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## UNWED FATHERS' RIGHTS IN ADOPTION: THE VIRGINIA CODE VS. THE UNIFORM ADOPTION ACT

It was an emotional scene: after a long custody battle, Roberta and Jan DeBoer were forced to give the child they had raised for two and a half years back to the child's birth parents. Much media attention surrounded the case of Baby Jessica, who was born to Cara Clausen on February 8, 1991.<sup>1</sup> Shortly after the birth, Clausen and Scott Seefeldt, whom Clausen named as Jessica's father, signed release of custody forms.<sup>2</sup> Roberta and Jan DeBoer filed a petition for adoption of Jessica; Clausen and Seefeldt's parental rights to Jessica were terminated; and the DeBoers transported their new baby from Iowa to their home in Michigan.<sup>3</sup>

Nine days after the termination of her parental rights, Clausen filed a motion to revoke her release of custody.<sup>4</sup> In her affidavit, she stated that she had lied when she claimed that Seefeldt was the father and that the true father was a man named Daniel Schmidt.<sup>5</sup> Schmidt then filed a petition seeking to intervene in Baby Jessica's adoption proceeding.<sup>6</sup> Once Schmidt established by a preponderance of the evidence that he was the child's biological father and the DeBoers failed to establish by clear and convincing evidence that he had abandoned the child, Schmidt's petition was granted.<sup>7</sup> More than eleven months after the DeBoers took Baby Jessica into custody, the court determined that the termination proceeding was void with respect to Schmidt and that the DeBoers' petition to adopt must be denied.<sup>8</sup> The case continued to bounce around the courts for two years, until Schmidt was ultimately awarded custody of the child<sup>9</sup> and the DeBoers were forced to relinquish custody of the baby they had raised as their own for two and a half years.<sup>10</sup>

Although the case of Baby Jessica is not the norm, it raises important questions about the role of unwed fathers in the adoption process. "This case poignantly demonstrated that the

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1. DeBoer v. Schmidt, 502 N.W.2d 649, 652 (Mich. 1993).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 653.

9. Ultimately, Clausen received custody of the child too, as she and Schmidt were married in 1992. *Id.* at 657.

10. MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 188 (1994).

claim of a biological parent, even an unwed father who had never seen the child, takes legal precedence over the interest of a child remaining with the only family she had ever known."<sup>11</sup> How far should the rights of unwed fathers extend, and how are these rights balanced with the rights of the birth mother, the prospective parents, and the child? Each state answers these questions through its state code. This has led to a variance of adoption practices throughout the country. In reaction to various solutions to the same problem, in 1994 the National Conference of Commissioners on Uniform State Laws<sup>12</sup> approved the Uniform Adoption Act (UAA) as a way to standardize adoption practices across the country,<sup>13</sup> but it has not yet been adopted by any state. The UAA differs from the current Virginia Code with regard to unwed fathers' rights, especially in the area of revoking adoptions. This note will examine unwed fathers' rights as embodied by the Virginia Code and consider the effect Virginia's adoption of the UAA would have on these rights.

While the Virginia Code and the UAA treat many aspects of adoption similarly, the UAA explicitly considers some possible situations that could arise involving unwed fathers.<sup>14</sup> The UAA tends to favor prospective adoptive parents,<sup>15</sup> though until the UAA is enacted, it is not clear how Virginia courts would ultimately interpret such cases. The Virginia Code seems to take a more neutral approach, focusing on the best interests of the child.<sup>16</sup> This approach may favor the prospective adoptive parents who have been emotionally involved in the child's life. Courts have also recognized, however, that unwed fathers do have an interest in their children and have occasionally found that it would be in the best interests of the child to award custody to the father. Adoption of the UAA in Virginia, therefore, would not do much to further safeguard unwed fathers' rights.

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11. *Id.*

12. The National Conference of Commissioners on Uniform State Laws spent five years trying to develop a uniform statute on adoption. The drafting committee approved the Uniform Adoption Act on August 4, 1994. The Act was approved by the Family Law Section of the American Bar Association in October 1994 and the ABA House of Delegates in February 1995. Catherine Sakach, Note, *Withdrawal of Consent for Adoption: Allocating the Risk*, 18 WHITTIER L. REV. 879, 892-93 (1997).

13. *Id.*

14. See UNIF. ADOPTION ACT § 2-401 cmt., 9 U.L.A. 50 (1994).

15. See *id.* at Prefatory Note, 9 U.L.A. 12 (1994).

16. See VA. CODE ANN. § 63.2-1205 (Michie 2002).

## FATHERS' RIGHTS: SUPREME COURT CASES

The drafters of the UAA claim that it is consistent with Supreme Court cases dealing with fathers' rights.<sup>17</sup> The unwed father has historically been treated as an unfit parent or has been presumed to have no interest in his child. The Supreme Court has greatly expanded the rights of unwed fathers over the years, responding to the realization that an unwed father with an interest in his child can be a fit parent.

Until the 1972 Supreme Court decision in *Stanley v. Illinois*,<sup>18</sup> unwed birth fathers had no legal rights to their children.<sup>19</sup> Illinois state law dictated that children of unwed fathers would automatically become wards of the state when the mother died.<sup>20</sup> Although Mr. Stanley had lived with the mother of his children for eighteen years, had three children with her, and was not shown to be an unfit parent, when she died, Mr. Stanley lost custody of his children because he had not married their mother.<sup>21</sup> Under the statute, unwed fathers were presumed to be unfit to raise their children, while unwed mothers, as well as married, widowed, or divorced fathers, were all presumed to be fit parents.<sup>22</sup> The term "parent" in the statute did not include unwed fathers in the definition.<sup>23</sup> Mr. Stanley raised an equal protection claim that he was being denied the right to show fitness as a parent on the basis of his gender.<sup>24</sup>

The Court held that unwed fathers have an interest in their children and are entitled to a hearing on their parental fitness before their children are removed from their custody.<sup>25</sup> The Court stated that the "private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a

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17. UNIF. ADOPTION ACT § 2-401 cmt., 9 U.L.A. 50 (1994).

18. 405 U.S. 645 (1972).

19. MIRIAM REITZ & KENNETH W. WATSON, ADOPTION AND THE FAMILY SYSTEM 63-64 (1992).

20. *Stanley*, 405 U.S. at 646.

21. *Id.*

22. *Id.* at 647.

23. *Id.* at 650.

24. *Id.* at 646.

25. *Id.* at 658.

powerful countervailing interest, protection."<sup>26</sup> This holding gave unwed fathers the chance to prove their fitness before having their children taken away from them, and it provided at least minimal protection to unwed fathers who had been active in establishing relationships with their children.<sup>27</sup> Stanley did not put unwed fathers in the same position as unwed mothers, who have the benefit of a presumption of parental fitness, but the decision was still a step toward rebutting the traditional views of unwed fathers as generally absent from their children's lives and presumably unfit to care for children on their own.<sup>28</sup>

Several years later, in *Caban v. Mohammed*, the Court struck down a New York statute that treated mothers and fathers differently with regard to giving consent to adoption.<sup>29</sup> The law allowed unwed mothers to block adoptions by merely withholding their consent, but an unwed father had no such control, even if he had developed a significant relationship with his child.<sup>30</sup> In order to block an adoption, the father would have to show that adoption was not in the child's best interests.<sup>31</sup> The statute, therefore, treated parents differently solely on the basis of sex. In order for a statute that distinguishes based on sex to withstand an equal protection challenge, the statute must serve an important governmental interest and be substantially related to achieving that interest.<sup>32</sup> The Court did not find any such interest embedded in the statute and recognized that the relationships unwed fathers have with their children could be as substantial as those between unwed mothers and their children,<sup>33</sup> noting that "maternal and paternal roles are not invariably different in importance."<sup>34</sup> *Caban* helped to rebut the assumption that fathers in general, and unwed fathers in particular, were not able to love and care for their children in the same way as mothers. Instead of succumbing to the assumption that an unwed father was unfit to care for his children, the father gained standing equal to the mother's: he would be presumed fit, and his unfitness would have to be proven.<sup>35</sup>

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26. *Id.* at 651.

27. *See generally id.*

28. *See generally id.*

29. *Caban v. Mohammed*, 441 U.S. 380, 386 (1979).

30. *Id.*

31. *Id.*

32. *Id.* at 388.

33. *Id.* at 389.

34. *Id.*

35. *Id.* at 394.

The Court extended its discussion of the importance of the unwed father's fostering a relationship with his children in protection of his parental rights and articulated the "best interests of the child" standard in *Quilloin v. Walcott*.<sup>36</sup> The father in *Quilloin* did not petition for legitimation of his child until eleven years after the child's birth, when the mother's new husband filed a petition for adoption.<sup>37</sup> The Court, in determining the best interests of the child, looked to the fact that, for eleven years, the child had been part of a family unit that wished to adopt him and during that time, his father sought neither legal nor physical custody.<sup>38</sup> The father "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."<sup>39</sup> Seemingly, the only reason the birth father wanted to block the child's adoption was to spite the birth mother's new husband.<sup>40</sup> The Court reasoned that it was best for the child to stay in the unit in which he had grown up.<sup>41</sup>

Again in *Lehr v. Robertson*, the Court emphasized the importance of an unwed father's active role in his child's life to his assertion of legal rights to the child.<sup>42</sup> *Lehr* involved a mother who retained custody of her daughter and subsequently remarried.<sup>43</sup> The mother's new husband tried to adopt her daughter when the child was two years old.<sup>44</sup> The biological father claimed that the adoption was invalid because he was not given advance notice of the adoption proceedings.<sup>45</sup> In finding against the biological father, the Court commented that mere biology does not merit constitutional protection<sup>46</sup> and that the "rights of the parents are a counterpart of the responsibilities they have assumed."<sup>47</sup> Further, the Court found that the "existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interest of the child."<sup>48</sup> The father in question had not developed a significant

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36. 434 U.S. 246 (1978).

37. *Id.* at 249.

38. *Id.* at 255.

39. *Id.* at 256.

40. See *id.* at 249-50 (noting that the biological father had not filed for "legitimation" of the child until immediately after receiving notice of the adoption petition).

41. *Id.* at 255.

42. *Lehr v. Robertson*, 463 U.S. 248, 266-67 (1983).

43. *Id.* at 250.

44. *Id.*

45. *Id.*

46. *Id.* at 261.

47. *Id.* at 257.

48. *Id.* at 256.

relationship with his child and did not seek to establish legal ties to her until she reached the age of two.<sup>49</sup> If the father truly had an interest in the child, the Court held, he could have ensured his parental rights by signing the putative father registry,<sup>50</sup> which would have notified him of any adoption proceedings enacted regarding his daughter.<sup>51</sup>

Unwed fathers have gradually gained more rights through cases such as these. Slowly, the different standards for unwed fathers and mothers have been broken down, and the ability of a father to be the primary caregiver for his children is being recognized. However, the stereotype that unwed fathers will be absent and do not want a part in their children's lives continues to fuel many negative attitudes and stereotypes about unwed fathers.

### CONSENT TO ADOPTION: THE UAA

Just as the Supreme Court cases focus on the role an unwed father has played in his child's life, the UAA's standards grant more rights to a father who has been active in developing a relationship with his child. The UAA requires consent to an adoption by both the birth mother and the birth father of a child born in wedlock.<sup>52</sup> It also requires the consent of an unwed father who has been judicially determined to be the father, or who has signed a document establishing himself as the father and "has provided, in accordance with his financial means, reasonable and consistent payments for the support of the minor and has visited or communicated with the minor."<sup>53</sup> Additionally, the UAA requires consent from fathers who have received their children into their home and openly held the children out as their own.<sup>54</sup>

In determining whose consent to adoption is required, the UAA makes distinctions based on the involvement of unwed fathers in the lives of their children,<sup>55</sup> distinguishing "the men

49. *Id.* at 262.

50. Many states have "putative father registries" on which men who may have fathered children out of wedlock may register their possible paternity. By registering, which usually involves filling out a registration form and mailing it to the registry, the putative father will receive notice of any possible adoption actions involving that child. See, e.g., Department of Children and Family Services, *Putative Father Brochure* (2003), available at [http://www.state.il.us/dcf/adoption/a\\_adoption\\_putative.shtml](http://www.state.il.us/dcf/adoption/a_adoption_putative.shtml) (providing information on Illinois's Putative Father Registry).

51. *Lehr*, 463 U.S. at 254.

52. See UNIF. ADOPTION ACT § 2-401(a)(1)(i), 9 U.L.A. 49 (1994).

53. *Id.* § 2-401(a)(1)(iii).

54. *Id.*

55. *Id.* § 2-401 cmt., 9 U.L.A. 50 (1994).

who manifest 'parenting behavior,' and have therefore earned the right to withhold consent from a proposed adoption of their children, from the men who fail to perform parental duties and may therefore be denied the right to veto a proposed adoption."<sup>56</sup>

The UAA also distinguishes between fathers who willfully abandon their children and those whose attempts at fatherhood have been thwarted.<sup>57</sup> The thwarted father has somehow been prevented from meeting his parental responsibilities, because the mother either never informed him of her pregnancy or the child's birth, lied to him about her plans for the child, disappeared with the child, named another man as the birth father, or was married to another man in a state that presumes the legitimacy of a child born to a married woman.<sup>58</sup> According to the UAA, the unmarried father in these circumstances has not willfully abandoned his child but has instead been externally prevented from carrying out his parental responsibilities.<sup>59</sup> Thwarted fathers can assert parental rights during the pendency of adoption proceedings, but they must prove a compelling reason for not having performed their parental duties.<sup>60</sup> The thwarted father must also defend against other parties who try to prove that termination of his rights is necessary to avoid "detriment or a risk of substantial harm to the child."<sup>61</sup>

The UAA sets out a specific time period during which any parent whose consent for adoption is required can revoke that consent.<sup>62</sup> First, consent may be given only after the child is born.<sup>63</sup> Second, a parent may unconditionally revoke consent within 192 hours, or eight days, after the birth of the child, no matter when the consent was given.<sup>64</sup> This provision was intended to take into consideration the best interests of the birth parents by not pressuring them into making decisions they may later regret,

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56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* § 2-404, 9 U.L.A. 53 (1994).

63. *Id.* § 2-404(a).

64. *Id.*



as well as to provide a shorter period of uncertainty to prospective adoptive parents.<sup>65</sup> After the 192 hour time period expires, consent becomes revocable for only a limited time and in highly specific circumstances, such as when there is proof of fraud or duress.<sup>66</sup>

The 192 hour revocation window appears to provide both birth parents and adoptive parents with a benefit. The birth parents have eight days during which to consider their decision to relinquish their parental rights, knowing that they can change their minds within that window and get their child back. The adoptive parents know that after the 192 hours have passed, they will not have to worry about the birth parents trying to reclaim the child. There still remain, however, 192 hours during which the adoptive parents will have to fear losing the child they hope to adopt, time during which emotional bonding can occur. Conversely, the birth parents may argue that 192 hours is not enough time to make such an important decision. They may feel pressure during those eight days equivalent to the pressure they felt when making the initial decision to give up the child. Thus, they may feel compelled to change their minds and revoke consent just in case they have made a mistake.

#### CONSENT TO ADOPTION: THE VIRGINIA CODE

Virginia's standards in adoption proceedings are set out in the Virginia Code.<sup>67</sup> This Code provides the guidelines that courts follow on issues such as deciding what constitutes the best interests of a child, determining the extent of the rights of incarcerated fathers, trying to balance the rights of thwarted fathers with those of other parties involved, and dealing with fathers who try to withhold consent for adoption. Virginia courts have followed many of the standards the Supreme Court set forth in its decisions pertaining to unwed fathers and adoption,<sup>68</sup> but there are also Virginia-specific cases providing authority on these matters.

The Virginia Code requires both parents to consent to the adoption of a child born in wedlock.<sup>69</sup> It is presumed that a child born in wedlock is the child of the birth mother and her husband, but this presumption may be rebutted by a preponderance of

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65. *Id.* § 2-404 cmt., 9 U.L.A. 54 (1994).

66. *Id.*

67. *See generally* VA. CODE ANN. §§ 63.2-1200 to -1248 (Michie 2004).

68. *See supra* notes 17-51 and accompanying text.

69. VA. CODE ANN. § 63.2-1202(C)(1) (Michie 2004).

evidence establishing paternity in another man.<sup>70</sup> The consent of a biological father who is not married to the birth mother is generally required as well, but there are circumstances in which this consent is not necessary.<sup>71</sup> The Code does not require the birth father's consent when his identity is not ascertainable.<sup>72</sup> It also allows adoption without consent when the father's identity and whereabouts are known, if notice of the adoption proceeding is sent to him by registered or certified mail at his last known address and he fails to object to the proceeding within twenty-one days of the date on which the notice was mailed.<sup>73</sup> Failing to appear at the consent hearing has the same effect on the father's rights as failing to register an objection.<sup>74</sup> The father's consent is also not required if he has been convicted of certain sexual crimes and the child was conceived as a result of those crimes.<sup>75</sup> The court can also grant a petition for adoption without the requisite consent in certain cases if it determines that the father's consent is withheld against the best interests of the child.<sup>76</sup>

These instances generally affect the rights of unwed fathers. For example, a birth father's consent is not required if the judge certifies that his identity is not "reasonably ascertainable."<sup>77</sup> The statute establishes that an "affidavit of the birth mother that the identity of the birth father is not reasonably ascertainable shall be sufficient evidence of this fact, provided there is no other evidence before the circuit court that would refute such an affidavit."<sup>78</sup>

These exceptions to the consent requirement do not effectively safeguard unwed fathers' rights. There is no specified standard of proof that the mother must meet to show that the father is unidentifiable or that she cannot locate him. This lack of a standard may even discourage unwed mothers from naming the father because it complicates the adoption process. If she merely states that she cannot determine who or where the father

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70. *Id.*

71. *See generally id.* § 63.2-1202(C).

72. *Id.* § 63.2-1202(C)(2).

73. *Id.*

74. *Id.* § 63.2-1202(C)(1). The father does not necessarily have to appear in court himself; he may instead be represented by counsel. *Id.*

75. *Id.* § 63.2-1202(D). For applicable criminal sections of the Code, see *id.* § 18.2-61 (rape), § 18.2-63 (carnal knowledge), and § 18.2-366(B) (incest).

76. *Id.* § 63.2-1203(A).

77. *Id.* § 63.2-1203(A)(3).

78. *Id.*

is, she saves herself the trouble of dealing with him or allowing his input regarding the child's fate.

The Virginia Code introduces the "best interests of the child" standard in section 63.2-1203(A) and defines it in section 63.2-1205. Courts must use this standard to determine whether failing to grant a petition for adoption would be detrimental to the child.<sup>79</sup> In making this determination, courts must consider many factors, including

the birth parent(s)' efforts to obtain or maintain legal and physical custody of the child; whether the birth parent(s)' efforts to assert parental rights were thwarted by other people; the birth parent(s)' ability to care for the child; the age of the child; the quality of any previous relationship between the birth parent(s) and the child . . . ; the duration and suitability of the child's present custodial environment; and the effect of a change of physical custody on the child.<sup>80</sup>

The Code, however, does not elaborate on how much weight these factors should be given or how much discretion the judiciary has in deciding what constitutes the best interests of the child.<sup>81</sup>

Virginia courts treat unwed fathers similarly to the Supreme Court with respect to determining the best interests of the child<sup>82</sup> and recognizing the difference between a purely biological relationship and a psychological relationship. The state courts have refused to apply the *Stanley* decision to cases in which the father had no prior psychological relationship with his child.<sup>83</sup> In *Commonwealth v. Hayes*, a father sought custody only after the child had been adopted, but the court refused to apply *Stanley* because Hayes had never given any support to and, in fact, had never even seen his daughter.<sup>84</sup> The court reasoned that there needed to be some sort of psychological, rather than merely a biological, relationship between father and child, such as the formation of a custodial or familial bond.<sup>85</sup> Granting custody to the father in this case would have also infringed on the best interests of the child because she had lived since birth with her adoptive parents.<sup>86</sup>

79. *Id.* § 63.2-1205.

80. *Id.*

81. *See id.*

82. *See, e.g., Doulgeris v. Bambacus*, 127 S.E.2d 145 (Va. 1962).

83. *See, e.g., Commonwealth v. Hayes*, 205 S.E.2d 644 (Va. 1974).

84. *Id.* at 647.

85. *See id.* (placing importance on financial support as a factor in a father's attempt to establish such a relationship).

86. *Id.* at 648.

Even when both parents' consent to adoption is required, a court can override a refusal of consent when it finds that adoption would be in the child's best interests.<sup>87</sup> In *Hickman v. Fatty*, the court found that a mother withheld her consent to her child's adoption contrary to the child's best interests.<sup>88</sup> The court based its decision on the facts that the mother was unable to care for her child, that she had made no effort to obtain legal or physical custody of her child, and that the child was over four years of age and would be emotionally damaged by a change in custody.<sup>89</sup> The *Hickman* court listed the following factors that it considered relevant in determining whether failure to grant an adoption would be detrimental to the child:

(1) the birth parent's efforts to obtain or maintain legal and physical custody of the child; (2) whether the birth parent's efforts to assert parental rights were thwarted by other people; (3) the birth parent's ability to care for the child; (4) the child's age; (5) the quality of any previous relationship between the birth parent and the child and between the birth parent and any other minor children; (6) the duration and suitability of the child's present custodial environment; and (7) the effect on the child of a change of physical custody.<sup>90</sup>

Weighing these factors helps courts to decide whether petitions for adoption serve a child's best biological and psychological interests.

In *Frye v. Spotte*, a Virginia court found that a continued relationship with their natural father would be detrimental to his children's welfare.<sup>91</sup> Mr. Frye attempted to block the adoption of his children by their birth mother's husband, but the court found, after examining his existing relationship with his children, that Mr. Frye's history of having a violent temper, perpetrating both spousal and child abuse, and sexually abusing his children made a continuing relationship with him not in the children's best interests.<sup>92</sup> Mr. Frye also abandoned his wife and daughters for another woman, taking all the food in their house with him and disconnecting the electricity and water when he left.<sup>93</sup> Not only

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87. See *Hickman v. Fatty*, 489 S.E.2d 232 (Va. 1997).

88. *Id.* at 234.

89. *Id.*

90. *Id.* at 235 (citing VA. CODE ANN. § 63.1-225.1 (Michie 1995) (superseded by VA. CODE ANN. § 63.2-1205 (Michie 2004))).

91. *Frye v. Spotte*, 359 S.E.2d 315 (Va. 1987).

92. *Id.* at 320.

93. *Id.*

did Mr. Frye not support his children, but he engaged in behavior that was directly harmful and blatantly contrary to their well-being.<sup>94</sup> Mr. Frye's actions, coupled with the fact that he never expressed an interest in his children until he learned of their stepfather's intent to adopt them, overwhelmingly convinced the court that any continued relationship between him and his children would be detrimental to the children and that Mr. Frye's objection should not be allowed to block their adoption.<sup>95</sup>

Once the required parental consent to an adoption is given, it is revocable under the Virginia Code only in very limited circumstances. Consent is "revocable prior to the final order of adoption"<sup>96</sup> only where it has been proven that the parent gave consent under fraud or duress or "upon written, mutual consent of the birth parents and prospective adoptive parents."<sup>97</sup> The Code states that adoption is not subject to attack after six months from the final order of adoption, even in the case of "fraud, duress, failure to give any required notice, failure of any procedural requirement, or lack of jurisdiction over any person, and such order shall be final for all purposes."<sup>98</sup> The State of Virginia has placed these limitations on challenges to adoptions because it prefers adoptions to be permanent after a court enters a final adoption decree.<sup>99</sup> Birth parents attempting to revoke their consent must raise a claim that fraud or duress was employed in obtaining their consent<sup>100</sup> — a difficult allegation to substantiate.

Courts rarely make such findings of fraud or duress absent exigent circumstances. For example, in *Harry v. Fisher*, a birth mother executed a written agreement to allow the Fishers to adopt her child three weeks before the child was born.<sup>101</sup> After the birth, both the biological mother and her husband executed their consent to the child's adoption, and the Fishers took custody of the child the next day.<sup>102</sup> Two months later, the birth mother sought to regain custody of her child by claiming that duress, strain, and mental and physical intimidation were used against her in obtaining her consent.<sup>103</sup> Noting that adoptive

94. *Id.*

95. *Id.*

96. VA. CODE ANN. § 63.2-1204 (Michie 2004).

97. *Id.*

98. *Id.* § 63.2-1216.

99. *See, e.g.,* *Doulgeris v. Bambacus*, 127 S.E.2d 145 (Va. 1962).

100. VA. CODE ANN. § 63.2-1234 (Michie 2004).

101. *Harry v. Fisher*, 221 S.E.2d 118, 118 (Va. 1976).

102. *Id.*

103. *Id.*

parents will prevail over an objection to adoption if they can show by a preponderance of evidence that the child's best interests will be served by remaining with them,<sup>104</sup> the court found that the mother's consent was freely and knowingly given.<sup>105</sup> The court found that the Fishers were proper and suitable custodians and that the birth mother failed to prove that she was a fit parent.<sup>106</sup> Therefore, it was in the child's best interests to stay with the adoptive parents.<sup>107</sup>

Any challenge to an adoption must generally be brought within six months of the final order of adoption, even if the challenge is based on fraud or lack of notice.<sup>108</sup> Courts, however, have made exceptions in cases such as *F.E. v. G.F.M.*, in which a mother and child were involved in an accident that took the life of the mother and resulted in the child being hospitalized.<sup>109</sup> The father did not speak English and relied on the child's maternal grandmother to help with the hospital paperwork.<sup>110</sup> The father unknowingly signed papers giving his consent to adoption, which the grandmother represented were forms to let her have access to the child's medical information and to allow her to accompany him to appointments.<sup>111</sup> During adoption proceedings, the grandmother falsely reported to the court that her grandson had lived with her his entire life.<sup>112</sup> The father was never notified of the adoption proceedings or the adoption itself.<sup>113</sup> With no knowledge of the adoption, the father continued to see and care for his son after the child was released from the hospital.<sup>114</sup> In 1998, when the father remarried and asked for his son, the grandmother informed him that she had adopted the child in 1995, refused to relinquish custody, and cut off all contact with the father.<sup>115</sup>

Strict application of the Virginia statute dealing with the statute of limitations for challenges to adoptions would have barred this father from regaining custody of his son, but the court

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104. *Id.* at 119 (pointing out that the execution of consent must also be valid, which it was in this case).

105. *Id.* (finding no sign of fraud, duress, or undue influence).

106. *Id.*

107. *Id.*

108. See *F.E. v. G.F.M.*, 547 S.E.2d 531, 536 (Va. 2001) (citing VA. CODE ANN. § 63.1-237 (Michie 2000)).

109. *Id.* at 535.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 536.

114. *Id.*

115. *Id.*

found that the six month limitation violated this father's due process and equal protection rights.<sup>116</sup> The court found that the interest of parents in relationships with their children is sufficiently fundamental to be included in the liberty interests protected by the Due Process Clause.<sup>117</sup> The court also considered the difference between biological and "actual" relationships,<sup>118</sup> holding that "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'coming forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the Due Process Clause."<sup>119</sup> Such a father has a constitutional right to a continuing relationship with his children, which may not be terminated without due process.<sup>120</sup>

In this case, the court found that the six month limitation was not sufficiently narrowly tailored to preserve the interests of the child's stability and the father's right to continue the relationship.<sup>121</sup> The father had no reason to know that his parental rights had been terminated.<sup>122</sup> He did not speak English and relied only on what the grandmother told him in interpreting the consent forms.<sup>123</sup> The father had no way of knowing that she had lied, and he was not made aware of the adoption proceedings.<sup>124</sup> He also could not have known that his relationship with his child had legally changed because nothing had changed outwardly.<sup>125</sup> He was still allowed to see the child and did so until the grandmother refused to allow him to contact the child.<sup>126</sup> The adoption was finalized without the father's knowledge, through no fault of his own, and he still maintained a relationship with his child after the adoption took place.<sup>127</sup> Therefore, it was neither in the best interests of the child nor fair to the father that his parental rights had been terminated.<sup>128</sup> As this case illustrates, courts do not always strictly adhere to the statutory six month standard.

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116. *Id.* at 537.

117. *Id.* at 538.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 539.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 536.

126. *Id.*

127. *Id.*

128. *Id.* at 535.

Several Virginia courts have also dealt with the question of a father's rights to his children when he is incarcerated. *Linkous v. Kingery*,<sup>129</sup> for example, concerned an incarcerated father who had only minimal contact with his children.<sup>130</sup> The children visited their father in jail only once, although the father expressed interest in maintaining a relationship and reuniting with them at the end of his term of incarceration.<sup>131</sup> In determining the best interests of the children, without proof of the father's unfitness, the court looked for the party seeking adoption to show, by clear and convincing evidence, that allowing a continued relationship between father and children would be detrimental to the children's welfare.<sup>132</sup> Considering that Mr. Linkous had, before his incarceration, been a marginal father at best,<sup>133</sup> the court determined that continuing the relationship in this case would, in fact, be detrimental to the children.<sup>134</sup> During his incarceration, Mr. Linkous engaged in further criminal conduct and activities that prolonged his incarceration and, therefore, his separation from his children.<sup>135</sup> The court also found that Mr. Linkous's action to block the adoption was not motivated by sincere love for his children.<sup>136</sup> He merely wanted to keep his children away from their adoptive parents and resume contact with them at an undetermined point in the future.<sup>137</sup> The court found that the best interests of the children would not support denying them a stable, loving relationship in favor of one that was at best unstable and unpredictable.<sup>138</sup>

While the court in *Linkous* declined to hold that the incarceration of an unwed father made him *per se* unfit to raise his children, some situations have arisen in which a father's incarceration has had that effect. In *Winfield v. Urquhart*, for example, the father had been incarcerated for murdering the mother of his children and wounding the children's stepfather.<sup>139</sup> The

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129. 390 S.E.2d 188 (Va. App. 1990).

130. *Id.* at 189.

131. *Id.*

132. *Id.* at 194. This determination is made on a case by case basis.

133. *Id.* at 195.

134. *Id.* at 196.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. 492 S.E.2d 464, 468 (Va. App. 1997).



murder and subsequent incarceration resulted in Mr. Winfield's inability to gain or maintain custody of his children, because he could not care for them from jail.<sup>140</sup> The children were also unable to appreciate the circumstances behind their mother's murder and thus could not make a reasoned choice about their situation.<sup>141</sup> The court considered other factors as well, such as the fact that the children had been in the Urquharts' custody for six years when the father tried to block their adoption,<sup>142</sup> but ultimately found that the circumstances behind his crimes alone were enough to prove the father's unfitness to parent.<sup>143</sup> The court found that withholding consent to the adoption would deny the children stability and be detrimental to their well-being.<sup>144</sup>

The Virginia Code thus places heavy weight on the factors used to decide what is in the best interests of a child. In most cases, custody is awarded to whoever has been most demonstrably active in caring for and raising the child. Courts have not held biological relation to be an overriding factor, looking instead at the fitness of the biological and adoptive parents, the child's current situation and stability, and, in some egregious instances, fraud and duress in the execution of the adoption.

### BEST INTERESTS OF THE CHILD: A CLOSER LOOK

In determining custody cases Virginia courts have traditionally used the best interests of the child standard, which has been described as "the universal principle guiding the adjudication of all matters concerning the welfare of the child."<sup>145</sup> There are generally three parties whose rights must be taken into consideration in adoption cases: the birth parents, the adoptive parents, and the child. When the parties have the same interests in mind, they can usually work together to do what is best for everyone involved. When the parties have competing interests, however, courts must often step in and determine whose rights will prevail in a given situation.

Of course, the welfare of the child should always be a priority in the minds of everyone involved in custody matters. The problem

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140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 469.

144. *Id.* at 470.

145. CLAIRE BREEN, *THE STANDARD OF THE BEST INTERESTS OF THE CHILD: A WESTERN TRADITION IN INTERNATIONAL AND COMPARATIVE LAW* 1 (2002).

lies in figuring out what is best for the child. There has been much discussion about biology and psychology, genetics versus interaction. These two concepts do not necessarily always overlap: "Whether any adult becomes the psychological parent of a child is based . . . on day-to-day interaction, companionship, and shared experiences,"<sup>146</sup> more than on genetics alone. Courts have often made the distinction between the biological father, the man involved in conceiving the child, and the psychological or social father, the person who is involved in the child's life and contributes to his or her upbringing.<sup>147</sup> A biological relationship gives the birth parents the "first right to the possession of the child."<sup>148</sup> The birth parents keep this right unless they decide to give their child up for adoption, or unless the state finds that the child has been neglected or delinquent or that the parents are unfit.<sup>149</sup> When an unwed father is not involved in his child's life, the question of biology and psychology must come into play.<sup>150</sup> In order to determine whether the biological father and the psychological father are in fact the same person, courts can look to three areas of filial obligations: personal care, financial support, and accommodation.<sup>151</sup>

The traditional view of unwed fathers is that their only contribution is biological.<sup>152</sup> "The birth father is often viewed as an illusory entity whose only link with this child is his involvement in the biological event."<sup>153</sup> The man will help create the child, but then he will not want any responsibility in raising the child.<sup>154</sup> While this view may be based at least partially in reality, and courts took this purely biological view until the *Stanley* decision in 1972,<sup>155</sup> it is certainly not true for all unwed fathers. Until *Stanley*, "birth fathers who were not married to the birth mothers of their children had no legal rights with respect to the children

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146. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 19 (1973).

147. GARY CLAPTON, *BIRTH FATHERS AND THEIR ADOPTION EXPERIENCES* 31 (2003).

148. GOLDSTEIN ET AL., *supra* note 146, at 16.

149. *Id.*

150. *Id.*

151. CLAPTON, *supra* note 147, at 176.

152. *Id.* at 40.

153. Paul Sachdev, *The Rights of Birth Fathers Must Be Protected*, in *ADOPTION: OPPOSING VIEWPOINTS* 77 (David Bender & Bruno Leone eds., 1991).

154. CLAPTON, *supra* note 147, at 40.

155. See *Stanley v. Illinois*, 405 U.S. 645 (1972); see also discussion of *Stanley*, *supra* notes 18-28 and accompanying text.

they fathered."<sup>156</sup> *Stanley* recognized that an unwed father can care for and nurture his children and that he should be given the opportunity to do so if he desires.<sup>157</sup>

When a father takes an interest in his child and is involved in that child's life, he becomes not only the child's biological father but the child's psychological father as well. While a child may feel a bond to a biological parent as a result of the blood relation, it is "day-to-day" interaction that will ultimately become the crux of the relationship:

[F]or the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation. Only a parent who provides for these needs will build a psychological relationship to the child on the basis of the biological one and will become his "psychological parent" in whose care the child can feel valued and "wanted."<sup>158</sup>

By this analysis, the number of biological parents a child can have is limited, but anyone could potentially become a psychological parent.

A parent's absence can easily break a purely biological bond, especially soon after birth, when the child has no awareness of his or her relationship to his or her parents. Unlike their parents, "children have no psychological conception of relationship by blood-tie until quite late in their development."<sup>159</sup> Parents not only possess the awareness and capacity to form such relationships, but also have already become emotionally invested in the child due to the process of conceiving, carrying and giving birth to the child, or being involved during the pregnancy in the case of fathers.<sup>160</sup> The child, however, will not begin to realize these relationships until later in his or her development and will naturally bond to those most involved in his or her upbringing.<sup>161</sup>

As noted by Goldstein, Freud, and Solnit, "[t]he 'family,' however defined by society, is generally perceived as the fundamental unit responsible for and capable of providing a child on a continuing basis with an environment which serves his

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156. REITZ & WATSON, *supra* note 19, at 63-64.

157. See generally *Stanley v. Illinois*, 405 U.S. 645 (1972).

158. GOLDSTEIN ET AL., *supra* note 146, at 17.

159. *Id.* at 12.

160. *Id.*

161. *Id.* at 12-13.

numerous physical and mental needs during immaturity."<sup>162</sup> The family unit traditionally consists of people who are related biologically, but a person will generally consider 'family' to be those people who have provided love and support. This support can come from either biological or adoptive parents, but not from an absent or inactive parent.<sup>163</sup> An inactive parent may be biologically related to the child, but biology alone will not always give rise to parental rights to that child.

One of the most important concepts in forming a relationship with a child is that of continuity: "Continuity of relationships, surroundings, and environmental influence are essential for a child's normal development."<sup>164</sup> Breaks in continuity of relationships can be damaging to a child and may cause infants up to eighteen months of age to refuse food, have difficulty sleeping, and cry excessively.<sup>165</sup> Infants and toddlers who suffer from disrupted continuity may also become less trusting.<sup>166</sup> Early adoption allows an uninterrupted psychological bond to form between the child and the adoptive parents.<sup>167</sup> This bond is harder to establish later in the child's life, when the child has already formed such relationships or has already grown less trusting due to broken relationships.<sup>168</sup> The permanence of parental relationships affords continuity in a child's life.<sup>169</sup> A protracted custody battle presents the possibility that a parental relationship will be disrupted; it also leaves the parties involved unsure whether their parental relationship will be interrupted.<sup>170</sup> This fear of interruption, especially in the waiting period between the adoptive placement of a child and the final order of adoption, can have a detrimental impact on the health and well-being of the child.<sup>171</sup> For this reason, final custody decisions should be made as quickly as possible; "[p]rocedural and substantive decisions should not exceed the time that the child-to-be-placed can endure loss and uncertainty."<sup>172</sup>

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162. *Id.* at 13.

163. *Id.* at 19.

164. *Id.* at 31-32.

165. *Id.* at 32.

166. *Id.* at 32-33.

167. *Id.* at 22.

168. *Id.*

169. *Id.* at 35.

170. *Id.*

171. *Id.* at 31-35.

172. *Id.* at 42.

## THE LEAST DETRIMENTAL ALTERNATIVE

Determining what is best for a child is a difficult and often time consuming task. It is not possible to envision every potential outcome or to realize all the future circumstances that could affect the decision. Therefore, instead of trying to determine what would be in the best interests of the child, placement decisions should be treated as emergencies and made within the minimum amount of time necessary for a reasoned judgment.<sup>173</sup> "Prompt appeal and decision safeguard not only the interest of the child,"<sup>174</sup> but also the interests of "aggrieved adult parties."<sup>175</sup>

The placement process is not perfect, and not every circumstance can be predicted. Instead of taking a great deal of time to determine the absolute best situation, courts should focus on finding the "least detrimental available alternative for safeguarding the child's growth and development."<sup>176</sup> This standard is defined as:

[T]hat specific placement and procedure for placement which maximizes, in accord with the child's sense of time and on the basis of short-term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent.<sup>177</sup>

This standard is similar to the best interests of the child standard but also takes into account the time pressures associated with changing the custody of a child.

The longer a custody dispute is dragged out, the more harmful it is to all parties involved. Adoptive parents become more emotionally attached to the child and suffer from the insecurity of not knowing whether they will be able to keep the child. Biological parents suffer from the uncertainty of not knowing whether they will get their child back. The child also suffers from changes in environment and the possibility of having established emotional bonds broken. The possible detriment only increases as the child grows older and forms stronger and more complex emotional bonds with the people who have taken care of him or

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173. *Id.* at 43.

174. *Id.* at 46.

175. *Id.*

176. *Id.* at 53.

177. *Id.*

her. The child may not understand why he or she is being taken away from the only people he or she recognizes as parents. These emotional issues become even more complicated when a father who did not know he had a child, or who has somehow been kept from his child, enters the picture.

#### A SPECIAL CASE: THE THWARTED FATHER

Not all unwed fathers who do not take care of their children have made conscious choices not to raise their children. There is a class of fathers who are either unaware that they are fathers or whose efforts at raising their children have somehow been thwarted by the birth mother or some other third party.<sup>178</sup> Treatment of the thwarted father is especially problematic: the thwarted father has tried to support or have contact with his children, but his efforts have been frustrated by the mother placing the children for adoption behind his back, moving away with the children without telling him, or using some other method of preventing him from gaining access to his children.<sup>179</sup> The issue that arises is whether the thwarted father's rights to his child trump those of potential adoptive parents.<sup>180</sup> The Supreme Court has not yet "squarely resolve[d] what should be done with the father who . . . has done everything he reasonably could to establish a relationship with his child but who has been thwarted by circumstances beyond his control."<sup>181</sup>

The Virginia Code allows parental consent to adoptions to be revoked prior to the final order of adoption, but only "upon proof of fraud or duress."<sup>182</sup> The Code, however, does not permit revocation of consent, even for fraud or duress, after six months from the date of entry of the final order of adoption,<sup>183</sup> but courts have not always followed this rule strictly, making exceptions in cases with special circumstances.<sup>184</sup> For example, in *F.E. v. G.F.M.*, the court held that the statute unconstitutionally violated due process as the time limitation "affected [the] father's fundamental right to

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178. David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 763 (1999).

179. See generally *id.* (discussing multiple thwarted-father cases).

180. See *id.* at 754-56 (illustrating this point with a discussion of the "Baby Richard" case, *In re Doe*, 159 Ill.2d 347 (1994)).

181. *Id.* at 763.

182. VA. CODE ANN. § 63.2-1204 (Michie 2004).

183. *Id.* § 63.2-1216.

184. See, e.g., *F.E. v. G.F.M.*, 547 S.E.2d 531 (Va. App. 2001); see also discussion of *F.E.*, *supra* notes 108-28 and accompanying text.

maintain that relationship with his son . . . .<sup>185</sup> This relationship was demonstrated by the father's continued contact with his child after the child had been adopted by the child's grandmother without the father's knowledge.<sup>186</sup>

The UAA allows the thwarted father to challenge an adoption before the adoption decree has been entered:

A thwarted father may succeed in blocking an adoption if he not only can prove a "compelling reason" for not having performed parental duties but successfully defends against an effort by the prospective adoptive parents, the birth mother, or an agency to prove that termination of a thwarted father's rights is necessary to avoid detriment or a risk of substantial harm to the child.<sup>187</sup>

The thwarted father thus does not get automatic access to his child. The UAA is "premised on the belief that children's ties are to the individuals who actually parent them — or who are committed to parenting them — and [who] deserve legal protection even if those ties are psychologically and socially constructed and not biologically rooted."<sup>188</sup> Just like the Virginia Code, the comment to the UAA states that a thwarted father may not challenge an adoption more than six months after the adoption decree has been issued.<sup>189</sup> Because the UAA has not been enacted, however, there is no case law to determine how strictly Virginia's courts would treat this rule.

The UAA and the Virginia Code have similar standards when it comes to thwarted fathers. The Virginia Code seems to focus on fraud or duress when allowing an adoption to be revoked.<sup>190</sup> It also focuses on the psychological relationship a father has built with his child and the best interests of the child standard.<sup>191</sup> Courts generally try to protect the parental relationship that has already developed, even if the father's rights to his child were thwarted.<sup>192</sup> Courts have generally treated the loss of the opportunity for a potential relationship as less substantial than the loss of an existing human bond.<sup>193</sup> This makes it hard for a thwarted father

185. *F.E.*, 547 S.E.2d at 538-39.

186. *Id.* at 539.

187. UNIF. ADOPTION ACT § 2-401 cmt., 9 U.L.A. 50 (1994).

188. Sakach, *supra* note 12, at 893.

189. UNIF. ADOPTION ACT § 2-401 cmt., 9 U.L.A. 50 (1994).

190. VA. CODE ANN. § 63.2-1204 (Michie 2004).

191. *Id.*

192. Meyer, *supra* note 178, at 763-64.

193. *Id.* at 764.

to show that it is in the best interests of the child for him to get custody. Even though it may not be the father's fault that he has not had contact with his child, the fact remains that he has not formed an emotional bond with the child, while the prospective adoptive parents have had that opportunity. Thus, it seems that courts will generally favor prospective adoptive parents, except for extreme cases such as *F.E. v. G.F.M.*<sup>194</sup>

The UAA also tends to benefit parents who have developed a psychological relationship with their child. The comment to section 2-401, however, directly addresses the question of a thwarted father.<sup>195</sup> Once the father has shown a compelling reason why he has not been able to have contact with his child (essentially, how he has been thwarted), he needs only to defend against the claim that terminating his parental rights is "necessary to avoid detriment or a risk of substantial harm to the child."<sup>196</sup> The UAA does not use the phrase "best interests of the child" but does take into account factors such as the relationship between the child's birth parents, the amount of time the child was out of their custody, and independent grounds for terminating the rights of the birth parents.<sup>197</sup> These factors do not appear to be as strict as those set forth by the Virginia Code.

### CONCLUSION

While both the UAA and the Virginia Code sections dealing with adoption purport to do what is in the "best interests of the child," the UAA on its face seems to be more supportive of unwed fathers' rights. The UAA specifically mentions the thwarted father and provides standards for dealing with his situation. It recognizes that not all fathers are intentionally unsupportive of their children and distinguishes between cases in which fathers are simply irresponsible or unresponsive to their children and cases in which fathers have a genuine interest in having a relationship with their children but are blocked from fulfilling that interest by some outside force. Adoption law has historically been focused mainly on the birth mother's rights, but the UAA expands that focus to include the birth father's rights as well.

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194. 547 S.E.2d at 536.

195. UNIF. ADOPTION ACT § 2-401 cmt., 9 U.L.A. 50 (1994).

196. *Id.*

197. UNIF. ADOPTION ACT § 2-408 cmt., 9 U.L.A. 61 (1994).



The UAA mainly focuses, however, on the best interests of the child, and it seems to favor the adoptive parents by making the revocation period shorter and more permanent. The UAA also appears to provide additional protection to birth parents by offering them an absolute period during which they can revoke their consent to their child's adoption. This period, however, is for such a short time after the birth of the child that it may give a false sense of control to the birth parents. This is especially true in the case of a thwarted father, who is not likely to raise an objection to the adoption within 192 hours because he is likely not even aware of the child's birth or the adoption proceedings within that time.

Like the UAA, the Virginia Code also tends to focus on what is in the best interests of the child, but it often seems to assume that keeping a child with his or her prospective adoptive family is better for the child than being returned to an interested and willing biological father who has had his rights infringed upon by others. It does not mention the unwed father specifically, other than in a listing of parties required to give consent to adoption. While the Virginia Code may not appear to do much for unwed fathers on its face, Virginia courts have sometimes allowed exceptions when the unwed father's rights have been substantially impaired and when there would be no detriment to the child.

Both the Virginia Code and the UAA attempt to adhere to what is in the best interests of the child, which is ultimately the most important aspect of the adoption process. Courts applying the Virginia Code seem to be a bit more flexible in examining the circumstances of a given situation and allowing a thwarted father to regain custody than the UAA suggests it would allow. Even though it seems to support the unwed father's rights on its face, the UAA tends to favor the adoptive family. Therefore, it may not really provide much extra protection to unwed fathers. It is likely that cases decided under the UAA will turn out very much like those decided under the Virginia Code. Adopting the UAA is therefore unlikely to provide any new benefits to unwed fathers in Virginia, even though it more explicitly recognizes their interests.

Adoption cases are unique because of the emotions involved and the fact that the outcome will greatly affect the child's life. Courts are not always able to look into the future and see what will be in the child's best interests, yet they are forced to make these decisions every day. States and courts may continue the trend of recognizing birth fathers' rights, perhaps by adopting the UAA, whether or not it actually grants unwed fathers more

rights, or they may further restrict adoption laws to make revocation of consent more difficult. Whichever route they take, courts will always be involved in the battle among the rights of the birth parents, the rights of the prospective adoptive parents, and the best interests of the child.

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