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No More Secret Adoptions: Providing Unwed Biological Fathers with Actual Notice of the Florida Putative Father Registry

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NO MORE SECRET ADOPTIONS: PROVIDING UNWED BIOLOGICAL FATHERS WITH ACTUAL NOTICE OF THE FLORIDA PUTATIVE FATHER REGISTRY

TIMOTHY L. ARCARO*

I. INTRODUCTION

In 2003, the Florida Legislature approved sweeping changes to Florida's codified Adoption Act. At the heart of these changes was the promulgation of the Florida Putative Father Registry.¹ The 2003 Florida Adoption Act created a legal presumption that every unwed biological father in Florida had knowledge of the existence of the registry and its requirements even though the father received no actual notice.² This presumption ultimately worked as a waiver of parental rights for those fathers who failed to timely register. Unwed biological fathers who registered properly preserved their right to receive actual notice of an intended adoption involving their offspring.³ Where an unwed biological father established compliance with the additional requirements set forth in the statute, his consent to the adoption would also be required.⁴

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¹ FLA. STAT. ANN. § 63.054 (West 2005) (setting forth the “[a]ctions required by an unmarried biological father to establish parental rights”).

² *But see id.* § 63.063(4)(d) (stating that out of state fathers were not required to register because “an unmarried biological father who resides in another state may not, in every circumstance, be reasonably presumed to know of and comply with the requirements of this chapter”).

³ *See id.* § 63.063(4) (listing registration requirements with which out-of-state unwed biological fathers must comply).

⁴ *Id.* § 63.062(2). The statute sets out the compliance requirements:

With regard to a child who is younger than [six] months of age at the time the child is placed with the adoptive parents, an unmarried biological father must have demonstrated a full commitment to his parental responsibility by having performed all of the following acts prior to the time the mother executes her consent for adoption:

1. Filed a notarized claim of paternity form with the Florida Putative Father Registry within the Office of Vital Statistics of the Department

(continued)

The 2003 Florida Adoption Act obligated the Florida Department of Health to publicize the Florida Putative Father Registry.⁵ Regardless of the Department's publicity efforts, however, unwed biological fathers were legally presumed to know and understand their legal obligations relating to the Registry requirements.⁶ While an unwed biological father was entitled to receive an adoption disclosure relating to an intended adoption of his offspring, that document did not provide any reference to the Florida Putative Father Registry.⁷ The 2003 Adoption Act raised constitutional concerns regarding the Registry because the Act failed to provide actual notice to unwed biological fathers in adoption proceedings, it eradicated all defenses for failing to register with the Registry, and it created a series of questionable legal presumptions. The Florida Supreme Court had the opportunity to address these issues in *Heart of Adoptions, Inc. v. J.A.*⁸ The court chose to avoid the constitutional issues implicated in the statute by

of Health, which form shall be maintained in the confidential registry established for that purpose and shall be considered filed when the notice is entered in the registry of notices from unmarried biological fathers.

2. Upon service of a notice of an intended adoption plan or a petition for termination of parental rights pending adoption, executed and filed an affidavit in that proceeding stating that he is personally fully able and willing to take responsibility for the child, setting forth his plans for care of the child, and agreeing to a court order of child support and a contribution to the payment of living and medical expenses incurred for the mother's pregnancy and the child's birth in accordance with his ability to pay.

3. If he had knowledge of the pregnancy, paid a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his financial ability and when not prevented from doing so by the birth mother or person or authorized agency having lawful custody of the child.

Id. § 63.062(2)(b).

⁵ *Id.* § 63.054(11); Tamar Lewin, *Unwed Fathers Fight for Babies Placed for Adoption by Mothers*, N.Y. TIMES, Mar. 19, 2006, § 1, at 1.

⁶ FLA. STAT. ANN. § 63.053(2).

⁷ *See id.* § 63.085.

⁸ 963 So. 2d 189 (Fla. 2007).

reconciling the statutory language to provide actual notice of intended adoptions to putative fathers.⁹ Although the court resolved the notice issue, other questions regarding the construction, application, and constitutionality of the Florida Putative Father Registry remain.

In Part II of this article, I will explain the operation of Florida's Putative Father Registry system and the legal presumptions placed on unwed biological fathers as set forth in Florida's codified adoption act. In Part III, I will review the four Supreme Court decisions that have established the parameters of putative father rights in adoption cases. In Part IV, I will examine criticisms of the Florida Putative Father Registry system and their relevance after *Heart of Adoptions*. In Part V, I will explain the rationale and impact of the Florida Supreme Court's decision in *Heart of Adoptions*. In Part VI, I will examine unanswered questions left in the wake of the Supreme Court of Florida's ruling in *Heart of Adoptions*. Lastly, I will offer my conclusions in Part VII with a summary of putative father rights in Florida post *Heart of Adoptions*.

II. FLORIDA'S PUTATIVE FATHER REGISTRY

The Florida Legislature initially created the Registry in 2001 as a way to strengthen the goals of permanency, stability, and finality in all adoption matters.¹⁰ Accordingly, Florida's codified adoption act provided absolutely no relief under any circumstances to an unwed biological father who failed to timely register.¹¹

In 2003, the Florida Legislature amended section 63.054 of the Florida Statutes in order to create the Florida Putative Father Registry when Governor Jeb Bush signed the bill into law on May 30, 2003.¹² Florida's Registry was designed to operate similarly to other state registries in that any man who believed he had fathered a child out of wedlock could file a claim of paternity with the Registry indicating his desire and intention to

⁹ *Id.* at 200. The adoption agency must provide the notice. *Id.* Effective July 1, 2008, the Florida Supreme Court's decision in *Heart of Adoptions* was codified by the legislature in section 63.062 of the Florida Statutes, which requires notice of intended adoptions be provided to putative fathers and allows them up to thirty days to register with the putative father registry. FLA. STAT. ANN. § 63.062(3) (West Supp. 2008).

¹⁰ See FLA. STAT. ANN. § 63.022(1)(b)-(d) (West 2005).

¹¹ See *id.* § 63.053(1).

¹² Jennafer Neufeld & Dalia Georgi, In re: Adoption of a Minor Child, 11 J. GEN. SOC. POL'Y & L. 1199, 1212 (2003).

be legally responsible for his offspring.¹³ In order for that claim to be timely filed in Florida, it must have been filed at any time prior to the birth of the child or prior to the filing of a petition to terminate parental rights.¹⁴

Even though timely registration would preserve an unwed biological father's right to notice of any subsequent adoption proceeding, unwed biological fathers were not otherwise entitled to actual notice of the Registry requirements.¹⁵ Florida law presumed that "[a]n [unwed] biological father, by virtue of the fact that he has engaged in a sexual relationship with a woman, is deemed to be on notice that a pregnancy and an adoption proceeding regarding that child may occur."¹⁶ This presumption coupled with the statutory time constraints for timely registration, required prompt action on the part of an unwed biological father who affirmatively sought to protect his interest in his offspring.¹⁷ In fact, timely registration in Florida was the only way an unwed biological father could transform his inchoate interest in his offspring to a constitutionally protected relationship when the child was being placed for adoption prior to six months of age.¹⁸ Failure to timely register constituted a complete and final waiver of parental rights.¹⁹

¹³ Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1032, 1039-40 (2002) (providing a full discussion of various state approaches to putative father registries).

¹⁴ FLA. STAT. ANN. § 63.054(1).

¹⁵ *Id.* § 63.053(2).

¹⁶ *Id.* § 63.088(1).

¹⁷ *Id.* § 63.022(1)(e). As to unwed fathers, the Legislature found:

An unmarried biological father has an inchoate interest that acquires constitutional protection only when he demonstrates a timely and full commitment to the responsibilities of parenthood, both during the pregnancy and after the child's birth. The state has a compelling interest in requiring an unmarried biological father to demonstrate that commitment by providing appropriate medical care and financial support and by establishing legal paternity rights in accordance with the requirements of this chapter.

Id.

¹⁸ *Id.* § 63.053(2). The statute reads, in part:

The Legislature finds that the interests of the state, the mother, the child, and the adoptive parents described in this chapter outweigh the

(continued)

When a birth mother intended to place her child for adoption in Florida, an unwed birth father was entitled to receive a statutorily mandated adoption disclosure form.²⁰ However, this document, which referenced important “Facts Regarding Adoption Under Florida Law,” failed to provide any information regarding the Registry or how an unwed biological father may go about protecting his rights.²¹ An unwed birth father was presumed to know the Florida registry law or rely on the Florida Health Department Office of Vital Statistics, which was responsible for creating, maintaining, and publicizing the Registry within “existing resources.”²² Apparently, however, the Florida Health Department was not effective in publicizing the Registry because only forty-seven men registered in 2004 even though 90,000 children were born out of wedlock in Florida that year.²³

For unwed birth fathers in Florida, registration was only the first step in the process of attempting to transform the inchoate relationship with their newborn child into a constitutionally protected relationship.²⁴ After registration, Florida law required an unwed father to file a commitment

interest of an unmarried biological father who does not take action in a timely manner to establish and demonstrate a relationship with his child in accordance with the requirements of this chapter.

Id.

¹⁹ *Id.* § 63.062(2)(d). Elsewhere, the statutes reflect that:

the Legislature prescribes the conditions for determining whether an unmarried biological father’s actions are sufficiently prompt and substantial so as to require protection of a constitutional right. If an unmarried biological father fails to take the actions that are available to him to establish a relationship with his child, his parental interest may be lost entirely, or greatly diminished, by his failure to timely comply with the available legal steps

Id. § 63.053(1).

²⁰ *Id.* § 63.085(1).

²¹ *Id.*

²² *See id.* § 63.054(3)–(12).

²³ Bill Kaczor, *Supreme Court Hears Adoption Law Debate*, S. FLA. SUN-SENTINEL, June 5, 2007, at 6B, available at 2007 WLNR 10462418.

²⁴ *See* FLA. STAT. ANN. § 63.062(2)(b)(1). For purposes of this article, newborn children are treated as children under six months of age.

affidavit in the adoption proceeding indicating that he is fully able and willing to take responsibility for the child.²⁵ If he had knowledge of the pregnancy, he would have had to have paid a reasonable amount of the expenses incurred in connection with the “child’s birth, in accordance with his financial ability to pay.”²⁶ In order for the unwed father to preserve a claim to his offspring, each of these actions must have been completed prior to the time the birth mother had executed her consent.²⁷

Although the 2003 Adoption Act stated that an adoption entity “may serve” upon an unwed birth father notice of an intended adoption plan involving his offspring, the agency was not compelled to do so.²⁸ The statute gave the adoption entity complete discretion to determine whether or not to serve an unwed birth father with an intended adoption plan.²⁹ The statute also clearly provided that fraud on the birth mother’s part could not serve as grounds to excuse an unwed birth father’s failure to register.³⁰ While there may be civil or criminal sanctions to address such fraud, the unwed birth father could not use a fraud-based argument to excuse his

²⁵ *Id.* § 63.062(2)(b)(2). Upon service of a notice of an intended adoption plan or a Petition for Termination of Parental Rights Pending Adoption, the father must execute and file an affidavit in the proceeding stating that:

he is personally fully able and willing to take responsibility for the child, setting forth his plans for care of the child, and agreeing to a court order of child support and a contribution to the payment of living and medical expenses incurred for the mother’s pregnancy and the child’s birth in accordance with his ability to pay.

Id.

²⁶ *Id.* § 63.062(2)(b)(3).

²⁷ *Id.* § 63.062(2)(b). Failure to complete each of these acts means the father is “deemed to have waived and surrendered any rights in relation to the child.” *Id.* § 63.062(2)(d).

²⁸ *Id.* § 63.062(3)(a).

²⁹ *Id.* The discretionary approach was unique in Florida. See Rebeca Aizpuru, *Protecting the Unwed Father’s Opportunity to Parent: A Survey of Paternity Registry Statutes*, 18 REV. LITIG. 703, 720 (1999). Many have called for uniform registration procedures and the sharing of information between state registries as a way to offer greater protections to unwed biological fathers. *Id.* at 732; Beck, *supra* note 13, at 1071–76.

³⁰ FLA. STAT. ANN. § 63.063(1)–(3).

failure to register.³¹ Stated affirmatively, fraud by the birth mother and even the adoption entity could not excuse an unwed birth father's failure to register because he was presumed to know the Registry requirements. Under the statute, court inquiry was limited to a determination of whether an unwed birth father had registered, and if so, whether he financially supported the child or birth mother during the pregnancy and whether he could now prove he had a plan to care for the child.³² The 2003 Registry requirements were much simpler because the threshold inquiry utilized an objective test for which there were no exceptions and no excuses.³³

When children over the age of six months are subject to adoption proceedings in Florida, the legislature has provided a "substantial relationship" test between birth fathers and their offspring.³⁴ In determining whether such a relationship exists, the court will focus on the unwed father's full commitment to the responsibilities of parenthood, which will include financially supporting one's offspring, and either regularly visiting the child at least monthly or maintaining regular communication with the child.³⁵ The court must also consider the unwed father's ability to complete these tasks and whether or not the birth mother had prevented such action.³⁶ Professor Laura Oren describes two categories of fathers affected by putative father registries: "thwarted fathers"—those that have been denied the opportunity to assert their rights based upon the birth mother's conduct, and "pop-up pops"—fathers who made no effort, who appear too late and offer too little, yet seek to assert their rights to disturb the intended adoption of their offspring.³⁷

The differing approaches to adoptions of newborn children and children over the age of six months are presumably justified by the fact there may be sufficient evidence to support the existence of a relationship with an older child where that may not be true of a newborn child.³⁸ Once

³¹ *Id.*

³² *Id.* § 63.062(2)(b).

³³ *See id.* § 63.062(2)(b)(1).

³⁴ *Id.* § 63.062(2)(a)(1)(a)–(b).

³⁵ *Id.*

³⁶ *Id.*

³⁷ Laura Oren, *Thwarted Fathers or Pop-Up Pops?: How to Determine When Putative Fathers Can Block the Adoption of Their Newborn Children*, 40 *FAM. L.Q.* 153, 154 (2006).

³⁸ *See* Stacy Lynn Hill, *Putative Fathers and Parental Interests: A Search for Protection*, 65 *IND. L.J.* 939, 961–62 (1990). "The problem with th[e] 'relationship' (continued)

the child has entered the world, it is rather easy to examine the actions taken by an unwed birth father to create a legal relationship with his offspring. It is also possible to review any evidence presented by the unwed father to support his effort to create a legally protected parent-child relationship. However, it is much more difficult to examine the parent-child relationship during the mother's pregnancy. In that period, the birth mother's investment and commitment to her unborn child appear to outweigh the commitment of any man.³⁹ For unwed biological fathers, the legal question becomes one of timing: after conception when does the law determine "[i]f he grasps that opportunity [of parenthood] and accepts some measure of responsibility for the child's future"?⁴⁰

III. CONSTITUTIONAL RIGHTS OF UNWED FATHERS IN ADOPTION MATTERS

The United States Supreme Court has addressed questions involving the rights and responsibilities of unwed biological fathers to their offspring on four occasions over the past forty years.⁴¹ The decisions rendered in each of those cases frame our modern discussion of unwed biological fathers' rights and responsibilities in adoption matters. The Court has made abundantly clear that an unwed biological father must come forward promptly to assume the responsibilities of parenthood through his own intentional conduct that reflects a voluntary desire to be legally responsible for his offspring.⁴²

standard is that it places putative fathers in an almost no-win situation in cases involving newborn children." *Id.* at 961.

³⁹ See Cecily L. Helms & Phyllis C. Spence, *Take Notice Unwed Fathers: An Unwed Mother's Right to Privacy in Adoption Proceedings*, 20 WIS. WOMEN'S L.J. 1, 38-39 (2005) ("The mother has invested her body, time and energy in carrying her unborn child. Because of her investment she becomes immediately vested with the right to make decisions concerning the welfare of the baby. . . . [A] biological mother also has an implicit privacy interest in making welfare decisions on behalf of her child.").

⁴⁰ *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

⁴¹ See *Lehr*, 463 U.S. 248; *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

⁴² *Caban*, 441 U.S. at 392.

A. Stanley v. Illinois (1972)

In *Stanley*, the United States Supreme Court first examined the rights of an unwed biological father to his offspring in a child protection proceeding that did not involve adoption.⁴³ Illinois law presumed all unwed fathers unfit to parent their offspring even though all married fathers, regardless whether they were separated or divorced, were presumed fit to do so.⁴⁴ Mr. Stanley had intermittently resided over an eighteen year period with the three children he had sired and raised.⁴⁵ Despite this, when the children's mother died, the children were declared wards of the state.⁴⁶ State law did not require a parental fitness hearing prior to removal, and Mr. Stanley's children were declared dependent even though there was no proof of neglect.⁴⁷

The United States Supreme Court held that as a matter of due process all parents are entitled to a hearing to determine their fitness prior to having their children removed from their custody.⁴⁸ Additionally, the Court noted that denying a biological father a hearing, but granting it to other parents merely because they were married, divorced, or separated, is contrary to the Equal Protection Clause.⁴⁹ In *Stanley*, the Court made clear that "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."⁵⁰ The Court's examination of Mr. Stanley's conduct and the interest he demonstrated in his children provided a roadmap to examine the parameters of unwed father's rights in future cases.

B. Quilloin v. Walcott (1978)

In *Quilloin*, the United States Supreme Court rejected an unwed biological father's efforts to legitimize his eleven-year old child and

⁴³ *Stanley*, 405 U.S. at 646-47.

⁴⁴ *Id.*

⁴⁵ *Id.* at 646.

⁴⁶ *Id.*

⁴⁷ *Id.* at 646-47.

⁴⁸ *Id.* at 657-58.

⁴⁹ *Id.* at 658.

⁵⁰ *Id.* at 651.

prevent the child's adoption by another man.⁵¹ Georgia law provided that only the consent of the mother is required for the adoption of an illegitimate child.⁵² The child could only be legitimated if a court so ordered or if the father married the mother and acknowledged the child as his own.⁵³ The United States Supreme Court held that the Georgia statute did not deprive the biological father of his rights under the Equal Protection or Due Process Clauses.⁵⁴

The child had been in the custody and control of his mother from the time he was born.⁵⁵ Mr. Quilloin had not regularly paid child support for the child, he never married the child's mother, nor did he establish a home with the mother.⁵⁶ The mother married another man, who adopted the child with her consent, and a Petition for Adoption was subsequently filed.⁵⁷ Although Mr. Quilloin "attempted to block the adoption and to secure visitation rights," he was not seeking custody of the child.⁵⁸

In rejecting Mr. Quilloin's arguments, the Court focused on his efforts to parent the child and concluded that he "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."⁵⁹ The Court's focus properly scrutinized the nature of the father's relationship with the child and the lack of effort demonstrated by the father. Mr. Quilloin did not act quickly and decisively to protect his rights and that delay ultimately cost him the relationship with his child.⁶⁰ The Court distinguished this case, because the child was being adopted by a step-parent and not being placed with a completely new set of parents.⁶¹

⁵¹ *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978).

⁵² *Id.* at 248 (citing GA. CODE § 74-403(1)-(2) (1975), amended by GA. CODE ANN. § 19-8-4 (2004)).

⁵³ *Id.* at 249 (citing GA. CODE §§ 74-101, -103 (1975), amended by GA. CODE ANN. §§ 19-7-20, -22 (2004)).

⁵⁴ *Id.* at 256.

⁵⁵ *Id.* at 247.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 256.

⁶⁰ *Id.* at 254.

⁶¹ *Id.* at 255.

C. Caban v. Mohammed (1979)

In *Caban*, the United States Supreme Court again examined the rights of an unwed biological father in the context of adoption proceedings.⁶² The Court found that an unwed father is entitled to due process protections where he demonstrates a full commitment to the responsibilities of parenthood by actively rearing his children.⁶³ A putative father's interest in his relationship with his child does acquire substantial constitutional protection where he affirmatively protects that interest.⁶⁴

Mr. Caban was actively involved in the rearing of his children; his name was on their birth certificate, he lived with them, and he contributed to the support of his family until the mother left and moved in with another man whom she subsequently married.⁶⁵ When the father attempted to obtain custody of the children from their grandmother who had taken them to Puerto Rico, the mother petitioned for adoption with her new husband.⁶⁶ The petition was subsequently granted and Mr. Caban's parental rights were terminated.⁶⁷ While New York law permitted a mother to block an adoption by withholding her consent, an unwed father did not hold the same right, even when his parental relationship with the child was substantial.⁶⁸

The Court determined that the law prevented "loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enable[d] some alienated mothers arbitrarily to cut off the paternal rights of fathers."⁶⁹ Additionally, the Court explained that the New York Statute "discriminate[d] against unwed fathers even when . . . they have manifested a significant paternal interest in the child."⁷⁰ Consistent with *Stanley* and *Quillion*, the Court found that when an unwed biological parent develops a relationship with his biological

⁶² *Caban v. Mohammed*, 441 U.S. 380, 381–82 (1979).

⁶³ *Id.* at 392.

⁶⁴ *Id.* at 392–93.

⁶⁵ *Id.* at 382.

⁶⁶ *Id.* at 383.

⁶⁷ *Id.* at 383–84.

⁶⁸ *Id.* at 386–87.

⁶⁹ *Id.* at 394.

⁷⁰ *Id.*

child and accepts some responsibility in the child's future, the father is afforded constitutional protection.⁷¹

D. Lehr v. Robertson (1983)

In *Lehr*, the United States Supreme Court would again address the question of putative father rights in the context of a putative father registry. New York law mandated notice of adoption proceedings to putative fathers who registered with the putative father registry or who satisfied a variety of other statutory tests to preserve their right to notice.⁷² In *Lehr*, a child born out of wedlock was adopted by the man the child's biological mother married eight months after the child's birth.⁷³ The putative father was not given notice of the adoption proceeding.⁷⁴ Mr. Lehr did not register with the putative father registry nor did he engage in the behavior one would expect of a responsible parent.⁷⁵ While he did live with the child's mother before the child's birth and visited the mother in the hospital when his child was born, he never lived with the child or the child's mother after birth, nor did he provide either of them with financial support.⁷⁶

The Court crystallized the principles announced in *Stanley*, *Quilloin*, and *Caban* by stating that "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in the personal contact with his child acquires substantial protection under the Due Process

⁷¹ See also *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

⁷² *Id.* at 250–51. Additionally, the law required that notice:

be given to several other classes of possible fathers of children born out of wedlock—those who ha[d] been adjudicated to be the father, those identified as the father on the child's birth certificate, those who live[d] openly with the child and the child's mother and who held themselves out to be the father, those who ha[d] been identified as the father by the mother in a sworn written statement, and those who were married to the child's mother before the child was six months old.

Id. at 251.

⁷³ *Id.* at 250.

⁷⁴ *Id.*

⁷⁵ See *id.* at 264, 266.

⁷⁶ *Id.* at 252.

Clause.”⁷⁷ The mere existence of a biological link is not constitutionally protected, but the link does give the biological father an “opportunity that no other male possesses to develop a relationship with his offspring.”⁷⁸ The Court determined that *Lehr*’s due process and equal protection rights were not violated because he had never established any custodial, personal, or financial relationship with his child.⁷⁹ Of course, the interest is not absolute and will only be protected where, as the *Lehr* Court subsequently held, the unwed father “grasps that opportunity [which no other male possesses] 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.”⁸⁰ The rights of an unwed father are a counterpart of the responsibilities he has assumed with respect to his child.⁸¹

In *Stanley*, *Quilloin*, *Caban*, and *Lehr*, the United States Supreme Court identified and explained the nature of an unwed father’s inchoate interest in his children, which it held only matures to a constitutionally protected right where the father accepts some measure of his parental responsibility.⁸² These cases all presented one common thread which served to bind responsible fathers to their children: “[t]he 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.”⁸³

The United States Supreme Court has long held that natural parents have a fundamental liberty interest in the care, custody, and management of their children.⁸⁴ Indeed, “[t]he rights to conceive and to raise one’s children have been deemed ‘essential.’”⁸⁵ Parents are presumptively fit and entitled to the “custody, care, and nurture” of their children absent a

⁷⁷ *Id.* at 261 (citation omitted).

⁷⁸ *Id.* at 262.

⁷⁹ *Id.* at 267.

⁸⁰ *Id.* at 262.

⁸¹ *Id.* at 257.

⁸² *See id.* at 262; *Caban v. Mohammed*, 441 U.S. 380, 392 (1979); *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978); *Stanley v. Illinois*, 405 U.S. 645, 657 (1972).

⁸³ *Adoption of Kelsey S.*, 823 P.2d 1216, 1228 (Cal. 1992) (en banc).

⁸⁴ *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

⁸⁵ *Stanley*, 405 U.S. at 651 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

showing of unfitness.⁸⁶ This presumption of parental fitness applies equally to parents be they married or unmarried.⁸⁷ A state may not constitutionally deprive an unwed father of the right to custody and care of his offspring absent notice and a hearing where particularized findings must be made to establish the father's unfitness.⁸⁸

IV. CRITICISMS OF THE FLORIDA PUTATIVE FATHER REGISTRY SCHEME ADOPTED IN 2003

Having established the constitutional framework for analyzing the unwed biological father's rights, we can now fully consider many of the perceived shortcomings found in Florida's Putative Father Registry. Many suggest the significant legal burdens placed on unwed biological fathers in the 2003 Act were a direct result of the backlash from a rather insensitive and unconstitutional effort to require birth mothers to provide notice to unwed biological fathers.⁸⁹ The notification and publication requirements of the Florida Adoption Act of 2001 placed significant legal burdens on a birth mother when she sought to place her child for adoption.⁹⁰ Where the birth father's location was unknown, she was forced to conduct a diligent search to locate him⁹¹ and in some cases, publish the names of men she had

⁸⁶ Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

⁸⁷ See *Stanley*, 405 U.S. at 649.

⁸⁸ *Id.*

⁸⁹ See, e.g., Andrew T. Binstock, Note & Comment, *Not If, But When?: Dismantling the Florida Adoption Act of 2001*, 10 CARDOZO WOMEN'S L.J. 625, 655 (2004).

⁹⁰ *Id.* at 628.

⁹¹ FLA. STAT. ANN. § 63.088(4) (West 2005). Where the mother knew the birth father's name but not his location, a diligent search must be conducted and must include inquiries concerning:

(a) The person's current address, or any previous address, through an inquiry of the United States Postal Service through the Freedom of Information Act;

(b) The last known employment of the person, including the name and address of the person's employer. Inquiry should be made of the last known employer as to any address to which wage and earnings statements (W-2 forms) of the person have been mailed. Inquiry should be made of the last known employer as to whether the person is eligible

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for a pension or profit-sharing plan and any address to which pension or other funds have been mailed;

(c) Regulatory agencies, including those regulating licensing in the area where the person last resided;

(d) Names and addresses of relatives to the extent such can be reasonably obtained from the petitioner or other sources, contacts with those relatives, and inquiry as to the person's last known address. The petitioner shall pursue any leads of any addresses to which the person may have moved. Relatives include, but are not limited to, parents, brothers, sisters, aunts, uncles, cousins, nieces, nephews, grandparents, great-grandparents, former or current in-laws, stepparents, and stepchildren;

(e) Information as to whether or not the person may have died and, if so, the date and location;

(f) Telephone listings in the area where the person last resided;

(g) Inquiries of law enforcement agencies in the area where the person last resided;

(h) Highway patrol records in the state where the person last resided;

(i) Department of Corrections records in the state where the person last resided;

(j) Hospitals in the area where the person last resided;

(k) Records of utility companies, including water, sewer, cable television, and electric companies, in the area where the person last resided;

(l) Records of the Armed Forces of the United States as to whether there is any information as to the person;

(m) Records of the tax assessor and tax collector in the area where the person last resided;

(n) Search of one Internet databank locator service; and

(o) Information held by all medical providers who rendered medical treatment or care to the birth mother and child, including the identity and location information of all persons listed by the mother as being

(continued)

sexual intercourse with around the time of conception if more than one man could be the father.⁹² The notification laws were widely chided as insensitive and humiliating, not to mention as an unconstitutional interference with a birth mother's right to privacy and decisional autonomy.⁹³ The notice provisions were ultimately held unconstitutional by Florida's Fourth District Court of Appeal.⁹⁴ In 2003, the Florida Legislature took a new approach to a putative father's notification right and instead of focusing on the conduct of the birth mother, it was now the putative father who would be primarily responsible to protect his right to receive notification of a pending adoption involving his offspring—the Florida Putative Father Registry had arrived.⁹⁵

A. Due Process and Presumptions

The Florida legislature amended Florida's codified adoption statute in 2003 in order to create the Florida Putative Father Registry.⁹⁶ In so doing, it also created a series of legal presumptions that ultimately focused on timely registration with the Registry as the starting point for consideration of an unwed biological father's rights. Failure to timely register permanently eliminated an unwed birth father from the equation, while timely registration would preserve a right to receive actual notice of an intended adoption plan.⁹⁷

The presumptions began with conception: by virtue of engaging in sexual intercourse with a woman, an unwed biological father was "deemed" to be on notice that a pregnancy and an adoption proceeding

financially responsible for the uninsured expenses of treatment or care and all persons who made any such payments.

Id.

⁹² *Id.* § 63.088(5).

⁹³ See Binstock, *supra* note 89, at 629; Candice Critchfield, *Ad Law Encourages Babies' Abandonment*, S. FLA. SUN-SENTINEL, Nov. 18, 2002, at 27A.

⁹⁴ See *G.P. v. State*, 842 So. 2d 1059, 1061 (Fla. Dist. Ct. App. 2003).

⁹⁵ FLA. STAT. ANN. § 63.054.

⁹⁶ See *id.* (creating the Florida Putative Father Registry).

⁹⁷ See *id.* § 63.062(2)(d). At a minimum, the unwed biological father must have timely registered with the Registry in order to be entitled to notice of any subsequent adoption proceedings. *Id.* Chapter 63 imposes additional obligations on unwed fathers. See *id.* § 63.062(2)(b)(1)–(3); see also *supra* notes 30, 35–36 and accompanying text.

regarding any subsequently born child could occur.⁹⁸ This “legislative notice” imposed upon each unwed biological father the affirmative duty to protect his own rights and interests.⁹⁹ In order to protect his rights, an unwed father was presumed to know of his legal obligation to timely register with the Florida Putative Father Registry.¹⁰⁰ An unwed father was presumed to know his child may be adopted without his consent unless he timely registers with the Registry, complies with the other obligations set forth in the chapter, and demonstrates a prompt and full commitment to his parental responsibilities.¹⁰¹ His act of registering would be the first step that must be taken in his effort to convert his inchoate interests to a constitutionally protected relationship.¹⁰² Unwed fathers that failed to timely register are deemed to have surrendered and waived any rights to the child.¹⁰³

The chief complaint asserted against the Florida Putative Father Registry scheme was that unwed birth fathers simply had no actual knowledge of their obligation to register.¹⁰⁴ The notion that an unwed male should intuitively know that when he engages in sexual intercourse with an unmarried woman he must also contact the state and report this private conduct to preserve a claim to his offspring holds no place in the history and traditions of American jurisprudence. The legislative presumption that unwed fathers are presumed to know of their obligation to register is not only inconsistent with deeply imbedded notions of privacy, but also unrealistic. This was emphasized by Justice Anstead’s comment when the Supreme Court of Florida was holding oral argument in *Heart of Adoptions* in July, 2007. He commented whether “that meant an unmarried man who has sex with a woman should skip ‘smoking the

⁹⁸ FLA. STAT. ANN. § 63.088(1).

⁹⁹ *Id.*

¹⁰⁰ *Id.* § 63.053(2).

¹⁰¹ *Id.*

¹⁰² *See id.* § 63.062(2)(b).

¹⁰³ *Id.* § 63.054(1). Pursuant to this statute, “a claim of paternity may not be filed after the date a petition is filed for termination of parental rights.” *Id.* A claim of paternity would also be untimely where it was filed after the birth mother executed her consent for adoption. *Id.* § 63.062(2)(b).

¹⁰⁴ *See, e.g., Heart of Adoptions, Inc. vs. J.A.*, 963 So. 2d 189, 194 (Fla. 2007).

classic cigarette' and instead immediately tell the Health Department: 'I want the state to know that I've just had sexual intercourse.'"¹⁰⁵

While there exists a general presumption that one knows the law, this presumption "is limited in its scope by the reason for it, and knowledge of the law will not be imputed to every person for all purposes."¹⁰⁶ "Where the fact of knowledge of the law is material, knowledge is presumed; [but] that presumption is rebuttable, and varies in force with the facts."¹⁰⁷ "[S]uch presumption is rebuttable, varying in force with the facts—strong in the case of a lawyer, or with respect to general laws which are matters of common knowledge, and weak, almost nonexistent, in respect to details or to laws which touch few persons."¹⁰⁸

The Florida Legislature presumed that every unwed biological father in every case is unfit and has abandoned his child where he has failed to timely register with the Florida Putative Father Registry.¹⁰⁹ The reason for such treatment was clearly addressed in *Stanley*: "[p]rocedure by presumption is always cheaper and easier than individual determination. But when . . . the procedure forecloses the determinative issues of competence and care . . . it needlessly risks running roughshod over the important interests of both parent and child [and] therefore cannot stand."¹¹⁰ Florida's presumption automatically terminates any parental interest an unwed biological father may have even where he has otherwise dutifully discharged his responsibilities as a parent; that presumption impermissibly slices too deeply into constitutionally protected interests. Termination of the unwed biological father's parental rights without notice and without his consent based upon failing to register is unconstitutional because it violates his due process rights under the Fourteenth Amendment

¹⁰⁵ Kaczor, *supra* note 23.

¹⁰⁶ 31A C.J.S. *Evidence* § 229 (2008).

¹⁰⁷ *Schaffer v. Fed. Trust Co.*, 28 A.2d 75, 76 (N.J. Ch. 1942).

¹⁰⁸ 29 AM. JUR. 2D *Evidence* § 290 (2008) (citing *Schaffer*, 28 A.2d at 78).

¹⁰⁹ See FLA. STAT. ANN. §§ 63.054(1), 63.062(2)(b)(1) (West 2005). These sections failed to provide actual notice of adoption proceedings to putative fathers who may have acquired constitutionally protected rights by virtue of their actions even though they may have failed to promptly register with the Registry. See FLA. STAT. ANN. §§ 63.054(1), 63.062(2)(b)(1).

¹¹⁰ *Stanley v. Illinois*, 405 U.S. 645, 656–57 (1972).

as well as his privacy rights under the Florida Constitution, which provides significant privacy protections beyond those of the Federal Constitution.¹¹¹

In *Lehr*, the United States Supreme Court found that a putative father's interest in his relationship with the child acquires substantial constitutional protection where the "father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child.'"¹¹² The Court in *Lehr* did not rule that putative father registry schemes were constitutionally permissible where the exclusive test of parenthood was timely registration. In fact, the *Lehr* Court found the putative father registration scheme employed by New York was but one of many ways that a birth father could seek to protect the inchoate interest in his offspring; it was not, however, the exclusive means.¹¹³

Even where an unwed biological father did not receive notice of an adoption proceeding but subsequently discovered that his child was being placed for adoption, he would still be categorically barred from filing a claim of paternity after a petition for termination of parental rights had been filed. In *In re Adoption of Baby A*,¹¹⁴ the Second District Court of Appeal of Florida grappled with many of the troubling issues presented where an unmarried father fails to register but subsequently claims paternity. The court's examination of the statute reflects the illogical and inconsistent application of various provisions relating to Florida's Putative Father Registry. Stopping short of declaring the registry unconstitutional, presumably because the issue was not before the court, the court stated that:

[f]or now, those issues must await action by the legislature or future judicial precedent or must perhaps depend upon the integrity and vigilance of adoption agencies to take actions independent of legal requirements (and perhaps adverse to their own interests) to balance the competing

¹¹¹ *Heart of Adoptions, Inc. vs. J.A.*, 963 So. 2d 189, 206 (Fla. 2007) (Lewis, C.J., concurring).

¹¹² *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (quoting *Caban v. Muhammed*, 441 U.S. 380, 392 (1979)).

¹¹³ *See id.* at 263–64.

¹¹⁴ 944 So. 2d 380 (Fla. Dist. Ct. App. 2006).

interests of biological parents, adoptive parents, and the child in the adoptions they undertake.¹¹⁵

B. Custody Plan

Where an unwed biological father has timely registered with the Registry, he has preserved his right to receive actual notice of an intended adoption.¹¹⁶ Registration is but the first step to transform the inchoate interest into a statutorily protected right in Florida. An unwed biological father must also file an affidavit in the adoption “proceeding stating that he is personally and fully able and willing to take responsibility for the child, setting forth his plans for care of the child, and agreeing to a court order of child support.”¹¹⁷ This plan of custody or “commitment affidavit” apparently required an unwed biological father to affirmatively establish fitness.¹¹⁸ Florida law provides no guidance on the standards a trial court should utilize in examining his “plans to care for his child.” The requirement to affirmatively establish an unwed father’s plan to rear his child presumes unfitness on the father’s part even though *Stanley* expressly rejects such presumptions regarding unwed fathers.¹¹⁹ Assuming an unwed biological father has maintained minimal contact with the birth mother

¹¹⁵ *Id.* at 396.

¹¹⁶ FLA. STAT. ANN. § 63.062(2)(b) (West 2005).

¹¹⁷ *Id.* § 63.062(2)(b)(2). The putative father must also agree to contribute “to the payment of living and medical expenses incurred for the mother’s pregnancy and the child’s birth in accordance with his ability to pay.” *Id.*

¹¹⁸ *Id.* § 63.062(3)(a). The statute provides that:

[t]he notice of intended adoption plan must specifically state that if the unmarried biological father desires to contest the adoption plan, he must file with the court, within [thirty] days after service, a verified response that contains a pledge of commitment to the child in substantial compliance with subparagraph (2)(b)2. The notice of intended adoption plan shall notify the unmarried biological father that he must file a claim of paternity form with the Office of Vital Statistics within [thirty] days after service upon him and must provide the adoption entity with a copy of the verified response filed with the court and the claim of paternity form filed with the Office of Vital Statistics.

Id.

¹¹⁹ *Stanley v. Illinois*, 405 U.S. 645, 657–58 (1972).

during the pregnancy and registered with the Registry, why should he be required to produce evidence of his parenting abilities? A birth mother who decides not to place her child for adoption certainly need not make such a showing. As acknowledged by many scholarly articles, her commitment to the child can be demonstrated through her unique genetic responsibility of carrying the child to term.¹²⁰ However, this fact alone is no guarantee that a pregnant unwed mother will have a better “plan of custody to care for her child” to the extent the law should excuse her of such presumptions. Excusing birth mothers from this requirement creates serious questions regarding Equal Protection under the law.¹²¹

C. Fraud

Consistent with the legal presumptions that underlie the Florida Putative Father Registry, the Florida Legislature placed one more legal burden on the shoulders of unwed biological fathers. Unwed biological fathers are also responsible for preventing any act that constitutes fraud as it relates to their Registry obligations.¹²² The codified adoption statute places the burden of preventing fraud on the unwed biological father and prohibits fraud as a defense for non-compliance with his affirmative

¹²⁰ See, e.g., Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313, 372–73 (1984); Robbin Pott Gonzalez, *The Rights of Putative Fathers to Their Infant Children in Contested Adoptions: Strengthening State Laws that Currently Deny Adequate Protection*, 13 MICH. J. GENDER & L. 39, 56–57 (2006).

¹²¹ See Mahrukh S. Hussaini, *Incorporating Thwarted Putative Fathers Into the Adoption Scheme: Illinois Proposes a Solution After the “Baby Richard” Case*, 1996 U. ILL. L. REV. 189, 213–17. Hussaini notes that:

[a]lthough a statute may permissibly require some affirmative action from unwed fathers, it must not unnecessarily limit the ways in which a putative father can take this affirmative action and manifest his parental interest. If it does, it has the potential of denying the equal protection of the laws to putative fathers, who may be as worthy of constitutional as unwed mothers, and the statute may be stricken as unconstitutional.

Id. at 214.

¹²² FLA. STAT. ANN. § 63.063(3).

Registry obligations.¹²³ Fraud on the part of the birth mother or even an adoption agency cannot serve as a basis to halt or overturn a final adoption.¹²⁴

It is certainly possible, however, that an adoption agency, whose sole function is to locate children for adoption and to be paid for those services, might provide inaccurate information to an unwed birth father.¹²⁵ It is also possible that a birth mother would misrepresent the identity of the unwed birth father or misrepresent her true intention of placing the child for adoption. A state statute that condones fraudulent behavior against unwed birth fathers resulting in the permanent deprivation of parental rights thus appears to be a denial of equal protection and due process.

One example of relief from the strict registry requirements can be found in the case of *In re Adoption of Baby Boy Doe*.¹²⁶ In *Baby Boy Doe*, the birth mother intentionally lied to the putative father telling him they would raise the child together and that she would not place the child for adoption.¹²⁷ Even though the mother's real intention was to place the child for adoption immediately after birth, the putative father relied on the mother's statements and thus did not protect his rights.¹²⁸ The Utah Supreme Court ruled the birth mother's intentional misrepresentation, coupled with the fact the father made clear his intention to rear his child,

¹²³ *Id.* (stating that "the unmarried biological father is in the best position to prevent" fraud).

¹²⁴ *Id.* § 63.063(2). The statute provides, in part, that:

[a]ny person injured by a fraudulent representation or action in connection with an adoption is entitled to pursue civil or criminal penalties as provided by law. A fraudulent representation is not a defense to compliance with the requirements of this chapter and is not a basis for dismissing a petition for termination of parental rights or a petition for adoption, for vacating an adoption decree, or for granting custody to the offended party.

Id.

¹²⁵ *See, e.g.,* Gruett v. Nesbitt, 17 P.3d 1090, 1097 (Or. Ct. App. 2001) (explaining that the agency misled the putative father by telling him that he had fourteen days to act but then placed the child with the adoptive parents shortly after the birth).

¹²⁶ 717 P.2d 686 (Utah 1986).

¹²⁷ *Id.* at 687, 690.

¹²⁸ *Id.* at 690.

relieved the father of the obligation to register because “termination of his parental rights was contrary to basic notions of due process, and . . . he came forward within a reasonable time after the baby’s birth.”¹²⁹

D. Florida’s Constitutional Right to Privacy

In *Heart of Adoptions*, Chief Justice Lewis’s concurring opinion goes beyond statutory analysis to address the additional privacy protections set forth in the Florida Constitution that should be extended to unmarried biological fathers.¹³⁰ Florida’s independent Right to Privacy Clause states that “[e]very natural person has the right to be let alone and free from governmental intrusion into the person’s private life.”¹³¹ This right “embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution.”¹³² The Supreme Court of Florida has not examined the parameters of Florida’s constitutional right to privacy in the context of Florida’s Putative Father Registry.

E. Notice Provisions in Other Florida Proceedings

Some unwed biological fathers have gone beyond Florida’s codified adoption act and argued that they were not prohibited from filing a paternity action pursuant to chapter 742 of the Florida Statutes, which requires a paternity determination prior to any termination of parental rights.¹³³ Although the Second District Court’s rationale in *Baby A* for requiring a paternity determination was ultimately rejected by the Supreme Court of Florida,¹³⁴ the Second District Court exposed the inconsistent treatment unwed biological fathers experienced in regards to their right to receive notice of proceedings involving their offspring in Florida.¹³⁵ The

¹²⁹ *Id.* at 691 (quoting *Ellis v. Soc. Servs. Dep’t of the Church of Jesus Christ of Latter-Day Saints*, 615 P.2d 1250, 1256 (Utah 1980)).

¹³⁰ *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 206 (Fla. 2007) (Lewis, C.J., concurring).

¹³¹ *Id.* (quoting FLA. CONST. art. I, § 23).

¹³² *Id.* (quoting *N. Fla. Women’s Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 619, 634 (Fla. 2003)).

¹³³ *See, e.g., In re Adoption of Baby A*, 944 So. 2d 380, 394–95 (Fla. Dist. Ct. App. 2006).

¹³⁴ *See Heart of Adoptions*, 963 So. 2d at 189.

¹³⁵ *In re Adoption of Baby A*, 944 So. 2d at 392–93.

lack of notice to unwed biological fathers in adoption proceedings was particularly difficult to reconcile given notice provisions in other areas of the law, such as in dependency and child support proceedings.¹³⁶ When it comes to an unwed biological father's asserting his interest in an intended adoption matter where he has failed to register—as opposed to his failing to financially support his offspring—it is crystal clear that biology alone is not enough.¹³⁷

V. *HEART OF ADOPTIONS V. J.A.*: ACTUAL NOTICE OF INTENDED ADOPTIONS NOW REQUIRED

When the Supreme Court of Florida granted review in *Heart of Adoptions*, many observers believed the court would resolve the questions related to an unwed biological father's due process right to receive notice of an intended adoption through a constitutional analysis of both state and federal law.¹³⁸ Given Florida's enumerated state right of privacy, it was also believed that the court might provide a substantive analysis of an unwed biological father's right to grasp the opportunity of parenthood.¹³⁹ Important questions such as when and how that right manifests in Florida would be critical in determining the validity of the Florida Putative Father Registry.

A. *Factual and Procedural History*

The purported father of Baby H, J.A., learned of the mother's pregnancy three months prior to the child's birth.¹⁴⁰ J.A. was not married

¹³⁶ *Id.* at 394 n.16, 395 n.21.

¹³⁷ See Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology "Plus" Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 48 (2004) (describing the apparent paradox of providing notice to putative fathers when a biological link to their offspring alone serves as sufficient justification for the public fisc but requiring biology-plus as an additional requirement in adoption matters).

¹³⁸ Cf. Amy U. Hickman & Jeanne T. Tate, *Florida's Putative father Registry: More Work Is Needed to Follow the Established National Trends Toward Stable Adoption Placements*, FLA. B.J., Jan. 2008, at 45.

¹³⁹ Jeffrey A. Parness & Therese A. Clarke Arado, *Safe Haven, Adoption and Birth Record Laws: Where Are the Daddies?*, 36 CAP. U. L. REV. 207, 215 n.43 (2007).

¹⁴⁰ *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 191 (Fla. 2007). Although there was no transcript of evidentiary findings made during the termination hearing, the stipulated

(continued)

to the birth mother at the time of her conception nor did he subsequently marry her.¹⁴¹ Approximately two weeks prior to the birth of Baby H, the adoption agency, Heart of Adoptions, Inc., sent a certified letter to J.A. requesting that he contact the agency regarding “a legal matter involving [the mother] and her pregnancy.”¹⁴² This correspondence indicated that the required adoption disclosure form¹⁴³ “was enclosed, and requested that J.A. sign and return an acknowledgment of receipt of the disclosure.”¹⁴⁴ On August 1, 2005, four days prior to the birth of Baby H, the adoption agency “sent J.A. a more detailed letter . . . which purported to confirm a conversation” that took place between a representative of the agency and J.A. indicating that the birth mother planned to place the child for adoption and that J.A. could be the biological father.¹⁴⁵ That letter also indicated that J.A.’s failure to provide financial support to the birth mother could be used to establish abandonment under Florida law and that the birth mother needed approximately \$2,100 per month to meet her living expenses.¹⁴⁶ The letter did not inform J.A. of the Florida Putative Father Registry, nor did it disclose the affirmative actions J.A. would have to take in order to preserve his right to receive notice of the adoption proceedings or to withhold his consent to the adoption.¹⁴⁷

On August 5, 2005, Baby H was born and J.A. filed a pro se petition to establish paternity and for related relief, seeking to “stop the mother from allowing the child to be adopted.”¹⁴⁸ The next day the birth mother placed the child for adoption with Heart of Adoptions, Inc. and “executed an

facts submitted by the parties indicate that J.A. claimed to be the biological father and the birth mother identified J.A. as the biological father. *See id.* at 191 n.2.

¹⁴¹ *See id.* at 192.

¹⁴² *Id.* at 191.

¹⁴³ The Adoption Disclosure Form is mandated by section 63.085 of the Florida Statutes. *See supra* note 20 and accompanying text.

¹⁴⁴ *Heart of Adoptions*, 963 So. 2d at 191.

¹⁴⁵ *Id.* at 192.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* J.A. filed his petition with the assistance of a non-lawyer using the Florida Supreme Court Approved Family Law Forms. *Id.* J.A.’s petition was filed in Citrus County, where the child was born, even though the termination case would be litigated in the Hillsborough County where venue was proper due to the birth mother’s waiver of venue pursuant to section 63.087(2)(a)(3). *Id.* at 192, 193 n.3.

affidavit of inquiry regarding the biological father.¹⁴⁹ On August 8, 2005, three days after both the birth of the child and the filing of J.A.'s petition to establish paternity, the agency filed a petition to terminate J.A.'s parental rights.¹⁵⁰ The petition alleged J.A. had physically and financially abandoned both the mother and the child and that J.A. was not entitled to notice of the adoption nor could he consent to the adoption because he did not properly file a claim of paternity with the Florida Putative Father Registry.¹⁵¹ J.A. was served with the petition and filed an answer denying all allegations.¹⁵²

¹⁴⁹ *Id.* at 192. In her affidavit of inquiry regarding the biological father, the birth mother made the following statements:

9. . . .

(2) [He] has been informed of my pregnancy and adoption plan but has not paid a fair and reasonable amount of the expense incurred in connection with the pregnancy, in accordance with his financial ability. In fact, the biological father [has] contributed no monies to me or this child or on our behalf;

. . .

(4) [He] did not provide or promise to provide the child or me during the pregnancy with support in a repetitive customary manner.

10. The biological father, [J.A.], is over the age of eighteen and is employed. I believe he has sufficient resources so that he could have provided some financial support to me during the pregnancy, if he so wished.

11. The biological father is aware that I reside in and can be located in the State of Florida. At all times during the pregnancy, he has known how to communicate with me.

12. Because of my limited resources, I have had to rely on assistance from the prospective adoptive parents, my mother and the State of Florida in order to provide for myself during the pregnancy.

Id. at 192–93. “According to the financial affidavit filed along with the paternity petition, J.A.’s monthly net income was \$1300.” *Id.* at 192.

¹⁵⁰ *Id.* at 193.

¹⁵¹ *Id.* The petition for termination alleged abandonment pursuant to sections 63.089, 63.064(1), and 63.032(1) of the Florida Statutes. *Id.* The petition also alleged J.A.’s failure
(continued)

The court held a hearing on September 27, 2005, to determine the status on the petition to terminate J.A.'s parental rights.¹⁵³ The parties stipulated that "J.A. did not file a claim of paternity with the Registry or execute an affidavit stating he was able and willing . . . to care for the child, and agreeing to a court order of support," including expenses incurred by the birth mother during the pregnancy.¹⁵⁴ They also stipulated that J.A. was aware of the birth mother's pregnancy at least three months prior to the birth of Baby H, that "he was aware of the adoption plan at least three weeks prior to the birth, and [that he] was contacted by the agency in writing at least twice prior to the birth."¹⁵⁵ The parties also stipulated that J.A. was unaware of the Registry requirements.¹⁵⁶ J.A. argued that he was entitled to notice of the Florida Putative Father Registry.¹⁵⁷

The trial court rejected J.A.'s mandatory notice claim and ruled that J.A.'s pending paternity claim did not preclude the entry of an order terminating J.A.'s parental rights without his consent.¹⁵⁸ The court found that J.A.'s consent to the termination of his parental rights or to the adoption was not required because J.A. had failed to "file a claim of paternity with the Registry" and failed to file an affidavit with the court indicating his "willing[ness] to take responsibility for the child."¹⁵⁹ The trial court did not rule on the abandonment allegations presented in the mother's petition.¹⁶⁰ At the conclusion of the trial, the "court issued a final order terminating the parental rights of J.A." and J.A. appealed.¹⁶¹

to "comply with the additional requirements of section 63.062(2) [of the] Florida Statutes."
Id.

¹⁵² *Id.* at 193–94.

¹⁵³ *Id.* at 194. No transcript of the hearing exists "because no court reporter was present." *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (stating that "although J.A. 'was never presented as a witness or sworn in as one,' he stated that he did not know about the Registry").

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

On appeal, the Second District Court of Appeal of Florida reversed the trial court's judgment of termination of parental rights and remanded.¹⁶²

[T]he Second District held that in ruling on a petition for termination [of parental rights] pending adoption, the trial court was without authority to terminate the parental rights of an alleged unmarried biological father who failed to register with the Registry because he was not a "parent" as defined in the statutory scheme [of chapter 63].¹⁶³

Additionally, "[t]he Second District further held that when a paternity action is pending at the time a petition [to terminate parental rights pending adoption] is filed, the paternity action should [be resolved] prior to the conclusion of the petition for termination."¹⁶⁴ The Second District Court of Appeal of Florida also certified the question presented in this case as one of great public importance.¹⁶⁵

On July 12, 2007, in *Heart of Adoptions*, the Supreme Court of Florida ruled in favor of providing unwed biological fathers with actual notice of the Florida Putative Father Registry and the legal obligations they must satisfy if they plan to grasp the opportunity of parenthood.¹⁶⁶ The court determined that unwed biological fathers are entitled to receive actual notice of intended adoption plans involving their offspring and that they have thirty days to register with the Florida Putative Father Registry after having received such notice.¹⁶⁷ The court's interpretation of chapter 63 eliminates the discretion of adoption entities, making it mandatory to provide such notice to biological fathers who were not married to the birth mother at the time of conception or of the birth of a child.¹⁶⁸ More

¹⁶² *Id.* The Second District Court of Appeal of Florida remanded based on its prior decisions in *In re Baby R.P.S.*, 942 So. 2d 906 (Fla. Dist. Ct. App. 2006), and *In re Adoption of Baby A*, 944 So. 2d 380 (Fla. Dist. Ct. App. 2006). *Heart of Adoptions*, 963 So. 2d. at 194.

¹⁶³ *Heart of Adoptions*, 963 So. 2d. at 194; see also *In re Baby R.P.S.*, 942 So. 2d at 908–09; *In re Adoption of Baby A*, 944 So. 2d at 389.

¹⁶⁴ *Heart of Adoptions*, 963 So. 2d. at 194; see also *In re Adoption of Baby A*, 944 So. 2d at 396.

¹⁶⁵ *Heart of Adoptions*, 963 So. 2d at 191, 194.

¹⁶⁶ *Id.* at 202.

¹⁶⁷ *Id.*

¹⁶⁸ Compare *id.* at 202 with FLA. STAT. ANN. § 63.062(3)(a) (West 2005).

significantly, the court's ruling provides unwed biological fathers with actual notice of both the Florida Putative Father Registry and the affirmative actions required of an unwed biological father who desires both to establish and preserve his right to be made a party to any proceeding to terminate his parental rights and to establish that his consent is required to a proposed adoption.¹⁶⁹ The court determined that the discretionary language found in section 63.062(3)(a), that "an adoption entity *may* serve upon any unmarried biological father . . . a notice of intended adoption plan," was inconsistent with the legislative intent and the statutory scheme set forth in the Florida Adoption Act codified in chapter 63.¹⁷⁰

B. The Court's Analysis

The Supreme Court of Florida framed the question presented in *Heart of Adoptions* as one of statutory interpretation and not one of constitutional rights.¹⁷¹ The court's approach to the question presented involved an analysis of two separate issues intertwined by the statutory scheme envisioned in Florida's codified adoption statute. The court's first task was to "determine whether the statutory scheme vest[ed Florida] trial court[s] with authority to terminate the parental rights of an alleged unmarried biological father who does not come within the categories of persons required to consent to adoption."¹⁷² "Within this broad question," the court set forth to determine "under what circumstances the [Florida] Legislature has required that an adoption entity serve notice on the unmarried biological father of the steps he must take to preserve his ability to either consent or withhold his consent to adoption."¹⁷³

The court identified the Florida Putative Father Registry as the "central feature" of the Florida Adoption Act.¹⁷⁴ In so doing, the Court went

¹⁶⁹ See FLA. STAT. ANN. § 63.062(2)(b) (laying out the required actions an unwed biological father must take).

¹⁷⁰ See *Heart of Adoptions*, 963 So. 2d at 199–200. The amended statute now states that "an adoption entity *shall* serve a notice of intended adoption upon any known and locatable unmarried biological father who is identified to the adoption entity by the mother." FLA. STAT. ANN. § 63.062(3) (West Supp. 2008) (emphasis added).

¹⁷¹ *Heart of Adoptions*, 963 So. 2d at 191.

¹⁷² *Id.* at 195. The categories of persons required to consent to an adoption are set forth in section 63.062(1) of the Florida Statutes.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 196.

through a lengthy analysis of the statutory provisions that dictate the rights and obligations of unwed biological fathers pursuant to Florida law. Within this comprehensive analysis, the Court ultimately “reject[ed] the Second District’s holding that an unmarried biological father’s failure to timely file with the Registry cannot provide a basis for terminating that father’s parental rights.”¹⁷⁵ The Supreme Court of Florida “conclude[d] that the Second District disregarded the clear intent of the Legislature in section 63.062(2)(d) that an unmarried biological father who does not comply with the requirements of section 63.062(2) is ‘deemed to have waived and surrendered any rights in relation to the child.’”¹⁷⁶ The Court found that “[t]he entire statutory scheme [set forth in chapter 63] would be frustrated if” unmarried biological fathers were excused from the Registry requirements.¹⁷⁷ The Supreme Court of Florida then ruled that Florida trial courts have authority to terminate parental rights of unwed biological fathers who fail to register, since registering is an integral function of the Registry.¹⁷⁸

The court identified the key question to be “under what circumstances an adoption entity is required to notify an unmarried biological father of the steps he must take to preserve his ability to either consent to withhold his consent to an adoption.”¹⁷⁹ The court then sought to eliminate the inconsistent language found in the Notice of Adoption Plan Under Act, which appears to provide discretion to the adoption entity as to when and if the entity had an obligation to serve a notice of an intended adoption plan

¹⁷⁵ *Id.* at 197.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 191. The court’s analysis included a review of various provisions of chapter 63 which reflect the legislative intent to require unmarried biological fathers to affirmatively act to preserve their parental interest in their offspring. *See id.* at 195–98. “An unmarried biological father who does not comply with each of the conditions provided in this subsection is deemed to have waived and surrendered any rights in relation to the child . . .” FLA. STAT. ANN. § 63.062(2)(d) (West 2005); *see also id.* § 63.053(1) (stating that an unmarried biological father’s “parental interest may be lost entirely, or greatly diminished, by his failure to timely comply with the available legal steps to substantiate a parental interest”); *id.* § 63.063(4)(d) (referring to an out of state unmarried biological father’s obligation to “protect and preserve his parental interest”).

¹⁷⁹ *Heart of Adoptions*, 963 So. 2d at 198.

on an unmarried biological father.¹⁸⁰ To grant such discretion would render meaningless the legislative intent that adoption entities locate and provide notice to an unmarried biological father before placement of a child in an adoptive home.¹⁸¹ Harmonizing various provisions of the Act in order to effectuate legislative intent, the court concluded that as a matter of statutory construction adoption entities are required to serve notice of the intended adoption plan containing notice of the Registry and affidavit requirements on unwed biological fathers.¹⁸² More importantly the court avoided ruling “on potential constitutional implications to the statutory scheme, either facially or as applied, by providing . . . unmarried biological father[s] a reasonable opportunity to comply with the statutory requirements.”¹⁸³ When the provisions of Florida’s Putative Father Registry are “read *in pari materia* with related provisions of chapter 63,” the court ruled that the clear legislative intent requires adoption entities to serve “a known, locatable, unmarried biological father with notice of the adoption plan,” giving him thirty days to file with the Registry.¹⁸⁴

In a concurring opinion, Chief Justice Lewis went beyond the court’s rationale in an effort to explain the legal nature of the interest an unmarried biological father has in his newborn child when that child is immediately

¹⁸⁰ FLA. STAT. ANN. § 63.062(3)(a). This section provides that an adoption agency

may serve upon any unmarried biological father identified by the mother or identified by a diligent search of the Florida Putative Father Registry, or upon an entity whose consent is required, a notice of intended adoption plan at any time prior to the placement of the child in the adoptive home.

Id. The Second District Court of Appeal of Florida interpreted this provision to mean that “an adoption agency has the discretion, but not a duty, to notify an unmarried biological father . . . of an intended adoption.” *In re Adoption of Baby A*, 944 So. 2d 380 (Fla. Dist. Ct. App. 2006).

¹⁸¹ *Heart of Adoptions*, 963 So. 2d at 198–99. The court noted that “a basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.” *Id.* (quoting *Am. Home Assurance Co. v. Plaza Material Corp.*, 908 So. 2d 360, 366 (Fla. 2005)).

¹⁸² *Id.* at 200.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

placed for adoption at birth.¹⁸⁵ His view of *Lehr* is consistent with a number of state court decisions that have established the principal that an unwed biological father does have a constitutionally protected, inchoate interest in the opportunity to develop a relationship with the child.¹⁸⁶ While acknowledging authority to the contrary, Chief Justice Lewis viewed an unwed biological father's opportunity to develop a substantial relationship with his offspring, where exercised, as the constitutionally protected inchoate interest.¹⁸⁷ Beyond his interpretation of *Lehr*, Chief Justice Lewis viewed Florida's independent Privacy Clause, set forth in the Florida Constitution, as a separate legal basis for protection of an unwed biological father's opportunity to develop a "substantial relationship" in Florida.¹⁸⁸

VI. UNANSWERED QUESTIONS

The Florida Supreme Court made clear in *Heart of Adoptions* that known unwed biological fathers are entitled to actual notice of the Florida Putative Father Registry and of the registration requirements when an intended adoption involves their offspring.¹⁸⁹ This pronouncement should arguably eradicate many of the legal presumptions underlying the 2003 Florida Putative Father Registry that were not otherwise directly addressed in the Court's opinion. However, the Court failed to resolve at least three significant issues which most certainly are lying in wait on Florida's adoption law horizon. They are: birthmother/agency fraud in the adoption

¹⁸⁵ *Id.* at 205–06 (Lewis, C.J., concurring).

¹⁸⁶ *Id.* at 205 (citing *Adoption of Kelsey S.*, 823 P.2d 1216, 1228–29 (Cal. 1992) (en banc) (establishing that an unwed biological father has a protected constitutional interest in the opportunity to develop a relationship with his child which cannot be denied by immediately placing the child for adoption); *In re Petition of Steve B.D.*, 730 P.2d 942, 945 (Idaho 1986) ("*Lehr* indicated both that the state may not deny due process and equal protection to unwed fathers who enjoyed established relationships with their children, and that the state may not deny unwed fathers the opportunity to establish such relations—what the Court described as 'the inchoate interest in establishing a relationship with [the child]'")).

¹⁸⁷ *Heart of Adoptions*, 963 So. 2d at 206 (Lewis, C.J., concurring).

¹⁸⁸ *Id.* The Florida Right of Privacy Clause states that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life." FLA. CONST. art. I, § 23.

¹⁸⁹ *Heart of Adoptions*, 963 So. 2d at 191.

process, the “opportunity” question, and Florida’s state constitutional right of privacy.

A. Fraud

Prior to the court’s ruling in *Heart of Adoptions*, an unwed biological father had no right to receive actual notice of the Putative Father Registry and no right to receive actual notice of intended adoption proceedings unless he timely registered with the Florida Putative Father Registry.¹⁹⁰ Failure to timely register effectively terminated his parental rights even where he may have received fraudulent information regarding his registration responsibilities. Florida’s 2003 codified Adoption Act eliminated fraud as a defense for failing to register with the Florida Putative Father Registry.¹⁹¹ Because the Act created an irrebuttable legal presumption that each unwed biological father living in Florida knew of his legal responsibility to register, fraud could not be a defense for failing to register.¹⁹² Stated affirmatively, fraud perpetrated against an unwed biological father by the birth mother, an adoption entity, an adoption agency, or any other third party, could not be a defense for failing to register. Since no unwed biological father could attempt to preserve a claim to parental rights without registering first, the failure to register was fatal in every case. The 2003 Act made clear that it was the unwed biological father who was affirmatively responsible for preventing fraud in every case.¹⁹³ While an unwed biological father may pursue civil or criminal penalties if he claimed fraud in the adoption process, that same claim of fraud could not serve as a basis for denying a petition to terminate his parental rights, nor could it serve as a basis for vacating a final judgment of adoption.¹⁹⁴

¹⁹⁰ See FLA. STAT. ANN. § 63.085 (West 2005). The only document that an unwed birth father was entitled to receive was the adoption disclosure form which failed to even mention the Putative Father Registry. *Id.*

¹⁹¹ See *id.* § 63.063.

¹⁹² *Id.* § 63.063(1)–(3).

¹⁹³ *Id.* § 63.063(3) (“The Legislature finds no way to remove all risk of fraud or misrepresentation in adoption proceedings and has provided a method for absolute protection of an unmarried biological father’s rights . . . the unmarried biological father is in the best position to prevent or ameliorate the effects of fraud and, therefore, has the burden of preventing fraud.”).

¹⁹⁴ *Id.* § 63.063(2).

Now that identified unwed biological fathers have a right to actual notice of Registry requirements in intended adoptions involving their offspring,¹⁹⁵ would it constitute fraud to intentionally violate that right? The answer would presumptively be yes even though this issue was not directly addressed by the *Heart of Adoptions* court. It would certainly follow that birth mother fraud or fraud perpetrated by an adoption agency/entity would no longer be permissible as it relates to the integrity of an intended adoption. It is not entirely clear that the fraud defense will be resuscitated in Florida, but the court's new construction of unwed biological fathers' rights would seem to support such a defense. An unwed biological father's right to receive notice seems to imply legal authority to enforce that right, which had been the practice in Florida prior the 2003 Registry scheme.¹⁹⁶

States that provide unwed biological fathers with actual notice of intended adoptions have sought to protect those rights in cases involving fraud.¹⁹⁷ Jurisdictions that do not expressly provide relief from strict registration requirements may have to find exceptions in order to effectuate justice. Such an exception was found to exist where a birth mother intentionally lied to the putative father, telling him they would raise the child together and that she would not place the child for adoption.¹⁹⁸ As a result of relying on the mother's statements, the putative father did not register even though the mother's real intention was to place the child for

¹⁹⁵ *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 200 (Fla. 2007).

¹⁹⁶ As late as 1964, Florida did not respect a father's right to his illegitimate child. *Clements v. Banks*, 159 So. 2d 892, 893 (Fla. Dist. Ct. App. 1964). By 1973, only the consent of the mother was required to begin adoption proceedings. Toni L. Craig, Comment, *Establishing the Biological Rights Doctrine to Protect Unwed Fathers in Contested Adoptions*, 25 FLA. ST. U. L. REV. 391, 420 (1998). By the late 1990s, however, this practice was changed to require that "within [sixty] days of filing the petition, the adoption petitioners must exercise 'good faith and diligent efforts' to notify and obtain consent from any parent whose consent is required but who has not consented." *Id.* at 420 n.195 (citing FLA. STAT. § 63.062(3) (1997)) (emphasis added); see also Claire L. McKenna, Comment, *To Unknown Male: Notice of Plan for Adoption in the Florida 2001 Adoption Act*, 79 NOTRE DAME L. REV. 789, 792 n.11 (2004) ("Prior to the 2001 Adoption Act, Florida law required notice only when the when the father's location or identity were known.").

¹⁹⁷ See, e.g., OR. REV. STAT. § 109.096(8) (2007).

¹⁹⁸ *In re Adoption of Baby Boy Doe*, 717 P.2d 686, 687, 690 (Utah 1986).

adoption immediately after birth.¹⁹⁹ The Utah Supreme Court ruled the birth mother's intentional misrepresentation, coupled with the fact the father made clear his intention to rear his child, relieved the father of the obligation to register because "termination of his parental rights was contrary to basic notions of due process, and . . . he came forward within a reasonable time after the baby's birth."²⁰⁰ Even though the responsibility to register with the putative father registry must ultimately be borne by an unwed father, there are specific fact cases which may justify the failure to register—particularly when that justification is based on fraud.

B. Florida's State Constitutional Right of Privacy and the "Opportunity" to Develop a Relationship

In *Lehr*, the United States Supreme Court stated that if the unwed biological father "grasps that opportunity [to develop a relationship with his offspring] 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."²⁰¹ The facts in *Lehr* provided a concrete timeline, making it rather easy to cast judgment on Mr. Lehr's efforts, or lack thereof, to parent his child. From the child's birth until the date litigation ensued, Mr. Lehr had over two years to "grasp the opportunity" of parenthood.²⁰² The Court was not convinced his actions demonstrated a full commitment to the child, especially in light of the fact he failed to register with the state registry.²⁰³ Given the significant passage of time, there was ample evidence that could be marshaled and reviewed by the Court in determining whether Mr. Lehr had converted his inchoate interest into a constitutionally protected right. Unfortunately, that is not always the case. More particularly, how is an unwed biological father's commitment to parent a child to be measured when the child has not yet been born and the unwed biological father is unaware of the pregnancy? Without the legally presumed knowledge of pregnancy as set forth in Florida's 2003 Adoption Act, unwed biological

¹⁹⁹ *Id.* at 690–91.

²⁰⁰ *Id.* at 691 (quoting *Ellis v. Soc. Servs. Dep't of the Church of Jesus Christ of Latter-Day Saints*, 615 P.2d 1250, 1256 (Utah 1980)).

²⁰¹ *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

²⁰² *Id.* at 250.

²⁰³ *Id.* at 262.

fathers will now have to be judged on a case-by-case basis, as required in *Stanley*.

Does an unwed biological father have a sufficient "opportunity" to establish a relationship with a newborn child when that child is immediately placed for adoption at birth by the birth mother? Practically speaking, there is almost no opportunity to do so given the child's *in utero* status. Comparatively, the birth mother has a much greater relationship to her child as she carries it through the gestational cycle to birth. This is not an option for an unwed biological father; at best he could provide financial support within his means as well as emotional support within his capacity if he is aware of the pregnancy. His ability to support the birth mother through the pregnancy is premised on his knowledge of the pregnancy and the birth mother's willingness to accept such support. An unwed biological father's commitment to his unborn child may objectively exist through his pre-birth conduct towards the pregnant mother and the child. Indeed, his relationship to his unborn child can only exist through that conduct. While it may be possible to judge the conduct of an unwed biological father towards his unborn child, judging the nature and quality of any relationship between the two is a highly subjective endeavor at best.

Florida law "recognize[s] the sanctity of the biological connection, and [that the court must] look carefully at anything that would sever the biological parent-child link."²⁰⁴ Prior to the promulgation of Florida's Putative Father Registry, the Florida Supreme Court had expressly considered an unwed biological father's conduct towards the mother during the pregnancy in order to properly evaluate the issue of abandonment.²⁰⁵ In *E.A.W.*, the court expressly considered the father's lack of emotional support for the mother during her pregnancy and the court made clear that in order to properly determine if an unwed father has protected his interest in his unborn child, the trial court must examine the father's actions to support the mother during the pregnancy.²⁰⁶

²⁰⁴ *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 967 (Fla. 1995).

²⁰⁵ *See id.* at 966.

²⁰⁶ *See id.* The court's inquiry was guided to some extent by the Florida Legislature because the statutory scheme included consideration of the father's conduct "towards the child's mother during her pregnancy" when considering abandonment. FLA. STAT. ANN. § 63.032(1) (West 1995). Similarly, the current version of Chapter 63 compels the Florida
(continued)

The Supreme Court of Florida first recognized that evidence of a putative father's pre-birth conduct is relevant to whether he has abandoned his child in *In re Adoption of Doe*.²⁰⁷ In *Doe*, the court specifically relied on the relationship between the assumption of parental responsibilities and biological fatherhood as set forth in *Lehr*.²⁰⁸ The court noted that:

[t]he importance of prenatal care to the future mental and physical health of the child has long been recognized . . . Because prenatal care of the pregnant mother and unborn child is critical to the well-being of the child and of society, the biological father, wed or unwed, has a responsibility to provide support during the prebirth period.²⁰⁹

The court also stated that "the health or well-being of the child is a continuum which extends back to the pregnancy of the mother."²¹⁰ Additionally, "[p]roviding prebirth support to the unborn child is a parental duty. Evidence of whether the parent has or has not furnished customary support to the pregnant mother is relevant to the issue of abandonment."²¹¹ In a specially concurring opinion, Justice Barkett wrote "separately to emphasize that parents may not be stripped of their parental rights lightly."²¹²

The Florida Supreme Court made clear in *Doe* and *E.A.W.* that a putative father's interest in his offspring prior to the child's birth is a fact issue the trial court must consider for purposes of excusing the father's consent to an adoption.²¹³ These cases establish the legal precedent recognized in this jurisdiction—an unwed biological father's constitutional right and interest in his child pre-birth arises where the father seeks to

courts to examine the pre-birth actions of a father in preserving his relationship to his child. FLA. STAT. ANN. § 63.062(2)(b) (West 2005).

²⁰⁷ 543 So. 2d 741, 747 (Fla. 1989).

²⁰⁸ *Id.* at 748–49.

²⁰⁹ *Id.* at 746.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 749 (Barkett, J., concurring).

²¹³ *Id.* at 746 (majority opinion); see also *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 966 (Fla. 1995).

affirmatively protect the relationship.²¹⁴ However, the Florida Legislature has decided that the substantive constitutional right of an unwed biological father to his child, as set forth in *Doe* and *E.A.W.*, now exists exclusively by virtue of the Florida Putative Father Registry.²¹⁵ Using the Registry as the exclusive means to test parental rights is inconsistent with *Lehr*. The New York statute at issue in *Lehr* recognized a variety of means to provide notice to putative fathers in adoption proceedings, only one of which was the registry.²¹⁶

In *Heart of Adoptions*, Chief Justice Lewis's concurring opinion recognizes the constitutional significance of an unwed biological father's opportunity to develop a relationship with his offspring.²¹⁷ While Chief Justice Lewis would find a violation of Florida's state constitutional right of privacy "to preclude [the] opportunity or summarily terminate such a vested right without notice or meaningful due process,"²¹⁸ it remains unclear as to when that right materializes as a matter of fact or law. Chief Justice Lewis understands *Lehr* to recognize that unmarried biological fathers do possess a protected interest in the opportunity to establish a substantial relationship with their offspring.²¹⁹ This "opportunity" to develop that relationship must be provided to putative fathers before the State seeks to terminate their parental rights.²²⁰ In order to provide adequate constitutional protection to unwed biological fathers, they must be provided actual notice and be given an opportunity to assert or waive their rights.²²¹

²¹⁴ *In re Adoption of Baby E.A.W.*, 658 So. 2d at 966–67; *In re Adoption of Doe*, 543 So. 2d at 746.

²¹⁵ FLA. STAT. ANN. § 63.054(1) (West 2005) ("[A]n unmarried biological father must . . . file . . . with the Florida Putative Father Registry.") (emphasis added).

²¹⁶ *Lehr v. Robertson*, 463 U.S. 248, 250–51 (1983).

²¹⁷ *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 205 (Fla. 2007) (Lewis, C.J., concurring).

²¹⁸ *Id.* at 207.

²¹⁹ *Id.* at 206.

²²⁰ *Id.*

²²¹ *C.f. Gonzalez*, *supra* note 120, at 54 (A mother dropping a child off at a Safe Haven as permitted in the Florida Statutes also acts as a unilateral termination of parental rights in that the putative father will never have an opportunity to assert his parental rights post-birth.).

The Florida Supreme Court in *Heart of Adoptions* would apparently start the “opportunity” clock when an unwed biological father receives notice of an intended adoption.²²² The opportunity clock may start running months earlier where an unwed biological father has already grasped the opportunity to parent the child. Although Chief Justice Lewis believes unwed biological fathers must be afforded the *opportunity* to form a substantial relationship, the question remains as to when that opportunity materializes as a matter of law. If receipt of the notice triggers the opportunity to form a relationship, then it would seem fruitless to examine the past conduct of an unwed biological father to support the birth mother during the pregnancy.²²³ If the opportunity begins with the notice, then the prospective conduct of the unwed biological father towards his offspring is where the court’s focus must center.

While the Florida Supreme Court has not articulated when the “opportunity to grasp” the parental relationship begins, the highest state court of New York has eloquently articulated the constitutional interest an unwed birth father has in his newborn child when the birth mother seeks to place the child for adoption: “[t]he unwed father’s protected interest requires both a biological connection and full parental responsibility; he must both be a father and behave like one.”²²⁴ The *Heart of Adoptions* court affirmatively answered the question of whether a putative father is entitled to a full measure of constitutional protections and entitled to an opportunity to establish a relationship with a newborn child, absent a showing of unfitness.²²⁵ Chief Justice Lewis recognized that newborn children present a particular problem given the limited opportunity on the part of the unwed father to form a relationship with the child in the limited time after birth and before a birth mother seeks to have the child placed for adoption.²²⁶ In Florida, that time could be limited to forty-eight hours or less where the birth mother executes a consent for adoption immediately after birth.²²⁷

²²² See *Heart of Adoptions*, 963 So. 2d at 202.

²²³ This would contradict the current statutory scheme. See FLA. STAT. ANN. § 63.062(2)(b)(3) (West 2005).

²²⁴ *In re Raquel Marie X*, 559 N.E.2d 418, 424 (N.Y. 1990) (citation omitted).

²²⁵ *Heart of Adoptions*, 963 So. 2d at 201–02.

²²⁶ *Id.* at 205 (Lewis, C.J., concurring).

²²⁷ See FLA. STAT. ANN. § 63.082(4)(b).

Nonetheless, a father who has promptly taken every available avenue to demonstrate he is willing and able to enter into the fullest possible relationship with his under-six-month-old child should also have an fully protected interest in preventing termination of the relationship by strangers, even if he has not as yet actually been able to form that relationship.²²⁸

The *Raquel* court ultimately held that if a qualifying unwed biological father wished to block a proposed adoption, he must be personally willing to assume full custody of the child and not simply wish to block to adoption by others.²²⁹ The New York Court of Appeals again affirmed that in some instances the Constitution protects an unwed father's *opportunity* to develop a relationship with his child in *Robert O v. Russel K.*²³⁰ This right properly vests only in those putative fathers who manifest a willingness to assume full custody of the child and do so promptly.²³¹

In *Heart of Adoptions*, Chief Justice Lewis's concurring opinion goes beyond statutory analysis to address the additional privacy protections set forth in the Florida Constitution and how those protections extend to unwed biological fathers.²³² Florida's independent Privacy Clause states that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life."²³³ This right "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution."²³⁴ Under both the Federal and Florida Constitutions, parents have a fundamental liberty interest in rearing their children.²³⁵ The United States Supreme Court's holding in *Lehr*, coupled with the constitutional privacy protections found in the Florida Constitution supports the recognition of an unwed biological father's inchoate interest in the *opportunity* to form a

²²⁸ See *In re Raquel Marie X*, 559 N.E.2d at 425.

²²⁹ *Id.* at 428.

²³⁰ 604 N.E.2d 99, 104 (N.Y. 1992).

²³¹ *Id.*

²³² *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 206 (Fla. 2007) (Lewis, C.J., concurring).

²³³ FLA. CONST. art. I, § 23.

²³⁴ *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 619, 634 (Fla. 2003) (quoting *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989)).

²³⁵ See *Beagle v. Beagle*, 678 So. 2d 1271, 1275 (Fla. 1996).

substantial relationship with his child.²³⁶ This opportunity cannot be summarily terminated or denied without meaningful due process of law.²³⁷

The United States Supreme Court in *Lehr* certainly did not impose a registration requirement on unwed biological fathers who otherwise grasped the opportunity to parent their child. Where an unwed biological father has transformed his inchoate interest into a constitutionally protected relationship with his offspring, the Florida Putative Father Registry intrudes on the privacy of this relationship by threatening termination for failure to comply with the additional registration requirements. Having established a constitutionally recognized and protected relationship, it would seem legally impermissible under federal and state law to require an unwed biological father affirmatively establish his plans to care for his child or face termination of parental rights. Given the fundamental interest at stake, registration does not appear to be narrowly tailored to meet a compelling governmental interest. The test of registration alone could easily terminate the constitutionally protected relationship that has been cultivated by a loving, supportive, and concerned unwed biological father. Given Florida's additional privacy protections and the federal constitutional protections granted to unwed biological fathers who grasp the opportunity to develop a substantial relationship with their offspring, it appears that formidable arguments exist which suggest that the Florida Putative Father Registry scheme violates the state and federal constitutional rights of unwed biological fathers in Florida.

VII. CONCLUSION

While many scholars and adoption practitioners anticipated a due process showdown between the Supreme Court of Florida and the Florida Legislature when the state's highest court entertained arguments in *Heart of Adoptions*—that was not to be. The Supreme Court of Florida avoided the constitutional issues altogether and resolved the case based on statutory construction of chapter 63 and the competing interests contained therein. In so doing, the court identified the legislative intent of creating adoptions with finality and stability. The court ultimately determined that such results could only be achieved where known, locatable unwed biological fathers receive actual notice of intended adoptions and are afforded notice

²³⁶ *Heart of Adoptions*, 963 So. 2d at 206 (Lewis, C.J., concurring).

²³⁷ *Id.* at 207.

of their obligations set forth in the statute and an opportunity to comply with those obligations.²³⁸

Unwed biological fathers are now entitled to notice of an intended adoption plan pertaining to their offspring as well as notice of their obligations set forth in section 63.062 of the Florida Statutes.²³⁹ While unwed biological fathers may still be presumed to have knowledge of their obligations as set forth in chapter 63, this presumption no longer serves to deny unwed biological fathers actual notice of intended adoptions. In *Heart of Adoptions*, the Florida Supreme Court expressly quashed a number of circuit court opinions to the extent those opinions were inconsistent with the court's current statutory construction of Chapter 63.²⁴⁰

The *Heart of Adoptions* ruling provides new protections for unwed biological fathers—namely, actual notice of their rights and information related to the Florida Putative Father Registry. Arguably these protections may come at the expense of adoption stability and finality due to the fact an unmarried biological father may now be given the chance to step forward and assert his claim to a child that would have otherwise been available for adoption.²⁴¹ As unwed biological fathers grasp the opportunity to parent their children, fewer children may ultimately be available for adoption. Where they do not accept some responsibility for their offspring after proper notice, there can be no doubt that such failure supports the birth mother's decision to place her child for adoption. While it is clearly difficult to balance the competing interests in adoption cases, actual notice to unwed biological fathers can only be a step in the right direction.

Beyond the Court's opinion in *Heart of Adoptions*, there are lingering questions as to an unwed biological father's opportunity to parent his child, especially in light of the state constitutional right of privacy in Florida. These questions will remain unanswered for now, but they will most certainly remain relevant for future challenges to the Florida Putative Father Registry.

²³⁸ *Id.* at 200 (majority opinion).

²³⁹ *Id.* at 202.

²⁴⁰ *See id.* at 203.

²⁴¹ *See* FLA. STAT. ANN. §§ 63.054(1), 63.062(2)(b)(1) (West 2005).