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Delineating the Reasonable Progress Ground as a Basis for Termination of Parental Rights - In re Austin

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DELINEATING THE REASONABLE PROGRESS GROUND AS A BASIS FOR TERMINATION OF PARENTAL RIGHTS—*IN RE AUSTIN*

One of the most significant areas of concern arising from neglect[1] and dependency[2] cases is the problem of the child who must spend his childhood in long-term foster care.[3] Of the several aspects[4] which this general

1. A neglected minor is defined as a child under 18 years of age:
(a) who is neglected as to proper care or necessary support, education as required by law, or as to medical or other remedial care recognized under State law or other care necessary for his well-being, or who is abandoned by his parents, guardian or custodian; or
(b) whose environment is injurious to his welfare or whose behavior is injurious to his own welfare or that of others.

ILL. REV. STAT. ch. 37, § 702-4 (1977).

2. The Juvenile Court Act defines a dependent minor as one under 18 years of age
(a) who is without a parent, guardian, or legal custodian;
(b) who is without proper care because of the physical or mental disability of his parent, guardian or custodian; or
(c) who has a parent, guardian, or legal custodian who with good cause, wishes to be relieved of all residual parental rights and responsibilities, guardianship or custody. . . .

Id. § 702-5.

3. A child may be taken from the custody of his parents if the court finds that there is probable cause to believe that the child is dependent or neglected and that removal from the home is a matter of urgent and immediate necessity so as to protect the child. When the court enters these findings, it then proceeds to place temporary custody with the state or, if appropriate, with a private individual, such as a relative or friend of the family. *Id.* § 703-6(2).

The Juvenile Court Act provides a great deal of flexibility to the courts as to the manner in which neglect and dependency cases may be resolved. For example, the court may allow the child to remain in the home and place the parents under supervision without proceeding to adjudication or entering findings. *Id.* §§ 704-7(1), 705-5. If the case proceeds to adjudication and the court finds a) the minor to be neglected or dependent and b) that entering a wardship order would serve the best interests of the child and the public, the court may enter an order adjudicating the child a ward of the court. *Id.* § 704-8(2). The Act defines a ward of the court to be a minor who has been adjudged delinquent, in need of supervision, neglected, or dependent. *Id.* §§ 701-18, 704-8.

One disposition available to the court is to return the child to the home and to place the parents under supervision. *Id.* § 705-4. If the court finds at disposition, however, that the parents are unable, unwilling, or unfit to care for the child and that taking the child from the parents' custody would be in his best interest, *id.* § 705-7(1), the judge may place the minor under the guardianship of the state. *Id.* § 705-7(1)(f). In addition, rather than placing guardianship with the state, the Act allows the court to place the child in the custody of a relative or other person, to grant guardianship to a probation officer, to commit the minor to another placement agency, or to commit the child to a licensed training or industrial school. *Id.* § 705-7(1)(a) to (d).

The above statutory procedures are also described in Comment, *Child Abuse: The Role of Adoption as a Preventative Measure*, 10 J. MAR. J. PRAC. & PROC. 546, 551-52 (1977) [hereinafter cited as *Adoption as a Preventative Measure*]; Comment, *The Child Abuse Epidemic: Illinois' Legislative Response and Some Further Suggestions*, 1974 U. ILL. L.F. 403, 415 [hereinafter cited as *Illinois' Legislative Response*].

4. Although foster placement is supposed to be a temporary alternative to allowing the child to remain in an unsuitable home environment, foster placement presents myriad prob-

problem encompasses, one is particularly troubling: that of a child who has formed permanent bonds with foster parents but who still may be considered ineligible for adoption because the natural parents persist in sincere but unsuccessful efforts to correct the conditions which necessitated the child's removal. As a result, the utilization of impermanent but long-term foster care has been the subject of continuing concern to authorities in juvenile law and the related social sciences.[5] Several experts believe that years of impermanent foster placement have a detrimental effect upon the child's de-

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lems. For instance, a child may experience multiple placements. He or she may be returned to his natural parents after spending several years in one home. Moreover, while foster placement is supposed to be a temporary arrangement, in actuality, more than half such children spend more than three years in placement. *See* Mnookin, *Foster Care–In Whose Best Interest?*, 43 HARV. EDUC. REV. 599, 611 (1973) [hereinafter cited as Mnookin]; Rein, Nutt & Weiss, *Foster Family Care: Myth and Reality*, in CHILDREN AND DECENT PEOPLE 24, 37-39 (A. Schorr ed. 1974); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care and Termination of Parental Rights*, 28 STAN. L. REV. 623, 626-627 (1976) [hereinafter cited as Wald].

5. Mnookin is concerned with the appropriate legal standard to apply in determining whether a child should be removed from his parents' custody. Although the generally used best interests standard is founded upon that basic precept of juvenile court philosophy, individual justice, Mnookin criticizes the standard in several respects. For example, he states that the test completely ignores the interests of the parents. Additionally, when attempting to determine what would serve the child's best interests, the juvenile court must compare the probable consequence of leaving the child in the parents' home with the "largely unknown alternative" of placing the child in foster care. This is due to the fact that the court may not be knowledgeable about or have control over the child welfare agency. Moreover, Mnookin states that in ascertaining the child's best interests, the juvenile court judge does not have the guidance of statutory standards and must necessarily make his determination based upon his personal values. This personal judgment "leaves considerable scope for class bias." *See* Mnookin, *supra* note 4, at 614-22.

Other studies also have indicated that because of insufficient resources, the focus in many child welfare agencies is upon the care of the child within its system, making the rehabilitation of the parents a second priority. H. MAAS & R. ENGLER, CHILDREN IN NEED OF PARENTS 390-91 (1959).

Wald states: "[I]t is now the prevailing ethic among child care experts that foster care has been overused as a means of protecting children. Although still widely used, foster care is considered generally to be a worse alternative than leaving a child in his home." Wald, *supra* note 4, at 644. This conclusion is based on several factors including the initial trauma of removal, perception of foster placement as punishment, identity problems and loyalty conflicts, the utilization of holding institutions, the inconsistent quality of foster homes, and the likelihood of multiple placements with the accompanying detrimental effect. *Id.* at 644-46. *See also* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973) [hereinafter cited as J. GOLDSTEIN]; H. STONE, REFLECTIONS ON FOSTER CARE (1969); Burt & Balyeat, *A New System for Improving the Care of Neglected and Abused Children*, 53 CHILD WELFARE 167, 168 (1974); Dembitz, Midonick, Pilpel & Strauss, *Panel Discussion–The Relationship between Promise and Performance in State Intervention in Family Life*, 9 COLUM. J. L. & SOC. PROB. 230 (1968); Lewis, *Foster Family Care: Has It Fulfilled its Promise?*, 355 ANNALS 31 (1964); Maluccio, *Foster Family Care Revisited: Problems and Prospects*, 31 PUB. WELFARE 12 (1973); Mnookin, *supra* note 4, at 622-27; Wiltse & Gambrill, *Foster Care, 1973: A Reappraisal*, 32 PUB. WELFARE 7 (1974); Note, *In the Child's Best Interests: Rights of the Natural Parents in Child Placement Proceedings*, 51 N.Y.U.L. REV. 446 (1976).

velopment[6] and that the sooner a permanent plan can be made for a child, the better.[7]

In an effort to alleviate this problem, Illinois provides in the Juvenile Court Act that a ward of the court, that is, a child adjudicated to be ne-

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6. Mnookin states: "Analysis of the differential effects of foster placement on a child's development raises severe methodological problems; these include defining a control group, establishing a standard of "successful development," and isolating the factors responsible for any noticeable effects. No studies prove either that foster care benefits or harms children." Mnookin, *supra* note 4, at 622.

Mnookin goes on to cite empirical studies which show, however, that children in foster care experience high rates of psychiatric disturbance. *Id.* at 623. He notes several factors which may cause emotional problems for foster children: "separation trauma" caused by the act of placement in itself; the child's conflicting loyalties between his natural parents and foster parents; and the inherently impermanent nature of foster placement which is intensified by experiencing multiple placements. *Id.* at 623-25. *See also* THE COMMUNITY'S CHILDREN: LONG-TERM SUBSTITUTE CARE: A GUIDE FOR THE INTELLIGENT LAYMAN (J. Parfit ed. 1967); G. TRASLER, IN PLACE OF PARENTS: A STUDY OF FOSTER CARE (1960); E. WEINSTEIN, THE SELF-IMAGE OF THE FOSTER CHILD (1960); Eisenberg, *The Sins of the Fathers: Urban Decay and Social Pathology*, 32 AM. J. ORTHOPSYCHIATRY 14 (1962); Maas, *Highlights of the Foster Care Project: Introduction*, 38 CHILD WELFARE 5 (1959).

7. Two commentators criticize the entire present system—from the standard on which the initial decision to remove the child is based to the length of time most children must spend in foster care. In addition to Mnookin's propositions, Wald also asserts that the best interests standard presently used to determine the child placement issue should be discarded. *See* note 5 *supra*. Wald's proposed standard is that the court determine "only whether the child can be protected from the specific harm(s) justifying intervention if left in the home." Wald, *supra* note 4, at 651. He states that his "specific harm" standard is preferable for three reasons. First, it is consistent with the purposes of the initial intervention, *i.e.*, to protect the child from specific harms. Second, "while a court must still make a difficult factual determination—the court at least knows the precise issue to be determined." Lastly, "the test helps minimize the possibility of unwarranted removal." *Id.* Thus, under Wald's standard, a child could be removed from his parents' custody only when the child was seriously endangered and the social welfare agency could not counter that danger by providing available services to the family. *Id.*

Wald proposes a system to monitor the status of children who are in placement. At the first stage, when the agency recommends placement, the court would require the agency to specify a realistic plan by which the parents would be able to regain custody of their child. Moreover, the court would indicate to the parents what services the agency was expected to provide and what the parents' obligations would be to effectuate the plan. Furthermore, the agency would be required to assign one specific individual to the case and that social worker would report any major problem directly to the court. The parents would participate in drawing up a visitation schedule and would remain involved in many of their child's activities while he was in placement. The court furthermore would review the case six months after placement and every six months thereafter. *Id.* at 679-84. However, if the offered services had not resulted in the parents being able to resume custody of the child, under Wald's proposed system parental rights would be terminated "by the time of the six-month review if the child is under three at the time of placement or by the twelve-month review for children over this age." *Id.* at 691.

Mnookin's proposed standard for removal of the child from the home also focuses on the court's determining whether the child was in immediate danger in the home and whether there were any reasonable means to protect the child's health without removal. Mnookin, *supra* note 4, at 631. Moreover, Mnookin asserts that in order to ensure a degree of stability to a foster child's life, the judge be required at the end of a fixed time period to choose between returning the child to his parents, terminating parental rights, or ordering "some other stable long-term environment." *Id.* at 633.

glected or dependent,[8] may be the subject of an adoption petition.[9] In conjunction with this provision, the Adoption Act provides that parents may be found unfit if they fail to make *reasonable efforts* to correct the conditions which were the basis for the child's removal *or* fail to make *reasonable progress* toward the child's return within twelve months of a determination of neglect or dependency.[10] After this initial finding of parental unfitness, if the judge further finds that appointment of a guardian with the right to consent to adoption is in the child's best interests, the court may give the child's guardian the power to consent to the adoption. This order terminates all parental rights.[11] Thus, the Juvenile Court and Adoption Acts provide

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See also J. GOLDSTEIN, *supra* note 5, at 40-45, wherein the authors discuss how a child's sense of time varies according to the child's age. This age differential affects the degree of trauma resulting from the initial placement and the rapidity with which the child will form new emotional bonds after placement.

8. A court may also enter a wardship order if a minor has been adjudicated delinquent or in need of supervision. *See* note 3 *supra*.

9. The Act provides that:

> (2) If the petition prays and the court finds that it is in the best interests of the minor that a guardian . . . be appointed and authorized to consent to the adoption of the minor, the court with the consent of the parents, if living, or after finding a non-consenting parent to be unfit as provided in this Section, may empower the guardian . . . of the minor . . . to appear in court where any proceedings for the adoption of the minor may . . . be pending and to consent to the adoption. Such consent is sufficient to authorize the court in the adoption proceedings to enter a proper order or decree of adoption without further notice to, or consent by, the parents of the minor. An order so empowering the guardian to consent to adoption terminates parental rights, deprives the parents of the minor of all legal rights as respects the minor and relieves them of all parental responsibility for him, and frees the minor from all obligations of maintenance and obedience. . . .

ILL. REV. STAT. ch. 37, § 705-9(2) (1977).

Thus, for the child who is under state guardianship, the Illinois Department of Children and Family Services may file a supplemental petition requesting the juvenile court's authorization for the guardian to consent to the child's adoption. If the parents have not consented, this petition will allege parental unfitness based on the appropriate grounds set forth in the Adoption Act, ILL. REV. STAT. ch. 40, § 1501(D)(a) to (n) (1977), which are incorporated into the Juvenile Court Act, ILL. REV. STAT. ch. 37, § 705-9(3) (1977). Moreover, the petition must state that the court's granting of the requested authorization would be in the child's best interests. The court thus must enter both the finding of parental unfitness and the finding of best interests as the basis for the authorization to the guardian to consent to the adoption.

10. The Act provides that:

> D. "Unfit person" means any person whom the court shall find to be unfit to have a child sought to be adopted, the grounds of such unfitness being any one of the following:
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> (m) Failure to make reasonable efforts to correct the conditions which were the basis for the removal of the child from his parents or to make reasonable progress toward the return of the child to his parents within 12 months after an adjudication of neglected minor under Section 2-4 or dependent minor under Section 2-5 of the Juvenile Court Act.

ILL. REV. STAT. ch. 40, § 1501(D)(m) (1977).

11. ILL. REV. STAT. ch. 37, § 705-9(2) (1977).

The child, however, retains the right of inheritance from and through the natural parent. *See, e.g.*, Bachleda v. Dean, 48 Ill. 2d 16, 19, 268 N.E.2d 11, 13 (1971). *In re* Estate of Tilliski, 390

that a finding of unfitness negates the parental consent which would otherwise have been required under the statutes.[12]

Although the reasonable efforts/reasonable progress requirements were added to the Adoption Act's definition of an unfit person in 1973,[13] it was only in the recent case of *In re Austin*[14] that the Appellate Court for the First District set forth the standard to be used to determine "reasonable progress."[15] By its articulation of this standard, the *Austin* court made a significant contribution to Illinois adoption law. The *Austin* standard makes it clear that parents cannot defeat a termination petition solely by asserting their sincere but unsuccessful efforts to correct conditions.

This Note will discuss the legislative intent behind the reasonable efforts/reasonable progress grounds as was perceived by the court in the case of *In re Massey*[16]—that of giving greater protection to the child's best interests. The Note will also examine the analysis through which the *Austin* court arrived at its reasonable progress standard. It will demonstrate how the language in the *Austin* decision concerning the child's best interests blurs the distinction between the issues of parental unfitness and the child's best interests in a termination case. Furthermore, two possible interpretations of *Austin's* best interests discussion will be presented. Lastly, the Note will discuss the implications flowing from the *Austin* standard for reasonable progress.

FACTS AND PROCEDURAL HISTORY

The Austin children were adjudged to be neglected minors based upon a specific finding of abuse.[17] At the dispositional hearing, the children were placed under the guardianship of the state. More than two years later, the state filed supplemental petitions alleging that their parents, the Harveys,[18] were unfit. The state requested the court to appoint a guardian with the right to consent to the children's adoption, thus terminating the Harveys'

Ill. 273, 280, 61 N.E.2d 24, 26 (1945). Moreover, the natural parents remain obligated to support the child. *See, e.g.*, Bachleda v. Dean, 48 Ill. 2d 16, 19, 268 N.E.2d 11, 13 (1971).

12. ILL. REV. STAT. ch. 37, § 705-9(2); *id.* at ch. 40, § 1510 (1977).

13. Act of Sept. 14, 1973, P.A. No. 78-854, § 1(k)(1), 1973 ILL. LAWS 2617. The reasonable efforts/reasonable progress grounds became effective as of October 1, 1973. Moreover, the subsection was amended in 1977 to include cases of dependency as well as neglect. Also, the time period allowed for parental rehabilitation was shortened from 24 to 12 months following the adjudication of neglect or dependency. Act of Sept. 8, 1977, P.A. No. 80-558, § 1(D)(m), 1977 ILL. LAWS 1780. This expanded subsection became effective as of October 1, 1977.

14. 61 Ill. App. 3d 344, 378 N.E.2d 538 (1st Dist. 1978).

15. *Id.* at 350, 378 N.E.2d at 542-43.

16. 35 Ill. App. 3d 518, 341 N.E.2d 405 (4th Dist. 1976).

17. 61 Ill. App. 3d at 345, 378 N.E.2d at 539.

18. The trial record indicates that Mr. Harvey was the stepfather of all but one of the children. Record, vol. 2, at 35. However, the appellate court refers to him as the children's father.

parental rights.[19] The state alleged unfitness on the ground that the parents had failed to "maintain a reasonable degree of interest, concern or responsibility as to the children's welfare."[20] Moreover, it alleged that the parents had failed to make reasonable efforts to correct conditions or to make reasonable progress toward the return of the children within 24 months[21] after the finding of neglect.[22] At the close of the state's case, the trial court granted a directed finding for the parents.[23] The state appealed the trial court's use of a subjective standard for the reasonable progress ground.[24]

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19. The appellate court did not specifically state that it was reviewing a termination action. However, this fact is clearly expressed in a quote from the trial judge which is set forth in the appellate court's opinion. 61 Ill. App. 3d at 345, 378 N.E.2d at 541.

20. *Id.* at 346, 378 N.E.2d at 540. ILL. REV. STAT. ch. 40, § 1501(D)(b) (1977).

21. The supplemental petitions in *Austin* were filed before the subsection was amended shortening the rehabilitation period to 12 months. *See* note 13 *supra*.

22. 61 Ill. App. 3d at 346, 378 N.E.2d at 540.

The state presented testimony from a social worker, a court psychiatrist, and the father. The social worker testified that in her opinion the parents had made no role change, were unable to establish a plan to live together, to accept any counseling, or to engage in meaningful conversation with the children during visits. *Id.* at 345, 378 N.E.2d at 539.

The psychiatrist testified that, based on his interview with the parents, and in addition to agency and other psychiatric reports, he found the parents' relationship so provocative that anyone in the same relationship would lose control and that their combined difficulties caused an impossible situation for resolving their difficulties. The psychiatrist stated that in his opinion the children should be freed for adoption. *Id.* at 345-46, 378 N.E.2d at 539-40.

The father was called as an adverse witness and testified that he and the mother were again living together after a separation. *Id.* at 346, 378 N.E.2d at 540.

23. *Id.* The state's allegation that the parents had failed to maintain a reasonable degree of interest, concern, or responsibility as to the children's welfare was rejected by the trial court and was not appealed by the state. *Id.* As to the reasonable efforts/reasonable progress grounds, the trial court found that the parents had made reasonable efforts to correct conditions within the meaning of the statute because, although those efforts were not substantial in an objective sense, they were significant in light of the Harveys' personal limitations. *Id.* The state appealed neither the rationale nor the outcome of this ruling.

Moreover, it is evident that the trial judge interpreted the subsection to require the same subjective standard for each ground. In sustaining the parents' motion for a directed finding, the court stated:

> [T]he question is, what did the legislature mean when they said reasonable . . . progress toward the return of the children? I construe that to mean reasonable given the limitations of the parents themselves . . . the Court feels that the special disabilities of the parents where such a provision is relied upon must be taken into consideration by this Court in determining whether or not the progress they have made is reasonable.

Id. at 347, 378 N.E.2d at 540. The trial court indicated its belief that the legislative intent was to prevent children from being in foster care for an overly long time. The court also acknowledged that these parents might never be ready for the return of the children. *Id.* at 347-48, 378 N.E.2d at 540-41. Testimony adduced at trial established that both parents suffered from personality disorders and that the mother had both visual and hearing impairments. Record, vol. 2 at 15-17. *See also* notes 141-43 and accompanying text *infra*. Thus, because of the trial judge's reliance on the above subjective standard, he apparently felt compelled to find that the state had not presented clear and convincing evidence of failure to make reasonable progress. 61 Ill. App. 3d at 349, 378 N.E.2d at 542.

24. *Id.* at 347, 378 N.E.2d at 540.

After examining the trial court's interpretation of the statutory standard for reasonable progress,[25] the appellate court reversed the directed finding on the ground that the lower court had applied an improper standard for this requirement.[26] The court found that, while the reasonable efforts ground required the use of a subjective standard,[27] the reasonable progress standard required measurable or demonstrable movement toward the goal of return of the child.[28] The appellate court also held that the two grounds are disjunctive,[29] that is, each ground is separate and distinct, so that either may be the basis for a finding of unfitness.[30]

BACKGROUND

Throughout a long line of federal and state cases, the principle has been firmly established that the right to family autonomy is a fundamental one.[31] Included in the concept of family autonomy is the parents' inherent right to the companionship and custody of their own child.[32] Notwithstanding the

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25. *See* note 23 *supra*.

26. 61 Ill. App. 3d at 349, 378 N.E.2d at 543.

27. *Id.* at 350, 378 N.E.2d at 542.

28. *Id.*

29. Actually, it is the word "or" in the subsection which is the disjunctive. A disjunctive term is defined as a word "which is placed between two contraries. . . ." BLACK'S LAW DICTIONARY 555 (4th ed. 1968). Therefore, it is the word "or" which gives each of the two grounds its own separate force.

30. 61 Ill. App. 3d at 349, 378 N.E.2d at 542.

31. Various aspects of the right to family autonomy have been upheld by the courts. *See, e.g.*, Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974) (mandatory maternity leave regulation struck down as an irrebutable presumption which penalized female teachers for deciding to have children); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Court upheld right of Amish parents to receive exemption from compulsory education laws in order to inculcate religious beliefs in children); Stanley v. Illinois, 405 U.S. 645 (1972) (Court struck down Illinois legislation which denied unwed father a hearing on his fitness as a parent); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (Oregon Compulsory Education Act struck down as an unreasonable interference with the liberty of parents to direct their child's education); Meyer v. Nebraska, 262 U.S. 390 (1923) (Nebraska statute prohibiting the teaching of a foreign language to a child under the eighth grade struck down as violative of parents' right to have child so instructed); *In re* Ybarra, 29 Ill. App. 3d 725, 331 N.E.2d 224 (1st Dist. 1975) (parental rights may not be terminated based on lack of interest when mother could not visit due to ill health, poverty, family problems, and lack of transportation).

32. In the case of Stanley v. Illinois, 405 U.S. 645 (1972), petitioner was an unwed father whose children were declared wards of the state upon the death of their mother. Under Illinois law, the state did not have to provide a hearing on the fitness of the unmarried father. The state instead could commence dependency proceedings and the court could declare the children state wards. The United States Supreme Court struck down the Illinois legislative scheme as violative of the due process clause of the 14th amendment. The Court stated:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody and management of his or her children 'come [*sic*] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.

fundamental nature of parental rights, courts have held that they are not absolute in nature. The state, as parens patriae,[33] may intervene in the parent-child relationship for compelling reasons.[34] One such reason is the protection of neglected and dependent children.[35] In Illinois, the state's obligation to protect children is embodied in the Abused and Neglected Child Reporting Act,[36] the Juvenile Court Act,[37] and the Adoption Act.[38]

In order to accomplish this protective function, the Juvenile Court Act provides a variety of ways in which neglect and dependency cases may be resolved.[39] Although the initial consideration in the resolution of such cases is the welfare and safety of the child, the Act mandates that the state preserve and strengthen the minor's family ties whenever possible.[40] Thus, even when a child has been removed from the home as a result of parental neglect or abuse and placed under state guardianship, the state must at-

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Id. at 651, *quoting in part* Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

One commentator, however, has criticized the principle of parental rights over the child in that the child is treated like a chattel while the parents' obligations and responsibilities toward the child are ignored. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 18.5, at 631 (1968) [hereinafter cited as H. CLARK]. *See also In re* Burton, 43 Ill. App. 3d 294, 356 N.E.2d 1279 (5th Dist. 1976), wherein the court recognized the property aspects of parental rights, *id.* at 297, 356 N.E.2d at 1283, yet also heeded the caution of Justice Barry that " '[b]y someone's standards, it is always possible to find a better home for a child than the one Providence has bestowed'." *Id.* at 298, 356 N.E.2d at 1283, *quoting In re* Hrusosky, 39 Ill. App. 3d 954, 960, 351 N.E.2d 386, 391 (3d. Dist. 1976) (Barry, J., dissenting).

33. The origin of the doctrine of parens patriae appears to have been derived from the English Crown's prerogative to protect those subjects who were unable to protect themselves. At least as far back as the seventeenth century, English equity courts exercised jurisdiction over children so as to protect their welfare. Similar jurisdiction was recognized at an early date in the United States and this jurisdiction is today covered by local statutes. H. CLARK, *supra* note 32 § 17.1, at 572.

34. For example, the state may pass legislation protecting children from harsh or unhealthy working conditions. Thus, the United States Supreme Court upheld the right of a state to enforce the child-labor laws in the case of Prince v. Massachusetts, 321 U.S. 158 (1944), even though the child in question was an ordained minister in the Jehovah's Witnesses Church and the activity in question was that of selling a religious publication under the supervision of the child's legal custodian.

35. The power of the state to intervene in the parent-child relationship so as to protect neglected and dependent children was noted by the court in Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952). In *Wallace*, the Illinois Supreme Court upheld the finding of dependency and the appointment of a guardian to consent to a blood transfusion for the minor over the objections of the parents on religious grounds. *See also* People v. Schoos, 15 Ill. App. 3d 964, 305 N.E.2d 560 (1st Dist. 1973), wherein the court affirmed the neglect finding and rejected the mother's challenge that the neglect statute was unconstitutionally vague and overly broad.

36. ILL. REV. STAT. ch. 23, § 2052 (1977).

37. ILL. REV. STAT. ch. 37, § 701-2 (1977).

38. ILL. REV. STAT. ch. 40, § 1525 (1977).

39. *See* note 3 *supra*.

40. ILL. REV. STAT. ch. 37, § 701-2(1) (1977).

tempt to rehabilitate the parents so that the family may be reunited.[41] If it appears, however, that the parents cannot be rehabilitated so as to enable them to resume custody of the child, the court may allow the minor, as its ward, to be the subject of an adoption petition.[42] In this way the state fulfills a second mandate of the Juvenile Court Act, that of placement in a family home so that the minor may become a member of the family by legal adoption or some other means.[43] Thus, adoption is one manner of solving neglect and dependency cases.[44]

Adoption in Neglect and Dependency Cases

Although the Juvenile Court Act provides for the adoption of wards of the court,[45] both that Act and the Adoption Act[46] require parental consent to

41. For example, the state must encourage parents to maintain contact with their children in placement. Moreover, in a series of cases brought under the ground of failure to maintain a reasonable degree of interest, ILL. REV. STAT. ch. 40, § 1501(D)(b) (1977), the appellate courts have denied the petitions for termination of parental rights due to either the state's failure to encourage visitation or to a social worker's refusal to allow parent-child contact. *See, e.g., In re* Overton, 21 Ill. App. 3d 1014, 316 N.E.2d 201 (2d Dist. 1974), where the court stated that since the mother kept the social worker informed as to her efforts to improve her life and since the social worker discouraged the mother from visiting, the state could not seek termination of parental rights on the reasonable interest ground. 21 Ill. App. 3d at 1019, 316 N.E.2d at 205. The order terminating parental rights was reversed in the case of *In re* Gibson, 24 Ill. App. 3d 981, 322 N.E.2d 223 (2d Dist. 1975), based on evidence that, when the mother was provided with transportation, the frequency of her visits with the child increased.

See also In re Taylor, 30 Ill. App. 3d 906, 334 N.E.2d 194 (1st Dist. 1975), in which the social worker testified that he had refused to give the children's addresses to the mother so that she might write to them. Also, the mother stated at the trial that previous social workers would not allow her to visit. The court reversed the finding of unfitness brought under the reasonable interest ground stating that "where official acts prevent a parent from maintaining contact with a child, unfitness under the Adoption Act cannot be proven by such lack of contact standing alone." 30 Ill. App. 3d at 911, 334 N.E.2d at 197.

It also appears that in cases involving mothers who are wards, the Department's burden increases. *See, e.g., In re* Barber, 55 Ill. App. 3d 587, 371 N.E.2d 299 (1st Dist. 1977). In *Barber*, the mother was a 19-year-old foster child when her child was born. The infant was placed in a foster home at three days of age. The mother left foster placement when she was 21 years old. At the trial there was conflicting testimony regarding the number of times the mother had contacted the child. Yet, by the mother's own testimony, two years had elapsed between the time of her last visit and the filing of the supplemental petition. *Id.* at 588, 371 N.E.2d at 300. The trial judge denied the petition, stating that he felt that the mother had been lulled into a state of false security and that the state had failed to produce evidence showing that it had made efforts to inculcate into the mother "the need for maintaining a greater degree of interest. . . ." *Id.* at 589, 371 N.E.2d at 301. The appellate court, approving the trial judge's reasoning, affirmed the ruling. *Id.* at 591-92, 371 N.E.2d at 302-03.

42. *See* note 8 *supra*.

43. ILL. REV. STAT. ch. 37, § 701-2 (1977).

44. *See Adoption as a Preventative Measure and Illinois' Legislative Response, supra* note 3, for a discussion of the use of adoption to prevent child abuse.

45. *See* note 9 *supra*.

46. ILL. REV. STAT. ch. 40, § 1510 (1977).

Illinois' first adoption statute waived consent only if the parents were deceased. 1867 ILL. LAWS 133. Shortly thereafter, parental desertion was added as a basis for waiving consent. ILL.

the adoption. This requirement is the result of the law's presumption that the child's best interests lies in living with his parents.[47] Obviously, in a great number of neglect and dependency cases, not only will parents refuse to consent to their child's adoption, they also will contest the termination of their parental rights. In these cases, the state may seek to free the child for adoption by alleging parental unfitness.[48]

Both the Adoption[49] and Juvenile Court[50] Acts provide that the parental consent requirement is waived upon a judicial finding of parental unfitness. The Adoption Act provides fourteen grounds for unfitness[51] and these are incorporated by reference in the Juvenile Court Act.[52] A fitness hearing may occur in juvenile court upon the filing of a supplemental petition asking the court to give the child's guardian the additional[53] right of consenting to the child's adoption.[54] A fitness hearing may also occur in the initial stage of an adoption proceeding.[55] The stakes involved in a fitness hearing are high—the termination of parental rights.[56] Because parental rights are of a fundamental nature, only a finding of unfitness is deemed to be a sufficient basis for termination of those rights.[57] Indeed, one author has stated that Illinois courts treat parental rights with a respect bordering on reverence and that the law favors the parent until the entry of an unfitness finding.[58]

REV. STAT. ch. 4, § 3 (1874). *See* Comment, *The Best Interests of the Child–The Illinois Adoption Act in Perspective*, 24 DEPAUL L. REV. 100 (1974), for a discussion of the evolution of the Illinois adoption statute.

47. Jarrett v. Jarrett, 348 Ill. App. 1, 6, 107 N.E.2d 622, 625 (3d Dist. 1952).

48. *See* note 9 *supra*.

49. ILL. REV. STAT. ch. 40, § 1510 (1977).

50. ILL. REV. STAT. ch. 37, § 705-9(2) (1977). *See also* note 9 *supra*.

51. ILL. REV. STAT. ch. 40, § 1501(D)(a) to (n) (1977). For example, an unfitness finding can be based on: the abandonment of the child, *id.* § (a); the failure to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare, *id.* § (b); substantial neglect of the child if continuous or repeated, *id.* § (d); extreme or repeated cruelty to the child, *id.* § (e); depravity, *id.* § (i); open and notorious adultery or fornication, *id.* § (j); and also on the other eight statutory grounds provided.

52. ILL. REV. STAT. ch. 37, § 705-9(3) (1977).

53. The Guardianship Administrator of the Department of Children and Family Services or his designee, acting as the ward's guardian may consent to the ward's marriage, his enlistment in the armed forces, legal proceedings, major medical and surgical treatment, and an application for a driver's license. ILL. REV. STAT. ch. 37, § 705-7(1)(f) (1977). Upon the juvenile court's granting to the guardian the right to consent to the child's adoption, the guardian may go into adoption court and give his consent. This consent is a sufficient basis for the entry of a proper adoption order. *Id.* §§ 705-7(3), 705-9(2) (1977).

54. *Id. See also* note 9 *supra*.

55. ILL. REV. STAT. ch. 40, § 1510 (1977). *See also In re Burton*, 43 Ill. App. 3d 294, 356 N.E.2d 1279 (1976), where the foster parents filed adoption petitions.

56. ILL. REV. STAT. ch. 37, § 705-9(2) (1977). *See also* note 9 *supra*.

57. *See, e.g., In re* Woods, 54 Ill. App. 3d 729, 369 N.E.2d 1356 (1st Dist. 1977) (clear and convincing evidence of parental failure to maintain a reasonable degree of interest overcomes inherent parental rights); *In re* Grant, 29 Ill. App. 3d 731, 331 N.E.2d 219 (1st Dist. 1975) (same). *See also In re* Buttram, 56 Ill. App. 3d 950, 372 N.E.2d 1135 (3d Dist. 1978) (unfitness based on depravity and best interests of the child outweighing residual parental rights).

58. T. Cowgill, *Toward The Concept of Future Parental Capacity Under The Illinois Adoption Act*, 66 ILL. B.J. 638 (1978) [hereinafter cited as Cowgill].

In addition to requiring a court to make a finding of unfitness, the Juvenile Court Act requires the judge to find that the appointment of such a guardian is in the child's best interests.[59] Thus, it appears that a court may decline to terminate parental rights where the child's chances for adoption are unlikely.[60] Moreover, the Adoption Act provides that the child's best interests are to be the prime considerations in the adoption proceedings[61] and in the interpretation of the Act.[62]

It is therefore apparent that in a termination case, the juvenile court is faced with two weighty issues—parental unfitness and the child's best interests.[63] The courts perceive each issue as separate and distinct. Parental unfitness is the threshhold issue and is addressed at the adjudicatory phase of the termination action. At this hearing, the focus is upon the parents' conduct. It is only at the dispositional stage of the action that the court may next consider the child's best interests.[64] If unfitness is found, then the

59. ILL. REV. STAT. ch. 37, § 705-9(2) (1977).

60. *See, e.g., In re* Gibson, 24 Ill. App. 3d 981, 322 N.E.2d 223 (1975). Although the court reversed the order terminating parental rights because it did not find the evidence to be clear and convincing, the court discussed the problems which would probably be encountered placing the child (12 years of age and with a learning disability) in an adoptive home. The court stated that while the child could not be assured of adoption, if the order were allowed to stand, the loss of the girl's mother would be certain. The court concluded that "[t]his is a fact we do not care to balance against the uncertain prospects of the child's adoption in order to satisfy a feeling that we are acting in the best interests of the child." *Id.* at 988, 322 N.E.2d at 228.

61. ILL. REV. STAT. ch. 40, § 1519 (1977).

62. *Id.* § 1525.

63. Because of the gravity of the interests at stake in termination cases, the courts have developed a set of guidelines to assist them in the determination of parental unfitness. For example, the statutory grounds for unfitness must be set forth with particularity. *In re* Westland, 48 Ill. App. 3d 172, 177, 362 N.E.2d 1153, 1157 (4th Dist. 1977) (appellate court reversed order appointing a guardian with right to consent to adoption because petition did not allege unfitness under the statute and mother was not found unfit pursuant to the statute). The burden of establishing parental unfitness rests upon the petitioner and he must provide clear and convincing evidence to support the allegation. *In re* Love, 50 Ill. App. 3d 1018, 1023, 366 N.E.2d 139, 142 (3d Dist. 1977) (trial court's unfitness finding affirmed based on clear and convincing evidence that parents were not mentally equipped to maintain a reasonable degree of interest, concern, or responsibility for the child's welfare). Such cases are to be carefully reviewed by the appellate courts. *In re* Woods, 54 Ill. App. 3d 729, 734, 369 N.E.2d 1356, 1360 (1st Dist. 1977) (evidence that father visited children six times in twelve years supported trial court's finding that father was unfit in that he failed to maintain a reasonable degree of interest). Termination cases are sui generis and thus each case is normally decided upon its unique set of facts. *In re* Hurley, 44 Ill. App. 3d 260, 266, 357 N.E.2d 815, 819 (2d Dist. 1976) (finding that mother was unfit due to failure to maintain a reasonable degree of interest was not supported by the evidence because of her ongoing contact with the children). The reviewing courts will not disturb the trial court's findings unless they are against the manifest weight of the evidence. *In re* Woods, 54 Ill. App. 3d 729, 737, 369 N.E.2d 1356, 1362 (1st Dist. 1977).

64. One attorney with expertise in the area of termination of parental rights states that in the termination proceeding, the state has the burden of proof and of going forward. Thus, the state must present a prima facie case of parental unfitness before the parents are required to present their defense. Absent this prima facie showing, the court must sustain the parents' motion for a directed finding. The state's evidence must clearly and convincingly show that the parents' conduct fell within the alleged statutory ground for a finding of unfitness. On the other

child's best interests become the paramount concern of the law for the remainder of the termination action and the subsequent adoption proceedings. This judicial mechanism has been described as a "2-step process"[65] which acts as a procedural safeguard of the parents' rights.[66]

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hand, evidence which deals with the child's best interests is that which does not pertain to the parents' conduct. Examples of relevant evidence include factors probative of revealing development of a psychological parent-child relationship with the foster parents, the length of time the child has been in foster placement, and the desires of the child and foster parents to proceed with the adoption. Thus, a finding of unfitness may not necessarily result in appointment of a guardian with the right to consent to adoption if, for example, the child has maintained a close relationship with his parents and opposes the adoption. Interview with Carol Amadio, Technical Advisor, Legal Staff, Ill. Dept. of Children and Family Services, in Chicago (February 22, 1979).

The evidence dealing with both unfitness and best interests may be presented during the state's case. Since the issue being adjudicated, however, is the parents' fitness, conceptually the judge must make a finding of unfitness before considering best interests. Some judges will not consider evidence dealing with the child's best interests during the adjudicatory phase, *i.e.*, the fitness hearing. Moreover, particularly since *Austin*, *see* note 139 and accompanying text *infra*, this area of the law is unclear as to how to distinguish between the unfitness and best interests issues. *Id.*

For example, in the Fifth District case of *In re* Burton, 43 Ill. App. 3d 294, 356 N.E.2d 1279 (5th Dist. 1976), in which the foster parents filed adoption petitions, the appellate court reversed the finding of unfitness and remanded the case because the trial court admitted evidence during the fitness hearing which dealt with the home life of the prospective adoptive parents. The court stated that "a fair reading of the applicable statutes indicates clearly that the legislature contemplated that a finding of parental unfitness necessarily precede consideration of the best interests of the child." *Id.* at 299, 356 N.E.2d at 1284. *See also In re* Buttram, 56 Ill. App. 3d 950, 372 N.E.2d 1135 (3d Dist. 1978); *In re* Barber, 55 Ill. App. 3d 587, 371 N.E.2d 299 (1st Dist. 1977); *In re* Woods, 54 Ill. App. 3d 729, 369 N.E.2d 1356 (1st Dist. 1977); *In re* Ybarra, 29 Ill. App. 3d 725, 331 N.E.2d 224 (1st Dist. 1975). One reviewing court, however, has stated that the rule requiring a finding of unfitness prior to considering best interests was not violated by the trial court's pronouncing the best interests finding before pronouncing the unfitness determination. *In re* Massey, 35 Ill. App. 3d 518, 521, 341 N.E.2d 405, 407 (4th Dist. 1976). In addition, one commentator has stated that there is "no clear statutory command" for the courts to hold in abeyance the child's best interests while determining the parents' fitness. Cowgill, *supra* note 58, at 639.

65. In *Burton*, the court stated: "As we read the Adoption Act, it contemplates a two-step process: first, the filing of a petition, followed by a hearing, and then, if consent or unfitness is found, the entry of an interim order; second, ordinarily after a six month waiting period, the final decree of adoption." *In re* Burton, 43 Ill. App. 3d 294, 302, 356 N.E.2d 1279, 1286 (5th Dist. 1976).

In *Burton*, the foster parents filed adoption petitions and the fitness hearing occurred at the initial stage of the adoption proceeding. Yet, the *Burton* "two-step process" test can be considered descriptive of the mechanism employed in a juvenile court termination action, *i.e.*, first determining unfitness and only after that considering the child's best interests. *See* Cowgill, *supra* note 58. It is in this second sense that the term "two-step process" is used in the balance of this Note.

66. Cowgill, *supra* note 58, at 639. The author goes on to state, however, that the "two-step process" actually favors the parents at the fitness hearing and the child *after* the entry of an unfitness finding. Cowgill concludes that while the procedure accommodates the parents' and child's interests in a logical sense, it is difficult for many judges and lawyers to "blithely switch their concern for the child's welfare on and off depending on the stage of the adoption." *Id.* This difficulty, according to Cowgill, induces judges to make a determination based on the

In re Massey and the Reasonable Efforts/Reasonable Progress Requirements

The reasonable efforts/reasonable progress requirements were added to the Adoption Act's definitions of an unfit person in 1973.[67] Although there is no legislative history, the *In re Massey*[68] court stated what it perceived to be the legislative intent behind the passage of this subsection. In *Massey*, the court discussed the problem of the child who is placed in foster care at an early age and develops a parent-child relationship during the years with his foster parents.[69] Because of these emotional ties, the court determined that returning the child to the natural parents would be traumatic and that adoption would be in the child's best interests.[70] The court commented

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child's best interests and then necessarily to find the parent unfit. *Id.* at 640. Therefore, upon review, the appellate courts must reverse the trial court "for a failure to follow *Burton's* 'two-step process' or to somehow rationalize their way toward affirmance." *Id.*

67. *See* note 13 *supra*.

68. 35 Ill. App. 3d 518, 341 N.E.2d 405 (4th Dist. 1976). In *Massey*, a probation officer visited the family's home and found it dirty and cluttered with soiled clothes, diapers, and garbage. *Id.* at 522, 341 N.E.2d at 408. The child appeared unhealthy and had a diaper rash. After the probation officer took the child to the doctor, the doctor filed a neglect petition. *Id.* When the child was ten weeks old, the court found her to be neglected and placed her under state guardianship. *Id.* at 519, 341 N.E.2d at 406. Nearly three years after the neglect finding, the parents unsuccessfully petitioned the court for their daughter's return. The termination action was commenced almost six years after the neglect adjudication. The state alleged unfitness on the grounds that the parents had failed to "maintain a reasonable degree of interest, concern or responsibility as to the child's welfare," that the parents failed to protect the child from conditions within her environment which were injurious to her welfare, and that the parents had failed to make reasonable efforts to correct conditions. *Id.* at 520, 341 N.E.2d at 406.

At the fitness hearing, the probation officer described the original circumstances leading to the child's removal. A social worker then described the family's present living situation, testifying that upon his home visits, he found the apartment dirty and cluttered with piles of clothing and debris. *Id.* at 523, 341 N.E.2d at 408. He also testified that the mother dropped out of a homemaking class after one session. Additionally, there was evidence which tended to show that the mother had not sought prompt medical care for another of her children. Also, evidence was adduced which showed that during the child's first three years in placement, the mother had visited six times, with her visits increasing to perhaps as much as a visit every two months during the last three years. However, the father visited less frequently. *Id.* at 520, 341 N.E.2d at 407. The mother's visits resulted in the child's attempts to hide from her during the visits and experiencing nightmares and bed-wetting afterwards. A child psychologist testified that, upon examining the child, he found her to be very immature and dependent upon her foster mother and therefore her removal from the foster home would be very traumatic for the child. *Id.* at 521, 341 N.E.2d at 407. Lastly, the judge allowed the foster mother to testify that she desired to adopt the girl. *Id.* at 520, 341 N.E.2d at 407.

Based upon this testimony, the trial court found the parents unfit on all three grounds. On review, the appellate court held that the evidence was insufficient to support the unfitness finding on all *but* the reasonable efforts ground. *Id.* at 521-22, 341 N.E.2d at 408. In affirming the unfitness finding on that ground, the court reasoned that the situation in the home had not changed since the neglect finding, that the mother had not attempted to improve her child care or homemaking skills and that the parents' failure to visit more frequently, while insufficient for a finding of unfitness in itself, demonstrated their failure to prepare themselves to meet their child's needs. *Id.* at 523, 341 N.E.2d at 409.

69. 35 Ill. App. 3d at 522, 341 N.E.2d at 408.

70. *Id.*

that *before* the reasonable efforts/reasonable progress requirements were instituted, it was very difficult to prove that the natural parents were unfit under the other grounds provided in the statute.[71] Thus, as long as the parents did not consent, the child remained ineligible for adoption. This type of situation, according to the *Massey* court, presented a "most vexing problem."[72] The court concluded that the reasonable efforts/reasonable progress requirements were a solution to this problem and that the new subsection was evidence of a legislative recognition and an intention to give greater protection to the child's best interests.[73]

The *Massey* court did not specifically state how the reasonable efforts/reasonable progress requirements gave more protection to the child's best interests. The court recognized, however, that the new subsection brought within the scope of the term "unfit person" a totally new group of parents who had never been previously reached by the other unfitness grounds. Thus, for example, while the parents in *Massey* could not be found unfit for failure to maintain a reasonable degree of interest in their child,[74] the court held that the evidence as to this lack of parental interest, combined with other facts, showed a failure to make reasonable efforts to correct conditions.[75]

In deciding the case before it on the reasonable efforts ground, the *Massey* court held that the essence of the subsection is that parents are unfit if they do not "make reasonable efforts to change themselves and their circumstances so that they can give the child the care it needs."[76] It was left to *Austin* to articulate the reasonable progress standard.

THE *AUSTIN* COURT'S ANALYSIS

Although eight other reasonable efforts/reasonable progress cases have been reviewed by the appellate courts,[77] it was not until *Austin* that a court

71. *Id.*

72. *Id.*

73. *Id.*

74. *See* note 68 *supra*.

75. *Id.* One may theorize that the reasonable efforts/reasonable progress grounds actually do provide greater protection to the child's best interests. This occurs because the subsection places two demands on parents which had never been previously required. These two statutory demands will benefit the child's best interests in one of two alternative ways: either the parents will be rehabilitated as the result of their efforts so that the child can be returned to the home in a relatively short period of time or the child will become eligible for adoption, thus curtailing the possibility of the child remaining in foster care for an overly long period of time.

Cowgill, *supra* note 58, at 642, agrees that in practical application, the reasonable efforts/reasonable progress requirements do make it easier to prove parental unfitness and, in this sense, protect the child's best interests. However, he criticizes the practical effect: this added protection to the child occurs at the expense of the parents' interests. Cowgill characterizes the operation of the reasonable efforts/reasonable progress grounds as a reflection of the "tensions between the rights of natural parents and the welfare of their children." *Id.*

76. 35 Ill. App. 3d at 523, 341 N.E.2d at 409.

77. See *In re* Gates, 57 Ill. App. 3d 844, 373 N.E.2d 568 (5th Dist. 1978) (court affirmed termination order as a modification of an earlier M.I.N.S. disposition appointing a guardian);

went beyond a factual application of the reasonable progress requirement to formulate a conceptual standard for that ground. The *Austin* court first held that the requirements of reasonable efforts and reasonable progress were disjunctive, so that lack of either could be the basis for a finding of unfitness.[78] The court then held that reasonable progress required measurable or demonstrable movement toward the return of the child.[79]

Efforts/Progress as Separate Grounds

As support for its holding that the reasonable efforts/reasonable progress requirements were disjunctive, the *Austin* court referred to the introductory passage in the Adoption Act's definition of an unfit person,[80] which states that any *one* of the specified grounds may be the basis for a finding of unfitness.[81] The court also asserted as a basis for its holding a fundamental principle of statutory construction: in statutory interpretation, no word, phrase,

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In re Robertson, 45 Ill. App. 3d 148, 359 N.E.2d 491 (3d Dist. 1977) (finding of unfitness based on failure to make reasonable efforts was affirmed due to death of younger sibling after the minor, found neglected, had been removed due to earlier abuse); *In re* Jankowski, 38 Ill. App. 3d 95, 347 N.E.2d 474 (1st Dist. 1976) (reasonable efforts/reasonable progress requirements did not apply since child had been adjudged dependent under earlier Family Court Act); *In re* Massey, 35 Ill. App. 3d 518, 341 N.E.2d 405 (4th Dist. 1976) (finding of unfitness based on reasonable efforts allegation affirmed on grounds of mother's lack of improvement in homemaking skills, refusal to attend mother's group, and infrequent visitation of parents); *In re* Einbinder, 31 Ill. App. 3d 133, 334 N.E.2d 188 (1st Dist. 1975) (finding of unfitness affirmed on other grounds, court did not consider reasonable efforts/reasonable progress requirements); People v. Gibbs, 30 Ill. App. 3d 878, 333 N.E.2d 227 (5th Dist. 1975) (court, in abstract opinion, affirmed sufficiency of evidence for unfitness finding); *In re* Ladewig, 34 Ill. App. 3d 393, 340 N.E.2d 150 (1st Dist. 1975) (mother's sporadic visits and lack of concern for child over six year period provided sufficient evidence to support unfitness finding on the reasonable progress ground); *In re* Ybarra, 29 Ill. App. 3d 725, 331 N.E.2d 224 (1st Dist. 1975) (in case involving finding of dependency under Family Court Act, subsection did not apply).

78. 61 Ill. App. 3d at 349, 378 N.E.2d at 542.

79. *Id.* at 350, 378 N.E.2d at 542.

80. *Id.* at 349, 378 N.E.2d at 542.

81. ILL. REV. STAT. ch. 40, § 1501(D) (1977). Although none of the earlier cases involving this subsection specifically state that the reasonable efforts/reasonable progress grounds are disjunctive, three prior cases tend to support the *Austin* holding. In each of these cases, the courts affirmed the order terminating parental rights on *either* the reasonable efforts *or* the reasonable progress grounds. *See, e.g., In re* Robertson, 45 Ill. App. 3d 148, 359 N.E.2d 491 (3d Dist. 1977) (unfitness finding affirmed on reasonable efforts ground); *In re* Massey, 35 Ill. App. 3d 518, 341 N.E.2d 405 (4th Dist. 1976) (same); *In re* Ladewig, 34 Ill. App. 3d 393, 340 N.E.2d 150 (1st Dist. 1975) (unfitness finding affirmed on reasonable progress ground). *But see In re* Gates, 57 Ill. App. 3d 844, 373 N.E.2d 568 (5th Dist. 1978) (court used the terms "reasonable efforts" and "reasonable progress" interchangeably).

It is important to recall that while the *Robertson, Massey*, and *Ladewig* courts applied the subsection's two grounds as though they were disjunctive, it was not until *Austin* that an appellate court specifically stated that the two grounds were separate and distinct. Moreover, *Austin* was the first instance in which an appellate court went beyond a mere application of the statute to formulate the conceptual standard of measurable or demonstrable movement for the reasonable progress requirement.

or clause should be rendered meaningless or superfluous.[82] The principle is based upon the general rule that words of a statute should be interpreted as communicating the meaning commonly attached to them.[83]

One other source of support which the court overlooked in holding that the two grounds are disjunctive were those cases involving the interpretation of statutes containing the word "or."[84] The general rule derived from those

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82. 61 Ill. App. 3d at 349, 378 N.E.2d at 542. The court cited two cases in which this principle was relied upon by the courts. In Consumers Co. v. Industrial Comm'n, 364 Ill. 145, 4 N.E.2d 34 (1936), the court was asked to interpret the Workmen's Compensation Act, ILL. REV. STAT. ch. 48, § 161 (1913) (current version at *Id.* § 138.6 (1977). The Illinois Supreme Court upheld an award to the decedent's widow stating that the widow's conversation with the employer regarding her theory of how her husband died fulfilled the Act's notice requirement. The court reasoned that to hold otherwise "would be to entirely ignore the quoted words and render the entire act inapplicable to such cases as the present one, to which it was obviously intended to apply." 364 Ill. at 150, 4 N.E.2d at 37.

Similarly, in Illinois Power Co. v. City of Jacksonville, 18 Ill. 2d 618, 165 N.E.2d 300 (1960), the Illinois Supreme Court was asked to interpret a provision in the Cities and Villages Act, ILL. REV. STAT. ch. 24, § 49-1 (1955) (current version at *id.* § 11-117-1 (1977)), concerning the authority of a municipality to operate an utility. 18 Ill. 2d at 622, 165 N.E.2d at 303. Applying the principle of statutory construction, the court observed that the company's construction of the provision would lead to the absurd result of limiting the municipal utility to its corporate boundaries by one phrase, yet would expressly permit the utility to supply individuals outside of those boundaries with the remainder of the statutory language. *Id.* The court held that the only legislative limitation was that the municipal utility supply the major portion of its product to its inhabitants. *Id.*

The first American case relying on this principle of statutory construction appears to be Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 662 (1829). Not only have Illinois courts used this principle to interpret the Workmen's Compensation Act and the Cities and Villages Act, *supra*, but also to construe the Structural Work Act, ILL. REV. STAT. ch. 48, § 60 (1971), in Halberstadt v. Harris Trust & Sav. Bank, 7 Ill. App. 3d 991, 289 N.E.2d 90 (1st Dist. 1972), and the Dental Practice Act, ILL. REV. STAT. ch. 91, § 60 (1939), in Winner v. Kadow, 373 Ill. 192, 25 N.E.2d 883 (1940).

83. 50 AM. JUR. *Statutes* § 238 (1944). Thus, where the language of a statute is "free [of] ambiguity . . . [the language] must be given effect by the courts." People v. Misevic, 32 Ill. 2d 11, 15, 203 N.E.2d 393, 395 (1964), *cert. denied*, 380 U.S. 963 (1965). The *Misevic* court held that a statute requiring entire and permanent recovery before a person who has escaped the consequences of a criminal act may be released applies to schizophrenics. The court observed that although schizophrenics rarely or never completely recover, the statute was nonetheless unambiguous. *See also* Droste v. Kerner, 34 Ill. 2d 495, 503, 217 N.E.2d 73, 78 (1966), *cert. denied*, 385 U.S. 456 (1967) (taxpayer did not have standing under Public Moneys Act, ILL. REV. STAT. ch. 102, §§ 11-16 (1963), to challenge legislature's conveyance of submerged land); Stiska v. City of Chicago, 405 Ill. 374, 379, 90 N.E.2d 742, 745 (1950) (bowling, billiards, and pool held to be amusements within meaning of statute authorizing taxation by corporate authorities); Schlieper v. Rust, 46 Ill. App. 3d 319, 324, 360 N.E.2d 1192, 1196 (5th Dist. 1977) (trial court exceeded its authority in ordering joint accounts transferred to conservator when conservator requested only production of passbook).

84. For example, in the case of People v. Spencer, 131 Ill. App. 2d 551, 268 N.E.2d 192 (1st Dist. 1971), the court was asked to interpret a Chicago trespass ordinance. The court stated that the use of the word "or" in the ordinance should be accorded significance. *Id.* at 553, 268 N.E.2d at 193. Thus, the court reasoned that by using the word "or" the council intended to create two distinct offenses. *Id.* at 553-54, 268 N.E.2d at 194. In People v. Trustees of North-

cases is that where a statute contains the word "or," the court should read the word as a disjunctive separation of the two provisions.[85] The court may depart from this rule only when such a reading would result in an apparent inconsistency which would defeat the statute's intent and purpose.[86]

The Standard for Reasonable Progress

After first holding that the reasonable efforts/reasonable progress grounds were separate and distinct, the *Austin* court stated that, while the reasonable efforts ground required the use of a subjective standard,[87] the standard for reasonable progress required a showing of measurable or demonstrable movement toward the goal of returning the child to his natural parents.[88] Thus, by using a subjective standard for the reasonable efforts ground, a court must determine whether the efforts made by the parents were reasonable in light of the parents' limitations.[89] Under the reasonable progress ground, the court must decide if the parents' efforts have resulted in measurable or demonstrable movement toward the goal of the child's return. By contrast, parental limitations are only one factor to be considered in determining whether this standard has been met.[90] In creating this distinction between the two standards, the *Austin* court relied upon four points.

First, the court reasoned that different standards were necessary in order to give each ground a distinct meaning.[91] This reason appears to be linked to the court's holding that the two requirements are separate and distinct.[92] Although the court was not explicit, the reasoning implies that if different standards were not used, the two requirements would be indistinguishable and the subsection would contain superfluous language. The court did not develop this point further, thereby failing to specify how the dual grounds were to relate to each other.

Although the court's first point is somewhat incomplete in and of itself, it is closely connected with the court's second basis for its holding, which deals

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western College, 372 Ill. 120, 152 N.E. 555 (1926), the court refused to construe "or" as conjunctive and thus denied the college a tax exemption. *See also* Campbell v. Prudential Insurance Co., 15 Ill. 2d 308, 155 N.E.2d 9 (1958) (court refused to interpret "or" in Insurance Code misrepresentation provision as conjunctive and held that the insurer could avoid liability by establishing either actual intent to deceive *or* a material effect upon the risk); People v. City of Chicago, 73 Ill. App. 3d 184, 219 N.E.2d 548 (1st Dist. 1966) (court refused to interpret "or" in Chicago ordinance as conjunctive and held that approval of building plans by an architect was sufficient under the ordinance).

85. Voight v. Industrial Comm'n, 297 Ill. 109, 130 N.E. 470 (1921).

86. *Id.*

87. 61 Ill. App. 3d at 350, 378 N.E.2d at 542.

88. *Id.*

89. This was the standard employed by the trial judge, which use was not appealed by the state. *See* note 23 *supra*.

90. *See* notes 107, 114, 115, and accompanying text *infra*.

91. 61 Ill. App. 3d at 349, 378 N.E.2d at 542.

92. *See* notes 78-86 and accompanying text *supra*.

with its interpretation of the words "effort" and "progress." The court stated that the word "effort" makes that standard inherently subjective since the word does not focus on objective results.[93] The word "effort" and the term "reasonable efforts" have been defined in a number of cases unrelated to the issue of termination of parental rights. None of these definitions compel the conclusion that the standard applied in measuring reasonable efforts must be a subjective one.[94] It is plausible to assert that the reasonable efforts ground lends itself to an argument that the standard should be objective, whereby the parents' efforts would be compared to the efforts of the reasonable person in like circumstances. Also, one may argue that to construe the reasonable efforts requirement to mean reasonable in light of the parents' limitations is to render that ground nearly meaningless. Such a construction makes the reasonable efforts requirement inapplicable in a case where the parents possess some limitations and make only minimal efforts. Under such circumstances, it will be nearly impossible for the state to establish clear and convincing proof that the parents' efforts were not reasonable in light of their limitations. Indeed, it will be able to establish failure to make reasonable efforts only in those cases where the parents have made no efforts at all.

The *Austin* court differentiated "efforts" from "progress" by reasoning that "progress" implied movement from one status to another.[95] The court

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93. 61 Ill. App. 3d at 350, 378 N.E.2d at 542.

94. In Woods v. Department of Labor & Indus., 62 Wash. 2d 389, 395, 382 P.2d 1014, 1018 (1963), the court defined effort as "a try, especially a hard try; attempt; endeavor," while in National Steel & Shipbldg, Co. v. United States, 419 F.2d 863, 874-75 (1969), the court referred to effort as meaning "exertion, **laborious attempts, or strenuous endeavors; struggle directed to the accomplishment of an object."

In addition, the word "reasonable" has been characterized as "a relative generic term difficult of adequate definition. While it has been said that it is an ordinary word in common use and familiar to the average person, in fact, the dictionaries give a number of meanings for the word, and it has various shades of meaning, . . . the particular shade is to be determined according to the context and circumstances of each particular case." 75 C.J.S. *Real Actions* at 634 (1952). Indeed, one court has stated that the function of the word "reasonable" is to enable the judiciary to formulate "a standard of decision to be accommodated to all circumstances." National Steel & Shipbldg. Co. v. United States, 419 F.2d 863, 876 (1969).

Thus, one may argue that a statute, by qualifying a certain conduct with the word "reasonable," allows for a degree of judicial flexibility in ascertaining the appropriate standard for that conduct. This flexibility is shown by the various definitions which different courts have given the term "reasonable efforts." *See, e.g.*, National Steel & Shipbldg. Co. v. United States, 419 F.2d 863 (1968) (reasonable efforts are those efforts which are proper, fair, equitable, and honest in the judgment of the "reasonable man," and suitable and appropriate to their purported goal in light of the facts and circumstances); Carr v. Administrator, Unemployment Compensation Act, 26 Conn. Supp. 336, 223 A.2d 313 (1966) (such efforts as men ordinarily use, apply, or exercise in their own business to protect their rights and interests, and such efforts as are within their realm of reason and logic under the circumstances); People v. Colerick, 67 Mich. 362, 34 N.W. 683 (1887) (such diligence and effort as men ordinarily would exercise in their own business to protect their own rights and interests); Clonts v. Laclede Gaslight Co., 144 Mo. App. 582, 129 S.W. 238 (1910) (reasonable efforts defined as nothing short of the utmost effort when dealing with employer's duty to safeguard employee's physical welfare).

95. 61 Ill. App. 3d at 350, 378 N.E.2d at 543.

further reasoned that a finding of "reasonable progress" entailed two decisions: one, whether any progress had occurred, and two, whether that progress was reasonable.[96] The court's interpretation of progress as movement from one status to another is consistent with the case law.[97] Moreover, a standard capable of measuring movement appears to be the appropriate conceptual mechanism with which to evaluate progress.[98]

The *Austin* court's third basis of support for its reasonable progress standard was *Massey's* statement that the reasonable efforts/reasonable progress subsections of the Adoption Act indicated the legislature's recognition of the plight of a child who is ineligible for adoption and its intention to give greater protection to the child's best interests.[99] Although the *Austin* court simply quoted this passage from *Massey* and did not develop the point any further, it seemed to implicitly endorse the *Massey* perception of the legislature's intent. Moreover, it may be theorized that by requiring the parents' efforts to result in measurable or demonstrable movement toward the child's return, the *Austin* court effectuated *Massey's* perception of the legislature's goal. *Austin* goes a significant step further. While *Massey* dealt with a case in which the parents had failed to make reasonable efforts,[100] *Austin* involved parents who had actually attempted to correct the conditions.[101]

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96. *Id.*

97. In Barbasol Co. v. Leggett, 106 Ind. App. 290, 300, 19 N.E.2d 481, 485 (1939), progress was defined as "a going forward." Other definitions also focus on some sort of movement. *See, e.g.*, Levine v. Colorado Transp. Co., 163 Colo. 215, 218, 429 P.2d 274, 276 (1967) ("moving forward, a proceeding onward, an advance"); Rathbun v. Sparks, 162 Colo. 110, 115, 425 P.2d 296, 298 (1967) ("to move forward").

98. Of course, the crux of the issue remains what amount of movement will constitute reasonable progress. By qualifying the word "progress" with the word "reasonable" the court is allowed flexibility in determining the correct standard. *See* note 94 *supra*.

99. 61 Ill. App. 3d at 350, 378 N.E.2d at 542.

Since the *Massey* and *Austin* decisions are the only two reasonable efforts/reasonable progress cases in which the courts have gone beyond a mere application of the statute, it is difficult to contrast and compare the *Austin* standard with prior case law. Cowgill has commented that the reasonable efforts/reasonable progress requirements make it easier to prove parental unfitness because the longer a parent delays in improving the original conditions, "the stronger the case against his fitness becomes." *Supra* note 58, at 642. In this sense, the *Massey* view of the legislative intent, that of providing greater protection to the child's best interests, is accomplished. *Id.*

100. In *Massey*, the court found, among other things, that the mother had refused to attend homemaking classes, the home had remained in the same dirty and unkempt condition as it had been originally, the mother had withdrawn from a mother's group and had apparently procrastinated in seeking medical attention for another child, and, furthermore, that the parents had visited the child in placement only infrequently. 35 Ill. App. 3d at 522-24, 341 N.E.2d at 408-409.

101. The trial record indicates that the parents had some insights into their problems. The father was aware that some of his difficulties could have been the result of his being an abused child. Record, vol. 1, at 18. The father also acknowledged to the social worker that the parents' separating would improve his wife's chances for regaining custody of the children. *Id.* at 25. Additionally, the parents kept in contact with the children by office visits or by communicating with the social worker. *Id.* at 9, 12-14, 16, 18-20, 23, 26, 27, 29. Lastly, the parents acknowledged their need of counseling and made inconsistent attempts to undergo counseling. *Id.* at 16, 17, 21, 26.

Thus, under *Austin*, it is clear that parental limitations should not be the sole criterion for determining the reasonableness of progress. *Austin* further indicates that parental efforts must result in measurable or demonstrable movement toward the return of the child. If this does not occur, the parents may be found unfit and their parental rights may be terminated. Instead of waiting indefinitely for the parents to show signs of progress, the child instead can find a permanent home through adoption. The *Austin* court's standard for reasonable progress thus furthers the legislative intention to give greater protection to the child's best interests.[102]

The court's last basis of support for its reasonable progress standard was the Adoption Act's requirement that the child's best interests be the paramount consideration in the interpretation of the Act.[103] Using this provision as a guide,[104] the *Austin* court held that reasonable progress required measurable or demonstrable movement toward the goal of the return of the child.[105] Additionally, the court stated three criteria for application of this standard. First, the court must determine if a small amount of progress is reasonable when considering the child's best interests.[106] Second, in its determination of reasonableness, the court may consider parental limitations but it also must consider the possibility of the child being forced to indefinitely reside with a succession of foster parents.[107] Third, the court may consider the particular circumstances surrounding a child's removal and conclude in some cases that slight progress is reasonable and in others that it is not reasonable.[108]

Although both the *Massey* statement and the Adoption Act provision refer to the child's best interests, it is important to note that the two statements discuss different aspects of the best interests concept. This distinction is not made in the *Austin* decision. *Massey's* thrust was that the legislative intent behind the reasonable efforts/reasonable progress grounds was to increase the protection of the child's best interests.[109] This legislative intent is ac-

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102. Future reasonable efforts/reasonable progress cases will determine whether other Illinois courts will endorse *Massey's* view of the legislative intent and will utilize the *Austin* court's standard to effectuate that intent. However, in two termination cases not involving the reasonable efforts/reasonable progress grounds, the courts have referred to *Massey's* discussion of the problem of children who remain in long-term foster care. *See In re* Woods, 54 Ill. App. 3d 729, 737, 369 N.E.2d 1356, 1362 (1st Dist. 1977); *In re* Burton, 43 Ill. App. 3d 294, 299, 356 N.E.2d 1279, 1283-84 (5th Dist. 1976). In addition, the court in the case of *In re* Gates, 57 Ill. App. 3d 844, 852, 373 N.E.2d 568, 575 (5th Dist. 1978), apparently endorsed *Massey's* view of the legislative intent behind the reasonable efforts/reasonable progress grounds by quoting the *Massey* statement and by analogizing the facts of the case with those of *Massey*. *Id.* at 852-53, 373 N.E.2d at 575.

103. ILL. REV. STAT. ch. 40, § 1525 (1977).

104. 61 Ill. App. 3d at 350, 378 N.E.2d at 542.

105. *Id.*

106. *Id.* at 350, 378 N.E.2d at 543.

107. *Id.*

108. *Id.*

109. 35 Ill. App. 3d 518, 522, 341 N.E.2d 405, 408. *See also* notes 68-76 *supra*.

complished by the operation of the statute itself.[110] Yet, notwithstanding its view of the legislative intent, the *Massey* court preserved the two-step nature of the termination proceeding and allowed the parental unfitness question to precede the best interests question.[111] On the other hand, while the Adoption Act explicitly provides that the child's best interests is the paramount consideration in the interpretation of the Act, the courts traditionally have qualified that mandate as being subject to a prior finding of parental unfitness.[112] Moreover, before *Austin*, parental unfitness was equated with parental conduct per se.[113] The *Austin* court, however, did not interpret the Adoption Act's mandate in this traditional manner.

Austin's statements that (1) a court must determine if a small amount of progress is reasonable with a proper regard for the child's best interests,[114] and (2) in considering parental limitations a trial court must consider the possibility of the child indefinitely residing in a succession of foster placements,[115] contain language which lends itself to two interpretations. An expansive view of the court's statements suggests that the court departed from prior case law. As stated,[116] a termination case is considered a two-step process in which parental unfitness is the threshold issue. Only after finding unfitness, based on the parents' conduct, may the court consider the child's best interests. Yet neither the proper regard for the child's best interests nor the possibility of indefinite, multiple foster placements are factors relevant to the parents' conduct. Thus, the court seems to make the best interests issue a part of the unfitness determination.

A more conservative view may be to interpret the court's decision as allowing for some balancing of parental limitations versus the possibility of the child residing in a succession of foster homes. The possibility of continued foster care is properly an aspect of the best interests issue; it is the converse of the assertion that the child's best interests would be served by its adoption. Therefore, the *Austin* court, at the least, indicated a departure from treatment of the unfitness and best interests considerations as totally separate and distinct.

IMPACT

From the paucity of facts included in the *Austin* opinion, it is not evident that the parents had shown ongoing concern for the children after their re-

110. *See* Cowgill, *supra* note 58, at 642.

111. As stated by Cowgill: "*Massey* scrupulously observes the 'two-step process' and bases its affirmance strictly on the parents' failure to improve themselves *as parents* after the child was originally taken away. Thus *Massey* does not encroach on the parents' traditional favored status at the fitness hearing." Cowgill, *supra* note 58, at 642.

112. *See* notes 48-66 and accompanying text *supra*.

113. *See* notes 57, 64, 65 *supra*.

114. 61 Ill. App. 3d at 350, 378 N.E.2d at 542-43.

115. *Id.* at 350, 378 N.E.2d at 543.

116. *See* notes 48-66 and accompanying text *supra*.

moval.[117] As a result, it is hard to appreciate the full significance of the appellate court's ruling. The trial record shows that the parents in fact had continued to manifest concern by visiting the children, by attempting counseling, and by keeping in touch with the social worker.[118] Notwithstanding this parental involvement, the appellate court found that there was a prima facie showing of failure to make reasonable progress.[119]

Austin is representative of the problematic situation which is most justiciably handled through application of the measurable/demonstrable movement standard. Although the parents perhaps had made sincere efforts to correct conditions, these efforts did not result in renewed custody of their children. Away from home, the children's bonds with their parents had waned and new emotional attachments had formed.[120] If the trial court's subjective standard had been applied,[121] the parents' minimal progress would have been considered reasonable and the termination petitions would have been denied. Thus, without the measurable/demonstrable movement standard, the Austin children and similarly situated children would be forced to spend their childhood in foster care. In contrast, the *Austin* standard signifies that if parents' sincere efforts to correct conditions do not result in demonstrable movement towards the children's return, the parents may be found unfit.

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117. *See* note 101 *supra*.

118. *Id.*

119. 61 Ill. App. 3d at 351, 378 N.E.2d at 543. The *Austin* court, however, did not apply its standard to the facts of the case. In other words, the court did not specifically spell out why there was a prima facie showing of failure to make reasonable progress. *See* note 133 and accompanying text *infra*.

On remand, the trial will be resumed as though the motion for a directed finding had been denied. *Id.* at 351, 378 N.E.2d at 543-44. Thus, the burden will shift to the parents to rebut the state's prima facie case. Using the appellate court's measurable or demonstrable movement standard, the trial judge will have to decide, after hearing the parents' evidence, whether the state has presented clear and convincing evidence of failure to make reasonable progress. If the court finds that the evidence is clear and convincing, the court may find the parents unfit. Thereafter, if the trial court additionally finds that the appointment of a guardian with the right to consent serves the children's best interests, it may enter the appointment. This order will terminate the Harveys' parental rights. *See* note 9 *supra*.

120. It is difficult to state what effect *Austin* will have on the problem of children who experience multiple placements. To the extent that the *Austin* standard requires the parents to make measurable or demonstrable movement towards the child's return, the standard appears to facilitate termination of parental rights. In this respect, *Austin* may have a beneficial effect on the multiple placement problem because the state will be encouraged to file termination petitions in those cases where parental efforts have resulted in only minimal progress.

Additionally, the Juvenile Court Act requires an agency which has guardianship of a child to file a supplemental petition for court review "within 24 months of dispositional order and each 24 months thereafter." ILL. REV. STAT. ch. 37, § 705-8(2) (1977). This petition must state "facts relative to the child's present condition of physical, mental and emotional health as well as facts relative to his present custodial or foster care." *Id.* Thus, there appears to be an appropriate statutory mechanism by which the juvenile court may require a child care agency to report its long-term plan for the child. For example, the court may require the agency to report whether the parents have been rehabilitated and, if not, whether adoption is being considered.

121. *See* note 23 *supra*.

Moreover, *Austin's* long-run effect may be the alleviation of the long-term foster care problem.[122]

Problems and Implications

The *Austin* court is to be commended for its articulation of the measurable/demonstrable movement standard.[123] This standard is a significant step in the evolution of the reasonable efforts/reasonable progress requirements. Unfortunately, the opinion is lacking in strong supportive analysis. This weakness is most apparent in the court's discussion of the need for different standards for the reasonable efforts and reasonable progress grounds.[124] For example, the *Austin* court cited no authority for its statement that the words "effort" and "progress" require different standards.[125] Moreover, the court's conclusion that the reasonable efforts ground requires a subjective standard[126] may be criticized. By defining reasonable efforts to mean that which is reasonable in the light of the parents' limitations, it may be argued that the first ground loses much of its force and becomes nearly meaningless.[127] The reasonable efforts ground lends itself just as easily to an application of an objective standard.[128] Finally, the opinion implies that the measurable/demonstrable movement standard flows from the Adoption Act's mandate that the child's best interests are to be the paramount consideration in the interpretation of the Act.[129] This reliance on the Act for the measurable/demonstrable movement standard, however, raises the unanswered question as to why the Adoption Act requires less from the reasonable efforts ground (*i.e.*, a subjective standard) than it does from the reasonable progress ground (*i.e.*, the measurable/demonstrable movement standard).

Because of its cursory discussion of the reasonable efforts ground, the *Austin* court forfeited the opportunity to more fully delineate the reasonable progress requirement. Other than its statements that the reasonable efforts

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122. The available literature indicates that the long-term foster care problem is a serious one. For example, more than 50% of children remain in foster care for three years or more. Wald, *supra* note 4, at 627. Furthermore, data from a Massachusetts study showed that 80% of those children did not return home after removal. A. GRUBER, FOSTER HOME CARE IN MASSACHUSETTS: A STUDY OF FOSTER CHILDREN, THEIR BIOLOGICAL AND FOSTER PARENTS (1973). It also appears that fewer than 10% of foster children are eventually adopted. E. SHERMAN, R. NEUMAN, & A. SHYNE, CHILDREN ADRIFT IN FOSTER CARE: A STUDY OF ALTERNATIVE APPROACHES (1974). *See also* notes 4-7 *supra*.

123. *See* notes 87-116 and accompanying text *supra*.

124. *See* notes 87-105 and accompanying text *supra*.

125. 61 Ill. App. 3d at 350, 378 N.E.2d at 542. *See also* notes 93-98 and accompanying text *supra*.

126. 61 Ill. App. 3d at 350, 378 N.E.2d at 542. *See also* notes 93, 94, and accompanying text *supra*.

127. *See* note 94 and accompanying text *supra*.

128. *Id.*

129. 61 Ill. App. 3d at 350, 378 N.E.2d at 542-43. *See also* notes 103-13 and accompanying text *supra*.

ground called for a subjective standard,[130] the *Austin* court did not discuss the first ground. This was probably due to the nature of the case; since the state appealed only the trial court's reasonable progress ruling,[131] it apparently conceded that the parents had made reasonable efforts. Yet by comparing and contrasting both grounds, the *Austin* court could have more fully analyzed the reasonable progress ground. In addition, the court could have demonstrated how each ground is to operate in relation to the other. The optimal solution would be to eliminate the subsection's dual grounds and replace them with a subsection which simply requires the correction of the conditions leading to the neglect or dependency adjudication.[132] However, as long as Illinois continues to employ the dual reasonable efforts/reasonable progress grounds, it is probably best to clarify each through a discussion of both grounds. After *Austin*, the reasonable efforts/reasonable progress subsection probably will be applicable in two types of situations. While the reasonable efforts requirement will be utilized in cases where the

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130. 61 Ill. App. 3d at 350, 378 N.E.2d at 542.

131. *Id.* at 346, 378 N.E.2d at 540.

132. In contrast to the dual nature of the Illinois reasonable efforts/reasonable progress grounds, the comparable statutes utilized in Iowa and Minnesota appear to be better drafted. IOWA CODE ANN. § 600A.8(6) (West 1978) provides that a court may terminate parental rights "[i]f following an adjudication that the child is in need of assistance under chapter 232, reasonable efforts under the direction of the juvenile court have failed to correct the conditions giving rise to this adjudication." Similarly, Minnesota provides for termination of parental rights upon a showing that "following upon a determination of neglect or dependency, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination." MINN. STAT. ANN. § 260.221(b)(5) (West 1978).

The drafting of these statutes is superior in several respects. For example, the language of the Iowa and Minnesota statutes is more straightforward. This is due to the elimination of the dual grounds of efforts and progress. By eliminating these dual grounds, the courts need not justify the use of two different standards. Moreover, in contrast to Illinois, the Iowa and Minnesota courts need not focus their attention on whether or not the parents' efforts or progress were reasonable. Those courts need only to address the factual issue of whether or not the conditions leading to the original adjudication have been corrected.

In the Minnesota case of *In re* Forrest, 246 N.W.2d 854 (Minn. 1976), the parents had a long history of alcoholism requiring frequent hospitalizations. Their child was placed in a foster home for this reason. Later, the court allowed her to return home under supervision. Due to the parents' continued drinking, the child was again removed and a petition requesting termination was filed. After a hearing on the petition, the juvenile court entered an order in May, 1973, terminating parental rights. The parents appealed to the district court and 17 months after the juvenile court's order was entered, there was a de novo hearing. The father testified that during the previous 13 months he had stopped drinking. The district court affirmed the termination order as to the mother but reversed the juvenile court's decision terminating the father's rights. *Id.* at 856. Yet, the district court conceded that the father was not prepared to assume the custody of the child due to his age "and past history." *Id.* at 857. The court expressed its doubt that the father would ever be able to regain custody but stated that this fact did not warrant terminating his parental rights. The Minnesota Supreme Court remanded the case for the purpose of entering further evidence concerning the father's ability to regain custody of his child. The court stated that if the father was permanently unable to care for his child, then the child's best interests required terminating the father's rights in order that the child could be adopted and thus be given a stable family life. *Id.*

parents have made no efforts to correct conditions, the reasonable progress ground will be applied in cases where no measurable or demonstrable movement has resulted despite parental efforts.

Future cases should develop the reasonable progress requirement in more concrete factual settings. While *Austin's* significance lies in its establishment of a conceptual standard with which to gauge reasonable progress, the *Austin* court failed to apply the measurable/demonstrable movement standard to the facts of the case. In other words, the *Austin* court never stated what facts would constitute measurable or demonstrable movement toward the return of the child. The appellate court, however, was asked only to decide the validity of the trial judge's standard for reasonable progress.[133] Yet, by its failure to address the case's factual background, the *Austin* court left future courts with no basis of comparison from which to apply the *Austin* standard. As a result, there will most likely be some variance in future cases as to what facts constitute measurable or demonstrable movement toward return of the child.

In addition to the weakness of the court's reasoning, the lack of comparison between the two statutory grounds, and the lack of factual application, the *Austin* opinion's language concerning the child's best interests[134] will create conceptual problems in future reasonable efforts/reasonable progress cases.[135] This language lends itself to two alternative interpretations, the more expansive view being that *Austin* allows the merging of the unfitness and best interests issues.[136] The more conservative view of *Austin* is that it

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Both the Iowa and Minnesota statutes require the courts that enter the neglect or dependency findings to provide directions to the parents as to how they are to correct the conditions leading to the adjudications. These directions are apparently suggested to the court by the social service agency and are included in the court order. Such directions apparently include counseling, participating in parenting groups, and similar measures. The state agency must assist the parents in these efforts toward rehabilitation and the parents, in turn, must cooperate with the agency. Thus, both the state and the parents are put on notice as to what their roles are in the service-plan. *See, e.g., In re* Rosenbloom, 266 N.W.2d 888 (Minn. 1978), in which the state had filed an earlier termination petition which was denied because the court found that the welfare department had failed to make reasonable efforts to rehabilitate the mother. After the denial, the court and counsel for all parties developed a written service plan. *Id.* at 890. After the mother refused to cooperate, a second termination petition led to the termination of her parental rights. *Id.* at 891. *See also In re* Scalzo, 220 N.W.2d 495 (Minn. 1974), in which the court affirmed the termination order and stated that the evidence had shown that the welfare department had made reasonable efforts to rehabilitate the mother.

Absent these court directions, it appears that the state is not able to terminate parental rights under the quoted statutory grounds. In the Iowa case of *In re* Crooks, 262 N.W.2d 786 (Iowa 1978), the order terminating parental rights was reversed because the record of the case did not reflect any court directions to attend the counseling sessions suggested by the Department of Social Services. The Supreme Court of Iowa stated that because the trial court had not provided directions to the parents, its order entering the neglect finding lacked specificity. The court thus found the termination statute unconstitutionally vague as applied in the case. *Id.* at 788.

133. 61 Ill. App. 3d at 346-47, 378 N.E.2d at 540.

134. 61 Ill. App. 3d at 350, 378 N.E.2d at 543.

135. *See* notes 103-16 and accompanying text *supra*.

136. *See* notes 114-16 and accompanying text *supra*.

allows the trial court to balance parental limitations with the possibility of the child's remaining in foster care.[137] *Austin* thus presents a conceptual problem to trial courts accustomed to deciding termination cases according to the two-step approach.[138] Each court must now determine to what extent *Austin* allows the child's best interests to influence the court's determination of reasonable progress.[139]

Although *Austin* laid a foundation for subsequent reasonable efforts/reasonable progress cases, it cannot presently be determined what the scope of the *Austin* standard for reasonable progress will be, especially since the *Austin* court did not apply the facts in establishing this standard. However, because the *Austin* court rejected the idea that reasonable progress should be decided solely in the light of parental limitations, it is arguable that the standard's scope will be a broad one. For example, under the measurable/demonstrable movement standard, it may be possible to find parents unfit due to factors beyond the parents' actual control. In *Austin*, a court pyschiatrist testified that both parents possessed personality disorders[140] and that the mother suffered from visual and hearing impairments.[141] These parental limitations were causally linked to the parents' failure to achieve measurable or demonstrable movement toward their children's return.[142] Although *Austin* permits a trial judge to consider parental limitations, he must balance these limitations against the possibility of the children remaining indefinitely in foster care.[143] Under *Austin*, where a psychiatrist gives an unfavorable prognosis for the parents' improvement and recommends freeing the children for adoption,[144] the final balance may be in favor of the children. In

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137. *Id.*

138. *See* notes 64-66 and accompanying text *supra*.

139. *See* note 64 and accompanying text *supra*.

140. Record, vol. 2, at 17. In response to the state's request that the court psychiatrist present his diagnosis of the parents, the psychiatrist stated that he "would regard them both as representing rather severe personality disorders of the borderline type that's been described with rather clear and a social [sic] characteristic." *Id.*

141. *Id.* at 16. This testimony was adduced in the course of the court psychiatrist's testimony stating the basis for his recommendation that the children be freed for adoption.

142. *Id.* at 15-18. This causal connection is obvious in the psychiatrist's testimony regarding the basis for his recommendation that the children be freed for adoption:

> I'm talking about . . . the untreatability of the parents and they seem to both be unable to either separate or to resolve their problems and . . . seemed [sic] to be locked in . . . a stable pathological conflictual relationship that's just terribly destructive for both of them.
>
> I think this is in part attributed to their own difficult early developmental periods that I think rather poorly equipped them to enter into a relationship of marriage and child rearing as was described in my clinical.
>
> But I think it's also in part attributable to the distortions that are introduced into every situation by mother's hearing defect as well as her visual defect that make it almost impossible to effectively communicate with mother because she responds inappropriately to questions that you ask her . . .

Id. at 15-16.

143. 61 Ill. App. 3d at 350, 378 N.E.2d at 543.

144. *Id.* at 346, 378 N.E.2d at 540.

such a case, it seems that the court will find that limited progress is not reasonable within the meaning of the statute and that parental rights must be terminated.

The justification for the termination of parental rights in these circumstances is the state's intention to protect the child's best interests.[145] Thus, the reasonable efforts/reasonable progress requirements and the *Massey* and *Austin* standards are indicative of a public policy intended to safeguard these interests over the residual rights of parents who are not able to fulfill their roles as parents. In this respect, parental unfitness under the reasonable progress ground is not a reflection of moral unfitness.[146] Rather, under the reasonable progress requirement as construed in *Austin*, parents are unfit if, one year after adjudication, and in light of the initial circumstances, the parents have not shown measurable or demonstrable movement towards regaining their child's custody and their limitations increase the likelihood that the child will remain indefinitely in foster care.[147]

CONCLUSION

Confronting the problem of children in long-term foster care, Illinois established the reasonable efforts/reasonable progress requirements in 1973.[148] This subsection has been described as a clock that always runs against, and never for, the natural parents because any delay on the parents' part to correct conditions exhausts the twelve-month time period allowed by the statute.[149] *In re Massey* contributed to the developing case law by stating the legislature's intention to give greater protection to the child's best interests rather than to the parents.[150] Although the *Austin* decision is analytically weak, it further interpreted the subsection by setting forth the standard for reasonable progress. *Austin* eliminates the notion that reasonable progress must be determined solely in light of the parents' limitations.[151] Using the *Austin* standard, it is clear that, notwithstanding sincere parental efforts to change conditions, parents may be found unfit if these efforts have

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145. *In re* Massey, 35 Ill. App. 3d 518, 522, 341 N.E.2d 405, 408 (4th Dist. 1976).

146. Compared to the other unfitness grounds set forth in the Adoption Act, ILL. REV. STAT. ch. 40, § 1501(D)(a) to (n) (1977), the reasonable efforts/reasonable progress requirements possess to a lesser degree any connotation of immorality.

147. 61 Ill. App. 3d at 350, 378 N.E.2d at 543. If the court additionally finds that appointment of a guardian with the right to consent is in the child's best interests, then parental rights will be terminated by the court's appointing such a guardian. ILL. REV. STAT. ch. 37, § 705-9(2) (1977).

148. *See* note 13 and accompanying text *supra*.

149. Cowgill, *supra* note 58, at 642.

150. 35 Ill. App. 3d at 522, 341 N.E.2d at 408. *See also* notes 67-76 and accompanying text *supra*.

151. 61 Ill. App. 3d at 350, 378 N.E.2d at 542-43. *See also* notes 87-116 and accompanying text *supra*.

not resulted in measurable or demonstrable movement toward the return of the child.

There will undoubtedly be differences of opinion as to the justice of the results obtained by the application of the *Austin* standard.[152] Such differences of opinion are to be expected when parents' inherent rights to their children are involved. The fact remains, however, that neglect and dependency cases are ongoing,[153] and the problem of children in long-term foster care always will accompany those cases. In the balance of parental rights versus the child's best interests, the reasonable efforts/reasonable progress requirements tip the balance in favor of the child.[154] The *Massey* court,

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152. *See* note 75 *supra*. Since Cowgill sees the reasonable efforts/reasonable progress grounds as giving protection to the child's best interests at the cost of the parents, it is likely that he will have the same criticism of the *Austin* standard.

153. During fiscal year 1978, the Illinois Department of Children and Family Services received 13,453 reports of neglect and dependency. Of that number, 5,874 reports came from Cook County. Within Cook County, Chicago's reports totaled 4,668. Conversation of October 19, 1978 with Ms. Barbara Oaks, Central Registry, Illinois Department of Children and Family Services, Springfield, Illinois.

154. The *Austin* trial recommenced on April 19, 1979. The only witness for the respondent-parents was the father, Mr. Harvey. He testified that at the time the children had been removed from the parents, the social worker had not made any counseling referrals for the parents, although she *had* recommended that the parents enter counseling. He also stated, however, that he and his wife had received some counseling from an agency which had been recommended to them by a previous public defender. Mr. Harvey testified that he and his wife were presently raising a three-year-old daughter and that he disciplined the child by talking to her. While stating that he had previously used physical discipline with his stepsons Michael and Maurice, the father said that he had learned that love and affection was the more effective way in which to raise children. Furthermore, the father stated that he was steadily employed and that, while he had in the past been incarcerated on criminal charges, he was no longer having problems with the law. Yet, in response to questioning by the guardian ad litem, the father stated that neither parent had been in counseling since July, 1977.

The state argued that the trial court was to determine whether reasonable progress had been made between the time of the neglect adjudications in 1974 and the time the state filed supplemental petitions requesting termination in 1976. The state's position was that any progress made since the time the termination petitions were filed was irrelevant.

In contrast to the state's argument, the public defender asserted that the father's testimony indicated that in the over-all period of time in which the termination petitions had been pending, reasonable progress had been made by the parents in that the father had not been recently incarcerated, the father was also steadily employed, and the parents were raising their youngest child without problems. The parents' counsel also stated that the parents' failure to receive counseling was not an indication of failure to make reasonable progress since the statute did not require reasonable progress to be the result of counseling.

The position asserted by the guardian ad litem was that the court should determine whether the parents had made reasonable progress as to their ability to care for all of the six children. Counsel stated that serious abuse had been found at the original neglect trials and that the parents had not presented any testimony in the termination action relevant to their ability to care for the five minors who were the subjects of the termination petitions.

On the court's own motion, the cases were continued until April 25, 1979. On this date, the trial judge stated that the two issues before him on remand were, first, whether the parents were unfit based on their failure to make reasonable progress towards the return of their chil-

through its recognition of the legislative intent, and the *Austin* court, by articulating the measurable/demonstrable movement standard, have judicially confirmed this role of the subsection.

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dren and, second, whether it was in the children's best interests that the court appoint a guardian with the right to consent to the minors' adoptions. As to the fitness issue, the court found that, although the parents had made some progress, their progress did not rise to the level of *reasonable* progress, given the facts of the particular case. The court therefore entered findings of parental unfitness. In stating his findings, the trial judge did not refer to the "measurable or demonstrable movement" standard articulated by the appellate court. 61 Ill. App. 3d at 350, 378 N.E.2d at 542. *See also* notes 87-116 and accompanying text *supra*.

In reference to the best interests issue, the trial court called the social worker to testify. She stated that the two Austin boys were living in one foster home while the three girls were placed in a second home. She also testified that both sets of foster parents were desirous of adopting the children. The trial judge also spoke to the Austin children in his chambers. Following these interviews, the trial judge stated in open court that each of the minors indicated that they were happy where they were, that they understood that the purpose of the proceedings was to terminate the Harveys' parental rights, and that they desired to be adopted by their respective foster parents. Based on the testimony of the social worker and his interviews with the children, the trial judge entered findings of best interests, granted the guardian, Richard S. Laymon, the right to consent to the Austin children's adoptions, and thus terminated the parental rights of the Harveys. The parents plan to appeal the orders.