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When One Parent Goes and the Other Parent Stays: The Inconsistency and Inequity of Guaranteeing Absent Parents Permanent Parental Rights

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When One Parent Goes and the Other Parent Stays: The Inconsistency and Inequality of Guaranteeing Absent Parents Permanent Parental Rights

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I. INTRODUCTION

It is well settled that the right to make decisions concerning the upbringing of one's children is a fundamental right deserving the utmost constitutional protection from unreasonable state interference.¹ It has also become increasingly well settled over the past twenty-five years that this right is not automatically and permanently guaranteed by biology. Rather, parental stature encompasses both "rights and responsibilities," and the rights are only guaranteed to a parent who has assumed parental responsibilities.² Why then is a responsible custodial parent subject to state interference with his or her parental decisions in the interest of guaranteeing an absent parent, who has abandoned his or her child financially, physically, and emotionally, permanent parental rights?

Consider David.³ David is a divorced single father of an eight-year-old boy. Shortly after David and his wife divorced, his ex-wife left their son Joel in David's custody and moved out of state. Joel was barely one year old at the time. Despite court orders and David's efforts, Joel's mother has failed to pay child support and has made no

1. In fact, it appears that this interest was the first unlisted individual right to be recognized by the United States Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923) as the first case in which parental rights were recognized as a fundamental liberty protected by the constitution); see also Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 655 (2002) ("Among the contemporary claims for protected liberty interests, none has received more widespread and consistent endorsement than a parent's 'fundamental right' to control the upbringing of her children.").

2. *Caban v. Mohammed*, 441 U.S. 380, 393-94 (1979) (affording a biological father constitutional protection of his parental rights where he has taken responsibility for his children); *Quilloin v. Wallcott*, 434 U.S. 246, 256 (1978) (holding that a biological father has no constitutionally protected rights where he has not assumed any responsibility for the child).

3. David's story is based on a real life story. However, the names have been changed to protect the privacy of those involved.

attempts to visit or communicate with Joel for over six years. At various periods in Joel's life, David has not even possessed a means to contact Joel's mother. While battling the natural obstacles that accompany being a single parent, David is under a court order to notify Joel's mother and the court of any changes in his residence, changes in Joel's school, or substantial medical events in Joel's life.⁴ On two occasions, David has had to petition the court for permission to relocate out of state.⁵

Now David waits, knowing that the day may come when Joel's mother decides that she wants to reassert her rights to visitation.⁶ This idea scares David as a parent, not because he selfishly wants to keep Joel away from his mother, but because he knows that neither he nor Joel would have any control over the terms of reestablished contact, nor would they be able to prevent Joel's mother from subsequently ceasing contact and disappearing once again.⁷ If this were to occur, David would be left to explain and comfort and counteract the emotional damage once again. David also lives with uncertainty because he knows that he cannot designate a permanent guardian to raise Joel in the event of his death. Regardless of any

4. These provisions were included in David's original decree of dissolution of marriage, pursuant to the family court's broad discretion under COLO. REV. STAT. ANN. § 14-10-124 (West 2002).

5. This requirement was also included in the original dissolution decree. Each of the jurisdictions to which David has been subject has similar requirements for a custodial parent to seek court authorization before relocating to another state and places the burden on the custodial parent to show that the move is in the child's best interest. See COLO. REV. STAT. ANN. § 14-10-129 (1)(a)(I); VA. CODE ANN. § 20-124.5 (Michie 2000); Rice v. Rice, 517 S.E.2d 220, 222 (S.C. Ct. App. 1999) (noting that the presumption against allowing custodial parent to remove child from state); Goodhand v. Kildoo, 560 S.E.2d 463, 466 (Va. Ct. App. 2002) (noting that the custodial parent must show that out-of-state move independently benefits the child).

6. All of the jurisdictions to which David has been subject also have strong presumptions that regular and continuous visitation with a natural parent is in the child's best interests. See COLO. REV. STAT. ANN. § 14-10-124(1) (declaring that it is in the best interests of the child to encourage frequent and continuing contacts with both parents); § 14-10-129(1)(b) (requiring a showing of endangerment for restriction of a natural parent's presumed visitation rights); *In re Marriage of Plummer*, 709 P.2d 1388, 1390 (Colo. Ct. App. 1985) (holding that a trial court's discretion in determining parent-child visitation "must be exercised in consonance with the public policy 'to encourage frequent and continuing contact between each parent and the minor child'"); *Venable v. Venable*, 254 S.E.2d 309, 310 (S.C. 1979) (holding that the court's power to absolutely deny visitation should be used sparingly and only in the extreme case); *Kogon v. Ulerick*, 405 S.E.2d 441, 442 (Va. Ct. App. 1991) ("Except under unusual circumstances, a child's best interests are served by maintaining close ties between him and his noncustodial parent.").

7. See *infra* Part III.B.1 for a discussion of a noncustodial parent's ongoing right to visitation, regardless of prolonged absence, and a custodial parent's limited right to object or restrict such visitation; see *infra* note 122 and accompanying text for the proposition that neither the child nor the custodial parent have any right to prevent the noncustodial parent from ceasing contact or disappearing from the child's life.

testamentary provisions in David's will, the court system would likely award custody of Joel to Joel's mother upon David's death.⁸

So, why is it that, despite her complete disregard for court orders and her natural duties as a parent, Joel's mother retains permanent parental rights? Why is the burden left on David, the responsible parent, to continue to comply with court orders, costing him precious time and money? Why does David remain legally obligated to provide information to a woman who does not keep the father and caretaker of her child informed of her whereabouts? Why isn't David considered the best person to decide who should have contact with his son and who would best raise his son in his absence? These are all good questions, for which, unfortunately, the law provides no answers.

State statutes generally provide three ways in which a biological parent's rights can be terminated against his or her will: state-initiated dependency and neglect actions, general adoptions, and stepparent adoptions.⁹ State-initiated actions are based on a state's interest in protecting children from dangerous home situations.¹⁰ While all states allow such actions after parental abandonment for as little as three months,¹¹ such relief is unavailable where the child has been abandoned by only one parent and is in the suitable care of the other natural parent because the state has no immediate interest.¹² General adoptions are also allowed to proceed over the objections of one or both parents where a child has been abandoned for as little as

8. Colorado has recently replaced the presumption of reverting custody to the surviving natural parent to a general best interest of the child standard. See *In re Custody of C.C.R.S.*, 892 P.2d 246, 254-55 (Colo. 1995) (overruling the presumption in favor of the natural parent). However, the other two states that are most likely to exercise jurisdiction in the event of David's death still employ a presumption in favor of the surviving parent. See, e.g., *Dodge v. Dodge*, 505 S.E.2d 344, 348 (S.C. Ct. App. 1998) (acknowledging the rebuttable presumption that custody automatically reverts to the surviving parent when the custodial parent dies); *Bailes v. Sours*, 340 S.E.2d 824, 827 (Va. 1986) (acknowledging the strong presumption in favor of reverting custody to the surviving natural parent).

9. See *infra* notes 40, 49, 60 and accompanying text.

10. See, e.g., Jeffrey J. Haugaard & Rosemary J. Avery, *Termination of Parental Rights to Free Children for Adoption*, in *CHILDREN, SOCIAL SCIENCE, AND THE LAW* 131, 132-33 (Bette L. Bottoms et al. eds., 2002).

11. See *infra* notes 40, 45-47 and accompanying text.

12. Because termination proceedings require the expenditure of limited state resources, states are only compelled to bring termination suits when the child is in immediate need of a safe and stable home; states have no immediate interest in terminating an absent parent's rights where the child is currently in the safe and suitable care of the present parent. See, e.g., *In re Adoption of Kohorst*, 600 N.E.2d 843, 848 (Ohio Ct. App. 1992) (refusing to intervene where the child is not "abused, neglected, or dependent" and the custodial parent "presently provides a loving and comfortable home for her"); Haugaard & Avery, *supra* note 10, at 137-39.

three months.¹³ Although the plain language of many statutes allows a biological parent to adopt his or her own child, states have disallowed such adoptions when a legal parent-child relationship already exists.¹⁴ Stepparent adoption statutes also allow adoptions over a noncustodial parent's objections after three or more months of abandonment.¹⁵ By definition, however, such adoptions require a new spouse.

None of these means for termination of parental rights is applicable to David's situation. This is not because David is any less suitable than the individuals who would assume care of a child at the conclusion of one of these proceedings,¹⁶ nor is it because the extent and length of parental abandonment is any less than that required in any of these proceedings.¹⁷ David's situation simply does not fit into the statutory categories.

The purpose of this Note is to identify the inconsistency and inequality present in existing parental rights laws, which prevent a natural parent from terminating the other natural parent's rights after prolonged abandonment. The situation addressed by this Note is not the typical custody situation in which parents compete for superior rights, nor is it the situation in which one parent, angered by the other parent's failure to pay child support or failure to show up on time for visitation, vindictively seeks to cut off the other parent's rights. The situation contemplated is the extreme, but not uncommon,

13. See *infra* notes 56-57 and accompanying text.

14. See *infra* note 81-83.

15. See *infra* notes 56, 60, 61 and accompanying text.

16. David, a young, loving, responsible, and financially sound parent, would certainly meet the common requirements set forth for adoptive parents. See, e.g., GA. CODE ANN. § 19-8-3(a) (1999) ("Any adult person . . . financially, physically, and mentally able to have permanent custody of the child"); KY. REV. STAT. ANN. § 199.520(1) (Michie 1998) ("[T]he petitioners are of good moral character, of reputable standing in the community and of ability to properly maintain and educate the child"); OR. REV. STAT. § 109.350 (2001) ("[T]he petitioner is of sufficient ability to bring up the child and furnish suitable nurture and education"); R.I. GEN. LAWS § 15-7-14 (2000) (same language as Oregon statute); TENN. CODE ANN. § 36-1-120(a)(10)-(11) (2001) ("That the petitioners are fit persons to have the care and custody of the child . . . [and] are financially able to provide for the child"); W. VA. CODE ANN. § 48-22-701(a)(3) (Michie 2001) ("That the petitioner is, or the petitioners are, fit persons to adopt the child"). For critiques of other child placements following terminations, see, for example, *Santosky v. Kramer*, 455 U.S. 745, 789-90 n.15 (1982) (Rehnquist, J., dissenting); MARK HARDIN & ROBERT LANCOUR, EARLY TERMINATION OF PARENTAL RIGHTS: DEVELOPING APPROPRIATE STATUTORY GROUNDS 22 (1996); THEODORE J. STEIN, CHILD WELFARE AND THE LAW 97-98 (rev. ed. 1998); Haugaard & Avery, *supra* note 10, at 134; and Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397, 413-14 (1996).

17. Termination and adoption statutes commonly allow for termination of parental rights after six months of a parent's failure to support, visit, or communicate with the child. See *infra* notes 47, 57. In David's case, the abandonment has involved failure to support, visit, and communicate and has lasted for more than six years.

case in which an absent parent has voluntarily removed himself or herself from the child's life, failing to support, visit, talk to, send cards to, check up on, keep apprised of the location of, or in any other way attempt to maintain a relationship with his or her child.¹⁸ One parent goes, and the other parent stays. This Note uses the term "absent parent" to refer to a parent who is, in every way, absent from the child's life. The term "present parent" is used to refer to the parent who stays, taking on every responsibility of raising the child, yet retaining only the title and legal rights of "custodian."¹⁹

To understand the legal status currently afforded to both absent and present parents, it is necessary to explore the current laws concerning parental rights, termination of parental rights, and child custody. Part II of this Note sets forth the legal nature of parental rights, the constitutional protection afforded to them, and the circumstances under which they can be lost. Part III identifies and analyzes the current lack of legal means by which a present parent can terminate the parental rights of an absent parent. This Part also identifies the limitations on the legal status of "custodian" and

18. For general discussion regarding the frequency with which noncustodial parents become absent from their children's lives, see, for example, SHOSHANA ALEXANDER, IN PRAISE OF SINGLE PARENTS 286 (1994) ("An astounding percentage of noncustodial parents take little or no emotional or financial responsibility for their children."); NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES 62 (1997) (noting that many fathers without custody rights abandon their relationship with their children within two years of the divorce); GEOFFREY L. GREIF, OUT OF TOUCH: WHEN PARENTS AND CHILDREN LOSE CONTACT AFTER DIVORCE 6 (1997) (citing 1996 Census Bureau statistics indicating that forty-seven percent of noncustodial fathers and thirty percent of noncustodial mothers do not visit their children); MICHAEL WHEELER, DIVIDED CHILDREN 57 (1980) (citing research (current in 1980) that revealed, of noncustodial fathers, ten percent had no visitation with their children, and another twenty percent had only erratic visitation); Frank F. Furstenberg, Jr., & Kathleen Mullan Harris, *The Disappearing American Father?: Divorce and the Waning Significance of Biological Parenthood*, in THE CHANGING AMERICAN FAMILY 197, 198 (Scott J. South & Stewart E. Tolnay eds., 1992) ("A number of recent studies seem to indicate that a substantial and growing fraction of nonresidential fathers spend little time with their biological offspring or offer them much in the way of material or emotional assistance."); and Christine Winquist Nord & Nicholas Zill, *Non-Custodial Parents' Participation in Their Children's Lives: Evidence from the Survey of Income and Program Participation* (Aug. 14, 1996), available at <http://fatherhood.hhs.gov/SIPP/NONCUSP1.HTM> (citing 1990 SIPP research that showed 31.7 of noncustodial fathers have not spent time with their children in the past 12 months). For cases involving true absent parents, see, for example, *In re Monahan*, 281 A.2d 620, 620 (Del. Super. Ct. 1971); and *Panter v. Ash*, 33 P.3d 1028, 1029-30 (Or. Ct. App. 2001).

While much of this research focuses on noncustodial, absent fathers, this Note endorses a gender-neutral approach to the present parent/absent parent dichotomy. It may be more common for present parents to be mothers, but there are a significant number of present fathers, who, like David, have the same concerns, problems, and needs as present mothers. The gender of the parents is completely irrelevant to the concerns addressed by this Note, and any gender bias contained in the sources relied upon is not endorsed by the author.

19. See *infra* Part III.B.

identifies some of the illogical and inconsistent outcomes that result from the current system. Part IV proposes that the law afford present parents an avenue by which they can terminate an absent parent's parental rights in the case of prolonged abandonment. This Part addresses many of the arguments for and against allowing such an action and discusses specific elements that would be appropriate.

II. PARENTAL RIGHTS AS A COUNTERPART TO PARENTAL RESPONSIBILITIES

A. *Constitutional Protection of Parental Rights*

1. Parental Rights as a Fundamental Liberty Protected by the Constitution

As early as 1923, the United States Supreme Court held that a parent's right to direct the upbringing of one's children is a fundamental liberty protected by the Constitution.²⁰ Specifically, "the custody, care, and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."²¹ "[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."²² If the state does interfere with this right, it must have a compelling reason to do so, and it must afford parents adequate due process protection.²³

Over the years, the Court has interpreted parental rights broadly to encompass all of the daily decisions involved in the upbringing of one's children.²⁴ Parents have the right to determine

20. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); see *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citing *Meyer*, 262 U.S. at 399); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); see also *Lehr v. Robertson*, 463 U.S. 248, 260 (1983); *Caban v. Mohammed*, 441 U.S. 380, 414 (1979); Wanda Ellen Wakefield, Annotation, *Validity of State Statute Providing for Termination of Parental Rights*, 22 A.L.R. 4th 774, § 2(a) (1983).

21. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

22. *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000) (citing *Reno v. Flores*, 507 U.S. 292, 304 (1993)).

23. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *Quilloin v. Wallcott*, 434 U.S. 246, 255 (1978).

24. See, e.g., *Santosky*, 455 U.S. at 753; *Quilloin*, 434 U.S. at 255.

aspects of their children's lives such as education,²⁵ religion,²⁶ and medical treatment.²⁷ Even with respect to adolescent children, parents retain the right to be involved in and to counsel their children in important life decisions.²⁸ Underlying these rights and decisional freedoms is the presumption that parents are in the best position to know what is in the best interests of their children.²⁹

Most recently, the Supreme Court held that parental rights include the right to decide who may have contact or visitation with one's children.³⁰ In *Troxel v. Granville*, the Court reversed a visitation order that granted paternal grandparents visitation with their two grandchildren over the mother's objection.³¹ Although the children had an ongoing, consistent relationship with their grandparents, the Court found that the natural mother's parental rights had been infringed upon when the lower court failed to afford her the "presumption that fit parents act in the best interests of their children."³² The Court emphasized that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."³³ Although *Troxel* was the first decision to directly address court-ordered visitation as an undue state interference, the decision flows quite logically from what was held nearly eight decades before: parental rights deserve the utmost Fourteenth Amendment protection from state interference.³⁴

2. Losing Constitutional Protection

Constitutional protection of parental rights, however, is not automatically guaranteed by biology. In recent years, the Supreme Court has recognized that "the rights of the parents are a counterpart of the responsibilities they have assumed."³⁵ Accordingly, the Court

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

26. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

27. *Parham v. J.R.*, 442 U.S. 548, 604 (1979).

28. *H.L. v. Matheson*, 450 U.S. 398, 410 (1981).

29. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 68-69 (2000); *Parham*, 442 U.S. at 604.

30. *Troxel*, 530 U.S. at 57.

31. The Supreme Court affirmed the Washington appellate court's reversal of the Washington Superior Court's order granting visitation to the grandparents. *Id.* at 61-63.

32. *Id.* at 60-61, 68-70.

33. *Id.* at 72-73.

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

35. *Lehr v. Robertson*, 463 U.S. 248, 257 (1983); *see also Caban v. Mohammed*, 441 U.S. 380, 397 (1979) ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.").

has declined to extend Fourteenth Amendment protections to natural parents who have not assumed adequate parental responsibilities.³⁶ Where natural parents have failed to financially support their children, regularly communicate with their children, or establish substantial relationships with their children, the Court has refused to extend heightened substantive due process, procedural due process, or equal treatment protection.³⁷ Thus, while present parents, who have assumed a natural parental role and natural parental responsibility, are entitled to the utmost constitutional protection of their parental rights, absent parents, who have failed to assume a natural parental role or natural parental responsibility, are not entitled to the same constitutional protection of their parental rights.

B. Legal Means To Terminate Parental Rights

Paralleling the Supreme Court's recognition that parental rights are a counterpart to the responsibilities a parent assumes, every state permits a court to permanently terminate a biological parent's rights where the parent has failed to assume adequate parental responsibilities.³⁸ Specifically, every state allows for parental rights to be terminated through state-initiated dependency and neglect proceedings, through general adoptions, or through stepparent adoptions.³⁹

1. Termination by the State

Every state's statutory scheme for state termination of parental rights includes a provision for involuntary termination upon a parent's failure to assume adequate parental responsibility.⁴⁰ Some

36. See, e.g., *Lehr*, 463 U.S. at 261-63; *Quilloin v. Wallcott*, 434 U.S. 246, 255-56 (1978).

37. See, e.g., *Lehr*, 463 U.S. at 262, 267-68; *Quilloin*, 434 U.S. at 255-56.

38. See *infra* Part III.B.1-3.

39. See *infra* notes 40, 49, 60.

40. See ALA. CODE § 26-18-5, -7 (1992); ALASKA STAT. § 47.10.011, .013, .088 (Michie 2000); ARIZ. REV. STAT. ANN. § 8-531(a), -533(a) (West 1999 & Supp. 2002); ARK. CODE ANN. § 9-27-303(2), -341(b)(3) (Michie 2002); CAL. FAM. CODE §§ 7802, 7822, 7840 (West 1994); COLO. REV. STAT. § 19-3-604 (2002); CONN. GEN. STAT. ANN. §§ 45a-715, -717 (West 1993); DEL. CODE ANN. tit. 13, §§ 1103, 1104 (1999); FLA. STAT. ANN. §§ 39.806, .811 (West 2003); GA. CODE ANN. § 15-11-94 (2001); HAW. REV. STAT. ANN. § 571-61 (Michie 1999); IDAHO CODE § 16-2005 (Michie 2001); 705 ILL. COMP. STAT. ANN. 405/2-21 (West 1999); IND. CODE ANN. § 31-35-2-4 (Michie 1997); IOWA CODE ANN. § 232.116 (West 2000); KAN. STAT. ANN. § 38-1583 (2000); KY. REV. STAT. ANN. §§ 625.090, .100 (Michie 1999); LA. CHILDREN'S CODE ANN. arts. 1004, 1015, 1037 (West 1995); ME. REV. STAT. ANN. tit. 22, §§ 4052, 4055 (West 1992); MD. CODE ANN., CTS. & JUD. PROC. §§ 3-803, -809 (2002); MASS. GEN. LAWS ANN. ch. 119, §§ 24, 29 (West 2003); MICH. COMP. LAWS ANN. § 712A.19b (West 2002); MINN. STAT. ANN. § 260C.301 (West 2003); MISS. CODE ANN. §§ 93-15-103, -109 (1994); MO. ANN. STAT. § 211.447 (West Supp. 2003); MONT. CODE ANN. §§ 41-

states refer to such conduct as “abandonment,”⁴¹ some refer to it as “desertion,”⁴² and some merely describe the behavior without assigning a particular label.⁴³ Whatever the label given, however, a parent’s failure to maintain a relationship with, communicate with, visit, or support one’s child for a given period of time is uniformly regarded as grounds for termination of parental rights.⁴⁴ Some states allow for termination after as little as three months of such parental conduct,⁴⁵ while others require up to one year.⁴⁶ Most often, states allow for state-initiated termination of parental rights after six months of a parent’s failure to communicate with, visit, or support his or her child.⁴⁷ Further, in calculating the length of time a parent has abandoned his or her child, most statutes allow courts to disregard “incidental” or “token” efforts made by a parent.⁴⁸ Thus, if a parent

3-423, -609 (2001); NEB. REV. STAT. § 43-292 (1998); NEV. REV. STAT. ANN. 128.105, .110, .012 (Michie 1998 & Supp. 2001); N.H. REV. STAT. ANN. §§ 170-C:1, :4-:5, :12 (2001); N.J. STAT. ANN. §§ 9:2-18, -19 (West 2002); N.M. STAT. ANN. §§ 32A-4-28, -29 (Michie 1995 & Supp. 2003); N.Y. JUD. CT. ACTS LAW § 614 (McKinney 1999); N.Y. SOC. SERV. LAW § 384-b(4)(b), (5) (McKinney 2003); N.C. GEN. STAT. §§ 7B-1103, -1111 (2001); N.D. CENT. CODE §§ 27-20-02(1), -20, -20.1, -44 (1991); OHIO REV. CODE ANN. §§ 2151.27, .353 (West 1994); OKLA. STAT. ANN. tit. 10, §§ 7003-4.7, 7006-1.1 (West 1998 & Supp. 2003); OR. REV. STAT. §§ 419B-500, -506 (2001); 23 PA. CONS. STAT. ANN. §§ 2511, 2512 (West 2001); R.I. GEN. LAWS § 15-7-7 (2000); S.C. CODE ANN. §§ 20-7-768, -1572 (Law. Co-op. 1985); S.D. CODIFIED LAWS §§ 26-8A-21.2, -26, -27 (Michie 1999); TENN. CODE ANN. §§ 36-1-102, -113, 37-1-147 (2001); TEX. FAM. CODE ANN. §§ 161.001, .003 (Vernon 2002); UTAH CODE ANN. §§ 78-3a-312, -402, -404, -408 (2002); VT. STAT. ANN. tit. 15A, §§ 3-501, -504 (2002); VA. CODE ANN. § 16.1-283 (Michie 1999); WASH. REV. CODE ANN. §§ 13.34.132, .180 (West 1993 & Supp. 2003); W. VA. CODE ANN. §§ 48-22-306, 49-3-1, 49-6-5b (Michie 2001); WIS. STAT. ANN. §§ 48.415, .417, .427 (West 2003); WYO. STAT. ANN. §§ 14-2-309, -310 (Michie 2003).

41. See, e.g., ALASKA STAT. § 47.10.013; ARIZ. REV. STAT. ANN. § 8-531(1); ARK. CODE ANN. § 9-27-303(2); CONN. GEN. STAT. ANN. § 45a-717; IDAHO CODE § 16-2005; IOWA CODE ANN. § 600A.8 (West 2001); LA. CHILDREN’S CODE ANN. art. 1015(4); N.H. REV. STAT. ANN. § 170-C:5; OKLA. STAT. ANN. tit. 10, § 7006-1.1; TENN. CODE ANN. § 36-1-102; UTAH CODE ANN. § 78-3a-408; WIS. STAT. ANN. § 48.415(1).

42. See, e.g., MICH. COMP. LAWS ANN. § 712A.19b(3)(a); R.I. GEN. LAWS § 15-7-7(a)(1)(4).

43. See, e.g., HAW. REV. STAT. ANN. § 571-61(b)(1)(C)-(D); KAN. STAT. ANN. § 38-1583; MONT. CODE ANN. § 41-423(3)(a)-(c); N.J. STAT. ANN. § 9:2-19; 23 PA. CONS. STAT. ANN. § 2511(a)(1); S.C. CODE ANN. § 20-7-1572; TEX. FAM. CODE ANN. § 161.001; VT. STAT. ANN. tit. 15A, § 3-504.

44. See *supra* note 40.

45. See, e.g., MICH. COMP. LAWS ANN. § 712A.19b(3)(a)(ii); WIS. STAT. ANN. § 48.415(1)(a)(2).

46. See, e.g., ARK. CODE ANN. § 9-27-341(b)(3)(B)(ii); CAL. FAM. CODE § 7822(a) (West 1994); GA. CODE ANN. § 15-11-94(b)(4)(C) (2001); HAW. REV. STAT. ANN. § 571-61(b)(1)(C)-(D); IDAHO CODE § 16-2005(a).

47. See, e.g., ALASKA STAT. § 47.10.013 (Michie 2000); ARIZ. REV. STAT. ANN. § 8-531(1) (West 1999); DEL. CODE ANN. tit. 13, § 1103(a)(2)(a)(2) (1999); LA. CHILDREN’S CODE ANN. art. 1015(4) (West 1995); MINN. STAT. ANN. § 260C.301(2)(a)(1) (West 2003); MO. ANN. STAT. § 211.447(4)(1) (West Supp. 2003); NEB. REV. STAT. § 43-292 (1998); N.H. REV. STAT. ANN. § 170-C:5 (2001); OKLA. STAT. ANN. tit. 10, § 7006-1.1(A)(2)(c) (West Supp. 2003); 23 PA. CONS. STAT. ANN. § 2511; S.C. CODE ANN. § 20-7-1572 (Law. Co-op. 1985 & Supp. 2002); S.D. CODIFIED LAWS § 26-8A-27 (Michie 1999); WASH. REV. CODE ANN. § 13.34.180 (West 1993).

48. See, e.g., NEV. REV. STAT. ANN. 128.105 (Michie Supp. 2001); N.H. REV. STAT. ANN. § 170-C:5; OR. REV. STAT. § 419B.506 (2001); R.I. GEN. LAWS § 15-7-7(a)(1) (2000); S.C. CODE ANN.

has consistently failed to support, visit, or communicate with his or her child, notwithstanding token efforts, the state can completely and permanently terminate his or her parental rights.

2. Termination by Adoption

A second way in which every state allows for involuntary termination of parental rights is by allowing adoption of the child over a parent's objection where the parent has failed to assume adequate parental responsibility.⁴⁹ All adoptions, whether the adopting parent is a foster parent, a private party, or a relative, have the effect of completely and permanently terminating the biological parents' rights.⁵⁰ While adoptions generally require the consent of both biological parents, every state allows an adoption to proceed over a biological parent's objection where that parent has failed to fulfill his or her parental responsibilities.⁵¹ Some states achieve this effect by authorizing adoptive parents to initiate termination of parental rights

§ 20-7-1572; UTAH CODE ANN. § 78-3a-407(1)(f) (2002); WYO. STAT. ANN. § 14-2-309 (Michie 2003).

49. See ALA. CODE § 26-10A-9 (Supp. 2002); ALASKA STAT. § 25.23.050 (Michie 2000); ARIZ. REV. STAT. ANN. §§ 8-106, -531, -533; ARK. CODE ANN. §§ 9-9-202, -207; CAL. FAM. CODE § 8604; COLO. REV. STAT. § 19-5-105 (2002); CONN. GEN. STAT. ANN. §§ 45a-717, -724 (West 1993); DEL. CODE ANN. tit. 13, §§ 908, 932, 1103; FLA. STAT. ANN. §§ 63.062, .064, .089, .102 (West 1997); GA. CODE ANN. § 19-8-10 (1999); HAW. REV. STAT. ANN. § 578-2; IDAHO CODE § 16-1504 (Michie 2001 & Supp. 2003); 750 ILL. COMP. STAT. ANN. 50/8 (West 1999); IND. CODE ANN. § 31-19-9-8 (Michie 1997); IOWA CODE ANN. §§ 600.3, 600A.5, 600A.8 (West 2001); KAN. STAT. ANN. § 59-2136 (1994); KY. REV. STAT. ANN. § 199.502 (Michie 1998); LA. CHILDREN'S CODE ANN. arts. 1015, 1193; ME. REV. STAT. ANN. tit. 18-A, § 9-204 (West 1998); MD. CODE ANN., FAM. LAW § 5-312 (Supp. 2003); MASS. GEN. LAWS ANN. ch. 210, § 3 (West Supp. 2003); MICH. COMP. LAWS ANN. §§ 710.41, .45, .51 (West 2002); MINN. STAT. ANN. § 259.24; MISS. CODE ANN. § 93-17-7 (Supp. 2003); MO. ANN. STAT. § 453.040 (West 2003); MONT. CODE ANN. §§ 42-2-607 to -610 (2001); NEB. REV. STAT. § 43-104; NEV. REV. STAT. ANN. 127.090, 128.105 (Michie 1998); N.H. REV. STAT. ANN. §§ 170-B:6, -C:5; N.J. STAT. ANN. § 9:3-46 (West 2002); N.M. STAT. ANN. § 32A-5-15, -18 (Michie 1995); N.Y. DOM. REL. LAW § 111 (McKinney 1999); N.C. GEN. STAT. §§ 7B-1103(a)(7), 7B-1111, 48-3-603 (2001); N.D. CENT. CODE §§ 14-15-06, -19 (1997); OHIO REV. CODE ANN. § 3107.07 (West 2000); OKLA. STAT. ANN. tit. 10, §§ 7503-2.1, 7505-2.1, -4.2 (West 1998); OR. REV. STAT. §§ 109.314, .324 (2001); 23 PA. CONS. STAT. ANN. §§ 2511, 2714; R.I. GEN. LAWS §§ 15-7-5, -7; S.C. CODE ANN. §§ 20-7-1572, -1695; S.D. CODIFIED LAWS § 25-6-4 (Michie 1999); TENN. CODE ANN. §§ 36-1-102, -113, -117 (2001); TEX. FAM. CODE ANN. §§ 162.001, .010 (Vernon 2002); UTAH CODE ANN. §§ 78-3a-312, -408, 78-30-4.16; VT. STAT. ANN. tit. 15A, §§ 2-402, 3-504 (2002); VA. CODE ANN. § 63.2-1203 (Michie 2002); WASH. REV. CODE ANN. §§ 26.33.100, .120, .130 (West 1997); W. VA. CODE ANN. §§ 48-22-301, -306, -501 (Michie 2001); WIS. STAT. ANN. §§ 48.81, .415 (West 2003); WYO. STAT. ANN. § 1-22-110.

50. See, e.g., FLA. STAT. ANN. § 63.172; MD. CODE ANN., FAM. LAW § 5-308 (1999); MINN. STAT. ANN. § 259.59(1); N.D. CENT. CODE § 14-15-14; OHIO REV. CODE ANN. § 3107.15; S.D. CODIFIED LAWS § 25-6-17; VA. CODE ANN. § 63.2-1215.

51. See *supra* note 49.

actions,⁵² while others waive the requirement that an absent parent provide consent.⁵³ Whatever the means, however, a parent who fails to support or maintain a substantial relationship with his or her child generally cannot object to an adoption.

In most states, the circumstances under which a biological parent loses his or her right to prevent an adoption parallel the circumstances under which the state is authorized to terminate parental rights. Like state-initiated actions, statutes vary in language from "abandonment" or "desertion" to general language describing the specific conduct required.⁵⁴ And like state-initiated actions, no matter what label is used, a parent's failure to support, communicate with, or visit his or her child for an extended period of time is uniformly regarded as grounds for denying that parent the right to prevent an adoption.⁵⁵ The period of abandonment required varies from three months to one year,⁵⁶ and, like state-initiated actions, the average required period is six months.⁵⁷ Further, as with state-initiated actions, many adoption statutes allow courts to disregard "incidental" or "token" efforts made by the absent parent.⁵⁸ Thus, if a parent has failed for an extended period of time to support, visit, or communicate with his or her child, notwithstanding token efforts, another party can

52. See, e.g., ME. REV. STAT. ANN. tit. 18-A, § 9-204; MONT. CODE ANN. § 42-2-603; N.M. STAT. ANN. § 32A-5-16; 23 PA. CONS. STAT. ANN. § 2512; WASH. REV. CODE ANN. § 26.33.100.

53. See, e.g., ARK. CODE ANN. § 9-9-202; CAL. FAM. CODE § 8604; COLO. REV. STAT. § 19-5-202; GA. CODE ANN. § 19-8-10 (1999 & Supp. 2002); HAW. REV. STAT. ANN. § 578-2; IND. CODE ANN. § 31-19-9-8; KY. REV. STAT. ANN. § 199.502; MD. CODE ANN., FAM. LAW § 5-312; MASS. GEN. LAWS ANN. ch. 210, § 3; MINN. STAT. ANN. § 259.24; MISS. CODE ANN. § 93-17-7(2)(b); N.J. STAT. ANN. § 9:3-46; N.Y. DOM. REL. LAW § 111; OHIO REV. CODE ANN. § 3107.07; OR. REV. STAT. §§ 109.314, .324.

54. See, e.g., ALASKA STAT. § 25.23.050 ("abandonment" and general description of conduct); ARK. CODE ANN. § 9-9-207(7) (Michie 2002 & Supp. 2003) ("abandonment"); CAL. FAM. CODE § 8604 (general description of conduct); HAW. REV. STAT. ANN. § 578-2 (general description of conduct); IDAHO CODE § 16-1504 (general description of conduct); N.J. STAT. ANN. § 9:3-46 (general description of conduct); N.Y. DOM. REL. LAW § 111 (general description of conduct); OR. REV. STAT. § 109.324 ("desertion"); W. VA. CODE ANN. § 48-22-301 ("abandonment"); WYO. STAT. ANN. § 1-22-110 ("abandonment" and "desertion").

55. See *supra* note 49.

56. See, e.g., ARK. CODE ANN. § 9-9-207(2) (1 year); CAL. FAM. CODE § 8604 (1 year); IND. CODE ANN. § 31-19-9-8 (abandon for six months; failure to communicate for 1 year); KY. REV. STAT. ANN. § 199.502 (3 months); OKLA. STAT. ANN. tit. 10, § 7505-4.2 (West Supp. 2003) (1 year).

57. See, e.g., ALA. CODE § 26-10A-9 (Supp. 2002); ALASKA STAT. § 25.23.050; MD. CODE ANN., FAM. LAW § 5-312; MO. ANN. STAT. § 453.040(7) (West 2003); NEB. REV. STAT. § 43-104 (1998); N.J. STAT. ANN. § 9:3-46; N.M. STAT. ANN. § 32A-5-18 (Michie 1995); N.Y. DOM. REL. LAW § 111; 23 PA. CONS. STAT. ANN. § 2511; S.D. CODIFIED LAWS § 25-6-4 (Michie 1999).

58. See, e.g., KAN. STAT. ANN. § 59-2136(d) (1994); NEV. REV. STAT. ANN. 127.090, 128.105 (Michie 1998 & Supp. 2001); N.H. REV. STAT. ANN. §§ 170-B:6, -C:5 (2001); OR. REV. STAT. § 109.324; R.I. GEN. LAWS § 15-7-5, -7 (2000).

adopt the child over the parent's objection, having the effect of permanently terminating his or her parental rights.⁵⁹

3. Termination by Stepparent Adoption

A third way in which parental rights can be involuntarily terminated is through stepparent adoptions. As with general adoptions, every state allows stepparent adoptions to proceed over an absent parent's objection.⁶⁰ While stepparent adoptions parallel general adoptions in most ways,⁶¹ some states have more relaxed requirements when a natural parent's spouse wishes to adopt his or her stepchild.⁶² For example, a few of the states that ordinarily

59. See *supra* note 49.

60. See ALA. CODE §§ 26-10A-9, -27 (1992 & Supp. 2002); ALASKA STAT. §§ 25.23.020(4)(A), .050; ARIZ. REV. STAT. ANN. §§ 8-102, -103, -106, -531, -533 (West 1999 & Supp. 2002); ARK. CODE ANN. §§ 9-9-202, -204(4)(i), -207; CAL. FAM. CODE §§ 9000, 9003 (West 1994 & Supp. 2003); COLO. REV. STAT. § 19-5-203(1)(d) (2002); CONN. GEN. STAT. ANN. §§ 45a-717, -724(a)(2)(D) (West 1993); DEL. CODE ANN. tit. 13, §§ 903, 908, 1103 (1999 & Supp. 2000); FLA. STAT. ANN. §§ 63.042(d), .089 (West 1997); GA. CODE ANN. §§ 19-8-3, -10 (1999); HAW. REV. STAT. ANN. §§ 578-1, -2 (Michie 1999); IDAHO CODE §§ 16-1504, -1509 (Michie 2001 & Supp. 2003); 750 ILL. COMP. STAT. ANN. 50/1, 50/2, 50/8 (West 1999); IND. CODE ANN. §§ 31-19-9-8, 31-19-15-2, -4; IOWA CODE ANN. §§ 600.4(3)(a), .12, .13 (West 2001); KAN. STAT. ANN. §§ 59-2113, -2136; KY. REV. STAT. ANN. §§ 199.470(4)(a), .502; LA. CHILDREN'S CODE ANN. arts. 1243.1, 1245 (West 1995 & Supp. 2003); ME. REV. STAT. ANN. tit. 18-A, §§ 9-204, -301, -302 (West 1998); MD. CODE ANN., FAM. LAW §§ 5-309(a), -312 (1999 & Supp. 2003); MASS. GEN. LAWS ANN. ch. 210, §§ 1, 3 (West Supp. 2003); MICH. COMP. LAWS ANN. § 710.51 (West 2002); MINN. STAT. ANN. §§ 259.24, .59(1a) (West 2003); MISS. CODE ANN. §§ 93-17-7, -13 (Supp. 2003); MO. ANN. STAT. §§ 453.010, .040; MONT. CODE ANN. §§ 42-1-106(1), 42-2-607, -608(h)(B), -610 (2001); NEB. REV. STAT. §§ 43-101, -104 (1998); NEV. REV. STAT. ANN. 127.030, .090, 128.105; N.H. REV. STAT. ANN. §§ 170-B:4, -B:6, -C:5; N.J. STAT. ANN. §§ 9:3-43, -46; N.M. STAT. ANN. §§ 32A-5-11, -15, -18, -32; N.Y. DOM. REL. LAW §§ 110, 111 (McKinney 1999 & Supp. 2003); N.C. GEN. STAT. §§ 48-3-603, 48-4-101, -102 (2001); N.D. CENT. CODE §§ 14-15-03(4)(a), -.06 (1997 & Supp. 2003); OHIO REV. CODE ANN. §§ 3107.03(D)(1), .07, (West 2000); OKLA. STAT. ANN. tit. 10, §§ 7503-1.1, -2.1, 7505-2.1, -4.2 (West 1998 & Supp. 2003); OR. REV. STAT. §§ 109.309, 314, .324; 23 PA. CONS. STAT. ANN. §§ 2511, 2903; R.I. GEN. LAWS §§ 15-7-4, -5; S.C. CODE ANN. §§ 20-7-1572, -1695(A)(1), -1820 (Law. Co-op. Supp. 2002); S.D. CODIFIED LAWS §§ 25-6-4, -17; TENN. CODE ANN. §§ 36-1-102, -113, -115 (2001 & Supp. 2002); TEX. FAM. CODE ANN. §§ 162.001(b)(2), .016 (Vernon 2002); UTAH CODE ANN. §§ 78-3a-402, -408, 78-30-1(3)(a)(i), -4.16 (2002); VT. STAT. ANN. tit. 15A, § 1-102(b) (2002); VA. CODE ANN. §§ 63.2-1201, -1203 (Michie 2002); WASH. REV. CODE ANN. §§ 26.33.100, .120, .140 (West 1997); W. VA. CODE ANN. §§ 48-22-301, -306, -501 (Michie 2001); WIS. STAT. ANN. §§ 48.81, .90(b), .415 (West 2003); WYO. STAT. ANN. §§ 1-22-104, -110 (Michie 2003).

61. Stepparent adoptions are often included, either explicitly or implicitly, within general adoption statutes. See, e.g., ALASKA STAT. § 25.23.020(4)(A); ARK. CODE ANN. § 9-9-204(4)(i); FLA. STAT. ANN. § 63.042(d); HAW. REV. STAT. ANN. § 578-1; IOWA CODE ANN. § 600.4(3)(a); KY. REV. STAT. ANN. § 199.470(4)(a); MASS. GEN. LAWS ANN. ch. 210, § 1; N.D. CENT. CODE § 14-15-03(4)(a); OHIO REV. CODE ANN. § 3107.03(D)(1); TEX. FAM. CODE ANN. § 162.001(b)(2); WIS. STAT. ANN. § 48.90(b). Thus, the same requirements for consent, waiver, time of abandonment, etc. often apply equally to stepparent adoptions. See *supra* notes 52-58 and accompanying text.

62. See, e.g., CAL. FAM. CODE § 9000 (West Supp. 2003), 9003 (West 1994); COLO. REV. STAT. § 19-5-203(1)(d) (2002); KAN. STAT. ANN. § 59-2136(d) (1994); LA. CHILDREN'S CODE ANN. arts.

require that an objecting parent's rights be terminated before or in conjunction with adoption proceedings remove this procedural hurdle when the spouse of a natural parent tries to adopt a stepchild.⁶³ In other states, failure to provide a "substantial" amount of child support for an extended period of time is, in and of itself, sufficient to create a rebuttable presumption that the absent parent has abandoned the child, thereby eliminating the need for the absent parent's consent.⁶⁴ Louisiana even provides for a rebuttable presumption that a stepparent adoption *is* in the child's best interests,⁶⁵ and California requires only the consent of the present parent if that parent has sole custody.⁶⁶ Thus, an absent parent faces the very real possibility of permanently losing his or her parental rights if any party other than the natural parent cares for the child or if the other natural parent eventually gets married.

III. THE VOID AND THE INCONSISTENCY: ABSENT PARENTS' RIGHTS ARE PROTECTED BY CIRCUMSTANCE, WHILE PRESENT PARENTS' RIGHTS ARE RESTRICTED BY CUSTODY

A. Present Parents Are Barred from Existing Means of Termination

Currently, no legal means exist by which a natural parent can acquire full parental rights when there is a living, absent parent. No state offers an explicit statutory remedy for this circumstance, and state statutes and case law generally foreclose the availability of private termination proceedings and natural parent adoptions.

1245 (West Supp. 2003), 1255 (West 1995); MICH. COMP. LAWS ANN. § 710.51(6) (West 2002); VT. STAT. ANN. tit. 15A, § 1-102(b) (1989).

63. See, e.g., FLA. STAT. ANN. §§ 63.102(1) (West 1997); LA. CHILDREN'S CODE ANN. arts. 1245 (West 1995); MICH. COMP. LAWS ANN. § 710.51(6) (West 2002); VT. STAT. ANN. tit. 15A, § 1-102(b) (2002).

64. See, e.g., COLO. REV. STAT. § 19-5-203(1)(d) (2002); KAN. STAT. ANN. § 59-2136(d) (1994); LA. CHILDREN'S CODE ANN. art. 1245 (West Supp. 2003).

65. LA. CHILDREN'S CODE ANN. art. 1255(B) (West 1995) ("When a court has granted custody to either the child's grandparents or his parent married to the stepparent petitioner, there shall be a rebuttable presumption that this adoption is in the best interests of the child.").

66. CAL. FAM. CODE § 9003(c) (West 1994) ("The consent, when reciting that the person giving it is entitled to sole custody of the child . . . is prima facie evidence of the right of the person signing the consent to the sole custody of the child and that person's sole right to consent.").

1. Termination Foreclosed to the Present Parent

Statutes authorizing termination of parental rights are generally unavailable to a natural parent seeking to terminate an absent parent's rights on grounds of abandonment. Termination statutes apply in only two contexts: state-initiated proceedings and adoption proceedings.⁶⁷ In fact, many state statutes specifically restrict the filing of termination petitions to authorized state agencies.⁶⁸ Other statutes restrict the filing of such actions to situations in which adoption is contemplated.⁶⁹ And, while the plain language of the remaining statutes appears to allow a natural parent to initiate a termination action,⁷⁰ courts generally prevent natural parents from doing so.⁷¹

67. See, e.g., Haugaard & Avery, *supra* note 10, at 131, 135-39.

68. See, e.g., ARK. CODE ANN. § 9-27-341(a)(1) (Michie Supp. 2003); COLO. REV. STAT. § 19-3-604 (2002); 20 ILL. COMP. STAT. ANN. 505/35.2 (West 2001); IND. CODE ANN. § 31-35-2-4(a) (Michie 1997); MD. CODE ANN., CTS. & JUD. PROC. § 3-809(a) (2002); MASS. GEN. LAWS ANN. ch. 119, §§ 24 29 (West 2003); MINN. STAT. ANN. § 260C.301(1) (West 2003); NEB. REV. STAT. § 43-292.02 (1998); N.J. STAT. ANN. § 9:2-18 (West 2002); N.Y. JUD. CT. ACTS LAW § 634 (McKinney 1999); OKLA. STAT. ANN. tit. 10, § 7003-4.7 (West Supp. 2003); R.I. GEN. LAWS § 15-7-7(a) (2000); S.D. CODIFIED LAWS § 26-8A-21.2 (Michie 1999); VA. CODE ANN. § 16.1-283(A) (Michie 2003); WASH. REV. CODE ANN. § 13.34.132 (West Supp. 2003).

69. See, e.g., HAW. REV. STAT. ANN. § 571-63 (Michie 1999); N.H. REV. STAT. ANN. § 170-C:1 (2001); N.M. STAT. ANN. § 32A-4-29(A) (Michie Supp. 2003); OR. REV. STAT. § 419B.500 (2001); 23 PA. CONS. STAT. ANN. § 2512 (West 2001); S.C. CODE ANN. § 20-7-1560 (Law. Co-op. Supp. 2002); S.D. CODIFIED LAWS § 26-8A-21.2. Some states allow a termination action for adoption purposes by adding prospective adoptive parents or foster parents to the list of persons who may file a petition. See, e.g., LA. CHILDREN'S CODE ANN. art. 1004(G) (West 1995); MICH. COMP. LAWS ANN. § 712A.19b(1) (West 2002); MO. ANN. STAT. § 211.447(5) (West Supp. 2003); VT. STAT. ANN. tit. 15A, § 3-504 (2002).

70. While some statutes explicitly allow a parent to initiate a termination action against the other parent, other statutes allow, generally, "any person" or "any interested party" to initiate a termination action. Compare CONN. GEN. STAT. ANN. § 45a-715 (West Supp. 2003), IDAHO CODE § 16-2004 (Michie 2001) IOWA CODE ANN. § 600A.5 (West 2001), N.C. GEN. STAT. § 7B-1103 (2001), WIS. STAT. ANN. § 48.42 (West 2003), and WYO. STAT. ANN. § 14-2-310 (Michie 2003), with ARIZ. REV. STAT. ANN. § 8-533 (West Supp. 2002), CAL. FAM. CODE § 7841 (West 1994), FLA. STAT. ANN. § 39.806 (West 2003), KAN. STAT. ANN. § 38-1581 (2000), and UTAH CODE ANN. § 78-3a-404 (2002).

71. Although such actions have sporadically been allowed in extreme cases, these cases are generally older, and most have been implicitly or explicitly overruled by more recent opinions. For example, in Connecticut, a mother was allowed to terminate the parental rights of the father who had a history of sexual assault, was incarcerated for sexually assaulting the mother, had never seen his child, and had no intentions to establish a parent-child relationship. *In re Rebecca W.*, 510 A.2d 1017 (Conn. App. Ct. 1986). However, this was quite obviously an extreme case, and it is the last known case in Connecticut allowing such an action. In Delaware, such an action was allowed upon the absent parent's consent. *In re Monahan*, 281 A.2d 620 (Del. Super. Ct. 1971). However, a later case noted that changes made to Delaware statutes in 1975 preclude such termination by limiting actions to situations in which adoption is contemplated. *In re D.E.R.*, No. 99-06-3TK, 2002 WL 31450946, at *1-2 (Del. Fam. Ct. July 11, 2002). In Texas, such actions have been allowed in extraordinary situations. See *Brazier v. Brazier*, 597 S.W.2d 442

Termination statutes that restrict filing to state agencies or prospective adoptive parents clearly provide no remedy for the situation at issue. Natural parents have no access to proceedings that are limited to state agencies, as the state has no need to invest time or resources where a child is being properly cared for by the remaining natural parent.⁷² Although many statutes allow states to terminate one parent's rights while leaving the other parent with full rights and custody of the child,⁷³ state agencies are only compelled to do so when the parent subject to termination is currently placing the child in substantial physical danger.⁷⁴ A state agency generally will not intervene where an absent parent has simply failed to support or visit a child.⁷⁵ Similarly, termination proceedings available to parents contemplating adoption provide no recourse for a present parent unless he or she marries and the stepparent is willing to assume the full and permanent duties of a natural parent.⁷⁶ Thus, the majority of states have statutorily foreclosed the ability of a present parent to terminate an absent parent's rights.

The remaining states have generally foreclosed this possibility through case law purporting to effectuate legislative intent and

(Tex. Civ. App. 1980) (allowing mother to terminate rights of statutorily presumed father where he was most likely not the biological father, he had expressed indifference to children, and he was serving a life sentence in prison); *G.W.H. v. D.A.H.*, 650 S.W.2d 480 (Tex. Ct. App. 1983) (allowing mother to terminate father's parental rights where father had long history of violence against women and was serving a 50-year sentence for murdering a woman by strangulation, over dissent's objection that the court should have required a finding that the father had actually hurt the children). However, Texas courts have also denied such actions where the initiating parent fails to show that the other parent has actually physically abused the children. See *Mayfield v. Smith*, 608 S.W.2d 767, 770 (Tex. Civ. App. 1980) (denying termination where, although father had history of incarceration for violent crimes and children were frightened and often cried when he visited, mother could not prove that father "ever hit the children or abused them physically"); see also *G.W.H.*, 650 S.W.2d at 482-84 (Murphy, J., dissenting).

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

73. See, e.g., CAL. FAM. CODE § 7802; FLA. STAT. ANN. § 39.811(3); GA. CODE ANN. § 15-11-103 (2001); OR. REV. STAT. § 419B.500; S.D. CODIFIED LAWS § 26-8A-27.

74. Because termination proceedings require the expenditure of limited state resources, states are only compelled to bring termination suits when the child is in immediate need of a safe and stable home; states have no immediate interest in terminating an absent parent's rights where the child is currently in the safe and suitable care of the present parent. See, e.g., *In re Adoption of Kohorst*, 600 N.E.2d 843, 848 (Ohio Ct. App. 1992) (refusing to intervene where the child is not "abused, neglected, or dependent" and the custodial parent "presently provides a loving and comfortable home for her"); *Haugaard & Avery*, *supra* note 10, at 137-39.

75. See, e.g., *In re Adoption of Kohorst*, 600 N.E.2d 843, 848 (Ohio Ct. App. 1992) (refusing to intervene where the child is not "abused, neglected, or dependent" and the custodial parent "presently provides a loving and comfortable home for her"); *Haugaard & Avery*, *supra* note 10, at 137-39.

76. See, e.g., *In re K.J.K.*, 396 N.W.2d 370, 371-72 (Iowa Ct. App. 1986); *State v. R.L.P.*, 772 P.2d 1054, 1058 (Wyo. 1989).

further general public policy.⁷⁷ Courts hearing these cases generally hold contrary to the plain language of statutes, which would otherwise allow a natural parent to bring a termination action, based primarily on the courts' refusals to relieve the absent parents of their child support obligations.⁷⁸ Despite extended histories of abandonment, threats of disruption to the children's lives, the increased burdens placed on the present parents, the detrimental characters of the absent parents, and in many cases, even the consent of both parents to the termination,⁷⁹ courts have held that depriving a child of one parent's financial support is not in the child's best interests.⁸⁰ Thus, the common law has generally foreclosed the present parent's access to the remaining termination statutes.

2. Adoption Foreclosed to the Present Parent

Like termination statutes, adoption statutes provide no recourse for a natural parent seeking to terminate an absent parent's rights. Similar to termination statutes, some adoption statutes

77. See, e.g., *K.J.K.*, 396 N.W.2d at 371-72 (reversing termination to avoid relieving father of child support obligation, despite consent of both parents, ongoing conflict between parents, and absence of relationship between father and child); *C.J.H. v. A.K.G.*, No. M2001-01234-COA-R3-JV, 2002 WL 1827660, at *1, 8 (Tenn. Ct. App. Aug. 9, 2002) (denying termination to avoid relieving father of child support obligation, despite consent of both parties, mother's acknowledgment of impact of decision, mother's financial stability and strong family support, and fact that father had never even seen his child); *R.L.P.*, 772 P.2d at 1057-58 (voiding order of termination as "a sham" where mother had no plans to marry, adoption was never contemplated, and there was no guardian ad litem representing the interests of the child).

78. The Iowa code includes "[a] parent" as one of the individuals who may petition for termination of a parent's rights, IOWA CODE ANN. § 600A.8 (WEST 2001), yet the Court of Appeals of Iowa held, "We cannot be persuaded that the legislature intended section 600A.8 to alter so radically the parental support obligation." *K.J.K.*, 396 N.W.2d at 371 (quoting *In re D.W.K.*, 365 N.W.2d 32, 35 (Iowa 1985)). The Tennessee code allows "any person . . . who has knowledge of the facts alleged or is informed and believes that they are true" to petition for the termination of a parent's rights, TENN. CODE ANN. § 37-1-119 (2001), yet the Court of Appeals of Tennessee held, "[L]egislative and judicial efforts to hold parents to their financial responsibility to support their children would be eviscerated if we were to allow an unfettered legal avenue through which a parent . . . could avoid all responsibility for future support." *C.J.H.*, 2002 WL 1827660, at *7 (quoting *In re Bruce R.*, 662 A.2d 107, 117 (Conn. 1985)).

79. See, e.g., *K.J.K.*, 396 N.W.2d at 370-71 (finding both parents consented, child was conceived while father was married to another woman, father had not seen child or spoken to mother since learning of her pregnancy, mother was worried about strain of future interference, and mother intends to remarry and have husband adopt); *C.J.H.*, 2002 WL 1827660, at *1 (finding father has never seen child nor does he have any interest in or intention to see child, mother is financially secure and has strong family support, and both parties consent); *Mayfield v. Smith*, 608 S.W.2d 767, 768 (Tex. Civ. App. 1980) (acknowledging that the absent parent has history of incarceration for violent crimes and the children become frightened and upset when he visits); *R.L.P.*, 772 P.2d at 1054-56 (both parties consent and father does not support or visit child).

80. See, e.g., *K.J.K.*, 396 N.W.2d at 371-72; *C.J.H.*, 2002 WL 1827660, at *8.

specifically preclude a natural parent with an existing legal parent-child relationship from adopting his or her own child.⁸¹ However, the vast majority of adoption statutes, by their plain language, allow a natural parent to adopt his or her own child, thereby allowing a present parent to acquire full parental rights.⁸² As with termination, however, courts have often stepped in to foreclose this option to natural parents.⁸³

In states that specifically preclude a natural parent who has an existing legal relationship with a child from adopting that child, a natural parent cannot acquire full parental rights through adoption unless the parent's rights have previously been terminated.⁸⁴ Thus, a parent who has consistently remained a fit and responsible parent is denied the right to adopt, while a parent who has given the state

81. See, e.g., DEL. CODE ANN. tit. 13, § 903 (1999); HAW. REV. STAT. ANN. § 578-1 (Michie 1999); VT. STAT. ANN. tit. 15A, § 1-102 (2002); VA. CODE ANN. § 63.2-1201 (Michie 2002).

82. Most state adoptions statutes allow, generally, for "anyone" or "any adult" to petition for adoption of a child. See, e.g., ALA. CODE § 26-10A-5 (Supp. 2002); ALASKA STAT. § 25.23.020 (Michie 2000); ARIZ. REV. STAT. ANN. § 8-103 (West 1999); COLO. REV. STAT. § 19-5-202(1) (2002); GA. CODE ANN. § 19-8-3 (1999); 750 ILL. COMP. STAT. ANN. 50/2 (West 1999); IOWA CODE ANN. § 600.4 (West 2001); KAN. STAT. ANN. § 59-2113 (1994); KY. REV. STAT. ANN. § 199.470(1) (Michie 1998); LA. CHILDREN'S CODE ANN. art. 1221 (West 1995); ME. REV. STAT. ANN. tit. 18-A, § 9-301 (West Supp. 2002); MD. CODE ANN., FAM. LAW § 5-309 (1999); MASS. GEN. LAWS ANN. ch. 210, § 1 (West Supp. 2003); MINN. STAT. ANN. § 259.22(1) (West 2003); MISS. CODE ANN. § 93-17-3(1) (Supp. 2003); MO. ANN. STAT. § 453.010 (West 2003); NEB. REV. STAT. § 43-102 (Supp. 2002); N.J. STAT. ANN. § 9:3-43 (West 2002); N.M. STAT. ANN. § 32A-5-11 (Michie 1995); N.C. GEN. STAT. § 48-1-103 (2001); OR. REV. STAT. § 109.309 (2001); 23 PA. CONS. STAT. ANN. § 2312 (West 2001); R.I. GEN. LAWS § 15-7-4 (2000); S.C. CODE ANN. § 20-7-1670 (Law. Co-op. Supp. 2003); S.D. CODIFIED LAWS § 25-6-2 (Michie 1999); TENN. CODE ANN. § 36-1-115(a) (2001); TEX. FAM. CODE ANN. § 162.001 (Vernon Supp. 2004); UTAH CODE ANN. § 78-30-1(3)(a)(ii) (2002); WASH. REV. CODE ANN. § 26.33.140(2) (West 1997); W. VA. CODE ANN. § 48-22-201 (Michie 2001). Further, some explicitly authorize the "natural" or "birth" parent of a child to petition to adopt that child. See, e.g., ARK. CODE ANN. § 9-9-204(3) (Michie 2002); FLA. STAT. ANN. § 63.042 (West 1997); N.H. REV. STAT. ANN. § 170-B:4 (2001); N.D. CENT. CODE § 14-15-03(3) (Supp. 2003).

83. See, e.g., *Marshall v. Marshall*, 239 P. 36 (Cal. 1925); *L.J.R. v. T.T.*, 739 So. 2d 1283 (Fla. Dist. Ct. App. 1999); *Peregood v. Cosmides*, 663 So. 2d 665 (Fla. Dist. Ct. App. 1995); *Green v. Sollenberger*, 656 A.2d 773 (Md. 1995); *In re Kohorst*, 600 N.E.2d 843 (Ohio Ct. App. 1992); *In re Graham*, 63 Ohio Misc. 22 (Ct. C.P. 1980); *Gilbertson v. Gilbertson*, 498 P.2d 1381 (Okla. 1972); *Campbell v. Kindred*, 554 P.2d 599 (Or. Ct. App. 1976); see also *D.H.S. v. Sabattus*, 683 A.2d 170, 171-72 (Me. 1996) (declining to void adoption because validity had not been presently challenged, but indicating in dicta that it would likely be declared void if challenged); *Bridges v. Nicely*, 497 A.2d 142, 148-49 (Md. 1995) (acknowledging that the plain meaning of the statute may allow for such action, but expressing concern for contrary legislative policy, and remanding to the circuit court to determine child's best interests).

84. See, e.g., *Marshall*, 239 P. at 37-38 ("The natural mother of a child could legally adopt such child only in a case wherein her parental relationship had theretofore been severed as a matter of law . . ."); *Stefanos v. Rivera-Berrios*, 673 So. 2d 12, 13 (Fla. 1996) ("Despite the permanency of a termination order, a parent whose parental rights have been terminated is not precluded from establishing new rights to his or her child through independent adoption proceedings.").

reason to terminate his or her parental rights retains the option of later seeking to adopt the child, thereby acquiring full parental rights.

In the majority of states, where the plain language of adoption statutes allows a natural parent to adopt his or her child,⁸⁵ the common law has again stepped in to close this avenue to the present natural parent.⁸⁶ The underlying basis for such rulings is the notion that the primary purpose of adoption is to create a legal relationship that does not already exist.⁸⁷ Like the courts in termination cases, courts denying present parent adoption petitions rely upon legislative intent rather than the plain statutory language.⁸⁸ Indeed, in several of these cases, the adoption had been granted pursuant to the plain meaning of the statute, and the adoption was later found void

85. See *supra* note 82.

86. See *supra* note 83. For an analysis of the inconsistency in Maryland case law, see Jennifer R. Terrasa, Note, *Limitations on Who May Adopt: A Natural Mother May Not Adopt Her Own Natural Children Notwithstanding the Consent of the Natural Father and the Children* Green v. Sollenberger, 338 Md. 118, 656 A.2d 773 (1995), 26 U. BALT. L. REV. 201, 215-24 (1996).

87. See, e.g., *Marshall*, 239 P. at 37-38; *L.J.R.*, 739 So. 2d at 1284; *Green*, 656 A.2d at 777-78; *Kohorst*, 600 N.E.2d at 846-47; *Graham*, 63 Ohio Misc. at 23; *Gilbertson*, 498 P.2d at 1384.

88. Each of the applicable state adoption statutes, on its face, allows such adoptions. See CAL. FAM. CODE § 8601(a) (West 1994) (requiring only that adoptive parent be at least ten years older than the child); FLA. STAT. ANN. § 63.042 (West 1997) (explicitly including birth parent as individual who may petition to adopt child); MD. CODE ANN., FAM. LAW § 5-309(a) (1999) ("Any adult may petition a court to decree an adoption."); OHIO REV. CODE ANN. § 3107.03(B)-(C) (West 2000) (listing "[a]n unmarried adult" and "[t]he unmarried minor parent of the person to be adopted" as individuals who may adopt); OKLA. STAT. ANN. tit. 10, § 7503-1.1(3) (West Supp. 2003) (listing "[a]n unmarried person who is at least twenty-on (21) years of age" as an individual who may adopt); OR. REV. STAT. § 109.309(1) (2001) ("Any person may petition the circuit court for leave to adopt another person . . ."). Nonetheless, the courts opined that such a result could not have been the legislatures' intent. See *Marshall*, 239 P. at 38 ("We are not prepared to hold that section 229 of the Civil Code was intended to apply to a situation such as this, and to effect a result so plainly opposite to that which was intended."); *L.J.R.*, 739 So. 2d at 1284 ("Like the Supreme Court of Oklahoma, 'we do not believe . . . that the legislature contemplated the use of adoption proceedings for the sole purpose of terminating parental rights" (quoting *Gilbertson*, 498 P.2d at 1384)); *Peregoud v. Cosmides*, 663 So. 2d 665, 669 (Fla. Dist. Ct. App. 1995) ("The procedure utilized . . . violates the intent and purposes of the Florida adoption law."); *Green*, 656 A.2d at 777 ("We hold that despite the broad and seemingly unqualified language used in these provisions, the General Assembly never intended for natural parents to be permitted to adopt their own *legitimate* children."); *Kohorst*, 600 N.E.2d at 847 ("We . . . do not believe that the General Assembly intended for adoption proceedings to be available for the 'adoption' of one's own natural child, born in wedlock . . ."); *Graham*, 63 Ohio Misc. at 25 ("Sound public policy dictates that the adoption statutes should not be construed to allow the natural mother to adopt her own minor children . . ."); *Gilbertson*, 498 P.2d at 1384 ("[W]e do not believe the Legislature intended to provide a proceeding for a parent to adopt his natural, legitimate child."); *Campbell*, 554 P.2d at 600 (agreeing with the legislative intent reasoning found in *Gilbertson*, *Marshall*, and *C.J.S.*, and further finding that the statute of limitations on challenging adoptions does not apply because "[t]he intention of the legislature in adopting [the statute of limitations] appears to have been for a different purpose").

pursuant to the appellate courts' reliance on legislative intent and public policy.⁸⁹

While courts denying present parent adoption petitions are adamant that the primary purpose of adoption is to create a new legal relationship, they presume that the legal relationship formed through adoption is no different than the legal relationship of custody occupied by a present parent.⁹⁰ Although one court recognized that adoption might create more inclusive rights than an order establishing paternity,⁹¹ most courts that have rejected present parent adoptions have opined that adoption "accords no benefits, rights, obligations, or duties which did not exist as the result of the natural [parent-child] relationship."⁹²

Further, by focusing on the purpose of creating new legal relationships, courts have generally failed to address the other purposes that adoption is meant to serve. In addition to creating new legal relationships, adoption statutes are meant to provide stability in a child's home, protect the parent-child relationship from future interference, and generally promote the well-being of the adopted child.⁹³ Although, in a couple of the cases, the petitioning parents argued that adoption does serve other purposes, the courts found such arguments unpersuasive, again focusing on the children's monetary

89. *Marshall*, 239 P. at 37-38; *L.J.R.*, 739 So. 2d at 1284; *Peregood*, 663 So. 2d at 667, 669; *Green*, 656 A.2d at 775, 779; *Gilbertson*, 498 P.2d at 1383-84; *Campbell*, 554 P.2d at 599-600.

90. See *L.J.R.*, 739 So. 2d at 1284 ("Granting her petition for adoption by birthparent 'confer[red] few or] no additional rights, privileges, or benefit upon the child[.]'" (quoting *Graham*, 63 Ohio Misc. at 25)); *Green*, 656 A.2d at 777 ("[N]o new rights or obligations attach as a result of the adoption. . . . [T]he status of the parties was in no way enhanced, nor was their legal relationship altered."); *Kohorst*, 600 N.E.2d at 847 ("[Adoption] accords no benefits, rights, obligations, or duties which did not exist as the result of the natural relationship."); *Graham*, 63 Ohio Misc. at 25 ("The granting of this adoption would confer no additional rights, privileges, or benefit upon the children."); *Gilbertson*, 498 P.2d at 1384 ("[A]doption confers no benefits or rights nor imposes any obligations or duties not previously existing as a result of the natural relationship."); *Campbell*, 554 P.2d at 600 ("The status of the children's home was not changed nor was there any change in the relationship, legal or otherwise, with respect to the father.").

91. *Kohorst*, 600 N.E.2d at 847.

92. *Id.*; see also *supra* note 90.

93. See, e.g., GA. CODE ANN. § 19-8-12(a) (1999); IDAHO CODE § 16-1501A(2)(a) (Michie 2001); MD. CODE ANN., FAM. LAW § 5-303; UTAH CODE ANN. § 78-30-4.12(2) (2002); *In re Carl*, 709 N.Y.S.2d 905, 910 (N.Y. Fam. Ct. 2000); JOSEPH GOLDSTEIN ET AL., IN THE BEST INTERESTS OF THE CHILD (1986) [hereinafter GOLDSTEIN, IN THE BEST INTERESTS], reprinted in JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 151, 154 (1996) [hereinafter BEST INTERESTS OF THE CHILD]; Lisa A. Fuller, Note, *Interstate Succession Rights of Adopted Children: Should the Stepparent Exception be Extended?*, 77 CORNELL L. REV. 1188, 1188 (1992).

interests in support.⁹⁴ Consequently, as with termination, adoption has generally been foreclosed as an available remedy for a natural parent to acquire full parental rights, leaving the present parent with no alternative to custody.

B. Custody Is Not Termination

Without adoption or termination of the absent parent's rights, a present parent's only legal right in his or her child is custody. Be it legal custody, physical custody, primary custody, sole custody, parental responsibility, or whatever title a state places upon the right, it remains limited and constricted by the absent parent's permanent parental rights.⁹⁵ The legal designation of custody is always attached to a court's ongoing and discretionary authority to modify or impose restrictions on its terms at any time.⁹⁶ The end result is that the present parent's "right to make decisions concerning the care, custody, and control of [his or her] . . . children"⁹⁷ is inhibited by state requirements and forever susceptible to a state court's interference.⁹⁸ State interferences are not limited to "compelling state interests" but, rather, any "change in circumstances" or other factors within the court's discretion.⁹⁹

Even an award of sole custody does not provide complete freedom from state interference. The custodial parent remains subject to statutes that require him or her to notify the court and the absent parent of changes of address, intentions to relocate out of state, changes in the child's school, and major medical decisions made on behalf of the child.¹⁰⁰ Further, the present parent generally has a

94. See, e.g., *Green*, 656 A.2d at 776-78; *Kohorst*, 600 N.E.2d at 847-48; see also *Peregood v. Cosmides*, 663 So. 2d 665, 670 (Fla. Dist. Ct. App. 1995); *In re Graham*, 63 Ohio Misc. 22, 24 (Ct. C.P. 1980).

95. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 648 (1972) (noting that the State's suggestion that natural father petition for custody "overlooks the fact that legal custody is not parenthood or adoption . . . and would still . . . leave him seriously prejudiced by reason of his status"); GREIF, *supra* note 18, at 160; WHEELER, *supra* note 18, at 176 ("Custody cases are never closed. The parent who loses custody at one trial lives to sue another day. The parent who wins, remains forever on probation.").

96. See, e.g., GA. CODE ANN. § 19-1-1; VT. STAT. ANN. tit. 15, § 668 (2002); W. VA. CODE ANN. § 48-5-703 (Michie 2001); WYO. STAT. ANN. § 20-2-204 (Michie 2003).

97. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (asserting such rights as undeniably "fundamental," warranting Fourteenth Amendment protection).

98. See, e.g., JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973), reprinted in *BEST INTERESTS OF THE CHILD*, *supra* note 93, at 3, 23-27 (1996).

99. See *supra* note 96.

100. See, e.g., MO. ANN. STAT. § 452.377 (West 2003); N.M. STAT. ANN. § 40-4-9.1 (Michie 1999); TENN. CODE ANN. § 36-6-110(3) (2001); UTAH CODE ANN. § 30-3-37 (2002); W. VA. CODE ANN. § 48-9-601(b)(2)-(3); WYO. STAT. ANN. § 20-2-202.

continuing duty to allow the absent parent access to the child's medical, dental, childcare, counseling, and school records.¹⁰¹ Some states even allow the absent parent an uninhibited right to communicate with the child's doctors, counselors, and schools.¹⁰² While some states allow certain requirements to be waived for good cause, as determined by the court,¹⁰³ many statutes provide that, unless a noncustodial parent's rights are terminated, the requirements are absolute.¹⁰⁴

1. Threat of Reestablished Contact

One of the most ominous rights retained by the absent parent is the right to, after any length of absence, reestablish visitation with the child. Despite the present parent's judgment, and despite the emotional damage that such visitation may cause to the child, if an absent parent's rights have not been legally terminated, he or she retains the permanent right to reestablish contact and visitation with the child.¹⁰⁵ Further, most states subscribe to a general policy of allowing and encouraging frequent and regular contact between a

101. See, e.g., ARIZ. REV. STAT. ANN. § 25-403(H) (West 2000); FLA. STAT. ANN. § 61.13(2)(b)(3) (West 1997); MD. CODE ANN., FAM. LAW § 9-104 (1999); MASS. GEN. LAWS ANN. ch. 71, § 34H (West Supp. 2003); MICH. COMP. LAWS ANN. § 722.30 (West 2002); MISS. CODE ANN. § 93-5-26 (1994); N.J. STAT. ANN. § 9:2-4.2 (West 2002); N.M. STAT. ANN. § 40-4-9.1(H); S.D. CODIFIED LAWS § 25-5-7.3 (Michie 1999); TENN. CODE ANN. § 36-6-110(4)-(5); VA. CODE ANN. § 20-124.6 (Michie 2000).

102. See, e.g., W. VA. CODE ANN. § 48-9-601(a)(2)-(4).

103. See, e.g., MICH. COMP. LAWS ANN. § 722.30; N.J. STAT. ANN. § 9:2-4.2; TENN. CODE ANN. § 36-6-110; VA. CODE ANN. § 20-124.6.

104. See, e.g., MISS. CODE ANN. §§ 93-5-24(8), -26; N.M. STAT. ANN. § 40-4-9.1(H); S.D. CODIFIED LAWS § 25-5-7.3.

105. See, e.g., ARIZ. REV. STAT. ANN. § 25-408(B); COLO. REV. STAT. §§ 14-10-124(1.5), -129(1)(b)(I) (2002); IND. CODE ANN. §§ 31-17-4-1, -2 (Michie 1997); MICH. COMP. LAWS ANN. § 722.27; N.D. CENT. CODE § 14-05-22(2) (1997); WIS. STAT. ANN. § 767.24(4)(a)(2) (West 2001); GREIF, *supra* note 18, at 161; WHEELER, *supra* note 18, at 52. *But see* WASH. REV. CODE ANN. § 26.10.160(2)(a)(i) (West 1997) (allowing for the limitation of visitation in cases of "[w]illful abandonment that continues for extended period of time or substantial refusal to perform parenting functions"). For discussion of the negative emotional impact continuous rights to visitation may have on the child, see, for example, *In re Rebecca W.*, 510 A.2d 1017, 1019 (Conn. App. Ct. 1986) (quoting and agreeing with the trial court's conclusion that "there would be no discernible benefit to the child, but rather a clear detriment, from her introduction for the first time to her father when she is five or six years old"); GOLDSTEIN ET AL., *supra* note 98, at 23; GREIF, *supra* note 18, at 27; Charles E. Depner, *Child Custody Research at the Crossroads, in* CHILDREN, SOCIAL SCIENCE, AND THE LAW 153, 160 (Bette L. Bottoms et al. eds., 2002); and Sara S. McLanahan & Marcia J. Carlson, *Welfare Reform, Fertility, and Father Involvement, in* THE FUTURE OF CHILDREN: CHILDREN AND WELFARE REFORM 147, 153 (2002), available at http://www.futureofchildren.org/information2826/-information_show.htm?doc_id=102678.

child and the noncustodial parent.¹⁰⁶ While such contact can be restricted or denied, the custodial parent bears the burden of showing extraordinary circumstances amounting to substantial endangerment of the child.¹⁰⁷ And while some jurisdictions recognize the need for gradual reestablishment of contact after extended periods of absence, they still require eventual reestablishment of contact.¹⁰⁸ Thus, despite extended periods of failure to support, visit, or communicate with one's child, an absent parent will likely be allowed visitation if, at some point in the future, he or she requests it.

2. Removal and Relocation Restrictions

Most custody orders restrict a custodial parent's ability to move with the child, especially when the move is to another state.¹⁰⁹ While some jurisdictions merely require the custodial parent to notify the court and the other parent of the move,¹¹⁰ others prohibit removal

106. See, e.g., COLO. REV. STAT. § 14-10-124(1); IOWA CODE ANN. § 598.41(1)(a) (West 2001); UTAH CODE ANN. § 30-3-32(2) (2002); VT. STAT. ANN. tit. 15, § 650 (2002). But see OR. REV. STAT. § 107.101(1) (2001) (limits policy of "frequent and continuing contact" to "parents who have shown the ability to act in the best interests of the child").

107. See, e.g., ARIZ. REV. STAT. ANN. § 25-408(B); COLO. REV. STAT. §§ 14-10-124(1.5)(a), -129(1)(b)(I); IND. CODE ANN. §§ 31-17-4-1, -2; MICH. COMP. LAWS ANN. § 722.27a(3); N.D. CENT. CODE § 14-05-22(2); TENN. CODE ANN. § 36-6-301 (requires past physical or emotional abuse, and only allows for restriction until abuse ceases); UTAH CODE ANN. § 30-3-32(2); VT. STAT. ANN. tit. 15, § 650; WIS. STAT. ANN. § 767.24(4)(b); WHEELER, *supra* note 18, at 52. For examples of what constitutes extraordinary circumstances, see, for example, *Welker v. Welker*, No. C3-01-2100, 2002 WL 2004594, at *4 (Minn. Ct. App. Sept. 3, 2002) (affirming finding of endangerment warranting denial of visitation where father had sexually abused child, but noting denial was not permanent and father could always move to modify order at a later date); *Cesar A.R. v. Raquel D.*, 578 N.Y.S.2d 831, 831 (N.Y. App. Div. 1992) (affirming finding of exceptional circumstances warranting denial of visitation where father had murdered children's mother and raped their stepsister and children feared him); *In re Waters*, No. CA88-09-131, 1989 WL 145972, at *1 (Ohio Ct. App. Dec. 4, 1989) (affirming finding of extraordinary circumstances warranting denial of visitation to father where child was the result of the father raping the child's mother).

108. See, e.g., UTAH CODE ANN. § 30-3-36(2) ("When parent-time has not taken place for an extended period of time and the child lacks an appropriate bond with the noncustodial parent, both parents shall consider the possible adverse effects upon the child and gradually reintroduce an appropriate parent-time plan for the noncustodial parent."); *In re C.J.S.*, 37 P.3d 479, 482 (CoIo. Ct. App. 2001) (ordering reestablished conduct "even though reconciliation with mother would be emotionally difficult for the child" by "orchestrating reintroduction to mother in a gradual manner under the supervision of therapists"); *In re Elmer*, 936 P.2d 617, 620 (Colo. Ct. App. 1997) (following recommendations of experts that parenting time be "integrated slowly to prevent long-lasting psychological damage" by ordering supervised visits and by delaying overnight visits).

109. See, e.g., WHEELER, *supra* note 18, at 65-66.

110. See, e.g., COLO. REV. STAT. § 14-10-129(1)(a)(II); VA. CODE ANN. § 20-124.5 (Michie 2000); WASH. REV. CODE ANN. § 26.09.430 (West Supp. 2003); WYO. STAT. ANN. § 20-2-202 (Michie 2003).

without the noncustodial parent's consent or a court order.¹¹¹ When removal is contested, the custodial parent generally has the burden of proving that the move is in the child's best interests.¹¹² In the case of an absent parent, the present parent will likely be able to show that the move is in the child's best interest,¹¹³ nonetheless, any relocation requires costly and time-consuming litigation.¹¹⁴

3. Lack of Authority To Designate Guardian in the Event of Death

As long as the absent parent retains parental rights, the present parent cannot provide for custody of the child in the event of the present parent's death. Quite the opposite, in the majority of states, despite the present parent's wishes or will, custody of the child automatically reverts to the absent parent.¹¹⁵ While a third party,

111. See, e.g., MASS. GEN. LAWS ANN. ch. 208, § 30 (West 1998); NEV. REV. STAT. ANN. 125C.200 (Michie Supp. 2001); N.J. STAT. ANN. § 9:2-2 (West 2002).

112. See, e.g., MO. ANN. STAT. § 452.377(9) (West 2003); *Rice v. Rice*, 517 S.E.2d 220, 222 (S.C. Ct. App. 1999) (rebuttable presumption against removal); *Goodhand v. Kildoo*, 560 S.E.2d 463, 466 (Va. Ct. App. 2002).

113. See, e.g., N.H. REV. STAT. ANN. § 458:23-a(IV)-(V) (Supp. 2002) (placing burden on objecting parent if custodial parent can show that move is reasonably related to a legitimate purpose); *In re Burgess*, 913 P.2d 473, 478 (Cal. 1996); *In re D.M.G.*, 951 P.2d 1377, 1383 (Mont. 1998).

114. For general discussion of the time and expense entailed in custody proceedings, see, for example, *Troxel v. Granville*, 530 U.S. 57, 75 (2000); WHEELER, *supra* note 18, at 15, 23.

115. See, e.g., *Woodford v. Superior Court of Ariz.*, 309 P.2d 973, 974 (Ariz. 1957) (noting "the well-settled proposition that, upon the death of a party who holds legal custody pursuant to a divorce decree, the right of legal custody automatically inures to the surviving parent"); *Brown v. Brown*, 238 S.W.2d 482, 484 (Ark. 1951); *In re Guardianship of Donaldson*, 223 Cal. Rptr. 707, 711 (Cal. Ct. App. 1986) ("Upon the death of the [custodial parent], the [absent parent] immediately became entitled to sole custody of her children."); *Evans v. Santoro*, 507 A.2d 1007, 1009-10 (Conn. App. Ct. 1986); *In re M.K.S.*, 726 So. 2d 309, 312 (Fla. Dist. Ct. App. 1998) ("[I]n the event of the death of one parent, the natural guardianship passes to the surviving parent."); *In re K.R.S.*, 560 S.E.2d 292, 294 (Ga. Ct. App. 2002) ("[T]he father as the surviving parent automatically became the legal custodian of K.R.S. at the moment of the mother's death since there had been no prior termination of the father's parental rights."); *In re Osborne*, 901 P.2d 12, 16 (Kan. Ct. App. 1995) ("Kansas adheres to the majority view that when a divorce decree gives custody to one parent and that parent dies, the right to custody automatically passes to the surviving parent . . ."); *In re Williams*, 447 So. 2d 1211, 1213 (La. Ct. App. 1984); *In re Kauch*, 264 N.E.2d 371, 373 (Mass. 1970); *In re Hohmann*, 95 N.W.2d 643, 647 (Minn. 1959) ("[T]he majority rule, which is adhered to in this jurisdiction, [is] that upon the death of the parent who has held custody of a minor child under a divorce decree the right to custody automatically inures to the surviving natural parent . . ."); *Stegall v. Stegall*, 119 So. 802, 803 (Miss. 1929); *Schumacher v. Schumacher*, 223 S.W.2d 841, 845 (Mo. Ct. App. 1949); *In re Estate of K.M.*, 929 P.2d 870, 872 (Mont. 1996) ("When one parent dies, the surviving parent automatically assumes the right to custody of the couple's children."); *In re Peterson's Guardianship*, 229 N.W. 885, 887 (Neb. 1930) ("Upon [the mother's death] the father immediately became entitled to her custody as a natural right, unaffected by the former decree."); *McLaughlin v. Mullin*, 651 A.2d 934, 935-36 (N.H. 1994); *Pollock v. Pollock*, 385 N.Y.S.2d 252, 252 (N.Y. App. Div. 1976); *McDuffie v. Mitchell*, 573 S.E.2d 606, 607-08 (N.C. 2002); *S.W. v. Duncan*, 24 P.3d 846, 851-52 (Okla. 2001);

such as a godparent or grandparent, can petition the court for custody, he or she will be facing an uphill battle against the common presumption that the surviving parent is entitled to custody absent a showing of unfitness.¹¹⁶ For the absent parent who continues to have no interest in raising the child, this may mean that he or she regains custody only to leave the child with another person of his or her choice, rather than the choice of the deceased parent.¹¹⁷ The unfortunate effect is that, after enduring the loss of his or her primary parent, the child may be forced to move and live with strangers, leaving behind the family and friends the child became attached to while growing up with the present parent.¹¹⁸

4. Ongoing Threat of Penalties for Violations

Finally, each of the requirements and restrictions that accompany a custody order is attached to statutorily prescribed penalties that can be imposed upon the present parent in the event of a violation. A violating parent risks being held in contempt of court, which may result in fines, an award of attorney's fees, jail time, or

In re Adoption of Abelsen, 225 P.2d 768, 770 (Or. 1950); Carr v. Prader, 725 A.2d 291, 293 (R.I. 1999); Dodge v. Dodge, 505 S.E.2d 344, 348 (S.C. Ct. App. 1998); Peacock v. Bradshaw, 194 S.W.2d 551, 555 (Tex. 1946); Nielson v. Nielson, 826 P.2d 1065, 1066-67 (Utah Ct. App. 1991); Judd v. Van Horn, 81 S.E.2d 432, 435 (Va. 1954); *In re* Welfare of Frank, 248 P.2d 553, 554 (Wash. 1952) ("Upon the death of the mother the father's right of custody as a natural parent revived automatically without any court action."); Sass v. Sass, 16 N.W.2d 829, 830-31 (Wis. 1944). *But see* IND. CODE ANN. § 29-3-3-6(a)-(b) (Michie 1997) ("[S]urviving parent of a minor does not have the right to custody of the minor without a proceeding authorized by law" if the surviving parent's visitation was previously supervised or suspended.); N.J. STAT. ANN. § 9:2-5 (Custody "shall not revert to the surviving parent without an order or judgment . . . to that effect.").

116. *See, e.g.*, Abrams v. Connolly, 781 P.2d 651, 657 (Colo. 1989); Clark v. Wade, 544 S.E.2d 99, 108 (Ga. 2001) ("[A] third party must prove by clear and convincing evidence that the child will suffer physical or emotional harm if custody were awarded to the biological parent."); Chambers v. Lee, 112 S.E.2d 614, 615 (Ga. 1960); *In re* Custody of N.A.K., 649 N.W.2d 166, 175 (Minn. 2002) ("[T]he presumption favoring the surviving parent can be overcome only by evidence evincing the existence of extraordinary circumstances of a grave and weighty nature . . ."); McDuffie v. Mitchell, 573 S.E.2d 606, 607-08 (N.C. Ct. App. 2002); Dodge, 505 S.E.2d at 349 ("Once the natural parent is deemed fit, the issue of custody is decided." (quoting Moore v. Moore, 386 S.E.2d 456, 458 (S.C. 1989))). *But see* OKLA. STAT. ANN. tit. 10, § 21.1(B) (West Supp. 2003) (custody can be denied to remaining natural parent in case of twelve months of failure to support or abandonment); S.D. CODIFIED LAWS § 25-5-29 (Michie 1999) ("[P]arent's presumptive right to custody . . . may be rebutted by proof . . . [t]hat the parent has abandoned . . . the child . . . [or] has abdicated his or her parental rights and responsibilities . . .").

117. *See, e.g.*, Donaldson, 223 Cal. Rptr. at 711 (holding that, upon father's death, custody automatically reverted to surviving mother, despite her prolonged absence, and it was within her authority to take children from paternal aunt and give them to her parents in another state).

118. *See, e.g., id.*; Dodge, 505 S.E.2d at 352 (holding that once custody reverts to surviving father, court has no authority to order ongoing contact or visitation with children's stepfather and half-brother, with whom they have lived the majority of their lives).

additional restrictions added to the custody order.¹¹⁹ A court may even consider such a violation grounds for modification of the custodial arrangement.¹²⁰ Whether the restriction amounts to a mere time-consuming and costly inconvenience, an invasion of familial privacy, or a potential disruption to the existing family unit, it is a legal requirement that must be followed. Even if the absent parent chooses not to enforce the requirements, the present parent remains technically and indefinitely constrained.¹²¹ While the absent parent has no legal obligation to visit his or her child or to keep the present parent informed of his or her whereabouts,¹²² the present parent must learn to live around the rights forever reserved for the absent parent.

C. Inconsistent and Illogical Outcomes

Where a biological parent has abandoned his or her child, failing to visit, communicate with, or support the child for extended periods of time, the parent will most likely lose his or her rights *if* the child is cared for by the state, a stranger, or a relative.¹²³ However, if the other parent is present, responsible, and caring, the absent parent's parental rights will be forever preserved by state law.¹²⁴ The absent parent's rights currently depend upon the actions and efforts of the other biological parent. If the other parent does nothing, the absent parent retains nothing.¹²⁵ If the other parent assumes not only his or her parental responsibilities but the absent parent's as well, the absent parent retains everything.¹²⁶ The absent parent acts no differently; it is the efforts of others that either permanently terminate or permanently preserve the absent parent's rights.

Where a person assumes complete responsibility for a child, providing full financial and emotional support, all of the child's daily contact, nurture, and encouragement, and establishing the only

119. See, e.g., KAN. STAT. ANN. § 23-701(g) (Supp. 2002); MO. ANN. STAT. § 452.400(6)-(7) (West 2003); NEB. REV. STAT. § 42-364.15 (1998); OHIO REV. CODE ANN. §§ 2705.031(B)(2), (E), .05(A) (West 1994 & Supp. 2003); OKLA. STAT. ANN. tit. 43, § 111.3(D) (West 2001).

120. See, e.g., FLA. STAT. ANN. § 61.13(4)(c)(5) (West Supp. 2003); MD. CODE ANN., FAM. LAW § 9-105(2) (1999); NEB. REV. STAT. § 125C.200 (Supp. 2001); OKLA. STAT. ANN. tit. 43, § 111.3(D)(7).

121. See *supra* notes 96, 104 and accompanying text; see also WHEELER, *supra* note 18, at 176 ("Custody cases are never closed. The parent who loses custody at one trial lives to sue another day. The parent who wins, remains forever on probation.").

122. See, e.g., DOWD, *supra* note 18, at 67-69; GOLDSTEIN ET AL., *supra* note 98, at 26; GREIF, *supra* note 18, at 166.

123. See *supra* Parts II.B.1. & 2.

124. See *supra* Parts III.A & B.

125. See *supra* Part II.B.

126. See *supra* Parts III.A. & B.

parental relationship that the child has, he or she will be entitled to the exclusive right “to make decisions concerning the care, custody, and control of their children”¹²⁷ if he or she is an adoptive parent.¹²⁸ However, a natural parent, under the same circumstances, is not entitled to the exclusive right “to make decisions concerning the care, custody, and control of their children.”¹²⁹ For as long as the absent parent is alive, unless the present parent remarries and completes a stepparent adoption, the present parent’s rights remain subject to interference by the state and the whims of the absent parent.¹³⁰

IV. A PROPOSAL FOR FILLING THE VOID

The law needs to provide a means for present parents to realize the full parental rights guaranteed to them by the Fourteenth Amendment. The present confinement to custody is simply not suited for the situation in which the noncustodial parent becomes completely absent from the child’s life.¹³¹ When a parent abandons his or her child, the protection of that parent’s rights should no longer depend upon the identity of the child’s caretaker, specifically not in the all or nothing fashion presently afforded.¹³² Nor should a responsible parent’s rights be constrained simply because he or she is the natural parent rather than an adoptive parent.¹³³ The law needs to provide present parents with the same legal recourse presently available to the state and adoptive parents.

127. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

128. See *supra* Part II.B.

129. *Troxel*, 530 U.S. at 66.

130. *Id.* at 67-68; see also *supra* Part II.B.3.

131. See *supra* Part III.B for discussion of the restrictions and limitations on custody. For discussion of the problems this designation creates, see, for example, GOLDSTEIN ET AL., *supra* note 98, at 46-49 (“[T]he law will not act in the child’s interests if it tries to do the impossible—to guess the future and to impose on the caregiver special conditions for the child’s day-to-day or weekend-to-weekend care. This leads to harmful and threatening discontinuity. . . .”); JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* (1979), reprinted in *BEST INTERESTS OF THE CHILD*, *supra* note 93, at 85, 90-91; Buss, *supra* note 1, at 649-54 (“[C]hild-rearing authority . . . belongs with whomever has undertaken parental responsibilities and thereby established her expertise.”).

132. See *supra* Parts II.B & III.B.

133. Both law and society favor natural parents over all other child caretakers. See, e.g., Johnson, *supra* note 16, at 400; Kristin J. Brandon, Comment, *The Liberty Interests of Foster Parents and the Future of Foster Care*, 63 U. CIN. L. REV. 403, 415 (1994) (recognizing the distinction between the rights of caretakers, which are state-created, and the rights of biological parents, which are “intrinsic human rights”).

A. Policy Arguments Against Termination

Providing a natural parent legal means to terminate an absent parent's rights faces many of the same arguments as any action resulting in the termination of parental rights. The threshold argument is that, as a constitutionally protected liberty, parental rights should be preserved whenever possible and termination should be allowed only in the most extreme circumstances.¹³⁴ This argument assumes, however, that the parent subject to termination is entitled to constitutional protection. Both the assumption and the argument fail in the case of an absent parent because, as the Supreme Court has recognized, "the mere existence of a biological link does not merit equivalent constitutional protection."¹³⁵ By failing to assume parental responsibilities and failing to fulfill a parental role, the absent parent loses constitutional protection of his or her parental rights.¹³⁶ This result is grounded in Supreme Court precedent and is apparent in state laws that allow for termination upon abandonment.¹³⁷ While the absent parent remains entitled to procedural due process protection to assure that he or she has, in fact, forsaken his or her parental responsibilities, once abandonment is established, the parent has no further rights to preserve.¹³⁸ At the very least, any rights that the absent parent may have should be outweighed by the present parent's constitutional rights.¹³⁹

The argument can also be made that reducing the child to a single parent is contrary to the child's interests in having the benefit of two parents.¹⁴⁰ However, the absent parent has already deprived

134. See, e.g., HARDIN & LANCOUR, *supra* note 16, at 4; Haugaard & Avery, *supra* note 10, at 135; Johnson, *supra* note 16, at 400; Verna Lilburn, Note, *Abandonment as Grounds for the Termination of Parental Rights*, 5 CONN. PROB. L.J. 263, 263, 287-88 (1991).

135. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

136. See *supra* Part II.A.2.

137. See *id.*; *supra* Part II.B.

138. See, e.g., *Lehr*, 463 U.S. at 262; *Santosky v. Kramer*, 455 U.S. 745, 760-61 (1982); *Quilloin v. Wallcott*, 434 U.S. 246, 255-56 (1978); *Stanley v. Illinois*, 405 U.S. 645, 656-58 (1972).

139. See *Lehr*, 463 U.S. at 261 ("[T]he mere existence of a biological link does not merit equivalent constitutional protection."); *id.* at 266-67 ("[T]he existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child."); *id.* at 267-68 ("If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights.").

140. See, e.g., DOWD, *supra* note 18, at 3-4, 13, 15, 27-28; McLanahan & Carlson, *supra* note 105, at 150-53; Linda Whobrey Rohman et al., *The Best Interests of the Child in Custody Disputes*, in PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS 60, 74 (Lois A. Weithorn ed., 1987); Iris Marion Young, *Mothers, Citizenship, and Independence: A Critique of Pure Family*

the child of such benefit.¹⁴¹ Furthermore, while early research indicated that children fare better emotionally in two-parent homes, recent research reveals that any differences are attributable to factors other than the number of parents a child has, and in fact, that many children may actually benefit emotionally from living in strong single-parent homes.¹⁴² Modern state adoption laws uniformly recognize that a single parent is as capable of successfully raising a child as are two-parent households.¹⁴³ Further, termination does not eliminate the

Values, in HAVING AND RAISING CHILDREN 15, 20 (Uma Narayan & Julia J. Bartkowiak eds., 1999).

141. See *supra* note 18 and accompanying text.

142. For general discussion of the early research that assumed two-parent homes were better than single-parent homes, see authorities cited *supra* note 140. For more modern assessments, challenging the old conclusions, and asserting that the number of parents in a home does not dictate a child's well-being, see, for example, STEPHANIE COONTZ, THE WAY WE NEVER WERE 222 (1992); DOWD, *supra* note 18, at xv, xix, 36, 39, 109; GOLDSTEIN ET AL., *supra* note 98, at 13; and Depner, *supra* note 105, at 162. In fact, modern research has revealed that most of the negative differences between children of two-parent households and children of single-parent households can be attributed to the common economic disparities between the two types of households, rather than the number of parents therein. See, e.g., DOWD, *supra* note 18, at 26, 39, 109; MARIANNE E. PAGE & ANN HUFF STEVENS, WILL YOU MISS ME WHEN I AM GONE?: THE ECONOMIC CONSEQUENCES OF ABSENT PARENTS 4-7 (Nat'l Bureau of Econ. Research, Working Paper No. 8786, 2002), <http://www.nber.org/papers/w8786>. Modern research has further revealed that children may actually fare better in strong single-parent homes. See, e.g., DOWD, *supra* note 18, at xviii, 33, 36, 103, 109-10, 113; Young, *supra* note 140, at 20-21.

143. All states now allow single-parent adoptions. See ALA. CODE § 26-10A-5(2) (1992); ALASKA STAT. § 25.23.020(a)(2) (Michie 2000); ARIZ. REV. STAT. ANN. § 8-103 (West 1999); ARK. CODE ANN. § 9-9-204(2) (Michie 2002); CAL. FAM. CODE § 8601(b) (West 1994); COLO. REV. STAT. § 19-5-202(1) (2002); CONN. GEN. STAT. ANN. § 45a-727(c)(3) (West 1993); DEL. CODE ANN. tit. 13, § 915(a) (1999); FLA. STAT. ANN. § 63.042(2) (West 1997); GA. CODE ANN. § 19-8-3 (1999); HAW. REV. STAT. ANN. § 578-1 (Michie 1999); IDAHO CODE § 16-1506 (Michie 2001); 750 ILL. COMP. STAT. ANN. 50/2 (West 1999); IND. CODE ANN. § 31-19-11-1 (Michie 1997); IOWA CODE ANN. § 600.4 (West 2001); KAN. STAT. ANN. § 59-2113 (1994); KY. REV. STAT. ANN. § 199.470(1) (Michie 1998); LA. CHILDREN'S CODE ANN. art. 1221 (West 1995); ME. REV. STAT. ANN. tit. 18-A, § 9-301 (West 1998); MD. CODE ANN., FAM. LAW §§ 5-309(a)-(b) (1999); MASS. GEN. LAWS ANN. ch. 210, § 1 (West Supp. 2003); MICH. COMP. LAWS ANN. § 710.24(1) (West 2002); MINN. STAT. ANN. § 259.22(1) (West 2003); MISS. CODE ANN. § 93-17-3(1) (Supp. 2003); MO. ANN. STAT. § 453.010 (West 2003); MONT. CODE ANN. § 42-1-106(2) (2001); NEB. REV. STAT. § 43-102 (1998); NEV. REV. STAT. ANN. 127.030 (Michie 1998); N.H. REV. STAT. ANN. § 170-B:4 (2001); N.J. STAT. ANN. § 9:3-43(a) (West 2002); N.M. STAT. ANN. § 32A-5-36 (Michie 1995 & Supp. 2003); N.Y. DOM. REL. LAW § 110 (McKinney 1999 & Supp. 2003); N.C. GEN. STAT. § 48-1-103 (2001); N.D. CENT. CODE § 14-15-03(2) (Supp. 2003); OHIO REV. CODE ANN. § 3107.03(B) (West 2000); OKLA. STAT. ANN. tit. 10, § 7503-1.1(3) (West Supp. 2003); OR. REV. STAT. § 109.309(1) (2001); 23 PA. CONS. STAT. ANN. § 2312 (West 2001); R.I. GEN. LAWS § 15-7-4(a) (2000); S.C. CODE ANN. § 20-7-1670 (Law. Co-op. 1985 & Supp. 2002); S.D. CODIFIED LAWS § 25-6-2 (Michie 1999 & Supp. 2003); TENN. CODE ANN. § 36-1-115 (2001); TEX. FAM. CODE ANN. § 162.001 (Vernon 2002); UTAH CODE ANN. § 78-30-1(3)(a)(ii) (2002); VT. STAT. ANN. tit. 15A, § 1-102 (2002); VA. CODE ANN. § 63.2-1201 (Michie 2002); WASH. REV. CODE ANN. § 26.33.140(2) (West 1997); W. VA. CODE ANN. § 48-22-201 (Michie 2001); WIS. STAT. ANN. § 48.82(1)(b) (West 2003); WYO. STAT. ANN. § 1-22-103 (Michie 2003). Some states explicitly preclude discrimination against an adoptive parent solely because he or she is single. See, e.g., ALA. CODE § 26-10A-5(2) ("No rule or regulation of the Department of Human Resources or any agency shall prevent an adoption by a single person solely because

child's ability to develop a relationship with the absent parent.¹⁴⁴ Essentially, the only right that is lost is the absent parent's right to force such communication or contact upon the present parent and child.¹⁴⁵

Finally, a recurring theme in the judicial decisions foreclosing a present parent's ability to terminate an absent parent's rights is the child's interest in the monetary obligations of the absent parent, including child support and inheritance.¹⁴⁶ Notwithstanding the fact that this argument is purely monetarily based, its weakness lies in the questionable value of the benefit that would be lost and the general insignificance placed on such rights in other contexts of termination. As an initial matter, one has to seriously question the value, if any, of retaining a support obligation and right of inheritance from a person who has failed to pay child support for extended periods of time.¹⁴⁷ In the modern world of child support collection, in which most debtors are plagued with negative credit reports, wage assignments, driver's license suspensions, tax refund intercepts, and potential jail time, a parent who still fails to pay child support likely has no significant monetary value from which the child could benefit.¹⁴⁸ Further, by allowing single parent adoptions and by placing little emphasis on an adoptive family's financial situation, the law has properly recognized

such person is single . . ."); CONN. GEN. STAT. ANN. § 45a-727(c)(3) ("The Court of Probate shall not disapprove any adoption under this section solely because of an adopting parent's marital status . . ."); MD. CODE ANN., FAM. LAW §§ 5-309(a)-(b) ("A court may not deny a petition for adoption solely because the petitioner is single or does not have a spouse.").

144. See, e.g., CAL. FAM. CODE § 8714.7(a)-(b); IND. CODE ANN. § 31-19-16-2; MASS. GEN. LAWS ANN. ch. 210, § 6C(a); N.M. STAT. ANN. § 32A-5-35; OR. REV. STAT. § 109.305(2); TENN. CODE ANN. § 36-1-121(f); Jennifer Wriggins, *Parental Rights Termination Jurisprudence: Questioning the Framework*, 52 S.C. L. REV. 241, 263 (2000) (advocating a more flexible and open adoption process); Fuller, *supra* note 93, at 1198-99 (explaining the open adoption process).

145. While adoptive parents remain free to allow contact between the children and the biological parents or relatives, they are generally not compelled to do so by law. See, e.g., CAL. FAM. CODE § 8714.7; IND. CODE ANN. § 31-19-16-2; MASS. GEN. LAWS ANN. ch. 210, § 6C; MO. ANN. STAT. § 453.080(4); OR. REV. STAT. § 109.305; R.I. GEN. LAWS § 15-7-14.1; S.D. CODIFIED LAWS § 25-6-17; TENN. CODE ANN. § 36-1-121(f); *Calderon v. Torres*, 445 So. 2d 1040, 1041 (Fla. Dist. Ct. App. 1984); *Sowers v. Tsamolias*, 929 P.2d 188, 191-92 (Kan. Ct. App. 1996); *State v. S.H.*, 45 P.3d 527, 532 (Utah Ct. App. 2002); *In re B.S.Z-S.*, 875 P.2d 693, 695 (Wash. Ct. App. 1994).

146. See Khristine Ann Heisinger, Note, *Child Support Properly a Factor in Determining Best Interests of Child in Voluntary Termination of Parental Rights*, 58 MO. L. REV. 969, 987-88 (1993); *supra* notes 80, 94 and accompanying text.

147. Research shows that the "strongest predictor" of whether a parent will pay future child support is whether he or she has paid child support in the past. Nord & Zill, *supra* note 18. Many parents who fail to pay support are poor, often unemployed or underemployed. McLanahan & Carlson, *supra* note 105, at 147, 156-57.

148. See *supra* note 147. For general descriptions of modern child support collection, see, for example, GREIF, *supra* note 18, at 162-64; McLanahan & Carlson, *supra* note 105, at 156-58; Heisinger, *supra* note 146, at 976-79.

that monetary considerations should not be a central factor in determining the best interests of a child.¹⁴⁹ Generally, society and the state are only concerned that a child is provided with the necessities of life within a safe and loving home.¹⁵⁰ Clearly, the state has an interest in preserving both parents' financial obligations where it appears likely that the child may require state economic assistance at some time in the future.¹⁵¹ This interest is taken into account in the suitability requirement for an adoptive parent¹⁵² and could likewise be incorporated into a suitability requirement for a natural parent.

B. The Compelling Need for Termination

Present parents should have the exclusive right "to make decisions concerning the care, custody, and control of their children."¹⁵³ Where two parents share this right in one child, admittedly, compromises and state intervention will often become necessary.¹⁵⁴ However, where a present parent retains constitutionally protected parental rights, and the other parent has lost such rights by failing to assume parental responsibilities and

149. Most state statutes require merely that the adoptive parent be "suitable" or "fit" to care for the child. See, e.g., DEL. CODE ANN. tit. 13, § 915 (1999); 750 ILL. COMP. STAT. ANN. 50/2 (West 1999); ME. REV. STAT. ANN. tit. 18A, § 9-308 (West 1998 & Supp. 2002); N.M. STAT. ANN. § 32A-5-36(F)(7) (Michie 1995 & Supp. 2002); S.C. CODE ANN. § 20-7-1760(B)(5) (Law. Co-op. 1985); VT. STAT. ANN. tit. 15A, § 3-703 (2002); W. VA. CODE ANN. § 48-22-701(a)(3) (Michie 2001). The few states that refer specifically to the parent's financial status require only that the parent be of adequate financial means to properly support and educate the child. See, e.g., GA. CODE ANN. § 19-8-3(a) (1999) (allowing adoption by "[a]ny adult person . . . [who] is financially, physically, and mentally able to have permanent custody of the child"); KY. REV. STAT. ANN. § 199.520(1) (Michie 1998 & Supp. 2002) (requiring that "the petitioners are of good moral character, of reputable standing in the community and of ability to properly maintain and educate the child" (emphasis added)); OR. REV. STAT. § 109.350 (requiring that "the petitioner is of sufficient ability to bring up the child and furnish suitable nurture and education"); R.I. GEN. LAWS § 15-7-14 (using language similar to the Oregon statute); TENN. CODE ANN. § 36-1-120(a)(10)-(11) (requiring "[t]hat the petitioners are fit persons to have the care and custody of the child . . . [and] are financially able to provide for the child"); see also Rohman, *supra* note 140, at 64-65 ("In a custody trial, evidence of economic and financial resources beyond what is needed to sustain life should be of less import unless tied to the special needs of the child involved."); Eric V. Meeker, *Termination of Parental Rights: Constitutional Rights, State Interests and the Best Interests of the Child*, 17 J. JUV. L. 82, 89 (1996) (arguing that children shouldn't be removed from their biological parents "for the sole purpose of being placed with families with better financial portfolios").

150. See *supra* note 149.

151. See, e.g., *In re K.J.K.*, 396 N.W.2d 370, 372 (Iowa Ct. App. 1986); *Brooks v. Fair*, 532 N.E.2d 208, 212-13 (Ohio Ct. App. 1988); DOWD, *supra* note 18, at 15, 18; GREIF, *supra* note 18, at 163.

152. See *supra* note 149.

153. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

154. See, e.g., WHEELER, *supra* note 18, at 49-51.

failing to fulfill any substantial parental role, there should be no compromise or state interference.¹⁵⁵ Not only is it unnecessary, but it is also contrary to constitutional precedent: "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."¹⁵⁶

All fit parents have a fundamental right to be free from the threat of future interference or harassment in matters concerning the raising of their children. This is one of the underlying premises of terminating all previous relationships upon any adoption.¹⁵⁷ States recognize that an adoptive parent has the exclusive right to decide, without court interference, whether and under what circumstances any individual can have contact with the adopted child or participate in the child's life.¹⁵⁸ While many adoptive parents allow such contact or participation, they are never forced to do so.¹⁵⁹ It would seem to follow that a natural present parent should be as entitled to such exclusive rights, if not even more so.¹⁶⁰ A natural present parent should be fully entitled to the "presumption that fit parents act in the best interests of their children"¹⁶¹ and should not be subject to a court's continuing jurisdiction to interfere upon any given "change of circumstances" or merely upon the request of the absent parent.¹⁶² When one parent has abandoned the child, leaving the present parent

155. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."); DOWD, *supra* note 18, at 103, 168-69; GOLDSTEIN ET AL., *supra* note 98, at 7 ("To safeguard the right of parents to raise their children as they see fit—free of government intrusion except in cases of abandonment, neglect, or abuse—is to safeguard each child's need for continuity."); *id.* at 23, 25, 32; GOLDSTEIN ET AL., *supra* note 131, at 90, 92; GOLDSTEIN, IN THE BEST INTERESTS, *supra* note 93, at 217, 227.

156. *Troxel*, 530 U.S. at 68-69 (citing *Reno v. Flores*, 507 U.S. 292, 304 (1993)).

157. See Fuller, *supra* note 93, at 1193-94.

158. See *supra* note 145.

159. See *supra* notes 144, 145.

160. See *supra* note 133. An adoption has the effect of severing the child's ties to all biological relatives, whereas, in the case of a natural present parent terminating an absent parent's rights, the child retains ties to one of his or her natural parents as well as that parent's relatives. Thus, if the state can justify allowing an adoptive parent to control the contacts and relationships a child has, including the right to exclude all of the child's biological relatives from the child's life, it would seem even more justifiable to allow a natural parent to have such control, given that the child still has contact with at least one biological relative—the present parent—and likely many others—the present parent's relatives.

161. *Troxel*, 530 U.S. at 68.

162. See *supra* Part III.B; see also GOLDSTEIN ET AL., *supra* note 98, at 81 ("To say that a child's relationship with her psychological parents . . . must not be interrupted is also to say that the rights and needs of those adults as parents are to be protected.")

to pick up the pieces and fulfill both parents' responsibilities, the absent parent should not retain the right to interfere with or harass the home that the present parent rebuilds.

A present parent should not be under any obligation to notify the court and the absent parent of changes in the child's school, address, or medical history, nor should the present parent be under any obligation to allow the absent parent access to the child's personal files.¹⁶³ Constitutional protection of parental rights and the fundamental zone of privacy surrounding the home both support this proposition.¹⁶⁴ Again, when the duties of raising a child are shared between two separated parents, court interference and requirements are often necessary.¹⁶⁵ However, when one parent assumes complete responsibility for raising a child, and the remaining parent is completely absent from the child's life, state-imposed requirements on the present parent are, again, unnecessary and completely contrary to the parent's constitutional rights.¹⁶⁶ Certainly no court would impose requirements upon an adoptive parent to allow the biological parents access to the child's medical and school records, nor would a court require an adoptive parent to notify the biological parents of changes of address.¹⁶⁷ Absent a compelling state interest, such as when two parents retain rights, such restrictions amount to undue state interference.

A present parent should have the legal right to designate a guardian for his or her child in the event of his or her death. Following the "presumption that fit parents act in the best interests of their children,"¹⁶⁸ it seems logical that the present parent is in the best position to determine who would best raise the child in his or her absence.¹⁶⁹ It seems equally illogical for states to presume that the absent parent, who is often a complete stranger to the child, is the best person to raise the child or designate a guardian.¹⁷⁰ Particularly

163. See *supra* Part III.B.

164. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."); GOLDSTEIN ET AL., *supra* note 98, at 32 ("The new family deserves . . . to be as free of state intervention as any other 'intact' family."); GOLDSTEIN ET AL., *supra* note 131, at 90; Buss, *supra* note 1, at 650, 656.

165. See *supra* note 154.

166. See *supra* note 164.

167. See Fuller, *supra* note 93, at 1188, 1193-94.

168. *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

169. See, e.g., *id.* ("[T]here is a presumption that fit parents act in the best interests of their children."); GOLDSTEIN ET AL., *supra* note 131, at 111 ("The presumption is that parents know best who should care for their child.")

170. See, e.g., *In re Custody of C.C.R.S.*, 892 P.2d 246, 258 (Colo. 1995) (criticizing other states' presumptions that custody should automatically revert to the surviving parent, and

in this context, where a child has endured the traumatic loss of his or her only present parent, the absent parent's retention of legal rights poses a substantial threat to the child's emotional well-being.¹⁷¹

In addition to the restrictions that naturally accompany custody orders, there are a multitude of day-to-day obstacles that the present parent and the child face when the absent parent retains parental rights. For example, private entities often require both legal parents' signatures for major decisions such as allowing a child to skip a grade or undergo elective surgery.¹⁷² State statutes often require the consent of both legal parents for actions such as name changes, permit applications, and entry of contracts.¹⁷³ Many states require both parents to consent if a minor child wishes to get married, have an abortion, or join the armed forces.¹⁷⁴ While many of these situations appear rare and their impact insignificant, after years of getting around the "other parent" section on daily forms, the impact is far from insignificant to the present parent and the child.

While this list is not intended to be exhaustive, the primary point should be clear: when an absent parent retains legal rights, the present parent, the child, and their newly established home life remain subject to and inhibited by those rights. The natural parent and the child have already been disadvantaged by the absent parent's conduct. It is illogical and inequitable to further inhibit their lives in the name of protecting the absent parent's rights.

C. *Filling the Void*

1. Method

States should allow present parents to terminate absent parents' rights in appropriate cases either by incorporating the right into existing termination or adoption statutes or by creating a

acknowledging that "giving custody to [the absent parent], who is virtually a stranger to [the child], ignores the welfare of the child and is likely to have a detrimental effect on his emotional and psychological well-being"); Meeker, *supra* note 149, at 91 ("It is difficult to conceive, for example, that a child has an interest in being returned to the custody of the parent who abandoned or abused her.").

171. See *supra* note 169.

172. See, e.g., GREIF, *supra* note 18, at 159.

173. See, e.g., DEL. CODE ANN. tit. 31, § 2502 (1997) (contract); HAW. REV. STAT. ANN. § 574-5(b)(2) (Michie 1999) (name change); IOWA CODE ANN. § 674.6 (West 1998) (name change); KY. REV. STAT. ANN. § 401.020 (Michie 1999) (name change); MICH. COMP. LAWS ANN. § 711.1(5) (West 2002)(name change); N.Y. ALCO. BEV. CONT. LAW § 99-f (McKinney 2000) (permit application); WIS. STAT. ANN. § 786.36(1) (West 1997) (name change).

174. See, e.g., GREIF, *supra* note 18, at 159.

separate statutory scheme. Because termination of parental rights actions are already heavily regulated by state law, the simple approach would be to make these proceedings available to present parents.¹⁷⁵ State statutes could be amended by either including natural parents as parties who may petition for termination of the other parent's parental rights or by allowing natural custodial parents to adopt their own children.¹⁷⁶ This would certainly be the most convenient and efficient manner of reform, as the grounds, burdens of proof, time requirements, and procedures are already provided for. However, because the situation contemplated has unique aspects and concerns not present in other contexts, the ideal approach would be for states to create a separate legal remedy tailored specifically to this situation.¹⁷⁷ A separate statutory scheme allowing a present parent to terminate the rights of an absent parent could incorporate much of the substance of existing termination and adoption statutes, while ensuring availability only in the true absent parent scenario described in this Note.¹⁷⁸

2. Grounds

Like other actions involving termination of parental rights, the proposed action would involve a two-prong test.¹⁷⁹ First, the present parent would have to show that the absent parent has abandoned the child. Second, the present parent would have to show that termination of the absent parent's rights is in the child's best interests. To satisfy the first prong, the present parent would be required to prove, by clear and convincing evidence, that the absent parent has abandoned the child.¹⁸⁰ Abandonment would consist of a parent's failure to visit, failure to communicate with, and failure to support his or her child for a specified period of time without just

175. See *supra* Part II.B.

176. For discussion of the current availability of these actions to present parents, see *supra* Part III.A.

177. Unlike most adoption and termination cases, the child is not in danger and has no need for immediate placement. See *supra* note 12 and accompanying text. The constitutional rights at issue, however, include the present parent's rights as well as the absent parent's rights. See *supra* Part II.A. Thus, the law's preference for natural parents and presumptions in favor of parental autonomy will influence various phases of the proceeding differently than in cases brought by the state or a nonparent. See *supra* note 133.

178. See *supra* Part II.B.

179. HARDIN & LANCOUR, *supra* note 16, at 9-10.

180. In any termination of parental rights action, allegations against the parent subject to termination must be proven by "clear and convincing" evidence. *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982).

cause.¹⁸¹ As a cautionary measure, states could require the present parent to show that the absent parent has failed all three of the common parental duties: visitation, communication, *and* support.¹⁸² Such a requirement would preclude termination in situations where a child is still receiving some benefit from the absent parent.¹⁸³ As with existing statutes, however, courts should be allowed to disregard incidental or token efforts at communication or support.¹⁸⁴

The absent parent would, of course, have the opportunity to show just cause for failing to fulfill his or her parental duties.¹⁸⁵ Any

181. This language combines the common elements found in state definitions of abandonment. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-717(g)(2)(A) (West 1993) (“[T]he child has been abandoned by the parent in the sense that the parent has failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child”); IDAHO CODE § 16-2005(a) (Michie 2001) (“The parent has abandoned the child by having willfully failed to maintain a normal parental relationship including, but not limited to, reasonable support or regular personal contact”); MO. ANN. STAT. § 211.447(2)(2)(b) (West Supp. 2003) (“The parent has, without good cause, left the child without any provision for parental support and without making arrangements to visit or communicate with the child, although able to do so”).

182. For state statutes allowing a finding of abandonment upon a failure of support or visitation or communication, rather than requiring failure of all three, see, for example, ALASKA STAT. § 25.23.050(a)(2) (Michie 2000); COLO. REV. STAT. § 19-5-105(3.1) (2002); GA. CODE ANN. § 19-8-10(b) (1999); HAW. REV. STAT. ANN. § 571-61(b)(1)(C)-(D) (Michie 1999); and LA. CHILDREN'S CODE ANN. art. 1015(4) (West 1995). *See also supra* note 64 and accompanying text.

183. If the child is receiving any benefit from the continued relationship, policy arguments urge that the child's right to such benefit be preserved. *See supra* notes 140, 146 and accompanying text. The true absent parent situation contemplated, however, is one in which the child is receiving no benefits from the relationship. *See supra* note 18 and accompanying text.

184. For examples of state statutes that allow courts to disregard “incidental” or “token” efforts when determining abandonment, see *supra* notes 48, and 58. For examples of what actions constitute “incidental” or “token” efforts, see, for example, *Greeson v. Barnes*, 900 P.2d 943, 945-46 (Nev. 1995) (finding abandonment proven where, during previous four years, father visited child once and paid only \$60 in child support, which was paid after initiation of termination suit); *In re Brittany L.*, 737 A.2d 670, 673-74 (N.H. 1999) (holding that efforts showed “a mere flicker of interest” insufficient to overcome finding of abandonment where father's only contact with child was through occasional cards on birthdays and major holidays); and *In re Termination of Parental Rights to I.H.*, 33 P.3d 172, 180 (Wyo. 2001) (holding that termination of parental rights was warranted where father's only child support payment over two year period was through an involuntary tax refund intercept).

185. For cases examining what constitutes “just cause,” see, for example, *In re Adoption of F.A.R.*, 747 P.2d 145, 150 (Kan. 1987) (“When a nonconsenting parent is incarcerated and unable to fulfill the customary parental duties required of an unrestrained parent, the court must determine whether such parent has pursued the opportunities and options which may be available to carry out such duties to the best of his or her ability.”); *In re K.D.O.*, 889 P.2d 1158, 1159-60 (Kan. Ct. App. 1995) (holding father has “reasonable cause” for his failure to support child's mother during her pregnancy where she refused his offers to provide financial support and transportation); *In re K.L.H.*, 771 So. 2d 706, 709 (La. Ct. App. 2000) (trial court erred by failing to consider the domestic abuse endured by noncustodial mother and the instability in her living arrangements in determining whether she had “just cause” for failing to pay child support during one year period); *Chastain v. Timmons*, 558 So. 2d 344, 346-47 (La. Ct. App. 1990) (finding “just cause” where custodial mother returned toys and clothes sent by noncustodial father, moved frequently, preventing child support payments from reaching her, and refused to

interference by the present parent or any other circumstances beyond the absent parent's control would be taken into account when determining just cause. Further, because the child is not in any immediate danger, the required time period for abandonment could be lengthened to two years, which is twice as long as any period required by existing termination or adoption statutes, yet safely beyond the point at which the abandonment will have become permanent in the child's mind.¹⁸⁶

The second prong, requiring a showing that termination is in the child's best interests, would incorporate the constitutional "presumption that fit parents act in the best interests of their children"¹⁸⁷ with the existing standards of "suitability."¹⁸⁸ Rather than imposing the court's judgment on the desirability of terminating the absent parent's rights, the court would afford deference to the present parent's judgment that termination is in the best interests of the child.¹⁸⁹ Courts should recognize that the present parent has been and will continue to be in the child's life daily, experiencing the child's joys and sorrows, witnessing the child's personality develop, and observing the child's emotional needs.¹⁹⁰ The present parent is thereby in the best position to assess the child's best interests.¹⁹¹ The court, on the other hand, has minimal exposure to or knowledge of the individual child and is consequently limited to generalizations, predictions, and often, a particular judge's personal parenting judgments.¹⁹² While it would be appropriate for the court to assess

provide father with current address so he could exercise visitation); and *In re Lambert*, 545 So. 2d 1122, 1123 (La. Ct. App. 1989) (for determination of "just cause," "[i]f the parent alleges lack of employment, he must prove that he was not only unemployed but unemployable.").

186. See *supra* notes 45-47, 56-57 and accompanying text for the time requirements included in existing termination and adoption statutes. For discussion of "the Child's Sense of Time," see GOLDSTEIN ET AL., *supra* note 98, at 41-42, 44-45.

187. *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

188. See *supra* notes 16, 149.

189. Compare cases cited *supra* notes 77, 83, (refusing such actions based upon the court's judgment of the best interests of the children and good public policy), with *Troxel*, 530 U.S. at 72-73 ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made.").

190. See, e.g., GOLDSTEIN ET AL., *supra* note 98, at 24-25.

191. Buss, *supra* note 1, at 649 ("Because the parent knows herself, her child, and her entire household better than the state knows them, and stands in a position of greater influence than the state over the behavior of all three, the parent is best situated to decide what private relationships should be fostered.").

192. See, e.g., GOLDSTEIN ET AL., *supra* note 98, at 47-48 ("[I]t is beyond the competence of any judge, or the competence of any discipline for that matter, to appraise the amalgam of human factors in any child placement dispute for purposes of making long-term predictions or dictating special conditions for custody."); GOLDSTEIN ET AL., *supra* note 131, at 91 ("The legal system has neither the resources nor the sensitivity to respond to a growing child's ever-

whether a parent is seeking the termination in good faith, absent dishonorable motivations, courts should accept a present parent's request for termination as a compelling indication that such a result would be in the child's best interests.¹⁹³

The next inquiry of the "best interests" prong would be into the suitability of the present parent to be the child's sole legal parent. This determination would involve an assessment of whether the parent is financially and emotionally capable of supporting the child alone.¹⁹⁴ At this point, the court could appropriately address the state's interest in not having to support the child in the future without the option of pursuing the absent parent for child support.¹⁹⁵ The present parent would have to demonstrate that his or her current financial resources and future earning potential are sufficient to support and educate the child at least through the age of majority.¹⁹⁶ The court could also assess the child's adjustment to and well-being in the single-parent environment.¹⁹⁷ Consistent with state policy, it may be appropriate for the court to appoint a guardian ad litem or child psychiatrist to represent the child and report to the court regarding the child's current well-being.¹⁹⁸ At the end of the inquiry, however, if

changing needs and demands. It does not have the capacity to deal on an individual basis with the consequences of its decisions. . . ."); *id.* at 93-94; GOLDSTEIN ET AL., *supra* note 93, at 160 ("[T]hey have a multitude of personal beliefs and ordinary knowledge about what is good and bad for children and about what makes a satisfactory or unsatisfactory parent; beliefs and knowledge which they, as adults moved by an urge to 'rescue' children, are tempted to impose. The risk that actions and decisions in child placement will rest on personal values presented in the guise of professional knowledge is therefore great—and all the more important to guard against."); Buss, *supra* note 1, at 647 ("In contrast [to a parent], the state's knowledge of and commitment to any particular child is relatively thin.").

193. *Troxel*, 530 U.S. at 72-73 ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decisions could be made."); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."); DOWD, *supra* note 18, at 116 ("We should trust the choices of adults as most beneficial for them and their children."); GOLDSTEIN ET AL., *supra* note 131, at 89 ("To be an *adult who is a parent* is therefore to be presumed by law to have the capacity, authority, and responsibility to determine and to do what is 'good' for one's children, what is 'best' for the entire family.").

194. See *supra* notes 16, 149 and accompanying text.

195. See *supra* note 151 and accompanying text.

196. See *supra* note 149.

197. See *supra* note 142 for discussion of the different effects a single-parent household can have on a child and research revealing that, absent economic strain, children may actually fare better in single-parent homes.

198. Forty-six states currently require the appointment of a guardian ad litem in termination of parental rights actions. Haugaard & Avery, *supra* note 10, at 138. For discussion

the parent is “financially, physically, and mentally able to have permanent custody of the child”¹⁹⁹ and the child is thriving under the sole care of the present parent, termination should be presumed to be in the child’s best interests, absent extraordinary and compelling reasons to the contrary.

3. Procedural Requirements

Consistent with the Due Process Clause, the proposed statute would necessarily provide the absent parent with all of the procedural safeguards afforded in any proceeding resulting in the termination of parental rights.²⁰⁰ The absent parent would be provided with notice and the opportunity to be heard, and allegations of abandonment would have to be proven by clear and convincing evidence.²⁰¹ Consistent with state practice, states could further provide the absent parent with the right to counsel.²⁰²

4. Effect

Upon finding that an absent parent has abandoned his or her child and that termination of that parent’s rights is in the child’s best interests, a final judgment would enter completely and permanently terminating the absent parents’ parental rights and responsibilities. Specifically,

[u]pon the termination of parental rights . . . all rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, visitation, or support existing between the child and parent shall be severed and terminated and the parent shall have no standing to appear at any further legal proceedings concerning the child.²⁰³

Aside from the absent parent’s right to appeal, the judgment would be permanent and irreversible.²⁰⁴ The absent parent would be

of the role a guardian ad litem or child psychiatrist would play in such a proceeding, see Johnson, *supra* note 16, at 403.

199. GA. CODE ANN. § 19-8-3(a) (1999) (suitability standard for an adopting parent).

200. See, e.g., Santosky v. Kramer, 455 U.S. 745, 747-48, 753-54 (1982); Stanley v. Illinois, 405 U.S. 645, 649, 657 (1972).

201. Santosky, 455 U.S. at 747-48, 753-54; Stanley, 405 U.S. at 649, 657.

202. While a parent does not have an automatic right to counsel in a termination of parental rights proceeding, STEIN, *supra* note 16, at 154, forty-six states provide parents with the right to counsel. Haugaard & Avery, *supra* note 10, at 138.

203. WASH. REV. CODE ANN. § 13.34.200(1) (West 1993).

204. For the general finality of such orders, and the parent’s right to appeal, see, for example, CAL. FAM. CODE § 7894(b)-(c) (West 1994); HAW. REV. STAT. ANN. § 571-63 (Michie 1999); KY. REV. STAT. ANN. § 625.110 (Michie 1999); NEB. REV. STAT. § 43-293 (1998); NEV. REV. STAT. ANN. 128.120 (Michie 1998).

divested of any residual rights to petition for visitation, object to the present parent's relocation, access the child's personal files, or in any other way interfere with the child's upbringing.²⁰⁵ Conversely, all of the present parent's preexisting parental rights would remain fully intact and, contrary to the reasoning in previous legal decisions, would be strengthened, expanded, and transformed. All obligations to notify the court and the absent parent of major parental decisions would cease, as would the court's jurisdiction to modify the parent's rights upon any change of circumstances. The present parent would gain the power to designate a legal guardian for the child in his or her will. The present parent would truly have the exclusive right "to make decisions concerning the care, custody, and control of [his or her child]."²⁰⁶ The present parent would become the sole parent.

V. CONCLUSION

In an ideal world, every child would receive love, care, and support from both natural parents. As we all know, however, this world is far from perfect, and the common make-up of families is rapidly changing. Current research indicates that approximately thirty percent of American children, or 18 million, live in single-parent families.²⁰⁷ Of these children, somewhere between thirty and forty percent, or approximately 6.3 million, have been essentially abandoned by the other parent.²⁰⁸ The remaining family units, consisting of present parents and the children they care for, necessarily face unique emotional and financial challenges. The question is whether the law should seek to minimize these challenges by offering full recognition and autonomy to these family units, or whether it will continue to restrict and interfere with their autonomy.

This Note has set forth a multitude of ways the law seeks to guarantee privacy and autonomy to recognized family units. It has also identified the ways in which the law limits the rights of one very prevalent family unit: the present parent family. The essential argument set forth is merely that the law should afford present parent families the same autonomy currently afforded to two-parent families and adoptive families. The United States Supreme Court has recognized that present parents' rights are fundamental liberties

205. Compare the rights associated with custody as set forth in *supra* Part III.B with the "fresh start" approach set forth in Fuller, *supra* note 93, at 1188, 1193-94.

206. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

207. GREIF, *supra* note 18, at 4.

208. *See supra* note 18.

deserving the utmost constitutional protection.²⁰⁹ The Court has also recognized that absent parents, who fail to assume adequate parental responsibilities, are not entitled to constitutional protection.²¹⁰ State laws have responded by severing parental rights where a parent has failed to communicate with, visit, or support his or her child for a prolonged period of time.²¹¹ State laws have also responded by granting adoptive parents, including single parents, full rights in their adoptive children.²¹² The inconsistency and inequality that remains is the legal rights afforded to present natural parents: custody.

This void must be filled. Custody is simply not suited for the situation in which one parent goes and the other parent stays. Present parents have a constitutionally protected right to raise their children as they see fit, safe from undue state interference. The children they raise have a compelling interest in a stable and loving home that is free from harmful intrusions. Absent parents lack any constitutional right to object to or interfere with the present parents' autonomy. All this being said, it seems only logical that present parents should be afforded a legal means by which to attain full parental rights in the children they raise.

*Wendee M. Hilderbrand**

209. *See supra* Part II.A.1.

210. *See supra* Part II.A.2.

211. *See supra* Part II.B.

212. *See supra* notes 145, 158, 167, and accompanying text.

* This Note is dedicated in loving memory of Richard V. Lohman, Esq., my mentor, my friend. Thank you for believing in me before you had reason, challenging me to always go further, supporting all of my aspirations, and showing me the kind of attorney I want to become. Your last request of me was to send you a copy of this Note; I regret that I am unable to do so. I just hope that, somehow, it finds its way to you.

I also dedicate this Note to my daughter Savannah, who has inspired this piece, my career, and my life. None of this would be possible without her smile and her love. I further dedicate this Note to my dear friend Bruce, who is the strongest, most noble single father I have ever known, and to all of the other parents who endure the trials detailed herein and triumph because of the extraordinary love they have for their children. I thank my father Jerry for taking ownership in my dreams. And finally, I humbly thank all of my editors for their time and efforts.
