

2-1-2002

## Unwed Birthfathers and Infant Adoption: Balancing a Father's Rights with the States Need for a Timely Surrender Process

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### Repository Citation

Jeanette Mills, *Unwed Birthfathers and Infant Adoption: Balancing a Father's Rights with the States Need for a Timely Surrender Process*, 62 La. L. Rev. (2002)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol62/iss2/7>

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## Unwed Birthfathers and Infant Adoption: Balancing a Father's Rights with the States Need for a Timely Surrender Process

Adoptions may be categorized according to many different criteria. One categorization is based on the status of the adoptive parent as a relative or non-relative.<sup>1</sup> Adoptions may also be categorized according to the age of the individual being adopted.<sup>2</sup> This comment addresses issues relevant to infants born out of wedlock and surrendered for adoption within their first year of life.<sup>3</sup>

In the 1990s, approximately 120,000 adoptions took place each year.<sup>4</sup> Statistics reflect that an estimated one million United States children now live with adoptive parents. Disruption and dissolution rates for adoptions have ranged from ten- to twenty-percent over the years.<sup>5</sup> While these percentages indicate that dissolution is a serious possibility for a significant number of adoptions, other reports indicate that less than one-percent of infant adoptions disrupt and less than one-tenth of a percent of adoptions are actually contested.<sup>6</sup> Due to such disparity, reliance on statistics to define the scope of the disruption/dissolution problem is not helpful.

The importance of minimizing dissolution rates, regardless of their percentage, stems from the impact that a single dissolution has

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1. Other classifications include, but are not limited to, adoption of "special needs" children, adoption of Native American children, and adoption of adults.

2. Examples of categorization by age include adoptions of children less than one year of age, infant adoptions, adult adoptions, and adoptions of children over one year of age.

3. While some of the issues that will be discussed are also relevant to other categories of adoption, the overlap and resulting effects are outside the scope of this paper. It is difficult to explain the importance of this topic because statistics in the adoption field are notably insufficient. From 1957 to 1975, states voluntarily reported adoption data to the National Center for Social Statistics. Since the dissolution of this agency, comprehensive statistics in this field have been limited. National Adoption Information Clearinghouse, *Adoption Statistics—A Brief Overview of the Data* (visited Feb. 4, 2001), available at [http://www.calib.com/naic/pubs/s\\_over.htm](http://www.calib.com/naic/pubs/s_over.htm).

4. The yearly average has varied from 50,000 adoptions in 1944, to 175,000 in 1970. National Adoption Information Clearinghouse, *Statistics—Adoption: Number and Trends* (visited Feb. 4, 2001), available at [http://www.calib.com/naic/pubs/s\\_number.htm](http://www.calib.com/naic/pubs/s_number.htm).

5. The disruption rate increases along with the age of the child. Disruption is a term used to describe an adoption that does not proceed to finalization. Dissolution is a term which refers to an adoption that has been dissolved after finalization. National Adoption Information Clearinghouse, *Statistics—Disruption and Dissolution* (visited Feb. 4, 2001), available at [http://www.calib.com/naic/pub/s\\_disrup.htm](http://www.calib.com/naic/pub/s_disrup.htm).

6. *Id.*

on the parties involved. Parties wait while courts decide future family units, a decision that can put lives on hold for years. This waiting process impacts the child, the adoptive parents, the contesting individual, and the families of these parties. Because of the pervasive effect of disruption, it is of paramount importance that states enact laws which are not only effective, but are also constitutional, thus securing the finality of adoptions. Requisite components of effective, constitutional legislation necessarily include procedural safeguards that recognize a birthfather's interest in a potential relationship with his child. Though also concerned with protecting the due process rights of an unwed father, the state has a legitimate interest in freeing a newborn for adoption as soon as possible in order to secure a stable family unit for the child.

Balancing these competing interests has proven to be a difficult task. A statutory scheme that weighs too heavily in favor of protecting a birthfather's rights runs the risk of delaying the time in which an infant becomes available for adoption. This type of delay decreases the likelihood that the child will be adopted and results in increased expenditures by the state. A scheme that weighs too heavily in favor of early release of a child for adoption could result in dissolution if the requirements of consent to and notice of the adoption have not been met. Thus, the goal of any statutory scheme should be to create procedures allowing a father who is interested in his child to have a role in the adoption process while simultaneously expediting the process of terminating the rights of fathers who lack such an interest.

This comment will attempt to assist Louisiana legislators as they seek to meet this goal. A brief overview of the adoption process is presented, followed by a discussion of the judicially recognized rights of unwed fathers. Then, the possibility of using the putative father registry to expedite this process, as well as the termination of parental rights when a child was conceived as a result of rape, is discussed. Finally, a recommendation is provided to the Louisiana legislature not to enact such provisions. Rather, the legislature is urged to decrease to one year the current four-year preemptive period established by Louisiana Children's Code article 1263. This statutory modification would result in an appropriate balance between birthfathers' rights and the state's interest in expediting the surrender process, and it does not run the risk of being declared unconstitutional.

## I. THE ADOPTION PROCESS

### A. Generally

There is an important distinction between a right to consent to an adoption and the right to notice of an adoption. The right to consent is a much broader concept than the right to notice. Those entitled to

the right to consent will also be entitled to notice. An individual who has the right to consent has the power to veto or approve of an adoption. In contrast, a party with the limited right to notice has no right to veto an adoption. A party with a right to notice is typically entitled to an opportunity to provide information as to whether the impending adoption is in the best interest of the child.<sup>7</sup>

An adoption may not proceed without the consent of the necessary parties. Consent may be waived or forfeited in certain situations. Consent may be required from the parents or, if someone other than the parents are legally responsible for the infant or child, the agency or individual with such a duty. Mothers have a legal right to consent regardless of their marital status. A father's consent is generally required if the child was conceived or born during a marriage.<sup>8</sup> The fact of marriage, despite divorce or annulment, may provide a male with a right to consent. The fact of marriage has been recognized as evidence of a commitment to undertake parental responsibilities.<sup>9</sup> A married or once-married father has the right to consent to adoption because "legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of marriage."<sup>10</sup> Historically, unwed birthfathers have not been accorded the right to consent to the adoption of their child.<sup>11</sup> This notion has changed steadily since the 1970s, and state statutes now reflect a greater recognition of the rights of unwed fathers. Changes have occurred in large part due to United States Supreme Court cases recognizing constitutional rights of birthfathers in certain circumstances.

Although legislators must answer the difficult questions of which individuals are entitled to an opportunity to participate in adoption proceedings and in what fashion such individuals may participate, there are other issues to resolve. One issue is how to safeguard the rights of a birthfather who has no knowledge of the pregnancy or birth of the child and, therefore, is deprived of an opportunity to "demonstrate[ ] a full commitment to the responsibilities of

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7. Joan H. Hollinger et al., *Adoption Law and Practice* § 2, at 2-3 (2000) [hereinafter Hollinger].

8. *Id.* § 2.04, at 2-16.1.

9. *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549 (1978).

10. *Id.* at 256, 98 S. Ct. at 555.

11. States have limited unwed father's right to consent by several different means including the following: (1) by not including them in the statutory definition of parent entitled to consent; (2) by providing certain criteria in the statutory definitions of unfitness which apply to unwed fathers; and (3) by providing unwed fathers with limited rights, such as notice, in lieu of greater substantive rights, such as consent. Hollinger, *supra* note 7, § 2.04[2], at 2-19.

parenthood."<sup>12</sup> This issue might be restated by asking the following question: Does the mother have a duty to disclose the potential father's name so that he can be notified, or, on the other hand, does the birthfather have the responsibility of reasonable inquiry as to whether an act of sexual intercourse resulted in pregnancy?

There are some state courts that have ruled in favor of a mother's right to non-disclosure of the birthfather's name. Rationale for such non-disclosure includes the mother's fear that the birthfather will harass her and the mother's fear for her own safety should the father be notified.<sup>13</sup> However, in such cases, fairness to all persons should be a factor, and procedural devices should be in place that attempt to provide notice to all parties. For instance, some states have enacted provisions for notice by publication in these circumstances. Utah's statutory scheme is rather strict in that it requires a male to file a paternity proceeding before he is entitled to participate in the adoption proceedings. The Utah Legislature reasoned that "by virtue of the fact that he has engaged in a sexual relationship with a woman, [the father] is deemed to be on notice that a pregnancy and an adoption proceeding regarding that child may occur, and has a duty to protect his own rights and interests."<sup>14</sup>

In 1992, the New York Court of Appeals addressed this issue in the case of *Robert O. v. Russell K.*<sup>15</sup> There, the court pointed out that a father's opportunity to demonstrate his commitment to the responsibilities of parenthood lasts for a finite period of time. There comes a point when the state's interest in freeing a child for adoption outweighs the father's interest. In this case, the birthfather did not discover there was a pregnancy until eighteen months after delivery. The court found that, where he had failed to take steps to discover the pregnancy and did not assert his rights until ten months after the adoption was final, the birthfather was entitled to neither notice, nor a right to withhold consent. Proof that the father had no knowledge of the child's birth did not change the fact that the window of opportunity had passed.<sup>16</sup>

Certain national trends have developed and been identified as states attempt to expedite the adoption process. According to Joan H.

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12. *Lehr v. Robertson*, 463 U.S. 248, 261, 103 S. Ct. 2985, 2993 (1983).

13. *See In re Karen A.B.*, 513 A.2d 770 (Del. 1986) (refusing to compel a mother to disclose the birthfather's name and proceeded with termination of his parental rights, as it was determined to be in the best interests of the child); *In re S.J.B.*, 745 S.W.2d 606 (Ark. 1988) (finding that failure to provide notice to the biological father who had no relationship with the child and was unaware of the child's birth did not violate due process although the birthmother knew his identity but refused to disclose his name for privacy and religious reasons).

14. Utah Code Ann. § 78-30-4.13 (2000).

15. 604 N.E.2d 99 (N.Y. 1992).

16. *Id.*

Hollinger, three distinct trends have developed within the national jurisprudence:

(1) increased reluctance to force a mother to divulge information about a putative father and more systematic efforts to set limits for seeking information about the father from other sources; (2) increased wariness about granting parental rights to putative fathers who have not come forward of their own volition; and (3) increased recognition of the risks to the child posed by delays in resolving the father's status; and as a consequence, fewer placements of a child in the limbo of foster care, and more placements on an "at risk" basis with the prospective adoptive parents.<sup>17</sup>

As evidenced by the above discussion, states throughout the nation are enacting innovative legislation to deal with the time and finality issues of the adoption process. Many of these provisions, however, are not feasible in Louisiana because of the greater protection accorded by the Louisiana Constitution to be discussed in Part I.C. In order to examine possible solutions in Louisiana, it is helpful to lay out the framework within which we have to work.

#### *B. United States Supreme Court Decisions*

The United States Supreme Court has on several occasions recognized the rights of the family and parents in adoption proceedings. The pertinent cases provide the foundation of an identifiable interest for birthfathers.<sup>18</sup> The first Supreme Court decision to deal specifically with the rights of unwed fathers is the 1972 decision of *Stanley v. Illinois*.<sup>19</sup> The Court in *Stanley* held that applying a statutory presumption of unfitness to all unwed fathers violates the Constitution's guarantee of equal protection and due process.

In *Stanley*, the unwed father had lived with the birthmother for a period of eighteen years, and they had three children together; however, he had never formally legitimated his children. When the birthmother died, the unwed father lost his children to the state in accordance with an Illinois statute that did not recognize unwed fathers as being parents entitled to a hearing to prove their fitness.

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17. Hollinger, *supra* note 7, § 2.04[2], at 2-64.4-2-64.5.

18. See *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625 (1923); *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438 (1944); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965).

19. 405 U.S. 645, 92 S. Ct. 1208 (1972).

The Court held that the Illinois statute was unconstitutional and that the father was entitled to a hearing to prove his parental fitness.<sup>20</sup>

The state's asserted interest in *Stanley* was to "protect 'the moral, emotional, mental, and physical welfare of the minor and the best interests of the community' and to 'strengthen the minor's family ties whenever possible.'"<sup>21</sup> The state desired removal of a child from his parents "only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal."<sup>22</sup> Although the Court recognized the state's interest as valid, the Court found that this legitimate state interest was not furthered by a statute that separates children from biological parents who play an important role in the child's life.

The Court considered the possibility of a statutory presumption of unfitness for any father that was unmarried. The Court reasoned that if statistics weighed in favor of this presumption, the state would be promoting efficiency within the judicial branch through the use of the presumption of unfitness. The Court rejected this notion, however, noting that "the Bill of Rights in general, and the Due Process Clause in particular . . . were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy."<sup>23</sup>

The Court also held that the statute violated the Equal Protection Clause of the United States Constitution. The statute accorded mothers and some categories of fathers a presumption of fitness, while unwed fathers were presumed to be unfit. The result of this disparate treatment was that unwed fathers were denied a hearing before the termination of their parental rights.

Although the unwed father in *Stanley* was granted a hearing before the termination of his parental rights, the Court did not assure *all* unwed fathers entitlement to such a hearing in future cases. Rather, the Court's decision in *Stanley* was based on the presence of a long relationship between the father and children which served as evidence of the father's commitment to his responsibilities. The Court also left many questions unanswered. For example, the Court did not address specific due process requirements for the situation where a father is entitled to a hearing. Nor was there a discussion on the amount of weight to be given to the state's interest in a situation where the father is, in fact, unfit.

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20. *Id.* at 658, 92 S. Ct. at 1216.

21. *Id.* at 652, 92 S. Ct. at 1213.

22. *Id.*

23. *Id.* at 656, 92 S. Ct. at 1215.

Six years later, the Supreme Court decided the case of *Quilloin v. Walcott*.<sup>24</sup> The Court found that an unwed father's rights are not violated where the state does not afford the unwed birthfather the same veto power that is afforded other fathers in the adoption process. Quilloin argued that he should have the same rights as a noncustodial, divorced father and thus be entitled to veto an adoption unless proven to be unfit. The Georgia statute only allowed Quilloin to demonstrate that the adoption was not in the best interests of the child, and Quilloin claimed this to be a violation of the Equal Protection Clause.

In denying Quilloin the right to participate in the adoption process, the Court distinguished the facts of *Quilloin* from those of *Stanley*.<sup>25</sup> The court pointed out that the unwed father in *Quilloin* had never been a "de facto member of the child's family unit."<sup>26</sup> The unwed father in *Stanley*, however, lived with the birthmother intermittently for eighteen years. In contrast to Quilloin, Stanley had demonstrated a commitment to the rearing of the child. This was not a situation where the "unwed father at any time had, or sought, actual or legal custody of his child."<sup>27</sup> Nor was this a case where "the proposed adoption would place the child with a new set of parents with whom the child had never before lived."<sup>28</sup> Rather, this was a situation where the state gave recognition to an already existing family unit, and the birthfather, who had not taken any steps to support or legitimate the child in over eleven years, was denied participation in the adoption process.<sup>29</sup>

Just one year later, the Supreme Court further defined the rights of unwed fathers in *Caban v. Mohammed*.<sup>30</sup> The Court held unconstitutional a New York adoption statute that denied an unwed father, whose identity was known and who had "manifested a significant paternal interest in [his] child,"<sup>31</sup> the opportunity to block the adoption of his child by withholding consent.<sup>32</sup> The statute was

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24. 434 U.S. 246, 98 S. Ct. 549 (1978).

25. Quilloin's support obligations and visitation were neither consistent nor significant. As a noncustodial father, Quilloin attempted to veto the adoption of his son by the son's stepfather. The child lived with the mother and the stepfather. Quilloin had agreed to have his name listed on the child's birth certificate. *Id.*

26. *Id.* at 253, 98 S. Ct. at 553.

27. *Id.* at 255, 98 S. Ct. at 555.

28. *Id.* This suggests that a different rule might result under those circumstances.

29. *Id.*

30. 441 U.S. 380, 99 S. Ct. 1760 (1979).

31. *Id.* at 394, 99 S. Ct. at 1769.

32. The statute allowed Caban an opportunity to show that termination of his parental rights in favor of the child's stepfather was not in the best interests of the child. However, the statute did not allow Caban an opportunity to consent to or veto the adoption. *Id.* at 385-88, 99 S. Ct. at 1764-66.



held to violate the Equal Protection Clause because its statutory gender-based distinction did not bear a substantial relationship to the state's interest of "providing for the well being of illegitimate children."<sup>33</sup>

The birthfather in *Caban* was listed on the birth certificates of the children, lived with the children for several years, and continued to visit the children weekly during visits to the grandmother's home. The Court emphasized that if the unwed father had not been involved in the child's care, a different result might follow.<sup>34</sup> Therefore, the holding of *Caban* is limited to situations where the father has established a substantial relationship with the child and acknowledged paternity. Thus, the Court began to form dividing lines between fathers that are involved in their child's life and fathers that are not involved in their child's life. Furthermore, according to at least one scholar, the age of the child may be significant: "*Caban* implies that legislative distinction between unwed mothers and fathers would be warranted in the case of newborns because of the difficulty in locating and identifying fathers, in contrast to unwed mothers, who are often both physically and emotionally closer to their infants."<sup>35</sup> However, as a child grows older, such a distinction would likely become unconstitutional.<sup>36</sup>

In 1983, the Supreme Court limited the scope of the protected interest held by unwed fathers in *Lehr v. Robertson*.<sup>37</sup> The court looked to the rights established in *Stanley*, *Quilloin*, and *Caban* in order to define the rights of a birthfather who had neither been involved in the care of his child, nor been acknowledged as the father on the child's birth certificate.

*Lehr* was a father who had not been involved in his child's life until the child was two-years-old, and he provided no financial support to his child. Although *Lehr* visited the child at the hospital following the child's birth and lived with the mother prior to birth, he did not fit into any of the statutory categories of fathers entitled to notice.<sup>38</sup> When an unwed father "demonstrates a full commitment to

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33. *Id.* at 391, 99 S. Ct. at 1767-68.

34. The court stated, "In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child." *Id.* at 392, 99 S. Ct. 1768.

35. Hollinger, *supra* note 7, § 2.04[2], at 2-26.

36. *Id.* at 2-27.

37. *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985 (1983).

38. The New York statute provided for notice to fathers who lived openly with the child and the child's mother after birth, those listed in the putative father registry, or listed on the child's birth certificate, and those who were married to the child's mother before the child was six months old. *Lehr* was not listed on the child's birth certificate and had not offered marriage to the mother. *Id.* at 250-52,

the responsibilities of parenthood by '[coming] forward to participate in the rearing of his child,'"<sup>39</sup> due process entitles him to substantial protection of that interest, "[b]ut the mere existence of a biological link does not merit equivalent constitutional protection."<sup>40</sup> Protection of family relationships is important because of the "emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship."<sup>41</sup> The court characterized the biological link as an "opportunity interest" that no other male possessed.<sup>42</sup> The statute was held to not violate the rights guaranteed Lehr under the Due Process Clause because it is the "developed" relationship and "commitment" to a child which is accorded substantial protection, not the mere biological link.<sup>43</sup>

The statute was also upheld against the equal protection argument. Disparate treatment accorded to the mother and birthfather was not unconstitutional in this situation because the mother had demonstrated her commitment to the child through her custodial relationship. Lehr, on the other hand, had not met his parental obligations and, therefore, was not guaranteed the same rights as the mother.<sup>44</sup>

Thus stems the rule that the presence of a biological link between an unwed father and his child does not, in and of itself, result in a protected liberty interest. This biological link must be coupled with a "commitment to the responsibilities of parenthood"<sup>45</sup> evidenced by "coming forward to participate in the rearing of [the] child."<sup>46</sup> Commitment must be demonstrated by concrete actions and is limited in duration.

### C. Louisiana Supreme Court Decisions

The Louisiana Supreme Court has also addressed the rights of unwed birthfathers. The Louisiana Constitution affords greater

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103 S. Ct. at 2987-88.

39. *Id.* at 261, 103 S. Ct. at 2993 (quoting *Caban v. Mohammed*, 441 U.S. 380, 392, 99 S. Ct. 1760, 1768 (1979)).

40. *Id.* at 261, 103 S. Ct. at 2993.

41. *Id.* (alteration in original) (citations omitted).

42. *Id.* at 262, 103 S. Ct. at 2993.

43. *Id.*

44. *Id.* at 248, 103 S. Ct. at 2985. *But see id.* at 268, 103 S. Ct. at 2997 (White, J., dissenting) (arguing that a state is in violation of the due process and equal protection clause of the Constitution where the state, who has actual notice of a biological father's existence and interest in the child, denies him an opportunity to be heard).

45. *Id.* at 261, 103 S. Ct. at 2993.

46. *Id.*

protection to birthfathers than does the United States Constitution. Therefore, conformity with the state court guidelines set forth in these cases will be critical to proposed legislation in Louisiana.

In the 1990 decision of *In re Adoption of B.G.S.*,<sup>47</sup> the Louisiana Supreme Court used the Due Process Clause of the Louisiana Constitution<sup>48</sup> to guarantee unwed birthfathers greater protection than the United States Constitution. The birthfather of the newborn child had verbalized his opposition to the adoption prior to the child's birth, formally acknowledged the child in accordance with statutory guidelines, attempted to have his name placed on the child's birth certificate at birth,<sup>49</sup> and filed a notice of intent to oppose the adoption. Despite these efforts, the lower court ruled that, due to the fact that his name was not on the birth certificate, the birthfather had no right to veto the adoption and that the child was illegitimate. Consequently, the birthfather's rights were limited to an opportunity to demonstrate that the adoption was not in the best interests of the child.

The Louisiana Supreme Court held that the statute violated due process because of the state's reliance on a presumption of unfitness. The statute did not provide for notice which was "reasonably calculated" to inform a birthfather of the action.<sup>50</sup> In addition, the statute lacked the requirement of a hearing and an "impartial decision maker."<sup>51</sup>

The court began by citing the Preamble to the 1974 Louisiana Constitution as evidence of the parent-child relationship being afforded greater protection than provided for in the United States Constitution. The Preamble states that the purpose of the Louisiana Constitution is to "afford opportunity for the fullest development of the individual."<sup>52</sup> The court then cited cases prior to the 1974 Constitution that recognized the natural right of a parent to his child.<sup>53</sup> Court rulings since the enactment of the Louisiana Constitution in

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47. 556 So. 2d 545 (La. 1990).

48. "No person shall be deprived of life, liberty, or property, except by due process of law." La. Const. art. I, § 2.

49. The birthfather asked an employee of the hospital to place his name on the birth certificate. The birthmother was reportedly unaware that she had the right to place the birthfather's name on the birth certificate. The birthmother's father had undertaken the responsibility of completing the requisite information and refused the birthfather's request to place his name on the birth certificate. Later, the birthfather was successful in obtaining the birthmother's consent to change the birth certificate, naming him as father. *In re Adoption of B.G.S.*, 556 So. 2d 545 (La. 1990).

50. *Id.* at 554.

51. *Id.* at 555.

52. *Id.* at 551.

53. *Id.*

1974 have "implicitly recognized that the reciprocal rights and obligations of natural parents and children are among those unenumerated rights retained by individuals pursuant to Louisiana Constitution Article I, Section 24."<sup>54</sup> The court further stated that "the interest of a biological parent in having an opportunity to establish a relationship with his child is one of those liberties of which no person may be deprived without due process of law under our state constitution."<sup>55</sup>

Finding the current statutory scheme to be constitutionally insufficient, the court issued interim guidelines to provide minimum safeguards. The court determined that procedures should not mistakenly or unfairly classify a birthfather as unfit. To avoid this, if a birthfather's identity and whereabouts are known, notice by mail of a pending action may be used. The court noted that "[t]he opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental requirement of due process of law."<sup>56</sup> Thus, the first guideline established by the court is that "[a]n unwed father's right to veto the adoption of his child cannot be terminated or declared forfeited without prior notice and a hearing on this issue."<sup>57</sup>

If, subsequent to receipt of notice, the birthfather exhibits his potential constitutional interest and opposition to the adoption, the court must then decide whether the father has "lost, waived or otherwise had his constitutional rights terminated."<sup>58</sup> Such a process, as stated by the court, must be "rendered rapidly."<sup>59</sup> His rights will be protected if he demonstrates that he has a commitment "to his parental responsibilities"<sup>60</sup> and that he has "grasped the opportunity to commence a relationship with his child."<sup>61</sup> In such a case, the court must vacate the surrender order, thereby recognizing the unwed father's parental rights.<sup>62</sup> If no response is received from the unwed

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54. *Id.*

55. *Id.* at 552.

56. *Id.* at 557. The court determined that the opportunity to confront or call witnesses was not required because that would "overwhelm administrative facilities" and be "unduly burdensome." *Id.* If informal procedures are enacted by the legislature, the guarantee of judicial review is essential (although such review may be provided subsequent to the termination of parental rights).

57. *Id.* at 558. The court noted that due process did not require a delay in the transfer of temporary custody while the parties awaited a determination as to these issues.

58. *Id.*

59. *Id.*

60. *Id.* at 559.

61. *Id.*

62. His rights are not limited to an opportunity to demonstrate the best interests of the child. If the birthfather succeeds in this portion of the hearing, his opposition

father, or he cannot be located within a reasonable time, the court may terminate his parental rights.<sup>63</sup>

The most recent Louisiana Supreme Court decision interpreting the rights of unwed birthfathers is *In re A.J.F.*<sup>64</sup> This case is one of strict statutory construction that weighs in favor of notice provisions for birthfathers.

In November of 1998, the soon-to-be birthfather and birthmother began dating. The birthfather still lived at home with his parents in Texas; the birthmother resided in this home, too. In January of 1999, the birthmother learned she was pregnant, and in April of 1999, she left the birthfather. She did not provide any information as to where she was going, but the birthfather succeeded in locating her.<sup>65</sup> While separated from the birthfather, the birthmother began dating another individual. Meanwhile, the birthfather continued preparing for the birth of his child.<sup>66</sup> In June or July of that same year, the birthmother returned to the birthfather but later left again to live with her boyfriend in Louisiana.

The birthmother delivered a child on October 7, 1999, and the boyfriend was listed on the paperwork as the father of the child. On October 9, the boyfriend executed a voluntary act of surrender, and the birthmother executed an act of surrender three days later. Approximately one week following the birth, the birthmother's grandmother informed the birthfather of the delivery, at which time he sought legal assistance and acknowledged paternity by authentic act on November 15, 1999. On the following day, he filed his name in the putative father registry. On November 22, 1999, the birthfather's attorney requested notice of the act of surrender, and on December 7, 1999, service of notice of surrender was made by process and was left with the receptionist at the birthfather's attorney's office. On January 26, 2000, the attorney saw the notice for the first time and filed an opposition to the act of surrender on January 28. Thus, the opposition to the act of surrender was not filed until 51 days after receiving notice of the act of surrender, well over the 15 days allowed by law.<sup>67</sup>

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to the adoption results in an order to vacate the surrender. *Id.* at 559.

63. *Id.* at 558.

64. 764 So. 2d 47 (La. 2000).

65. He was reportedly charged with breaking down the door of the birthmother's parents home in an attempt to see the birthmother. *Id.* at 49.

66. He bought baby items and set them up in his room at his parents home. *Id.*

67. The pertinent parts of Louisiana Children's Code article 1137 are as follows (emphasis added):

A. An alleged or adjudicated father or his representative, if applicable, may oppose the adoption of his child by filing a clear and written declaration of intention to oppose the adoption. The notice of opposition

The juvenile court ruled that service was improper, granted the birthfather's opposition to the adoption, and awarded him custody of the child. The birthfather was found to have established his parental rights by executing and recording an authentic act of acknowledgment, by acknowledging his paternity in open court, and by showing through DNA testing that he was the baby's father. The court then found that the birthfather had "manifested a substantial commitment to his parental responsibilities"<sup>68</sup> as required by article 1138 of the Louisiana Children's Code.<sup>69</sup> Critical to this finding was the facts that the birthfather had provided food, clothing, and shelter to the birthmother during her pregnancy and had begun to provide furnishings and essentials for the baby prior to birth. The court further noted that the birthfather sought the assistance of legal counsel as soon as he discovered the birth. The juvenile court recognized that the father's right to annul the surrender had prescribed according to Children's Code article 1148.<sup>70</sup> However, the court further stated that "[w]hile the [c]ourt would agree that the time

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shall be filed with the court indicated in the notice of filing of surrender *within fifteen days* after the time he was served with the notice of surrender, or from the time he was served with notice of the filing of an adoption petition in the event that no surrender was executed or filed.

68. La. Ch.C. art. 1138. The pertinent parts of Louisiana Children's Code article 1138 are as follows:

A. At the hearing of the opposition, the alleged or adjudicated father must establish his parental rights by acknowledging that he is the father of the child and by proving that he has manifested a substantial commitment to his parental responsibilities and that he is a fit parent of his child.

B. Proof of the father's substantial commitment to his parental responsibilities requires a showing, in accordance with his means and knowledge of the mother's pregnancy or the child's birth, that he either:

(1) Provided financial support, including but not limited to the payment of consistent support to the mother during her pregnancy, contributions to the payment of the medical expenses of pregnancy and birth, or contributions of consistent support of the child after birth; that he frequently and consistently visited the child after birth; and that he is now willing and able to assume legal and physical care of the child.

(2) Was willing to provide such support and to visit the child and that he made reasonable attempts to manifest such a parental commitment, but was thwarted in his efforts by the mother or her agents, and that he is now willing and able to assume legal and physical care of the child.

69. *In re A.J.F.*, 764 So. 2d at 53 (discussing *In re A.J.F.*, No. 99-AD-149 (Feb. 18, 2000)).

70. Article 1148 states the following: "*No action* to annul a surrender shall be brought for any reason after *ninety days* from its execution or after a decree of adoption has been entered, whichever is earlier." La. Ch.C. art. 1148 (emphasis added).

for bringing an action for annulment of the surrender has expired, and would further agree that no such action was filed by or on behalf of [the birthfather], the court cannot ignore the fraudulent actions committed by [the birthmother] and [her boyfriend] and the detrimental consequences of those actions."<sup>71</sup>

On March 23, 2000, the Fifth Circuit Court of Appeal reversed the juvenile court. The appellate court agreed with the juvenile court that service was made improperly. The appellate court also found Children's Code article 1147, which allows a surrender to be annulled on the basis of "duress or fraud," to be applicable. Nevertheless, the fifth circuit determined that Children's Code article 1148 dictated that the father's action to annul the surrender had prescribed.<sup>72</sup> The court of appeal reasoned that the birthfather had actual knowledge of the birth of the baby within days of the delivery, and, despite this knowledge, he did not bring his action to annul the surrender until January 28, 2000, two weeks beyond the 90-day period provided for in Children's Code article 1148.

The Louisiana Supreme Court reversed the fifth circuit. Justice Knoll's majority opinion noted that both lower courts correctly held that service was improper as it was not made by registered or certified mail, return receipt requested. Nor was service perfected by notice to the birthfather's attorney.<sup>73</sup> Although the court of appeal had found the action prescribed pursuant to Children's Code article 1148, the supreme court found such reliance on article 1148 to be "both misplaced and incorrect as a matter of law."<sup>74</sup>

When a birthmother executes an act of surrender of an illegitimate child, three possible situations result. The first is where the mother has identified the alleged or adjudicated father, and his whereabouts are known. In this situation, Children's Code article 1132 dictates that the identified father receive notice, and thereafter, the father has fifteen days to oppose the adoption.<sup>75</sup> Service "shall be made by either registered or certified mail, return receipt requested," regardless of whether the father lives in state or out of state.<sup>76</sup>

The second situation occurs when the mother names the alleged

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71. In re A.J.F., 756 So. 2d 1187, 1190 (La. App. 5th Cir. 2000) (discussing In re A.J.F., No. 99-AD-149 (Feb. 18, 2000)).

72. The appellate court noted, "the 90-day time period to annul an adoption is absolute and without exception." *Id.* at 1191.

73. The process server failed to serve the attorney of record or his secretary. *Id.* at 50.

74. *Id.* at 54.

75. The pertinent provisions read as follows: "If a mother of an illegitimate child has executed a surrender and identifies the child's alleged or adjudicated father, the agency or individual to whom the child was surrendered shall exercise due diligence in attempting to locate him . . ." La. Ch.C. art. 1132(A).

76. La. Ch.C. arts. 1132-33.

or adjudicated father in the act of surrender, but his whereabouts are unknown. This scenario is governed by Children's Code article 1136 which provides for appointment of a curator who will make a "diligent effort to locate the alleged or adjudicated father within seven days."<sup>77</sup> After thirty days following the appointment of the curator, and upon determining that the curator has made a diligent effort to locate the alleged or adjudicated father, the court must terminate the father's parental rights.<sup>78</sup>

The third situation is where the mother indicates that the birthfather's identity is unknown. Here, the result is termination of the birthfather's rights once a "diligent effort has been made to identify the father."<sup>79</sup>

The supreme court noted that the facts of the *A.J.F.* case did not fall within any of the identified categories. Rather, this birthmother had incorrectly identified the birthfather on the act of surrender. The court then indicated that the birthfather's actual knowledge of the birth was not legally sufficient to serve as a substitute for formal notice required by Children's Code article 1132. This article details essential information that must be provided to the birthfather so that his rights are protected in accordance with the United States Supreme Court decision in *Lehr*.<sup>80</sup>

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77. La. Ch.C. art. 1136(B).

78. La. Ch.C. art. 1136(C).

79. La. Ch.C. art. 1135(A).

80. *In re A.J.F.*, 764 So. 2d 47, 57 (La. 2000); *see Lehr v. Robertson*, 463 U.S. 248, 261-62, 103 S. Ct. 2985, 2993-94 (1983). The information required to be given to the alleged or adjudicated father, according to Louisiana Children's Code article 1132(D), is as follows:

The notice of the surrender shall be issued by the clerk and shall contain the following information in substantially the following form:

\* \* \* \*

[T]he Act of Surrender alleges that you are the father of this child. You may attempt to oppose the adoption of this child only by filing a written objection with this court within fifteen days after you receive this notice.

If you file a written objection timely, the court will then hold a hearing within twenty days of the filing of the opposition, to determine whether you have established or forfeited your parental rights.

To establish your parental rights to oppose the adoption, you must acknowledge that you are the father of the child or be found to be the father by court order as a result of blood tests. Thereafter, you must also demonstrate to the court that you are a fit parent who is willing and able to assume the legal and physical care of your child. You must also demonstrate that you have made a substantial commitment to your parental responsibilities by providing or attempting to provide substantial and consistent support for the mother during pregnancy or after the child's birth and by frequently and consistently visiting or attempting to visit the child after birth.



The supreme court found that the fifth circuit had misapplied articles 1147 and 1148 of the Children's Code. An act of surrender is a contract and, therefore, is governed by general contract principles. Consent is one of the requisite elements for the formation of a contract and may be vitiated by a showing of fraud or duress. Since the birthfather was not a party to the act of surrender, the articles pertaining to nullification of an act of surrender due to fraud or duress do not apply to him.<sup>81</sup>

Furthermore, the court of appeal's rationale regarding the interpretation of Children's Code article 1148 as "absolute" was also held to be incorrect. The supreme court rejected the argument of the court of appeal that without such an interpretation "[t]here would then be no safeguards to prevent a biological father from successfully annulling an adoption ten or 15 years after it took place."<sup>82</sup> To the contrary, several provisions in the Children's Code were identified by the supreme court as safety nets that secure the finality of adoptions and serve the state's interest in promoting adoptions.<sup>83</sup>

If you fail to file a written motion of opposition, or if, after a hearing on a motion timely filed, the court finds that you have failed to establish your parental right to oppose the adoption, the court will order the termination of any and all parental rights you may have and the child may be subject to adoption.

81. *In re A.J.F.*, 764 So. 2d at 58. See also La. Ch.C. art. 1147 ("No act of surrender shall be subject to annulment except upon proof of duress or fraud, notwithstanding any provision of law to the contrary.")

82. *In re A.J.F.*, 756 So. 2d 1187, 1191 (La. App. 5th Cir. 2000).

83. The provisions identified by the court are Louisiana Children's Code articles 1262, 1263, and 1142. The first of these safety nets is provided by Children's Code articles 1262 and 1263. Article 1262 establishes that "no action to annul a final decree of adoption of any type may be brought except on the grounds of fraud or duress." La. Ch.C. art. 1262. Children's Code article 1263 provides peremptive time periods for annulment of a final decree of adoption. These time frames are six months from the date of discovery, and no later than "four years from the date of the signing of the final decree or mailing of the judgment." La. Ch.C. art. 1263. The text of article 1263 is as follows:

A. No action to annul a final decree of adoption based upon a claim of fraud or duress perpetrated by the adoptive parent or by his agent or representative with the parent's knowledge shall be brought after a lapse of six months from the date of discovery of the fraud or duress.

B. An action to annul a final decree of adoption based upon a claim of fraud or duress perpetrated by anyone else must be brought within six months from discovery of the fraud or duress and in no event later than four years from the date of the signing of the final decree or mailing of the judgment when required.

Review of the comments to article 1148 do not provide a similar cross reference to aid the reader. In fact, the comment to 1148 reads, "with the addition of these new safeguards to the surrender process, a ninety day period in which to assert or lose *any claim* of fraud or duress seems justifiable." La. Ch.C. art. 1148 cmt. (1991). Perhaps this was the source of the fifth circuit's confusion.

While the supreme court correctly points out that Louisiana Children's Code article 1148 is inapplicable to the situation in *A.J.F.* due to the fact that the birthfather was not a party to the act of surrender, its recognition of Children's Code article 1263 as a safety net for the finality of adoptions does little to assist the birthfather in this situation. There was no "final decree of adoption" that would make the time provisions of Children's Code article 1263 applicable. Thus, we examine the applicability of the second safety net provided by the court.

The supreme court identified Louisiana Children's Code article 1142<sup>84</sup> as a provision designed for cases such as *A.J.F.* This provision is designed to "minimize, if not eliminate, successful attacks to the surrender of parental rights."<sup>85</sup> Children's Code article 1142 is a safety net for "alleged or adjudicated fathers who may have learned of their putative fatherhood and wish to take steps to recognize their parental rights."<sup>86</sup>

*In re A.J.F.* is a case of strict statutory interpretation. Applying contract principles, the Louisiana Supreme Court held the preemptive ninety-day period of Children's Code article 1148 applicable in an

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84. The text of article 1142 is as follows:

- A. If no opposition is timely received by the court, the court shall, upon motion, render an order declaring the rights of the parents terminated.
- B. The motion shall be accompanied by a certified copy of the child's birth certificate, a certificate from the putative father registry indicating whether any act of acknowledgment by authentic act has been recorded, and a certificate from the clerk of court in and for the parish in which the child was born indicating whether any acknowledgment by authentic act, legitimation by authentic act, or judgment of filiation has been recorded relative to this child.
- C. If the clerk reports that a legitimation by authentic act has been duly recorded by a father, the court shall deny the motion unless the father's parental rights have been terminated in accordance with Title X or the father has executed a surrender in accordance with this Title or has given his consent to the adoption in accordance with Article 1195.
- D. If any of these certificates identify an alleged or adjudicated father who has not previously been served with notice of the mother's act of surrender, the alleged or adjudicated father shall be served with a copy of the motion to terminate his parental rights and given an opportunity to be heard in accordance with Articles 1132 through 1141 unless any of the following occur:
  - (1) The alleged or adjudicated father's parental rights have been terminated by a judgment in accordance with Title X.
  - (2) The alleged or adjudicated father has executed an act of surrender in accordance with this Title.
  - (3) The alleged or adjudicated father has executed a release of claims in accordance with Article 1196.

85. *In re A.J.F.*, 764 So. 2d at 59.

86. *Id.* at 60.

action to annul a surrender only when such action is brought by a party to the contract of surrender. Recognizing the likelihood that the drafters of the Children's Code enacted provisions to ensure the finality of judgments, the court identified Children's Code articles 1262, 1263, and 1142 as providing this finality.

Despite the fact that the finality of adoptions is provided for within the Children's Code, the need for expediting the adoption processes remains. Under the present statutory scheme, an action to annul a final decree of adoption can be brought "four years from the date of the signing of the final decree."<sup>87</sup> Thus, there is the possibility that a child who has lived with his adoptive parents for five years will be exposed to disruptive litigation in order to protect the established family unit.<sup>88</sup>

Not only is this an unsatisfactory result, but neither the Louisiana nor the United States Constitution requires such a result. There are thirty-five jurisdictions in the United States that provide for a final adoption within one or two years of the final decree.<sup>89</sup> There is an even shorter time period provided for by the Uniform Adoption Act.<sup>90</sup> Clearly, the Louisiana law is not in line with the national trend of ensuring final adoptions within a much briefer time frame.

*In re A.J.F.* is likely to provide motivation to adoption professionals, organizations, and policymakers to help draft new legislation that will reduce these time periods of uncertainty. Of course, any new legislation that provides a shorter time period within which a surrender may be granted or in which a final surrender may be set aside must be in accord with Louisiana's more stringent constitutional requirements and not simply modeled after another state's legislation. Hasty enactment of legislation increases the risk

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87. La. Ch.C. art. 1263(B).

88. The calculation of five years results from the four-year provision in Children's Code article 1263 and the one-year provision of Children's Code article 1216 which applies to agency adoptions. According to article 1216, "The child *shall have lived with the petitioner for at least one year* and at least six months shall have elapsed after the granting of an interlocutory decree before the petitioner may file a petition for final decree of agency adoption." La. Ch.C. art. 1216 (emphasis added). The one-year provision in Children's Code article 1233, providing for private adoption cases, reads as follows:

"Notwithstanding Article 1238, upon due consideration of the factors enumerated in Article 1230(B), the court may render a final decree of private adoption at the first hearing, without the necessity of first entering an interlocutory decree, only if the rights of the child's parents have been terminated pursuant to Title X or XI *and the child has lived in the petitioner's home for one year.*"

La. Ch.C. art. 1233 (emphasis added).

89. La. Ch.C. art. 1263 cmt.

90. The Uniform Adoption Act provides for a six-month period. La. Ch.C. art. 1263 cmt.

of having such legislation declared unconstitutional, a result that would be anything but helpful to the field of adoption and the quest for finality in adoptions.

To assist in reducing this risk, this comment will now analyze the constitutionality of potential legislative proposals. It is the hope of this author that this analysis will reduce the risk of enacting legislation that, although beneficial in the sense of expediting the finality of adoptions, would be declared unconstitutional by the Louisiana Supreme Court.

## II. ANALYSIS OF POTENTIAL LEGISLATIVE PROPOSALS

An unwed father's biological relationship with a child is not in and of itself sufficient to constitute a protected interest. The United States Supreme Court has declared that the interest is substantial, however, when the unwed father comes forward and participates in the rearing of the child. Where an unwed father is not involved in a child's life, provides no support to the child, and is not named on the child's birth certificate, there is no protected interest that requires notice or a hearing.<sup>91</sup> On the other hand, where an unwed father is involved, supportive, and is named on the birth certificate, he is entitled to a hearing to prove his fitness.<sup>92</sup>

The Louisiana Constitution guarantees to a birthfather the opportunity to develop a relationship with his child; such is a right of which "no person may be deprived without due process of law under our state constitution."<sup>93</sup> The Louisiana Supreme Court has emphasized the rights of unwed fathers to proper notice and a fair hearing.<sup>94</sup> Proper notice and a fair hearing, however, do not guarantee that the unwed father will be acknowledged as having a protected interest. Rather, it gives the unwed father an opportunity to prove his interest in accord with the principles established by the United States Supreme Court—that he has come forward to participate in the rearing of his child and grasped the opportunity to initiate a relationship with such child.

### A. *Putative Father Registry*

Louisiana's putative father registry was established by Louisiana Revised Statutes 9:400. The registry allows for the recordation of the

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91. *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985 (1983).

92. *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208 (1972).

93. *In re Adoption of B.G.S.*, 556 So. 2d 545, 552 (La. 1990).

94. *Id.* at 545.

following names: adjudicated fathers,<sup>95</sup> a male claiming paternity of a child, anyone who has filed an acknowledgment or filiation by authentic act, and any person who files a judgment of filiation.<sup>96</sup> Filing creates a rebuttable presumption that the person who filed is the father of the child. However, filing does not guarantee that, prior to the adoption of the child, consent to the adoption must be obtained from the individual who filed.<sup>97</sup> Rather, registration plays a role prior to the termination of parental rights. Louisiana Children's Code article 1141 requires the attorney for the adoptive parents to obtain a certificate from the putative father registry listing any names pertaining to the child at issue.<sup>98</sup> This information accompanies a motion for termination of parental rights. If the registry identifies the name of any "alleged or adjudicated fathers who [have] not previously been served with notice" then they will be served with a copy of the motion to terminate and be given an opportunity to be heard.<sup>99</sup> However, as noted by the court in *In re B.G.S.*, this does not guarantee that a male listed in the registry will be notified of an adoption proceeding.<sup>100</sup>

The Louisiana Supreme Court, in the case of *In re B.G.S.*, addresses the sufficiency of Louisiana's current putative father registry, describing it as "patently insufficient to meet the basic requirements of due process."<sup>101</sup> The *B.G.S.* court analyzed the New York putative father registry in *Lehr*, declaring it unlikely to "survive a constitutional attack."<sup>102</sup> The New York registry provides to a father who has entered his name in the registry a right to notice of the adoption and, subsequently, the opportunity to provide evidence that the adoption is not in the best interest of the child. The court took note of the fact that in Louisiana the registered father is not given the opportunity to veto the adoption.<sup>103</sup>

It may be inferred from the court's analysis that a registry serving the purpose of notifying registered fathers and providing them an opportunity to show that the adoption is not in the best interest of the child would not meet Louisiana's constitutional requirements of due

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95. "Adjudicated fathers" includes not only those fathers adjudicated by Louisiana courts to be the father of a child born out of wedlock, but also those fathers adjudicated by courts of another state when the individual files a copy of the court order which provides such adjudication. La. R.S. 9:400A(1), 9:400A(3) (1999).

96. La. R.S. 9:400 (1999).

97. La. R.S. 9:400.1 (1999).

98. La. Ch.C. art. 1141.

99. La. Ch.C. art. 1142.

100. *In re Adoption of B.G.S.*, 556 So. 2d 545, 558 (La. 1990).

101. *Id.* at 557.

102. *Id.* at 558.

103. *Id.* at 557.

process. However, a registry that allows notice prior to a parental right termination proceeding, as well as an opportunity to veto an adoption, might be a viable solution in Louisiana.

Putative father registries have been used in a wide variety of ways in other states. In some states, registration is merely a safety net to provide notice to those individuals that the state has not otherwise identified. In other states, registration is the only means by which a male is guaranteed an opportunity to participate in the adoption proceedings.

It is unclear whether the Louisiana Supreme Court would uphold a statute mandating that the registry be the only means by which a male may make known his "possible constitutional interest in the child and his opposition to the adoption."<sup>104</sup> In *B.G.S.*, language in the court's description of minimum safeguards seems to indicate that such a scheme would be impermissible. The court stated that "if the natural father does not respond or *cannot be located* within a reasonable time, then the court may terminate his parental rights and continue with the adoption proceedings."<sup>105</sup> This appears to place on the state the burden of identifying and attempting to locate the birthfather. Thus, a system which allows the state to merely scan a registry to see if a birthfather has himself taken action would not reflect an effort on the part of the state to "locate" a birthfather.

### *B. Rape*

Several states have provided that when a parent causes a child to be conceived by rape, that parent's rights may be terminated or his consent will not be required prior to the surrender for adoption.<sup>106</sup>

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104. *Id.* at 558.

105. *Id.* at 558 (emphasis added).

106. See Alaska Stat. § 25.23.180(c)(3) (Lexis 2000) (allowing termination of parental rights where the parent "committed an act constituting sexual assault or sexual abuse of a minor . . . that resulted in conception of the child and that termination . . . is in the best interests of the child"); Del. Code Ann. tit. 13 § 1103(a)(2)(b)(3)(3) (Michie 2001) (finding abandonment when certain criteria are met, one of which includes a determination that legal or physical custody would pose a "risk of substantial harm to the physical or psychological well-being of the minor because the circumstances of the minor's conception"); Idaho Code § 16-2005(h)(1) (Michie 2000) (allowing termination of parental rights where the individual caused the infant to be "conceived as a result of rape . . . with a minor child under sixteen"); 750 Ill. Comp. Stat. 50/12.1(j) (West 1999) (refusing to allow for notice via the putative father registry where the father "is the father of a child as a result of criminal sexual abuse or assault"); Ind. Code Ann. § 31-19-9-8(a)(4) (West 1999) (dispensing with the consent requirement as to a biological father if the child was "born out of wedlock" and "conceived as a result of . . . a rape for which the father was convicted"); Kan. Stat. Ann. § 59-2136(h)(6) (1994) (terminating parental rights after clear and convincing evidence proves that the

This raises the question of whether, in Louisiana, felonious acts resulting in conception can constitutionally result in termination of parental rights.

Lending support to the argument that it is in line with the United States Constitution to terminate a parent's rights based on how they caused the child to be conceived is Justice Scalia's majority opinion in the case of *Michael H. v. Gerald D.*<sup>107</sup> Disagreeing with the dissenting opinion, Justice Scalia pointed out, "Justice Brennan's position leads to the conclusion that if Michael had begotten Victoria by rape, that fact would in no way affect his possession of a liberty interest in his relationship with her."<sup>108</sup> This leads to the inference that if a child were conceived by means of rape, the rapist father might not possess a liberty interest in the relationship with his child like that of other birthfathers.<sup>109</sup>

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"birth of the child was the result of rape of the mother"); Minn. Stat. Ann. § 259.47(3)(6)(b)(1) (West 1998 & Supp. 2002) (exempting birth mothers from identifying and locating a father where the birth mother "submit[s] an affidavit stating . . . the child was conceived as the result of . . . rape"); Mo. Ann. Stat. § 211.447(4)(5) (West Supp. 2002) (including conception as a result of an act of forcible rape as grounds for termination of parental rights and noting that a guilty plea or conviction is "conclusive evidence supporting the termination"); Neb. Rev. Stat. § 43-104.15 (1998), Neb. Rev. Stat. § 43-104.09 (1998) (dispensing with notice requirement where a birthmother has submitted an affidavit indicating that she is unwilling or unable to identify the birthfather due to the fact that the child was conceived "as a result of sexual assault or incest"); N.M. Stat. Ann. § 32A-5-19 (Michie 1999 & Supp. 2001) (dispensing with consent requirement for a child conceived as a result of rape); N.Y. Dom. Rel. Law § 111-a (McKinney 1997) (eliminating notice requirement to persons "convicted of rape in the first degree involving forcible compulsion . . . when the child who is the subject of the proceeding was conceived as a result of such rape"); Ohio Rev. Code Ann. § 3107.07(F) (West 2000) (obviating the need for consent where the child was conceived as a result of rape and the father "is convicted of or pleads guilty to the commission of that offense"); Okla. Stat. Ann. tit. 10, § 7006-1.1(A)(11) (West Supp. 2000) (allowing for termination of parental rights where the child "was conceived as a result of rape . . . This paragraph shall only apply to the parent who committed the rape or act and whose child has been placed out of the home" if this is in the best interest of the child); 23 Pa. Cons. Stat. Ann. § 2511(a)(7) (West 2001) (allowing termination of parental rights where the child is "conceived as a result of a rape"); Wash. Rev. Code Ann. § 26.33.170(2)(b) (West Supp. 2002) (dispensing with consent requirement where the parent is "found guilty of rape. . . where the other parent of the adoptee was the victim of the rape . . . and the adoptee was conceived as a result of the rape"); Wis. Stat. Ann. § 48.415(9)(a) (West Supp. 2001) (identifying "[p]arenthood as a result of sexual assault" as a grounds for termination of parental rights proved by a "final judgment of conviction or other evidence produced at a fact-finding hearing"); Wyo. Stat. Ann. § 1-22-110(a)(viii) (Lexis 2001) (allowing adoption without consent to father where the child was "born out of wedlock as a result of sexual assault . . . for which he has been convicted").

107. 491 U.S. 110, 109 S. Ct. 2333 (1989).

108. *Id.* at 124, 109 S. Ct. at 2342-43.

109. Justice Brennan does not rebut this argument in his dissent, therefore it is

Many states that provide for termination of parental rights in a rape situation require that the person be *convicted* of rape. Yet, if it is necessary to await a conviction in such cases, there is no benefit to the state in the form of expediting the surrender process. The cases specific to this area typically concern older children who are being surrendered for adoption subsequent to a criminal verdict against the father. On the contrary, other states do not require that a conviction is necessary in order to terminate the alleged rapist's parental rights. The statutes in these states require that a child be conceived out of rape without any indication of the requisite proof.

The difficulty with such a provision in Louisiana is that the court in *In re B.G.S.* has already indicated its distaste for presumptions. This resistance stems from the supreme court's belief that reliance on a presumption is inappropriate to prove unfitness in lieu of requiring proof where the purpose of the presumption is mere convenience. The presumption analyzed by the *B.G.S.* court, however, was a presumption of unfitness, and the presumption was based on two different factors: the marital status of the birthfather in *Lehr*, and the birthmother's unwillingness to list the birthfather on the birth certificate in *In re B.G.S.* Such a presumption can be easily rebutted if given the opportunity, and this is precisely why the court expressed a distaste for the presumption. Another flaw in such a presumption is that in situations such as *Lehr* and *In re B.G.S.*, the presumption can be established as a result of the unilateral efforts of the birthmother alone. For example, by refusing to marry the birthfather, or by refusing to admit that she knows who the birthfather is when asked to list his name on the birth certificate, the birthmother could make the presumption applicable.

A presumption of unfitness based on the fact that a child was conceived out of rape should warrant a different result because rape is not within the control of the birthmother. Rape is an act of the birthfather which would justify termination of his parental rights. The difficulty lies in how to prove the fact of rape such that it would beneficially expedite the adoption process by eliminating the requirement of consent of the rapist-birthfather. The possibility of leaving this determination of fact within the control of the birthmother is problematic. If the birthmother has the unilateral power to prove this fact, an increase in children surrendered for adoption who were reportedly conceived out of rape might result. For the same reason that birthmothers often find it easier to state that a birthfather is unknown, the birthmother might find it easier to state

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uncertain whether he would vote contrary to Justice Scalia on this issue. Justice Brennan is joined by Chief Justice Marshall and Justice Blackmun in his dissent. *Id.* at 154, 109 S. Ct. at 2358.



that her child was conceived out of rape. The allegation of rape would relieve the birthmother from obtaining the birthfather's consent and put the decision to surrender the child solely within her control. This type of process is not likely to be constitutional in Louisiana.

Despite the fact that the Louisiana Supreme Court has indicated its disfavor for presumptions, it may be possible to overcome this hurdle by recognizing the fact of rape as an irrebuttable presumption of unfitness. This presumption is distinguishable from presumptions that the court has addressed previously and might have a different result.

The real hurdle is in the reliance on the birthmother for such a determination. The situation where a birthfather has been determined to have caused a child to be conceived out of rape based on the sworn testimony or affidavit of the birthmother would be subject to Children's Code article 1263 allowing for annulment of a final decree of adoption based upon fraud. Thus, the finality of the adoption would remain unsecured. Legislation that provides a means of terminating a birthfather's rights initially, while risking an annulment of the final decree based on fraud, does a disservice to adopted children, adoptive parents, and the stability of these families.

Because of the risk of fraud, a hearing would be necessary prior to the termination of parental rights to determine the fact of rape. At this hearing, the less stringent standard of clear and convincing proof could be used to determine whether the child was conceived as a result of rape.<sup>110</sup> A troublesome scenario that could result would be where a factual finding of rape based on the lesser standard of clear and convincing evidence is made in the termination of parental rights hearing, but the father is later acquitted in state criminal proceedings.<sup>111</sup>

Not only does this result seem controversial, but the provision would do little to facilitate expediting the finality of adoptions. The purpose for enacting a rape provision would be to empower courts to terminate parental rights without the consent of the birthfather. Since the Louisiana Constitution would appear to compel a hearing prior to termination of parental rights, a rape provision will do little to affect the speed of parental rights termination. The argument that a

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110. In 1982, the Supreme Court established the burden of proof required by the state before termination of parental rights. The Court found New York's "fair preponderance of the evidence" standard insufficient and dictated that a state must prove its case by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 768, 102 S. Ct. 1388, 1402 (1982).

111. This scenario assumes that there is a later criminal trial. Of course, the situation could occur where there are no criminal charges later asserted by the birthmother.

birthfather is unfit or has lost his right to consent to an adoption arguably could surface at a pre-surrender hearing without the enactment of such a provision.

A rape provision might be beneficial if it created a rebuttable presumption of unfitness at the hearing. Once the birthmother provided evidence that demonstrated by a clear and convincing standard that the child was conceived out of rape, the burden would shift to the birthfather to prove otherwise. While the *B.G.S* court indicated a disfavor for presumptions of unfitness, this was in the context of notice provisions only (where a state relies on a presumption of unfitness in order to deny a birthfather right to notice). A burden-shifting presumption of unfitness in the context of a child conceived out of rape would not deny the birthfather notice or an opportunity to rebut the presumption. Rather, it would expedite the process of parental rights termination through the use of a presumption based on a logical inference.

### C. Statutory Rape

An alternative scheme is a statute which provides for termination of parental rights where the child was conceived as a result of statutory rape. At first glance, this provision appears to be without many of the difficulties accompanied by a typical rape provision. A statutory rape provision would dispense with the difficulties of proving the fact of rape. This provision would allow for termination of a birthfather's rights based solely on proof that he is the birthfather and that he is a certain age in relation to the birthmother.<sup>112</sup>

The state, as evidenced by current statutory rape laws which have been upheld, has a legitimate interest in discouraging sex between a minor and major. This state interest outweighs the father's potential interest in his child. However, in the case of statutory rape, as opposed to other cases of rape, there is no *mens rea* element of the crime. Arguably, it is the *mens rea* element of the crime in non-statutory rape situations that results in the denial of parental rights to the offender. Since the criminal *mens rea* is lacking in the case of statutory rape, perhaps the possibility of termination of parental rights should not follow. Another weak point in the logic of a statutory rape provision is that the provision overlooks the possibility that once a child is conceived, the state interest shifts from deterrence to recognition of the protected interests of the parties involved.

Regardless of the lack of criminal *mens rea*, a statutory rape conviction might provide a means for termination of parental rights

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112. This could be provided by means as simple as an affidavit given that this is a current method of naming birthfathers.

on other grounds. If criminal charges are brought and the father is convicted of statutory rape, then the stronger argument for terminating rights should no longer be the crime committed but the fact that the father will not be able to be involved in the child's care due to incarceration. A widely-used argument for terminating parental rights is that incarceration for a felony results in a specified length of prison time such that it is not feasible to demonstrate any commitment to parental responsibilities. Therefore, rather than creating a scheme that allows for termination of parental rights based on a finding of statutory rape, perhaps the better approach is to terminate parental rights based on the subsequent prison sentence which inhibits any parental involvement and is a more established method of terminating rights. Nevertheless, such a provision would do little to expedite the adoption process as it pertains to newborns.

### III. RECOMMENDATION AND CONCLUSION

Balancing the competing state interests of protecting the due process rights of an unwed father and expediting the finality of adoptions is a difficult task. Any proposed legislation must be critiqued in light of the Louisiana Constitution's more stringent due process requirements. Although it appears to be a national trend to enact statutory schemes that expand the grounds for dispensing with a birthfather's required consent in order to expedite the process, this author does not believe this to be the answer to the problem. Such legislative maneuvering merely shifts the problem from an issue of timely surrender to a risk of annulment of a final decree if fraud is later discovered.

Because Louisiana's Constitution has guaranteed birthfathers greater rights than the United States Constitution, this author believes that the only constitutional solution to expediting the finality of adoptions lies in amending Children's Code article 1263. The amendment would allow for a one-year peremptive time frame to bring an action to annul a final decree of adoption based upon a claim of fraud or duress. The official legislative comments to article 1263 note that a bill has been introduced in every regular session since 1991 to recommend shortening this time frame. Despite these recommendations, the legislature has resisted such a decrease.

Legislators should find comfort in the fact that Louisiana has provided a statutory scheme which protects a birthfather's rights throughout the surrender process in accordance with Louisiana's more stringent constitutional guarantees. It would seem appropriate that, since birthfather's rights are not compromised during this initial process, legislators would approve a reduction in the time period available to file a motion to annul a final decree.

A time period of four years is simply unrealistic and unnecessary. If a birthfather discovered that his child had been surrendered for adoption within the four-year time period provided currently by Children's Code article 1263, a dissolution of an adoptive family unit that has been established for five years would not be in the best interests of the child.<sup>113</sup>

One would hope that, despite whatever fraud or unremediable event that might have occurred pertaining to the birthfather, the focus would shift from protecting the rights of the birthfather to a recognition of the best interests of the child. The idea that a five-year old child could be placed with a complete stranger, although a stranger related biologically, and removed from the only parents he or she has known because of the four-year provision in article 1263, does not reflect a "best interest of the child" standard, or any desirable standard for that matter. Therefore, the legislature should reduce this preemptive time period to one year. Louisiana has a strong safety net in place prior to the point of finalization. Because Louisiana has accorded birthfathers protection above and beyond that of the United States Constitution during the pre-finalization process, birthfather's rights have sufficiently been protected. Therefore, a potentially disruptive four-year preemptive period is unnecessary and should be reduced.

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113. The Louisiana Supreme Court, in *In re J.M.P.*, discussed the psychological development of the child as follows:

Continuity of parental affection and care provides the basis for the child's sense of selfworth and security; parental discipline and example are essential for the child's development of values and ideals. . . On the other hand, when parental care is inadequate, or when the child suffers a loss, change or other harmful interruption of the child-parent relationship, particularly in his early years, the child may experience serious deficits in his mental or emotional growth.

*In re J.M.P.*, 528 So. 2d 1002, 1014 (La. 1988).

