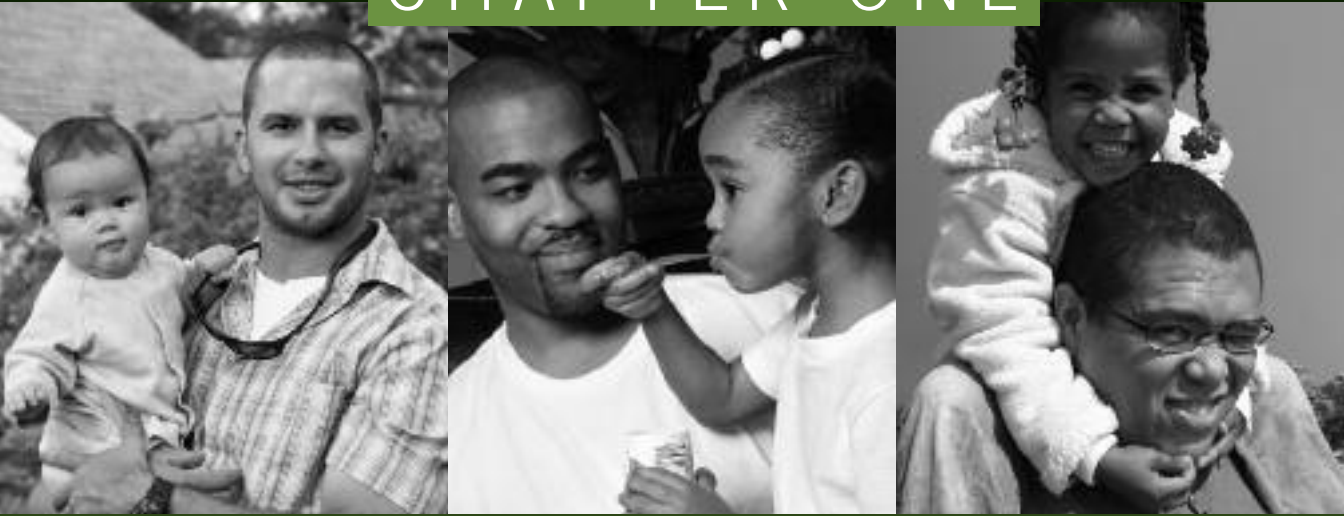


## CHAPTER ONE



# Advocating for the Constitutional Rights of Nonresident Fathers

**Vivek S. Sankaran**

# CHECKLIST

## Advocating for the Constitutional Rights of Nonresident Fathers

### **Determine if your client has a constitutionally protected interest in his child.**

- Find out if your client has or has attempted to establish a relationship with his child that gives him a right to notice and an opportunity to be heard in court proceedings.
- Assess whether he has perfected this interest by determining if he has complied with the state's procedures to establish paternity, such as:
  - filing with a putative father registry;
  - placing his name on the birth certificate;
  - being married to the mother at the time of conception or birth;
  - maintaining regular contact and a relationship with the child; and/or
  - paying child support.

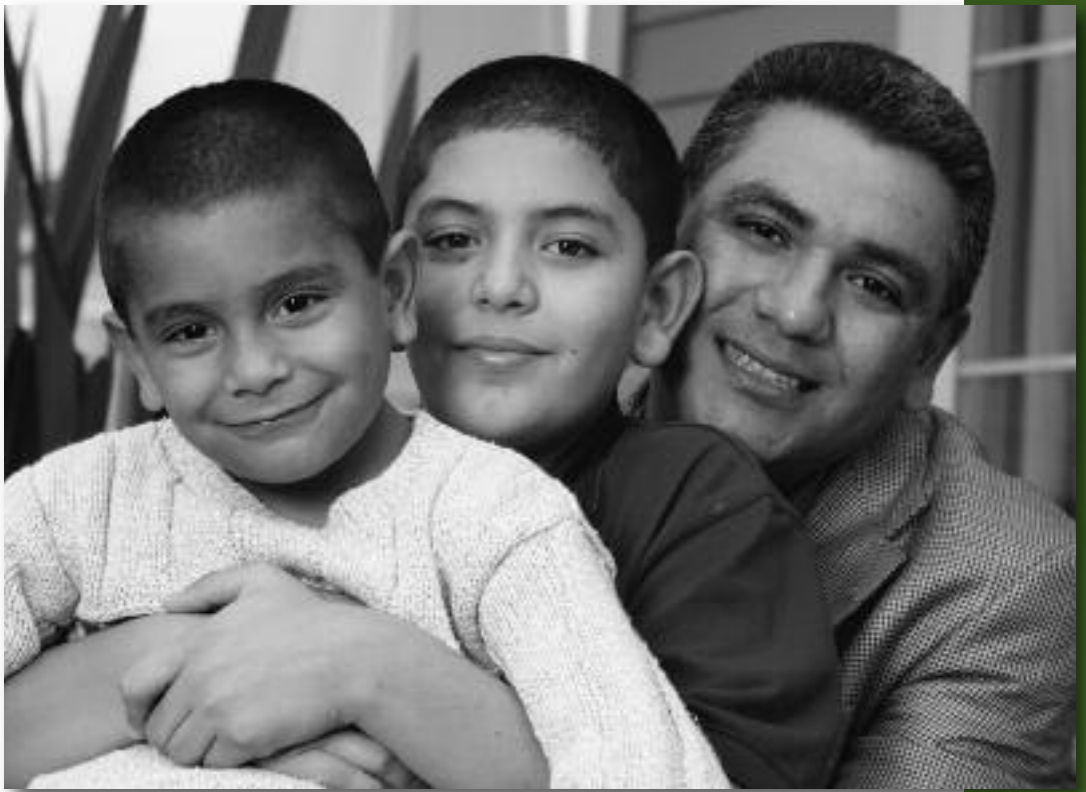
### **File necessary pleadings to safeguard your client's constitutional rights.**

- Has your nonoffending, nonresident father client been denied custody and forced to comply with services, absent proof of unfitness? If so, the state may be encroaching upon his constitutionally protected interests.
- If the father's constitutional interests are not being protected, consider:
  - filing a motion challenging the imposition of services;
  - arguing that the court can't interfere with his constitutionally protected custodial rights;
  - requesting immediate placement of the child with the father.

## Understand the interplay between state law and constitutional rights.

- Generally, between state and federally based rights, legal fathers should be able to:
  - be notified of proceedings;
  - visit their children;
  - request custody;
  - receive court-appointed counsel, if indigent; and
  - have a hearing before their parental rights are terminated.

Download this and other checklists at [www.fatherhoodqic.org/checklists](http://www.fatherhoodqic.org/checklists)



**M**onths after a child welfare case is petitioned, a nonresident father appears in court and requests custody of his children who are living in foster care. Little is known about the father, and immediately, the system—judge, caseworkers, and lawyers—view him with suspicion and caution, inquiring about his whereabouts and his prior involvement in the children’s lives. Those doubts, in turn, raise complicated questions about his legal rights to his children.

- Does the Constitution give him any rights to his children and is he entitled to a presumption of parental fitness?
- Did he preserve those rights?
- Does state law grant him stronger protections?
- Is the court permitted to place the children in foster care if no allegations of unfitness are made against him?

As a lawyer or judge working in the child welfare system, you’re likely to face this scenario. The largest percentage of child victims of abuse and neglect come from households headed by single mothers. Consequently, dependency proceedings frequently focus on reunifying children with their mothers.<sup>1</sup> The child welfare system responds to this dynamic by treating fathers as legal strangers to their children and minimizing the importance of their rights. Often, involving fathers is an afterthought. Evidence reveals that child welfare caseworkers, courts, and lawyers typically do a poor job locating nonresident fathers at the outset of a case, involving them once identified, and ensuring their constitutional and statutory rights are fully protected.<sup>2</sup>

But a growing consensus has emerged that disempowering fathers in this way harms children, who generally benefit when both parents participate in their lives.<sup>3</sup> Efforts are underway across the country to transform child welfare systems to recognize rights of fathers and develop practices and procedures to help them participate in the child welfare process.

This chapter offers guidance to help legal advocates protect nonresident fathers’ constitutional rights. After briefly reviewing parents’ constitutional rights, it provides a framework to assess whether a nonresident father has perfected these rights and taken steps to preserve them. It then discusses states’ efforts to adjudicate the rights of nonresident fathers and encourages lawyers to determine if those efforts are constitutional. Zealous advocacy will help ensure the child welfare system validates the meaningful relationships between nonresident fathers and their children.

## Nonresident Father Involvement in Dependency Cases

In a multistate study, researchers conducted telephone interviews with 1,222 caseworkers in Arizona, Massachusetts, Minnesota, and Tennessee. Caseworkers were interviewed about 1,958 children in their caseloads, each of whom had a living father who did not reside in the household from which the child was removed. The study found:

- 72% of caseworkers noted that paternal involvement enhanced child well-being.
- 68% of fathers were identified by the caseworker.
- 55% of fathers were actually contacted by the caseworker.
- 50% of those fathers contacted expressed interest in their child living with them.
- 56% of contacted fathers (30% of all fathers in the study) visited their child.
- 50% of contacted fathers (28% of all fathers in the study) expressed interest in assuming custody of their child.
- 4% of cases involving nonresident fathers had a goal of reunification with the father.

**Source:**

Malm K., J. Murray and R. Geen. *What about the Dads? Child Welfare Agencies' Efforts to Identify, Locate and Involve Nonresident Fathers*. Washington, D.C.: U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, 2006. Available at: <http://aspe.hhs.gov/hsp/06/CW-involve-dads/index.htm>.

## Preserving Fathers' Constitutional Rights

Your first task is to determine whether the father's relationship with his child is constitutionally protected because of the procedural protections that result if constitutional rights exist. The Supreme Court has recognized a birth parent's right to direct the upbringing of his or her child as a fundamental liberty interest protected by the Fourteenth Amendment of the United States Constitution.<sup>4</sup> Described as "one of the oldest of the fundamental liberty interests,"<sup>5</sup> the parental right has been applied to protect many parental decisions. For example, it prevents the state from directing a child's religious upbringing,<sup>6</sup> choosing with whom the child should associate,<sup>7</sup> and making medical decisions for the child.<sup>8</sup> These holdings rest on the premise that the "natural bonds of affection lead parents to act in the best interests of their children."<sup>9</sup>

## Benefits for Foster Children when Nonresident Fathers are Involved

A multistate study using data supplied by states that participated in the original *What About the Dads* study found that children whose fathers were more involved:

- had a higher likelihood of reunification and a lower likelihood of adoption;
- were discharged from foster care more quickly than those with less or no paternal involvement; and
- had substantially lower likelihood of subsequent maltreatment allegations.

Engaging fathers in their children's lives is also linked to children's:

- improved physical and mental health;
- improved self-esteem;
- responsible sexuality;
- emotional maturity; and
- greater financial security.

In contrast, children in homes without fathers tend to:

- experience high rates of poverty at an earlier age;
- have problems in school; and
- become involved with the criminal justice system.

### Sources:

Malm, K., E. Zielewski and H. Chen. *More about the Dads: Exploring Associations between Nonresident Father Involvement and Child Welfare Case Outcomes*. Washington, D.C.: U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, 2008. Available at: <http://aspe.hhs.gov/hsp/08/moreaboutdads/index.htm>; Horn, W. and T. Sylvester. *Father Facts: Fifth Edition*. Gaithersburg, MD: National Fatherhood Initiative, 2007; National Child Welfare Resource Center for Family-Centered Practice. "Father Involvement in Child Welfare: Estrangement and Reconciliation." *Best Practice/Next Practice: Family Centered Child Welfare*, Summer 2002.

## Parents' constitutional rights in child welfare proceedings

In child protection cases, this right has fueled constitutionally-based procedural protections for parents. If the state seeks to remove a child from the home, an emergency hearing must be held promptly and the state must prove why removal is necessary. Before the state assumes extended custody of the child, a finding of unfitness is required. The parent must receive adequate notice and a meaningful opportunity to be heard at the hearing where this finding is made.<sup>10</sup> Before the state terminates parental rights, it must prove parental unfitness by clear and

convincing evidence<sup>11</sup> at a hearing. Due process may mandate appointing counsel to represent the parent at this hearing.<sup>12</sup> Thus, resolving this threshold question—whether the nonresident father’s relationship with his child is constitutionally-protected—is crucial in determining if he is entitled to other constitutional protections, all of which trump conflicting federal and state statutes.

## Federal constitutional rights

How do you determine whether a nonresident father is entitled to constitutional protections?

### Parental involvement

The Supreme Court has answered this question by looking at the level of involvement of the nonresident father in his child’s life. “When a father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the Due Process Clause.”<sup>13</sup> For example, in *Lehr v. Robertson*, the Supreme Court upheld a New York statute that did not require a father to be notified of his child’s impending adoption because the father did not take meaningful steps to establish a parental relationship with his child.<sup>14</sup> The Court reasoned:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child’s best interests lie.<sup>15</sup>

Similarly, in *Quilloin v. Walcott*, the Court held that a birth father, who had minimal contact with the child, could not disrupt a child’s adoption into a family with whom the child had already been living.<sup>16</sup> In both decisions, the Supreme Court prevented fathers who had not made efforts to establish a relationship with their children from using the Constitution to disrupt the child’s permanent placement.

But when the father has such a relationship, the Court has prevented states from infringing on the father-child bond without providing adequate process. In *Caban v. Mohammed*, the Court struck down a New York statute that denied a father the right to object to an adoption to which the biological mother had

## Supreme Court Cases Addressing the Rights of Nonresident Fathers

- *Stanley v. Illinois*, 405 U.S. 645 (1972).
- *Quilloin v. Walcott*, 434 U.S. 246 (1978).
- *Caban v. Mohammed*, 441 U.S. 380 (1979).
- *Lehr v. Robertson*, 463 U.S. 248 (1983).
- *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

already consented.<sup>17</sup> The Court held that since the father was as involved in the children's upbringing as their mother, they both had to be treated equally.<sup>18</sup> Although the Supreme Court has never proscribed the specific actions a nonresident father must take to perfect his constitutionally-protected interest in his child, the Court's rulings clarify that the rights of fathers who have established relationships with their children are constitutionally protected from state interference absent proof of unfitness.

### **Paternity establishment**

Additionally, the Supreme Court has held that due process requires states to give all fathers the opportunity to establish parental relationships by allowing them to claim their interest in the child soon after the child's birth.<sup>19</sup> States have created several ways for fathers to assert parentage. In some states, fathers have to file an affidavit of paternity jointly with the child's mother or institute a paternity suit. Others use putative father registries to let fathers assert their interests. State practices vary on this issue; as the father's lawyer, you will need to know these differences. Most appellate courts find a father's failure to comply with state procedures constitutes a permanent waiver of the father's rights to his child.<sup>20</sup>

### **Exceptions**

Extending substantial protections to a birth father who has a relationship with his child and allowing all fathers an opportunity to claim their parental interest soon after the child's birth are well-established principles. The only exception is when, under state law, another man, typically the husband of the child's mother, has been designated the child's legal father. A number of states have strong presumptions that the husband of the child's mother is the legal father if the child was born during the marriage. In these states, even if another man claims to be the



## Additional Resources

- ▶ Greene, Angela. “The Crab Fisherman and His Children: A Constitutional Compass for the Non-Offending Parent in Child Protection Cases.” *Alaska Law Review* 24, 2007, 173, 181-199.
- ▶ Harris, Leslie Joan. “Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions.” *Journal of Family Studies* 9, 2007, 281, 307.
- ▶ Sankaran, Vivek S. “But I Didn’t Do Anything Wrong: Revisiting the Rights of Non-Offending Parents in Child Protection Proceedings.” *Michigan Bar Journal* 85, March 2006, 22.

child’s birth father, he does not have any standing to assert his rights since the law recognizes someone else as the child’s legal father. This statutory scheme was challenged in *Michael H. v. Gerald D.*, where the Supreme Court, in a split decision, affirmed these statutes.<sup>21</sup>

Be aware of the intricacies of your state’s paternity laws to decide how your clients’ rights may be impacted if another man claims to have a parental relationship with the child. For example, some jurisdictions, like Louisiana, have allowed courts to permit dual paternity in limited situations.<sup>22</sup>

### ▶ Practice tips

How do these constitutional principles translate into good practice? Once the nonresident father is identified, you will need to determine his prior involvement in the child’s life.

- Did he pay child support? When, and how frequently?
- How often did he visit the child?
- Did he provide the child’s mother any assistance during her pregnancy?
- Did he send gifts and/or cards to the child?
- Did he attend school meetings or take the child to doctor appointments?
- Is his name on the birth certificate?

Answering these questions will flesh out whether the father developed the type of relationship with his child that courts deem constitutionally protected. If a relationship exists, the father is guaranteed the due process

protections noted above, regardless of conflicting state and federal laws, unless state law has designated another person as the child's legal father. If no other legal father exists, the father must be given notice and an opportunity to be heard and the state cannot interfere with his custodial rights absent proof of unfitness. His rights to the child are substantial and state encroachment must be justified by compelling reasons.

If a relationship does not exist, assess whether the father's opportunity to establish a parental relationship was blocked in any way.

- Does state law provide adequate mechanisms for the father to become involved in the child's life?
- Did the child's mother in some way prevent the father from developing a relationship with the child?
- Did the father make all reasonable efforts to form a parental relationship?
- Was the child taken into state care almost immediately after birth (e.g., from the hospital)?

If evidence shows the father never had a meaningful opportunity to create a parental bond with his child, you could argue that the Constitution requires that he be given the opportunity. In *Lehr*, the Supreme Court specifically analyzed whether state law protected a father's right to form such a relationship. Evidence of fraud or concealment on the part of the mother or the state agency may help persuade a judge to give the father an opportunity to assert his rights. When representing nonresident fathers, ensure that the constitutional protections given to all parents are afforded to those fathers whose prior actions merit such protection.

## Determining if State Law Protects Fathers' Rights

Assuming the nonresident father has perfected his constitutional rights to his child, you must next determine whether provisions under state law are constitutional.

- Does state law provide him with notice and an opportunity to be heard about his child's custody?
- Does it give him a presumption of parental fitness?

If not, the state may have impermissibly encroached upon his rights based solely on a subjective determination of what is best for his child. Thoroughly understanding the interplay between constitutional rights and state statutory provisions is crucial in vindicating the rights of nonresident fathers.

## ■ Tips for Agency Lawyers

Child welfare agency lawyers also have an important role to play in ensuring that fathers' constitutional rights are protected. You can take the following steps:

- Ensure the nonresident father is identified and located early in the case and receives notice of all child protective proceedings.
- Ensure the child welfare agency conducts comprehensive assessments of nonresident fathers (and any paternal relatives who express interest) immediately after they request custody or visitation.
- Encourage caseworkers to include the father in his child's case plan, focus on his strengths, and offer him appropriate services.
- If no evidence of parental unfitness exists, counsel the child welfare agency that the father has a constitutional right to obtain custody over his child.
- Ensure court orders and agency practices do not hinder the father's right to visit with his child without proof that it may harm or endanger the child's safety or well-being.
- Remember that all parties in child welfare proceedings need to work together to ensure that constitutional rights are respected, delays and appeals are minimized and reunification or other permanency outcomes are achieved promptly.

Generally, most states provide nonresident fathers basic procedural rights to:

- notice of proceedings and opportunity to participate;
- visitation with children; and
- court-appointed counsel if indigent.

But states vary considerably on two key issues: 1) whether the child must be placed with the nonresident father absent proof of unfitness, and 2) whether the court can order a fit nonresident father to comply with services it deems are in the child's best interests. Differing state approaches to these issues are described below.

### **No parental presumption**

A number of states, such as Michigan and Ohio, have policies permitting courts to deprive nonresident fathers of custodial rights to their children immediately upon an adjudication or plea finding that the mother abused or neglected them.<sup>23</sup> In these jurisdictions, immediately upon a finding against one parent, the trial

court obtains custody of the child and can issue any order it deems is in the child's best interest. Even absent a finding of unfitness against the nonresident father, the court can place the child in foster care, compel the nonresident father to comply with services, and order that the father's rights be terminated based on failure to comply with those services. These systems treat nonresident fathers as legal strangers to the child, and the burden is on them to prove to the court it is in the child's best interest to be placed with them.

## **Deprivation of legal custody**

Other jurisdictions have adopted a more nuanced approach while continuing to deprive nonresident fathers of full custodial rights.<sup>24</sup> In these courts, judges recognize the constitutionally-based parental presumption but only apply the presumption to the physical custody of the child. Absent a finding of unfitness, nonresident fathers are granted physical custody of their children, but the court still retains legal custody. That is, the court makes decisions about the child and can order the nonresident father to comply with services. While safeguarding the physical custody rights of nonoffending parents, these systems restrict their legal custody.

## **No jurisdiction**

Finally, two states, Maryland and Pennsylvania, have adopted a completely different approach.<sup>25</sup> In those states, if a nonresident father is willing to immediately assume care and custody of the child and is not unfit, the court may not assume jurisdiction over the child for any purpose, even to offer services to the offending parent or the child. The juvenile court must dismiss the case and the only limited action it may take is to grant custody to the nonresident father before dismissal. Once the custody transfer is made, all court involvement or oversight will end.

As the brief discussion above shows, states differ significantly on whether the nonresident father has a presumptive right to custody of his child and whether he can be forced to comply with services.<sup>26</sup> If a state's practices conflict with the procedural protections guaranteed by the Constitution, it is essential to file all necessary pleadings to safeguard such rights. These may include:

- making a request at the detention or shelter care hearing for immediate placement of the child with the father;
- filing a motion challenging the imposition of services on your client absent a finding of unfitness; and
- arguing that if a fit nonresident father requests custody, then the court cannot interfere with his custodial rights in any way.

Appeals of trial court decisions should be taken immediately, as opposed to waiting until after the father's rights are terminated because, at that point, many of the challenges may be moot or be deemed waived by the court. Of course, the specific arguments that you should make in a given case will depend on the wishes and interests of the client. Always remember to evaluate whether the decisions made by the court and the child welfare agency protect fathers' constitutional rights.

## Conclusion

Traditionally, the basic constitutional rights of nonresident fathers in child welfare cases have been given short shrift. As an advocate for nonresident fathers, you can change this dynamic by challenging practices that violate the basic procedural protections that the Constitution provides many fathers. By doing so, the child protection system will begin opening its doors more widely to invite fathers to actively plan for their children's well-being.

## Endnotes

1. For a comprehensive study of paternal involvement in child welfare cases, see Sonenstein, F., K. Malm and A. Billing. *Study of Fathers' Involvement in Permanency Planning and Child Welfare Casework*. Washington, D.C.: U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, 2002. <<http://aspe.hhs.gov/hsp/CW-dads02>>
2. See Malm K., J. Murray and R. Geen. *What about the Dads? Child Welfare Agencies' Efforts to Identify, Locate and Involve Nonresident Fathers*. Washington, D.C.: U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, 2006, which explores the reasons why child welfare agencies have traditionally excluded fathers from the case-planning process. <<http://aspe.hhs.gov/hsp/06/CW-involve-dads/index.htm>>
3. For an analysis of the ways that paternal involvement in child welfare cases enhances child well-being, see Malm, K., E. Zielewski and H. Chen. *More about the Dads: Exploring Associations between Nonresident Father Involvement and Child Welfare Case Outcomes*. Washington, D.C.: U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, 2008. <<http://aspe.hhs.gov/hsp/08/moreaboutdads/index.htm>>
4. Meyer v. Nebraska, 262 U.S. 390 (1923).
5. Troxel v. Granville, 450 U.S. 57, 65 (2000).
6. Wisconsin v. Yoder, 406 U.S. 205 (1972).
7. Troxel, 450 U.S. at 57.
8. Parham v. J.R., 442 U.S. 584, 603 (1979).
9. Ibid., 603.

10. *Stanley v. Illinois*, 405 U.S. 645 (1972).
11. *Santosky v. Kramer*, 455 U.S. 745 (1982).
12. *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981).
13. *Lehr v. Roberstson*, 463 U.S. 248, 261 (1983).
14. *Ibid.*, 248.
15. *Ibid.*, 262.
16. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1977).
17. *Caban v. Mohammed*, 441 U.S. 380 (1979).
18. *Ibid.*, 389.
19. *Lehr*, 463 U.S. at 262-263.
20. *See, e.g.*, *Marco C. v. Sean C.*, 181 P.3d 1137 (Az. Ct. App. 2008); *Heidbreder v. Carton*, 645 N.W.2d 355 (Minn. 2002); *Hylland v. Doe*, 867 P.2d 551 (Or. Ct. App. 1994); *Sanchez v. L.D.S. Social Services*, 680 P.2d 753 (Utah 1984) (all refusing to permit fathers to assert parental rights where they did not comply with statutory requirements).
21. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).
22. *Smith v. Cole*, 553 So. 2d 847 (La. 1989).
23. For Ohio cases, *see, e.g.*, *In re C.R.*, 843 N.E.2d 1188 (Ohio 2006); *In re Russel*, 2006 Ohio App. LEXIS 6565 (Ohio Ct. App. 2006); *In re Osberry*, 2003 Ohio App. LEXIS 4922 (Ohio Ct. App. 2003). Michigan's approach is exemplified in the following cases: *In re Church*, 2006 Mich. App. LEXIS 1098 (Mich. Ct. App. 2006); *In re Camp*, 2006 Mich. App. LEXIS 1620 (Mich. Ct. App. 2006); *In re Stramaglia*, 2005 Mich. App. LEXIS 1339 (Mich. Ct. App. 2005).
24. *See, e.g.*, *J.P. v. Dep't of Children and Families*, 855 So. 2d 175 (Fla. Dist. Ct. App. 2003); *In re Jeffrey P.*, 218 Cal. App. 3d 1548 (Ct. App. 1990).
25. *See, e.g.*, *In re M.L.*, 757 A.2d 849 (Pa. 2000); *In re Russell G.*, 672 A.2d 109 (Md. Ct. Spec. App. 1996).
26. None of these states specifically distinguish between mothers and fathers. However, in practice, these different approaches typically affect the noncustodial parents who most often are fathers.