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# Notice of Relinquishment: The Key to Protecting the Rights of Unwed Fathers and Adoptive Parents

Susan Kubert Sapp
*University of Nebraska College of Law*, ssapp@clinewilliams.com

Note

# Notice of Relinquishment: The Key to Protecting the Rights of Unwed Fathers and Adoptive Parents

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## I. INTRODUCTION

In 1986, 3,785 children were born out of wedlock in Nebraska.[1] The number of nonmarital[2] children has risen sharply over the last ten years,[3] increasing public and legislative interest in creating laws which

1. Telephone interview with Mark Miller, Data Coordinator, Nebraska Division of Health Data (Oct. 29, 1987) (hereinafter Interview).
2. The word "nonmarital" will be used in this Note to refer to any child born of unmarried parents, since the word "illegitimate" may be considered disparaging. *See* Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 53 n.228 (1975). The substitution of "nonmarital" is intended to be consistent with the Supreme Court's usage of the word "illegitimate." *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972).
3. Two thousand four hundred fifty-eight children were born out of wedlock in Ne-

will facilitate adoptions.

The Nebraska Supreme Court has acknowledged that the state has a compelling interest in facilitating "the transfer of children by relinquishment from unwed mothers and the adoption of those children."[4] However, under Nebraska's current statutory procedures regarding paternity and adoption, the court is unable to apply Nebraska law in a way which both facilitates speedy adoptions and protects the rights and interests of all parties involved. This problem is clearly evident in light of Nebraska's most recent adoption case, *In re Application of S.R.S and M.B.S.*[5]

In *S.R.S. & M.B.S.*, the Nebraska Supreme Court invalidated the adoption of a nonmarital child because the child's biological father had not consented to the adoption.[6] The court held the Nebraska statute, which does not require an unwed father's consent to the adoption of his child unless the father has filed an intent to claim paternity within five days of the child's birth,[7] was unconstitutional as applied to the father in *S.R.S. & M.B.S.*[8]

As a result of *S.R.S. & M.B.S.*, Nebraska's paternity and adoption laws do not provide answers to two very important questions: 1) to what extent are the rights of unwed fathers protected in Nebraska, and 2) when can an adoption be considered final so that the rights of adoptive parents are protected? This Note addresses both unanswered questions. Part I provides background information regarding the rights of unwed fathers under United States Supreme Court and Nebraska Supreme Court decisions. Part II discusses *S.R.S. & M.B.S.* and analyzes its effect on current Nebraska paternity and adoption law. Part III recommends reformation of Nebraska's paternity and adoption statutes.

## II. BACKGROUND

### A. The Rights of Unwed Fathers Under United States Supreme Court Decisions

The rights of unwed fathers have been examined several times in

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braska in 1977, compared to three thousand seven hundred eighty-five born out of wedlock in 1986. Interview, *supra* note 1.

4. Shoecraft v. Catholic Social Servs. Bureau, Inc., 222 Neb. 574, 575, 385 N.W.2d 448, 449 (1986).
5. 225 Neb. 759, 408 N.W.2d 272 (1987), *reh'g denied*, (Nebraska Supreme Court Minute Record, Case No. 10830).
6. *Id.* at 769, 408 N.W.2d at 279.
7. NEB. REV. STAT. § 43-104.02 (1984). For the exact language of the statute, see *infra* note 46.
8. *In re* Application of S.R.S. & M.B.S., 225 Neb. 759, 769, 408 N.W.2d 272, 279 (1987).

the past few years by the United States Supreme Court.[9] The Supreme Court first liberalized the rights of unwed fathers in *Stanley v. Illinois*.[10] The father in *Stanley* lived with the biological mother and their three children intermittently for eighteen years, but failed to legitimize the children according to the procedures defined by Illinois law. Upon the mother's death, the children were placed with a state-appointed guardian.[11] The Court held that all putative fathers must be afforded a hearing on their custodial claims and remanded the case to the lower court to determine the unwed father's parental fitness.[12]

The Court did not set forth a test for the lower court to use to determine the unwed father's parental fitness,[13] but did emphasize that the right of an unwed father to custody of his nonmarital child merits constitutional protection. However, the form this protection should take was not clear because of a footnote in the decision which stated that unwed fathers are entitled to notice and a hearing with respect to adoption and custody proceedings concerning their children.[14]

The footnote caused many states to assume that unwed fathers have a right to notice of adoption and custody proceedings concerning their children. Such states have responded by enacting statutes which require various forms of notification. For example, Wisconsin recently enacted a statute that set forth stringent procedures a court must follow to identify, locate, and give notice to an unwed father of custody or adoption proceedings concerning his child.[15] Wisconsin requires a hearing be held prior to the termination of the father's rights, and the court has the discretion to require that the father be notified of the hearing through publication, if necessary.[16]

Other states require that the father be notified of adoption and cus-

9. Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 245 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983).
10. 405 U.S. 645 (1972).
11. *Id.* at 649. Under ILL. REV. STAT. §§ 702-1 and 702-5 (1972), nonmarital children become wards of the state upon the death of the mother. *Id.*
12. Stanley v. Illinois, 405 U.S. 645, 658 (1972). Justice White, writing for the majority, concluded: "[A]ll Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause." *Id.*
13. The Court noted only that the cost of individualized fitness hearings was minimal. *Id.* at 657 n.9. However, the Court may soon determine the proper standard to be applied at an unwed father's parental fitness hearing. *See In re* Baby Girl M, 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984), *appeal docketed sub nom.*, McNamara v. City of San Diego, No. 87-5840 (U.S. April 24, 1988).
14. Stanley v. Illinois, 405 U.S. 645, 657 n.9 (1972).
15. WIS. STAT. ANN. § 48.42 (West 1987).
16. *Id.*

tody proceedings concerning his child only if the father previously acknowledged the child in some way. For example, South Dakota requires that notice be given to the father as long as the father acknowledged paternity within sixty days of the birth of the child.[17] Minnesota requires that the father be given notice of any proceedings concerning his child if: 1) the father's name is on the child's birth certificate; 2) the father supported the child or mother financially; 3) the father openly lived with the mother or child; or 4) the father filed an affidavit of paternity with the county court.[18]

*Stanley* left the scope of an unwed father's rights in question, but the boundaries became clearer in *Quilloin v. Walcott*.[19] In *Quilloin*, the parents had never lived together and had never married. The mother married another man when the child was two years old. The father provided sporadic support and visited the child on an irregular basis. When the child was eleven, the mother consented to an adoption by her husband. The biological father's consent was not required under Georgia statutes, but when he received notice of the impending adoption, he objected.[20]

The unwed father in *Quilloin* claimed that an unwed father is entitled to an absolute veto with respect to the adoption of his child, just as married or divorced fathers are, unless the court finds him an unfit parent.[21] However, using the "best interests of the child" standard, the Court determined the father in *Quilloin* was not entitled to veto the adoption of his child because he had not supported or nurtured the child.[22] The Court determined the unwed father's rights were "readily distinguishable from those of a separated or divorced father" and, therefore, the Court affirmed the adoption petition that lacked the unwed father's consent.[23]

In *Caban v. Mohammed*,[24] the Court again evaluated an unwed father's rights based on the degree of responsibility he had shown toward his children. The children in *Caban* were young, unlike the eleven year old child in *Quilloin*. The children had lived with both parents for two years before the couple separated. The Court in *Caban* determined that the father had acknowledged paternity and had established a relationship with and supported his nonmarital children. He, therefore, could not be barred by statute[25] from an opportunity to oppose the children's adoption. The Court held that the

17. S.D. CODIFIED LAWS ANN. § 25-6-4 (Supp. 1983).
18. MINN. STAT. ANN. § 259.26 (Supp. 1984).
19. 434 U.S. 246 (1978).
20. GA. CODE ANN. §§ 74-103(3), 74-203 (1976).
21. Quilloin v. Walcott, 434 U.S. 246, 253 (1978).
22. *Id.* at 255.
23. *Id.* at 256.
24. 441 U.S. 380 (1981).
25. N.Y DOM. REL. LAW, §§ 111, 111a (McKinney 1977 & Supp. 1983-84).

differential statutory treatment afforded unwed mothers and unwed fathers did not bear a substantial relationship to the acknowledged state interest of providing adoptive homes for nonmarital children.[26] The Court thus found it unconstitutional for states to deny unwed fathers the power to veto the adoption of their children in cases in which the father has established a relationship with his nonmarital children and has aided in their support and nurturance.[27] *Caban* appears to be limited to the facts of the case,[28] therefore, a proper reading of *Caban* should focus on the Court's rationale, rather than the result.[29]

Both *Caban* and *Quilloin* appear to set the standard that an unwed father has no absolute parental rights without having manifested significant paternal interest. Accordingly, a father who does not accept financial or emotional responsibility for his child most likely cannot expect his rights to be protected to the same degree as other parents.[30] However, while the Court determined the unwed father's rights based on whether he had "come forward to participate in the rearing of his child,"[31] the Court failed to provide any guidance concerning the proper criteria that should be used to distinguish "responsible" unwed fathers from "irresponsible" ones.[32] The lack of criteria is particularly problematic in cases in which the unwed mother relinquishes the child as an infant and, consequently, the father never has an opportunity to establish a parental relationship with his child.

In *Lehr v. Robertson*,[33] the Court considered the rights of an unwed father who was not given the opportunity to establish a parental relationship with his infant child prior to adoption of the child by the mother's husband. In *Lehr*, the father lived with the mother prior to the child's birth, but the father's name did not appear on the child's birth certificate.[34] The father claimed the mother concealed the child's whereabouts for two years after the child's birth. When the

26. Caban v. Mohammed, 441 U.S. 380, 394 (1979).
27. *Id.* at 392.
28. "In those cases where the father never has come forward to participate in the rearing of his child, nothing . . . precludes the State from withholding from him the privilege of vetoing the adoption of that child." *Id.* The dissent agreed that the *Caban* holding should be limited to similar factual situations involving the adoption of a child "against the wishes of a natural father who previously ha[d] participated in the rearing of the child and who admit[ted] paternity." *Id.* at 409 (Stewart, J., dissenting).
29. Comment, *Extending the Rights of Unwed Fathers*, 29 EMORY L.J. 833, 848 (1980).
30. Comment, *Limiting the Boundaries of Stanley v. Illinois: Caban v. Mohammed*, 57 DEN. L.J. 671, 677 (1980).
31. *See* Caban v. Mohammed, 441 U.S. 380, 392 (1979).
32. The Court in *Caban* did not explain what conduct is expected of the unwed father in order to establish a parental right. *See* Weinhaus, *Substantive Rights of the Unwed Father: The Boundaries Are Defined*, 19 J. FAM. L. 445 (1980-1981).
33. 463 U.S. 248 (1983).
34. *Id.* at 252. Nevertheless, the mother told friends and family and the New York State Department of Social Services that Lehr was the father. *Id.*

father, with the help of a detective, finally was able to locate the mother and child, the mother refused his offer to provide financial support for the child.[35]

Eight months after the child's birth, the mother married another man. When the child was two years old, the other man petitioned to adopt the child. One month later the biological father filed a request to determine paternity and reasonable visitation privileges.[36] The father claimed he was unaware of the pending adoption when he filed the request to determine paternity, but as soon as he learned of the adoption, his attorney notified the court that the father planned to seek a stay of the adoption.[37] The county court granted the adoption, notwithstanding the biological father's objection and request for parental rights.[38]

On appeal, the Supreme Court held the "mere existence of a biological link does not merit [an unwed father] equivalent constitutional protection" as compared to a married, separated, or divorced father.[39] The father in *Lehr* did not have a significant custodial, personal, or financial relationship with the child and allegedly did not seek to establish a legal tie until the child was two years old. Therefore, the Court only considered whether the New York statute adequately protected the father's opportunity to form such a relationship.[40]

The New York statute set forth categories of unwed fathers who were deemed "worthy" of receiving notice of adoption proceedings involving their children.[41] The father in *Lehr* did not fall within those categories and, therefore, did not receive notice. The father claimed that the statutory scheme which arbitrarily denied notification to certain unwed fathers was unconstitutional. The Court held that if New York's 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."[42] Nevertheless, the Court found the statute valid, holding that "the legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously . . . justify a trial judge's determination to require all interested parties to adhere precisely to the procedural requirements."[43]

The Court also determined that the New York adoption procedures were designed to promote the best interests of the child, protect the

35. *Id.*
36. *Id.* at 250-253.
37. *Id.*
38. *Id.*
39. *Id.* at 261.
40. *Id.* at 262.
41. *See* N.Y. DOM. REL. LAW § 111, 111a (McKinney 1977 & Supp. 1983-84).
42. Lehr v. Robertson, 463 U.S. 248, 263-64 (1983).
43. *Id.* at 265.

rights of interested third parties, and insure promptness and finality.[44] The Court concluded that states are not prevented from granting different legal rights to parents who have not established custodial relationships with their child from those who have established such relationships.[45]

The Court's decision in *Lehr* did nothing to clarify an unwed father's rights in cases in which the child is a newborn infant at the time of relinquishment by the mother. When the child is an infant, an unwed father never has the opportunity to establish a parental relationship. Without an opportunity to manifest love and responsibility for the infant, the unwed father is effectively precluded from being able to fulfill the Supreme Court's standards under which he could receive parental rights in custody and adoption proceedings concerning his child.

Through *Stanley*, *Quilloin*, *Caban*, and *Lehr*, the United States Supreme Court has protected only the rights of unwed fathers to the same degree as married, divorced, or separated fathers in cases in which the father has established a responsible relationship with the child. As noted above, establishing responsibility is nearly impossible if the child is an infant. If any general rule can be gleaned from these decisions, it is that an unwed father's rights regarding his nonmarital child are contingent on a judicial evaluation of his behavior prior to and after the child's birth. A father can lose his rights if his behavior does not conform to a judicial interpretation of statutory standards which vary from state to state. The unfortunate result of this rule is that neither unwed fathers, unwed mothers, attorneys, nor adoptive parents know the rights and obligations of a specific unwed father prior to a judicial evaluation of the case. Such judicial evaluation is almost always after the child has been placed in an adoptive home. Therefore, it is virtually impossible to know if an adoption is truly final when the adoption petition is granted. Such uncertainty results in a constant threat to the finality of adoptions.

### B. The Rights of Unwed Fathers According to the Nebraska Supreme Court

In Nebraska, an unwed father is given notice that the mother has relinquished her rights to his child or that an adoption of his child is pending only if the unwed father has filed an intent to claim paternity pursuant to Nebraska Revised Statute, section 43-104.02.[46] Under sec-

44. *Id.*
45. *Id.* at 267-68.
46. NEB. REV. STAT. § 43-104.02 (1984) provides in pertinent part:

> (1) Relinquishment or consent for the purpose of adoption given only by a mother of a child born out of wedlock pursuant to section 43-104 shall be sufficient to place the child for adoption and the rights of any alleged

tion 43-104.02, the intent to claim paternity must be filed with the Department of Social Services within five days after the birth of the child; it is irrelevant whether the father's name is on the birth certificate, what type of financial or emotional relationship the father has had with the mother or child, or whether the father is even aware of the narrow method through which he can establish his paternity rights.[47] If an intent to claim paternity is not filed, or is not filed in a timely fashion, an unwed mother may relinquish her child for adoption notwithstanding the objection of the father. Neither the father's lack of notice regarding the mother's relinquishment nor the father's ignorance of the law is sufficient to waive the statute's five-day requirement.[48]

In *Shoecraft v. Catholic Social Services Bureau, Inc.*,[49] the Nebraska Supreme Court upheld section 43-104.02 and denied the unwed father parental rights because he had not filed an intent to claim paternity until nine days after the child's birth. The court held section 43-104.02 constitutional as applied to the unwed father in *Shoecraft* because the unwed father failed to support the mother prior to birth and because he failed to comply with the statute's time limit despite having knowledge of the impending adoption.[50] The court summarily addressed the father's separate equal protection and due process claims and upheld the constitutionality of the statute's gender-based distinctions[51] and lack of notice.[52] The court preferred to focus on the statute's five-day filing requirement.

In upholding the five-day filing requirement, the *Shoecraft* court placed great emphasis on the fulfillment of legislative objectives and the constitutionality of the means used to achieve those objectives.

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father shall not be recognized thereafter in any court unless the person claiming to be the father of the child has filed with the Department of Social Services on forms provided by the Department, within five days after the birth of such child, a notice of intent to claim paternity.

47. *See* NEB. REV. STAT. § 43-104.04 (1984).

48. *See* Shoecraft v. Catholic Social Servs. Bureau, Inc., 222 Neb. 574, 385 N.W.2d 448 (1986), in which the court noted the father, like all citizens was "presumed to know the law. Statutes of limitation bar evenly the claims of the wary and the unwary and the just and the unjust." *Id.* at 580, 385 N.W.2d at 454.

49. 222 Neb. 574, 385 N.W.2d 448 (1986).

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

51. *Id.* at 577, 385 N.W.2d at 451. The court held the state's "compelling interest in the well-being of all children, whether born in or out of wedlock, and of their proper nurture and care," is sufficient to justify the "disparate treatment of an unwed father and an unwed mother." *Id.*

52. *Id.* at 578, 385 N.W.2d at 452. The court stated that although § 43-104.02 does not provide notice to the father of the birth or the relinquishment of the child, and "[t]hat omission might well, in a particular case, render constitutionally suspect as violative of due process the termination of the father's rights. . . . The lack of notice . . . does not render the [statutory] scheme unconstitutional as to the appellee father." *Id.*

The court accepted the legislature's determination that the five-day period was the average length of time a mother spends in the hospital after giving birth. The court also accepted the rationale that a mother should know, prior to leaving the hospital, whether the father is going to come forward to provide support and "legitimize" the child.[53] The court additionally determined that the five-day requirement was reasonable because it furthered the presumed legislative objective of expediting adoptions.[54]

The Nebraska Supreme Court incorrectly presumed that expedition of adoptions was the only legislative intent behind the statute. The actual intent of the legislature was to facilitate the adoption of nonmarital children in a manner that would bring the local statute within the due process guidelines of recent United States Supreme Court decisions,[55] such as *Stanley v. Illinois*.[56] Both *Stanley* and the Nebraska Legislature recognized that expedition of adoption procedures was not a sufficient reason to deny the due process rights of unwed fathers, and that prior to termination of his rights, an unwed father deserved both notification and a hearing.

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency.... [W]hen, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.[57]

Unfortunately, the *Shoecraft* court disregarded the Court's reasoning in *Stanley* as well as the intent of the Nebraska Legislature. By holding that effectuating adoptions is a sufficiently compelling reason to allow disparate treatment of unwed fathers as compared to other parents, the court placed greater importance on the efficacy of the adoption process than the validity of the adoption itself.[58]

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53. *Id.* at 579, 385 N.W.2d at 452.
54. *Id.* at 580, 385 N.W.2d at 452.
55. In the 1976 Legislative hearing, the bill's sponsor, Senator Gary Anderson, expressly pointed out the motivation behind the proposed statute:
    > The problem basically has to deal with the questions of claims of paternity that might be made by the natural father of the child, a child who is born out of wedlock and is being placed for adoption. We now have a situation where the courts have recognized that the father, the natural father, does at least have a right to a hearing. And some of our courts are now saying that in order to complete the relinquishment there has to be relinquishment from the father, or in lieu of that, some form of notice generally, a publication.

    *Hearing on L.B. 224 Before Nebraska Judiciary Comm.*, 84th Leg., 1st. Sess. 2 (Jan. 29, 1976).
56. 405 U.S. 645 (1972).
57. *Id.* at 656-57; *see supra* note 55.
58. Shoecraft v. Catholic Social Servs. Bureau, Inc., 222 Neb. 574, 577, 385 N.W.2d 448, 451 (1986).

The *Shoecraft* court noted that a statute which terminates a father's parental rights might be "render[ed] constitutionally suspect as violative of due process," in cases in which the father is not given notice of the termination proceeding.[59] However, the father in *Shoecraft* had knowledge of the pregnancy and the proposed adoption, thus, the court held that he did not deserve notification and, accordingly, interpreted the statute as only requiring notice in cases in which the father has complied with the requirements of the statute.[60] Chief Justice Krivosha addressed this shortcoming in his dissent in *Shoecraft*.

> While it is true that in the instant case the statute does not automatically deny the father the right to notice and a hearing, nevertheless it does seek to accomplish a similar end. The statute requires that the father must, within five days after birth, acknowledge paternity in a narrow, limited manner, to wit, by filling out a form provided by the Department of Social Services. The father must also file the form with the Department of Social Services. In my view, this statutory scheme unconstitutionally discriminates against the father.[61]

Instead of addressing the procedural shortcomings of section 43-104.02, the *Shoecraft* court adopted the language of *Quilloin v. Walcott*.[62] The court held that a statutory scheme may distinguish the rights of an unwed father from the rights of a married, divorced, or separated father in cases in which "the unwed father did not seek nor exercise any financial responsibility for the child."[63] Adopting the *Quilloin* language enabled the *Shoecraft* court to ignore the fact that section 43-104.02 violates the rights of unwed fathers in the manner prohibited by *Stanley*. Thus, the court's strict adherence to statutory procedures appears to be contrary to both United States Supreme Court precedent and the intentions of the Nebraska Legislature.

## III. *IN RE APPLICATION OF S.R.S. & M.B.S.*

In *Shoecraft*, the court implied that a case involving an unwed father who had lived with the child and nurtured and supported the child and the mother might be decided in favor of the unwed father.[64] The Nebraska Supreme Court recently decided such a case, *In re application of S.R.S. & M.B.S.*[65] Construing the same statute it held constitutional in *Shoecraft*, the court in *S.R.S. & M.B.S.* held section 43-

59. *Id.* at 578, 385 N.W.2d at 451.
60. *Id.*
61. *Id.* at 583, 385 N.W.2d at 454 (Krivosha, C.J., dissenting).
62. 434 U.S. 246 (1978).
63. Shoecraft v. Catholic Social Servs. Bureau, Inc., 222 Neb. 574, 580, 385 N.W.2d 448, 452 (1986).
64. "This is not a case where [the father] lived with the child and nurtured and supported [the child] and the mother." *Id.*
65. 225 Neb. 759, 408 N.W.2d 272 (1987).

104.02,[66] which requires an unwed father to file an intent to claim paternity within five days after the birth of the child, unconstitutional as applied to this particular unwed father.[67]

In *S.R.S. & M.B.S.*, the child's parents lived together and planned to marry before the child was conceived. When the child was born, the unwed father's name appeared on the birth certificate. The parents also signed an agreement providing the child would bear the father's last name. The couple lived with their son for approximately nineteen months. During this time, the father cared for and supported the mother and the child. When the child was nineteen months old, the mother and child moved from the father's home and the parents never reconciled. The mother moved in with another man and refused to disclose the location of the child to the father. The mother was aware of the father's desire to retain custody of his child. Nevertheless, when the child was two years old, the mother placed the child for adoption, and the child was subsequently placed with prospective adoptive parents.

Under Nebraska law, adoption decrees cannot be entered until the child has resided with the prospective adoptive parents for at least six months.[68] During the first five months of the six-month waiting period, the father tried to locate his son. When he learned that his son had been placed for adoption, he contacted an attorney and commenced proceedings to establish his parental rights.[69] The prospective adoptive parents, the adoption agency, and the county court were aware that the child's father had commenced paternity proceedings.[70] Yet, the prospective adoptive parents filed a petition for adoption at the end of the six-month waiting period, and the petition was subsequently granted by the county court.[71] The county court held the father had abandoned his child and could not contest the adoption.[72] The District Court of Lancaster County affirmed the county court decision.[73]

By the time the case was heard by the Nebraska Supreme Court,

66. NEB. REV. STAT. § 43-104.02 (1984). For the exact language of the statute see *supra* note 46.
67. *In re* Application of S.R.S. & M.B.S., 225 Neb. 759, 769, 408 N.W.2d 272, 279 (1987).
68. *See* NEB. REV. STAT. § 43-109 (1984).
69. *In re* Application of S.R.S. & M.B.S., 225 Neb. 759, 763, 408 N.W.2d 272, 275 (1987).
70. *Id.*
71. *In re* Adoption #6884, No. 85-395 (Lancaster County Court, filed June 7, 1985).
72. The county court determined the father had abandoned the child pursuant to NEB. REV. STAT. § 43-104(3)(b) (1984), which states in pertinent part: "No adoption shall be decreed unless the petition therefor[e] is accompanied by written consents . . . except that consent shall not be required of any parent who shall . . . have abandoned the child for at least six month next preceding the filing of the adoption petition . . ." *In re* Adoption #6884, No. 85-395 at 8 (Lancaster County Court, filed June 7, 1985).
73. *In re* Adoption #6884, No. 85-395 (Lancaster County Court filed Dec. 30, 1985).

the child was four and one-half years old and had lived with his adoptive family for two and one-half years.[74] Reversing the district court's decision, the Nebraska Supreme Court ruled the father had not abandoned the child, and declared the statute's[75] five-day filing requirement unconstitutional as applied to this father.[76] The court concluded that even though the father did not file for paternity rights within the five days required under section 43-104.02, the father's consent was necessary for the adoption to be valid.[77]

Both *Shoecraft* and *S.R.S. & M.B.S.* noted the integrity of the family is a fundamental right retained by the people under Article IX of the Bill of Rights, and that the "relationship between a parent and child is constitutionally protected."[78] Yet, the court in *S.R.S. & M.B.S.* distinguished the consitutional rights of the unwed fathers in *Shoecraft* and *S.R.S. & M.B.S.* because of factual differences between the cases.

The court stated the rights of the father in *S.R.S. & M.B.S.* "are not so easily distinguishable from those of the mother or of separated or divorced fathers . . . [because the father] provided for and had daily contact with his child for the first nineteen of the twenty-four months of the child's life, before the mother placed the child [for adoption]."[79] Therefore, the court reasoned "where the child is no longer a newborn and has already established strong ties with a father who has acknowledged and supported him,"[80] the five-day requirement no longer operated to attain the goal of rapid placement of newborns with adoptive parents.[81] Additionally, because the father had established a relation-

74. *In re* Application of S.R.S. & M.B.S., 225 Neb. 759, 760, 408 N.W.2d 272, 274 (1987).

75. NEB. REV. STAT. § 43-104.02 (1984). For the exact language of the statute, see *supra* note 46.

76. *In re* Application of S.R.S. & M.B.S., 225 Neb. 759, 769, 408 N.W.2d 272, 279 (1987). Under different facts, the court had previously held § 43-104.02 to be constitutional. *See* Shoecraft v. Catholic Social Servs. Bureau, Inc., 222 Neb. 574, 385 N.W.2d 448 (1986); *see also* notes 49-63 and accompanying text.

77. *In re* Application of S.R.S. & M.B.S., 225 Neb. 759, 769, 408 N.W.2d 272, 279 (1987).

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

79. *Id.* at 768, 408 N.W.2d at 278.

80. *Id.* at 768-69, 408 N.W.2d at 278.

81. *Id.* at 768, 408 N.W.2d at 278. The court reasoned that in some cases, the five-day filing requirement operates as a "legitimate means of attaining a worthy end, the rapid placement of newborns in families that could commit to raising them." *Id.* "Rapid placement of newborns as soon as possible after birth with prospective adoptive parents . . . [is] in the best interests of the child, the adoptive parents, and the parent making the difficult decision to relinquish the child." *Id.* at 767, 408 N.W.2d at 278.

> However, the 5-day requirement secures no such result in cases such as this one, where the child is no longer a newborn and has already established strong ties with a father who has acknowledged and supported him. The effect of the requirement [in such cases] is to allow a mother to singlehandedly sever a relationship between father and child, no matter what the quality of that relationship is.

ship with the child, the court held that no compelling interest would be served by allowing an unwed mother "to singlehandedly sever a relationship between a father and child."[82] Therefore, the court held section 43-104.02 unconstitutional as applied to the unwed father in *S.R.S & M.B.S.*, and ruled the adoption of the unwed father's child could not continue without the unwed father's consent.[83]

The *Shoecraft* and *S.R.S. & M.B.S.* decisions leave many unanswered questions regarding the rights of unwed fathers in Nebraska. These unanswered questions provide little assurance to adoptive parents regarding the validity and finality of present or future adoptions. The *S.R.S. & M.B.S.* court, quoting the language of the dissent in *Caban v. Mohammed*,[84] stated that " 'the [paternity] statutes now in effect may be enforced as usual unless "the adoption of an older child is sought" and "the father has established a substantial relationship with the child and [is willing to admit] his paternity." ' "[85] Such reasoning is unsatisfactory for prospectively determining an unwed father's rights and useless for informing adoptive parents which adoptions will be upheld if later challenged by an unwed father. It is patently unfair to protect an unwed father's rights more vigorously contingent upon the fact that the child is an "older child."

The unwed father in *S.R.S. & M.B.S.* did have a substantial relationship with his child and the court correctly ruled his rights were deserving of protection. Yet, the rights of the father in *Shoecraft*, who never had an opportunity to develop or not develop a "substantial relationship" with his infant child, were found to be undeserving of protection. The concurring opinion in *S.R.S. & M.B.S.* convincingly illustrates the problem with the Nebraska Supreme Court's inconsistent method of determining which unwed fathers deserve to have their rights protected:

> To have the constitutionality of a law such as [section 43-104.02] depend in each instance upon the facts determined after the fact is to fly in the very face of the act's purpose. No adoptive parent can now know with certainty whether the facts underlying the relationship between the natural father and the adoptive child are such as to render the provisions of sections 43-104.02 to

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*Id.* at 768-69, 408 N.W.2d at 278.

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

83. *Id.* at 769, 408 N.W.2d at 279. The Nebraska Supreme Court remanded the case to the Lancaster County Court to determine who would retain custody of the child, based on the child's best interests. By stipulated settlement, the adoptive parents and the biological father agreed that the child will live with the adoptive family and the adoptive family will be the child's legal guardians. The biological father will receive liberal visitation rights. The settlement agreement was approved by the Lancaster County Court. Lincoln Journal Star, April 21, 1988, at 1, col. 5.

84. 441 U.S. 380 (1979).

85. *In re* Application of S.R.S. & M.B.S., 225 Neb. 759, 769, 408 N.W.2d 272, 279 (1987) (quoting Caban v. Mohammed, 441 U.S. 380, 392-93 (1979) (Stevens, J., dissenting)) (citations omitted).

> section 43-104.04 constitutional or unconstitutional until after the facts have been examined by a court. Furthermore, this court has now ruled, in effect, that if the child is removed from the natural mother while in the hospital, thereby making it impossible for the natural father to establish a relationship with the child, the act will be held constitutional; but if the natural mother delays placing the child out for adoption so that the natural father has the opportunity to develop a relationship with the child, the act will be declared unconstitutional. . . . *Such uncertainty is bound to create much distress, as evidenced by the instant case . . . and will continue to repeat itself in future cases.*[86]

If Nebraska adoption law continues to operate under the current statutory scheme, our state will have to endure many more heartbreaking cases like *S.R.S. & M.B.S.* The current statutory scheme is not sufficient to protect the rights of unwed fathers or to facilitate valid, permanent adoptions. A new statute should establish clear expectations for unwed fathers and also should establish notification procedures to best insure the finality of adoptions.

## IV. RECOMMENDATIONS FOR STATUTORY REFORM OF NEBRASKA'S PATERNITY AND ADOPTION STATUTES

### A. Practical Problems with Nebraska's Paternity and Adoption Statutes

In Nebraska, if an unwed father fails to file an intent to claim paternity within five days of the birth of his nonmarital child, and if the case does not involve an older child with whom the father has established a relationship, the father is most likely precluded from ever establishing parental rights to his child.[87] Even in cases in which the nonmarital child is an older child with whom the father has established a relationship, the father's parental rights are not clear-cut.

In *Shoecraft*, the court held the statutory five-day filing requirement constitutional as applied to the unwed father because the father had not provided financial and emotional support to the mother during her pregnancy.[88] Under the standard set forth in *S.R.S. & M.B.S.*, the five-day filing requirement is unconstitutional whenever a court determines that an unwed father of an older child has "nurtured and supported [the child] and the mother."[89] The results of *Shoecraft* and *S.R.S. & M.B.S.* create several substantial problems for unwed fathers, unwed mothers, adoptive parents, adoption agencies, and attorneys handling adoptions—problems for which the current Nebraska statutes provide no solution.

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86. *Id.* at 770, 408 N.W.2d at 279 (Krivosha, C.J., concurring in result only)(emphasis added).
87. *Id.* at 769, 408 N.W.2d at 279.
88. Shoecraft v. Catholic Social Servs. Bureau, Inc., 222 Neb. 574, 580, 385 N.W.2d 448, 452 (1986).
89. *In re* Application of S.R.S. & M.B.S., 225 Neb. 759, 768, 408 N.W.2d 272, 278 (1987).

The first and most significant problem with the current Nebraska paternity and adoption statutes is the uncertain status of an unwed father's rights and responsibilities. This uncertainty leaves a large number of constitutional bases for an unwed father to contest the validity of relinquishment and adoption of his nonmarital child after the child has been placed with an adoptive family. This problem is clearly illustrated in *S.R.S. & M.B.S.* where the adoptive home was shattered by the court's post-adoption ruling that the lack of the unwed father's consent rendered the adoption invalid. The result is that all adoptions in which consent was not obtained from the biological father are of questionable validity.

Another serious problem with Nebraska's current paternity and adoption statutes is that, in many cases, an unwed mother can single-handedly sever the unwed father's rights to his child. Under the current statutes, only the unwed mother's consent to the adoption is necessary absent the father's compliance with the five-day filing requirement.[90] The unwed mother can easily frustrate the ability of the unwed father to establish parental rights to his child by refusing to identify the father or by concealing the existence of the pregnancy altogether.

Unless an unwed father is: 1) aware of the mother's pregnancy or the child's existence; 2) aware of the mother's relinquishment; and 3) aware of, and fulfills, the five-day filing requirement, Nebraska's paternity and adoption statutes do not provide even minimal procedures for notifying him of proceedings involving his nonmarital child. In both *Shoecraft* and *S.R.S. & M.B.S.*, the unwed father was listed on the birth certificate.[91] Both fathers easily could have been given notice of the mother's relinquishment, the subsequent adoption proceedings, and the father's legal rights and responsibilities. It is ironic that our society expends so much effort aiding and counseling unwed mothers regarding their rights and options, while an unwed father is not even informed of relinquishment and adoption proceedings involving his child.

### B. Solving the Problems with Nebraska's Paternity and Adoption Statutes Through Statutory Reform

#### *1. Statutory Reform*

The problems with Nebraska's paternity and adoption statutes can be solved only through statutory reform, as the existing statutes are wholly inadequate for providing an environment that facilitates valid

90. NEB. REV. STAT. § 43-104 (1984).

91. Shoecraft v. Catholic Social Servs. Bureau, Inc., 222 Neb. 574, 575, 385 N.W.2d 448, 450 (1986); *In re* Application of S.R.S. & M.B.S., 225 Neb. 759, 760, 408 N.W.2d 272, 274 (1987).

and permanent adoptions. The Nebraska paternity and adoption statutes should be completely reformed to provide procedures for notifying *all* unwed fathers of relinquishment and adoption proceedings concerning their nonmarital children, and to notify fathers of precisely what is required to retain parental rights with regard to their nonmarital children. The statutes must not merely be altered to avoid future occurrences of the fact scenarios present in *S.R.S. & M.B.S.* and *Shoecraft*. The statutes must be completely redesigned to avoid both the contingencies we have seen before and the contingencies yet to come.

The most important aspect of a newly-designed statutory procedure is that *all* putative fathers must receive notification of the mother's relinquishment. Only after notification should the courts attempt to determine whether a particular unwed father is a fit parent. Above all, the determination of parental fitness should be made by the courts, not by the parties involved in facilitating the adoption.

The statutory scheme must not set forth categories of unwed fathers who "deserve" notification. Invariably there would be fact situations not anticipated by the statute's drafters. Consequently, unwed fathers would claim their rights were violated because they should have been included in the categories of fathers receiving notice and that would continue to threaten the finality of adoptions. To be effective, a new statutory system must notify *all* unwed fathers and *then* determine if, through their behavior, they have forfeited their parental rights.

The current statutes should be reformed, despite the fact that children may be placed for adoption more rapidly under the current statutory procedures. Placing a child with adoptive parents as soon as possible after birth is a worthy goal. Yet, expediting the placement of a child without taking time to clarify the rights and interests of the biological parents puts the adoption at greater risk of being invalidated after placement has occurred. Increased litigation over children, invalidation of adoptions, and possibly even removal of children from adoptive homes will not facilitate a greater number of adoptions, nor will it protect the best interests of the child, as evidenced by *S.R.S. & M.B.S.*

In order to truly facilitate valid and permanent adoptions, an unwed father's rights must be fully recognized and respected through procedures which inform him of his rights and responsibilities regarding his nonmarital child. If the unwed father's rights are respected, and he subsequently consents to the adoption of his nonmarital child, then the prospective adoptive parents will know that their adoption of the child is very likely a valid and final adoption.

*2. Discussion of Recommended Statutes*

The key to protecting the parental rights of unwed fathers and insuring the finality of adoptions is determining whether a child was born outside of marriage, the identity of the unwed father, and the status of the unwed father's paternal rights prior to the mother's relinquishment of the child.[92] It may not always be possible to make these determinations prior to the mother's relinquishment, but at the very least these determinations should be made prior to placement of the child with the prospective adoptive family. In some cases, placements may be delayed temporarily to comply with the necessary procedures, but once the unwed father's rights are determined, placement can be made with the knowledge that once the six-month waiting period is over and the adoption petition is granted, the adoption is permanent. Waiting to contend with the unwed father's rights until the six-month waiting period is over and the adoption petition is filed places both the prospective adoptive family and the unwed father in an emotionally charged situation which may lead to more difficult legal determinations of parental rights.

The burden of notifying the unwed father of the proposed or actual relinquishment of the child, and of his rights and responsibilities regarding the child, should not be placed solely with those people acting as agents for the unwed mother or the prospective adoptive parents. However, by placing the *initial* burden of determining the interests of the biological father and notifying the biological father of his rights on the agency or attorney contacted by the mother,[93] the burden on taxpayers is minimal. Most of the burden of observing the rights of the biological father would be borne by those effectuating the adoptions, not by the state. The purpose of appointing a guardian ad litem[94] is to insure that an objective third party has the last opportunity to determine if the interests of the biological father have been protected. Although the cost of a guardian ad litem would be absorbed by the state, that cost would most likely be minimal in the majority of cases. Additionally, appointing a guardian ad litem would be necessary only in a very small percentage of cases.

The appointment of a guardian ad litem is necessary to truly respect the rights of the biological father and the best interests of the child. The attempt to identify and notify the prospective biological father or fathers must be vigorous, yet it must observe, whenever possible, the privacy interests of the unwed mother.

Neither the guardian ad litem nor the court should be able to force

92. *See infra* § 1.1 Sample Statute p. 402.
93. *See infra* §§ 1.2-1.5 Sample Statute p. 402-03.
94. *See infra* §§ 2.1-2.4 Sample Statute p. 403-04.

the biological mother to disclose the identity of the biological father.[95] However, the relinquishment and adoption procedure should make it as difficult as possible for the biological mother to deliberately and singlehandedly sever the rights of the biological father. Requiring the biological mother to testify under oath, in a private hearing, that she is unable to identify the biological father will make it difficult for her to lie and will make it difficult for her attorney or agency representative to ethically recommend that she not disclose the identity of the father.[96] Furthermore, if agencies and attorneys are aware a judicial determination of the identity of the father will occur at some time in the process, the agencies and attorneys will be more likely to encourage the mother to disclose the identity of the biological father within the confidentiality of the agency's or attorney's relationship with the biological mother.

If the agency or attorney contacted by the biological mother is unable to identify or locate the biological father, the burden is then on the guardian ad litem to notify the biological or prospective biological fathers, if reasonably possible. The attempts to notify must be vigorous to fully protect the best interests of the child.[97] The best interests of the child and the adoptive family clearly are not served when an adoption is nullified some time after the adoption petition has been granted. Therefore, the guardian ad litem should exercise great care in attempting to notify the unwed father. Again, it is crucial that there be no attempt by the notifying party to determine whether a particular father "deserves" notice. The court should determine a particular father's parental fitness in a proceeding which adequately protects the father's rights and insures the accuracy of all information regarding the mother and father's relationship.

If the biological mother discloses that the pregnancy was the result of incest, the biological father does not need to be notified of any proceedings regarding his child.[98] If the mother alleges the child was conceived as a result of a sexual assault, the biological father must receive notice of the proceedings involving his child.[99] However, if the court determines the child was in fact conceived as the result of a sexual assault, the father's consent will not be required for a valid relinquishment by the biological mother.[100]

When the guardian ad litem has identified and notified the biological father or prospective biological fathers, or when the guardian ad litem has exhausted a search for the father and has been unable to

95. *See infra* § 1.5 Sample Statute p. 403.
96. *See infra* § 2.3 Sample Statute p. 404.
97. *See infra* §§ 2.1-2.3 Sample Statute pp. 403-04.
98. *See infra* § 3.2 Sample Statute p. 404.
99. *See infra* § 1.2 Sample Statute p. 402.
100. *See infra* § 7.3 Sample Statute p. 406.

identify or locate him, the guardian ad litem should report the status of the paternity determination to the court.

The statutory time limit for the guardian ad litem's search should be thirty days.[101] However, the court should be able to extend this time period upon a showing of reasonable cause. The court should not allow the child to be placed in the prospective adoptive home unless the prospective adoptive parents have been warned that the interests of the biological father have not been determined yet, and the child may be removed from the prospective adoptive home if the biological father chooses to assert his parental right to custody and the court finds him fit to do so.[102]

If the attorney or agency contacted by the biological mother or the guardian ad litem has been able to identify the biological father, but the father has not been located or notified, the court should be allowed to order notification through publication to the unwed father.[103] The court should not order publication in cases in which the prospective biological father is unknown; such publication most likely would be ineffective without the biological mother's name. The mother's name should never be included in the publication without her consent.[104]

If more than one man claims to be the biological father of the child, the court should specify procedures for a genetic determination. At the custodial determination hearing, the court should determine whether allowing the biological father custody of the child would be in the best interests of the child, affording superior rights to the natural parents, yet paying due regard to the rights of any parties seeking custody who have established a pyschological bond with the child. Courts should consider establishing visitation rights for biological parents in cases where "psychological parents" have established a significant and lengthy relationship with the child.[105] The guardian ad litem should make his or her recommendation at the custodial hearing. The court's determination should not be based on a comparison between the socioeconomic status of the biological father and a prospective adoptive family.

If a court is forced to enter an order terminating the parental rights of an unknown, unidentified, or unlocated father, the order should not become final until the adoption petition is granted after the

101. *See infra* § 2.4 Sample Statute p. 404.
102. *See infra* § 1.1 Sample Statute p. 402.
103. *See infra* §§ 4.1-4.2 Sample Statute pp. 404-05.
104. *See infra* § 4.3 Sample Statute p. 405.
105. *See infra* § 7.2 Sample Statute p. 406. In *S.R.S. & M.B.S.*, the court accepted an agreement between the biological father and adoptive parents whereby the adoptive parents retained custody of the child, but the father retained reasonable visitation privileges. *See* Lincoln Journal Star, April 21, 1988, at 1, col. 5.

six-month waiting period.[106] The prospective adoptive parents should be apprised, before the child is placed in the home, that the biological father has not been identified and has not given consent to the relinquishment, and that the order terminating his rights will not be final until the end of the six-month waiting period.[107]

*3. Recommended Statutes*

**Section 1: Duties of the Notifying Party**

§ 1.1 Whenever a child is claimed to be born out of wedlock, and the biological mother contacts an adoption agency or attorney to relinquish her rights to the child, or the biological mother joins in a petition for adoption to be filed by her husband, the agency or attorney contacted must establish that the child was in fact born outside of marriage, must establish the identity of the biological father, and must obtain a consent to relinquishment and adoption or a waiver of rights from the biological father, before filing the intent to relinquish, actual relinquishment, or adoption petition with the court.[108]

§ 1.2 In order to attempt to obtain the consent to relinquishment and adoption from the biological father, the agency or attorney contacted by the biological mother (the notifying party) must notify by certified mail:

a. Any person adjudicated by a court in this state or by a court in another state or territory of the United States to be the father of the child;

b. Any person who is recorded on the child's birth certificate as the child's father;

c. Any person who might be the father of the child who is openly living with the child and the child's mother at the time the relinquishment is given, or any person who is holding himself out to be the child's father;

d. Any person who has been identified as the child's father by the mother;

e. Any person who was married to the child's mother within six months prior to the birth of the child and prior to the execution of the relinquishment, and;

f. Any other male who the notifying party may have reason to believe may be the father of the child.[109]

§ 1.3 The notice sent to the notifying party shall inform any of the above individuals that:

106. *See infra* § 5 Sample Statute p. 404.
107. *Id.*
108. *See* MICH. COMP. LAWS ANN. § 710.36(1) (West Supp. 1987).
109. *See* N.Y. DOM. REL. LAW § 111-2 (2) (a-h) (Mckinney 1977, Supp. 1988).

a) relinquishment has been given by the mother or that the mother intends to execute a relinquishment;

b) that the possible biological father is advised of his right to file with the Department of Social Services on a form provided by the department, his notice of intent to claim paternity of the child to be relinquished, and his intent to assert his right of custody to the child;

c) that the possible biological father's failure to file his notice of intent to claim paternity and custody of the child with the Department of Social Services within twenty days of the receipt of the notice shall constitute a waiver of his right to consent to the adoption of the child;

d) that the father has the opportunity to relinquish the child; and

e) that the father has a duty to contribute to the support and education of the child and to the pregnancy-related expenses of the mother should he prove to be the father of the child, and a right to claim visitation should custody not be awarded.

§ 1.4 If the mother refuses to identify the biological father or possible biological fathers, the notifying party shall inform the mother of the legal and medical need to determine the paternity of the child prior to adoption.

§ 1.5 If the notifying party is unable to locate and notify the biological father or possible biological fathers, or if the mother refuses or is unable to identify the father, the notifying party shall execute an affidavit stating that such party has used due diligence to locate the biological father or possible biological fathers, and setting forth the methods through which the effort was made to locate those persons. The affidavit shall be attached to any intent to relinquish or actual relinquishment executed by the biological mother, and to any adoption petition filed by the biological mother and her spouse.

**Section 2: Appointment of a Guardian Ad Litem**

§ 2.1 If an intent to relinquish or actual relinquishment by the mother, or any petition for adoption by the biological mother and her spouse is filed, and does not contain the written consent of the biological father when received by the court, or contains an affidavit stating that the biological father is unknown or can not be located, the court will appoint a guardian ad litem to determine the interests of the biological father and to represent the best interests of the child. The guardian ad litem will be chosen from a qualified pool of local attorneys. The guardian ad litem will receive reasonable compensation for the representation, the amount of which shall be determined at the discretion of the court.

§ 2.2 The guardian ad litem shall have the following duties:

a. Identify the biological father whenever possible;

b. Notify the biological father or prospective biological fathers of the proposed relinquishment of the child and inform the biological father or prospective biological fathers of their parental rights with regard to the child;

c. Notify the court if all reasonable attempts to both identify and notify the biological father are unsuccessful.

§ 2.3 To determine the interests of the biological father, the guardian ad litem shall determine, by deposition, affidavit, or hearing, the following:

a) whether the mother was married at the time of conception of the child or at any time thereafter;

b) whether the mother was cohabitating with a man at the time of conception or birth of the child;

c) whether the mother has received support payments or promises of support with respect to the child or in connection with her pregnancy; or

d) whether any man has formally or informally acknowledged or declared his possible paternity of the child.[110]

§ 2.4 The guardian ad litem shall complete the determination of the interests of the biological father within thirty days of appointment, unless the court finds reasonable cause to extend the time period. After the guardian ad litem has completed the determination, the court shall hold a hearing as soon as practicable to determine whether the child was born out of wedlock, to determine the identity of the father, if possible, and to determine or terminate the rights of the biological father.

**Section 3: Notice Requirements**

§ 3.1 Notice of the judicial proceeding shall be given to every person identified by the guardian ad litem as the biological father or as a prospective biological father. Notice shall be given in the manner appropriate under the rules of civil procedure for the service of process in this state and in any additional manner the court directs. Proof of notice shall be filed with the court before the petition is heard.[111]

§ 3.2 Notice is not required to be given to a person who may be the father of a child conceived as a result of an incestual act.[112]

110. *See* KAN. STAT. ANN. § 38-1129 (b) (1986).

111. *See id.* § 38-1129 (e) (1986).

112. *See* WIS. STAT. ANN. § 48.42 (2)(m) (West 1982).

**Section 4: Notice by Publication**

§ 4.1 If the guardian ad litem is unable to locate and notify an identified biological father, the court has discretion to order that the guardian ad litem attempt to notify the identified biological father through publication.

§ 4.2 If publication is deemed appropriate, the court will determine which newspaper is likely to give notice. The court shall consider the last known residence of the prospective father, the location of his relatives, if known, or the last known location of the prospective father. The publication shall include the date, place and location of the hearing, the court file number, the name, address and telephone number of the guardian ad litem and other information the court determines to be necessary to give effective notice to the prospective father. Such information shall include the following, if known:

a. the name of the father or prospective father;
b. a description of the father;
c. the former address of the father;
d. approximate date and place of conception of the child;
e. date and place of birth of the child.[113]

§ 4.3 The publication should not include the name of the mother unless the mother gives her consent. The notice shall not include the name of the child unless the court determines that inclusion of the child's name is essential to give effective notice to the father.[114]

**Section 5: Terminating the Rights of an Unknown Father**

§ 5 If, after the inquiry by the guardian ad litem, no father can be identified or successfully notified, and no person has appeared claiming to be the biological father and claiming custodial rights, the court shall enter an order terminating the unknown biological father's rights with reference to the child. Subject to the disposition of an appeal, upon the expiration of six months after an order terminating parental rights is issued under this subsection, the order shall not be questioned by any person, in any manner, or upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter.[115]

**Section 6: Termination Through Failure to Appear**

§ 6 If a prospective father is identified to the satisfaction of the guardian ad litem, or if more than one man is identified as a possible father, each shall be given notice of the paternity proceeding. If any

113. *See* WIS. STAT. ANN. § 48.42 (4)(b)(4) (West 1987).
114. *See id.* § 48.42 (4)(b)(5) (West 1987).
115. *See* UNIF. PARENTAGE ACT § 25(d), 9B U.L.A. 340 (1973).

one of them fails to appear without reasonable cause, or, if appearing, fails to claim custodial rights, his parental rights with reference to the child shall be terminated.[116]

**Section 7: The Determination of Parental Rights**

§ 7.1 If a man who alleges that he is the biological father appears at the hearing and wishes to contest the termination of his parental rights, the court shall set a date for a hearing on the issue of paternity or, if all parties agree, the court may immediately commence hearing testimony concerning the issue of paternity. The court shall inform the man claiming to be the father of the child of his right to counsel.[117]

§ 7.2 At the hearing to determine the biological father's parental rights to the child, the court shall inquire into his fitness and ability to properly care for the child. The custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable biological parent and with due regard for any substantial relationship the child may have developed with other persons claiming custody.[118]

§ 7.3 The court may determine the father's consent is not required for a valid relinquishment by the biological mother, or a valid adoption by the biological mother and her spouse, upon a finding of any of the following:

a. The father abandoned or neglected the child after having knowledge of the child's birth;

b. The father is unfit as a parent;

c. The father had knowledge of the child's birth and has made no reasonable efforts to support or communicate with the child;

d. The father abandoned the mother, without reasonable cause, and with knowledge of the pregnancy;

e. The child was conceived as the result of a sexual assault or an incestual act.[119]

§ 7.4 All proceedings under this article shall be given the highest priority and shall be advanced on the court docket so as to provide for their earliest practical disposition. An adjournment or continuance of a proceeding under this article shall not be granted without a showing of good cause.

## IV. CONCLUSION

The time has come for society to recognize and respect the rights of

116. *See* KAN. STAT. ANN. § 38-1129 (c) (1986).
117. *See* WIS. STAT. ANN. § 48.423 (West 1987).
118. *See* MICH. COMP. LAWS ANN. § 710.39 (1) (West Supp. 1987).
119. *See* KAN. STAT. ANN. § 38-1129 (c) (1-6) (1986).

unwed fathers as carefully as it protects the rights of unwed mothers. The law must adapt to a changing society. Men have assumed a much greater portion of the child rearing responsibilities than they have in the past and, accordingly, must be afforded the same consideration as women in custody and reproductive issues.

The current precarious state of adoptions in Nebraska must not continue. Legislators must seize the opportunity to remedy the unsatisfactory status of Nebraska's paternity and adoption statutes. The adoption community cannot withstand another blow as devastating as the one received in *S.R.S. & M.B.S.*

*Susan Kubert Sapp '89*