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I. Introduction

On July 3, 1994, in the wake of the "Baby Richard" proceedings,[1] the Illinois Legislature amended the state's Adoption Act in an effort to alter the outcome of that case. The amendments, which were numerous,[2] included a Putative Father Registry,[3] a Best Interests Custody Hearing,[4] and a number of fast-track provisions intended to bring closure to adoption proceedings on an expedited basis.[5]

The Putative Father Registry permits a man who has fathered a child by an unmarried woman to protect his parental interest in the child by listing his name and identifying information with the registry within specified time periods.[6] Failure to comply with the registry's filing requirements creates a virtually irrebuttable presumption that the man is not the child's biological father,[7] rendering him ineligible to seek custody of the child.[8] Compliance with the registry entitles the man to notice of the child's adoption proceedings, and opportunities to prove his paternity and challenge the adoption.[9] If the biological father's challenge is successful the adoption petition will be denied and the court will hold a custody hearing to determine the placement option that is in the child's best interest.[10]

The amendments were in large part the Illinois Legislature's attempt to resolve the problem of the "thwarted putative father:"[11] the man who has been "defrauded, deceived, or in some other way prevented from establishing a relationship"[12] with his child by the mother. The thwarted putative father presents a multifaceted dilemma because U.S. Supreme Court case law recognizes the parental rights of an unwed father only if he has "grasped" the opportunity to develop a familial relationship with the child.[13] When a putative father who does not know of the pregnancy or birth of a child fails to grasp that opportunity, he also fails to meet the legal standard that protects his interest in the child.[14]

In the Baby Richard case the thwarted putative father dilemma was compounded by three additional issues. First, Baby Richard was placed for adoption as a newborn, before his biological father had an opportunity to develop a relationship with him.[15] Second, there was considerable speculation that the biological mother, having surrendered her rights to Baby Richard, changed her mind and colluded with the biological father to regain custody of the child. Third, and most significant, the Illinois courts took more than four years to resolve the case. By enacting the Putative Father Registry, the Best Interest Custody Hearing, and the fast-track provisions the Illinois Legislature attempted to reduce the potential for similar occurrences in the future.[16]

This article examines the amendments to the Illinois Adoption Act that were prompted by the Baby Richard case. Part II explains how the amendments function within the overall statutory scheme of the Adoption Act. Part III examines the case law that has arisen under section 12.1, the Putative Father Registry. Part IV examines the case law that has arisen under section 20, the Best Interests Custody Hearing. Part V concludes that the case developments have yielded a substantial harvest of procedures, policies, presumptions and many unintended consequences.

II. The Statutory Scheme

Section 1(R) of the Illinois Adoption Act defines a putative father as a man who (i) is not married to the mother; (ii) has not been judicially adjudicated the father prior to the commencement of the adoption proceedings; (iii) may be less than eighteen years of age; (iv) and did not

father the child as a result of criminal sexual abuse or assault.[17] Section 11(b) of the Illinois Adoption Act requires the mother to sign an affidavit attesting to or withholding the identity of the father.[18] The mother's attestations of the father's identity are irrebuttable as to her, but rebuttable by the biological father.[19] Consequently, the adoptive parents are entitled to rely on the mother's identification of the father but a putative father is not foreclosed from asserting his parental interest in the child even if the mother attests that another man is the child's father.[20]

The amended Act creates a five-step process by which a putative father can protect his parental interest in a non-marital child who is being placed for adoption. In step one, the man must establish his status as the child's putative father. He can do so in one of two ways. Under section 8(b)(1)(B), a putative father can marry the mother[21]; or live with the child and hold himself out to be the child's biological father[22]; or make a good faith effort to support the child financially before and/or after birth[23]; or otherwise develop a relationship with the child.[24]

In the event that a putative father's efforts to comply with section 8(b)(1)(B) are thwarted by the mother, he still can still protect his parental interest by complying with the filing requirements of section 12.1, the Putative Father Registry.[25] The putative father may register either before or within thirty days of the child's birth.[26] Compliance with either the conduct provisions of section 8(b)(1)(B) or the filing requirements of section 12.1 qualifies him to receive notice of the child's adoption proceedings.[27] However, failure to comply with either provision forecloses the putative father from receiving notice of the child's adoption,[28] consenting to or contesting the adoption,[29] or thereafter asserting "any interest" in the child.[30]

Section 12.1(g) provides an exception to the registry's time and filing requirements if the man can prove by clear and convincing evidence[31] that he was prevented from registering within the thirty-day period by "uncontrollable circumstances."[32] The "uncontrollable circumstance" exception, however, estops the putative father from defending noncompliance on the grounds that he lacked knowledge of the child's conception or birth or that, despite such knowledge, he relied on the mother's misrepresentations that he was not the father.[33] This statutory estoppel is based on the legislative presumption that participating in intercourse places the man on notice of the possible conception of a child.[34]

In the second step, section 12a gives the putative father thirty days from the receipt of notice of the adoption proceedings to file either a Declaration of Paternity or a Denial of Paternity with the Adoption Court.[35] If the man files a Declaration of Paternity, section 12a also requires him to file a Parentage Action[36] within the same thirty-day period.[37] The purpose of the Parentage Action is to prove or disprove the putative father's paternity of the child. The adoption proceeding will be stayed while the Parentage Action is pending.[38]

If the Parentage Action confirms the putative father's paternity then, in step three, he will be entitled to participate in the adoption proceedings.[39] If the putative father consents to the adoption, his parental interests will be terminated and the adoption case will proceed.[40] If the putative father contests the adoption and seeks custody of the child then, under step four, the adoptive parents may seek a fitness hearing to have the putative father declared unfit.[41] If the fitness hearing determines that he is unfit, his parental interests will be terminated and the adoption will proceed.[42] Absent an unfitness finding, step five is triggered and per section 20, the court will hold a Best Interest Custody Hearing[43] in which both the putative father and the adoptive parents will have standing to seek custody of the child.[44]

Several additional amendments fast-track the adoption proceedings throughout this process by (1) giving them priority over other civil cases[45]; (2) limiting judicial discretion to grant time extensions[46]; (3) barring joinder of matters "not germane" to the adoption[47]; (4) imposing a one-year time limit on revocation of consents and surrenders[48]; and (5) expediting appeals.[49]

The amendments, read in conjunction with the statutory scheme of the Adoption Act,[50] are intended to reverse prior Illinois law that provided notice of the child's adoption to all putative fathers, whether or not they had demonstrated a commitment to the child.[51] The old law also permitted a putative father to intervene in a child's adoption proceedings and, unless found unfit, automatically gain custody of the child.[52] Frequently, however, a putative father's intervention would delay and frustrate the adoption proceedings with no countervailing benefit to any of the parties.[53]

By fast-tracking adoption proceedings, limiting defenses to noncompliance with the Putative Father Registry, and reversing the presumption that all putative fathers are entitled to notice of adoption proceedings, the Illinois Adoption Act now clearly places the burden on the man to demonstrate his commitment to the child before the state is obligated to recognize his parental interests.[54] Failure to meet that burden allows the state to shift its interest from protecting the putative father's parental rights to protecting the child's interest in obtaining the legitimacy and stability of placement with a permanent adoptive family.[55]

III. The Putative Father Registry

A. The Concept of a Putative Father Registry

Putative father registries create a triage of rights when unwed parents cannot agree between themselves as to what role, if any, the biological father should play in his child's life. Typically in these situations the mother does not want the biological father to interfere with her plans either to raise the child or place the child for adoption. As long as the mother maintains custody, current law gives her considerable latitude to thwart the father from developing a relationship with the child.

A putative father registry provides the man with a statutory means of preserving his parental interest in the child that the mother cannot thwart. Mere filing with the registry triggers a series of protective laws which, once complied with, enable the putative father to seek custody of the child notwithstanding the mother's desire to place the child for adoption. Noncompliance with a registry, however, bars the man from ever asserting his parental interest in the child. At that point, the child's interest in a stable adoptive home becomes paramount and the adoption can proceed free of parental disputes or impediments.

B. The Constitutional Framework

Illinois' Putative Father Registry was enacted against a backdrop of four United States Supreme Court cases that address the "putative father consent requirement."[56] The cases broadly divide putative fathers into two categories: those who are entitled to notice of their child's adoption proceedings and those who are not. In effect, putative fathers who have demonstrated a commitment to rearing their children are entitled to notice of and an opportunity to consent to or contest their child's adoption.[57] Putative fathers who have failed to demonstrate a commitment to their children forfeit their parental rights in the children, including the right to notice of adoption proceedings.[58]

According to *Stanley v. Illinois*,[59] a putative father who demonstrates a commitment to the "companionship, care, custody and management"[60] of his child establishes a "substantial" interest in maintaining that relationship as against the state's de minimis interest in disrupting it.[61] Based on this proposition, in *Caban v. Mohammed*[62] a putative father who established a committed and caring relationship with his two older children[63] was entitled to veto the stepparent adoption of their mother's husband.[64] Contrarily, the court held in *Quilloin v. Walcott* that the putative father had forfeited the right to veto his child's stepparent adoption because of his failure to comply with a state statute that required him to legitimize the child in order to preserve his parental interests.[65]

Along a similar vein, *Lehr v. Robertson*[66] rejected a putative father's efforts to veto his child's adoption because of his failure to comply with the filing requirements of New York's Putative Father Registry. In order to preserve the right to notice of a child's adoption proceedings, the New York law required only that the putative father mail a postcard to the registry setting forth his identifying information and intention to acknowledge paternity of the child.[67] Under *Lehr*, the Constitution protected a man who complied with the statute,[68] but provided no protection to a man whose only link to the child was biological.[69]

Illinois' Putative Father Registry must comply with the framework set forth by these four Supreme Court cases. The registry's "notice" and "no notice" categories of putative fathers stem directly from *Caban* and *Quilloin*. In accordance with those cases, a putative father can qualify to receive notice of his child's adoption proceedings merely by filing with the registry. The registry's filing requirements are comparable to those of *Lehr* and do not appear to be so burdensome as to thwart reasonable efforts at compliance.

The registry's "fast-track" provisions and exclusion of the "no knowledge" defense are intended to eliminate adversarial disruptions that prolong and prevent the adoption of children who do not have parents who have demonstrated a commitment to their well-being. These provisions are consistent with the Supreme Court's recognition that when a putative father fails to step up to the plate, his parental interest may yield to the child's interest in legitimacy and permanency.[70]

However, the registry may be subject to constitutional challenge, not for what it provides, but rather, for what it fails to provide. In *Lehr*, the Supreme Court upheld the New York Registry but noted that "if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate."[71] Consequently, Illinois' registry contains an "uncontrollable circumstance" exception to its filing requirements which suggests that noncompliance will be excusable under the right circumstances.[72] However, this exception may be illusory since the statute does not set forth circumstances that qualify for the exception and specifically excludes as "uncontrollable circumstances" the father's lack of knowledge of the pregnancy or birth and his reliance on the mother's misrepresentations that he was not the biological father.[73] Short of medical incapacity, imprisonment[74] or alien abduction, it is difficult to conjure circumstances that would qualify as an "uncontrollable circumstance." This ambiguity in the statute will no doubt invite litigation that will delay adoptions and defeat the intent of the fast-track provisions. More importantly, the false promise of the "uncontrollable circumstance" exception could so prejudice

a putative father's efforts to demonstrate his parental interest as to violate *Lehr's* admonition.

On a similar note, assuming that the Putative Father Registry adequately protects the man whose sexual partner and child reside within Illinois, it provides no protection for the man whose partner and child leave the state without informing him of their new location. Because there is no interstate reciprocity among Putative Father Registries or similar preservation of rights statutes, compliance with Illinois' registry will not protect the man whose child is in another state.[75] That man's only legal recourse will be to file in every state that has a registry or comparable law and, of course, he will have no legal recourse in states where such statutes do not exist. The lack of interstate reciprocity among registries means that, for the man who does not know his child's location, even vigilant compliance with every available statute may prove futile. If no amount of compliance with the law can yield the law's promised benefits then a Putative Father Registry like Illinois' may be subject to due process challenges because the burdens imposed by the statute do not yield a reasonable chance of success.

Last, the Putative Father Registry may raise privacy issues because, if taken literally, it requires a man to report to the state every time he has sexual relations with an unmarried woman if he wishes to protect his inchoate parental interests. The privacy right established for married couples in *Griswold v. Connecticut*[76] and extended to unmarried individuals in *Eisenstadt v. Baird*[77] was intended originally to protect privacy in the most basic sense, that is, the right to keep one's intimate relations beyond the prying eyes of government. Like all rights, however, privacy may be infringed upon to protect compelling government interests. Tailoring the adoption process to protect a man's parental interest in a child probably justifies placing the burden of registering on the man who knows or should know that he has impregnated a woman. However, requiring a man who is thwarted from registering for reasons well beyond his control to inform the government each time he has nonmarital sex may be too great an infringement upon his privacy. While instances where a man would have preserved his parental interest had he known of the child may be rare, their possibility challenges the presumption that ignorance of the pregnancy or birth can never qualify as an uncontrollable circumstance.[78]

C. The Cases

1. In re K.J.R. and D.F.R. to Adopt O.J.M.

Within the first year of its passage, Illinois' Putative Father Registry was challenged on fraud, due process and equal protection grounds. In *K.J.R.*,[79] the mother originally listed "T.M." as the father on the child's birth certificate and in the adoption proceedings.[80] Accordingly, T.M. consented to the child's adoption.[81] Before the adoption was complete, however, the mother apparently changed her mind and admitted that E.M.H., not T.M., was the true biological father.[82] She thereafter withheld her consent to the adoption, failed to attend court appearances and refused to participate in discovery.[83] Eventually, her parental rights were terminated.[84] In the meantime, E.M.H. filed motions to intervene in the adoption proceedings and to have his parentage determined by blood tests.[85] The trial court denied both motions because E.M.H. had not filed with the Putative Father Registry.[86]

On appeal, E.M.H. first argued that although he had sexual relations with the mother and was aware of her pregnancy, he was deceived by her into believing that he was not the father.[87] The First District rejected this argument as unsupported by the facts, unreasonable, and inconsistent with the registry's policies and provisions.[88] The court found that having intercourse with the mother during the period of conception placed E.M.H. on notice of the possibility that he could have fathered the child notwithstanding the mother's representations.[89] The court reasoned that despite the mother's denial of his paternity, E.M.H. reasonably could assume that he or another man was the father, but he could not reasonably assume that he absolutely could not be the father.[90] Quoting the statute, the court said, "[T]he Putative Father Registry statute does not require certainty by the putative father that he is in fact the biological father at the time he registers with it. It defines 'putative father' as 'a man who *may* be a child's father.'"[91] The court further noted that the fraud defense was inconsistent with the Putative Father Registry, which provides a man who fathers a child with a means of protecting his parental interest independent of the mother's conduct,[92] but which also forecloses the man from asserting his lack of knowledge of the pregnancy or birth as a defense to noncompliance.[93] The court added that failure to file with the registry was "prima facie evidence of sufficient grounds to support termination of such father's parental rights under the Adoption Act."[94] The court concluded that this result was consistent with the registry's purpose of balancing "the interests of the putative father with the adoptive parents and, more overridingly, the child whose interests are paramount."[95]

E.M.H. next argued that the Putative Father Registry violated his right to equal protection because it provided fathers whose parental rights were terminated under the Adoption Act with a shorter time period to adjudicate their fitness than fathers whose fitness was determined under the Juvenile Court Act.[96] Specifically, E.M.H. argued that under the Juvenile Court Act a putative father was given thirty days from receipt of notice to assert his parental interests,[97] whereas, under the Adoption Act a man was entitled to notice only after he had complied with the Putative Father Registry.[98] That difference in treatment, he argued, was irrational and unconstitutional.[99] The court disagreed. It

reconciled the notice provisions of the Juvenile Court Act with those of the Adoption Act by finding that under both acts a putative father's noncompliance extinguished his right to notice of adoption proceedings.[100] The court concluded that since the consequences of noncompliance with statutory prerequisites to notice were the same in both statutes as to both categories of putative fathers, the differences between the statutes did not create an equal protection violation.[101]

E.M.H. last argued that the Putative Father Registry deprived him of his liberty interest in developing a relationship with his child without notice and an opportunity to be heard.[102] The court rejected this argument on the grounds that E.M.H. had waived any liberty interest he might have had by failing to file with the registry.[103] Relying on *Lehr v. Robertson*,[104] the court said that a putative father was constitutionally required to demonstrate a commitment to the child in order to protect his parental rights[105] and under Illinois law that requirement could be satisfied by filing with the registry and commencing a Parentage Action.[106] However, when a putative father failed to meet these requirements his interest yielded to the child's interest in obtaining an adoptive home.[107]

On a final note, the court ruled that the blood tests E.M.H. had procured to establish his paternity were inadmissible because they were irrelevant to the issue of his noncompliance with the registry.[108] In so ruling, the court concluded that DNA tests are inadmissible to prove the paternity of a putative father who did not preserve his parental rights under the Putative Father Registry.[109]

2. A.S.B. v. Department of Child and Family Services

In *A.S.B. v. Department of Child and Family Services* ("D.C.F.S.")[110] the Second District raised the Putative Father Registry sui sponte to reach a conclusion similar to that reached in *K.J.R.* In *A.S.B.* the child had been abandoned by her mother and taken into D.C.F.S. custody shortly after her birth.[111] Despite D.C.F.S. representations that it was unable to contact the mother, she did appear to surrender her parental rights and submit to blood tests.[112] Nonetheless, D.C.F.S. claimed that her unavailability prevented it from identifying the father.[113] Accordingly, default proceedings terminated the parental rights of the unknown father and the adoption proceeding commenced.[114] Before finalization of the adoption, however, a D.C.F.S. report surfaced on the record stating that the mother had named the petitioner as the biological father.[115] Thereafter, the petitioner appeared in the adoption proceeding claiming to be the child's father. The court granted him a continuance until December 30 to hire an attorney.[116] However, on December 19 the court granted the adoption decree without giving notice to the petitioner. The petitioner attempted again to intervene in the adoption proceedings and subsequently appealed the denial of that motion.[117] In his appeal, petitioner asserted, inter alia, that he had been denied his due process right to notice of the termination of his parental rights and of the adoption.[118] Relying on *Caban v. Robertson*,[119] the court responded that although the petitioner was "presumptively capable of protecting his interest in such notice"[120] by filing with the registry, he had not done so and, therefore, was barred from challenging the adoption.[121]

The petitioner next argued that the time and filing requirements of the Putative Father Registry[122] subjected him to gender discrimination in violation of his right to equal protection.[123] The court countered that the Putative Father Registry's gender-based classification was substantially related to the important governmental objectives of (i) identifying and locating putative fathers who wanted to protect their parental interests and (ii) facilitating adoptions.[124]

Finally, the petitioner argued that he was thwarted from asserting his parental rights by the mother's misrepresentations that he was not the father.[125] The court responded that the registry provided the petitioner with a simple means of protecting his interest in the child independent of the mother's conduct.[126] The court concluded that his noncompliance was not excused by the mother's deception and, therefore, extinguished all legally protected interests he may have had in the child.[127]

3. Tinya v. Quinella W.

In *Tinya v. Quinella W.*,[128] the Second District partially reversed a trial court that had found a putative father unfit for failing to file with the Putative Father Registry.[129] The issue before the trial court was whether the man could be adjudicated an unfit parent under the Juvenile Court Act, not whether he had any rights in an adoption proceeding under the Adoption Act.[130] On appeal the man argued that the Putative Father Registry statute applied only to notice requirements under the Adoption Act but not to termination proceedings under the Juvenile Court Act.[131] The appellate court agreed.[132] However, the appellate court affirmed the lower court judgment because it had based its finding of unfitness on several additional grounds that were appropriate under the Juvenile Court Act.[133]

D. Summary

Although few, these three cases have harvested a substantial yield of procedures, policies, presumptions and burdens arising under the Illinois Putative Father Registry. First and foremost, every case holds that noncompliance with the Putative Father Registry filing requirements raises an absolute bar to subsequent assertions of parentage with respect to the adoptive child. Second, the cases uphold section 12.1(g) which estops the putative father from asserting

as defenses either his lack of knowledge of the pregnancy or birth, or his reliance on the mother's misrepresentations of his paternity. Third, the cases are in agreement that the new statutory scheme places the burden on the putative father to preserve affirmatively his parental interest in a child and penalizes him for indecision or delay.

However, a somewhat confusing distinction is developing with respect to whether noncompliance with the Putative Father Registry should be considered in a fitness determination. The *K.J.R.* court unconditionally stated that failure to comply with the Putative Father Registry "is prima facie evidence of sufficient grounds to support termination of such father's parental rights under the Adoption Act."[134] In *Tinya*, the Second District held that failure to comply with the registry could not be cited as a ground for unfitness under the Juvenile Court Act.[135] However, in *A.S.B.*, the Second District sustained a lower court finding of unfitness under the Juvenile Court Act based in part on a D.C.F.S. report that two searches of the registry had disclosed no listing of a putative father.[136] Whether these distinctions amount to a significant legal difference awaits further case developments.

IV. The Best Interests Custody Hearing

A. Background

The section 20 Best Interest Custody Hearing was enacted in response to the public outcry after Baby Richard's custody was transferred from his adoptive parents to his biological father without either a hearing to determine if that placement change was in his best interest or a plan to ease his transition from one home to another. The handing off of Baby Richard from the family he had known to the family he had never met poignantly demonstrated the failure of the Adoption Act to provide an opportunity for the child's best interests to be considered when an adoption fails. Section 20 is intended to fill that statutory gap by instructing a court to hold a custody hearing promptly when an adoption is vacated or denied. Section 20 grants standing to the adoptive parents, the child, any biological parents whose rights have not been terminated, and any parties who have been granted leave to intervene.[137] These parties may seek custody of the child or present evidence relevant to the child's placement. The court's custody determination is to be based on the placement option that is in the child's best interest.[138]

Two cases of note have arisen under section 20 that address the appropriateness of a Best Interest Custody Hearing. In *In re Adoption of Ginnell* the appellate court ruled that a Best Interest Custody Hearing must be held when a stepparent adoption is denied and the biological father is seeking custody.[139] In *In re Adoption of E.L.* the appellate court ruled that a best interests custody hearing should not have been held when fraud vitiated the court's jurisdiction over the adoption proceedings.[140]

B. The Cases

1. In re Adoption of Ginnell

In *Ginnell*, a stepfather filed a petition to adopt his wife's son.[141] The child's biological father opposed the adoption and sought joint custody.[142] The lower court determined that the biological father was not unfit[143] and on his behalf entered visitation and temporary support orders.[144] On appeal, the Second District admonished the trial court for failing to hold a Best Interest Custody Hearing after the adoption petition was denied.[145] The court noted that section 20 did not distinguish between related and unrelated adoptions and remanded the case with instructions that the trial court conduct a custody hearing on the biological father's joint custody petition.[146]

The *Ginnell* case exposes a serious and possibly unintended consequence of section 20. In passing section 20 the Illinois Legislature intended to secure stability and permanency promptly for children who were the subjects of custody disputes.[147] Although section 20 does not distinguish between related and unrelated adoptions, the Legislature probably did not intend section 20 to upset settled custody arrangements between biological parents. In *Ginnell*, the lower court may have declined to hold a custody hearing because the biological mother already had custody of the child. However, the appellate court's ruling that a custody hearing must be held after a failed stepparent adoption, even when the child has always been in the mother's custody, may discourage such adoptions if they raise the risk that the custodial parent will lose custody of the child.

Furthermore, in *Ginnell* the mother and stepfather filed an Adoption Petition a few weeks after the biological father filed a Parentage Action.[148] This chronology suggests that the Adoption Petition was an effort to thwart the putative father's efforts to develop a relationship with the child. It is possible, however, that in future cases the order of filings could be reversed with a putative father seeking to seize custody of the child from the mother and stepfather. Consider the following scenario: A putative father complies with the registry and Parentage Action requirements. Although his paternity of the child is confirmed, the mother discourages him from developing a relationship with the child. Furthermore, she is financially self-sufficient and refuses financial support from him.

Over time, the man's interest in the child diminishes and whatever relationship they may have developed slips away. Five years later the mother marries and the stepfather wishes to adopt the child. The putative father receives

notice of the adoption proceedings and petitions for custody of the child. Perhaps he wants custody; perhaps he is upset about the marriage; or perhaps he sees an opportunity to be paid off. Under the *Ginnell* ruling, even if the putative father is found to be unfit, his custody petition still would disrupt and delay the adoption proceeding with no countervailing benefit to anyone. This scenario contravenes the intent of the fast-track amendments which is to minimize adversarial disruptions[149] in order to expedite adoptions.[150] More importantly, fear of such a scenario may discourage stepparent adoptions if that procedure puts the custodial parent at risk of losing custody of the child.

2. In re the Adoption of E.L.

In *In re the Adoption of E.L.* the First District ruled that a Best Interest Custody Hearing had been held improperly after an adoption was vacated on the grounds that fraud deprived the court of jurisdiction.[151] The facts of this case, hopefully, are unusual. E.L. was born in 1995.[152] In the following two years her mother, Marisa, and her father, J.L., shared in her caretaking and eventually married.[153] Soon after the marriage, however, Marisa left the marital home.[154] For the following four-month period E.L. lived with her father while his relatives provided daycare.[155] When Marisa attempted a reconciliation in 1998, J.L. expressed concern about her drug and alcohol use, and told her that she was no longer welcome in his home.[156] Marisa agreed to leave but soon returned with a police officer who helped her remove E.L.[157] Although Marisa did not inform J.L. of her new location, she telephoned him frequently, promising that he could visit E.L., but never followed through.[158] For months J.L. searched unsuccessfully for Marisa and E.L. but was unable to locate them.[159] The police refused to aid J.L.'s search because E.L. was in the lawful custody of her mother.[160]

In the meantime, the A.'s, residents of Florida, sought to adopt a child. In 1996 they retained Larry Raphael, whom they assumed was an Illinois attorney, and paid him $3,000 to place ads on their behalf to adopt a child.[161] However, in May of 1997 Raphael was disbarred from legal practice in Illinois.[162] Nonetheless, in 1998 Raphael informed the A.'s that a two-year-old girl was available for adoption through an agency called New Beginnings.[163] He also told them that the mother was divorcing her husband, who was not the child's father.[164] After a brief meeting with Marisa and E.L., the A.'s took E.L. home with them.[165] The next day Raphael introduced the A.'s to his "associate" Louis Capozzoli who, they were told, would represent them in the adoption proceedings.[166]

On March 9, 1998 the A.'s filed a petition to adopt E.L.[167] The adoption petition included affidavits from the A.'s in which they attested that they had paid $17,000 to New Beginnings to arrange the adoption.[168] In fact, the A.'s had not made any payments to New Beginnings.[169] Instead, they had paid $5,000 in cash to Capozzoli, and wrote checks to Raphael for $1,000 and Adoption Consulting Services for $12,650.[170] The later two checks were deposited in an account belonging to Raphael.[171] The adoption petition also included Marisa's Affidavit of Identification which listed Theodore Perez-Gonzalez as E.L.'s father.[172] Based on this affidavit the court granted temporary custody of E.L. to the A.'s and terminated the parental rights of Marisa and Perez-Gonzalez.[173]

In April, J.L. learned that E.L. had been placed for adoption.[174] When he could not get the details from Marisa he sought legal help.[175] He and Marisa attended a meeting with Veronica Baker, a Chicago Legal Clinic attorney.[176] However, when Baker learned that Marisa had placed E.L. for adoption without J.L.'s consent, she excused Marisa from the meeting.[177] Thereafter, J.L. left the meeting to obtain the name of the adoption agency from Marisa.[178] Baker then telephoned New Beginnings and spoke with its director, Rita Sankey, who incorrectly told her that E.L.'s adoption was "already finalized."[179] During the time she was excluded from the meeting Marisa reported to the police that J.L. had assaulted her when he obtained the name of the adoption agency. Consequently, J.L. was arrested as he left the clinic.[180] Although Baker did not believe Marissa's allegation, she was required by the clinic's policies to discontinue her representation of J.L.[181]

In July, Legal Aid Bureau volunteer William Dillon assumed representation of J.L.[182] Dillon drafted a letter to New Beginnings, which J.L. signed, stating that he had been named E.L.'s father in an order of parentage and support and that he objected to E.L.'s adoption.[183] The letter also provided New Beginnings with an address and phone number at which J.L. could be reached.[184] Capozzoli responded with a letter that did not disclose who he represented but which denied that J.L. was E.L.'s biological father and asserted that J.L. had been reported to the D.C.F.S. for molesting the child.[185] Both assertions had been made by Marisa and both were false. Capozzoli ended his letter by urging J.L. to "move on" with his life.[186] At the time, Dillon assumed that Capozzoli represented New Beginnings, when in fact, Capozzoli represented the A.'s.[187]

In September, Capozzoli conducted a search of the Illinois Putative Father Registry to find E.L.'s father.[188] However, he searched under Marisa's name and the name given to E.L. by the A's rather than under her birth name.[189] Capozzoli's search revealed that Perez-Gonzalez was listed as E.L.'s putative father.[190]

On October 8, 1998, the trial court entered a final judgment order of adoption.[191] Neither New Beginnings nor Capozzoli informed the court of their contacts with J.L.[192] On November 24, 1998, with the aid of yet another attorney, J.L. filed a motion to examine and copy the court

file from the adoption proceedings.[193] The next day, the A.'s learned for the first time of J.L.'s existence and objections to E.L.'s adoption.[194] On December 2, 1998, J.L. filed petitions to set aside the adoption based on lack of jurisdiction and fraud.[195] When a paternity test confirmed that J.L. was E.L.'s biological father, he moved for summary judgment on the petitions.[196]

The trial court found that Marisa had surrendered E.L. for adoption properly.[197] It also found that Marisa's affidavit of identification falsely naming Perez-Gonzalez as E.L.'s father created a rebuttable presumption of truth as to that assertion.[198] The court further found that while Capozzoli's actions had been "improper," they were not the type of fraud required to vacate the adoption.[199] However, the court did recognize that it had failed to acquire personal jurisdiction over J.L. and, therefore, was required to vacate the judgment of adoption regardless of its other findings.[200] Pursuant to section 20, the court then conducted a custody hearing at which expert testimony concluded that E.L. would thrive in either home.[201] The trial court ruled that E.L.'s best interests would be served by a joint custody arrangement, with the A.'s retaining physical custody and J.L. obtaining legal custody with visitation rights once he established residence in Florida.[202] However, when the A.'s and J.L. were unable to work out the details of the arrangement,[203] the court entered an order naming the A.'s as E.L.'s physical custodians, J.L. as E.L.'s legal custodian, and granting J.L. visitation rights on weekends, holidays and summers once he assumed residence in Florida.[204]

On appeal J.L. argued that because the trial court had failed to obtain both personal and subject matter jurisdiction the adoption proceedings were void *ab initio*, thus vitiating the requirement for a section 20 custody hearing.[205] In support of this argument, J.L. asserted that he was a necessary and indispensable party to the adoption proceedings, was never found unfit, had acknowledged his paternity, married the child's mother, paid child support, openly held himself out as E.L.'s father, and had not consented to E.L.'s adoption.[206] Accordingly, E.L. never became "available for adoption" pursuant to 750 Illinois Compiled Statute § 50/5.[207] The appellate court agreed.[208] It ruled that Capozzoli's conduct constituted a deliberate fraud on the court and that his conduct could be imputed to the A.'s.[209] The court further found that Capozzoli's fraud prevented the lower court from obtaining personal jurisdiction over J.L. and, therefore, that court lacked jurisdiction over all of the adoption proceedings, including the custody hearing.[210] The court also held that even if the A.'s had been entitled to a custody hearing, the trial court's order granting physical custody to them was against the manifest weight of the evidence.[211] The court stated,

> [Section 20 creates] a possibility that the best interests of a child might lie with the petitioning adoptive parents or some other third party, even where a biological parent or parents have not consented or been found unfit. . . .
>
> [W]e do not view it as impacting on or eliminating the presumption that in a child-custody dispute, the right or interest of a natural parent in the care, custody, and control of a child is superior to a claim by a third party. The "superior rights doctrine" thus applies to a best interest hearing under section 20.[212]

The court concluded that public policy supported voiding the adoption proceedings ab initio lest future adoptive parents/attorneys be encouraged to engage in similarly deceptive behavior to gain the extra time needed to secure a final judgment.[213]

It took two and a half years and at least eight attorneys[214] for J.L. to regain custody of E.L. During the time that J.L. vigilantly searched for his daughter she was developing a loving relationship with her adoptive parents. Ultimately, E.L. was removed from their home and returned to her father, but it cannot be doubted that the price of unraveling this knot was more than dear to both sets of parents and the child. Some of the responsibility for this ordeal must be attributed to the lower court's failure to come to terms with how the pervasive fraud on the court affected its jurisdiction. Specifically, the lower court failed to recognize (i) the relationship between the fraud that deprived it of jurisdiction over the adoption proceedings and (ii) the fraud that deprived it of jurisdiction over the custody hearing; (iii) the relationship between the section 11(b) evidentiary presumptions and the section 20 custody hearing; and (iv) the relationship between "The Superior Rights Doctrine" and Section 20.

a) The Relationship Between Jurisdiction and Fraud

The lower court failed to recognize that the entire adoption proceeding had been tainted by fraud. Instead, the court ruled that the fraud that occurred was not serious enough to void the adoption.[215] The appellate court disagreed. It cited Marisa's affidavit falsely naming Perez-Gonzalez as E.L.'s father[216]; the affidavits of the A.'s falsely attesting that they had paid New Beginnings when they really had paid Raphael, Capozzoli, and Adoption Consulting Services; Capozzoli's letter failing to inform J.L. of the adoption proceeding,[217] and his additional failure to inform the court of J.L.'s existence.[218] These deceptions, the court found, were intended to prevent the court, J.L., and the A.'s from learning about each other and to mislead the court into believing the case was a valid "'agency adoption' rather than a 'grey market' adoption for cash."[219]

Illinois law is clear that an attorney's fraud is attributable to his clients.[220] Illinois law also holds that when an adoption is tainted by the fraud of the adoptive parents, or their attorney or other agent acting on their behalf, the adoption is void.[221] When the fraud deprives the court of jurisdiction, the adoption is void ab initio.[222] This line of cases stems from *Pennoyer v. Neff's* holding that lack of jurisdiction voids a judgment ab initio and renders it unenforceable.[223]

b) The Relationship Between Jurisdiction, Fraud and Section 20

After the final adoption order was entered the court acknowledged that it never had acquired personal jurisdiction over J.L.[224] Nonetheless, the court proceeded to conduct a section 20 custody hearing based on the assumption that its lack of jurisdiction was cured by J.L.'s intervention and filing of a post-judgment general appearance.[225] Although this assumption was consistent with section 20, it misconceived the concept of personal jurisdiction.

First, and most importantly, a court either has personal jurisdiction—the authority to take action against a person's liberty interests—or it does not. There is no middle ground. When the court recognized that it lacked jurisdiction over J.L. and vacated the adoption order, it should have voided all prior proceedings rather than assume that it had jurisdiction to conduct a custody hearing. If the court did not have jurisdiction from the beginning it could not retroactively obtain jurisdiction to bring the action to a final resolution.

Second, assuming arguendo that J.L.'s intervention or post-judgment appearance could have cured the jurisdictional defect, the court did not permit J.L. to intervene in a way that achieved that result. Typically, an intervenor is entitled to full party participation rights which attach as if the party had been joined at the commencement of the action; i.e., the intervenor is entitled to participate fully in the pleadings, discovery, trial and resolution. For J.L.'s intervention to cure the jurisdictional defect, the court should have given him the opportunity to claim and defend as if he had been joined at the commencement of the action. Instead, the court limited J.L.'s intervention to the post-judgment action and proceeded with the custody hearing. Moreover, J.L.'s general appearance could not have cured the court's lack of jurisdiction retroactively because, under Illinois law, a general appearance submits a party to the court's jurisdiction prospectively, not retrospectively.[226]

On a more important note, J.L. argued that because fraud rendered the court's jurisdiction void *ab initio* the court should have proceeded as if no adoption action had ever been filed. At that point, E.L. should have been returned to J.L. because he never consented to her adoption and never had been adjudicated unfit.[227] Instead, the court proceeded to conduct a custody hearing. Perhaps the court was unaware of how the fraud-on-the-court[228] deprived it of jurisdiction. Perhaps the court tried to duck the issue by finding that the fraud was not the type that deprived it of jurisdiction.[229] Or perhaps the court proceeded to the custody hearing because the language of section 20 did not give it another choice. Section 20's command that a court conduct a best interest custody hearing upon the vacation or denial of an adoption does not contain a fraud exception. If a fraud exception is to be judicially imposed on section 20 the result will be a return to the Baby Richard scenario—custody of the child will automatically revert to whichever natural parent has not surrendered the child or been found unfit. In the instant case, E.L. would have been returned to J.L.'s custody without a hearing to determine if that placement was in her best interest.

Section 20, however, was enacted to avoid the Baby Richard result notwithstanding the errors that derailed the adoption proceeding. That, in fact, was the whole point of section 20—to provide a safety net to protect the child's best interests notwithstanding the frauds and follies of the adults. If a fraud exception is to be read into section 20 then, ironically, the fraud that vitiates the court's jurisdiction will vitiate substantially section 20 as well.

c) The Relationship Between the Section 11(b) Affidavit and the Section 20 Custody Hearing

Section 11(b) provides that a mother who surrenders her child for adoption may attest to the identity of the father in an affidavit.[230] When Marisa filed her section 11(b) affidavit she falsely identified E.L.'s father as Theodore Perez-Gonzalez, who subsequently consented to the adoption.[231] Even though Perez-Gonzalez's paternity was contradicted by J.L.'s paternity test, the court assumed that section 11(b) foreclosed further judicial inquiry into J.L.'s parental rights.[232] This construction, however, misconstrued the purpose and function of section 11(b)'s presumptions and their relation to section 20.

Section 11(b) is a rule of procedural due process. It allocates the burdens of pleading, proving or disproving paternity. Section 11(b) creates two presumptions: an irrebuttable presumption as to the mother and a rebuttable presumption as to the biological father. The irrebuttable presumption arises once the mother has attested to the identity of the biological father in her affidavit. There are two consequences to this identification. First, the adoptive parents are entitled to rely on it. Second, the mother is subsequently estopped to identify a different man as the father if the adoptive parents have relied on her first identification. The estoppel, however, binds only the mother, not the court or the father. Instead, the statute creates a rebuttable presumption of paternity as to the biological father that shifts the burden of proving or disproving paternity onto him. Hence, the mother's affidavit does not foreclose the father

from litigating the issue of paternity if she has misidentified the father. The fact that the father's presumption is rebuttable assumes, of course, that the real father will be permitted to participate in the proceedings in order to rebut the presumption.

As a rule of procedural due process, section 11(b) is intended to aid in the implementation of section 20. Section 20 is a rule of substantive due process that creates standing for specified persons to participate in a custody hearing following a failed adoption. The lower court was correct when it ruled that the A.'s were entitled to rely on Marisa's identification of Perez-Gonzalez because section 11(b) provides that the mother's identification is conclusive as to the adoptive parents. The lower court was also correct when it allowed J.L. to establish his paternity because section 11(b) provides that the mother's attestation is "rebuttable as to the biological father."[233] The lower court was incorrect, however, when it required J.L. to prevail at a custody hearing in order to regain custody of his child. That construction suggests that section 11(b) is not a procedural rule of pleading, but rather a rule of substantive law intended to substitute proof of facts with presumptions. That position, however, runs counter to the specific language of the statute that says the presumption of paternity is "rebuttable" as to the biological father. Furthermore, the court's construction of section 11(b) effectively sanctioned Marisa's fraud by allowing her to subvert J.L.'s parental rights and then force him into a section 20 custody hearing to reacquire them.[234]

The court's construction of section 11(b) confused the reasons as to why the mother's presumption is irrebuttable but the father's presumption is rebuttable. The mother's presumption is irrebuttable because once she has given her consent and the adoptive parents have relied on her affidavit, she is estopped to change her story. The estoppel prevents the mother from challenging the adoption and protects the adoptive parents from claims of unlawful custody. The father, however, is *not* similarly estopped because (1) he is statutorily permitted to rebut the mother's identification; (2) he has not consented to the adoption and, therefore, the adoptive parents have not relied on his representations; and (3) once any presumption is rebutted it no longer has any evidentiary effect. Finally, the fact that the father is permitted to rebut the mother's paternity claim assumes that the paternity issue will be subject to full litigation and not be presumed. Hence, Marisa's false affidavit of paternity was erroneously used by the lower court to foreclose further inquiry into the fraud that permeated the proceedings.

On a more quizzical note, section 11(b) provides that the mother's identification of the father "shall create a rebuttable presumption of truth as to the biological father only." What does that clause mean when the mother identifies the wrong man? Since the wrong man is not the biological father can he, the wrong man, rebut the presumption by establishing non-paternity? On its face, the statute would seem to answer in the negative because once the wrong man rebuts the presumption he is no longer the "biological father" entitled to rebut the presumption. Consider also, if the wrongly identified man acquiesces to the presumption of paternity (as in this case), is his consent conclusive just because the mother named him? On the other hand, a biological father who wants to assert his parental rights will need to rebut the presumption only if the mother identifies the wrong man. This issue raises the question of who is "the father" who is permitted to rebut the presumption of paternity—a challenger to the alleged biological father or the biological father only?

d) The Relationship Between the Superior Rights Doctrine and Section 20

The appellate court construed section 20 to be consistent with Supreme Court rulings that recognize the "superior rights doctrine."[235] This doctrine presumes that biological parents have a "fundamental right to the care, custody and control of their own children" that is protected by the due process clause of the Fourteenth Amendment.[236] Under *Troxel v. Granville*[237] and *Stanley v. Illinois*,[238] the superior rights doctrine creates a presumption of custody in favor of the natural parent that a third party can overcome only by showing that good cause exists to rebut the presumption and it is in the child's best interests to be placed with the nonparent.[239]

The lower court heard testimony that E.L. would prosper with either the A.'s or J.L. Based on this testimony the court entered a joint parenting order virtually splitting custody of E.L. between the A.'s and J.L.[240] The appellate court reversed this ruling because Illinois' version of the superior rights doctrine holds that when evidence supports the custody of each contender, the tie goes to the natural parent.[241] Hence, if fraud had not vitiated the lower court's jurisdiction *ab initio*, its order granting physical custody to the A's still would have violated the superior rights doctrine.

C. Summary

Ginnell and *E.L.* illustrate some of the problems that are likely to arise as Illinois courts integrate section 20 into the Adoption Act's statutory scheme. *Ginnell* raised the possibility that section 20 may discourage stepparent adoptions if that proceeding provides an opportunity for a non-custodial parent to challenge the child's current custody placement. *E.L.* raised the possibility that a judicially imposed fraud-on-the-court exception to section 20 could limit a court's ability to protect a child's best interests in a custody determination.

V. Conclusion

Sometimes laws function as intended and sometimes laws have unintended consequences. The Baby Richard Amendments were intended to provide putative fathers with a statutory means of preserving their parental interest in nonmarital children and children who are the subject of a failed adoption, with a custody hearing to determine which placement option is in their best interest. To some extent, the case law that has developed under the amendments is achieving these results. However, even when a case strictly adheres to the language of a statute it may yield consequences that are beyond the intent of the amendments.

For example, while *K.J.R.* demonstrates how compliance with the Putative Father Registry can protect a father from a mother's fraud, *E.L.* suggests how fraud can deprive a child of the protections of a Best Interest Custody Hearing. Similarly, while *Ginnell* requires a custody hearing following a failed stepparent adoption, it also raises the specter that such hearings will discourage stepparent adoptions if they place the custodial parent at risk of losing custody of the child.

Finally, *K.J.R.* and *A.S.B.* consistently applied the estoppel provisions of the Putative Father Registry that bar a man from raising ignorance of the birth, or reliance on the mother's misrepresentations, as defenses to noncompliance. However, compliance with the registry also forces the man to chose between two constitutionally protected fundamental rights: the right to the "care, custody and control" of his biological children versus his privacy right to be free from government intrusion in the most intimate matters of his life. This constitutional choice may well invite litigation that disrupts and delays adoption proceedings.

Some of these consequences may have been foreseen when the amendments were enacted. As to those consequences that were not foreseen, foreseeable or consistent with the intent of the amendments it is now the role of the judiciary to carefully craft rulings that negotiate these obstacles lest the amendments leave the adoption courts and the interests they safeguard no better off than before their enactment.

Endnotes

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1. The Baby Richard saga began in 1990 when Daniella Janikova became pregnant by her live-in boyfriend Otaker Kirchner. Kirchner financially supported Daniella throughout the pregnancy and they jointly planned for the child to be born at St. Joseph's Hospital in Chicago, Illinois. However, shortly before Janikova's due date Kirchner returned to Czechoslovakia and Janikova moved into a women's shelter where she made arrangements for the child's adoption with the Does. From the outset, Janikova refused to identify the child's father to the Does for fear that he would oppose the adoption. In order to avoid the unknown father's interference, the Does assisted Janikova in finding another hospital for the birth. Shortly before giving birth Janikova moved out of the shelter and into her uncle's house. By that time Kirchener had returned to Chicago but was not informed of the changes in arrangements for the child's birth. The child, Richard, was born in March. *In re* John Doe, 627 N.E.2d 648, 649–50 (Ill. App. Ct. 1993). Four days after Richard's birth, Janikova executed a final and irrevocable consent to place him for adoption and the Does filed a Petition to Adopt, stating that the father was "unknown" and served notice by publication on "all unknown fathers." That same day Baby Richard went home with the Does where he remained for the following four and a half years. *Id.* at 650.

After Baby Richard's placement with the Does, Janikova continued to reside in her uncle's home. She avoided contact with Kirchner who was insistent on learning of the child's well-being and location. Although Kirchner was eventually told that the child had died he persisted in his efforts to find the child. In early May Kirchner finally was informed that the child had been placed for adoption. *Id.*

On June 6, 1991, Kirchner filed an appearance in the adoption proceeding and one week later sought leave of court to file an answer. As the adoption case proceeded, Kirchner and Janikova reconciled and married. The trial court, however, dismissed Kirchner's objections, finding that he lacked standing to oppose the adoption because his parentage had not been established. *Id.* at 651.

Kirchner then filed a Paternity Action on December 9, 1991 which resulted in a finding that he was Richard's biological father. On December 23, 1991 the Does amended their Adoption Petition to allege that Kirchner was an unfit parent and, therefore, his consent to the adoption was not required. The trial court granted the petition finding that Kirchner had "failed to demonstrate a reasonable degree of interest, concern or responsibility in the welfare of the child" during the first thirty days of his birth and, therefore, was not entitled to challenge the adoption. On May 13, 1992 the trial court entered a Judgment of Adoption. *Id.* Kirchner appealed, challenging the court's finding of unfitness. The appellate court affirmed the judgment, finding that it was in Richard's best interest to remain with the Does. *Id.* at 648. Kirchner then appealed to the Illinois Supreme Court which, on June 16, 1994, reversed and vacated the adoption. The court found that (1) the Does, their attorney, and Janikova had conspired to defraud Kirchner and the court by falsely attesting that Kirchner failed to show a reasonable degree of interest in Richard during the first thirty-day period immediately following his birth; (2) the evidence did not support the finding that Kirchner had failed to show a reasonable degree of interest during the first thirty-day period immediately following Richard's birth and (3) the appellate court erred when it based its ruling on Richard's best interest when Kirchner's parental rights had been improperly

terminated. *In re* John Doe, 638 N.E.2d 181 (1994). The Does then filed a request for rehearing the Illinois Supreme Court and a petition to stay the Illinois Supreme Court's ruling with the U.S. Supreme Court. O'Connell v. Kirchener, 513 U.S. 1303 (1995).

In response to the Illinois Supreme Court's reversal of the adoption, the Illinois General Assembly held an emergency session in which it passed several amendments to the Adoption Act in an effort to change the result of the case. One amendment, § 20, required a court to hold a Best Interest Custody Hearing upon the vacation or denial of an adoption. *In re* John Doe, 649 N.E.2d 324, 328–29. Based on § 20 of the Adoption Act, and § 601(b) of the Marriage and Dissolution of Marriage Act, the Does filed a petition for a Best Interest Custody Hearing. *Id.* at 329. Kirchner responded by filing a writ of habeas corpus on Richard's behalf on November 15, 1994. *Id.* at 329. The Illinois Supreme Court granted the habeas corpus on the grounds that (1) the Does lacked standing to seek a custody hearing under § 601(b) because they had only "possession", but not lawful "physical custody" of Richard; *id.* at 329–36, and (2) applying newly enacted § 20 retroactively to a final judgment would violate the separation of powers doctrine. *Id.* at 336–38. Finally, amidst much media fanfare, Richard was turned over to his biological parents. Thereafter, the Kirchners separated. Richard continues to live with Janikova, the only parent who voluntarily relinquished her legal rights to him. However, since Kirchner still retains legal custody, should anything happen to him the case would be reopened. *'Richard' Inquiry Halted by Bilandic; Illinois Supreme Court Justice Stops Reopening of Case,* CHI. TRIB., July 29, 1997, at 1. *See also* Anthony Zito, *Baby Richard and Beyond: The Future of Adopted Children,* 18 N. ILL. U.L. REV. 445 (1998) (providing a detailed account of the circumstances surrounding the Baby Richard proceedings).

2. 750 ILL. COMP. STAT. §§ 50/1, /8, /11, /12.1, /12a(1.5), /20, /20a, /20b (2002) (effective July 3, 1994).

3. 750 ILL. COMP. STAT. § 50/12.1 (2002).

4. *Id.* § 50/20.

5. *Id.* 750 ILL. COMP. STAT. § 50/11a (2002); 750 ILL. STAT. § 50/20 (2002).

6. 750 ILL. COMP. STAT. § 50/12.1(a)–(b) (2002).

7. *Id.* § 50/12.1(h).

8. *Id.* § 50/12.1(g).

9. *Id.* § 50/12a.

10. *Id.* § 50/20.

11. 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, 191 (1996).

12. *Id.* at 191–92 n.22.

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

14. Hussaini, *supra* note 11, at 207.

15. *Id.* at 190–92.

16. Shelley B. Bostick, *The Baby Richard Law: Changes to the Illinois Adoption Act,* 82 ILL. B.J. 654, 655, at n.20 (1994).

17. 750 ILL. COMP. STAT. § 50/1(R) (2002).

18. *Id.* § 50/11(b) (2002).

19. *Id.*

20. *See, e.g.,* In re Adoption of E.L., 733 N.E.2d 846 (Ill. App. Ct. 2000).

21. 750 ILL. COMP. STAT. § 50/8(b)(1)(B)(i) (2002).

22. *Id.* § 50/8(b)(1)(B)(iii).

23. *Id.* § 50/8(b)(1)(B)(iv).

24. *Id.* § 50/8(b)(1)(B)(v).

25. *Id.* § 50/12.1(a)(1)–(4). When registering, a putative father must state: any and all names that he is known by; an address at which he may be served; his social security number; his date of birth; all names the mother may be known by; her last address (if known); her social security number and her date of birth. In addition, he must also state the name, gender, place of birth and date of birth or anticipated date of birth of the child if known to him.

26. *Id.* § 50/12.1(b).

27. *Id.* § 50/12.1(g), §50/8(b)–(c).

28. *Id.* § 50/12.1(h).

29. *Id.*

30. *Id.* § 50/12.1(g).

31. *Id.*

32. *Id.* § 50/12.1(g)(1)–(2). *See* Hussaini, *supra* note 11, at 215–16.

33. 750 ILL. COMP. STAT. § 50/12.1(g) (2002).

34. Bostick, *supra* note 16, at 657.

35. 750 ILL. COMP. STAT. § 50/12a(2), (4) (2002).

36. *Id.* § 45/7 (2001); § 50/12a(2) (2002).

37. *Id.* § 50/12a(2)(5).

38. *Id.* § 50/12a.

39. *Id.* § 50/8(b)(1)(B)(vii).

40. *Id.* § 50/11(a).

41. *Id.* § 50/8(a)(1).

42. *Id.*

43. *Id.* § 50/20 (2002). The court's custody determination will be based on the best interests of the child standard as set forth in section 5/602 of the Illinois Marriage and Dissolution Act. *Id.*

44. *Id.*

45. *Id.* § 50/20.

46. *Id.* § 50/20b.

47. *Id.* § 50/20.

48. 750 ILL. COMP. STAT. § 50/11(a) (2002). *See* Meza v. Rogriguez, 713 N.E.2d 764 (Ill. App. Ct. 1999) (examining the irrevocability of consents and surrenders for adoption).

49. 750 ILL. COMP. STAT. § 50/20 (2002).

50. *Id.* § 50/8(b)–(c) (2002).

51. *Id.* § 50/8. *See generally In re* Adoption of Syck, 562 N.E.2d 174 (Ill. 1990).

52. *See In re* Kirchner, 649 N.E.2d 324 (Ill. 1995); *In re* Adoption of Ginnell, 737 N.E.2d 1094, 1098 (Ill. App. Ct. 2000).

53. Bostick, *supra* note 16, at 655.

54. 750 ILL. COMP. STAT. § 50/8(d). The 1994 amendments also added subsection (d) to section 50/8, which provides that "in making a determination under subparagraphs (b)(1) and (c)(1), no showing shall be required of diligent efforts by a person or agency to encourage the father to perform the acts specified therein." This language offers further support of the legislature's intent to place the burden solely on the putative father to preserve his parental rights.

55. *See* H.B. 2424, 1994 Leg., 88th Sess. (Ill. 1994). *See also* Bostick, *supra* note 16, at 658.

56. Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983).

57. *Caban,* 441 U.S. 380; *Stanley,* 405 U.S. 645.

58. *Quilloin,* 434 U.S. 246.

59. *Stanley,* 405 U.S. 645. Joan and Peter Stanley lived together intermittently for eighteen years, but never married. The relationship produced three children. Under Illinois law, non-marital children automatically became wards of the state upon the death of their mother. Therefore, when Joan died, all three children were taken from Peter and made wards of the state without a determination of his fitness as a parent. Peter sued the state for custody, claiming that he had been denied equal protection since Illinois law did not take children from wed fathers or unwed mothers without first adjudicating their unfitness. The Illinois Supreme Court ruled against Stanley holding (1) that parental fitness was irrelevant and (2) the fact that Peter had never married the children's mother was a sufficient reason for removing the children from his care. The U.S. Supreme Court reversed, holding that the Illinois law unconstitutionally denied equal protection of the law to unwed fathers.

60. *Id.* at 647.

61. *Id.* at 650.

62. *Caban,* 441 U.S. 380. Abdiel Caban had two children with Maria Mohammed while they were living together. They subsequently separated and married other people. Caban maintained weekly contact with the children for the first nine months, and after that whenever possible. When Mohammed and her new husband filed a Petition to Adopt, Caban and his new wife countered with their own Petition to Adopt. The trial court allowed the mother to prevail because § 111n of the New York Domestic Relations Law provided that consent for adoption of an illegitimate child was only needed from the mother. Caban appealed the judgment, claiming that his equal protection and due process rights had been violated. The appellate court and the New York Court of Appeals affirmed. The United States Supreme Court reversed. The Court held that the New York statute violated the equal protection clause of the Fourteenth Amendment "as the distinction it invariably makes between the rights of unmarried mothers and the rights of unmarried fathers has not been shown to be substantially related to an important state interest." The Court did not render an opinion as to whether the statute also violated Caban's due process rights.

63. *Id.* at 382 (the children were ages eight and ten).

64. *Id.*

65. *Quilloin,* 434 U.S. 246. Leon Webster Quilloin had a child with Ardell Williams Walcott. The couple never married and the child lived with Walcott at all times. During an eleven-year period, Quilloin never had nor sought physical or legal custody of his child. Subsequently, Walcott married and her new husband sought to adopt the child. Georgia Law provided that if a child were born out of wedlock, only the mother's consent was needed for the child's adoption, unless the father had legitimated the child by marrying the mother or obtaining a court order declaring the child legitimate and capable of inheriting from him. Quilloin did neither. The trial court found that Quilloin did not have standing to challenge the stepparent adoption. On appeal to the Supreme Court of Georgia, Quilloin argued that his equal protection and due process rights had been violated. However, the court affirmed the trial court's decision. Quilloin appealed to the U.S. Supreme Court, which also affirmed the decision. The Court determined that when an unwed father fails to foster a relationship with or provide regular support for his child, his parental rights are readily distinguishable from those of a wed father.

66. *Lehr,* 463 U.S. 248. Jonathan Lehr and Lorraine Robertson had one child, Jessica, out of wedlock. Eight months after Jessica's birth her mother married another man. During the next two years, Lehr rarely saw Jessica and failed to provide financial support. Subsequently, the Robertsons filed an Adoption Petition in the Family Court of Ulster County. Under New York law, a putative father was entitled to notice of an adoption proceeding only if he filed with the State's Putative Father Registry. Lehr had not done so. Allegedly unaware of the pending Adoption Petition, Lehr filed Petitions for a Determination of Paternity and Reasonable Visitation Privileges in the Westchester County Family Court. Both the Ulster County judge and the appellee's attorney were made aware of Lehr's pending petitions in the Westchester Court. The Ulster judge stayed the Paternity Action until he could rule on a Motion to Change the Venue of that proceeding. Lehr received notice of that motion and as a result was informed of the adoption proceedings for the first time. Lehr's attorney made plans to seek a stay of the adoption proceeding, but before he could do so the judge signed the adoption order, maintaining that Lehr did not have a right to notice of the adoption proceedings prior to the signing of the order. Lehr filed a petition to vacate the adoption, asserting fraud and several violations of his constitutional rights.

67. *Id.* at 255.

68. *Id* at 262–68. Lehr claimed that the New York statute violated his due process rights by denying him the opportunity to develop a relationship with his child. He further claimed that even if the statute were found to adequately protect that right, he was entitled to special notice because both the mother and the court were aware that he had filed an affiliation proceeding in another court. Finally, Lehr claimed that the statute violated his right to equal protection of the law by classifying putative fathers into two groups: those entitled to receive notice of adoption proceedings and those who were not, while always allowing the biological mother the right to receive notice.

69. *Id.* at 262.

70. *Id.* at 255–56.

71. *Id.* at 264.

72. 750 ILL. COMP. STAT. § 50/12.1(g) (2002).

73. *Id.* § 50/12.1(g).

74. Apparently, even imprisonment may not satisfy the "uncontrollable circumstance" exception either. *See In re* Baby Girl P., 802 A. 2d 1192 (2002) (father who failed to comply with New Hampshire's Putative Father Registry while imprisoned was barred from objecting to child's adoption).

75. *See* Mary Beck, *Toward a National Putative Father Registry Database,* 25 HARV. J.L. & PUB. POL'Y 1031 (2002).

76. Griswold v. Connecticut, 381 U.S. 479 (1965).

77. Eisenstadt v. Baird, 405 U.S. 438 (1972).

78. The author would like to thank Professor Donald L. Beschle of The John Marshall Law School, Chicago, Illinois for his contributions to this section.

79. In re K.J.R. & D.F.R. to Adopt O.J.M., 687 N.E.2d 113 (1st D. 1997).
80. *Id.* at 113.
81. *Id.*
82. *Id.* at 114.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id. See* 750 ILL. COMP. STAT. § 50/12.1 (2002).
87. *Id.*
88. *Id.* at 118.
89. *Id.*
90. *Id.* at 115–16.
91. *Id.* at 116 (emphasis added). *See* 750 ILL. COMP. STAT. § 50/1 (2002).
92. *K.J.R.*, 687 N.E.2d at 116–17.
93. *Id.* at 115–17. *See* 750 ILL. COMP. STAT. § 50/12.1(g) (2002).
94. *K.J.R.*, 687 N.E.2d at 115. *See* 750 ILL. COMP. STAT. § 50/12.1 (2002).
95. *K.J.R.*, 687 N.E.2d at 116. *See* 750 ILL. COMP. STAT. § 50/20a (2002).
96. *K.J.R.*, 687 N.E.2d at 117. *See* 705 ILL. COMP. STAT. § 405/1 (2002).
97. *K.J.R.*, 687 N.E.2d at 117. *See* 705 ILL. COMP. STAT. § 405/2 (2002).
98. *K.J.R.*, 687 N.E.2d at 119. *See* 705 ILL. COMP. STAT. § 50/12.1 (2002).
99. *K.J.R.*, 687 N.E.2d at 117.
100. *Id.* at 119. *See* 705 ILCS 405/2-30.4 (1997); 750 ILL. COMP. STAT. § 50/12.1 (2002).
101. *K.J.R.*, 687 N.E.2d at 118.
102. *Id.* at 120.
103. *Id.* at 121.
104. *Lehr*, 463 U.S. 248.
105. *K.J.R.*, 687 N.E.2d at 121.
106. *Id.* at 121.
107. *Id.*
108. *Id.* at 122.
109. *Id.*
110. A.S.B. v. Department of Child and Family Services, 688 N.E.2d 1215 (2d D. 1997).
111. *Id.* at 1215.
112. *Id.* at 1216.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 1217.
117. *Id.*
118. *Id.* at 1218–19.
119. *Caban*, 441 U.S. 380.
120. *A.S.B.*, 688 N.E.2d at 1219.
121. *Id.*
122. 750 ILL. COMP. STAT. § 50/12.1(b) & (g) (2002).
123. *A.S.B.*, 688 N.E.2d at 1220.
124. *Id.* at 1225.
125. *A.S.B.*, 688 N.E.2d at 1222.
126. *Id.* at 1220; 750 ILL. COMP. STAT. § 12.1(g) (2002).
127. *A.S.B.*, 688 N.E.2d at 1222. *See* 750 ILL. COMP. STAT. § 50/12.1(g) (2002).
128. *Tinya*, 765 N.E.2d 1214 (Ill. App. Ct. 2002).
129. *Id.* at 1217.
130. *Id.* at 1216.
131. *Id.* at 1217.
132. *Id.*
133. *Id.* at 1218.
134. *K.J.R.*, 687 N.E.2d at 118.
135. *Tinya*, 765 N.E.2d at 1218.
136. *A.S.B.*, 688 N.E.2d at 1218.
137. 750 ILL. COMP. STAT. § 50/20 (2002).
138. *Id.*
139. In re Adoption of Ginnell, 737 N.E.2d 1094, 1099 (Ill. App. Ct. 2000).
140. In re Adoption of E.L., 733 N.E.2d 846, 865 (Ill. App. Ct. 2000).
141. *Ginnell*, 737 N.E.2d at 1096.
142. *Id.*
143. *Id.*
144. *Id.* at 1097.
145. *Id.* at 1096.
146. *Id.* at 1099.
147. Bostick, *supra* note 16, at 658.
148. *Ginnell*, 737 N.E.2d at 1096.
149. 750 ILL. COMP. STAT. §§ 50/11; 50/20; 50/20a (2002).
150. *Id.* § 50/20.
151. *E.L.*, 733 N.E.2d at 865.
152. *Id.* at 848.
153. *Id.* at 848–49.
154. *Id.* at 849.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 849–50. Ultimately, the A's paid almost $20,000 to Raphael to arrange for E.L.'s adoption. Appellant's Brief in Support of Appeal at 1, *E.L.*, 733 N.E.2d 846 (Ill. App. Ct. 2000) (No. 99-2070 Consolidated with 99-2465 and 99-2676).
162. *E.L.*, 733 N.E.2d at 849.
163. *Id.* at 849–50.
164. *Id.* at 850.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* Their affidavits were corroborated by the affidavit of Rita Sankey, the director of New Beginnings. Appellant's Brief at 31, *E.L.* (No. 99-2070).
169. *E.L.*, 733 N.E.2d at 850.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* The first time J.L. heard of E.L.'s adoption was in March of 1998, when Marisa's mother telephoned him to ask why he had put E.L. up for adoption. Soon thereafter Marisa admitted

to J.L. that E.L. had been adopted. Appellant's Brief at 5, *E.L.* (No. 99-2070).

175. *E.L.*, 733 N.E.2d at 850.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 850–51. The final order of adoption was actually entered on October 8, 1998. Appellant's Brief at 6, *E.L.* (No. 99-2070).

180. *E.L.*, 733 N.E.2d at 851. J. L. was hospitalized that night with chest pains. The charges were subsequently dismissed when Marisa did not appear for the court date. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*, Dillon also advised J.L. to file with Illinois' Putative Father Registry which he did even though the Paternity Order should have protected his right to notice of E.L.'s adoption proceedings. Appellant's Brief at 6–7, *E.L.* (No. 99-2070).

184. *E.L.*, 733 N.E.2d at 851.

185. *Id.*

186. *Id.*

187. Appellant's Brief at 7, *E.L.* (No. 99-2070).

188. *E.L.*, 733 N.E.2d at 851.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. Appellant's Brief at 8, *E.L.* (No. 99-2070).

194. *Id.*

195. *E.L.*, 733 N.E.2d at 851.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 851–52.

201. *E.L.*, 733 N.E.2d at 852, 855. Andrea Corn, a doctor of psychology, appeared as an expert witness for the A's. *Id.* at 853. She testified that E.L. had developed a "secure and loving" relationship with the A's and that any separation from them would be "catastrophic," putting E.L. at risk for severe psychological problems. *Id.* at 853–54. However, Dr. Corn conceded that she had never observed J.L. interact with E.L. and could not testify as to the nature of their relationship. *Id.* at 854. Dr. Bennett Leventhal, a physician, Professor of Psychiatry and Pediatrics, and the Director of Child and Adolescent Psychiatry at the University of Chicago, testified as an expert on J.L.'s behalf. *Id.* In contrast to Dr. Corn's approach, Dr. Leventhal observed E.L. interact with both the A's and J.L. *Id.* He determined that the child had developed a loving and secure relationship with both the A's and J.L. *Id.* Dr. Leventhal disagreed with Dr. Corn's assertion that E.L. would develop psychological problems if separated from the A's. *Id.* He ultimately concluded that E.L. would develop into a healthy and happy child under the primary care of either the A's or J.L. *Id.* at 855.

202. *E.L.*, 733 N.E.2d at 855.

203. *Id.* Matters in contention were (1) whether J.L.'s visits to E.L. had to be supervised by the A.s and (2) whether J.L. could retain his right to appeal. Appellant's Brief at 22, *E.L.* (No. 99-2070).

204. *In re* Adoption of *E.L.*, 733 N.E.2d at 855.

205. *Id.* at 855–56.

206. *Id.* at 856.

207. Appellant's Brief at 26, *E.L.* (No. 99-2070).

208. *E.L.* 733 N.E.2d at 856.

209. *Id.* at 858.

210. *Id.* at 860.

211. *Id.* at 864.

212. *Id.* at 862

213. *Id.* at 861.

214. Appellant's Brief, *E.L.* (No. 99-2070).

215. *E.L.*, 733 N.E.2d at 855.

216. *Id.*

217. *Id* at 858.

218. *Id.* at 859.

219. *E.L.*, 733 N.E.2d at 857.

220. *In re* Barker, 346 N.E.2d 26, 29 (Ill. App. Ct. 1976) (stating that it is fraud for the adoptive parent's attorney to misinform the court about a father's objection to the adoption). *See* Appellant's Brief at 30, *E.L.* (No. 99-2070); *In re* Nadler, 438 N.E.2d 198, 201 (Ill. 1982) (stating that it is fraud to prepare and sign false affidavits to procure an adoption). *See* Appellant's Brief at 31, *E.L.* (No. 99-2070).

221. *See* Appellant's Brief at 33 and cites therein, *E.L.* (No. 99-2070).

222. *E.L.*, 733 N.E.2d at 856.

223. Pennoyer v. Neff, 95 U.S. 714, 732–33 (1877).

224. *E.L.*, 733 N.E.2d at 855–56.

225. Appellant's Brief at 24, *E.L.* (No. 99-2070).

226. *Id.* at 26.

227. *E.L.*, 733 N.E.2d at 861.

228. Appellant's Brief at 26–28, *E.L.* (No. 99-2070).

229. *E.L.*, 733 N.E.2d at 851.

230. 750 ILL. COMP. STAT. § 50/11(b) (2002).

231. *E.L.*, 733 N.E.2d at 850.

232. Appellant's Brief at 40–42, *E.L.* (No. 99-2070).

233. 750 ILL. COMP. STAT. § 50/11(b) (2002).

234. Appellant's Brief at 36, *E.L.* (No. 99-2070).

235. *E.L.*, 733 N.E.2d at 862.

236. *Id.* at 862 (citing In re Custody of Townsend, 427 N.E.2d 1231, 1235 (Ill. 1981); *Toxel,* 530 U.S. 57, 66 (2000); *Stanley,* 405 U.S. at 658; In re Kirchner, 649 N.E.2d 324 (Ill. 1995)).

237. *Troxel,* 530 U.S. at 101.

238. *Stanley,* 405 U.S. at 658.

239. Appellant's Brief at 50, *E.L.* (No. 99-2070).

240. *E.L.*, 733 N.E.2d at 855.

241. *Id.* at 864.