The Constitutional Rights of Putative Fathers Recognized in Louisiana's New Children's Code

Teanna West Neskora

Repository Citation
THE CONSTITUTIONAL RIGHTS OF PUTATIVE FATHERS RECOGNIZED IN LOUISIANA'S NEW CHILDREN'S CODE

I. INTRODUCTION

In June, 1991, the Louisiana legislature adopted a children's code. The code is the result of a compilation of the existing laws that affect children in Louisiana. However, a compilation of existing statutes would be incomplete if the statutes did not accurately reflect settled jurisprudence, particularly supreme court decisions that call into question the continued viability of existing statutes. Therefore, the Children's Code Committee, the group responsible for drafting the code, revised the statutory scheme to take into account areas of the law where the courts had spoken but the existing statutes had not been amended to reflect these opinions.

In recent years, both federal and state supreme court decisions have recognized the right of the biological father of an illegitimate child to oppose the adoption of his child, if the father has admitted his paternity and assumed parental responsibility. Yet Louisiana's statutes on surrender of parental rights and adoption had not been amended to reflect these decisions. Accordingly, as part of the effort to insure that the Children's Code reflected both current statutory law and current judicial decisions, the Children's Code Committee incorporated the mandates of the courts regarding the constitutional rights of putative fathers and revised the statutory scheme governing the voluntary surrender of parental rights. Without these amendments, many adoptions in Louisiana would be susceptible to constitutional attack.

Copyright 1992, by LOUISIANA LAW REVIEW.

1. The Children's Code was passed as 1991 La. Acts No. 235 and was approved by the Governor on July 2, 1991. The effect of the code, in addition to containing new provisions, is to repeal articles 1-128 of the Code of Juvenile Procedure and numerous statutes in Title 9 of the Revised Statutes. The sections regulating surrender and adoption that have been repealed are 9:401-441.

2. Prior to the adoption of the Children's Code, 89 separate titles and codes regulated the lives of Louisiana's children. This lack of organization led to ambiguity, conflicting statutes, and a burdensome system of laws that was not easily accessible. The Children's Code Committee, a group committed to improving the quality and efficiency of the legal system that affects children, remedied these problems by compiling all of the existing statutes into a single source in addition to classifying and clarifying them.

3. A putative father is defined as the alleged or reputed father of an illegitimate child. Black's Law Dictionary 1237 (6th ed. 1990).

4. The articles on Surrender of Parental Rights are located in Title XI of the Children's Code and became effective on January 1, 1992.
The focus of this comment is the constitutionally recognized rights of the putative father and Louisiana's recent legislative revision recognizing these rights. To understand the necessity for the recent revision of the surrender and adoption articles, section II chronicles the historical development of the rights of putative fathers as recognized in major United States Supreme Court decisions. Then, section III explains Louisiana law as it existed prior to the statutory revision. The significance of the recent legislative enactments is apparent only when contrasted to the law before the revision. In section IV, the Louisiana Supreme Court's decision in *In re Adoption of B.G.S.* is examined. The court held in this opinion that the method of terminating an unwed father's rights provided by the existing statute was unconstitutional. In section V, the new surrender statutes that recognize the rights of the putative father are analyzed and explained in an effort to assist those practicing in the field of adoption. In spite of the comprehensiveness of this statutory scheme, drafted to protect the constitutional rights of the natural father, there are concerns left unresolved. Section VI of this comment addresses the issues that arise when the mother refuses to identify the father and thus denies him notice of any adoption proceeding.

II. United States Supreme Court Decisions

During the past twenty years, the United States Supreme Court has on four occasions examined the extent to which a natural father's biological relationship with his illegitimate child receives constitutional protection. In the first of these cases, *Stanley v. Illinois,* the Court held that a custodial putative father could not be deprived of the custody of his children unless he was first found to be an unfit parent. Stanley lived with and cared for his children intermittently throughout their lives, and there was nothing in the record to indicate that he had been a neglectful father. The Illinois statute, struck down by the Court, allowed the state to remove an illegitimate child from his father's custody and place him in a foster home upon the death of his mother, without any proceeding to first determine whether the father was a competent parent. Under this statute, the nature of the relationship between the father and the child was irrelevant; upon the death of the mother, the child automatically became a ward of the state. The Court held that the putative father had a constitutionally protected privacy interest in the children he had "sired and raised," and that the removal of the children from his custody without first giving him an opportunity to present evidence regarding his fitness as a parent violated his right to due process.

---

5. 556 So. 2d 545 (La. 1990).
7. Id. at 651, 92 S. Ct. at 1212.
The Court's subsequent decision in *Quilloin v. Walcott* significantly restricted the breadth of the holding in *Stanley*. In *Stanley*, the Court explained that the state's interest in caring for the children was "de minimis" if the father was in fact a fit parent. When, however, the countervailing interests are more substantial, as they were in *Quilloin*, the degree of protection that a state must afford to the rights of an unwed father may not be the same.

Quilloin had never lived with or had custody of his son, nor had he formally legitimated the child. He had, however, informally acknowledged the child and established a relationship with the child consisting of sporadic visits and support. In this case the husband of the mother, with whom the eleven-year-old child had lived for the past eight years of his life, sought to adopt the child, and the child expressed his desire to be adopted by his stepfather. The Court found these countervailing interests substantial enough to uphold the constitutionality of the Georgia statute that authorized the adoption of an illegitimate child over the objection of the biological father who had not been found to be an unfit parent.

At the adoption proceeding the relevant question was not whether the putative father was a fit parent; rather, the lower court inquired whether the adoption was in the best interest of the child. The Supreme Court found that Quilloin's procedural due process rights had been fully satisfied by the opportunity to be heard on his claims concerning the child's care and custody, and that the application of the "best interests of the child" standard did not violate his substantive due process rights.

In *Caban v. Mohammed*, the Court further clarified the nature of the protection the state must afford the natural father of an illegitimate child. The challenged New York statute allowed the mother of an illegitimate child to veto the child's adoption simply by withholding her consent. An unwed biological father, however, could not veto the adoption by withholding his consent, and an adoption of his child could be granted over his objection if the court determined that the adoption would be in the best interest of the child. Even though the statute in question was similar to the one that had been upheld in *Quilloin*, the Court held that such a discriminatory gender-based statute resulted in

---

11. The Georgia statute in question gave Quilloin the right to veto the adoption if he had formally legitimated the child prior to the filing of the petition for adoption.
13. Id. at 254, 98 S. Ct. at 554.
15. Id. at 386-87, 99 S. Ct. at 1765.
a denial of equal protection to a father who had an established rela-
tionship with his child.\textsuperscript{16}

The facts of \textit{Caban}, however, were more compelling than those in \textit{Quilloin}. In \textit{Caban}, the parents were living together when the children were born, and the father shared in the care and support of the children for a number of years. When the children were two and four years old, the parents separated and each subsequently married and sought custody of the children. Later, the mother's husband sought to adopt the children with the mother's consent. In upholding the father's equal protection challenge, the Court emphasized that the New York statute discriminated against a putative father who had manifested a parental interest in his child and who had demonstrated a commitment to maintaining a significant relationship with the child.\textsuperscript{17} The difference in the Court's holdings in \textit{Caban} and \textit{Quilloin} is explained by the difference in the quality and the nature of the relationship that existed between the father and his children.

The extent of the right of the putative father to block the adoption of his child was most recently addressed by the Supreme Court in \textit{Lehr v. Robertson}.\textsuperscript{18} The adoption in this case was sought by a stepfather who married the mother eight months after the child's birth. The adoption proceedings began after the child was two years old, without Lehr's knowledge and without notice to him. The Court determined that Lehr had not demonstrated a custodial, personal, or financial commitment to his child and therefore he had not developed a relationship with the child that deserved any further procedural protection than that already provided by the state. The state had established a putative father registry through which a putative father could file to claim paternity of a particular child. Under the New York statute, a putative father who filed was entitled to notice of an adoption proceeding and gained standing to challenge the adoption of his child. The state also required that notice of an adoption proceeding be given to other classes of putative fathers, none of which was applicable to Lehr.\textsuperscript{19}

Rather than filing with the putative father registry, Lehr filed a petition for visitation and to have his paternity recognized, but he filed in a court in a different county than the one considering the adoption petition. Lehr became aware of the adoption proceedings after filing his paternity petition. However, because of his petition, the mother, stepfather and, apparently, the trial court were aware that he was trying

\textsuperscript{16} Id. at 391-92, 99 S. Ct. at 1768.
\textsuperscript{17} Id. at 392-93, 99 S. Ct. at 1769.
\textsuperscript{18} 463 U.S. 248, 103 S. Ct. 2985 (1983).
\textsuperscript{19} Id. at 251-52 n.5, 103 S. Ct. at 2988 n.5. The inclusion of a putative father in any of the other classes to whom notice was due was within the ultimate control of the mother.
to intervene in the adoption proceeding. But because Lehr had not met any of the statutory requirements, the judge deemed that he was not entitled to notice of the proceeding, and the adoption was granted without Lehr having an opportunity to voice his opposition.

The Supreme Court affirmed the adoption, emphasizing that the statute authorized a simple means by which a putative father could protect his rights and that Lehr did not avail himself of this simple procedure. It is significant, however, that the Court refused to base its opinion solely on the basis of the father's lack of filing with the putative father registry. Rather, it focused on the nature of the relationship that existed between Lehr and his child. The Court emphasized that it was not looking at the constitutionality of New York's procedures for terminating a developed relationship as it was in *Caban*, because it determined that Lehr, unlike Caban, had only a "potential" rather than a "developed" relationship with his child. The court classified his relationship with his daughter as "potential" because he had never had a role in providing custodial care for the child, he had visited her only sporadically, and he had never contributed financially to her care. Further, he had not sought to establish a legal tie with the child until after she was two years old. The Court's classification of his relationship as "potential" is significant. Under the Court's analysis, only a "developed" relationship is entitled to constitutional protection under the due process clause.21

In his dissenting opinion, Justice White offered a very different picture than the one painted by the majority.22 Immediately after the baby was born, the mother concealed her whereabouts from the father, successfully preventing him from developing a relationship with the child. On the rare occasions when he located her, he visited with the child as often as the mother would permit and offered financial support, which was rejected. At one point the mother concealed the child from Lehr for over a year, and only with the service of a private detective did he finally learn the whereabouts of his child. The majority ignored the issues raised in the dissenting opinion concerning the evasive maneuvers taken by the mother which denied the father the opportunity to develop the relationship that would warrant constitutional protection.

A possible explanation for the Court's willingness to overlook the issues raised by the dissent is the deference that a majority of the Court seems willing to give a de facto family that consists of the biological mother, the child and the stepfather.23 The Court, in both this opinion

---

20. Id. at 261, 103 S. Ct. at 2993.
21. Id., 103 S. Ct. at 2993.
22. Id. at 268, 103 S. Ct. at 2997 (White, J., dissenting). Justice White was joined in the dissent by Justices Marshall and Blackmun.
23. Id. at 262 n.19, 103 S. Ct. at 2994 n.19.
and Quilloin, considered adoptions by stepfathers who had supported the child and with whom the child had lived for most of his or her life. The natural father in these cases was not seeking full custody; rather, each father was seeking visitation rights and was attempting to block the adoption by the stepfather. In neither case did the Court expound on the weight given to the fact that it was a stepparent who had petitioned for adoption and that the child would continue to live in the same family situation that existed prior to the adoption. In each of these cases, however, the Court justified its opinion because of the legal recognition that the adoption gave to an already functioning family unit. In Quilloin, the Court acknowledged that "the balance of equities tips" in favor of the established family unit.24

These four United States Supreme Court cases have a common theme—a putative father's interest in having a relationship with his child is manifestly a liberty interest protected by the fourteenth amendment's due process guarantee. However, the biological connection between the father and the child, without more, does not merit constitutional protection. But when an unwed father is committed to his child, assumes parental responsibility, and participates in the rearing of his child, his interest in maintaining personal contact with the child acquires substantial protection under the due process clause.25 In cases where the father has never come forward to participate in the rearing of his child, or when he has failed to grasp the opportunity to be a parent and accept some responsibility for the child's future,26 the state may withhold from him the privilege of vetoing the adoption of that child.27 But in cases, such as Caban, where the father has admitted his paternity and established a substantial relationship with the child, a state will not be allowed to develop a statutory scheme that removes the child from the life of the

24. Id., 103 S. Ct. at 2994 n.19. Further evidence of the Court's willingness to deny a putative father access to his child when the child is living in a functioning family unit is seen in the Court's recent decision in Michael H. v. Gerald D., 491 U.S. 110, 109 S. Ct. 2333 (1989). In that case, the child was the legal child of Gerald, the husband of the mother, even though she was Michael's biological child. The mother and the child lived with Michael intermittently during the first three years of the child's life, and Michael, the putative father, held the child out as his child and had an established relationship with her. He filed suit to be declared her father and to have visitation rights. In spite of the relationship that existed between the putative father and the child, because of the husband's legal status as the child's father, the Court denied that the putative father had a fundamental liberty interest that deserved constitutional protection. The Court was of the opinion that the type of relationship between Michael and his daughter had not been treated as a protected family unit under the historic practices of our society, but contrarily, American traditions have protected the marital family against the sort of claim that Michael was asserting.

26. Id. at 262, 103 S. Ct. at 2993.
putative father, unless the father is first given notice of the proceeding and an opportunity to defend his relationship. In Lehr, the Court clearly distinguished between fathers with an inchoate relationship and those with a fully developed relationship.\(^\text{28}\)

III. LOUISIANA STATUTES ON VOLUNTARY SURRENDER PRIOR TO THE RECENT REVISION

Prior to the recent revision, the Louisiana legislature had, for over twenty years, totally ignored the Court’s opinions, and the existing statutes were woefully inadequate to protect the constitutionally mandated rights of the putative father. The inadequacy became apparent in the Louisiana Supreme Court case of In re the Adoption of B.G.S., when the court declared one key statute in the adoption scheme unconstitutional.\(^\text{29}\) Before B.G.S. and the changes in the law that resulted from the B.G.S. decision can be appreciated, it is necessary to understand the statutory scheme that existed at that time.

Historically, Louisiana had two different sets of statutes governing surrender, depending on whether the parent surrendered the child to an agency\(^\text{30}\) or to a private individual.\(^\text{31}\) The legislature justified these distinctions on the theory that there were built-in safeguards against coercion of the mother in agency surrenders.\(^\text{32}\) Theoretically, in agency adoptions a caseworker assigned to confer with the parent counsels the parent and insures that the surrendering parent is aware that the act of surrender, once executed, is irrevocable.\(^\text{33}\) Whether this was a valid distinction is now a moot point because under the new law this distinction has only limited significance. But, under the old statutory scheme, the two different sets of statutes resulted in two different sets of requirements governing the rights of the putative father, although the father had no role in selecting the mode of surrender used by the mother.

A. Surrender to an Agency

When an unwed mother voluntarily surrendered her child, her surrender alone terminated all parental rights of the father, unless he had formally acknowledged or legitimated the child prior to her surrender.\(^\text{34}\) A mother could surrender her child to an agency immediately after

---

28. Lehr, 463 U.S. at 261 n.17, 103 S. Ct. at 2993 n.17.
29. It was La. R.S. 9:422.8 that was found unconstitutional.
birth, whereas surrenders to a private individual required that the mother wait for five days before surrendering the child. The mother's swift surrender to an agency effectively denied the putative father any opportunity to acknowledge the child and oppose the adoption. No other code articles governing agency surrenders recognized the rights of a putative father who wanted to gain custody of his child and raise the child himself. Nor was any other procedural safeguard provided through which the putative father could gain a hearing regarding his interest in his child if he had not acknowledged or legitimated before the surrender. In essence, a mother who surrendered a newborn baby to an agency unilaterally denied the father all rights to the child.

B. Surrender to a Private Individual

Although the requirements for surrender to a private individual were different than the requirements for surrender to an agency, the differences did not result in recognition of the rights of the putative father. If the mother of an illegitimate child elected not to list the father’s name on the birth certificate, her surrender alone was all that was needed to surrender the child for adoption. As in surrenders to an agency, the father could record an act of acknowledgment before the child’s mother executed the act of surrender. Because in private adoptions a birth mother could not execute an act of surrender until five days after the birth of the baby, on its face the statute appeared to provide a five day “window of opportunity” within which a father could acknowledge the child and have his parental rights recognized. Additionally, however, to secure his right to oppose the adoption, the father had to have the act of acknowledgment recorded on the child’s birth certificate prior to the mother’s act of surrender.

Even though these requirements were very narrowly drawn, it appeared that the father had an opportunity, albeit a very limited one, to achieve recognition of his parental rights. But what the law giveth, the law may also taketh away. The articles that regulate the bureau of vital statistics provide that a putative father may not place his name on a child’s birth certificate without the mother’s consent. Common sense dictates that few mothers will consent to having the father’s name on the birth certificate if her objective is to surrender the baby for adoption without the father’s approval. Thus, the statutes that regulated

private adoptions appeared to provide the putative father a means by which he could oppose the adoption, but in reality the application of these statutes gave no advantage to the father.

In the remote circumstance where the father was successful in timely acknowledging his child and having his name entered on the birth certificate, he was not entitled to a hearing on his parental rights. He gained only the right to oppose the adoption at a hearing on whether the adoption was in the best interests of the child.41

IV. THE LOUISIANA SUPREME COURT SPEAKS IN In re Adoption of B.G.S.

Clearly, the Louisiana statutes regulating surrender and adoption did not incorporate the mandates of the United States Supreme Court decisions described in section II. But this was the current law in Louisiana in 1990 when the Louisiana Supreme Court heard the case of In re Adoption of B.G.S.42 The unique facts in B.G.S. called attention to the contradictory provisions in the Louisiana statutes that on one hand seemed to grant the father the right to veto his child’s adoption and on the other hand enabled the mother to defeat this right by preventing him from placing his name on his child’s birth certificate. The failure of Louisiana’s laws to provide any protection to a putative father with an established relationship, as required by the United States Supreme Court, was obvious.

However, B.G.S. was a case that involved a newborn baby. The United States Supreme Court has not spoken on whether, and if so, how, a putative father of a newborn baby can establish a constitutionally protected liberty interest in his future relationship with his child. In Caban, the Court specifically reserved this question.43 B.G.S. forced the Louisiana Supreme Court to examine the very issue that had been left unanswered by the earlier United States Supreme Court cases. The B.G.S. court was confronted with a fully committed putative father of an infant who was asserting his rights to veto the adoption and have custody of his own child. It is the Louisiana Supreme Court’s decision in this case that led to the revision of the adoption and surrender statutes.

42. 556 So. 2d 545 (La. 1990).
43. Caban v. Mohammed, 441 U.S. 380, 392 n.11, 99 S. Ct. 1760, 1768 n.11 (1979). Since the question was not presented in Caban, the Court specifically expressed no view on whether the difficulties of locating and identifying unwed fathers at birth would justify an adoption statute that distinguished between the mothers and fathers of newborns setting forth more stringent requirements concerning the acknowledgment of paternity or a stricter definition of abandonment.
A. Facts

When sixteen-year-old R.S. discovered she was pregnant, the nineteen-year-old father, V.L., wanted to marry her. Her parents refused to consent to the marriage and suggested that she surrender the baby for adoption. R.S. acquiesced to the suggestion, but V.L. was opposed and wanted to raise the child himself. In spite of his opposition, Mrs. S. and R.S. informed the attending doctor that R.S. would surrender the baby for adoption. The doctor notified an infertile couple who contacted their attorney to petition for a private adoption. V.L. contacted an attorney to oppose the adoption and learned he must have his name placed on the baby's birth certificate in order to prevent the adoption.

Mr. S. filled out the birth certificate and refused to name V.L. as the father. The day after the baby's birth, August 9, 1989, V.L. filed an authentic act of acknowledgment with the clerks of court in both Orleans and Jefferson Parishes and requested that the clerks place his name on the baby girl's (B.G.S.'s) birth certificate.

Eight days after the birth of the baby, R.S. and her parents executed an authentic act of surrender to the adoptive parents. On this same day, in an effort to intervene in the surrender, V.L. contacted the office of vital statistics and requested that the clerk place his name on the birth certificate. The department of vital statistics gave him a form that required R.S.'s authorization to name anyone as the father on the birth certificate. V.L. continued to have communication with R.S. and repeatedly vowed to oppose the adoption and raise the child himself, and he continued to request that she sign the form to name him as the father on the birth certificate. Ultimately, on September 21, R.S. signed the form acknowledging V.L. as the father, and he obtained a new birth certificate designating him as the father of B.G.S. The following day the adoptive parents filed a petition for adoption in the Jefferson Parish Juvenile Court. V.L. timely moved to intervene and dismiss the adoption on the grounds that the birth certificate named him as the father and he had not consented to the adoption.

45. When a minor parent surrenders to an individual, his or her parents must join in the surrender.
46. In the meantime, on August 31, he filed a "Petition for Habeas Corpus and/or Request of Information Concerning Status of B.G.S." in District Court in Jefferson Parish. A hearing was held on this petition on September 7, where he learned that B.G.S. had been given to the anonymous adoptive parents. V.L. then amended his petition to seek custody, visitation and/or the identity of the adoptive parents, and he filed a notice of his intent to oppose the adoption.
47. La. R.S. 9:422.4(A) (1991) provides that a father who is named on the birth certificate can veto the adoption.
The juvenile court, citing the provisions of the private adoption statutes, held that the mother's act of surrender terminated the father's right to veto the adoption because his name did not appear on the birth certificate at the time she executed the act of surrender. The court further held that V.L.'s only recourse was to attempt to show that the adoption was not in the child's best interest during the adoption proceedings.\(^4\)

However, after the court of appeal ordered an evidentiary hearing, the juvenile court declared Louisiana Revised Statutes 40:34 unconstitutional.\(^4\) Additionally, the court held that the lack of V.L.'s consent invalidated the surrender and adoption proceedings.

On October 31, the adoptive parents appealed to the Louisiana Supreme Court from the juvenile court's judgment declaring the law unconstitutional.\(^5\) The supreme court upheld the juvenile court's decision that part of the statutory scheme for effecting surrenders for private adoptions was unconstitutional. However, the court found the constitutional deficiency in Louisiana Revised Statutes 9:422.8, the statute allowing the mother to unilaterally terminate the father's rights, rather than in the birth certificate statute. The court held the method of terminating parental rights provided by the statute was unconstitutional because the statute established a mechanism allowing the state to terminate the parental rights of a putative father without first providing him with notice and an opportunity to be heard.\(^5\)

B. Louisiana Supreme Court Recognizes Constitutional Liberty Interest in Relationship with a Newborn Child

If B.G.S. had been an older child with whom V.L. had lived and supported, it is clear that the Louisiana statutory scheme applied to V.L. would have been unconstitutional under the United States Supreme

---

49. This is the statute that requires the mother's consent before an unwed father can place his name on his child's birth certificate.
50. On November 17, the juvenile court awarded temporary custody of the child to her natural father, after determining that this would be in her best interest. In awarding custody of the child to her natural father, the juvenile court applied the guidelines established by the Louisiana Supreme Court in In re J.M.P., 528 So. 2d 1002 (La. 1988). In that case, the court held that when the custody of a child is contested between the natural parent and the adoptive parent, the biological relationship is to be given priority. If the natural parent is a fit parent, the social policy of basing custody on the biological relationship outweighs any advantages offered by the adoptive parents unless the child has bonded with the adoptive parents to the extent that they are considered the child's psychological parents. B.G.S. had not been in the custody of the adoptive parents long enough to have developed a psychological bond with them; therefore, applying the J.M.P. guidelines, the biological father was the parent who should have been awarded custody.
51. In re Adoption of B.G.S., 556 So. 2d 545, 558 (La. 1990).
Court decisions in Stanley, Caban, Quilloin, and Lehr. However, none of the cases handed down by the Supreme Court have considered what may be a more typical adoption situation: a birth mother refusing to name the putative father on the birth certificate of a newborn infant and then surrendering the baby to adoptive parents without the consent of, or notice to, the putative father.

In Lehr, the Court clearly distinguished between an inchoate and an established relationship, but did not address what actions, if any at all, the father of a newborn might take to demonstrate a commitment to fatherhood that would justify constitutional protection. The Court’s silence on the rights of a putative father of a newborn has permitted state courts and legislatures to interpret Lehr in a variety of different ways. Relying on the language in Lehr, a California court of appeals recently stated that “Lehr does not stand... for the proposition that an unwed father who makes affirmative efforts to establish a relationship with his child must be afforded an opportunity to veto an adoption. Lehr mandates that some unwed fathers be afforded the opportunity to receive notice and to participate in the adoption proceedings concerning their children.... Nothing in Lehr mandates that rights of fathers... with ‘potential’ rather than ‘substantial’ relationships with their children be equal to those of the child’s mother.” 52 The adoptive parents in B.G.S. made this same argument: because V.L. did not have a developed relationship with the child, he did not have a constitutionally protected interest in his parenthood. 53

The Louisiana Supreme Court rejected this narrow reading of Lehr and clearly recognized that an unwed father of a newborn infant may establish a liberty interest in a future relationship with his child by “coming forward to participate in the rearing of his child.” 54 Relying on the four decisions reported in section II, the B.G.S. court found an implied assumption that a putative father of a newborn child who is fully committed to that child has a constitutionally protected interest in the opportunity to develop an emotional bond with his child. If the putative father grasps the opportunity and accepts some measure of responsibility for the child’s future, he has done all that the United States Supreme Court requires in order to have an interest worthy of constitutional protection. 55 Additionally, the court concluded article 1, section 2 56 of the Louisiana Constitution independently recognizes that

53. B.G.S., 556 So. 2d at 550.
55. B.G.S., 556 So. 2d at 550-51.
56. La. Const. art. 1, § 2: “No person shall be deprived of life, liberty, or property,
a putative father may not be deprived of the right to establish a relationship with his child without due process of law.\textsuperscript{37}

C. Due Process: Right to Notice and Opportunity to be Heard

Recognizing that V.L.'s relationship with his daughter deserved constitutional protection, the private adoption statutory scheme clearly violated his due process rights to notice and denied him an opportunity to present his case before termination of his parental rights. After declaring Louisiana Revised Statutes 9:422.8 unconstitutional, the court provided broad guidelines for the lower courts to follow until the legislature acted in this area. Specifically, the court held that a putative father deserves notice of the surrender of his child for adoption and the opportunity for a hearing to establish whether he has demonstrated parental commitment to the child.

1. Notice

The court held that the putative father is entitled to notice of any proposed action to terminate his rights if his identity is known or readily discoverable, unless there is clear and convincing evidence that his interest has lapsed.\textsuperscript{38} The fact that the identities of some natural fathers may be difficult or impossible to discover is not a valid reason to deprive notice to a father who has come forward timely to make his identity known and to assume his responsibilities and assert his rights.\textsuperscript{59}

2. Hearing

In every adoption there is a hearing before the juvenile court judge to determine if the adoption is in the best interest of the child. The B.G.S. court rejected the argument that the putative father was entitled only to present his case and object to the adoption at this best interest hearing. Addressing this issue, the court stated that "due process requires that when a State seeks to terminate a protected interest, it must afford notice and an opportunity for hearing appropriate to the nature of the case before the termination becomes effective."\textsuperscript{60} The court clearly recognized that the father is not entitled to object to the deprivation of

\begin{itemize}
\item\textsuperscript{37} B.G.S., 556 So. 2d at 552.
\item\textsuperscript{38} Id. at 554.
\item\textsuperscript{39} Id.
\item\textsuperscript{40} Id. at 555 (emphasis in original). \end{itemize}
his rights at a best interest of the child hearing, in which he is only given the opportunity to defeat the adoption by regaining parental rights in competition with the adoptive parents. The court recognized that an unwed father, deprived of the custody of his child, is at a severe disadvantage to defeat the adoption by proving that the adoption is not in the best interest of the child. "The rather sparse opportunity of an unwed father whose children have been taken away to regain them by defeating the adoption upon a showing that it is not in the best interests of the children does not satisfy the requirements of procedural due process." 61

The best interest of the child hearing is a very different proposition from a hearing to show that the father has established a relationship with the child and has not abandoned his constitutional right to parent his own child. Therefore, the court held a best interest hearing should occur only if the father has surrendered his rights or has had his parental rights terminated. Whether the father has exercised his right to establish and maintain a relationship with the child or, alternatively, whether he has waived that right is to be determined at a hearing designed specifically for this purpose. 62 If the father does not respond or is not located within a reasonable time, the court may terminate his parental rights and continue with the adoption proceedings. "On the other hand, if the father appears and demonstrates that he is fully committed to his parental responsibilities and has grasped the opportunity to commence a relationship with his child, the court must uphold his parental rights, vacate the surrender and dismiss the adoption." 63

V. THE NEW ARTICLES ON SURRENDER FOLLOWING B.G.S.

The Louisiana Supreme Court in In re B.G.S. set forth broad requirements to guide the lower courts in recognizing the rights of putative fathers before the mother could surrender the child for adoption. The new articles on surrender and adoption 64 incorporate all of the general requirements from B.G.S.; however, to carry out these broad requirements, many specific provisions were necessary. Following the recommendations of the Children's Code Committee, the legislature passed a comprehensive set of articles on surrender and adoption that recognizes the rights of both the putative father and the mother.

This section will analyze the new articles and the constitutional and policy reasons for the changes in the law. As each new article is discussed,

61. Id.
62. Id.
63. Id. at 558-59.
64. The articles on surrender and adoption are located respectively in Titles XI and XII of the Children's Code.
the necessary steps that must be taken by attorneys will be detailed in an effort to provide guidance so that adoptions will not be invalidated on technical grounds of non-compliance with the statutory scheme. Part A of this section considers the notice to which the putative father is entitled if the mother executes an act of surrender of his child. Specifically, the necessary content of the notice of surrender, the type of service required for both resident and nonresident fathers, the appointment and duty of a curator to locate an identified father, and the necessary effort to identify an unidentified father are all addressed in part A.

Next in part B, the putative father's right to a hearing is explained. Both the nature of the hearing and the proof that is necessary to establish that he has a substantial relationship with his child are discussed. Part C examines the rights of the mother if the putative father is successful in vetoing the adoption. Finally, part D addresses the requirements necessary if a putative father, rather than opposing the adoption, elects to surrender his rights to his child. The requirements necessary for a father's surrender to be valid are compared to the requirements necessary for a surrender by the mother.

A. Notice

Even though In re B.G.S. arose in the context of a private adoption, nothing in the opinion suggests that its holding is any less relevant when the mother surrenders the child to an agency. The court required that "when the father's identity is known or readily discoverable, he must be given notice of any proposed action to terminate his rights . . . ."\textsuperscript{65} A statutory scheme that treats putative fathers differently simply because the surrendering mother chooses to surrender to an agency rather than to a private individual would be subject to attack on equal protection grounds and would lead to instability of adoptions. To avoid this problem, the legislature required that all putative fathers receive the same due process protection of notice of the mother's surrender and an opportunity to be heard, regardless of which mode of surrender the mother elects.

As an additional safeguard, the law requires all acts of surrender to be filed with the juvenile court within seventy-two hours after the act is executed.\textsuperscript{66} This insures the court's involvement in the adoption process from the beginning and insures that hearings are expedited and that putative fathers receive procedural protection.\textsuperscript{67} The mother's act

\textsuperscript{65} In re Adoption of B.G.S., 556 So. 2d 545, 554 (La. 1990).
\textsuperscript{66} La. Ch.C. art. 1131.
\textsuperscript{67} La. Ch.C. art. 1131 comment.
of surrender serves as a trigger that the father must now be notified of the surrender and informed of his rights.68

1. Notice of Filing of Surrender Form

To insure that the notice received by a putative father is sufficient to inform him of his rights, the drafters supplied a form69 for notifying the father of the pending proceedings. The form provides the father with notice of the mother's surrender of the child for adoption and informs him of what he must do procedurally to protect his rights to oppose the adoption.70 The required notice informs the putative father that the mother has voluntarily filed an act of surrender alleging that he is the father of the child and that he has fifteen days after receiving notice to file a written objection to oppose the adoption. Upon objection, the court will schedule a hearing within twenty days71 to determine whether he has established or forfeited his parental rights. The notice must specify what affirmative efforts on his part would demonstrate to the court that he had established a parental relationship with the child. Finally, the notice informs the father that if he fails to file a written notice of opposition, or if, after the hearing on the motion, the court finds he has failed to establish his parental right to oppose the adoption, the court will terminate any and all parental rights he may have and the child will be subject to adoption.

2. Service Requirements

The Louisiana Supreme Court in In re B.G.S. did not specify the type of notice required. However, the court, quoting from the United States Supreme Court decision in Mullane v. Central Hanover Bank and

68. La. Ch.C. arts. 1133 and 1134 require that notice of the mother's surrender is to be promptly served on the nonsurrendering father.
69. La. Ch.C. art. 1132.
70. This is one of several efforts by the drafters to provide specific forms to insure that the legislative mandate is followed. Use of the form provided in the code is not mandatory; a similar form can be drafted. However, the comment to Article 1132 indicates that using the form provided will help insure that "putative fathers receive accurate and complete information concerning their potential parental rights . . . ." Other places where the drafters have provided forms are Article 1125 (the affidavit of family history) and Article 1122 (the voluntary act of surrender for adoption).
71. The comment to Children's Code art. 1132 states that the time requirements imposed by this article are designed to comply with the requirements established in In re J.M.P. In J.M.P., 528 So. 2d 1002 (La. 1988), the Louisiana Supreme Court provided that in all contested adoptions, hearings and appeals are to be heard and decided within twenty days of the court's receipt of the notice or the lodging of the record on appeal. The time limits were imposed so that a natural parent would not lose the right to custody of the child because the adoptive parent had become the psychological parent to the child during the delay between hearings.
Trust Co., indicated that "a State must provide 'notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" 2 Unless the father actually receives the notice of the pending adoption, his fundamental right to "choose for himself whether to appear or default, acquiesce or contest" 3 is worthless. Therefore, every identified putative father, unless he has previously executed a surrender or waived notice of service, 4 must receive notice of the mother's act of surrender. If the father is a resident of Louisiana, he must be served with notice either personally or with the notice of filing of surrender left at his domicile. 5 A nonresident father may be served by registered mail, at the address that the mother has provided on the notice, with return receipt required. 6 If the required notice does not reach the father, further steps must be taken to locate him before he may be denied the opportunity to be heard. The new articles, therefore, authorize the court to appoint a curator to locate any father who is not reached by service of process.

3. Appointment of Curator to Locate Identified Father

To insure that the father has every opportunity to exercise his rights, a curator is appointed to receive notice on behalf of the father who is identified but whose whereabouts are unknown. 7 The appointment of a curator provides a safety net for an identified father who has not received service of process, either because the mother did not give an address in her act of surrender or because attempts to serve him at the address given were unsuccessful.

The responsibility of the curator is to make a diligent effort to locate the putative father. 8 Again, time limitations have been statutorily imposed in order to insure that the process proceeds expeditiously. The curator must begin the search for the father within seven days after the appointment, exclusive of legal holidays. Thirty days after the appointment of the curator, the agency or the attorney for the adoptive parents may file a motion with the court to terminate the father's parental rights. Upon a finding that the father was not located and that a diligent
effort was made to locate him, the court will terminate his parental rights. The court requires the curator to investigate and submit proof of unsuccessful investigations into any address listed in the mother's act of surrender, and any address that the father provided in the putative father registry or in a formal act of acknowledgment filed with the Clerk of Court in the parish of the child's birth.79

If the curator locates the father within thirty days of his appointment, the curator serves the father with notice of the mother's act of surrender. Additionally, the curator files an affidavit with the court detailing his efforts to locate the father, discloses the location of the father, and certifies that the father was given oral or written notice of the mother's filing of surrender. The located father must file any objection within fifteen days.80

The appointment of a curator serves a dual purpose in the adoption setting. First, the likelihood of a father being located is far greater if an independent attorney diligently pursues the father rather than allowing the attorney for the adoptive parents or the agency to assume this responsibility. The goal of the attorney who is representing the agency or the adoptive parents is to secure the adoption, and locating the father is at odds with this goal. A conscientious curator will follow up any available information that would reasonably aid in locating the father. These efforts should locate fathers who have been denied access or who have no knowledge of the births but desire to raise their children.81 Additionally, the curator's efforts help to insulate adoptions from later attacks by unlocated putative fathers whose whereabouts could have been determined with reasonable effort. If a curator makes a good faith effort to locate the father but is unsuccessful, a later due process challenge to the adoption should fail.

4. Diligent Effort to Identify an Unidentified Father

When the father of the child is "unknown", he receives minimal due process protection. However, before his parental rights are terminated, proof is required that a diligent effort was made to identify

79. La. Ch.C. art. 1136(D)(5) requires that the curator detail the efforts that he has made to locate the father. The curator's efforts must include, but are not limited to, publication seeking the father's whereabouts.

80. La. Ch.C. art. 1136(E).

81. Appointing a curator will increase the costs of adoptions. La. R.S. 9:426 says that the curator is to be an attorney who receives a fee, and that the person who petitions the court will bear the costs as costs of court. Therefore, the adoptive parents pay for the curator's services. Apparently, if the father is located by the curator and he is successful in gaining custody of the child, the adoptive parents are still responsible for paying for the curator's services.
When the attorney for the agency or the prospective adoptive parents file the appropriate motion with the court, presentation of the following four documents constitutes sufficient proof that the identity of the father is unknown and that his identity has been sought with diligent effort: the mother's declaration in the act of surrender that the father is unknown; a copy of the child's birth certificate with no one indicated as the father; a certificate from the putative father registry certifying that no one has registered as the father; and a certificate from the Clerk of Court in the parish where the child was born certifying that no one has acknowledged the child.

If the identity of the father is unknown, this article is not a violation of the father's due process rights according to the United States Supreme Court in Mullane. "[I]t has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." The state has provided two mechanisms through which the putative father can take formal steps to establish his parental connection with the child. The father may register with the putative father registry, and he may formally acknowledge the child in the parish of the child's birth. His failure to timely utilize one of these methods to assert his paternity will result in the denial of any further right to a relationship with the child.

A close examination is necessary to determine whether the systems provided by the state are adequate before the state will be allowed to deny a father of his right to a future relationship with the child. The Court in both Quilloin and Lehr assessed the adequacy of the methods provided by the state for an unnamed father to come forward to assert his paternity. In Quilloin, under Georgia law, a father's consent was required for a child to be adopted if the father had formally legitimated the child. Because Quilloin did not timely avail himself of this legal procedure, the adoption could proceed over his veto. Likewise, the father in Lehr did not receive notice of his child's pending adoption because he failed to register with the putative father registry, similar to the one established in Louisiana.

The Court ultimately upheld the adoptions of the children in both Quilloin and Lehr because the fathers had not developed a substantial

82. La. Ch.C. art. 1135(A).
83. La. Ch.C. art. 1135(B).
86. Id. at 249-50, 98 S. Ct. at 552. Quilloin did not file to legitimate his son until after the adoption petition had been filed.
relationship with their children that justified additional procedural protection. Because, in each case, the relationship between the father and the child was an inchoate one, the Court found that the state had provided adequate methods for the father to come forward and establish his paternity. Louisiana has established both of the registration systems found to be adequate in Quilloin and Lehr through which an unidentified father can come forward to claim paternity. The inference can be made that Louisiana's law, providing the father with the opportunity to register in the putative father registry or to acknowledge the child with the parish Clerk of Court, provides all the procedural due process protection that the Court requires for a father who is unknown.

The new statutes provide with great specificity what type of notice is required, what efforts must be taken to locate a father whose whereabouts are unknown, and what evidence is sufficient to terminate the father's rights if the father's identity is unknown. Precise detail was included in the statutory scheme to insure that every putative father with an interest in a relationship with his child would be afforded an opportunity to present his case.

B. Right to a Hearing

"The fundamental requisite of due process of law is the opportunity to be heard." 88 Giving the father notice of the adoption proceedings is of little value if he is not given an opportunity to oppose the adoption. Under the new statutes, any father who chooses to oppose the adoption of his child may do so by filing a motion with the appropriate court within fifteen days after he receives the notice of surrender or fifteen days from the time he receives notice of the adoption if there was no surrender. 89

1. Nature of the Hearing

A debate has raged in many adoption cases over the nature of the hearing given to the putative father. Many jurisdictions have taken the approach that the unwed father gains only an opportunity to participate in a hearing where the focus is to determine whose custody would promote the "best interest of the child." 90 A court, when called upon to decide who gets parental custody and rights to a child by applying the best interest of the child standard, considers a multitude of factors.

89. La. Ch.C. art. 1137(A).
90. Id. An adoption proceeding where a mother consents to her husband's adoption of the child would be one where there had been no surrender but the father would nevertheless have the right to notice of the proceeding.
The value of the natural father-child relationship is only one factor in the court's analysis.\textsuperscript{92} For this reason, the Louisiana Supreme Court in \textit{B.G.S.} rejected the best interest of the child standard as the applicable test when a putative father with an established relationship or a commitment to establishing a relationship comes forward to oppose the adoption.\textsuperscript{93} Rather, the purpose of the hearing is to determine whether the father has established or forfeited his parental rights. If the court determines that the father has established his parental rights, he gains legal custody of the child and can veto the adoption.\textsuperscript{94} A father with established parental rights is not forced to compete with the adoptive parents to determine who can provide the most advantageous environment for the child. Procedurally, a father who proves that he has established parental rights to the child walks out of the courtroom with his child, as the child's legal custodian.\textsuperscript{95} If the father is not successful in proving that he has established his parental rights, then his only opportunity to defeat the adoption is at a best interest of the child hearing where the judge weighs many factors before determining which placement would serve the child's best interest.

\textbf{2. Proof of Establishment of Parental Rights}

At the father's hearing, the court will decide if the father has established his parental rights and gained the right to custody of his child. The \textit{B.G.S.} court went beyond the standard set forth in \textit{Stanley} and required more than proof that the father is fit to be a parent. The burden of proof on the father is to demonstrate to the court that he is a fully committed parent who has taken affirmative steps to establish and maintain a relationship with his child.\textsuperscript{96} He may present evidence of both formal and informal methods taken to establish a relationship.\textsuperscript{97} Relevant evidence includes formal acknowledgment, legitimation or attempted legitimation, a declaration of paternity filed in the putative father registry, adjudication of paternity by a court, as well as informal acknowledgment by providing substantial support and parental care to the child.\textsuperscript{98}

The father is not limited to proving he has an established relationship with the above-mentioned evidence. The statute does not indicate that

\begin{itemize}
\item \textsuperscript{92} Elizabeth Buchanan, The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson, 45 Ohio St. L.J. 313, 346 (1984).
\item \textsuperscript{93} The holding of \textit{B.G.S.} was codified in La. Ch.C. art. 1138(A).
\item \textsuperscript{94} La. Ch.C. art. 1138(B).
\item \textsuperscript{95} The rights of the surrendering mother when the father has successfully defeated the adoption are addressed infra in text accompanying notes 103-111.
\item \textsuperscript{96} La. Ch.C. art. 1137(B).
\item \textsuperscript{97} Id.
\item \textsuperscript{98} La. Ch.C. art. 1137 comment.
\end{itemize}
any one of these requirements is necessary nor that any one alone will
be sufficient to prove that the father has established a relationship with
his child. The statute is broad enough for judicial discretion depending
on the particular facts of each case.

To illustrate, it should be recalled that the father in B.G.S. had
taken numerous formal actions to establish his relationship with his
child, and he was committed and competent to provide a home for the
child. He had not, however, provided any financial support during the
mother's pregnancy. The court determined that the mother had not
called on him to provide financial assistance, and he had done all he
could do to establish a relationship with the child, especially in light
of the efforts by the mother's family to deny him this opportunity. As
B.G.S. illustrates, the father of a newborn baby may have a more
difficult burden of proving by objective means that he is committed to
parental responsibility and that he has grasped the opportunity to accept
responsibility for his child's future, "but the due process guarantee is
not so narrow as to permit a state to deny him the chance to do so."100

When an evaluation of the parent-child relationship involves an older
child, Louisiana courts should require a showing of more than a formal
relationship, as the Court did in Caban and Quilloin. The only formal
relationship between Caban and his two children was the placing of his
name on their birth certificates. However, he had lived with the children
and the mother in a de facto family and had cared for and supported
the children for a number of years.101 The Court found he had established
a substantial relationship with his children that warranted protection.

In Quilloin, the father visited the child, provided sporadic support,
and informally acknowledged the child, yet the Court held he had not
established a relationship significant enough to allow him to veto the
adoption. It is notable, though, that in Quilloin the adoption was sought
by a stepfather with whom the child had lived for eight years, and the
only effect of the adoption was legal recognition of a family relationship
that already existed. The child indicated that he wanted to be adopted
by his stepfather, but that he also wanted to continue to see his father.102
Thus Quilloin is distinguishable from a case where the putative father
seeks to veto an adoption involving strangers. In such a case, it is
conceivable that a parent-child relationship similar to that between Quil-
loin and his son might convince a court that a relationship did exist
that was significant enough to allow the putative father to veto the
adoption.

100. Id.
It is apparent from these cases that the court will have to weigh each fact to determine whether a significant relationship has been developed between the father and the child. In addition to factors such as the age of the child and the extent of the father's relationship with the child, the court should also consider the mother's attempts to secrete the child from the father or to deny the father access to the child, as well as the persistence on the part of the father to protect his interests. The court should not reward a mother by deciding that the father has not established a relationship with the child if the mother made it impossible for the father to maintain contact. Thus, although the majority in Lehr determined that Lehr had "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child," the dissent indicated that it was the mother's actions which made it impossible for Lehr to establish a relationship with his child. Since the New York court denied Lehr an opportunity to present his case, there is no proof of his assertions. If they are true, however, the mother successfully deprived him of an opportunity to establish a significant relationship with the child, and this lack of an established relationship resulted in the denial of his right to veto the adoption.

Protecting the due process rights of a putative father who is committed to his child is the purpose of Louisiana's newly adopted statutory scheme. The vehicle through which the father may assert his rights is the hearing where he may prove that he has established a relationship with his child. The effectiveness of the plan will be insured only if the father receives a hearing and at the hearing the judge considers all relevant information in determining whether the father has seized the opportunity to assert his interests and demonstrate his commitment to his child. Counsel can protect the father's right to a hearing by timely advising him to register with the putative father registry and/or to acknowledge the child in the parish of its birth. The success of the hearing will be determined by the effectiveness of counsel in presenting all pertinent information and by the court's willingness to consider the actions of the father as well as the efforts taken by others to hamper the father's attempts to establish a relationship with the child.

C. The Rights of the Mother after Successful Opposition by the Father

The effect of the father gaining legal custody of his child is to dismiss the adoption proceedings. Therefore, the mother's surrender

104. Id. at 268, 103 S. Ct. at 2997.
cannot have the normal effects of transferring custody and terminating parental rights pursuant to an adoption.\textsuperscript{103} Under the facts of \textit{B.G.S.}, the putative father and the surrendering mother were married\textsuperscript{106} before the final decision was rendered by the court. Therefore, the court simply vacated the mother’s surrender and stated that it had no effect on the parental rights of either the mother or the father.\textsuperscript{107} The court did not discuss the rights a surrendering mother may have in the more typical situation where she does not continue a relationship with the father.

The legislature was left to determine what effect a successful opposition by the father should have on the mother’s surrender. The act of surrender requires the mother to freely and voluntarily surrender custody of the child for the purpose of placement and adoption.\textsuperscript{108} The effect of surrender is to grant the mother’s irrevocable consent to the subsequent adoption of the child,\textsuperscript{109} but when the mother “executes a surrender, she does so in reliance upon the assumption that the adoption of her child will be finalized. When, instead, the adoption is blocked by an order recognizing the right of the father to withhold his consent, then the mother’s surrender is nullified for failure of cause.”\textsuperscript{110}

When the mother executes her surrender, she legally terminates all of her rights to the child. Every act of surrender must comply with the formal requirement that the mother waives notice of any subsequent adoption proceedings.\textsuperscript{111} Therefore, she will not receive notice of the putative father’s opposition to the adoption nor of the hearing to determine if he has established his parental rights. Since the focus of the father’s hearing is to determine if he has established his parental rights, evidence that the mother believes is relevant to the best interests of the child will not be before the court. Therefore, if the court maintains the father’s opposition and allows him to veto the adoption, the mother’s surrender is invalid for failure of cause. The father now has legal custody, but the legal rights the mother had at the time of surrender are reinstated, or perhaps more appropriately, her potential rights are recognized. In light of the change in circumstances, the surrendering mother must be notified of the father’s successful challenge to the adoption.\textsuperscript{112} She may then choose to reevaluate her decision to surrender and may petition the juvenile court for a change of custody of the child or for visitation

\textsuperscript{103} La. Ch.C. art. 1139(A).
\textsuperscript{106} In re Adoption B.G.S., 556 So. 2d 545, 548 (La. 1990). They were married after obtaining a waiver of parental consent pursuant to La. R.S. 9:212.
\textsuperscript{107} B.G.S., 556 So. 2d at 556.
\textsuperscript{108} La. Ch.C. art. 1122(B)(5).
\textsuperscript{109} La. Ch.C. art. 1123.
\textsuperscript{110} La. Ch.C. art. 1139 comment.
\textsuperscript{111} La. Ch.C. art. 1122(B)(7).
\textsuperscript{112} La. Ch.C. art. 1139(B).
privileges. At this hearing the mother may present evidence that would bear on the best interest of the child.\textsuperscript{113}

\textbf{D. Requirements for a Father Who Elects to Surrender}

Thus far the focus of this comment has been on the recently recognized rights of the putative father who wants to block the adoption of his child, and on the necessary changes in the surrender articles to protect his rights. Other changes were needed to protect the rights of both parents when they elect to surrender the child for adoption by providing that specific requirements be met for a surrender to be valid. Several changes were designed primarily to insure that the mother is in a position to make an informed and voluntary decision regarding the surrender of her child. In an effort to insulate adoptions from future equal protection challenges, the same additional protection afforded the mother by the new law was extended to the father. However, the drafters recognized that there are legitimate reasons for treating mothers and fathers differently in some situations, so every requirement does not apply uniformly.

The next three divisions of this comment involve a discussion of the new requirements that parents wait five days after the birth of a child to execute a surrender and that parents receive counseling before executing a surrender, as well as the exceptions provided for fathers to both of these requirements. Additionally, a new article that allows a father to relinquish all claims to a child after the child's birth is discussed.

\textbf{1. Five Day Wait Before Executing the Surrender}

One of the changes from the prior law on surrenders concerns the time at which a parent may surrender a child. Under the old statutes, a parent who surrendered the child to an individual had to wait until five days after the birth of the child to execute the surrender.\textsuperscript{114} However, if the parent surrendered the child to an agency, the child could be surrendered immediately after birth.\textsuperscript{115} Under the new statutes, the mother cannot surrender the child under any circumstances until five days after the birth of the child.\textsuperscript{116} The father, however, may execute the act of surrender at any time before or after the birth, but the surrender can be revoked until five days after the birth of the child.\textsuperscript{117} The purpose for the five day requirement is to provide the mother with ample time

\begin{enumerate}
\item \textsuperscript{113} Children’s Code Project Memo 1990-6, Surrender and Adoption Revisited at 25 (1990).
\item \textsuperscript{114} La. R.S. 9:422.7(A) (1991).
\item \textsuperscript{116} La. Ch.C. art. 1130(A).
\item \textsuperscript{117} La. Ch.C. arts. 1123(B), 1130(B).
\end{enumerate}
to recover from the physical and psychological impact of giving birth and to insure that she has had sufficient time to reflect on the nature of her actions.\textsuperscript{118} Allowing the father to surrender anytime before or after the birth of the child assumes that the physiological debilitation of pregnancy and delivery has not affected his vulnerability.\textsuperscript{119} However, the drafters recognized that a father could also feel differently about his parenthood after the child's birth than he felt before the birth, leading him to change his mind about surrendering the child.\textsuperscript{120} Therefore, to insure that surrendering mothers and fathers are treated equally, a father may revoke a surrender given before the birth until five days after the birth of the child.\textsuperscript{121}

Allowing fathers to execute the act of surrender before the birth of the child expedites the adoption process by providing for an early determination of the father's intention toward the baby. If the father executes a surrender before the birth of the baby, the birth mother, the agency or attorney, and the adoptive parents are all in a better position to proceed with plans for the baby's future knowing that the father has surrendered his parental rights. An adoption that is granted after receiving a valid surrender from the father is shielded from a future attack by the father claiming his rights weren't recognized. Therefore, allowing a father five days after the birth of the child to revoke his surrender seems to be a small price to pay for the security the written act of surrender brings to adoptions.

2. Counseling

Another of the new requirements governing surrender requires that prior to the execution of a surrender, the surrendering parent must participate in two counseling sessions with a mental health professional, who must attest that the surrendering parent appeared to understand the nature of his or her act.\textsuperscript{122} This article has a twofold purpose. First, it is intended to continue the requirement of Louisiana law that a surrender for adoption be executed voluntarily with full knowledge of its consequences. Additionally, it protects adoptions from later attacks by the birth mother who asserts that the physical and emotional strain of birth caused her to be susceptible to the overreaching of agencies or

\textsuperscript{118} La. Ch.C. art. 1130 comment.
\textsuperscript{119} Id.
\textsuperscript{120} Children's Code Committee Summary of Committee Action on Surrenders and Adoptions at 4 (Nov. 16, 1990).
\textsuperscript{121} La. Ch.C. arts. 1123(B), 1130(B).
\textsuperscript{122} La. Ch.C. art. 1120(A) & (B).
The surrendering father may waive the counseling and execute a valid act of surrender without it.

Anytime a statute makes distinctions based on gender, the possibility of an equal protection challenge exists, unless the state can demonstrate a legitimate interest that justifies the distinction. There are two possible reasons for allowing the father, but not the mother, to waive the counseling requirement. The most obvious is that the father is not subject to the same physical and emotional strain that frequently accompanies childbirth and he will, therefore, not be as vulnerable to outside pressures to execute the surrender. Another reason for allowing the putative father to waive the counseling is that his act of surrender is not necessary for an adoption. If the father is given notice and an opportunity to be heard, and he does not make a timely opposition, the adoption can proceed without his surrender. Since the putative father's act of surrender is not absolutely required, he is not subjected to the same pressures that may be exerted against the mother. Arguably, the gender distinction drawn between mothers and fathers in this statute is based on rational reasons that further a legitimate state objective.

The underlying public policy that is promoted by this distinction is the stability that valid surrenders provide to adoptions. Even though many unwed fathers are interested in raising their own children, many others do not share this interest or are not emotionally or financially prepared to accept the burden. If the father has no interest in establishing a relationship with his child, it is better for all parties involved to recognize his rights and to solicit his surrender. An adoption that proceeds without a signed surrender by the father is less secure from a future attack by the father asserting violation of his due process rights. But if the uninterested father must submit to counseling sessions before he can execute an act of surrender, he might forego signing. This circumstance could result in leaving all other interested parties uncertain as to his possible claim to the child and may force the adoptive parents or the agency to serve him with notice of the surrender and possibly undergo the expense of appointing a curator to locate him after the birth of the child. Thus, it is evident that the state has a legitimate interest in providing stability to adoptions by protecting them from future challenges by securing a signed surrender from an uninterested father. This reason alone may be sufficient to insulate this article from an equal protection challenge.

123. La. Ch.C. art 1120 comment.
124. La. Ch.C. art 1120(C).
125. Even though this comment is concerned with the rights of the putative father, it should be noted that this argument is ineffective when applied to a married father whose consent is required for the surrender.
However, if the purpose of the counseling requirement is to insure that the parent is making an informed voluntary surrender, allowing the father to waive the requirement is justified only if some other procedure insures that the father's surrender is both voluntary and informed. If the state does not provide some other mechanism to protect the surrendering father's interest, this article could be vulnerable to an equal protection challenge.

The new articles include other safeguards to insure that a parent's surrender to an individual is made voluntarily. An independent attorney must represent the parent when the parent surrenders a child to an individual. Additionally, a surrendering parent who is a minor must be joined in the surrender by his or her parents. Both of these requirements provide assurance that the surrendering parent has the benefit of guidance to make an informed choice.

The same precautionary measures are not required when the surrender is made to an agency. Thus, a minor parent can surrender a child to an agency without the consent of his or her parents, and surrender to an agency does not require the parent to have independent counsel. Retaining these distinctions between agency surrenders and surrenders to an individual is justified only because of the new requirement that a mental health counselor assist the surrendering parent in making an informed decision. Analysis of the policy of distinguishing between surrenders to an individual and surrenders to an agency is beyond the scope of this comment. However, these differences, when coupled with the father's ability to waive counseling, result in no safeguards to insure that a father makes an informed decision when the surrender is to an agency. The father will not have the benefit of an independent attorney, a mental health counselor, or, if he is a minor, his parents, to assist him before he signs away his rights to his child. The statute that allows a father, but not a mother, to waive counseling, could be subject to an equal protection attack when coupled with the other differences that exist in a surrender to an agency.

3. Relinquishment of Claims

The rights of the putative father to veto an adoption and gain custody of his child were the impetus of the revision of the surrender

126. La. Ch.C. art. 1121.
127. La. Ch.C. art. 1113(A).
128. La. Ch.C. art. 1113(E).
129. La. Ch.C. art. 1121. The requirements of this article are only applicable to private surrenders.
130. Considering the strong public policy in favor of encouraging uninterested fathers to execute acts of surrender, perhaps allowing the father to waive the counseling would be acceptable if the safeguard of having an independent attorney to represent the father was imposed on agency surrenders.
and adoption articles. However, the drafters recognized that many putative fathers have no interest in a future relationship with their children. Frequently, these fathers want to assume no responsibility, and because they are fearful of the possibility of future support obligations, they are reluctant to admit paternity. The fear is that the surrender is seen as an admission of paternity, and if the mother changes her mind and does not surrender the child, the putative father will be responsible for paying support. This concern by putative fathers, and their accompanying reluctance to sign surrenders, hinders all other parties from proceeding with the adoption. As has been discussed previously, a surrender signed by the putative father provides for a more secure adoption by insulating it from later attacks by the father asserting that his rights have been violated. Therefore, the drafters developed a statutory solution to the conflict arising from these competing interests. The father is allowed to consent to the adoption of his child by executing a relinquishment of any real or potential claims that he may have to the child. The act includes a waiver of service for any subsequent adoption proceedings, as well as a statement that the act will not be used as evidence of a confession, admission, or acknowledgment of paternity in any other proceeding.

Even though Louisiana Children's Code article 1196 allows the relinquishment of claims to be executed by any alleged or putative father, it was designed primarily for use when the identity of the father is uncertain or when a putative father has no interest in the child and is not willing to admit paternity. Although the relinquishment of claims serves a useful purpose in the adoption setting when paternity is disputed, it must be recognized that its availability presents the potential for misuse. The alternative of using the relinquishment of claims instead of the authentic act of surrender could result in denying putative fathers the protection this legislation was designed to provide. Since the purpose of the relinquishment of claims is to allow for more secure adoptions by obtaining the consent of the uninterested father, it was written with fewer requirements. The relinquishment of claims must be executed by authentic act, but none of the other procedural safeguards necessary for an act of surrender are required. The potential for abuse arises from these differences. An attorney or agency could request that a putative father, even a father who admits his paternity, sign a relinquishment of claims rather than an act of surrender and deny the father the safeguards of counseling and independent legal advice that are required when a father executes an authentic act of surrender.

131. La. Ch.C. art. 1196(A).
132. La. Ch.C. art. 1196(B).
To insure that attorneys or agencies do not circumvent the rights of the putative father by using the relinquishment of claims rather than the act of surrender, the relinquishment should be subject to the identical requirements of an act of surrender. Thus, to protect the rights of the putative father, for a relinquishment to be valid, the father should be subject to the counseling requirement; in a surrender to an individual, the father should have the benefit of independent counsel, and a minor father should need parental consent; the relinquishment should be revocable until five days after the birth of the child; and a family medical history should be included for the benefit of the child being relinquished.

Until the legislature reconsiders this article, attorneys and agencies are encouraged to use the relinquishment of claims sparingly and only when an alleged father does not admit paternity. If this alternative is applied to a putative father who does not contest paternity and the father is not provided with the procedural protection provided by the new articles on surrender, the father could later protest the adoption, claiming that his relinquishment was not given with full understanding of his rights.

VI. AREAS OF CONCERN UNANSWERED BY THE NEW LEGISLATION

The Louisiana legislature took a giant step forward with the approval of the new Children's Code. The new articles on surrender and adoption replace a scheme that probably had been unconstitutional since the United States Supreme Court decision in *Stanley* with a scheme that provides both procedural and substantive due process protection to the natural father. At the same time this new scheme fosters the public policy of providing greater stability and certainty to adoptions, thus serving the best interests of the children adopted. If each requirement called for by the statutes is meticulously followed, there should be few challenges from surrendering parents and adoptions will be secure. However, any deviation from these requirements will open the door for challenges to adoptions by natural parents whose due process rights were circumvented by other parties to the adoption. The responsibility for insuring that the statutes are closely complied with falls squarely on the attorneys and agencies who are involved in the adoption process. There needs to be a commitment from these participants to follow both the letter and the spirit of the law.

One area that seems to be especially susceptible to abuse by both surrendering mothers and those concerned with placing the child for adoption is Louisiana Children's Code article 1135. This article allows an unwed mother who claims she does not know the identity of the father to declare in the act of surrender that the father is unknown. Because he is unknown, the effort required to locate him is less demanding and thus less likely to reach him than the effort required if a name is given in the surrender.
As explained in section IV, all that is required to terminate the parental rights of an unknown father is the declaration that he is unknown in the mother's surrender, a copy of the birth certificate without the father's name, and certificates from the putative father registry and from the Clerk of Court in the parish where the child was born certifying that no one has filed in regard to this child.\textsuperscript{134} Two of these requirements, the declaration that he is unknown and the birth certificate, are completely within the mother's control. The location of the birth of the child is also within the mother's control. The mother can elect to have the baby in any parish in the state or in any state in the country, potentially making it extremely difficult and expensive for a putative father to obtain the procedural advantage the statute was designed to give him through registration.

If a father's identity is honestly not known, this statute serves a valid purpose by giving a man who claims he is the father of the child an opportunity to come forward to assert his rights. But absent artificial insemination from an unknown donor, rape, or cases where a mother has had multiple sexual partners, the mother will know the identity of the father. It is highly prejudicial to the interests of the putative father for a surrendering mother to list him as unknown when she in fact knows his identity. The Louisiana Supreme Court in \textit{B.G.S.} said, "[I]f a mother wishes to surrender her child for adoption, it is in her best interest to omit the father's name from the birth certificate so that he will be unable to block the adoption of the child."\textsuperscript{135} Of course, the court made this statement in the context of the prior statutory scheme. However, a similar statement could be made about the new surrender statutes. If a mother wishes to surrender her child for adoption, it is in her best interest to withhold the father's name from her surrender. Allowing a mother to avoid naming the father simply by declaring in her act of surrender that he is unknown infringes on the rights of all other parties involved.

First, the mother may be successful and the father will be denied an opportunity to come forward in time to assert his rights. Even though the statute provides methods through which the father can make his identity known, the mother can circumvent his rights by wilfully withholding his name. The following hypothetical case serves to illustrate. A woman living outside Louisiana becomes pregnant. She informs the putative father, who is delighted. He assists the mother in paying for the medical expenses during the early months of the pregnancy and begins to plan for the future with a baby in his life. Later, the mother decides she no longer wants anything to do with the father, and she

\textsuperscript{134} La. Ch.C. art. 1135(B).
\textsuperscript{135} In re Adoption of B.G.S., 556 So. 2d 545, 556 (La. 1990).
does not want the father to have access to the child. She wants to surrender the baby for adoption. So she comes to Louisiana, concealing her whereabouts from the father. She contacts an attorney who represents a couple who have been waiting to adopt a newborn baby. Five days after the baby's birth the mother executes an act of surrender declaring that the identity of the father is unknown. The attorney for the prospective adoptive parents meticulously follows every statutory provision, and the final adoption decree is granted in due course.

How secure is this adoption? It would be ludicrous to say the father had forfeited his rights because he did not file an act of acknowledgment in the parish where the child was born or register with the putative father registry. He did not know where the child was born, and to expect him to file in the putative father registry in every state that has one imposes an unreasonably heavy burden. Further, the state established this registration system to assist a putative father in making his identity known in order to protect his rights, not to be used as a device to deny the father due process if he did not avail himself of it in cases where the mother actually knew his identity. A strong argument could be made that the mother's act of withholding the father's name resulted in denying him due process because he did not receive notice of her act of surrender nor did he have an opportunity to oppose the adoption.

Fraud or duress are the only actions available to annul a final decree of adoption, and must be brought within six months of the discovery of the fraud or duress. The mother's actions in our hypothetical could certainly be characterized as fraud. Other courts have addressed this issue and have held the mother's action fraudulent if she stated on the birth certificate and on the act of surrender that the identity of the father is unknown in an effort to prevent the father from receiving notice of the pending adoption and asserting his right to veto the adoption. Similarly, a mother's naming someone other than the father

---

136. Id. at 557-58.
137. La. Ch.C. art. 1262.
138. La. Ch.C. art. 1263.
139. La. Civ. Code art. 1953 defines fraud as a "misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other."
140. In re Riggs, 612 S.W.2d 461 (Tenn. Ct. App. 1980), cert. denied, 450 U.S. 921, 101 S. Ct. 1370 (1981). In an effort to deny the father any access or rights to the child in this case, the mother used an assumed name when she signed the birth certificate and the act of surrender. On both documents she stated that the identity of the father was unknown. A final adoption was granted, but when the father located the baby and filed suit for his custody, the adoption was rendered invalid because the mother had fraudulently denied the father the opportunity to receive notice of the proceeding. Therefore, the adoption was executed without valid termination of the father's rights, and the father was given custody of the child.
on the birth certificate and act of surrender has been considered fraud when the mother acted specifically to prevent the father from being able to assert his rights to the child.\textsuperscript{141}

When the mother refuses to name the father her actions impact on all other parties to the adoption. Not only has she deprived the father of his due process rights, she may also have subjected the adoptive parents to a lengthy court battle with the putative father if he is later successful in locating the child. In addition, the adoptive parents may ultimately suffer the emotional trauma of having the child removed from their custody if the father's action is successful.

Justice White has said that "there is no bar to requiring the mother of an illegitimate child to divulge the name of the father when the proceedings at issue involve the permanent termination of the father's rights."\textsuperscript{142} But Justice White did not suggest what steps could be taken to require the mother to divulge the name of the father. Furthermore, a strong argument must be made on behalf of the mother that the state cannot violate her right to privacy by compelling her to reveal intimate details about her life such as the name or names of her sexual partners. Support for the mother's right to privacy can be found from both courts and commentators.\textsuperscript{143} There is no indication that the statute was written with the intention of compelling the mother to reveal the name of the father, but informing the mother of the consequences of her actions is the responsibility of attorneys and agencies. If the father later learns of his parenthood and pursues an action in fraud, the adoption could be in jeopardy, and it is the adoptive parents and the child who will suffer emotionally and financially. An attorney who is aware that the mother knows but does not want to reveal the identity of the father is

\textsuperscript{141} In re the Adoption of Baby Girl S., 535 N.Y.S.2d 676 (Surr. Ct. 1988). The mother in this case was in the process of being divorced when she became pregnant with the putative father's child. Because she did not want the putative father to have access to the baby, she used her maiden name on her act of surrender and identified the father as the man who had been her husband at the time she became pregnant. She even submitted extrajudicial consent to the adoption from her estranged husband. She was aware that the putative father wanted custody of the baby and had filed a petition to establish his paternity before the birth of the baby. The adoption was granted to a couple who were both practicing attorneys who also knew the identity of the putative father and knew that he had filed to have his paternity established. Because the mother and the adoptive parents had all acted to prevent the putative father from receiving notice of the adoption, their actions were deemed fraudulent and the adoption was dismissed.

\textsuperscript{142} Lehr v. Robertson, 463 U.S. 248, 273 n.5, 103 S. Ct. 2985, 2999 n.5 (1983) (White, J., dissenting opinion).

faced with an ethical dilemma between representing his client's best interest in maintaining her privacy and insuring that she does not perpetrate a fraud on the court and the father.

Another unfortunate result of the surrendering mother's failure to name the biological father is to deprive the child of a statutorily granted right. In an effort to provide adoptive parents and children with knowledge of the child's genetic history, an extensive medical genetic history of the biological parents and their immediate families is to accompany all acts of surrender. In addition, the surrendering parent is allowed to indicate his or her wishes concerning the release of nonidentifying or identifying information in the event of a medical necessity for which the information is needed to treat the child. A child's mother who withholds the name of the biological father may, at the same time, be depriving the child of important medical information and of a potential source of assistance in a medical emergency that may not arise for years. Arguably, the greatest wrong resulting from the mother's actions is depriving her child of the liberty interest of having an opportunity to associate with a potentially committed biological parent. Even though society applauds adoptions of children who otherwise would not have a home, one needs only to read the popular press to recognize that in spite of happy adoptive homes, many adopted children have a strong need to find their biological parents. There is no denying that the biological connection is extremely significant, and every child should have the opportunity to be raised by a biological parent when there is one who is committed to assuming this responsibility. By refusing to name the father in her act of surrender, the mother is denying her child this opportunity.

VII. SUMMARY

The United States Supreme Court has recognized that a biological father of an illegitimate child has a liberty interest in his relationship with his child that requires constitutional protection if the relationship is a developed one.

Prior to the recent statutory revisions, the Louisiana law governing the surrender of children for adoption allowed a mother to surrender the child without the putative father's consent. The only way a father could gain standing to oppose the adoption was to have his name placed on the birth certificate, and the mother was able to circumvent the

144. La. Ch.C. art. 1124.
145. Id.
146. La. Ch.C. art. 1189.
father's rights by refusing to allow him to have his name entered on the birth certificate.

The Louisiana Supreme Court in *In re Adoption of B.G.S.* held that the Louisiana statute that allowed an unwed mother to surrender her child for adoption without first giving the putative father notice and an opportunity to be heard was unconstitutional. Because of this decision, and to comply with recent United States Supreme Court decisions, the Louisiana legislature recently adopted a statutory scheme recognizing the rights of a committed putative father to veto the adoption of his child. The father is entitled to receive notice of the mother's act of surrender. The notice informs the father of the steps he must take to assert his rights to gain custody of the child.

The hearing that results when the father comes forward to oppose the adoption is not a hearing where he is placed in competition with the prospective parents to determine what placement would be in the best interest of the child. Rather, he is allowed to prove that he has established a substantial relationship with his child. The father of a newborn child is not excluded from joining this class of fathers. He can establish the requisite relationship with his child by asserting his paternity and taking steps that indicate to the court that he is a committed parent who is ready to assume responsibility for the child. When a father is successful in establishing that he has a significant relationship with the child, he gains the power to veto the adoption and gains custody of the child.

To insure that the statutes that govern surrenders of children do not discriminate on the basis of gender, the requirements for the putative father's surrender are similar to the requirements governing the mother's act of surrender. The mother cannot execute a surrender until five days after the birth of her baby. The father can surrender the child at any time prior to or after the birth, but the father's consent does not become irrevocable until five days after the birth of the child.

The new statutes require that before a parent executes an act of surrender, that parent must participate in two counseling sessions with a trained mental health counselor in order to insure that the parent is making an informed, voluntary decision. A father is permitted to waive this requirement. Coupled with the facts that a minor parent can surrender to an agency without consent of his or her parents, and that a parent is not required to be represented by independent counsel in a surrender to an agency, this statute when applied in an agency surrender could be subject to an equal protection attack. A putative father is allowed to relinquish all claims that he may have to a child without admitting paternity for the purpose of any other proceeding.

The concern that remains, now that the new statutes have become effective, is the possibility that the mother could circumvent the father's right to notice and an opportunity to be heard by declaring in her act
of surrender that she does not know the identity of the father of the child. In addition to denying the father his constitutional rights, this action on the part of the mother could subject the adoptive parents to extensive litigation with the father. Furthermore, it results in denying the child potentially critical genetic information, and most importantly, the opportunity to be raised by a committed biological parent.

Teanna West Neskora