

# RETHINKING VERMONT'S TERMINATION OF PARENTAL RIGHTS LAWS: GUIDELINES FOR A COMPREHENSIVE TERMINATION OF PARENTAL RIGHTS STATUTE

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"This is a melancholy and exceedingly delicate case, and we do not reach today's judgment without searching reflection."<sup>1</sup>

## INTRODUCTION

Nationally, reports of suspected child abuse and neglect have risen dramatically over the course of the past decade, up "from 181 reports for every 10,000 children in 1980 to about 420 for every 10,000 children in 1992."<sup>2</sup> "On a single day in 1991, more than 600,000 children were in out-of-home placements, including foster and group homes, juvenile justice facilities, and psychiatric institutions."<sup>3</sup> This represents a sixty-three percent increase in such placements since 1982.<sup>4</sup>

Currently, in Vermont, there are approximately 1200 children in foster care, and this number is expected to increase to over 1800 cases by the year 2000.<sup>5</sup> Once a child enters the foster care system, there are three possible long-term outcomes: 1) reunification with his or her family because the abusive conditions that led to the out-of-home placement have been alleviated; 2) termination of the parent's rights with a plan for adoption; or 3)

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1. *In re A.B.E.*, 564 A.2d 751, 757-58 (D.C. 1989) (overturning lower court's termination of father's parental rights).

2. A.B.A. PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, *America's Children At Risk: A National Agenda for Legal Action* 50 (July 1993) [hereinafter *Children at Risk*] (citing WILLIAM J. BENNETT, *THE INDEX OF LEADING CULTURAL INDICATORS* 11 (Heritage Foundation, Mar. 1993)).

3. *Id.* (citing Edna McConnell Clark Foundation, *ESSENTIAL ELEMENTS FOR SUCCESS, IN KEEPING FAMILIES TOGETHER, FACTS ON FAMILY PRESERVATION SERVICES* (1991)).

4. *Id.*

5. Interview with William Young, SRS Commissioner, Department of Social and Rehabilitation Services, in Waterbury, Vt. (Dec. 17, 1993) [hereinafter *Young Interview*].

long-term foster care for a child who cannot return home, and for whom adoption is not a realistic option. Overall, eighty percent of Vermont children who are in state custody due to abuse or neglect return home.<sup>6</sup> Only 7.8% of these children's parents' rights are terminated.<sup>7</sup> Statewide, there were 151 completed Termination of Parental Rights ("TPR") family court cases for the calendar years 1991 and 1992.<sup>8</sup> Between 1984 and 1992, 478 termination orders were issued by Vermont courts.<sup>9</sup> Parental rights may also be terminated in connection with a probate court adoption proceeding, such as a stepparent adoption. There are no available statistics regarding the number of termination orders granted each year by Vermont probate courts.

This article examines the laws governing termination of parental rights in Vermont and other states. Unlike most other states, Vermont does not have a comprehensive parental rights termination statute. This article encourages Vermont policy-makers to examine the issue of termination of parental rights, both in substance and process, with the goal of drafting a termination statute for Vermont. This statute should provide adequate notice of the forms of parental behavior that may be grounds for termination of parental rights, and provide a clearly delineated and expedited judicial process for hearing termination actions. Further, this article calls for increased judicial oversight of long-term planning for children in state custody in order to facilitate permanency planning. This article also invites discussion and a critical reexamination of the policy considerations that underlie Vermont's termination laws. Finally, this article recommends policy guidelines that focus on balancing the rights of parents with the rights and interests of children in termination proceedings, ensuring permanency for children in state custody, and developing a statutory termination model that would allow courts to terminate parental rights only if it is the least restrictive option consistent with the child's best interests.

Section I of this article provides a general introduction to the issue of termination of parental rights, including a discussion of

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6. *Id.*

7. *Id.*

8. Interview with Linda Coble, State-wide Permanency Planning Coordinator for the Vermont Department of Social and Rehabilitation Services, Montpelier, Vt. (Dec. 12, 1993) [hereinafter Coble Interview].

9. Young Interview, *supra* note 5.

the Vermont Department of Social and Rehabilitation Services' ("SRS") role in termination proceedings, as well as an introduction to the Federal Adoption Assistance and Child Welfare Act. Section II addresses the United States Supreme Court's treatment of the constitutional issues that underlie termination proceedings. Section III provides an overview of state termination statutes, including a discussion of grounds for termination, standing, the standard of proof in termination cases, and various dispositional alternatives. Finally, section IV suggests guidelines for the creation of a Vermont Parental Rights Termination Statute, drawing upon various state statutory provisions.

Termination of parental rights issues have received extensive media attention in recent years. In Florida, the celebrated case of Gregory Kingsley focused attention on the plight of children trapped in foster care who have little hope of ever returning home.<sup>10</sup> Although this case was mistakenly billed by the press as a boy "divorcing" his mother, Gregory did nothing more than what the state should have done for him; namely, move to terminate the parental rights of his mother so that he could be adopted by a family that wanted him and could provide him with long-term nurturing and stability.

Another highly publicized case was that of "Baby Jessica DeBoer." The DeBoer case highlighted the contentious emotional legal issues that can arise between birth parents and prospective adoptive parents.<sup>11</sup> In the DeBoer case, Jessica's mother, Cara Clausen, relinquished her rights to her baby two days after Jessica's birth and then, one month later, filed a petition to revoke her relinquishment.<sup>12</sup> Cara also intentionally named a man as Jessica's father who was subsequently found not to be her biological father. Daniel Schmidt, the actual biological father, intervened in the adoption proceeding filed by the prospective adoptive parents, the DeBoers, and gained custody after complex legal maneuvering in both Iowa and Michigan courts.<sup>13</sup> Because of the protracted litigation in the DeBoer case, Jessica was twenty-two months old when she was returned to her birth parents after having lived with her prospective adoptive family

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10. *Gregory K. v. Ralph K.*, No. CI92-5127, 1992 WL 551488 (Fla. Cir. Ct. 1992); *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

11. *In re Clausen*, 502 N.W.2d 649 (Mich. 1993).

12. *Id.* at 652.

13. *Id.* at 652-53, 668.

since she was three weeks old.<sup>14</sup> The Michigan Supreme Court, in the final state court ruling, reasoned that absent a showing of parental unfitness, which the prospective adoptive parents had failed to prove by clear and convincing evidence, a natural parent's right to custody could not be disturbed.<sup>15</sup> The court found that neither Iowa law, Michigan law, nor Federal law authorized prospective adoptive parents to retain custody of a child whose natural parents were not found unfit simply because the adoptive parents may have been better able to provide for her future and education.<sup>16</sup>

At the same time, the Washington County Family Court in Vermont was deciding whether the court's equitable powers allowed it to terminate one parent's rights to the minor children in an order of parental rights and responsibilities issued in a divorce proceeding.<sup>17</sup> In *Dessureau*, the plaintiff urged the court to exercise its equitable powers to grant the parties' child permanent freedom from the influence of an abusive parent who "show[ed] no likelihood of being able to resume parental duties within a reasonable period of time."<sup>18</sup> The court, however, finding no statutory authority to terminate parental rights in a divorce proceeding, declined to terminate the father's rights on equitable grounds, holding that "[a]bsent explicit statutory authorization, the court is unwilling to extinguish rights of constitutional magnitude under its equitable powers."<sup>19</sup>

### I. VERMONT TERMINATION STATUTES

Currently, there are only two statutory avenues that lead to termination of parental rights in Vermont. The procedure most commonly utilized is found in title 33, section 5532 of the Vermont Statutes Annotated and is entitled "Modification or vacation of orders."<sup>20</sup> This section allows for the termination of

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14. *Id.* at 652.

15. *Id.* at 664.

16. *Id.* at 667.

17. *Dessureau v. Dessureau*, No. S-144-87 WnFd (Vt. Fam. Ct. Jan. 17, 1992).

18. *Id.* at 2. Title 33, section 5540 of the Vermont Statutes Annotated provides a list of four factors to be considered by the court in determining best interests in termination proceedings and other court proceedings involving children in foster care. VT. STAT. ANN. tit. 33, § 5540 (1992).

19. *Dessureau*, No. S-144-87 WnFd, slip op. at 3.

20. VT. STAT. ANN. tit. 33, § 5532 (1992).

parental rights of children in the custody of the state who are either children in need of care or supervision ("CHINS children")<sup>21</sup> or delinquent children.<sup>22</sup>

Most state-involved terminations evolve out of CHINS abuse, neglect, and abandonment cases, otherwise termed "care and protection" cases.<sup>23</sup> In these termination cases, SRS initiates termination proceedings once a child has been in state custody for a period of time, and the agency has determined that the child cannot safely be returned home. Generally, with young children, if the parents make little or no progress, the state moves more quickly to terminate parental rights as children are more likely to suffer future harm if the child's early years lack permanency.<sup>24</sup> However, Vermont law provides no time-frame for when or under what circumstances the state should move to terminate parental rights. Consequently, the State has broad discretion to decide if and when termination actions are brought.

SRS has promulgated regulations that seek to ensure the right to "permanency" for a child in state custody. These regulations state in pertinent part:

During the time a child is separated from the family, the child is cast into a state of limbo in which his right to form a permanent attachment with an adult whose expectations he can eventually internalize is not observed. Deprived for an extended period of time of that attachment, the child cannot be expected to achieve adequate adulthood.

Permanency, then, is inherent in ensuring a child's ultimate right. Therefore, we will make every effort available to help the natural family to provide permanency for the child. If, however, after developing a plan, offering services and implementing the plan, we find [twelve] months have passed and there is no

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21. CHINS children are abused, abandoned, neglected, or unmanageable children as those terms are defined under VT. STAT. ANN. tit. 33, § 5502(a)(12) (1992).

22. VT. STAT. ANN. tit. 33, § 5532 (1992). A delinquent child is a child who has committed an act designated a crime under the laws of this state or another state or under federal law with exceptions for certain traffic offenses. VT. STAT. ANN. tit. 33, § 5502(a)(3)-(4) (1992).

23. Young Interview, *supra* note 5.

24. *Id.*

substantial improvement in the family conditions which precipitated intervention, we must proceed as if the child were not to return home.

At that point, although services to the family will continue, attempts must be made to place the child in a living situation affording him the opportunity of a permanent attachment with an adult whose expectations, when internalized by the child, will lead him to adequate adulthood. We will, in the ensuing months before dispositional review, make every effort to establish to the court's satisfaction the necessity of terminating residual parental rights and placing the child for adoption with an adult who can meet his survival requisites and who has provided the basis for permanent attachment.<sup>25</sup>

Further, the SRS Casework Manual provides criteria for a social worker to evaluate when making a decision regarding placement of a child in a "legal risk home," i.e. a home where the foster parents make a commitment to adopt the child in their care if the child becomes free for adoption. The criteria are as follows:

1. Degree and chronicity of parental incapacity.
2. Severity of abuse/neglect to the child or a sibling.
3. History of protective service involvement with the parents.
4. Child's prior placement history (voluntary or involuntary).
5. Length of time in out-of-home placement.
6. Age of child.<sup>26</sup>

There are no statutory provisions under Vermont law that address the SRS recognized right to permanency for children in state custody.

The concept of permanency for children in foster care derives in large measure from the Adoption Assistance and Child Welfare Act of 1980, commonly cited as P.L. 96-272.<sup>27</sup> This law was enacted to deal with the problem of "foster care drift," defined as

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25. VT. SOC. SERV. MANUAL § 1010.22 (rev. ed. July 1982). This regulation is entitled "Right to Permanency." *Id.*

26. VT. DEPT SOC. AND REHAB. SERVS. CASEWORK MANUAL, policy no. 4230, at 2 (June 8, 1990).

27. 42 U.S.C. §§ 620-628, 670-679a (1988).

children languishing in foster care for many years in multiple placements without a plan to either be returned home or be placed for adoption.<sup>28</sup> Put simply, the intent of P.L. 96-272, through comprehensive plans and regulatory standards, is to achieve "permanent and healthy home[s]" for children.<sup>29</sup>

One of the most important features of P.L. 96-272 is the federal mandate that requires participating states to create a "case review system."<sup>30</sup> Pursuant to the federal law, the case review system must assure that:

(A) each child has a case plan designed to achieve placement in the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child,

(B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review . . . in order to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship.<sup>31</sup>

The case plan for children in foster care must meet certain requirements.<sup>32</sup> The focus on permanence for children is evident in the statute which requires that the case plan include:

a plan for assuring that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the

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28. S. REP. NO. 336, 96th Cong., 2d Sess. 1 (1980).

29. John J. Musewicz, *The Failure of Foster Care: Federal Statutory Reform and the Child's Right to Permanence*, 54 S. CAL. L. REV. 633, 728-29 (1981).

30. 42 U.S.C. § 671(a)(16) (1988).

31. 42 U.S.C. §§ 675(5)(A)-(B) (1988).

32. *Id.* § 675(1).

parents' home, facilitate return of the child to his own home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.<sup>33</sup>

Prior to enactment of P.L. 96-272, case plans were required for children in AFDC supported foster care,<sup>34</sup> but the focus was not on providing permanency for children.<sup>35</sup>

In order for states to be eligible for federal funds, federal law specifically requires that in each family's case, SRS make reasonable efforts to keep the family together through preventative services and, once a child is removed from the home, make reasonable efforts to reunite the family.<sup>36</sup> Some states have incorporated the concept of reasonable efforts into their termination statutes.<sup>37</sup> In these statutes, the State must prove, or the court must at least consider, at the termination hearing, the extent of the efforts made by the State to reunite the family.<sup>38</sup> Under title 33, section 5526 of the Vermont Statutes Annotated, family court judges at merits hearings must address whether SRS has made reasonable efforts to keep a family intact. If the court determines that reasonable efforts have not been made in a given case, SRS will not receive federal money to subsidize state custody of that child.<sup>39</sup> It is unusual for courts to find that reasonable efforts have not been made.<sup>40</sup>

In Vermont, the statute governing state initiated termination proceedings is not a termination statute per se, but rather, a modification statute.<sup>41</sup> Terminations by SRS are modification cases because the moving party is seeking: 1) to modify the family

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33. *Id.*

34. Foster care funding was available through the AFDC Foster Care program under Title IV-A of the Social Security Act. Section 101 of P.L. 96-272 replaced IV-A with the new Title IV-E. Pub. L. No. 96-272, § 101, 94 Stat. 501 (1980).

35. *Musewicz, supra note 29*, at 728 n.383.

36. 42 U.S.C. § 671(a)(15) (1988).

37. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-717(h) (West 1993); R.I. GEN. LAWS § 15-7-7(2)(a) (Supp. 1993); KY. REV. STAT. ANN. § 625.090(2)(c) (Michie/Bobbs Merrill 1990).

38. *See sources cited supra note 37.*

39. *Young Interview, supra note 5.*

40. *Id.*

41. VT. STAT. ANN. tit. 33, § 5532 (1992).

court's initial disposition order, which transferred custody and/or guardianship from the parent(s) to SRS but kept residual parental rights intact; and 2) to terminate residual parental rights. Residual parental rights are "those rights and responsibilities remaining with the parent after the transfer of legal custody or guardianship of the person of the minor, including, but not necessarily limited to, the right to reasonable visitation, the responsibility for support, and, subject to subdivision (a)(6) of this section, consent to adoption."<sup>42</sup>

To terminate parental rights, the State or other moving party must prove by clear and convincing evidence both that there has been a "substantial change in material circumstances" and "that termination is in the best interest of the children."<sup>43</sup> This two-step analysis is similar to the two-tier inquiry required in modification of parental rights and responsibilities proceedings in post-divorce actions.<sup>44</sup> "The change in circumstances [in termination cases] is the failure of the expectation that parental ability to care for a child will improve within a reasonable time after the CHINS adjudication."<sup>45</sup> The best interests of the child standard is the guiding framework for termination cases under the Juvenile Proceedings Act. In all termination proceedings, the court must consider the child's best interests in accordance with the following factors:

- (1) The interaction and interrelationship of the child with his natural parents, his foster parents if any, his siblings, and any other person who may significantly affect the child's best interests;
- (2) The child's adjustment to his home, school, and community;
- (3) The likelihood that the natural parent will be able to resume his parental duties within a reasonable period of time; and

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42. VT. STAT. ANN. tit. 33, § 5502(a)(16) (1992).

43. *In re A.F.*, 160 Vt. 175, 177, 624 A.2d 867, 869 (1993) (citing *In re S.R.*, 157 Vt. 417, 420, 599 A.2d 364, 366 (1991)).

44. *In re S.R.*, 157 Vt. 417, 420, 599 A.2d 364, 366 (1991).

45. *In re D.B.*, 635 A.2d 1207, 1209 (Vt. 1993) (unpublished in Vermont Reports).

(4) Whether the natural parent has played and continues to play a constructive role, including personal contact and demonstrated love and affection, in the child's welfare.<sup>46</sup>

The Vermont Supreme Court has consistently found that the most critical factor in determining the best interests of a child is the third factor, "whether the parent 'will be able to resume his [or her] parental duties within a reasonable period of time.'"<sup>47</sup> Although there is not yet a published Vermont Supreme Court decision that addresses what constitutes a "reasonable period of time" and specifically whether "reasonable" should be based on the parent's or child's sense of time, SRS has argued successfully at the trial court level that reasonable is what is reasonable for the child.<sup>48</sup> This argument finds support in the works of Joseph Goldstein, Anna Freud, and Albert Solnit who recommend that all placement decisions reflect the child's, not the adult's, sense of time.<sup>49</sup> "Unlike adults," they argue, "who have learned to anticipate the future and thus to manage delay, children have a built-in time sense based on the urgency of their instinctual and emotional needs."<sup>50</sup>

A termination statute can be drafted to provide direction in ascertaining the reasonable likelihood of realizing corrected parental behavior within a reasonable period of time. In Virginia, for example, proof of any of the following is prima facie evidence that:

It is not reasonably likely that the conditions which resulted in such neglect or abuse can be substantially corrected or eliminated so as to allow the child's safe return to his parent or parents within a reasonable period of time.

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46. VT. STAT. ANN. tit. 33, § 5540 (1992).

47. *In re R.W.*, 154 Vt. 649, 650, 577 A.2d 253, 253 (1990) (mem.) (quoting *In re J.R.*, 153 Vt. 85, 100, 570 A.2d 154, 161 (1989)). However, in a Vermont Family Court case, the court dismissed the termination petition due to compelling evidence that supported the parents' continuing relationship under the first and fourth factors. *In re Ja.B. & Jv.B.*, No. 85-9-89 WrJ (Vt. Fam. Ct. June 30, 1993).

48. Interview with Michael Duane, Asst. Attorney General, Waterbury, Vt. (Dec. 17, 1993).

49. JOSEPH GOLDSTEIN, ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 40 (1973).

50. *Id.*

a. The parent or parents are suffering from a mental or emotional illness or mental deficiency of such severity that there is no reasonable expectation that such parent will be able to undertake responsibility for the care needed by the child in accordance with his age and stage of development;

b. The parent or parents have habitually abused or are addicted to intoxicating liquors, narcotics or other dangerous drugs to the extent that proper parental ability has been seriously impaired and the parent, without good cause, has not responded to or followed through with recommended and available treatment which could have improved the capacity for adequate parental functioning; or

c. The parent or parents, without good cause, have not responded to or followed through with appropriate, available and reasonable rehabilitative efforts on the part of social, medical, mental health or other rehabilitative agencies designed to reduce, eliminate or prevent the neglect or abuse of the child.<sup>51</sup>

The other method by which a parent's rights are terminated in Vermont is through probate court proceedings.<sup>52</sup> Probate court terminations occur in Vermont only in connection with adoption proceedings.<sup>53</sup> All of the terminations in which SRS is involved are currently heard in the Family Court, while any subsequent adoptions of children in State custody are processed through the probate court system.<sup>54</sup> This two court system is utilized even though the Vermont Family Court is empowered to order the transfer of probate proceedings to the family court if the issues, parties, and evidence are so similar that a transfer to family court would "expedite resolution of the issues or would best

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51. VA. CODE ANN. § 16.1-283(B)(2) (Michie 1988).

52. VT. STAT. ANN. tit. 15, § 435 (1992). This section of the statute is entitled "Consent to adoption of minor." *Id.*

53. Telephone Interview with Mary Kennedy, Register, Vermont Probate Court, Randolph District (Oct. 7, 1994) [hereinafter Kennedy Interview].

54. Young Interview, *supra* note 5.

serve the interests of justice.<sup>55</sup> In Vermont, a biological parent's consent is required for adoption unless one of a number of circumstances exists. For example, if the child is in SRS custody without limitation as to adoption or if a parent has abandoned the child, consent would not be required.<sup>56</sup> The Vermont Supreme Court has held that "[t]he burden of proving such abandonment is a heavy one" and requires a showing of an "absolute, complete and intentional" abandonment.<sup>57</sup> The abandonment ground is commonly pled in situations where an uninvolved biological parent refuses to relinquish his or her rights, the other parent has remarried, and there is a stepparent waiting to adopt the child(ren).

## II. BACKGROUND: UNITED STATES SUPREME COURT DECISIONS

Many of the basic questions that arise in termination of parental rights cases have been addressed by the United States Supreme Court over the course of the last century. Although balancing the rights and interests of parents with the rights and interests of children is an emotional and difficult task, the Court has nonetheless established several key parameters governing termination proceedings.

Recognition of the family's sacred place in our society and the fundamental right of families to be free from governmental intrusion into their affairs is longstanding. The United States Supreme Court has found a "private realm of family life which the state cannot enter," and has held that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."<sup>58</sup>

The right of parents to raise their children has been deemed an "essential," "basic civil [right] of man."<sup>59</sup> Therefore, even where parents have not been "model parents" and "[e]ven when blood relationships are strained, parents retain a vital interest in

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55. VT. STAT. ANN. tit. 4, § 455(b) (Supp. 1993).

56. *Id.* § 435(1), (6).

57. *In re Bingham*, 149 Vt. 211, 212, 541 A.2d 1197, 1198 (1988) (quoting *Whitton v. Scott*, 120 Vt. 452, 459, 144 A.2d 706, 710 (1958)).

58. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-640 (1974).

59. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

preventing the irretrievable destruction of their family life.<sup>60</sup> This right is not absolute but qualified by the state's "*parens patriae* interest in preserving and promoting the welfare of the child."<sup>61</sup> The United States Supreme Court has also established that not every indigent parent is entitled to court appointed counsel. In *Lassiter v. Department of Social Services*, the Court held that the presumption that an indigent is entitled to court appointed counsel exists only in cases where a person is to be deprived of his or her physical liberty.<sup>62</sup> Otherwise, the courts are to use the analysis set out in *Matthews v. Eldridge*, looking to the individual circumstances of a given case, and balancing the private interest at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions.<sup>63</sup> In *Lassiter*, the termination proceeding did not deprive the mother of her physical liberty, there was no danger of future criminal prosecution, and, according to the Court, the case "presented no specially troublesome points of law."<sup>64</sup> For these reasons, the Court concluded that the proceeding was fundamentally fair under the Fourteenth Amendment even though the court did not appoint counsel to represent the mother.<sup>65</sup> At the time the Supreme Court issued its opinion in 1981, thirty-three states and the District of Columbia had already provided "for the appointment of counsel in termination cases" by statute.<sup>66</sup>

In Vermont, parents who are parties to termination proceedings are routinely appointed counsel.<sup>67</sup> Vermont children are guaranteed counsel in any CHINS or delinquency case, including termination cases, and are also appointed a guardian ad litem.<sup>68</sup> Vermont Rule of Family Procedure 2 modifies title 33, section 5525 of the Vermont Statutes Annotated, which states

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60. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

61. *Id.* at 766. *Parens patriae* is the role of the state as guardian of persons under legal disability, such as juveniles. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

62. *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 25 (1981).

63. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

64. *Lassiter*, 452 U.S. at 32.

65. *Id.* at 33.

66. *Id.* at 34.

67. VT. R. FAM. PROC. 2(c) (1994).

68. *Id.*; VT. STAT. ANN. tit. 33, § 5525(a) (1992).

that an attorney or a guardian ad litem shall be appointed upon motion.<sup>69</sup>

The United States Supreme Court has also decided the question as to what burden of proof is required in parental rights termination cases. In *Santosky v. Kramer*, the Court established a minimum "clear and convincing evidence" standard, finding that such a standard struck a "fair balance" between the rights of the parent(s) and the concerns of the state.<sup>70</sup> Thus, this standard was required to satisfy due process under the Fourteenth Amendment.<sup>71</sup> The Supreme Court has historically mandated the intermediate clear and convincing standard when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money."<sup>72</sup> The *Santosky* Court, in considering the three *Eldridge* factors, found that in parental rights termination proceedings, the "private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight."<sup>73</sup> The Court was therefore led to reject the preponderance of the evidence standard in termination proceedings in favor of the clear and convincing standard.

At the time the Supreme Court decided *Santosky*, thirty-five states and the District of Columbia already specified a higher standard of proof than the preponderance standard in parental rights termination proceedings.<sup>74</sup> Since 1978, prior to *Santosky*, New Hampshire has required the even higher "beyond a reasonable doubt" standard of proof in termination proceedings.<sup>75</sup> The New Hampshire Supreme Court held in *Robert H.* that the "beyond a reasonable doubt" standard is required due to the potential termination of "liberty and natural rights of parents guaranteed under [the] New Hampshire Constitution, part I, article 2."<sup>76</sup>

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69. VT. R. FAM. PROC. 2(c) (1994); VT. STAT. ANN. tit. 33, § 5525(a) (1992) (emphasis added).

70. *Santosky*, 455 U.S. at 769-70.

71. *Id.*

72. *Id.* at 756 (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979)).

73. *Id.* at 758.

74. *Id.* at 749.

75. *State v. Robert H.*, 393 A.2d 1387, 1389 (N.H. 1978).

76. *Id.*

The constitutional language that gives rise to the heightened standard in relevant part provides that “[a]ll men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness.”<sup>77</sup>

The Vermont Constitution provides similar language: “[t]hat all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. . . .”<sup>78</sup>

Given the similarity in the two states’ constitutions, it may be argued that the Vermont Constitution also requires the beyond a reasonable doubt standard in termination cases. If this argument has been raised in appeals to the Vermont Supreme Court, however, it is an issue that has not yet been addressed by the court in any published decision.

### III. OVERVIEW OF STATE TERMINATION LAWS

States, for the most part, have enacted specific, comprehensive termination statutes that conform to the principles set forth under United States Supreme Court decisions and embrace the policy of permanency embodied in P.L. 96-272.<sup>79</sup>

Prior to embarking on a discussion of various provisions of state termination statutes, this article proposes the following ground rules as a framework within which the discussion should be contained. First, a termination statute should provide “fair warning” to parents and children of the behaviors that might constitute grounds for termination.<sup>80</sup> Second, a termination statute should strive to balance the “compelling” interests of the parents with the interests of the child, given the child’s age and developmental needs.<sup>81</sup> Third, the statute should incorporate the philosophy of permanency and, to that end, incorporate the basic

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77. N.H. CONST. pt. 1, art. 2.

78. VT. CONST. ch. 1, art. 1.

79. See *supra* notes 27-35 and accompanying text.

80. GOLDSTEIN, *supra* note 49, at 136.

81. *In re B.L.*, 145 Vt. 586, 591, 494 A.2d 145, 148 (1985) (quoting *In re N.H.*, 135 Vt. 230, 237, 373 A.2d 851, 856-57 (1977)).

tenets of the Federal Adoption Assistance and Child Welfare Act. Fourth, the statute should state that termination is only appropriate if it is the least restrictive remedy given the best interests of the child. Finally, a range of statutory options should be available to the court so that as permanent an arrangement as possible can be provided for a child if parental rights are not terminated.

### A. Grounds

Given the above framework, what should be the grounds for state intervention at the level of a possible termination of a parent's rights? How serious must the parental behavior be? How detrimental must the impact of terminating the parent's rights be on the child?

Most states include in their termination statutes a list of "grounds," one or more which, if proven, would provide a basis for termination of a parent's rights. Many states combine in one of these grounds both "abuse" and "neglect." In other states, as in Vermont, abuse or neglect is established at a merits proceeding occurring months, or perhaps years, prior to a termination action and is not a ground which must be proven at termination.<sup>82</sup> If this is the case, the termination proceedings will usually focus on whether the parent(s) has taken sufficient steps to correct or eliminate the condition(s) that led to the finding of abuse or neglect, thus making family reunification possible within a reasonable period of time.<sup>83</sup> This type of proceedings scenario is the usual rule in terminations involving the parental rights of children in foster care due to the "reasonable" family reunification efforts a state agency is mandated to make under P.L. 96-272.<sup>84</sup> Many states have incorporated the federal "reasonable efforts" requirement into their state statutes.<sup>85</sup> Some state statutes require more than reasonable efforts. In New Jersey, for example,

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82. See *In re C.L.*, 151 Vt. 480, 563 A.2d 241 (1989), cert. denied, 493 U.S. 1026 (1990).

83. See, e.g., N.M. STAT ANN. § 32A-4-28(B)(2) (Michie Supp. 1993); VA. CODE ANN. § 16.1-283(B)(1)-(2) (Michie 1988).

84. See *supra* note 36 and accompanying text.

85. See, e.g., CAL. WELF. & INST. CODE § 366.26(c)(2) (West Supp. 1994); CONN. GEN. STAT. ANN. § 17a-112(d)(2) (West Supp. 1994); R.I. GEN. LAWS § 15-7-7(d)(2)(a) (1988 & Supp. 1993).

the state must make "diligent" efforts toward strengthening the parental relationship.<sup>86</sup>

Despite general reasonable efforts mandates, there will be some cases which will not warrant any efforts to reunify the family because such efforts would be futile or likely to cause danger to the child.<sup>87</sup> Therefore, exceptions to a blanket reasonable efforts mandate should be provided for in a termination statute. In Vermont, courts have seen fit to forego requiring reasonable efforts to reunite a family in cases of total parental abandonment or horrendous abuse, and have ordered termination of parental rights at the initial disposition hearing.<sup>88</sup> The initial disposition hearing is held thirty days after a merits determination that a child is in need of care or supervision, unless the court grants a continuance.<sup>89</sup>

In accordance with the general framework principle of "fair warning," specific statutory definitions of abuse and neglect should be clearly delineated in a termination statute. Currently in Vermont, definitions of abuse and neglect are found not in the termination section of the Juvenile Proceedings Act, but rather in the Child Welfare Services statute.<sup>90</sup> Abuse can be physical, emotional, or sexual.<sup>91</sup> The vast majority of children under the age of ten who are coming into Vermont SRS custody have been sexually abused.<sup>92</sup> If Vermont statistics are indicative of national trends, it is worthwhile to note that most states do not specifically include sexual abuse in their definitions of abuse.

The definition of neglect in Vermont is as follows:

Failure to supply the child with adequate food, clothing, shelter or health care. For the purposes of this chapter, "adequate health care" includes any medical or nonmedical remedial health care permitted or authorized under state law. Notwithstanding that a child might be found to be without proper parental care under chapter 55 of Title 33, a parent or other person responsible for a

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86. N.J. STAT. ANN. § 30:4C-15(d) (West 1981 & Supp. 1994).

87. See, e.g., *In re Juvenile Appeal* (84-AB), 471 A.2d 1380, 1383 (Conn. 1984).

88. Coble Interview, *supra* note 8.

89. VT. STAT. ANN. tit. 33, §§ 5526(b), 5528(a) (1992 & Supp. 1993).

90. VT. STAT. ANN. tit. 33, § 4912 (1992 & Supp. 1993).

91. *Id.*

92. Coble Interview, *supra* note 8.

child's care legitimately practicing his or her religious beliefs who thereby does not provide specified medical treatment for a child shall not be considered neglectful for that reason alone. . . .<sup>93</sup>

This definition of neglect does not, but should, expressly address the long-recognized potential for state intervention on the basis of neglect in low income and non-Anglo families which cannot, or choose not, to adhere to a white middle class standard of living. To address this issue, the American Bar Association's Juvenile Justice Standards Project: *Standards Relating to Abuse and Neglect* recommend that specific harm to a child must be proven prior to *any* coercive state intervention, i.e. removing a child from his or her home, recognizing that "not every type of harm from which we might wish to protect children constitutes a basis for intervention."<sup>94</sup>

Courts have also spoken on the issue of neglect. The New Hampshire Supreme Court has held that "growing up in a so-called disadvantaged home is not a sufficient basis for coercive [state] intervention."<sup>95</sup> The Supreme Court therefore overturned the lower court's termination of a father's parental rights where the father was illiterate and frequently unemployed, a personal situation that the court acknowledged "leads to low income, and thus low or substandard living and housing conditions."<sup>96</sup>

It is undisputed that a vastly disproportionate percentage of children in custody are from poor families or families of color. According to the American Bar Association, in 1989, "about [thirty-four percent] of all children in foster care were African-American, although only about [fifteen percent] of all children in the general population are African-American."<sup>97</sup>

In addition to considering including a specific harm requirement in statutory definitions of neglect, there are other preventative measures a legislature can take when drafting a termination statute to avoid unnecessary state intervention in

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93. VT. STAT. ANN. tit. 33, § 4912(3)(B) (Supp. 1993).

94. *Standards Relating to Abuse and Neglect*, A.B.A. JUV. JUST. STANDARDS PROJECT 61 (1981) [hereinafter A.B.A. STANDARDS].

95. Robert H., 393 A.2d at 1391 (quoting WALD, STATE INTERVENTION ON BEHALF OF "NEGLECTED" CHILDREN IN PURSUING JUSTICE FOR THE CHILD 246, 252 (M. Rosenheim ed. 1976)).

96. *Id.* at 1390.

97. *Children at Risk*, *supra* note 2, at 51.

poor or non-Anglo families in neglect cases. The statute, for instance, can expressly address the issue. The Kentucky termination statute, in one of its neglect grounds, specifically states that a child is neglected when "for reasons other than poverty alone," a parent has failed to provide "essential food, clothing, shelter, medical care or education."<sup>98</sup> Alternative language is provided in the Pennsylvania statute which states that "[t]he rights of a parent shall not be terminated solely on the basis of environmental factors such as inadequate housing, furnishings, income, clothing and medical care if found to be beyond the control of the parent."<sup>99</sup> Specific findings on the poverty factor in terminations based on alleged parental neglect could also be legislatively mandated.

In some states, the degree of seriousness of the abuse or neglect is the central focus of the abuse or neglect statutory ground for termination. In Virginia, to terminate parental rights, the neglect or abuse suffered by the child must have presented a "serious and substantial threat to his life, health or development."<sup>100</sup> Wisconsin sets out a separate statutory ground entitled Child Abuse which combines a showing of "substantial threat" to the child with a showing of either an act to the child that resulted in a felony conviction, or a showing that the child was removed from the familial home on more than one occasion and was adjudicated to be in need of protection or services because of physical or sexual abuse of the child by the parent.<sup>101</sup>

Many states have a ground for termination that refers to felony convictions of parents or imprisonment for felony convictions. In California, a termination action may be brought where a parent has been convicted of a "felony indicating parental unfitness."<sup>102</sup> Examples of such felonies are not provided in the statute. By contrast, in Delaware, the felony ground specifically provides that the parent must have been convicted of a felony where the child at issue was the victim of the crime or which involved harm to the child.<sup>103</sup>

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98. KY. REV. STAT. ANN. § 625.090(1)(f) (Michie/Bobbs-Merrill 1990) (emphasis added).

99. 23 PA. CONS. STAT. ANN. § 2511(b) (1991 & Supp. 1994).

100. VA. CODE ANN. § 16.1-283(B)(1) (Michie 1988).

101. WIS. STAT. ANN. § 48.415(5) (West 1987).

102. CAL. WELF & INST. CODE § 366.26(c)(1) (West Supp. 1994).

103. DEL. CODE ANN. tit. 13, § 1103(a)(4) (1993).

Some states take a different view regarding the felony ground and have enacted a felony statutory termination ground that focuses on the abandonment aspect of a parent's incarceration due to a felony conviction.<sup>104</sup> For example, in Colorado, if a parent is to be incarcerated and "not eligible for parole for at least six years from the date the child was adjudicated dependent or neglected," a petition can be brought to terminate that parent's rights.<sup>105</sup> Intent on the part of the parent to abandon his or her child need not be proven.<sup>106</sup> The A.B.A. Standards, by contrast, include a volitional element, requiring that "parental conduct . . . be examined [to determine] whether the parent was able to care or to arrange care for the child."<sup>107</sup> Incarcerated or institutionalized parents under the A.B.A. Standards are expressly found to be incapable of abandoning their children under this test.<sup>108</sup>

In many states the abandonment ground is not statutorily defined; rather, the statute merely provides conclusively that parental abandonment of a child constitutes grounds for termination.<sup>109</sup> Wisconsin's definition is fairly typical of statutes that provide a more comprehensive definition of abandonment. The statute provides as follows:

(1) Abandonment. (a) Abandonment may be established by a showing that:

1. The child has been left without provision for its care or support, the petitioner has investigated the circumstances surrounding the matter and for 60 days the petitioner has been unable to find either parent;
2. The child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by [section] 48.356(2) and

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104. See, e.g., ARIZ. REV. STAT. ANN. § 8-533(B)(4) (1989).

105. COLO. REV. STAT. § 19-3-604 (1)(b)(III) (Supp. 1993).

106. *Id.* § 19-3-604(1)(b).

107. A.B.A. STANDARDS, *supra* note 94, at 166.

108. *Id.*

109. See, e.g., ARIZ. REV. STAT. ANN. § 8-533(B)(1) (Supp. 1993); NEB. REV. STAT. § 43-292(1) (1988); N.M. STAT. ANN. § 32A-4-28(B)(1) (Michie 1978 & Supp. 1993).

the parent has failed to visit or communicate with the child for a period of 6 months or longer; or

3. The child has been left by the parent with a relative or other person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of one year or longer.<sup>110</sup>

The A.B.A. Standards offer a similar definition for abandonment except that the time-frames are one year and eighteen months for sections two and three, respectively.<sup>111</sup>

In Alabama, abandonment is defined more succinctly in the definitions section of the termination statute as:

[a] voluntary and intentional relinquishment of the custody of a child by a parent, or a withholding from the child, without good cause or excuse, by the parent, of his presence, care, love, protection, maintenance or the opportunity for the display of filial affection, or the failure to claim the rights of a parent, or failure to perform the duties of a parent.<sup>112</sup>

Through statute or common law, states uniformly recognize that abandonment requires intentional behavior by the parent(s).<sup>113</sup>

Many courts have addressed facts that show parental abandonment. The New Hampshire Supreme Court found that a parent who made no attempt to communicate with her daughter for a period in excess of two years, although she lived within thirty miles of the child, abandoned her daughter.<sup>114</sup> The court noted a "mere flicker of interest" on the part of the parent" will not preclude a finding of abandonment.<sup>115</sup>

In a 1975 decision, an Arizona appellate court, following the reasoning of a majority of other state jurisdictions, held that

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110. WIS. STAT. ANN. § 48.415(1) (West 1987) (emphasis omitted).

111. A.B.A. STANDARDS, *supra* note 94, at 162.

112. ALA. CODE § 26-18-3(1) (1975 & Supp. 1992).

113. See, e.g., *In re Appeal in Maricopa County*, Juv. Action No. JS-3594, 653 P.2d 39, 42 (Ariz. Ct. App. 1982); *Smith v. Smith*, 720 P.2d 1219, 1221 (Nev. 1986).

114. *In re Jessica B.*, 429 A.2d 320, 323 (N.H. 1981).

115. *Id.* at 323 (quoting *In re Diana P.*, 424 A.2d 178, 183 (N.H. 1980)).

abandonment requires intentional conduct by a parent that demonstrates a "settled purpose to relinquish all parental rights in the child."<sup>116</sup> The court in *Anonymous* also set out examples of specific conduct which constitute abandonment under Arizona law. These include the "withholding of parental presence, love, care, filial affection and support and maintenance."<sup>117</sup> In *Anonymous*, the court found a parent had abandoned her child by leaving her two-year-old child to be cared for by others and failing to have any contact with the child for more than one year, with only minimal contact after that year.<sup>118</sup>

A subsequent Arizona case again addressed the issue as to whether a parent abandoned his child. In *In re Appeal of Maricopa County Juvenile Action No. JS-6520*, a natural father's rights to his son were terminated due to the father's failure to visit him.<sup>119</sup> The father had visited the child only six times during the three years the child was in foster care. The Court of Appeals of Arizona held that the father's minimal contact with his son failed to demonstrate "any participation by or presence of appellant in Johan's life," the evidence thus supporting termination on abandonment grounds.<sup>120</sup>

In some states, a parent's failure to support his or her child is specifically included as part of the abandonment ground, while in other states, failure to support a child is a separate statutory ground for termination.<sup>121</sup> In Texas, a petition to terminate for failure to support is most often filed by a custodial parent against a non-custodial parent.<sup>122</sup> In Hawaii, there are three abandonment grounds: desertion, failure to communicate, and failure to support for at least one year where the child is in the custody of another.<sup>123</sup>

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116. *Anonymous v. Anonymous*, 540 P.2d 741, 743 (Ariz. Ct. App. 1975).

117. *Id.*

118. *Id.*

119. *In re Appeal in Maricopa County Juvenile Action No. JS-6520*, 756 P.2d 335 (Ariz. Ct. App. 1988).

120. *Id.* at 339.

121. See, e.g., IDAHO CODE § 16-2005(a) (1979 & Supp. 1994); IOWA CODE ANN. § 600A.8(4) (West 1981); N.C. GEN. STAT. § 7A-289.32(5) (1993); S.C. CODE ANN. § 20-7-1572(4) (Law. Co-op. 1985 & Supp. 1993).

122. Ellen K. Solender, *Termination of the Parent-Child Relationship*, 13 TEX. TECH L. REV. 967, 972 (1982).

123. HAW. REV. STAT. § 571-61(b)(1)(A),(C)-(D) (1985).

Discussion of terminations based on a parent's failure to support his or her child(ren) raises the concern that such terminations will encourage "deadbeat" parents to seek termination of their parental rights rather than financially support their children. Legislation, however, can be drafted to affirmatively address this issue.

First, a termination statute can be drafted that only allows for *involuntary* terminations after a hearing on failure to support grounds. This in itself would eliminate much of the problem because someone other than the delinquent parent would have to initiate the termination petition. At the hearing, the failure to support ground, under *Santosky*, would then need to be proven by at least clear and convincing evidence.<sup>124</sup>

Second, a legislature can also require that the termination be in the child's best interests. In many cases, particularly where the obligor parent is affluent and therefore at least potentially a provider for the child, terminating an obligor's parental rights may well not be in the child's best interests, unless perhaps there is a pending stepparent adoption which would ensure a "step-provider" for the child. By contrast, when continuation of a parent-child relationship can be shown to be harmful to the child, termination under a best interests standard could be ordered regardless of an obligor parent's income or the likelihood of collecting support.

Two state termination statutes specifically address whether a parent's financial obligation to support his or her child survives termination. In New Jersey, the statute expressly states that the duties of the parents with respect to the "support and maintenance" of the child continue after termination.<sup>125</sup> Hawaii provides that a terminated parent's "legal duties and liabilities" continue unless and until the child is legally adopted.<sup>126</sup> In Illinois, although the statute states that natural parents are relieved of "all parental responsibility"<sup>127</sup> for a child once their rights to a child are terminated, Illinois case law recognizes a residual duty on the part of terminated parents to support their children.<sup>128</sup> Other state statutes generally follow the common

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124. See *supra* notes 70-74 and accompanying text.

125. N.J. STAT. ANN. § 9:2-20 (West 1993).

126. HAW. REV. STAT. § 571-63 (1993).

127. ILL. ANN. STAT. ch. 705, para. 405/2-29(2) (Smith-Hurd 1992).

128. See *In re M.M.*, 619 N.E.2d 702, 708 (Ill. 1993).

law rule and expressly provide that all rights, duties and obligations of parents cease once the parent-child relationship has been legally dissolved.<sup>129</sup>

A termination statute can and should also include a section that clearly provides that any child support due and owing at the time of termination is a continuing legal obligation of the terminated parent. Failure to so provide implies that a parent can sell his or her parental rights in exchange for release from his or her financial obligations to the child. In Texas, and perhaps in other states, "[s]uch an exchange would be tantamount to [felonious] child selling."<sup>130</sup>

Many states also have a separate ground for termination based on a parent's mental illness, mental deficiency, or mental retardation. Although some state statutes do not define mental illness or mental deficiency, in other states the terms are quite clearly defined either in the "grounds" section or in a "definition" section.<sup>131</sup> The labels themselves differ from state to state.

California has a separate ground for termination due to a parent's status as "mentally disabled."<sup>132</sup> California, unlike other states, explicitly provides in its statute the method by which a parent would come to be labelled "mentally disabled."<sup>133</sup> For example, in "mental disability" termination cases a parent would have to be certified as such by two experts, each of whom is either a physician and surgeon or a licensed psychologist with five years postgraduate experience in the diagnosis and treatment of mental and emotional disorders.<sup>134</sup> Many states that have adopted a mental illness or deficiency ground provide minimal statutory definition, and most fail to address the diagnostic procedures necessary to sustain such a label if termination is sought. Even so, courts have generally turned back constitutional challenges to such statutes on vagueness grounds.<sup>135</sup>

The Kentucky termination statute provides a useful alternative to using mental illness or deficiency as a ground for

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129. See, e.g., ILL. ANN. STAT. ch. 705, para. 405/2-29(2) (Smith-Hurd 1992); N.C. GEN. STAT. § 7A-289.33 (1993); S.C. CODE ANN. § 20-7-1576 (Law. Co-op. 1985).

130. Solender, *supra* note 122, at 974.

131. See, e.g., DEL. CODE ANN. tit. 13, § 1101(9) (1993).

132. CAL. FAM. CODE § 7827 (West 1994).

133. *Id.*

134. *Id.*

135. Anne M. Payne, *Parent's Mental Deficiency As Factor In Termination of Parental Rights—Modern Status*, 1 A.L.R. 5th 469, 511 (1992).

termination. In Kentucky, the "emotional illness," "mental illness," or "mental deficiency" of a parent is not a statutory ground for termination of parental rights; rather, it is just one factor the court must address in determining whether termination is in the best interests of the child.<sup>136</sup> Similarly, in Colorado, the "emotional illness," "mental illness," or "mental deficiency" of a parent is a factor for the court to consider within a ground that addresses the "unfitness" of a parent.<sup>137</sup> In Colorado, as in most other states, the mental health problems a parent might have are only relevant to termination insofar as they impact on a parent's ability to provide for his or her child.<sup>138</sup>

Some states combine mental illness or deficiency grounds or factors with substance abuse grounds or factors. Mississippi groups these grounds together. Under the state's statute, both grounds are defined in part as "diagnos[ed] condition[s] unlikely to change within a reasonable time."<sup>139</sup> Louisiana combines both into one ground entitled "Loss of custody due to the parent's condition."<sup>140</sup> The condition can be "mental illness," "mental retardation," or "substance abuse."<sup>141</sup> Further, there must be, among other considerations, "no reasonable expectation that the parent's condition will change or that he will be rehabilitated in the foreseeable future."<sup>142</sup>

Some termination statutes, such as Indiana's, give no mention of a parent's mental health as either a ground for termination or as a specific factor for the court to consider. Indiana courts have nonetheless found that although the mental retardation of a parent cannot be a ground for termination, it is "a factor to be considered along with other pertinent evidence bearing upon the question of a parent's fitness."<sup>143</sup> In *Egly v. Blackford County Department of Public Welfare*, an Indiana appellate court emphasized, however, that it is not sufficient to show in termination proceedings that a foster home or adoption would

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136. KY. REV. STAT. § 625.090(2)(a) (Michie/Bobbs-Merrill 1990).

137. COLO. REV. STAT. § 19-3-604(1)(b)(I) (Supp. 1993).

138. *Id.*; See also, CAL. FAM. CODE § 7827 (West 1994); KY. REV. STAT ANN. § 625.090(2)(a) (Michie/Bobbs-Merrill 1990).

139. MISS. CODE ANN. § 93-15-103(3)(d)(i) (Supp. 1993).

140. LA. CHILD. CODE ANN. art. 1015(7) (West 1994).

141. *Id.* art. 1015(7)(b).

142. *Id.* art. 1015(7)(f).

143. *R.M. v. Tippecanoe County Dep't of Pub. Welfare*, 582 N.E.2d 417, 420 (Ind. Ct. App. 1991).

provide a "better social and educational environment" for children than a home where one or both parents suffer from mental and social deficiencies.<sup>144</sup>

This concern on the part of the *Egley* court parallels the concern raised earlier in the context of neglect cases. Social workers may be tempted to intervene unnecessarily in families where parents are unable or unwilling to provide their children with the kind of middle-class advantages they might want a child to have, and that a foster placement could provide.<sup>145</sup> The potential for discrimination against persons with a mental illness or developmental disability is as great, if not greater, than the potential for disparate treatment of poor persons or persons of non-Anglo culture. For this reason, a statute should not include a mental health ground for termination of parental rights. The mental health of a parent should only be a consideration in termination proceedings if relevantly linked to another ground such as abuse, neglect, or abandonment.

The District of Columbia provides yet another approach to incorporation of a parent's mental health into a termination statute. The District of Columbia's statutory language is broad in scope and looks to the "physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child."<sup>146</sup> The potential for discrimination against persons who are mentally ill or developmentally disabled would be greatly diminished under this type of statutory language.

Some states provide yet another ground for termination of parental rights: out-of-home placement. Under the A.B.A. Standards, out-of-home placement is a ground for termination if a child under three years of age is out of the biological family home by court order and in placement for two years or more.<sup>147</sup> For a child three years of age or older, the child must be in placement for three or more years.<sup>148</sup> Underlying the entire A.B.A. Standards is the strong preference for keeping children with their families or reuniting them as quickly as possible and

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144. *Egley v. Blackford County Dep't of Pub. Welfare*, 575 N.E.2d 312, 315 (Ind. Ct. App. 1991).

145. See *supra* notes 93-97 and accompanying text.

146. D.C. CODE ANN. § 16-2353(b)(2) (1989).

147. A.B.A. STANDARDS, *supra* note 94, at 43.

148. *Id.*

requiring agencies to work toward reunification.<sup>149</sup> The A.B.A. Standards expressly reject shorter time-frames (six months to one year) recommended by various commentators, finding that reunification would not be realistic within such brief time periods.<sup>150</sup>

An out-of-home placement ground was added to the Arizona termination statute in 1986 in order to "expedite the adoption of numerous children who remain in temporary foster care for indeterminate lengths of time with no hope of being returned to their natural parents and, in so doing, promote a stable and long-term family environment for these children."<sup>151</sup> The Arizona statute provides for two time-frames in its out-of-home placement ground, the difference between them being the degree of effort the parent has made to remedy the conditions that led to the placement. Termination actions at one year are allowed if the parent(s) substantially neglected to remedy the circumstances that led to the placement.<sup>152</sup> It is not until the two year mark that terminations based on out-of-home grounds can be brought if the parent has been unable to remedy the circumstances that led to the placement and it is unlikely that they will be able to adequately parent their child in the near future.<sup>153</sup>

In *In re Appeal in Maricopa County Juvenile Action No. JS-6520*, statutory time-frames notwithstanding, the Arizona Supreme Court looked to the legislative intent to expedite adoption.<sup>154</sup> The court refused to terminate parental rights to two older children in a three child family on the out-of-home placement ground because it found it unlikely that the two older children would ever be adopted.<sup>155</sup> Parental rights to the youngest child, however, were terminated on out-of-home grounds because that child was in a pre-adoptive home at the time of the termination proceedings.<sup>156</sup> All three children had been in out-of-home placements for over two years.<sup>157</sup>

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149. *Id.* at 3.

150. *Id.* at 167.

151. 1986 ARIZ. SESS. LAWS 205, § 1.

152. ARIZ. REV. STAT. ANN. § 8-533(B)(6)(a) (1989).

153. *Id.* § 8-533(B)(6)(b).

154. *In re Appeal in Maricopa County Juvenile Action No. JS-6520*, 756 P.2d 335, 340-41 (Ariz. Ct. App. 1988).

155. *Id.*

156. *Id.* at 340.

157. *Id.* at 337.

New Mexico also has a termination ground that is based on the length of time a child has spent in an out-of-home placement. This ground contains no time-frames for initiating termination actions, but generally states that a child must have been in an out-of-home placement for "an extended period of time."<sup>158</sup> New Mexico also looks to the nature of a child's ties to the "substitute family" when a termination is sought on out-of-home grounds, with a particular focus on whether a "psychological parent-child relationship has developed between the substitute family and the child."<sup>159</sup> Other factors the court must address in out-of-home placement terminations include the preference of the child in terms of where he or she wishes to live and whether the substitute family desires to adopt the child.<sup>160</sup>

At first glance, the New Mexico out-of-home placement ground is attractive because of its child-centered focus. However, this "no-fault" focus contains one essential flaw. It fails to recognize the constitutionally protected interest of parents to live with and raise their children. The statutory ground is vague, broad, and offers parents no statutory opportunity to "redeem" themselves by showing a likelihood of being able to resume parental responsibilities. Nor does the statute direct the court to examine, at the time termination is sought, the efforts made by the state to reunite the family. Because termination is such a drastic severing of constitutionally protected family relationships, there must be a balancing of parental rights and interests with children's rights and interests. This is necessary to ensure that parents' due process rights are fully protected and to avoid unnecessary intrusion in family matters, while continuing to ensure that children are living in safe, adequate homes.<sup>161</sup> To achieve such balance under the New Mexico out-of-home placement ground, the parental behavior that led to the placement needs to be examined at the termination proceedings, either as a ground in itself or as a potential long-term barrier to reunification. This should be the first stage of inquiry. The New Mexico out-of-home placement ground factors could then be looked to as potential best interests factors. The best interests analysis

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158. N.M. STAT. ANN. § 32A-4-28(B)(3)(a) (Michie 1994).

159. *Id.* § 32A-4-28(B)(3)(c).

160. *Id.* § 32A-4-28(B)(3)(d)-(e).

161. See *supra* section III and accompanying text; A.B.A. STANDARDS, *supra* note 94, at 3.

under the proposed guidelines is the second tier of inquiry after a ground is established and state efforts to reunify have been proven.<sup>162</sup> This two-tier approach is already codified in some states.<sup>163</sup>

Similar to New Mexico's child-focused out-of-home placement ground is the District of Columbia's child-focused best interests ground. In determining best interests under the District of Columbia statute, the court is instructed to look to the following factors:

(1) the child's need for continuity of care and caretakers and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages;

(2) the physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child;

(3) the quality of the interaction and interrelationship of the child with his or her parent, siblings, relative and/or caretakers, including the foster parent; and

(4) to the extent feasible, the child's opinion of his or her own best interests in the matter.<sup>164</sup>

Constitutional challenges to the District of Columbia termination statute have been brought on vagueness grounds and as violative of parents' due process rights. However, the D.C. Court of Appeals has rejected such constitutional challenges, finding that parents' rights "are not absolute, and must give way before the child's best interests."<sup>165</sup> In *In re C.O.W.*, the appellant argued that the District of Columbia best interests

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162. See *infra* notes 261-62 and accompanying text.

163. See, e.g., N.C. GEN. STAT. § 7A-289.31(a) (1993); 23 PA. CONS. STAT. ANN. § 2511 (1991 & Supp. 1994).

164. D.C. CODE ANN. § 16-2353(b) (1989).

165. *In re A.B.E.*, 564 A.2d 751, 755 (D.C. 1989) (citing *In re Adoption of J.S.R.*, 374 A.2d 860, 864 (D.C. 1977)).

statute violated parents' due process rights because it allowed a comparison between natural parents and foster parents in termination actions.<sup>166</sup> This comparison is problematic as the basis for terminating parental rights since the children at issue are in custody precisely because the biological family home was not adequately providing for the child.<sup>167</sup> Therefore, in "contests" between the natural parents and foster parents, natural parents are bound to fall short.<sup>168</sup> Although sympathetic to the appellant's argument, the court found that the trial court had carefully made specific findings under the D.C. "best interests" statute and did not make a direct comparison between natural and foster parents.<sup>169</sup> Thus, any potential "constitutional infirmities" had been avoided.<sup>170</sup>

### B. Standing

Legislators drafting a termination statute must grapple with the basic issue of who or what entity will be authorized to bring termination actions. Currently in Vermont, under the Juvenile Proceedings Act, "[a]ny party to the proceedings, and any person having supervision or legal custody of or an interest in the child" may initiate termination actions.<sup>171</sup> There are no Vermont Supreme Court decisions that address the issue of standing in termination cases or interpret this statutory section. Thus, it remains an open question as to who precisely comes under the broad umbrella of a person who has "an interest in the child." For instance, would a foster parent have standing to bring a termination action in Vermont?

Usually, states allow agencies akin to Vermont's SRS to bring termination actions.<sup>172</sup> This is because the vast majority of terminations involve children in state custody. Some states also expressly allow the child<sup>173</sup> or a person representing the child's

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166. *In re C.O.W.*, 519 A.2d 711, 713 (D.C. 1987).

167. *Id.* at 714.

168. *Id.*

169. *Id.* at 714-15.

170. *Id.* at 714.

171. VT. STAT. ANN. tit. 33, § 5532(b) (1992).

172. See, e.g. ALASKA STAT. § 47.10.080(C)-(D) (Michie 1990); ARIZ. REV. STAT. ANN. § 533(A) (1989); CONN. GEN. STAT. ANN. § 45A-715(A) (WEST 1993).

173. See, e.g., MICH. COMP. LAWS § 712A.19b (1992).

best interests, such as a guardian ad litem, to initiate termination actions.<sup>174</sup> A child historically has been viewed by society and courts as incompetent and thus legally incapable of bringing court actions. Therefore, statutory language that allows a child to directly bring an action may be interpreted to mean that a guardian ad litem or "next friend" must be the person who actually files a termination petition on behalf of the child.

In Florida, for example, where the statute formerly allowed "any person who has knowledge of the facts alleged" to file termination petitions, an appellate court held that Gregory Kingsley lacked standing to file a termination petition because of his legal incapacity as a child.<sup>175</sup> By contrast, in a recent Arizona case, an appellate court held that children do have legal standing to bring termination actions under a statute containing broad language, but which does not specifically name the child as having standing.<sup>176</sup> The court specifically rejected the argument that children as minors are under a legal disability and as such are precluded from bringing termination actions.<sup>177</sup>

States sometimes recognize foster parents as having standing to bring termination actions. In Utah, foster parents can initiate termination actions, but only when they have had physical custody of the child for at least one year and they intend to adopt the child.<sup>178</sup> New Hampshire qualifies the right of foster parents to file termination actions even further by restricting actions to those situations where:

- (a) [t]he child has lived in the foster home continuously for [two years]; and
- (b) [t]he foster parents have requested in writing the licensed child-placing agency to legally free the child for adoption, but that the agency has not initiated proceedings, and there is reasonable cause to believe that grounds exist.<sup>179</sup>

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174. See, e.g., FLA. STAT. ANN. § 39.464 (West Supp. 1994); N.M. STAT. ANN. § 32A-4-29(A)(3) (Michie 1993).

175. *Kingsley v. Kingsley*, 623 So. 2d 780, 784-785 (Fla. Dist. Ct. App. 1993) (quoting FLA. STAT. ANN. ch. 39.464(1) (Supp. 1992)).

176. *In re Appeal in Pima County Juvenile Severance Action No. S-113432*, 872 P.2d 1240, 1243 (Ariz. Ct. App. 1993).

177. *Id.*

178. UTAH CODE ANN. § 78-3a-404(1)(b) (Supp. 1994).

179. N.H. REV. STAT. ANN. § 170-C:4(II)(a)-(b) (1994).

States also commonly allow "blood relative[s]"<sup>180</sup> or a child's legal guardian to file petitions for termination.<sup>181</sup>

Missouri has a unique statutory scheme regarding standing in termination cases. In Missouri, "[a]ny information that could justify the filing of a petition [for termination,] may be referred to the *juvenile officer*."<sup>182</sup> The juvenile officer makes a preliminary inquiry and may then either file a termination petition in the juvenile court or notify the informant within thirty days that the officer does not believe that a petition should be filed. If the juvenile officer decides not to file a petition, the informant then has direct access to the juvenile court which may order the juvenile officer to conduct further inquiry or file a petition.<sup>183</sup>

States are divided as to whether, and under what circumstances, one parent should be allowed to initiate a termination action against the other parent. As is true in Vermont, states routinely provide procedures for a parent to seek termination of the other parent's rights when the termination is in connection with a stepparent adoption.<sup>184</sup> This is also the case in Alaska. However, Alaska also allows one parent to file a petition to terminate the other parent's rights, independent of adoption, "on grounds that the parent committed an act constituting sexual assault . . . of a minor . . . that resulted in conception of the child and that termination of the parental rights of the biological parent is in the best interests of the child."<sup>185</sup> Delaware has model language that encompasses both the pending adoption situation and a focus on the interests of the child. The Delaware statute provides:

Unless adoption is contemplated, the termination of [one] parent's rights by the other parent shall not be granted if the effect will be to leave only [one] parent holding parental rights, unless the Court shall find the

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180. See, e.g., CONN. GEN. STAT. ANN. § 45a-715(a)(5) (West 1993); DEL. CODE ANN. tit. 13, § 1104(4) (1993).

181. See, e.g., OKLA. STAT. tit. 10, § 1130(C) (Supp. 1994); TEX. FAM. CODE ANN. § 11.03(a)(4) (West 1986).

182. MO. ANN. STAT. § 211.447(1) (Vernon 1983 & Supp. 1994) (emphasis added).

183. *Id.*

184. See VT. STAT. ANN. tit. 15, § 435 (1989). Although not explicit, the statute allows for a parent to seek termination of parental rights of the other parent if there is a pending stepparent adoption. *Id.*

185. ALASKA STAT. § 25.23.180(c)(3) (Michie 1991).

continuation of the rights to be terminated will be harmful to the child.<sup>186</sup>

Several states simply provide that a parent has standing to bring a termination action against the other parent.<sup>187</sup> Presumably, unless otherwise provided, the same ground(s) would have to be proven in these terminations as must be proven when someone other than a parent initiates the termination action. In Nevada, abandonment is the only ground under which one parent can move to terminate the rights of the other parent.<sup>188</sup> If a natural parent refuses to consent to the adoption of his or her child in a Vermont Probate Court adoption proceeding, the petitioning party must prove that the non-consenting parent "abandoned the care and support of the minor, or is, in the opinion of the probate court, incompetent to have the care and custody of the minor."<sup>189</sup>

### C. *Standard Of Proof*

Following the United States Supreme Court decision in *Santosky*, states that had not yet adopted a minimum clear and convincing standard of proof for termination cases did so. A recent California case raises the issue of what precisely needs to be proven by clear and convincing evidence.<sup>190</sup> In California, the statutory scheme combines termination proceedings with dependency proceedings for terminations where the child has been declared a "dependent" and is no longer in the physical custody of his or her parent(s).<sup>191</sup> The California Supreme Court found that the procedural safeguards in the dependency/termination statute *as a whole* were adequate to protect parents' due process rights even though the ultimate issue of termination under the statute only has to be proven by a preponderance of the evidence.<sup>192</sup> In these terminations, allegations of abuse or neglect must be proven by clear and convincing evidence at the

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186. DEL. CODE ANN. tit. 13, § 1103(b) (1993).

187. See, e.g., N.H. REV. STAT. ANN. § 170-C:4(I) (1994).

188. NEV. REV. STAT. ANN. § 128.105(7) (Michie 1993).

189. VT. STAT. ANN. tit. 15, § 435(1) (1989).

190. *Cynthia D. v. Superior Court*, 851 P.2d 1307, 1315 (Cal. 1993).

191. CAL. WELF. & INST. CODE § 361 (West 1984 & Supp. 1994).

192. *Cynthia D.*, 851 P.2d at 1315.

time the child is initially removed from the home.<sup>193</sup> Also, the statute provides that the court shall only terminate parental rights if it determines by clear and convincing evidence that a child is likely to be adopted.<sup>194</sup>

At the time a termination petition is brought, it is either the parental behavior ground(s) for termination that must be proven by clear and convincing evidence (i.e. abuse, neglect, or abandonment), or, if children are in state custody at the point of termination, the ground that must be proven by clear and convincing evidence is usually, as in Vermont, that the parent(s) has failed to correct the behavior that initially led to the child's removal from the home and the parental behavior is unlikely to improve within a reasonable period of time.<sup>195</sup> The precise standard in Vermont for children in state custody is clear and convincing evidence that there has been a "substantial change in material circumstances" and that termination is in the child's best interests, as determined in accordance with enumerated statutory factors.<sup>196</sup> The most important of these factors is "whether the parent 'will be able to resume his [or her] parental duties within a reasonable time.'<sup>197</sup>

As mentioned previously, only New Hampshire requires a higher standard of proof, beyond a reasonable doubt, in termination cases.<sup>198</sup> Although the New Hampshire termination statute requires only a clear and convincing standard of proof, the New Hampshire Supreme Court has held that the New Hampshire Constitution requires the higher standard.<sup>199</sup>

On the federal level, "reasonable doubt" is the standard of proof in termination proceedings brought under the Indian Child Welfare Act.<sup>200</sup> Under this statute, a termination decision must be supported by "evidence beyond a reasonable doubt" that

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193. CAL. FAM. CODE § 7821 (West Supp. 1994).

194. CAL. WELF. & INST. CODE § 366.26(c)(1) (West Supp. 1994).

195. See, e.g., ARIZ. REV. STAT. ANN. § 8-533(B)(6)(b) (1989); MINN. STAT. ANN. § 260.221(b)(5) (West 1992 & Supp. 1994); *In re Michael M.*, 614 A.2d 832, 836 (Conn. App. Ct. 1992); *In re Montgomery*, 316 S.E.2d 246, 252-253 (N.C. 1984).

196. *In re J. & J.W.*, 134 Vt. 480, 483, 365 A.2d 521, 523 (1976).

197. *In re G.S.*, 153 Vt. 651, 652, 572 A.2d 1350, 1351 (1990) (mem.) (citing *In re J.R.*, 153 Vt. 85, 100, 570 A.2d 154, 161 (1989)).

198. See *supra* notes 75-76 and accompanying text.

199. See N.H. REV. STAT. ANN. § 170-C:10 (1994); *supra* note 77 and accompanying text.

200. 25 U.S.C. § 1912(f) (1988).

"continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."<sup>201</sup>

#### D. *The Best Interests Inquiry and Disposition Alternatives*

Under most state termination statutes, the child's best interests are of paramount consideration in parental rights termination cases.<sup>202</sup> In some states, adoption is closely linked to a best interests determination. For example, in California, unless the moving party can prove by clear and convincing evidence that a child is likely to be adopted, termination may not be ordered by the court.<sup>203</sup> In Vermont, SRS does not initiate termination actions unless there is at least a plan for adoption.<sup>204</sup> Underlying this policy is the concern that children not be deprived of a parent unless another parent is going to take his or her place.<sup>205</sup>

In a similar vein, the Arizona Supreme Court held that lower courts could not assume termination was in a child's best interests merely because the father had abandoned the child.<sup>206</sup> The mother, in this case, was required to show that termination would provide an affirmative benefit to the child, such as the existence of a current adoption plan.<sup>207</sup>

Often, the best interests inquiry will also include the child's position or wishes regarding termination as a specific factor for the court's consideration.<sup>208</sup> In drafting a termination statute, legislators must decide how the child's position will be made known to the court and what weight the child's wishes should be given. Should termination of parental rights be ordered over a child's objection if the child is old enough to be capable of what

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201. *Id.*

202. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-706 (West 1993); FLA. STAT. ANN. § 39.467(1) (West 1988 & Supp. 1994).

203. CAL. WELF. & INST. CODE § 366.22(a) (West Supp. 1994).

204. *See* Young interview, *supra* note 5 and accompanying text.

205. *Id.*

206. *In re Appeal in Maricopa County Juvenile Action No. JS-500274*, 804 P.2d 730, 734-35 (Ariz. 1990).

207. *Id.* at 735.

208. *See, e.g.*, CAL. FAM. CODE § 7890 (West Supp. 1994); CONN. GEN. STAT. ANN. § 45a-612 (West 1993); *See also*, *Hirczy v. Hirczy*, 838 S.W.2d 783, 785 (Tex. Ct. App. 1992).

the Professional Code of Conduct terms "considered judgment"?<sup>209</sup>

In West Virginia, although not framed as a best interests factor, "if a child fourteen years of age or older or otherwise of an age of discretion as determined by the court" objects to termination, the court may not terminate parental rights.<sup>210</sup> In California, if termination proceedings involve dependent children, the court must decide if termination would be detrimental to a child, ten years of age or older, who objects to termination.<sup>211</sup> California also provides, in certain situations, for the testimony of children to be taken in chambers where the court finds that the child is "likely to be intimidated by a formal courtroom setting," or is "afraid to testify in front of his or her parent[s]."<sup>212</sup>

Another factor many states weigh in the determination of best interests is the loss of contact between a parent and child or between the child and other family members following termination.<sup>213</sup> Research has shown that continued contact between children and parents after divorce or while children are in foster care, exclusive of situations where harm would come to a child, is important to a child's self-esteem and to a realistic understanding of the problems that caused the parent-child separation.<sup>214</sup> Although termination of parental rights under most statutes would seem to preclude future parent-child contact, Montana courts have found that, in exceptional cases, the court can order post-termination visitation if such contact is found to be in the child's best interests.<sup>215</sup> In one case, parental rights were terminated due to the mother's recurring mental health problems. The court found, however, that there was a psychological attachment between the child and the mother, and thus upheld post-termination visits at the discretion of the state's social

209. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1993).

210. W. VA. CODE § 49-6-5(a)(6) (Supp. 1994).

211. CAL. FAM. CODE § 7954 (West 1994).

212. CAL. WELF. & INST. CODE § 350(b) (West Supp. 1994).

213. See, e.g. DEL. CODE ANN. tit. 13 § 1103(b) (1992); *In re Jessica M.*, 586 A.2d 597 (Ct. 1991); *Hicks v. Enlow*, 764 S.W.2d 68 (Ky. 1989); *In re Scott*, 767 P.2d 298 (Mont. 1988); *Juan R. v. Necta V.*, 55 A.D.2d 33 (N.Y. App. Div. 1976).

214. Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 466-467 (1983).

215. *In re V.B.*, 744 P.2d 1248, 1250 (Mont. 1987).

services agency.<sup>216</sup> The court made it clear, however, that "[i]n the event of an adoption, continuing contact cannot be court-ordered" even with agency approval.<sup>217</sup>

Once a child has been adopted, biological parents retain no legally cognizable right to post-termination contact with their children.<sup>218</sup> In Vermont, the Supreme Court has made it clear that termination of a parent's rights eliminates any right a parent may have to visit his or her child.<sup>219</sup> Even if contact with a parent(s) is not desirable, continued contact with siblings or relatives may be in the child's best interests. After termination of parental rights, any contact between siblings, or between the children and maternal or paternal relatives, would be at the discretion of the social services agency if the agency retained custody, or at the discretion of the adoptive parents once an adoption has occurred. If an "open adoption" occurs, there can be agreement between the biological parent(s) and the adoptive parent(s) allowing post-adoption visitation, however, "[o]pen adoption arrangements are informally practiced in the United States, and there is usually no legal contract filed with the court for an open adoption."<sup>220</sup>

If a court determines that termination is not in a child's best interests, a statute should contain various disposition options so that an order can be fashioned that best provides permanency for the child. The Mississippi termination statute specifically mandates that alternatives, short of termination, be considered "when, in the best interest of the child, parental contacts are desirable and it is possible to secure such placement without termination of parental rights."<sup>221</sup>

The South Dakota statute provides two options: foster care with an independent living component for children sixteen years

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216. *Id.* But see, *Scott*, 767 P.2d at 300 (discretionary contact not allowed because it would not be beneficial to the child); *In re C.P.* 717 P.2d 1093, 1095 (Mont. 1986) (parent retained no visitation rights after her parental rights were terminated).

217. *V.B.*, 744 P.2d at 1250.

218. Annotation, *Inclusion in Decree of Adoption of Provision Giving Natural Parent Right to Visit Child or Otherwise Preserving Rights of Natural Parent*, 114 A.L.R. 271 (1938).

219. *In re L.A.*, 154 Vt. 147, 160, 574 A.2d 782, 789 (1990).

220. Marianne Berry, *Risks and Benefits of Open Adoption*, THE FUTURE OF CHILDREN, Spring 1993, at 125, 126 (citing Carol Amadio and Stuart Deutsch, *Open Adoption: Allowing Adopted Children to "Stay in Touch" with Blood Relatives*, 22 J. FAM. L. 59 (1983-84)).

221. MISS. CODE ANN. § 93-15-103(4) (Supp. 1993).

of age or older, or long-term foster care in a specific foster home under a court-approved plan.<sup>222</sup> Under the second option, "the court may retain jurisdiction of the action and proceedings for future consideration of termination of parental rights" if termination is found in the future to be the "least restrictive alternative available in keeping with the best interests of the child."<sup>223</sup> To prevent children from languishing in foster care, the South Dakota statute also requires court review every six months for those abused or neglected children in state custody who do not have a long-term foster care plan or whose parents' rights have not been terminated.<sup>224</sup> The review period can be shorter if the Department of Social Services feels there is a need for a review hearing for the purpose of clarifying a child's legal status or for "any other reason to protect the interests of the child."<sup>225</sup>

The Ohio termination statute also provides for long-term foster care as a statutory alternative to termination for children adjudged to be abused, neglected, or dependent if the court finds by clear and convincing evidence that this option is in the best interests of the child.<sup>226</sup> In these cases, the court must also find that one of the following factors exists:

(a) The child, because of physical, mental, or psychological problems or needs, is unable to function in a family-like setting and must remain in residential or institutional care;

(b) The parents . . . have significant physical, mental, or psychological problems and are unable to care for the child because of those problems, adoption is not in the best interest of the child . . . and the child retains a significant and positive relationship with a parent or relative;

(c) The child is sixteen years of age or older, has been counseled on the permanent placement options available

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222. S.D. CODIFIED LAWS ANN. § 26-8A-26 (rev. ed. 1992).

223. *Id.*

224. S.D. CODIFIED LAWS ANN. § 26-8A-24 (rev. ed. 1992).

225. *Id.*

226. OHIO REV. CODE ANN. § 2151.353(A)(5) (Anderson rev. ed. 1994).

to him, is unwilling to accept or unable to adapt to a permanent placement, and is in an agency program preparing him for independent living.<sup>227</sup>

In California, a court cannot terminate parental rights of children in state custody unless it determines by clear and convincing evidence that the child is likely to be adopted.<sup>228</sup> At selection and implementation hearings for children in custody the goal is to "provide stable, permanent homes" for those children who come before the court.<sup>229</sup> If the evidence does not establish grounds for termination, the court has several other options at its disposal. If there is a probability that a child will be adopted, but there is no specific placement yet determined and the child would be difficult to place, the court can order that efforts be made for a period of up to ninety days to locate an appropriate adoptive family without terminating parental rights.<sup>230</sup> In certain situations, the court, again without terminating parental rights, can appoint a legal guardian for the child and issue letters of guardianship.<sup>231</sup> The court can also order the child be placed in long-term foster care.<sup>232</sup>

"Permanent guardianship" is a permanency planning option under the New Mexico termination statute.<sup>233</sup> This option is available in cases where "the likelihood of the child being adopted is remote or it is established that termination of parental rights is not in the child's best interest."<sup>234</sup> Any adult, including a relative or foster parent, can act as a permanent guardian for the child. An agency or institution may not serve as a permanent guardian.<sup>235</sup> Permanent guardianship proceedings are separate from termination proceedings. In permanent guardianship proceedings, the court must find, using a clear and convincing standard, that: 1) the child has been adjudicated abused or neglected; 2) the department has made reasonable efforts to

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227. *Id.*

228. CAL. WELF. & INST. CODE § 366.26(c)(1) (West Supp. 1994).

229. *Id.* § 366.26(b).

230. *Id.* § 366.26(c)(3).

231. *Id.* § 366.26(c)(4).

232. *Id.*

233. N.M. STAT. ANN. § 32A-4-31 (Michie Supp. 1993).

234. *Id.* § 32A-4-31(C)(4).

235. *Id.* § 32A-4-31(B).

reunite and further efforts would be unproductive; 3) reunification is not in the child's best interests; and 4) it is unlikely the child will be adopted or it is established that termination of parental rights is not in the best interests of the child.<sup>236</sup>

The Wisconsin Children's Code provides a disposition option known as "sustaining care," which is an alternative in cases where the court has terminated parental rights and has found that adoption is either unlikely or not in the child's best interests.<sup>237</sup> A child placed in "sustaining care" is placed with a "licensed foster parent with whom the child has resided for [six] months or longer."<sup>238</sup> These foster parents do not have legal custody or guardianship of the children in their care but they are granted "the rights and responsibilities necessary for the day-to-day care of the child."<sup>239</sup> These statutory rights include, but are not limited to, the authority to consent to routine and emergency health care, approve the child's participation in school activities, travel out of state with the child, and consent to the child's travel out of state.<sup>240</sup>

To ensure that children who remain in long-term foster care do not drift from placement to placement and fall through the cracks in the social services system, frequent judicial and non-judicial oversight of these cases must be provided for by statute. In Michigan, permanency for children is the focus of the state's entire juvenile foster care statute.<sup>241</sup> From the time a child is taken into state's custody, Michigan's statutory scheme provides for frequent judicial oversight of the child's case plan including services offered, parent progress, and additional services warranted.<sup>242</sup> Foster care review hearings, at which time the court addresses such issues as whether a parent has complied with services offered and whether visitation has occurred, are held "not more than [ninety-one] days after entry of the order of disposition and every [ninety-one] days thereafter for the first year."<sup>243</sup> After the first year a review hearing is held within 182

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236. *Id.* § 32A-4-31(C); *See also* §§ 32A-4-28, 32A-4-32(F).

237. WIS. STAT. ANN. § 48.428(1) (West Supp. 1993).

238. *Id.* § 48.428(2).

239. WIS. STAT. ANN. § 48.428(3) (West 1987).

240. *Id.*

241. *In re Marin*, 499 N.W.2d 400, 402-403 (Mich. Ct. App. 1993).

242. MICH. COMP. LAWS §§ 712A.19, 712A.19a (Supp. 1993).

243. *Id.* § 712A.19(3),(5).

days of the permanency planning hearing.<sup>244</sup> Review hearings can be accelerated on motion of a party or at the court's discretion, to review any element of the case service plan.<sup>245</sup> If a child is still in foster care and parental rights have not been terminated, permanency planning hearings are held not more than 364 days after a disposition order has been entered in a case.<sup>246</sup> These hearings are then held every 364 days thereafter so long as a child remains in foster care.<sup>247</sup>

The purpose of permanency planning hearings is "to review the status of the child and the progress being made toward the child's return home or to show why the child should not be placed in the permanent custody of the court."<sup>248</sup> At the permanency planning hearing, if the court determines a child should not be returned home, the state social services agency must initiate termination proceedings within forty-two days after the hearing unless the agency demonstrates that termination would not be in the child's best interests.<sup>249</sup> At this juncture, the court is instructed by statute to order either of the following placement alternatives: continued foster care for a limited time period set by the court, if other placement is not possible, or long-term foster care if this is found to be in the child's best interests.<sup>250</sup>

#### IV. GUIDELINES FOR A VERMONT TERMINATION STATUTE

Vermont, unlike most other states, lacks a specific "termination" statute. The phrase "termination of parental rights" or similar phraseology does not appear in either of the two statutes that collectively govern termination of parental rights for children in custody<sup>251</sup> or in the statute governing probate court terminations.<sup>252</sup> The statutes also do not provide for grounds which could give rise to a termination action. The Vermont statute that governs terminations for children in state custody

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244. *Id.*

245. *Id.*

246. *Id.* § 712A.19a(1).

247. *Id.*

248. *Id.* § 712A.19a(2).

249. *Id.* § 712A.19a(5).

250. *Id.* § 712A.19a(6)(a)-(b).

251. VT. STAT. ANN. tit. 33, §§ 5528, 5532 (1991).

252. VT. STAT. ANN. tit. 15, § 435(1) (1989 & Supp. 1994).

merely states that an order of the court can be terminated "on the ground that changed circumstances so require in the best interests of the child."<sup>253</sup> There is no mention in the statute of the underlying policy considerations that should govern terminations. For example, must an adoption be pending before a parent's rights are terminated? Should the focus of state intervention proceedings, including termination of parental rights, be to provide permanency for children? If so, what precisely is meant by "permanency"?

The following guidelines are offered to provide policy-makers and other interested individuals with a framework within which to begin the discussion of what a Vermont comprehensive termination of parental rights statute might look like. The recommendations are primarily a synthesis of the best features of various state statutes and the three goals of 1) maximizing state efforts to keep families together, 2) providing fair warning to parents of the behaviors that might lead to termination of their rights and a well-defined judicial process for monitoring permanency planning for children and for terminating parental rights, and overall, 3) providing permanency for children within the least restrictive alternative, always bearing in mind the "touchstone" standard, the best interests of the child.<sup>254</sup>

### *Guidelines*

1. The general focus of a termination statute should be on permanency for children, either within their natural families or, if this is not possible, in another long-term stable living situation. The purpose of the Federal Adoption Assistance and Child Welfare Act, P.L. 96-272, is to provide this type of permanency for children,<sup>255</sup> and a state statute should undertake to implement its core provisions. Permanency in living situations is vital to a child's long-term emotional and psychological well-being because these long-term family living situations allow a child to form the necessary attachments for positive growth and development.<sup>256</sup>

2. Judicial oversight of permanency planning for children in state custody should be increased. One year to fifteen months

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253. VT. STAT. ANN. tit. 33, § 5532 (1991).

254. *In re A.B.E.*, 564 A.2d 751, 754 (D.C. 1989).

255. See *supra* notes 27-35 and accompanying text.

256. See *supra* notes 24-25 and accompanying text.

after the disposition, a hearing should be held to plan for the long-term placement of the child at issue. At this hearing, if the state identifies termination of parental rights as part of the long-term plan, the court should set a time-frame for the commencement of termination proceedings.<sup>257</sup> So long as a child remains in custody, there should be, at least, annual judicial permanency review hearings. Six month hearings should also be held to review progress toward the goals identified in the child's case plan. The six month reviews could be held outside the judicial realm, perhaps a combination of the current SRS administrative reviews and, at a party's request, review by a citizen foster care review board.<sup>258</sup> However, if non-judicial avenues are provided at these six month junctures, there should be a statutory provision that allows a party, upon motion, to request that the court review any element of a case plan. Generally, no child should spend more than two years in foster care unless it is a "permanent" long-term arrangement that the court has found to be in the child's best interests.

3. The statute should be arranged as a two-tier termination statute, the first tier being proof of a ground for termination and the second tier being the inquiry as to whether termination is in the child's best interests. Grounds for termination should be clearly delineated and well-defined in the termination statute. These grounds, at a minimum, should include physical, emotional, and sexual abuse, neglect, and abandonment. For children in state custody, where the child has been out of the home due to abuse, neglect, or abandonment, the inquiry at termination should, as is currently the case in Vermont and other states, focus on the likelihood that the parental behavior that led to the out-of-home placement will continue, preventing the child from being able to return home within a reasonable period of time.

For terminations that are initiated for children who are not in state custody, a ground(s) plus specific harm due to the alleged parental behavior should be required to be proven at the termination proceeding. The A.B.A. Juvenile Justice Standards recommend that coercive state intervention occur only in families where the parental behavior can be shown to have caused specific

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257. See *supra* notes 241-250 and accompanying text.

258. Howard Davidson, *A Legislative Legacy for "Gregory K."—The Kid Who "Divorced" His Parents* 7 (unpublished manuscript, on file with the A.B.A. Center on Children and the Law).

harm to the child.<sup>259</sup> More recently, the A.B.A. Working Group on the Unmet Legal Needs of Children and their Families, reiterated the long standing concern that "coercive intervention . . . not occur in situations involving child neglect, unless necessary to protect a child from demonstrable physical harm."<sup>260</sup> A statute's definition of neglect should be drafted to expressly provide that "neglect" not be based on circumstances that are the result of poverty, such as homelessness, as is done in Kentucky and Pennsylvania.<sup>261</sup>

The second tier of a termination statute should be an inquiry as to whether termination is in the best interests of the child. The statute should include, at a minimum, the following factors for court consideration:

- a. The age and developmental needs of the child;
- b. The child's relationship to his/her natural family, including siblings and extended family members, with specific findings made as to the impact on the child of loss of parent-child contact, loss of sibling contact and loss of support;
- c. The child's position regarding termination; and
- d. Whether termination of parental rights is the least restrictive alternative for the child. This factor should include consideration of the likelihood of adoption.

The child's position regarding termination should be given deference commensurate with his or her age and maturity. If a child between the ages of ten and thirteen objects to termination, the court should only order termination if it specifically finds that to do otherwise would be harmful to the child. If a child is fourteen years of age or older, and objects to termination, termination should not be ordered.

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259. A.B.A. STANDARDS, *supra* note 94, at 60.

260. *Children at Risk*, *supra* note 2, at 50 (citing Albert J. Solnit, *Too Much Reporting, Too Little Services*, in *Child Abuse: An Agenda for Action* 145-45 (George Gerbner, Catherine J. Ross and Edward Zigler, eds., 1980)).

261. *See supra* notes 99-100.

Termination should only be ordered if the court finds it to be the least restrictive alternative commensurate with the best interests of the child. Policy-makers should consider a statutory presumption that termination is not in a child's best interests unless it is the least restrictive alternative. Termination would be the least restrictive option if an adoption is pending or extremely likely, or where all future contact with a parent is contraindicated due to the seriousness of the harm that was perpetrated on the child.

4. A court should have a continuum of statutory options available allowing it to order the least restrictive placement option for the child. Recommended options include:

- a. Designation of foster parents, relatives, or other appropriate persons as legal guardians of the child, to establish a "permanent guardianship";<sup>262</sup>
- b. Long-term foster care with a specific home designated in the plan and approved by the court at a permanency hearing, and ongoing court review every six months to address permanency issues that might arise;
- c. Foster care with an independent living component for children sixteen years of age and older with ongoing six month court reviews;
- d. Termination with a specific plan for adoption; and
- e. Termination with no plan for adoption, with placement in "sustaining care" foster homes.

5. A termination statute should incorporate the "reasonable efforts" provision of P.L. 96-272; termination should not occur unless the state can prove at the termination hearing that reasonable efforts have been made to reunite the family. The statute should also specifically define those situations, if any, where reasonable efforts might not be required, for example, where there has been "egregious abuse."<sup>263</sup>

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262. See N.M. STAT. ANN. § 32A-4-29(A)(3) (Michie 1993) (containing a well developed concept of "permanent guardianship").

263. See FLA. STAT. ch. 39.464(4) (West Supp. 1994).

Although P.L. 96-272 requires reasonable efforts be made to reunite families, the United States Supreme Court has recently held that children in foster care have no standing to sue to enforce the reasonable efforts provision of the federal law in federal court.<sup>264</sup> The A.B.A. has recommended that Congress enact legislation to clarify that children are empowered to enforce their rights in court under P.L. 96-272.<sup>265</sup> Until children have a clearly established federal remedy, it will be up to individual states to ensure that the reasonable efforts provisions, as well as other provisions of P.L. 96-272, are enforceable under state statutes. In a recent case, the U.S. Court of Appeals for the District of Columbia ruled that D.C. law allows foster children to sue in federal court to enforce the provisions of two D.C. statutes that parallel the Adoption Assistance and Child Welfare Act.<sup>266</sup>

Recommending that a state statute incorporate the reasonable efforts provision of P.L. 96-272 and provide a statutory enforcement mechanism that allows children to enforce their rights under a parallel state statute does not mean that in all cases reuniting the family should be the focus of a child's case plan. Howard Davidson of the A.B.A. Center on Children and The Law recommends that "[o]nce a court has found a parent to have directly inflicted, or allowed serious harm to be inflicted, on a child—and the child has been removed from that home—the burden of proof *should shift* to the parent who seeks to have their parent-child relationship fully restored."<sup>267</sup>

6. Termination cases should be given the highest priority in Vermont's family courts and in the Vermont Supreme Court. All proceedings involving permanency planning for children, including terminations, should be conducted in as expedient a manner as possible, consistent with due process. The rationale for providing speedy resolution in cases involving children is well stated in the A.B.A.'s recent report on the unmet legal needs of children and their families:

Children cannot wait for years for a determination that they should be returned to their natural parents, placed

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264. *Suter v. Artist M.*, 112 S.Ct. 1360, 1367-70 (1992).

265. *Children at Risk*, *supra* note 2, at 48-49.

266. *LaShawn A. v. Kelly*, 990 F.2d 1319, 1325-26 (D.C. Cir. 1993), *cert. denied*, 114 S.Ct. 691 (1994).

267. *Davidson*, *supra* note 258, at 10-11.

permanently in an adoptive home, or are entitled to special education services. The delays that are annoying and frustrating to adults . . . can permanently damage children and their families.<sup>268</sup>

The Vermont Children's Forum, in its 1993 Children's Campaign Agenda, echoed the A.B.A.'s sentiments recommending that "effective, enforceable mandates . . . be imposed so that courts give termination of parental rights ("TPR") cases the priority status and attention they deserve. Guidelines should apply to the whole process, including any appeal to the Supreme Court."<sup>269</sup>

Carrying out the above recommendation for prioritizing and expediting permanency-related court hearings and appeals will demand increased funding of the family court system. As the A.B.A. recommends, consideration should be given to employing a range of professionals who could assist in handling cases that do not require an adversarial forum. These professionals might include magistrate hearing officers, referees, or mediators.

7. A termination statute should clearly identify the persons who have standing to initiate termination actions and the procedure for so doing. The following individuals and entities should be included in the list of those recognized: the child, the child's attorney, the child's guardian ad litem, SRS, any adoption placement agency or long-term foster care agency who has custody and guardianship of the child, and a parent vis-a-vis the other parent. In parent-to-parent terminations, Vermont's termination statute should incorporate language such as that used in Delaware's statute:

Unless adoption is contemplated, the termination of [one] parent's rights by the other parent shall not be granted if the effect will be to leave only [one] parent holding parental rights, unless the Court shall find the continuation of the rights to be terminated will be harmful to the child.<sup>270</sup>

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268. *Children at Risk*, *supra* note 2, at 56.

269. VERMONT CHILDREN'S FORUM CAMPAIGN AGENDA, CHILDREN IN THE COURT SYSTEM 11 (1993).

270. DEL. CODE ANN. tit. 13, § 1103(5)(b) (Supp. 1993).

8. Voluntary relinquishments, in situations other than where an adoption is pending, should only be allowed after a hearing to determine if such a relinquishment is in the child's best interests.<sup>271</sup>

9. A termination statute should provide for court-appointed counsel for the child and the parent(s) who are parties to the proceedings. This is currently the practice in Vermont in terminations involving foster children. Although the right to counsel for children is mandated in proceedings brought under the Juvenile Proceedings Act, the parents' right to counsel is not clear.<sup>272</sup> The statute should also clearly provide that counsel be appointed for children in private party terminations. In a recent Oklahoma Supreme Court case, the court found that in both state-initiated and private termination actions, there was a potential conflict between the child's interests and the other party's interests such that a child required his or her own attorney.<sup>273</sup> The court noted that there was perhaps an even greater likelihood of the petitioner's interest being "partisan" in private termination actions, making it that much more important for a child to be appointed counsel.<sup>274</sup> In 1979, the A.B.A. adopted rigorous standards governing the appointment of counsel for children which provide in relevant part:

Justice requires that all parties (including children as well as parents and other adults) subject to juvenile and family court proceedings are represented.

Children and their parents (or guardians) should have independent counsel at all stages of legal proceedings concerning charges of delinquency, status offenses, and cases involving child abuse or neglect, custody and adoption, except in temporary emergencies where immediate participation of counsel cannot be arranged.<sup>275</sup>

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271. See A.B.A. STANDARDS, *supra* note 94.

272. VT. R. FAM. PROC. 2(c) (1994).

273. *In re S.A.W. v. Torres*, 856 P.2d 286, 290 (Okla. 1993).

274. *Id.*

275. *Children at Risk*, *supra* note 2, at 7 (quoting *Standards Relating to Counsel for Private Parties*, in I.J.A./A.B.A. JUVENILE JUSTICE STANDARDS 11, 14, 15-16 (1980)).

A termination statute should also mandate that every child who comes before the court in a termination proceeding be appointed a guardian ad litem to represent the best interests of the child.<sup>276</sup> It is important for a child to have both an attorney and a guardian ad litem to ensure that the child's express position as well as the best interests position is before the court.

10. The legislature should consider consolidating all cases involving children into one court system, as was done for the most part when the family court system came into existence in 1990. Although the Vermont family courts can order the transfer of probate proceedings to family court if the issues in both actions are interrelated, terminations in connection with adoption are still solely under the jurisdiction of the probate court. A unified court system that consolidates all matters pertaining to children and families is necessary to "ensure that all facets of such cases and the domestic and social problems they reflect [will] be centralized and resolved in a single court system."<sup>277</sup>

#### CONCLUSION

As the number of children in foster care continues to rise, the time is ripe for Vermont policy-makers and lawmakers to critically reexamine Vermont's termination laws. This article advocates the enactment of a comprehensive termination statute that would govern all terminations—a statute that embodies a policy framework and delineates straightforward, expedited procedures for bringing and resolving termination actions. This article also calls for expanding termination actions to include private party terminations, even where an adoption is not pending, if to refrain from doing so would be harmful to the child.

Termination of parental rights cases pit two of our nation's most valued rights against each other—the right of parents to raise their children free from state interference, and the right of children to live in a safe, adequate environment. Balancing these interests is not an easy task, but legislation can be drafted that weighs each right carefully and safeguards both the integrity of families and the welfare of children. It is time for Vermont to address these issues in the legislature, as many states have done, for the benefit of all Vermont citizens.

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276. VT. R. FAM. PROC. 2(c) (1994).

277. *Children at Risk*, *supra* note 2, at 54.

