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ALTERNATIVE STANDARDS FOR THE TERMINATION OF PARENTAL RIGHTS

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An examination of New Jersey statutory and judicial standards for the termination of parental rights indicates to the authors that a revolution is occurring of noteworthy significance. Discussions of the theory of psychological parenthood and the state's power as parens patriae, coupled with critical evaluations of several proposed solutions to the problems involved in termination actions, lead the authors to suggest that viable alternatives do exist and may be offered as the bases for statutory reform.

INTRODUCTION

There is a revolution in progress in the American law of the family. The revolution began slowly in the 1940s and 1950s with attempts to eliminate the stigma of illegitimacy[1] and continued into the 1960s with the expansion of no-fault grounds for divorce.[2] In the 1970s, the revolution endures with the recognition of the necessity to pro-

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[1] Reform has continued in this area to the present with most of the constitutional decisions on discrimination against illegitimates arising during the 1970s. *See* Trimble v. Gordon, 430 U.S. 762 (1977). By the early 1960s, all of the states had legitimation statutes and much reform had taken place with regard to the rights of the illegitimate. H. CLARK, THE LAW OF DOMESTIC RELATIONS §§ 5.2, 5A, at 158 n.1, 176–80 (1968).

[2] While in some states such reform predated the 1960s, it was during this decade that no-fault grounds became the primary form of divorce throughout the United States. *See* Foster, *Divorce Reform and the Uniform Act*, 7 FAM. L.Q. 179, 179–84 (1973).

tect children against parental misconduct and to abolish the archaic standards for the termination of parental rights.

There are many circumstances in which the state may attempt to intervene in the functioning of an ongoing family. Such intervention is usually not objectionable as it relates only to the interactions between the family and society. In recent years, however, it has been increasingly recognized that some parents are not sufficiently qualified to provide for their children's upbringing.[3] Although individuality in child rearing techniques should be encouraged so as to assure the maintenance of cultural diversity, the state cannot tolerate practices which will prevent the child from ever assuming a productive role in society.[4] The question of what practices may be prohibited under this approach is indeed difficult, and serious doubts exist concerning the power of the state to intervene in such areas as education[5] and health care.[6] Some practices, however, such as child abuse and neglect, are so abhorrent that they cannot be tolerated.

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[3] *See generally* C. KEMPE & R. HELFER, HELPING THE BATTERED CHILD AND HIS FAMILY (1972).

[4] 1 HEW, CHILD ABUSE AND NEGLECT: THE PROBLEM AND ITS MANAGEMENT 2–3 (1976).

[5] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

[6] A recent example of the controversy inherent in the state's power to intervene in health care is the case of In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

In re Quinlan concerned a twenty-one year old woman, Karen Ann Quinlan, who was hospitalized as a result of her comatose state. 70 N.J. at 23, 355 A.2d at 653–54. Although Karen was kept alive with the assistance of a respirator, doctors believed she would be unable to breathe without it. *Id.* at 23, 355 A.2d at 654. After numerous unsuccessful attempts to remove her from the respirator, it was decided that she was dependent upon it for her continued existence. *Id.* at 25, 355 A.2d at 655.

Mr. Quinlan, Karen's father, requested the discontinuance of Karen's life-sustaining medical treatment. *Id.* at 22, 355 A.2d at 653. As a result of Karen's doctors' refusal to disconnect the respirator, Mr. Quinlan instituted an action in the Chancery Division of the Superior Court of New Jersey. *Id.* The court, however, refused to withdraw Karen's life-support system. *Id.* at 18, 355 A.2d at 651. Certification was granted by the Supreme Court of New Jersey. *Id.*

In reversing the lower court's opinion, Chief Justice Hughes, speaking for the court, stated:

> We have no hesitancy in deciding . . . that no external compelling interest of the State could compel Karen to endure the unendurable, only to vegetate a few measurable months with no realistic possibility of returning to any semblance of cognitive or sapient life.

Id. at 39, 355 A.2d at 663. Although the court recognized the sovereign's obligation to preserve life, it also indicated that the State's interest must be balanced against the equally important right to privacy. *Id.* at 41, 355 A.2d at 664. The court considered the right to privacy broad enough to encompass a patient's decision to decline medical treatment in particular situations:

> The nature of Karen's case and the realistic chances of her recovery are quite unlike those of the patients discussed in many of the cases where treatments were ordered. In many of those cases the medical procedure required (usually a transfusion) constituted a minimal bodily invasion and the chances of recovery and return to functioning life were very good.

Id. at 40–41, 355 A.2d at 664. It is evident that the medical procedures to be implemented and the attendant results to be realized from their utilization were a vital consideration in the court's balancing of the State's interest in the preservation of life and the individual's right to privacy.

The state is severely restricted in responding to such clearly prohibitable actions. If the improper conduct is criminal, then fines and imprisonment can be imposed on the parent to prevent a repetition of such conduct. Furthermore, these penalties serve as a deterrent to other potential offenders.[7] Criminal prosecution of the parent, however, provides little or no benefit to the injured child: there is no direct effect on the parent's right to reclaim custody of the child. Moreover, imprisonment or fines may increase the parent's hostility toward the child.[8]

There is a need for civil remedies which furnish a child with suitable protection when threatened by a harmful domestic environment. To provide such care, courts have developed remedies ranging from an order of temporary custody for foster parents to remedial counseling services. Yet, there are certain situations in which home remedies are inadequate. In such cases, the primary remedy available for the protection of the child is the termination of parental rights.[9]

> We think that the State's interest contra weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately, there comes a point at which the individual's rights overcome the State interest.

Id. at 41, 355 A.2d at 664.

Although Karen Quinlan was an adult, her legal status was not unlike that of a minor, since her comatose condition rendered her incompetent to independently exercise her right to privacy. *Id.* For this reason, Mr. Quinlan, as Karen's guardian, attempted to assert her interests as would a guardian of a minor legally incapable of making a medical decision.

The court, in fashioning its declaratory relief, established a specific procedure to terminate Karen's life sustaining treatment:

> Upon the concurrence of the guardian and family of Karen, should the responsible attending physicians conclude that there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state and that the life-support apparatus now being administered to Karen should be discontinued, they shall consult with the hospital 'Ethics Committee' or like body of the institution in which Karen is then hospitalized. If that consultative body agrees that there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state, the present life-support system may be withdrawn.

Id. at 54, 355 A.2d at 671. By requiring multiple assent in the decision to withdraw Karen's treatment, the court has attempted to prevent unwarranted reliance on the right to privacy as a means of overcoming the prevailing state interest in the preservation of life. For a discussion of other cases exploring the role of the state in child health care, see H. KRAUS, FAMILY LAW 557 (1976).

[7] A good summary of many of these state laws appears in Katz, *Child Neglect Laws in America*, 9 FAM. L.Q. 3, 75–362 (1975).

[8] H. CLARK, *supra* note 1, § 6.5, at 201.

[9] For a comparative perspective on this problem, see Eekelaar, *Deprivation of Parental Rights: Legislative Contrasts in England, Wales, Australia and Canada*, 7 FAM. L.Q. 381 (1973).

The termination of parental rights is an extraordinary judicial remedy which is to be granted only after intensive consideration of parental conduct and the needs of the child. Judicial caution in granting termination arises from the permanent and irreversible nature of the order.[10] Termination involves the elimination of any legal recognition of a continuing parent-child relationship[11] and, usually, the end of any social recognition of the relationship. This remedy may be contrasted with a custody order which vests a non-parent with temporary authority over a child, but does not eliminate the parent's residual right to reclaim the child at some later date.[12] The award of custody does not imply that termination will follow, nor are the standards for the two awards similar, except in their most general aspects.[13] While custody is freely granted for the temporary protection of a child against impending harm, termination reflects a decision that no substantial likelihood exists that a proper parent-child relationship is capable of being restored in the future.

Although most statutory provisions for the termination of parental rights articulate the "best interests of the child" as a primary factor to be evaluated in the decision to terminate,[14] the legislatures and courts have placed substantial emphasis upon the rights of the parent in such actions.[15] Any standard to be developed for the termination of parental rights must take account of these prerogatives. The standard must not, however, allow them to supersede the fundamental right of the child to a permanent home. The proper balancing of these interests has been, and continues to be, the subject of substantial litigation and attempted and actual statutory reform.

The revolution taking place with regard to the rights of the child is evidenced by the increasing judicial reliance upon psychological principles relating to the placement of the child. Traditional approaches to the factors involved in a determination of the "best interests of the child" are now being supplanted by direct analysis of the child's problems and the methods by which they should be resolved. The recent decisions of the Supreme Court of New Jersey in *Sees v. Baber*[16] and *Sorentino v. Family & Children's Society of*

[10] *E.g.*, In re N., 96 N.J. Super. 415, 423–24, 233 A.2d 188, 192–93 (App. Div. 1967).

[11] *See generally* H. CLARK, *supra* note 1, § 18.5 (1968).

[12] In re Adoption of J., 139 N.J. Super. 533, 548, 354 A.2d 662, 669 (App. Div. 1976), *rev'd on other grounds*, 73 N.J. 68, 372 A.2d 607 (1977); *see* Sorentino v. Family & Children's Soc'y of Elizabeth, 74 N.J. 313, 321 & n.1, 378 A.2d 18, 22 (1977).

[13] *See* Sorentino v. Family & Children's Soc'y of Elizabeth, 74 N.J. 313, 321 & n.1, 378 A.2d 18, 22 (1977).

[14] The words "best interests of children" are specifically used in the New Jersey Adoption Law. N.J. STAT. ANN. § 9:3–37 (West Cum. Supp. 1978-1979).

[15] *See* text accompanying notes 153–56 *infra*.

[16] 74 N.J. 201, 377 A.2d 628 (1977).

Elizabeth [17] signal a judicial cognizance of the necessity to develop a new approach for termination and custody. These decisions demonstrate a novel application of *parens patriae,* an historical element of the court's equitable jurisdiction, as a justification for the court's increased recognition of the child's rights and interests in termination and custody decisions. The *Sees* decision represents a radical use of *parens patriae,* in granting termination based solely on the welfare of the child regardless of parental rights, absent parental misconduct.[18] This interpretation of *parens patriae* exhibits a marked departure from the traditional belif that the best interests of the child require termination only in circumstances where one or both parents can be found totally and permanently unfit to retain custody of their children.[19]

Discussion of the revolution in termination standards will begin with an analysis of the current New Jersey statutory scheme for the termination of parental rights with a subsequent analysis of case law standards prior to *Sees* and *Sorentino.* An examination of psychological parenthood, the theoretical foundation for the modern approach to termination of parental rights, will then be presented. Next, the author will discuss the *Sees* and *Sorentino* standards and the *parens patriae* approach to termination which they suggest. Finally, a series of proposals for new methods of termination will be outlined and an analysis offered of their potential. The analysis suggests that several viable alternatives for dealing with termination actions, without the abridgement of the rights of any party, do exist, and can be offered as bases for statutory reform.

CURRENT STATUTORY STANDARDS FOR TERMINATION OF PARENTAL RIGHTS

Three separate statutory approaches to the termination of parental rights exist in New Jersey: surrender-termination, general-termination and adoption-termination.

The Surrender-Termination Approach

Applicable only where a parent of the child has executed a surrender of custody to an approved agency, the surrender-termination approach requires that the agency, as plaintiff, represent the child in the termination action.[20] Since the document of surrender itself

[17] 72 N.J. 127, 367 A.2d 1168, *juris. retained,* 74 N.J. 313, 378 A.2d 18 (1977).

[18] 74 N.J. at 221, 377 A.2d at 638; *see* notes 204–20 *infra* and accompanying text.

[19] *See* text accompanying notes 133–38 *infra.*

[20] N.J. STAT. ANN. §§ 9:2–18, –19 (West 1976).

must contain certain formal provisions, the court must assess the validity of the document. In the alternative, the court need only find that the parent intended to surrender the child.[21] When a surrender is executed, it is fully valid, regardless of the parents' ages. The surrender is revocable only at the discretion of the approved agency in which the child was placed, or upon a finding by a proper court that the surrender was obtained by fraud, duress, or misrepresentation.[22]

If only one parent executes a document of surrender, the court is required to examine the parental rights of the non-executing parent.[23] It is specifically provided that the act of surrender by one parent does not affect the rights of the other.[24] Furthermore, a judicial termination of one parent's rights does not necessarily terminate the rights of the other.[25] Termination of the rights of the non-surrendering parent will occur only on specified statutory grounds: a determination that the other parent is "dead, . . . mentally incompetent, . . . has forsaken parental obligations or has been divorced by the [surrendering] parent" on fault grounds.[26] In addition, if the child is illegitimate and the surrender is executed by the mother, the statute provides "that the father, and the husband of the mother if she is married, shall have no right to custody of the child."[27] Finally, in an appropriate case, the court may terminate the parental authority of any previously appointed custodian or guardian of the child.[28] Upon the completion of these inquiries, the court may order the termination of parental rights and the transfer of the right to custody and control over the child to the plaintiff-agency.[29] The order precludes all control of the child by the parent or guardian, but does

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[21] *Id.* §§ 9:2–17, –19. The surrender must include a declaration of the intent of the party to relinquish custody, a formal acknowledgement of the termination of the surrendering parent's rights in favor of the approved agency, and a further acknowledgment of a full understanding of the effect of such surrender. *Id.* § 9:2–17.

[22] *Id.* § 9:2–16. Surrenders under this statute are infrequently challenged. For a discussion of this statute, see Sees v. Baber, 74 N.J. at 212–13, 377 A.2d at 634; In re Adoption by J.B. & F.B., 63 N.J. Super. 98, 102, 164 A.2d 65, 67 (App. Div. 1960).

[23] *See* N.J. STAT. ANN. § 9:2–15 (West 1976). It is not clear, however, that a final order of termination can be granted under the statute unless the parental rights of the non-surrendering parent are terminated. *See id.* § 9:2–20.

[24] *Id.* § 9:2–15.

[25] *See id.* §§ 9:2–15, –20.

[26] *Id.* § 9:2–19. "The phrase 'mentally incompetent' means inability to understand and discharge the natural and regular obligations of care and support of a child by reason of mental disease, feebleness of mind, or habitual intemperance." *Id.* § 9:2–13(e).

[27] *Id.* § 9:2–19. It should be noted that the father of an illegitimate child is expressly excluded from the statutory definition of "parent." *Id.* § 9:2–13(f). For a discussion of this section, see text accompanying notes 51–54 and 58–60 *infra*.

[28] *Id.* § 9:2–20.

[29] *Id.*

not relieve either of financial responsibility for the child's continued support.[30]

The General-Termination Approach

Under this approach, a petition for termination may be brought, not only by an approved agency, but by *any* person, association or agency interested in the child's welfare, and, when appropriate, by the Division of Youth and Family Services (DYFS or Division).[31] The statute provides for the filing of a petition by such a party if: a "person having custody of" a child has been convicted of child abuse, neglect, cruelty or abandonment; the named "child has been adjudged delinquent;" "the best interests of [a] child" under the custody of the Division requires guardianship; custody has been taken away from the parent or guardian of a child and has been granted to the Division; or, following the voluntary placement of the child with an agency, the parent has failed to maintain contact with the child for one year, although the parent is able to do so.[32] Upon the filing of a

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[30] *Id.*

[31] *Id.* § 30:4C–15 (West 1964). It should be noted that the Division of Youth and Family Services (DYFS) is the successor agency of the Bureau of Children's Services mentioned in the statute. *See id.* § 30:4C–2(a) (West Cum. Supp. 1977-1978).

[32] *Id.* § 30:4C–15 (West 1964). Under the fourth basis in this section, DYFS must have obtained custody pursuant to either section 30:4C–11 or section 30:4C–12. The former section requires DYFS to take custody of a child if, on verification of a complaint to the Division, it appears:

> (a) that the welfare of such child will be endangered unless proper care and custody is provided;
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> (b) that the needs of such child cannot properly be provided for by financial assistance as made available by the laws of this State;
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> (c) that there is no person legally responsible for the support of such child whose identity and whereabouts are known and who is willing and able to provide for the care and support required by such child; and
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> (d) that such child, if suffering from a mental or physical disability requiring institutional care, is not immediately admissable to any public institution providing such care.

Id. § 30:4C–11. The latter section provides for the assumption of custody on court order if it appear[s] that the parent or parents, guardian, or person having custody and control of any child within this State is grossly immoral or unfit to be entrusted with the care and education of such child, or shall fail to provide such child with proper protection, maintenance and education, or is of such vicious, careless or dissolute habits as to endanger the welfare of such child . . . .

> . . . .
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> If . . . it appears that the child requires care and supervision by the Bureau of Children's Services but the parent, parents, guardian, or persons having custody and control of the child continue to refuse to apply for care . . ., the bureau may apply to the Juvenile and Domestic Relations Court of the county where the child

petition, a court may issue an interlocutory order, committing the child to DYFS's custody pending the outcome of the hearing.[33] If DYFS is not the petitioner, the court is directed to give notice of the petition to the Division,[34] which then must investigate the situation and report its findings to the court.[35] If, as a result of the required hearing, it is concluded that a final termination order should be issued, DYFS assumes control of the child's person and property, and may consent to adoption by a third party[36] or another mode of placement.

The Adoption-Termination Approach

When adoption is desired and termination has not yet been secured under one of the previous approaches, it usually occurs at the preliminary hearing in the adoption proceeding.[37] The court is required to make a determination of the natural parents' right to custody based upon their compliance with substantial procedural and substantive prerequisites.[38] Notice must be given to any parent whose rights have not been previously terminated, or who has not executed a surrender to an approved agency.[39] Such notice may not be waived and must include the purpose, date, and place of the hearing, the parent's right to appear and object to the adoption, the right to counsel and the right to have counsel appointed in the case of indigency.[40] The statute includes in the definition of "parent," a "natural father" of an illegitimate child "who has acknowledged the child"[41] or who must be notified because of his "relationship with the

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resides for an order making the child a ward of the court and placing such child under the care and supervision of the Bureau of Children's Services.

Id. § 30:4C–12.

[33] *Id.* § 30:4C–17.

[34] *Id.*

[35] *Id.* § 30:4C–12.

[36] *Id.* §§ 30:4C–20, –22.

DYFS is also empowered to accept voluntary surrenders of the custody and control of a child. *Id.* § 30:4C–23. Surrender in these cases is only to be received after investigation has demonstrated that acceptance of the surrender would be permanently advantageous to the child. *Id.* The surrender must be notarized and is "irrevocable except at the discretion of the Bureau of Children's Services or upon order of a court of competent jurisdiction." *Id.*

[37] *See id.* §§ 9:3–47(c), –48(c)(4) (West Cum. Supp. 1978-1979). The current statute became effective in 1978. *Id.* § 9:3–37 note (West Cum. Supp. 1978-1979). *Compare id.* §§ 9:3–17 to 36 (West 1976) (repealed 1978) *with id.* §§ 9:3–37 to 56 (West Cum. Supp. 1978-1979).

[38] *Id.* § 9:3–41 to 48 (West Cum. Supp. 1978-1979).

[39] *Id.* § 9:3–45.

[40] *Id.*

[41] *Id.* § 9:3–38(f). Under the old law, "parent" was defined "not [to] include the father of an illegitimate child." *Id.* § 9:3–18(f) (West 1976) (repealed 1978).

child, financial or otherwise."[42] If a parent does choose to object, the statute prohibits the adoption, absent a finding that "such parent has substantially failed to perform the regular and expected parental functions of care and support . . . includ[ing] maintenance of an emotional relationship with the child."[43] If the prospective adoptive parents have not received custody of the child through an approved agency, the statute specifies a bifurcated proceeding in which termination occurs at a preliminary hearing held sixty to ninety days after the adoption action is instituted.[44] Termination may be based upon a finding of "intentional abandonment or very substantial neglect of parental duties without a reasonable expectation of a reversal of that conduct."[45] It should be noted, however, that a direct surrender by the natural parents to the adoptive parents is not conclusive.[46] Finally, if the adoption is by a "relative," as defined by the statute, the agency report may be limited or waived and the bifurcated proceeding may be consolidated into a single hearing.[47]

PROBLEMS WITH THE EXISTING TERMINATION STATUTES

From the viewpoint of the natural parent in a termination action, two major rights must be protected—notice of the proposed termination and an opportunity to be heard.[48] The requirement of notice and an opportunity to be heard for an absent parent or one who has not been joined as a party in a termination or adoption proceeding has recently been elevated to constitutional levels by the Supreme Court's decision in *Stanley v. Illinois*.[49] That decision involved the parental rights of an unwed father upon the death of the mother.[50] Upon the mother's death, proceedings were instituted by the State of

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[42] *Id.* § 9:3–45 (West Cum. Supp. 1978-1979). For a discussion of this section, see text accompanying notes 59–61 and 65–67 *infra*.

[43] *Id.* § 9:3–46(a) (West Cum. Supp. 1978-1979).

[44] *Id.* § 9:3–48.

[45] *Id.* § 9:3–48(c)(1).

[46] Sees v. Baber, 74 N.J. at 215, 377 A.2d at 635. For a detailed discussion of *Sees*, see notes 204–20 *infra* and accompanying text.

[47] N.J. STAT. ANN. § 9:3–48(c)(4) (West Cum. Supp. 1978-1979).

[48] *See* Stanley v. Illinois, 405 U.S. 645 (1972). For a discussion of the protection of parental rights, see Ketcham & Babcock, *Statutory Standards for the Involuntary Termination of Parental Rights*, 29 RUTGERS L. REV. 530 (1976); Simpson, *The Unfit Parent: Conditions Under Which a Child May Be Adopted Without the Consent of His Parent*, 39 DET. L.J. 347 (1962); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976).

[49] 405 U.S. 645 (1972).

[50] *Id.* at 646–47.

Illinois which resulted in the appointment of a guardian.[51] The state court had refused the father an opportunity to be heard with respect to the children's disposition by the Illinois court.[52] The Supreme Court found the state procedure violative of due process and declared that any natural parent is entitled to notice and the opportunity to contest proceedings in the case of adoption or termination.[53] The scope of *Stanley* has since been limited to those situations where the parent has actively maintained substantial contact with the child, at least when the parent knew of the child's existence.[54]

With respect to the termination of parental rights, the application of *Stanley* is particularly difficult. To the extent that the rights involved are personal to the parent, personal service of process may be necessary to protect these rights.[55] However, the father of a child born out-of-wedlock may be impossible to identify without the cooperation of the mother. Furthermore, the mother may be unable or unwilling to identify the father. Thus, the inability of the court or agency to otherwise determine his identity may seriously hinder an adoption in an otherwise appropriate case.

The notice problem is especially acute under the current New Jersey surrender-termination statute. It is clear under this approach that a decision by a court to terminate parental rights of one parent does not, *per se*, affect the rights of the other parent, nor does the surrender by the custody-holding parent terminate the rights of the parent who lacks custody.[56] The rights of the parent lacking custody have been dealt with in the surrender-termination approach by a provision which allows the court to terminate the parental rights of an absent parent under certain statutorily described circumstances.[57] Since there is no requirement that notice be given the parent before a judgment is entered, this provision would not meet the constitutional standards set forth in *Stanley*.[58] While constitutional difficulties remain in the surrender-termination statute, similar problems have been cured in the recently enacted adoption statute.

Under the current adoption-termination approach, the *Stanley* notice requirements have been met. The statute requires that the

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[51] *Id.*

[52] *Id.*

[53] *Id.* at 658.

[54] Quilloin v. Walcott, 46 U.S.L.W. 4055 (U.S., Jan. 10, 1978).

[55] *See* May v. Anderson, 345 U.S. 528, 533–34 (1953); N.J. STAT. ANN. § 9:3–45 (West Cum. Supp. 1978-1979).

[56] N.J. STAT. ANN. § 9:2–15 (West 1976); *see* notes 23–25 *supra* and accompanying text.

[57] *Id.* § 9:2–19 (West 1976); *see* note 26 *supra* and accompanying text.

[58] *See id.* § 9:2–18 (West 1976).

complaint for adoption be served on a parent whose rights have not been terminated or who has not executed a voluntary surrender.[59] In addition, a putative father who has maintained some kind of relationship with his child must be given notice personally.[60] The general-termination approach probably does not meet the requirements of *Stanley*. While it requires that service shall "be made upon the parent, parents, guardian or person having custody and control . . . in accordance with rules of court," it does not provide for service on the putative father.[61]

In addition to *Stanley's* notice requirements, the current statutory schemes must be examined with reference to the parent's opportunity to appear and present his or her view as to the child's custody. Under the surrender-termination approach, the threshold question to be determined is that of the validity of the surrender by the custody-holding parent to the approved agency.[62] The basis for limiting the inquiry is the assumption that the grant of custody to the agency is prima facie proof of the inability of the parent to assume the care of the child.[63] This theory has some validity relative to the surrendering parent. Even if the parent has regained capacity to care for the child, the willingness to release the child demonstrates a lack of concern that would, in most cases, be sufficient for termination of his or her rights.

With respect to the non-surrendering parent, however, the question is more difficult. The traditional view, as expressed in the surrender-termination approach, is that a finding of non-marital parentage or of fault in a divorce action was determinative of the incapacity of an individual to raise his or her own children.[64] As both divorce and non-marital sexual relations become more accepted features of society, it becomes increasingly difficult to assume that such conduct is inherently immoral or reflective on any abilities of the parent to properly raise children. It seems clear that the holding of *Stanley* has recognized this aspect of social change by providing the non-surrendering parent the opportunity to prove his or her fitness for raising the child.

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[59] *Id.* § 9:3–45 (West Cum. Supp. 1978-1979); *see* text accompanying note 42 *supra*.

[60] N.J. STAT. ANN. § 9:3–45 (West Cum. Supp. 1978-1979); *see* text accompanying note 44 *supra*.

[61] N.J. STAT. ANN. § 30:4C–17 (West 1964).

[62] *Id.* § 9:2–19 (West 1976).

[63] *See id.* This is not expressly stated in the statute, but appears to be the only reasonable basis which can be implied.

[64] *Id.* § 9:2–19.

In contrast, the recently enacted adoption statute fulfills the *Stanley* requirements. The statute permits any parent who has not executed a surrender or been the object of a prior termination proceeding to object to the proceeding.[65] Such an objection is not required in a traditional legal form. It may be "communicated to the court by personal appearance or by letter."[66] Furthermore, the statute prevents a judgment of adoption absent a finding by the court of substantial neglect of parental duty or a surrender by the parent.[67]

Finally, the general-termination approach also appears to be satisfactory in this regard. Guardianship cannot be awarded to DYFS absent a demonstration of parental inadequacy or misconduct.[68] Furthermore, a non-custodial parent has the right to participate in the hearing and to argue for the return or continuation of custody of the child.[69]

From the viewpoint of the child, however, a number of interests are not protected by any of the statutory approaches. Principally, there is a lack of opportunity for the child, either individually or by a court-appointed guardian *ad litem*, to present his or her own views as to the appropriateness of the determination. The traditional assumption that the child's interests are protected by the parent or agency has been repeatedly condemned, and new procedures are being developed to assure an opportunity for the child to evaluate the situation and express its own views.[70]

Presently, in an adoption action, a child, ten years of age or older, is provided the opportunity to speak on his or her own behalf.[71] In a termination action under either of the other statutory schemes, however, the child is not provided with the right to present its views, nor is the child even entitled to notice of the proceedings.[72] In addition to the lack of opportunity to be heard, the interests of the child are minor considerations in many termination proceedings. Under the surrender-termination statute, no inquiry into the interests of the child is required.[73] Termination is based solely

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[65] *Id.* § 9:3–46(a) (West Cum. Supp. 1978-1979).

[66] *Id.*

[67] *Id.*

[68] N.J. STAT. ANN. §§ 30:4C–15, –20 (West 1964).

[69] *See id.* §§ 30:4C–17, –20.

[70] H. CLARK, *supra* note 1, § 18.4, at 625.

[71] N.J. STAT. ANN. § 9:3–49 (West Cum. Supp. 1978-1979). The rule until recently, required that the child's views be presented to the court by the approved agency. *Id.* § 9:3–28 (West 1976) (repealed 1978).

[72] *See id.* §§ 9:2–18 to 20 (West 1976); *id.* §§ 30:4C–11 to 24 (West 1964).

[73] *See id.* §§ 9:2–18 to 20 (West 1976).

on the determination of inadequate parental child care embodied in the surrender of custody.[74] Even under the general-termination statute, the child is not a party to the litigation.[75] Although the child's view should not be binding since the child may be unable to evaluate fully the factors which are germane to termination, the child's comments should not be overlooked.

The failure of the general-termination statute to encourage prompt termination additionally infringes upon the child's rights. Children tend to linger in the social service system for extended periods of time because agencies are unwilling to conclusively decide future parental unfitness.[76] The harm in this delay results from the fact that the placement of a child for adoption, and the consequent provision for the child of a permanent and stable home, becomes more difficult as the child grows older. Thus, the statute must provide the child with the opportunity for timely termination.

A further problem is that there are no courts with special expertise to deal with termination issues. The decisions in termination cases are rarely easy ones, and the court which is to consider them should be fully aware of the range of social and economic factors which come into play in making such decisions.[77] This requires special knowledge of the workings of the social service system and the evaluation of psychological and sociological evidence bearing upon the best interests of the child. At present, expertise is usually acquired through court room experience. The judge who is successful in dealing with these matters, however, is likely to be appointed to a higher court, where he or she will cease to deal with these cases, whereupon an inexperienced judge will fill the vacancy. Thus, a consistent degree of expertise in the handling of such matters is rarely present.

CASE LAW FACTORS IN TERMINATION

Having enunciated the statutory requirements for the termination of parental rights, it is appropriate to look to the manner in which these standards have been applied by the New Jersey courts. Until the supreme court's recent decisions in *Sorentino* and *Sees*, the most important factor in termination has been the use of "forsaken

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[74] *See id.* §§ 9:2–19, –20.

[75] *See id.* §§ 30:4C–12, –15 (West 1964).

[76] *See generally* CLABURN & MAGURA, FOSTER CARE CASE REVIEW IN NEW JERSEY: AN EVALUATION OF ITS IMPLEMENTATION AND EFFECTS (1977).

[77] For a discussion of the multitude of problems which arise in termination cases, see J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

parental obligations" as a jurisdictional prerequisite for termination.[78] *In re Adoption of Children by D.* [79] provides the accepted judicial interpretation of "forsaken parental obligations" [80] within the parameters of the statutory definition of "intentional abandonment or very substantial neglect of parental duties without a reasonable expectation of a reversal of that conduct in the future." [81]

In order to fully comprehend the termination proceeding involved in *In re Adoption of Children by D.*, it is first necessary to outline the two step procedure involved in that action. First, the "jurisdictional question," [82] which entails a finding that the prerequisites for parental unfitness under the adoption statutes have been met, must be answered.[83] If jurisdiction is found to exist, a court will then proceed to the second step and address the "dispositional question," in which the best interests and welfare of the child are considered.[84]

In *In re Adoption of Children by D.*, the supreme court was faced with an adoption proceeding in the "divorced parents situation." [85] The facts of the case indicated that there had been offspring born of a marriage which had ended in divorce.[86] The mother had retained custody of the children and then married D. who sought to adopt the children.[87] The mother consented, but the natural father, U., opposed the petition.[88] Before and during the marriage, U. had committed several juvenile and criminal offenses, some of which were drug-related.[89] As a result, U. had been incarcerated a number of times, his longest period of confinement being three years.[90] After his release, U. had been employed as "the successful operator of a parking lot" and had deposited twenty dollars a week for three years in a bank account for the support of his children.[91] In order to determine whether U.'s conduct was sufficient to justify termination,

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[78] *See* notes 188–219 *infra* and accompanying text.

[79] 61 N.J. 89, 293 A.2d 171 (1972).

[80] *Id.* at 94–95, 293 A.2d at 173.

[81] N.J. STAT. ANN. § 9:3–48(c)(1) (West Cum. Supp. 1978-1979).

[82] KETCHAM & BABCOCK, *supra* note 48, at 539.

[83] N.J. STAT. ANN. § 9:3–48(c)(1) (West Cum. Supp. 1978-1979); *see* KETCHAM & BABCOCK, *supra* note 48, at 539.

[84] KETCHAM & BABCOCK, *supra* note 48, at 539.

[85] 61 N.J. at 92, 293 A.2d at 172.

[86] *Id.* at 96, 293 A.2d at 174.

[87] *Id.* at 96–97, 293 A.2d at 174–75.

[88] *Id.* at 97, 293 A.2d at 175.

[89] *Id.* at 96, 293 A.2d at 174.

[90] *Id.*

[91] *Id.* at 97, 293 A.2d at 175.

the court stated that forsaken parental obligations "require[s] a past course of conduct amounting to intended abandonment or very substantial neglect of both parental duties and claims, with no reasonable expectation of any reversal of that conduct in the near future."[92] Upon the facts of the case, the court held that the requirement of present unfitness had not been met, and the court therefore refused to terminate U.'s parental rights to his children.[93] As to the dispositional stage, the court addressed the issue of whether the best interests of the child could be intertwined with those interests concerned with parental unfitness.[94] The court concluded that the best interests of the child could only be considered after valid grounds for termination had been found.[95]

Neither the courts nor the legislature have described the dispositional stage in the same exacting manner accorded the jurisdictional stage. For example, with respect to the jurisdictional question, the legislature, in the recently repealed adoption-termination statute, provided that there must be "forsaken parental obligations."[96] This terminology was specifically defined by that statute.[97] The new adoption-termination statute further demonstrates this emphasis on jurisdiction since it incorporates the supreme court's interpretation of the former statute's definition of forsaken parental obligations, although not using the words forsaken parental obligations.[98] The only

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[92] *Id.* at 94–95, 293 A.2d at 173. Prior to *In re Adoption of Children by D.*, the present fitness of the parents was considered in the dispositional stage as a factor in determining the child's best interests. It was not part of the jurisdictional questions. The judicial interpretation given to "abandonment" in the seminal decision of Winans v. Luppie, 47 N.J. Eq. 302, 20 A. 969 (Ct. Err. & App. 1890), allowed abandonment to be repented of, but only if it was in the best interests of the child. *Id.* at 304–05, 20 A. at 970. *Winans* demonstrated that present parental unfitness was considered in the dispositional stage. *See id.* at 305, 20 A. at 970. The supreme court, in *In re Adoption of Children by D.*, modified the jurisdictional requirements by augmenting the statutory definition of forsaken parental obligations. 61 N.J. at 94–95, 293 A.2d at 173. Instead of being simply conduct which demonstrates a relinquishment of all duties toward the child, the new requirement of "no reasonable expectation of any reversal of that conduct in the near future" was added to the statutory definition. *Id.*

[93] *Id.* at 98–99, 293 A.2d at 175–76.

[94] *Id.* at 95, 293 A.2d at 174.

[95] *Id.* The traditional preference for the parental rights approach was again impliedly upheld through the court's specific refusal to consider the best interests of the child until having acknowledged jurisdiction. *Id.*

[96] N.J. STAT. ANN. § 9:3–24(c) (West 1976).

[97] *Id.* § 9:3–18(d).

[98] *Compare* In re Adoption of Children by D., 61 N.J. 89, 92, 293 A.2d 171, 173 (1972) (defining forsaken parental obligations as "a past course of conduct amounting to intended abandonment or very substantial neglect of both parental duties and claims, with no reasonable expectation of any reversal of that conduct in the near future") *with* N.J. STAT. ANN. § 9:3–48(c)(1) (West Cum. Supp. 1978-1979) (defining the standard for termination as "intentional

statutory limitation as to the dispositional stage, however, is "that the best interests of the child would be promoted by the adoption."[99] Further statutory elucidation of this standard is absent.[100] In light of *In re Adoption of Children by D.*, it appears that the statutory standard adopted from this formulation facilitates the court's approach to the jurisdictional question.[101] The absence of any definitive statutory guidelines, coupled with the inherent vagueness of the concept of best interests of the child, has resulted in the use of a variety of factors to discover best interest, none of which have assumed a dominant role. The most commonly considered factors include: the character, condition, habits and other surroundings of the claimant; the difference in social standing between the parties; the inequality of fitness between the natural and adopting parents; blood ties, if any, between the child and the adopting parents; the improved health of the child since placement in the custody of the adopting parents; and the development of psychological parenthood.[102] The result of this approach has been the judicial juggling of a combination of any number of the above considerations.[103]

Although the highest court of New Jersey had approved the use of the psychological parenthood factor in earlier decisions,[104] this con-

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abandonment or very substantial neglect of parental duties without a reasonable expectation of a reversal of that conduct in the future").

[99] N.J. STAT. ANN. § 9:3-27(c) (West 1976).

[100] The adoption act provides no definition for "best interests." *See id.* § 9:3-18.

[101] *See* notes 85-93 *supra* and accompanying text.

[102] *See* Comment, *Adoption: Psychological Parenthood as the Controlling Facts in Determining the Best Interests of the Child*, 26 RUTGERS L. REV. 693, 694 (1973).

[103] In the following cases, best interests factors were balanced: Lavigne v. Family & Children's Soc'y of Elizabeth, 11 N.J. 473, 478-79, 482-83, 95 A.2d 6, 8-9, 11 (1953) (inequality of fitness between natural and adopting parents and psychological parenthood); In re A.B.M., 132 N.J. Eq. 434, 434-41, 28 A.2d 518, 519-22 (Ct. Err. & App. 1942) (inequality of fitness between natural and adopting parents and psychological parenthood); Winans v. Luppie, 47 N.J. Eq. 302, 305-06, 20 A. 969, 969-70 (Ct. Err. & App. 1890) (difference in social standing between the parties and psychological parenthood); Richards v. Collins, 45 N.J. Eq. 283, 287-88, 17 A. 831, 832-33 (Ct. Err. & App. 1889) (character, condition, habits and other surroundings of claimant and psychological parenthood); In re P., 114 N.J. Super. 584, 592-95, 277 A.2d 566, 570-72 (App. Div. 1971) (psychological parenthood and inequality of fitness between natural and adopting parents, but decided solely on psychological parenthood); In re Adoption by J.B. & F.B., 63 N.J. Super. 98, 105-06, 164 A.2d 65, 85-89 (App. Div. 1960) (inequality of fitness between natural and adopting parents and psychological parenthood); In re Jacques, 48 N.J. Super. 523, 528-33, 138 A.2d 581, 584-86 (Ch. Div. 1958) (inequality of fitness between natural and adopting parents, blood ties between child and adopting parents and psychological parenthood); In re D., 78 N.J. Super. 117, 125-27, 187 A.2d 628, 632-33 (Union County Ct., Prob. Div. 1963) (inequality of fitness between natural and adopting parents, improved health of child since in custody of adopting parents and psychological parenthood).

[104] *E.g.*, Lavigne v. Family & Children's Soc'y of Elizabeth, 11 N.J. 473, 478-79, 482-83, 95 A.2d 6, 8-9, 11 (1953). *See also* note 103 *supra*.

sideration was not used by the court as the sole factor in determining disposition until its decision in *Sorentino*.[105] Prior to *Sorentino*, however, the appellate court had used that factor exclusively in reaching a decision upon termination. In *In re P.*,[106] the mother had surrendered her child to the adopting parents four days after its illegitimate birth.[107] Two months later, just before marrying the natural father, the mother requested the child's return.[108] Answering the jurisdictional question, the appellate division initially held that there had been an abandonment.[109] With regard to the dispositional question, the court held that although both the natural and adopting parents were equally fit,[110] the best interests of the child required that the adopting parents keep the child.[111] The court based its determination of the dispositional question entirely on psychological parenthood, *i.e.*, on the emotional ties which had developed between the child and the adopting parents during the two-year period that had elapsed since the surrender of custody.[112] The court also indicated that even in the first few months following surrender, a sufficient psychological relationship could possibly develop, which could warrant retention of custody by the foster parents.[113]

In re P. is indicative of a revolution taking place with respect to the rights of parents and children.[114] The movement advocates an increased recognition of the rights of the child, and runs counter to the traditional emphasis on parental rights.[115] *Parens patriae*, when coupled with this movement, is virtually an unlimited source of power for any court that wishes to utilize it, and can provide the energy for new inroads into the established parental rights theory.[116] In *Sees v. Baber* this synthesis is demonstrably evident in the supreme court's dicta which advocated the unprecedented avoidance of the jurisdictional-dispositional procedure in a case factually similar to *Sorentino*.[117]

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[105] *See* notes 188–264 *infra* and accompanying text.
[106] 114 N.J. Super. 584, 277 A.2d 566 (App. Div. 1971).
[107] *Id.* at 587, 277 A.2d at 567.
[108] *Id.* at 587, 277 A.2d at 568.
[109] *Id.* at 591–92, 277 A.2d at 570.
[110] *Id.* at 592–93, 277 A.2d at 570–71.
[111] *Id.* at 593–95, 277 A.2d at 570–72.
[112] *Id.* at 595, 277 A.2d at 572.
[113] *Id.*
[114] *See* Simpson, *supra* note 48, at 348–49.
[115] *Id.*
[116] *See* 74 N.J. at 221, 377 A.2d at 638.
[117] *See id.*

PARENS PATRIAE AS AN ALTERNATIVE STANDARD FOR TERMINATION OF PARENTAL RIGHTS

Parens patriae, the equitable power of the state to protect children and act in their welfare according to their best interests, has been recognized in Anglo-American law for almost three centuries.[118] Although numerous attempts have been made to determine the source of this jurisdiction, its origin remains obscure.[119]

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[118] 2 J. STORY, EQUITY § 1332, at 760–62 (5th ed. 1849). Story suggests that the first exercise of this jurisdiction was in 1696. *Id.*

[119] *Id.* § 1328, at 758. It has been suggested that *parens patriae* originated from the King's duty to protect and defend his loyal subjects, particularly those subjects who could not adequately care for themselves. *Id.* The King was said to act as *parens patriae*, the patriarchal first parent of the realm, Eyre v. Shaftsbury, 4 Eng. Rep. 659, 664 (Ch. 1722), on behalf of idiots, lunatics and infants without guardians. 2 J. STORY, *supra* note 118, § 1328, at 758–59. Upon the grant of the Great Seal to the Chancellor which created the Court of Chancery, the royal *parens patriae* prerogative was transferred to the Chancellor as a branch of the general equitable jurisdiction of the court. 2 J. FONBLANQUE, A TREATISE OF EQUITY 228 n.a (1795). The validity of this theory has been questioned, however, since the Chancellor's power to deal with lunatics and idiots arose from a specific delegation of authority by the King to the Chancellor. *Id.* The criticisms arose, that given the King's original power, there would be no specific need for a later grant of authority to the Chancellor *vis á vis* lunatics and idiots. *Id.* From this, it was inferred that neither did the power over infants vest originally in the King. *Id.* However, this is explained by the fact that the power over lunatics and idiots originally vested in the feudal lords, thus requiring a parliamentary act to invest the King with the power. *Id.*

Another explanation attempts to derive the power from the law of trusts. Duke of Beaufort v. Berty, 24 Eng. Rep. 579, 579 (Ch. 1721). Since the Court of Chancery had the general power and jurisdiction over all trusts, it was argued that the guardian relationship must have also stemmed from that jurisdiction. *Id.* It has been contended that the relationship between parent and child is that of a trustee and a trust *res*. Rossman, *Parens Patriae*, 4 ORE. L. REV. 233, 236 (1925). But analogizing guardianship to a trust relationship has been criticized since trusts are applied to property and not to persons. 2 J. FONBLANQUE, *supra* at 228 n.a.

A third explanation places the power initially in the Court of Chancery and then in the Court of Wards and Liveries upon its establishment. Smith v. Smith, 26 Eng. Rep. 977, 977 (K.B. 1745); Morgan v. Dillon, 88 Eng. Rep. 361, 364 (Ch. 1724); Falkland v. Berty, 23 Eng. Rep. 814, 818 (Ch. 1696); 2 J. FONBLANQUE, *supra* at 228 n.a; 2 J. STORY, *supra* note 118, § 1332, at 760–61. After the Court of Wards and Liveries was abolished, this theory continues, the power was returned to Chancery. *Id.* A variation of this theory traces the power initially to the Court of Wards and Liveries and upon its termination to Chancery. 2 J. FONBLANQUE, *supra* at 228 n.a. In any event, neither explanation substantiates the proposition that the *parens patriae* power originated in Chancery. *See* 2 J. STORY, *supra* § 1332, at 760–61. Furthermore, since the Court of Wards and Liveries' jurisdiction extended only to infants with property, 2 J. FONBLANQUE, *supra* at 228 n.a, Chancery's general jurisdiction with regard to infants could not be derived therefrom. *Id.*

Another prominent theorist claims that the power was simply usurped by the Chancellor in 1696. *Id.* At that time, the Chancellor appointed a guardian on petition without bill for the first time. *Id.* Thereafter, the exercise of this power was accepted. *Id.* It is highly unlikely, however, that as late as 1696 such an usurpation would be either claimed by the Chancellor or tolerated by Parliament. 2 J. STORY, *supra* § 1332, at 762 n.1.

The ancient common law writs of Ravishment of Ward and *De Recto de Custodia* have also been suggested as the origin of the jurisdiction. *See* 2 J. FONBLANQUE, *supra* at 228 n.a. How-

Probably the most credible account of this power is that since such a power existed in every civilized state, it is reasonable to assume that the power is inherent in the sovereign.[120]

In New Jersey, the *parens patriae* power was first exercised by the court of chancery in 1868.[121] Upon the merger of law and equity, jurisdiction passed to the superior court.[122] The jurisdiction exists in *pari passu* with, and does not depend upon statute.[123] Although it is clear that the power is greater than specific statutory grants of authority,[124] the limits of the power have never been determined.[125] The application of *parens patriae* to determine the status of a child according to the best interests and welfare will be analyzed with respect to the established custody and termination standards outlined above. Consideration of New Jersey case law, including *Sorentino* and *Sees*, suggest that *parens patriae* may be a sole basis for termination independent of statutory restrictions.[126]

The interpretation of *parens patriae* has varied according to the definition of what constitutes the child's welfare. In the custody context, one standard prevails with respect to divorced or separated parents.[127] In custody disputes between divorced or separated parents,

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ever, these writs were law remedies, not equitable remedies. *Id.* Also, they only applied to contending competitors to a right of guardianship and not to a general all-inclusive authority to act in the best interests of the infant. *Id.*

The last prominent theory traces *parens patriae* back to the *inquisitio post mortem*, abuses of which caused the Court of Wards and Liveries to be established. 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 332, at 1836 (W. Jones ed. 1916). Blackstone indicates that when the male heir reached twenty-one or the female heir sixteen, they could seek the return of their lands from their guardian. But in order to do this, a fine consisting of one-half of the year's profit from the land, had to be paid. No heir was excused payment of the fine. This payment was viewed as a consideration for the protection afforded the ward. In order for the King to ascertain how much he was owed and to make certain that the heir would get his property, a system of traveling judges was used. These judges, called justices in eyre or itinerant justices, made inquiries upon the death of any man of fortune. This *inquisitio post mortem* established the value of the estate, the type of tenure and the name and age of the heir. But the inquisition became so corrupt that Henry VIII was forced to establish the Court of Wards and Liveries. *Id.* Thus, this theory considers the inquisition the origin of Chancery's general power to deal with infants. However, since the inquisition's jurisdiction was limited to infants with property as was the Court of Wards and Liveries, this theory is also unacceptable. *Id.*

[120] 2 J. FONBLANQUE, *supra* note 119, at 228 n.a.

[121] *See* Baird v. Baird, 19 N.J. Eq. 481, 485 (Ct. Err. & App. 1868).

[122] Henderson v. Henderson, 10 N.J. 390, 395, 91 A.2d 747, 749–50 (1952). The superior court succeeded to the power of the former court of chancery by virtue of Article XI, section IV, paragraph 3 of the New Jersey Constitution of 1947. *See* 10 N.J. at 395, 91 A.2d at 750.

[123] In re Erving, 109 N.J. Eq. 294, 297, 157 A. 161, 163 (Ch. 1931).

[124] *Id.*

[125] In re Lippincott, 96 N.J. Eq. 260, 261–62, 124 A. 532, 533 (Ch. 1924).

[126] *See* notes 188–264 *infra* and accompanying text.

[127] *See* notes 128–30 *infra* and accompanying text.

it is the general rule in New Jersey that the best interests of the child is of paramount consideration.[128] Underlying the best interests rule is the principle that neither "parent ha[s] a prima facie right to the child's custody."[129] Instead, courts are required to exercise their discretion based upon considerations of the child's welfare.[130] By contrast, two different standards apply in parent-stranger custody disputes. Such situations present a more distinct separation of parent-oriented and child-oriented factors.[131] In this context, two opposing views have emerged: the parental rights approach and the best interests approach.[132]

The "blood is thicker than water" rationale, which can be equated with King Solomon's famous custody decision, provided the basis of the parental rights standard.[133] Under the parental rights test, the parent will retain custody unless shown to be unfit.[134] In all jurisdictions, unfitness can be shown by proving that the natural parent has abandoned the child, that the natural parent is of an undesirable moral character, or that the home environment of the natural parent is not proper.[135] This view derives from the belief that the parent's interests will reflect those of the child except in extraordinary circumstances.[136] The justification for this approach is the belief that in a functional family the parents are entitled to the custody and control of their children.[137] In most situations, this standard is based

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[128] English v. English, 32 N.J. Eq. 738, 742–43 (Ct. Err. & App. 1880). It should be noted that this approach is universally accepted in the custody contest. Simpson, *supra* note 48, at 356.

This best interests rule developed out of early cases in which the father was deemed always entitled to the custody of his child absent a showing of parental unfitness. *E.g.*, State v. Stigall, 22 N.J.L. 286, 287–89 (Sup. Ct. 1849). The mother was only entitled to custody if the child were of "tender years," absent such parental misconduct. *Id.* at 289. Later, it was established that both father and mother had equal rights to the child and, consequently, the best interests of the child would determine the grant of custody. *E.g.*, Clemens v. Clemens, 20 N.J. Super. 383, 390–91, 90 A.2d 72, 75–76 (App. Div. 1952).

[129] Note, *Measuring the Child's Best Interests—A Study of Incomplete Considerations*, 44 DEN. L.J. 132, 133 (1967).

[130] *Id.*

[131] H. CLARK, *supra* note 1, § 17.5; Simpson, *supra* note 48, at 357–58; Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 152–53 (1963) [hereinafter cited as *Alternatives*].

[132] H. CLARK, *supra* note 1, § 17.5.

[133] Foster, *Adoption and Child Custody: Best Interests of the Child*, 22 BUFFALO L. REV. 1, 1 (1973). King Solomon's decision was based on the "superiority" of the natural parent. Thus, the woman who cried out to prevent the death of the child had to be the mother because her love for the child was greater. *See* 1 KINGS 3:16–28.

[134] Simpson, *supra* note 48, at 357.

[135] *See Alternatives*, *supra* note 131, at 153.

[136] *Id.* at 155.

[137] H. CLARK, *supra* note 1, § 17.5.

upon two assumptions: parents, "with all their faults," are more capable of providing "for their children than strangers or agencies of the state;" and, the emotional ties with the biological parent are even more important than the greater material benefits and care which could be provided by foster or adoptive parents.[138]

The parental rights approach provides an easy solution for judges unwilling to weigh the relevant, albeit complicated, factors inherent in a proper custody decision.[139] In addition, the parental rights theory is compatible with the human and judicial tendency to stereotype relationships.[140] As a result, judges have traditionally preferred to use the parental rights approach with its relatively clear standards for the trier of fact to the amorphous best interests approach.[141]

The best interests standard, like the parental rights approach, is also based upon considerations of the welfare of the child.[142] Theoretically, however, parental unfitness is not the *sine qua non* of granting custody to a stranger.[143] Thus, even if a parent were not found to be unfit, custody could be awarded to a non-parent if mandated by the best interests of the child.[144] In determining best interests, the courts consider numerous factors: the "moral fitness of the . . . parties;" the home environment of each party; "the emotional ties of the child to the parties and of the parties to the child; the age, sex and health of the child;" whether it would be desirable to continue the present relationship with the third party; and finally, the child's preference.[145]

This approach has been criticized because of its indeterminate nature which allows selective and subjective application of the numer-

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[138] *Id.* An exception to the parental rights approach developed in many jurisdictions allowing that, if a parent voluntarily gives up a child to a stranger and a strong relationship develops between the child and the stranger, the court will not dissolve this relationship and return the child to the parent. Simpson, *supra* note 48, at 357–58. The criteria for such a decision are: "the length of stay" with the third party; "the nature of [the] . . . relationship . . . ; the degree of contact maintained with the parent;" and, whether or not the parent intended the stay to be temporary or permanent. H. CLARK, *supra* note 1, § 17.5, at 594. The use of the latter fact has been criticized in cases where the temporary nature of the stay is determinative because "the child begins to resemble a chattel, title to which remains in the parent even though possession may be transferred." *Id.*

[139] Foster, *supra* note 133, at 3.

[140] *Id.* at 2.

[141] *Alternatives*, *supra* note 131, at 153–55.

[142] *Id.* at 155–56. It is obvious that all courts base their decisions on the welfare of the child. However, the difficulty lies in the definition of the best interests of the child.

[143] *See* H. CLARK, *supra* note 1, § 17.5.

[144] *Alternatives*, *supra* note 131, at 156 n.24.

[145] *Id.* at 153.

ous factors.[146] To escape the criticism that this test is but a disguise under which bare "judicial intuition" operates, most courts use various procedural devices which tend to favor the natural parent in obtaining custody.[147] An example of such a device is the limited presumption that custody by the natural parent will be in the best interests of the child.[148] Such efforts have, in fact, turned the best interests test into a disguised form of the parental rights theory.[149] Thus, although best interests language is present in many custody cases, the parental rights theory is actually applied through the use of procedural devices in most parent-stranger custody contests.[150] Thus, in most cases the application of the best interests and parental rights theories have yielded the same result.[151] This is clearly the dilemma in New Jersey where custody had never been awarded to a stranger absent parental unfitness until the 1977 decision of *Sorentino v. Family & Children's Society of Elizabeth.*[152]

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[146] *Id.* at 153–54.

[147] *Id.* at 154.

[148] *Id.* at 154–55.

[149] *Id.* at 154 & n.18. *Contra*, H. CLARK, *supra* note 1, § 17.5.

[150] *Alternatives*, *supra* note 131, at 154 & n.18.

[151] *See* In re Mrs. M., 74 N.J. Super. 178, 181 A.2d 14 (App. Div. 1962). *In re Mrs. M.* is a perfect example of a court using best interest language but actually applying the parental preference standard. The court stated the rule that the welfare of the child is the essential factor and that even parental rights must be subordinated to the best interest of the child. *Id.* at 183, 181 A.2d at 16. Nevertheless, the court refused to award custody of the child to a third party who had retained custody for over 14 months solely because the parent was not deemed to be unfit. *Id.* at 187–90, 181 A.2d at 18–20. The court completely ignored whether taking a twenty-eight month old child away from the third party would be in the child's best interests. *See id.* Thus, although best interests language was present in the case, the true determining factor was parental unfitness. *Id.* at 187, 181 A.2d at 18.

[152] S.M. v. S.J., 143 N.J. Super. 379, 385, 363 A.2d 353, 356 (Ch. Div. 1976); *see* 74 N.J. at 320, 326–27, 378 A.2d 21, 24–25. As to the present criteria for awarding custody in parent-stranger situations, see the discussion of the *Sorentino* decisions in notes 151–240 *infra* and accompanying text.

Although many New Jersey decisions used best interests language, all custody decisions prior to *Sorentino II* were decided strictly on parental rights. The first important custody case for purposes of this discussion was Richards v. Collins, 45 N.J. Eq. 283, 17 A. 831 (Ct. Err. & App. 1889). In *Richards*, the mother gave her child to an aunt, and after many years, sought the return of the child. *Id.* at 288–89, 17 A. at 832–33. The court noted its authority to consider the welfare of the child paramount to the legal rights of the parents in certain circumstances. *Id.* at 286–87, 17 A. at 832. Nevertheless, the *Richards* court emphasized the mother's abandonment in granting custody to the child's aunt. *See id.* at 288–89, 17 A. at 832–33. Thus, although the court considered the welfare of the child to be the controlling factor, the case can also be interpreted as a parental rights decision. *See id.* at 285–89, 17 A. at 832–33.

The judicial reaction to *Richards* in Giffin v. Gascoigne, 60 N.J. Eq. 256, 47 A. 25 (Ch. 1900), demonstrated a refusal to accept *Richards'* broad best interests language. In *Giffin*, the father gave custody of his child to an aunt. Subsequently, the child was transferred to his grandfather who refused to return the child. *Id.* at 257, 262, 47 A. at 25, 27. The court held that only if a parent is unfit may custody be awarded to a third party. *Id.* at 260, 47 A. at

In New Jersey, the application of *parens patriae* to the termination of parental rights has reflected the same parental preference ap-

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26–27. With respect to *Richards*' best interests language, the court narrowly interpreted such language to mean relative material benefits: "Such a view would take his child from the poor man and give it to his richer neighbor who might offer to adopt it." *Id.* at 259, 47 A. at 26. This clear parental rights approach in *Giffin* formed the basis of the decision in Hesselman v. Haas, 71 N.J. Eq. 689, 64 A. 165 (Ch. 1906). In *Hesselman*, the mother had given away her child at its birth, *id.* at 691, 64 A. at 166, and sought its return, ten years later. *See id.* at 696, 64 A. at 168. The court granted custody to the mother, finding that she had not completely abandoned the child. The court did not consider effects upon the child in being taken away from the couple after ten years. *See id.* at 695–97, 64 A. at 167–68. Subsequently, in Ziezel v. Hutchinson, 91 N.J. Eq. 325, 100 A. 300 (Ct. Err. & App. 1920), the court of errors and appeals utilized the reasoning of *Hesselman*. In *Ziezel*, the mother died in childbirth and the father gave the child to the maternal grandparents. After three years, the father wanted the child back. *Id.* at 325–26, 100 A. at 300. The court clearly applied the parental preference standard, holding that since the father was not unfit, custody must be granted to him. *Id.* at 328, 100 A. at 301. Another case also characterized by parental rights language is *Ex parte* Kirschner, 111 A. 737 (N.J. Ch. 1920). In *Kirschner*, the court noted that New Jersey law had "repudiate[d] the theory that" the custody of children should be determined "according to the view which officials of the state take as to what is for the best interests of the children." *Id.* at 738.

In cases subsequent to *Richards v. Collins*, best interest language continued to be mentioned in spite of the definite parental rights approach which was taken. For example, in Corsi v. State Board of Children's Guardians, 96 N.J. Eq. 254, 124 A. 609 (Ch. 1924), the best interests language was quoted in full from *Richards*. Nevertheless, the case was decided on the issue of abandonment and parental unfitness. *Id.* at 257–58, 124 A. at 610–11.

It must be noted that although the courts continued to use best interests language in making parental rights decisions, the superficial use of such language began to be more dominant in the late 1930s. To be sure, this trend can be considered one of mere form and not substance, but it can also be said to signal an extremely gradual change in the attitude of the courts. *See* S.M. v. S.J., 143 N.J. Super. 379, 384–85, 363 A.2d 353, 355–56 (Ch. Div. 1976). The result in *Sorentino II* can be partially traced to this tendency to speak in terms of best interests. One of the first cases of this trend was *In re* A.B.M., 132 N.J. Eq. 434, 28 A.2d 518 (Ct. Err. & App. 1942). In that case, while basing its holding on a finding of abandonment, the court stated: "Our law is clear on the subject. It is not the parental right but the interest of the child which is controlling." *Id.* at 441, 442, 28 A.2d at 522. *In re A.B.M.* was followed by *In re* R.L., 137 N.J. Eq. 271, 44 A.2d 396 (Ch. 1945), which provided an excellent statement of best interests principles: "A child cannot be regarded in the law as a mere inanimate chattel. The rights of the parent must not be permitted to obliterate the rights of the child." *Id.* at 275, 44 A.2d at 398. *See also* Starr v. Gorman, 136 N.J. Eq. 105, 107–08, 40 A.2d 564, 565–66 (Ct. Err. & App. 1945) (welfare of the child controlling element); Baum v. Kornberg, 139 N.J. Eq. 265, 269, 50 A.2d 844, 846 (Ct. Err. & App. 1947) (the interest of the child and not the parental right is controlling).

In In re Alsdorf, 142 N.J. Eq. 246, 59 A.2d 610 (Ch. 1948), the court attempted to make a synthesis of prior custody decisions. The older cases such as *Giffin* and *Ziezel* were denominated parental rights cases, and cases beginning with *In re A.B.M.* were considered to represent the cases emphasizing best interests of the child rather than parental rights. *Id.* at 253, 59 A.2d at 614–15. Subsequent cases follow *Alsdorf* in stressing the child's welfare. *See, e.g.*, Scanlon v. Scanlon, 29 N.J. Super. 317, 325, 102 A.2d 656, 661 (App. Div. 1954) ("[w]here circumstances of weight and importance concerning the welfare of the infant transcend the strict legal rights of the parents, the court may award the custody of the infant to a stranger"); In re S., 57 N.J. Super. 154, 156, 154 A.2d 129, 130 (Essex County Ct. 1959) ("[p]rimary and controlling issue . . . [is] . . . welfare and best interests of the infant involved"); In re Mrs. M., 74

proach as present in the custody area.[153] Although all termination decisions claim to be rooted in the best interests and welfare of the child, it is clear that the statutory framework has been interpreted to favor retention of custody by natural parents.[154] Traditionally, this result has arisen from the creation of a jurisdictional-dispositional procedure in termination proceedings under the adoption-termination approach which, until recently, represented the great bulk of cases.[155] It is apparent that since the best interests of the child are not considered until the court's jurisdiction has been established, the jurisdictional-dispositional approach does not inherently favor the best interests of the child.[156] For *parens patriae* to constitute an effective

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N.J. Super. 178, 183, 181 A.2d 14, 16 (App. Div. 1962) ("welfare of the child is the controlling consideration . . . [to which] [e]ven parental rights must yield").

The modern trend of classifying custody decisions in terms of the welfare of the child was remarked upon in S.M. v. S.J., 143 N.J. Super. 379, 363 A.2d 353 (Ch. Div. 1976). This decision clearly recognized that, in New Jersey, custody of a child had never been granted to a stranger absent "support of one of the parents or a finding of unfitness or abandonment." *Id.* at 385, 363 A.2d at 356. In *S.M.*, the mother of an illegitimate child married a man shortly after the child's birth who was not the child's father. *Id.* at 382, 363 A.2d at 354. The husband and wife lived together for over seven years and during that time had two children. *Id.* Upon separation, the mother took custody for over a year and then gave all of the children to her husband who, at the time of the decision, had retained custody for over two years. *Id.* Upon the mother's attempt to secure the return of her illegitimate child, the court ruled in favor of the husband, granting him custody based upon the child's best interests. *Id.* at 385–86, 363 A.2d at 356. Although *S.M.* can be construed as giving a child to a stranger in the absence of parental unfitness, it is clear that the particular facts of the case demonstrate that the husband was not really a stranger. *See id.* at 382, 363 A.2d at 354. *S.M.* is analogous to a divorce or separation situation in which both parents have equal rights to the children and best interests control. *See* notes 128–30 *supra* and accompanying text. Thus, although the *S.M.* court characterized its decision as the first granting of custody to a stranger absent parental unfitness, *see* 143 N.J. Super. at 381, 363 A.2d at 354, the case is actually distinguishable in that the husband was truly not a stranger. Rather, *Sorentino II* is the first case in which a stranger has been awarded custody absent parental unfitness. *See* text accompanying notes 223–25 *infra*.

[153] The termination of parental rights almost exclusively arises in adoption proceedings. In a divorce or separation situation, it is rarely the case that either spouse will press to terminate the rights of the other since termination is seldom granted in such cases. *See* 74 N.J. at 322–23, 378 A.2d at 22–23. Therefore, discussion of *parens patriae* as applied to termination proceedings between husband and wife is not meaningful.

[154] *See* note 152 *supra*. This is the rule not only in New Jersey, but in all other jurisdictions. Simpson, *supra* note 48, at 380–81.

[155] Ketcham & Babcock, *supra* note 48, at 539–41.

[156] *Id.* at 539–40. A good example of the method by which the jurisdictional-dispositional approach can prevent consideration of the child's welfare is presented in the Oregon case of State v. McMaster, 259 Ore. 291, 486 P.2d 567 (1971). In that case, a two-month old illegitimate child was taken from her mother on charges of neglect. *Id.* at 301, 486 P.2d at 572. When the child was four years old the natural parents contested the suit for termination by the foster parents. *Id.* at 303, 486 P.2d at 572. The Supreme Court of Oregon held that the actions of the mother were not serious enough to justify termination. *See id.* at 303–04, 486 P.2d at 572–73. For a discussion of this case in the context of the jurisdictional-dispositional approach and psychological parenthood, see Ketcham & Babcock, *supra* note 48, at 538–42.

approach to the termination of parental rights it is necessary to demonstrate that it avoids the problems inherent in the two stage "jurisdictional-dispositional procedure." Furthermore, the best interests of the child test and the psychological parentage approach must provide a clear, dependable and judicially manageable set of criteria for evaluation of any particular case.[157] Therefore, "best interests" must be "broken up into more specific and concrete elements stressing the child's psychological welfare."[158] If this is not done, the courts will revert to such convenient generalizations as "'a natural parent is to be preferred over a stranger,'" or "'a mother is to be preferred over a father'" or "'the non-custodial parent should be given . . . visitation rights.'"[159] While these "rules of thumb" may be correct in many cases as the natural parents are usually the psychological parents, the basic thrust of the theory of psychological parenthood, however, is that such rules should not be applied automatically since the natural parents may lose, or never achieve, psychological parent status.[160]

The results of various behavioral studies which outline the manner in which psychological parenthood can be an accurate measure for termination will now be presented. These provide a basis for direct judicial acceptance of *parens patriae* as an independent basis for termination of parental rights requiring only an examination of the best interests, *i.e.*, psychological welfare, of the child.

The basis of psychological parenthood is the mutual interaction between the adult and the child.[161] The belief in the blood relationship which forms the basis of pre-*Sorentino* decisions overlooked the child's method of structuring relationships.[162] The essential element of successful personality development is not the biological occurrence which initiated the relationship, but the psychological relationship existing between the adult and the child.[163] Although the biological parent's opportunity to establish such a relationship is great, this advantage may be lost when a third party has had custody of the child

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[157] If psychological parenthood is to be the determining factor in terminating parental rights, there must be "criteria predictive of the formation and growth of psychological and emotional ties that can be employed in order to evaluate the effects of removing a child from the psychological home." Comment, *supra* note 102, at 693, 702.

[158] Foster, *supra* note 133, at 3.

[159] *Id.*

[160] *See* notes 161–68 *infra* and accompanying text.

[161] J. GOLDSTEIN, *supra* note 77, at 19. Professor Goldstein contends that such a role cannot be filled "by an absent, inactive adult, whatever his biological . . . relationship to the child. . . ." *Id.*

[162] *See id.* at 31–39.

[163] *Id.* at 16–20.

for a period of time.[164] The child begins to view the third party as its psychological parent after some period of separation from the biological parent, and, after a period of time, the psychological relationship with the biological parent begins to weaken and is eventually replaced by a psychological relationship with the new custodian.[165] Return of the child to the biological parent after establishment of psychological parenthood with a third party will cause severe harm to the child and can even prevent the child from initiating new relationships.[166] Thus, the "rule of thumb" generalizations presently used to determine custody and termination[167] may fail to provide for the child's best interests since they ignore the present psychological relationship existing between the child and the third party.[168]

A real understanding of the dynamics of psychological parenthood requires an anlaysis of what has been termed "the affection-relationship."[169] The child's "affection-relationship" is the model for "all future interpersonal relationships."[170] It arises from the "satisfaction by the 'parent' of the child's basic needs" and is firmly established by the end of the first year of infancy.[171] The separation of a child from the adult with whom it has had such a relationship has been deemed "psychologically equivalent . . . to the orphaning of that child."[172] Although the child may form a new "affection-relationship," it will be of lesser strength.[173] Once the relationship is broken, however, return of the child to that adult will not restore the relationship. This will have a distinct effect on the child's future ability to establish relationships with others.[174]

The court, in a custody or termination matter, must identify any presently existing "affection-relationships."[175] Three points of inquiry must be considered: the length of time the relationship has existed; the affection of the adult for the child; and the affection of the child for the adult.[176] This inquiry is more complex in those

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[164] *Alternatives, supra* note 131, at 158.
[165] *Id.* at 158–59.
[166] *See* J. GOLDSTEIN, *supra* note 77, at 31–34.
[167] *See* notes 159–60 *supra* and accompanying text.
[168] *See* J. GOLDSTEIN, *supra* note 77, at 31–39.
[169] *Alternatives, supra* note 131, at 160.
[170] *Id.* at 160–61.
[171] *Id.* at 160.
[172] *Id.* at 161.
[173] *Id.*
[174] *Id.* at 160–61.
[175] *Id.* at 162.
[176] *Id.* The Colorado case of Root v. Allen, 151 Colo. 311, 377 P.2d 117 (1962), provides an excellent example to demonstrate the applicability and accuracy of psychological parenthood

situations in which a child has developed more than one "affection-relationship."[177] Other factors, including the child's recent developmental state, the child's present emotional needs, the probable trend of future development and the corresponding problems and needs that may arise from this trend must be considered.[178]

Thus, in view of the need of every child for continuous, affectionate and stimulating relationships, the judicial decisions which result in the return of custody to biological parents after a psychological relationship has developed with a third party are truly not based upon the best interests of the child.[179] Judicial disposition should, therefore, not be rendered without providing the decisionmakers with sufficient data as to the possible psychological consequences of the decision.[180] Furthermore, in the absence of such data, a presumption should be established in favor of continuing the then current quasi-parental relationship of the child unless that relationship is but recently established.[181]

Procedurally, time is of the utmost importance since the welfare of the child depends on the length of time he or she has spent with the foster parents.[182] If a return of the child to the biological parents

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theory. The case concerned the custody of Sharon, an eleven year old girl. *Id.* at 313, 377 P.2d at 118. Sharon's parents had been divorced in her first year and Rachel, Sharon's mother, obtained custody at that time. *Id.* at 312, 377 P.2d at 118. Rachel and Sharon moved to Denver where Rachel met and, after two years, married Robert Allen. *Id.* at 313, 377 P.2d at 118. When Sharon was eight years old, her mother died. *Id.* at 313, 377 P.2d at 119. The natural father, William Root, had remarried and established a home in California. *Id.* at 314, 377 P.2d at 119. Although Root had seen Sharon for only an hour and a half in the ten years following his divorce from Rachel, he attempted to regain custody of Sharon after Rachel's death. *Id.* at 313, 377 P.2d at 118. The Supreme Court of Colorado refused to return custody to Root. *Id.* at 319–20, 377 P.2d at 122.

Expert testimony at the trial had demonstrated that Sharon was shy, reserved, lacked confidence and, because of her insecurity, relentlessly attempted to establish relationships with those around her. *Id.* at 318–19, 377 P.2d at 121. After Rachel's death, Allen was the most significant adult in Sharon's life. *Id.* at 319, 377 P.2d at 121. Expert testimony was also introduced to the effect that destruction of Sharon's affection-relationship with Allen would add to Sharon's lack of confidence and instability. *Id.* at 318, 377 P.2d at 121. The experts agreed that Sharon would probably establish a new affection-relationship with the Roots, but that such an affection-relationship would be weak. *Id.* In addition, Sharon could develop anger toward both Root and Allen which could lead to various psychological problems. *Id.* Thus, the quality of Sharon's affection-relationship with Allen mandated that custody remain with Allen. *Id.* at 319–20, 377 P.2d at 122; *Alternatives, supra* note 131, at 164.

[177] *Alternatives, supra* note 131, at 166.

[178] *Id.*

[179] *See* J. GOLDSTEIN, *supra* note 77, at 31–34.

[180] *See* Foster, *supra* note 133, at 3. It has been suggested that custody matters would be better handled by members of the judiciary with some specialized training in behavioral science. *See id.*

[181] *See* Goldstein, *Psychoanalysis and Jurisprudence*, 77 YALE L.J. 1053, 1074 (1968).

[182] Comment, *supra* note 102, at 709.

is to be considered, the rehabilitation of these parents must be accomplished rapidly to prevent their loss of status as psychological parents. In the courts, especially at the appeal level,[183] such matters should be disposed of as quickly as possible.[184]

The distinction between custody and termination discussed above is largely irrelevant under the principles of psychological parenthood.[185] The harm to the child in removing it from its psychological environment is the same whether the decision was temporary or permanent.[186] Once the removal continues for some period of time, agency placement is preferred because of the better opportunity it affords to avoid the development of an undesirable "affection-relationship."[187]

In conclusion, the *parens patriae* power to determine the status of a child according to his or her best interests is a viable independent standard for termination of parental rights. Since it is not dependent on statutory standards such as forsaken parental obligations, this power is a potent authority to be exercised in furthering the welfare of the child. In applying this power, courts should be cognizant of the relative importance of the factors derived from behavioral studies. These studies also demonstrate the need to develop a termination standard by emphasizing the importance of the child's psychological well-being to any best interests determination. In light of this proposal, it would be beneficial to examine the reforms promulgated by the New Jersey supreme court in *Sorentino* and *Sees*. It is through these cases that the possibility of using *parens patriae* can be established and the importance of the best interests standard demonstrated.

The *Sorentino* case involved a sixteen-year-old unmarried mother who had given birth to a child on May 5, 1974.[188] On May 30, 1974, the child was surrendered to the Family and Children's Society of Elizabeth for temporary foster care.[189] This arrangement was for thirty days, at the end of which time the mother either could have taken her child back or surrendered it permanently.[190] After the thirty days had elapsed, the mother sought the return of her child,

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[183] *Id.* at 710.

[184] *Id.*

[185] *Id.* at 710–11.

[186] *Id.* at 711.

[187] *Id.* at 711–12.

[188] 72 N.J. at 129, 367 A.2d at 1169.

[189] *Id.* The child's natural father had refused to marry the mother and, as a result, the child's grandmother would not allow the child and the mother to remain in her home. *Id.*

[190] *Id.*

but the agency coerced the mother into surrendering the child.[191] Subsequently, the adoptive parents received the child on July 9, 1974.[192] After the coerced surrender, the mother repeatedly and unsuccessfully attempted to regain custody of her child.[193] Although the natural parents sought legal counsel in early 1975, they were advised not to take further legal action until July of that year.[194] The trial judge found the Sorentinos to be fit parents and granted them custody as the natural parents.[195] The appellate division affirmed, but it stayed the custody order pending appeal, and a further stay was granted by the Supreme Court of New Jersey pending its own decision.[196] By the time of the court's decision, the natural parents had married.[197] Furthermore, the child had been in the custody of the adopting parents for a twenty-nine month period: July 9, 1974, to December 17, 1976.[198]

The supreme court held that because the mother had been coerced by the agency, there had been no forsaken parental obligations.[199] The court recognized that such a conclusion would normally result in the child's return to the natural parents.[200] Yet, noting its concern for the "potentiality of serious psychological injury" to the child based on a possible "drastic change in . . . life circumstances," the case was remanded to the trial court with a directive to determine whether such injury would result.[201] The court contended that, by ordering a hearing to determine psychological injury, it was not "evad[ing] its responsibility as *parens patriae* of all minor children, to preserve them from harm."[202] The court did, however, retain jurisdiction to allow for review of the trial court's determination on remand.[203]

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[191] *Id.* at 129–30, 376 A.2d at 1169.

[192] *Id.* at 128, 367 A.2d at 1169.

[193] *Id.* at 129, 367 A.2d at 1169.

[194] *Id.* at 129–30, 367 A.2d at 1169. The attorney for the natural parents advised them to wait until the mother reached the age of 18, advice which the supreme court felt was ill-considered. *Id.* at 130, 367 A.2d at 1169.

[195] *Id.*

[196] *Id.*

[197] *Id.* at 134, 367 A.2d at 1171. It was, however, unclear at what point the marriage took place. *See id.*

[198] *See id.* at 127–31, 367 A.2d at 1168–70.

[199] *Id.* at 129–30, 367 A.2d at 1170.

[200] *Id.* at 131, 367 A.2d at 1170.

[201] *Id.* at 131–33, 367 A.2d at 1170–71.

[202] *See id.* at 132, 367 A.2d at 1171. The court further noted that "[t]he possibility of serious psychological harm to the child . . . transcends all other considerations." *Id.*

[203] *Id.* at 133, 367 A.2d at 1171.

Before considering the impact of *Sorentino*, attention must be given to the New Jersey supreme court's decision in *Sees* which was handed down while *Sorentino* was on remand.[204] Unlike the placement through an agency as in *Sorentino*, *Sees* involved a private placement of a child for adoption.[205] The child was born to the unmarried mother on July 3, 1976,[206] and surrendered to acquaintances of a physician employed by the hospital in which the baby was born.[207] While in the hospital, the mother signed a surrender form drafted by the adopting parents' attorney.[208] Six days after the birth, the mother changed her mind and notified the defendants that she desired the return of her child. The adoptive parents, however, refused to return the child.[209] The action for the return of the child resulted in a supreme court decision rendered on July 27, 1977,[210] at which time the child had been in the custody of the adopting parents for one year.[211]

The court found the applicable law to be that parental consent to surrender a child may be withdrawn in a private placement situation, whereas consent granted to an approved agency is valid and binding.[212] Thus, despite the fact that the mother had executed a consent form, her consent was held to be insufficient under the termination statute.[213] Applying the jurisdictional-dispositional test according to the guidelines outlined in *In re Adoption of Children by D.*, the court held that since there had been no abandonment, no factors regarding the child's best interests could be considered.[214] Thus, the court ordered that custody be returned to the natural parents.[215] The

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[204] *See* 74 N.J. at 201, 377 A.2d at 628. *Compare Sees*, 74 N.J. at 201, 377 A.2d at 623, *with Sorentino*, 72 N.J. at 127, 367 A.2d at 1168 and *Sorentino II*, 74 N.J. at 313, 378 A.2d at 18.

[205] *Id.* at 205–07, 377 A.2d at 630–31.

[206] *Id.* at 204, 377 A.2d at 630.

[207] *Id.* at 206–07, 377 A.2d at 631.

[208] *Id.* at 207, 377 A.2d at 631.

[209] *Id.* at 207–08, 377 A.2d at 631.

[210] *Id.* at 201, 377 A.2d at 628.

The trial court terminated the natural mother's rights in her child and the appellate division affirmed on January 17, 1977. *Id.* at 205, 377 A.2d at 630. The Supreme Court of New Jersey granted the natural mother's petition for certification and motion for acceleration on March 1, 1977. Sees v. Baber, 74 N.J. 251, 377 A.2d 656 (1977).

[211] 74 N.J. at 222, 377 A.2d at 639.

[212] *Id.* at 215, 377 A.2d at 635. The court reasoned that since "no statutory obligation" existed to the consent, a "retraction" was permissible. *Id.* The court found further support in the fact that in most other jurisdictions such a consent was not considered "absolutely irrevocable." *Id.*

[213] *Id.* at 216, 377 A.2d at 636.

[214] *Id.* at 220–21, 377 A.2d at 638.

[215] *Id.* at 221, 377 A.2d at 638.

court attempted to reconcile this holding with *Sorentino* due to its factual similarity, noting that *Sorentino* was an example of a situation in "which [a court] might obtrude upon [an] . . . otherwise . . . clear legal picture in favor of a natural parent" in order to utilize its jurisdiction under the *parens patriae* power.[216] The court, however, distinguished *Sorentino* from *Sees* based on the time spent by the child with the adopting parents.[217] While the twenty-nine month period in *Sorentino* warranted a hearing to decide potential psychological harm, the court held that the twelve month period in *Sees* was not long enough to require such a psychological inquiry.[218] Therefore, a *Sorentino*-type hearing on psychological harm was considered unnecessary.[219]

Two months after *Sees*, the supreme court affirmed the trial court's decision[220] that psychological injury would result to the Sorentino child if custody were to be given back to the natural parents.[221] The court extensively considered the issue of termination of parental rights as this appeal was the first supreme court hearing on the planned adoption by the foster parents.[222] *Sorentino* was the first decision in New Jersey in which custody had ever been granted to a stranger, absent parental unfitness.[223] Until *Sorentino*, New Jersey's best interest approach had always been a disguised parent-oriented approach. However, *Sorentino* clearly represented a custody decision decided according to a true best interests test.[224] It was a new exercise of *parens patriae* in the custody context.[225]

In the custody context, the supreme court's decision after remand (*Sorentino II*) was simply a reaffirmation of the custody principles enunciated in its earlier opinion.[226] With regard to termination,

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[216] *Id.*

[217] *Id.* at 221–23, 377 A.2d at 638–39.

[218] *Id.* at 221–22, 377 A.2d at 638–39. The court found that an examination of the psychological consequences "would not likely add illumination" to its decision. *Id.* at 222, 377 A.2d at 639. Given the child's age, the court concluded "that the nature and duration of such psychological damage [is] imponderable." *Id.*

[219] *Id.* at 221, 378 A.2d at 22.

[220] 74 N.J. at 320, 378 A.2d at 21.

[221] *Id.* at 317, 378 A.2d at 20.

[222] *Id.* at 321, 378 A.2d at 22.

[223] *See id.* at 326–27, 378 A.2d at 24–25. For a discussion of the first case allegedly granting custody in the absence of parental unfitness, see S.M. v. S.J., 143 N.J. Super. 379, 363 A.2d 353 (Ch. Div. 1976); note 110 *supra*.

[224] *See* 74 N.J. at 316–20, 378 A.2d at 19–21. *See also* notes 142–45 *supra* and accompanying text.

[225] For a discussion of S.M. v. S.J., 143 N.J. Super. 379, 363 A.2d 353 (Ch. Div. 1976), see note 152 *supra*.

[226] *See* 74 N.J. at 320, 378 A.2d at 21. The *Sorentino II* court added nothing to the criteria initially used in *Sorentino* in determining the grant of custody.

however, *Sorentino II* provided extensive guidelines in response to the defendants' direct petition for adoption.[227] The court indicated that a primary purpose of the adoption act "is the maintenance of stable, continuing relationships between parent and child."[228] Nevertheless, this purpose of the act was found inapplicable as there never had been a relationship between the Sorentinos and their child.[229] In such a case, it was noted, another purpose of the adoption act emerges: the protection of the new family from interference by parents with whom the child has no continuing relationship, legal or otherwise.[230] The court classified all prior termination proceedings as reflecting either of two purposes: to encourage stable relationships between the natural parents and the child; and where termination was granted, to protect the new family from interference by parents with whom the child had no relationship.[231] Applying this analysis to the Sorentino situation, the court indicated that termination would be proper as there was no existing relationship between the Sorentinos and their child since the child had been in the custody of the adopting parents almost from birth.[232]

The court then sought to distinguish *Sees*.[233] Rather than relying upon the *parens patriae* power to terminate parental rights, absent forsaken parental obligations, where warranted by the child's best interests,[234] the court attempted to characterize the Sorentinos' behavior as amounting to forsaken parental obligations.[235] Both the Sorentinos' delay in seeking legal advice and the adopting parents' lack of any notice of the Sorentinos' change of heart were considered relevant to "the issue of abandonment and termination."[236] The court indicated that these facts suggested "strongly . . . the conclusion that" the Sorentinos had forsaken their parental obligations.[237]

Although, at least superficially, *Sorentino II* adopts the traditional analysis of termination law, it is doubtful whether the court's

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[227] *Id.* at 322–25, 378 A.2d at 22–24.

[228] *Id.* at 322–23, 378 A.2d at 22.

[229] *Id.* at 323–24, 378 A.2d at 23.

[230] *Id.* at 323, 378 A.2d at 23.

[231] *Id.* at 323–24, 378 A.2d at 23.

[232] *Id.* at 324–25, 378 A.2d at 23–24. The court reviewed the conduct of the natural parents in this regard, finding "equivocation and indecision on [their] part" which the court considered "harmful" to the child's interests. *Id.* at 324, 378 A.2d at 23.

[233] *Id.* at 325–26, 378 A.2d at 24.

[234] *See* 74 N.J. at 221, 377 A.2d at 638; notes 169–87 *supra* and accompanying text.

[235] *Id.* at 324, 377 A.2d at 23.

[236] *Id.*

[237] *Id.* at 325, 377 A.2d at 24. Due process considerations, however, led the court to remand the petition for termination to the chancery division. *Id.*

findings were sufficient to merit termination under the traditional standards. One problem arises with respect to the existence of forsaken parental obligations on the part of the Sorentinos. While, initially the court had impliedly found that there had been no forsaken parental obligations,[238] in *Sorentino II*, the court found it appropriate to examine the issue due to "a more fully developed record."[239] There appears, however, to have been no significant difference in the factual criteria present in both decisions.[240] In addition, the traditional prerequisites for forsaken parental obligations seem to be absent, especially in light of *In re Adoption of Children by D.'s* requirement of both past neglect and present inability.[241] The facts strongly suggest that such past neglect and present inability cannot be attributed to the Sorentinos' conduct. On June 30, 1974, only two days after the child was surrendered, the father learned of the surrender.[242] Three visits to the adoption agency followed in September and December.[243] In January, 1975, legal counsel was sought.[244] Such conduct is not indicative of abandonment and neglect, rather it suggests prompt resort to available remedies in order to regain custody of the child. Although the court viewed the adopting parents' ignorance of the Sorentinos' efforts as relevant to the question of abandonment, there was no explanation of this connection.[245]

Another questionable aspect of *Sorentino II* is the superficiality with which the court applied the traditional jurisdictional-dispositional

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[238] *See* 72 N.J. at 130–31, 367 A.2d at 1170; text accompanying note 165 *supra*. It is evident from *Sorentino* that the court had determined that there had been no forsaken parental obligations. In discussing In re Adoption of Children by D., 61 N.J. 89, 293 A.2d 171 (1972), the court mentioned the rule "that where the parent had not forsaken obligations, the adoption could not be approved even if in the best interest of the child." 72 N.J. at 131, 367 A.2d at 1170. The court then stated that its conclusions that there had been coercion and thus no forsaken parental obligations would "[o]rdinarily" indicate "an immediate vesting of custody of the child in the natural parents." *Id.* Immediately thereafter, the hearing to determine the psychological impact on the child was ordered. 72 N.J. at 132, 367 A.2d at 1170. Furthermore, in *Sorentino II*, the court admitted "that in *Sorentino I* there was at least an implied determination that there was *then* no basis for terminating parental rights." 74 N.J. at 322, 378 A.2d at 22 (emphasis in original).

[239] 74 N.J. at 322, 378 A.2d at 22.

[240] *Compare* 74 N.J. at 316–17, 378 A.2d at 19–20 *with* 72 N.J. at 129–30, 367 A.2d at 1168–70. After the *Sorentino II* decision adverted to "a more fully developed record" it proceeded to discuss the purposes of the adoption act, prior termination cases, and the same facts found in *Sorentino*. *Id.* at 322–25, 378 A.2d at 22–25.

[241] 61 N.J. at 94–95, 293 A.2d at 173. For a discussion of *In re Adoption of Children by D.*, see notes 85–101 *supra* and accompanying text.

[242] 72 N.J. at 129, 367 A.2d at 1169.

[243] *Id.*

[244] *Id.*

[245] 74 N.J. at 324, 378 A.2d at 23. For a discussion of *In re Adoption of Children by D.*, see notes 85–101 *supra* and accompanying text.

test.[246] *In re Adoption of Children by D.* clearly prescribes that the dispositional standard becomes relevant only after a finding of statutory jurisdiction, that is, a finding adequate to support termination of parental rights.[247] Furthermore, the best interests may not be considered at the jurisdictional stage.[248] In *Sorentino II*, the finding of forsaken parental obligations is questionable,[249] and even if statutory jurisdiction existed, the court, in direct contrast with *In re Adoption of Children by D.*, considered best interests as a factor in the establishment of jurisdiction.[250] The court noted that the natural parents' actions, upon which the decision to terminate was based, were "harmful to the well-being of the child and are relevant in the consideration of the issue of abandonment and termination."[251] Use of such a mild justification, indicates a move away from the traditional jurisdictional-dispositional approach.

Eight months earlier, the *Sees* court had indicated in dicta that under certain circumstances the jurisdictional-dispositional approach was not applicable and that *Sorentino* was an example of such a case.[252] The thrust of the *Sees* dicta was that *parens patriae* could be used to grant custody to adopting parents in situations where prior law dictated granting of custody to the natural parents.[253] According to *Sees*, this result could be based entirely upon an exercise of the court's *parens patriae* jurisdiction.[254] It appears, however, that the court intended to apply the jurisdictional-dispositional approach and not the *Sees* dicta.[255] The court was particularly insistent upon evaluating the factors that could lead to the conclusion that the Sorentinos had forsaken their parental obligations.[256] Nevertheless, there is some indication in the opinion that the court may have followed the dicta in *Sees*. The court's consideration of best interests as

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[246] *See id.*

[247] 61 N.J. at 94–95, 293 A.2d at 173–74.

[248] *Id.* at 94, 293 A.2d at 174.

[249] *See* notes 238–45 *supra* and accompanying text.

[250] *See* 74 N.J. at 324, 378 A.2d at 23.

[251] *Id.*

[252] 74 N.J. at 221, 377 A.2d at 638; *see* text accompanying note 273 *supra*.

[253] *Id.*

[254] *Id.*

[255] *See* 74 N.J. at 321–26, 378 A.2d at 21–24. *See also* notes 238–51 *supra* and accompanying text.

[256] *Id.* at 324, 378 A.2d at 23. At the conclusion of the opinion in *Sorentino II*, the court noted that "the record points strongly to the conclusion that there has been an abandonment." 74 N.J. at 326, 378 A.2d at 24.

a factor in jurisdiction[257] as well as its finding of forsaken parental obligations by the Sorentinos supports this interpretation.[258]

Sorentino II is representative of the reluctance of the New Jersey supreme court to rely solely upon its *parens patriae* jurisdiction in making a custody determination absent the traditional statutory prerequisites. It is clear that the basic faith in the biological family as a presumptively superior placement for any child which was the policy basis for all prior New Jersey termination proceedings,[259] was not the rationale of *Sorentino II*. It has been shown that, although *parens patiae* has been traditionally interpreted only in terms of specific statutory standards of conduct,[260] it is not coterminous with those standards.[261] Thus, the court has the power to exercise this jurisdiction in all situations where the welfare of the child demands it. Since the *Sorentino* court suggested that psychological parenthood alone could be a sufficient basis for termination[262] and since there had been no contact between the Sorentinos and their child,[263] the court's efforts to establish statutory jurisdiction were unnecessary. The dicta in *Sees*, suggesting the expanded scope of *parens patriae* jurisdiction,[264] provides a more efficient and relevant approach to the type of situation found in *Sorentino*.

Even, or perhaps especially, in view of the reforms of *Sorentino* and *Sees*, the idea of statutory reform in the termination area seems attractive. It is, therefore, appropriate to turn now to various types of statutory reforms impinging on termination which have been proposed and/or enacted.

PROPOSED STATUTORY REFORM

In the past five years, legislators, child advocacy groups, and academics have given increasing attention to the need for statutory reform in the area of termination of parental rights. As already indicated, some of this reform could come from judicial exercise of the inherent *parens patriae* power over termination, but another effective

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[257] *See* 74 N.J. at 324, 378 A.2d at 23.

[258] *See id.*; notes 238–45 *supra* and accompanying text.

[259] *See* notes 153–56 *supra* and accompanying text. The principle of biological parenthood would never allow termination of the natural parents' rights absent some form of severe parental misconduct. *Alternatives*, *supra* note 131, at 157–58.

[260] *See* text accompanying note 83 *supra*.

[261] *See* text accompanying notes 123–25 *supra*.

[262] *See* 74 N.J. at 324–25, 378 A.2d at 23.

[263] *Id.* at 324, 378 A.2d at 23.

[264] 74 N.J. at 221, 377 A.2d at 638.

means of securing reform is through the enactment of appropriate reforming statutes. Thus, it is appropriate to examine some of the proposed model statutes and the recommendations of two national commissions in this regard.

The Proposed Model Statutes

The least detailed of the proposed model statutes is the Model Statute for Termination of Parental Rights (Juvenile Court Judges Statute) which was prepared by the Neglected Children Committee of the National Counsel of Juvenile Court Judges under the supervision of Judge James H. Lincoln.[265] The primary purpose of this statute is to provide permanence and stability in the child's home situation.[266] In addition, a court is directed to give primary consideration to the physical, mental and emotional condition of the needs of the child.[267]

Various bases for termination of parental rights are provided for under the proposed statute.[268] One basis for termination is absolute abandonment.[269] The statute provides that where a child has been abandoned and the parents fail "to claim the child within three months" subsequent to "the finding of the child," termination is appropriate.[270] Where the child has not been abandoned, the statute provides other bases with differing considerations depending on the child's current status.[271] In all situations, the court must examine the fitness of the parents to retain or regain custody of the child,[272] but unlike the traditional statutes, parental fitness is the exclusive factor only where the child is in the natural parents' custody upon commencement of the termination proceeding.[273] Even in such cases, the court is directed to consider efforts made by child care agencies to rehabilitate the family.[274]

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[265] NEGLECTED CHILDREN COMMITTEE OF THE NATIONAL COUNCIL OF JUVENILE COURT JUDGES, MODEL STATUTE FOR TERMINATION OF PARENTAL RIGHTS, 27 JUV. JUST. 3 (1976) [hereinafter cited as JUVENILE COURT JUDGES STATUTE].

[266] *Id.* § 1, at 5.

[267] *Id.* § 12(5), at 8.

[268] *Id.* § 12, at 7–8.

[269] *Id.* § 12(4), at 8.

[270] *Id.* The statute includes within the concept of abandonment "circumstances [under which] the identity of the parents is unknown and cannot be ascertained despite deligent searching." *Id.*

[271] *See id.* § 12(3), at 7–8.

[272] *See id.* § 12, at 7–8.

[273] *See id. Compare id.* § 12(1), at 7 *with id.* § 12(2), (3), at 7–8.

[274] *Id.* § 12(1) (g), at 7.

Where the child is not in the home at the time of commencement of the termination proceedings, the court is also required to examine, *inter alia*, the failure of the parent to provide care, to maintain regular contact, and to cooperate with the agency in an effort to improve the welfare of the child.[275] Where a child is in foster care, the court is directed to compare the present conditions in which the child is living with what his natural parents would be able to provide.[276] The standards used to make this comparison tend to assume that the child will be permanently placed with the fostering family so to fulfill the child's need for permanence.[277]

The Juvenile Court Judges Statute also attempts to deal with the procedural problems addressed in *Stanley v. Illinois*.[278] It provides for direct service of process where possible, but makes allowance for service by publication where a party cannot be located.[279] This latter provision has been the subject of controversy because publication requires public disclosure of personal information. The statute also provides for notice to all interested parties including not only parents and guardians, but also persons having temporary custody under court order or agency placement.[280] The child is also entitled to be present at the hearing.[281] The court, however, has discretion to waive the child's appearance in appropriate circumstances.[282]

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[275] *Id.* § 12(2), at 7.

[276] *Id.* § 12(3), at 7–8. Factors involved in the comparison include, *inter alia*:

> (a) The love, affection and other emotional ties existing between the child and the parents, and his ties with the integrating family.
>
> (b) The capacity and disposition of the parents from whom he was removed as compared with that of the integrating family to give the child love, affection and guidance and continuing the education of the child.
>
> (c) The capacity and disposition of the parents from whom the child was removed and the integrating family to provide the child with food, clothing, medical care and other physical, mental and emotional needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining such continuity.
>
> (e) The permanence as a family unit of the integrating family or person.
>
> (f) The moral fitness, physical and mental health of the parents from whom the child was removed and that of the integrating family or person.

Id. § 12(3) (a)–(f), at 7.

[277] *See id.*

[278] *See* text accompanying notes 49–53 *supra*.

[279] JUVENILE COURT JUDGES STATUTE, *supra* note 265, § 4(2), at 6.

[280] *Id.* §§ 3(2), 4(1), at 6.

[281] *Id.* § 4(3), at 6.

[282] *Id.* In order to protect the interests of both the child and the parents, provision is made for appointment of counsel for each. *Id.* § 7, at 6. The child's counsel must be an attorney acting as guardian *ad litem*. *Id.* § 7(1), at 6. Parents are entitled to counsel if they desire and the court is empowered to appoint counsel if they are indigent. *Id.* § 7(2), at 6. Additionally, the hearing may be conducted informally, *id.* § 11, at 7, and the standard of proof is merely the

The second major model statute on termination is denominated the Model Act to Free Children for Permanent Placement (Model Act).[283] More encompassing than the other reform proposals, the Model Act attempts to deal with all termination problems in a coordinated manner. The general purpose of the Act is to promote a permanent and stable home environment for minor children.[284]

The Model Act deals with grounds for termination in two separate contexts. It deals first with termination by the voluntary act of the parents.[285] It prohibits voluntary surrenders from taking place earlier than seventy-two hours after the child's birth.[286] After that time, it allows the surrender to be effective, either directly to the prospective parents, or through an authorized agency, on petition to the appropriate court.[287] The Act would require that surrender be confirmed by a court upon a finding that the surrender is in the child's best interests.[288] It is important to note that the surrender does not become effective as a termination on its issuance, but only on its confirmation by the court.[289]

Involuntary termination under these provisions requires that one of three conditions be found in addition to a conclusion that the termination is in the child's best interests.[290] As in most statutes, the conditions for termination include abandonment and neglect.[291] The Model Act also provides a more complex termination standard where

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preponderance of the evidence. *Id.* § 8, at 6. The doctor-patient privilege cannot be claimed, *id.* § 9, at 6, nor can any evidence adduced be admissible in any subsequent civil or criminal proceeding, *id.* § 10, at 6–7.

[283] HEW, UNITED STATES CHILDREN'S BUREAU, OFFICE OF CHILD DEVELOPMENT, MODEL ACT TO FREE CHILDREN FOR PERMANENT PLACEMENT (Feb. 8, 1977 Draft) [hereinafter cited as MODEL ACT].

[284] MODEL ACT, §1 (a), at 1. More specifically, the general purpose of the Act is to:

> (1) provide judicial procedures for freeing minor children from the custody and control of their legal parents, by terminating the parent-child relationship;
>
> (2) promote the placement of such minor children in a permanent home, either through adoption or by vesting their *de facto* parents with legal guardianship; and
>
> (3) ensure that the constitutional rights and interests of all parties are recognized and enforced in all proceedings and other activities pursuant to this Act.

Id. § 1(a) (1)–(3), at 1.

[285] *Id.* § 3, at 13.

[286] *Id.* § 3(a) (2), at 13.

[287] *Id.* § 3(a), at 13.

[288] *Id.*

[289] *Id.*, Commentary to § 3, at 14; *see id.* § 3, at 13. The comment following section 3 suggests that the requirement of confirmation is included to ensure compliance with the "constitutional standards of due process and . . . constitutional right of family integrity." *Id.*, Commentary to § 3, at 14.

[290] *Id.* § 4(a), at 15.

[291] *Id.* § 4(a) (1), (2), at 15.

the child has been removed from the natural parents by court order for a period of one year.[292] This standard is applied if the conditions leading to the court order still exist, are not likely to be remedied in the near future, and "the continuation of the parent-child relationship" impedes the child's "early integration into a stable . . . home."[293]

Authority to seek involuntary termination under the Act rests with a variety of persons, but not as large a group as permitted under the Juvenile Court Judges Statute.[294] A petition may be filed by an authorized agency, by either parent with respect to the other parent, by any guardian of the child, including a guardian *ad litem* previously appointed for the child, or by any person who has had physical custody of the child for a period of one year.[295] This does not allow the "interested person" or peace officer permitted by the Juvenile Court Judges Statute to bring the petition,[296] but presumably their viewpoint would be represented by the guardian *ad litem* or authorized agency.[297] One factor in this limitation is clearly the fear of involvement by one who has received a child for fostering and then immediately seeks to transform the fostering relationship into an adoptive one.[298] The Model Act would permit such a transition but only after a substantial period had passed thus allowing the relationship to ripen into one of psychological parenthood.[299]

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[292] *Id.* § 4(a) (3), at 15.

[293] *Id.* The court is required to appoint a guardian *ad litem* to protect the child's interests in all involuntary termination proceedings. *Id.* § 12(d), at 38. In addition, the court may in an appropriate case, appoint a guardian *ad litem* in a voluntary termination proceeding. *Id.* The guardian *ad litem* is required to be an attorney-at-law "experienced in the field of children's rights." *Id.* § 13(b), at 42. He is required to conduct a full investigation and consult with all parties including, where appropriate, the child. *Id.* § 13(a), at 42. He is entitled to participate fully in all hearings and must make recommendations to the court regarding the best interests of the child. *Id.* In addition, the guardian *ad litem* is specifically authorized to appeal any disposition. *Id.* The guardian *ad litem* is to be compensated by the court rather than by the parties to prevent the exercise of any undue influence. *Id.* § 13(d), at 43; *see id.*, Commentary to § 13, at 44. Moreover, the court is specifically authorized to appoint counsel for any other party to the action who desires such appointment and is unable to pay an appropriate fee. *Id.* § 12(a), at 37.

[294] *Compare id.* § 8(b), at 26 *with* JUVENILE COURT JUDGES STATUTE, *supra* note 265, § 3 at 5.

[295] MODEL ACT, *supra* note 283, § 8, at 26. It should be noted that provision allowing a guardian *ad litem* to seek termination refers to a guardian appointed "in a prior neglect, abuse or child protection proceeding," *Id.*, Commentary to § 8, at 27, and not the required appointee under section 12(d) of the Act, *see* note 293 *supra*. MODEL ACT, *supra*, Commentary to § 8, at 27.

[296] JUVENILE COURT JUDGES STATUTE, *supra* note 265, § 31(1) (a), at 5.

[297] *See* MODEL ACT, *supra* note 283, Commentary to § 8, at 27.

[298] *See id.*

[299] *See id.* § 8(b) (4), at 26.

The due process requirements of notice and an opportunity to be heard are dealt with explicitly in the statute.[300] Notice of the hearing is to be given to the parents, guardians, legal custody holders and guardians *ad litem* of the child.[301] Notice is not required for the state agency.[302] In cases where the identity of the natural father is unknown to the petitioner for termination, the statute provides several means of attempting to notify the absent parent.[303] "If, after choosing and acting upon one of the[se] options," the court deems further notice unlikely "to lead to . . . identification of the father," and the child is at least thirty days old, the court may terminate the father's parental rights without further notice.[304]

The final proposed termination statute is that propounded by Professor Michael Wald.[305] Unlike the two other proposals, this draft is not in the form of a model statute. As a result, no attempt is made to deal with the procedural problems in termination, and its focus is primarily upon termination standards. Wald separates the circumstances for termination into three categories: termination upon the first hearing of a case;[306] terminations other than at the initial hearing, when the child is less than three years old at the time of the

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[300] *Id.* § 10(a), at 31–32.

[301] *Id.* § 10(a), at 31. A significant difference between the MODEL ACT and existing statutes lies in the provision permitting an interested party to waive notice of the proceedings. *Id.* § 10(d), at 32. This is to be contrasted with the currently in force New Jersey statute on adoption which explicitly proscribes such a waiver. N.J. STAT. ANN. § 9:3–45 (West Cum. Supp. 1978-1979).

[302] *See* MODEL ACT, *supra* note 283, § 10, at 31–32.

[303] *Id.* § 12(b), at 37. The court has the following options:

> (1) inquire of the mother concerning the identity of the father, but may not compel disclosure by the mother;
>
> (2) determine whether notice of the proceedings by publication or public posting is likely to lead to the identification of the father, and, if so, order such notification; but the court shall not include the mother's name in the notice by publication or public posting without her informed consent;
>
> (3) appoint, if deemed necessary, an attorney as guardian *ad litem* for the putative father to conduct a diligent search for him and to report the results to the court; or
>
> (4) deem, after consideration, that all of the above options are futile.

Id.

[304] *Id.* § 12(c), at 38. At the hearing, all persons who are entitled to notice are permitted to present evidence as to the appropriateness of termination. *Id.* § 11, at 35. The court, in its discretion, is permitted to exclude the child from the hearing, *id.*, but the child's views would presumably be presented by the child's guardian *ad litem*. *See id.* § 12(d), at 38.

[305] *See generally* Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976).

[306] *Id.* at 693–95.

placement;[307] and terminations other than at first hearing, when the child is three years of age or older at the time of placement.[308]

Termination at the time of first hearing, the first category of termination, would only be permitted in three circumstances.[309] First, it is permitted where there has been a finding of both abandonment and endangerment.[310] Abandonment is defined as a sixty day period during which "the parents have not cared for or contacted" the child.[311] It is a condition precedent to a finding of endangerment, defined as harmful conduct to the child by a third party to whom the parent had given custody of the child.[312] The two remaining circumstances arise where the parent has been found to have abused the child or its siblings.[313] One involves the situation in which the child has remained in the home after the parent has received treatment for abusive conduct which has recurred.[314] In the second situation, the child has been removed from the home, subsequently returned and found to be endangered again.[315] In both situations, Wald suggests that the likelihood of the parent being able to benefit from further treatment is so slight that it is inappropriate for the court to order anything other than the termination of the parental relationship.[316] Even in these cases, however, Wald would permit the court to exercise discretion in deciding whether to terminate, placing the burden on the parent to demonstrate that successful reunion is possible.[317]

In the second category of termination, in which the child is under the age of three when removed from the home, Wald advocates termination when the child has been in placement for six months.[318] Reasoning that the child's attachment to its parents is

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[307] *Id.* at 695.

[308] *Id.* at 695–96.

[309] *Id.* at 694–95. It is suggested that a wider range of termination at this stage "is too drastic a policy," considering the lack of "data indicating . . . significant harm as a result of . . . temporary foster care." *Id.* at 693.

[310] *Id.* at 694 & n.273.

[311] *Id.* Professor Wald also includes within the scope of "abandonment" those parents who fail to appear at the court proceedings despite adequate notice. *Id.* at 694.

[312] *See id.* It is noted that a mere absence by the parent does not per se constitute endangerment since the child could be in the custody of a responsible third party. *Id.* at 694 n.273.

[313] *Id.* at 694–95.

[314] *Id.* at 694. The post-treatment recurrence of physical abuse is indicative of the possibility that the parent is "untreatable" and that subsequent "therapy is unlikely to be successful." *Id.*

[315] *Id.* at 694–95.

[316] *Id.*

[317] *Id.* at 695. Professor Wald justifies the exercise of judicial discretion since "[e]fforts to provide treatment are still in their infancy and therapists are continually discovering new treatment modalities." *Id.* at 694 n.277.

[318] *Id.*

unlikely to survive this time period, Wald concludes that the child will probably have identified new psychological parents after a six month absence from its natural parents.[319] Finally, for the child three years of age or above, a one year placement period would be necessary prior to termination.[320] The psychological parenthood argument is less persuasive because of the child's longer period of custody with the natural parents.[321]

NATIONAL STANDARDS

In addition to the model statutes discussed above, two national commissions have examined questions pertinent to the termination of parental rights. While neither group focused upon the preparation of a proposed statute, each developed general standards for the guidance of those who seek reform, either through statute or by the reorganization of agencies.

The first of these groups, the National Advisory Committee on Criminal Justice Standards and Goals, was created by the Law Enforcement Assistance Administration of the United States Department

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[319] *Id.* Professor Wald further notes that "[t]he consensus of expert opinion" concludes that it is crucial "to avoid multiple placements for children" at such a tender age. *Id.* It is contended that such multiple placements result in harm to the child's development and future relationships. *Id.* Finally, Professor Wald concludes that the foster parent relationship is inadequate for the child's needs at that point "since the foster parents may avoid . . . an emotional involvement out of fear of losing the child." *Id.*

[320] *Id.* at 695–96. While Professor Wald finds little evidence of harm to the child in foster placement up to one year, after that point "the balance of harm changes." *Id.* This conclusion is reached since parental acceptance of the foster arrangement as permanent tends to increase and the possibilities of adoption decline. *Id.* at 696. Finally, while a one-year period is prescribed the court would not be forestalled from terminating at an earlier point in an appropriate case. *Id.*

[321] *Id.* at 696. This longer period of time with the natural parents tends to create some sense of permanence in the relationship and a "permature [*sic*] termination" might be more harmful than beneficial to the child. *Id.*

Termination after a fixed period of time would not be absolutely required. *Id.* at 696–99. Four exceptions to these standards are proposed: (1) where the child would be harmed by termination because of an existing viable relationship with the natural parents, *id.* at 696; (2) situations in which a placement is effectuated with a relative who has no intention of adopting, but will provide permanent care, *id.* at 697; (3) for children who require special physical or emotional care, *id.* at 698; and (4) situations in which placement in a "permanent family" is either not available or is undesirable, *id.* at 699. In the first of these cases, termination would be refused because of the child's strongly perceived need to retain an attachment to its family. *See id.* at 696–97. In the latter three, termination is not effected because it is not legally required for the type of placement sought, and, consequently, there is no need to terminate. *Id.* at 697–99. Professor Wald notes that periodic review of the cases would be necessary. *See id.* at 699.

of Justice.[322] This group, chaired by Governor Brendan Byrne of New Jersey, created the Task Force on Juvenile Justice and Delinquency Prevention (Task Force), which proposed standards for the administration of the juvenile justice system, some of which relate to the status of endangered children and the termination of parental rights.[323]

The basic purpose underlying the standards proposed by the Task Force for the termination of parental rights is the fostering of permanency in the child's relationship, regardless of parental fault.[324] It should be noted, however, that this purpose applies only in the context of specific recommendations that would make removal of the child from the home far more difficult than at present.[325] The recommendations require that substantial social services be provided the parents during the period of removal.[326] Additionally, at least two judicial hearings are required before termination is permitted.[327] This standard does not apply, of course, to the circumstances of a voluntary release of the child for adoption by its parents.

The other national commission which has dealt with these problems is the Institute for Judicial Administration of the American Bar Association Juvenile Justice Standards Project (Institute), chaired by

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[322] TASK FORCE ON JUVENILE JUSTICE AND DELINQUENCY PREVENTION, NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION (Gov't Printing Office 1976) [hereinafter cited as TASK FORCE REPORT].

[323] *Id.*; *see id.* Standard 14.27–.32, at 488–501.

[324] *Id.* Standard 14.32, at 500. The Standard provides:

> Statutes governing termination of parental rights should be premised on the child's need for a permanent, stable family home, not on principles related to parental fault. Therefore, termination should be required if the child cannot be returned home within 6 months to 1 year after placement, depending on the child's age, unless:
>
> 1. Termination would be harmful to the child because of the strength of the child's family ties;
>
> 2. The child is placed with a relative who does not wish to adopt the child;
>
> 3. The child is placed in a residential treatment program and termination is not necessary to provide a permanent family home; or
>
> 4. There is a substantial likelihood that a permanent placement cannot be found and the failure to terminate will not jeopardize the child's chances of obtaining a permanent placement.

Id.

[325] *Id.* Standard 14.27 Commentary, at 488–90.

[326] *Id.* Standard 14.29 & Commentary, at 494–95.

[327] *See id.* Standard 14.30 & Commentary, at 496–97; Standard 14.32 & Commentary, at 500–01.

Judge Irving R. Kaufman.[328] This group's Drafting Committee on Intervention in the Lives of Children, chaired by Margaret K. Rosenheim and Judge William S. White,[329] came to conclusions similar to those proposed by the National Advisory Committee. Unlike that Committee, however, the Institute considered specifically the problems of abandonment and termination where the child had not previously been in placement.[330] The Institute would allow termination at a first dispositional hearing under certain limited circumstances.[331] Termination would also be allowed at the first hearing where, although the parents had been receiving treatment, the child, or another child of the family, had been previously removed from the home, but upon returning was subjected to a new incident of physical harm.[332] Even in such circumstances the Institute would not allow termination in certain circumstances[333] and such a disposition is not permitted if the child, over the age of ten, objects to termination.[334]

Once the child is in placement outside of its home, the Institute's standards require review of the child's situation every six months.[335] Termination would be automatic at the first six-month review for a child who was placed when under the age of three.[336] For a child older than three at the time of placement, the automatic termination would be effective at the second semi-annual review.[337]

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[328] ABA INSTITUTE OF JUDICIAL ADMINISTRATION, JUVENILE JUSTICE STANDARDS PROJECT: STANDARDS RELATING TO ABUSE AND NEGLECT (1977) (Hon. Irving R. Kaufman, Chairman) [hereinafter cited as JUVENILE JUSTICE STANDARDS PROJECT].

[329] *Id.* at iv.

[330] *Id.* Standard 8.1 & Commentary, at 148–51.

[331] *Id.* Standard 8.2B1, at 151. Those circumstances are enumerated as follows:

> a child has been abandoned when he/she has not been cared for or contacted by his/her parents, although the parents are physically able to do so for sixty days prior to the adjudicatory hearing, and despite adequate efforts to notify the parents, they do not appear at the adjudicatory or dispositional hearing.

Id.

[332] *Id.* Standard 8.2B2, .2B3, at 151.

[333] *Id.* For the circumstances under which termination is not allowed, see TASK FORCE REPORT, *supra* note 322, Standard 14.32, at 500; note 324 *supra*.

[334] JUVENILE JUSTICE STANDARDS PROJECT, *supra* note 328, Standard 8.4 Commentary, at 158–61.

[335] *Id.* Standard 7.1, at 135–61.

[336] *Id.* Standard 8.3, at 154. Termination is not automatic, however, if the child could be returned home, or if the circumstances dictated in the TASK FORCE REPORT, *supra* note 322, Standard 14.32, at 500, are present. JUVENILE JUSTICE STANDARDS PROJECT, *supra* note 328, Standard 8.3, at 154.

[337] JUVENILE JUSTICE STANDARDS PROJECT, *supra* note 328, Standard 8.3, at 154. The same exceptions to automatic termination pertain to a child three years of age or younger. *Id.*; *see* note 336 *supra*.

Termination could occur at the first review only if "the court finds that the parents have failed to maintain contact with the child during the previous six months and to reasonably plan for resumption of care of the child."[338]

While these two national groups both propose systems that make it difficult to initially remove the child from its home, once that removal is accomplished, the termination of parental rights is easy. This dichotomy is a response to the increasing recognition of the child's need for psychological parents and acceptance of the belief that such parenthood is of a relatively short duration.[339]

CONCLUSION

The increasing frequency of the termination of parental rights actions in recent years has forced the courts to re-examine the traditional dichotomy of the jurisdictional and dispositional stages in such proceedings. This examination has made it clear that it is inappropriate to separate the two decisions. If there is a real desire to act in the best interests of the child, the court must be able to consider not only the circumstances and actions of the parents, but also the effect of such actions upon their children.

It is now recognized that termination may be necessary where parents have not intended to harm their children, but were unable to provide the emotional support necessary for their proper development. Similarly, it is also acknowledged that the return of a child to its biological parents after an extended period of separation may be to the child's disadvantage if a new psychological parenthood has formed in the interim. Thus, the courts must be free to examine the total

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[338] JUVENILE JUSTICE STANDARDS PROJECT, *supra* note 328, Standard 8.3B, at 154. The Project Committee would also require that one court have jurisdiction of all termination proceedings. *Id.* Standard 8.1 Commentary, at 149–50. Furthermore, parents must be given notice that termination may be considered prior to any hearing at which it may be raised as a possible disposition. *Id.* Standard 7.5D, at 143.

In addition to considering the standards for termination of parental rights, the Project Committee also provides standards for the duty of the court following a termination.

> When parental rights are terminated, a court should order the child placed for adoption, placed with legal guardians, or left in long-term foster care. Where possible, adoption is preferable. However, a child should not be removed from a foster home if the foster parents are unwilling or unable to adopt the child, but are willing to provide and are capable of providing, the child with a permanent home, and the removal of the child from the physical custody of the foster parents would be detrimental to his/her emotional wellbeing because the child has substantial psychological ties to the foster parents.

Id. Standard 8.5(A), at 161–62.

[339] *See id.* Standard 7.5D, at 143.

situation of the child in order to issue an appropriate judgment in such matters.

That the courts have the power to act in this manner has been demonstrated in this article. The authority existing under the *parens patriae* doctrine allows courts wide discretion to consider any factor which may be of importance in a child's development. In the exercise of this power, the rights of both the natural and foster parents are not ignored, but would be considered as a component of the total perspective with the child's best interest as the focal point. A parent is entitled to be heard on the termination of his or her rights, but the right to be heard does not necessarily imply the right to regain custody or guardianship.

The proposed standards for the termination of parental rights restrict the circumstances under which termination may be granted. They require that certain specific findings be demonstrated before termination is permitted. If such standards are adopted, then hopefully the courts will not allow them to become a new jurisdictional test for the termination of parental rights, but rather will employ them flexibly, under the *parens patriae* power, as guidelines to be considered in light of all the circumstances. The decision whether to terminate parental rights is often the most important decision that can be made with respect to the future of a child. It is the responsibility of the courts to retain sufficient flexibility in the making of such decisions so as to assure that the best interests of the child will be protected.