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## In re N.L.B. v. Lentz: The Missouri Supreme Court's Unwarranted Extension of a Putative Father's Constitutional Protections

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# ***In re N.L.B. v. Lentz: The Missouri Supreme Court's Unwarranted Extension of a Putative Father's Constitutional Protections***

## I. INTRODUCTION

*“Out-of-wedlock births in the United States have climbed to an all-time high.”<sup>1</sup>*

Recent statistics indicate that nearly four in every ten children born in the United States have unwed parents,<sup>2</sup> and that these children are surrendered for adoption more frequently than children born into wedlock.<sup>3</sup> Adoption has life-long implications for all parties involved, especially the child. An adopted child “is less likely to grow up in poverty [and] more likely to obtain an education . . . than a child raised by a single mother.”<sup>4</sup> While a mother has a unilateral right to abort or to deliver a child without informing its biological father, the nature of an unwed father’s rights to his child remains an unsettled area of law.<sup>5</sup>

According to Martin Bauer, president of the American Academy of Adoption Attorneys who specializes in contested adoptions, “the most common contest is where the mom wants to place the baby [for adoption] and the dad objects.”<sup>6</sup> Due to the burgeoning number of babies born out of wedlock and the expanding number of unwed fathers who wish to play a role in their children’s lives, putative fathers’<sup>7</sup> legal rights have become an increasing concern to parents and courts alike.

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1. *Almost 4 in 10 U.S. Children Born Out of Wedlock in 2005*, USA TODAY, Nov. 21, 2006, available at [http://www.usatoday.com/news/health/2006-11-21-births\\_x.htm](http://www.usatoday.com/news/health/2006-11-21-births_x.htm).

2. *Id.* The report also indicated that, while many people associate out-of-wedlock births with teen mothers, “births among unwed mothers rose most dramatically among women in their 20s.” *Id.*

3. Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL’Y 1031, 1032 (2002).

4. *Id.* at 1035.

5. Tamar Lewin, *Unwed Fathers Fight for Babies Placed for Adoption by Mothers*, N.Y. TIMES, Mar. 19, 2006, at A10.

6. *Id.*

7. “The term ‘putative father’ means a man who has had sexual relations with a woman to whom he is not married and is therefore presumed to know that such woman may be pregnant as a result of such relations.” Protecting Rights of Unknowing Dads and Fostering Access to Help Encourage Responsibility (Proud Father) Act of 2006, S. 3803, 109th Cong. § 440(8) (2006). This note will use the term “putative father” throughout to mean a biological father who is not a presumed father (by mar-

When a mother's rights are terminated<sup>8</sup> and the child is placed for adoption, the crucial issue is to determine what rights a putative father has, and also what he must do to avail himself of them. The difficulty arises in balancing the weight of the father's biological ties, when he has not assumed legal or custodial responsibilities for the child, against the necessity of expeditiously placing the child in a stable adoptive home.<sup>9</sup>

In the last few decades, courts have sharpened their focus on the rights of putative fathers and have consistently held that an unwed father's parental rights to his child are entitled to constitutional protections such as due process in certain situations.<sup>10</sup> For instance, putative fathers in almost all states are entitled to notice of an adoption proceeding or of a hearing to terminate their parental rights.<sup>11</sup> However, states require a putative father first to take some type of affirmative action, such as registering with the state's putative father registry or taking steps to assert his paternity, in order to protect his rights and ensure they receive such protection.<sup>12</sup> The Supreme Court of the United States has stated that the limited nature of a putative father's rights requires that he affirmatively "develop a relationship with his offspring" and "accept [] some measure of responsibility for the child's future" before his rights may receive constitutional protections.<sup>13</sup>

In *Lentz*, the Missouri Supreme Court granted an unwed father leave to intervene in an adoption, despite the fact that he had failed to bring himself

riage), an acknowledged father (whose name is on the birth certificate), or an adjudicated father (one who has timely filed a paternity action).

8. The mother's rights can be terminated either voluntarily or involuntarily by a juvenile officer. Section 211.447 of the Missouri Revised Statutes requires that the juvenile officer file a petition for termination of parental rights in the juvenile court, or join a termination action that has been filed by another party. MO. REV. STAT. § 211.447.2 (2006). Upon the petition of the juvenile officer, the juvenile court may terminate the rights of a parent to a child when it finds that termination is in the best interests of the child and when it appears by clear and convincing evidence that grounds delineated in the statute are present. 211.447.7.

9. Lewin, *supra* note 5.

10. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE RIGHTS OF PRESUMED (PUTATIVE) FATHERS 1-2 (2004), [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/putativeall.pdf](http://www.childwelfare.gov/systemwide/laws_policies/statutes/putativeall.pdf).

11. *Id.* at 2.

12. *Id.* Mailing in a postcard to the putative father registry assures the putative father that he will receive notice of termination of parental rights or adoption proceedings. See *Lehr v. Robertson*, 463 U.S. 248, 264 (1983). States vary in the information they maintain in their registries, though commonly included are the name, address, social security number and date of birth of the putative father and natural mother, the name and address of any person adjudicated by a court to be the father, and the child's name, date of birth and registration date. CHILD WELFARE INFO. GATEWAY, *supra* note 10, at 3.

13. *Lehr*, 463 U.S. at 262.

into the realm of constitutionally protected putative fathers.<sup>14</sup> This note explains why the holding of the *Lentz* court subverted the intent of Missouri's adoption statutes and its putative father registry, and argues that an unwed biological father who has not filed a valid paternity action, registered with the putative father registry, or demonstrated a substantial commitment to the responsibilities of parenthood should not be entitled to the additional constitutional protections available to diligent putative fathers. The note will argue that it is not a violation of his constitutional rights to deny such a father leave to intervene in the adoption of his child without a hearing on parental fitness.

## II. DUE PROCESS AND PUTATIVE FATHERS

Putative fathers have typically challenged state adoption and termination of parental rights statutes on due process or equal protection grounds.<sup>15</sup> These challenges are relatively recent developments, as historically biological fathers have enjoyed few rights to their illegitimate children because state laws provided that the mother's consent alone was necessary for an adoption to proceed.<sup>16</sup>

### A. Due Process for Putative Fathers Prior to the Advent of Putative Father Registries

#### 1. Supreme Court Case Law: *Stanley v. Illinois* and After

In 1972, the Supreme Court of the United States issued the groundbreaking holding in *Stanley v. Illinois*, which established that Fourteenth Amendment due process guarantees a putative father certain constitutional rights to his child.<sup>17</sup> In *Stanley*, two unwed biological parents of three children lived together intermittently for eighteen years.<sup>18</sup> The State of Illinois took the children from their father upon their mother's death and declared them wards of the state because Illinois law automatically presumed unwed fathers unfit to raise their illegitimate children.<sup>19</sup>

The Court held that because Stanley had "sired and raised" his children, his rights had acquired a substantial protected interest, and therefore the statute at issue and its automatic presumption of parental unfitness violated his

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14. *In re Adoption of N.L.B. v. Lentz*, 212 S.W.3d 123, 128 (Mo. 2007) (en banc).

15. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979).

16. Robin DuRocher, Commentary, *Balancing Competing Interests in Post-Placement Adoption Custody Disputes*, 15 J. LEGAL MED. 305, 314 (1994).

17. 405 U.S. 645, 657-58 (1972).

18. *Id.* at 646.

19. *Id.* at 646-47.

due process rights.<sup>20</sup> The Court tempered its holding by recognizing the flexibility of due process and that the exact procedures and protections it affords a litigant will vary depending on the nature of both the government and private interests at stake.<sup>21</sup> In sum, *Stanley* affirmed that due process protection applies to those relationships “unlegitimized by a marriage,”<sup>22</sup> such as a biological father and his child born out of wedlock, but also announced that “due process of law does not require a hearing ‘in every conceivable case of government impairment of private interest.’”<sup>23</sup>

In applying this concept, subsequent Supreme Court case law established that a putative father must have established more than a biological connection to his child prior to an adoption in order for his rights to acquire a heightened degree of due process protection such as a hearing on parental fitness.<sup>24</sup> Two of the Court’s key post-*Stanley* decisions focused on the legally significant distinction between inchoate rights and legally-cognizable, fully developed parental rights. In 1978, *Quilloin v. Walcott* established that it is not a due process violation to deny a putative father both notice and consent to adoption when he has not participated in the rearing of his child or shown a substantial commitment to being a parent.<sup>25</sup> The Court reaffirmed this position one year later in *Caban v. Mohammed*, holding that the state may procedurally distinguish between fathers who maintain a substantial role in their children’s lives and those who do not.<sup>26</sup>

## 2. Missouri Case Law

Missouri has similar decisions concerning putative fathers’ due process rights, the most applicable being the 1978 Missouri Supreme Court case of *Ex rel J.D.S. v. Edwards*.<sup>27</sup> In *Edwards*, an unwed father challenged a Missouri statute that permitted the juvenile court to transfer guardianship and custody of a child to the state, even though only the mother’s rights had been terminated.<sup>28</sup> At issue in *Edwards* was whether a state may “constitutionally terminate parental rights without providing the putative father an opportunity to

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20. *Id.* at 651, 657-58.

21. *Id.* at 650-51.

22. *Id.* at 651-52.

23. *Id.* at 650 (quoting *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 894 (1961)).

24. *See infra* note 65.

25. 434 U.S. 246, 254-55 (1978).

26. *See* 441 U.S. 380, 389 n.7 (1979) (citing *Quilloin*, 434 U.S. at 256). The statute at issue in *Caban* allowed an unwed mother to block adoption of her child simply by withholding consent, but not an unwed father. *Id.* at 385-87. The Court held that the statute violated the Equal Protection clause because it treated unmarried parents differently solely on the basis of their sex. *Id.* at 388, 391.

27. 574 S.W.2d 405 (Mo. 1978) (en banc).

28. *Id.* at 406.

protect his status as a parent.”<sup>29</sup> The *Edwards* court declared the Missouri statute unconstitutional, but stated that an unwed father does not automatically enjoy the same initial presumption of fitness as a married father.<sup>30</sup> Rather, it is only after a “reasonable showing of fatherly concern” that unmarried fathers enjoy the same presumption of fitness as married ones.<sup>31</sup> Therefore, *Edwards* held that the State “is free to require an unwed father first to prove that he has seasonably demonstrated a meaningful intent and a continuing capacity to assume responsibility with respect to the supervision, protection and care of the child” before an unwed father attains the same presumption of parental fitness as that of a married father.<sup>32</sup>

Two years after *Edwards*, the Court of Appeals for the Eastern District of Missouri decided *State ex rel. T.A.B. v. Corrigan*<sup>33</sup> and expounded upon the nature and extent of putative fathers’ rights in Missouri. *Corrigan* cited *Edwards* in support of its holding that only the putative father who has affirmatively asserted paternity qualifies as a “parent” under Missouri statutes.<sup>34</sup> Because the putative father in *Corrigan* had not taken steps to establish a legal relationship with his child, he did not meet Missouri’s statutory definition of a parent.<sup>35</sup> Therefore, the court held that it was not a violation of his due process or equal protection<sup>36</sup> rights to deny the father notice of a pending adoption of his child.<sup>37</sup> The court carefully noted that “[t]he current Missouri statutes on termination of parental rights reflect the rationale enunciated in *Stanley v. Illinois* [ . . . ] and *State ex rel. J.D.S. v. Edwards*.”<sup>38</sup>

### B. Due Process for Putative Fathers after *Lehr v. Robertson*<sup>39</sup> and the Advent of the Putative Father Registry

The emergence of state putative father registries in the 1980s created a new facet in the issue of putative fathers and their due process rights.<sup>40</sup> *Lehr*

29. *Id.*

30. *Id.* at 408.

31. *Id.* at 409.

32. *Id.* at 408-09. Missouri did not establish its putative father registry until 1988, ten years after *Edwards*. See H.R. 1272-74, 84th Gen. Assem., 2d Reg. Sess. (Mo. 1988).

33. 600 S.W.2d 87 (Mo. App. E.D. 1980).

34. *Id.* at 91; MO. REV. STAT. § 211.442.3 (2006) (“The putative father of a child shall have no legal relationship unless he . . . has acknowledged the child as his own by affirmatively asserting his paternity.”).

35. *Corrigan*, 600 S.W.2d at 93-94.

36. Litigants have attacked legislation affecting putative fathers’ legal rights on both due process and equal protection grounds. See *supra* note 26. This article focuses primarily on due process concerns.

37. *Id.* at 91.

38. *Id.*

39. 463 U.S. 248 (1983).

*v. Robertson* in 1983 was the first case to address the constitutionality of putative father registries in light of a putative father's due process rights. In upholding the constitutionality of a putative father registry, the United States Supreme Court distinguished an unwed father's mere biological link to his child from "an actual relationship of parental responsibility."<sup>41</sup> *Lehr* said that because the strength of the familial bond exists by virtue of the relationships formed therein and not sheer biology, courts may require an unwed biological father first to assert paternity and act as a father to his child before his rights may acquire heightened constitutional protection.<sup>42</sup> According to *Lehr*, the putative father registry system afforded putative fathers an alternate and adequate opportunity to establish a relationship with a child born outside of marriage.<sup>43</sup> Therefore, *Lehr* held that a putative father who had neither filed with a state's putative father registry nor established a substantial relationship with his child was not entitled to notice of a pending adoption under the due process or equal protection clauses of the Constitution.<sup>44</sup>

Thus, *Lehr* established that in order to be entitled to a heightened degree of constitutional protection, a natural father who has not asserted paternity must either file with a state's registry or participate in the rearing of his child and demonstrate a substantial commitment to the responsibilities of parenthood.<sup>45</sup> If the father fails to grasp these opportunities to be a parent, "the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie."<sup>46</sup> Furthermore, the Supreme Court explicitly stated that, "[i]n those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."<sup>47</sup>

### III. STATEMENT OF THE CASE

The facts of *Lentz* illustrate that this particular putative father had not availed himself of the opportunity to be a parent to his child and therefore his parental rights were not entitled to heightened due process protections under the standards established by Supreme Court case law or Missouri statutory law. Baby Bond was born on December 12, 2004 in Cape Girardeau, Mis-

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40. As of October 2004, 23 states had enacted putative father registries. CHILD WELFARE INFO. GATEWAY, *supra* note 10, at 3.

41. *Id.* at 259-60.

42. *Id.* at 261.

43. *Id.* at 262-64. A key reason the Court upheld the putative father registry scheme was that "the right to receive notice was completely within appellant's control." *Id.* at 264.

44. *See id.*

45. *Id.* at 260-61 (quoting *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)).

46. *Id.* at 262.

47. *Caban*, 441 U.S. at 392.

souri to Ibbaanika Bond.<sup>48</sup> Appellant Craig Lentz, the natural father, was present at the child's birth, although only the mother's name was put on the birth certificate and the father was listed as "unknown."<sup>49</sup> Upon release from the hospital, the mother placed Baby Bond in foster care in Cape Girardeau for adoption, and Lentz returned to Columbia, Missouri.<sup>50</sup> On January 20, 2005, the parents removed the child from foster care in Cape, and both signed a "Reconsideration of Adoption Plan by Birth Parents."<sup>51</sup> Lentz wrote, "not the father" after his signature.<sup>52</sup> After removing the child from foster care, Craig Lentz and the mother took the child to Kansas City, Missouri and placed Baby Bond with another couple for the purpose of adoption and Lentz returned to Columbia.<sup>53</sup>

On February 15, 2005, the Kansas City couple with whom the child had been placed filed for transfer of custody and adoption.<sup>54</sup> The mother consented to the adoption at a hearing on February 25, and the petition stated that the father was "unknown."<sup>55</sup> On March 2, 2005, one week after the hearing, Lentz filed with the putative father registry, signed documents with the mother confirming that he was the father, and also signed an "acknowledgement of paternity form" pursuant to section 193.215 of the Missouri Revised Statutes.<sup>56</sup> Lentz then filed an answer objecting to the adoption and termination of his parental rights on April 28 and a "Petition of Declaration of Paternity" on June 17.<sup>57</sup>

On September 29, 2005 the Jackson County Circuit Court terminated Lentz's parental rights pursuant to section 453.030(3) of the Missouri Revised Statutes.<sup>58</sup> The court held that Lentz's failure to file a paternity action or with the putative father registry within the allotted timeframe resulted in his inability to withhold consent to the adoption.<sup>59</sup>

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48. *In re N.L.B. v. Lentz*, 212 S.W.3d 123, 124 (Mo. 2007) (en banc); Brief of Appellant Craig Lentz at 5, *In re N.L.B. v. Lentz*, 212 S.W.3d 123 (en banc) (Mo. 2007) (No. SC87291), 2006 WL 2643693.

49. *Lentz*, 212 S.W.3d at 124.

50. *Id.*

51. *Id.* Lentz and the mother each paid \$150 for the cost of foster care. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* The father was never served with process. *Id.* However, the court found that the night before the hearing, February 24, father and mother visited with the child. *Id.* Thus, the father had actual notice of the hearing, but chose not to attend. *Id.*

56. *Id.* An amended birth certificate was issued on March 4 (naming Lentz as the father), and Lentz was granted leave to intervene in the adoption proceeding on March 28. *Id.*

57. *Id.*

58. *Id.* at 125.

59. *Id.* at 126-27.



Lentz appealed directly to the Missouri Supreme Court, challenging the constitutionality of one of Missouri's adoption statutes, section 453.030.3 of the Missouri Revised Statutes.<sup>60</sup> Lentz contended that section 453.030.3 violated his due process rights because it permitted termination of his parental rights without a hearing on his fitness as a parent.<sup>61</sup> The Missouri Supreme Court reversed the trial court and held that it was error to restrict the evidence to the question of whether the father qualified as a presumed or an adjudicated father under the statute, or whether or not he had registered with the putative father registry.<sup>62</sup> Instead, the Missouri Supreme Court held that the trial court should have considered all evidence pertaining to the ultimate and overriding ground for adoption in Chapter 453: "the welfare of the person sought to be adopted."<sup>63</sup>

#### IV. ADEQUATE CONSTITUTIONAL PROTECTION FOR LENTZ'S RIGHTS

One impetus behind the court's affording Lentz a hearing on parental fitness appears to have been in order to avoid declaring this particular section of Chapter 453 unconstitutional.<sup>64</sup> The court cited *Edwards* for the proposition that the Missouri Constitution requires that "the same presumption of fitness afforded married fathers in parental termination proceedings be afforded to natural fathers *after a reasonable showing of fatherly concern* in such cases."<sup>65</sup> This statement is correct, but the court misconstrued its application to the case at bar.

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60. *Id.* at 124.

61. *Id.* at 127. Appellant argued that section 453.030 was "insufficient to protect his interest in the parent-child relationship." *Id.*

62. These are the three categories of fathers in section 430.030.3 of the Missouri Revised Statutes whose consent to adoption is required. Mo. Rev. Stat. § 430.030.3(2)(a)-(c) (2006). The trial court divided the hearings: the first was devoted to analysis under section 453.030 of the Missouri Revised Statutes and whether or not the father fell into one of these three categories of men. *Id.* at 127. The second concerned the issue of whether or not the father had willfully abandoned the child under section 453.040. *Id.* at 128.

63. *Id.* Thus, the Court found that failure to file an action for paternity or to file with the putative father registry "is but one factor to be considered as part of the challenge." *Id.* at 127.

64. *See id.* The court stated it was not necessary to address Lentz's claim that section 453.030 was unconstitutional to the extent that it permitted termination of parental rights without a hearing on parental fitness due to its finding that Missouri's statutory scheme for adoptions "tacitly" allows a hearing on parental fitness in unusual circumstances like the case at bar. *Id.*

65. *Id.* at 128 (quoting *Ex rel. J.D.S. v. Edwards*, 574 S.W.2d 405, 409 (Mo. 1978) (en banc)) (emphasis added). *Edwards* declared a Missouri statute violated the Equal Protection Clause because it permitted severance of all parental rights of an illegitimate child though only the mother's rights had been terminated. *Edwards*, 574 S.W.2d at 408. *Edwards'* holding was based largely on the U.S. Supreme Court's

To be entitled to the heightened constitutional protection of a hearing on parental fitness, Missouri case law requires Lentz to have taken affirmative steps to bring his inchoate parental rights into the realm of legally-cognizable ones.<sup>66</sup> Lentz did nothing to avail himself of the additional constitutional protections available to putative fathers after *Stanley*, *Quilloin*, *Caban*, and *Lehr*. He did not register with the putative father registry, participate in the rearing of his child, or provide his child with financial support.<sup>67</sup> He had initially testified that he was not the child's biological father and denied having intercourse with the mother "in a manner that would have led to contraception."<sup>68</sup> Finally, he spent approximately twelve hours and 150 dollars on the child since its birth, namely in transporting it from one foster home to another.<sup>69</sup>

These facts indicate that Lentz did not act as father to his child. He failed to form a relationship with Baby Bond and did not demonstrate the "fatherly concern" required by *Edwards*. *Lehr* affirmed that parental rights "do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."<sup>70</sup> Because Lentz's parental rights never sprang into being, he was not entitled to the additional constitutional protections available for diligent putative fathers, and thus it was not

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decision in *Stanley v. Illinois*, 405 U.S. 645 (1972). See *Edwards*, 574 S.W.2d at 408. *Stanley* held that a state law that automatically declared illegitimate children wards of the state upon the death of only their mothers unconstitutionally denied putative fathers due process. *Stanley*, 405 U.S. at 657-58. In both cases, the statutes were unconstitutional not because they did not always provide a parental fitness hearing before terminating a putative father's parental rights, but because they foreclosed the possibility of such. See *Edwards*, 574 S.W.2d at 408 (stating that when the procedure "forecloses the determinative issues of competence and care . . . it needlessly risks running roughshod over the important interests of both parent and child").

66. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 262 (1983). The Supreme Court in *Lehr* cited numerous articles in support of its contention that a putative father must take affirmative steps in order to avail himself of the panoply of parental rights available to other classes of parents. See *id.* at 261 n.17.

67. As noted, Lentz did expend \$150 in transporting his child from one foster care home to another on January 20. See *supra* note 50.

68. *In re N.L.B. v. Lentz*, 212 S.W.3d 123, 124-25 (Mo. 2007) (en banc). Upon withdrawing Baby Bond from his first foster care placement on January 20 and prior to placing him in the second, Lentz and the mother signed a "Reconsideration of Adoption Plan by Birth Parents" wherein Lentz wrote "not the father" after his signature. *Id.* at 124.

69. Brief of Respondents at 24, 26, *In re N.L.B. v. Lentz*, 212 S.W.3d 123 (Mo. 2007) (en banc) (No. SC87291), 2006 WL 2643694. The \$150 was half of the cost to remove Baby Bond from foster care in Cape Girardeau. *Id.* at 27. The parents immediately thereafter took the baby to Kansas City where they placed him in his second foster home. *Id.* at 8-9.

70. *Lehr*, 463 U.S. at 260.

unconstitutional to deny him a hearing on his parental fitness before terminating his parental rights.

Furthermore, even absent active involvement in his child's life, the right to receive notice of the pending adoption was entirely within Lentz's control per Missouri's Putative Father Registry. The *Lehr* court upheld the constitutionality of putative father registries as adequately protecting a biological father's inchoate interest in his child.<sup>71</sup> The requirements vary from state to state, but generally filing notice in the form of a postcard with the requisite state agency ensures that a registrant will receive notice of a pending adoption of his child.<sup>72</sup> Lentz could have ensured that he received notice of the impending adoption by filing a notice of intent to claim paternity with Missouri's registry within fifteen days of the baby's birth,<sup>73</sup> but refused to do so.<sup>74</sup>

The Putative Father Registry provides diligent fathers and putative fathers an extra degree of constitutional protection, should they choose to avail themselves of it. Missouri's Putative Father Registry statute clearly states that failure to timely file with the Registry constitutes a waiver of a man's rights to withhold consent to an adoption.<sup>75</sup> Thus, the *Lentz* court's statement that failure to "file with the putative father registry is but one factor to be considered as part of the challenge" is not an accurate application of the statute.<sup>76</sup>

#### A. Statutory Interpretation

The court erred in its attempt to strictly construe section 453.030.3 of the Missouri Revised Statutes,<sup>77</sup> and thereby allowing Lentz to contest the adoption of Baby Bond.<sup>78</sup> The statute clearly identifies three categories of fathers whose consent to adoption is required,<sup>79</sup> and Lentz does not fall under any of these by his own admission.<sup>80</sup> Lentz is not a presumed father in that

71. *Id.* at 248-49.

72. Beck, *supra* note 3, at 1032.

73. MO. REV. STAT. § 192.016.1(2) (2006).

74. *See supra* note 67.

75. § 192.016.7. There are statutory exceptions for failure to register due to fraud by the mother, but none apply in this case. *See* § 192.016.7(1)(a)-(c). Again, this statement is assuming the man has not taken other action to bring himself within the purview of the statute, such as filing a paternity action.

76. *In re N.L.B. v. Lentz*, 212 S.W.3d 123, 127 (Mo. 2007) (en banc).

77. Strict construction is a guiding principle of statutory construction in Missouri. *See Nelson v. Crane*, 187 S.W.3d 868, 869-70 (Mo. 2006) (en banc).

78. *Lentz*, 212 S.W.3d at 124.

79. § 453.030.3(2)(a)-(c).

80. *Lentz*, 212 S.W.3d at 126.

he was never married to the mother, nor did he attempt to marry her.<sup>81</sup> Furthermore, Lentz did not file a paternity action within fifteen days of the baby's birth,<sup>82</sup> nor did he register with the putative father registry within fifteen days of the baby's birth.<sup>83</sup>

In its opinion, the court acknowledged that "it is uncontested that [Lentz] does not fall within any of these categories."<sup>84</sup> However, the court reasoned that the fact that the statute does not require consent from such fathers does not necessarily mean they have consented to the adoption.<sup>85</sup> As a result, the court stated that failure to bring oneself into one of the three categories in section 453.030(2) of the Missouri Revised Statutes was merely one factor to consider in the consent-to-adoption analysis.<sup>86</sup>

Rather than adhering to the guidelines mandated by the statute, the court used the welfare of the adoptee as its guiding principle, and stated that all evidence pertaining to it should be admitted.<sup>87</sup> In essence, the court inferred that section 453.030.3 "tacitly allow[s] an unwed father in [the] father's position to contest the adoption by presenting evidence of his parental fitness despite the fact that he did not fall within one of the three categories of fathers under section 453.030.3(2)."<sup>88</sup> The Court justified its interpretation of the statute with another inference. It stated that a hearing on parental fitness would probably not be necessary in most cases where the father had failed to bring himself into the purview of section 453.030.3 because those putative fathers will not bother to challenge the adoption process.<sup>89</sup> The court failed to recognize that an unwed father such as Lentz is exactly the category of father the adoption statutes and putative father registry were aimed at precluding from challenging adoptions.

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81. § 453.030.3(2)(a); Brief of Respondents at 18, *In re N.L.B. v. Lentz*, 212 S.W.3d 123 (Mo. 2007) (en banc) (No. SC87291), 2006 WL 2643694.

82. § 453.030.3(2)(b). Lentz did not file a paternity action in a court of competent jurisdiction until June 17, 2005, nearly six months after Baby Bond's birth. *Lentz*, 212 S.W.3d at 124.

83. § 453.030.3(2)(c). Lentz did not register with the putative father registry until March 2, 2005, nearly three months after the Baby's birth. *Lentz*, 212 S.W.3d at 124.

84. *Lentz*, 212 S.W.3d at 126.

85. *Id.* at 127.

86. *Id.* It should be noted that the Court did not cite any case law or statutory authority in support of this proposition. *See id.* at 127-28.

87. *Id.* at 128. In determining the welfare of the person to be adopted, the court was "informed by the fundamental proposition and presumption that maintaining the natural parent-child relationship is in the best interests of the child." *Id.*

88. *Id.* at 127 (emphasis added).

89. *Id.* at 127-28.

### B. *Invalid Voluntary Acknowledgment of Paternity*

The court erred in finding that the father had standing and had timely intervened in the adoption proceeding by virtue of his filing a voluntary acknowledgement of paternity with a mother whose rights had previously been voluntarily terminated.<sup>90</sup> First, Lentz executed the acknowledgment of paternity approximately two months after the relevant statutory time period.<sup>91</sup> Missouri's statute clearly states that only a father who has filed either an action for paternity or with the putative father registry within *fifteen days* of the baby's birth may consent to an adoption.<sup>92</sup> Lentz executed his acknowledgement of paternity two months late and filed his Petition of Declaration of Paternity nearly six months late.<sup>93</sup>

The Court found that Lentz had standing to intervene in the adoption "by virtue of the fact that he and the mother had signed an 'acknowledgment of paternity'" on March 2.<sup>94</sup> The Court did not account for the fact that the already-untimely acknowledgment was executed with a mother who voluntarily extinguished her parental rights on February 25.<sup>95</sup> A mother whose parental rights have been voluntarily terminated does not have standing as a mother to add an individual's name to a child's birth certificate and thereby circumvent the finality of the adoption process after the fact. Because this mother's rights were already extinguished, the voluntary acknowledgement of paternity executed between Lentz and herself is legally invalid.

The Court acknowledged that Lentz did not fall into one of the three categories of fathers and putative fathers whose consent to adoption is necessary under the Missouri statutes.<sup>96</sup> Despite this acknowledgement, the Court said that failure to bring oneself into one of these categories did not preclude a father or putative father from intervening in an adoption proceeding because the overriding ground for adoption in 453.030 is "the welfare of the person sought to be adopted."<sup>97</sup>

However, not only were Lentz's actions untimely and statutorily insufficient, they were inconsistent with a child's best interests and the actions of a father who wishes to parent a child. Lentz admittedly received notice of the fifteen-day requirement of Missouri's Putative Father Registry at the hospital

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90. *Id.* at 128.

91. *Id.* at 124.

92. MO. REV. STAT. § 453.030.3(2)(b)-(c) (2006) (emphasis added).

93. *Lentz*, 212 S.W. 3d at 124. While the child was born on December 12, 2004, Lentz did not file with the putative father registry until March 2, 2005, and did not file his "Petition of Declaration of Paternity" until June 17, 2005. *Id.*

94. *Id.* at 128.

95. *Id.* at 124.

96. *Id.* at 126.

97. *Id.* at 128.

within forty-eight hours of the baby's birth, and he refused to register.<sup>98</sup> He subsequently signed a "Reconsideration of Adoption Plan" on January 20 with the mother, but wrote "not the father" next to his name.<sup>99</sup> Finally, Lentz was present at the child's foster home in Kansas City, Missouri on February 24, the night before the adoption hearing.<sup>100</sup> The evidence presented at trial indicated that Lentz was aware of the impending adoption action the next day and refused to attend.<sup>101</sup> Most importantly, Lentz continued to deny he was the natural father at that time.<sup>102</sup>

### C. Lentz Subverts the Intent of Missouri's Adoption Statutes and a Putative Father Registry

The *Lentz* court's interpretation of the relevant provisions of Missouri's adoption laws and Chapter 453 subverts the intent of Missouri's putative father registry and adoption scheme. Adoptions involving a child born to an unwed mother must seek to balance the interests of all parties involved.<sup>103</sup> These include the biological father's interest in a legally recognized relationship with his child, the mother's privacy rights, and the child's interest in expeditiously finding a stable adoptive home.<sup>104</sup> The mechanics of a putative father registry are designed to protect all of these interests. By placing the right to automatically receive notice of an impending adoption entirely within the putative father's control, such registries protect a mother's privacy rights while providing prompt and constitutionally adequate notice of an impending adoption to a putative father.<sup>105</sup>

One of the stated purposes of the original putative father registry in New York was to facilitate planning for a child's future and to ensure permanency therein.<sup>106</sup> In *Lehr v. Robertson*, the Court examined New York legislature's intent behind the enactment of the first of such registries:

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98. Brief of Respondents at 7-8, *In re N.L.B. v. Lentz*, 212 S.W.3d 123 (Mo. 2007) (en banc) (No. SC87291), 2006 WL 2643694.

99. *Id.* at 8.

100. *Id.* at 24-25.

101. *Id.* at 25.

102. *Id.*

103. Beck, *supra* note 3, at 1032.

104. *Id.*

105. *Id.* at 1039-40 (discussing the mechanics of a putative father registry). Typically, registries provide a man with notice of any adoption petition for the child of a woman whom the father named in his registration. *Id.* at 1039. Receiving notice affords a man the opportunity to consent to the adoption or to argue at the hearing that he should parent the child rather than the prospective adoptive parents. *Id.* at 1039-40.

106. *Lehr v. Robertson*, 463 U.S. 248, 264 n.20 (1983).

The measure will dispel uncertainties by providing clear constitutional statutory guidelines for notice to fathers of out-of-wedlock children. It will establish a desired finality in adoption proceedings and will provide an expeditious method for child placement agencies of identifying those fathers who are entitled to notice through the creation of a registry of such fathers . . . The measure is intended to codify the minimum protections for the putative father which *Stanley* would require.<sup>107</sup>

The *Lentz* decision blatantly conflicts with this stated core purpose of the registries, namely ensuring an expeditious finality to adoption proceedings, by obfuscating both planning and permanency for Baby Bond's future. Such obfuscation of the adoption process is evidenced by the three different placements Baby Bond experienced in the first three months of life.

Furthermore, allowing intervention was contrary to the child's best interests in that *Lentz*'s first and only attempts to assert paternity did not arise until the child was nearly three months old, the adoptive process had already begun, and the relevant statutory periods had passed.<sup>108</sup> Furthermore, he did not seek leave to intervene in the adoption until the child was three months and twelve days old.<sup>109</sup> *Lentz*'s only previous "fatherly" actions were to transport the child from one foster care home to another on January 20.<sup>110</sup> As noted, this untimely and ex post facto assertion of rights serves to disrupt the stability of adoptions and is the kind of behavior putative father registries and consent to adoption laws were aimed at eliminating.

Moreover, it has been noted that creation of a putative father registry serves to eliminate judicial discretion in decisions regarding whether or not to allow a father leave to intervene in any given adoption proceeding.<sup>111</sup> In her analysis of Illinois' putative father registry legislation, Mahrukh Hussaini asserts that "[t]he judicial discretion of the courts is significantly reduced as courts no longer need to rule on whether a father who failed to meet statutory deadlines nonetheless showed sufficient interest in the child to merit notice

107. *Id.*

108. *In re N.L.B. v. Lentz*, 212 S.W.3d 123, 124 (Mo. 2007) (en banc).

109. *Id.*

110. *Id.* *Lentz* claimed his initial hesitancy in claiming paternity was due to the fact that he did not believe there was "sufficient penetration," but later realized that to be untrue. *Id.* at 125. The mother's testimony indicated that she felt there was sufficient penetration, and had not had intercourse with anyone else during the relevant time period. *Id.* Regardless, Missouri's putative father registry deems a man to have notice of potentially being a father merely by having had intercourse with the mother. See MO. REV. STAT. § 192.016.6 (2006).

111. Mahrukh S. Hussaini, *Incorporating Thwarted Putative Fathers into the Adoption Scheme: Illinois Proposes a Solution after the "Baby Richard" Case*, 1996 U. ILL. L. REV. 189, 211 (1996).

and a right of consent.”<sup>112</sup> Rather, a father’s failure to comply with statutory deadlines is “conclusive evidence” of his failure to meet the requirements for additional constitutional protection.<sup>113</sup>

The *Lentz* case is an example of an exercise of judicial discretion. Judge Limbaugh stated that, given the “unusual circumstances” of this case, the Missouri statutes “tacitly allow” for a hearing on parental fitness “despite the fact that he did not fall within one of the three categories of fathers under section 453.030.3(2).”<sup>114</sup> The only recognized exception for failure to register in section 453.030.3(2) pertains to fraudulent behavior by the mother and is not applicable in this case.<sup>115</sup> Judge Limbaugh appears to have carved out his own exception to the consent requirement of 453.030.3(2), namely “the welfare of the person sought to be adopted.”<sup>116</sup>

## V. COMMENT

After *Lehr v. Robertson* and Missouri’s subsequent enactment of a Putative Father Registry in 1988, the right to receive notice of a pending adoption became entirely within an unwed biological father’s control.<sup>117</sup> Furthermore, section 453.030.3(2)(b) of the Missouri Revised Statutes states that an unwed father who has filed a paternity action or acknowledged paternity pursuant to section 210.823 of the Missouri Revised Statutes is entitled to notice of an adoption as well.<sup>118</sup> In sum, Supreme Court case law and Missouri’s statutory scheme stand for the proposition that a putative father’s consent is neces-

112. *Id.*

113. *Id.* Of course this would not be true if the father had taken some other action that would entitle him to notice and consent under the relevant statute, such as openly living with the child or marrying the mother. *Id.*

114. *Lentz*, 212 S.W.3d at 127. Concerning consent to adoption, consent is only required from the man who:

(a) Is presumed to be the father pursuant to the subdivision (1), (2), or (3) of subsection 1 of section 210.822, RSMo; or (b) Has filed an action to establish his paternity in a court of competent jurisdiction no later than fifteen days after the birth of the child and has served a copy of the petition on the mother in accordance with section 506.100 RSMo; or has (c) Filed with the putative father registry pursuant to 196.016, RSMo . . . and has filed an action to establish his paternity in a court of competent jurisdiction no later than fifteen days after the birth of the child.

MO. REV. STAT. § 453.030.3(2) (2006).

115. *See* § 192.016.7(1)(a)-(c) (stating that failure to timely file with the putative father registry waives the consent requirement unless the father was led to believe through the mother’s misrepresentation or fraud that the mother was not pregnant when she was, terminated the pregnancy when she had not, or the child died after birth when it actually lived).

116. *Lentz*, 212 S.W.3d at 128.

117. *See* § 196.016.

118. § 453.030.3(2)(b).



sary to an adoption if he has affirmatively asserted his paternity, availed himself of the Registry, filed a paternity action, or is a presumed,<sup>119</sup> adjudicated,<sup>120</sup> or acknowledged<sup>121</sup> father.

It is entirely uncontested that Lentz did not fall into any one of the aforementioned categories of unwed biological fathers in Missouri whose consent to adoption is necessary. He never affirmatively asserted his paternity by demonstrating a substantial commitment to being a father to Baby Bond, nor did Lentz timely seize the opportunity to avail himself of the registry or to file a paternity action. Finally, he was not a presumed father in that he was never married to the mother, nor did he attempt to marry her.

Rather than allowing the Missouri statutes to dictate when an unwed biological father's consent is necessary in an adoption proceeding, the Missouri Supreme Court elected to use the welfare of the adoptee as its guiding principle.<sup>122</sup> The court is correct in that the adoption statutes are to be construed "so as to promote the best interests and welfare of the child," and that the child's best interests are always the paramount concern in an adoption proceeding.<sup>123</sup>

However, the Lentz court effectively ignored Missouri's statutes and, in doing so, failed to recognize that granting Lentz leave to intervene in the adoption was not in Baby Bond's best interests. State adoption statutes are inherently informed by a child's best interests,<sup>124</sup> and presumably Missouri's adoption and putative father registry statutes were crafted with this guiding principle in mind. While maintaining the natural parent-child relationship will often be in the child's best interests, unfortunately that is not always the case. As it stands, Baby Bond has no mother, and may go to live with a man whom she has never known,<sup>125</sup> failed to act within any of the relevant statutory time frames, provided no financial or emotional support, and directly contributed to her experiencing at least three placements within the first three months of her life.

The Missouri Supreme Court was satisfied that the putative father registry and adoption statutes will serve to expedite adoptions "in the great majority of cases."<sup>126</sup> The court failed to recognize that Missouri's putative father

119. § 210.822.

120. § 210.817.

121. § 210.823.

122. *In re N.L.B. v. Lentz*, 212 S.W.3d 123, 128 (Mo. 2007) (en banc).

123. *H.W.C. v. D.A.H. (In re M.F.)*, 1 S.W.3d 524, 532 (Mo. App. W.D. 1999).

124. 2 AM. JUR. 2D *Adoption* § 8 (2007) (stating that the purposes of adoption statutes include: to preserve and protect the best interests of the child, secure the best possible home for the child, and protect the interests of children whose parents are unable or unwilling to provide for their care).

125. Whether or not Baby Bond ultimately will be adopted or placed with her natural father is still to be determined as the Missouri Supreme Court reversed and remanded the case to the trial court. *Lentz*, 212 S.W.3d at 128.

126. *Id.* at 128.

registry and adoption statutes are aimed at preventing exactly what happened in the *Lentz* case. Allowing this father leave to intervene in the adoption and holding that his failure to meet all of the statutory deadlines was “but one factor to be considered” effectively obliterated the intent of the adoption statutes and rendered Missouri’s Putative Father Registry irrelevant. A putative father registry is irrelevant if a father who fails to timely register or to file a paternity action is granted party status to intervene in an adoption nonetheless. The very reason legislatures adopt strict statutory timelines in which unwed biological fathers must act is to secure timely permanence for children and prevent fathers like Lentz, who have not asserted paternity in any form, from disrupting that child’s opportunity for a stable and expeditious adoption. Legal finality and timely permanence are nowhere to be found for Baby Bond, who will probably end up with a father who took multiple steps to actively disown the child during the crucial first months of its life.

Denying Lentz leave to intervene in the adoption without a hearing on his parental fitness is entirely consistent with legislative intent behind the concept of a putative father registry,<sup>127</sup> as well as United States Supreme Court case law regarding the appropriate extent of a putative father’s rights. Such case law has established that the state may not arbitrarily treat unwed fathers differently from unwed mothers, nor may it automatically presume that all such fathers are strangers to their illegitimate children. However, when a biological father is not married to the mother, the Court has said it is not unconstitutional to place the burden upon him to establish a relationship with the child or to take other necessary steps to affirmatively assert paternity, such as registering with the putative father registry. When a father fails to take any of the multiple opportunities available to him, the state is not required to afford him the panoply of due process protections, such as a hearing on parental fitness, before his child may be adopted. Most importantly, it is not in the child’s best interests to be placed with a natural parent who has all but disowned the child in the first three months of life.

State legislatures face a difficult task in seeking to balance the rights of a putative father with a child’s best interests. The difficulty increases when the child is a newborn and the man has had fewer opportunities to demonstrate his commitment to the responsibilities of parenting. However, Missouri’s statutes explicitly state under what conditions a man may withhold consent to his child’s adoption.<sup>128</sup> Furthermore, United States Supreme Court case law has firmly established that when a putative father has not reached the “biology ‘plus’”<sup>129</sup> threshold established by *Lehr*, the state is free to con-

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127. See *supra* text accompanying note 106.

128. See *supra* notes 32-35 and accompanying text; see also MO. REV. STAT. § 453.030.3 (2006).

129. 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). Oren uses the term “biology ‘plus’” to refer to *Lehr*’s requirement

sider the best interests of the child without first evaluating parental fitness.<sup>130</sup> This formulation means that a state may deny *even notice* of an adoption to a man such as Lentz who has not taken action to bring himself to the constitutionally-protected side of the equation.<sup>131</sup>

Contrary to the *Lentz* court's belief, the circumstances of this case are not unusual.<sup>132</sup> What is unusual is the court's insistence on granting a father such as Lentz leave to intervene in an adoption and thereby thwarting not only the intent of Missouri's adoption scheme, but also the child's opportunities for a stable and prompt adoption. It is firmly established that the degree of protection a state must grant to a putative father depends upon the commitment which the father has demonstrated to his child.<sup>133</sup> Where the biological father of a child born out of wedlock has not filed a valid paternity action, registered with the putative father registry, or demonstrated a substantial commitment to the responsibilities of parenthood, he is not entitled to the additional constitutional protections available to diligent putative fathers. Therefore, he has no standing to withhold consent to the adoption of his child, and it is not a violation of his constitutional rights to deny such a father a hearing on parental fitness or to refuse to grant him leave to intervene in the adoption of his child.

LAUREN STANDLEE

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that a putative father "step forward and grasp the opportunity to develop a relationship with his child" in order for his rights to acquire constitutional protection. *Id.*

130. *Id.* at 159.

131. *Id.*

132. *In re N.L.B. v. Lentz*, 212 S.W.3d 123, 127 (Mo. 2007) (en banc).

133. Hussaini, *supra* note 111, at 199.