Putative Fathers' Rights: Striking the Right Balance in Adoption Laws

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PUTATIVE FATHERS' RIGHTS: STRIKING THE RIGHT BALANCE IN ADOPTION LAWS

"[T]he rights of the parent are a counterpart of the responsibilities they have assumed."1

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I. INTRODUCTION

Several infant adoption cases captured media attention in the 1990s when unwed biological fathers gained custody of children previously placed with adoptive families. As a result, there is growing recognition of the need to ensure that putative fathers receive early notice of adoption proceedings and that they fully understand their rights and responsibilities. Achieving these goals requires adoption law reforms. While they are a small minority, these fathers genuinely want to parent their infants and they should be given that opportunity. On the other hand, the law must recognize that in most infant adoptions, the father either wants nothing to do with the child or is willing to consent to the adoption. When drafting new laws, this entire range of situations must be considered, and the need to notify fathers must be balanced with the needs of the child, the mother, and the state.

By examining several different state laws and the balances they have achieved, this Comment identifies four elements of a good adoption law. First, putative fathers should be given notice of an adoption in the beginning of the adoption process. Second, putative fathers should be required to act promptly, with a time limit on their right to veto the adoption. Third, the father should be willing and able to assume custody of the child in order to veto the adoption. Fourth, the state may choose not to notify the father if there is a risk of harm to the mother or the child.

The history of fathers' constitutional rights and the extent of those rights today are explored in Part II of this Comment. Part III uses the

2. See In re B.G.C., 496 N.W.2d 239, 241 (Iowa 1992) (granting a biological father custody of his two-and-a-half year old daughter because his parental rights were never terminated); In re A.M.P., 507 N.W.2d 616, 619-20 (Minn. Ct. App. 1993) (granting a biological father custody of his child because the consent form he signed was ambiguous); In re Raquel Marie X., 559 N.E.2d 418, 428 (N.Y. 1990) (granting a biological father custody of his child because he came forward promptly and was willing to assume custody of the child).

3. A putative father is the alleged or supposed father whose parentage is still an issue, therefore his claim to custody is at issue. STEVEN H. GIFFS, LAW DICTIONARY 378 (1984).

4. See infra note 91 for a list of articles addressing the need for adoption reform.

5. Id.

6. See Peter Marks, The Quest of the Fathers: The Courts Know Him as a "Fleeting Impregnator. " Robert Would Prefer to be Called Dad, NEWSDAY (New York) Apr. 1, 1992, § II, at 56 (recounting interviews with adoption professionals on the scope of the issue). "[T]he upstanding unwed father, who acknowledges paternity when confronted and agrees to support mother and child, remains the exception." Id.

7. "[I]n most situations . . . the alleged father will not respond to the service of notice, will not file a claim to paternity in a timely manner, and may be willing to sign a disclaimer of paternal interest." UNIF. ADOPTION ACT § 3-704 commentary at 138 (Proposed Draft 1993) (on file with the National Conference of Commissioners on Uniform State Laws).

8. See infra part V for a discussion of the interests that must be balanced.
Schmidt-DeBoer controversy as a framework to identify the unresolved constitutional questions regarding infants and thwarted fathers. Part IV analyzes the attempts of New York, California, and Minnesota to resolve those problems. Part V examines the interests that must be balanced, and Part VI introduces two statutory schemes that balance these interests: Indiana's notice statute and the Uniform Adoption Act. Part VII examines Minnesota's 1994 adoption legislation and recommends an additional element that should also be included in Minnesota's adoption laws.

II. HISTORICAL RECOGNITION OF FATHERS' RIGHTS

A. Before Constitutional Protections

Historically, unwed and putative fathers had neither a right to notice of an adoption nor a right to prevent mothers from placing their children for adoption. These fathers had no legal relationship with their children, who were considered "illegitimate." Because the mother had the right to custody, most states' adoption statutes only required the mother's consent. This rule applied even when the father ac-


10. See infra part VI.A.

11. See infra part VI.B.

12. See Note, Father of an Illegitimate Child—His Right to be Heard, 50 Minn. L. Rev. 1071, 1075-76 (1966) (providing an overview of various state adoption statutes).


14. See, e.g., Ga. Code Ann. § 74-403(3), 74-203 (1975) (providing that only the mother's consent is required for the adoption of an illegitimate child); Minn. Stat. § 259.24, subd. 1(a) (1959) (amended 1974) (specifically stating that "the consent of the father of an illegitimate child to an adoption shall not be required"); see also 2 Am. Jur. 2d Adoption § 68 (1994) (providing a general discussion of the requirements of the mother's consent).
knowledged the child as his own, voluntarily supported the child, wished to assert a right of guardianship, or had been prevented by the mother from legitimizing the child. The father, therefore, had no rights to veto the adoption of his child.

B. Constitutional Protections

The Fourteenth Amendment to the Constitution guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Beginning in 1972, the United States Supreme Court heard the first of four cases that recognized an unwed father's relationship with his child as a liberty interest protected by the Fourteenth Amendment. In the second and third decisions, the Supreme Court limited that liberty interest to fathers who have "shouldered responsibility" for their children and who have developed "substantial relationships" with their children. The last of these four decisions explained that a father's biological connection to the child affords him an "opportunity interest," but he must "grasp" his opportunity in order to obtain constitutional protection.

1. Stanley v. Illinois

The first Supreme Court decision to recognize the rights of unwed and putative fathers, Stanley v. Illinois, was decided in 1972. Peter Stanley had never married the mother of his children, but they lived together and raised their children as a family. When the mother died, the State took custody of the children because unwed fathers

15. 2 C.J.S. Adoption of Persons § 58 (1972). A father's consent becomes necessary for adoption only if the father has legitimized the child. Id.
17. Stanley v. Illinois, 405 U.S. 645, 651-52 (1972). The liberty interest, first acknowledged in Stanley, is the putative father's right to a relationship with his child free from state interference. See infra note 29 for a history of the family liberty interest.
18. Quillioin v. Walcott, 434 U.S. 246 (1978) held that a father who "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of [his] child" did not have protection under the due process and equal protection clauses and was not permitted to veto the adoption of the child. Id. at 256 (emphasis added).
19. Caban v. Mohammed, 441 U.S. 380 (1979). The Court held that a father had developed a "substantial relationship" with his children by living with and supporting them. Id. at 394.
20. Lehr v. Robertson, 463 U.S. 248, 262 (1983). The Court held that a father who failed to establish a "custodial, personal, or financial" relationship with his child had failed to "grasp" his "opportunity interest." Id. at 267.
22. Id. at 646-47.
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were not included within Illinois' statutory definition of parents. Stanley challenged the definition because he had lived with and raised his children along with their mother.

The State of Illinois argued that most unmarried fathers are "unsuitable and neglectful parents" because they are strangers to their children. The Court, however, held that the State could not make such a broad presumption because some unwed fathers were "wholly suited" to having custody. The State also emphasized the need for prompt procedures, and the Court responded by stating that while this was a legitimate concern, "the Constitution recognizes higher values than speed and efficiency."

The United States Supreme Court acknowledged the unwed father's right to a relationship with his child, and stated that the Constitution protects all family relationships, whether or not they are legitimized by a marriage ceremony. "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." The Supreme Court found that the State's actions were impermissible be-

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23. Id. at 650. Parents were defined as "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent." Id. at 650 (citing ILL. REV. STAT. ch. 37, § 714-14).
24. Id. at 646.
25. Id. at 654.
27. Id. at 654. The Supreme Court reviews constitutional challenges to state statutes using three standards of review. An intermediate standard is common in gender issues. Under this standard, the state must show a "legitimate" purpose and the statute must be "substantially" related to that purpose. Reed v. Reed, 404 U.S. 71, 76-77 (1971). The Court apparently applied an intermediate standard of review in Stanley because it found that the State's purpose was legitimate, but the statute was not substantially related to the State's purpose because some fathers were suited to have custody, and making their children wards of the State would do more harm than good to the children. Stanley, 405 U.S. at 652-53. For an analysis of the Supreme Court's application of the three constitutional standards to putative fathers, see Linda R. Crane, Family Values and the Supreme Court, 25 CONN. L. REV. 427, 453 n.171 (1993).
28. Stanley, 405 U.S. at 656.
29. Id. at 651. The liberty interest in one's family has been recognized in cases such as Meyer v. Nebraska, 262 U.S. 390 (1923). In that case, the Court protected the rights of parents to educate their children as they desire. Id. at 399. The Court used the due process clause to protect a broader, more essential right to conceive and raise one's children. Id. See also Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (protecting the privacy of the marriage relationship and finding unconstitutional a law forbidding contraception); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (protecting marriage and procreation as fundamental rights and finding unconstitutional a statute providing for sterilization of criminals). The Stanley Court cited each of these cases in support of extending family liberty to the unwed father and his relationship with his child. Stanley, 405 U.S. at 651.
30. Stanley, 405 U.S. at 651.
31. Id.
cause all parents are entitled to a hearing on their fitness before their children are removed from their custody.32

Stanley was significant because the Supreme Court protected an unwed father’s rights and declared that parental fitness could not be determined solely on the basis of marital status. All fathers have a fundamental liberty interest “in the companionship, care, custody, and management” of their children.33

2. Quilloin v. Walcott

Six years later, the Supreme Court refused to protect an unwed father in Quilloin v. Walcott.34 Leon Quilloin wanted to veto the adoption of his son by the son’s stepfather.35 However, Quilloin’s son was eleven years old, and Quilloin had never previously sought custody of him.36 Furthermore, Quilloin had only provided irregular child support.37 Although he had visited his son many times, these contacts were disruptive, and the son wanted to be adopted by his stepfather.38

Georgia law required the consent of only the mother before an illegitimate child could be placed for adoption.39 Quilloin claimed that the statute was unconstitutional under Stanley because it presumed that unwed fathers were unfit as a matter of law.40

On review, the United States Supreme Court recognized the State’s interest in having children reared in traditional family settings.41 Allowing the adoption would not only permit the child to live in such a setting, but would also allow the child to continue living in the same place with the same parents.42 Furthermore, Quilloin only sought to veto the adoption and acquire visitation rights, he did not ask for cus-

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32. Id. at 658.
33. Id. at 651.
34. 434 U.S. 246 (1978).
35. Id. at 247.
36. Id. at 253.
37. Id. at 251.
38. Id.
39. Quilloin, 434 U.S. at 248 n.3 (citing GA. CODE ANN. § 74-403(3) (1975)).
40. Id. at 250 n.8.
41. The Court noted that the lower court had “relied generally on the strong State policy of rearing children in a family setting . . .” Id. at 252. Quilloin was decided in 1978, and the Court seems to use the terms “family setting” and “family already in existence” to refer to a traditional family structure that includes both a mother and a father in the home. The author acknowledges that many people today would also consider Quilloin and his son to be a family.
42. [T]his [is not] a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Id. at 255.

The Court applied an intermediate scrutiny test since the state’s interest in recognizing the existing family unit, which it believed to be in the best interest of the child,
to the child... indeed, he does not even now seek custody of his child."44

3. Caban v. Mohammed

In 1979, the Court used the Quilloin factors of custody and support to decide *Caban v. Mohammed*.45 In this case, the father, Abdiel Caban, had a substantial relationship with his two children.46 He had lived with his children as their father and had supported them for several years until he separated from their mother.47 Even after the separation, Caban frequently saw the children.48

When a stepfather petitioned to adopt the children, Caban filed a cross petition.49 Under New York law, a mother could veto an adoption by simply withholding her consent, but an unwed father had no similar control.50 Since the mother could veto Caban’s petition for adoption, but Caban could not veto the stepfather’s petition, the New York court granted the stepfather’s petition.51 Caban challenged the law as unconstitutional under the Equal Protection Clause.52

The United States Supreme Court distinguished the case from *Quilloin* by emphasizing Caban’s “substantial relationship”53 with his children in contrast to Quilloin’s “failure to act as a father.”54 Caban had not only lived with his children for several years before separating from their mother, but he had also spent time with the children and raised them after the separation.55 Quilloin, on the other hand, never sought custody and waited until his son was eleven years old before seeking visitation rights.56

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43. *Quilloin*, 434 U.S. at 247, 256.
44. *Id.* at 256.
46. *Id.* at 382-83.
47. *Id.* at 382.
48. *Id.* at 382-83.
49. *Id.* at 383.
50. *Caban*, 441 U.S. at 386-87.
51. *Id.* at 393 n.15.
52. The Court used intermediate scrutiny because the statute discriminated on the basis of gender. See *supra* note 27 for an explanation of the intermediate standard of review; see also Crane, *supra* note 27, at 453.
53. *Caban*, 441 U.S. at 393.
54. *Id.* at 389 n.7.
55. *Id.* at 382-83.
The Court again recognized that the State had a legitimate interest in encouraging the adoption of illegitimate children and noted that when a father has never come forward to participate in the rearing of his child, a state may treat him differently and not allow him to veto an adoption. However, when a father has participated in the rearing of his children, the gender distinction is unconstitutional because a father's relationship with his older children may be equal to a mother's relationship; therefore, the father should be allowed the same veto rights to an adoption as the mother.

Accordingly, the Court found the New York statute unconstitutional and ruled that when an unwed father has established a substantial relationship with a child and admitted paternity, the state may not treat the father differently than the mother.

The Court made it clear that this analysis applied to older children. The Court stated that in infant adoptions there may be a basis for legitimately giving different rights to mothers and fathers, but the Court expressed no view on those rights.

4. Lehr v. Robertson

The fourth United States Supreme Court case involving the constitutional rights of unwed fathers was Lehr v. Robertson, decided in 1983. Jonathan Lehr challenged New York's notice statute because he was not given notice when his two-year-old daughter was adopted by her stepfather.

57. Caban, 441 U.S. at 389 n.7, 392.
58. Id.
59. Id. at 393.
60. Id. at 392.
61. This is true "even if unwed mothers as a class were closer than unwed fathers to their newborn infants ... even if the special difficulties attendant upon locating and identifying unwed fathers at birth would justify a legislative distinction between mothers and fathers of newborns. . . ." Id. 389, 392.
62. Caban, 441 U.S. at 392 n.11.
64. Id. at 252-53. Lehr claimed a due process violation because he was deprived of notice and an opportunity to be heard. Id. Notice and an opportunity to be heard are procedural due process issues and the analysis requires the court to balance three factors: the private interest; the government interest; and the risk of error in the procedure and the probable value of additional safeguards. See Mathews v. Eldridge, 424 U.S. 319, 321 (1976).
The statute in question provided for a putative father registry under which a putative father only needed to mail a postcard to notify the state of his intent to claim paternity. Once on the register the father was entitled to notice of any pending adoption of his child. Lehr did not notify the registry, and he did not meet New York's alternative notice requirements. Therefore, the State did not give Lehr notice of the adoption of his daughter, even though the State knew of Lehr's identity and his whereabouts.

The Court held that Lehr had not been denied due process because the registry was available to him. In addition, the Court found that Lehr had not been denied equal protection because he did not have a "custodial, personal, or financial" relationship with his daughter.

In contrast, the fathers in the first three cases claimed a right to their relationships with their children and challenged the state statutes on a substantive due process basis. Therefore, instead of the balancing test, the state had to show that the law was "substantially related" to a "legitimate" state interest. See supra note 27 for the intermediate standard of review.

65. Lehr, 463 U.S. at 250-51.
66. Id. at 251.
67. New York requires that notice be given to seven classes of possible fathers, including: (1) those adjudicated to be fathers by the state of New York; (2) those adjudicated to be fathers by another state; (3) those who filed with the putative father registry; (4) those named on the child's birth certificate; (5) those who live openly with the mother and child and hold themselves out to be the father; (6) those identified by the mother in a sworn written statement; and (7) those married to the mother before the child is six months old. N.Y. DOM. REL. LAW § 111-a, subd. 2 (McKinney 1988 & Supp. 1994).
68. While Lehr had not sent in a postcard to the registry, he had filed a paternity petition in another county. Lehr, 463 U.S. at 252. The judge who signed the stepfather's petition to adopt knew of Lehr's pending petition, but granted the stepfather's adoption petition because Lehr was not entitled to notice under New York's notice statutes. Id. at 253.
69. Id. at 248, 265. Applying the procedural due process balancing test, supra note 64, the Court found New York's procedural requirements to be "adequate" because Lehr did not yet have a relationship with his daughter while the State had several significant interests at stake, such as uncomplicated adoption proceedings, the privacy interests of unwed mothers, avoiding unnecessary controversy, and the finality of adoption decrees. Lehr, 463 U.S. at 262-65. Finally, no additional safeguards could have helped Lehr since New York's statute already covered most responsible fathers, and the presence of the putative father registry made the right to notice within Lehr's control. Id. at 264.
70. Id. at 267. Lehr claimed that his rights were violated under the Equal Protection Clause because New York law "denied him the right to consent to [his daughter's] adoption and afforded him fewer procedural rights than her mother." Id. at 255. Lehr argued that while natural mothers were always a constitutionally-protected class, only a particular group of fathers were protected. Id. at 266.

In rejecting this argument, the Court reasoned that because the mother had formed a custodial relationship with the daughter and Lehr had not, they were not similarly situated; thus, equal treatment was not required. Id. at 267. The dissent, however, disagreed with the majority's characterization of Lehr's relationship with his child and presented the more unfortunate side of the case. Id. at 268. A factual record was
doing so, the Court noted the distinction between a "mere biological relationship" and "an actual relationship of parental responsibility," which it characterized as a relationship with "daily associations" and "emotional bonds."  

The Court began its analysis by noting that "the rights of the parents are a counterpart of the responsibilities they have assumed." Then, comparing Lehr with the previous three cases, Justice Stevens wrote that the relationships in Stanley and Caban were "developed parent-child relationship[s]," whereas the relationships in Quilloin and Lehr were merely "potential relationship[s]." The developed relationship "acquires substantial protection under the Due Process Clause," but the potential relationship does not merit the same protection.

The potential relationship is based on the biological connection that affords a father a unique opportunity to develop a relationship with his child. If a father "grasps that opportunity" and accepts responsibility for the child, then the Constitution will protect the relationship. If he fails to grasp his opportunity, the "Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." 

Lehr is the current constitutional standard for unwed fathers' parental rights. Thus, a father must "grasp" his "opportunity interest" before his rights will be protected by the Constitution.

never created in this case because Lehr's proceeding was first stayed, then dismissed. Id. at 271. Lehr alleged that he visited the mother and child in the hospital every day when the child was born, but the mother concealed her whereabouts from him when she left the hospital. Id. at 269. Lehr never ceased trying to locate them, and the few times he did find them, he visited them to the extent the mother would allow. Id. When the child was two years old, Lehr located them again with the aid of a detective agency. Id. At that time, Lehr offered to provide financial assistance and to set up a trust fund for the child, but the mother refused and threatened Lehr with arrest if he did not stay away. Id. at 248, 269.

71. Id. at 259-60.
72. Id. at 261.
73. Lehr, 463 U.S. at 257.
74. Id. at 261.
75. Id.
76. Id. at 262.
77. Id.
78. Lehr, 463 U.S. at 262. It is important to note that the decision states that the Constitution will not "automatically" protect his interest. See John R. Hamilton, The Unwed Father and the Right to Know of His Child's Existence, 76 Ky. L.J. 949, 978 (1987-88) (discussing the implications of the Lehr language and a possible right to notice in some situations).
79. Lehr is the most recent putative father case from the Supreme Court. See Alexandra R. Dapolito, The Failure to Notify Putative Fathers of Adoption Proceedings: Balancing the Adoption Equation, 42 CATH. U. L. REV. 979, 985-95 (1993).
III. UNRESOLVED CONSTITUTIONAL QUESTIONS

The unwed father’s liberty interest in his relationship with his child is relatively well established under these four Supreme Court decisions. However, all four cases involved older children, and the Supreme Court specifically declined deciding when the Constitution protects a putative father’s relationship with an infant child.80 Two unresolved constitutional questions remain. The first question is what actions are required for a putative father to “grasp” his opportunity and veto an infant adoption. The second question is whether a genuinely thwarted father should be able to veto an adoption, when he has genuinely not been able to grasp his opportunity.

A. The Father of the Infant Child

Many states have adoption statutes that grant rights to those putative fathers of infant children who have shown responsibility in specific ways, such as providing support for their children and visiting regularly with them.81 Minnesota, for example, requires that an adoption be with the consent of any man who is or was married to the mother, is named on the birth certificate, substantially supported the child, openly lives with the mother or the child, and was adjudicated to be the

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80. In Caban, the Supreme Court specifically reserved the question of infants. 441 U.S. 380, 389, 392 (1979). See supra notes 61-62 and accompanying text.

81. For a summary of each state’s statutes addressing when consent is not necessary, see Hollinger, supra note 13, at § 1-A. See, e.g., Alaska Stat. § 25.23.050 (1991) (consent not required from a parent who has abandoned the child for six months or who has failed to communicate with the child and to provide care and support); Ark. Code Ann. § 9-9-207 (Michie 1993) (consent not required of a parent who has deserted a child or who has failed to communicate or provide support for a period of one year); D.C. Code Ann. § 16-304 (1991) (consent not required when a parent either cannot be located or has abandoned the child and voluntarily failed to contribute to the child’s support for six months); Haw. Rev. Stat. § 578-2 (1993) (consent not required of parent who has deserted child for 90 days, or who fails to communicate with or provide support for one year); Me. Rev. Stat. Ann. tit. 19, § 532 (West 1980 & Supp. 1993) (consent not required of a parent who has willfully abandoned a child or who is unwilling or unable to undertake parental responsibility); Md. Code Ann., Fam. Law § 5-312 (1991) (consent not required in independent adoption if it is in the child’s best interest to terminate parental rights); Mo. Rev. Stat. § 453.040 (Vernon Supp. 1994) (consent not required from a parent whose identity is unknown, or from a parent who has willfully abandoned or failed for 60 days to support and care for a child under one year of age); Ohio Rev. Code Ann. § 3107.07 (Page’s 1989 & Supp. 1993) (consent not required of putative father who willfully abandoned or failed to care for and support the minor, or abandoned the mother during her pregnancy and up to the time of the surrender of the child); Utah Code Ann. §§ 78-30-4.1 to 78-30-5 (1992 & Supp. 1993) (consent not required of a parent who has not provided support and has made no effort to do so without good cause, and a rebuttable presumption arises if a parent has failed to support and communicate with the child for a period of one year); Wis. Stat. § 48.415 (1987 & Supp. 1993) (consent not required from parent who has failed to assume parental responsibility).
father, or filed a notice of intent to retain parental rights. All of these actions are ways in which a father can “grasp” his opportunity by showing actual responsibility for his child.

Often, the opportunity goes unrealized. Aside from adoptions by step-parents, nearly half of all adoptions in the United States are infant adoptions. The adoption is finalized within their first two years, but they are usually placed with an adoptive family long before the adoption is actually finalized. Placing a child for adoption shortly after birth limits the father’s opportunity to support the child, live with the child, or even visit with the child. There is no occasion for him to “grasp” his opportunity interest. The question remains, then, of what actions should be required of a putative father in order to “grasp” his opportunity and veto the adoption of his infant child.

B. The Thwarted Father

In many situations, a putative father either wants nothing to do with the child or is willing to consent to the adoption. In a few cases, however, the father genuinely wants to take responsibility for parenting his child, but he has been thwarted of the opportunity to do so. Lehr, for example, was a thwarted father; despite his attempts to grasp his opportunity to parent his child, the mother prevented him from doing so. Other instances where a father may be thwarted include situations where the mother does not tell the father about the child’s existence, or where the father may know about the child but not about the mother’s plans to place the child for adoption. A father may also be unable to provide support because of poverty, illness, or incarceration.

83. There were 24,589 unrelated infant adoptions in the United States in 1986, accounting for almost half of the unrelated domestic adoptions in that year. NATIONAL COMM. FOR ADOPTION, ADOPTION FACTBOOK 60 (1989). Special needs children, some of whom may have been infants, comprised one-fourth of unrelated domestic adoptions, or 13,568 adoptions. Id. Of the remaining unrelated domestic adoptions, most were healthy children over age two. Id. In addition, there were 10,019 foreign adoptions. Id.
84. For purposes of the survey, infants were defined as children under the age of two. Id.
85. Many factors account for the delay. For example, once a petition to adopt is filed, it usually takes approximately six months for the adoption to be finalized. In Minnesota, the time is at least three months. MINN. STAT. § 259.27, subd. 4 (1992). For a state-by-state breakdown of the lengths of the adoption process, see NATIONAL COMM. FOR ADOPTION, ADOPTION FACTBOOK, 22-33 (1989).
86. See supra note 7 and accompanying text.
87. See supra note 70.
88. These examples of thwarted fathers are discussed in the Uniform Adoption Act. UNIF. ADOPTION ACT § 2-401 commentary at 66; § 3-704 commentary at 136 (Proposed
The thwarted father may be willing and able to parent, but if the child has already been placed for adoption, and especially if the adoption has been finalized, many courts will not disrupt the child's stability by transferring custody to the father. Therefore, the father will lose custody of the child without ever having a true "opportunity" to develop a relationship with the child.

C. An Example from Iowa

Several controversial cases involving the thwarted father problem have arisen. In Iowa's Schmidt-DeBoer controversy, *In re B.G.C.*, the child known as "Baby Jessica" was returned to her father after two and a half years with potential adoptive parents because her father's parental rights had never been terminated.

The child was born on February 8, 1991, and the adoptive parents, the DeBoers, were granted custody on February 25, 1991. The mother's rights were terminated, but the mother knowingly named the wrong man as the father. Once the biological father, Daniel

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90. 496 N.W.2d 239 (Iowa 1992). "B.G.C." represents "Baby Girl Clausen."


When the adoptive parents, the DeBoers, filed in Michigan, the media created a flurry of public awareness and called for reform to the adoption laws. *See, e.g.*, Adoption Code Needed, USA TODAY, Aug. 27, 1993, at 10A; Geoffrey Cowley et al., *Who's Looking After the Interests of Children?*, Newsweek, Aug. 16, 1993, at 54; Mary Deibel, *DeBoers Look to Supreme Court in Custody Battle*, StarTrib (Minneapolis) July 25, 1993, at 1A; Timothy M. Phelps, *The Law Wasn't on Jessica's Side*, N.Y. Newsday, Aug. 8, 1993, at 3. But see Michele Ingrassia & Karen Springen, *She's not Baby Jessica Anymore*, Newsweek, Mar. 21, 1994, at 60 (detailing the child's successful adjustment to the move).

92. *In re Clausen*, 501 N.W.2d at 194.

93. *Id.*

94. *Id.* This was not the only problem in the case. Cara Clausen had no counseling and was apparently offered none at the hospital. Memo from Joan H. Hollinger, Reporter for the Uniform Adoption Act, to the National Conference of Commissioners on...
Schmidt, found out about his daughter, he intervened in the adoption proceeding to attempt to reclaim her. The intervention was filed March 27, 1991, exactly thirty days after the infant was placed with the DeBoers and forty-seven days after her birth. When blood tests were completed in September, they showed a 99.9% probability that Schmidt was the father and a 0% probability that the man who had been named by the mother was the father.

The State of Iowa has chosen to protect the custodial rights of parents. Iowa legislation provides that a father's parental rights cannot be terminated without a showing of unfitness, abandonment, or voluntary relinquishment of parental rights.

In the DeBoer-Schmidt controversy, the adoptive parents, the DeBoers, tried to show unfitness and abandonment. On September

Uniform State Laws 1 (Aug. 1993) (on file with the National Conference of Commissioners on Uniform State Laws) [hereinafter Hollinger Memo]. In addition, the lawyer who facilitated the placement had handled few adoptions and did not explain to Clausen that he was representing the DeBoers, that she might have a right to revoke her consent within 72 hours of the child's birth, and that she was entitled to be present at the hearing terminating parental rights. Hollinger Memo at 1-2.

95. In re Clausen, 501 N.W.2d at 194.
96. Id. Schmidt would also have been protected under Minnesota's statutes. See infra part IV.C. In addition, the mother filed a request to revoke her release of custody on March 6, 1991, so the DeBoers knew there was a problem just nine days after they received custody of the child. In re Clausen 501 N.W.2d at 194.
97. In re Clausen, 501 N.W.2d at 194.
98. See Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966), cert. denied, 383 U.S. 949 (1966). In Painter, the Iowa Supreme Court granted custody of a child to the maternal grandparents rather than to the child's father who was leading a "bohemian" lifestyle in California. Id. at 158. In reaction to that case, the Iowa legislature amended the state's termination of parental rights statute in order to better protect parents. See infra note 99 and accompanying text.
99. Iowa's statute for termination of parental rights requires a finding of clear and convincing proof of one of the following grounds:
1. A parent has signed a release of custody . . . and the release has not been revoked.
2. A parent has petitioned for the parent's termination of parental rights
3. A parent has abandoned the child.
4. A parent has been ordered to contribute to the support of the child or financially aid in the child's birth and has failed to do so without good cause.
5. A parent does not object to the termination after having been given proper notice and the opportunity to object.
6. A parent does not object to the termination although every reasonable effort has been made to identify, locate and give notice to that parent . . .
7. An adoptive parent requests termination of parental rights and the parent-child relationship based upon a showing that the adoption was fraudulently induced.


Abandonment is defined as "to permanently relinquish or surrender . . . parental rights, duties, or privileges." Id. § 600A.2(17) (Supp. 1992). The term includes both the "intention to abandon and the acts by which the intention is evidenced." Id.
100. In re Clausen, 501 N.W.2d at 194.
24, 1991, the DeBoers filed a petition to terminate Schmidt's parental rights, alleging that he was an unfit parent because he had abandoned Jessica as well as two previous children. The Iowa district court, however, found that Schmidt's parental rights could not be terminated because he had not abandoned his daughter. To the contrary, the court found that he did all he could once he found out that he might be her father. Therefore, the petition to adopt was denied. In addition, the court held that Iowa law did not allow consideration of the best interests of the child because Schmidt's parental rights were never terminated.

In September 1992, on appeal, the Iowa Supreme Court affirmed the district court's findings and ordered that custody of the two-and-a-half-year-old child be transferred to Daniel Schmidt.

IV. ALTERNATIVE STATE SOLUTIONS TO THE UNRESOLVED CONSTITUTIONAL QUESTIONS

Different states have found different solutions to the problems associated with putative fathers. The State of Iowa has chosen to protect parents unless they have voluntarily relinquished or have abandoned their child. New York and California have adopted standards similar to each other, but with greater limitations on fathers' rights than in

101. B.G.C., 496 N.W.2d 239, 245 (Iowa 1992). At the time of the lawsuit, Schmidt had a son, age 14, and a daughter, age 12. Id. He had not supported them financially, and he had not maintained any relationship with either of them. Id.

102. Id. at 246.

103. Id. The Iowa court held that even though Schmidt did not assume responsibility for the child at first, he did not intend to abandon her since he had not been told specifically that the child was his. Id. In addition, once Clausen told Schmidt the child might be his, Schmidt spoke with an attorney and intervened in the adoption. Id.

104. Id. Under Iowa law, an adoption petition shall not be filed until parental rights have been terminated. IOWA CODE § 600.3(2) (1981). Cara Clausen's (the mother) and Scott Seefeldt's (the named father) parental rights were terminated, but Daniel Schmidt's (the biological father) parental rights were never terminated. B.G.C., 496 N.W.2d at 244-45. Therefore, the adoption proceedings were defective from the beginning. Id.

105. Id. at 245. The court admitted that the best interest argument was "very alluring," but held that the law could not be bypassed and parental rights could only be terminated on the grounds specifically stated in IOWA CODE § 600A.8. Id. The child's best interests may only be considered if the father contests the adoption after he has lost his right to veto the adoption. Id.


107. See supra notes 98-99 and accompanying text.
Iowa. In the opposite direction, Minnesota has recently amended its statutes to require the consent of additional fathers and providing those fathers with greater protection.

A. New York

New York has adjudicated two significant cases involving putative fathers. In both cases, the issues were resolved by balancing the fathers’ rights against the needs of the children who had already been placed for adoption.

In 1979, in response to the Supreme Court’s *Caban* decision, New York adopted a statute that gave putative fathers the right to veto an adoption only under specific circumstances. For a child under six months old, the father must have openly lived with the mother for six continuous months immediately preceding the child’s placement for adoption, openly acknowledged paternity during this period, and have paid reasonable pregnancy and birth expenses in accordance with his means. These requirements were thought to provide objective and unambiguous criteria for determining whether a father intended to assume responsibility for his child.

In the first case, *In re Raquel Marie X.*, the mother and father had a tumultuous relationship. Shortly after the birth of their second daughter, the mother placed the baby with an adoption agency. Later, at the father’s insistence, she retrieved the child. However, she subsequently placed the baby for adoption a second time. The

108. See infra parts IV.A. and IV.B.
109. See infra part VII.
112. See supra part II.B.3.
114. Id.
115. See *Raquel Marie X. II*, 559 N.E.2d at 422.
117. Id. at 420. The detailed facts are found in the lower court decision, *In re Raquel Marie X.*, 545 N.Y.S.2d 379, 380 (N.Y. App. Div. 1989) [hereinafter *In re Raquel Marie X. I*]. The mother had to obtain an order of support for their first daughter, as well as several protective orders because of the father’s violent conduct. Id. at 380. She also accused him of raping her and filed at least three separate criminal complaints against him for assault and violation of the protective orders. Id.
119. Id.
120. Id. The mother eventually married the father, and they both sought to regain custody of the child. Id. at 381.
father challenged the adoption, but he could not veto the adoption because of New York’s “living together” requirement.121

The Raquel Marie X. court found the “living together” requirement unconstitutional because the requirement was only “tangentially” related to the father’s desire to establish a relationship with his child.122 The living together requirement focused on the father’s relationship with the mother, rather than with the child.123 The requirement could also be used by the mother to cut off the father’s rights, even when he wished to form, or attempted to form, a relationship with his child.124

The court set out a new two-part standard for when a father can veto an adoption.125 First, the father must act “promptly” once he knows about the child,126 with that action occurring during the six months preceding the placement of the child.127 Second, the father must be willing and able to assume custody of the child and must not be merely seeking to veto the adoption.128

In New York’s second putative father case, Robert O. v. Russell K.,129 the biological mother and father had separated.130 The mother did not tell the father about the pregnancy or the adoption because she did not want him to feel that she was trying to pressure him into marriage.131 The mother placed the child for adoption before she and the father later reconciled and married.132 When the father found out about the child, a year and a half after the placement, he did all he could to challenge the adoption.133 He claimed that the state had a duty to ensure that he was notified of the adoption.134

121. Id. at 382-83. The statute required the father to openly live with the mother for six continuous months prior to the placement of the child. See supra note 114 and accompanying text.

122. Raquel Marie X. II, 559 N.E.2d at 426. The court used a strict scrutiny standard because a liberty interest was at stake, and the State had to show a “powerful countervailing interest” and a “close fit” between that interest and the legislation. Id. at 425.

123. Id. at 426.

124. Id.

125. Id. at 424, 428. The other two provisions from the statute, acknowledgement of paternity and payment of pregnancy and birth expenses, remained factors to be considered by the court. Id.

126. Id. at 424.

127. Raquel Marie X. II, 559 N.E.2d at 428.

128. Id. at 424, 428.


130. Id. at 100.

131. Id. For an interview with the mother and father, see Marks, supra note 6, at 56.


133. The father attempted to meet the statutory requirements by reimbursing the mother for her medical expenses, filing with the putative father registry, and commencing an action to vacate the adoption. Id.

134. Id. at 100. Under New York’s statutes, he was not entitled to either notice or consent rights. Id. at 101. The district court never even asked for the name of the father. Id.
The court, however, held there was no such duty in this case because the mother had done nothing to hide the pregnancy and the father had failed to take any steps to discover the pregnancy or the birth of the child. When the father did find out, the adoption had already been finalized for ten months and the child had lived with the adoptive parents for a year and a half.

The court then restricted the Raquel Marie X. standard by ruling that the "promptness" requirement is measured from the time of the child's birth, not from the time the father becomes aware of the child. The court stated that the State of New York had a legitimate interest in the child's need for early permanence and stability and, in effect, decided that the State's interest in finalizing the adoption outweighed the father's interest in establishing a relationship with his child.

B. California

California considered a similar situation in In re Kelsey S. In this case, the putative father knew that the mother planned to place the child for adoption. He wanted to raise the child, so he filed an action with the court to establish his parental rights. Under California law at the time, the father could not veto the adoption because he was not a "presumed father." A "presumed father" was defined as a man who receives the child into his home and openly holds out the child as his own.

The California Supreme Court found the law unconstitutional because it allowed a mother to unilaterally preclude a father from becoming a presumed father. Following New York's lead, the California court held that if a putative father comes forward "promptly" and demonstrates "full commitment to his parental responsibilities—emo-

135. Id. at 104-05. Yet, the father may not be any more at fault than the mother. When the mother found out she was pregnant, she was afraid the father would think she was trying to pressure him into marriage, and in her anger and fear she told him she did not want to see him any more. Id. at 100; see Marks, supra note 6, at 56.
137. Id. at 103-04.
138. Id. at 104.
139. Id.
141. Id. at 1217.
142. Id. at 1217-18.
143. Id. at 1218-19.
144. Id. at 1220 (citing Cal. Civ. Code § 7004(a)(4) (1983)).
145. Kelsey S., 823 P.2d at 1236.
146. Id. The court added that all factors should be considered, including the father's conduct before the birth of the child. Id. Once he knows or reasonably should know about the child, then he must act promptly to assume parental responsibilities. Id. at 1236-37.
tional, financial, and otherwise," then the Federal Constitution will protect him by requiring a showing of unfitness before his parental rights can be terminated.

In summary, California and New York have both imposed time limits on the rights of a putative father. Those states will grant a putative father custody of his child only if he acts "promptly." In addition, they have specified what actions he must take. He must be willing and able to assume custody of the child.

C. Minnesota

Minnesota protects putative fathers by giving them statutory rights to receive notice and to consent to the adoption. In 1994, the Minnesota Legislature amended the adoption statutes to encourage more birth mothers to give notice to putative fathers. The statutes were amended even though Minnesota's laws on notice and consent have not been constitutionally challenged.

The categories of fathers who are legally entitled to receive notice are the same as they were before the 1994 amendments, and they are contained in two statutes. One is in the Parentage Act and the other is the adoption statutes. Minnesota law details who is entitled to notice, and then states that consent is required from the same fathers who are entitled to notice. The Parentage Act requires that notice be given to a presumed father, such as a man who is or was

147. Again relying on the New York court's decision in *Raquel Marie X II*, the Kelsey S. court held that the father must be willing to assume full custody of the child and not be merely trying to veto the adoption. *Id.* at 1237 (citing *In re Raquel Marie X. II*, 559 N.E.2d 418, 428 (N.Y. 1990)).

148. *Id.* at 1236.

149. *Id.*; Robert O. v. Russell K., 604 N.E.2d 99, 103-04 (N.Y. 1992). In contrast to these two states, the District of Columbia Court of Appeals has ruled that even if the father has acted timely, the adoptive parents can overcome his right with clear and convincing evidence that an adoption would serve the best interests of the child. *In re Baby Boy C.*, 581 A.2d 1141, 1143 (D.C. 1990).

150. See infra part VII for a detailed description and analysis of the 1994 amendments.

151. See Judith D. Vincent, *Adoption: What in the World is Going On?*, 6 MINN. FAM. L.J. 64, 65 (1993). "Questions have been raised, though never addressed in Minnesota, as to whether statutes which limit a birth father's time to assert his claims are constitutional under due process criteria." *Id.* The Retention of Rights statute, MINN. STAT. § 259.261 (1992), was a minor issue in a 1993 case where the father was allowed to revoke his consent to termination of parental rights because the form he signed was contradictory. *In re A.M.P.*, 507 N.W.2d 616, 620-21 (Minn. Ct. App. 1993). In that case, the court ruled that filing with the county within the proper period satisfied the requirement for filing with the state under the Retention of Rights statute. *Id.* at 621.

152. See infra notes 260-63 and accompanying text.


married to the mother. If there is no presumed father, notice is given according to the adoption statutes. The adoption statutes require that notice be given to a putative father in six situations: (1) his name appears on the child's birth certificate; (2) he has substantially supported the child; (3) he was married to the mother 325 days before the child's birth or within ten days after the birth; (4) he is openly living with the mother or the child or both; (5) he was adjudicated to be the father; or (6) he has filed a notice of his intent to retain his parental rights according to the Retention of Rights statute. If a father does not fit one of these categories, then he is not entitled to notice of the adoption.

A putative father who is not entitled to notice under the Parentage Act or the adoption statutes may turn to the Retention of Rights statute. This statute allows a father who is not otherwise entitled to notice to file an affidavit of his intent to retain parental rights. The affidavit must be filed within ninety days of the birth of the child or within sixty days of the child's placement for adoption, whichever is sooner. If the affidavit is not filed, the father will not receive notice and his parental rights will be terminated. If the affidavit is filed, the mother then has sixty days to deny paternity and to file a petition challenging the father. The mother must prove that he is not the father in order for him to lose his rights. If the father is not cha-

156. Pursuant to Minn. Stat. § 257.55 (Supp. 1993), a man is presumed to be the biological father if: (1) he is or has been married to the mother, and the child is born during the marriage, or within 280 days after the marriage is terminated by death, annulment, declaration of invalidity, dissolution, or divorce, or after a decree of legal separation is entered by a court; (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 of vital statistics, (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; (4) he has received the child into his home as his own; (5) he and the child's mother acknowledged paternity under § 257.34 in writing and filed with the state registrar of vital statistics; (6) he is likely to be the father based on blood testing; (7) he and the mother executed a recognition of parentage under § 257.75 even though another man is presumed to be the father under this section; and (8) he and the mother executed a recognition of parentage under § 257.75 even though another man and the mother have also executed a recognition of parentage.

158. Id., subd. 1(2)(a)-(f).
159. Minn. Stat. § 259.261, subd. 1 (1992). The Retention of Rights statute is otherwise known as the "60/90 Day Statute."
160. Id.
161. Id.
162. Id.
163. Id., subd. 3.
lenged, his claim of paternity becomes conclusive evidence of his parenthood. 165

In summary, a father that is not entitled to notice under the Parentage Act or the adoption statutes must take the responsibility upon himself to file a notice of intent to retain parental rights. Moreover, in light of the four United States Supreme Court decisions, the law only protects those fathers who have “grasped” their opportunity interest in developing a relationship with their child. 166

The Retention of Rights statute has not resolved all of the problems associated with putative fathers. If a father does not know about the child, then he has no reason to file an affidavit. If the affidavit is not filed, the father’s parental rights will be terminated ninety days from the birth or sixty days from the placement, whichever is sooner. 167 Thus, the statute may cut off a putative father’s rights before he ever knows he has a child.

V. BALANCING THE INTERESTS

In finding a solution to the problems associated with the putative father, the father’s opportunity interest must be balanced against the rights and interests of the other parties involved in the adoption proceeding. These other parties include the child, the mother, and the state. 168 Since notifying the father often significantly delays the adoption, the interests must be balanced to achieve a workable solution for all of the parties involved. 169

The putative father who genuinely wants to parent his child and assume full custody should be given notice of the adoption so that he may “grasp” his opportunity to develop a relationship with the child before it is too late. However, that opportunity should be limited by the rights and needs of the other parties. First, because of the child’s need for early stability, 170 the opportunity should be limited in time by requiring the father to act promptly in making his decision. Second,
because of the child's need for parents who are fully committed to
caring for the child,\textsuperscript{171} the opportunity should be limited to fathers
who are willing to assume full custody of and full responsibility for the
child. Those putative fathers who merely want to veto the adoption
should not be allowed to prevent the adoption of the child.\textsuperscript{172} Third,
because of the safety needs of the mother and the child, special consid-
eration should be given to those situations where the father has a his-
tory of harmful behavior toward the mother or toward other children,
including a history of abuse, violence, rape, or incest.

A. \textit{The Interests}

Four parties have interests that must be considered and balanced in
order to find a solution to the problems associated with putative fa-
thers. These four parties are: the father, the child, the mother, and
the state.

1. \textit{The Interests of the Father}

Putative fathers should be notified early in the adoption process.
Although it is clear that the father's opportunity interest will only be
protected when it has been "grasped,"\textsuperscript{173} this opportunity should not
be taken away without at least providing the father with notice of his
potential loss and an opportunity to grasp his interest in taking on the
responsibilities and rights of fatherhood.\textsuperscript{174}

This requirement is derived from the elementary rule that the state
may not cut off people's constitutional . . . interests without letting
them know of its proposed action so that they may have an opportu-
nity to argue against the loss of their interests. If a father has a viable
opportunity interest in establishing a relationship with his child, the

\begin{footnotesize}
\begin{enumerate}
\item[171.] See infra note 177 and accompanying text.
\item[172.] When the father is allowed to veto an adoption with no requirement that he
assume custody, the mother is left raising the child by herself or the child is left linger-
ing in foster care. Birth fathers often interfere not because they want the child, but
because they want to prevent the birth mother from making adoption plans. Judith
Vincent, The DeBoer Adoption Case—Minnesota Style, (Minnesota State Bar Ass'n
Continuing Legal Education, New Developments in Family Law, November 1993)
(video 4 of 4).
\item[173.] See supra notes 76-79 and accompanying text (discussing Lehr and the current
constitutional standard).
\item[174.] See Elizabeth Buchanan, \textit{The Constitutional Rights of Unwed Fathers Before and After
Lehr v. Robertson}, 45 Ohio St. L.J. 313, 351, 353-56, 367 (1984); Hamilton, supra note 78,
at 953-58, 998-1000, 1008-09. "The opportunity to develop this liberty interest is obvi-
ously cut off if the father is not informed of his child's existence." Hamilton, supra at
988. Since the relationship between the father and child is critical, "the state may not
prevent the development of a custodial relationship by denying an unwed father an
opportunity to have custody . . . ." Buchanan, supra at 351-52.
\end{enumerate}
\end{footnotesize}
2. **The Child’s Interests**

Children need stable and secure relationships and environments in order to grow and develop fully. When a child is forced to move from one family to another, the change can be harmful to the child’s future development, with different consequences for children of different ages. When balancing the interests of all the parties, the child’s need for quick and permanent placement must be considered because the child is the most important party in the adoption proceeding.

3. **The Mother’s Interests**

Mothers also have rights and interests in the balance, the most important of which is the right to privacy. The right to privacy is a right to be free from governmental interference in child raising and

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176. Children have both physical and emotional needs, and their “primary emotional need is for permanence and stability.” Buchanan, *supra* note 174, at 364.

177. For a discussion of a child’s need for continuity and the implications of that need on the adoption process, see Joseph Goldstein et al., *Beyond the Best Interests of the Child* 31-35 (1973). See also Robert S. Rausch, Note, *Unwed Fathers and the Adoption Process*, 22 WM. & MARY L. REV. 85, 105-09, 114 (1980) (suggesting that the child’s psychological needs should play an integral role in the adoption process).


178. Adoption laws must take the child’s needs into consideration because, unfortunately, children have few constitutional or legal rights of their own. Responding to the adoption controversy, Dr. James Merikangas, Yale professor of psychiatry, stated that “[a]t present, although we have a Constitution and a Bill of Rights, it doesn’t apply to children. We need to have a constitutional amendment that specifically lists what rights children have.” Alison Young, *Emotional Cases Heat Up Debate On Rights, Support Grows To Give Children More Of A Say*, DETROIT FREE PRESS, Sept. 12, 1993, at 5F.

179. See, e.g., Rausch, *supra* note 177, at 123.
family related decisions such as education,\textsuperscript{180} contraception,\textsuperscript{181} and abortion.\textsuperscript{182}

Most recently, the right to privacy has been expanded to include a woman's right to make child bearing decisions regardless of the father's wishes.\textsuperscript{183} Since a woman has this privacy right in child bearing decisions, she should have a similar right in child rearing decisions.\textsuperscript{184} One fundamental child rearing decision is the placement of a child for adoption without interference from the father.

4. The State's Interests

When an adoption is contested, the state usually has an interest at stake as well.\textsuperscript{185} For instance, in \textit{Robert O. v. Russell K.},\textsuperscript{186} the State of New York had an interest in protecting the finality of the adoption when the adoption had been final for ten months and the child had lived with the adoptive parents for a year and a half.\textsuperscript{187} Other state interests recognized in the case included protecting the child's stability, protecting the mother's privacy right, and maintaining efficiency for the state.\textsuperscript{188} The \textit{Robert O.} concurrence analyzed each of the State's interests and concluded that although protecting the finality of the adoption, the stability of the child, and the privacy of the mother were legitimate State interests,\textsuperscript{189} maintaining efficient adoption proceedings was not a State interest worthy of protection.\textsuperscript{190}

\begin{itemize}
  \item \textsuperscript{180} Meyer v. Nebraska, 262 U.S. 390, 401 (1923).
  \item \textsuperscript{181} Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
  \item \textsuperscript{182} Roe v. Wade, 410 U.S. 113, 153-54 (1973).
  \item \textsuperscript{183} Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976); see also Hamilton, \textit{supra} note 78, at 990.
  \item \textsuperscript{184} See Raab, \textit{supra} note 169, at 278 (detailing additional arguments in support of the mother's right to make child rearing decisions).
  \item \textsuperscript{185} This section of this Comment addresses the state's interests in infant adoptions. The state plays a different role in stepparent adoptions because the state is validating an already existing family unit, as opposed to creating a new family unit. Buchanan, \textit{supra} note 174, at 364, 366. See \textit{supra} part II.B., the Supreme Court cases, for a discussion of the state's interests in stepparent adoption cases.
  \item \textsuperscript{186} 604 N.E.2d 99 (N.Y. 1992).
  \item \textsuperscript{187} See \textit{supra} notes 129-39 and accompanying text. In effect, the state protects the interests of the child and the adoptive parents because they have no rights of their own. See \textit{supra} notes 168, 178.
  \item \textsuperscript{188} \textit{Robert O.}, 604 N.E.2d at 104-05 (citing \textit{In re Jessica XX.}, 430 N.E.2d 896 (N.Y. 1981) (Cooke, Ch. J., dissenting); \textit{In re Christopher L.}, 450 N.Y.S.2d 269 (N.Y. Sup. Ct. 1982)).
  \item \textsuperscript{189} \textit{Robert O.}, 604 N.E.2d at 106-08. The Supreme Court reached the same conclusion in Lehr v. Robertson, 463 U.S. 248, 284 (1983). See \textit{supra} note 69 and accompanying text.
  \item \textsuperscript{190} \textit{Id.} at 108. This analysis comports with the United States Supreme Court's finding in \textit{Stanley v. Illinois} that efficiency was not a legitimate state interest where father's rights were concerned. 405 U.S. 645, 656 (1972). Although efficiency for the state may
\end{itemize}
B. Balancing the Interests

The father's right to notice of the adoption of his child is important and should be protected. In doing so, however, the interests of the father must be balanced against the interests of the child, the mother, and the state.

1. The Father and the Child

A conflict between the interests of the father and the interests of the child often arises when the father does not find out about the child until after the child has been placed for adoption.191 The father then challenges the adoption, but, as the challenge proceeds through the court system, the child remains with the adoptive parents, bonding with them and becoming a part of their family. Children need stability and permanence, and the state has an interest in ensuring that these needs are met.192 Because the child usually remains with the adoptive parents throughout the court proceedings, the father is precluded from establishing his own bonds with the child.193

The interests of the father and child, however, do not have to conflict.194 The child's need for stability can be balanced with the father's interests. First, the father should be notified of the adoption plans at the beginning of the adoption process so that any chance of conflict can be addressed early in the proceedings.195 Second, the father's op-

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191. This was the case in In re B.G.C., 496 N.W.2d 239 (Iowa 1992) (discussed supra part III.C). See also Robert O. v. Russell K., 604 N.E.2d 99 (discussed supra notes 129-39 and accompanying text).

192. See supra notes 176-78 and accompanying text. The Robert O. court indicated that the state of New York had a legitimate interest in protecting the finality of adoptions.

193. In effect, the father cannot win. See Zinman, supra note 89 at 986-89 (stating that courts are often reluctant to deny adoption and grant custody to a putative father for fear that removing the child from the adoptive parents will traumatize the child).

194. Id. at 996. The responsible father's rights and the child's best interests conflict only after the state grants temporary custody to the adoptive family and allows the child to become attached to them. Id. Before the child is placed for adoption, the state's only interest is in providing a home for the child, and in doing so quickly and efficiently so that the child will have a stable environment. At this point, before the actual placement, the father's interest in raising his child is equal to, if not greater than, the state's interest in providing a home. Id. Zinman recommends that temporary custody should be granted to the father while the case is pending and that courts need to expedite the adjudication of putative fathers' rights. Id.

195. "Since courts are generally reluctant to remove a child from an adoptive home once the child is placed, the time to protect the putative father's due process rights is prior to an adoption placement." Dapolito, supra note 79, at 982. With the growing acceptance of nontraditional families and the increasing numbers of putative fathers attempting to exercise their parental rights, the father's interest must be handled efficiently at the beginning of the adoption proceedings. Id. at 983.
portunity to develop a relationship with the child should be limited in time and in extent.

The first limitation, the limitation in time, has been recognized in several important cases. Lehr was the first Supreme Court decision to recognize the need for prompt action. The Court found that Lehr had waited too long, even though his daughter was only two years old. New York and California both require “prompt” action by a putative father, as evidenced by the New York Appellate Court decision in Raquel Marie X. II and by the California Supreme Court decision in Kelsey S. Minnesota also requires prompt action in the Retention of Rights statute, which requires fathers who are not entitled to notice to act within sixty days of placement or ninety days of the child’s birth, whichever is sooner. The Uniform Adoption Act would also require a father to act promptly once he either knows or should know of the child.

The second limitation, the limitation in extent, would limit the opportunity to those fathers who are willing and able to assume legal and physical custody of the child. This requirement ensures that the child’s needs for stability and commitment are met. The custody requirement was first articulated in Quilloin v. Walcott, where the Court refused to protect Quilloin’s parental rights because he only sought visitation rights, not custody of the child. New York and California also require that the father seek custody of the child and not merely seek to veto the adoption. Finally, the Uniform Adoption Act would require a genuinely thwarted father to be willing and able to assume legal and physical custody of a child.

In summary, the interests of the father and the child can be balanced by ensuring that the father receives notice of the adoption, but also by requiring the father to act promptly and be willing and able to assume custody of the child. The father will then have a chance to grasp his opportunity interest, and the child’s final placement can become permanent as quickly as possible.

196. See supra notes 63-79 and accompanying text.
201. Id., subd. 1; see also supra notes 159-65 and accompanying text.
204. Id. at 256; see supra notes 43-44 and accompanying text.
205. See supra notes 128, 147 and accompanying text.
2. The Father and the Mother

The mother has an advantage because she can refuse to inform the putative father of the pregnancy and she can refuse to provide the name of the father to those who are facilitating the adoption. In these situations, the father will never have an opportunity to grasp unless he has a legal right to notice.

On the one hand, some courts have expressed a belief that the mother's right to privacy in adoption matters should be protected so that she is the one who decides whether or not the putative father will be notified. On the other hand, some commentators argue that the mother's privacy right should be balanced with the father's opportunity interest. When balanced, these interests do not necessarily need to conflict. Instead, they should be viewed as two ways to serve the child's best interests. The child's interests may be best served by a caring father who genuinely wants to raise his child. A court should be able to take the father into consideration and weigh all the options for the child.

Therefore, unless there are exceptional circumstances, the mother should not be able to unilaterally cut off the putative father's opportunity interest. He should be given notice of the adoption and a limited chance to grasp his opportunity interest. In some exceptional

207. See B.G.C., 496 N.W.2d 239, 241 (Iowa 1992); Robert O. v. Russell K., 604 N.E.2d 99, 100 (N.Y. 1992). The Robert O. concurrence opined that "no law could, or should, be written to prevent women such as [the mother] from making the very personal and human choice to withhold information about their pregnancies from the men whom they know are the biological fathers." Robert O., 604 N.E.2d at 108 (Titone, J. concurring). See also Lehr v. Robertson, 463 U.S. 248, 264 n.21 (1983). The Lehr Court recognized the privacy interests of unwed mothers by referencing Roe v. Norton, 422 U.S. 391 (1975). In Norton, the mother challenged a Connecticut statute requiring her to name the father of her children in order to receive Aid to Families with Dependent Children (AFDC). Id. at 392. The state Legislature, however, amended the statute while the case was on appeal, so the Supreme Court did not make a ruling on the mother's right to privacy. Id. at 393-94.

208. See, e.g., Hamilton, supra note 78, at 990-91; Raab, supra note 169, at 278-79; Rausch, supra note 177, at 122-30.

209. Raab, supra note 168, at 279.

210. Id.

211. The New York Appellate Court determined in In re Raquel Marie X. II. that a mother should not be able to unilaterally determine the rights of the putative father. 559 N.E.2d 418, 426 (N.Y. 1990). For a complete discussion of the case, see supra notes 116-28 and accompanying text.

212. An adoption statute must consider who will bear the burden of establishing his interest. Statutes that require notice to be given to a father place a burden on the mother or the facilitator of the adoption to identify the father and to seek him out so that he may be notified. Statutes that do not give notice to a father effectively place a burden on the father to find out whether a child was conceived during his relationship with a woman. This burden is sometimes legitimate because the Supreme Court has stated in Lehr that rights only come with responsibilities. Lehr v. Robertson, 463 U.S.
circumstances, however, the physical safety and emotional well-being of the mother and child may be at risk. For instance, when the father has a history of abuse or rape. In these situations, the mother’s privacy rights should outweigh the father’s right to notice and the adoption should be allowed to proceed without his involvement.213

3. The Father and the State

Once an adoption is finalized, the state’s interest in finalizing adoptions may outweigh the rights of putative fathers.214 Nevertheless, if the state would notify the father at the beginning of the process, then the father could make the choice to act promptly to “grasp” his opportunity interest before the adoption is finalized. His opportunity interest would then be protected and the problem would be resolved before it was too late. Since “grasping the opportunity interest” is critical to the father’s rights, the state should not be able to deny the father a chance to grasp this opportunity.215

VI. LEGISLATIVE SOLUTIONS

A legislative solution is needed to achieve a fair balance of the interests of all of the parties. While several states have case law that governs adoption proceedings, cases arise by chance and take a long time to resolve. A statute, on the other hand, can be enacted quickly and resolve many potential disputes at one time. A few states have enacted statutes that achieve a good balance between the parties. The Indiana statute provides an excellent example of such a statute. The National Council of Commissioners on Uniform State Laws has also drafted a Uniform Adoption Act that, if promulgated, would create some uniformity among the various state adoption laws.

213. See, e.g., N.M. STAT. ANN. § 32A-5-19(c) (Michie 1989) (consent not required from biological father if child is conceived by rape or incest); see also UNIF. ADOPTION ACT § 3-704 (a)(3), at 132 (Proposed Draft 1993) (allowing courts to terminate parental rights of alleged parents who have been convicted of a crime of violence or of violating a restraining or protective order); Id. § 3-704 (b)(3) (allowing courts to terminate the parental rights of a parent or genuinely thwarted father if there is a risk of substantial physical or psychological harm to the child because of the circumstances of the child’s conception, the behavior of the father during the mother’s pregnancy or after the child’s birth, or the father’s behavior towards other children).

214. See Robert O., 604 N.E.2d at 101 (allowing child to stay with adoptive parents because the adoption had been final for ten months); Raquel Marie X. I, 545 N.Y.S.2d at 382-83 (giving father custody because he challenged the adoption before it was final).

215. Buchanan, supra note 174, at 351-52. "[T]he state must at least give all biological parents equal opportunities to establish and maintain protected relationships with their children." Id. at 352.
A. Indiana Statute Section 31-3-1-6.1

The best way to protect both the father and the child is to give the father notice of the adoption and to determine his intentions toward his child as early as possible. To that end, Indiana has enacted an Adoption Procedures statute which effectively balances interests of the father, the mother, and the child. First, the father must take some responsibility by registering with the putative father registry. If he does not register, and if the mother does not disclose the identity or address of the father, then the putative father is not entitled to notice of the adoption. Second, if the father has registered, then when the mother names him as the father, he is entitled to notice of the adoption. Third, if he wishes to contest the adoption, he must file either a motion to contest or a paternity action within thirty days. In addition, if he files a motion to contest, he must appear at the hearing to...

216. If the father has registered with the putative father registry, then he is entitled to actual notice. Ind. Code § 31-3-1-6.1(c) (Supp. 1993).
217. Id. § 31-3-1-6.1(h).
218. The Indiana Codes states:

Sec. 6.1 (b) If the mother has provided an attorney or agency arranging an adoption with the name and address of a putative father who has:
(1) failed or refused to consent to the adoption of the child; or
(2) not had the parent-child relationship terminated under IC 31-6-5;
then the putative father is entitled to receive notice of the adoption proceedings under Rule 4.1 of the Indiana Rules of Trial Procedure.

Sec. 6.1(f) Notice of the adoption proceeding shall be given to the putative father who is entitled to notice under subsection (b) or (c) in substantially the following form:

NOTICE TO NAMED FATHER
____ (putative father’s name), who has been named the father of the child born to ____ (mother’s name) on ____ (date), or who claims to be the father of the child born to ____ (mother’s name) on ____ (date), is notified that a petition for adoption of the child was filed in the office of the clerk of ____ court, ____ (address of the court).

If ____ (putative father’s name) wishes to contest the adoption of the child he must file a motion to contest the adoption in accordance with IC 31-3-1-6.3 in the above named court, or a paternity action under IC 31-6-6.1 within thirty (30) days after the date of service of this notice.

If ____ (putative father’s name)
(1) does not file:
(A) a motion to contest the adoption; or
(B) a paternity action under IC 31-6-6.1; within thirty (30) days after service of this notice; or
(2) after filing a paternity action under IC 31-6-6.1 fails to establish paternity within a reasonable period as determined by the paternity court under IC 31-6-6.1-2.2; the above named court will hear and determine the petition for adoption. His consent will be irrevocably implied and he will lose his right to contest either the adoption or the validity of his implied consent to the adoption. He will lose his right to establish his paternity of the child under IC 31-6-6.1.

Id. § 31-3-1-6.1(f).

The second form for giving notice is available for an unnamed father whose child was conceived outside of the State of Indiana. This form is essentially the same, however, it allows for notice by publication. Id. § 31-3-1-6.1(e).
contest the adoption, and if he files a paternity action, he must establish paternity in the action.\textsuperscript{219} If the father does not act or does not follow through by appearing at the hearing to contest the adoption or the hearing to establish his paternity, his inaction is considered an irrevocable consent to the adoption.\textsuperscript{220}

Indiana's statute follows the Supreme Court's test of requiring a putative father to "grasp his opportunity interest" by requiring the father to take actions evidencing his responsibility toward the child.\textsuperscript{221} He must first sign the registry, then he must file a motion, and finally, he must appear at a hearing and successfully contest the adoption or establish paternity.

While the statute protects the putative father's opportunity interest by giving him notice, it also limits his interest by requiring him to grasp it promptly.\textsuperscript{222} A father must sign the registry before the adoption begins, and then he must make a decision within thirty days of receiving notice.\textsuperscript{223} This requirement protects the father by giving him thirty days to take action. It also protects the child because disputes will be dealt with quickly, thus ensuring the child's need for early permanence.

The statute does not require that the father be willing to assume custody, but it does provide that if the father challenges the adoption, by either a motion to contest or by a paternity action, he must actually follow through and appear at the hearing to contest the adoption or establish paternity.\textsuperscript{224} This requirement of legal action demonstrates a significant step toward ensuring that the father is genuinely interested in raising the child and not merely trying to veto the adoption.

\textsuperscript{219} \textit{Id.} § 31-3-1-6.1(m).


\textsuperscript{221} \textit{Lehr v. Robertson}, 463 U.S. 248, 262 (1983); see also \textit{supra} notes 73-79 and accompanying text.

\textsuperscript{222} See \textit{supra} notes 126, 146 and accompanying text (discussing the New York and California "prompt" requirements).

\textsuperscript{223} \textit{Ind. Code} § 31-3-1-6.1(f); see \textit{supra} note 218 for the language of the statute.

\textsuperscript{224} \textit{Id.} § 31-3-1-6.1(m); see \textit{supra} note 219 for the language of the statute.
B. The Uniform Adoption Act

The National Conference of Commissioners on Uniform State Laws has drafted a new Uniform Adoption Act in response to the need for adoption law reform.\textsuperscript{225} The Act incorporates the rights of fathers established in the four Supreme Court decisions on adoption\textsuperscript{226} and addresses the unresolved constitutional issues of infants and thwarted fathers.\textsuperscript{227} The rights of fathers arise in three different sections: Persons Whose Consent to Adoption is Required,\textsuperscript{228} Notice of Pendency of Proceeding,\textsuperscript{229} and Grounds for Terminating Relationship.\textsuperscript{230}

In section 2-401, Persons Whose Consent to Adoption is Required, consent is required from several categories of putative fathers, including those who were married to the mother, those who have legally established paternity, and those who have actually developed relationships with their children.\textsuperscript{231} In section 2-402, consent is not required of those putative fathers whose parental rights have been terminated or who have failed to respond to notice within thirty days.\textsuperscript{232}

In section 3-401, Notice of Pendency of Proceeding, notice must be served on putative fathers whose consent is required, who claim to be fathers, or who are named as the father or possible father.\textsuperscript{233} Under

\begin{itemize}
\item \textsuperscript{225} The Conference began work on the Act in 1989 and finished in 1994. UNIF. ADOPTION ACT prefatory note at 2, 4 (Proposed Draft 1993). Previous attempts to unify state laws were unsuccessful. \textit{Id.} at 1. The original Uniform Adoption Act of 1953 and its revisions in 1969 and 1971 were only enacted by a few states, and the American Bar Association worked on but never approved a Model State Adoption Act in the 1980s. \textit{Id.} The Conference approved the draft in August 1994.
\item \textsuperscript{226} See supra part II.B. In addition, a new act was needed to address the changes in adoption practices that are not yet reflected in many state laws, such as the differences between agency placements and direct placements, the newly recognized need for medical and background information, and guidelines on what types of payments are lawful and unlawful. UNIF. ADOPTION ACT, prefatory note at 1 (Proposed Draft 1993).
\item \textsuperscript{227} See supra parts III.A. and III.B.
\item \textsuperscript{228} UNIF. ADOPTION ACT § 2-401, at 63 (Proposed Draft 1993).
\item \textsuperscript{229} \textit{Id.} § 3-401, at 112; § 3-404, at 116.
\item \textsuperscript{230} \textit{Id.} § 3-704, at 131. In most cases, termination of parental rights is not usually a problem because the father either does not respond to notice, does not file a claim of paternity, or is willing to sign a disclaimer. \textit{Id.} § 3-704 commentary at 138.
\item \textsuperscript{231} Specifically, consent is required from any man who: (1) was married to the mother when the child was born or 300 days before the child’s birth; (2) “attempted” to marry the mother in apparent compliance with the law before the child’s birth; (3) acknowledged paternity under the state’s law or has been judicially determined to be the father if the father has also either (a) provided support within his financial means and regularly visited or communicated with the child or (b) married or attempted to marry the mother after the child’s birth; and (4) has received the minor into his home and openly held out the minor as his child. \textit{Id.} § 2-401(a)(1)(i)-(iv), at 63-64.
\item \textsuperscript{232} \textit{Id.} § 2-402(a)(1), (7), at 67-68.
\item \textsuperscript{233} UNIF. ADOPTION ACT § 3-401(a)(1), (3), at 112-13 (Proposed Draft 1993). Others that should be served include, but are not limited to an agency whose consent is required and another individual who has custody of the child or who has a court-ordered right of visitation or communication with the child. \textit{Id.} § 3-401(a)(2), (4).
\end{itemize}
section 3-404, unknown fathers are entitled to an investigation as to their identity and whereabouts in order to attempt to give them notice. These two sections protect the father's opportunity to know about the adoption plans. At the same time, these sections protect the mother's privacy because she is not required to name the father. If the father knows about the child, he has ample time to come forward and assume parental responsibilities. If, however, the father has been genuinely thwarted, he will be protected by section 3-704 on termination of parental rights.

Section 3-704, Grounds for Terminating Relationship, divides fathers into two groups based on the grounds for terminating parental relationships: 1) those fathers who knew or should have known about the child, and 2) those fathers who were genuinely thwarted. The distinction is helpful because most fathers fall into the first group and their rights can be terminated if they have not taken specific action to assume responsibility for the child. This includes pre-birth support from fathers who know or should know about the pregnancy. For the second group of fathers, the few who are genuinely thwarted, the balance tips in their favor. Genuinely thwarted fathers will gain cus-

234. An inquiry must be made and must include: (1) whether the mother was married at the probable time of conception or later; (2) whether the mother was cohabitating with a male at the probable time of conception; (3) whether the mother has received payments or promises of support for the child or for her pregnancy; (4) whether the mother has named any father on the birth certificate or in applying for public assistance; and (5) whether any individual has acknowledged or claimed paternity of the child. Id. § 3-404(b)(1)-(5), at 116-17.

235. The drafters of the Act believe that women often have excellent reasons for not naming the father and that the mother's right to remain silent outweighs the father's right to notice. Id. § 3-404 commentary at 118.

236. Id.

237. A father may be genuinely thwarted in several ways: the mother may not tell him about the child; he may know about the child but not about the mother's plans to place the child for adoption; he may attempt to provide support for the child but the mother may refuse to allow him to do so; or he may be unable to provide support because of poverty, illness, or incarceration. Id. § 2-401 commentary at 66; § 3-704 commentary at 136.

238. UNIF. ADOPTION ACT § 3-704, at 131 (Proposed Draft 1993). The specific actions that should be taken by the father are: (1) payment of reasonable prenatal, natal, and postnatal expenses in accordance with his financial means; (2) reasonable and consistent payments for the support of the child within his financial means; (3) regular visits with the child; and (4) if the child has been in the custody of someone other than the mother, the father must have manifested ability and willingness to assume legal and physical custody of the child. Id. § 3-704(a)(1)(i)-(iv), at 131.

239. Id. § 3-704, at 131.

240. If the individual who is the subject of the petition to terminate proves that he or she had good cause for not complying with the requirements of subsections (a)(1) or (2) [fathers who know or should know about a child under six months and fathers of children over six months], and termination is not justified on a ground stated in subsection (a)(3) through (5) [harmful behavior, not the biological father, and grounds that may be stated in individual state
tody of the child as long as 1) they are willing and able to promptly assume legal and physical custody;241 2) there is no risk of substantial harm to the child;242 and 3) the change would not be detrimental to the child.243

The specific requirements placed on the first group of fathers, those who know or should know about the child, are in accord with the Supreme Court's requirement that fathers "grasp their opportunity interest."244 Since these fathers know about the child, they have the opportunity to choose whether or not to grasp their interest. The pre-birth requirement is also significant because a father must grasp his opportunity "promptly" if he knows or should know about the mother's pregnancy. These requirements successfully balance the father's interest with the child's need for a permanent home.

The Act's distinction of the rare but genuinely thwarted father, the second group of fathers, is also important. In the earlier notice section, by requiring an inquiry into an unnamed father's identity, the act

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241. Id. § 3-704(b) (3), at 133. This requirement was based on the New York and California court rulings requiring "prompt" action and an ability and willingness to assume custody rather than merely trying to veto the adoption. Id. § 3-704 commentary at 137.

242. Id. § 3-704(b) (3), at 133. The court may terminate the parental relationship if it is in the best interest of the minor and if there is clear and convincing evidence that placing the minor in the individual's legal and physical custody would pose a risk of substantial harm to the physical or psychological well-being of the minor [because of the circumstances of the minor's conception, the individual's behavior during the mother's pregnancy or since the minor's birth, or the individual's behavior with respect to other minors, indicates that the individual is unfit to maintain a relationship of parent and child with the minor.]

Id. § 3-704(b)(3), at 133.

243. Id. § 3-704(b)(4), at 133. Parental rights may be terminated if failure to terminate would be detrimental to the minor.

In determining detriment, the court shall consider any relevant factor, including the individual's efforts to obtain or maintain legal and physical custody of the minor, the individual's ability to pay for the minor's support, the age and custodial environment of the minor before being placed for adoption, the quality of any previous relationship between the individual and the minor and between the individual and any other children, the duration and suitability of the minor's present custodial environment, the effect of a change of physical custody on the minor, and any recommendation of the minor's guardian ad litem.

Unif. Adoption Act § 3-704(b)(4), at 132-33 (Proposed Draft 1993). This fourth section is an attempt to balance the needs of a child who has already been living with prospective adoptive parents for some time with the interests of a father who has genuinely been thwarted of his opportunity to establish a relationship with his child. Id. § 3-704 commentary at 138-39.

recognizes the need to protect his opportunity interest even if the mother does not want to identify him.245 In the Grounds for Termination section, by granting custody to the genuinely thwarted father who does appear, the Act encourages the other parties to notify the father as soon as possible, rather than merely hoping he does not appear later.

The Act also attempts to balance the father’s interests with the child’s needs for a stable and permanent environment by requiring that the genuinely thwarted father be able and willing to assume custody, as in New York and California, and by considering the detrimental effects that a change of custody might have on the child.

Finally, the father’s rights are limited by the safety needs of the mother and the child in two provisions.246 First, both knowing fathers and thwarted fathers will lose their parental rights if they have been convicted of a violent crime or if they have violated a restraining or protective order.247 Second, the thwarted father will lose parental rights if there is a risk of substantial harm to the child because of situations such as rape or incest or other harm to the mother or to any other child.248

VII. MINNESOTA’S 1994 LEGISLATION

In 1994, the Legislature amended the adoption laws in Minnesota.249 The new laws affect many areas of the adoption process, such as adoption studies, birth parent histories, consents, payments, advertising, and significant regulations for both agencies and direct adoptive placements.250 A new statute specifically on Direct Adoptive Placements was added251 with two subdivisions directly affecting putative fathers.252

A. Notice for Fathers: Protecting Mothers and Children from Risk of Harm

Subdivision three of the 1994 statute requires a custody order from a district court before a child is placed with adoptive parents.253 At this

246. UNIF. ADOPTION ACT § 3-704 commentary at 136 (Proposed Draft 1993).
247. Id. § 3-704(a)(3) commentary at 132.
248. Id. § 3-704(b)(3) commentary at 133.
250. For example, consent may not be made until 72 hours after birth and must be within 60 days after placement. Id. § 15, subd. 2a, 1994 MINN. LAWS 1879. This provision amends MINN. STAT. § 259.24.
252. Id., subsd. 3, 8.
253. Id., subd. 3(a).
point in the process, both parents must sign affidavits indicating their support of the motion.\textsuperscript{254} If there is no affidavit from the birth father, the birth mother must sign an affidavit that "describes her good faith efforts or efforts made on her behalf to identify and locate the birth father for purposes of securing his consent."\textsuperscript{255}

Exceptions are allowed if there is a risk of harm to the mother or child. A mother may instead submit an affidavit stating that she is exempt from making efforts to identify and locate the father if,

1. the child was conceived as the result of incest or rape;
2. efforts to locate... could result in physical harm to the mother or child; or
3. efforts to locate... could reasonably result in severe emotional distress of the birth mother or child.\textsuperscript{256}

The notice language does not require the mother to identify and locate the father, but only to state the efforts that she made.\textsuperscript{257} The intent of the language is to encourage the mother to notify the father so that more fathers can be involved in the adoption process.\textsuperscript{258} The father's involvement not only lets the mother know early on if the father will object to the adoption, but also helps in the collection of birth parent history.\textsuperscript{259}

No new categories of father's rights are created.\textsuperscript{260} If the father is not already entitled to notice under the existing notice statutes,\textsuperscript{261} then he is governed by the Retention of Rights statute\textsuperscript{262} which requires him to find out about the child on his own and file an affidavit of his intent to retain parental rights.\textsuperscript{263}

In summary, genuinely thwarted fathers in Minnesota still do not have statutory rights to notice. With the new statute, it is hoped that more mothers will be encouraged to give them notice. However, if it does not work out this way, Minnesota should seriously consider requiring notice to the genuinely thwarted father under a provision similar to that of the Uniform Adoption Act.

\textsuperscript{254} Id., subd. 3(a)(2).
\textsuperscript{255} Id., subd. 3(b). (emphasis added).
\textsuperscript{256} Act of Aug. 1, 1994, ch. 631, § 22, subd. 3(b)(1)-(3), 1994 MINN. LAWS 1882.
\textsuperscript{257} The language is actually ambiguous and open to interpretation by the courts. Telephone interview with LauraSue Schlatter, Assistant Attorney General, Office of the Attorney General (June 10, 1994).
\textsuperscript{258} Id.
\textsuperscript{259} Id.
\textsuperscript{260} Id.
\textsuperscript{262} MINN. STAT. § 259.261 (1992). This statute is often referred to as the "60/90 Day Statute."
\textsuperscript{263} Id. See supra notes 159-65 and accompanying text.
The new statute also successfully balances the father's interests with the safety needs of the mother and child. The putative father need not receive notice in cases of incest and rape, physical harm, or severe emotional distress.

B. Limitation on Time to Act

Subdivision eight to the 1994 statute limits the father's rights to consent to or veto the adoption. If the father's consent is required, then he must consent to or veto the adoption within sixty days of personal service, otherwise he is deemed to have consented to the adoption.\(^{264}\)

The time limitation has a foundation in the United States Supreme Court decisions, the New York and California decisions, the Indiana statute, and the Uniform Adoption Act. The *Quilloin* Court ruled that eleven years was too long to wait to seek visitation,\(^{265}\) and the *Lehr* court ruled that two years was too long to wait to file an action with the court.\(^{266}\) New York and California both require the putative father to act "promptly" once he knows about the adoption,\(^{267}\) and New York has further ruled that promptness is measured in terms of the child's birth, not in terms of the father's awareness of the child.\(^{268}\) The Indiana statute requires the father to act within thirty days of receiving notice,\(^{269}\) and the Uniform Adoption Act does not require consent from a father who does not respond within thirty days of notice.\(^{270}\) In summary, the sixty day time limitation on the father is consistent with these other cases and statutes. In addition, the time limit is necessary to balance the father's rights with the needs of the child for early permanence and stability.

C. Limitation Requiring Custody and Paternity

The Minnesota statute still does not require the birth father to be willing and able to assume custody of the child or to establish paternity

\(^{264}\) Act of Aug. 1, 1994, ch. 631, § 22, subd. 8(b), 1994 Minn. Laws 1886. The 60 day limit works together with the Retention of Rights statute, Minn. Stat. § 259.261, and the Preadoption Residence statute, Minn. Stat. § 259.27, subd. 4. The Retention of Rights statute gives the father 60 days from placement or 90 days from birth, whichever is sooner, to file with the state. The Preadoption Residency statute requires the child to reside in the adoptive home for three months before the adoption can be finalized. See supra note 85.


\(^{267}\) See supra notes 126, 146 and accompanying text.


\(^{269}\) Ind. Code § 31-3-1-6.1(m). See supra note 219 and accompanying text.

of the child. As a result, the father can veto the adoption without assuming any responsibility for the child, and the mother who wanted to place the child for adoption may end up raising the child herself. The interests of the father must be balanced with the rights and needs of the mother and child. Minnesota should further amend the current statutes to require the father to both 1) be willing and able to assume custody of the child and 2) establish paternity, in order to veto an adoption.

A willingness to assume custody of the child is an essential requirement because it ensures that the father is genuinely interested in parenting the child, not merely trying to harass the mother or veto the adoption without any intentions of parenting the child.

The custody requirement has a foundation in the decisions of the Supreme Court and in the various state laws. The Supreme Court recognized the custody requirement in *Quilloin* when it denied Quilloin's petition because he only requested visitation rights, not custody of the child. New York and California both require that the father be willing and able to assume custody of the child, not merely trying to veto the adoption. Indiana gives the father an option to either contest the adoption or to establish paternity. Finally, in the cases of a genuinely thwarted father, the Uniform Adoption Act would require the father to be willing and able to promptly assume legal and physical custody in order to veto the adoption.

Requiring the father to establish paternity is beneficial to both the child and the father. This requirement protects the child by ensuring that there is a legal father who will be responsible for the child’s support in the future. This requirement also protects the father because he is creating a legal relationship with his child and his constitutional rights to that relationship will then be protected.

VIII. Conclusion

Under the United States Constitution, the putative father’s rights are protected when he assumes the duties of parenthood. In an infant adoption, however, the father’s rights must also be balanced with the rights and needs of the mother, the child, and the state. Several states

273. *IND. CODE* § 31-3-1-6.1(m). See supra note 218 and accompanying text.
274. The genuinely thwarted father is the rare father who genuinely did not know about the child or was unable to support the child. The custody requirement is in UNIF. ADOPTION ACT § 3-704(b)(1) at 133. See supra notes 237, 241 and accompanying text.
275. See supra notes 76-79 and accompanying text (discussing the current constitutional standard protecting a father who has "grasped" his opportunity interest).
have attempted to strike the proper balance between these rights, and there are four elements to an adoption law that achieves a good balance. First, the father should be notified of the proceedings in the beginning of the adoption process so that he has an opportunity to take on his paternal duties if he is genuinely interested in doing so. Second, fathers should be required to act promptly, with a time limit on their right to veto the adoption, in order to protect the child’s need for early stability. Third, the father should be required to be willing and able to assume custody of the child in order to ensure that he is genuinely interested in parenting the child. Fourth, the state may choose to not provide notice to fathers if there is a risk of harm to the mother or child.

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