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### Foster Parents and AIDS: Considering the Best Interests of a Foster Child in *In re Interest of John T.*, 4 Neb. Ct. App. 79, 538 N.W.2d 761 (1995)

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Note\*

Foster Parents and AIDS:  
Considering the Best Interests of a  
Foster Child in *In re Interest of  
John T.*, 4 Neb. Ct. App. 79, 538  
N.W.2d 761 (1995)

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## I. INTRODUCTION

When Diane first met her friend, Sarah, through the Project Kids Program,<sup>1</sup> she never anticipated the situation in which she was getting involved. It all started out innocently enough. Diane's role was to spend time with ten year-old Sarah and to be a friend and a role model to her. When they first started spending time together, Sarah lived at home with her mother and her brothers. Now, two years later, Sarah lives in a foster home. After Sarah was placed in the foster home, Diane's role began to change. She spent hours at various meetings discussing the family's reunification plan and making phone calls as an advocate for Sarah. She never knew what would happen next. Many times, Diane felt she was waging a personal battle for her young friend's best interests in the complex world of foster care. In today's child welfare system, volunteers like Diane are not alone in having a personal stake in the outcome of a child placement decision.

With all the competing interests involved in a child placement decision, are the best interests of the child really the controlling factor in making decisions regarding foster children? The child welfare system today must deal with many factors that compete with the best interests of children. Many situations regarding child welfare often find their way into a court of law, where decisions must be made as to what type of placement is in the best interests of the child. We would all like to think that our judicial system would never place other considerations ahead of a child's best interest. These other considerations should not outweigh the child's best interests. However, this can happen. Such was the case of a little boy named John T.

In *In re Interest of John T.*,<sup>2</sup> the Nebraska Court of Appeals disapproved the plan of the Nebraska Department of Social Services ("DSS")<sup>3</sup> to remove a young boy from the home of his foster parents,

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1. This scenario is based on the author's own experience as a Project Kids volunteer. The Project Kids Program is a component of the Parent Aide Support Service, which is a program supervised by the Nebraska Department of Health and Human Services. This program utilizes volunteers to provide support to families in an effort to reduce risk factors that contribute to child abuse and neglect. The Project Kids component of the program matches a child who needs special help or attention with a volunteer who provides role modeling, self-esteem enhancement, and other types of support to the child.
  2. 4 Neb. Ct. App. 79, 538 N.W.2d 761 (1995).
  3. The Department of Social Services, now known as the Department of Health and Human Services, is the state agency responsible for child welfare services in Nebraska. See NEB. REV. STAT. § 68-1207 (Reissue 1996). The Department's role in providing such services is to develop and implement a comprehensive statewide approach to providing child welfare services and to assure that children are swiftly moved through the system. See 390 NEB. ADMIN. R. & REGS. 1-002 to -004 (1995). The Department's role in placing children begins when the court has given custody of the child to the Department or when the parents have voluntarily relinquished the child to the Department. When custody is court-ordered,

one of whom had HIV-AIDS.<sup>4</sup> In *John T.*, the court promoted the interests of the foster parents under the guise of seeking the best interests of the child. This proposition may not be evident in the court of appeals opinion alone, but becomes apparent through the progression of the case as a whole. John's best interests were placed behind the social goal of discouraging discrimination in the judicial process against an individual with AIDS.

It cannot be disputed that there is widespread discrimination against individuals with HIV-AIDS.<sup>5</sup> Such discrimination has prompted reforms to protect the rights of people infected with HIV-AIDS.<sup>6</sup> Discouraging discrimination against individuals with this dis-

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the Department is authorized to make all decisions about placement, medical and psychological treatment, and education of the child. If parental rights have been terminated or relinquished, the Department will make all decisions regarding the child. See 390 NEB. ADMIN. R. & REGS. 7-001 to -001.01 (1995).

4. The term "HIV-AIDS" will be used throughout this Note to refer to the human immunodeficiency virus (HIV) and the acquired immune deficiency syndrome (AIDS). See Abigail English, *The HIV-AIDS Epidemic and the Child Welfare System: Protecting the Rights of Infants, Young Children, and Adolescents*, 77 IOWA L. REV. 1509, 1511 n.1 (1992). HIV is the virus that causes AIDS. AIDS is a disease in which the immune system is severely depressed, causing the body to be subject to many opportunistic infections and cancers. See Joseph Evall, *Sexual Orientation and Adoptive Matching*, 25 FAM. L.Q. 347, 360 n.86 (1991).
5. See Janet L. Dolgin, *AIDS: Social Meanings and Legal Ramifications*, 14 HOFSTRA L. REV. 193, 198-99 (1985)(discussing public fear and panic associated with AIDS victims and persons in high risk groups for contracting AIDS); Nancy B. Mahon, *Public Hysteria, Private Conflict: Child Custody and Visitation Disputes Involving an HIV Infected Parent*, 63 N.Y.U. L. REV. 1092, 1092-94 (1988)(discussing public hysteria and violence against HIV infected people and the discriminatory treatment HIV-infected individuals receive from the public, members of the clergy, emergency care personnel, government officials, and the judiciary); John Parry, *AIDS as Handicapping Condition—Part I*, 9 MENTAL & PHYSICAL DISABILITY L. REP. 402, 402-03 (1985)(citing specific instances of discrimination against people with AIDS); Lynn E. Sudbeck, *Students With AIDS: Protecting an Infected Child's Right to a Classroom Education and Developing a School's AIDS Policy*, 40 S.D. L. REV. 72, 72-73 (1995)(discussing public fear of AIDS and of people who are infected with the disease); Robert P. Wasson, Jr., *The AIDS Crisis as an Impetus to Law Reform in the United States and Kenya*, 17 SUFFOLK TRANSNAT'L L. REV. 1, 10-12 (1994)(discussing irrational fear of AIDS victims); see also David P. Russman, *Alternative Families: In Whose Best Interests?*, 27 SUFFOLK U. L. REV. 33, 58-60 (1993) (discussing association of AIDS with homosexuality resulting in prejudice against the gay community).
6. See English, *supra* note 4, at 1514-15 (discussing adoption of HIV-AIDS policies by state child welfare agencies and adoption of national guidelines on HIV-AIDS by government agencies and professional organizations); Marlene C. McGuirl & Robert N. Gee, *AIDS: An Overview of the British, Australian, and American Responses*, 14 HOFSTRA L. REV. 107, 126-132 (1985)(discussing various state local reforms prohibiting discrimination against AIDS victims); John Parry, *AIDS as Handicapping Condition—Part II*, 10 MENTAL & PHYSICAL DISABILITY L. REP. 2, 2-4 (1986)(discussing constitutional, federal, and state law protections for people with AIDS); Sudbeck, *supra* note 5, at 74-81 (discussing protections for AIDS-infected children under federal law).

ease is a legitimate goal in the judicial and social systems. However, in a situation like John T.'s, can this be taken too far? Whose interests are to be given more weight—those of an HIV-AIDS-infected foster parent or those of the foster child? In the *John T.* situation, the fact that the foster mother had AIDS, as opposed to some other terminal illness, tipped the scales in favor of protecting the foster parents' interests over what was really in the best interests of this child.

This Note first presents the factual background of *In re Interest of John T.*, as well as the ultimate outcome of the situation, which is not evident in the court of appeals opinion itself. Next, this Note presents the legal framework upon which the case can be analyzed. This Note then analyzes the Nebraska Court of Appeal's opinion in *John T.*, beginning with an analysis of the differences in the rights of biological families as compared to the rights of foster and adoptive families. The meaning of the best interests of the child standard is then examined. The ramifications of interjecting the social and political goal of discouraging discrimination against HIV-AIDS-infected individuals into a child placement decision are then discussed. This Note concludes by examining the future implications for the child welfare system arising from the *John T.* case and the subsequent federal court suit brought by the foster parents alleging discrimination by DSS because of the foster mother's HIV-AIDS status.

## II. BACKGROUND

*In re Interest of John T.*<sup>7</sup> was an appeal to the Nebraska Court of Appeals seeking to reverse an order of the juvenile court. The juvenile court order approved the DSS plan to remove a three-and-a-half-year-old boy from the home of foster parents because the foster mother was HIV-positive. The court of appeals reversed the juvenile court's order, thereby disapproving the DSS plan.<sup>8</sup> However, there is much more to this case than what is revealed in the court of appeals opinion, making the story all the more tragic.

John T. was born on December 28, 1991.<sup>9</sup> When he was three months old, DSS placed John in the home of foster parents, Jay and GayLynn Brummett.<sup>10</sup> John was placed in foster care because his parents could not care for him properly. John's biological mother had suffered from schizophrenia<sup>11</sup> for over half her life,<sup>12</sup> and his biologi-

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7. 4 Neb. Ct. App. 79, 538 N.W.2d 761 (1995).

8. See *id.* at 100, 538 N.W.2d at 773.

9. See *id.* at 84, 538 N.W.2d at 764.

10. See *id.* at 80, 538 N.W.2d at 762.

11. Schizophrenia is a serious mental illness. A schizophrenic may suffer from positive symptoms, which are the presence of certain phenomena which are not present in a normal individual, and negative symptoms, which are the absence of certain functions which should be present in a normal individual. The specific

cal father was incarcerated on a sexual assault charge and was also possibly schizophrenic.<sup>13</sup> Because his mother was schizophrenic, John had a fourteen-percent chance of developing schizophrenia himself.<sup>14</sup> If John's father also had schizophrenia, John would have a fifty-percent chance of developing the illness.<sup>15</sup>

John's placement with the Brummetts was a "fos-adopt" placement, a term of art meaning the placement was assumed permanent and the foster parents would adopt the child when the child became free for adoption.<sup>16</sup> On April 9, 1992, John was adjudicated as a child without proper support through no fault of his parents, and the biological parents later relinquished all rights to John, freeing him for adoption.<sup>17</sup> At the time of John's placement with the Brummetts, DSS had a health regulation concerning foster and adoptive parents which stated that in the case of adoption, the health of the parents should be maintained until the child reaches the age of majority.<sup>18</sup>

The Brummetts first applied to be foster parents in December of 1990, and their performance as foster parents since that time was satisfactory.<sup>19</sup> However, when they applied to be foster parents, neither Jay nor GayLynn Brummett disclosed to DSS that GayLynn Brummett had tested HIV positive in 1989 and was taking AZT, a drug commonly taken as treatment for the disease.<sup>20</sup> DSS found out about GayLynn's HIV status through an anonymous report,<sup>21</sup> and, when confronted with the information, GayLynn Brummett confirmed the report.<sup>22</sup> Mrs. Brummett stated that she did not disclose the information because she believed she would be rejected as a foster parent.<sup>23</sup> DSS asked the Brummetts to consider changing John's placement

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symptoms of schizophrenia include hallucinations, delusions, catatonia, thought disorder, disturbance of emotion, attentional impairment, and memory failures. See SCHIZOPHRENIA 15, 15-17 (Steven R. Hirsch et al. eds., 1995); see also CHARLES G. COSTELLO, SYMPTOMS OF SCHIZOPHRENIA (1993)(detailing the various symptoms of schizophrenia).

12. See *In re Interest of John T.*, 4 Neb. Ct. App. 79, 84, 538 N.W.2d 761, 764 (1995).
13. See *id.* at 84-85, 538 N.W.2d at 764-65.
14. See *id.* at 88, 538 N.W.2d at 766.
15. See *id.*
16. See *id.* at 85, 538 N.W.2d at 765.
17. See *id.* at 80, 538 N.W.2d at 762.
18. See *id.* at 96, 538 N.W.2d at 770.
19. See *id.* at 85, 538 N.W.2d at 765.
20. See *id.*
21. See *Appeal Rejected; Foster Mom With AIDS to Get Boy Back*, OMAHA WORLD HERALD, Dec. 15, 1995, at 29 [hereinafter *Appeal Rejected*].
22. See *AIDS Part of Battle to Keep Foster Son Brummetts' Battle*, OMAHA WORLD HERALD, Feb. 19, 1996, at 11 [hereinafter *Brummetts' Battle*].
23. See *In re Interest of John T.*, 4 Neb. Ct. App. 79, 96, 538 N.W.2d 761, 771 (1995); see also *Foster Mom With AIDS Dies at 31*, OMAHA WORLD HERALD, Oct. 26, 1996, at 28 [hereinafter *Foster Mom Dies*].

from fos-adopt to long-term foster care.<sup>24</sup> The Brummetts insisted on adopting John.<sup>25</sup>

DSS gathered information stating that GayLynn Brummett would develop AIDS within the next seven years and had no chance of survival.<sup>26</sup> Concerned about the potential impact of losing his mother at a young age on the schizophrenia in his biological makeup,<sup>27</sup> DSS filed a placement change to transfer John to another foster home.<sup>28</sup> The transfer was approved by the juvenile court.<sup>29</sup>

John's guardian ad litem appealed the juvenile court order to the court of appeals.<sup>30</sup> The court of appeals opinion, rendered on October 3, 1995, stated that the DSS plan was not in John's best interests. The court found that a preponderance of the evidence showed that it was in John's best interests to stay with the Brummetts. This evidence showed that John had bonded with the Brummetts, had a close extended family through the Brummetts, that there were no deficiencies in John's care, and that there was no risk of John contracting HIV from Mrs. Brummett through ordinary household contact.<sup>31</sup> Even though the Brummetts had deceived DSS in violation of the health regulation regarding adoptive parents,<sup>32</sup> the court disapproved the DSS plan. DSS petitioned the Nebraska Supreme Court for further review of the case,<sup>33</sup> but the Court refused.<sup>34</sup> It appeared that John would be staying with the Brummetts.

However, one crucial fact not evident in the court of appeals opinion is that John had *already* been transitioned into a new foster home in June of 1995 and had been living there since that time.<sup>35</sup> Pursuant to the mandate of the court of appeals, DSS submitted a new plan for

24. *See In re Interest of John T.*, 4 Neb. Ct. App. 79, 86, 538 N.W.2d 761, 765 (1995).

A long term foster care agreement would have allowed John to remain with the Brummetts, without adoption, subject to review by DSS and the court every 6 months. *See id.*

25. *See id.* at 86, 538 N.W.2d at 766.

26. *See id.*, 538 N.W.2d at 765.

27. *See id.* at 87, 538 N.W.2d at 766.

28. *See id.* at 80, 538 N.W.2d at 762.

29. *See id.* at 81, 538 N.W.2d at 762.

30. *See id.*, 538 N.W.2d at 763.

31. *See id.* at 85-86, 538 N.W.2d at 765; *see also Case Law Development: Zoning, Housing, & Custody*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 90, 94 (1996)[hereinafter *Case Law Development*].

32. *See In re Interest of John T.*, 4 Neb. Ct. App. 79, 95-96, 538 N.W.2d 761, 770-71 (1995); *see also Case Law Development, supra* note 31, at 94.

33. *See* Petition for Further Review and Memorandum Brief in Support Thereof, *In re Interest of John T.*, 4 Neb. Ct. App. 79, 538 N.W.2d 761 (1995) (No. A-95-0215); *see also Appeal Rejected, supra* note 21.

34. *See Appeal Rejected, supra* note 21, at 29.

35. *See* Petition for Further Review and Memorandum Brief in Support Thereof at 6, *In re Interest of John T.*, 4 Neb. Ct. App. 79, 538 N.W.2d 761 (1995) (No. A-95-0215); *see also Brummetts' Battle, supra* note 22, at 11.

John in January of 1996.<sup>36</sup> This plan stated that it was in John's best interests to have him remain in the home of the new set of foster parents based on the change in circumstances.<sup>37</sup> The juvenile court issued an order approving the plan.<sup>38</sup> In response, the Brummetts moved for a Writ of Mandamus from the district court, ordering the juvenile court to send the child back to them. The district court denied the writ,<sup>39</sup> and the Brummetts then moved for a writ from the Nebraska Supreme Court.<sup>40</sup> The supreme court ordered the juvenile court to return John to the Brummetts.<sup>41</sup> John was returned to the Brummetts in March of 1996.<sup>42</sup>

Although Jay Brummett was able to adopt John in November of 1996, GayLynn Brummett died of AIDS in October 1996, one month before the adoption was finalized.<sup>43</sup> Jay Brummett is now suing DSS in federal court for damages under the Americans With Disabilities Act, claiming that DSS discriminated against him because his wife had AIDS.<sup>44</sup>

### III. RELEVANT LAW

The child placement system in the United States is controlled by the best interests standard: placement of a child should only be carried out to further the welfare of the affected child.<sup>45</sup> In *Ziebarth v.*

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36. See Memorandum Brief at 15, *In re Interest of John T.*, No. 49-463 (Lancaster County Juv. Ct. Jan. 24, 1996).
  37. See *Brummetts' Battle*, *supra* note 22, at 11; Reply Brief at 5-6, *In re Interest of John T.*, 49-463 (Lancaster County Juv. Ct. Jan. 26, 1996).
  38. See Order for Approval of Placement Change, *In re Interest of John T.*, 49-463 (Lancaster County Juv. Ct. Jan. 26, 1996).
  39. See Order, *Brummett v. Nebraska Dep't of Soc. Servs.*, 537-138 (Lancaster County Dist. Ct. Jan. 29, 1996)(order denying Brummett's petition for mandamus).
  40. See Petition and Motion for Writ of Mandamus, *State ex. rel. Brummett v. Thorson* (No. S-33-960006)(Neb. Jan. 30, 1996)(ordering Juvenile Court Judge Toni Thorson to comply with the opinion of the Nebraska Court of Appeals).
  41. See Order, *State ex. rel. Brummett v. Thorson* (No. S-96-178)(Neb. Feb. 23, 1996)(order stating juvenile court judge complied with the writ of mandamus); Order, *State ex. rel. Brummett v. Thorson* (No. S-96-178)(Neb. Mar. 13, 1996)(order dismissing the case); see also *Brummetts' Battle*, *supra* note 22, at 11.
  42. See Butch Mabin, *Judge Says Man Can Sue Officials in Adoption Case*, LINCOLN JOURNAL STAR, April 26, 1997, at 1C.
  43. See *id.*
  44. See *id.*; see also *Foster Mom with AIDS Wins Round in Court*, OMAHA WORLD HERALD, May 22, 1996, at 28.
  45. See Margaret Howard, *Transracial Adoption: Analysis of the Best Interest Standard*, 59 NOTRE DAME L. REV. 503, 503 (1984); see also *Lindley v. Sullivan*, 889 F.2d 124, 133 (7th Cir. 1989)(holding that state adoption proceedings center on the best interests of the child, not the desires of potential parents); *Collier v. Krane*, 763 F. Supp. 473, 476 (D. Colo. 1991)(recognizing duty of state to serve best interests of child); *In re Adoption of Michelle Lee T.*, 117 Cal. Rptr. 856, 858 (Ct. App. 1975)(holding that the overriding concern in an adoption case is the



*Ziebarth*,<sup>46</sup> the Nebraska Supreme Court provided the following description of the best interests standard:

Under Nebraska law, the inquiry into providing for the best interests of the children "includes, but is not limited to, a consideration of the relationship of the children to each parent and the general health, welfare, and social behavior of the children. We have said that we also look to the moral fitness of the parents, including their sexual conduct; the respective environments each offers; the emotional relationship between the child and the parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and the capacity of each parent to provide physical care and to satisfy the needs of the child."<sup>47</sup>

Such considerations are to be used by the court in determining whether it is in the best interests of a particular child to be adopted by particular parents. The health of adoptive parents is a legitimate consideration in determining the best interests of a child according to Nebraska law.<sup>48</sup> At the time of John's placement with the Brummetts, DSS had a regulation covering foster parent health, which stated:

An applicant must be in such physical/mental condition that it is reasonable to expect him/her to be able to fulfill parenting responsibilities. In case of adoption, health should be maintained to the child's majority. The worker may request a physician's and/or therapist's report on the health of an applicant if there appears to be a health condition that might affect parenting ability. A negative report may be the basis for denial of an application at any point in the home study process.<sup>49</sup>

The regulation emphasizes the importance of the foster or adoptive parents' health as a factor to consider in determining whether it is in the child's best interests to be placed with certain parents. Furthermore, the DSS regulation regarding the health of foster and adoptive parents operates like a statutory provision because agency regulations have the force of statutory law.<sup>50</sup> This regulation was particularly important in *John T.*

Both foster and adoptive relationships have their origins in state law. Adoption was unknown to the common law.<sup>51</sup> The matter of

best interests of the child); *Eggleston v. Landrum*, 50 So. 2d 364, 366 (Miss. 1951)(recognizing unanimous agreement that the welfare of the child is the primary consideration in an adoption proceeding); *In re Adoption of "E"*, 279 A.2d 785 (N.J. 1971)(noting that the welfare of the child is the paramount consideration controlling the court's exercise of discretion).

46. 238 Neb. 545, 471 N.W.2d 450 (1991).

47. *Id.* at 554, 471 N.W.2d at 457 (1991)(quoting *McDougall v. McDougall*, 236 Neb. 873, 877, 464 N.W.2d 189, 192 (1991)).

48. *See id.*; *Beran v. Beran*, 234 Neb. 296, 302, 450 N.W.2d 688, 693 (1990).

49. *In re Interest of John T.*, 4 Neb. Ct. App. 79, 96, 538 N.W.2d 761, 770 (1995)(quoting 474 NEB. ADMIN. R. & REGS. 4-010.04C (1988)).

50. *See Slack Nursing Home, Inc. v. Department of Soc. Servs.*, 247 Neb. 452, 467, 528 N.W.2d 285, 296 (1995); *Sunrise Country Manor v. Nebraska Dep't of Soc. Servs.*, 246 Neb. 726, 735, 523 N.W.2d 499, 504 (1994).

51. *See In re Ritchie*, 155 Neb. 824, 827-28, 53 N.W.2d 753, 755 (1952); *see also In re Adoption of Cassandra B.*, 248 Neb. 912, 918, 540 N.W.2d 554, 558 (1995).

adoption is wholly statutory.<sup>52</sup> Each state has a statutory scheme which regulates adoption practice.<sup>53</sup> Currently in Nebraska, adoption procedure is set out in a specific statutory plan<sup>54</sup> and is also subject to administrative regulations.<sup>55</sup> Potential adoptive parents are subject to an investigation by the State or other licensed child placement agency in order to ensure that the placement of the child in the home is appropriate.<sup>56</sup> Similarly, the foster care relationship is derived "from a knowingly assumed contractual relation with the State" and is "an arrangement in which the State has been a partner from the outset."<sup>57</sup> In Nebraska, a foster care home must be licensed and has to meet certain requirements in order to obtain and keep a license.<sup>58</sup>

In contrast, the biological family has a much different origin than the foster or the adoptive family. Thus, the biological family has different legal rights. The biological family is not based on a contract or statutes, but is a distinct human right. "[T]he rights to marry and to procreate biologically are older than any state law, and, for that matter, older than the Constitution or the Bill of Rights."<sup>59</sup> Furthermore, these rights are "ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in this Nation's history and tradition."<sup>60</sup> Because foster families and adoptive families have their origins in state law, while the biological family is considered an intrinsic human right, there are manifest legal differences between these types of families.

The legal differences between the biological family and the foster or adoptive family have been recognized by various courts. In *Smith v. Organization of Foster Families for Equality and Reform*,<sup>61</sup> the United States Supreme Court noted the differences between the foster family and the biological family.

[T]here are also important distinctions between the foster family and the natural family. First, unlike the earlier cases recognizing a right to family privacy, the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements.<sup>62</sup>

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52. See *In re Ritchie*, 155 Neb. 824, 828, 53 N.W.2d 753, 755 (1952).

53. See *Evall*, *supra* note 4, at 349.

54. See NEB. REV. STAT. §§ 43-101 to -116 (Reissue 1993 & Cum. Supp. 1996).

55. See 390 NEB. ADMIN. R. & REGS. 6-002.01 to 002.15 (1995).

56. See NEB. REV. STAT. § 43-107 (Reissue 1993 & Cum. Supp. 1996).

57. *Smith v. Organization of Foster Families for Equal. and Reform*, 431 U.S. 816, 845 (1977).

58. See NEB. REV. STAT. §§ 43-296, 43-1901 to -1906 (Reissue 1993 & Cum. Supp. 1996); NEB. ADMIN. R. & REGS. 6-003.01 to -003.13 (1996).

59. *Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989).

60. *Smith v. Organization of Foster Families for Equal. and Reform*, 431 U.S. 816, 845 (1977)(quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

61. 431 U.S. 816 (1977).

62. *Id.* at 845.

These legal differences have also been recognized in several cases in the federal courts.<sup>63</sup> For example, in *Collier v. Krane*,<sup>64</sup> the U.S. District Court of Colorado addressed the difference between a biological and an adoptive family.

The family relationship which lies at the core of this action is an adoptive one. While the biological family relationship is a recognized and protected interest in both our Constitution and natural law, the adoptive family relationship differs in several substantial ways. The adoptive family's rights, like those of the foster family, arise from state statute. The adoption process is entirely a creature of state law, and parental rights and expectations involving adoption have historically been guarded by legislative enactment.<sup>65</sup>

Because of the manifest legal differences between biological families and foster or adoptive families, placement of children in foster or in adoptive homes is subject to regulation through statutes and the courts. State courts have recognized that adoptive and foster care relationships are based on state law and that there is no right to adopt or to become a foster parent. For example, in *In re Opinion of the Justices*,<sup>66</sup> the New Hampshire Supreme Court stated that "[t]here is . . . no such right to adopt [or] to be a foster parent . . . as these relationships are legal creations governed by statute."<sup>67</sup> This proposition, as it relates to adoption, was stated most clearly by the Louisiana Court of Appeals in *In re Hughes*.<sup>68</sup>

There is no inherent right of adoption. It is a creature of the law and exists only where the law expressly grants it and then subject to the restrictions and limitations which the law imposes. It may be considered a privilege or a right bestowed by authority of the state.<sup>69</sup>

Because the adoption process is regulated by the state, adoption always involves weighing competing interests.<sup>70</sup> The importance of this weighing and balancing was expressed by the Seventh Circuit Court of Appeals in *Lindley v. Sullivan*.<sup>71</sup>

Because of its statutory basis, adoption differs from natural procreation in a most important and striking way. Adoption always involves the weighing and balancing of many competing interests. The rights of a couple to adopt must be reconciled with the state's interest . . . in securing ultimately the welfare of the child.<sup>72</sup>

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63. See *Procopio v. Johnson*, 994 F.2d 325, 330 (7th Cir. 1993); *Lindley v. Sullivan*, 889 F.2d 124, 130-31 (7th Cir. 1989); *Collier v. Krane*, 763 F. Supp. 473, 476 (D. Colo. 1991); *Crim v. Harrison*, 552 F. Supp. 37, 39-40 (N.D. Miss. 1982).

64. 763 F. Supp. 473 (D. Colo. 1991).

65. *Id.* at 476.

66. 530 A.2d 21 (N.H. 1987).

67. *Id.* at 24.

68. 176 So. 2d 158 (La. Ct. App. 1965).

69. *Id.* at 161.

70. See *Collier v. Krane*, 763 F. Supp. 473, 476 (D. Colo. 1991).

71. 889 F.2d 124 (7th Cir. 1989).

72. *Id.* at 131 (citations omitted).

Securing the child's welfare through an adoptive or foster placement is determined by weighing and balancing interests. The standard for both agencies and courts handling adoptions is the "best interests of the child."<sup>73</sup> Like these other courts, Nebraska has recognized that the biological parent-child relationship is a constitutionally protected interest<sup>74</sup> and that adoption is wholly statutory.<sup>75</sup> Based on this legal framework, *In re Interest of John T.* can be analyzed.

#### IV. ANALYSIS OF *IN RE INTEREST OF JOHN T.*

Child placement law clearly defines the rights of the various parties and articulates the standard by which placement decisions should be made. However, the fact combination in the *John T.* case—an HIV-AIDS-infected foster mother, a child with genetic loading for schizophrenia, and the deception of the state placement agency by the foster parents—presented an unusual situation. Although HIV-AIDS infection has been a factor in numerous court cases involving adoption, visitation arrangements, and custody of children,<sup>76</sup> and although much legal literature has addressed the rights of children who are themselves infected with HIV-AIDS,<sup>77</sup> *In re Interest of John T.* is exceptional in that no other cases have dealt with an attempt to remove a foster child from an HIV-infected foster parent who wishes to adopt the child.<sup>78</sup> Thus, this case involves considerations that were not included in previous cases. *John T.* involves much more than the HIV-AIDS infection of a prospective adoptive parent; it involves important considerations such as the differences between adoptive or foster families and biological families, as well as the meaning of the term "best interests of the child." *John T.* is a significant case because it illustrates how social and political considerations, such as protecting individuals with AIDS from discrimination, can be interjected into a child placement decision and outweigh the child's best interests. Because of the unusual facts, as well as societal pressure to halt discrimination

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73. Evall, *supra* note 4, at 349.

74. See *Uhing ex rel Jones v. Uhing*, 241 Neb. 368, 373, 488 N.W.2d 366, 370 (1992).

75. See *In re Ritchie*, 155 Neb. 824, 827-28, 53 N.W.2d 753, 755 (1952); see also *In re Adoption of Cassandra B.*, 248 Neb. 912, 918, 540 N.W.2d 554, 558 (1995) (holding that the matter of adoption is wholly statutory in Nebraska).

76. See *In re Adoption of Johnson*, 612 N.E.2d 569 (Ind. Ct. App. 1993); *Stewart v. Stewart*, 521 N.E.2d 956 (Ind. Ct. App. 1988); *Doe v. Roe*, 526 N.Y.S.2d 718 (Sup. Ct. 1988); *Jane W. v. John W.*, 519 N.Y.S.2d 603 (Sup. Ct. 1987); *Steven L. v. Dawn J.*, 561 N.Y.S.2d 322 (Fam. Ct. 1990).

77. See, e.g., English, *supra* note 4; Briar McNutt, *The Under-Enrollment of HIV-Infected Foster Children in Clinical Trials and Protocols and the Need for Corrective State Action*, 20 AM. J.L. & MED. 231 (1994); Parry, *supra* note 6; Sudbeck, *supra* note 5.

78. See *In re Interest of John T.*, 4 Neb. Ct. App. 79, 97-98, 538 N.W.2d 761, 771 (1995).

against AIDS victims, the court made several errors in deciding this case.

**A. The Court Did Not Appropriately Apply a Balancing of Interests Test in *John T.* by Failing to Recognize the Manifest Legal Differences Between Biological Families and Foster or Adoptive Families**

One of the most striking differences between *John T.* and other cases dealing with custody or visitation by an HIV-AIDS-infected parent is that previous cases deal with an HIV-AIDS-infected *biological* parent.<sup>79</sup> This left the court of appeals with only cases involving biological families to consider in rendering its decision in *John T.* The court discussed several cases "involving parents, children, and [AIDS],"<sup>80</sup> in which HIV-AIDS infection was held insufficient as grounds for precluding visitation with a child by the infected parent or for removing custody from the infected parent.<sup>81</sup> The court used the reasoning of these cases as part of the basis for its decision to disapprove the DSS plan. The court admitted that these cases involve "custodial or visitation rights of natural parents, whereas the instant case involves whether it is in the best interest of a child to stay with his foster parents, one of whom has AIDS."<sup>82</sup> Although it acknowledged that there is a difference between the previous cases and *John T.*, the court provided no analysis of the significance of these differences.<sup>83</sup> The court overlooked the fact that in dealing with biological families, a fundamental right is involved, whereas in dealing with foster or adoptive families, a balancing of interests test must be used. These differences cannot be ignored when considering the court's attempt to

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79. See *Stewart v. Stewart*, 521 N.E.2d 956 (Ind. Ct. App. 1988)(mother moved for termination of father's visitation rights because father had AIDS); *Doe v. Roe*, 526 N.Y.S.2d 718 (Sup. Ct. 1988)(maternal grandparents sought custody from custodial father and moved for order compelling father to undergo involuntary AIDS test); *Jane W. v. John W.*, 519 N.Y.S.2d 603 (Sup. Ct. 1987)(mother opposed father's application for visitation with child because father had AIDS); *Steven L. v. Dawn J.*, 561 N.Y.S.2d 322 (Fam. Ct. 1990)(father moved for change of custody because children's custodial mother HIV-infected).

80. *In re Interest of John T.*, 4 Neb. Ct. App. 79, 98-99, 538 N.W.2d 761, 771-72 (1995).

81. See *id.*

82. *Id.* at 99, 538 N.W.2d at 772.

83. The only recognition the court gave to the difference between biological families and adoptive families was a short analysis that a biological parent has superior rights to a child over that of a proposed adoptive parent. The court recognized that the situation faced in *John T.* "is not like the 'adoption' cases" because John's biological parents were not asserting any rights in this case. See *In re Interest of John T.*, 4 Neb. Ct. App. 79, 93, 538 N.W.2d 761, 769 (1995). However, the court then proceeded to analogize the *John T.* situation to cases involving biological families without providing any analysis of the differences between the rights of biological families as opposed to those of foster or adoptive families. See *id.*

analogize cases involving HIV-AIDS-infected biological parents to the *John T.* situation.

From the opinion itself, it may appear that a consideration of the rights of different parties is not needed. However, an analysis of whose rights are affected and what those rights are makes a difference in this case because of the need to apply a balancing of interests test. Not only did the court need to consider whether moving John to another foster home was in his best interests, but the court also needed to consider that if the transition plan was disapproved, the Brummetts would be adopting John. Because adoption was involved in the situation, the competing interests of the parties should have been taken into account. In failing to appropriately apply a balancing of interests test, the court veiled a decision based on social and political considerations under the guise of seeking the child's best interests.

In *John T.*, the interests to be considered were John's best interests on one hand, and protecting the Brummetts' interest in being adoptive parents on the other hand. Mrs. Brummett's HIV-AIDS infection, as well as John's genetic loading for schizophrenia, would be factors in this balancing test. By failing to first define the rights of the parties and to give appropriate weight to each, the court did not apply a balancing test in *John T.* The competing factors in this case were not viewed appropriately in light of the facts.

### **B. The Brummetts' Interest in the Fos-Adopt Relationship Is Not Equivalent to the Biological Parent-Child Relationship Because There Is No Fundamental Right to Adopt or to Provide Foster Care**

In applying a balancing test, a court must give the appropriate weight to the interests of the foster parents. In order to do this, the court must first recognize the rights the foster parents possess. In attempting to define the rights of the foster parents, the court mistakenly analogized the *John T.* situation to child custody and visitation cases involving HIV-AIDS-infected biological parents. Custody or visitation cases involving HIV-AIDS-infected biological parents may seem an appropriate analogy to the situation posed by *John T.* on the surface. However, the differences between adoptive or foster families and biological families must be taken into account when making such a comparison. Although there are some similarities between the relationships, a distinction must be made between biological families and foster or adoptive families, which was not made in *John T.*

This distinction is important to the analysis of this case because, although there is a fundamental right to marry and raise children,<sup>84</sup> there is no fundamental or absolute right to adopt or to provide foster

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84. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

care.<sup>85</sup> Indeed, adoption is a privilege.<sup>86</sup> Courts have also held that prospective adoptive parents have no protected liberty interest in the children they are seeking to adopt.<sup>87</sup> Likewise, foster parents do not have an expectation or entitlement to adopt a foster child by the mere placement of a child in their home.<sup>88</sup>

The differences in the rights possessed by biological families and those of foster or adoptive families provide a distinction between *John T.* and other cases involving HIV-AIDS-infected biological parents. There is no inherent right to adopt or to provide foster care, but there is a fundamental right to raise one's own biological children. "[T]he biological family relationship is a recognized and protected interest in both our Constitution and natural law."<sup>89</sup> Therefore, HIV-AIDS-infected biological parents seeking custody of or visitation with their children are basing their claims on a fundamental right which cannot be taken away from them because they are infected with a disease.

Taking these differences into account, the situation faced in *John T.* is very different than the cases involving biological parents. The HIV-AIDS-infected biological parents have a fundamental right to raise their children. The Brummetts had no fundamental right to adopt John. This distinction makes a difference in the balancing of interests which should have occurred in this case. The HIV-AIDS-infected foster or adoptive parent's interests are not equivalent to those of an HIV-AIDS-infected biological parent because of the differing nature of each relationship. The Brummetts' interest in adopting John should not be given weight equal to that given to the HIV-AIDS-infected biological parents in the cases discussed by the court. The court gave the Brummetts' interest in the fos-adopt relationship too much weight by failing to make an analysis of these differences.

Any interest the Brummetts had in the foster care relationship and potential adoptive relationship does not rise to a fundamental right like those of the biological families in the cases cited by the court of appeals. Therefore, the court erred in analogizing this case to cases involving biological parents with HIV-AIDS without giving considerable weight to the differences in the rights involved in each type of rela-

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85. See *Collier v. Krane*, 763 F. Supp. 473, 476 (D. Colo. 1991) (concluding there is no fundamental right to adopt); *Eggleston v. Landrum*, 50 So. 2d 364, 366 (Miss. 1951)(stating there is no absolute right of adoption); *In re Opinion of the Justices*, 530 A.2d 21, 24 (N.H. 1987)(stating there is no right to adopt or become a foster parent).

86. See *Eggleston v. Landrum*, 50 So. 2d 364, 366 (Miss. 1951); *In re Adoption of "E"*, 271 A.2d 27, 29 (N.J. Essex County Ct. 1970), *rev'd on other grounds*, 279 A.2d 785 (1971).

87. See *Ellis v. Hamilton*, 669 F.2d 510, 513-14 (7th Cir. 1982); *Crim v. Harrison*, 552 F. Supp. 37, 41 (N.D. Miss. 1982).

88. See *Crim v. Harrison*, 552 F. Supp. 37, 41 (N.D. Miss. 1982).

89. *Collier v. Krane*, 763 F. Supp. 473, 476 (D. Colo. 1991).

tionship. By treating these relationships as essentially equal, the court over-emphasized the interest of the foster parents. Because there is no fundamental, natural, or inherent right to adopt or become a foster parent, it is clear that the Brummetts had no *right* to have John remain in their home. In spite of this, the court placed the Brummetts' interest in the foster care relationship on equal footing with the interests of biological parents.

In spite of the differences between biological families and foster or adoptive families, decisions involving these relationships are all controlled by the same standard: the best interests of the child.<sup>90</sup> It must be remembered that even though the same standard controls all three relationships, decisions regarding biological families involve a fundamental right, but decisions regarding foster and adoptive families involve weighing and balancing of competing interests. Taking this into account, decisions regarding foster or adoptive families cannot be decided in the same way as those involving biological families, even though the same standard governs both. Instead of applying a balancing test, the court refused to recognize the significance of the differences between biological families and adoptive or foster families. The court stated that "because the determinative standard is the same, we are unable to give the lack of a biological connection between the foster parents and John any meaningful force when assessing the child's best interests."<sup>91</sup> Refusal to recognize the differences between biological families' rights and foster or adoptive families' rights resulted in the court's skewed application of the best interests standard.

The Brummetts' interests in this situation were given priority over John's best interests. It is improper to place the interests of parents or potential parents ahead of the interests of the child when making a placement decision. The Nebraska Supreme Court stated in *In re Interest of Stoppkotte*<sup>92</sup> that the primary consideration in such cases is the "best interests of the child, not that of the parents."<sup>93</sup> When the State makes a placement decision, the child's interests govern that decision. "State adoption proceedings center upon the best interests of the child, not the desires, however intense, of potential parents to add to their family by adoption."<sup>94</sup> In order to understand how a court should balance the interests of the foster parents and the interests of

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90. See *In re Interest of John T.*, 4 Neb. Ct. App. 79, 99, 538 N.W.2d 761, 772 (1995); see also *In re Interest of Jorius G.*, 249 Neb. 892, 546 N.W.2d 796 (1996) (best interests standard used regarding foster children); *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994) (best interests standard governs custody case between biological parents); *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991) (best interest standard used in adoption case).

91. *In re Interest of John T.*, 4 Neb. Ct. App. 79, 99, 538 N.W.2d 761, 772 (1995).

92. 210 Neb. 1, 312 N.W.2d 454 (1981).

93. *Id.* at 7, 312 N.W.2d at 457.

94. *Lindley v. Sullivan*, 889 F.2d 124, 133 (7th Cir. 1989).



the child, the meaning of the term "best interests of the child" must be explored. This leads to an examination of the best interests of the child standard and how it should have been applied in *John T.*

### C. The Best Interests of the Child Standard and the Court's Problematic Application of this Standard in *John T.*

There is unanimous agreement that the welfare of the child is the primary consideration in an adoption proceeding.<sup>95</sup> Although *John T.* was not an adoption proceeding itself, it cannot be said that adoption of John by the Brummetts should not have been a concern. The original placement was fos-adopt, and if the plan to move John to another foster home was disapproved, the court knew that the Brummetts would seek to adopt John thereafter. The court's statements about John witnessing Mrs. Brummett's death, which would not happen unless John was returned to the Brummetts and adopted by them, certainly indicate that the court contemplated that John would be adopted by the Brummetts after the court disapproved the DSS plan.<sup>96</sup> This makes the standard used in an adoption proceeding an appropriate consideration.

The overriding concern in an adoption proceeding is supposed to be the best interests of the child. However, the best interests standard itself contains several competing interests which allow other political and social considerations to enter child placement decisions.<sup>97</sup> Furthermore, many features of adoption practice come from an era in which the needs of the potential adoptive parents were considered the paramount interest.<sup>98</sup> Thus, other interests can easily be interjected into the best interests standard and overrule the true best interests of the child.

Although it is clear that the best interests of the child control an adoption proceeding, determining exactly what those best interests are can be difficult. The court of appeals itself recognized that the best interests standard is "by its very nature subjective" and "eludes precise definition."<sup>99</sup> The best interests of the child is an elusive standard for several reasons.<sup>100</sup> The meaning of "the best interests of the child" varies from state to state.<sup>101</sup> Furthermore, this standard grants judges broad discretion in making decisions regarding child

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95. See *Eggleston v. Landrum*, 50 So. 2d 364, 366 (Miss. 1951).

96. See *In re Interest of John T.*, 4 Neb. Ct. App. 79, 92-93, 538 N.W.2d 761, 769 (1995)(discussing possible impact on John of witnessing foster mother's death).

97. See Howard, *supra* note 45, at 503.

98. See Evall, *supra* note 4, at 349.

99. *In re Interest of John T.*, 4 Neb. Ct. App. 79, 94, 538 N.W.2d 761, 769 (1995).

100. See Mahon, *supra* note 5, at 1109.

101. See *id.*

placement.<sup>102</sup> Because the best interests standard is subjective and grants judges broad discretion, the competing factors within the standard itself are not always given their appropriate weights.

There are several problems with the court's determination of John's best interests. First the court did not adequately consider the effects GayLynn Brummett's health condition would have not only on Mrs. Brummett herself, but on John and Mr. Brummett as well. Secondly, the court did not give the appropriate weight to the significance of the foster parents' deception in obtaining the placement of this child. Lastly, but perhaps most importantly, the court's decision was based on outdated information, and the change in circumstances in this case would have significantly impacted the court's best interests analysis. John's best interests were not given their proper weight in relation to the interests of the foster parents.

The court of appeals based its analysis of John's best interests on the testimony of several expert witnesses. This testimony resulted in a battle of the experts, with the court having to decide which experts to believe. Dr. Ann Evelyn, who performed a psychiatric evaluation of John, and Dr. George Williams, a child psychologist, recommended that John remain with the Brummetts.<sup>103</sup> Both experts indicated that it would be harder for John to undergo a placement change than to endure the death of Mrs. Brummett.<sup>104</sup> Dr. John Donaldson, a psychiatrist, recommended that John be transitioned to a new set of foster parents.<sup>105</sup> Dr. Donaldson opined that the concealment of Mrs. Brummett's HIV-AIDS diagnosis indicated that the Brummetts were in denial of the seriousness of the disease<sup>106</sup> and that the demands placed on both Mr. and Mrs. Brummett as a result of Mrs. Brummett's illness would make it very difficult for the Brummetts to meet John's needs.<sup>107</sup> After considering the expert testimony, the court found that there was "more credible evidence against the plan to remove John than there is in support of the plan."<sup>108</sup> In so doing, the court did not give proper consideration to several factors involved in determining John's best interests.

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102. See Russman, *supra* note 5, at 35.

103. See *In re Interest of John T.*, 4 Neb. Ct. App. 79, 88-90, 538 N.W.2d 761, 767 (1995).

104. See *id.*

105. See *id.* at 87-88, 538 N.W.2d at 766.

106. See Brief of Appellee at 7-8, *In re Interest of John T.*, 4 Neb. Ct. App. 79, 538 N.W.2d 761 (1995) (No. A-95-0215).

107. See *id.* at 7.

108. *In re Interest of John T.*, 4 Neb. Ct. App. 79, 95, 538 N.W.2d 761, 770 (1995).

The health of the potential adoptive parents is one thing to take into consideration when determining the best interests of a child.<sup>109</sup> The DSS health regulation for foster or adoptive parents in effect at the time stated that a health condition affecting parenting ability or a condition that indicates that a parent will not live until the child reaches the age of majority are factors that may result in denial of an application to be a foster or adoptive parent.<sup>110</sup> AIDS surely qualifies as a health condition that affects parenting ability and would also impact upon the whether the parent's health can be maintained until the child reaches the age of majority. AIDS not only affects, but *destroys* the health of the infected individual. A person with AIDS is subject to many debilitating or lethal opportunistic infections and cancers.<sup>111</sup> HIV-AIDS can affect nearly all systems of the body.<sup>112</sup> Oral and dental disease, pulmonary disease, liver disease, anemia, renal disease, and various skin diseases are just some of the illnesses from which AIDS patients commonly suffer.<sup>113</sup> AIDS patients are very susceptible to various viral, bacterial, and fungal infections.<sup>114</sup> Malignancies such as Kaposi's sarcoma, Non-Hodgkin's lymphoma, and central nervous system lymphoma are also commonly associated with AIDS.<sup>115</sup> A person with AIDS may also suffer from AIDS dementia, which affects the AIDS patient's cognitive abilities, such as concentration, memory, and ability to think clearly.<sup>116</sup> AIDS dementia can eventually result in more serious psychiatric problems such as agitation, hallucinations, and paranoid delusions.<sup>117</sup> AIDS is not only debilitating, but it is fatal.<sup>118</sup> This means that not only would Mrs. Brummett's illness affect her ability to parent John, but that Mrs. Brummett would die before John reached the age of majority. This is exactly the kind of scenario that the health regulation was designed to prevent.

The effects of the foster mother's health were not properly considered by the court of appeals. AIDS has been described as a disease

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109. See *Ziebarth v. Ziebarth*, 238 Neb. 545, 554, 471 N.W.2d 450, 457 (1991); *McDougall v. McDougall*, 236 Neb. 873, 877, 464 N.W.2d 189, 192 (1991); *Beran v. Beran*, 234 Neb. 296, 302, 450 N.W.2d 688, 693 (1990).

110. See 474 NEB. ADMIN. R. & REGS. 4-010.04C (1988); see also *In re Interest of John T.*, 4 Neb. Ct. App. 79, 96, 538 N.W.2d 761, 770 (1995).

111. See *Evall*, *supra* note 4, at 360 n.86.

112. See FRANCINE COURNOS & NICHOLAS BAKALAR, AIDS AND PEOPLE WITH SEVERE MENTAL ILLNESS 76 (1996).

113. See *id.* at 77-84.

114. See *id.* at 82.

115. See *id.* at 84.

116. See *id.* at 61-63.

117. See *id.*; see also Brief of Appellee at 6-7, *In re Interest of John T.*, 4 Neb. Ct. App. 79, 538 N.W.2d 761 (1995) (No. A-95-0215).

118. See *Wasson*, *supra* note 5, at 7.

that makes life "nasty, brutish and short."<sup>119</sup> The court was aware that, although she had no symptoms as of August 1993,<sup>120</sup> GayLynn Brummett's HIV-AIDS infection would eventually affect her health.<sup>121</sup> However, the case contains little discussion of the terrible effects the disease would have on Mrs. Brummett's health. Furthermore, not only would the disease affect Mrs. Brummett's ability to care for John, but Mr. Brummett's ability to parent, also. Dr. Donaldson's opinion indicated that as Mrs. Brummett became increasingly ill, the disease would reduce the amount of support available to John from Mr. Brummett.<sup>122</sup> Based on the wide spectrum of diseases to which a person with AIDS is susceptible,<sup>123</sup> it is not difficult to see how this disease would impact not only the health of the infected person, but be draining to the person's spouse as well. The fact that the parenting ability of both parents would be affected by Mrs. Brummett's illness weighs heavily against allowing the child to remain with the Brummetts. The evidence indicated that Mrs. Brummett would die while John was a young child and that the trauma of her death could impact on John's genetic loading for schizophrenia. Considering Mrs. Brummett's health condition and John's genetic history, the Brummetts were not equipped to raise John. "A couple has no right to adopt a child it is not equipped to rear. . . ."<sup>124</sup> The foster mother's health condition should have been a major factor against allowing John to remain with the Brummetts, but was instead de-emphasized by the court.

The fact that Mrs. Brummett would eventually die of a disease that causes the body to "rapidly deteriorate toward inevitable death,"<sup>125</sup> and that this illness and death would be traumatic for John and draining to Mr. Brummett should have been a significant factor in this case. Instead, the court tried to downplay the health aspects of Mrs. Brummett's HIV-AIDS infection. "It is our task," the court stated, "to put

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119. Leonard Orland & Sue L. Wise, *The AIDS Epidemic: A Constitutional Conundrum*, 14 HOFSTRA L. REV. 137, 138 (1985).

120. *See In re Interest of John T.*, 4 Neb. Ct. App. 79, 90, 538 N.W.2d 761, 767 (1995).

121. *See id.* at 90, 538 N.W.2d at 768 (doctor's testimony that Mrs. Brummett's prognosis is poor and that she will die from AIDS). Even though asymptomatic, an HIV-infected person is not unaffected by the disease. The disease is not dormant during the asymptomatic period, which is the period after the person is diagnosed HIV-positive, but before a diagnosis of AIDS is made. The virus is actively replicating at high levels during this phase. An asymptomatic HIV-infected person may suffer from central nervous system infection, aseptic meningitis, dementia, and other infections and diseases. *See* CURNOS & BAKALAR, *supra* note 112, at 60-63, 76. This demonstrates that Mrs. Brummett's health would be affected by her HIV infection, even though she was currently asymptomatic.

122. *See In re Interest of John T.*, 4 Neb. Ct. App. 79, 88, 538 N.W.2d 761, 766 (1995).

123. *See supra* text accompanying notes 112-117.

124. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1205 (5th Cir. 1977).

125. Orland & Wise, *supra* note 119, at 138.

aside the fact that the foster mother has AIDS."<sup>126</sup> Furthermore, the court attempted to de-emphasize the particularly horrible type of death associated with AIDS. The court emphasized that Mrs. Brummett at that time had full capability to parent John, and that her ability to parent "is compromised by virtue of her illness, which is only true at an uncertain point in the future."<sup>127</sup> This makes it sound as if Mrs. Brummett's parenting ability may never be affected by her illness, especially if medical advancements helping AIDS victims were to be made. Furthermore, the court tried to disassociate Mrs. Brummett's disease from the health regulation by stating that "DSS does not have a specific policy on AIDS, and other than may be inferred from the [health] regulation, there is no evidence about what would have been done with the [Brummetts'] application if [Mrs. Brummett]'s health status had been fully disclosed."<sup>128</sup>

In addition to downplaying Mrs. Brummett's health status, the court attempted to cast this situation as something that occurred by chance. The court stated that "[l]ife is indeed uncertain, and no child is guaranteed that he or she will proceed through childhood . . . with his or her parents healthy or even alive . . . . We know that parents suffer and die from illness, and their children observe this and suffer with their parents."<sup>129</sup> This makes it sound as if this situation was completely unexpected by the Brummetts. However, this was simply not a case where a child was adopted by parents and later one of them was stricken with a fatal disease. The evidence indicated that this situation was produced purposely by the Brummetts through their deception of DSS.

This leads to a second problem with the court's best interests analysis. The court did not properly weigh the significance of the deception practiced by the Brummetts and the impact of such deception on John. The general moral fitness and the attitude and stability of the parent's character are things to take into account when determining the child's best interests.<sup>130</sup> The Brummetts' conscious deception, designed to have John placed in their home, has implications about the Brummetts' moral fitness and character. The health regulation in effect at the time stated that when placing a child with adoptive parents, the health of the parents should be maintained until the child reaches the age of majority.<sup>131</sup> This indicates that had DSS known

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126. *In re Interest of John T.*, 4 Neb. Ct. App. 79, 100, 538 N.W.2d 761, 772 (1995).

127. *Id.* at 97, 538 N.W.2d at 771.

128. *Id.* at 96, 538 N.W.2d at 771.

129. *Id.* at 100, 538 N.W.2d at 773.

130. See *Ziebarth v. Ziebarth*, 238 Neb. 545, 554, 471 N.W.2d 450, 457 (1991); *McDougall v. McDougall*, 236 Neb. 873, 887, 464 N.W.2d 189, 192 (1991); *Beran v. Beran*, 234 Neb. 296, 302, 450 N.W.2d 688, 693 (1990).

131. See 474 NEB. ADMIN. R. & REGS. 4-010.04C (1988); see also *In re Interest of John T.*, 4 Neb. Ct. App. 79, 96, 538 N.W.2d 761, 770 (1995).

about Mrs. Brummett's true health status, John would not have been placed with them as a fos-adopt placement.<sup>132</sup> The written application process for foster parenting is such that disclosure of this information would have occurred had the Brummetts been truthful.<sup>133</sup> The foster parents made it a point not to disclose Mrs. Brummett's HIV-AIDS infection because they knew they would not have a child placed with them for adoption if that information was known to DSS.<sup>134</sup>

The court's analysis regarding the deception practiced by the foster parents does not consider what this deception indicates about the foster parents' character. First, the court recognized that the foster parents deceived DSS and that "[t]he end result of this litigation is that John will have one of two very difficult life experiences."<sup>135</sup> The court also recognized that, "absent the dishonesty" by the Brummetts, the court would not have to decide "which alternative is 'less bad' for John."<sup>136</sup> Even after these recognitions, the court stated that the deception is not necessarily against the child's best interests, that there is no evidence that the deception adversely affects John, and that using the deception to determine the outcome of the case would be putting aside John's best interests.<sup>137</sup> This reasoning contradicts itself.

The court's reasoning is not only contradictory, but it indicates disregard for the seriousness of the deception by the foster parents. First, it cannot be said that the deception did not adversely affect John because the deception was the very reason that John was in this situation. Second, the fact that the Brummetts lied in order to obtain a placement of a fos-adopt child indicated a lack of concern on the part of the Brummetts for the best interests and the future of the child. The Brummetts could not have had John's best interests in mind when they applied to be fos-adopt parents, knowing that Mrs. Brummett would become ill and die of AIDS and that John would be subjected to seeing her die of a terrible illness at a young age. Although

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132. This does not, however, indicate that the Brummetts would have been denied the opportunity to serve as foster parents. As long as Mrs. Brummett's health did not limit her parenting ability, she could still be a foster parent. DSS asked the Brummetts to change John's placement from fos-adopt to long-term foster care, which indicates that DSS did not deny the Brummetts all opportunity to serve as foster parents, but found their adoption of John problematic because of the impending death of Mrs. Brummett and the impact of her death on John's genetic loading for schizophrenia. See *In re Interest of John T.*, 4 Neb. Ct. App. 79, 87, 538 N.W.2d 761, 766 (1995).

133. See *In re Interest of John T.*, 4 Neb. Ct. App. 79, 95-96, 538 N.W.2d 761, 770 (1995).

134. See *id.* at 96, 538 N.W.2d at 771 (1995); see also *Foster Mom Dies*, *supra* note 23, at 28; *Brummetts' Battle*, *supra* note 22, at 11.

135. *In re Interest of John T.*, 4 Neb. Ct. App. 79, 93, 538 N.W.2d 761, 769 (1995).

136. *Id.* at 97, 538 N.W.2d at 771.

137. See *id.*

the court acknowledged that the Brummetts had been dishonest,<sup>138</sup> the court failed to consider the implications of this deceit. Dr. Donaldson was the only expert who considered the implications of the Brummetts' deceit.<sup>139</sup> Obviously, the court sided with the other two experts who did not consider the implications of this deceit. The Brummetts wanted a child and lied in order to get what they wanted, regardless of what that meant for the future of the child. The Brummetts' actions in obtaining this placement indicate self-interest, rather than the best interests of the child they were attempting to adopt. These indications were never considered by the court.

The final problem with the court's decision is that it was based on outdated information. The decision did not consider the fact that John had already been removed from the Brummett home and transferred to another foster home at the time of the opinion.<sup>140</sup> Had this information been considered, the outcome of the case could have been entirely different. The court primarily based its decision to disapprove the DSS plan on expert testimony that it would be more traumatic to move John than to let him witness GayLynn Brummett's death. The court viewed the DSS plan as a "punitive notion," meaning that the purpose of taking John away was to punish the foster parents for their dishonesty.<sup>141</sup> However, the fact that John had already been removed from the Brummetts and placed in a new foster home largely negates this view.

When considering the significant change in circumstances in this case, it must be taken into account that the best interests of the child is a relative standard.<sup>142</sup> As stated in *In re Interest of Michelle Lee T.*,<sup>143</sup> "[t]he question is not whether a particular set of circumstances is in the best interest[s] of the child, but whether a particular set of circumstances relative to an alternate set of circumstances is in the best interest[s] of the child."<sup>144</sup> Considering that John had already been transferred to another foster home makes this question important. John could either stay in his new placement with two healthy parents or be returned to the Brummetts where he would witness Mrs. Brummett's death and possibly spend the rest of his life without a mother. The court decided that John should not be removed from

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138. *See id.* at 95-96, 538 N.W.2d at 770.

139. *See id.* at 96, 538 N.W.2d at 771; *see also* Petition for Further Review and Memorandum Brief in Support Thereof at 5, 8, *In re Interest of John T.*, 4 Neb. Ct. App. 79, 538 N.W.2d 761 (1995) (No. A-95-0215).

140. *See* Petition for Further Review and Memorandum Brief in Support Thereof at 6, *In re Interest of John T.*, 4 Neb. Ct. App. 79, 538 N.W.2d 761 (1995) (No. A-95-0215).

141. *See In re Interest of John T.*, 4 Neb. Ct. App. 79, 97, 538 N.W.2d 761, 771 (1995).

142. *See In re Adoption of Michelle Lee T.*, 117 Cal. Rptr. 856, 860 (Ct. App. 1975).

143. *Id.*

144. *Id.*

the Brummetts because experts testified that it would be more traumatic to move John than to let him witness Mrs. Brummett's death. Once John had already been moved, the question of whether or not John should be removed from the Brummetts was moot, and the expert testimony on which the court based its decision became inapplicable. Nebraska law recognizes that a material change in circumstances that affects the best interests of the child can be a basis for a change in custody.<sup>145</sup> DSS petitioned the supreme court for further review of the case in November of 1995, setting forth the change in circumstances.<sup>146</sup> However, the supreme court refused to review the decision and the case was ordered back to the juvenile court.<sup>147</sup>

Once ordered back to the juvenile court, evidence was presented that, as a result of John already being transitioned into another foster home, one of the two experts originally opposing the DSS plan to remove John from the Brummetts changed his opinion.<sup>148</sup> The guardian ad litem who originally brought the action also changed his opinion.<sup>149</sup> Both Dr. Williams and the guardian ad litem agreed that it was now in John's best interests to remain in the home of the second set of foster parents.<sup>150</sup> Although these changes could not be considered by the court of appeals,<sup>151</sup> they could have been considered by the supreme court. In spite of this, the supreme court ordered the juvenile court judge to send John back to the Brummetts.<sup>152</sup>

After examining the problems with the court of appeals opinion and acknowledging the progression of the case after that point, inquiry can be made into why the Nebraska Supreme Court ordered John back to the Brummetts in spite of these changed circumstances. Knowing that John was already removed from the Brummetts and

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145. See *Miles v. Miles*, 231 Neb. 782, 784, 438 N.W.2d 139, 141 (1989).

146. See *Petition for Further Review and Memorandum in Support Thereof at 6, In re Interest of John T.*, 4 Neb. Ct. App. 79, 538 N.W.2d 761 (1995) (No. A-95-0215).

147. See *Appeal Rejected*, *supra* note 21, at 29; see also *Brummetts' Battle*, *supra* note 22, at 11.

148. See *Order for Approval of Placement Change at 3-5, In re Interest of John T.*, 49-463 (Lancaster County Juv. Ct. Jan. 26, 1996)(order for approval of placement change which states Dr. George Williams changed his opinion to recommend that the child remain with the new set of foster parents).

149. See *id.*; see also *Stipulation, In re Interest of John T.*, 49-463 (Lancaster County Juv. Ct. Jan. 24, 1996)(stipulation indicating guardian ad litem's position that it was in the child's best interests to remain with the new set of foster parents.)

150. See *Order for Approval of Placement Change at 3-5, In re Interest of John T.*, 49-463 (Lancaster County Juv. Ct. Jan. 26, 1996)(order for approval of placement change which states Dr. George Williams changed his opinion to recommend that the child remain with the new set of foster parents and guardian ad litem was in agreement with this position).

151. See *In re Interest of John T.*, 4 Neb. Ct. App. 79, 82, 538 N.W.2d 761, 763 (1995) (in reviewing a final order of the juvenile court, the standard of review is *de novo* on the record).

152. See *supra* note 40; see also *Brummetts' Battle*, *supra* note 22, at 11.



that the effects of such removal were what the court of appeals was trying to prevent by disapproving the DSS plan, why would the supreme court order John to be transitioned, yet again, back to the Brummetts? The answer is that the social goal of protecting individuals with HIV-AIDS from discrimination was interjected into this case from the beginning and was the basis for the outcome of the situation.

#### **D. The Effect of Interjecting Societal and Political Interests into a Child Placement Decision—Why AIDS Was a Factor in the Outcome of This Case**

The court's view of this case as an "AIDS case" is very significant to the outcome of the situation. Because of discrimination against AIDS victims, there is now a movement to stop such discrimination.<sup>153</sup> The fact that *John T.* involved AIDS, as opposed to some other terminal illness, is important because the social goal of preventing discrimination against AIDS victims was interjected into this case. The reforms and policies sparked by the AIDS epidemic indicate that ending discrimination against HIV-AIDS-infected individuals is an important social and political interest. It cannot be said that avoiding discrimination against an HIV-AIDS infected individual was not a factor in this case. Avoiding discrimination against a foster parent with AIDS was an underlying consideration in the case, which undercut the importance of considering John's best interests.

The fact that the foster mother had AIDS—as opposed to some other terminal illness—runs through the entire case. Although the court tried to downplay the seriousness of the effects the disease would have on Mrs. Brummett's ability to parent John, references specific to AIDS, which are not applicable to other terminal illnesses, were made throughout this case. The court of appeals made much of the fact that John would not have any higher risk of contracting AIDS from remaining in the Brummett home.<sup>154</sup> If GayLynn Brummett had cancer instead of AIDS, the fact that John had no higher risk of getting cancer by living in the household would not have even been discussed. Cancer is known to be a debilitating and terminal disease, much like AIDS.<sup>155</sup> However, we seldom hear of discrimination against cancer victims in the news, as we do of discrimination against AIDS victims. With the knowledge that HIV-AIDS is not spread through casual contact, why are transmission routes even a consideration? The information about the low risk of John contracting AIDS was purposely interjected because this was an "AIDS case." If AIDS

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153. See *supra* note 6.

154. See *In re Interest of John T.*, 4 Neb. Ct. App. 79, 85-86, 98, 538 N.W.2d 761, 765, 771-72 (1995).

155. See Dolgin, *supra* note 5, at 195-96.

was not a significant factor in this case, HIV-AIDS transmission routes would not have been discussed.

The considerable symbolism associated with AIDS and its "heavy baggage of meanings"<sup>156</sup> also played a role in this case. AIDS has been linked with homosexuality and intravenous drug use, both of which are often seen as contrary or destructive to normal family life and socially approved forms of sexuality.<sup>157</sup> A diagnosis of AIDS often results in "a 'diagnosis' of social marginality."<sup>158</sup> The court used the important social ramifications of AIDS to downplay the fact that the foster parents engaged in conscious deception to gain custody of John. In the opinion, the court stated that "[w]e cannot say it is per se against the child's best interests that his parents have hidden a health condition which generates from some quarters a degree of discrimination, hysteria, and paranoia."<sup>159</sup> The court implied that the foster parents should not have to take responsibility for their deception simply because AIDS is a disease that generates negative social reactions. This rationalization allowed the court to minimize the significance of the foster parents' deception. There is a need to diminish the significance of the deception because it is a very strong factor against allowing the Brummetts to adopt John. The deception indicates the Brummetts' concern for their own self-interests over John's best interests. The court highlighted the social ramifications of AIDS in order to avoid having to address the foster parents' deception—the very thing that instigated this whole situation and which can only be blamed on the foster parents. In order to further the social and political goal of avoiding discrimination against persons with AIDS, the court used a rationalization to decrease the significance of the foster parents' deception.

Not only was the preference for the foster parents' interest running throughout the court of appeals opinion, but the social and political considerations involved in discouraging discrimination against individuals with disabilities were also interjected in this case. The Rehabilitation Act of 1973<sup>160</sup> provides that disabled individuals cannot be treated differently by institutions receiving public funding.<sup>161</sup> The Americans with Disabilities Act of 1990<sup>162</sup> expands the protections provided in the Rehabilitation Act to the private sector.<sup>163</sup> AIDS is considered a disability under the Americans with Disabilities Act.<sup>164</sup>

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156. *Id.* at 193 n.1.

157. *See id.* at 197.

158. *Id.* at 201 (emphasis omitted).

159. *In re Interest of John T.*, 4 Neb. Ct. App. 79, 96, 538 N.W.2d 761, 771 (1995).

160. *See* 29 U.S.C.A. §§ 701-796 (1995 & West Supp. 1997).

161. *See* Sudbeck, *supra* note 5, at 74-75.

162. *See* 42 U.S.C.A. §§ 12101 to 12213 (1995 & West Supp. 1997).

163. *See* Sudbeck, *supra* note 5, at 80.

164. *See id.* at 80-81.

The influence of Mrs. Brummett's AIDS status and that AIDS qualifies as a disability is evident in the position taken by John's guardian ad litem in his brief to the court of appeals.<sup>165</sup> First of all, it must be kept in mind that a guardian ad litem is appointed to protect the interests of the child, not to represent the foster parents.<sup>166</sup> However, this did not prevent the guardian ad litem from making a lengthy argument that the DSS health regulation violated Mrs. Brummett's right to equal protection. This argument states that the health regulation results in "disparate treatment" for potential adoptive parents who are terminally ill and also "generates disparate treatment to healthy persons who are married to persons suffering from a terminal illness."<sup>167</sup> Furthermore, it was argued that the health regulation "clearly creates a category on the basis of an inherently suspect characteristic."<sup>168</sup> The guardian ad litem stated that because "carriers of HIV or AIDS are considered to have a disability,"<sup>169</sup> "Mrs. Brummett is in a category of persons protected under the law."<sup>170</sup> This argument obviously advocates for the foster parents' interests. This is a clear indication that even the guardian ad litem, who was supposed to be representing John's best interests, actually assisted in interjecting the foster parents' interests into this case.

Although the court did not specifically address whether the health regulation violated Mrs. Brummett's constitutional rights, the court obviously read the brief and was aware the argument was made.<sup>171</sup> Even though the constitutional rights of the foster parents were not specifically addressed, the existence of this argument, especially when brought by the person who was supposed to represent John's interests only, is evidence that AIDS as a disability was an underlying consideration in the case and was an influence on the court's decision.

The reaction the case received in the press also indicates the push for ending discrimination against individuals with HIV-AIDS. In the media, the case was represented to be purely about "AIDS phobia."<sup>172</sup> The Brummetts' attorney is quoted in one newspaper article as saying, "[t]his is AIDS on trial."<sup>173</sup> Such statements show the impact of

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165. See Brief of Appellant at 32-38, *In re Interest of John T.*, 4 Neb. Ct. App. 79, 538 N.W.2d 761 (1995) (No. A-95-0215).

166. See NEB. REV. STAT. § 43-272.01 (Reissue 1993 & Cum. Supp. 1996).

167. Brief of Appellant at 33, *In re Interest of John T.*, 4 Neb. Ct. App. 79, 538 N.W.2d 761 (1995) (No. A-95-0215).

168. *Id.* at 35.

169. *Id.* at 36.

170. *Id.* at 37.

171. See *In re Interest of John T.*, 4 Neb. Ct. App. 79, 82, 538 N.W.2d 761, 763 (1995) (specifically stating that the guardian ad litem asserts that the health regulation is a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution).

172. See *Brummetts' Battle*, *supra* note 22.

173. *Id.* at 11.

AIDS on this case. This case should not have been about "AIDS on trial." It should have been about what was best for a child. The Brummetts were seen as victims "who fought to adopt their foster son, even though one of them was dying of AIDS."<sup>174</sup> Meanwhile, DSS was seen as a state bureaucracy that was "targeting an HIV positive person."<sup>175</sup> The Brummetts were even honored by the American Civil Liberties Union as Civil Libertarians of the Year in 1996.<sup>176</sup> The Brummetts were held up as crusaders for the rights of disabled persons, while DSS was seen as an agency that discriminates against individuals with disabilities. The true issue in this case was AIDS, not the best interests of the child.

Almost no one would say that we should allow discrimination against HIV-AIDS infected persons or other disabled persons. Also, most would not say that individuals with certain handicaps should be barred from adopting or raising children.<sup>177</sup> However, the disability of a potential adoptive parent coupled with a reluctance to discriminate against disabled individuals should not overshadow what is truly in the child's best interests. In the *John T.* situation, GayLynn Brummett was more than just disabled—she was dying. Protecting the "rights" of Mrs. Brummett as an AIDS victim resulted in a great detriment to John—having to be shifted, not once, but twice, between two sets of foster parents. Furthermore, Mrs. Brummett had no right to adopt John in the first place. In a case like this, what was best for John should have been the primary consideration, not what would best further the societal and political interests in preventing AIDS discrimination. We don't want to discriminate, but we need to be discriminating in choosing adoptive parents.<sup>178</sup>

### **E. Future Implications of the *John T.* Decision and Jay Brummett's Suit in Federal Court**

Jay Brummett is suing DSS in federal court, alleging that DSS discriminated against him because his wife had AIDS.<sup>179</sup> The basis for the suit is the Americans with Disabilities Act and the Rehabilitation Act,<sup>180</sup> which prohibit discrimination against disabled individuals. Throughout the country, it is standard practice to require full medical

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174. *Judge Lets Suit Over Adoption Proceed Under Disabilities Act*, OMAHA WORLD HERALD, April 27, 1997, at 4B.

175. *Foster Mom Dies*, *supra* note 23.

176. See Paul Hammel, *Foster Parents, Chambers Receive Honor From ACLU*, OMAHA WORLD HERALD, October 18, 1996, at 28.

177. See *In re Marriage of Carney*, 598 P.2d 36 (1979)(citing various instances where handicapped people successfully adopted and parented children).

178. See Stephanie Mencimer, *HIV Tests for Adoptive Parents?*, LEGAL TIMES, February 20, 1995, at 6.

179. See Mabin, *supra* note 42, at 1C.

180. See *id.*

examinations for adoptive parents.<sup>181</sup> If Jay Brummett is successful in his suit in federal court, will that mean that in order to receive federal funding, state social service agencies cannot have any health regulations that could be seen as discriminating against disabled individuals? If state agencies can no longer have health regulations in order to avoid discrimination against disabled individuals, while private agencies are still allowed to have health regulations, would that not result in children who are placed through state agencies being at higher risk of placement with a seriously ill adoptive parent than those who are placed through private agencies? The current DSS regulations on adoption contain no provisions concerning the health of prospective adoptive parents.<sup>182</sup> This indicates that *John T.* may have already had its greatest impact on the future of adoptions through state agencies in Nebraska. If the best interests of the child is really the primary consideration in an adoption proceeding, "discrimination" to some extent should be allowed in choosing the parents who will adopt the wards of this state.

## V. CONCLUSION

The aftermath of *In re Interest of John T.* leaves us with a difficult question. Should protecting HIV-AIDS-infected adults from discrimination be more important than protecting the rights of children in the child welfare system? The interests of both of these groups are highly important. However, in a situation such as the one faced in *John T.*, the motivations of the individual parties must be taken into consideration. John was just an infant, incapable of making any decisions, when he was placed with the Brummetts. Much like Diane, our Project Kids Volunteer, who did not know what to expect when her friend Sarah was placed in foster care, John could never have anticipated the ramifications his foster care placement would have on his future. John had no choice in the decisions that were being made for him. Similarly, DSS had no way of knowing that it was placing John in a potentially damaging situation. On the other hand, the Brummetts were adults, fully capable of making their own decisions. They were aware of Mrs. Brummett's health status for several years before they tried to adopt John. They were the only people in this situation who had insight into what the future would bring for the child they wished to adopt. They were the only ones who knew where the events they had set in motion could possibly lead.

Looking at the relative positions of these parties, who could best have prevented this situation? The answer must be the Brummetts. They were the only ones who knew the truth about Mrs. Brummett's

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181. See Mencimer, *supra* note 178, at 6.

182. See 390 NEB. ADMIN. R. & REGS. 6-002 to -022.15 (1995).

health condition and what this could mean for the future of any child they tried to adopt. In spite of this knowledge, the Brummetts chose to pursue their own self-interests in adopting a child at the expense of that child. How can it be said by the court that this deception did not adversely affect John? The answer must lie in the fact that Mrs. Brummett had AIDS, and no court wants to be viewed as discriminating against someone with this disease.

Because children and adults are not on equal footing, the interests of an AIDS-infected adult must yield to the best interests of a child. While the adult has the decisionmaking power, the child is defenseless. Children in the custody of the state foster care system must be protected from future situations like the one in which John T. found himself. It is the state's duty to serve the best interests of children, and these interests cannot be subordinate to the interests of HIV-AIDS-infected adults.

As stated by the court of appeals, life is indeed uncertain. Although we cannot escape this fact, the uncertainty of life should not be exacerbated by deception. When foster parents deceive a child placement agency in order to obtain placement of a child, this deception must be considered in deciding whether these parents are fit to raise the child. When the deception is not discovered until after the child has been placed with the family, does that make the deception any less detrimental to the child? Once the child has been removed from the foster parents and placed in a stable home environment, it is wrong for a court to place the interests of the foster parents ahead of the best interest of the child and to order the child back to the original foster parents. This subjects children to being shifted back and forth between foster homes.

For foster children, life is more uncertain than for most. This uncertainty affects not only children, but others who have a personal stake in the outcome of child placement decisions, such as biological parents, foster parents, and people involved in the child welfare system, like our Project Kids Volunteer, Diane. Two years after befriending Sarah, Diane sees the decisions that are made regarding Sarah and tries to make sure that those decisions are in Sarah's best interests. But what about children who don't have someone looking out for them? The interests of the adults involved in a child placement decision should not be paramount to the best interests of the child. Children's best interests will not be served by courts that favor the interests of adults over those of children.

In a situation like the one faced in *John T.*, there are important competing interests on both sides. Protecting HIV-AIDS-infected individuals is a legitimate goal that must be pursued. However, considering this goal in the context of the *John T.* case, one simple fact must be remembered—adults can make their own decisions and children can-

not. This is why protecting HIV-AIDS infected adults from discrimination must yield to the best interests of children in cases like *John T.*

We want all children to have the best life can offer them. That is what Diane wants for Sarah. Did we not want that for John T.? Do we not want that for all foster children? In light of *In re Interest of John T.*, we must ask ourselves if that goal is truly being pursued in our courts.

*Jenny L. Plager '99*