Freeing Children for Permanent Placement Through a Model Act

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Foreword
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Over half a million American children have been living outside their birth parents' home for as long as ten years.¹ Most of these children, who are in foster family or institutional care as a result of abuse or neglect proceedings, are in a condition of legal limbo. Neither adoption nor even a permanent plan for their futures is possible because they have not been legally freed from their birth parents.

It is to the interest of the state, looking toward a stable and continuous society, and to the interest of the children themselves if they are to become physically, mentally and morally sound adults, that they be raised in security and permanence. The Model Act to Free Children for Permanent Placement has been drafted to this end. The Act and the accompanying Commentary are intended to serve as an impetus to the fifty-four jurisdictions of the United States to reform their child welfare laws.

This Act was developed by me under a grant from the U.S. Department of Health, Education, and Welfare (OCD-CB-473). Professor Ruth-Arlene W. Howe of Boston College Law School was

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Associate Director of the project and was instrumental in the developing of the Act and Commentary. Closely working with us have been Melba McGrath of Boston College Law School and Attorneys Peter Zupcofska and James Hanrahan of Boston. Professor Jerome A. Barron of George Washington University Law School served as constitutional law consultant.

Seven major drafts preceded this final draft. Participating in the hammering out of the final work were lawyers, judges, legislators, social workers, social service administrators, physicians, psychiatrists, adoptive and foster parents, and representatives from the principal minority groups. Throughout the process of developing the Act we received input from the U.S. Department of Health, Education, and Welfare. Since the Act has not yet been officially endorsed, however, it does not necessarily represent government views.
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Section 1

[Purposes of Act; Construction of Provisions]

(a) The general purposes of this Act are to:
   (1) provide prompt judicial procedures for freeing minor children from the custody and control of their parents, by terminating the parent-child relationship;
   (2) promote the placement of such minor children in a permanent home, preferably through adoption or by vesting their de facto parents with legal guardianship; and
   (3) ensure that the constitutional rights and interests of all parties are recognized and enforced in all proceedings and other activities pursuant to this Act.

(b) It is the policy of this State that:
   (1) whenever possible and appropriate, the birth family relationship shall be recognized, strengthened, and preserved through efforts and procedures as provided for under [state] statute(s);
   (2) removal of a child from his home shall occur only when the child cannot be adequately protected within the home;
   (3) if a child has been removed from his home for one year and cannot be returned home within a reasonable time thereafter, the state should promptly find an alternative arrangement to provide a stable, permanent home for him;
   (4) the interests of the child shall prevail if the child’s interests and parental rights conflict; and
   (5) because termination of the parent-child relationship is so drastic, all non-judicial attempts by contractual arrangements,
expressed or implied, for the surrender or relinquishment of children, are invalid unless approved by the court.

(c) This Act shall be liberally construed to promote the general purposes and policies stated in this section.

Commentary to Section 1

[Purposes of Act; Construction of Provisions]

Three broad general purposes are stated in subsection (a). The first general purpose of providing judicial procedures for the termination of the parent-child relationship is similar to the general purpose of all existing state termination statutes. The phrase "freeing minor children from the custody and control of their parents" is derived from California Civil Code Sections 232-39, entitled "Freedom From Parental Control and Custody."

Subsection (a)(2) declares that the intent of the Act is to promote the settlement of children in permanent homes, preferably through adoption or via vesting legal guardianship in de facto parents. This section reflects the philosophy that a child's ongoing needs for proper physical, mental and emotional growth and development can best be met when he is firmly anchored in a family of his own.

Paragraph (3) of subsection (a) addresses the constitutional requirement of protecting individual due process rights. In subsequent sections the Model Act provides for counsel for parents, appointment of guardians ad litem for children, minor or incompetent parents and adequate notice to all parties.

Subsection (b) articulates the key underlying policy principles that are to guide the state's approach to judicial termination of parental rights. In paragraph (1) the state pledges, whenever possible and appropriate, to recognize the birth family relationship and to strengthen and preserve that parental relationship through efforts and procedures mandated by other existing state statutes.

Paragraph (2) provides that the sole criterion for removing a child from its home is that the child cannot be protected within the home either by his parents alone or through the marshalling of community social services or court ordered protective supervision. This principle appears in some neglect laws, but is not generally found in existing termination statutes. The Model Act's sole focus is upon
protecting the child, while most state neglect statutes also refer to an inability to protect the public.

When a child has been removed from his home for one year, paragraph (3) of subsection (b) places an affirmative duty upon the state to ascertain whether the child can be returned home within a reasonably foreseeable time. The exact length of time will vary depending upon the child's age and the various considerations enumerated in Section 4. If a return to the birth family is not possible or appropriate, this paragraph requires that the state begin to take steps to provide such a child with an alternative stable, permanent home.

Paragraph (4) mandates that the interests of the child shall prevail. This represents a departure from the wording of most existing termination and neglect statutes. Only California's Civil Code Section 232.5 directs that: "The provisions of this chapter shall be liberally construed to serve and protect the interests and welfare of the child."

The final paragraph in subsection (b) declares invalid all non-judicial attempts at severance of the parent-child relationship by contractual arrangements. Termination of a parent-child relationship involves a severe reordering of personal statuses and legal rights and obligations. A judicial proceeding is necessary to ensure that the constitutional rights of all parties are recognized and enforced in accord with the general purpose expressed in subsection (a) (3). The Model Act, in subsequent sections, provides for some accommodation to the administrative procedures of some states which permit agencies to accept voluntary relinquishments from parents or other caretakers. In some instances, the required judicial proceeding may be only to ratify the voluntary relinquishment and to certify the proposed plan for the child. See Sections 3, 10(d) and 15(a) infra.

The last subsection (c) is a directive for liberal construction of all provisions of the Act in order to accomplish the stated purposes.

Section 2

[Definitions]

(a) As used in this Act, unless the context otherwise requires:

(1) "Authorized agency" means a public or private non-profit
social agency expressly empowered by law to place children for adoption or foster care.

(2) "Child" means a son or daughter, whether by birth or by adoption, under the age of 18 years.

(3) An "abused or neglected child" means a child whose physical or mental health or welfare is harmed or threatened with harm by the acts or omissions of his parent or other person responsible for his welfare.

(4) "Harm" to a child's health or welfare can occur when the parent or other person responsible for his welfare:

   (i) inflicts, or allows to be inflicted, upon the child, physical or mental injury, including injuries sustained as a result of excessive corporal punishment;

   (ii) commits, or allows to be committed, against the child, a sexual offense, as defined by state law;

   (iii) fails to supply the child with adequate food, clothing, shelter, education (as defined by law), or health care, although financially able to do so or offered financial or other reasonable means to do so; for the purpose of this Act, "adequate health care" includes any medical or non-medical remedial health care permitted or authorized under state law;

   (iv) abandons the child; abandonment is conclusively presumed if the child is found under such circumstances that the identity or whereabouts of the parent is unknown and has not been ascertained by diligent searching and the parent does not claim the child within 2 months after the child is found; or

   (v) fails to provide the child with adequate care, supervision, or guardianship by specific acts or omissions of a similarly serious nature requiring intervention of the child protective service or a court.

(5) "Threatened harm" means a substantial risk of harm.

(6) "Physical injury" means death, permanent or temporary disfigurement, or impairment of any bodily organ.

(7) "Mental injury" means injury to the intellectual or psychological capacity of a child as evidenced by an observable and substantial impairment in his ability to function within his normal range of performance and behavior with due regard to his culture.
(8) "Court" means the [_______] court.

(9) "Guardian of the child's person" means a person, other than the parent of a child, or an authorized agency appointed by a court having jurisdiction over the child, to serve as custodian and to promote the general welfare of the child, with the duty and authority to make decisions permanently affecting the child's health and development.

(10) "Guardian ad litem" means an attorney appointed by a court having jurisdiction, to represent a person: either the child, his minor or incompetent parent, or his putative father in a judicial proceeding brought to terminate the parent-child relationship.

(11) "Legal custodian" means a person, or an authorized agency to whom legal custody of the child has been given by a court having jurisdiction over the child.

(12) "Legal custody" means a status created by court order under which a legal custodian has the following rights and duties:

(i) to maintain the physical custody of a child;
(ii) to protect, nurture, train and discipline a child;
(iii) to provide adequate food, clothing, shelter, and education as required by law, and routine medical care for a child; and
(iv) to consent to emergency medical and surgical care; and to sign a release of medical information to appropriate authorities, pursuant to state law.

(13) "Minor" means an unmarried person under the age of 18 years.

(14) "Parent" means the birth or adoptive mother or father of a child, regardless of the marital status of the parent; but the term excludes a parent whose rights have been terminated by judicial decree.

(15) "De facto parent" means a person, other than a parent, legal custodian, or guardian of the person, such as a relative, stepparent, or foster parent, who has had continuous physical custody of a child for one year and with whom the child has developed significant emotional ties.

(16) "Parent-child relationship" includes all rights, powers, privileges, immunities, duties and obligations existing between
parent and child, as defined by state law.

(17) "Party" includes the child, the parents, and the petitioner.

(18) "Protective supervision" means a legal status under which a court, following an adjudication of abuse or neglect, permits a child to live in his home, subject to the supervision of an authorized agency designated by the court and subject to return to the court at any time during the period of protective supervision in case of harm or threatened harm.

(19) "Relinquishment" means the informed and voluntary release of the physical custody of a child by a parent to an authorized agency for the purpose of freeing the child for adoption or other permanent placement.

(20) "Residual parental rights and responsibilities" means the rights and responsibilities remaining with the parent after the transfer of legal custody or guardianship of the person, including, but not limited to, the right to reasonable visitation, consent to adoption, and the responsibility of support.

(b) As used in this Act, pronouns of the masculine gender include the feminine.

Commentary to Section 2

[Definitions]
The twenty terms and phrases defined in this section can be divided into three categories. First, all the possible parties in a termination proceeding: such as "child," "parent," "de facto parent," "legal custodian," "guardian of the child's person," guardian ad litem," "agency" and "court" are defined. The second category defines an "abused or neglected child," with specific examples of what constitutes "harm" or "threatened harm" to a child's health or welfare and includes definitions of "physical injury" and "mental injury." Third, various statuses and relationships: such as "minor," "legal custody," "parent-child relationship," "protective supervision," "relinquishment," and "residual parental rights and responsibilities" are delineated.

The Model Act's enumeration of major parties is consistent with the definitions found in most of the existing separate state termina-
tion chapters. The definition of "child" follows the wording of the Uniform Adoption Act and the trend to recognize any person under the age of 18 years as a child.

It should be noted that the definition of "parent" encompasses any birth or adoptive parent without regard to marital status. This definition is viewed as a positive step toward the elimination of discriminatory distinctions based solely on the status of legitimate or illegitimate birth, and is an approach consistent with the Uniform Parentage Act. See Uniform Parentage Act, Comment to Sections 1 and 2. This definition is also viewed as a necessary step to accord the unwed father an opportunity to receive "notice" and to be heard on matters concerning the custody of his child, as required by Stanley v. Illinois. 405 U.S. 645 (1972).

The Model Act includes one term, "de facto parent," that does not generally appear in termination statutes. This definition is derived from a concept found in the Uniform Child Custody Jurisdiction Act's definition of "person acting as parent." The Model Act introduces the term "de facto parent" to describe the person who has had continuous physical custody of a child in his home for one year and with whom the child has developed significant emotional ties, but who has no other legal status pursuant to court order. A "de facto parent" may be a relative, a stepparent, or a foster parent.

The Model Act requires that the guardian ad litem be an attorney appointed by the court to represent either a child, his minor or incompetent parent, or an unknown putative father. Limiting guardian ad litem appointments to attorneys is the most effective method of implementing the Act's general purpose to ensure that the constitutional rights and interests of all parties are recognized and enforced in all proceedings. See Commentary following Section 13, infra for further discussion of the duties and qualifications of the guardian ad litem.

The definition of an "abused or neglected child" is consistent with the Federal Child Abuse Prevention and Treatment Act of 1974 (Pub. L. 93-247) and the Code of Federal Regulations (45 C.F.R. Section 1340.1-2) and with terms found in the Model Child Protection Services Act, developed under the auspices of OCD/HEW. "Harm" to a child's health or welfare may occur from
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five kinds of parental acts or omissions: infliction of physical or mental injury; commission of or allowing a sexual offense as defined by state law against the child; failure to provide adequate care although financially able; abandonment; or such failure to provide adequate supervision that child protective services must intervene.

"Physical injury" may mean death, permanent or temporary disfigurement or impairment of any bodily organ—broken limb or a damaged internal organ such as a kidney. "Mental injury" encompasses emotional harm. It must be evidenced by some observable and substantial impairment of the child’s social and intellectual functioning. The court is directed to give "due regard to the child’s culture" when weighing evidence to determine if a substantial impairment of ability to function within a normal range has occurred or is threatened.

The Model Act’s definition of “abandonment” [(a)(4)(iv)] is a narrow one which addresses the situation of a “foundling” left without any clue to the identity of the parent and under circumstances that indicate a complete abdication of all parental responsibility for the child. (A phone call to authorities notifying them of the location of the child—in a phone booth, bus depot, or rest room, for example—would not rebut the presumption of abandonment). If within two months the parents do not voluntarily appear or cannot be located by diligent inquiry by the agency or appropriate law enforcement personnel, the Model Act views such parental conduct as a ground for termination of parental rights so that permanent planning for such an infant can proceed. The Model Act does not require a finding of an intent to abandon.

The status and relationship definitions found in the third category of terms are modeled after the DHEW Model Family Court Act, ARIZ. REV. STAT. ANN. Section 8-531 and IDAHO CODE Section 16-2002. These statutes closely follow the suggested language found in the 1961 Children’s Bureau publication, Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children 38-40 (Reprint 1968).

The Model Act’s definition of “parent-child relationship” incorporates by reference “rights, powers, privileges, immunities, duties and obligations” as established under state law. Parents tradi-
tionally have been entitled to the custody of their children, unless they are proven to be "unfit." The state has imposed upon parents specific minimum responsibilities for fulfilling certain basic needs of their children for financial security, health and education. These basic needs of children represent social values shared by a majority of the population in the United States, but to which some groups may give varying priorities depending upon class, race, religion or other factors. Clearly, the dominant societal expectation is that child-rearing will occur within the context of a secure and autonomous relationship—one basically free from government intrusion.

Governmental intervention into the privacy of the family unit has traditionally been justified under the doctrine of parens patriae which gives precedence to a child's right to life over his parents' rights to custody. If the court determines that the child is suffering "harm" or is "threatened with harm," as these are defined in the Model Act, the court may make various orders. See Section 16 infra. One possible order is for "protective supervision" which permits a child to remain in his home, but subject to the supervision of an authorized agency designated by the court. Such an order can be a positive step toward implementing the general state policy expressed in Section 1(b)(1) to recognize, strengthen and preserve the birth family relationship whenever possible. Such an order would be appropriate for a family which has been assessed to have more strengths than weaknesses and where it has been determined that the parents can benefit from individual casework services or perhaps can learn better parenting techniques from a homemaker placed within the home.

When it has been decided that a child cannot be adequately protected within his own home, the court may place the child in foster care and order a change of "legal custody" and appoint a "guardian of the child's person." The legal custodian is charged with responsibility for the day-to-day physical care of the child, while the guardian of the child's person has authority to make important decisions affecting the health and development of the child. (See Section 17, infra.) In some instances the custodian and the guardian of the person may be the same individual. In other cases an authorized agency may be appointed the guardian of the child's
person and the legal custodian could be a relative or other interested party. Whenever the court transfers "legal custody" to someone other than the birth parent or appoints a "guardian of the child's person," certain "residual parental rights and responsibilities" remain with the parent until a final decree of termination of the "parent-child relationship." These "residual rights and responsibilities" remaining until termination generally include the right of reasonable visitation, consent to adoption and the responsibility for support. "Relinquishment" refers to any voluntary parental release of the physical custody of a child to an authorized agency specifically for adoption or other permanent planning. Such a release must be made with full knowledge and assumes that the parent intends to completely give up exercise of all parental rights and responsibilities.

Section 3

[Grounds for Voluntary Termination of the Parent-Child Relationship]

(a) If the court determines that termination of the parent-child relationship is in the best interest of the child, it may order such termination provided that:

(1) a parent either directly or through an authorized agency voluntarily petitions for the termination of the parent-child relationship; or

(2) a parent has executed an out-of-court notarized statement evincing to the court's satisfaction that the parent has voluntarily and knowingly relinquished the child to an authorized agency no earlier than 72 hours after the child's birth.

Commentary to Section 3

[Grounds for Voluntary Termination of the Parent-Child Relationship]

Consistent with the mandate in Section 1(b)(5) that termination be judicially supervised, this section requires the court to decide upon all voluntarily sought terminations of the parent-child relationship by considering the best interest of the child. Two general types of circumstances are envisioned. A voluntary petition seeking the ter-
mination of a parent-child relationship may be filed by a parent either directly or through an authorized agency. Or, an authorized agency which has accepted a written relinquishment of a child from a parent may present it to the court. (See Section 9(c) infra.)

This section of the Model Act recognizes that in some states well established administrative procedures are utilized to accept voluntary relinquishments. The Model Act does not require that these be abolished, nor does it require that all relinquishing parents appear personally before the court. In the interest of meeting constitutional standards of due process and recognition of the constitutional right of family integrity, all administrative relinquishments must be presented to the court and found to have been voluntarily and knowingly executed. The Model Act thus requires that a notarized statement be attached to the petition. Agencies may need to rethink their procedures for accepting voluntary relinquishments, including the oral explanations of the significance of the parents' decision, the language of the form executed by the parent and the numbers and kinds of staff present at the execution of the relinquishment.

Section 4
[Grounds for Involuntary Termination of the Parent-Child Relationship]

(a) An order of the court for involuntary termination of the parent-child relationship shall be made on the grounds that the termination is in the child's best interest, in light of the considerations in subsections (b) through (f), where one or more of the following conditions exist:

(1) the child has been abandoned, as defined by Section 2(a)(4)(iv);
(2) the child has been adjudicated to have been abused or neglected in a prior proceeding;
(3) the child has been out of the custody of the parent for the period of one year and the court finds that:
   (i) the conditions which led to the separation still persist, or similar conditions of a potentially harmful nature continue to exist;
   (ii) there is little likelihood that those conditions will be remedied at an early date so that the child can be returned to
the parent in the near future; and

(iii) the continuation of the parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home.

(b) When a child has been previously adjudicated abused or neglected, the court in determining whether or not to terminate the parent-child relationship shall consider, among other factors, the following continuing or serious conditions or acts of the parents:

(1) emotional illness, mental illness, mental deficiency, or use of alcohol or controlled substances rendering the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time;

(2) acts of abuse or neglect toward any child in the family; and

(3) repeated or continuous failure by the parents, although physically and financially able, to provide the child with adequate food, clothing, shelter, and education as defined by law, or other care and control necessary for his physical, mental, or emotional health and development; but a parent or guardian who, legitimately practicing his religious beliefs, does not provide specified medical treatment for a child, is not for that reason alone a negligent parent and the court is not precluded from ordering necessary medical services for the child according to existing state law.

(c) Whenever a child has been out of physical custody of the parent for more than one year, the court shall consider, pursuant to subsection (a)(3), among other factors, the following:

(1) the timeliness, nature and extent of services offered or provided by the agency to facilitate reunion of the child with the parent;

(2) the terms of social service contract agreed to by an authorized agency and the parent and the extent to which all parties have fulfilled their obligations under such contract.

(d) When considering the parent-child relationship in the context of either subsections (b) or (c), the court shall also evaluate:

(1) the child's feelings and emotional ties with his birth parents; and

(2) the effort the parent has made to adjust his circumstances, conduct, or conditions to make it in the child's best interest to
return him to his home in the foreseeable future, including:

(i) the extent to which the parent has maintained regular visitation or other contact with the child as part of a plan to reunite the child with the parent;

(ii) the payment of a reasonable portion of substitute physical care and maintenance if financially able to do so;

(iii) the maintenance of regular contact or communication with the legal or other custodian of the child; and

(iv) whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time.

(e) The court may attach little or no weight to incidental visitations, communications, or contributions. It is irrelevant in a termination proceeding that the maintenance of the parent-child relationship may serve as an inducement for the parent’s rehabilitation.

(f) If the parents are notified pursuant to Section 10(a) and fail to respond thereto, such failure shall constitute consent to termination on the part of the parent involved. The court may also, pursuant to Section 12(c), terminate the unknown father’s relationship with the child.

Commentary to Section 4

[Grounds for Involuntary Termination of the Parent-Child Relationship]

This section is designed to provide greater specificity in the statement of standards in termination and neglect statutes. Subsection (a) sets forth three fact situations which, if proven to exist, may justify an involuntary termination if deemed in the child’s best interest. The three situations are: abandonment, prior adjudicated abuse or neglect, and being out of the custody of the parent for a year if the conditions that led to separation or similar conditions of a potentially harmful nature still persist, there is little likelihood that the child can be returned in the near future, and continuation of the parent-child relationship greatly impedes chances for adoption or integration of the child into a stable and permanent home.

Subsection (b) establishes guidelines for the court’s consideration if termination is sought because of prior adjudicated abuse or
neglect. The emphasis is upon whether a parent's present emotional or mental condition or use of alcohol or controlled substances consistently renders the parent unable to care for immediate and ongoing physical and psychological needs of the child. Parental acts of abuse or neglect toward other children in the family must be considered in determining whether the child who is the subject of the petition is harmed or threatened with harm. A "spiritual healing" clause, (b)(3), exempts a parent from being deemed negligent for the sole reason that, in legitimately practicing his religious beliefs, he does not provide specified medical treatment.

In subsection (c) a number of factors are listed for the court to consider when a child has been out of the custody of the parent for a year because of either private placement arrangements made by the parent or under court order. In order to ascertain whether return is likely in the foreseeable future, the court is directed to explore (1) the timeliness, nature and extent of services provided to the parents; (2) the terms of any social service contract agreed to by an authorized agency and the parent; and (3) the extent to which all parties have fulfilled their obligations under the contract.

This directive to consider a social service contract is in line with current task-oriented, reality-based casework which has been proven to be helpful in improving the parenting capacity of borderline or character disordered parents. It is critically important that agency intake and service practices reflect an understanding of the psychodynamic functioning of families that abuse or neglect their children. Treatment services should be offered by workers who are trained in differential diagnosis and who have the capacity to encourage positive growth.

Subsection (d) requires the court to evaluate and consider the child's feelings and emotional ties with his birth parents. Whether the parent has made efforts to adjust his circumstances, conduct or condition to make it in the child's best interest to return in the foreseeable future must be weighed. The court must consider such matters as whether the parent has maintained regular visitation, assumed reasonable support and maintenance obligations and cooperated with the agency. These aspects are thought to be important indices of whether additional services are likely to bring about a lasting parental adjustment which will permit the child's return to
the parent. In cases where parental contact has been sporadic, i.e. merely a card at Christmas, and does not indicate any pattern or ability to sustain ongoing communication, subsection (e) permits the court to disregard such incidental contacts. This section underscores the Model Act's general purpose that to further the best interests of the child, it must be recognized that some children need the opportunity to grow and mature separate and apart from their birth parents.

Finally, subsection (f) provides that parental failure to respond to properly given notice, pursuant to Section 10 will constitute consent to termination or, pursuant to Section 12(c), the court may terminate the rights of the unknown father.

Section 5

[Jurisdiction for Termination of Parent-Child Relationship]

The [Juvenile/Family] court has original and exclusive jurisdiction over proceedings to terminate the parent-child relationship.

Commentary to Section 5

[Jurisdiction for Termination of Parent-Child Relationship]

Although court structures vary, the Model Act does suggest that the juvenile or family court or division within a district or circuit court system have original and exclusive jurisdiction.

It is recommended that jurisdiction over termination proceedings be vested in a division of the court of highest general trial jurisdiction which also has jurisdiction over guardianship, custody, adoption, dependency and support, paternity, divorce and other family litigation. In some states it may be the probate court. In addition to having broad substantive jurisdiction over family matters, the court of original and exclusive jurisdiction over termination should also have access to appropriate social service resources and a clear-cut responsibility for related judicial administrative matters.
Section 6

[Retention of Jurisdiction]
For the purposes of this Act, when a court has obtained jurisdiction over a child pursuant to this Act, the jurisdiction may continue until the child become 18 years of age, unless adopted or emancipated earlier.

Commentary to Section 6

[Retention of Jurisdiction]
This section enables the court to have continuing jurisdiction until the child is adopted or emancipated and should encourage fulfillment of the general purpose of the Act to promote the placement of minor children in permanent homes. This language is consistent with both the Uniform Child Custody Act and the Interstate Compact on the Placement of Children which grant continuing jurisdiction to the court making the dispositional order.

Section 7

[Venue]
Proceedings under this Act shall be commenced in the court of original and exclusive jurisdiction sitting in the county either where the child resides, or the petitioner resides or does business.

Commentary to Section 7

[Venue]
Proper venue is deemed to exist in the child's residence, or the petitioner's residence or place of doing business because it is assumed that these will be the places with the most significant contacts and the most interest in the case. Venue in a place devoid of significant contacts would drastically hamper compliance with later procedural requirements. See Section 14, infra.
Section 8
[Persons Eligible to Petition]

(a) A parent, either directly or through an authorized agency, may file a petition seeking voluntary termination of the parent-child relationship.

(b) A petition seeking involuntary termination of the parent-child relationship may be filed by:
   (1) an authorized agency;
   (2) either parent seeking termination with respect to the other parent; or
   (3) a guardian of the child's person, legal custodian, the child's guardian ad litem appointed in a prior proceeding; or
   (4) a de facto parent, as defined in Section 2(a)(15), of a child who had been in foster care for 2 years.

(c) An authorized agency having custody of any child conclusively presumed abandoned pursuant to Section 2(a)(4)(iv) shall file a petition seeking involuntary termination within 10 days after establishment of abandonment.

Commentary to Section 8
[Persons Eligible to Petition]
Subsection (a) addresses voluntary petitions and enables a parent to petition the court directly or to have an authorized agency initiate proceedings in behalf of the parent. Subsection (b) deals with involuntary petitions to terminate the parent-child relationship and extends standing to an authorized child placement agency, to a parent seeking termination with respect to the other parent, and finally to a group of other persons deemed legitimately interested either because of their legal status as guardian of the child's person, legal custodian or guardian ad litem, or because they have actual physical custody of the child and are de facto parents as defined in Section 2. These provisions are derived from the 1961 Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children prepared by the Children's Bureau, and, instead of giving standing broadly to "any other person having a legitimate interest in the matter," specify alternative petitioners.
Subsection (c) requires an authorized agency having custody of any child conclusively presumed abandoned to file a termination petition within 10 days of the establishment of abandonment. This should accelerate permanent planning for such children.

A *de facto* parent, such as a relative or stepparent, is accorded standing to bring a termination petition with respect to a child in their continuous physical care at least one year when significant emotional ties exist. Foster parents may also be *de facto* parents, but paragraph (4) of subsection (b) limits their right to petition to children who have been in foster care for at least two years. This provision of the Model Act recognizes that in some instances the foster parent is in the best situation to know the child, the frequency and quality of his contacts with the parents and the efforts of the agency. It provides an advocate for the child in foster care for more than two years if he is forgotten by all others as the result of uncovered caseloads. Thus, if a foster parent brings a petition the court should be alert to investigate why a permanent placement has not been worked out for the child.

Giving foster parents standing to bring a termination petition should not be equated with awarding them permanent guardianship. The court must still make a final order that furthers the child's best interests. Recent court decisions have recognized that foster parents as "*de facto* parents" have standing to appear as parties and contest the removal of a child in their care. See *In re B.G.*, 11 Cal. 3d 1079 (1975); *Katzoff v. Superior*, 127 Cal. Rptr. 178, 54 Cal. App. 3d 1079 (1976); and *Cennami v. Department of Public Welfare — Mass. —*, 363 N.E.2d 539 (1977). In *Smith v. Organization of Foster Families* 431 U.S. 816 (1977), the U.S. Supreme Court held that foster parents did not have a right to a full hearing to contest the removal of the child in their care. However, in so holding, the Court assumed that foster parents did have a constitutionally protected "liberty interest," *Smith* at 847.

The guardian *ad litem* mentioned in paragraph (3) of subsection (b) is not the guardian *ad litem* whom the court must appoint in a termination proceeding under this Act, but refers to a guardian *ad litem* appointed in a prior neglect, abuse or child protection proceedings as authorized in the DHEW Model Child Protection Services Act. This does not, however, prohibit the same person from
serving in both capacities, and in fact, such a continuing role is preferable, since the attorney would be familiar with the previous court action.

Section 9

[Contents of the Petition]

(a) A petition for termination of the parent-child relationship shall be entitled, "In the Interest of ____________, a person under the age of 18 years," and shall set forth with specificity:

1. the name, sex, date and place of birth, and address, of the child;
2. the name and address of the petitioner; and the nature of his relationship to the child;
3. the names, dates of birth, and addresses of the child's parents;
4. if the child's parent is a minor, the names and addresses of such minor’s parents or guardian of the person;
5. the names and addresses of any:
   i. guardian of the child's person,
   ii. custodian of the child, and
   iii. guardians ad litem appointed in a prior proceeding;
6. the facts on which termination is sought, the grounds authorizing termination, the effects of a termination decree as set forth in Section 18 of this Act, and the basis of the court’s jurisdiction;
7. the names of the persons or authorized agencies to whom or to which temporary legal custody or guardianship of the child’s person may be transferred upon disposition.

(b) If the information required under paragraphs (2) and (6) of subsection (a) is not stated, the petition shall be dismissed; if any other facts required under paragraphs (1), (3), (4), (5) or (7) of subsection (a) are not known or cannot be ascertained by the petitioner, he shall so state in the petition.

(c) A copy of any relinquishment or consent to adoption, previously executed by a parent to an authorized agency, shall accompany the petition, pursuant to Section 3(a)(2).
Commentary to Section 9

[Contents of the Petition]

In this section the form and contents of any petition for termination under the Model Act are specified. All the requirements are consistent with the broad general purposes stated in Section 1(a) and (b)(4). In accordance with the Uniform Juvenile Court Act, the petition is entitled, "In the Interest of __________, a person under the age of 18."

Particular attention has been given to recent cases, such as Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10 (1976), which held the Iowa termination notice procedure violative of the parents' due process rights. Paragraph (6) of subsection (a) thus requires that the petition not only state the facts on which termination is sought, but must also refer to the particular legal standard from Sections 3 and 4 that apply. These requirements are designed to meet the new due process demands for precision in defining concepts like the quality of parental care and the meaning of neglect. (See Commentary to Section 4, supra). The assumption of subsection (a)(6) above is that these requirements for a new specificity in termination proceedings will prevent the issuance of termination decrees based on vague and undefined statutory generalities. Furthermore, compliance with the requirement of subsection (a)(6) will facilitate the emphasis placed by the Model Act on provision of right to counsel. (See also Sections 10 and 12, infra.)

As a result of subsection (a)(6), counsel for either parent or the child will now immediately know the allegations on which the case for termination is based since these must be stated specifically in the petition. There is the further requirement that the effect of a termination decree must be clearly stated. If these data, the information identifying the petitioner, and the nature of the relationship between the petitioner and the child are not given, the court must dismiss the petition. Without such information parents whose rights to the custody and control of their children have been challenged cannot adequately prepare a defense.

Paragraph (7) calls for the names of the authorized persons or agencies to whom or to which legal custody or guardianship of the child's person may be transferred. It should further the general
purpose of promoting the placement of minor children in permanent homes by requiring that the petitioner give careful consideration to a placement plan at the time of petitioning for termination.

The other paragraphs in subsection (a) ask for the names and addresses of other significant parties if they are known to the petitioner. This should facilitate the court's giving notice to all necessary parties. When a parent has voluntarily executed a relinquishment or consent to adoption form to an agency, this must be appended to the petition.

Section 10

[Notice; and Waiver]

(a) Within 10 days after the filing of a petition, the court shall set a place and time for the preliminary hearing, to be held pursuant to Section 12 of this Act; the preliminary hearing shall be held no later than 45 days after filing of the petition. The court shall cause notice thereof to be given to the petitioner, the parents of the child, any guardian of the person of the child, any person having legal custody of the child, and any guardians ad litem appointed in a prior proceeding. If the parent of the child is a minor, the court may give notice to such child's parent or guardian if the court finds that notice is in the best interest of the minor's child.

(b) Notice of the preliminary hearing and copy of the petition, certified by the petitioner, his agent or attorney, or the court clerk, shall be personally served on the persons named in subsection (a) at least 10 days before the hearing. The notice shall state that a party is entitled to counsel in the proceeding and that if a party is indigent the court will appoint counsel.

(c) If personal service on a parent, either within or without this State, cannot be effected, notice shall be given by registered mail sent at least 20 days before the hearing to his last reasonably ascertainable address. If notice is not likely to be effective, the court may order notice to be given by publication at least 20 days before the hearing. Publication shall be in a newspaper of general circulation, likely to give notice, in the place of the last reasonably ascertainable address of the parent, whether within or without this State, or if no address is known, in the place where the termination petition has been filed.
(d) At any time before the preliminary hearing, notice and appearance may be waived by a parent or a person described in subsection (a) before the court or in a writing attested by 2 or more credible witnesses who are 18 or more years of age and subscribe their names thereto in the presence of the person executing the waiver. The face of the waiver shall contain language explaining the meaning and consequences of the waiver and the termination of the parent-child relationship. A parent who has executed a waiver is not required to appear. If the parent resides outside this State, the waiver shall be acknowledged before a notary public of the foreign jurisdiction and shall contain the current address of the parent. The court shall review all waivers to determine their effectiveness. All waivers to be effective shall be found by the court to have been knowingly and voluntarily executed.

(e) If the petitioner has reason to know that a person entitled to notice is unable to read, such notice shall be given verbally. If the person is unable to comprehend English, all notices, if practicable, shall be given in that person's native language or through an interpreter.

Commentary to Section 10

[Notice; and Waiver]

The Fourteenth Amendment of the United States Constitution provides that a state shall not deprive any person of life, liberty or property without due process of law. As noted earlier in Commentary to Section 1, judicial termination of the parent-child relationship is a serious intrusion into the privacy of the family unit and can be viewed as a deprivation of liberty—as interference with the right to have and raise a family. Griswold v. Connecticut, 381 U.S. 479 at 485 (1965). Therefore the Model Act strives to require procedures that will conform to constitutional due process standards.

The minimum requirements in any proceeding made subject to due process requirements are adequate notice of the proposed action and an opportunity to be heard. In Mullane v. Central Hanover Bank Company, 339 U.S. 306 at 314 (1950), the Court said:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. The
notice must be of such a nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance.

Subsection (a) enumerates the various necessary parties—petitioner, parents, guardian of the child's person, legal custodian or guardian ad litem, who after the filing of a petition seeking termination of a parent-child relationship, must receive notice of the preliminary hearing set by the court to occur within 45 days. In Section 2(a)(14) the Model Act defines "parent" as including an unwed, putative father unless such a parent has had his rights judicially terminated. See Section 12(b) infra for procedures when the birth father's identity is unknown. Notice to a minor's parent or guardian is left to the discretion of the court.

Subsection (b) provides that each party enumerated in subsection (a) shall personally receive notice of the preliminary hearing and that a certified copy of the petition seeking termination must be attached. This subsection (b), when read in conjunction with Section 9(a)(6) which requires the petition to state with specificity the alleged statutory grounds for termination, goes far to ensure procedural due process to the affected parties. Each notice must clearly state that the party is entitled to counsel in the termination proceedings and that if the party is indigent the court will appoint counsel.

Subsection (c) addresses the manner of service of process when it cannot be accomplished personally. Registered mail is the preferred method. If this is not likely to provide notice, the court may order notice by publication in a newspaper of general circulation at the place of the last reasonably ascertainable address of the party. This section conforms with the requirements for reasonable notice articulated in Mullane, supra.

Subsection (d) allows a parent or a person described in subsection (a) to waive notice and appearance. It is anticipated that this section would be used in the case of voluntary terminations. The waiver may be before the court or in writing, attested by two or more credible witnesses, and the face of the waiver must contain language that explains the meaning and consequences both of the waiver and the termination of the parent-child relationship. This
section is included to accommodate existing administrative procedures used by some agencies. The requirement for witnesses and a clear statement on the face of the waiver itself will provide protection for parents whose execution of the waiver must be based on informed knowledge of the consequences. Agencies might well choose to make counsel available to parents before accepting such a waiver.

Finally by requiring in subsection (e) that notice be given in a "person's native language or through an interpreter," the Model Act introduces another mechanism that will help to ensure procedural due process. It is clear that additional efforts must often be made when parties are known to be non-English speaking or to be illiterate to ensure that they truly understand the significance of the notice and may prepare for their day in court.

Section 11

[Hearings: Phases and Conduct]

(a) All termination petitions, filed under this Act, shall be considered by the court in three distinct phases, commencing with a preliminary hearing, pursuant to Section 12, followed by the adjudicatory phase to determine the appropriateness of termination, and concluding with a dispositional hearing, pursuant to Section 16.

(b) All hearings shall be conducted in the manner of a non-jury civil trial. The proceedings shall be recorded. Only those persons whose presence is requested by persons entitled to notice under Section 10 or who are found by the court to have a direct interest in the case or the work of the court shall be present. Those persons so admitted shall not disclose any information obtained at the hearing which would identify an individual child or parent. The court may require the presence of witnesses deemed necessary to the disposition of the petition, including persons making a report, study, or examination which is before the court if such persons are reasonably available. A parent who has executed a waiver pursuant to Section 10(d) need not appear at the hearing. If the court finds that it is in the best interest of a child, the child may be excluded from the hearing.
Commentary to Section 11

[Conduct of Hearing]

Subsection (a) refers to the three distinct phases of a termination proceeding: the preliminary hearing, as required by Section 12, the adjudicatory phrase, governed by Sections 3, 4 and 15, and the dispositional phase, governed by Section 16.

Subsection (b) expressly incorporates many of the "typical" neglect hearing provisions found in existing state laws as analyzed in Katz, Howe & McGrath, Child Neglect Laws in America, 9 Family L.Q. 70-71 (1975). The termination hearing is to be heard by the court without a jury, conducted in an informal manner but transcribed, and closed to the general public except interested parties. The court may require the presence of witnesses and persons making any report, study or examination of involved parties. In addition, to provide a mechanism for simplifying a voluntary relinquishment, the Model Act does allow for excusing the presence of a parent who has executed a waiver pursuant to Section 10(d) supra. The Model Act dispenses with a jury trial in order to minimize criminalization of the termination proceeding.

Section 12

[Preliminary Hearing]

(a) If a party appears without counsel, the court shall inform him of his right thereto and upon request, if he is indigent, shall appoint counsel to represent him. No party may waive counsel unless the court shall have first explained the nature and meaning of a petition seeking termination of the parent-child relationship.

(b) If identity of the birth father of the child is unknown to the petitioner, at the preliminary hearing required under Section 10(a) the court shall:

(1) Inquire of the mother concerning the identity of the father, but may not compel disclosure by the mother;

(i) If the mother provides identification of the father, the court shall immediately give notice to the father pursuant to the provisions of Section 10;

(ii) If the mother does not or cannot provide identification of the father, the court shall determine whether notice of the pro-
ceedings by publication or posting is likely to lead to the identification of the father and, if so, shall order such notification; but only upon the mother's written informed consent;

(2) If the procedures in (i) and (ii) above fail to provide identification of the father, then the court shall appoint an attorney as guardian ad litem for the putative father to conduct a discreet search for him and to report the results to the court no later than 30 days from the date of the preliminary hearing.

(c) If after acting upon the provision stated in subsection (b), the identity of the father is not determined within 30 days following the preliminary hearing, the court shall immediately enter an order terminating the unknown father's relationship with the child.

(d) In all involuntary termination proceedings, the court shall appoint an independent attorney to represent the separate interests of the child and to serve as the child's guardian ad litem. The court, in its discretion, may appoint a guardian ad litem for the child in any voluntary termination proceeding pursuant to Section 3 of this Act.

(e) Upon a finding at the preliminary hearing that reasonable cause exists to warrant an examination, the court, on its own motion or on motion by any party, may order the child to be examined at a suitable place by a physician, psychiatrist, licensed clinical psychologist, or other expert appointed by the court, prior to a hearing on the merits of the petition. The court also may order examination of a parent or custodian whose ability to care for a child before the court is at issue. The expenses of any examination, if ordered by the court, shall be paid by the [__________].

**Commentary to Section 12**

*[Preliminary Hearing]*

This section of the Model Act introduces the important concept of a "preliminary hearing" into the termination proceedings. At the preliminary hearing it is the function of the judge to advise all the parties, before formal commencement of the proceedings, of their constitutional rights to be represented by counsel and to remain silent, to confront, cross-examination and subpoena witnesses. The judge must also ascertain whether any party appearing without counsel fully understands his right to counsel or to appointed counsel if indigent. Subsection (a) specifically prohibits any waiver
of counsel until after there has been a full explanation of the nature and meaning of the termination of the parent-child relationship. Subsections (b) and (c) outline the steps that the court shall take at the preliminary hearing when the birth father’s identity is unknown to the petitioner.

In all involuntary termination proceedings the court must appoint an attorney as guardian ad litem for the child to provide the child with separate and independent counsel. In the discretion of the court an attorney to serve as guardian ad litem may be appointed for the child when a parent voluntarily seeks termination, but such an appointment is not mandatory. As authorized under Sections 11 and 15 (a) of the Model Act, the court may adjourn the preliminary hearing to allow appointed counsel adequate preparation time. If all parties are fully apprised of all of their rights and are represented by counsel, the proceeding may go immediately forward into the adjudicatory stage.

The right to appointed counsel found in subsection (a) is an important feature that conforms to due process standards under the requirements of Stanley v. Illinois, 405 U.S. 645 (1972). This subsection rejects the distinction made by some courts that neglect or termination proceedings, although civil and not criminal, nonetheless do not require court appointed counsel for the indigent parent. Since Stanley, an increasing number of state supreme courts have held that an indigent parent involved in an involuntary termination proceeding concerning his child is constitutionally entitled to be represented by counsel.

Subsection (a) thus also adopts the view that a right to appointed counsel for the indigent parent is constitutionally mandated. The position advocated by some courts, which would restrict the right to appointed counsel for parents in termination proceedings on an ad hoc judicial estimate of the need for counsel, is rejected on the ground that it will encourage litigation and will fail to give parents necessary guidance and protection.

It should be noted that subsection (a) imposes an obligation upon the court to explain to the parent the significance of the termination proceeding. Such explanation is deemed essential, because for many parents, the nature of the termination proceeding is unclear. The required explanation is intended to assure as far as possible
that before waiving appointed counsel an indigent parent fully understands that the termination decree will permanently sever parental rights since otherwise the waiver may be made too casually. Furthermore, this subsection places the initiative on the court to inform the parent of a right to appointed counsel, and only after carefully explaining the nature of the termination proceeding may the court ask the parent if he or she wishes to waive that right. Deeming the right to counsel waived unless requested is expressly disapproved.

Subsections (b) and (c) of this section are a response to the declaration in *Stanley v. Illinois*, *supra* at 657, n.9 that unwed fathers are entitled to notice of adoption and custody proceedings concerning their children. Notice is required in order to permit such fathers to make a claim to the custody of their children and a showing of their competence to care for them.

Subsections (b) and (c) contemplate in the main a fact situation where the mother has relinquished or wishes to relinquish an infant for adoption and where either or both the identity and whereabouts of the unwed father are not known. The Model Act thus reflects a broad view of *Stanley* in requiring some reasonable but practical effort to find and reach the unwed father even if unknown. However, subsections (b) and (c) take the position that the effort to provide notice to the unwed father, if futile, need not be pursued to the point that placement of the child involved is unreasonably delayed. While detailing some alternative modes of notice, the policy of the subdivisions of subsection (b) is to leave the determination of the form of notice, as well as whether notice may be dispensed with altogether, to the sound discretion of the court which has inquired into the matter. Such a procedure is designed to render proper deference both to the due process rights of the birth father and to a proper and sensitive concern for the future placement and welfare of the child.

Privacy interests of both mother and child support the philosophy of subsection (b)(1) that the mother should not be compelled to identify the father in order that he may be notified of a termination proceeding. Whether or not compelling the mother to identify the father is constitutional, the theory of this subsection is that strong policy considerations argue against such compulsion.

The effort to provide due process to the birth father, the natural
mother, the child and ultimately, the adoptive parents sometimes results in setting these rights in conflict. Accommodation of the competing rights can best be resolved by a wise use of discretion by the court making the termination decision. Subsection (b) tries as far as possible to fashion remedies that would give the birth father notice of the termination proceeding without rendering the pending termination and future adoption impossible. The court must first consider whether notice is in fact likely to lead to the identification of the father. Subsection (b)(ii) allows for a good faith effort to reach the birth father through notice of publication if the mother consents to the use of her name.

Subsection (b)(2) is designed to prevent the procedure for providing notice to the unwed father from becoming an empty formalism. Provision for appointment when necessary of a guardian *ad litem* may be a particularly effective notice procedure when the mother does not know the father's present whereabouts. The mother may not be willing to have her name included in a notice by publication in a newspaper but may be able to provide the guardian *ad litem* with clues to the father's whereabouts. In such circumstances, the appointment of a guardian *ad litem* to search for the father will protect the privacy rights of the mother and at the same time will be more likely to locate the father than mere newspaper notice.

If the court fails to reach the unknown birth father through the procedures set forth in subsections (b)(1) and (2) the court is empowered by subsection (c) to enter an order terminating the unknown father's parental rights and responsibilities 30 days after the preliminary hearing. This time period is prescribed to assure that at least some significant period of time is allotted for the notification of the unknown birth father in order to give him an opportunity to assert, if he wishes, a right to the care and custody of his child.

In summary, subsections (b) and (c), the "Stanley" provisions of the Model Act, attempt to assure a good faith effort to notify the unwed father even if his whereabouts and identity are not known. At the same time, these subsections authorize the termination of the parental rights of the unwed father, even if he has not received notice, if the court concludes that the process of searching for him is likely to prove futile.
Subsection (e) authorizes the court to order that a child, parent or both, prior to the hearing on the merits of the petition, be examined by a physician, psychiatrist, licensed clinical psychologist or other expert. And subsection (f) requires the court to order a psychosocial assessment of the child’s needs, pursuant to Section 13.

Section 13

[Psychosocial Assessment and Report]

(a) The court, if it assumes jurisdiction at the preliminary hearing, shall order a psychosocial assessment of the child’s needs in all involuntary proceedings. This study shall be made either by:

(1) social service personnel attached to the court;

(2) an authorized agency which is not the petitioner or a mental health agency; or

(3) an independent social work practitioner. An authorized agency which is the petitioner may make the assessment only upon court determination that none of the above alternatives are possible. The report shall be submitted within 30 days after the court directive, unless the court grants a request for an extension.

(b) The court, when it hears a voluntary petition brought pursuant to Section 3, may order a psychosocial assessment if deemed in the best interest of the child.

(c) The psychosocial assessment shall be based upon consideration of:

(1) the circumstances described in the petition;

(2) the present physical, mental and emotional conditions of the child and his parents, including the results of all medical, psychiatric, or psychological examinations of the child or of any parent whose relationship to the child is subject to termination;

(3) the nature of all past and existing relationships among the child, his siblings and his parents;

(4) the proposed plan for the child;

(5) the child’s own preferences according to his maturity of judgment; and

(6) any other facts pertinent to determining what will be in the child’s best interest, including, but not limited to the child’s culture, such as services provided or offered by the [State Department of Social Services] or by any other agencies or individuals.
Commentary to Section 13

[Psychosocial Assessment and Report]

The title of this section of the Model Act is designed to highlight the interdisciplinary judgments that should be weighed in an assessment of a child's current social, emotional and psychological needs and in an evaluation of the capacity of the parent to adequately nurture the child and meet those needs.

Subsection (a) requires that at the preliminary hearing of all involuntary petitions the judge order a psychosocial assessment of the child's needs to be done by social service personnel attached to the court or by an authorized agency, not the petitioner or mental health agency, or an independent social work practitioner. If an authorized agency is the petitioner, the court may direct that the psychosocial assessment be made by some other agency or by an independent social work practitioner to give the assessment the objectivity that is desirable. This section contemplates that social casework and other clinical services, organized and administered by an executive branch of state government, may be available to the court. If such personnel are not attached to the court, the Model Act requires that the judge utilize other resources.

When the court hears a voluntary petition for termination, in its discretion it may order a psychosocial assessment, but this is not mandatory. See Sections 3 and 12. Again, this more permissive option is available to accommodate existing agency administrative procedures governing voluntary petitions for termination.

Subsection (c) spells out the considerations for the psychosocial assessment. This study is considered critical in helping the court reach a disposition that will further the best interests of the child. A carefully prepared psychosocial study by a professional social caseworker will describe where a child is developmentally, the quality of both past and existing relationships with parents and other current caretakers, and estimate the nurturing capacity of any adult whose parental rights are subject to termination. The proposed future plan for the child, adoption or long-term guardianship, can be evaluated in light of these assessments. For example, a plan that proposed adoption of the child by foster parents with whom strong emotional ties had developed might be deemed preferable to a plan that envisioned several additional moves for a
child before any consideration of a permanent placement. The Model Act also requires recognition of a child's own wishes, depending upon his age and maturity of judgment.

Section 14

[Guardians ad litem]

(a) During all stages of the proceeding, the child's guardian ad litem shall be the legal representative of the child, and may examine, cross-examine, subpoena witnesses and offer testimony. The guardian ad litem may also initiate an appeal of any disposition that he determines to be adverse to the best interest of the child.

(b) In addition, the guardian ad litem shall be an advocate for the child during the dispositional phase to ensure that the best possible permanent placement plan is made. To ascertain the child's wishes, feelings, attachments, and attitudes, he shall conduct all necessary interviews with persons, other than parents, having contact with and knowledge of the child and, if appropriate, with the child. In the case of an American Indian child, he shall report on the legal status of the child's membership in any federally recognized Indian tribe.

(c) The guardian ad litem for a child shall be an attorney, preferably one who is experienced in the field of children's rights.

(d) The guardian ad litem for other persons entitled to such representation pursuant to Section 2(a)(10) shall protect the rights, interests, and welfare of the party and may exercise the powers enumerated in subsection (a).

(e) The court shall compensate the guardian ad litem for services and related expenses according to the court's fee schedule.

Commentary to Section 14

[Guardians ad litem]

The function of Section 14 is to insure that counsel for the child and other parties play an effective role. The Gault case ushered in a new era of court appointed counsel for minors involved in juvenile proceedings.

Section 14(a) imposes specific legal duties on the child's court appointed guardian ad litem in order to avoid a situation where such
counsel would play a merely routine role on an assembly line basis for a minimal fee. The duties imposed on counsel of conducting investigations and personal interviews will enable the attorney to effectively participate in the adjudicatory stage of the termination proceeding. The guardian ad litem may initiate an appeal of any disposition that he views as adverse to the child's best interest. Subsection (b) contemplates that during the dispositional stage, the guardian ad litem's recommendations to the court will reflect not only his legal judgments but will also be informed by the psychosocial assessment prepared by social service workers. See Sections 13 and 15. It is expected that the guardian ad litem will be an advocate for the child.

The guardian ad litem is especially charged with reporting on the legal status of an American Indian child's membership in a federally recognized Indian tribe because of the special benefits that frequently accrue from membership, i.e., eligibility to share in any judgment that might be awarded to a tribe by the Indian Claims Commission, receipt of tribal assets as they are periodically distributed to members, or preference for employment by the Bureau of Indian Affairs. See also the reference to American Indian children in Section 18(d) infra.

Subsection (c) makes an additional effort to implement the overall purpose of Section 14, effective legal representation for the child, by requiring that such representation be entrusted to those who have already demonstrated experience in and commitment to the legal problems of children. The decision to limit appointments to attorneys was made because judicial termination is presently an adversarial rather than an arbitration/mediation proceeding. Separate and independent legal counsel for the child provided by lawyers experienced in the field of children's needs and rights is needed. Although a given locale may not presently have such a specialized bar, this model articulates the standard that should be sought.

The purpose of subsection (e) is to make it clear that compensation for appointed counsel in termination proceedings must be forthcoming. The best interests of the child are best protected if appointed counsel in the proceeding can be sure of being compensated for his skill, time and effort. Furthermore, it is the assumption of
Section 15

[Findings]

(a) If a petition has been voluntarily filed under Section 8(a) and is uncontested, the court shall make its findings at the end of the preliminary hearing if all parties are then before the court; but if not all parties are present, the court shall continue the hearing to give the absent parties opportunity to appear. The court will also continue the hearing to give parties without counsel the opportunity to be represented.

(b) If an involuntary petition has been filed pursuant to Section 8(b), the court shall hold an adjudicatory hearing to commence within 15 days following the end of the preliminary hearing in order to determine whether grounds for termination of the parent-child relationship exist.

(c) All findings shall be based upon clear and convincing evidence and rules applicable to the trial of civil causes. If information contained in a court-ordered report, study, or examination is received in evidence, the person making the report, study or examination shall be subject to both direct and cross-examination. If a parent or child has been or is in treatment with a psychiatrist, licensed clinical psychologist, or social worker, a privilege shall be deemed to exist between the patient and the therapist. However, no existing physician-patient or similar privilege other than the attorney-client privilege may be asserted to exclude evidence of abuse and neglect of the child or his siblings or parental conduct or condition specified in Section 4 of this Act; nor does any privilege exist if a court has ordered an examination of a parent or child pursuant to Section 12(e) of this Act.

Commentary to Section 15

[Findings]

Subsections (a) and (b) direct the court to employ different procedural time frames for voluntary and involuntary petitions. If a voluntary petition is filed pursuant to Section 8(a), supra, the court
may make its findings concerning termination of the parent-child relationship at the end of the preliminary hearing. If an involuntary petition is before the court, there must be an adjudicatory hearing to establish whether grounds for termination exist that commences within 15 days following the preliminary hearing. The differing requirements of these subsections are consistent with earlier distinctions drawn in Sections 4, 12, 13 and 14. See generally Commentary to these sections.

Subsection (c) prescribes both the requisite quantum of proof that must be shown if a termination decree is to issue and other evidentiary matter that may be used. There are three choices for a quantum of proof in termination and neglect proceedings. One of the choices is the criminal beyond a reasonable doubt standard. The other two choices are civil standards: the preponderance of the evidence standard and the clear and convincing standard.

The Model Act, in adopting the clear and convincing standard as the quantum of proof, follows the trends in both state and federal courts which is to reject the two other alternatives: the beyond a reasonable doubt and the preponderance of the evidence standards.

Since the overriding consideration in termination proceedings is the welfare of the child, the fault or guilt of the parents is not a central focus. Thus, the standard of beyond a reasonable doubt used in the criminal process was deemed inappropriate for these proceedings. The preponderance of the evidence standard, used in some civil proceedings, was rejected because this lesser test would make it too easy for the state to separate a child from its parents. By choosing the clear and convincing standard, the Model Act tries to provide the fairest measure for weighing the claims of the competing interests.

The final sentences of subsection (c) deal with the question of privilege. First, traditional therapist-client privileges for past or ongoing treatment shall be recognized. But, second, no existing physician-patient or similar privilege can be a basis for "excluding evidence regarding abuse and neglect of the child or his siblings or parental condition specified in Section 4." This approach is consistent with a majority of the current state child abuse and neglect reporting statutes which commonly waive the doctor-patient privilege, the husband-wife privilege and either similar privileges or

Thus, the Model Act accords a parent who has been or is a patient the privilege to refuse to disclose or to prevent a therapist from disclosing any communication between the patient and therapist relative to treatment of his mental or emotional condition, except evidence regarding abuse or neglect may not be excluded. In making the distinction between patients already in treatment with a therapist and a court-ordered mental examination or investigation, the Model Act follows both case law and sound clinical practice. While the Model Act recognizes the necessity for preserving confidentiality in the treatment relationship, it also acknowledges the judicial need for important information derived from court-ordered examinations and investigations.

It should be noted that this subsection specifically covers the social worker-client relationship. In light of the policies articulated in Section 1(b) *supra* and considerations to be weighed by the court under Sections 4 and 16, it is reasonable to anticipate that parents involved in termination proceedings will have had substantial contact with social workers.

**Section 16**

[Dispositions]

(a) After considering all the evidence, if the court finds that sufficient grounds exist for termination of the parent-child relationship, the court shall:

(1) Decree termination of the parent-child relationship and after having considered the psychosocial assessment and report elect one of the following alternatives:

(i) appoint an individual as guardian of the child’s person and vest legal custody in that person; or

(ii) appoint an individual as guardian of the child’s person and vest legal custody in another individual or in an authorized agency; or

(iii) appoint an authorized agency as guardian of the child’s person and vest legal custody in that agency; or
(2) Not decree termination of the parent-child relationship and after having considered the psychosocial assessment and report order that a long-term or permanent home for the child be provided by appointing as guardian of the child's person the present de facto parent if:
   (i) it is deemed that the child would benefit from the continued parent-child relationship; or
   (ii) the child is 14 or more years of age and objects to the termination of the parent-child relationship.

(b) Any person or agency appointed guardian of the child’s person under subsection (a) shall report to the court within 90 days on a permanent placement plan for the child. Within an additional 90-day period thereafter, a report shall be made to the court on the implementation of such plan.

(c) In making an order under subsection (a)(2), the court must specify what residual rights and responsibilities remain with the birth parent.

(d) If the court finds that sufficient grounds for termination do not exist, it shall dismiss the petition and under applicable statutory standards make an order:
   (1) returning the child to the custody of his parents;
   (2) placing the child under protective supervision or under guardianship of the person; or
   (3) vesting or continuing temporary legal custody in an authorized agency or person.

(e) Any order the court makes under subsection (d)(2) or (3) shall designate the period of time it shall remain in effect, with mandatory review by the court no later than one year thereafter. The court shall also specify what residual rights and responsibilities remain with the birth parent. Any individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by the court.

(f) Every order the court makes pursuant to this section shall be in writing and shall recite the findings upon which the order is based, including findings pertaining to the court's jurisdiction. Every order must fix responsibility for the child's support. All orders are final, conclusive, and binding on all persons after the date of entry.
Commentary to Section 16

[Dispositions]
This section of the Model Act should be closely considered in conjunction with the statement of purposes in Sections 3 and 4 supra. While Section 15 supra addressed the matter of adjudication of the petition on the merits to terminate a parent-child relationship, Section 16 focuses upon the range of dispositional orders that the court may make. It is during this phase of the proceeding that the court reviews the psychosocial assessment and the recommendation of the guardian ad litem. This section, in a general way, incorporates language found in Section 9—Decree of the Act for Termination of the Parent-Child Relationship suggested in the DHEW's Legislative Guides, supra at 44.

States and courts should be aware that continued eligibility of children for AFDC foster care assistance plans requires that the state agency or an office of that agency continue to serve as guardian for the child. Nonetheless, courts may wish to appoint another agency or individual as guardian for the child.

Subsection (a)(1) provides three alternative dispositions open to the court if termination is decreed. It should be noted that a present de facto parent could be appointed under this section. For example, under (a)(1)(i) a relative might be appointed guardian of the child's person and be granted legal custody. Under (a)(1)(ii) a foster parent might be granted legal custody while guardianship of the child's person remained with a relative or an agency official.

Subsection (a)(2) addresses those cases where the court may determine that sufficient grounds exist to justify termination, but because of other circumstances it may deem that a termination decree is not in the child's best interest. Again, this decision is made by the court after careful review of the psychosocial assessment and the recommendations of the guardian ad litem. For example, although an older child may have developed a sound relationship with the present de facto parent such as a foster parent or relative, close ties may still exist between the child and the birth parent. Adoption may not be desired by the child; the de facto parent may not be financially able to adopt if no subsidy is available. In such circumstances permanent vesting of guardianship and legal custody in the de facto parent may be the best plan. It should be noted that
subsection (c) requires the court to specify the rights and responsibilities that remain with the birth parent if a termination decree is not issued.

Subsection (b) requires that any person or agency appointed pursuant to subsection (a) must report back to the court on the completed placement plan for the child. This mandate was added to ensure that following a termination decree a child in fact would be adopted or settled into a permanent guardianship. Authorization for such a mandatory return is provided by Section 6—Retention of Jurisdiction, supra. By retaining jurisdiction, a judge has the power to hold a hearing and to make further orders should that be deemed necessary.

Subsection (d) provides the court with alternatives if sufficient grounds for termination are not found to exist. Consistent with the public policy stated in Section 1(b)(1) supra to recognize, strengthen and preserve the birth family relationship wherever possible, the court under paragraphs (1) and (2) may return the child to the custody of his parents either with or without protective supervision. (See Section 2(a)(13) and Commentary supra for discussion of the scope of protective supervision.) A court may find that a parent has been rehabilitated. Significant emotional ties may continue to exist between parent and child, or the court may deem a proposed alternative plan for the child, i.e., to be temporarily placed with persons other than the birth parents, to be in the child’s best interest.

Finally, subsection (e) requires that all orders be in writing, recite the findings upon which the order is based, and fix responsibility for the child’s support. The requirement that the order be in writing and recite the findings upon which it is based should facilitate meaningful review upon appeal and hence furthers the general purpose stated in Section 1(a)(3) supra of protecting the constitutional rights and interests of all parties. Also, all orders are to be final, conclusive and binding on all persons from the date of entry. This is a very typical provision and ensures that any party aggrieved by the other may initiate an appeal under Section 22 infra.
Section 17
[Authority of Guardian of Child’s Person]
(a) The guardian of the child’s person has the authority without limitation:

(1) to consent to marriage, enlistment in the military service of the United States, and any medical, psychiatric, or surgical treatment; and to represent the child in legal actions, unless another person has been appointed guardian ad litem to represent the child;

(2) to serve as custodian, unless another person or authorized agency has been appointed custodian by court order; and

(3) to consent to adoption of the child if the parent-child relationship has been terminated under this Act.

(b) The guardian of the child’s person also has the duty of reasonable visitations when he does not have physical custody of the child, except to the extent that the right to visitation is limited by court order.

Commentary to Section 17
[Authority of Guardian of Child’s Person]
Under Section 16(d) supra the court when not decreeing termination may order long-term placement and appoint a present de facto parent or foster parent as guardian of the child’s person. The duties and authority of such an appointed guardian are defined in this section and correspond to the definition of “guardianship of the child’s person” appearing in both the DHEW Model Family Court Act and the Children’s Bureau Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children (Reprint 1968).

Section 18
[Effect of Decrees]
(a) An order terminating the parent-child relationship divests the parent and the child of all legal rights, powers, privileges, immunities, duties, and obligations with respect to each other, except
the right of the child to inherit from the parent. This right of inheritance shall be terminated only by a final order of adoption.

(b) The parent-child relationship may be terminated with respect to one parent without affecting the relationship between the child and the other parent.

(c) Any parent whose relationship with the child is terminated is not entitled to notice of proceedings for the adoption of the child by another, nor has he any right to object to the adoption or otherwise to participate in the proceedings.

(d) No order or decree entered pursuant to this Act shall deprive a child of any benefit due him from any third person, agency, state, or the United States; nor shall any action under this Act be deemed to affect any rights and benefits, that a child derives as a descendant of a member of a federally recognized American Indian tribe.

(e) If an order is made pursuant to Section 16(c), only those residual parental rights and responsibilities specified by the court remain. All custodial rights and duties are subject to the rights, powers, and duties of the guardian of the child’s person and to residual parental rights and responsibilities not terminated by judicial decree.

Commentary to Section 18

[Effect of Decrees]

Subsection (a) follows the traditional approach of divesting both parent and child of all rights, duties and obligations toward one another, except that the child’s right to inherit from the natural parent is terminated only upon a final order of adoption. This approach, admittedly weighted in favor of the child, is consistent with a public policy commitment to “the best interests” of the child.

Subsection (b) clarifies that a decree may terminate the relationship between a child and one parent without affecting the status of the child’s relationship with the other parent. Subsection (c) underscores the finality of the decree and the fact that following termination a parent will have no standing to object to adoption or other planning in behalf of the child.

The wording of subsection (d) reflects a special concern for the unique position of American Indian children. It is also included to cover generally any Social Security insurance benefit or any other
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governmental or private assistance which if discontinued might seriously hamper effective permanent planning for the child. *See generally* DHEW, *Subsidized Adoption in America* (1976).

**Section 19**

[Contempt]

(a) If, without reasonable cause, any person served with a citation within this State as provided in this Act fails to appear, or to abide by an order of the court, or to bring a child before the court if required by the notice of hearing, the court in its discretion may adjudicate the failure to be a contempt of court, as defined and punished by [the applicable state statutes.]

**Commentary to Section 19**

[Contempt]

The above section's inclusion in the Model Act is grounded in the general doctrine of *parens patriae*. There may be instances when, in order to best serve and protect the welfare of a child, the court will exercise its traditional discretionary powers to enforce its orders. Reference is made to existing definitions and sanctions as they may appear in other state statutes.

**Section 20**

[Records: Access and Confidentiality]

(a) All court files and records of any proceedings conducted under this Act shall be kept in a separate locked file and withheld from public inspection, but on special order of the court shall be open to inspection by a party in the case and his attorney, an authorized agency to which guardianship of the person or legal custody of the child has been transferred, or by legitimate researchers if all identifying data is withheld unless the identifying data cannot be concealed, in which case the researcher has a duty not to disclose.

(b) As used in this section, the term "files and records" includes the court docket and entries therein, petitions and other papers filed in a case, transcripts of testimony taken by the court, and findings, orders, decrees, and other writings or evidentiary materials
filed in proceedings before the court, other than social records.

(c) Social records shall be withheld from public inspection, but information contained in those records may be furnished to persons or agencies having a legitimate interest in protection, welfare, or treatment of the child, in a manner the court determines.

(d) As used in this section, the term "social records" includes the psychosocial study and investigation reports required under Section 14 and other related papers, materials and correspondence, including medical, psychiatric, or psychological studies and reports, either in the possession of the court or an authorized agency.

(e) No person, official, or agency may make copies of the files and records or social records or parts thereof, unless the court so orders.

Commentary to Section 20

[Records: Access and Confidentiality]

The primary intent of both Section 20 and 21 infra is to remove court files and social records from public inspection, but to give all parties and their attorneys or any agency having legal custody of a child access to them. It should be noted that records may be open to "legitimate researchers if all identifying data is withheld, unless such identifying data cannot be concealed, in which case the researcher has the duty not to disclose. (Emphasis added.) The underlined option is included because some court record departments may not have the capacity to provide researchers with data that are free from all identifying information. Thus, the Model Act imposes an obligation not to disclose upon the "legitimate researcher" who is granted leave by the court to use records. See Section 21 infra for possible sanction.

Section 21

[Penalties for Disclosure of Confidential Records]

(a) Except as authorized under Section 20 and under a court order, it is unlawful for any person to disclose, receive, or make use of, authorize, knowingly permit, participate in, or acquiesce in the use of any information involved in any proceeding under this Act,
directly or indirectly derived from the files, records, or other papers compiled pursuant to this Act or acquired in the course of the performance of official duties.

(b) A person who discloses information or aids and abets another in gathering such information in violation of the provisions of this section is guilty of a misdemeanor punishable by [the applicable state statutes.]

Commentary to Section 21

[Penalties for Disclosure of Confidential Records]
This section of the Model Act follows the policy expressed in Section 20, supra which is to carefully guard the confidentiality of court records in these cases. It thus provides a criminal sanction for violation of the confidentiality requirements of Section 20. It does not suggest any specific monetary amount for a fine, but rather refers to "applicable state statutes" for the sanction of unlawful disclosure or use of files and records. As noted in the preceding Commentary to Section 20, legitimate researchers may utilize records if all identifying data are either withheld or not disclosed. The obligation of non-disclosure is thus imposed on researchers in view of some of the logistical barriers that might arise in the attempt to make the contents of files available to researchers without any identifying information.

Section 22

[Appeals]
Any party aggrieved by an order, judgment, or decree of the court, within 30 days after notice of its entry, may appeal to the [_________] for review of questions of law. The procedure of an appeal is governed by the rules applicable to appeals from the [_________] court in civil cases. The pendency of an appeal or application therefor does not suspend an order of the court regarding a child, but a petition for the child's adoption may not be heard pending the appeal of an involuntary petition to terminate a parent-child relationship.
Commentary to Section 22

[Appeals]

In accordance with its general purpose of ensuring that all parties' constitutional rights are fully protected, the Model Act includes the above section granting the right of appeal for review of questions of law. This section, as in other instances, does not spell out an appeals procedure but rather incorporates by reference existing state procedures and rules applicable to appeals of civil cases. See Sections 1(b)(1) and 2(a)(4). However, because of the ongoing needs of a minor child for care and supervision, this section does not allow for any suspension of orders of the court regarding a child during the pendency of an appeal.

Section 23

[Termination Decrees of Other State or Tribal Courts]

If the parent-child relationship has been terminated by judicial decree in another state, the decree shall be accorded full faith and credit. Such termination by decree of a federally or state recognized Indian Tribal Court shall also be accorded recognition.

Commentary to Section 23

[Termination Decrees of Other State or Tribal Courts]

Due to the increasing mobility of our American population, it has become increasingly important to recognize and anticipate that parties before the court may have been involved in proceedings in another jurisdiction. A parent and child relationship may have been judicially terminated in another state. This section of the Model Act articulates the policy mandated by the Full Faith and Credit Clause of the CONSTITUTION OF THE UNITED STATES. The section also provides for recognition of termination decrees issued by courts of federally or state recognized Indian tribes. An intent of the section is to prevent forum shopping.

This section is thus very similar to sections found in other model and uniform laws. See generally Revised Uniform Adoption Act, and Uniform Child Custody Jurisdiction Act.
Section 24

[Severability]
If any provision of this Act or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Commentary to Section 24

[Severability]
The above severability clause is commonly used to ensure maximum utilization of all the provisions of the Model Act in the event that any single section or portion thereof is held to be invalid. For similar clauses, see Revised Uniform Adoption Act and Uniform Child Custody Jurisdiction Act.

Section 25

[Priority]
All termination proceedings under this Act shall be given calendar priority and handled expeditiously.

Commentary to Section 25

[Priority]
This section is important in order to ensure that the decisional time frame is responsive to the needs of children. It should also avoid long delays due to defensive motions. This section also reaffirms the spirit of earlier sections in which specific time limits are set. See generally Sections 1(b)(3); 4(a)(3); 8(c); 10; 12(c); 13(a) and 16(b) and (e), supra.

Section 26

[Effective Date]
This Act shall take effect on ______________.
Commentary to Section 26

[Effective Date]
Generally an effective date should be set at three to six months after enactment to afford sufficient time to adopt whatever administrative changes are necessary to implement the procedures mandated by this Act.

Section 27

[Repeal]
(a) The following acts and parts of acts are repealed as of the effective date of this Act.
   (1)
   (2)
   (3)
(b) On the effective date of this Act any pending termination proceedings are not affected thereby.

Commentary to Section 27

[Repeal]
Since many states already have numerous statutes dealing with child abuse and neglect, child protective services, foster care and adoption, each state should make a special attempt to be consistent in the use of definitional terms. Other areas that might need evaluation include prior legislative statements of general purposes and intent, sections covering conduct of hearings, the standard of proof, rights to counsel and appointment of guardians ad litem. Enactment of this Model Act should occasion careful review of other child welfare statutes.