St. John's Law Review

Volume 67, Winter 1993, Number 1 Article 10

DRL § 111-a: New York Court of Appeals Rules that an Unwed Father Who Does Not Know of the Existence of His Child Has No Right to Notice of State Action Terminating His Parental Rights

Annette Haselhoff

DRL § 111-a: New York Court of Appeals rules that an unwed father who does not know of the existence of his child has no right to notice of state action terminating his parental rights

Domestic Relations Law section 111-a defines the circumstances under which an unwed father has a right to receive notice that his child has been placed for adoption.[1] Although fathers denied this right have attacked this section of the DRL on both equal protection and due process grounds, the United States Supreme Court in *Lehr v. Robertson*[2] upheld the constitutionality of the statute, recognizing that unwed fathers have only a conditional right to receive notice of placement.[3] Specifically, the Court held

---

[1] DRL § 111-a(2) (McKinney 1988). Section 111-a(2) provides in pertinent part that the following persons are entitled to notice:

> (a) any person adjudicated by a court in this state to be the father of the child;
>
> (b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the social services law;
>
> (c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of the social services law;
>
> (d) any person who is recorded on the child's birth certificate as the child's father;
>
> (e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;
>
> (f) any person who has been identified as the child's father by the mother in a written, sworn statement;
>
> (g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law; and
>
> (h) any person who has filed with the putative father registry an instrument acknowledging paternity of the child, pursuant to section 4-1.2 of the estates, powers and trusts law.

Id.

[2] 463 U.S. 248 (1983).

[3] *Id.* at 261. In *Lehr*, the biological father of a child placed for adoption claimed that the adoption order was invalid because he had not been notified of the adoption proceeding. *Id.* at 250. In rejecting Lehr's claims, the Court relied on the facts that Lehr did not financially support his daughter, live with the child and her mother after the birth, appear as the

that the right to receive notice exists only when the "unwed father demonstrates a full commitment to the responsibilities of parenthood."[4]

Since the unwed father in *Lehr* knew of the existence of his child, the Supreme Court's decision left open the question of the due process rights of a father who did not know of the existence of his child and thus had no opportunity to take on parental responsibilities.[5] Recently, the New York Court of Appeals, in *Robert O. v. Russell K.*,[6] addressed this issue and held that an adoption finalized without prior notice to a biological father who was unaware of even having fathered a child did not violate the father's rights to due process and equal protection.[7]

In *Robert O.*, a biological father who asserted that he had only recently learned of his child's existence[8] sought to vacate the final order of adoption of his child ten months after the adoption was completed.[9] Upon placing the child for adoption, the biological

---

father on the birth certificate, offer to marry the mother, or register with New York's putative father registry in concluding that Lehr could have easily protected his right to be notified by registering with the Putative Father Registry. *Id.* at 265. Thus, Lehr's treatment under New York's notice statute was held constitutional on both equal protection and due process grounds. *Id.*

[4] *Id.* at 261.

[5] Supreme Court decisions thus far have decided the rights of fathers who knew of the existence of their children at the time the children were put up for adoption and have enunciated a principle of protection to those biological fathers who behave as fathers. *See, e.g.*, *Lehr*, 463 U.S. at 248 (finding father who had not established relationship with child nor filed as father in putative father registry not entitled to notice of adoption); Caban v. Mohammed, 441 U.S. 380 (1979) (determining father who had established relationship with child and acknowledged paternity must have same right to consent as mother); Quilloin v. Walcott, 434 U.S. 246 (1978) (concluding father who never sought legal or actual custody nor attempted to shoulder any responsibility over child denied veto power over adoption in "the best interests of the child"); Stanley v. Illinois, 405 U.S. 645 (1972) (holding statute presuming unfitness of father merely because not married to mother unconstitutionally violative of due process and equal protection).

[6] Robert O. v. Russell K., 80 N.Y.2d 254, 604 N.E.2d 99, 590 N.Y.S.2d 37 (1992).

[7] *Id.* at 267, 604 N.E.2d at 105, 590 N.Y.S.2d at 43.

[8] *Id.* at 260, 604 N.E.2d at 101, 590 N.Y.S.2d at 39. Robert O. and Carol A. had lived together until a disagreement caused Robert to move out. *Id.* at 259, 604 N.E.2d at 100, 590 N.Y.S.2d at 38. Subsequently, Carol discovered her pregnancy. *Id.* Not wanting Robert to believe she was attempting to coerce him to marry her, she did not tell him of the pregnancy. *Id.* Neither, however, did she conceal her pregnancy. *Id.* at 260, 604 N.E.2d at 101, 590 N.Y.S.2d at 39. Eighteen months after the birth and ten months after the finalized adoption, the couple having reconciled and married, Carol told Robert of the birth of his child. *Id.*

[9] *Id.* On October 1, 1988 Carol A. gave birth to a boy who was delivered to Russell K. and JoAnne K. on discharge from the hospital, according to prior agreement. *Id.* Carol executed a judicial consent and the adoption was finalized in May of 1989. *Id.* In March 1990,

mother had not been asked to identify the father.[10] She did, however, sign a statement asserting that no one was entitled to be notified of the adoption[11] under DRL section 111-a,[12] and that there was no one whose consent was required under DRL section 111.[13] The Family Court held that the petitioner did not have a constitutional right to notice of, or consent to, the adoption,[14] which decision was unanimously affirmed by the Appellate Division.[15]

The New York Court of Appeals, affirming the judgment of the Appellate Division, decided that an adoption finalized without notice to or the consent of an unknowing father did not violate the father's right to due process[16] or to equal protection.[17] The court

---

Robert commenced the proceeding to vacate the adoption. *Id.*

[10] *Id.*

[11] *Id.*

[12] DRL § 111-a (McKinney 1988); *supra* note 1 (text of statute).

[13] DRL § 111(1)(e) (McKinney 1988). DRL § 111(1)(e) provides in pertinent part that consent to the adoption shall be required

> [o]f the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if: (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child.

Id. DRL § 111(1)(e) was struck down by the New York Court of Appeals as unconstitutional in *In re* Raquel Marie X., 76 N.Y.2d 387, 559 N.E.2d 418, 559 N.Y.S.2d 855, *cert. denied*, 111 S.Ct. 517 (1990), after the adoption of Robert's child was finalized. *Robert O.*, 80 N.Y.2d at 261, n.1, 604 N.E.2d at 101, 590 N.Y.S.2d at 39. *Raquel Marie* had no retrospective application to *Robert O.*, but the Court of Appeals referred to it in its analysis. *Id.*

[14] *Robert O.*, 80 N.Y.2d at 260, 604 N.E.2d at 101, 590 N.Y.S.2d at 39.

[15] Robert O. v. Russell K., 173 A.D.2d 30, 578 N.Y.S.2d 594 (2d Dep't 1992).

[16] *Robert O.*, 80 N.Y.2d at 267, 604 N.E.2d at 105, 590 N.Y.S.2d at 43.

[17] *Id.* The mere fact that men aware of their fatherhood status are distinguished from those who are unaware is not dispositive of the existence of an equal protection violation. *Id.* The equal protection inquiry focuses on whether a rational relationship can be found between the statute and the state interest. *Id.*

The court in *Robert O.* did not address the gender-based aspect of the classification. Gender-based classifications generally must bear a substantial relation to a legitimate governmental interest. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that statute prohibiting beer sales to males under 21, but females under 18 violates Equal Protection).

In the context of adoption cases, the Supreme Court has allowed certain gender-based classifications. *See* Caban v. Mohammed, 441 U.S. 380, 388 (1979) (quoting *Craig*, 429 U.S. at 197). "[S]uch distinctions 'serve important governmental objectives and [are] substantially related to achievement of those objectives.'" *Id.* Moreover, in *Lehr*, the Supreme Court stated, "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 parties different legal rights." 463

found that no due process protection exists for a father's biological interest alone.[18] Writing for the court, Judge Simon explained that recognizing such a right would impinge on the state's interest in assuring speed and efficiency in finalizing adoptions as well as the mother's concern for privacy.[19] A constitutionally protected right to notice, according to the majority, arises only through some manifestation on the part of the father of his willingness to assume custodial duties.[20] Moreover, this opportunity is of limited duration and is lost if no action is taken early in the child's life and early in the adoption proceedings.[21] Finding that the petitioner had failed to manifest his willingness to take on parental responsibilities until ten months after the adoption was finalized, the court held he had no right to notice, despite his lack of knowledge of the child's existence.[22]

Rejecting the majority's absolute rule, Judge Titone, in a concurring opinion, contended that a due process inquiry entails a "sensitive balancing" of the biological parents' interests[23] against

---

U.S. at 267-68.

[18] *Robert O.*, 80 N.Y.2d at 262, 604 N.E.2d at 102, 590 N.Y.S.2d at 40. According to the majority, "[O]nly if the unwed father 'grasps the opportunity' to form a relationship with his child will the inchoate right created by biology blossom into a protected liberty interest under the Constitution." *Id.*

[19] *Id.* at 266, 604 N.E.2d at 104, 590 N.Y.S.2d at 42. Recognizing a right to notice based on biology alone would "inevitably lead to inhibiting a state's interest in prompt and efficient efforts to finalize adoption proceedings and limiting a mother's right to privacy." *Id.*

[20] *Id.* at 265, 604 N.E.2d at 104, 590 N.Y.S.2d at 42.

[21] *Id.* at 265-66, 604 N.E.2d at 104-05, 590 N.Y.S.2d at 42-43. The protected interest is "the opportunity, of limited duration, to manifest a willingness to be a parent. As *Raquel Marie* made clear, and we reaffirm today, that opportunity becomes protected only if grasped." *Id.* at 266, 604 N.E.2d at 105, 590 N.Y.S.2d at 43.

[22] *Id.* at 264, 604 N.E.2d at 104, 590 N.Y.S.2d at 42. In some situations, the court stated, the Constitution does protect a father's right to an opportunity to develop a relationship with his child. *Id.* at 262, 604 N.E.2d at 102, 590 N.Y.S.2d at 40. This right is extended only to "the unwed father who manifests his willingness to assume full custody of the child and does so promptly." *Id.* The court found that this right does not arise from biology alone. *Id.* It is submitted, however, that in ruling out the biological link, the court does not divulge the origin of this right.

[23] *Id.* at 270, 604 N.E.2d at 102, 590 N.Y.S.2d at 40. Judge Titone addressed not only the interests of the biological father, but also the privacy interests of the biological mother and concluded that "a rule which places the onus on the man to investigate whether a woman with whom he is no longer intimate has become pregnant is out of step with modern mores and the realities of contemporary heterosexual liaisons." *Id.* at 268, 604 N.E.2d at 106, 590 N.Y.S.2d at 44 (Titone, J., concurring). This rule would require men to "foist continued contact on women with whom they are no longer involved." *Id.*

See Carl Belliston, *The Putative Father's Due Process Rights to Notice and a Hearing: In re* Baby Doe, 1986 B.Y.U. L. REV. 1081, 1093 (1986) (asserting there to be basic and "unavoidable" conflict between guaranteeing notice to putative father and protecting pri-

legitimate state interests.[24] Although Judge Titone disagreed with a rule that biology alone is never enough to warrant due process protection,[25] he agreed that the court should not dismantle the ten-month-old adoption in view of the strong policy favoring finality of adoptions,[26] and termed petitioner's position "an unfortunate one."[27]

Courts adjudicating the rights of unwed fathers concededly tread through a difficult and sensitive area of competing legal interests.[28] It is submitted, however, that the majority in *Robert O.*, in balancing the state's interests of speed and efficiency in adoption proceedings with the interests of the father, failed to recognize

---

vacy of birth mother).

[24] *Robert O.*, 80 N.Y.2d at 270, 604 N.E.2d at 107, 590 N.Y.S.2d at 45 (Titone, J., concurring).

[25] *Id.* at 267, 604 N.E.2d at 105, 590 N.Y.S.2d at 43 (Titone, J., concurring). "I cannot agree that in all circumstances 'biology alone is not enough to warrant constitutional protection.' " *Id.* Judge Titone stated that "due process principles *may* give unmarried fathers the right to an opportunity to develop relationships with their biological children." *Id.* at 269-70, 604 N.E.2d at 107, 590 N.Y.S.2d at 45 (Titone, J., concurring) (emphasis added).

[26] *Id.* at 267, 604 N.E.2d at 105, 590 N.Y.S.2d at 43 (Titone, J., concurring). Judge Titone reasoned that strong public policies favoring finality of adoptions clearly outweigh the interest of a biological father who has been "deprived of the opportunity to 'manifest and establish his parental responsibility' towards the child." *Id.* (quoting *In re* Raquel Marie X., 76 N.Y.2d 387, 409, 559 N.E.2d 418, 428, 559 N.Y.S.2d 855, 865, *cert. denied*, 111 S.Ct. 517 (1990)). At some point the matter must be considered "irrevocably closed, so that the parties can go forward with their lives." *Robert O.*, 80 N.Y.2d at 269, 604 N.E.2d at 106, 590 N.Y.S.2d at 44. Finality is also deemed important not simply to provide the child with a stable home but also to resolve the legal rights of the parties involved; for example, rights of inheritance and to governmental benefits. *Id.*

[27] *Id.* at 270, 604 N.E.2d at 104, 590 N.Y.S.2d at 42. "[T]hrough no fault of his own, he has been deprived of the 'blessings of the parent-child relationship' and even the opportunity of developing such a relationship." *Id.* (quoting Lehr v. Robertson, 463 U.S. 248, 262 (1983)).

[28] *Robert O.*, 80 N.Y.2d at 264, 604 N.E.2d at 104, 590 N.Y.S.2d at 42. The parental right to conceive and raise a family, a right implicated when a child is placed for adoption without the consent of both parents, has traditionally been highly revered. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (terming right "essential"); Skinner v. Oklahoma, 316 U.S. 535, 541 (1941) (labeling right to procreate one of "basic civil rights of man"); May v. Anderson, 345 U.S. 528, 533 (1953) (identifying right to conceive and raise family as "right more precious . . . than property rights"). "The intangible fibers that connect parent and child . . . are woven throughout the fabric of our society, providing it with strength, beauty and flexibility." *Lehr*, 463 U.S. at 256.

Conversely, the state has a recognized interest in the speed and efficiency of adoption proceedings, *Robert O.*, 80 N.Y.2d at 266, 604 N.E.2d at 104, 590 N.Y.S.2d at 42, protecting adoptive parents, *Lehr*, 463 U.S. at 266, and ensuring that the effects of state intervention are in the best interests of the children. Chapsky v. Wood, 26 Kan. 650, 653-54 (1881). Additionally, in *Robert O.*, the court recognized the privacy interest of the unwed mother. 80 N.Y.2d at 266, 604 N.E.2d at 104, 590 N.Y.S.2d at 42 (citing *Lehr*, 463 U.S. at 261).

the interest of the child in forming a relationship with his or her natural parents. Moreover, the Court of Appeals, in reaching its decision, failed to examine crucial language in prior Supreme Court precedents.

In deciding the scope of protected parental interests, the "best interests" of the child are necessarily implicated.[29] Yet, in stating that "the biological link of the father is insufficient to create a constitutionally protected interest,"[30] the court devalued the father's unique biological link without considering the *child's* fundamental interest in establishing a relationship with the biological father.[31] In spite of happy adoptive homes, children deprived of a relationship with their natural parents may feel rejected by those parents[32] and face difficulty adjusting.[33] Such children may also feel isolated

---

[29] McGaffin v. Roberts, 479 A.2d 176, 183 (Conn. 1984) (quoting Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977)) ("[T]he crucial issue [in determining parental rights] is the best interest of the child. The constitutional concerns are not entirely parental because the preservation of the family integrity 'encompasses the reciprocal rights of both parent[s] and children.' "), *cert. denied*, 470 U.S. 1050 (1985).

[30] *Robert O.*, 80 N.Y.2d at 265, 604 N.E.2d at 104, 590 N.Y.S.2d at 42 (citing *Lehr*, 463 U.S. at 261).

[31] *See* Rebecca L. Steward, Note, *Constitutional Rights of Unwed Fathers: Is Equal Protection Equal for Unwed Fathers?*, 19 SW. U. L. REV. 1087, 1107 (1990). "[C]hildren have a fundamental interest in a relationship with their father." *Id.*

[32] *See* ARTHUR D. SOROSKY ET AL., THE ADOPTION TRIANGLE: THE EFFECTS OF THE SEALED RECORD ON ADOPTEES, BIRTH PARENTS AND ADOPTIVE PARENTS 87 (1978). Telling an adopted child that he or she was chosen for adoption by the adoptive parents implies to the child that "the birth parents cruelly rejected or deserted him/her, leading to feelings in the child of mistrust of adults and of being unloved and unwanted, which in many cases persisted into later life." *Id.* "Since information about the birth father is not usually provided . . . his child can develop only one of two images of him: (a) the feeling that something is wrong with him and that he is the villain . . . ; or (b) no image at all, as if the child had only one birth parent." *Id.* at 49. There may be a traumatic effect on children due to rejection by their natural parents. *See, e.g.*, *In re* Tachick, 210 N.W.2d 865, 870 (Wis. 1973) ("[T]his is true in all cases where the parental rights have been terminated and where the parents have voluntarily given up the child.").

[33] *See* Robert S. Rausch, Note, *Unwed Fathers and the Adoption Process*, 22 WM. & MARY L. REV. 85, 105-06 (1980). A child's desire to be wanted and loved has been termed a "primal need," without which a child may "lack self-confidence and self-esteem." *Id.*; SOROSKY, *supra* note 32, at 113. One commentator has asserted that

> [a]dopted youngsters, both male and female, may demonstrate a compulsive urge to procreate, thus providing them with their first contact with a blood relative. This can lead to a pregnancy at a very early age, conceived within or outside of marriage. For some, the pregnancy may serve as a means of disproving fears about hidden genetic anomalies.

Id. "Adoptees are also seen as more vulnerable to the experience of loss, abandonment, or rejection than non-adoptees." *Id.* at 101. *See* Alan M. Levy, *Father Custody, in* EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW 100, 107 (Diane H. Schetsky et al. eds., 1985) (quoting J. Herzog, *On Father Hunger: The Father's Role in the Modulation of Aggressive*

from their origins,[34] many to the extent that they feel a strong need to find their natural parents.[35] Adopted children may also lack access to crucial medical information of which only a natural parent would be aware.[36]

The New York Court of Appeals, in *Robert O.*, also failed to reconcile its decision with critical language of the Supreme Court in *Lehr*: "When an unwed father demonstrates a full commitment to the responsibilities of parenthood . . . his interest . . . acquires substantial protection under the Due Process Clause . . . . [b]ut the mere existence of a biological link does not merit *equivalent* constitutional protection."[37] The use of the word "equivalent" implies that the Constitution provides *some right* based on biology alone,[38]

Drive and Fantasy, in FATHER AND CHILD (S. Cath et al. eds., 1982)). "It appears from newer work that the father is also crucial in the formation of the child's sense of self and consolidation of core gender identity." *Id.*

[34] *See* John L. Hill, *What Does It Mean to be a "Parent?" The Claim of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 403 (1991) (arguing child's lack of knowledge of biological identity will result in child feeling "a sense of psychological rootlessness"). One commentator has noted that although normally one is not particularly cognizant of one's genealogy, since it is accepted as a matter of fact, adoptees' lack of knowledge about their birth parents and ancestors can cause maladjustment. SOROSKY, *supra* note 32, at 113. The adoptee's predicament has been termed "genealogical bewilderment," which is a state of confusion and uncertainty. *Id.*

[35] *See* Teanna W. Neskora, *The Constitutional Rights of Putative Fathers Recognized in Louisiana's New Children's Code*, 52 LA. L. REV. 1009, 1042 (citing Bernard Gauzer, *Who Am I?*, PARADE MAGAZINE, Oct. 27, 1985, at 26; Elizabeth Taylor, *Are You My Mother?*, TIME, Oct. 9, 1989, at 90). It has been noted that although society may applaud "adoptions of children who otherwise would not have a home, one needs only to read the popular press to recognize that in spite of happy adoptive homes, many adopted children have a strong need to find their biological parents." *Id.*; SOROSKY, *supra* note 32, at 105. Although adolescence is an exceptionally trying time for adoptees, as genealogical concerns become more of an issue, the consensus is that certain stages and experiences in the adoptee's life tend to pique the curiosity in genealogy throughout the adoptee's lifetime. *Id.* at 114, 141-42.

[36] *See* D. Marianne B. Blair, *Lifting the Genealogical Veil: A Blueprint for Legislative Reform of the Disclosure of Health-Related Information for Adoptions*, 70 N.C. L. REV. 681 (1992). Many adoptive children have failed to receive critically needed medical attention because information known only by a natural parent was not available to them. *Id.*

[37] Lehr v. Robertson, 463 U.S. 248, 261 (1983) (emphasis added).

[38] *See* John R. Hamilton, *The Unwed Father and the Right to Know of His Child's Existence*, 76 KY. L.J. 949, 978 (1987-1988).

> The Court did *not* say that unwed fathers [who have only the biological link] have *no* constitutionally protected interest in the relationship with their children. Moreover, if the statement in question was interpreted to mean that such a biological link is accorded no protection under the Constitution, this would be inconsistent with the statements [in *Lehr*] discussing "the *significance* of the biological connection."

Id. (quoting *Lehr*, 463 U.S. at 262). It should be recognized that the biological link gives rise to some constitutional protection, although less than were there a developed relationship

although less substantial than if a father-child relationship had been developed.[39] The Court also stated in *Lehr* that "if this [notice] 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."[40] The unknowing father is clearly not in the position to ensure himself of notice under DRL 111-a since in order to secure a right to receive notice, by establishing a relationship with a child or by filing with the putative father registry, a man would first have to know of his status as a father.

The concurring opinion, although recognizing a right based on biology alone,[41] also undervalued the relationship between father and child. It may be said that Judge Titone's "sensitive balancing" of the interests of the parties[42] in effect "balances away" any practical value to the father of having such a right[43] since this right is extinguished if not asserted prior to the finalization of the adoption, an order likely to occur before the father even knows of the existence of his child.[44] The concurrence also neglected to "balance

---

between father and child. *Id.* at 979.

[39] *See Lehr*, 463 U.S. at 262 n.18. In *Lehr*, unlike *Robert O.*, the father knew of the existence of the child. *Id.* at 252. Therefore, in deciding that a natural father who played a substantial role in the rearing of his child has a greater claim to protected rights than a mere biological father, the Supreme Court did not need to "take sides in the ongoing debate . . . over the relative weight to be accorded biological ties and psychological ties." *Id.*

[40] 463 U.S. at 263-64. The facts of *Lehr* did not implicate the issue of the due process rights of an unknowing father, but rather the rights of a knowing father who had failed to register with New York's putative father registry. *Id.* at 262.

[41] Robert O. v. Russell K., 80 N.Y.2d 254, 267, 604 N.E.2d 99, 105, 590 N.Y.S.2d 37, 45 (1992) (Titone, J., concurring).

[42] *Id.* at 270, 604 N.E.2d at 107, 590 N.Y.S.2d at 45 (Titone, J., concurring).

[43] *Id.* at 270-71 n.*. Judge Titone insisted that his difference with the majority position is not simply how the father's rights are labeled. *Id.* He found that the father's interest is outweighed by society's interest in the *finalization* of the adoption. *Id.*

The "balancing" discussed by Judge Titone in his concurring opinion looks to the state's interest in finality as the weight of the decision not to undo the adoption. *Id.* This, however, violates the premise that the state cannot violate a father's rights for a period of time and then rely on child's best interests to justify the complete termination of these rights. *See Recent Developments: Family Law—Unwed Fathers' Rights—New York Court of Appeals Mandates Veto Power Over Newborn's Adoption for Unwed Father Who Demonstrates Parental Responsibility*, 104 HARV. L. REV. 800, 806 n.45 (1991) (citing *In Re* Baby Girl Eason, 358 S.E.2d 459, 463 (Ga. 1987)). It has been noted that "[t]he unwed father has a constitutionally protected interest which cannot be denied him through state action. Only the state can alter its action to prevent the development of a parent-child relationship with adopting parents until the unwed father's rights are resolved." *Id.*

[44] *See* Stacy L. Hill, *Putative Fathers and Parental Interests: A Search for Protection*, 65 IND. L.J. 939, 941 (1990). It has been noted that the court "has granted constitutional

in" the child's interest in knowing his father.[45]

Although the right to notice cannot be absolute,[46] it is submitted that courts should inquire of the mother to determine the identity of the father,[47] or, at a minimum, attempt notice by publication.[48] By placing the onus on the mother to reveal the identity of the father, rather than on the father to discover the birth of his

---

protection only to those putative fathers who have established an actual relationship with their children. This places an almost insurmountable burden on the interested father who never had an opportunity to develop a relationship with his child." *Id.*

[45] *See supra* notes 31-36.

[46] *See* Belliston, *supra* note 23, at 1091. The due process right to notice is not absolute, however, and the Supreme Court has endorsed a flexible, non-technical standard. *Id.* at 1091-92.

[47] *See* Rausch, *supra* note 33, at 129 (recommending meaningful notice be provided to possible fathers, identifying mother but not child). It has been suggested that "because the interests of a third person, the child, are at stake, the issue of disclosure is broader than individual policy. The embarrassment . . . to certain unwed mothers . . . is outweighed by the interest of protecting the rights of genuinely concerned fathers." *Id.*

[48] *See* Hamilton, *supra* note 38, at 1001-09 (concluding father has right to know of birth of his child, and proposing statute requiring notice). Section 3 of the UNIFORM PUTATIVE AND UNKNOWN FATHER ACT provides in part:

> (d) If, at any time in the proceeding, it appears to the court that there is a putative father of the child who has not been given notice, the court shall require notice of the proceeding to be given to him in accordance with subsection (b).
>
> (e) If, at any time in the proceeding, it appears to the court that an unknown father may not have been given notice, the court shall determine whether he can be identified. That determination must be based on evidence that includes inquiry of appropriate persons in an effort to identify him for the purpose of providing notice. The inquiry must include:
>
> > (1) Whether the mother was married at the probable time of the conception of the child or at a later time;
> >
> > (2) Whether the mother was cohabiting with a man at the probable time of conception of the child;
> >
> > (3) Whether the mother has received support payment or promises of support, other than from a governmental agency, with respect to the child or because of her pregnancy;
> >
> > (4) Whether the mother has named any man as the biological father in connection with applying for or receiving public assistance; and
> >
> > (5) Whether any man has formally or informally acknowledged or claimed paternity of the child in a jurisdiction in which the mother resided at the time of or since conception of the child or in which the child has resided or resides at the time of the inquiry.
>
> . . . .
>
> (g) If, after the inquiry required by subsection (e), it appears to the Court that there may be an unknown father of the child, the court shall consider whether publication or public posting of notice of the proceeding is likely to lead to actual notice to him. The court may order publication or public posting of the notice only if, on the basis of all information available, the court determines that the publication or posting is likely to lead to actual notice to him.

UNIFORM PUTATIVE AND UNKNOWN FATHERS ACT, 9B U.L.A. 16 (1988).

child, the mother's privacy interest may be better served[49] as would the father's and child's interest in developing their relationship. Furthermore, in those unavoidable instances in which the adoption has been finalized without notice to the unknowing father, the court should conduct a hearing to determine the "best interests" of the child.[50] In the proper circumstances, the court might consider an open adoption of the child,[51] a right to visitation for the natural father, or joint custody between the adoptive parents and the natural father.[52]

The New York Court of Appeals, in *Robert O.*, refused to recognize the value of the biological link between father and child. Despite the various alternatives recognized by states and commentators, the court chose to deny the unknowing father any right to notice of adoption based on his biological link alone, a rule that is not only one-sided but also shortsighted.

Annette Haselhoff

---

[49] *See* Robert O. v. Russell K., 80 N.Y.2d 254, 268, 604 N.E.2d 99, 106, 590 N.Y.S.2d 37, 44 (1992); *supra* note 23.

[50] *See* Belliston, *supra* note 23, at 1091. It has been argued that because the extent of the father's interest is so very fact-sensitive, the right to notice and the opportunity to be heard "should be absolute to ensure that all relevant factors are brought to light." *Id.*

[51] Some commentators have advanced that a putative father be able to press for an open adoption of his child. *See* Carol Amadio & Stuart L. Deutsch, *Open Adoptions: Allowing Children to "Stay in Touch" With Blood Relatives*, 22 J. FAM. L. 59, 60 (1983-84). An open adoption may be a method by which "biological bonds," "psychological parentage," and "status of the family unit" can be balanced to define "best interests." *Id.* It has been noted that an "open adoption provides an alternative to an avoidance of legal procedures that serve to formally sever all ties in a manner that alienates a father who may provide some sense of identity for the child." *Id.*; Gayle Wintjen, Note, *Make Room for Daddy: A Putative Father's Rights to His Children*, 24 NEW ENG. L. REV. 1059, 1093 (1990). Such an arrangement benefits the putative father and child equally. *Id.*

[52] *See* Wintjen, *supra* note 51, at 1090. The inconsistencies of the law in this area have been highlighted by the question, "If the courts are willing to declare joint custody as a viable option in divorce, why isn't it also a viable option for putative fathers?" *Id.* It has been asserted that "[s]o long as a putative father has attempted in good faith to form a parental relationship with his child, there is no reason why he should be denied visitation or custody, a right inherent to any other natural father." *Id.* at 1093; *see also The Emerging Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581, 1589 (1972) (putative father's visits "might instill in the child a sense of his father's love. The father may be able to develop desirable qualities in the child that the mother cannot."). "[T]he father should be able to impart to the child his character traits and to develop interests in the child which the mother may be uninterested, unwilling, or incapable of developing . . . ." *A Father's Right to Visit His Illegitimate Child*, 27 OHIO ST. L.J. 738, 741-42 (1966).