Prepared by the North Dakota Legislative Council staff for the Judicial Process Committee
September 2007

ESTABLISHING A PATERNITY REGISTRY - BACKGROUND MEMORANDUM

Senate Concurrent Resolution No. 4028 (copy attached as an appendix) directs a study of the feasibility and desirability of establishing a paternity registry. Testimony in support of the resolution indicated that a paternity registry can help protect a child's right to a secure and stable adoption by requiring a biological father to assert his rights or allow his rights to be terminated in a timely manner.

ADOPTION LAW

Generally, adoption is a creature of state law, and although all 50 states in the Union have different ways of dealing with the issue of adoption, the overall adoption scheme is similar in most states. According to the National Adoption Information Clearinghouse, some of the similarities between states' adoption laws include:

- All states allow the adoption of a child;
- All states allow the adoption of a foreign-born child;
- A single adult or a husband and wife together can adopt;
- A child may be placed with prospective adoptive parents by the public agency responsible for adoptions or by a private agency;
- A person may not be paid for placing a child for adoption; however, reasonable fees may be charged;
- All adoption hearings take place in state courts;
- All adoptions are based upon the consent of persons or agencies legally empowered with the care or custody of the child;
- An investigation and home study to determine the appropriateness of particular adopting parents are required before an adoption can occur;
- All adoption proceedings are confidential and held in a court that is closed to the public or in the judge's chambers and all documents pertaining to the adoption are sealed and kept a permanent record of the court in a locked file; and
- The adoptive parents or adult adoptee can receive limited information that does not identify the biological parents.

Areas that differ from state to state include:

- Who is required to consent to an adoption; for example, the mother, father, agency, and adoptee;
- When and how consent may be executed and revoked;
- Who may adopt, who may be adopted, and who may place a child for adoption;
- Whether the state has a putative father registry, information contained in the registry, revocation of information contained in the registry, notice requirements of registered putative fathers, and who has access to the registry;
- Whether and how the state regulates fees and expenses, such as birth parent expenses, agency fees and costs, intermediary fees, payments for relinquishing a child, and state agency fees; and
- The specifics of how and to what extent the state recognizes a foreign adoption.

Although the National Conference of Commissioners on Uniform State Laws drafted uniform adoption Acts in 1953, 1969, and 1994, the states have been hesitant to adopt these Acts. North Dakota, along with Alaska, Arkansas, and Ohio, has enacted the National Conference of Commissioners on Uniform State Laws' 1996 Revised Uniform Adoption Act. Since it was enacted in 1971 as North Dakota Century Code (NDCC) Chapter 14-15, North Dakota's version of the Act has been amended several times, resulting in nonuniform provisions. Vermont appears to be the only state that has adopted the 1994 version of the Uniform Adoption Act.

In addition to North Dakota's version of the Revised Uniform Adoption Act, state law addresses adoption in NDCC Chapter 50-12 regarding licensure by the Department of Human Services of child-placing agencies; Chapter 50-28 regarding the Department of Human Services' adoption assistance program for special needs children; Chapter 14-13, enacted in 1963, regarding Interstate Child Placement Compacts; Chapter 14-15.1, enacted in 1987, regarding the relinquishment of a child to adoptive parents; and Chapter 14-20, enacted in 2005, the Revised Uniform Parentage Act. The Revised Uniform Parentage Act, a 2002 revision of the Uniform Parentage Act, also has been enacted by Delaware, Oklahoma, Texas, Utah, Washington, and Wyoming.

North Dakota law does not provide for a paternity registry; however, NDCC Chapter 14-20, the Revised Uniform Parentage Act, establishes a procedure for a man to sign an acknowledgment of paternity or a denial of paternity. Section 14-20-17 establishes a procedure for the rescission of an acknowledgment or denial of paternity. With respect to the consent required for adoption, Section 14-15-05 provides that the consent of the father of the minor is required if the person is presumed to be the biological father of the minor as provided for under Section 14-20-10.

PATERNITY REGISTRY LAWS

When a mother wishes to place a child up for adoption, the nature and extent of the father's legal rights in relation to the child vary from state to state. At common law, no legal relationship existed between the father and the child if the biological parents were not married. Gradually, both society and the law

began to recognize the relationship between a father and his out-of-wedlock child. The question of whether a putative or presumed father has a legal interest in his child is of great practical importance for adoption. State laws require that everyone with a legal relationship to the child have his or her rights terminated before an adoption can proceed. Thus, courts must determine whether, under the relevant state statute, an unwed father has a legal interest in his child. If so, the court must afford the biological father the statutorily prescribed degree of due process protection before his legal relationship to the child may be terminated. The state's interest in placing children with adoptive parents quickly requires that the nature of the father's rights be determined promptly. States differ dramatically in the requirements they impose on an unwed father who wishes to preserve the father's legal interest in the child.

Many states have addressed this issue by creating "paternity" or "putative father" registries. Most paternity registry statutes provide that when a father registers with the appropriate state agency, the father will be notified of any petition to adopt the child. The general premise of a paternity registry is that by filing a form with the appropriate state agency, a putative father's parental rights will not be terminated without his knowledge.

As of 2005, 23 states (Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Tennessee, Texas, and Wyoming) have statutes authorizing the establishment of paternity registries. These statutes usually provide that the failure to register or file may preclude the right to notice of termination or adoption proceedings. States differ in the information they maintain in their registries, but the information may include the name, address, Social Security number, and date of birth of the putative father and birth mother; the name and address of any person adjudicated by a court to be the father; the child's name and date of birth or expected month and year of birth; and a registration date. A number of states make provisions in their statutes which allow putative fathers to revoke or rescind a notice of intent to claim paternity. Of these states, 12 allow revocation at any time, while revocation is effective only after the child's birth in Arkansas and Iowa. Florida only allows revocation at any time before the child's birth. Other states limit the right of rescission to 60 days after the paternity claim is submitted or before a court proceeding to establish paternity, whichever occurs first.

Access to information maintained in registries also varies from state to state. Many jurisdictions permit certain persons access to registry records. In general, those persons with a direct interest in the case, such as birth mothers, courts, attorneys, licensed adoption agencies, prospective adoptive parents, state social service departments, state child support offices, and registries of other states, are entitled to access the information contained in the registries.

Paternity Registry Laws of Neighboring States

Minnesota

The Minnesota paternity registry law is contained in Minnesota Statutes Chapter 259. Section 259.49(1)(b) provides that:

- The putative father may register any time before the birth of the child but must register no later than 30 days after the child's birth; and
- A putative father who has registered must file his intent to initiate a paternity action within 30 days after receiving notice from the adoption registry in order to preserve his rights to the child.

Minnesota Statutes Section 259.52(1)(b) provides that the information contained in the Minnesota paternity registry includes:

- The name, any known alias, address, Social Security number, and date of birth of the putative father and the birth mother;
- If applicable, a certified copy of a court order from another state adjudicating the putative father to be the father;
- The child's name, gender, place of birth, and date or anticipated date of birth, if known;
- The registration date; and
- Other information deemed necessary.

Minnesota Statutes Section 259.52(3) provides that the information contained in the registry may be released to:

- A person who is required to search the registry before an adoptive placement;
- The mother of the child;
- A public authority responsible for child support enforcement; and
- An attorney representing the birth mother or adoptive parents.

Montana

The Montana paternity registry law is contained in Montana Code Sections 42-2-205 and 42-2-206. The Montana law provides that a putative father:

- May file prior to the child's birth but no later than 72 hours after the child's birth;
- May file even if he has no actual knowledge that a pregnancy has occurred; and
- May complete the department form or submit a signed and notarized statement with the required information.

According to Montana law, the information contained in the registry or the claim must include:

- The name, address, Social Security number, and date of birth of the putative father and the birth mother;
- The putative father's tribal affiliation, if applicable;

- The child's name and place of birth, if known, or approximate date and location of possible conception;
- The expected delivery date;
- The date of registration;
- The name and affiliation of person requesting registry information; and
- Any other information deemed necessary.

Montana Code Section 42-2-223 provides that unless a support order is issued, the putative father may revoke registration at any time by submitting a signed, notarized statement. According to Section 42-2-217(1), access to the information maintained in the registry may be made available to:

- A department representative;
- An adoption agency;
- The prospective adoptive parents or their attorney; and
- Any woman who is the subject of a registration.

South Dakota

South Dakota does not have a paternity registry law. South Dakota Codified Laws Chapter 25-6 provides that within 60 days of the child's birth, the putative father must acknowledge paternity through one or more of these actions:

- Publicly acknowledging the child as his own and receiving the child into his family;
- Placing his name on the child's birth certificate; or
- Commencing a judicial proceeding claiming a parental right.

Iowa

Iowa's paternity registry law is contained in Iowa Code Section 144.12A. Under this law, the putative father may file before the child's birth but no later than the date of the filing of the petition for termination of rights. Section 144.12A(3) provides that the information contained in the registry or claim must include:

- The name, address, Social Security number, and any other identifying information requested of the putative father and birth mother; and
- The name, date of birth, and location of birth of the child, if known.

Iowa Code Section 144.12A(5) provides, regarding the revocation of a claim to paternity, that:

- Information provided to the registry may be revoked by submission of a written statement, signed and acknowledged by the putative father and notarized, stating that to the best of his knowledge he is not the father;
- Revocation nullifies the claim to paternity and any information is expunged from the registry; and
- Revocation is effective only after the child's birth.

According to Iowa Code Section 144.12A(4), access to the information maintained in the registry may be made available to:

- The birth mother;
- The court;
- The Department of Human Services;
- The attorney of any party to an adoption or termination proceeding;
- The Child Support Recovery Unit; or
- Any other person, upon order of the court, for good cause shown.

United States Supreme Court Cases Regarding the Father's Interest in a Child

In a series of cases, the United States Supreme Court has addressed the issues relating to the parental right of unwed fathers. An overview of this case law appears to indicate the Court's desire to allow states to decide the manner and the extent to which the state addresses paternity rights.

Stanley v. Illinois

In *Stanley v. Illinois*, 405 U.S. 645 (1972), an unwed father challenged a law that permitted the state of Illinois to take his children away from him without any showing that he was an unfit parent. Stanley was the biological father of three children and had lived with him and their mother for 18 years when the mother died. Upon her death, the state of Illinois removed the children from their home. The Supreme Court, while recognizing that the state has a valid interest in protecting children, held the perfunctory removal of the children to be constitutionally impermissible. The majority wrote that Stanley's interest in retaining custody of his children is "cognizable and substantial", therefore, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him.

Quilloin v. Walcott

In *Quilloin v. Walcott*, 434 U.S. 246 (1978), the natural father challenged the stepfather's adoption of the child. Although the state did not find Quilloin to be an unfit parent, the trial court granted the adoption over his objection. In his appeal, Quilloin argued that the law that denied him the authority to veto the adoption but granted it to married and divorced fathers, violated equal protection principles. The Supreme Court held that the equal protection clause does not require states to treat unwed fathers the same as married or divorced fathers in every respect. The Court held that Georgia was justified in granting the adoption over the natural father's objection because the state has a strong policy of rearing children in a family setting. Consistent with *Stanley*, the *Quilloin* Court suggested that the father's level of participation in rearing the child is actually the decisive factor. In *Quilloin*, the Court thought the natural father's interest was weak when weighed against the

state interest because he never exercised actual or legal custody over his child and never shouldered any significant responsibility for the daily supervision, education, protection, or care of the child. The Court concluded that there was no constitutional violation in refusing to allow Quilloin to veto the adoption because he "had not taken steps to support or legitimate the child over a period of more than 11 years."

Caban v. Mohammed

In *Caban v. Mohammed*, 441 U.S. 380 (1979), the mother and natural father of the child had lived together for some time but had never married. Their relationship ended, but even after their separation the father maintained regular contact with the children over a period of years. When the mother remarried and her new husband petitioned for adoption, Caban challenged the New York law that required the mother's consent to the adoption but provided that he could prevent the adoption only upon showing that it would not be in the child's best interest.

The Court held that the gender-based distinction was not justified because Caban had proven himself a worthy father over a period of six years. Under those circumstances, the Court held that it was unfair for the statute to dictate that the mother should have more authority over decisions affecting the child. *Caban* expanded the *Stanley* decision to protect men who maintain relationships with their children, even when they do so outside of the traditional nuclear family unit, and for a considerably shorter time than the 18-year period in *Stanley*.

Lehr v. Robertson

In *Lehr v. Robertson*, 463 U.S. 248 (1983), Lehr, the biological father, filed suit to establish paternity and visitation of his two-year-old daughter. While his suit was pending in one court another court terminated his parental rights and his daughter was adopted without his knowledge. In an attempt to set aside the adoption order, Lehr challenged the validity of the statute that governs who is entitled to notice of an action to adopt a child.

The relevant statute required that notice of adoptions be served upon anyone who fits within any one of seven categories. For example, Lehr would have been entitled to notice if he had placed his name on the birth certificate or openly lived with the child's mother and held himself out to be the father. He also would have been served if he had filed with the state's paternity registry. Concluding that the statute provided adequate opportunities for unwed fathers to preserve their inchoate interest in their children, the Court held that the statute's notice provisions were constitutional.

Consistent with *Stanley*, *Quilloin*, and *Caban*, the Supreme Court's analysis in *Lehr* focused on the father's behavior toward the child. The Court stated that as the natural father, Lehr had the unique opportunity to develop a relationship with the child: "If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship . . . . If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie."

Because none of the other options listed in the statute were available to Lehr, the only manner in which Lehr himself could have protected his parental rights was to file with the paternity registry. Satisfied that this opportunity was sufficient, the Court noted that Lehr's right to receive notice was completely within his control. "By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt [the child]." Because he failed to take advantage of that opportunity, the Court held that New York was justified in terminating his parental rights without first notifying him. The decision in *Lehr* has been interpreted as giving states great latitude in using paternity registries to determine whether an unwed father has accepted or forfeited his opportunity to parent; however, the statutes must provide unwed fathers a meaningful opportunity to assume parental responsibilities.

RECENT ADOPTION-RELATED LEGISLATION

Senate Bill No. 2366 (2007) set forth a procedure for an adoptive parent to obtain a validation of a foreign decree of adoption.

House Bill No. 1121 (2005) provided for the adoption of the Uniform Parentage Act (2000). The bill established the procedure for the determination of parentage in the state. The bill also established a procedure for the execution of an acknowledgment of paternity, the denial of paternity, genetic testing, and paternity of a child of assisted reproduction. The bill addressed jurisdictional issues and provided for the confidentiality of certain parentage records. The bill also repealed chapters and sections of the Century Code relating to the current Uniform Parentage Act, the Uniform Status of Children of Assisted Conception Act, and paternity acknowledgment.

House Bill No. 1035 (2003) related to provisions of the Revised Uniform Adoption Act. The bill created definitions for the terms "abandonment," "department," "genetic sibling," "identifying," "investigation," "relative," and "stepparent"; provided that a petition for adoption and a report filed by the petitioner must state that the petitioner's expenses were reasonable and must indicate the types of fees that may be reasonable; provided that the court is to make a finding as to the reasonableness of fees paid by the petitioner; clarified the residency requirements as the requirements apply to various adoption situations; provided that certain identifying and nonidentifying information may be shared between consenting parties to the adoption; removed the search prohibition of birth parents and birth siblings in the

case of involuntary adoptions; provided that an adult child of a deceased adopted individual may initiate a search for identifying and nonidentifying information; provided that if only one genetic parent consents to the disclosure, the information disclosed may only relate to the consenting parent; and removed the 10-day withdrawal period for relinquishment of a birth parent's parental rights.

House Bill No. 1036 (2003) provided that in an adoption proceeding the court is required to make a finding as to the reasonableness of expenses paid. The bill also provided for a definition of "reasonable fees" and extends the time for filing a petition for adoption from 90 days to 180 days.

SUGGESTED STUDY APPROACH

A possible approach to the study of the feasibility and desirability of establishing a paternity registry would be to:

- Receive testimony from interested persons such as the Department of Human Services, adoption agencies, and adoptive parents regarding problems or concerns with the present adoption system in this state with respect to paternity determination issues;
- Receive testimony from representatives of the State Bar Association of North Dakota regarding issues that may arise from the establishment of a paternity registry;
- Review paternity registry laws of other states in order to address any problems or concerns with the adoption of a similar law in this state; and
- Develop recommendations and prepare legislation necessary to implement the recommendations.

ATTACH:1