BIRTH FATHERS' RIGHTS IN ADOPTION

A MINNESOTA PERSPECTIVE

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INTRODUCTION.

Perhaps no issue has raised such ongoing and intense questions in society as well as the legal profession and the courts as the rights of biological fathers in the various contexts relating to their relationships with their children. While these issues of biology versus psychology and rights of men versus the impact of bonding and attachment in defining children's best interests are seen in many context within the law, in few places are they as difficult to deal with on the myriad of factual basis that they exist then in the adoption arena.

More specifically, the historical context within which the courts have looked at the relationships between men and their children have shaped the ultimate ability of men to have any relationship at all. From being viewed as chattel to be dealt with as men decided to being viewed as having no relationship whatsoever with their fathers, children have often been used as the ping pong ball in the table tennis game of life. The current historical analysis and statutory structure that exists in Minnesota, and as described in the rest of this article, is merely the current solution in a long line of competing public policies, philosophical views, and statutory schemes. Whether it ultimately promotes children's best interests, depends on your own political view. Whether ultimately children need permanency and that permanency needs to be established quickly, can be debated throughout the decades. What is clear here however is that as the Minnesota Supreme Court has recently stated, the balancing of rights and responsibilities of equities and best interests of desires and needs among the competing parties is at least attempted in a constitutionally protected manner in the current statutory scheme.

I. First Things First - What Is A "Father"?

Do not assume that just because a man is believed to be the biological father of a child – even if everyone, including the birth mother, adoption agency, and adoptive parents, believes him to be the biological father –that he is entitled to any notice of an adoption, that his consent is required for a child to be adopted, or that he can block an adoption.

Rather, the law provides for several categories of fathers – and the status a man holds, i.e. in which category he is placed, is critical when considering what rights he has with respect to a child placed for adoption.

"Putative" fathers are those men who may be a child's father, but who is (1) not married to the child's mother on or before the date that the child was or is to be born, and (2) has not established paternity of the child according to section 257.57in a court proceeding before the filing of a petition for the adoption of the child. Minn. Stat. §259.21, subd. 12.

"Presumed" fathers are those men whom the law 'presumes' to be a child's father, by virtue of a statute which provides a list of those fathers entitled to the status of a presumptive father. See Minn. Stat. §257.55, subd. 1.

While the statutes are not as clear on this aspect, a child's 'legal' father is a father who is already established as the child's legal parent, such as a father who has been adjudicated as the father.

II. Who Must Consent For A Child To Be Adopted?

Pursuant to Minn. Stat. §259.24, consent is required of a child's parent if that parent is entitled to notice of the child's adoption. Therefore, the determination of who is entitled to notice of the adoption is critical – not only does that determination govern who must be given notice of the adoption, it governs who must consent to the adoption for the adoption to be actually completed.

III. Why Are Fathers' Rights Such A Concern In Adoption Cases?

With very few exceptions, when a child is placed for adoption the placement is made by the mother, and the birth mother consents to the adoption either through a consent to voluntary termination of parental rights or through a consent to adoption. However, it is quite common for birth fathers to not be involved whatsoever in the adoptive placement. When a birth father is not involved –and accordingly is not consenting to the adoption – then it is critical to determine whether the birth father is entitled to notice of the adoption, and therefore whether his consent is required, before the adoption can be completed. The more quickly this determination can be made, the better for all involved, as disrupted adoptive placements are devastating for the children, the adoptive families, and the birth mothers.

IV. Historically, Unmarried Birth Fathers Had Little, To No, Rights With Regards To Their Biological Children.

Historically, most states, including Minnesota, did not consider a putative father to hold any 'parental rights' to a child, did not require that a putative father be given notice of an adoption, and did not require a putative fathers' consent to an adoption. Heidbreder v. Carton, 645 N.W.2d 355, 363 (Minn. 2002) (citing Min. Stat. 259.24, subd. 1(a)(1971)).

Essentially, unmarried fathers historically had very little recognizable legal interest, or influence, over their biological children. This really began to change in 1972, when the United States Supreme Court issued the Stanley v. Illinois decision.

V. Eventually, The United States Supreme Court Recognized Some Rights Held By Biological Fathers With Regards To Their Offspring, However, The Level Of Protection Accorded To Biological Fathers Was Dependent Upon The Relationship The Birth Father Had Established With The Child.

A. Basic Constitutional Rights – Stanley v. Illinois and Caban v. Mohammed.

The modern concept of "birth father's rights" first really began to develop with the United States Supreme Court decision of Stanley v. Illinois. In this case, the Supreme Court considered the claim of an unmarried father who had lived with and helped to raise his three children for years. When their mother died, the state of Illinois pursuant to their statutory scheme, automatically declared the father unfit, based simply upon the fact the parents had not been married, and placed the children with other guardians. The father challenged this procedure, claiming a violation of Equal Protection.

As the Supreme Court stated, "[t]he rights to conceive and to raise one's children have been deemed 'essential' * * * 'basic civil rights of man,' * * *and rights far more precious . . . than property rights." Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citations omitted). The Supreme Court stated that "[I]t is plain that the interest of a parent in the companionship, care, custody, and

management of his or her children 'come[s] to this Court with" a respect not accorded to mere financial interests. Id. at 651 (citations omitted).

The Stanley decision, while undoubtedly a significant step in recognizing the Constitutional rights of unmarried fathers as to their children, however is in reality quite limited, particularly in any potential application to the situation of a newborn placed for adoption upon birth. The key to the Stanley decision, and therefore to the level of constitutional protection a father might enjoy as to his biological children, is the level of relationship between the birth father and the child.

The importance of the biological fathers' relationship with the child was emphasized again, and further explored, by the United States Supreme Court in Caban v. Mohammed, 441 U.S. 380 (1979). In Caban, a biological father and mother resided together, had two children, and raised them together for a time. Litigation eventually ensued, during which the biological mother and her new husband attempted to have the children adopted by her husband over the objection of the biological father. Analyzing the New York statute at issue under the Equal Protection clause, the United States Supreme Court held that in "those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child." Caban, 441 U.S. at 392. However, "where the father has established a substantial relationship with the child and has admitted his paternity," then the State can more easily locate the father, and accordingly he is more likely to have acquired protection under the Equal Protection Clause. Caban, 441 U.S. at 393.

Again, the Supreme Court indicated that the relationship the birth father established and maintained with his offspring remained as the key, as to whether the birth father developed any significant constitutional protection.

B. Constitutional Scrutiny Of A "Father's Registry" Statute

In response to Stanley and Caban, states developed different statutory schemes in regards to birth fathers. "Father's registries" began to be developed, and in 1983 the United States Supreme Court considered the constitutionality of a "father's registry" in Lehr v. Robertson, 463 U.S. 248 (1983). In Lehr, a birth father claimed that New York's registry statutes, which allowed his two-year-old daughter to be adopted by her stepfather without either his consent or notice to him, violated due process and equal protection. The New York statutes at issue in Lehr provided that birth fathers were entitled to notice of an adoption if they fit any of seven statutory categories; those categories identified men who had been actually involved with the child such as those men who had been living with the child or were on the child's birth certificate. The New York statute then also provided a father's registry, upon which a man could register his name and thereby become entitled to notice of a child's adoption. If a birth father did not meet any of the seven categories of men entitled to notice of the adoption under the New York statute, and failed to enter his name upon the fathers' registry, then under the New York statute he was not entitled to notice of the adoption and the adoption could proceed without his consent. See Lehr, 463 U.S. at 251-252.

As the Supreme Court noted in Lehr, in analyzing a due process claim the first step is to identify the nature of the interest in liberty for which a litigant is claiming protection. Lehr, 463 U.S. at 256. The Court noted that:

> The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases.
> Lehr, 463 U.S. at 256.

Quoting Justice Stewart's dissenting opinion in Caban, the Court noted that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." Lehr, 463 U.S. at 260 (quoting Caban, 441 U.S. at 397, Stewart, J. dissenting). Again, the Court

went on to analyze the relationship between a birth father and the child. The Court held that "[w]here an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'coming forward to participate in the rearing of his child,' * * * his interest in personal contact with the child acquires substantial protection under the due process clause." Lehr, 463 U.S. at 261 (citations omitted). However, the Court held that "the mere existence of a biological link does not merit equivalent constitutional protection." Id. In contrast, "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. If "he fails to do so," he has lost this protection. Lehr, 463 U.S. at 261-62.

As held in Lehr, a putative father thus has an inchoate interest in his offspring, which receives some level of due process protection; essentially a birth father is entitled to Constitutional protection of his 'opportunity' to further develop a more protected relationship. Then, as the Lehr court noted, whether a birth father had established a "significant custodial, personal, or financial relationship" with the child is significant in analyzing whether the putative father has 'grasped the opportunity' to form a relationship which acquires more significant protection under the Due Process Clause.

The Lehr court went on to state that if the statutory "scheme were likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate. Yet, * * * the right to receive notice was completely within" the control of the putative father, as all he had to do was mail a postcard to the registry. Lehr, 463 U.S. at 263-64. "The possibility that he may have failed to do so because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself." Id. As the Court noted, a "more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees." Lehr, 463 U.S. at 264. "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." Lehr, 463 U.S. at 265.

Accordingly, the Lehr decision definitively established the requirements a 'registry' statute must meet in order to withstand due process scrutiny, and further gave a clear indication that a putative father does not possess a fully-developed constitutional right to a biological child – but rather possesses an inchoate interest, and his opportunity to develop that relationship is what requires protection.

The Lehr court also considered the Equal Protection Clause in relation to the New York registry scheme. The Court again noted that "the existence or nonexistence of a substantial relationship between parent and child is relevant criterion in evaluating both the rights of the parent and the best interests of the child." Lehr, 463 U.S. at 366-67. As the putative father in Lehr had never established a "substantial relationship" with the child, then the statutes did not violate Equal Protection by denying him the ability to stop the adoption. Where "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." Lehr, 463 U.S. at 268. The Lehr court thus definitively established the application of Equal Protection to putative fathers, establishing that putative fathers do not hold the same constitutional rights with regards to a biological child, as does the biological mother.

VI. Historical Development of The Law In Minnesota

A. 60/90 Day Affidavit Requirement

From the mid-1970s, until January 1, 1998, Minnesota's statutory scheme was two-tiered. Minn. Stat. §259.49 provided a list of categories of men who were entitled to notice of an adoption; this list identified those men who had some level of actual involvement with the child, by identifying those men who had engaged in certain actions such as living with the mother and child, executing a Declaration of Parentage, etc. See, e.g., Minn. Stat. §259.49, subd. 1 (1997)

If a man was not entitled to notice under any of the categories provided in section 259.49, a man could still become entitled to notice of an adoption if he were to file, within 90 days of the child's birth or within 60 days of the child's placement with prospective adoptive parents, whichever was sooner, he filed with the Minnesota Department of Health an affidavit stating he intended to retain parental rights. Minn. Stat. §259.51 (1997).

B. The Impact Of The J.A.V. Decision By The Minnesota Supreme Court

The problem with the statutory scheme represented by Minn. Stat. §259.49 and Minn. Stat. §259.51, became apparent in In Re Paternity of J.A.V., 547 N.W.2d 374, (Minn. 1996). In J.A.V., the child was born and placed for adoption, and the 60/90 day period ran with no affidavit filed by the birth father. However, after the expiration of the 60/90 day time frame, the birth father filed his affidavit with the Department of Health, and then initiated a paternity action. Litigation ensued. The Minnesota Supreme Court held that the failure to timely file the 60/90 day affidavit did act to deny the putative father the right to notice of an adoption. However, the J.A.V. court held that a putative father could still bring, and be heard upon, a paternity action at any point up until the adoption had actually been finalized. J.A.V., 547 N.W.2d 377. The J.A.V. court held that had the Legislature intended the expiration of the 60/90 day period to not only deny a putative father the right to notice of the adoption, but to actually prohibit the putative father from asserting any interest in the child whatsoever after the expiration of that 60/90 day time period, then the Legislature "surely would have done so in language of greater clarity than we find here." Id. at 377. The result of the J.A.V. decision, therefore, was to indicate an adoption could be disrupted by a putative father filing a paternity action at any point up until the final adoption hearing.

In response to J.A.V., the Supreme Court's Task Force on Foster Care and Adoption recommended that Minnesota institute a putative fathers' registry statute, similar to that which had been enacted and upheld in Illinois. The recommendation was for a

statutory scheme, similar to the Illinois statutes, which would create a mechanism by which putative fathers could independently assert an interest in a child and become entitled to notice of an adoption, but which would also provide finality and certainty to a child and adoptive parents upon expiration of the registry time periods. Such a statutory scheme would therefore remove the risk of disrupted adoptive placements, beyond a certain time period, thereby addressing the problem created by the J.A.V. decision.

VII. Current Law In Minnesota – The Minnesota Fathers' Adoption Registry

A. The Registry Statutes

Pursuant to these recommendations, and similar to the Illinois law, Minnesota enacted what is now known as the Minnesota Father's Adoption Registry, codified at Minn. Stat. §259.52. Minnesota' statutory scheme related to birth fathers and an entitlement to notice of an adoption, remains two-tiered.

First, those fathers who fit the categories contained in Minn. Stat. §259.49, remain entitled to notice. There are several categories of men entitled to notice under section §259.49, essentially these categories are men who have taken some identifiable action with regards to the child. See Minn. Stat. §259.49, subd. 1(b).

Secondly, however, for those putative fathers who do not fit any of the categories of men entitled to notice of an adoption contained in section 259.49, the Minnesota Fathers' Adoption Registry provides a mechanism by which a putative father may, independently of any action by the birth mother, ensure he will receive notice of an adoption and the right to assert an interest in a child.

Specifically, at any time before the child's birth and up until 30 days after the child's birth, a putative father may register upon the Minnesota Fathers' Adoption Registry. Minn. Stat. §259.52, subd. 7. Registration is free, and easily accomplished by viewing and printing the forms on-line, or by calling the Registry a the Department of Health.

However, the statute provides that a putative father must register no later than 30 days after the child's birth. Minn. Stat. §259.52,

subd. 7. If a putative father is not otherwise entitled to notice pursuant to section 259.49, and he fails to register within 30 days of the child's birth, he:

> (1) is barred thereafter from bringing or maintaining an action to assert any interest in the child during the pending adoption proceeding concerning the child;
> (2) is considered to have waived and surrendered any right to notice of any hearing in any judicial proceeding for adoption of the child, and consent of that person to the adoption of the child is not required; and
> (3) is considered to have abandoned the child.

Minn. Stat. 259.52, subd. 8. The statute further provides that "lack of knowledge of the pregnancy or birth is not an acceptable reason for failure to register." Minn. Stat. 259.52, subd. 8.

Accordingly, if a putative father has failed to timely register within 30 days of the child's birth, the adoption may proceed without notice to the putative father, without his consent, and even over his objection.

The statute provides only one exception for a putative father who has failed to timely register within 30 days of the child's birth, and still desires to assert an interest in the child. Specifically, a putative father may be <u>considered</u> to have timely registered, <u>if</u> he can prove:

By clear and convincing evidence that:
(i) it was not possible for him to register within the period of time specified in subdivision 7;
(ii) his failure to register was through no fault of his own; and
(iii) he registered within ten days after it became possible for him to file.
Minn. Stat. §259.52, subd. 8.

B. Case Law Interpreting And Applying the Registry Statutes

In keeping with the statute's purpose – of balancing the rights of birth mothers, birth fathers, adoptive parents, and children placed for adoption – the Minnesota Supreme Court has applied the statutory language exactly as it was written. In Heidbreder v. Carton, 645 N.W.2d 355 (Minn. 2002), a birth father residing in Iowa registered upon the Registry on the 31st day after the child's birth. He then brought a paternity action, asserting that the statutory deadlines should not apply to him as it was not possible for him to register within 30 days of the child's birth because the birth mother had not told him where she was or what her plans were, and asserting other claims including a claim that the birth mother and adoption agency had engaged in fraud or concealment which should 'toll' the running of the Registry time periods.

The Minnesota Supreme Court concluded that the Legislature "intended not to excuse an untimely registration based on concealment of the fact of pregnancy or birth by the birth mother even if the concealment made it "not possible" for the putative father to timely register and his failure to timely register was "through no fault of his own". Heidbreder, 645 N.W.2d at 366-67. The Minnesota Supreme Court held therefore that concealment by the birth mother of facts related to the pregnancy or birth, such as her location, would not excuse a putative father's failure to timely register. Heidbreder, 645 N.W.2d at 366-67. Further, the Minnesota Supreme Court specifically refused to impose a "fiduciary duty" on an unmarried birth mother to disclose her location to a putative father, "even if she knows he wants to know her location or establish a relationship with his child." Heidbreder, 645 N.W.2d at 368. The Minnesota Supreme Court noted there is "no need to impose such a duty on the birth mother" because the Registry provides "a means for the putative father to assert his interest in his child independent of the birth mother through registration with the Minnesota Fathers' Adoption Registry." Heidbreder, 645 N.W.2d at 368. Furthermore, the Minnesota Supreme Court, in analyzing the language of the statute and the Legislature's failure to include a 'substantial compliance' exception, further "declined to carve out a substantial compliance exception to the statutory requirement that a putative father not

otherwise entitled to notice" must register within 30 days of the birth of the child. Heidbreder, 645 N.W.2d at 369.

The Minnesota Supreme court noted that "[a]doption registries serve the interests of the child and adoptive parents by establishing a clear cut-off date after which there is little risk that a putative father who has failed to timely register and who is not otherwise entitled to notice can disrupt the adoptive placement." Heidbreder, 645 N.W.2d at 369. The Court noted that while Heidbreder's registration was only one day late, his registration "cannot be treated any differently than a registration that is one week, none month, one year, or one decade late. The state cannot give a putative father an infinite amount of time to claim an interest in the child. At some point, the putative father's interest in knowing and raising his child gives way tot the child's interest in having a permanent and stable home." Heidbreder, 645 N.W.2d at 370.

Finally, the Minnesota Supreme Court went on to conclude that Minn. Stat. 259.52 is not a statute of limitations, and therefore could not be tolled by "fraudulent concealment," even if such fraudulent concealment had actually occurred. Heidbreder, 645 N.W.2d at 370.

In addressing the Constitutional issues, relying on Lehr, the Minnesota Supreme Court concluded that due process did not require recognition of Heidbreder's interest in the child as a putative father, concluding that Heidbreder had not established a "custodial , personal or financial relationship" with the child. The Minnesota Supreme Court concluded that the entire statutory scheme containing the Minnesota Fathers' Adoption Registry adequately protected Heidbreder's opportunity to form a relationship with the child, and therefore complied with the requirements of due process. Heidbreder, 645 N.W.2d at 374.

In addressing the Equal Protection issue, the Minnesota Supreme Court noted that it is "well established that the state can treat unmarried parents differently with respect to their rights in an adoption proceeding based on each parent's relationship to the child," and that where Heidbreder did not have an established relationship with the child, and where he did not avail himself of the opportunities provided to him to establish such a relationship,

equal protection did not require the legislature to give Heidbreder the same opportunity as the birth mother to block the adoption by withholding his consent. Heidbreder, 645 N.W.2d at 376-77.

The Minnesota Supreme Court, in Heidbreder v. Carton, has clearly stated that the Fathers' Adoption Registry must be applied as it was written, and that a putative father must timely register within 30 days of the child's birth in order to assert an interest in a child.

C. Do Not Assume Anything –Read The Registry Statutes Carefully To Determine Who Is Entitled To Notice.

Many practitioners assume a man is entitled to notice of an adoption – for example, a biological father who is a 'presumed' father because he has had a blood test done indicating he is the child's father. However, Minn. §257.74 states that a presumed father is entitled to notice of an adoption *pursuant to section 259.49*. Minn. Stat. §257.74, subd. 1(a) (emphasis added). Minn. Stat. §259.49 entitles only certain categories of men to notice of an adoption – and those categories are not the same as the categories of men who are 'presumed' fathers. See, Minn. Stat. §259.49, subd. 1(b) and Minn. Stat. §257.55, subd. 1. As Minn. Stat. §259.49, at least in its most recent revision, was enacted after Minn. Stat. §257.74, and as section 259.49 is more specific, it probably controls over section 257.74. Accordingly, some 'presumed' fathers may not actually be entitled to notice of an adoption.

VIII. Registration Is Only The Beginning - What Happens After Timely Registration?

Where a putative father has timely registered, within 30 days of the child's birth, that is not the end of the story. In fact the putative father must complete several more steps before he is entitled to further notice and to actually stop an adoption.

When a putative father has registered, the adoptive parents, adoption agency, attorneys, or birth mother become aware of registration in several ways. Upon registration, the Minnesota Fathers' Adoption Registry is supposed to send notice of the registration to the birth mother.

Furthermore, as the statute requires that the registry be searched before an adoption can be granted, the registry results conducted 30 days after a child's birth will demonstrate that a putative father has registered, and the date upon which the registration occurred.

Once a putative father has registered, then pursuant to Minn. Stat. §259.52, subd. 9, either the birth mother, the adoption agency, or the adoptive parents must serve the putative father, and they may do so by certified mail return receipt requested, with a "notice to registered putative father, an intent to claim parental rights form, a denial of paternity form, and a consent to adoption form pursuant to subdivision 11." Minn. Stat. §259.52, subd. 9.

Once he is served with those forms, this begins yet another 30 day period during which the putative father is required to take certain actions. Within 30 days of his receipt of these documents, the putative father must:

(1) file a completed Affidavit of Intent to Claim Parental Rights with the court administrator in the county win which the adoption petition will be filed; and
(2) initiate a paternity action.

See Minn. Stat. §259.52, subd. 10; see also Minn. Stat. §259.49, subd. 1(b)(8).

In a recent Hennepin County case, the court addressed the claims of a putative father who timely registered within 30 days of the child's birth, received the forms, timely completed and filed an Affidavit of Intent to Claim parental Rights within 30 days of his receipt of the forms, and then failed to actually initiate his paternity action by achieving service on the birth mother until 35 days after he received the forms – 5 days after the expiration of the thirty-day period. The Hennepin County court concluded that, despite the fact that the putative father's attorney had mailed a copy of the paternity complaint to the birth mother's attorney within the 30 day period, and filed a copy of the compliant with the trial court within the 30 day period, the statute was clear that the putative father must strictly comply with all time periods in order to be entitled to further notice of the adoption and to assert an interest in the child. The Hennepin County court concluded, therefore, that by failing to meet his 30 day period to initiate a paternity action, and by failing to establish sufficient 'good cause' for his failure to do so, the putative father lost the right to receive further notice, lost the right to assert an interest in the child, and dismissed his paternity action in its entirety, allowing the adoption to move forward.

As Heidbreder has already clearly established, along with the plain language of the statute, the consequences when a putative father has failed to timely register within 30 days of the child's birth -- the second and third steps, the filing of the affidavit of Intent to Claim Parental Rights, and the initiation of the paternity action within 30 days of the service of the forms, appear to be the next wave of litigation.

IX. Practical Problems With the Minnesota Fathers Adoption Registry

As the Registry is beginning to be utilized with more frequency, and as more varied fact scenarios appear, practical problems with the administration of the Registry and its provisions are appearing.

A. Deficiencies and Inaccuracies in the Department of Health Forms.

Attached hereto are copies of the forms prepared by the Department of Health to be used in serving a father who is on the Registry but who has not established paternity. The forms are the attempt by the Department of Health to accurately reflect the requirements under the law.

Unfortunately, the forms themselves are in conflict with the law. More specifically, it is clear under the law that once the man receives notice of the intent to proceed with an adoption, he has 30 days within which to both file the certificate in the county court where the adoption is to take place as well as to legally commence a paternity action. The forms unfortunately seem to indicate that whether the child is born or not when he receives notice of the intent to proceed with the adoption, he has until 30 days after the child is born in which to begin the paternity action and file the required form with the county court. This of course completely defeats the intent of the statute which is to require the biological father to decide how he is going to react within 30 days of receipt of the notice of the intent to place the child for adoption. The statute is specifically set up in order to allow this to happen prior to the birth of the child so as to allow the birth mother to make adequate plans whether those would be for adoption or to maintain custody or to give custody to the biological father. The error in the forms, can cause significant difficulties in that it, as noted, is not in conformity with the law.

In addition to that, it is the policy of the Department of Vital Statistics to simply indicate that someone has registered on the Adoptive Fathers' Registry, it will not indicate or give an opinion as to whether or not that registration occurred after the 30 days after birth. As noted further on, that then requires ongoing litigation as a result of the unwillingness of the Department of Health and the Department of Vital Statistics to reflect the fact in their response that there has been only a late registration.

B. Litigation

One of the most immediately apparent problems with the Registry, is that in some respects the Registry appears to be generating time-consuming and lengthy litigation, rather than providing the quick finality it was intended to provide.

For example, the Registry accepts a registration no matter the date. So, if a putative father registers upon the 32nd day for example, the adoptive parents must then file a motion with the court and go through litigation in order to complete the adoption. When the statute so clearly places the burden to take action – and the burden to prove any application of the exceptions to the statutory deadlines – upon birth fathers, it seems procedurally the burden, and primary costs, should be upon the putative father to address these issues. Unfortunately, with the way the Registry statute is applied, in reality the adoptive parents shoulder the burden – including the financial and emotional costs – of bringing these issues before the Court.

C. Trial Court Administration

Particularly in smaller counties, which may not have a great deal of adoption files in the first place, these cases involving actual use of the Registry may 'fall through the cracks' or may result in unexpected actions by the court administration. Some of the practical concerns, and realities, of the various actions required by the Registry statutes have not yet been worked out or thought through by all counties. As examples:

1. Some trial courts have never seen an actual Affidavit of Intent to Claim Parental Rights from a birth father. The Affidavit of Intent to Claim Parental Rights form probably arrives in the

mail without warning. By its very terms, and under the statute, that Affidavit of Intent to Claim Parental Rights, even when properly completed, does not have a trial court file number, does not reference an adoption file number or names of the child and adoptive parents, and often refers only to a birth mother's name. Adoption files, in contrast, usually are categorized by the name of the adoptive parents and the child, and do not include in the caption any reference to the birth mother's name. Without any reference to the adoptive parents or the adoption file, trial courts do not always seem to know what to actually do with this piece of paper when it has arrived – and there does not seem to be any uniform standard amongst the counties, of how to handle these documents.

2. Some of the concerns – and inconsistent practices amongst the trial courts – may include:
    i. What file number to assign to the Affidavit of Intent to Claim Parental Rights?
    ii. Is there any way to cross-reference it with adoption files to determine if it matches an adoption file? And, given the confidentiality of the proceedings, should that even happen?
    iii. Should anyone – like the birth mother – be given notice of its filing?
    iv. When the Affidavit of Intent to Claim Parental Rights form is filed –then what? What if counsel for the adoptive parents calls to see if such a form has been filed – what do the trial courts do? Do they inform them of the filing? Do they tell them of the date of the filing – which is critical, given the 30 day restriction? Do they refuse to tell anyone – including the adoptive parents - anything about the document because it's 'confidential'? If they refuse to disclose this information, how are the adoptive parents supposed to address these issues with the Court?

   While the Registry was supposed to make the process of determining if a putative father had a right to notice of an adoption – and a right to withhold consent to the adoption – easier and quicker, the practical problems in administering the Registry are becoming apparent and are in some cases actually causing costly, time-consuming litigation.

3. Furthermore, what is the trial court's obligation, or authority, with regards to the birth father? What, if anything, should the trial court administrators be doing when they receive one of these documents, or if the birth father is calling them and asking questions?
    i. What notice is the putative father entitled to – is he entitled to notice of a pre-adoptive custody order or just the adoption petitioner? And from whom is he entitled to that notice – can the trial court administrators even disclose information to him?
    ii. He is not entitled to the adoption court file number, caption (containing the adoptive parents' full names), access to the adoption file (containing confidential information in the adoption homestudy, such as income information, social security numbers, family origin discussions). However, some trial court administrators appear to be taking it upon themselves to disclose such information or court documents from the adoption to the putative father, without prior notice to the adoptive parents.

D. Selection of Adoptive Parents

In Sundboom v. Keul, the birth mother received notice from the Registry, before her child's birth, that the birth father had registered upon the Registry. The birth mother then served the birth father with the forms, by certified mail, and listed her home county of Olmsted County as the county in which the birth father should file his Affidavit of Intent to Claim Parental Rights. The adoption eventually proceeded in Washington County, and litigation ensued with the birth father. The birth father timely filed his Affidavit of Intent to Claim Parental Rights within 30 days of the child's birth in Olmsted County, but did not initiate a paternity action within the 30 day period. The trial court concluded that the birth father was entitled to notice of the adoption, exercising the discretion to require such notice pursuant to Minn. Stat. 259.49, subd. 2 (stating [I]f, in the course of the [adoption] proceedings, the court shall consider that the interests of justice will be promoted it may continue the proceeding and require that such notice as it deems proper shall be served on any person). The

Court of Appeals upheld the exercise of that discretionary notice, where the birth mother had erroneously listed Olmsted County as the county of the adoption proceedings and where the birth father had consistently exercised his desire to parent through his timely registration, timely filing of his Affidavit of Intent to Claim Parental rights, and other actions. Sundboom v. Keul, 2002 WL 1613866, * 3(Minn. Ct. App. 2002).

The Sundboom decision does demonstrate the ability of the trial court to order, in its discretion, that notice of an adoption be given. However, the circumstances of this decision involved an erroneous notice of the county in which the adoption would be filed, and that this notice occurred before the child's birth. On the basis of those unique facts, the case appears to be quite limited in its application.

The Sundboom decision does raise a practical concern – what should a birth mother do, when she has yet to select adoptive parents but desires to serve a birth father to see if he is actually going to proceed with asserting an interest in the child? The decision seems to indicate a birth mother must first select adoptive parents, and place them at risk of a disrupted adoption, before she can actually serve the birth father under the statute, because only then will she know the county in which the adoption proceedings will be located. This appears to work against the very intention of the Registry statutes – making adoptive placements as low risk as possible. Should a process be created whereby a birth mother can first serve the birth father – thereby determining if he will actually be asserting an interest in the child and stopping an adoption – before creating an at-risk adoptive placement?