Judicial and Statutory Trends in the Law of Adoption

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JUDICIAL AND STATUTORY TRENDS IN THE LAW OF ADOPTION

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In this analysis of the recent developments in American adoption laws, the author emphasizes the complexity of the adoption process and its traditional concern for the welfare of the child. Utilizing the model adoption legislation recently drafted by the Department of Health, Education, and Welfare as a guide, Professor Katz indicates that the modern tendency is toward greater recognition of the need for safeguarding the interests of all of the parties to an adoption proceeding.

INTRODUCTION

Today, adoption is not only the juridical act creating certain civil relations between two persons; it is also a social process. The social implications are based upon the fact that the history of adoption in the United States is part of the history of child welfare and particularly of the treatment of the dependent child. Because of this emphasis on the child and his well-being, in recent years the American approach has placed continually greater emphasis upon the interrelationship between the legal and the social problems involved in this area.

With this in mind, this article will undertake to analyze some of the similarities and differences between adoption laws in the United States, using, as a point of reference, a single modern statute thought to be a guide to enlightened legislation—An Act for the Adoption of Children, drafted by the Children's Bureau of the United States Department of Health, Education, and Welfare. Throughout the course of this article reference will also be made to the Act's companion statute, An Act for Termination of the Parent-Child Relationship; for the drafters of the Model Adoption Act envisioned a "package plan"—i.e., that states would adopt the Model Adoption Act and the Model Termination Act

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2 Children's Bureau, U.S. Dep't of Health, Education, and Welfare, Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children 49 (1961) [hereinafter referred to as the Model Adoption Act (MAA)].

3 Children's Bureau, U.S. Dep't of Health, Education, and Welfare, op. cit. supra note 2, at 37 [hereinafter referred to as the Model Termination Act (MTA)].

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together. Finally, in discussing these two acts in relation to the existing law of the different states, some attempt will be made to evaluate and compare the advantages and disadvantages inherent in the various positions. By so doing, it is hoped that all the considerations, both social and legal, which surround the adoption proceeding will be brought to the attention of all those concerned with this important area of the law.

I
PREREQUISITES TO ADOPTION

Before discussing the substantive problems involved in an adoption, it seems necessary to turn our attention to the preliminary matter of prerequisites to the adoption proceeding. Especially important are two prerequisites which have been advocated over the years. These are (1) that in a nonrelative adoption, the placement must be made by a licensed social service agency, and (2) that a judicial proceeding to terminate the rights of the natural parents in the child must antedate the petition for adoption. It is in satisfying these prerequisites that the Model Adoption Act and its companion statute best exemplify the meeting of the realms of law and the social sciences.

THE REQUIREMENT OF AGENCY PLACEMENTS

Turning to the first of the above-mentioned requirements, section 6 of the Model Adoption Act provides that except for the related adoption no adoption petition will be entertained unless “the child sought to be adopted has [first] been placed for adoption with the petitioners by a child placement agency.” This type of “agency placement” is to be contrasted with a private or independent placement. That kind of placement is exemplified by the private placing of a child by a physician where the physician knows that one of his patients, an unmarried mother, for example, wants to give up her child for adoption and that another of his patients wishes to adopt a child. His arranging the adoption without resorting to a social service agency for study and investigation would be an independent adoption, or, as it is sometimes called a “private placement.”

The dangers inherent in this latter type are clear and for this reason

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5 A related adoption is usually accomplished without agency involvement at the petition-filing stage.
such unregulated adoptions have been widely criticized on the grounds that they foster "black market" adoptions, that they can be arranged for profit, and that they can leave both the adoptive and the natural parents unprotected. Aside from these criticisms, there is the equally important consideration that even "a lawyer who is well equipped to handle the legal aspects of adoption may not be qualified to decide many questions included in placing a child which properly lie within the realm of specialized social knowledge." It is this element of "specialized social knowledge" which, though an advantage of great importance, is generally lacking in independent adoptions, and which section 6 of the Model Adoption Act is designed to secure.

The advantages of agency placement are also seen in an investigation of the services provided by such agencies. As intimated previously, the purpose of such services is both to promote the well-being of the child to be adopted, and also to recognize the needs and interests of both the natural and the adoptive parents. The services to the child would take the form of making a study of the child which would include his development history, his family history, and a medical and psychological examination. In addition, the child would be placed in the home of a suitable adoptive family under the supervision of the agency.

Similarly, with regard to the natural parents, casework help would be given to arrive at a decision regarding relinquishment of the child. For example, a social worker would discuss plans for the child, the problem of confidentiality, and preference for the religious upbringing of the child. And if the natural parent is an unmarried mother, specialized services would be provided because of the existing social disadvantages for her and her child. Services to the adoptive parents would consist of casework help, protection, the selection of a child suitable for them if their home can be used, and assistance in completion of legal adoption and
post-adoption counseling. These services would also have the valuable by-product of aiding the court in making the best disposition of the case by providing it with carefully drawn reports and recommendations prepared by trained social workers.

The position taken by the Model Adoption Act in seeking to secure the advantages of such "specialized social knowledge" to the child and his natural and adoptive parents is also found in several existing state statutes. Thus, in Connecticut and Delaware the courts are prohibited from entering a decree of adoption for any child not related to the petitioners in some way, unless the placement has been made by a licensed child welfare agency.10 Likewise, in recent years it has been the practice in many American jurisdictions that before an adoption is decreed, the court must order a study made of the child, his natural parents, and his adoptive parents.11 This position, it is suggested, represents a forward step in the history of American adoption laws, and a logical development of the American courts' traditional concern for the welfare of the child.

TERMINATION OF PARENTAL RIGHTS AND RESPONSIBILITIES

In regard to the second prerequisite, it clearly appears in the best interests of the child and his natural and adoptive parents that an informal court proceeding to terminate parental rights and responsibilities in the child precede the actual adoption, and that the termination decree provide for guardianship and for legal custody of the child. The traditional relinquishment or release to a social service agency can cause considerable legal and psychological difficulties. The reciprocal rights, privileges, duties, and obligations of parents and child are uncertain. The child's status is questionable and the agency's area of function is unclear. It is the purpose of the Model Termination Act to alleviate this

11 There is some variation among the jurisdictions as to whether such an investigation should be mandatory or discretionary. E.g., in New York, N.Y. Dom. Rel. Law §§ 112(5), 113, 115-1(3), 116(2)-(3), and Illinois, Ill. Rev. Stat. ch. 4, § 9.1-6 (1961), it is mandatory; while in Mississippi, Miss. Code Ann. § 1269-05 (1956), and Nevada, Nev. Rev. Stat. § 127.210(4) (1959), it is discretionary. The District of Columbia makes the investigation mandatory unless the petitioner is a spouse of a natural parent of the adoptee, which natural parent consents to the adoption or joins in the adoption petition, in which case the investigation is discretionary. D.C. Code Ann. § 16-216 (1961). Other jurisdictions treat this problem in still different ways. See, e.g., Md. Ann. Code art. 16, § 76 (1957) (mandatory except where the court "has such intimate and personal knowledge of the facts and circumstances" as to render an investigation unnecessary).
uncertainty by providing for voluntary and involuntary "severance of the parent-child relationship and supervision by judicial process which will safeguard the rights and interest of all parties concerned . . . ."12

In a voluntary termination proceeding, a petition to terminate may be filed either directly by a parent or through an authorized agency.13 A petition to involuntarily terminate the parent-child relationship may be filed in any one of five ways: (1) by either parent when termination of the parent-child relationship is sought with respect to the other; (2) by the guardian of the person or the legal custodian of the child; (3) by the person standing in loco parentis to the child; (4) by an authorized agency; or (5) by any other person having a legitimate interest in the matter.14 Grounds for such an involuntary termination are: abandonment; substantial and continuous or repeated neglect; incapacity to discharge parental responsibilities; or that the presumptive parent is not a natural parent of the child.15

If the court terminates the parent-child relationship, it will appoint an individual as guardian of the child's person, or appoint one individual as guardian of the child's person and vest legal custody in another individual or in an authorized agency—or where it is alleged in the petition that the termination is sought in contemplation of adoption, it will appoint an official of an authorized agency as guardian of the child's person and will vest legal custody in that agency.16 If the court does not terminate the parent-child relationship, an order placing the child under protective supervision for a temporary period, or vesting legal custody for a time in an authorized agency, may nonetheless be made if the best interests of the child so require; this order is also to fix the responsibility for child support, and to certify the case to an appropriate court for any necessary further action.17 The effect of the termination decree is thus to divest the parent and child of all legal rights, privileges, duties and obligations, including rights of inheritance, with respect to each other.18

Termination acts have been criticized on the ground that they fail to provide adequate safeguards for the rights of the natural parents.19 The

12 MTA § 1.
13 MTA § 4(a).
14 MTA § 4(c).
15 MTA § 4(b).
16 MTA § 9(l).
17 MTA § 9.
18 MTA § 10.
Model Termination Act, however, makes an earnest effort to safeguard these rights, insofar as it is consistent with the rights of the other parties involved. Thus, fair and reasonable requirements are laid out for the notification of the natural parents; the parents are entitled to be represented by counsel at the termination hearing; if they are financially unable to procure the services of counsel themselves, counsel will be provided; and a preponderance of the evidence, under the rules applicable to the trial of civil cases, is necessary to establish any of the grounds for involuntary termination.20

The complaint might also be made that the Model Termination Act permits hearsay evidence to be introduced at the termination hearing—for Section 8 of that Act provides that relevant and material information of any nature, including that contained in reports, studies, or examinations, may be admitted and relied upon to the extent of its probative value. It must be remembered, however, that the hearing is to be before a judge, not a jury, and it seems unlikely that the judge would give such information more than its due probative weight. Moreover, a termination hearing differs from a criminal or civil trial as it does not seek to penalize anyone, by searching for the presence of guilt or liability. A termination hearing seeks above all else the welfare of the child, with due regard for the rights of the natural and adoptive parents; and it may well be that this ideal can best be achieved in a hearing characterized by informality and confidentiality, freed from strict compliance with the rules of evidence.

II

WHO MAY ADOPT; WHO MAY BE ADOPTED—IN GENERAL

In any discussion of the substantive law of adoption the first questions which logically arise are “Who may adopt?” and “Who may be adopted?” In this area the Model Adoption Act is fairly typical of the statutes in many states,21 and of the Uniform Adoption Act as well.22 It provides that any child may be adopted who is in the state at the time the petition for adoption is filed,23 and that husband and wife may jointly adopt a child, or if one of the spouses is already the child’s parent, the other

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20 MTA § 8.
21 A table showing the characteristic features of American adoption laws can be found in Note, 38 Va. L. Rev. 544, 552-53 (1952).
23 MAA § 3.
may separately adopt him. An individual may also adopt a child where such individual is an unmarried adult, or a married adult who has been accorded the right to reside separate and apart from his or her spouse by judicial decree. In this respect, however, the Model Adoption Act does not completely follow the Uniform Adoption Act in that it does not include in the category of individuals eligible to adopt a child an unmarried mother or father, regardless of age.

While the overall position taken by the Model Adoption Act is basically sound, its wisdom in rejecting the Uniform Act's treatment of the unmarried minor parent is subject to certain doubts. It might have been wise to include the Uniform Act's provision making the unmarried minor parent of a child a suitable person to adopt him. One can imagine a situation where the mother of an illegitimate child dies in childbirth, and the father, a minor, would like to adopt the child; or it might be that an unmarried father of an illegitimate child entering military service would want to adopt the child, in order to bestow all the benefits which might accrue to him upon his child. As the Model Adoption Act now reads, if the father of the illegitimate child is an adult, or if he is a minor married even to a person other than the mother of the child, he could qualify under section 4(a) or section 4(b). But if he is a minor and unmarried, he could not qualify under the Act.

RELIGIOUS CONSIDERATIONS

In neither sections 3 (Who May Be Adopted), 4 (Who May Adopt), nor 7 (Petition) of the Model Adoption Act is there any reference to the religion of the child or of the adoptive parents. Perhaps this aspect of adoption law was considered a policy matter, rather than a legislative one; or, perhaps, since under the Model Adoption Act a prerequisite to an adoption is placement by a licensed social service agency, it was intended that this matter should be considered at the placement stage.

The Child Welfare League of America, however, has taken the following position on religion and adoption:

A child should ordinarily be placed in a home where the religion of adoptive parents is the same as that of the child, unless the parents have specified that the child should or may be placed with a family of another religion. Every effort (including interagency and interstate referrals) should be made to place the child within his own faith, or that designated by his parents. If however such matching means that placement might never be feasible, or involves a substantial

\(^{24}\) MAA § 4.

\(^{25}\) Uniform Adoption Act § 3(4).
delay in placement or placement in a less suitable home, a child's need for a permanent family of his own requires that consideration should then be given to placing the child in a home of a different religion. For children whose religion is not known, and whose parents are not accessible, the most suitable home available should be selected.26

Similarly, many states are concerned with the religion of the child and of his natural and adoptive parents, and consider this aspect of the "matching process" in their statutes. In some states the religious affiliations of the parties concerned must be placed on the petition or must be considered in the disposition of the case.27 In others there are provisions regarding the placement of the adoptive child in the custody of adoptive parents whose religious affiliation is the same as the child's. These provisions are typically qualified by the words "when practicable,"28 or

26 Child Welfare League of America, Standards for Adoption Service 25 (1958). The quoted statement is in accord with the beliefs underlying practices in a high proportion of nonsectarian agencies, and with those represented by the Council of Jewish Federation and Welfare Funds and by the Department of Social Welfare, National Council of Churches of Christ in the United States. But Catholic adoption agencies are committed to "the basic principle that any Catholic child being placed for adoption can have his total needs met only in a Catholic adoptive home." Bowers, The Child's Heritage—From a Catholic Point of View, in 2 A Study of Adoption Practice 130 (Schapiro ed. 1956). This position is based on the Catholic viewpoint that "religion is something more than a value to the child. It is also an obligation basic to his very nature." Id. at 130-31. However, the practice of Catholic adoption agencies varies somewhat where applicants representing a marriage between a Catholic and a non-Catholic are concerned. Some Catholic agencies will consider such applications, particularly "in instances where the mother is Catholic or in families in which the non-Catholic party is willing to take instructions in the fundamental teachings of the Catholic church. On the whole, however, agencies seek to use adoptive couples both of whom are Catholic." National Conference of Catholic Charities, Adoption Practices in Catholic Agencies 50 (1957).


"when possible." The important question thus is, what effect do the courts give to such words? — that is, are these words interpreted as being mandatory or discretionary?

The New York Court of Appeals interpreted the words "when practicable" as discretionary in Matter of Maxwell. In that case the issue before the court was whether the New York adoption laws prohibited the adoption of the Maxwell child, since the religion of the adoptive parents differed from that of the natural mother. The relevant statute provided that "in granting orders of adoption . . . the court shall, when practicable . . . give custody only to . . . persons of the same religious faith as that of the child."

Several hours after Mrs. Maxwell's son was born, she signed an affidavit, prepared by the attorney for the adoptive parents, the Smiths, in which she gave her consent to the infant's adoption by them. In addition, she declared that she "does not at the present time embrace any religious faith." Adoption proceedings were commenced by the Smiths a few years after Mrs. Maxwell had given her child up for adoption. During those years the child had been living with the Smiths. At the adoption proceedings, Mrs. Maxwell stated that she embraced the Catholic faith, and that she had not known that the persons to whom the baby had been given were Protestants. She further testified that her affidavit declaring that she did not embrace any religious faith had been signed without knowledge of its contents. On these grounds Mrs. Maxwell demanded return of the child and further demanded that, in any event, the child be brought up in the Catholic faith.

The trial court denied Mrs. Maxwell's petition and granted the adoption. On appeal Judge Fuld, writing for the majority, affirmed the lower court's decision. He found the language of the statute, directing the court, when practicable, to give custody only to persons of the same religious faith as that of the child to be discretionary. He said:

The statute calls upon the court to give custody to persons of the same religious faith as that of the child when practicable. That term is of broad content, necessarily designed to accord the trial judge a discretion to approve as adoptive

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31 N.Y. Soc. Welfare Law § 373(3).
32 The Smiths agreed, however, to have the child baptized in the Catholic faith and educated in Catholic parochial schools. 4 N.Y.2d at 433, 151 N.E.2d at 850-51, 176 N.Y.S.2d at 284.
parents persons of a different faith from the child’s in exceptional situations. Had the legislature intended that in every case the child be adopted by persons of its own religious faith, it obviously would have made its design known by language far different from that which it used. The presence in the statute of the words “when practicable” was to enable the court to relax the requirement in the unusual case such as the one before us. 3

Judge Desmond dissented, urging that the words “when practicable” were not discretionary, as indicated by the majority, but mandatory. He criticized the failure to make efforts to find adoptive parents of the same religious faith as the child, declaring “it is inconceivable that in the city of Buffalo such persons could not be found.” 4 However the dissent seems to miss the main thrust of Judge Fuld’s opinion. It is not that other couples could not be found, but that the child had been living with the Smiths for over four years, and that to place him with some other couple, or in an institution, would have had serious consequences so far as his well-being was concerned. Thus, the court stated:

The statute may not be employed as a means of wiping out a relationship between foster parents and child which originated in good faith and has continued for the entire four and a half years of the youngster’s life. . . . [T]o tear the child from the love and care of these petitioners, the only mother and father he has ever known, and send him instead to an institution until other parents are found, would be inordinately cruel and harsh. No law requires consequences so distressing. 5

Although with Matter of Maxwell it seems that New York has taken its place with the majority of jurisdictions in interpreting the religious requirements of adoption statutes liberally where the child’s welfare is concerned, some jurisdictions take a more rigid position. Thus, the Massachusetts court, in Petition of Goldman, 6 construed a statute similar to that interpreted in Maxwell as being mandatory.

In the Goldman case, a Jewish woman wished to adopt twins born illegitimately to a Catholic woman. The twins had been in the custody of the petitioners since they were two weeks old. The natural mother

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3 Id. at 434, 151 N.E.2d at 850-51, 176 N.Y.S.2d at 284.
4 Id. at 440, 151 N.E.2d at 854, 176 N.Y.S.2d at 289.
5 Id. at 434-35, 151 N.E.2d at 851, 176 N.Y.S.2d at 284-85.
6 E.g., Cooper v. Hinrichs, 10 Ill. 2d 269, 140 N.E.2d 293 (1957), reversing 8 Ill. App. 2d 269, 130 N.E.2d 678 (1955); In re Adoption of Kure, 197 Minn. 234, 266 N.W. 746 (1936); In re Adoption of Duren, 355 Mo. 1222, 200 S.W.2d 343 (1947); Butcher’s Estate, 266 Pa. 479, 109 Atl. 683 (1920).
consented to the adoption and also agreed to the twins' being brought up in the Jewish faith. The judge of the probate court found that the petitioners were qualified as adoptive parents in all respects, save that they were not of the same religious affiliation as the natural mother of the children. But he reasoned that since there were many Catholic couples in the area who could furnish the twins a good home, it was "practicable" within the meaning of the Massachusetts provision to give custody of the children to persons of their own religious faith. The Supreme Judicial Court of Massachusetts affirmed the lower court's decision, applying the test urged by the dissent in Maxwell — the availability of other couples of suitable religion to adopt the children. In so doing it seems that the court broadly interpreted the phrase, "when practicable," to mean "whenever it is possible to procure."

The constitutionality of such "religious protection" provisions has been widely discussed. Regarding this issue of the constitutionality of the Massachusetts religious protection provision, the court said in the Goldman case: "All religions are treated alike. There is no 'subordination' of one sect to another. No burden is placed upon anyone for maintenance of any religion. No exercise of religion is required, prevented, or hampered." However, one author questions the decision in Goldman on a number of constitutional issues, including the validity of the statutory provision itself. And another in discussing the New York statute involved in Maxwell, believed that this provision, if given Judge Desmond's dissenting interpretation, would violate in spirit, at least, both the state guarantees of religious liberty and the first amendment.

Regardless of what conclusion might be reached on the constitutionality of the interpretation advocated by Judge Desmond and the Goldman court, the one practical conclusion which is suggested by a reading of these two cases is that in both the whole religious problem arose out of

39 Cf. Ramsey, The Legal Imputation of Religion to an Infant in Adoption Proceedings, 34 B.U.L. Rev. 649, 657 (1959). This is how the Rhode Island statute is meant to be interpreted. R.I. Gen. Laws Ann. § 15-7-13 (1956) provides: "The word 'when practicable' as used in reference to adoptions shall be interpreted as being without force or effect if there is a proper or suitable person of the same religious faith or persuasion as that of the child available to whom orders of adoption may be granted."
40 See Ramsey, supra note 39, at 680-84; Comment, Religion as a Factor in Proceedings for Adoption and Custody of Children, 1957 U. Ill. L.F. 114; Note, Constitutionality of Mandatory Religious Requirements in Child Care, 64 Yale L.J. 772 (1955).
41 331 Mass. at 652, 121 N.E.2d at 846.
43 Ramsey, supra note 39, at 653 n.10.
of the fact that each was a private placement. Thus, in each the problem could and should have been avoided by initial resort to a licensed agency for placement of the child. These cases illustrate the great pitfalls of private placements for the unprotected natural and/or adoptive parents. The hardship that can result for either set of parents is immense. Whatever the merits of either position on the “religious protection” provisions, the fact of the matter is that situations such as Goldman and Maxwell can be avoided if the position of the Model Adoption Act is accepted and agency placement is made a prerequisite to the adoption proceeding.

RACIAL BACKGROUND

Another area in which the framers of the Model Adoption Act have seemingly deferred to the present practice in each of the states is that concerning the question of the racial relationship between the adopted child and the adoptive parents. In answer to this question the Child Welfare League of America has stated that racial background in itself should not be the major criterion in the selection of a home for a child. Its position is:

It should not be assumed that difficulties will necessarily arise if adoptive parents and children are of different racial origin. At the present time, however, children placed in adoptive families with similar racial characteristics, such as color, can become more easily integrated into the average family group and community.44

Some state statutes, while not barring interracial adoptions, do provide for the placing of the identity of the races of the natural parents, the child, and the adoptive parents on the adoption petition.45 The effect to be given this information was in issue in the case of In re Adoption of a Minor,46 decided under the applicable provision of the District of Columbia Code.47 In that case the petition for adoption was filed by the child’s natural mother and his stepfather. Both the child and his mother were white, but his stepfather was a Negro. The district court denied the adoption petition, with Judge Holtzoff reasoning that “the boy when he grows up might lose the social status of a white man by reason of the

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45 See statutes cited note 27 supra.
47 The petition or the exhibits annexed thereto shall contain the following information:

(4) The race and religion of the adoptee, or his natural parent or parents.
(5) The race and religion of the petitioner.

fact that by record his father will be a negro if this adoption is approved.\textsuperscript{48}

The Court of Appeals reversed the district court's decision, holding that while a difference in race or religion may have relevance in adoption proceedings, that factor alone cannot be decisive; the child's welfare must be paramount. Judge Bazelon, speaking for the court, reasoned that since the child was happy living in the home of his mother and his stepfather, and since he would continue to live in that home anyway (because his mother had custody of him), denying the adoption would only serve the harsh and unjust end of depriving the child of a legitimized status in that home.\textsuperscript{49}

To be contrasted with this liberal view is the unusual approach of the Louisiana and Texas statutes\textsuperscript{50} which prohibit interracial adoptions altogether. However, such statutes are subject to serious attack on the constitutional grounds that they violate the equal protection clause of the fourteenth amendment.\textsuperscript{51} A constitutional question could also arise under the full faith and credit clause if a jurisdiction refused, on the grounds of local policy prohibiting interracial adoptions, to recognize the status of an adopted child under a foreign adoption decree.\textsuperscript{52}

Besides the questionable

\textsuperscript{48} 97 U.S. App. D.C. at 100, 228 F.2d at 447.
\textsuperscript{49} Id. at 101, 228 F.2d at 448.
\textsuperscript{50} La. Rev. Stat. § 9.422 (1950) ("A single person over the age of twenty-one years, or a married couple jointly, may petition to adopt any child of his or their race."); Tex. Rev. Civ. Stat. Ann. art. 46a, § 8 (1959) ("No white child can be adopted by a negro person, nor can a negro child be adopted by a white person.") For a discussion of the Louisiana Provision see Wadlington, Adoption of Persons Under Seventeen in Louisiana, 36 Tul. L. Rev. 201, 205-09 (1962).
\textsuperscript{51} Cf. Perez v. Sharp, 32 Cal. 2d 711, 198 P.2d 17 (1948) wherein California's anti-miscegenation statute was held violative of the equal protection clause.
\textsuperscript{52} See In re Estate of Morris, 56 Cal. App. 2d 713, 133 P.2d 452 (Dist. Ct. App. 1943). That case involved the issue of whether California would recognize a Rhode Island adoption. In Rhode Island, where it was legal, John F. Morris, a 92-year-old unmarried man, adopted his 61-year-old niece as his child. California law authorized only the adoption of minor children. Basing its result mainly on the decisions in Williams v. North Carolina, 317 U.S. 287 (1942) and Fauntleroy v. Lum, 210 U.S. 230 (1908), the California court held that:

[When] the State of Rhode Island, acting in accord with its laws, established through valid adoption proceedings the status of adopted child and adoptive parent between decedent herein and her uncle, full faith and credit must be given to such decree and the status thereby created must be recognized by the State of California, notwithstanding a claimed conflict with the announced policy of the latter state.

56 Cal. App. 2d at 723, 133 P.2d at 456. As to the important distinction between the power of a foreign jurisdiction to create a status which under rules of comity and the full faith and credit clause of the federal constitution must in some instances be recognized by the
legality of the Texas and Louisiana statutes and the policy they enunciate, the wisdom of the rigidity of their position is, at best, suspect. Since, as has been emphasized, the adoption process is replete with social considerations, it seems that before reaching any decision, all of these considerations should be weighed. To attribute such weight to any one factor that it precludes all consideration of the others could conceivably so tie the hands of the court in certain instances as to prevent the achievement of the most practical and equitable result.

III

PARENTAL CONSENT TO ADOPTION

In discussing the requirement of parental consent to adoption, the first thing to be noted is the formality which statutes generally require for such consent to be effective. The Model Adoption Act generally requires written consent to an adoption by the natural parents of the child. Such consent must be acknowledged before an officer authorized to take acknowledgments and must be witnessed by a representative of a child placement agency or of the court—a position substantially reflecting that taken by the Uniform Adoption Act and many other statutes. These requirements of acknowledgment and attestation are designed to ensure that the natural parents are aware of the importance of the act of consenting; the belief is that such formalities will probably help deter the natural parents from making a hasty and improvident decision, and will protect them from fraud, coercion, and overreaching. An additional safeguard for the rights of the natural parents is found in the Model Adoption Act’s provision requiring that the consent of the parents or guardian of the person of a minor parent must accompany the consent of the minor parent to the adoption. In this respect the Model Act differs from the statutes found in the District of Columbia.

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local forum, and the lack of power of a foreign jurisdiction to attach to the status incidents which are repugnant to the laws or policy of the local forum, see Tsilidis v. Pedakis, 132 So. 2d 9 (Fla. Dist. Ct. App. 1961). As to the recognition of the adoptive status created by a foreign decree, see Taft, Adoption in the Conflict of Laws, 15 U. Pitt. L. Rev. 222, 251-66 (1954); Beadle, Interstate and Foreign Adoptions in North Carolina, 40 N.C.L. Rev. 691, 705-06 (1962).

53 MAA § 8(b).

54 Uniform Adoption Act § 5.


56 MAA § 8(a).

and in several states,\(^{58}\) which state that minority is not a bar to consent.

Aside from those cases where the natural parents consent to the adoption, many jurisdictions recognize certain other situations where the adoption will be allowed without the consent of the natural parents. Traditionally, these situations dispensing with the consent requirement have been the following: (1) When the parents, or one of them, have lost parental rights through voluntary relinquishment or involuntary termination by court proceedings; (2) when the child has been abandoned; (3) when the parent is mentally disabled; (4) when the parents are divorced (with certain important qualifications); and (5) when the child is illegitimate, in which case one parent's consent may be unnecessary.\(^{69}\)

The Model Adoption Act does not itself include these traditional grounds for dispensing with the consent requirement. This is because it assumes that there has been a proceeding to terminate parental rights in the child prior to the filing of the adoption petition and these situations are embodied in the Model Termination Act, as grounds for the involuntary termination of the rights of the natural parents.\(^{60}\) However, since the Model Adoption Act and the Model Termination Act are companion statutes, designed to be enacted together, it is apparent that the drafters of the Model Adoption Act intended to preserve the traditional grounds for dispensing with the consent requirement.

**WHEN THE CHILD HAS BEEN ABANDONED**

The courts have defined “abandonment” variously as conduct of the natural parents renouncing the parental relationship,\(^ {61}\) or as a “refusal to perform the natural and legal obligations of care and support,”\(^ {62}\) or as a withholding of love, care, and the opportunity to display filial af-

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59 Other grounds include failure to support, maintain or care for the child, neglect, habitual drunkenness or intemperance, general unfitness, desertion, and sentence to imprisonment. See Comment, A Compilation of Consent Provisions of Adoption Statutes, 24 Rocky Mt. L. Rev. 359, 362-64 (1952).

60 MTA § 4(b).

61 Abandonment is “any conduct on the part of the parent, which evinces a settled purpose to forego all parental duties, and to relinquish all parental claims to the child.” Winans v. Luppie, 47 N.J. Eq. 302, 304, 20 Atl. 969, 970 (Ct. Err. & App. 1890). This definition has been endorsed by other jurisdictions: e.g., Davies Adoption Case, 353 Pa. 579, 588, 46 A.2d 252, 257 (1946). Pennsylvania has now adopted the Winans definition by statute. Pa. Stat. Ann. tit. 1, § 1(a) (Supp. 1961).

It is generally agreed, however, that for such conduct of the natural parents to constitute abandonment, it must be intentional.\(^6\) Usually, the situation which results in a finding of abandonment is one where the parent leaves his child permanently or indefinitely in the care of others, making little or no effort to support him.\(^6\) Some statutes also specify the length of time for which this state of affairs must continue in order for it to constitute abandonment.\(^6\)

Many cases in this area involve fact situations illustrating negative attitudes toward parenthood, manifested in attempts to "give up" a child. In the Maxwell case, in discussing the issue of abandonment arising from Mrs. Maxwell's relinquishment of responsibility for the welfare of her child, Judge Fuld said:

The mother did not, it is true, leave her child on a doorstep, but surely an abandonment may be established by proof of conduct less drastic than that . . . . When the appellant asserted that she did not want the baby and that she "wanted" to be done with the matter "as quickly as possible," when she did everything she could to conceal the child's very birth, and herself hid behind a false name, and when thereafter she returned to Canada and for almost a year manifested not the slightest interest in the welfare of the child . . . she was guilty of conduct that amounted to the abandonment found by the courts below. It was, in short, the appellant's callous disregard for her child, her complete indifference to how he was faring, not her signing of the surrender and consent document . . . that constituted the abandonment . . . .\(^6\)

The Illinois Supreme Court employed similar reasoning in Stalder v. Stone,\(^6\) where a mother attempted to defeat the adoption of her illegitimate child by the persons with whom she had left him. The record there


\(^{65}\) Cases to this effect are collected in Annot., supra note 64, at 678-80. But failure to support alone is not usually held sufficient to constitute abandonment. See, E.g., Johnson v. Strickland, 88 Ga. App. 281, 76 S.E.2d 533 (1953); Smith v. Smith, 67 Idaho 349, 180 P.2d 853 (1947); In re Walton, 123 Utah 380, 259 P.2d 881 (1953); Petition of Rice, 179 Wis. 531, 192 N.W. 56 (1923).


\(^{67}\) 4 N.Y.2d at 433, 151 N.E.2d at 850, 176 N.Y.S.2d at 283-84.

\(^{68}\) 412 Ill. 488, 107 N.E.2d 696 (1952).
indicated that the mother had attempted unsuccessfully to abort the child; that when he was born she had lied about his identity and had placed him with her sister; and that she had later removed him and placed him with others, still not disclosing his true identity and visiting him only infrequently. It was held that since she had abandoned the child, her consent to the adoption was unnecessary. The court caustically observed that the mother's "entire contact with the child [was] characterized by efforts to get rid of him." She had, said the court, "merely acted as an agent for some unknown parent in finding a refuge for the child."

On the other hand, there have been cases where the parent "abandons" his child, but within a reasonable time thereafter resumes his parental duties. In these instances the courts have treated the parent's resumption of his duties toward the child as repentance, revoking or terminating the abandonment. However, this repentance must be something more than a mere mental intent; it must be conduct which manifests an intent to resume parental responsibilities.

Moreover, it must be noted that the evidence necessary to determine abandonment must be related to the conduct of the natural parent. The "best interests of the child" test is not, and should not be, relevant. In spite of this there is language in some of the cases which indicates such a concern for the "best interests of the child," while professing to decide the abandonment issue. Perhaps, much of this confusion of issues is a result of the attempt to litigate the abandonment issue in the adoption proceeding, rather than in a proceeding to terminate parental rights and

60 Id. at 496-97, 107 N.E.2d at 700-01.
61 Id. at 496, 107 N.E.2d at 700.
62 See, e.g., In re Kline, 24 Del. Ch. 427, 8 A.2d 505 (Orphans' Ct. 1939); Bair Adoption Case, 393 Pa. 296, 141 A.2d 873 (1958); Davies Adoption Case, 353 Pa. 579, 42 A.2d 252 (1946).
63 In a recent case, the Pennsylvania court said:

[T]he welfare of the child is not to be considered until abandonment has been established or consent proved: Susko Adoption Case, 363 Pa. 78, 69 A.2d 132; Schwab's Adoption Case, 355 Pa. 534, 50 A.2d 504. In Susko . . . we stated: "Unlike custody cases, in adoption proceedings the welfare of the child is not material until either consent or abandonment . . . has been established." In Schwab . . . we said: "The welfare of the child, as an element in adoption proceedings, has no relation to the question of the parent's abandonment."

In re Adoption of Hangartner, 181 A.2d 280, 284 (Pa. 1962).
responsibilities prior to the adoption. In this regard the position of the Children's Bureau that a termination proceeding should antedate the filing of the adoption petition has the advantage of lessening the opportunity for confusion as to the issues being litigated, and thus provides a certain amount of protection for the rights of the natural parents in their child.

WHEN THE PARENT IS MENTALLY DISABLED

Forty states and the District of Columbia allow children of the mentally-disabled to be adopted without their parent's consent. The reasoning underlying the position taken by these jurisdictions is that a person suffering from mental disease is incapable of giving consent.

The constitutionality of such a statutory provision was passed on by the Illinois Supreme Court, in People ex rel. Nabstedt v. Barger where the statute required that the parent must have been mentally ill for a period of three years, and that two qualified physicians selected by the court testify that he was not expected to recover in the foreseeable future,

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76 Thus it has been held that, absent a statute to the contrary, there can be no adoption if the jurisdiction requires the consent of the natural parents and one of them is insane, since such a parent is incapable of giving consent. Keal v. Rhyderick, 317 Ill. 231, 237-38, 148 N.E. 53, 56 (1925).

before his consent to the adoption of his child could be dispensed with. The statute further authorized court appointment of a guardian ad litem to represent the parent and consent to the adoption. The Illinois court held that due process of law required by the fourteenth amendment was not denied the parent by such a proceeding, even though the parent’s relatives had been given no notice of its pendency. The court further stated that even though there was a possibility that the parent might be restored to good health and reason but yet be unable to regain the custody and companionship of his child, the act was nonetheless constitutional.

In evaluating the decision in the Nabstedt case it would seem that it represents a fair and reasonable approach to one of the grave problems which permeate this area, namely, the problem posed by the difficulty of determining the extent and duration of the natural parent’s illness. To protect the rights of such a parent, it should be required that in order for the children of the mentally ill to be adopted without their parents’ consent, the parental disability must be hopeless or incurable. A finding to this effect based on competent medical testimony should thus be required, and some fixed period of disability should be established. These limitations were met in the Nabstedt case through the testimony of court-appointed physicians and the statutory provision fixing the period of disability at three years. This approach is also followed elsewhere. Thus, Nevada requires that the natural parents’ mental illness has continued for a two-year period in order for their consent to their child’s adoption to be dispensed with.79

In opposition to the above views, some states80 do not require an incurable affliction before dispensing with the consent of the mentally disabled parent. Such a position, however, seems to ignore the important advances that have been made in the field of psychiatry during recent years. With new drugs, new methods of therapy and additional trained personnel in mental hospitals, mental illness is no longer necessarily a hopeless affliction. Admittedly, it is neither reasonable nor fair to an adoptable child to put him in an institution, in the temporary custody of relatives, or in foster care pending his parents’ recovery from mental illness, which recovery might never occur. On the other hand, it is equally unfair to a parent to give a court the power to take his child away from him when he might regain his health within a reasonable period of time. It is submitted that, on balance, the incurable affliction requirement con-

tained in such statutes as the one in force in Illinois represents a workable and just arrangement for the safeguarding of the respective interests of both parents and child.

The *Nabstedt* case also illustrates another needed protection for the natural parent, namely, the appointment of a guardian, *guardian ad litem*, or next friend who acts for the parent to give or withhold consent.81 Only with such a provision is the mentally ill parent assured of proper representation in the termination or adoption proceedings. Without such a provision all other protective statutes, such as the incurable affliction requirement, could be rendered meaningless.

In its study of the mentally disabled and the law, the American Bar Foundation questions the protection which adoption proceedings afford natural parents afflicted with mental illness. It calls for court-appointed counsel as one of several approaches to the problem.82 However, this is a partial solution at best; for, as indicated previously, more than one party's interest is involved here. Protection must be afforded not to the rights of the natural parents only, but to those of the child as well. An answer can be found only in weighing and balancing these respective interests, in affording the maximum reasonable safeguards to the parents and in bearing ever in mind the welfare of the child.

WHEN THE NATURAL PARENTS ARE DIVORCED

In general, there are four types of cases in which there arises the issue of whether or not the consent of a divorced natural parent is necessary for adoption. These are (1) where there has been a valid divorce decree and one spouse is given custody of the child, subject to visitation rights in the other spouse; (2) where the divorce decree gives no visitation rights to one of the spouses or states that absolute care, custody, and control is in one spouse; (3) where the divorced natural parent has not visited the child or has made no effort to support him; (4) where the custody of the child is given to one parent because of the other's misconduct and that misconduct was the basis for the divorce decree.

Under statutes requiring simply that the living parents of a child must consent to its adoption,83 the courts have generally held that the consent of a natural parent who has been divorced and deprived of the custody

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of his child may not be dispensed with. In some states, however, statutes provide that the consent of such a parent is not required; but it has been held that even where statute makes his consent unnecessary, he must nonetheless be given notice of the adoption proceedings and an opportunity to make known his objections.

Some jurisdictions decide the consent issue with regard to divorced natural parents by looking to the grounds upon which the divorce decree was granted. Thus, in New York the consent of a parent is unnecessary when he or she has been divorced on the grounds of adultery and deprived of the custody of his child. Another jurisdiction has a similar statutory provision with regard to cruelty as the basis for divorce.

However, where the offending spouse has visitation rights, it has been held in most jurisdictions that this, in and of itself, is sufficient to make his or her consent a prerequisite to a valid adoption. This position is based upon the courts' reasoning that statutes dispensing with the consent of one of the natural parents when custody is in the other natural parent apply only if the latter has absolute custody over the child, and that any notion of absolute custody in one of the parents is inconsistent with the right of visitation in the other. In Iowa, however, even though a spouse

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84 E.g., Willis v. Bell, 86 Ark. 473, 111 S.W. 808 (1908); Lucas v. Wistner, 97 N.H. 128, 82 A.2d 602 (1951).
85 E.g., Iowa Code § 600.3 (1922), which provides that where the parents are not married to each other or where one of them has been deprived of custody by judicial procedure, only the consent of the parent "having the care and providing for the wants of the child" is required. In New Mexico, whether the consent of a parent who has been divorced and deprived of the custody of his child is necessary, is a question for the discretion of the court. N.M. Stat. Ann. § 22-2-6(1) (Supp. 1961).
87 N.Y. Dom. Rel. Law § 111.
90 E.g., Jackson v. Spellman, 55 Nev. 174, 28 P.2d 125 (1934). In that case, the divorce decree granted the wife "sole custody and control" of the children, with visitation rights in her husband. In holding the husband's consent necessary, the court stated that "consent of the guilty spouse can only be dispensed with in a proceeding for adoption . . .
had visitation rights, her consent was held to be unnecessary on the theory that the existence of visitation rights was only one of the factors to be considered in determining whether or not the consent of the objecting parent was required.\textsuperscript{91} Also, when the divorced natural parent has not exercised his visitation rights or has made no effort to support his child, thereby evidencing his general lack of interest in the child’s welfare, that parent’s consent will be unnecessary in almost all jurisdictions. The courts tend to treat this situation as an abandonment.\textsuperscript{92}

Unfortunately, in many respects the law in this area is confused and lacks a reasoned foundation. Natural parents’ rights to their children should be well-protected. What took place in a divorce proceeding may or may not be relevant in an adoption proceeding. While one spouse may have been awarded custody of the child in the divorce proceeding, that should not mean, except in the most unusual circumstances—e.g., where the other spouse’s conduct would also have served as a basis for involuntary termination—that this other spouse no longer has any right to his child, or that he should not be consulted before the child is legally adopted by another. Circumstances change, and a spouse who may have been unfaithful during marriage and divorced because of this, should not necessarily be punished further by being deprived of power to act when his child is being adopted by another. Thus, the basis for divorce should not be the criterion for determining whether a spouse’s consent is or is not necessary for an adoption. Secondly, something more should be required than merely giving the offending spouse notice and an opportunity to raise objections. At the very least, the position taken by Washington, New Mexico, Idaho, and Texas\textsuperscript{93} in giving the offending spouse with visitation rights the general right to object to the adoption of his child, seems to be required if the final decree is to be both fair and reasonable.

\section*{WHEN THE CHILD IS ILLEGITIMATE}

Although in some jurisdictions the father’s consent is required if he legitimizes the child,\textsuperscript{94} generally, in the case of illegitimate children, when the custody is awarded to the innocent party without reserving any rights whatever in the guilty spouse. The custody must be absolute.” Id. at 184, 28 P.2d at 129.


\textsuperscript{92} Cases are collected in Annot., 47 A.L.R.2d 824, 847-49 (1956), and Annot., 35 A.L.R.2d 652, 688-91 (1954).

\textsuperscript{93} See authorities cited note 89 supra.

\textsuperscript{94} This seems to be the position of the District of Columbia. D.C. Code Ann. § 16-
the statutes require the consent of the mother only. It must be borne in mind, however, that statutes of the latter type deal with an exception to the general provision that both of the "living parents" of a child must consent to that child's adoption. Failure to distinguish between the rule and the exception has led some courts into an erroneous position regarding the central problem in this area—the situation where a child is legitimized after the then-unmarried mother has given her consent to its adoption.

Some courts profess to find a solution to this problem of whether the father's consent is then required by applying the "best interests of the child" test; but such a view ignores both the statutory law and the real question which the court is called upon to determine. For, by statute a parent has a right to object to his child's adoption, and the question for the court's decision is whether the father of an illegitimate child falls within the statutory provision requiring consent of both living parents or whether the above-noted exception is controlling. In other words, the issue is the rights of the father, rather than the interests of the child.

Still a few cases endorse a strict statutory interpretation of the exception, reasoning that since it is expressly provided that the consent of the mother only is sufficient, once her consent is given that of the father becomes unnecessary. However, it seems clear that the purpose of such provisions is to deal with those situations where the father is unknown, and to prevent a father who accepts no responsibility and feels no concern.

13(b)(2)(c) (1961) requires the father's consent when "the adoptee has been legitimated according to the laws of any jurisdiction ..." A similar provision may be found in Wash. Rev. Code § 26.32.030(2) (Supp. 1958). The Arizona statute, however, provides that the father's consent is required if he has acknowledged the child. Ariz. Rev. Stnt. Ann. § 8-103A(1)(b) (1956). But it would seem that the practical difference between those statutes using the term "legitimization" and those using the term "acknowledgment" is greatly minimized by the fact that the usual cases involving the issue of the necessity of the father's consent are those where there has been both a legitimization of the child by subsequent marriage and acknowledgment of the child by the father. See, e.g., In re Adoption of Anderson, 189 Minn. 85, 248 N.W. 657 (1933); Sklaroff v. Stevens, 84 R.I. 1, 120 A.2d 694 (1956).

97 Ex Parte Combs, 150 N.E.2d 505 (Ohio C.P. 1958); Davis v. Sears, 35 S.W.2d 99 (Tex. Comm'n App. 1931); Adoption of Morrison, 260 Wis. 30, 49 N.W.2d 739 (1951).
for his child from capriciously preventing that child's adoption. To apply such a provision to a case where the child has been legally legitimatized in good faith is to extend it to a situation where it was not meant to apply.

It is submitted that the better reasoning is to be found in those cases which permit the father's legitimization of his child to operate retroactively so that his assent becomes necessary. So long as the child has been legitimatized before the adoption has taken place, it would seem that the statutory provision requiring the assent of both living parents to the child's adoption should be controlling. What is important in this area is the legal relationship between father and child and when such a relationship has been established by the father's legitimization, the father's interest in that relationship and his rights in his child should not be taken from him without his consent.

On the other hand, it also seems that even if the natural mother has not given previous consent, acknowledgment through intermarriage, alone, should not make the father's consent indispensable. Nor should merely supporting the child be sufficient; for, to allow dependency to be the criterion would be to give a person supporting or generally maintaining the child more power than he should have, including the power to bar an adoption—an opportunity that should be afforded to legal parents only. The important point should be that the father take all the steps necessary to legally legitimatize the child; the establishment of a legal relationship should be the test, rather than mere dependency or intermarriage with the natural mother.

IV

Withdrawal of Consent

Legislatures and courts have assumed a variety of positions with regard to withdrawal of parental consent to an adoption in the United States. At one extreme is the rule that consent, once given, is thereafter absolutely irrevocable, absent fraud or duress. On the other hand, some

99 E.g., In re Adoption of Anderson, 189 Minn. 85, 248 N.W. 657 (1933); In re Adoption of Doe, 231 N.C. 1, 55 S.E.2d 8 (1949); Sklaroff v. Stevens, 84 R.I. 1, 120 A.2d 694 (1956); Harmon v. D'Adamo, 195 Va. 125, 77 S.E.2d 318 (1953).

100 See generally Comment, Revocation of Parental Consent to Adoption: Legal Doctrine and Social Policy, 28 U. Chi. L. Rev. 564 (1961). This excellent comment gives a comprehensive analysis of the case law, statutory provisions and social service attitudes on the problem of revocation of parental consent.

of the cases indicate that parental consent is absolutely revocable until the final decree of adoption is issued.\textsuperscript{102} Between these two extremes is to be found the position of the Model Adoption Act\textsuperscript{103} and that of many American jurisdictions\textsuperscript{104} which regards the question of withdrawal of consent as one for the discretion of the court.

It seems that the discretionary rule embodied in the Model Adoption

\textsuperscript{102} See, e.g., In re White, 300 Mich. 378, 1 N.W.2d 579 (1942); State ex rel. Platzer v. Beardsley, 149 Minn. 435, 183 N.W. 956 (1921); In re Adoption of Anderson, 189 Minn. 85, 248 N.W. 657 (1933). There is a great deal of difference among the jurisdictions as to when consent becomes absolutely irrevocable. In some, consent becomes irrevocable only after issuance of the final decree: In re Harville, 233 La. 2, 96 So. 2d 20 (1957); Green v. Paul, 212 La. 338, 31 So. 2d 819 (1947). Still other jurisdictions hold consent revocable until the adoption hearing: e.g., Stone Adoption Case, 398 Pa. 190, 156 A.2d 808 (1959). In Michigan, consent is irrevocable after the termination decree. Mich. Stat. Ann. § 27.3178(546) (Supp. 1959). The North Carolina statute provides that consent becomes irrevocable when the interlocutory decree is issued unless such consent was given to a director of public welfare or a licensed child placement agency, in which case it becomes irrevocable 30 days after it is given; and in any event consent becomes irrevocable six months after it is given. N.C. Gen. Stat. § 48-11 (Supp. 1961). Tennessee's very unusual statute provides in essence that consent is irrevocable after the final decree, but absolutely revocable for a period (30 to 90 days) after it was given if no adoption petition is filed in the interim; if such a petition is filed, consent is revocable in the discretion of the court. Tenn. Code Ann. § 36-117 (Supp. 1962).

\textsuperscript{103} MAA § 10 provides:
Withdrawal of any consent filed in connection with a petition for adoption hereunder shall not be permitted, except that the court after notice and opportunity to be heard is given to the petitioner in the adoption proceeding, to the person seeking to withdraw consent and to an authorized agency involved in this proceeding may, if it finds that the best interest of the child will be furthered thereby, issue a written order permitting the withdrawal of such consent. The entry of an order of adoption renders any consent irrevocable.

Act represents the modern trend. Only two states, Florida and Illinois, appear to cling to the rule that consent is absolutely irrevocable.106 And the reasoning with which the older cases buttressed the absolute-right-of-revocation rule—that parental consent being necessary to an adoption, withdrawal of such consent before the final decree had "vested" any right to the child in the adoptive parents deprived the court of jurisdiction to decree the adoption106—is no longer generally followed.107

In line with this trend the discretionary rule has been expressly adopted by statute in some jurisdictions. Thus, Minnesota, formerly a leading jurisdiction in applying the absolute-right-of-revocation rule,108 has come to the discretionary rule by statute.109 The Georgia statute similarly provides that parental consent, once given, "may not be revoked by the parents as a matter of right."110 A Maryland statute provides that the adoption petition may be granted without parental consent if such consent is withheld "contrary to the best interests of the child."111 A Delaware statute allows the natural parents sixty days after the giving of consent within which to seek the court's permission to revoke it.112 And the Uniform Adoption Act takes the position that consent should be revocable in the discretion of the court until the interlocutory decree is issued.113 In evaluating the merits of these various positions, one can

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106 See authorities cited note 101, supra. But some states have statutory provisions to the general effect that consent is irrevocable where the child has been given up for adoption to a licensed child placement agency, in accordance with prescribed procedures. E.g., Ohio Rev. Code § 3107.6 (Page 1954); Tex. Rev. Civ. Stat. Ann. art. 46a, § 6 (Supp. 1961); Wash. Rev. Code § 26.33.070(1) (Supp. 1958). Such provisions have generally been given effect by the courts. E.g., Kozak v. Lutheran Children's Aid Society, 164 Ohio St. 335, 130 N.E.2d 796 (1955); Catholic Charities v. Harper, 161 Tex. 21, 337 S.W.2d 111 (1960).

107 See, e.g., In re White, 300 Mich. 378, 1 N.W.2d 579 (1942); State ex rel. Platzer v. Beardsley, 149 Minn. 435, 183 N.W. 956 (1921).


109 E.g., In re Adoption of Anderson, 189 Minn. 85, 248 N.W. 657 (1933).


111 Md. Ann. Code art. 16, § 74 (1957). While the statute refers in terms only to those cases in which a parent "withholds" his consent, the Maryland Court of Appeals has ruled that it also applies where consent is given and then revoked. King v. Shandrowski, 218 Md. 38, 145 A.2d 281 (1958).


113 Uniform Adoption Act § 6. So far as the author has been able to discover, neither the courts nor the legislatures in Alabama, Alaska, Colorado, Idaho, Maine, Nebraska, North Dakota, Rhode Island, Vermont, Virginia and Wyoming have taken a definite position on this subject.
sympathize with the view of some social welfare agencies favoring the rule which denies revocation altogether, since a great deal of effort goes into the placement of a child, and the revocation of parental consent would disrupt the adoption plan. However, it would also seem that fairness to the natural parents demands a less rigid rule than absolute denial of any right of revocation. For, parents are the natural custodians of their children and they should be granted every reasonable opportunity to maintain what one court has called "the sacred relationship of parent and child."

Finally, it must be remembered that here as in other areas of adoption law there are three parties involved—the natural parents, the adoptive parents, and the child—all of whose rights and well-being must be considered. Of course natural parents should have an opportunity to maintain their relationship with their child; but to give them the absolute right to revoke consent at any time, or even within a limited time at their unrestricted election, would result in uncertainty with regard to the disposition of the case and the welfare of the child. With the threat of the natural parents' revocation hanging over the adoptive parents, placements would be difficult. Adoptive parents would tend to feel insecure with regard to the adoption, and this feeling might have a detrimental effect in their relationship with their adoptive child. Further, the adoptive child might suffer as well, as a change in environment after a child has become settled in his adoptive home might cause serious psychological problems. Finally, to give the natural parents an unfettered right of revocation, even for a limited time, could provide them with the power to choose between contesting sets of adoptive parents; this could conceivably provide an opportunity for them to extort money from the adoptive parents in return for a promise not to revoke consent.

The discretionary rule embodied in the Model Adoption Act has the advantage of avoiding these dangers posed by the rigidity of the extreme positions. It permits the court to weigh all of the factors in an adoption case, and to approve a revocation when the facts of the individual case warrant it. But like any rule which places great reliance upon judicial discretion, it has the drawback of furnishing no specific criterion to aid the court in reaching a decision. The Model Adoption Act attempts to

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114 Adoption of McKinzie, 275 S.W.2d 365, 372 (Mo. App. 1955). This case includes a brief summary of the law on revocation of consent in various jurisdictions.


solve the problem by employing the “best interests of the child” criterion. Some decisions in this area have announced such general criteria as the encouragement of adoption and avoidance of the stigma of illegitimacy. Probably the only satisfactory solution is to ensure that the judge, in exercising his discretion, has all the information bearing on the case which he needs to do justice to all of the parties concerned.

V

THE INTERLOCUTORY DECREE PRACTICE AND THE PROCEDURE UNDER THE MODEL ACTS

Any comparative analysis of the adoption laws of the various states and the Model Adoption Act would be incomplete without, at least, a brief discussion of the basic procedural difference between these statutory schemes. As might be expected, the most fundamental difference in this regard is that under the latter the procedure is a twofold one, being separated into the termination proceedings and the adoption proceedings, while under many statutes the proceeding is unified. Several statutes provide for the issuance of an interlocutory decree of adoption which generally culminates in the issuance of a final decree. Some leaders in the social service field have criticized the Model Adoption Act for its failure to utilize the interlocutory decree. To them, the interlocutory decree practice found in nineteen jurisdictions and embodied in the Uniform

117 MAA § 10.

118 See Comment, op. cit. supra note 100, at 571-72.

119 Some criticisms were voiced at the Welfare Conference Group of the Health and Welfare Council of the National Capital Area meeting in Washington, D.C., March 6, 1962. One of the leading spokesmen for this group is Mr. Richard B. Barker, of the Barker Foundation, Washington, D.C. The author acknowledges with gratitude the benefit gained from discussions and correspondence with Mr. Barker on the interlocutory decree problem.

Adoption Act has legal, social and psychological advantages over the procedures advanced by the Model Adoption Act.

Typically, under the adoption procedure of a jurisdiction such as the District of Columbia which employs the interlocutory decree practice, the following steps might occur:

1. A child is born February 1, 1962.
2. The child is removed from the hospital and placed in an agency foster home on February 5, 1962.
3. A relinquishment of parental rights is taken from the mother on February 21, 1962 and is filed with the court.
4. A petition for adoption requesting an interlocutory decree is filed with the court on February 22, 1962.
5. The social report of the agency is filed with the court on February 28, 1962.
6. An interlocutory decree of adoption is entered by the court on March 1, 1962. This interlocutory decree of adoption terminates the parental rights of the natural parents and decrees that from and after its entry the child shall be deemed to have been born of the adopters.
7. The child enters the adoptive home on March 1, 1962. During the interim period between February 21 and March 1 the adopting parents have been advised of the background history of the child, omitting natural names and places, and have had an opportunity to see the child and to be with him in the foster home.
8. The interlocutory decree, by its terms, becomes final on August 1, 1962.

While the outcome under the District of Columbia practice and under the Model Adoption Act with its companion Model Termination Act may be the same, the method of achieving this outcome differs. As mentioned previously the model acts provide a two-step procedure—a proceeding to terminate the rights of the natural parents in the child, followed by the adoption proceeding proper—rather than the one-step procedure outlined above. The adherents of the interlocutory decree


Uniform Adoption Act § 11 (six months).
practice say that this procedure saves the costs of two court proceedings and the delays necessarily incident to such proceedings.

The interlocutory decree procedure has even more important advantages to offer to the natural parents, the adoptive parents, and the child. The natural mother, for example, knows at or about the time her relinquishment of parental rights occurs that the court has passed on the legality of the relinquishment and upon the legality of the adoption petition and the effectiveness of the social report. She can be more at ease knowing her child will be adopted by parents found satisfactory through an agency investigation. The delay between the termination of parental rights and responsibilities and the final adoption decree which occurs under the model adoption acts is avoided, as is the uncertainty as to the status of the child during this period between the termination of parental rights and the conclusion of the adoption proceedings. While the Model Act's termination decree might bridge this temporal gap by vesting custody in the adoptive parents and guardianship in a social welfare agency, this would be something far less than an interlocutory decree having "the same legal effects as a final decree of adoption." 

Moreover, under the model acts the child, too, may be at a disadvantage during this interim between the termination of his parent's rights in him and issuance of the final decree of adoption. For, to utilize the previous illustration, a social welfare agency might be appointed legal guardian of the child while the future adoptive parents would have custody of him; and in situations where the legal relationship of parent-child is the criterion rather than dependency, the child might be deprived of important financial benefits during this period.

122 D.C. Code Ann. § 16-222(b) (1961). Thus, the District of Columbia treats the period during which the interlocutory decree is in effect as something more than a "getting acquainted" or "trial" period. Contra, In re Clements' Petition, 201 Tenn. 98, 103-04, 296 S.W.2d 875, 878 (1956), where the court said that the purpose of the interlocutory decree was to provide an opportunity "to see whether or not things will work out for the child—a kind of trial period, and preliminarily adjudicating everything essential to make the final adoption if the investigation and final proof is in accord." Id. at 103-04, 296 S.W.2d at 878.

123 Normally under intestacy laws a child not yet legally adopted would not share in the estate of his future adoptive parents. But some workmen's compensation statutes place emphasis on dependency rather than legal relationship in awarding benefits to children. See 99 C.J.S. Workmen's Compensation § 141(2)(b) (1958). However, in Varchmin v. District Ct., 133 Minn. 265, 158 N.W. 250 (1916), where the Minnesota Supreme Court was concerned with the application of the Minnesota Workmen's Compensation Act to a child adopted by a widow after her husband's death, the court remarked:

[T]he statute includes all children of the deceased, and other children who have legal
In reply, it might be argued with much force that the approach of the model acts, with its two proceedings, reduces the confusion that would arise if the issue of termination were litigated in the same proceeding as the adoption. As persuasive as this argument may be, it is suggested that the above-mentioned advantages inherent in the interlocutory decree practice would be well worth the consideration of the Children's Bureau. By utilization of the interlocutory decree practice, it is possible that the Bureau's carefully drafted and generally excellent suggested legislation could be materially improved.

CONCLUSION

In the preceding pages, emphasis has been laid on the fact that the adoption of a child is no longer a simple legal act, but rather a legal and social process. The development of the "social investigation" and "adoption study" requirements in the law of adoption, plus recognition of its social aspects, has brought into the adoption process persons educated in fields other than law—notably professional social workers, persons trained in interviewing techniques, understanding human behavior, and evaluating family relationships. But because adoption is both a legal and social process, involving the services of social workers and the resources of social agencies, as well as the skills of lawyers and judges, and because an adoption has a certain amount of human interest so far as the general public is concerned, the real effect of adoption is sometimes lost sight of. Professional roles are confused, and the identity of the decision maker may be forgotten. Yet it is still a judge in court who actually decides, not a social worker.

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1 Id. at 267, 158 N.W. at 251. For the criterion of dependency for receiving death benefits under the Social Security Act, see 74 Stat. 946, 952 (1960), 42 U.S.C. § 402(d)(3) (Supp. III, 1962), Gonzalez v. Hobby, 110 F. Supp. 893 (D.P.R. 1953). An Alabama health insurance contract was held to provide protection for children living with the adopting parents during the period of probation. Blue Cross-Blue Shield v. Kelley, 141 So. 2d 533 (Ala. 1962). A financial benefit available to the adopting parents during the time in which a child, placed by an agency for adoption, is living with the parents, is that they can claim the dependency deduction under the federal income tax laws. Int. Rev. Code of 1954, § 152(b).

2 For a comparison of the goals of the lawyer and the social worker, see Gallagher, Interprofessional Teamwork to Safeguard Adoptions, 6 Children 101 (1959); Katz, The Lawyer and the Caseworker: Some Observations, 42 Social Casework 10 (1961).

3 An interesting account of a disputed adoption originally sponsored by a state public
It is precisely because adoption remains a legal as well as a social process, because it is a judge, applying the laws passed by a legislature, who grants or denies the adoption, that it becomes necessary for legislators and judges to take into account social and sometimes psychological considerations in drafting their statutes and in reaching their decisions. It is this element which makes the Model Adoption Act enlightened legislation; for this Act recognizes the decision-making role of the judge, and yet attempts to ensure that in reaching his decision he will consider the social as well as the legal aspects of adoption, and that he will have all available information which will aid him in reaching a just disposition of the case.

A judge, employing the norms embodied in the Model Adoption Act, will recognize that there are three parties whose interests and feelings are involved in the adoption process, and that all must be treated fairly. He will realize that the natural parents must be cautioned, informed, counselled, and protected; he will realize that the adoptive parents must likewise be protected, that their reliances and expectations should be strongly considered. And, after considering the interests of these parties, when the judge is faced with the final decision in an adoption case, he will ponder again that ancient question, “Is it well with the child?”

welfare agency but later prevented because changed circumstances convinced officials that the home was not adequate can be found in Lindford, The Miller Adoption Case, 34 Social Serv. Rev. 421 (1960). In this article, Dean Lindford traces an adoption from the initial placement to the appeal of the adoption order to the state supreme court. The case, based on a real case, though the names of individuals and agencies were disguised in order to preserve confidentiality, illustrates decision-making on various levels in a social welfare department and shows the manner in which administrative agencies, law enforcement officers and the courts work together in the solution of an adoption problem.