Notes

UNWED FATHERS AND THEIR NEWBORN CHILDREN PLACED FOR ADOPTION: PROTECTING THE RIGHTS OF BOTH IN CUSTODY DISPUTES

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The case of Baby Jessica[1] and the ensuing interstate custody dispute has brought the issue of unwed, or putative fathers'[2] rights in adoption to the public's attention. Heated debates are occurring on all fronts, from the courtroom to the dinner table, as to how the disputes between unwed fathers and prospective adoptive parents should be resolved. "Biological," or parental, rights[3] and the child's "best interest"[4] are the buzzwords used to describe the two extremes of the spectrum of solutions that have been used to resolve custody disputes between unwed fathers and adoptive parents.[5] Different courts are using different solutions to resolve these disputes and are reaching inconsistent

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1. *In re* Baby Girl Clausen, 502 N.W.2d 649 (Mich. 1993), *stay denied sub nom.*, DeBoer v. DeBoer, 114 S. Ct.. 1 (1993), *stay denied*, 114 S. Ct.. 11 (1993).

2. Although § 1 of the Putative and Unknown Fathers Act defines "putative" and "unknown" fathers slightly differently, the terms will be used interchangeably for the purposes of this Note. Unif. Putative and Unknown Fathers Act § 1, 9B U.L.A. 54 (1994).

3. Biological or parental rights standards assume that the child's best interest is served by being placed in the custody of the natural parent, absent some showing that the natural parent is unfit. If a parent is not shown to be unfit, courts following this standard automatically place the child with the biological parent regardless of any other circumstances that could be considered. Sheppard v. Sheppard, 630 P.2d 1121, 1128 (Kan. 1981); Gregory S. Hilderbran, Case Comment, *In re Baby Girl Eason: Balancing Three Competing Interests in Third Party Adoptions*, 22 GA. L. REV. 1217, 1234 (1988).

4. The best interest of the child standard is generally a totality of the circumstances test which considers all factors that may have a bearing on which parents, biological or adoptive, would best serve the child's interests. Suzette M. Haynie, Note: *Biological Parents v. Third Parties: Whose Right to Child Custody is Constitutionally Protected?*, 20 GA. L. REV. 705, 707 (1986). In making the determination under this standard, claims of competing "parents" are considered on equal footing. Hilderbran, *supra* note 3, at 1234.

5. State courts have used a variety of tests to resolve these disputes. One is a pure "best interest" test, *see* Haynie *supra* note 4, and another is a strict biological presumption or "parental fitness" standard, *see* Hilderbran, *supra* note 3. "Between the parental fitness standard and the best interest of the child standard are a variety of rebuttable presumption standards...premised on the belief that custody by the natural parent usually serves the child's best interest," but allowing the adoptive parents to offer evidence to the contrary. Hilderbran, *supra* note 3, at 1235. "These standards are distinguishable only by the nature and degree of evidence necessary to succeed in the rebuttal." *Id.* For a discussion of the different rebuttable presumption standards, see Haynie, *supra* note 4.

results[6] thus causing protracted litigation.[7]

To remedy the disparity among courts, this Note proposes a two-tiered solution for resolving custody disputes such as that in the Baby Jessica case which can be uniformly implemented by all courts.[8] By uniformly implementing the proposed solution, courts will protect the rights of biological fathers, adoptive parents and especially the children caught in the middle of these disputes. Moreover, a uniform system for deciding custody disputes between unwed fathers and adoptive parents will also prevent forum shopping in interstate adoption cases.[9]

The situation of Baby Jessica and the one to be addressed in this note is that of a newborn placed for adoption when the biological father is unaware of the child's existence due to deception or concealment by the biological mother. Part I of this Note summarizes the United States Supreme Court cases dealing with the rights of unwed fathers, revealing how little guidance the Court has given for adoptions involving newborns and biological fathers who are unaware of their child's existence.[10] Part II uses two similar cases to illustrate the extreme divergence in the methods used and results achieved in resolving custody disputes between unwed fathers and prospective adoptive parents.[11] One of these cases[12] illustrates how the expectation of different results in different state courts leads to forum shopping and unnecessary delays in the determination of the child's future. The other case[13] will illustrate how even within the same state, when two different courts use two different methods, the same delays occur. Part III will discuss the proposed two-tiered approach to resolving custody disputes between biological fathers and prospective adoptive parents.[14]

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6. *See infra* notes 89–155 and accompanying text.

7. *See infra* notes 151 & 155 as to how such protracted litigation can be seriously harmful to the child's well being.

8. It is commonly noted that the "[w]hile the laws of the fifty states may vary as to the substantive rules in custody determinations..." consistency in the application of the laws would serve to prevent some of the injustice inherent in custody litigation. *In re* Baby Girl Clausen, 502 N.W.2d 649, 660 (Mich. 1993).

An area of great concern here, however, is how to achieve consistency among the states. It has been noted that "[a]lthough uniformity in state adoption law is in theory a desirable objective, efforts at achieving uniformity in state adoption law have thus far failed." William M. Schur, *Adoption Procedure, in* 1 ADOPTION LAW AND PRACTICE 4–1, 4–13 (Joan H. Hollinger ed., 1993). Uniform adoption laws have generally been met with resistance although several states have adopted uniform and model acts and other states have adopted portions of them. *Id.* In light of the fact that Congress has been increasingly willing "to become involved in the fields of domestic relations in general and adoption in particular" consideration should be given to the possibility of federal legislation regulating adoption procedures. *Id.* at 4–49. "[B]ecause of the mobile nature of American families, because many adoptions involve interstate and international transactions, and because there is a widespread belief that weak state legislation permits abusive adoption practices in interstate and international adoptions, there have been calls for federal legislation...." *Id.* at 4–30.

9. It has been noted that "the lack of uniformity in state law leads to considerable pressure to engage in forum shopping. Results achievable under the laws of one state may not be possible in another. Efforts to regulate adoption in states which have enacted strong regulatory laws have been undermined by laws and practices in other states which have little or no effective regulation." *Id.* at 4–1, 4–12 (footnote omitted).

10. *See infra* notes 16–88 and accompanying text.

11. *See infra* notes 89–155 and accompanying text.

12. *In re* Baby Girl Clausen, 502 N.W.2d 649 (Mich. 1993).

13. *In re* Petition of John Doe and Jane Doe to Adopt Baby Boy Janikova, 638 N.E.2d 181 (Ill. 1994).

14. *See infra* notes 156–180 and accompanying text.

Finally, part IV argues that no matter what method is adopted, it must incorporate procedures to ensure fast, efficient, and final resolutions.[15]

I. THE EVOLUTION OF UNWED FATHERS' RIGHTS THROUGH SUPREME COURT DECISIONS

Historically, putative fathers have been virtually ignored by the law. These fathers have been afforded few, if any, rights to their biological children born out of wedlock.[16] In 1972, however, the Supreme Court began to recognize and to expand the rights of unwed fathers.[17] Although none of the Supreme Court cases address the issue of a newborn placed for adoption when the biological father is unaware of the child's existence, a brief overview of the cases will show the current status of unwed fathers' constitutional rights.[18]

A. Expansion of Putative Fathers' Rights in the Supreme Court

1. Stanley v. Illinois

In *Stanley v. Illinois,*[19] the Supreme Court first recognized that putative fathers do have "at least minimal parental rights" to their illegitimate children.[20] Although not married, Peter Stanley lived with his children and their natural mother until the mother's death.[21] Upon the mother's death, because Stanley was an unwed father, the children were declared wards of the state.[22] The Illinois law in place at that time provided the guidelines for removing children from the home. The law differed, however, in the treatment of married parents and unmarried mothers and the treatment of unwed fathers. Where neglect was at issue, in order to take children out of the parent's home, the Illinois law[23] required notice, a hearing, and proof of the parent's[24] unfitness.[25] In the case of unwed fathers, however, Illinois law merely presumed children had no surviving parent or guardian and the children thus became

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15. *See infra* notes 181–198 and accompanying text.

16. *See generally* Hilderbran, *supra* note 3; Stacy Lynn Hill, Note: *Putative Fathers and Parental Interests: A Search for Protection*, 65 IND. L.J. 939 (1990); Donald L. Swanson, Note: *The Putative Father's Parental Rights: A Focus on "Family"*, 58 NEB. L. REV. 610 (1979); Joan H. Hollinger, *Consent to Adoption, in* 1 ADOPTION LAW AND PRACTICE 2–1 (Joan H. Hollinger ed., 1993).

17. Stanley v. Illinois, 405 U.S. 645 (1972) (first United States Supreme Court case to address the rights of unwed fathers). It should be noted, however, that at least one commentator believes that the Supreme Court cases have done little to change putative fathers' rights. Hill, *supra* note 16, at 942.

18. The Supreme Court cases that address the rights of unwed fathers all involved fathers of older children. Also, the fathers in these cases were all aware of their child's existence.

19. 405 U.S. 645 (1972).

20. Hill, *supra* note 16, at 943.

21. *Stanley*, 405 U.S. at 646.

22. *Id.*

23. The Illinois law applicable in 1972 was the Illinois Juvenile Court Act: ILL. REV. STAT. ch. 37, para. 702–5 & 701–14; ch. 106 3/4, para. 62 (1967).

24. The Illinois statute in effect at the time excluded unwed fathers from its definition of "parent." Included in the term "parent" were "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includ[ed] any adoptive parent." Stanley v. Illinois, 405 U.S at 650.

25. *Id.* at 650.

wards of the state.[26]

In finding the Illinois law unconstitutional,[27] the Supreme Court recognized that even an unwed father has rights in his children[28] and family[29] which deserve due process protection. It held that Stanley, like all other parents, was entitled to a hearing on his fitness before his parental rights could be terminated.[30]

Although the Court found that an unwed father had rights that deserved protection, its holding was limited to circumstances in which a *de facto* family and an established relationship existed.[31] The Court did not recognize an unwed father's rights based solely on the biological relationship between a father and his children, but rather recognized an unwed father's rights based on his biological relationship *and* the existence of an established family relationship.

2. Quilloin v. Walcott

The decision in *Stanley*[32] was held not to apply in *Quilloin v. Walcott*[33] where the father had not demonstrated any of the normal responsibilities attached to the notion of parenthood.[34] In *Quilloin*, the biological father had never married or lived with the child and the child's mother.[35] He never had or sought legal custody of the child and had never filed a petition to legitimate[36] the child until eleven years after her birth, when her stepfather sought to adopt her.[37]

In allowing the adoption to proceed, the Court took note of the fact that the child had lived with her mother and stepfather since she was almost three years old.[38] The adoption would, in effect, serve to give "full recognition to a family unit already in existence...."[39]

Because the Court relied on an existing family relationship in both

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26. *Id.* at 649.
27. *Id.* at 658 ("contrary to the Equal Protection Clause").
28. The Court recognized the "interest of a parent in the companionship, care, custody, and management of his or her children...." *Id.* at 651, and noted that the "interest ... of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id.*
29. The Court noted that "the integrity of the family unit has found protection in the Due Process Clause...." and that the law has not "refused to recognize those family relationships unlegitimized by a marriage ceremony." *Id.*
30. *Id.* at 649.
31. *Id.* at 657–58.
32. 405 U.S. 645 (1972).
33. 434 U.S. 246 (1978).
34. "[H]e has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." *Quilloin*, 434 U.S. at 256.
35. *Id.* at 247.
36. The process of legitimating a child is usually a statutory procedure which legalizes the status of an illegitimate child thus putting the child on the same legal footing as children born in wedlock. BLACK'S LAW DICTIONARY 901 (6th ed. 1990).
37. *Quilloin*, 434 U.S. at 249–50.
38. The child was born in December 1964 and her mother and stepfather were married in September 1967. The child, who was eleven when the dispute arose, had thus lived with her mother and stepfather for eight years. *Id.* at 247.
39. *Quilloin*, 434 U.S. at 255.

Stanley[40] and *Quilloin*,[41] it was clear, at this point, that constitutional protection would not be afforded a putative father on the mere existence of a biological link. There must also be "some affirmative action by the putative father to acknowledge and accept his responsibilities."[42] The biological father must also "act" like a father.[43]

3. Caban v. Mohammed

In *Caban v. Mohammed*,[44] the Supreme Court reaffirmed its position in the previous two cases by requiring some form of established relationship between the unwed father and his child to warrant any form of constitutional protection of the father's parental rights.[45]

In *Caban*, the biological father, Caban, and the children's mother, Mohammed, had lived together out of wedlock for several years until Mohammed moved out.[46] After the breakup, they both developed other relationships and were subsequently married. Mohammed and her husband filed a petition to adopt the children against which Caban and his wife cross-petitioned in an attempt to adopt the children themselves.[47] The New York statutory scheme then in existence differentiated between the rights of unwed mothers and unwed fathers in terms of their rights to consent to adoption.[48] Mohammed was allowed to block Caban's petition merely by withholding her consent.[49] Caban, on the other hand, could not block Mohammed's petition unless he could show that the adoption was not in the child's best interest.[50] Consequently, Mohammed and her husband received custody and the adoption petition was granted. At this point, all rights that Caban had to the children were terminated.[51]

The Court found the New York statutory scheme to be unconstitutional[52] and thereby recognized that "an unwed father may have a relationship with his

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40. Stanley had lived with the children and their mother continuously until her death. Stanley v. Illinois, 405 U.S. 645, 646 (1972).

41. The Court placed great emphasis on the *de facto* family that existed between the child, her mother, and her stepfather. *Quilloin*, 434 U.S. 246.

42. Hill, *supra* note 16, at 949.

43. "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' (citation omitted), his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he 'act[s] as a father toward his children.'" Lehr v. Robertson, 463 U.S. 248, 261 (1983).

44. 441 U.S. 380 (1979).

45. *See* Hill, *supra* note 16, at 949.

46. *Caban*, 441 U.S. at 382.

47. *Id.* at 383.

48. *Id.* at 384.

49. *Id.*

50. *Id.*

51. The Uniform Adoption Act notes that the effect of a final adoption decree is to cut off all ties to the natural parent or family. Unif. Adoption Act § 14, 9 U.L.A. 11, 58 (1971). As noted in the comment to § 14, "The termination of relationship of parent and child between the adopted person and his natural parents and the family of the natural parents follows the trend of modern statutes and is desirable for many reasons. It eases the transition from old family to new family by providing for a clean final 'cutoff' of legal relationships with the old family." *Id.* at 59.

52. The statute was struck down because of its impermissible distinction between unwed mothers and unwed fathers in Caban's situation. *Caban*, 441 U.S. at 394.

children fully comparable to that of the mother."[53] The Court thus developed the rule that where the father has assumed parental responsibilities for the child and maintains a continuing relationship with the child, he must be given the same rights in adoption proceedings as the mother.[54] The Court again made the distinction between an unwed father who asserts his rights and one who does not.[55] This distinction by the Court can only be held to apply, however, in cases where the child is beyond the infancy stage and the father would thus have had the chance to develop a relationship with the child or to assume responsibilities for her day to day needs.[56] This holding cannot be applied in the case of a father whose newborn child is placed for adoption before he has the chance to develop a relationship.

4. Lehr v. Robertson

In a later case, *Lehr v. Robertson*,[57] the Court extended its analysis in a situation where a putative father had not established a relationship with his child. Lehr had not lived with or supported his biological child and did not seek to legitimate her until after she was two years old.[58] The Court distinguished between the "developed relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case...."[59] The Court followed the previous cases, noting that constitutional protection will not be awarded a putative father on the "mere existence of a biological link."[60] The Court did, however, recognize the "opportunity interest" that the biological link does provide to an unwed father.[61] The court stated that an unwed father who takes advantage of "that opportunity and accepts some measure of responsibility for the child's future"[62] may enjoy the constitutional protections of that relationship.[63]

Thus, the Court maintained its stance of requiring some form of relationship between the biological father and the child before the father's rights will be constitutionally protected, although its definition of "relationship" was expanded by the recognition that a father has an opportunity to develop a relationship with his biological child that should be protected.[64] After *Lehr*, the Supreme Court recognizes not only existing relationships, but also the opportunity to develop such relationships.[65]

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53. *Id.* at 389.
54. The Court "did not hold unconstitutional statutes which would withhold veto power over adoptions from unwed fathers who did not come forward and assert their rights as fathers." *See* Hill, *supra* note 16, at 950–951.
55. *See id. See also* Lehr v. Robertson, 463 U.S. 248 (1983).
56. *Caban*, 441 U.S. at 392.
57. 463 U.S. 248 (1983).
58. *Id.* at 262.
59. *Id.* at 261.
60. *Id.*
61. "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." *Id.* at 262.
62. *Id.*
63. *Id.*
64. The Court in Stanley v. Illinois, 405 U.S. 645 (1972), and in Caban v. Mohammed, 441 U.S. 380 (1979), had only recognized the already existing relationship with the child as one deserving protection. *See supra* notes 19–31 & 44–56 and accompanying text.
65. While the Court in *Lehr* recognized a father's right to develop a relationship with his

Lehr's opportunity to develop a relationship with his child was found to be protected by the New York statutory scheme[66] providing for notice to unwed fathers who had registered with the Putative Father's Registry.[67] The court found that, because Lehr failed to register, he gave up his right to notice of the adoption, and consequently, there was no violation of his constitutional rights.[68]

Beginning with its decision in *Stanley*,[69] the Court expanded the rights of unwed fathers. Subsequent to *Lehr*,[70] an "unwed father's constitutional rights attached when a biological link and a relationship exist between father and child ...."[71] With its decision in *Michael H. v. Gerald D.*,[72] however, the Court halted its expansion of unwed fathers' rights.

5. Michael H. v. Gerald D

Michael H. and Carol D. had engaged in an extramarital affair that resulted in the birth of Victoria D.[73] Carol's husband Gerald was listed on the birth certificate as the father, but a blood test determined that Michael was, in fact, the father.[74] For three months, Victoria and her mother lived with Michael, who held himself out to be the child's father.[75] Michael also made substantial efforts to shoulder responsibility for the child and to have his paternity judicially determined.[76] Nevertheless, his efforts were thwarted by California's statutory presumption[77] that a child born to a woman living with

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child, subsequent state court decisions have recognized a time limit inherent in this opportunity. For example, the Supreme Court of Georgia noted that while an unwed father has a constitutionally protected opportunity to develop a relationship with his natural child, the opportunity can be lost "if not timely pursued." *In re* Baby Girl Eason, 358 S.E.2d 459, 462 (Ga. 1987). The District of Columbia Court of Appeals stated that "a natural father who fails promptly to assert his opportunity interest in developing a relationship with his child may forever lose that interest." *In re* Baby Boy C., 581 A.2d 1141, 1161 (App. D.C. 1990). The court in *Baby Boy C.* goes on to note that a child's "need for early assurance of permanence and stability is an essential factor in the constitutional determination of whether to protect a parent's relationship with his or her child .... The opportunity is fleeting. If it is not, or cannot, be grasped in time, it will be lost." *Id.* at 1162.

66. N.Y. DOM. REL. LAW § 111 (McKinney 1976).

67. Although at least 11 states (Idaho, Michigan, Montana, Nebraska, New York, North Carolina, Oklahoma, Tennessee, Texas, Utah and Wisconsin) have putative father registries, the Uniform Putative and Unknown Fathers Act rejects such a requirement for three reasons:

> (1) while 'ignorance of the law is no excuse,' most fathers or potential fathers—even very responsible ones—are not likely to know about the registry as a means of protecting their rights ...; (2) individual state registries do not protect responsible fathers in interstate situations; and (3) since the registries rely on unsupported claims, their accuracy is in doubt and their potential for an invasion of privacy and for interference with matters of adoption, custody and visitation is substantial.

Unif. Putative and Unknown Fathers Act § 3 Comment, 9B U.L.A. 28, 36 (Supp. 1994).

68. "[T]he right to receive notice was completely within [Lehr's] control." 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." *Id.* at 265.

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

70. Lehr v. Robertson, 463 U.S. 248 (1983).

71. Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971, 980 (1992).

72. 491 U.S. 110 (1989). The was a plurality decision.

73. *Id.* at 113–14.

74. *Id.*

75. *Id.* at 114.

76. *Id.* at 114–17.

77. CAL. EVID. CODE § 621 (repealed 1992).

her husband was presumed to be a child of the marriage.[78]

In upholding the California statute, the Court relied on the notion of traditionally protected liberty interests and found that the family unit was a traditionally protected liberty interest, but that a father's rights to a relationship with his child born from an adulterous relationship were not traditional liberty interests.[79] Thus, in limiting the rights of an unwed father with regard to his child born out of wedlock and in favoring the marital presumption, the Court steadfastly upheld the notion of the *de facto* family's protected liberty interest.[80]

B. Present Status of Unwed Fathers' Rights

Where a putative father has established psychological as well as biological ties to his child,[81] the Court recognizes between them a constitutionally protected relationship.[82] The Court also seems to recognize that a biological father has an opportunity interest[83] in developing a relationship with his illegitimate child. The opportunity interest must receive constitutional protection when the father has taken steps to grasp that interest, such as participating "in the care and custody of his child." [84]

The Supreme Court cases, however, leave many questions unanswered. For example, what rights does a father have when his newborn child has been placed with prospective adoptive parents before he is even aware of the child's existence? In *Caban v. Mohammed*[85] the Court suggested that a distinction between unwed mothers and fathers may be justified in the case of a newborn because of potential difficulties in identifying and locating the putative father, but the court never addressed the question directly.[86] In light of *Lehr's* recog-

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78. The presumption could only be rebutted by the husband or wife and only in limited circumstances. *See generally Michael H.*, 491 U.S. at 115.

79. *Id.* at 123–24. The dissent argued that the plurality opinion too narrowly defines the interest protected as that of a father to his child born out of an adulterous relationship instead of the more broad interest of a father in his child. The dissent argues that because Michael had established a relationship with his child and met the Court's previously espoused "biology plus" standards, his interest in the relationship with his daughter deserved protection. *Id.* at 136–162 (Brennan, J. dissenting).

80. Although the Court recognizes that:

> "'in some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father,'"...a limit is [] imposed by the circumstance that the mother is, at the time of the child's conception and birth, married to, and cohabiting with, another man, both of whom wish to raise the child as the offspring of their union.

Michael H., 491 U.S. at 129 (quoting Lehr v. Robinson, 463 U.S. 248, 260 n.16 (1983) (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J. dissenting))).

81. "[H]e must both be a father and behave like one." *In re* Raquel Marie X., 559 N.E.2d 418, 424 (N.Y. 1990).

82. Elizabeth A. Hadad, Comment, *Tradition and the Liberty Interest: Circumscribing the Rights of the Natural Father*: Michael H. v. Gerald D., 56 BROOK. L. REV. 291, 299 (1990).

83. "The biological connection between father and child is unique and worthy of constitutional protection if the father grasps the opportunity to develop that biological connection into a full and enduring relationship." Adoption of Kelsey S., 823 P.2d 1216, 1228 (Cal. 1992).

84. Zinman, *supra* note 71, at 980.

85. Caban v. Mohammed, 441 U.S. 380 (1980).

86. The Court left this question unresolved noting that the difficulties do not necessarily persist past infancy. *Id.* at 392.

nition of an unwed father's opportunity interest[87] in establishing a relationship with his child, the distinction becomes less tenable, especially in a case where the putative father is seeking to assert his rights. The question of how to handle a custody dispute between a putative father and prospective adoptive parents when the father has learned of the child's existence[88] only after the child has been placed with the adoptive parents has thus been left to the states.

II. STATE COURT TREATMENT OF UNWED FATHERS IN ADOPTION PROCEEDINGS

While the state court decisions purport to answer some of the questions left unanswered by the Supreme Court cases relating to unwed fathers' rights, their answers vary. The answers vary between states as well as between different courts in the same state. Two state court cases[89] will be used to demonstrate how different courts may reach drastically different results. The differences in state laws lead to forum shopping.[90] The differences in state laws as well as the differences between courts in the same state are causing a lack of consistency and predictability in adoption proceedings[91] as well as unnecessarily protracted litigation. Following the discussion of the two cases is a brief analysis of how a uniform adoption system, with clearly articulated standards, could have resulted in a more expeditious final decision of the cases.

A. In re Baby Girl Clausen[92]

In the famous "Baby Jessica" case, two and a half year old Jessica was ultimately returned to her biological father who, it was found, had not abandoned his child and had never terminated his parental rights.[93] Although the ultimate disposition of this case was in the Michigan Supreme Court, it all began in Iowa,[94] the home of Jessica's biological parents.

On February 8, 1991, Cara Clausen gave birth to a baby girl. At the

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87. "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." Lehr v. Robertson, 463 U.S. 248, 262 (1983).

88. Implicit in the analysis is that the father's lack of knowledge arises through no fault of his own. If his lack of knowledge is due to his own oversight or neglect, the outcome would be different because it could then be said that he abandoned his opportunity interest. In such a case, "the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie." *Id.*

89. *In re* Baby Girl Clausen, 502 N.W.2d 649 (Mich. 1993); *In re* Petition of John Doe and Jane Doe to Adopt Baby Boy, 627 N.E.2d 648 (Ill. App. Ct. 1993).

90. *See supra* note 9.

91. Congress has also taken note of the fact that a lack of uniformity in state adoption laws may lead to a substantial amount of "black market" adoptions between states with weak adoption laws. Several Congressmen believe that uniform federal regulations may serve to reduce the number of adoptions that occur through black market operations. *See* S. REP. NO. 95–167, 95th Cong., 2d Sess. 26 (1978), *reprinted* in 1978 U.S.C.C.A.N. 557, 571.

92. 502 N.W.2d 649 (Mich. 1993), *stay denied sub nom.*, DeBoer v. DeBoer, 114 S. Ct. 1 (1993), *stay denied*, 114 S. Ct. 11 (1993).

93. *Clausen*, 502 N.W.2d at 652–53.

94. *See In re* B.G.C., 496 N.W.2d 239 (Iowa 1993).

time, Cara was unmarried and had been dating Scott Seefeldt, who was initially named as the baby's father.[95] Both Cara and Scott executed release of custody forms and Roberta and Jan DeBoer subsequently filed a petition for adoption on February 25, 1991. On February 25, 1991, Cara and Scott's parental rights were terminated and the DeBoers were granted custody of Jessica pending the final adoption proceeding.[96]

Nine days after the adoption petition was filed, on March 6, 1991, Cara changed her mind and sought to revoke her release of custody.[97] It was at that time that Cara admitted to having lied as to the child's paternity.[98] On March 12, Daniel Schmidt, Jessica's actual biological father, filed an affidavit of paternity and, on March 27, a petition to intervene in the adoption proceeding.[99] Daniel Schmidt and Cara Clausen were subsequently married.[100]

In December of 1991 the Iowa District Court handed down an order denying the DeBoers' petition for adoption finding that Schmidt's parental rights were not terminated.[101] The court based its decision on the fact that Schmidt had proven, by a preponderance of the evidence, that he was the biological father as well as on the DeBoers' inability to establish by clear and convincing evidence that Schmidt had abandoned the child.[102] The district court decisions were then affirmed by the Iowa Appellate and Supreme Courts.[103]

On remand from the Iowa Supreme Court, the Deboers were ordered to appear with the child.[104] Instead of appearing at the Iowa hearing, the Deboers filed a petition in Michigan asking the Washtenaw Circuit Court to assume jurisdiction in the hopes of obtaining a more favorable decision in that state's courts.[105] Because the DeBoers did not appear in Iowa as required by that state's court, their rights as temporary guardians and custodians of Jessica were terminated.[106] Iowa proceedings continued and the DeBoers were ordered to return Jessica to the Schmidts in January of 1992.[107] Because they failed to deliver the child as ordered, in January of 1993, the Deboers were held in con-

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95. *Clausen*, 502 N.W.2d at 652.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *In re* B.G.C., 496 N.W.2d 239, 241 (Iowa 1993).
102. Iowa does not require a best interest of the child analysis unless abandonment has been established. *Id* at 245. ("The general rule is that the state cannot interfere with the rights of natural parents simply to better the moral and temporal welfare of the child as against an unoffending parent, and, as a general rule, the court may not consider whether the adoption will be for the welfare and best interests of the child where the parents have not consented to an adoption or the conditions which obviate the necessity of their consent do not exist.").
103. *In re* B.G.C., 496 N.W.2d 239 (Iowa, 1993).
104. *In re* Baby Girl Clausen, 502 N.W.2d 649, 653 (Mich. 1993) (per curiam).
105. *Id.* The statutory scheme in Iowa did not allow for a best interest determination in this case. However, in Michigan, a best interest of the child test is often applied in custody disputes with the exception being "[i]f the putative father has established a custodial relationship with the child or has provided support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him." MICH. COMP. LAWS § 710.39(2) (1980); MICH. STAT. ANN. §27.3178 (555.39) (Law. Coop. Pub. 1994). By ignoring the Iowa decision in the hopes of receiving the application of a best interest standard in Michigan, the DeBoers were engaging in the kind of forum shopping that could be avoided by a uniform system.
106. *Clausen*, 502 N.W.2d. at 653.
107. *Id.* at 653 n.9.

tempt by the Iowa district court and warrants were issued for their arrest.[108] In the meantime the Washtenaw County Court had decided that it had jurisdiction to make a "best interest" determination as to Jessica's custody.[109] A hearing was held[110] where the court determined that it was in the child's best interest to remain with the Deboers. In the Michigan appeals, however, the courts did not address the issue of the best interests of the child. The case was instead dismissed for lack of jurisdiction[111] and the DeBoers were ordered to return Jessica to Dan Schmidt, her biological father.

In the final analysis, two and a half year old Baby Jessica was forced from the only home and the only parents she had ever known.[112] This disturbing result was reached because of a chain of events that were beyond the control of both Jessica and her biological father.[113] First, the mother lied as to the paternity of the child, thereby committing a fraud on the court,[114] the biological father and the adoptive parents.[115] Secondly, because of the possibility of different resolutions of these types of disputes in Iowa and Michigan,[116] the DeBoers sought out a different jurisdiction which they felt might be more favorable to their position thus prolonging the final determination of the matter.[117] Consequently, while two sets of parents sought to adjudicate their rights, Baby Jessica's rights as well as her home-life stability and emotional well-being were jeopardized.

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108. *Id.*

109. *Id.*

110. The best interest hearing lasted for eight days, from January 29, 1993 to February 12, 1993. *Id.*

111. The Court of Appeals determined that the Michigan courts did not have jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA). *Id.* at 653. The Michigan Supreme Court, relying on the Parental Kidnapping Prevention Act (PKPA), declared that it was required to enforce the Iowa decision. *Id.* at 656.

112. "Judicial decisions have recognized the harm to a child which results when he is removed from a stable home environment." *In re* Baby Girl M., 236 Cal. Rptr. 660, 664 (1987); Michael U. v. Jamie B., 705 P.2d 362, 368 n.7 (Cal. 1985).

113. The dissent notes, however, that "Daniel knew that Cara was pregnant in December 1990....The child was born in February 1991. Having knowledge of the facts that support the likelihood that he was the biological father, nevertheless, he did nothing to protect his rights." 502 N.W.2d 649, 686 (Mich. 1993) (Levin, J., dissenting).

114. "Fraud on a court is intolerable in any proceeding; ... particularly ... in adoption proceedings where misrepresentations may be calculated to ... cut off constitutionally protected interests." *In re* Raquel Marie X., 559 N.E.2d 418, 420 n.1 (N.Y. 1990).

115. Courts should consider the imposition of severe sanctions upon the discovery of such frauds. Such sanctions have been advocated by the new Uniform Adoption Act. Section 3–404 of the newly approved Uniform Adoption Act states that a mother who places her child for adoption should be warned that she will be subject to civil sanctions if she knowingly misidentifies the biological father. Uniform Adoption Act (1994), National Conference of Commissioners on Uniform State Laws, meeting in its one-hundred-and-third year, July 29–August 5, 1994. Sanctions have also been proposed by several commentators, including one author who proposed a statute governing the rights of an unwed father to know of his child's existence. John R. Hamilton, Note, *The Unwed Father and the Right to Know of His Child's Existence*, 76 KY. L.J. 949, 1003 n.407 (1988). Another proponent of such sanctions is the dissenting judge in *In re* Petition of John Doe and Jane Doe to Adopt Baby Boy, 627 N.E.2d 648, 663 (Ill. App. Ct. 1993) (Tully, J., dissenting).

116. *See supra* note 105.

117. *In re* Baby Girl Clausen, 502 N.W.2d 649, 653 (Mich. 1993) (per curiam).

B. In Re Petition of John Doe and Jane Doe to Adopt Baby Boy[118]

In the case of "Baby Jessica," the Iowa court refused to apply a best interest standard because it found that Daniel had not terminated his parental rights and had not consented to the adoption.[119] The court ignored all other factors such as the amount of time that Jessica had been with the adoptive parents and the effect that a "shift" in parents might have on her.[120] In the case of John and Jane Doe, however, the Illinois Court of Appeals purported[121] to use a best interest determination to find that the child, in a situation almost exactly like that of Jessica, should remain with the adoptive parents. The Illinois Supreme Court, however, subsequently overruled the Court of Appeals decision and followed the reasoning of the Iowa courts.

In *John and Jane Doe*, Otakar, the natural father had lived with Daniella, the mother, during the early stages of her pregnancy and would have continued to live with and support her if she had not moved out of their apartment while he was temporarily out of the country.[122] After moving out, Daniella refused to speak to Otakar and refused his offers of financial assistance for the pregnancy.[123]

On the day the baby was due, Otakar went to the hospital where he and Daniella had planned to have the baby.[124] Daniella was not there.[125] Her uncle told Otakar that the baby had died three days after it was born. Otakar, however, did not believe him[126] and began trying to contact Daniella and to locate her to find out whether the baby had in fact died.[127]

While Otakar was trying to find out if his baby was alive, the child had been placed for adoption and was in the home of the prospective adoptive

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118. 627 N.E.2d 648 (Ill. App. Ct. 1993).

119. *In re* B.G.C., 496 N.W.2d 239, 243–246 (Iowa 1993) (en banc).

120. *Id.*

121. The word "purported" has been used here because of the strong disagreement between the majority and the dissent as to whether a true best interest standard was actually applied. The dissent notes that the factors to be considered in a best interest analysis include: "(1) the wishes of the child; (2) the sufficiency and stability of the respective homes and surroundings of the parties; (3) the interaction and relationship between the parent and child; (4) the child's adjustment to his home; and (5) the mental and physical health of the parties involved." *In re Petition of John and Jane Doe,* 627 N.E.2d at 661–62. (Tully, J., dissenting). The majority, on the other hand, took note only of the fact that "it would be contrary to the best interests of the child to remove him from the parents who adopted him if he has lived with them continuously for the first 18 months of his life." *Id.* at 653.

122. Otakar had returned to Czechoslovakia to visit his family and while he was away, Daniella received a phone call from his aunt informing her that Otakar and his former girlfriend had been married and were on their honeymoon. Daniella became very distraught at this and moved out of the apartment before Otakar returned. *Id.* at 649.

123. Otakar had given $500 to a mutual friend to deliver to Daniella, but she refused to accept it. *Id.* at 650.

124. Prior to the time Daniella moved out, the couple had made plans for the baby to be born at a hospital about one block from where they lived. *Id.* at 649.

125. Daniella purposely went to another hospital so that Otakar he would not find her. *Id.* at 650.

126. Otakar left a message on the uncle's answering machine stating that he did not believe that the baby was dead. *Id.*

127. Otakar tried to contact Daniella and spoke with mutual friends in an effort to ascertain whether his baby was alive. He checked with several area hospitals and even searched for a death certificate. When all of these efforts failed, Otakar looked into Daniella's car to find some evidence of a baby. He even went through the trash outside her uncle's home in an effort to locate some evidence of his child's existence. *Id.*

parents.[128] In the course of the adoption proceedings, Daniella refused to name the biological father. When the Doe's filed their petition for adoption, they claimed that the child's biological father was unknown.[129] However, Daniella had previously told the Does and their lawyer that she knew who the father was but did not want to reveal his identity for fear he may try to assert his parental rights.[130]

Approximately two months later, Daniella informed Otakar of the birth of their child and of the child's placement for adoption. At this time, Otakar sought the aid of a lawyer for the first time, a fact ultimately found by the Appeals Court to be dispositive in finding Otakar unfit.[131] As did the Schmidts in *In re Baby Girl Clausen*,[132] Daniella and Otakar subsequently married, and Otakar sought to declare his paternity. Following a determination that Otakar was the child's father, the Does amended their adoption petition alleging that Otakar's consent was not necessary because he was unfit to care for a child. The trial court found that "Otakar had failed to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a newborn child during the first 30 days after the birth" and his consent to the adoption was thus unnecessary.[133] On this ground, the trial court found Otakar to be "unfit."[134]

On appeal, the Illinois appellate court employed a "best interest" analysis and noted that although both parents and children have rights, "the child is the real party in interest ... [and] it is his best interest and corollary rights that come before anything else, including the interests and rights of biological and adoptive parents."[135] In determining the best interest of the child, the majority of the court went to great lengths to find that Otakar was unfit.[136] In employing the best interests analysis, the court took note of the fact that it would be contrary to the child's best interest "to switch parents at this stage of his life."[137] Thus the adoptive parents retained custody of Richard.

The Illinois Supreme Court did not, however, agree with the analysis of

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128. *Id.* at 650.
129. *Id.* at 650.
130. *Id.* In this case, the fraud was even more severe than that in *In re* Baby Girl Clausen. Here, the fraud was committed not just by the biological mother, as in Jessica's case, but also by the prospective adoptive parents and their lawyer.
131. The trial court noted that had he gone to a lawyer instead of digging through garbage, his rights would have been determined in the beginning and none of these proceedings would have been necessary. *Id.* at 651.
132. 502 N.W.2d 649 (Mich. 1993) (per curiam).
133. *In re John and Jane Doe*, 627 N.E.2d at 651.
134. *Id.* at 651.
135. *Id.* at 652.
136. The dissent notes that "[t]he majority, in its misguided fervor to champion 'injustice', has patently distorted and slanted the actual facts of this case on a number of important points." *Id.* at 656. The dissent then goes on to give its own version of the facts. The facts as stated by the majority and the dissent are essentially similar; they depart on the issue of whether Otakar took the necessary steps to be declared a "fit" parent.
137. *Id* at 654, noting that this case "vividly illustrates why it would be contrary to the best interest of the child to remove him from the parents who adopted him if he has lived with them continuously for the first 18 months of his life. Richard is now two years and five months old. The only parents that he has ever known are John and Jane Doe. He has not touched or seen Daniella since four days after his birth, and he has never spoken a word to her. Nor has he ever touched, seen or communicated with Otakar. In fact, he is totally unaware of the existence of Daniella or Otakar." *Id.* at 653.

the Appeals Court.[138] In fact, the Illinois Supreme Court did not even consider the interests of the child.[139] Thus, after three years of litigation, during which time baby Richard was with his adoptive parents, the child was placed with his biological father.

C. The Result of In re Baby Girl Clausen and In re Petition of John Doe and Jane Doe to Adopt Baby Boy Janikova

There were many similarities between *In re Baby Girl Clausen* and *In re John Doe and Jane Doe*. Neither Jessica nor Richard's biological fathers ever terminated their parental rights.[140] In both cases, the mother deceived the biological fathers.[141] In both cases, the child had been placed with the prospective adoptive family when the father learned of the child's existence and whereabouts.[142] Thus, both biological fathers were deprived of their opportunity interest in developing a relationship with their child.[143] Both children were approximately two and a half years old at the time of the final disposition of the cases.[144] But most importantly, both cases took an excessive amount of time to reach the final determination because of the lack of consistency between the courts and, consequently, both Jessica and Richard will probably suffer severe psychological trauma as a result of the switch in parents.[145]

The difference in the outcomes, or expected outcomes,[146] between the various courts in the two cases is a result of the two different standards used to determine custody disputes between unwed fathers and prospective adoptive parents. The Iowa court used a parental presumption/parental rights standard[147] to determine Jessica's fate and, because Daniel Schmidt was not found to be

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138. *In re* John Doe and Jane Doe to Adopt Baby Boy Janikova, 638 N.E.2d 181 (Ill. 1994).

139. The Illinois Supreme Court noted that the "laws are designed to protect natural parents in their preemptive rights to their own children wholly apart from any consideration of the so-called best interests of the child." *Id.* at 182.

140. Interest of B.G.C., 496 N.W.2d 239, 241 (Iowa 1993) and Matter of John Doe and Jane Doe, 627 N.E.2d 648 (Ill. App. Ct. 1993).

141. *See* discussions of *In re* Baby Girl Clausen, Part II A, notes 91–115 and Matter of Petition of John Doe and Jane Doe, Part II B, notes 116–138 and accompanying text.

142. *In re* Baby Girl Clausen, 502 N.W.2d 649, 652 (Mich. 1993) (per curiam), and *John and Jane Doe*, 627 N.E.2d 648, 650 (Ill. App. Ct. 1993).

143. *See supra* notes 61 & 65 for discussion on the biological fathers opportunity interest.

144. This fact helps to illustrate the need for fast and efficient settlement of these cases. *See infra* notes 181–198 and accompanying text.

145. The dissent in *In re* Baby Girl Clausen noted that "every expert testified that there would be serious traumatic injury to the child [as a result of switching her parents] at this time." 502 N.W.2d at 669 (Levin, J., dissenting).

146. An expected difference in outcome was the situation in *In re* Baby Girl Clausen where the adoptive parents attempted to achieve a more favorable result in the Michigan courts. 502 N.W.2d 649 (Mich. 1993) (per curiam).

147. "Courts applying a parental rights standard award custody to the biological parent unless the nonparent can prove the parent is unfit. The burden on the nonparent to show unfitness is heavy and rarely overcome. According to the...courts which still use this traditional standard, biological parents have a natural right to the care and custody of their children which cannot be overcome absent a clear and unequivocal showing of unfitness, voluntary relinquishment, or abandonment. Once a parent is found fit, these courts conclusively hold that awarding custody to the biological parent rather than a third party is better for the child." Haynie, *supra* note 4, at 708–709.

unfit, and not to have terminated his parental rights, it was decided that he had not lost his opportunity interest in developing a relationship with his daughter. Daniel Schmidt, the biological father was thus granted custody of Jessica.[148]

The Illinois Appeals Court, on the other hand, used a best interest determination[149] to decide that Richard should remain with his adoptive parents. Richard had been with the adoptive family for eighteen months when the case came before the court[150] and the court found that it would be detrimental to his emotional well-being to remove him from the only home and parents that he had ever known.[151] The Illinois Supreme Court, however, applied a parental presumption standard as did the Iowa courts.

Clearly, the two different standards can lead to two different results and the application of the two different standards by different courts in the same case can lead to forum shopping and long drawn out litigation that only hurts the child in the long run.[152]

Regardless of whether a best interest or a parental presumption analysis is used, one fact is clear: a uniform standard among all states would serve to dispel the confusion and conflict that results from cases such as *In re Baby Girl Clausen* and *In re John Doe and Jane Doe*.[153] The result of a uniform standard is apparent when one considers the Baby Jessica case. There, the adoptive parents employed two different state courts in an attempt to achieve the desired ruling. Because Iowa used a parental presumption and Michigan may have used a best interest standard, the DeBoers tried to get a "better" result in the Michigan courts once the Iowa courts had decided against them.[154] If both states had employed the same standard, there would have been no need for the DeBoers to forum shop for a desired result, and Jessica's case would have been decided much sooner and at a time when any change would have been less traumatic.[155]

In the case of Richard, Baby Boy Janikova, a uniform system would have

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148. Interest of B.G.C., 496 N.W.2d 239, 244–45 (Iowa 1993).

149. "[C]ourts applying a true best interests standard focus solely on the interests of the child ....These courts consider the claims of competing 'parents' on an equal footing, with neither party bearing the burden of proof...these courts require ... that each party present evidence that awarding custody in his favor would serve the child's best interests. The court then determines which 'parent' is best for the child." Haynie, *supra* note 4, at 708–09.

150. Yet another example of the need for fast and efficient methods of deciding these disputes in order to minimize the harm that can occur to a child if the court ultimately decides that it is best to switch him back to the biological parent. *See infra* notes 181–198.

151. It is interesting to note here that although "Baby Jessica" was in the same situation by the time the battle for her custody was over, this issue was not addressed in that case.

152. *See infra* note 155 for a discussion as to how protracted litigation in these cases can cause severe psychological trauma to the children involved.

153. In looking at other state court cases, numerous methods have been used to resolve these disputes, without showing any consensus. *See supra* note 5. A uniform system would help to reduce the uncertainty and interstate tension that has resulted from these divergent cases.

154. Had Michigan assumed jurisdiction, they probably would have been correct in the assumption that a "better" result would be achieved there, for it is quite likely that the amount of time Jessica had been with the DeBoers would have been dispositive to a determination that it was in Jessica's best interest to remain with the DeBoers.

155. Psychological testimony in cases between adoptive and natural parents continuously reaffirms the notion that the older a child becomes, the more devastating a switch in parents would be. *See generally In re* Baby Girl M., 236 Cal. Rptr. 660 (1987); *In re* Baby Boy C., 581 A.2d 1141 (App. D.C. 1990); *In re* John Doe and Jane Doe to Adopt Baby Boy, 627 N.E.2d 648 (Ill. App. Ct. 1993); *In re* Baby Girl Clausen, 502 N.W.2d 649 (Mich. 1993).

provided clear guidelines that both the Illinois Appeals and Supreme Courts could have followed. Assuming that both properly followed the guidelines, the two courts should have reached the same result and a change in the parents of a three year old child would not have been necessary.

III. A PROPOSED SOLUTION

That neither the best interest nor the parental presumption standard protects the interests of all parties involved in a custody dispute between a putative father and the prospective adoptive parents with whom the child has been placed must be recognized. On the one hand, a parental fitness or parental presumption standard assumes that removing the child from the adoptive parents' home and placing him or her in the biological father's custody is in the child's best interest.[156] While there may be merit to this assumption,[157] this is not always the case. Often, other factors must be taken into consideration, such as the child's immediate well-being and the psychological effects that a switch in parents may have on him or her.[158]

On the other hand, the use of a best interest standard will quite often lead to inconsistent and arbitrary judgments depending on the disposition and values of the presiding judge.[159] Also, in light of the long waiting lists of prospective adoptive families and the traditional preference for a two parent family,[160] the unwed biological father will generally be at a disadvantage in every case in which a best interest standard is used.[161] Because the parental fitness standard

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156. Hilderbran, *supra* note 3, at 1243.

157. "It has been suggested that biological relationships ... may serve to encourage the development of psychological relationships that foster a sense of continuity and heritage from the child's perspective." Marianne M. DeMarco, *Delineation of the Boundaries of Putative Father's Rights: A Psychological Parenthood Perspective*, 15 SETON HALL L. REV. 290, 291 n.7 (1985). "The genetic bond between father and child gives them a shared heritage and a common ancestry, and it presents the biological father with a unique opportunity to develop a meaningful relationship with his own offspring." Zinman, *supra* note 71, at 997.

The Supreme Court of California has also noted that a "child has a genetic bond with its natural parents that is unique among all relationships the child will have throughout its life...Absent a showing of a father's unfitness, his child is ill-served by allowing its mother effectively to preclude the child from ever having a meaningful relationship with its only other biological parent." Steven A. v. Rickie M., 823 P.2d 1216, 1236 (Cal. 1985).

158. *See supra* note 155.

159. "The problem with the best interest standard is that ... It may become a mere facade behind which social workers, lawyers and judges hide when making decisions based on intuition, personal likes and dislikes, armchair psychology and ideology, so deeply rooted that the decision makers are unaware that it is mere ideology." William M. Schur, *Adoption Procedure, in* 1 ADOPTION LAW AND PRACTICE 4–1, 4–10 (Joan H. Hollinger ed., 1992).

160. As a general rule, the traditional notion of a two parent family no longer stands up to judicial scrutiny. "As recently as only a few years ago, it might have been reasonable to assume that an adopted child would be placed in a two-parent home and thereby have a more stable environment than a child raised by a single father. The validity of that assumption is now highly suspect in light of modern adoption practice." Kelsey S. v. Rickie M., 823 P.2d 1216, 1234 (Cal. 1992). The court goes on to cite statistics as to the percentage of single parent adoptions in California to show that a significant number of children placed for adoption are adopted by single parents: 7.7 percent of children placed for independent adoption and 21.9 percent of those placed with agencies for adoption. *Id.*

161. "[A] best interest test is a no-win situation for the unwed father of a newborn with whom he has not yet had the opportunity to develop an emotional tie." *Recent Development: Family Law—Unwed Fathers' Rights—New York Court of Appeals Mandates Veto Power Over Newborn Adoption for Unwed Father Who Demonstrates Parental Responsibility*—In re

neglects the interests of the child[162] and the best interests standard often neglects the interests of the biological father,[163] neither test is completely satisfactory. Therefore, a standard which protects both the interests of the child and the interests of the unwed father is clearly needed.[164]

This section proposes a standard that first considers the biological father's fitness to be a custodial parent, and then considers any detriment that might occur if the child is placed with the biological father.[165] A necessary prerequisite to a settlement of the dispute is a determination of whether or not the father has lost his opportunity interest.[166] If a putative father has given up or lost his opportunity interest, no further analysis is necessary because his consent to the adoption is not needed.[167] Once it has been established that a putative father has maintained his opportunity interest,[168] a determination as to his fitness to assume custody of the child should be made. If the court determines that the putative father is unfit to assume custody, it need not reach the analysis of detriment to the child because unfitness alone will destroy any rights that a father might have to custody of his child. In the determination of fitness, a specific list of factors should be set out for consideration by the courts. These factors might include those listed by the court in *Steven A. v. Rickie M.*:[169] (1) the father's conduct both before and after the child's birth; (2) whether the father promptly attempts to assume his parental responsibilities as fully as the mother will allow and his circumstances permit once he knows, or reasonably should know of the pregnancy; (3) whether the father demonstrates a willingness to assume custody; (4) the father's public acknowledgment of paternity; (5) payment of pregnancy and birth expenses to the extent he is able; and (6) prompt legal action to seek custody.[170]

Raquel Marie X., 104 HARV. L. REV. 800, 807 (1991) [hereinafter *Recent Development*].

162. The parental fitness standard, as noted earlier, merely considers whether the biological parent is fit. It makes no considerations for the child's interest except for that of its biology and heritage. *See supra* note 4.

163. The best interest standard merely makes biology a factor in the consideration of the child's interest. *See supra* note 4. Thus, the father is given no greater protection, by the fact of his biological connection to the child, than are the adoptive parents, who have no biological ties.

164. Although the argument has been made that the adoptive parents also have a constitutionally recognized liberty interest in their relationship with the child the courts have not explicitly held this to be so. *See generally* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977).

165. The two considerations may be interchangeable; one need not necessarily be made before the other. A determination of detriment will necessarily preclude the father from obtaining custody, as will a determination that the father is unfit.

166. "[The] Supreme Court ... mandates substantial constitutional protection of a fit noncustodial parent whose 'opportunity interest' ... is still intact." *In re* Baby Boy C., 582 A.2d 1141, 1177 (D.C. 1990). This opportunity interest can, however, be lost "if not timely pursued." *See supra* note 65.

167. *See supra* notes 54 & 65.

168. Although a father can lose his opportunity interest by not timely pursuing a relationship with his child, the question arises as to whether the biological mother may preclude the father from establishing a relationship with the child and thus cause him to lose his "opportunity interest". Several commentators suggest that a mother should not be allowed to unilaterally preclude the father from establishing a relationship with his child. *See generally In re* Adoption of Lathrop, 575 P.2d 894, 898 (Kan. Ct. App. 1978) and *In re* Baby Girl S., 141 Misc.2d 905, 916 (N.Y. Sur. Ct. 1988). Others note, however, that after a certain period of time the fault of the father is irrelevant because switching the child would cause serious psychological harm. *See generally In re* Steve B.D., 730 P.2d 942, 945 (Idaho 1986) and Zinman, *supra* note 71, at 987.

169. 823 P.2d 1216 (Cal. 1992).

170. This list is not meant to be exhaustive but is merely a listing of those factors

Upon a finding that the putative father is not unfit, the court must then look to the detriment[171] that may be caused to a child by removing it from the adoptive parents home.[172] A determination of the detriment to the child is narrower than a determination of the child's best interest. In considering a child's best interest, there are a host of factors involved in the determination,[173] whereas a detriment determination only considers factors bearing on the harm which may result from separation of the child and the prospective adoptive parents,[174] such as the child's age and the length of time that the child has been with the adoptive parents.[175]

It has been suggested that in order to find that a transfer of the child to the natural father would not be a detriment, the court need only find that the father has "the ability, capacity, fitness and readiness to assume parental re-

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suggested by the court in *Steven A. Id.* The Uniform Putative and Unknown Fathers Act sets out its own list of factors to be considered in the determination of a father's parental rights:

> (1) the age of the child;
> (2) the nature and quality of any relationship between the man and the child;
> (3) the reasons for any lack of a relationship between the man and the child;
> (4) whether a parent and child relationship has been established between the child and another man;
> (5) whether the child has been abused or neglected;
> (6) whether the man has a history of substance abuse or of abuse of the mother or the child;
> (7) any proposed plan for the child;
> (8) whether the man seeks custody and is able to provide the child with emotional or financial support and a home, whether or not he has had the opportunity to establish a parent and child relationship with the child;
> (9) whether the man visits the child, has shown any interest in visitation, or, desiring visitation, has been effectively denied an opportunity to visit the child;
> (10) whether the man is providing financial support for the child according to his means;
> (11) whether the man provided emotional or financial support for the mother during prenatal, natal, and postnatal care;
> (12) the circumstances of the child's conception, including whether the child was conceived as a result of incest or forcible rape;
> (13) whether the man had formally or informally acknowledged or declared his possible paternity of the child; and
> (14) other factors the court considers relevant to the standards for making an order....

Unif. Putative and Unknown Fathers Act § 5, 9B U.L.A. Supplement 28 (1988). These factors could be combined with, or used in place of, those listed in *Steven A.*

171. Detriment is defined as "any loss or harm suffered...." BLACK'S LAW DICTIONARY 451 (6th ed. 1990). The child's age and the effects of a change of placement at this stage of its development are the fundamental considerations in the determination of detriment. As one court has stated, "the child may be so long in the custody of the nonparents that, even though there has been no abandonment or persisting neglect by the parent, the psychological trauma of removal is grave enough to threaten destruction of the child." Bennett v. Jeffreys, 356 N.E.2d 277, 284 (N.Y. 1976).

172. One commentator has proposed placement of the child with the putative father during the proceedings and thus eliminating the need for a detriment determination. Zinman, *supra* note 71. Although this might be feasible when the father is aware of the child's existence at the initiation of adoption proceedings, it gives little assistance in a situation where the child has been with the prospective adoptive parents for any length of time prior to the father's learning of his existence. At that point, there is the risk that the child will be moved several times—to the father from the adoptive parents and back again if the father is found unfit. This could ultimately cause more damage to the child than it prevents.

173. *See supra* note 4.

174. *See generally In re* Baby Girl M., 236 Cal. Rptr. 660 (Ct. App. 1987); Zinman, supra note 71, 101 and 103; Hilderbran, *supra* note 3.

175. *See also supra* note 171.

sponsibility."[176] This inquiry ignores, however, any actual effects on the child and concentrates solely on the interests of the father. By engaging a two-step fitness and detriment analysis, courts can better protect both the interests of the child, whose custody is in dispute, and the interest of the biological father.[177]

By determining the unwed father's fitness to raise his child, as well as considering the potential detriment, the father's rights are given more protection than by applying the best interest test. A best interest analysis is often a no-win situation for the unwed father.[178] The court in *In re Baby Girl Eason*[179] recognized this when it rejected the use of a best interest test on the ground that it is "presumptively unfair to compare the putative father with the adoptive parents who have nurtured and cared for the child most of its life."[180] A best interest test could lead to the conclusion that the child should remain with the adoptive parents, regardless of whether it is found that the father is unfit. In contrast, under the two-tiered analysis, courts would require a fitness determination, giving the father a preference over the adoptive parents, provided that he is found fit to assume custody. If the father is found to be fit, and it is determined that there would be little or no resulting detriment to the child, the father will receive custody. Thus, the result under a best interest test and the two-step test that requires both a determination of detriment to the child and a determination of the father's fitness may have different results.

The two-tiered approach suggested in this Note protects the rights of the unwed father by requiring that he be found unfit before his rights automatically can be terminated. The test also protects the rights of the children placed for adoption by requiring that there be a showing that little or no detriment would result if the child were to be moved from the adoptive parents home to the biological father's home. Consequently, the test would provide a better balancing of rights than either the parental presumption or the best interest standard.

IV. FAST, EFFICIENT AND FINAL RESOLUTION

Whatever method courts decide to use, it is of paramount importance that these disputes be resolved in a quick and efficient manner.[181] Dragging custody disputes out over long periods of time only serves to cause emotional harm to everyone involved, especially to the child whose future hangs in limbo while

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176. *In re* the Department of Social Services to Dispense with Consent to Adoption, 461 N.E.2d 186, 190 (Mass. 1984); *In re* Baby Girl M., 236 Cal. Rptr. 660, 670 (Ct. App. 1987) (Lewis, J., dissenting).

177. The interests of the prospective adoptive parents are also protected by the fact that once courts begin to examine the detriment to a child, standards will be set for the length of time a child can be in the adoptive family's home before it will be considered detrimental to remove her. Thus, the adoptive parents will be assured of some predictability and stability in their relationships with the children they seek to adopt.

178. *Recent Development, supra* note 161 at 807. ("Given the long waiting list of adoptive parents that exists today ... and the traditional preference for rearing a child in a two-parent home, a best interests test is a no-win situation for the unwed father of a newborn with whom he has not yet had the opportunity to develop an emotional tie.")

179. 358 S.E.2d 459 (Ga. 1987).

180. Zinman, *supra* note 71, at 993.

181. "Because the development of a child's relationship with parental figures is of critical importance in resolving the ultimate placement, minimizing the time expended in the adoption proceeding is crucial." *In re* Baby Boy C., 581 A.2d 1141, 1170 (D.C. 1990).

the case slowly moves through the courts.[182]

A child needs "permanence and stability" early in its life.[183] Fast and efficient resolutions of custody disputes will serve to provide the child with a "permanent, stable environment"[184] and will prevent the child "from being uprooted after establishing emotional ties with [prospective] adoptive parents."[185]

Moreover, fast and efficient resolution of these disputes will also serve to protect the rights of other parties involved. For instance, the biological mother's interest "will be terminated in a timely manner,"[186] and the biological father will be allowed to develop a relationship and bond with his child sooner.[187] In addition, the adoptive parents will have a fast resolution to their dilemma, thus allowing them to form permanent and lasting bonds with the children they seek to adopt.[188] All of the parties involved "will be spared the trauma and legal costs of protracted custody disputes",[189] and the state will further its goals of fast, efficient and final resolutions of legal disputes.[190]

By implementing a uniform system of deciding these cases, forum shopping[191] will be avoided. Consequently, multiple courts will no longer be asked to hear the same case, as happened in the Baby Jessica case.[192] This will surely lead to faster adjudication and resolution of these disputes and, consequently, to less psychological trauma to the children caught in the middle.[193]

It has also been noted that if courts were to give priority to these types of cases, it would only impose a minimal administrative burden on the courts.[194] This burden would easily be outweighed by a consideration of the possible

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182. As the court in *In re* Petition of John Doe and Jane Doe to Adopt Baby Boy, 627 N.E.2d 648, 656 (Ill. App. Ct. 1993) noted, "society can ill afford cases where children are 'switched' parents after the first 18 months of their life."

183. Steve B.D. v. Swan, 730 P.2d 942, 945 (Idaho, 1986).

184. Zinman, *supra* note 71, at 1000.

185. *Recent Development: Family Law—Unwed Fathers' Rights-New York Court of Appeals Mandates Veto Power Over Newborn's Adoption for Unwed Father Who Demonstrates Parental Responsibility—In* re Raquel Marie X., 104 HARV. L. REV. 800, 807 (1991).

186. *Id.*

187. *Id.*

188. Adoptive parents may not be as quick to develop emotional bonds with the children they seek to adopt when there is no certainty as to the permanency of the situation. *In re* Adoption of N., 673 P.2d 864, 868 (Or. Ct. App. 1983).

189. Zinman, *supra* note 71, at 1000.

190. *Id.*

191. *See supra* note 9 and accompanying text.

192. Custody disputes that result in protracted litigation, such as *In re* Baby Girl Clausen, 502 N.W.2d 649 (Mich. 1993), can have a profound effect on the detriment prong of the two-tier analysis proposed in Part III of this Note. The longer the case is drawn out, the longer the child remains with the adoptive parents and the more detrimental it becomes to remove the child from that home. By providing for fast adjudication of these cases, the court may eliminate the bias in favor of the adoptive parents that may result under the two-tier analysis.

193. In the Baby Jessica case, the Iowa court had terminated the DeBoers right to custody of Jessica and ordered them to return her to the Schmidts on December 27, 1991. The Michigan Supreme Court did not make its final determination that Jessica should be returned to the Schmidts until July 2, 1993. Thus, had there been no forum shopping here, the case would have been over and Jessica returned to the Schmidts more that seven months earlier. It is possible that the impact of the switch on Jessica may have been less severe at the earlier date.

194. Zinman, *supra* note 71 at 999–1000. Zinman cites only five such cases decided in New York in 1990 and 1991 to support his proposition that "only a handful of such cases" had been decided recently in New York and thus any administrative burden the states might experience by giving these cases priority would only be minimal. *Id.*

emotional harm that can result when these cases are delayed.[195]

One prerequisite to fast and final adjudications of unwed father's rights is that the father must be aware of his paternity. A person cannot adjudicate rights he does not know he has. Therefore, there must be some requirement that a mother inform the father of his child's existence[196] and her plans to place the child for adoption. As discussed earlier,[197] courts should consider the imposition of sanctions when the biological mother, adoptive parents or the attorneys deceive the court as to the fathers identity.[198] This would help deter fraud in cases such as Baby Jessica and reduce the trauma and heartache associated with them.

V. CONCLUSION

The Supreme Court has not addressed the issue of unwed fathers' rights when their children have been placed for adoption as infants. In addition, State court decisions in this area have been inconsistent because different tests have been used. Egregious examples were seen in the cases of Richard[199] and Jessica,[200] where different courts reached opposite results on the basis of the same set of facts.[201] This lack of uniformity has lead to forum shopping, delayed determinations of child placement,[202] uncertainty and often to traumatic shifts in the child's home. The problems inherent in the lack of uniformity are detrimental to all parties involved—the biological father, the adoptive parents and most of all the child whose fate is being decided in long, often bitter court disputes.

This Note proposes that a two-tier solution be uniformly implemented in disputes between the unwed, biological father and the adoptive parents, one that would serve to protect the interests of the biological father as well as the interests of his child. As part of that uniform system, it is imperative that provisions include fast, efficient and final resolutions so as to minimize the trauma that may be caused to the children caught in the middle of such battles.

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195. *Id.* at 1000.

196. At least one commentator has proposed that unwed fathers have a right to know of their child's existence regardless of whether the child has been placed for adoption. John R. Hamilton, Note: *The Unwed Father and the Right to Know of His Child's Existence*, 76 KY. L.J. 949 (1988). Hamilton proposes a statute that would serve to protect the father's right to know in adoption cases. *Id.* at 1002 n. 407.

197. *See supra* note 115.

198. These sanctions should only be applied in cases where the mother knowingly and intentionally misrepresents or conceals the father's identity. They should not apply in cases of rape, incest or other cases of sexual abuse. In those cases, a strong argument can be made that the father has no rights whatsoever as far as the child is concerned.

199. *See supra* notes 118–140 and accompanying text.

200. *See supra* notes 92–117.

201. Custody of Jessica was awarded to her biological father. *See supra* note 93 and accompanying text. Richard remained with his adoptive parents. *In re* Petition of John Doe and Jane Doe, 627 N.E.2d 648, 656 (Ill. App. Ct. 1993).

202. *See supra* notes 9 & 105 and accompanying text.