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Nebraska's Five-Day Statute of Limitations for Unwed Fathers

Daniel S. Wilson
University of Nebraska College of Law

Note

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I. INTRODUCTION

The Supreme Court's decision in *Stanley v. Illinois*[1] opened the door for the search by putative fathers[2] for constitutional recognition. In response to *Stanley*, many states amended their statutes to afford the unwed father a limited right to participate in his child's adoption proceeding.[3] This new found recognition, however, has caused several distinct problems which are directly attributable to the nature of the nonmarital familial relationship. The problems include notification of

1. 405 U.S. 645 (1972). In *Stanley*, the Court held that the unwed father was entitled to a hearing on his fitness as a parent. In addition, the Court noted that the State of Illinois, by denying Stanley a hearing, while extending it to all other parents whose custody of their children is challenged, deprived him of rights guaranteed by the equal protection clause. *Id.* at 649.
2. A putative father is defined as "[t]he alleged or reputed father of an illegitimate child." BLACK'S LAW DICTIONARY 1113 (5th ed. 1979).
3. *See generally* Note, *The Putative Father's Parental Rights: A Focus on Family*, 58 NEB. L. REV. 610 (1979).

the unwed father, refusal of the father to sign the adoption consent form, and injury to the mother, adoptive parents, or child in regard to the publication of notice.

In an effort to eliminate the above problems and expedite the adoption process of children born out of wedlock, Nebraska adopted a statutory scheme requiring putative fathers to take positive steps to assert their parental rights.[4] Section 43-104.02 of the Nebraska statutes was enacted by the legislature to perform a function similar to a statute of limitations.[5] Pursuant to this statute, a putative father in Nebraska must file a notice of intent to claim paternity with the Department of Social Services within five days after the birth of the child.[6] If the father fails to file the requisite claim, the unwed mother's consent shall be deemed sufficient for the purpose of the adoption, and the

4. The provisions under scrutiny in this Note are NEB. REV. STAT. § 43-104.02 to -104.04 (1984). NEB. REV. STAT. § 43-104.02 (1984) provides:

> Adoption; child born out of wedlock; relinquishment or consent requirements; paternity claim; notice; contents. (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 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.
>
> (2) The notice shall contain the claimant's name and address, the name and last-known address of the mother, and the month and year of the birth or the expected birth of the child.

NEB. REV. STAT. § 43-104.03 (1984) provides:

> Paternity claim; notice; to whom given; effect. Within three days after the filing of a notice to claim paternity, the Director of Social Services shall cause a certified copy of such notice to be mailed by certified mail to (1) the mother or prospective mother of such child at the last-known address shown on the notice of intent to claim paternity, or (2) an agent specifically designated in writing by the mother or prospective mother to receive such notice. The notice shall be admissible in any action for paternity under sections 43-1401 to 43-1413, and shall estop the claimant from denying his paternity of such child thereafter and shall contain language that he acknowledges liability for contribution to the support and education of the child after its birth and for contribution to the pregnancy-related medial expenses of the mother.

NEB. REV. STAT. § 43-104.04 (1984) provides:

> Paternity claim; failure to file notice; effect. If a notice of paternity is not filed within five days, the mother of a child born out of wedlock or an agent specifically designated in writing by the mother may request, and the Department of Social Services shall supply, a certificate that no notice of intent to claim paternity has been filed with the department and the filing of such certificate pursuant to section 43-102 shall eliminate the need or necessity of a consent or relinquishment for adoption by the natural father of such child.

5. *Hearing on L.B. 224 Before Nebraska Judiciary Comm.*, 84th Leg., 1st Sess. 6 (Jan. 29, 1976)(statement of Eleanor Swanson) [hereinafter *Hearing*].
6. NEB. REV. STAT. § 43-104.02 (1984).

unwed father's paternal rights are terminated.[7]

The Nebraska Supreme Court analyzed the constitutionality of section 43-104.02 in two recent decisions.[8] First, in *Shoecraft v. Catholic Social Services Bureau, Inc.*,[9] an unwed father filed his notice of paternity four days late. The father argued that section 43-104.02 violated both the United States and Nebraska constitutional guarantees of due process and equal protection. The Nebraska Supreme Court found the five-day provision in section 43-104.02 constitutional. Pursuant to section 43-104.02, the father lost all rights to his child.

In a subsequent decision, *In re Application of S.R.S. & M.B.S.*,[10] the Nebraska Supreme Court again was confronted with the question of the constitutionality of section 43-104.02. In *S.R.S. & M.B.S.*, the putative father did not file a notice of paternity until thirty months after the birth of his child. The court acknowledged this failure, but stressed the fact that the father had lived with the child and contributed to its support for nineteen of the child's first twenty-four months. Distinguishing the facts from those in *Shoecraft*, the court held that section 43-104.02 was unconstitutional as applied to custodial fathers. The court did reaffirm its holding in *Shoecraft* by stating that section 43-104.02 does have possible constitutional applications.[11] In the wake of these two decisions, the constitutionality of section 43-104.02 is questionable.

This Note will analyze the five-day Nebraska adoption statutes[12] and argue that the statutes are unconstitutional. More specifically, Part II of this Note will provide an overview of the two Nebraska Supreme Court decisions. Following this discussion, Part III provides a due process and equal protection analysis of the five-day statutes in light of these two decisions and the four relevant United States Supreme Court decisions.[13] Part IV will look at the underlying legislative history of the statutes and offer a hypothesis for the existing confusion surrounding the statutes. Finally, Part V will present a proposal for statutory reform. The statutory proposal will include new statutory provisions and the relevant research and reasoning supporting such provisions.

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7. *Id.*

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

9. 222 Neb. 574, 385 N.W.2d 448 (1986).

10. 225 Neb. 759, 408 N.W.2d 272 (1987).

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

12. NEB. REV. STAT. § 43-104.02 to -104.04 (1984).

13. Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983).

II. NEBRASKA CASES

A. *Shoecraft v. Catholic Social Services Bureau, Inc.*

1. Facts

In *Shoecraft*, the unwed mother and father were students at the University of Nebraska at the time the mother became pregnant. The mother's pregnancy and a later confirmation of the pregnancy were both communicated to the father, Shoecraft. The parties remained in contact during the pregnancy and several times discussed a possible relinquishment for adoption. During the pregnancy term, Shoecraft did not pay any of the mother's expenses, nor did he make an effort to complete and return the relevant medical questionnaires. The putative father received prompt notice of the birth of his son and visited the mother two days after the birth. Shoecraft filed a notice acknowledging paternity nine days after the birth of the child.[14] The mother subsequently relinquished the child to the Catholic Social Services Bureau, which placed the child with prospective adoptive parents.

Shoecraft applied for a writ of habeas corpus alleging paternity, acknowledgment, and subsequent relinquishment by the mother. The district court held that sections 43-104.02 to 43-104.04 of the Nebraska statutes were void and violated the United States and Nebraska constitutional guarantees of due process and equal protection.[15]

2. Majority Opinion

Prior to initiating its evaluation of the Nebraska statutory scheme, the Nebraska Supreme Court contemplated the nature of the asserted right and the interests at stake in an adoption proceeding. Although the court recognized that the status of an unwed father is clearly distinguishable from that of a separated or divorced father, an unwed father's suspect classification and the state's compelling interest in the well-being of the child required the application of a strict scrutiny test.[16]

Upon making this determination, the majority quickly dispensed with the due process claim advanced by Shoecraft. The majority expressed concern about the absence of a provision providing for notification to the father concerning the birth of his child. In a particular case, such an omission could render the termination of an unwed father's rights constitutionally suspect as violative of due process.[17] In

14. Shoecraft v. Catholic Social Servs. Bureau, Inc., 222 Neb. 574, 575, 385 N.W.2d 448, 450 (1986). NEB. REV. STAT. § 43-104.02 (1984) requires a father to file a notice of paternity within five days after the birth.
15. Shoecraft v. Catholic Social Servs. Bureau, Inc., 222 Neb. 574, 575, 385 N.W.2d 448, 450 (1986).
16. *Id.* at 577, 385 N.W.2d at 451.
17. *Id.* at 578, 385 N.W.2d at 451.

the present case, however, the court noted that Shoecraft knew about the pregnancy, the whereabouts of the mother, and the date of the birth. Thus, the court held that the lack of a notice provision in the adoptive statutes did not render the scheme unconstitutional as applied to Shoecraft.

The majority proceeded to address the alleged equal protection deficiency of the adoption statutes. Upon reviewing the relevant statutes, the court found an inherent difference in the treatment of the mother and the father. Pursuant to section 43-104.02, an unwed mother in the State of Nebraska is entitled to automatic custody of the child. Termination of her custody must be preceded by notice, a hearing, and a subsequent finding of unfitness. Further, the removal must be in the best interests of the child.[18] An unwed father, on the other hand, has no automatic right to custody, must acknowledge the paternity within five days of the birth, and must establish paternity in a judicial proceeding.[19]

The majority offered several positive state interests to justify its decision that the statute, as applied to Shoecraft, was constitutional. First, the five-day standard coincides with the approximate amount of time a mother and a child are kept in a hospital after birth.[20] The five-day period allows the mother a reasonable amount of time to determine whether the father will come forward to claim the child. If the father fails to claim the child during this period, the mother can individually relinquish the child prior to becoming exceedingly attached to the child.

Second, the majority recognized the desirability of placing a child born out of wedlock as soon as possible after birth.[21] A prompt placement policy provides the child a home with parents anxious to rear and support the child, rather than a home in which the mother must depend on social agency support or on the outcome of a judicial proceeding to compel child support.

Finally, the majority acknowledged the state's view that a rapid determination of an unwed father's right to object to a relinquishment and subsequent adoption is in the best interests of the child, the relinquishing mother, and the prospective parents.[22] Such a policy acts to remove the doubt surrounding an illegitimate child's adoption proceeding and, further, diminishes the fears of the potential adoptive parents.

After an extensive evaluation of the statute's purposes and legislative history, the court considered the claims of the putative father.

18. *Id.*
19. *Id.* at 578, 385 N.W.2d at 452.
20. *Id.* at 579, 385 N.W.2d at 452.
21. *Id.*
22. *Id.*

First, the court noted that Shoecraft had exhibited no responsibility for the child or the mother prior to the birth. Based on Shoecraft's lack of concern and support, the court, relying on the reasoning expressed by the Supreme Court in *Quilloin v. Walcott*,[23] stated that Shoecraft's rights were clearly distinguishable from those of a divorced or separated father and, accordingly, Nebraska could constitutionally afford him less veto authority.[24] In a similar fashion, the court discredited Shoecraft's claim of ignorance of the law. In simple terms, the court stated that ignorance of the law was no excuse.[25] Section 43-104.02 was, therefore, deemed constitutional as applied to the facts of the case.

3. Dissent

Chief Justice Krivosha dissented from the majority opinion. In his view, section 43-104.02 violated both the fourteenth amendment to the United States Constitution and article I, section 3 of the Nebraska Constitution.[26]

Chief Justice Krivosha stated that a common thread ran throughout several similar United States Supreme Court cases which undermined the validity of section 43-104.02. Although the majority argued that the purpose of the act was to facilitate the adoption of children born out of wedlock, Chief Justice Krivosha noted that to accomplish this purpose, section 43-104.02 treated putative fathers differently than unwed mothers. In Krivosha's opinion, such a difference in treatment has been held objectionable by the Supreme Court in its adoption decisions.[27]

In essence, Chief Justice Krivosha's objection to section 43-104.02 was that it unconstitutionally discriminated against putative fathers, and, thereby, denied unwed fathers in Nebraska equal protection. To support his view, Chief Justice Krivosha repeatedly quoted *Caban v. Mohammed*[28] and *Stanley v. Illinois*,[29] which both held adoption stat-

23. 434 U.S. 246 (1978). In *Quilloin*, an unwed father attempted to block the adoption of his son and sought visitation rights. The issue confronting the Court was whether the state adoption laws that denied the unwed father the authority to prevent the adoption of his illegitimate child were constitutional. The Court rejected the father's assertions that his interests were indistinguishable from those of a married or separated father and, as a result, held that the statute did not deny him his rights under the due process and equal protection clauses. In finding the father's rights distinguishable, the Court noted that the father had never shouldered any responsibility with respect to the daily supervision, education, protection or care of the child. *Id.*

24. Shoecraft v. Catholic Social Servs. Bureau, Inc., 222 Neb. 574, 580, 385 N.W.2d 448, 452 (1986).

25. *Id.*

26. *Id.* at 580, 385 N.W.2d at 453 (Krivosha, C.J., dissenting).

27. *Id.*

28. 441 U.S. 380 (1979). In *Caban*, the unwed mother and father both filed petitions

utes violative of the equal protection clause.

Several inherent characteristics of the Nebraska statute provided Chief Justice Krivosha with further support for his conclusion. First, although section 43-104.02 does not automatically deny the putative father the right to notice and a hearing, it does seek to accomplish a similar end.[30] The narrow manner of filing prescribed in section 43-104.02 requires an unwed father to file a completed form with the Department of Social Services within five days after the birth.

Second, Krivosha expressed his concern over the apparent rigidity of the relatively short period of time provided to a putative father to file. Pursuant to section 43-104.02, a putative father, such as Shoecraft, could forever lose his rights to his child because he filed four days beyond the five-day prerequisite.[31]

Next, Chief Justice Krivosha lamented the inconsistencies which are inherent within the Nebraska adoption laws.[32] Two statutes in particular, sections 13-109 and 13-102 are inconsistent with section 43-104.02. Section 13-109 allows a putative father to establish paternity by providing support,[33] while section 13-102 allows judicial acknowledgement of paternity.[34] Neither of the aforementioned statutes, however, require a putative father to file a form within five days. Further, section 13-111 allows the mother four years to establish paternity, yet a father is afforded merely five days.[35]

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for the adoption of their children. The surrogate granted the mother's petition to adopt the children thereby cutting off all of the unwed father's rights and obligations. The issue before the Court was whether the distinctions in the state statutes, requiring the unwed mother's consent, but not the unwed father's, bore a substantial relation to some important state interest. In its decision, the Court adopted a general test and ultimately held that the distinctions in the statutes between unmarried mothers and fathers did not bear a substantial relation to the state's interest in providing adoptive homes for children born out of wedlock. *Id.* at 394.

29. 405 U.S. 645 (1972). In *Stanley*, an unwed couple had lived together for eighteen years and during that time had three children. Subsequently, the mother died and, pursuant to state law, the children became wards of the state. Under state law, unwed fathers were presumed to be unfit. The question before the Court was whether a presumption that distinguishes and burdens all unwed fathers is constitutionally repugnant. The Court concluded that the unwed father was entitled to a hearing on his fitness as a parent and that the state, by denying him a hearing and extending it to all other parents, denied Stanley equal protection of the laws. *Id.* at 649. In rendering this decision, the Court noted that the Constitution recognized higher values than speed and efficiency. *Id.* at 656.
30. Shoecraft v. Catholic Social Servs. Bureau, Inc., 222 Neb. 580, 583, 385 N.W.2d 448, 454 (1986)(Krivosha, C.J., dissenting).
31. *Id.*
32. *Id.* at 584, 385 N.W.2d at 454-55.
33. NEB. REV. STAT. § 13-109 (1983)(current version at NEB. REV. STAT. §§ 43-1401 to -1412 (Cum. Supp. 1986)).
34. *Id.* § 13-102 (current version at NEB. REV. STAT. § 43-1406 (Cum. Supp. 1986)).
35. *Id.* § 13-111 (current version at NEB. REV. STAT. § 43-1411 (Cum. Supp. 1986)).

The final criticism expressed by Chief Justice Krivosha was directly related to the majority's opinion. The majority stated that the case before it was not one in which Shoecraft had lived with, nurtured, or supported the mother or child. Chief Justice Krivosha noted that the time period prescribed in section 43-104.02 coincides perfectly with the time the mother and child are in the hospital, thus making it extremely difficult to establish such a relationship.[36]

B. *In re Application of S.R.S. & M.B.S.*

1. Facts

In *S.R.S. & M.B.S.*, a child was born on September 2, 1982.[37] Prior to the birth of the child, the putative father and the unwed mother had lived together and had discussed marriage.[38] Despite the fact that the couple was not married, the father's name appeared on the birth certificate, and the child bore the father's last name.[39] Upon leaving the hospital, the couple lived together with the child for approximately nineteen months.[40] During this time, the putative father provided financial support for the family and aided in the care of the child.

On June 10, 1984, the unwed mother, with the child, left the putative father and moved in with the mother's boyfriend.[41] Because of the secrecy of the mother's address and a subsequent move, the putative father spent only a limited amount of time with the child.[42] In July of that year, the mother considered placing the child for adoption. On September 28, 1984, the child was released to the Child Saving Institute without the father's knowledge.[43]

During this time, the father had contacted the unwed mother's family several times trying to discover the whereabouts of the child, but was unsuccessful. Finally, in the first part of February 1985, the

36. Shoecraft v. Catholic Social Servs. Bureau, Inc., 222 Neb. 580, 585, 385 N.W.2d 453, 455 (1986)(Krivosha, C.J., dissenting).
37. *In re* Application of S.R.S. & M.B.S., 225 Neb. 759, 760, 408 N.W.2d 272, 274 (1987).
38. *Id.* at 760, 408 N.W.2d at 274. The unwed mother chose to remain single. *Id.*
39. *Id.* The two parties signed an agreement providing for the child to bear the putative father's name. *Id.*
40. *Id.*
41. *Id.* at 761, 408 N.W.2d at 274. The unwed couple lived in a number of living arrangements with friends. The child spent time with the paternal grandmother and various other relatives for short periods of time. At one time, the paternal grandmother had instituted a proceeding to have herself appointed guardian of the child. *Id.*
42. *Id.* The father saw the child only when the mother left him with the paternal or maternal grandparents. The father did provide money, diapers, and medication during the child's stay with relatives. *Id.*
43. *Id.* at 762, 408 N.W.2d at 275. The child initially was placed with a foster family and in October officially was placed with the adoptive parents. *Id.*

unwed mother informed the maternal grandmother of the adoption. Upon receiving this information, the maternal grandmother contacted the putative father who called the adoption agency and requested the return of his child. The adoption agency refused to return the child. In response to this denial, on March 1, 1985, the father filed an intent to claim paternity.[44]

On March 27, 1985, the adoptive parents filed a petition for adoption.[45] The putative father appeared before the county court to contest the adoption proceeding, but his efforts were unsuccessful. Despite his contentions, the trial court ordered the adoption and held that the natural father's consent was unnecessary because clear and convincing evidence pursuant to section 43-104 showed that he had abandoned the child, and more importantly, his parental rights.[46] The putative father subsequently appealed to the Nebraska Supreme Court, assigning two errors: (1) that sections 43-104.02 to 43-104.04 are unconstitutional on their face and as applied to him, and (2) that the court erred in finding he had abandoned his son during the six-month period prior to the filing of the adoption petition.[47]

2. Opinion

The Nebraska Supreme Court reversed the decision of the district court.[48] In the decision, the court first addressed the putative father's claim that he had not abandoned the child pursuant to section 43-104. Under this section, the time period within which abandonment must be shown is the six-month period immediately prior to the filing of the adoption petition by the adoptive parents.[49] The court referred to several definitions formulated by other courts[50] and proposed that, in order to constitute abandonment, a putative father's conduct must appear by clear and convincing evidence to be willful, intentional, or voluntary, without just cause or excuse.[51] The court held that the putative father's conduct did not fall within this standard.

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44. *Id.* at 763, 408 N.W.2d at 275. Prior to the adoption, the father did not consent or intend to relinquish his rights to his son. *Id.*
45. *Id.*
46. *Id.* The natural father appealed the decision to the district court, which affirmed the trial court's holding. *Id.* at 760, 408 N.W.2d at 273.
47. *Id.* at 760, 408 N.W.2d at 273-74.
48. *Id.* at 760, 408 N.W.2d at 273. The Nebraska Supreme Court remanded the case to the Lancaster County Court to determine who would retain custody of the child. By stipulated agreement the parties agreed that the child will live with the adoptive parents and they will be the child's legal guardians. The natural father received liberal visitation rights. Lincoln Journal Star, April 21, 1988, at 1, col. 5.
49. *In re* Application of S.R.S. & M.B.S., 225 Neb. 759, 764, 408 N.W.2d 272, 276 (1987).
50. *In re* Adoption of Christofferson, 89 S.D. 287, 290, 232 N.W.2d 832, 834 (1975); *In re* Cordo, 41 N.C. App. 503, 507, 255 S.E.2d 440, 442 (1979); Young v. Young, 588 S.W.2d 207, 209 (Mo. App. 1979).
51. *In re* Application of S.R.S. & M.B.S., 225 Neb. 759, 765, 408 N.W.2d 272, 276 (1987).

Second, the court addressed the issue of whether section 43-104.02 was unconstitutional on its face and as applied to the putative father. The evidence revealed that the putative father had not filed within the five-day limitation and did not file until two and one-half years had passed.[52] The court noted, however, that for nineteen of the twenty-four months prior to the child's placement with the agency, the father had provided for the child and had daily contact with the child.[53]

Because of this prior custodial relationship, the court found that the putative father's rights were difficult to distinguish from those of the mother or a separated or divorced father.[54] According to the court, such a familial bond with the child should afford the father's rights substantial protection. To substantiate its position, the court cited *Lehr v. Robertson*[55] and stated, "when an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection."[56]

Unlike *Shoecraft*, the court found no compelling interest was served by the five-day rule.[57] Thus, the court held that section 43-104.02 was unconstitutional as applied and did not allow the adoption to proceed without the father's consent.

III. ANALYSIS

"But we are here not asked to evaluate the legitimacy of the state ends, rather, to determine whether the means used to achieve these ends are constitutionally defensible."[58] This statement by the *Stanley* Court appropriately expresses the focus of this Note's analysis. The Nebraska legislature enacted sections 43-104.02 to 43-104.04 to remove the doubt surrounding an adoption and to expedite the adoption process of children born out of wedlock. The ends sought by the legislature are commendable. The means, however, are constitutionally suspect.

The major issue for resolution is whether the five-day filing requirement of section 43-104.02 provides putative fathers in Nebraska sufficient protection pursuant to the due process and equal protection clauses. To fully develop the analysis surrounding this question, the

52. *Id.* at 767, 408 N.W.2d at 277.
53. *Id.* at 768, 408 N.W.2d at 278.
54. *Id.*
55. 463 U.S. 248 (1983).
56. *In re* Application of S.R.S. & M.B.S., 225 Neb. 759, 768, 408 N.W.2d 272, 278 (1987).
57. The court stated that, in *Shoecraft*, the filing requirement provided a legitimate means of attaining the rapid placement of newborns. No such compelling interest would be served by allowing a two-year relationship to be severed for a failure to file within five days. *Id.* at 769, 408 N.W.2d at 278-79.
58. Stanley v. Illinois, 405 U.S. 645, 652 (1972).

five-day provisions will be evaluated in light of the previously discussed Nebraska Supreme Court decisions and the relevant United States Supreme Court decisions.

A. Due Process

The first question which must be resolved regarding the due process analysis is whether the Nebraska five-day statutes adequately protect a putative father's opportunity to develop a relationship with his child or, more succinctly, his opportunity interest. The Supreme Court has specifically addressed the issue of whether a registry system sufficiently protects an unwed father's opportunity to form an inchoate relationship with his child.

In *Lehr v. Robertson*,[59] a child was born out of wedlock on November 9, 1976. Eight months after the birth, the mother married Richard Robertson. When the child was two years old, the couple filed an adoption petition, and ultimately an order of adoption was awarded. The natural father subsequently filed a suit contending that the adoption order was invalid because he was not given advance notice of the adoption proceeding. The Court considered whether New York had sufficiently protected the unmarried father's inchoate relationship with a child he had never supported and had rarely seen in two years. The Court ultimately held that the New York registry statutes did sufficiently protect the putative father's interest in establishing a relationship with his child.[60]

Although the Supreme Court held that the registry system did provide the putative father with adequate protection, two factors conceivably were afforded great weight by the *Lehr* Court and could have affected the Court's decision regarding New York's statutory protection of an unwed father's opportunity interest. First, the timing of the putative father's claim in *Lehr* significantly hindered his chances of establishing his opportunity claim.[61] The biological father did not seek to establish a legal tie with his daughter until she was two years old.

The second major factor that could have contributed to the Court's denial of the putative father's opportunity interest was the relationship between the prospective adoptive parents. The Court was not

59. 463 U.S. 248 (1983).

60. *Id.* at 265.

61. Several statements made by the *Lehr* Court signify the impact of the timing of the putative father's claim on his opportunity interest. In regard to the putative father, the Court stated, "[a]ppellant has never had any significant custodial, personal, or financial relationship with Jessica, and he did not seek to establish a legal tie until after she was two years old." *Id.* at 262. In addition, the Court, in its statement of the issue, made specific reference to the delay in the father's claim for paternity. *Id.* at 249.

faced with a proposed adoption that would have placed the child with an unfamiliar set of parents. Rather, the adoption merely gave recognition to a family unit already in existence.[62]

After *Lehr*, it is still questionable whether a registry system adequately protects a putative father's opportunity to form a relationship with his newborn child. Several statements made by the *Lehr* Court stress the importance of affording unwed fathers with such an interest.[63] The most significant statement made by the Court concerning a father's opportunity interest was that:

> The significance of the biological connection is that it offers the natural father an *opportunity that no other male possesses to develop a relationship with his offspring.* If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development.[64]

The emphasized words expressly provide that a father must be afforded the opportunity to develop a relationship with his child.

The Nebraska Supreme Court in *Shoecraft* was confronted with the question of the constitutional validity of section 43-104.02. The court, however, failed to discuss the issue of whether the five-day scheme adequately protected Shoecraft's opportunity to form a relationship with his child. The court determined that because Shoecraft had merely a biological connection with the child, rather than a custodial relationship, the lack of a notice provision could not render the scheme unconstitutional.[65]

Several statements made by the *Shoecraft* court show why Shoecraft was not afforded his protected opportunity interest. First,

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62. The *Lehr* Court, in a footnote, clearly communicated the impact of the nature of the proposed adoptive parents on its decision to uphold the New York statutes as constitutional:

> This case happens to involve an adoption by the husband of the natural mother, but we do not believe the natural father has any greater right to object to such an adoption than to an adoption by two total strangers. If anything, the balance of equities tips the opposite way in a case such as this. In denying the putative father relief in *Quilloin v. Walcott*, 434 U.S. 246 (1978), we made an observation equally applicable here:
> "Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interests of the child.'"

Lehr v. Robertson, 463 U.S. 248, 262 n.19 (1983).

63. In its decision, the Court repeatedly acknowledged the existence of the putative father's opportunity interest. *Id.* at 262-63.

64. *Id.* at 262 (emphasis added)(footnote omitted).

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

the court acknowledged that the five-day filing period was selected because it was the standard length of time a child and mother remain in the hospital following birth.[66] Second, the court stated that "[t]his is not a case where he [the father] lived with the child and nurtured and supported it and the mother."[67] Finally, the court stated that, "until after the birth, he (the putative father) exhibited (at least financially) no responsibility for the child or the mother."[68]

The above statements by the *Shoecraft* court are illogical and confusing. The court stressed the fact that Shoecraft had not established a relationship with his child. Section 43-104.02, however, provides the putative father only five days after the birth of the child to do so. In addition, the mother and the child are generally in the hospital during this five-day period. Such a situation makes it difficult for the father to establish a relationship with his child.

Pursuant to section 43-104.02, a putative father can protect his rights by registering with the Department of Social Services any time during the pregnancy and up to five days after the birth of the child.[69] Although this time period appears reasonable, this Note contends that the time period is unreasonable and precludes the putative father's opportunity to develop a relationship with his child. Several factors support this conclusion.

First, section 43-104.02 presumes that a putative father can develop a relationship with his child prior to the child's birth based upon an extension of his relationship with the child's mother during her pregnancy[70] and the hospital stay. The Nebraska Supreme Court in *Shoecraft* acknowledged this presumption when it stated, "until after the birth, he exhibited (at least financially) no responsibility for the child or the mother."[71] Such a presumption, however, is false. Although the father can develop an attachment to the child during the pregnancy,[72] he cannot develop a relationship with the child prior to the birth by providing financial support to the unwed mother.

Second, the unique nature of the nonmarital relationship, in conjunction with the potential confusion and uncertainty that surround the relationship, demand a more reasonable filing period. The state may argue that the putative father has nine months and five days to file the form. During the course of the pregnancy, however, the un-

66. *Id.* at 579, 385 N.W.2d at 452.
67. *Id.* at 580, 385 N.W.2d at 452.
68. *Id.*
69. NEB. REV. STAT. § 43-104.02 (1984).
70. *See generally* Case Comments, *Domestic Relations—Parental Rights of the Putative Father: Equal Protection and Due Process Considerations*, 14 MEM. ST. U.L. REV. 259 (1984).
71. Shoecraft v. Catholic Social Servs. Bureau, Inc., 222 Neb. 574, 580, 385 N.W.2d 448, 452 (1986).
72. S. HANSON & F. BOZETT, DIMENSIONS OF FATHERHOOD 98 (1985).

wed couple must make a decision regarding the child's future. The alternatives confronting the unwed couple in regard to their relationship and the child's fate are numerous and perplexing. The unwed mother and father are forced to decide whether to marry, whether to stay single, whether to place the child for adoption, whether to keep the child, or whether to live together and raise the child.

Finally, the State of Nebraska assumes the father has knowledge of the filing requirement.[73] The uncertainty and confusion described above, however, may preclude the unwed father from discovering the filing requirement until after the expiration of the five-day period. In an unwed relationship, the father may depend upon representations made by the unwed mother regarding the child's future and the unwed couple's future. Because of these representations, the father may forgo his opportunity to seek legal counsel and, ultimately, his opportunity to discover his "protected" rights under the Nebraska statutory scheme. In such a case, the fragile rights of the unwed father should outweigh the efficiency which the state achieves by implementing this five-day statute of limitations.[74]

The second part of this due process analysis will show why section 43-104.02 fails to provide adequate constitutional protection to custodial fathers. The Supreme Court first addressed the protected rights of custodial fathers in *Stanley v. Illinois*.[75] In *Stanley*, the unwed mother lived with the unwed father intermittently for eighteen years. During this time, the couple had three children. The unwed mother subsequently died, and the children, pursuant to Illinois law, became wards of the state.[76] Following a dependency proceeding, the children were placed with court-appointed guardians. The Supreme Court held that as a matter of due process, Stanley was entitled to a hearing in regard to his fitness as a parent before his children could be taken from him.[77]

During the proceeding, the State of Illinois claimed that most unwed fathers are unsuitable and neglectful parents.[78] The Court responded by stating, "[b]ut not all unwed fathers are in this category;

73. The Supreme Court in *Lehr* did not accept the putative father's "ignorance of the law" excuse. In regard to this excuse, the Court stated, "[t]he possibility that he may have failed to do so because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself." Lehr v. Robertson, 463 U.S. 248, 264 (1983).

74. *See infra* text accompanying note 87.

75. 405 U.S. 645 (1972).

76. Under Illinois law, the unwed father was presumed to be unfit. *Id.*

77. *Id.* at 649 (1972). In addition, the Court held that by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the fourteenth amendment. *Id.*

78. *Id.* at 654 (footnote omitted).

some are wholly suited to have custody of their children."[79] The Court noted that had Stanley been afforded a proper hearing, he may have been found to be deserving of the custody of his children.[80]

The Nebraska five-day statutory scheme operates in a manner similar to the Illinois presumption statutes. Under the Nebraska scheme, a custodial father could have lived with, supported, and aided in the rearing of his child, but if he failed to file the intent to claim paternity form, his rights would be terminated.[81] In essence, the Nebraska statutes presume that all putative fathers who fail to file the proper piece of paper with the Department of Social Services are unfit.

In conclusion, section 43-104.02 does not protect the opportunity interests of custodial fathers or fathers of newborns. The Nebraska Supreme Court in *Shoecraft* upheld the constitutionality of the five-day statutes and thus denied fathers of newborns, such as Shoecraft, a reasonable opportunity to establish a relationship with their children. Further, the five-day statutory scheme attempts to exclude fathers who have established a significant interest in their children from participating in their children's adoption proceedings. Subsequently, however, the Nebraska Supreme Court, in *In re S.R.S. & M.B.S.*,[82] recognized a substantially protected right and held section 43-104.02 unconstitutional in relation to custodial fathers. Pursuant to this decision, custodial fathers in Nebraska should be afforded their protected rights.

B. Equal Protection

The United States Supreme Court evaluates a putative father's equal protection claim in a manner similar to an evaluation of the father's rights under the due process clause.[83] Essentially, the Court looks at whether a substantial relationship exists between the unwed parent and the child. Thus, when the unwed mother and the unwed father are similarly situated with regard to their relationship with the child, statutes differentiating between the two parties may not be constitutionally applied. If the father has not come forward to participate in the rearing of the child, however, the Court generally has held that nothing in the equal protection clause precludes the state from with-

79. *Id.* (footnote omitted).
80. *Id.* at 655.
81. Shoecraft v. Catholic Social Servs. Bureau, Inc., 222 Neb. 574, 583, 385 N.W.2d 448, 454 (1986)(Krivosha, C.J., dissenting). Chief Justice Krivosha used similar reasoning in support of his equal protection argument. *Id.*
82. 225 Neb. 759, 408 N.W.2d 272 (1987).
83. The *Lehr* Court stressed the importance of a custodial relationship in regard to a putative father's constitutional rights. "As we have already explained, the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child." Lehr v. Robertson, 463 U.S. 248, 266-67 (1983).

holding from him the privilege of vetoing the adoption of his child.[84]

The United States Supreme Court, in *Caban v. Mohammed*,[85] provided a test to determine whether the above differences in treatment are permissible under the equal protection clause. The *Caban* test provides that "[g]ender based distinctions 'must serve important governmental objectives and must be substantially related to achievement of these objectives' in order to withstand judicial scrutiny under the Equal Protection Clause."[86]

In *Caban*, an unwed mother and father lived together and represented themselves as being husband and wife. While living together, the unwed mother gave birth to two children. During this time the father lived with the children and contributed to the support of the family. After approximately five years, the mother took the two children and took up residence with, and later married, a different man.

Subsequently, the parents filed conflicting claims for the adoption of the children. The surrogate noted the limited rights of unwed fathers in adoption proceedings and granted the mother's petition, thereby cutting off all of the father's rights and obligations. In addressing the unwed father's equal protection claim, the Court held that the distinction made by the New York adoption laws did not bear a substantial relation to the state's interest in providing adoptive homes for children born out of wedlock.

The reasons for such a conclusion were twofold. First, the *Caban* Court noted that a court should have no trouble identifying or locating a father who has established a custodial relationship with his child. Second, the Court found that although a putative father may object to the adoption of his child, this impediment to the adoption is the result of a natural parental interest and is shared by both genders alike.[87]

The applicable state interests associated with sections 43-104.02 to 43-104.04 can be identified by referring to the legislative history of the bill. According to the legislative history, the bill was designed to eliminate the undue delays, the doubt, and the cloud that hangs over such adoption proceedings.[88] More specifically, the state's interests are the prompt and efficient placement of children born out of wedlock, finality in the adoption proceeding, and the elimination of embarrassment to the mother, adoptive parents, and child caused by the publication of

84. *Id.* at 276.

85. 441 U.S. 380 (1979).

86. *Id.* at 388 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

87. *Id.* at 391-92. In addition, the Court noted that "[n]either the State nor the appellees have argued that unwed fathers are more likely to object to the adoption of their children than are unwed mothers; nor is there any self-evident reason why as a class they would be." *Id.* at 392.

88. *Hearing, supra* note 5 (statement of Sen. Anderson).

notice.[89]

The distinctions between an unwed mother's rights and an unwed father's rights under section 43-104.02 are easily identifiable. The unwed mother is entitled to custody of the child, and custody cannot be taken from her absent evidence of unfitness and proof that the removal is in the best interests of the child. In addition, the mother's custody is automatic unless terminated after notice and a fair hearing.[90]

In direct contrast, a putative father has no automatic right to custody. He must file a form with the Department of Social Services within five days after the birth of the child and must establish paternity in a judicial proceeding. A failure to file will result in termination of all his rights in relation to the child.[91] If the mother decides to relinquish the baby for adoption, the unwed father must meet three conditions in order to successfully contest the proposed relinquishment. The father must show that he is a fit parent, able to properly care for the child, and that the child's best interests will be served by granting custody to him.[92]

Application of the *Caban* test to the fact pattern in *S.R.S. & M.B.S.* demands a conclusion that the gender-based distinctions in section 43-104.02 fail to bear a substantial relationship to the state's interests. In *S.R.S. & M.B.S.*, the putative father came forward to participate in the support and rearing of his child for nineteen of the child's first twenty-four months of life. A court would have no trouble identifying or locating the unwed father. A reasonable inquiry by the court of the mother, relatives of the mother, or a review of the birth certificate would have revealed both the father's identity and his location. Because the identification and location of the unwed father were readily available to the court, the adoption proceeding would not be subjected to any significant delays. In addition, knowledge of such information would eliminate the need for publication of notice and thus preclude embarrassment to the interested parties. As a result, the different treatment accorded to unwed mothers and custodial unwed fathers does not bear a substantial relationship to the interests of the State of Nebraska in expediting the adoption process, promoting finality, or eliminating the embarrassment of the parties. Accordingly, the disparate treatment imposed by section 43-104.02 should be impermissible.[93]

89. Shoecraft v. Catholic Social Servs. Bureau, Inc., 222 Neb. 574, 579, 385 N.W.2d 448, 452 (1986).

90. *Id.* at 578, 385 N.W.2d at 451-52.

91. The *Shoecraft* court specified the differences in treatment found in section 43-104.02. *Id.* at 579, 385 N.W.2d at 452.

92. The *Shoecraft* court further addressed the distinctions present in section 43-104.06(1). *Id.* at 578-79, 385 N.W.2d at 452.

93. *See id.* at 578, 385 N.W.2d at 451-52.

Historically, the states have afforded the mother greater rights because she is the one who has carried the child and the one who must ultimately bear the child.[94] This Note, however, contends that the common law distinctions drawn between unwed mothers and fathers of newborns are outdated[95] and can no longer deny putative fathers equal protection.

The above conclusion is supported by the fact that the unwed mother and the unwed father are equally competent caretakers. Studies by a number of respected psychologists reveal that most stereotypical associations are erroneous. The results of these studies indicate that fathers, much like mothers, are capable of sensitive interaction with their infants, are responsive to the needs of the child, and most importantly, are competent caretakers.[96] In regard to the children, psychologists have found that children form attachments to both parents at approximately the same time and, in addition, display no preference for one parent over the other.[97]

One psychologist, Michael Lamb, adeptly addressed the distinction: "With the exception of lactation, there is no evidence that women are biologically predisposed to be better parents than men are."[98] Essentially, the only distinction between the unwed mother and the unwed father is gender. When the parties are similarly situated, the Supreme Court has held that statutes containing gender-based distinctions may not be constitutionally applied.[99]

Application of the *Caban* test to the *Shoecraft* case further supports a conclusion that the five-day statutes are constitutionally invalid under the equal protection clause. More specifically, the gender-based distinctions inherent in the five-day statutory scheme are not

94. Justice Stevens' reasoning in his dissenting opinion in *Caban* typifies the historical reasoning behind such distinctions. In his dissenting opinion, he stated:

> [B]oth parents are equally responsible for the conception of the child out of wedlock. But from that point on through pregnancy and infancy, the differences between the male and the female have an important impact on the child's destiny. Only the mother carries the child; it is she who has the constitutional right to decide whether to bear it or not. In many cases, only the mother knows who sired the child, and it will often be within her power to withhold that fact, and even the fact of her pregnancy, from that person.

Caban v. Mohammed, 441 U.S. 380, 404-405 (1979)(Stevens, J., dissenting)(footnotes omitted).

95. Shoecraft v. Catholic Social Servs. Bureau, Inc., No. 85-391, slip op. 287, 299 (Lancaster County Dist. Ct. June 14, 1985).

96. M. LAMB, THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 437, 479 (1981).

97. S. HANSON & F. BOZETT, *supra* note 72; M. LAMB *supra* note 96.

98. M. LAMB, *supra* note 96, at 479.

99. Lehr v. Robertson, 463 U.S. 248 (1983). The Court in *Lehr* stated: "[w]e have held that these statutes may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child." *Id.* at 267.

substantially related to an important state interest. The important state interests identified by the Legislature will be addressed individually.

First, the Legislature was concerned with eliminating the embarrassment suffered by the mother and the illegitimate child that would result from the judicial proceedings and the publication of notice. The viability of this interest today is questionable. Since the enactment of section 43-104.02 in 1975, the annual number of children born out of wedlock in the State of Nebraska has almost doubled, and in 1986 comprised approximately fifteen percent of all births.[100] Arguably, the stigma formerly associated with illegitimacy has subsided and is negligible. Thus, no showing has been made that the distinctions made under section 43-104.02 bear a substantial relationship to the proclaimed interest of eliminating embarrassment to the mother and child.

The second identifiable interest suggested by the Legislature is the prompt placement of children born out of wedlock. Several specific problems can be attributed to this interest. One problem is the reluctance of the unwed father to consent to the adoption of his child. The *Caban* Court, however, dispelled the one-sided nature of this problem and stated that this reluctance was the result of a natural parental interest shared by both genders alike.[101]

Two additional, interrelated problems associated with the prompt placement interest are the identification and location of the unwed father. Admittedly, the five-day statutes eliminate these two problems by not requiring the court to perform these tasks. Thus, the five-day statutes, in some cases, further the state's interest in expediting the adoption process.

The United States Supreme Court's decision in *Reed v. Reed*[102] could arguably demand a conclusion that the methodology implemented by sections 43-104.02 to 43-104.04 to accomplish the prompt placement of children born out of wedlock violates the equal protection clause. In *Reed*, a mother and father separately filed petitions in probate court seeking appointment as administrator of their adoptive son's estate. The Idaho Code compelled a preference for males, and as a result the father was designated as the administrator.

The question presented to the *Reed* Court was whether a difference in the sex of competing applicants for letters of administration bore a rational relationship to a state objective sought to be achieved by the operation of the statute.[103] The Court held that although the

100. NEBRASKA DEP'T OF HEALTH DIV. OF HEALTH DATA AND STATISTICAL RESEARCH, UNWED ADOPTIONS FOR YEARS 1975-1986.

101. Caban v. Mohammed, 441 U.S. 380, 391-92 (1979).

102. 404 U.S. 71 (1971).

103. *Id.* at 76. The objective of the state was to reduce the workload of the probate

statute reduced the workload on the probate courts, the statute failed to achieve that objective in a manner consistent with the commands of the equal protection clause.[104]

Although the Nebraska Legislature never explicitly stated that it sought to eliminate one class of contestants, the enactment of the five-day statutes accomplished such an end. Admittedly, the five-day scheme does, in most cases, expedite the adoption process and diminish the workload of the courts by not requiring the courts to attempt to identify or locate the putative fathers. Pursuant to the Supreme Court's decision in *Reed*, however, the scheme accomplishes this interest in a discriminatory manner. Preference to unwed mothers merely for purposes related to administrative ease is an example of arbitrary legislation prohibited by the equal protection clause.[105]

IV. SOURCE OF THE PROBLEM

The constitutional deficiencies of Nebraska's five-day statutory scheme can be directly attributed to the Nebraska Legislature. A careful review of the statute itself and the legislative history reveals a blatant disregard for the rights of unwed fathers. The record evidences an overwhelming concern for the adoptive parents and for the rapid placement of children born out of wedlock. This unbalanced concern can be attributed to the interests of the creators of the statute and the persons testifying in favor of it.[106]

The overzealous concern by the state for a quick and efficient determination of parental rights prompted the passage of an unconstitutional statutory scheme. Although the state's interest in an efficient adoption procedure is important, this interest is not so important as to justify the implementation of unconstitutional means. The *Stanley* Court aptly addressed the propriety of such an "efficient" procedure:

> 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 effi-

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courts by eliminating one class of contests. In regard to this objective, the Court noted that the crucial question was whether the statute advanced that objective in a manner consistent with the command of the equal protection clause. *Id.*

104. *Id.* In addition, the *Reed* Court stated:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

Id. at 76-77.

105. *Id.* at 76.

106. *Hearing, supra* note 5. Those in favor of the bill included representatives of local adoption agencies and attorneys representing adoptive parents.

> ciency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.[107]

The most disconcerting factor regarding the statutory scheme is the apparent randomness in the selection of the five-day period and the lack of justification for its implementation. The legislative history fails to reveal any reference by the promoters of the bill or by the Legislature to any outside resource to justify their ultimate choice. Admittedly, the child's interests should be paramount and should be afforded great protection, but the necessity of such a short filing period is unjustified.

The Legislature's failure to refer to outside resources may have contributed to an unfair balancing of the interests of the adoptive parents, the unwed mother, the putative father, and the child. Psychological research refutes the extreme necessity of such an early placement of the child. Several prominent psychologists have specifically addressed the timing of a child's attachment to his parents.

> It is generally believed that infants are not attached to anyone until they attain six to eight months of age (compare Ainsworth 1969; Lamb 1978). It is only at this age that infants have matured cognitively to such an extent that they have a primitive but adequate conception of the independent and permanent existence of other persons (compare Bell 1970; Decarie 1965). Furthermore, it is only at this age that infants begin to protest reliably when separated from their parents (Ainsworth 1962; Bowlby 1973).[108]

Reference to the above research and similar psychological attachment findings could have conceivably induced a more thoughtful filing period selection.

Whether the Legislature actually sought to deny the putative father of his right to notice and the opportunity for consent, the statute provides on its face for a similar result.[109] The five-day provision functions much like a statute of limitations[110] in that neither the state nor the petitioner need provide notice of the pending deadline and ignorance of the deadline by the putative father is no excuse. Those fathers who let the statute run are afforded no recourse.

V. STATUTORY REFORM

In the aftermath of the two recent Nebraska Supreme Court deci-

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107. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

108. Lamb, *The Development of Parent Infant Attachments in the First Two Years of Life*, THE FATHER-INFANT RELATIONSHIP 23 (F. Pedersen ed. 1980).

109. Shoecraft v. Catholic Social Servs. Bureau, Inc., 222 Neb. 574, 583, 385 N.W.2d 448, 454 (1986)(Krivosha, C.J., dissenting).

110. *Hearing, supra* note 5 (statement of Eleanor Swanson).

sions,[111] the Legislature should consider a revision of the existing statutes or the enactment of a new scheme. The objective of this section of the Note is to provide a statutory scheme that affirmatively governs the adoption proceeding of children born out of wedlock. In order to effectively accomplish this task, consideration must be given to the interests of all parties, namely the mother, the natural father, the child, and the adoptive parents.

The delicate nature of such a proceeding demands a scheme that offers a careful balancing of the aforementioned parties' interests. The Uniform Parentage Act (UPA)[112] effectively balances the interests of all the relevant parties. This statutory scheme includes three sections that directly correspond to the Nebraska five-day statutes.[113]

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

112. UNIF. PARENTAGE ACT, 9B U.L.A. 295 (1973).

113. The three provisions of the Uniform Parentage Act scrutinized in this section are sections 4, 24, and 25.

§ 4. Presumption of Paternity.

(a) A man is presumed to be the natural father of a child if:

(1) he and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court;

(2) before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) if the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) if the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation;

(3) after the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) he has acknowledged his paternity of the child in writing filed with the [appropriate court or Vital Statistics Bureau],

(ii) with his consent, he is named as the child's father on the child's birth certificate, or

(iii) he is obligated to support the child under a written voluntary promise or by court order;

(4) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child; or

(5) he acknowledges his paternity of the child in a writing filed with the [appropriate court or Vital Statistics Bureau], which shall promptly inform the mother of the filing of the acknowledgement, and she does not dispute the acknowledgement within a reasonable time after being informed thereof, in a writing filed with the [appropriate court or Vital Statistics Bureau]. If another man is presumed under this sec-

In direct contrast to the Nebraska statutes, however, the UPA provides the putative father with significant protection.

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tion to be the child's father, acknowledgement may be effected only with the written consent of the presumed father or after the presumption has been rebutted.

(b) A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

Id. § 4, 9B U.L.A. at 298-99.

§ 24. When Notice of Adoption Proceeding Required. If a mother relinquishes or proposes to relinquish for adoption a child who has (1) a presumed father under Section 4(a), (2) a father whose relationship to the child has been determined by a court, or (3) a father as to whom the child is a legitimate child under prior law of this State or under the law of another jurisdiction, the father shall be given notice of the adoption proceeding and have the rights provided under [the appropriate State statute] [the Revised Uniform Adoption Act], unless the father's relationship to the child has been previously terminated or determined by a court not to exist.

Id. § 24, 9B U.L.A. at 336.

§ 25. Proceeding to Terminate Parental Rights.

(a) If a mother relinquishes or proposes to relinquish for adoption a child who does not have (1) a presumed father under Section 4(a), (2) a father whose relationship to the child has been determined by a court, or (3) a father as to whom the child is a legitimate child under prior law of this State or under the law of another jurisdiction, or if a child otherwise becomes the subject of an adoption proceeding, the agency or person to whom the child has been or is to be relinquished, or the mother or the person having custody of the child, shall file a petition in the [_____] court to terminate the parental rights of the father, unless the father's relationship to the child has been previously terminated or determined by a court not to exist.

(b) In an effort to identify the natural father, the court shall cause inquiry to be made of the mother and any other appropriate person. The inquiry shall include the following: whether the mother was married at the time of conception of the child or at any time thereafter; whether the mother was cohabiting with a man at the time of conception or birth of the child; whether the mother has received support payments or promises of support with respect to the child or in connection with her pregnancy; or whether any man has formally or informally acknowledged or declared his possible paternity of the child.

(c) If, after the inquiry, the natural father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given notice of the proceeding in accordance with Subsection (e). If any of them fails to appear or, if appearing, fails to claim custodial rights, his parental rights with reference to the child shall be terminated. If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine custodial rights.

(d) If, after the inquiry, the court is unable to identify the natural father or any possible natural father and no person has appeared claiming to be the natural father and claiming custodial rights, the court shall enter an order terminating the unknown natural father's parental rights with reference to the child. Subject to the disposition of an appeal upon

First, section 4 of the UPA, "The Presumption of Paternity," enumerates various situations in which a putative father is presumed to be the child's biological father, and, as a result, formal proceedings to establish paternity are not necessary.[114] Second, section 24 of the UPA specifically defines when notice of the adoption proceeding must be accorded to the father. Under this section, three specific categories of fathers must be afforded notice.[115] Finally, section 25 of the UPA, "Proceeding to Terminate Parental Rights," is a natural extension of section 24. This section addresses situations in which the father of the child has not been ascertained in accordance with section 24 and further allows for the termination of the parental rights of the natural father.

A comparison of the above sections and the Nebraska five-day statutory scheme reveals several significant differences. Essentially, the UPA allows the court to examine and protect the relationships between the parties in addition to providing a means for the putative father to affirmatively assert paternity. More importantly, section 4 protects fathers who have taken some affirmative action in regard to the familial relationship and his child. In comparison, section 43-104.02 fails to protect fathers who have established, or attempted to establish, a relationship with their children. Pursuant to the Nebraska statute, a father can only assert paternity by filing a notice with the Department of Social Services.

A second difference is found in section 24 of the UPA. This section requires the court to provide notice to putative fathers who have established a custodial relationship with their children, regardless of registration. The Nebraska statutory scheme, on the other hand, limits notice of the adoption proceeding to only those persons who have affirmatively registered. A third implicit difference is the automatic termination characteristic of section 43-104.02. Pursuant to section 43-

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the expiration of [6 months] after an order terminating parental rights is issued under this subsection, the order cannot 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.

(e) Notice of the proceeding shall be given to every person identified as the natural person or a possible natural father [in the manner appropriate under rules of civil procedure for the service of process in a civil action in this state, or] in any manner the court directs. Proof of giving the notice shall be filed with the court before the petition is heard. [If no person has been identified as the natural father or a possible father, the court, on the basis of all information available, shall determine whether publication or public posting of notice of the proceeding is likely to lead to identification and, if so, shall order publication or public posting at times and in places and manner it deems appropriate.]

Id. § 25, 9B U.L.A. at 339-40.

114. *Id.* § 4, 9B U.L.A. at 298.

115. *Id.* § 24, 9B U.L.A. at 336.

104.02, a trial judge is not required to attempt to identify or locate the father, nor is he required to determine whether publication is necessary. Essentially, the Nebraska statutory scheme acts as a closed scheme[116] that affords the trial judge no discretion in the notice of termination decisions.

The aforementioned sections of the UPA offer several substantive advantages to the parties involved in an adoption proceeding. First, the UPA provides adequate protection of the putative father's interests in his child. The statutory means include the presumption of paternity, a putative father registry, the requirement of judicial inquiry, and notice through publication. Subsections (b) through (e) of section 25 act to assure the state that concerned fathers who are unaware of the registry system are adequately protected.[117]

Next, the UPA affords adoptive parents and the child an efficient adoption process. Two particular aspects of this statutory scheme promote efficiency. First, the UPA seeks to identify the natural father in order to determine his potential interest in his child.[118] Second, section 25(d) acts much like a statute of limitations in that it provides a specific date after which a father may not reopen a judgment terminating his parental rights.[119] Such a system alleviates the doubt and uncertainty that commonly surround an adoption proceeding, and further, it enables the court to quickly terminate an uninterested putative father's rights.

A third inherent advantage of this statutory scheme is promotion of the finality of adoption proceedings and further attempts to eliminate the doubts of the interested parties. Subsections (c) and (d) of section 23 firmly address this issue and offer no recourse to uninterested fathers who fail to appear or appeal.[120]

Upon reviewing the above advantages, one cumulative advantage can be identified. The UPA attempts to balance the interests of the parties involved in an adoption proceeding.

Several disadvantages related to the UPA scheme are noteworthy and deserve discussion. First, pursuant to section 25(d), a putative father is allowed six months to appeal an order terminating his rights. Although attachment between a child and an adult generally does not occur until six to eight months after birth,[121] the six-month time period is unduly burdensome upon the adoptive parents. Several states that have adopted the UPA have, therefore, reduced the time period

116. *See generally* Note, *Putative Father's Right to Notice of Adoption Proceedings Involving His Child*, 49 MO. L. REV. 650, 663 (1984).
117. UNIF. PARENTAGE ACT § 25 (b-e), 9B U.L.A. 295, 339-40 (1973).
118. *Id.* § 25(b), 9B U.L.A. at 340.
119. *Id.* § 25(d), 9B U.L.A. at 340.
120. *Id.* § 25(c), (d), 9B U.L.A. at 340.
121. *See* Lamb, *supra* note 108, at 23.

allowed for appealing the termination order.[122]

The amount of time afforded a putative father to appeal involves a balancing of two interests. First, the interested fathers should be afforded ample time to protect their inherent rights. Because of the indefinite character of the nonmarital relationship, a father may be unaware of the birth of the child or unable to determine the child's location. Adequate time should be afforded to a father who has an interest in forming a relationship with his child. Second, the time period chosen should be related to the adoptive parents' interest. Unlike the child's attachment to his parents, the adoptive parents' attachment to the child begins much sooner, and, accordingly, their attachment rights should be protected. A period of thirty days from the termination proceeding should adequately afford the father sufficient time to appeal the court's determination. Additionally, the attachment between the adoptive parents and the child would be considerably less in a thirty-day period as opposed to the six-month period prescribed by the UPA.

A second disadvantage to the UPA statutory scheme is the significant amount of discretion afforded to the judge. Under subsection (e), great deference is given to the court to determine whether publication or the public posting of notice is likely to lead to the notification of the putative father.[123] The decision regarding publication or the posting of notice requires a balancing of the interests of the mother and the natural father.

The possibility of embarrassment for the mother may deter some unwed mothers from placing their children for adoption even when an adoption would be in the child's best interests.[124] Although the interests of the father are significant, the low success ratio of notice by publication tips the scale in favor of the mother's interests. The possibility of embarrassment to the mother, the deterrent effect on the placement of her child, and the low probability of notification of the father by publication demand a restriction on the discretion of the judge. The provision could be refined to state that "the publication or posting of notice should be permitted only when an inquiry conducted by the court reveals that the probability of notification of the father through publication is substantial."

VI. CONCLUSION

Sections 43-104.02 to 43-104.04 of the Nebraska statutes inade-

122. Two states that have adopted a shorter time period are Colorado and North Dakota. *See* COLO. REV. STAT. § 19-6-126(4) (1986)(3 months); N.D. CENT. CODE § 27-20-45(5) (Supp. 1987)(30 days).

123. UNIF. PARENTAGE ACT § 25(e), 9B U.L.A. 295, 340 (1973).

124. *Id.*

quately protect the constitutional rights of putative fathers in the State of Nebraska. This statutory scheme discriminates against unwed fathers, fails to protect putative fathers' opportunity interests, and presumes that fathers who fail to file are unfit.

The aforementioned constitutional violations should ultimately prompt statutory reform by the Nebraska Legislature. Before attempting to draft the new statutes, however, the Legislature should consider adopting sections 4, 24, and 25 of the Uniform Parentage Act. Unlike the existing Nebraska statutes, these sections attempt to balance the interests of all the relevant parties, including those of the putative father.

Daniel S. Wilson '89