The Best Interests of the Child - The Illinois Adoption Act in Perspective

Craig Benson
Christine Godsil Cooper
Joel Handler
Ralph Waters

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol24/iss1/4

This Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
THE BEST INTERESTS OF THE CHILD—THE ILLINOIS ADOPTION ACT IN PERSPECTIVE

INTRODUCTION

Effective October 1, 1973, the Illinois Adoption Act\(^1\) was amended by the addition of section 9.1-20a:

> The best interests and welfare of the person to be adopted shall be of paramount consideration in the construction and interpretation of this Act.

The Adoption Act does not otherwise attempt to clarify this section, nor does it explain how section 9.1-20a functions within a procedural context. Given this apparent statement of policy, this Comment will discuss how this concern for the adoptive child evolved, and consider to what extent the best interests of the child can be served in Illinois.

I. HISTORICAL BACKGROUND

According to Sir Henry Maine, adoption is one of the oldest and most widely employed legal fictions.\(^2\) Adoption affects the biological parents, the adoptive parents, the person adopted, and the community. Through the years, adoption has served varied purposes. Ancient adoption law, particularly Roman law, was clearly designed to benefit the adoptor.\(^3\) Maintaining the continuity of the adoptor’s family was the primary purpose of adoption.\(^4\) Adoption under Roman law was an institution “whereby the great families provided themselves with heirs to their property and worship, successors to office or a political following.”\(^5\) References to

---

1. ILL. REV. STAT. ch. 4, §§ 9.1-1 et seq. (1973). All references to sections hereafter shall be to the above Act unless otherwise indicated.
4. Huard, supra note 3, at 745. In his historical reconstruction Sir Henry Maine surmised that without adoption, primitive tribes could not have absorbed each other or combined except on terms of “absolute superiority on one side and absolute subjection on the other.” MAINE, supra note 2, at 131.

Before a Roman adoption could occur, three prerequisites had to be met. The first condition was that the adoption had to “imitate nature.” Brosnan, The Law of Adoption, 22 COLUM. L. REV. 332 (1922). This requirement meant that a eunuch could
adoption are found in the earliest known codes of law. As early as 2285 B.C., the Code of Hammurabi spoke of adoption as it existed among the Babylonians. The biblical account of the finding of Moses by the Pharaoh’s daughter gives credence to the fact that adoption was known to both Egyptians and the Hebrews. In Greece, adoption arose when a man had no offspring or no male offspring. The adoptee’s relationship with his own kin was immediately severed upon adoption, and the

not adopt, but an impotent person could, since impotence might be cured. The first condition accounted for the second: an adopted child could not be older than his father. Justinian declared that a man had to be eighteen years older than the son he desired to adopt. The final requirement was that only a man could adopt. After 291 A.D. women were allotted a limited form of adoption to help ease their loss of children taken from them.

There were two types of adoption permitted by Roman law: adoption and adrogation. Id. Adoption in the strict sense was the legal act whereby a person who was under the power of the natural head of his family passed out of such pater familias to fall under the paternal power of a new family head. The adoptee became a stranger to his natal agnatic family. This was accomplished, initially, when a son was fictitiously sold three times by his father, and his daughter or granddaughter sold once. See Adam, Roman Antiquities (1833). Justinian simplified this procedure, enabling adoption to be effective by a simple proceeding before a magistrate wherein the adoptor, adoptee, and the natural parent appeared. Appeal of Woodward, 81 Conn. 152, 70 A. 453 (1908).

Adrogation meant the adoption of a person, generally an adult, who was sui generis and independent. The person adrogated renounced the worship of the gods of his previous family and worshipped the gods of his new family. W. Buckland, A Textbook of Roman Law 123 (1927). Adrogation was more ancient in form than adoption, and adrogation required the enactment of a specific law by the Comitia Curia. Huard, supra note 3, at 745, citing I. Colquhoun, A Summary of the Roman Civil Law 688 (1849).

Thus, either by adoption in the strict sense, or by adrogation, the adopted child’s relations with his biological family were severed and the adopted child submitted himself to his new father’s patria potestas. However, according to Justinian, the adopted child usually retained his right to the succession of his natural father. Note, The Effect of the Law of Adoption Upon Rights of Inheritance, 1 So. L. Rev. 70, 76 (1875).

Patria potestas, in its original form, was a complete power over the offspring and descendants, including the power of life and death. In Appeal of Woodward, supra at 163, 70 A. at 457, this aspect of the Roman law had a strong effect on some American judges, who were repelled by the Roman parental power since “[w]ith us every man who has reached his majority is free from [anyone else’s] power.”


7. “And she adopted him for a son and called him Moses, saying I took him out of water!” Exodus 2:10. See also Esther 2:5-8, where Mordecai adopts his niece, Esther.

8. Goody, supra note 5, at 61. Adoption could also arise when a man with no sons wanted to prevent a close kinsman from claiming his daughter as an heiress. Adoptions could be either inter vivos or by will, and usually involved close kin. If an individual had a legitimate son of his own, he could not adopt another.

9. Id. Goody expounds that if adoption was during a man’s lifetime, his
adoptee “could be more easily repudiated than a ‘natural’ son.”

The ancient inhabitants of what is now Germany incorporated military ceremonies in their practice of adoption, whereby a warlike weapon was placed in the hands of the adopted individual. Adoption was also a prevalent custom of many American Indian tribes. However, the settlers’ courts prohibited their tribal customs since adoption was considered a purely statutory matter, accomplished by power of law and not by act of the parties. Hence, adoption as practiced by the American Indians was cut short, since the courts of the white settlers would not sanction a custom that did not conform to their statutory requirements.

The chief object of adoption under the Hindu law was the “perpetuation of the lineage.” The requirements for adoption emphasized concern for class and the biological family rather than for the child adopted. The adoptor could not already have a son, nor could the adoptor adopt a boy of another class. An only son could not be adopted, and the consent of a kinsman of the adoptee was required. The adopted son was to be a close consanguine to the adoptor, preferably a brother’s son. The actual adoption involved a specific ceremony which emphasized the giving and receiving of the child. As a result of the act, the adopted son received new rights of inheritance and the concomitant obligations, but still retained a minimal link with his natural family, as shown by the fact that he was prohibited from marrying within the family.

Thus, it can be seen that adoption was utilized by numerous archaic societies to prolong the continuity of family existence. The “best inter-

10.  Id. at 62.
12.  Brosnan, supra note 11, at 334; Huard, supra note 3, at 748; Presser, supra note 3, at 489.
13.  Non-she-po v. Wa-nin-ta, 37 Ore. 213, 62 P. 15 (1900), stated: “It never was in the power of an individual, either by the common law of England or the Roman law, to adopt the child of another at his volition, or by the consent of the parents.” See Henry v. Taylor, 16 S.D. 424, 93 N.W. 641 (1903).
14.  MAYNE, A TREATISE ON HINDU LAW AND USAGE 133 (9th ed. 1922).
15.  Goody, supra note 5, at 63.
16.  Id. at 63-64.
17.  MAYNE, supra note 14, at 202. The adoptor would ask the natural father: “Give me thy son,” and the other answers: “I give him.” He receives him with these words: “I take thee to continue the line of my ancestors.”
18.  Id. at 179.
19.  MAINE, supra note 2.
ests of the child" seemed irrelevant during these times since it was the interest of the adoptor rather than the adoptee that was the focal point of adoption.

The term "best interest of the child" was never referred to in the English common law. In fact, adoption never achieved formal legal recognition. As was seen with the ancient practice of adoption, the adoptee became a member of the adoptor's family, acquired a quasi-interest in the adoptor's property during the adoptor's life, and succeeded to such property when the adoptor died. Yet, to the English, due to their high regard for blood lineage, adoption never gained support since heirs were perceived only as legitimate children who were heirs of the blood. Glanvill emphasized this belief when he stated: "Only God can make a heres, not Man."23

In the Middle Ages, the property-owning classes in England did not want an outsider made a part of the family since this would work to the prejudice of the expected heirs.24 Because of this unwillingness to accept

21. Id. at 745.
22. Id.
23. Glanvill, vii, 1., quoted in 2 F. Pollack & F. Maitland, The History of English Law 254 (2d ed. 1898). But see Presser, supra note 3, at 499. "Glanvill's rule also may have had more to do with expressing a sentiment against testamentary bequests and inter vivos gifts to nonrelated persons than it did with adoption."
24. Id. The dispute over the mantle-children was one possible reason for the court's resistance to an adoption law. An ancient custom, later incorporated into the English common law, provided for the legitimization of children born out of wedlock to parents who subsequently married. Id. at 450. This custom was utilized in Germany, France, and Normandy whereby the children, along with their father and mother stood under a cloth extended while the marriage was solemnized. The children were called "mantle-children." Pollack & Maitland, supra note 23, at 399. After a controversy involving whether the common law would adopt the canon law rule allowing legitimization, the Statute of Merton, 20 Henry III 1235 A.D., expressly rejected this canon law rule. Presser, supra note 3, at 451.

The rationale most commentators offered for the Statute of Merton's refusal to recognize the mantle-children is that the rule was introduced by a foreigner. T. Barrington, Observation of Ancient Statutes 44, 45 (1796), discussed in Joachimsen, The Statute to Legalize the Adoption of Minor Children, 8 Albany L.J. 353, 355 (1873).

Maitland suggests another reason for the unwillingness to accept adopted heirs: from the days of the Conquest, legitimate children inherited fiefs held by military service. Pollack & Maitland, supra note 23, at 314-16. However, this contention has been challenged on the basis that, from the Conquest until after 1200, the military fief was not inheritable. Thorne, English Feudalism and Estates in Land, 1959 Cambridge L.J. 193. Instead, the Lord over the land, to whom the military service was owed, could freely award the land to whomever he desired when the tenant for service died. Id. Professor Thorne relates that a new tenant was chosen on the basis of who could provide the best military service that was desired. Yet, due to convenience and expectancy factors, the land would pass to the children of the former tenants.
adopted heirs, the English courts in the thirteenth century were reluctant to establish adoption law.

Despite the absence of common law adoption, foster parenthood as well as other mechanisms for the care of both dependent and independent children were available. These alternatives made adoption, from a social welfare standpoint, unnecessary. In the case of foster parenthood, English families accepted and treated foster children as if they were natural children, except that they had no legal recognition and thus could not inherit from the foster parents.

The two mechanisms which reached their zenith by the seventeenth century and had as their purpose the temporary training of the child were the institutions of “putting out” and “apprenticeship.” During the sixteenth century in England, nearly all young people in service would change jobs by going to a new family for an extended period of time. This “putting out” system applied to both rich and poor alike, although, in most instances, the children of the poor were passed on to the rich. Moreover, under the “putting out” system, when the child was sent to another house, he had to learn the “manner (or the trade) of the head of the family.”

The practice of “apprenticeship” was similar to that of “putting out” and received the same acceptance in the seventeenth century. This prac-

---

Presser explains that, if the Lord could freely award the land to whomever he desired, upon the death of the tenant for service, then the only heirs who could receive property were heirs by adoption, although it was the Lord who was doing the adopting and not the tenant who was succeeded. Moreover, if the Lords made arbitrary choices which were resented by a sufficient number of the landless offspring of the former tenants, “perhaps this resentment eventually resulted in a reluctance on the part of the common law judges to recognize 'adopted' heirs of the tenant himself.”

Presser, supra note 3, at 452.

25. These child care mechanisms are pertinent in connection with the purpose of American adoption statutes. The purpose of American adoption statutes enacted in the mid-nineteenth century was to provide for the best interests of the child, but this need was satisfied in England by these child care mechanisms. Hence a statute on adoption was not incorporated into the common law. See Presser, supra note 3, at 453.

26. Huard, supra note 3 at 746.

27. See generally P. Laslett, The World We Have Lost 1-3, 53-80 (1965).

28. Id. at 3.

29. Id. at 69-70.

30. Aries, Centuries of Childhood 290-91 (Baldick transl. 1962).

31. See text accompanying notes 40-64 infra.

32. Aries, supra note 30, at 371.
tice presently continues among members of English working class. The institutions of “apprenticeship” and “putting out” children served as the basis for resolving the problem of dependent children, a problem which became the prime concern of American adoption statutes.

Adoption laws in the United States evolved from the increasing concern for the welfare of neglected and dependent children. Instead of emphasizing the continuity of the adoptor’s family, American adoption laws stressed the welfare of the child. As a result, the “best interest of the child” formula became a unique American contribution to the law of adoption.

Since our jurisprudence was largely acquired from England, “the absence of a common-law precedent undoubtedly inhibited the initiation of the practice of adoption in this country.” Colonial America continued the English institutions of “apprenticeship” and “putting out.” Not only did the parent voluntarily engage in the practice of “putting out,” but the state often encouraged this custom. For example, when children became “rude, stubborn, and unruly,” according to the laws of the Massachusetts Colony of 1648, the state could take them from their parents and place them in another’s home. The procedure for “putting out” a child often appeared in the will of the parent, whereby the parent provided for adoption by a relative. Even in the absence of a will, orphans were placed in relatives’ homes. In either case, religion acted as an essential factor

33. Id.
35. Huard, supra note 3, at 749.
36. J. DEMOS, FAMILY LIFE IN PLYMOUTH COLONY 70-72 (1970). One of the most plausible rationales why the parents engaged in “putting out” their children was that they did not trust themselves with their own children and were afraid the children would be spoiled if they gave them too much affection. E. MORGAN, THE PURITAN FAMILY 77 (2d ed. 1966).
37. Huard, supra note 3, at 747.
39. MORGAN, supra note 36, at 78. Morgan also relates that both the colonies of Massachusetts and Connecticut had provisions for the death penalty “for a rebellious son and for any child who should smite or curse his parents.”
40. DEMOS, supra note 36, at 73.
41. Presser, supra note 3, at 457. Demos cites a situation involving four orphans where it is apparent that seventeenth century Americans did consider the best interest of the child as the central purpose of adoption. Here, the orphans’ father died and the mother subsequently married. Then, the mother pre-deceased the orphans’ step-father. The step-father, before he remarried, saw that the children were taken care of. DEMOS, supra note 36, at 122.
to guarantee the quality of the child's upbringing.\textsuperscript{42}

The custom of "binding out" was used for orphans who had no relatives.\textsuperscript{43} In this situation, orphans were placed in homes to work. The emphasis was on the benefits that accrued to the adults from the child labor.\textsuperscript{44} Subsequently, in the latter part of the eighteenth century, protective legislation was enacted for the care and training of orphan apprentices and indentured servants. If the requirements of the legislation were not met, the state had the power to remove the orphans from their masters.\textsuperscript{45}

By the middle of the nineteenth century, a growing concern for the "best interest" of the child could be seen. One English visitor remarked in 1848:

One blessed custom they have in America resulting from the abundance which they enjoy: a man dies, his widow and children are objects of peculiar care to the surviving branches of his family, the mother dies—her orphans find a home among her friends and relatives.\textsuperscript{46}

However, with the advent of industrialism and massive immigration, "putting out," "apprenticeship" and "binding out" became economically impracticable. The practice of placing orphans with relatives became inappropriate, particularly for the urban masses, since facilities often were economically incapable of supporting an additional member. Thus, in the middle of the nineteenth century, new means for child welfare became necessary. A reform movement resulted in the institution of adoption.

In the 1840's and '50's, American adoption statutes were private acts.\textsuperscript{47} The purposes of these private acts varied, ranging from the changing of names so that the adopted child could sue and be sued or grant and receive an estate in the new name,\textsuperscript{48} to enabling the adopted child

\begin{footnotes}
\item[42] The following illustrates the role of religion:
Widow Mary Ring who died in 1631 left her young son Andrew to grow up in the family of her son-in-law Stephen Deane—requiring Deane "to help him forward in the knowledge and feare of God, not to oppresse him by any burdens but to tender him as he will answere to God."

\item[43] Presser, \textit{supra} note 3, at 458.

\item[44] A. Calhoun, \textit{A Social History of the American Family} 171-72 (1917).

\item[45] \textit{Id.} at 308.

\item[46] \textit{Id.} at 23. \textit{But see} M. Kornitzer, \textit{Child Adoption in the Modern World} 347 (1952), where it is pointed out that later in the century, parents advertised children for adoption, or gave them away. Also, children's societies placed thousands of uninvestigated children in uninvestigated homes.


\item[48] See, \textit{e.g.}, Pennsylvania statute, Pub. L.N. 212, 1844 entitled: "An Act to change the names of certain persons therein named," which provided:
Be it enacted . . . that Eliza Jane Jarvis, of Allegheny county, the daughter
\end{footnotes}
to inherit from the adoptive parents as a natural child.\textsuperscript{49} \textit{Vidal v. Commargere}\textsuperscript{50} is the leading case interpreting private adoption acts and emphasizing the rights of the adopted child. Briefly, this case involved an 1837 statute which authorized the adoption of a seven-year-old child, and provided that the adoption be evidenced before, and executed by, a notary within six months after the enactment of the statute. The adoptive parents complied with the provisions and the notary declared that the adoptee should have "the same rights, and advantages and prerogatives, as if she had been the issue of the marriage of the parties to the act."\textsuperscript{51} Subsequently, the adoptive father died and collateral heirs brought suit contending that the adopted child acquired no right by the above-mentioned act, and, therefore, did not have an interest in the father's estate. The court rejected the argument and concluded that the legislature did intend to confer some substantial right by passing this private act.\textsuperscript{52} Moreover, the court relied on Webster's Dictionary for the meaning of the term of Oliver J. Jarvis, and now the adopted child of James and Hannah Miles, shall henceforth be called and known by the name of Eliza Jane Miles, and by this name to be capable of suing and being sued, and of granting or taking any estate in the same manner she could have done if no change had been made therein.

49. An example of an act which provided for the changing of the adopted child's name as well as entitling him or her to the same rights as if natural-born is an Illinois provision enacted in 1853. The Act provided:

\begin{quote}
\textit{Section 1. Be it enacted by the people of the state of Illinois, represented in the General Assembly, That the name of Marshall Myrick, of the county of Jersey, the adopted son of Jonathan E. Cooper of said county, be changed to that of Marshall Myrick Cooper.}
\end{quote}

\begin{quote}
\textit{Section 2. That the said Marshall Myrick Cooper shall be and he is hereby declared to be entitled to all the rights that would belong or pertain to him were he the natural son of the said Jonathan E. Cooper.}
\end{quote}

\begin{quote}
\textit{Section 3. This act to take effect and be in force from and after its passage.}
\end{quote}

Ill. Laws, 1853, at 485. A subsequent Pennsylvania statute, Pub. L. No. 100, passed in 1855, exemplifies the purpose of adopting a child as a lawful heir:

\begin{quote}
\textit{Be it enacted . . . that it shall be lawful for John H. Bugher and Rebecca Bugher to adopt, in pursuance of their petition to the legislature, as and for their child and heir at law, Rachel Clark, now living with them at Fayette city, by the name of Emily Bugher, and the said child shall hereafter be known by the latter name, and have capacity to take and inherit from said petitioners real and personal estate in manner as if she were their lawful child: Provided, that said petitioners shall further present their petition to the court of common pleas of Fayette County, consenting to such adoption and capacity to inherit by said child, and said court shall by its decree approve of the same.}
\end{quote}

50. 13 La. Ann. 516-17 (1858). It should be noted, however, that Louisiana incorporated civil law adoption practice, especially a Spanish statute which was repealed in 1808.

51. \textit{Id.} at 519.

52. \textit{Id.} at 517.
“adoption,” and concluded that the legislature’s use of “adoption” in Vidal’s notorial act meant the same as its dictionary definition, and its meaning under a Spanish statute. The court emphasized the right of the adopted child and awarded her the succession. By the middle of the nineteenth century, most state legislatures had enacted general adoption statutes and therefore did not need to rely on case law and private acts.

In 1846, Mississippi enacted the first general adoption statute which enabled a stranger to the adoptor’s blood to become an heir of that adoptor. Texas and Vermont followed in 1850. Massachusetts passed the first comprehensive adoption statute in 1851. Key provisions of the act, which emphasized greater supervision of the adopter-adoptive relationship, included the following requirements: (1) That the natural parents or legal guardian give written consent; (2) that the child, if fourteen or older, himself consent; (3) that the spouse of the adoptor (if married) join in the petition for adoption; (4) that the probate judge be satisfied that the petitioner(s) be “of sufficient ability to bring up the child...and that it is fit and proper that such adoption should take effect”; (5) that once the probate court approves, the adopted child becomes “for all intents and purposes” the legal child of the petitioner(s); (6) that the decree of adoption deprive the natural parents of all legal rights and obligations respecting the adopted child; and (7) that any petitioner or child who is the subject of such a petition might appeal to the Supreme Judicial Court from the decree of the probate judge. According to one contemporary source, the purpose of the Massachusetts act, as well as the other acts passed over the next quarter century (which for the most part were direct copies of the Massachusetts law), was to secure for the adopted child a proper share in the estate of the adopting parents in the event the parents died intestate.

These early adoption statutes have been classified into two broad

---

53. Id. at 517-19.
54. See H. Witmer, et al., INDEPENDENT ADOPTIONS 28 (1963) [hereinafter cited as WITMER].
56. Id.
57. Presser, supra note 3, at 465 n.106.
58. Huard, supra note 3, at 748. There is some controversy as to whether Massachusetts or Mississippi can claim the first adoption statute. Huard believes that, though Mississippi may have been first, the Massachusetts law was “more complete.”
60. Kuhlman, supra note 34, at 225.
types. The first type did not make any express provision for public supervision of the adoption agreement or its effect on the welfare of the child. Rather, these statutes, which included those of Texas, Vermont, Tennessee and Mississippi, were authentications and public records of private adoption agreements.\textsuperscript{62} The second class of acts provided for judicial supervision over adoption.\textsuperscript{63} Included in this second class was the Illinois adoption act of 1873-74.\textsuperscript{64} Under this statute, a resident of Illinois had to petition the circuit or county court where the individual resided for leave to adopt a child as well as to change the child's name to his own.\textsuperscript{65} After the petition for adoption\textsuperscript{66} was submitted, certain requirements had to be satisfied before the court would enter a decree, \textit{i.e.}, the natural parents' desertion of the child at least one year prior to the adoption application, and the court's satisfaction that the adoptive parents were sufficiently able to bring up the child in an atmosphere that included suitable nutrition and education.\textsuperscript{67} Under that act, as now, any child fourteen or older had to consent in order for the adoption to be valid.\textsuperscript{68} Moreover, once adopted the child was treated for inheritance purposes as a natural child, with the exception that he was incapable of receiving property specifically devised to bodily heirs of the adoptive parents.\textsuperscript{69}

\textbf{II. Modern Developments—Focus on Illinois}

In tracing the evolution of adoption, this Comment has shown how adoption affected the natural parents, the adoptors, the person adopted, and the community. Depending on the time frame or civilization involved, one of these parties was given priority over the other. The law of many early civilizations, such as Rome, emphasized the right of the adoptor. Although many Englishmen were sensitive to the need for perpetuating the family line through adopted heirs, this sensitivity was not strong enough to overcome the English notion that heirs should be of the blood, made

\begin{itemize}
\item \textsuperscript{62} \textsc{Witmer}, supra note 54, at 30.
\item \textsuperscript{63} Id.
\item \textsuperscript{64} Ill. Rev. Stat. ch. 4, §§ 1-8 (1874).
\item \textsuperscript{65} Id. § 1.
\item \textsuperscript{66} The following was required by statute to be included in the petition for adoption:
\begin{enumerate}
\item Name, sex, and age of the adopted child;
\item The new name of the child, if desired;
\item Name and residence of the natural parents, if known to the petitioner and whether they consent to such adoption.
\end{enumerate}
Id. at § 2.
\item \textsuperscript{67} Id. § 3.
\item \textsuperscript{68} Id. § 4; Ill. Rev. Stat. ch. 4, § 9.1-12 (1973).
\item \textsuperscript{69} Ill. Rev. Stat. ch. 4, § 5 (1874).
\end{itemize}
by God, not by man.\textsuperscript{70} Also, adoption was not introduced into the common law because of the child-rearing practices, "putting out" and "apprenticeship," which appeared to provide adequately for child welfare. When adoption moved across the Atlantic to America, the new statutes exhibited a radical departure from the basic premise of Roman law, since the welfare of the adopted rather than the continuity of the adoptor's family became the primary concern of American laws. As a result of this concern, the "best interests of the child" formula arose in state adoption laws.

Illinois has, by statute, espoused a policy of serving the best interests of the child. To aid in analyzing the extent to which the state is serving the "best interests of the child," the following sections of this Comment examine the present Illinois adoption procedures. There are three general stages of adoption regulation: (1) the pre-adoption stage, when it is determined that an adoption may take place; (2) the actual proceeding, which includes the investigation of the adoptive parents and adherence to racial and religious criteria; and (3) the stage following the initial adoption decree.

\section{A. Pre-Adoption}

In Illinois, as in every state, it is believed that a child's best interest is served by being with the natural parents.\textsuperscript{71} Because of this belief in the bond between child and natural parents, the state places primary importance on the consent of the parents in any adoption proceeding. An adoption that takes place without informed, knowledgeable consent will be void.\textsuperscript{72} The courts require strict proof of consent, to prevent the tragedy of a child who has formed emotional attachments to the adoptive parents being returned to natural parents who did not consent to the adoption.\textsuperscript{73}

Until recently, Illinois law required only the consent of the mother in the adoption of an illegitimate child.\textsuperscript{74} The Illinois courts upheld this principle for several years,\textsuperscript{75} but in 1972 the United States Supreme Court

\begin{itemize}
  \item \textsuperscript{70} Presser, supra note 3, at 514.
  \item \textsuperscript{71} Jarrett v. Jarrett, 348 Ill. App. 1, 107 N.E.2d 622 (1952).
  \item \textsuperscript{72} In Petition of Lewis v. LoChiro, 350 Ill. App. 394, 112 N.E.2d 917 (1953), the court held that a mother who had surrendered her child to an adoption agency without informing her husband had not given proper consent since the father must consent or no adoption could occur.
  \item \textsuperscript{73} In re Perl, 38 Ill. App. 2d 430, 187 N.E.2d 303 (1962). To consent, a parent must physically appear before the proper authorities and give his or her consent to the adoption. The fact that a parent would consent if found is not sufficient. Hook v. Wright, 329 Ill. 299, 160 N.E. 579 (1928); Keal v. Rhyderck, 317 Ill. 231, 148 N.E. 53 (1925).
  \item \textsuperscript{74} ILL. REV. STAT. ch. 4 § 9.1-8 (1971).
  \item \textsuperscript{75} Jambrone v. David, 16 Ill. 2d 32, 156 N.E.2d 569 (1959); In re Simaner, 16 Ill. App. 2d 48, 147 N.E.2d 419 (1958).
\end{itemize}
ruled in *Stanley v. Illinois* that the interest of the father of an illegitimate child was no different than the interest of the mother, so that his consent was also necessary in an adoption proceeding.

The natural parents, however, are not the only persons who must consent to the adoption. The consent of both adopting parents is also a vital prerequisite before any adoption can occur. If a wife were not joined by her husband in the adoption petition, the court would not grant the

---

76. 405 U.S. 645 (1972).

77. Changes in Illinois adoption law were occasioned by *Stanley*. In Slawek v. Covenant Children's Home, 52 Ill. 2d 20, 284 N.E.2d 291 (1972), the Illinois Supreme Court held unconstitutional those portions of the Illinois Adoption and Paternity Acts which conflicted with *Stanley*. In accordance with this decision, a critical paragraph from section 9.1-8, which provided the procedure for consents, has now been deleted.

Other sections of the Act have also been added or amended to properly reflect *Stanley*, the most critical of which is 9.1-1E. Under this section, the father of an illegitimate child is now considered to be and accorded the rights of a "parent." But section 9.1-1D, which sets forth the grounds for a finding of parental unfitness, was amended by the addition of two more grounds:

(k) Failure to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth.

(l) Failure to make reasonable efforts to correct the conditions which were the basis for the removal of the child from his parents or to make reasonable progress toward the return of the child to his parents within twenty-four months after an adjudication of neglect under Section 2-4 of the Juvenile Court Act.

Other more procedural changes are as follows: section 9.1-12a providing for notice to the putative father is totally new. Such notice may be "upon written request" by any "interested party" to "any clerk of any circuit court," and may be by personal service, or certified mail. Unless the father responds appropriately, he loses his rights to the child and waives notice of any further proceedings. If he is not the father he may file a disclaimer of paternity which is noted by the clerk.

Section 9.1-10 provides the forms for consent and surrender for born and unborn children. All consent forms provide for the consenting parents general appearance and waiver of service, and explicitly advise the signor that the document, with one exception, is irrevocable.

Under section 9.1-9, the general rule of irrevocability is excepted to for fathers, who may revoke for any reason before the expiration of 72 hours after birth of the child. Consents and surrenders are otherwise irrevocable except when there is a showing of fraud or duress.

After *Stanley* putative fathers can be omitted as defendants if they have been served with notice under section 9.1-12a and have filed a disclaimer of paternity, or failed to file the same for request for notice under that section.

Under the 1973 amendments, even persons whose rights have been terminated under section 9.1-12a must be named as parties. Defendants who cannot be personally served with process are to be served by publication by the circuit court clerk. Generally no names appear on this notice. Defendants over fourteen years of age, including the person sought to be adopted, may waive service by filing a general appearance. See also Hession, *Adoptions after Stanley—Rights for Fathers of Illegitimate Children*, ILL. B.J. 350 (Mar. 1973).
request, as there must be proof that both adoptive parents wish to have the child. The agency to which a child is given must also consent to the adoption. If the child's parents are not living, the guardian of the child must consent to the adoption. Where no guardian exists, the court will appoint one who is to protect the best interests of the child during the adoption proceeding. Consent is usually not required from relatives or godparents of the child unless they can show that they have been acting in the capacity of parents. Standing in loco parentis has been traditionally defined as contributing money toward food, shelter, and clothing for the child.

Illinois law states that parental consent to an adoption is irrevocable unless such consent were obtained through fraud or duress. The parents must be informed of its irrevocability, and when so informed, later change of heart will not defeat an adoption decree. When the biological parents assert that there has been fraud or duress, the burden of proof rests on the party claiming the fraud. Fraud will be found when the parent or parents were misinformed, or not given enough information to make an informed consent. Duress will be found if the consent were obtained by taking advantage of a weakened condition of a parent. Because the mother is often in a weakened emotional and physical state immediately after giving birth, no consent may be given for seventy-two

80. In Cook County, Melvin Parnell is designated as the guardian for all children to be adopted. It is debatable whether he is able to look after the best interest of each child.
81. See People ex rel. Smilga, 345 Ill. App. 365, 103 N.E.2d 378 (1952), where the petitioner cared for the child for seven years, and was the child's godmother. Upon their arrival in the United States the child was placed for adoption. The court, in denying petitioners claim that her consent to the adoption was necessary, held that she had not provided the child with enough financial support to stand in loco parentis.
84. Shlensky v. Shlensky, 396 Ill. 179 (1947); In re Balota, 7 Ill. App. 2d 178, 155 N.E. 2d 104 (1959).
85. People ex rel. Karr v. Weike, 30 Ill. App. 2d 361, 174 N.E.2d 897 (1961). The mother believed she had a year in which to decide whether or not to keep the child. The agency representative knew of her belief and made no attempt to correct it.
86. People ex rel. Buell v. Bell, 20 Ill. App. 2d 82, 155 N.E.2d 104 (1959). In this case the mother gave consent while under the influence of a sedative, and no explanation was given as to the irrevocability of the consent.
This requirement gives the parents time to reflect on their situation, to avoid a hasty decision.

While some decisions in the past allowed parents to withdraw their consent prior to a final decree of adoption, the trend today is in the opposite direction. It seems clear that in the absence of fraud, the courts will not allow parents to withdraw their consent. Such action is based on the belief that new attachments will be formed in the adoptive home and removal from that home may have harmful effects upon the child.

When dealing with consent, the final person to be considered is often the child. In Illinois, if the child is fourteen or older, his or her consent will be necessary for the adoption to occur. If, however, the child is under the age of fourteen, the courts need not inquire as to the wishes of the child. It is felt that a child under fourteen is not able to determine what is best for himself or herself. Thus, a child under fourteen may have no voice in the disposition of the case.

To summarize the area of consent, it can be generally stated that consent of the natural parents or guardian is always necessary, as is consent of the adoptive parents. In addition, the adoption agency must consent, and if there is someone standing in loco parentis, the consent of this person may, at times, also be necessary. Last, parental consent is final unless there has been fraud or duress, and a child under fourteen need not be consulted.

87. ILL. REV. STAT. ch. 4, § 9.1-9 (1973). For the exception with regard to fathers, see note 77 supra.
90. Giacopelli v. Crittenton Home, 16 Ill. 2d 556, 566 (1959). The court stated: "We cannot uproot the child from an adoptive home full of love, care, and opportunity for the sole and only purpose of placing him with his natural parents."
92. In Cook County, the judge will always ask the child his or her preferences in a contested adoption. Interview with Judge Helen F. McGillicuddy, Associate Judge, Circuit Court of Cook County, in Chicago, Oct. 10, 1973 [hereinafter cited as McGillicuddy Interview].
93. On the other hand, perhaps the ability to overlook the required consents was established long ago. In the apparently forgotten case of Baker v. Strahorn, 33 Ill. App. 59 (1889), an adoption was permitted without the required consent of the divorced father, and without a declaration that he was unfit. After the divorce of the parents, the mother became ill and consented to an adoption by the grandparents. The natural father objected to the adoption, claiming it could not go forward without his consent. The court disagreed, stating, at 60: "The welfare of the child is an important element in a proceeding of this character. The natural rights of the parents are not to be disregarded, but nothing is to be yielded to mere caprice or obstinacy, or to opposition prompted by any unworthy motives." The adoption was granted.
The only instance in which a state will allow a child to be taken from his or her natural parents without their consent and adopted by new parents is when the natural parents are found unfit. As stated above, the child's best interest is normally held to be with the natural parents. However, in those cases in which the parents are judged unfit, the best interests of the child will dictate removal from their care and custody. As long as they are fit, biological parents are held to have a right to their children; the courts will not find parental unfitness unless the evidence is conclusive. In Petition of Dickholtz, the majority opinion emphasized this point with the following statement:

Unless the proof is clear that the natural parents are unfit to have the care, custody and control of the child, the contest for control of the child's future between persons having no vested interest in the child . . . as against the natural law which binds a mother to her child, should be resolved in favor of the mother.

In order to obtain a finding of parental unfitness, one of the following must be proven: depravity, cruelty, habitual drunkenness, open adultery or fornication, desertion, or abandonment. Depravity and open adultery or fornication will be treated together, since a finding of open adultery will also constitute a finding of depravity. Depravity may be defined as an inherent deficiency of moral sense and rectitude. This has been construed to mean a severe deviation from established societal behavior, and not just one departure from the norm. Furthermore, this severe deviation must be in utter disregard of normal moral behavior, and it must be shown that a child raised in such an atmosphere would be adversely affected. Conviction of a crime in most instances will not brand a parent a depraved person. The party asserting depravity always bears the bur-

98. See Oeth v. Erwin, 6 Ill. App. 2d 18, 126 N.E.2d 526 (1955), where it was held that a child born out of wedlock does not brand the mother a depraved person. In Stalder v. Stone, 412 Ill. 488, 107 N.E.2d 696, 701 (1952), Justice Maxwell writing for the majority found that:
where the affair resulting in the birth of the child is but one of a series, conducted both before and after the birth, with different persons, some of whom were known to be already married, and where abortion and perjury are resorted to without moral trepidation, then it can properly be found that there is an inherent deficiency of moral sense and rectitude constituting the depravity of character contemplated by the state.
den of proof, since the Illinois courts favor the natural parents. To prove a parent unfit due to drunkenness, it must be shown that the drunkenness has existed for a period of one year prior to the adoption petition. A parent in a state of habitual drunkenness cannot effectively be a parent and will be held unfit. Cruelty to one’s child may also be grounds for unfitness. The degree of cruelty necessary to warrant a finding of unfitness, however, is not entirely clear. A parent may exert force upon his or her child if the force is reasonable and intended to maintain discipline. A parent who goes beyond the bounds of reasonableness and interferes with the physical well-being of a child will, in many cases, be found unfit.

Parental desertion or abandonment accounts for most of the instances of termination of parental rights. Desertion will be found when the child is deserted for three months prior to the adoption petition. An important test in this regard is whether or not the parent has maintained a reasonable degree of interest in the child. A parent who is ill or is kept away from his or her child will not be guilty of desertion.

Failure to support is not always considered a sign of desertion. The courts will, additionally, look closely at the amount of time spent with the child as well as financial support, in order to determine their decision.

102. Habitual drunkenness has been defined as: “the involuntary tendency to become intoxicated, which is required by frequent repetition, such frequent indulgence to excess as to show a formed habit and inability to control the appetite.” Garrett v. Garrett, 252 Ill. 318, 326 (1911).
104. Cruelty which would be unlawful under the criminal statutes is not always enough to find the parent unfit. See generally Terr & Watson, The Battered Child Rebrutalized: Ten Cases of Medical-Legal Confusion, 124 AMER. J. PSYCH. 1432 (1968).
105. ILL. REV. STAT. ch. 4, § 9.1-1D(f) (1973). See In re Walpole, 5 Ill. App. 2d 362, 125 N.E.2d 639 (1955), in which the court held that:
   Only clear and convincing proof of such conduct on the part of a parent, that shows unmistakably that the parent is relinquishing his parental duties and claims, or willfully throwing the child upon the world, without regard or consideration to his or her responsibilities or obligations, will justify a court in holding that parent unfit.
   Id. at 369, 125 N.E.2d at 645.
106. Hill v. Allabaugh, 333 Ill. App. 602, 78 N.E.2d 127 (1948) (the father became ill while out of state, no desertion found); In re Walpole, 5 Ill. App. 2d 362, 125 N.E.2d 639 (1955) (the mother refused to allow the father to visit his child, there could be no desertion).
107. In Carson v. Oberling, 73 Ill. App. 2d 412, 218 N.E.2d 820 (1966), the father failed to meet support payments, but visited his children regularly. The court
The courts will then carefully examine the length of time of the alleged desertion. If it finds that the parent exercised any parental duties within three months of the date of the petition for adoption, desertion will not be found.\textsuperscript{108} If a parent deserts his or her child for a period longer than three months, but subsequently resumes some parental duties, the courts will not allow a finding of unfitness.

Unlike desertion, abandonment has no three month time limit. Abandonment is evidenced by conduct on the part of the parent which shows a settled purpose to forego all parental duties and relinquish claims to the child.\textsuperscript{109} In one case, a mother who moved to another state with no intention of returning to see her son was found to have abandoned him.\textsuperscript{110} In abandonment, therefore, it is the intent of the parent, rather than the length of the desertion, that is important.

\section*{B. The Adoption Proceeding}

Once consent to the adoption or unfitness of the parents has been established, there are certain procedures required in Illinois to insure that the best interests of the child will be served. One such requirement is that the parents or guardian of the child sought to be adopted be notified of the proceeding.\textsuperscript{111} Thus, if they have not consented or been adjudged unfit, they may oppose the adoption.\textsuperscript{112} This precludes the adoption from being granted until controversies are resolved. Hence, a child will be spared the pain of having formed new emotional attachments only to be returned later to the natural parents, because of proof that the natural parents were not notified.

Section 9.1-6 of the Illinois Adoption Act\textsuperscript{113} requires that the court, within ten days after the filing of a petition for adoption, appoint an agency or other competent person to investigate fully the allegations in the petition, and determine whether the adoptive parents are fit and proper persons to raise the child. Such investigation of the adoptive parents is designed to insure that the child will be put in a home with all the advantages of a normal family relationship. This investigation will not be refused to find desertion. In Houston v. Brackett, 38 Ill. App. 2d 463, 187 N.E.2d 545 (1963), the father failed to support the children, and only visited them four times in two years. The court found this to be desertion.

108. Smith v. Cirvello, 338 Ill. App. 503, 88 N.E.2d 107 (1949). The father had only seen his children three times in one year, but his last visit had been just one month before the adoption petition. The court could not grant the request for adoption.


111. ILL. REV. STAT. ch. 4, \S 9.1-7 (1973).


113. ILL. REV. STAT. ch. 4, \S 9.1-6 (1973).
quired, however, when the adoptive parents are related to the child.\textsuperscript{114}

Another procedure to be followed in Illinois is stated in section 9.1-15 of the Adoption Act, which requires that "the court in entering a decree of adoption shall, whenever possible, give custody through adoption to a petitioner or petitioners of the same religious belief as that of the child."\textsuperscript{115} At the time this section was passed into law, it was felt that it was in the best interest of a child to remain with the religion of the natural parents whenever possible.\textsuperscript{116} The Illinois courts definitely take the religion of the prospective parents into consideration, but this does not forbid the placement of a child with parents of a different religion.\textsuperscript{117} Thus, a difference in religion in and of itself will not deny adoption to otherwise qualified parents.

There is a paucity of cases and laws concerning transracial adoption in Illinois, but according to \textit{Fountaine v. Fountaine},\textsuperscript{118} race alone cannot be decisive in a custody or adoption proceeding. Transracial adoption does occur in Illinois, but on a small scale. There is some debate concerning the desirability of transracial adoption, but foster home care and institutional care are regarded as poor alternatives for the child.\textsuperscript{119} While there are no laws in Illinois concerning transracial adoption, agencies do not encourage it.\textsuperscript{120} The Illinois courts, however, may not deny adoption using race as the sole criterion.\textsuperscript{121}

The final element involved in the adoption proceeding stage is the discretion given the judge in determining the best interests of the child. As previously stated, the courts will seldom, if ever, find that it is in the

\begin{footnotesize}
\begin{enumerate}
\item Id. It should be noted that this Comment does not deal with adoption agency regulations, but only with legal requirements.
\item Both the Catholic and Jewish faiths consider it a breach of religious law to allow a child born into either of those religions to be placed in a family of a different religion. Interview with Richard Mandell and Nicholas Stevenson, Chicago adoption lawyers, in Chicago, Oct. 8, 1973.
\item In Cooper v. Hinrichs, 10 Ill. 2d 269, 140 N.E.2d 293 (1957), the majority held that:
\begin{quote}
In each instance the court has the discretion to determine primarily whether the child's best interests are served by the adoption, and identity of religion between the child and the adoptive parents is a significant and desirable but not an exclusive factor to be considered by the court in the exercise of this discretion.
\end{quote}
\textit{Id.} at 276, 140 N.E.2d at 299.
\item 9 Ill. App. 2d 482, 133 N.E.2d 532 (1956).
\item See generally James, \textit{Race as a Consideration in Adoption and Custody Proceedings}, 1959 U. ILL. L.F. 256.
\item Id.
\item Fountaine v. Fountaine, 9 Ill. App. 2d 482, 133 N.E.2d 532 (1956).
\end{enumerate}
\end{footnotesize}
best interest of a child to be taken from the natural parents, unless there has been a showing of their unfitness. This is generally followed, although it may mean removing the child from the only home he or she has ever known. There are, however, factors which may influence a court to deviate from the normal pattern and find that the best interests of the child outweigh the interests of the natural parents. The length of time the child has been away from the natural parents is an important factor. In cases in which the child has lived several years with the adoptive parents, the court will be reluctant to give the natural parents custody again. The rationale for this is that the child might be severely damaged by such a forced change of environment. In addition to the length of time the child has been with the adoptive parents and away from the natural parents, the court will also look at the age, sex, and stability of the child.

The financial ability of the contesting parties may be an additional factor considered by the court. However, it is usually given little weight if it is considered at all. Courts often will not favorably receive an argument that one party is in a better financial situation to care for the child. To do so would discriminate against the poor, as well as allow bidding for the child. In any case, the trial judge may have to make a personal determination as to the best interests of the child. Hopefully, such determinations are made in actual fairness to the child.

C. Post Adoption

The last stage in the adoptive process—the post adoption stage—deals with procedures after the initial decree of adoption has been issued. At this stage, the adoptive parents have had the child for at least six months. After this time period, they may apply for a decree of adoption and the court, having had the time to view the results of the agency investigation, will render a decision. This period between the initial decree and the final decree gives the new parents a chance to demonstrate further their fitness to raise the child. It allows for additional investigation, if necessary, and gives the child time to acquaint himself or herself to the new surroundings. Once the final decree is issued, the adop-

123. People v. Weeks, 228 Ill. App. 262 (1923).
124. Id.
125. McGillicuddy interview, supra note 92.
tion is complete and the adopted child will have the rights and duties equal
to that of a natural child.\(^{128}\)

Illinois law further provides for confidentiality of the records of the adoption\(^ {129}\) and of the agency report on the adoptive parents. It is believed
that it is in the best interests of the adopted child not to know who his or
her natural parents are. This provision also protects the adoptive parents
and the child from the natural parents who may wish to take the child back
at some future time. Indeed, the records are so confidential that a child
may not learn of his or her natural parents without a court order. Once
the adoption is complete, the child receives a new birth certificate\(^ {130}\) and
all ties with the natural parents are severed.\(^ {131}\)

Finally, the courts will not overturn a valid adoption decree unless
there has been a clear violation of the law during the proceeding. Courts
will not overturn on technicalities.\(^ {132}\) Thus, if there has been substantial
compliance with the statute, the adoption will stand.\(^ {133}\)

III. THE BEST INTERESTS OF THE CHILD

In order to make laws that will serve "the best interests of the child"
lawmakers might turn to the behavioral sciences for guidance. However,
empirical research offers little that can be regarded as conclusive standards
for the unique situation of adoption.\(^ {134}\) There is, of course, a wealth of lit-
erature on the development of the child,\(^ {135}\) but such information has little
bearing on adoption decisions. A key factor in this dilemma is the diffi-
culty of doing controlled research in cases where there are custodial alterna-
tives, i.e., in cases where there are custody fights or where there are dif-
ferent sets of parents desiring to care for the child.

\(^{128}\) ILL. REV. STAT. ch. 4 (1973).
\(^{129}\) Id. § 9.1-18.
\(^{130}\) Id. § 9.1-19.
\(^{131}\) Id. § 9.1-17.
\(^{132}\) Petition of Wojtkowiak, 14 Ill. App. 2d 344, 144 N.E.2d 760 (1957).
\(^{133}\) Petition of Stern, 2 Ill. App. 2d 311, 120 N.E.2d 62 (1954).
\(^{134}\) See J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of

Rev. 479 (1968). This portion of the Comment is based solely upon research that is
expressly empirical, and has either ignored or but superficially considered theoretical
works that did not exhibit any empirical justification. The reason for this approach
is the author's theoretical bias.

\(^{135}\) See generally E. Erikson, Childhood and Society (1963); P. Musser, J.
Conger, & J. Kagan, Child Development and Personality (1963); Thomas et al.,
Individuality in Responses of Children to Similar Environmental Situations, 117 Am.
In custody fights, there are such diverse circumstances that rigorous controls are unattainable. For example, if a one-year-old child who has been living for five months with adoptive parents is reclaimed by the natural parents, the adjudicator must decide which set of parents should be granted custody. Such a real-life decision means consideration of numerous elements, a situation quite different from the theoretical one involving a single element, such as whether children of alcoholics are worse off than children of non-alcoholics. It is not a simple matter of determining whether the child should be placed with the "more fit" parent.

To begin with, there is the problem of balancing the relative fitnesses of the opposing claimants. Further, these situations are complicated by the risks of separating the child from parent figures and the risks of the adoption process itself. For instance, while it may appear that the natural parents are more fit, the child may suffer because of separation from the adoptive parents. On the other hand, if it is the adoptive parents who are considered more fit, then the child will be left with the problems that appear to be inherent in the adoption process. Furthermore, it is not simply a matter of determining whether it is preferable for a child to be with parents of a particular age, class, religion, or temperament, but

136. There is a wealth of literature on the deleterious effects of maternal deprivation and parental separation, as well as on the effects of the adoption process. The information on parental separation is not directly applicable to the problems of adoption because these studies generally deal with the effects of hospitalization and parental death. However, these studies are suggestive. For parental separation see, e.g., M. Ainsworth et al., The Effects of Maternal Deprivation: A Review of Findings and Controversy in the Context of Research Strategy, in DEPRIVATION OF MATERNAL CARE, PUBLIC HEALTH PAPERS No. 14, Geneva: World Health Organization 97 (1962); J. Bowlby, MATERNAL CARE AND MENTAL HEALTH, MONOGRAPH SERIES No. 2, Geneva: World Health Organization (1951); Bowlby, The Nature of the Child's Tie to His Mother, 39 INT'L J. PSYCHOANALYSIS 350 (1958); Bowlby, Separation Anxiety: A Critical Review of the Literature, 1 J. CHILD PSYCHOL. & PSYCH. 251 (1960); Bowlby et al., The Effects of Mother-Child Separation: A Follow-Up Study, 29 BRITISH J. MED. PSYCHOL. 211 (1956); Humphrey et al., Adoptive Families Referred for Psychiatric Advice, 110 BRITISH J. PSYCH. 549 (1964); Mead, A Cultural Anthropologist's Approach to Maternal Deprivation, in DEPRIVATION OF MATERNAL CARE, PUBLIC HEALTH PAPER No. 14, Geneva: World Health Organization 45 (1962); Schaffer, Objective Observations on Personality Development in Early Infancy, 31 BRITISH J. MED. PSYCHOL. 174 (1958); Spitz, Hospitalism, 1 PSYCHOANAL. STUDY OF THE CHILD 53 (1945); Spitz, Ananalytische Depression, 2 PSYCHOANAL. STUDY OF THE CHILD 313 (1946). On the effects of adoption, see, e.g., Bohman, A Comparative Study of Adopted Children, Foster Children and Children in Their Biological Environment Born After Undesired Pregnancies, 221 SUPPLEMENT ACTA PAEDIATRICA SCANDINAVIA 1 (1971); Jackson, Unsuccessful Adoptions: A Study of 40 Cases Who Attended a Child Guidance Clinic, 41 BRITISH J. MED. PSYCHOL. 389 (1968); Mikawa & Boston, Psychological Characteristics of Adopted Children, 42 SUPP. PSYCH. Q. 274 (1968).

137. See Bohman; Jackson; Mikawa & Boston; supra note 136.
one of comparing these attributes in two or more distinct sets of parents. Clearcut answers are rare. The judge is often faced with balancing the harm or the benefit that would seem to follow from placement with either set of parents. It is obvious that rigorous controls cannot be devised in order to arrive at firm standards for placement. However, some of the findings and difficulties of the behavioral sciences may aid in determining "the best interest of the child."139

It may appear to the layperson that a child adopted in infancy is like any other child; yet there are indications, as discussed later, that such an attitude is naive. It may be noted on an intuitive level that the adopted child suffers from a two-tiered problem: emotional reactions to both the natural and the adoptive parents. In the first instance, the child feels rejection by the natural parents, regardless of the wisdom or altruism of their decision to release their child. For example, the child may try to accept the fact that the unmarried mother was unable to provide care, and therefore gave the child to the adoptive parents for the "good" of the child. Yet the evidence of other unmarried mothers keeping their children would serve to underscore the child's sense of abandonment. For whatever reasons the parents relinquished the child, there are similarly situated parents who have kept their children. Even in cases of death or institutionalization of the parent, the child may experience feelings of rejection.140

In the second instance, the child may feel that he or she is a second choice for the adoptive parents. This emotion is felt because, in most instances, the reason for the decision to adopt is reproductive difficulty.141

138. For example, if it were determined that, other things being equal, a child fares better with parents who are not economically deprived, then it would be easy to award the child to the contesting parents who are financially secure. Yet, if it is shown that it is preferable for a child to be accepted by his or her natural parents, rather than to be "rejected" (as the child might view the decision), then it would be simpler to leave the child with the natural parents. While researchers have not stated that a particular socioeconomic level has necessary consequences, some effects have been suggested. For a review of the literature, see Ziv & Luz, Manifest Anxiety in Children in Different Socioeconomic Levels, 15 HUMAN DEV. 224 (1973).

139. It would be particularly useful to the legal profession for the behavioral scientists to deliberately join the effort in devising standards to determine the best interests of the child, rather than to have the legal profession tread into territory for which it is untrained. Such an attempt was made by Goldstein, Freud, & Solnit, supra note 134. However, Beyond the Best Interests of the Child explains little of the empirical or clinical facts on which the guidelines are based. The lawyer then can rely only on the authors' reputations, a source which places an evaluation more in the realm of faith than science.

140. That children view death as a rejection of the child by the deceased is a common psychoanalytic interpretation. See, e.g., id. at 12.

141. It is common knowledge, or a common assumption, that infertile people are more likely to adopt than are the fertile. See, e.g., Kirk, Dilemna of Adoptive Par-
Therefore, adoption is a second choice, second to the choice of procreation.

Research suggests that adopted children may face special additional obstacles because of attitudes of the adopting parents. It is not uncommon for adoptive parents to blame the child's behavioral problems on heredity.142 Such an attitude on the part of the parents could easily place stress on the parent-child relationship, emphasizing the separateness of the adopted child, i.e., emphasizing the fact that the child is not a natural child of the adoptors—that the child does not belong with the adopting family.143

The psychiatric literature suggests that adopted children are more prone to emotional disturbances than are non-adopted children. The first such study was published by Marshall Schecter, M.D. His conclusions have stimulated much research and rebuttal. In his study Schecter observes that adopted children are thirteen times more likely to be referred to psychiatrists than are non-adopted children.144 More conservative researchers reduce the relative incidence of psychiatric disturbance among the adopted; the lowest reported rate is that the adopted are almost twice as likely to be found in psychiatric settings.145

143. See D. KIRK, SHARED FATE: A THEORY OF ADOPTION AND MENTAL HEALTH (1964). Kirk deals with the problem that both adoptor and adoptee try to believe that they are like a natural, biological family, when in fact they know they are not.
145. Goodman et al., Adopted Children Brought to Child Psychiatric Clinic, 9 ARCHIVES OF GEN. PSYCH. 451 (1963). Goodman criticizes Schecter's original study because it did not control for geography and income. Since it is primarily the middle and upper classes who legally adopt, it is to be expected that adopted children would be over-represented in a psychiatrist's private practice, since it is precisely those groups who are more likely to utilize psychiatrists. Goodman found that 1.7% of the population was extrafamilially adopted, that is, adopted by nonrelatives. At the Staten Island Health Center, from 1956 through 1962, 2.4% of the patients were extrafamilially adopted. While Goodman believes that this difference is significant, it is less alarming than other studies show. Id. at 459. Other studies of the incidence of adopted children found in psychiatric settings include Bohman, A Comparative Study of Adopted Children, Foster Children and Children in Their Biological Environment Born After Undesired Pregnancies, 221 SUPPLEMENT ACTA PAEDIATRA SCANDINAVIA 1 (1971); Humphrey et al., Adoptive Families Referred for Psychiatric Advice, 109 BRITISH J. PSYCH. 599 (1963); Jackson, Unsuccessful Adoptions: A Study of 40 Cases Who Attended a Child Guidance Clinic, 41 BRITISH J. MED. PSYCHOL, 389 (1968); Jameson, Psychiatric Disorders in Adopted Children in Texas, 63
There is some evidence that the ability to avoid emotional disturbances varies with the age of placement and with the type of placement. It appears that children adopted after the age of six months are more likely later to evidence psychiatric disturbances, but such findings are not conclusive. In fact, one contradictory study shows that children adopted after the age of six years fared no worse than those adopted in infancy. What is particularly striking about this study is that the older children had been placed in several foster homes prior to adoption.

Independent placement is done by persons not associated with an adoption agency, usually physicians and attorneys. This type of placement seems to cause more problems for the child than does placement by an agency, but the evidence offered is tentative and conflicting. It seems reasonable to expect that parents who were found unqualified by an agency but who subsequently adopted through independent channels would be a greater risk to the adopted child and a possible cause of disturbance.

It is generally unquestioned that institutionalization should be a last resort—that even poor parenting is preferable to institutional parenting.

---


148. Id. at 532. The number of such foster home placements averaged 2.3. In all cases, court action had terminated parental rights.


However, a surprising degree of resiliency has been found in some children who have experienced institutionalization and severe parental deprivation. At the same time, there does appear to be a critical period of residence in an institution during which the juvenile inmates are most susceptible to psychopathology. It cannot be said, however, that severe deprivation, whether caused by institutionalization, foster care, or poor parenting, commonly causes psychopathy or affectionless behavior.

The psychiatric and social science literature dealing indirectly with parental unfitness, viz., child abuse, has emphasized prevention, treatment, and crisis intervention; but it has not evolved concrete standards for termination of parental rights. This is to be expected, since the involuntary termination of parental rights is considered to be a drastic measure.

That the Illinois Adoption Act requires natural parents to consent to the termination of their parental rights and adoptive parents to agree to the adoption seems so reasonable as not to require any supporting data. It would be unthinkable to give a child to unconsenting parents or to terminate parental rights without cause and without consent. While it is obvious that the consent of the adoptive parents is in the best interests of the child and the adoptive parents, it can also be seen that the consent of the natural parents is not necessarily in the best interests of the child. American law reflects the American belief that parents have certain inviolable rights in their children. The best interest of the parent is the basic

of any system of parenting depends upon the qualities that are desired in a particular culture. Multiple mothering or institutional parenting is not per se unhealthy. B. Bettelheim, Children of the Dream (1969); Mead, A Cultural Anthropologist's Approach to Maternal Deprivation, in Deprivation of Maternal Care, Public Health Paper No. 14, Geneva: World Health Organization 45 (1962).


152. Williams, supra note 151.

153. Bowlby, supra note 151.

154. This can be seen by a check of the citations in Social Science and Humanities Index and Index Medicus for the last ten years.


156. Id. It can be inferred that the adoption statute is based on this belief. The value that parents have certain rights over their children can be observed by any participant in this society. For an analysis of the relationship of basic cultural postulates to law, see generally E.A. Hoebel, The Law of Primitive Man (1954).

While some courts view themselves as champions of children's rights, other more realistic courts have recognized their limitations. In In re Schwab's Adoption, 355 Pa. 534, 540, 50 A.2d 504, 508 (1947), the Supreme Court of Pennsylvania, in a much criticized decision, held that "the welfare of the child is weighed only after the necessary consents have already been given or forfeited." An Illinois case has interpreted the Illinois act similarly: In In re Petition to Adopt Cech, 8 Ill. App.
premise. To remove a child from the custody of a fit natural parent without the parent's consent violates that faith. Additionally, this consent requirement offers some protection to both the adoptive parents and the adopted child: it minimizes the possibility that the natural parent will later attempt to regain the custody of the child. Under the Illinois Adoption Act, the consent of the child need not be taken into account unless the child is over the age of fourteen. This may seem a harsh rule when the child is old enough to appreciate the proceedings, but on the other hand, it can be seen as a terrible burden on a child of young years to have to decide whom he or she will have as a parent. The potential for regret and guilt is great.

The statutory requirement that the adoption records be kept confidential may or may not be in the best interests of the child. This confidentiality may be considered a violation of the child's civil rights, particularly at the time of the child's majority. It may be argued that the child has a right to such genealogical information. On the other hand, this confidentiality may be seen as a necessary measure to protect the adoptee from unpleasant facts. It may be better to "let sleeping dogs lie" than, for example, to expose the adoptee to the fact that his or her biological relatives were criminals or insane. However, it is difficult to characterize a measure as protective when those who are to be "protected" do not necessarily want the protection. It does appear that confidentiality serves the best interests of the adoptive parents, who will not be threatened by the prospect of the child learning about and perhaps loving his or her natural parents. That the records be kept concealed from the world at large, including the adoptive and natural parents, does seem to protect the child from unwelcome interference by either set of parents. The adoptive

---

3d 642, 291 N.E.2d 21 (1972), the court stated:

[Section 9.1-15 of the Adoption Act] contains the legislative declaration that the welfare of the child shall be the prime consideration in all adoption proceedings. . . . Nevertheless, this declaration does not mean that absent consent or unfitness, adoption can be granted solely upon the basis of the best interest of the child. . . . The welfare of the child may be the decisive criterion in awarding custody in divorce and separate maintenance cases but it is not the sole dictate of the result in adoption proceedings. Adoption, unlike mere custody, severs conclusively the rights and interest of the natural parents. . . . These rights should not be terminated unless a clear and convincing case has been made in strict compliance with the adoption statute. . . . The nature of adoption necessitates an appraisal of the effect not only upon the child but also upon the natural parent.

Id. at 645, 291 N.E.2d at 23-24.

157. ILL. REV. STAT. ch. 4, § 9.1-12 (1973). Judge McGillicuddy has explained that the consent or wishes of the child are often considered when the child is old enough to understand the proceedings. McGillicuddy interview, supra note 92.
parents are then unable to find evidence to blame the child for his or her heredity, and the natural parents are unable to contact the child.

The basic premise that has been accepted by the state is that, barring unusual circumstances, the child’s best interest is served by having the child remain with his or her natural parents. It is easy to see that this premise is a necessary one: in ordinary circumstances, the state feels incompetent to change the biological order absent compelling reasons that such a change will, with a reasonable degree of certainty, affect a desired result. Given the absence of professional consensus about what will or will not have a particular effect in these circumstances, and absent any consensus about what is or is not “desirable,” any unnecessary interference by the state can be seen to be equivocal. It is “safer” to leave nature alone. Responsibility is thus avoided. Whether the American cultural postulate that children should be raised by their biological parents is valid at present is irrelevant. The postulate exists; it is deeply ingrained; it is safe; and no superior, acceptable alternative commands wide support in this country. Thus, little meaning can be put into the policy of protecting the “best interests of the child.” It could even be questioned whether the state prefers the best interests of the child over the best interests of the parents, inasmuch as lawmakers identify more with parents than with children. It does appear that lawmakers (and others) want to be known as champions of children. But owing to the nebulous nature of the “best interests of the child,” the strength of this “commitment” to children cannot be gauged.

Craig Benson
Christine Godsil Cooper
Joel Handler
Ralph Walters