

N.C. Gen. Stat. § 48-3-601 and N.C. Gen. Stat. § 7B-1111: A Putative Father’s Right to Be a Father

ABSTRACT

An absent and uninterested father should not be able to withhold consent to a child’s adoption to the detriment of the mother. However, when the father is genuinely unaware of the child’s existence, through deceit of the mother or lack of communication, he is not being afforded the chance to be interested. As it now stands, North Carolina adoption law is distressingly inadequate because it does not provide any recourse for biological fathers in situations like this. The law is too strict and statutory construction forces courts to apply the plain meaning of the statute rather than what is “just” and consistent with the intended purpose of the Chapters. Fathers in these situations should not automatically lose their parental rights. Although the negative results are isolated to a very narrow group of men, the effects are so catastrophic that it is worth our attention. This Comment explores solutions in the form of amendments to North Carolina General Statute section 48-3-601 and North Carolina General Statute section 7B-1111.

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INTRODUCTION

Venson Westgate and Brandi Wood had an on-and-off relationship for three years that rekindled in late October to early November 2012.¹ Wood soon called off the relationship with Westgate to resume dating another man, whom she married shortly after in January 2013.² A month after her marriage, Wood informed Westgate that she was twenty-weeks pregnant with Westgate's child, but demanded that he keep the pregnancy a secret for the sake of her marriage.³

Westgate immediately offered to set money aside for the child, but Wood refused because she did not want her husband to know.⁴ Regardless, Westgate started putting \$100 to \$140 per month in a lockbox for the baby.⁵ In addition to offering financial support for the baby, he offered to purchase specific items, he discussed healthcare providers, he suggested baby names, and he even requested that he be present during the child's birth.⁶

In March, Westgate attended Wood's first sonogram appointment where he further expressed his enthusiasm for becoming a father.⁷ Westgate even offered to pay for Wood's medical bills, but Wood refused the offer.⁸ Although Wood refused Westgate's financial support, Westgate was able to provide Wood emotional support throughout the pregnancy, via Facebook.⁹

1. *In re Adoption of C.H.M. (C.H.M. I)*, 788 S.E.2d 594, 595 (N.C. Ct. App. 2016), *rev'd*, 812 S.E.2d 804 (2018).

2. *Id.*

3. *In re Adoption of C.H.M. (C.H.M. II)*, 812 S.E.2d 804, 806 (N.C. 2018).

4. *C.H.M. I*, 788 S.E.2d at 596.

5. *Id.*

6. *Id.* at 595.

7. *C.H.M. II*, 812 S.E.2d at 806.

8. *Id.*

9. *C.H.M. I*, 788 S.E.2d at 595; *C.H.M. II*, 812 S.E.2d at 806.

Then in April 2013, Wood lied to Westgate and told him that the child was not his and that the pregnancy was actually the result of a prior sexual assault.¹⁰ Upon hearing this, Westgate requested a DNA test to confirm that he was not the father.¹¹ Wood refused his request.¹² Instead, Wood moved to North Carolina and blocked Westgate on Facebook.¹³ Then on June 28, 2013, Wood gave birth to C.H.M. and placed the baby up for adoption.¹⁴ Wood did not tell Westgate that she gave birth or that she placed the baby up for adoption.¹⁵ Westgate also lied to the adoption agency when she told them that her pregnancy was the result of a sexual assault.¹⁶

Then in July 2013, Wood requested that Westgate meet her at a bar.¹⁷ When it was obvious that Wood was no longer pregnant, Westgate inquired about the baby.¹⁸ Wood still neglected to tell Westgate that she put the baby up for adoption, and instead she told him that the baby was being treated at the hospital for a heart condition.¹⁹ Westgate once again requested a DNA test so that he could be sure that the baby was not his.²⁰ Wood refused his request.²¹ Wood told Westgate that there was no chance that the baby was his because the timeframe of conception and their intimate encounter did not match up.²² She also told him that the baby's blood type and hair color did not match his.²³ Despite being repeatedly told that the baby was not his, Westgate still contacted an attorney in September to see what his legal rights were.²⁴ In November, Wood finally admitted that Westgate was the father and that she had put the baby up for adoption without his consent.²⁵

Westgate objected to the adoption and on April 23, 2014, there was a hearing in Wake County District Court to determine whether Westgate's consent to the adoption was necessary.²⁶ The district court ruled in favor of

10. *C.H.M. I*, 788 S.E.2d at 595.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 595–96.

15. *Id.* at 596.

16. *C.H.M. II*, 812 S.E.2d 804, 806 (N.C. 2018).

17. *C.H.M. I*, 788 S.E.2d at 596.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

Westgate and found that Westgate had in fact satisfied all three statutory requirements imposed by North Carolina General Statute section 48-3-601, and therefore Westgate's consent to the adoption was necessary.²⁷ The North Carolina Court of Appeals affirmed.²⁸ The supreme court reversed.²⁹

Despite Westgate's status as C.H.M.'s biological father and despite all his efforts to provide financial and emotional support to Wood and the child during the pregnancy, the supreme court applied section 48-3-601 and concluded that Westgate's consent to the adoption was not necessary.³⁰ The supreme court held that putting money into a lockbox is not the equivalent of providing the type of "real, tangible support" that the statute requires.³¹ That "[t]he unusual facts of this case cannot overshadow [Westgate's] failure to comply with the statutory requirements."³²

The North Carolina General Assembly enacted Chapter 48, the chapter governing adoptions, with the stated purpose of balancing the rights of the minor children, the biological parents, and the adoptive parents.³³ Section 48-3-601 of the North Carolina General Statutes, the section regarding consent for adoption, is far too narrow and thus fails to support the General Assembly's stated intent. The North Carolina General Assembly also enacted Chapter 7B, Article 11, the article on the termination of parental rights, with the stated purpose of terminating the rights of parents that demonstrate they will not provide sufficient care for their child.³⁴ The section regarding grounds for termination is also far too narrow and inadequately furthers the stated intent.³⁵ The courts are restricted by the statutory construction of these two statutes and have been forced to follow the plain meaning, and unfortunately, capable fathers have been the ones paying the cost.

An absent and uninterested father should not be able to withhold consent to a child's adoption to the detriment of the mother. The North Carolina Supreme Court in *In re Byrd* stated that the General Assembly drafted section 48-3-601 with the noble intent "to protect the interest and rights of men who have demonstrated paternal responsibility and to facilitate the adoption process in situations where a putative father . . . has walked away from his responsibilities to mother and child, but later wishes to

27. *Id.* at 597.

28. *Id.* at 601.

29. *C.H.M. II*, 812 S.E.2d 804, 812 (N.C. 2018).

30. *Id.*

31. *Id.* at 810–11.

32. *Id.* at 812.

33. N.C. GEN. STAT. § 48-1-100(a) (2017).

34. N.C. GEN. STAT. § 7B-1100(1) (2017).

35. N.C. GEN. STAT. § 7B-1111 (2017).

intervene and hold up the adoption process.”³⁶ However, when the father is genuinely unaware of the child’s existence, through deceit of the mother or lack of communication, he is not being afforded the chance to be interested. Fathers in these situations should not automatically lose their parental rights. Look at how child support works, for example. If a woman has a one-night stand with a stranger and becomes pregnant, the father has no choice but to pay child support for his child until the child reaches eighteen years of age.³⁷ This law makes sense; it takes two to tango, so both parties should be responsible for the result. The same idea should underlie sections 48-3-601 and 7B-1111.³⁸ This Comment argues that if a father is legally obligated to support his child, then the law should also protect the father’s right to be a father.

Part I of this Comment provides a brief background of North Carolina law regarding adoptions and the termination of parental rights. Part II gives several examples of recent North Carolina cases that have implemented these statutes and were left with unjust rulings. Part III offers suggestions for ways in which the North Carolina General Assembly can amend the statutes so that they can better align with the intended purpose. Ultimately, this Comment argues that the legislature should add catch-all phrases to sections 48-3-601 and 7B-1111 of the North Carolina General Statutes that allow the courts to decide these cases on an ad hoc basis by examining the facts of each case and coming to the most fitting conclusion. Giving the court this kind of discretion will prevent unjust rulings where the father does take substantial steps for the child, but not the exact steps listed in the statute, and as a result loses his parental rights. This Comment also argues that in situations where the father is genuinely unaware of the child’s existence, the court should conduct a hearing to decide whether continuing with the adoption proceeding or placing the child with the biological father is in the best interest of the child.

I. BACKGROUND OF THE NORTH CAROLINA GENERAL STATUTES: CHAPTER 48 ADOPTIONS AND CHAPTER 7B ARTICLE 11 TERMINATION OF PARENTAL RIGHTS

While enacting section 48-3-601 and section 7B-1111 of the North Carolina General Statutes, the North Carolina legislature used language that was entirely too strict. When applying these statutes, the courts have been

36. *In re Byrd*, 552 S.E.2d 142, 146 (N.C. 2001).

37. *Shoaf v. Shoaf*, 192 S.E.2d 299, 303 (N.C. 1972).

38. N.C. GEN. STAT. §§ 48-3-601, 7B-1111 (2017).

forced to follow the plain meaning of the statutes and the results have been inconsistent with the intended purpose of the chapters.

A. Chapter 48 Adoptions: Intended Purpose of Chapter 48 Versus the Strict Language of North Carolina General Statute Section 48-3-601

According to the legislative intent section of Chapter 48, the primary purpose of the Chapter has, and always will be, the best interest of the child.³⁹ Over time, however, the General Assembly has changed its mind on what is in a child's "best interest." Prior to 1996, the General Assembly believed that maintaining stability was the best way to advance the child's best interest.⁴⁰ The legislature intended to protect the minor child from being taken from his adoptive home after he had adjusted and been there for a significant amount of time.⁴¹ The secondary purpose of the statute at that time was "to prevent later disturbance of [the adoptive parent's] relationship to the child by biological parents whose legal rights have not been fully protected."⁴²

In 1996, the General Assembly amended the "legislative intent" section of Chapter 48.⁴³ Although the best interest of the child remained the primary goal, the General Assembly changed its mind on the path to get there.⁴⁴ Prior to the amendment, the statute stressed the importance of "protecting children against disruption of their adoptive families."⁴⁵ The current statute, on the other hand, concerns itself with the protection of the biological parent-child

39. See *In re Adoption of Clark*, 381 S.E.2d 835, 839 (N.C. Ct. App. 1989), *rev'd*, 393 S.E.2d 791 (N.C. 1990). "The General Assembly finds that it is in the public interest to establish a clear judicial process for adoptions . . . that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors." N.C. GEN. STAT. § 48-1-100(a) (2017). "In construing this Chapter, the needs, interests, and rights of minor adoptees are primary. Any conflict between the interests of a minor adoptee and those of an adult shall be resolved in favor of the minor." *Id.* § 48-1-100(c)

40. See *In re Clark*, 381 S.E.2d at 839-40.

41. *Id.* "The primary purpose of this chapter is . . . to protect [the child] from interference, long after they have become properly adjusted in their adoptive homes by biological parents who may have some legal claim because of a defect in the adoption procedure" *Id.* (citations omitted).

42. *Id.* at 840.

43. N.C. GEN. STAT. § 48-1-100 editor's note (1999). The General Assembly revised Chapter 48 in 1995, but the revisions did not become effective until 1996.

44. *Id.* § 48-1-100(a).

45. See Lauren Vaughan, Note, *Closing the Window of Opportunity: The Limited Rights of Putative Fathers Under N.C. Gen. Stat. § 48-3-601 and In re Byrd*, 23 CAMPBELL L. REV. 305, 310 (2001).

relationship by preventing unnecessary separation.⁴⁶ The secondary focus is “to protect biological parents from ill-advised decisions to relinquish a child or consent to the child’s adoption.”⁴⁷ The amendment also provides that the provisions in the chapter “shall be liberally construed and applied to promote its underlying purposes and policies.”⁴⁸

Following that logic, it would make sense that the courts should be resolving these issues in favor of the relationship between the minor child and his biological parent.⁴⁹ Case law exemplifies that while a certain outcome may be better aligned with the statute’s purpose, courts are prevented from reaching such an outcome because they are bound to follow the plain meaning of the statute.⁵⁰ In certain situations, the intent of the statute and the statute itself stand at odds.⁵¹

In North Carolina, parental consent is necessary for the adoption of a minor child.⁵² North Carolina General Statute 48-3-601 governs the rights that unwed fathers have to prevent the adoption of their children.⁵³ The plain language of that statute states that a putative father’s⁵⁴ consent to adoption is only required if: (1) he is married to the mother;⁵⁵ (2) if he has legitimized

46. § 48-1-100(b)(1). Currently “[t]he primary purpose of this Chapter is to advance the welfare of minors by . . . protecting minors from unnecessary separation from their original parents.” *Id.*

47. *Id.* § 48-1-100(b)(2).

48. *Id.* § 48-1-100(d).

49. *See id.* §§ 48-1-100(a)-(d).

50. *In re Byrd ex rel. Adoption of Byrd*, 529 S.E.2d 465, 469 (N.C. Ct. App. 2000), *aff’d sub nom. In re Byrd*, 552 S.E.2d 142 (N.C. 2001). In *Byrd*, the court used statutory construction to determine the statute’s plain meaning because it was obligated to “yield to [its] judicial stricture to follow the statutory law, not make it.” *Id.* However, the plain meaning of the statute led to an unjust result, and the court itself even acknowledged that “the facts of a particular case may cry out for fairness, or a different result.” *Id.* The statute makes no exception for the support requirement of section 48-3-601, and the court refused to read in any exception because the language of the statute was clear. *Id.* at 471. “As with the acknowledgment requirement, the respondent was given the choice under the statute to provide support for a biological mother who was uncertain as to whether he fathered the child, or face the possibility that the child could be adopted by third parties without his consent.” *Id.*

51. *Id.* at 469–71.

52. N.C. GEN. STAT. § 48-3-603 (2017).

53. *Id.* § 48-3-601. Section 48-3-601 governs when the consent of the putative father is necessary and section 48-3-603 provides when consent is not necessary. The putative father’s consent is not necessary if the parental rights of the putative father are already terminated under North Carolina General Statute section 7B-1111(a)(5) (2017).

54. A putative father is “[t]he alleged biological father of a child born out of wedlock.” *Putative father*, BLACK’S LAW DICTIONARY (10th ed. 2014).

55. N.C. GEN. STAT. § 48-3-601(2)(b)(1) (2017). Consent is required if the putative father is married to the mother, if the child was born within 280 days after the termination of

the minor under state law;⁵⁶ (3) if he acknowledged his paternity prior to the filing of the petition;⁵⁷ (4) if he has received the minor into his home and held out the minor as his child;⁵⁸ (5) or if he is the adoptive father of the minor child.⁵⁹ Therefore, because the courts are required to follow the plain meaning of the statute, if the father does not meet one of the above requirements, the child can be put up for adoption without the father's consent. A putative father could do "virtually all that could reasonably be expected" of him under the circumstances and his child could still be put up for adoption without his consent.⁶⁰ Taking a child away from a biological father that does "virtually all that could reasonably be expected"⁶¹ under the circumstances, does not "[protect] minors from unnecessary separation from their original parents."⁶²

B. Chapter 7B Article 11 Termination of Parental Rights: Intended Purpose of Article 11 Versus the Strict Language of North Carolina General Statute Section 7B-1111

North Carolina General Statute section 48-6-603(a)(1) states that consent is no longer necessary if the parental rights of the biological parents have been terminated under Article 11 of Chapter 7B of North Carolina's Juvenile Code.⁶³ Article 11 of the Juvenile Code governs the termination of parental rights.⁶⁴ According to the legislative intent section of Article 11, the purpose of the Article is to have procedures in place to terminate parental rights "when the parents have demonstrated that they *will not* provide the degree of care which promotes the . . . well-being of the juvenile."⁶⁵ Also, "to recognize the necessity . . . [of] a permanent plan of care at the earliest

the marriage, or if the parties separated pursuant to a separation agreement or order of separation. *Id.* Consent is also required if the putative father attempted to marry the mother prior to the birth, but the marriage was declared invalid. *Id.* § 48-3-601(2)(b)(2).

56. *Id.* § 48-3-601(2)(b)(3). In order to legitimize a child born out of wedlock, a putative father may file a legitimization petition by attaching a certified birth certificate to the petition and setting out the names of the mother and the child. N.C. GEN. STAT. § 49-10 (2017). "If it appears to the court that the petitioner is the father of the child, the court may thereupon declare and pronounce the child legitimated . . ." *Id.*

57. § 48-3-601(2)(b)(4).

58. *Id.* § 48-3-601(2)(b)(5).

59. *Id.* § 48-3-601(2)(b)(6).

60. *In re* Byrd, 552 S.E.2d 142, 146 (N.C. 2001).

61. *Id.*

62. N.C. GEN. STAT. § 48-1-100(b)(1) (2017).

63. N.C. GEN. STAT. § 48-3-603 (2017).

64. N.C. GEN. STAT. § 7B-1100 (2017).

65. *Id.* § 7B-1100(1) (emphasis added).

possible age, while at the same time recognizing the need to protect juveniles from the unnecessary severance . . . with biological or legal parents.”⁶⁶ Just as the best interest of the child is the main concern of Chapter 48, Article 11 provides that “the best interests of the juvenile should be taken in all cases where the interests of the juvenile and those of the juvenile’s parents or other persons are in conflict.”⁶⁷

Following that logic, it would make sense that the courts should be resolving these issues in favor of the relationship between the minor child and his biological parent, unless the biological parent has shown that he will not provide for the child. However, the case law demonstrates an opposite result.⁶⁸ The courts are prevented from applying the intent of the statute because the language of section 7B-1111 is also too strict.

Section 7B-1111 discusses the various grounds for terminating parental rights.⁶⁹ According to section 7B-1111, if an unwed father of the minor child fails to take the necessary steps to legitimize his child prior to the filing of a petition or motion to terminate parental rights, then his rights can be terminated by the court.⁷⁰ Therefore, in order to prevent the termination of his rights, an unwed father must have: (1) acknowledged his paternity of the minor child either judicially or by an affidavit; (2) legitimized the minor child either by marriage to the mother or through filing a petition for legitimation; or (3) “provided substantial financial support or consistent care with respect to the juvenile and mother.”⁷¹

66. *Id.* § 7B-1100(2).

67. *Id.* § 7B-1100(3).

68. *See* *A Child’s Hope, LLC v. Doe*, 630 S.E.2d 673, 679 (N.C. Ct. App. 2006).

69. N.C. GEN. STAT. § 7B-1111 (2017).

70. *Id.* § 7B-1111(a)(5). The court may also terminate parental rights: (1) if the parent abused or neglected the child; (2) if the parent willfully abandoned the child in foster care for over a year; (3) if the child is placed with the department of social services or another licensed agency and the parent fails to pay a reasonable portion of the child support to the agency for a period of six months preceding the petition while being physically and financially able to do so; (4) if one parent has custody of the child pursuant to a court order and the noncustodial parent willfully and without justification fails to pay child support for a period of one year immediately preceding the filing of the petition; (5) if the parent is incapable of providing proper care for the child and there is a reasonable probability that the incapability will continue for the foreseeable future and the child is deemed dependent; (6) if the parent willfully abandons the child for at least six consecutive months immediately preceding the petition; (7) if the parent has committed murder or voluntary manslaughter of another child of the parent or another child living in the home; (8) if the court has already terminated the parent’s right with respect to another child and the parent lacks the ability or willingness to establish a safe home; or (9) if the father was convicted of rape and the child was conceived as a result of that rape. *Id.* §§ 7B-1111(a)(1)-(11).

71. *Id.* § 7B-1111(a)(5).

Of course, these steps are not easy to take if the putative father is lied to about the outcome of the pregnancy. For example, in situations where the mother told the putative father that the child might not be his, that she had miscarried, or that she had an abortion—it would be difficult for the putative father to take any of the steps required by the statute. In the above situations, the putative father often does not find out that he has a child until he is served with a petition to terminate his parental rights and by then it is too late.⁷² Just because a putative father failed to take the steps provided in section 7B-1111—because he is unaware of the child’s existence—does not prove that he “*will not* provide the degree of care which promotes the . . . well-being of the juvenile.”⁷³ All this shows is that *he did not* take the steps because he was unaware, not that *he would not* have taken the necessary steps had he been given the chance.

In sum, the North Carolina legislature has enacted two strict statutes that are inconsistent with the stated intent of the Chapters. As a result, the courts are forced to do the best they can while adhering to the plain meaning of the statutes. Therefore, revising the statutes is the only way to receive results that are in the best interest of the child and properly align with the stated intent of the General Assembly.

II. STATUTORY FRAMEWORK: “PLAIN MEANING” AND THE DETRIMENT OF BIOLOGICAL FATHERS

Since North Carolina courts are forced to follow the plain meaning of the law, judges are often left with no choice but to make a decision that ignores the statute’s goal of preserving biological relationships.⁷⁴ As a matter of statutory interpretation, if a statute is unambiguous on its face, then courts are compelled to follow the plain meaning.⁷⁵ However, if the statute is ambiguous then the courts can look to outside evidence in order to determine the legislative intent.⁷⁶ As written, sections 48-3-601 and 7B-1111 are unambiguous and courts are left to follow the law of statutory construction and apply the plain meaning rule, even when the result is less than desirable.⁷⁷ For example, the language of the statute has forced courts to rule that a putative father’s knowledge of his child’s existence is irrelevant

72. See *A Child’s Hope, LLC*, 630 S.E.2d at 679 (Jackson, J., dissenting).

73. N.C. GEN. STAT. § 7B-1100(1) (2017) (emphasis added).

74. *In re Byrd ex rel. Adoption of Byrd*, 529 S.E.2d 465, 468 (N.C. Ct. App. 2000), *aff’d sub nom. In re Byrd*, 552 S.E.2d 142 (N.C. 2001) (holding that the court must apply the plain meaning of the statute, even if it results in the outcome is an unjust result).

75. *Id.* at 469.

76. See *id.*

77. *Id.*

as to whether or not he loses his parental rights.⁷⁸ The following cases demonstrate how strict compliance with these narrow rules have led to unjust results.

In September 1997, eighteen-year old Shelly O'Donnell told her seventeen-year old boyfriend, Michael Gilmartin, that she was pregnant with his child.⁷⁹ Michael immediately offered her the opportunity to live at his mother's house during her pregnancy to cut down on expenses.⁸⁰ She refused the offer.⁸¹ Michael then began working two full-time jobs in order to save money for the baby.⁸²

Later in her pregnancy, Shelly informed Michael that he may not be the father because a new ultrasound indicated a different due date, and therefore, a different timeframe for the conception.⁸³ Shelly decided that she wanted to give the child up for adoption.⁸⁴ Since Shelly was unsure of who the child's biological father was, she asked Michael to consent to the adoption.⁸⁵ Michael refused her request and told her that he would take care of the child himself.⁸⁶

On March 4, 1998, Shelly gave birth to Rachel.⁸⁷ Michael found out about the baby through his mother and attempted to see Rachel, but was not allowed because he was not an approved visitor.⁸⁸ Despite not being allowed to visit, he attempted to be there for the baby by purchasing a \$100.00 money order and baby clothes that he gave to his mother to pass on to Rachel.⁸⁹

78. See *In re Adoption of Clark*, 381 S.E.2d 835, 839 (N.C. Ct. App. 1989), *rev'd*, 393 S.E.2d 791 (N.C. 1990) (holding that "a putative father's knowledge of the existence of his illegitimate child is not relevant to a proper analysis of the necessity of a putative father's consent under Section [48-3-603(a)(1)]."). The mother does have to provide the father notice of the adoption petition, but if the father does not do one of the five things listed in §7B-1111(a)(5) prior to the petition, he loses his parental rights, making it immaterial as to whether he objects to his child being adopted. N.C. GEN. STAT. § 7B-1111(a)(5).

79. *In re Byrd ex rel. Adoption of Byrd*, 529 S.E.2d at 467.

80. *Id.* at 469.

81. *Id.*

82. *Id.* at 469-70.

83. *Id.* at 467.

84. *Id.*

85. *Id.*

86. *Id.* On November 14, 1997, Shelly called Michael and informed him that the child may not be his. *Id.* at 472 (Hunter, J., dissenting). Regardless of this knowledge, Michael "refused to consent to the adoption and advised [Shelly] that he still wanted to raise the child." *Id.* at 473.

87. *Id.* at 467 (majority opinion).

88. *Id.* at 473 (Hunter, J., dissenting).

89. *Id.* at 470 (majority opinion). Michael's mother was not on the hospital's allowed visitors list either. She mailed the clothes and money to Shelly. *Id.* at 473 (Hunter, J., dissenting).

The next day, March 5, 1998, the Byrds filed an adoption petition in Wake County District Court to adopt Rachel.⁹⁰ That same day, Michael filed a complaint and petition in Chowan County District Court requesting “(1) the court to order a blood test to determine parentage of the baby, (2) all other proceedings in the cause be stayed until the test results were available and (3) custody should be granted in his favor . . . if he was determined to be the father.”⁹¹ The district court denied Michael’s petition.⁹² Michael later filed a petition for a blood test in Wake County, which was granted by the court.⁹³ The blood test confirmed that he was indeed Rachel’s father.⁹⁴

Despite Michael’s status as Rachel’s biological father and despite all his efforts to gain custody of her, the Wake County District Court applied section 48-3-601 and concluded that Michael’s consent to the adoption was not necessary.⁹⁵ The court based its decision on the fact that Michael “neither adequately acknowledged paternity nor provided the financial support required under General Statute section 48-3-601(2)(b)(4)(II).”⁹⁶ The court of appeals affirmed the lower court ruling.⁹⁷ The court of appeals did admit that Michael faced a “difficult dilemma:” he either had to acknowledge paternity of a child that might not be his, or face the possibility that his child might be adopted without his consent.⁹⁸ The court recognized that this case “may cry out for fairness, or a different result,” but the court was required to apply the rules of statutory construction and apply the “plain meaning” of the law.⁹⁹ The supreme court also affirmed the ruling and noted that “[Michael] did virtually all that could reasonably be expected of any man, and certainly of a seventeen-year-old, under the circumstances,” but there

90. *Id.* at 467 (majority opinion).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 466–67.

A putative father must have acknowledged his paternity and provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both.

N.C. GEN. STAT. § 48-3-601(2)(b)(4)(II) (2017).

97. *In re Byrd ex rel. Adoption of Byrd*, 529 S.E.2d at 468–69.

98. *Id.* at 468–69.

99. *Id.* at 469.

was nothing the court could do because “the statute is clear in its requirements.”¹⁰⁰

In *A Child's Hope, LLC v. Doe*,¹⁰¹ Peter,¹⁰² a college student at UNC Chapel Hill, was in a romantic relationship with Monica,¹⁰³ a woman that he had known for years.¹⁰⁴ In August 2001, Monica told Peter that she was pregnant.¹⁰⁵ Upon hearing the news that he was a father, Peter immediately dropped out of college, moved back home with his mother in Sampson County in order to save money, and began working so that he could provide for the baby.¹⁰⁶ Peter attended a prenatal appointment, cared for Monica's two children during other prenatal appointments, and purchased a larger four door vehicle to transport the child.¹⁰⁷ The couple even discussed baby names and the possibility of marriage in the future.¹⁰⁸ However, when Peter informed Monica that he was not quite ready for marriage, their relationship declined and they eventually broke up.¹⁰⁹

After the break up, Monica requested that Peter relinquish his rights to the baby.¹¹⁰ Peter refused and told Monica that if she was not willing to care for the baby once it was born, he was willing to be the primary caretaker.¹¹¹ Subsequently, Monica told him that she had a miscarriage and that there was “no child.”¹¹² Peter was skeptical after their previous conversations, so he took steps to verify whether or not Monica was telling the truth about the miscarriage.¹¹³ He went to Monica's doctor in order to inquire whether she in fact had a miscarriage, but his investigation at the hospital did not go far.¹¹⁴ Due to confidentiality laws, the doctors could not provide him with any information regarding Monica's medical history.¹¹⁵ After failing at the

100. *In re Byrd*, 552 S.E.2d 142, 146 (N.C. 2001).

101. *A Child's Hope, LLC v. Doe*, 630 S.E.2d 673 (N.C. Ct. App. 2006).

102. For ease of reading, a pseudonym is used in place of “the biological father.”

103. Again, a pseudonym is used for ease of reading.

104. *A Child's Hope, LLC*, 630 S.E.2d at 674.

105. *Id.*

106. *Id.*

107. *Id.* at 674–75.

108. *Id.* at 674.

109. *Id.* at 675.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* Peter saw in an online newspaper article that an unidentified baby was left at the Johnson Memorial Hospital during the same weekend that Monica claimed to have a miscarriage, so Peter contacted the hospital to see if Monica had in fact given birth. *Id.* The hospital staff could not provide him with any medical information regarding Monica due to

doctor's office, Peter went to the Johnston County Department of Social Services to get help in finding his child.¹¹⁶ The agency initiated an investigation and determined that he was indeed the father of the child.¹¹⁷ Peter subsequently filed an action for custody.¹¹⁸

The Wake County District Court ruled in Peter's favor and denied the petition to terminate his parental rights.¹¹⁹ The court of appeals reversed the district court's ruling and held that Peter had no legal right to the minor child.¹²⁰ Therefore, despite Monica lying about the status of the pregnancy, the drastic life changes that Peter made after learning of the pregnancy, and his continued efforts to find the baby, he still had no legal right to the child.¹²¹

The court terminated Peter's rights because he failed to take the specific action required by General Statute section 7B-1111(a)(5).¹²² The court staunchly applied the plain meaning of the statute and held that because Peter failed to establish paternity judicially, legitimize the child through the judicial process or through marriage, or provide the biological mother with *substantial* support or *consistent* care throughout the pregnancy, he had no claim for his parental rights.¹²³

confidentiality concerns. *Id.* After no luck at the hospital, Peter went to the Johnston County Department of Social Services to further inquire about the child mentioned in the article. *Id.* The Johnston County Department of Social Services allowed Peter to take a paternity test, but the test results were negative with regard to the newspaper article baby. *Id.*

116. *Id.*

117. *Id.* at 676.

118. *Id.* Based on Peter's report to the Department of Social Services, one of the DSS social workers contacted Monica and questioned her about the father. *Id.* Monica claimed that the baby was conceived during a rape in Chapel Hill and that she did not know the father's identity. *Id.* The court found "that during the entirety of the pregnancy [Monica] concealed her pregnancy from her entire family due to embarrassment that would be caused from having a third child by a third different father." *Id.*

119. *Id.* at 673.

120. *Id.* at 678-79.

121. *Id.*

122. *Id.*

123. *Id.* Judge Jackson disagreed with the majority's holding and distinguished in her dissent the instant case from *Byrd* and *Anderson*,

The majority relies on the holdings of *In re Adoption of Byrd*, 354 N.C. 188, 552 S.E.2d 142 (2001) and *In re Adoption of Anderson*, 360 N.C. 271, 624 S.E.2d 626 (2006) in its opinion. Although I recognize that this line of cases has established bright line rules regarding the rights of a putative father, I believe that the instant case is distinguishable from both *Byrd* and *Anderson* due to its unique facts. In both *Byrd* and *Anderson*, the putative fathers made offers of support, which subsequently were turned down by the biological mothers. In the instant case, it is undisputed that [Peter] made drastic changes in his life upon learning of the pregnancy. [Peter]'s actions from the time he learned of the pregnancy cannot be seen as anything but an acknowledgment of his paternity.

The court failed to give weight to the fact that it was only when Monica told Peter that she had miscarried that he stopped preparing for the child. Even after receiving the news, Peter made every effort to verify whether Monica's statements were true. Technically, because Peter did not take the precise steps needed under statute, the court was obligated to terminate his parental rights. The legislature did not intend for unjust results such as this, but because of the way the statute is written, the court had no choice but to come to this conclusion. Peter made sufficient attempts to be an engaged father, but because of the way the law is written, his attempts fell short. Essentially, Peter was "damned if he tried and damned if he didn't."

Eight years later, the North Carolina Supreme Court heard a similar case in *In re Adoption of S.D.W.*¹²⁴ In this case, Gregory Johns was involved in a relationship with Laura Welker for less than a year.¹²⁵ They were never married and they never cohabitated.¹²⁶ Their relationship was "mostly physical."¹²⁷ In 2009, while Welker was using an Intra-Uterine Device for birth control, Welker became pregnant and the couple mutually decided that Welker would have an abortion.¹²⁸ After terminating the pregnancy, Welker told Johns that she had changed her birth control method to a hormonal shot, and the couple continued to engage in sexual intercourse without a condom.¹²⁹ By March 2010, Johns had ended the relationship with Welker and all contact between the two had ceased.¹³⁰ Seven months later, Welker gave birth to Johns' baby, S.D.W.¹³¹

Johns did not find out that Welker gave birth until he heard it from a friend in April 2011.¹³² Welker had written a false name under the father line on the Affidavit of Parentage and left the line for the last known address blank.¹³³ At the same time, Welker relinquished custody of S.D.W. to an

Id. at 679. (Jackson, J., dissenting).

124. *In re Adoption of S.D.W.*, 758 S.E.2d 374 (N.C. 2014).

125. *Id.* at 375.

126. *Id.*

127. *Id.* (internal quotation marks omitted).

128. *Id.* at 376.

129. *Id.*

130. *Id.* Welker cut off contact with Johns after March 2010, aside from one night of sexual intercourse on Johns' birthday in November 2010. *Id.*

131. *Id.*

132. *In re S.D.W.*, 745 S.E.2d 38, 41 (N.C. Ct. App. 2013), *rev'd sub nom.* 758 S.E.2d 374 (N.C. 2014).

133. *In re Adoption of S.D.W.*, 758 S.E.2d at 376. When a parent attempts to place her child for adoption, it is necessary for the parent to file an Affidavit of Parentage "[t]o assist the court in determining that a direct placement was valid and all necessary consents have been obtained, the parent or guardian who placed the minor shall execute an affidavit setting out names, last known addresses, and marital status of the minor's parents or possible

adoption agency and the minor child was placed in the custody of the prospective adoptive parents.¹³⁴ As soon as Johns found out that he had a child, he took steps to assert his parental rights and prevent the adoption from taking place.¹³⁵ The North Carolina Supreme Court, however, refused to hold that Johns' parental rights were violated.¹³⁶ The court determined "that obtaining notice of the pregnancy and birth was not beyond Johns' [] control and that he had sufficient opportunity to acknowledge paternity and establish himself as a responsible parent within the time set by statute."¹³⁷ Although Welker told Johns that she was using a hormonal birth control shot, the court's majority said that he should have been on notice because he was not using condoms in addition to the shot.¹³⁸ Justice Jackson criticized the majority for holding that men must "use multiple, redundant forms of contraception or risk losing any rights they might have to raise and care for any children that result from this (protected) sexual activity."¹³⁹

The majority stated Johns should have been on notice of Welker's fertility due to the fact that he had previously impregnated her.¹⁴⁰ The court believed that Johns' knowledge of Welker's fertility should have led him to inquire as to whether or not she was pregnant after the relationship had ended.¹⁴¹

The dissent, on the other hand, posited that the fact of Welker's previous pregnancy cut in the other direction.¹⁴² The first time Welker became pregnant by Johns, she immediately told him.¹⁴³ Therefore, he would have no reason to believe she would not tell him again.¹⁴⁴ It is hard to imagine how "Johns had any meaningful opportunity to acquire notice of the fact that Welker was pregnant or had borne a child" when "Welker told Johns she was using birth control, when she told him about a prior

parents." N.C. GEN. STAT. § 48-3-206(a) (2017). On the Affidavit of Parentage, Welker "incorrectly nam[ed] 'Gregory Thomas James' as the father and [left] blank the line for the father's last known address." In re *Adoption of S.D.W.*, 758 S.E.2d at 376.

134. In re *Adoption of S.D.W.*, 758 S.E.2d at 376. Welker relinquished custody to Christian Adoption Services, Inc. and once again Welker "misidentified the father as 'Gregory Thomas James'" on the agency intake form. *Id.* The agency previously identified Benjamin and Heather Jones as the prospective adoptive parents. *Id.*

135. *Id.*

136. *Id.* at 375.

137. *Id.*

138. *Id.* at 382 (Jackson, J., dissenting).

139. *Id.*

140. *Id.* at 380 (majority opinion).

141. *Id.*

142. *Id.* at 382 (Jackson, J., dissenting).

143. *Id.*

144. *Id.*

pregnancy, when she knew of this pregnancy but said nothing, and when she acted affirmatively to conceal S.D.W.'s existence from him."¹⁴⁵

Without having studied the law, it would not be obvious to these men that they needed to do more in order to secure their parental rights. Being that the courts are obligated to follow *stare decisis* and apply the foundational rules of statutory construction, the courts are powerless to prevent these unjust results. The courts do not have authority to overstep their role as the judicial branch and essentially make new law by ruling contrary to the plain meaning.¹⁴⁶ Therefore, it is up to the legislature to amend the language of the statute in order to better align the wording of the statutes with their intended purpose.

III. FRAMEWORK FOR A POTENTIAL AMENDMENT

In order to amend the statutes correctly and to prevent injustice, the legislature should look to the stated intent of Chapter 48 and Article 11. As previously stated, the best interest of the child has always been the primary focus of the legislature while constructing Chapter 48 and Article 11. Any interest that conflicts with the best interest of the child should be resolved accordingly.¹⁴⁷ Almost forty percent of the children born each year are to unmarried women.¹⁴⁸ The family dynamic is rapidly changing and the law needs to progress with it.¹⁴⁹ Regardless of whether the minor child is born into a nuclear family or out of a one-night-stand, a father's rights should be protected.¹⁵⁰ A father's rights should be equal to the mother's, and only second to the rights of the minor child.

The courts are at the mercy of the law as it is written. Therefore, in order to come to a just result, it is up to the General Assembly to make the changes necessary to protect the father's rights. The statutes as currently

145. *Id.* at 383.

146. *In re Byrd ex rel. Adoption of Byrd*, 529 S.E.2d 465, 468 (N.C. Ct. App. 2000), *aff'd sub nom. In re Byrd*, 552 S.E.2d 142 (N.C. 2001).

147. See N.C. GEN. STAT. § 7B-1100(3) (2017); N.C. GEN. STAT. § 48-1-100(c) (2017).

148. *Unmarried Childbearing*, CDC/NAT'L CTR. FOR HEALTH STATISTICS, <https://perma.cc/F9A7-93G8> (last updated Mar. 31, 2017).

149. See Jennifer R. Johnson, *Preferred by Law: The Disappearance of the Traditional Family and Law's Refusal to Let it Go*, 25 WOMEN'S RTS. L. REP. 125, 128-29 (2004). "Families differ in both size and shape within and among the many cultural and socio-economic layers that make up this society. We cannot continue to pretend that there is one formula . . . to achieve the supportive, loving environment we believe children should inhabit." *Id.* at 131 (internal citation omitted).

150. See Erin E. Gibbs, *Preserving Your Right to Parent: The Supreme Court of North Carolina Addresses Unmarried Fathers' Due Process Rights in In re Adoption of S.D.W.*, 94 N.C. L. REV. 723, 723 (2016).

written generally accomplish the purpose of protecting mothers from an uninterested father refusing to consent to the adoption. However, the statutes do nothing to protect the rights of uninformed or misinformed fathers. Although the negative results are isolated to a narrow group of men, the effect is so catastrophic that it is worth amending the statute to correct it. This Part will offer the North Carolina General Assembly the necessary framework for potential amendments to General Statutes section 48-3-601 and section 7B-1111 in order to soften the language of the current statutes. It will also propose amendments to sections 48-3-601 and 7B-1111 in order to provide for an exception for fathers who are genuinely unaware of their child's existence. If a court finds that a father was unaware of his child's existence, then there should be a hearing to determine what placement is in the best interest of the child.

A. Proposed Amendments to General Statute Section 48-3-601 and Section 7B-1111: To Protect Fathers Who Take Substantial Steps under the Circumstances

In order to give the courts more discretion when interpreting the statutes, a catch-all clause should be added to both section 48-3-601 and section 7B-1111. For example, the current section 48-3-601 says that the putative father's consent for adoption is only necessary if: (1) he is married to the mother;¹⁵¹ (2) he has legitimized the minor under state law;¹⁵² (3) he acknowledged his paternity prior to the filing of the petition;¹⁵³ (4) he has received the minor into his home and held out the minor as his child;¹⁵⁴ or (5) if he is the adoptive father of the minor child.¹⁵⁵ If the legislature added a catch-all clause stating, "or any other substantial attempt, under the circumstances, to provide for the minor child," then the statute would no longer be as strict and it would be in the court's discretion to determine what constitutes a "substantial attempt."

The current section 7B-1111 states that the termination of parental rights is proper if the putative father failed to (1) acknowledge his paternity of the minor child either judicially or by an affidavit; (2) legitimize the minor child either by marriage to the mother or through filing a petition for legitimation; or (3) provide substantial financial support or consistent care with respect to the minor child and mother.¹⁵⁶ Just as with section 48-3-601,

151. N.C. GEN. STAT. § 48-3-601(2)(b)(1) (2017).

152. *Id.* § 48-3-601(2)(b)(3).

153. *Id.* § 48-3-601(2)(b)(4).

154. *Id.* § 48-3-601(2)(b)(5).

155. *Id.* § 48-3-601(2)(b)(6).

156. N.C. GEN. STAT. § 7B-1111(a)(5) (2017).

the legislature should add a catch-all clause stating, “or any other substantial attempt, under the circumstances, to provide for the minor child.” If the legislature adds such catch-all clauses to these statutes, the courts would no longer be plagued by the plain-meaning doctrine and courts would be able to reach a just result for these men and their children.

In order to determine what qualifies as a “substantial attempt,” the courts would consider the specific circumstances of each case. The test would be “if the putative father did all that could be reasonably expected *under the circumstances*,” then his consent would be required for the adoption of the child. An example of a “substantial attempt” would be if there is evidence that the putative father continually offered to provide financial support to the mother during the pregnancy, but she continually denied the help. Or, if the putative father provided emotional and financial help in the beginning of the pregnancy up until he was told that the mother had a miscarriage or an abortion.

Let us use Michael Gilmartin¹⁵⁷ as an example to illustrate how the amendment to section 48-3-601 would work. Michael “(1) offer[ed] to provide [Shelly] with a place to live during her pregnancy, (2) obtain[ed] various jobs to provide support for the child, and (3) fil[ed] several court documents requesting custody of the child upon a determination that he was the child’s biological father.”¹⁵⁸ Under these facts and applying section 48-3-601 as it is currently written, the court could not take into account the fact that Michael made these attempts.¹⁵⁹ All that mattered under section 48-3-601 was that Michael did not acknowledge the paternity of the child, regardless of whether the child was actually his.¹⁶⁰ Even though Shelley made it clear that she would not accept any financial support from him, the statute punished Michael for failing to provide financial support.¹⁶¹ Therefore, the court was forced to rule that Michael’s consent was not necessary for the adoption of his child.¹⁶² With the softer language of the proposed amendment, the court would be able to take into account all the attempts that Michael made as well as the fact that Michael had no knowledge as to whether the child was actually his.

We will use Peter in order to illustrate the effects of the section 7B-1111 proposed amendment. Peter also “continued to prepare to parent the minor child by maintaining consistent contact . . . with [Monica] regarding

157. *In re Byrd ex rel. Adoption of Byrd*, 529 S.E.2d 465 (N.C. Ct. App. 2000), *aff’d sub nom. In re Byrd*, 552 S.E.2d 142 (N.C. 2001).

158. *Id.* at 468.

159. *Id.*

160. *Id.*

161. *Id.* at 470–71.

162. *Id.* at 469.

the progress of the pregnancy, leaving school to return home to care for the child, gaining and maintaining employment, attending a prenatal appointment . . . and purchasing a larger car to transport the child.”¹⁶³ Even after being told that Monica miscarried, Peter “took fairly dramatic steps to ensure the veracity of [Monica’s] statements” and searched for evidence of his child.¹⁶⁴ After finding out that his child was not miscarried, Peter immediately filed an action to legitimate the child.¹⁶⁵ In applying section 7B-1111 as written, the court was unable to look at all the relevant circumstances, therefore, the court held that “[d]espite the fact that [Peter] may have acted consistently with acknowledging his paternity, the statute is clear in its requirements . . . and there was no evidence that [Peter] met those requirements.”¹⁶⁶ The court was also unable to consider the fact that Monica “purposefully deceived” Peter.¹⁶⁷ Under the proposed amendment, the court would be able to look at the whole picture and determine whether Peter did all that could be reasonably expected of him under the circumstances.

These amendments would protect fathers, like Michael and Peter, that arguably took significant steps to provide for their children yet failed to take the specific steps listed in sections 48-3-601 and 7B-1111. Courts would no longer have to “yield to . . . judicial stricture”¹⁶⁸ and could consider all the relevant circumstances. Further, because the statutes would no longer be strict and unambiguous, the court could look beyond the plain-meaning of the words and apply the General Assembly’s stated purpose—protection of the biological parent-child relationship by preventing unnecessary separation.¹⁶⁹ With the addition of the catch-all clauses, courts would likely find that Michael and Peter did all that could reasonably be expected of them under the circumstances. Applying the softer language of the amended statutes, Michael and Peter’s consent would have been necessary prior to the adoption of their children.

Adding the catch-all clauses to sections 48-3-601 and 7B-1111 would help men like Michael and Peter who knew about their children and “did virtually all that could reasonably be expected” of them.¹⁷⁰ However, men that were lied to, or not told about the existence of a child, like Johns,¹⁷¹ have

163. *A Child’s Hope, LLC v. Doe*, 630 S.E.2d 673, 674–75 (N.C. Ct. App. 2006).

164. *Id.* at 680 (Jackson, J. dissenting).

165. *Id.* at 676 (majority opinion).

166. *Id.* at 678.

167. *Id.* at 679 (Jackson, J. dissenting).

168. *In re Byrd ex rel. Adoption of Byrd*, 529 S.E.2d at 469.

169. N.C. GEN. STAT. § 7B-1100(2) (2017); N.C. GEN. STAT. § 48-1-100(b)(1) (2017).

170. *In re Byrd*, 552 S.E.2d 142, 146 (N.C. 2001).

171. *In re Adoption of S.D.W.*, 758 S.E.2d 374 (N.C. 2014).

no incentive to make an effort, let alone a “substantial attempt,” to provide for a child that they do not even know exists.

B. Proposed Amendments to North Carolina General Statute Sections 48-3-601 and 7B-1111(a)(5): What to Do When the Putative Father is Unaware of the Mother's Pregnancy

For situations where the father claims that he was not informed of the child's existence, there needs to be more than just a catch-all phrase in the statutes. If a putative father truly did not know about the pregnancy, his parental rights should not be terminated because he failed to acknowledge paternity and provide substantial financial support under sections 48-3-601 or 7B-1111(a)(5). It is impossible to acknowledge paternity and provide support for an unknown child.

First, the legislature needs to amend both North Carolina General Statute section 48-3-601 and section 7B-1111(a)(5) to include exceptions regarding putative fathers with no knowledge of the child.¹⁷² Then, practically speaking, if a putative father receives notice that his parental rights are being terminated pursuant to section 7B-1111 or that his child is being placed for adoption pursuant to section 48-3-601, he would need to immediately file a petition and an affidavit swearing under penalty of perjury that he falls within the exception and had no knowledge of the child's existence.¹⁷³ Finally, after receiving the petition and affidavit, the court would need to have a hearing to determine whether placing the child with the putative father would further the best interest of the child.¹⁷⁴

1. An Exception for Fathers With No Knowledge of the Child

If a putative father truly did not know about the pregnancy, his parental rights should not be terminated because he failed to acknowledge paternity and provide substantial financial support under either section 7B-1111 or section 48-3-601.

The current section 7B-1111 states that termination of parental rights is proper if “[t]he father of a juvenile born out of wedlock” failed to (1) acknowledge his paternity of the minor child either judicially or by an affidavit; (2) legitimize the minor child either by marriage to the mother or through filing a petition for legitimation; or (3) provide substantial financial support or consistent care with respect to the minor child and mother.¹⁷⁵ The

172. See *infra* Section III.B.1.

173. See *infra* Section III.B.2.

174. See *infra* Section III.B.3.

175. N.C. GEN. STAT. § 7B-1111(a)(5) (2017).

legislature should amend the language in section 7B-1111(a)(5) from “[t]he father of a juvenile born out of wedlock” to “[t]he father of a juvenile born out of wedlock, *with the knowledge of the juvenile’s existence*.”¹⁷⁶ The addition of “with the knowledge of the juvenile’s existence” would provide for an exception within the statute in order to prevent unjust rulings.

The current section 48-3-601 states that a putative father’s consent to adoption is only required if he has done one of the following things before the filing of the adoption petition: (1) he is married to the mother;¹⁷⁷ (2) if he has legitimized the minor under state law;¹⁷⁸ (3) if he acknowledged his paternity prior to the filing of the petition;¹⁷⁹ (4) if he has received the minor into his home and held out the minor as his child;¹⁸⁰ (5) or if he is the adoptive father of the minor child.¹⁸¹ The legislature should amend the language of section 48-3-601 to include a clause that states “if the biological father was unaware of the child’s existence until after the date of the adoption petition, then the biological father may petition the court and request that his consent be required prior to the adoption.”

2. *Petition and Affidavit*

Courts must determine whether or not the putative father actually knew about the child.¹⁸² Since determining that the father had no knowledge of the child does not immediately give the father custody but only gives him the opportunity to have a hearing, the burden of proof should be relatively low to avoid unjust results. For example, in the past, courts have looked at whether or not the father should have known of the child’s existence or whether he took the proper steps to find out.¹⁸³ The courts have held that having sexual intercourse with a known-fertile woman was enough to put a

176. *Id.*

177. N.C. GEN. STAT. § 48-3-601(2)(b)(1) (2017). Consent is also required if the putative father attempted to marry the mother prior to the birth but the marriage was declared invalid. *Id.* § 48-3-601(2)(b)(2).

178. *Id.* § 48-3-601(2)(b)(3).

179. *Id.* § 48-3-601(2)(b)(4).

180. *Id.* § 48-3-601(2)(b)(5).

181. *Id.* § 48-3-601(2)(b)(6).

182. In a practical sense, this would apply to men that have been lied to by the biological mother so they would not have knowledge of a child’s existence. It would also apply to situations where a woman gets pregnant after a one-night stand and has no way of getting in contact with the father. There could be other situations where this would apply; however, these are the situations that have been issues in the past. *See In re Adoption of S.D.W.*, 758 S.E.2d 374 (N.C. 2014).

183. *Id.* at 376 (ruling against the putative father because the court believed that he *should* have known about the minor child’s existence because it was within his “control”).

putative father on notice that the mother was pregnant.¹⁸⁴ That even though the mother said she was on birth control, the father should have also worn a condom.¹⁸⁵

Courts should only require that the putative father file a petition and an affidavit swearing under penalty of perjury that he had no knowledge of the child. Making the putative father swear under penalty of perjury provides some protection against fathers who knew about the child and did nothing, yet it provides fathers that truly had no knowledge of the child a chance to prove to the judge that he is in the best interest of the child. For example, being lied to about the presence of birth control or about the existence of the child would be enough to get a putative father past this initial hurdle.

a. Hearing to Determine the Best Interest of the Child

Once the court gets over this initial hurdle of the petition and affidavit, it is necessary to have a hearing to determine what is in the best interest of the minor child. The hearing will determine whether continuing with the adoption proceeding and terminating the father's parental rights is in the best interest of the minor child or whether discontinuing the adoption proceeding and placing the child with the biological father is in the best interest of the minor child. Because the right to parent is a fundamental right of a biological parent, and this hearing could potentially lead to the termination of a father's parental rights, the standard of proof should be whether there is clear and convincing evidence that the putative father is unfit to parent.¹⁸⁶

With that said, the best interest of the child should always be paramount. Therefore, the child's stability should not be overlooked. For example, if the child has already been with the adoptive family for a year or more, then the stability of the child should outweigh the rights of the father and the child should remain with the adoptive family.¹⁸⁷ However, if a putative father petitions the court shortly after the child is born, like these men did, then the court must find by clear and convincing evidence that the putative father is unfit to parent in order to terminate his parental rights. While making this determination, the court must keep in mind that according to the legislature the best interest of the child is best accomplished by

184. *Id.* at 379–80.

185. *Id.*

186. *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982). The Due Process Clause of the Fourteenth Amendment requires that the State support its allegations by clear and convincing evidence before it can sever the rights of parents in their biological child. *Id.*

187. “In the case of a juvenile who is in the custody or placement responsibility of a county department of social services and has been in placement outside the home for 12 of the most recent 22 months . . . the director of the department of social services shall initiate a proceeding to terminate the parental rights . . .” N.C. GEN. STAT. § 7B-906.1(f) (2017).

preventing unnecessary separation of the child and the biological parent whenever possible.¹⁸⁸

CONCLUSION

An absent and uninterested father should not be awarded the benefit of withholding consent to a child's adoption. However, when a father does take substantial steps for the benefit of the child, but not the exact steps enumerated in section 48-3-601, he should not automatically lose his parental rights. Also, if a father is genuinely unaware of the existence of the minor child, through deceit or lack of communication, he should not lose his parental rights without a hearing to plead his case.

North Carolina adoption law, as it now stands, is distressingly inadequate because it does not provide any recourse for biological fathers in these situations. Currently, the plain meaning of the consent statute is at odds with the legislative intent of the Chapter and it is in desperate need of an amendment. The North Carolina General Assembly could remedy these errors by (1) adding catch-all clauses within the statute which would allow for the court's discretion and (2) by having hearings in which the court would determine whether continuing with the adoption proceeding or placing the child with the biological father is in the best interest of the minor child. In both of these situations, the court should make sure it keeps in mind the purpose of the chapter, which is "to advance the welfare of minors by [] protecting minors from unnecessary separation from their original parents."¹⁸⁹

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188. N.C. GEN. STAT. § 7B-1100(2) (2017); N.C. GEN. STAT. § 48-1-100(b)(1) (2017).

189. § 48-1-100(b)(1).

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