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SOLOMON'S SWORD: ADJUDICATION OF CHILD CUSTODY QUESTIONS†

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> Then the king said, "The one says, 'This is my son that is alive, and your son is dead'; and the other says, 'No; but your son is dead, and my son is the living one.'" And the king said, "Bring me a sword." So a sword was brought before the king. And the king said, "Divide the living child in two, and give half to the one, and half to the other." Then the woman whose son was alive said to the king, because her heart yearned for her son, "Oh, my lord, give her the living child, and by no means slay it." But the other said, "It shall be neither mine nor yours; divide it." Then the king answered and said, "Give the living child to the first woman, and by no means slay it; she is its mother."
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> 1 *Kings* 3:23-27 (RSV)

I. INTRODUCTION

It is significant that this story from the reign of King Solomon in the tenth century B.C. uses as its setting a battle over child custody to illustrate the legendary "wisdom of Solomon."[1] It is equally meaningful that after the passage of some three thousand years of civilization and supposed social progress, a twentieth century American judge could remark that "a judge agonizes more about reaching the right result in a contested custody issue than about any other type decision he renders."[2] And this agony intrudes into an ever-increasing number of cases.[3]

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† The substance of this article appeared in a paper delivered before an institute on "What Are 'the Best Interests of the Child' in Custody Proceedings?" sponsored by the School of Social Work of Virginia Commonwealth University on March 2-3 and April 6-7, 1973. The views expressed herein are solely those of the author and do not necessarily represent the views of the Office of the Attorney General of Virginia.

1. Professor Henry Foster has pointed out that this story has also "sowed the seeds of superstition" by implicitly asserting the validity of the "blood is thicker than water" shibboleth. Foster, *Adoption and Child Custody: Best Interests of the Child?*, 22 BUFF. L. REV. 1 (1973).

2. B. BOTEIN, TRIAL JUDGE 273 (1952).

3. For example, in 1969 there were approximately 69,700,000 children under the age of eighteen in the United States and during that same year there were an estimated 840,000 children involved in divorce proceedings, another 171,000 children under twenty-one were

It has been estimated that in 1960 there were about 64,000,000 children under eighteen with approximately 3,300,000 living with a parent who was separated or divorced, and another 5,000,000 children were living with a parent who was previously divorced but had remarried—a total of almost thirteen per cent of all children under eighteen.[4] It would not be unrealistic to posit that between fifteen and twenty per cent of all children under eighteen will be involved in some legal determination of their custody—contested or uncontested—during their childhood.

It is not merely the greater statistical intrusion of child custody issues upon our collective consciousness that motivates us to reexamine the processes by which these determinations are made. Legal battles over the custody of children have recently leaped from the cloistered halls of justice and the antiseptic pages of appellate courts' opinions to the slick sheets of popular magazines and the blaring headlines of the daily newspapers.[5] In addition, the increas-

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adopted and an additional 323,000 neglected, emotionally disturbed and dependent children of that age were in either foster family care or in institutions. Thus, at least nineteen out of every thousand children under the age of twenty-one were involved in some type of custody proceeding during that single year. U.S. Bureau of the Census, Statistical Abstract of the United States: 1972, at 8, 305 (1972); U.S. Dept. of Health, Education and Welfare, Vital Statistics of the United States, 1969: Vol. III Marriage and Divorce 2-9 (1972); White House Conference on Children, Profiles of Children 147 (1970). *See also* H. CARTER & P. GLICK, MARRIAGE AND DIVORCE: A SOCIAL AND ECONOMIC STUDY 36-38, 252-55 (1970).

4. R. CAVAN, THE AMERICAN FAMILY 469 (4th ed. 1969).

5. Three prime examples of this are the cases of Scarpetta v. DiMartino, No. 71-475 (3d Dist. Ct. App. Fla., Sept. 28, 1971); Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152 (1966), *cert. denied*, 385 U.S. 949 (1966); People *ex rel.* Scarpetta v. Spence-Chapin Adoption Serv., 36 App. Div. 2d 524, 317 N.Y.S.2d 928 (1971), *aff'd*, 28 N.Y.2d 185, 269 N.E.2d 787 (1971); and the custody case involving Caroline Desramault discussed in Foster, *supra* note 1, at 6. The *Painter* case involved a determination by the Iowa Supreme Court that four-year-old Mark Painter's welfare was best served by his remaining on an Iowa farm with his elderly maternal grandparents rather than by his returning to his father who had recently remarried and was living in the so-called "Bohemian atmosphere" of a San Francisco area art colony. *See* H. PAINTER, MARK, I LOVE YOU (1967). *See also* Levine, *Child Custody: Iowa Corn and the Avant Garde*, 1 FAM. L.Q. 1, 3 (1967); Poteat, *Iowa Supreme Court v. Wild Oats*, 18 MAINE L. REV. 173 (1966); Note, 8 ARIZ. L. REV. 163 (1966); Note, 79 HARV. L. REV. 1710 (1966); Note, 4 HOUST. L. REV. 131 (1966); Note, 51 IOWA L. REV. 1114 (1966); Note, 7 J. FAM. L. 81 (1967); Note, 41 TUL. L. REV. 148 (1966).

The *Scarpetta*, or "Baby Lenore" case involved an effort by an unwed alien mother to revoke an adoption where she had previously surrendered the child to an adoption agency, and the child had been placed with the DiMartinos. Her efforts were successful in New York, but the DiMartino family moved to Florida where, unlike New York, the adoptive parents were allowed to be heard, and the Florida court awarded custody to them. *See* Foster, *supra* note 1, at 7-12; Inker, *The Adoption of Baby Lenore: Two Interpretations of a Child's Best*

ing public sentiment for re-examination of the divorce laws and the response of legislative bodies have tended to bring domestic relations law, or family law, out of the back alleys of the law and into the spotlight.[6] The reasons for the late emergence of family law into the forefront of judicial and legislative reform are varied, but Sol Isaacs, a pioneering spirit among family lawyers, touched on some of the more crucial impediments to an earlier examination when he related that:

> Perhaps the very nature of family law explains the delay in organizing effectively to improve it. It has been relatively so much simpler to compile and coordinate other branches of the law which can be met with considerable detachment. But in family law one finds emotion, sentimentality, religious dogma, taboos. Here is opened the Pandora's box of psychiatry and psychology and of those elemental drives which make man both a god and a beast. A society cannot exist without family law, but family law has certainly developed without much legal guidance in modern times. Lawyers have appeared content to leave this area to the ministry or the social sciences. The truth is that the bar has feared to face family law. It can do so no longer.[7]

This article will attempt to deal with some of these "taboos," at

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Interest, 11 J. FAM. L. 285 (1971); Inker, *Expanding the Rights of Children in Custody and Adoption Cases*, 11 J. FAM. L. 129 (1971); Katz, *The Adoption of Baby Lenore: Problems of Consent and the Role of Lawyers*, 5 FAM. L.Q. 405 (1971).

The Caroline Desramault case evoked similar controversy in English and French periodicals in 1972 after a two-year history in the courts of both countries, during which custody of the children was given first to the father, then joint custody in both parents with alternative three-month periods of custody in each parent, followed by an award of custody to the paternal grandmother, another award in favor of the father, and, finally, an award to the mother which was avoided by the father's flight with the child to Belgium where French process could be avoided. When the litigation started, the baby was nine months old and at the time the last decision was made, she was two-and-a-half years old. In the interim the case had been heard by eight courts with most of the trial court decisions being reversed on appeal. *See* Foster, *supra* note 1, at 6-7 n.17.

6. When the National Conference of Commissioners on Uniform State Laws was formed in 1892, marriage and divorce, along with commercial paper, were deemed the most insistent subjects for uniform legislation but it was not until August 6, 1970, that the Uniform Marriage and Divorce Act was promulgated. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 176 (1970). It was not until 1958 that the American Bar Association authorized the formation of the Section of Family Law. Isaac, *Family Law and the Lawyer*, 2 J. FAM. L. 43, 45-47 (1962).

7. *Id.* at 44.

least within the limited context of child custody. There are numerous recent articles dealing broadly with marriage, divorce and child custody, adoption, and abuse or neglect and dependency proceedings, but few of these articles attempt to deal with the common thread that runs through all the child custody subareas of juvenile and family law — the substantive and procedural aspects of termination of parental or other custodial rights in children and the ensuing placement of custody in a new agency or person.[8] The basic premise of this article is that there is a unity of procedural approaches that may be utilized in legislative reform of child custody laws, while at the same time there can be provided greater recognition of, and protection for, the child's best interests.

Apart from the increasing incidence of custody adjudications and the greater public awareness of, and interest in, child custody matters, there is a broader concern that must be primary in importance; that concern is society's obvious interest in the development of well-adjusted and healthy children who will grow into emotionally mature and contributing citizens. Professor Sanford Katz has effectively articulated this goal:

> We say that we expect children to be physically and emotionally secure; to become responsible citizens in their community and to become economically independent; to acquire an education and develop skills; to respect people of different races, religions, and national, social, and economic backgrounds; to become socially responsible and honorable, and to have a sense of family loyalty. There is evidence that parental affection influences this development.[9]

Another writer has described the means of achieving this goal, at least under normal circumstances:

> The most important determining factor in the early phases of development is the child's dependence upon his parents, whom he needs not only for physical survival but who are also the most important objects in his world. The quality of his relations with them determine the security and satisfaction with which he involves himself with his external world. From the beginning of life the basic need of the indi-

8. *See, e.g.*, the articles cited in notes 45, 69, 75, 77, 82, 83, 85, 86, 88, 100 and 102, *infra*. It should be noted that most of these articles have appeared in print within the past ten years.

9. Katz, *Book Review*, 64 MICH. L. REV. 756, 763 (1966), *citing* L. BERKOWITZ, THE DEVELOPMENT OF MOTIVES AND VALUES IN THE CHILD (1964).

> vidual, as part of a psychosocial unit, is to maintain good relations with his objects — specifically people with whom he has close emotional ties — for only by doing so can he feel secure within himself and interact successfully with others.[10]

When, for one reason or another, the normal parent-child relationship is disturbed, this parent dependence is disrupted and the child's need "to maintain good relations with his objects" must be met by some parent substitute or alteration in the family setting or normal development of the child will not take place. There need not be a complete breakdown in the marital relationship to the extent that one of the parents has left the marital domicile in order to have a disruption in the child's development pattern. As a matter of fact, the "effects of marital conflict on children can be more severe than the effects of divorce or separation."[11] Dr. Louise Despert, in her classic study of the effects of divorce on children, postulated that, contrary to her initial speculation, it was not divorce itself "but the emotional situation in the home, with or without divorce, that is the determining factor in a child's adjustment," and she described this factor as "emotional divorce."[12] The child of either "emotional" or judicial divorce often "acts like an employee of a bankrupt firm who has lost all confidence in his principals and no longer therefore feels any pleasure in his work. Thus the child in such circumstances stops work — that is, his normal development is checked and he reacts to the abnormal situation in some abnormal way."[13] Consequently,

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10. L. PINCUS, *Relationships and the Growth of Personality* in MARRIAGE: STUDIES IN EMOTIONAL CONFLICT AND GROWTH 17 (L. Pincus ed. 1955).

11. JOINT COMMISSION ON MENTAL HEALTH OF CHILDREN, CRISIS IN CHILD MENTAL HEALTH: CHALLENGE FOR THE 1970'S 169-70 (1969); R. BLOOD, THE FAMILY 597-615 (1972); M. BRECKENRIDGE & M. MURPHY, GROWTH AND DEVELOPMENT OF THE YOUNG CHILD 40-44 (1969); M. MAHLER & R. RABINOVITCH, *The Effects of Marital Conflict on Child Development* in NEUROTIC INTERACTION IN MARRIAGE 44-56 (V. Eisenstein ed. 1956); Sugar, *Divorce and Children*, 63 SOUTHERN MED. J. 1458 (1970). Such a disruption may materially heighten the possibility of delinquency. C. BURT, THE YOUNG DELINQUENT 90-92 (1938); S. GLUECK & E. GLUECK, DELINQUENTS IN THE MAKING 196-99 (1952); W. HEALY & A. BRONNER, NEW LIGHT ON DELINQUENCY AND ITS TREATMENT 78-91 (1936).

12. L. DESPERT, CHILDREN OF DIVORCE 9-10 (1953). *See also* W. GOODE, AFTER DIVORCE (1956); Bernstein & Robey, *The Detection and Management of Pediatric Difficulties Created by Divorce*, 30 PEDIATRICS 950 (1962); Lehrman, *Psychopathological Aspects of Emotional Divorce*, 26 PSYCHOANALYTIC REV. 1 (1939); McDermott, *Divorce and Its Psychiatric Sequelae in Children*, 23 ARCH. GEN. PSYCHIAT. 421 (1970); McDermott, *Parental Divorce in Early Childhood*, 124 AM. J. PSYCHIAT. 118 (1968).

13. A. FREUD, INTRODUCTION TO PSYCHOANALYSIS FOR TEACHERS 36 (1949).

society must be concerned with the described emotional trauma inflicted upon not only the child of divorce, but also upon the child involved in either adoption or neglect and dependency proceedings. Dr. Anna Freud has pointed to the danger to society from a failure to compensate for custodial shortcomings:

> Increased frustrations . . . arising for instance from unloving, forbidding, rejecting attitudes of the parents abnormally increase the child's aggressive reaction to the normal and inevitable deprivations. . . . The lack of steady love-relationships in early childhood caused either by internal or external factors . . . gives rise to states of emotional starvation . . . and aggression manifests itself as pure, independent destructiveness.[14]

It is this sort of negative implication from a poor custody decision that provides the reason for Judge Botein's agony.[15]

II. BACKGROUND

A. *Social History*

There are some sound historical and social reasons for the late development of the law in this field. The most pervasive explanation is the changing role of the family in most cultures and the almost revolutionary shift in its structure in developed and developing societies. The Industrial Revolution of the 19th century accelerated acutely the transition of the family from a broader structure to the husband — wife — children unit that we recognize today as the nuclear or immediate family. The family formerly encompassed a kinship web that included the clan, the extended family or the joint household.[16] Dr. Kingsley Davis has discussed the implications of this transition:

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14. A. Freud, *Notes on Aggression* in J. GOLDSTEIN & J. KATZ, THE FAMILY AND THE LAW 983 (1965). Durbin and Bowlby have similarly pointed out the following:

> Two points need to be emphasized therefore in considering the development of cooperation in humans; first that it is a natural process like growth, and will proceed spontaneously in a good environment; and secondly, that it can only develop satisfactorily when conditions are favourable. Anything which leads to distrust and fear of others will interfere. . . . E. DURBIN & J. BOWLBY, PERSONAL AGGRESSIVENESS AND WAR 59-62 (1939).

15. *See* note 2 *supra.*

16. *See* Cavan, *supra* note 4, at 419; W. GOODE, WORLD REVOLUTION AND FAMILY PATTERNS (paperback ed. 1970); Davis, *Sociological and Statistical Analysis,* 10 LAW & CONTEMP. PROB.

> Theoretically the problem of the post-divorce child is universal—not only because divorce itself in one form or another is universal, but more profoundly because the child of divorce constitutes a potentially anomalous element in social organization. In most societies this potentiality is not allowed to express itself; instead, social institutions exist which take care of the child without undue turmoil. The peoples of Western civilization, on the other hand, have developed a peculiar institutional system that makes the problem very acute and hard to solve in practice. To understand why this is true one must compare the position of the child after divorce in different societies.
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> Although the immediate family is a universal group, it is not instinctive; rather it is a cultural phenomenon . . . . It happens that in countless societies the immediate family is so interwoven with other institutional groups that, in case of divorce, the children do not constitute a social problem. The break-up of the immediate family is the same as in our society, and the anomaly of the child's position is potentially the same, but actually the parents' relation to other persons—often to clansmen and joint householders—is such that the child continues largely under their care.[17]

Dr. Davis' 1944 article pointed to the development of the nuclear or immediate family with its minimal "emphasis on extended kinship, with equalitarian rights of the parents in the child, and with intense emotional involvement in both the marital and the parental relationship" as creating a relatively new and unsolved social problem that must somehow be met "by the creation of new institutional relationships that will replace the kinship bonds of primitive and archaic societies."[18] Almost three decades later we are still grasping for a solution to this problem.

B. *Legal History*

Adoption has more ancient origins than do the legal concepts of

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700 (1944); Gales, *Marriage and the Family: Chinese Law*, 6 J. FAM. L. 36 (1966); Hays & Mindel, *Extended Kinship Relations in Black and White Families*, 35 J. MARR. & FAM. 51 (1973); Lemkin, *Orphans of Living Parents: A Comparative Legal and Sociological View*, 10 LAW & CONTEMP. PROB. 834 (1944).

17. Davis, *supra* note 16, at 700-01. *See also* Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963).

18. Davis, *supra* note 16, at 719-20.

marital custody or neglect and dependency.[19] Despite its earlier origins it was not until Roman Law that the adoption process was initially formalized by a judicial proceeding,[20] and the adoption law of Rome has been absorbed into the legal fabric of civil law countries like France, Germany and Spain.[21] The common law of England did not provide for adoptions, however, and it was not until 1926 that Parliament enacted an adoption law.[22] Adoption first entered this country through the early civil law codes of Louisiana and Texas but, like Rome, the institution was principally concerned with inheritance rights and not with the protection of the adoptee.[23] Social-conscience adoption, or that based primarily on the welfare of the child, is an American development which originated in Massachusetts in 1851.[24] The Massachusetts example was followed by other states, but it was not until forty years later that Michigan required a judge to make an investigation before entering a decree. In 1917 Minnesota enacted a more comprehensive law requiring an investigation, control of both private placement and agency adoptions, a social investigation prior to adjudication, and a trial custody period prior to entry of a final decree. Similar laws have been enacted in most states.[25]

The modern law regarding child custody took longer to develop. Roman private law developed a quasi-legal doctrine of *patria potestas* which gave recognition to the absolute power of a father to the custody and control of his children.[26] This doctrine carried over into

19. *See, e.g.*, EXODUS 2:10; CODE OF HAMMURABI §§ 183, 185, *quoted in* Inker, *The Adoption of Baby Lenore: Two Interpretations of a Child's Best Interests*, 11 J. FAM. L. 285 (1971).

20. CLARK, DOMESTIC RELATIONS 602 (1968) [hereinafter cited as CLARK]; Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332 (1922); Huard, *Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956); Infausto, *Perspective on Adoption*, 383 ANNALS 1 (1969); Simpson, *The Unfit Parent: Conditions Under Which a Child May Be Adopted Without the Consent of His Parent*, 39 U. DET. L.J. 347, 349 (1962).

21. *See* note 20 *supra*.

22. The Adoption of Children Act of 1926, 16 & 17 Geo. 5, c. 29; 17 HALSBURY, LAWS OF ENGLAND §§ 1406-23 (2d ed. 1935).

23. Infausto, *supra* note 20, at 3-4. An excellent survey on the history of adoption in the United States may be found in Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443 (1971).

24. *See* Presser, *supra* note 23, at 443; H. WITMER, INDEPENDENT ADOPTIONS 20-30 (1963).

25. Infausto, *supra* note 20, at 7.

26. *Patria potestas* was the Roman law concept of "paternal authority" or "paternal power" (BLACK'S LAW DICTIONARY 1283 (4th ed. 1951)). *See also* Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L.Q. 108, 109 (1971).

English law and endured until about the fourteenth century.[27] In feudal England custody was merely an incident of the guardianship of lands, and it only gradually came to be regarded as involving any responsibility toward the child.[28] The courts of equity later assumed jurisdiction over the welfare of children under the developing doctrine of *parens patriae*[29] which was founded on the theory that the crown should protect all those who have no other protector. This idea crystallized by the seventeenth century. Furthermore, *patria potestas* crept back conceptually into this scheme, the father becoming regarded as a natural guardian whose unfitness was practically impossible to establish.[30] This common law preference for the father carried over into American law, and in most jurisdictions it has only been abrogated by statute. It was not until 1925 that the English Guardianship of Infants Act[31] equalized the parents' right to custody although the deterioration of paternal preference began earlier in the United States. Today the laws of most states provide that there will be no preference for either parent in a custody contest, but, as a practical matter, most adjudications favor the mother.[32]

Like adoption and child custody, the modern concepts of abuse, neglect and dependency were very late in developing. The strength of the father's claim to ultimate decision-making with regard to the care and control of his children and the difficulty in rebutting what

27. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 435 (2d ed. 1898).

28. Foster & Freed, *Child Custody (Part I)*, 39 N.Y.U.L. REV. 423 (1964); CLARK at 572; Eyre v. Shaftesbury, 2 P. Wms. 102, 24 Eng. Rep. 659 (1722).

29. *Parens patriae* was an English common law concept meaning "father of his country; parent of the country. . .referring to the sovereign power of guardianship over persons under disability." BLACK'S LAW DICTIONARY 1269 (4th ed. 1951).

30. Foster & Freed, *supra* note 28, at 424; Inker & Perretta, *supra* note 26, at 109-10; Weinman, *The Trial Judge Awards Custody*, 10 LAW & CONTEMP. PROB. 721-23 (1944); 1 W. BLACKSTONE, COMMENTARIES *452; 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 511-13 (3d ed. 1927); Comment, 36 S. CAL. L. REV. 255 (1963). The poet Percy Shelley is supposed to have been one of the earliest exceptions to this almost unimpeachable rule when Lord Eldon refused to give him custody of his children because of his "vicious and immoral" atheistic beliefs. *Shelley v. Westbrooke*, 37 Eng. Rep. 850 (Ch. 1817). *See also* Comment, *The Custody of Children*, 2 IND. L.J. 325 (1927).

31. Guardianship of Infants Act, 15 & 16 Geo. 5, c. 45 (1925). There was a gradual change in English law prior to that time as earlier Acts gave the Court of Chancery the authority to award custody of children under seven, and later under sixteen, to the mother. Talfourd's Act, 2 & 3 Vict., c. 54 (1839); Infants Custody Act, 36 & 37 Vict., c. 12 (1873).

32. Drinan, *The Rights of Children in Modern American Family Law*, 2 J. FAM. L. 101, 102 (1962); Comment, 36 S. Cal. L. Rev. 255, 257-58 (1963).

amounted, in practical terms, to a presumption in favor of the reasonableness of that role as exercised by the father has previously been discussed.[33] Historically, actual physical abuse was primarily the concern of the criminal courts subject to the leeway given the parent to use "due moderation" in the disciplining of the child.[34] Neglect law is principally statutory in origin, but a common law rule developed in the absence of statute that a parent had the obligation to provide food, shelter or clothing within their ability to so provide, and the death of a child resulting from a dereliction of such duty could be manslaughter or, if willful, murder.[35] Early laws were developed, however, dealing with orphaned, abandoned, dependent and neglected children, and the law progressed from the almshouse, through apprenticeship and orphan asylums, to placement of the children in foster homes or placement through adoption.[36] A startling example of the inadequacies of the law in dealing with such children a century ago is the classic story of the child Mary Ellen who was discovered in a tenement building suffering from malnutrition and daily beatings. The church worker who found her sought to have the child removed. Unsuccessful, she finally turned in desperation to the Society for the Prevention of Cruelty to Animals for assistance on the theory that Mary Ellen was a member of the

33. See text accompanying notes 26-32 *supra*.

34. Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Hinkle v. State, 127 Ind. 490, 26 N.E. 777 (1891); State v. Fischer, 245 Iowa 170, 60 N.W.2d 105 (1953); State v. Washington, 104 La. 443, 29 So. 55 (1901); People v. Green, 155 Mich. 524, 119 N.W. 1087 (1909); State v. Koonse, 123 Mo. App. 655, 101 S.W. 139 (1907); Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903); Richardson v. State Board, 98 N.J.L. 690, 121 A. 457 (1923); State v. Liggett, 84 Ohio App. 225, 83 N.E.2d 663 (1948); Stanfield v. State, 43 Tex. 167 (1875); Carpenter v. Commonwealth, 186 Va. 851, 44 S.E.2d 419 (1947); State v. McDonie, 89 W.Va. 185, 109 S.E. 710 (1921); Steber v. Norris, 188 Wis. 366, 206 N.W. 173 (1925); State v. Spiegel, 39 Wyo. 309, 270 P. 1064 (1928); PERKINS, CRIMINAL LAW 878-80 (1957); Annot., 89 A.L.R.2d 396 (1963). In a minority of jurisdictions the parent was deemed to be the sole arbiter as to the reasonableness of the degree of punishment, and all punishment was per se reasonable that did not result in disfigurement or permanent injury, or was not inflicted maliciously. Nicholas v. State, 32 Ala. App. 574, 28 So. 2d 422 (1946); Dean v. State, 89 Ala. 46, 8 So. 38 (1889); Boyd v. State, 88 Ala. 169, 7 So. 268 (1889); State v. Jones, 95 N.C. 588, 59 Am. Rep. 282 (1886).

35. Biddle v. Commonwealth, 206 Va. 14, 141 S.E.2d 710 (1965); 1 WHARTON, CRIMINAL LAW AND PROCEDURE § 297 (1957); Shepherd, *The Abused Child and the Law*, 22 WASH. & LEE L. REV. 182, 184-86 (1965).

36. Paulsen, *Juvenile Courts, Family Courts and the Poor Man*, 54 CALIF. L. REV. 694, 699 (1966); Presser, *supra* note 20, at 351-52. The adoption laws resulted largely from the inability of society to deal effectively with these children in 19th century institutional settings. Nugent v. Powell, 4 Wyo. 173, 33 P. 23 (1893).

animal kingdom and that the laws regarding cruelty to animals were applicable.[37] Today the law of abuse, neglect and dependency is a creature of statute and is a part of the juvenile or welfare law of every state.[38]

C. *Present State of the Law*

1. Divorce Custody

Despite the considerable flux in divorce law there are some general postulates that may be made about the state of divorce custody law at the present time. Most custody determinations in divorce proceedings are consensual and incidental to the resolution of the marital conflict,[39] but if a contest develops an adjudication must be made by a judge who exercises his discretion with the aid of few statutory guidelines.[40] The harsh common law rule awarding the father unlimited rights to the child has been replaced by a preference for the mother, but both rules have ostensibly been abrogated by statute or judicial decisions, although in practice the mother still usually prevails over the father, especially when the child is of tender years.[41] Somewhat at war with those earlier and vestigial concepts is the "best interest of the child" doctrine as early articulated by Judge Cardozo:

> The chancellor in exercising his jurisdiction upon petition does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as parens patriae to do what is best for the interest of the child. He is to put himself in the position of a 'wise, affectionate, and careful parent' . . . and make provision for the child accordingly. . . . He is not determining rights 'as between a parent and a

37. FONTANA, THE MALTREATED CHILD: THE MALTREATMENT SYNDROME IN CHILDREN 8-9 (1964).

38. CLARK at 581-82.

39. Goode, *supra* note 12, at 311-13; R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 223-24 (1969). There may often be a custody decree, but its terms are predicated on a more or less pro forma judicial confirmation of a pre-existing agreement between the parties.

40. Texas, however, allows a jury to determine custody. *See* Levy, *supra* note 39, at 222. *See also* Oster, *Custody Proceedings: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21, 23-25 (1965).

41. Foster & Freed, *supra* note 28, at 425. *See also* C. FOOTE, R. LEVY & F. SANDER, FAMILY LAW 851 (1966).

> child,' or as between one parent and another. . . . Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child.[42]

Most courts subscribe to the "best interest" test in all child custody cases, but at best the rule is applied in a modified form.[43] In many jurisdictions this mutation results from the infusion of a parental fitness test where the custody contest is between a parent and a nonparent.[44] The contrary view was stated almost a century ago by Judge Brewer, later a Justice of the United States Supreme Court, in the case of *Chapsky v. Wood*:

> It is an obvious fact, that ties of blood weaken, and ties of companionship strengthen, by lapse of time; and the prosperity and welfare of the child depend on the number and strength of these ties, as well as on the ability to do all which the promptings of these ties compel. . . . The right of the father must be considered; the right of the one who has filled the parental place for years should be considered. . . . Above all things, the paramount consideration is, what will promote the welfare of the child?[45]

The deviations from the "best interest" rule in an intraparental custody proceeding stem from the traditional preference for the mother and the concept of fault which still dominates divorce actions.[46] Where the contest is between a parent and a "stranger,"

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42. Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624, 626 (1925). Many states incorporate this test in their statutes and require its application in custody disputes. Leavell, *Custody Disputes and the Proposed Model Act*, 2 GA. L. REV. 162, 163 (1968).

43. Foster & Freed, *supra* note 28, at 425.

44. *See, e.g.*, People *ex rel* Portnoy v. Strasser, 303 N.Y. 539, 104 N.E.2d 895 (1952). In some states the nonparent is faced with an almost insurmountable burden of proof which may even treat the parental rights as almost absolute. In Raymond v. Cotner, 175 Neb. 158, 120 N.W.2d 892 (1963), a majority of the court held that a natural parent has an absolute right to custody unless that right is forfeited due to unfitness. The dissent advocated the "best interest" test. *See also* Meyer v. Nebraska, 262 U.S. 390 (1923), where the Supreme Court held that the parent's right to instruct his child is an inherent natural right entitled to the protection of the due process clause. *See* Ernst v. Flynn, 373 Mich. 337, 129 N.W.2d 430 (1964).

45. 26 Kan. 650, 653-54, 40 Am. R. 321, 333 (1881). Other early cases expressing a primary concern for the well-being of the child are United States v. Green, 26 F. Cas. 30 (No. 15256) (C.C.D.R.I. 1824); Brinster v. Compton, 68 Ala. 299 (1880); Sheers v. Stein, 75 Wis. 44, 43 N.W. 728 (1889).

46. Podell, Peck & First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51, 66-67 (1972);

however, there is still a frequent use of a residual property concept in the parental right doctrine.[47] The "property" language is seldom used now but the same idea is expressed in natural law terms, or by a bare reference to "the parent's right to custody."[48] Nevertheless, the "best interest" doctrine stands as the polestar for enlightened custody adjudications.

2. *Adoption Custody*

Adoption proceedings are purely statutory, and as procedure and substance are often indistinguishable in this area, general rules are difficult to state. Professor Foster has stated that "the 'rules of thumb': (1) parental fitness, and (2) best interests of the child, constitute the black letter law of custody" in adoption.[49] There are two approaches to the initiation of an adoption. One, utilized by the Children's Bureau of the U.S. Department of Health, Education and Welfare, provides for the termination of pre-existing custodial rights in separate procedures,[50] and the second terminates existing rights and establishes new ones in the same proceeding.[51] In either case the adoption is initiated by a petition, but the primary rele-

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Comment, *Child Custody: Considerations in Granting the Award Between Adversely Claiming Parents*, 36 S. CAL. L. REV. 255, 261 (1963); Comment, *Alimony, Property Settlement and Child Custody Under the New Divorce Statutes: No-fault is Not Enough*, 22 CATH. U. L. REV. 365, 378 (1973). At one time this was the general rule and especially where the ground for the divorce was adultery. Parker v. Parker, 222 Md. 69, 158 A.2d 607 (1960); Beck v. Beck, 175 Neb. 108, 120 N.W.2d 585 (1963); Owens v. Owens, 96 Va. 191, 15 S.E. 72 (1898); Regenvetter v. Regenvetter, 124 Wash. 173, 213 P. 917 (1923); SELECTED ESSAYS ON FAMILY LAW 612, 613 (1950); 1 VERNIER, AMERICAN FAMILY LAW § 54, p. 274 (1961).

47. *See* Leavell, *supra* note 42, at 164. *See also* Shea v. Shea, 100 Cal. App. 2d 60, 223 P.2d 32, 34 (1950) (court stated that "California has, in effect, adopted the harsh rule that the right of a fit and proper parent to have the custody of his child is somewhat in the nature of a property right. . . ."); Kennedy v. Meara, 127 Ga. 68, 56 S.E. 243, 247 (1906) (court said that "the parent cannot be deprived of his property right in the labor and services of the minor child, except by due process of law.") *See* Comment, *Custody of Children: Best Interest of Child vs. Rights of Parents*, 33 CALIF. L. REV. 306 (1945).

48. tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 900, 921-27 (1964). *See Raymond* v. *Cotner, supra* note 45; Whiteman v. Robinson, 145 W.Va. 685, 116 S.E.2d 691 (1960).

49. Foster, *supra* note 1, at 2-3.

50. CHILDREN'S BUREAU, LEGISLATIVE GUIDES FOR THE TERMINATION OF PARENTAL RIGHTS AND RESPONSIBILITIES AND THE ADOPTION OF CHILDREN 9, 37 (Children's Bureau Publication No. 394-1961) [This Act is hereinafter cited as CHILDREN'S BUREAU TERMINATION ACT and is set forth in the Appendix]. *See also* Katz, *Community Decision-Makers and the Promotion of Values in the Adoption of Children*, 4 J. FAM. L. 7 (1964).

51. CLARK at 613, 615.

vance of the two approaches is in the notice requirements and the procedure at the hearing.[52] The petition is usually required to be signed and verified by the adoptive parents, and, in some states, the names of the natural parents must be given in the petition.[53] In many states the adoptive parents must have had the child residing with them for a certain period of time[54] before the initiation of the petition, and, in most states, notice of the petition must be given to the prior custodian and/or the natural parents.[55] The second stage is the normally informal hearing, at which the petitioner, or petitioners, has the burden of proof.[56]

Perhaps the most crucial procedural stage from the standpoint of the child is the agency investigation which is either allowed or required in almost all states.[57] At this point in the adoption, the judge refers the petition to a public or licensed private adoption agency for an investigation and report. In some states the court then enters an interlocutory decree with a final decree to be entered after a trial period, most commonly six months.[58] The interlocutory decree may be revoked for cause,[59] but the final decree has the status and presumed validity of any other judgment.[60] However, it is at this point that most litigation occurs through the attempted revocation of consent by the natural parent or prior custodian or an attack on the

52. *Id.* at 611-15.

53. *Id.* at 615.

54. *Id.*

55. *Id.* at 611-14. The notice requirement is complex, and the complexity has been heightened by the recent Supreme Court decision in Stanley v. Illinois, 405 U.S. 645 (1972), which requires notice to the putative father of an illegitimate child, or at least an effort to give notice which comports with due process. *See* Hession, *Adoptions After "Stanley"—Rights for Fathers of Illegitimate Children*, 61 ILL. B. J. 350 (1973); Note, 21 DEPAUL L. REV. 1036 (1972); Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581 (1972); Note, *Stanley v. Illinois: Expanding the Rights of the Unwed Father*, 34 U. PITT. L. REV. 303 (1972); Comment, *The Strange Boundaries of Stanley: Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517 (1973). *See also* In re Brennan, 270 Minn. 455, 134 N.W.2d 126 (1965); State *ex rel.* Lewis v. Lutheran Social Services, 47 Wis. 2d 420, 178 N.W.2d 56 (1970), *vacated and remanded sub nom.* Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972).

56. CLARK at 615-16.

57. *Id.* at 616-19.

58. *Id.* at 619-20.

59. Newton v. Wilson, 199 Va. 864, 102 S.E.2d 299 (1958).

60. Wilson v. Anderson, 232 N.C. 212, 59 S.E.2d 836 (1950), *rehearing denied*, 232 N.C. 521, 61 S.E.2d 447 (1950); Whitley v. Reeves, 39 Tenn. App. 169, 281 S.W.2d 411 (1955); Magevney v. Karsch, 167 Tenn. 32, 65 S.W.2d 562 (1933).

decree by the parents.[61] Other points of serious conflict arise in the situation where foster parents seek to adopt a child entrusted to them by an agency, and where pre-existing custodial rights are terminated involuntarily because of unfitness.[62]

3. *Abuse, Neglect and Dependency*

Custody decrees resulting from a judicial determination that a child has been abused, neglected or is dependent are usually adoption decrees entered after the prior parental or custodial rights have been terminated.[63] These termination procedures are wholly statutory and vary considerably from jurisdiction to jurisdiction, although there is a trend toward enactment of a specific termination statute.[64]

It is difficult to state a dogmatic rule as to where child neglect begins and ends. Each case must stand on its own facts, but "neglect" generally contemplates a failure to exercise the care demanded by the circumstances. It embraces wilful as well as negligent disregard of a legal duty, and its meaning changes in response to change in surrounding circumstances. Neglect may encompass not only a failure to provide for the physical needs of a child commensurate with the material ability of the custodian, but it may also involve a denial of affection, guidance or consideration. A "dependent" child, in the usual statutory sense, is a normal child whose support comes from a source other than the natural guardian and the concept need not encompass the extreme example of abandonment.[65]

Missouri has enacted a statute which is somewhat typical of the newer laws in establishing a jurisdictional base. It provides for termination of parental rights where:

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61. CLARK at 620-29, 666-71; Note, *Revocation of Parental Consent to Adoption: Legal Doctrine and Social Policy*, 28 U. CHI. L. REV. 564 (1961); Note, *Attacks on Adoption Decrees by Natural Parents to Regain Custody*, 61 YALE L. J. 591 (1952). *See also In Re* Krueser, 104 Ariz. 26, 448 P.2d 82 (1968).

62. CLARK at 629-38; Foster, *supra* note 1; Katz, *Foster Parents Versus Agencies: A Case Study in the Judicial Application of "The Best Interests of the Child" Doctrine*, 65 MICH. L. REV. 145 (1966); Simpson, *supra* note 20.

63. CLARK at 629; Simpson, *supra* note 20.

64. Note, *Legislative and Judicial Recognition of the Distinction between Custody and Termination Orders in Child Neglect Cases*, 7 J. FAM. L. 66, 67 (1967).

65. 47 AM. JUR. 2d *Juvenile Courts and Delinquent Children* § 24 (1969).

> [I]t appears by clear, cogent and convincing evidence—that for one year or more immediately prior to the filing of the petition (a) the parents have abandoned the child; (b) the parents have willfully, substantially and continuously or repeatedly neglected the child and refused to give the child necessary care and protection; (c) the parents, being financially able, have willfully neglected to provide the child with the necessary substance, education or other care necessary for his health, morals or welfare . . . ; (d) the parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals or wellbeing of the child; (e) the parents have been found incompetent. . . .[66]

Neglect, of course, is difficult to judicially determine.[67] In recent years there has been a tendency to stress the provision of protective services to children within their family in neglect situations and avoid termination unless other alternatives fail.[68] The law has attempted to deal more directly with abuse as represented by battering than with neglect.[69] The areas of abuse, neglect and dependency are probably among the most fertile fields for statutory revision.

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66. MO. REV. STAT. § 211.441.1 (2).

67. Dean Monrad Paulsen has pointed to one of the greatest difficulties:

> What one regards as proper care may, indeed, be a matter of dispute reflecting class and cultural differences. Standards of child rearing adequate in one cultural setting may appear appalling in another. Paulsen, *supra* note 36, at 699.

S. KATZ, WHEN PARENTS FAIL 22-89 (1971); M. MIDONICK, CHILDREN, PARENTS AND THE COURTS: JUVENILE DELINQUENCY, UNGOVERNABILITY AND NEGLECT 11-13 (1972); H. RIESE, HEAL THE HURT CHILD (1962); Chevigny, *Safeguarding Legal Rights in Providing Protective Services*, 13 CHILDREN 870 (1966); Young, *The Problem of Neglect—The Legal Aspects*, 4 J. FAM. L. 29 (1964).

68. T. BECKER, CHILD PROTECTIVE SERVICES AND THE LAW (1969); CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR CHILD PROTECTIVE SERVICES (1960); S. JENKINS & M. SAUBER, PATHS TO CHILD PLACEMENT 140-58 (1966); R. MULFORD, V. WYLEGALA & E. MELSON, CASEWORKER AND JUDGE IN NEGLECT CASES (1956); Bishop, *Helping Neglectful Parents*, 355 ANNALS 82 (1964); Sandusky, *Services to Neglected Children*, 7 CHILDREN 23 (1960).

69. *See* D. BAKAN, SLAUGHTER OF THE INNOCENTS (1971); D. GIL, VIOLENCE AGAINST CHILDREN: PHYSICAL CHILD ABUSE IN THE UNITED STATES (1970); R. HELFER & C. KEMPE, THE BATTERED CHILD (1968); C. KEMPE & R. HELFER, HELPING THE BATTERED CHILD AND HIS FAMILY (1972); L. YOUNG, WEDNESDAY'S CHILDREN (1964); Daly, *Willful Child Abuse and State Reporting Statutes*, 23 MIAMI L. REV. 283 (1969); Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679 (1966); Paulsen, Parker & Adelman, *Child Abuse Reporting Laws—Some Legislative History*, 34 GEO. WASH. L. REV. 482 (1966); Shepherd, *supra* note 35.

III. Law Reform

Despite the neglect of many years, there has been almost a sunburst of legislative proposals within the last decade. Public opinion has apparently coalesced with efforts to reform the divorce laws in the several states, and the child custody provisions have tagged along with these reform efforts. Instead of discussing each of these proposals separately, this paper will attempt to briefly discuss the various stages of the custody process and will refer to the reform suggestions within the context of each stage.

A. *Adjudicatory Processes*

1. Initiation of Proceedings

Divorce custody proceedings are customarily initiated by the filing of the initial pleading in the divorce proceeding. The Revised Uniform Marriage and Divorce Act provides that the initial petition must contain "the names, ages, and addresses of all living children of the marriage, and whether the wife is pregnant," and the Act further requires the pleading to recite "any arrangements as to support, custody, and visitation of the children. . . ."[70] The Divorce Reform Act requires essentially the same recitation in the initial pleading, therein referred to as a "libel."[71]

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70. Revised Uniform Marriage and Divorce Act § 303(b) 4 and 5 [hereinafter cited as Rev. UMDA]. The ABA Family Law Section's Proposed Revised Uniform Marriage and Divorce Act agrees with this approach as it incorporates § 303 (b)(4) in toto and its § 303 (b)(6) changes § 303 (b)(6) in the Rev. UMDA only slightly with no real difference in substance. The Uniform Marriage and Divorce Act was promulgated in 1970 and the Act was revised a year later (the relevant sections of the Revised Act are included in the Appendix to this article). The Revised Act was submitted to the ABA House of Delegates in February, 1972, but it did not receive the endorsement of that body because of the opposition of the Family Law Section. The Section's Council thereafter approved and recommended the Proposed Revised Uniform Marriage and Divorce Act [hereinafter cited as Prop. Rev. UMDA]. The pertinent portions of that proposal which differ from the corresponding sections of the Rev. UMDA are included in the Appendix. *See Proposed Revised Uniform Marriage and Divorce Act*, 7 Fam. L.Q. 135 (1973); Podell, *The Case for Revision of the Uniform Marriage and Divorce Act*, 7 Fam. L.Q. 169 (1973) *reprinted from* 18 S.D.L. Rev. 601 (1973). *See also* Callow, *Custody of the Child and the Uniform Marriage and Divorce Act*, 18 S.D. L. Rev. 551 (1973); Foster, *Divorce Reform and the Uniform Act*, 18 S.D.L. Rev. 572, 590 (1973); Levy, *Introduction to Symposium on the Uniform Marriage and Divorce Act*, 18 S.D. L. Rev. 531 (1973). Judge Podell, Chairman of the ABA Family Law Section, indicated that the ABA House of Delegates would act on the proposed revisions at its August, 1973, meeting, but action was deferred at that time. *See* 42 U.S.L.W. 2099 (August 14, 1973).

71. *A Divorce Reform Act*, 5 Harv. J. Legis. 563, 582 (1968) (especially § 201 (a)(1) of that Act).

In an adoption a petition generally starts the proceeding. The Revised Uniform Adoption Act requires that certain specified information be set forth therein and that notice be given to the agency, the public welfare department and any agency or person whose consent is required but who has not consented.[72] The Children's Bureau Act for the Adoption of Children contains similar petition entries and requires notice to be served on the child placement agency and on any agency responsible for making the requisite social study.[73] In termination proceedings a petition is filed by any one of a broad category of persons on certain grounds, with a specific checklist of items to be set forth, and with notice given to the parents of the child, the guardian of the person of the child,[74] the person who has legal custody of the child, any person *in loco parentis* to the child, and the guardian *ad litem* of any party.[75]

2. *Representation for Child*

Perhaps the most widespread movement in the developing law of child custody has been the advocacy of legal representation for the child.[76] The Revised Uniform Marriage and Divorce Act provides

72. REVISED UNIFORM ADOPTION ACT §§ 9, 11. The UNIFORM ADOPTION ACT was originally promulgated in 1953, and it was extensively revised in 1969 and further amended in 1971. Section 9 was one of the sections amended at that time.

73. *See* AN ACT FOR THE ADOPTION OF CHILDREN §§ 7, 11 contained in CHILDREN'S BUREAU, LEGISLATIVE GUIDE FOR THE TERMINATION OF PARENTAL RIGHTS AND RESPONSIBILITIES AND THE ADOPTION OF CHILDREN, *supra* note 50 [this Act is hereinafter cited as CHILDREN'S BUREAU ADOPTION ACT and is set forth in the Appendix]. This Act does not require notice to other parties as the termination of pre-existing parental or custodial rights takes place in an earlier and separate proceeding.

74. One important and highly desirable feature of the two Children's Bureau Acts is the definition section (Section 2) which clearly defines the important terms and establishes the concept of "guardianship of the person." *See also* Fraser, *Guardianship of the Person*, 45 IOWA L. REV. 239 (1960); Paulsen & Best, *Appointment of a Guardian in the Conflict of Laws*, 45 IOWA L. REV. 212 (1960); Weissman, *Guardianship: Every Child's Right*, 355 ANNALS 134 (1964).

75. *See* CHILDREN'S BUREAU TERMINATION ACT at §§ 4-6. Some solution must be found to the dilemma posed by *Stanley v. Illinois*, *supra* note 55, regarding notice to the putative father of an illegitimate child. One approach has been to require the putative father to file a notice of intent to claim paternity prior to the birth of the child with the appropirate probate court in order to have any subsequent standing. *See* MICH. COMP. LAWS ANN. § 710.3(a) (Supp. 1972).

Another approach where either the father or his whereabouts are unknown would be to appoint a guardian *ad litem* for him charged with the responsibility of trying to locate the father and reporting his whereabouts to the court. This would be far preferable to utilizing order of publication as the Supreme Court suggested in *Stanley*.

76. Coyne, *Who Will Speak for the Child?*, 383 ANNALS 34 (1969); Edelstein, *The Law*

that "the court *may* appoint an attorney to represent the interests of a minor or dependent child."[77] The Proposed Revised Uniform Marriage and Divorce Act states that "the court *shall* appoint an attorney. . . ."[78] The Revised Uniform Adoption Act makes no specific reference to the appointment of counsel for the child although the Children's Bureau Act provides that the "court may appoint a guardian *ad litem* for such person as may be deemed necessary or desirable."[79] The Act for the Termination of the Parent-Child Relationship provides for power in the court to appoint a guardian *ad litem* for any "party" including the child.[80]

Although the mandatory appointment of counsel for the child in all custody proceedings is highly desirable and preferred, an equally crucial issue is posed by the question of the role that the attorney should play — is he a guardian *ad litem* in the traditional sense, or is he an advocate?[81] Actually, the role is, and should be, mixed

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Guardian in the New York Family Court, 24 JUV. JUSTICE 14 (1973); Hansen, *The Role and Rights of Children in Divorce Actions*, 6 J. FAM. L. 1 (1966); Inker & Perretta, *supra* note 26; Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 BUFF. L. REV. 501 (1963); Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State*, 4 FAM. L.Q. 319 (1970); Pokorny, *Observations by a "Friend of the Court,"* 10 LAW & CONTEMP. PROB. 778 (1944). *See also* Barth v. Barth, 39 Ohio Op. 2d 83, 225 N.E.2d 866 (1967); Zinni v. Zinni 103 R.I. 417, 238 A.2d 373 (1968); Wendland v. Wendland, 29 Wis. 2d 145, 138 N.W.2d 185 (1965). There is an interesting dissenting opinion by Circuit Judge Rives in the case of Brown v. Chastain, 416 F.2d 1012, 1025-26 (5th Cir. 1969), wherein he equated a child custody hearing to a habeas corpus proceeding and argued that there should be a right to a transcript of the former equal to the right for one in the latter for purposes of appeal. The Supreme Judicial Court of Maine has recently held that due process required the appointment of counsel for indigent parents at a hearing for the termination of parental rights on the ground of unfitness. Danforth v. State Dept. of Health and Welfare, 303 A.2d 794 (Maine 1973).

77. REV. UMDA § 310 (emphasis supplied).

78. PROP. REV. UMDA § 310 (emphasis supplied). The DIVORCE REFORM ACT, note 71 *supra*, requires in § 201(b) that a lawyer must be appointed for minor children, and it further provides in § 201 (c) that the children "shall be treated as parties to the divorce proceeding. . . ."

79. CHILDREN'S BUREAU ADOPTION ACT § 14.

80. CHILDREN'S BUREAU TERMINATION ACT §§ 2m, 6, 8.

81. Children's Bureau, The Attorney's Part in Adoption (Children's Bureau Folder No. 47-1959); Fain, *The Role and Responsibility of the Lawyer in Custody Cases*, 1 FAM. L.Q., #3, 36 (1967); Gibbs, *Practical Views of the Family Lawyer on the Subject of "Our Separate Ways,"* 1 FAM. L.Q., #3, 3 (1967); Isaacs, *supra* note 6; Isaacs, *supra* note 76; Katz, *supra* note 5; Katz & Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 GEO. L.J. 1401 (1973); Phillips, *Mental Hygiene, Divorce and the Law*, 3 J. FAM. L. 63 (1963); Polow, *The Lawyer in the Adoption Process*, 6 FAM. L.Q. 72 (1972); Speca & Wehrman, *Protecting the Rights of Children in Divorce Cases in Missouri*, 38 U. Mo. (KC)

depending on the facts and situation in a given case. However, a more important question arises with regard to the type of training the law student should receive to prepare him for the socio-legal role he must increasingly assume in the juvenile courts.[82]

3. *Role of Judge and Court Organization*

The judicial role in custody proceedings is central and of particular significance because of the wide discretion reposed in the judge in such cases. The criteria utilized in selecting such judges, however, differ little from those applied in the judicial selection process in general. Dr. Andrew Watson has discussed this with concern and has listed, among other problems, (1) the tendency of the judge to moralize,[83] (2) the desire among judges to be completely correct in their decisions, a desire that may result in "decision-making paralysis," (3) the failure of many juvenile or family court judges to understand the behavioral sciences or have any familiarity with child development or psychology concepts as expressed in the literature and (4) the pitfalls of judicial administration which may cause a case to be rotated from docket to docket with a different judge handling each stage of the proceeding.[84]

A comparable problem is created by judicial splintering, that is, where a multitude of courts may deal with the problems of the

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L. REV. 1 (1969); Treadwell, *The Lawyer in Juvenile Court Dispositional Proceedings: Advocate, Social Worker, or Otherwise*, 16 JUV. CT. JUDGES J. 109 (1965); Watson, *The Lawyer as Counsellor*, 5 J. FAM. L. 7 (1965).

82. Barnett, *Emotional Problems Encountered in Divorce Cases—A Seminar*, 3 J. FAM. L. 208 (1963); Bradway, *The Legal Peg and the Social and Economic Hole*, 10 LAW & CONTEMP. PROB. 855 (1944); Fogelson, Pearson & Sander, *Making Better Lawyers: A Report on a Unique Interdisciplinary Venture*, 2 FAM. L.Q. 322 (1968); Kahn-Freund, *Observations on the Possible Cooperation of Teachers of Law and Teachers of Social Science in Family Law*, 9 J. LEGAL ED. 76 (1956); Levy, *The Perilous Necessity: Nonlegal Materials in a Family Law Course*, 15 J. LEGAL ED. 43 (1963); Skoler, *Law School Curriculum Coverage of Juvenile and Family Court Subjects*, 5 J. FAM. L. 74 (1965); Treadwell, *supra* note 81; Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 93 (1968); Zukerman, *Cultivating Social Perspectives in the Lawyer*, 5 J. FAM. L. 1 (1965).

83. In this regard see the almost unbelievable colloquy quoted in Katz, *supra* note 67, at 63-64.

84. Watson, *Children of Armageddon: Problems of Custody Following Divorce*, 21 SYR. L. REV. 55, 61-64 (1969) [hereinafter cited as Watson]. *See also* Bronson, *Custody on Appeal*, 10 LAW & CONTEMP. PROB. 737 (1944); Wadlington, *Portrait of the Judge as Popular Author: An Appeal for Anonymity and Restraint in Domestic Relations Opinions*, 1 FAM. L.Q., #4, 77 (1967); Watson, *Family Law and Its Challenge for Psychiatry*, 2 J. FAM. L. 71 (1962); Weinman, *The Trial Judge Awards Custody*, 10 LAW & CONTEMP. PROB. 721 (1944).

family. One court may handle juvenile delinquency problems, another divorce and its custody adjudications, a third neglect and dependency cases and yet a fourth adoptions. There must be a greater effort to integrate these similar functions into a single judicial setting — as in the Family Court — where all child custody proceedings will be dealt with by a single court which is equipped to entertain the complex legal questions involved.[85]

4. *Role of Social Services Personnel*

Perhaps in no other court, and in no other type of case, is the role of non-legal professional advice more crucial than in a child custody case in the Juvenile or Family Court. The role of social workers and psychiatric or psychological consultants and counselors is expanding and rightly so. The Revised Uniform Marriage and Divorce Act provides for maximum utilization of such personnel, and the Proposed Revised Uniform Marriage and Divorce Act agrees with these provisions.[86] The Revised Uniform Adoption Act also provides for an investigation or investigations as do the Children's Bureau Acts.[87]

B. *Decision-Making and Disposition*

The "best interest of the child" test and the importance of its role

85. Children's Bureau, Legislative Guide for Drafting Family and Juvenile Court Acts (Children's Bureau Publication No. 472-1969); Dembitz, *Ferment and Experiment in New York: Juvenile Cases in the New Family Court*, 48 CORNELL L.Q. 499 (1963); Dyson & Dyson, *Family Courts in the United States*, 8 J. FAM. L. 505 (1968) and 9 J. FAM. L. 1 (1969); *Family Courts: A Symposium*, 27 TENN. L. REV. 357 (1960); Goldberg & Sheridan, *Family Courts—An Urgent Need*, 8 J. PUBL. L. 537 (1959); Hansen, *Three Dimensions of Divorce*, 50 MARQ. L. REV. 1 (1966); Kay, *A Family Court: The California Proposal*, 56 CALIF. L. REV. 1205 (1968); Kay & Phillips, *Poverty and the Law of Child Custody*, 54 CALIF. L. REV. 717, 725 (1966); Paulsen, *The New York Family Court Act*, 12 BUFF. L. REV. 420 (1963); Paulsen, *supra* note 36, at 698-706; Rubin, *The Standard Family Court Act*, 1 J. FAM. L. 105 (1961); *The Standard Family Court Act*, 5 N.P.P.A.J. 99 (1959).

86. REV. UMDA §§ 404-05. *See also* R. Hansen & S. Goldberg, *Casework in a Family Court*, in READINGS IN LAW AND PSYCHIATRY 328 (Allen, Ferster & Rubin ed. 1968).

87. REV. UNIFORM ADOPTION ACT §§ 11-13; CHILDREN'S BUREAU TERMINATION ACT § 7; CHILDREN'S BUREAU ADOPTION ACT § 12. *See also* Benedek, *Child Custody Laws: Their Psychiatric Implications*, 129 AM. J. PSYCHIAT. 102 (1972); Benedek & Benedek, *New Child Custody Laws: Making Them Do What They Say*, 42 AM. J. ORTHOPSYCHIAT. 825 (1972); Foster & Freed, *Child Custody (Part II)*, 39 N.Y.U. L. REV. 615 (1964); Katz, *supra* note 50; Plant, *The Psychiatrist Views Children of Divorced Parents*, 10 LAW & CONTEMP. PROB. 807 (1944); *Symposium on the Child and the Law: Custody*, 10 KAN. L. REV. 555, 558 (1962); Watson, *supra* note 84; Westman, *The Psychiatrist and Child Custody Contest*, 127 AM. J. PSYCHIAT. 123 (1971).

in custody adjudications have been discussed previously.[88] As pointed out, the test is quite subjective and difficulty often results from that very subjectivity. California has codified guidelines rather than allowing for an open-ended discretion:

> In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody should be awarded in the following order of preference:
>
> (a) To either parent according to the best interests of the child.
>
> (b) To the person or persons in whose home the child has been living in a wholesome and stable environment.
>
> (c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.
>
> Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interest of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.[89]

Section 402 of the Revised Uniform Marriage and Divorce Act also provides guidelines:

> The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including:
>
> (1) the wishes of the child's parent or parents as to his custody;

88. *See* text accompanying notes 42 and 43 *supra*.

89. CAL. CIV. CODE § 4600 (West Cum. Supp. 1973).

(2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(4) the child's adjustment to his home, school, and community; and

(5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.[90]

The Revised Uniform Adoption Act and the two Children's Bureau Acts merely refer to the best interests of the child without codifying standards. The Family Law Section of the A.B.A. in 1963 approved a draft Model Child Custody Law, initially drafted by Professor Foster. The draft states:

In awarding the custody, the Court is to be guided by the following standards, considerations and procedures:

1) Custody shall be awarded to either parent according to the best interests of the child.
2) Custody may be awarded to persons other than the father or the mother whenever such award serves the best interests of the child. Any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall prima facie be entitled to an award of custody.
3) If a child is of sufficient age and capacity to reason, so as to form an intelligent preference, his wishes as to custody shall be considered and be given due weight by the court.
4) Whenever good cause appears therefor, the court may require an investigation and report concerning the care, welfare and custody of the minor child of the parties. When so directed by the Court, investigators or professional personnel attached to or assisting the Court shall make investigations and reports which shall be made available to all interested parties and counsel at least ten days before hearing, and such reports may be received in evidence if no objection is made, and if objection is made, may be received in evidence provided that the person or persons

90. The PROP. REV. UMDA agrees with this language.

> responsible for such report are available for cross-examination as to any matter which has been investigated.
> 5) The Court may hear the testimony of any person or expert, produced by any party or upon the Court's own motion, whose skill, insight, knowledge or experience is such that his testimony is relevant to a just and reasonable determination of what is to the best physical, mental, moral and spiritual well-being of the child whose custody is at issue.
> 6) Any custody award shall be subject to modification or change whenever the best interests of the child require or justify such modification or change, and wherever practicable, the same judge who made the original order shall hear the motion or petition for modification of the prior award.
> 7) Reasonable visitation rights shall be awarded to parents and to any person interested in the welfare of the child in the discretion of the Court, unless it is shown that such rights of visitation are detrimental to the best interests of the child.[91]

Professor Sanford Katz has suggested certain questions which should guide the court's decision:

> (1) What disposition will provide the child with a stable, orderly, and loyal parent-child relationship, thus lessening the likelihood that the state will have to interfere with the relationship in the future?
> (2) What disposition will furnish the child with the economic base necessary for him to become a useful and productive member of society?
> (3) What disposition will provide the child with an environment that will foster physical and emotional health?
> (4) What disposition will furnish the child with an environment that will encourage educational goals?
> (5) What disposition will provide the child with an environment that will promote equal respect for all human beings and will give him an opportunity to mature into a morally stable and responsible adult?[92]

Dr. Watson has urged utilization of a new standard, termed the "psychological best interest of the child" test which he describes as "an organizing concept which can relate and integrate all relevant

91. *Proposed Statute*, PROCEEDINGS OF THE FAMILY LAW SECTION OF THE AMERICAN BAR ASSOCIATION 38 (1963). *See also* Foster & Freed, *supra* note 87, at 628.

92. Katz, *supra* note 62, at 170.

data in relation to custodial disposition."[93] In this concept Dr. Watson includes a consideration of the child's (1) school needs, (2) material needs, (3) need for adequate social stimulation, (4) need for special therapy, (5) needs relating to the quantity and quality of "parenting," (6) response to parent substitution, (7) psychic status, (8) need for adult models, and (9) need for stability.[94] Some thirty years ago Professor Sayre urged that the test should be the "best interests of all the persons involved."[95] Dr. Watson's arguments appear valid, however, and some effort should be made to codify in general language the boundaries of the "best interests of the child"

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93. Watson, *supra* note 84, at 67.

94. *Id.* at 67-71. *See also* I.J. BOWLBY, ATTACHMENT AND LOSS: ATTACHMENT 29, 177-209 (1969); S. BRODY, PATTERNS OF MOTHERING 88-89, 356-57 (1956); Despert, *supra* note 12; I.H. DEUTSCH, THE PSYCHOLOGY OF WOMEN 7, 174 (1944); O. ENGLISH & C. FOSTER, FATHERS ARE PARENTS, TOO (1951); E. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968); H. Modlin, *Mother or Father as Custodian of Child* in NATIONAL COLLEGE OF STATE JUDICIARY, FAMILY LAW 81 (1972); H. MODLIN, READINGS IN LAW AND PSYCHIATRY 319 (Allen, Ferster & Rubin ed. 1968); R. PATTON & L. GARDNER, GROWTH FAILURE IN MATERNAL DEPRIVATION (1963); J. RICHMOND & E. LIPTON, *Studies on Mental Health of Children with Specific Implications for Pediatricians* in PREVENTION OF MENTAL DISORDERS IN CHILDREN 105-10 (Caplan ed. 1961); Bernstein & Robey, *The Detection and Management of Pediatric Difficulties Created by Divorce*, 30 PEDIATRICS 950 (1962); Bradbook, *The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Inter-Parental Child Custody Disputes*, 11 J. FAM. L. 557 (1971); Brun, *The Child of Divorce in Denmark*, 28 BULL. MENNINGER CLINIC 3 (1964); Chumley & Blumenthal, *Children's Reactions to Temporary Loss of the Father*, 130 AM. J. PSYCHIAT. 778 (1973); Cline & Westman, *The Impact of Divorce on the Family*, 2 CHILD PSYCHIAT. & HUMAN DEVELOP. 78 (1971); Foster, *The Inter-Relation Between Law and Psychiatry in Matrimonial Problems*, 2 FAM. L.Q. 266 (1968); Gardner, *Separation of the Parents and the Emotional Life of the Child*, 40 MENTAL HYGIENE 53 (1956); Gay & Tonge, *The Late Effects of Loss of Parents in Childhood*, 113 BRIT. J. PSYCHIAT. 753 (1967); Katz, *A Symposium on Mental Health Concepts in Family Law*, 1 FAM. L.Q. 2, 61 (1967); Landis, *The Trauma of Children When Parents Divorce*, 22 MARR. & FAM. LIVING 7 (1960); Lehrman, *Psychopathological Aspects of Emotional Divorce*, 26 PSYCHOANALYTIC REV. 1 (1939); McDermott, *Divorce and Its Psychiatric Sequelae in Children*, 23 ARCH. GEN. PSYCHIAT. 421 (1970); McDermott, *supra* note 12; Nye, *Child Adjustment in Broken and in Unhappy Unbroken Homes*, MARR. & FAM. LIVING 356 (Nov., 1957); Otterstrom, *The Social Outlook for Children of Divorce*, 3 ACTA GENETICA ET STATISTICA MEDICA 72 (1952); Podell, Peck & First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51 (1972); Sugar, *Children of Divorce*, 46 PEDIATRICS 588 (1970); Westman & Cline, *Divorce is a Family Affair*, 5 FAM. L.Q. 1 (1971); Westman, Cline, Swift & Kramer, *Role of Child Psychiatry in Divorce*, 23 ARCH. GEN. PSYCHIAT. 416 (1970); Work & Anderson, *Studies in Adoption: Requests for Psychiatric Treatment*, 127 AM. J. PSYCHIAT. 948 (1971). Despite this volume of materials, Professor Robert Levy, the Reporter for the UMDA, has concluded after an extensive review of available writings of social scientists that "what relevant empirical data exists is almost useless." R. Levy, *supra* note 39, at 223. *See also* Note, *Adoption: Psychological Parenthood As the Controlling Factor in Determining Best Interests of the Child*, 26 RUTGERS L. REV. 693 (1973).

95. Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672 (1942).

test in terms similar to the California or Family Law Section statutes.

C. *Modification*

Dr. Watson has pointed to the need for stability as a major factor in the normal development of a child.[96] An effort should be made to build into any legislative scheme certain restrictions on modification. Section 409 of the Revised Uniform Marriage and Divorce Act provides that "no motion to modify a custody decree may be made earlier than 2 years after its date of entry" unless affidavits establish that the child's "physical, mental, moral, or emotional health" is seriously endangered.[97] The Revised Uniform Adoption Act provides for the incontestability of the adoption decree after one year, and the Children's Bureau Adoption Act provides for finality after two years.[98]

D. *Recognition of Foreign Decrees*

One of the most troublesome problems in child custody law has been the recognition of foreign custody decrees in another state.[99] The law is presently in a state of mass confusion, and an effort has been made to clear up this uncertainty by the promulgation of the Uniform Child Custody Jurisdiction Act.[100] Some approach must be

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96. Watson, *supra* note 84, at 71.

97. REV. UMDA § 409(a).

98. REV. UNIFORM ADOPTION ACT § 15; CHILDREN'S BUREAU ADOPTION ACT § 21.

99. *See* Ford v. Ford, 371 U.S. 187 (1962); Kovacs v. Brewer, 356 U.S. 604 (1958); May v. Anderson, 345 U.S. 528 (1952); People *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1946). *See also* Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 S. CT. REV. 89 (1964); Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings*, 64 MICH. L. REV. 1 (1965); Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953); Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379 (1959); Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795 (1964); Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act*, 38 S. CAL. L. REV. 183 (1965); Rheinstein, *Jurisdiction in Matters of Child Custody*, 26 CONN. BAR. J. 48 (1952); Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROB. 819 (1944); Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. CHI. L. REV. 42 (1940); Taintor, *Adoption in the Conflict of Laws*, 15 U. PITT. L. REV. 222 (1954); Note, *Long-Arm Jurisdiction in Alimony and Custody Cases*, 73 COLUM. L. REV. 289 (1973); Comment, *Conflicting Custody Decrees: In Whose Best Interest?*, 7 DUQ. L. REV. 262 (1969); Note, *Child Custody Decrees—Interstate Recognition*, 49 IOWA L. REV. 1178 (1964); Note, *Ford v. Ford: Full Faith and Credit to Child Custody Decrees?*, 73 YALE L.J. 134 (1963).

100. UNIFORM CHILD CUSTODY JURISDICTION ACT, HANDBOOK OF THE NATIONAL CONFERENCE

made to minimize the ability of unsuccessful litigants to "forum shop" and flee with a child to seek a more favorable custody adjudication.

CONCLUSION

Divorce reform is a reality in contemporary America, and, as its momentum gradually builds, many jurisdictions will be taking a closer look at their domestic relations laws. Unfortunately, the focus of the reform movement is most often directed at the divorce itself without taking a broader look at the custody aspect of divorce as well,[101] and even less attention is paid to the child custody ramifications of other proceedings. The beginning point of meaningful reform of child custody law is obviously the statutory matrix of such law in each state, and the various recent uniform and model acts present reasonable alternative proposals for consideration by legislative bodies. No one recommendation offers a panacea, and it is quite unlikely that such an ideal could be formulated in any such area of the law so totally dependent on predicting the future course of human behavior. However, there are certain minimum girders

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OF COMMISSIONERS ON UNIFORM STATE LAWS 194 (1968). *See* Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969); Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 3 FAM. L.Q. 304 (1969); Walther, *The Uniform Child Custody Jurisdiction Act*, 54 MARQ. L. REV. 161 (1971).

101. Foster, *The Future of Family Law*, 383 ANNALS 129 (1969); Freed & Foster, *Divorce American Style*, 383 ANNALS 71 (1969); Gallagher, *No-Fault Divorce in Delaware*, 59 A.B.A.J. 873 (1973); Goldstein & Gitter, *On Abolition of Grounds for Divorce: A Model Statute and Commentary*, 3 FAM. L.Q. 75 (1969); Lee, *Divorce Law Reform in Michigan*, 5 J. LAW REFORM 409 (1972); McCurdy, *Divorce—A Suggested Approach with Particular Reference To Dissolution for Living Separate and Apart*, 9 VAND. L. REV. 685 (1956); Paulsen, *Divorce—Canterbury Style*, 1 VALPARAISO L. REV. 93 (1966); Sass, *The Iowa No-Fault Dissolution of Marriage Law in Action*, 18 S.D.L. REV. 629 (1973); Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966).

One argument made in favor of no-fault divorce is that the elimination of fault will lessen conflict and minimize custody contests. However, in Goddard, *A Report on California's New Divorce Law: Progress and Problems*, 6 FAM. L.Q. 405 (1972), the author reported that after one and a half years experience under the new law, there was "at least as much bitterness in contested cases involving child custody under the new law as there was under the prior law." *Id.* at 418-19. A recent note has criticized the child custody aspects of many no-fault divorce plans. Note, *Alimony, Property Settlement and Child Custody Under the New Divorce Statutes: No-fault Is Not Enough*, 22 CATH. U. L. REV. 365 (1973). Dr. Lawrence Kubie has suggested an alternate approach to child custody disputes by using mediation by a child custody committee in Kubie, *Provisions for the Care of Children of Divorced Parents: A New Legal Instrument*, 73 YALE L.J. 1197 (1964).

that can be fabricated into a rational whole. The skeleton of the structure must comport with the requirements of due process to minimize the risk of collateral attack and to similarly discourage efforts to relitigate awards because of dissatisfaction with the process.

The role of counsel must be enlarged, not only for the child but also for indigent, incompetent and other minor parties to the proceeding. The provision of counsel should also be more within the context of advocacy rather than within the framework of a relatively passive guardian *ad litem* concept. Obviously, there is a significant need for greater interdisciplinary training and communication and for an enhanced understanding of the complementary roles of various professionals in the search for an appropriate disposition. The problem of court organization must be faced and similar judicial functions integrated into a Family Court which is properly staffed to help focus the scope of judicial inquiry. Statutory guidelines which comport with our best understanding of the nature of child development must be framed to eliminate the vagueness of the "best interests of the child" test.

Courts and counsel must further recognize that the child is often a pawn in a larger game played by the adults among themselves. The decree ultimately entered should be the product of a rational and enlightened decisional process, and the system must have sufficient confidence in the process to "case harden" the decree so as to minimize the possibility of modification. Modification should only be predicated upon serious questions relating to the physical, psychological and emotional health of the child. The court should be required to use a two-stage modification proceeding, the initial stage of which is an *ex parte* hearing based on affidavits which obviates the necessity for periodic adversary hearings. Foreign custody awards should be accorded the same presumption of regularity and finality that the forum's decrees are accorded.

However, even an optimum statutory modification will not guarantee desirable adjudicatory processes as there is still an evidentiary task of crucial importance. Courts must draw on the knowledge and research of other disciplines such as psychiatry, psychology, theology, education, sociology, social work, and education so that those fields may demonstrate the extent to which various characteristics of the child and the custodial claimants are significant in achieving the objective of a healthy parent-child relationship. The behavioral

sciences can also help to supply answers to such critical questions as the effect of parental personalities and behavior on the child, the extent to which the peer group and other institutions and aspects of the environment outside the family affect the child, and the immediate and long range impact on the child's maturation and socialization. Through a coordinate juxtaposition of statutory reform and decisional re-examination we can hopefully develop an approach to child custody matters which will maximize the possibility that the child is the true beneficiary of the adjudicatory process and not the parents or an agency. If we can approximate these objectives, we may have finally found a viable substitute for Solomon's sword.

APPENDIX

Revised Uniform Marriage and Divorce Act[102]

SECTION 306. [*Separation Agreement.*]

(a) To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for disposition of any property owned by either of them, maintenance of either of them, and support, custody, and visitation of their children.

(b) In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the support, custody, and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.

(c) If the court finds the separation agreement unconscionable, it may request the parties to submit a revised separation agreement or may make orders for the disposition of property, maintenance, and support.

* * *

(f) Except for terms concerning the support, custody, or visitation of children, the decree may expressly preclude or limit modification of terms set forth in the decree if the separation agreement so provides. Otherwise, terms of a separation agreement set forth in the decree are automatically modified by modification of the decree.

SECTION 310. [*Representation of Child.*]

The court may appoint an attorney to represent the interests of a minor or dependent child with respect to his support, custody, and visitation. The court shall enter an order for costs, fees, and disbursements in favor of the child's attorney. The order shall be made against either or both parents, except that, if the responsible party is indigent, the costs, fees, and disbursements shall be borne by the [appropriate agency].

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102. The only sections and portions of sections set forth here are those relating directly to custody adjudications.

SECTION 401. [*Jurisdiction; Commencement of Proceeding.*]

(a) A court of this State competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this State (i) is the home State of the child at the time of commencement of the proceeding, or (ii) had been the child's home State within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reason, and a parent or person acting as parent continues to live in this State; or

(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this State and (i) has been abandoned or (ii) it is necessary in an emergency to protect him because he has been subjected to or threatened with mistreatment or abuse or is neglected or dependent; or

(4) (i) no other State has jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2) or (3), or another State has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine custody of the child, and (ii) it is in his best interest that the court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

(d) A child custody proceeding is commenced in the [ ] court:

(1) by a parent, by filing a petition

(i) for dissolution or legal separation; or

(ii) for custody of the child in the [county, judicial district] in which he is permanently resident or found; or

(2) by a person other than a parent, by filing a petition for custody of the child in the [county, judicial district] in which he is permanently resident or found, but only if he is not in the physical custody of one of his parents

(e) Notice of a child custody proceeding shall be given to the child's parent, guardian, and custodian, who may appear, be heard, and file a responsive pleading. The court, upon a showing of good cause, may permit intervention of other interested parties.

SECTION 402. [*Best Interests of Child.*][103]

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SECTION 403. [*Temporary Orders.*][104]

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SECTION 404. [*Interviews.*]

(a) The court may interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be part of the record in the case.

(b) The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel upon request. Counsel may examine as a witness any professional personnel consulted by the court.

SECTION 405. [*Investigations and Reports.*]

(a) In contested custody proceedings, and in other custody proceedings if a parent or the child's custodian so requests, the court may order an investigation and report concerning custodial arrangements for the child. The investigation and report may be made by [the court social service agency, the staff of the juvenile court, the local probation or welfare department, or a private agency employed by the court for the purpose].

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103. *See* text accompanying note 90 *supra*.

104. This section provides for temporary custody orders after an uncontested affidavit or hearing.

(b) In preparing his report concerning a child, the investigator may consult any person who may have information about the child and his potential custodial arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian; but the child's consent must be obtained if he has reached the age of 16, unless the court finds that he lacks mental capacity to consent. If the requirements of subsection (c) are fulfilled, the investigator's report may be received in evidence at the hearing.

(c) The court shall mail the investigator's report to counsel and to any party not represented by counsel at least 10 days prior to the hearing. The investigator shall make available to counsel and to any party not represented by counsel the investigator's file of underlying data, and reports, complete texts of diagnostic reports made to the investigator pursuant to the provisions of subsection (b), and the names and addresses of all persons whom the investigator has consulted. Any party to the proceeding may call the investigator and any person whom he has consulted for cross-examination. A party may not waive his right of cross-examination prior to the hearing.

SECTION 406. [*Hearings.*]

(a) Custody proceedings shall receive priority in being set for hearing.

(b) The court may tax as costs the payment of necessary travel and other expenses incurred by any person whose presence at the hearing the court deems necessary to determine the best interest of the child.

(c) The court without a jury shall determine questions of law and fact. If it finds that a public hearing may be detrimental to the child's best interest, the court may exclude the public from a custody hearing, but may admit any person who has a direct and legitimate interest in the particular case or a legitimate educational or research interest in the work of the court.

(d) If the court finds it necessary to protect the child's welfare that the record of any interview, report, investigation, or testimony in a custody proceeding be kept secret, the court may make an appropriate order sealing the record.

SECTION 407. [*Visitation.*]

(a) A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health.

(b) The court may modify an order granting or denying visitation rights wherever modification would serve the best interest of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

SECTION 408. [*Judicial Supervision.*]

(a) Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health care, and religious training, unless the court after hearing, finds, upon motion by the noncustodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or his emotional development significantly impaired.

(b) If both parents or all contestants agree to the order, or if the court finds that in the absence of the order the child's physical health would be endangered or his emotional development significantly impaired, the court may order the [local probation or welfare department, court social service agency] to exercise continuing supervision over the case to assure that the custodial or visitation terms of the decree are carried out.

SECTION 409. [*Modification.*]

(a) No motion to modify a custody decree may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral, or emotional health.

(b) If a court of this State has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interest of the chlid. In applying

these standards the court shall retain the custodian appointed pursuant to the prior decree unless:

(1) the custodian agrees to the modification;

(2) the child has been integrated into the family of the petitioner with consent of the custodian; or

(3) the child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him.

(c) Attorney fees and costs shall be assessed against a party seeking modification if the court finds that the modification action is vexatious and constitutes harassment.

SECTION 410. [*Affidavit Practice.*] A party seeking a temporary custody order or modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceeding, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

Proposed Revised Uniform Marriage and Divorce Act[105]

SECTION 306. [*Separation Agreement.*]

* * *

(b) *In a proceeding for dissolution of marriage or for legal separation, the court shall examine the terms of any separation agreement and if found to be fair and reasonable shall approve them and upon request may incorporate such terms in the decree, provided, that in the case of terms relating to child support, custody and visitation, before approving such terms, the court shall be satisfied that in addition to being fair and reasonable, such terms promote the best interests of the child.*

SECTION 310. [*Representation of Child or Incompetent Spouse.*]

105. The only sections set forth here are those wherein the Family Law Section disagrees with the custody provisions of the REV. UMDA.

(a) *In any proceeding brought pursuant to this Act, the court shall appoint an attorney, who may be a member of the Court system personnel, to independently represent the interests of a minor, dependent or incompetent child with respect to support, custody, visitation and any other matter dealing with the children's welfare in such proceeding.*

(b) *The court shall also appoint an attorney [guardian ad litem] to represent the interests of an incompetent spouse who does not have a general guardian and is not represented by his own attorney in such proceeding.*

SECTION 408. [*Judicial Supervision.*]

(a) Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health, care, and religious training, unless the court after hearing, finds, upon motion by the noncustodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical, *mental, moral or emotional health would be endangered or seriously impaired.*

(b) If both parents or all contestants agree to the order, or if the court finds that in the absence of the order the child's physical, *mental, moral or emotional health would be endangered or seriously impaired,* the court may order the [local probation or welfare department, court social service agency] to exercise continuing supervision over the case to assure that the custodial or visitation terms of the decree are carried out.

An Act for Termination of the Parent-Child Relationship[106]

SECTION 1. [*Purpose.*]

* * *

SECTION 2. [*Definitions.*]

When used in this Act, unless the text otherwise requires:

a. "Court" means the ( ) court.

b. "Child" or "Minor" means a person less than 18 years of age.

c. The singular includes the plural, the plural the singular, and

106. This has been edited to delete the sections that are not substantive in nature and to delete §§ 15-18 relating to Effective Date, Separability, Construction and Repeal.

the masculine the feminine, when consistent with the intent of the Act.

d. "Neglected" used with respect to a child refers to a situation in which the child lacks proper parental care necessary for his health, morals, and well-being.

e. "Legal custody" means a status created by court order embodying the following rights and responsibilities:

(1) the right to have the physical possession of the child,

(2) the right and the duty to protect, train and discipline the child, and

(3) the responsibility to provide the child with food, shelter, education and ordinary medical care, provided that such rights and responsibilities shall be exercised subject to the powers, rights, duties and responsibilities of the guardian of the person and subject to residual parental rights and responsibilities if these have not been terminated by judicial decree.

f. "Guardianship of the person" with respect to a minor means the duty and authority to make important decisions in matters having a permanent effect on the life and development of the minor, and to be concerned about the general welfare of the minor. It includes but is not necessarily limited either in number or kind to:

(1) the authority to consent to marriage, to enlistment in the armed forces of the United States, and to major medical, psychiatric and surgical treatment; to represent the minor in legal actions; and to make other decisions concerning the child of substantial legal significance;

(2) the authority and duty of reasonable visitation, except to the extent that such right of visitation has been limited by court order;

(3) the rights and responsibilities of legal custody except where legal custody has been vested in another individual or in an authorized agency;

(4) when the parent-child relationship has been terminated by judicial decree with respect to the parents, or only living parent, or when there is no living parent, the authority to consent to the adoption of the child and to make any other decision concerning the child which the child's parents could make.

g. "Guardian ad litem" means a person appointed by the court to protect the interest of a minor or an incompetent in a case before the court.

h. "Authorized agency" means a public social agency authorized to care for or place children or a voluntary social agency approved for such purposes by the State through a license, certification or otherwise.

i. "Parent" means (1) the mother, (2) a father as to whom a child is legitimate, (3) a person as to whom a child is presumed to be a legitimate child, or (4) an adoptive parent; but such term does not include a parent as to whom the parent-child relationship has been terminated by judicial decree.

j. "Parent-child relationship" includes all rights, privileges, duties, and obligations existing between parent and child, including inheritance rights.

k. "Residual parental rights and responsibilities" means those rights and responsibilities remaining with the parent (where there has not been termination of the parent-child relationship by judicial decree) after the transfer of legal custody and guardianship of the person, including but not necessarily limited to, the right to reasonable visitation, consent to adoption, the right to determine the child's religious affiliation and the responsibility for support.

l. "Protective supervision" means a legal status created by court order in proceedings not involving violations of law but where the legal custody of the child is subject to change, whereby the child is permitted to remain in his home under the supervision of the court or an agency designated by the court and is subject to return to the court during the period of protective supervision.

m. "Parties" includes the child and the petitioners.

SECTION 3. [*Jurisdiction.*]

The [ ] court shall have exclusive original jurisdiction over petitions to terminate the parent-child relationship when the child involved is present in the State.

SECTION 4. [*Petition and Grounds.*]

(a) A petition may be filed by a parent either directly or through an authorized agency. The parent-child relationship may be terminated with respect to the parent by whom or on whose behalf such

petition has been filed, where the court finds that such termination is in the best interest of the parent and the child.

(b) A petition for termination of the parent-child relationship with respect to a parent who is not the petitioner may be filed by a petitioner designated in subsection (c). The petition may be granted where the court finds that one or more of the following conditions exists:

(1) that the parent has abandoned the child in that the parent has made no effort to maintain a parental relationship with such child,

(2) that the parent has substantially and continuously or repeatedly neglected the child,

(3) that the presumptive parent is not a natural parent of the child,

(4) that the parent is unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period.

(c) The petition under subsection (b) may be filed by the following:

(1) either parent when termination of the parent-child relationship is sought with respect to the other parent,

(2) the guardian of the person or the legal custodian of the child or the person standing in loco parentis to the child,

(3) an authorized agency,

(4) any other person having a legitimate interest in the matter.

SECTION 5. [*Contents of Petition.*]

The petition for the termination of the parent-child relationship shall include, to the best information or belief of the petitioner:

(a) the name and place of residence of the petitioner;

(b) the name, sex, date and place of birth, and residence of the child;

(c) the basis for the court's jurisdiction;

(d) the relationship of the petitioner to the child, or the fact that no relationship exists;

(e) the names, addresses, and dates of birth of the parents;

(f) where the child's parent is a minor, the names and addresses of said minor's parents or guardian of the person;

(g) the names and addresses of the person having legal custody or guardianship of the person or acting in loco parentis to the child or the organization or authorized agency having legal custody or providing care for the child;

(h) the grounds on which termination of the parent-child relationship is sought;

(i) the names and addresses of the persons and authorized agency or officer thereof to whom or to which legal custody or guardianship of the person of the child might be transferred.

SECTION 6. [*Notice—Waiver—Guardian Ad Litem.*]

After a petition has been filed, the court shall set the time and place for a hearing, and shall cause notice thereof to be given to the petitioner, the parents of the child, the guardian of the person of the child, the person having legal custody of the child, any individual standing in loco parentis to the child, and the guardian ad litem of any party.

Where the child's parent is a minor, notice shall also be given to said minor's parents or guardian of the person unless the court is satisfied, in the exercise of its discretion, that such notice is not in the best interest of said minor and that it would serve no useful purpose.

Notice shall be given by personal service. However, where reasonable efforts to effect personal service have been unsuccessful or where it shall appear impracticable to attempt such service the court shall order service by registered or certified mail to the last known address of the person to be notified and by publication once a week for 3 successive weeks in a newspaper of general circulation within the court's district. The hearing shall take place no sooner than 10 days after service of notice, or where service is by registered or certified mail and publication, the hearing shall take place no sooner than 10 days after the date of last publication.

Notice and appearance may be waived by a parent in writing before the court or in the presence of, and witnessed by, a clerk of court or social worker attached to and designated by the court, provided that such parent has been apprised by the court or by such person of the meaning and consequences of the termination action. The parent who has executed such a waiver shall not be required to appear. Where the parent is a minor, the waiver shall be effective only upon approval by the court.

When termination of the parent-child relationship is sought under Sec. 4(b)(4), the court shall appoint a guardian ad litem for the alleged incompetent parent. The court may, in any other case, appoint a guardian ad litem, as may be deemed necessary or desirable, for any party.

SECTION 7. [*Social Study Prior to Disposition.*]

Upon the filing of a petition, the court shall direct that a social study be made either by social service personnel attached to the court or by an authorized agency and that a report in writing of such study be submitted to the court prior to the hearing, except that where an authorized agency is a petitioner, either in its own right or on behalf of a parent, a report in writing of the social study made by such agency shall accompany the petition. The court may order additional social study as it deems necessary. The social study shall include the circumstances of the petition, the social history, the present condition of the child and parents, proposed plans for the child, and such other facts as may be pertinent to the parent-child relationship, and the report submitted shall include a recommendation and the reasons therefor as to whether or not the parent-child relationship should be terminated. Where the parent is a minor, if the report does not include a statement of contact with the parents of said minor, the reasons therefor shall be set forth. The purpose of the social study is to aid the court in making disposition of the petition and shall be considered by the court prior thereto.

SECTION 8. [*Hearing.*]

Cases under this Act shall be heard by the court without a jury. The hearing may be conducted in an informal manner and may be adjourned from time to time. Stenographic notes or mechanical recording of the hearing shall be required as in other civil cases in the ( ), unless the parties waive the right to such record and the court so orders. The general public shall be excluded and only such

persons admitted whose presence is requested by any person entitled to notice under Sec. 6 or as the judge shall find to have a direct interest in the case or in the work of the court; provided that persons so admitted shall not disclose any information secured at the hearing which would identify an individual child or parent. In addition, the court may require the presence of witnesses (including persons making any report, study or examination which is before the court when such persons are reasonably available) deemed necessary to the disposition of the petition, except that a parent who has executed a waiver pursuant to Sec. 6 shall not be required to appear at the hearing.

When termination of the parent-child relationship is sought under Sec. 4 (b) the parent or guardian ad litem shall be notified as soon as practicable after the filing of a petition and prior to the start of a hearing of his right to have counsel, and if counsel is requested and the parent is financially unable to employ counsel, counsel shall be provided.

The court's finding with respect to grounds for termination shall be based upon a preponderance of evidence under the rules applicable to the trial of civil causes, provided that relevant and material information of any nature, including that contained in reports, studies or examinations, may be admitted and relied upon to the extent of its probative value. When information contained in a report, study or examination is admitted in evidence, the person making such a report, study or examination shall be subject to both direct and cross-examination when he is reasonably available.

Where the termination is sought under Sec. 4(b)(4), to support a decree of termination, evidence of the alleged condition shall be no less than that required to support a commitment to an institution for the mentally ill or mentally deficient under ( ).

SECTION 9. [*Decree.*]

Every order of the court terminating the parent-child relationship or transferring legal custody or guardianship of the person of the child or providing for protective supervision of the child shall be in writing and shall recite the findings upon which such order is based, including findings pertaining to the court's jurisdiction. Such order shall be conclusive and binding on all persons from the date of entry.

(1) If the court finds grounds for the termination of the parent-child relationship it shall terminate such relationship and:

(a) appoint an individual as guardian of the child's person, or
(b) appoint an individual as guardian of the child's person and vest legal custody in another individual or in an authorized agency, or
(c) where it is alleged in the petition that the termination is in contemplation of adoption, appoint an official of an authorized agency as guardian of the child's person and vest legal custody in such agency.

The court shall also make an order fixing responsibility for the child's support. The parent-child relationship may be terminated with respect to one parent without affecting the relationship between the child and the other parent.

(2) Where the court does not order termination of the parent-child relationship, it shall dismiss the petition; provided, however, that where the court finds that the best interest of the child requires substitution or supplementation of parental care and supervision, it shall make an order placing the child under protective supervision, or vesting temporary legal custody in an authorized agency and fixing responsibility for temporary child support, and shall certify the case to an appropriate court for such further action as may be necessary.

SECTION 10. [*Effect of Decree.*]

An order terminating the parent-child relationship shall divest the parent and the child of all legal rights, privileges, duties, and obligations, including rights of inheritance, with respect to each other.

SECTION 11. [*Court Costs.*]

All court costs including costs of giving notice and advertising shall be paid by the petitioners. The court, however, may suspend such costs where payment would work a hardship on the petitioner or would be otherwise inappropriate.

SECTION 12. [*Records.*]

The files and records of the court in any proceedings had under this Act shall be kept in a separate locked file and shall be withheld from public inspection, but shall be open to inspection by persons having a legitimate interest in the case and their attorneys and by

an authorized agency to which legal custody of the child has been transferred. Such files and records may, pursuant to rule of court or special order of the court, be inspected by other persons and agencies having a legitimate interest in the protection, welfare, or treatment of the child or in research studies. As used in this section, the words "files and records" include the court docket and entries therein, the petitions and other papers filed in any case, transcripts of testimony taken by the court, and findings, orders, and decrees, and other writings filed in proceedings before the court, other than social records.

Social records shall be withheld from public inspection except that information from such records may be furnished to persons and agencies having a legitimate interest in the protection, welfare, and treatment of the child or in research studies, in such manner as the court determines. As used in this section, the words "social records" include the social service records of the court, the social studies and reports referred to in Sec. 7, and related papers, and correspondence, including medical, psychological, and psychiatric studies and reports, either in the possession of the court or authorized agency.

No person shall be entitled to make copies of such files and records or social records or parts thereof unless the court so orders.

It shall be unlawful, except for purposes for which files and records or social records or parts thereof or information therefrom have been released pursuant to this section, or except for purposes permitted by special order of the court, and in accordance with any applicable rules of the court, for any person to disclose, receive, or make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of any information concerning any person before the court directly or indirectly derived from the files and records or communications of the court, or social records, or acquired in the course of the performance of official duties.

Any person who shall disclose information in violation of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not to exceed $500 or imprisoned for a period not to exceed 6 months or both.

SECTION 13. [*Appeals.*]

Any party aggrieved by any order or decree of the court may appeal to the [appellate] court for review of questions of law. The

procedure of such an appeal shall be governed by the same provision applicable to appeals from the [highest court of general trial jurisdiction]. The pendency of an appeal or application therefor shall not suspend the order of the court regarding a child.

SECTION 14. [*Termination Decrees of Other States.*]

When the relationship of parent and child has been terminated by judicial decree in another State, such decree shall have the same force and effect as to matters within the jurisdiction of this State as though it had been granted by a court of this State.

An Act for the Adoption of Children[107]

SECTION 1. [*Purpose.*]

* * *

SECTION 2. [*Definitions.*[108]]

* * *

SECTION 3. [*Who May Be Adopted.*]

Any child present within this State at the time the petition for adoption is filed may be adopted.

SECTION 4. [*Who May Adopt.*]

The following persons if they are residents of this State are eligible to adopt children:

(a) the husband and wife jointly, or either the husband or wife if the other spouse is a parent of the child;
(b) an unmarried adult;
(c) a married adult who by judicial decree has been accorded the right to reside separate and apart from his or her spouse.

SECTION 5. [*Venue.*]

Adoption proceedings must be brought in the court of the county or district where the petitioners reside.

SECTION 6. [*Prerequisites to Petition.*]

Except when a petition is filed by relatives of the child within the

107. This has been edited to delete sections that are not substantive and which are repetitive of sections in TERMINATION ACT.

108. The only differences between this section and § 2 of the TERMINATION ACT are the inclusion of definitions for "Adult," "Child Placement Agency" and "Relatives of the child within the second degree either by blood or affinity."

second degree either by blood or affinity, no petition for adoption shall be entertained unless prior to the filing of the petition

(1) A decree of termination of the parent-child relationship with respect to each living parent of the child sought to be adopted has been entered; and

(2) the child sought to be adopted has been placed for adoption with the petitioners by a child placement agency.

SECTION 7. [*Petition.*]

A petition for adoption shall be filed in duplicate, verified by the petitioners, and shall specify to the best of their information or belief:

(1) The full names, ages, and place of residence of the petitioners, and if they are married, the place and date of the marriage; and their relationship, if any, to the child;

(2) except where the petitioners are relatives of the child within the second degree either by blood or affinity, an allegation that a decree of termination of the parent-child relationship with respect to each living parent of the child sought to be adopted has been entered and that such child was placed for adoption with the petitioners by a child placement agency, together with the name of said agency and the date of said placement;

(3) the date and place of birth of the child;

(4) the name of the child used in the proceeding, and if a change in name is desired, the new name;

(5) that it is the desire of the petitioners that the relationship of parent and child be established between them and the child;

(6) a full description and statement of value of all property owned or possessed by the child.

SECTION 8. [*Consents Required.*]

(a) Where a petition is filed by relatives of the child within the second degree either by blood or affinity, no adoption of such child may be ordered unless the written consent to the adoption of the child by the petitioners is given by each parent of the child or if there is no parent, by the guardian of the child's person. A minor parent may consent to an adoption but his consent shall be effective only when concurred in by his parents or his guardian of the person.

(b) Where a petition is filed by any other persons, no adoption of a child may be ordered unless the written consent to the adoption of such child by the petitioners is given by the child's guardian of the person.

Where the consent of a guardian of the child's person is required, the court may dispense with such consent only if it finds that the withholding of such consent is arbitrary and capricious.

Consents shall be acknowledged before an officer authorized to take acknowledgments and witnessed by a representative of a child placement agency or by a representative of the court.

(c) Where the child is 12 years of age or older, the adoption shall not be granted without his consent. Such consent shall be given in court or shall be in writing in such form as the court may direct.

SECTION 9. [*Filing of Consents.*]

Written consents required by Sec. 8(a) shall be attached to the adoption petition. In the case of a consent by a guardian of the child's person, the guardian shall file directly with the court satisfactory evidence of his authority to consent to adoption of the child. Where the parent-child relationship has been terminated by judicial decree a certified copy of the termination decree shall be filed directly with the court by the guardian of the child's person.

SECTION 10. [*Withdrawal of Consent.*]

Withdrawal of any consent filed in connection with a petition for adoption hereunder shall not be permitted, except that the court after notice and opportunity to be heard is given to the petitioner in the adoption proceeding, to the person seeking to withdraw consent and to an authorized agency involved in this proceeding, may, if it finds that the best interest of the child will be furthered thereby, issue a written order permitting the withdrawal of such consent. The entry of an order of adoption renders any consent irrevocable.

SECTION 11. [*Notice—Service.*]

After a petition has been filed, the court shall set the time and place for a hearing and shall cause notice thereof to be served on the petitioners, on the child placement agency, if any, that placed the child with the petitioners for adoption, and on any authorized agency responsible for making the social study required by Sec. 12. Notice shall be given by personal service or by registered or certified mail.

SECTION 12. [*Social Study Prior to Disposition.*][109]

* * *

SECTION 13. [*The Child Living Within the Proposed Adoptive Home.*]

The hearing on the petition shall not be held until the child has lived 12 months in the home of the petitioners under the supervision of an authorized agency. The 12 months' residence may be waived by order of the court on the motion of the petitioners or an authorized agency involved in this proceeding if the court is satisfied that the best interest of the child will be furthered thereby.

SECTION 14. [*Hearing.*][110]

* * *

SECTION 15. [*Decree.*]

If after the hearing and consideration of the report required by Sect. 12, the court is satisfied that the requirements of this Act have been met and that the adoption is in the best interest of the child, the court shall make an order granting the adoption. The order may change the name of the child to that of the petitioners. The order of the court shall be in writing and shall recite the findings upon which such order is based including findings pertaining to the court's jurisdiction. Such order shall be conclusive and binding on all persons from the date of entry.

Birth certificates

[Incorporate by reference to appropriate sections of the State birth registration law, preferably in accordance with Secs. 16 and 17 of the Model State Vital Statistics Act: 1959 Revision]. The clerk of court shall mail a copy of every adoption decree to the State (department of public welfare).

SECTION 16. [*Effect of Adoption Decree.*]

(a) Upon entry of the decree of adoption, the relationship of parent and child and all the legal rights, privileges, duties, obligations, and other legal consequences of the natural relationship of child and parent shall thereafter exist between the adopted person and the

109. This section is substantially identical to § 7 of the TERMINATION ACT.

110. This section is substantially identical to § 8 of the TERMINATION ACT.

adoptive parents the same as though the child were born to the adoptive parents in lawful wedlock. The adopted child shall be entitled to inherit real and personal property from and through the adoptive parents and the adoptive parents shall be entitled to inherit real and personal property from and through the adopted child the same as though the child were born to the adoptive parents in lawful wedlock.

(b) Upon entry of the decree of adoption, the relationship of parent and child between the adopted person and the persons who were his parents just prior to the decree of adoption shall be completely severed and all the legal rights, privileges, duties, obligations, and other legal consequences of the relationship shall cease to exist, including the right of inheritance, except that where the adoption is by the spouse of the child's parent, the relationship of the child to such parent shall remain unchanged by the decree of adoption.

SECTION 17. [*Withdrawal or Denial of Petition.*]

(a) In any case in which the petition is withdrawn or denied the court shall order the removal of the child from the proposed adoptive home if the court finds that such removal is in the child's best interest. If such removal is ordered, the court shall vest temporary legal custody of the child in an authorized agency with power to remove the child and to plan for the child's welfare and the court shall fix responsibility for temporary child support, provided, however, that where the parent-child relationship has been terminated by judicial decree, the authorized agency or individual granted legal custody of the child by such decree shall, unless the court otherwise orders, continue to act in such capacity, and such individual or authorized agency shall be similarly empowered to remove the child from the proposed adoptive home. The court shall in addition certify the case to an appropriate court for such further action as may be necessary.

(b) In any case in which the petition is withdrawn or denied and the court does not order the removal of the child, the court shall certify the case to an appropriate court for such further action as may be necessary.

SECTION 18. [*Abatement.*]

In the event of the death of the petitioner or of the petitioners, the proceeding shall abate and the petition for adoption shall be dismissed, but where there are two petitioners and one of the peti-

tioners dies, the proceeding shall continue uninterrupted as if the death had not occurred.

SECTION 19. [*Records.*][111]

* * *

SECTION 20. [*Appeals.* §[112]

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SECTION 21. [*Invalidation.*]

After 2 years from the date the adoption decree is entered, any irregularity in the proceeding shall be deemed cured and the validity of the decree shall not thereafter be subject to attack on any such ground in any collateral or direct proceeding.

SECTION 22. [*Subsequent Adoption.*]

The adoption of an adopted person is authorized, and in that case, the references to the parents are to adoptive parents.

SECTION 23. [*Adoption Decrees of Other States.*]

Where an adoption has been judicially decreed by a court in another State, such decree shall have the same force and effect as to matters within the jurisdiction of this State as though it had been granted by a court of this State.[113]

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111. This section is substantially identical to § 12 of the TERMINATION ACT.

112. This section is substantially identical to § 13 of the TERMINATION ACT.

113. The language of § 23 is substantially identical to that of § 14 of the TERMINATION ACT and has the same effect. §§ 24-27 relating to Effective Date, Separability, Construction and Repeal are not included herein.