WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD

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FILE NO. S-475

CHILDREN:
ADOPTION:
Necessity of Consent to
Adoption by Unwed Father

COPY

Honorable George W. Woodcock
State's Attorney, Wabash County
111 East Fifth Street
P. O. Drawer #433
Mt. Carmel, Illinois 62863

Dear Mr. Woodcock:

I have your letter asking my opinion as follows:

"Recently the Supreme Court of the United States in a 5 to 2 decision stated that a state could not automatically exclude an unmarried father from having custody of his children while authorizing similar custody rights for married fathers and mothers and unmarried mothers. Supposedly the majority opinion, written by Justice Byron White, emphasized that the state should not interfere in the private interest area of unmarried parenthood because 'the rights to conceive and raise one's children have been deemed excellent. . . basic civil rights of man.'

"In light of this decision, I am deeply concerned and disturbed as to what our situation in Illinois will be where the Department of Children and Family Services has in the past been willing to take young unmarried pregnant girls under its direction, place them in a hospital, and thereafter when the baby is born place the child out for adoption with only the mother's consent, or, in the alternative, the child has in some instances been left in the custody of the mother. Recently in Wabash County one of our citizens has just had a baby, she is unmarried, and she relinquished her rights to the baby to the Department of Children and Family Services. In light of the Supreme Court decision, the Department of Children and Family Services now must make a decision whether to obtain a release from the alleged father of the child or does it ignore the fact that the child had a father. By this, I mean in some instances even the girl involved doesn't know who the father of the child is, and would this necessitate the Children and Family Services obtaining waivers of rights from all parties who could possibly be the father of the child, or do you continue in Illinois where unmarried mothers are involved who would relinquish their right to custody go ahead and place the children out for adoption without any regard as to the alleged father. I am sure that you can ascertain the problem involved, and I am also sure that you can see the possibility where 300 or 400 children who in the past few years have been placed out for adoption would have to be held in foster homes and taken away from the adoptive parents because the alleged father of the child never surrendered his rights, and by the same token never

> assumed any of the obligations of fatherhood. This is a serious question in Illinois, and I would like to know whether or not the Department of Children and Family Services should obtain releases from alleged fathers or whether we continue the policy that has existed in the past of obtaining releases only from the mothers."

The United States Supreme Court decision to which you refer is Stanley v. Illinois, 405 U.S. , 31 L.Ed.2d 551, 92 S.Ct. 1208. In the Stanley case an unmarried couple had lived together intermittently for eighteen years. During that time they had three children. After the death of the mother, the Illinois Department of Children and Family Services brought a dependency proceeding and the children were proved illegitimate and were declared wards of the court. Their custody was placed with the Department.

The Illinois Supreme Court had found no denial of equal protection, holding that the unwed father had no right to custody without pursuing adoption or guardianship proceedings, as provided in part in the Paternity Act. Ill. Rev. Stat. 1971, ch. 106 3/4, par. 62; in re: Stanley, 45 Ill. 2d 132.

The United States Supreme Court on certiorari in the Stanley case said:

> "* * * We conclude that as a matter of due process of law, Stanley was entitled to a hearing on his fitness as

a parent before his children were taken from him and that by denying him a hearing and extending it to all other parents whose custody of their children is challenged the State denied Stanley the equal protection of the law guaranteed by the Fourteenth Amendment."

The Court further stated:

"* * * it may be argued that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's. The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

"Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."

As a footnote to the foregoing the Court interjected the following:

> "We note in passing that the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal. If unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings. If they do care, under the scheme here held invalid, Illinois would admittedly at some later time have to afford them a properly focused hearing in a custody or adoption proceeding.
>
> "Extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined. The Illinois law governing procedure in juvenile cases, Ill. Rev. Stat. c. 37, §704-1, et seq., provides for personal service, notice by certified mail or for notice by publication when personal or certified mail service cannot be had or when notice is directed to unknown respondents under the style of 'all whom it may concern.' Unwed fathers who do not promptly respond cannot complain if their children are declared wards of the State. Those who do respond retain the burden of proving their fatherhood."

On May 26, 1972, the Illinois Supreme Court handed down its decision in People ex rel. Slawek v. Covenant Children's Home, No. 44386, March Term, 1972. This was an adoption case where the facts as set forth in the Briefs of the parties seem to differ from those in Stanley because

the parties did not cohabit over an extended period of time or live a familial life. Nevertheless, the Court states as follows:

> "The United States Supreme Court has recently held that State laws which deny a hearing to determine the fitness of a father for the custody of his children born out of wedlock while extending this right to other parents are based upon an unreasonable distinction and violate equal-protection principles. (Stanley v. Illinois, 405 U.S. , 31 L.Ed.2d 551, 92 S.Ct. 1208.) The court recognized that the interests of the father of an illegitimate child are nc different from those of other parents. Thereafter, the court vacated other decisions which denied the putative father various rights to his child. (Rothstein v. Lutheran Social Services, 47 Wis.2d 420, 173 N.W.2d 56, vacated (Apr. 17, 1972), 40 U.S.L.W. 3498; Vanderlaan v. Vanderlaan, 126 Ill.App.2d 410, vacated (Apr. 17, 1972), 40 U.S.L.W. 3498.) We hold that the provisions of the Adoption and Paternity Acts are unconstitutional insofar as they are in conflict with Stanley, Rothstein and Vanderlaan. In this regard, we direct attention to the United States Supreme Court's remand in the Rothstein appeal, in which the issues and facts are similar to those in the instant case. That order, in pertinent part, reads as follows: 'The judgment is vacated and the case is remanded *** for further consideration in light of Stanley v. Illinois, 405 U.S. (1972), and with due consideration for the completion of the adoption proceedings and the fact that the child has apparently lived with the adoptive family for the intervening period of time.'"

It follows that to effectuate a valid adoption under United States and Illinois law, consent to adoption must be obtained from both the father and the mother of an illegitimate child pursuant to section 8 of "AN ACT in relation to the adoption of persons, and to repeal an act therein named" (Ill. Rev. Stat. 1971, ch. 4, par. 9.1-8) and that a nonconsenting parent or an unknown parent must otherwise be made a party defendant in an adoption proceeding under section 5 of that Act (Ill. Rev. Stat. 1971, ch. 4, par. 9.1-5). Further, process must be served as provided in section 7 of the Act which reads:

> "All persons named in the petition for adoption, except the petitioners, but including the person sought to be adopted, shall be made parties defendant by name, and if the name or names of any such persons are alleged in the petition to be unknown such persons shall be made parties defendant under the name and style of 'All whom it may concern'. All parties defendant shall be notified of such proceedings in the same manner as is now or may hereafter be required in other civil cases or proceedings." Ill. Rev. Stat. 1971, ch. 4, par. 9.1-7

I must therefore conclude that under the recent Illinois and United States decisions, notice must be given the unwed father and he must be afforded opportunity to be heard.

Very truly yours,

ATTORNEY GENERAL