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0012Baby Richard cases: A legislative solutionCaruso;Carmen D.~Caruso;Carmen D.~

## GUEST EDITORIAL

Baby Richard cases: A legislative solution

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Editor's note: Carmen David Caruso is a partner with Foran & Schultz. He was "the product of a successful adoption" and is now the proud father of three sons. His purpose in this guest editorial is to "rise above the intense emotion and blame game" in the Baby Richard case and propose legislative solutions to prevent similar cases in the future.

The case of the child known as "Richard" was an avoidable tragedy, but we have been playing a "blame game" that misses the point. The biological father, the adoptive parents and the courts have been condemned to varying degrees - but true blame for Richard's plight rests with all of us, for as a society we have failed to demand the enactment of laws to put the interests of our children first.

The problem stems from confusion as to the proper "rights" of unwed fathers. If a woman chooses abortion, the father has no voice. He cannot command her to give birth and then turn the child over to him. If she chooses to give birth and rear the child alone, the father will be liable for child support (and rightly so) upon proof of paternity; but in almost every case, he would be unsuccessful in the event he were to challenge the mother for custody.

If the birth mother places her child for adoption, however, the Illinois Adoption Act gives the biological father a 30-day veto over the birth mother's decision, even though she presumably believes an adoption is in the best interests of her child. If a father demonstrates a "reasonable degree of interest, concern or responsibility as to the welfare of [the] newborn child" within 30 days after the birth, he is deemed "fit" to be the father and must give his consent to any adoption; and, as in Richard's case, he can ask a court to overturn an adoption that was commenced during the first 30 days without his consent.

The 30-day law was not enacted to protect the best interests of children. It reflects the age-old presumption that children are better off with their natural parents; but in effect, it treats children as property. After the birth, a biological father has 30 days to "claim" his child. Adoptions commenced in violation of this 30-day rule may be voided, as Richard's was, not to protect the child, but to protect the rights of the biological father.

Responding to the Illinois Supreme Court's decision to overturn Richard's adoption, the Illinois Legislature hastily amended the Illinois Adoption Act to require an evidentiary hearing to determine whether a transfer of custody from the adoptive to biological parents is in the child's best interests. In Richard's case, the

Illinois Supreme Court viewed the amendment as an improper legislative attempt to change the result in a case that was already decided.

For future cases, the amendment may be well-intentioned, but it is fundamentally flawed. It focuses on the child's best interests, but the "best interests" hearing is not held until after lengthy and bitter litigation that results in the voiding of an adoption. By then, two families are already at war; and one family is destroyed. Worse, the amendment will actually encourage more scorched-earth litigation by rewarding the adoptive parents for clinging to the child as long as possible, as Richard's adoptive parents did, in order to argue that a transfer of custody is not in the child's best interests. This amendment proves the old maxim that hard cases

make bad law.

Richard's case would have tested the wisdom of King Solomon, but the solution is within our grasp. To prevent the suffering that results whenever adoptive and biological parents fight for the same child, the law should require that the "rights" of unwed biological fathers must be determined, with finality, before the adoption commences. To protect a child's best interests from the moment of birth, unwed biological fathers who intend to be real fathers should be required, whenever possible, to declare their intent before the child is born.

This would not infringe any legitimate "right" that fathers may claim. Nature provides nine months to prepare for parenthood. As soon as he learns of the pregnancy, a real father strives to provide the mother with the best available prenatal care. He plans for the child's arrival. When the baby is born, he welcomes the child with love. No 30-day decision-making period is necessary. Moreover, medical science has increasingly recognized that a child's prenatal care is critically important to the child's well-being after birth. A father's rights come with responsibilities. Clearly, it would be in the best interests of the child to require or at least encourage the biological father to assume responsibility during the fetal period.

Advocates for the "rights" of unwed biological fathers may argue that a birth mother may deny or be uncertain as to paternity, or, as in Richard's case, she may lie and say the baby died at birth. These problems are solvable. Under current law, an unwed expectant father may file a petition to establish paternity, before the child is born. Paternity is then established at birth, before the newborn is delivered to adoptive parents. If Richard's biological father had sought to establish his paternity, he would have become "the only father that Richard has ever known" and Richard would have been spared this tragedy. This simple procedure should be made mandatory whenever paternity is suspected. The bottom line is that no child should ever be made to suffer because his biological parents could not get their adult lives in order.

Only in an extreme case, when the biological father does not learn of the pregnancy (because he had no contact with the mother in the nine months after they had intercourse), could a requirement that he declare his intent before birth arguably infringe upon his "rights." But even under current law, his "rights" in that extreme situation are not absolute but may instead be extinguished 30 days after birth. When the best interests of the child are considered, the "balance of interests" shifts to the child at the moment of birth. With the lone possible exception of a man who is called into military service in time of war, in which case special laws may be needed, there is no justice in risking harm to the child to reward a biological father who does not learn of the pregnancy.

When a father demonstrates his love for his baby before, during and after birth, tragic cases like Richard's cannot happen. Only when, as currently permitted by Illinois law, a man can ignore the mother of his

unborn child and then wait 30 days after birth to decide whether he wants to be a father, can a legal and human tragedy like this occur. We must change our laws to put the best interests of our children first.

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Endnotes:

. See, 750 ILCS 50/1 (D)(1), setting forth the "30 day" test for determining fitness; and 750 ILCS 50/8, setting forth the right of a "fit" unwed father to consent to the adoption; see also, *In re Petition of Doe*, 159 Ill.2d 347, 350 (1994) (hereinafter "Richard I" - i.e. the Illinois Supreme Court's first opinion in this case) (holding that under these statutes, the adoption in "Richard's" case was void because the biological father had demonstrated "reasonable interest" within 30 days after birth, but did not give his consent to the adoption).

. See, *Richard I*, supra, 159 Ill.2d at 350 (wherein the Illinois Supreme Court expressly held that when an adoption is voided because of a failure to obtain the consent of a father who was "fit" because he demonstrated an interest in the child within 30 days after birth, the father is entitled to custody, and the "child's best interests" are completely irrelevant; it is erroneous to even consider the child's interests as a factor in the custody decision); see also, *In re Petition of Otakar Kirchner*, 1995 Ill. LEXIS 56 (Supreme Court of Illinois, Feb. 28, 1995) (hereinafter "Richard II", i.e. the Illinois Supreme Court's second opinion in this case)(confirming the holding of *Richard I*).

. See, Public Act 88-550, effective July 3, 1994, adding 750 ILCS 50/20(b).

. See, *Richard II*, supra, 1995 Ill. LEXIS at \*39-48.

. See, 750 ILCS 45/7.

. This fact was noted by the appellate court in "Richard's" case. See, *In re Petition of Doe*, 254 Ill.App.3d 405, 415 (First Dist. 1993)("[A]n unwed man who sincerely believes that he was one of the sexual partners to the physiological formation of a child may file a lawsuit to determine legally whether he is the father and assert his parental rights before the child is born. Had [Richard's father] done so, he could have asserted his parental rights from the moment Richard was born")(emphasis in original). In *Richard I*, the Illinois Supreme Court reversed the opinion of the appellate court for considering the 'best interests of the child' as the controlling factor in the case.

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