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Easing the Delivery of Adoption Reform in Nebraska: L.B. 712

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Easing the Delivery of Adoption Reform in Nebraska: L.B. 712

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I. INTRODUCTION

In the Spring of 1995, the Nebraska Legislature passed a statutory procedure to protect the validity of adoptions in Nebraska. This procedure broke new ground in balancing the interests and rights of putative fathers with the predominate concern for legal stability in all adoptive placements. The former version of Nebraska's law required an unwed father to claim paternity within five days of the birth of his child.¹ Unfortunately, the law gave little protection to a father who did not know of his child's birth or the biological mother's adoption plan. As a result, the Nebraska Supreme Court warned in dicta that the five-day filing provision could be "constitutionally suspect" for failing to provide at least some degree of notice to a father that his poten-

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1. NEB. REV. STAT. § 43-104.02 (Reissue 1995 & Cum. Supp. 1996).

tial parental rights could end with an adoptive placement of the child by the biological mother.²

After *Shoecraft v. Catholic Social Services Bureau, Inc.*, adoptive parents, birth mothers, and their children began placing less trust in the legal finality of adoptions when the birth father was unaware of the child's birth or the mother's plan to place the child for adoption. Practitioners who dealt with adoption cases began formulating their own makeshift procedures to notify birth fathers, but there was no consistency among these practices. No one could be sure how much notice—or even what kind of notice—was sufficient to pass constitutional scrutiny.

One year after *Shoecraft*, the court held the five-day filing statute unconstitutional in *In re S.R.S.*³ In that case, an adopted child in Nebraska had his placement disrupted after he had lived with his adoptive family for four years.⁴ The court found the five-day filing provision of section 43-104 unconstitutional because it failed to address the issue of notice and overall failed to provide a suitable procedural framework to handle adoptions involving older children.⁵ Responding to the court's decision, the Nebraska Legislature moved to change the statutory rights of unwed fathers in the context of adoptions involving both infants and older children.

This Article will examine the history of unwed fathers' rights in adoption as set forth by the United States Supreme Court and the Nebraska Supreme Court. This Article also will identify and discuss the changes L.B. 712 made in Nebraska law and how those changes improved the validity of Nebraska adoptions. Finally, this Article will analyze United States Supreme Court and Nebraska Supreme Court decisions reached after L.B. 712 went into effect in September 1995. Ultimately, this Article concludes that L.B. 712 and its related provisions can withstand both a due process and equal protection challenge under the reasoning and analysis employed by the courts at this time.

II. HISTORY

A. Review of United States Supreme Court Cases

The United States Supreme Court has recognized that unwed fathers have certain, albeit limited, potential parental rights when their minor children are placed for adoption.⁶ For example, in *Stanley v.*

2. See *Shoecraft v. Catholic Soc. Servs. Bureau, Inc.*, 222 Neb. 574, 578, 385 N.W.2d 448, 451 (1986).

3. *In re S.R.S.*, 225 Neb. 759, 769, 408 N.W.2d 272, 278-79 (1987).

4. *Id.*

5. *Id.*

6. See, e.g., *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 245 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

Illinois,⁷ the unwed father had lived with his three children and their mother sporadically for eighteen years, but failed to claim paternity under the procedures set forth under Illinois law. When the mother died, the state appointed guardians for the children.

The *Stanley* Court refused to deny the father's parental rights in the first instance and instead ordered the lower court to determine the father's parental fitness, ruling that putative fathers have a right to a hearing on their custodial claims.⁸ According to *Stanley*, an unwed father possesses certain constitutional protections in relation to the custody of his children.⁹ The Court further held that an unwed father deserved notice and a hearing in regard to an adoption and custody proceeding involving his children.¹⁰ The Court's ruling, while affording some protections to unwed fathers, neither specifically stated those protections nor outlined a procedure to test a father's parental fitness. After *Stanley*, it appeared only that an unwed father deserved some kind of notice and some kind of hearing on his parental fitness.

Six years later, in *Quilloin v. Walcott*,¹¹ the Supreme Court again considered unwed fathers' rights, this time emphasizing the difference between an uninvolved biological father and a nurturing, supportive father. In *Quilloin*, the mother and father had never married or lived together. Instead, the mother married another man when the child was two years old. The child's father visited infrequently and rarely provided any financial or emotional support. The mother consented to the child's adoption by her husband when the child was eleven years old. The biological father objected when he learned of the pending adoption.

The issue decided in *Quilloin* was whether, as the biological father claimed, an unwed father had the same absolute veto power regarding the adoption of his child as a married or divorced father possessed. Because he had not nurtured or supported the child, *Quilloin* ruled that "in the best interests of the child," the father could not veto the adoption.¹² According to *Quilloin*, the rights of an unwed father were "readily distinguishable from those of a separated or divorced father."¹³

A few years after *Quilloin*, the Supreme Court reaffirmed its prior approach when it again ruled in *Caban v. Mohammed* that once a father establishes a relationship with his children and takes an active role in supporting them, a state cannot summarily deny the father's

7. 405 U.S. 645 (1972).

8. *Id.* at 658.

9. *Id.* at 657 n.9.

10. *Id.*

11. 434 U.S. 245 (1978).

12. *Id.* at 255.

13. *Id.* at 256.

power to veto an adoption.¹⁴ In *Caban*, the father had lived with his children and their mother for two years before the father and mother separated. *Caban* emphasized this support and relationship in deciding that the New York statute could not deny the father an opportunity to object to the adoption of his children by another man.¹⁵

By 1983, when the Court heard *Lehr v. Robinson*,¹⁶ it found a factual scenario involving unwed parents that differed from the cases the Supreme Court had heard previously. Unlike *Quilloin* and *Caban*, the father in *Lehr* had no opportunity to establish any kind of relationship with his child or to provide any financial support. While the father and mother lived together for a time prior to her pregnancy, the mother concealed the birth of their child for two years. When the father finally found out about his child, the mother refused his attempts to provide support. The mother's husband attempted to adopt the child at about the same time the biological father asked for a determination of paternity. Later claiming he had not been aware of the pending adoption at the time he questioned paternity, the biological father protested the adoption. After the county court granted the adoption, the biological father appealed.

Lehr ruled that the "mere existence of a biological link does not merit equivalent constitutional protection" to an unwed father as to a married, separated, or divorced father.¹⁷ The Court noted that the father had failed to establish significant personal or custodial relationships with the child.¹⁸ Consequently, the Court considered only whether the state statute protected the father's opportunity to form such relationships.¹⁹ In the Court's view, the state statute provided for such opportunity.²⁰ The Court held, however, that if the statutory scheme "was likely to omit many responsible fathers and, if qualifications for notice were beyond the control of an interested putative father, it might be procedurally inadequate."²¹

Through *Stanley*, *Quilloin*, *Caban*, and *Lehr*, the United States Supreme Court partially clarified unwed fathers' rights in relation to the adoption of their toddler-aged and older children. Uncertainly still lies, however, in adoption scenarios in which the child is an infant at the time of the adoptive placement. An unwed father has little or no opportunity to establish the type of relationship that justifies giving the father a voice in the adoption of his child. This "gap" in the legal parameters surrounding adoption creates difficulty for attorneys,

14. *Caban v. Mohammed*, 441 U.S. 380, 394 (1979).

15. *Id.* at 393.

16. 463 U.S. 248 (1983).

17. *Id.* at 261.

18. *Id.* at 262.

19. *Id.* at 262-63.

20. *Id.* at 265.

21. *Id.* at 263-64.

agencies, and biological and adoptive families because there are few clear standards governing adoptions involving newborns and infants, and these form the majority of adoptive placements each year.

B. Review of Nebraska Supreme Court Cases

In the mid-1970s, in the wake of *Stanley v. Illinois*, the earliest United States Supreme Court decision on unwed father's rights, the Nebraska Legislature passed section 43-104, which gave a biological father up to five days after the birth of his child to file a form with the Department of Social Services claiming paternity and asserting his rights to the child. If the biological father failed to meet the five-day deadline (he could file anytime during the pregnancy as well), he lost his right to object to the adoptive placement of his child. The statute had no requirement that the birth father be notified of the existence of his child or the adoption plan.

The Nebraska Supreme Court decided two cases construing the original five-day filing statute, reaching different conclusions in each. First, in *Shoecraft v. Catholic Social Services Bureau, Inc.*,²² the birth father had knowledge of the impending adoption of his child, but failed to claim paternity until nine days after the child's birth. The *Shoecraft* court upheld the five-day filing statute as applied to the particular unwed father in that case because he had not supported the birth mother during her pregnancy, and he had failed to comply with the statutory deadline despite his knowledge of the birth and the planned adoptive placement.²³ The court upheld the deadline for filing five days after the child's birth and held the statute constitutional.²⁴ The court reasoned that the Legislature had assumed a mother's average hospital stay was about five days and concluded that the five-day limit furthered the legislative intent for expediency in adoption proceedings.²⁵

Shoecraft correctly applied the statute in effect at the time, yet the statute's underlying deficiencies were revealed within the court's analysis. The court noted that the five-day filing statute might be "render[ed] constitutionally suspect as violative of due process" in a case in which a biological father is not given notice of the adoption.²⁶ Yet the court in *Shoecraft* found that the statute was constitutional as applied to the particular biological father because the father had knowledge of both the pregnancy and the proposed adoption.²⁷ The

22. 222 Neb. 574, 385 N.W.2d 448 (1986).

23. *Id.* at 578, 385 N.W.2d at 451.

24. *Id.*

25. *Id.* at 579, 385 N.W.2d at 452 (citing *Hearing on L.B. 224 Before Neb. Judiciary Comm.*, 84th Legis., 1st Sess. 2 (Neb. 1975)(statement of Sen. Anderson)).

26. *Id.* at 578, 385 N.W.2d at 451.

27. *Id.*

court provided no further guidance, however, concerning which biological fathers should receive notice, how or when they should receive notice, or what impact a preexisting parental relationship between a biological father and child might have not only on the right to notice, but ultimately on the constitutionality of the five-day filing statute.

Those questions were partially answered in *In re S.R.S.*,²⁸ in which an unwed father had a relationship with his child and somewhat aided in financial support for the child. In *S.R.S.*, the court declared the five-day filing statute unconstitutional as applied to the particular biological father.²⁹ In contrast to the facts in *Shoecraft*,³⁰ the biological father in *S.R.S.* had lived with and helped to support his child for approximately nineteen months after the child was born. At that point, the mother moved out with the child and lived with another man. She refused to inform the father of his child's location. When the child was two years old, the mother, despite her knowledge of the father's wish for custody, placed the child for adoption. Shortly thereafter, the child was placed with a prospective adoptive family.

As soon as the father learned of the adoption proceeding, he filed an intent to claim paternity, but obviously had missed the five-day filing deadline. Despite knowledge of the filing, the adoptive family and adoption agency continued with the adoption. The county court then issued a decree of adoption after the statutory six-month waiting period, concluding that the biological father had abandoned the child.

The Nebraska Supreme Court overturned the adoption because the facts failed to show that the father had abandoned the child and further held the five-day filing requirement unconstitutional as applied to the father in *S.R.S.*³¹ The tragic circumstance of *S.R.S.* was underscored by the fact the child had lived with the adoptive family for more than two years, making him four years old by the time the adoption was reversed. *In re S.R.S.*, more than any other case, illustrated the need for adoption reform to better insure legal stability for Nebraska's adopted children. Nevertheless, adoption reform would not come for another eight years.

In the interim, adoption practitioners searched for ways to synthesize *Shoecraft* and *S.R.S.* to better interpret the status of unwed fathers' rights in Nebraska. Both cases held that the "relationship between a parent and child is constitutionally protected" under the Bill of Rights, Article IX of the of the United States Constitution.³² Yet, the differences between the two cases blurred the line between what was constitutional and unconstitutional, leaving significant

28. 225 Neb. 759, 408 N.W.2d 272 (1987).

29. *Id.* at 769, 408 N.W.2d at 279.

30. *See supra* text accompanying notes 21-23.

31. *In re S.R.S.*, 225 Neb. 759, 769, 408 N.W.2d 272, 279 (1987).

32. *Id.* at 767, 408 N.W.2d at 277.

questions as to whether the five-day filing statute could survive without revision. For example, the *In re S.R.S.* court ruled that because the father had established a relationship with his child, no compelling interest would be served by allowing the mother "to singlehandedly sever a relationship between a father and child."³³ Yet, the court severed the biological father's parental rights in *Shoecraft* because the father had not established a relationship with his child despite his lack of opportunity to establish such a relationship. Both fathers had notice of the child's existence; neither filed an intent to claim paternity within five days of the birth; yet, one lost the opportunity to parent and one did not.

After *Shoecraft*, *In re S.R.S.*, and the prior United States Supreme Court cases, Nebraska attorneys and agencies were left to try to interpret what protection needed to be afforded an unwed father to complete a valid and legally stable adoptive placement. Adoption reform became necessary because it was nearly impossible to know in advance whether a particular adoption scenario was a "*Shoecraft*" case—a scenario in which the parties could rely on the five-day filing requirement—or an "*S.R.S.*" case—a scenario in which the five-day filing requirement would be disregarded. The problem was no one knew what procedures had to be followed if the five-day filing statute was inapplicable.

This uncertainty and the consequent level of concern within the adoption community was only heightened by the well-publicized "Baby Jessica" case in Iowa.³⁴ After "Baby Jessica," the Nebraska Legislature realized, as did the adoption community, that if statutory procedures remained unchanged, the courts likely would overturn adoptive placements and remove children—even happy two-year-olds—from their adoptive homes. The Legislature's response came in the form of L.B. 712, enacted September 7, 1995.

III. L.B. 712

Senator Gerald Matzke introduced L.B. 712 not as legislation intended to promote birth fathers' rights, but rather as an act to strengthen the validity of adoptions in Nebraska.³⁵ The intent of L.B. 712 was to provide an adoption process that would adequately address an unwed father's rights as early in the adoption process as possible to promote finality in the placement. The aspirational goal was to ascertain the status of the birth father's rights before the child was placed

33. *Id.* at 769, 408 N.W.2d at 278.

34. *In re Clausen*, 502 N.W.2d 649 (Mich. 1993).

35. *Hearing on L.B. 712 Before Neb. Comm. on Health and Human Servs.*, 94th Legis., 1st Sess. 2 (Neb. 1995)(statement of Sen. Matzke).

in an adoptive home and in all cases before the adoption decree was entered and deemed final.³⁶

A. What L.B. 712 Did

In passing L.B. 712, the Legislature did not replace the statutory five-day filing deadline; rather, L.B. 712 made additions to enhance the existing law. Legislators attempted to strengthen the statute's constitutional foundation to enable the statute to withstand an unwed father's due process challenge regardless of the unique facts presented in a particular adoption scenario. The Bill tried to stabilize the legality of Nebraska adoptions by including a series of steps to identify the birth father's rights earlier in the adoption process. In actuality, L.B. 712 did little more than codify what many agencies and practicing attorneys were already doing in terms of notifying birth fathers. To improve finality of adoption, agencies and attorneys attempted to make each case as factually similar to *Shoecraft* as possible so the birth father could not effectively disrupt adoptive placements after the five-day filing deadline. Essentially, L.B. 712 provided needed structure to insure that these make-shift efforts would satisfy due process challenges. The procedures were designed to promote uniformity and consistency so when performed correctly the adoptive placement would not be subject to reversal in a later legal challenge.

As proposed and now codified in the various new subsections of 43-104, a birth father still must challenge an adoptive placement within five days of the child's birth. After a mother decides to place her child for adoption, however, the agency or attorney must now make a good faith effort to identify and locate the biological father and give him notice.³⁷ The heart of L.B. 712 is the procedure to notify an unwed father of the pregnancy and pending adoption. Once this notification is provided—either by certified mail or publication—a father must act or be barred from contesting the adoption.

The new law also requires that a father who files an intent to claim paternity be willing to take steps to pursue custody.³⁸ An unwed father who wishes to contest an adoption must do more than simply file an objection, thereby forcing the birth mother to parent the child. Rather than simply holding the adoption proceeding hostage by his claim of paternity, the father must seek custody of his child. This provision is logical, as no purpose is served by allowing an unwed father to prevent an adoptive placement simply by laying claim to his parental rights if he takes no further steps to fulfill the considerable responsibilities of parenting. Under the reform of L.B. 712, a father must file

36. *Id.*

37. NEB. REV. STAT. § 43-104.08 (Reissue 1995 & Cum. Supp. 1996).

38. *Id.* § 43-104.02.

suit to obtain custody within thirty days of filing his intent to claim paternity or he will lose standing to object to the adoptive placement of his child.³⁹

According to the new version of the statute,⁴⁰ a father has five business days after the child's birth, or five business days after notice is provided, whichever is later, in which to declare his intent to claim paternity and obtain custody and to file with the Department of Social Services (now known as the Department of Health and Human Services).⁴¹ The previous statute allowed five days; the current version counts five business days. This provision, while seemingly insignificant, could prevent the court from overturning an adoption when the birth father has had insufficient opportunity to respond because the birth or notification occurs over a weekend or holiday.

One of the unique provisions in L.B. 712 is its requirement that the birth mother sign an affidavit, under oath, as the basis for her identification of the putative biological father.⁴² This provision improves Nebraska adoption law by reducing the instances of false identification by the mother. First, the father is much more likely to be identified and thus notified because the mother could face a claim of perjury if she knowingly falsifies information in the affidavit. Second, the affidavit provides a counseling vehicle for the birth mother's attorney or agency representative to impress upon her the reason why accurate identification of the birth father is crucial for the stability of the adoptive placement. Furthermore, any putative father who wishes to insure that he receives notice of any child born of an out-of-wedlock union can file an intent to claim paternity any time during the nine months between conception and birth. Because only due diligence is required, L.B. 712 does not guarantee that a birth father will receive actual or constructive notice of the adoption. But, any birth father concerned with receiving notice has the power in his own hands to assure that he receives actual notice by filing in the putative father registry.

If only one biological father is identified, he is notified of the birth (or expected birth), the impending adoption, and his right to relinquish paternity, deny paternity, or contest the adoption. If he consents to the adoption or fails to avail himself of the statutory procedures to contest the adoption, due process likely is satisfied and the adoption should withstand any later challenge by the birth father.⁴³

39. *Id.* § 43-104.05.

40. *Id.* § 43-104.02.

41. *Id.*

42. *Id.* § 43-104.09.

43. *Id.* § 43-104.11.

To satisfy the notice requirements in L.B. 712, the biological father or possible biological fathers must be notified by certified mail.⁴⁴ The notice portion of the law takes a broad sweep at any and all potential birth fathers of the child. While some may view these efforts as "overkill," an adoption's validity is strengthened whenever all potential dissenters can be identified and their interests addressed at the outset of the adoption process.

Section 43-104.13 requires that the father receive notice as soon as possible to allow the greatest possible time for him to choose to claim or relinquish his rights.⁴⁵ The notice must (1) name the mother; (2) state the impending birth date or actual birth date of the child; (3) state that the mother intends to relinquish custody or join in the adoption filed by her husband; (4) name the person identified as the possible biological father; (5) identify the rights and options that the biological father may exercise; (6) identify who the potential father must contact to exercise his rights; and (7) notify the biological father of his responsibilities should he claim paternity.⁴⁶

Cases in which the identity of the biological father is unknown or undiscoverable do occur. These situations pose a serious threat to the validity of adoptions because the father or potential father cannot be notified if he is unknown. In an attempt to address such situations, L.B. 712 requires publication when the identity of the birth father or potential birth fathers is unknown or when his location cannot be ascertained through reasonable efforts.⁴⁷ The publicized notice provides specific information concerning the father and the date and location of the conception to provide the best opportunity for the actual father to recognize that he is the person being notified.⁴⁸ Further, the publication identifies the birth date or expected birth date, the pending adoption, and similar rights and options as detailed in section 43-104.13.⁴⁹

The publication requirement further illustrates that the purpose of L.B. 712 is to address the due process rights of an unwed father at the time of the adoptive placement to prevent future claims by a putative father that can threaten the finality of the adoption and, consequently, the child's best interests. Like the certified mail notice, publication imparts the two most crucial pieces of information that the *Shoecraft* court held were necessary to preserve the validity of an adoption: the fact of the pregnancy and the actual or expected date of the child's birth. After receiving this information, the birth father has the right to file his intent to claim paternity immediately, or if the

44. *Id.* § 43-104.12.

45. *Id.* § 43-104.13.

46. *Id.*

47. *Id.* § 43-104.14.

48. *Id.*

49. *Id.*

child is not yet born, the man can wait a maximum of five business days after the birth to file. Either way, any decision to act or fail to act rests in the father's own hands and therefore is under his exclusive control.

According to section 43-104.15, the procedures outlined above should be conducted prior to the child's placement with the adoptive family if at all possible.⁵⁰ Yet, this section also provides an exception to identification and notice if it would place the mother in physical jeopardy, or if the conception resulted from sexual assault or incest.⁵¹ Attorneys and agencies must sign an affidavit detailing their efforts to give actual or constructive notice to the putative father(s).⁵² This affidavit requires the attorney or agency to affirm the due diligence undertaken to identify and provide notice to the biological father or possible fathers.⁵³ Also, all documents regarding notification to the father or potential father must be attached to the final adoption decree.⁵⁴

If for some reason the court hearing the petition for adoption believes that due diligence has not been satisfied in identifying and notifying the biological father, it may appoint a guardian ad litem to identify and provide notice to the biological father.⁵⁵ Thus, if the steps taken to address the birth father's rights do not conform with the statute's requirements, the court has the power to mandate that those requirements be met before the adoption decree is entered. This judicial action solidifies the resulting adoption, as the biological father's rights are properly addressed by an objective party, rather than a party involved in facilitating the adoptive placement. The specific responsibilities and powers of the guardian are outlined in L.B. 712 to insure the statutory procedures are followed.⁵⁶

Section 43-104.22 illustrates that L.B. 712 was not designed as a "pro-father" bill; rather, it is a "pro-child" effort. The reforms are charged with minimally, but adequately, protecting a biological father's rights so as to eliminate later legal challenges to the adoption. This is not to say, however, that an unmarried birth father has the unfettered right to object to an adoptive placement. Section 43-104.22 lists several circumstances under which a court shall determine that a biological father is not entitled to veto an adoption of his putative child.⁵⁷ Circumstances that direct a court to disregard a biological father's opposition to an adoption include the following: (1) the father

50. *Id.* § 43-104.15.

51. *Id.*

52. *Id.* § 43-104.16.

53. *Id.*

54. *Id.* § 43-104.17.

55. *Id.* § 43-104.18.

56. *Id.* § 43-104.18 to -21.

57. *Id.* § 43-104.22.

abandoned or neglected the child after learning of the birth; (2) the father is not a fit parent; (3) the father knew of the birth and failed to offer any support to the mother or child; (4) the father abandoned the mother during a known pregnancy and provided no support; (5) the conception occurred as a result of nonconsensual intercourse or incest; (6) the statute's procedures were followed, and the father failed to file his intent to claim paternity and obtain custody by the end of the five-day filing deadline; (7) the father failed to file a legal action to claim paternity and custody within thirty days after filing his claim form with Social Services; or (8) the putative father is not the biological father.⁵⁸

B. What L.B. 712 Did Not Do

The Legislature did not change or eliminate the five-day filing requirement for a putative father to claim paternity and seek custody; rather, L.B. 712 only slightly modified how those days are counted. In *Shoecraft*, the court affirmed the validity of requiring a birth father to act during the pregnancy or within five days of the birth, and the Legislature apparently found no reason to change it. Additionally, L.B. 712 supported the reasoning of *Shoecraft* when it identified expediency as a legitimate basis upon which to design a statutory scheme regarding unwed fathers' rights. Therefore, the only change in the five day period stems from the point at which it begins to adequately address a father's rights in cases in which he had an opportunity to establish a relationship with his child, such as in the case of an "older child." In these cases, the father may still file an intent to claim paternity and obtain custody within five business days of notification of the upcoming adoption. This change makes L.B. 712's provisions, as well as its five-day rule, equally applicable to both an older child, like the child in *In re S.R.S.*, and a newborn, like the child in *Shoecraft*. As such, L.B. 712 should remove the uncertainty and speculation inherent in trying to decide, prospectively, whether a given case is a "*Shoecraft*" case or an "*S.R.S.*" case.

In addition, L.B. 712 took no steps to inhibit adoption, decrease the incentives for adoption, or increase the likelihood of abortions. The section of the statute requiring the birth mother to sign an affidavit of identification regarding the birth father requires only that the birth mother be truthful in her statements regarding the biological father's identity. Requiring identification under oath enhances the accuracy of notice, thus affording due process and increasing the stability of the later adoption.

Finally, none of the requirements set forth in L.B. 712 should operate to burden agencies and attorneys representing birth parents and

58. *Id.*

adoptive couples. The statute sets forth simple steps to insure that if the father can be identified, he is notified; after he is notified, the father has a sufficient, but limited period of time to step forward and act like a father—taking on both the rights and responsibilities of a parent. The steps required of the adoption practitioners include minimal tasks such as securing the mother's affidavit, sending certified copies of letters to potential fathers, and publishing information in the local newspaper, if necessary. Many attorneys were already taking such steps or substantial equivalents before L.B. 712 was passed. Considering what the parties to an adoption must endure if an adoption is later contested by a surprise appearance by the biological father, the minimal steps taken early, even if a slight additional burden, save great expense, trauma, and effort later.

IV. NOTABLE DECISIONS SINCE ENACTMENT OF L.B. 712

In 1995, the United States Supreme Court, in *O'Connell v. Kirchner*,⁵⁹ again ruled on issues affecting biological fathers' rights. In *O'Connell*, the child was four years old and had lived with his adoptive parents since birth. For the first two months of the child's life, the child's biological father was told that his son was dead. Immediately upon finding the boy alive, the father asserted his rights. According to the lower court, he was a fit parent and adequately pursued his rights. Consequently, the lower court reversed the adoption decree and awarded the biological father immediate custody.

The *O'Connell* Court expressed regret that the Illinois court had entered an erroneous adoption decree in 1992, and that the delay in correcting the error had such unfortunate effects. Nonetheless, the Court affirmed reversal of the adoption decree.⁶⁰ *O'Connell* illustrates the point that faulty effort prior to or during the adoption process can and will cause future heartache and tragedy.

The Nebraska Supreme Court also ruled on two adoption cases involving unwed fathers' rights since the Legislature passed L.B. 712, but these two cases came to fruition before the new statute took effect. Consequently, the cases were decided under the old statute.⁶¹ Nonetheless, these cases are helpful in predicting the Nebraska Supreme Court's likely response to L.B. 712 if challenged in the future.

First, in *In re Adoption of Cassandra B.*,⁶² the father lived with the mother and his children for some time and periodically provided financial support. After the mother and father separated, the father pro-

59. 513 U.S. 1138 (1995).

60. *Id.*

61. See *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996); *In re Adoption of Cassandra B.*, 248 Neb. 912, 540 N.W.2d 554 (1995).

62. 248 Neb. 912, 920, 540 N.W.2d 554, 559 (1995).

vided little financial support, but did keep in contact with his children. The mother eventually placed the children with an adoption agency, lying about the identity of their father. When the father learned of the placement and pending adoption, he filed a motion to claim paternity.

The court held that the plain language of the pre-L.B. 712 statute requiring the consent or substitute consent of both living parents to be attached to an adoption decree meant that the adoptive family's failure to secure the father's or a substitute's consent constituted a procedural failure.⁶³ *Kassandra* concluded that the county court lacked subject matter jurisdiction and reversed the order terminating the father's parental rights. The court addressed the five-day notice issue only to the extent that it previously had stated that it was not applicable to a father whose child was not a newborn, if he had established a relationship with the child and provided support.⁶⁴ If anything, *Kassandra* further evidenced the need to replace the law as it existed prior to L.B. 712.⁶⁵

Four months later, the court decided *Friehe v. Schaad*.⁶⁶ In *Friehe*, the mother called the father one day after birth to inform him of the child's existence; the mother stated that she was unaware of her pregnancy until the day of the birth. Upon visiting the mother's parents and then the mother, the father learned the mother was considering adoption, but she expressed a desire for it to be a joint decision. The father failed to claim paternity within the five-day filing period, but informed the mother that he wished to keep the child. The mother, however, continued to insist on an adoption.

The court began its analysis noting that no established relationship existed between the child and father.⁶⁷ The court went on to analyze not the constitutionality of terminating an established bond, but the termination of an opportunity to form one.⁶⁸ According to *Friehe*, the state has a compelling governmental objective in insuring the well-being and proper care and nurture of all children.⁶⁹ Consequently, the state may treat mothers and fathers differently because

63. *Id.*

64. *Id.* at 921-22, 540 N.W.2d at 560 (citing *In re S.R.S.*, 255 Neb. 759, 408 N.W.2d 272 (1987)).

65. As this Article goes to press, L.B. 1041 was introduced by Senator Gerald Matzke and was passed by the Nebraska Legislature in April 1998. The Bill rectifies the issues raised in *In re Adoption of Kassandra B.*, 248 Neb. 912, 540 N.W.2d 554 (1995). Specifically, L.B. 1041 clarified that (1) consents to adoption need be filed only prior to the hearing on the adoption (not attached to the petition); (2) the necessity of an unwed father's consent is governed exclusively by the subsections of 43-104; and (3) if a birth father's consent is not required for any reason under § 43-104.22, a substitute consent for him does not need to be obtained.

66. *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996).

67. *Id.* at 833, 545 N.W.2d at 746.

68. *Id.* at 833-34, 545 N.W.2d at 746-47.

69. *Id.* at 834, 545 N.W.2d at 747.

the statute, including the five-day filing period, supports such a state interest.⁷⁰ Further, "it is in the best interests of the child to allow the transfer to a loving adoptive family as soon as possible after birth."⁷¹ Because the father immediately knew of the birth and the mother's intentions regarding adoption, and because the five-day filing period was constitutional, the father could not prevent the adoption. Only the father's own ignorance of the law had prevented him from protecting his parental rights.⁷²

Friehe represents the only likely scenario in which the former law would seem to function properly. The five-day notice was held valid because the father had notice of the birth and imminent adoption during the five days after the birth. Similar to the court's reasoning in *Friehe*, L.B. 712 places primary responsibility for protecting an unwed father's rights into his own hands. This occurs when the man (or men) identified as the putative father is provided actual or constructive notice of the expected or actual birth of the child and the impending adoption plan, and is given a set, but limited, time in which to either act or lose any rights he might have to the child. In this way, the father's rights are sufficiently protected to make the adoption resistant to any later claims. Once the father's rights have been addressed by those acting in furtherance of the adoption through the reasonable efforts of due diligence, not under a standard of perfection, only the father can be blamed if he fails to act in time to secure his parental rights either after receiving notice or by exercising his right to file in the putative father registry any time after his child is conceived.

V. CONCLUSION

In passing L.B. 712, the Nebraska Legislature improved adoption law in two very important ways. After following the steps outlined in the statute, an adoption is relatively impervious to challenges by an unwed father who unexpectedly attempts to claim paternity rights to a child with whom he has established no parent-child relationship. The statute also clarifies the procedures to follow to effectuate a valid and legally stable adoptive placement of an older child who may have some degree of relationship or involvement with the birth father. While on its face the statute seems to promote enhanced rights for unwed fathers by adding notification procedures to the adoption process, it does so only as a means to an end. By requiring minimal due diligence in the early stages of an adoption, the validity of the entire adoption improves. In this way, tragic cases like *In re S.R.S.* can be avoided. The Nebraska Legislature wisely anticipated the language

70. *Id.*

71. *Id.* at 835, 545 N.W.2d at 747.

72. *Id.*

in *Friehe*, which announced that nurturance, support, and loving care of children is a paramount state interest. By adopting L.B. 712, the Legislature did service to that endeavor.