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Prenatal Abandonment: 'Horton Hatches the Egg' In the Supreme Court and Thirty-Four States

Mary M. Beck
Missouri University

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PRENATAL ABANDONMENT: 'HORTON HATCHES
THE EGG' IN THE SUPREME COURT
AND THIRTY-FOUR STATES

*Mary M. Beck**

This article addresses an issue critical to forty-one percent of fathers in the United States: prenatal abandonment. Under prenatal abandonment theory, fathers can lose their parental rights to non-marital children if they do not provide prenatal support to the mothers of their children. This is true even if the mothers have not notified the fathers of the pregnancy and if the mothers or fathers are unsure of the fathers' paternity. While this result may seem counter-intuitive, it is necessitated by demographic trends. Prenatal abandonment theory has been structured to protect mothers, fathers, and fetuses in response to a number of social factors: the link between pregnancy and increased rates of sexual assault, domestic violence, and domestic homicide; the high non-marital birth rate; the commonality of casual sexual relationships; the likelihood that non-marital children will live in poverty; and poverty's deleterious effects upon children.

The 2013 United States Supreme Court's decision in Adoptive Couple v. Baby Girl¹ endorsed prenatal abandonment theory and elevated the rights of pregnant women and fetuses while tying an unwed father's rights to the responsibilities he assumes from the moment of conception. This Article analyzes relevant socio-demographics and comprehensively reviews existing case law to conclude with recommendations for the structure of prenatal abandonment theory as it now exists in various forms in thirty-four states.

* Emeritus Professor of Clinical Law. Professor Mary Beck taught in Schools of Nursing and Medicine for thirteen years before joining the Missouri University law faculty in 1993, as Director of the Family Violence Clinic. Her work includes representing indigent domestic violence survivors and dying custodial parents in a law school-based practice; consulting in adoption, assisted reproductive technology, and surrogacy in a private law practice; serving as a faculty member and administrator in schools of nursing and medicine; working as a certified family nurse practitioner at the Columbia Free Clinic, at publicly funded walk in clinics, and at Missouri University Hospital and Clinics; representing clemency clients; and drafting multi-state and federal legislation involving birth parents' rights, adoption of children, stand-by guardianship, and domestic violence. She thanks her colleagues Rigel Oliveri and Paul Litton and research assistant Ross Valore for their assistance in developing this article.

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

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INTRODUCTION

Dr. Seuss was perhaps the first to recognize prenatal abandonment theory, the concept that a biological father forfeits his parental rights to a newborn by neglecting his parental responsibilities during the mother's pregnancy. In Seuss's 1940 classic book, *Horton Hatches the Egg*, Mayzie the bird pressures Horton the elephant to sit on her egg while she takes a brief break that turns into an extended rest on Palm Beach.² Horton steadfastly sits upon the egg, enduring jeers, threats, ice storms, seasickness, and ridicule.³ Just as the egg is hatching, Mayzie returns to claim her egg and to exclude Horton.⁴ Horton's heart is heavy and sad until the baby emerges as a tiny elephant with wings.⁵ The book's last page pictures a jubilant Horton holding up his winged baby elephant; Mayzie is not seen.⁶

Prenatal abandonment is in a state of evolution. Just as 1950s child support legislation dramatically altered fathers' responsibilities to non-marital children,⁷ recent state and federal legislation, as well as case law, has spurred a sea change in the rights and responsibilities of non-marital fathers. Today, thirty-four states have adopted prenatal abandonment laws, a trend the United States Supreme Court endorsed in 2013.

In *Adoptive Couple v. Baby Girl*,⁸ the Court extended its jurisprudence regarding unwed fathers' responsibilities to include the prenatal period.⁹ There, the Court withheld federal statutory protection for parental rights under the Indian Child Welfare Act (ICWA) from an unwed Native American father because he had prenatally abandoned his child and her mother by failing to support them during the pregnancy or otherwise to assume

2. DR. SEUSS, *HORTON HATCHES THE EGG* (3d ed. 1940). It is interesting that in this popular culture reference to prenatal abandonment, it is the mother who prenatally abandons her child, a biologically impossible feat for human birth mothers. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See CARMEN SOLOMON-FEARS, Cong. Research Serv., RL 34756, NON-MARITAL CHILDBEARING: TRENDS, REASONS, AND PUBLIC POLICY INTERVENTIONS 31-32 (2008); Brief for the American Academy of Adoption Attorneys as Amici Curiae in Support of Petitioners at 7, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399).

8. *Adoptive Couple*, 133 S. Ct. at 2552.

9. See *Adoptive Couple*, 133 S. Ct. at 2565.

custody of the child after birth.¹⁰ After *Adoptive Couple*, non-support constitutes prenatal abandonment.¹¹ This is a crucial holding for pregnant women and their fetuses.

This seminal case provides valuable protections for non-marital fathers. If a man can forfeit his constitutional parental rights by ignoring his parental duties even before birth, the rational conclusion is that a man can secure parental rights under the Constitution by fulfilling his prenatal responsibilities. In so doing, a non-marital father preserves his right to consent or withhold consent to the baby's adoption after birth. Thus, properly deployed, prenatal abandonment theory forms the basis of sound law that protects each parent and the child.

However, social realities confound the application of prenatal abandonment theory, particularly when states are developing rules for its implementation. Forfeiture laws must span the full expanse of circumstances leading to the waiver of parental rights while recognizing certain mitigating factors.¹² For example, when is a man on notice that he has or might have parental responsibilities to an unborn fetus or child? Does the mother know the identity of the father, due to the circumstances in which a child was conceived? May the mother fear identification and notification of the father due to sexual assault or domestic violence?

Forty-one percent of American children are born out of wedlock.¹³ For these children, no father is presumed by law at birth, and it is difficult to determine paternal responsibility to provide child support. Determining

10. *Adoptive Couple*, 133 S. Ct. at 2552. The implications of prenatal abandonment on the applicability of ICWA are beyond the scope of this Article. In summary, the Supreme Court of the United States held that 25 U.S.C. 1912(f) on involuntary termination of parental rights did not apply to Father because he had never had custody of Baby Girl. *Id.* at 2559–62. Next, the Court looked at 25 U.S.C. 1912(d), finding that remedial efforts for parents did not apply to Father because he had abandoned Baby Girl before birth and never exercised custody of her. *Id.* at 2565–64. The Court then reasoned that 25 U.S.C. 1915(a) on adoptive preferences did not apply because no other Indian family had formally petitioned to adopt Baby Girl. *Id.* at 2574–77.

11. *Adoptive Couple*, 133 S. Ct. at 2552. *See also id.* at 2574–77 (Sotomayor, J., dissenting) (restating the majority's holding that where a father fails to support the child financially or emotionally, the child will be considered abandoned, and the relationship is discontinued). Sotomayor also notes in her dissent that the Court's "discussion focuses on Birth Father's particular actions, but nothing in the majority's reasoning limits its manufactured class of semiprotected ICWA parents to biological fathers who failed to support their child's mother during pregnancy." *Id.* at 2578.

12. *See* GA. CODE ANN. § 19-8-12(B)(4) (Westlaw through 2016 Sess.); IDAHO CODE ANN. § 16-1504(2)(B)(III) (Westlaw through 2016 Reg. Sess.); N.J. STAT. ANN. § 9:17-43(3) (Westlaw through 2017).

13. Joyce Martin et al., *Births: Final Data for 2011*, 62 NAT'L VITAL STAT. REP. 1, 9 (2013).

when unwed fathers maintain their statutorily protected parental rights, such that their consent to adoption should be required, is even more complicated. This paper posits that public policy demands that men be obligated to inquire of their sexual partners whether pregnancy resulted from sexual intercourse and that women be simultaneously relieved of the obligation to notify men of pregnancy or paternity. The threat of domestic violence and homicide places too great a burden on mothers. And men have too much to lose by relying upon women whose ability and willingness to notify men of impending fatherhood vary greatly. Any legislation that requires women to notify men of pregnancy or adoption refuses to recognize the serious dangers that domestic violence and domestic homicide pose for pregnant women and their fetuses. Moreover, any such legislation ignores new social norms regarding female sexuality—namely, that casual encounters can lead to multiple potential fathers.

In light of these social realities, this Article takes up three important questions regarding prenatal abandonment theory. First, what is the moral justification for permitting prenatal abandonment when it extinguishes the parental rights of a biological parent even before a baby is born? Second, what is the current state of the law of prenatal abandonment theory and how is it currently implemented throughout the country? Third, what *should* such laws look like if they are to adequately protect the needs, interests, and rights of unwed mothers, fathers, and their children?

This Article begins with the justification for prenatal abandonment theory, explaining the contemporary social and familial relationships that demand it. While contemporary social realities necessitate prenatal abandonment theory, they also complicate its implementation. Part II reviews the facts, holding, and opinions in *Adoptive Couple v. Baby Girl*, the seminal Supreme Court case on this issue. Part III then provides a thorough account of existing federal and state law, including precedent that might clarify the conditions under which non-marital fathers' parental rights are protected or forfeited. A complete list of relevant state law is provided in the Appendix. In light of the social demands outlined in Part I and the complicated tapestry of existing state and federal law surveyed in Parts II, III, and the Appendix, Part IV concludes that all states should enact prenatal abandonment laws with three specific features: a requirement that the non-marital father inquire if sex led to pregnancy and self-identify as the father; a requirement that the father pay prenatal support or waive parental prerogatives; and protection for the parental prerogatives of those non-marital fathers who do provide prenatal support.

PART I. SOCIETAL BACKGROUND: DEMOGRAPHICS OF CONTEMPORARY
SOCIETY AND RELATIONSHIPS

The demographics of contemporary society necessitate prenatal abandonment law but also confound it. Pregnancy and parenthood can both impoverish single women and endanger the physical safety of single mothers, fetuses, and children. This necessitates the financial support of non-marital fathers during pregnancy as well as after birth.¹⁴ However, the rise of non-marital births is associated with reduced paternal involvement, including emotional and financial support. Children suffer poorer developmental outcomes as a result.¹⁵

Today, a father's ability to receive notice of an adoption action is complicated by the fact that parents are less likely to be married¹⁶ and less likely to know the identity of the fetus's father than in previous years.¹⁷ Further, this Section documents the ways in which sexual assault, domestic abuse, and domestic homicide drive women's choices in responding to pregnancy, childbirth, and the identification of fathers.¹⁸ The contours of prenatal abandonment theory must incorporate recognition of these social realities and dangers.

1.1 Establishing Genetic and Legal Paternity of Non-Marital Children

Non-marital children comprise forty-one percent of births in the United States. The rate of non-marital births varies among demographic groups—for example, seventy-two percent of non-Hispanic Black mothers are unmarried, as are eighty-eight percent of teenage mothers.¹⁹ The Census Bureau reports that Utah has the lowest non-marital birth rate, that Washington, D.C. has the highest, and that non-marital births have climbed steadily since the 1940s.²⁰ The trend has shown no signs of reversing. Data shows that an unmarried mother is both most likely to be the custodial parent of her child and most likely to relinquish a child to adoption.²¹

14. See *infra* Section 1.5.

15. See *infra* Section 1.6.

16. See *infra* Section 1.1.

17. See *infra* Section 1.2.

18. See *infra* Sections 1.3, 1.4.

19. Martin et al., *supra* note 13, at 41.

20. Steven Nelson, *Census Bureau Links Poverty With Out-of-Wedlock Births*, U.S. NEWS & WORLD REP. (May 6, 2013), <http://www.usnews.com/news/newsgram/articles/2013/05/06/census-bureau-links-poverty-with-out-of-wedlock-births>.

21. TIMOTHY S. GRALL, U.S. CENSUS BUREAU, P60-240j, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT 2009, 1 (2011).

In sum, the typical American family is no longer comprised of a married mother and father living with their children, and this change is an immutable reality for just under half of America's children.²² The implication of the high non-marital birth rate is that forty-one percent of all children may be born without the financial and developmental security provided by two involved parents.

Identification of the father is a critical step in obtaining child support and prenatal reimbursement after birth. Genetic paternity must be confirmed or agreed upon and legal paternity established before the state or a parent can enforce child support payments or order custody and visitation.²³ Yet fathers may resist establishment of paternity to avoid paying child support, at least until their genetic paternity is confirmed by DNA testing. Non-invasive, at-home paternity kits are available for as little as \$90 on the Internet, and do not require the intervention of a physician.²⁴ However, genetic confirmation of paternity does not establish legal paternity, which must be ascertained by paternity action or completion of a Voluntary Acknowledgement of Paternity Affidavit (VAPA).²⁵ VAPAs require witnessing or notarization of both parents' signatures as well as the mother's husband's signature if she is married to someone other than the child's father.²⁶ These forms are freely available and free to complete, and they may be completed without legal counsel.²⁷ Both confirmation of genetic paternity and legal establishment of paternity can be affordably accomplished by the parties themselves.

22. Natalie Angier, *The Changing American Family*, N.Y. TIMES, Nov. 26, 2013 at D1-D8. Stating:

The nation's birthrate is half of what it was in 1960, and last year it hit its lowest point ever. As steep as the fertility decline has been, the marriage rate has fallen more sharply, particularly among young women, who do most of the nation's childbearing. As a result, 41 percent of babies are now born out of wedlock, a fourfold increase since 1970.

Id. at D2.

23. See, e.g., MO. REV. STAT. § 210.823 (Westlaw through 2016 Reg. Sess.); Jeffrey A. Parness & Zachary Townsend, *The Price of Pleasure: Children Hurt Too*, 14 J. L. & FAM. STUD. 245, 253 (2012) ("Every state is already obligated (as a condition to the receipt of federal funds) to provide most unwed fathers with an opportunity to acknowledge paternity at birth.").

24. See *About*, HOMEDNA, <https://homedna.com/about/> (last visited Feb. 5, 2017).

25. VAPA forms are available online with instructions. See *Acknowledgement of Paternity for a Child Born to an Unmarried Woman*, N.Y. CHILD SUPPORT ONLINE 2, <https://www.childsupport.ny.gov/dcse/pdfs/4418.pdf>.

26. See MO. REV. STAT. § 193.215.1 (Westlaw through 2016 Reg. Sess.).

27. See *Affidavit Acknowledging Paternity*, MO. DEP'T HEALTH & SENIOR SERVS., <http://www.selfrepresent.mo.gov/file.jsp?id=43978> (last visited Aug. 24, 2016).

While obtaining post-birth child support is complicated, obtaining prenatal support is much more complex. Prenatal DNA testing of a fetus for paternity is expensive and invasive in early pregnancy, and less reliable, though less invasive, in later pregnancy.²⁸ Invasive procedures such as chorionic villous sampling pose a risk to mother and fetus, and must be done with the costly intervention of a physician.²⁹ Noninvasive prenatal paternity testing on the mother's blood sample may only be accomplished after ten weeks of pregnancy.³⁰ This test is a fairly recent development and is not readily available in all laboratories, nor is it as reliable as testing samples from amniocentesis or chorionic villous sampling.³¹

In summary, timely identification of fathers is complicated by the genetic and legal requirements to determine paternity. While genetic and legal determination may be completed affordably and efficiently after birth, the process is more expensive and invasive during pregnancy. It must also be noted that all of the paternity testing techniques depend on the cooperation of the potential father(s) in order to obtain the required DNA sample.³² While no easy solutions exist, prenatal abandonment theory is a sensible response to protect non-marital children, their mothers, and their fathers.

1.2 Identifying Fathers in an Era of Casual Sex

The casual nature of sexual relationships today contributes to the rate of children born without identified fathers. For example, studies reveal that thirty-six percent of college students engage in casual sexual relationships, which may be labeled "friends with benefits," "one night stands," or some variant.³³ This social phenomenon complicates paternal identification in several key ways.

28. See *Blood (Non-Invasive) vs. Invasive Prenatal Paternity DNA Tests*, PRENATAL GENETICS CTR., <http://www.prenatalgeneticscenter.com/comparing-prenatal-test/compare/comparetable/> (last visited Apr. 3, 2017).

29. *Frequently Asked Questions*, PATERNITY TESTING CORP. (July 5, 2015), <http://www.ptclabs.com/faq>; *Tests and Procedures: Chorionic villus sampling*, MAYO CLINIC, <http://www.mayoclinic.org/tests-procedures/chorionic-villus-sampling/basics/risks/prc-20013566> (last visited Oct. 24, 2016).

30. See PRENATAL GENETICS CTR., *supra* note 28.

31. *Id.*

32. See *Paternity Testing*, PATERNITY TESTING CORP. (July 5, 2015), <http://www.ptclabs.com/paternity>. Paternity Testing Corporation does take pictures of those persons from whom they take samples for DNA testing. Men who wish to establish paternity should insist upon the test confirming the mother's maternity in order to verify that the testing was done on the correct woman/fetus. This may also make the process less expensive. *Frequently Asked Questions*, PATERNITY TESTING CORP. (July 5, 2015), <http://www.ptclabs.com/faq>.

33. *E.g.*, Melissa A. Bisson & Timothy R. Levine, *Negotiating a Friends with Benefits Relationship*, 38 ARCH. SEX BEHAV. 66 (2009).

Frequent and varied sexual partners around the time of conception impair identification of a fetus's father. Where several potential fathers exist, a woman's ability to identify the father of her fetus is also diminished by difficulties in identifying possible dates of conception. These difficulties include poor recall of her last menstrual period, the irregularity of her menstrual cycle, the wide variation in fertility during the menstrual cycle, irregularities in oral contraceptive use, and possible vaginal bleeding following conception.³⁴

Additionally, half of all pregnancies are unintended, and nearly half again end in abortion.³⁵ That means that a quarter of children born in the United States were not planned, so the need to identify a father may not have been anticipated. Women are less likely to be tracking their ovulation when conception occurs unintentionally, which is more likely in casual sexual relationships. Untimed ovulation impairs identification of a father. And both men and women may be misled in attempts to identify a fetus's father when they incorrectly assume that contraceptives are infallible. For example, in 2014, the Centers for Disease Control reported that the failure rate of the male condom was a full eighteen percent, largely due to incorrect usage.³⁶ More recent data suggests condom failure rates of thirteen percent.³⁷

Finally, problems identifying fathers not only arise from casual encounters, ignorance of reproductive physiology, failure to track menstrual cycles, and contraceptive failures, but also from mothers' legal privacy right to withhold the name or possible names of their children's fathers.³⁸ This privacy right has its roots in United States Supreme Court jurisprudence,³⁹ and has been ratified by at least one state court in adoption cases where fathers have not assumed prenatal responsibilities.⁴⁰ When fathers have not

34. See Linda Hunter, *Issues in Pregnancy Dating: Revisiting the Evidence*, 54 J. MID-WIFERY WOMEN'S HEALTH 184 (2009).

35. Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities*, 84 CONTRACEPTION 478, 478 (2011).

36. *Effectiveness of Family Planning Methods*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 7, 2014), http://www.cdc.gov/reproductivehealth/contraception/unintendedpregnancy/pdf/contraceptive_methods_508.pdf. The CDC divides contraceptive failure rates into 'perfect use' and 'typical use.' Barrier contraceptives have failure rates of up to 28%; male condoms 18%; and IUD's, oral contraceptives, implants, cervical rings, etc. have failure rates varying from .05-9%. *Id.*

37. Aparna Sundaram et al., *Contraceptive Failure in the United States: Estimates from the 2006-2010 National Survey of Family Growth*, Persp. on Sexual & Reprod. Health (Guttmacher Inst.), Mar. 2017, at 7. The overall rate of failure for reversible birth control methods from 2006-2010 was ten percent, down from twelve percent in 2002. *Id.*

38. See *Lehr v. Robertson*, 463 U.S. 248 (1983).

39. See *Lehr*, 463 U.S. at 248.

40. See, e.g., *Evans v. S. Carolina Dep't of Soc. Servs.*, 399 S.E.2d 156, 157 (S.C. 1990).

established a relationship with their children or taken steps to legally assume responsibility for them, mothers' withholding of fathers' identities may not effectively thwart fathers' attempts to assume responsibility.⁴¹ But when mothers do thwart fathers, it imperils both fathers' rights and children's chances of finding stability through adoption.

1.3 Sexual Assault Resulting in Pregnancy

The ability or desire of pregnant women to identify potential fathers is further complicated in cases of sexual assault. A woman impregnated during a sexual assault may be less likely to know the father's identity, and may therefore be ill-equipped to fulfill any duty to inform him of the pregnancy. Even if the survivor knows the identity of her attacker, she may be reluctant to notify him about the pregnancy because she is outraged at the violation and because doing so may endanger her and the fetus.

While estimates vary, approximately eighteen percent of women in the United States will be raped during their lifetime.⁴² Under certain circumstances, a woman may be unable to identify and notify potential fathers of the resulting pregnancy.⁴³ For example, drug-induced rape may inhibit the survivor's memory of the attack or attacker.⁴⁴ In addition, fifteen percent of

41. See *M.C. v. T.W.*, 136 S. Ct. 2490 (2016); *In re Baby A*, 363 P.3d 193 (Colo. 2015), *cert. denied*. "Thwart" is commonly used in case law to describe this situation. Birth mother efforts to thwart birth fathers result in tort actions, disciplinary complaints against attorneys and agencies, and actions for fraud. See, e.g., *In re Krigel*, 480 S.W.3d 294, 300 (Mo. 2016); *Kessel v. Leavitt*, 511 S.E.2d 720, 809 (W.Va. 1998).

42. *Raising Awareness About Sexual Abuse: Facts and Statistics*, U.S. DEPT. JUST. NSOPW, <https://www.nsopw.gov/en-US/Education/FactsStatistics?AspxAutoDetectCookieSupport=1> (last visited Oct. 25, 2016).

43. See Patricia Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 132-33. Stories from rape survivors confirm that survivors of drug induced rapes may not recall the attack or the attacker:

She testified that she woke up the next morning naked, with male emissions on her body, leading her to believe that someone had had sex with her that evening. . . . Complainant's son testified that he was awakened by the shaking of the bed and saw a man he had never seen before in bed on top of his mother. He said the man's 'private part' was in his mom's 'private part.' His mother was naked and appeared to be asleep. She was not holding or kissing the man. . . . [S]he was dumped on the lawn in front of her home and was found by her father in a disoriented state; . . . she had no memory of the incident the night before. . . .

Id.

44. See *id.* at 132 ("He then penetrated her. When she was next conscious her underwear had been replaced. The appellant remarked, 'Do you remember that then? Don't worry you won't . . . later.'").

survivors are raped by strangers.⁴⁵ Considering that a survivor may have little-to-no memory of the attack or the rapist(s), or may not know her attacker(s), her ability to report the identity of her attacker(s) is limited.

As discussed in the next section, a woman who does know the identity of her attacker may nonetheless be reluctant to notify him about the pregnancy, as doing so may endanger her and the child. Further, she may be outraged, justifiably, by any suggestion that her attacker could have rights to the resulting child. Under such circumstances, several states, including New Jersey, Wisconsin, Nevada, and Oklahoma, have adopted provisions that terminate the parental rights of the father, deny him custody or visitation rights, or eliminate the notice requirement.⁴⁶

1.4 Domestic Violence and Domestic Homicide

The threat of domestic violence and domestic homicide for pregnant women and mothers cannot be overstated. Domestic violence is characterized by coercive control of a survivor through physical, sexual, psychological, or financial abuse.⁴⁷ While physical and sexual abuse are commonly recognized forms of domestic violence, psychological and financial manipulation are also legally cognizable forms of abuse.⁴⁸ Indeed, less visible abuse, such as putting a gun to a woman's head or withholding child support that finances rent and food, can control a woman as effectively as bruising blows.

45. THE WHITE HOUSE COUNCIL ON WOMEN & GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 9 (2014).

46. *Shepherd v. Clemens*, 752 A.2d 533, 540 (Del. 2000). Stating:

New Jersey, Wisconsin, Nevada and Oklahoma are a few of the states that have provisions either terminating the parental rights of the father who conceived a child as a result of a sexual assault, denying custody or visitation to the father, or eliminating the father's right to notice of the impending adoption of the child.

Id. See also *In re Adoption of C.A.T.*, 47 Kan. App.2d 257 (Kan. Ct. App. 2012); *LeClair v. Reed ex rel. Reed*, 182 Vt. 594 (Vt. 2007).

47. Off. on Violence Against Women, *Domestic Violence*, U.S. DEPT. JUST., <http://www.ovw.usdoj.gov/domviolence.htm> (last visited Feb. 20, 2013).

48. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 897 (1992); ELIZABETH M. SCHNEIDER ET AL., *DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE* 7 n.1 (2d ed. 2008). See also *Economic Abuse Fact Sheet*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, <http://www.ncadv.org/files/EconomicAbuse.pdf>. Stating:

Victims of domestic violence may be unable to leave an abusive partner or may be forced to return to an abusive partner for economic reasons. Victims of coerced debt may face massive barriers to economic self-sufficiency, including struggling to find a job or even obtaining a place to live after leaving an abuser due to debt and its detrimental effects on their personal credit scores.

Id.

The risk of injury and death to American pregnant women due to domestic violence is not speculative. Conservative estimates suggest that one in every four women will experience domestic violence in her lifetime.⁴⁹ The FBI reports that thirty-seven percent of all women murdered in the United States in 2013 were murdered by an intimate partner.⁵⁰ Abuse is exacerbated during pregnancy.⁵¹ Homicide is the second leading cause of death for pregnant women.⁵² Overall, thirty-one percent of all deaths of pregnant and postpartum women result from domestic violence.⁵³

Pregnancy renders a woman uniquely vulnerable to physical, emotional, and financial abuse, and an abusive father can *de facto* use the pregnancy as a vehicle to control the mother.⁵⁴ A pregnant woman's physical state is altered by weight gain, displaced center of gravity, and increased blood volume, workload on her heart and lungs, need for food, and fatigability.⁵⁵ These physiological effects of pregnancy impede a mother's ability to support and protect herself and the fetus, who she is possibly more motivated to protect than herself. The mother's emotional state is vulnerable because the demands of pregnancy make her reliant upon others for assis-

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49. See U.S. DEP'T JUST., NCJ 181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (2000); NAT'L COAL. AGAINST DOMESTIC VIOLENCE, DOMESTIC VIOLENCE NATIONAL STATISTICS (2015) ("1 in 3 women and 1 in 4 men have been physically abused by an intimate partner."); *Violence Against Women Fact Sheet*, WORLD HEALTH ORG. (2016), <http://www.who.int/mediacentre/factsheets/fs239/en/> ("Almost one third (30%) of women . . . report that they have experienced some form of . . . violence by their intimate partner in their lifetime.").
 50. U.S. DEP'T JUST., CRIME IN THE UNITED STATES, 2013 (2014). The percentage of women murdered by intimate partners has been estimated to be as high as fifty percent by some studies. See, e.g., Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NIJ J. 14, 18 (2008).
 51. Rebekah Kratochvil, *Intimate Partner Violence During Pregnancy: Exploring the Efficacy of a Mandatory Reporting Statute*, 10 HOUS. J. HEALTH L. & POL'Y 63, 65 (2009).
 52. *Id.*
 53. Donna St. George, *CDC Explores Pregnancy-Homicide Link*, WASH. POST, Feb. 23, 2005, at A05; accord Kratochvil, *supra* note 49 (reporting that the first or second leading cause of death for pregnant women is domestic homicide); see generally Casey, 505 U.S. at 889 ("The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy."); Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 670-72 (2006) (noting between 3.9% and 20% of pregnant women are abused).
 54. See *Domestic Violence*, OFF. ON VIOLENCE AGAINST WOMEN, U.S. DEP'T JUST., <http://www.ovw.usdoj.gov/domviolence.htm> (last visited Feb. 20, 2013) (defining abuse in part as coercive control of a survivor.).
 55. See Haywood L. Brown, M.D., *Physical Changes During Pregnancy*, MERCK MANUAL, http://www.merckmanuals.com/home/womens_health_issues/normal_pregnancy/physical_changes_during_pregnancy.html (last visited Apr. 20, 2017).

tance and support. Her financial state is vulnerable because of the monetary demands of pregnancy, including lost wages from morning sickness, fatigability, frequent doctor visits and medical tests, doctor-ordered bed rest, hospitalization for parturition, and six-to-eight weeks of unemployment during postpartum recovery.⁵⁶

The shocking rates of domestic and sexual abuse, combined with the physiological effects of pregnancy, demonstrate that domestic and sexual abuse and domestic homicide are inescapable terrors for pregnant women, who render themselves uniquely vulnerable to violence due to the obligations they assume when they elect to continue pregnancies or seek to protect fetuses and newborns. With pregnancy and identification of a father linked to heightened risks of abuse and homicide, a woman may wish to avoid both identifying the father and giving him actual notice of the pregnancy. In light of this, Congress developed an exception to a mother's obligation to name the father of her child for government use in enforcing child support in cases where danger to mother and child exists.⁵⁷

1.5 *Payment of Prenatal and Child Support: History and Demographics*

As she plans for her future and the future of her children, a pregnant woman may use the payment, or nonpayment, of prenatal support to forecast whether a father will pay child support after the birth. Within the conceptual structure of prenatal abandonment theory, the absence of prenatal support may vest mothers with the power to relinquish children to adoption without interference from fathers.

The payment of child support is intended to lift children out of poverty and thus to avoid poverty's deleterious effects.⁵⁸ Single custodial parents and their children are more likely to experience poverty, with twenty-eight percent of such parents reporting below-poverty incomes.⁵⁹ The financial burden of parenthood disproportionately falls on the shoulders of single women; single mothers comprise eighty-three percent of the single custodial parents of non-marital children.⁶⁰ Poverty harms the children of single par-

56. See Shari Motro, *Preglimony*, 63 STAN. L. REV. 647, 648 (2011).

57. Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1974); SOLOMON-FEARS, *supra* note 7, at 4; see also Jacqueline M. Fontana, *Cooperation and Good Cause: Greater Sanctions and the Failure to Account for Domestic Violence*, 15 WIS. WOMEN'S L.J. 367, 372-74 (2000) (tracing the legislative history of the good cause exception enabling women not to name fathers in order to escape abuse).

58. A 1996 welfare theory posited that poor women could escape poverty by child support. See, e.g., Stacy Brustin, *Child Support: Shifting the Financial Burden in Low-Income Families*, 20 GEO. J. ON POVERTY L. & POL'Y 1 (2012).

59. GRALL, *supra* note 21 at 1.

60. See *id.*

ents, causing poorer developmental outcomes and lower educational achievement.⁶¹ Specifically, the effects of poverty on children include poor academic performance,⁶² higher school dropout rates,⁶³ and increased incidences of abuse/neglect,⁶⁴ behavioral and socio-emotional problems,⁶⁵ physical health problems, and developmental delays.⁶⁶

Poverty's effects on the children of single mothers are exacerbated by the fact that non-marital fathers consistently fail to support their children.⁶⁷ In 2009, census data indicated that only forty-one percent of custodial parents received full child support.⁶⁸ Similarly, 5.6 million mothers were due child support in 2011, but only three-quarters received any portion of the amount due.⁶⁹ The census does not report the payment of prenatal support, and full payment of prenatal support may be even rarer than full payment of child support. Fathers have not been historically obliged to pay pregnancy expenses or mothers' prenatal support, so we may expect that fathers' reluctance to provide prenatal support mirrors fathers' documented resistance to providing child support.⁷⁰

Per the dictates of biology, mothers are the parents who are pregnant and present at birth. Thus, mothers' names are automatically listed on birth certificates, which are prepared at birth.⁷¹ Mothers are always responsible for

61. Nicholas Kristof, *Modern Family Matters*, N.Y. TIMES, Jan. 23, 2014, at A27 (positing that society and politicians are reluctant to address the problem of single parenthood for fear of being accused "of being moralists, racists, anti-woman, anti-freedom, supporting government decisions into personal decisions"; that conservatives are right to highlight family stability as critical to welfare of children; that "liberals are often too politically correct to address the issue at all"; and that the answers lie in family planning, undoing mass incarceration trends, and "outreach efforts and job programs that give young people a lift and stake in the future").

62. Jeanne Brooks-Gunn & Greg J. Duncan, *The Effects of Poverty on Children*, 7 FUTURE CHILD. 55, 57–62 (1997).

63. *Id.* at 58.

64. *Id.* at 59.

65. *Id.* at 58.

66. *Id.*

67. See *Enforcing Child Support Orders: Dealing With a Deadbeat Parent*, DIVORCENET, <http://www.divorcenet.com/resources/child-support/enforcing-child-support/enforcing-child-support-options-dealing-non-payment> (last visited Oct. 25, 2016) (reviewing the custodial parent's options to get support); GRALL, *supra* note 21 at 9 (finding that child support receipt rates are falling).

68. See GRALL, *supra* note 21, at 1 ("Custodial parents receiving the full amount of child support due declined between 2007 and 2009, from 46.8 percent to 41.2 percent.").

69. See GRALL, *supra* note 21, at 1.

70. See generally Motro, *supra* note 56, at 647.

71. *In re M.M.M.*, 428 S.W.3d 389 (Tex. App. 2014) (holding that a mother listed on the child's birth certificate is the woman who gave birth to the child, upholding an order adjudicating the mother as the parent, and concluding that under the Uniform Parentage Act, a woman is a mother if she gives birth to the subject child).

their own prenatal support, and are always liable for child support because they are always identifiable on the birth certificate for child support enforcement. Concomitantly, in many jurisdictions, non-marital mothers are in sole control of children born out of wedlock, until and unless paternity is legally established.⁷² Historically:

Men had no legal obligations to women with whom they conceived out of wedlock. Today, the same rule holds in cases in which the woman terminates an unintended pregnancy – the man owes her nothing. . . . Most states require unwed fathers to participate in the ‘reasonable expenses’ of pregnancy . . . which are generally limited to expenses that directly benefit the subsequently born child.⁷³

Today, a non-marital father continues to have no automatic legally-recognized rights to or responsibilities for his born child.⁷⁴ He is not a legally-recognized father unless he, the mother, or the state’s Child Support Enforcement Office legally establishes his paternity.⁷⁵ However, even the father whose paternity is not legally established maintains constitutional protection of his parental rights by the establishment of a significant financial, custodial, and personal relationship with the fetus (via the mother) or child.⁷⁶

A man can legally establish paternity by filing a paternity action that culminates in a judgment of paternity, or by completing a Voluntary Acknowledgment of Paternity Affidavit (VAPA).⁷⁷ VAPA forms are kept in

72. See, e.g., *Adoptive Couple v. Baby Girl*, 133 U.S. 2552, 2573 (2013).

73. Motro, *supra* note 56, at 651.

74. See, e.g., MO. REV. STAT. § 210.822 (Westlaw through 2016 Reg. Sess.).

75. Cf. MO. REV. STAT. § 210.823 (Westlaw through 2016 Reg. Sess.) (providing for the voluntary acknowledgment of a paternity affidavit).

76. See Parness & Townsend, *supra* note 23, at 251 n.50 (2012) (citing *Lehr v. Robertson*, 463 U.S. 248, 262 (1983), where the court noted that for unwed sexual partners who conceive, the mother is always a legal parent at birth while the father can only become a parent under law by developing custodial, emotional or financial ties).

77. See MO. REV. STAT. § 210.823 (Westlaw through Nov. 4, 2014). Stating:

1. A signed acknowledgment of paternity form pursuant to section 193.215 shall be considered a legal finding of paternity subject to the right of either signatory to rescind the acknowledgment, in writing, by filing such rescission with the bureau within the earlier of: (1) Sixty days from the date of the last signature; or (2) The date of an administrative or judicial proceeding to establish a support order in which the signatory is a party. The acknowledgment may thereafter only be challenged in court on the basis of fraud, duress or material mistake of fact with the burden of proof upon the challenger. No judicial or administrative proceeding shall be required or permitted to ratify an unchallenged acknowledgment of paternity. 2. Except

birthing hospitals and are often completed there by fathers attending the births of their children.⁷⁸ All fifty states must provide VAPA forms as a condition of receiving federal funds.⁷⁹ The forms are also commonly found on the Internet.⁸⁰ A father has two options to list his name on a birth certificate: a paternity judgment or a completed VAPA. Inclusion on a birth certificate identifies the father for child support enforcement purposes. However, a father may not attend his child's birth, where it is convenient to execute a VAPA, or he may not wish to execute a VAPA because of attendant child support responsibilities. The failure to complete a VAPA complicates and postpones the collection of child support and the identification of men with parental rights.

Analysis indicates that federal and state programs to establish paternity and collect child support have become increasingly aggressive.⁸¹ While this may seem to bode well for the ability of single parents to support their children, schemes such as criminal penalties for failure to pay support or the conditioning of public benefits on a mother's willingness to establish parentage have been shown to negatively impact both custodial and noncustodial parents.⁸² These efforts are negatively associated with the engagement of fathers with their children, reducing father-child visitation.⁸³

for good cause shown, the legal responsibilities of the parties, including child support obligations, shall not be suspended during the pendency of any action in which an attempt is made to revoke the signed acknowledgment under this section. 3. The acknowledgment shall be filed with the bureau. An acknowledgment effectuated under the law of any other state or territory shall be given the same effect in this state as it has in the other state or territory.

Id. VAPA forms were also discussed earlier in this Article. *See supra* Section 1.1.

78. *See* MO. ANN. STAT. § 193.087 (Westlaw through 2016 Reg. Sess.) (providing the procedure for VAPA forms).

79. Parness & Townsend, *supra* note 23, at 253 ("Every state is already obligated (as a condition to the receipt of federal funds) to provide most unwed fathers with an opportunity to acknowledge paternity at birth"); *See also id.* at 253 n.64 (citing 42 U.S.C. § 666(a)(2) (2006)).

80. *See* discussion *infra* Section 4.3 ("The majority of states have now legislated putative father registries, where a man can register his intent to claim paternity . . . Registration is cheap (the cost of a letter) and can be completed easily on forms available online, in hospitals of birth, and . . . State Child Protective Agencies").

81. Laurie S. Kohn, *Engaging Men as Fathers: The Courts, The Law, and Father-Absence in Low-Income Families*, 35 CARDOZO L. REV. 511, 531 (2013).

82. *Cf. id.* at 531-534.

83. *See id.* at 533. A number of experimental programs exist to address this negative association, including "pass through" support payments not involving assignment of payments to the government and in kind support payments. *See id.* at 531-562.

Regarding this trend with trepidation, some progressive analysts argue that non-marital fathers are simply unable to meet their child support obligations due to fundamental changes in the job market penalizing undereducated men with very low pay.⁸⁴ They cite scholarly studies showing that men's education or job training provides lasting solutions to child support.⁸⁵

It is noteworthy that child support programs serve half of all children in poor families,⁸⁶ and that "Blacks and Hispanics . . . have poverty rates that greatly exceed the overall average."⁸⁷ This means that child support demands are greatest in poor families and that minorities are over-represented in poor families. Thus, child support obligations fall most heavily on racial minorities.

Poor and undereducated single mothers face even more substantial barriers to parenthood in the workforce than fathers do. Disparate pay is factored into calculation of child support and potential prenatal tax deductions. Men's earnings increase by six percent when they have children, while women's incomes decrease by four percent for each child they have.⁸⁸ This is in addition to the fact that, on average, women earn only eighty cents to every dollar men earn, and women of color earn even less.⁸⁹ In sum: men earn more than women, fathers earn more than mothers, and fathers fail to

84. See, e.g., Eduardo Porter, *Time to Try Compassion, Not Censure, for Families*, N.Y. TIMES (Mar. 4, 2014), <http://www.nytimes.com/2014/03/05/business/economy/time-to-try-compassion-not-censure-for-families.html> (arguing that "the job market has changed in such fundamental ways that many men" lacking in education can no longer fulfill marriage obligations or afford to pay child support").

85. To view one such study, see *How the Child Support System Affects Low-Income Fathers*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/human-services/how-child-support-affects-low-income-fathers.aspx> (last updated Sept. 2012). The President's Fatherhood Initiative has tackled the problem of absent fathers, including those avoiding child support. It has dedicated much of its budget to urging marriage as a fix for absent/non-supportive fathers, but research shows that investment in increasing the level of education of biological fathers would have a great effect on their commitment to the mothers of their children and financial ability to care for their children. See generally *The President's Fatherhood Pledge*, NAT'L RESPONSIBLE FATHERHOOD CLEARINGHOUSE, <https://www.fatherhood.gov/pledge> (last visited Feb. 11, 2017).

86. *Id.*

87. *Who is poor?*, INST. FOR RES. ON POVERTY, <http://www.irp.wisc.edu/faqs/faq3.htm> (last visited Aug. 20, 2016).

88. Claire Cain Miller, *The Motherhood Penalty vs. the Father Bonus: A Child Helps Your Career, if You're a Man*, N.Y. TIMES (Sept. 6, 2014), http://www.nytimes.com/2014/09/07/upshot/a-child-helps-your-career-if-youre-a-man.html?_r=0&abt=0002&abg=0.

89. *Pay Equity & Discrimination*, INST. FOR WOMEN'S POL'Y RES., <http://www.iwpr.org/initiatives/pay-equity-and-discrimination> (last visited Aug. 20, 2016). See also Ariane Hegewisch & Asha DuMonthier, *The Gender Wage Gap: 2015 Earnings Differences by Race and Ethnicity*, INST. FOR WOMEN'S POL'Y RES. (Mar. 2016), <http://>

pay child support. These factors disadvantage mothers and drive them and their children into a downward spiral of poverty.

Professor Shari Motro has promoted prenatal support payments to women as a means of compensating mothers for the harms associated with pregnancy, including psychological injuries, lost wages, maternity clothes, and childbirth classes.⁹⁰ In *Preglimony*, Professor Motro proposes a tax deduction for men paying such support.⁹¹ A tax deduction might serve to motivate fathers to assist the pregnant mothers of their children.

In summary, mothers ought to (and surely do) use the non-support of fathers during pregnancy, knowledge of fathers' failure to support existing children, and general knowledge of fathers' underpayment of child support to forecast the level of support they may expect once their children are born.⁹² Fact patterns from state case law, discussed in Part III of this Article, elucidate the resistance of some fathers to payment of child support.⁹³ Negative paternal attitudes toward support factor into a woman's relinquishment decision,⁹⁴ a decision that must be made during pregnancy. Thus, mothers rely upon prenatal abandonment theory to safeguard their unfettered rights to relinquish newborns to adoption.

www.iwpr.org/publications/pubs/the-gender-wage-gap-2015-earnings-differences-by-race-and-ethnicity.

90. See Parness & Townsend, *supra* note 23, at 245. See also Motro, *supra* note 5, at 929–31; Anahad O'Connor, *Really? The Claim: For a Difficult Pregnancy, Bed Rest is Best*, N.Y. TIMES (May 20, 2013, 2:49 PM), http://well.blogs.nytimes.com/2013/05/20/really-the-claim-for-a-difficult-pregnancy-bed-rest-is-best/?_r=0 (explaining that the need for support for lost wages is realistic in that “one out of five pregnant women in the United States is placed on bed rest, usually to help prevent complications like premature birth, hypertension and miscarriage”).
91. See generally Motro, *supra* note 56, at 682–97.
92. *E.g.*, the birth mother who relinquished her child in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), spoke with me the night before the Supreme Court oral argument. She explained that the father's refusal to support her during her pregnancy and his child support arrangements for his older child influenced her decision to relinquish her child. Conversation had on April 15, 2013.
93. See *infra* Section 3.3. See, *e.g.*, *Doe v. Attorney W.*, 410 So. 2d 1312, 1316 (Miss. 1982) (“[H]e demanded that she not use his name in applying for welfare assistance.”); *State ex rel. Lewis v. Lutheran Soc. Servs. of Wis. & Upper Mich.*, 227 N.W.2d 643, 646 (Wis. 1975) (“Rothstein's response to this was that he wanted to know the name of the doctor to make certain that his name could not be used on the birth certificate as the father of the child.”).
94. See, *e.g.*, *In re Infant Child Skinner*, 982 P.2d 670, 678 (Wash. Ct. App. 1999) (upholding the termination of a father's parental rights where the child's mother petitioned the court for termination because the father did not use the resources available to him to provide support for his child).

1.6 *The Status of Fathering in the United States*

Fathers play a crucial role in the development of children. However, with a marked decrease in paternal involvement in child-rearing, prenatal abandonment theory may provide a framework for pregnant women to make decisions regarding their children's future during pregnancy, rather than after birth.

In 2010, twenty-seven percent of fathers lived separately from their children; of these fathers, twenty-seven percent reported no visits with their children in a year, and another thirty-one percent reported less than monthly phone calls or emails.⁹⁵ Other reports indicate that forty percent of nonresident fathers have no regular contact with their children after the first year of life, with non-contact increasing to fifty percent after the child turns five.⁹⁶

Children whose fathers are involved with their rearing have higher IQ's, possess stronger cognitive abilities, and attain higher academic achievement through adolescence than children with uninvolved fathers.⁹⁷ This higher educational attainment is closely correlated with higher future income.⁹⁸ Children with involved fathers also demonstrate good physical and emotional health, better academic performance, pro-social behavior, fewer school behavior problems, and a tendency to avoid drugs, violence, and delinquent behavior.⁹⁹ Conversely, absentee and non-support-paying

95. See Gretchen Livingston & Kim Parker, *A Tale of Two Fathers: More Are Active, but More Are Absent*, PEW RES. CENT. SOC. & DEMOGRAPHIC TRENDS (June 15, 2011), <http://www.pewsocialtrends.org/2011/06/15/a-tale-of-two-fathers/>.

96. See Kohn, *supra* note 81, at 516.

97. Jeffery Rosenberg & W. Bradford Wilcox, *The Importance of Fathers and the Healthy Development of Children*, U.S. DEP'T HEALTH & HUM. SERVS. OFF. ON CHILD ABUSE & NEGLECT (2006), <https://www.childwelfare.gov/pubPDFs/fatherhood.pdf>.

98. Eduardo Porter, *A Simple Equation: Education = More Income*, N.Y. TIMES (Sept. 10, 2014), <http://www.nytimes.com/2014/09/11/business/economy/a-simple-equation-more-education-more-income.html>.

99. Rosenberg & Wilcox, *supra* note 97, at 12-13. Cf., Jessica Dixon Weaver, *The First Father: Perspectives on the President's Fatherhood Initiative*, 50 FAM. CT. REV. 297, 301 (2012). Stating:

It must be acknowledged that children raised by single parents do face greater risks in all areas of well-being, mostly because they are more likely to be poor. Because they are indigent, they are likely to grow up in poor housing located in unsafe neighborhoods, with low-achieving schools and few community supports. In addition to these tangible negative factors, the emotional or psychological effect of having no relationship with one parent can lead to early experimentation with drugs, alcohol and sex, as well as dropping out of school and subsequent criminal behavior. Once children enter the juvenile justice system, they are much more likely to go to prison once they reach adulthood. In contrast, children in two-parent homes tend

fathers disadvantage non-marital children, increasing the likelihood of an impoverished childhood and poor behavioral development.¹⁰⁰

If a father shows little inclination to support a woman during her pregnancy, she may assume that his disinterest will continue after birth. On this understanding, she may wish to consider alternative options for the fetus, including abortion or adoption. Because many of these decisions must occur during pregnancy, prenatal abandonment theory helps pregnant women extrapolate their current circumstances into the post-birth future to better inform their decisions.

1.7 Conclusions from Demographic Analysis

Reflecting upon the demographics outlined above, it is clear that non-marital mothers and their children operate at a disadvantage in contemporary society. Half of all pregnancies are unintended, and half of those end in abortion. Mothers are the likelier custodian of non-marital children, and many fathers abandon child support obligations, thereby impoverishing single custodial mothers and their children. Poverty is associated with poor developmental outcomes for these children. A single woman may be unable or unwilling to identify the father of her child, she may fear domestic abuse or homicide if she does so, or she may be outraged by any requirement to identify the man or men who might have fathered her children by rape.

Not surprisingly, single pregnant women are the most likely demographic to relinquish children to adoption.¹⁰¹ In making this decision, they

not to be as poverty-stricken as those in single-mother homes, and can therefore afford to live in better housing, located in safer neighborhoods, with higher-ranked schools and a number of community supports.

Id.

100. Marsha Garrison, *Child Support and Children's Poverty—A Review of Small Change: The Economics of Child Support*, 28 FAM. L.Q. 475, 503 (1994) (book review). Stating:

Exposure to a single-parent family has been correlated with an enormous number of social ills, including poor health, childhood behavioral problems, delinquency, reduced educational attainment, lower occupational status and income, and higher rates of poverty, early childbearing, and divorce. While these disadvantages do not result solely from reduced socioeconomic status, this factor appears to be the most important of the identifiable causes. Child support may not have the potential to lift already poor, or near poor, children out of poverty, but it can ensure that the economic hardship occasioned by family dissolution is equitably distributed among family members so that children do not suffer disproportionately.

Id.

101. See, e.g. C.A. Bachrach et al., *Relinquishment of premarital births: evidence from national survey data*, 24 FAM. PLANNING PERSP. 48 (1992); Lori Chambers, *Newborn*

may consider factors such as fathers' provision of prenatal support and the risk of abuse and homicide. For example, the mother in *Adoptive Couple v. Baby Girl*, discussed in depth in the next section, factored the father's refusal to pay prenatal support into her relinquishment decision.¹⁰²

Given these demographic and social forces, unmarried fathers should not rely on mothers to protect their paternal rights. Rather, unmarried fathers should protect their rights by affirmatively seeking information about a possible pregnancy, signing putative father registries, filing paternity actions or otherwise establishing paternity, and paying or arranging to provide documented prenatal support to the mothers of their children. A father who provides regular and significant prenatal support and assistance to the mother of his child ensures the best prenatal environment for his child and protects his parental rights under the United States Constitution. Importantly, while requiring affirmative steps from a woman exposes her to the significant risks of harm, requiring these affirmative steps from fathers is not associated with known risks of domestic violence or homicide.

PART II. ADOPTIVE COUPLE V. BABY GIRL

This decision was the first non-marital father's rights case decided by the United States Supreme Court in thirty years. While the Court's major holding regarded the application of the Indian Child Welfare Act, the case, with its common fact pattern of a non-marital father refusing to pay prenatal support, broadly speaks to the problems faced by many unwed mothers. More importantly, the Court's assumption that a non-marital father could abandon his fetus by failing to pay prenatal support, and that such abandonment might affect his parental rights, reflects the Court's tacit endorsement of prenatal abandonment theory. This holding implicitly validated the laws of thirty-four states and represents a shift towards systematic acceptance of the theory.

Adoption: Birth Mothers, Genetic Fathers, and Reproductive Autonomy, 26 CAN. J. FAM. L. 339 (2010).

102. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558 (2013). Birth Mother texted Biological Father in the sixth month of her pregnancy asking him to either pay support or terminate his parental rights. *Id.* "Biological Father responded via text message that he relinquished his rights." *Id.* This text exchange suggests Birth Mother used Birth Father's unwillingness to support her as a basis for an adoption plan.

2.1 *Adoptive Couple v. Baby Girl: Facts*

The following facts are undisputed. Baby Girl's biological mother ("Mother") was a single Hispanic woman with two other children.¹⁰³ She and Baby Girl's father ("Father") were engaged to be married when they conceived Baby Girl.¹⁰⁴ Father was a Cherokee Indian.¹⁰⁵ Mother notified Father of her pregnancy before her first prenatal appointment and asked him for support.¹⁰⁶ He refused to provide financial support until Mother married him (marriage would have increased Father's military pay),¹⁰⁷ which she refused to do.¹⁰⁸ Father had a history of failing to pay child support for his older child,¹⁰⁹ and he did not provide any support during Mother's pregnancy with Baby Girl despite Mother's repeated requests.¹¹⁰ At the time that he was served with the adoption petition, four months into Baby Girl's life, he had not provided any support to Mother or Baby Girl.¹¹¹

Father arranged for his friends to follow Mother when he suspected that she was dating someone else during the pregnancy,¹¹² but he ultimately ascertained that she was working 12-14 hour days in order to support herself and her older children.¹¹³ At the beginning of her third trimester, after multiple requests for support, Mother texted Father requesting that he either provide prenatal support or terminate his parental rights.¹¹⁴ Father responded to Mother via text that he would terminate his parental rights rather than pay child support to her.¹¹⁵ When asked at trial if his conduct was "conducive to being a father" he answered, "I don't believe so."¹¹⁶

Mother developed an adoption plan with a South Carolina adoptive couple ("Adoptive Parents") and the couple provided financial support to

103. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 553 (S.C. 2012), *rev'd* 133 S. Ct. 2552 (2013).

104. *See Adoptive Couple*, 133 S. Ct. at 2558.

105. *Adoptive Couple*, 133 S. Ct. at 2558.

106. *Adoptive Couple*, 731 S.E.2d at 553 n.4.

107. *Adoptive Couple*, 731 S.E.2d at 553 nn.3-4.

108. *Adoptive Couple*, 731 S.E.2d at 553.

109. *Adoptive Couple*, 731 S.E.2d at 550 ("The mother of his first child was forced to take court action after Father had amassed a child support arrearage of approximately \$11,000.").

110. *Adoptive Couple*, 731 S.E.2d at 569-70.

111. *Adoptive Couple*, 731 S.E.2d at 588.

112. Brief for Am. Acad. of Adoption Attorneys as Amicus Curiae in Support of Petitioners at 23-24, *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012) (No. 12-399).

113. Transcript of Record at 482-83, *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012).

114. *Adoptive Couple*, 731 S.E.2d at 569.

115. *Adoptive Couple*, 731 S.E.2d at 569.

116. *Adoptive Couple*, 731 S.E.2d at 570.

Mother during her pregnancy.¹¹⁷ Baby Girl was born in Oklahoma on September 15, 2009.¹¹⁸ Adoptive Parents attended the birth, where Adoptive Father cut the umbilical cord.¹¹⁹ Father knew Baby Girl's due date and the location of the Oklahoma hospital where she was to be born.¹²⁰ He did not inquire about delivery of the baby, nor did he visit Baby Girl or her Mother in the hospital at the time of delivery.¹²¹ Father did not pay any support until Baby Girl was sixteen months old,¹²² and he first asked for visitation with Baby Girl when she was twenty-two months old.¹²³

Meanwhile, Mother's attorney had inquired of the Cherokee Nation during the pendency of the pregnancy as to Father's status as an enrollee; however, the attorney misspelled Father's name as "Dustin" instead of "Dusten," and this resulted in the tribe's erroneous response that Father was not enrolled.¹²⁴ Father's Native American heritage was confirmed after the birth.¹²⁵ Baby Girl is 1.2% or 3/256 Cherokee.¹²⁶

Adoptive Parents applied to the Interstate Compact for Placement of Children ("ICPC") in Oklahoma and South Carolina.¹²⁷ They received ICPC approval in South Carolina, their state of residence, and filed an adoption petition there on September 18, 2009, three days after Baby Girl's birth.¹²⁸ On January 6, 2010, Father, still in Oklahoma, was served notice of the adoption petition.¹²⁹ On January 14, 2010, Father filed a paternity action in Oklahoma.¹³⁰ On March 16, 2010, Adoptive Parents successfully moved to dismiss the Oklahoma paternity action.¹³¹

The adoption proceeded in the South Carolina court.¹³² On March 30, 2010, Adoptive Parents amended their petition to acknowledge Father's Cherokee membership, and the Cherokee Nation filed a Notice of Intervention in the South Carolina adoption action on April 7, 2010.¹³³ Father's paternity was confirmed after the adoption court ordered paternity testing

117. *Adoptive Couple*, 731 S.E.2d at 570.

118. *Adoptive Couple*, 731 S.E.2d at 552.

119. *Adoptive Couple*, 731 S.E.2d at 554.

120. *Adoptive Couple*, 731 S.E.2d at 571 n.39.

121. *Adoptive Couple*, 731 S.E.2d at 554.

122. *Adoptive Couple*, 731 S.E.2d at 579.

123. *Adoptive Couple*, 731 S.E.2d at 578.

124. *Adoptive Couple*, 731 S.E.2d at 554.

125. *Adoptive Couple*, 731 S.E.2d at 555.

126. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2556 (2013).

127. *Adoptive Couple*, 731 S.E.2d at 554.

128. *Adoptive Couple*, 731 S.E.2d at 555, 570.

129. *Adoptive Couple*, 731 S.E.2d at 555.

130. *Adoptive Couple*, 731 S.E.2d at 555.

131. *Adoptive Couple*, 731 S.E.2d at 555.

132. *Adoptive Couple*, 731 S.E.2d at 559.

133. *Adoptive Couple*, 731 S.E.2d at 555, 572.

on May 6, 2010.¹³⁴ Father answered the adoption petition on May 25, 2010, stating he did not consent to the adoption.¹³⁵ The trial ran from September 12 to September 15, 2011.¹³⁶

Father never had legal custody of Baby Girl under South Carolina or Oklahoma law because she was born of a single woman; only Mother had legal authority over Baby Girl.¹³⁷

Under these facts, South Carolina law would have waived Father's consent because he had not paid prenatal support, but its courts held that ICWA trumped state law.¹³⁸

2.2 *Adoptive Couple v. Baby Girl: Opinions and Holdings*

On November 25, 2011, the South Carolina Trial Court issued an order finding that ICWA applied,¹³⁹ that the Existing Indian Family Doctrine exception to the ICWA requirements did not apply,¹⁴⁰ that Father did not consent to the adoption and his rights were not terminated,¹⁴¹ and that Baby Girl would not be seriously injured by transferring her custody to Father.¹⁴²

On December 31, 2011, Adoptive Parents transferred the twenty-seven-month-old Baby Girl to her father, whom she had never met.¹⁴³ He took her to Oklahoma.¹⁴⁴

On appeal, the South Carolina Supreme Court found that it had jurisdiction to decide the case over Oklahoma.¹⁴⁵ It also found that Father satisfied the ICWA definition of "parent," that Baby Girl satisfied the ICWA definition of "Indian Child," and that the Cherokee Nation is a "Federally Recognized Indian Tribe."¹⁴⁶ Thus, it held that ICWA applied to the case.¹⁴⁷ It further held that Father's rights could not be terminated, that the best interests of Baby Girl were served by granting custody to Father, and that the adoptive placement deviated from the ICWA placement prefer-

134. *Adoptive Couple*, 731 S.E.2d at 555.

135. *Adoptive Couple*, 731 S.E.2d at 556.

136. *Adoptive Couple*, 731 S.E.2d at 556.

137. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2562 (2013).

138. *Adoptive Couple*, 731 S.E.2d at 576–79 (Kittredge, J., dissenting).

139. *Adoptive Couple*, 731 S.E.2d at 556.

140. *Adoptive Couple*, 731 S.E.2d at 556.

141. *Adoptive Couple*, 731 S.E.2d at 556.

142. *Adoptive Couple*, 731 S.E.2d at 556.

143. *Adoptive Couple*, 731 S.E.2d at 556.

144. *Adoptive Couple*, 731 S.E.2d at 556.

145. *Adoptive Couple*, 731 S.E.2d at 559.

146. *Adoptive Couple*, 731 S.E.2d at 560.

147. *Adoptive Couple*, 731 S.E.2d at 559–60.

ences. It affirmed the trial court holding with a “heavy heart.”¹⁴⁸ Justices Kittredge and Hearn dissented at length.¹⁴⁹

On appeal, the United States Supreme Court overturned the South Carolina Supreme Court’s decision. The Court held that Father had prenatally abandoned Baby Girl and had never had custody of her, and thus it withheld the heightened parental protections of ICWA from him based upon 25 U.S.C. §§ 1912(d) and (f).¹⁵⁰

The United States Supreme Court held that Baby Girl was an “Indian Child” and that ICWA did apply, but it did not decide whether Father qualified as a “parent” under ICWA.¹⁵¹ “Rather, assuming for the sake of argument that he is a ‘parent,’ we hold that neither 25 USC 1912(f) nor 25 USC 1912(d) bar the termination of his parental rights.”¹⁵² The ICWA defines unwed fathers as follows:

(9) “[P]arent” means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. *It does not include the unwed father where paternity has not been acknowledged or established.*¹⁵³

Because Baby Girl’s father was not married to her mother, and because he had neither acknowledged Baby Girl nor established paternity, Adoptive Parents had argued that Father did not qualify as a “parent” under ICWA’s

148. *Adoptive Couple*, 731 S.E.2d at 565–67.

149. *Adoptive Couple*, 731 S.E.2d at 567–91.

150. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013). The Court held:

25 U.S.C. § 1912(f)—which bars involuntary termination of a parent’s rights in the absence of a heightened showing that serious harm to the Indian child is likely to result from the parent’s ‘continued custody’ of the child—does not apply when, as here, the relevant parent never had custody of the child. We further hold that § 1912(d)—which conditions involuntary termination of parental rights with respect to an Indian child on a showing that remedial efforts have been made to prevent the “breakup of the Indian family”—is inapplicable when, as here, the parent abandoned the Indian child before birth and never had custody of the child. Finally, we clarify that § 1915(a), which provides placement preferences for the adoption of Indian children, does not bar a non-Indian family like *Adoptive Couple* from adopting an Indian child when no other eligible candidates have sought to adopt the child.

Id.

151. *Adoptive Couple*, 133 S. Ct. at 2557 n.1, 2560.

152. *Adoptive Couple*, 133 S. Ct. at 2560.

153. 25 U.S.C.A. § 1903(9) (Westlaw through Pub. L. No. 114-219) (emphasis added).

heightened parental protections.¹⁵⁴ By instead “assuming *arguendo*” that Father was a “parent,” the Supreme Court ducked the questions of whether state or federal law controlled which non-marital fathers qualify as an ICWA “parent,” how the unwed father definition under ICWA should be analyzed, and whether South Carolina’s black letter law on prenatal abandonment—waiving father’s rights—could have resolved Father’s status under ICWA.¹⁵⁵ Consequently, *Adoptive Couple v. Baby Girl* does not resolve the issue of how to identify those fathers that ICWA protects.

The Supreme Court could have withheld ICWA parental protections from Father solely based upon his lack of custody after birth. This would have: 1) established the absence of the “continued custody” prong required under 25 U.S.C. § 1912(f)¹⁵⁶ because Father did not seek or obtain custody until after the adoption was filed; and 2) eliminated the need to provide remedial services required under 25 U.S.C. § 1912 (d) to prevent breakup of an Indian family because no Indian family existed absent father’s custody.¹⁵⁷ Instead, the Court repeatedly included Father’s prenatal abandonment in its calculus.¹⁵⁸

In so doing, the Supreme Court’s analysis of the prenatal abandonment followed the pattern previously set by state courts: considering every fact with any possible bearing upon fathers’ intentions to either assume or abandon parental responsibilities for their fetuses.¹⁵⁹ Holistic consideration of the circumstances has been deemed appropriate where a father’s constitutional parental rights are at risk.¹⁶⁰

154. See *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 560 (S.C. 2012).

155. *Adoptive Couple*, 133 S. Ct. at 2574 (Sotomayor, J., dissenting) (referring to arguments in the majority opinion at 2559–60).

156. 25 U.S.C.A. § 1912(f) (Westlaw through 2016 Pub. L. No. 114-219).

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Id.

157. 25 U.S.C.A. § 1912(d) (Westlaw through 2016 Pub. L. No. 114-219).

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Id.

158. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558, 2562–63, 2565 (2013).

159. See *infra* Section 3.2.

160. See *infra* Section 3.3.

Whereas the South Carolina Supreme Court explicitly recognized both Father's prenatal abandonment and South Carolina's extant law on prenatal abandonment, it did not rely on South Carolina's prenatal abandonment law to waive Father's rights.¹⁶¹

The United States Supreme Court did not rely on South Carolina's prenatal abandonment law, but it *did* rely on the patterns described by prenatal abandonment theory to arrive at its holding, validating the theory of prenatal abandonment law. The Court considered the father's prenatal abandonment with his failure to assume post-natal custody, using the prenatal and postnatal abandonment in tandem to support its ICWA analysis. In so doing, the Court extended the reach of its recognition of prenatal abandonment beyond South Carolina to other states without extant prenatal abandonment law. In essence, the Court made a failure to provide prenatal support undergird prenatal abandonment theory. And conversely, it suggested that a father's assumption of prenatal responsibilities is a relevant factor in deciding a father's rights in all newborn adoption cases and in all paternal rights cases.

To this end, Justice Alito's last paragraph of his majority opinion is noteworthy. Here, for the first time in his analysis, he discusses the issue of prenatal abandonment independently from the assumption of custody post-birth:

As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child *in utero* and refuse any support for the birth mother—perhaps contributing to the mother's decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. Such an interpretation would raise equal protection concerns, but the plain text of §§ 1912(f) and (d) makes clear that neither provision applies in the present context.¹⁶²

The idioms “play the ICWA trump card” and “at the eleventh hour” evoke images of gamesmanship and brinksmanship, respectively, and convey a sense of outrage at a lower court decision that would advantage a father's

161. *Cf. Adoptive Couple*, 133 S. Ct. at 2564 (arguing that “the South Carolina Supreme Court erred in finding that § 1912(f) barred termination of Biological Father's parental rights.”).

162. *Adoptive Couple*, 133 S. Ct. at 2565.

manipulative use of ICWA to reward his irresponsible pre-birth conduct. The paragraph is unnecessary to the opinion, as all issues had been decided before it. Thus, its inclusion underscores the Court's warning that such conduct imperils equal protection—equal protection that could only apply to mothers and children.

Deconstructed, the indignation expressed in the last paragraph included: first, that an unwed father could expect to wrest control of a newborn child from a mother who had maintained a pregnancy, had dedicated over nine months of her life to gestation and parturition, and who had subjected her health, job, and finances to gestating that fetus without contribution from the father; second, that the father might seek to control the very child for whom he had earlier refused any responsibility; and third, that a court might reward any father's self-serving, manipulative, and irresponsible conduct, particularly given how deeply such conduct can affect the lives of the mother and child. The Court's subsequent comments about dissuading adoption of Native American children¹⁶³ and raising equal protection concerns confirm the importance of Native American children's rights to adoption and permanency under federal constitutional law.¹⁶⁴ It would also surely apply to any state law or state court decision rewarding a father's similar actions affecting the welfare of any child or mother.

Justice Alito's words portend a broader application of prenatal abandonment theory extending beyond cases involving Native American children. The Court in *Adoptive Couple* used prenatal abandonment theory to withhold the extra protections reserved for the special class of Native American fathers. If prenatal abandonment can eliminate the heightened protections that Congress has provided parents of Native American children, it should also operate to block fathers who lack those heightened protections reserved for vulnerable populations. Thus, the Court made prenatal abandonment theory available to all non-marital fathers, mothers, and children.

Women should have the right to rely upon this prenatal abandonment theory by evaluating the pre-birth conduct of their children's fathers in making a post-birth plan. Thus, a father should not be able to sabotage an adoption plan based on his own pre-birth conduct. Children should have a right to prompt permanency decided by the parent(s) who have the legal parental prerogatives to exercise such control. Fathers should have the right

163. *Adoptive Couple*, 133 S. Ct. at 2564 (Justice Alito mentioned concerns regarding adoption of Indian children elsewhere as well: "And this would, in turn, unnecessarily place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home, even in cases where neither an Indian parent nor the relevant tribe objects to the adoption.").

164. *See Adoptive Couple*, 133 S. Ct. at 2564.

to protect their parental rights if they can prove they provided consistent and meaningful prenatal support commensurate to their ability to pay.

PART III. LEGAL BACKGROUND

This section documents the major trends in federal and state legislation and case law leading up to the present. Historically, “common law imposed no legal obligation on the putative father to support an illegitimate child under the doctrine of *nullius filius*.”¹⁶⁵ However, key federal legislation and jurisprudence have revised this presumption to account for the unique challenges faced by non-marital children,¹⁶⁶ weighed against the need to preserve parental rights.¹⁶⁷ Similar trends exist at the state level.¹⁶⁸ As is demonstrated in this section, the legal framework is ripe for explicit, across-the-board acceptance and adoption of prenatal abandonment theory.

3.1 Federal Legislation and Case Law

Two parallel theories defining the rights of non-marital fathers have emerged in federal legislation and jurisprudence during the last sixty years. First, the “biology plus” theory posits that an unwed father must have more than a mere biological relationship with his child in order to obtain constitutional protection of his parental rights.¹⁶⁹ While biology plus proved its value in cases regarding support obligations and paternal rights in children after birth, it is ill-suited to understanding such obligations and rights during pregnancy. In contrast, prenatal abandonment theory addresses this limitation by looking to the conduct of the father during pregnancy to determine the nature and extent of his parental rights. This section provides an overview of the emergence of the two theories in federal legislation and jurisprudence.

Congress and the Supreme Court worked in parallel, ultimately developing two theories that defined the rights of non-marital fathers: “biology

165. *In re T.J.S.*, 16 A.3d 386, 390 n.3 (N.J. Super. Ct. App. Div. 2011). See Brief for the American Academy of Adoption Attorneys as Amicus Curiae in Support of Petitioners at 7, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399).

166. SOLOMON-FEARS, *supra* note 7, at 4 (Congressional child support action addressed the facts that non-marital children lived in poverty, did poorly in school and experienced more emotional and behavioral problems).

167. See *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 92 S. Ct. 1208 (1972).

168. See *infra* Sections 3.2, 3.3.

169. See, e.g., Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 *FORDHAM L. REV.* 971, 976 (1992).

plus” and prenatal abandonment. The states adapted their statutes to reflect these theories.

“The evolution of unwed father law began in 1950 when Congress first enacted legislation requiring states to enforce child support—a requirement typically dependent upon mothers identifying fathers of non-marital children.”¹⁷⁰ These child support laws changed the historical norm by imposing parental obligations on unwed fathers. It was only a matter of time before the judiciary extrapolated the protection of parental rights from the imposition of paternal obligations. In 1972, the United States Supreme Court changed history by protecting an unwed biological father’s rights in *Stanley v. Illinois*.¹⁷¹ It also established that a father’s contribution to the lives of his children ought to be factored into a decision about his rights, as Peter Stanley had lived with his children and their mother for many years.¹⁷²

With the imposition of parental obligations and the protection of parental rights came the challenge of establishing paternity. In 1974, Congress “created specific state requirements for establishing paternity and child support . . . and established the cooperation requirement.”¹⁷³ This legislation also explicitly required mothers to identify unwed fathers. On one hand, this legislation facilitated paternal payment of child support, thus relieving the state of supporting poor women through welfare. However, it required a mother to identify the non-marital father regardless of her preference. This requirement was troubling in situations of abuse, violence, or fear of retribution against the mother for the levying of child support obligations. In response to such danger to mothers and children, Congress enacted a good cause exemption¹⁷⁴ waiving the identification requirement if it would “subject the child or mother to substantial danger or physical harm or undue

170. Brief for the American Academy of Adoption Attorneys as Amicus Curiae in Support of Petitioners at 7, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399).

171. *See Stanley v. Illinois*, 92 S. Ct. 1208, 1209–10 (1972).

172. Peter lived intermittently with Joan for 18 years and with the children for the duration of their lives. When Joan died, Peter had given the children to the Ness family, which prompts this author to wonder why he objected to the State’s intent to nominate the Ness’s as foster parents for the children. *See Stanley*, 92 S. Ct. at 1220 (Burger, J., dissenting).

173. Brief for the American Academy of Adoption Attorneys as Amicus Curiae in Support of Petitioners at 7, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399) (quoting Jacqueline M. Fontana, *Cooperation and Good Cause: Greater Sanctions and the Failure to Account for Domestic Violence*, 15 WIS. WOMEN’S L.J. 367, 372 (2000)). *Accord* Social Services Amendments of 1974, Pub. L. No. 93-647.

174. Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1974) (establishing the good cause exception for women not to name fathers in order to escape abuse). *See also* SOLOMON-FEARS, *supra* note 7, at 43–44; Fontana, *supra* note 57, at 372–74.

harassment.”¹⁷⁵ With this exemption, Congress recognized the link between abuse by fathers and child support.

The “biology plus” theory emerged from two United States Supreme Court decisions in the late 1970s. In *Quilloin v. Walcott*, the Court withheld constitutional protection for the parental rights of an unwed father who had never legitimated his son, taken custody of him, or shouldered significant responsibility for him.¹⁷⁶ This case marks the seeding of “biology plus”—a theory positing that an unwed father must have more than a mere biological relationship with his child in order to obtain constitutional protection of his parental rights.¹⁷⁷

In 1979, the United States Supreme Court decided *Caban v. Mohammed*, striking down a New York law that withheld the right to consent to adoption from an unwed father who had actively reared his two young children.¹⁷⁸ In these two cases, we see the Court beginning to recognize and uphold the constitutional parental rights of fathers who have more than a genetic relationship with their children.

The nascent “biology plus” theory became more defined in 1983. In *Lehr v. Robertson*, the Court upheld a New York law waiving notice of step-parent adoption to an unwed father who had not filed with the state’s putative father registry, had not established his paternity, and had not supported and rarely visited his two-year-old daughter.¹⁷⁹ The Court commented that:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of the responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship. . . . If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child’s best interests lie.¹⁸⁰

With these sentences, the *Lehr* court announced that putative father registry requirements passed constitutional muster and that constitutional protection was limited to those unwed fathers who assumed parental

175. 121 CONG. REC. 23,697 (1975). See also Mary R. Mannix et al., *The Good Cause Exception to the AFDC Child Support Cooperation Requirement*, 21 CLEARINGHOUSE REV. 339, 339 (1988).

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

177. Zinman, *supra* note 169, at 976.

178. *Caban v. Mohammed*, 441 U.S. 380, 394 (1979).

179. *Lehr v. Robertson*, 463 U.S. 248, 267–68 (1983).

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

responsibilities. New York had enacted an unwed father registry statute that provided a statutory bright line rule providing registered unwed fathers with rights to notice. The *Lehr* court found that the Constitution does not require notice of an adoption to unregistered fathers unless they exhibit a commitment to parenting in other ways.

Importantly, *Lehr* went further than previous Court decisions in identifying the type of paternal conduct that would signify “full commitment to the responsibilities of parenthood”¹⁸¹ affording responsible fathers protection under the federal Constitution’s due process clause. It did this by describing Mr. Lehr’s failures: “[Lehr] has never had any significant custodial, personal, or financial relationship with Jessica, and he did not seek to establish a legal tie until after she was two years old.”¹⁸² This sentence led to state standards defining the “plus” in the biology plus theory. “Thirty years later, at least forty-one states report cases using the father’s commitment to parenting as a standard to determine consent rights to adoption.”¹⁸³

However, the *Lehr* court left unanswered the question of how to identify a man who had constitutionally protected his parental rights to a child *in utero*. The Court obliquely answered this question six years later in *Michael H. and Victoria D. v. Gerald D.*¹⁸⁴ In this case, a married woman conceived a child in an extramarital affair while living with her husband, but subsequent to the birth lived intermittently with the child’s biological father, Michael H.¹⁸⁵ The Court upheld the constitutionality of a California law providing a presumption of legitimacy to a child born of a married woman cohabiting with a husband who was not impotent or sterile.¹⁸⁶ The plurality opinion imposed a prenatal limitation for constitutional protection of a non-marital father’s rights: where the married mother “is, at the time of the child’s conception and birth, married to and cohabiting with” her husband and the married couple wishes to raise the child as the offspring of their marriage.¹⁸⁷ The Court never used the word “prenatal” to describe this period of time, but the dissent highlighted that Michael H. did live sporadically with the mother and child after her birth and provided financial sup-

181. *Lehr*, 463 U.S. at 261.

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

183. Brief for the Am. Acad. of Adoption Attorneys as Amicus Curiae in Support of Petitioners at 15, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399). See Ardis L. Campbell, Annotation, *Rights of Unwed Father to Obstruct Adoption of His Child by Withholding Consent*, 61 A.L.R. 5th 151 (1998).

184. *Michael H. and Victoria D. v. Gerald D.*, 491 U.S. 110 (1989).

185. *Michael H.*, 491 U.S. at 113–15.

186. *Michael H.*, 491 U.S. at 131–32 (upholding CAL. EVID. CODE § 621 (1989) (repealed 1994)).

187. *Michael H.*, 491 U.S. at 129.

port for the child.¹⁸⁸ Thus, *Michael H.* may be read to support a theory that *prenatal support* would provide constitutional protection of a non-marital father's parental rights.

If any question was left after the *Lehr v. Robertson* and *Michael H.* opinions as to what conduct creates, or in the alternative, waives constitutional protection for a non-marital father's parental rights with his fetus or newborn child,¹⁸⁹ *Adoptive Couple* answered it. In its adoption of prenatal abandonment theory, the federal government was years behind the states. Indeed, the states had begun addressing important questions regarding sufficiency of support, and what support was required when the father doubted his paternity, long before the United States Supreme Court decided *Adoptive Couple v. Baby Girl*. The next Section examines the evolution of state legislation regarding prenatal parental obligations and rights, and Section 3.3 summarizes the key factors considered by state courts in applying such legislation. The state law and court interpretations embody the unfolding of biology plus theory for the prenatal period.

3.2 State Legislation

The states have adopted the central tenets of United States Supreme Court jurisprudence while adapting to the social context in which families develop: a rising out-of-wedlock birth rate, increasing awareness of the effects of abuse and rape, the ubiquity of travel and technology, and a growing acknowledgment of casual sexual encounters. In doing so, state laws have clarified what conduct protects or forfeits parental consent rights.¹⁹⁰ In addition, all states have established electronic state databases for fathers to file intentions to claim paternity. This section provides an overview of state legislation. For greater detail, reference the Appendix, which lists all state laws on prenatal abandonment.

First, it must be understood that fathers' rights to consent and their rights to notice are distinct rights. State statutes must therefore provide for

188. *Michael H.*, 491 U.S. at 159–60 (White, J., dissenting).

189. See *Lehr v. Robertson*, 463 U.S. 248, 262–65 (1983) (discussing contributions a non-marital father must make to a child's life to warrant constitutional protection).

190. See, e.g., UTAH CODE ANN. § 78B-6-121(3) (Westlaw through 2016 3d Spec. Sess.) (Stating that with “regard to a child who is six months of age or less at the time the child is placed with prospective adoptive parents, consent of an unmarried biological father is not required unless . . . the unmarried biological father” files a paternity action; files a paternity affidavit stating he is able and willing to take full custody of the child, sets forth his plans for the child's care, and agrees to court ordered child support and payment of pregnancy and birth expenses, and actual or offered payment of mother's pregnancy related expenses). See generally *Adoption of Kelsey S.*, 823 P.2d 1216 (Cal. 1992).

notice of adoption or dependency actions at a meaningful time to qualifying fathers *and* afford consent rights to fathers who have established a constitutionally and/or statutorily protected relationship with the child. A judicial determination of fathers' rights to notice and/or consent must occur on a short timeline in newborn adoptions, because the hearings or procedures must occur soon after birth to secure the best interests of children. In newborn adoptions, this requires fathers to have previously protected their parental rights to consent and notice. Some states guarantee notice and/or consent to non-marital fathers who timely file with state putative father registries.¹⁹¹ Concomitantly, such registries restrict rights to notice and/or consent from fathers who have not timely protected their interests.

These registries are necessary because mothers can intentionally or accidentally thwart non-marital fathers in their efforts to assume parental responsibility. The mother may deliberately or unintentionally obfuscate the father's knowledge of pregnancy and/or birth by reporting she is not pregnant when she is or by reporting a due date incorrectly.¹⁹² The mother may travel interstate or inter-country without the father's knowledge. The mother may misidentify or decline to identify a father because she genuinely does not know his identity or because she fears domestic violence or murder by the father. The mother may also resist involving a father if the conception occurred in a sexual assault. Lastly, the mother may simply wish to deceive the father. Such actions would complicate the father's ability to establish paternity, file with the forum state's father registry, and obtain notice of an adoption or protective custody action.¹⁹³ Putative father registries paint with a broad brush to give notice to *all* fathers who file timely such that those fathers have opportunities to appear and defend.

191. See, e.g., MO. REV. STAT. § 192.016 (Westlaw through 2016 Reg. Sess. of 98th Gen. Assemb.); MO. REV. STAT. § 453.030 (Westlaw through 2016 Reg. Sess.). See also UTAH CODE § 78B-6-121(3) (Westlaw through 2016 3d Spec. Sess.) (requiring that a non-marital father file a paternity action, file a paternity affidavit, file with a father's registry and pay or offer to pay mother's pregnancy related expenses).

192. See, e.g. *In re Krigel*, 480 S.W.3d 294, 298 (Mo. 2016). ("Birth Mother contacted Birth Father in late March. Birth Mother informed him that her expected due date had changed from early April to early May. This statement was intended to deceive Birth Father of the real due date."). See Robin Elise Weiss, *Hidden and Denied Pregnancy*, VERYWELL (Apr. 12, 2016), <https://www.verywell.com/hidden-and-denied-pregnancy-2758580> (remarking that women do not always recognize that they are pregnant). See also Robin Elise Weiss, *Every Single Way to Estimate Your Due Date*, VERYWELL (Oct. 6, 2016), <https://www.verywell.com/your-pregnancy-due-date-calculator-2758866> (remarking that due dates are always estimates).

193. See, e.g., *Kessel v. Leavitt*, 511 S.E.2d 720 (W. Va. 1998) (regarding a mother who, in absence of national fathers' registry, used interstate travel to confound and ultimately stop a father from obtaining parental rights to his non-marital child).

A father married to the mother of a child at birth is presumed to have paternal rights and thus presumed to have both notice and consent rights. This is not true of non-marital fathers. Registering with a father registry within a state's announced time frame ensures non-marital fathers notice of adoption or dependency actions,¹⁹⁴ but not necessarily consent rights.¹⁹⁵ Fathers can statutorily protect both their consent and notice rights to newborns by filing an action to establish their paternity, providing prenatal support, and filing with any state father's registry.¹⁹⁶ Voluntary Acknowledgement of Paternity Affidavits (VAPAs) provide non-marital fathers with a simple extrajudicial process to legally establish paternity by executing an affidavit with a cooperative mother. Absent a cooperative mother, fathers must provide prenatal support, file timely with father registries, and/or otherwise comply with state statutes to ensure rights to both consent and notice.

Putative father registries protect thwarted fathers' rights to notice by allowing fathers to file with a state registry at any time during a pregnancy and obtain notice with an opportunity to be heard in an adoption or dependency action.¹⁹⁷ Putative fathers who also provide prenatal support may obtain unflinching constitutional protection for their consent rights.

194. *See, e.g.*, MO. REV. STAT. §§ 453.060.5, 453.060.1(6) (Westlaw through 2016 Reg. Sess.).

195. *See, e.g.*, MO. REV. STAT. § 192.016 (Westlaw through 2016 Reg. Sess. of 98th Gen. Assemb.).

196. *See, e.g.*, MO. REV. STAT. § 453.030.3 (Westlaw through 2016 Reg. Sess.); MO. REV. STAT. § 453.060.1(1)-(5) (Westlaw through 2016 Reg. Sess.). *But see* Adoption of A.S., 151 Cal. Rptr. 3d 15 (Cal. Ct. App. 2012) (finding that unwed father did not achieve presumed father status on the basis of his prebirth conduct despite his New York paternity judgment).

197. Mary Beck, *A National Putative Father Registry*, 36 CAP. U. L. REV. 295, 301 (2007). The number of dependency actions related to drug exposed newborns has increased to such a level that some states are enacting specific statutes to address parental rights in such cases. *See, e.g.*, MO. REV. STAT. § 211.447.5(6)(b) (Westlaw through 2016 Reg. Sess.). Stating:

It is presumed that a parent is unfit to be a party to the parent and child relationship upon a showing that: a. Within a three-year period immediately prior to the termination adjudication, the parent's parental rights to one or more other children were involuntarily terminated pursuant to subsection 2 or 4 of this section or subdivision* (1), (2), (3), or (4) of this subsection or similar laws of other states; b. If the parent is the birth mother and within eight hours after the child's birth, the child's birth mother tested positive and over .08 blood alcohol content pursuant to testing under section 577.020 for alcohol, or tested positive for cocaine, heroin, methamphetamine, a controlled substance as defined in section 195.010, or a prescription drug as defined in section 196.973, excepting those controlled substances or prescription drugs present in the mother's body as a result of medical treatment administered to the mother, and the birth

Despite these advantages, only thirty-four states have enacted putative father registries.¹⁹⁸ The effectiveness of state registries may be further limited in interstate dependency or adoption actions. In the event that conception occurs in one state and a dependency action or adoption is filed in a second state, the father's registration in the state of conception will not protect his rights to notice of a court action in a second state. These limitations speak to the necessity of instituting a national registry; however, Congressional action to do so has proven ineffective.

The United States Congress and Utah have attempted to rectify that interstate problem. Senator James Inhofe and Representatives Vicky Hartzler and Anne Kuster introduced a national registry called the Responsible Father Registry in the U.S. Senate and the U.S. House of Representatives, respectively.¹⁹⁹ Representative Hartzler continues to develop a national registry bill.²⁰⁰ The Utah legislature unsuccessfully entertained S.B. 10, which was a bill to enact a "Compact for Interstate Sharing of Putative Father Registry Information."²⁰¹ The joint resolution urging enactment of this bill includes the fact that "the United States Congress has not yet enacted legislation facilitating the interstate sharing of putative father registry information."²⁰² Protection of fathers' rights to notice can only be fully protected where the interstate movement of mothers and/or the filing of an adoption petition in a state unknown to the father does not operate to foreclose the father's ability to obtain notice and consent rights tied to timely registration in father registries.

mother is the biological mother of at least one other child who was adjudicated an abused or neglected minor by the mother or the mother has previously failed to complete recommended treatment services by the children's division through a family-centered services case.

Id.

198. Beck, *A National Putative Father Registry*, *supra* note 197, at 299 (these registries are difficult to total and categorize because they take different forms that may or may not protect responsible birth fathers and mothers).

199. Protecting Adoption Act, H.R. 2818, 114th Cong. (2015); Protecting Adoption and Promoting Responsible Fatherhood Act of 2015, S. 1637, 114th Cong. (2015). The bills contain mandatory provisions to protect mothers and fathers and a provision urging states to enact prenatal abandonment laws.

200. Email conversation between the author and Joe Tvrdy, legislative assistant to Rep. Hartzler, last email 1/3/2017.

201. S.B. 10, 2015 Gen. Assemb., Reg. Sess. (Utah 2015).

202. S.J.R. 1, 61st Leg., 2015 Gen. Sess. (Utah 2015).

3.3 State Case Law

This section summarizes the emergence and application of prenatal abandonment theory in state courts.²⁰³ The Appendix provides a state-by-state account of prenatal abandonment legislation and case law. Some of the more common elements in prenatal abandonment case law are listed below, with cases discussed in greater detail to follow.

1. Father's payment of prenatal support.²⁰⁴
2. Father's contribution to medical costs.²⁰⁵
3. Father's level of interest in fetus, mother, or pregnancy.²⁰⁶
4. Father's abuse of mother and/or child or fetal endangerment.²⁰⁷

203. Appendix A is a summary of all prenatal abandonment laws and decisions in the fifty states. The cases discussed in this section are organized chronologically whereas cases discussed in the Appendix are organized by state.

204. *See, e.g., C.V. v. J.M.J.*, 810 So. 2d 692, 697 (Ala. Civ. App. 1999) *rev'd sub nom. Ex parte C.V.*, No. 1981316, 2000 WL 1717011 (Ala. Nov. 17, 2000) *withdrawn and superseded on reh'g*, 810 So. 2d 700 (Ala. 2001); *In re Ariel H.*, 86 Cal. Rptr. 2d 125 (Cal. Ct. App. 1999); *In re Adoption of Doe v. Roe*, 543 So. 2d 741 (Fla. 1989) (determining that marginal financial support does not evince an assumption of parental duties); *In re Adoption of Baby James Doe*, 572 So. 2d 986 (Fla. Dist. Ct. App. 1990) (reversing denial of motion for rehearing in part where father provided support in a repetitive, customary manner); *In re Adoption of Anderson*, 624 S.E.2d 626, 628-629 (N.C. 2006); *In re Adoption of S.K.N.*, 735 S.E.2d 382 (N.C. Ct. App. 2012); *In re F.H.*, 283 N.W.2d 202 (N.D. 1979) (upholding lower court's determination of parental abandonment where father failed to provide financial support even though he knew the agency who had custody of the child); *In re Adoption of J.N.C.*, No. 2008-CA-25, 2008 WL 2861702, at *1 (Ohio Ct. App. July 25, 2008); *Roe v. Reeves*, 708 S.E.2d 778, 786 (S.C. 2011); *State ex rel. Lewis v. Lutheran Soc. Servs. of Wis. & Upper Mich.*, 227 N.W.2d 643 (Wis. 1975) (upholding lower court's determination that father abandoned his child before it was born where father did not provide any support for the child).

205. *See, e.g., Doe*, 543 So. 2d 741; *In re Adoption of D.J.V.*, 796 P.2d 1076 (Mont. 1990); *Abernathy v. Baby Boy*, S.E.2d 25 (S.C. 1993); *T.M. v. B.B.*, 232 P.3d 1026 (Utah 2010).

206. *See, e.g., John Doe v. Attorney W.*, 410 So. 2d 1312, 1313, 1316-17 (Miss. 1982); *In re Carrie GG*, 709 N.Y.S.2d 247, 249 (N.Y. App. Div. 2000); *In re Kailee CC.*, 579 N.Y.S.2d 191 (N.Y. App. Div. 1992); *Lewis*, 227 N.W.2d at 646.

207. *See, e.g., C.V. v. J.M.J.*, 810 So. 2d at 696-97; *In re T.M.Z.*, 665 S.W.2d 184, 187 (Tex. App. 1984); *In re Adoption of Baby E.A.W. v. G.W.B.*, 658 So. 2d 961, 963-66 (Fla. 1995); *In re Gaipa v. Johnson*, 555 N.W.2d 867, 868, 870 (Mich. Ct. App. 1996); *In re Raquel Marie X.*, 559 N.E.2d 418, 420, 428-29 (N.Y. 1990).

5. Mother's lying to adoptive petitioners and/or adoption agencies regarding birth father.²⁰⁸
6. Mother's or Mother's family's efforts to thwart Father's assumption of prenatal responsibilities.²⁰⁹
7. Effect of Mother's moving between states.²¹⁰
8. Father's notice or awareness of the pregnancy and/or the adoption.²¹¹
9. Father's efforts to establish or evade legal responsibility for the fetus or child.²¹²
10. Father's claims excusing his failure to assume parental responsibility because of
 - a. His incarceration;²¹³
 - b. His legal expenses;²¹⁴
 - c. Mother's welfare benefits;²¹⁵
 - d. The absence of court ordered support;²¹⁶
 - e. Mother's not asking for support;²¹⁷

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208. See, e.g., *In re Adoption of A.A.T.*, 196 P.3d 1180, 1184–85 (Kan. 2008); *In re Adoption of EHM*, 808 So. 2d 397, 406 (La. Ct. App. 2000); *In re Adoption of Hart*, 577 N.E.2d 77, 79–82 (Ohio Ct. App. 1989).
209. See, e.g., *In re M.D.K.*, 58 P.3d 74, 749–50 (Kan. Ct. App. 2002); *K.B. v. J.G.*, 9 So. 3d 1124, 1125–26 (Miss. 2009);); *Jeremiah J. v. Dakota D.*, 826 N.W.2d 242 (Neb. 2013); *In re Kiran Chandini*, 560 N.Y.S.2d 886 (N.Y. App. Div. 1990); *In re Adoption of Suvak*, No. 1-03-51, 2004 WL 231494, at *13–15 (Ohio Ct. App. Feb. 9, 2004); *Adoption of A.A.T.*, 196 P.3d at 1184–85; *Abernathy*, 437 S.E.2d at 29; *In re Adoption of Baby Girl*, 233 P.3d 517, 519, 524 (Utah Ct. App. 2010).
210. See, e.g., *Adoption of A.S. v. Vincenzo*, 151 Cal. Rptr. 3d 15 (Cal. Ct. App. 2012); *Kessel v. Leavitt*, 511 S.E.2d 720 (W. Va. 1998).
211. See, e.g., *In re Adoption of S.D.W.*, 758 S.E.2d 374, 380–81 (N.C. 2014); *Robert O. v. Russell K.*, 604 N.E.2d 99, 100 (N.Y. 1992); *State ex rel. Lewis v. Lutheran Soc. Services of Wis. & Upper Mich.*, 227 N.W.2d 643, 646 (Wis. 1975).
212. See, e.g., *Doe v. Attorney W.*, 410 So. 2d 1312, 1316–17 (Miss. 1982); *Lewis*, 227 N.W.2d at 646.
213. See, e.g., *In re HMK* No. 304575, 2011 WL 6187076, at *2 (Mich. Ct. App. Dec. 13, 2011); *In re F.H.*, 283 N.W.2d 202, 211–14 (N.D. 1979); *In re Adoption of Kyle*, 592 N.Y.S.2d 557, 560–61 (App. Div. 1992); *In re Stephen C.*, 566 N.Y.S.2d 178 (App. Div. 1991).
214. See, e.g., *J.C.J. v. Heart of Adoptions*, 989 So. 2d 32, 35–36 (Fla. Dist. Ct. App. 2008).
215. See, e.g., *F.H.*, 283 N.W.2d at 210–13; *Roe v. Reeves*, 708 S.E.2d 778, 784 (S.C. 2011).
216. See, e.g., *In re Adoption of D.J.V.*, 796 P.2d 1076, 1078 (Mont. 1990); *In re Baby Boy W.*, 831 P.2d 643, 646 (Okla. 1992).
217. See, e.g., *In re Baby Boy N.*, 874 P.2d 680, 690 (Kan. Ct. App. 1994); *In re J.L.G.*, 808 So. 2d 491, 495 (La. Ct. App. 2001).

- f. Mother's refusing support; father funding bank account;²¹⁸
- g. Father's attorney "misleading him;"²¹⁹ or
- h. Father's failure to consult an attorney.²²⁰
- 11. The significance of Father's reliable and prompt assumption of parental responsibilities *vis-a-vis* Mother's relinquishment decision.²²¹
- 12. Father's proposals of marriage.²²²
- 13. Father's offer of a residence or other non-financial assistance during pregnancy.²²³
- 14. Father's living off Mother's welfare or work income during pregnancy.²²⁴
- 15. Father's willingness to personally assume custody of the child upon birth.²²⁵
- 16. Whether Father's proactive efforts to assume custody and/or responsibility constitute defensive efforts to block an adoption.²²⁶
- 17. Father's questioning/acknowledging paternity.²²⁷

218. See *In re Adoption of M.D.K.*, 58 P.3d 745, 750–51 (Kan. Ct. App. 2002); *In re Wilkinson*, No. 204217, 1998 WL 1989831, at *1 (Mich. Ct. App. Oct. 2, 1998); *Reeves*, 708 S.E.2d at 785.

219. *M.D.K.*, 58 P.3d at 749.

220. See, e.g., *In re Appeal in Pima Cty. Juv. Severance Action No. S-114487*, 876 P.2d 1121, 1133–35 (Ariz. 1994).

221. See, e.g., *Adoption of Michael H.*, 898 P.2d 891, 896–901 (Cal. 1995); *In re F.H.*, 283 N.W.2d 202, 213–14 (N.D. 1979); *In re Infant Child Skinner*, 982 P.2d 670, 677–78 (Wash. Ct. App. 1999); *State ex rel. Lewis v. Lutheran Soc. Servs. of Wis. & Upper Mich.*, 227 N.W.2d 643, 646–47 (Wis. 1975).

222. See, e.g., *In re Adoption of Baby Girl M.*, 942 P.2d 235, 242 (Okla. Civ. App. 1997).

223. See, e.g., *In re Adoption of John Doe*, 543 So. 2d 741, 746 (Fla. 1989); *In re Adoption of Baby Boy B*, 866 P.2d 1029, 1036–37 (Kan. 1994); *In re Adoption of Baby Boy S.*, 822 P.2d 76, 78 (Kan. Ct. App. 1991); *Abernathy v. Baby Boy*, 437 S.E.2d 25, 29 (S.C. 1993).

224. See *In re Adoption of Baby E.A.W. v. J.S.W.*, 658 So. 2d 961, 965, 970 (Fla. 1995).

225. See *Adoption of Kelsey S.*, 823 P.2d 1216, 1236–38 (Cal. 1992); *In re Adoption of Kyle*, 592 N.Y.S.2d 557, 560–61 (1992); *In re Raquel Marie X.*, 559 N.E.2d 418, 420, 428–29 (N.Y. 1990); *In re Stephen C.*, 566 N.Y.S.2d 178, 179 (App. Div. 1991); *Abernathy*, 437 S.E.2d at 29.

226. See, e.g., *Ex parte J.W.B. & K.E.M.B.*, 933 So. 2d 1081, 1090–92 (Ala. 2005); *In re Appeal in Pima Cty. Juv. Severance Action No. S-114487*, 876 P.2d 1121, 1133–35 (Ariz. 1994); *Raquel Marie X.*, 559 N.E.2d at 420, 428–29; *In re Gionna L.*, 824 N.Y.S.2d 182, 184 (N.Y. App. Div. 2006).

227. See, e.g., *Ex parte J.W.B. & K.E.M.B.*, 933 So. 2d 1081, 1090–91 (Ala. 2005); *Ex parte F.P. & R.P.*, 857 So. 2d 125, 136–38 (Ala. 2003); *In re Adoption of D.M.M.*, 955 P.2d 618, 619–21 (Kan. Ct. App. 1997); *K.B. v. J.G.*, 9 So. 3d 1124, 1129–31

18. Evidentiary standard applied.²²⁸
19. Reviewing court's deference to trial court when evidence is documentary versus *ore tenus*.²²⁹

The first appellate decision of record to grapple with the concept of prenatal abandonment theory resulted in the theory's dismissal; however, it also formed the groundwork for its future application. In 1974, a Texas appeals court dismissed prenatal abandonment theory when it wrote in *Elliot v. Maddox* that the father's conduct "assuredly could not have been an act of abandonment of anyone then not yet born."²³⁰ One year later, Texas enacted a statute providing for prenatal abandonment.²³¹ And in 1984, Texas used that law to affirm a trial court's termination of a father's rights for reasons including prenatal abandonment.²³²

(Miss. 2009); *In re Adoption of S.K.N.*, 735 S.E.2d 382, 386–89 (N.C. Ct. App. 2012). *Raquel Marie X.*, 559 N.E.2d at 427–28; *State ex rel. Lewis v. Luther Social Services of Wisconsin & Upper Michigan*, 227 N.W.2d 643, 646–47 (Wis. 1975).

228. *See, e.g., In re Adoption of Baby Boy B*, 866 P.2d 1029, 1031 (Kan. 1994); *J.C.J. v. Heart of Adoptions*, 989 So. 2d 32, 34 (Fla. Dist. Ct. App. 2008) ("A finding of abandonment resulting in a termination of parental rights must be based upon clear and convincing evidence.").
229. *See, e.g., In re Adoption of Baby Boy S.*, 822 P.2d 76, 78 (Kan. App. 1991). *Ore tenus* evidence is evidence presented in person to the judge whereas depositions/affidavits do not put a witness in front of the judge.
230. *Elliot v. Maddox*, 510 S.W.2d 105, 107 (Tex. Civ. App. 1974). This decision was quoted in *F.H.* for its language that voluntary abandonment could have included a period of time prior to birth. *See In re F.H. v. W.S.*, 283 N.W.2d 202, 212 (N.D. 1979) (quoting *Elliot*, 510 S.W.2d at 108).
231. TEX. FAM. CODE ANN. § 161.001(b)(1)(H) (Westlaw through 2015 Reg. Sess. of 84th Legis.)

The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence . . . that the parent has . . . voluntarily and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth.

Id. See also Holley v. Adams, 554 S.W.2d 367 (Tex. 1976) (granting respondent father's petition to terminate the parent-child relationship between the mother and her son pursuant to § 161.001(b)(1)(H), referred to as TEX. FAM. CODE § 15.02(1)(H)).

232. *See In re T.M.Z.*, 665 S.W.2d 184, 187 (Tex. App. 1984) ("[W]e hold the evidence is clear and convincing that J.A.Z. 'voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy . . . and remained apart from the child and failed to support the child since the birth'").

In this same time period, the Wisconsin Supreme Court began to define and employ prenatal abandonment theory in a series of paternity cases. In *Lewis*, the Wisconsin Supreme Court affirmed the trial court's termination of a father's parental rights, holding that the father had abandoned the child before birth.²³³ This decision is the first clearly elucidated case in which the court found prenatal abandonment theory and applied a multifactorial analysis to determine a father's support or abandonment of his fetus and the mother, an analysis that is now routine.

Lewis contains facts typically seen in subsequent state court opinions on prenatal abandonment, including the mother's early notification of the father, the discussion of marriage, the father's evasion of paternal responsibilities (in this case, saying that he would tell the mother's doctor not to put his name on the birth certificate), the father's disinterest in the wellbeing of the fetus or mother, the father's failure to provide financial support, the mother's notification to the father of an adoption plan, the father's questioning of his paternity, and the mother's decision to relinquish the child due to the father's refusal to accept responsibility.²³⁴

233. State *ex rel.* Lewis v. Lutheran Soc. Servs. of Wis. & Upper Mich., 227 N.W.2d 643, 646 (Wis. 1975).

234. *Lewis*, 227 N.W.2d at 645–46. The facts in this case compel the conclusion that Rothstein abandoned his child before it was born. The trial court concluded:

That his repeated denials of paternity, lack of concern for or interest in the support, care and well-being—including pre-natal care—of the child, and the disregard for the well-being of the child's mother from the date the pregnancy was announced to approximately the birthdate of the child manifested a clear intent on the part of petitioner, Rothstein, to disassociate himself from responsibility for the birth and care of the child . . . She [mother] testified that he refused to marry her after she informed him of her pregnancy, stating that he could not be sure he was the father of the child. Rothstein denied these conversations . . . In entering its findings of fact and conclusions of law, the trial court observed that it believed Miss Lewis and disbelieved Rothstein on every point where their testimony was in conflict, because her testimony was 'substantially more credible and convincing.' The findings are not against the great weight and clear preponderance of the evidence. In fact, we would make the same findings on the record in this case . . . [S]he informed him . . . on December 24, 1967, that she had been to a doctor, who confirmed her pregnancy. Rothstein's response to this was that he wanted to know the name of the doctor to make certain that his name could not be used on the birth certificate as the father of the child. He further stated he would not deny the possibility that he was the father . . . After Karen [birth mother] arrived at the home of her aunt and uncle in Janesville, she visited Rothstein two or three times in Chicago and had several additional telephone conversations with him. . . On at least one of these occasions she communicated to him the fact that her aunt and uncle had offered to finance a wedding for them. Rothstein's response was that he did not know he was the father of the child, and that if he was not

The *Lewis* court found that the birth mother had relied upon the father's pre-birth conduct in choosing adoption for the child.²³⁵ Further, it held that she was entitled to make that decision during her pregnancy and not required to give the father the full duration of the pregnancy to demonstrate his intent to assume parental responsibilities.²³⁶ Judicial respect for a mother's limited nine-month timeline (particularly her need to make timely decisions regarding adoption) is seen repeatedly in prenatal abandonment cases. This may be especially true when a father eschews prenatal responsibility but asserts parental rights after birth.

Finally, the *Lewis* opinion demonstrates that when testimony presented by a mother and a father sharply conflict, trial courts weigh the relative credibility of the parties. Because appellate courts give deference to trial courts' determinations of facts,²³⁷ responsible fathers and their attorneys should present all pertinent evidence during the trial court proceedings. Strong evidentiary support may include careful documentation of support payments (including those which were returned by the mother) and demonstration that the father has conformed with all statutory require-

there was no reason for a marriage. Karen concluded that there was no hope of changing Rothstein's attitude toward her or the child. She therefore decided to terminate her relationship with Rothstein and give the child up for adoption after it was born. She wrote him a letter informing him of this fact in the spring of 1968. Rothstein's feelings, as evidenced by a statement to Miss Lewis' aunt in April, 1968, were that he was not ready to accept the responsibility of marriage and a family, and that the conception of the baby was the fault of Miss Lewis.

Id.

235. *Lewis*, 227 N.W.2d 643.

236. *Lewis*, 227 N.W.2d at 646–47. The Court recognized the mother's decisional timeline:

Rothstein's refusal to accept responsibility required Miss Lewis to decide whether to keep the baby or put it out for adoption after it was born. She chose the latter course, making her decision in the best interests of the child. She was not required to wait until the last minute to make this decision. She was entitled to act in reliance on Rothstein's actions and statements prior to and during the spring of 1968.

Id.

237. See, e.g., *Ex parte J.W.B. & K.E.M.B.*, 933 So. 2d 1081 (Ala. 2005); *Ex parte C.V.*, 810 So. 2d 700 (Ala. 2001). Some reviewing courts in prenatal abandonment cases are distinguishing trial court credibility determinations based upon *ore tenus* evidence versus out of court testimony. For example, reviewing courts give less deference to trial courts relying on depositions and affidavits than in court testimony. See, e.g., *J.W.B.*, 933 So. 2d at 1090 ("With deference to the presumption of correctness afforded the probate court's findings under the *ore tenus* rule, we hold that the probate court did not exceed its discretion when it concluded that the biological father has not been prevented from maintaining a significant parental relationship with [the] minor child.").

ments, such as filing with father registries.²³⁸ These actions demonstrate the credibility of fathers and preserve their rights.

North Dakota was the second state to hold that children can be abandoned before birth. In its 1979 decision *In re F.H. v. W.S.*, the North Dakota Supreme Court affirmed the trial court's termination of parental rights.²³⁹ The facts that grounded prenatal abandonment in *F.H.* are typical but also include the father's moving out of the state in which the mother resided.²⁴⁰ The lower court held that the mother's ability to rely upon welfare or charity for needed support did not relieve the father of his support duties.²⁴¹ The court rejected the father's claim that his incarceration should excuse his failure to provide prenatal and postnatal support, because his commission of the crimes for which he was incarcerated was voluntary.²⁴²

Like the *Lewis* Court, the *F.H.* Court held that adoption of a newborn requires a prompt hearing.²⁴³ Fathers may claim this cuts off or cuts short their opportunities to develop constitutionally protected relationships with their children. To the contrary, the opportunity to pay prenatal support offers all fathers the opportunity to constitutionally protect their parental rights over a typical nine-month prenatal period.

In 1982, in *John Doe and a Female Infant v. Attorney W.*, the Mississippi Supreme Court affirmed the trial court's termination of a father's

238. See, e.g., *In re Adoption of M.D.K.*, 58 P.3d 745, 751 (Kan. App. 2002) (Beier, J., concurring). The father should document persistent attempts at support:

Even in the most acrimonious of situations, a father-to-be can fund a bank account in the mother-to-be's name. He can have property or money delivered to the mother-to-be by a neutral third party. He can and must be as creative as necessary in providing material assistance to the mother-to-be during the pregnancy and, the law thus assumes, to the child once it is born. He must not be deterred by the mother-to-be's lack of romantic interest in him, even by her outright hostility. If she justifiably or unjustifiably wants him to stay away, he must respect her wishes but be sure that his support does not remain equally distant.

Id. See also *Roe v. Reeves*, 708 S.E.2d 778, 785 (S.C. 2011) (citing *M.D.K.* for the proposition that father's obligations to support child's mother does not cease just because the mother might "rebuke some of his efforts", and terminating father's rights after little to no evidence was documented of him providing support to his child's mother).

239. *In re F.H.*, 283 N.W.2d 202, 212 (N.D. 1979) (citing *Elliot v. Maddox's* holding that abandonment during the prenatal period could be included in the period of time establishing 'voluntary abandonment,' and *Lewis*, which explicitly held that a child could be abandoned before birth).

240. See *F.H.*, 283 N.W. at 213.

241. *F.H.*, 283 N.W. at 211.

242. *F.H.*, 283 N.W. at 213.

243. See *F.H.*, 283 N.W. at 210.

parental rights.²⁴⁴ The *Doe* Court relied upon the previously discussed evidence of prenatal abandonment, plus two new factors.²⁴⁵ First, the father had demanded that the mother neither identify him nor provide his name to the welfare agency.²⁴⁶ Second, the father had told the mother that the pregnancy was her problem and her decision.²⁴⁷

The *Doe* case is the first in which a court noted that the father had urged the mother to obtain an abortion and had misled the adoptive petitioners into believing that he had no objections to an adoption. The relevance of urging abortions on mothers goes unstated; although no case relies upon it to ground prenatal abandonment, it is often listed in the facts. In *Doe*, as in subsequent cases, the father's urging of abortion was accompanied by his failure to pay support.²⁴⁸

The *Doe* father first sought parental rights in defense to the adoption filing.²⁴⁹ His belated assertion of his rights, which occurred after he had refused to provide pregnancy support, suggests ambivalence about parenting and/or an evasion of financial responsibility. While birth parents should have the right to change their minds after birth and before relinquishment, the conduct the *Doe* father demonstrated is far different from a simple change of mind. As the court found, the *Doe* father instead "evinced a settled purpose . . . to forego all parental duties."²⁵⁰ Such damning behavior included the father's prohibition of the use of his name on welfare documents, refusal of prenatal support, termination of his relationship with the mother during the pregnancy, and insistence that decisions regarding the pregnancy and the baby were exclusively those of the mother's.²⁵¹

244. *Doe v. Attorney W.*, 410 So. 2d 1312, 1317 (Miss. 1982).

245. See *Doe v. Attorney W.*, 410 So. 2d at 1316–17. Summarizing:

The evidence as summarized above (and accepted by the lower court) establishes that: (1) Doe, after the natural mother's pregnancy was known to him, suggested to her that she have an abortion; (2) he refused to contribute to the expense of her prenatal care; (3) he demanded that she not use his name in applying for welfare assistance; (4) his relationship with her ceased because he did not want the responsibility for both her and the child; (5) he told her that the decision regarding the child's destiny was hers alone and that she could do whatever she wanted with the child; and (6) a month prior to the baby's birth, he advised appellee that he would surrender the child for adoption and had no objection to the baby's being offered for adoption.

Id.

246. *Doe v. Attorney W.*, 410 So. 2d at 1316–17.

247. *Doe v. Attorney W.*, 410 So. 2d at 1316–17.

248. See *Doe v. Attorney W.*, 410 So. 2d at 1314.

249. See *Doe v. Attorney W.*, 410 So. 2d at 1316.

250. See *Doe v. Attorney W.*, 410 So. 2d at 1316.

251. See *Doe v. Attorney W.*, 410 So. 2d at 1316–17.

In 1984, in *In the Interest of T.M.Z.*, a Texas appeals court affirmed a trial court's termination of a father's rights for abandonment including during a period of time pre-birth.²⁵² Part of the father's abandonment defense in *T.M.Z.* was that it was the mother who left their place of abode.²⁵³ However, the mother left only when the father threw a radio at her stomach.²⁵⁴ Although he missed, he threw with such force that the radio went through a wall.²⁵⁵ The court discussed the abuse but did not rely upon it in its holding.²⁵⁶ The role of abuse in determining father's prenatal abandonment has evolved over time: now, Florida considers even emotional abuse material to a discussion of prenatal abandonment.²⁵⁷

In 1989, Ohio decided a series of cases in which it used prenatal abandonment to both uphold and withhold paternal rights. In *In Re Adoption of Hart*, an appellate court affirmed a trial court's decision waiving the father's consent because he had abandoned the mother during her pregnancy and the child after birth.²⁵⁸ The father filed a paternity action one year after the child's birth in response to an adoption petition.²⁵⁹ On appeal, the father claimed that the adoptive petitioners had fraudulently pled that the father was unknown.²⁶⁰ The court held that knowledge possessed by the mother could not be imputed to the adoptive parents. Mothers can decline to identify a father, and such non-identification typically does not relieve fathers of prenatal support obligations. It is this situation that putative father registries remedy, since fathers can register with or without the cooperation of the mother and the timely registered father gets notice and an opportunity to defend.

Florida's courts also proved to be rich ground for the development of prenatal jurisprudence. The Florida Supreme Court first upheld an adoption on a theory of prenatal abandonment in 1989.²⁶¹ In deciding *In re Adoption of John Doe v. Richard Roe*, the court relied upon *Lehr*, holding that the father's prenatal conduct eliminated the father's "privilege of vetoing the adoption."²⁶² The court expounded its reasoning:

252. *In re T.M.Z.*, 665 S.W.2d 184, 187 (Tex. Ct. App. 1984).

253. *T.M.Z.*, 665 S.W.2d at 186–87.

254. *T.M.Z.*, 665 S.W.2d at 186–87.

255. *T.M.Z.*, 665 S.W.2d at 186–87.

256. *See T.M.Z.*, 665 S.W.2d at 187.

257. *See, e.g., Adoption of Baby E.A.W. v. G.W.B.*, 658 So. 2d 961, 962 (Fla. 1995).

258. *See In re Adoption of Hart*, 577 N.E.2d 77 (Ohio Ct. App. 1989).

259. *Adoption of Hart*, 577 N.E.2d at 80–81.

260. *Adoption of Hart*, 577 N.E.2d at 80–81.

261. *In re Adoption of Doe v. Roe*, 543 So. 2d 741 (Fla. 1989).

262. *Doe v. Roe*, 543 So. 2d at 748.

For the reasons set forth above, we concluded that it was critical to the well-being of the child that the unwed father provide prebirth support to the unwed pregnant mother when such support is needed and within his means. Having determined that the welfare of the child is an element to be considered in an adoption proceeding, we are ineluctably led to the conclusion that prebirth conduct is relevant to the issue of abandonment. In the instant case, we hold that the failure of respondent natural father to provide prebirth assistance to the pregnant mother, when he was able and assistance was needed, vested respondent natural mother with the sole parental authority to consent to the adoption of the child and removed from the natural father the privilege of vetoing the adoption by refusing to give consent.²⁶³

This opinion was the first to detail the importance of prenatal health care and nutrition to the future health of the child, and to relate those concerns directly to the prenatal support of the father.²⁶⁴ The Court found that the father's "argument that he has no parental responsibility prior to birth and . . . his failure to provide prebirth support [as] irrelevant to the issue of abandonment is not a norm that society is prepared to recognize. Such an argument is legally, morally, and socially indefensible."²⁶⁵

Finally, the 1989 *Doe v. Roe* case presented a novel situation where the father proposed marriage, signed a voluntary affidavit of paternity, and did in fact marry the mother two months after the baby's birth and placement for adoption.²⁶⁶ Essentially, the *Doe v. Roe* court echoed the biology plus theory,²⁶⁷ but in this case, the father's protective conduct occurred too late to avoid prenatal abandonment.

In 1990, the biology plus theory favored the father in *In re Adoption of Baby James Doe*, in which the Florida Court refused to waive the father's consent rights because he had signed a lease for an apartment with the mother, resided with her during the pregnancy, produced receipts for baby furniture, bedding, clothing, and baby gifts, and produced the identification band from the hospital of the child's birth with the father's surname on it.²⁶⁸ The father's preservation of evidence of the lease and applicable purchases represents an important practice point for attorneys representing fathers, as the mother's and father's testimonies often conflict in these cases.

263. *Doe v. Roe*, 543 So. 2d at 749.

264. *Doe v. Roe*, 543 So. 2d at 746.

265. *Doe v. Roe*, 543 So. 2d at 746.

266. *Doe v. Roe*, 543 So. 2d at 743.

267. *Supra* note 179 and accompanying text.

268. *In re Adoption of Baby James Doe*, 572 So. 2d 986, 987 (Fla. Dist. Ct. App. 1990).

In 1990, *In re Adoption of D.J.V.*, the Montana Supreme Court affirmed a trial court's termination of birth father's parental rights for abandonment based upon pre- and post- birth conduct.²⁶⁹ The birth parents' testimony conflicted as to whether the father, whose net worth was \$200,000, had offered to pay for pregnancy-related medical expenses. The evidence presented at trial demonstrated that he did not pay for "any expenses of Carolyn's [the birth mother's] pregnancy or hospitalization, or any child support following the birth of D.J.V."²⁷⁰ The Court rejected Father's claim that the absence of a court order should excuse his non-payment of support²⁷¹ and granted the step-parent adoption petition.²⁷²

Also in 1990, a New York Court of Appeals relied upon the biology plus theory in the calculus of two prenatal support and abandonment cases decided together: *In re Raquel Marie X. v. Mr. and Mrs. C.* and *In re Baby Girl S. v. Natural Father*.²⁷³ A biology plus analysis protected the father's rights in one case and waived the father's rights in the other case. New York defined a six-month (second and third trimesters) pre-placement period as the relevant prenatal interval and listed the abandonment factors to be considered as including: "public acknowledgement of paternity, payment of pregnancy and birth expenses, steps taken to establish legal responsibility for the child, and other factors evincing a commitment to the child."²⁷⁴ The court also indicated that a father's qualifying interest required a willingness to assume full custody of the child and not merely a desire to block adoption by others.²⁷⁵

The *Raquel Marie X.* and *Baby S.* court reviewed United States Supreme Court jurisprudence about the rights of unwed fathers and explicitly considered how a father could establish the custodial relationship required to protect his parental interest.²⁷⁶ In doing so, the Court emphasized both the financial and personal commitment of the father during pregnancy. In its factual recitations, the court noted that the father in *Raquel Marie X.* had assaulted the mother on several occasions and that the Appellate Division found that the parents' relationship, which resulted in marriage months after the birth, was neither normal nor stable. In that case, the Court

269. *In re Adoption of D.J.V.*, 796 P.2d 1076 (Mont. 1990).

270. *D.J.V.*, 796 P.2d at 1079.

271. *See D.J.V.*, 796 P.2d at 1076–78 (holding that absence of court order mandating support did not absolve natural of legal duty to support child; if father is able to provide support and fails to do so during one-year period prior to petition for adoption then consent is not required).

272. *D.J.V.*, 796 P.2d at 1079.

273. *In re Raquel Marie X.*, 559 N.E.2d 418, 424 (1990).

274. *Raquel Marie X.*, 559 N.E.2d at 428.

275. *Raquel Marie X.*, 559 N.E.2d at 428.

276. *Raquel Marie X.*, 559 N.E.2d at 420–425.

delivered no prenatal abandonment-related ruling associated with the abuse,²⁷⁷ although a father's abuse of a pregnant woman is frequently cited in prenatal abandonment cases.²⁷⁸

In 1991, in *In re Stephen C.*, and in 1993, in *In re Adoption of Kyle*, New York waived an incarcerated father's rights because he was not willing to assume full custody of the child himself, despite his express wish that one of his relatives act as guardian of the child for the duration of his incarceration.²⁷⁹ In *Adoption of Kyle*, New York waived the incarcerated father's rights despite his express wish that the child live with his mother while he served a four-year sentence.²⁸⁰

Also in 1991, in *In re Adoption of Baby Boy S.*, the Kansas Court of Appeals upheld a trial court's termination of an incarcerated father's parental rights based upon his failure to provide support for the six months prior to child's birth when he had knowledge of the pregnancy.²⁸¹ While the *Baby Boy S.* Court considered typical factors in prenatal abandonment, it added a novel non-financial factor: the father's babysitting of the mother's other children.²⁸² Babysitting enables mothers to attend prenatal medical appointments and is an important consideration benefitting the fetus's development and the mother's health.²⁸³

In 1992, the Court of Appeals of New York waived a father's consent rights in *Robert O. v. Russell K.*²⁸⁴ In that case, the father had claimed an exception to New York law requiring "promptness" because he did not know of the birth.²⁸⁵ The court clarified that promptness in a father's assumption of responsibility is "measured in terms of the baby's life not by

277. *Raquel Marie X.*, 559 N.E.2d at 420.

278. This is not surprising given the frequency of domestic abuse of all women, especially pregnant women, in the United States. See *infra* Section 1.4.

279. *In re Stephen C.*, 566 N.Y.S.2d 178, 178 (N.Y. App. Div. 1991); *In re Adoption of Kyle*, 592 N.Y.S.2d 557, 560 (Sur. 1992). Subsequent cases show that New York requires father's personal assumption of custody and its requirement is not satisfied by passing the child off to a relative. *In re Gionna L.*, 824 N.Y.S.2d 182, 184 (N.Y. App. Div. 2006).

280. *Adoption of Kyle*, 592 N.Y.S.2d at 560.

281. *In re Adoption of Baby Boy S.*, 822 P.2d 76, 78 (Kan. Ct. App. 1991) ("the mother testified that the father did not provide her with money, groceries, or a place to live, nor did he give her his paycheck or babysit her other children. Moreover, the mother stated the father showed a complete disregard for supporting her before his incarceration.") The trial court concluded that the father made no effort to inquire after the welfare of the mother in her pregnant condition.

282. *Baby Boy S.*, 822 P.2d at 78 (These factors were disputed by the mother and father, and the Appellate Court found that substantial evidence supported the trial court's interpretation accepting the mother's version.).

283. *Baby Boy S.*, 822 P.2d at 78.

284. *Robert O. v. Russell K.*, 604 N.E.2d 99 (N.Y. 1992).

285. *Robert O.*, 604 N.E.2d at 102.

the onset of the father's awareness."²⁸⁶ The concurrence noted that putting the onus on the father to seek information about pregnancy from the mother was out of step with sexual mores and required men to invade the mother's privacy after a relationship had ended. But it did not note that it would also be "out of step" to charge the mother with notifying the father.²⁸⁷ Nonetheless, the same concurring judge concluded that the State's interest in finality outweighed the father's interests.²⁸⁸

Also in 1992, in *In re Adoption of Baby Boy W.*, the Oklahoma Supreme Court upheld a trial court decision waiving the father's consent rights where he had not supported the mother during pregnancy.²⁸⁹ The father's appeal alleged that he had no obligations absent a court order binding him to pay pregnancy-related medical bills and child support.²⁹⁰ The Court held that Oklahoma law requires prenatal support and child support in the absence of a court order.²⁹¹ It would be another ten years before a Kansas concurrence distinguished that birth may trigger a legal obligation, but voluntary support before birth "preserves the father-to-be's rights."²⁹²

Additionally in 1992, the California Supreme Court overruled the trial and appellate courts' decisions against the father in *Adoption of Kelsey S.* and held that to determine whether an unwed father has demonstrated a full commitment to his parental responsibilities—emotional, financial, and otherwise—courts must analyze the father's conduct both before and after the child's birth.²⁹³ The Court announced a two-step analysis: 1) whether the father had demonstrated the necessary commitment to his parental responsibilities, and 2) whether the father could be deprived of the right to withhold his consent to adoption.²⁹⁴ The Court indicated that factors for the first step include the father's willingness not just to block adoption but also to assume full custody himself.²⁹⁵ In upholding the father's rights, the Court also considered the father's public acknowledgement of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child.²⁹⁶ It carved out an

286. *Robert O.*, 604 N.E.2d at 103.

287. *Robert O.*, 604 N.E.2d at 106.

288. *Robert O.*, 604 N.E.2d at 106–07.

289. *In re Adoption of Baby Boy W.*, 831 P.2d 643, 645, 647 (Okla. 1992).

290. *Baby Boy W.*, 831 P.2d at 645.

291. *Baby Boy W.*, 831 P.2d at 646.

292. *In re Adoption of M.D.K.*, 58 P.3d 745, 750 (Kan. Ct. App. 2002) (J. Beier, concurring).

293. *Adoption of Kelsey S.*, 823 P.2d 1216, 1236 (Cal. 1992).

294. *Kelsey S.*, 823 P.2d at 1237–38.

295. *Kelsey S.*, 823 P.2d at 1237 (quoting *In re Raquel M.*, 559 N.E.2d 418, 423 (N.Y. 1990)).

296. *Kelsey S.*, 823 P.2d at 1237.

exception in a footnote for the father who impregnates the mother by rape.²⁹⁷

In 1993, the Supreme Court of South Carolina affirmed a trial court decision upholding a father's parental rights in *Abernathy v. Baby Boy*.²⁹⁸ The *Abernathy* Court found that the father had appeared at the hospital of birth, offered to pay medical birth expenses, and manifested a willingness to assume sole custody of the child.²⁹⁹ The court cited *Lehr*, *Stanley*, and *Caban* in holding that a father's parental rights cannot depend upon the whim of the unwed mother, and that the father had timely demonstrated a willingness to develop a full custodial relationship with his child.³⁰⁰ The *Abernathy* court concluded that the father's parental rights could not depend upon a mother's refusal to avail herself of the father's efforts to provide emotional and financial support.³⁰¹ In this case, the father's urging of the mother not to abort was accompanied by his provision of support and transportation.³⁰²

Also in 1993, Ohio decided its second prenatal abandonment case, *In re Adoption of Klonowski*, when its appellate court upheld a father's consent rights where he gave the mother a key to an apartment he had rented for them and proposed marriage to the mother, and where she denied her pregnancy.³⁰³ Although father had neither paid nor offered to pay any medical expenses associated with the pregnancy,³⁰⁴ the Court found no prenatal abandonment.³⁰⁵

In two 1994 cases, Kansas courts demonstrated that prenatal abandonment or support can, respectively, waive or preserve a father's parental rights. In *Adoption of Baby Boy B.*, the Kansas Supreme Court affirmed the trial and appellate courts' upholding of father's consent rights to deny adoption.³⁰⁶ The Court held that the key question was whether the father provided support to the mother during the six-month period before the child's birth.³⁰⁷ The father had housed the mother and her three children for six weeks and spent money on entertainment, restaurants, and maternity clothes for the mother.³⁰⁸ He had also offered her his income tax refund of

297. *Kelsey S.*, 823 P.2d at 1237 n.14.

298. *Abernathy v. Baby Boy*, 437 S.E.2d 25, 29 (S.C. 1993).

299. *Abernathy*, 437 S.E.2d at 29.

300. *Abernathy*, 437 S.E.2d at 28-29.

301. *Abernathy*, 437 S.E.2d at 29.

302. *Abernathy*, 437 S.E.2d at 27.

303. *In re Adoption of Klonowski*, 622 N.E.2d 376, 377 (Ohio Ct. App. 1993).

304. *Klonowski*, 622 N.E.2d at 378.

305. *Klonowski*, 622 N.E.2d at 379.

306. *In re Adoption of Baby Boy B.*, 866 P.2d 1029, 1037 (Kan. 1994).

307. *Baby Boy B.*, 866 P.2d at 1036-37.

308. *Baby Boy B.*, 866 P.2d at 1036.

\$1,000 plus \$1,100 for post-partum expenses, both of which the mother refused.³⁰⁹ The Court held that the mother's refusal of support was a reasonable factor supporting the trial court's protection of the father's rights.³¹⁰

Baby Boy B. is important in its discussion of evidence and evidentiary standards. The Court pointed out that when evidence is all documentary, the reviewing court may consider the case *de novo*.³¹¹

The *Baby Boy B.* Court held that "[t]he test to be applied in determining if the natural father's consent is necessary under K.S.A.1992 Supp. 59–3136(h)(4) is one of reasonableness under all the relevant surrounding circumstances existing in the case."³¹² The Kansas Court's reasonableness standard is less demanding than Florida's clear and convincing evidence standard, applied in a 2008 decision.³¹³ Courts may allow a lower evidentiary standard for waiver of a non-marital father's parental rights, as in *Baby Boy B.*, than for termination of them, as in *Baby Boy N.* (discussed next.) The United States Supreme Court has held that termination of parental rights requires a clear and convincing standard.³¹⁴

In contrast to the waiver of parental rights in *Baby Boy B.*, the Kansas Appellate Court, in *Baby Boy N.*, affirmed a trial court's termination of a father's parental rights for failure to provide prenatal support.³¹⁵ Here, the Court rejected the father's contentions that the mother did not need support, finding that he had never determined her need by asking or offering to support her during the pregnancy.³¹⁶ The Court also found that he terminated their relationship and withdrew his support upon her disclosure of the pregnancy.³¹⁷ Additionally, the Court rejected the father's argument that he

309. *Baby Boy B.*, 866 P.2d at 1037.

310. *Baby Boy B.*, 866 P.2d at 1037.

311. *Baby Boy B.*, 866 P.2d at 1031–32. The dichotomy between *ore tenus* and documentary evidence and the increased deference a reviewing court provides to *ore tenus* evidence is also considered in the checkered cases that are considered in Alabama. See discussion *infra* p. 162.

312. *Baby Boy B.*, 866 P.2d at 1036.

313. *J.C.J. v. Heart of Adoptions*, 989 So. 2d 32, 34 (Fla. Dist. Ct. App. 2008).

314. See *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982). Contrast MO. ANN. STAT. § 211.447 (Westlaw through 2016 Reg. Sess. of 98th Gen. Assemb.) for grounds to terminate parental rights with MO. ANN. STAT. §192.016.7 (Westlaw through 2016 Reg. Sess. of 98th Gen. Assemb.) which waives a man's rights to consent to adoption where he has not established himself as the legal father of a child. While these procedures are different, they both result in a man's loss of rights to withhold consent to adoption.

315. *In re Baby Boy N.*, 874 P.2d 680, 691 (Kan. Ct. App. 1994).

316. *Baby Boy N.*, 874 P.2d at 690.

317. *Baby Boy N.*, 874 P.2d at 690.

had been misled by counsel, an argument that was also explicitly and soundly rejected by another Kansas court eight years later.³¹⁸

Also in 1994, the Arizona Supreme Court upheld its trial court in *The Father in Pima County Juvenile Action*.³¹⁹ That Court had previously considered and remanded this case for reconsideration of the facts with application of the proper standard for abandonment.³²⁰ On its second review, the Court evaluated the father's prenatal conduct.³²¹ The *Pima County* father argued that he "could not form a relationship" with the child, who had been surrendered at birth to the adoptive parents, but that the father had "assert[ed] his legal rights at the first opportunity by responding to the petition to sever [his rights]."³²² The father also claimed that his due process rights were violated because he could not afford an attorney and lacked the knowledge to contest the adoption.³²³ The Court noted that the mother's attorney had given the father notice by letter of the pending adoption and that it was the father's own inaction that had kept him from the courtroom.³²⁴ The Court held that the father had not affirmatively sought to block the adoption, seek custody, or establish his paternity, and that his defensive filing did not cure his inaction.³²⁵ A father's defensive filings and failure to personally seek custody of the child have been cited with increasing frequency in prenatal abandonment cases.³²⁶

In 1995, the California Supreme Court decided *Adoption of Michael H.*. There, the Court found that post-birth conduct evincing a full commitment to the responsibilities of parenting did not cure a failure to demonstrate such full commitment pre-birth.³²⁷ The birth father had been arrested—in one of two "violent outbursts"—for aggravated assault upon the mother.³²⁸ Justice Kennard's dissent and concurrence attributed the break-up of the parents' relationship to the mother without reference to the father's domestic violence.³²⁹ This omission of relevant facts ignores the influence of domestic violence on relationships, minimizes the danger of domestic violence to women, especially pregnant women, and does not

318. *In re Adoption of M.D.K.*, 58 P.3d 745, 749 (Kan. Ct. App. 2002).

319. *See In re Appeal in Pima Cty. Juv. Severance Action No. S-114487*, 876 P.2d 1121, 1136 (Ariz. 1994).

320. *Pima Cty. Juv. Severance Action*, 876 P.2d at 1126.

321. *Pima Cty. Juv. Severance Action*, 876 P.2d at 1133.

322. *Pima Cty. Juv. Severance Action*, 876 P.2d at 1133.

323. *Pima Cty. Juv. Severance Action*, 876 P.2d at 1134.

324. *Pima Cty. Juv. Severance Action*, 876 P.2d at 1135.

325. *Pima Cty. Juv. Severance Action*, 876 P.2d at 1133.

326. *See supra* note 226 and accompanying text.

327. *Adoption of Michael H.*, 898 P.2d 891, 901 (Cal. 1995).

328. *Michael H.*, 898 P.2d at 893.

329. *See Michael H.*, 898 P.2d at 901–10 (Kennard, J., concurring and dissenting).

acknowledge the role of domestic violence in the calculus of a woman's decision making about a pregnancy.

The *Michael H.* Court distinguished the statutory and constitutional parental rights of the non-marital father and described the question as whether the father had transformed his inchoate constitutional interest into a constitutional right that entitled him to block the adoption.³³⁰ The Court discussed the mother's need for the father's prompt and timely commitment to the responsibilities of parenting, and relied upon the trial court's finding that the father had not committed himself to parenting during the pregnancy nor acted as though he objected to the adoption until two weeks after Michael was born.³³¹ The Court specifically discussed the importance of the father's timely notice of objection or consent to adoption due to the short timeline in which the mother must make a decision to abort, adopt, or parent the baby,³³² recognizing the limited time between the moment a woman realizes that she is pregnant and the moment that the law requires she maintain the pregnancy. Only in this period does she have exclusive control over her body and her pregnancy; as her options become increasingly limited, she may be forced to share parental decisions with the father.

California's elucidation of mothers' choices—abortion, adoption, or parenting—assists their decision making by clarifying and limiting the father's ability to intervene in proportion to his assumption of responsibility. Thus, if the father fails to timely provide prenatal support, a woman may forego abortion and chose adoption, secure in the knowledge that she alone can control the relinquishment decision.

In 1995, six years after Florida's first prenatal abandonment decision,³³³ the Florida Supreme Court held that a father's conduct, including the absence of *emotional* support to the birth mother and the father's emotional abuse of the birth mother, could constitute grounds for a finding of prenatal abandonment.³³⁴ In *In re Adoption of Baby E.A.W.*, the mother testified that she was employed and self-supporting until an accident forced her out of work. She further testified that the father grabbed her, shook her, and spit on her, that the father's only phone calls to her after she moved away from him were pointless early morning phone calls to annoy her, and that the father attended one of the mother's prenatal doctor visits, during which he acted like an "ice cube"³³⁵ (the father testified that he had not attended any doctor's visits). The trial court found that while the mother

330. See *Michael H.*, 898 P.2d 895–96.

331. See *Michael H.*, 898 P.2d 896.

332. *Michael H.*, 898 P.2d at 898.

333. *In re Adoption of Doe*, 543 So. 2d 741, 743 (Fla. 1989).

334. *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 964, 967 (Fla. 1995).

335. *Baby E.A.W.*, 658 So. 2d at 964.

and father lived together for part of the pregnancy, the father used the mother's food stamps and her Aid to Dependent Children check to supplement his earnings.³³⁶ For the first time, the Court found that the father's cohabitation with the birth mother in *Baby E.A.W.* was a decisional factor for prenatal abandonment, rather than for protection of paternal rights.³³⁷ The trial court did not consider cohabitation to be a form of prenatal support in this case because the father was depending on the mother's resources rather than providing support.³³⁸ The state Supreme Court upheld this finding, and further held that the father's lack of emotional support and his emotional abuse of the mother constituted explicit considerations in a finding of prenatal abandonment.³³⁹

In 1996, a Michigan Court in *In re Brianna Marie Gaipa v. Johnson* vacated a trial court order finding the father had provided prenatal support and set out test factors to determine the adequacy of prenatal support.³⁴⁰ The father physically abused the mother, and she "lived in a series of domestic violence shelters."³⁴¹ The Court held that the test to be applied is whether the "father provided reasonable support or care under the circumstances of the case" and listed these factors:

[the] father's ability to provide support or care, the needs of the mother, the kind of support or care provided, the duration of the support, whether the mother impeded the father's efforts to provide her with support, and any other factors that might be significant under the facts of the case.³⁴²

The concept that a father has a responsibility to provide either "support" or "care" is an important addition to the prenatal abandonment theory.³⁴³ Requiring a father to provide care *and/or* support gives courts a vehicle to factor in the father's abuse of the mother. This consideration is necessary, as abuse imperils both mother and child as much as failure to provide financial support.

In 1997, a Kansas appellate court addressed a father's statutory prenatal support obligation where he and the mother questioned his paternity in *In re Adoption of D.M.M.* After not paying prenatal support, the father later

336. *Baby E.A.W.*, 658 So. 2d at 970.

337. *Baby E.A.W.*, 658 So. 2d at 965.

338. *Baby E.A.W.*, 658 So. 2d at 965.

339. *Baby E.A.W.*, 658 So. 2d at 697.

340. See *In re Gaipa v. Johnson*, 555 N.W.2d 867 (Mich. Ct. App. 1996).

341. *Gaipa*, 555 N.W.2d at 868.

342. *Gaipa*, 555 N.W.2d at 869.

343. See *Gaipa*, 555 N.W.2d at 869.

learned of his paternity and attempted to assert parental rights.³⁴⁴ The father claimed violations of his fundamental constitutional right to custody and of his due process rights, claiming there had been no reasonable opportunity to provide prenatal support, since paternity had been in doubt. The court held that uncertainty of paternity did not excuse prenatal support obligations because excusing such obligations would:

[N]egate the legislative intent behind 59-2136 of providing ‘a measure by which to gauge a father’s commitment to his child during pregnancy, a time when a mother’s obligations and responsibilities are clear and unavoidable. The statute sets up a balancing obligation of the father to the child and recognizes that those parental responsibilities arise prior to birth.’³⁴⁵

The *D.M.M.* court clarified that even though its holding might conceivably require more than one man to pay prenatal support, such multiple payments were preferable to depriving a pregnant woman of any support.³⁴⁶ “If any of those partners wishes to preserve his parental rights in the event of a later adoption, each one will be required to initiate reasonable efforts toward supporting the mother prior to the child’s birth.”³⁴⁷ To hold otherwise would undermine policy supporting the prenatal health of fetuses and allow any man to avoid prenatal support by simply alleging that mother had other sexual partners who might have fathered the fetus.

Also in 1997, Oklahoma affirmed a trial court’s holding in *Baby Girl M.* that waived the father’s consent to the adoption of his daughter.³⁴⁸ The father reported that he had proposed to the mother, but the Court held that marriage proposals do not “amount to ‘any action to legally establish his claim to paternity of the child.’”³⁴⁹ The *Baby Girl M.* Court explicitly held that intent to exercise parental responsibility was insufficient to establish legal paternity,³⁵⁰ even though a marriage during the pregnancy would have established legal paternity.³⁵¹

In 1999, in *In re Infant Child Skinner*, the Washington Court of Appeals considered the *effects* of a father’s prenatal non-support in its decision

344. *In re Adoption of D.M.M.*, 955 P.2d 618, 784 (Kan. Ct. App. 1997).

345. *D.M.M.*, 955 P.2d at 622.

346. *D.M.M.*, 955 P.2d at 622.

347. *D.M.M.*, 955 P.2d at 622.

348. *In re Adoption of Baby Girl M.*, 942 P.2d 235, 244 (Okla. Civ. App. 1997).

349. *Baby Girl M.*, 942 P.2d at 242.

350. *Baby Girl M.*, 942 P.2d at 243.

351. Jeffrey A. Parness, *Imprecise State Parentage Laws*, 76 LA. L. REV. 481, 483 (2015).

to terminate paternal rights.³⁵² The facts of non-support in *Skinner* were typical, but the *Skinner* court went further by factoring into its consideration the *effect* of the father's prenatal non-support on the mother's relinquishment and adoption decision. In *Skinner*, the mother testified that she turned to an adoption agency because she did not believe she had the financial means to rear her child.³⁵³ A father's prenatal abandonment foists the difficult relinquishment decision upon mothers. Such fathers should not be rewarded with parental rights at the eleventh hour, after nine months of the very abandonment and neglect that has forced a mother to come to a painful relinquishment decision.³⁵⁴

Also in 1999, a tortured dance between the Alabama Supreme Court and the Alabama Legislature began achieving notoriety.³⁵⁵ That year, the Supreme Court, in a thirty-three page opinion, affirmed a trial court's findings that a father had prenatally abandoned his child.³⁵⁶ The opinion described significant abuse by the father of the mother, including an incident in which the mother's shoulder was dislocated and father was arrested for "battery upon a pregnant woman."³⁵⁷ The Alabama Supreme Court issued its first opinion on November 17, 2000, but withdrew it upon rehearing and substituted a new one in 2001.³⁵⁸ In the final decision, the Alabama Supreme Court reversed the appellate court and upheld the father's parental rights amidst several concurrences and dissents, as well as a recusal.³⁵⁹ On remand, the *C.V.* Court departed from its own rule,³⁶⁰ and, in an astounding display of judicial jujitsu, adopted trial court factual findings based

352. *In re Infant Child Skinner*, 982 P.2d 670, 678 (Wash. Ct. App. 1999). Stating facts supporting the trial court judgment:

Indeed, Skinner testified that she contacted New Hope because she did not believe she had adequate support to raise the child. Williams has also assigned error to the finding that after he learned of Skinner's pregnancy, he 'showed no evidence of any ability or commitment to change himself, he has taken no parenting class, he dropped out of a school program at Clallam Bay Correctional Center, he was fired from his job in the kitchen at Clallam Bay Correctional Center, and he has proposed no realistic plan for caring for the child.'

Id.

353. *Infant Child Skinner*, 982 P.2d at 678.

354. *See Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2564-65 (2013).

355. *See Ex parte C.V.*, 810 So. 2d 700, 706 (Ala. 2001).

356. *C.V. v. J.M.J.*, 810 So. 2d 692, 697 (Ala. Civ. App. 1999) *rev'd sub nom. Ex parte C.V.*, No. 1981316, 2000 WL 1717011 (Ala. Nov. 17, 2000) *withdrawn and superseded on reh'g*, 810 So. 2d 700 (Ala. 2001).

357. *C.V. v. J.M.J.*, 810 So. 2d at 697.

358. *Ex parte C.V.*, 810 So. 2d at 701-02.

359. *Ex parte C.V.*, 810 So. 2d at 701-02.

360. *Ex parte C.V.*, 810 So. 2d at 705.

upon *ore tenus* evidence by upending the trial court's *ore tenus* findings of fact.³⁶¹ The *C.V.* Court held that consent to adoption implied by prenatal abandonment could be revoked after birth, as is the case in voluntary consent to adoption.³⁶² This Court's finding that prenatal abandonment was revocable abrogates the theory's value to mothers, who must make decisions about abortion and relinquishment during pregnancy based upon the birth father's conduct. The decision also disregards the importance of financial support to a developing fetus. To allow a father to vitiate the mother's plan after birth undercuts any legislative intent to inform mothers' decisional analysis about abortion or adoption, facilitate adoptive placements, respect mothers' parental rights, and ensure permanency for children.

Justice Lyon concurred specially, writing that Alabama did not have prenatal abandonment until 1999, after the subject child was born, when its legislature explicitly added prenatal abandonment to its statutory law.³⁶³ Justice Lyons suggested that the timing required reversing the appellate court's affirmance, which relied upon prenatal abandonment law that was not explicit in the statute until after relevant events.³⁶⁴ Justice Moore, concurring, wrote that Alabama did have prenatal abandonment precedent prior to the 1999 legislative amendment.³⁶⁵

The Alabama Supreme Court in *C.V.* held that the trial court's finding that the birth father had emotionally, financially, and physically abused the mother during her pregnancy could go to the father's fitness to parent, but not to prove his abandonment.³⁶⁶ The 1996 Michigan decision defining prenatal abandonment as failure to provide support and care³⁶⁷ is the better analysis for purposes of prenatal abandonment because it includes the significant effects of abuse upon the physical health of the fetus and the mother as well as the impact of the abuse upon the mother's analysis of abortion, adoption, or parenting options. The *C.V.* court, by limiting the role of abuse to only a finding of unfitness, undermined the totality of

361. *Ex parte C.V.*, 810 So. 2d at 715. For a discussion of *ore tenus* evidence, see *supra* page 144 and page 147, note 237 and accompanying text.

362. *Ex parte C.V.*, 810 So. 2d at 729.

363. *Ex parte C.V.*, 810 So. 2d at 708.

364. *Ex parte C.V.*, 810 So. 2d at 708.

365. *Ex parte C.V.*, 810 So. 2d at 703.

366. *Ex parte C.V.*, 810 So. 2d at 722. The Supreme Court did not presume that the trial court's findings of fact were correct under the *ore tenus* rule, because the trial court relied upon deposition testimony of the birth mother and not upon any oral presentation to the trial court judge. Under the *ore tenus* rule, a reviewing court presumed trial court findings are correct as long as the findings are based upon actual testimony in court and not upon affidavits or deposition. *Id.* at 719.

367. *In re Gaipa v. Johnson*, 555 N.W.2d 867, 870 (Mich. App. 1996).

circumstances analysis typically associated with prenatal abandonment determinations.

In contrast to *C.V.*, an Alabama trial court found that the father of a child born 25 days before the State's enactment of prenatal abandonment legislation had prenatally abandoned the child in *Ex parte F.P.*.³⁶⁸ The Supreme Court subsequently reversed *Ex parte C.V.* a second time in 2001, holding that prenatal abandonment did not exist in 1997 when the subject child was born,³⁶⁹ and reversed *Ex parte F.P.* in 2003, on the basis that the Alabama six-month prenatal abandonment statute was impermissibly applied retroactively when the subject child's gestation expired before the statute was six months old.³⁷⁰

The Supreme Court in *F.P.* largely adopted the dissenting opinion of Judge Yates in the appellate opinion, which found that the birth father had diligently pursued his legal rights over the child.³⁷¹ The dissenting Supreme Court justice, Justice Stuart, pointedly contested Justice Yates's facts as mischaracterizing the birth father's prenatal conduct, and highlighted that the trial court had based its facts upon *ore tenus* evidence.³⁷² Justice Stuart indicated that the birth father had shunned the mother at school (both birth parents were seventeen years old), and that he had denied to the assistant principal both that she was pregnant and that he was the father of her child.³⁷³ That the *F.P.* Court declined to presume the correctness of the trial court's findings of fact in *Ex parte F.P.* marks the second time it derogated *ore tenus* evidence in a birth father's rights case over prenatal abandonment.³⁷⁴ While the *ore tenus* evidence deference did not operate in the first two Alabama prenatal abandonment birth father cases, the Alabama Supreme Court did defer to the *ore tenus* evidence of a trial court in 2005 in *Ex parte J.W.B.*.³⁷⁵

The Alabama Supreme Court and its legislature disputed the existence of prenatal abandonment, its irrevocability, and when the theory became effective and/or available, notwithstanding precedential holdings. For example, after the Supreme Court held in *C.V.* (2001) that implied consent to adoption could be voluntarily revoked by the father after birth, the 2002 legislative amendments clarified the irrevocability of pre-birth abandon-

368. See *F.P. v. J.K.M.*, 857 So. 2d 110, 112 (Ala. Civ. App. 2001), *rev'd sub nom. Ex parte F.P.*, 857 So. 2d 125, 125 (Ala. 2003).

369. *Ex parte C.V.*, 810 So. 2d at 727.

370. See *Ex parte F.P.*, 857 So. 2d at 138.

371. *F.P. v. J.K.M.*, 857 So. 2d at 118.

372. *Ex parte F.P.*, 857 So. 2d at 139–42.

373. *Ex parte F.P.*, 857 So. 2d at 140.

374. See *Ex parte F.P.*, 857 So. 2d at 139.

375. *Ex parte J.W.B. & K.E.M.B.*, 933 So. 2d 1081, 1087 (Ala. 2005).

ment.³⁷⁶ Alabama's *ore tenus* evidence deference rule did not operate in the first two prenatal abandonment birth father cases.³⁷⁷ However, the Alabama Supreme Court did defer to the *ore tenus* evidence of a trial court in 2005 in *J.W.B.*³⁷⁸

In 2002, Kansas affirmed the trial court's decision to terminate the father's parental rights in *In re Adoption of M.D.K.*³⁷⁹ The Court wrote that all relevant circumstances should be considered in determining whether the father was thwarted by the mother and whether his prenatal support satisfied the statutory requirements. The court's analysis included factors such as: alleged interference from the mother, whether the father's offers were merely general offers of assistance, the mother's needs, the father's knowledge of the mother's address, the mother's threats of restraining orders, and the father's ability to pay support.³⁸⁰ Judge Beier's concurrence emphasized the central and basic point of prenatal support cases: that support may not be court ordered prior to birth, but that it preserves the father's parental rights. Judge Beier states unequivocally:

An unwed man who learns that his unwed sexual partner is pregnant and intends to carry the pregnancy to term has only one way to ensure he can exercise his parental rights after the birth, regardless of whether the mother intends to exercise hers: He must relinquish possession and control of a part of his property or income to the mother-to-be during the last 6 months of the pregnancy so that she may use the items or money to support herself or prepare for the arrival of the child. He must do this regardless of whether his relationship with the mother-to-be continues or ends. He must do this regardless of whether the mother-to-be is willing to have any type of contact with him whatsoever or to submit to his emotional or physical control in any way. The birth may be the event that triggers a legal obligation of support, but it marks the end of the period when voluntary support can preserve the father-to-be's right to raise his child.³⁸¹

376. *See Ex parte C.V.*, 810 So. 2d 700 (Ala. 2001).

377. ALA. CODE § 26-10A-9 (Westlaw through Act 2017-81 of 2017 Reg. Sess.).

378. *See Ex parte J.W.B. & K.E.M.B.*, 933 So. 2d 1081, 1090–92 (Ala. 2005).

379. *In re Adoption of M.D.K.*, 58 P.3d 745, 747 (Kan. Ct. App. 2002).

380. *See M.D.K.*, 58 P.3d at 748–50. For an example of a father successfully suing the mother of his child's family for interference with parental rights see *Kessel v. Leavitt*, 511 S.E.2d 720 (1998).

381. *M.D.K.*, 58 P.3d at 750.

The *M.D.K.* father reported that his attorney advised him that he owed no support until a court ordered it,³⁸² implying that the attorney committed malpractice.³⁸³

In 2008, a Florida appellate court applied a standard of clear and convincing evidence in its decision to terminate a father's parental rights for prenatal and postnatal abandonment.³⁸⁴ The court found that the father had prenatally abandoned his fetus and that termination of his parental rights was supported by clear and convincing evidence.³⁸⁵ This heightened standard is appropriate when a court is terminating parental rights, but a lower burden attaches when the father has not established parental rights and the court is waiving his consent to adoption because he has not established rights to that consent.³⁸⁶ The *J.C.J.* court explicitly rejected the father's claim that his costs for litigation to prevent the adoption should excuse his failure to pay prenatal or postnatal child support.³⁸⁷ Other fathers have posited various similar justifications, including that welfare was covering the mother's prenatal costs or that incarceration made payment impossible, to limited success.³⁸⁸

Maternal "fraud" is another theme that emerges from the case law. In its most recent prenatal abandonment case, *Adoption of A.A.T.*, the Kansas Supreme Court terminated paternal rights in the face of the father's allegations that the birth mother had committed fraud.³⁸⁹ Conception occurred

382. *M.D.K.*, 58 P.3d at 747.

383. *M.D.K.*, 58 P.3d at 750 (stating "[h]e who hesitates truly is lost, and a lawyer who advises otherwise commits malpractice.").

384. *J.C.J. v. Heart of Adoptions*, 989 So. 2d 32, 34 (Fla. Dist. Ct. App. 2008).

385. *J.C.J.*, 989 So. 2d at 36. For the proposition that the clear and convincing standard of proof for termination of parental rights is necessary, see *Santosky v. Kramer*, 455 U.S. 755, 769–70 (1982).

386. See *In re Adoption of Baby Boy B.*, 866 P.2d 1029, 1033 (Kan. 1994) (explaining the lower burden of substantial competent evidence).

387. *J.C.J.*, 989 So. 2d at 35–36. After reversing court below, citing the dissent of the court below:

We should not equate the filing of 'court papers' and the taking of legal positions with the establishment of human relationships. A child can be abandoned just as surely when papers have been filed with a court as when they have not been. While those papers sit in a folder in a courthouse, children grow. They are read to and tucked in at night. They are nursed to health. They are taught. They are nurtured. They are loved. And they love back. And bonds are formed - but not with a biological father who has allowed himself to remain absent from the child's life.

Id.

388. See, e.g., *In re F.H. v. W.S.*, 283 N.W.2d 202, 211–12 (N.D. 1979) (citing numerous cases where courts rejected father's claims that incarceration made payment impossible).

389. *In re Adoption of A.A.T.*, 196 P.3d 1180, 1204 (Kan. 2008).

in New York; after informing the father of the pregnancy in October, the mother moved to Kansas, refusing to give the father her new address.³⁹⁰ In January, the mother told the father she had aborted.³⁹¹ The father doubted her veracity but did not file with the New York putative father registry, file a paternity action, or take any action in Kansas.³⁹² In fact, the mother had lied about the abortion to the father and had instead put the baby up for adoption.³⁹³ She had also lied to the adoption agency and the adoptive parents about the father's name.³⁹⁴ Birth mother fraud or lies appear frequently in the case law.³⁹⁵ However, birth mother fraud rarely frustrates the parental rights of a father who provides reliable and consistent prenatal support, unless the mother actively thwarts him.³⁹⁶ Fathers and their lawyers are well-advised to file with putative father registries (where available), file paternity actions, and establish confirmable bank accounts into which regular deposits are made for the welfare of a fetus.

Active maternal "thwarting" may take several shapes. For example, in *Dr. K.B. and Dr. R.M. v. J.G.*, the Mississippi Supreme Court protected the rights of the birth father despite his failure to pay prenatal support on the basis of the mother's actions to thwart his interests.³⁹⁷ In this case, the Caucasian birth mother notified the African American father, J.G., that he might be the father along with eight other men, all of whom were apparently not African-American.³⁹⁸ Her twins were biracial, so J.G. was the likely father.³⁹⁹ In this case, the Court determined that J.G.'s failure to pay support was justified because the birth mother had thwarted him with her promiscuity, by threatening to file harassment charges against him if he called her during the pregnancy, by her parents' hostility toward him based upon his race, which motivated him to avoid her home, and by asking him

390. *A.A.T.*, 196 P.3d at 1185.

391. *A.A.T.*, 196 P.3d at 1185.

392. *A.A.T.*, 196 P.3d at 1195–96.

393. *A.A.T.*, 196 P.3d at 1195–96.

394. *A.A.T.*, 196 P.3d at 1195–96.

395. See, e.g., *In re Krigel*, 480 S.W.3d 294, 298 (Mo. 2016); *T.W. v. M.C.*, 363 P.3d 193, 197 (Colo. 2015), *reh'g denied* (Jan. 11, 2016); *Kessel v. Leavitt*, 511 S.E.2d 720, 739 (1998) (providing examples of birth mother efforts to thwart birth fathers that result in tort actions, disciplinary complaints against attorneys and agencies, or actions for fraud).

396. See *A.A.T.*, 196 P.3d at 1195 (finding abandonment where "the record does not evidence any support, financial or otherwise, being provided, with the exception of some insignificant financial payments of \$200 for airfare and '\$20 here, \$20 there.'").

397. See *Dr. K.B. v. J.G.*, 9 So. 3d 1124, 1130–31 (Miss. 2009).

398. *Dr. K.B.*, 9 So. 3d at 1126–27.

399. *Dr. K.B.*, 9 So. 3d at 1126.

to keep their relationship a secret.⁴⁰⁰ This decision is significant in its deviation from the majority of holdings, which require a father who is uncertain of his paternity to nonetheless provide prenatal support in order to both support the fetus that is possibly his and to protect his parental rights to that fetus.⁴⁰¹ The role of uncertain paternity has not excused prenatal abandonment in other cases,⁴⁰² but the role of racial discord and threatened harassment charges in this case augmented the uncertain paternity and altogether constituted a sufficient excuse for the father's prenatal abandonment.⁴⁰³

In 2010, Utah affirmed its trial court's decision in *In re Adoption of T.B.* to dismiss a father's motion to set aside the adoption of his daughter for failure to comply with statutory requirements.⁴⁰⁴ The opinion focused on whether the father had developed constitutional protection of his parental rights through a qualifying relationship with his child under *Lehr*, even though the father had not timely complied with Utah's statute section 78B-6-121(3). In its interpretation of the statutory language ("consent of an unmarried biological father is not required"), the Court applied the following test:

[T]he father must (1) initiate paternity proceedings; (2) file notice that he has commenced paternity proceedings with the state registrar of vital statistics; (3) file a sworn affidavit with the district court stating that he is willing and able to take full custody of the child, setting forth his plans to care for the child, and agreeing to a court order of child support and payment of medical expenses; and (4) *offer to assist, and actually assist, with expenses associated with the pregnancy and birth*. Each of these requirements must be satisfied prior to the time that the natural mother executes her consent to adoption or relinquishes the child for adoption.⁴⁰⁵

The majority acknowledged that the father had requested receipts from which to pay prenatal medical expenses and sought the mother's permission to monitor her pregnancy and attend the birth, but that the mother had been uncooperative.⁴⁰⁶ The dissent questioned what more the father could

400. *Dr. K.B.*, 9 So. 3d at 1130–31.

401. *Dr. K.B.*, 9 So. 3d at 1130–31.

402. See, e.g., *In re Adoption of D.M.M.*, 955 P.2d 618, 622 (Kan. Ct. App. 1997).

403. See *Dr. K.B.*, 9 So. 3d at 1130–31.

404. See *In re Adoption of T.B.*, 232 P.3d 1026, 1027 (Utah 2010).

405. *T.B.*, 232 P.3d at 1031 (emphasis added) (internal citations omitted).

406. *T.B.*, 232 P.3d at 1027–28.

have done in the short space between birth and the mother's consent to adoption fifty-four days later.⁴⁰⁷ The majority responded that the father could have complied with the statute.⁴⁰⁸ The dissent examined what constitutional protection a father could obtain during the prenatal period that would trump his failure to comply with statutory process.⁴⁰⁹ *Adoptive Couple v. Baby Girl* suggests that prenatal support provides that constitutional protection.⁴¹⁰

In 2011, in *Roe v. Reeves*, the South Carolina Supreme Court decided its second prenatal abandonment case when it reversed a trial court's holding that the father's consent to adoption was necessary.⁴¹¹ The Court quoted the Kansas 2002 decision in *M.D.K.* for the rule that a mother's lack of romantic interest and even hostility does not prevent a father from funding a bank account or providing assistance through a third party.⁴¹² The Court explicitly rejected the father's claim that the mother's reliance upon government benefits to provide for her basic needs relieved the father of his prenatal support obligations.⁴¹³

In 2012, California decided a two-state prenatal abandonment case, in which conception occurred in New York and adoption in California.⁴¹⁴ In *Adoption of A.S.*, the appellate court held that a New York filiation order made shortly after the child's birth did not establish the father's right to prevent adoption filed in California.⁴¹⁵ The Court also analyzed New York law and found that the father's filiation order could bestow consent rights if the father also promptly asserted his interest and willingness to assume custody of the child; the factors in that test included his payment of pregnancy and birth expenses.⁴¹⁶ The court concluded that neither California nor New York law would protect this father's consent rights.⁴¹⁷ In a globalized world, bi-state cases are increasingly common, and a national putative father registry where fathers could assert their intentions to assume parental responsibility would do much to protect at least the rights to notice of responsible fathers, who would then have the opportunity to provide prenatal support.

407. *T.B.*, 232 P.3d at 1035–36.

408. *T.B.*, 232 P.3d at 1035–36.

409. *See T.B.*, 232 P.3d at 1038–40.

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

411. *Roe v. Reeves*, 708 S.E.2d 778, 784–5 (S.C. 2011).

412. *Reeves*, 708 S.E.2d at 783 (quoting *In re Adoption of M.D.K.*, 58 P.3d 745, 750–51 (Kan. Ct. App. 2002)).

413. *Reeves*, 708 S.E.2d at 784.

414. *Adoption of A.S.*, 151 Cal. Rptr. 3d 15, 18 (Ct. App. 2012).

415. *A.S.*, 151 Cal. Rptr. 3d at 19.

416. *A.S.*, 151 Cal. Rptr. 3d at 27–28.

417. *A.S.*, 151 Cal. Rptr. 3d at 27–28.

Also in 2012, in *In re Adoption of S.K.N.*, North Carolina upheld the birth father's rights where he had lived with the mother during the pregnancy and provided support to her after the birth.⁴¹⁸ The parents' relationship was "punctuated by domestic violence [and] substance abuse" and the mother was afraid to tell the father of the pregnancy.⁴¹⁹ She denied to the father that she was pregnant and kept the boy's birth a secret, which the father discovered almost immediately.⁴²⁰ North Carolina provides consent rights to unwed fathers who: 1) acknowledge paternity of the child; 2) make reasonable and consistent prenatal support payments commensurate with their means, including pregnancy related medical expenses; and 3) visit or communicate with the mother during and after the pregnancy.⁴²¹ The Court held that when the father's mother placed a phone call to the Division of Social Services, in which she acknowledged the father's paternity, that act sufficed for the father's acknowledgment of paternity required by the first prong.⁴²² The father's living with the birth mother satisfied both the second and third prongs.⁴²³ The holding that a man's mother can establish his paternity in a phone call to a state office is surprising, because such acknowledgement does not trigger responsibilities or rights and may not reflect the father's belief as to his paternity or his willingness to accept responsibility. However, in this case the father also took immediate actions to assert paternity upon learning of his son's birth, contemporaneous with his mother's phone call.⁴²⁴ The Court's concluding admonishment that mothers cannot be in total control of adoption⁴²⁵ is consistent with United States Supreme Court jurisprudence that a non-marital father's rights depend upon the responsibility he has assumed.⁴²⁶

In 2014, the North Carolina Supreme Court decided *In Re Adoption of S.D.W.* and reinstated the trial court's judgment in favor of the adoptive parents after the biological father attempted to intervene and to dismiss the adoption.⁴²⁷ The Court made explicit what efforts are required of an unwed father to determine the existence of pregnancy in a woman with whom he had a multiyear relationship in which they had sexual relations "10 to 20 times a week."⁴²⁸ The mother had previously conceived by the father and

418. See *In re Adoption of S.K.N.*, 735 S.E.2d 382 (N.C. Ct. App. 2012).

419. *S.K.N.*, 735 S.E.2d at 384.

420. *S.K.N.*, 735 S.E.2d at 384.

421. *S.K.N.*, 735 S.E.2d at 385.

422. *S.K.N.*, 735 S.E.2d at 385.

423. *S.K.N.*, 735 S.E.2d at 386.

424. *S.K.N.*, 735 S.E.2d at 385.

425. See *S.K.N.*, 735 S.E.2d at 389.

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

427. See *In re Adoption of S.D.W.*, 758 S.E.2d 374 (N.C. 2014).

428. *S.D.W.*, 758 S.E.2d at 375.

aborted with the father's knowledge, and the father testified that the mother was on birth control, but he was not knowledgeable about what form the contraception took.⁴²⁹ The father never used condoms.⁴³⁰

Despite the opportunity to limit its decision to the highly particularized facts of the case, the Supreme Court's analysis broadly framed the essential question in *S.D.W.* as whether "the qualifications for notice are beyond the control of an interested putative father."⁴³¹ The father alleged both that he was unaware that the mother was pregnant and that he had no reason to know she was.⁴³² The Court noted that the mother had fraudulently named another man as the father, upon which information the agency relied, and that the mother had visited the actual father two months after the child was born and they "marked the occasion [his birthday] with another act of sexual intercourse," and that she still did not notify the father of the birth.⁴³³ While the Court found the conduct of both parents troubling, it held that nothing the mother had done had put notification of the pregnancy beyond the father's control.⁴³⁴

This North Carolina case addresses a pattern in which women are historically held responsible for birth control and for notifying a father of pregnancy. The Court declined to establish a rule by which sex serves as notice of a possible pregnancy and instead based its decision upon facts as applied to its statutes.⁴³⁵ At least fourteen states now place responsibility on men to inquire whether pregnancy resulted from sexual relations with a

429. *S.D.W.*, 758 S.E.2d at 376.

430. *S.D.W.*, 758 S.E.2d at 376.

431. See *S.D.W.*, 758 S.E.2d at 380 (quoting *Lehr*, 463 U.S. at 263–64).

432. See *S.D.W.*, 758 S.E.2d at 379.

433. *S.D.W.*, 758 S.E.2d at 387.

434. *S.D.W.*, 758 S.E.2d at 380–81.

Johns [Father], on the other hand, demonstrated only incuriosity and disinterest. He knew that Welker [Mother] was fertile because she already had a child when they met. He knew that, despite Welker's purported use of birth control, he had impregnated her once, leading to an abortion. He assumed that her subsequent birth control methods would be effective without making detailed inquiry. He and Welker continued an active sex life, even after they broke up. From John's perspective, the sex was unprotected and contraception was wholly Welker's responsibility. The burden on him to find out whether he had sired a child was minimal, for he knew how to contact Welker. All he had to do was ask, for when he finally did call her, she told him. All the while, *S.D.W.* continued to live and bond with his adoptive parents.

Id.

435. *S.D.W.*, 758 S.E.2d at 381.

woman,⁴³⁶ and demographics supporting the policy for this rebalancing of reproductive responsibilities are discussed in Section 1 of this paper. Perhaps the emerging issue in prenatal abandonment will be to allocate whether it is the mother's responsibility *to give* or the father's responsibility *to obtain* timely notice that a pregnancy resulted after sexual relations. In *S.D.W.*, where the mother had defrauded the adoption agency and adoptive parents, but not the father, the North Carolina Supreme Court held that it was the father's passivity that had resulted in his lack of notice.⁴³⁷ The same issue of the father's notice of pregnancy has arisen in putative father registry cases and courts have uniformly held, consistent with this North Carolina decision, that the responsibility belongs to the father.⁴³⁸

436. See Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1050–51, n. 76, 77 (2002) (citing ARIZ. REV. STAT. § 8-106.01(F) (1997); GA. CODE ANN. §19-8-12(a)(6) (Westlaw through Act 10 of 2017 Legis. Sess.); IDAHO CODE § 16-1505(f)(2) (Westlaw through 2016); 750 ILL. COMP. STAT. 50/12.1(g) (Westlaw through P.A. 99-983 of 2016 Reg. Sess.); MONT. CODE ANN. § 42-2-204(1) (Westlaw through 2017 Legis. Sess.); OHIO REV. CODE ANN. § 3107.061 (Westlaw through 2016); MINN. STAT. § 259.52(8) (Westlaw through 2017); TEX. FAM. CODE ANN. § 160.254 (Westlaw through 2015 Reg. Sess. of 84th Legis.); UTAH CODE ANN. § 78B-6-110 (Westlaw through 2016 3d Spec. Sess.). New Jersey has no putative father registry but provides that an act of sexual intercourse constitutes constructive notice (for due process purposes) that a man may have conceived a child—unless the mother actively deceives him and thwarts his efforts to find her, thereby activating the statutory fraud protections. N.J. STAT. ANN. § 9:3-46 (Westlaw through 2017). An Ohio dissent discussed extensively that state's statute providing that sexual intercourse with a woman puts a man on notice that if a child is born as a result and the putative father fails to file with the registry, the child may be adopted without his consent pursuant to law. *In re Adoption of Baby Boy Brooks*, 737 N.E.2d 1062 (Ohio Ct. App. 2000). See also *In re Adoption of S.J.B.*, 745 S.W.2d 606 (Ark. 1988); *In re Paternity of Baby Doe*, 734 N.E.2d 281, 287 (Ind. Ct. App. 2000); *Robert O. v. Russell K.*, 604 N.E.2d 99 (N.Y. 1992). In Michigan Supreme Court Justice Levin's dissent in the Baby Jessica case, he indicated that putative fathers know that sexual intercourse may result in pregnancy and thus know of the opportunity to establish a family and the need to protect that opportunity. See *In re Clausen*, 502 N.W.2d 649, 687 (Mich. 1993) (Levin, J., dissenting). Accord MO. REV. STAT. § 453.061 (Westlaw through 2016 Reg. Sess. of 98th Gen. Assemb.) (stating “[a]ny man who has engaged in sexual intercourse with a woman is deemed to be on notice that a child may be conceived and as a result is entitled to notice of an adoption proceeding only as provided in this chapter.”).

437. *In re Adoption of S.D.W.*, 758 S.E.2d 374 (N.C. 2014).

438. Beck, *supra* note 436, at 1050–51. States began legislating that sex served as notice in 1997, and judges began commenting on how sex-constitutes-notice-of-pregnancy legislation was in step with modern mores by 1999. *Id.* See also *infra* note 507.

3.4 *Synopsis of Case Analysis*

The state cases reflect judicial analysis of multiple factors and particularized facts to determine whether a non-marital father has developed a relationship with an unborn child that qualifies him for constitutional protection of his rights. Some of the more common facts seen in these decisions were listed at the beginning of this section and noted in each case discussion.

At least one commentator has noted the emphasis on case facts in determining non-marital fathers' rights in adoption and bemoans the arbitrary manipulation of those facts to suit the prejudices of the judge.

The variations among courts with respect to the termination of a father's parental rights upon a finding of abandonment is illustrative of the subjective nature of this issue. Some courts allow a finding of abandonment on the basis of a father's prebirth conduct, considering such factors as the father's attitude towards the pregnancy and towards any arrangements for the subsequent placement of the child. These factors are extremely arbitrary and often courts 'are moved by natural sympathy in a case' which compels them to construe the facts in a light that will support the decision they wish to render. The unpredictability stemming from the courts' application of the facts to the law of abandonment urgently needs resolution because of its effect on the children involved.⁴³⁹

Judges also note the concern that bias could play a role in decisions based on fact patterns.⁴⁴⁰ The California *Michael H.* decision may provide an example of a court construing the facts in order to reach a predetermined decision.⁴⁴¹ In her concurring opinion, Justice Kennard argued that the majority artfully constructed its opinion in order to "justify" its outcome of not removing a four-and-a-half year old child from the only home he had ever known.⁴⁴²

Most trial court and appellate decisions do turn on the facts, giving rise to entire articles on how to apply mathematical and statistical analyses

439. Tracy Cashman, *When is a Biological Father Really a Dad?*, 24 PEPP. L. REV. 959, 976-77 (1997) (describing *DeShaney v. Winnebago Dep't of Soc. Servs.* 489 U.S. 189, 202-03 (1989), "contending lower court constructed a decision favoring the child on the basis of the gruesome facts of the case.").

440. *DeShaney*, 489 U.S. at 202-03 (1989); see Cashman, *supra* note 439, at 976-77.

441. See *Adoption of Michael H.*, 898 P.2d 891, 901 (Cal. 1995).

442. *Michael H.*, 898 P.2d at 906-10 (Kennard, J., concurring).

to case facts to determine the outcome.⁴⁴³ The clear intent of these analyses is to recognize parental rights commensurate with the father's assumption of responsibility.⁴⁴⁴ We may hope that the law is applied fairly to the facts and that a balance is reached between giving proper weight to the conduct of a responsible father and protecting a child's rights to rapid permanency and a mother's right to sole decision making authority where appropriate.

PART IV. RECOMMENDATIONS FOR PRENATAL ABANDONMENT LAW DERIVED FROM DEMOGRAPHICS AND CASE LAW

The shifting social landscape should inform public policy and state laws on prenatal abandonment/support theories. Existing state court prenatal abandonment decisions demonstrate how courts both analyze and inform relevant public policy issues undergirding mother's rights,⁴⁴⁵ children's rights to permanency,⁴⁴⁶ the health of fetuses and children,⁴⁴⁷ and father's rights.⁴⁴⁸ The federal Constitution demands the protection of the liberty interests of unmarried fathers, unmarried mothers, and their non-marital children.⁴⁴⁹

What emerges from a synthesis of constitutional rights, demographics, and prenatal abandonment case law is that state policy on prenatal abandonment should aim to ensure: 1) support by both parents of a non-marital fetus; 2) children's and newborns' rights to support and immediate permanency with parents; 3) non-marital mothers' rights to privacy, safety, support, and importantly, to unilateral control over their children when fathers have not timely assumed responsibilities; and 4) non-marital fathers' rights to privacy and clear information on how to protect their parental rights without relying on mothers.

States must enact three key legal protections to protect these interrelated rights: 1) allocate the responsibility to the father to determine the pregnancy and identify himself as the father; 2) require the father to con-

443. See Fred Kort, *Quantitative Analysis of Fact-Patterns in Cases and Their Impact on Judicial Decisions*, 79 HARV. L. REV. 1595 (1966).

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

445. See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013); see also *State ex rel. Lewis v. Lutheran Soc. Servs. of Wis. & Upper Mich.*, 227 N.W.2d 643, 646–47 (Wis. 1975).

446. See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2564 (2013).

447. *In re Adoption of Doe*, 543 So. 2d 741, 746 (Fla. 1989).

448. *In re Adoption of Suvak*, No. 1-03-51, 2004 WL 231494, at *2–4 (Ohio Ct. App. Feb. 9, 2004).

449. See *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000). The plurality and dissent attempt to define parental liberty interests as they are not enumerated constitutional rights and bear state definition “elaborated with care.” *Id.* at 65–66, 73; *id.* at 93 (Scalia, J., dissenting); *id.* at 95–96 (Kennedy, J., dissenting).

tribute prenatal support or waive his parental prerogatives before birth to inform the mother's short decisional timeline, in order to ensure the best prenatal environment for fetuses and avoid pregnancy-related abuse of the mother; and 3) ensure parental prerogatives to fathers who have constitutionally protected their parental rights with prenatal support.

4.1 Allocate the Responsibility to Father to Determine Pregnancy and Identify Himself as Father

The father is the better parent with whom to vest responsibility to obtain notice of pregnancy and to identify himself as a parent. This may seem counterintuitive because the mother is the first to know about the pregnancy. Nonetheless, allocating legal responsibility to the parent with the most to lose is the most effective means of protecting the rights of all parties. The demographics of non-marital births, domestic assault and homicide, rape, casual sexual encounters, non-payment of child support, and under-involvement of fathers with their non-marital children all support vesting fathers with the responsibility to take affirmative action.

The byzantine businesses of notifying a father of a pregnancy and identifying a father of a non-marital fetus can occur in two separate ways. Either the mother can inform the father of pregnancy⁴⁵⁰ and paternity, or the father can inquire of the mother if she became pregnant following sexual intercourse.⁴⁵¹ Identification of a father can therefore depend upon the ability and willingness of either parent, and the burden should not fall solely upon mothers.

Identification of a child's father is complicated by each parent's misinformation about failure rates of commonly used contraceptives, ignorance of reproductive physiology, and today's practice of engaging in casual and multiple sexual relationships. Parties may have little or no relationship to each other and may not know how to communicate with each other. Further, critical issues such as child support enforcement, domestic violence, and rape factor into the willingness of either or both parents to identify the father. Problematically, these issues are woven into the identification decisions for mothers of the more than four in ten children born out of wedlock in the United States.

Women with multiple partners around the time of conception may be unable to identify the father of a fetus. A woman's reproductive ignorance, particularly where she has vaginal bleeding after conception, also confounds

450. *E.g.*, *Lewis*, 227 N.W.2d at 645 (finding of fact that mother told father of the pregnancy).

451. *E.g.*, *In re Adoption of S.D.W.*, 758 S.E.2d 374, 380–81 (N.C. 2014) (holding that father should inquire of mother as to pregnancy).

her identification of a father and calculation of due date. When ultrasound dating of a pregnancy occurs months after conception, the mother's recollection of relevant sexual partners may be fuzzy. Women may also mistakenly assume that the use of a contraceptive rules out an individual man from having fathered a child, when in fact the contraceptive may have failed and he may be the father. In summary, a woman's ability to identify a father may be effectively compromised.

The unrelenting frequency of domestic violence and homicide associated with pregnancy contributes to some mothers' unwillingness to name fathers even when they can identify them. As noted in Part I of this Article, statistics bear out the legitimacy of these fears.⁴⁵² By enacting legislation relieving mothers of the obligation to identify fathers in abusive situations, Congress has acknowledged that the notification of men of pregnancy and its attendant support obligations may incur abuse of the mother and/or child.⁴⁵³

Placing the burden on fathers to identify themselves is particularly appropriate when mothers are physically impaired or unconscious at the time of conception. While the woman is the first to know of a pregnancy, some men are actually better positioned to know if they fathered a woman's fetus than the mother herself. Generally, a man's impregnation of a woman necessitates some level of consciousness on his part, whereas she may be impaired or even unconscious. Therefore, men may be better equipped to identify the women that they impregnated. In cases of rape, the state justice system may operate to dissuade fathers from identifying themselves because states may waive or terminate a rapist's parental rights⁴⁵⁴ and/or prosecute him for the rape.

452. See *supra* Section 1.4.

453. Soc. Serv. Amend. of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1975); SOLOMON-FEARS, *supra* note 7, at 4; see also 121 CONG. REC. H7141 (daily ed. Jul. 21, 1975) (statement of Rep. James Corman); Fontana, *supra* note 57, at 372-73 (explaining that the amendment established the good cause exception for women not to name fathers in order to escape abuse); Mannix et al., *supra* note 175, at 339 n.5 ("Congress was concerned about situations in which cooperation might result in 'substantial danger or physical harm or undue harassment to the mother or child.'").

454. See *Nevares v. M.L.S.*, 345 P.3d 719 (Utah 2015) (holding that parental rights are withheld from a 20-year-old man/father who statutorily raped a 15-year-old girl/mother according to Utah law but not Colorado law); see also MO. REV. STAT. § 211.447.5(5) (Westlaw through 2016 Reg. Sess.). The statute states:

The juvenile officer or the division may file a petition to terminate the parental rights of the child's parent when it appears that one or more of the following grounds for termination exist . . . (5). The child was conceived and born as a result of an act of forcible rape or rape in the first degree. When the biological father has pled guilty to, or is convicted of, the forcible rape or rape in the first degree of the birth mother, such a plea or convic-

At least fourteen states put the burden on fathers of non-marital children to determine the existence of a pregnancy and in essence self-identify and notify themselves.⁴⁵⁵ These states provide that men are on notice of a possible pregnancy by virtue of having had intercourse with a woman, thereby relieving women of the responsibility of notifying a father of possible paternity and effectively allocating the burden of discovery to men.⁴⁵⁶ This means that men have to actively inquire of women about possible conception in order to learn if they have fathered a fetus.

This shift of responsibility from mother to father to determine pregnancy is complicated. Judges have recognized that men who repeatedly inquire of women about pregnancy may risk claims of harassment.⁴⁵⁷ Additionally, men may not realize that symptoms of pregnancy alert some woman to the fact of pregnancy sooner than others, and may not be sufficiently informed about reproductive physiology to know how often to inquire whether a woman has become pregnant.⁴⁵⁸ Importantly, men are not historically accustomed to this responsibility, may be ignorant of the responsibility, and may resist carrying it out. Additionally, potential child support responsibilities may factor into men's willingness to pursue notification of pregnancy.⁴⁵⁹

Ignorance of contraceptive failure rates is another factor influencing fathers' inquiries into possible pregnancy, as underscored by a North Carolina decision discussed in Part III of this Article.⁴⁶⁰ The *S.D.W.* trial court recited that:

A putative Father who engages in a sexual relationship with a woman multiple times without benefit of contraception is on notice that a child may result from the sexual relationship and must make diligent inquiry to discover the existence of his child

tion shall be conclusive evidence supporting the termination of the biological father's parental rights.

Id.

455. See, e.g., MO. REV. STAT. § 453.061 (Westlaw through 2016 Reg. Sess. of 98th Gen. Assemb.); see Beck, *supra* note 436, at 1050–51 n.76, 77.

456. MO. REV. STAT. § 453.061 (Westlaw through 2016 Reg. Sess. of 98th Gen. Assemb.) (“Any man who has engaged in sexual intercourse with a woman is deemed to be on notice that a child may be conceived and as a result is entitled to notice of an adoption proceeding only as provided in this chapter.”).

457. See *Robert O. v. Russell K.*, 604 N.E.2d 99, 106 (N.Y. 1992) (Titone, J., concurring).

458. See *supra* Sections 1.1, 1.2.

459. See *supra* Sections 1.5, 1.6.

460. *In re Adoption of S.D.W.*, 758 S.E.2d 374, 376 (N.C. 2014).

in order to establish a Constitutional Parental Right regarding that Minor Child.⁴⁶¹

In this case, the appellate court based its holding on facts that the father knew the mother was fertile, had left birth control up to the mother, had not specifically confirmed details of her birth control, and had not called the mother at all during the entire pregnancy.⁴⁶² While both the trial court and state Supreme Court allocate responsibility to the father to inquire about a possible pregnancy, the *S.D.W.* analysis permits the interpretation that contraceptive use is exculpatory, perhaps relieving men of inquiring about a pregnancy if they confirm use of contraceptives by the woman or use a condom. But this view ignores contraceptive failure rates. Notice of pregnancy is fraught with difficulty when even judges refuse to acknowledge that contraceptives fail.

Men's uncertainty about their paternity further impedes inquiry regarding pregnancies and payment of prenatal support. Men may resist paying prenatal support because their genetic paternity is not typically confirmed until after birth.⁴⁶³ However, state case law provides that any possible father of a fetus must provide prenatal support if he wishes to protect his parental rights, even if that requires more than one man to provide prenatal support.⁴⁶⁴ At least one man has argued that the mother's "promiscuity" thwarted him from paying support.⁴⁶⁵ However, courts have demanded payment of prenatal support even in cases in which paternity was uncertain.⁴⁶⁶

Holding multiple potential fathers accountable for prenatal support serves the general policy and legislative purposes of advancing the interests of unborn children and of relieving women from serving as the sole source of support in pregnancy. Whether or not this is fair to multiple men who

461. *In re Adoption of S.D.W.*, 758 S.E.2d at 377–78.

462. *In re Adoption of S.D.W.*, 758 S.E.2d at 380–81.

463. *See infra* Sections 1.1, 1.2.

464. *In re Adoption of D.M.M.*, 955 P.2d 618, 622 (Kan. Ct. App. 1997). Explaining:

Any man should be aware that he may become the father of a child as a result of having sexual intercourse with a woman, regardless of the number of sexual partners she has. If any of those partners wishes to preserve his parental rights in the event of a later adoption, each one will be required to initiate reasonable efforts toward supporting the mother prior to the child's birth.

Id.

465. *E.g.*, *Dr. K.B. v. J.G.*, 9 So. 3d 1124, 1128 (Miss. 2009).

466. *See Dr. K.B.*, 9 So. 3d at 1128, 1130–31. The court did not rely upon the ambiguities attendant to the ten possible fathers and instead relied upon the father's reasonable fear of contacting the mother and confronting the mother's parents. *Id.*

had sexual relations with one woman, the fact is that paying prenatal support is a cost of protecting parental rights.⁴⁶⁷

Both men and women face substantial impediments to identifying the father of a fetus/child and giving or seeking notice of pregnancy. The end result is that fathers may not support fetuses and mothers during pregnancy, to both the mother and child's peril. Importantly, the legal obligation to provide support cannot be enforced during the pregnancy, despite the significant legal implications of failure to do so.⁴⁶⁸

In sum, public policy demands and case law suggests that men be obligated to inquire of their sexual partners whether pregnancy resulted from sexual intercourse, and that women be simultaneously relieved of the obligation to notify men of pregnancy or paternity. Some state court decisions have recognized this.⁴⁶⁹ The threat of domestic violence and homicide place too great a burden on mothers. And men have too much to lose by relying upon women whose abilities and willingness to notify men of impending fatherhood vary greatly. The biological imperative is that women are automatically notified of pregnancy and simultaneously maternity. Women automatically bear the physiological burdens of pregnancy, of making decisions about abortion or pregnancy, and of supporting their pregnancies and fetuses. Men, on the other hand, bear no physiological burden but have much at stake in supporting their fetuses, and in determining and protecting paternity. Paternity law performs best when it vests responsibility in the class of persons with the most to lose by missing notification of pregnancy: the fathers.⁴⁷⁰

4.2 Require Fathers to Provide Support During Pregnancy or Waive Parental Prerogatives

Requiring fathers to pay prenatal support or waive parental rights is necessary in order to inform the mother's short decisional timeline, ensure

467. See *In re Adoption of M.D.K.*, 58 P.3d 745, 750 (Kan. Ct. App. 2002) (Beier, J., concurring) (clarifying that attorneys who misguide potential fathers on this point do so at their peril of malpractice actions because "[t]he birth may be the event that triggers a legal *obligation* of support, but it marks the end of the period when *voluntary* support can preserve the father-to-be's right to raise his child").

468. See *generally M.D.K.*, 58 P.3d 745.

469. See, e.g., *In re Adoption of S.D.W.*, 758 S.E.2d 374, 380–81 (N.C. 2014) (holding that where the mother fraudulently identified the father on birth and adoption documents and failed to notify him of the pregnancy but the father did nothing to inquire about whether pregnancy had resulted from sexual intercourse, the father was not deprived of due process of law through the adoption of his child against his wishes due to his failure to "tak[e] any of the steps that would establish him as a responsible father").

470. See *Robert O. v. Russell K.*, 604 N.E.2d 99, 103 (N.Y. 1992).

the best prenatal environment for fetuses, and to avoid pregnancy-related abuse impacting the mother's liberty and safety interests.

A. Mother's Decisional Timeline

Women have legally, physically, and emotionally enforced timelines in which to make decisions about pregnancy, abortion, and adoption.⁴⁷¹ A woman may obtain an abortion until twenty-two weeks of gestation. When a man investigates the possibility of pregnancy, and provides support in the early weeks of gestation, the mother is able to forecast a father's voluntary level of support and assistance into her abortion calculus.

When a woman makes a decision to maintain a pregnancy, the father has another eighteen to twenty weeks in which to constitutionally protect his parental rights to a child by providing support and assistance to the pregnant mother of his child. Some states explicitly require prenatal support during the second and third trimesters or the last six months of a pregnancy.⁴⁷² This information about father's willingness to support a fetus/child is crucial to women considering adoption,⁴⁷³ particularly once legal abortion is no longer available to a woman. Numerous case decisions, including the first-ever reported prenatal abandonment case, cite the entitlement of a mother to decide whether to relinquish a child to adoption during the pregnancy, and do not require her to wait until birth to give a father time to evince his assumption of parental responsibilities.⁴⁷⁴

While a mother may relinquish a child months or even years after birth, waiting to relinquish for any period of time after birth necessarily exposes mothers and babies to increased opportunities to bond.⁴⁷⁵ Relinquishment after increased bonding severs a relationship that is more devel-

471. See UNIV. OF N.M. CTR. FOR REPROD. HEALTH, <http://www.unmcrh.org/abortion-care/> (last visited Feb. 22, 2015) (The University of New Mexico offers abortion until 22 weeks gestation. Abortions conducted before nine weeks' gestation are medical; abortions done after nine weeks must be conducted surgically in a clinic, and abortions done after 12–16 weeks may require an overnight stay).

472. E.g., ALA. CODE § 26-10A-9(a)(1) (Westlaw through Act 2017-81 of 2017 Reg. Sess.); *In re Adoption of D.M.M.*, 955 P.2d 618, 618 (Kan. Ct. App. 1997).

473. Karen Pazol et al., *Abortion Surveillance*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6108a1.htm> (last visited Feb. 23, 2015) (The CDC reports that "[i]n 2009, most (64.0%) abortions were performed at 8 weeks' gestation, and 91.7% were performed at 13 weeks' gestation.").

474. E.g., *State ex rel. Lewis v. Lutheran Soc. Servs. of Wis. & Upper Mich.*, 227 N.W.2d 643, 646–47 (Wis. 1975).

475. See generally Kay M. Robson & R. Kumar, *Delayed Onset of Maternal Affection After Childbirth*, 136 BRIT. J. PSYCHIATRY 347, 351 (1980) (concluding that maternal bonding increases over time).

oped and involves that much more anguish and emotional adjustment for mother and child.⁴⁷⁶

Thus, a mother's decisional timeline is essentially the period of pregnancy. Fathers complain that the prenatal abandonment timeline is too short for them and plead for time after birth to pay support and to demonstrate responsibility.⁴⁷⁷ Such complaints by fathers about brief timelines ignore the fact that fathers have nine full months of pregnancy to assume responsibilities to protect their parental rights.

Requiring support during the second and third trimesters gives sufficient opportunity for fathers to determine if the pregnancy resulted from their sexual intercourse and to pay the support and provide the assistance that protects their parental rights, all while informing birth mothers' choices and advancing the health of fetuses and newborns. Requiring support during pregnancy to protect paternal rights is sensible and not unduly burdensome to fathers, given the burden that falls on mothers and children if fathers fail to provide support.

B. Best Prenatal Environment for Fetuses

Fathers' historical avoidance of responsibilities associated with their children imperils their own parental rights, the health of their fetuses and children, and the safety of their children's mothers. As illustrated in some of the factual vignettes discussed in Part III, some men may regard non-marital pregnancy as the mothers' problem.⁴⁷⁸ Data confirms that many fathers do not pay their child support and documents the under-engagement of many non-custodial fathers with their children.⁴⁷⁹

Florida's first prenatal abandonment case relied upon the deleterious effects of insufficient financial support upon the developing fetus and has been quoted in other state decisions.⁴⁸⁰ Fathers' non-support necessarily factors into the poverty experienced by single mothers, and poverty is

476. *Id.*

477. See *In re Adoption of H.N.R.*, 2014-Ohio-4959, ¶ 18 (Ohio Ct. App. 2014) (in which the father claims fathers are too distracted and too busy in children's first months of life to register with putative father registries or initiate the establishment of paternity).

478. *E.g.*, *Doe v. Attorney W.*, 410 So. 2d 1312, 1316–17 (Miss. 1982) (where the father refused to take responsibility for the child and told the mother not to notify the welfare agency that he was the father); *Lewis*, 227 N.W.2d at 646 (where the father threatened to call the doctor to make sure his name was not on the birth certificate).

479. See *supra* Section 1.5; NAT'L CONF. ST. LEGISLATURES *supra* note 85.

480. *Appeal of H.R.*, 581 A.2d 1141, 1162 (D.C. 1990); *In re Adoption of Michael H.*, 898 P.2d 891, 898 (Cal. 1995); *In re Adoption of Doe*, 543 So. 2d 741, 746 (Fla. 1989).

associated with demonstrably poor developmental outcomes for children.⁴⁸¹ Fathers' absence or reduced engagement with children is associated with children's lower academic achievement, corresponding reduced income level, and increased criminal activity. Failure to pay prenatal support portends to a mother that a father will not support the child after birth.

C. Pregnancy-Related Abuse

In addition to detrimentally affecting children, fathers' non-support can constitute a form of abuse of the custodial parent or the pregnant woman. *Adoptive Couple v. Baby Girl* demonstrates the financial abuse that women often face during pregnancy as well as its association with other known features of abuse, and its facts support the conclusion that states should require prenatal support or waive fathers' rights.⁴⁸²

In *Adoptive Couple*, Father had told Mother by the time of her first prenatal appointment (before her timeline for abortion vanished) that he would not contribute financial support unless she married him.⁴⁸³ His demand was fatuous, since birth fathers' support obligations are independent of marital status, as are women's support needs for medical bills, transportation, clothing, and lost wages during a pregnancy.⁴⁸⁴ More significantly, Father's marriage ultimatum constituted exploitation, because it attempted to force the mother to stay in the relationship, "to use his control over finances to deprive [her] of necessary monies for herself or her children."⁴⁸⁵

Father's abusive tactics continued four months after the birth and placement of the child, when he invoked the Indian Child Welfare Act

481. See *supra* Sections 1.5, 1.6.

482. See generally *supra* Section 1.4 (explaining the risks and consequences of domestic violence during pregnancy).

483. See Petition for Writ of Certiorari at 5, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (No. 12-399), 2012 WL 4502948 at *5–6.

484. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 578 (S.C. 2012), *rev'd* 133 S. Ct. 2552 (2013) (Kittredge, J., dissenting) (stating "[an unwed father] must provide support regardless of whether his relationship with the mother-to-be continues or ends.") (quoting *Roe v. Reeves*, 708 S.E.2d 778, 783 (S.C. 2011)). See also Shari Motro, *Responsibility Begins at Conception*, N.Y. TIMES (July 7, 2012), nytimes.com/2012/07/07/opinion/time-for-pregnancy-support-alimony.html (discussing women's need for financial support during pregnancy).

485. See *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1360 (E.D. Penn. 1990); *Facts About Domestic Violence and Economic Abuse*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, <http://www.ncadv.org/files/EconomicAbuse.pdf>. (last visited Sept. 23, 2016); *Economic Abuse*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, http://www.mmgconnect.com/projects/userfiles/File/DCE-STOP_NOW/NCADV_Economic_Abuse_Fact_Sheet.pdf. (last visited Sept. 23, 2016).

(ICWA) because Mother did not keep his baby.⁴⁸⁶ Over text message, Father made it clear it that terminating his parental rights to evade paying support would be acceptable to him as long as Mother kept his baby. It was only when he realized Mother was not keeping his baby that he objected.⁴⁸⁷ Abusers' manipulation of finances and legal processes—in this case ICWA—to maintain control of their victims is often not recognized by judges.⁴⁸⁸ “In fact, many abusers appear to be manipulating the court.”⁴⁸⁹ This is evidenced in *Adoptive Couple* by the recitation of disturbing facts of financial abuse, stalking, and manipulation by both the majority and the dissent, although neither names the father's controlling, coercive conduct as the abuse it was.⁴⁹⁰

Such judicial oversight exposes women to domestic abuse and homicide when they have rendered themselves vulnerable by the obligations they assume in choosing pregnancies over abortions. The public deludes itself that domestic violence affects only a few women⁴⁹¹ and that only physical battering constitutes abuse.

Over nine months of her life, Baby Girl's Mother had subjected her health and her finances to a pregnancy for which Father had refused any responsibility. After birth, Father wrested control of the very child he had abandoned and to whom Mother had just dedicated nine months of her life, and he prevailed in obtaining a court-ordered transfer of the child to him.⁴⁹² This eviscerated Mother's liberty interest in placing Baby Girl up for adoption and diminished Mother's post-relinquishment recovery by voiding her choice of an open adoption with a hand-picked adoptive family⁴⁹³—all actions theoretically protected by the South Carolina legislature.⁴⁹⁴ The

486. See *Adoptive Couple v. Baby Girl*, 731 S.E.2d at 555; *id.* at 569–70 (Kittredge, J., dissenting).

487. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558 (2013).

488. *Gender Bias in the Courts of the Commonwealth Final Report*, 7 WM. & MARY J. WOMEN & L. 705, 751 (2001).

489. *Id.*

490. *Adoptive Couple*, 731 S.E.2d at 552–53, 569–70 (Kittredge, J., dissenting); Transcript of Record, *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (2012) (No. 12-399).

491. The author testified for an adoption bill in the Missouri Legislature in the Children, Families and Persons with Disabilities Subcommittee of the House. After the author quoted statistics on domestic violence and its impact upon relinquishing mothers, a representative said, “Well, that's only a few women.” *Before the Children, Families and Persons with Disabilities H. Subcomm.*, 99th Sess. (Mo. Mar. 13, 2014).

492. *Adoptive Couple*, 731 S.E.2d at 556.

493. See generally *Adoptive Couple*, 731 S.E.2d at 590.

494. S.C. CODE ANN. § 63-17-20B (Westlaw through 2016 Sess.) (“Unless the court orders otherwise, the custody of an illegitimate child is solely in the natural mother unless the mother has relinquished her rights to the child.”). As the Iowa Supreme

Supreme Court's description of Father's "eleventh hour" assertion of paternal rights and observation that the father "play[ed] the ICWA card" at his convenience indicate the Court's strong distaste for Father's conduct.⁴⁹⁵ Justice Alito wrote that a decision allowing such conduct by a father would raise equal protection concerns.⁴⁹⁶

When fathers do not provide prenatal support, or when fathers exert disturbing and manipulative coercive control and/or physically abuse a pregnant woman, public policy and state law should allocate sole control over newborns to birth mothers.

4.3 Ensure Parental Prerogatives to Fathers Who Have Constitutionally Protected Their Parental Rights by Prenatal Support

The converse legal theory, protecting fathers' rights in the prenatal period, must co-exist with prenatal abandonment theory. *Lehr* made clear that an unwed father's rights are commensurate with his assumption of substantial personal, custodial, and financial responsibilities for his child.⁴⁹⁷ *Adoptive Couple* extended the possibility of establishing this relationship during the prenatal period.⁴⁹⁸ Prenatal abandonment theory is also prenatal support theory. The father's rights must be protected when he assumes prenatal responsibilities and mothers must have exclusive rights to control their children at birth if fathers do not assume responsibilities prenatally.⁴⁹⁹

Mothers can thwart fathers by misleading them about pregnancies,⁵⁰⁰ lying about an expected date of confinement (due date),⁵⁰¹ moving between states or out of the country,⁵⁰² or refusing to accept specific and definite

Court eloquently stated, "The State has no right to influence [a birth mother's] decision by preventing her from choosing a family she feels is best suited to raise her child." *In re N.N.E.*, 752 N.W.2d 1, 9 (Iowa 2008).

495. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013).

496. *Adoptive Couple*, 133 S. Ct. at 2565.

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

498. *Adoptive Couple*, 133 S. Ct. at 2565.

499. *Adoptive Couple*, 133 S. Ct. at 2559, 2560.

500. *In re Adoption of S.K.N.*, 735 S.E.2d 382, 384 (N.C. Ct. App. 2012) ("As her weight gain from the pregnancy became obvious, Ms. Godwin continued to deny that she was pregnant, insisted that she was simply 'gaining weight', and expressed 'outrage' when questioned about it.").

501. *In re Krigel*, 480 S.W.3d 294, 298 (Mo. 2016). ("Birth Mother contacted Birth Father in late March. Birth Mother informed him that her expected due date had changed from early April to early May. This statement was intended to deceive Birth Father of the real due date.").

502. See *Smith v. Malouf*, 722 So. 2d 490 (Miss. 1998); *Kessel v. Leavitt*, 511 S.E.2d 720 (W. Va. 1998). In these cases, birth mother used interstate travel to overcome the investigative and legal efforts of the fathers to establish their legal rights to their children.

offers of prenatal support.⁵⁰³ The effect of such fraudulent or obstructive conduct by a mother can cause a father to miss key state deadlines and/or fail to provide prenatal support.⁵⁰⁴ State law must provide fathers with means of protecting their parental rights without reliance upon mothers or adoption agencies.

The majority of states have now legislated putative father registries, where a man can register his intent to claim paternity.⁵⁰⁵ Such registration allows a father to overcome any obstacles he might encounter in asserting and claiming paternity, including his inability to locate the mother, the mother's deliberate obfuscation of her whereabouts, or the mother's refusal to respond to the father's legitimate inquiries.⁵⁰⁶ Registration is cheap (the cost of a letter) and can be completed easily on forms available online, in hospitals of birth, and in State Child Protective Agencies. Importantly, registration does not require that the father continue a relationship with the mother.⁵⁰⁷

However, not all states have registries, and thus some states deprive men of an economical system of obtaining notice of an adoption or protective custody action. At least one judge has lamented his state's failure to legislate registries.⁵⁰⁸

503. *In re Adoption of S.K.N.*, 735 S.E.2d at 389 (“[T]he legislature ‘did not intend to place the mother in total control of the adoption to the exclusion of any inherent rights of the biological father.’”) (quoting *In re Adoption of Byrd*, 552 S.E.2d 142, 148 (N.C. 2001)); *In re Adoption of Anderson*, 360 N.C. 271, 274–75 (2006).

504. *In re Adoption of S.K.N.*, 735 S.E.2d at 384.

505. Beck, *supra* note 197, at 339.

506. See *supra* Section 3.2.

507. See, e.g., 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, 220 (1996).

The burden placed on putative fathers under Illinois' new legislation is not necessarily out of step with modern mores or the realities of contemporary heterosexual relationships. Neither is it completely unrealistic. To meet the burden which the new legislation places on a putative father, he need neither remain in contact with a woman with whom he has had sexual intercourse, nor turn to other sources of information to determine whether he has conceived a child with her. Under the new legislation, a putative father need only file with the putative father registry based on his knowledge that he has had intercourse with a woman and commence a parentage action within thirty days of that filing. His interests will not be jeopardized if he ends relations with her, and his social habits are not, therefore, greatly affected. By simply mailing a postcard to the registry and commencing a parentage action, tasks which can hardly be labelled a burden, a putative father can preserve his rights to notice and consent.

Id.

508. See generally *In re Adoption of S.J.B.*, 745 S.W.2d 606 (Ark. 1988).

Unfortunately, no national registry exists. State father registries cannot ensure notice to fathers of interstate adoptions if the father does not know the state of birth or of adoption. For example, a man is unable to register in the “right” state if a mother leaves the state of conception or an adoption action is initiated by adoptive parents in a state unknown to the father.⁵⁰⁹ The national Responsible Father Registry bill, now called the Protecting Adoption Act, would go toward fixing this interstate problem by erecting a national registry linking all participating state registries.⁵¹⁰ However, this Act would not help fathers in states without registries. A national registry would prevent any mother’s deliberate or accidental obfuscation of an adoption by providing a timely registered father in any state with notice of any adoption proceeding for a child of the woman named in his registry filing. Although no national registry exists, Utah’s legislature also recently entertained a bill that would create a national registry to facilitate cooperation among states.⁵¹¹

Mothers may also thwart fathers by threatening them with civil protective orders or criminal actions for harassment.⁵¹² When mothers threaten to lodge harassment claims, fathers must desist contact and are best advised to file paternity actions pre-birth to evidence their intent to establish paternity and file with putative father registries where possible. Such fathers must document their interest and their financial support. And importantly, if a mother refuses to accept prenatal support, case law suggests that the father can protect himself by establishing a fund with the mother’s knowledge for support of the fetus.⁵¹³ State law must protect fathers against any fraud, must protect fathers who establish paternity timely, and must credit fathers with prenatal support if they establish funds for that purpose and mothers have been appraised.

Non-marital fathers’ parental rights merit constitutional protection when they have established *Lehr*’s personal, custodial and financial relationship standard before or after birth. As discussed in Part I, Section 1.6, these paternal rights are important to fathers as well as children, as evidence shows that children whose fathers are involved in childrearing demonstrate higher intelligence quotients, attain higher academic achievement, avoid drugs and

509. *E.g.*, N.Y. DOM. REL. LAW § 110 (Westlaw through 2017).

510. *See supra* Section 3.2.

511. S.B. 10, 2015 Gen. Assemb., Reg. Sess. (Utah 2015).

512. *See* Dr. K.B. v. J.G., 9 So. 3d 1124 (Miss. 2009). *See also In re Adoption of M.D.K.*, 58 P.3d 745, 750 (Kan. Ct. App. 2002) (“Finally, J.T. contends his attempts to support D.K. were hindered by interference from D.K. and D.K.’s mother. Specifically, J.T. cites D.K.’s requests for him to stop calling and D.K.’s threats to obtain a restraining order against him.”).

513. *Roe v. Reeves*, 708 S.E.2d 778, 783–85 (S.C. 2011); *In re Adoption of M.D.K.*, 58 P.3d 745, 750–51 (Kan. Ct. App. 2002).

violence, and enjoy good emotional and physical health.⁵¹⁴ It is imperative for fathers and children that state law operationalize means for fathers to protect their parental rights against fraud and obfuscation.

Fathers may complain that they did not know of laws requiring them to assume parental responsibilities pre-birth or to register with state putative father registries. This complaint is not surprising given the evolutionary history of non-marital fathers' responsibilities. Thus, it is important to start publicizing laws informing fathers of their rights and responsibilities to non-marital children. Some states have enacted filing fee surcharges which go to administer putative father registries and may fund publicizing their registries.⁵¹⁵ The national father registry bill has always contained a provision for a national publicity campaign and requirements that states publicize their registries.⁵¹⁶

To the extent that the nature of non-marital fathers' ignorance stems from a historical norm of abdicated responsibility, the most effective solution may be education at the high school level regarding the number of non-marital births in the United States, the effects of teen pregnancy upon children and their mothers and their fathers, the effectiveness of various contraceptives, the child support calculation tables for fathers or non-custodial parents of non-marital children, and the options state Child Support Enforcement organizations utilize in collecting payments such as criminal penalties and revocation of drivers' licenses.⁵¹⁷

CONCLUSION

When women choose to continue pregnancies, despite unwed fathers' refusal to provide support, they rely upon prenatal abandonment laws to escape physical and economic abuse and to protect their liberty interests in placing their children for adoption. Withholding the protection of state prenatal abandonment laws in the name of the Indian Child Welfare Act would have eviscerated women's constitutional interests in parenting decisions and

514. *See supra* Section 1.6.

515. *E.g.*, IND. CODE § 31-19-2-8 (Westlaw through 2016 Second Reg. Sess. of 119th Gen. Assemb.) (providing for a \$50 putative father registry fee); MO. ANN. STAT. §§ 192.016.11, 453.020.2 (Westlaw through 2016 Reg. Sess. of 98th Gen. Assemb.) (same).

516. Beck, *supra* note 197.

517. *E.g.*, MO. ANN. STAT. § 568.040 (Westlaw through 2016 Reg. Sess. of 98th Gen. Assemb.). *See generally License Restrictions for Failure to Pay Child Support*, NAT'L CONF. ST. LEGISLATURES (Jan. 30, 2014), <http://www.ncsl.org/research/human-services/license-restrictions-for-failure-to-pay-child-support.aspx> (containing a list of states and what licenses may be affected by failure to pay child support).

their unquestionable right to life. The United States Supreme Court did not allow it in *Adoptive Couple*.

States, each with their own domestic abuse, dependency, paternity, and dissolution laws, have highly developed adoption laws protecting mothers' constitutional rights in parenting and in personal safety. Thirty-four states recognize prenatal abandonment theory.⁵¹⁸ The prenatal abandonment in *Horton Hatches the Egg* is unusual in that it is the mother, Mayzie, who prenatally abandons her fetus/egg, which is not physically possible for a human mother.⁵¹⁹ Nonetheless, the story of Horton's Egg was

518. See *infra* Appendix.

519. States do use civil laws to protect fetuses from both their mothers and fathers. See generally 750 ILL. COMP. STAT. ANN. 50/1(D)(t) (Westlaw through P.A. 99-983 of 2016 Reg. Sess.), found constitutional in *In re Jamarqon C.*, 788 N.E.2d 344, 353 (Ill. App. Ct. 2003). See MO. ANN. STAT. § 211.447.5(6) (Westlaw through 2016 Reg. Sess. of 98th Gen. Assemb.), which reads:

The parent is unfit to be a party to the parent and child relationship because of a consistent pattern of committing a specific abuse including, but not limited to, specific conditions directly relating to the parent and child relationship which are determined by the court to be of a duration or nature that renders the parent unable for the reasonably foreseeable future to care appropriately for the ongoing physical, mental, or emotional needs of the child. (b) It is presumed that a parent is unfit to be a party to the parent and child relationship upon a showing that: a. Within a three-year period immediately prior to the termination adjudication, the parent's parental rights to one or more other children were involuntarily terminated pursuant to subsection 2 or 4 of this section or subdivision (1), (2), (3), or (4) of this subsection or similar laws of other states; b. If the parent is the birth mother and within eight hours after the child's birth, the child's birth mother tested positive and over .08 blood alcohol content pursuant to testing under section 577.020 for alcohol, or tested positive for cocaine, heroin, methamphetamine, a controlled substance as defined in section 195.010, or a prescription drug as defined in section 196.973, excepting those controlled substances or prescription drugs present in the mother's body as a result of medical treatment administered to the mother, and the birth mother is the biological mother of at least one other child who was adjudicated an abused or neglected minor by the mother or the mother has previously failed to complete recommended treatment services by the children's division through a family-centered services case; c. If the parent is the birth mother and at the time of the child's birth or within eight hours after a child's birth the child tested positive for alcohol, cocaine, heroin, methamphetamine, a controlled substance as defined in section 195.010, or a prescription drug as defined in section 196.973, excepting those controlled substances or prescription drugs present in the mother's body as a result of medical treatment administered to the mother, and the birth mother is the biological mother of at least one other child who was adjudicated an abused or neglected minor by the mother or the mother has previously failed to complete recommended treatment services by the children's division through a family-centered services case; or d. Within a three-year

extraordinarily popular,⁵²⁰ which suggests the public's endorsement of Horton's story. The moral of Horton's story is that the real parent stands the post no matter what: "I meant what I said and I said what I meant . . . An elephant's faithful one hundred percent!"⁵²¹

The operation of prenatal abandonment requires non-marital fathers to assume responsibility despite the complications of contemporary demographics. State efforts to shape this theory are guided by the cases discussed in Part III of this Article. Unmarried men should bear the responsibility to inquire of women with whom they have had sexual intercourse as to whether pregnancies resulted and must identify themselves as fathers. They must provide documented prenatal support and assistance to women who are pregnant when any possibility of their paternity exists. Finally, they should register with putative father registries and file paternity actions appropriately. State laws must 1) protect the privacy and domestic safety of non-marital mothers who maintain pregnancies; 2) protect non-marital fathers' rights when they can document significant and consistent prenatal support and assistance, commensurate with their means, and have concomitantly taken appropriate and timely action to assume and establish legal paternity; and 3) withhold non-marital fathers' rights to consent to adoption where fathers have committed documented domestic violence against the mothers of their fetuses or abdicated prenatal support responsibilities in the absence of birth mother fraud.

That forty-one percent of the nation's children are born outside of marriage, that non-marital children are more likely to live in poverty to

period immediately prior to the termination adjudication, the parent has pled guilty to or has been convicted of a felony involving the possession, distribution, or manufacture of cocaine, heroin, or methamphetamine, and the parent is the biological parent of at least one other child who was adjudicated an abused or neglected minor by such parent or such parent has previously failed to complete recommended treatment services by the children's division through a family-centered services case.

Id.

520. *Horton Hatches the Egg* has remained popular in the United States. In 2001, PUBLISHERS WEEKLY reported that the book had sold 987,996 copies to date, placing it at 138 in the magazine's list of the best-selling children's books of all time. Debbie H. Turvey, *All-Time Bestselling Children's Books*, PUBLISHER'S WEEKLY (Diane Roback ed.) (Dec. 17, 2001), <http://www.publishersweekly.com/pw/by-topic/childrens/childrens-industry-news/article/28595-all-time-bestselling-children-s-books.html>. In 2007, the National Education Association named the book one of its "Teachers' Top 100 Books for Children" based on an online poll. *Teacher's Top Books for Children*, NAT'L EDUC. ASS'N, <http://www.nea.org/grants/teachers-top-100-books-for-children.html> (last visited Nov. 2, 2016).

521. See SEUSS, *supra* note 2. Horton makes this statement repeatedly in the non-paginated book.

their detriment, and that non-marital mothers are uniquely vulnerable to domestic violence and homicide mandates that the states make fathers' rights commensurate with the responsibilities they assume during the prenatal period. ❧

APPENDIX: SUMMARY OF PREABANDONMENT THEORY
AS APPLIED IN EACH STATE

Alabama

ALA. CODE § 26-10A-9 (2015)

(a) A consent or relinquishment required by Section 26-10A-7 may be implied by any of the following acts of a parent:

(1) Abandonment of the adoptee. Abandonment includes, but is not limited to, the failure of the father, with reasonable knowledge of the pregnancy, to offer financial and/or emotional support for a period of six months prior to the birth.⁵²²

Case Law

In 2000, in *C.V. v. J.M.J. and T.F.J.*⁵²³, the Alabama Supreme Court issued its first prenatal abandonment opinion; the Court withdrew it upon rehearing and substituted a new one in 2001,⁵²⁴ ultimately holding that a father could revoke his prenatal abandonment just as he could revoke his consent, therefore upholding his parental rights.⁵²⁵

In 2003, the Alabama Supreme Court reversed its trial and appellate courts in *Ex Parte F.P. and R.P.* on the basis that the Alabama six-month prenatal abandonment statute was impermissibly retroactively applied where the subject child's gestation expired shortly before the statute was six months old.⁵²⁶

In 2006, the Alabama Supreme Court decided *Ex parte J.W.B.* and upheld the trial court's finding of the birth father's consent implied by his prenatal abandonment.⁵²⁷ The intermediate court had reversed the trial court and the Supreme Court again reversed, restoring the findings made by the trial court. The trial court had concluded, based upon *ore tenus* evidence, that a mother had not thwarted the father's developing a protective relationship with his child.⁵²⁸ As is common in prenatal abandonment cases,

522. ALA. CODE § 26-10A-9 (Westlaw through Act 2017-81 of 2017 Reg. Sess.)).

523. See *C.V. v. J.M.J.*, 810 So. 2d 692, 692 (Ala. Civ. App. 1999) *rev'd sub nom. Ex parte C.V.*, No. 1981316, 2000 WL 1717011 (Ala. Nov. 17, 2000) *withdrawn and superseded on reh'g*, 810 So. 2d 700 (Ala. 2001) (Crawley, J., dissenting) (a man has no duty to support his child before his paternity can be established, but other states have held differently).

524. *Ex parte C.V.*, 810 So. 2d 700 (Ala. 2001).

525. See *C.V.*, 810 So. 2d at 700. See discussion *supra* Section 3.3.

526. *Ex parte F.P.*, 857 So. 2d at 137–38. See discussion *supra* Section 3.3.

527. *Ex parte J.W.B. & K.E.M.B.*, 933 So. 2d 1081, 1092 (Ala. 2005).

528. *J.W.B.*, 933 So. 2d at 1090.

the *J.W.B.* Court extensively examined the totality of circumstances giving rise to a finding of prenatal and post-birth abandonment.⁵²⁹ The birth father was one of two possible fathers.⁵³⁰ The mother never lied to the father and the father did not file with the putative father registry.⁵³¹ The father did not institute legal proceedings until he was served with notice of an adoption of which he already knew.⁵³² His filing was defensive in that he did not proactively seek legal and financial responsibility for the child but only filed action to establish paternity in reaction to the adoption filing.⁵³³ Such inaction has been a factor in the decisions of numerous courts in prenatal abandonment findings.⁵³⁴

Arizona

In 1994, the Arizona Supreme Court upheld the trial court in *The Father in Pima County Juvenile Action*.⁵³⁵ The Court held that the father had not affirmatively sought to block the adoption, seek custody, or establish his paternity and that his defensive filing did not cure his inaction, nor did his claim that he could not afford an attorney.⁵³⁶

California

CAL. HEALTH & SAFETY CODE § 102425.

(a) The certificate of live birth for any live birth occurring on or after January 1, 2016, shall contain those items necessary to establish the fact of the birth and shall contain only the following information:

529. *J.W.B.*, 933 So. 2d at 1083–85.

530. *J.W.B.*, 933 So. 2d at 1083.

531. *J.W.B.*, 933 So. 2d at 1090.

532. *J.W.B.*, 933 So. 2d at 1090–91.

533. See *J.W.B.*, 933 So. 2d at 1090–91.

534. See *J.W.B.*, 933 So. 2d at 1092 (quoting Murdock, J., in *K.W.J. v. J.W.B.*, 933 So. 2d 1075, 1081 (Ala. Civ. App. 2005)).

We should not equate the filing of ‘court papers’ and the taking of legal positions with the establishment of human relationships. A child can be abandoned just as surely when papers have been filed with a court as when they have not been. While those papers sit in a folder in a courthouse, children grow. They are read to and tucked in at night. They are nursed to health. They are taught. They are nurtured. They are loved. And they love back. And bonds are formed-but not with a biological father who has allowed himself to remain absent in the child’s life.

Id. See also *In re Appeal in Pima Cty. Juv. Severance Action No. S-114487*, 876 P.2d 1121, 1135 (Ariz. 1994); *Doe v. Attorney W.*, 410 So. 2d 1312, 1316 (Miss. 1982).

535. See *In re Pima Cty. Juv. Severance Action*, 876 P.2d 1121.

536. *Pima Cty. Juv. Severance Action*, 876 P.2d at 1133–35. See discussion *supra* Section 3.3.

- (1) Full name and sex of the child.
- (2) Date of birth, including month, day, hour, and year.
- (3) Place of birth.
- (4) Full name, birthplace, and date of birth of each parent, including month, day, and year, and the parental relationship of the parent to the child.

(C) If the parents are not married to each other, the father's name shall not be listed on the birth certificate unless the father and the mother sign a voluntary declaration of paternity at the hospital before the birth certificate is submitted for registration. The birth certificate may be amended to add the father's name at a later date only if paternity for the child has been established by a judgment of a court of competent jurisdiction or by the filing of a voluntary declaration of paternity.⁵³⁷

Case Law

In 1992, The California Supreme Court reversed a termination of father's rights in *Adoption of Kelsey S.* when it developed a two-step analysis to determine whether an unwed father has demonstrated a full commitment to his parental responsibilities both before and after the child's birth.⁵³⁸

In 1995, the California Supreme Court decided *Adoption of Michael H.*, in which it found that post-birth conduct evincing a full commitment to the responsibilities of parenting cannot cure a failure to demonstrate such full commitment before birth⁵³⁹ and held that the father's rights were properly terminated.⁵⁴⁰

In 1999, a California appeals court decided *In re Ariel H.* and determined that father was not a presumed father and waived his parental rights.⁵⁴¹ *Ariel H.* is one of the more entertaining prenatal abandonment decisions. The question was whether the father had demonstrated a full commitment to his parental responsibilities—emotional, financial, and otherwise—both before and after birth including “public acknowledgment of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child.”⁵⁴² The court commented that “[w]hile eager to participate in the procreating part—Joshua (the father) apparently had unprotected sex with Lisa at least

537. CAL. HEALTH & SAFETY CODE § 102425 (Westlaw through 2017 Reg. Sess.).

538. *Adoption of Kelsey S.*, 823 P.2d 1216, 1236–37 (Cal. 1992). See discussion *supra* Section 3.3.

539. *Adoption of Michael H.*, 898 P.2d 891, 897, 904 (Cal. 1995).

540. *Michael H.*, 898 P.2d at 901. See discussion *supra* Section 3.3.

541. See *In re Ariel H.*, 86 Cal. Rptr. 2d 125 (Cal. Ct. App. 1999).

542. *Ariel H.*, 86 Cal. Rptr. 2d at 127.

40 times—he never made a serious effort to assume the true mantle of fatherhood.”⁵⁴³ The father had hung out with his friends at the mall, had spent what money he had on compact discs, did not go to see his child, and did not notify his parents about the baby or otherwise publicly acknowledge his paternity.⁵⁴⁴ The court concludes that “Joshua is no Horton”, referring to Dr. Seuss’s popular children’s book *Horton Hatches the Egg*.⁵⁴⁵

In 2012, a California appellate court decided a two-state prenatal abandonment decision against a father in *Adoption of A.S.*, in which it held that a New York filiation order made shortly after the child’s birth did not establish father’s right to prevent adoption filed in California.⁵⁴⁶

Colorado

COLO. REV. STAT. § 19-5-105(3)(C)(III) (1994)

(3.1) The court may order the termination of the other birth parent’s parental rights upon a finding that termination is in the best interests of the child and that there is clear and convincing evidence of one or more of the following: (c) That the parent has not promptly taken substantial parental responsibility for the child. In making this determination the court shall consider, but shall not be limited to, the following: (II) Whether the parent has failed to pay regular and reasonable support for the care of the child, according to that parent’s means; and (III) Whether the birth father has failed to substantially assist the mother in the payment of the medical, hospital, and nursing expenses, according to that parent’s means, incurred in connection with the pregnancy and birth of the child.⁵⁴⁷

Delaware

DEL. CODE ANN. TIT. 13 § 1103(A)(2)(A)(I)(A) (2009)

a. The Court may order a termination of parental rights based upon abandonment if the Court finds that the following occurred and that the respondent intended to abandon the child: 1. In the case of a minor who has not attained 6 months of age at the time a petition for termination of parental rights has been filed, and for whom the respondent has failed to: A.

543. *Ariel H.*, 86 Cal. Rptr. 2d at 127.

544. *Ariel H.*, 86 Cal. Rptr. 2d at 127.

545. *Ariel H.*, 86 Cal. Rptr. 2d at 128.

546. *Adoption of A.S.*, 151 Cal. Rptr. 3d 15, 28 (Cal. Ct. App. 2012). See discussion *supra* Section 3.3.

547. COLO. REV. STAT. ANN. § 19-5-105(3)(c)(III) (Westlaw through 1st Reg. Sess. of 71st Gen. Assemb.).

Pay reasonable prenatal, natal and postnatal expenses in accordance with the respondent's financial means[.]⁵⁴⁸

Florida

FLA. STAT. § 63.089(4) (2012)

(4) Finding of abandonment. A finding of abandonment resulting in a termination of parental rights must be based upon clear and convincing evidence that a parent or person having legal custody has abandoned the child in accordance with the definition contained in s. 63.032. A finding of abandonment may also be based upon emotional abuse or a refusal to provide reasonable financial support, when able, to a birth mother during her pregnancy or on whether the person alleged to have abandoned the child, while being able, failed to establish contact with the child or accept responsibility for the child's welfare.⁵⁴⁹

Case Law

In 1989, the Florida Supreme Court decided *In re Adoption of John Doe v. Richard Roe*.⁵⁵⁰ The appellate court had reversed the trial court's grant of adoption and certified the question of whether prenatal abandonment could waive father's consent to adoption; the Supreme Court answered affirmatively.⁵⁵¹

In 1990, one year later, Florida used the biology plus theory to cut in favor of a father in *In re Adoption of Baby James Doe v. Doe* when it remanded a case involving a father who produced documentary proof of monetary support and the identification band from the hospital of the child's birth with his surname on it.⁵⁵²

In 1995, the Florida Supreme Court affirmed trial and appellate court decisions in *In re Adoption of Baby E.A.W. v .J.S.W.*⁵⁵³ The Court held that father's conduct—including absence of his emotional support to mother and his emotional abuse of mother—could constitute grounds for a finding of prenatal abandonment.⁵⁵⁴

In 2008, a Florida appellate court affirmed the trial court's termination of a father's parental rights for prenatal and postnatal abandonment in

548. DEL. CODE ANN. tit. 13. § 1103(a)(2)(a)-(a)(2)(a)(1)(A) (Westlaw through 2017).

549. FLA. STAT. ANN. § 63.089(4) (Westlaw through 2017 Reg. Sess. of 25th Legis.).

550. See *In re Adoption of John Doe*, 543 So. 2d 741 (Fla. 1989).

551. *John Doe*, 543 So. 2d at 743.

552. See generally *In re Adoption of Baby James Doe*, 572 So. 2d 986, 987–88 (Fla. Dist. Ct. App. 1990). See discussion *supra* Section 3.3.

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

554. *Baby E.A.W.*, 658 So. 2d at 962.

Heart of Adoptions.⁵⁵⁵ The court used a clear and convincing evidentiary standard to terminate father's parental rights based upon prenatal abandonment.⁵⁵⁶

Georgia

GA. CODE ANN. § 19-8-12(B)(4)(D) (2008)

(b) If there is a biological father who is not the legal father of a child and he has not executed a surrender . . . , he shall be notified of adoption proceedings regarding the child in the following circumstances:

(4) If the court finds from the evidence . . . that such biological father who is not the legal father has performed any of the following acts:

(D) Provided support or medical care for the mother either during her pregnancy or during her hospitalization for the birth of the child.⁵⁵⁷

Idaho

IDAHO CODE ANN. § 16-1504(2)(b)(iii) (2014)

(2) In accordance with subsection (1) of this section, the consent of an unmarried biological father is necessary only if the father has strictly complied with all requirements of this section.

(b) With regard to a child who is under six (6) months of age at the time he is placed with adoptive parents, an unmarried biological father shall have manifested a full commitment to his parental responsibilities by performing all of the acts described in this subsection and prior to the date of the filing of any proceeding to terminate the parental rights of the birth mother. The father shall have strictly complied with all of the requirements of this subsection by:

(iii) If he had actual knowledge of the pregnancy, paying a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his means, and when not prevented from

555. J.C.J. v. Heart of Adoptions, 989 So. 2d 32, 32 (Fla. Dist. Ct. App. 2008).

556. For an example of the clear and convincing standard of proof needed for termination of parental rights see *Santosky v. Kramer*, 455 U.S. 745 (1982).

557. GA. CODE ANN. § 19-8-12(b), (b)(4), (b)(4)(D) (Westlaw through 2016 Sess.).

doing so by the person or authorized agency having lawful custody of the child.⁵⁵⁸

Illinois

750 ILL. COMP. STAT. 50/8 (2013)

(b) Where consents are required in the case of an adoption of a minor child, the consents of the following persons shall be sufficient:

(B) The father of the minor child, if the father:

(iv) in the case of a child placed with the adopting parents less than 6 months after birth, made a good faith effort to pay a reasonable amount of the expenses related to the birth of the child and to provide a reasonable amount for the financial support of the child before the expiration of 30 days following the birth of the child, provided that the court may consider in its determination all relevant circumstances, including the financial condition of both biological parents[.]⁵⁵⁹

Iowa

IOWA CODE § 600A8(3)(a)(2)(d)

[] The following shall be, either separately or jointly, grounds for ordering termination of parental rights:

3. The parent has abandoned the child. For the purposes of this subsection, a parent is deemed to have abandoned a child as follows:

(2) In determining whether the requirements of this paragraph are met, the court may consider all of the following:

(d) With regard to a putative father, whether the putative father paid a fair and reasonable sum, in accordance with the putative father's means, for medical, hospital, and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child, or whether the putative

558. IDAHO CODE ANN. § 16-1504(2), (2)(b), (2)(b)(iii) (Westlaw through 2016 Reg. Sess.).

559. 750 ILL. COMP. STAT. 50/8(b), (b)(B), (b)(B)(iv) (Westlaw through P.A. 99-983 of 2016 Reg. Sess.).

father demonstrated emotional support as evidenced by the putative father's conduct toward the mother.⁵⁶⁰

Kansas

KAN. STAT. ANN. § 59-2136(h)(1)(D)

(h)(1) [T]he court may order that parental rights be terminated, upon a finding by clear and convincing evidence, of any of the following:

(D) the father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth[.]⁵⁶¹

Case Law

In 1991, in *In re Adoption of Baby Boy S.*, the Kansas Court of Appeals upheld a trial court's termination of incarcerated father's parental rights.⁵⁶²

In 1994, Kansas courts decided two prenatal abandonment cases and demonstrated that prenatal abandonment/support can operate to waive or preserve father's parental rights. In *Baby Boy B.*, the Kansas Supreme Court affirmed the trial and appellate courts' upholding of father's consent rights to deny adoption and discriminated between appellate review of documentary and *ore tenus* evidence as well as set a reasonableness evidentiary standard.⁵⁶³

In *Baby Boy N.*, the Kansas Court of Appeals affirmed a trial court decision to terminate father's parental rights for failure to provide prenatal support, which he unsuccessfully attempted to blame on poor legal advice.⁵⁶⁴

560. IOWA CODE § 600A.8(3), (3)(a)(2), (3)(a)(2)(d) (Westlaw through 2017 Reg. Sess.).

561. KAN. STAT. ANN. § 59-2136(h)(1), (h)(1)(D) (Westlaw through 2017 Reg. Sess.).

562. *In re Adoption of Baby Boy S.*, 822 P.2d 76, 78 (Kan. Ct. App. 1991) ("[T]he mother testified that the father did not provide her with money, groceries, or a place to live, nor did he give her his paycheck or babysit her other children. Moreover, the mother stated the father showed a complete disregard for supporting her before his incarceration."). The trial court concluded that the father made no effort to inquire after the welfare of the mother in her pregnant condition. *Id.* See discussion *supra* Section 3.3.

563. *In re Adoption of Baby Boy B.*, 866 P.2d 1029, 1037 (Kan. 1994). See discussion *supra* Section 3.3.

564. *In re Baby Boy N.*, 874 P.2d 680, 689-90 (Kan. Ct. App. 1994). See discussion *supra* Section 3.3.

In 1997, a Kansas Court of Appeals affirmed its trial court's termination of father's parental rights in *In re Adoption of D.M.M.*, in which both mother and father questioned his paternity.⁵⁶⁵

In 2002, the Kansas Court of Appeals affirmed the trial court's decision to terminate a father's parental rights in *In re Adoption of M.D.K.*⁵⁶⁶ Judge Beier's concurrence emphasized a central issue to prenatal support cases—that support may not be court ordered prior to birth but that it preserves the father's parental rights.⁵⁶⁷

In 2008, the Kansas Supreme Court decided *In re Adoption of A.T.T.*, where it affirmed the trial court's termination of a father's parental rights for nonsupport during the pregnancy in a multi-state case where the mother moved from the conception state to Kansas to give birth and relinquish her baby and refused to give father her new address.⁵⁶⁸

Kentucky

KY. REV. STAT. ANN. § 625.065(1)(e)

(1) The putative father of a child shall be made a party and brought before the circuit court in the same manner as any other party to an involuntary termination action if one (1) of the following conditions exists:

(e) He has contributed financially to the support of the child, either by paying the medical or hospital bills associated with the birth of the child or financially contributed to the child's support; or

(2) Any person to whom none of the above conditions apply shall be deemed to have no parental rights to the child in question.⁵⁶⁹

Louisiana

LA. CHILD. CODE ANN. art. 1138(B)(1)

A. At the hearing of the opposition, the alleged or adjudicated father must establish his parental rights by acknowledging that he is the father of the

565. See *In re Adoption of D.M.M.*, 955 P.2d 618 (Kan. Ct. App. 1997). See discussion *supra* Section 3.3.

566. *In re Adoption of M.D.K.*, 58 P.3d 745, 747–48 (Kan. App. 2002).

567. *M.D.K.*, 58 P.3d at 750. See discussion *supra* Section 3.3.

568. *In re Adoption of A.A.T.*, 196 P.3d 1180, 1184–85 (Kan. 2008). See discussion *supra* Section 3.3.

569. KY. REV. STAT. § 625.065(1)(e) (Westlaw through 2017 Reg. Sess.).

child and by proving that he has manifested a substantial commitment to his parental responsibilities and that he is a fit parent of his child.

B. Proof of the father's substantial commitment to his parental responsibilities requires a showing, in accordance with his means and knowledge of the mother's pregnancy or the child's birth, that he either:

(1) Provided financial support, including but not limited to the payment of consistent support to the mother during her pregnancy, contributions to the payment of the medical expenses of pregnancy and birth[.]

D. If the court finds that the alleged or adjudicated father has failed to establish his parental rights, it shall decree that his rights are terminated.⁵⁷⁰

Case Law

In 2000, in the case *In re Adoption of E.H.M.*, a Louisiana appellate court affirmed the lower court's holding terminating the biological father's rights.⁵⁷¹ Both courts looked at several factors to determine if the biological father assumed parental responsibilities and ultimately determined he was not fit to be a parent. Biological father showed his unfitness by physically abusing birth mother on several occasions, abusing drugs and alcohol, and committing several crimes leading to his incarceration.⁵⁷² The fact that biological father failed to provide any support to birth mother while she was pregnant also showed his unfitness to be a parent:

Furthermore, before he was incarcerated, he made no effort to provide financial support for TLM or the unborn baby. ACM was working for his father and uncle, and they allowed him to work as he pleased. TLM testified that if he had a hangover, he would stay in bed instead of going to work. Even with his sporadic work habits, he testified he made \$1,200 per month. That money was not saved or spent for the upcoming expenses of fatherhood, however, even though he was living with his parents and paying nothing for room and board.⁵⁷³

In 2001, a Louisiana appellate court reversed a trial court's holding and terminated a biological father's parental rights in *In Re Adoption of*

570. LLA. CHILD. CODE ANN. art. 1138(B)(1) (Westlaw through 2016).

571. *In re Adoption of EHM*, 808 So. 2d 397, 406 (La. Ct. App. 2000).

572. *Adoption of EHM*, 808 So. 2d at 406.

573. *Adoption of EHM*, 808 So. 2d at 406.

*J.L.G.*⁵⁷⁴ The court looked at the biological father's support of the mother, his visitation, and his fitness to be a parent to determine whether the biological father was fit to be a parent.⁵⁷⁵ The court also discussed the irrelevance of mother's failure to request support:

TJT argues in brief that MLG never requested support from him. Article 1138 does not refer to providing support "if requested." A father who is committed to his parental responsibilities will offer support to his child without being asked. Furthermore, MLG testified she did not ask him for support because to have done so would have been a vain and useless act: "I didn't ask him for that because I knew he wasn't going to give it to me."⁵⁷⁶

Michigan

MICH. COMP. LAWS § 710.39(1)-(2)

(1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.

(2) If the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance with [his] ability to provide such support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the

574. *In re Adoption of J.L.G.*, 808 So. 2d 491, 494–95 (La. Ct. App. 2001).

575. *Adoption of J.L.G.*, 808 So. 2d at 494–95, 499.

It is undisputed that TJT provided no financial support to MLG while she was pregnant, paid no medical expenses for MLG or JLG, and provided no cash, diapers, formula, or items for JLG after she was born. At most, he and his mother provided four clothing outfits and a rattle. . . . TJT knew he could have made contributions to the child's support through CCS, but he stated that if a child was not going to be a part of his life, he was not going to support the child.

Id.

576. *Adoption of J.L.G.*, 808 So. 2d at 494–95, 499.

putative father shall not be terminated except by proceedings in accordance with [MCL 710.51(6)] or [MCL 712A.2].⁵⁷⁷

Case Law

In 1996, a Michigan court in *In re Brianna Marie Gaipa v. Johnson* vacated a trial court order finding a father had provided prenatal support and set out test factors to evaluate prenatal support including the father's physical abuse of the mother.⁵⁷⁸

In 1998, the Michigan Court of Appeals decided in *In re Adoption of J.L.G.* that a putative father had the ability to provide financial support to the mother during her pregnancy, but failed to do so.⁵⁷⁹ In a short memorandum opinion, the court held that the birth mother's refusals to accept baby items from the putative father's family and her failure to answer his two offers of support did not relieve putative father of his obligation to provide support under Mich. Comp. Laws § 710.39(2).⁵⁸⁰ The court ultimately affirmed the lower court's termination of the putative father's parental rights.⁵⁸¹

In 2011, *In Re H.M.K.*, the Michigan Court of Appeals discussed an incarcerated father's support obligations to the birth mother.⁵⁸² The court held that the father's obligation to provide financial support still existed even when he was in prison and noted that the father's ability to provide support is determined by his "actual financial resources whatever their origin, including wages from employment, proceeds of a legal settlement, rental income, and monetary gifts."⁵⁸³ Using Mich. Comp. Laws § 710.39(1), the court ultimately affirmed the lower court's holding that the biological father's parental rights were terminated because he did not provide substantial and regular support during the birth mother's pregnancy.⁵⁸⁴

577. MICH. COMP. LAWS § 710.39(1)-(2) (Westlaw through P.A.2016).

578. *In re Gaipa v. Johnson*, 555 N.W.2d 867, 867-68 (Mich. Ct. App. 1996). See discussion *supra* Section 3.3.

579. *In re Wilkinson*, No. 204217, 1998 WL 1989831, at *1 (Mich. Ct. App. Oct. 2, 1998)

580. *Wilkinson*, No. 204217, 1998 WL 1989831, at *1.

581. *Wilkinson*, No. 204217, 1998 WL 1989831, at *1.

582. HMK No. 304575, 2011 WL 6187076, at *2 (Mich. Ct. App. Dec. 13, 2011).

583. HMK, No. 304575, 2011 WL 6187076, at *2.

584. HMK, No. 304575, 2011 WL 6187076, at *2.

Mississippi

MISS. CODE ANN. § 93-17-6

(4) Proof of an alleged father's full commitment to the responsibilities of parenthood would be shown by proof that, in accordance with his means and knowledge of the mother's pregnancy or the child's birth, that he either:

(a) Provided financial support, including, but not limited to, the payment of consistent support to the mother during her pregnancy, contributions to the payment of the medical expenses of pregnancy and birth, and contributions of consistent support of the child after birth; that he frequently and consistently visited the child after birth; and that he is now willing and able to assume legal and physical care of the child; or

(b) Was willing to provide such support and to visit the child and that he made reasonable attempts to manifest such a parental commitment, but was thwarted in his efforts by the mother or her agents, and that he is now willing and able to assume legal and physical care of the child.⁵⁸⁵

Case Law

In 1982, in *John Doe and A Female Infant v. Attorney W.*, the Mississippi Supreme Court affirmed the trial court's termination of a father's parental rights where the father had misled the adoptive parents and sought parental rights only in defense to their adoption filing.⁵⁸⁶

In 2009, the Mississippi Supreme Court considered prenatal abandonment and protected the rights of the father in *Dr. K.B. and Dr. RM. v J.G.*⁵⁸⁷ The Court decided that the father's failure to provide prenatal support was justified because the birth mother had thwarted him with her promiscuity and by threatening to file harassment charges against him.⁵⁸⁸

Montana

MONT. CODE ANN. § 42-2-610.4(b) (2013)

585. MISS. CODE ANN. § 93-17-6 (Westlaw through 2017 Reg. Sess.).

586. *John Doe v. Attorney W.*, 410 So. 2d 1312, 1313 (Miss. 1982). See discussion *supra* Section 3.3.

587. *Dr. K.B. v. J.G.*, 9 So. 3d 1124, 1124 (Miss. 2009).

588. *Dr. K.B.*, 9 So. 3d at 1130–31. See discussion *supra* Section 3.3.

(1) The parental rights of a putative father may be terminated by the court if the putative father has failed to timely establish and maintain a substantial relationship with the child.

(4) In order to meet the minimal showing of having established a substantial relationship with regard to a child who is the subject of an adoption proceeding involving a child who is under 6 months of age at the time that the child becomes the subject of adoption proceedings, a putative father has the burden to show that the putative father has manifested a full commitment to parental responsibilities by:

(b) if the putative father had actual knowledge of the pregnancy, paying a fair and reasonable amount of the expenses incurred in connection with the pregnancy and the child's birth in accordance with the putative father's means when not prevented from doing so by the person or authorized agency having lawful custody of the child[.]⁵⁸⁹

Case Law

In 1990, in *In re Adoption of D.J.V.*, the Montana Supreme Court affirmed a trial court's termination of birth father's parental rights for abandonment despite his claim that he was under no court order to support based upon pre- and post-birth conduct.⁵⁹⁰

Nebraska

NEB. REV. STAT. § 43-104.22.5 (2009)

The court shall determine that such father's consent is not required for a valid adoption of the child upon a finding of one or more of the following:

(5) The father had knowledge of the pregnancy and failed to provide reasonable support for the mother during the pregnancy[.]⁵⁹¹

589. MONT. CODE ANN. § 42-2-610.4(b) (Westlaw through 2017 Sess.).

590. *In re Adoption of D.J.V.*, 796 P.2d 1076, 1078–79 (Mont. 1990). See discussion *supra* Section 3.3. See *In re Adoption of Baby Boy W.*, 831 P.2d 643 (Okla. 1992) and *In re Adoption of M.D.K.* 58 P.2d 745 (Kan Ct. App 2002) for other examples of cases explaining that prenatal support is required to avoid a finding of abandonment absent court order child support for a fetus.

591. NEB. REV. STAT. § 43-104.22.5 (Westlaw through 2017 Reg. Sess. of 105th Legis.).

Case Law

In 2013, the Nebraska Supreme Court reversed a trial court's waiver of a birth father's consent in *Jeremiah J. v. Dakota D.*⁵⁹² The question in this case was the effect of the mother's intentional obfuscation about the baby's date of birth in response to his inquiries.⁵⁹³ The Court held such misrepresentation could estop the mother from obtaining summary judgment waiving the father's parental rights for failure to comply with a statute that required him to file a post-birth objection to an adoption within five days of birth with the Nebraska father registry.⁵⁹⁴ The Nebraska registry allows pre-birth filing, but that does not guarantee notice to the father.⁵⁹⁵ This case relates to prenatal abandonment in several ways. Nebraska requires a notice to birth father that recites his obligation to pay pre-birth support.⁵⁹⁶ The Nebraska Supreme Court decided the case on father's late father registry filing because Nebraska law requires father's filing in the five days after birth and prebirth filing will not suffice to protect his parental rights.⁵⁹⁷ But had father paid prenatal support, the court could have decided the case on constitutional grounds without reference to the five-day filing obligation.

*Nevada**NEV. REV. STAT. § 128.011 (1975)*

A mother is "abandoned" if the father or putative father has not provided for her support during her pregnancy or has not communicated with her for a period beginning no later than 3 months after conception and extending to the birth of the child.⁵⁹⁸

Case Law

In 1998, the Nevada Supreme Court affirmed a trial court's termination of a father's parental rights for abandonment in *In re Parental Rights as to Symantha Renae Carron*.⁵⁹⁹ The use of prenatal conduct to undergird

592. See *Jeremiah J. v. Dakota D.*, 826 N.W.2d 242 (Neb. 2013).

593. *Jeremiah J.*, 826 N.W.2d at 245. Mother had also lied to Father that he was not the father of her unborn child. *Id.* at 244.

594. *Jeremiah J.*, 826 N.W.2d at 247.

595. *Jeremiah J.*, 826 N.W.2d at 251–52 (Connolly, J. concurring).

596. NEB. REV. STAT. § 43-104.13.7 (Westlaw through 2017 Reg. Sess. of 105th Legis.).

597. *Jeremiah J.*, 826 N.W.2d at 252 (Connolly, J. concurring).

598. NEV. REV. STAT. § 128.011 (Westlaw through end of 2015 Reg. Sess.).

599. *In re Carron*, 956 P.2d 785 (Nev. 1998), *overruled by In re N.J.*, 8 P.3d 126 (Nev. 2000).

abandonment was an issue of first impression for Nevada, and the Court held that a father's pre-birth conduct may not by itself justify termination of father's parental rights, but it can serve, at least in part, as the basis for termination of parental rights.⁶⁰⁰ The *Carron* Court in 1998 did not mention or perhaps did not know of the existence of N.R.S. 128.011, which was enacted in 1975 and provides that failure to provide prenatal support of and contact with birth mother constitutes abandonment of the birth mother.⁶⁰¹ This holding, with its failure to recognize the state prenatal abandonment statute, continues to vex practitioners in the state because it leads to inconsistent and unpredictable results.⁶⁰²

New Hampshire

N.H. REV. STAT. ANN. § 170-B:6 (2006)

I. In an intrastate or interstate adoption, but not an international adoption, the following persons shall be given notice by the court and shall have the right to request a hearing to prove paternity:

(d) A person who is . . . providing financial support to [birth mother] or the child at the time any action under this chapter is initiated and who is holding himself out to be the child's father prior to the mother surrendering her parental rights pursuant to RSA 170-B:9 or the mother's parental rights being involuntarily terminated.⁶⁰³

New Jersey

N.J. STAT. ANN. § 9:3-46(a) (1998)

a. A person who is entitled to notice pursuant to section 9 of P.L.1977, c. 367 (a) shall have the right to object to the adoption of his child False In a contest between a person who is entitled to notice pursuant to section 9 of P.L.1977, c. 367 (C.9:3-45) objecting to the adoption and the prospective adoptive parent, the standard shall be the best interest of the child. The best interest of a child requires that a parent affirmatively assume the duties en-

600. *Carron*, 956 P.2d at 788–89, *overruled by N.J.*, 8 P.3d at 126.

601. NEV. REV. STAT. § 128.011 (Westlaw through end of 2015 Reg. Sess.) (Abandoned Mother is defined as, “[a] mother is ‘Abandoned’ if the father or putative father has not provided for her support during her pregnancy or has not communicated with her for a period beginning no later than 3 months after conception and extending to the birth of the child.”).

602. Interview with Ishi Bunin, Fellow of the American Academy of Adoption Attorneys (Sept. 10, 2014).

603. N.H. REV. STAT. ANN. § 170-B:6 (Westlaw through end of 2016 Reg. Sess.).

compassed by the role of being a parent. In determining whether a parent has affirmatively assumed the duties of a parent, the court shall consider, but is not limited to consideration of, the fulfillment of financial obligations for the birth and care of the child. . . .⁶⁰⁴

New Mexico

N.M. STAT. ANN. § 32A-5-3(F)(4)(a)(5) (2012)

F. “acknowledged father” means a father who:

(4) has openly held out the adoptee as his own child by establishing a custodial, personal or financial relationship with the adoptee as follows:

(a) for an adoptee under six months old at the time of placement: 5) has provided reasonable and fair financial support to the mother during the pregnancy and in connection with the adoptee’s birth in accordance with his means and when not prevented from doing so by the person or authorized agency having lawful custody of the adoptee or the adoptee’s mother[.]⁶⁰⁵

New York

N.Y. DOM. REL. LAW § 111(1)(e)(iii)

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

(e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if: (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother’s pregnancy or with the birth of the child.⁶⁰⁶

Case Law

In 1990, the New York Court of Appeals relied upon biology plus theory in the calculus of two prenatal support/abandonment cases decided together: in *In re Raquel Marie X. v. Mr. and Mrs. C.* and *In re Baby Girl S.*

604. N.J. STAT. ANN. § 9:3-46(a) (Westlaw through 2017).

605. N.M. STAT. ANN. §32A-5-3(F)(4)(a)(5) (Westlaw through 2017 Legis. Sess.).

606. N.Y. DOM. REL. LAW § 111(1)(e)(iii)(McKinney through 2008).

v. Natural Father.⁶⁰⁷ The court protected father's rights in one case and waived fathers' rights in the other case. The court indicated that a father's "qualifying interest . . . require[s] a willingness himself to assume full custody of the child," and "not merely attempt to block the adoption by others."⁶⁰⁸

In 1990, New York courts made conflicting decisions in two cases. In *In re Kiran Chandini*, a New York appellate court upheld a father's consent rights when the mother refused his offer of child support.⁶⁰⁹ But in *John E. v. Doe*, a New York appellate court waived father's rights where the mother had refused the father's offers of support.⁶¹⁰ The distinguishing factor was the *John E. v. Doe* Court's finding that the father's only interest was in blocking the adoption.⁶¹¹

In 1991, *In re Stephen C.*, a New York appellate court waived an incarcerated father's rights, because he was not willing to assume full custody of the child himself.⁶¹² In 1993, in *In re Adoption of Kyle*, a New York appellate court similarly waived another incarcerated father's rights.⁶¹³

In 1992, the New York Supreme Court Appellate Division decided *In re Kailee CC.*, in which it affirmed the trial court's decision waiving the father's consent to adoption for prenatal abandonment.⁶¹⁴ The court's discussion centered on such factors as the father's urging the mother to undergo abortion upon her early notice to him of the pregnancy, her giving him her adoption attorney's professional card to facilitate contact, his quitting his employment, his leaving his place of lodging and becoming a street person, his never expressing any objection or interest in the adoption plan, and his continued use of drugs.⁶¹⁵ The *Kailee* court emphasized the father's knowledge of the adoption plan and the efforts of the mother to facilitate his communication with the adoption attorney. The father's knowledge of the adoption plan during the pregnancy emerges as a decisional factor possibly because he has the notice to consider cooperating with the adoption or providing the prenatal support necessary to protect his parental rights.

607. See *In re Raquel Marie X.*, 559 N.E.2d 418 (N.Y. 1990).

608. *Raquel Marie X.*, 559 N.E.2d at 428. See discussion *supra* Section 3.3.

609. See *In re Kiran Chadini*, 560 N.Y.S.2d 886 (N.Y. App. Div. 1990).

610. *John E. v. Doe*, 564 N.Y.S.2d 439 (N.Y. App. Div. 1990).

611. *John E.*, 564 N.Y.S.2d at 444.

612. See *In re Stephen C.*, 566 N.Y.S.2d 178 (N.Y. App. Div. 1991). See discussion *supra* Section 3.3.

613. *In re Adoption of Kyle*, 592 N.Y.S.2d 557 (N.Y. App. Div. 1992). See discussion *supra* Section 3.3.

614. *In re Kailee CC.*, 179 A.D.2d 891 (N.Y. App. Div. 1992).

615. *Kailee CC.*, 179 A.D.2d at 891-92.

Also in 1992, a New York court waived father's consent rights in *Robert O. v. Russell K.*⁶¹⁶ The father had claimed an exception to New York law requiring "promptness" because he did not know of the birth.⁶¹⁷

In 2000, *In re Carrie GG.*, a New York court waived a father's consent where the only interest he showed in the child was to block the adoption and held that the mother had no obligation to encourage the father to develop a meaningful relationship with child.⁶¹⁸

In 2006, *In re Adoption of Matthew D.*, a New York court upheld a father's consent rights where he had expressed a willingness and desire to raise the child, filed a proceeding to establish paternity prior to child's birth⁶¹⁹ (but failed to file with the state's putative father registry), and did not help financially support the mother or pay for her medical expenses.⁶²⁰ The dissent wrote that the father's desire to parent was undermined by his failure to take steps to develop his plan to raise the child—for example, his small, dangerously located apartment that was not fit for a baby.⁶²¹

In another 2006 case, *In re Gionna L.*, a New York court waived a father's consent where his living with the mother was an attempt to evade law enforcement and the father sought custody in his mother in "nothing more than an effort to block the adoption by others, rather than [an assumption of] custodial care."⁶²²

North Carolina

N.C. GEN. STAT. § 48-3-601(2)(b)(4)(II) (1997)

Unless consent is not required under G.S. 48-3-603, a petition to adopt a minor may be granted only if consent to the adoption has been executed by:

616. See *Robert O. v. Russell K.*, 604 N.E.2d 99 (N.Y. 1992).

617. *Robert O.*, 604 N.E.2d at 102.

To conclude that petitioner acted promptly once he became aware of the child is to fundamentally misconstrue whose timetable is relevant. Promptness is measured in terms of the baby's life not by the onset of the father's awareness. The demand for prompt action by the father at the child's birth is neither arbitrary nor punitive, but instead a logical and necessary outgrowth of the State's legitimate interest in the child's need for early permanence and stability.

Id. See also discussion *supra* Section 3.3.

618. *In re Carrie GG.*, 709 N.Y.S.2d 247, 249 (N.Y. App. Div. 2000).

619. *In re Adoption of Matthew D.*, 818 N.Y.S.2d 399, 400 (App. Div. 2006).

620. *Matthew D.*, 818 N.Y.S.2d at 402.

621. *Matthew D.*, 818 N.Y.S.2d at 402.

622. *In re Gionna L.*, 824 N.Y.S.2d 182, 184 (App. Div. 2006).

(2) In a direct placement, by:

b. Any man who may or may not be the biological father of the minor but who:

4. Before the earlier of the filing of the petition or the date of a hearing under G.S. 48-2-206, has acknowledged his paternity of the minor AND

II. Has provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both[.]⁶²³

Case Law

In 2006, North Carolina held in *In re Adoption of Anderson* that mere offers of support by a father do not constitute sufficient compliance with its statute.⁶²⁴ The question for the Court was whether the father made consistent and reasonable support payments, and noted that the mother's refusal to accept assistance could not defeat the father's paternal interest.⁶²⁵ Where the mother had declined the father's tender of \$100, the court instructed that the father could then have opened a bank account or established a trust fund.⁶²⁶

In 2012, a North Carolina appellate court upheld birth father's rights where he had lived with mother including during the pregnancy and after birth providing support for her in *In re Adoption of S.K.N.*⁶²⁷

In 2014, the North Carolina Supreme Court decided *In re Adoption of S.D.W.* and determined what efforts are required of an unwed father to determine whether a woman with whom he had a multiyear relationship had become pregnant.⁶²⁸

623. N.C. GEN. STAT. § 48-3-601(2)(b)(4)(II) (Westlaw through end of 2016 Reg. Sess.).

624. *In re Adoption of Anderson*, 624 S.E.2d 626, 628–630 (N.C. 2006).

625. *Anderson*, 624 S.E.2d at 629–631.

626. *Anderson*, 624 S.E.2d at 631.

627. *In re Adoption of S.K.N.*, 735 S.E.2d 382, 384 (N.C. Ct. App. 2012). See discussion *supra* Section 3.3.

628. See *In re Adoption of S.D.W.*, 758 S.E.2d 374 (N.C. 2014). See discussion *supra* Section 3.3.

*North Dakota**Case Law*

In 1979, in *In re F.H. v. W.S.*, the North Dakota Supreme Court affirmed its trial court's termination of parental rights and held that mother's reliance upon welfare and father's incarceration did not relieve father of support obligations.⁶²⁹

Ohio

OHIO REV. CODE ANN. § 3107.07 (2015)

Consent to adoption is not required of any of the following:

(B)The putative father of a minor if either of the following applies:

(2) The court finds, after proper service of notice and hearing, that any of the following are the case:

(c) The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first.⁶³⁰

Case Law

In 1989, in *In re Adoption of Hart*, an Ohio appellate court affirmed a trial court decision waiving a father's consent.⁶³¹ The father claimed that the adoptive petitioners had fraudulently pled that the father was unknown and the court held that knowledge possessed by the mother could not be imputed to the adoptive parents.⁶³²

In 1993, in *In re Adoption of Klonowski*, an Ohio appellate court affirmed a trial court protected a father's consent rights where he gave mother a key to an apartment he had rented for them.⁶³³

In 2004, in *In Re Adoption of Suvak*, the Ohio Supreme Court affirmed its appellate and trial courts' holdings protecting a fifteen-year-old father's rights because the sixteen-year-old mother's father and family had ordered him out of their home and threatened the father with criminal

629. *In re F.H.*, 283 N.W.2d 202, 214 (N.D. 1979). See discussion *supra* Section 3.3.

630. OHIO REV. CODE ANN. § 3107.07 (Westlaw through 2015-2016 Gen. Assemb.).

631. *Hart*, 577 N.E.2d at 80, 84.

632. *Hart*, 577 N.E.2d at 81-82. See discussion *supra* Section 3.3.

633. *In re Adoption of Klonowski*, 622 N.E.2d 376, 379 (Ohio Ct. App. 1993). See discussion *supra* Section 3.3.

charges and/or a protective order if he continued to see the mother.⁶³⁴ The Court held that the father had not “willfully” abandoned the mother during pregnancy.⁶³⁵ This case demonstrates active thwarting of the father’s attempts to assume responsibility and that such thwarting, even when conducted by the mother’s parents rather than the mother herself, operates to preserve the father’s consent rights.

In 2008, in *In re Adoption of J.N.C.*, an Ohio appellate court affirmed a trial court’s decision terminating a father’s parental rights.⁶³⁶ The court noted that the father’s providing birth mother with a coat, one pair of shoes, and “some money” was not enough financial support to require his consent for adoption.⁶³⁷

In 2009, in *In re Adoption of Potts*, an Ohio appellate court affirmed a trial court decision to require the father’s consent where the father registered timely with the state’s putative father registry and repeatedly offered the mother both assistance and support during the pregnancy.⁶³⁸ The mother told him he was not the child’s father and threatened him with a protective order if he persisted in his offers.⁶³⁹ The court held that the father’s offers were sufficient to overcome the Ohio statute on willful prenatal abandonment.⁶⁴⁰ The mother’s threats to seek criminal charges or restraining orders against the father absent abuse supported a finding that she actively thwarted the father’s attempts to assume prenatal responsibility.⁶⁴¹

Oklahoma

OKLA. STAT. tit. 10, § 7505-4.2

C. Consent to adoption is not required from a father or putative father of a minor born out of wedlock if: 1. The minor is placed for adoption within ninety (90) days of birth, and the father or putative father fails to show he has exercised parental rights or duties towards the minor, including, but not limited to, failure to contribute to the support of the mother of

634. *In re Adoption of Suvak*, No. 1-03-51, 2004 WL 231494, at *6–7 (Ohio Ct. App. Feb. 9, 2004).

635. *Suvak*, 2004 WL 231494, at *6–7.

636. *In re Adoption of J.N.C.*, No. 2008-CA-25, 2008 WL 2861702, at *1 (Ohio Ct. App. July 25, 2008).

637. *J.N.C.*, No. 2008-CA-25, 2008 WL 2861702, at *2.

638. *In re Adoption of Potts*, No. C-080689, 2009 WL 724059, at *1 (Ohio Ct. App. Mar. 20, 2009).

639. *Potts*, 2009 WL 724059, at *1.

640. *Potts*, 2009 WL 724059, at *1.

641. *Potts*, 2009 WL 724059, at *1.

the child to the extent of his financial ability during her term of pregnancy[.]⁶⁴²

Case Law

In 1987, in *In re Adoption of Baby Boy D.* the Oklahoma Supreme Court affirmed the portion of its trial court holding waiving father's right to consent, because the basis for his constitutional interest was lost when he failed to assume those prenatal parental responsibilities which would have provided permanency and stability for his child.⁶⁴³

In 1992, in *In re Adoption of Baby Boy W.*, the Oklahoma Supreme Court upheld a trial court decision waiving father's consent rights holding that Oklahoma law requires prenatal support in absence of a court order.⁶⁴⁴

In 1997, Oklahoma affirmed a trial court's holding in *Baby Girl M.* that waived father's consent to the adoption of his daughter holding that marriage proposals do not amount to "any action to legally establish his claim to paternity of the child."⁶⁴⁵

South Carolina

S.C. CODE ANN. § 63-9-310(A)(5)(b) (2008)

(A) Consent or relinquishment for the purpose of adoption is required of the following persons:

. . . (5) the father of a child born when the father was not married to the child's mother, if the child was placed with the prospective adoptive parents six months or less after the child's birth, but only if:

. . . (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's preg-

642. OKLA. STAT. tit. 10, § 7505-4.2 (Westlaw through 2d Sess. of 55th Legis. 2016). See discussion *supra* Section 3.3.

643. *In re Adoption of Baby Boy D.*, 742 P.2d 1059, 1068, 1071 (Okla. 1985) *reh'g denied* (Sept. 16, 1987). Father had knowledge of the pregnancy, did not provide for mother during her pregnancy, did not pay for medical expenses related to the birth and/or of the child or the mother, did not attempt to learn when and where the child had been born, and essentially abandoned the support and care of the mother and child during pregnancy and at birth. *Id.* at 1068. See discussion *supra* Section 3.3.

644. *In re Adoption of Baby Boy W.*, 831 P.2d 643, 646 (Okla. 1992).

645. *In re Adoption of Baby Girl M.*, 942 P.2d 235, 242-43 (Okla. Civ. App. 1997).

nancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses.⁶⁴⁶

Case Law

In 1993, the Supreme Court of South Carolina affirmed its trial court decision upholding a father's consent rights in *Abernathy v. Baby V.* where mother refused father's offers of support.⁶⁴⁷

In 1997, the Supreme Court of South Carolina affirmed its trial court's holding that father's consent to adoption was not required in *Doe v. Brown*.⁶⁴⁸ Father had conceived the child by statutory rape, had not paid expenses associated with mother's pregnancy or birth of the child and had not made "good faith efforts to assume parental responsibility and comply with the statute" which was described as the "Abernathy standard" that it set out in its 1993 decision in which it protected a father's rights.⁶⁴⁹

In 2011, in *Roe v. Reeves*, the South Carolina Supreme Court reversed a trial court's holding that the father's consent was necessary upon finding that the father's contributions were insufficient to establish a claim of right to consent under the statute.⁶⁵⁰ The Court quoted the 2002 Kansas decision in *M.D.K.*⁶⁵¹ for the rule that a mother's lack of romantic interest and even hostility does not prevent a father from funding a bank account or providing assistance through a third party.⁶⁵² The Court explicitly rejected the father's claim that the mother's reliance upon government benefits to provide for her basic needs relieved the father of his prenatal support obligations.⁶⁵³

Tennessee

TENN. CODE ANN. § 36-1-102

(1)(A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, "abandonment" means that: . . . (iii) A biological or legal father has either willfully failed to visit or willfully failed to make reasonable payments toward the support of the child's mother during the four

646. S.C. CODE ANN. § 63-9-310(A)(5)(b) (West through 2016 Sess.).

647. *Abernathy v. Baby Boy*, 437 S.E.2d 25, 29 (S.C. 1993). See discussion *supra* Section 3.3.

648. *Doe v. Brown*, 489 S.E.2d 917, 920–21 (S.C. 1997).

649. *Brown*, 489 S.E.2d at 921.

650. *Roe v. Reeves*, 708 S.E.2d 778, 785 (S.C. 2011).

651. *In re Adoption of M.D.K.*, 58 P.3d 745, 750–51 (Kan. App. 2002).

652. *Reeves*, 708 S.E.2d at 784.

653. *Reeves*, 708 S.E.2d at 784.

(4) months immediately preceding the birth of the child; provided, that in no instance shall a final order terminating the parental rights of a parent as determined pursuant to this subdivision (1)(A)(iii) be entered until at least thirty (30) days have elapsed since the date of the child's birth[.]⁶⁵⁴

Case Law

In 1999, a Tennessee appellate court affirmed the trial court's order terminating a father's parental rights in *Bethany Christian Services*.⁶⁵⁵ The court noted that father provided no financial support to birth mother and the child, avoided birth mother's phone calls, ignored her at school, and did not visit the birth mother and the child.⁶⁵⁶ The court noted that this factual situation was clearly governed by the state's prenatal abandonment statute⁶⁵⁷ and ultimately held the responsibility is placed upon a biological father to initiate contact and give support: "He cannot rely upon [birth mother's] failure to contact him or provide him with bills, because he had the responsibility to initiate contact and give support."⁶⁵⁸

Texas

TEX. FAM. CODE ANN. § 161.001

The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence: (1) that the parent has: . . . (H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth[.]⁶⁵⁹

Case Law

In 1984, Texas affirmed a trial court's termination of father's rights for abandonment including prebirth in *In re T.M.Z.* where the court held that

654. TENN. CODE ANN. § 36-1-102 (Westlaw through 2016 Legis. Sess.).

655. *Bethany Christian Servs. v. Jackson*, No. 03A01-9810-JV-00345, 1999 WL 356303, at *1-2 (Tenn. Ct. App. May 19, 1999).

656. *Bethany Christian Servs.* No. 03A01-9810-JV-00345, 1999 WL 356303, at *4.

657. *Bethany Christian Servs.* No. 03A01-9810-JV-00345, 1999 WL 356303, at *4.

658. *Bethany Christian Servs.* No. 03A01-9810-JV-00345, 1999 WL 356303, at *4.

659. TEX. FAM. CODE ANN. § 161.001 (Westlaw through 2015 Reg. Sess. of 84th Legis.).

abandonment was more than a physical separation and included turning one's back on a duty.⁶⁶⁰

Utah

UTAH CODE ANN. § 78B-6-121(3)(d)

(3) Except as provided in Subsections (6) and 78B-6-122(1), and subject to Subsection (5), with regard to a child who is six months of age or less at the time the child is placed with prospective adoptive parents, consent of an unmarried biological father is not required unless, prior to the time the mother executes her consent for adoption or relinquishes the child for adoption, the unmarried biological father: . . .

(d) offered to pay and paid, during the pregnancy and after the child's birth, a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his financial ability, unless:

- (i) he did not have actual knowledge of the pregnancy;
- (ii) he was prevented from paying the expenses by the person or authorized agency having lawful custody of the child; or
- (iii) the mother refuses to accept the unmarried biological father's offer to pay the expenses described in this Subsection (3)(d).⁶⁶¹

Case Law

In 2010, in *In re Adoption of Baby Girl*, a Utah Appeals Court affirmed a trial court's denial of father's consent rights.⁶⁶² The majority did not consider father's offers to pay prenatal support and instead focused on the adequacy of his setting forth a plan of care for the child and his failure to agree "to a court order of child support."⁶⁶³ It is the dissent that focuses on the adequacy of father's prenatal support where mother refused his offer to pay birth expenses.⁶⁶⁴

660. *In re T.M.Z.*, 665 S.W.2d 184, 187 (Tex. App. 1984). See discussion *supra* Section 3.3.

661. UTAH CODE ANN. § 78B-6-121(3)(d) (Westlaw through 2016 3d Spec. Sess.).

662. *In re Adoption of Baby Girl*, 2010 UT App 114, ¶ 4, 23, 233 P.3d 517, 519, 524.

663. *In re Adoption of Baby Girl*, 2010 UT App 114 at ¶ 16, 22, 233 P.3d at 522, 524.

664. *In re Adoption of Baby Girl*, 2010 UT App 114 at ¶ 33, 233 P.3d at 526.

Later in 2010, the Utah Supreme Court affirmed a trial court's decision dismissing father's motion to set aside the adoption where he had failed to comply with statutory requirements in *In re Adoption of T.B.*⁶⁶⁵

In 2014, Utah considered prenatal support in *In re Adoption of J.S.*, where father had offered prenatal support and mother refused.⁶⁶⁶ The court indicates that father's offer satisfied the prenatal support plank in its statutory scheme but his failure to comply with the paternity affidavit of the statutory requirements did not significantly advance the state's interest in protecting children.⁶⁶⁷ Thus father did not transform his inchoate interest in his child to a constitutionally protected interest because the offer to pay prenatal support was but one of four statutory criteria required. The question is whether Utah would have found father constitutionally protected his parental rights by actually paying prenatal support. This case suggests not and maintained the analysis it used in *In re Adoption of T.B.*.⁶⁶⁸

Vermont

VT. STAT. ANN. tit. 15A § 3-504(a)(1)(A)

(a) If a respondent answers or appears at the hearing and asserts parental rights, the court shall proceed with the hearing expeditiously. If the court finds, upon clear and convincing evidence, that any one of the following grounds exists and that termination is in the best interest of the minor, the court shall order the termination of any parental relationship of the respondent to the minor:

(1) In the case of a minor under the age of six months at the time the petition is filed, the respondent did not exercise parental responsibility once he or she knew or should have known of the minor's birth or expected birth. In making a determination under this subdivision, the court shall consider all relevant factors, which may include the respondent's failure to:

(A) pay reasonable prenatal, natal, and postnatal expenses in accordance with his or her financial means[.]⁶⁶⁹

665. *In re Adoption of T.B.*, 2010 UT 42, ¶ 2, 13, 233 P.3d 1026, 1027, 1029.

666. *In re Adoption of J.S.*, 2014 UT 51, ¶ 11, 102, 358 P.3d 1009, 1013, 1041.

667. *In re Adoption of J.S.*, 2014 UT 51 at ¶ 103, 358 P.3d at 1041.

668. *In re Adoption of T.B.*, 2010 UT 42 at ¶ 40-44, 233 P.3d at 1035-36.

669. VT. STAT. ANN. tit. 15A § 3-504(a)(1)(A) (Westlaw through 2015-2016 Legis. Sess.).

Washington

Case Law

In 1999, the Washington Court of Appeals affirmed its trial court termination of father's parental rights in *In re Infant Child Skinner*, discussing mother's resort to adoption based upon father's failure to support her.⁶⁷⁰

West Virginia

W. VA. CODE § 48-22-306(b)(2) (2001)

(b) Abandonment of a child under the age of six months shall be presumed when the birth father:

- (1) Denounces the child's paternity any time after conception;
- (2) Fails to contribute within his means toward the expense of the prenatal and postnatal care of the mother and the postnatal care of the child;
- (3) Fails to financially support the child within father's means; and
- (4) Fails to visit the child when he knows where the child resides: *Provided*, That such denunciations and failure to act continue uninterrupted from the time that the birth father was told of the conception of the child until the time the petition for adoption was filed.

(c) Abandonment of a child shall be presumed when the unknown father fails, prior to the entry of the final adoption order, to make reasonable efforts to discover that a pregnancy and birth have occurred as a result of his sexual intercourse with the birth mother.⁶⁷¹

Wisconsin

WIS. STAT. § 48.415(6)(b) (2011)

Grounds for termination of parental rights shall be one of the following: . . .

- (6) Failure to assume parental responsibility. (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.

670. *In re Infant Child Skinner*, 982 P.2d 670, 678 (Wash. Ct. App. 1999). See discussion *supra* Section 3.3.

671. W. VA. CODE § 48-22-306(b)(2) (Westlaw through 2016 Legis. Sess.).

(b) In this subsection, “substantial parental relationship” means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.⁶⁷²

Case Law

In 1975 in *State ex rel. Lewis v. Lutheran Social Services.*, the Wisconsin Supreme Court affirmed the trial court’s termination of father’s parental rights holding that the father abandoned the child before birth.⁶⁷³

672. WIS. STAT. § 48.415(6)(b) (Westlaw through 2015 Act 392).

673. *State ex rel. Lewis v. Lutheran Soc. Servs. of Wis. & Upper Mich.*, 227 N.W.2d 643, 646–47 (Wis. 1975). See discussion *supra* Section 3.3.