

formation on the medical history to be evaluated in making a determination on whether to bring suit.<sup>77</sup>

### CONCLUSION

Undoubtedly, unwarranted medical malpractice lawsuits are filed by attorneys. It appears that the solution to the overall problem can best be achieved by preventive, rather than remedial measures. To reduce malicious prosecution actions, there must be fewer groundless medical malpractice lawsuits.

Although there are other methods, such as state legislation, probably the most effective alternative is attorney self-regulation by screening potential malpractice claims. Numerous benefits could accrue; i.e. fewer unnecessary lawsuits placing a burden on the already over-crowded judiciary, fewer retaliatory lawsuits filed by falsely accused medical practitioners, better relations between the legal and medical professions, and less governmental involvement in the practice of law in the form of statutes such as those enacted by Florida and California. The benefits appear to be overwhelming. Seldom has the adage "an ounce of prevention is worth a pound of cure" been more appropriate.

CURTIS B. COPELAND

## A SURVEY OF STATE LAW AUTHORIZING STEPPARENT ADOPTIONS WITHOUT THE NONCUSTODIAL PARENT'S CONSENT

### I. INTRODUCTION

THE INCREASE of divorce and remarriage in American society has radically changed the concept of family. A typical family may no longer be composed of two parents and their biological off-springs living in the same household. The trend is toward a stepfamily composed of a parent, a biological child, a spouse, and the spouse's child.<sup>1</sup> This paper essentially concerns the ability of a stepparent (in most cases, a stepfather), married to a custodial natural parent, to adopt a minor child from a previous marriage without the consent of the noncustodial natural parent.

The legal obligations and rights of a stepparent to a stepchild have not been clearly defined. A stepchild, unlike an orphan, has not been legally

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<sup>77</sup> *Id.*

<sup>1</sup> Wadlington, *The Divorced Parent and Consent for Adoption*, 36 U. CIN. L. REV. 196, 208 (1967); Chambers, *Parents' Rights: Adoption Without Consent*, 13 TRIAL No. 16, 29 (Oct. 1977).

protected by welfare laws based on the underlying assumption that the natural parent will support his child from a previous marriage. The law does not, therefore, impose any duty upon a stepparent to support a stepchild.<sup>2</sup> The legislature and the judiciary have emphasized the blood ties between the natural parent and child as well as the natural parent's inherent right to retain control over a biological off-spring.<sup>3</sup> There are two ways a stepparent may become obligated to support a stepchild; by a voluntary assumption of parental duties or by statute.<sup>4</sup> A stepparent is presumed to be legally obligated if he voluntarily assumes support and other responsibilities with the intent to establish an *in loco parentis* relationship. Voluntary assumption creates only limited rights<sup>5</sup> and obligations.<sup>6</sup> The *in loco parentis* relationship gives the stepparent the right to have the stepchild render services and to represent the stepchild in legal actions involving third parties, but does not include the right of the stepparent to collect workmen's compensation or proceeds from insurance policies, wrongful death suits or descent and distribution.<sup>7</sup> Voluntarily assumed obligations also fail to provide stability within the new family unit in that once the marriage is terminated (by divorce or death of a spouse), the noncustodial natural parent, rather than the stepparent, immediately has legal custody of the child.<sup>8</sup> Custody reverts to the natural parent regardless of such factors as the bonds of affection between the stepparent and the stepchild or the child's need for a stable and continuous family relationship.

Adoption clearly resolves the conflicts between a stepparent and the noncustodial natural parent while imposing legal obligations upon the stepparent. Although the stepparent's right to adopt the child helps to solidify an existing family, adoption seems a harsh remedy, especially where the natural parent does not consent. Once an adoption is granted, the relationship between the child and his blood relatives is terminated.<sup>9</sup> The natural

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<sup>2</sup> Berkowitz, *Legal Incidents of Today's "Step" Relationship: Cinderella Revisited*, 4 FAM. L.Q. 209, 210 (1970).

<sup>3</sup> Meyer v. Nebraska, 262 U.S. 390 (1923); Locker v. Venus, 177 Wis. 558, 570, 188 N.W. 613, 617 (1922). See also Lewis & Levy, *Family Law and Welfare Policies: The Case for "Dual Systems,"* 54 CAL. L. REV. 748, 762 (1966).

<sup>4</sup> Berkowitz, *supra* n.2, at 210.

<sup>5</sup> Chicago Mutual Training School Ass'n v. Scott, 159 Ill. App. 350, 354 (1911); Young v. Hipple, 273 Pa. 439, 447, 117 A. 185, 188 (1922); Monk v. Hurlburt, 151 Wis. 41, 45, 138 N.W. 59, 61 (1912).

<sup>6</sup> Even when the stepparent provides a home and supports the child it is not presumed to be gratuitous. The stepparent could recover compensation for the prior services without any legal obligation unless the facts established a voluntary assumption. Miller v. United States, 123 F.2d 715, 717 (8th Cir. 1941); Eickhoff v. Sedalia, Warsaw S.W. Ry., 106 Mo. App. 511, 544, 80 S.W. 966, 967 (1904).

<sup>7</sup> Berkowitz, *supra* n. 2, at 213.

<sup>8</sup> *In re B.G.*, 11 Cal. 3d 679, 697, 523 P.2d 244, 256, 114 Cal. Rptr. 444, 456 (1974); *In re Arkle*, 93 Cal. App. 404, 410, 269 P. 698, 691 (1928). See generally Comment, *Stepparent Custody: An Alternative to Stepparent Adoption*, 12 U. CAL. D.L. REV. 604, 627 (1979).

<sup>9</sup> *E.g.*, CAL. ANN. CIV. CODE § 229 (West 1954).

parent no longer has visitation rights,<sup>10</sup> support obligations<sup>11</sup> or statutory property rights under the laws of descent and distribution.<sup>12</sup>

An "incomplete adoption" has been suggested as a means of avoiding the harshness of stepparent adoptions.<sup>13</sup> This middle approach balances the interests of both parent and stepparent by giving equal custody rights.<sup>14</sup> Additionally, the parent's support obligation is modified or terminated and the stepparent's rights are enlarged by permitting the child to remain within the new family even upon the death of the custodial parent and by permitting the child to assume the stepparent's surname.<sup>15</sup> Apparently this approach stops short of adoption and favors custody in order to retain some of the natural parent's obligations and visitation rights. However, the natural parent's retention of some rights does not alleviate the conflict inherent in a dual parent situation. Furthermore, emotional trauma often results when the court, in order to determine the best interests of the child before awarding custody, asks the child to choose between the stepparent and noncustodial parent. As a result, legislatures are moving toward stronger provisions favoring the adoption of a child by a stepparent.

Some legislatures have recently amended their statutes to favor stepparent adoptions. The social acceptance of a restructured family subsequent to divorce and the awareness that the needs of the stepchild supersede the rights of a noncustodial parent are the reasons for this trend.

Traditionally, the major obstacle to a stepparent's adoption has been the lack of consent by the noncustodial parent. Now adoption may be granted without parental consent in every state. Common grounds set out in various statutes for terminating parental rights are: abandonment; inability to provide care for the child for a set period of time; mental illness or deficiency of the parent; incarceration for certain felonies; continuous drug or alcohol abuse; or extreme child abuse or neglect.<sup>16</sup> In a stepparent adoption, "abandonment" has been liberally defined. Unlike the common law which defined "abandonment" as the intent to permanently sever parental ties with the child,<sup>17</sup> the statutes and courts often interpret it to mean a failure to pay child support and/or communicate with the child for a specified period of time.<sup>18</sup>

<sup>10</sup> *In re Marriage of O'Connell*, 80 Cal. App. 3d 849, 859, 146 Cal. Rptr. 26, 32 (1978).

<sup>11</sup> *Mitchell v. Brown*, 18 Cal. App. 117, 120, 122 P. 426, 427 (1912).

<sup>12</sup> *In re Stewart's Estate*, 30 Cal. App. 2d 594, 597, 86 P.2d 1071, 1072 (1939).

<sup>13</sup> Brodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 44-46 (1975).

<sup>14</sup> *Id.* at 45.

<sup>15</sup> *Id.* at 46.

<sup>16</sup> The statutes establishing these grounds are discussed in tiers one-four, *infra*.

<sup>17</sup> Brodenheimer, *supra* n. 12, at 46.

<sup>18</sup> *E.g.*, UNIFORM ADOPTION ACT, 9 U.L.A. §§ 1-23 (1980). (revised in 1969 and amended in 1971).

Even though abandonment has been liberally construed, the courts generally still insist upon such a finding or the noncustodial parent's refusal to consent serves as an absolute bar to the stepparent adoption.<sup>19</sup> Absent a finding of abandonment, the noncustodial parent can withhold consent unreasonably and without concern that the adoption is in the best interests of the child. In essence, these state courts rely on a two-part test that requires first that the parent must be found unfit before the court considers what is in the best interests of the child.<sup>20</sup>

Some statutes have shifted the emphasis from protecting parental rights to solely protecting the best interests of the child.<sup>21</sup> The result is that an adoption without the consent of noncustodial parent may be granted without a finding of parental unfitness. While earlier cases interpreted these statutes as requiring a finding of parental unfitness before granting an adoption,<sup>22</sup> more recent cases have granted involuntary adoptions absent such a finding.<sup>23</sup> The courts determine the best interests of the child by reviewing the following factors:

[Q]uestions of family stability, . . . present and future effects of adoption or nonadoption on the child, . . . interaction between the child and the contestants, . . . the child's adjustment to his or her living situation, school, community; and . . . mental and physical health of all interested parties.<sup>24</sup>

Nevertheless, these courts have cautiously interpreted statutes which terminate parental rights based solely upon the best interests of the child in order to protect the natural parent's right to control and care for his or her child. It has been a judicial bulwark that the parent has an inherent natural right to control the child and such rights are entitled to due process protections.<sup>25</sup> As will be discussed in detail, the dicta of a recent Supreme Court case indicates that a statute which terminates parental rights absent a finding of parental unfitness violates due process.<sup>26</sup> The legislative trend favoring stepparent adoptions may therefore be curtailed in the future unless the statutes define the term "best interests" of the child and provide explicit

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<sup>19</sup> Comment, *Stepparent Custody: An Alternative to Stepparent Adoption*, 12 U CAL. D.L. REV. 604. See also CAL. CIV. CODE § 224 (West Supp. 1979).

<sup>20</sup> *Westerlund v. Croaff*, 68 Ariz. 36, 198 P.2d 842 (1948); *Beltran v. Heim*, 248 Md. 397, 236 A.2d 723 (1968).

<sup>21</sup> ARIZ. REV. STAT. ANN. § 8-106 (West Supp. 1980-1981); D.C. CODE ANN. § 16-304 (1973); M.D. ANN. CODE art. 16 § 74 (1981); MASS GEN. LAWS ANN. ch. 210 § 3 (West Supp. 1981); VA. CODE § 63.1-225 (1980).

<sup>22</sup> *In re Hyatt*, 24 Ariz. App. 170, 536 P.2d 1062 (1975); *Logan v. Coup*, 238 Md. 253, 208 A.2d 694 (1965).

<sup>23</sup> *In re New England Home for Little Wanderers*, 367 Mass. 631, 328 N.E.2d 854 (1975) *Lloyd v. Shutes* 24 Md. App. 515, 332 A.2d 338 (1975); *Dyer v. Howell*, 212 Va. 453, 184 S.E.2d 789 (1971).

<sup>24</sup> *In re J.O.L. III*, 409 A.2d 1073, 1075 (D.C. 1979).

<sup>25</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>26</sup> *Quilloin v. Walcott*, 434 U.S. 246 (1978).

criteria in order to insure that the court's decision is not arbitrary and capricious.

This paper will explore the constitutional implications involved in terminating parental rights without consent as well as the potential vagueness in a "best interest" statute. There will be a review of the law in every state regarding stepparent adoptions and each state's statute will be categorized according to the liberality of its provisions and its interpretations in permitting adoptions without parental consent. The state statutes are categorized into four tiers. The first tier includes not only the progressive "best interest" states (including recent Canadian Law) but also contains statutes which combine a best interest test with a finding of parental unfitness. The second tier consists of state statutes modeled after the Uniform Adoption Act<sup>27</sup> which requires a liberal finding of abandonment; i.e. failure to provide support and/or communicate with the child for a period of time. Tier three encompasses statutes with provisions similar to, but not as liberal as, the Uniform Adoption Act or the best interest statutes. Many of the states in tier three are difficult to classify as will be demonstrated by a closer look at the statutes. Finally, tier four is composed of a potpourri of states which seem to severely restrict the courts discretion by requiring a traditional finding of parental unfitness. The status of stepparent adoptions without consent of a natural parent is an area of the law which needs to be reviewed in order to understand the competing interests of the parties involved as well as how each state's statutory and case law has addressed the social problems emanating from stepparent-stepchild relationships.

## II. CONSTITUTIONAL PROBLEMS IN INVOLUNTARY ADOPTIONS

The Supreme Court has consistently held that parents have a fundamental right as well as a privacy interest in controlling the upbringing of their children. A constitutional liberty interest guaranteed to the family was first formally recognized by the Supreme Court in *Meyer v. Nebraska*.<sup>28</sup> The Court held that the fourteenth amendment's guarantee of "liberty" protects "the right of the individual . . . to marry, establish a home and *bring up children*."<sup>29</sup>

The Court recently reaffirmed its position that parents have a liberty interest in the care and custody of their children in *Stanley v. Illinois*.<sup>30</sup> It was also found that before parental rights can be terminated, due process requires a hearing to determine whether or not the parent is unfit.<sup>31</sup> The

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<sup>27</sup> UNIFORM ADOPTION ACT, 9 U.L.A. §§ 1-23 (revised in 1969 and amended in 1971).

<sup>28</sup> 262 U.S. 390 (1923). The court upheld the right of parents to have their minor children taught German.

<sup>29</sup> *Id.* at 399 [emphasis added].

<sup>30</sup> 405 U.S. 645 (1972). An unwed father was entitled to a hearing on his fitness as a parent before being denied custody of his children.

<sup>31</sup> *Id.* at 651-52.

Court reasoned that the state's interest in caring for the children is "de minimis" unless it can prove the father is unfit to care, nurture, manage or have custody of his children.<sup>32</sup> Although *Stanley* seemed to imply that only biological parents have a due process right to a hearing on fitness before being denied custody, it was recognized in *Smith v. Organization of Foster Families for Equality & Reform* that foster parents, similar to biological parents, have a constitutionally protected interest.<sup>33</sup> This court acknowledged the fact that a loving and interdependent relationship between an adult and child may exist even in the absence of a blood relationship.<sup>34</sup> Relying upon this rational, a stepparent, analogous to a foster parent, would seem to have a constitutionally protected interest in retaining custody of the child. This interest of the stepparent is paramount to the state's interest, but when in conflict with the biological parent, requires a balancing of rights.

In *Quilloin v. Walcott*,<sup>35</sup> the Supreme Court limited the broad language in *Stanley*<sup>36</sup> which implied that a parent must be found unfit before parental rights can be terminated. *Quilloin* states that the degree of protection afforded the rights of a parent must always be balanced with other interests to determine which are more substantial.<sup>37</sup> A best interest of the child standard is not *per se* unconstitutional and can be applied in specific circumstances without violating a parent's substantive rights. In order to distinguish this case from past precedent, the Court stated:

There is little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.<sup>38</sup>

The child in *Quilloin* was not being removed from the custody of a parent without that parent's consent. Rather, this stepparent adoption proceeding merely gave "full recognition to a family unit already in existence, a result desired by all concerned, except . . . [the noncustodial unwed father]."<sup>39</sup> Even though *Quilloin* held it was constitutional to terminate the parental rights of an unwed father solely upon a "best interest of the child" standard, it was reluctant to apply this holding to a separated or divorced parent. In dicta, *Quilloin* implied that a married parent has more veto power because

<sup>32</sup> *Id.* at 657.

<sup>33</sup> 431 U.S. 816 (1977). The placement agency's arbitrary removal of foster children from a foster home violated the Due Process and Equal Protection clauses.

<sup>34</sup> *Id.* at 844.

<sup>35</sup> 434 U.S. 246 (1978). The issue was whether a Georgia statute which only required a "best interest" standard in granting an adoption over the objection of the unwed father had violated his due process and equal protection rights.

<sup>36</sup> 405 U.S. at 651-52, 657-58.

<sup>37</sup> 434 U.S. at 248.

<sup>38</sup> *Id.* at 255 (citing *Smith v. Organization of Foster Families of Equality & Reform*, 431 U.S. at 862-63. (Stewart, J., concurring)).

<sup>39</sup> 434 U.S. at 255.

during the marriage the parent had supervised and been responsible for the child's welfare.<sup>40</sup> The court assumed that all divorced parents shouldered responsibility for the child during marriage; it did not *specifically* address the issue of a divorced parent who had abandoned the child prior to divorce. Nor did the court specify how it would balance the interests of the child against a parent who had abandoned the child after a divorce for an extended period of time. Thus, it is still unclear whether or not a "best interest of the child standard" must be coupled with a showing of unfitness in order to terminate the parental rights of a divorced parent.

However, even assuming a "best interest of the child" standard may be constitutional in special circumstances, the standard must be explicit in the statute. The Supreme Court has held that constitutional rights may not be infringed by a statute whose terms are "so vague, indefinite, and uncertain" as to cloud their meaning.<sup>41</sup> If the statute does not clearly define the grounds for terminating a parent's rights, the parent would not have adequate notice as to what behavior could be a basis for an adoption without consent.<sup>42</sup> To be constitutional, the statute must also require the judge to specify the reasons that justify the adoption without consent.<sup>43</sup> This requirement of documentation facilitates the consideration of all relevant facts so that the decision is not arbitrary. Finally, the statute should require the court to find the least restrictive alternative to an adoption.<sup>44</sup> A checklist of alternatives would insure that the judge has not overlooked an alternative and that the decision has been objectively made.

Best interest statutes should survive constitutional objections if they are not vague and limit the Court's interference with the parent's rights. However, the dicta in *Quilloin* may imply that in some unspecified circumstances a divorced parent has a greater right than an unwed parent to veto an adoption. If the Supreme Court follows the *Quilloin* dicta, the pure best interest statutes would be unconstitutional in reference to a divorced parent.

### III. THE FOUR TIERS OF STATE LAW TERMINATING PARENTAL RIGHTS WITHOUT CONSENT

#### A. *Tier One: Emphasis On The Best Interests Of The Child*

##### 1. Pure Best Interest States

Arizona,<sup>45</sup> the District of Columbia,<sup>46</sup> Maryland,<sup>47</sup> Massachusetts,<sup>48</sup>

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<sup>40</sup> *Id.* at 256.

<sup>41</sup> *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939).

<sup>42</sup> *Alsager v. District Court of Polk County, Iowa*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (3d Cir. 1976).

<sup>43</sup> Cherminsky, *Defining the "Best Interests": Constitutional Protections in Involuntary Adoptions*, 18 J. FAM. L. 79, 81 (1979-1980).

<sup>44</sup> *Id.* at 107. See also *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632, 639-47 (1974). The Court held that "the Fourteenth Amendment requires the school board to employ alternative administrative means, which do not so broadly infringe upon basic civil liberties, in support of their legitimate goals." *Id.* at 647.

<sup>45</sup> ARIZ. REV. STAT. ANN. § 8-106 (West Supp. 1980-81).

and Virginia<sup>49</sup> statutorily require that the best interests of the child be the determining factor in granting an adoption without a natural parent's consent. A finding of parental unfitness is a possible but not essential factor in this determination. Many courts, however, have engrafted the traditional finding of parental unfitness or abandonment on to the statute. Even though the statutes from these states are similarly worded, their interpretations by the courts have varied greatly.

Arizona is the most recent state to enact a best interest statute<sup>50</sup> although the child's welfare has generally been a factor in adoption decisions by the courts.<sup>51</sup> The statute, however, surpasses even the courts' emphasis of the child's welfare in that it is to be the sole rather than the primary consideration in determining whether or not to grant an adoption. Prior case law required a finding of parental neglect or unfitness before reaching the issue of the best interests of the child.<sup>52</sup> A literal interpretation of the statute implies that an adoption may be granted without a finding of unfitness as long as the court has stated a rational basis for its decision.<sup>53</sup>

The District of Columbia has extended the minority view that a best interest standard is a sufficient basis for granting an adoption without the consent of a parent who has neither abused nor abandoned the child.<sup>54</sup> According to the statute, the court may grant an adoption upon a finding of parental abandonment or failure to provide child support<sup>55</sup> or because it is in the child's best interest.<sup>56</sup> The best interest standard was challenged on vagueness grounds in *In re J.S.R.*<sup>57</sup> The court held that the statute was not unconstitutionally vague nor did it terminate parental rights without due

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<sup>46</sup> D.C. CODE ANN. § 16-304 (1973).

<sup>47</sup> MD. ANN. CODE art. 16, § 74 (1981).

<sup>48</sup> MASS. GEN. LAWS ANN. ch. 210, § 3 (West Supp. 1981).

<sup>49</sup> VA. CODE § 63.1-225 (1980).

<sup>50</sup> ARIZ. REV. STAT. ANN. § 8-106 (West Supp. 1980-1981).

<sup>51</sup> In *In re Holman*, 80 Ariz. 201, 295 P.2d 372 (1956) the court held that "the welfare of a child is the primary consideration in determining an application for adoption . . . [and that] the court may ignore the natural rights of the parent, if, in so doing, the child's welfare is promoted." *Id.* at 205, 295 P.2d at 375. (citing to 1 Am. Jur., *Adoptions*, § 4 (1973)). In *Anderson v. Pima*, 77 Ariz. 339, 344, 271 P.2d 834, 836-37 (1954) the court stated that the best interest standards must not be vague and that there must be a finding of unfitness but that the court has the power to grant an adoption without consent if it is in the best interests of the child. In *Rizo v. Burrue*, 23 Ariz. 137, 144, 202 P. 234, 237 (1921) the court held that the natural rights of the parent may be ignored if, in so doing, the child's welfare would be promoted.

<sup>52</sup> *In re Hyatt*, 24 Ariz. App. 170, 176, 536 P.2d 1062, 1068 (1975).

<sup>53</sup> ARIZ. REV. STAT. ANN. § 8-106(c) (West Supp. 1980-1981).

(T)he court may waive the requirement of the consent of any person required to give consent when after a hearing on actual notice to all persons adversely affected the court determines that the interests of the child will be promoted thereby. In such case, the court shall make written findings of all facts upon which its order is founded.

<sup>54</sup> D.C. CODE ANN. § 16-304 (1973).

<sup>55</sup> *Id.* at § 16-304(d).

<sup>56</sup> *Id.* at § 16-304(e).

<sup>57</sup> 347 A.2d 860 (D.C. 1977).



process. In order to meet the needs of a variety of factual situations, the court observed that the best interest standard may be imprecise and elastic as long as it has some guidelines.<sup>58</sup> Nevertheless, in determining the best interests of the child, the court still looked to parental characteristics such as the ability to provide adequate care.

In *In re J.O.L. II* the District of Columbia Court of Appeals reaffirmed the constitutionality of its best interest statute.<sup>59</sup> The court also stated that the statute did not require a legal finding of unfitness or abandonment before granting an adoption. Unlike *In re J.S.R.*, this court looked to a checklist of factors which affect the child rather than solely to the characteristics of the parent<sup>60</sup> and found that in order to make a determination as to the child's best interest, the court must rely on evidence which specifies the particular needs of the child.<sup>61</sup>

The Maryland statute also endorses a best interest standard: "(T)he court may grant a petition for adoption without any of the consents hereinafter specified, if, after a hearing the court finds that such consent or consents are withheld contrary to the best interests of the child."<sup>62</sup> Like the Arizona courts, Maryland courts have upheld the constitutionality of a statute which permits adoption without consent of the parent.<sup>63</sup> However, unlike the Arizona courts, the Maryland courts have construed the statute as not requiring a showing of parental unfitness before considering the best interests of the child.<sup>64</sup> Rather, the court may scrutinize the total circumstances in deciding whether the adoption is in the present and future welfare of the child.<sup>65</sup> This jurisdiction, however, may be shifting emphasis toward requiring more protection of parental rights. Maryland's Supreme Court recently held that a statute which terminates parental rights must be narrowly construed because an adoption decree permanently severs the natural rights of the parent.<sup>66</sup>

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<sup>58</sup> The judicial guidelines added were: "That the standard 'best interests of the child' requires the judge, recognizing human frailty and man's limitations with respect to forecasting the future course of human events, to make an informed and rational judgment, free of bias and favor, as to the least detrimental of the available alternatives." *Id.* at 863 (citing *In re Adoption of Tachick*, 60 Wis. 2d 540, 210 N.W. 2d 865 (1973)).

<sup>59</sup> 409 A.2d 1073 (D.C. 1979), *cert. granted*, 101 S. Ct. 69 (1980), *vacated* 101 S. Ct. 523 (1980).

<sup>60</sup> *Id.* at 1075. The court relied upon the fact that the stepchildren had become emotionally disturbed when forced to visit their natural father.

<sup>61</sup> *Id.* at 1075 n.2.

<sup>62</sup> MD. ANN. CODE art. 16, § 74 (1981).

<sup>63</sup> *Lippy v. Breidenstein*, 249 Md. 415, 240 A.2d 251 (1968); *Winter v. Director of the Dept. of Pub. Welfare*, 217 Md. 391, 143 A.2d 81 (Ct. App.), *cert. denied* 358 U.S. 912 (1958).

<sup>64</sup> *Swartz v. Hudgins*, 12 Md. App. 419, 428, 278 A.2d 652, 657 (1971). The court held that parental rights may be forfeited by abandonment, unfitness of parent, or where it is in the best interests of the child [emphasis added].

<sup>65</sup> 217 Md. at 394-95, 143 A.2d at 83.

<sup>66</sup> *Logan v. Coup*, 283 Md. 253, 257, 208 A.2d 694, 697 (1965).

The Massachusetts legislature enacted a flexible best interest statute that permits adoption without parental consent provided that the "court considers the ability, capacity, fitness, and readiness, of the child's parents . . . and shall also consider the ability, capacity, fitness, and readiness of the petitioners . . . to assume such responsibilities."<sup>67</sup> A recent Massachusetts case also indicated that the best interest standard must be flexible in order to meet the needs of children in various circumstances.<sup>68</sup> An adoption was granted in that case even though the nonconsenting parent had minimally contributed toward the child's support and had periodically communicated with the child. Another case has emphasized the emotional bonds between the child and the stepparent, as well as the stepparent's greater ability and willingness to provide for the child's care.<sup>69</sup> In favoring the party who is better able to supervise the best interests of the child, the Massachusetts Supreme Court interpreted the statute to mean that proof of parental unfitness is not necessary before granting an involuntary adoption.<sup>70</sup>

The last state analyzed in tier one, Virginia, has codified the best interests of the child standard<sup>71</sup> with a clear statement that parental consent is unnecessary: "[I]f after hearing evidence the court finds that the valid consent of any person or agency whose consent is herein above required is withheld contrary to the best interests of the child or is unobtainable, the court may grant the petition without such consent."<sup>72</sup> Virginia courts have relied on this section to terminate a natural parent's rights without consent.<sup>73</sup>

In a later stepparent adoption case, *Malpass v. Morgan*,<sup>74</sup> a Virginia court was more reluctant to sever parental rights. While stating that statute empowered the court to grant an adoption without a finding that the parent had abandoned the child or was an unfit parent, it found that this did not include unfettered discretion in the court to permanently sever parental rights.<sup>75</sup> In a contest between a parent and a non-parent, the court reasoned that the rights of the parent should not be severed unless continuance of the parent-child relationship would be detrimental to the child's welfare.<sup>76</sup> *Mal-*

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<sup>67</sup> MASS. GEN. LAWS ANN. ch. 210, § 3(c) (West Supp. 1981).

<sup>68</sup> *In re Carson*, ..... Mass. App. Ct. ...., 382 N.E.2d 1116, 1118 (1978).

<sup>69</sup> *In re Minor* (No. 1), 367 Mass. 907, 907, 327 N.E.2d 735, 736, (1975).

<sup>70</sup> *In re New England Home for Little Wanderers*, 367 Mass. 631, 641, 328 N.E.2d 854, 861 (1975).

<sup>71</sup> VA. CODE § 63.1-225 (1980).

<sup>72</sup> *Id.* at § 63.1-225(c).

<sup>73</sup> *Dyer v. Howell*, 212 Va. 453, 456, 184 S.E. 2d 789, 792 (1971) (The court relied solely upon the best interests of the child standard because, under the particular circumstances the child desperately needed the security and stability provided by the adoptive home.) *See also Szmblor v. Clements*, 214 Va. 639, 643, 202 S.E.2d 880, 884 (1974).

<sup>74</sup> 213 Va. 393, 192 S.E.2d 794 (1972).

<sup>75</sup> *Id.* at 399, 192 S.E.2d at 799.

<sup>76</sup> *Id.* (citing *Walker v. Brooks*, 203 Va. 417, 124 S.E.2d 195 (1962)). The *Walker* court held that "between a natural parent and a third party, the rights are, if at all possible, to be respected, such rights being founded upon natural justice and wisdom, and being essential to the peace, order, virtue and happiness of society." 203 Va. 421, 124 S.E.2d at 198.

*pass* thus appears to add a judicial requirement to the best interest statute.<sup>77</sup>

Canadian courts rely solely upon the child's best interest in its adoption decisions with no requirement of a showing of parental unfitness. In *In re Blunden*,<sup>78</sup> the court granted the adoption based solely upon a best interest standard even though it felt the statute infringed upon parental rights. Under a best interest standard, if the stepparent has supplanted the natural parent as the child's psychological parent, the court may not deny the adoption because the natural parent has paid support or communicated with the child.<sup>79</sup> The court supported the statute as the best response to society's acceptance of the change in family relationships created by divorce: "[I]f the association is not a normal one, that is the unfortunate outcome of the divorce rather than of the adoption."<sup>80</sup> In *In re R.P.L.*<sup>81</sup> the court stated "that stepparent adoption, against the will of the natural parent to be excluded, is a drastic remedy that should not be used if the benefits sought thereby can be obtained by a custodial order or a change of name or both."<sup>82</sup> However, the court granted the stepparent adoption because any other alternative (a change of custody or of the child's surname) would not provide this child with special needs the same "stability, continuity, and encouragement."<sup>83</sup> The court stated that it was following the legislature's intent to address a societal trend:

The two-father situation is, of course, extremely common on this continent, but it may be becoming less so. Step-parent adoptions now constitute a substantial proportion of the adoptions going through this court: because of the number of service people in the region, the practice in such areas tends to reflect national trends early enough.<sup>84</sup>

## 2. Almost Pure Best Interest States

There are a number of states<sup>85</sup> which do not have pure best interest statutes but incorporate enough of the best interest language to be classified

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<sup>77</sup> See also *Ward v. Law*, 219 Va. 1120, 253 S.E.2d 658 (1979), which followed *Malpass* in requiring a showing of parental unfitness before terminating parental rights.

<sup>78</sup> No. CH 27897 (1st Dist. Halifax Cty., N.S., Can., Aug. 1, 1979), reprinted in 2 FAM. L. REV. 136 (Can. 1979).

<sup>79</sup> 2 FAM. L. REV. at 138-39.

<sup>80</sup> *Id.* at 139.

<sup>81</sup> No. CH 23117 (1st Dist. Halifax Cty., N.S., Can., Dec. 28, 1978), reprinted in 2 FAM. L. REV. 142 (Can. 1979).

<sup>82</sup> 2 FAM. L. REV. at 145.

<sup>83</sup> *Id.* at 143.

<sup>84</sup> *Id.*

<sup>85</sup> Connecticut, CONN. GEN. STAT. ANN. § 45-61f(d) (West Supp. 1980); Idaho, IDAHO CODE §§ 16-1504, 16-2005 (1979); Iowa, IOWA CODE ANN. § 600.7(4) (West Supp. 1981-1982); Maine, ME. REV. STAT. ANN. tit. 19, § 532(2)(A) (West 1981); New Jersey, N.J. STAT. ANN. § 9:3-37 (West Supp. 1980); Wisconsin, WIS. STAT. ANN. § 48.84 (West Supp. 1980-1981).

under tier one. The Connecticut statute<sup>86</sup> permits the court to grant a non-consensual adoption if it is in the best interests of the child and the non-consenting parent has not provided suitable guidance or care. While the statute does not require a legal finding of abandonment or unfitness, it does require the court to consider the parent's conduct in determining whether or not the establishment or reestablishment of a relationship between the child and natural parent would be in the child's best interest.

The Idaho statute<sup>87</sup> provides that an adoption may be granted without parental consent if there is a judicial termination of parental rights based upon a finding of abandonment (failure to pay support, and/or communicate with the child) or because it is in the child's best interests.<sup>88</sup> Similarly, Iowa's statute does not require parental consent but emphasizes the best interests of the child and the stepparent.<sup>89</sup> The Iowa Supreme Court<sup>90</sup> considered it "wise" to affirm an adoption decree even without a showing that the non-consenting parent was unfit because the stepparent had established a parental relationship with the child and had provided the child with a stable home life. Therefore, the court was giving legal recognition to a previously established relationship. In this circumstance, the interests of the child and the stepparent outweighed the rights of the noncustodial parent who refused to consent to the adoption yet did not request custody.<sup>91</sup>

The adoption legislation of Maine primarily addresses the removal of the child from a home where the conditions are detrimental to the child's welfare.<sup>92</sup> Although the statute provides for the termination of parental

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<sup>86</sup> CONN. GEN. STAT. ANN. § 45-61f(d) (West Supp. 1980). Parental consent is not required if:

(1) Over an extended period of time but not less than one year the child has been abandoned by the parent . . . (2) the child has been denied, by reason of acts of [the parent] . . . , the care, guidance or control necessary for his physical, educational moral, or emotional well-being whether such denial is the result of the physical or mental incapacities of the parent . . . attributable to . . . habit, misconduct or neglect . . . [and] in the best interests of the child [the parent should not] be permitted to exercise parental rights . . . .

*Id.*

<sup>87</sup> IDAHO CODE §§ 16-1504; 16-2005 (1979).

<sup>88</sup> *Id.* at § 16-2005(a). The court may grant an order terminating the relationship if: "The parent has *abandoned* the child by . . . including but not limited to [a failure to reasonably] . . . support or [regularly] . . . contact [the child]; failure of the parent to maintain the relationship without just cause for a period of one year [is] prima facie evidence of abandonment . . . . *Id.* [emphasis added].

<sup>89</sup> IOWA CODE ANN. § 600.74(4) (West Supp. 1981-1982). "If any person required to consent under this section refuses to . . . give consent, . . . [t]he court shall then determine, . . . whether, in the best interests of the person to be adopted, and the petitioner, any particular consent is unnecessary . . . ." *Id.*

<sup>90</sup> *In re Zimmerman*, 229 N.W.2d 245, 249 (Iowa 1975). See also *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966). The Iowa Supreme Court has consistently stretched the best interest standard by emphasizing the adopters ability to provide a stable home rather than determining that the noncustodial parent is unfit.

<sup>91</sup> 229 N.W.2d at 249.

<sup>92</sup> ME. REV. STAT. ANN. tit. 19, § 532(2)(A)(1) & (2) (1981). "Consent is not required of parents who: (1) Have willfully abandoned the child; or (2) Are unwilling or unable

rights based upon the child's best interest, it is not a pure best interest statute because it requires the courts to review a number of other factors before granting an adoption.

New Jersey's adoption statutes have recently been revised in order to emphasize the best interests of the child rather than the rights of the non-custodial parent.<sup>93</sup> Prior to this revision, the New Jersey Supreme Court had held that it was improper for a court to consider solely the psychological welfare of the child in an adoption decision.<sup>94</sup> In interpreting the repealed statute,<sup>95</sup> the court found that an adoption could not be granted without a finding of substantial neglect of parental duties or an intent to abandon the child.<sup>96</sup> In order to change these stringent requirements, the revised statute states that its provisions are to be liberally construed so that due consideration is given to the child's best interests.<sup>97</sup>

The New Jersey Superior Court has interpreted the revised statute in *In re Adoption of Children by F.*<sup>98</sup> The stepparent adoption was granted without a finding that the parent was unfit or had abandoned the child.<sup>99</sup> Even though the court liberally construed the statute, it considered the best interests of the parent as well as the child and, in an unprecedented decision, incorporated visitation rights within the adoption decree.<sup>100</sup>

Wisconsin appears in tier one because its supreme court has interpreted its statute<sup>101</sup> to include a best interest standard even though it does not explicitly refer to the child's best interests.<sup>102</sup>

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to undertake parental responsibility." *Id.* Title 20, § 4055 (1)(3) deals with the grounds for terminating parental rights:

The court may order termination of parental rights if: (1) The parent consents to the termination . . . or; (2) The court finds, based on clear and convincing evidence that: (a) the parent is unwilling or unable to protect the child from jeopardy; (b) the circumstances are unlikely to change in a reasonable time; and (c) termination is in the best interests of the child." Section 4055(2) specifies the considerations of the court. "In deciding to terminate parental rights, the court considers the needs of the child, including the child's age, attachments to relevant persons, periods of attachment and separation and the child's ability to integrate into a substitute placement or back into his parent's home.

<sup>93</sup> N.J. STAT. ANN. 9:3-37 to 9:3-54 (West Supp. 1980).

<sup>94</sup> *In re Adoption of Children by D.*, 61 N.J. 89, 98, 293 A.2d 171, 175 (1972). See *In re J.*, 139 N.J. Super. 533, 538-39, 354 A.2d 662, 665, (1976), *rev'd on other grounds*, 73 N.J. 68, 372 A.2d 607 (1977). This case was reversed because the evidence did not support that the adoption was in the child's best interests. But see Boskey, *Alternative Standards for the Termination of Parental Rights*, 9 SETON HALL 1 (1978).

<sup>95</sup> N.J. STAT. ANN. § 9:3-17 to 9:3-36 (1953).

<sup>96</sup> *In re Adoption of Children by D.*, 61 N.J. at 98, 293 A.2d at 175.

<sup>97</sup> N.J. STAT. ANN. at §§ 9:3-37, 9:3-46(b).

<sup>98</sup> 170 N.J. Super. 419, 406 A.2d 986 (1979).

<sup>99</sup> *Id.* at 423, 406 A.2d at 988.

<sup>100</sup> *Id.* at 425-26, 406 A.2d at 989.

<sup>101</sup> WIS. STAT. ANN. §§ 48.84, 48.415 (West Supp. 1980-1981).

<sup>102</sup> *In re Tachick*, 60 Wis.2d 540, 556, 210 N.W. 2d 865, 873 (1973). Although *Tachick* concerns the adoption of an illegitimate child by relatives, the holding can be applied by analogy to a stepparent adoption case.

## B. Tier Two: States Under the Uniform Adoption Act

Five states<sup>103</sup> have enacted the Uniform Adoption Act<sup>104</sup> and three states have modeled sections of their statutes after the Act.<sup>105</sup> The Uniform Adoption Act specifies the circumstances when an adoption will be granted without consent of the parent.<sup>106</sup> Another section includes a best interest standard as one of several factors the court must consider before granting an adoption.<sup>107</sup>

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<sup>103</sup> MONT. REV. CODES ANN. §§ 61-201 to 61-218 (1979); N.M. STAT. ANN. §§ 40-7-1 to 40-7-11, 40-7-13 to 40-7-17 (1978); N.D. CENT. CODE § 14-15-01 to 14-15-23 (1979); OHIO REV. CODE ANN. §§ 3107.01 to 3107.14 (Page 1980); OKLA. STAT. tit. 10, § 60.1-60.23 (West Supp. 1980).

<sup>104</sup> UNIFORM ADOPTION ACT, 9 U.L.A. §§ 1-23 (1980). (revised in 1969 and amended in 1971).

<sup>105</sup> The three statutes which have modeled sections after the Act are: ALASKA STAT. § 20.15.050 (Supp. 1980); ARK. STAT. ANN. § 56-207 (Supp. 1979); IND. CODE ANN. § 31-3-1-6 (Burns 1980).

<sup>106</sup> UNIFORM ADOPTION ACT, 9 U.L.A. at § 6.

### [Persons as to Whom Consent and Notice Are Not Required]

(a) Consent to adoption is not required of: (1) a parent who has [deserted a child without affording means of identification, or who has] abandoned a child; (2) a parent of a child in the custody of another, if the parent for a period of at least one year has failed significantly without justifiable cause (i) to communicate with the child or [emphasis added] (ii) to provide for the care and support of the child as required by law or judicial decree; (3) the father of a minor if the father's consent is not required by section 5(a)(2); (4) a parent who has relinquished his right to consent under section 19; (5) a parent whose parental rights have been terminated by order of court under section 19; (6) a parent judicially declared incompetent or mentally defective if the Court dispensed with the parent's consent; (7) any parent of the individual to be adopted, if (i) the individual is a minor [18] or more years of age and the Court dispenses with the consent of the parent or (ii) the individual is an adult; (8) any legal guardian or lawful custodian of the individual to be adopted, other than a parent, who has failed to respond in writing to a request for consent for a period of [60] days or who, after examination of his written reasons for withholding consent, is found by the Court to be withholding his consent unreasonably; or (9) the spouse of the individual to be adopted, if the failure of the spouse to consent to the adoption is excused by the Court by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances constituting an unreasonable withholding of consent. (b) Except as provided in section 11, notice of a hearing on a petition for adoption need not be given to a person whose consent is not required or to a person whose consent or relinquishment has been filed with the petition.

<sup>107</sup> *Id.* at § 19.

### [Relinquishment and Termination of Parent and Child Relationship]

(c) In addition to any other proceeding provided by law, the relationship of parent and child may be terminated by a court order issued in connection with an adoption proceeding under this Act on any ground provided by other law for termination of the relationship, and in any event on the ground (1) that the minor has been abandoned by the parent, (2) that by reason of the misconduct, faults, or habits of the parent or the repeated and continuous neglect or refusal of the parent, the minor is without proper parental care and control, or subsistence, education, or other care or control necessary for his physical, mental, or emotional health or morals; or, by reason of physical, mental incapacity the parent is unable to provide necessary parental care for the minor, and the court finds that the conditions and causes of the behavior, neglect, or incapacity, are irremedial or will not be remedied by the parent and that by reason thereof the minor is suffering or probably will suffer serious physical, mental, moral, or emotional harm, or (3) that in the case of a parent not having custody of a minor, *his consent is being unreasonably withheld contrary to the best interest of the minor* [emphasis added].

The three states which have statutes modeled after the Act will be discussed first. Alaska's version of the Act focuses on three factors, the parents failure to communicate with the child, failure to pay child support and other acts of abandonment of the child.<sup>108</sup> The legislature has tried to curtail the courts' discretion by attaching words of limitation to the factors considered in granting an adoption without consent; e.g. "failing significantly without justifiable cause" to communicate or provide support. In a recent case, *In re K.M.M.*,<sup>109</sup> the Alaska Supreme Court construed the statute strictly in favor of the nonconsenting parent because of the above limiting language. The court held that an occasional letter coupled with presents and cards at holidays from the nonconsenting parent was a "meaningful" communication which prevented the stepparent adoption.<sup>110</sup>

Arkansas has adopted the Uniform Adoption Act provisions concerning adoption without consent almost verbatim.<sup>111</sup> In construing the statute, the Arkansas Court of Appeals has permitted a stepparent adoption upon a finding that the natural parent has failed to significantly communicate or provide support.<sup>112</sup> However, the supreme court has held that the consent of the parent is required where the evidence does not establish that the parent failed to significantly communicate with the child.<sup>113</sup>

Indiana's statute,<sup>114</sup> similar to Alaska's statute, permits adoption without consent if the parent has failed to or has made only a token effort to communicate with the child, or has failed to pay child support within a specified period of time. A number of Indiana courts have relied upon the statute in their decisions concerning adoptions.<sup>115</sup> *In re Adoption of Anonymous*<sup>116</sup> added the judicial gloss that if the nonconsenting parent communicated with the child whenever able, an inference arose that any subsequent failure to communicate was because of an inability rather than an intent to do so.<sup>117</sup>

Montana,<sup>118</sup> New Mexico,<sup>119</sup> North Dakota,<sup>120</sup> Ohio,<sup>121</sup> and Oklahoma<sup>122</sup>

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<sup>108</sup> ALASKA STAT. § 20.15.050(a)(1)-(2) (Supp. 1980).

<sup>109</sup> 611 P.2d 84 (Alaska 1980).

<sup>110</sup> *Id.* at 88.

<sup>111</sup> ARK. STAT. ANN. § 56-207 (Supp. 1979).

<sup>112</sup> *Brown v. Fleming*, 266 Ark. 814, 817-818, 586 S.W.2d 8, 9-10 (Ark. Ct. App. 1979).

<sup>113</sup> *Harper v. Caskin*, 265 Ark. 558, 561-62, 580 S.W. 2d 176, 178-79 (1979).

<sup>114</sup> IND. CODE ANN. § 31-3-1-6(g)(1) (Burns 1980).

<sup>115</sup> *In re Adoption of Herman*, ..... Ind. App. ...., 406 N.E.2d 277 (1980); *Rosell v. Dausman*, ..... Ind. App. ...., 373 N.E. 2d 185 (1978); *In re Adoption of Lockmondy*, 168 Ind. App. 563, 343 N.E.2d 793 (1976); *In re Adoption of Thornton*, 171 Ind. App. 457, 358 N.E. 2d 157 (1976).

<sup>116</sup> 158 Ind. App. 238, 302 N.E.2d 507 (1973).

<sup>117</sup> *Id.* at 243, 302 N.E.2d at 510.

<sup>118</sup> MONT. CODE ANN. §§ 61-201 to 61-218 (1979).

<sup>119</sup> N.M. STAT. ANN. §§ 40-7-1 to 40-7-11, 40-7-13 to 40-7-17 (1978).

<sup>120</sup> N.D. CENT. CODE §§ 14-15-01 to 14-15-23 (1979).

have enacted the Uniform Adoption Act in its entirety. Two of the states, Ohio and Oklahoma, by case law, have narrowly construed their adoption statutes in order to protect the nonconsenting parent's rights. The Ohio case, *In re Harshey*,<sup>123</sup> applied a strict standard rather than a vague best interest standard in granting a stepparent adoption. In Oklahoma, *In re Lewis Adoption*<sup>124</sup> stressed that its statute<sup>125</sup> requires parental consent unless the parent has wilfully failed to contribute to the child's support.

Even though the Oklahoma courts require a finding of parental unfitness before waiving consent, they impose a strict standard of parental fitness. The Oklahoma Supreme Court has held that a parent who sent gifts and paid the child's insurance premiums did not meet the statutory definition of fitness.<sup>126</sup>

C. *Tier Three: States with Statutes Similar to the Uniform Adoption Act or which are Difficult to Classify*

There are thirteen states that have either enacted statutes similar to some of the Uniform Adoption Act provisions (although often more limiting) or have laws sufficiently distinguishable from the first two tiers to warrant being discussed separately. Nevertheless, the *best interests* standard still plays a significant, though secondary, role in many of these statutes.

In California, the consent of the noncustodial parent is unnecessary if one parent has been awarded custody by judicial decree and the other parent for a period of one year willfully fails to communicate with and to pay for the care, support and education of the child when able to do so.<sup>127</sup> According to the statute, a failure to pay for the care, support, and education of the child as well as to communicate with the child for one year, is *prima facie* evidence that such failure was willful and without lawful excuse.<sup>128</sup> Unlike the Uniform Adoption Act, the court relies on a two-step analysis. As judicially interpreted, the nonconsenting parent must have neglected the child (as defined in section 224) before the court reaches the issue of the child's best interests.<sup>129</sup> The court also deviates from the Act by requiring

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<sup>121</sup> OHIO REV. CODE ANN. §§ 3107.01 to 3107.14 (Page 1980).

<sup>122</sup> OKLA. STAT. tit. 10, §§ 60.1 to 60.20 (West Supp. 1980).

<sup>123</sup> 40 Ohio App. 2d 157, 161, 318 N.E.2d 544, 548 (1974).

<sup>124</sup> 380 P.2d 697, 701 (Okla. 1963).

<sup>125</sup> OKLA. STAT. tit. 10, at 860.7.

<sup>126</sup> *In re Adoption of Eddy*, 4871.2d 1362, 1366-67 (Okla. 1971). *But see* *Mann v. Garrett*, 556 P.2d 1003, 1006 (Okla. 1976). The supreme court held that one support payment made within a year of the adoption petition was a sufficient contribute toward the child's support to maintain the parent's right to prevent the adoption.

<sup>127</sup> CAL. CIV. CODE § 224 (West Supp. 1980).

<sup>128</sup> *Id.*

<sup>129</sup> *Smith v. Ross*, 270 Cal. App. 2d 605, 75 Cal. Rptr. 900 (1969); *Shields v. Thevenin*, 189 Cal. App. 2d 245, 250, 11 Cal. Rptr. 219 (1961).



a finding of both a willful failure to communicate and a failure to support the child.<sup>130</sup>

Georgia's statute<sup>131</sup> is similar to those in tier one in that it includes a *best interests* approach as well as statutory provisions similar to the Uniform Adoption Act. The statute not only permits adoption without consent upon a finding of abandonment or upon the best interests of the child,<sup>132</sup> but it also eliminates the need for consent when the:

[P]arent . . . has failed significantly for one year . . . prior to the filing . . . for adoption (1) to communicate *or* to make a bona fide attempt to communicate with the child *or* (2) to provide for the care and support of the child as required by law or judicial decree, and the court is of the opinion that the adoption is for the best interest of the child.<sup>133</sup>

Louisiana, like Delaware, has a statute which expressly addresses *stepparent* adoptions without the consent of the parent.<sup>134</sup> The statute permits an adoption upon a finding of failure to support<sup>135</sup> *or* failure to visit, communicate or attempt to communicate with the child without just cause for a period of two years.<sup>136</sup> A finding of any one of these conditions is sufficient.<sup>137</sup>

Consent is not required in Oregon if the court makes a finding of either willful neglect or of parental failure to show why the child should not be adopted.<sup>138</sup> The grounds for termination of parental rights include not only unfitness<sup>139</sup> and abandonment<sup>140</sup> but also a failure to communicate provision that is more liberal than the Uniform Adoption Act.<sup>141</sup> In making this determination, the court may disregard the noncustodial parent's *incidental* visitations, communications, or contributions with the child.<sup>142</sup>

Pennsylvania has recently enacted a consolidated adoption act that specifies the grounds for an involuntary termination of parental rights.<sup>143</sup> The statute states that the court's "primary consideration" shall be "the needs

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<sup>130</sup> *Owens v. Murray*, 86 Cal. App. 3d 222, 150 Cal. Rptr. 58 (1978); *Robinson v. Duckett*, 48 Cal. App. 3d 244, 121 Cal. Rptr. 574 (1975).

<sup>131</sup> G.A. CODE ANN. § 74-405 (Supp. 1980).

<sup>132</sup> *Id.* at § 74-405(a).

<sup>133</sup> *Id.* at § 74-405(b) [emphasis added].

<sup>134</sup> LA. REV. STAT. ANN. § 9:422.1 (West Supp. 1981).

<sup>135</sup> *Id.* at § 9:422.1(1) & (2).

<sup>136</sup> *Id.* at § 9:4.1(3).

<sup>137</sup> *Id.* at § 9:422.1.

<sup>138</sup> OR. REV. STAT. §§ 109.312 to 109.330 (1979).

<sup>139</sup> OR. REV. STAT. § 419.523(2) (1979).

<sup>140</sup> *Id.* at § 419.523(4).

<sup>141</sup> *Id.* at § 419.523(3)(b).

<sup>142</sup> *Id.*

<sup>143</sup> PA. STAT. ANN. tit. 23, § 2511 (Purdon Supp. 1981).

and welfare of the child.<sup>144</sup> However, the structure of this section seems to relegate the best interest standard to a position of secondary importance. As structured, a parent must be found unfit before the best interests of the child can be considered. The first subsection states that parental rights can be terminated if there is a finding of refusal or failure to perform parental duties.<sup>145</sup> The second subsection refers to the best interest standard but it is not connected to the first subsection by an "or" indicating that the subsections are of equal weight.<sup>146</sup> The two-pronged approach used by the Pennsylvania courts wherein the second prong, the child's best interest, becomes relevant only if the court finds the parent unfit<sup>147</sup> is novel because it increases rather than limits the court's discretion. Even though the parent has violated his or her duties, the court may deny the adoption by relying upon the best interest standard.

Utah law encompasses some of the Uniform Adoption Act language in directing that consent is unnecessary where the natural parent fails to support or communicate with the child without good cause for a period of a year or more, disregarding any "token" contacts that the father may have attempted.<sup>148</sup>

Under the Delaware statute,<sup>149</sup> the grounds for termination of parental rights includes the usual provisions of abandonment of the child, incompetence of the parent, failure to provide for the child's physical, mental, and emotional needs, as well as a provision which expressly addresses stepparent adoptions.<sup>150</sup> In a stepparent adoption proceeding, parental consent cannot be waived solely because the parent failed to provide for the child's needs. Two additional factors must be found; that the child has resided with the stepparent for one year<sup>151</sup> and that the noncustodial parent has been and will remain incapable of fulfilling parental duties.<sup>152</sup> While this stepparent

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<sup>144</sup> *Id.* at § 2511(b).

<sup>145</sup> *Id.* at § 2511(a). The parental acts which may terminate the parent-child relationship are: "Incapacity, abuse, neglect, or refusal of the parent to care, control, or [provide] substance necessary for the [child's] physical or mental well-being and [such] conditions . . . cannot or will not be remedied by the parent. *Id.* at § 2511(a)(2). See also *In re Burns*, 474 Pa. 615, 379 A.2d 535 (1977); *In re Adoption of Croisette*, 468 Pa. 417, 364 A.2d 263 (1976); *In re Adoption of Orwick*, 464 Pa. 549, 347 A.2d 677 (1975); *In re Adoption of Jagodzinski*, 444 Pa. 511, 281 A.2d 868 (1971).

<sup>146</sup> *Id.* at § 2511(b).

<sup>147</sup> *In re Adoption of David C.*, 479 Pa. 1, 17-18, 387 A.2d 804, 812 (1978) (The court held that a parent who sporadically communicated with his child and irregularly paid child support failed to perform his parental duties, therefore the child's welfare became paramount). *In re Adoption of R.I.*, 468 Pa. 287, 361 A.2d 294 (1976). *In re Adoption of R.I.* is cited in the 1980 Source and Comment of PA. STAT. ANN. tit. 23, § 2511 (Purdon Supp. 1981) as the basic background material for § 2511(b). The commentators relied on its holding that the best interests of the child cannot be considered until there is a finding that a parent has failed to meet the statutory requirements.

<sup>148</sup> UTAH CODE ANN. § 78-30-5 (1977) [emphasis added].

<sup>149</sup> DEL. CODE ANN. tit. 13, § 1103 (Supp. 1980).

<sup>150</sup> *Id.* at § 1103(5)(b).

<sup>151</sup> *Id.* at § 1103(5)(b)(1).

<sup>152</sup> *Id.* at § 1103(5)(b)(2).

adoption section does not specifically refer to a best interest standard, another general adoption section<sup>153</sup> includes a best interest standard. The Delaware Superior Court has combined the two sections in determining whether to grant a stepparent adoption. In *In re Three Minor Children*,<sup>154</sup> the court held that there is a dual requirement for termination of parental rights; a finding that the parent is unfit and a finding that the adoption is in the child's best interest. However, the court retained the discretion to define parental unfitness and the best interests of the child on a case-by-case basis.<sup>155</sup>

Mississippi has recently revised its laws on termination of parental rights.<sup>156</sup> A new section has added a best interest of the child standard to the factors to be analyzed by the courts in an adoption proceeding.<sup>157</sup> Also, the new section specifically enumerates the factors a court may consider to find a parent unfit and to establish that the best interests of the child will be served by the adoption.<sup>158</sup>

Nevada's statute does not include a best interest of the child test.<sup>159</sup> The statute restricts the courts' discretion by requiring a finding of abandonment, neglect, or unfitness of the parent before granting an adoption decree.<sup>160</sup> The statute does give the courts some flexibility, however, in determining whether the standards have been met.<sup>161</sup> Similarly, the New Hampshire statute<sup>162</sup> does not refer to a best interest test. The statute will waive parental consent if the court finds the usual grounds of unfitness or if the parent has failed to provide support or maintain communication with the child for six months.<sup>163</sup>

The Rhode Island termination of parental rights statute<sup>164</sup> not only permits the court to disregard contributions to support which are of an infrequent and insubstantial nature,<sup>165</sup> or to consider lack of communica-

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<sup>153</sup> *Id.* at § 1108(a) (1975).

<sup>154</sup> 406 A.2d 14, 19 (Del. Super. Ct. 1979).

<sup>155</sup> *Id.*

<sup>156</sup> MISS. CODE ANN. § 93-15-101 (Supp. 1980).

<sup>157</sup> *Id.* at § 93-15-103(1).

<sup>158</sup> *Id.* at § 93-15-103(3)(a)-(e) (Supp. 1980). In summary, the grounds for terminating parental rights are: the parent has deserted, abandoned, or made no contact with the child for a specified period of time varying in length depending upon the child's age; or the parent is an alcoholic, or has mental deficiencies or illness, or other extreme physical incapacitation which makes the parent unable to even minimally care for the child; or where there is extreme antipathy by the child toward the parent or where the relationship has eroded because of the parent's neglect, abuse, prolonged absence, failure to communicate, or prolonged imprisonment.

<sup>159</sup> NEV. REV. STAT. § 128.105 (1980).

<sup>160</sup> *Id.* at § 128.105(1).

<sup>161</sup> *Id.* at § 127.105(2).

<sup>162</sup> N.H. REV. STAT. ANN. § 170-B:6(v) (1978).

<sup>163</sup> *Id.* at § 170-C:5 (1978 & Supp. 1979) [emphasis added].

<sup>164</sup> R.I. GEN. LAWS § 15-7-7 (Supp. 1980).

<sup>165</sup> *Id.* at § 15-7-7(a). See also Chambers, *Parent's Rights: Adoption Without Consent*, 13 Trial No. 16, 30 (Oct. 1977).

tion or contact for six months or more prima facie evidence of abandonment or desertion,<sup>166</sup> but also provides facets of a best interests test in that "the court shall give primary consideration to the physical, psychological, mental, and intellectual needs of the child."<sup>167</sup>

Texas, in unique language, permits "(t)he court [to] waive the requirement of consent to the adoption by the managing conservator if it finds that the consent is being refused, or has been revoked, without good cause."<sup>168</sup> In *Curton v. Gordon*,<sup>169</sup> the court held that a parent had willfully abandoned the child because of his imprisonment for a prolonged period and failure to pay for the child's support.

The New York Domestic Relations Law<sup>170</sup> provides for involuntary termination of parental rights upon an individual's petition to adopt a child if it is in the child's best interests. The New York statute is difficult to classify because it follows the trends of the best interest states while still protecting the noncustodial parent's rights. It is clear, however, that the legislature intended to incorporate a best interest standard when it amended its adoption laws.<sup>171</sup>

Prior to the enactment, the court of appeals had stringent standards for determining whether an abandonment had occurred. A finding of abandonment required parental acts which manifested an intent to forego all parental rights and obligations.<sup>172</sup> In a leading case, *In re Susan W.*,<sup>173</sup> the court of appeals held that even though a parent evinces a mere "flicker of interest" in the child, parental rights may not be involuntarily terminated. In response to stringent standards for finding abandonment, the statute was amended to provide that token efforts to fulfill parental obligations will not prevent the courts from terminating parental rights.<sup>174</sup>

The court of appeals in *In re Corey L. v. Martin L.*,<sup>175</sup> interpreted the amendments to the Domestic Relations Law.<sup>176</sup> The court held that the best interests of the child cannot be legally considered in evaluating whether the

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<sup>166</sup> *Id.* at § 15-7-7(d).

<sup>167</sup> *Id.*

<sup>168</sup> TEX. FAM. CODE ANN. tit. 2, § 16.05(d) (Vernon 1975).

<sup>169</sup> 510 S.W.2d 682, 686 (Tex. Civ. App. 1974).

<sup>170</sup> N.Y. DOM. REL. LAW § 111 (McKinney 1977 & Supp. 1980).

<sup>171</sup> N.Y. FAM. CT. ACT § 611 (McKinney Supp. 1978).

<sup>172</sup> *In re Maxwell*, 4 N.Y.2d 429, 433, 151 N.E.2d 828, 850, 176 N.Y.S.2d 281, 283 (1958); *In re Bistany*, 239 N.Y. 19, 24, 145 N.E. 70, 71 (1924).

<sup>173</sup> 34 N.Y.2d 76, 80, 312 N.E.2d 171, 174, 356 N.Y.S.2d 34, 38 (1974). Since the amendments came in response to *In re Susan W.*, a stepparent adoption case, the amendments were also intended to reach children who had been abandoned by the noncustodial parent.

<sup>174</sup> N.Y. DOM. REL. LAW at § 111.

<sup>175</sup> 45 N.Y.2d 383, 380 N.E.2d 266, 408 N.Y.S.2d 439 (1978). See Note, *Corey L. v. Martin L.: Involuntary termination of Parental Rights Under New York's "Abandonment Concept,"* 43 ALB. L. REV. 189 (1979).

<sup>176</sup> N.Y. DOM. REL. LAW at § 111(2)(a)-(e) (McKinney 1977 & Supp. 1980).

parent's acts amount to an abandonment. The best interests of the child do not become relevant until the court makes a finding of abandonment. Furthermore, the court adhered to the prior restrictive interpretation of the statute that insubstantial communication does not, *ipso facto*, constitute abandonment.<sup>177</sup> Therefore, *Corey* requires the court to classify the parent's conduct as abandonment (even if such conduct showed a "flicker" of parental interest in the child's welfare) before applying the amendments.

A number of New York lower courts have devised a method of using a best interest test without first finding an abandonment.<sup>178</sup> In reliance upon a court of appeals decision<sup>179</sup> prior to *Corey*, these courts held that in "extraordinary circumstances" the best interests of the child becomes the primary consideration in adoption proceedings. *Corey* did not address the application of a best interest test in "extraordinary circumstances" nor did it review the lower cases which relied on it. Therefore, stepparents unable to meet the stringent requirements to prove abandonment may rely on a best interests of the child test upon proving "extraordinary circumstances."

#### D. Tier Four: States that Permit Adoption Without Consent Only upon a Finding of Parental Unfitness

The remaining states have enacted statutes<sup>180</sup> that provide for parental terminations based upon the traditional grounds of unfitness (abandonment, neglect, failure to support or maintain). Even where the statutory provisions are sufficiently ambiguous to allow for a liberal judicial interpretation, these courts have not relied upon a best interest standard.

The Alabama statute<sup>181</sup> states that consent may be waived if the parent has abandoned the child or has lost guardianship in a prior divorce proceeding. The Alabama Court of Civil Appeals held that the statute requires a finding of "conscious disregard and indifference toward parental duties" before a stepparent adoption can be granted without the consent of the natural parent.<sup>182</sup> In denying the stepparent adoption, the court emphasized the

<sup>177</sup> 45 N.Y.2d at 389, 380 N.E.2d at 269, 408 N.Y.S.2d at 441-42.

<sup>178</sup> *In re Kim Marie J.*, 59 A.D.2d 716, 398 N.Y.S.2d 374, appeal dismissed, 43 N.Y.2d 826, 373 N.E.2d 371, 402 N.Y.S.2d 572 (1977); *In re Andress*, 93 Misc. 2d 399, 402 N.Y.S. 2d 743 (Fam. Ct. 1978); *In re K.W.V.*, 92 Misc. 2d 292, 399 N.Y.S.2d 593 (Sup. Ct. 1977); *In re Susanne Y.*, 92 Misc. 2d 652, 401 N.Y.S.2d 383 (Fam. Ct. 1977).

<sup>179</sup> *Bennett v. Jeffreys*, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976).

<sup>180</sup> ALA. CODE § 26-10-3 (Supp. 1981); COLO. REV. STAT. § 19-4-107(e)II (1978); CONN. GEN. STAT. ANN. § 45-63(a) (West Supp. 1981); FLA. STAT. ANN. § 63.072 (West Supp. 1980); HAWAII REV. STAT. § 571-61(b)(1)(A)-(F) (1968); ILL. ANN. STAT. ch. 4, § 9.1-8 (Smith-Hurd Supp. 1980); KAN. STAT. ANN. § 59-2102 (1976); KY. REV. STAT. ANN. §§ 199.500(1)(c), § 208C.090(1) (Baldwin 1980); MICH. COMP. LAWS ANN. § 710.51(5)(a)-(b) (Supp. 1981-1982); MINN. STAT. ANN. § 260.221(b)(1)-(7) (West Supp. 1981); MO. ANN. STAT. § 453.040 (Vernon 1977); NEB. REV. STAT. § 43-104 (1978); N.C. GEN. STAT. § 48-6 (Supp. 1979); TENN. CODE ANN. § 36-110 (1977); VT. STAT. ANN. tit. 15, § 435(1) (Supp. 1980); WASH. REV. CODE ANN. § 26.32.040(4) (1961); W.VA. CODE § 48-4-1(a)(2) (1980); WYO. STAT. § 1-22-110 (1977).

<sup>181</sup> ALA. CODE § 26-10-3 (Supp. 1981).

<sup>182</sup> *Straslawicz v. Gallman*, 349 So. 2d 593, 596-97 (Ala. Civ. App. 1977).

parent's ill-health and infrequent employment as mitigating circumstances for a failure to pay child support or communicate with the child.<sup>183</sup> In comparison to previously discussed decisions, this court strictly construed the statute by requiring a subjective intent to disregard parental duties as opposed to the standard approach which emphasizes the best interests of the child.

A recent case reflects the court's adherence to strict construction of the statute.<sup>184</sup> In interpreting one of the factors which obviates the necessity of parental consent, loss of guardianship of the child in a divorce proceeding,<sup>185</sup> the court held that the child must have been removed from the parent in "positive terms" before a custody determination will be classified as a loss of guardianship.<sup>186</sup> This definition of "loss of guardianship" closed the door to an opportunity to define the ambiguous term in such a way as to protect the child's best interests.

The Colorado statute provides that an adoption may be granted without the consent of the natural parent if the court finds an abandonment of the child or a failure to pay child support.<sup>187</sup> In construing the statute the Colorado Court of Appeals stated that the best interests of the child is not paramount in a stepparent proceeding because such a proceeding is not based on a "societal responsibility to improve the child's situation."<sup>188</sup> The court stated that its strict construction was justified because the statute could accomplish its purpose without supplementation by case law. In a seemingly contradictory statement, the court purported to consider the best interests of the child which was not a factor listed in the statute.<sup>189</sup>

The Connecticut statute<sup>190</sup> provides for an adoption by a stepparent but only after an appropriate party has petitioned for the termination of parental rights<sup>191</sup> and the child has been adjudicated free for adoption.<sup>192</sup> There has been little relevant case law interpreting this statute.

Under the Florida statute,<sup>193</sup> parental consent to an adoption is deemed waived upon a finding of abandonment, incompetency or a prior court termination of parental rights. In *Collins v. Cottrill*<sup>194</sup> the court emphasized that the best interests of the child will not alleviate the need for consent or, in

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<sup>183</sup> *Id.*

<sup>184</sup> *Steeler v. McDaniel*, 380 So. 2d 892, 894-95 (Ala. Civ. App. 1980).

<sup>185</sup> ALA. CODE at § 26-10-3.

<sup>186</sup> 380 So. 2d at 895.

<sup>187</sup> COLO. REV. STAT. § 19-4-107(e)(II) (1978).

<sup>188</sup> *In re S.S.F.T.*, 38 Colo. App. 110, 115, 553 P.2d 82, 88-89 (1976).

<sup>189</sup> *Id.* at 115, 553 P.2d at 89.

<sup>190</sup> CONN. GEN. STAT. ANN. § 45-63(a) (West Supp. 1981).

<sup>191</sup> *Id.* at § 45-61(c).

<sup>192</sup> *Id.* at 45-61(j).

<sup>193</sup> FLA. STAT. ANN. § 63.072 (West Supp. 1980).

<sup>194</sup> 388 So. 2d 302, 304 (Fla. Dist. Ct. App. 1980).

the absence of such consent, a finding of abandonment. The court specifically retreated<sup>195</sup> from prior case law<sup>196</sup> holding that the best interests of the child may be the sole factor justifying an adoption. Although the court stated that this was a departure from prior case law it failed to recognize other decisions which had strictly construed the statute. One of these earlier cases, *Durden v. Henry*,<sup>197</sup> held that infrequent visits or failure to support was not equivalent to outright abandonment, and that abandonment must be complete in order to terminate parental rights. Thus neglect by natural parents or disinterest and failure to carry out parental obligations will not always justify terminating parental rights. In *Depres v. Pagel*,<sup>198</sup> the court exemplified this proposition in holding that the incarceration or alcoholism of the natural parent does not necessarily constitute abandonment.

Hawaii, by statute,<sup>199</sup> provides for the involuntary termination of parental rights upon a finding that the natural parent: has deserted the child without means of identification; has surrendered care and custody of the child to another; has failed to communicate with the child; has failed to provide support for the child when able to do so; has been found unable to provide, now and in the future, for the child who had been taken from the parents custody; or has been found to be mentally ill or mentally retarded and unable to give consent to the adoption or provide adequate care for the child. Although this statute does not specifically include a best interests test, reference is made to the "well being" of the child in determining whether the parent can provide adequate care.<sup>200</sup>

In applying this statute, the Hawaii courts have focused on the actions of the parents rather than the best interests of the child. In *In re Adoption of a Minor*,<sup>201</sup> the court, narrowly construing this statute, held that when making a determination of abandonment, the court must look to the total conduct of the parents rather than to any one of the parental acts listed in the statute<sup>202</sup> as reasons for terminating parental rights. Thus a natural father's consent will still be required if he has sent his child an occasional card at Christmas or other holidays.

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<sup>195</sup> *Id.* at § 305.

<sup>196</sup> *Watson v. Watson*, 330 So. 2d 848 (Fla. Dist. Ct. App. 1976); *In re Adoption of Layton*, 196 So. 2d 784 (Fla. Dist. Ct. App. 1967); *In re Adoption of Corcuera*, 145 So. 2d 493 (Fla. Dist. Ct. App. 1962).

<sup>197</sup> 343 So. 2d 1361, 1362 (Fla. Dist. App. 1977). See also *In re Noble*, 349 So. 2d 1215 (Fla. Dist. Ct. App. 1977) (Neglect by a natural parent or disinterest and failure to carry out parental obligations does not always justify an adoption.) and *In re Turner*, 352 So. 2d 957 (Fla. Dist. Ct. App. 1977) (The court held abandonment must be complete in order to terminate parental rights).

<sup>198</sup> 358 So. 2d 905, 907 (Fla. Dist. Ct. App. 1978).

<sup>199</sup> HAWAII REV. STAT. § 571-61(b)(1)(A)-(G) (1968).

<sup>200</sup> *Id.* at § 571-61(b)(1)(E).

<sup>201</sup> 50 HAWAII 255, 259, 438 P.2d 398, 400-01 (1968).

<sup>202</sup> HAWAII REV. STAT. at § 571-61(b)(A)-(G).

The Illinois statute<sup>203</sup> requires consent to an adoption unless the court finds the parent to be unfit as statutorily defined.<sup>204</sup> Although this statute liberally defines "unfitness", the courts have held that absent consent or a finding of unfitness of the natural parents, an adoption cannot be granted solely upon the basis of the best interests or welfare of the child.<sup>205</sup>

The Kansas adoption statute<sup>206</sup> requires the consent of a noncustodial divorced parent unless such parent has neglected to assume parental duties for a period of two years. Unlike other states, the Kansas legislature has left the interpretation of "failure to assume parental duties" to the discretion of the courts. In applying this statute, the Kansas Supreme Court<sup>207</sup> has held that a parent who failed to communicate with the child for five years and withheld child support payments, allegedly to enforce his visitation rights, did not adequately assume the duties of a parent.

Kentucky permits involuntary termination of a parent's rights<sup>208</sup> upon a judicial finding that the parent is unfit and that the termination is in the best interests of the child.<sup>209</sup> The statute specifically sets forth the criteria to be used in determining whether a parent is unfit<sup>210</sup> and what is in the best interests of the child.<sup>211</sup>

In Michigan, the court may terminate a natural parent's rights in favor of the adopting stepparent upon a finding that the nonconsenting natural parent has, for a period of two years, failed to regularly support the child *and* has failed to communicate or visit the child.<sup>212</sup> Because of the recent enactment of this statute, there is little interpretation in case law. The courts may interpret it as not implicitly embodying a best interest test, however, because while the legislature included this test in both child custody<sup>213</sup> and consensual adoption proceedings,<sup>214</sup> it was omitted from the newly enacted nonconsensual adoption statute.

In Minnesota, the juvenile court may grant a stepparent adoption without the consent of the noncustodial parental upon a finding of abandon-

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<sup>203</sup> ILL. ANN. STAT. ch. 40, § 1510 (Smith-Hurd 1980).

<sup>204</sup> *Id.* at § 1501(D)(a-n). Parental rights may be terminated upon a finding of any one or more of the grounds for unfitness; *e.g.* abandonment of the child; failure to be reasonably interested in the child's welfare; neglect, cruelty or physical abuse of the child; adultery; drunkenness; drug addiction; or failure to communicate with the child for twelve months.

<sup>205</sup> *In re Adoption of Burton*, 43 Ill. App. 3d 294, 301, 356 N.E.2d 1279, 1285 (1976).

<sup>206</sup> KAN. STAT. ANN. § 59-2102 (1976).

<sup>207</sup> *Waters v. Zwegardt*, 195 Kan. 614, 408 P.2d 590 (1965); *see Sharp v. Thurman*, 197 Kan. 502, 419 P.2d 812 (1966).

<sup>208</sup> KY. REV. STAT. ANN. § 199.500(1)(c) (Baldwin 1980).

<sup>209</sup> *Id.* at § 208C.090(1)(a)-(f).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at § 208C.090(2)(a)-(e).

<sup>212</sup> MICH. COMP. LAWS ANN. § 710.51(5)(a)-(b) (Supp. 1981-1982).

<sup>213</sup> *Id.* at § 722.23.

<sup>214</sup> *Id.* at § 710.51(1)(d).



ment, neglect (financially, physically or emotionally), failure to pay support, unfitness, or the nonconsenting parent's failure to correct conditions after being declared unfit.<sup>215</sup> These provisions are supplemented by a section<sup>216</sup> which does not require consent of a parent who has lost custody of the child through a divorce or dissolution decree. Unlike the adoption provisions, custody is determined in this section by exclusive consideration of the best interests of the child as statutorily defined.<sup>217</sup> Thus, the statute, read literally, abrogates the necessity of the noncustodial parent's consent even though there was no finding of unfitness or denial of visitation rights during the custody proceeding. However, *Parks v. Torgenson* has construed "loss of custody" to require more than a mere custodial preference such as a divorce decree which extinguishes all parental rights.<sup>218</sup>

The Missouri statute<sup>219</sup> waives parental consent if the child has been willfully abandoned or neglected. However, case law indicates that the Missouri courts have interpreted willful abandonment to mean an intent to sever all parental ties with the child. In *H.J.N. v. E.M.N.*,<sup>220</sup> the Missouri Court of Appeals denied an adoption because it reasoned that the statute, in derogation of the common law, must be construed strictly in favor of the natural parent.<sup>221</sup> Lack of communication with the child cannot be the sole basis for the court's decision to grant the adoption without the noncustodial parent's consent. Even though it was held in *D.A.Z. v. M.E.T.*<sup>222</sup> that mere occasional communications with a child may constitute abandonment, a later case<sup>223</sup> indicates that abandonment is to be strictly construed to mean an intent to totally sever the parent-child relationship. In *Sarona v. La Grands*,<sup>224</sup> the court held that although it would be in the best interests of the child to be adopted and the natural father had failed to provide support and maintenance, the evidence failed to establish an intent to forego parental obligations as statutorily required for a finding of abandonment.

By statute the Nebraska courts may waive the natural parent's consent if the child has been abandoned for more than six months or has been

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<sup>215</sup> MINN. STAT. ANN. § 260.221(b)(1)-(7) (West Supp. 1981).

<sup>216</sup> *Id.* at § 259.24(1)(b)-(c).

<sup>217</sup> *Id.* at § 518.17(1)(a)-(i).

<sup>218</sup> 267 Minn. 468, 477-78, 127 N.W.2d 549, 553-54 (1964).

<sup>219</sup> MO. ANN. STAT. § 453.040 (Vernon 1977).

<sup>220</sup> 517 S.W.2d 709, 715 (Mo. Ct. App. 1974).

<sup>221</sup> *Id.* at 712.

<sup>222</sup> 575 S.W.2d 243, 244 (Mo. App. 1978). *But see* E.N. v. E.M.N., 559 S.W.2d 543, 544-45 (Mo. App. 1977) where the court stated that lack of communication with the child was not a sufficient disregard of parental duties to warrant an adoption without the noncustodial parent's consent.

<sup>223</sup> *Savona v. LeGrande*, 581 S.W.2d 414 (Mo. Ct. App. 1979).

<sup>224</sup> *Id.* at 416.

neglected.<sup>225</sup> The North Carolina statute<sup>226</sup> permits stepparent adoptions without consent if the noncustodial father has willfully failed, without just cause, to provide for the care, support, or education of the child as judicially ordered.<sup>227</sup> Similar to the above statutes, the South Carolina statute<sup>228</sup> states that a parent's rights cannot be terminated unless the court makes a finding of abandonment.

Consent of a child's parent is not required in South Dakota if the non-consenting parent has been guilty of adultery, has been convicted of a crime punishable by imprisonment, has abandoned the child, has been adjudged a habitual drunkard or mentally incompetent, or has been deprived of the custody of the child.<sup>229</sup> In *Christofferson v. McConn*<sup>230</sup> the statute was interpreted as authorizing the court to grant the stepparent adoption even though the nonconsenting parent had maintained minimal contacts with the child.

Tennessee's statute<sup>231</sup> is rather vague in that it provides very few guidelines for the courts in its determination of whether to grant the adoption. The language simply states that the court shall determine whether or not the child has been abandoned, and if so, consent shall be waived. The West Virginia law<sup>232</sup> is equally vague. The court may waive consent, if, among other factors, the noncustodial parent "has not acknowledged parental status by contributing to [the] child's support."<sup>233</sup>

Washington also has an old statute that does not require parental consent if it is the "finding of [the] court that [the] child [was] deserted or abandoned under circumstances showing a willful and substantial lack of regard for parental obligation."<sup>234</sup> This statute gives the court no guidance as to the definitions of desertion or abandonment. In comparison, Vermont's statute is even more succinct; consent is not required where the "natural parent has abandoned the care and support of the child."<sup>235</sup>

The Wyoming statute<sup>236</sup> permits the courts to waive parental consent upon a finding that the child has been willfully abandoned or deserted,<sup>237</sup> that the noncustodial parent has willfully failed to contribute to the support

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<sup>225</sup> NEB. REV. STAT. § 43-104 (1978).

<sup>226</sup> N.C. GEN. STAT. § 48-6 (Supp. 1978).

<sup>227</sup> *Id.* at § 7A-289.32(5) (Supp. 1979).

<sup>228</sup> S.C. CODE § 20-11-40 (1977).

<sup>229</sup> S.D. CODIFIED LAWS ANN. § 25-6-4(1)-(4) (1977).

<sup>230</sup> 232 N.W.2d 832 (S.D. 1975).

<sup>231</sup> TENN. CODE ANN. § 36-110 (1977).

<sup>232</sup> W. VA. CODE § 48-1(a)(2) (1980).

<sup>233</sup> *Id.*

<sup>234</sup> WASH. REV. CODE ANN. § 26.32.040(4) (1961).

<sup>235</sup> VT. STAT. ANN. tit. 15, § 435(1) (Supp. 1980).

<sup>236</sup> WYO. STAT. § 1-22-110 (1977).

<sup>237</sup> *Id.* at § 1-22-110(a)(iii).

of the child for one year,<sup>238</sup> or that the parents' rights have been judicially terminated<sup>239</sup> under another provision<sup>240</sup> which has similar language. The Wyoming statute appears to allow the courts discretion in finding grounds for termination of parental rights; but case law indicates that a failure to support must be coupled with an actual intent to sever parental relations.<sup>241</sup> In *D.S. v. Department of Public Assistance and Social Services*,<sup>242</sup> the Wyoming Supreme Court held that it may look to the best interests of the child, but it must also find abandonment, abuse, or neglect<sup>243</sup> before terminating parental rights in the appointment of a guardian.<sup>244</sup> The repeated emphasis upon the word "willful" in the statutes, although providing for the child's welfare in the most extreme circumstances of parental disinterest, may do little to protect the child's *best interests* when his emotional stability is not given priority over the ambivalent natural parent's reluctance to sever his attachments for the sake of his child.

#### IV. CONCLUSION

The termination of parental rights is unquestionably a "drastic remedy" in order to protect the *best interests* of a child. However, in view of changing social conditions and a redefining of the family unit, the pure *best interests* approach of a minority of states and Canada may be the most reasonable approach if the statutes are drafted so as to withstand attacks of unconstitutionality.

At present, the stepparent's *in loco parentis* rights are insufficient to establish any meaningful claims to his child with respect to effective custodial rights. A myriad of difficulties may arise regarding the support obligations of the stepparent as well as his right to retain custody of the child should the natural custodial parent die. The emotional development of a child is often dependent upon his knowledge that his home environment is and will remain a stable, secure, and continuous arrangement coupled with the love and sense of belonging a permanent family unit can provide. It may hamper a stepparent's and child's attempt to establish a normal and meaningful relationship if a third party - the natural parent - has retained parental rights without accepting parental obligations.

For these reasons some legislatures have enacted adoption statutes which include or rely solely upon a best interest standard. However, the courts have not always deferred to the legislative intent to elevate the child's interests over the natural parent's. To fulfill the intent of these statutes, the

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<sup>238</sup> *Id.* at § 1-22-110(a)(IV).

<sup>239</sup> *Id.* at § 1-22-110(a)(ii).

<sup>240</sup> *Id.* at § 14-2-301.

<sup>241</sup> *In re Adoption of Voss*, 550 P.2d 481, 487 (Wyo. 1976).

<sup>242</sup> 607 P.2d 911, 919 (Wyo. 1980).

<sup>243</sup> WYO. STAT. at § 14-2-306(b).

<sup>244</sup> *Id.* at § 14-2-306(a).

courts should emphasize the psychological bonds the child has developed with a stepparent. When the court finds that the stepparent has superseded the natural parent as the psychological parent, a *best interests* approach may prove instrumental in continuing the new family unit.

LARRY K. LASKIEWICZ