Missouri Law Review

Volume 49
Issue 3 *Summer 1984*

Article 8

Summer 1984

Putative Father's Right to Notice of Adoption Proceedings Involving His Child

John L. Roark

PUTATIVE FATHER'S RIGHT TO NOTICE OF ADOPTION PROCEEDINGS INVOLVING HIS CHILD

Lehr v. Robertson[1]

Beginning in 1972, the Supreme Court has attempted to define parental rights of putative fathers under the due process and equal protection clauses.[2] Since unwed fathers were first extended rights in *Stanley v. Illinois*,[3] courts and commentators[4] have disagreed over the nature of these rights. Of primary concern is how unwed mothers and fathers may receive differing treatment under the Constitution.[5] In *Lehr v. Robertson*,[6] the Court refined its views on putative fathers' parental rights. Nevertheless, much uncertainty remains concerning the validity of adoption statutes and decrees. This dubiety poses problems for parties seeking adoption or termination of parental rights where the natural parents are not married.

In *Lehr*, the Court considered whether the due process and equal protection clauses give a putative father who has not established a substantial relationship with his child an absolute right to receive notice and an opportunity to

---

1. 103 S. Ct. 2985 (1983).

2. *See* Caban v. Mohammed, 441 U.S. 380, 394 (1979); Quilloin v. Walcott, 434 U.S. 246, 255-56 (1978); Stanley v. Illinois, 405 U.S. 645, 658 (1972). Although this issue arises most often in connection with adoption proceedings, the parental rights of putative fathers can also arise in the context of the right to maintain a tort action upon the death of an illegitimate child. *See* Parham v. Hughes, 441 U.S. 347, 352 (1979); *see also Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1275-76 (1980); *cf.* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 76 (1968) (state may not deny natural mother the right to recover for the wrongful death of her illegitimate child).

3. 405 U.S. 645 (1972).

4. *See, e.g.*, Paulin, *Illegitimacy and Family Privacy: A Note on Maternal Cooperation in Paternity Suits*, 70 NW. U.L. REV. 910, 919 (1976); Stenger, *Expanding Constitutional Rights of Illegitimate Children (1968-1980)*, 19 J. FAM. L. 407, 440 (1980-81); Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581, 1584 (1972); Note, *The "Strange Boundaries" of* Stanley: *Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517, 518 (1973).

5. *See* Caban v. Mohammed, 441 U.S. 380, 393 (1979); Quilloin v. Walcott, 434 U.S. 246, 248 (1978).

6. 103 S. Ct. 2985 (1983).

be heard before the child is adopted. The child, Jessica, was born out-of-wedlock on November 9, 1976.[7] The unwed father, Lehr, lived with the mother prior to the child's birth;[8] however, his name did not appear on the birth certificate.[9] Although Lehr visited the mother and child every day during their hospital stay, he did not offer to marry the mother, nor did he live with mother and child after the birth or provide them with any financial support.[10] Eight months after Jessica's birth, her mother married Richard Robertson.[11] On December 21, 1978, the Robertsons filed an adoption petition in the Family Court of Ulster County, New York. On January 30, 1979, Lehr filed a petition in the Westchester County Family Court requesting a determination of paternity, an order of support, and reasonable visitation privileges. On March 3, 1979, Lehr alleged that he learned for the first time of the adoption proceedings pending in Ulster County. Four days later, Lehr's attorney informed the Ulster County Family Court that he planned to seek a stay of the adoption proceeding pending the determination of the paternity petition. Nevertheless, the court entered an adoption order the same day.[12]

Upon motion by the Robertsons, Lehr's paternity petition was dismissed by the Westchester County Family Court.[13] After unsuccessfully attempting to appeal the adoption order,[14] Lehr filed a petition with the Ulster County Family Court to vacate the adoption order. This petition was denied,[15] and the denial was affirmed by the Appellate Division of the Supreme Court[16] and the New York Court of Appeals.[17] Lehr appealed to the United States Supreme

---

7. *Id.* at 2987.

8. *Id.* at 2997 (White, J., dissenting). Lehr and Jessica's mother, Lorraine, cohabitated for approximately two years before the child's birth. *Id.*

9. *Id.* Nevertheless, the mother had told friends, relatives, and the New York State Department of Social Services that Lehr was the father. *Id.*

10. *Id.* Lehr claimed that the mother had concealed the child's whereabouts from the time of her discharge from the hospital until August, 1978. With the help of a detective agency, Lehr was able to locate Lorraine and Jessica in August, 1978. Lehr alleged that at that time the mother refused his offer to provide financial assistance for Jessica. *Id.*

11. *Id.* at 2987.

12. *Id.* at 2987-89. The Ulster County Family Court judge informed Lehr's attorney that he had signed the adoption order earlier that day even though he was aware of the pending paternity petition because he did not believe he was required to give notice to Lehr prior to entry of the adoption order.

13. *Id.* at 2989. Lehr did not appeal this dismissal.

14. *Id.* at 2989 n.6. Lehr's appeal was dismissed because he had not attempted to intervene in the adoption proceeding. *Id.*

15. *In re* Adoption by Lorraine & Richard Robertson of Jessica Martz, 102 Misc. 2d 102, 423 N.Y.S. 2d 378 (Family Ct. 1979).

16. *In re* Adoption of Jessica "XX", 77 A.D.2d 381, 434 N.Y.S.2d 772 (1980), *aff'd*, 54 N.Y.2d 417, 430 N.E.2d 896, 446 N.Y.S.2d 20 (1981), *aff'd sub nom.*, Lehr v. Robertson, 103 S. Ct. 2985 (1983).

17. *In re* Jessica "XX", 54 N.Y.2d 417, 430 N.E.2d 896, 446 N.Y.S.2d 20 (1981), *aff'd sub nom.*, Lehr v. Robertson, 103 S. Ct. 2985 (1983).

Court.[18]

Lehr challenged the constitutionality of the New York adoption proceeding statute[19] on two grounds.[20] First, he asserted that the statute violated the due process clause because the notice procedure inadequately protected a putative father's opportunity to establish a relationship with his illegitimate child. He contended that because an unwed father's actual or potential relationship with a child born out-of-wedlock is a protected liberty interest, a putative father has a constitutional right to receive prior notice[21] and an opportunity to be heard before he can be deprived of that interest.[22] Lehr argued further that even if the New York notice procedure was adequate in the normal case, he was entitled to special notice because the Ulster County Family Court and the child's mother had knowledge of the pending paternity action in the Westchester County Family Court.[23] Lehr also asserted that the gender-based classification in the New York adoption statute violated the equal protection clause because it denied a putative father the right given the mother to consent to his child's adoption, and because it accorded a putative father fewer procedural rights than the mother.[24]

The Supreme Court affirmed the judgment of the New York Court of Appeals.[25] The Court first sought to define the liberty interest at stake. Justice Stevens' majority opinion noted that in most cases, state law determines the outcome of legal problems arising from the parent-child relationship.[26] State laws almost universally express an "appropriate preference" for the formal family.[27] Justice Stevens also noted that the Constitution occasionally supersedes state law, providing even greater protection for certain formal family relationships.[28] In some cases, constitutional protection has been extended to the relationship between natural parents and children born out-of-wedlock.[29]

---

18. *Id.*
19. N.Y. DOM. REL. LAW § 111-a (McKinney 1977 & Supp. 1983-84).
20. 103 S. Ct. at 2990.
21. In this context, the term "notice" refers to actual and constructive notice, as provided by state statutes regarding service of process.
22. 103 S. Ct. at 2990.
23. *Id.* at 2995.
24. *Id.* at 2990.
25. *Id.* at 2985, 2997.
26. *Id.* at 2991 (citing United States v. Yazell, 382 U.S. 341, 351-53 (1966)).
27. 103 S. Ct. at 2991 (citing Moore v. City of E. Cleveland, 431 U.S. 494, 505 (1977); Trimble v. Gordon, 430 U.S. 762, 769 (1977)).
28. 103 S. Ct. at 2991 (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923)).
29. 103 S. Ct. at 2991-92. Justice Stevens' opinion discussed three cases in which the Supreme Court had examined the protection of the natural father's biological relationship with his illegitimate child. *See* Caban v. Mohammed, 441 U.S. 380, 394 (1979); Quilloin v. Walcott, 434 U.S. 246, 255-56 (1978); Stanley v. Illinois 405 U.S. 645, 658 (1972). In *Stanley,* the Court held unconstitutional under the due process clause an Illinois dependency proceeding statute that removed non-delinquent children from the homes of unwed fathers without notice, hearing, or an opportunity to

These cases establish that the existence of a substantial relationship between parent and child is relevant in evaluating the rights of the parent and the best interests of the child.[30] Therefore, an unwed father who demonstrates a full commitment to the responsibilities of parenthood by participating in the rearing of his child acquires substantial protection under the due process clause. The "mere existence of a biological link does not merit equivalent constitutional protection."[31] Lehr had no significant custodial, personal, or financial relationship with the child and did not seek to establish a legal tie until the child was two years old. Thus, the Court was concerned only with whether the New York statute adequately protected Lehr's opportunity to form such a relationship.[32]

Lehr did not qualify to receive notice of the pending adoption proceeding under New York law.[33] Although section 372-c of the New York Social Services Law[34] provides for the establishment of a putative father registry, Lehr did not register and therefore did not receive notice of the adoption through the registry system.[35] The Court held that if New York's statutory adoption scheme was "likely to omit many responsible fathers, and if qualifications for notice were beyond the control of an interested putative father, it might be

---

prove fitness. 405 U.S. at 657-58. Since the Court concluded that all Illinois parents are constitutionally entitled to a hearing on fitness before their children are removed from their custody, a statute that denied unwed fathers such a hearing while granting it to other parents was "inescapably contrary to the Equal Protection Clause." *Id.* at 658.

Quilloin involved a Georgia statute that authorized the adoption of a child born out-of-wedlock over the objection of the natural father. The Court held that a statute which required a mother's consent to the adoption of a child born out-of-wedlock, but required the father's consent only if he had legitimated the child, did not violate the equal protection clause. 434 U.S. at 256. The Court also found that the unwed father's substantive rights under the due process clause were not violated by a "best interests of the child" standard used in the state's adoption proceedings. *Id.* at 255.

In *Caban,* the Court held unconstitutional under the equal protection clause a New York statute that granted a mother a veto over the adoption of her illegitimate child but did not grant a similar veto to the natural father who had admitted paternity and participated in the rearing of the child. 441 U.S. at 393-94.

30. 103 S. Ct. at 2996.

31. *Id.* at 2993. This is where Justices White, Marshall, and Blackmun departed from the majority. The dissenters argued that to determine whether due process requirements apply in the first place, the Court should look to the nature of the interest at stake, not the "weight" of the interest. *Id.* at 2998 (White, J., dissenting). They argued that the biological connection itself creates a protected interest. Due process does not require actual notice to every putative father; however, the procedures adopted by a state must at least represent a reasonable effort to determine the identity of the putative father and to give him adequate notice. Finally, the dissent argued that Lehr's constitutional rights were violated because his identity was known yet he was denied an opportunity to be heard. *Id.* at 2999-3001 (White, J., dissenting).

32. *Id.* at 2994.

33. N.Y. DOM. REL. LAW § 111-a (McKinney 1977 & Supp. 1983-84).

34. N.Y. SOC. SERV. LAW § 372-c (McKinney 1983).

35. 103 S. Ct. at 2995.

thought procedurally inadequate."[36] In particular, the Court noted that the right to receive notice is completely within the putative father's control, since he can guarantee notice by filing with the registry. The Court did not find the New York statutory scheme arbitrary for not adopting a more open-ended requirement. Therefore, the New York laws adequately protected the putative father's inchoate interest in establishing a relationship with his illegitimate child.[37] Nor was Lehr entitled to special notice. "[T]he legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously . . . justify a trial judge's determination to require all interested parties to adhere precisely to the procedural requirements of the statute."[38]

The Court also rejected Lehr's equal protection claim.[39] Justice Stevens observed that the New York adoption procedures were designed to promote the best interests of the child, protect the rights of interested third parties, and ensure promptness and finality.[40] To serve these ends, certain people were given the right to veto an adoption and the right to receive prior notice of any adoption proceeding. The mother of an illegitimate child is always in this favored class, but only certain putative fathers are included.[41] The existence or non-existence of a substantial relationship between parent and child is relevant in evaluating the rights of the parent and the best interests of the child. Thus, the equal protection clause does not prevent a state from granting different legal rights to parents who have not established custodial relationships with the child from those who have established such a relationship.[42] Because Lehr had never established a custodial, personal, or financial relationship with his child,[43] the statutes did not deny him equal protection.[44]

The *Lehr* holding is discouraging in several respects. Lehr made continuous and determined efforts to establish the kind of personal, custodial, and financial relationships with his child that the Court recognized as deserving of constitutional protection.[45] Nevertheless, the Court found that he was not entitled to receive notice and an opportunity to be heard in the adoption proceeding. Even though the Ulster County Family Court and the mother had knowledge that Lehr had filed an affiliation proceeding in another court,[46] Lehr was denied notice and an opportunity to be heard.[47] The Court noted that a putative father's inchoate relationship with his child is a liberty interest protected

36. *Id.* at 2994-95.
37. *Id.* at 2995.
38. *Id.*
39. 103 S. Ct. at 2996.
40. N.Y. DOM. REL. LAW § 111, 111-a (McKinney 1977 & Supp. 1983-84).
41. 103 S. Ct. at 2996.
42. *Id.* at 2996-97.
43. *Id.* at 2996.
44. *Id.* at 2985.
45. *See* text accompanying note 12 *supra.*
46. 103 S. Ct. at 2995, 2999.
47. *Id.* at 2989.

under the due process clause.[48] This interest, however, was held to be adequately protected because Lehr's effort did not clearly fall within any of the narrow qualifications for notice listed in the New York statute.[49]

The Supreme Court sanctioned the mother's determined effort to deprive Lehr of his opportunity to establish a relationship with his child. The rationalization was that Lehr could have protected this interest by filing with the putative father registry.[50] By so holding, the Court valued more highly the state's interest in facilitating the expeditious adoption of young children than the putative father's interest in establishing a significant parental relationship with his child. The Court could have maintained the basic integrity and underlying purpose of the New York scheme and still have protected the parental interest of Lehr. The Court should have held that where a court has actual notice of a putative father's identity and interest in his child, the father must receive notice of and an opportunity to be heard in any legal proceeding affecting his parental interest with his child.

The holding is also discouraging because the Court offered little in the way of a definitive test for assessing the adequacy of notice provisions in other state statutes. The standard articulated by the Court is that if notice provisions "were likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it *might* be thought procedurally inadequate."[51] The tentative nature of this standard creates uncertainty concerning the adequacy of notice provisions which differ from those of New York.[52]

Missouri has a bifurcated statutory scheme for adoptions: two different statutes and two different procedures can be involved.[53] Under one procedure (termination-adoption), parental rights are terminated under Missouri Revised Statutes sections 211.422-.492,[54] then the adoption proceedings occur pursuant to sections 453.015-.170.[55] Under the second procedure (non-termination), the adoption order is entered under sections 453.015-.170 without prior termina-

48. *Id.* at 2994-95.
49. *See* N.Y. DOM REL. LAW § 111-a (McKinney 1977 & Supp. 1983-84).
50. 103 S. Ct. at 2995.
51. *Id.* at 2994-95.
52. The Court left unanswered questions which are certain to arise in the future. For example, where a putative father has established a significant personal, financial, and custodial relationship with his child, under what circumstances can his parental rights be terminated without actual notice of the proceedings? Under what circumstances can a judge require the mother of an illegitimate child to divulge the name of the father? The dissent argued that "[a]bsent special cirucmstances, there is no bar to requiring the mother of an illegitimate child to divulge the name of the father when the proceedings at issue involve the permanent termination of the father's rights." *Id.* at 2999 n.5 (White, J., dissenting).
53. *See* MO. REV. STAT. § 453.015-.170 (1978 & Vernon Supp. 1984); MO. REV. STAT. § 211.442-.492 (1978 & Supp. 1983); *see also* Tomlinson v. O'Briant, 634 S.W.2d 546, 548 (Mo. Ct. App. 1982).
54. (1978 & Supp. 1983).
55. (1978 & Vernon Supp. 1984).

tion of parental rights.[56] The main difference between the two procedures is that the termination-adoption procedure must be used when consent is required of one or both parents[57] of the child to be adopted,[58] but is not waived[59] or otherwise given in writing.[60] Adoptions where the parental rights of putative fathers are at stake have occurred under both procedures.[61] These two procedures involve similar, but not identical, requirements for notice directed to putative fathers.[62] To determine whether the two statutes and procedures sufficiently protect the constitutional rights of putative fathers, it is necessary to examine the notice provisions applicable for each procedure.[63]

Under the notice provisions for the termination of parental rights proceedings, the parent of the child must be summoned and receive a copy of the termination petition.[64] Section 211.422 also provides, however, that "[t]he father of an illegitimate child shall have no legal relationship unless he, prior to the entry of the decree under Sections 211.442 to 211.492, has acknowledged

---

56. *Id.*

57. "Parent" is defined as "a biological parent or parents of a child as well as the husband of a natural mother at the time the child was conceived, or a parent or parents of a child by adoption, including both the mother and the putative father of an illegitimate child." MO. REV. STAT. §§ 211.442, 453.015 (1978 & Supp. 1983).

58. *See id.* § 453.030-.040 (Supp. 1983). The written consent of the parents, or surviving parent is required when the person sought to be adopted is under 18 years old, unless one of the exceptions in § 453.040 applies. Exceptions are made where: the parent is of deficient mental condition; parental rights have been terminated by law; the right to consent has been waived; the parent has abandoned the child; or the parent's identity is unknown.

59. *See id.* § 453.050 (juvenile court may permit a parent of a child to waive the necessity of his or her consent to a future adoption).

60. *See id.* § 453.030.3.

61. *See* State *ex rel.* J.D.S. v. Edwards, 574 S.W.2d 405, 406 (Mo. 1978) (en banc) (putative father successfully challenged on due process and equal protection grounds the termination of parental rights statute where the termination proceeding was a prelude to intended adoption action); State *ex rel.* T.A.B. v. Corrigan, 600 S.W.2d 87, 88 (Mo. Ct. App. 1980) (challenge to an order entered in a termination of parental rights proceeding prior to an adoption proceeding); *cf.* J.B.B. v. Baby Girl S., 611 S.W.2d 359 (Mo. Ct. App. 1980) (appeal of an adoption order by guardian ad litem raising constitutional questions concerning notice to the putative father where putative father's rights were not previously terminated under MO. REV. STAT. § 211.447 (1978)).

62. *Compare* MO. REV. STAT. § 211.442, .453, .457 (1978 & Supp. 1982); *with id.* § 453.015, 453.030-.060 (1978 & Vernon Supp. 1984).

63. This Note does not analyze the constitutionality of the Missouri adoption and termination of parental rights statutes under the equal protection clause. The Missouri statutes are similar to New York's in that the mother of an illegitimate child has the right to prior notice of any adoption or termination of parental rights proceeding while only certain classes of putative fathers have an equivalent right. Since the Court in *Lehr* found this distinction to be rational under the equal protection clause, the Missouri statutes would probably be upheld.

64. MO. REV. STAT. § 211.457 (1978). The term "parent" includes "both the mother and the putative father of an illegitimate child." *Id.* § 211.442 (Supp. 1983).

the child as his own by affirmatively asserting his paternity."[65] Section 211.453 provides that a writ of summons shall be served on a parent whose identity is known and who can be personally served as provided in chapter 506.[66] The court shall not require service "in the case of a parent whose identity is unknown or cannot be ascertained, or cannot be located."[67]

If the father's identity is known and he is subject to service, he is not entitled to service unless he has affirmatively asserted his paternity.[68] If a putative father's parental rights are terminated under chapter 211, then he is not entitled to notice of the adoption proceeding under chapter 453.[69]

Although it is the key to the statutory scheme, the phrase "affirmatively asserting his paternity" is not defined. Nevertheless, in *State ex rel. T.A.B. v. Corrigan,*[70] the court suggested three ways a putative father could satisfy the standard: (1) filing an affidavit of paternity; (2) placing his name on the birth certificate; or (3) filing with the court the mother's admission of paternity.[71]

The *Lehr* test for protecting a putative father's inchoate relationship with his child[72] was that notice procedures might be inadequate if the scheme was likely to omit many responsible fathers and if qualification for notice was beyond the control of an interested putative father.[73] Missouri's termination-

65. MO. REV. STAT. § 211.457 (1978).

66. *Id.* § 506.120-.190.

67. *Id.* § 211.453 (Supp. 1983). A putative father is required to receive notice if his identity is known, he can be personally served, and he has acknowledged the child by affirmatively asserting his paternity.

68. *Id.* § 211.442-.492 (1978 & Supp. 1983).

69. *See id.* § 453.040, .060 (Vernon Supp. 1984). Like § 211.442, § 453.060 allows a court to waive notice if the putative father has acknowledged the child.

70. 600 S.W.2d 87 (Mo. Ct. App. 1980).

71. *Id.* at 92. The court noted four methods used in other states: (1) paying the mother's medical and hospital expenses related to the pregnancy; (2) supporting the child in a continuous and regular manner; (3) living with the mother and child as a family unit; and (4) receiving the child into his home and openly holding out the child as his natural child. *Id.* at 92; *see* FLA. STAT. ANN. § 63.062 (1977 & West Supp. 1983); HAWAII REV. STAT. § 578-2 (1976); MINN. STAT. ANN. § 259.26 (1982); UNIF. PARENTAGE ACT § 4 (1973), 9A U.L.A. 579 (1979).

72. In resolving whether the parental rights of putative fathers under the due process clause are adequately protected by the notice provisions in the termination of parental rights and adoption statutes, two separate questions must be answered. First, do the provisions adequately protect the parental rights of those putative fathers who have established a significant personal, financial, or custodial relationship with their illegitimate child? Second, do the provisions adequately protect a putative father's inchoate relationship with his child? Although the latter question was directly addressed in *Lehr,* the Court specifically declined to decide whether New York adoption law adequately protects the parental rights of putative fathers who have developed significant custodial, personal, or financial relationships with their illegitimate children. 103 S. Ct. at 2994. Since the Court has provided insufficient guidance to answer the first question, except that notice to a putative father who has established a significant relationship with his child would at least have to meet the *Lehr* test, this Note will address only the latter question.

73. *Id.* at 2994-95.

adoption notice scheme is constitutionally suspect because it is likely to omit many responsible fathers.

Under section 211.447,[74] the juvenile officer is required to make a preliminary inquiry to see whether a termination of parental rights petition is to be filed. After a petition is filed, the trial judge can order the juvenile officer to conduct further inquiry into the circumstances underlying the petition. Unless the parent has consented in writing to termination of parental rights, "an investigation and social study shall be made by the juvenile officer, the state division of family services or other public or private agency authorized or licensed to care for children as directed by the court."[75] Therefore, notice to the putative father depends to some extent upon the diligence of the inquiry by the juvenile officer or the State Division of Family Services (DFS).

The mother of an illegitimate child can easily deprive an interested putative father of the right to notice of the termination and adoption proceedings by declining to identify the father to the juvenile officer, DFS, or the court. The judge has limited ability to compel identification.[76] Thus, under the termination-adoption scheme, the mother can easily frustrate the ability of the putative father to establish a legally significant relationship with his child by concealing the child's whereabouts, consenting to the child's adoption, or refusing to identify the putative father.

It is unclear whether the Missouri termination-adoption scheme can be characterized as "likely to omit many responsible fathers."[77] No statutory formulation could effectively prevent the mother of an illegitimate child from refusing to identify the putative father.[78] The factor which makes the notice provisions in the termination-adoption procedure constitutionally suspect, however, is that, unlike New York's scheme, it is not clear that the qualifications for notice in Missouri are within the control of an interested putative father. A putative father registry, although premised on the legal fiction that persons have constructive notice of the law, gives the putative father control over his ability to receive notice. There is no such registry in Missouri, nor is there a functional equivalent.

The methods of affirmatively asserting paternity listed by the court in *Corrigan* could serve as functional equivalents of a registry system, but each is flawed. The first method of affirmatively asserting paternity involves filing an

---

74. (Supp. 1983).

75. *Id.* § 211.472 (1978). In many adoption cases, DFS is heavily involved in placing and supervising the child. The agency often investigates the prospective adoptive parents and sometimes counsels the natural parents. Wellington v. Grieshaber, 631 S.W.2d 883, 885 (Mo. Ct. App. 1982).

76. *See* State *ex rel.* T.A.B. v. Corrigan, 600 S.W.2d 87, 94 (Mo. Ct. App. 1980) (prohibiting juvenile court judge from holding the mother of an illegitimate child guilty of contempt for refusing to identify the putative father at a hearing to terminate her parental rights).

77. 103 S. Ct. at 2994-95.

78. *See* note 76 and accompanying text *supra.*

affidavit with the court.[79] Unless the affidavit happens to be filed with the court which handles the termination and adoption proceedings, there is no guarantee the putative father will receive notice of the proceedings because no formal mechanism ensures that the court handling the termination proceeding will be made aware of the affidavit.[80]

The second method requires the putative father to place his name on the birth certificate.[81] Unfortunately, the putative father cannot have his name placed on the birth certificate without the written consent of the mother, unless a determination of paternity has been made by a court of competent jurisdiction.[82] Since a court must either determine paternity or the mother must give written consent, this method of qualifying for notice is beyond the control of an interested putative father.

The third method of affirmatively asserting paternity involves seeking an admission of paternity from the mother and filing it with the court.[83] This method is also deficient in that the mother is free to withhold consent.[84]

The notice provisions in the Missouri termination-adoption procedure are directed to reach fathers who have established significant relationships with their children. A putative father qualifies for notice if he acknowledges the child by affirmatively asserting his paternity.[85] On its face, the Missouri scheme seems less constitutionally suspect than New York's because qualifying for notice in Missouri is more open-ended. To qualify for notice in New York, the putative father must affirm his paternity within one of the statutorily recognized methods.[86] In comparison, the Missouri scheme gives discretion to the trial judge to determine whether a putative father qualifies for notice.

If the facts of *Lehr* were analyzed under Missouri law, Lehr would have qualified for notice, since he filed his paternity petition prior to entry of the adoption order.[87] It is not at all certain, however, that Lehr would have actu-

---

79. 600 S.W.2d at 92. Presumably the court intended that the affidavit could be filed in any state court.

80. It probably is not the practice of the juvenile officer to contact every other court in Missouri or other states to determine whether a putative father has filed such an affidavit. It seems unreasonable to impose this burden, particularly since a putative father registry is an efficient alternative.

81. 600 S.W.2d at 92.

82. 13 MO. ADMIN. CODE § 50-150.010(2) (1978).

83. 600 S.W.2d at 92.

84. *Id.; see* note 71 and accompanying text *supra.* Nor are the methods of affirmatively asserting paternity used in other states pointed out by *Corrigan* within the control of an interested putative father since the mother can refuse financial assistance and conceal the whereabouts of the child. Moreover, these methods of affirmatively asserting paternity involve the establishment of a significant personal, custodial, and financial relationship with the child. Therefore, these alternatives are irrelevant to the issue of procedural safeguards for notice to protect the putative father's *opportunity* to establish a significant relationship with his child.

85. *See* notes 64-69 and accompanying text *supra.*

86. *See* notes 33-35 and accompanying text *supra.*

87. Although no Missouri court has so held, filing a paternity petition presuma-

ally received notice of the termination and adoption proceedings. The child's mother would not have identified Lehr to the court nor could she be compelled to do so by threat of a contempt citation.[88] If the juvenile court had contacted all other courts in the state to see if a paternity petition had been filed, then Lehr may have been identified and received notice. If not, Lehr would not have received notice and an opportunity to be heard. As a result, Lehr could have successfully challenged the constitutionality of the Missouri scheme as applied because he qualified for, but did not receive notice.

The New York law was held constitutional because the decision to forego a more open-ended notice requirement was not arbitrary, and because the legitimate state interest in facilitating expeditious adoption justifies a trial judge's determination to require that all interested parties adhere precisely to the procedural requirements of the statute.[89] The Missouri scheme gives the trial judge more discretion to determine when notice to a putative father is required. Thus, adoption orders in Missouri are more susceptible to challenge on constitutional grounds by putative fathers who were entitled to notice but failed to receive notice. Because of its suspect constitutionality, the Missouri statutory scheme casts doubt over the finality of adoption orders entered under its provisions.

Under Missouri law, it is possible for a child to be adopted under the provisions in chapter 453[90], without resort to a termination of parental rights proceeding under chapter 211.[91] In fact, this procedure was followed in one reported case where questions arose concerning the adequacy of notice to a putative father.[92]

The notice requirements relevant to putative fathers are similar to their counterparts in the termination-adoption procedure. Under the Missouri adoption statute,[93] a putative father must be served with a summons and a copy of the petition unless: his parental rights have been previously terminated; he has waived the necessity of his consent to a future adoption of the child; the court finds that his identity is unknown and cannot be ascertained; or the court finds that he has not acknowledged the child as his own by affirmatively asserting his paternity.[94]

For the most part, the notice provisions affecting putative fathers in chapter 453 involve the same qualifications and considerations as the notice provisions in chapter 211. Nevertheless, there is an important difference. Under the termination of parental rights notice provisions, a putative father who has not

---

bly would be a sufficient assertion of paternity.

88. *See* State *ex rel.* T.A.B. v. Corrigan, 600 S.W.2d 87, 94 (Mo. Ct. App. 1980).

89. 103 S. Ct. at 2995.

90. MO. REV. STAT. § 453.015-.170 (1978 & Vernon Supp. 1984).

91. *Id.* § 211.442-.492.

92. *See* J.B.B. v. Baby Girl S., 611 S.W.2d 359 (Mo. Ct. App. 1980).

93. MO. REV. STAT. § 453.015-.170 (1978 & Vernon Supp. 1984).

94. *See id.* § 453.015, .030, .040, .060 (Vernon Supp. 1984).

acknowledged his child by affirmatively asserting his paternity is not entitled to notice, even where his identity is known to the court.[95] Under chapter 453, however, if the putative father's identity is known, he is entitled to notice regardless of whether he has acknowledged the child by affirmatively asserting his paternity.[96]

The guardian ad litem is the only person involved in the adoption proceeding who has a significant interest in identifying the putative father and ensuring that he becomes involved in the proceeding.[97] The guardian ad litem represents the best interests of the child. These interests include ensuring that the adoption order is not unreasonably subject to challenge by a party whose constitutionally protected parental rights were adversely affected. There are practical and financial limitations, however, to the guardian ad litem's ability to conduct an inquiry sufficient to determine whether a putative father entitled to notice under the statute exists.

If the facts of *Lehr* were analyzed under the non-termination statutory notice scheme, Lehr may have qualified for but likely would not have received notice of the adoption proceeding. If the court learned of Lehr's identity through the investigation by the juvenile officer or DFS, then Lehr would have qualified for notice.[98] Since Jessica's mother was unwilling to identify Lehr as the father, however, it is very unlikely Lehr would have actually received notice of the proceeding.

To the extent that the notice provisions under the non-termination procedure resemble or are identical to their counterparts under the termination-adoption procedure, they suffer the same constitutional infirmities. The notice provisions for putative fathers in chapter 453 do not adequately protect a putative father's opportunity to establish a significant relationship with his child because these provisions are likely to omit many fathers, and qualification for notice is beyond an interested putative father's ability to control. Even if these notice provisions are facially adequate, they are suspect as applied in many

---

95. *See* notes 64-68 and accompanying text *supra*. MO. REV. STAT. § 453.070 (1978) contains a provision similar to that in § 211.472 in that, except where all parents required to give consent have consented, no adoption decree involving a minor child shall be entered until a full investigation has been made by a juvenile court officer, DFS, or any entity involved in the care and placement of children.

96. MO. REV. STAT. § 453.015, .030, .040, .060 (Vernon Supp. 1984). From this standpoint, the notice provisions activated under a non-termination adoption procedure are less constitutionally suspect than those involved in the "termination-adoption" procedure. The former more adequately protect the putative father's inchoate relationship with his child.

97. To the extent that DFS is involved in the adoption proceeding, the agency could be responsible for conducting a diligent inquiry to identify and locate the putative father. DFS would have little incentive to conduct a diligent search for the father since this would conflict with their interest in expeditiously resolving the adoption. *See* Wellington v. Grieshaber, 631 S.W.2d 883, 885-887 (Mo. Ct. App. 1982) (discussion of DFS's conflicting responsibilities).

98. *See* note 96 and accompanying text *infra*.

cases where a putative father has developed a significant relationship with his child, yet received no notice of a subsequent adoption proceeding because the court was not aware of his existence.

In light of the Supreme Court's holding in *Lehr,* two main problems afflict Missouri's statutory scheme for providing notice to putative fathers of legal proceedings affecting their parental rights. First, the notice provisions are facially suspect under the due process clause and raise doubt concerning the finality of adoption orders entered pursuant to statute.[99] Second, because qualification for notice is "open-ended," orders are susceptible to challenge on constitutional grounds by those putative fathers entitled to notice who did not receive it. The first problem can adequately be addressed by establishing a putative father registry. Such a system would ensure that qualification for notice is within the control of an interested putative father.

There are advantages and disadvantages to a putative father registry.[100] For example, a registry system reduces the need for time-consuming efforts to locate the father of the child. Additionally, a registry system can help thwart the mother's efforts to defeat a father's parental interest by refusing to disclose his identity. One drawback is that "[e]ven if enacted in all states, [the registry's] effective operation requires an interstate cross-registration system. Otherwise a mother intending to frustrate the interests of a properly registered father could place the child with an out-of-state agency."[101] More importantly, the registry is based, at least in part, on the fiction that persons have constructive notice of laws that affect their interests. Unless well-publicized, it is doubtful that many putative fathers would be aware or take advantage of such a registry. The danger also exists that a court or a guardian ad litem would be content to consult the registry rather than diligently seek to determine the identity of a putative father. The registry system should constitute an additional procedural safeguard rather than the backbone of the notice procedure.

The second problem could be addressed similarly to the *Lehr* situation. Requisite methods of acknowledging the child by affirmatively asserting paternity could be specifically listed in the statutes. The methods noted by *Corrigan*

---

99. MO. REV. STAT. § 453.140 (1978) provides that "[a]fter the expiration of one year from the date of entry of the decree of adoption, the validity thereof shall not be subject to attack in any proceedings, collateral or direct, by reason of any irregularity in proceedings had pursuant to this chapter." In *In re* Adams, 237 S.W.2d 232, 234 (Mo. Ct. App. 1951), the court held that failure to give notice of an adoption proceeding to the natural father was not a "mere irregularity in the proceeding." Thus, the decree was void to the extent that it purported to terminate all legal relationship between the natural father and his child. *Adams* involved interpretation of MO. REV. STAT. § 9616d (1939) (repealed 1947), a predecessor to current § 453.140 (1978). In a more recent case, the court of appeals held that § 453.140 precludes an attack on the validity of an adoption decree on the grounds that the judgment was procured by false testimony that the natural father had abandoned the child. *In re* Kerr, 547 S.W.2d 837, 839-40 (Mo. Ct. App. 1977).

100. *See* Note, *supra* note 4, at 528.

101. *Id.* at 528.

or provided in the New York statute could be used. The main advantage of this approach is that it ensures the finality of many adoption orders by narrowing the bases upon which a constitutional challenge to the order could be mounted by a putative father. Unless a putative father qualifies for notice under one of the applicable provisions, his due process rights would be protected.[102] The disadvantage of this approach, which is the advantage of an open-ended notice requirement, is that the trial judge has less discretion to determine, on a case-by-case basis, whether a putative father's relationship with the child is such that prior notice and an opportunity to be heard is required. Perhaps this discretionary element can be built into a "closed" notice requirement scheme. The statute could provide that the trial judge may give notice to a putative father not otherwise entitled to receive notice where the father's identity is known and his interest in the child is such that justice requires he receive notice. This type of provision would ensure that the notice provisions retain the advantages of both "open" and "closed" schemes.[103]

Until legislative modification of the notice provisions occurs, there are several things which can be done to protect the parental rights of putative fathers while ensuring the finality of adoption orders. First, trial court judges can insist that any adoption order be preceded by a diligent and full inquiry to determine the identity and locate the putative father. Additionally, the judge can strongly urge the mother to divulge the father's name. The guardian ad litem should also actively encourage the mother to identify the father. If the mother appears able, but unwilling to do so, in the appropriate case the guardian ad litem should refuse to enter into the adoption agreement. If an adoption order is entered over the guardian ad litem's objections, this order should be appealed to resolve important constitutional questions concerning the procedural adequacy of the notice provisions.

Lehr is narrowly focused on its facts; consequently, the decision does not offer clear guidance for determining the constitutionality of statutes with notice provisions differing from those in the New York adoption statutes. Analysis of Missouri's statutory scheme in light of *Lehr,* however, indicates that it is constitutionally suspect. Revision of the notice provisions in the Missouri scheme would alleviate the uncertainty which undermines the validity of many adoption decrees entered under the present statutes.

JOHN L. ROARK

102. 103 S. Ct. at 2995.

103. If the New York statute had contained this provision, Lehr could have challenged as an abuse of discretion the Ulster County Family Court's refusal to provide him notice and an opportunity to be heard.