SEEKING THE WISDOM OF SOLOMON: DEFINING THE RIGHTS OF UNWED FATHERS IN NEWBORN ADOPTIONS

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I. Introduction

The right of an unwed father[2] to gain legal custody of a child he sired out of wedlock was first recognized by the United States Supreme Court in 1972.[3] In the ensuing years the Supreme Court has revisited the issue of unwed fatherhood and adoption four subsequent times,[4] yet each time the Court has avoided giving comprehensive treatment to this vexing issue. As a result, while unwed fathers' rights have expanded dramatically since 1972, this development has been uneven and at times erratic. States have tried on their own to reconcile the Supreme Court's guidance on this issue with their own judgments about the role an unwed father should play in the life of his child.

The issue simmered without much public scrutiny until the 1990s when the topic seemingly exploded onto the national scene with a spate of highly-emotional and well-publicized custody disputes pitting prospective adoptive parents against emergent biological fathers belatedly claiming parental rights to the children they sired out of wedlock.[5] While public opinion diverged over whose claim for custody was deserving of the law's sanction, these cases revealed to a national audience that existing legal regimes were woefully inadequate to handle the contentious issue of unwed fathers' rights with the requisite rapidity to avoid endangering the children around whom the controversies centered. The unwed father controversies of the 1990's thus catalyzed a public call for adoption law reform.[6]

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2 This essay uses the terms "unwed father," "biological father," and "putative father" interchangeably, as is the apparent practice of courts and state legislatures.

3 Stanley v. Illinois, 405 U.S. 645 (1972).

4 Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983); Michael H. v. Gerald D., 491 U.S. 110 (1989).

5 *See infra* Section II.

6 *See, e.g.*, Lynn Smith, *Rallying Cry for Adoptive Parents Rights; Families: A Grass-Roots Committee Wants to Reform Adoption Laws to Avoid Another Baby Jessica Dispute*, L.A. TIMES, Oct. 20, 1993, at E1.

The road to reform, however, has been rocky. Legislators, social scientists, and legal scholars have tangled over the proper prioritization of interests in these inherently complex disputes. How are the biological ties of the unwed father to be weighted against the nurturing bond developed between the prospective adoptive parents and the child they have raised since its birth? How are a child's best interests to be reconciled with an unwed father's interest in becoming a parent? What is to be done in situations where the unwed father is unaware of his child's birth and subsequent eligibility for adoption? How long does a biological father have to come forward and claim his offspring? Consensus in answering these and related questions has been hard to find.

The importance of clearly defining the rights of unwed fathers in the context of newborn adoptions lies not in the magnitude of disputes generated by such uncertainty but in the systemic and personal tolls exacted each time an unwed father and a prospective adoptive parent become embroiled in a custody fight over a young child. While the emergent biological father contesting his child's adoption is the exception rather than the rule, just the potential that he may reappear and successfully foil an adoption is often enough to dissuade couples and individuals from adopting.[7] Additionally, when such disputes do materialize, the emotional toll exacted on the participants is sufficiently great[8] that society at large has an interest in seeking a resolution to this disturbing problem. Thus it is an error for state legislatures to ignore this issue just be-

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[7] *See, e.g.*, Jon D. Hull, *The Ties That Traumatize*, TIME MAGAZINE, Apr. 12, 1993, at 48-9 ("Though the National Council for Adoption estimates that less than 1% of the 50,000 U.S. adoptions each year are contested, Jessica [DeBoer]'s case raises alarming questions for millions of adoptive parents. In at least half of all adoption cases, the natural fathers can't be located." Mary Best Seader, vice president of the National Council for Adoption adds that: "People don't trust the permanency of American adoption anymore."); Dick Williams, *The Wisdom of Solomon is Needed: Baby Richard Cases Terrifies Adoptive Parents*, THE ATLANTA JOURNAL AND CONSTITUTION, Jan. 31, 1995, at A10 ("For adoptive parents, case law - not theory and promise - grows more terrifying by the day. Surely public horror stories of children being wrenched from loving homes cause married couples to rethink the adoption option."); Gary Stein, *Girl's Best Interests Don't Enter Equation*, Sun-Sentinel (Fort Lauderdale) at 1B ("We don't want people to be afraid of adoption, said Angel Welsh, 'because these cases (in the news) are truly the minority. But I know if we hadn't adopted Emily yet, and we read about this, it would scare me to death'").

[8] *See, e.g.*, ROBBY DEBOER, LOSING JESSICA (1993) (describing the trauma of a prospective adoptive parent who lost custody of the child she had raised since birth in a legal battle with the child's biological father).

cause the actual number of unwed father custody disputes are not large.[9]

Twenty-three years after the United States Supreme Court first considered the question of biological fathers' rights in the adoption context, no national consensus — popular, legal, or legislative — has emerged on how the issue should be resolved. Great conflict continues to exist among the states, and in turn, uncertainty and the potential for tragedy accompany any court dispute in which putative fathers confront prospective adoptive parents. There is a legal maxim which states "that it is sometimes better that the law be clear than that it be wise, if it cannot be both."[10] In the case of unwed fathers' rights, the current jurisprudence unfortunately fails on both counts.

This article seeks to analyze the development of unwed fathers' rights in American adoption law and illuminate the issues which have made this topic so vexing for judges and legislators alike. After so doing, this article endeavors to propose a solution to this problem which balances the interests of biological fathers, adoptive parents, the state, and the child in an equitable fashion. Towards this end, Part II of the article frames the current issues in the unwed father controversy by looking at three well-publicized cases which introduced the nation to this problem in adoption law. Part III examines the breadth of the Supreme Court's jurisprudence on this issue. Part IV compares the approaches various state courts have taken when confronted with emergent putative fathers. Part V analyzes the Uniform Adoption Act of 1994 and its proposals for balancing the rights of unwed fathers in the adoption context. Finally, Part VI puts forth a proposed solution to the dilemma of unwed biological fathers.

II. The Unwed Father Controversy

Between 1991 and 1995, the lives of three children introduced the nation to the problem posed by the unresolved status of unwed

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9 *See, e.g.*, Larry Barszewski, *Adoption Lawyer Sometimes Stirs Up Controversy*, SUN-SENTINEL, (Fort Lauderdale) February 9, 1996, at 1b. (Reporting that a bill designed to address the problem of unwed fathers in adoption proceedings in Florida "was shelved by legislators who said the laws might not be needed because the instances of biological fathers disputing adoptions is uncommon").

10 United States v. Nelson, 918 F.2d 1268, 1276 (6th Cir. 1990)(Ryan, J., concurring).

fathers' rights in newborn adoptions. Each infant became party to a fierce and well-publicized custody dispute pitting its prospective adoptive parents against an emergent biological father. The duration of the controversies and the discontinuity of their judicial outcomes highlighted to a national audience the import of reforming current adoption law.

A. *Baby Jessica*[11]

For most Americans the saga of young Jessica DeBoer,[12] which unfolded in the national media in 1993, served as an introduction to the dilemma posed by biological fathers in the context of infant adoptions. On February 8, 1991 Cara Clausen, a 28-year old unwed mother from Iowa, gave birth to an infant girl who she immediately placed for adoption.[13] On the release-of-custody form she named her current boyfriend, Scott Seefeldt, as the child's father.[14] Believing that the requisite consents had been secured,[15] Jan and Robby DeBoer, a Michigan couple, took custody of the girl they had named Jessica and filed a petition for adoption in the juvenile court of Iowa on February 25, 1991.[16]

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[11] The custody dispute for Baby Jessica resulted in four reported opinions. The original adoption petition was brought in Iowa. *In re* B.G.C., 496 N.W.2d 239 (Iowa 1992). When rebuffed by the Iowa Supreme Court, the prospective adoptive parents brought suit in Michigan. *In re* Baby Girl Clausen, 501 N.W.2d 193 (Mich. App. 1993). Upon appeal by the biological father the case went to the Michigan Supreme Court. *In re* Baby Girl Clausen, 502 N.W.2d 649 (Mich. 1993). The prospective adoptive parents then unsuccessfully sought a hearing by the United States Supreme Court. DeBoer v. DeBoer, 114 S. Ct. 1 (1993).

[12] DeBoer v. DeBoer, 114 S. Ct. 1 (1993). The infant girl at the center of this custody dispute has been referred to in court records and the popular media alternatively as "Baby Jessica," "Baby Girl Clausen," "B.G.C.," and "Jessica DeBoer." *Id.*

[13] *In re* Baby Girl Clausen, 501 N.W.2d 193, 194 (Mich. App. 1993). Cara formally relinquished her parental rights to her child two days after its birth. *Id.*

[14] *Id.* Scott Seefeldt signed a consent to release the baby for adoption on February 14, 1991. *Id.*

[15] *Id.* Even the propriety of Cara Clausen's consent to the adoption of Jessica has been called into question. Apparently she was neither given nor offered counseling regarding her decision to relinquish rights to her child while she was in the hospital. Furthermore, the attorney who handled the placement of Jessica did not explain to Cara that he was representing the DeBoers and that she might have a right to revoke her consent for up to 72 hours after the birth of the child. Memo from Joan H. Hollinger, Reporter for the Uniform Adoption Act to the National Conference of Commissioners on Uniform State Laws 1, 1-2 (Aug. 1993).

[16] *In re* Baby Girl Clausen, 501 N.W.2d at 194. A hearing was held on that same day at which Cara Clausen's and Scott Seefeldt's parental rights were terminated. The pair received notice of the hearing but did not attend. *Id.*

Trouble began when Cara reunited with her old boyfriend — the true biological father of young Jessica — Daniel Schmidt.[17] On March 6, 1991, Cara sought to revoke her consent to the adoption and revealed to the Iowa juvenile court that she had lied when she named Scott Seefeldt as Jessica's biological father.[18] When Schmidt learned from Cara that he was Jessica's father, he filed an affidavit of paternity[19] and intervened in the DeBoer's adoption proceeding.[20]

Schmidt's contention was that since he — as Jessica's true biological father[21] — never consented to her adoption, his parental rights had never been terminated. A bench trial was held in the Iowa district court on November 4, 1991 to address the issues which had suddenly complicated what had begun as a routine adoption proceeding. The DeBoers asserted that Schmidt's parental rights should be terminated on the ground that he was an unfit parent as evidenced by the fact that he had abandoned Jessica and two other children who he had fathered with different women a number of years earlier.[22] Alternatively, the DeBoers implored the court to utilize the "best interests of the child" standard when deciding Jessica's future.

Despite their finding that the DeBoer's "have provided exemplary care for the child [and] view themselves as the parents of [the] child in every respect,"[23] the district court held on December 27, 1991 that the DeBoers had failed to show by clear and convincing evidence that Schmidt had abandoned Jessica.[24] In the ab-

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17 *Id.* Cara and Daniel would later marry. *Id.*

18 *Id.* The juvenile court dismissed Cara's "request to revoke her release of custody on the ground that it lacked subject-matter jurisdiction because a petition for adoption had been filed." *In re* Baby Girl Clausen, 501 N.W.2d 193, 194 (Mich. App. 1993).

19 *In re* Baby Girl Clausen, 501 N.W.2d 193, 194 (Mich. App. 1993). Schmidt's affidavit was filed on March 12, 1991.

20 *Id.* This was done on March 27, 1991. Jessica had been placed with the DeBoers for 30 days at this point and Jessica was now 47 days old. *Id.*

21 *Id.* Court ordered blood tests showed a 99.9% probability that Schmidt was Jessica's biological father and a 0% probability that Seefeldt was the baby's father. *Id.*

22 *Id.*

23 *In re* Interest of B.G.C., 496 N.W.2d 239, 245 (Iowa 1992).

24 *Id.* This finding was based on the following facts: Cara had informed Schmidt on February 27, 1991 that she thought he was Jessica's father. Schmidt, a truck driver, was due to leave town that day. He asked Cara to investigate what steps could be taken to rescind the adoption. Cara found an attorney to take their case and the next Saturday — ten days after he was told he might be Jessica's father — Schmidt "met

sence of such a showing, the court felt it was inapposite to conduct a best interest of the child analysis. Thus, the court concluded that Schmidt's parental rights remained intact and the DeBoer's petition to adopt young Jessica had to be denied. Baby Jessica who had been living with the DeBoers in Michigan since February 1991 was ordered by the court to be returned to Daniel Schmidt by January 12, 1992.[25]

The DeBoers appealed the district court decision all the way to the Iowa Supreme Court. The court was impressed by the emotional power of the case but felt duty bound to apply the law as it existed.[26] It thus affirmed the district court's denial of the DeBoer's petition to adopt Jessica on September 23, 1992. While acknowledging that "Daniel (Schmidt) has had a poor performance record as a parent," the Iowa Supreme Court nonetheless felt it could not "bypass the termination requirements of [Iowa law] and order the granting of the adoption without establishment of any of the grounds for termination specified in [the law] because it would be in the baby's best interest."[27] To do so, the court felt, would "be to engage in uncontrolled social engineering" and Iowa courts are not free to take children from parents simply by deciding another home offers more advantages.[28] Because Schmidt had neither been shown to have abandoned[29] Jessica, nor consented to the adoption, the adoption proceedings were held to be "fatally

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with the attorney to discuss how he might assert his parental rights" over Jessica. Without waiting for the results of blood tests, he immediately filed a request to vacate the termination order on March 12, 1991. He filed his petition to intervene in the adoption case on March 27, 1991, one month after he had first heard that he might be Jessica's biological father. *Id.* at 246.

[25] *In re* Baby Girl Clausen, 501 N.W.2d at 194. The Iowa Supreme Court granted a stay on the transfer of custody pending the DeBoer's appeal. *Id.* at 195.

[26] *In re* Interest of B.G.C., 496 N.W.2d at 241. "As tempting as it is to resolve this highly emotional issue with one's heart, we do not have the unbridled discretion of a Solomon. Ours is a system of law, and adoptions are solely creatures of statute." *Id.*

[27] *Id.* at 245.

[28] *Id.* at 241 (quoting *In re* Burney, 259 N.W.2d 322, 324 (Iowa 1977)).

[29] *Id.* at 247. Justice Snell in a spirited dissent wrote that:

> The evidence is sufficient to show abandonment of the baby by Daniel . . . . Daniel knew that Cara was pregnant in December 1990 . . . . Having knowledge of the facts that support the likelihood that he was the biological father, nevertheless, he did nothing to protect his rights . . . . Daniel's sudden desire to assume parental responsibilities is a late claim to assumed rights that he forfeited by his indifferent conduct to the fate of Cara and her child. The specter of newly named genetic fathers, upsetting adoptions, perhaps years later, is an unconscionable re-

flawed."[30] The case was remanded to the district court for an order changing custody from the DeBoers to Daniel Schmidt.

The DeBoer's rights to Jessica were terminated on December 3, 1992 in the Iowa district court. The DeBoers, however, proceeded to file a petition in their home state of Michigan to modify the Iowa custody determination under the Uniform Child Custody Jurisdiction Act ("UCCJA").[31] The DeBoers urged the Michigan court to consider the best interests of Jessica in making their decision.[32] The Washtenaw Circuit Court agreed that it had jurisdiction to hear the case and that the "best interests of the child" was the proper standard to apply. Accordingly, it convened a best-interests hearing on January 29, 1993. On February 12, four days after Jessica's second birthday, the Michigan court held that it was in the best interest of Baby Jessica for her to remain with her prospective adoptive parents, the DeBoers.[33]

The DeBoer's victory, however, was short-lived. Schmidt appealed to the Michigan Court of Appeals which reversed the lower court ruling on the dual grounds that the circuit court lacked jurisdiction under the UCCJA and that the DeBoers did not have standing under the UCCJA to challenge the Iowa custody determination.[34] The Iowa custody decision, reached without consideration of Jessica's best interests, could not be disturbed by the courts of Michigan. This determination was affirmed as correct by the Michigan Supreme Court on July 2, 1993.[35]

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sult. Such a consequence is not driven by the language of our statutes, due process concerns or the facts of this case.

In re Interest of B.G.C., 496 N.W.2d at 247 (Snell, J., dissenting).

30 *Id.* at 245.

31 Uniform Child Custody Jurisdiction Act (UCCJA), codified in Michigan as MICH. COMP. LAWS. ANN. § 600.651-.673 (1981 & Supp. 1993-94). The UCCJA has been adopted by all 50 states and gives a court jurisdiction to modify an existing custody decree if it sits in the child's home state or a state in which the child has a significant connection and jurisdiction would be in the child's best interest. The DeBoers argued that Michigan had jurisdiction to modify the Iowa custody order because Jessica had lived all but three weeks of her life in Michigan. *In re* Interest of B.G.C, 496 N.W.2d at 245.

32 *In re* Baby Girl Clausen, 501 N.W.2d at 196.

33 *Id.*

34 *Id.* at 196-98.

35 *In re* Baby Girl Clausen, 502 N.W.2d 649 (Mich. 1993). Justice Levin, however, dissented strongly, objecting to the court's apparent failure to realize that its decision was dramatically altering a young child's life:

[T]his is not a lawsuit concerning the ownership, the legal title, to a bale

In a final effort the DeBoers appealed to the United States Supreme Court for a stay of the Iowa and Michigan rulings pending the High Court's review of the case. The Supreme Court, however, denied the request[36] and in so doing forced the DeBoers to surrender their two and a half year old daughter to Daniel Schmidt — a man whom she had never seen before.

B. *Baby Richard*

As the Baby Jessica saga was unfolding in Iowa and Michigan, a similar fate was befalling an infant boy in Illinois. The ordeal of Baby Richard, however, was to last even longer than that of his kindred spirit Jessica. Richard's story[37] began in 1989 when his biological parents, Otakar "Otto" Kirchner and Daniella Janikova, met while working in a Chicago restaurant.[38] They began living to-

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> of hay. This is not the usual A v. B lawsuit; . . . There is a C, the child, 'a feeling, vulnerable, and [about to be] sorely put upon little human being': Baby Girl Clausen, also known as Jessica DeBoer, who will now be told, 'employing all necessary resources of the [Washtenaw Circuit] [C]ourt,' that she is not Jessie, that the DeBoers are not Mommy and Daddy, that her name is Anna Lee Schmidt, and that the Schmidts, whom she has never met, are Mommy and Daddy. This child might, indeed, as the circuit judge essentially concluded, have difficulty trying that on for size at two and one-half years, she might, indeed, suffer an identity crisis . . . . [E]very expert testified that there would be *serious traumatic injury to the child at this time.*

Id. at 668-69 (Levin, J., dissenting) (quoting Lemley v. Barr, 343 S.E.2d 101, 104 (W. Va. 1986)) (emphasis and alterations in original).

36 DeBoer v. Schmidt, 114 S. Ct. 11 (1993).

37 *In re* the Petition of Doe, 627 N.E.2d 648 (Ill. App. Ct. 1993). There exists a substantial amount of controversy over the actual facts of the Baby Richard case. In the Appellate Court decision two interpretations of the facts are laid out, one by the majority and one by the dissent. *Id.* Dissenting Justice Tully alleges that the majority "has patently distorted and slanted the actual facts of this case on a number of important points." *Id.* at 656 (Tully, J., dissenting). Even greater passions were aroused amongst the justices of the Illinois Supreme Court when deciding Otakar Kirchner's habeas corpus petition. *In re* Kirchner, 1995 Ill. LEXIS 56 (February 28, 1995). The majority concluded their lengthy opinion with the following attack on a fellow justice's dissent: "The dissent by Justice McMorrow departs from the record, misstates the facts and misinterprets the law. *Id.* at 53. It is quite simply, wrong in its assertion and wrong in its conclusions. We reiterate that the recitation of facts covered in the majority per curium opinion is well documented in the record of proceedings and that the authorities upon which we have relied solidly support the conclusions we have reached in support of the issuance of the writ of habeas corpus." *Id.* at 53. For her part, Justice McMorrow provides a competing interpretation of the facts in her dissent entitled: "Correction of Facts." *Id.* at 70.

38 *In re* the Petition of Doe, 627 N.E.2d at 649.

gether and by June of 1990 Daniella had become pregnant. The couple, however, became estranged during Daniella's pregnancy[39] and she moved out of their shared apartment and broke off communications with Otto.[40] She moved into a women's shelter and decided to place her child up for adoption.[41]

On March 16, 1991 Daniella gave birth to a baby boy. Four days later she executed a consent to adoption and on the same day, the prospective adoptive parents — known in court papers only as the Does — filed a petition for adoption. In their petition the Does averred that the biological father of the child was unknown.[42] On March 20, 1991, the Does took home their son Richard.

Otto was told by Daniella's uncle — at Daniella's instruction — that her baby had died three days after birth.[43] On May 12, however, Daniella had a sudden change of heart and reunited with Otto.[44] She then confessed to him that she had put her baby up for adoption.[45] On May 18, 1991 Otto went to a lawyer to discuss getting Richard back from the Does.[46] After proving his paternity

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39 *Id.* Trouble for the couple began when Daniella was informed by Otakar's aunt that while Otakar was visiting his native Czechoslovakia he resumed seeing his old girlfriend. *Id.*

40 *Id.* Daniella's behavior throughout this case is erratic. While she initially refused to all communications with Otakar after his return from Czechoslovakia on February 8, 1991, she did meet with him on February 27 and 28. During the latter meeting she went to Otakar's apartment where they engaged in sexual intercourse. The following day, Daniella phoned Otakar and informed him that she again did not want to have any further communication or contact with him. Daniella did not see or speak with Otakar again until May 12, 1991. *Id.* at 650-51.

41 *Doe*, 627 N.E.2d at 650. On February 11, 1991 Daniella met with a lawyer and the couple who hoped to adopt Daniella's soon-to-be-born child. She acknowledged that she knew who the father of the child was but refused to name him out of fear that he would not consent to the adoption. *Id.*

42 *Id.*

43 *Id.* Otto purportedly did not believe that the child had died. He claims that on many occasions he would drive by Daniella's house and check her garbage for diapers or other indicators that a baby was living with her. He also maintains that he called several hospitals seeking information about Daniella and her baby. *Id.*

44 *Doe*, 627 N.E.2d at 650. Otto found, upon his return from work on May 12 that Daniella, who had refused all contact with him since March, had moved back into his apartment. The couple would later marry in September, 1991. *Id.*

45 *Id.* at 651. Otto actually was told that his child had been placed for adoption a few days earlier, some time between May 5 and May 10, by a friend. On May 12, 1991 Richard was 57 days old. *Id.* at 650.

46 *Id.* Otto's retained counsel filed an appearance in the adoption proceeding on Otto's behalf on June 6, 1991. *Doe*, 627 N.E.2d at 650.

of Richard,[47] Otto tried to void the adoption proceedings on the ground that he had never consented to waive his parental rights to his biological son. The Does responded, on December 23, 1991, by amending their adoption petition to allege that Otto was an unfit parent and that therefore his consent to Richard's adoption was not necessary. The dispute went to trial on May 5, 1992.

The trial court found Otto to be an unfit parent pursuant to section 1(D)(l) of Illinois Adoption Act which holds an unwed father to be unfit where it is found by clear and convincing evidence that he has "failed to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth."[48] The trial court concluded that Otto's efforts of sifting through Daniella's garbage and calling different hospitals in the thirty days following Richard's birth did not meet the level of conduct required of unwed fathers by the statute.[49] Otto's parental rights were terminated, thereby eliminating the need for his consent to the adoption. On May 13, 1992, a judgment for the adoption of Richard by the Does was entered by the trial court.[50] Otto appealed.

When the Illinois Appellate Court heard Otakar's appeal, Richard was already over two years old. In considering Otto's challenge the appellate court declared that "the best interest of Richard surfaces as the paramount issue in the case."[51] Since the Does had lovingly cared for their adopted son since birth, and since Richard was totally unaware of the existence of Daniella and Otakar, the appellate court affirmed the adoption decision holding that "[p]lainly it would be contrary to the best interest of Richard to switch parents at this stage of his life."[52]

Otto appealed the appellate court's decision to the Illinois Supreme Court. The state high court unanimously reversed the

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47 *Doe*, 627 N.E.2d at 629. Otakar was found by the court to be the biological father of Richard on December 9, 1991. *Id.*

48 *Doe*, 627 N.E.2d at 649. (quoting 750 ILL. COMP. STAT. § 50/1(D)(l) (West 1992)).

49 *Id.* The trial court believed that Otakar should have sought legal counsel if he was seriously committed to reclaiming Richard: "Had Mr. Kirchner, instead of probing through garbage bags, gone to [legal counsel] at that juncture there would be no such proceedings here." *Id.*

50 *Id.*

51 *Id.* at 652.

52 *Doe*, 627 N.E.2d at 654.

decisions of the two lower benches stating that the finding that Otakar was an unfit parent was simply "not supported by the evidence."[53] The court was very critical of the appellate court's emphasis on the child's best interests which the justices believed could not be considered until grounds for terminating Otto's parental rights were established.[54] The judgment granting the Doe's petition of adoption was therefore vacated. Richard, now over three years old, was ordered to be given to Otto Kirchner.

The United States Supreme Court denied the Does' petition for certiorari on November 7, 1994.[55] The Supreme Court's rebuff, however, did not spell the end of the Baby Richard odyssey. The Illinois Supreme Court's vacatur of Richard's adoption caused such a public outcry that the state legislature — at the urging of Governor Edgar — enacted an amendment to the Adoption Act. The amendment provided that upon the vacation of an adoption

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[53] *In re* Petition of Doe, 638 N.E.2d 181, 182 (Ill. 1994) *cert. denied* 115 S. Ct. 499. The Illinois Supreme Court felt Otakar's attempts to locate the child following Richard's birth were sufficient under the Adoption Act to show his interest in his son. That he did not do more, in the view of the court, was the fault of Daniella who thwarted his efforts and the attorney for the adoptive parents who failed to make any effort to ascertain the name or address of the father despite the fact that Daniella had communicated to him that she knew who the baby's father was. *Id.*

[54] *Id.* Justice Heiple, writing for the court, reserved special criticism for the appellate court's treatment of the case, stating:

> In the opinion below, the appellate court, wholly missing the threshold issue in this case, dwelt on the best interests of the child. Since, however, the father's parental interest was improperly terminated, there was no occasion to reach the factor of the child's best interests. The point should never have been reached and need never have been discussed.

Id.

The Illinois Supreme court later offered a more detailed explanation for adopting such a view:

> In vacating the adoption, this court noted that a child is not available for adoption until it has been validly determined that the rights of his parents have been properly terminated. As this court held in *In re* Adoption of Syck (1990), . . . 562 N.E.2d 174, when ruling on parental unfitness, a court cannot consider the child's best interests, since the child's welfare is not relevant in judging the fitness of the natural parent. Only after the parent has been found by clear and convincing evidence to be unfit can the court proceed to consider the child's best interest and whether those interests would be served if the child were adopted by the petitioners. Though we know that the best-interests-of-the-child standard is not to be denigrated, we reiterate that this standard is never triggered until after it has been validly determined that a child is available for adoption.

In re C.C.R.S, No.94SC23, 1995 Ill. LEXIS at *8.

[55] Baby Richard v. Kirchner, 115 S. Ct. 499 (1994).

proceeding a custody hearing was to take place in order to determine who should have custody of the child based upon the child's best interests.[56] In accordance with this new provision, the Does petitioned for a best interests-custody hearing in the circuit court of Cook County.[57] In response, Otakar filed a petition for a writ of habeas corpus with the Illinois Supreme Court arguing that upon the vacatur of the Does adoption petition he was entitled to legal custody of Richard and that the Does no longer had standing to request a custody hearing.[58] Oral argument on Otakar's writ petition was heard before the Illinois Supreme Court on January 25, 1995. Four hours after arguments concluded, the Illinois Supreme Court issued a one line order directing the Does "to surrender forthwith custody of the child known as Baby Boy Richard."[59] The Does appeals to the United States Supreme Court for a stay of the Illinois ruling were denied.[60] Richard, who now at four years old could no longer be accurately called a baby, was ordered to leave his parents and live with a couple who he had never met.[61]

C. *Baby Emily*

Baby Emily was born on August 28, 1992. She was given up for adoption three days later by her natural mother Linda Benco and adopted by Steve and Angel Welsh of Plantation, Florida. Gary Bjorklund, Emily's biological father, had consistently and emphatically declared his unwillingness to relinquish his parental rights.[62]

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56 750 ILL. COMP. STAT. § 50.20b (1994). This new provision was to "apply to all cases pending on or after the effective date of this amendatory Act of 1994," which was July 3, 1994. *Id.*

57 *In re* C.C.R.S, No.94SC23, 1995 Ill. LEXIS at *11.

58 *Id.*

59 *See* O'Connell v. Kirchner, 115 S. Ct. 1084 (1995) (O'Connor, J., dissenting).

60 O'Connell v. Kirchner, 115 S. Ct. 891, 1084 (1995).

61 *Id.* Otto had spoken about allowing a gradual turnover of the boy to ease Richard's trauma. *See, e.g.*, Janan Hanna, *Kirchner Still Wants Richard; Biological Dad Concedes Transfer May Take Years*, CHICAGO TRIBUNE, Feb. 6, 1995 at N1. However, on April 17, 1995, Otakar went back to the Illinois Supreme Court to seek an order that would direct the police to seize Richard from the Does' custody and delivery the boy to him. Kirchner also asked the court to hold the Does in contempt for not obeying the court order to turn over custody of Richard. *Biological Father Seeks Boy's Return*, N.Y. TIMES, Apr. 19, 1995, at A18. On April 30, 1995 the Does surrendered Richard to Otto and Daniella. The Does have once again asked the U.S. Supreme Court to hear the case. *Id.*

62 *In re* Adoption of Baby E.A.W., 647 So.2d 918, 921 (Fla. Dist. Ct. App. 1994). Bjorklund testified that he was contacted by the attorney/intermediary in the adop-

Before Emily was removed from the hospital, Gary's attorney contacted the Welshes' lawyer to inform her that Gary wanted custody of the baby girl.[63] At the pleading of Linda Benco,[64] who had been estranged from Gary for two months prior to giving birth,[65] the Welshes proceeded with the adoption and took Baby Emily home.

The court fight which ensued revealed the sort of judicial schizophrenia which has become common in biological father—adoptive parent disputes. The Welshes claimed Gary — despite his pre-birth assertion of parental rights — had abandoned Emily and therefore his consent was not required to release Emily for adoption. This argument was tenable because Florida law provided that in determining whether abandonment of a child has occurred, the court may consider the conduct of the father towards the child's mother during her pregnancy.[66] The Welshes asserted that Gary's neglect of Emily's birth mother was sufficient to prove abandonment.

The trial court found in favor of Gary Bjorklund, ruling that he had not abandoned Emily.[67] Thirteen months later, however,

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tion proceeding, Charlotte Danciu, in July of 1992 and at that point he emphatically stated that he was not going to give up the child for adoption and that he began his quest for legal representation at that time. *Id.* In spite of this conversation, Danciu proceeded to obtain a pre-birth order claiming that the biological father had waived his rights to the baby. Danciu neither informed the trial court of her conversation with Bjorklund nor the prospective adoptive parents. For such conduct she was later criticized by the Florida Appellate court. *Id.* at 930-31 (Pariente, J., concurring).

63 Mike Wilson, *Baby Emily: Whose Life is this Anyway,* ST. PETERSBURG TIMES, Jan. 24, 1995, at 1A.

64 *See id.* ("Benco begged the Welshes to adopt the baby, whom she called Hope because she hoped the child would have a good life").

65 Baby E.A.W., 647 So.2d at 922. By the time of the birth of Emily, the relationship between Linda and Gary was extremely acrimonious. *Id.* ("the Court finds that the natural parents' relationship was at best a love-hate situation in its initial stages and deteriorated to the hate side of the scale after the pregnancy . . ."). Linda left Gary in June of 1992 claiming he was abusive and unsupportive. She has since resisted his efforts to communicate. The level of animosity between the two became so great that Linda's consent to surrender Emily for adoption was conditional upon Gary not getting custody. She has since indicated that if Gary gets custody of Emily she will institute suit to revoke her consent to waive her parental rights. *See, e.g.,* Joe Newman, *Fla. Supreme Court to Decide Baby Emily's Fate,* The Palm Beach Post, Apr. 3, 1995 at 1B.

66 FLA. STAT. § 63.032(14) (1992).

67 *Wilson, supra* note 63, at 1A. Judge Vonhof ruled: "Under any definition of abandonment, the natural father has not, in fact, abandoned the natural mother or the child. He has exhibited every available means of attempting to contest the adoption, and his desire to have the custody of and to be with his natural daughter was unrefuted during the time of the hearing." *Id.*

the trial judge was persuaded to rehear the case[68] and this time, despite hearing virtually identical testimony, the trial judge reversed himself finding that Gary had indeed abandoned Emily's birth mother.[69] The adoption of Emily could proceed.

Gary appealed to the appellate court which reversed the trial court's holding on June 22, 1994. Reconsidering the case *en banc,* however, the appellate bench reversed its position. Faulting Gary for his lack of financial and emotional support of Emily's mother during her pregnancy, the Fourth District Court of Appeals of the State of Florida concluded in a 6-5 decision that Gary had abandoned Emily and her natural mother.[70] His consent was therefore not necessary for Emily to be placed for adoption. Cognizant that it was navigating uncharted waters, and uncertain whether a trial court could properly consider emotional support in rendering a determination of abandonment, the appellate court certified an appeal to the Florida Supreme Court.[71]

Shortly before Emily's third birthday, on July 20, 1995, the Florida Supreme Court held that a trial court, in making a determination of abandonment, may consider the lack of emotional support and/or emotional abuse by the father of the mother during her pregnancy.[72] Thus, the Florida high court affirmed the district

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68 *Id.* Rehearing was granted because Emily did not have an attorney representing her interests at the first trial. *Id.*

69 *Id.* At the second trial it was brought out that Bjorklund had been convicted of rape in 1977. The judge however, contended that this fact did not effect his decision. *Wilson, supra* note 63 at 1A.

70 *In re* Adoption of Baby E.A.W., 647 So.2d at 922. It is important to note that the court made its decision solely on the issue of abandonment, explicitly refusing to consider the issue of Emily's best interests: "because the Court has found that the natural father abandoned the minor child, it is unnecessary for this Court to delve into the question of the best interest of the child and, therefore, the Court finds that the various objections which were raised to the introduction of certain exhibits and/or testimony would become moot." *Id.*

71 *Id.* The district court certifed an appeal on the question: "In making a determination of abandonment as defined by Fla.Stat. § 63.032(14)(1992), may a trial court properly consder lack of emotional support and/or emotional abuse of the father toward the mother during pregnancy as a factor in evaluating the 'conduct of the father towards the child during pregnancy.'" *Id.* at 924. As an incidental matter, this was a misquotation of the Florida statute. As the Florida Supreme Court subsequently pointed out, the statute in question "allows a court to consider the father's conduct toward the child's mother — not toward the child, as the certified question says — during the pregnancy." *In re* the Adoption of Baby E.A.W., 658 So.2d 961, 963 (Fla. 1995).

72 *Id.* at 965.

court's *en banc* decision that Baby Emily properly belonged with her adoptive parents. Gary Bjorklund is likely to petition the United States Supreme Court to review the case.[73]

D. *The Issues*

The cases of Jessica, Richard, and Emily dramatically illustrate the extent to which conflict exists both within and between states as to how to adjudicate the rights of biological fathers in adoption disputes. The law remains confused as to what an unwed father must do to protect his right to veto the adoption of a child he sired out of wedlock and in what duration of time he must act to safeguard this right. Otto Kirchner did not contest Baby Richard's adoption until almost two months after the child's birth yet Otto eventually won legal custody. Similarly, Daniel Schmidt, who had abandoned two prior illegitimate children and had no significant contact with Cara Clausen during her pregnancy, was held not to have abandoned Jessica despite the fact that she was already living in Michigan with the DeBoers for over a month before he contested her adoption. Gary Bjorklund, on the other hand, indicated his unwillingness to consent to the adoption of Baby Emily from before the infant was even born, yet the courts of Florida adjudged him to have abandoned the child due to the unsupportive posture he assumed towards Emily's natural mother during her pregnancy.

Such disparate treatment raises important questions. How long should an unwed biological father have to come forward and claim his parental rights to his natural son or daughter? How should abandonment be determined? And whose duty is it to notify the biological father that a child he sired is being placed for adoption? The Illinois Supreme Court faulted Daniella and the prospective adoptive parents for not making greater efforts to locate and notify Otto of Richard's pending adoption. In Iowa, the DeBoer's thought they had received the birth father's consent only to be foiled by Cara's duplicity.

State legislatures have seemingly been unable to draft statutes with the requisite clarity for courts to be able to readily resolve these conflicts in a manner expeditious enough to avoid wreaking

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[73] *See, e.g.*, Debbie Cenziper, *Judges Control Future of Adopted Girl - Again; State Supreme Court Hears Case of Baby Emily*, SUN-SENTINEL (Fort Lauderdale), Apr. 6, 1995, at 1B.

havoc upon the lives of the prospective adoptive parents, the natural fathers, and the children they fight over. The Illinois law focusing on the natural father's behavior within thirty days of the child's birth seemed to establish a coherent guideline but the state's courts disagreed over whether digging through trash and calling hospitals qualified as conduct demonstrating an interest in the welfare of an infant. And once disagreements over statutory interpretation arise, the judicial system has proved itself to be too cumbersome to resolve these disputes in a timely manner. Jessica was two and a half when she was ordered to leave her parents, Richard was four, and Emily was nearly three by the time the Florida Supreme Court decided her fate.

The inescapable paradox of these adoption cases is that while the institution of adoption is founded upon a concern for the best interests of the children it seeks to place, the courts in a near singular voice have refused to consider this salient concern in adjudicating the rights of unwed fathers. While utilizing a naked best interests standard in a prolonged custody battle would pose some legitimate concerns about social engineering[74] and motivating the prolongation of court disputes,[75] a system of adoption dispute resolution which does not give tangible consideration to the welfare of the child, is unacceptable.

A final lesson to be drawn from the trilogy of Jessica, Richard, and Emily is that people really care about this issue. The saga of Baby Jessica catalyzed a national dialogue on adoption and lead to the formation of a nationwide children's rights organization. The ongoing fight for Baby Emily has mobilized public calls for the ref-

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74 *See, e.g.*, Alan Dershowitz, *Who Should Parent Baby Richard?* THE BUFFALO NEWS, Feb. 3, 1995, at 3. ("A civilized society does not simply allocate children to the custodians who will best serve their interests. If it did, we would see many children 'upgraded' to aspiring adoptive parents who are wealthier, better educated and more loving. The state must have only a limited role in interfering with the biological family, lest it become a social engineer in an area fraught with danger of abuse").

75 *See* Je'Nell Blocher Gustafson, *The Natural Father, I Presume: The Natural Father's Rights Versus the Best Interests of the Child*, 1 SAN DIEGO JUSTICE J. 489 (1993). Admittedly, there is a very real danger associated with deciding a case based upon the child's best interest alone where the determination turns on the degree the child has bonded to the prospective adoptive parents. The message this sends to prospective adoptive parents is that, regardless of the birth father's interest in his child, if they can locate a mother who wishes to relinquish her child for adoption and are successful in either hiding the child from the father or protracting litigation, they will be permitted to keep the child. *Id.*

ormation of Florida's adoption laws. And the Baby Richard controversy so flared public temperament that it lead to an acrimonious dispute between the Governor of Illinois and the state's supreme court.[76] In a free society state intrusions into the sacred realm of family relations are subject to close public scrutiny. When the law operates clumsily in this sphere or fails to protect the interests of the parties it was designed to protect, the legal system fails itself and society.

Variations amongst the states as to the breadth of the rights of unwed fathers exist only because the United States Supreme Court has shown a staunch unwillingness to rule decisively on this issue. While the nation's high court is responsible for creating the basic framework of biological father rights, it has avoided elaboration. Understanding where Supreme Court jurisprudence on this issue is and the direction in which it may be heading is essential for engineering reforms to the current adoption system. That is then the topic we turn to next.

III. The Supreme Court's Unanswered Questions

A. *The Unwed Father Cases*

What may not be readily apparent from the lengths the courts of Iowa and Illinois went to protect the rights of Daniel Schmidt and Otto Kirchner is the fact that unwed fathers' rights are relative newcomers to American jurisprudence. Prior to 1972, the unwed father of a child born out of wedlock could be completely excluded from the adoption process.[77] Most states required only maternal consent for a child to be relinquished for adoption.[78] Unwed fa-

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76 Governor Edgar of Illinois characterized the state supreme court's decision in the Richard case as "incredibly inhumane," "outrageous," and "heartless." Kevin McDermott, *Dad Gets "Baby Richard"; State High Court Rules Against Adoptive Parents*, THE STATE JOURNAL-REGISTER (Springfield, Ill.), Jan. 26, 1995, at 1. In a statement released shortly after the decision Governor Edgar said: "I know I am joined by millions of my fellow citizens in being disgusted by this heartbreaking decision." *Id.* The Governor also added: "I don't know of any issue that has been more mishandled in my 25 years in government." Adrienne Drell, *Baby Richard Appeal Filed*, CHICAGO SUN-TIMES, Jan. 27, 1995, at 1.

77 *See* H. Krause, ILLEGITIMACY: LAW AND SOCIAL POLICY 32 (1971).

78 This was due to the codification of the maternal-preference doctrine which held that a mother's care was essential to the welfare of children and superior to the type of compassion which could be shown by a father. *See* R. HOROWITZ & H. DAVIDSON, LEGAL RIGHTS OF CHILDREN 234 (1984).

thers were often powerless to prevent their biological offspring from being placed into the home of an adoptive family if that was the natural mother's wish. For the great majority of unwed fathers, it is safe to say, this absolution of responsibility was a blessing more than it was a concern. But for some unwed fathers such a regime was extremely troubling. To them there seemed to be an inherent injustice in a system which went to lengths to protect the parental rights of unwed mothers and married fathers, yet had no problem in summarily disposing of the parental rights of biological fathers just because they had not married the women who bore their children.

Peter Stanley was such a man.[79] He brought the issue of unwed father rights before the United States Supreme Court for the first time in 1972. Having fathered three children with Joan Stanley, the couple lived together on an on-again, off-again basis for eighteen years without marrying. When Joan passed away, the state of Illinois moved in to take custody of "her" children. A state law held that the children of single mothers became wards of the state upon her death. And since Illinois considered unwed fathers to be presumed unfit to raise their children,[80] the state never considered letting the children stay with their biological father. In a fight for the custody of his children which would go to the Supreme Court, Stanley challenged the Illinois law on the grounds that it violated his due process and equal protection guarantees under the Fourteenth Amendment.[81] The Supreme Court agreed with Stanley.[82] The Court rebutted the Illinois position on the presumptory unfitness of unwed fathers stating that the law has not "refused to recognize those family relationships unlegitimized by a marriage ceremony."[83] The Court held that denying Stanley and those like him a hearing to determine unfitness "while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause."[84] The Court therefore concluded that as a matter of due

79 Stanley v. Illinois, 405 U.S. 645 (1972).

80 *Id.*

81 *Stanley*, 405 U.S. at 658. While unwed fathers were statutorily denied parental rights, married fathers and unwed mothers could not be stripped of their parental rights absent a hearing to show unfitness. *Id.*

82 *Id.* at 652. The Stanley court held that a father's "interest in retaining custody of his children is cognizable and substantial." *Id.* at 658.

83 *Id.* at 651.

84 *Stanley*, 405 U.S. at 658.

process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him.[85]

Considered the first victory for the rights of unwed fathers, the *Stanley* decision of 1972, nonetheless, was rather misleading. It appeared that the court was guaranteeing all unwed fathers the constitutionally-based right to a determination of unfitness before their rights to their offspring could be extinguished. Yet such an interpretation would prove to be overbroad as the Court would later demonstrate when it returned its attention to the dilemma of unwed fatherhood six years later.

The case of *Quilloin v. Walcott*[86] came before the Supreme Court in 1978.[87] A Georgia man named Quilloin had conceived a child with Ardel Walcott but neither married nor lived with her.[88] Several years later, Ardel Walcott married another man and, after a seven year interval, her husband tried to adopt the child who Quilloin had fathered.[89] Ardel naturally consented. Quilloin, however, despite his financial and parental neglect for his offspring, sought to prevent the adoption in order to preserve visitation rights.[90] The Georgia courts denied him veto power over the adoption citing his failure to legitimize the child and the child's best interests.[91] Quilloin appealed to the Supreme Court on the principle that he thought had been established in *Stanley*.[92]

The Supreme Court did not agree with Quilloin's interpretation of *Stanley* and in a unanimous decision allowed the adoption to proceed.[93] In so doing, the Court indicated that the parental rights bestowed in *Stanley* were not to be universally granted to every man who had impregnated a woman.[94] In allocating due process and equal protection rights, the Court's analysis in *Quilloin* shifted to focus, not on the biology of producing a child, but

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85 *Id.* at 652.

86 Quilloin v. Walcott, 434 U.S. 246 (1978).

87 *Id.* at 247.

88 *Id.*

89 *Id.* at 248.

90 *Id.*

91 Quilloin v. Walcott, 434 U.S. 246 (1978).

92 *Id.* at 247-48. As a matter of due process and equal protection, an unwed father was entitled to an absolute right to veto the adoption of his child absent a finding of unfitness. *Id.*

93 *Id.* at 253.

94 *See id.* at 256.

rather, on the nature of the father-child relationship.[95] The Justices denied Quilloin's constitutional claims because "he never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[96] So if a father was not going to make an effort to establish a relationship with his offspring, then in the eyes of the Supreme Court, he was not entitled to the parental privileges which would give him a voice in his child's future custodial arrangement.[97]

The Supreme Court's stand in *Quilloin* would be later reinforced in the case of *Caban v. Mohammed.*[98] Abdiel Caban and Maria Mohammed had two children together.[99] For five years the couple lived together and raised their offspring.[100] Except for the lack of a marriage certificate, nothing about the couples' appearances or actions belied the fact that their union was unsanctioned by the state.[101] Abdiel was even listed as the father on both children's birth certificates.[102] Maria and Abdiel's relationship, however, eventually deteriorated and the coupled parted company.[103] The children lived with the mother but Abdiel never let his relationship with his children wane.[104] There remained regular visits and support even after both he and Maria married other people.[105]

The real troubles began when Maria and her husband initiated proceedings to adopt the children.[106] Abdiel and his wife countered with a cross-petition for adoption.[107] However, under

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95 *Quilloin*, 434 U.S. at 255.

96 *Id.* at 256.

97 *Id.* As one commentator has noted: "*Quilloin* thus established that an unwed father must have more than a biological link with his child to receive constitutional protection of his parental rights - he must participate in the care of his child and accept responsibility for his child's well-being. If an unwed father is unable to display such commitment, the Court would allow the state to terminate his parental rights." Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered For Adoption*, 60 FORDHAM L.R. 971, 976 (1992).

98 Caban v. Mohommed, 441 U.S. 380 (1979).

99 *Id.* at 382.

100 *Id.* at 383.

101 *Id.*

102 *Id.*

103 *Caban*, 441 U.S. at 383.

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.* at 384.

the New York statutory regime in force at the time, only the unwed mother's consent was required for the adoption of her child.[108] The unwed father had no input in the process.[109] Therefore, Maria withheld her consent from Abdiel's petition and granted it to the petition sponsored by herself and her husband.[110] The New York courts sanctioned Maria's actions and Caban took his fight to the Supreme Court.[111] Caban argued that the distinction drawn under New York law between the rights of unwed fathers and those of other parents violated the equal protection clause of the Fourteenth Amendment.[112] Relying on *Quilloin,* Caban asserted that he had a due process right as a responsible natural father to maintain a parental relationship with his children absent a finding of his unfitness as a parent.[113]

Applying an equal protection analysis, the Supreme Court found the New York statute to be defective.[114] The New York law, the Court declared, "quite simply treat[ed] unmarried parents differently according to their sex."[115] This differentiation was a violation of the equal protection clause because the distinction did not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children.[116] In defense of its law, New York tried to advance a policy argument "advocating that requiring . . . unmarried fathers' consent for adoption would pose a strong impediment for adoption because often it is impossible to locate unwed fathers when adoption proceedings are brought, whereas mothers are more likely to remain with their children."[117] Considering the facts of this dispute, the Supreme Court rejected this argument as well.[118] In cases such as this, the Court began, where the father has established a substantial relationship with the child and has admitted his paternity, a State should have no difficulty in identifying the father even of children born out of wed-

108 *Caban,* 441 U.S. at 384.
109 *Id.*
110 *Id.*
111 *Id.*
112 *Id.* at 385.
113 *Caban,* 441 U.S. at 385.
114 *Id.* at 388.
115 *Id.* at 388.
116 *Id.*
117 *Id.* at 391.
118 *Caban,* 441 U.S. at 384.

lock.[119] Because Caban had proven himself to be a responsible father, his interest in his children was entitled to the same protection afforded the mother.[120] A father who had developed a relationship with his children could not have his rights summarily terminated just because he had not married the mother.[121]

Caban, building upon the foundation of *Stanley* and *Quilloin,* helped establish what some commentators have referred to as the Supreme Court's Biology Plus[122] test for establishing the rights of unwed fathers. Under this analysis, an unwed father does not receive constitutionally protected rights by merely conceiving a child with a woman. In order to trigger the protection of the Constitution the unwed father must establish a positive and substantial relationship with his child. Only then does he gain the right to veto his child's adoption.

The Supreme Court revisited the unwed father issue again in 1983. The seminal issue in *Lehr v. Robertson*[123] regarded the rights of a biological father to be given advance notice that his offspring was involved in an adoption proceeding. Jon Lehr had fathered a child with Lorraine Robertson.[124] The pair neither married nor lived together following the birth of a baby girl named Jessica.[125] Lehr contended that he always wanted to provide for his daughter and to be a part of her life, but Lorraine always thwarted his attempts.[126] Less than a year after Jessica's birth, Lorraine married.[127] Unbeknownst to Jon, she and her husband filed a petition for Jessica's step-father to adopt Jessica.[128] Jon would have been notified of this procedure by the state if he had filed with New York's putative father registry.[129] However, he failed to do so and the adoption process proceeded without him.[130] When news of Jessica's adoption reached him, Jon fought to have it invalidated.[131]

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119 *Id.* at 393.
120 *Id.*
121 *Id.*
122 *See, e.g., Zinman, supra* note 97, at 975.
123 Lehr v. Robertson, 463 U.S. 248 (1983).
124 *Id.* at 250.
125 *Id.*
126 *Id.* at 251.
127 *Id.*
128 *Lehr,* 463 U.S. at 252.
129 *Id.*
130 *Id.*
131 *Id.* at 254.

His claim was that "a putative father's actual or potential relationship with a child born out of wedlock is an interest in liberty which may not be destroyed without due process of law; . . . therefore . . . he had a constitutional right to prior notice and an opportunity to be heard before he was deprived of that interest."[132]

The United States Supreme Court was unsympathetic to Lehr's contention. The Court reiterated its conviction that biology alone did not vest constitutional rights in an unwed father.[133] Thus, unless an unwed father has established a relationship with his child, he may not look to the Constitution for due process protection.[134] From the perspective of the Justices, Jon Lehr fit more the mold of the irresponsible Quilloin than of the dedicated Stanley or Caban. The Court continued to find nothing defective within the New York notice statute which Lehr could have benefited from had he been in compliance.[135] Due process required nothing more.

The jurisprudence developed by the Supreme Court between *Stanley* and *Lehr* held that, for the biological father, constitutional protection was a privilege originating in the development of a parental relationship with his illegitimate child. If the biological father was unable to establish himself as a part of his offspring's life, he could not claim a right to veto the child's adoption. On the other hand, if he had played an active part in the affairs of his child, his rights to that child could not be extinguished absent either his consent or a demonstration of unfitness.

As a result of the Supreme Court's most recent revisitation of the unwed father dilemma, the 1989 case of *Michael H. v. Gerald D,* the rights of unwed fathers have become vulnerable to ques-

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132 *Id.* at 255.

133 *Lehr,* 463 U.S. at 259-60. The significance of the biological connection, the Court explained:

> is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.

Id. at 262 (footnote omitted).

134 *Id.*

135 *Id.* at 265.

tions.[136] Here the Court, in a plurality opinion, denied an unwed father who had developed a relationship with his child the opportunity to establish paternity for the purposes of visitation.[137] At issue in the case was the constitutionality of a California statute which presumed that the child of a married woman was a child of the marriage absent a showing that the husband was either impotent or sterile.[138]

The controversy centered around the extraordinary[139] lifestyle of Carol D., an international model.[140] While married to Gerald D., Carol had an affair and conceived a child with Michael H.[141] Carol proceeded to reside for various durations with her husband, Michael H., and another man.[142] For the months that Carol lived with Michael H., Michael H. held their child out as his own.[143] Eventually, however, Carol returned to her husband and refused to allow Michael H. visitation with their child.[144] When Michael H. took legal action to secure visitation, Gerald D. defended by invoking California's marital presumption statute.[145]

The validity of the statute was upheld by the Supreme Court despite the fact that it appeared to deny parental rights to a putative father who satisfied the Court's Biology Plus test.[146] Justice Scalia, writing the plurality opinion, stated that "[t]he presumption of legitimacy was a fundamental principle of the common law"[147] which operated to promote the peace and tranquillity of States and families.[148] Michael H.'s reliance on *Stanley* and its progeny as "establishing that a liberty interest is created by biological fatherhood plus an established parental relationship," was held by the plurality

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136 Michael H. v. Gerald D., 491 U.S. 110 (1989).

137 *Id.*

138 *Id.* at 113. *See* CAL. EVID. CODE § 621 (West Supp. 1989).

139 *Michael H.*, 491 U.S. at 110. "The facts of this case are, we must hope, extraordinary." *Id.* at 113.

140 *Id.* at 113.

141 *Id.* Paternity tests showed a 98.07% probability that Michael H. was the child's father. *Id.* at 114.

142 *Michael H.*, 491 U.S. at 114.

143 *Id.*

144 *Id.*

145 *Id.*

146 *Michael H.*, 491 U.S. at 114.

147 *Id.* at 124 (quoting H. Nicholas, Adulturine Bastardy 1 (1836)).

148 *Id.* at 125 (quoting J. Schouler, LAW OF THE DOMESTIC RELATIONS § 225, at 304 (quoting Boullenois, TRAITE DES STATUS, bk. 1, p. 62)).

to "distort[ ] the rationale of those cases."[149] The prior cases, the plurality distinguished, rested "not upon such isolated factors but upon the historic respect — indeed sanctity would not be too strong a term — traditionally accorded to the relationships that develop within the unitary family."[150] Scalia felt that the relationship Michael H. was seeking protection for had no basis in the historic practices of our society.[151] Therefore Michael H.'s assertion that his relationship with his child was a constitutionally protected liberty interest had to be defeated.[152]

While Scalia's opinion seemed to discredit the Biology Plus test, Justice Brennan writing in dissent reaffirmed his and three other justices' belief that *Stanley* and its progeny have produced a unifying theme: although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so.[153] *Michael D.* undoubtedly cast some degree of uncertainty upon the Supreme Court's stance on unwed father rights.[154] However, *Michael D.* not withstanding, lower courts have continued to construe *Stanley* and its progeny as affording constitutional rights to unwed fathers who develop a substantive relationship with their biological offspring.

B. *The Unanswered Question of Newborn Adoptions*

Since 1972, the Supreme Court has ushered the concept of parental rights for unwed fathers from a state of legal non-existence to a recognized right warranting constitutional protection in

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149 *Id.* at 123.

150 *Id.*

151 *Michael H.*, 491 U.S. at 124.

152 *Id.* at 124-30.

153 *Id.* at 142-43 (Brennan, J., dissenting). *See also id.* at 159-60 (White, J., dissenting).

154 *See* Homer H. Clark, Jr., The Law of Domestic Relations in the United States, § 20.2, at 858 (2d ed. 1988) "The Supreme Court has attempted on four subsequent occasions to clarify some of the issues raised by the Stanley case but has succeeded only in compounding the confusion." *See also* Kirsten Korn, Comment, *The Struggle for the Child: Preserving the Family in Adoption Disputes Between Biological Parents and Third Parties*, 72 N.C. L. REV. 1279, 1306 (1994). "The question of whose interests will be protected in the future, however, remains unanswered. The five unwed father cases, in addition to *Moore* and *Smith*, have left the Supreme Court, as well as state courts, with the ability to deny unwed fathers and other parental figures protection in their family relationships." *Id.*

certain circumstances. But the Court has refused to refine its unwed father jurisprudence past its "Biology Plus" pronouncement. The main deficiency in such a limitation is that a Biology Plus analysis is meaningless in the majority of adoption cases where an illegitimate child is given up for adoption at or near birth.[155] The putative father in this circumstance never has an opportunity to establish a parental relationship with his offspring.[156]

The Supreme Court has avoided addressing the issue of newborn adoptions in its past unwed father decisions.[157] The Court's recent refusals to grant certiorari in the cases of Baby Jessica and Baby Richard indicate that the Supreme Court remains unwilling to address the question of whether an unwed father has a legal interest in — and thus the right to veto the adoption of — a child he sired out of wedlock and with whom he has not yet had an opportunity to develop a relationship. The Supreme Court's hesitancy to speak to this important issue may be attributable to a traditional and implicit understanding that the regulation of family matters is, whenever possible, better effectuated at the state level.[158] However, given the Supreme Court's substantial involvement in the creation and evolution of unwed father rights to this point, its unwillingness to address what has become the issue's seminal unresolved question may not be justified by such belated deference to tradition.

The Supreme Court's obstinacy has left the states wide latitude in crafting solutions to the dilemma posed by unwed fathers and

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155 NATIONAL COMM. FOR ADOPTION, ADOPTION FACTBOOK 60 (1989). In 1986 there were 24,589 unrelated infant adoptions in the United States. This figure accounts for almost half of the unrelated domestic adoption for that year. *See* H. KRAUSE, FAMILY LAW IN A NUTSHELL 174 (2d ed. 1986) (stating that "the question that is most important to the functioning of the typical adoption process has not been answered: [none] of the earlier cases articulates the interested and responsible unmarried father's rights immediately after the child's birth").

156 *See* Clark, *supra* note 154, section 20.2, at 861. "The Lehr case also leaves unanswered the question of the father's rights respecting adoption placements of newborn children. In such cases he usually will have had no opportunity to develop a relationship with the child if the mother relinquishes the child straight from the hospital to an adoption agency, the procedure favored for non-relative adoptions by many agencies." *Id.*

157 *See Caban*, 441 U.S. at 392, n. 11 (stating that, "Because the question is not before us, we express no view whether such difficulties would justify a statute addressed particularly to newborn adoptions . . .").

158 Lynda H. Walters & Audrey W. Elam, *The Father and the Law*, 29 AM. BEHAVIORAL SCIENTIST 78 (1985).

newborn adoptions. The resultant statutes have varied widely in both scope and consequence causing the type of interstate disharmony and confusion that was illustrated by the cases of Jessica, Richard, and Emily. However, it is within these state level judicial and legislative activities that the unwed father debate has received its most comprehensive and sustained — if discordant — treatment.

IV. State Approaches to the Rights of Unwed Fathers

Prior to 1972 most states only required the consent of the natural mother for a child to be eligible for adoption.[159] In the wake of *Stanley* and its progeny the states realized that the rights of an unwed father could no longer be ignored in all situations.[160] However, in seeking to reform their adoption statutes, the states were on their own in interpreting how to translate the Supreme Court's guidelines into actual law.[161]

In addition to the crucial issue of newborn adoptions, the Supreme Court's decisions on unwed fathers' rights left open to the states the resolution of other critical problems. Never addressed by the Court was the question of whether an unwed father whose identity or whereabouts were unknown must be given notice of his child's adoption.[162] Also left undecided was the issue of whether, if an unwed father is given notice and an opportunity to be heard, his rights may be terminated based on a consideration of the child's best interests, or whether he must be proved to be unfit before he could lose his parental rights.[163] The *Lehr* decision left open the question of "how much" of a relationship a natural father must develop with his offspring to entitle the unwed father to notice of, and the right to veto the adoption.[164] In providing answers to these questions, state legislatures were inevitably forced to reveal

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159 *Clark, supra* note 154 section 20.2, at 855. Under these statutes the unwed father had "no legally enforceable right to assert his parental rights in the child if the mother wished to place the child for adoption or if she failed in her parental duties." *Id.*

160 *Id.* at 860.

161 *See id.* "It is difficult if not impossible to arrive at an accurate or useful assessment of the Supreme Court's decisions from Stanley to Lehr." *Id.*

162 *Clark, supra* note 154, at 860-61.

163 *Id.* at 861.

164 HOMER H. CLARK, JR. THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, section 20.2, at 858 (2d ed. 1988).

their biases regarding unwed fatherhood, adoption, and children's rights.

A. *Consent and Notice*

In the wake of the Supreme Court's decision in *Caban v. Mohammed,* numerous states rewrote their adoption laws to better incorporate the unwed father into the adoption process.

States placing a high value on preserving the custodial rights of biological fathers implemented what have been referred to as "absolute consent requirements."[165] Such statutes require the consent of the putative father unless grounds for the termination of his parental rights — i.e., denial of paternity, neglect, abuse, or abandonment — has been established. Illustrative is the relevant Montana statute which reads, "If the mother of a child born out of wedlock proposes to relinquish the child for adoption and the relinquishment or consent of the birth father cannot be obtained, the child may not be placed for adoption until the parental rights of the father are terminated. . . ."[166] States with "absolute consent" prerequisites for adoption are very protective of the rights of unwed fathers.[167] By requiring a putative father's consent to adoption, such states also mandate that unwed fathers receive notice of adoption proceedings.[168] In so doing, women are often encouraged to name the father — or list the potential fathers — of their children. Failure to do so may jeopardize the successful placement of their children with adoptive parents. However, forcing birth mothers to

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165 Katherine L. Corley, Comment, *Removing the Bar Sinister: Adoption Rights of Putative Fathers,* 15 CUMB. L. REV. 499, 511 (1985).

166 MONT. CODE ANN. § 40-6-125(1) (1993).

167 Other states with absolute consent requirements for adoption include: ALA. CODE § 26-10A-7(5) (1992); ARIZ. REV. STAT. ANN. § 8106(A)(1)(b) (Supp. 1993); DEL. CODE ANN., tit. 13, § 1106(a)b.1 (1993); D.C. CODE ANN. § 16-304(b)(2)(A), (d) (1989); IOWA CODE ANN. § 600.3 (1981); KAN. PROB. CODE ANN. §§ 59-2129(a)(1)-(2), 59-2136 (Vernon Supp. 1993); MD. CODE ANN. FAM. LAW. § 5-311(a)(1)-(2), (b) (Supp. 1993); MICH. COMP. LAWS ANN. § 710.31 (West 1993); MO. ANN. STAT. § 453.040(1)-(3) (Vernon Supp. 1993); NEV. REV. STAT. ANN. § 127.0401.(a) (Michie Supp. 1993); OKLA. STAT. ANN. 10, § 60.5(1) (West 1993); 23 PA. CONS. STAT. ANN. § 2711(a)(3) (Supp. 1993); R.I. GEN. LAWS 15-7-5(a), (b) (1988); S.D. CODIFIED LAWS ANN. § 25-6-4 (1992); VA. CODE ANN. § 63.1-225C.2 (Supp. 1993); WASH. REV. CODE ANN. § 26.33.160(1)(b)(West Supp. 1994); WYO. STAT. § 1-22-109(a)(i)-(iv) (1988).

168 *See Corley, supra* note 165, at 512, n.92. All of the states with absolute consent requirements provide for efforts to notify the putative father. *Id.* ("states require notice to anyone whose consent is required. This is only logical; without notice, consent could not be obtained.")

name fathers may seriously implicate the women's privacy rights. Additionally, the requisite standard for proving unfitness befitting termination of parental rights can be quite rigorous[169] as was demonstrated in the Baby Jessica case.[170] Since such jurisdictions focus on protecting the rights of the biological father, the child's best interests are usually not eligible for consideration until after a ground for the father's termination has been established.[171]

Other states employ "conditional consent" statutes which give putative fathers consent and notice rights only if they meet, by their actions or status, certain prescribed criteria.[172] Commonly, to be entitled to consent rights, unwed fathers are required to either: legitimate the child or establish paternity;[173] provide financial aid to the mother for the purpose of rearing the child;[174] appear on the child's birth certificate;[175] communicate or form a supportive relationship with the child;[176] or take the child into their home.[177]

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169 *See Clark, supra* note 154, at section 19.6 at 823-24. "Unfitness is a rigorous standard, one which goes beyond a mere determination of the child's best interests. The parent's claim is strengthened even further by the rule adopted in some states that the unfitness must be proved by clear and convincing evidence." *Id.*

170 *See* IOWA CODE ANN. § 600A.8 (1981 & West Supp. 1994). In order to terminate parental rights under Iowa law, there must be a finding of "clear and convincing" evidence of the existence of one of the statutory grounds for termination. *Id.* In the Baby Jessica case, it was held that Daniel Schmidt had not been shown, by clear and convincing evidence, to have abandoned Jessica, thus his parental rights could not be terminated. *Id.*

171 *In re* B.G.C., 496 N.W.2d 239 (Iowa 1992). *See also In re* M.M.S., 502 N.W.2d 4 (Iowa 1993). Under the rule that due process rights accompany father's relationship with child, including child born out of wedlock, when termination of parental rights is grounded on claim of abandonment, abandonment must be established by clear and convincing evidence before court will be authorized to explore the issue of the child's best interests. *Id.*

172 Karen C. Wehner, Comment: *Daddy Wants Rights Too: A Perspective on Adoption Statutes,* 31 HOUS. L. REV. 691, 706-7 (1994).

173 *See e.g.,* ALASKA STAT. § 25.23.040(a)(2) (1991); ARK. CODE ANN. § 9-9-206(a)(2) (Michie 1993); CAL. FAM. CODE § 8604(a) (West 1994); FLA. STAT. ANN. § 63.062(1)(b)(4) (West Supp. 1994); IDAHO CODE § 16-1504 (Supp. 1993); IND. CODE ANN. § 31-3-1-6(a)(2) (Burns Supp. 1993); KY. REV. STAT. ANN. § 199.5001 (1991); LA. CHILD CODE ANN. art. 1193 (West Supp. 1993); OR. REV. STAT. ANN. § 109.092 (1990); TEX. FAM. CODE ANN. § 15.023 (West Supp. 1993)

174 *See e.g.,* FLA. STAT. ANN. § 63.062(1)(B)(5) (WEST SUPP. 1994); KAN. PROB. CODE ANN. §§ 59-2129 to -2136 (Supp. 1993); N.C. GEN. STAT. § 48-6(a)(3)c (1991); S.C. CODE ANN. § 20-71690(A)(4)(a) (Supp. 1993).

175 *See* ME. REV. STAT. ANN. tit. 19, § 532-C (West Supp. 1992); MINN. STAT. ANN. § 259.24(a) (West 1992); N.M. STAT. ANN. § 32A-5-17(A)(5) (1993); OHIO REV. CODE ANN. § 3107.06(F)(3) (1989).

176 *See e.g.,* HAW. REV. STAT. § 578-2(A)(5) (1993); ME. REV. STAT. ANN. tit. 19,

Additionally, some conditional consent statutes require notification of men who are, or formerly were, married to the birth mother.[178]

Conditional consent statutes may not afford unwed fathers much protection. Particularly in the case of newborn adoptions, it would be extremely difficult, if not impossible, for putative fathers to meet most of these requirements, especially if the birth mother is uncooperative or thwarting his efforts. Like the Supreme Court, most states have avoided addressing the issue of whether unwed fathers should be vested with consent and notice rights in newborn adoptions. New York and California, however, are two exceptions. The courts of these two states both confronted this issue and established consent rights for unwed fathers who took efforts to seize their parental opportunities.

B. *Newborn Adoptions*

In the case in *In re Raquel Marie X.*,[179] the New York Court of Appeals was confronted with a challenge to the state's conditional consent statute. The statute at issue granted an unwed father the right to veto his newborn offspring's adoption only if he satisfied three criteria: "he lived with either the mother or the child continuously for six months prior to the adoption; he admitted paternity; and he provided reasonable financial support to the mother for birth expenses."[180] In evaluating the propriety of the statute, the Court of Appeals consolidated two factually similar cases. Both

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§ 532-C (West Supp. 1992); N.J. STAT. ANN. § 9:3-46(a) (West 1993); N.M. STAT. ANN. § 32A-5-17(A)(5) (1993).

177 *See e.g.*, MINN. STAT. ANN. § 259.26(2)(d) (West 1992); N.M. STAT. ANN. § 32A-5-17(A)(5) (1993); S.C. CODE ANN. § 20-7-1690(A)(4) (Supp. 1993).

178 *See e.g.*, MINN STAT. § 257.55 (Supp. 1993):

> A man is presumed to be the child's father and entitled to notice of adoption if: (1) he is or has been married to the mother, and the child is born during the marriage . . . ; (2) before the child's birth, he "attempted" to marry the mother in apparent compliance with the law; (3) after the child's birth, he and the mother married or attempted to marry and (a) he acknowledged paternity in a writing filed with the state registrar . . . , (b) consented to being named as the father on the birth certificate, or (c) is obligated to support the child under written voluntary promise or by court order; . . .

Id.

179 *In re* Raquel Marie X., 559 N.E.2d 418 (N.Y. 1990), *cert. denied*, 111 S. Ct. 517 (1990).

180 *Id.* at 419 (citing Domestic Relations Law § 111(1)(e)).

cases — *Matter of Raquel Marie X.* and *Matter of Baby Girl S.* — featured unwed fathers who manifested desires to assume custody of their illegitimate children but were thwarted by the natural mothers who surrendered the children to prospective adoptive parents.[181] Neither father lived continuously with the natural mother or child for six months prior to the adoption thus putting at issue whether either biological father could veto the mothers' decision to surrender the children for adoption. In *In re Raquel Marie X.* the constitutionality of the "living together" requirement of the New York Statute was scrutinized.

Examining the Supreme Court's literature from *Stanley* through *Michael H.*, the New York Court of Appeals concluded that for an unwed father's rights to be respected, there must exist "both a biological connection and full parental responsibility; he must both be a father and behave like one."[182] Since the consolidated cases before the New York court involved newborn adoptions where the fathers did not have an opportunity to develop a relationship with their offspring, the Court of Appeals examined the dual questions of whether a state was constitutionally required to recognize unwed father rights in the newborn adoption context, and if it was, the court investigated what actions a father must take to secure such rights.[183]

Building upon the foundation laid down in *Lehr* that the biological link offers the unwed father "the opportunity" to develop a constitutionally protected interest in his child,[184] the Court of Appeals reasoned that:

> a father who has promptly taken every available avenue to demonstrate that he is willing and able to enter into the fullest possible relationship with his under-six-month old child should have an equally fully protected interest in preventing termination of the relationship by strangers, even if he has not as yet

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181 *In re Raquel Marie X.*, the natural mother surrendered the child to adoptive parents three days after the biological father petitioned for custody. *See In re* Raquel Marie X., 545 N.Y.S.2d 379 (App. Div. 1989). In *In re Baby Girl S.*, the biological father established his paternity two months prior to the baby's birth, offered to marry the natural mother, and came up with $8000 for pregnancy expenses; the mother nonetheless put the child up for adoption. *See In re* Baby Girl S., 535 N.Y.S.2d 676 (N.Y. Sup. Ct. 1988).

182 *Raquel Marie X.*, 559 N.E. at 424.

183 *Id.*

184 *Lehr*, 463 U.S. at 262.

actually been able to form that relationship.[185]

An unwed father demonstrating such resolve would then have a protected, fundamental right to veto the adoption of his newborn child absent a showing of unfitness.[186] Since the New York statute would deny this fundamental right to a father who did not live with the birth mother or child for six continuous months prior to the adoption, the Court of Appeals subjected it to the dual tests of determining whether the statute furthered a "powerful countervailing State interest," and if it did, whether there existed "a close fit between the governmental objective sought and the means chosen to achieve it."[187]

The court determined that the state had unquestionably substantial interests at stake in adoption laws, consent provisions, and the placement of newborn babies.[188] The contested statute, the court also found, promoted the state's interest in adoption "by limiting the necessity for paternal consent, thus making the process surer and speedier."[189] However, the court held that the statute's "living together" requirement was not sufficiently narrowly tailored to further these interests of the state.[190] The difficulty with the "living together" requirement, the court explained, "stems from its focus on the relationship between father and mother, rather than father and child."[191] Thus, it can easily be used to block the father's rights.[192] Even a father who consistently and promptly declares his desire to raise his child can be thwarted in his attempts by the natural mother if she refused to cohabitate with him. Additionally, the court declared that the "living together requirement" did not "sufficiently further state interests" since the statutes other two requirements — acknowledgment of paternity and payment of birth expenses — "already ensure that the father is both identifiable and, to some extent, ready to support the child financially."[193] Accordingly, the Court of Appeals held that the "living together" requirement rendered the New York consent statute

185 *Raquel Marie X.*, 559 N.E. at 425.
186 *Id.*
187 *Id.*
188 *Id.*
189 *Raquel Marie X.*, 559 N.E.2d at 425.
190 *Id.* at 426-27.
191 *Id.* at 426.
192 *Id.*
193 *Id.*

unconstitutional.[194]

The New York court continued to promulgate a standard to guide courts in determining whether an unwed father has demonstrated the requisite interest in his offspring to be vested with the right of consent.[195] The court held that an unwed father must promptly demonstrate his desire to assume parental responsibilities and be willing to take full custody of his child, not just block its adoption by others.[196] In evaluating whether an unwed father's actions sufficiently demonstrate his desire to raise his child, the court advised consideration of the fathers acknowledgment of paternity, his payment of birth expenses, the steps he has taken to establish legal responsibility for the child, and any other relevant actions demonstrating his commitment to fatherhood.[197] Applying this guide to the pair of cases under consideration, the Court of Appeals affirmed the lower court's granting of custody to the father in *Matter of Baby Girl S.* and remanded the case of *Raquel Marie X.* in which the unwed father was originally denied custody for reconsideration in accordance with the newly established guidelines.

The California Supreme Court confronted the issue of newborn adoptions two years after the New York Court of Appeals in the case of *Adoption of Kelsey S.*[198] The California Civil Code embraced a conditional consent regime which created two classes of biological fathers: "natural fathers" and "presumed fathers."[199] Natural fathers had only biological links to their offspring and they were not afforded consent rights by the statute.[200] Thus, the child of a "natural father" could be placed for adoption with only the consent of the birth mother.

In order for an unwed father to become vested with consent

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194 *See Raquel Marie X.*, 559 N.E. at 426 "[T]he 'living together' requirement of Domestic Relations Law § 111(1)(e) — which cuts off [an unwed father's] interest by imposing as an absolute condition an obligation only tangentially related to the parental relationship — cannot stand." *Id.*

195 *Id.* at 427.

196 *Id.* at 428.

197 *Id.*

198 *In re* Adoption of Kelsey S., 1 Cal. 4th 816 (1992).

199 CAL. CIV. CODE § 7004 (1983).

200 CAL. CIV. CODE § 7017 (1983). If a natural unwed father wanted to contest the adoption of his child his only appeal was to the child's best interests. *Id.* This, however, was a daunting obstacle to overcome as "the trial court's determination is frequently that the child's interests are better served by a third party adoption than by granting custody to the unwed natural father." Adoption of Kelsey S., 1 Cal. 4th at 824.

rights, he had to qualify as a "presumed father" under the statute. To achieve such status, however, an unwed father had to receive the child into his home and openly hold the child out as his own.[201] Absent a showing of parental unfitness, a child could not be placed for adoption in California without the consent of the child's birth mother and presumed father regardless of the child's best interest.[202]

In *Kelsey S.* the constitutionality of this statutory regime came under attack. The case involved an unwed father who earnestly and promptly tried to demonstrate his parental responsibility but was denied custody because, due to the uncooperative behavior of the infant's mother, he was unable to fulfill the statutory requirement of receiving the child into his home.[203] Analyzing the case in a manner similar to the New York Court of Appeals' approach in *Raquel Marie X.*, the California Supreme Court found the statutory scheme unconstitutional because it allowed a birth mother, by her actions alone, to deny an unwed father the chance to parent his offspring.[204] Whether an unwed father's rights are to be respected, should depend solely upon his own actions. In the newborn adoption context, the California high court advised that a court should consider an unwed father's conduct "both before and after the child's birth."[205] A biological father who "promptly attempt[s] to assume his parental responsibilities," to the extent that the birth mother will allow him, and demonstrates a willingness to assume full custody of the child should be afforded constitutional protection for his parental interest.[206]

The decisions of *Raquel Marie X.* and *Kelsey S.* are important advances in unwed father jurisprudence. They represent the first attempts by courts to address the rights of biological fathers in the context of newborn adoptions. Both cases represent diligent attempts

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201 CAL. CIV. CODE § 7004(a)(4) (1983).

202 *Adoption of Kelsey S.*, 1 Cal. 4th at 825.

203 *Id.* The unwed father in this case filed an action to establish his parental rights and desire to attain custody two days after the child's birth. The birth mother, who knew of the father's desire to raise the child, nonetheless surrendered the child to a couple hoping to adopt the child. *Id.* at 822.

204 *See Adoption of Kelsey S.*, 1 Cal. 4th at 849. (holding "that section 7004, subdivision (a) and the related statutory scheme violates the federal constitutional guarantees of equal protection and due process for unwed fathers to the extent that the statutes allow a mother unilaterally to preclude her child's biological father from becoming a presumed father and thereby allowing the state to terminate his parental rights on nothing more than a showing of the child's best interests.")

205 *Id.*

206 *Id.*

to reconcile the father's interest in raising his child with the states' interest in promoting speedy and permanent adoptions while maintaining the ability to circumscribe the need for paternal consent. By looking to the father's pre-birth conduct and his willingness to assume full custody, the states' have a readily available set of criteria which can be utilized ensure that caring fathers get to raise children. However, both decisions are less successful in reconciling the child's best interests with those of the fathers and the state.[207] Limited by the fact that they are legal guidelines and not detailed pieces of legislation, the standards established by *Raquel Marie X.* and *Kelsey S.* only assume relevance when unwed father disputes reach the courts — i.e., after the infant has already been placed with the adoptive parents. Thus, even if an unwed father prevails in court, the judgment puts the emotional welfare of the child at risk by wresting it from the only set of parents it has ever known.[208] Additionally, the point at which the unwed father satisfies the criteria suggested by the New York and California courts may not be sufficiently clear to discourage prospective adoptive parents from litigating the unwed father's status, thereby keeping the child in an uncomfortable state of legal limbo for the duration of the court battle.

Reconsider the case of Baby Emily. Would Gary Bjorklund's rights have been recognized under either the *Raquel Marie X.* or *Kelsey S.* standard? Gary came forward promptly and demonstrated a desire to assume full custody of his child. However, he contributed little in the way of money or emotion support to the mother. How would the case balance out? And would it be so apparent from the outset who would prevail that either the unwed father or the prospective adoptive parents would not contest the issue? Thus, while the efforts of the New York and California courts are very valuable in furthering the analysis of unwed father rights, and should protect the rights of some deserving unwed fathers, the cases do not remove all of the troubling elements from the resolution of these tough cases. Specifically, chil-

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207 *Recent Developments: Family Law - Unwed Fathers' Rights - New York Court of Appeals Mandates Veto Power Over Newborn's Adoption for Unwed Father Who Demonstrates Parental Responsibility - In re Raquel Marie X.*, 104 HARV. L. REV. 800, 806 (1991). The New York Court of Appeals never addressed the issue of the children's best interests in deciding the two cases before it. One commentator has noted that this deliberate omission is a consequence of the court's "unspoken premise . . . that the state cannot withhold the father's rights improperly for a period of time and then rely on reference to the child's best interests to terminate those rights completely." *Id.*

208 *Id.* at 805-6.

dren may continue to remain in an uncomfortable state of legal limbo - subject to removal from one family to another - as court disputes prolong themselves, even under the standards of *Raquel Marie X.* and *Kelsey S.*

C. *Limitations Period for Attacking Finalized Adoptions*

For adoptive parents throughout the country, the Baby Jessica case dramatically raised the specter of emergent putative fathers upsetting established adoptive relationships.[209] And for adoptive parents no feature of an adoption system is more important than permanency. It is critical that there exists some point in time when the decree of adoption becomes final and unassailable. Most states have statutes which limit the amount of time in which a challenge to a finalized adoption decree may be lodged.[210] However, like so many aspects of adoption, large variations exist among the states.

In many jurisdictions there is either a one or two year statute of limitations on attacking a finalized adoption decree.[211] However, in states which place a premium on blood relations, this period may be significantly longer.[212] Iowa, and states similarly

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209 *See e.g.*, Sophfronia Scott Gregory, *Can Adoptions Be Undone?: Sometimes the Claims of a Biological Father May Outweigh All Other Considerations*, TIME, July 19, 1993 at 49.

210 States have an interest in ensuring that adoptions become permanent. *See e.g.*, ALA. CODE, § 26-10A-25 cmt. (1992) (stating that a statute of limitations for attacking adoptions is necessary because "it is imperative that the adoptee be assured a secure and stable environment without an untimely and unfounded interruption.")

211 *See e.g.*, ALA. CODE § 26-10A-25(d) (1992 & Michie Supp. 1994) ("A final decree of adoption may not be collaterally attacked, except in cases of fraud or where the adoptee has been kidnapped, after the expiration of one year from the entry of the final decree and after all appeals, if any."). Other states with one year statutes of limitation on challenges include: ALASKA STAT. § 25.23.140 (1991); ARK. CODE ANN. § 9-9-216 (Michie 1991); D.C. CODE ANN. § 16-310(Supp. 1992); FLA. STAT. ANN. § 63.182 (West 1985 & Supp. 1993); HAW. REV. STAT. § 578-12 (1992); MD. FAM. LAW CODE ANN. § 5-325 (1984 & Supp. 1991); MASS. GEN. LAWS ANN. ch. 210, §11 (West 1987); N.H. REV. STAT. ANN. § 170-B:17 (1990); N.M. STAT. ANN. § 32A-5-36(K) (Michie Supp. 1993); N.D. CENT. CODE § 14-15-15 (1991); OHIO REV. CODE ANN. § 3107.16 (Anderson 1989); OKLA. STAT. ANN. tit. 10, § 58 (West 1987); OR. REV. STAT. § 109.381 (1991); S.C. CODE ANN. § 20-7-1800 (Law. Co-op. 1985 & Supp. 1992). States with two year statutes of limitations include: COLO. REV. STAT. § 19-5-214 (Supp. 1992); DEL. CODE ANN. tit. 13, § 918 (1981); KY. REV. STAT. ANN. § 199.540 (Michie/Bobbs-Merrill 1991); NEB. REV. STAT. §43-116 (1988); TEX. FAM. CODE ANN. § 16.12 (West 1986).

212 *See, e.g.*, CAL. CIV. CODE § 228.15 (West Supp. 1993) (requiring a Five Year Statute of Limitations); N.C. GEN. STAT. § 48-21 (1991) (requiring Final Order within three years of proceeding).

disposed, place no limitation period on challenges to finalized adoption decrees.[213] Thus, adoptive parents in these states, especially those who were never able to attain paternal consent for their adoptions, must always live with the fear that a putative father may emerge, even years later, and jeopardize the integrity of their family. At the other end of the spectrum, states which place a high value on the permanency of adoptions may declare adoptions final upon entry[214] or utilize very short statutes of limitation.[215]

For statutes of limitation to have any meaning they must be enforced by state courts. Without faithful recognition of these statutory periods, adoptive parents are denied the security that comes with knowing that their adoptive children are no longer at risk. However, in the emotional area of adoption law, it cannot be taken for granted that a statute of limitations will always be faithfully applied. Two recent cases, one from New York and the other from Washington D.C., illustrate the divergent manners in which finalized adoptions may be treated in different jurisdictions.

In the case of *Robert O. v. Russell K.*,[216] the New York Court of Appeals entertained a challenge to a finalized adoption brought by

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213 *See* IOWA CODE ANN. § 600.14 (stating that "An appeal from any final order or decree rendered under this chapter . . . shall be taken in the same manner as an appeal is taken from a final judgment under the rules of civil procedure. . . . The supreme court shall review an adoption appeal de novo."). Other states listing no statute of limitations for challenging final adoption decrees include: GA. CODE ANN. § 19-8-1 (Michie 1991 & Supp. 1992); IDAHO CODE § 16-1512 (Supp. 1992); ILL. ANN. STAT. ch. 40, para. 1517 (Smith-Hurd Supp. 1992); IND. CODE ANN. § 31-3-1-2 (Burns 1987 & Supp. 1992); MONT. CODE ANN. § 40-8-127 (1991 & SUPP. 1992); NEV. REV. STAT. ANN. § 127.180 (Michie 1986); N.J. STAT. ANN. § 9:3-50 (West 1993); R.I. GEN. LAWS § 15-7-14 (1988); S.D. CODIFIED LAWS ANN. § 25-6-13 (1992); TENN. CODE ANN. § 36-1-124 (1991); UTAH CODE ANN. § 78-30-9 (1992); VT. STAT. ANN. tit. 15, § 447 (1989); WASH. REV. CODE ANN. § 26.33.260 (West 1986); W.VA. CODE § 48-4-12 (1992); WYO. STAT. § 1-22-112 (1988).

214 *See, e.g.*, N.Y. Dom. Rel. Law § 114 (McKinney 1988 & Supp. 1995). *See also In re* K.W.V., 399 N.Y.S.2d 593, 595 (Sup. Ct. 1977) (*citing* D.R.L. § 114). "Adoption, following termination of natural parental status, is final and not subject to abrogation except for defects such as fraud or newly discovered evidence." *Id.*

215 *See e.g.*, ARIZ. REV. STAT. ANN. §§ 8-116, -236, 17B-25(a), -29(c) (1989 & Supp. 1994) (appeal must be taken within 15 days after the final order of adoption is entered); LA. CH. CODE ANN. art. 1259, 1262 (1993) (thirty days to appeal, no annulment except for fraud or duress, action for annulment for fraud or duress must be brought within six months); MICH. COMP. LAWS ANN. § 710.64-.65 (West 1993) (twenty days to appeal); MISS. CODE ANN. § 93-17-15 (1973) (six months); VA. CODE ANN. § 63-1-237 (Michie 1991) (six month statute of limitations).

216 Robert O. V. Russell K., 604 N.E.2d 99 (N.Y. 1992).

a biological father. Robert O. was engaged to Carol A. until persistent disagreement caused the couple to split up. Shortly after this split, Carol realized that she was pregnant but did not tell Robert. She placed the child up for adoption at birth. Carol and Robert subsequently reconciled and married. A few months after they were married, Carol informed Robert that she had surrendered their child for adoption. At this time the baby was eighteen months old and its adoption by its adoptive parents had been final for ten months.[217] Nonetheless, Robert immediately tried to vacate the adoption. He sought to comply with statutory requirements by reimbursing Carol for her birth expenses, filed with the states putative father registry, and instituted a court action.[218]

Since finalized adoptions are unassailable in New York except in cases of fraud or newly discovered evidence,[219] Robert claimed that the adoption should be voided because it was procured by fraud on account of Carol's deception and concealment of the child's birth.[220] The lower courts, however, held that no fraud had been committed and thus the adoption would not be vacated. Robert then averred to the Court of Appeals that a vacatur was still in order because he was entitled to the constitutional protections extended in *Raquel Marie X.*[221] Robert claimed that he was willing to assume custody and parental responsibility and had acted promptly in undertaking every available avenue to gain custody of his child "as soon as he became aware of the child's existence."[222] Thus Robert contended that he qualified under the test of *Raquel Marie X* as an unwed father whose parental interest was worthy of protection. The New York Court of Appeals did not agree with Robert and upheld the unassailability of a non-fraudulently acquired, finalized adoption decree. The court explained that "the timing of the father's actions is the 'most significant' element in determining whether an unwed father has created a liberty inter-

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217 *Id.* at 101.

218 *Id.*

219 *See supra* note 215.

220 *Robert O.*, 604 N.E.2d at 101.

221 *Id.* at 102. ("Petitioner asks us to extend *Raquel Marie's* protection to him - i.e., to find that the Constitution also protects the custodial opportunity of the unknowing unwed father who does nothing to manifest his parental willingness before placement because he is unaware of the child's existence").

222 *Id.* at 103.

est."[223] And in this case, "to conclude that petitioner acted promptly once he became aware of the child is to fundamentally misconstrue whose timetable is relevant."[224] Promptness, the court instructed, "is measured in terms of the baby's life not by the onset of the father's awareness."[225] In *Raquel Marie X.*, the Court of Appeals explained that the period in which an unwed father must act in order to secure protection for his parental rights was limited to the six continuing months immediately preceding the child's placement for adoption.[226] This demand for prompt action is a "necessary outgrowth of the State's legitimate interest in the child's need for early permanence and stability."[227] Thus, the interest of the state in finalizing adoptions, concerns over the welfare of the child, and the rights of the adoptive parents in the family they have formed, all militate against a finding that a putative father who belatedly tries to assert his parental rights should receive constitutional protection.[228]

The District of Columbia Court of Appeals confronted the issue of an unwed father's challenge to a finalized adoption in the case of *In re M.N.M.*[229] Here a St. Louis couple conceived a child and shortly thereafter became estranged. The unwed father, when contacted by a St. Louis adoption agency, voiced his opposition to allowing the child to be put up for adoption and explained that he wanted to raise the infant.[230] The mother proceeded to place the child up for adoption in Washington D.C. and refused to inform the biological father of the whereabouts of the child. The putative

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223 *Id.*

224 *Id.*

225 Robert O. v. Russell K., 604 N.E.2d at 103.

226 *Id.* (citing *In re* Matter of Raquel Marie X., 559 N.E.2d 418 (N.Y. 1990).

227 *Id.* at 103-4.

228 *Id.* at 104. "The competing interests at stake in an adoption — and the complications presented by petitioner's position — are clearly illustrated here: nearly a year and a half after the baby went to live with the adoptive parents, and more than 10 months after they were told by the court that the baby was legally theirs, petitioner sought to rearrange those lives by initiating his present legal action." *Id.*

One commentator in comparing the New York Court of Appeals decision with the Baby Jessica case has noted: "Unlike the decision in *B.C.G*, the *Robert O.* case illustrates that the competing interest in adoption must not be jeopardized by an unwed father who attempts to belatedly assert his parental rights." Alexandra R. Dapolito, *Note: The Failure to Notify Putative Fathers of Adoption Proceedings: Balancing the Adoption Equation*, 42 CATH. U. L. REV. 979, 1006 (1993).

229 *In re* M.N.M, 605 A.2d 921 (D.C.App. 1992).

230 *Id.* at 922.

father filed paternity and custody actions in St. Louis one week after the child's birth in an effort to locate and claim the infant.[231] During this time the child was placed with an adoptive family in the District of Columbia who filed a petition for adoption.[232] The agency which arranged the adoption in Washington D.C. made no effort to identify or locate the biological father beyond asking the birth mother to identify him, which she did not.[233] The trial court entered a final adoption decree on April 11, 1988.[234] The statute of limitations for challenging finalized adoptions in Washington D.C. is one year.[235]

The putative father, upon discovering the location of his child, motioned to intervene in the adoption proceeding in the District of Columbia on June 5, 1989, one month and twenty four days after the statute of limitations had expired.[236] The trial judge denied the motion on the grounds that the statute of limitations had expired. He wrote: "The sanctity of the adoption process can be preserved only by requiring strict adherence to procedural rules."[237] The District of Columbia Court of Appeals, however, reversed, holding that the putative father had "sufficiently asserted his parental interest" and therefore was entitled to "claim substantial protection under the Due Process Clause."[238] The protection due the putative father was notice of his child's pending adoption and an opportunity to participate in those proceedings. The D.C. court felt that the adoption agency's failure to notify and receive the consent of the biological father, despite the District of Columbia's absolute consent statute,[239] was a violation of the putative father's

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231 *Id.* at 927.

232 *Id.* at 922-23.

233 *Id.* at 923.

234 *In re* M.N.M, 605 A.2d 921, 923 (D.C.App. 1992).

235 D.C. CODE ANN. § 16-310 (1989) (The statute of limitations states: "An attempt to invalidate a final decree of adoption by reason of a jurisdictional or procedural defect may not be received by any court of the District, unless regularly filed with the court within one year following the date of the final decree became effective.")

236 *In re* M.N.M, 605 A.2d at 924.

237 *Id.*

238 *Id.* at 927 (quoting *Lehr*, 463 U.S. at 261).

239 *See* D.C. CODE ANN. § 16-304(b)(2)(A) (1989). "Consent to a proposed adoption of a person under eighteen years of age is necessary . . . from both parents, if they are both alive." *Id.* § 16-306(a). To implement consent from both parents, "due notice of pending adoption proceedings shall be given to each person whose consent is necessary thereto, immediately upon filing of a petition." *Id.* § 16-304(d). Consent of a parent may be dispensed with if, "after such notice as the court directs," a parent

constitutional rights requiring that he "must be 'restored . . . to the position he would have occupied had due process of law been accorded to him in the first place.'"[240] Thus, despite the fact that the statute of limitations had run and that the child at issue had been living with its adoptive parents for four years, the court held that the biological father's challenge could go forth to the extent that he was entitled to voice his opinion of where the child's best interest lie.[241] In so holding, the *M.N.M.* case undermines a strong public policy interest in ensuring the permanence of adoptions.[242]

The divergence of the New York and District of Columbia courts in addressing the issue of attacking finalized adoptions dramatically illustrates the inter-jurisdictional conflict which exists in deciding unwed father cases generally. Depending on the predisposition of the attending judges towards adoption and parental rights, laws can be interpreted to either protect the permanency of adoption or to allow an unwed father a belated opportunity to win custody of his biological offspring.

D. *Custody Distinction*

Another increasingly significant issue in the unwed father controversy involves determinations of the actual physical custody of adoptive children. While courts frequently amalgamate the concepts of parental and custodial rights, the terms actually denote different legal ideas. Parental rights refer to having a certain level of control over the life and rearing decisions of a child. Custody, on the other hand, refers to the relationship which exists between parents and children who actually live together. Custodial parents or guardians have the right and "obligation to supervise, care for,

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cannot be located or has abandoned the child. *Id.* This exception was not applicable here as the court noted: "Appellees do not contend that the adoption agency attempted to notify appellant of the pending proceedings or that the trial court directed notice to him of the proceeding (or found that such notice would be futile)." *In re* M.N.M, 605 A.2d at 928.

240 *In re* M.N.M, 605 A.2d at 928-30 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1985)).

241 *Id.* at 930 (quoting *Lehr*, 463 U.S. at 262).

242 *See* Dapolito, *supra* note 228, at 1001. ("The *M.N.M.* decision demonstrates how courts will bend over backwards to accommodate the claim of the unwed father, even going so far as to make an exception to a 'hard and fast' one-year statute of limitations, violating 'an unequivocal public policy.'" (*quoting In re* M.N.M, 605 A.2d at 933 (Gallagher, J., dissenting)).

and educate the child" on a daily basis.[243] While a granting of parental rights often includes a concomitant delivery of custodial rights, it is possible in some instances to divorce the latter right from the former. Prospective adoptive parents in some states have tried to effectuate this schism of parental and custodial rights in order to retain custody of the infants they have raised when emergent biological parents successfully veto their adoption attempts.

In most states, custody orders are modifiable pursuant to statute or common law.[244] And while determinations of parental rights often focus on the rights of the biological father, the predominant consideration in custody modifications is the best interests of the child.[245] Modification orders were originally intended for use in deciding custody between divorced parents but in recent years their use has been extended in some jurisdictions to the adoption context. States desiring to give protection to the relationship developed between prospective adoption parents and their adoptive child have expanded their statutes to give adoptive parents standing to appeal for custody when their efforts at adoption have been thwarted. The initiatives undertaken by the state of Colorado are instructive on this point.

Colorado is one of eight states which has adopted the Uniform Dissolution of Marriage Act (UDMA).[246] Section 14-10-123(1)(b) of the Colorado code is a verbatim adoption of UDMA 401(d) and provides that a custody proceeding may be brought "by a person other than a parent, by filing a petition seeking custody of the child in the county where the child is a permanent resident or where he is found, but only if the child is not in the physical custody of one of his parents."[247] Standing to seek permanent cus-

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243 Clark, *supra* note 154, at section 19.2, 789.

244 *Id.* at section 19.9, 836.

245 *Id.* at section 19.9, 840. "The traditional position taken by many courts was and still is that a custody decree may be modified where modification is proven to promote the child's best interests . . . ." *Id.*

246 9A UNIF.L.ANN. 147 (1987). States adopting the UDMA in full or in part include: ARIZ. REV. STAT. ANN. §§ 25-311 TO 25-339 (1989); COLO. REV. STAT. ANN. §§ 14-2-101 TO 14-2-113, 14-10-101 TO 14-10-133 (West 1987); ILL. ANN. STAT. ch. 750, 5/101 to 5/802 (Smith-Hurd Supp. 1992); KY. REV. STAT. ANN. §§ 403.010 TO 403.350 (Michie/Bobbs-Merrill 1991); MINN. STAT. ANN. §§ 518.002 TO 518.66 (WEST 1992); MO. STAT. ANN. §§ 452.300 TO 452.416 (1992); MONT. CODE ANN. §§ 40-1-101 TO 40-1-404, 40-4-101 TO 40-4-225 (1991); WASH. REV. CODE ANN. §§ 26.09.002 TO 26.09.914 (1992).

247 COLO. REV. STAT. ANN. § 14-10-123(1)(b)(West 1987).

tody, then, is granted to prospective adoptive parents but only if the child is living with them at the time they institute proceedings. Recognizing that a foiled adoption procedure can result in the rapid transfer of the disputed child back to the biological parent — thus abrogating a prospective adoptive parent's standing to seek custody under § 14-10-123(1)(b) — and concerned with enhancing protections for the relationship developed between an infant and its "psychological parents," the Colorado legislature amended section § 14-10-123 by adding subsection (c) which provides that a custody proceeding may be brought: "By a person other than a parent who has had physical custody of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical custody."[248] Thus, standing is conferred upon prospective adoptive parents who have raised a child for a minimum of six months provided they commence their custody action within six months of losing physical custody.[249] The determining factor in a custody proceeding is the best interests of the child.[250]

The constitutionality of utilizing a best interests of the child analysis in a custody dispute between a biological parent and prospective adoptive parents was recently challenged in the case of *In re C.C.R.S.*[251] The case involved a biological mother who surrendered her child at birth to a prospective adoptive couple pursuant to an agreement that the couple wishing to adopt would wait a minimum of one year before they would file a petition for relinquishment and adoption.[252] Six months later, the natural mother informed the prospective adoptive parents that she had changed her mind about the adoption and wished to revoke her release of custody.[253] The prospective adoptive parents refused to return the child and instead filed a petition for custody pursuant to § 14-10-

248 *Id.* § 14-10-123(1)(c).

249 "The adoption of this section constitutes legislative recognition of the effects of 'psychological parenting' upon the best interests of the child." *In re* C.C.R.S., No. 94SC23, 1995 Colo. LEXIS 15, at *12. *See also* COLO. REV. STAT. ANN. § 19-3-702(5)(b) (West Supp. 1993) (recognizing need for custodial stability and permanency planning for children adjudged dependent or neglected and removed from physical custody of their parents without terminating the parent-child relationship).

250 COLO. REV. STAT. ANN. §§ 14-10-123.4, 14-10-124(1.5)(West 1987).

251 *In re* C.C.R.S., No. 94SC23, 1995 Colo. LEXIS 15.

252 *Id.* at *5.

253 *Id.* at *6.

123.[254] The trial court, after hearing testimony from the parties and two clinical psychologists, concluded that while the biological mother was a "fit and proper parent," it was in the best interests of the child to remain in the custody of the prospective adoptive parents.[255] The biological mother retained her parental rights which guaranteed visitation with the child, but the prospective adoptive parents became vested with permanent custody of the infant.[256] This decision was later affirmed by the state court of appeals.

The biological mother appealed to the Colorado Supreme Court challenging the lower court decisions on the ground that absent a demonstration of her parental unfitness, a court could not consider the child's best interests in determining custody without violating her constitutional right to due process of law.[257] In support of this contention she relied on *Stanley* and its progeny. The Colorado Supreme Court, however, distinguished the unwed father cases on the ground that they all dealt with terminations of parental rights by which the biological parent was denied not only custody but also rights to visitation, communication, and the ability to try and regain custody at a later date.[258] Thus, the unwed father cases only demonstrate that the natural parent enjoys certain procedural protections during a termination proceeding, "and confers upon the biological parent no substantive custodial right to the child."[259] The natural mother in this case was not having her pa-

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254 *Id.* at *7.

255 *In re* C.C.R.S., No. 94SC23, 1995 Colo. LEXIS 15, *8-11. "The court found that a parent-child relationship had developed between the child and the [prospective adoptive parents] and that a severance of that relationship would be psychologically traumatic to the child. . . . Notwithstanding [the biological mother's] fitness, the court determined that the [prospective adoptive parents] could provide a more 'secure and healthy home environment' than the natural mother." *Id.* at *9.

256 *Id.* at *11.

257 *In re* C.C.R.S., No. 94SC23, 1995 Colo. LEXIS 15 at *13. The biological mother also challenged the prospective adoptive parents standing to seek custody under § 14-10-123(1) and asserted that she had a right to immediate reunification with her child under Colorado's Children's Code. The Colorado Supreme Court concluded that since the prospective adoptive parents had continuous control of the infant for six months and currently retained custody, they had 'standing to bring this action under either § 14-10-123(1)(b) or (1)(c).' *Id.* at *23. The court continued to find that since the custody decision was based upon § 14-10-123 and not a provision of the Children's Code, the Children's Code was inapplicable in the current case. *Id.* at *23-24.

258 *Id.* at *27.

259 *In re* C.C.R.S., No. 94SC23, 1995 Colo. LEXIS 15 at *27.

rental rights terminated and retained visitation rights. She therefore had no claim to a liberty interest in the custody of her child.

The state supreme court explained that in adjudicating a custodial dispute between a biological parent and a third-party, Colorado courts recognize a "presumption that the biological parent has a first and prior right to custody."[260] This presumption, however, may be rebutted by a showing that the best interests of the child are better served by granting custody to the third-party.[261] After reviewing in-state precedent and case law from other jurisdictions which used a child's best interest as the keystone for custody decisions, Colorado Supreme Court concluded "that the best interest of the child standard is the prevailing determination in a custody contest between biological parents and psychological parents."[262]

Turning to the facts of the case the Colorado Supreme Court determined that the trial judge correctly applied the best interests of the child standard to the facts and arrived at the proper result.[263] It agreed with the trial court's finding that:

> C.C.R.S. has lived with the respondents for the entire four and one-half years of his life and, to C.C.R.S., this is the only home he has ever known. C.C.R.S. is happy and well adjusted. The respondents have formed a loving relationship with the child, the respondents have raised C.C.R.S. since birth, the respondents have fulfilled C.C.R.S.'s psychological needs, have provided a stable home for C.C.R.S., and above all, C.C.R.S. identifies the respondents as his parents. The continuation of this relationship can therefore be presumed to be in the child's best interests.[264]

Courts in other jurisdictions have likewise looked to the child's best interests when deciding whether to vest legal custody in either a biological parent or a prospective adoptive parent with whom the child has lived for a significant length of time. For example, the New Jersey Supreme Court in *Sorentino v. Family & Children's Society of Elizabeth* held that even in the case of an infant whose surrender for adop-

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260 *Id.* at *30.

261 *Id.*

262 *Id.* at *37. The court added: "Our foremost priority is therefore to resolve the dispute in a way that minimizes the detriment to the child." *Id.*

263 *In re* C.C.R.S., No. 94SC23, 1995 Colo. LEXIS 15 at *38-39.

264 *Id.* at *39.

tion was coerced, the biological mother was not entitled to regain custody unless she could prove that no psychological harm would result to the infant who had been living with prospective adoptive parents for thirty-one months.[265] In California, the ongoing case of Michael H.[266] demonstrates an analogous use of the child's best interests to preserve custody in the prospective adoptive parents despite an award of parental rights to the biological father.[267]

While the utilization of the parental rights/custody distinction undoubtedly reduces the trauma which impacts both prospective adoptive parents and children when custody must be permanently transferred, this technique is extremely unfair to the deserving unwed father. That someone's parental interest can be protected yet their ability to become a parent be denied is illogical. Yet this is exactly

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265 Sorentino v. Family & Children's Society of Elizabeth, 367 A.2d 1168 (N.J. 1976).

266 The history of the publication of this case is nearly as complicated as the case itself. *See In re* Adoption of Michael H., 11 Cal. Rptr. 2d 261 (Cal.App. 1992),(op. withdrawn by order of ct.), *In re* Adoption of Michael H., No. SO28855, 1992 Cal. LEXIS 6519. Appeal after remand, *In re* Adoption of Michael H., 29 Cal. Rptr. 2d 251 (Cal.App. 1994), review granted, John S. v. Mark K. 32 Cal. Rptr. 2d 545, and reprinted as modified for tracking pending review, Adoption Michael H., 29 Cal. App. 4th 252 (4th Dist. 1994) (Not Citable; Superseded by Grant of Review (See Cal. Rules of Court, rules 976, 977)). The decision on the custody decision was not published.

267 *In re Adoption of Kelsey S.*, 4 Cal.Rptr. 2d at 636. The case of Michael H. involves a thwarted biological father who was able, after a lengthy court battle, to establish himself as a 'presumed father' entitled to parental rights under the test of *Kelsey S.* However, the *Kelsey S.* decision was strictly limited to the question of parental rights to veto a proposed adoption and did not address the issue of custody. *See In re Adoption of Kelsey S.*, 4 Cal.Rptr. 2d at 636 ("Even if petitioner has a right to withhold his consent (and chooses to prevent the adoption), there will remain the question of the child's custody. That question is not before us, and we express no view on it."). Thus, the adoptive parents petitioned for and were granted permanent custody of the child they had raised for two years. Acknowledging the seeming unfairness of the verdict to Mark, who the court admitted has vigilantly made every timely effort to claim his right to parent his child, "the judge pronounced that "[w]hen exercise of parental rights would be demonstrably harmful to the child, the court's obligation is to protect the child." John Wilkens, *Dad Sad He Was Denied Custody; Appeal Unsure,* THE SAN DIEGO UNION-TRIBUNE, Oct. 20, 1993, at B1. In the opinion of the court, the child faced "an unconscionably high risk" of long term emotional and psychological problems if he was taken away from the only home and family he knew. *Id.* As a result of the custody decision, the biological father retains legal parental rights, including visitation, but he will have no input in the daily care and raising of his biological son. The prospective adoptive parents received permanent guardianship of the child until he reaches the age of eighteen. The biological father has appealed the custody decision. John Wilkens, *Father Will Appeal Decision that Denies Him Custody of Son,* THE SAN DIEGO UNION-TRIBUNE, Oct. 22, 1993, at B3. The prospective adoptive parents have appealed the decision giving the biological father the right to veto their adoption. *Id.*

what has happened in the case of Michael H. and *C.C.R.S.* The reality is that parental rights do not mean very much if one is not able to raise and care for one's child on a daily basis. The value of the unwed father jurisprudence may be dangerously subverted if no matter how promptly and earnestly a biological parent seeks to establish a relationship with his offspring he will never be able to become a real parent. This logic seems to encourage duplicity and deceit on behalf of the birth mother and prospective adoptive parents.[268] Indeed it may even subvert the stringent requirements states establish to regulate adoption procedures.[269]

Because of such concerns, certain states do not decide custody disputes between a biological parent and third-parties according to the best interests of the child. In these jurisdictions a showing of parental unfitness is required before a natural parent can be deprived of the custody of their child.[270] In one state it was even held that the use of a naked best interest of the child standard was unconstitutional.[271]

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268 *Wilkens, Dad Sad, supra* note 267, at B1. The attorney for the biological father in the *Michael H.* case expressed outrage at the custody decision in these terms: "It is just not OK to take someone's child when you know the parent wants to raise him, to keep him by fair means and foul, drag it out two and one half years until now suddenly you can say . . . it would be detrimental to the child to move him. . . . To me that is so morally repugnant it is not even funny." *Id.*

269 As Justice Lohr of the Colorado Supreme Court wrote in his dissent in *C.C.R.S.*:

> By allowing disappointed prospective adoptive parents to petition for custody under the UDMA, the majority creates a legal loophole in the relinquishment and adoption statutory framework. Disappointed prospective adoptive parents now have the opportunity to bring extensive litigation in an effort to gain custody of a child with whom they do not have a legally cognizable relationship. The majority thus creates a way for persons seeking to adopt to circumvent the requirements of the relinquishment and adoption statutes by merely seeking physical custody of a child. . . . In addition, despite non-compliance with the statutory requirements, prospective adoptive parents are assured of the chance to retain physical custody. Moreover, once non-parents have physical custody of a child, there may be little a biological parent can do to regain custody. Trial courts utilizing the best interests of the child standard are often reluctant to remove a child from a home once the child has begun to develop psychological attachment to the family. The majority's creation of this option for disappointed prospective adoptive parents to pursue custody under the UDMA undermines the legislature's intent in crafting the relinquishment scheme to provide stable unions by requiring informed consent.

In re C.C.R.S., No. 94SC23, 1995 Colo. LEXIS 15 at *47-48 (Lohr, J., dissenting).

270 *See, e.g.*, Stuhr v. Stuhr, 481 N.W.2d 212 (Neb. 1992); Rozas v. Rozas, 342 S.E.2d 201 (W.Va. 1986); Barstad v. Frazier, 348 N.W.2d 479 (Wis. 1984).

271 Sheppard v. Sheppard, 630 P.2d 1121 (Kan. 1981), *cert. denied*, 455 U.S. 919 (1982).

The custody distinction may appear to be an innovative, modern-day Solomon-like division of the child between prospective adoptive parents and biological fathers. However, this approach may succeed in only creating two imperfect relationships void of permanence and stability.[272] Determining custody solely based on the best interests of the child gives too little deference to the putative father's rights and threatens adoption regimes with subversion. The idea that one can be a parent without custody is, in reality, a legal fiction.[273]

E. *Conclusion*

Adoption laws amongst the fifty states vary dramatically. This lack of uniformity in determining how to address unwed father controversies contributes greatly to a national sense of confusion and injustice. Further frustration is inhered by the fact that no state has seemingly been able to produce an adoption system which can sufficiently and equitably balance the interests of the state, the unwed father, the child, and the prospective adoptive parents. And when controversies reach the judicial system, the state courts have proven themselves to be too cumbersome to adequately resolve issues of parental rights, consent, and custody in the timely manner that is essential to avoid endangering the emotional and psychological health of all of the parties involved. Indeed the

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272 *In re* C.C.R.S., No. 94SC23, 1995 Colo. LEXIS 15 at *47-48 (Lohr, J., dissenting). As the dissent in C.C.R.S. stated: "The majority further undermines the legislature's intent to create stable adoptive families by leaving the two families in this case in legal flux. In this case, the [prospective adoptive parents] have physical custody of the child but are not able to adopt. Furthermore, the [prospective adoptive parents] must live with the possibility that custody could be altered in the future. The [biological parent], on the other hand, is deprived of the opportunity to nurture and rear her child on a daily basis. . . . Her parental rights seem illusory at best, yet she is burdened by the legal responsibilities of parenthood. Moreover, the court will have continuing involvement in the lives of these two families through its role in monitoring visitation and other issues of conflict. Far from creating a stable familial structure for the child, the majority's decision leaves these families with only a temporary solution and little piece of mind." *In re* C.C.R.S., No. 94SC23, 1995 Colo. LEXIS 15 at *49-50 (Lohr, J., dissenting).

273 *In re* C.C.R.S., No. 94SC23, 1995 Colo. LEXIS 15 at *47-48 (Lohr, J., dissenting). From the dissent in C.C.R.S.: "Although in this case the petitioner's parental rights have not been terminated, the petitioner's opportunity to develop a nurturing relationship with her child has been severely curtailed. Because this nurturing relationship approaches the importance ascribed to an individual's parental rights, the same standard should apply in custody proceedings between parents and non-parents as in actual termination proceedings. Thus, a trial court should be required to find a parent unfit prior to severing custodial rights in favor of a non-parent." *Id.* at *51-52.

courts themselves have lamented over their own inability to craft satisfying solutions for these difficult cases. As the appellate court wrote at the conclusion of its decision in the Michael H. case:[274]

> It is particularly troubling that a truly 'fair' decision is impossible in this case. It is hard to argue with the underlying human reasoning of Kelsey S. On the facts of this case it would be clearly wrong to cavalierly reject Mark's interest in his son. However, because of the timing of this case, a good and loving couple have unavoidably bonded with this child over the last two years. This decision threatens undeserved and painful disruption for both them and the child. It also opens the door (as suggested by Kelsey S.) to an acrimonious legal battle over whether Mark is fit to be a parent. The facts and results of this case are a painful reminder of the inherent limits of our legal system. While rights usually can be identified, wrongs cannot always be redressed. This is such a case.[275]

The diversity of state approaches to unwed father rights, coupled with such feelings of inadequacy and frustration have lead to a call for the unification and reformation of national adoption laws. The National Conference of Commissioners on Uniform State Laws undertook this weighty task in 1989. In 1994 the organization produced the Uniform Adoption Act of 1994 which was approved by the American Bar Association in February of 1995. The extent to which this piece of draft legislation resolves the conflicts identified above will be the focus of the next section.

V. The Uniform Adoption Act of 1994

The Uniform Adoption Act of 1994 (hereinafter "UAA" or "the Act")[276] seeks to clarify and codify the rights of unwed fathers in three crucial areas: consent to adoption, notice of adoption, and termination of parental rights.

A. *Consent*

In addition to the consent of the birth mother,[277] the UAA requires the consent of only four types of putative fathers before a

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274 *See supra* note 269, and accompanying text.

275 *In re* Adoption of Michael H., 29 Cal.Rptr.2d at 257.

276 UNIF. ADOPTION ACT § 2-401 (a)(1)(1994).

277 *Id.* § 2-401(a)(1). The only exceptions to the requirement of maternal consent are addressed in § 2-402. *Id.* § 2-402.

child may be relinquished for adoption.[278] A man is vested with consent rights only if he is, or was, married to the mother within 300 days of the birth of the child;[279] attempted to marry the mother,[280] receives the child into his home and holds the infant out as his own,[281] or if he legally establishes paternity of the child.[282] In this latter case, however, consent rights are conditional upon the putative father either establishing a financial and emotional relationship with the child[283] or marrying, or attempting to marry, the mother after the birth of the child but before the minor is put up for adoption.[284] In addition, the UAA specifies that consent is not required if the putative father is incompetent,[285] executes a verified statement denying paternity,[286] or fails to respond to notice of an adoption proceeding in a timely manner.[287]

B. *Notice*

Notice of an adoption proceeding must be served[288] upon all putative fathers vested with consent rights by the Act.[289] Notice must also be served upon any "individual whom the petitioner knows is claiming to be or who is named as the father or possible father of the minor adoptee and whose paternity of the minor has not been judicially determined[.]"[290] If the putative father of an adoptee is unknown, the UAA provides that the court shall undertake efforts to identify him.[291] If such efforts are successful, then

278 *Id.* § 2-401 commentary at 47. "In accord with federal and state constitutional decisions since the early 1970s on the status of unwed fathers in adoption proceedings, the Act distinguishes the men who manifest 'parenting behavior,' and have therefore earned the right to withhold consent from a proposed adoption of their children, from the men who fail to perform parental duties and may therefore be denied the right to veto a proposed adoption." *Id.*

279 UNIF. ADOPTION ACT § 2-401 (a)(1)(i)(1994).

280 *Id.* § 2-401(a)(1)(ii).

281 *Id.* § 2-401(a)(1)(iv).

282 *Id.* § 2-401(a)(1)(iii).

283 UNIF. ADOPTION ACT § 2-401(a)(1)(iii)(A)(1994).

284 *Id.* § 2-401(a)(1)(iii)(B).

285 *Id.* § 2-402(a)(3).

286 *Id.* § 2-402(a)(4).

287 *Id.* § 2-402(a)(6).

288 UNIF. ADOPTION ACT § 3-401(a)(1994). Notice of an adoption proceeding must be served within 20 days after a petition for adoption is filed. *Id.* § 3-401(a).

289 *Id.* § 3-401(a)(1).

290 *Id.* § 3-401(a)(3).

291 UNIF. ADOPTION ACT § 3-401(a)(1994). These efforts must include an inquiry

the putative father becomes entitled to notice unless his whereabouts are unknown.[292] The court has the option of ordering publication or public posting of notice if the tribunal believes such efforts are likely to lead to receipt of notice by the putative father.[293] The Act also provides that while the birth mother cannot be forced to identify the adoptee's biological father,[294] if she fails to do so, the court must admonish her on the dangers of delay and detriment to the child that could result. The same provision also threatens the birth mother with a civil penalty if she knowingly names the wrong biological father.[295]

C. *Grounds for Terminating Parental Rights*

The UAA enhances a state's ability to terminate parental rights by augmenting the grounds for parental termination normally found in state statutory schemes.[296] Fathers failing to act swiftly and substantially are likely to have their parental rights terminated under the UAA. Such a termination will be assessed against any putative fathers who either fail to file a claim of paternity within 20 days of receiving notice[297] or who were earlier judged, pursuant to section 2-404, not to be entitled to notice.[298]

A putative father timely appearing to assert his parental rights to a newborn baby[299] may nonetheless be adjudged unfit if the

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into whether the woman was married at the time of conception, was cohabiting with a man, received payments or promises of support as a result of her pregnancy, if a father is listed on the birth certificate, or any individual has claimed paternity. *Id.* § 3-404(b)(1)-(5) at 89-90.

292 *Id.* § 3-404(c).

293 *Id.* § 3-404(d).

294 UNIF. ADOPTION ACT § 3-404 commentary at 91. "This section protects the right of the adoptee's birth mother to remain silent in response to a request to name the father or to reveal his whereabouts. Women often have good reasons — for example, fear of abuse — for not naming a father. Moreover, birth mothers might be dissuaded from placing their children for adoption if they believed they would be punished for failure to name the father." *Id.*

295 *Id.* § 3-404(e). "If . . . the woman who gave birth to the minor adoptee fails to disclose the identity of a possible father or reveal his whereabouts, she must be advised that the proceeding for adoption may be delayed or subject to challenge if a possible father is not given notice of the proceeding, that the lack of information about the father's medical and genetic history may be detrimental to the adoptee, and that she is subject to a civil penalty if she knowingly misidentified the father." *Id.*

296 UNIF. ADOPTION ACT § 3-504 commentary at 101.

297 *Id.* § 3-504(a).

298 *Id.* § 3-504(b).

299 UNIF. ADOPTION ACT § 3-504(c)(1994). The Act differentiates the putative fa-

court finds, by clear and convincing evidence, that he has failed to: pay reasonable birth-related expenses;[300] make reasonable and consistent payments for the support of the child;[301] visit regularly with the infant;[302] and manifest an ability and willingness to assume full custody of the child.[303]

Special consideration is given by the UAA to the genuinely "thwarted" putative father.[304] A thwarted putative father desirous of gaining custody of his offspring is given the opportunity to protect his parental rights if he can prove, by a preponderance of the evidence, that he had a "compelling reason" for not complying with the parenting requirements of § 3-504(c)(1).[305] However, even if a thwarted putative father can make such a showing, the court may still terminate his parental rights if it is demonstrated by a preponderance of the evidence that such a termination is in the best interests of the child.[306]

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ther's responsibilities in the case of an adoption of a child under the age of 6 months from those required in the case of an older child. *Id.* § 3-504(c)(1). Since this paper focuses on newborn adoptions, this is the section the analysis will concentrate on. *See Id.* § 3-504(c)(2)(for treatment of putative father's parental rights in the case of a child over 6 months old.) *Id.*

300 UNIF. ADOPTION ACT § 3-504(c)(1)(i).

301 *Id.* § 3-504(c)(1)(ii).

302 *Id.* § 3-504(c)(1)(iii).

303 *Id.* § 3-504(c)(1)(iv).

304 *See id.* § 2-401 commentary at 47.

> Special attention has been given the thwarted father and the balance between his rights and the interests of the child. A thwarted father is a man who has been prevented from meeting his parenting responsibilities [as defined by § 2-401(a)(1)(iii) or (iv)) because the mother did not tell him of the pregnancy or birth, lied about her plans for the child, disappeared after the child's birth, named another man as the father, or was married to another man in a State that maintains a version of the conclusive presumption of paternity upheld by a plurality of the U.S. Supreme Court in *Michael H. v Gerald D.*, (citation omitted) or because the State, acting through its licensed agency, placed the child with prospective adoptive parents before he was aware of his child's existence or could assume parenting responsibilities.

In re M.N.M., 605 A.2d 921, 924 (*citing* Lehr v. Robertson, 463 U.S. at 261).

305 UNIF. ADOPTION ACT § 3-504(d)(1994).

306 *Id.* § 3-504(d)(3)-(4). Providing that even if a thwarted putative father demonstrates a "compelling reason" for not fulfilling his parental responsibilities, the court may still terminate the putative father's parental rights if "it finds, upon clear and convincing evidence, that one of the following grounds exists, and, by a preponderance of the evidence, that termination is in the best interest of the minor: . . . (3) placing the minor in the [putative father's] legal and physical custody would pose a risk of substantial harm to the physical or psychological well-being of the minor be-

The UAA prohibits challenges to final adoption decrees more than six months after they are issued.[307] This deadline is binding even in the context of a thwarted putative father.[308]

Putative father's under the UAA must, therefore, act promptly, decisively, and in a prescribed manner in order to protect their parental rights. Thwarted putative fathers must not only demonstrate conclusively that they were in fact thwarted, but they must also defend against assertions by the prospective adoptive parents that a reversal of custody would be contrary to the best interests of the child.

D. *Evaluation of the Uniform Adoption Act of 1994*

The UAA is commendable for its attempt to address the vexing issues presented by unwed fatherhood in a comprehensive and uniform manner. Compared with the patchwork of adoption regimes currently in place amongst the fifty states, the UAA, which offers states practical guidance for the first time in the troubling areas of consent rights, notice, and parental termination, is a dramatic step forward in the attempt to reform adoption law. However, the plan as it exists is not likely to prove to be the panacea that many had hoped for.

In its balancing of the interests at stake in the adoption context, the UAA gives too little weight to the position of the unwed father. The UAA simply does not adequately protect the rights of putative fathers in the context of newborn adoptions. For example, consent rights are virtually non-existent under the UAA for any un-

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cause the circumstances of the minor's conception, the [putative father's] behavior during the mother's pregnancy or since the minor's birth, or the [putative father's] behavior with respect to other minors, indicates that the [putative father] is unfit to maintain a relationship of parent and child with the minor; or (4) failure to terminate the relationship of parent and child would be detrimental to the minor." *See also id.* § 3-504(e) (advising that "In making a determination under subsection (d)(4)(the court shall consider any relevant factor, including the [putative father's] efforts to obtain or maintain legal and physical custody of the minor, the role of other persons in thwarting the [putative father's] efforts to assert parental rights, the [putative father's] ability to care for the minor, the age of the minor, the quality of any previous relationship between the [putative father] and the minor and between the [putative father] and any other minor children, the duration and suitability of the minor's present custodial environment, the effect of a change of physical custody on the minor.") *Id.*

307 *Id.* § 3-707(d).

308 *Id.* § 2-401 commentary at 47.

wed father in the common case where the birth mother surrenders the adoptee at birth. Consent rights are only vested in men who marry or attempt to marry the birth mother.[309] An unwed father (who never attempted to marry the birth mother) can only hope to earn consent rights through the provisions of § 2-401(a)(1)(iii). Yet even if the unwed father immediately proves his paternity[310] and manifests his desire to assume custody, he must still either form a relationship with his child, including financial support;[311] or receive the child into his home[312] before the UAA will bestow consent rights upon him. However, the birth mother can easily and unilaterally prevent an unwed father from being able to meet either of these "parenting responsibilities."[313] By surrendering the child at birth the natural mother immediately nullifies both the putative father's opportunity to form a relationship with the child and his ability to receive the child into his home.

Without consent rights, an unwed father's only chance to win custody of his child lies in his ability to defend his entitlement to parental rights under § 3-504. Here again the demands upon the unwed father are severe and easily complicated by an uncooperative birth mother. In addition to a timely assertion of parental rights[314] and a manifestation of an ability and willingness to assume legal custody,[315] in order to protect his parental rights to a newborn, an unwed father must pay reasonable birth[316] and support[317] expenses, and visit regularly with the child.[318] Here again, a surrender of the baby at birth to its prospective adoptive parents prevents the putative father from visiting or paying support. In addition, prospective adoptive parents frequently pay for birth expenses. Knowing that the putative father's parental rights are contingent upon his paying these fees, the prospective adoptive parents have an added incentive to cover these costs and see to it

309 UNIF. ADOPTION ACT § 2-401(a)(1)(i)(ii)(1994).
310 *Id.* § 2-401(a)(1)(iii).
311 *Id.* § 2-401(a)(1)(iii)(A).
312 *Id.* § 2-401(a)(1)(iv).
313 *See id.* § 2-401 commentary at 45 (referring to the requirements of (a)(1)(iii) and (iv) as "parenting responsibilities").
314 UNIF. ADOPTION ACT § 3-504(c)(1994).
315 *Id.* § 3-504(c)(1)(iv).
316 *Id.* § 3-504(c)(1)(i).
317 *Id.* § 3-504(c)(1)(ii).
318 UNIF. ADOPTION ACT § 3-504(c)(1)(iii)(1994).

that the natural mother refuses any attempt by the putative father to reimburse her for pre-natal and post-natal care.

On a more general level it is problematic that in both the parental rights and consent contexts the UAA places so much emphasis on financial payments when determining the putative father's eligibility for rights. By making consent and parental rights contingent upon financial payments, the UAA seems to envision parental rights largely as a function of monetary contribution. This greatly disadvantages poor men who want to raise their children. Even though the UAA requires only payments in accordance with the respondent's financial means, how is this threshold to be determined? The efforts of poor men are likely to be looked upon as inadequate in an age of inflated medical costs. In the *Baby Emily* case for example, there was much dispute over whether Gary Bjorklund's efforts of paying rent, buying the birth mother a pair of pants, and providing a crib were sufficient to demonstrate adequate financial support.[319] The cases of *Raquel Marie X.* and *Kelsey S.* said that it was proper to consider, as one of numerous factors, financial support in determining a putative father's entitlement to parental rights.[320] The UAA, however, converts financial support from one of many factors to be considered into a dispositive requirement. In so doing the UAA may be over-reaching the guidelines suggested in those two cases.

In addition, while the UAA claims to give special consideration to the thwarted putative father,[321] it is questionable whether the provisions of the UAA will be adequate to protect the deserving, legitimately thwarted putative dad. A thwarted unwed father is given the chance to defend his parental rights if he can prove by clear and convincing evidence that he had a compelling reason for not fulfilling his "parenting responsibilities" as defined in § 3-

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319 *In re* Adoption of Baby E.A.W., 647 So.2d at 921.

320 *See In re* Raquel Marie X., 559 N.E. at 428 ("The interim judicial evaluation of the unwed father's conduct in this key period may include such considerations as his public acknowledgment of paternity, payment of pregnancy and birth expenses, steps taken to establish legal responsibility for the child, and other factors evincing a commitment to the child.")

321 UNIF. ADOPTION ACT § 3-504 (1994), ("[R]espondent father may avoid having his rights terminated under [§ 3-504](c)(1) by proving that he had no reason to know of the minor's birth or expected birth or that he was 'thwarted' in his efforts to assume parental duties by the mother, an agency, the prospective adoptive parent, or another person.") *Id.*

504(c)(1)(i)-(iv).[322] However, even if a putative father can carry this burden, his rights are still subject to termination if the court determines that his treatment of the birth mother during her pregnancy was inadequate[323] or that transferring custody of the child to him would not be in the infant's best interest.[324] Both of these hurdles may be prohibitive even in the case of a worthy putative father. It is difficult for a single, custody-less father to compete with a typically affluent prospective adoptive couple in a contest over the child's best interests.[325] This is especially true when the child is surrendered at birth and lives for the length of the litigation with the prospective adoptive parents. Thus, even a putative father who promptly comes forward, asserts his rights, proves he was thwarted, and is prepared to assume custody, can have his parental rights terminated because his child was secretly transferred to an adoptive couple who have bonded with the child and can offer the infant greater economic advantages.

Treatment of the birth mother is also a very problematic criteria on which to hinge a putative father's rights. While few will argue that an abusive or battering male should be entitled to custody rights, the UAA provision as worded has potential application well beyond this context. Failure to provide emotional support to the birth mother during her pregnancy, for example, may become considered grounds for termination under this provision. And whether emotional support of the birth mother should be a prerequisite for parenthood is an unsettled issue.[326] Moreover, rela-

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322 *Id.* §3-504(d).

323 *Id.* § 3-504(d)(3).

324 UNIF. ADOPTION ACT § 3-504 (d)(4)(1994). *See also id.* § 3-504(e) at 100-101 (advising the court, when making a best interest of the child determination, to consider all 'relevant factors' of the case, including, "the duration and suitability of the minor's present custodial environment, and the effect of a change of physical custody on the minor.")

325 John Ryan, president of the National Association of Birth Father Rights, asserts that best interest determinations have the effect of putting the child on the auction block, giving more right to whoever has possession of the child or can provide a better home, usually those with more money: "If a judge is forced to rule in best interests in every case, and you have a married couple, older, financially stable, versus a young single mother or father, any judge in his or her right mind is going to rule with the couple." Smith, *supra* note 6, at E1.

326 *See In re Adoption of Baby E.A.W.*, 647 So.2d at 924. (Certifying to the Florida Supreme Court the question of whether a trial court may consider lack of emotional support toward the mother during pregnancy as a factor in evaluating the "conduct of a father towards the child during pregnancy.")

tions between unmarried biological parents can become acrimonious or the couple may have little contact after conception. The unwed father may only reemerge when he discovers the pregnancy and his interest may be solely in the child at that point. There does not seem to be any coherent reason why an unwed father must have a good relationship with the birth mother in order to be a fit parent to his offspring.[327] As long as the father is non-abusive, his parental rights should not be jeopardized just because he did not have a supportive relationship with the birth mother during her pregnancy. But under the UAA, treatment of the birth mother can be used to foreclose rights. Not only does this not seem fair, for the reasons just articulated, but this seems to be an illogical requirement to put on a thwarted father. To get to this stage of consideration the putative father must convincingly prove that he was thwarted. This means that he must show that the birth mother, by her actions, either alone or in coordination with the prospective adoptive parents, intentionally prevented him from fulfilling his parenting responsibilities by deception or evasion. How then can it be expected that the biological father will have had a supportive relationship with the mother who tried to hide her pregnancy from him? Thus, an earnest biological father who does everything within his power to protect and assert his parental rights may still be denied custody because of the uncooperative behavior of the birth mother or prospective adoptive parents.

The UAA's elaborate notification regime also raises some important questions. Despite the emphasis placed on paternal action in the sections on consent and parental rights, the UAA's notification provisions seem to place responsibility for informing putative fathers of pending adoptions squarely upon the birth mother and the court. The Act requires the court to undertake an inquiry to discern the identity of an unknown father for the purpose of providing notice.[328] The UAA maintains that it respects the birth mother's right to remain silent as to the identity and whereabouts of the biological father, however the Act instructs a court, when

327 *See* Larry Kaplow, *Adoption Case Weighs Dad's Role Before Birth*, The Palm Beach Post, Apr. 6, 1995 at 1A. Reporting: "Attorneys for Gary Bjorklund . . . argued that while he and the baby's mother 'couldn't stand each other,' that was not a legitimate reason to let the child be adopted against his wishes. 'He's not required to love the mother. He loves the baby,' said his attorney, Steve Pesso." *Id.*

328 UNIF. ADOPTION ACT § 3-404(a)(1994).

confronted by an intransigent birth mother, to admonish her as to the impropriety of such silence, and, in effect, encourage her to inform. This is necessary because the court's duty to inquire about the putative father is largely reliant on information to which only the birth mother has easy access. Thus the act seems to place pressure upon the woman's right to privacy.

The purpose of a notification regime should be to give putative father's notice of the pending adoption of their biological offspring in order that, if interested, he may appear and assert his rights. However, while the UAA's notification provisions are elaborate, it is doubtful, in light of the stringent requirements placed upon putative fathers who want to defend their parental rights, that a man who relies on such notice to discover his offspring's placement for adoption (or possibly even of its birth) will be able to do anything at that point to protect his parental rights. Thus the UAA's notice requirement may not be of any assistance to a putative father in helping him assert his parental rights. Instead it seems that the Act's notification regime is configured to notify putative fathers only in order to facilitate the official termination of their parental rights. The prospective adoptive parents are benefited by the scheme, but the putative father himself may gain nothing more from the notification then the opportunity to bear witness to the judicial proceeding which officially declares him an unfit parent unworthy of rights.

A final criticism of the UAA lays in its inability to deter the type of lengthy litigation which currently plagues unwed father cases and keeps children in a state of legal limbo. Many of the determinative issues under the UAA are highly litigious and open to judicial interpretation. What amount of support is reasonable in light of the putative father's means? Was the putative father legitimately thwarted? Is it in the child's best interest for her to be returned to a caring and earnest thwarted biological father, or remain with the prospective adoptive parents who have her since birth? Losers are certain to take appeals under the UAA just as they do today under various state laws. And since courts may consider the duration of the child's relation with its prospective adoptive parents in determining her best interests, prospective adoptive parents are given an added incentive under the UAA to prolong court disputes as long as they have physical custody of the infant. The biases of individual state courts and judges will also still be

able to operate under the UAA regime. Different outcomes may result from similar factual situations depending upon the value given to blood and adoptive relations by the fact finders in the various states. Thus it is likely that the UAA will not be able to prevent the sorts of lengthy court disputes that heighten frustration and make the consequences of final decisions all the more dire.

Thus, for its inadequate protection of putative fathers and its inability to prevent lengthy court battles, the UAA is not the prescription that the country needs to cure its chronic adoption problems.

VI. Proposed Solution

Adoption law in the United States as it relates to unwed fathers remains in disarray twenty-three years after the Supreme Court's *Stanley* decision. The UAA is a bold attempt at adoption reform yet it does not adequately address the myriad of putative father problems infecting the current system. In an effort to further the debate on the direction of adoption reform this paper seeks to conclude by proposing a legislative solution to the problems which have been discussed at some length above. The proposal is called the Statute Clarifying the Rights of Unwed Fathers in Newborn Adoptions (SCRUFNA).

A. *Goals*

SCRUFNA is conceived with 3 goals in mind.

First, SCRUFNA seeks to effectuate an equitable balancing of the interests of the unwed father, the infant adoptee, the prospective adoptive parent(s), the state, and the birth mother. The unwed father's interest is in having his parental rights fairly determined. He is entitled to have this determination made solely upon actions that he, and he alone, either takes or fails to take. No other party should be allowed to interfere with a putative father's efforts to assert his parental rights. The best interests of the child are threefold: first the child's interest is in being placed with a parent or set of parents who are committed to loving and caring for her; second is in seeing that this placement is effectuated in an expedient manner; and third, that this placement, once made, is assured of permanency. The interest of the prospective adoptive parents is in getting protection for the relationship they form when they assume

custody of an adoptee. The state's interest is in ensuring that an adoption regime provides for expedient and permanent placement of unwanted children into the homes of caring adoptive parents. The state also has an interest in seeing that the rights of unwed fathers are clearly defined and protected. Birth mothers want to know that when they surrender their children for adoption those children will be placed in the homes of caring and dedicated parents.

SCRUFNA's second goal is to provide clear, objective guidelines that will enable unwed father cases to be adjudicated quickly thus avoiding the long drawn out disputes which have become characteristic of putative father-contested adoption cases.

Third, SCRUFNA hopes that by achieving its first two goals it will restore faith in the efficiency and permanence of the American adoption system.

B. *Burden of Discovery, Consent, and Parental Rights*

The United States Supreme Court has written that "the rights of the parent are a counterpart of the responsibilities they have assumed."[329] This sentence captures the ethos of SCRUFNA. A biological mother becomes vested with parental rights upon giving birth. The laws of nature force her to assume responsibility for an out of wedlock conception. Her male partner, however, does not have his choices similarly constrained. He is not compelled to take responsibility for his actions by either the dictates of biology or society.[330] He may walk away from the liaison unimpeded. Thus a male connected only genetically to a newborn has no claim to parental rights.[331]

For a biological father to attain parental rights he must earn them through consistent demonstrations of responsibility. SCRUFNA, therefore, places the initial burden of discovering the

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329 Lehr v. Robertson, 463 U.S. at 257.

330 *Id.* Since we are focused on the adoption context, we exclude consideration of paternity/child support issues which could flow from an out of wedlock birth when the biological mother decides to keep and raise the child. *Id.*

331 *See Caban*, 441 U.S. at 397 (Stewart, J., dissenting): "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." Lehr v. Robertson, 463 U.S. at 259-60: Court notes the "clear distinction between a mere biological relationship and an actual relationship of parental responsibility." *Id.*

woman's pregnancy and subsequent surrender of the child for adoption solely upon the putative father. To enable a concerned biological father to find out if a child he may have sired is placed for adoption, SCRUFNA provides for the establishment of a putative father registry.[332] Putative father registries are ideal tools for balancing the rights of unwed fathers against those of the other concerned parties in the adoption matrix[333] and have already been set up in a number of states.[334] They require men who are concerned that they may have impregnated a woman and are interested in taking responsibility for their potential offspring, to take the affirmative action of entering their names, addresses and the names of the women they believe they may have conceived a child with, on the putative father registry. Once registered, a man is entitled to immediate notice if the woman he has named places a child up for adoption.

Under SCRUFNA the putative father registry will be made as accessible as possible. Provisions will be made to enable an unwed father to register by either mail or telephone. SCRUFNA also envisions a single national putative father registry rather then the maintenance of fifty separate ones in each state. This way a putative father can receive notice even if the birth mother crosses state lines to give the child up for adoption.[335] The putative father will have to be entered on the registry by thirty days after the birth of the child or by the date the child is placed for adoption, whichever comes later, in order to receive notice. This time frame is envisioned as being sufficient to enable unwed males who are firmly committed to becoming fathers to act while closing out those biological fathers who waver in their interest and fail to take immedi-

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332 On the benefits of putative father registries, *See generally Dapolito, supra* note 228.

333 *Id.* at 1021.

334 *See* ARIZ. REV. STAT. ANN. § 8-106.01 (West Supp. 1994); ARK. CODE ANN. § 20-18-701 TO -705 (Michie 1987 & Supp. 1991); GA. CODE ANN. § 19-11-9 (1992); IDAHO CODE § 16-1513 (1992); LA. REV. STAT. ANN. § 9:400 (West 1992); MO. ANN. STAT. § 192.016 (Vernon Supp. 1993); N.M. STAT. ANN. § 32A-5-20 (MICHIE SUPP. 1993); N.Y. DOM. REL. LAW § 111-a (McKinney 1992); OKLA. STAT. ANN. tit. 10, § 55.1 (West 1987); TENN. CODE ANN.§ 35-1-111 (1992); UTAH CODE ANN. § 78-30-4.8 (1992).

335 Recall the problems caused in the case of *In re* M.N.M, 605 A.2d 921 (D.C.App. 1992), when the birth mother who conceived in Missouri gave the child up for adoption in Washington D.C. Because the putative father could not locate the child to assert his rights, the case took on added complexity.

ate action. This time limit will be strictly enforced.[336]

The putative father registry thus simply solves the often vexing problem of notice in unwed father cases. The concerned father is given the opportunity to secure notice if he acts promptly and signs the register. No burden is ever placed upon the court to investigate the putative father's identity and the birth mother's privacy interests are protected as she is never pressured to provide the name or whereabouts of the child's biological father. Even more important is the fact that the use of a registry will prevent a biological father from ever becoming thwarted. No one has the power to prevent a man from signing the national registry. There is nothing that either the birth mother or the prospective adoptive parents can do to prevent a caring unwed father from registering and receiving notice of the pending adoption. In addition, putative father registry regimes have been upheld by the Supreme Court as adequately protecting a biological father's right to due process.[337] The Supreme Court has also held that a putative father cannot excuse himself from the requirement of registering by claiming he was ignorant of the existence of the registry or its legally binding nature.[338]

The putative father registry under SCRUFNA also plays a pivotal role in determining parental rights. SCRUFNA provides that a putative father who fails to appear on the national registry by either thirty days after the birth of the child or the day the child is surrendered for adoption, whichever comes later, is held to have abandoned his child and concomitantly forfeited his parental rights. In this case the child is freed for adoption with only the consent of the mother. On the other hand, a man who appears on

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336 On the importance of strictly enforcing putative father registry time frames, *see generally Dapolito, supra,* note 228, at 1023-24. *See also* Sanchez v. L.D.S. Social Services, 680 P.2d 753 (Utah 1984) (held that an unwed father who registered late was not permitted to have custody of his child) and *In re* Adoption of Reeves, 831 S.W.2d 607 (Ark. 1992) (Putative father who failed to comply with state registry law was not entitled to set aside adoption decree on basis of failure to give him notice of adoption proceeding).

337 Lehr v. Robertson, 463 U.S. at 264-65. The Court explained that "The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights." *Id.* at 265.

338 *Id.* at 264. However, SCRUFNA feels that it is nevertheless important to publicize the registry in order to educate unwed fathers to its existence and importance. *See Dapolito, supra,* note 228, at 1025-26.

the registry, timely responds to notice by establishing paternity and manifesting a desire to assume full legal and physical custody of his child will become vested with a rebuttal presumption of parental rights entitling him to veto the adoption. By so doing, SCRUFNA protects the putative father who does everything within his power to demonstrate a commitment to his newborn child. His registration on the registry demonstrates his prompt desire to take responsibility for his child and his timely response to notice, establishment of paternity, and manifestation of desire to assume full custody confirms the seriousness of his commitment to fatherhood. Such men are worthy of parental and consent rights because they have "grasped" the opportunity afforded them by their genetic link to the child. These requirements are also immune to "thwarting" by uncooperative birth mothers or prospective adoptive parents as the man is judged solely upon his own actions.

Prospective adoptive parents may try to overcome the investment of presumed parental and consent rights in a registered putative father by proving, by clear and convincing evidence, that another ground[339] for terminating his parental rights exists under SCRUFNA. These include incompetence, physical abuse of the mother during her pregnancy, conviction for a violent felony within the last ten years, and spurning a birth mother's pleas for assistance during pregnancy. This last ground is an innovation of SCRUFNA and deserves elaboration.

SCRUFNA is very concerned with protecting the rights of deserving unwed fathers. To this end, SCRUFNA goes to lengths so that a putative father will not lose his parental rights as the result of thwarting or deception on the part of either the birth mother or prospective adoptive parent. Thus the hurdle for protecting his rights is not rigorous (registering, promptly responding to notice, and asserting a desire and ability to assume full custody), albeit constrained by a limited time frame. However, SCRUFNA has no intention of enabling a putative father, who is notified by the birth mother during her pregnancy, to disregard her travails resting upon a belief that the act of his registering on the putative father registry alone will ensure him of custody. Thus, SCRUFNA makes

339 Dapolito, *supra* note 228. Prospective adoptive parents cannot claim that a registered putative father "abandoned" his child under SCRUFNA. The very act of the putative father registering and subsequently responding to notice conclusively defeats such a claim. *Id.*

the following provision: "A registered putative father may have his parental rights terminated if it is proven by clear and convincing evidence that he was notified by the birth mother during the course of her pregnancy that she needed some financial (i.e., payment of medical fees) or other type of assistance (i.e., someone to drive her to her doctor) to deal with a pregnancy related issue and that he then unreasonably refused to assist her in a manner befitting his financial means, geographic location, work situation, etc."

Such a provision is superior to a blanket requirement for the payment of birth expenses as is found in the UAA because here the putative father cannot be thwarted by a birth mother who refuses his efforts or by prospective adoptive parents who pay all pregnancy expenses for the natural mother. The father is still judged only upon his own actions. He is never penalized for offering assistance and having it refused. He is only judged unfit if he spurns the woman who he impregnated when she asks him for help in providing for their unborn child.

C. *Placement of the Child, Finality, and Curtailing Litigation*

All of the cases and statutory frameworks which have been examined in this paper have failed to adequately balance the interests of the putative father with that of the contested child. At the end of each case the courts are left with the Solomonic choice of deciding whether to deny a putative father his parental rights or wrest a child from the home of the only parents he has ever known. SCRUFNA seeks to resolve this crucial conflict between the interests of the father and the child. In so doing SCRUFNA endeavors to protect the welfare of the prospective adoptive parents as well.

In current adoption regimes the interests of the unwed father and his offspring are immediately made irreconcilable by the prospective adoptive parents assuming custody of the child at or near birth. This assumption of physical control of the child is the most pivotal event in the adoption process. For prospective adoptive parents the act of taking possession of a child can be as momentous as if they gave birth to the child themselves. Many prospective adoptive parents experience the same type of immediate bonding the inures between biological parents and their children when they assume custody of their adoptee.[340] They do not wait until their

340 *See, e.g.*, MARY EARLE CHASE, WAITING FOR BABY: ONE COUPLE'S JOURNEY

adoption becomes legally finalized before they begin acting like loving parents. Thus, prospective adoptive parents should not be blamed for fiercely defending their adoptive parental rights when a putative father belatedly appears to challenge the adoption.[341]

The infant adoptees also immediately begin to bond with their prospective adoptive parents when they are taken from the hospital into the adoptive couple's (or individual's) home. Since the children typically remain with the prospective adoptive parents for the duration of court disputes, by the time final judgment is handed down, the child's psychological welfare is endangered by the possibility of being removed from the set of parents the child identifies as mom and dad. Thus, through the inadequacies of current adoption law, by the time a deserving putative father can prove that his parental rights were wrongfully withheld, his interests and those of the child he has fought for are placed in complete opposition to one another.

SCRUFNA seeks to resolve this recurrent problem in the following way. After a child is born, and surrendered for adoption, the prospective adoptive parents may not assume custody until a final decree of adoption is entered. Until finalization, the adoptee is to be placed in a designated care facility (DeCaF or Decaf). Hospitals, women's shelters, orphanages, or private adoption agencies

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THROUGH INFERTILITY TO ADOPTION 173 (1990): ("Now, I smile inside when people who are thinking about adopting ask me about loving or 'bonding with' a child. I wish I could give them scientific evidence or the results of some survey, but I can only say, I'm sorry, the only evidence I have is my experience — and that of every adoptive couple I have talked to: The instant you lay eyes on that baby, you will be madly in love.")

341 Certain commentators have placed blame upon prospective adoptive parents for the tragic results in unwed father cases. *See, e.g.*, Betty Jean Lifton, *Custody Case Affirms Biological Ties That Bind*, N.Y. Times, July 24, 1993, at A18. ("Jessica's biological mother and father have been in court trying to get their baby back from the time she was a month old. If the DeBoers had not defied the Iowa court rulings ordering them to return Jessica to her father, who had not signed away his parental rights, this tragedy could have been avoided.") To gain a sense of the motivation behind a prospective adoptive parent's fight for her child. *See* DeBoer, *supra* note 7, at xii. ("Dearest Jessica, we are about to venture into a dark place, to turn back the pages of your life. It will be a sorrowful journey, full of pain, looking into the inner core of what has happened, somehow trying to explain it to you. I pray what we are about to do will be honest and clear to you. As I look around the house at all the legal documents and letters of comfort, I can only hope that someday you might be able to return to a place in your mind that tells you, 'My momma and daddy loved me. They did everything they could to make me try to understand that I was an important person, that I was an individual and not a piece of property, and that I was worth fighting for.'")

may establish Decafs on their premises. The infant adoptees will be cared for in these facilities until their adoptions are finalized. Prospective adoptive parents and registered putative fathers will have visitation rights with the adoptees during this waiting period.

The earliest a finalized adoption decree can be entered, saving for one exception to be discussed subsequently, is thirty days after the child's birth. If at the thirty day mark no putative father has appeared on the national registry, then parental rights in any potential biological father are terminated. At this point the court may enter a final decree of adoption awarding the prospective adoptive parents full legal and physical custody. This decree cannot be challenged after entry. Prospective adoptive parents can then be assured that once they take their child home, she will be theirs forever.

The only way this waiting period can be by-passed is if the adoptive parents attain the informed consent of both of the adoptees biological parents. The consent of the biological father, however, will only be valid if it is supported by blood tests proving his paternity. This stringent requirement is needed to ensure that the birth mother does not name the wrong man as the child's father.

If a putative father appears on the registry within thirty days of birth, timely responds to notice and manifests his desire to assume full custody and parental responsibility for the child, then he becomes vested with a rebuttable presumption of parenthood. Unless the prospective adoptive parents challenge the putative father's status on one of the alternative grounds mentioned above, the putative father becomes recognized as the legal parent of the child and may assume full custody and control of his child from that point.

It is believed that three considerations will militate against the prospective adoptive parents contesting the putative father's parental rights at this time. First, without avail to a claim of abandonment, the prospective adoptive parents are limited in their attack upon the putative father to the above enumerated grounds of parental termination. Since each of these grounds are dependent on the existence of certain, easily identifiable facts, prospective adoptive couples will usually know or be able to quickly discover whether they have a viable defense. Second, and more importantly, because they do have physical custody, prospective adoptive

parents do not have as great a stake in the resolution of this controversy. They are not faced with losing a child they have raised since birth. Since they have not yet assumed parental roles vis-a-vis the adoptee, they may be more able to concede the child to the putative father. Rather then expending time, legal fees, and effort fighting for this particular child, they may just as well dedicate their efforts to trying to adopt another, unclaimed child. Third, the prospective adoptive parents will also know that they gain no benefit from prolonging litigation under SCRUFNA. The child will remain in the Decaf for the duration of the litigation. Thus, unless they have strong proof that either the putative father spurned or battered the natural mother, was recently convicted of a violent felony, or is incompetent, the prospective adoptive parents are unlikely to dig in their heels and battle hard for this adoptee.

D. *Conclusion*

Thus SCRUFNA seeks to reconcile the interests of all the parties in the adoption system. Putative fathers have their rights clearly defined. They are pressured to act quickly to demonstrate their parental responsibility but they are assured that they will be judged solely upon their own actions. SCRUFNA protects putative fathers from thwarting, but also summarily terminates their rights if they do not sign the national register within thirty days of their offspring's birth. SCRUFNA protects the child by making sure it ends up with an individual or couple who are dedicated to her care. The child's placement is delayed to ensure that the interests of the various parties are not put into immediate conflict. However, the time preceding placement is considered reasonable in light of the benefit of permanence which it will guarantee. SCRUFNA ensures that adoptions, once finalized, will become unassailable, thus protecting the interest of the child and the prospective adoptive parents. The state will be satisfied by the functioning of a system that effectuates efficient and permanent adoptions and protects the interests of worthy unwed fathers. The birth mother's interest are also protected as she is assured that her child will go to a loving parent or set of parents.

It is also hoped that SCRUFNA will also remove the necessity of lengthy litigation in these highly emotional cases. From the end of the initial thirty day period it should become clear who is enti-

tled to custody of the child. If, as in the overwhelming majority of cases, no putative father appears on the registry, then the adoptive parents can become vested with full legal and physical custody, secure in the fact that their legitimacy as parents can never again be questioned. If a putative father registers and comes forward, then it should become equally clear that barring the existence of certain facts or past events, he is entitled to become a parent.

SCRUFNA demands patience upon all parties (except the putative father) in the adoption system. It causes delay to prevent against what is a relatively rare occurrence, a custody battle between an unwed father and prospective adoptive parents. However, because these disputes do occur and because when they do they not only wreak havoc upon the lives of the parties involved, but also undermine faith in the entire system of American adoption, the cost in delay imposed by SCRUFNA in order to prevent the reoccurrence of calamities akin to the cases Jessica, Richard, and Emily is reasonable and justified.