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A PROBLEM COMMONLY ENCOUNTERED in the enforcement of child support payments ordered in a proceeding in Bastardy arises when the mother of the child, in whose custody the child remains, refuses to allow the putative father reasonable periods of visitation. In numerous cases, visits with the child are denied, even when the putative father regularly pays the weekly support and, in addition, expresses a genuine affection and concern toward the well-being of the child. In many such instances, the putative father refuses to make further payments, contending that if he is obligated to support the child, he has a corresponding right of visitation. In other instances, the putative father loses interest in the welfare of the child and becomes remiss in his payments. In either situation, the mother may be forced to rely on welfare assistance and the child's support becomes the public's responsibility.

The law, of course, provides methods which are intended to compel the putative father to support, *i.e.* civil contempt actions,[1] criminal nonsupport actions,[2] and wage attachments.[3] Yet, as evidenced by the growing welfare expenditures, in too many instances these methods are ineffectual. At the same time, the denial of visitation rights may eliminate the possibility of the development of a father-child relationship and of the affection and concern which such an attachment could provide. Assuming that the putative father desires an association with his illegitimate child which the mother refuses, what remedies does or should the putative father have?

Historical Development

A bastard at early common and civil law was a child born out of wedlock or under circumstances such that the mother's husband was excluded from being the father.[4] In deeming the child a bastard, the law was attempting to discourage incestuous and illicit relationships by branding the child with the reproach and shame that should have been cast on those who brought him into being.[5] As a bastard, the son of no

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1 Ohio Rev. Code § 3111.18.

2 *Ibid.* § 2151.42.

3 *Id.* § 3115.23.

4 Briggs v. McLaughlin, 134 La. 133, 63 So. 851 (1913); McLoud v. State, 122 Ga. 393, 50 S.E. 145 (1905).

5 *In Re* Lunds Estate, 26 Cal. 472, 159 P. 2d 643 (1945).

one,[6] the son of the public,[7] the custody and support of the child were in the hands of the local parish. The bastard was a social Ishmaelite, bent on schemes to the ruination of others,[8]—so despicable that he was denied a right to be supported by his parents, denied the right to inherit and even denied a name, except as acquired through reputation.[9]

This medieval doctrine was first modified by deeming the child the son of his mother and placing in the mother the exclusive right to custody[10] and the exclusive obligation to support the child.[11] Eventually, the putative father was recognized to have a right to custody, subject to the rights of the mother.[12] Subsequently, by statute the putative father became obligated to support the child.[13]

Today in nearly all jurisdictions, Bastardy statutes exist in order to establish paternity, to compel the putative father to pay the maternity expenses, and to compel the putative father to support the child. The statutes, having a limited function, have failed to cover all aspects of bastardy and in many areas one must resort to the common law for remedies.

Recent Developments

As concerns the right of visitation, a few states have acted through the legislature to grant[14] or to deny[15] the privilege. Others have either remained silent on the matter or have established policy through the judiciary.

The preponderance of case law concerned with this issue has tended toward the recognition of visitation rights.[16] Courts have primarily looked to four factors in determining these cases: acknowledgment of paternity by the father, his support of the child, his expression of genuine

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6 Adams, Nullius Filius, 6 U. Toronto L.J. 361 (1946).

7 Moore v. Baughman, 7 Ohio N.P. 149, 8 Ohio Dec. 396 (1898).

8 Schouler, Domestic Relations 704 (1905).

9 State *ex rel.* Griffin v. Zimmerman, 67 Ohio App. 272, 36 N.E. 2d 808 (1941).

10 Regina v. Brighton, 121 Eng. Rep. 782 (1861).

11 Criesar v. State, 97 Ohio St. 16, 119 N.E. 128 (1917); People v. Chamberlain, 121 App. Div. 385, 106 N.Y.S. 149 (1907); Commonwealth v. Callaghan, 223 Mass. 150, 111 N.E. 773 (1916).

12 Meredith v. Meredith, 272 App. Div. 79, 69 N.Y.S. 2d 462 (1947); French v. Catholic Community League, 69 Ohio App. 442, 44 N.E. 2d 113 (1942); Commonwealth *ex rel.* Human v. Hyman, 164 Pa. Super. 64, 63 A. 2d 447 (1949).

13 10 Am. Jur. 2d *Bastards* § 60-6 1963; Ohio Rev. Code § 3111.17.

14 Note, Father of an Illegitimate Child—His Right To Be Heard, 50 Minn. L. Rev. 1071 (1966).

15 Ill. Rev. Stat., S.H.A. Ch. 106¾ § 62 (1957).

16 Mixon v. Mize, 198 So. 2d 373 (Fla. D. Ct. App. 1967); Strong v. Owens, 91 Cal. App. 2d 336, 206 P. 2d 48 (1949); Ex Parte Hendrix, 186 Okla. 712, 10 P. 2d 444 (1940); Cornell v. Hartley, 54 Misc. 2d 732, 283 N.Y.S. 2d 318 (1967); Baker v. Baker, 81 N.J. Eq. 135, 85 A. 816 (1913); Bagwell v. Powell, 267 Ala. 19, 99 So. 2d 195 (1957); Commonwealth v. Rozanski, 206 Pa. Super. 397, 213 A. 2d 155 (1965).

interest in the child, and whether his visitations would be detrimental to the child's welfare.[17] Another factor not expressly considered, but one which was probably significant, was the type of relationship previously existing between the putative father and the child. In situations where the parents had cohabitated for several years and a family relationship, though illicit, had developed, the courts granted visitation privileges to the putative father. However, in recent Florida[18] and New York[19] cases, in 1967 and 1968 respectively, the court granted visitation even though a family relationship had never existed. And in the New York case, the putative father had even denied paternity in a bastardy proceeding.

Of these five factors considered by the courts, the controlling principle utilized has been the best interest of the child. The 1913 case of *Baker v. Baker*[20] held that both access and custody must be considered from the viewpoint of the child's best interests. It was concluded that the father's right to reasonable access had to be maintained unless this visitation could be proven detrimental to the child's well-being. *In re Anonymous*[21] cited the development of close ties between the father and his children as an imperative reason to permit visitation. Notably, the court held that the welfare of the children required the father's continued relation with them. Both *People ex rel Francois v. Ivanova*[22] and *Commonwealth v. Rozanski*[23] cited the guiding principle in determining visitation as the best interests of the child. And in the Pennsylvania case Judge Hoffman further remarked that "neither the fact of illegitimacy nor the personal preferences or prejudices of the parents should control the court's decision."

The emphasis of these findings was upon the factual situation of the case at issue. The majority opinion in *Commonwealth v. Rozanski*[24] in overruling its opinion one year earlier in *Golimbewski v. Stanley*[25] was expressive of this:

> To state as a matter of law that the visits of a putative father are always detrimental to the illegitimate child's best interest is to exalt rule over reality. This approach ignores the growing recognition in our courts, and in courts throughout the nation, of the need to determine the welfare of each child in light of his own particular needs and circumstances.

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17 Mixon v. Mize, *supra* n. 16.

18 *Ibid.*

19 Anonymous v. Anonymous, 56 Misc. 2d 711, 289 N.Y.S. 2d 792 (1968).

20 81 N.J. Eq. 135, 85 A. 816 (1913).

21 12 Misc. 2d 211, 172 N.Y.S. 2d 186 (1958).

22 14 App. Div. 2d 317, 221 N.Y.S. 2d 75 (1961).

23 206 Pa. Super. 397, 213 A. 2d 155 (1965).

24 *Ibid.*

25 205 Pa. Super. 101, 208 A. 2d 49 (1965).

It should be noted that the conference of visitation rights is always subject to the court's review. The court is the directive and regulative agent in the determination of the suitability of the putative father's visitation, both at the time of disposition and in the subsequent situation.

The court's role in the determination of the putative father's rights was reiterated in *Commonwealth v. Rozanski.*[26] The court's opinion took cognizance of the fact that "granting visitation privileges to the putative father may not always serve the child's best interests." However, it noted that visitation rights "are always a matter for the supervision of the courts." The court stated that "should it subsequently appear that the father's presence was detrimental to the child's welfare, the right to visit might be withdrawn."

In *Baswell v. Powell,*[27] acknowledgment was made of the merit of the mother's contention that the visitation of the putative father was potentially disruptive to her home. The court granted the father's request to access but set forth specific provisions intended to prevent this situation from arising.

A consideration which advances the argument for the putative father's visitation has been the psychological development of the child. In *People ex rel Mahoff v. Matsoui*[28] the court concluded that:

> The father must not be excluded from a full opportunity to have such possession of his child as will enable him to impart to it what from the father enters into the child's character, and to indulge the affection that a father feels and bestows, whereby the boy may grow up in knowledge and love of him.

In *Commonwealth v. Rozanski*[29] it was noted that:

> The putative father may, in many instances, instill in the child a sense of stability. He may develop qualities in the child which the mother is uninterested, unwilling or incapable of developing. To the extent that he can perform such a valuable service, his presence becomes exceedingly important.

The court in *Baker v. Baker*[30] saw the visitation of the putative father conducive to the development of the affection which a child should have for a parent interested in his well-being. Judge Howell further remarked that such a relationship would help enable the child to bear the ignominy of his origin, "if he had the consciousness that he was acknowledged to be on the same affectionate footing as the other (legitimate) child, notwithstanding the disparity between their legal situations."

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[26] *Supra* n. 23.

[27] *Supra* n. 16.

[28] 139 Misc. 21 (1931), 247 N.Y.S. 112.

[29] *Supra* n. 23.

[30] *Supra* n. 20.

The Ohio View

If the issue of a putative father's right to visitation with his illegitimate child were raised in an Ohio court, it would appear as a case of first impression. The court would necessarily look to the Ohio Rev. Code, case law from other jurisdictions, and judicial decisions dealing with other issues concerning children.

The common law rule that a putative father has no right to visit his illegitimate child has not been altered in any reported decision by an Ohio court. As concerns custody, the putative father does have a recognizable right, but one which is subject to the rights of the mother.[31] In *French v. Catholic Community League*[32] the court stated that, if the putative father publicly acknowledges the child as his own, has continuously contributed to its support and well-being and is a proper person, he is next in law entitled to the custody of the child, if the mother relinquishes or abandons control. The matter of custody is important in this area, as the courts of Pennsylvania[33] and Illinois[34] have considered visitation to be a form of limited custody.

As elsewhere, the controlling principle in an Ohio case involving a child is the best interest rule.[35] In speaking of the court's function in a case involving a minor, in *Anonymous v. Anonymous*[36] the court maintained that: "a court's purpose is to serve the child's rights." In *Kay v. Kay*[37] in which a grandparent was asking for visitation rights, it was held that: "the granting of visitation to others than a parent should be done only after showing that the welfare of the child either demands it or will not be adversely affected by it." In view of the above three Ohio cases, if the child's best interest were explored, it appears there would be a possibility that an Ohio court might grant a putative father the right of visitation with his illegitimate child.

It should be noted that Ohio has both a custody statute[38] and a visitation statute,[39] but both deal with parental rights. However, these statutes are probably not applicable to the present issue, for at common law a putative father was not considered a parent.[40] For instance, in *Kay v.*

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31 *Supra* n. 12.

32 *Ibid.*

33 *Id.*

34 DePhillips v. DePhillips, 35 Ill. 2d 154, 219 N.E. 2d 465 (1966); Wallace v. Wallace, 60 Ill. App. 2d 300, 210 N.E. 2d 4 (1965).

35 *In re* Tilton, 161 Ohio St. 571, 120 N.E. 2d 445 (1954); Geshwiler v. Dodge, 4 Ohio St. 615 (1855); *In re* Frinzl, 152 Ohio St. 164, 87 N.E. 2d 583 (1949).

36 18 Ohio Op. 2d 282, 182 N.E. 2d 205 (1962).

37 51 Ohio Op. 434, 112 N.E. 2d 562 (1953).

38 Ohio Rev. Code § 3109.03.

39 *Id.* § 3109.05.

40 People v. Fitzgerald, 167 App. Div. 85, 152 N.Y.S. 641 (1915); People v. Rupp, 219 Ill. App. 269 (1920); Canfield v. Porterfield, 222 Mo. App. 553, 292 S.W. 85 (1927).

Kay[41] the court in interpreting Ohio Rev. Code § 3109.05 stated, "the statute does not apply to others than parents of the children involved."

If then it is the child's interests to which the court must turn its attention, which interest of the child would best be served through visitation with the putative father? As indicated earlier, the child's psychological well-being is a primary consideration:

> It is axiomatic in child development that each child needs a close warm relationship with an adult of each sex if he is to make an adequate gender identification (i.e. male or female), if he is to get along in a normal fashion with other people when he is an adult, if he is to have a successful marriage and become a fit parent himself.[42]

In this area does it make a difference to a child whether his father is marital or putative? "As to the child the father is never putative." [43]

In the area of support, the child's interest would also be better served. If the putative father were permitted to visit, establish a father-child relationship, and develop a parental concern for the child, he would be more prone to develop a sense of responsibility toward him, and would, therefore, be more apt to regularly support him. Not only would the child directly benefit from the support payments, but the putative father would probably be more inclined to provide him with his needs and wants, over and above the court ordered payments.

Finally, in the event that the putative father would gain custody,[44] the child could make the transition more easily, if he had previously had association with the father. In being transferred from one home to another, the child would tend to adapt more readily to his new home, if he realized that in the past the father had taken care of him and was interested in his well-being.

The argument perhaps most frequently employed against granting the putative father visitation privileges is that the further association (provided by the father's visitation) between the mother and father would result in a continuation of the liaison and the birth of more bastard children. However, continued sexual involvement, as well as visitation, would most probably recur regardless of legislation, as long as the parties involved consented. Secondly, if the relationship between the mother and the putative father is deteriorated to the extent that visitation cannot be privately established, it seems unlikely that court-ordered access would lead to further sexual indulgence. The attempt to discourage illicit relationships by the legal prohibition of visitation would appear at best to be ineffectual.

Other opponents of the establishment of visitation rights contend

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41 *Supra* n. 37.

42 Barker, The Child and Divorce, 73 Case and Comment (No. 6) (1967).

43 *Supra* n. 23.

44 *Supra* n. 12.

that continued association between the mother and putative father diminishes the mother's opportunity and interest in marrying someone else and consequently negates the possibility of a husband assuming the role of father to the illegitimate child. This situation is certainly analogous to that of the divorcee. The high incidence of remarriage among divorced women with children attests to its fallacy. In addition, the marriage of the mother does not ensure that her husband will be willing to supply the emotional and financial care that the putative father may be willing to provide. Too often the husband's regard for the illegitimate child begins where the putative father's support payments end.

Another objection is based on the argument that once the support obligation has been legally established, the putative father can be compelled to perform regardless of whether he is permitted any contact with the child. While acknowledging that the distinction between the support obligation and the right of visitation should be maintained, can the putative father be expected to comply with an order for support for 18 or possibly 21[45] years by force of law alone? Would not a person be more inclined to assume his obligation if he were motivated by a genuine desire to do so? And would not periodic contact between a father and his child be more likely to provide that motivation than a law grounded on the theory of might makes right?

Conclusion

It would seem only reasonable to assume that the putative father should not summarily be denied the right to visit his child. Due process requires that he be given the opportunity to state his case. In the absence of factual situations which justify denial of visitation privileges, the best interests of the child and of society would be better served if a putative father were given standing in order to determine a reasonable right of visitation.

At the same time it should not be said that the putative father has an inalienable right to visit his illegitimate offspring. Again, it is the best interests of the child that are determinative. Even a parent does not have an absolute right to the custody or society of his children, for the courts have never held that the parent-child relationship could not be terminated if the child's best interests necessitated such.[46]

In handling the question of the putative father's right to visitation, the law must cease regarding illegitimacy in the medieval light of devils and demons, and must consider the father-child relationship in view of modern social knowledge. Regardless of legal status, to the child a natural putative father is as much a father as is a marital father.

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[45] Ohio Rev. Code § 3113.01 and § 2151.42.

[46] Eastlake v. Ruggeiro, 7 Ohio App. 2d 212, 220 N.E. 2d 126 (1966).