

Does Father Know Best? Arkansas's Approach to the "Thwarted" Putative Father*

I. INTRODUCTION

"It's awful Everybody keeps saying how bad they feel for us but she's a two-year-old girl who got shoved in a truck and driven to Oklahoma with strangers."¹ These were the concerns of Matt Capobianco after a South Carolina court ordered him and his wife, Melanie, to turn custody of their two-year-old daughter over to her biological father, whom she had never met.²

The Capobiancos' story made headlines after the couple contested this decision before the United States Supreme Court.³ Although the child's biological father had relinquished his parental rights via text message and signed a statement that he would not contest her adoption, he later changed his mind, claiming that he did not know what he had signed.⁴ Even though the father had provided no support to the birth mother or to the child for the first four months of her life, she was taken from the Capobiancos, the only parents she had ever known, to be placed with her biological father based on a state court's interpretation of the Indian Child Welfare Act of 1978 (ICWA).⁵

The United States Supreme Court granted certiorari and, twenty months after the biological father received custody of the child, the Court ruled that the lower courts had erred in their

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1. Eric Egan, *Couple Will Fight for Adopted Daughter's Return*, WCIV-TV (last updated Jan. 2, 2012, 7:54 PM), <http://www.abcnews4.com/story/16431415/couple-will-fight-for-adopted-daughters-return> (internal quotation marks omitted) (statement of Matt Capobianco).

2. *Id.*

3. *See* *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

4. *Id.* at 2558-59.

5. *Id.* at 2556, 2558; *see also* Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (2012).

application of the ICWA provisions.⁶ Eventually, the biological father returned custody of the child to the Capobiancos.⁷

Although this case turned on the application and interpretation of the ICWA, a piece of legislation not addressed by this comment, it provides a concrete and tragic example of how the legal system's attempts to balance the rights of biological parents with the best interests of a child can occasionally go awry. States must do their best to provide clarity in this ever-evolving area of law. However, an unusual set of circumstances will often arise that leads to a difficult and heart-wrenching decision by a court.

Arkansas, like many states, has struggled in recent years to strike an appropriate balance.⁸ Prior to several United States Supreme Court decisions in the 1970s and 1980s, the putative father of an illegitimate child had little to no rights regarding the adoption of his biological child.⁹ However, as society's views on illegitimate children have changed over the years, so too have the laws regarding the rights of biological fathers. These changes have been necessary to ensure that a putative father who has recognized a child as his own and provided support to that child receives the same constitutional protections as the child's birth mother.¹⁰

In most cases, it is clear whether a putative father has provided support for his child, especially when the adoption occurs several years after the child is born.¹¹ However, the father's involvement may be more difficult to discern in cases of newborn adoptions. These adoptions, by nature, require the father to provide support to the birth mother during pregnancy, which may become difficult when the relationship between the birth

6. *Adoptive Couple*, 133 S. Ct. at 2559, 2565.

7. See "Baby Veronica" Handed Over to Adoptive Parents, *Cherokee Nation Confirms*, CBSNEWS.COM, <http://www.cbsnews.com/news/baby-veronica-handed-over-to-adoptive-parents-cherokee-nation-confirms/> (last updated Sept. 24, 2013, 1:04 AM).

8. See generally C. Aaron Holt, Note, *The Confusion and Clarification of Arkansas's Adoption Consent Law: In re the Adoption of SCD, a Minor, and the Arkansas General Assembly's Response*, 58 ARK. L. REV. 735 (2005) (detailing recent legislation passed by the Arkansas General Assembly that protects a putative father's relationship with his biological child).

9. Ardis L. Campbell, Annotation, *Rights of Unwed Father to Obstruct Adoption of His Child by Withholding Consent*, 61 A.L.R.5th 151, 151 (1998).

10. See *Lehr v. Robertson*, 463 U.S. 248, 266-68 (1983); see also *infra* Part III (discussing United States Supreme Court jurisprudence on this issue).

11. See, e.g., *Lehr*, 463 U.S. at 267-68.

parents is strained. Nonetheless, a putative father who truly wants a say in his child's future must be willing to disregard any animosity for the child's mother and provide support that will benefit the child. Otherwise, he risks losing his opportunity to object to a future adoption of that child.¹²

However, a different issue may arise when a putative father unsuccessfully attempts to establish this relationship because his efforts are thwarted by the birth mother through no fault of his own. In this scenario, the father is commonly referred to as a "thwarted putative father."¹³ The United States Supreme Court has yet to address the constitutional rights of thwarted fathers, leaving states to manage the dilemma on their own.¹⁴

The Arkansas General Assembly has also not addressed the thwarted father scenario, leaving the courts to resolve disputes on a case-by-case basis.¹⁵ The case law in Arkansas is clear that a truly thwarted father will be held to a lower standard of statutory compliance, but courts have failed to provide clear guidelines for determining when a putative father will be considered thwarted in his efforts.¹⁶ This case-by-case approach has created uncertainty regarding when a birth father's consent to an adoption is necessary, which is likely to have negative effects on all parties involved in the adoption process—especially the child to be adopted.

This comment examines Arkansas's current approach to the issue of the thwarted putative father and provides suggestions for a more well-defined rule of law that considers the best interests of the child. First, Part II explores Arkansas's current consent statute. Part III then discusses the United States Supreme Court's decision in *Lehr v. Robertson*. Part IV examines the two cases from the Arkansas appellate courts that have addressed the issue of the thwarted father. Next, Part V explains the negative effects

12. See ARK. CODE ANN. § 9-9-206(a)(2)(F) (Supp. 2013) (allowing a father to object to an adoption if "[h]e proves a significant custodial, personal, or financial relationship existed with the minor before the petition for adoption is filed").

13. See 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) ("There is the 'thwarted father,' who truly tried to develop a relationship with his child, but was frustrated through no fault of his own . . .").

14. See *id.*

15. See Holt, *supra* note 8, at 752.

16. See *In re Adoption of Baby Boy B.*, 2012 Ark. 92, at 9-13, 394 S.W.3d 837, 842-44.

that a contested adoption may have on the parties involved, the child to be adopted in particular. Lastly, Part VI offers suggestions intended to clarify Arkansas's consent statute and implement measures to best protect the best interests of children awaiting adoption.

II. BACKGROUND

In 2005, the Arkansas General Assembly amended Arkansas's adoption consent statute in response to the Arkansas Supreme Court's decision in a case styled as *In re Adoption of SCD*.¹⁷ In that case, the court held that a putative father had "legitimated" his child by registering with the Arkansas Putative Father Registry¹⁸ and filing a paternity action, so his consent was required prior to the adoption of the child.¹⁹ At the time the court decided the case, the consent statute did not explicitly establish a time period during which the putative father had to "legitimate" his child.²⁰ Earlier case law suggested the filing of an adoption petition was the cutoff date for the father to file a paternity action.²¹ The supreme court disagreed with this interpretation and held that the putative father had "legitimated" the child in accordance with the statute even though he had waited until a few days after the adoption petition was filed to file his paternity action.²²

The 2005 legislation removed the "otherwise legitimated" language from the consent statute and replaced it with language that requires consent of the putative father when "he has a written order granting him legal custody of the minor at the time the petition for adoption is filed, or he proves a significant custodial, personal, or financial relationship existed with the minor before the petition for adoption is filed."²³ This amended language

17. Holt, *supra* note 8, at 735-36; *see also* Act 437, § 1, 2005 Ark. Acts 1386, 1386-87 (codified at ARK. CODE ANN. § 9-9-206(a)(2) (Supp. 2013)) (relevant legislation).

18. *See infra* Part VI.C. for a discussion on the Arkansas Putative Father Registry. Registration is a fairly simple process that requires a putative father to fill out a form and have his signature notarized.

19. *In re Adoption of SCD*, 358 Ark. 51, 58-59, 186 S.W.3d 225, 229 (2004).

20. *Id.* at 58, 186 S.W.3d at 228.

21. *Id.* at 57, 186 S.W.3d at 227-28.

22. *Id.* at 58-59, 186 S.W.3d at 228-29.

23. Act 437, § 1, 2005 Ark. Acts 1386, 1386 (codified at ARK. CODE ANN. § 9-9-206(a)(2) (Supp. 2013)).

requires that a putative father take action *before* the adoption petition is filed in order for his consent to be required.

Additionally, the 2005 legislation added two new provisions to Arkansas Code Annotated section 9-9-207, which now provides that consent is not required from a putative father who is listed in the Arkansas Putative Father Registry or a putative father who has signed an acknowledgment of paternity, but who, in either instance, “failed to establish a significant custodial, personal, or financial relationship” with the child.²⁴ This change was meant to clarify the meaning of the consent statutes and purported to grant rights only to those putative fathers who had taken the necessary steps to establish their parental rights.²⁵ There were, however, still some unanswered questions regarding the rights of putative fathers under this statute, such as whether strict compliance with the statute is necessary for a thwarted putative father or a father who had no notice of the pregnancy at all.²⁶

III. THE UNITED STATES SUPREME COURT’S POSITION ON A PUTATIVE FATHER’S CONSTITUTIONAL RIGHTS

In order to appreciate the development of the rights of putative fathers in Arkansas, it is important to understand the United States Supreme Court jurisprudence concerning the constitutionality of notice requirements in cases involving putative fathers. The seminal case, *Lehr v. Robertson*,²⁷ was clearly influential on Arkansas lawmakers, as the language of the Arkansas consent statute is almost identical to the language used by the Court.²⁸ Additionally, *Lehr* was discussed at length in recent opinions issued by both the Arkansas Court of Appeals²⁹

24. Act 437, § 2, 2005 Ark. Acts 1386, 1387-88 (codified at ARK. CODE ANN. § 9-9-207(10)–(11) (Repl. 2009)).

25. See Holt, *supra* note 8, at 736.

26. See *id.* at 751.

27. 463 U.S. 248 (1983).

28. See *In re Adoption of Baby Boy B.*, 2012 Ark. 92, at 7, 394 S.W.3d 837, 841 (“This legislative response to *In re Adoption of SCD* utilized language from *Lehr v. Robertson* . . .”).

29. *X.T. v. M.M.*, 2010 Ark. App. 556, at 6-8, 377 S.W.3d 442, 445-46, *overruled in part by Baby Boy B.*, 2012 Ark. 92, at 9, 394 S.W.3d at 842.

and the Arkansas Supreme Court,³⁰ which necessitates a more in-depth discussion of the case.

A. Facts and Procedural History

In *Lehr*, a putative father brought an appeal to set aside an order of adoption of his child by the child's stepfather.³¹ The putative father argued "that the Due Process and Equal Protection Clauses of the Fourteenth Amendment . . . g[a]ve him an absolute right to notice and an opportunity to be heard before the child may be adopted."³² The Court disagreed.³³

The child was born out of wedlock in 1976.³⁴ Eight months after the birth, the child's mother married a man who was not the child's biological father.³⁵ When the child was over two years of age, her mother and stepfather filed a petition for adoption in Ulster County, New York.³⁶ After hearing testimony and receiving a favorable report from the Department of Social Services, a court granted the adoption.³⁷ The biological father, who had rarely visited and had provided no support for the child, argued that the order was invalid because he did not receive notice of the adoption proceeding.³⁸

The law in New York required notice for certain classes of putative fathers, including those who had registered with the state's putative father registry.³⁹ The putative father did not register, nor did he meet any of the other qualifications that would have put him in a class of persons who must have received notice.⁴⁰ Nonetheless, the putative father argued that his constitutional rights had been violated by the New York statutory scheme based on two alternative theories: (1) "that a putative father's actual or potential relationship with a child born out of wedlock is an interest in liberty which may not be destroyed without due process of law," which provided him with a

30. *Baby Boy B.*, 2012 Ark. 92, at 7-8, 394 S.W.3d at 841.

31. *Lehr*, 463 U.S. at 248.

32. *Id.* at 250.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Lehr*, 463 U.S. at 250.

37. *Id.*

38. *Id.* at 249-50.

39. *Id.* at 251.

40. *Id.* at 251-52.

constitutional right of notice; and (2) “that the gender-based classification in the statute, which both denied him the right to consent to [the child’s] adoption and accorded him fewer procedural rights than her mother, violated the Equal Protection Clause.”⁴¹

B. Rationale of the Court

As to the due process claim, the Court held that the putative father had only an “inchoate interest in establishing a relationship” with his child, and the New York statute adequately protected that interest.⁴² Therefore, the trial court did not violate the rights of the putative father by requiring strict compliance with the notice statutes.⁴³ To reach this decision, the Court stated:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child’s best interests lie.⁴⁴

The Court found that the putative father was not entitled to notice because he had not established a “significant custodial, personal, or financial relationship” with his child and did not seek to establish a legal connection until she was over two years of age.⁴⁵ The Court was “concerned only with whether New York ha[d] adequately protected his *opportunity* to form such a relationship.”⁴⁶ It found that the statute served a legitimate state interest while still providing protection to several classes of fathers.⁴⁷ Further, the Court noted that an act as simple as sending a postcard to the registry would have protected the putative father’s right to notice.⁴⁸

41. *Lehr*, 463 U.S. at 255 (footnote omitted).

42. *Id.* at 265.

43. *Id.*

44. *Id.* at 262 (footnote omitted).

45. *Id.*

46. *Lehr*, 463 U.S. at 262-63 (emphasis added).

47. *Id.* at 264-65.

48. *Id.* at 264.

As to the equal protection claim, the Court found that a state law “may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose.”⁴⁹ The law at issue guaranteed certain individuals—all mothers but only certain putative fathers—the right to veto an adoption and a right to notice.⁵⁰ The putative father argued this was inequitable, but the Court found that the statute did not deny him equal protection because he had never established a substantial relationship with his child, but the mother had.⁵¹ Since both parents had established significantly different relationships with the child, the Equal Protection Clause did not prevent New York from providing each with different rights.⁵²

IV. ARKANSAS’S APPROACH TO THE THWARTED FATHER

Although *Lehr* addressed notice requirements rather than consent, the “significant custodial, personal, or financial relationship” standard from the case has made its way into many state consent laws, including Arkansas’s.⁵³ Generally, discerning whether a putative father has created a significant relationship with his child in a case similar to *Lehr*, where the child was a few years old at the time the adoption took place, would be a fairly easy task for a court. However, cases involving newborns are often more complicated, especially where the putative father and mother are unable, or unwilling, to communicate with one another.

One of the criticisms of the 2005 amendments to Arkansas’s consent statutes has been that the changes “fail[] to take into account the situation of the putative father whose earnest attempts to establish a relationship with his child are frustrated by an uncooperative mother.”⁵⁴ The relevant statutes fail to address the situation in which a father attempted to comply with the statutory

49. *Id.* at 265-66.

50. *Id.* at 266.

51. *Lehr*, 463 U.S. at 267.

52. *Id.* at 267-68.

53. See ARK. CODE ANN. § 9-9-207(a)(10)–(11) (Repl. 2009).

54. Holt, *supra* note 8, at 751.

requirements but failed to do so because of the acts of another.⁵⁵ Therefore, courts must resolve such cases with little guidance as to which factual situations allow for something less than strict statutory compliance.

A. *X.T. v. M.M.*

*X.T. v. M.M.*⁵⁶ was the first thwarted father case to reach the appellate level in Arkansas after the new legislation was passed. The case involved a juvenile putative father who had only limited contact with the birth mother after she moved to another state.⁵⁷ The Arkansas Court of Appeals held that the father's consent was not necessary after the mother put the child up for adoption because he had failed to strictly comply with the statute.⁵⁸ While the decision kept the best interests of the child in mind, the majority's odd reliance on a concurring opinion from the Kansas Court of Appeals left the decision open to a heated dissent and eventually a partial overruling by the Arkansas Supreme Court.

1. *Facts and Procedural History*

In *X.T.*, the putative father appealed the decision of the Benton County Circuit Court finding his consent was not required for the adoption of his child because he had not met the requirements of Arkansas's consent statute.⁵⁹ The putative father and birth mother were both minors at the time the mother became pregnant.⁶⁰ The birth mother then resided at the Texas home of the putative father and his mother for three weeks after learning of her pregnancy, but she moved to St. Louis, Missouri after being asked by the putative father's mother to leave the residence.⁶¹ The birth mother resided with her aunt in St. Louis for the rest of her pregnancy.⁶² After the putative father verbally abused the birth mother over the phone, the aunt changed the birth mother's

55. See ARK. CODE ANN. § 9-9-206 (Supp. 2013); ARK. CODE ANN. § 9-9-207 (Repl. 2009).

56. 2010 Ark. App. 556, 377 S.W.3d 442, *overruled in part by In re Adoption of Baby Boy B.*, 2012 Ark. 92, at 9, 394 S.W.3d 837, 842.

57. *Id.* at 2-3, 377 S.W.3d at 444.

58. *Id.* at 1-2, 377 S.W.3d at 443.

59. *Id.* at 1, 377 S.W.3d at 443.

60. *Id.* at 2, 377 S.W.3d at 444.

61. *X.T.*, 2010 Ark. App. 556, at 3, 377 S.W.3d at 444.

62. *Id.*

phone number and refused to provide it to the father.⁶³ The aunt did, however, provide her own phone number to the mother of the putative father so that the two could remain in contact with her.⁶⁴

Eventually, the birth mother arranged a meeting with an adoption agency and made an adoption plan.⁶⁵ She gave birth, and the adoptive parents, who were Arkansas residents, were given custody of the child.⁶⁶ The putative father contested the adoption, arguing that his consent was required because he had “legitimated” the child by filing with putative father registries in both Missouri and Texas.⁶⁷

First, the Arkansas Court of Appeals noted that the language of the consent statute on which the father relied was no longer in effect.⁶⁸ Instead, the law required him to have established “a significant custodial, personal, or financial relationship” with the child in order for his consent to be required.⁶⁹ The court then examined the actions taken by the putative father in the months leading up to the birth of the child and found that the trial court did not err by concluding that the father’s consent was not required for the adoption.⁷⁰ The court noted that the credibility of the birth father and his mother regarding their “meager claims of [prenatal] support” were questionable, as both had to reassess their testimony when presented with previous inconsistent statements.⁷¹ The court then dismissed the father’s argument that he was unable to provide support because he did not have the birth mother’s address, pointing out that his mother still had a valid telephone number that would have allowed him to communicate with the birth mother’s aunt.⁷² Additionally, the court noted that he was unable to speak directly to the birth mother because he had verbally abused her.⁷³

The court determined that there were many ways that the father could have provided support despite the lack of contact

63. *Id.*

64. *Id.* at 3-4, 377 S.W.3d at 444.

65. *Id.* at 4, 377 S.W.3d at 444.

66. *X.T.*, 2010 Ark. App. 556, at 4, 377 S.W.3d at 444.

67. *Id.*

68. *Id.* at 4-5, 377 S.W.3d at 445.

69. *Id.* at 5, 377 S.W.3d at 445.

70. *Id.* at 8-9, 377 S.W.3d at 446-47.

71. *X.T.*, 2010 Ark. App. 556, at 8, 377 S.W.3d at 446-47.

72. *Id.* at 8-9, 377 S.W.3d at 447.

73. *Id.* at 9, 377 S.W.3d at 447.

with the mother-to-be, including “transform[ing] himself from a dependent and immature boy into an independent and mature man capable of performing the obligations and duties that arise from the parental relationship he sought to assert.”⁷⁴ While the case was pending, the putative father had been suspended from school several times due to misbehavior, had failed to seek help for alcohol and marijuana use, had made no effort to obtain gainful employment, and had been arrested immediately before the adoption hearing for driving while intoxicated and fleeing the scene of a crime.⁷⁵ In the court’s opinion, this behavior indicated that the putative father lacked “sufficient judgment and maturity to enable him to control his own behavior, much less care for an infant.”⁷⁶

The court also cited the putative father’s diagnosed “Narcissistic Personality Traits” and lack of preparation for parental responsibilities as factors supporting its determination that he had done little to create a significant relationship with his child.⁷⁷ The court ultimately ruled that the putative father “had, but squandered, his opportunity to gain parental rights by assumption of parental responsibility; therefore, the trial court properly held that his consent to the adoption was not required.”⁷⁸

To reach this conclusion, the majority opinion first noted that the language of the Arkansas consent statutes closely resembled the language from *Lehr*.⁷⁹ Therefore, the court “conclude[d] that the General Assembly intended that putative fathers in Arkansas should be afforded no more rights with respect to their illegitimate children than those set out in *Lehr*.”⁸⁰ Specifically, the court found that a putative father must perform parental duties before he has established rights as a parent to make decisions regarding the best interests of his child.⁸¹

74. *Id.* at 10, 377 S.W.3d at 448 (footnote omitted).

75. *Id.* at 11, 377 S.W.3d at 448.

76. *X.T.*, 2010 Ark. App. 556, at 11, 377 S.W.3d at 448.

77. *Id.* at 11-12, 377 S.W.3d at 448.

78. *Id.* at 12, 377 S.W.3d at 449.

79. *Id.* at 7-8, 377 S.W.3d at 446.

80. *Id.* at 8, 377 S.W.3d at 446.

81. *X.T.*, 2010 Ark. App. 556, at 7, 377 S.W.3d at 446.

2. Rationale of the Court

To interpret the financial language from the consent statute, the Arkansas Court of Appeals relied heavily on a concurring opinion written by a Kansas appellate judge.⁸² The court, quoting the Kansas opinion, found that a putative father has certain minimum responsibilities:

[The putative father] has only one way to ensure he can exercise his parental rights after the birth, regardless of whether the mother intends to exercise hers: He must relinquish possession and control of a part of his property or income to the mother-to-be during the last 6 months of the pregnancy so that she may use the items or money to support herself or prepare for the arrival of the child.⁸³

The Kansas judge went on to state that a putative father “can—and must—be as creative as necessary in providing material assistance to the mother-to-be.”⁸⁴ This includes providing financial support even if the father is unable to contact the mother, such as by funding a bank account in the mother’s name or by sending money to her through a third party.⁸⁵ Clearly, the putative father in *X.T.* fell short of this standard by testifying that the only support he had provided was occasionally giving the birth mother cookies and saving money under his mattress.⁸⁶

B. *In re* Adoption of Baby Boy B.

Two years later, a thwarted father case reached the Arkansas Supreme Court, and it appeared that the state would finally have a more definite ruling on the subject from its highest court. However, the only certainty *In re Adoption of Baby Boy B.* provided was that, under particular facts, a thwarted father may not be required to strictly comply with Arkansas’s consent statutes. The court overruled the portion of *X.T.* that adopted the financial standard articulated by the Kansas Court of Appeals judge,⁸⁷ but the court failed to further define what constitutes “a

82. *See id.* at 9-10, 377 S.W.3d at 447.

83. *Id.* at 9, 377 S.W.3d at 447 (quoting *In re Adoption of M.D.K.*, 58 P.3d 745, 750-51 (Kan. Ct. App. 2002) (Beier, J., concurring)).

84. *Id.* at 10, 377 S.W.3d at 447 (quoting *M.D.K.*, 58 P.3d at 751 (Beier, J., concurring)).

85. *Id.*

86. *X.T.*, 2010 Ark. App. 556, at 8, 377 S.W.3d at 446.

87. *In re Adoption of Baby Boy B.*, 2012 Ark. 92, at 9, 394 S.W.3d 837, 842.

significant custodial, personal, or financial relationship.” Although the court found that the father was thwarted, little guidance was provided for future courts to determine what behavior constitutes thwarting.

1. Facts and Procedural History

In re Adoption of Baby Boy B. presented a situation in which the prospective adoptive parents of a child filed a petition for adoption, and the biological father promptly intervened.⁸⁸ The circuit court found that the father’s consent to the adoption was not required and entered a decree granting the adoption.⁸⁹ On appeal, the father argued that the circuit court erred by ruling that he had failed to establish “a significant custodial, personal, or financial relationship” with the child.⁹⁰ He asked the Arkansas Supreme Court to vacate the adoption decree and remand the case to allow his complaint for custody of the child to proceed.⁹¹

The putative father and birth mother were attending Southeast Missouri State University when they learned of the pregnancy.⁹² Initially, they visited an agency in Missouri together to get information about the pregnancy, and the couple continued dating for several months.⁹³ However, the birth mother eventually left Missouri and decided to make an adoption plan with an agency in Texas.⁹⁴ She told the father of the adoption plan but did not disclose her whereabouts to him.⁹⁵ After learning of the plan, the father contacted an attorney in Missouri to discuss his parental rights.⁹⁶ He then filed with the putative father registries of Missouri, Illinois, Texas, and Arkansas.⁹⁷ He and the birth mother continued to communicate by phone after she moved to Texas, but she still refused to inform him of her whereabouts.⁹⁸ The putative father told the mother that he wanted to raise the child with her as a family, but he left the decision of whether to

88. *Id.* at 4, 394 S.W.3d at 839.

89. *Id.*

90. *Id.* at 4-5, 394 S.W.3d at 839.

91. *Id.* at 5, 394 S.W.3d at 839.

92. *Baby Boy B.*, 2012 Ark. 92, at 1-2, 394 S.W.3d at 838.

93. *Id.*

94. *Id.* at 2, 394 S.W.3d at 838.

95. *Id.*

96. *Id.*

97. *Baby Boy B.*, 2012 Ark. 92, at 2-3, 394 S.W.3d at 838-39.

98. *Id.* at 2, 394 S.W.3d at 838.

put the child up for adoption to her.⁹⁹ It was clear, however, that he did not actually intend to leave the decision up to her because he refused to sign any of the paperwork sent to him by the agency to relinquish his parental rights.¹⁰⁰

The father established a bank account with money borrowed from his mother in anticipation of the child's birth.¹⁰¹ He did not provide any financial support to the birth mother, and she continued to refuse to tell him of her whereabouts, including the fact that she had moved again from Texas to Arkansas.¹⁰² She also failed to inform him of the child's birth.¹⁰³ The mother relinquished her parental rights, and the baby was placed with the adoptive parents on the day of the child's birth.¹⁰⁴ The hearing on the adoption petition was held a few months later, and the trial court determined that, pursuant to Arkansas Code Annotated section 9-9-206, the putative father's consent was not required.¹⁰⁵ The circuit court found that his consent was unnecessary because his best efforts did not strictly comply with the consent statute.¹⁰⁶

2. Rationale of the Court

The Arkansas Supreme Court relied on the trial court's finding that the putative father had done all that he could to protect his rights and determined that he had substantially complied with the statute.¹⁰⁷ To determine that strict compliance was not required in this case, the court began by examining the legislative intent behind Arkansas Code Annotated section 9-9-206.¹⁰⁸

The court first noted that, historically, ambiguities in adoption statutes have generally been construed in favor of the birth parents' rights, and the court then focused on the specific language of the 2005 amendments to the consent statutes.¹⁰⁹ The court found that the Arkansas General Assembly had acted in

99. *Id.*

100. *Id.*

101. *Id.* at 12, 394 S.W.3d at 844.

102. *Baby Boy B.*, 2012 Ark. 92, at 12, 394 S.W.3d at 844.

103. *Id.* at 3, 394 S.W.3d at 839.

104. *Id.*

105. *Id.* at 4, 394 S.W.3d at 839.

106. *Id.* at 5, 394 S.W.3d at 840.

107. *Baby Boy B.*, 2012 Ark. 92, at 13, 394 S.W.3d at 844.

108. *Id.* at 5-6, 394 S.W.3d at 840.

109. *Id.* at 5-7, 394 S.W.3d at 840-41.

response to the ruling in *SCD* and codified the notice standard from *Lehr*.¹¹⁰ Based on this analysis, the court concluded that the intent of the legislature in amending the statutes was to extend protection of parental rights to a father who has established a significant relationship with his child.¹¹¹

Next, the court considered what degree of statutory compliance was necessary for the father's consent to be required.¹¹² The court recognized that it had not previously considered the issue and found the Arkansas Court of Appeals' analysis in *X.T.* unpersuasive.¹¹³ Unlike *X.T.*, there were no allegations of abuse in this case, nor did the father have an alternative means of communicating with the mother.¹¹⁴

The Arkansas Supreme Court determined that the court of appeals' reliance on the concurring opinion from the Kansas Court of Appeals in *X.T.* was misguided.¹¹⁵ The court stated, "[t]o the extent *X.T.* adopt[ed] that standard . . . it is overruled."¹¹⁶ Significantly, the court did not overrule the entire *X.T.* ruling. This suggests that the court did not necessarily disagree with the outcome of *X.T.*, but perhaps found the reasoning on which the opinion relied to be flawed.

Next, the court examined how other jurisdictions have treated the issue of the thwarted father.¹¹⁷ Some courts have found that strict compliance with adoption statutes was not required when a putative father can establish good cause for failure to comply with the literal requirements of the statute or makes "sufficient prompt and good faith efforts to assume parental responsibility."¹¹⁸ The court found this reasoning persuasive but did not specifically adopt the "sufficient prompt and good faith efforts" standard. Instead, the court implemented a standard that considers the efforts of a father in light of the birth mother's attempts to thwart those efforts.¹¹⁹

110. *Id.* at 7-8, 394 S.W.3d at 841.

111. *Id.* at 8, 394 S.W.3d at 841.

112. *Baby Boy B.*, 2012 Ark. 92, at 8, 394 S.W.3d at 841.

113. *Id.* at 9, 394 S.W.3d at 842.

114. *Id.*

115. *Id.*

116. *Id.*

117. *See Baby Boy B.*, 2012 Ark. 92, at 9-11, 394 S.W.3d at 842-43.

118. *Id.* at 10-11, 394 S.W.3d at 842-43 (quoting *Roe v. Reeves*, 708 S.E.2d 778, 782 (S.C. 2011)).

119. *Id.* at 13, 394 S.W.3d at 844.

The court pointed out that, in this case, the putative father remained romantically involved with the birth mother, allowed her to stay at his apartment several nights a week before she moved, bought her a diaper bag, and diligently attempted to locate her.¹²⁰ He also contacted several attorneys, registered with the putative father registries of four states, and borrowed money from his mother to open a checking account for the unborn child.¹²¹ The court recognized that these actions would not meet strict compliance with the consent statute because the father was unable to establish a significant relationship with the unborn child.¹²² However, the court held that these actions substantially complied with the requirements of the statute in such a way that his consent to the adoption was required in light of the birth mother's attempts to thwart his efforts.¹²³

C. Significance of These Opinions

The efforts of the putative fathers in the two cases are clearly distinguishable. But how will courts address cases that are not so easy to resolve? The answer to this question is not clearly addressed in either case, but a close reading may provide some guidance.

First, it is notable that the Arkansas Supreme Court did not overrule *X.T.* in its entirety.¹²⁴ Instead, the court found that the concurring opinion from the Kansas Court of Appeals provided too stringent of a standard compared to the one contemplated by the Arkansas General Assembly.¹²⁵ Kansas's consent statute explicitly requires a father to provide *financial* support to the birth mother during the last six months of her pregnancy to ensure his parental rights are not terminated.¹²⁶ The only time restriction under Arkansas law is that the father must have established *any* relationship prior to the filing of the adoption petition.¹²⁷

Additionally, Arkansas law provides three means through which a father may establish his rights: (1) by providing custodial

120. *Id.* at 11-12, 394 S.W.3d at 843.

121. *Id.* at 12, 394 S.W.3d at 843-44.

122. *See Baby Boy B.*, 2012 Ark. 92, at 13, 394 S.W.3d at 844.

123. *Id.*

124. *See id.* at 9, 394 S.W.3d at 842.

125. *Id.* at 6-8, 394 S.W.3d at 841.

126. KAN. STAT. ANN. § 59-2136(h)(1)(D) (West 2014).

127. *See* ARK. CODE ANN. § 9-9-206(a)(2) (Supp. 2013).

support; (2) by providing personal support; or (3) by providing financial support.¹²⁸ While the financial relationship may be the most easily identifiable means of providing support during pregnancy, there are other avenues a father may take to establish a relationship with the child. For example, the father may register with the state's putative father registry, file a paternity action, hold the child out as his own to others, attend doctor's visits with the mother, or make a parenting plan with the mother. Some of these actions may become more difficult if the birth mother moves out of state, but they are not impossible, even for those with limited resources.

Second, both cases involved birth mothers who moved away from the state in which the father resided, but this alone did not appear to be a determining factor. The putative father in *X.T.* still had an open line of communication with the birth mother after she moved and could have provided some support.¹²⁹ This contrasts with *In re Adoption of Baby Boy B.*, where the father was able to contact the birth mother but unable to locate her and send support because she moved and refused to disclose her whereabouts.¹³⁰ Even though the putative could not send monetary assistance, he put funds away specifically for the child's benefit and filed with the putative father registries of four states.¹³¹ Therefore, whether a putative father has an open line of communication with the birth mother appears to be more determinative of whether he was thwarted in his efforts to establish a relationship with his child than whether he resides in the same geographic area as the mother.

Finally, whether a putative father is abusive toward the mother also appears to play a role in determining whether he was thwarted. The Arkansas Supreme Court did not specifically address this issue, but the court noted that *X.T.* involved an abusive relationship that led to the mother limiting her contact with the biological father.¹³² Although the *X.T.* decision did not turn solely on the issue of the putative father's abusive behavior, it was clearly a factor considered by the Arkansas Court of Appeals when it made its decision. The abuse was mentioned

128. See ARK. CODE ANN. § 9-9-206(a)(2)(F).

129. *X.T. v. M.M.*, 2010 Ark. App. 556, at 3, 377 S.W.3d 442, 444.

130. 2012 Ark. 92, at 12, 394 S.W.3d at 843.

131. *Id.* at 12, 394 S.W.3d at 844.

132. *Id.* at 9, 394 S.W.3d at 842.

several times throughout the *X.T.* opinion¹³³ and noted by the Arkansas Supreme Court when it discussed the case to resolve *In re Adoption of Baby Boy B.*¹³⁴ However, the mother in *X.T.* had provided the father with an alternative means of communication despite the abuse,¹³⁵ so it is unclear whether the outcome of that case would have been different had the father been unable to contact the mother.

Although these two cases provide some guidance for Arkansas courts to determine whether a putative father must consent to an adoption, both failed to articulate any specific factors that a court should take into consideration. The lack of certainty in cases that fall somewhere between these two decisions may lead to drawn out proceedings that could negatively affect the child involved. It may also be difficult for close cases to ever produce an appellate-level decision that provides more clarity in this area of practice. An adoptive parent who loses custody of a child at the trial-court level may not be willing to go through the emotional strain of possibly losing that child all over again in an appeal. Without a clear rule, decisions from the state's many trial courts are likely to be inconsistent, which creates uncertainty for birth parents, adoptive parents, attorneys, and adoption agencies.¹³⁶ Although it may be difficult to provide a set of rules for these types of cases upon which both supporters of birth parents' rights and supporters of adoptive parents' rights can agree, the current state of uncertainty is not productive for anyone involved in such a situation.

V. EFFECTS ON ADOPTIVE CHILDREN AND PARENTS

Although these situations are rare, they may take a significant emotional and psychological toll on all parties involved—the birth parents, the adoptive parents, and the child. The question of whether a putative father has been thwarted arises more often than the number of appellate cases would suggest, and the situation may cause adoptive parents to back out earlier in the adoption process or to not appeal an initial decision denying an

133. See *X.T.*, 2010 Ark. App. 556, at 3, 13-14, 377 S.W.3d at 444, 449.

134. 2012 Ark. 92, at 9, 394 S.W.3d at 842.

135. *X.T.*, 2010 Ark. App. 556, at 3, 377 S.W.3d at 444.

136. Interview with Keith Morrison, Partner, Wilson & Associates P.L.L.C., in Fayetteville, Ark. (Oct. 24, 2013) [hereinafter Morrison Interview] (on file with author).

adoption petition.¹³⁷ Further, these cases have a tendency to make local and national news, which may discourage prospective adoptive parents from considering adoption because the risks are simply too high.¹³⁸

The national publicity of some widely debated adoption decisions in the 1990s¹³⁹ prompted discussion of the issue in the field of psychology. Dr. Lita Linzer Schwartz¹⁴⁰ has written specifically on the subject of “adoption disruption” and “adoption dissolution,” which are situations in which the adoption process ends before it is legally finalized or after it has been legally completed, respectively.¹⁴¹ Either may be caused by lack of consent by a biological parent. Dr. Schwartz notes that a disrupted adoption may have a variety of immediate and far-reaching effects on an adopted child, the adoptive parents, and any other children of the adoptive parents.¹⁴²

The anxiety of a child involved in a custody dispute between divorcing parents is often obvious and can be analogized with a disrupted adoption.¹⁴³ However, in a divorce, the child generally maintains contact and interaction with both parents, although the contact may be limited and relationships may become strained.¹⁴⁴ Conversely, in the case of a disrupted adoption, the child—especially one placed with his or her adoptive family at birth—may be removed from the only parents he or she has ever known to live with complete strangers.¹⁴⁵

137. *Id.*

138. See Scott A. Resnik, *Seeking the Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoptions*, 20 SETON HALL LEGIS. J. 363, 366-79 (1996) (describing three high-profile adoption proceedings).

139. See *id.*

140. Dr. Schwartz was a Professor at Penn State University and an advocate of serving the best interests of the child in any type of court proceeding. LITA LINZER SCHWARTZ, *WHEN ADOPTIONS GO WRONG: PSYCHOLOGICAL AND LEGAL ISSUES OF ADOPTION DISRUPTION*, at vi (2006).

141. *Id.* at 5.

142. See *id.* at 66-71.

143. See *id.* at 66.

144. See *id.*

145. This was precisely the case in the adoption involving the Matt and Melanie Capobianco, who saw their daughter turned over to the custody of a man she had never met at the age of twenty-seven months. See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2559 (2013).

Perhaps a better analogy is that of a child who has lost both parents due to their sudden deaths.¹⁴⁶ However, the difference here is that when a child's parents die, the child is often placed with family members with whom he or she has had at least some previous contact.¹⁴⁷ Additionally, the age of the child will have an impact on how a separation affects the child.¹⁴⁸ Studies indicate "that an infant can remember and respond differently to the smell, voice, and face of the mother as early as the first few weeks of life."¹⁴⁹ It appears doubtful, however, that separation from the primary caregiver when a child is younger than six months will cause more than temporary disruption of eating and sleeping habits, or perhaps increased irritability.¹⁵⁰

However, between the ages of six months and four years a child appears to be most vulnerable to issues arising from the separation from his or her primary caregivers, at least initially.¹⁵¹ Between these ages, children are still developing cognitively and emotionally and are highly dependent on their primary caregivers.¹⁵² Often, children who have been placed with adoptive parents pending the outcome of an adoption fall squarely within this age range.¹⁵³ A bonding expert in the early proceedings involving Matt and Melanie Capobianco¹⁵⁴ testified that he believed "beyond a reasonable doubt" that severing the bond that the Capobianco family had formed with the child would be "very traumatic" and could lead to "depression, anxiety, [and] it could cause disruption in [Baby Girl's] capacity to form relationships at a later age."¹⁵⁵ Age aside, other factors may

146. In a work by Paul D. Steinhauer, which focuses on psychological issues related to foster children who are removed from the home of a biological parent due to abuse or neglect, Mr. Steinhauer cites studies that show attachment behavior and separation anxiety applies to children in general. See PAUL D. STEINHAUER, *THE LEAST DETRIMENTAL ALTERNATIVE: A SYSTEMATIC GUIDE TO CASE PLANNING AND DECISION MAKING FOR CHILDREN IN CARE* 27-32 (1991). In fact, a section of the book focuses on Mr. Steinhauer's sessions with a five-year-old girl who lost both parents in a tragic car accident and who was initially unable to comprehend and mourn the loss of her parents. See *id.* at 42-58.

147. See *id.* at 42-43.

148. *Id.* at 18.

149. *Id.*

150. *Id.*

151. STEINHAUER, *supra* note 146, at 18.

152. *Id.*

153. See, e.g., *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2559 (2013) (age two).

154. See *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012), *overruled by Adoptive Couple*, 133 S. Ct. 2552 (2013).

155. *Id.* at 581 (alterations in original) (internal quotation marks omitted).

indicate the severity of the effects of a long-term or permanent separation of a child from his or her primary caregivers, such as the stability of the initial attachment and the child's own temperament, making some situations more or less volatile.¹⁵⁶

In addition to the emotional bonds that children over the age of six months form with their caretakers, they may have developed at least some sense of identity.¹⁵⁷ Dr. Schwartz explains that "a key element of [identity] is the child's name,"¹⁵⁸ which may be changed once custody is handed over to a different set of parents. She hypothesizes that this may cause confusion for the child or lead to feelings that the child's original parent was "bad" in some way.¹⁵⁹

Another consideration is that of the loss experienced by the adoptive parents, which may be similar to the grief associated with the death of a child.¹⁶⁰ Effects may include severe depression, feelings of helplessness, rage at the seemingly unjust legal system, and lower self-esteem.¹⁶¹ The extent of the grief will vary among adoptive parents, but it is still a serious issue that may require therapy in many cases.¹⁶²

The adoptive parents may also have to explain the removal of the adoptive child to their other children.¹⁶³ They may have to calm their children's fears that they could also be taken away and comfort them when they experience feelings of loss.¹⁶⁴ This may be even more difficult when the parents are preoccupied with the loss of the adopted child.

The uncertainty that surrounds rights of thwarted putative fathers in Arkansas may also pose a problem to both practitioners counseling adoptive parents and agency officials advising and interviewing birth mothers. Since this area of law is not well developed, attorneys should carefully advise adoptive parents about the possibility of a birth father contesting an adoption and

156. See STEINHAEUER, *supra* note 146, at 18-32. See generally JOHN BOWLBY, A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT (1988) (providing additional information on attachment behavior in children).

157. SCHWARTZ, *supra* note 140, at 66.

158. *Id.*

159. See *id.* at 67.

160. *Id.* at 63.

161. *Id.* at 70.

162. SCHWARTZ, *supra* note 140, at 63.

163. See *id.* at 68.

164. See *id.*

the likelihood of his success. Adoption professionals must also be mindful to fully inquire into whether the putative father had any involvement during the pregnancy. This issue may come up almost weekly for an adoption attorney, whether in dealing with a client or answering a question for an official with an adoption agency.¹⁶⁵ These negative effects reveal the importance of providing clarity in the law to reduce the number of disrupted adoptions in Arkansas.

VI. SOLUTIONS TO THE THWARTED FATHER PROBLEM

The 2005 amendments made by the Arkansas General Assembly attempted to clarify the law surrounding consent of putative fathers, but recent court decisions quickly muddied the waters. The issue of the thwarted father, while it may not appear often, is still a pressing one. This Part first proposes reform to Arkansas adoption law that would empower courts to take the best interests of the child into consideration in any contested adoption proceeding. A proposed amendment to Arkansas Code Annotated section 9-9-206(a)(2) that specifically addresses the issue of the thwarted father follows. Finally, this Part explains why this solution best provides clarity in the law while also balancing the interests of the parties involved.

A. Create a Transition Period for any Contested Adoption

First, the best interests of the child should always be taken into consideration during a contested adoption, and the Arkansas General Assembly should adopt additional safeguards to ensure that this occurs, such as empowering courts to order a transition period if a case involves a change in custody.¹⁶⁶ In many contested adoptions, especially those involving newborns, the adoptive parents maintain custody of the child until the court decides to grant or deny the adoption petition.¹⁶⁷ In thwarted father cases, it may take months for the case to come before a circuit court judge, and if the decision is appealed, it will be drawn

165. Morrison Interview, *supra* note 136.

166. *Id.*

167. *Id.* In many situations, it may take a court many months to grant or deny the petition. See, e.g., *In re Adoption of Baby Boy B.*, 2012 Ark. 92, at 3-4, 394 S.W.3d 837, 839 (taking four months for the court to issue its final decree).

out even longer. If at some point during the process, a court decides to deny the petition because a judge finds that the father's consent was necessary, then the child may be taken from the only home he or she has ever known and placed with the father, who is likely to be a complete stranger.

Although a child may eventually adjust to the new surroundings, this abrupt change of custody may be traumatic for the child involved, as well as for both sets of parents.¹⁶⁸ The transition may be less abrupt if the change of custody occurred over an extended period with a more gradual assumption of custody by the biological father.¹⁶⁹ Rather than awarding custody of the child immediately to the biological parent when a court denies an adoption petition, the court should consider a transition period that allows the child to continue his or her daily routine.¹⁷⁰ The two sets of parents would gradually shift roles, so long as the best interests of the child continue to be served.¹⁷¹

Admittedly, this approach will be difficult for the parents involved in a contentious adoption proceeding, but it will likely provide assurance to the child that his or her new caretaker is dedicated to his or her well-being and that the new home is safe and secure.¹⁷² Under current Arkansas law, judges are not expressly vested with the authority to provide for such a transition period. Therefore, the Arkansas General Assembly should amend Arkansas's adoption laws and direct judges in contested adoption hearings to consider implementing a transition period when it appears to be in the best interests of the child.¹⁷³

B. Specifically Address the Issue of Thwarted Fathers in the Consent Statute

Second, the issue of the thwarted father should be specifically addressed in one of Arkansas's consent statutes. Arkansas Code Annotated section 9-9-206(a)(2) should be amended to add an additional subsection that reads as follows:

(H) If a putative father proves, by clear and convincing evidence, that he is unable to establish a significant

168. See SCHWARTZ, *supra* note 140, at 66.

169. See *id.*

170. See *id.* at 89-90.

171. *Id.*

172. See *id.*

173. Morrison Interview, *supra* note 136.

custodial, personal, or financial relationship with the child prior to the filing of the adoption petition through no fault of his own, a rebuttable presumption shall be created that his consent is required if he has:

- (1) Prior to the filing of the adoption petition, registered with the Arkansas Putative Father Registry or signed an acknowledgement of paternity for the child; and
- (2) Filed a signed affidavit, within twenty (20) days of receiving notice of the filing of any adoption petition, stating his intentions to care for and raise the child, and containing an agreement to pay his share of the reasonable expenses incurred by the mother throughout the pregnancy.¹⁷⁴

1. Through No Fault of His Own

The “through no fault of his own,” language would apply only to the putative father who has been thwarted in his efforts to establish a significant relationship with his child due to forces beyond his control. Accordingly, the language represents a narrow exception. A putative father should not fall under this subsection’s requirements if his actions or behavior contributed to his failure to establish “a significant custodial, personal, or financial relationship” with the child.

For example, a putative father who is unable to contact a birth mother because he physically abused her, or any of her children, should not be considered thwarted.¹⁷⁵ Such an individual chooses to act in an abusive manner toward his partner, and the consequences should not be used as a shield to protect a father’s constitutional rights. In cases of documented physical abuse, it may be prudent, or even necessary, for a birth mother to limit contact or move without disclosing her location. An abused mother should not have to worry about whether taking steps to ensure her own safety will later prevent her from putting her child up for adoption.

174. Other literature proposes similar statutory schemes. *See generally* Resnik, *supra* note 138; Tyler M. Hawkins, Comment, *Adoption of Infants Born to Unaware, Unwed Fathers: A Statutory Proposal That Better Balances the Interests Involved*, 2009 UTAH L. REV. 1335.

175. *See* Resnik, *supra* note 138, at 420.

Further, a putative father who is simply hesitant to provide the birth mother and child with support and takes no action after learning of a pregnancy should not be afforded the protection of this statute. If the putative father knows or has reason to know that a woman is pregnant with his child, he must make a diligent effort to establish a significant relationship. It is only when he makes this attempt but is denied the opportunity to do so by the birth mother that he would be able to establish his rights under the proposed amendment. Therefore, if the birth mother can show that the putative father knew or had reason to know of the pregnancy and failed to provide support, or worse, denied her pleas for support, then he cannot assert his right to consent under this new provision.¹⁷⁶

Admittedly, this new subsection swings the pendulum further in favor of putative fathers' rights than the current statute.¹⁷⁷ However, the proposal is not meant to provide putative fathers with an "easy way out" should they sit on their rights throughout an entire pregnancy. Instead, it is meant to ensure that a putative father who has a genuine interest in raising his children has an opportunity to do so, even if the birth mother is uncooperative. For this reason, the putative father should be required to prove by clear and convincing evidence that he has been unable to establish a significant relationship with the child in order to secure his rights under the proposal. He would carry this heightened burden to prove that he took all of the necessary steps to establish his rights in some way, but once this hurdle is cleared, he has few steps to take to establish his right to consent to the adoption.

Ultimately, a court must determine whether a father has been thwarted. This may produce additional litigation, but it should be fairly clear whether the father was thwarted or not in most cases, especially given the clear and convincing evidence standard. Failure to require a father to prove that he was thwarted could lead to putative fathers doing nothing for the birth mother or child throughout the pregnancy, only to use the protections of this new proposal to prevent the adoption at the last minute.

176. *See id.* at 426-27.

177. *See* ARK. CODE ANN. § 9-9-206 (Supp. 2013).

2. Establishing a Paternity and Affidavit Requirement

The proposal would also limit the amount of time during which the father could contest the adoption. Doing so may result in decisions being made earlier in the child's life, even if litigation is necessary. This window should be roughly the same as the amount of time given to a birth mother.¹⁷⁸ In Arkansas, a biological parent may relinquish his or her parental rights and consent to adoption before a petition is filed.¹⁷⁹ He or she has ten days from the birth of the child or the signing of the consent form, whichever is later, to revoke this relinquishment, but the biological parent may waive this period in lieu of a shorter, five-day period.¹⁸⁰ A court cannot hold a hearing on an adoption petition until this revocatory period has elapsed.¹⁸¹

Under this proposal, a father may register with the Arkansas Putative Father Registry at any time during the pregnancy. Registration entitles him to receive notice of a planned adoption, and he then has twenty days to file an affidavit with the court, as opposed to the five-day period during which the birth mother is given to revoke her consent.¹⁸² The thwarted father should be afforded additional time to file the affidavit since, even after diligent efforts, he may not know that the child was born until he receives notice of the adoption.

Registration under the current law allows a thwarted putative father to meet the first requirement of the proposed amendment and receive notice of the adoption.¹⁸³ However, registration alone should not automatically allow a thwarted putative father to establish his rights. While doing so gives him an opportunity to reflect on taking responsibility for his child, the second step requires him to submit a concrete statement that he is committed to raising the child and that he has considered how he will do so.¹⁸⁴ Requiring both steps may potentially filter out some putative fathers who simply seek to disrupt an adoption at the last

178. See ARK. CODE ANN. §§ 9-9-209(b)(1), -220(b)(1)(A) (Repl. 2009) (allowing a parent to withdraw consent or relinquishment within ten days after the signing of the document or the birth of the child, whichever is later, or five days if the ten-day period is waived and the waiver is so stated within the document).

179. See ARK. CODE ANN. § 9-9-220(a) (Repl. 2009).

180. ARK. CODE ANN. §§ 9-9-209(b)(1), -220(b)(1)(A) (Repl. 2009).

181. ARK. CODE ANN. § 9-9-212(a)(1) (Supp. 2013).

182. ARK. CODE ANN. § 9-9-212(a)(4)(C).

183. See ARK. CODE ANN. § 9-9-224 (Repl. 2009).

184. Hawkins, *supra* note 174, at 1350.

minute out of spite toward the biological mother or those that are hesitant about actually parenting a child on their own.¹⁸⁵

3. *The Rebuttable Presumption*

Finally, once a putative father has met these requirements, the inquiry should continue because the best interests of the child still must be considered. The proposed legislation creates a rebuttable presumption in favor of the putative father's rights, but it does not make his consent automatic.¹⁸⁶ In cases where there is clear evidence that requiring the father's consent would not be in the best interests of the child, the adoptive parents could rebut the presumption by demonstrating other grounds for terminating the putative father's rights.¹⁸⁷ These other grounds might include evidence of the putative father's incompetence, previous physical or sexual abuse of the birth mother or other children, conviction for a violent felony within a certain time period, or past termination of parental rights for other children.¹⁸⁸

Although this approach may also encourage litigation, the adoptive parents should be provided with an opportunity to prove that the best interests of the child are not served by requiring the putative father's consent. The court should be allowed to consider what is ultimately best for the child rather than automatically requiring a thwarted father's consent in every situation in which he has established paternity and filed an affidavit. Such a bright-line rule ignores what is best for the child involved. Additionally, requiring the court to consider a transition period may help to reduce some of the child's anxiety if custody will change following disposition of the case.¹⁸⁹

C. Other Considerations

The proposal does not address every issue that may arise in the situation of a thwarted father, but it provides a starting point by addressing this situation on the face of the consent statute. This proposal is intended to encourage a birth mother to give a

185. *See id.*

186. *See Resnik, supra* note 138, at 426.

187. *See id.*

188. *Id.*

189. *See supra* notes 166-73 and accompanying text.

putative father notice of a pregnancy and provide him with an opportunity to establish his parental rights.

Critics may suggest that this proposal neither considers a putative father who has never been informed of a pregnancy nor provides him with a proper outlet to preserve his rights. However, he would still have to timely file with the registry in order to secure his right to consent under this new proposal. Requiring registration based solely on knowledge of a sexual encounter, rather than knowledge of an actual pregnancy, may seem extreme. However, if a putative father is unable to contact the potential birth mother in order to discern whether she has become pregnant, registration may be the only way that he will receive notice of an adoption, even under current law.¹⁹⁰ Further, a birth mother may have no way of contacting a man she suspects to be the father after a casual sexual encounter, forcing her to plan for her and her child's future alone. Failing to establish a time limit on when a putative father can contest an adoption could lead to contested adoptions that occur years after a child has been placed in a home. Surely this does not serve the best interests of the child.¹⁹¹

Another concern with this new proposal may be that a putative father will fail to meet the law's requirements because he is unaware of how to register or that a registry exists. Arkansas's Putative Father Registry provides a means for a putative father to receive notice of the adoption of his child with little or no expense on his part.¹⁹² Under current law, registration alone is not enough for a father to establish that his consent is required.¹⁹³ Further, he can ensure his consent is required without registering at all if he forms a significant relationship with his child.¹⁹⁴ Therefore, the need to inform putative fathers about the registry has not been of paramount importance in the past, but it would be under this new proposal.

190. Arkansas Code Annotated section 9-9-206(a)(2)(G) does not explicitly consider a putative father who has not complied because he was unaware of a pregnancy. Presumably, the father's consent would not be required in this situation under current law. *See Escobedo v. Nickita*, 365 Ark. 548, 555-56, 231 S.W.3d 601, 606 (2006) (holding that a putative father's consent was not required before the adoption of his child because he had not "otherwise legitimated" the child prior to the filing of the adoption petition even though he had no notice of the pregnancy).

191. *See* SCHWARTZ, *supra* note 140, at 66.

192. *See* ARK. CODE ANN. § 9-9-212(a)(4)(C) (Supp. 2013).

193. ARK. CODE ANN. § 9-9-207(a)(10)–(11) (Repl. 2009).

194. ARK. CODE ANN. § 9-9-206(a)(2)(F) (Supp. 2013).

One method of addressing this issue would be to establish a scheme similar to the one employed in Arizona. There, forms for filing with its registry must be available not only from the Department of Health Services, but also at county government offices, all hospitals, licensed child-placement agencies, sheriff's offices, and correctional facilities.¹⁹⁵ The Arkansas Department of Health, the entity in charge of maintaining the putative father registry,¹⁹⁶ should make these forms more widely available. Additionally, the organization should publish additional information that explains the registry and the rights associated with registration. This information should be made available along with the necessary forms so that a putative father can understand the weight of his decision.

Another criticism may be that this proposal does not protect the thwarted father who has registered in a state other than Arkansas. This is a valid concern with no simple solution. A proposal that requires adoptive parents or agencies to look at registries outside of Arkansas would make little sense, as they would have to search potentially dozens of registries looking for a putative father that they may never find. This may cause added expense and additional stress that may deter some prospective adoptive parents. A proposal could require the adoptive parents or agency to search the registries of any state where the birth mother believes that the father may reside. While this is a good practice, it too is flawed because a birth mother could simply lie about the father's location.

Perhaps the best solution, and one which this comment supports, is the establishment of a national registry.¹⁹⁷ This would create one database which would gather all putative father registry information from each state.¹⁹⁸ The new, national registry would allow a putative father in any state to register, and the state would then report its registrants to the national database.¹⁹⁹ The adoptive parents could then perform one search in the national database to find a putative father who has

195. See ARIZ. REV. STAT. ANN. § 8-106.01(A) (2014).

196. See ARK. CODE ANN. § 20-18-702(a) (Repl. 2014).

197. See generally Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031 (2002) (advocating for the creation of a national putative father registration database).

198. *Id.* at 1071.

199. *Id.*

registered in other states.²⁰⁰ However, no such national database currently exists. Therefore, requiring the putative father to register in Arkansas appears to be the most sensible solution for the time being.

Although this proposed rule may not perfectly balance the rights of putative fathers with those of the adoptive parents, it does provide clear guidelines for the courts to follow. Clarity will allow adoption lawyers to better serve their clients and may quell the apprehensions of adoptive parents about problems that may arise with a putative father after a child has already been placed. It also gives putative fathers who have a real interest in raising their children a straightforward means to do so, even when the birth mother is uncooperative. Most importantly, the proposal better protects the child to be adopted because it is likely to produce faster adoption decisions and takes the child's best interests into consideration.

VII. CONCLUSION

A great deal can be at stake in a contested adoption proceeding, most notably the mental health and well-being of the child at the center of the controversy. These decisions are never easy and may change a child's world forever. Therefore, clear guidelines should be established that reduce the number of, or more quickly resolve, contested adoptions. Arkansas's current approach to the thwarted putative father does not establish such guidelines, and the issue should be addressed sooner rather than later to ensure that adopted children are protected.

TIFFANY N. GODWIN

200. *Id.*