ADOPTION AND BIRTH FATHERS: A BALANCING OF INTERESTS

During the last several decades, few issues in the area of non-dissolution family law have caused as much discussion, interpretation, controversy, and review as the relationship between biological fathers and their children when no marriage was involved. In particular, thorny issues have arisen when the biological mother of a child decides that it is in her interest and the best interests of the child to place the child in a permanent adoptive home shortly after birth. The rights of the biological father who desires to be involved in the life of a child when an adoption is contemplated, and the manner in which those rights are protected or eliminated, has created an ongoing discussion involving litigation, statutory change, case law, and interpretations for at least the past thirty years.

Prior to that time, it was generally agreed that in most instances the biological father of a child born out of wedlock had little, if any, legal rights with respect to the child. In fact, even in situations where the parents had been married, in many states it was possible for the biological mother after divorce to place a child for adoption with no notice to the biological father.

The primary focus of the last thirty years has been an attempt by legislatures and courts to balance the interests of the child, the biological father, the biological mother, and the adoptive parents in an effort to determine both legally and constitutionally what steps need to be taken by a biological father to protect his rights and to remain involved in the life of his child.

Beginning with Stanley v. Illinois, 405 U.S. 645 (1972), the United States Supreme Court determined that even without the benefit of marriage, a biological father had some level of constitutional right to participate in the lives of his children. The United States Supreme Court in Stanley, as well as in later decisions, made it clear that at a minimum a man who fathered children outside of the marriage relationship had a constitutionally protected "opportunity interest" in

exercising his rights as a father and becoming involved in the lives of his children, even potentially to take custody.

Nevertheless, the reality was that many men who fathered children simply did not care about the children and had no interest in becoming involved in their lives or otherwise participating in their rearing. As a result of that, legislatures around the country began to wrestle with the question of how to write statutes in a way that would give men their constitutionally protected "opportunity interest," while at the same time recognizing that there was a strong public policy favoring rapid movement to permanency for children, and that children's best interests were clearly served by placement in permanent adoptive homes as quickly as possible after birth.

In direct response to the Stanley case, the legislature in Minnesota passed what became known as the 60/90-day statute. See Minn. Stat. §259.51 (1996). That statute said that in adoption cases, a man was required to indicate any interest in a child within 60 days of the placement of the child for adoption or 90 days of the birth of the child, whichever was shorter. It was intended that if a man, during that period of time, failed to indicate an interest, he would lose his ability to object to the placement of the child and to the adoption itself.

The mechanism, however, for "registration" and thus for indicating his interest in becoming a parent or otherwise objecting to the adoption, was never clearly identified, nor clearly spelled out. No clear notice provision or any requirement for other direct contact with the birth father was provided. In addition, the paternity statutes during this period of time were becoming increasingly effective in adjudicating men as fathers, for purposes of requiring financial contribution to children, whether they chose to be involved in the child's life or not. It was only a matter of time until the two concepts contained in the paternity statutes and the adoption statutes came into conflict.

That conflict occurred In Re Paternity of J.A.V., 547 N.W.2d 374 (Minn. 1996). In that case, the question was directly raised as to whether or not the father, having failed to "register" or in any way indicate an interest in the child as required by the 60/90-day statute, was precluded not only from objecting to the adoption, but from also bringing a paternity action. In a split decision, the Minnesota Supreme Court determined that the 60/90-day statute, since it was in the adoption statutes, did prevent his objection to the adoption in the juvenile court, but did not actually prevent the biological father from bringing a paternity action in family court if the adoption had not yet been completed (thus, effectively, allowing him to preclude the adoption). Thus, the legislature's attempt to have clarity with respect to timing in the adoption of children became ineffective, and it became a race to the courthouse to see whether a paternity action would be initiated, or an adoption would be completed, first.

This conflict, and lack of coordination, between the two statutes left all parties in a significant state of limbo. This was particularly true, as adoption actions happen and are held in juvenile court and paternity actions are held in family court. The coordination of notice and the inability on the part of the adoptive parents to know until the final adoption hearing whether or not the adoption was going to go through, created substantial anxiety among the parties, and had a strong impact on the ability of the adoption community to plan for permanency for children.

During the same period of time, the same legal and social conflict was occurring throughout the country. Virtually every state was reviewing its statutory construction in light of not only Stanley, but also several additional United States Supreme Court cases. See Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983).

In Minnesota, in response to the J.A.V. case as well as the other United States Supreme Court cases, interested parties and the legislature took a new look at creating a way to clarify the balance of

the interests between the parties in a way that recognized the needs of the child, the desires of the birth mother and the adoptive parents, and the constitutionally protected rights of the biological father.

After studying the issue in depth, in 1997 the Minnesota Supreme Court Task Force on Foster Care and Adoption, after reviewing various states' responses to this thorny issue, recommended the creation of a Putative Fathers' or as it is now known the Adoptive Fathers' Registry.

In response to the Task Force's recommendations, and the input of numerous groups, the legislature enacted Minn. Stat. §259.52, the Minnesota Fathers' Adoption Registry, effective for births occurring on or after January 1, 1998. The legislation, modeled after similar statutes in Illinois and Indiana, attempted to balance the child's best interests and need for permanency, with the desires of the adoptive parents, the desire of the biological mother for placement of the child into an adoptive home, and the constitutionally protected "opportunity interest" of the biological father to be involved in his child's life and object to the adoption if he desired to do that.

Of particular note in designing this statute was the United States Supreme Court decision in Lehr v. Robertson, 463 U.S. 248 (1983). That case, which specifically approved a 'registry' approach to the constitutional rights of birth fathers, identified more specifically what that constitutional right was. Specifically, the court held that "the mere existence of a biological link did not merit equivalent constitutional protection" and the "significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity" he then acquires significant protection under the Due Process Clause. However, if he fails to do so, he has lost this protection. See Lehr, 463 U.S. at 261-262.

Thus, in looking at the equities and the balancing factors, it was determined that in order to protect the rights of those fathers who actually desired to be active fathers, it was necessary to create an actual location where they could register and let their desires to be parents be known. It was critical

to the statutory scheme, that once he was registered, an adoption could not be completed without notice to the birth father that an adoption was intended.

The Department of Vital Statistics, through the Minnesota Department of Health, was given the responsibility of creating the mechanism and procedures, and to develop the forms, to be used by the biological father who wished to prevent any adoption from occurring. Once a man has timely registered on the registry, no adoption can be completed without verification that notice has been given to him. If no one has registered within the required time line, then that fact must be shown to the court, via documents generated by the Minnesota Fathers' Adoption Registry.

In addition, a significant change was made which allowed biological fathers to exert their rights prior to the birth of the child. The statute states that a man may register at any time simply by filling out a form indicating the name of the biological mother, the address where he believes she is, and where he can be contacted. For the first time, and in somewhat of a unique situation, the biological father actually can take action with respect to a child prior to the birth, in an effort to protect his "opportunity interest."

The statute also indicates that if a man desires to oppose the adoption and has not registered before birth, he must file on the Minnesota Fathers' Adoption Registry within 30 days of the birth of the child. His failure to timely register not only prevents him from objecting to the adoption, but specifically prevents him from bringing a paternity action in the family court, the issue that had been raised in the J.A.V. decision.

Further, in an effort to provide a clear procedure to be used if a man does register on the Minnesota Fathers' Adoption Registry, the legislature and the statute designated the development of uniform forms to be sent to any man registered on the registry if a child was born to the woman identified and the child was placed for adoption. Those forms are designed to specifically tell the

biological father the steps he needs to take in order to exert his rights as a father. As noted elsewhere in the statute, those steps, after receiving notice of the intent to place the child that he might have fathered, require him to do two things. First, within 30 days of his receipt of the notice, he must timely send notice of his intent to parent to the court where the adoption is to take place on a specific form provided to him. He needs to simply fill out the form and forward it off to the appropriate court, which is also identified in the material provided to him.

In addition to that, however, he must actually commence a paternity action against the biological mother within 30 days of his receipt of the notice of the intent to place the child for adoption. A failure to do either one of these two things, under the statute, may result in his losing his rights to maintain a paternity action and to object to the adoption itself. It should be noted as well, that a biological father can also begin the paternity action prior to the birth of the child to further protect his interest.

The statute further addresses those men who register late and claim some reason for having failed to do so within the time required, specifically stating that a failure to timely register initially under the registry may be justified if the biological father can show that through no fault of his own it was "not possible" for him to timely register. The statute also addresses a failure to timely initiate a paternity action after registration, giving a biological father the option of proving "good cause" for his failure to commence the paternity action in the time required. Unfortunately, the term "good cause" is not defined in the legislation, and substantial litigation has continued to develop around the question of interpreting that statutory phrase.

This becomes of even greater importance to biological fathers protecting their rights in that the statute also specifically states that his failure to know about the pregnancy itself, or the birth, or placement for adoption, is not an excuse for a failure to timely register, and thus is is not in and of

itself "good cause." Thus, the burden is on biological fathers, as identified in Lehr. Having been present at the time of conception, the burden is theirs to take action independent of any information given to them by the biological mother concerning her pregnancy or the actual birth of the child. In legal terms, this raises the question of what, if any, duty exists on behalf of the biological mother to discuss the actual fact of the pregnancy or birth with the biological father.

In the inevitable conflict of interests, the interpretation and constitutional validity of the Minnesota Fathers' Adoption Registry worked its way to the Minnesota Supreme Court in the summer of 2002. In the case of Heidbreder v. Carton, 645 N.W.2d 355 (Minn. 2002), the Minnesota Supreme Court was faced directly with new challenges to the constitutionality of the statute itself and its impact on the protected "opportunity interest" of the biological father, and the question of how strictly the terms of the statute would be interpreted.

In Heidbreder, the biological father resided in Iowa. The biological mother had also resided in Iowa for a period of time, and they in fact had lived together for a short period mid-way through the pregnancy. She left prior to the birth of the child and moved to the State of Minnesota to be closer to her mother and other relatives. She did not inform him of her location, although he was aware of some facts that might have suggested that to him. He was aware of the pregnancy and the due date. While there continued to be communication by e-mail between the biological mother and the biological father, and while he was aware specifically of the date the child was due, she refused to tell where she was. She did not specifically notify him when the child was born, although the child was actually born on the specific due date.

On the thirty-first day after the birth of the child, the biological father became aware the child had been born. Within hours he went to the Internet, downloaded the appropriate forms for the Minnesota Registry, and put the registration forms in the mail. Thus, he registered, pursuant to the

terms of the statute, within thirty-one days of the date of the birth of the child. He missed the required registration period by one day.

The Minnesota Supreme Court, in a strongly worded split decision, made several significant holdings. Initially, it held that the statute, based on several United States Supreme Court decisions including the Lehr case which had involved a putative fathers' registry, did pass constitutional muster with respect to protecting the "opportunity interests" available to the biological father.

In addition, the majority of the Court, in citing the provisions surrounding a claim of "good cause," found that there was no legal or fiduciary duty by the biological mother to notify the biological father that she was pregnant, that the child had in fact been born, or that the child had been placed for adoption. The duty in fact, and responsibility, rested entirely with the biological father, who knowing he had had sexual relations with the woman, and knowing there might be a resulting child and in this case knowing she was in fact pregnant, had the responsibility of taking action necessary to protect his interests in any unborn child.

Of critical interest also is that the majority of the Court determined that the thirty-day time period from the birth of the child for registration was an absolute 'bright line in the sand.' The fact that he had registered thirty-one days after the birth, was too late to protect his rights to object to the adoption or to begin a paternity action. He had lost his rights to maintain a paternity action or to object to the adoption by being one day late in his registration. In reviewing the language of the statute, the majority found that the legislature had not included language providing for "substantial compliance" and declined to carve out a substantial compliance exception to the 30 day requirement.

The majority in its opinion noted that any time period would result in some men being included, and some men being excluded, regardless of what that time period was. It indicated also that

there was a "good cause" exception, which could be applied by the court in the appropriate and proper circumstances. The Court concluded, however, that this was not one of those circumstances.

The dissent, in a strongly worded disagreement with the ultimate conclusion, indicated that the majority was "arrogant" in its conclusion. The majority prevailed on only on a 4-to-3 vote of the Court.

This strict interpretation of the timelines contained in the Adoptive Fathers' Registry, puts the burden on the biological father to make a decision about his desires and intent with respect to a child as quickly as possible, and to act accordingly. He does not have the luxury to wait to decide if he wants to be a father. While the statute expanded his rights from ninety days after birth under the old statute, to approximately ten months since it now includes the nine months of pregnancy under the new statute, the statute also shortened the period of time and made it absolute with respect to a failure to register after birth. His failure to timely register eliminates his ability to be involved in the life of the child in an adoption case.

In addition, the registration itself does not equal a finding of paternity. A registration by a biological father results in him being notified on the appropriate Department of Health forms that there is an intent to place the child for adoption. As stated, once he receives that notification, he now has an additional thirty-day period during which he must in fact commence the actual paternity action. If he fails to commence the paternity action after receipt of the notice, he will also lose his rights to object to the adoption or to maintain a paternity action.

In dealing with cases such as this, there are a number of pitfalls of which practitioners must be aware. Initially, of course, this statute only applies to "putative fathers" and not to legal fathers or "presumptive fathers." Within the context of the Fathers' Adoption Registry statute, there are listed those men who as a result of their circumstances are not simply "putative fathers," but might be

"presumptive fathers." A "presumptive father" under the adoption statutes has more rights with respect to notice and consent to adoption than a "putative father" and would not be covered by the Fathers' Adoption Registry. However, note also should be made of the fact that those men listed in the Fathers' Adoption Registry statute as being exempt from the registration requirements, are not identical to the men listed as "presumptive fathers" in the paternity statute. Of notable exception is the fact that while under the paternity statutes a man who has had a blood test indicating a high degree of probability of paternity, may be a "presumptive father" for paternity purposes, that same man is not excluded from the responsibility of filing under the registry in an adoption case in order to protect his rights. This distinction appears intentional on the part of the legislature. Particularly in cases where some criminal allegation of criminal sexual conduct has been made, which then resulted in blood tests, it appears to be the intent of the legislature to not elevate those men who have participated in such crimes to a level of "presumptive father" where the biological mother desires to place the child for adoption. Thus, the inconsistency between the two statutes in defining who is and who is not a "presumptive father" for purposes of adoption can be critical in some cases, and may be a concern for the criminal court as well.

In addition, as Heidbreder has demonstrated, the timelines applied by these statutes are critical, are strict, and excuses for non-compliance are not likely to be accepted lightly by the Courts. Thus, should a client present with such a situation, a practitioner is well advised to research the applicability of these statutes and move quickly to avoid missing one of these statutory deadlines.

Anyone who has worked in this area of family law knows that these cases arrive with every conceivable fact situation that can be imagined. Such issues as to the validity of the forms giving notice to a man who has already registered, the meaning of the phrase "good cause," whether or not the

statute applies if the biological father is a minor, etc. will no doubt be litigated on those individual fact situations as they arise, and indeed such litigation post-Heidbreder is already beginning to occur.

Nevertheless, the passage of the Fathers' Adoption Registry, and the strict interpretation given to the statute by the majority in the Heidbreder case, has finally given substantial structure and certainty to the procedure to be used in adoption. On the one hand it has given to biological fathers a clear procedure by which he may maintain his "opportunity interest" to a child, and by which no adoption can ever occur without him having full knowledge and notice of it.

On the other hand, the Legislature, and courts, have drawn a clear timeline indicating a time period after which the failure of the biological father to take the required action to protect his interest will result in his losing his rights to be a parent and allowing the permanent placement of the child in an adoptive home, even over his objection.

While the balancing of factors on behalf of the parties is never an easy one, given the infinite variety of factual possibilities in these relationship dynamics, the statute has given us significant stability and direction on behalf of early permanency for children.