Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions

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Leslie Joan Harris

The first case in which the United States Supreme Court held that an 
unmarried father has a constitutionally protected interest in custody and raising 
his children was a juvenile court dependency case,1 Stanley v. Illinois.2 Even 
though Stanley held that the Illinois juvenile court had violated that father’s 
rights by failing to treat him as a parent,3 until the last decade, in most child 
abuse and neglect cases the juvenile court and child welfare system continued 
to ignore fathers who were not living with their children at the time the case 
was filed. In contrast, today, best practices manuals encourage agencies and 
courts to identify and involve children’s legal parents, particularly nonresident 
fathers, in cases as soon as possible.4

This changing approach to nonresident fathers, in turn, makes child 
protection cases more complicated. If poorly implemented, it can also threaten 
to undermine the goals of modern child protection law—insuring children’s 
safety, reuniting children with the parents from whom they were removed 
when possible, and moving them rapidly into alternate permanent homes when 
not possible. Most obviously, if the policy of involving nonresidential fathers 
is implemented woodenly, by requiring that children be placed with the fathers

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1 “Dependency” is a traditional term still used in some statutes that may, 
depending on the jurisdiction, include abuse as well as neglect. In this paper the term is 
used interchangeably with “neglect and abuse” to describe the child protection 
caseload of the juvenile court.

2 405 U.S. 645, 658 (1972). The Court said, “The private interest here, that of a 
man in the children he has sired and raised, undeniably warrants deference and, absent 
a powerful countervailing interest, protection.” Id. at 651.

3 Id. at 666–67.

4 E.g., NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, ADOPTION 
AND PERMANENCY GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND 
cd/pdf/aandpguidelinesbookcompact.pdf; JEFFREY ROSENBERG & W. BRADFORD 
WILCOX, U.S. DEP’T OF HEALTH & HUM. SERVICES, THE IMPORTANCE OF FATHERS IN 
THE HEALTHY DEVELOPMENT OF CHILDREN 33 (2006), available at http://www.child-
welfare.gov/pubs/usermanuals/fatherhood/fatherhood/pdf. This book is part of the 
at the outset of the case when little is known about them, the children may be endangered. Less dramatically, efforts to work with fathers can result in children remaining in the system longer. And working with fathers can undermine, or even short-circuit, efforts to reunite children with the mothers from whom they were taken, raising problems of defining children’s best interests as well as fairness to both parents in what amounts to state-generated custody contests.

Part I of this Article sets the stage by describing the typical families from which foster children come. It reviews data that show a very high proportion of these children do not live with their fathers, even though the identity and location of many fathers is known. Part II describes the traditional child welfare practice of ignoring nonresidential fathers and its rationale—the belief that these fathers typically have little to offer their children and that their presence can impede the goals of protecting children and finding permanent homes for them. Despite these objections, law and practice regarding nonresidential fathers is changing because of new federal requirements and new social work practices, as Part III explains. Nevertheless, some states may favor the older approach to nonresident fathers’ involvement in dependency cases, based on the conviction that it expresses sounder social policy. Part IV discusses possible strategies such states might use to resist wholesale implementation of the new policies while still complying with the federal requirements. This part concludes, however, that these strategies are not likely to be successful. Instead, states should require early and decisive judicial involvement in cases where legal paternity is not determined and apply legal rules for determining parentage that the state uses in other contexts. Part V discusses problems that arise when nonresidential fathers accept the invitation to participate in dependency cases. These fathers may claim an immediate right to custody, perhaps free of any kind of state supervision. Accepting this claim is problematic because little or nothing may be known of a father’s capacity to be a good parent and because granting him immediate custody may be incompatible with efforts to reunite the child with the mother from whom he or she was taken. This part reviews the various ways that states have responded to this claim and recommends an approach that protects the child’s safety and interest in maintaining a relationship with both parents, where appropriate.
I. FOSTER CHILDREN’S FAMILIES AT THE OUTSET OF CASES

Most children who are the subjects of juvenile court abuse and neglect cases do not live with their fathers. However, often the fathers’ identities and locations are known or can be determined soon after cases are filed.

A. Foster Children Are Likely Not to Live with or Have Contact with Their Fathers

In the last thirty-five years, the proportion of children younger than eighteen living apart from their fathers has grown dramatically, and foster children are even more likely than children in the general population to live away from their fathers and not have contact with them.

Between 1970 and 1990, the proportion of children living only with their mothers doubled from 11% to 22% of all children; since 1990, the changes have leveled off. In 2001, 18.5 million children lived with only one parent; 2.2 million lived with their fathers, and 16.3 million with their mothers. Children of color were more likely than white children to live with only one parent. In 2001, 51% of black children lived with only one parent, compared to 19% of non-Hispanic white children and 26% of Hispanic children. The 1997 National Survey of America’s Families found an even higher rate of separation of parents and children; it reported that a third of all children younger than eighteen live apart from a parent, and 83% of this group live with a mother rather than a father.

A large fraction of the children living with only one parent were born to unmarried mothers. In 2001, 20.6 million children lived with an unmarried parent; 79% lived with their mothers only, 11% lived with theirs father only, and the remainder lived with both parents.

Incomplete data show that the proportion of children in the child welfare system who come from single-parent families is even higher than in the general population. More than half of all foster children live in single, female-headed households, and the proportion may be as high as 80% of foster

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6 Id. at 2.

7 Id. at 2–3.

8 Id. at 2.


10 KREIDER & FIELDS, supra note 5, at 4.
children and 72% of all children served by child welfare agencies. These figures likely understate the number of children living apart from their biological fathers because some fraction of the families headed by a married couple includes stepparents.

Studies also show that even when the father of a child in the child welfare system is known, he is unlikely to have contact with the child. A research brief published in 2003 reported that only 54% of foster children had had contact with their fathers in the past year, compared with 66% of comparable children receiving child welfare services and 72% of children in the general population.

The next section discusses studies finding that, contrary to what these data might suggest, child welfare agencies can locate the great majority of nonresidential fathers, but that caseworkers tend not to include nonresidential fathers in foster care cases even when they can find them.

B. Agencies Often Can Identify and Find Nonresident Fathers But Choose Not To

A study published in 2006 found that in 40% of almost 2,000 cases examined, the caseworker knew who the child’s father was and where he could be found when the case was opened. In another 31%, his identity was known within thirty days, or his identity was known when the case was opened but his location was not. By the time a case had been in the system for at least three months but not more than thirty-six months, the caseworker knew the identity of the father 88% of the time. Nevertheless, paternity had not been established for 37% of the children.

11 KARIN E. MALM, URB. INST., GETTING NONCUSTODIAL DADS INVOLVED IN THE LIVES OF FOSTER CHILDREN 1 (2003), available at http://www.urban.org/UploadedPDF/310944_caring_for_children_3.pdf. Data collected in 1999 from the Adoption and Foster Care Analysis and Reporting System (AFCARS) found that at least half the children in the system came from female-headed households. The AFCARS data came from states that reported complete information for at least 90% of their cases. Oregon had the lowest percentage of children in mother-headed families—37%; and Maryland had the highest—88%. SONENSTEIN ET AL., supra note 9, (follow “How do the trends in non-custodial fatherhood affect families served by child welfare agencies?” hyperlink).

12 SONENSTEIN ET AL., supra note 9, (follow “How do the trends in non-custodial fatherhood affect families served by child welfare agencies?” hyperlink).

13 MALM, supra note 11, at 1.


15 Id.

16 KARIN MALM, JULIE MURRAY, AND ROB GEEN, U.S. DEP’T OF HEALTH & HUM. SERV., WHAT ABOUT THE DADS? CHILD WELFARE AGENCIES’ EFFORTS TO IDENTIFY,
The agency’s awareness of the father’s identity and location did not guarantee that he would be included in the case. Agencies reported contact with 55% of the fathers, but 20% whose identity and location were known were never contacted by the agency.\textsuperscript{18} Fathers who were identified early were much more likely to have contact with the agency than those identified later. Eighty percent of the fathers whose identity and location were known at the outset of the case were contacted by the agency, but only 13% of the fathers identified after the child had been in foster care for more than thirty days were contacted.\textsuperscript{19}

The study also found that when the agency did not know the father’s identity, it did not necessarily use all available resources to find him. In only 20% of the cases in which the father had not been found did the caseworker ask the state child support agency for help,\textsuperscript{20} even though cooperation between the agencies is encouraged and child support agencies have a very high success rate in finding missing fathers.\textsuperscript{21}

As the next part describes, the inattention to nonresidential fathers described in this section is consistent with longstanding child welfare practice.

\section{The Tradition of Ignoring Nonresidential Fathers}

In the late 1960s and early 1970s, the era in which \textit{Stanley v. Illinois} was decided, the law of many states still followed the common law tradition of not recognizing the fathers of nonmarital children as legal parents.\textsuperscript{22} Peter Stanley was such a father. He had lived intermittently with Joan Stanley for eighteen years.

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\textsuperscript{17} \textit{Id.}

\textsuperscript{18} \textit{Id.} at ix; \textit{Research Summary, supra} note 14, at 4. “Contact” included face-to-face contact, telephone calls, and written or voice mail communication. The most common reason for not contacting the father is that he could not be reached by phone (60%); 31\% of the fathers were reported to have been incarcerated at some point, but this caused difficulty in communicating in about 15\% of the cases. Other issues were unreliable transportation, homelessness, unstable housing, and being out of the country. \textit{Id.}

\textsuperscript{19} \textit{Research Summary, supra} note 14, at 3.

\textsuperscript{20} MALM ET AL., supra note 16, at ix. However, in 33\% of the cases the worker used the state parent locator service. \textit{Id.}

\textsuperscript{21} In a South Carolina study, missing parents were located in more than 75\% of the cases referred by child welfare staff to child support enforcement agencies, more than half within a month. \textit{Id.} at 4.

\textsuperscript{22} At common law, nonmarital children were \textit{nullius filius}, the children of no one. \textit{See William Blackstone, 1 Commentaries} *454–59. By the early nineteenth century, these children were recognized as the children of their mothers. \textit{Michael Grossberg, Governing the Hearth} 207–15 (1985).
years and was living with her and their three children when she died. A juvenile court found the children dependent on the basis that they had no parent to care for them, even though Peter came forward and sought custody. The Supreme Court ultimately held that Peter had a constitutionally protected interest in his relationship with his children and that Illinois’s refusal to recognize that relationship amounted to a legal determination that he was an unfit parent without a hearing, a violation of procedural due process.

After Stanley, states quickly enacted statutes to provide procedural and substantive protection to unmarried fathers in cases involving custody of their children. The Uniform Parentage Act of 1973, promulgated the year after Stanley was decided, was the foundation for a number of these statutes. It provides that once the parent-child relationship is established between a man and his child, the rights and duties attendant to that relationship are the same as for all other parents and children.

However, child welfare proceedings remained a world apart. Child welfare agencies and juvenile courts largely continued to ignore nonresidental fathers in proceedings involving allegations of child abuse, neglect and dependency, much as they always had. The practice of dealing only with custodial parents was deeply embedded in dependency practice. A

24 Id. at 646–47.
25 Id. at 658. The three Supreme Court cases concerning unmarried fathers’ rights that followed Stanley all arose in the context of adoption. 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). These cases are discussed infra at text accompanying notes 48–50. The most recent case, Michael H. v. Gerald D., 491 U.S. 110 (1989), was a private custody and visitation dispute between the mother, who had reconciled with her husband, and the biological father.
26 UNIF. PARENTAGE ACT §§ 1–2 (1973) (amended 2002), 9B U.L.A. 387, 390 (2001). The 1973 Act provided that a man was presumed to be a child’s father if 1) he was or had been married to the mother within 300 days of the child’s birth, 2) he and the mother married after the child was born and his paternity was evidenced by his having acknowledged his paternity in a writing filed with the state office of vital statistics, his being named on the birth certificate with his consent, or his obligation to support the child pursuant to a voluntary agreement or court order, 3) he received the child into his home and openly held the child out as his during the child’s minority, or 4) he filed a writing acknowledging his paternity with the office of vital statistics and the mother did not dispute his paternity after being informed of this claim. UNIF. PARENTAGE ACT §4(a) (1973), 9B U.L.A. 393–94.
A presumption of paternity could be overcome only by clear and convincing evidence. UNIF. PARENTAGE ACT §4(b) (1973), 9B U.L.A. 394. If two or more presumptions applied, “the presumption which on the facts is founded on the weightier considerations of policy and logic controls.” Id.
27 Child welfare workers’ bias against noncustodial fathers is well-documented. SONENSTEIN ET AL., supra note 9, (follow the “Are child welfare systems biased against non-custodial fathers?” hyperlink).
nonresidential father was highly unlikely to be able to mount a challenge to his omission, as a practical matter, because he was unlikely to know about the case and, if he knew about it, probably would not have access to an attorney who could help him present his claim.\textsuperscript{28}

Then, as today, courts and child welfare agencies did not consider many noncustodial fathers as possible custodians for their children because they were incarcerated, homeless, or impaired by substance abuse.\textsuperscript{29} As recently as the early 2000s, child welfare agency administrators told researchers that downsides to involving fathers included the risk of reintroducing an abuser into the home, increasing conflict between the parents, threats to female caseworkers from fathers who had engaged in domestic violence, and the increased amount of time workers had to spend on cases if fathers were involved.\textsuperscript{30} The administrators also expressed concern about increased costs of providing services and transportation and fathers creating “barriers to other permanency options.”\textsuperscript{31} In addition, caseworkers often perceived fathers as being uninterested in helping their children, an attitude that persists to this day. In one recent study of caseworker attitudes toward fathers, the workers said they believed that only half the fathers wanted to help make decisions about their children and only a quarter were interested in having their children with them.\textsuperscript{32} Only a third of the fathers who had been contacted had visited their children in foster care.\textsuperscript{33} The workers perceived that fathers often think that the state wants to contact them only to collect child support and therefore reject contact with the agency.\textsuperscript{34}

\textsuperscript{28} At this time, lawyers had just begun to appear in juvenile courts in significant numbers, and their focus was on juvenile delinquency, not dependency, cases. \textit{In re Gault}, 387 U.S. 1, 34–41 (1967), the Supreme Court case that first held that minors charged as delinquents in juvenile court have a constitutional right to counsel, was decided only five years before \textit{Stanley}. It was not until nine years after \textit{Stanley} that the Supreme Court held that parents have a limited constitutional right to counsel in termination of parental rights cases. \textit{Lassiter v. Dept. of Soc. Services}, 452 U.S. 18, 48 (1981). Thus, parents who appeared in juvenile court dependency cases were likely not to have lawyers in many states, and it was even less likely that a nonresidential father who was left out of a case would find an attorney to assert his parental claim.

\textsuperscript{29} \textit{Sonnenstein et al.}, supra note 9 (follow “Are child welfare systems biased against non-custodial fathers?” hyperlink). A newer study of almost 2,000 cases in four states found that 58% of fathers contacted by a child welfare agency were substance abusers, half were involved with the criminal justice system, 77% failed to comply with all of the offered services, and 42% had four or more of the listed problems. \textit{Malm et al.}, supra note 16, at 91–92. These are the same conditions that brought the mothers into the system in the first place. \textit{Id.} at 72, tbl.3-12.

\textsuperscript{30} \textit{Malm et al.}, supra note 16, at 25.

\textsuperscript{31} \textit{Id.} at 26.

\textsuperscript{32} \textit{Id.} at ix.

\textsuperscript{33} \textit{Id.} at ix–x.

\textsuperscript{34} \textit{Father Involvement in Child Welfare: Estrangement and Reconciliation}, \textit{Best Practice Next Practice: Family-Centered Child Welfare}, Summer 2002, at 1,
In focus groups funded by the Annie E. Casey Foundation, caseworkers admitted that it was easier to work with families made of single mothers and their children and that they were particularly unlikely to try to work with fathers when children with the same mother had different fathers.\textsuperscript{35} Even advocates of greater father involvement concede that sometimes bringing fathers into the picture can be “ill-advised.”\textsuperscript{36}

New federal and state legislation, along with professional statements of “best practices,” reject this traditional approach to nonresidential fathers. They encourage courts and agencies to find and involve nonresidential fathers for several reasons, as the next section explains.

\section*{III. The New Drive to Involve Nonresidential Fathers}

Major changes in child welfare law and practice, driven by federal legislation enacted in the 1990s, have resulted in a new emphasis on finding and involving fathers in abuse and neglect cases. The Adoption and Safe Families Act of 1997\textsuperscript{37} (AFSA) emphasizes speeding up decision-making so that children spend less time in foster care. AFSA requires that the child welfare agency file a termination of parental rights petition if a child has been in care for fifteen of the last twenty-two months unless an exception applies.\textsuperscript{38} If the agency waits to determine whether a child in foster care has a legal father and, if so, the nature of his relationship to the child, it may be unable to meet this deadline. For this reason alone, early determination of the father’s legal status is important.

Identifying a child’s legal father can also help implement two practices that promote involvement of the child’s extended family, both maternal and paternal, in the case. The first practice, kinship foster care, is strongly encouraged by the 1996 federal welfare reform legislation. The statute requires states to “consider giving preference to an adult relative over a non-related

\footnotesize{3–5, \textit{available at} http://www.hunter.cuny.edu/socwork/nrcfpp/downloads/newsletter/BPNPSummer02.pdf; \textit{see also} MALM ET AL., \textit{supra} note 16, at 6 (summarizing studies on the opinions of fathers’ perceptions of child welfare practices).}

\footnotesize{35} SONENSTEIN ET AL., \textit{supra} note 9, (follow “Are child welfare systems biased against non-custodial fathers?” hyperlink).

\footnotesize{36} ROSENBERG \& WILCOX, \textit{supra} note 4, at 33.


\footnotesize{38} 42 U.S.C. § 675(5)(E) (2006). To be precise, this section requires that state law include this provision as a condition of the state receiving federal funds for its child welfare system. The exceptions are: 1) the child is being cared for by a relative; 2) the child welfare agency has documented in the case plan a compelling reason for determining that filing would not be in the child’s best interests; and 3) reasonable efforts to reunify have been required and the state has not provided timely services necessary for the safe return of the child. \textit{Id.}
caregiver when determining a placement for a child.\textsuperscript{39} Since the 1980s, the practice of placing children in the homes of relatives has increased substantially. At least forty-eight states and the District of Columbia give a placement preference to relatives.\textsuperscript{40} In addition to the federal mandate, kinship care has become more popular because the number of non-kin foster care homes is insufficient for the demand and because of judicial decisions recognizing the rights of relatives to be foster parents and to be paid the same as non-kin foster parents.\textsuperscript{41} In addition, kinship care appears to save states money; caseworkers supervise and monitor kinship foster families less than other foster parents, and kin foster families request and receive fewer services for themselves and for the children who live with them.\textsuperscript{42} The practice is also supported by assumptions that foster care placement with relatives will be less traumatic and disruptive for children, that children will be moved among kinship foster placements fewer times, and that placements with relatives will help children maintain contact with their birth families and their communities.\textsuperscript{43}

Even if a child is not placed with a relative, child welfare practice in many states seeks family member involvement in decision-making about the child’s placement and treatment plans. Family group conferencing or family meetings, a practice first developed in New Zealand, “recognizes that families have the most information about themselves and have the ability to make well-informed decisions.”\textsuperscript{44} All family members are invited to participate and to help create a


\textsuperscript{40} U.S. DEP’T OF HEALTH & HUM. SERVICES, REPORT TO THE CONGRESS ON KINSHIP FOSTER CARE vi (2000), available at http://aspe.hhs.gov/hsp/kinr-2c00/full.pdf. In 2002, 2.3 million children lived in kinship care; of these, 400,000 were in kinship foster care; and almost 60% of the children in kinship care live with grandparents.

\textsuperscript{41} URBAN INSTITUTE, CHILDREN IN KINSHIP CARE 1, available at http://www.urban.org/UploadedPDF/900661.pdf. Black non-Hispanic children make up 43% of those in kinship care, and 17% are Hispanic. Id. About half the children are teens or preteens, including 20% who are sixteen or seventeen years old. Id.

\textsuperscript{42} Miller, 440 U.S. at 144.

\textsuperscript{43} See U.S. DEP’T OF HEALTH & HUM. SERVICES, supra note 40; Miller v. Youakim, 440 U.S. 125, 146 (1979) (recognizing the right of relative foster care providers to be paid as are non-kin foster parents).

\textsuperscript{44} NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, supra note 4, at 10–12. But see Rob Geen, The Evolution of Kinship Care Policy and Practice, 14(1) Future of Children 131 (2004) (noting that no rigorous research supports the conclusion that children fare better in the long run if they are placed with relatives).
plan for the child that is subject to agency approval.\textsuperscript{45} Identifying the child’s father and establishing his legal paternity is the first step in determining which paternal relatives should be involved in family decision-making processes and whether any of them would be good foster care providers for the child.

Despite these legal and practical reasons for seeking to identify and involve children’s fathers in dependency cases, some workers are still skeptical about whether bringing nonresidential fathers into the picture does more harm than good, as discussed above.\textsuperscript{46} Because of this, some states may try to develop policies that allow workers discretion about whether to involve fathers in individual cases. The next section discusses strategies that a state might use to implement such policies and concludes that in all but a limited number of cases the strategies will not work.

IV. CAN STATES EFFECTIVELY RESIST INVOLVING NONRESIDENTIAL FATHERS?

A state wanting to give caseworkers discretion to avoid working with alleged fathers who appear unlikely to become good custodial parents might decide to use a technique developed to protect adoptions from being disrupted by unmarried fathers, putative father registries. The first part of this section analyzes this strategy and concludes that it would not be useful in most child welfare cases. Alternatively, a state might allow workers to do what they have always done, that is, ignore the alleged fathers—hoping they do not show up—or drag their feet if the fathers do appear. The second part of this section discusses several recent cases from around the country that involve such fact patterns (though it is not clear whether the agencies were deliberately avoiding working with the men or were simply inept at resolving disputed cases). These cases illustrate the perils of this approach.

A. Putative Father Registries in Child Welfare Cases

Men whose legal paternity has been established have the same parental rights as mothers. Children cannot be adopted if these fathers’ custodial rights have not been terminated, and, as a matter of sound policy, the child’s paternal relatives should be and, depending on the state, may have rights to be considered as possible custodians if the child is removed from the parents. A state that wanted to limit its obligation to involve nonresidential fathers would, then, have to do so by denying rights to unmarried fathers whose legal paternity has not been established. The most likely mechanism for doing this

\textsuperscript{45} \textit{Id.} For more details on family group conferencing or family meetings, see Susan M. Chandler & Marilou Giovannucci, \textit{Family Group Conferences: Transforming Traditional Child Welfare Policy and Practice}, 42 Fam. Ct. Rev. 216 (2004).

\textsuperscript{46} See text accompanying notes 29–35 supra.
would be a putative father registry, a device that the Supreme Court has held may sometimes be used to cut off the parental rights of unmarried fathers whose children are being adopted.47

The U.S. Supreme Court has held that some, but not all, unmarried biological fathers whose paternity has not been established have parental rights entitled to constitutional protection.48 To enjoy this protection, the putative father must have demonstrated a commitment to the responsibilities of parenthood. However, a state may constitutionally give an unmarried father who has not seized the opportunity to assume parental responsibility less protection than mothers and married fathers receive, provided that state law gives him an adequate opportunity to form such a relationship.49 Several state high courts have elaborated on this holding, ruling that biological fathers must have the opportunity to step forward to take on parental responsibilities, and a state law that forecloses this possibility is unconstitutional as applied to them.50

Putative father registries purport to give men the opportunity to take on parental responsibilities by allowing them to file their claims of paternity with the state. Men who file are entitled to receive notice of an adoption or termination of parental rights proceeding involving the child.51 A state might try to use a putative father registry to cut off the rights of men to receive notice of dependency cases involving their children, to participate in the cases if they learned of them, and to block adoption of their children if the rights of the children’s mothers are eventually terminated. However, for several reasons, putative father registries do not work well in child welfare cases.

The first problem is that while a putative father registry can constitutionally be used to cut off the procedural and custodial rights of fathers of young children in some circumstances, it cannot constitutionally be used in all cases. In Lehr v. Robertson, the Supreme Court held that a putative father

47 When I posted a query about states’ treatment of unmarried fathers in child welfare cases on a national listserv, I got responses from several states citing me to their putative father registry statutes.


registry was constitutionally adequate to protect the procedural rights of an unmarried father who had not expressed interest in his child before he learned that her stepfather was about to adopt her.\textsuperscript{52} However, the Court indicated that in some cases a father who had not registered could still be constitutionally entitled to procedural and substantive protection for his relationship with his child. The Court said:

In this case, we are not assessing the constitutional adequacy of New York’s procedures for terminating a developed relationship. Appellant has never had any significant custodial, personal or financial relationship with [his daughter], and he did not seek to establish a legal tie until after she was two years old. We are concerned only with whether New York has adequately protected his opportunity to form such a relationship.\textsuperscript{53}

Prudence alone dictates that states should not attempt to use putative father registries to cut off the rights of biological fathers of older children. At most, states should use registries only for cases involving very young children for whom the permanent plan is prompt termination of parental rights, followed by adoption.\textsuperscript{54} Even in this kind of case, a putative father registry

\textsuperscript{52} 463 U.S. at 262-64 (1983).

\textsuperscript{53} Id. at 262–63. For this reason, the Uniform Parentage Act (UPA) as amended in 2002, provides that a putative father is entitled to notice of termination of parental rights or adoption proceedings even if he has not registered if “a father-child relationship between the man and the child has been established under the Act” or if the man has filed a paternity suit. UNIF. PARENTAGE ACT § 402(b) (2002), 9B U.L.A. 322. Further, it allows termination of the parental rights of a putative father who has not registered and is not exempt from registration only if the child is younger than one year. UNIF. PARENTAGE ACT § 404 (2002), 9B U.L.A. 323. If the child is older than a year, every alleged father must be given notice of the proceeding. UNIF. PARENTAGE ACT § 405, 9B U.L.A. 324. Under the UPA, a father-child relationship is established if the man is presumed to be the father and the presumption is not rebutted, the man and the mother have signed and filed a voluntary acknowledgment of paternity with the state vital records office, the man has been adjudged to be the father, the man has adopted the child, or the man is the father of the child under the provisions of the UPA governing assisted reproduction. UNIF. PARENTAGE ACT § 201(b) (2002), 9B U.L.A. 309.

\textsuperscript{54} Under federal law, states must enact statutes that allow termination of parental rights immediately, without efforts by the agency to reunite the family, if 1) the parent has abandoned the child; 2) the parent has been convicted of murder or manslaughter of another of his or her children; 3) the parent has been convicted of aiding or abetting, attempting, conspiring to commit, or soliciting such a murder or manslaughter; or 4) the parent has been convicted of felony assault resulting in serious bodily injury to the child or another of the parent’s children. 42 U.S.C. §5106a(b)(2)(A)(xi)–(xii), (xv) (2006); see also 42 U.S.C. § 671(a)(15)(D) (2006) (providing that states must excuse agency from providing reasonable efforts to reunify if a judge finds aggravated circumstances, including abandonment, torture, chronic abuse, sexual abuse; homicide of a child; prior involuntary termination of parental rights).
may not have the intended effect. In several recent cases, state appellate courts have held that failure to file with a putative father registry did not cut off an alleged father’s rights to prevent the adoption of his infant shortly after birth. In Adoption of N.L.B., the trial court terminated the unmarried father’s parental rights and allowed the adoption of the child without his consent because he had not filed with the putative father registry by the statutory deadline.\(^55\) The Missouri Supreme Court reversed, holding that the registry statute said that consent did not have to be obtained but did not say that consent had been given.\(^56\) It concluded that the statute did not preclude the putative father from appearing to challenge the adoption.\(^57\) His failure to file on time was only one factor to consider in assessing the challenge, the court said.\(^58\) The Florida Supreme Court has interpreted its paternity statutes as requiring that putative fathers who are known and locatable be notified of their obligation to register with the putative father registry before failure to file can result in termination of parental rights. This interpretation avoids possible due process objections to the statutory scheme.\(^59\)

Finally, putative father registries will not work to prevent late-appearing fathers from disrupting planning efforts where the child is in foster care and the state has been working with the mother to reunite her with the child. A putative father may appear at any time and establish his paternity by registering late, if that is permitted. If it is too late to register, he can file a paternity suit or, with the mother’s cooperation, sign and file a voluntary acknowledgment of paternity with the state vital records office. This voluntary acknowledgment would have the same legal effect as a judgment of paternity,\(^60\) establishing his status as the child’s legal father. The next section illustrates this disruptive effect, examining recent cases in which agencies have failed to clarify a putative father’s legal status promptly.

**B. The Consequences of Delay in Determining Legal Paternity**

Several recent cases concern a putative father who responds to the overtures from the agency but is not willing to assume responsibility for the child unless blood tests show that he is the biological father. In each case, the putative father did not take the initiative to resolve this question, and the agency decided not to work with the father and moved toward a permanent plan of adoption. At the eleventh hour, the blood tests were done, confirming

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\(^{55}\) 212 S.W.3d 123, 124–25 (Mo. 2007).

\(^{56}\) Id. at 127.

\(^{57}\) Id.

\(^{58}\) Id.

\(^{59}\) Heart of Adoptions, Inc. v. J.A., No. SC07-738, WL 2002660 (Fla. 2007).

\(^{60}\) Federal law mandates that states have voluntary acknowledgment of paternity procedures. A father’s name cannot be included on the child’s birth certificate unless a voluntary acknowledgment is on file, and the acknowledgment must have the same legal effect as a judgment of paternity. 42 USC § 666(a)(5)(C)(i) (2006).
the man’s biological paternity. In the meantime, the state had filed to terminate any rights the father had, based on his failure to take steps to prepare himself to assume custody up to that point.61 Courts and legislatures are divided in their response to this situation. Some allow the putative father’s relationship to the child to be terminated because of the delay to which he contributed. However, others view the putative father as having no responsibility to the child until he is determined to be the legal father and require that he be given the opportunity to prove his ability to be a parent after the finding of paternity.

An example of the first approach is In re S.M., a 2006 decision from the Indiana Court of Appeals.62 The state removed the newborn baby S.M. from his mother in the hospital because he was born drug affected and filed a petition in juvenile court.63 His likely father’s identity was known, but his location was not.64 By the time the child was eight months old, the putative father, who was in another state, had learned of the child’s birth and contacted the agency.65 He appeared at the initial hearing on the petition to terminate his parental rights when the child was fourteen months old, but missed other hearings.66 While the juvenile court did not order him to participate in services, the agency told him that he needed to establish paternity and complete parenting and drug and alcohol assessments.67 He told a worker that he did not want to participate in services until he was sure of his paternity.68 The agency made some unsuccessful efforts to help him have the genetic testing done.69 The father failed to appear at the hearing on the termination petition when the child was twenty months old, and the court granted the petition on the basis that there was a reasonable probability that “the conditions that resulted in the child’s removal or the reasons for placement outside the home of the parents will not be remedied.”70 The father appealed, arguing that he should not be held responsible for failing to participate in services because the agency had

61 A similar fact pattern arises in adoption cases, where traditional grounds for adoption without a parent’s consent, particularly abandonment, required proof of the parent’s “settled purpose to forgo all parental duties and relinquish all parental claims.” Meyer, supra note 51, at 771. As Professor David Meyer has observed, this definition does not apply to a father who was unaware of the child, and “until quite recently, many courts refused to find abandonment even when the father was fully capable of contact but made only the most sporadic and token expressions of parental interest.” Id. While a number of states have amended their definitions of abandonment to allow adoption when a parent has been absent for a long time, they typically require that the parent have had an opportunity to participate in the child’s life. Id. at 773–77.

63 Id. at 867.
64 Id.
65 Id.
66 Id.
67 Id.
68 Id. at 867–68.
69 Id.
70 Id.
not assisted him sufficiently.\textsuperscript{71} The court rejected the argument: “[W]e regard [the agency’s] involvement with [the father] to have adequately informed him of the steps he needed to take to make a showing before the juvenile court that his parental rights to S.M. should not be terminated.”\textsuperscript{72} A 2005 Utah case, State ex rel. S.H., reaches a similar conclusion,\textsuperscript{73} and a North Carolina statute appears to call for the same result.\textsuperscript{74}

In contrast, in 2006 the Oregon Supreme Court held in State ex rel. DHS v. Rardin that a father was not responsible for failing to form a relationship with his child before he knew for certain that he was the biological father.\textsuperscript{75} The man was living with the mother when the child was born in 1995, and his name was on the birth certificate.\textsuperscript{76} When the child was eighteen months old, the mother told the man he might not be the father, and he moved out and had no further contact with the child.\textsuperscript{77} When the child was four years old, the state removed him from the mother’s custody and contacted the putative father, but he insisted on having a paternity test before becoming involved.\textsuperscript{78} He could not pay for the test, and the agency would not pay for it either.\textsuperscript{79} The state and the putative father remained in intermittent contact, and eventually the state filed to terminate his rights.\textsuperscript{80} He then had a paternity test done, which confirmed his relationship to the child.\textsuperscript{81} The case came to trial two years later, and the court granted the termination petition.\textsuperscript{82} It found that the father could not present a viable plan for the child to live with him because he had delayed developing a relationship with the child, who was then seven years old.\textsuperscript{83} The Oregon Supreme Court ultimately reversed, saying,

We do not agree that the facts described above prove by clear and convincing evidence that father was unfit. First, although father became aware at some point in 1999 that child had temporarily been removed from mother’s custody, father’s awareness of the details of child’s circumstances is unclear. It is undisputed that father was living in another state at the time,

\textsuperscript{71} Id. at 869.  
\textsuperscript{72} Id.  
\textsuperscript{73} 119 P.3d 309 (Utah Ct. App. 2005).  
\textsuperscript{74} N.C. Gen. Stat. § 7B-506(h)(1) (2006) says that the rights of a putative father who has not acknowledged paternity and whose paternity has not been adjudicated may be terminated on the basis of failure to provide substantial financial support or consistent care for the child. This ground is not available for fathers whose paternity has been acknowledged or adjudged. See id. § 7B-1111(a)(5) (2006).  
\textsuperscript{75} 134 P.3d 940 (Or. 2006).  
\textsuperscript{76} Id. at 941.  
\textsuperscript{77} Id. at 942.  
\textsuperscript{78} Id.  
\textsuperscript{79} Id.  
\textsuperscript{80} Id. at 942–43.  
\textsuperscript{81} Id. at 942.  
\textsuperscript{82} Id.  
\textsuperscript{83} Id. at 943.
and that, during some of the time when child was not in mother’s custody, child was with maternal grandparents or stepfather. Child undoubtedly would have been better off if father had been involved in her life at that period, but, given father’s uncertain knowledge of the circumstances of child’s living situation, that evidence does not show that his conduct, as opposed to mother’s, was “seriously detrimental” to child. Second, as described above, during that time father reasonably believed that he might not be child’s biological father and wanted to confirm his paternity before exercising his parental rights. Third, for the two years between father’s DNA test and the entry of the judgment terminating his rights, father was unable to establish any relationship with child because DHS would not permit it.84

Cases from Connecticut85 and Nebraska86 approach this issue similarly. The fundamental issue in this kind of case is whether to expect that a putative father will attempt to “seize the opportunity” to develop a relationship with a child while his paternity is still uncertain. If so, as a practical matter, the putative father must take the initiative to have paternity testing done since the agency is unlikely to allow him to be involved unless he is proven to be the biological father.87 If he asks, the state child support enforcement agency will provide him with paternity establishment services, though he may not know this.88 While it is probably constitutional to impose this burden on putative fathers,89 any agency actions that impede a putative father’s efforts to establish his legal fatherhood should prevent involuntary termination of his rights. Thus, even in states that, like Indiana, attribute delay in establishing paternity to the

84 Id. at 946. After filing the termination petition, the agency did not allow the father to have contact with the child, even though the case did not come to trial for two years. Id. But see In re Chezron M., 698 N.W.2d 95, 100 (upholding an order terminating the parental rights of a father on the basis of abandonment on facts similar to those in Rardin).
87 However, some statutes allow such a putative father to participate in the juvenile court proceeding. E.g., Ark. Code Ann. § 9-27-311 (Supp. 1999) (any man who is not legally identified as a child’s biological parent, but who is alleged to be or claims to be the child’s biological father, must be allowed to participate in juvenile court proceedings).
88 See 42 U.S.C. § 654(4)(A)(ii) (2006) (requiring that a state plan must provide that the state will offer paternity establishment services for any child if an individual applies for services with respect to the child); 45 C.F.R. § 302.33(a)(1)(i) (2006) (providing that the state plan must provide that the services established under the plan shall be made available to any individual who files an application for the services with the IV-D agency); see also 42 U.S.C. § 654(29)(C) (2006) (providing that a state must require individual and child to submit to genetic tests pursuant to judicial or administrative order).
89 See text accompanying notes 62–86 supra.
father, the strategy of stonewalling a putative father to allow a child to be adopted by another is risky. The disappointed man will surely appeal termination of his rights, and the appellate court’s determination of whether the agency acted appropriately will necessarily be very fact-intensive with an unpredictable outcome.

As this section has shown, states should not attempt to resist the new approach to foster children’s nonresidential fathers. They should determine legal paternity promptly, rather than trying to ignore fathers who are not likely to become actively involved in their children’s lives. Statutes and rules should require agencies to make best efforts to find missing fathers and to take the initiative to resolve their legal status promptly. Except when immediate adoption of a young child is the plan, putative father registries should not be relied upon to cut off men’s parental rights, and even there only with caution. Instead, juvenile court statutes should require that notice of proceedings be given to any man who claims to be, or is alleged to be, the child’s father, and that diligent efforts to find such men be made. Statutes should also authorize the juvenile court to resolve paternity disputes, including ordering genetic testing, using the same standards that are used to resolve paternity issues generally.\(^\text{90}\)

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\(^{90}\) For example, see Or. Rev. Stat. § 419A.004(16) which defines “Parent” as: “the biological or adoptive mother, [and] the legal [or adoptive] father of the child, ward, youth or youth offender, or a putative father of the child, ward, youth or youth offender”; and who satisfies the criteria set out in ORS 419B.875(1)(c) until a court of competent jurisdiction confirms his paternity or finds that he is not the legal father. Moreover, section 419A.004 further defines a “legal father” as a “man who has adopted the child, ward, youth or youth offender, or whose paternity has been established or declared under ORS 109.070, ORS 416.400 to 416.470 or by a juvenile court.” Id. The commentary to this section, drafted by a work group of the Oregon Law Commission, explained that the prior version of this statute paraphrased Or. Rev. Stat. § 109.070 but the definitions are not identical, creating the possibility that a putative father might be recognized as a legal father under ORS 109.070 but not under the juvenile code, for no reason. This section amends the definition of “parent” to mean all mothers and all legally recognized fathers. In turn, legally recognized fathers are adoptive fathers and biological fathers whose paternity has been established under ORS 109.070, which applies generally, or under ORS 416.400 to 416.470, which creates an administrative procedure for establishing paternity in child support cases.


Where more than one man has a claim to be recognized as a child’s legal father, state statutes used in other settings, such as those involving private custody and child support disputes, should be used. One of the most interesting examples of this approach is California, where the law regarding the circumstances in which a presumption of parentage may be rebutted was first developed in juvenile court dependency cases and
then extended to private disputes. A California statute provides that a man is presumed to be the father of a child if he takes the child into his home and holds out the child as his. CAL. FAM. CODE § 7611(d). This provision was derived from the 1973 UPA, which is discussed above. See supra note 26. The leading cases on the application of this provision in child welfare cases are In re Jesusa V., 85 P.3d 2 (Cal. 2004), and In re Nicholas H., 46 P.3d 932 (Cal. 2002). These cases establish that this presumption is not necessarily rebutted by proof that the man is the not the child’s biological father and that the juvenile court has discretion to determine whether it is appropriate in a particular case to find that the presumption has been rebutted. The California Supreme Court later extended these cases to disputes about the legal parentage of children born to lesbian co-parents, invoking a statute that says that in determining legal maternity, “[j]s far as practicable, the provisions of this part applicable to the father and child relationship apply.” Elisa B. v. Superior Court, 117 P.3d 660, 665 (Cal. 2005); K.M. v. E.G., 117 P.3d 673, 678 (2005); Kristine H. v. Lisa R., 117 P.3d 690 (2005) (construing CAL. FAM. CODE § 7611).


To protect cases against disruption by late-appearing putative fathers, the statutes should require judges to make findings on the record about the efforts that were made to identify the child’s father and whether the efforts were sufficient to protect the putative father’s constitutionally protected right to an opportunity to develop a relationship with the child.

As a policy matter, state child welfare agencies should assume the responsibility to initiate paternity determinations when a putative father appears, rather than requiring him to initiate an action. Even if child welfare agencies do not have funds to pay for paternity testing, statues or administrative rules should explicitly authorize them to request paternity establishment services from the child support agency for children in foster care.\footnote{42 U.S.C. \textsection 654(4)(A)(i) (2006).} Child welfare agency personnel are more likely to understand how to work with the child support agency than are putative fathers, and prompt resolution of this issue is essential to satisfactory resolution of cases.

Finally, state policy should permit the child welfare agency to work with a legal father who is unlikely to be able to parent his child to relinquish his parental rights voluntarily if necessary to assure permanency for the child in another setting.

When a child’s legal father is identified and becomes involved in the child welfare case, the next issues that may arise concern what rights he has to custody of the child and to reunification services if he does not receive custody. The next part focuses on these questions.

V. THE CUSTODIAL RIGHTS OF LEGAL, NONRESIDENTIAL FATHERS

When a nonresidential parent learns that the state has removed a child from the residential parent’s home on the basis of abuse or neglect, he may come forward and claim custody as a matter of right. A recent study of child welfare practices found that among the four states examined, beliefs about how to handle this kind of case varied significantly.\footnote{MALM ET AL., \textit{supra} note 16.} In Massachusetts, the child welfare administrators who participated in the study commonly said that foster placement was not an issue in this kind of case because the child has a parent willing to assume custody. However, they said that before a child is released to a father, his home is studied to determine if he presents a risk to the child.\footnote{Id. at 39.} In other states, juvenile courts do take jurisdiction over the children as dependent. Fathers in Minnesota are given preference for placement, but the standards and assessment procedures are the same as for other kin.\footnote{Id. at 40.} Statutes and case law

\begin{footnotesize}
\begin{enumerate}
\item \footnotesize{Paternity Disestablishment in 2006 (2006), \textit{available at} http://www.clasp.org/publications/pat_disest_2006.pdf.}
\item \footnotesize{42 U.S.C. \textsection 654(4)(A)(i) (2006).}
\item \footnotesize{MALM ET AL., \textit{supra} note 16.}
\item \footnotesize{Id. at 39.}
\item \footnotesize{Id. at 40.}
\end{enumerate}
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from other states reveal an even greater range in how juvenile courts approach this issue. This section describes and critiques the major approaches.

A. Child Is Not within the Court’s Jurisdiction if a Parent Is Available

Courts in at least two states have held that if the child has a parent who is ready and willing to care for the child, the court simply cannot find the child to be within the court’s jurisdiction, rejecting arguments that this approach may endanger the child because the child then has no legal custodian and may wind up in the physical custody of a parent who also mistreats the child.

In In re M.L., the Pennsylvania Supreme Court held that a juvenile court erred in finding a child dependent when the father, who had never been married to the mother but who had shared custody from the time of birth, appeared and demanded custody. The case had begun as a custody dispute between the parents, with the mother initially filing claims of abuse against the father with the child welfare agency. The agency found those claims to be unfounded but concluded that the mother’s obsessive behavior endangered the child’s emotional and mental health. The juvenile court asserted jurisdiction, found the child dependent, and placed the child with the father. The mother appealed, and the supreme court reversed, interpreting the statute defining “dependent child”—one who “is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental or emotional health, or morals”—as requiring proof that neither parent was able to provide care. The dissent argued that the “fundamental flaw in the majority’s approach is that it authorizes an automatic transfer of custody to the non-custodial parent without requiring a finding of dependency. In so doing, the majority ignores the purpose of a dependency finding,” which, it said, is to determine “whether the agency can establish that the child is dependent under the existing custody arrangement, and if such a finding is made, ... which disposition is ‘best suited to the protection and physical, mental, and moral welfare of the child.’” The majority rejected this claim, saying that judges have broad powers to fashion remedies in custody actions.

96 Id. at 850.
97 Id.
98 Id.
99 Id.
100 Id. at 855.
101 Id.
102 Id. at 851 & n.3.
The Maryland Court of Appeals similarly held in *In re Russell G.*, that a child falls within the statutory definition of a “child in need of assistance” only if both parents are unable or unwilling to care for the child properly. In this case, the agency had filed a petition against both parents, alleging that the father was unable to care for the child because he had failed to intervene to protect him from his mother’s neglect and because he lacked legal custody, and the juvenile court sustained the petition. The court reversed, holding that the evidence was insufficient to prove that the father knew that the mother was not caring for the child properly. The court also said,

[W]e perceive no legal, logical, or factual support for the proposition that lack of legal custody prevented the father from caring for the child. It may perhaps be arguable that, at least theoretically, lack of physical custody may render a parent unable to give a child care and attention (except during visits), but we need not address that abstract proposition here. By the time of the adjudicatory hearing, Russell G. was and had been in the care and physical custody of his father, by virtue of the court’s emergency shelter care order, and was then apparently receiving proper care and attention from Frank G.

After *In re Russell G.* was decided, the Maryland legislature enacted a statute that codifies this result and gives the juvenile court limited authority to enter a custody order:

[i]f the allegations in the petition are sustained against only one parent of a child, and there is another parent available who is able and willing to care for the child, the court may not find that the child is a child in need of assistance, but, before dismissing the case, the court may award custody to the other parent.

**B. Nonresidential Parent Has No Right to Custody**

At the other extreme from *M.L.* and *Russell G.*, Michigan and Ohio courts and statutes in North Carolina and Maine allow the juvenile court to take jurisdiction over a child based on evidence of the custodial parent’s abuse or

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103 The statute defined a “child in need of assistance” as one whose “parents, guardian or custodian are unable or unwilling to give proper care and attention to the child . . .” Md. Code Ann., Cts. & Jud. Proc. § 3-801(f)(2) (West 2006).
105 Id. at 111.
106 Id. at 116.
107 Id. at 116.
108 Md. Code Ann., Cts. & Jud. Proc. § 3-819(e) (West 2006). Before a court may enter a custody order in favor of the nonresidential parent under this statute, it must find that the allegations against the custodial parent have been proven. *In re Sophie S.*, 891 A.2d 1125, 1133 (Md. Ct. Spec. App. 2006).
neglect alone and give no special placement preference to the child’s other parent.

In Maine, the juvenile court can take jurisdiction upon a finding that the child is not safe with the custodian even if the noncustodial parent appears, and the court may, but is not required to, grant custody to the noncustodial parent. North Carolina has no statute dealing particularly with nonresidential fathers but instead treats them as “relatives.” The relative placement statute provides that the court must inquire as to whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order temporary placement of the juvenile with the relative unless the court finds that placement with the relative would be contrary to the best interests of the juvenile.

The Ohio Supreme Court decreed a similar approach to the claims of nonresidential fathers in a 2006 case, In re C.R. The court held that when a juvenile court finds that a child is abused, neglected or dependent in the mother’s home, it may award custody of the child to a nonparent without making any finding about the suitability of placing the child with the noncustodial father. The Michigan Court of Appeals reached the same result in a 2002 case with the same name, In re C.R. The court interpreted the state’s statutes as allowing the juvenile court to take jurisdiction over a child upon a finding that only one parent had abused or neglected the child, and to enter orders to either or both parents. If a parent does not comply with these orders, the court may later enter an order terminating his parental rights, based on evidence that would be admissible and sufficient to establish jurisdiction in the first place. Unpublished court of appeals opinions confirm this interpretation of the juvenile court’s authority.

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110 Id. § 4036.
111 N.C. GEN. STAT. ANN. § 7B-506(h)(2).
112 843 N.E.2d 1188, 1190 (Ohio 2006).
113 Id.
115 Id.
116 Id. at 514–15.
C. Court Has Jurisdiction over Child, But Parent Is Preferred Placement

Several courts and legislatures take a middle position between the two extremes described above. They allow courts to assert jurisdiction over a child upon proof of the custodial parent’s abuse or neglect, but require placement with the nonresidential parent unless the state proves that he or she cannot provide proper care. Some of the states have begun to address the complex question of how this placement preference affects the rights of the former custodial parent to reunification efforts and to reclaim custody. The results have been mixed.

In 2003, the Kansas Supreme Court interpreted its juvenile code as allowing a court to assert jurisdiction based on evidence against only one parent, with a preference for placing the child in the legal custody of the other parent, and closing the case.\footnote{In re T.S., 74 P.3d 1009, 1018 (Kan. 2003).} However, the court can enter an alternate disposition if in the best interests of the child.\footnote{Id.} In 2000, the New Hampshire Supreme Court held that after the juvenile court finds a child abused or neglected because of the custodial parent’s conduct, the noncustodial parent is entitled as a matter of due process to a hearing regarding his or her suitability to claim custody.\footnote{In re Bill F., 761 A.2d 470, 475–76 (N.H. 2000).} The court said,

\[W\]e hold that parents who have not been charged with abuse or neglect be afforded, upon request, a full hearing in the district court regarding their ability to obtain custody. At that hearing, a parent must be provided the opportunity to present evidence pertaining to his or her ability to provide care for the child and shall be awarded custody unless the State demonstrates, by a preponderance of the evidence, that he or she has abused or neglected the child or is otherwise unfit to perform his or her parental duties. The district court shall make findings of fact supporting its decision.\footnote{Id.}

This holding has since been codified by the New Hampshire legislature.\footnote{N.H. REV. STAT. ANN. § 169-C:19-e (2006); see Paula Werme, Denying Rights of Fit Parents (Mar. 2005), http://werme.8m.net/nhdcyt/fit_parents.html (discussing the implementation of the New Hampshire statute).} California and Florida statutes essentially codify the New Hampshire rule, allowing jurisdiction based on the custodial parent’s conduct but requiring that the child be placed with the nonresidential parent unless the court finds that this placement would endanger the child.\footnote{CAL. WELF. & INST. CODE § 361.2(b) (West 2006); FLA. STAT. ANN. § 39.521(3) (West 2006).} In California, the court has...
discretion to give the nonresidential parent legal custody and close the case, to place the child with the nonresidential parent subject to juvenile court supervision and then review the case three months later after the agency conducts a home visit, or to place the child with the parent subject to juvenile court supervision. The court must make findings on the record or in writing to support the order. The Florida statute also gives the judge discretion to give legal custody to the former nonresidential parent and close the case or to place the child with that parent subject to court supervision.

At least four courts have confronted claims that placement with the nonresidential parent may interfere with efforts to reunite the child with the former custodial parent. The Nebraska Court of Appeals’ 2006 decision in In re Ethan M. is the most sympathetic to the former custodial parent. The trial judge erroneously excused the agency from making reasonable efforts to reunite the child with his father, from whose custody he was removed. After reversing this order, the appellate court also reversed the trial court’s decision to place the child with his mother in California, saying that placement with her posed “a substantial and unnecessary hindrance to efforts of reunification of [the son] with [the father].” The court said,

[a]dditionally, [father] was awarded physical custody of [son] at the time of [mother] and [father’s] California divorce—although the record before us is unclear as to whether this result derived from the parties’ agreement or from a court decision after a custody contest. Nevertheless, the record before us contains substantial information about [mother] which reveals that she has mental illnesses of consequence, as well as a history of periodically leaving the marital home for significant timeframes, leaving [father] to care for [son]. We recognize that [mother] attributes such behavior to [father’s] abuse of her and [son], which assertion [father] denies. Nonetheless, the fact is that by virtue of the California divorce decree, [father] is [son’s] custodial parent.

The other three decisions dealing with the conflict between the claims of the former custodial parent to reunification efforts and of the nonresidential parent to immediate custody are more neutral, giving the trial judge substantial discretion. In In re T.S., the Kansas case discussed above, the trial judge had


124 CAL. WELF. & INST. CODE § 361.2(b).
125 Id. § 361.2(c).
126 FLA. STAT. ANN. § 39.521(3)(b).
128 Id. at 368–69.
129 Id. at 371.
130 Id.
interpreted the disposition statute as requiring placement with the father and closing the case, even though he believed that it would be better to enter an order that would require the state to attempt to reunify the child with the mother. The mother appealed, and the Kansas Supreme Court held that the court does not have to find that reunification with the former custodial parent is not a viable alternative before placing the child with the nonresidential parent. However, the court said that placement with the nonresidential parent was subject to the court’s judgment about the child’s best interests, which leaves room for the judge to decide to order reunification efforts.

Courts in Florida and California, interpreting the statutes described above, have explicitly concluded that the juvenile court judge has discretion regarding placement and reunification, based on the best interests of the child. The Florida statute says that if the judge does not close the case after giving custody to the nonresidential parent, the court retains jurisdiction and may order that reunification services be provided to the parent from whom the child has been removed, that services be provided solely to the parent who is assuming physical custody in order to allow that parent to retain later custody without court jurisdiction, or that services be provided to both parents, in which case the court shall determine at every review hearing which parent, if either, shall have custody of the child. The standard for changing custody of the child from one parent to another or to a relative or another adult approved by the court shall be the best interest of the child.

*R. W. v. Dep’t of Children & Families* rejected a former custodial mother’s argument that under this statute she was entitled to custody because she had completed all the requirements in the case plan. The court confirmed that the trial judge makes the custody order on the basis of the child’s best interests.

The California statute also deals explicitly with this issue. As in Florida, if the judge places the child with the nonresidential parent subject to court supervision, it may order that reunification services be provided to the parent or guardian from whom the child is being removed, or the court may order that services be provided solely to the parent who is assuming physical custody in order to allow that parent to retain later custody without court supervision, or that services be provided to both parents, in which case the court shall determine, at review hearings held pursuant to Section 366, which parent, if either, shall have custody of the child.

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132 *Id.* at 1018.
133 *Id.*
136 *Id.*
137 CAL. WELF. & INST. CODE § 361.2(b)(3).
An intermediate court of appeals confirmed that this provision gives the juvenile court discretion about whether to order reunification services for the custodial parent if it finds the child within the court’s jurisdiction because of the conduct of the custodial parent and places the child with the noncustodial parent.138

The solution to the problem of how to handle the nonresidential parent’s claim to custody must protect the child’s right to safety and to maintenance of relationships with his or her parents, particularly the parent who was raising him or her before the juvenile court action was filed, while acknowledging the interests of both parents in their relationship to the child. The intermediate position, described in this part, best accomplishes these goals.

The nonresidential parent might argue that he is entitled to custody automatically, without anything but the most nominal judicial involvement, just as he would be entitled to custody if the custodial parent died. The critical point, here, though is that the former custodial parent is not dead, and she and the child continue to have claims to a relationship with each other and statutory rights to state assistance to protect that relationship.

The nonresidential parent might also argue that if this were a private custody suit and he moved for a modification, based on proof that the mother had abused or neglected the child, he would be entitled to custody and the mother would not receive state services. This argument proves too much, however. The father would not be entitled to custody simply by alleging that the mother was unfit; he would have to prove this at trial. Further, the mother would be able to present evidence, not only about her own competence to parent, but also about any of the father’s problems that would make him an unsuitable custodian. Further, the child’s interest in safety strongly militates against a rule that would require the juvenile court to allow the father to take the child without any inquiry into his fitness.

The more difficult question that the private custody analogy raises is how a case should be handled if the mother cannot presently provide the child a safe home and the father can. In a private custody dispute, the father would receive custody. Though this is a closer case, the result should not necessarily be the same in a child welfare case, which should instead be resolved by an individualized determination of the child’s best interests. Because continuity of relationships is so important to children, there should be a presumption in favor of attempting reunification, which can be overcome by showing that this is contrary to the child’s best interests. For example, a court might find that the child’s interests would be served by immediate placement with a father who had been involved in the child’s life and who the child knew as a parent, but not with a father who was, from the child’s perspective, a stranger. If the court concludes that reunification with the mother is likely and is the best permanent outcome for the child, it should place the child with the father only if he will

cooperate with efforts to achieve this goal. On the other hand, if the court orders immediate placement with the father, forgoing efforts to reunify the mother and child, it should protect the relationship between the mother and child by ordering visitation for the mother unless it finds that this would harm the child, just as a court in a private custody dispute would do.

VI. CONCLUSION

Bringing nonresidential fathers into the child welfare system is supposed to improve the lot of foster children by increasing the chances that they will not linger in foster care and that their relationships to their families will not be unnecessarily damaged. This Article has shown that if reforms intended to achieve these goals are not fully and intelligently implemented, problems of delay and family destruction may be created or exacerbated. Ordinarily, agencies should attempt to identify children’s legal fathers very early in the case. Laws and administrative rules must require notice to putative fathers, and courts must supervise efforts to identify and locate fathers. Courts or administrative agencies must have authority to require mothers and putative fathers to submit to paternity testing and to resolve paternity disputes. Agencies should front, if not pay, the costs of genetic testing.

When nonresidential fathers do appear in dependency cases, courts must confront the potentially clashing custodial rights of these fathers and the former custodial mothers. Courts must avoid the temptation to close cases quickly and cheaply by automatically placing a child with the father without investigating whether the child will be safe and considering whether efforts should be made to reunite the child with the mother. A critical part of the solution to these problems is well-drafted statutes and rules that require judges to ensure children’s safety and give them discretion to make dispositional orders that will serve the child’s best interests.