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ADOPTION AND TERMINATION PROCEEDINGS IN WISCONSIN: STRAINING THE WISDOM OF SOLOMON

STEPHEN W. HAYES*
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"And the King said, 'Divide the living child in two, and give half to the one, and half to the other.'" I Kings 3:25.

I. INTRODUCTION

Perhaps no contested matter produces more joy, more heartache, more judicial response and more legislative reaction than the battle waged between birth parents and prospective adoptive parents for the right to raise a child. Decisions which are often made from the heart first and the lawbook second have produced a circuitous and sometimes precarious path for lawyers and judges alike to follow. As a result, increasingly rigid concepts have been created to ease the difficult burdens of decision makers and practitioners. Those recent judicial and legislative efforts may have wrought order from chaos at the expense of the best interest of the child.

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Special acknowledgment is extended to William C. Pickering for his contributions to this article.
II. BACKGROUND

At a minimum, the birth parents, the child and the state are involved in a termination and adoption proceeding. If the child has been living with others, the interests of potential adoptive or foster parents may also be involved. State laws may require the involvement of other participants, such as a guardian ad litem. Despite the many important and often conflicting interests involved, courts and legislatures often have focused on the biological parents at the expense of the other parties. Consequently, the fundamental rights of biological parents are typically safeguarded quite zealously in adoption or termination proceedings, while the equally fundamental and often conflicting rights of other parties, most importantly those of the child, may be ignored.

A. Parental Rights Under Common Law

In primitive societies, the larger kinship group rather than the family was the basic societal unit. If the immediate family was dissolved for some reason, the children in such societies would remain in the clan in which they had been raised. Because the child’s family was considered to be the clan, the loss of a birth parent had little legal or official impact on the child.

American society, on the other hand, has generally placed great emphasis on the family and viewed the parents as the primary figure in child development. Anglo-Ameri—
can culture has generally recognized the exclusive authority of parents to govern and control their children. Society has also recognized that this authority gives the parent certain interests including the psychological benefits which may arise from parenthood, the right to administer discipline and expect obedience, the duty to provide care and to nurture the child and the correlative right to preserve the integrity and the autonomy of the family unit.

The position of parents at common law was a mix of a rather romantic view of parenthood with contract and property law principles. Society recognized that, due to their "want and weaknesses," children had to be given care. Society then idealistically assumed that nature had designated the biological parents the most fit and proper persons to provide that care. The contractual underpinning of common-law parental rights is implicit in the view that the parents were entitled to the custody of the child's person and to the value of the child's labor and services as a quid pro quo for the parental obligation to maintain and educate the child. Since the parents' right to their children was considered akin to that of property owners to their chattels, it followed that the parents' interests were of primary concern.

Parenthood also engendered specific obligations under the common law, including the duty to maintain and edu-
cate the child while a minor and to make reasonable provisions to prepare the child to become a useful member of society.\textsuperscript{18} If the parents failed to discharge this obligation while able to do so, or acted in a manner endangering the health or morals of the child, they risked forfeiture of the right to the value of the child's services\textsuperscript{19} and to the custody of the child.\textsuperscript{20}

The duty to educate biological offspring gave rise to a parental obligation to society at large. The parents' failure to adequately discharge that obligation worked a severe hardship on society by depriving it of a "useful citizen" and creating "a nuisance."\textsuperscript{21} The duty to care for the child also created a social obligation which could be enforced by third parties who could collect from the parents the cost of providing necessities for the child.\textsuperscript{22}

Judicial intrusion was exerted generally only against a parent's custodial rights. At early common law, courts possessed the authority to remove a child from parental custody when the child's morals, safety or other interests strongly required it.\textsuperscript{23} Courts, however, possessed no authority to sever parental rights. Adoption or termination proceedings were unknown at common law.\textsuperscript{24}

Modern courts and legislatures have continued to recognize the fundamental nature of the interests biological parents have in their children.\textsuperscript{25} Parental rights have been characterized as "more precious to many people than their

\begin{thebibliography}{9}
\bibitem{18} J. Kent, \textit{supra} note 11, at *189; \textit{cf.} McGoon v. Irvin, 1 Pin. 526 (1845).
\bibitem{19} \textit{cf.} Patek v. Plankinton Packing Co., 179 Wis. 442, 446, 190 N.W. 920, 922 (1923).
\bibitem{20} 2 J. Kent, \textit{supra} note 11, at *205.
\bibitem{21} \textit{Id.} at *196.
\bibitem{22} \textit{See, e.g.,} Simpson Garment Co. v. Schultz, 182 Wis. 506, 509-10, 196 N.W. 783, 784 (1924); McGoon v. Irvin, 1 Pin. 526 (1845).
\bibitem{23} \textit{Id.} at *205.
\bibitem{24} Estate of Topel, 32 Wis. 2d 223, 229, 145 N.W.2d 162, 165 (1966).
\end{thebibliography}
right to life itself." One court noted that "it is not unlikely that many parents would choose to serve a prison sentence rather than to lose the companionship and custody of their children." Parental rights justly deserve protection by the legislature and judiciary. At what point, however, should the sanctity of rights created by birth be disturbed and for what purpose?

B. The Interests of the Child in Termination Proceedings

A child's interests within the family are many and varied. Some, though certainly not all, of these interests may coincide with parental interests. One such interest, to remain with one's biological parents and siblings, has been recognized as ""the other side of the coin which asserts the natural right of a parent to custody and guardianship over children."" Another is the mutual right of parent and child to inherit from one another. Finally, both parent and child possess important coinciding interests in the protection and maintenance of a viable family group provided that unit is functioning properly to meet the needs of the child.

A child also has certain interests which, when the family unit is malfunctioning or nonexistent, may conflict with those of a biological parent. Corresponding to common-law parental obligations is the child's right to support during his minority and to an appropriate education. A child also has a right to a safe and secure environment, and to guidance, assistance and support when confronted with important personal matters. In addition, a child has an

27. Davis, 618 F.2d at 379.
28. Bell, supra note 13, at 1084 n.78 (quoting V. DeFrancis, TERMINATION OF PARENTAL RIGHTS 15-16 (1971)).
31. See supra notes 18-20 and accompanying text.
important interest in the treatment of medical and emotional conditions, and freedom from harm, injury or neglect.\textsuperscript{34}

Even short of termination proceedings, the interests of the child may clash in a significant manner with the interests of the biological parent.\textsuperscript{35} When faced with these clashes, courts have attempted to analyze and balance the interests involved. In termination or adoption proceedings, however, the important physical and psychological interests of the child often are not adequately balanced with parental rights.

While giving lip service to the often silent interest of the child,\textsuperscript{36} courts and legislatures typically subordinate that interest to those of the biological parents, at least at the initial stages of inquiry. In Wisconsin termination hearings, for example, the question of whether a proposed termination or adoption will serve the best interests of the child is usually not reached unless it has first been determined that the consent of the biological parents has either been obtained or can be dispensed with.\textsuperscript{37} Other jurisdictions have presumed that custody by the biological parent is invariably in the child's best interest.\textsuperscript{38} The parental rights doctrine itself ignores the child's interests and entitles biological parents to custody of their offspring absent an affirmative showing of unfitness.\textsuperscript{39} The practical effect of this is to condition the consideration of the child's interests upon a prior finding of such parental conduct as will justify dispensing with the biological parents' consent to a termination or adoption. Although designated by the legislature as the keystone for decision-making in

\textsuperscript{34} Bell, \textit{supra} note 13, at 1084 n.78.


\textsuperscript{37} See, e.g., Wis. STAT. §§ 48.42, 48.427 (1981-1982).


\textsuperscript{39} Comment, \textit{supra} note 5, at 152-53.
Children’s Code actions, the best interests of the child often will not be directly addressed.\textsuperscript{40}

\section*{C. Psychological Parents}

Unlike adults, children do not have a psychological conception of any relationship with others derived from blood-ties until quite late in development.\textsuperscript{41} Children develop psychological attachments through day to day interchange with the adults who care for them.\textsuperscript{42} It is the character and continuity of these psychological relationships which lead the children to perceive their caretakers as their parents. This perception, rather than the fact of biological parenthood, is the basis of their relationship.\textsuperscript{43}

Usually a child’s biological, legal and psychological parents are one and the same.\textsuperscript{44} Termination and adoption proceedings sever these roles and place them in different individuals. Once a child is adopted, legal and psychological parenthood resides in the adoptive parent.

Although recognition is becoming more pronounced, courts and legislatures have been slow to give credence to the important role played by psychological parents. The United States Supreme Court, for example, only recently recognized the privacy rights of extended family members,\textsuperscript{45} and the child’s right to remain with the psychological parents.\textsuperscript{46} The Court, however, has refused to place the interests of foster parents on the same plane as those of biological parents.\textsuperscript{47}

Recently, section 48.01(2) of the Wisconsin Statutes was amended to require courts to consider the interests of persons with whom the child has been placed for adoption.\textsuperscript{48} However, two recent decisions of the Wisconsin Supreme

\begin{thebibliography}{99}
\bibitem{40} Cf. Comment, \textit{supra} note 4, at 560.
\bibitem{41} J. \textsc{Goldstein}, A. \textsc{Freud} \& A. \textsc{Solnit}, \textit{supra} note 30, at 12-13.
\bibitem{42} \textit{Id.}
\bibitem{43} Read, Book Review, 13 \textsc{J. Fam. L.} 601, 602 (1973-74).
\bibitem{44} Muench \& Levy, \textit{Psychological Parentage, A Natural Right}, 13 \textsc{Fam. L.Q.} 129, 152-53 (1979).
\bibitem{45} Moore \textit{v.} City of East Cleveland, 431 U.S. 494 (1977).
\bibitem{46} Quill\textsc{In} \textit{v. Walcott}, 434 U.S. 246 (1978).
\bibitem{48} The recent amendments to Wis. \textsc{Stat.} § 48.01(2) (1981-1982) require judicial consideration of the interest of persons “with whom the child has been placed for adoption.” Act of Nov. 27, 1981, ch. 81, § 2, 1981 Wis. Laws 726, 727.
\end{thebibliography}
Court suggest that the court may be deviating from the nationwide trend recognizing the importance of psychological parents. Earlier, the interests of the psychological parent had been at least implicitly recognized by the court.

D. Guardian ad Litem

1. The Role of the Guardian ad Litem in Termination Proceedings

A guardian ad litem is an attorney appointed to protect the interests of a minor in a specific court proceeding. The attorney's role is that of an advocate for the child's best interests. In contested adoptions and in cases dealing with involuntary termination of parental rights, appointment of legal counsel or a guardian ad litem for the minor child is mandatory. When the parent in a termination proceeding is a minor, the parent must also be served by a guardian ad litem.

49. In re J.L.W., 102 Wis. 2d 118, 140, 306 N.W.2d 46, 56 (1981); In re Adoption of R.P.R., 98 Wis. 2d 613, 297 N.W.2d 833 (1980), rev'd 95 Wis. 2d 573, 291 N.W.2d 591 (Ct. App. 1980). In J.L.W. the Wisconsin Supreme Court reversed on constitutional grounds and required that the unfitness of the birth mother be found before terminating her rights. Although J.L.W. was the first Wisconsin case to impose this additional burden, there was neither prospective application of the rule nor a remand to permit the petitioners in favor of termination of the mother's rights an opportunity to put in evidence of the mother's unfitness. This failure to remand following reversal may be an abandonment by the court in support of the psychological parent concept.


51. See, e.g., In re Adoption of Randolph, 68 Wis. 2d 64, 227 N.W.2d 634 (1975); In re Adoption of Tachick, 60 Wis. 2d 540, 210 N.W.2d 865 (1973); In re Adoption of Morrison, 260 Wis. 50, 49 N.W.2d 759 (1951), reh'g denied, 260 Wis. 69a, 51 N.W.2d 713 (1952).


53. In re Termination of Parental Rights to Kegel, 85 Wis. 2d 574, 583, 271 N.W.2d 114, 118 (1978). The same duty is imposed in divorce custody disputes. See, e.g., Allen v. Allen, 78 Wis. 2d 263, 254 N.W.2d 244 (1977); deMontigny v. deMontigny, 70 Wis. 2d 131, 233 N.W.2d 463 (1975); Wis. Stat. § 767.045 (1981-1982).


55. Id. § 48.23(2).
The guardian ad litem has a duty to investigate the facts, consult with the child when possible, gather evidence and call and cross-examine witnesses. The guardian also must recommend to the court the disposition which is in the best interests of the child. This recommendation is presumed to be in the child's best interests unless a fair preponderance of the credible evidence supports a contrary determination. Because the guardian ad litem must function as a lawyer and social worker, he or she occupies a unique position in termination proceedings. The guardian ad litem as court advisor potentially possesses power beyond that of other lawyers in civil cases to affect the outcome of adoption or termination proceedings.

2. What Weight Must Be Given to the Recommendation of the Guardian ad Litem?

Before 1954 no adoption could be granted without the consent of the child's legal guardian. In 1955, however, the

56. See In re Termination of Parental Rights to Kegel, 85 Wis. 2d 574, 583, 271 N.W.2d 114, 118 (1978) (citing deMontigny v. deMontigny, 70 Wis. 2d 131, 136-42, 233 N.W.2d 463, 466-69 (1975)). See also Bahr v. Galonski, 80 Wis. 2d 72, 257 N.W.2d 869 (1977).

57. See Wis. Stat. § 48.85(1), (2) (1981-1982); In re Termination of Parental Rights to Kegel, 85 Wis. 2d 574, 271 N.W.2d 114 (1978). Note that while § 48.85 clearly refers to the recommendation of the guardian, nowhere does the statute call for the recommendation of the guardian ad litem. Without a discussion, the Wisconsin Supreme Court has interpreted "guardian" in § 48.85 to include "guardian ad litem." In re Adoption of Tachick, 60 Wis. 2d 540, 543-46, 210 N.W.2d 865, 868-69 (1973).


59. The writers believe that there exists a conflict between the duty of the guardian ad litem to act as an advocate and the apparent duty under Wis. Stat. § 48.85(2) (1981-1982) to provide impartial counsel to the court in the form of a recommendation. Wis. Stat. § 48.85(1) (1981-1982) requires the guardian (and by case law the guardian ad litem) to file a recommendation with the court ten days before trial. By necessity at least a tentative recommendation as to the ultimate disposition of the child must be presented by counsel for the child before hearing the testimony of the witnesses and viewing the exhibits admitted into evidence at trial.

The interrelationship between Wis. Stat. § 48.85(1), (2) (1981-1982) and case law needs clarification. The duty of the guardian ad litem for the child in termination and adoption matters should be clearly defined. Is the guardian an advocate, an assistant to the court, or both?

As one writer has indicated, in divorce custody disputes the guardian ad litem should not be considered an expert social worker or a counselor for the trial judge. Cook, The Guardian ad Litem — Duties, Professional Responsibilities and Limitations in Custody Cases, Wis. J. Fam. L., Dec. 1982, at 17. The same principle should be applicable to adoption matters.

60. See In re Adoption of Tschudy, 267 Wis. 272, 65 N.W.2d 17 (1954).
Wisconsin Legislature enacted section 48.85 which allowed a trial court to dispense with the legal guardian's consent if the legal guardian's refusal to consent was arbitrary, capricious or not based on substantial evidence.\(^6\)

In 1959 the legislature revised that section to give presumptive weight to the legal guardian's recommendations subject to rebuttal by a clear preponderance of the evidence.\(^6\) Subsequently, in 1969, a fair preponderance of the credible evidence was deemed sufficient to rebut the presumption.\(^6\)

Wisconsin statutes do not expressly designate the weight to be given to the opinion of a guardian ad litem. However, in 1973 the Wisconsin Supreme Court recommended that the opinion of the guardian ad litem be given the same weight as that of a legal guardian under section 48.85(2) of the Wisconsin Statutes.\(^6\) The court provided no rationale for expanding the coverage of section 48.85(2) to include the guardian ad litem, but simply stated that, "[i]t is true the guardian ad litem's recommendation opposing the adoption does not have the force and effect under present sec. 48.85(2) that it formerly had. At one time the trial court in an adoption proceeding could not grant the petition over the objection of the guardian ad litem."\(^6\)

In the event the recommendation of the guardian ad litem does not support the petition for adoption, the court,

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61. Wis. Stat. § 48.85 (1955). See also In re Adoption of Brown, 5 Wis. 2d 428, 92 N.W.2d 749 (1958); In re Adoption of Shields, 4 Wis. 2d 219, 89 N.W.2d 827 (1958).


64. In re Adoption of Tachick, 60 Wis. 2d 540, 210 N.W.2d 865 (1973).

65. Id. at 544, 210 N.W.2d at 867. In Tachick the court first applied the fair preponderance test to the recommendation of a guardian ad litem in an adoption proceeding. Application of the test to the recommendation of the guardian ad litem in an adoption matter was further confirmed in In re Adoption of Randolph, 68 Wis. 2d 64, 227 N.W.2d 634 (1975). The same test was applied to an involuntary termination of parental rights proceeding in In re Termination of Parental Rights to Kegel, 85 Wis. 2d 574, 271 N.W.2d 114 (1978).

However, the court declined to address the application of the fair preponderance test to the recommendation of the guardian ad litem in In re Adoption of R.P.R., 98 Wis. 2d 613, 297 N.W.2d 83 (1980), rev'd 95 Wis. 2d 573, 291 N.W.2d 591 (Ct. App. 1980).
according to the statute, must then hold a hearing to determine whether the best interests of the child would be served by the proposed adoption. The statute does not specifically indicate the procedure to be followed in a termination case. How the recommendation procedure of section 48.85 is to dovetail with current termination rules is not clear.

III. JUDICIAL TREATMENT OF THE INTERESTS INVOLVED IN ADOPTION OR TERMINATION CASES

A. United States Supreme Court

The United States Supreme Court has long granted the utmost deference to the position of parents within the family. In Meyer v. Nebraska and Pierce v. Society of Sisters, the Court found that the right of parents to educate their children was within the liberty interests protected by the fourteenth amendment. More recently, the Court recognized as fundamental the parental interests in guiding the religious upbringing of children.

In contrast to its traditional deference to parental rights, however, the Court has recently given at least implicit recognition to other individuals whose interests may conflict with those of the parents. The Court has, for example, recognized that a family may include individuals other than or in addition to the biological parents and their immediate offspring. More importantly, the Court has recognized in

67. Id.
68. 262 U.S. 390 (1923). The Meyer Court also recognized a corresponding parental duty under the natural law to provide the child with an education suitable to his station in life.
69. 268 U.S. 510 (1925).
70. Wisconsin v. Yoder, 406 U.S. 205 (1972). An interesting sidelight to this case involved the dissent of the late Justice William Douglas. Douglas' chief reason for dissenting was his perception that the Court's analysis of the case as solely a contest between parents and state ignored the children and their interests. In Justice Douglas' opinion, prior recognition of children's constitutional rights required that the Court view the child as an independent entity with rights distinct from those of the parents. Id. at 241-49 (Douglas, J., dissenting).
71. See Smith v. Organization of Foster Families, 431 U.S. 816, 844-45 (1977) (recognizing that the foster family may be as or more important to a child than the biological family when the foster family has been the only family the child has known, implying that the foster parents may have a legally cognizable interest arising
several recent cases challenging the right of a minor to an abortion without prior parental consent that at certain points parental interests must defer to a child’s individual and constitutionally protected privacy rights.\textsuperscript{72}

Within the last ten years, beginning with \textit{Stanley v. Illinois},\textsuperscript{73} the Court has increasingly accepted for review adoption\textsuperscript{74} and parental termination\textsuperscript{75} decisions. Analysis of these cases suggests two important trends. First, it appears that the Court is applying principles developed in early parental rights cases.\textsuperscript{76} In so doing, it has explicitly recognized that the interests of the biological parent in termination and adoption proceedings is a fundamental one,\textsuperscript{77} entitled to deference and protection by the state, absent powerful countervailing interests.\textsuperscript{78} Second, complete application of these protections has been extended to the interests of unwed fathers who have established familial relationships with their children.\textsuperscript{79}

With few exceptions, the Court has viewed these cases as being solely a contest between parent and state.\textsuperscript{80} The Court has recognized the importance of the state’s parens patriae

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\item from positive law, but also noting that any rights foster parents might have are secondary to those of biological parents; Moore v. City of East Cleveland, 431 U.S. 494 (1977) (rejecting ordinance which narrowly defined “family” as nuclear family).
\item \textsuperscript{72} See \textit{H.L. v. Matheson}, 450 U.S. 398 (1981); \textit{Bellotti v. Baird}, 428 U.S. 132 (1976); \textit{Planned Parenthood v. Danforth}, 428 U.S. 52 (1976). These cases are important not only because of the Court’s recognition that the interests of at least three parties are involved (the parent, the state and the child), but also for the attempt to weigh the interests and to fashion a remedy based on a perception of a constitutionally acceptable balance of the competing interests.
\item \textsuperscript{73} 405 U.S. 645 (1972).
\item \textsuperscript{74} \textit{E.g.}, \textit{Caban v. Mohammed}, 441 U.S. 380 (1979); \textit{Quilloin v. Walcott}, 434 U.S. 246 (1978). Both cases involved the need to obtain the unwed father’s consent to an adoption.
\item \textsuperscript{75} \textit{See, e.g.}, \textit{Santosky v. Kramer}, 455 U.S. 745 (1982) (constitutionally proper burden of proof); \textit{Lassiter v. Department of Social Servs.}, 452 U.S. 18 (1981) (indigent parents do not have right to an attorney).
\item \textsuperscript{76} See, for example, \textit{Stanley}, 405 U.S. at 651, or more recently, \textit{Santosky v. Kramer}, 455 U.S. 745, 753 (1982), for evidence of the Court’s reliance on \textit{Meyer v. Nebraska}, 262 U.S. 390 (1923).
\item \textsuperscript{77} \textit{Santosky v. Kramer}, 455 U.S. 745, 753 (1982).
\item \textsuperscript{78} \textit{Lassiter v. Department of Social Servs.}, 452 U.S. 18, 27 (1981).
\item \textsuperscript{79} \textit{See} \textit{Caban v. Mohammed}, 441 U.S. 380 (1979); \textit{Stanley}, 405 U.S. 645.
\end{itemize}
interest in the well-being of the child and the state's fiscal and administrative interest in reducing the cost and burdens of the proceeding. It has rejected the contention that these interests necessarily conflict with parental interests and has subordinated them to parental interests when they do.

*Santosky v. Kramer* is an exception to the Court's "parent versus state" approach. Prior to *Santosky*, the only recognition accorded to interests other than those of the parents or the state in adoption or termination proceedings was that given by justices dissenting from the majority analysis. In *Santosky*, however, the Court included, for the first time, analysis of interests beyond merely those of the state or parents.

While the *Santosky* Court's initial analysis dealt in traditional "parent versus state" terms, the Court eventually addressed the question of the weight to be given to the interests of the child and of foster parents in termination proceedings. The Court rejected the argument that either interest should be contrasted with those of the biological parents in the factfinding stage of a termination proceeding. However substantial the interests of foster parents may be, the Court explained, such interests are subservient to those of biological parents when the rights of each conflict.

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83. Id. at 31.
86. Justice Stevens, for example, recognized the interests of adoptive parents and the child in his dissent in Caban v. Mohammed, 441 U.S. 380, 408-09 (1979) (Stevens, J., dissenting). See also Justice Stewart's dissent in *Caban* recognizing the child's interest as well. Id. at 400 (Stewart, J., dissenting). The most thoughtful and thought provoking dissent was that of Justice Rehnquist in *Santosky*, which argued that proper analysis of termination proceedings involved a weighing and balancing of countervailing interests of state, parent and child throughout the entire process, rejecting completely the majority's parent-centered analysis. Santosky, 455 U.S. at 770-91 (Rehnquist, J., dissenting).
87. See Santosky, 455 U.S. at 759-60 (Court noted that the factfinding stage of the New York proceeding put the state directly against the parent without focusing on potentially conflicting interests of either the child or foster parents).
88. Id. at 760-61. The Court reasoned that these interests were not implicated directly in the factfinding stage. The child's interests, the Court concluded, are ade-
tween the interests of the child and the parent, the Court concluded, are not to be assumed until after a finding of parental unfitness.\textsuperscript{89}

The Court's departure from the "parent versus state" focus may have been a reaction to the dissent of Justice Rehnquist. Justice Rehnquist agreed with the Court's characterization of the parent's interest as substantial and constitutionally protected\textsuperscript{90} and that the proper burden of proof must allocate the risk of error among the various parties.\textsuperscript{91} He disagreed, however, with the Court's assumption that the child's interest in a termination proceeding coincides with that of the parents.\textsuperscript{92}

While conceding a mutual interest in preventing erroneous terminations, Justice Rehnquist noted that the child's interest is distinct from the parent's because it "exists only to the extent that such a continuation would not be harmful to him."\textsuperscript{93} In addition, Justice Rehnquist suggested that an erroneous failure to terminate also would adversely affect important interests of the child.\textsuperscript{94} Consequently, he argued, a child has interests in the factfinding phase of a termination proceeding independent of and often contrary to, parental interests.\textsuperscript{95} After balancing the child's and state's interests\textsuperscript{96} against those of the parents, Justice Rehnquist concluded that the state had set a proper burden of proof by allocating the risk of error equally.\textsuperscript{97}

Equally important is the issue of the status of unwed fathers in adoption proceedings. In \textit{Stanley v. Illinois}\textsuperscript{98} the

\textsuperscript{89} Id. at 760. The Court noted that the shared and vital interest in preventing erroneous termination of the natural relation indicated a coincidence of interests until the termination of the factfinding stage. \textit{See also id.} at 765.

\textsuperscript{90} Id. at 774 (Rehnquist, J., dissenting).

\textsuperscript{91} Id. at 786-87 (Rehnquist, J., dissenting).

\textsuperscript{92} Id. at 788 n.13 (Rehnquist, J., dissenting).

\textsuperscript{93} Id. (Rehnquist, J., dissenting).

\textsuperscript{94} Id. at 788-89 & n.13 (Rehnquist, J., dissenting).

\textsuperscript{95} Id. at 788 n.13 (Rehnquist, J., dissenting).

\textsuperscript{96} Justice Rehnquist also disagreed with the majority's assertion that the state's parens patriae interests in the child arose only after the factfinding stage. \textit{Id.} at 790 n.16 (Rehnquist, J., dissenting).

\textsuperscript{97} Id. at 790-91 (Rehnquist, J., dissenting).

\textsuperscript{98} 405 U.S. 645 (1972).
Court held that a state could not deprive an unwed father of the custody of children whom "he has sired and raised" solely upon an assumption of unfitness derived from the children's illegitimate status. A state statute allowing the adoption of a child without consent of an unwed father who had lived with and supported his children was held unconstitutional in *Caban v. Mohammed.* In contrast, a Georgia statute which denied an unwed father this same right to consent to an adoption was upheld in *Quilloin v. Walcott* where the father neither exercised nor sought actual or legal custody nor shouldered any significant responsibilities regarding the child's care or support.

Two important distinctions as to the parental rights of unwed fathers are being made by the Court. First, the Court differentiates between unwed fathers who have participated in raising the child and those who have not. Second, the Court distinguishes situations involving newborn children from those involving older children.

In *Stanley* and *Caban* state intervention deprived an unwed father of his children after he had established a familial relationship with them and actually participated in their rearing. However, in *Quilloin* the father had never lived with the child nor attempted to legitimate or support him.

In all of the above cases the Court attempted to protect an existing de facto familial relationship between parents and child. In *Stanley* and *Caban* the Court extended con-
institutional protection to the rights of unwed fathers who had assumed parental responsibilities similar to those of a legitimate parent. In *Quilloin* the Court refused to extend the same rights to a father whose only relation to the child was biological.108

Distinctions based on the age of the child are not so clear. The Court has not decided whether the parental rights of unwed fathers of newborn infants are entitled to the same constitutional protection as the rights of unwed fathers of older children. Language in *Caban*, a case involving older children,109 implies that they may not be so entitled. The Court suggested in dicta that in the case of newborns where the father had not come forward to participate in parental responsibilities, he might not be entitled to the full panoply of constitutional protections.110

### B. Wisconsin Supreme Court

1. 1890-1949

Significant judicial discussion of Wisconsin's adoption and termination proceedings began in the late nineteenth century.111 Since adoption proceedings were unknown at common law,112 many early Wisconsin decisions dealt with the question of whether the trial court met the statutory pre-requisites for jurisdiction to enter an adoption order.113

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108. *See supra* note 105. The Court later noted in *Caban* that the father's claim in *Quilloin* was rejected in part "for his failure to act as a father toward his children." *Caban*, 441 U.S. at 389 n.7.

109. The children were ages four and six at the time. *Caban*, 441 U.S. at 389.

110. After discussing the problems of illegitimate newborns the Court noted that in those cases where the father never did come forward to participate in the child's upbringing a state would not be precluded by the equal protection clause from withholding his privilege to veto the adoption of the child. *Caban*, 441 U.S. at 392. The Court expressed no view, however, whether the special difficulties surrounding the adoption of newborn children "would justify a statute addressed particularly to newborn [infants] adoptions, setting forth more stringent requirements concerning the acknowledgement of paternity or a stricter definition of abandonment." *Id.* at 392 n.11.

111. *See In re Estate of McCormick*, 108 Wis. 234, 84 N.W. 148 (1900); Parsons v. Parsons, 101 Wis. 76, 77 N.W. 147 (1898); Schiltz v. Roenitz, 86 Wis. 31, 56 N.W. 194 (1893).


113. *See, e.g.*, Will of Bresnehan, 221 Wis. 51, 265 N.W. 93 (1936); St. Vincent's Infant Asylum v. Central Wis. Trust Co., 189 Wis. 483, 206 N.W. 921 (1926); *In re Adoption of Bearby*, 185 Wis. 33, 200 N.W. 686 (1924); Carlson v. MacCormick, 178
Though the supreme court initially held that adoption statutes were to be liberally construed and that mere irregularities of procedure would not be allowed to defeat the purposes of such laws, the court required that the statutory prerequisites of jurisdiction exist before a court could be authorized to act.

The most important concern the Wisconsin Supreme Court faced was the evaluation of the interests involved in adoption proceedings. During this period the court first considered the interest of the child in adoption proceedings. The court stated that "[t]he adoption statute . . . looks to the interests of children primarily. That is its controlling idea and policy. Therefore every reasonable intendment should be indulged in, in case of doubt, in the line of promoting that object." Based on that policy, the court erased all doubt as to the weight of the child’s interest in early state adoption proceedings, finding that "the controlling consideration is and should be the welfare and best interest of the child."

The court also weighed the child’s interest in remaining in a stable and secure environment. In what may be the earliest treatment by the Wisconsin Supreme Court of what later became the concept of separation trauma, the court held that:

In determining matters having to do with the custody of children, the primary question is what is for the best interests of the child? Where a parent has voluntarily contracted away his rights, and the child as a result has formed

Wis. 408, 190 N.W. 108 (1922); Glascott v. Bragg, 111 Wis. 605, 87 N.W. 853 (1901); cases cited supra note 111. One interesting sidelight is that many of the initial cases involved collateral rather than direct attacks on the adoption discussed therein. Bresnehan, In re Estate of McCormick and Glascott were will contests brought by parties disgruntled at the prospect of sharing the estate with an adoptee. Schiltz involved an action for alienation of affection.

114. Glascott v. Bragg, 111 Wis. 605, 610, 87 N.W. 853, 854 (1901); Parsons v. Parsons, 101 Wis. 76, 80, 77 N.W. 147, 148 (1898).
115. In re Adoption of Bearby, 185 Wis. 33, 35, 200 N.W. 686, 687 (1924).
116. Other issues often raised involved questions of interpretation of the then current adoption statutes. The court, for example, defined abandonment in Parsons as "no more than neglect or refusal to perform the natural and legal obligations of care and support which parents owe to their children." Parsons v. Parsons, 101 Wis. 76, 79, 77 N.W. 147, 148 (1898).
117. Id. at 80, 77 N.W. at 148.
118. In re Adoption of Jackson, 201 Wis. 642, 645, 231 N.W. 158, 159 (1930).
new attachments, it may very well be that a situation has been created which a court will hesitate to disturb, not on the principal ground that the contract was valid or invalid, but because, everything considered, the welfare of the child demands continuance of the new relationship.\textsuperscript{119}

The rights of individuals other than those traditionally involved in adoption proceedings were first considered by the court in \textit{In re Adoption of Jackson}.\textsuperscript{120} In that case, the maternal grandparents argued that, as grandparents, they were the natural guardians of the child and were legally entitled to his custody. The court rejected the idea that blood relatives have rights in such children and held that any rights which may exist were subordinate to the best interests of the child.

In perhaps the most important decision of the period, \textit{Lacher v. Venus},\textsuperscript{121} the court discussed the rights of parents in adoption proceedings. Earlier, the court had described parents' rights as the "most sacred natural rights."\textsuperscript{122} In \textit{Lacher} the court recognized that natural parenthood gave rise to substantial rights as well as responsibilities.\textsuperscript{123} It con-

\textsuperscript{119} Stickles v. Reichard, 203 Wis. 579, 583, 234 N.W. 728, 730 (1931).

\textsuperscript{120} 201 Wis. 642, 231 N.W. 158 (1930). The case involved a dispute between the maternal grandparents and a maternal aunt over the custody of a child whose parents had died in an accident. Though both couples were found to be proper and suitable to adopt the child, the court awarded the child to the maternal aunt.

\textsuperscript{121} 177 Wis. 558, 188 N.W. 613 (1922).

\textsuperscript{122} Schiltz v. Roenitz, 86 Wis. 31, 40, 56 N.W. 194, 196 (1893).

\textsuperscript{123} \textit{Lacher}, 177 Wis. at 570, 188 N.W. at 617. Describing the relationship between parent and child, the court stated:

The unit of the state is the individual, its foundation the family. To protect the unit in his constitutionally guaranteed right to form and preserve the family is one of the basic principles for which organized government is established. 1 Cooley, Torts (3d ed.) 27.

That natural parenthood implies both substantial responsibilities and gives substantial rights needs no discussion. That willful neglect to perform the one may properly result in the forfeiture of the other is also not open to debate and not here for consideration.

A natural affection between the parents and offspring, though it may be naught but a refined animal instinct and stronger from the parent down than from the child up, has always been recognized as an inherent, natural right, for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and the pursuit of happiness, our government is formed. We trust that it will never become the established doctrine that the state shall say to the parents, and particularly to the mother, she who doth travail, and in great pain bring forth her child and after labour doth rejoice
cluded that these rights, even though "naught but a refined animal instinct and stronger from the parent down than from the child up,"\textsuperscript{124} deserved constitutional protections. Based on the above, the court found itself favoring the natural rights of parents over the control and custody of their children. This preference for parental rights influenced subsequent decisions\textsuperscript{125} and remains an influence.\textsuperscript{126}

2. 1950-1969

After almost a decade of inactivity, the court addressed a number of new and controversial issues, including revocation of a consent to adopt and the status of unwed fathers. In \textit{In re Adoption of Morrison}\textsuperscript{127} the court considered whether a minor mother could revoke her voluntary consent to terminate her rights prior to the adoption hearing. Pursuant to prebirth arrangements,\textsuperscript{128} the child was placed with the adoptive parents six days after birth and remained there until the time of trial. The minor mother later executed a

\begin{quote}
that the child is born, that there is but a mere privilege and not a right to the subsequent affection, comfort, and pride of and in such child.

We have not overlooked those features in connection with the family relationship that savor of financial or property rights; the right to service, to earnings, to actions for damages against those who destroy or impair the ability to serve, the natural as well as the statutory right to support from the child even after its majority; the right to inheritance, all of which are certainly as much entitled to the protection of the constitutional provision as to due process of law as are those which merely affect the pocketbook.

\ldots

The normal man and woman who have exercised their inherent right to form the family relationship and have brought children into this world and who have not by willful omission or commission on their part renounced that relationship, cannot and ought not to have such relationship destroyed, even by attempted action in the name of the state, save and except through due process of law.
\end{quote}

\textit{Id}. at 569-70, 188 N.W. at 617-18.
\textsuperscript{124} \textit{Id}. at 569, 188 N.W. at 617.
\textsuperscript{125} \textit{In re} Rice, 179 Wis. 531, 192 N.W. 56 (1923).
\textsuperscript{126} See, e.g., \textit{In re} Adoption of R.P.R., 95 Wis. 2d 573, 581-83, 291 N.W.2d 591, 596-97 (Ct. App. 1980), \textit{rev'd}, 98 Wis. 2d 613, 297 N.W.2d 833 (1980) (discussion of \textit{Lacher}).
\textsuperscript{127} 260 Wis. 50, 49 N.W.2d 759 (1951), \textit{reh'g denied}, 260 Wis. 69a, 51 N.W.2d 713 (1952).
\textsuperscript{128} The adoptive parents agreed to, and did, pay the medical expenses for the care of the minor mother from the last period of pregnancy until after the delivery of the child. \textit{Id}. at 52-53, 49 N.W.2d at 760.
voluntary written consent before the court, and the adoptive parents petitioned for adoption. Prior to the adoption hearing, the minor mother attempted to withdraw her consent, claiming that the consent had been the result of coercion and was neither freely nor voluntarily given.

On appeal the supreme court refused to allow the minor mother to withdraw her freely given consent without cause. This decision was based on several factors. First, the court concluded that in cases most similar to Morrison, courts had refused to allow withdrawal. Second, the court explained that a contrary holding would contradict express statutory language. Finally and most importantly, the court decided that the best interests of the child required a refusal.

In Morrison the court also considered the status of unwed fathers. Shortly after coming of age, and after the adoption proceedings had been commenced but prior to the final decree, the mother married the father. Thus, at the time of the adoption proceeding the child was legitimate under the statute. Consequently, the court had to decide whether the consent of the father was necessary prior to the adoption. While recognizing the rights of a biological father, the court found that such rights must be subordinated

129. At the time she signed the consent, the minor mother was accompanied by her mother, her brother and her attorney. Id. at 53, 49 N.W.2d at 760-61.
130. Id. at 60-63, 49 N.W.2d at 764-65 (citing In re Adoption of Minor, 144 F.2d 644 (D.C. Cir. 1944); Wyness v. Crowley, 292 Mass. 461, 198 N.E. 758 (1935)).
131. Morrison, 260 Wis. at 63, 49 N.W.2d at 765 (“The minority of a parent is not ground for revoking consent.” Wis. Stat. § 322.04(4) (1947)).
132. “The primary and paramount consideration in construing the adoption statutes is the welfare of the child and the so-called rights of the natural parents in such child are subordinated thereto.” Morrison, 260 Wis. at 59, 79 N.W.2d at 763.
133. The court again discussed the rights of unwed fathers in In re Aronson, 263 Wis. 604, 58 N.W.2d 553 (1953). In Aronson the court found that the putative father, together with parents and the person having custody at the commencement of the proceedings, were proper parties to a juvenile proceeding and thus had the right to appeal the final order transferring custody of the child in terminating parental rights. However, the court also found that a putative father had no right to notice of such proceedings because to require such notice might in some interests be inimical to the best interests of the child, and the child’s interests were paramount. Id. at 616, 58 N.W.2d at 559.
134. See Wis. Stat. § 245.36 (1947).
135. Wis. Stat. § 322.04(1) (1947) expressly provided that the consent of the father of a child born out of marriage was not required for a valid adoption. Thus, the issue became whether § 322.04(1) applied to the date the adoption action was commenced or the date the adoption order was entered.
to the best interests of the child. In so doing, the court again acknowledged the importance of psychological parenthood and what was to become known as separation trauma:

If the proposed adoptive parents have instituted adoption proceedings upon reliance of the written consent of the mother of an illegitimate to the adoption and the court has assumed jurisdiction in such proceedings, and have taken the child into their home for a substantial period of time so that bonds of affection have developed between the child and them, it could hardly be maintained that it would be in the best interests of the child to disrupt all this and force the removal of the child from the foster home because of the subsequent marriage of the mother to the natural father and the failure of the father to then give his consent. 136

A subsequent appeal involving the same parties illustrates an early tendency of the Wisconsin Legislature to pass laws in reaction to judicial decisions in the area of adoption. 137 Shortly after the decision in Morrison, a bill was prepared and introduced at the behest of the adoptive parents which, though introduced as a bill of general application, was particularly drafted to fit the status of the child they wanted to adopt. When enacted into law, it effectively allowed the adoptive parents to petition a court for an order declaring the child to be theirs for all legal intents and purposes. 138 The adoptive parents followed the procedures set

136. Morrison, 260 Wis. at 64-65, 49 N.W.2d at 766. The Morrison court also discussed the role of the guardian ad litem:

[T]he function of the guardian ad litem in adoption cases is not to counsel with the mother at the time of her signing the consent, but rather . . . he is to make his own independent investigation thereafter as to whether the mother freely and voluntarily executed such consent, and also as to whether the best interests of the child would be promoted by him joining in such consent.

Id. at 67-68, 49 N.W.2d at 767-68.

137. In re Adoption of Morrison, 267 Wis. 625, 66 N.W.2d 732 (1954).

138. Act of May 20, 1953, ch. 170, 1953 Wis. Laws 163 (codified at Wis. STAT. § 322.04(9)(b) (1953)):

Whenever a petition shall be filed in any court showing that such court had theretofore made an order for the adoption by the petitioners of an illegitimate child of a minor mother, which order was invalid due to a failure to secure the concurrence in consent required by this subsection, the court shall appoint a time and place for hearing the petition and due notice of such hearing shall be given to the mother of such child in the manner provided in § 324.18. If upon such hearing it shall appear that the illegitimate child was placed for adoption and continued to remain for more than 5 years in the custody of the petitioners, that the mother was, at the time of giving her consent, represented by a
forth and the trial court ordered the adoption. The supreme court subsequently upheld this order and the constitutionality of the statute in the second *In re Adoption of Morrison* case.139

During this period the court decided three cases dealing with the consent of institutional guardians in adoptions where the State Department of Public Welfare was the child’s guardian. In *In re Adoption of Tschudy*140 the court held that a court lacked jurisdiction to order the adoption of a child in the legal guardianship of the Department without its consent. Shortly after *Tschudy*, the legislature passed reactive legislation eliminating the absolute veto power of such a guardian over an adoption.141 In *In re Adoption of Brown*142 and *In re Adoption of Shields*143 the court interpreted the new statute to mean that before it could waive the requirement of the guardian’s consent, the trial court must find either that the refusal is not based on a bona fide belief that it is in the best interest of the child or that the guardian...

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139. 267 Wis. 625, 66 N.W.2d 732 (1954).
140. 267 Wis. 272, 65 N.W.2d 17 (1954). *Wis. Stat.* § 322.04(2) (1953) expressly required the consent of the Department to the adoption of a child in the legal guardianship of the Department. Citing *Lacher v. Venus*, 177 Wis. 558, 188 N.W. 613 (1922), the court found that because adoption proceedings are statutory, the essential statutory requirements must be complied with for a court to have jurisdiction to order an adoption. *Tschudy*, 267 Wis. at 284, 65 N.W.2d at 22.
141. Act of Aug. 20, 1955, ch. 575, § 7, 1955 Wis. Laws 719, 748 created a provision allowing a trial court to review a refusal of consent:

If a guardian whose consent is required by *§ 48.84(1)(c)* refuses to consent, he shall file with the court a summary of his reasons for withholding consent. After a study of this report, the court may dismiss the petition on the ground that the guardian refuses to consent or may set a time and place for a hearing to determine whether the guardian’s refusal to consent is contrary to the best interests of the child. At least 10 days notice in writing of the hearing shall be given to both the petitioner and the guardian refusing to consent. If the court, after the hearing, determines that the guardian’s refusal to consent is arbitrary, capricious or not based on substantial evidence, it may waive the requirement of such consent and proceed to determine the petition for adoption in accordance with the best interests of the child.

It was codified at *Wis. Stat.* § 48.85 (1955).
142. 5 Wis. 2d 428, 92 N.W.2d 749 (1958).
143. 4 Wis. 2d 219, 89 N.W.2d 827 (1958).
has no reasonable factual basis for believing that the adoption is not in the child's best interest.\textsuperscript{144}

During the 1960's, the court's influence in this area was primarily indirect through several decisions regarding the status, under state testamentary or intestacy laws, of a person who had been the subject of adoption proceedings.\textsuperscript{145} These decisions raised few novel legal issues in the termination or adoption law area.\textsuperscript{146}

3. 1970-1979

Significant developments in the area of adoption and termination occurred after 1970. Generally, three major issues were faced by the court. First, the court considered the effect of termination or adoption proceedings on the interests or rights of parties other than the three traditionally involved in adoption proceedings. Second, the court reviewed the rights of a child who is the subject of a termination or adoption proceeding. In particular, the court during this period examined the nature of the "best interests" doctrine, the rights of the child and the weight of those rights in relation to potential conflicts with parental rights. The court also for the first time provided an in-depth analysis of separation trauma. Third, in a series of significant cases, all denomi-

\textsuperscript{144} In \textit{Shields}, 4 Wis. 2d at 224, 89 N.W.2d at 830, the court stated:

In the light of this legislative history, we construe § 48.85, Stats., as authorizing the county court to dispense with the guardian's consent to adoption only where the evidence taken at the required hearing discloses either (1) that the guardian's refusal to consent is not based on a bona fide belief that such is for the best interests of the child, or (2) that the guardian has no reasonable basis in fact for believing that the proposed adoption would be contrary to the child's best interests. In either of those cases the refusal of consent would be arbitrary, capricious, or not based on substantial evidence. On the other hand, the court is not authorized to waive guardian's consent merely because it disagrees with the guardian's appraisal of the facts and, substituting its judgment for that of the guardian, considers that the proposed adoption will best serve the interests of the child.

The court heavily relied on \textit{Shields} in \textit{Brown}, 5 Wis. 2d at 436-39, 92 N.W.2d at 753.

\textsuperscript{145} See, e.g., \textit{Nelson v. City Bank}, 42 Wis. 2d 390, 166 N.W.2d 251 (1969); \textit{Tennessee v. Topel}, 32 Wis. 2d 223, 145 N.W.2d 162 (1966); \textit{Smith v. Reinhart}, 30 Wis. 2d 250, 140 N.W.2d 219 (1966); \textit{Roth v. Filipek}, 25 Wis. 2d 528, 131 N.W.2d 286 (1964).

\textsuperscript{146} In \textit{Tennessee v. Topel} the court did address the issue of whether the failure to appoint a guardian ad litem in an adoption proceeding was a jurisdictional defect. The court found that it was not. 32 Wis. 2d at 229-30, 145 N.W.2d at 165.
nated *State ex rel. Lewis v. Lutheran Social Services*, the court dealt with the rights of an unwed father in termination proceedings.

a. Interests of other parties

In *Estate of Pamanet* the biological siblings of the decedent contested the inheritance rights of birth parents whose rights to the decedent had been terminated. The court held that the termination of parental rights completely severed the legal relationship between the parent and child, and destroyed all rights of the parent to the child, including those of inheritance. Interestingly, the court held that as a result of the termination proceeding the decedent's biological brothers and sisters, not the parents whose rights as parents had been terminated, were the decedent's heirs at law.

In *In re Z* foster parents petitioned the court for review of an administrative decision which ordered removal of children from their foster home for adoptive placement. Although the court recognized that foster parents had some rights regarding children in their custody and care which had been conferred on them by the Children's Code, the court held that such rights must bow to the rights of the child as expressed by the best interests doctrine.

Another major issue faced by the court during this period was whether the doctrine of parental rights, as enunciated by

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147. 68 Wis. 2d 36, 227 N.W.2d 643 (1975); 59 Wis. 2d 1, 207 N.W.2d 826 (1973); 47 Wis. 2d 420, 178 N.W.2d 56 (1970), vacated and remanded sub nom. Rothstein v. Lutheran Social Servs., 405 U.S. 1051 (1972).
148. 46 Wis. 2d 514, 175 N.W.2d 234 (1970), *reh’g granted*, 46 Wis. 2d 518, 177 N.W.2d 105 (1970).
149. *Id.* at 516, 175 N.W.2d at 236.
150. *Id.* at 518, 175 N.W.2d at 236-37. On rehearing, the court noted that only those biological siblings who had themselves been adopted by other parties no longer had the right to inherit from the decedent sibling. The court thus implicitly noted that it is not the termination which destroys the rights of biological siblings, but an order of adoption. Therefore, the rights of biological siblings to inherit from and through each other remains legally cognizable until such time as an adoption order places the child in an entirely new family unit. 46 Wis. 2d at 518-19, 177 N.W.2d at 105.
151. 81 Wis. 2d 194, 260 N.W.2d 246 (1977).
152. *Id.* at 203, 260 N.W.2d at 250-51. Though the court recognized some rights of foster parents, it reasoned that the legislature had mandated that in those instances where the interests of the child conflict with the interests of the parent or guardian, such conflicts are clearly to be resolved, not in favor of the parent or guardian, but in favor of the interests of the child. *Id.*
the court, extended to relatives of the biological parent. In both *In re Adoption of Tachick*\(^{153}\) and *In re Adoption of Randolph*\(^{154}\) grandparents had petitioned for adoption. In *Tachick* the children had lived with the grandparents all of their lives, while in *Randolph* the children had been placed with a cousin of one of the natural parents after both parents' accidental death and had become assimilated into the cousin's family. In *Tachick* the court reversed the trial court and ordered that the grandparents' petition for adoption be granted. The *Randolph* court, on the other hand, affirmed the denial of the petition for adoption. In both cases the guardian ad litem had recommended against adoption.

The question of whether relatives other than biological parents possess "some right" or interest derived from the biological parents was not directly addressed in *Tachick*. Yet the *Tachick* court appeared to recognize this right in finding that "it is significant that the petitioners are the grandparents of the child and have taken care of him since birth."\(^{155}\) In *Randolph* the grandparents claimed that the trial court's denial of adoption contravened the legal rights of grandparents "who stand in the legal shoes of the deceased parent and have the right to the award of the adoption in the absence of a finding that they are unfit."\(^{156}\) The court rejected this argument, noting that there was no authority for the proposition that in an adoption proceeding the grandparents succeeded to whatever rights the biological parents may have had.\(^{157}\)

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153. 60 Wis. 2d 540, 210 N.W.2d 865 (1973).
154. 68 Wis. 2d 64, 227 N.W.2d 634 (1975).
155. *Tachick*, 60 Wis. 2d at 549, 210 N.W.2d at 869. It should be also noted that this clause served to again support the concepts of psychological parenthood and separation trauma.
156. *Randolph*, 68 Wis. 2d at 67, 227 N.W.2d at 636.
157. The decision was based in part on the court's belief that the provision in the juvenile code requiring a parent to consent to an adoption contained no provision requiring such consent from a grandparent. The court also noted that a similar contention had been rejected in *In re Adoption of Jackson*, 201 Wis. 642, 231 N.W. 158 (1930). Finally, the court implicitly recognized that even had such rights existed, they would be subordinate to the best interests of the child. *Randolph*, 68 Wis. 2d at 68, 227 N.W.2d at 636-37.
b. Rights of the child

Throughout this period the court reviewed in greater depth the rights of the child. First, the court attempted to further define what was meant by the "best interests of the child." Second, the court formulated a method for weighing those interests in competition with the rights of other parties in adoption proceedings. Third, the court considered the weight to be given to the factor of separation trauma and the child’s right to a stable and secure environment.

The best interests concept is indeed an amorphous one. This is borne out by three positions the Wisconsin Supreme Court has taken. Language in early cases gave rise to the view that a determination of the best interests of the child was solely a question of fact. This view was repudiated in Tachick when the court found that such a determination was a question of law, reviewable de novo by the supreme court.

In Randolph the court stepped back from this definition, holding that a determination of the best interests of the child by the trial court was a "mixed question of facts and law." The court stated that a determination of the best interests of the child was a question of fact "in the sense that precise determinations must be made about specific factors such as age, finances of the parties, discipline questions, and psychological factors." On the other hand, the "application of the correct standards for determining the best interests of the child and the ultimate conclusion of where the best interests of the children lie is a matter for legal determination by the trial court, reviewable as such on appeal."

The court has also discussed the conflict between the rights of the child and the rights of other parties. Section

158. In re Adoption of Jackson, 201 Wis. 642, 645, 231 N.W. 158, 159 (1930).
159. In re Adoption of Tachick, 60 Wis. 2d 540, 549, 210 N.W.2d 865, 869 (1973).
160. In re Adoption of Randolph, 68 Wis. 2d 64, 69, 227 N.W.2d 634, 637 (1975).
161. Id.
162. Id. Adoption and termination cases appear to be given almost unique treatment by courts of appeal. Appeals in these areas appear to place a greater interest than usual on examining the facts first, and the law second, in reaching a decision. This may account for the high number of appellate reversals and for the frequency with which recommendations of the guardians ad litem are overridden.
of the Wisconsin Statutes established that the interests of the child are paramount. The court has repeatedly recognized that where a conflict exists, it must be resolved in favor of the child. The child’s best interests, the court has determined, are superior to the interests of foster parents, prospective adoptive parents and other relatives of the child.

The interest of the child given the most attention by the court was the child’s interest in remaining in a stable environment. In three cases decided during this period, the court focused its attention on the factor of the psychological trauma attendant upon disturbing the continuity of a child’s environment. The court appeared to give great weight to the factor of separation trauma when the child had been placed prior to the initiation of judicial proceedings. In the court reversed the trial court’s denial of a petition for adoption by the grandparents of the children in part because of its opinion that the trial court had given too little weight to the separation trauma factor. In the court was in effect giving legal recognition to an already formed family, whereas in the court would in effect be destroying that family and removing the children from a stable environment to place them with the grandparents.

163. The intent of chapter 48 of the Wisconsin Statutes is to promote the best interests of the child; the best interests of the child are paramount. Wis. Stat. § 48.01(2) (1979).
164. See, e.g., In re Z, 81 Wis. 2d 194, 203, 260 N.W.2d 246 (1977).
165. Id. at 203, 260 N.W.2d at 251; In re Adoption of Randolph, 68 Wis. 2d at 69, 227 N.W.2d at 636-37. See also In re Termination of Parental Rights to Kegel, 85 Wis. 2d at 583-84, 271 N.W.2d at 118; In re Adoption of Tachick, 60 Wis. 2d at 547-48, 210 N.W.2d at 868-69, citing Wis. Stat. § 48.01 (1973).
168. In re Adoption of Randolph, 68 Wis. 2d 64, 227 N.W.2d 634 (1975); In re Adoption of Tachick, 60 Wis. 2d 540, 210 N.W.2d 865 (1973).
169. In re Termination of Parental Rights to Kegel, 85 Wis. 2d 574, 271 N.W.2d 114 (1978); In re Adoption of Randolph, 68 Wis. 2d 64, 227 N.W.2d 634 (1975); In re Adoption of Tachick, 60 Wis. 2d 540, 210 N.W.2d 865 (1973).
170. The importance the supreme court gave to the factor of separation trauma in large part explains the contradictory results in Randolph and Tachick. In both cases grandparents of the children involved had attempted to adopt them. The situations of the grandparents in both instances were remarkably similar. The chief and perhaps only difference between the two situations was that in Randolph the children in question had been placed with a third party and had effectively become part of the home, whereas in Tachick the children had lived almost their entire lives with the grandparents. It appears, therefore, that in Tachick the court was in effect giving legal recognition to an already formed family, whereas in Randolph the court would in effect be destroying that family and removing the children from a stable environment to place them with the grandparents.
171. Tachick, 60 Wis. 2d at 556, 210 N.W.2d at 873.
tion of Parental Rights to Kegel\(^{172}\) the court held that, since the children involved had spent the vast majority of their lives in the care of their grandparents and the grandparents had provided the only stability in the lives of the children, the children’s need for a stable environment outweighed the interests of the birth mother in the termination proceedings.\(^{173}\) Although the grandparents’ situation in *Randolph* was strikingly similar to the position of the grandparents in *Tachick*, the *Randolph* court refused to award adoptive custody to the grandparents, in large part because the children had become part of the family with which they resided.\(^{174}\)

c. Treatment of parental rights

The Wisconsin Supreme Court faced the issue of the rights of unwed fathers in termination proceedings in a series of cases all titled *State ex rel. Lewis v. Lutheran Social Services*.\(^{175}\) Originally the biological mother had petitioned the court for a termination of her parental rights to facilitate the child’s placement for adoption. The birth father had not been given notice of the termination hearing and had consented to neither the termination of his parental rights nor the appointment of Lutheran Social Services as the guardian of the child.\(^{176}\) Approximately four months after the termination hearing, the putative father petitioned the court for a writ of habeas corpus asking the court to vacate the termination and adoptive placement order and grant him a hearing

\(^{172}\) 85 Wis. 2d 574, 585, 271 N.W.2d 114, 119 (1978).

\(^{173}\) *Id.* at 585, 271 N.W.2d at 119.

\(^{174}\) *Randolph*, 68 Wis. 2d at 70-72, 227 N.W.2d at 641.

\(^{175}\) *State ex rel. Lewis v. Lutheran Social Services* actually involved three separate cases. The first was *State ex rel. Lewis v. Lutheran Social Servs.*, 47 Wis. 2d 420, 178 N.W.2d 56 (1970) (*Lewis I*). This case was later returned to the Wisconsin appellate courts by the decision of the United States Supreme Court to vacate and remand the decision in *Lewis I* in *Rothstein v. Lutheran Social Servs.*, 405 U.S. 1051 (1972). The court considered the issues raised on remand in *State ex rel. Lewis v. Lutheran Social Servs.*, 59 Wis. 2d 1, 207 N.W.2d 826 (1973) (*Lewis II*), where the court in turn remanded the case to the trial court for certain additional evidentiary findings. The additional findings of the trial court were again appealed to the supreme court in *State ex rel. Lewis v. Lutheran Social Servs.*, 68 Wis. 2d 36, 227 N.W.2d 634 (1975) (*Lewis III*).

\(^{176}\) The statutes did not require that such notice be given to an unwed father.
regarding his right to the care, custody and control of his illegitimate child.\footnote{177}

In \textit{Lewis I}\footnote{178} the court focused primarily on the rights of an unwed father in a termination proceeding. On appeal, the biological father contended that all unwed fathers have parental rights which include the right to notice of a hearing prior to termination of parental rights.\footnote{179} While recognizing that an unwed father possessed some rights at common law, the court held that any rights he may have enjoyed were abrogated by the Children's Code.\footnote{180}

The decision was appealed to the United States Supreme Court at approximately the same time the Court was deciding \textit{Stanley v. Illinois}.\footnote{181} After deciding \textit{Stanley}, the Court in \textit{Rothstein v. Lutheran Social Services}\footnote{182} vacated the decision of the Wisconsin Supreme Court and remanded it “for further consideration in light of \textit{Stanley} . . . with due consideration for the completion of adoption proceedings and the fact that the child has apparently lived with the adoptive family for the intervening period of time.”\footnote{183}

These issues were addressed in \textit{Lewis II}.\footnote{184} In a majority opinion written by Chief Justice Hallows, the lone dissenter

\begin{footnotes}
\footnote{177. \textit{Lewis I}, 47 Wis. 2d at 421-22, 178 N.W.2d at 56-57.}
\footnote{178. 47 Wis. 2d 420, 178 N.W.2d 56 (1970). \textit{See supra} note 175.}
\footnote{179. \textit{Id}. at 422-23, 178 N.W.2d at 57.}
\footnote{180. In addition, the court found that the rights of an illegitimate father, though recognized, do not rise to the status of “parental rights” and therefore any failure to grant parental rights or notice of hearing did not violate the state or federal constitution. \textit{Id}. at 434, 178 N.W.2d at 63.}
\footnote{181. 405 U.S. 645 (1972).}
\footnote{182. 405 U.S. 1051 (1972).}
\footnote{183. \textit{Id}. at 1051.}
\footnote{184. 59 Wis. 2d 1, 207 N.W.2d 826 (1973). \textit{See supra} note 175.}
\end{footnotes}
in *Lewis I*, the court held that under *Stanley*, the denial of the existence of parental rights in an unwed father was unconstitutional. The court believed that *Stanley* mandated that the adoption of an illegitimate child required either the consent or the termination of the right of both unwed parents or the consent of one parent accompanied by the proper termination of the rights of the other.

Analysis of the majority opinion raises several questions, some of which were raised in the dissent. The first concerns the proper application of *Stanley*. The majority opinion required either the termination of the parental rights or the consent of an unwed father prior to the adoption of his children. The majority, while holding *Stanley* to require this position, provided no reference to confirming language in that decision. In addition, the majority opinion appeared to ignore critical distinctions between *Stanley* and *Lewis*. For example, while the majority opinion noted that Mr. Stanley had lived for eighteen years with the mother and the children, consideration of this factor was deemed unimportant in distinguishing *Stanley* from the facts in *Lewis*. The fact that Mr. Stanley had custody and had lived in a parental relationship with the children was critical to the United States Supreme Court.

Moreover, the majority opinion apparently disregarded the directions of the United States Supreme Court in *Rothstein*. The *Rothstein* Court required that the case be remanded "with due consideration for the completion of adoption proceedings and the fact that the child has appar-

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185. *See supra* note 180.  
186. *Lewis II*, 59 Wis. 2d at 8-9, 207 N.W.2d at 830.  
187. Justice Robert Hansen, who concurred in *Lewis I*, wrote a dissenting opinion in *Lewis II*.  
188. The dissent points out that there are important distinctions between *Stanley* and *Lewis* which rendered the *Stanley* decision inapplicable to a "*Lewis*" setting. Most important of these was the fact that Mr. Stanley had lived in a familial relationship with the mother of the children and the children themselves. Therefore, the action taken in *Stanley* involved the destruction of an existing family unit. The home of the father was the only home the three children had ever known. Mr. Stanley had never denied the fact of his paternity nor had he ever refused to accept the responsibilities thereof. These facts distinguish *Stanley* from the situation involved in *Lewis*. *See* 59 Wis. 2d at 14-17, 207 N.W.2d at 833-36 (Hansen, R., J., dissenting).  
189. *Lewis II*, 59 Wis. 2d at 4, 207 N.W.2d at 828.  
190. *Id.* at 14, 207 N.W.2d at 833 (R. Hansen, J., dissenting).
ently lived with the adoptive family for the intervening period of time.”

Although specifically acknowledging this instruction, the majority, as pointed out by the dissent, nowhere addressed the issues raised in Rothstein.

The unwed father appealed for the final time to the Wisconsin Supreme Court in Lewis III. The court concluded that the father had in fact abandoned the child and that termination of the rights of both biological parents was in the child’s best interest. In so doing, the court appeared to reverse its position in Lewis II which subordinated the child’s best interests to those of parents in termination proceedings.

d. Use of custody cases in termination proceedings

In Lewis II and several more recent cases the court relied on language from custody determination cases to bolster decisions made in termination proceedings. Three important nontermination custody cases were decided in this period. Issues similar to those faced in termination pro-

191. Rothstein, 405 U.S. at 1051.
192. Lewis II, 59 Wis. 2d at 3, 207 N.W.2d at 828.
193. Id. at 17-20, 207 N.W.2d at 833 (Hansen, R., J., dissenting).
194. 68 Wis. 2d 36, 227 N.W.2d 634 (1975). In Lewis II the court remanded the case to a referee to determine whether the alleged father was in fact the father of the child in question and, if so, whether he was fit to have or should have custody. The referee found the alleged father to be the father of the child in question. The court also vacated the adoption decision and remanded with a direction to hold a termination hearing. On remand the trial court terminated the rights of the unwed father on the grounds of abandonment. See id. at 37-38, 227 N.W.2d at 644-45.
195. In Lewis II Chief Justice Hallows attempted to resolve the apparent conflict between the natural rights of the parent and the best interests of the child test by noting that in Ponsford v. Crute, 56 Wis. 2d 407, 202 N.W.2d 5 (1972), the court found that the best interests were not a controlling factor. The majority opinion did, however, note that a decision on where the best interests of a child lie in an adoption or termination proceeding would be inappropriate for decision at that time. Lewis II, 59 Wis. 2d at 9-10, 207 N.W.2d at 831. In Lewis III, however, the court specifically noted that determinations under Wis. Stat. ch. 48 (1973) are to be made giving paramount consideration to the best interests of the child. Lewis III, 68 Wis. 2d at 41, 227 N.W.2d at 647. The court’s sole analysis under Lewis III was that the termination of the parental rights of both biological parents was in the child’s best interests. Id. at 41-42, 227 N.W.2d at 647.
196. See, e.g., In re J.L.W., 102 Wis. 2d 118, 306 N.W.2d 46 (1981); In re Termination of Parental Rights to A.M.K., 105 Wis. 2d 91, 312 N.W.2d 840 (Ct. App. 1981); In re Adoption of R.P.R., 95 Wis. 2d 573, 291 N.W.2d 591 (Ct. App.), rev’d, 98 Wis. 2d 613, 297 N.W.2d 833 (1980).
197. LaChapell v. Mahwinney, 66 Wis. 2d 679, 225 N.W.2d 501 (1979); deMontigny v. deMontigny, 70 Wis. 2d 131, 233 N.W.2d 463 (1975); Ponsford v. Crute, 56 Wis. 2d 407, 202 N.W.2d 5 (1972).
ceedings were raised and these decisions, though based on factors not at all similar to those faced in termination proceedings,198 were to be an important influence on the court’s thinking in the latter area.

The major influence was the court’s subordination of the child’s best interests to parental rights. The court held that as between a natural father and third parties, the father cannot be deprived of custody unless unfit.199 The court also held that as a general matter, though not invariably, a child’s best interests will be served by living with his parents.200 It is only after this latter presumption is overcome that the best interests of the child prevail over parental custody rights.201

4. 1980-1982

The Wisconsin court has recently been faced with increasing numbers of disputes arising out of adoption or termination proceedings. In two of these matters, the interests of the biological parents in termination or adoption proceedings were at issue,202 while in two others, the interest of the child was the focus.203

In re Termination of Parental Rights to T.R.M.204 involved an action by the natural mother to terminate the rights of the unwed father. The supreme court reversed an order terminating the birth father’s parental rights. It found

198. In Ponsford, for example, the court’s imposition of the requirement that a natural parent be found unfit before being deprived of the custody of his minor children was based on the court’s construction of Wis. Stat. § 247.24 (1971) (now § 767.24). Ponsford v. Crute, 56 Wis. 2d 407, 413, 202 N.W.2d 5, 8 (1972). That statute specifically noted that the court can give the care and custody of the child to a relative only “if the court finds either that the parents are unable to adequately care for any such child or are not fit and proper persons to have the care and custody thereof.” No such requirement is established in Wis. Stat. ch. 48 (1981-1982).

199. Ponsford v. Crute, 56 Wis. 2d 407, 413, 202 N.W.2d 5, 8 (1972).


201. Id. at 683-84, 225 N.W.2d at 503.


203. In re Termination of Parental Rights to T.R.M., 100 Wis. 2d 681, 303 N.W.2d 581 (1981); In re Adoption of R.P.R., 95 Wis. 2d 573, 291 N.W.2d 591 (Ct. App.), rev’d, 98 Wis. 2d 613, 297 N.W.2d 833 (1980).

204. 100 Wis. 2d 681, 303 N.W.2d 581 (1981), rev’g and remanding 95 Wis. 2d 736, 291 N.W.2d 660 (Ct. App. 1980).
that the trial court's factual finding had merely repeated the language of the termination statute and as such was inadequate to protect the rights of the litigants and facilitate review of the record by an appellate court. More importantly, the court in *T.R.M.* found that the trial court's finding lacked a specific and formal determination regarding the best interests of the child. A trial court, the court decided, is under an obligation in termination proceedings to make findings with regard to the best interests of the child in relation to the evidence adduced at trial. Failure to make this formal finding required reversal and remand for completion of the record.

*In re Adoption of R.P.R.* involved a consent to adopt procedure no longer allowed under current Wisconsin statutes. The court of appeals noted that, in adoption proceedings, the issue is really not the fitness of parents but the best interests of the child. While accepting the proposition that the interests of a parent or parents are not irrelevant, the court concluded that the child's interests must control. In addition, the court rejected that part of the parental rights doctrine which was based on the common-law property right of natural parents to their offspring, holding that such a concept is inconsistent with the modern day concept of the best interests of the child. The court reiterated the position.

205. *Id.* at 687, 303 N.W.2d at 583.
206. *Id.*
207. *Id.* However, the court did note that the rights of the parent were also affected by the lack of an adequate record. It noted that filial relationships were basic to our social structure and in the absence of a factual basis for legal interference with the family, social bonds between parents and child should not be disturbed. Consequently, the court found that since the effect of a termination order represents a drastic interference with the fundamental rights of a parent, the rights of a parent must be accorded a high order of respect and considered paramount until circumstances show that a parent has forfeited these rights. *Id.* at 688-89, 303 N.W.2d at 584.
208. 95 Wis. 2d 573, 291 N.W.2d 591 (Ct. App.), rev'd, 98 Wis. 2d 613, 297 N.W.2d 833 (1980).
210. *In re Adoption of R.P.R.*, 95 Wis. 2d at 577-78, 577 n.1, 291 N.W.2d at 593-94, 594 n.1.
211. *Id.* The court went on to distinguish custody cases from termination cases, noting that the controlling factor for ending parental custody is not the best interests of the child but parental fitness or unfitness. *Id.* at 582, 291 N.W.2d at 596.
212. *Id.* at 583, 291 N.W.2d at 596.
that the primary consideration in construing adoption statutes is the welfare of the child and the so-called rights of the natural parents are subordinate thereto.\textsuperscript{213} While blood ties are not irrelevant, they do not, under Wisconsin law, rise to the stature of a presumption.\textsuperscript{214} The principles enunciated by the court of appeals appear to remain the law in Wisconsin.\textsuperscript{215}

On appeal, the supreme court reversed the court of appeals,\textsuperscript{216} confirming the higher court’s recent position that the best interests of the child doctrine is a mixed question of law and fact.\textsuperscript{217} The court held that the trial court’s findings were not against the great weight and clear preponderance of the evidence, thus reinstating the trial court’s holding allowing the withdrawal of consent by the natural mother.\textsuperscript{218}

In \textit{In re Termination of Parental Rights to A.M.K.}\textsuperscript{219} the court of appeals was presented with several constitutional issues.

\begin{enumerate}
\item[(213)] Id. at 585, 291 N.W.2d at 597.
\item[(214)] Id. at 586, 291 N.W.2d at 598.
\item[(215)] Though the decision of the court of appeals was reversed by the supreme court, the supreme court’s reversal was based on narrow grounds. The decision of the court of appeals is based on two factors. One was that the trial court had improperly raised a presumption in favor of the natural parents. Id. at 579, 291 N.W.2d at 594. In so doing, the court of appeals held that there is no presumption in favor of a biological parent in an adoption proceeding. This conclusion was affirmed by the supreme court in its opinion. The supreme court, while differing on the issue, did not differ on the law. The court held that the trial court did not apply a presumption in favor of the natural mother. It only considered natural parental ties as one factor in determining the best interests of the child. \textit{In re Adoption of R.P.R.}, 98 Wis. 2d at 622, 297 N.W.2d at 837-38. In addition, the court of appeals decision was predicated on what it felt to be the improper use of expert testimony. The supreme court also reversed on this issue. There was no reversal on the best interests issue, nor did there need to be.
\item[(216)] \textit{In re Adoption of R.P.R.}, 98 Wis. 2d 613, 297 N.W.2d 833 (1980), rev’g 95 Wis. 2d 573, 291 N.W.2d 591 (Ct. App. 1980). However, it should be noted that the supreme court’s decision left intact certain legal principles expressed in the court of appeals’ discussion of the best interests doctrine. See supra note 215.
\item[(217)] \textit{In re Adoption of R.P.R.}, 98 Wis. 2d at 618, 297 N.W.2d at 836. The court held that when there is a mixed question of law and fact, factual determinations will not be reversed unless against the great weight and clear preponderance of the evidence. Id. at 618-19, 297 N.W.2d at 836 (quoting Zapuchalak v. Hueal, 82 Wis. 2d 184, 192, 262 N.W.2d 514, 518 (1978)).
\item[(218)] \textit{In re Adoption of R.P.R.}, 98 Wis. 2d at 623, 297 N.W.2d at 836. The court also disagreed with the holding of the court of appeals that the trial court had applied a presumption in favor of the natural mother, finding that the trial court had properly found that blood ties were merely a factor to be considered.
\item[(219)] 105 Wis. 2d 91, 312 N.W.2d 840 (Ct. App. 1981).
\end{enumerate}
sues involving parental rights within termination proceedings. The two most important questions involved the biological parent’s attack on the burden of proof and the relationship of the least restrictive alternative philosophy of the Children’s Code with the standard of parental unfitness.

Proof of the factors influencing termination must be by clear and convincing evidence. The birth father argued that the application of such a standard in termination proceedings violated, among other things, his right to due process. In rejecting this contention, the court analyzed the right of the parent involved. The court recognized that while not absolute, the right to establish a home and raise children without governmental interference was a basic right with which the state may not interfere absent a compelling reason for doing so. However, as fundamental as this interest is, it is not the only interest involved in the proceeding. Other interests include those of the parent, child and state, which may or may not conflict within a particular termination proceeding. Based on a balancing of the interests involved, the court concluded that a clear and convincing burden of proof was constitutionally correct.

The court also noted that to fully protect parents’ fundamental rights in termination cases, two conclusions must be drawn by the trial court from sufficient evidence: (1) that the

220. One of the constitutional issues involved an attack on vagueness grounds on a statute which has since been repealed. Id. at 97-101, 312 N.W.2d at 844-45. The discussion of this is therefore unnecessary to the present article.  
222. The birth father made two arguments in regard to his attack on the burden of proof. One of these was that the clear and convincing standard of proof violated his constitutional right to equal protection under the 14th amendment because other chapter 48 proceedings required a standard of beyond a reasonable doubt (e.g., prior to a finding of delinquency under Wis. Stat. § 48.12 (1979)). A.M.K., 105 Wis. 2d at 103-04, 312 N.W.2d at 846-47. The court treated this issue rather summarily, holding that the burden of proof treated parents faced with involuntary termination as a unified group subject to a single standard and so the fact that parents subject to termination were subject to a different standard than those in other situations was irrelevant to the proceedings. Id. at 104, 312 N.W.2d at 847.  
223. A.M.K., 105 Wis. 2d at 105-06, 312 N.W.2d at 847. The court also acknowledged that the judicial power to terminate this right is an awesome one which may be viewed as a sanction more severe than imprisonment. Id. at 106-07, 312 N.W.2d at 847-48.  
224. Id. at 109, 312 N.W.2d at 849.  
225. Id. at 110, 312 N.W.2d at 849.
termination proceeding is in the best interests of the child and (2) that the parent is unfit. In *A.M.K.* the biological father argued that before terminating parental rights the court must consider and reject less drastic alternatives. The court rejected this contention, concluding that the examination of alternative remedies is implicit in a finding of unfitness. In so holding, the court also established the standard for finding unfitness in termination proceedings:

To support a finding of unfitness, "it must appear that the [parent] has 'so conducted himself, or shown himself to be a person of such description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some serious and important respect, that his rights should be treated as lost or suspended,—should be superseded or interfered with.' "

Perhaps the most important case to be decided during this period was *In re J.L. W.* The court in *J.L. W.* overturned an order terminating an unwed mother's parental rights on the ground that the lower court had not made a specific finding that she was unfit, even though a finding of unfitness was not required under either Wisconsin statutes or case law at the time. The court's decision to require such a finding was based on constitutional considerations. The opinion noted that the integrity of the family was subject to constitutional protection. While this protection did not preclude some state control over parental discretion in dealing with children when the child's physical or mental health may be in jeopardy, it did require recognition that a parent's interest in the custody of a child was cognizable and substantial.

The court also attempted to determine the effect of the recent decision of the United States Supreme Court in *Quilloin v. Walcott.* The court distinguished *Quilloin* because

226. *Id.* at 110-11, 312 N.W.2d at 850.
227. *Id.* at 101, 312 N.W.2d at 845.
228. *Id.* at 102, 312 N.W.2d at 846 (quoting Lemmin v. Lorfeld, 107 Wis. 264, 266, 83 N.W. 359, 360 (1900) (emphasis deleted)).
229. 102 Wis. 2d 118, 306 N.W.2d 46 (1981).
230. *Id.* at 132, 306 N.W.2d at 53.
231. *Id.* at 133, 306 N.W.2d at 53.
the child in *J.L.W.* had been part of an existing family unit with his biological mother.233 The court thereupon held that, except in circumstances like those presented in *Quilloin*, the due process protections of the state and federal constitutions prohibited termination of a natural parent’s rights unless the parent was unfit.234

The impact of *J.L.W.* on the termination process raises several questions, the primary one being whether a finding of unfitness is required in all termination proceedings. Analysis of *J.L.W.* indicates that the court did not go this far. The court’s requirement of unfitness in *J.L.W.* rests in large part on its analysis of *Stanley* and *Quilloin*. The distinction between the two is critical. In both cases the birth parent whose rights were in jeopardy was an unwed parent. While in *Stanley* the unwed father had lived in an existing family unit with the child, in *Quilloin* the father had had no familial relationship with the child. The court in *J.L.W.* recognized this distinction, reiterating the serious constitutional reservations raised “if a state were to attempt to force the breakup of a natural family over the objections of parents and children without some showing of unfitness...”235 Since the birth parent had legal and physical custody of the child during the majority of the child’s first four months of life and the child’s existing “family unit” included the birth parent, the court concluded that a finding of fitness was necessary.236 Thus, it could be inferred that where these or similar factors were not present, a birth parent’s rights could be terminated without a finding of unfitness.

IV. LEGISLATIVE HISTORY OF THE TERMINATION AND ADOPTION PROCESS

A. Early Adoption Legislation: 1890-1952

As noted previously, the adoption or termination process was an entirely statutory one. Under early Wisconsin legis-

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233. *In re J.L.W.*, 102 Wis. 2d at 135, 306 N.W.2d at 54.
234. *Id.* at 136, 306 N.W.2d at 55.
235. *Id.* at 134, 306 N.W.2d at 54 (quoting *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (emphasis added)).
236. *Id.* at 135, 306 N.W.2d at 54.
lation passed in the nineteenth century,\(^{237}\) an adoption without the consent of the biological parent could only be accomplished upon a finding that one or both of the parents had "abandoned the child or gone to parts unknown."\(^{238}\) Legislative limitation of the bases for termination was based on the long-standing view of children as the property of their parents. The parents had an absolute right to their children unless they voluntarily relinquished that right, either by written consent or by abandonment.\(^{239}\)

The Wisconsin court added grounds of abuse or neglect to the single statutory ground of abandonment.\(^{240}\) These were later incorporated into the adoption statutes.\(^{241}\) Section 48.07(7) of the 1933 Wisconsin Statutes further expanded the grounds for termination of parental rights to include: (1) If a custodian (other than a parent) was not fitted for care, custody and control of the child; (2) If the biological parents abandoned the child; (3) If the biological parents substantially and continuously or repeatedly refused or being financially able have neglected to give such child parental care and protection.\(^{242}\)

The grounds of abandonment and neglect gave courts relatively broad discretion on the question of termination of parental rights. Although the Wisconsin Supreme Court required notice to birth parents before a finding of abandonment could be made, the then existing statute did not require

\(^{237}\) Under early Wisconsin law, proceedings to terminate parental rights and proceedings to adopt a minor took place under different chapters of the Wisconsin statutes. Termination proceedings were governed by Wis. Stat. ch. 48. See, e.g., Wis. Stat. § 48.07 (1923). Adoption proceedings, however, were governed by Wis. Stat. § 4022 (1923). Wis. Stat. § 4022 (1923) was renumbered to Wis. Stat. § 322.02 by Act of Feb. 9, 1925, ch. 4, 1925 Wis. Laws 6, 29. The provisions regarding adoption proceedings were not incorporated into Chapter 48 until 1955. Act of Aug. 20, 1955, ch. 575, § 7, 1955 Wis. Laws 719, 747-50 (codified at Wis. Stat. §§ 48.81-.97 (1955)).

\(^{238}\) Wis. Stat. § 4022 (1898).

\(^{239}\) Until Lacher v. Venus, 177 Wis. 558, 188 N.W. 613 (1922), an adoption could be granted on a finding of abandonment without notice to the birth parents. See Schiltz v. Roenitz, 86 Wis. 2d 31, 188 N.W.2d 613 (1922); Parsons v. Parsons, 101 Wis. 76, 77 N.W. 147 (1898). In a 4-3 decision, Lacher held that the right of a parent to his or her child was a substantial right which required adherence to the principles of due process of law if such right could be effected by the court.

\(^{240}\) Schiltz v. Roenitz, 86 Wis. 31, 188 N.W. 613 (1922).


\(^{242}\) Wis. Stat. § 48.07(7) (1933).
the consent of the unwed father before an adoption could be ordered.\textsuperscript{243} The statutes also did not recognize either a distinction between a parent who had raised a child and one who had never seen the child, or a distinction between an older child and an infant.

Under the early legislative scheme, adoptions were not necessarily final upon entry of the decree. An adoption could be annulled within two years of the entry of the adoption order if, before age fourteen, the child developed insanity, feeblemindedness, epilepsy, or venereal disease from a condition which existed prior to the adoption and was unknown to the adoptive parents.\textsuperscript{244} After two years parties were estopped from avoiding the effect of the adoption order. The probation period was intended for the benefit of the adopting parents\textsuperscript{245} and did not expressly give the birth mother the right to intervene during that two year period.

\textbf{B. 1950-1979}

In 1955 the legislature added to section 48.40(2)(d) additional grounds for involuntarily terminating parental rights.\textsuperscript{246} First, involuntary termination was allowed upon a finding of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior detrimental to the health, morals and well-being of the minor. Such a finding could be made only if the parent had been deprived of legal custody of the child by court order at least


\textsuperscript{244} Wis. Stat. § 322.09 (1933).

\textsuperscript{245} Contrast this approach with Wis. Stat. §§ 48.84, .86 (1979), under which the birth mother was given a period of time prior to the entry of the adoption order within which to reclaim the child. See In re Adoption of R.P.R., 98 Wis. 2d 613, 297 N.W.2d 833 (1980), rev'd 95 Wis. 2d 573, 291 N.W.2d 591 (Ct. App. 1980). Due to the requirement that the child reside in the home of nonrelative adopting parents for six months before the adoption petition may be filed, the prospective adoptive family still retains a period within which to reject the child; however, it is now before finalization of the adoption. Wis. Stat. § 48.90(2) (1981-1982).

a year earlier and did not later receive legal custody.\textsuperscript{247} Another new ground was a finding of mental deficiency rendering the parent incapable of providing "proper parental care and protection." Lastly, the court could also now terminate upon a finding of parental mental illness if such illness existed prior to the finding of the standard grounds for termination of parental rights.\textsuperscript{248}

The creation in 1955 of Wisconsin Statute sections 48.84 and 48.86 effectively provided an opportunity for the birth mother to consent to an adoption, have the child placed with prospective adoptive parents and then withdraw her consent to the adoption.\textsuperscript{249} Under these sections, parental consent to an adoption was considered "irrevocable" once given in writing before a judge. Before a court could allow her to withdraw her consent, the birth mother was required to show that the best interests of the child would be furthered by allowing her such withdrawal.\textsuperscript{250}

Section 48.84 was enlarged in 1955 to require the consent of a guardian before a court could approve an adoption.\textsuperscript{251} The guardian was required to file with the court written reasons for refusal to consent to the adoption. If such written objections were filed, the court had the alternative to dismiss the petition for adoption or to set a hearing to see if the reasons set forth were arbitrary and capricious or based on insufficient evidence. If the court made the latter finding, it could waive the requirement of the consent.\textsuperscript{252} Absent such a determination waiving the consent, the failure to obtain the recommendation of the guardian would prove fatal to an adoption.

\section*{C. Current Legislative Procedures for Termination of Parental Rights}

No significant changes were made in the grounds for termination of parental rights for the next quarter of a century.

\begin{itemize}
\item \textsuperscript{247} \textit{Wis. Stat.} § 48.40(2)(d) (1957).
\item \textsuperscript{248} \textit{Id.} § 48.40(3).
\item \textsuperscript{249} Act of Aug. 20, 1955, ch. 575, 1955 Wis. Laws 719.
\item \textsuperscript{250} \textit{Wis. Stat.} § 48.86 (1957).
\item \textsuperscript{252} \textit{Wis. Stat.} § 48.85 (1957).
\end{itemize}
In 1979 the Wisconsin Legislature made wholesale revisions to the termination statute. These revisions were part of a nationwide trend to provide greater protection for birth parents in termination proceedings, to preserve existing family units and to protect children from the consequences of legally insufficient terminations due to unconstitutionally vague statutes. These revisions affected the procedures for both voluntary and involuntary termination of parental rights.

The new law made the procedure for voluntarily consenting to the termination of one’s parental rights more specific. The statute now requires a parent’s consent to be taken in a court of record. If the parent is located near the city in which the proceedings are to take place, the parent should appear in the proceedings and place his consent on the record. If an appearance in that court is difficult or impossible, any court of record in the state or in another jurisdiction may be used.

Putative fathers who are reluctant to become adjudicated fathers may consent to the termination of their rights by executing an affidavit, disclaimer and consent form before a no-

255. Wis. STAT. § 48.41(2)(a) (1981-1982) states:
(2) The court may accept a voluntary consent to termination of parental rights only as follows:
   (a) The parent appears personally at the hearing and gives his or her consent to the termination of his or her parental rights. The judge may accept the consent only after the judge has explained the effect of termination of parental rights and has questioned the parent and is satisfied that the consent is informed and voluntary.

Id. § 48.41(2)(b) states:
(2) The court may accept a voluntary consent to termination of parental rights only as follows:
   (b) If the court finds that it would be difficult or impossible for the parent to appear in person at the hearing, the court may accept the written consent of the parent given before a judge of any court of record. This written consent shall be accompanied by the signed findings of the judge who accepted the parent’s consent. These findings shall recite that the judge questioned the parent and found that the consent was informed and voluntary before the judge accepted the consent of the parent.
Terminations required for stepparent adoptions may now be accomplished either by giving a consent in a court of record or by executing a properly witnessed affidavit in which the parent being terminated consents voluntarily and with full knowledge of the consequences of his or her act. Where the voluntary termination of parental rights involves a minor parent, a guardian ad litem must be appointed and must approve the minor's consent. The separate procedure permitting one to voluntarily consent to an adoption in lieu of voluntary termination of parental rights was abolished.

The involuntary termination procedure has been totally revised. The general grounds which existed prior to September 1, 1980, and which had been in some cases clarified by case law, were dispensed with in favor of six more specific

256. Id. § 48.41(2)(c) states:
(2) The court may accept a voluntary consent to termination of parental rights only as follows:

(c) A person who may be the father of a child born out of wedlock, but who has not been adjudicated to be the father, may consent to the termination of any parental rights that he may have as provided in par. (a) or (b) or by signing a written, notarized statement which recites that he has been informed of and understands the effect of an order to terminate parental rights and that he voluntarily disclaims any rights that he may have to the child, including the right to notice of proceedings under this subchapter.

(2) The court may accept a voluntary consent to termination of parental rights only as follows:

(d) If the proceeding to terminate parental rights is held prior to an adoption proceeding in which the petitioner is the child's stepparent, the child's birth parent may consent to the termination of any parental rights that he or she may have as provided in par. (a) or (b) or by filing with the court an affidavit witnessed by 2 persons stating that he or she has been informed of and understands the effect of an order to terminate parental rights and that he or she voluntarily disclaims all rights to the child, including the right to notice of proceedings under this subchapter.

(3) The consent of a minor or incompetent person to the termination of his or her parental rights shall not be accepted by the court unless it is joined by the consent of his or her guardian ad litem. If the guardian ad litem joins in the consent to the termination of parental rights with the minor or incompetent person, minority or incompetence shall not be grounds for a later attack on the order terminating parental rights.

and narrowly drawn grounds for involuntary termination. A two-stage hearing procedure was established. In the first, or factfinding, stage a jury or a court must determine whether the grounds for termination of parental rights have been proved by petitioner by clear and convincing evidence.\[^{261}\]

After completion of the adjudicative or factfinding phase, the court then must determine what disposition is in the best interests of the child. The factors for determining the child's best interests were heretofore undefined in the statute. The legislature reaffirmed that the best interests of the child shall be the prevailing factor to be considered by the court and set forth six factors reflecting case law and current thinking\[^{262}\] which the court may consider.\[^{263}\] These factors should be considered only after the first phase of the termination process has concluded with findings that one of the six termination grounds has been met and that the parent

\[^{261}\] Sections 48.84, 48.86, 48.87 were repealed by Act of 1981, ch. 81, 1981 Wis. Laws, following In re Adoption of R.P.R., 95 Wis. 2d 573, 291 N.W.2d 591 (Ct. App.), rev'd, 98 Wis. 2d 613, 297 N.W.2d 833 (1980).

\[^{262}\] See J. Goldstein, A. Freud & A. Solnit, Before the Best Interests of the Child (1979); J. Goldstein, A. Freud & A. Solnit, supra note 30.

\[^{263}\] Wis. Stat. § 48.426(3) (1981-1982) states:

In considering the best interests of the child under this section the court shall consider but not be limited to the following:

(a) The likelihood of the child's adoption after termination.
(b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
(c) Whether the child has substantial relationships with the parent or
is unfit.\textsuperscript{264} It is at this latter stage that expert testimony may be appropriate to assist the court in reaching a disposition decision which it deems to be in the best interest of the child.

After the close of the dispositional hearing, the court has three alternatives. First, it may dismiss the petition for termination of parental rights.\textsuperscript{265} Second, it may terminate the parental rights of one or both parents.\textsuperscript{266} Third, it may terminate the rights of one or both parents and place the child in sustaining care.\textsuperscript{267} Under either the second or the third alternative the court must also make an order determining legal custody and transferring guardianship to one of several possible institutions or individuals set forth in the statute.\textsuperscript{268}

The trial court must enter a judgment which sets forth its findings and disposition.\textsuperscript{269} The findings of fact and conclusions of law must be specific and not merely restate the statutory grounds.\textsuperscript{270} A termination judgment is considered final, and the appeal process must begin within thirty days of the date the order is entered.\textsuperscript{271}

V. RECOMMENDATIONS FOR CHANGE

A. Proposed Legislative Changes

Any future legislation in the adoption or termination area should distinguish between the involuntary termination

other family members, and whether it would be harmful to the child to sever these relationships.

(d) The wishes of the child.

(e) The duration of the separation of the parent from the child.

(f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child’s current placement, the likelihood of future placements and the results of prior placements.

\textsuperscript{264} In re J.L.W., 102 Wis. 2d 118, 306 N.W.2d 46 (1981). Exactly at what point in the proceedings and under what circumstances the fitness or unfitness finding must be made is not clear from the decision.


\textsuperscript{266} Id. § 48.427(3).

\textsuperscript{267} Id. § 48.427(4).

\textsuperscript{268} Id. §§ 48.427(3)(a), 48.427(3)(b), 48.428.

\textsuperscript{269} Wis. Stat. § 48.43(1) (1981-1982).

\textsuperscript{270} In re Termination of Parental Rights to T.R.M., 100 Wis. 2d 681, 303 N.W.2d 581 (1981).

of the rights of parents who have lived in a family relationship with the child and those who have never participated in the raising of the child. Such a distinction would be consistent with the tenor of modern United States Supreme Court decisions dealing with termination of parental rights.\textsuperscript{272} Some effort to distinguish between the child who is part of a family unit and one who is not was made in section 48.415(6), but current legislation generally fails to take into account this critical factor.\textsuperscript{273}

Section 48.415(6) permits termination of rights of a father who failed to assume parental responsibility.\textsuperscript{274} The specificity of its language, however, often prevents termination of the rights of fathers in certain cases where it may be


\textsuperscript{273} It should be noted that Wis. Stat. § 48.415(1)(b) (1981-1982) does involve the issue of whether a relationship with the child has been developed. Under section 48.415(6) psychological parenthood is in some instances given at least inferential consideration.

\textsuperscript{274} Wis. Stat. § 48.415(6) (1981-1982) states:

At the factfinding hearing the court may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

\begin{enumerate}
  \item Failure to assume parental responsibility may be established by a showing that a child has been born out of wedlock, not subsequently legitimated or adopted, that paternity was not adjudicated prior to the filing of the petition for termination of parental rights and:
    \begin{enumerate}
      \item The person or persons who may be the father of the child have been given notice under s. 48.42 but have failed to appear or otherwise submit to the jurisdiction of the court and that such person or persons have never had a substantial parental relationship with the child; or
      \item That although paternity to the child has been adjudicated under s. 48.423, the father did not establish a substantial parental relationship with the child prior to the adjudication of paternity although the father had reason to believe that he was the father of the child and had an opportunity to establish a substantial parental relationship with the child.
    \end{enumerate}
  \item In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial relationship with the child, the court may consider factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child or the mother during her pregnancy and whether the person has neglected or refused to provide care or support even though the person had the opportunity and ability to do so.
\end{enumerate}
in the interest of the child on the basis of the very parental inadequacy which led to the termination proceeding. For example, if a child is born after the father is imprisoned and the birth mother wishes to place the child for adoption, the father can argue that his incarceration at the time of the birth has precluded the opportunity to establish a substantial parental relationship with the child. Unless the court goes beyond a literal reading of the statute to hold that the father voluntarily deprived himself of this opportunity by committing the crimes for which he was convicted and subsequently confined, the father's own reprehensible conduct could stand as a complete defense to the termination of his rights, even where termination may be in the child's best interests. Such specificity provides substantial protection for the rights of the parent of infants and older children alike, but may not be appropriate when considering termination of the rights to an infant.

The requirement that petitioner must show that respondent had an opportunity to establish a parental relationship or the respondent's ability to use lack of an opportunity as a defense, whichever the case may be, should be changed. Reference to "opportunity" in section 48.415(6) should be eliminated or reserved for those situations in which a familial relationship has existed.

The problems are not limited to section 48.415(6). Section 48.415(5) permits termination if petitioner can prove that a parent's conduct has caused death or injury to a minor or minors who live in the parent's household and resulted in two or more separate felony convictions. Much like the case of imposing liability on a dog owner only after the dog has taken its second bite, petitioner must show multiple incidents of abuse causing death or injury, not just to any minor,


At a factfinding hearing the court may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

. . . .

(5) REPEATED ABUSE. Repeated abuse may be established by a showing that on more than one occasion the parent has caused death or injury to a minor or minors living in the parent's household resulting in 2 or more separate felony convictions.
but to a minor living in the household of the parent, in order to cross the threshold of this statute to reach consideration of the child's best interests. Thus, in a family of three children, it may take the death of a second child before the best interests of the third child will even be considered in a termination proceeding.  

This is not to suggest that the showing of either the failure to assume parental responsibility or the extensive allegations required to show repeated abuse should automatically terminate the rights of a birth parent. Predicating judicial consideration of the child's interests upon the very difficult threshold of the current statutory grounds, however, frequently prevents a court from evaluating the best interests of the child to determine whether the child should have an opportunity to live in a permanent and stable family unit. If the best interests of the child are to be the focal point of proceedings under chapter 48, the current statutory scheme, which often protects the rights of the parent first and inquires into the best interests of the child second, should be modified to effect a more equitable balance between these two interests. A felony conviction of child abuse should permit a court to then consider parental unfitness and the child's best interests in the termination context.

Two grounds available for limited use are section 48.415(3), and section 48.415(4). While the concepts

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276. CHIPS (child in need of protection or services) remedies may provide long term foster placement for child number three, which could in turn lead to termination and placement for adoption. Wis. Stat. §§ 48.345, 48.415(2) (1981-1982).

277. Wis. Stat. § 48.01(2) (1981-1982) states:

This chapter shall be liberally construed to effect the objectives contained in this section. The best interests of the child shall always be of paramount consideration, but the court shall also consider the interest of the parents as guardian of the child, the interest of the person or persons with whom the child has been placed for adoption and the interests of the public.

278. In re J.L.W., 102 Wis. 2d 118, 306 N.W.2d 46 (1981), injected yet a third area of inquiry into the process. After determining that one of the six grounds for involuntary termination has been satisfied and that the parent has lived in a family relationship with the child, a decision must be made whether the parent is unfit. Only after the allegation has also been proven may the court examine directly the question of the best interest of the child.


At the factfinding hearing the court may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:
embodied in both grounds are sound, if it is appropriate to make the threshold easier to cross so that the best interests of the child will be given consideration more frequently, each well-intentioned statute goes too far.

In the case of continuing parental disability, an initial showing must be made that the parent is now and has been for two of the preceding five years confined at certain treatment facilities on account of mental illness or developmental disability.\(^2^8\) It must also be shown that the parent’s condition is not apt to be resolved within a certain period of time and that the child is not receiving adequate substitute care by the other parent or a relative or guardian. Rather than require proof of all three elements prior to reaching the best interests question, it should be adequate to prove the disability. Consideration of the parent’s future condition or whether the care currently received by the child is adequate should then be part of the evaluation of what disposition would be in the child’s best interests.

\[3\] CONTINUING PARENTAL DISABILITY. Continuing parental disability may be established by a showing that:

(a) The parent is presently, and for a cumulative total period of at least 2 years within the 5 years immediately prior to the filing of the petition has been, an inpatient at one or more hospitals as defined in s. 50.33(1)(a), (b) or (c), licensed treatment facilities as defined in s. 51.01(2) or state treatment facilities as defined in s. 51.01(15) on account of mental illness as defined in s. 51.01(13)(a) or (b) or developmental disability as defined in s. 55.01(2) or (5);

(b) The condition of the parent is likely to continue indefinitely; and

(c) The child is not being provided with adequate care by a relative who has legal custody of the child, or by a parent or guardian.

280. Id. § 48.415(4) states:

At the factfinding hearing the court may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

\[4\] CONTINUING DENIAL OF VISITATION RIGHTS. Continuing denial of visitation rights may be established by a showing that:

(a) The parent has been denied visitation rights by court order in an action affecting marriage;

(b) At least 2 years have elapsed since the order denying visitation rights was issued and the court has not subsequently modified its order so as to permit visitation rights; and

(c) The parent would not be entitled to visitation rights if he or she were to seek such rights at the time the petition for termination of parental rights is filed.

281. Id. § 48.415(3).
When considering termination under section 48.415(4) it must be shown that: (1) the parent whose rights are the subject of the termination procedure is currently under an order of the court denying his or her rights of visitation; (2) that two years have passed since the visitation order was entered without modification of the order; and (3) that visitation rights would not currently be granted if requested.\textsuperscript{282} Denial of visitation rights as a ground may be used most frequently in the stepparent adoption situation in which the noncustodial parent declines to voluntarily terminate parental rights although he or she has had little apparent interest in or communication with the child.\textsuperscript{283}

Under a termination scheme oriented to the child's interests, it should be sufficient grounds to establish the first element, with latter elements considered in determining whether termination is in the child's interest. Eliminating the last element would serve to eliminate a redundant layer of proof from the petitioner's already substantial burden. The petitioner must currently prove for the second time those elements necessary to sustain denial of visitation as in a divorce case. This burden may be particularly difficult if there has been no recent information on the conduct of respondent parent who has not visited for two years.

Preservation of an existing family unit or rehabilitation of a previously existing unit which no longer functions as a unit serve as cornerstones for the recent reconstruction of chapter 48. The ground for involuntary termination which perhaps best encompasses the thrust of the modifications made to chapter 48 is that found in section 48.415(2).\textsuperscript{284}

\textsuperscript{282} Id. § 48.415(4).
\textsuperscript{283} Section 48.415(4) may serve as an alternative to section 48.415(1)(a)(3) "abandonment" in stepparent termination proceedings.
\textsuperscript{284} Wis. Stat. § 48.415(2) (1981-1982) states:

At the factfinding hearing the court may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

\begin{quote}
(2) CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services may be established by a showing that the child has been adjudged to be in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under ss. 48.345, 48.347, 48.363 or 48.365 containing the notice required by s.
Under section 48.415(2) a consideration of the termination of parental rights becomes a possibility only after the child has been placed outside the home pursuant to an earlier adjudication. Typically the parent who has failed to fulfill his or her responsibility in such a case receives services from a family service unit or agency after the CHIPS finding is made. Under section 48.415(2) the court may later terminate parental rights after the child has been outside the home for a year or more and the parent has consciously refused to correct problems which caused the separation of the parent and the child in the first place. If the parent is simply unable to improve the conditions causing the separation and it is not likely that the conditions will be improved, the court may terminate parental rights once the child has been outside the home for a total of two years or more.

Recognition of the need to respect the integrity of an existing family unit, coupled with the need to protect the child against separation from psychological as well as birth parents, makes section 48.415(2) an appropriate ground for termination of parental rights. The time periods of one year and two years before which termination may be attempted under this section conflict with the well-established need to place infants for adoption at the earliest stage possible. However, the section will often apply to situations in which newborn infants are not involved and in which there has been a familial relationship between parent and child. Consequently, the time limits, although they could be shorter, may well be appropriate. Concern for early placement of a child would not be relevant to discussion of section 48.415(2)

48.356(2), that the agency responsible for the care of the child and the family has made a diligent effort to provide the services required by the court, and:

(a) The child has been outside the home for a cumulative total period of one year or longer pursuant to such orders and the parent has substantially neglected or wilfully refused to remedy the conditions which resulted in the removal of the child from the home; or

(b) The child has been outside the home for a cumulative total period of 2 years or longer pursuant to such orders, the parent has been unable to remedy the conditions which resulted in the removal of the child from the home and there is a substantial likelihood that the parent will not be able to remedy these conditions in the future.

285. See id. §§ 48.13, .345.

286. J. GOLDSTEIN, A. FREUD & A. SOLNIT, supra note 30, at 22.
if the remaining grounds for termination of parental rights were not so difficult to prove. Appropriate relaxation of the other five standards in section 48.415 would better comport with the express intent of chapter 48 to give the best interests of the child paramount consideration. Section 48.415(2) would then need little change.

The remaining ground of abandonment has considerably more limited application than its predecessor statute. Unless the birth parents simply disappear and cannot be located, the time limits set forth in the current law preclude early placement of the child. The section does not distinguish between a parent who leaves a well-established family unit and a parent who is simply not interested in the child at its birth.

The current statute does recognize that haphazard or incidental contact between the parent and the child should not preclude a determination that parental rights should be in-


At the factfinding hearing the court may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(1) ABANDONMENT. (a) Abandonment may be established by a showing that:

1. The child has been left without provision for its care or support, the petitioner has investigated the circumstances surrounding the matter and for 60 days the petitioner has been unable to find either parent;
2. The child has been placed, or continued in a placement, outside the parent’s home by a court order containing the notice required by s. 48.356(2) and the parent has failed to visit or communicate with the child for a period of 6 months or longer; or
3. The child has been left by the parent with a relative or other person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of one year or longer.

(b) Incidental contact between parent and child shall not preclude the court from finding that the parent has failed to visit or communicate with the child under par. (a) 2 or 3. The time periods under par. (a) 2 or 3 shall not include any periods during which the parent has been prohibited by judicial order from visiting or communicating with the child.

(c) A showing under par. (a) that abandonment has occurred may be rebutted by other evidence that the parent has not disassociated himself or herself from the child or relinquished responsibility for the child's care and well-being.

Cf. Wis. Stat. § 48.40(2)(a) (1977) (court may, upon petition, terminate all rights of parents to a minor if it finds that the parents have abandoned the minor).
voluntarily terminated. The statute thus implicitly acknowledges that abandonment should properly be viewed from the child's perspective rather than the parents'. This acknowledgment is not uniformly applied throughout this section. Under section 48.415(1)(c), some parental activity, though carried out beyond the knowledge of the child or custodian, may preclude a finding that the child has been left without provision for care or support. For example, a parent could claim he or she established a college fund for the child or sent funds for the current support of the child which were returned to the parent. Even though unknown to the child or the custodian, the action may defeat termination because "the parent has not disassociated himself or herself from the child." 289 In another example, although less clear, an unwed father could claim he had no notice of the birth, and that his lack of concern for the child was not an intentional disassociation of himself from the child.

A more general definition of abandonment without time limits would give the court or jury an opportunity to consider the totality of the parent's conduct before and after the birth of the child. Under neither the current law nor the recommended change does a finding of abandonment result in automatic termination of parental rights. It represents only the first threshold that must be crossed by a petitioner. In some cases, fitness or unfitness must then be proved. Finally, the court must be satisfied that the best interests of the child will be furthered before the termination may occur. Loosening the abandonment requirement would properly allow more cases to reach the best interests phase.

The increased specificity in section 48.415, although providing greater protections for biological parents, has reduced judicial flexibility to deal with the rights and best interests of the child. Previous statutory grounds were not in all cases specific and definite and there did exist a risk of unjust infringement of the rights of a birth parent to the child. However, resulting statutory changes and contemporaneous

290. See State ex rel. Lewis v. Lutheran Social Servs., 68 Wis. 2d 36, 227 N.W.2d 643 (1975) (discussion of father's conduct prior to the child's birth which constitutes a basis for terminating his parental rights).
common-law development involving particularly the termination of rights of unwed parents to infants have served to subordinate the interests of the child to the rights of a biological parent.

Under the new procedure, the best interests of the child are often not examined by the court unless the court or jury has first determined that the conduct of the birth parent mandates intervention in the parent-child relationship. The statute does not recognize the concept of psychological parenthood as a factor to be considered when determining whether an involuntary termination of parental rights should take place unless the factfinding phase concludes that the statutory grounds have been proven. The statute also does not consider the difference to the child between a parent who has never lived with the child and one who has lived on a regular basis with the child. No distinction based on the age of the child is considered.

Those identified deficiencies are covered in the final hearing stage; but many cases will never reach that phase because the limited and narrow grounds available under the first phase make it unlikely that parents of newborns will fail the initial test. Broadening of the grounds is one answer. Evaluation of broadened grounds in a one-stage proceeding which also considers directly the best interests of the child represents another solution. The latter would lessen the risk of subordination of the child’s interests to the parents’ rights.

B. Proposed Judicial Changes

Although adoption is primarily a statutory proceeding, there are two areas where further judicial action is warranted. The first involves the role of the guardian ad litem. The second involves further development of the judicially required finding of unfitness.

1. The Role of the Guardian ad Litem

The Wisconsin Supreme Court’s application of section 48.85 to guardians ad litem should be eliminated. By so doing, there would be no question that the guardian ad litem is to serve as an advocate for the child’s best interests and not as referee for the court. The elimination of the recommendation of the guardian ad litem is not apt to have a practical
effect upon decisionmaking in adoption matters. Courts have seldom addressed the issue of the weight to be given to the opinion of the guardian and certainly have seldom given it presumptive weight. The elimination of the recommendation procedure should also remove from the lawyer serving as guardian ad litem the burden of acting as a social worker, psychologist or psychiatrist, roles for which few lawyers have been properly trained.

Similarly, the interests of all parties to termination or adoption proceedings would be better served if the presumptive weight currently given to the opinion of the guardian by section 48.85 is also eliminated. The guardian’s report should be treated simply as a part of the evidence presented, leaving to the court the attribution of appropriate weight to its content.

The requirement that a guardian ad litem make a recommendation under section 48.85 was expanded by the court without concomitant analysis of the procedural implications. If neither the courts nor the legislature choose to end the practice of providing a recommendation by a guardian ad litem, specific procedures should be enunciated to better define the role and importance of the guardian ad litem.

2. The Requirement of Unfitness

The unfitness doctrine enunciated in In re J.L. W. deserves additional attention and development by the Wisconsin Supreme Court. The court’s constitutional characterization of this requirement should mute criticism of the case as an act of judicial legislation so long as its application is limited to situations involving a parent who has established a familial relationship with the child. The court’s holding in J.L. W., however, may go beyond this limitation to a blanket application of the unfitness determination to all termination or adoption proceedings.

Such an extended application of a constitutional requirement of unfitness would be unfortunate for two reasons. The United States Supreme Court has distinguished between

291. See In re Adoption of Randolph, 68 Wis. 2d 64, 227 N.W. 2d 634 (1975).
292. 102 Wis. 2d 118, 306 N.W.2d 46 (1981).
the rights of parents who have established a familial relationship with their children and those of parents who have not. The Court also appears to differentiate between situations involving infants and those involving older children.\textsuperscript{293} The blanket application of an unfitness requirement, therefore, cannot be supported by reference to the federal constitution. Blanket application of an unfitness requirement in all situations imposes judicial rigidity on often markedly different situations requiring maximum flexibility.

Several important questions remain to be answered by the Wisconsin court. First, when a finding of unfitness is required, the court (or the legislature) should identify the stage in the proceeding where the determination of this issue falls.\textsuperscript{294} Perhaps a parent in a familial relationship with the child should have to be found unfit after the grounds for termination are proven.\textsuperscript{295} Second, if there is no familial relationship, the question arises whether the finding of unfitness should be dispensed with or whether the parent should have to prove his fitness. Finally, a definition of "unfitness" is essential.\textsuperscript{296} The need for finality of placement for the child at the earliest moment makes prompt resolution of the above issues a matter of paramount judicial consideration.

\section*{VI. \textbf{Conclusion}}

If nothing else, analysis of judicial treatment of termination and adoption proceedings, as well as analysis of the

\begin{footnotesize}
\begin{footnote}{293} See \textit{supra} notes 98-108 and accompanying text.\end{footnote}
\begin{footnote}{294} In the opinion of the writers, unfitness and proof of grounds are logically related since both criteria focus on the parent. However, if unfitness is not for the jury, either a three stage proceeding is required or unfitness must fall in stage two, the best interest stage, so that evidence on the subject of unfitness will not unduly prejudice a jury determination on the issue of grounds to terminate.\end{footnote}
\begin{footnote}{295} It is arguable that proof of grounds as set forth in section 48.415(1)(b) constitutes a determination of unfitness of the parent. Until \textit{In re J.L.W.}, 102 Wis. 2d 118, 306 N.W.2d 46 (1981), that would have seemed to be the case. Does petitioner now have to prove, for example, under section 48.415(5) that respondent severely beat a minor in the same household two or more times resulting in two or more separate felony convictions and also prove that respondent is unfit? The holding in \textit{J.L.W.} would seem to require that. The court may have intended unfitness as an alternative to section 48.415. In those cases in which there is no familial relationship, petitioner would then need to show unfitness, not grounds under section 48.415.\end{footnote}
\begin{footnote}{296} It is not clear whether unfitness is a question of fact, a question of law or a mixed question of fact and law.\end{footnote}
\end{footnotesize}
Wisconsin Legislature's involvement therein, indicates that this is an area fraught with significant and often conflicting concerns. The legislative effort which made wholesale modifications to the grounds for involuntary termination of parental rights was both necessary and commendable. However, the result produced statutes which may either be of limited use\textsuperscript{297} or may have been made so specific as to leave little flexibility in their application by the court. This has often resulted in a juxtaposition of the rights of the parent and the child in terms of protections to be offered each.

The unfortunate consequence will not be that fewer terminations of parental rights take place than occurred under the predecessor statute, but that courts will have fewer opportunities to evaluate directly the best interests of the children and thereby give consideration to such salient factors as the age of the child and the presence of the child in a family unit.

Current statutes and case law appropriately protect the right of a parent to continue to raise a child who is part of a viable family unit. Inadequate protection exists for the child who is not yet a member of a family unit or who has the misfortune to no longer be a part of a viable family unit. Such inadequacies are reflected not only in the difficult hurdles petitioner must overcome before the child's best interests are considered, but also in the imprecise guidelines which govern the actions of the child's guardian ad litem.

A definite conclusion to the issues raised by \textit{J.L. W.} must be provided by either the courts or the legislature in order to prevent a multitude of protracted legal battles over children. Such delays in securing final placement will leave the most innocent participant in the proceeding with the longest lasting scar.