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**AVOIDING THE NEED TO “UNSCRAMBLE THE EGG:” A
PROPOSAL FOR THE AUTOMATIC STAY OF SUBSEQUENT
ADOPTION PROCEEDINGS WHEN PARENTS APPEAL A
JUDGMENT TERMINATING THEIR PARENTAL RIGHTS**

I. HYPOTHETICAL¹

Imagine that your client, Jane Doe, comes to you and explains that she is in desperate need of your help. As you calmly tell her to explain the facts of her problem, Ms. Doe begins by explaining that almost two and a half years ago, her two children, A and B, were taken into foster care by State X after she was accused of neglecting them. Although Ms. Doe complied with the goals set by the court for reunification, Judge Y terminated her parental rights after fifteen months. She then filed a timely appeal with the appellate court in State X and went through the necessary steps to appeal the judgment. Each side filed many extensions, and the appeal took another fifteen months.

Ms. Doe explains that the appellate court determined that Judge Y was incorrect in terminating Ms. Doe’s parental rights. However, the court also explained that it recently came to their attention that thirty days after the judgment terminating Ms. Doe’s parental rights, but after Ms. Doe filed her appeal, Ms. Doe’s two children were adopted by their foster parents. Although Ms. Doe had no knowledge of the subsequent adoption, the appellate court explained that Ms. Doe’s appeal of the judgment terminating her parental rights did not automatically stay the subsequent adoption proceedings under State X’s adoption statute. The court further explained that, because Ms. Doe’s children had been adopted for over a year, there was nothing that Ms. Doe, nor the court, could do to overturn the adoption. Ms. Doe, obviously extremely upset by this turn of events, has come to you asking whether there is anything you can legally do to help get her children back.

Upon researching, you realize with a sinking feeling that the court of appeals was correct in their analysis of State X’s laws and that appealing the judgment to the Supreme Court of State X could ultimately be fruitless. You then set out on a path to determine whether State X’s law is constitutionally sound, and whether there is any possibility of gaining a remedy for Ms. Doe.

1. Hypothetical is based roughly on the case of *In re Tekela*. See generally *In re Tekela*, 780 N.E.2d 304 (Ill. 2002).

II. INTRODUCTION

In November of 1997, President William J. Clinton signed the Adoption and Safe Families Act of 1997 (ASFA)² into law.³ With one swift movement of his pen, President Clinton modified the then existing Adoption Assistance and Child Welfare Act of 1980⁴, which primarily promoted reasonable efforts to reunify the child and the biological parents.⁵ The ASFA redefined the standard of reasonable efforts, and simultaneously promoted the idea that if reasonable efforts did not succeed to reunite the family within fifteen months, termination of parental rights was in the child's best interest.⁶

To implement the ideas of the Adoption and Safe Families Act, states have modified their statutes to set guidelines for judges terminating parental rights in compliance with the ASFA.⁷ Each statute allows the government to utilize their police and *parens patriae*⁸ powers to remove children from their parent's custody in order to protect those children incapable of helping themselves, to promote public welfare and to prevent harm.⁹ Simultaneously, each state has taken strides to ensure that children do not lose precious time lacking continuity and stability in the foster care system and are instead placed in safe and stable homes by giving judges guidelines and a timeline for terminating parental rights.¹⁰

Although such efforts to find safe and stable homes for children should be commended, in recent years three supreme court decisions in separate states revealed a disturbing problem.¹¹ These cases raise the question of whether

2. Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

3. *Id.*

4. Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.).

5. *See id.*

6. *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

7. Steve Christian, National Conference of State Legislatures, *1998 Legislative Responses to the Adoption and Safe Families Act of 1997*, 24 STATE LEGISLATIVE REPORT (1999), at <http://www.ncsl.org/programs/cyf/asfaslr.htm>.

8. Traditionally, the *parens patriae* power refers to the role of state as a sovereign, and gives the government standing to prosecute a lawsuit on behalf of a citizen incapable of prosecuting on their own. BLACKS LAW DICTIONARY 1144 (8th ed. 2004).

9. Will L. Crossley, *Defining Reasonable Efforts: Demystifying the States Burden under Federal Child Protection Legislation*, 12 BU. PUB. INT. L.J. 259, 264 (2003). For background information on state legislatures' responses to ASFA, see Christian, *supra* note 7.

10. *See* Christian, *supra* note 7.

11. The three cases are: 1) *In re Tekela*, 780 N.E.2d at 312-313 (holding that, although clear and convincing evidence of unfitness did not exist to terminate Mother's parental rights, the termination of Mother's parental rights must be upheld due to the subsequent adoption of Mother's children during her appeal), 2) *In re JK*, 661 N.W.2d 216, 226 (Mich. 2003) (holding that the adoption of Mother's children, which took place during her appeal, was invalid under Michigan law, which provided for the automatic stay of adoption proceedings during appeal), and 3) *State ex rel. T.W. v. Ohmer*, 133 S.W.3d 41, 43 (Mo. 2004) (holding that it is an abuse of

states have shifted too far in their push to quickly move children into permanent homes at the expense of a parent's right to appeal such judgments. In each case, the trial court decided to commence adoption proceedings, and at times even finalize such adoptions, while the parents pursued their right to appeal the termination judgments underlying, and necessary to, such adoptions.¹²

This Comment analyzes this startling problem and proposes a statutory solution. It does not suggest that states should not terminate the rights of unfit parents when termination of parental rights is in the best interest of the child. Nor does this Comment suggest that adoption is not in the best interest of the child after a legal termination has occurred. Instead, this Comment suggests that states have swung too far in their attempt to comply with the ASFA, trampling on the rights of parents to appeal any judgment made against them. By failing to provide for automatic stays when parents appeal a wrongful judgment terminating their parental rights and instead finalizing adoptions before a decision on the appeal is rendered, states have effectively taken away the right to appeal.

Section III of this Comment examines the historical background of today's state statutes, focusing primarily on the Adoption and Safe Families Act of 1997 and state responses to the ASFA legislation. Section IV analyzes recent case law, which reveals a problem regarding subsequent adoptions following the appeal from judgments terminating parental rights. Section V contains the author's analysis of the problem, focusing on both constitutional and policy concerns. Section V proposes a model statute, which provides for automatic stays of any ongoing or subsequent adoption proceedings upon notice of a timely appeal of the underlying judgment terminating parental rights. In addition, this proposal provides for an expedited appellate process in order to prevent children from languishing in the foster care system and to comply with the mandates set forth in the ASFA. Section V also analyzes how this proposal satisfies constitutional due process concerns as well as public policy concerns that arise when states fail to stay adoption proceedings upon appeal.

discretion for a circuit court to proceed with an adoption of children who were the subject of a termination of parental rights while an appeal of the termination is pending). *See also* In the Interest of J.R.G., 624 So. 2d 273, 275 (Fla. 2d Dist. Ct. App. 1993) (holding that although the termination of parental rights was affirmed, the subsequent adoption that took place during the appeal should be reversed under the Florida statute providing for automatic stays pending appeal); In the Interest of Baby Boy N, 874 P.2d 680, 690-91 (Kan. Ct. App. 1994) (holding that the trial court did not have jurisdiction to enter an order of adoption, as operation of the order terminating the father's parental rights was suspended as soon as the father filed notice of appeal of the termination order); Jean Ann Kobinski v. The State of Nevada Welfare Division, 738 P.2d 895, 897-98 (Nev. 1987) (stating as dictum concern with Nevada's procedure of finalizing an adoption pending appeal, but upholding the subsequent adoption due to their affirmance of the underlying termination).

12. *See supra* note 11 and accompanying text.

III. BACKGROUND

A. *The Adoption and Safe Families Act of 1997*

Beginning in 1980, states received guidance in structuring their individual foster care and adoption statutes from the Adoption Assistance and Child Welfare Act of 1980.¹³ However, significant problems in implementing the ambiguous mandate for “reasonable efforts” and a strong policy for reunification¹⁴ led to a disturbing rise in the number of children coming into, and either remaining in, or returning to the foster care system.¹⁵ As a result, more children were entering foster care than were exiting into safe, permanent and stable placements.¹⁶ In 1997, there were over five hundred thousand children nationwide in the foster care system,¹⁷ and the number was rapidly increasing.¹⁸ In response to increased concern over nation-wide trends,¹⁹ the

13. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.).

14. The Adoption Assistance and Child Welfare Act mandated that in order to remain eligible for federal funding, “reasonable efforts will be made prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home and to make it possible for the child to return to his home.” *Id.* at § 101.

15. Cristine H. Kim, Comment, *Putting Reason Back into the Reasonable Efforts Requirement in Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287, 292 (1999) (explaining that states were placing great emphasis on goals of family preservation and reunification, which caused children to “languish[] in foster care” and “remain[] in limbo as to their permanency”). See also 143 Cong. Rec. S12,669 (1997) (testimony of Sen. Dewine) (stating that “[t]here can be no doubt that this problem did, in fact, arise because of the 1980 law, and it arose because this 1980 law was and has been for 17 years misinterpreted”).

16. United States General Accounting Office report to the Chairmen, Subcommittee on Human Resources, Committee on Ways and Means, House of Representatives, *Juvenile Courts: Reforms Aim to Better serve Maltreated Children* at 8 (1999), available at <http://www.gao.gov/archive/1999/he99013.pdf>. This phenomenon is known as a “foster care drift,” where children languish in the foster care system “because permanent goals were not established, maintained and carried out.” *Del A. v. Roemer*, 777 F. Supp. 1297, 1313 (E.D. La. 1991). See also Robert M. Gordon, *Drifting Through Byzantium, The Promise and Failure of Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 643 (1999) (explaining that “[m]any of these children [in foster care] lacked any prospect of going to a permanent home any time soon, and were instead ‘drifting’ among multiple homes for long periods of time”).

17. Foster care is defined as:

24-hour substitute care for children placed away from their parents or guardians and for whom the State agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes. 45 C.F.R. § 1355.20 (2004).

18. Christian, *supra* note 7 (reporting that at the end of 1985, the number of children in foster care totaled 270,000 while by the end of 1996, the total was approximately 502,000).

19. In addition to the concern over the number of children currently stagnant in the foster care system, legislators were also concerned with incidences of murder among children returned

One Hundred and Fifth Congress passed, and on November 19, 1997, President Clinton signed, the Adoption and Safe Families Act of 1997 (ASFA) into federal law.²⁰

The ASFA is widely accepted as one of the most significant pieces of federal child welfare legislation in United States history.²¹ The purpose of the ASFA is primarily to promote the adoption of children who are currently in foster care.²² In order to fulfill this goal, the ASFA provides states with procedural guidance, which was previously lacking under the Child Welfare Act of 1980.²³

First, the ASFA provides states with guidance in determining reasonable efforts and safety requirements for foster care and adoption.²⁴ Unless the family situation falls within a few clearly defined exceptions,²⁵ the ASFA requires that states make reasonable efforts for twelve months to reunify and preserve the family unit and make it possible for the child to return home.²⁶ Although the ASFA does not define reasonable efforts, it does provide that "in determining reasonable efforts to be made with respect to the child, as described in this paragraph, and in making such reasonable efforts, the child's health and safety shall be the paramount concern."²⁷

Secondly, the ASFA sets a timetable explaining when states should begin termination proceedings after a child has been in foster care and the state has

to their biological parents, the detrimental effect that allowing for eighteen months to attempt reunification has on the waiting child, the number of time extensions allowed by states, and permanent plans which allowed children to remain in unstable long-term foster placements. ROBERT C. FELLMETH, *CHILD RIGHTS AND REMEDIES* 314 (Diana G. Collier ed. 2002).

20. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

21. Christian, *supra* note 7. With the enactment of the ASFA legislation, each state was required to enact numerous extensive changes to their state laws and policies in order to remain eligible for funds previously more easily available under the Social Security Act. *Id.*

22. See Adoption and Safe Families Act of 1997 § 101. See also Katherine A. Hort, Comment, *Is Twenty-Two Months Beyond the Best Interest of the Child? ASFA's Guidelines for the Termination of Parental Rights*, 28 FORDHAM URB. L.J. 1879, 1894-95 (2001).

23. Compare Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.) with Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

24. Adoption and Safe Families Act of 1997 § 101(a)(15); 42 U.S.C. § 671(a)(15) (2000).

25. Reasonable efforts are not required if the parent has 1) subjected the child to "aggravated circumstances" including abandonment, torture, chronic abuse and sexual abuse, 2) committed, aided and abetted, attempted, conspired or solicited to commit murder or manslaughter of another child, committed felony assault that results in serious bodily injury of another child, or 3) the parental rights to another child have been involuntarily terminated. *Id.* at § 101(a)(15)(D); 42 U.S.C. § 671(a)(15)(D).

26. *Id.* at § 101(a)(15)(B)(2); 42 U.S.C. § 671(a)(15)(B)(ii). This is a change from the Adoption Assistance and Child Welfare Act of 1980, which required states to make reasonable efforts towards reunification for at least eighteen months. FELLMETH, *supra* note 19, at 314.

27. Adoption and Safe Families Act of 1997 § 101(a)(15)(A), 42 U.S.C. § 671(a)(15)(A).

made reasonable efforts toward reunification.²⁸ In setting the guidelines, many different versions of a timeline were introduced.²⁹ One timeline proposed that states should be required to initiate termination proceedings after a child had been in care 18 of the last 24 months.³⁰ Another plan proposed that the timetable should be hastened, requiring termination proceedings after the child had been in care only 12 of the last 18 months.³¹ Ultimately, the ASFA offered a compromise, providing that if a child has been in foster care for 15 of the most recent 22 months the state is required to file a petition to begin termination proceedings and “concurrently to identify, recruit, process, and approve a qualified family for adoption.”³²

Finally, in addition to providing both guidance to the states in their reasonable effort requirements, and a timeline for termination proceedings, the ASFA provided for monetary “adoption incentive payments” to states for each foster child adopted over and above a “base number”³³ in a given year.³⁴ Under ASFA guidelines, each state would receive four thousand dollars for

28. *Id.* at § 101(a)(3)(E), 42 U.S.C. § 675(5)(E).

29. Compare Adoption Promotion Act of 1997, H.R. 867, 105th Cong. § 3 (a)(3)(E) (1997) and Promotion of Adoption, Safety, and Support for Abused and Neglected Children (PASS) Act, H.R. 867, 105th Cong. § 104(a)(3)(E) (1997) with Adoption and Safe Families Act of 1997, H.R. 867, 105th Cong. § 103(a)(3)(E) (1997) (enacted).

30. Adoption Promotion Act of 1997, H.R. 867, 105th Cong. § 3(a)(3)(E). See also 143 Cong. Rec. H. 2016 (daily ed. Apr. 30, 1997) (statement by Rep. Shaw) (describing the Adoption Promotion Act of 1997 as “require[ing] States to move to terminate parental rights parental rights and find an adoptive family if children under 10 have been in foster care for 18 of the past 24 months”).

31. See Promotion of Adoption, Safety, and Support for Abused and Neglected Children (PASS) Act, H.R. 867, 105th Cong. § 104(a)(3)(e). See also 143 Cong. Rec. H. 2027 (statement of Rep. Tiahrt) (describing the PASS Act as “reduc[ing] a timeframe for the State to seek to terminate parental rights from 18 to 12 months”).

32. Adoption and Safe Families Act of 1997 § 103(a)(3)(E), 42 U.S.C. § 675(5)(E). Note that the state does not have to file the petition to terminate parental rights if the child is being cared for by a relative or if the state has not provided the services necessary for the safe return of the child to the child’s home. *Id.* § 103(a)(3)(E)(i)-(iii), § 675(5)(E)(i)-(iii).

33. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 201(g)(3)(A)-(B) (codified in scattered sections of 42 U.S.C.). In the original legislation, the base number for fiscal year 1998 was the average number of foster child adoptions in fiscal years 1995, 1996, and 1997. *Id.* The base number for subsequent fiscal years was the number of foster child adoptions in the fiscal year with the greatest number of foster care adoptions since 1997. *Id.* The current version of the legislation sets the base number fiscal year 2003 at the number of foster child adoptions in fiscal year 2002. Adoption Promotion Act of 2003 § 4(c)(5)(A), 42 U.S.C. § 673b(g)(3)(A) (2000). For subsequent years, the base number is the number of foster child adoptions in the fiscal year with the greatest number of foster care adoptions since 2002. *Id.* at § 4(c)(5)(B), § 673b(g)(3)(B).

34. Adoption and Safe Families Act of 1997 § 201(d)(1), 42 U.S.C. § 673b(d)(1) (providing the amounts of adoption incentive payments due for a fiscal year to a State).

every adoption completed over the base number as well as an additional two thousand dollars for every child adopted with “special needs.”³⁵

Many bipartisan groups supported the ASFA,³⁶ and the ultimate goal of the legislation seemed to be standard across all arenas: “to ensure that abused, neglected children are in safe settings and to move children more rapidly out of the foster care system.”³⁷ Although the ASFA provides clear guidelines for states in terminating parental rights, the legislation provides no procedural guidance to states in circumstances where the system breaks down and parental rights are wrongfully or prematurely terminated.³⁸ Although the ASFA provides an overall goal of promoting adoption and diminishing the number of children “languishing” in the foster care system, the ASFA does not provide guidance for states in how to proceed during an appellate process.³⁹

Although a few legislators testifying at the legislative hearings discussed maintaining a parent’s right to appeal,⁴⁰ the great majority of legislators mainly focused on pinpointing a way to proceed quickly and more efficiently to permanency and adoption for children in foster care.⁴¹ An overwhelming number of those who testified at the legislative hearings made no mention of preserving the right to appeal, but focused instead on the intention that the ASFA would prompt states to enact their own legislation in compliance with

35. *Id.* Because the original legislation did not allow adoption incentive payments after fiscal year 2003, President George W. Bush expanded the availability of the adoption incentive payments until fiscal year 2008. Adoption Promotion Act of 2003 § 3(a)(2)(B), (C). *See also* 42 U.S.C. § 673b(b)(5). In addition, the Adoption Promotion Act of 2003 furnished additional payments of four thousand dollars for foster care adoptions of children over nine years old, which were classified as “older child adoptions.” Adoption Promotion Act of 2003 § 3(a)(3)(C). *See also* 42 U.S.C. § 673b(d)(1)(C).

36. Hort, *supra* note 22, at 1894 (stating that the act “had tremendous bipartisan support” and explaining that organizations such as the Heritage Foundation and Child Defense Fund endorsed the legislation).

37. *Child Welfare Revisions: Hearing of the Social Security and Family Policy Subcomm. of the Senate Finance Comm.* 105th Cong. (1997) [hereinafter *Child Welfare Revisions*] (statement of Sen. John Chafee). *See also* 143 Cong. Rec. S12671 (1997) (statement of Sen. Rockefeller); United States General Accounting Office report to the Chairmen, Subcommittee on Human Resources, Committee on Ways and Means, House of Representatives, *Juvenile Courts: Reforms Aim to Better serve Maltreated Children* at 8 (1999), available at <http://www.gao.gov/archive/1999/he99013.pdf>.

38. *See generally* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

39. *See id.*

40. *Hearing upon the Promotion of Adoption Safety and Support for Abused and Neglected Children (PASS) Act Before the Senate Finance Comm.* 105th Cong. (1997) [hereinafter *Hearing*] (statement of Sen. Mary L. Landrieu) (stating that the legislators should not inhibit parents from exhausting their legal rights).

41. *Id.*; 143 Cong. Rec. S12671 (1997) (statement of Sen. Rockefeller); *Child Welfare Revisions, supra* note 37.

the federal mandates to allow for faster termination proceedings, and a greater number of adoptions.⁴²

B. State Statutory Action Following the ASFA

Largely, the ASFA legislation left a great deal of discretion to the states in determining which changes should be made to their state legislation to ensure compliance with the ASFA.⁴³ With incentives provided by the federal government,⁴⁴ today each state has enacted legislation to conform to the requirements of the ASFA.⁴⁵ The great majority of state statutes now provide for initiating termination proceedings when a child has been in state care for 15 of the last 22 months, as provided by the ASFA.⁴⁶ In addition, each state statute lays out further provisions which judges use as guidelines to determine when the state has provided “reasonable efforts” for reunification, and when grounds exist to justify terminating a parent’s rights.⁴⁷ Although all states have

42. See, e.g., *Hearing, supra* note 40; 143 Cong. Rec. S12671 (1997) (statement of Sen. Rockefeller); *Child Welfare Revisions, supra* note 37 (testimony of Rep. Camp).

43. Christian, *supra* note 7.

44. See 42 U.S.C. § 673b(d)(1) (describing the incentive payments “payable to a State”).

45. Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First Three Years of the Adoption and Safe Families Act Implementation*, 39 FAM. CT. REV. 25, 32 (2001). The National Conference on State Legislatures has published a searchable database of all states’ implementing legislation. National Conference on State Legislatures, *Summaries of State Legislation Enacted in Response to the Adoption and Safe Families Act*, at <http://www.ncsl.org/statefed/cf/asfasearch.htm> (updated 2001).

46. E.g., ALASKA STAT. § 47.10.088(d)(1) (Michie 2004); COLO. REV. STAT. ANN. § 19-3-604(2)(k) (West 2004); IDAHO CODE § 16-1623(i) (Michie 2004); 705 ILL. COMP. STAT. ANN. 405/2-13(4.5)(a)(i) (West 2004); IND. CODE ANN. §31-35-2-4.5(2)(B) (West 2005); IOWA CODE ANN. § 232.111(2)(a)(1) (West 2004); ME. REV. STAT. ANN. tit. 22, § 4052(2A)(A) (West 2004); MD. CODE ANN., [FAM. LAW] § 5-525.1(b)(1)(i) (2004); MASS. GEN. LAWS ANN. ch. 119, § 26(4)(iii) (West 2005); MO. ANN. STAT. § 211.447(2)(1) (2004); 42 PA. CONS. STAT. ANN. § 6351(f)(9) (West 2004); R.I. GEN. LAWS § 40-11-12.1(e)(6) (2004); S.C. CODE ANN. § 20-7-768(A)(1) (Law. Co-op. Supp. 2004); W. VA. CODE ANN. § 49-6-5b(a)(1) (Michie 2004); WIS. STAT. ANN. § 48.417(1)(a) (West 2004). *But see*, N.C. GEN. STAT. § 7b-907(d) (2005) (providing for a termination petition to be filed after a child has been in care 12 out of the most recent 22 months); N.D. CENT. CODE § 27-20-44(1)(b)(2) (2003) (providing for a termination petition to be filed after a child has been in care for 450 out of 660 nights); OHIO REV. CODE ANN. § 2151.413(D) (West 2004) (providing for a termination petition to be filed after a child has been in care for 12 of the most recent 22 months).

47. E.g., ALASKA STAT. § 47.10.086 (Michie 2004); ALASKA STAT. § 47.10.088 (Michie 2004); ARIZ. REV. STAT. ANN. § 8-533 (West 2004); ARIZ. REV. STAT. ANN. § 8-846 (West 2004); ARK CODE ANN. § 9-27-341 (Michie 2004); COLO. REV. STAT. ANN. § 19-3-604 (West 2004); FL. STAT. ANN. § 39.701 (West 2004); IDAHO CODE § 16-1615 (Michie 2004); 705 ILL. COMP. STAT. ANN. 405/2-13.1 (West 2004); IND. CODE ANN. § 31-34-21-5.6 (West 2005); KY. REV. STAT. ANN. § 625.090 (Banks-Baldwin 2004); ME. REV. STAT. ANN. tit. 22, § 4041 (West 2004); ME. REV. STAT. ANN. tit. 22, § 4055 (West 2004); MINN. STAT. ANN. § 260C.301 (West 2005); MISS. CODE ANN. § 93-15-103 (2004); MO. ANN. STAT. § 211.183 (West 2004); MO. ANN.

adopted provisions in compliance with the federal law, many variations exist in the exact provisions states have chosen.⁴⁸

Similarly, just as states have enacted different statutes regarding the termination of parental rights, states have responded to the lack of direction given in the ASFA by taking vastly different statutory stances on the effect of appealing a judgment wrongfully terminating parental rights. Although a judgment terminating parental rights is considered a “final judgment,” which allows dissatisfied parties to appeal, each state has a different interpretation of whether such an appeal should stay the underlying judgment and any subsequent adoption proceedings until a decision is rendered. A minority of states specifically provide for automatic stays of the underlying termination judgment and subsequent adoptions upon notice of an appeal.⁴⁹ Other states

STAT. § 211.447 (West 2004); MONT. CODE ANN. § 41-3-423 (2003); NEB. REV. STAT. § 43-292 (2004); N.C. GEN. STAT. § 7B-507 (2004); N.D. CENT. CODE § 27-20-44 (2003); R.I. GEN. LAWS 15-7-7 (2004); S.C. CODE ANN. § 20-7-768 (Law. Co-op. 2004); S.C. CODE ANN. § 20-7-763 (Law Co-op. 2004); S.C. CODE ANN. § 20-7-1572 (Law Co-op. 2004); TENN. CODE ANN. § 37-1-166 (2004); UTAH CODE ANN. § 78-3a-313.5 (2004); UTAH CODE ANN. § 78-3a-311 (2004); UTAH CODE ANN. § 62A-4a-203 (2004); UTAH CODE ANN. § 62A-4a-203.5 (2004); VA. CODE ANN. § 16.1-283 (Michie 2004); WASH. REV. CODE ANN. § 13.34.190 (West 2005); W. VA. CODE ANN. § 49-6-3b (Michie 2004); W. VA. CODE ANN. § 49-6-5b (Michie 2004); WYO. STAT. ANN. § 14-2-309 (Michie 2004).

48. *E.g.*, ALASKA STAT. § 47.10.086 (Michie. 2004); ALASKA STAT. § 47.10.088 (Michie. 2004); ARIZ. REV. STAT. ANN. § 8-533 (West 2004); ARIZ. REV. STAT. ANN. § 8-846 (West 2004); ARK CODE ANN. § 9-27-341 (Michie 2003); COLO. REV. STAT. ANN. § 19-3-604 (West 2004); CONN. GEN. STAT. ANN. § 46b-129 (WEST 2005); FLA. STAT. ANN. § 39.701 (West 2004); IDAHO CODE § 16-1615 (Michie 2004); IDAHO CODE § 16-1623 (Michie 2001); 705 ILL. COMP. STAT. ANN. 405/2-13 (West 2004); 405 ILL. COMP. STAT. ANN. 2-13.1 (West 2004); IND. CODE ANN. § 31-35-2-4.5 (West 2005); IND. CODE ANN. § 31-34-21-5.6 (West 2005); IOWA CODE ANN. § 232.111 (West 2004); KY. REV. STAT. ANN. § 625.090 (Banks-Baldwin 2004); ME. REV. STAT. ANN. tit. 22, § 4041 (West 2004); ME. REV. STAT. ANN. tit. 22, § 4055 (West 2004); MD. CODE ANN., [FAM. LAW] § 5-525.1 (2004); MASS. GEN. LAWS ANN. ch. 119, § 26 (West 2005); MINN. STAT. ANN. § 260C.301 (West 2003); MISS. CODE ANN. § 93-15-103 (2004); MO. ANN. REV. STAT. § 232.111 (West 2004); MO. ANN. REV. STAT. § 211.183 (West 2004); MO. ANN. REV. STAT. § 211.447 (West 2004); MONT. CODE ANN. § 41-3-423 (2003); NEB. REV. STAT. § 43-292 (2004); N.C. GEN. STAT. § 7b-507 (2004); N.C. GEN. STAT. § 7b-907 (2004); N.D. CENT. CODE § 27-20-44 (2003); OHIO REV. CODE ANN. § 2151.413 (West 2004); 42 PA. CONS. STAT. ANN. § 6351 (West 2004); R.I. GEN. LAWS § 15-7-7 (2004); R.I. GEN. LAWS § 40-11-12.1 (2004); S.C. CODE ANN. § 20-7-768 (Law. Co-op. 2004); S.C. CODE ANN. § 20-7-763 (Law. Co-op. 2004); S.C. CODE ANN. § 20-7-1572 (Law. Co-op. 2004); TENN. CODE ANN. § 37-1-166 (2004); UTAH CODE ANN. § 78-3a-313.5 (2004); UTAH CODE ANN. § 78-3a-311 (2004); UTAH CODE ANN. § 62A-4a-203 (2004); UTAH CODE ANN. § 62A-4a-203.5 (2004); VA. CODE ANN. § 16.1-283 (Michie 2004); WASH. REV. CODE ANN. § 13.34.190 (West 2005); W. VA. CODE § 49-6-3b (Michie 2004); W. VA. CODE § 49-6-5b (Michie 2004); WIS. STAT. ANN. § 48.415 (West 2004); WIS. STAT. ANN. § 48.417 (West 2003); WYO. STAT. ANN. § 14-2-309 (Michie 2004).

49. *E.g.*, CAL. WELF. & INST. CODE §366.26(b)(1) (West 2005); FLA. STAT. ANN. § 9.146(c)(2) (West 2005); ILL. SUP. CT. R. 305(e); KAN. STAT. ANN. §59-2407 (2003); MICH. COMP. LAWS ANN. § 710.56(2)(c) (West 2004).

allow for the stay of the termination judgment and subsequent adoptions, but only upon a motion made to the trial court that entered the judgment, and at times, upon issuance of a bond.⁵⁰ Moreover, some states fail to specifically discuss the effect that an appeal will have on a judgment terminating parental rights, and because of this oversight, the judiciary is forced to piece together an answer based on the effect of appeals in other areas of the law.⁵¹

IV. RECENT CASES REVEAL A DISTURBING PROBLEM

Recently, case law from the supreme courts of Illinois, Michigan and Missouri have revealed a problem that stems from the wide variety of procedural guidelines that states have enacted to deal with the effect of appealing the judgment terminating parental rights on adoption proceedings and the underlying judgment.⁵² In each of the following cases, the courts examined their state's controlling statute and decided whether the trial court was correct in allowing the child to be adopted after a timely appeal was initiated or if the trial court should have instead suspended or stayed the proceedings pending the outcome of the appeal.⁵³

A. *In re Tekela*⁵⁴

In August of 2002, the Illinois Supreme Court faced a situation in *In re Tekela*, where a mother's rights were terminated and, pending appeal, her two children were adopted.⁵⁵ In March of 1993, two of Wanda Cooper's ("Mother's") three children, Ira and Tekela, were placed in foster care by the State of Illinois after allegations of abuse.⁵⁶ Over four years later, in August of 1997, the State of Illinois petitioned the circuit court to terminate Mother's parental rights, alleging that Mother suffered from a mental illness and would be unable to discharge her parental responsibilities.⁵⁷

50. *E.g.*, ARIZ. STAT. JUV. CT. P. R. 88; IDAHO CODE §16-1617 (Michie 2004); LA. CHILDRENS CODE. art. 336(A) (West 2004); N.H. REV. STAT. ANN. §170-C:15 (2004).

51. *Compare* MO. REV. STAT. ANN. § 453.011 (West 2004) with *State ex rel. T.W. v. Ohmer*, 133 S.W.3d 41 (Mo. 2004).

52. *In re Tekela*, 780 N.E.2d 304; *In re JK*, 661 N.W.2d 216; *State ex rel. T.W.*, 133 S.W.3d 41.

53. *In re Tekela*, 780 N.E.2d 304; *In re JK*, 661 N.W.2d 216; *State ex rel. T.W.*, 133 S.W.3d 41.

54. 780 N.E.2d 304.

55. *Id.* at 305.

56. *Id.* at 306.

57. *Id.* Simultaneously, the State petitioned the court to appoint the Division of Child and Family Services as guardian of the children with the power to consent to an adoption of mother's three children. *Id.*

In December of 1998, the State filed a Motion for Summary Judgment, which Mother promptly objected to in writing.⁵⁸ On April 3, 1999, the court granted the State’s Motion for Summary Judgment, terminating Mother’s parental rights and concurrently appointing a guardian for both Ira and Tekela, who could consent to their adoption.⁵⁹ One month later, on May 7, 1999, Mother filed a timely notice of appeal, consistent with requirements set forth by Illinois statute, arguing that issues of material fact existed at the time the judgment was made, making summary judgment improper.⁶⁰

In February of 2001, the appellate court reversed the decision of the circuit court, stating summary judgment and “[t]ermination of parental rights [are] drastic measure[s] and, accordingly, the facts must be reviewed with close scrutiny.”⁶¹ The appellate court stated there were unresolved questions of material fact regarding whether Mother’s mental illness left her unable to discharge her parental responsibilities.⁶² Ultimately, the Illinois Supreme Court found that the lower court erred in granting summary judgment.⁶³

Approximately a week after the appellate court issued its judgment, the public guardian assigned to the case by the circuit court filed a motion to vacate the appellate court’s decision and informed the appellate court for the first time that both Ira and Tekela had been adopted by their foster parents in September of 1999.⁶⁴ The adoption took place four months after Mother filed her notice of appeal.⁶⁵ The appellate court denied the guardian’s motion to vacate, expressing doubt about whether the adoption was legally valid in light of the appellate courts decision to reverse the termination order.⁶⁶ The Illinois Supreme Court expressly stated, “neither the State nor the public guardian challenge the substance of the appellate court’s February 20, 2001, ruling that

58. *Id.*

59. *In re Tekela*, 780 N.E.2d, at 306. The circuit court simultaneously terminated the parental rights of Father; however, Father did not appeal the judgment and therefore is not involved in the present appeal. *Id.*

60. *Id.* In her appeal, Mother raised a constitutional question of whether the use of summary judgment to terminate parental rights violates due process; however the court explained that answering the constitutional question was not necessary in deciding the case. *People v. Cooper (In re T.J.)*, 745 NE.2d 608, 615 (Ill. App. Ct. 2001).

61. *Id.* at 616.

62. *Id.* at 617-18 (stating that “the question of whether a parent has a mental illness or impairment that prevents her from discharging her parental duties, unlike the question of whether a parent has a conviction for a particular crime, is a nuanced, fact-intensive question that does not readily lend itself to summary determination”).

63. *Id.* at 618 (explaining that before terminating mother’s parental rights, the court should have examined how mother would function as a parent with medication and therapy, and a psychological assessment should have been obtained to examine how mother performed her parental responsibilities).

64. *In re Tekela*, 780 N.E.2d at 306.

65. *See id.*

66. *Id.* at 307.

summary judgment was inappropriate in this case.”⁶⁷ Instead, the State argued that, although Mother’s rights should not have been terminated through the summary judgment proceeding, the decision by the appellate court was moot because Mother’s children had already been adopted for over a year at the time of the appellate court’s decision.⁶⁸

Under then current Illinois statutes, in order to effectively preclude the lower court from finalizing an adoption while the appeal was pending, Mother should have filed a motion to stay the underlying judgment when she appealed the underlying judgment terminating her parental rights.⁶⁹ Although the court acknowledged that statutes in other states provided for automatic stays when an order terminating parental rights is appealed,⁷⁰ in Illinois the stay was not an automatic occurrence.⁷¹ In addition, under Illinois law, once a child has been adopted for a term of one year, the adoption is final and unappealable.⁷² Although this statutory scheme provided children with permanent placements, it also left parents without a remedy if their rights had been erroneously terminated.⁷³

In reversing the order of the appellate court, the Illinois Supreme Court explained that they were bound by then current Illinois law, which required the parent to request a stay to “protect that right [to appeal] and to take necessary steps to preserve the fruits of [that parent’s] appeal.”⁷⁴ However, the court also acknowledged that a stay is necessary to preserve the status quo pending appeal due to the short period of time that normally elapses between the entry of an order terminating parental rights and the subsequent adoption enforcing

67. *Id.*

68. *Id.*

69. *In re Tekela*, 780 N.E.2d at 308 (stating that “[a] notice of appeal is not an application of stay within the meaning of this court’s rules”).

70. The court expressly referenced Florida’s Rules of Appellate Procedure, which provided for the automatic stay of any subsequent adoption during the appeal of the termination of parental rights. *Id.* at 308 n.1. *See generally* FLA. R. APP. P. § 9.146.

71. *See In re Tekela*, 780 N.E.2d at 308 (stating that “in this case, Wanda failed to request a stay . . .”) (emphasis in original). The current version of the Illinois Supreme Court Rule has changed, allowing for the automatic stay of the termination of parental rights upon notice of an appeal, and prohibits “entry of an order of adoption without the parent’s consent or surrender, and shall also operate to stay the termination order with respect to any power granted to a person or agency to consent to an adoption.” ILL. SUP. CT. R. 305(e)(2).

72. *In re Tekela*, 780 N.E.2d at 310.

73. *See id.* at 311 (explaining that “[w]hile our constitution guarantees a right to meaningful appellate review, it does not necessarily guarantee relief on the merits or relief that will be acceptable to the appellant”). “No procedural principal is more familiar . . . than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” *Id.* at 308 (quoting *Coleman v. Thompson*, 501 U.S. 722, 751 (1991)).

74. *Id.* at 308.

that order.⁷⁵ Although the court expressed concern and frustration with the situation at hand, the court was compelled by Illinois law to reinstate the termination order due to the subsequent adoption that occurred during the appeal.⁷⁶

In a strong dissent, Chief Justice Harrison noted that Mother had a fundamental right to appeal the judgment entered against her under Illinois law.⁷⁷ Justice Harrison noted that the State of Illinois provided that "[a] condition precedent to an adoption is either consent of the parent or a finding by the court that consent is not required for the reason of unfitness."⁷⁸ Justice Harrison argued that, because the court of appeals found that Mother's parental rights were not legally terminated, and Mother did not consent to the adoption, Ira and Tekela were not eligible for adoption.⁷⁹ He further explained that the failure to request a stay from the trial court should not preclude Mother from appealing nor leave her without a remedy.⁸⁰

Overall, both sides expressed frustration regarding the statutory system they were required to follow.⁸¹ While still advocating for permanency and stability for the children the state is trying to protect, both the majority and the dissent strongly expressed a need for a change in Illinois law to prevent a similar situation from occurring in the future.⁸² In response, the Illinois legislature amended their rule regarding appeals and now provides for automatic stays of subsequent adoption proceedings upon notice of an appeal from the judgment terminating parental rights.⁸³

B. *In re J.K.*⁸⁴

In 2003, the Michigan Supreme Court faced a situation similar to that seen only one year before in Illinois.⁸⁵ In 1999, the State of Michigan took

75. *Id.* The court explained later in the opinion that an adoption is normally completed between three months and a year after the termination of parental rights. *In re Tekela*, 780 N.E.2d at 312.

76. *Id.* at 312-13 (noting that "structured reforms are obviously necessary" in this area).

77. *Id.* at 313 (Harrison, J., dissenting).

78. *Id.* at 314 (Harrison, J., dissenting).

79. *Id.* While Chief Justice Harrison acknowledged the need for finality and stability in the adoption process he noted that "finality and stability cannot excuse the failure to effectuate an adoption that complies with the law." *In re Tekela*, 780 N.E.2d at 315 (Harrison, J., dissenting).

80. *Id.* at 314 (Harrison, J., dissenting).

81. *See generally id.* at 311-12 (stating that the court is dealing with critical issues of children and families and expressing a need for "structured reform"); *id.* at 315 (Harrison, J., dissenting)(stating that by allowing the adoption to take place "the majority has embarked on a dangerous course" as "once the adoption decree is entered, the natural parents will be left with no recourse").

82. *See id.* at 312-16.

83. ILL. SUP. CT. R. 305(e).

84. 661 N.W.2d 216 (Mich. 2003).

jurisdiction over sixteen month old JK after respondent (“Mother”) admitted to using marijuana.⁸⁶ Mother complied with all of the goals set by the court by entering into substance abuse counseling, participating in an assistive living program, retaining employment, securing housing, caring for herself, visiting with her child and attending to her child’s needs.⁸⁷ However, despite these efforts, the State petitioned for termination of Mother’s parental rights, citing as its only basis for termination a lack of attachment and bonding with the child, which was disputed by psychiatrists.⁸⁸

Mother first appealed the decision terminating her parental rights to the court of appeals, who affirmed the judgment.⁸⁹ Mother then filed a timely application to appeal the judgment to the Michigan Supreme Court, and filed a copy of the application to appeal with the trial court.⁹⁰ However, before the court ruled on the application, and before a hearing date was scheduled, the trial court entered an order finalizing the adoption of Mother’s child by the current foster parents.⁹¹

Under Michigan law, when an appeal from the judgment terminating parental rights is filed, the Michigan Adoption Code prohibits a trial court from entering an order of adoption until the court of appeals affirms the termination.⁹² The county in this case admitted they did not comply with the adoption code, but instead designated the subsequent adoption as “at risk” of being overturned by the appellate court.⁹³

Ultimately, the court held there was not clear and convincing evidence that Mother’s parental rights should have been terminated,⁹⁴ and found it disturbing that the trial court proceeded with the adoption pending the appeal in the supreme court.⁹⁵ The court explained that in doing so, the trial court ignored

85. *See generally id.* The Michigan court analyzed the situation under the Michigan Adoption Code. MICH. COMP. LAWS ANN. § 710.56(2) (West 2004).

86. *In re JK*, 661 N.W.2d at 218.

87. *Id.* at 220.

88. *Id.*

89. *Id.* at 221. This decision was rendered in an unpublished memorandum opinion on March 1, 2002. *Id.* at 221 n.15.

90. *In re JK*, 661 N.W.2d at 221.

91. *Id.* The Court was only informed of the subsequent adoption after requesting updated findings of fact from the trial court in August, 2002. *Id.* at 220 n.16.

92. *Id.* at 224. *See also* MICH. COMP. LAWS ANN. § 710.56(2) (West 2004).

93. *In re JK*, 661 N.W.2d at 225 n.25. The court explained that the adoption was labeled “at risk” because the county understood there was a risk that the court could vacate the termination of parental rights, thereby invalidating the adoption. *Id.*

94. *Id.* at 222-23 (explaining that there was not sufficient evidence to support a finding that there was either a lack of bond and attachment between Mother and child or a lack in Mother’s ability to provide proper care and custody of her child).

95. *Id.* at 225.

the supreme court’s power to review decisions.⁹⁶ Although the supreme court felt the statute prohibiting such adoptions was clear, they clarified it by stating that “[i]n order to prevent this situation from recurring, we hold that trial courts are *not permitted* to allow an adoption of a child whose parent’s rights have been terminated while the parent’s appeal of that termination is pending in either the court of appeals or this [Supreme] Court.”⁹⁷ Therefore, the supreme court reversed the decision terminating Mother’s parental rights and vacated the order of adoption as invalid.⁹⁸

C. *State ex. rel. T.W. v. Ohmer*⁹⁹

In the spring of 2004, the Missouri Supreme Court ruled on a situation mirroring those that the courts in both Illinois and Michigan faced.¹⁰⁰ In *State ex. rel. T.W. v. The Honorable Steven R. Ohmer, Judge*, Mother’s twin daughters, KAW and KAW, were taken into custody by the State of Missouri after two failed attempts to place them, with Mother’s consent, into adoptive homes.¹⁰¹ Before her twins were born, Mother decided that she would voluntarily place her children for adoption in order to “give them a better life.”¹⁰² The twins were born premature, and throughout their two-month hospital stay, Mother visited her children and cared for them.¹⁰³ After finding two adoptive families, both of whom were deemed unfit,¹⁰⁴ Mother decided she was capable of raising her children herself, and took strides to meet the goals set by the trial court to regain custody of her children.¹⁰⁵ Despite her efforts, the trial court terminated Mother’s parental rights in December of 2002.¹⁰⁶ Mother then appealed the trial court’s judgment, but while the appeal was pending the trial court proceeded with the adoption of KAW and KAW to their foster parents in April of 2003.¹⁰⁷

Concurrently ruling in a separate opinion that the state did not have sufficient evidence to legally terminate mother’s parental rights,¹⁰⁸ the

96. *Id.*

97. *In re JK*, 661 N.W.2d at 226 (emphasis added).

98. *Id.*

99. 133 S.W.3d 41 (Mo. 2004).

100. *Id.*

101. *In the Interest of K.A.W.*, 133 S.W.3d 1, 7 (Mo. 2004).

102. *Id.* at 6.

103. *Id.*

104. Mother regarded the first adoptive family unfit after visiting them and learning that they did not wish to retain contact with her after the adoption. *Id.* British adoption officials deemed the second prospective adoptive family unfit. *Id.*

105. *In the Interest of K.A.W.*, 133 S.W.3d, at 7.

106. *Id.* at 8.

107. *State ex rel. T.W. v. Ohmer*, 133 S.W.3d at 41, 42 (Mo. 2004).

108. *In re K.A.W.*, 133 S.W.3d at 21 (stating that “Mother’s parental rights were terminated because of little more than her efforts to find an adoptive family for her twins”). The Supreme

Missouri Supreme Court granted mother a writ of prohibition, prohibiting the trial court judge from taking any further action consistent with an adoption, and ordered the trial judge to set aside the decree of adoption.¹⁰⁹ Although Missouri juvenile law does not specifically provide for automatic stays of adoption proceedings upon an appeal of an order terminating a parent's rights,¹¹⁰ the supreme court ruled that "[i]t is an abuse of discretion and a circuit court lacks the power to proceed with adoption of a child who has been the subject of a termination of parental rights while an appeal of the judgment terminating parental rights is pending."¹¹¹ The Missouri Supreme Court, like the Michigan Supreme Court also noted that "[p]roceeding with adoption while the termination is reviewed on appeal compromises the parent's right to appellate review by requiring, as an effective precondition to reversal of the termination, that the appellate court be prepared to address a separate adoption proceeding."¹¹² Although the Missouri statutes were ambiguous as to whether stays should be automatic pending appeals in termination cases,¹¹³ the Missouri Supreme Court construed the statute as requiring automatic stays of the underlying termination judgment and any subsequent adoptions pending appeal.¹¹⁴

V. AUTHOR'S ANALYSIS

The above cases demonstrate the problem that occurs when children are adopted while the underlying judgment terminating parental rights is undergoing appellate review. If the underlying termination judgment is reversed after an appeal has taken place, the result can be devastating, not only to the relationship existing between the biological parent and child, but also to the relationship being created between the adoptive parents and the child. Although the courts in Missouri and Michigan ultimately rendered a decision seemingly consistent with due process and the right to appeal, each court expressed frustration and great concern over the effects of overturning the

Court stated that 1) Mother's placement of her children for adoption did not constitute emotional abuse, 2) Mother's feelings of being overwhelmed were normal for a mother of five on welfare and did not constitute abuse or a mental impairment, 3) the trial court's finding that Mother's children suffered from attachment disorder was not supported by clear and cogent and convincing evidence, 4) the trial court's findings of lack of familial support for Mother were not supported by clear and cogent and convincing evidence and 5) the trial courts findings of a lack of emotional ties between Mother and the children was not supported by clear and cogent and convincing evidence. *Id.* at 12-16.

109. *State ex rel. T.W.*, 133 S.W.3d at 43.

110. *See* MO. ANN. STAT. § 453.011 (West 2004).

111. *State ex rel. T.W.*, 133 S.W.3d at 43.

112. *Id.*

113. *See* MO. ANN. STAT. § 453.011 (West 2004).

114. *State ex. rel T.W.*, 133 S.W.3d at 43.

termination of parental rights after a subsequent adoption has been finalized.¹¹⁵ On the other hand, there is also great concern over the lack of remedy available under state statutes that do not provide for automatic stays.¹¹⁶ Although there is no easy answer,¹¹⁷ it is clear that a significant problem exists in the outcome of the Illinois case. Such outcome should prompt state judges and legislators nationwide to be proactive in their advocacy by examining their own state statutes and advocating for change if their statutes do not provide for automatic stays, just as the Illinois legislature did after realizing the error of their own decision.

A. *Constitutional Concerns*

The Fourteenth Amendment to the United States Constitution “provides heightened protection against government interference with certain fundamental rights and liberty interests” that are rooted in United States history and traditions and implicit in the concept of ordered liberty.¹¹⁸ It has been long established and accepted by the Supreme Court that natural parents have a fundamental liberty interest in the “care, custody and management of their child.”¹¹⁹ This fundamental liberty interest is protected by the Fourteenth

115. See *Id.*; *In re JK*, 661 N.W.2d 216, 225. See also *In the Interest of J.R.G.*, 624 So. 2d at 275 (stating that after a termination proceeding an order of adoption shall not be entered until it is clear that the adoption will not be affected by an appeal, as reversing an order terminating parental rights after a subsequent adoption could cause serious consequences); *In the Interest of Baby Boy N*, 874 P.2d 680, 691 (Kan. Ct. App. 1994) (stating that “setting aside an adoption decree is an extreme decision and is fraught with possible consequences”).

116. See *In re Tekela*, 780 N.E.2d at 312 (stating that there is a “compelling need for structured reform in this area”). See also *Jean Ann Kobinski v. The State of Nevada, Welfare Division*, 738 P.2d 895, 898 (Nev. 1987) (stating that “[a]lthough our statutes do not expressly preclude the finalization of an adoption under these circumstances, the possibility of future trauma to the child implicates public policy and justifies refusal to enter an adoption decree . . .”).

117. See *In re JK*, 661 N.W.2d at 225 (stating that “[t]here is no outcome that will avoid the imposition of suffering upon either the birth parent of this child or his present adoptive parents”).

118. *Washington v. Gluxberg*, 521 U.S. 702, 720-21 (1997).

119. *E.g.*, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (stating that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Org. of Foster Families*, 431 U.S. 816, 845 (1977); *Moore v. E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The principal that parents have a fundamentally protected liberty interest in the care and custody of their children is also widely accepted by states. *E.g.*, *G.W.B. v. J.S.W.*, So. 2d 961, 966-67 (Fla. 1995); *In the Interest of Doe*, 57 P.3d 447, 458 (Haw. 2001); *Davis v. Smith*, 583 S.W.2d 37, 40 (Ark. 1979); *State v. Renetta D.*, 571 N.W.2d 608, 612 (Neb. 1997); *Jason S. V. Vally Hosp. Med. Ctr.*, 87 P.3d 521, 527 (Nev. 2004); *Hoff v. Berg*, 595 N.W.2d 285, 288 (N.D. 1999); *In re Murray*, 556 N.E.2d 1169, 1171 (Ohio 1990); *Greenville County Dep’t of Social Servs. v. Bowes*, 437 S.E.2d 107, 110-11 (S.C. 1993); *In the Matter of S.H.*, 337 N.W.2d 179, 181 (S.D. 1983);

Amendment's Due Process Clause,¹²⁰ and includes the rights of parents to establish a home, raise their children and control their children's education, as well as to nurture their children and control their destiny.¹²¹ The right of a parent to raise their children is, in fact, one of the oldest fundamental liberty interests that has been recognized by the Supreme Court.¹²² In addition, the Court has stated that the fundamental liberty interest existing between parent and child "undeniably warrants deference and, absent a powerful countervailing interest, protection."¹²³

In noting this, the Supreme Court has held that the fundamental liberty interest held by parents is not lost when parents lose custody to the state or are not "model parents."¹²⁴ Although the relationship between the parent and child may be strained, both parents and children continue to retain a vital interest in preventing the destruction of the parent-child relationship.¹²⁵ The Court has acknowledged that a termination proceeding interferes with the parent's fundamental liberty interest and therefore held that when a state attempts to destroy familial bonds, the state must provide for fundamentally fair procedures.¹²⁶ In holding, the Court stated:

The fact that the important liberty interests of the child and its foster parents may also be affected by a permanent neglect proceeding does not justify denying the *natural parents* constitutionally adequate procedures. Nor can the State refuse to provide natural parents adequate procedural safeguards on the ground that the family unit already has broken down; that is the very issue the permanent neglect proceeding is meant to decide.¹²⁷

In response, the Supreme Court requires that "state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause."¹²⁸ In addition, the Court mandates that in order to terminate parental rights, the state must

Hawk v. Hawk, 855 S.W.2d 573, 579 (Tenn. 1993); In the Matter of the Termination of Parental Rights to T.R.M., 303 N.W.2d 581, 584 (Wis. 1981).

120. U.S. CONST. amend. XIV, § 1.

121. Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923).

122. Troxel v. Granville, 530 U.S. 57, 65 (2000). In stating the monumental importance of terminating parental rights, the Supreme Court has stated that the right to raise children is "essential" and one of the "basic civil rights of man" that is "far more precious . . . than property rights." *Stanley*, 405 U.S. at 651 (quoting *Meyer*, 262 U.S. at 399; *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *May v. Anderson*, 345 U.S. 528, 533 (1953)).

123. *Stanley*, 405 U.S. at 651.

124. *Santosky*, 455 U.S. at 753.

125. *Id.*

126. *Id.* at 753-54. The Supreme Court explained that "[i]f anything, persons faced with the forced dissolution of their parental rights have a *more critical* need for procedural protections than do those resisting state intervention into ongoing family affairs." *Id.* (emphasis added).

127. *Id.* at 754 n.7 (emphasis in original).

128. *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 37 (1981) (Blackmun, J., dissenting).

support its allegations by at least clear and convincing evidence.”¹²⁹ Further, in understanding the importance and finality of any decision to terminate parental rights,¹³⁰ but recognizing that the family is not beyond regulation, the Supreme Court has noted that any decision infringing on a parent’s fundamental liberty interest will be subjected to strict judicial scrutiny.¹³¹

The Supreme Court has previously explained that the meaning of due process under the United States Constitution is the “right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.”¹³² In addition, the Court stated that “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”¹³³ Although the Court recognized that the requirements of due process are flexible and should be tailored to each individual situation, the Court suggested guidelines to analyze the interests at stake and resolve questions that may arise.¹³⁴ Specifically, the Court explained that, in order to determine whether a state has impeded on a fundamental liberty interest and therefore violated the requirements of the Due Process Clause, courts should consider:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹³⁵

Turning to the constitutional concerns related to the problem at hand, the question of whether adoptions pending the appeal of the termination of parental rights violates due process has not, to date, been brought before the United States Supreme Court.¹³⁶ However, in recent years, the Court has decided other cases regarding the fundamental liberty interest of the parent-

129. *Santosky*, 455 U.S. at 747-48.

130. The proceeding to terminate parental rights has been characterized by the Supreme Court of Nevada as “tantamount to the imposition of a civil death penalty.” In the Matter of Parental Rights as to J.L.N., 55 P.3d 955, 958 (Nev. 1955).

131. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Lawrence v. Texas*, 539 U.S. 558 (2003).

132. *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Joint Anti-Fascist Comm v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

133. *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (Frankfurter, J., concurring)).

134. *Id.* at 334.

135. *Id.* at 335.

136. In March of 2003, the Supreme Court denied the petition for writ of certiorari to review the decision 2001 of *In re Tekela*. *Wanda Cooper v. Illinois*, 538 U.S. 915 (2003).

child relationship.¹³⁷ These cases suggest that under strict scrutiny of the Court, a state statute that impedes the parent-child relationship and the underlying liberty interest will be deemed to violate due process if it does not serve a compelling governmental interest.¹³⁸

In looking at subsequent adoptions finalized after a parent has appealed the underlying termination proceeding, a strong argument can be made that, by not providing for and allowing automatic stays of adoption proceedings when notice of appeal of underlying termination of parental rights has been given, the state is violating the Due Process Clause of the United States Constitution. In the case of *In re Tekela*, although the Illinois Supreme Court determined that clear and convincing evidence did not exist and Mother's rights should not have been terminated, Mother's liberty interest in her children was nevertheless destroyed due to the premature adoption of her children.¹³⁹ This violates the explicit holding of the Supreme Court in *Santosky v. Kramer* which stated that a parent's rights should not be terminated unless clear and convincing evidence is shown to support destroying the liberty interest embedded in the parent-child relationship.¹⁴⁰ When parents are prevented from reuniting with their children, not by a showing of clear and convincing evidence of parental unfitness, but by the premature adoption of their children during the appellate process, their constitutionally protected liberty interest has been destroyed through an unconstitutional procedure.

In addition, in comparing the risk of erroneous decisions with the private interests when the state proceeds with subsequent adoptions while parents appeal the judgment terminating their parental rights, the *Eldridge* factors skew to such action being a violation of the Due Process Clause. In such a situation, there are many private interests at stake. In weighing the factors, one must take into consideration the interest of the government, and each party involved.¹⁴¹ Here, as in any conflict involved in the termination of parental rights and adoption, there are many conflicting interests between the natural parents, the child and the state.

As discussed above, as long as the natural parent is able to supply the child with a safe and secure environment, the natural parents have a long accepted

137. *E.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Troxel v. Granville*, 530 U.S. 57 (2000).

138. *See M.L.B.*, 519 U.S. at 124-28 (holding that Mississippi precedent, which did not allow M.L.B. to appeal the termination of her parental rights *in forma pauperis*, violated the due process clause); *Troxel*, 530 U.S. at 73-75 (holding that a Washington statute, which allowed any person to petition for visitation and authorized the state courts to grant visitation whenever it may serve the child best interests, was unconstitutional, as it infringed on a parent's fundamental right to rear her children without showing through clear and convincing evidence that the visitation was to prevent harm to the child).

139. *In re Tekela*, 780 N.E.2d at 312-13.

140. *Santosky*, 455 U.S. at 747-48.

141. *Eldridge*, 424 U.S. at 334 .

interest in the care and custody of their child and in the preservation of the parent-child relationship.¹⁴² In addition, the natural parents have an interest in obtaining an accurate and just decision regarding their parental rights.¹⁴³ If the child is adopted before a parent has finished his (or her) appeal, both of these interests have been prematurely destroyed.

Similar to the interests of the natural parent, the child also has an interest in maintaining a parent-child relationship and building bonds with his (or her) natural parent.¹⁴⁴ In addition, the child has an interest in residing in a safe and stable home environment that is permanent and secure.¹⁴⁵ Only when the court finds that the natural parent *cannot* provide a safe and secure home does the child's interest lie in residing without the natural parent.¹⁴⁶ However, as long as the natural parent's home is safe and the parent is not deemed unfit, the child has a strong interest in remaining with the natural parent.¹⁴⁷

In contrast, the state has a plethora of interests that must be reviewed and weighed against the interest of the parent and child. First, like the natural parents, the state has an interest in obtaining an accurate and just determination of the parent's fitness.¹⁴⁸ In addition, the state also has an administrative interest in reducing the financial cost and burden of the proceedings and services required to terminate parental rights.¹⁴⁹ Finally, states have a compelling interest in protecting the children who reside in their state from harm.¹⁵⁰ Through the state's *parens patriae* power, states have an urgent interest in preserving and promoting the welfare of the children in their state.¹⁵¹ To do this, the state must identify parents who pose a risk to children and proceed with terminating the rights of the parent if reasonable efforts do not lead to a remedy of the dangerous or harmful situation. However, if there is reason to believe that a positive and nurturing relationship can exist between the natural parent and child, it is well accepted that the state's interest favors preserving and not severing the natural familial bonds.¹⁵²

142. *Santosky*, 455 U.S. at 753.

143. *Id.* at 765 (quoting *Lassiter*, 452 U.S. at 27).

144. *Id.* at 761.

145. *Id.* at 788-98 (Rhenquist, J. dissenting) (explaining that a safe, stable and loving homelife is essential to a child's physical emotional and spiritual well being).

146. *Santosky*, 455 U.S. at 761.

147. *Id.* at 760.

148. *Id.* at 766 (quoting *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981)).

149. *Id.* at 766. It is estimated that in fiscal year 2000 total spending for out-of-home care, including federal, state and local funding, was at least 9.1 billion dollars. United States Department of Health and Human Services, Administration for Children and Families, *Foster Care National Statistics*, at <http://nccanch.acf.hhs.gov/pubs/factsheets/foster.cfm> (last visited Mar. 8, 2005).

150. *Santosky*, 455 U.S. at 766.

151. *Id.*

152. *Id.* at 767. See also *Stanley*, 405 U.S. at 652 (explaining that there is "no gain towards

Next, *Eldridge* requires an analysis of whether, by allowing for subsequent adoptions while a parent appeals the underlying judgment terminating their parental rights, there is an increased risk of erroneous decisions.¹⁵³ As the decision of *In re Tekela* demonstrates, such erroneous decisions are possible and have occurred.¹⁵⁴ Appealing a judgment can be a lengthy process in the United States, while adoption, in many cases, occurs quickly.¹⁵⁵ If a parent fails to meet a state's requirements for a stay, or a judge ruling on a motion to stay denies the motion, the effects can be devastating. The adoption could be final and unappealable long before a parent or the trial judge receives the final ruling from the appellate court on the necessary termination. If the termination is reversed, the parent is left stripped of his or her child and the relationship that is considered "fundamental" without a finding of unfitness. As case law has shown, the risk being discussed has occurred due to the absence of automatic stays.¹⁵⁶ In contrast, such a risk of erroneous outcomes can be greatly reduced by requiring states to automatically stay judgments to terminate parental rights upon notice of an appeal.

In light of the above factors, it is apparent that the states' interest in reducing the cost of terminating parental rights is comparatively slight compared to the risk that erroneous decisions can occur that would strip the natural parent of their fundamental and constitutionally protected interest in a relationship with their children. Therefore, there is a strong possibility that a state that does not require the automatic stay of adoption proceedings, but instead allows adoptions to proceed before a final decision is rendered, is in violation of the Due Process Clause of the United States Constitution.

B. Policy Concerns

Notwithstanding the constitutional concerns discussed above, there are also strong policy arguments that courts and state legislators should examine when either determining whether a change should be made to their state's current appellate procedure or interpreting ambiguous language in their current statutory rules.

First, by not providing for automatic stays of adoptions pending appeal, the integrity of the judicial system is strongly diminished.¹⁵⁷ If the appellate court finds that a parent's rights have been wrongly terminated, courts are forced to

[the state's] declared goals when it separates children from the custody of fit parents. . . the State spites its own articulated goals when it needlessly separates [a child] from his family").

153. *Eldridge*, 424 U.S. at 335.

154. *See In re Tekela*, 780 N.E.2d 304.

155. *Id.* at 312.

156. *See e.g., In re Tekela*, 780 N.E.2d 304; *State ex rel. T.W.*, 133 S.W.3d 41. *See also In the Interest of J.R.G.*, 624 So. 2d 273; *In the Interest of Baby Boy N.*, 874 P.2d 680; *Jean Ann Kobinski*, 738 P.2d 895.

157. *In re JK*, 661 N.W.2d 216, 225.

make a choice between taking a child away from the safe and stable home of an adoptive parent where the child has found permanence, or alternatively, severing the relationship between the natural parent and child without a finding of unfitness and leaving the natural parent whose rights have been wrongly terminated without a remedy.¹⁵⁸ Likewise, if stays are not automatic, but are instead allowed at the discretion of the trial judge, the granting of appeals could be allowed or disallowed according to one judge’s bias or whim and stays may not be uniformly granted.¹⁵⁹ This choice distorts the nature of appellate review and leaves a black cloud on the granting of relief.¹⁶⁰

Similarly, such a dilemma leaves open the risk that states could be tempted to delay the adjudication leading to the judgment terminating parental rights in order to find a suitable adoptive family and subsequently race to an order of adoption as soon as possible after such judgment is rendered.¹⁶¹ This risk exists when having a decree of adoption would effectively moot any challenge to the judgment terminating parental rights, as once an adoption is final parents will be left without a remedy whether they succeed on appeal or not.¹⁶²

Finally, and arguably most importantly, allowing adoptions before the appeal is final leaves all of the parties involved, including the child and the adoptive parents in a situation with no finality or stability.¹⁶³ In Michigan, the trial court allowed the adoption in *In re JK* to take place pending appeal and termed the adoption an “at risk” adoption.¹⁶⁴ The court recognized the chance that the judgment terminating Mother’s parental rights might be declared erroneous but nonetheless placed the child for adoption.¹⁶⁵ In *In re JK*, the Michigan Supreme Court reprimanded the trial court for granting the “at risk” adoption and explained that such adoptions will have a “significant effect on the lives of everyone connected with this case.”¹⁶⁶ Allowing an adoption, knowing that the bond and relationship the adoptive parent forms with the child could ultimately be torn apart, can have a traumatic psychological effect

158. *Id.*

159. *See In re Tekela*, 780 N.E.2d at 315 (Harrison, J., dissenting) (stating that such a system “places a parent’s fundamental rights wholly at the mercy of a judge’s subjective view of what is fair”).

160. *In re JK*, 661 N.W.2d at 217.

161. *In re Tekela*, 780 N.E.2d at 315 (Harrison, J., dissenting).

162. *See id.*

163. *See In re JK*, 661 N.W.2d 216, 225 (expressing concern over the necessity of removing the child from the adoptive parents in order to “give faithful effect to the law”); Jean Ann Kobinski, 738 P.2d at 898 (expressing concern over the “possibility of future trauma to the child”); *In the Interest of J.R.G.*, 624 So. 2d at 275 (explaining that, had the court been required to reverse the termination of parental rights, it would have serious effects on the children, adoptive parents and natural parents).

164. *In re JK*, 661 N.W.2d at 225 n.25.

165. *Id.*

166. *Id.* at 225.

on all parties involved, especially the child.¹⁶⁷ Furthermore, even if the trial court does not deem the adoption to be “at risk” of reversal, a proceeding terminating parental rights is always “subject to careful scrutiny on appeal and reversal is always a possibility.”¹⁶⁸ Therefore, finalizing the adoption of children, in *any* case, before an appeal of the underlying termination has been adjudicated always carries the grave risk that the stability and finality given to the child will have to be destroyed in order to give faithful effect to the law.

The above policy concerns, which have been stated by courts when determining whether stays of the adoption should have been given upon notice of appeal, point to the conclusion that the “status quo” should be preserved pending appeal by providing for automatic stays of subsequent adoption proceedings and the underlying judgment terminating parental rights.

C. Proposed Solution

In response to the concerns raised above, a proposed model statute is laid out below. This statute does not alter statutory provisions that allow states to protect their interest in terminating the rights of parents who are deemed unfit through clear and convincing evidence. Instead, the model statute is a proposal to protect the constitutional rights of parents whose parental rights have been *wrongly* terminated by providing for the automatic stay of adoption proceedings pending a final decision on appeal. In addition, the model statute provides for a strict expedited timeline for the appellate process in order to comply with the mandate set by ASFA and to protect children from languishing in the foster care system during a lengthy appellate process.

Proposed Model Statute—Appeals, Termination of Parental Rights¹⁶⁹

Section 1: Legislative Findings

1. Natural parents have a interest in both maintaining a relationship with their child unless deemed by the court to be unfit and in appealing any wrongful termination of their parental rights.
2. The State has a compelling interest in providing stable and permanent homes for children in a prompt manner, in preventing the disruption of

167. Santosky, 455 U.S. at 788-89 (Rhenquist, J. dissenting) (stating that “a stable, loving homelife is essential to a child’s physical, emotional and spiritual wellbeing”). See also MARY ANN MASON, *THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE, AND WHAT WE CAN DO ABOUT IT* 98 (2000) (stating that children who lose a parent have an increased risk of emotional and social dysfunction in adulthood).

168. *Kobinski*, 738 P.2d at 898.

169. Portions of this model statute were compiled by examining statutes in various states. See FLA. R. APP. P. 9.146; ILL. SUP. CT. R. 305; KAN. STAT. ANN. § 59-2407 (1994); MICH. COMP. LAWS ANN. § 710.56(2) (West 2004); MO. ANN. STAT. 453.011 (West 2003).

adoptive placements, and in holding parents accountable for meeting the needs of children.

3. Adoptive children have the right to permanence and stability in their adoptive placement.
4. Adoptive parents have a constitutional interest in retaining custody of a legally adopted child.

Section 2: Legislative Purpose

1. To provide procedures to insure children, parents, guardians and other interested parties the constitutionally protected right to due process by assuring hearings by an impartial court with recognition and enforcement of all parties' constitutional rights, while insuring that public safety as well as the interests of the integrity of the court and the state government are simultaneously protected.
2. To encourage timely and permanent placements for children with families suitable to meet their individual needs.
3. To provide for the safety, care and protection of children and to ensure and promote the health and well-being of all children in the state's care.

Section 3: Definitions

1. "Adoption" Creating a legal relationship between a parent and child where it did not already exist. Declaring the child to legally be the child of the adoptive parents and entitled to all the rights, and privileges, and subject to all obligations of a child born to such adoptive parents.
2. "Child" Any person under the age of eighteen who has not been emancipated.
3. "Child Placement Agency" Any person, society, association or institution licensed by the Department of Child and Family Services to care for, receive, or board children and to place children in a licensed child caring institution or a foster or adoptive home.
4. "Court" The state supreme court, the court of appeals, and the circuit court in exercise of jurisdiction described by state statute.
5. "Order" A decision, order, judgment, decree or rule of a lower tribunal, excluding minutes and minute book entries.
6. "Parent" A woman who gave birth to a child, the putative father of the child and the husband of the woman who gave birth to the child at the time the child was conceived. If a child has been legally adopted, the term "parent" also includes the adoptive mother and father of the child.

Section 4: Appellate Procedure—Termination of Parental Rights

1. An appeal from an order terminating parental rights must be taken within thirty (30) days after receipt of the order by the appellant in court, thirty-five (35) days from the mailing of the order to appellant by the clerk of the court, or thirty (30) days after service by a party or law guardian of the appellant.
2. The record shall be filed by the circuit court within thirty (30) days after notice of the appeal is filed in the circuit court.
3. Appellant's brief must be filed within thirty (30) days of the filing of the record on appeal.
4. Respondent's brief must be filed within thirty (30) days of the filing of appellant's brief.
5. Any reply brief must be filed within ten (10) days of the filing of respondent's brief.
6. In no event shall the court permit more than one request for an extension by either party.
7. The court shall give priority over other civil litigation to appeals filed under this rule in reaching a determination on the status of the termination of parental rights by entering scheduling orders to ensure that a ruling will be entered within thirty (30) days of the close of oral arguments.

Section 5: Effect of Appeal—Stays of Proceedings

1. A termination of parental rights order, with placement of the child with a licensed child placement agency or the Department of Child and Family Services for subsequent adoption, shall automatically be suspended upon timely notice of appeal to the trial court while the appeal is pending.
2. No bond will be required with respect to a stay pending appeal of the termination of parental rights.
3. During the appeal, the child shall continue in the custody of the Division of Child and Family Services or other child placement agency under the order until the appeal is decided. The Division of Child and Family Services or other child placement agency, through the jurisdiction of the trial court, will continue to have the authority to make decisions regarding the care, custody and support of the child.

4. The automatic stay under this rule shall stay the power to enter an order of adoption without the parents consent as well as the power of any person or agency to consent to an adoption for the parent.

D. Arguments In Support of Proposed Model Statute

The above legislation is not intended to decrease the rights of states to terminate the parental rights of unfit parents when termination is in the best interest of the child. Nor should the legislation be interpreted as obscuring the rights of states to proceed with adoptions after termination has occurred. When a parent is unfit, both termination and adoption are essential to realize the child’s right to a safe, permanent and stable home environment. Instead, the above legislation is intended to enable parents to realize their protected right to appeal a judgment wrongfully entered against them. The proposed statute is intended to bring balance back into the legal system that seems to have been lost in the states’ quest to comply with the ASFA and promote speedier adoptions. The proposed legislation allows states to remain in compliance with the ASFA mandates, while simultaneously satisfying any constitutional and policy concerns that arise under a system that allows for adoptions pending the outcome of a rightful appeal.

1. Compliance with the Adoption and Safe Families Act

Although the proposed legislation could slow down the timing of adoptions in cases where a parent appeals the termination judgment, the proposal still allows and encourages states to maintain compliance with the requirements of the ASFA. The ASFA requires states to make reasonable efforts for reunification for 12 months after the child enters the custody of the state.¹⁷⁰ In addition, the ASFA requires states to petition for the termination of parental rights after the child has been in care for 15 out of the most recent 22 months.¹⁷¹ Further, the ASFA requires states to “identify, recruit, process, and approve a qualified family for adoption.”¹⁷² Because the above legislation does not alter the state’s right to terminate parental rights, and does not attempt to modify the state’s procedure during the underlying termination proceedings, states that enact legislation like that proposed will not fall out of compliance with the ASFA.

In addition, while a parent is appealing the termination of their parental rights and a stay is in effect, the legislation provides that the stay will not change the states’ jurisdiction over the care, custody and support of the child.

170. Adoption and Safe Families Act of 1997 § 101(a)(15)(B)(ii), 42 U.S.C. § 671(a)(15)(B)(ii).

171. *Id.* § 103(a)(3)(E); 42 U.S.C. § 675(5)(E).

172. *Id.*

This gives states the right to move children into pre-adoptive homes and monitor their progress while the appeal is proceeding. The only power lost to states is the power to *finalize* such adoptions until the appeal is completed. Further, because the legislation promotes expediting the appellate process in termination of parental rights cases, children will not languish in the foster care system, as required by the ASFA. Although staying adoption proceedings while an appeal is proceeding will slow the adoption process, states will not be allowing children to languish, as they will be diligently attempting to resolve the situation through an expedited appellate process.

2. Putting Constitutional Concerns to Rest

In addition to allowing states to remain in compliance with the ASFA, the proposed legislation lays to rest any constitutional concerns that may arise when states does not provide for automatic stays and instead allow for the subsequent adoption of children before an appeal has concluded. This legislation satisfies the interests of all parties, including the parent, the child and the state.

The interest of the child in residing in a safe, permanent and stable home environment¹⁷³ is satisfied, as the child can be placed in a safe home while the appeal is pending and will not be returned to a dangerous environment. In addition, the state has the authority to place the child in a pre-adoptive home during the appeal to make the transition to adoption easier if the underlying termination is upheld. Further, the child will not be left to languish in multiple foster homes during a lengthy appellate process, as the process has been expedited to allow for a faster resolution of the case.

In addition, the interest of both the parent and the state to gain an accurate and just decision regarding their parental rights is satisfied.¹⁷⁴ The parent is able to appeal the judgment without fear that their children will be adopted in the process, leaving them without a remedy if the judgment is reversed. Similarly, although the state will have to maintain support of the child during the appeal, the court will simultaneously reduce the financial burden of maintaining the care, custody and support of the child during the appeal by expediting the time it will take to obtain a just, accurate and final decision on appeal.

Likewise, providing for automatic stays pending appeal will substantially lower the risk that an erroneous decision may occur during the proceedings. By providing for automatic stays, the risk that a parent would be denied a stay or would not meet the requirements of the stay is greatly reduced. In effect, there is a reduced chance that a finalized adoption will occur during the appeal, which greatly decreases the risk that an erroneous decision will be rendered or

173. *Santosky*, 455 U.S. at 788-89 (Rhenquist, J. dissenting).

174. *Id.* at 766.

that parents will be left without a remedy if the judgment terminating parental rights is overturned. Although there is still a chance that judges will erroneously disregard the mandate and proceed with an adoption during the appeal despite statutory language that clearly provides otherwise,¹⁷⁵ if such an adoption would occur, the judiciary has a clear way of examining the problem and determining the rightful solution. As a result, states are able to maintain the right of parents to appeal judgments and are providing for fundamentally fair procedures when terminating a parent’s protected right to their children, as required by the Supreme Court.¹⁷⁶ Such a proposal should withstand the strict judicial scrutiny that is applied to procedures that terminate a parent’s fundamentally protected right.

3. Grounded in Policy

In addition to maintaining compliance with the ASFA and satisfying any constitutional concerns, the proposed legislation is also supported by policy.

First, automatic stays of the judgment terminating parental rights and any subsequent adoption upon notice of appeal maintains the integrity of the judicial system that is arguably lost when such stays do not take place.¹⁷⁷ As long as courts comply with the statutory mandate to automatically stay subsequent adoption proceedings, courts will no longer be forced to make the difficult decision of taking away the rights of the adoptive parent or alternatively leaving the natural parent without the remedy afforded to them.¹⁷⁸ Instead, appellate courts can focus only on the issue brought before them: whether the trial court rightfully terminated the rights of the natural parents.

Similarly, by providing for stays of adoptions until an appeal is complete, the adoptive parent will not have to endure the emotional upheaval of having an adopted child removed from their home. Once a court finalizes an adoption, the adoptive parent has an interest in bonding and maintaining a relationship with the child by providing for them both physically and emotionally. By providing for automatic stays and not allowing premature or “at risk” adoptions to take place, not only are appellate courts relieved of making a decision between an adoptive parent and a natural parent, but the adoptive parent is also relieved of the turmoil and emotional effect that such a decision is bound to have.¹⁷⁹ It has been noted that if adoptive parents feel they are “at risk” of losing the adopted child, they are less likely to make an effort to bond

175. See *In re JK*, 661 N.W.2d 216.

176. See *Lassiter*, 452 U.S. at 37 (Blackmun, J., dissenting).

177. See *In re JK*, 661 N.W.2d. at 225.

178. *Id.*

179. See *In the Interest of J.R.G.*, 624 So. 2d at 275 (explaining that, had the court been required to reverse the termination of parental rights, it would have serious effects on the children, adoptive parents and natural parents).

emotionally with the child.¹⁸⁰ Under the proposed legislation, the child can be placed in the home of the prospective adoptive parent, but the legal ties will not be made until after a decision on appeal is rendered. This legislation ensures that any legal and emotional bonds made between the adoptive parent and child after the adoption occurs cannot and will not be torn apart, and therefore logically promotes the creation of such bonds.

In addition, if a system with automatic stays during appeals is implemented, children are ultimately afforded more stability and permanence in their adoptive placements. Allowing for adoptions, even those deemed “at risk” of reversal, does not provide the child with permanency and stability. Instead, such a system provides the child with the risk of yet another detrimental upheaval. Studies have shown that a child who loses a parent, whether through death or a legal process, has an increased risk of emotional and social problems in adulthood.¹⁸¹ If the child’s relationship “is interrupted more than once, as happens with multiple foster placements in the early years, the children’s emotional attachments become increasingly shallow and indiscriminate.”¹⁸² If adoption proceedings are stayed during the appellate process, an order of adoption will have more impact and will be more likely to induce the feeling of finality and stability that is much needed in the life of any child who has been removed from his/her home.

Finally, when the appellate process is expedited, children will not be forced to languish in the foster care system or in pre-adoptive homes while waiting for what could be a lengthy appellate process to proceed. Although this Comment promotes stays of adoption, it does not promote children suffering in the foster care system for excessive amounts of time, as “even in a loving, long term foster home, the uncertainty of the foster care status may cause hardship.” Instead, the proposed statute promotes an expedited appellate process, which will lessen the risk of excessive foster care. This allows adoptive parents and children to form much needed attachments and bonds to each other as soon as possible¹⁸³ while still allowing natural parents the right to appeal any judgment against them.

180. See Jessica K. Heldman, Comment, *Court Delay and the Waiting Child*, 40 SAN DIEGO L. REV. 1001, 1010 n.60 (stating that adoptive parents may be anxious or tentative in developing bonds with the child).

181. MASON, *supra* note 167, at 98.

182. JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 19 (1996).

183. “A child’s attachment to the parent and the parent’s attachment to the child are considered factors that protect against delinquency.” Heldman, *supra* note 180, at 1011 n.69 (2003) (citing Sharon G. Elstein, *Understanding the Relationship between Maltreatment and Delinquency*, 18 CHILD L. PRAC. 136, 139 (1999)).

VI. CONCLUSION

As stated, the ASFA was one of the most significant pieces of child welfare legislation in United States history. It promoted the idea that, while states should make reasonable efforts to reunify families after removing children from the homes of their parents, significant efforts should be made to stop children from languishing in the foster care system and to promote adoption after the termination of parental rights. Using the ASFA mandates as guidance, states enacted statutes to comply with the federal legislation, but arguably swung too far in their quest to finalize a greater number of adoptions at the expense of the parents' right to appeal.

As the cases of *In re Tekela*, *In re J.K.* and *State ex rel. T.W. v. The Honorable Steven R. Ohmer, Judge* indicate, there are major implications when states choose not to automatically stay adoption proceedings while parents pursue their appellate rights and choose instead to finalize adoptions before the outcome of the appeal is known. Both constitutional and policy-based concerns exist regarding such procedures. If the appellate court ultimately decides that the parent's rights were unlawfully terminated, the state is faced with having to "unscramble the proverbial egg" by overturning the subsequent adoption or leaving the parents without a remedy.

The proposed statutory changes promoted in this Comment are not intended to reward negligent and unfit parents, but are intended to preserve the rights of parents whose rights have been *wrongly* terminated. Although it is clear that no simple or perfect solution exists, and a compromise is necessary, the proposed legislation protects the union between the child and natural parent as well as the appellate rights of the natural parent while simultaneously promoting the purpose of the ASFA to reduce the number of children languishing in foster care and to promote adoption. It is extremely important for states to promote the safety and security of children; however, states must still ensure that the appellate rights of parents are maintained to ensure a remedy if the "system" breaks down and parental rights are wrongly terminated.

In conclusion, it is not merely the responsibility of the legislature but also the judicial branch to promote change. While it is imperative to sever the rights of unfit parents and to promote stability for children, it is also extremely important that states maintain the rights of parents during the quest for stability. In order to maintain the rights of the state, the child and the parents, a partnership must be forged between the judicial branch and the legislature to examine the procedures currently used during an appeal from the termination of parental rights and promote changes to automatically stay subsequent adoption proceedings and expedite the appellate process. States should not

idly sit waiting for a problem to arise under current procedural guidelines that do not provide for stays, but should instead be proactive in their advocacy.

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