Babies Jessica, Richard, and Emily: The Need for Legislative Reform of Adoption Laws

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INTRODUCTION

"There were no winners in this case." Unfortunately, this sad portrayal of the much-publicized adoption case of Baby Jessica is both accurate and applicable to several other adoption cases. Along with Baby Jessica, the recent cases of Baby Richard in Illinois and Baby Emily in Florida illustrate the need for immediate legislative reform of state adoption laws. After Jessica spent the first twenty-nine months of her life with her adoptive parents, she was forced to begin a new life with her natural parents. Although Richard spent all but four days of his life with his adoptive parents, he was "returned" to his natural parents more than four years after his birth. Emily was twenty-seven months old before the first appeal of her adoption case was finally completed; her adoption was eventually upheld.

Regrettably, Jessica, Richard, and Emily are innocent victims of complicated and bitter legal battles between natural and adoptive parents. Yet, innocent children should never be forced to bear the emotional burdens of such custody disputes. "There is little that can be as detrimental to a child's sound development as uncertainty over

* J.D. with High Honors, 1995. I would like to thank Professor Sarah R. Bensinger for her insightful feedback and tireless enthusiasm during the writing and editing of this article.
1. Too Much Love, Pain for Jessica, Plain Dealer, Aug. 6, 1993, at 4B.
2. Adoption is generally defined as the procedure by which "an adult and child become legally related to each other in the same respect as birth parents and children." Alan Sussman & Martin Guggenheim, The Rights of Parents 175 (1980).
3. While Jessica was not the child's birth name, for purposes of clarity, this Note will refer to her as Jessica, the name given her by the adoptive parents. Jessica's natural parents renamed her Anna a few months after they regained custody of her. See Mary Neubauer, No Longer 'Little Jessica', 3-Year-Old Reclaimed by Mother, Now is 'Anna', Chi. Trib., Mar. 11, 1994, (Evening Update), at 2.
4. Richard was a fictitious name used by the Illinois Appellate Court to anonymously describe the baby boy who was the subject of that case. In re Doe, 627 N.E.2d 648, 649 n.1 (Ill. App. Ct. 1993), rev'd, 638 N.E.2d 181 (Ill.), cert. denied, 115 S. Ct. 499, and cert. denied, 115 S. Ct. 499 (1994) [hereinafter Doe I].
5. Although the child's natural father refers to her as Ashley, court documents, the media, and her adoptive parents call her Emily. The natural mother originally called her child "Hope" because she hoped the child would have a good life. See Mike Wilson, Baby Emily: Whose Life is This Anyway?, St. Petersburg Times, Jan. 24, 1995, at 1A.
whether he is to remain in his current 'home,' under the care of his parents or foster parents, especially when such uncertainty is pro-
longed." This is particularly true when the child has spent his or her entire life with one family, only to be removed later to a new family with whom the child has had no contact. Jessica and Richard typify this problem; Emily will avoid a similar fate.

This Note will outline the myriad problems that arose in these three cases and propose legislative reforms to prevent such tragic cases from re-occurring. Parts I, II, and III will track the complicated procedural and factual histories of the three principal cases. Parts IV and V will focus on the frequent conflict between the putative father's rights and the "best interests of the child." Those two sections will also discuss the three principal cases and the competing interests of the natural and adoptive parents in each instance. Finally, Part VI will discuss four proposed legislative reforms: (1) expedited decisions and appeals; (2) putative father registries; (3) mandatory preplacement counseling; and (4) penalties for fraud.

Each of the proposed reforms will benefit the adoption process. First, expedited court decisions and appeals will ensure that final placement of the child takes place as quickly as possible. Second, a putative father registry will enable the putative father to protect his parental rights before the child is placed with adoptive parents, even if the natural mother attempts to conceal the adoption. Third, mandatory preplacement counseling will ensure that the natural mother places her child for adoption with informed consent. Fourth, punishing fraud will discourage the natural mother from fraudulently concealing the natural father's identity; such concealment is the cause of many adoption battles. Thus, the proposed reforms balance the interests of natural and adoptive parents but also protect the child's well-being.

I. Baby Jessica

On February 8, 1991, Cara Clausen, an unmarried Iowa woman, gave birth to a baby girl who later became known as Jessica DeBoer.9

7. A "putative father" is "[the alleged or reputed father of a child born out of wedlock." BLACK'S LAW DICTIONARY 1237 (6th ed. 1990).
9. See supra note 3.
Two days later, the baby was given up for adoption by Cara, and Scott Seefeldt, the man Cara named as the baby’s natural father, executed a release of custody form four days later. On February 25, 1991, Roberta and Jan DeBoer filed an adoption petition in juvenile court in Iowa. At a court hearing held the same day, the parental rights of Cara and Scott were terminated. In addition, the DeBoers were granted custody of Jessica and returned with her to their home in Ann Arbor, Michigan.

On March 6, 1991, Cara filed a request in the Iowa juvenile court to revoke, on several grounds, her consent to the adoption. Primarily, she claimed that she had lied by naming Scott Seefeldt as the natural father and that Daniel Schmidt was Jessica’s actual father. Later that month, Daniel filed an affidavit of paternity and sought to intervene in the DeBoers’ adoption proceeding on the grounds that he had never consented to the adoption. The Iowa district court ordered blood tests, which ultimately revealed that there was a 99.9% chance that Daniel was the biological father and a 0% chance that Scott was the biological father.

As a result of the blood tests, the Iowa district court ruled in late 1991 that Daniel’s parental rights had not been terminated and that he


11. Typically, an adoption petition sets forth background information regarding the child and both sets of parents and asks the court to approve the adoption. Morton L. Leavy & Roy D. Weinberg, Law of Adoption 32 (4th ed. 1979). The DeBoers sought to adopt Jessica because they were infertile. See Court Asked to Act on Baby Jessica Case, Legal Intelligencer, July 22, 1993, at 4.


13. A court hearing is conducted to determine whether the contemplated adoption is a proper one. Courts will usually examine all available information in making their decisions. See, e.g., Leavy & Weinberg, supra note 11, at 50.


15. Cara and Scott received notice of the hearing but waived their right to attend. Id.

16. Cara claimed that the release of her parental rights was procured by fraud, coercion, and misrepresentation. She also argued that she had “good cause” for revoking her consent because her release of custody was obtained 40 hours after birth, in violation of Iowa law. Id. at 242. The relevant portion of the Iowa statute requires that a release of custody “be signed, not less than seventy-two hours after the birth of the child to be released, by all living parents.” Iowa Code Ann. § 600A.4(2)(d) (West 1981).

17. Cara stated that she lied because “she was dating Scott at the time she found out that she was pregnant, and she did not want to create problems by appearing to have another man’s baby.” B.G.C., 496 N.W.2d at 246. Cara’s fraud is especially troubling because her actions set in motion the lengthy custody battle which caused emotional strain on all parties involved, especially Jessica. The use of fraud is discussed infra notes 233-57 and accompanying text.

18. Clausen I, 501 N.W.2d at 194.

19. The DeBoers, doubting Cara’s truthfulness regarding the biological father, objected to the Iowa district court’s order. Consequently, results of the blood tests were not available for five months. Id.
had not consented to Jessica's adoption. Therefore, the court found that Daniel (who had married Cara during the proceedings) was entitled to custody of Jessica and ordered that Jessica be returned to the Schmidts. At this stage in the litigation, Jessica was rapidly approaching her first birthday. The legal battle was not even close to ending, however. Appeals were taken to the Iowa Court of Appeals and then to the Iowa Supreme Court, which affirmed the Court of Appeals' ruling on September 23, 1992. At this point, Jessica was already nineteen months old. In its opinion, the Iowa Supreme Court maintained that its decision did not invalidate an adoption decree: "Adoption of the baby was denied by the district court because the father's rights were not terminated." The court also refused to consider the issue of Jessica's best interests, emphasizing that "[c]ourts are not free to take children from parents simply by deciding another home offers more advantages."

Approximately two months later, the Iowa Supreme Court denied the DeBoers' motion to reconsider and remanded the case to the district court to issue an order changing physical custody to the Schmidts. After the DeBoers failed to appear before the Iowa district court on December 3, 1992, the district court "found that the DeBoers had no legal right or claim to physical custody of the child" and scheduled another hearing for the DeBoers to show cause why they should not be held in contempt. By this time, Jessica was nearly twenty-two months old.

On December 3, 1992, the day their rights were terminated in Iowa, the DeBoers sought refuge in the Michigan courts. They filed a petition in Washtenaw County Circuit Court pursuant to the Uniform

20. The district court also rejected the DeBoers' arguments that Daniel was an unfit parent and had abandoned Jessica because the DeBoers failed to prove each of these claims by "clear and convincing" evidence. Id.
22. The Iowa Court of Appeals' opinion is unreported. That court ruled only that Cara's parental rights were not terminated, and, therefore, the court refused to consider the validity of the DeBoers' adoption petition. Id.
23. Id. at 246.
24. Id. at 241. In addition, the Iowa Supreme Court affirmed the district court's findings that Daniel was neither an unfit parent nor had abandoned Jessica under Iowa law. Id. at 246.
25. Id. at 241 (quoting In re Burney, 259 N.W.2d 322, 324 (Iowa 1977)).
27. Id. That hearing was held on January 22, 1993, and resulted in the DeBoers being held in contempt of court for failing to appear and failing to return Jessica to the Schmidts. Id. at 195 n.1.
Child Custody Jurisdiction Act (UCCJA)\textsuperscript{28} seeking to modify the Iowa order granting custody to the Schmidts.\textsuperscript{29} Daniel Schmidt then filed a motion for summary disposition and sought to enforce the Iowa judgment in Michigan.\textsuperscript{30} On January 11, 1993, however, less than one month before Jessica's second birthday, the Washtenaw County Circuit Court denied the motion and ordered that Jessica remain with the DeBoers.\textsuperscript{31}

Jessica's second birthday came and went. On March 29, 1993, the Michigan Court of Appeals reversed the Washtenaw County Circuit Court's decision, holding that the circuit court lacked jurisdiction to intervene in the case.\textsuperscript{32} The court noted that the UCCJA was designed to "avoid jurisdictional competition between states by establishing uniform rules for deciding when states have jurisdiction to make child custody determinations."\textsuperscript{33} Additionally, the Court of Appeals held that the DeBoers lacked standing as third parties to initiate a custody action because the Iowa decisions stripped them of any legal claim to Jessica.\textsuperscript{34}

The DeBoers appealed to the Michigan Supreme Court, which affirmed the Court of Appeals' decision on July 2, 1993.\textsuperscript{35} By now,

\begin{enumerate}
\item[28.] Mich. Comp. Laws Ann. §§ 600.651-673 (West 1981). The purpose of the UCCJA is to promote interstate cooperation and avoid jurisdictional conflicts by granting jurisdiction to the state that has the most contacts with the child. With few exceptions, the UCCJA obligates sister states to enforce custody determinations made by the state that has proper jurisdiction. All fifty states and the District of Columbia have adopted the UCCJA. See James C. Murray, Comment, \textit{One Child's Odyssey Through the Uniform Child Custody Jurisdiction and Parental Kidnapping Prevention Acts}, 1993 Wis. L. Rev. 589, 591. Some of these states, however, enacted the UCCJA with modifications that encouraged dissatisfied, noncustodial parents to forum shop for a state more favorable to their goals. See Linda Lea M. Viken, \textit{Calling in the Feds: The Need for an Impartial Referee in Interstate Child Custody Disputes}, 39 S.D. L. Rev. 469, 473 (1994).
\item[29.] Clausen I, 501 N.W.2d at 195. The DeBoers claimed that Michigan had jurisdiction as Jessica's "home state" under the UCCJA because Jessica had lived in Michigan for all but 17 days of her life and because it would be in her best interests for Michigan to exercise jurisdiction. Id.; see also Mich. Comp. Laws Ann. § 600.653(1)(a), (b).
\item[30.] Clausen I, 501 N.W.2d at 196. In a subsequent hearing on the best interests of the child, the Washtenaw County Circuit Court held that it was indeed in Jessica's best interests to remain in the custody of the DeBoers. Id.
\item[31.] Id.
\item[32.] Id.
\item[33.] Id. Since the case was pending in Iowa courts first, the court of appeals noted that Michigan courts were precluded under the UCCJA from exercising concurrent jurisdiction. Id. at 197.
\item[34.] Id. at 197.
\item[35.] In re Clausen, 502 N.W.2d 649, 668 (Mich. 1993) (per curiam) [hereinafter Clausen II]. Justice Levin filed a lengthy dissent in which he sharply criticized the majority for ignoring Jessica's best interests:
\begin{quote}
I would agree with the majority's analysis if the DeBoers had gone to Iowa [and] purchased a carload of hay . . . . But this is not a lawsuit concerning the ownership, the legal title, to a bale of hay. This is not the usual \textit{A v. B} lawsuit; \textit{Schmidts v. DeBoers}, or, if you prefer, \textit{DeBoers v. Schmidts}. There is a C, the child.
\end{quote}
\end{enumerate}
Jessica was almost two and a half years old. The Michigan Supreme Court based its holding on two independent grounds. First, the court held that Michigan courts lacked jurisdiction under both the UCCJA and the Federal Parental Kidnapping Prevention Act (PKPA) to decide the case. Second, it affirmed the Court of Appeals’ ruling that the DeBoers did not have standing to bring a custody action. The Michigan Supreme Court also noted that the refusal by the Iowa courts to employ a “best interests of the child” standard did not enable Michigan’s courts simply to ignore the Iowa custody orders.

Finally, the DeBoers appealed to the United States Supreme Court to stay enforcement of the Michigan Supreme Court’s decision. The application was initially heard by Justice Stevens in his role as Circuit Justice for the Sixth Circuit. Justice Stevens denied the DeBoers’ request because there was neither a reasonable probability that the other Justices would grant certiorari, nor a “fair prospect” that if the Court did hear the case, it would conclude that the decision below was erroneous. Justice Stevens subsequently referred the applications to the full court which, in a 6-2 decision issued on July 30, 1993, also refused to stay the Michigan Supreme Court’s decision. After a twenty-nine-month legal fight, Jessica returned to Iowa with the Schmidts on August 3, 1993.

Id. at 668-69 (Levin, J., dissenting).


37. Clausen II, 502 N.W.2d at 652.

38. Id.

39. “[T]he UCCJA and PKPA] do not provide that a best interests of the child standard is the substantive test by which all custody decisions are to be made.” Id. at 661.


41. Id. Justice Stevens also emphasized that “[n]either Iowa law, Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education.” Id. at 2.

42. The Court had only eight members when the decision was made because Justice Ruth Bader Ginsburg had not yet been confirmed by the U.S. Senate to replace retiring Justice Byron White. See Robert Green, Supreme Court Denies Stay in Adoption Case, REUTERS, July 30, 1993.

43. DeBoer v. DeBoer, 114 S. Ct. 1, 11 (1993). The majority denied the stay without comment. Justice Blackmun filed a separate dissenting opinion, joined by Justice O’Connor, in which he criticized the majority for ignoring the child’s best interests. “I am not willing to wash my hands of this case at this stage, with the personal vulnerability of the child so much at risk.” Id. (Blackmun, J., dissenting).

44. The emotional custody dispute ended with the “haunting videotape of the 2-year-old child, weeping as she was carted away” from the DeBoers’ home in Ann Arbor. Roberta de
II. Baby Richard

In many respects, the circumstances of the Baby Richard case parallel those of the Baby Jessica case. Otakar Kirchner and Daniela Janikova, the biological parents, were unmarried but living together in Chicago when Daniela became pregnant in June 1990. The couple learned that the baby was due in March 1991 and planned that the baby would be born at St. Joseph's Hospital, located one block away from their apartment. In late January 1991, Otakar returned to his native Czechoslovakia for approximately two weeks to attend to his gravely ill grandmother. While he was gone, Daniela received a telephone call from Otakar's aunt, who said that Otakar had been seeing his former girlfriend in Czechoslovakia and the couple had married. Shortly thereafter, Daniela moved out of the apartment and into a shelter for abused women. During her stay at the shelter, Daniela decided to place her baby for adoption. In mid-February 1991, Daniela left the shelter and moved in with her uncle in a Chicago suburb. When Otakar returned from Czechoslovakia in mid-February 1991, he tried to contact Daniela at her uncle's home, but she refused to speak to him.

On March 16, 1991, Daniela went to Alexian Brothers Hospital in Elk Grove Village, Illinois, and gave birth to Richard. Four days later, Daniela signed a document that gave her "final and irrevocable" consent to the adoption. She told the adoptive parents and their Boer, From Start, Media Took Sides in Baby Jessica Case, STAR TRIBUNE, Aug. 23, 1993, at 11A. The author of that story is not related to Roberta or Jan DeBoer. Id.

46. Id.
47. Id.
48. Id. Daniela subsequently called Otakar in Czechoslovakia, and he denied that his aunt's story was true. Id.
49. Id.
50. Id. After a friend contacted a lawyer for her, Daniela met with the lawyer and the adoptive parents on several occasions. Daniela stated that she knew the biological father but refused to disclose his identity because she feared he would assert his parental rights. Id. at 650.
51. Id. at 650.
52. Id. Daniela met with Otakar on two consecutive days at the end of February 1991, but she refused to return his numerous calls thereafter. Id.
53. Id. On the same day, Otakar inquired at St. Joseph's Hospital about Daniela, but was informed that she had not been admitted to the hospital. Otakar checked with St. Joseph's Hospital on several other occasions, but each time was told that the hospital had no record of a Daniela Janikova. Id.
54. Id. Under Illinois law, a natural parent's consent to adoption, if properly executed, is irrevocable unless the consent was obtained by fraud or duress. 750 ILCS § 50/11 (West 1993) (amended 1995).
attorney that she knew the father but would not furnish his name. On the same day, Richard was placed with the adoptive parents after they filed an adoption petition that averred that the identity of the biological father was unknown.

Otakar made several inquiries about the baby, but Daniela and her uncle repeatedly told him that the baby had died shortly after birth. Fifty-seven days after the child was born, Otakar learned that the child was alive and had been adopted. On May 18, 1991, Otakar met with a lawyer to discuss the matter and intervened in the adoption proceedings in June 1991. After reconciling, Otakar and Daniela were married on September 12, 1991, and Otakar filed a petition to declare paternity later that month. On December 23, 1991, the adoptive parents filed an amended petition to adopt, alleging that because Otakar was an "unfit" parent under Illinois law, his consent to the adoption was not necessary. At this point, Richard was already nine months old.

The adoption trial began on May 5, 1992, and eight days later the trial court entered judgment in favor of the adoptive parents. Over fifteen months later, in a 2-1 opinion issued on August 18, 1993, the Illinois Appellate Court affirmed the trial judge's decision and upheld the adoption. Richard was nearly two and a half years old. The ap-

57. Doe I, 627 N.E.2d at 650. Otakar was not informed that the baby was being placed for adoption.
58. Doe I, 627 N.E.2d at 182.
59. Doe II, 638 N.E.2d at 182. Otakar filed an Appearance in the adoption proceeding and sought leave of court to file an answer. The trial court, however, struck Otakar's answer on the ground that he lacked standing. Id.
60. Doe I, 627 N.E.2d at 651. Otakar filed an Appearance in the adoption proceeding and sought leave of court to file an answer. The trial court, however, struck Otakar's answer on the ground that he lacked standing. Id.
61. Doe II, 638 N.E.2d at 182. Otakar filed an Appearance in the adoption proceeding and sought leave of court to file an answer. The trial court, however, struck Otakar's answer on the ground that he lacked standing. Id.
62. Doe I, 627 N.E.2d at 651. Although Circuit Judge Eugene Wachowski's opinion is unpublished, the appellate court quoted his conclusion that Otakar was an unfit parent: "[T]here is clear and convincing evidence that there was no reasonable degree of interest indicated by Mr. Kirchner in the first thirty days of the life of this child." 750 ILCS § 50/1D(1) (West 1995). When such a showing is made by clear and convincing evidence, the unfit parent waives consent to the adoption. Id. § 50/8(a)(1).
63. Doe I, 627 N.E.2d at 651. Although Circuit Judge Eugene Wachowski's opinion is unpublished, the appellate court quoted his conclusion that Otakar was an unfit parent: "[T]here is clear and convincing evidence that there was no reasonable degree of interest indicated by Mr. Kirchner in the first thirty days of the life of this child." Id.
64. Id. at 656. Justice Tully's vigorous dissent criticized the majority opinion, which "patoently distorted and slanted the actual facts of this case on a number of important points." Id. (Tully, P.J., dissenting). Justice Tully also argued that it was improper to terminate Otakar's parental rights based on a failure to show interest in his child during the first thirty days of life
pellate court emphasized that because the child was the real party in interest, the child’s best interests and corollary rights prevailed over the interests and rights of both biological and adoptive parents. Since Richard had spent all but four days of his life with his adoptive parents, the court decided that it would be contrary to Richard’s best interests to remove him from their home.

Nonetheless, on June 16, 1994, the Illinois Supreme Court reversed the appellate court’s decision for two primary reasons. First, the court noted that the appellate court’s finding that Otakar was an unfit parent because he “had not shown a reasonable degree of interest in the child” was unsupported by the evidence. Since Otakar was not an unfit parent, his consent to the adoption was required. Second, the court stressed that absent a finding of parental unfitness, Richard’s best interests could not be considered. Rather, the court stressed that if a best interests inquiry, standing alone, were “a sufficient qualification to determine child custody, anyone with superior income, intelligence, education, etc., might challenge and deprive the parents of their right to their own children. The law is otherwise and was not complied with in this case.” The Illinois Supreme Court issued its decision exactly three years and three months after Richard was born. After the court denied rehearing, the adoptive parents applied because he was deceived by Daniela and was completely unaware of the child’s birth until after that time period had lapsed. Id. at 663 (Tully, P.J., dissenting).

65. Id. at 652.
66. Id. at 653. The court “extrapolated” from state and federal laws that “after a newborn child has been placed for adoption and lives continuously thereafter for longer than 18 months with his adopting parents . . . it would be contrary to the best interest of the child to remove him from his home and family by disturbing the judgment of adoption.” Id. At this stage of the proceedings, Richard had spent all twenty-nine months of his life with his adoptive parents.

67. Doe II, 638 N.E.2d at 183.
68. Id. at 182. In fact, the court explained that Otakar had made “various attempts to locate the child, all of which were either frustrated or blocked by the actions of the mother.” Id. The court also noted that Daniela’s efforts to conceal the birth were aided by the adoptive parents’ attorney, who made no effort to locate the name or address of the father, even though Daniela indicated that she knew who he was. Id.

69. See 750 ILCS § 50/8(a) (West 1995) (amended 1995)
70. Doe II, 638 N.E.2d at 182.
71. Id. at 183. The court’s refusal to apply the best interests test was later criticized as a “bright line solution” by the New Mexico Supreme Court in In re Adoption of J.J.B., 894 P.2d 994, 1007 (N.M.), cert. denied, 116 S. Ct. 168 (1995). That court concluded that a trial court “should not be bound by the traditional bright line solution of awarding the child like a trophy to whichever party wins the litigation. The child’s best interests may be served by applying more equitable principles.” Id. at 1010.
pealed to the United States Supreme Court, which denied their petitions for certiorari on November 7, 1994.72

But, the legal battle over Baby Richard was still far from over. The Illinois General Assembly responded to the Illinois Supreme Court's June 1994 decision by rapidly amending Illinois's Adoption Act; the amendments took effect on July 3, 1994. One of the new provisions requires a court to conduct a custody hearing based on the child's best interests when an adoption petition is denied or when an adoption judgment is vacated.73 On January 25, 1995, the Illinois Supreme Court heard oral arguments on Otakar's petition for a writ of habeas corpus, issued an oral mandate to the adoptive parents to surrender Baby Richard "forthwith" and did not grant them a best interests hearing pursuant to the statute.74 The adoptive parents again appealed to the United States Supreme Court, which twice declined to stay the order of the Illinois Supreme Court.75 On February 28, 1995, the Illinois Supreme Court issued its written opinion granting Otakar's habeas corpus petition.76 The court concluded that the adoptive parents lacked standing to request a custody hearing under the statute and the best interests amendment could not be applied retroactively to Baby Richard because final adjudication of the case occurred when the court issued its previous opinion on June 16, 1994.77

72. Separate petitions were filed by the adoptive parents and by Richard's guardian ad litem, but both were denied. See Doe v. Kirchner, 115 S. Ct. 499 (1994); Baby Richard v. Kirchner, 115 S. Ct. 499 (1994).
75. O'Connell v. Kirchner, 115 S. Ct. 1084 (1995). The first request for a stay was denied by Justice Stevens in his capacity as Circuit Justice for the Seventh Circuit. See O'Connell v. Kirchner, 115 S. Ct. 891 (Stevens, Circuit Justice 1995). In so doing, Justice Stevens noted that "the regrettable facts that an Illinois court entered an erroneous adoption decree in 1992 and that the delay in correcting that error has had such unfortunate effects on innocent parties" were not matters that he could consider in making his decision. Id. at 893. The second request for a stay was denied by the full court, in a 7-2 decision, on February 13, 1995. See O'Connell v. Kirchner, 115 S. Ct. 1084 (1995). Joined by Justice Breyer, Justice O'Connor dissented, stressing that the case involved "wrenching factual circumstances" and a stay was justified because the rationale for the Illinois Supreme Court's order was unknown. Id. at 1084-85 (O'Connor, J., dissenting).
76. In re Kirchner, 649 N.E.2d 324 (Ill.) (per curiam), cert. denied, 115 S. Ct. 2599, and cert. denied, 115 S. Ct. 2600 (1995).
77. Id. at 338. "The legislative branch of Illinois' three-branch government cannot sit as a reviewing court over the decisions of the judicial branch which has adjudicated a suit at law and established and articulated the legal rights of the parties to the litigation." Id. The court also rejected the argument that Richard had a due process right to remain with the adoptive parents, emphasizing instead that a right to family relationships does not supersede the natural parents' interests absent a finding of unfitness. Id. at 339. The 5-2 opinion contained two separate dissents. Justice Miller contended that the adoptive parents were entitled to a trial court hearing to determine whether a best interests custody hearing would be proper under the statute. Id. at 343
Sixteen days after the Illinois Supreme Court's written opinion was handed down, Richard celebrated his fourth birthday. After delicate negotiations regarding his transfer broke down, Richard was taken from the adoptive parents and on April 30, 1995, before a throng of media and protestors, was "returned" to Daniela and his father, Otakar, whom Richard had never met. The legal proceedings finally ended eight weeks later, when the United States Supreme Court denied the adoptive parents' petitions for certiorari one last time.78

III. Baby Emily

Linda Benco and Gary Bjorklund, the natural parents of Baby Emily, were unmarried but living together when Linda became pregnant in November 1991.79 One month later, when Linda told Gary she was pregnant, she claimed he had very little reaction to the news.80 In addition, Linda maintained that she received neither financial nor emotional support from Gary throughout the entire pregnancy.81 In June 1992, she moved out of their apartment because Gary was allegedly abusive.82 At some point prior to this time, however, Linda claimed she told Gary that she was considering adoption and he responded by saying "do whatever you have to do."83

Because Linda took this response to be a verbal agreement, she continued to follow through with the adoption process and met with Charlotte Danciu, an attorney.84 In July 1992, Danciu contacted Gary, who told her he would not consent to the adoption.85 On August 12, 1992, the trial court held a hearing on the adoptive parents'
motion to waive Gary's consent to adoption. On the same day, the trial court signed an order that waived Gary's consent because he had "deliberately avoided receiving notice" of the hearing and because he had abandoned Linda. On August 28, 1992, Linda gave birth to Emily, and the adoptive parents, Stephen and Angel Welsh, brought Emily home three days later. Gary then went to Legal Aid to contest the adoption.

The trial judge conducted a hearing in October 1992, regarding Gary's alleged abandonment. After considering Gary's objection to the adoption and his testimony, the court ruled on October 16, 1992, that there was not "clear and convincing" evidence of abandonment. Consequently, Gary's consent to the adoption was required before the adoption could be finalized. The trial judge, however, agreed to re-hear the case, and after more evidentiary hearings, reversed his decision in September 1993 and finalized Emily's adoption to the Welshes. The trial judge's final decision was issued thirteen months after the birth of Emily.

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86. Id. at 930 (Pariente, J., specially concurring). Danciu did not inform the trial court of her telephone conversation with Gary in which he objected and refused to consent to the adoption. Id. at 931 (Pariente, J., specially concurring). Danciu also did not inform the adoptive parents of his objection until Emily had been born. Judge Pariente concluded: "In short, we cannot help but think that candor from this intermediary/attorney to the court and her clients, the adoptive parents, might have prevented the series of events which occurred later." Id. (Pariente, J., specially concurring).

87. Id. at 930 (Pariente, J., specially concurring).

88. Id. at 934 (Pariente, J., specially concurring); see also Elsa C. Arnett, 'Baby Emily' Case a Groundbreaker, PHILADELPHIA INQUIRER, Sept. 1, 1994, at G4.

89. Baby E.A.W., 647 So. 2d at 921.

90. Under the Florida Adoption Act, "abandoned" means a situation in which the parent or legal custodian of a child, while being able, makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations. If, in the opinion of the court, the efforts of such parent or legal custodian to support and communicate with the child are only marginal efforts that do not evince a settled purpose to assume all parental duties, the court may declare the child to be abandoned. In making this decision, the court may consider the conduct of a father towards the child's mother during her pregnancy.

91. Gary testified that he did provide financial and emotional support to Linda during the pregnancy and was "overjoyed" with the fact he was going to be a father. He also testified that, when Danciu contacted him in July 1992, he told her that he would emphatically contest any adoption proceeding, and he began his quest for legal representation at that time. Baby E.A.W., 647 So. 2d at 921.

92. Id. at 934 (Klein, J., dissenting). Circuit Judge Gary Vonhoff's opinion is unreported, but Judge Klein's dissent in the appellate court's en banc decision quoted his initial finding on abandonment: "[U]nder any definition of abandonment, the natural father has not, in fact, abandoned the natural mother or the child. He has exhibited every available means of attempting to contest the adoption." Id. (Klein, J., dissenting).


94. See Larry Barszewski, Dad Closer to Blocking Adoption, SUN-SENTINEL (Fort Lauderdale), June 23, 1994, at 1A. In this decision, the trial judge concluded that abandonment had occurred because Gary "offered minimal financial support to the natural mother and . . . the
after the case first came before him and thirteen months after Emily was born.

In a 2-1 opinion issued on June 22, 1994, Florida's District Court of Appeal reversed the trial judge's decision and ruled in favor of Gary. At this point, Emily was rapidly approaching her second birthday. Like the trial judge, the appellate court also agreed to re-hear the case, and in a 6-5 decision en banc, reversed and upheld the adoption on November 30, 1994. The court concluded that the trial judge's finding of abandonment was supported by evidence in the record and Gary had "made only legal, after-the-fact gestures toward parenthood." The court further emphasized that "the trial court's finding of abandonment and our affirmance of that finding is based upon the entire spectrum of 'conduct' and is certainly neither limited to nor dependent upon the failure of the birth father to provide emotional support to the expectant mother." After the appellate court's en banc decision, the first level of appeal in the Baby Emily case was finally over. By this time, Emily was already twenty-seven months old.

On July 20, 1995, just over one month before Emily's third birthday, the Florida Supreme Court ruled 5-2 to affirm the appellate court's en banc decision. The court concluded that trial courts may consider a father's emotional abuse and lack of emotional support toward the mother during her pregnancy when evaluating whether emotional support to the natural mother was nonexistent. More importantly, there was almost no testimony to establish that the natural father exhibited any type of feeling for the unborn child." Baby E.A.W., 647 So. 2d at 922 (quoting the trial judge's opinion).

95. Baby E.A.W., 647 So. 2d at 941 app. The court began by noting that although the case initially involved the single issue of whether or not Gary had waived consent to the adoption, "it has since become needlessly complicated with multiple irrelevant issues and thereby unreasonably delayed, all to the detriment of the child." Id. The court then proceeded to reject each of the trial judge's three bases for reversing his earlier decision. First, the court found that Gary's financial inability to support Linda during her pregnancy did not suffice to support abandonment because it unfairly penalized Gary for being poor. Id. at 948-49 app. Second, the court held that Gary's lack of emotional support was "entirely too vague a standard" to support a finding of abandonment. Id. at 949 app. Finally, the court noted that Gary's assistance from Legal Aid in asserting his parental rights could not justify terminating his parental rights because every person has a right to counsel in such situations. Id. at 950-51 app.

96. Id. at 919. The appellate court's 2-1 decision in June 1994 was withdrawn and replaced by the en banc opinion. Id. The court attached the 2-1 decision as an appendix to its en banc opinion, however. Id. at 941-57 app.

97. Id. at 924. The court noted that because Gary was not married, he was not legally responsible to support his child. The court therefore required Gary to take "some positive action to assume the responsibilities of parenthood before he becomes entitled to exercise the rights of parenthood," but concluded that he had failed to meet this burden. Id. at 923.

98. Id. at 924.

99. In re Adoption of Baby E.A.W., 658 So. 2d 961 (Fla. 1995).
abandonment has occurred. Furthermore, the court found “substantial competent evidence to support the trial judge’s finding of clear and convincing evidence” that Gary abandoned Baby Emily. A petition for certiorari was filed with the United States Supreme Court on October 13, 1995.

IV. RIGHTS OF THE PUTATIVE FATHER

In each of the three principal cases, the putative father challenged an adoption after his child had already been placed with the adoptive parents. But a putative father should be required to affirmatively assert an interest in his child before birth, ideally by submitting his name to a putative father registry. As discussed more thoroughly in Part VI, a putative father registry places only a slight burden on a putative father and protects his rights from concealed adoptions similar to those in the Baby Jessica and Baby Richard cases. A putative father simply does not have an absolute right to raise his child merely because of his biological ties to the child. In fact, only recently have courts recognized the rights of putative fathers.

For many years, the law was clear that a putative father had no claim of custody to his child. In 1972, however, the United States Supreme Court in Stanley v. Illinois held unconstitutional an Illinois statute that presumed every putative father was an unfit parent. The putative father in Stanley had lived intermittently with his children and the natural mother for eighteen years, and no evidence indicated that he was a neglectful father. In light of these

100. Id. at 964.
101. Id. at 967. Justice Kogan dissented in the result, arguing both that Gary had taken sufficient steps to protect his opportunity interest in Emily’s future and that the evidence supporting prenatal abandonment was “at best equivocal and therefore unconvincing.” Id. at 977 (Kogan, J., concurring in part and dissenting in part). Justice Anstead’s dissent criticized the majority of overreaching in several respects, primarily “in applying the concept of abandonment to prebirth situations when the concept has traditionally, and with good reason, been limited to relationships between parents and their actual existing children.” Id. at 980 (Anstead, J., dissenting).
102. See MARTHA A. FIELD, SURROGATE MOTHERHOOD 121 (1988).
103. 405 U.S. 645 (1972).
104. Illinois’s dependency statute provided that children automatically became wards of the state when one parent died, unless there was a surviving parent or guardian. Id. at 649. Illinois, however, defined a “parent” as “the father and mother of a legitimate child, or the natural mother of an illegitimate child and . . . any adoptive parent.” Id. at 650 (quoting ILL. REV. STAT. ch. 37, para. 701-14 (1967)). An unwed father was not included in the definition. Therefore, under this statutory framework, no showing of unfitness was required before a child could be removed from the father’s custody to become a ward of the state; every putative father was presumed to be unfit. Id. at 647.
105. Id. at 646, 655.
considerations, the Court stressed that "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." The Court therefore prohibited Illinois from removing the children from the putative father's custody without first conducting a parental "fitness" hearing.

A majority of the Supreme Court has addressed the scope of a putative father's constitutional rights on three occasions since Stanley. Quilloin v. Walcott, the first of these cases, involved the constitutionality of Georgia's adoption laws which, as applied, denied the putative father authority to prevent adoption of his child. Under Georgia's statute, only the consent of an unwed mother to an adoption was required; an unwed father could acquire veto power over the adoption only if he had legitimated his child. The natural mother's husband, who was the child's stepfather, filed a petition to adopt when the child was eleven years old. Although the putative father had theretofore made no effort to legitimate his child, he filed a petition to legitimate after the stepfather filed the adoption petition. After the trial court concluded that granting the legitimation petition would not be in the "best interests of the child," the Supreme Court affirmed on the grounds that application of the best interests standard adequately

106. Id. at 651. Although the Court acknowledged that the state had a legitimate interest in protecting children in certain circumstances, it noted that this interest would be de minimis when the father was a fit parent. Id. at 657-58.

107. Id. at 658. The Court rejected Illinois's statutory presumption as violating the father's procedural due process rights: "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care . . . it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." Id. at 656-57 (footnote omitted). The Court also concluded that the Equal Protection Clause prohibited Illinois from granting married parents, divorced parents, and unwed mothers a fitness hearing before children were removed from their custody without also granting unwed fathers such a hearing. Id. at 658.

108. See Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978). In another case, a plurality of the Court upheld a California statute that presumed that a married man was the father of his wife's child and denied a putative father the right to establish paternity in an evidentiary hearing, even though blood tests showed that there was a 98.07% chance the putative father was the biological father. Michael H. v. Gerald D., 491 U.S. 110 (1989) (plurality opinion).

109. 434 U.S. 246.

110. Quilloin, 434 U.S. at 248-49. In contrast, Georgia required both living parents to consent when the child was born to married parents, even if the parents were divorced or separated at the time of the adoption proceedings. Id. at 248.

111. Id. at 249. By this time, the mother and stepfather had already been married for eight years, and the child had been in the custody of his natural mother since birth. Id. at 247.

112. Id. at 247. The putative father did not seek custody of the child; he filed the legitimation petition only to secure visitation rights. Id.
protected the father's interests. The Court also suggested that mere biological ties are insufficient when the father "has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child." The Court revisited a putative father's rights one year later in *Caban v. Mohammed*. In that case, a New York statute permitted an unwed mother to prevent an adoption by withholding her consent, but did not give unwed fathers similar power, even when the father had already developed a substantial relationship with his children. Although the putative father had developed a "substantial" relationship with his son and daughter, his rights were terminated under the statute when the natural mother and her husband adopted the children. The Court acknowledged that because the statute imposed a gender-based distinction, it could survive constitutional challenge under the Equal Protection Clause only if it was substantially related to the achievement of important governmental objectives. The Court concluded that the State's proffered reasons for the gender-based distinction did not meet this standard. First, it rejected the State's claim that a "fundamental difference between maternal and paternal relations" justified the distinction. Second, the Court rejected the State's argument that promoting adoption of illegitimate

113. The Court analyzed this standard in the context of both due process and equal protection. As to due process, the Court stated that due process would not be offended by use of a "best interests" standard where "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 [the putative father]." *Id.* at 255. As to the equal protection claim, the Court concluded that a state may give an unwed father less authority to veto an adoption than a divorced or separated father. The unwed father's interests, the Court noted, are "readily distinguishable" from those of a separated or divorced father who "will have borne full responsibility for the rearing of his children during the period of the marriage." *Id.* at 256.

114. *Id.* at 256.
116. The natural father could prevent termination of his parental rights only by showing that the adoption would not be in the best interests of the child. *Id.* at 387.
117. *Id.* at 387. In support of this conclusion, the Court noted that Caban "lived with the children as their father" and "contributed to the support of the family" for more than four years. *Id.* at 382. He continued to visit and communicate with the children after the natural mother took them and moved in with her future husband. *Id.* at 382-83.
118. *Id.* at 383-84.
119. *Id.* at 388.
120. *Id.* at 388-89. The Court stated that such a generalization, even if it were true in infancy, would diminish in importance as the children got older:

The present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother. . . . There is no reason to believe that the Caban children—aged 4 and 6 at the time of the adoption proceedings—had a relationship with their mother unrivaled by the affection and concern of their father. *Id.* at 389.
children was a valid reason for the distinction. The Court did note, however, that nothing in the Equal Protection Clause would preclude the State from treating fathers who failed to participate in the rearing of their children differently from fathers like Caban, who had manifested significant paternal interest in his children.

The final case in the sequence, *Lehr v. Robertson*, also involved a New York adoption statute. In that case, the Court upheld a New York law which did not require that notice of adoption proceedings be given to a putative father who failed to register his name with the state, even if the state had notice of his existence and whereabouts. The natural mother and her husband filed a petition to adopt the mother's two year-old child, and an adoption order was subsequently issued. The putative father discovered that the adoption had taken place and brought suit to invalidate it on the grounds he was not given advance notice of those proceedings. The Court dismissed the putative father's due process claim by distinguishing actual from potential parent-child relationships:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," *Caban*, 441 U.S. at 392, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. . . . But the mere existence of a biological link does not merit equivalent constitutional protection.

Since the putative father had not participated in the rearing of his child during the first two years of life, the father's due process rights were not violated. The Court also dismissed the father's equal pro-

121. *Id.* at 389. The Court rejected this claim because there was no reason to believe that unwed fathers would be more likely than unwed mothers to withhold consent to adoptions. *Id.* at 392.
122. *Id.* at 392.
124. Such a statutory requirement is known as a "putative father registry." The effectiveness of these registries is discussed infra notes 207-221 and accompanying text.
125. *Id.* at 250.
126. *Id.* Although certain classes of putative fathers were entitled to automatic notice under the statute without having to register, the Court noted that Lehr was not a member of any of those classes. *Id.* at 251-52.
127. *Id.* at 261.
128. The Court noted that the putative father's name was not listed on the birth certificate, he did not live with the mother or the child after birth, he did not offer to marry the mother, and he had never provided them with any financial support. *Id.* at 252. The Court also noted that the fact that the trial court and the mother knew of the father's whereabouts did not mandate a contrary result: "The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights." *Id.* at 265 (footnote omitted).
tection claim because he was not "similarly situated" to the natural mother, who had established a relationship with the child.  

The principle derived from these four Supreme Court cases is that biology alone does not provide a putative father with constitutional rights. Instead, "it is the liberty interest the father of an illegitimate child has in a developed parent-child relationship ... that has been recognized as an interest that is clothed with constitutional safeguards of due process and equal protection." Indeed, the Supreme Court has repeatedly endorsed the principle that a natural parent has a fundamental liberty interest in the care, custody, and nurturing of his or her child. The Court has also held that a putative father is entitled to some procedural protection. Consequently, several lower courts have invalidated adoptions where the biological father did not have notice of the adoption proceedings.

That is not to say, however, that a putative father must receive notice of or consent to the adoption in all cases. Although a putative father is entitled to some constitutional protection, he generally must take action quickly in order to protect his parental rights. For example, New York's highest court stressed in *Robert O. v. Russell K.* that how quickly the father acts is the "most significant" element

129. *Id.* at 267 (footnote omitted). "If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights." *Id.* at 267-68 (footnotes omitted).


131. *See,* e.g., *Santosky v. Kramer,* 455 U.S. 745, 753 (1982); *Lassiter v. Department of Soc. Servs.,* 452 U.S. 18, 27 (1981). Other courts have recognized this principle as well. *See,* e.g., *In re L.W.,* 613 A.2d 350, 355 (D.C. 1992); *Nale v. Robertson,* 871 S.W.2d 674, 678 (Tenn. 1994) ("Parents, including parents of children born out of wedlock, have a fundamental liberty interest in the care and custody of their children. ... ").

132. *See,* e.g., *Armstrong v. Manzo,* 380 U.S. 545, 550 (1965) ("It is clear that failure to give [the natural father] notice of the pending adoption proceedings violated the most rudimentary demands of due process of law.").

133. *See,* e.g., *In re M.N.M.,* 605 A.2d 921 (D.C.), *cert. denied,* 113 S. Ct. 636 (1992); *In re B.G.S.,* 556 So. 2d 545 (La. 1990); *In re S.R.S.,* 408 N.W.2d 272 (Neb. 1987) (per curiam).

134. For example, those states that have putative father registries do not require that notice be given to unwed fathers who fail to register with the state either before or shortly after the child's birth. *See infra* notes 208-214 and accompanying text.

135. *See,* e.g., *In re Juvenile Severance Action No. S-114487,* 876 P.2d 1121, 1132 (Ariz. 1994) (en banc) (putative father must "act persistently" and must "vigorously assert his legal rights" even when circumstances prevent him from exercising traditional methods of bonding with the child); *In re Steve B.D.,* 730 P.2d 942, 945 (Idaho 1986) (per curiam) ("because of a child's urgent need for permanence and stability, the unwed father must act quickly to take responsibilities and establish ties" with the child); *In re Adoption of Clark,* 381 S.E.2d 835, 840 (N.C. Ct. App. 1989), *rev'd,* 393 S.E.2d 791 (N.C. 1990) (father's consent to adoption unnecessary where he failed to legitimate his child before the adoption petition was filed).

in determining whether a putative father has created a liberty inter-
est.137 The court further emphasized that the timing of the father's actions should be determined by the life of the baby, not when the father learned that he was indeed the real father.138 Finally, the court maintained that a timing requirement based on the child's life rather than the father's actions is "a logical and necessary outgrowth of the State's legitimate interest in the child's need for early permanence and stability."139

In the Baby Jessica case, it is debatable whether Daniel Schmidt acted with sufficient promptness to protect his constitutional rights. The Iowa Supreme Court found that Daniel did not abandon Jessica under Iowa law.140 Rather, the court maintained that Daniel did "everything he could reasonably do to assert his parental rights" after Jessica was born.141 While Daniel may have acted promptly after birth, the court ignored how Daniel acted prior to Jessica's birth. Justice Snell's dissenting opinion pointed out that because Daniel and Cara worked in the same building for the same employer, Daniel knew Cara was pregnant in December 1990, two months before Jessica was born.142 Because Daniel took no responsible steps to legit-
imate his child before birth, the dissent maintained that his parental rights should have been terminated: "Daniel's sudden desire to assume parental responsibilities is a late claim to assumed rights that he forfeited by his indifferent conduct to the fate of Cara and her child."143

A second concern in the Baby Jessica case is that Daniel had fathered two other children, both of whom he failed to support. The Iowa Supreme Court acknowledged that "Daniel has had a poor performance record as a parent. . . . The record shows that Daniel has

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137. Id. at 103; see also In re Raquel Marie X., 559 N.E.2d 418, 428 (N.Y.), cert. denied, 498 U.S. 984 (1990).
138. "Promptness is measured in terms of the baby's life not by the onset of the father's awareness." Robert O., 604 N.E.2d at 103. This standard is easily justified, particularly when one considers that the child is completely innocent and should not be forced to shoulder the burden of a protracted custody battle because the natural father took no interest in the child before birth.
139. Id. at 103-04.
140. In re B.G.C., 496 N.W.2d 239, 246 (Iowa 1992). Under Iowa law, "[t]o abandon a minor child" means to permanently relinquish or surrender "the parental rights, duties, or privileges inherent in the parent-child relationship. The term includes both the intention to abandon and the acts by which the intention is evidenced. The term does not require that the relinquishment or surrender be over any particular period of time." IOWA CODE ANN. § 600A.2(16).
141. B.G.C., 496 N.W.2d at 246.
142. Id. at 247 (Snell, J., dissenting).
143. Id. (Snell, J., dissenting).
largely failed to support these children financially and has failed to maintain meaningful contact with either of them." 144 Daniel’s failure to care for his other children seems to be an extremely relevant factor but one that was given no substantial weight by any court. The courts might not have addressed the issue because the Iowa statutory provision on abandonment does not specify that relationships with previous children may be considered. Under the revised Uniform Adoption Act, however, Daniel’s relationships with his previous children and his conduct during Cara’s pregnancy could have been considered in determining whether his parental rights with regard to Jessica should have been terminated. 145

In the Baby Emily case, two arguments can be made that support the termination of Gary’s parental rights. First, as the Florida District Court of Appeals noted en banc, he showed no interest in the baby during the pregnancy and was abusive toward the natural mother. 146 The appellate court’s reliance on this conduct as grounds for abandonment was justified, based on an earlier decision by the Florida Supreme Court. 147 Second, there was public outcry that Gary’s parental rights should be ignored because he was convicted in 1977 of raping a woman at gunpoint. 148 Under the Uniform Adoption Act, Gary’s parental rights could be terminated on the basis of prebirth abandonment 149 and, perhaps, on the basis of his rape conviction. 150

144. Id. at 245. Justice Snell expounded that Daniel’s first child was born in 1976 but Daniel stopped supporting him just two years later; from 1978 to 1990, Daniel saw his son three times. Before Jessica was born, Daniel fathered one other daughter, “whom he has never seen and has failed to support. He stated he just never took any interest in her.” Id. at 247 (Snell, J., dissenting).

145. The Act enables a court to consider the natural father’s “behavior during the mother’s pregnancy” and “the quality of any previous relationship . . . between [the natural father] and any other minor children” in deciding whether to terminate parental rights. Unif. Adoption Act § 3-504(d)(3), (e) (1994).

146. In re Baby E.A.W., 647 So. 2d 918, 924 (Fla. Dist. Ct. App. 1994) (en banc), aff’d, 658 So. 2d 961 (Fla. 1995).

147. In re Adoption of Doe, 543 So. 2d 741, 746 (Fla.), cert. denied, 493 U.S. 964 (1989) (“[P]rebirth conduct does tend to prove or disprove material facts bearing on abandonment and may be properly introduced and used as a basis for finding abandonment . . . .”). The appellate court also concluded that the totality of circumstances was stronger in the Baby Emily case than in Doe to support a finding of abandonment. Baby E.A.W., 647 So. 2d at 924.

Other courts have also found prebirth abandonment sufficient to terminate a father’s rights. See, e.g., Doe v. Attorney W., 410 So. 2d 1312, 1317 (Miss. 1982) (upholding termination of father’s rights where he “allowed the natural mother to bear all the physical, mental and financial burdens of pregnancy and childbirth without at any time assisting her financially”); In re Baby Girl K., 335 N.W.2d 846, 855 (Wis. 1983), appeal dismissed, 465 U.S. 1016 (1984) (father’s failure to provide “care or support” to mother during pregnancy, despite his ability to do so, is evidence justifying termination of parental rights).

148. Gary served five years of a 10-year sentence for the crime. See Robert L. Steinback, Courts Differ on Direction of Custody Cases, Miami Herald, July 1, 1994, at 1B.

149. See supra note 145 and accompanying text.
Of the three principal cases, the Baby Richard case presents the strongest argument that it would be unfair to deprive the natural father, Otakar Kirchner, of his parental rights. Daniela concealed Richard's birth and adoption, and her uncle lied to Otakar by stating that the baby died shortly after birth. Otakar, however, did not believe this explanation and immediately made efforts to locate his son:

As the trial court found, Otto searched the garbage cans of the home where Daniella was living for physical evidence of his baby and called a series of hospitals in an attempt to discover whether his child had really died at birth, during the first 30 days after Richard was born notwithstanding that he had been told his child was dead. . . . [His conduct] showed an intense interest and concern for both the truth and for his child. He did what he could.

When Otakar finally learned that Richard was alive, he met with a lawyer and instituted proceedings to assert his rights a few weeks later. "The unilateral decision by one individual to deprive a person of the opportunity to know his child—without any showing of fault on the part of the person so deprived—would not, it is submitted, be accepted—or tolerated—in any other context." Because Otakar took several steps to locate his child, the Illinois Supreme Court correctly found that his parental rights were improperly terminated.

There is little dispute that the constitutional rights of the putative father must be given due consideration in an adoption dispute. It is often difficult, however, to assess whether the father has taken sufficient steps to establish a protected liberty interest in raising his child. A putative father registry, discussed in more detail in Part VI, is an

150. Parental rights may be terminated by clear and convincing evidence that shows that "the respondent has been convicted of a crime of violence or of violating a restraining or protective order, and the facts of the crime or violation and the respondent's behavior indicate that the respondent is unfit to maintain a relationship of parent and child with the minor." Unif. Adoption Act § 3-504(c)(3). It is unclear, however, whether a court interpreting this section would conclude that a 1977 rape conviction would be sufficient grounds to terminate a father's rights to a child born fifteen years later.


152. In re Kirchner, 649 N.E.2d 324, 328 (Ill.) (per curiam), cert. denied, 115 S. Ct. 2599, and cert. denied, 115 S. Ct. 2600 (1995).

153. Doe I, 627 N.E.2d at 651.


155. But see Kirchner, 649 N.E.2d at 343-46 (McMorrow, J., dissenting) (questioning the majority's characterization of the facts and Otakar's fitness as a parent).
ideal solution. Such a registry eliminates the need for judges to make subjective assessments of a father’s behavior and enables a father truly committed to raising his child to protect his own rights before the child is given up for adoption.

V. THE BEST INTERESTS OF THE CHILD

Although the putative father’s constitutional rights must be considered, the best interests of the child frequently support upholding the adoption. Thus, a court is often faced with a difficult decision: “Should the court deny the adoption and risk causing emotional harm to the child, or should it grant the adoption to safeguard the child’s best interests and thereby deprive the putative father of his parental rights?”156 There is little judicial precedent on which a court may rely, because determining the child’s best interests rests entirely on the facts of each particular case.157 In addition, current state laws do not make judicial resolution of the conflict between the putative father’s rights and protecting the child’s welfare any easier. Every state stresses that the best interests of the child must be the paramount consideration in interpreting adoption statutes.158 In fact, the adoption statutes in the three principal cases all explicitly emphasize this point.159 The Illinois provision so persuaded the state’s appellate court that it decided the Baby Richard case exclusively on Richard’s best interests:

Since the child is the real party in interest, it is his best interest and corollary rights that come before anything else, including the interests and rights of biological and adoptive parents. . . . If there is a conflict between Richard’s best interest and the rights and interests of his parents, whomever they may be, the rights and interests of the

159. Florida’s adoption statute states that a court “shall enter such orders as it deems necessary and suitable to promote and protect the best interests of the person to be adopted.” FLA. STAT. ch. 63.022(1) (1994). Similarly, the Illinois Adoption Act requires that “[t]he best interests and welfare of the person to be adopted shall be of paramount consideration in the construction and interpretation of this Act.” 750 ILCS § 50/20a (West 1995) (amended 1995). When the Baby Jessica case was decided, Iowa law mandated that “[t]he welfare of the person to be adopted shall be the paramount consideration in interpreting this division. The interests of the adopting parents, however, shall be given due consideration in this interpretation.” IOWA CODE ANN. § 600.1 (West 1981). The Iowa provision has since been amended. See infra notes 171-172 and accompanying text.
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parents must yield and allow the best interest of Richard to pass through and prevail. This tenet allows for no exception.\(^{160}\)

The Illinois Supreme Court, however, later reversed this decision, concluding that Illinois law requires statutory grounds for terminating parental rights before the child's best interests may be considered.\(^{161}\)

In the Baby Jessica case, the Iowa Supreme Court reached a similar conclusion.\(^{162}\)

Furthermore, several courts that have recently addressed this issue have also held that the putative father's parental rights must be terminated before the best interests of the child can be evaluated. For example, in Nale v. Robertson, the Tennessee Supreme Court invalidated a state statutory provision that allowed a court to enter an adoption decree based on the child's best interests without a prior judicial termination of the father's parental rights: "[T]he state and federal constitutions require that the natural father's parental rights be determined before the court may proceed with the issue of adoption."\(^ {163}\)

In In re Stevens, the Delaware Supreme Court concluded that "acceptance of a best interest of the child [sic] as the exclusive or dominant ground for termination of parental rights raises a serious due process and equal protection concern."\(^{164}\)

Instead, the court held that a statutory basis for termination of parental rights is required before the best interests test can be applied.\(^ {165}\)

Not all states have such a requirement, however. "[T]he statutes in some states provide that a parent's rights respecting his child may be terminated when that is required in order to serve the child's best interests."\(^ {166}\)

In Massachusetts, for example, the consent of both natural parents to an adoption petition may be waived where the court


\(^{161}\) See supra notes 70-71 and accompanying text.

\(^{162}\) See supra notes 24-25 and accompanying text.

\(^{163}\) 871 S.W.2d 674, 680 (Tenn. 1994).

\(^{164}\) 652 A.2d 18, 26 (Del. 1995) (en banc). The court further emphasized that applying the best interests standard without a showing of unfitness "carries the dangerous potential of placing the welfare of the child over the legitimate familial interests of parents who have sought to assert their parental rights in good faith." Id. In another case addressing this issue, the New Jersey Supreme Court stressed that it "has long been decided that the mere fact that a child would be better off with one set of parents than with another is an insufficient basis for terminating the natural parent's rights." In re Baby M, 537 A.2d 1227, 1252 (N.J. 1988).

\(^{165}\) Stevens, 652 A.2d at 25.

\(^{166}\) Homer H. Clark, Jr., The Law of Domestic Relations in the United States, § 20.7, at 905 (2d ed. 1988). The United States Supreme Court has never decided whether parental rights can be terminated solely on the basis of the child's best interests. The Court's only mention of the issue was a vague reference in Santosky v. Kramer: "Nor is it clear that the State constitutionally could terminate a parent's rights without showing parental unfitness." 455 U.S. 745, 753 (1982).
finds that granting the petition is in the child's best interests.\textsuperscript{167} In so doing, however, a court must "consider the ability, capacity, fitness and readiness of the child's parents or other person . . . to assume parental responsibility and . . . consider the ability, capacity, fitness and readiness" of the prospective adoptive parents.\textsuperscript{168} Thus, the issue of whether the child's best interests may be considered when terminating parental rights varies from state to state.

Both the Illinois and Iowa legislatures amended their best interests standards in response to the Baby Richard and Baby Jessica cases. The Illinois legislature amended its Adoption Act in July 1994, one month after the Illinois Supreme Court invalidated the adoption of Baby Richard and granted custody to Otakar Kirchner. The amendment requires a best interests hearing after an adoption is vacated, but the Illinois Supreme Court, after the amendment was enacted, refused to apply the amendment retroactively to the Baby Richard case.

While the General Assembly may enact retroactive legislation which changes the effect of a prior decision of a reviewing court with respect to others whose circumstances are similar but whose rights have not been finally decided, it is axiomatic that the General Assembly may not validly enact a statute, the effect of which is to change a decision of this court which has finally adjudicated the rights of particular parties.\textsuperscript{169}

After this decision, another bill designed to clean up the statutory language of the Baby Richard amendment was approved by a committee in the Illinois House.\textsuperscript{170}

In Iowa, the state legislature responded to the Baby Jessica case by amending the best interests standard.\textsuperscript{171} The new provision still requires a court to give due consideration to the interests of the adopting parents in determining what is in the best interests of the child. But the amendment goes one step further:

\begin{quote}
In determining the best interest of the person to be adopted and the interests of the adopting parents, any evidence of interests relating to a period of time during which the person to be adopted is
\end{quote}

\textsuperscript{167} See Adoption of a Minor, 389 N.E.2d 90, 90 (Mass. 1979).
\textsuperscript{168} \textsc{Mass. Gen. Laws Ann. Ch. 210, § 3(c) (West 1987).}
\textsuperscript{169} \textit{In re Kirchner}, 649 N.E.2d 324, 336-37 (III.) (per curiam), \textit{cert. denied}, 115 S. Ct. 2599, \textit{and cert. denied}, 115 S. Ct. 2600 (1995). The adoptive parents argued that the new amendment could be applied retroactively because the case was still "pending" in July 1994—petitions for rehearing with the Illinois Supreme Court and petitions for certiorari with the United States Supreme Court had not yet been denied. The Illinois Supreme Court, however, rejected this argument on the ground that "final adjudication" of Otakar's right to custody took place in the court's June 1994 decision. \textit{Id.} at 337.
\textsuperscript{170} David Heckelman, \textit{House Panel Moves to Tighten 'Baby Richard' Law}, \textsc{Chi. Daily L. Bull.}, May 10, 1995, at 1. Whether the bill will be enacted into law remains to be seen.
\textsuperscript{171} \textsc{Iowa Code} § 600.1 (1995).
placed with prospective adoptive parents and during which the placement is not in compliance with the law, adoption procedures, or any action by the court, shall not be considered in the determination.\textsuperscript{172}

This provision may dissuade potential adoptive parents both from ignoring court orders to return children to natural parents and from prolonging the legal battles in order to further strengthen their psychological bonds with the child.

Many people believe that the best interests of the child should be the exclusive consideration in an adoption case.\textsuperscript{173} In fact, a substantial number of courts apply the best interests test, despite its inherently subjective nature, as the paramount consideration in child custody disputes.\textsuperscript{174} On one hand, the best interests standard safeguards the child, who lacks the maturity and intelligence to understand the emotional consequences of removal from psychological parents:

When adults are forced to bear the consequences of their choices, however disastrous, at least their character and personality have been fully formed, and that character can provide the foundation for recovery, the will to go on. The character and personality of a child two and one-half years old is just beginning to take shape. To visit the consequences of adult choices upon the child during the formative years of her life . . . is unnecessarily harsh and without legal justification.\textsuperscript{175}

On the other hand, the problem with using the best interests test as the exclusive consideration is that it will invariably give preference to parents based on their social and economic status. Despite a loving relationship, some parents could lose their children to more affluent or better-educated parents. "A transfer of parental rights in such settings may well advance the best interest of a particular child but the law does not sanction such a change without compliance with statutory standards."\textsuperscript{176} In addition, the best interests standard has been criticized repeatedly as being too vague. "Best interest is so amor-

\textsuperscript{172} Id.

\textsuperscript{173} One study showed that 95\% of those surveyed preferred the best interests test as the paramount consideration. \textit{This is What You Thought}, GLAMOUR, Jan. 1994, at 77.


\textsuperscript{175} \textit{Clausen II}, 502 N.W.2d 649, 671 (Mich. 1993) (per curiam) (Levin, J., dissenting).

\textsuperscript{176} \textit{In re Stevens}, 652 A.2d 18, 26 (Del. 1995).
phous a concept that it should not be considered until and unless facts are proven which raise serious questions about the existence or viability of the parent-child relationship."\textsuperscript{177} The ideal solution, therefore, would be to protect the best interests of the child without having to apply the standard. Enacting legislative reforms designed to expedite the adoption process and imposing strict guidelines on natural and adoptive parents should solve the problem.

In an adoption case, although the child’s emotions and development are in limbo, a child is often treated as property, lacking emotion or feeling.\textsuperscript{178} One writer said of Baby Jessica’s return to the Schmidts: “She’ll be moved from Michigan to Iowa like a piece of furniture awarded in a property dispute. Only furniture doesn’t feel loss or confusion.”\textsuperscript{179} Therefore, it is certainly in the best interests of the child and all parties involved to have a “clear rule from the outset as to who her proper custodian is, to prevent her from being transferred back and forth between parties who are feuding over their parental rights.”\textsuperscript{180} In order to protect the best interests of the child without forcing a judge or psychologist to apply the actual test, states should enact legislative reforms.

\textbf{VI. Necessary Legislative Reforms}

While the best interests of the child standard is laudable because it makes the child’s well-being the paramount concern, application of the standard is not always easy, particularly when both the natural and adoptive parents will provide a stable and loving home for the child. Adoption cases become even more complicated when a judge must also make a subjective assessment about whether or not the putative father asserted his parental interest in a timely fashion. The question, then, is how best to balance the rights and interests of all parties involved while taking into account the child’s well-being. The proposed reforms discussed below accomplish this goal by preventing postplace-

\textsuperscript{177} Lucy Cooper & Patricia Nelson, Adoption and Termination Proceedings in Wisconsin: A Reply Proposing Limiting Judicial Discretion, 66 MARQ. L. REV. 641, 643 (1983); see also Selmann, supra note 158, at 843 ("The best interests standard is nebulous and largely undefined.").

\textsuperscript{178} See, e.g., Clausen II, 502 N.W.2d at 687 (Levin, J., dissenting) ("The majority, by ignoring the best interests of the child, has approached this case as if it were a contest between two parties over a piece of property."); Lynne Trinklein, Heart-Wrenching Adoption Drama May Result in Better Laws, IDAHO FALLS POST REG., Aug. 6, 1993, at A5 (Jessica DeBoer “was treated like property. A grand prize, winner-take-all trophy.”).


\textsuperscript{180} FIELD, supra note 102, at 89.
ment challenges and by fostering finality and rapid placement in order to protect the child's fragile emotional state.

First, expedited court decisions and appeals will ensure that the final placement of a child takes place quickly. Second, a putative father registry will allow the putative father to protect his parental rights before the child is placed with adoptive parents, even if the natural mother seeks to conceal the adoption. Third, mandatory preplacement counseling will ensure that the natural mother is giving her informed consent when she places her child for adoption. Fourth, punishing fraud will discourage the natural mother from fraudulently concealing the natural father's identity. By incorporating these reforms, states can ensure that the best interests of the child will be promoted without forcing judges to apply an amorphous, subjective standard on a case-by-case basis.

A. Expedited Decisions and Appeals

The three principal cases poignantly illustrate the need for more rapid decisions and appeals in adoption cases. Presently, private adoption disputes are not being resolved quickly enough. The Illinois Appellate Court in the Baby Richard case underscored this problem: "Richard's story is the account of a helpless child caught in the quagmire of a judicial system that in attempting to resolve his problem became part of his problem. . . . In a case of this nature, where plainly time is critical, it is a sad commentary on our judiciary.”

181. See, e.g., Kirsten Korn, Comment, The Struggle for the Child: Preserving the Family in Adoption Disputes between Biological Parents and Third Parties, 72 N.C. L. REV. 1279, 1327 (1994). In addition to the three principal cases, other courts have recently stressed that adoption cases take far too long to resolve. See, e.g., Stevens, 652 A.2d at 30 (“Children should not be placed in a legal limbo for long periods of time while adults litigate their claims of relationship. All the adult parties to this proceeding bear some blame for their acrimonious and often misleading efforts to delay and frustrate the legal process.”); In re BJB, 888 P.2d 216, 220 (Wyo. 1995) (“We are committed to the earliest possible resolution of this case; neither the parties nor the child should be suspended in the judicial equivalent of outer space any longer.”). 182. Doe I, 627 N.E.2d 648, 656 (Ill. App. Ct. 1993), rev'd, 638 N.E.2d 181 (Ill.), cert. denied, 115 S. Ct. 499, and cert. denied, 115 S. Ct. 499 (1994). The court placed some of the blame on the attorneys for failing to advise the court of the exigent nature of the case and for not moving to have the case expedited. Id. at 656 n.5. Other courts have also blamed attorneys who fail to request expedition. See, e.g., In re J.M.P., 528 So. 2d 1002, 1017 (La. 1988). In the Baby Emily case, one justice criticized the entire system for its failure to protect the child: In a real sense, the most victimized party here is the child. Where does the fault lie?—It rests on inadequate laws, procedural rules incapable of recognizing the needs of a small growing child, state agencies too unmindful of the biological father's rights, parties too eager to litigate, judges and lawyers who let the child's fate bog down in a quagmire of legal technicality. We all have failed Baby Emily. In re Adoption of Baby E.A.W., 658 So. 2d 961, 979 (Fla. 1995) (Kogan, J., concurring in part and dissenting in part).
have recognized the importance of prompt decisions in light of the potential psychological effects on a child:

The damage done by the actual and potential disruption of the adoption system by protracted litigation of such cases would be especially incalculable as to the children involved. The harm caused to infants, who need stable relationships with adults for the psychological bonding necessary for their well-being and character development, could be incurable. 183

Experts in psychology also agree that because rapid placement is critical to a child’s development, all parties involved must greatly reduce the time they take for decision making. 184

Expediency is critical at all stages of an adoption case. Initial court hearings must be conducted promptly, and the appeal period “should be extremely short, not more than a week or two with a final decision rendered within days after the close of that hearing. Prompt appeal and decision safeguard not only the interest of the child, but also those of the aggrieved adult parties.” 185

Although initial hearings were held quickly in each of the three principal cases, postplacement appeals concerning the termination of parental rights lasted at least two years in each case. That is simply inexcusable. Swifter judicial decisions and appeals will prevent the emotional bonding between the child and the adoptive family that only strengthens as time goes on. When minimal bonding has occurred, however, the adoptive parents

183. In re Adoption of E.A.W., 647 So. 2d 918, 925 (Fla. Dist. Ct. App. 1994) (Pariente, J., concurring) (acknowledging that the potential damage to the child increases as the trial and appellate processes are prolonged), aff’d, 658 So. 2d 961 (Fla. 1995); Doe II, 638 N.E.2d 181, 186 (Ill.) (McMorrow, J., concurring) (“Delay damages the child, regardless of who is eventually awarded custody of the child”), cert. denied, 115 S. Ct. 499, and cert. denied, 115 S. Ct. 499 (1994); J.M.P., 528 So. 2d at 1016; Sanchez v. L.D.S. Soc. Servs., 680 P.2d 753, 755 (Utah 1984).

184. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 42 (1979). The authors argue that the need to protect the child should outweigh the need for legal certainty:

While the taking of time is often correctly equated with care, reasoned judgment, and the assurance of fairness, it often also reflects too large and burdensome caseloads or inefficiently deployed resources. Whatever the cause of the time-taking, the costs as well as the benefits of the delay to the child must be weighed. Our guideline would allow for no more delay than that required for reasoned judgment. By reasoned judgment we do not mean certainty of judgment. We mean no more than the most reasonable judgment that can be made within the time available—measured to accord with the child’s sense of time.

Id. at 42-43.

185. Id. at 46. Quick hearings are vital, because if they are “scheduled and conducted at the normal pace of other civil proceedings, the child often will have become psychologically attached to the adoptive parents before the hearing and cannot be returned to his biological parent without subjecting him to the risk of permanent mental and emotional harm.” J.M.P., 528 So. 2d at 1016.
may be less reluctant to relinquish the child to the natural parents after an unfavorable court decision.\textsuperscript{186}

Recent statutory amendments in Iowa and Illinois emphasize that courts must hear adoption cases on an expedited basis. For example, Iowa's amendment provides that the state supreme court "may adopt rules which provide for the expediting of contested cases" concerning adoption petitions and termination of parental rights.\textsuperscript{187} Illinois now dictates that appealable questions on these issues "shall be heard on an expedited basis."\textsuperscript{188} It is not enough, however, for courts merely to consider adoption cases on an expedited basis. Courts must resolve these cases more swiftly as well.

The Baby Emily case perfectly illustrates the delays which plague the judicial system. Less than two months after Baby Emily was born, the trial judge conducted a hearing concerning the natural father's parental rights and decided that issue just one week later. The trial judge, however, agreed to rehear the case and did not resolve it until Emily was thirteen months old. The Florida District Court of Appeal was faced with the same problem. A three-judge panel of that court initially considered the appeal but did not issue a decision until Emily was almost twenty-two months old. Like the trial judge, the appellate court also agreed to rehear the case; its en banc decision came over five months later, when Emily was twenty-seven months old. There is simply no excuse for such delays when their primary result is to further jeopardize the child's already fragile well-being.\textsuperscript{189}

One method of reducing the inherent delays is to impose fixed deadlines on courts to hear and decide adoption cases. In \textit{In re J.M.P.}, the Louisiana Supreme Court imposed such a framework for decisions at the trial and appellate levels.\textsuperscript{190} Since many of the delays

\textsuperscript{186} For example, in the Baby Pete case in Vermont, the adoptive parents agreed to return the child to the natural parents after they lost the first round in court, rather than appeal the decision, because of the harm delay would cause to the child. Ironically, the natural father considered the potential damage to his child and let Baby Pete remain in the physical custody of his adoptive parents. The natural father and the adoptive mother shared legal custody. This case is discussed infra notes 242-249 and accompanying text.

\textsuperscript{187} \textsc{Iowa Code} § 600.14 (1995).

\textsuperscript{188} 750 ILCS § 50/20b (West 1995) (amended 1995).

\textsuperscript{189} Of course, fact-finding may be an inherently time-consuming process in any adoption case, particularly where the testimony of the parties will be contradictory. See \textit{Baby E.A.W.}, 647 So. 2d at 931 (Pariente, J., specially concurring). Nonetheless, because the ultimate goal of adoption law is to protect the child's well-being, courts should focus on making quick, "reasoned" judgments rather than striving for legal certainty. See Goldstein et al., supra note 181, at 42-43.

\textsuperscript{190} \textit{J.M.P.}, 528 So. 2d at 1017. The court, exercising its supervisory jurisdiction, imposed a three-step process designed to expedite adoption cases and recommended "to each judicial and
which occurred in the three principal cases occurred at the appellate level, *J.M.P.*'s mandate regarding appeals should be incorporated by courts and legislatures: "The court of appeal shall hear and decide an appeal taken from the trial court within twenty days of the lodging of the record on appeal."191 If appeals must be filed within one week of a court's decision and the twenty-day rule is imposed, the entire appellate process should take no more than a few months, and final placement could occur before the child is six months old.192

In addition to reducing the time needed for making decisions, the lengthy "waiting period" which adoptive parents must endure before adoptions are legally finalized should be eliminated.193 "[T]he 'waiting period' is, as the name suggests, a period of uncertainty for adult and child. It is a period of probation encumbered by investigative visits and the fear of interruption. It is not, as it ought to be, a full opportunity for developing secure and stable attachments."194 Moreover, "all of the continuity problems attributable to the waiting period are exacerbated by the lengthy opportunity for appeal following a final decree."195 In order to facilitate stable, healthy environments in which adopted children grow up, some psychologists have argued that the adoption decree should be finalized the moment placement with the adoptive family occurs.196 Alternatively, the Uniform Adoption Act gives a birth parent the absolute right to revoke consent to the adoption within the first eight days after birth.197 One might argue that finality would jeopardize the constitutional rights of

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191. *Id.* (emphasis added).

192. The effectiveness of the deadlines is dependent, of course, on strict adherence by all courts involved. See, e.g., *In re JWR*, 607 So. 2d 634, 637 (La. Ct. App.), cert. denied, 607 So. 2d 571 (La. 1992) ("This court is now required to decide this case, the procedural history of which was conducted in total disregard of *In re JMP*."). Critics might argue that an expedited decision is simply an unrealistic goal in an adoption case. But, judges often consider and rule on requests for temporary restraining orders quickly, and there is no valid reason why they cannot resolve adoption cases expeditiously as well. It would help, of course, if the attorneys in an adoption case clearly raise the need for expediency to the judge. As the Illinois Appellate Court noted, this was not done in the Baby Richard case. *See supra* note 182.

193. Most states require waiting periods of 60-180 days after the child is placed before a final order of adoption is entered. *See* Heather M. Little, *Adoption Law Consistency Would Cut Pain*, *Plain Dealer*, Aug. 8, 1993, at 1C.


195. *Id.* at 37.

196. *Id.* at 36. This suggestion may be too harsh. Natural parents should have a short period of time to recover from the pregnancy before they forever relinquish their rights to raise their child.

197. *Unif. Adoption Act* § 2-404(a). After that eight-day period, consent may only be revoked before the adoption decree is issued and only if there is clear and convincing evidence that the consent was obtained on the basis of fraud or duress. *Id.* § 2-408(b)(1).
putative fathers who are unaware the adoption took place. Use of a putative father registry, however, would protect the father's rights by ensuring him of notice of any proposed adoption. The father would then be able to intervene and contest the adoption before placement occurred.

Although the waiting period before an adoption is finalized should be shortened, the existence of a waiting period before the child is given up for adoption is critical and should not be eliminated. This waiting period "give[s] the mother time to assess how she feels about adoption—during pregnancy and for a short time thereafter." In the Baby Jessica case, one portion of Cara's petition to revoke consent to the adoption was based on the fact that she consented just forty hours after birth, instead of at least seventy-two hours as required by statute. Had the waiting period not been violated in Jessica's case, Cara might have been honest about the natural father's true identity and the protracted custody dispute would never have occurred.

Legislation that expedites adoption proceedings is necessary because postplacement custody disputes between adoptive and biological parents will continue to linger for years without resolution. Notwithstanding any emotional bonding with the child, lengthy custody disputes leave the adoptive parents on shaky ground and may affect their treatment of the child: "[A]doptive parents may involuntarily inhibit the development of a strong bond of nurture and love with a child for fear that the child may be taken from them. That fear may deny the emotional support the child obviously needs." Therefore, rapid placement with no resulting uncertainty as to the finality of the adoption is essential. "The law favors rapid placement so that the

198. FIELD, supra note 102, at 91. Most states currently have mandatory waiting periods that range from twelve to seventy-two hours after birth. See UNIF. ADOPTION ACT § 2-404 cmt.

199. In re B.G.C., 496 N.W.2d 239, 243 (Iowa 1992). The Iowa Supreme Court did not specifically decide the waiver issue, noting only that "[w]e do not suggest that a mother cannot waive the seventy-two hour requirement . . . ." Id. Cara's execution of consent so quickly after birth, notwithstanding Iowa's statutory requirements, may be attributed to the fact that she did not have her own lawyer. Thus, independent legal counsel is necessary so a natural parent understands the effects that relinquishing a child will have on his or her parental rights. See infra notes 230-35 and accompanying text. Iowa's amended Adoption Act now states that the 72-hour requirement may not be waived by either natural parent. IOWA CODE § 600A.4(2)(g) (1995). Additionally, any person who accepts a release of custody "prior to the expiration of the seventy-two-hour period required is guilty of a serious misdemeanor." Id. § 600A.10(2).

200. See infra note 230 and accompanying text.


child can bond with those who will be the legal parents and not with those from whom the child may be taken. This sound policy benefits the child, the natural parents, the prospective adoptive parents, and society."\textsuperscript{203}

In order to protect the best interests of the child, the entire adoption process must be finalized as soon as possible. "When no one person has cared for an infant for more than a few months, the child should not yet have developed a dependency on any one person at the time of placement."\textsuperscript{204} The Uniform Adoption Act recognizes the need for finality by limiting all challenges to adoption decrees and orders terminating parental rights to six months, notwithstanding the basis of the challenge.\textsuperscript{205} A better option is to shorten this limit to three months so that placement may occur within six months after birth.\textsuperscript{206}

**B. Putative Father Registries**

An ideal solution to the conflict between the putative father's rights and the best interests of the child is to place the burden on the putative father to assert his parental rights before the birth of the child. Requiring affirmative action by the father is justified because "[t]he opportunity to exercise responsibility for the care and protection of a child begins before the child's birth."\textsuperscript{207} Consequently, several states\textsuperscript{208} have enacted a "putative father registry," which provides...
automatic notice of a pending adoption to a father who has filed with the state’s department of health.\textsuperscript{209} These registries typically require any unwed man who claims to have fathered a child to register any time before or within a short period after the birth of the child in order to receive notice of any adoption proceedings.\textsuperscript{210}

Those states that have enacted putative father registries interpret them strictly against putative fathers, thereby avoiding lengthy and destructive custody disputes.\textsuperscript{211} For example, lack of knowledge of the pregnancy is not deemed a legitimate reason for failing to file.\textsuperscript{212} One court has held that a putative father’s lack of knowledge about the registry’s existence is also not a valid defense:

\begin{quote}
It is not too harsh to require that those responsible for bringing children into the world outside the established institution of marriage should be required either to comply with those statutes that accord them the opportunity to assert their parental rights or to yield to the method established by society to raise children in a manner best suited to promote their welfare.\textsuperscript{213}
\end{quote}

\textsuperscript{209} The registry usually records the name, address, social security number, and any other relevant information about the putative father so that when an adoption petition is filed, he will receive notice of and be able to take part in the proceedings. Alexandra R. Dapolito, Comment, \textit{The Failure to Notify Putative Fathers of Adoption Proceedings: Balancing the Adoption Equation}, 42 Cath. U. L. Rev. 979, 1021 (1993).

\textsuperscript{210} See, e.g., Ariz. Rev. Stat. Ann. \textsection 8-106.01B (any time before birth but no later than thirty days after birth); Idaho Code \textsection 16-1513(2) (prior to birth or "must be registered prior to the date of any termination proceeding, or proceeding wherein the child is placed with an agency licensed to provide adoption services"); 750 ILCS \textsection 50/12.1(b) (any time before birth but no later than thirty days after birth); Ind. Code Ann. \textsection 31-3-1.5-12 (prior to birth or within thirty days after birth or the date of a filing of a petition to adopt, whichever occurs later); Utah Code Ann. \textsection 78-30-4.8(2) (prior to birth or either before the child is relinquished to a licensed agency or an adoption petition is filed).

\textsuperscript{211} Dapolito, \textit{supra} note 209, at 1023. For example, the Utah Supreme Court held that a putative father who registered one day after his child was placed with an adoption service and just four days after the child was born had nonetheless waived his parental rights. Sanchez v. L.D.S. Soc. Servs., 680 P.2d 753, 756 (Utah 1984). "It is of no constitutional importance that [the putative father] came close to complying with the statute. Because of the nature of subject matter dealt with by the statute, a firm cutoff date is reasonable, if not essential." Id. at 755; see also \textit{In re Adoption of Reeves}, 831 S.W.2d 607, 608 (Ark. 1992) (father who failed to register waived right to set aside adoption decree, even though father had already developed a "significant relationship" with the child).

\textsuperscript{212} See, e.g., Ariz. Rev. Stat. Ann. \textsection 8-106.01F; 750 ILCS \textsection 50/12.1(g). These requirements are certainly justified because all putative fathers "are aware that sexual intercourse may result in pregnancy, and of the potential opportunity to establish a family. If they wish to protect that opportunity, they can do so by maintaining some relationship with the women with whom they had intercourse to determine whether they become pregnant." Clausen \textit{II}, 502 N.W.2d at 687 (Levin, J., dissenting).

\textsuperscript{213} Sanchez, 680 P.2d at 756.
Thus, the failure to register may have permanent effects on a putative father's parental rights.\textsuperscript{214}

Although Illinois did not have a putative father registry when its supreme court decided the Baby Richard case, the Illinois legislature quickly responded by amending the State's Adoption Act one month later to include a registry.\textsuperscript{215} Iowa also enacted such a registry in 1994.\textsuperscript{216} The majority of states, however, do not have registries and should not wait for protracted custody disputes in their own courts before they respond to the problem.\textsuperscript{217} The lamentable outcomes in the three principal cases should motivate other states to amend their adoption laws.

Putative fathers are not unfairly burdened by use of a registry. It is hardly unreasonable to require a natural father who is truly interested in raising his child to register with the state. The registration process is simple and ensures the father that he will be notified if someone seeks to adopt his child. By registering, the father may intervene and contest the adoption without later claiming he was the victim of fraud. In that respect, the registry acts as an "insurance policy" against attempted fraud and protects the rights of fathers who are committed to raising their children:

The purpose of the putative father registry is to protect the parental rights of fathers who affirmatively assume responsibility for children they may have fathered and to expedite adoptions of children whose biological fathers are unwilling to assume responsibility for their children by registering with the putative father registry or otherwise acknowledging their children.\textsuperscript{218}

\textsuperscript{214} For example, in Indiana, the failure to file constitutes a waiver of notice of the adoption proceeding and can be implied, irrevocable consent to the adoption. \textit{Ind. Code Ann.} § 31-3-1.5-16. In Arizona, a putative father "who does not file . . . waives his right to be notified of any judicial hearing regarding the child's adoption and his consent to the adoption [sic] not required." 1995 \textit{Ariz. Sess. Laws} 221, *2 (to be codified at \textit{Ariz. Rev. Stat. Ann.} § 8-106.01E); see also \textit{Utah Code Ann.} § 78-304-8.8(4). Illinois' Adoption Act incorporates the waiver of notice provisions and also specifies that the failure to register "shall constitute an abandonment of the child and shall be prima facie evidence of sufficient grounds to support termination of such father's parental rights under this Act." 750 ILCS § 50/12.1(h); see also \textit{Idaho Code} § 16-1513(3).

\textsuperscript{215} \textit{See supra} note 208.

\textsuperscript{216} \textit{Id.}

\textsuperscript{217} \textit{See id.} Although Illinois and Iowa amended their adoption statutes in 1994, Florida did not. In February 1994, a bill amending Florida's Adoption Act, which would have established a putative father registry, passed in the Florida House, but was defeated by Florida's Senate Judiciary Committee. \textit{See Cruel Adoption Laws Turn Babies Into Pawns, supra} note 82, at 12A. A new adoption reform bill was recently introduced in the state legislature, however. \textit{See Debbie Cenziper, Adoption Law Up For a Change, Sun-Sentinel} (Fort Lauderdale), Feb. 14, 1995, at 1B.

Thus, a putative father registry is "an ideal option for state legislatures, because it balances protection of an unwed father's interests with the state's interest in finalizing adoptions." If state legislatures are truly committed to protecting the best interests of children and preventing lengthy and emotionally charged custody disputes, they will enact putative father registries.

One final point is of critical importance—all states must make diligent and consistent efforts to publicize the existence of these registries so that putative fathers will be well-informed of their rights and responsibilities. It is vital that each state "post in a conspicuous place a notice that informs the public about the purpose and operation of the registry." Although the failure to post such a notice should "not relieve a putative father of the obligation to register," a putative father registry will be meaningless without widespread publicity of its existence.

C. Mandatory Preplacement Counseling

A third focus of legislative reform should include mandatory counseling for natural parents. Along with putative father registries, a counseling requirement will help minimize fraudulent adoptions by ensuring that natural parents make decisions with informed consent. Both parents should receive personal and legal counseling prior to placing a child for adoption and, preferably, well-before the child is

219. Dapolito, supra note 209, at 1021; see also Karen C. Wehner, Comment, Daddy Wants Rights Too: A Perspective on Adoption Statutes, 31 Hous. L. Rev. 691, 717-18 (1994) ("If all states incorporated such a registry into their statutes, courts would spend less time determining who the father is. This would provide the putative father greater protection as the court could check the registers of many different states before terminating his rights.").

220. IND. CODE ANN. § 31-3-1.5-13(b); see also Dapolito, supra note 209, at 1025 (publicity necessary for a successful registry). Illinois does not have a specific statutory provision regarding publicity of its registry, and only sixty-seven men had registered during the first year after the registry was enacted. Michael Gillis, State Dads Gain Voice in Adoption, Chi. Sun-Times, July 2, 1995, at 3. Indiana, on the other hand, makes a statutory effort to publicize its registry by requiring each hospital, local health department, clerk of a circuit court, and branch office of the Bureau of Motor Vehicles to post information about the registry. IND. CODE ANN. § 31-3-1.5-13(b). Oklahoma also requires its Department of Human Services to "provide, from any available funds, for the publication and statewide distribution to the public of information as to the existence of the paternity registry," OKLA STAT. ANN. tit. 10, § 55.1(G)(2). Because the success of Oklahoma's provision is contingent on the availability of funds, however, it may be ineffective. Therefore, each state must allocate money for the explicit purpose of publicizing its registry. Furthermore, I would expand on Indiana's list by posting information and registration forms at all post offices, train and bus stations, and libraries. Each state should make public service announcements on television and radio as well.

221. IND. CODE ANN. § 31-3-1.5-13(c)(5).
even born.\textsuperscript{222} A few states have incorporated counseling provisions into their adoption statutes.\textsuperscript{223} For example, California specifies that at least three counseling sessions must be \textit{offered} to each birth parent before that parent may place a child for adoption.\textsuperscript{224} Similarly, Iowa's amended Adoption Act now requires that before custody of a child may be released, three hours of counseling must be \textit{offered} to the biological parent.\textsuperscript{225} In addition, the Uniform Adoption Act dictates that before a natural parent may execute consent to an adoption, the parent "must have been informed of the meaning and consequences of adoption" as well as the "availability of personal and legal counseling."\textsuperscript{226}

The problem with statutes that dictate only that counseling be \textit{available} is that those parents who do not take advantage of this option will not receive information that might influence their decision. Because the goal is to ensure that the parent makes an informed, voluntary decision before releasing the child, counseling should be mandatory, not optional. An effective example of a mandatory requirement is found in Louisiana's Children's Code, which requires a parent to submit to a minimum of two counseling sessions with a licensed mental health specialist before executing consent to an adoption.\textsuperscript{227} This provision guarantees that adoption decisions are made

\textsuperscript{222} See, e.g., LINDA C. BURGESS, THE ART OF ADOPTION 6 (1981) ("Counseling is most effective over a period of several months before the birth of the child.").


\textsuperscript{224} CAL. FAM. CODE §§ 8801.3(a), 8801.5(d). If accepted, the counseling sessions must be at least fifty minutes in length and held on different days. \textit{Id.} § 8801.5(d). Upon request of the birth parent, the adoptive parents must pay for both the costs of counseling and the costs of separate legal counsel for the birth parent. \textit{Id.} § 8801.5(c)(4)-(5). California also requires that the counseling sessions include an explanation of the alternatives to adoption, the alternative types of adoption, and the rights and responsibilities of the birth parent with respect to adoption. \textit{Id.} § 8801.5(c)(1)-(3). Maine also dictates that counseling be offered to the natural parents. ME. REV. STAT. ANN. tit. 19, § 1112(2)(A) (a court may approve a consent to surrender the child only if "[a] licensed child placing agency or the department [of human services] certifies to the court that counseling was provided or was offered and refused"). New Jersey's statute is very broad; it requires only that the birth parent "be offered counseling as to his or her options other than placement of the child for adoption." N.J. STAT. ANN. § 9:3-39.1(b).

\textsuperscript{225} IOWA CODE § 600A.4(2)(d) (1995). If the biological parent accepts this offer, the counseling "shall be provided after the birth of the child and prior to the signing of a release of custody or the filing of a petition for termination of parental rights as applicable." \textit{Id.} This counseling requirement, however, would enable a woman still suffering from the stresses of pregnancy and labor to legally release her rights to the child. Such a situation could easily be avoided by starting counseling before the child is born. See supra note 222 and accompanying text.

\textsuperscript{226} UNIF. ADOPTION ACT § 2-404(e) (emphasis added).

\textsuperscript{227} LA. CHILD. CODE ANN. art. 1120(A). A father is entitled to waive this requirement, however. \textit{Id.} art. 1120(C). Unless waived by a court for good cause, New Mexico also requires mandatory counseling before a natural parent may consent to adoption or relinquish parental
with informed consent and may thus prevent at least some potential adoption disputes from occurring.

The advantage of counseling prior to birth is that it will prevent later attempts to annul the adoption on the ground that the stresses of pregnancy and labor unduly influenced the decision.\(^2\) When counseling is provided and a woman chooses to place her child for adoption, "the commitment to adoption will be more consciously taken and better understood. This type of plan lends itself to a reduced risk for all involved parties and provides honest and more comprehensive information about herself and the biological father."\(^2\)

In addition to personal counseling, natural parents need independent legal counseling to prevent "coerced" adoptions by attorneys who represent the adoptive parents. This is a crucial requirement that may have made a difference in each of the principal cases. "[B]irth parents mustn't be pushed into decisions they will later regret. Cara Schmidt signed away her parental rights just 40 hours after giving birth, a time when any woman is emotionally exhausted. She got no counseling to brace her for the grief that would follow, and she never had a lawyer."\(^2\) Similarly, the Illinois Supreme Court noted in the Baby Richard case that the attorney for the adoptive parents both handled the initial placement of the child and "failed to make any effort to ascertain the name or address of the father despite the fact that the mother indicated she knew who he was."\(^2\)

Finally, in the Baby Emily case, attorney Charlotte Danciu acted as an "inter-
mediary” but her conduct has also been questioned by the Florida courts.232

An ideal example of a legal counseling requirement can be found in Louisiana’s Children’s Code, which mandates that a natural parent who executes a consent to adoption must be represented by an attorney who does not represent the adoptive parents.233 “This legal counseling requirement, like the mental health counseling requirement, aims to protect the surrendering parent from making an unwise decision and to reinforce the finality of adoptions by precluding later challenges.”234 The Uniform Adoption Act also specifies that a natural parent’s consent may be taken only by a lawyer who does not represent an adoptive parent or an adoption agency to which the child will be relinquished.235 It should be incumbent upon every state legislature to implement similar requirements and assure that all natural parents receive personal and legal counseling before placement of a child occurs.

232. Both opinions of the appellate court questioned Danciu’s conduct. The appellate court’s 2-1 opinion, after acknowledging Danciu’s failure to inform the trial judge of her telephone conversation with Bjorklund in which he expressly objected to the adoption, continued:

We are just as appalled to learn that there is later testimony of the prospective adoptive parents that the attorney likewise failed to inform them of Gary’s objection and refusal to consent until after the birth of the baby. We cannot help but think that a little candor from this intermediary might have prevented some of what occurred later.

In re Adoption of Baby E.A.W., 647 So. 2d 918, 943 app. (Fla. Dist. Ct. App. 1994) (en banc), aff’d, 658 So. 2d 961 (Fla. 1995). In the en banc decision, the appellate court again criticized Danciu on similar grounds. See supra note 86. Accusations of misconduct have also been directed at Danciu by other lawyers who have dealt with her in adoption cases. See, e.g., Larry Barszewski, Adoption Lawyer Sometimes Stirs Up Controversy, SUN-SENTINEL (Fort Lauderdale), Feb. 9, 1995, at 1B; Debbie Cenziper, Heartbroken Couple to Give Baby Back to Birth Parents, ORLANDO SENTINEL, Feb. 5, 1995, at B1.

233. LA. CHILD. CODE ANN. art. 1121(A). In addition, the natural parent’s attorney must execute an affidavit which states that the attorney fully explained the consequences of surrendering the child to the parent. Id. art. 1121(C). The purpose of this provision is “to provide some further insurance that the parent has knowingly executed the surrender and to provide further insulation against a subsequent challenge to the surrender process on the grounds that the parent was ignorant or misunderstood the nature of the surrender document.” Id. at cmt. c.

234. Deborah Pearce-Reggio, Comment, Children’s Law Matures: Surrender and Adoption under Louisiana’s New Children’s Code, 67 Tul. L. Rev. 1631, 1649 (1993); see also Korn, supra note 181, at 1323 (“With mandatory legal and psychological counseling, birth mothers would be better prepared both to make the decision and to understand the emotional and legal consequences of relinquishing a child for adoption.”).

235. UNIF. ADOPTION ACT § 2-405(a)(4). “To avoid even the appearance of a conflict of interest, a consent or relinquishment has to be executed before a ‘neutral’ individual, who has to attest to the apparent validity of the consent or relinquishment.” Id. § 2-404 cmt. In light of potential conflict of interest, confidentiality and zealous representation problems, other commentators have argued that independent legal counseling should be incorporated in future legislative reforms. See, e.g., Carol S. Silverman, Regulating Independent Adoptions, 22 COLUM. J.L. & SOC. PROBS. 323, 349 (1989); Maria L. Tenuta, Independent Adoptions in Minnesota: A Decade of Controversy and Opposition Mandates Legislative Reform, 13 HAMLINE J. PUB. L. & POL’Y 381, 391 (1992).
D. Penalizing Fraud

Reform is also necessary to dissuade all parties involved in an adoption case from acting fraudulently. As Justice Levin noted in his ardent dissent in the Michigan Supreme Court, the absence of fraud might have prevented the Baby Jessica case from ever getting started:

The sympathetic portrayal of the Schmidts in the majority opinion ignores that it was Cara Schmidt's fraud on the Iowa court and on Daniel Schmidt that is at the root of this controversy. If she had identified Daniel Schmidt as the father when she consented to waive her parental rights, before she had a change of heart, he too might have relinquished his parental rights. If Daniel Schmidt had refused to relinquish his rights, the DeBoers would not have assumed custody of the child and this litigation would have been avoided. 236

In the Baby Richard case, the Illinois Supreme Court implicated Daniela Janikova for fraudulently concealing Richard's birth but emphasized that the adoptive parents and their attorney were culpable as well:

To the extent that it is relevant to assign fault in this case, the fault here lies initially with the mother, who fraudulently tried to deprive the father of his rights, and secondly, with the adoptive parents and their attorney, who proceeded with the adoption when they knew that a real father was out there who had been denied knowledge of his baby's existence. When the father entered his appearance in the adoption proceedings 57 days after the baby's birth and demanded his rights as a father, the petitioners should have relinquished the baby at that time. It was their decision to prolong this litigation through a lengthy, and ultimately fruitless, appeal. 237

Ironically, both natural mothers, after acting fraudulently, reconciled and eventually married the natural fathers. 238 When Daniel Schmidt and Otakar Kirchner later won their respective legal battles, Jessica and Richard were "returned" to their natural parents. Thus, the end result in both cases was that the natural mothers "benefited" from

236. Clausen II, 502 N.W.2d 649, 686 (Mich. 1993) (per curiam) (Levin, J., dissenting). Of course, the DeBoers are as much to blame for the result of the case as anyone. Despite Cara's fraud, the DeBoers knew the adoption had not been finalized; they nonetheless ignored the orders of the Iowa courts and sought refuge in Michigan. See supra notes 28-44 and accompanying text.


their own fraud and regained physical custody of their children.\textsuperscript{239} Such fraudulent conduct may discourage future adoptions: "[N]o normal couple would undertake to adopt a child and risk establishing the supreme ties of affection and concern that exist between parents and child if they were in constant jeopardy of having their child ripped from their arms by a returning natural parent."\textsuperscript{240}

Unfortunately, fraud similar to that perpetrated by Cara and Daniela arises frequently in adoption cases.\textsuperscript{241} For example, the Baby Pete\textsuperscript{242} case in Vermont, which was settled just a few months after the Schmidts regained custody of Baby Jessica, also involved fraud by the natural mother. Baby Pete was given up for adoption shortly after birth by Angela Harriman, the natural mother, and Marcus Stoddard, the man she named as the child's father.\textsuperscript{243} Daniel Harriman, Angela's estranged husband, did not learn of the adoption until six weeks later, but Baby Pete had already been released to Donna and Richard McDurfee, a Vermont couple.\textsuperscript{244} Claiming that he was the real father, Harriman then sued to assert his parental rights; blood tests ordered

\textsuperscript{239} This is arguably an unjust result. See, e.g., Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889) (establishing the well-recognized legal principle that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong"). Indeed, Justice Levin's dissent in the Michigan Supreme Court criticized the majority for not being "troubled that the result of its decision will be to return the child to Cara Schmidt despite her fraud." \textit{Clausen II}, 502 N.W.2d at 687 (Levin, J., dissenting); see also \textit{In re Kirchner}, 649 N.E.2d 324, 344 (Ill.) (per curiam) (McMorrow, J., dissenting) ("Daniella's deceit is being rewarded and she is able to circumvent her relinquishment of maternal rights and custody . . . ."), \textit{cert. denied}, 115 S. Ct. 2599, \textit{and cert. denied}, 115 S. Ct. 2600 (1995).

\textsuperscript{240} \textit{Wooten v. Wallace}, 351 S.E.2d 72, 75 (W. Va. 1986); see also Goodman, supra note 179 and accompanying text (arguing that the result of the Baby Jessica case will be to deter prospective adoptive parents from adopting).

\textsuperscript{241} In the past few years, there have been several other cases where the natural mother placed the child for adoption without the father's knowledge, even though she knew the identity of the father. See, e.g., \textit{In re Juvenile Severance Action No. S-114487}, 876 P.2d 1121, 1125 (Ariz. 1994) (en banc) (father opposed adoption before birth, but mother released the child shortly after birth without the father's knowledge); \textit{In re M.N.M.}, 605 A.2d 921, 922 (D.C.), \textit{cert. denied}, 113 S. Ct. 636 (1992) (after mother travelled to and placed child for adoption in District of Columbia, she refused to identify father despite knowing his identity and his location in Missouri, where she had given birth); \textit{Nale v. Robertson}, 871 S.W.2d 674, 675-76 (Tenn. 1994) (mother surrendered child for adoption even though father told her before birth that he wanted custody if she did not); see also the Baby Pete case, discussed \textit{infra} notes 242-49 and accompanying text.

\textsuperscript{242} Although his birth name was James M. Stoddard, the child was renamed Peter by his adoptive parents. See Indira A.R. Lakshmanan & Bob Hohler, \textit{Vt. Adoption Turning into Custody Fight, BOSTON GLOBE}, Aug. 10, 1993, at 9.

\textsuperscript{243} In court, Angela swore in an affidavit that Marcus was the child's natural father. See Sally Johnson, \textit{Adoption's Tangled Web}, \textit{WASH. TIMES}, Sept. 30, 1993, at A13.

\textsuperscript{244} The McDurfees had raised Pete since the day after his birth on November 24, 1992. \textit{Id.}
by the probate court later revealed that there was a 99.94 percent chance that Daniel Harriman was indeed the biological father.245

Ironically, the Baby Pete case had a happy ending. The McDurfees decided that if they lost the first round in court, they would return the child rather than appeal the decision.246 Although Daniel Harriman would likely have prevailed in court,247 he also considered the best interests of his child and the dispute was settled amicably.248 The unique settlement terms provided that the McDurfees would retain physical custody of Baby Pete and Daniel Harriman would share legal custody with Donna McDurfee.249 But as the Baby Jessica and Baby Richard cases illustrate, many cases involving fraud are bitterly contested and not resolved amicably.

Although courts generally recognize that a fraudulently induced consent to adoption is invalid,250 the issue of fraud is more complicated when the natural parent is entirely excluded from the adoption proceedings. Certainly, a strong argument can be made that a parent “who loses all rights to his children has a great interest in having a right to challenge an adoption decree from which he was fraudulently excluded.”251 On the other hand, protecting the best interests of the child requires that limits be placed on the time in which a parent may challenge an adoption decree or an order terminating parental rights on the basis of fraud. The need for restrictions is illustrated by Louisi-

245. These test results also rebutted the portion of Angela’s sworn affidavit in which she denied having had sexual relations with Daniel Harriman since early 1991. Id.

246. See For Once, the Baby Won, N.Y. TIMES, Sept. 1, 1993, at A18. The McDurfees stated that they made their decision in order to protect the best interests of the child. A Familiar Custody Case, a Different Decision, N.Y. TIMES, Aug. 29, 1993, at 28.

247. Although Angela and Marcus gave up the baby, Daniel Harriman was the biological father and was still legally married to Angela when Baby Pete was born. He therefore had an “overwhelming legal advantage” that Daniel Schmidt did not have in the Baby Jessica case. For Once, the Baby Won, supra note 246, at A18. This advantage stems from the fact that “[t]he married father is, from the outset, legally responsible to support the child. The unmarried father has no such automatic legal responsibility.” In re Adoption of Baby E.A.W., 647 So. 2d 918, 923 (Fla. Dist. Ct. App. 1994) (en banc), aff’d, 658 So. 2d 961 (Fla. 1995).

248. See, e.g., Agreement Reached in Adoption Battle, St. PETERSBURG TIMES, Aug. 21, 1993, at 7A.

249. Richard McDurfee, the adoptive father, summarized the result: “Nobody lost and the baby won.” For Once, the Baby Won, supra note 246, at A18. The settlement also entitled Daniel Harriman to “visitation rights and a voice in his [son’s] upbringing.” Id. The judge’s order approving the settlement officially changed the child’s name on the birth certificate to Peter Elliot Harriman McDurfee. See Judith Gaines, ‘Unique’ Adoption Ruling, BOSTON GLOBE, Aug. 21, 1993, at 1.

250. See, e.g., Adoptive Parents of M.L.V. v. Wilkens, 598 N.E.2d 1054, 1057 (Ind. 1992); Boatwright v. Walker, 715 S.W.2d 237, 243 (Ky. Ct. App. 1986); Grafe v. Olds, 556 So. 2d 690, 694 (Miss. 1990); see also ROBERT S. LASNIK, A PARENT’S GUIDE TO ADOPTION 40 (1979) (“A fraudulently induced consent will be declared null and void by a court even after an adoption has been finalized.”).

ana’s Children’s Code, which places limits on challenges to an adoption procured by fraud only after the fraud is discovered.\(^{252}\) Theoretically, a party who, after seventeen years, discovers that fraud or duress influenced the adoption decree could then bring an action to annul it.”\(^{253}\) The fact that such a lawsuit can be brought is preposterous, particularly when the goal of adoption law is to promote finality and stability for the child.

Some states do not follow the “discovery rule” but, instead, specify time limits, usually one year in length, after which an adoption decision may not be challenged, even if fraud or duress is alleged.\(^{254}\) Similarly, the Uniform Adoption Act limits all challenges to six months, even if the parent was fraudulently excluded from participating in the proceedings.\(^{255}\) The problem is that even a six-month period may be too long, especially when the time for trial court decisions and multiple appeals are factored into the equation. For example, if a parent brings a fraud claim just before this six-month period expires, by the time the trial judge hears the case and issues a decision, the child may already have developed too strong a bond with his adoptive parents to simply be whisked away like a piece of property. “Furthermore, even if the case is decided promptly and correctly by the trial court, the normal appellate delay may have unsettling and harmful effects upon the developing relationship between the child and his psychological parent.”\(^{256}\) Moreover, as the Baby Jessica and Baby

\(^{252}\) “No action to annul a final decree of adoption of any type may be brought for any reason after a lapse of six months from discovery of the fraud or duress.” LA. CHILD. CODE ANN. art. 1263 (emphasis added).

\(^{253}\) Pearce-Reggio, supra note 234, at 1671; see also Teanna W. Neskor, Comment, The Constitutional Rights of Putative Fathers Recognized in Louisiana’s New Children’s Code, 52 LA. L. REV. 1009, 1041 (1992). Oklahoma has a similar problem. That state’s statute of limitations for adoption cases bars challenges brought more than one year after an adoption decree is entered. OKLA. STAT. ANN. tit. 10, § 58. The discovery of fraud, however, is an exception that can toll the statute of limitations. See, e.g., Wade v. Geren, 743 P.2d 1070, 1072-73 (Okla. 1987); Hurt v. Noble, 817 P.2d 744, 746 (Okla. Ct. App. 1991). Other states also allow fraud to toll the statute of limitations in adoption cases. See, e.g., ALA. CODE § 26-10A-25(d) (1992); HAW. REV. STAT. ANN. § 578-12 (Michie 1993).

\(^{254}\) See, e.g., ALASKA STAT. § 25.23.140(b) (1991) (decrees terminating parental rights may not be challenged, even on grounds of fraud, more than one year after the order is issued); MO. ANN. STAT. § 453.140 (Vernon 1986) (“After the expiration of one year from the date of entry of the decree of adoption, the validity thereof shall not be subject to attack in any proceedings, collateral or direct, by reason of any irregularity in proceedings had pursuant to this chapter”); N.H. REV. STAT. ANN. § 170-B:17 (1994) (final adoption decrees cannot be challenged more than one year after they are issued, even if fraud is alleged).

\(^{255}\) See UNIF. ADOPTION ACT § 2-401 cmt. (“A person may not challenge an adoption decree more than six months after it is issued, even if the person was thwarted in his ability to assume parenting responsibilities.”).

\(^{256}\) In re J.M.P., 528 So. 2d 1002, 1016 (La. 1988).
Richard cases illustrate, many custody battles concerning fraud currently linger in courts for several years, not months.

Therefore, legislative reforms are necessary for two reasons: (1) to eliminate the ability to commit fraud, and (2) to penalize fraudulent actors and dissuade others from doing the same. A putative father registry should achieve the first goal. The state will automatically provide notice to the father if the mother tries to place the child for adoption. The father can then intervene and assert his rights, rather than be forced to do so after the child has already been placed with the adoptive parents. In essence, a registry makes the mother’s conduct irrelevant. Regardless of the man the mother identifies, the actual father will be able to protect his rights. This may prevent some adoption disputes involving fraud from ever commencing.257

Of course, measures should be taken to dissuade persons from perpetrating fraud in the first place. One possible solution is to prosecute the fraudulent actor. In the Baby Pete case, after the settlement between the McDurfees and Daniel Harriman had been reached, Angela Harriman was charged with lying under oath when she falsely identified Marcus Stoddard as the biological father of her baby.258 Although Angela’s false statement was made under oath, any fraudulent action should give rise to criminal penalties. Iowa’s amended Adoption Act states that a release of custody form must contain a notice to the natural parent that a person who “knowingly and intentionally identifies a person who is not the other biological parent in the written release of custody or in any other document related to the termination of parental rights proceedings...is guilty of a simple misdemeanor.”259 Alternatively, the Uniform Adoption Act authorizes a civil penalty against a natural parent who knowingly misidentifies the other natural parent with the intent to deceive that parent, the adoptive parents, or an agency.260

257. See supra note 236 and accompanying text.


260. UNIF. ADOPTION ACT § 7-105(f). The comment to that section explains that fraud may result in legal disputes not unlike those in the Baby Jessica and Baby Richard cases:

This provision may serve to warn birth parents about the harmful consequences for their children of failing to tell the truth. One such consequence may be the belated discovery by the other parent of an adoption proceeding, followed by an effort by that parent to contest the adoption, thus plunging the parties into litigation with an uncertain outcome.
In the final analysis, a child should never be called upon to bear the burden of an adult’s fraudulent conduct. Yet, Jessica and Richard will spend the rest of their lives shouldering this weighty emotional burden. The threat of stiff penalties for fraudulent conduct should encourage all parties involved in an adoption proceeding to act honestly. In addition, a putative father registry will protect fathers from concealed births and adoptions and, therefore, should eliminate most post-birth fraud claims.

CONCLUSION

Several articles were written about Jessica’s and Richard’s rapid assimilation into their new homes.261 No one, however, can accurately predict whether or not each child’s long-term development will be adversely affected by what has already transpired:

Whenever biological parents succeed in reclaiming a child after years of estrangement—after years in a substitute family—the child’s feelings of being wanted and secure are jeopardized. Equally threatened are many developmental advances which are firmly rooted in the reciprocal interchange of affection between an immature dependent being and his familiar adult caretakers.262

Only over a long period of time can one truly evaluate the effect of these painful ordeals on Jessica and Richard. In order to prevent such tragic cases from recurring, legislative reforms are critical and should include at least four components: (1) procedures for expediting adoption hearings and decisions; (2) putative father registries to prevent postbirth intervention by putative fathers; (3) mandatory preplacement counseling for natural parents; and (4) severe penalties for individuals who use fraud for their own benefit in adoption cases.

These legislative reforms will protect the interests of all parties involved in an adoption case. A putative father registry will guarantee the putative father that he will not be excluded from adoption proceedings, even if the natural mother or adoptive parents attempt to fraudulently conceal the adoption. Rapid placement and expedited decisions will protect the child’s best interests by preventing removal of the child years after placement and bonding have occurred. Finally,

Id. cmt.

261. See, e.g., Jerome & Alexander, supra note 4, at 43 (citing report by psychologist who visited Richard daily that he was “adapting well to his new environs”); Baby Jessica Adjusts to Life with Her Biological Parents, ORLANDO SENTINEL, Oct. 1, 1993, at A6 (“Baby Jessica is settling in well with her biological parents,” according to therapists.); Baby Jessica is Calling Biological Father “Daddy”, ORLANDO SENTINEL, Sept. 15, 1993, at A8.

262. GOLDSTEIN ET AL., supra note 184, at 54.
mandatory counseling will ensure that all parties involved make decisions with informed consent. These adoption reforms are necessary because "[j]ustice delayed is justice denied—slow justice is no justice." Regrettably, the Baby Jessica, Baby Richard and Baby Emily cases plainly illustrate the truth of this statement.
