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At this time, the record is insufficient to address Ramirez' claims. There is no evidence in the record of the racial composition of the jury pool, the procedure utilized for the jury pool, or the racial composition of the Hall County community. Additionally, for purposes of the *Batson* challenge, the record is unclear on whether Ortega was even peremptorily struck by the State. Furthermore, the record does not include defense counsel's objections, if any, to the removal of Ortega or the State's reasons for exercising the alleged peremptory challenge.

An evidentiary hearing is required to properly resolve these issues, and therefore, these issues are not appropriate for review on direct appeal. Ramirez is free to raise these issues of ineffective assistance of trial counsel in a motion for postconviction relief.

CONCLUSION

The jury's decision to convict Ramirez of assault in the third degree does not preclude the sentencing court from ordering restitution for Brant's broken jaw. A broken jaw is not a per se "serious bodily injury," and the jury's rejection of assault in the first degree does not implicate the sentencing court's findings of fact on the damages actually suffered by Brant. We also find that the record is insufficient to address both of Ramirez' claims of ineffective assistance of counsel.

AFFIRMED.

JEREMIAH J., APPELLANT, V. DAKOTA D., APPELLEE.

826 N.W.2d 242

Filed February 8, 2013. No. S-12-517.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was

granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.

3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
4. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
5. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
6. **Summary Judgment.** If a genuine issue of fact exists, summary judgment may not properly be entered.
7. **Paternity: Adoption.** A biological mother may not deliberately misrepresent or withhold information as to the date of a child's birth in order to prevent the biological father from timely objecting to the adoption of the child.

Appeal from the County Court for Hall County: PHILIP M. MARTIN, JR., Judge. Reversed and remanded for further proceedings.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellant.

Rachel A. Daugherty, of Myers & Daugherty, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

WRIGHT, J.

NATURE OF CASE

Jeremiah J. appeals from the county court's determination that Jeremiah did not comply with the statutory requirement that to contest the adoption of his minor child, he had to file an objection within 5 business days of the child's birth. The court sustained Dakota D.'s motion for summary judgment and dismissed Jeremiah's "Amended Petition to Establish Necessity of Father's Consent to Adoption," concluding there were no

genuine issues as to the facts in this case. We reverse the judgment and remand the cause for further proceedings.

SCOPE OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] Statutory interpretation presents a question of law, which we review independently of the lower court's determination. *In re Interest of Erick M.*, 284 Neb. 340, 820 N.W.2d 639 (2012).

FACTS

Jeremiah and Dakota began dating in 2008 and stopped seeing each other in 2011. In the middle of June 2011, shortly after she became aware of her pregnancy, Dakota told Jeremiah she was pregnant. Following an argument, Dakota told Jeremiah he was not the father and that she did not want Jeremiah to have anything to do with the pregnancy.

In October 2011, Dakota told an adoption agency that Jeremiah was the biological father of her expected child. Danessa Kenney, a caseworker with the agency, called Jeremiah sometime in November to inform him he had been identified by Dakota as a possible biological father for the unborn child. She told Jeremiah that Dakota wanted to place the child up for adoption.

Jeremiah visited with Kenney in person on November 30, 2011, and was given a letter describing his legal rights and responsibilities. The letter stated that the expected due date for the unborn child was February 18, 2012. The letter stated in part that if he wanted to file a notice of objection, he had to do

so "within 5 business days after the birth of the child." At that time, Jeremiah expressed to Kenney that he did not want the child put up for adoption.

After his meeting with Kenney, Jeremiah attempted to contact Dakota by telephone. He was unable to reach her, but he left her a voice mail message. Dakota did not return his telephone call. He again attempted to contact Dakota on December 14, 2011. Again, Dakota did not answer and did not return his telephone call.

The child was born on February 9, 2012, but Jeremiah was not told about the birth. Jeremiah attempted to contact Dakota two times on February 13. She did not answer either of those telephone calls. However, he did manage to speak with her that day. During their brief conversation, Dakota did not tell him that the child had already been born. At the summary judgment hearing, she testified that she did not tell him the child had been born because she did not want him to know about the birth during the time period he had to object to the adoption. Her testimony was, in part, as follows:

> Q[.] Did you communicate directly with him [Jeremiah] on February 13th?
>
> A[.] Yes, I did.
>
> Q[.] Did you tell him that the baby had been born?
>
> A[.] No, I did not.
>
> . . . .
>
> Q[.] Isn't it true that you did not want him to know about the birth?
>
> A[.] Within the five to 10 business days, no, I did not.
>
> Q[.] Let me break this down. Within the five business days that he had to object to the [adoption], is that what you are referring to?
>
> A[.] Yes, I am.
>
> Q[.] You did not want him to know of the birth during that period of time[?]
>
> A[.] That is correct.

After their telephone conversation on February 13, Dakota blocked Jeremiah's telephone number.

Jeremiah called and spoke with Kenney on February 13, 2012, and asked how Dakota's pregnancy was going. Kenney

responded that she could not legally communicate with Jeremiah about the birth of the child. He asked Kenney what he needed to do to exercise his rights as a father. Kenney told Jeremiah to read the letter she had given him in November and the letter would explain to him what he needed to do. She directed Jeremiah to the Web site for the Bureau of Vital Statistics that would provide him access to the paperwork necessary to file an objection to the adoption. As of February 13, Jeremiah did not know that the child had already been born.

Jeremiah contacted a local hospital on February 15, 2012, in an attempt to discover if Dakota had been admitted to the hospital in anticipation of the child's birth. He was told she was not a patient at the hospital. He called the hospital again on February 17, attempting to discover if Dakota was a patient. He was again told she was not. On February 17, he again contacted Kenney who did not provide him with any information. Kenney testified that Jeremiah was angry during that telephone call because he could not get in contact with Dakota and Kenney would not give him any information about his child.

On February 17, 2012, Jeremiah attempted twice to contact Dakota, but was unable to reach her. As of February 17, the day before the child's original due date, Jeremiah was unable to acquire any knowledge that the child had been born and he sought legal help to file an objection. Jeremiah was never told, prior to the birth of the child, that he could file an objection to the adoption before the child was born, and he testified that he did not know it was an option.

On February 20, 2012, Jeremiah signed a "Notice of Objection to Adoption and Intent to Obtain Custody" with the Nebraska Department of Health and Human Services. On the form, Jeremiah noted that the child was due to be born on February 18, but that as of the date the form was signed, it was unknown to him if the child had been born. The notice was filed on February 21, the first business day after the February 18 expected due date. Sometime after he had filed his objection, Jeremiah was told by one of Dakota's coworkers that the child had been born and that it was a girl. He was told the incorrect birth date, and the child's name was incorrect.

On February 23, 2012, Jeremiah filed a "Petition to Establish Necessity of Father's Consent to Adoption" in the county court for Hall County, requesting the court to determine whether Jeremiah's consent was needed for the proposed adoption of the minor child. Dakota moved for summary judgment. At the hearing on Dakota's motion, the court determined that the notice given to Jeremiah on November 30, 2011, complied with the applicable statute because it advised Jeremiah to seek legal counsel immediately. It found that Jeremiah was aware of the pregnancy and that the due date was simply an estimate of when the child would be born and was not a guarantee of the birth date. It sustained Dakota's motion for summary judgment because Jeremiah failed to object to the adoption within 5 business days after the birth of the child, as required by law.

ASSIGNMENTS OF ERROR

Jeremiah assigns as error, restated, that (1) summary judgment was improper because a genuine issue of material fact remains and (2) the county court erred in granting Dakota's motion for summary judgment because the 5-day filing requirement in Neb. Rev. Stat. § 43-104.02 (Reissue 2008) was unconstitutional as applied to him.

ANALYSIS

Summary Judgment

[4-6] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012). After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.* If a genuine issue of fact exists, summary judgment may not

properly be entered. *Nye v. Fire Group Partnership*, 265 Neb. 438, 657 N.W.2d 220 (2003).

The county court sustained Dakota's motion for summary judgment because Jeremiah did not strictly comply with § 43-104.02, which states:

> A Notice of Objection to Adoption and Intent to Obtain Custody shall be filed with the biological father registry under section 43-104.01 on forms provided by the Department of Health and Human Services (1) within five business days after the birth of the child or (2) if notice is provided after the birth of the child (a) within five business days after receipt of the notice provided under section 43-104.12 or (b) within five business days after the last date of any published notice provided under section 43-104.14, whichever notice is earlier. Such notice shall be considered to have been filed if it is received by the department or postmarked prior to the end of the fifth business day as provided in this section.

At the hearing, Dakota presented a prima facie case that would entitle her to a favorable verdict at trial when she introduced evidence that Jeremiah had not strictly complied with § 43-104.02. Her evidence, including affidavits, established that the child's birth date was February 9, 2012, and that Jeremiah did not file a notice of objection within 5 business days of that birth date. Jeremiah admitted that he did not file a notice within 5 business days of the child's birth. Since the statute requires a father to file a notice of objection to the adoption within 5 business days of the child's birth date and Jeremiah did not file such objection, a prima facie case was made.

The burden then shifted to Jeremiah to produce evidence that would create a material issue of fact such that granting summary judgment in Dakota's favor was improper. This burden was met through Dakota's testimony that she withheld the child's date of birth so that Jeremiah would miss the opportunity to file an objection. Summary judgment was not proper because a genuine issue of material fact existed regarding

whether Dakota was equitably estopped from relying upon § 43-104.02 because she purposefully and deliberately misled Jeremiah regarding the date of birth of the child to intentionally prevent him from complying with the statute. Kenney also testified that she did not inform Jeremiah of the birth date when he called her on February 13, 2012.

The evidence established that Jeremiah told Dakota and Kenney of his intention to contest the adoption. He actively sought the child's date of birth, but he was unable to learn the date of birth. Dakota's and Kenney's actions regarding the date of birth of the child raise an issue of material fact whether Dakota is estopped from relying upon § 43-104.02 because she deliberately attempted to deny Jeremiah information concerning the child's date of birth in order to prevent Jeremiah from objecting to the child's adoption.

[7] A biological mother may not deliberately misrepresent or withhold information as to the date of the child's birth in order to prevent the biological father from timely objecting to the adoption of the child. The 5-day notice set forth in § 43-104.02 is not meant to be used as a subterfuge for deception to prevent an alleged father from objecting to the adoption of the child in question. See *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996).

In *Friehe*, the biological mother of the child filed a petition for declaratory judgment in the district court for Hall County seeking a determination of the respective rights of the parties. She asserted that the putative father's rights in regard to the adoption were terminated by his failure to comply with § 43-104.02. In response, putative father asserted that the mother was equitably estopped from claiming the protection of these statutes as a result of fraudulent misrepresentations. Specifically, he alleged that the mother was equitably estopped from relying on § 43-104.02 and Neb. Rev. Stat. § 43-104.04 (Reissue 1993) because the mother intentionally hid the fact of her pregnancy from the putative father in an attempt to prevent him from exercising his right to file a notice of intent to claim paternity within the 5-day period.

In addressing the issue of equitable estoppel, we stated that the doctrine of equitable estoppel applies where, as the

result of conduct of a party upon which another person has in good faith relied to his detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed, citing *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 515 N.W.2d 794 (1994). However, we concluded that the putative father's claims for equitable estoppel were without factual support because there was no evidence that the mother intentionally hid her pregnancy from him.

On the record presented, there is a material issue of fact whether Dakota was equitably estopped from relying on §§ 43-104.02 and 43-104.04 (Reissue 2008) because she intentionally hid the fact of the child's birth in an attempt to prevent Jeremiah from objecting to the adoption. Because there is a material issue of fact in dispute, the county court erred in sustaining Dakota's motion for summary judgment and dismissing Jeremiah's petition.

Constitutional Challenges

Jeremiah asserts that § 43-104.02 as applied to the facts of this case violates his due process and equal protection rights under the 14th Amendment to the U.S. Constitution and article I, § 3, of the Nebraska Constitution. Because we conclude the court erred in sustaining the motion for summary judgment, we do not reach Jeremiah's constitutional challenges to § 43-104.02.

CONCLUSION

A material issue of fact exists whether Dakota was estopped from relying upon § 43-104.02 because she intentionally misled Jeremiah to prevent him from complying with the requirements of § 43-104.02. We reverse the order sustaining summary judgment in favor of Dakota and remand the cause to the county court for further proceedings.

Reversed and remanded for
further proceedings.

Connolly, J., concurring.

I concur in the court's judgment that this cause must be remanded for the district court to determine whether Dakota

intentionally misled Jeremiah about the date of the child's birth. But I disagree that this finding is relevant to a claim of equitable estoppel. Jeremiah neither alleged nor argued in the county court, nor raised on appeal, a claim of equitable estoppel. Instead, he argued at trial and on appeal that the statutes violated his due process and equal protection rights. So the inquiry is whether the county court could not constitutionally apply Nebraska's adoption statutes to bar Jeremiah's claim that his consent to an adoption is required.

The primary issue before the trial court was whether Nebraska's adoption statutes,[1] as applied to Jeremiah, violated his constitutional rights. His petition sought an order determining that he was the child's father and that his consent to an adoption was required. He invoked § 43-104.05(1), which provides a 30-day period for seeking an adjudication of such claims from the date that the putative father timely filed notice of his objection.

In his amended petition, Jeremiah alleged that he had filed his notice of objection on February 21, 2012, the first business day after the probable delivery date in Dakota's notice of the pregnancy. He alleged that Dakota had concealed the child's actual date of birth from him. He specifically claimed that to the extent his failure to comply with § 43-104.02 had rendered his consent to an adoption unnecessary, the adoption statutes violated his due process and equal protection rights.

Jeremiah also sought DNA testing to establish his paternity and an order (1) requiring his consent and (2) determining that as applied to him, Nebraska's adoption statutes violated his constitutional rights. But he did not claim that Dakota should be equitably estopped from claiming that his consent was unnecessary under § 43-104.02.

In sustaining Dakota's motion for summary judgment, the county court rejected Jeremiah's constitutional claims because he failed to timely contact an attorney after receiving notice that Dakota was pregnant and that he was the biological father. This reasoning was essentially a determination that the adoption statutes provided Jeremiah with a sufficient

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[1] See Neb. Rev. Stat. §§ 43-104 to 43-104.23 (Reissue 2008).

opportunity to protect his interest in asserting paternity and seeking custody.

The majority opinion states that Dakota presented a prima facie case that would entitle her to a favorable verdict at trial and that the burden then shifted to Jeremiah to produce evidence that would create a genuine issue of material fact. I disagree. Dakota intended her allegations that Jeremiah had failed to timely file an objection to an adoption with the biological father registry as an affirmative defense. Under our case law, however, Dakota's defense could not entitle her to judgment regardless of whether Jeremiah's allegations were true. The county court could rule for her only because it concluded that Jeremiah could have protected his rights by contacting an attorney. So I do not agree with the majority opinion's burden-shifting scheme for these adoption proceedings.

Moreover, although our case law has sometimes focused on whether the biological mother concealed the child's birth, Jeremiah's claim is not against Dakota. Jeremiah claims that under these circumstances, applying the registration deadline to bar his paternity claim violated his constitutional rights. And unlike the putative father in *Friehe v. Schaad*,[2] Jeremiah did not claim that the mother was estopped from relying on the adoption statutes because of her deceptions. So I believe that the opinion incorrectly characterizes Jeremiah's constitutional claims as an equitable estoppel claim.

Due Process Requires an Adequate Opportunity to Form a Relationship With a Child

An analysis of Jeremiah's due process claim necessarily starts with *Lehr v. Robertson*.[3] There, the U.S. Supreme Court considered whether New York's putative father statutes violated an unwed father's right to develop a relationship with his biological child. The putative father had never lived with or supported his alleged child and had rarely seen her. But

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[2] *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996).

[3] *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983).

after the mother married, her husband sought to adopt the child when she was over 2 years old. The putative father did not know of the adoption proceeding. Before the court entered the adoption decree, he had commenced a separate proceeding to have a court determine his paternity and order support payments and visitation. After the adoption was ordered, however, the court dismissed his petition. New York maintained a putative father registry and notified any registered putative father of an adoption proceeding. The putative father had not registered and argued that he did not know of the requirement. He claimed that he was entitled to notice and a hearing before he was deprived of an actual or potential relationship with his biological child.

The Supreme Court distinguished between a developed parent-child relationship and a potential relationship:

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] 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. At that point it may be said that he "act[s] as a father toward his children." . . . But the mere existence of a biological link does not merit equivalent constitutional protection. . . .
>
> 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. . . .
>
> In this case, we are not assessing the constitutional adequacy of New York's procedures for terminating a developed relationship. . . . We are concerned only with whether New York has adequately protected his opportunity to form such a relationship.[4]

The Court concluded that New York's putative father statutes were adequate to protect the putative father's opportunity interest and that his ignorance of the law was not a reason to criticize it. The Court also rejected his alternative argument that because he had commenced a paternity proceeding, he was

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[4] *Id.*, 463 U.S. at 261-63 (citations omitted).

entitled to "special" notice beyond what the statutory scheme would have provided had he complied:

> The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights. Since the New York statutes adequately protected appellant's inchoate interest in establishing a relationship with [his biological child], we find no merit in his claim that his constitutional rights were offended because the Family Court strictly complied with the notice provisions of the statute.[5]

In analyzing the statutory scheme, however, the Court also pointed out the type of scheme that would be procedurally inadequate to protect a putative father's opportunity interest:

> If this scheme were likely to omit many responsible fathers, and *if qualification for notice were beyond the control of an interested putative father*, it might be thought procedurally inadequate. Yet, as all of the New York courts that reviewed this matter observed, the right to receive notice was completely within appellant's control. By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt [his biological child].[6]

In a footnote, the Court stated, "There is no suggestion in the record that appellee engaged in fraudulent practices that led appellant not to protect his rights."[7]

With this due process framework set out, I turn to Nebraska's statutes.

Nebraska's Adoption Statutes Are Inadequate to Protect a Putative Father's Paternity Claim From a Biological Mother's Fraud

In Nebraska, if a biological mother withholds or misrepresents information about the child's birth to a putative father,

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[5] *Id.*, 463 U.S. at 265.

[6] *Id.*, 463 U.S. at 263-64 (emphasis supplied).

[7] *Id.*, 463 U.S. at 265 n.23.

the adoption statutes are inadequate to ensure he has an opportunity to claim paternity. This is true because if the mother withholds or misrepresents information about the child's birth, a putative father will usually not have an opportunity to timely file a notice of his objection to an adoption and intent to seek custody. And the county court misconstrued how the statutes operate by reasoning that Jeremiah could have protected his rights simply by contacting an attorney after receiving notice of Dakota's pregnancy.

Unless exceptions apply,[8] § 43-104.12 requires the mother's adoption agency or attorney to exercise due diligence to provide a statutory notice that is set out in § 43-104.13 to several categories of potential fathers. Those categories include "[a]ny person who has been identified as the biological father or possible biological father of the child by the child's biological mother . . . ."[9] Under § 43-104.13, the notice "shall be served sufficiently in advance of the birth of the child, whenever possible, to allow compliance with subdivision (1) of section 43-104.02."[10] In most circumstances, including here, § 43-104.02 requires a putative father to file a notice of his paternity claim during a 5-day period that begins on the child's date of birth.

Under § 43-104.13, the biological mother's notice to a putative father must include the following information: (1) the mother's name, that she is pregnant, and her "expected or actual date of delivery"; (2) that the mother plans to relinquish custody or join in a petition for adoption filed by her husband; (3) that the mother has identified the recipient as a possible biological father; and (4) that the recipient may have rights with regard to the child.[11] Under § 43-104.13(5), the notice must state that the recipient has the right to (a) deny paternity, (b) waive parental rights, (c) relinquish and consent to adoption, (d) file a notice of objection and intent to obtain custody

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[8] See § 43-104.18.

[9] See § 43-104.12(5).

[10] See § 43-104.13.

[11] See *id*.

under § 43-104.02, or (e) object to an adoption proceeding in a court that has already determined that he is the child's biological father.[12]

In addition, the notice must state that if the putative father plans to object to the adoption and seek custody, he should seek his own legal counsel immediately. Alternatively, if he wishes to waive his rights, he can contact the mother's agency or attorney. Finally, the notice must inform the recipient that if he is the biological father and if the child is not adopted, he has a duty to support the child and to pay for pregnancy-related expenses.[13]

But under § 43-104.13, if the biological mother's agent provides prebirth notice of the pregnancy, her agent is required to provide only the mother's *expected* delivery date. There is no requirement for the State, the biological mother, or her agent to notify the putative father of the child's birth or to notify him that he can file a prebirth notice of objection. Moreover, even if he were told that he could file a prebirth notice of objection—because of the postbirth filing requirement under § 43-104.02—the prebirth notice of objection would be insufficient to provide him with an opportunity to claim paternity and demonstrate that he is fit to be the custodial parent.

Many other jurisdictions provide a putative father with an opportunity to receive notice of an adoption proceeding or to object to an adoption if he has timely filed a notice of his intent to claim paternity with a putative father registry.[14] But the statutes vary widely in their requirements and effect.

Some of these statutes require a putative father to register a paternity claim with the registry before the child's birth *or* within a specified period after the child's birth.[15] Under

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[12] See *id*.

[13] See *id*.

[14] See Annot., 28 A.L.R.6th 349 (2007).

[15] See, e.g., Ala. Code § 26-10C-1(i) (2009); Mont. Code Ann. § 42-2-206 (2007); Tenn. Code Ann. § 36-2-318 (2001); Tex. Fam. Code Ann. § 160.402(a) (West 2008).

some state statutes, filing a prebirth claim of paternity would mean that the putative father's consent to an adoption is required, that he is entitled to notice of an adoption proceeding or a proceeding to terminate parental rights, or that he may claim paternity and object to the adoption.[16] That is not true in Nebraska.

It is true that § 43-104.01 permits a putative father to file a prebirth notice of his objection to an adoption and intent to seek custody. Yet, a prebirth registration of a paternity claim is insufficient to obtain any right to assert the claim or receive notification of an adoption proceeding. Instead, under § 43-104.02(1), a putative father's consent to an adoption is not required if he does not file a postbirth notice of an objection within 5 days of the child's birth. Based on the statute's language, this requirement applies even if the putative father has filed a prebirth notice of objection. The majority opinion illustrates that adoption agencies explain the law exactly this way to a putative father. The only possible exceptions for filing a notice of objection after the 5-day deadline apply if the biological mother provided the statutory notice after the child's birth or provided notice through publication.[17]

Nebraska is not alone is requiring a putative father to register a claim of paternity within a specified period after the child's birth. But the deadline under other state statutes with a postbirth filing requirement is typically 30 days from the child's birth.[18] Nebraska's 5-day filing deadline after the

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[16] See, e.g., *Lehr, supra* note 3; Ariz. Rev. Stat. Ann. § 8-106.01(A) (2007); Ark. Code Ann. § 20-18-702 (2005); Ind. Code Ann. § 31-19-5-4 (LexisNexis 2007); Iowa Code Ann. § 233.2(4)(b) (West 2006); Mont. Code Ann. § 42-2-203 (2007); Tenn. Code Ann. § 36-2-318(i); Wyo. Stat. Ann. § 1-22-109(a) (2011).

[17] See § 43-104.02(2).

[18] See, e.g., Ariz. Rev. Stat. Ann. § 8-106.01(B); 750 Ill. Comp. Stat. Ann. § 50/12.1(b) (LexisNexis Cum. Supp. 2009); Ind. Code Ann. § 31-19-5-12 (LexisNexis 2007); Minn. Stat. Ann. § 259.52(7) (West Cum. Supp. 2013); Ohio Rev. Code Ann. § 3107.07(B)(1) (LexisNexis Supp. 2009). See, also, Unif. Parentage Act (2000) § 402, 9B U.L.A. 322 (2001); Rebeca Aizpuru, Note, *Protecting the UnWed Father's Opportunity to Parent: A Survey of Paternity Registry Statutes*, 18 Rev. Litig. 703 (1999).

child's birth appears to be the shortest of any state statutory scheme.[19] And unlike some state statutes, Nebraska's statutes do not contain an exception for putative fathers who did not receive notice of the child's birth.[20]

It is true that under § 43-104.05, we have upheld the 30-day limitation period for commencing a paternity claim against procedural and substantive due process claims. In *In re Adoption of Baby Girl H.*,[21] the biological mother provided the statutory notice after the child's birth and the letter informed the putative father that he had 5 days from his receipt of the letter to file a notice of his objection with the registry. The putative father timely filed a notice of objection, but failed to timely commence a proceeding to adjudicate his claim in the proper court.

But here, we are not dealing with the 30-day period for commencing a paternity claim. More important, it is the 5-day time limit for filing a postbirth notice of an objection that undercuts a putative father's opportunity to object to an adoption and seek custody. Section 43-104.05(1) provides a 30-day limitation period for a putative father to commence a paternity claim *if* the putative father has "timely filed" a notice of objection under § 43-104.02. And under § 43-104.05(2), if the putative father has not timely filed the notice of objection, he is out of luck—i.e., his consent to an adoption is not required.

So, in most cases, unless the biological mother notifies the putative father of the child's birth or the putative father otherwise knows of the birth, the putative father will not have an adequate opportunity to timely file a notice of his objection to an adoption and intent to seek custody. This is likely true even if the putative father has filed a prebirth notice of objection and obtained an attorney. Simply put, the 5-day

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[19] See Aizpuru, *supra* note 18. Compare, Mo. Ann. Stat. § 453.030(3)2(c) (West Cum. Supp. 2013); N.M. Stat. Ann. § 32A-5-19(E) (2006).

[20] See, Ariz. Rev. Stat. § 8-106.01(E); 750 Ill. Compiled Stat. Ann. 50/12.1(g).

[21] See *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001), *disapproved on other grounds, Carlos H. v. Lindsay M.*, 283 Neb. 1004, 815 N.W.2d 168 (2012).

limitation period is not long enough for the State to notify a registered putative father of the child's birth—even if the statutes required the State to provide this notice—and for him to respond with a notice of objection.

The absence of a statutory notice of the child's birth might not present a constitutional problem if the period for filing a post-birth paternity claim were long enough for the putative father to discover the child's birth even without the biological mother's cooperation. Requiring the putative father to make inquiries about the birth is consistent with putting the burden on him to protect his potential relationship with the child. But the combination of these statutes permits the biological mother to flout the procedures intended to protect the putative father's opportunity to object to an adoption and demonstrate his fitness for custody. By withholding or misrepresenting information to the putative father about the child's birth, the biological mother has shut the door on the putative father's opportunity to object.[22]

As explained, however, the Due Process Clause requires the State to adequately protect a putative father's opportunity to form a relationship with his child.[23] And the notice provisions of Nebraska's adoption statutes will frequently not protect a putative father's opportunity interest if the biological mother withholds or misrepresents the fact of the child's birth.

This court has upheld Nebraska's 5-day filing deadline while recognizing that it might violate a putative father's due process rights when he did not have notice of his alleged child's birth. In *Shoecraft v. Catholic Social Servs. Bureau*,[24] the putative father filed a notice of his paternity 9 days after the child's birth—too late to object to the adoption.

We discussed the legislative history behind the 5-day-postbirth filing period. We stated that the Legislature had

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[22] See, also, § 43-104.04.

[23] See *In re Adoption of Baby Girl H., supra* note 21, citing *Lehr, supra* note 3.

[24] *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986).

selected this period as a reasonable time after the birth for the mother to know whether the father will step forward to claim his child and assume parental responsibilities. We concluded that the 5-day filing requirement reflected the State's compelling interest in facilitating a quick adoption when the mother does not know the biological father's intentions. In contrast, the putative father knew of the pregnancy but had not offered to pay for pregnancy expenses, and he knew of the child's birth on the same day. Nonetheless, we recognized that the adoption statutes' failure to require notification to a putative father of the child's birth "might well, in a particular case, render constitutionally suspect as violative of due process the termination of the father's rights."[25]

The next year, in *In re Application of S.R.S. and M.B.S.*,[26] we held that Nebraska's adoption statutes were unconstitutional as applied to a biological father who had lived with and supported the mother and his child for several months. The mother placed the child with an agency for adoption when he was 2 years old. We reversed the trial court's judgment that the father's consent was unnecessary because he had not filed a notice of his paternity claim with the registry until more than 2 years after the child's birth. Relying on *Lehr*, we distinguished fathers who had nurtured and supported the mother and child from those with a mere biological tie to the child. We stated that when the father has acknowledged paternity and established ties with the child, "[t]he effect of the [5-day filing] requirement is to allow the mother to singlehandedly sever a relationship between father and child, no matter what the quality of that relationship is."[27]

In two later cases, we similarly held that Nebraska's adoption statutes were unconstitutionally applied to permit a stepfather's adoption of the biological father's child without his consent in the following circumstances: (1) when the biological

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[25] *Id.* at 578, 385 N.W.2d at 451.

[26] *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987).

[27] *Id.* at 769, 408 N.W.2d at 278.

father has developed a relationship with the child and provided support[28]; and (2) when a court has previously adjudicated the biological father's claim of paternity and ordered visitation and support payments.[29]

In *Friehe*,[30] we again upheld the 5-day filing requirement against a putative father's as-applied due process challenge when he learned of the child's birth on the next day. In the days following the birth, the biological father and mother engaged in discussions over his desire to obtain custody and her desire for an adoption. They agreed to temporarily place the child with an adoption agency and postpone a decision. When the father contacted an attorney 2 days later, he was informed of the filing requirement, but it had expired by 1 day. The father still did not file a notice of objection until the next month, after the mother informed him that she had decided to relinquish the child for adoption. The father later filed a declaratory judgment action, claiming that the adoption statutes were unconstitutional as applied to him. The trial court rejected this claim.

On appeal, we concluded that the putative father had it within his power to assert his rights and that his ignorance of the filing requirement was not an excuse. We concluded that the putative father's own failure to act after learning of the child's birth had deprived him of an opportunity to assert his rights. Thus, under the facts of the case, the statutes did not violate his due process rights.

But here, the critical distinction is that the putative father claims he did not know of the child's birth. Jeremiah did not move for summary judgment. Accepting his allegations as true, however, the 5-day-postbirth filing requirement permitted Dakota to singlehandedly deny Jeremiah any opportunity to preserve his right to object to the adoption, establish his paternity, and seek custody.[31] She could do this only because of the

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[28] See *In re Adoption of Corbin J.*, 278 Neb. 1057, 775 N.W.3d 404 (2009).

[29] See *In re Adoption of Jaden M.*, 272 Neb. 789, 725 N.W.2d 410 (2006).

[30] *Friehe, supra* note 2.

[31] Compare *In re Application of S.R.S. and M.B.S., supra* note 26.

inadequate protection of a putative father's opportunity interest in the adoption statutes.

Because Dakota has admitted to withholding the child's birth date from Jeremiah, I believe that the only remaining factual issue is whether Jeremiah otherwise knew of the child's birth. Because the court did not correctly decide the due process issue, I believe on remand it must make this finding. I would hold that if the court finds that Jeremiah could not have filed the postbirth notice of objection because of Dakota's deceptions, it cannot constitutionally apply the adoption statutes to bar his claims that he is the child's father and that his consent to the adoption is required. Other courts have reached similar conclusions.[32] Because I reach this conclusion, it is unnecessary to consider whether the statutes would also violate Jeremiah's equal protection rights if applied to bar his claims.

STEPHAN, J., joins in this concurrence.

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[32] See, *In re M.N.M.*, 605 A.2d 921 (D.C. 1992); *Petition of Doe*, 159 Ill. 2d 347, 638 N.E.2d 181, 202 Ill. Dec. 535 (1994); *Doe v. Queen*, 347 S.C. 4, 552 S.E.2d 761 (2001); *In re Adoption of Baby Boy Doe*, 717 P.2d 686 (Utah 1986).