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Imprisonment Constitutes Abandonment Such as Is Contemplated by the Adoption Statutes So as to Dispense with the Consent of a Natural Father in an Adoption Proceeding for His Child, and Failure to Support Due to Imprisonment Dispenses with the Right of the Natural Parent to Object to an Adoption Proceeding for His Child.

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CASE NOTES

ADOPTION—CONSENT—ABANDONMENT AND FAILURE TO SUPPORT—IMPRISONMENT CONSTITUTES ABANDONMENT SUCH AS IS CONTEMPLATED BY THE ADOPTION STATUTES SO AS TO DISPENSE WITH THE CONSENT OF A NATURAL FATHER IN AN ADOPTION PROCEEDING FOR HIS CHILD, AND FAILURE TO SUPPORT DUE TO IMPRISONMENT DISPENSES WITH THE RIGHT OF THE NATURAL PARENT TO OBJECT TO AN ADOPTION PROCEEDING FOR HIS CHILD. *Hutson v. Haggard*, 475 S.W.2d 330 (Tex. Civ. App.—Beaumont 1971, no writ).

The natural father appealed from the judgment of the Juvenile Court of Dallas County granting the petition for the adoption of his child without his consent. Appellant and his former wife, Judith Lynn Haggard (now the wife of Bill C. Haggard, petitioner in the court below and appellee here) were married in June, 1966, and the minor child involved in this proceeding, Melissa Ann Hutson, was born in August, 1967. The appellant was imprisoned from September, 1966, to about June, 1967. There is conflict in his testimony (as to his imprisonment) in answers to two separate interrogatories.[1] But while he was incarcerated at Segoville, the child's mother divorced him in June, 1968. The provisions of the divorce decree awarded the mother custody of the child, ordered the appellant to pay ten dollars per week for her support, and failed to mention visitation privileges for the father. In June, 1968, the child's mother married the appellee, Bill Haggard. In March, 1969, the appellant was arrested and on December 17, 1969, was given a ten to twenty-five year sentence at the Ohio State Penitentiary where he was incarcerated at the time of this proceeding. The appellant said that he would be eligible for a review of his sentence in 1974. With respect to support, the appellant could not corroborate his statement that he sent $560 to the child's mother for support, which she flatly denied. She alleged that he had not sent her one penny since the child

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1 His prior incarcerations are admitted, but it is difficult to determine precisely where and when he was imprisoned so it is necessary to reproduce his answers given in answer to separate interrogatories. In answer to a question as to his having been incarcerated prior to his Ohio conviction, appellant said:

> I was incarcerated in Milan, Michigan, Correctional Inst. on or about September 1966, then transferred to Segoville, Texas, parole in June 1967. I was violated (sic) in August of 1967, went to Sandstone, Minn. then transferred to Segoville, they released me in October 1968. I was then arrested in East St. Louis, March 1969, then to present commitment.

In answer to another interrogatory, he gave this chronology of his imprisonment:

> March of 1966 through June 1966, South Bend, Indiana, July 1966 to Milan, Michigan, then to Segoville until June 1967; In October 1967 to Segoville and released in October 1968. I was arrested again in March 1969, then again July 1969, present incarceration in O.P.

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was a month old. It was established that the appellant earned $130.06 at the prison and had $55 in his account. At the time of the adoption proceeding the child was four and one-half years old. The trial court granted the petition for adoption dispensing with the natural father's consent holding that (1) under article 46a, section 6a,[2] the appellant's imprisonment constituted abandonment and (2) under article 46a, section 6a, the appellant had failed to support his child commensurate with his financial ability. Either exception (to the article 46a consent requirement) would be sufficient to dispense with the necessity of the natural parent's consent to the adoption of his child.[3] Held—*Affirmed.* Imprisonment constitutes abandonment such as is contemplated by the adoption statutes so as to dispense with the consent of a natural father in an adoption proceeding for his child, and failure to support due to imprisonment dispenses with the right of the natural parent to object to an adoption proceeding for his child.

Adoption was unknown to the common law and exists as the result of statute throughout the United States having as its roots the civil law.[4] The original purpose of the early adoption law was to permit the continuance of the family when there were no blood descendents,[5] thereby insuring succession of property.[6] Thus the early laws benefited the adopting parent rather than the adopted child.[7] Today this is no longer true as the welfare of the child is always the paramount consideration in any adoption proceeding.[8] Recent statutory and decisional law have reflected a trend by the courts and legislatures not only to promote the best interests of the adopted child, but at the same time to protect the rights of both the natural and adoptive parents.[9]

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2 TEX. REV. CIV. STAT. ANN. art. 46a, § 6a (1969).
Sec. 6. (a) Except as otherwise provided in this section, no adoption shall be permitted except with the written consent of the living parents of the child; provided, however, that if a living parent or parents shall *voluntarily abandon* and *desert* a child sought to be adopted, for a period of two (2) years, and shall have left such child to the care, custody, control and management of *other persons*, or if such parent or parents shall *have not contributed substantially* to the support of such child during such period of two (2) years *commensurate with his financial ability*, then, in either event, it shall not be necessary to obtain the written consent of the living parent or parents in such default, and in such cases adoption shall be permitted on the written consent of the Judge of the Juvenile Court of the county of such child's residence; or if there be no Juvenile Court, then on the written consent of the Judge of the County Court of the county of such child's residence. (emphasis added).

3 Patella v. Jones, 303 S.W.2d 490, 491 (Tex. Civ. App.—Dallas 1957, writ dism'd).

4 C. VERNIER, AMERICAN FAMILY LAWS § 254 (1936); Reeves v. Ellis, 257 S.W.2d 876, 878 (Tex. Civ. App.—Amarillo 1953, writ ref'd n.r.e.).

5 Martin, *Parent and Child—Adoption—Consent of Natural Parent—Abandonment*, 36 TUL. L. REV. 584 (1962).

6 Grove, *Independent Adoption: the Case for the Gray Market*, 13 VILL. L. REV. 116 n.5 (1967).

7 Martin, *Parent and Child—Adoption—Consent of Natural Parent—Abandonment*, 36 TUL. L. REV. 584 (1962).

8 *In re* Adoption by J.B., 164 A.2d 65, 68 (N.J. 1960); Edwards, *Adoption—the Welfare and Best Interest of the Child*, 5 WILLIAMETTE L.J. 93 (1968).

9 Infausto, *Annual Review of Decisions and Statutory Revisions Affecting Adoptions*, 3

Consistent with this trend, all states except one have statutes requiring the consent of both natural parents to an adoption of their child.[10] In accordance with article 46a, section 6, Texas Revised Civil Statutes, the Texas courts have pursued a policy[11] of upholding the natural parent's right to object to such adoption. In this light, the United States Supreme Court has also emphasized the fundamental importance of the parent and child relationship.[12] The natural parent's right to object to an adoption of his child is not without its limits. Realizing the possibility of an unfit parent obstructing the best interests of a child, most legislatures have implemented statutory exceptions covering certain situations which dispense with the necessity of the natural parent's consent.[13] While in an adoption proceeding the best interests of the child are generally of paramount concern, it is well established that the consent of each natural parent is an essential requirement and that the courts strictly construe the statutes dispensing with such consent.[14] Moreover, the courts will not even consider the best interests of the child in light of the relative merits of the contesting parties until the statutory exception dispensing with parental consent has been conclusively established.[15] The natural parent's relationship with the child

FAMILY L.Q. 123 (1969); R. POUND, THE SPIRIT OF THE COMMON LAW 189 (1921): "The individual interest of parents which used to be the one thing regarded has come to be almost the last thing regarded as compared with the interest of the child and the interest of society."

10 Martin, *Parent and Child—Adoption—Consent of Natural Parent—Abandonment*, 36 TUL. L. REV. 584 (1962). Although South Carolina has no statute, case law evidences the court's desire for the consent of the natural parents to an adoption proceeding. Diggers v. Jolley, 64 S.E.2d 19, 21 (S.C. 1951). For further commentary on the consent requirement, *see* Barnard, *A Compilation of Consent Provisions of Adoption Statutes*, 24 ROCKY MT. L. REV. 359 (1952).

11 Newsom v. Camp, 380 S.W.2d 692, 694 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.):

> . . . [the] intent of the Legislature in enacting Section 6 [of this Article (46) respecting necessity for written consent of living parents] was to recognize the inherent right of parents to the possession, custody, control, services and earnings of their children, and that their children should not be subject to adoption by others, so long as the parents meet the corresponding obligations of not abandoning their children to the care of others and contributing what they reasonably can to their support.

Lee v. Purvin, 285 S.W.2d 405, 408 (Tex. Civ. App.—Waco 1955, writ ref'd n.r.e.):

> The public policy of this State, as expressed in all of the adoption statutes enacted by the Legislature is to protect the sanctity of the home and the natural relationship existing between parent and child by providing that no adoption of the normal offspring of worthy parents should be permitted except with written consent of the living parents . . . .

12 People *ex rel.* Portnoy v. Strasser, 104 N.E.2d 895, 896 (N.Y. 1952): "No court can, for any but the gravest reasons, transfer a child from its natural parent to any other person." Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042, 1045 (1923): ". . . since the right of a parent . . . to establish a home and bring up children is a fundamental one and beyond the reach of any court."

13 Simpson, *The Unfit Parent: Conditions Under Which a Child May Be Adopted Without the Consent of His Parent*, 39 U. DET. L.J. 347, 360, 361 (1962).

14 Heard v. Bauman, 443 S.W.2d 715, 719 (Tex. Sup. 1969). Stinson v. Rasco, 316 S.W.2d 900, 905 (Tex. Civ. App.—Dallas 1958, no writ): "[T]he rule of strict construction applies in favor of a non-consenting parent." It should be construed in favor of the natural parent's rights, especially where it is claimed that owing to misconduct, the parent's consent to the adoption is not required.

15 Stalder v. Stone, 100 N.E.2d 497, 499 (Ill. App. 1951). *See also* Platt v. Moore, 183

has been recognized to be a prerequisite to the development of the individual and concomitant to the establishment of a strong family life which is the basis of an orderly society.[16] In keeping with public policy, the courts have assumed a strict attitude towards the dispensing of parental consent to an adoption proceeding. To emphasize the severity of the consequences of an adoption proceeding, the courts have frequently compared it to a custody proceeding.[17]

Texas enacted its first adoption statute in 1850, being perhaps the first state in the country to do so.[18] Following the trend of most states, Texas legislated statutory provisions dispensing with the written consent of the natural parent to adoption in certain situations[19] in order to better protect the interests of the child against a statutorily unfit parent. In applying these statutory exceptions, the Texas courts,[20] in

S.W.2d 682, 685 (Tex. Civ. App.—Amarillo 1944, writ ref'd w.o.m.): "Until the conditions laid down by the statute are complied with, there is no discretion resting in the court to consider the interest of the child in disregard of the wishes of its parents."

The burden of proof is decidedly upon the shoulders of the petitioner for the adoption. As the Indiana appellate court noted in *In re* Bryant's Adoption, 189 N.E.2d 593, 600 (Ind. App. 1963), the one seeking to sever the tie of natural parent-child should not only present a preponderance of proof but such proof should be established by clear and indubitable evidence. *See* Lout v. Whitehead, 415 S.W.2d 403, 406 (Tex. Sup. 1967). But two jurisdictions provide for the dispensing of parental consent solely according to the best interests of the child. MD. ANN. CODE art. 16, § 74 (1951) provides that an adoption may be permitted without parental consent if such consent can be shown to have been withheld contrary to the child's best interests. ARIZ. REV. STAT. ANN. ch. 1, § 8-104 (1952) is similar. *See* Infausto, *Annual Review of Decisions and Statutory Revisions Affecting Adoptions*, 3 FAMILY L.Q. 123, 128 (1969).

16 Simpson, *The Unfit Parent: Conditions Under Which a Child May Be Adopted Without the Consent of His Parent*, 39 U. DET. L.J. 347, 350 (1962).

17 The court in *In re* Adoption of Smith, 366 P.2d 875, 876 (Ore. 1961) made this distinction:

> The best-interests-of-the-child standard has no similar relation to the issues presented in a proceeding to dispense with consent for an adoption. In an adoption, a court is asked to terminate every right and interest of the natural parent. Adoption goes far beyond the child-centered question of custody during minority. Indeed, the denial of an adoption petition has no necessary bearing on the physical custody of the child. The child's environment can be protected in a number of ways, under the divorce laws and the juvenile code. The petition to adopt concerns a different kind of right, the subjective tie between a parent and child, the right of a parent to be identified with his child for emotional, religious or other reasons. A father may hope his son will bear his name; a mother may anticipate that her daughter will inherit her property.

See also Jackson v. Russell, 97 N.E.2d 584, 585 (Ill. App. 1951); *In re* Adoption of Moriarty, 152 N.W.2d 218, 227 (Iowa 1967).

18 Tex. Laws 1850, ch. 39, at 36; 3 H. GAMMEL, LAWS OF TEXAS 474 (1898); Comment, *Legislation Article 46a: Adoption, the Consent Requirement and Its Statutory Exceptions*, 15 BAYLOR L. REV. 100 (1963); according to Barnard, *A Compilation of Consent Provisions of Adoption Statutes*, 24 ROCKY MT. L. REV. 359 (1952), Massachusetts was the first state to enact adoption laws in 1851. But Texas passed its adoption law in 1850. For a full development of the history of the adoption laws in Texas, *see* Wynn, *Pitfalls in Adoption*, 20 TEX. B.J. 617 (1957).

19 TEX. REV. CIV. STAT. ANN. art. 46a, § 6 (1951). This statute was amended in 1951 with respect to abandonment and failure to support. The latest statute is TEX. REV. CIV. STAT. ANN. art. 46a (1969).

20 Heard v. Bauman, 443 S.W.2d 715, 719 (Tex. Sup. 1969), in which the court stated: "While adoption statutes are generally given a liberal construction, the rule of strict construction applies in favor of a non-consenting parent. This is especially true in cases in which it is asserted that because of the parent's misconduct toward the child, his consent

line with the majority view,[21] have strictly construed them in favor of the non-consenting parent. Varying fact situations have pressed the courts to interpret the intended meaning of abandonment and failure to support in its statutory context. The Texas courts[22] have generally adopted the definition of abandonment as laid down in *Strode v. Silverman*:

> Voluntary abandonment, as used in the adoption statute, does not include an act or a course of conduct pursued by a parent which is done through force of circumstances or dire necessity, but it is used more in a sense of a wilful act or course of conduct, and such as would imply a conscious disregard or indifference to such child in respect to the parental obligation that the parent owes such child.[23]

Most courts across the United States have construed the statutory exception dealing with abandonment rather strictly.[24]

In adoption proceedings based upon failure to support, the only necessary contention is that the natural parent has failed to substantially support the child commensurate with his financial ability and circumstances for a period of more than two years.[25] "Since this qualification may work for or against a parent depending upon the given situation, the determination of what is substantial and commensurate with his financial ability must be made on an ad hoc basis."[26] The judicial de-

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to the adoption is not required." *See also* Gilley v. Anthony, 404 S.W.2d 60, 63 (Tex. Civ. App.—Dallas 1966, no writ); Stinson v. Rasco, 316 S.W.2d 900, 905 (Tex. Civ. App.—Dallas 1958, no writ).

21 Infausto, *Annual Review of Decisions and Statutory Revisions Affecting Adoptions*, 3 FAMILY L.Q. 123, 124 (1969): "Jealously guarding the parental relationship, the courts generally applied the abandonment provisions strictly in favor of the natural parent." But the strict construction rule is not without its critics as the court in People *ex rel.* Cocuzza v. Cobb, 94 N.Y.S.2d 616 (Sup. Ct. 1950) warned that proof of a wilful and settled intent to renounce permanently the parental rights and duties, often contravenes desirable objectives of adoption statutes and subordinates the best interests of the child to the dictates of an inflexible doctrine. Two states have statutorily eased such inflexibilty. ARIZ. REV. STAT. ANN. ch. 1, § 8-104 (1952); MD. STAT. ANN. art. 16, § 74 (1971).

22 Hendricks v. Curry, 401 S.W.2d 796, 801 (Tex. Sup. 1966); Grider v. Noonan, 438 S.W.2d 631, 637 (Tex. Civ. App.—Corpus Christi 1969, no writ); Whitehead v. Lout, 408 S.W.2d 569, 571 (Tex. Civ. App.—Tyler 1966), *rev'd*, 415 S.W.2d 403 (Tex. Sup. 1967); Lee v. Purvin, 285 S.W.2d 405, 408 (Tex. Civ. App.—Waco 1955, writ ref'd n.r.e.); Burran v. Fuller, 248 S.W.2d 1015, 1018 (Tex. Civ. App.—Austin 1952), *rev'd*, 151 Tex. 335, 250 S.W.2d 587 (1952).

23 209 S.W.2d 415, 419 (Tex. Civ. App.—Waco 1948, writ ref'd n.r.e.).

24 Infausto, *Annual Review of Decisions and Statutory Revisions Affecting Adoptions*, 3 FAMILY L.Q. 123, 124 (1969).

25 Comment, *Article 46a: Adoption, the Consent Requirement and Its Statutory Exceptions*, 15 BAYLOR L. REV. 100, 105 (1963).

26 *Id.* at 105. For a review of the holdings of different Texas courts on the issue of non-support see Heard v. Bauman, 443 S.W.2d 715 (Tex. Sup. 1969); White v. Lout, 415 S.W.2d 403 (Tex. Sup. 1967); Laslie v. Cole, 465 S.W.2d 811 (Tex. Civ. App.—Corpus Christi 1971, no writ); Rubey v. Kuehn, 440 S.W.2d 95 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd); Conder v. Helvey, 430 S.W.2d 374 (Tex. Civ. App.—Fort Worth 1968, no writ); Thompson v. Meaux, 429 S.W.2d 668 (Tex. Civ. App.—Amarillo 1968, no writ); Smith v. Waller, 422 S.W.2d 189 (Tex. Civ. App.—Fort Worth 1967, writ ref'd n.r.e.).

termination of imprisonment as construed by the courts in light of the statutory exceptions—abandonment and failure to support—has not been made in this state. However, it has been passed on in other jurisdictions.[27]

Although seven jurisdictions statutorily dispense with a natural parent's consent if the latter is imprisoned or has lost his civil rights,[28] these jurisdictions have not had to construe imprisonment in relation to statutes providing for the abandonment and failure to support exceptions to the consent rule. This has not been a prevalent judicial question over the years and it has been adjudicated in very few jurisdictions. Although these deliberations have not conformed to any judicial trend, it appears that the courts have adopted three different approaches. Each approach in conjunction with the respective statutory provisions of the particular jurisdiction has had an ultimate bearing upon the court's conclusion concerning the imprisonment issue.

The majority of states follow the *traditional view* on an adoption based upon the dispensing of the natural parent's consent.[29] Here, the best interests of the child are not considered until consent or parental unfitness as described in the statute is shown.[30]

An Arizona case, *Petition for Kelley Minors*,[31] represents the *best interest view*. In this approach the only issue ever considered by the court is the best interests of the child despite the nature of the adoption or the parties involved.[32]

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27 Imprisonment with respect to parental abandonment, failure to support, and termination of parental rights as to the child has been reviewed in the following cases: Petition for Kelley Minors, 432 P.2d 158 (Ariz. App. 1967); Phillips v. Massey, 39 S.E.2d 493 (Ga. App. 1946); Staat v. Hennepin County Wel. Bd., 178 N.W.2d 709 (Minn. 1970); Mayfield v. Braund, 64 So. 2d 713 (Miss. 1953); Casper v. Huber, 456 P.2d 436 (Nev. 1969); *In re* Riggs Adoption, 175 N.Y.S.2d 388 (Sur. 1958); State v. Grady, 371 P.2d 68 (Ore. 1962); *In re* Adoption of Jacono, 231 A.2d 295 (Pa. 1967); *In re* Welker, 50 Pa. D. & C. 573 (1944); *In re* Glenn, 29 Erie Co. L.J. 302 (Pa. 1946); *In re* Adoption of Jameson, 432 P.2d 881 (Utah 1967).

28 ALAS. STAT. § 20.10.040(2) (1962) (imprisonment); IOWA CODE ANN. § 600.3 (1950) (imprisonment); MASS. GEN. LAWS ch. 210, § 3 (1941) (imprisonment); MONT. REV. CODES § 61-205 (1970) (loss of custody through cruelty); N.Y. DOM. REL. LAW § 111 (McKinney Supp. 1972) (loss of civil rights); OKLA. STAT. ANN. § 60.6 (1966) (loss of civil rights); ORE. REV. STAT. § 109.322 (1969) (imprisonment).

29 *See* Simpson, *The Unfit Parent: Conditions Under Which a Child May Be Adopted Without the Consent of His Parent*, 39 U. DET. L.J. 347, 350 (1962).

30 *In re* Adoption of Jacono, 231 A.2d 295, 296 (Pa. 1967):

> Unlike custody cases, in adoption proceedings the welfare of the child is not material until either consent or abandonment as prescribed by the Adoption Act has been established. Once abandonment has been established and, *only then*, it becomes the duty of the Court to determine whether the adoption will be for the child's welfare and best interests. (emphasis added).

See generally Simpson, *The Unfit Parent: Conditions Under Which a Child May Be Adopted Without the Consent of His Parent*, 39 U. DET. L.J. 347, 350 (1962). The proof of a wilful and settled intent to renounce permanently the parental rights and duties, often contravenes desirable objectives of adoption statutes and subordinates the best interests of the child to the dictates of an inflexible doctrine. People *ex rel.* Cocuzza v. Cobb, 94 N.Y.S.2d 616, 617 (Sup. Ct. 1950).

31 432 P.2d 158, 161 (Ariz. App. 1967).

32 Petition for Kelley Minors, 432 P.2d 158, 161 (Ariz. App. 1967). This view is also not without its danger. An extreme interpretation of the best interests rule could lead to a

The third approach is a compromise between the previous two. This *third-party* or *non-parent* approach is well illustrated by the Mississippi Supreme Court in *Mayfield v. Braund*.[33] The best interest of the child is the only issue in any adoption proceeding *unless* a *third party* is a petitioner for the adoption. In this case the interests of the child are not in issue until the third party proves by sufficient evidence that the natural parent is unfit or has abandoned his child so as to dispense with his consent.[34]

If a jurisdiction adheres to the best interests view, as does Arizona, the imprisonment of the father will only be a factor[35] in the determination of what is best for the child. Unlike the first and third views (if the petitioner is a non-parent) which demand that the petitioner meet the proof of unfitness of the natural parent in order to dispense with his consent before ruling on the issue of the welfare of the child, the best interests view leaves wide discretion with the trial court to determine what will promote the welfare of the child.[36] In Arizona the judge can, if he sees fit, dispense with the necessity of parental consent upon any grounds and ignore the natural rights of the parent, if in doing so, he promotes the welfare of the child.[37] The Arizona approach would not have to make a determination of whether imprisonment constitutes abandonment or failure to support, since the imprisonment would only be a factor in the adoption proceeding.

The first and third views (when the adopting party was a non-parent) have been considered in conjunction with the imprisonment problem several times. Particular attention has been paid to statutory language and the particular facts of the case. The Minnesota[38] and Utah[39] Supreme Courts have held that imprisonment per se was not abandonment, because the separation due to imprisonment was not the result of an intentional act, but rather it was due to one's own misfortune or misconduct. A lower court in Pennsylvania held that imprisonment was not abandonment within the statutory context even though it was alleged that the position of imprisonment was one in which the father voluntarily put himself.[40] The court concluded further that failure to

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redistribution of the entire minor population among the worthier members of the community, a project the courts have declined to undertake. Simpson, *The Unfit Parent: Conditions Under Which a Child May be Adopted Without the Consent of His Parent*, 39 U. DET. L.J. 347, 355 (1962).

33 64 So. 2d 713, 714 (Miss. 1953).

34 Mayfield v. Braund, 64 So. 2d 713, 714 (Miss. 1953). If the proceeding had been between natural parents, it appears that the jurisdictions adopting this view would follow the best interests doctrine.

35 Petition for Kelley Minors, 432 P.2d 158 (Ariz. App. 1967). But the imprisonment was due to malicious acts of father towards children.

36 *Id.* at 161.

37 *Id.* at 161.

38 Staat v. Hennepin County Wel. Bd., 178 N.W.2d 709, 713 (Minn. 1970).

39 *In re* Adoption of Jameson, 432 P.2d 881, 882 (Utah 1967).

40 *In re* Welker, 50 Pa. D. & C. 573 (1944).

support due to imprisonment was not sufficient to show that a divorced father had abandoned his child.[41] The Mississippi Supreme Court[42] and the Oregon Supreme Court[43] hold that imprisonment is not an abandonment of a child, inferring in their opinions that the possibility of the prisoner's rehabilitation and subsequent attendance to his child is a factor precluding a finding of abandonment. The Mississippi court further noted the fact that abandonment of a child may be repented by the natural parent, and that the parent can by repentance acquire all parental rights again, including that of preventing an adoption by withholding his consent.[44] The Nevada Supreme Court has held that imprisonment for a twenty-five year murder sentence was abandonment in light of the Nevada statute.[45] This statute provided that a parent who leaves his child to the support of others and fails to communicate with said child for a period of six months is presumed to have intended to abandon the child.[46] A New York surrogate court also has held that imprisonment was not abandonment, relying on the definition laid down by Judge Cardoza.[47] The division of reasoning is obvious.

The failure to support due to imprisonment has received less attention than the abandonment question. However, in *Staat v. Hennepin County Welfare Board,* the supreme court took notice of the Minnesota statute which insists that a parent be financially able before the parent can be found to have neglected the child, and held that the natural father, who was imprisoned, could not neglect his child since the state could not prove his financial ability.[48] The Supreme Court of Pennsylvania recognized that a prisoner could not have supported his child with money, and as such the court inferred that for this period of incarceration he could not have abandoned his child.[49]

The only Texas authority concerning the effect of imprisonment upon the parent-child relationship is *Bee v. Robbins.*[50] In this case the court determined that the child of a deceased mother and imprisoned father (50-year sentence) was a dependent child within the statutory meaning of Texas Revised Civil Statutes article 2330, even though the father had arranged for its care through its maternal grandparents.[51]

The issue of imprisonment constituting abandonment and causing failure to support within the context of Texas Revised Civil Statutes

41 *Id.*
42 Mayfield v. Braund, 64 So. 2d 713, 721 (Miss. 1953).
43 State v. Grady, 371 P.2d 68, 69 (Ore. 1962).
44 Mayfield v. Braund, 64 So. 2d 713, 721 (Miss. 1953).
45 Casper v. Huber, 456 P.2d 436, 437 (Nev. 1969).
46 *Id.* at 437 n.2.
47 *In re* Riggs Adoption, 175 N.Y.S.2d 388, 389 (Sur. Ct. 1958).
48 178 N.W.2d 709, 712 (Minn. 1970).
49 *In re* Adoption of Jacono, 231 A.2d 295, 297 n.2 (Pa. 1967) (dicta).
50 303 S.W.2d 827 (Tex. Civ. App.—Dallas 1957, no writ).
51 *Id.*

article 46a, section 6a,[52] was presented on appeal for the first time in Texas in *Hutson v. Haggard*.[53] The court properly followed the Texas rule of strict construction of the adoption statute in favor of a non-consenting parent, while at the same time recognizing the broad discretion of the trial judge in determining the best interests and welfare of the child in an adoption contest.[54] The court held that the natural father's imprisonment constituted voluntary abandonment[55] of his child so as

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52 TEX. REV. CIV. STAT. ANN. art. 46a, § 6a (1969):

> Except as otherwise provided in this section, no adoption shall be permitted except with the written consent of the living parents of the child; provided, however, that if a living parent or parents shall *voluntarily abandon* and *desert* a child sought to be adopted, for a period of two (2) years, and shall have left such child to the care, custody, control and management of *other persons*, or if such parent or parents shall *have not contributed substantially* to the support of such child during such period of two (2) years *commensurate with his financial ability*, then, in either event, it shall not be necessary to obtain the written consent of the living parent or parents in such default, and in such cases adoption shall be permitted on the written consent of the Judge of the Juvenile Court of the county of such child's residence; or if there be no Juvenile Court, then on the written consent of the Judge of the County Court of the county of such child's residence. (Emphasis added.)

53 475 S.W.2d 330 (Tex. Civ. App.—Beaumont 1971, no writ).

54 *Id.* at 333.

55 *Id.* at 333. Applying the well established definition of abandonment as defined by the court in Strode v. Silverman, 209 S.W.2d 415, 419 (Tex. Civ. App.—Waco 1948, writ ref'd n.r.e.), the court paraphrased the supreme court in Hendricks v. Curry, 401 S.W.2d 796, 801 (Tex. Sup. 1966):

> . . . we are of the opinion that appellant's wilful criminal acts and course of conduct has been such as implies a conscious disregard and indifference to Melissa in respect to his parental obligations that as a parent he owed to her. Thus, we reject the contention that imprisonment does not constitute voluntary abandonment under Staat, ...

The voluntariness of the abandonment seems to be evident to the court by the voluntary acts of the natural father that led to his imprisonment.

The Texas statute should be distinguished from holdings of two other states, Oregon and Mississippi. TEX. REV. CIV. STAT. ANN. art. 46a, § 6(a) (1969) has a two year limitation at the end of which the abandonment or failure to support becomes final. Pearson v. Newton, 371 S.W.2d 126, 128 (Tex. Civ. App.—Amarillo 1963, no writ); Jones v. Bailey, 284 S.W.2d 787, 790 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.). In Texas the prospect of a prisoner rehabilitating is precluded by statute, unlike Oregon and Mississippi which according to case law, State v. Grady, 371 P.2d 68, 69 (Ore. 1962) and Mayfield v. Braund, 64 So. 2d 713, 721 (Miss. 1953), have recognized the possibility of a prisoner rehabilitating and repenting his abandonment of his child. This view was instrumental in each court's decision that imprisonment was not intentional abandonment of the child.

It is of further import to distinguish between the Texas definition of abandonment and that of the Minnesota court, whose opinion on imprisonment constituting intentional abandonment was rejected by the Texas court.

> Voluntary abandonment, as used in the adoption statute, . . . is used more in a sense of a wilful act or course of conduct, and such as would imply a conscious disregard or indifference to such child in respect to the parental obligation that the parent owes to such child. Strode v. Silverman, 209 S.W.2d 415, 419 (Tex. Civ. App.—Waco 1948, writ ref'd n.r.e.). We think there is an abandonment when the desertion is accompanied by an intention to entirely forsake the child. There must be an intention to sever the parental relation and wholly throw off all obligations springing from it.

Staat v. Hennepin County Wel. Bd., 178 N.W.2d 709, 713 (Minn. 1970), *citing* State v. Clark, 182 N.W. 452, 453 (Minn. 1921). Obviously the Minnesota definition requires a much stronger intention by the natural parent to constitute abandonment of the child, than the Texas one which seems to suggest that a passing indifference to parental obligation may be inferred from a parent's wilful act or course of conduct and that such would satisfy the definition of abandonment. Such indifference for two years consummates the abandonment according to TEX. REV. CIV. STAT. ANN. art. 46a, § 6(a) (1969).

to dispense with the necessity of his consent to the adoption of his child.[56] In so doing, the court rejected the appellant's contention that he had not abandoned his child in the sense of the Texas statute, having cited foreign decisions in line with the Minnesota Supreme Court in *Staat*,[57] which indicated that under the laws of the particular state, ". . . incarceration of the parent does not constitute intentional abandonment."[58] As his confinement was the result of his own voluntary acts, the court in *Haggard* held that the record disclosed that no one except the natural father (appellant) was responsible for his inability to support his child.[59] Consequently, the court rejected the appellant's contention that he had supported his child commensurate with his ability to do so.[60]

The court in the instant case adopted the line of decisions represented by the rationale of the court in *Petition for Kelley Minors*.[61] The *Haggard* court reasoned that this Arizona case was analogous to the instant Texas case in that the Arizona court had to construe a similar Arizona statute in light of a closely parallel fact situation.[62] This reasoning is clearly erroneous. The fact situations, as well as the respective statutes, are dissimilar. While the instant case dealt with the imprisonment of a natural father for armed robbery,[63] the Arizona court was compelled to dispense with the consent of the natural father to the adoption not so much on account of his imprisonment per se, but rather on account of the reason for his imprisonment: his unnatural and malicious acts towards his children.[64] Moreover, the Arizona statute under construction in *Petition for Kelley Minors*[65] is in no way similar to the Texas statute interpreted by the *Haggard* court,[66] except in dispensing with the consent of the natural parent. The Arizona statute provides:

> An order of adoption may be entered without the consent of the parent . . . when, after hearing, the court determines that the interests of the child will be promoted thereby.[67]

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56 TEX. REV. CIV. STAT. ANN. art. 46a, § 6(1) (1969).

57 Staat v. Hennepin County Wel. Bd., 178 N.W.2d 709 (Minn. 1970).

58 Hutson v. Haggard, 475 S.W.2d 330, 333 (Tex. Civ. App.—Beaumont 1971, no writ).

59 *Id.* at 333.

60 *Id.* at 333.

61 432 P.2d 158 (Ariz. App. 1967).

62 Hutson v. Haggard, 475 S.W.2d 330, 333 (Tex. Civ. App.—Beaumont 1971, no writ).

63 *Id.* at 331.

64 *Petition for Kelley Minors*, 432 P.2d 158, 159, 161 (Ariz. App. 1967).

65 Although ARIZ. REV. STAT. ANN. § 8-102(a) (1956) providing for the dispensing of the consent of a natural parent if he has become incompetent was mentioned in *Petition for Kelley Minors*, it was not determinative in that case. The Arizona Court of Appeals said:

> We must consider whether the finding by the court of the appellant's prior conduct was sufficient to satisfy § 8-104 A.R.S., and give the court jurisdiction to proceed without appellant's consent.

432 P.2d 158, 160 (Ariz. App. 1967).

66 Hutson v. Haggard, 475 S.W.2d 330, 332 (Tex. Civ. App.—Beaumont 1971, no writ).

67 ARIZ. REV. STAT. ANN. § 8-104 (1956).

While the Texas statute provides:

> Except as otherwise provided in this section, no adoption shall be permitted except with the written consent of the living parents of the child; provided, however, that if a living parent or parents shall voluntarily abandon and desert a child sought to be adopted, for a period of two (2) years, and shall have left such child to the care, custody, control and management of other persons, or if such parent or parents shall have not contributed substantially to the support of such child during such period of two (2) years commensurate with his financial ability, then, in either event, it shall not be necessary to obtain the written consent of the living parent or parents in such default, and in such cases adoption shall be permitted on the written consent of the Judge of the Juvenile Court of the county of such child's residence; or if there be no Juvenile Court, then on the written consent of the Judge of the County Court of the county of such child's residence.[68]

However, the court in *Haggard* was justified in adopting the Arizona court's approach to adoption proceedings. "There, as here, the paramount question before the court was the best interest of the children."[69] Although such an approach is not set out statutorily in Texas, recent Texas case law has evidenced such an attitude. In *Drieth v. Lightfoot*[70] and *Rubey v. Kuehn*,[71] Texas civil appeal decisions, it was held that the trial court is required to consider the entire record and to exercise its broad discretion in determining what is for the best interest and welfare of the child. The *Haggard* court adopted the view of these two courts, but overlooked Texas authority which requires a finding of abandonment and/or failure to support by the non-consenting parent, before even passing on the issue of the welfare of the child.[72] The court in *Platt v. Moore* spoke on this issue stating:

> Until the conditions laid down by the statute are complied with, there is *no discretion* resting in the court to consider the interest of the child in disregard of the wishes of its parents.[73]

The effect of the *Haggard* case is to overrule such a stringent requirement in *Platt* and to follow *Drieth* and *Rubey* by only considering the right of the parent to object in relation to the welfare of the child in an adoption proceeding. As a result, the Beaumont court, by adopting the best interest view in *Petition for Kelley Minors*,[74] has further extended

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68 TEX. REV. CIV. STAT. ANN. art. 46a, § 6a (1969).
69 Hutson v. Haggard, 475 S.W.2d 330, 333 (Tex. Civ. App.—Beaumont 1971, no writ).
70 446 S.W.2d 390, 392 (Tex. Civ. App.—Waco 1969, writ ref'd n.r.e.).
71 440 S.W.2d 95, 99 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd).
72 Platt v. Moore, 183 S.W.2d 682 (Tex. Civ. App.—Amarillo 1944, writ ref'd w.o.m.).
73 *Id.* at 685 (emphasis added).
74 432 P.2d 158 (Ariz. App. 1967).