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### He Who Hesitated Lost: Unwed Father in Utah Forfeits Parental Rights

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# Verdict

SEPTEMBER 2, 2015

JOANNA L. GROSSMAN

## He Who Hesitated Lost: Unwed Father in Utah Forfeits Parental Rights

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She promised not to give their baby up for adoption as long as he promised not to file a formal paternity action. He complied; she reneged on her promise. But when he tried to protect himself through a paternity action, he was told it was too late: he had already forfeited his rights. The Utah Supreme Court was legally right to deny this unwed father the opportunity to contest the adoption of his child, but why?



### *In the Matter of the Adoption of B.Y.: A Sad Case*

Jake Strickland and W.P. were in a non-marital, sexual relationship that led to the conception of a child. W.P. informed him in April 2010 that she was pregnant and that he was the father, and they remained in contact throughout her pregnancy. In August, W.P. told Strickland that she had plans to place the child for adoption. He strenuously objected and urged her to keep the baby. She agreed, but only in exchange for a promise that he would “never leave” and would “jointly share custody and costs.”

Despite this informal agreement, Strickland got in touch with a lawyer to ask about protecting his parental rights. The attorney advised him that he should file a paternity action in order to preserve the right to veto any attempted adoption. Strickland told W.P. he planned to file such an action; she became upset and threatened, again, to place the as-of-yet-unborn child for adoption. He promised not to file, if she promised not to proceed

with the adoption. They agreed.

Unbeknownst to Strickland, W.P. pursued the adoption plan, relinquishing parental rights the day after the child was born on December 29, 2010. The family services agency searched vital records and determined that no paternity action had been filed as of January 4, 2011. Under Utah law, only a mother's consent is required for an adoption unless a putative father has taken one of several specified actions to preserve his rights. No paternity action, no rights.

Strickland filed suit to challenge the adoption.

## Unwed Fathers and Adoption Law

When can an unwed father's biological child be adopted without his consent? Unwed fathers in most states do not have the same rights as unwed mothers vis-à-vis their children. Their parental rights turn not just on biology, but also on whether they have carried out the obligations of fatherhood and, especially in the case of infants, whether they have complied with technical legal requirements necessary to establish their status.

The issue in *Adoption of B.Y.* is whether Strickland's delay in filing a paternity action—crucially, until after the adoption proceeding was filed—had to be excused since he relied on the mother's promise not to place the child for adoption. That answer turns in part on Utah parentage law, discussed below—and, in larger part, the scope of unwed fathers' rights under the U.S. Constitution.

As a general rule, a child is available for adoption when his biological parents have surrendered their parental rights or had them terminated. An adoption has the effect of severing the legal ties between the child and his biological parents, and establishing a new parent-child relationship with the adoptive parents.

For children born to married parents, the consent of husband and wife is required before an adoption can proceed, unless the husband has successfully disproved paternity (a procedurally difficult process in most states, impossible in others). For children born to unmarried parents, the rules are different. The biological mother has legal parental rights that arise from the act of giving birth. Her consent to an adoption is essential. The biological father, however, does not have the same automatic rights. The biological tie provides the opportunity to be a parent, but the father must grasp that opportunity as early and fully as possible.

This two-tiered system developed after a series of Supreme Court cases in the 1960s and 1970s holding that states could neither categorically disadvantage illegitimate children, nor categorically deny the parental rights of unwed fathers. But rather than equalize the

rights of unwed mothers and fathers—providing, for example, that all biological parents have full-blown parental rights regardless of conduct—states generally compromised by giving unwed fathers rights only if they satisfied certain criteria.

Under a typical law, an unwed father can earn full parental rights through marriage to a child's mother, being named on a birth certificate, being adjudicated the biological father, or living openly with the child and her mother. Some states also set up a “putative father registry,” which would permit men who registered to be notified of proposed adoptions or other actions regarding their children.

With respect to a newborn, an unwed father must register as a putative father (if the state offers that option) or file a paternity action, usually before any adoption proceeding is filed. This formal action by the unwed father entitles him to notice of any subsequent adoption proceeding—and the right to object.

### **Grasping the Opportunity to be a Father: The State's Way or the Highway**

For children other than newborns, the question whether a father has adequately grasped the opportunity to parent (sufficient to trigger his constitutional parental rights) will often turn on whether he has established a social-paternal relationship with the children. Has he paid support for them? Has he spent time with them? Has he developed a strong attachment to them, and they to him?

For newborns, however, the opportunity to be grasped can be much narrower. In 1983, the Supreme Court considered in *Lehr v. Robertson* (<https://supreme.justia.com/cases/federal/us/463/248/>) whether the State of New York could disregard the objection of a biological father who had not followed the specific rules for preserving parental rights. There, the child's biological father, Johnathan Lehr, did not list himself in the state's putative father registry. But as soon as he learned of the proposed adoption of his daughter by her stepfather, he filed an objection in court. He argued that it was unconstitutional for the state to provide greater parental rights to unwed mother than unwed fathers, and also that it was a violation of his substantive due process rights to allow the adoption over his objection.

The Court in *Lehr*, however, upheld New York's statutory scheme and its bypassing of Jonathan's consent to the child's adoption. By not satisfying any of the statutory criteria for legal fatherhood, the Court reasoned, Jonathan had not earned full-blown protection of his parental rights. As the Court wrote, the biological tie

offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and

accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.

But the key to the *Lehr* ruling is that the particular "opportunity" the unwed father must grasp is the one the state provided: the "opportunity," in advance of any adoption proceeding, to list himself formally on the state's putative father registry. That he showed up in the court considering the adoption and made his objection crystal clear was not a sufficient grasping of the opportunity to be a parent. The state, at that point, was constitutionally entitled to disregard his wishes.

Is this fair? The system can lead to some pretty harsh consequences for unwed fathers, many of whom would be excellent parents if given the chance. The problem with a system that gave them more rights, however, is that it jeopardizes prospective adoptions and destabilizes ones that have been finalized. This has potentially devastating consequences for the unwed mother, the actual or prospective adoptive parents, and, most importantly, the child. If unwed fathers had absolute parental rights, or could grasp the opportunity to parent in diffuse ways, it would be difficult or impossible to place children for adoption. And adoptions that did go forward without the consent of an unwed father—perhaps one who could not be found or who had expressed no interest in parenting—would have to be undone after the fact so the child could be returned to the biological father. That outcome occurred in two heart-wrenching and very public cases ("Baby Richard" and "Baby Jessica") in the 1990s, in which children were taken from adoptive parents several years after placement and given to their biological fathers whose consent had not been properly obtained. Those cases and similar ones led many states to impose more procedural obstacles to unwed fatherhood in order to strike a better compromise between the rights of fathers, on the one hand, and the best interests of the child, the rights of mothers seeking to place children for adoption (or allow adoption by the mother's spouse), and the rights of adoptive parents, on the other.

### **The Utah Supreme Court's Ruling in *In the Matter of the Adoption of B.Y.: Lehr Redux***

Like most states, Utah has a somewhat technical scheme for dealing with the rights of unwed fathers. **Section 78B-6-110 (<http://law.justia.com/codes/utah/2014/title-78b/chapter-6/part-1/section-110/>)** of the Adoption Act provides that an unwed father is "on notice" that a pregnancy and adoption may occur by "virtue of the fact that he has engaged in a sexual relationship with a woman." He is entitled to actual notice from a court—and thus the opportunity to formally object—only if, *at the time the adoption*

*proceeding is begun*, he is listed as the father on the child’s birth certificate, is openly living in the same household with the child, or has initiated a proceeding to establish paternity.

Another section anticipates and eliminates the most obvious excuses for failing to initiate a paternity proceeding before the adoption proceeding. It provides that “each parent of a child conceived or born outside of marriage is responsible for his or her own actions and *is not excused from strict compliance . . .* based upon any action, statement, or omission of the other parent or third parties.” A misrepresentation by one parent may lead to civil or criminal penalties for that parent, but it will not, under Utah’s statutory scheme, affect the proposed adoption of the child. This provision was adopted in 2003 and is typical of adoption law revisions designed to prevent another “Baby Richard” or “Baby Jessica” situation.

Where does this leave Jake Strickland? As a statutory matter, he was clearly out of luck. There is no dispute about the relative timing of the adoption proceeding (first) and the paternity action (second). He was not listed on the birth certificate and was not married to the child’s mother. He had, therefore, no right to notice of the proposed adoption and thus no right to make his objections known as a legal matter.

And his excuse—that he relied on W.P.’s promise not to initiate adoption proceedings in exchange for his not filing a paternity action—is expressly rejected by statute. Neither of them was wise to rely on the promises of the other. Strickland would have been better served by listening to his lawyer, who correctly advised that he should initiate a paternity action to protect his rights. As it turns out, that was the only way he could have protected his rights and avoided the adoption of his child over his objection.

His statutory claim alone would not have made it to the Utah Supreme Court, but he also challenged the statutory scheme on constitutional grounds. His claim, in short, is that the state cannot constitutionally deny him the right to object to the adoption given his agreement with W.P. that neither would proceed with the proposed legal actions.

Strickland cites several constitutional provisions in support of his basic claim, two of which are worth discussion.

First, Strickland claims he was denied procedural due process by the state’s refusal to hear his objection to the adoption. The right of procedural due process, guaranteed under the Fourteenth Amendment, is generally thought to encompass notice and the opportunity to be heard. Here, however, Strickland had notice of the basic facts—that W.P. was pregnant and planned to give birth in Utah—and notice that he had to take affirmative steps to establish parental rights. He had so-called “constructive notice” of the

rules because everyone is assumed (however absurdly) to know the law, but also had actual notice because his lawyer relayed the relevant information. The only notice he was denied was notice that W.P. did in fact plan to place the child for adoption, but as a general matter, the constitution regulates only the action of the state, not that of private parties.

Strickland's claim that he was deprived of the opportunity to be heard faced a similar problem. Had he initiated the paternity action, he would have been a party to the adoption proceeding and had the opportunity to voice his objection. It was again his reliance on W.P.'s representations that caused him to miss out on the opportunity—not the actions of the State of Utah. In prior cases, only “impossibility” has been deemed sufficient to render the strict statutory scheme unconstitutional. For example, the Utah Supreme Court said that an unwed father could not constitutionally be deprived of his right to be heard when the mother moved suddenly and secretly from California to Utah before giving birth and then placed the child immediately for adoption on the representation that the identity of the father was unknown. That father had no reasonable opportunity to file a paternity action in Utah to protect his rights. But Strickland is not in the same boat. He knew about the pregnancy, the child, the possibility of an adoption in Utah, and how to protect his rights, but chose to rely instead on his informal agreement with W.P.

Strickland's second constitutional claim was rooted in principles of substantive due process—that he had a fundamental right to parent his biological child, which was infringed by the Utah Adoption Act and, in particular, its requirement of “strict compliance” with the procedural formalities to establish full parental rights. This claim was pretty clearly foreclosed by the U.S. Supreme Court's ruling in *Lehr*. In that case, as discussed above, the Court upheld the denial of the unwed father's right to object to an adoption because he failed to put his name on the putative father registry, of which he had never heard (and nor had anyone else). New York was entitled to prescribe specific formalities for preserving parental rights and to enforce them strictly. Utah has the same discretion.

## Conclusion

It may be the case that Strickland got a raw deal—and that he is one of the unwed fathers who would, if given more of an opportunity, have stepped up to the plate to parent. Without more facts, it is hard to say for sure. Regardless, it would be hard to imagine removing the child, who is almost five years old, from the adoptive family at this point. The system represents a delicate balance of competing interests and, states believe, does more good than harm.

Strickland's case, though, raises an issue that extends beyond the adoption context. In today's more complicated world, families are created and organized in a wide variety of ways, often built based on a private agreement about the rights and obligations of each party. Sperm and egg donors waive parental rights in exchange for the promise they will have no parental obligations. Surrogates agree to carry a baby for someone else based on a similar exchange. Biological mothers enter written agreements to share parental rights with a lesbian co-parent. The law, however, does not always recognize those agreements.

Recall the Craigslist sperm donor who is being sued for child support despite his clear agreement with the child's two mothers that he would have neither rights nor obligations with respect to the child (discussed [here](https://verdict.justia.com/2014/01/27/craigslist-sperm-donor-owes-child-support) (<https://verdict.justia.com/2014/01/27/craigslist-sperm-donor-owes-child-support>)). Or the many cases in which a lesbian co-parent who was promised rights by a child's biological mother was declared a legal stranger in court (discussed [here](https://verdict.justia.com/2011/08/23/do-lesbian-co-parents-have-rights) (<https://verdict.justia.com/2011/08/23/do-lesbian-co-parents-have-rights>) and [here](https://verdict.justia.com/2013/04/16/parenthood-by-contract) (<https://verdict.justia.com/2013/04/16/parenthood-by-contract>)). The law books are filled with cases where the ties families purported to create by agreement were not enforced in court and ties they did not intend to create were imposed upon them. Private agreements can play a very important role in establishing (or, to a lesser degree, eliminating) parent-child ties, but only where it is clear the law will enforce them. Strickland made the mistake of assuming that his agreement with W.P. would prevent her from changing her mind. It didn't.



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