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Lucy Cooper
Patricia Nelson

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ADOPTION AND TERMINATION PROCEEDINGS IN WISCONSIN: A REPLY PROPOSING LIMITING JUDICIAL DISCRETION

LUCY COOPER*
PATRICIA NELSON**

I. INTRODUCTION

The debate between those persons loosely labelled "pro-child" or "pro-adoption" and those labelled "pro-parent" is a long standing one and probably will never be resolved.1 Also unresolved is the debate between those who advocate giving broad discretion to juvenile court judges and those who advocate a much more limited jurisdictional system.2

Our purpose here is to continue the debate, as this article is written as a response to a previous article Adoption and Termination Proceedings in Wisconsin: Straining the Wisdom

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1. See, e.g., Lacher v. Venus, 177 Wis. 558, 188 N.W. 613 (1922). In this case the majority cites ties of natural affection between biological parent and child and emphasizes the parent's right to due process. As with many of these cases, the court was split, and there is a ringing dissent emphasizing the importance of stability for the child and the importance of encouraging adoption.

of Solomon,\textsuperscript{3} which we view as "proadoption." Our article will contend that court intervention in families should be limited, because discretion is fraught with dangers — dangers of class or racial bias as well as simple fallibility. It will also examine Wisconsin's recent legislation regarding children who are the subjects of placement or termination proceedings.

The child protection, termination and adoption process does not operate in a social vacuum.\textsuperscript{4} The problems of infertility among couples who want children,\textsuperscript{5} combined with the increasing number of women raising their out of wedlock children,\textsuperscript{6} and the increasing number of abortions performed in the last ten years,\textsuperscript{7} has diminished greatly the number of healthy infants available for adoption.\textsuperscript{8} In addition, many more people are adopting older, handicapped and minority children — children who used to be considered "unadoptable."\textsuperscript{9} These trends may encourage easy terminations of parental rights. Thus, it is even more important to preserve the legal protections of biological parents in the face of pressures to give children to someone "better."

II. BEST INTEREST: A MEANINGLESS PHRASE

The previous article argues that current Wisconsin law sets too high a threshold before a court may consider the

\begin{itemize}
\item[4.] See Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977), which includes a lengthy discussion of the social context in which child protection proceedings arise.
\item[5.] See, e.g., NEWSWEEK, Dec. 6, 1982, at 102-10 ("As many as 3-1/2 million American couples — about one in five — are infertile.").
\item[8.] Conversation with JoEl Demant, Lutheran Social Services (Feb. 16, 1983).
\item[9.] Conversation with Kay Pena, Regional Representative of the North American Council on Adoptive Children (Feb. 16, 1983).
\end{itemize}
best interest of the child and subordinates the interest of the child to the rights of the birth parent. We disagree. Best interest is so amorphous a concept that it should not be considered until and unless facts are proven which raise serious questions about the existence or viability of the parent-child relationship. The protections accorded to parental rights are simply legislative and judicial recognition of the human belief that "blood is thicker than water."

The problem with the best interest standard is that it has no content without further definition. It may become a mere facade behind which social workers, lawyers and judges hide when making decisions based on intuition, personal likes and dislikes, armchair psychology, and ideology so deeply rooted that the decision makers are unaware that it is mere ideology.

10. Hayes & Morse, supra note 3, at 482-94.


No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 


13. See J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 17 (1979). See also State ex rel. Lewis v. Lutheran Social Servs., 59 Wis. 2d 1, 207 N.W.2d 826 (1973), in which Chief Justice Hallows, writing for the majority, stated:

The phrase "best interests of the child" means all things to all people; it means one thing to a juvenile judge, another thing to adoptive parents, and still something different to disinterested observers. The tendency in man is to apply intuition in deciding that a child would be "better" with one set of parents than with another and then express this intuitive feeling in terms of the legal standard of being "in the best interests of the child."

59 Wis. 2d 1, 9, 207 N.W.2d 826, 831 (1973). 

See also Indian Child Welfare Act of 1978, 25 U.S.C. § 1901(4) (Supp. V 1982). In this legislation, Congress removed from the states child custody jurisdiction over reservation Indians after a legislative finding "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions..." Id. § 1901(4).
The desire to punish mothers engaging in interracial relationships has motivated some custody decisions. In one case, a judge removed a child from his mother in a child protection proceeding at least in part because she was living with a black man.\textsuperscript{14} Recently, a state supreme court overturned the removal of a white child from his white mother after she had a child by a black man.\textsuperscript{15} The trial judge commented in his decision that the local community was not ready for that kind of integration.\textsuperscript{16}

Political prejudice also can be found in at least one decision of the 1950's in which a mother with left wing political beliefs lost custody of her child partly because the judge thought anyone who was a Communist must be a bad parent.\textsuperscript{17} Courts sometimes employ a religious bias as well. The Wisconsin Supreme Court overturned a trial court decision in which a judge denied custody to a mother in favor of a father because the mother was an agnostic, while the father was religious.\textsuperscript{18}

Courts also tend to use custody cases as a forum for comment on sexual morality and as a vehicle for punishing what the trial judges view as immorality.\textsuperscript{19} The effect of this has been a tendency for judges to punish women who stray from the straight and narrow path of sexual fidelity or who engage in nonmarital sexual activity. This "bad girl standard" is alive and well in Illinois,\textsuperscript{20} where a transfer of custody away from a custodial mother was approved solely because the mother resided with a man to whom she was not married. There was no evidence that the man was in any way cruel to

\textsuperscript{16} Subsequently, the mother again lost custody of her son, this time because of her "sexual irresponsibility" and "unstable lifestyle." Milwaukee J., Mar. 15, 1983, at 4, col. 1.
\textsuperscript{17} Portnoy v. Strasser, 303 N.Y. 539, 104 N.E.2d 895 (1952). In this case the trial court denied the mother custody of the child. The court of appeals reversed the lower court's order and returned custody to the mother.
\textsuperscript{18} Welker v. Welker, 24 Wis. 2d 570, 129 N.W.2d 134 (1964).
\textsuperscript{19} See Wendland v. Wendland, 29 Wis. 2d 145, 138 N.W.2d 185 (1965) (summarizing a few of the "morality" custody cases in Wisconsin). In Wendland the court refused to overturn a trial court's award of custody to an adulteress. The other cases involve "scandalized" courts removing custody from adulterous mothers.
the children or that the children were unhappy or maladjusted. Wisconsin courts, both at the trial court and the Supreme Court levels, vacillate on this "bad girl" issue. In some cases the best interest test seems to include a requirement that the custodian not have a paramour. In other cases, while the court criticizes sexual immorality, the best interest standard is held to require that the custodian's sexual immorality have some adverse effect on the child before custody is transferred.

The issue of a parent's economic status as an element of best interest also arises. For example, in 1962 the Wisconsin Supreme Court reversed a trial court's decision in a divorce case where the mother appeared to have lost custody more because of her lower economic circumstances than for any other reason. Still, many lawyers who litigate custody cases learn to dread the fight on behalf of an impoverished single parent against the two-parent home with a backyard and trees, regardless of how well adjusted the child may have been before the custody dispute began.

The Wisconsin Legislature has partially defined the wide open best interest test in custody disputes between parents. The definition focuses on the child's relationship with each parent and with the people in that parent's surrounding family and circle of friends, as well as upon the feasibility of each parent's custodial plan for the child. Still, the court may consider "such other factors as the court may in each individual case determine to be relevant." Proceeding under this section one trial court decided that a highly relevant factor was the mother's refusal to move back to Milwaukee over a year after moving 250 miles away to Rhinelander. The trial judge transferred custody of the

21. Id. at __, 400 N.E.2d at 422.
23. See, e.g., Goembel v. Goembel, 60 Wis. 2d 130, 208 N.W.2d 416 (1973);
Wendland v. Wendland, 29 Wis. 2d 145, 138 N.W.2d 185 (1965).
26. Id. § 767.24(2)(b).
27. Id.
28. Id. § 768.24(2)(d)-(e).
29. Id. § 767.24(2)(f).
three children to their father.\textsuperscript{30}

The problems with applying a best interest test in custody disputes between parents are multiplied tenfold when a parent is pitted against the resources of the state. Usually the parent is poor, and, in child protection or termination proceedings, he or she has often done something that the professionals in the child protection system think is deficient.\textsuperscript{31} As the United States Supreme Court in \textit{Santosky v. Kramer}\textsuperscript{32} stated, "[b]ecause the parents subject to termination proceedings are often poor, uneducated, or members of minority groups such proceedings are often vulnerable to judgments based on cultural or class bias."\textsuperscript{33}

In these proceedings various phrases come to stand as a kind of judicial shorthand for social values which remain unexamined. For instance, there appears to be an assumption that the disadvantages of being raised as an illegitimate child automatically renders adoption in the best interest of an out of wedlock child.\textsuperscript{34} Because of the stigma of illegitimacy, it is urged, a child's best interest requires \textit{not} letting biological parents, particularly out of wedlock fathers, have any say in whether a child is adopted.\textsuperscript{35}

Since 1973, with the publication of \textit{Beyond the Best Inte-
ests of the Child,36 the concept of "psychological parent" has received a great deal of attention from courts and commentators.37 The authors of this widely acclaimed treatise argue that the relationship between psychological parent and child is the primary factor in every child's best interest and that courts must always preserve and protect that relationship.38 The psychological parent concept is, however, new and very controversial. Experts disagree about the validity of the concept39 and about its application, both to the child welfare system in general40 and to decisions about a particular child's placement.41 It is premature, to say the least, to jettison the firmly rooted and ancient protections for biological families in favor of recently discovered "truths" about child development.

To criticize the generalized, vague best interest test for removal and termination cases is not to argue against the exercise of judicial discretion. Courts are and must be free to consider a psychological parent-child tie and other factors which may affect the interests of the child, but only after the existence of specific statutory grounds for intervention have been proven.

39. See Strauss & Strauss, supra note 37. See also J. Goldstein, A. Freud & A. Solnit, supra note 13, at 199-202 n.10, in which the authors cite some works which would seem to contradict their theories about the central importance of psychological parenthood and the disastrous effects of separation trauma. The authors, it should be noted, are not persuaded and stick by their original thesis. See In re J.L.W., 102 Wis. 2d 118, 139, 306 N.W.2d 46, 57 (1981), for the Wisconsin Supreme Court's view that some of the current pronouncements regarding separation trauma "would appear to be gross oversimplification."
40. Strauss & Strauss, supra note 37.
41. See In re J.L.W., 102 Wis. 2d 118, 306 N.W.2d 46 (1981) (psychologists' expert opinions were sharply at odds). See also In re R.P.R., 98 Wis. 2d 613, 297 N.W.2d 833 (1980), in which one psychologist insisted that separation trauma would be the central and disastrous event of R.P.R's life if he were removed from his adoptive home. Another psychologist insisted that suffering rejection trauma at a later date would be far worse in the long run than separation trauma.
III. CHILD PROTECTION AND TERMINATION OF PARENTAL RIGHTS IN WISCONSIN

The Wisconsin Legislature has revamped Wisconsin's child protection, termination and adoption laws. The revision was a response to landmark United States Supreme Court decisions holding that juvenile courts must afford certain due process rights to parents and children, to arguments that the discretion of courts had been too broad and to failures of the system such as "foster care drift." Wisconsin's termination of parental rights legislation must be looked at in the context of its child protection laws as a whole.

A. Changes in Child Protection Laws

In 1977 the legislature made major changes in the laws governing what were then called delinquency, dependency and neglect proceedings. Chapter 354 was the first major revision of the 1955 Children's Code. The reforms contained veered sharply away from the earlier Code's broad grant of authority to juvenile court judges to make placement decisions at the request of social workers.

The legislature tightened the bases for intervention in a child's biological family by specifying the grounds on which a court could find a "child in need of protection and services" (CHIPS). The vague terms "dependency" and "neglect" were deleted, as was such language as "proper" parental care, "faults or habits" of parents, and "his occupation, behavior, condition, environment or associations are such as to injure, endanger his welfare or that of others." These criteria were replaced with eleven grounds for inter-

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44. See Wald, supra note 11, at 628-29.
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All of them require proof of specific abuse or danger to a child, proof that the parent wants to place the child, or proof that the child is in an illegal placement. Even if grounds for intervention are proven, the court may not place the child outside the home without investigation of other alternatives which would allow the child to remain with the natural parents. In all cases placement terminates after one year unless extended by the court after a hearing.

In its dispositional order, the court must make specific findings of fact and conclusions of law to support the disposition. It must decide what services are required for the child and family, what agency is responsible for providing those services, and, if the child is removed from the home, what must be done by the parent or child before the child will be returned. The obvious intent of the legislature was to set some reasonable limits on intervention into families, to ensure that once intervention does occur the purpose of that intervention is specific and clear, and to assign responsibility for achieving that purpose.

B. Termination of Parental Rights: Reforms

Having revised the law governing CHIPS proceedings, the legislature turned to the termination of parental rights and adoption process. The two major pieces of legislation which resulted were chapter 81 and chapter 330 of the Wisconsin Statutes.

In chapter 81 the legislature repealed the old law governing independent adoptions and created a new system by which biological and adoptive parents may arrange for the

51. Id. § 48.355(1).
52. Id. § 48.355(4).
53. Id. § 48.355(2).
54. Id. § 48.355(1).
55. Id. § 48.355(2)(b)1.
56. Id. § 48.355(2)(b)5.
57. Id. § 48.01.
placement and adoption of children independent of any agency. The new law imposes penalties for the buying and selling of children in Wisconsin, provides for an investigation of the proposed adoptive home prior to placement, and removes the possibility of anonymity in independent adoptions. The new law also requires termination of the

61. The whole subject of agency versus nonagency adoptions could easily take up another article. As the available pool of healthy infants becomes smaller, the traditional rivalry between agencies wanting children to place and others who think, for whatever reasons, that children's parents are as competent as social workers to choose adoptive parents, has become more bitter than ever. Agency lobbyists besiege legislators with tales of black marketing children. Advocates of independent adoption speak of the right of a parent to place a child as he, or more often she, sees fit, ignoring the fact that some unsavory practices do occur especially where a young mother is intensely pressured by others to give up a baby in return for care and support during her pregnancy. Both groups, unfortunately, can cite true horror stories of placements gone sour and children suffering, just as both sides can cite many instances of good placements resulting in the children growing up in happy families. Wisconsin's legislature chose to compromise the demands of both sides, leaving independent adoptions a legal possibility but creating a process that permits only a very committed biological parent and an equally committed and confident adoptive parent to use the law. Since the law has been in effect a scant year, it is not yet possible to calculate the long term effect of chapter 81 on adoption practices in Wisconsin.

Foreign adoptions are almost as controversial as independent adoptions and contested terminations because of the competing needs of couples who desperately want but cannot have children biologically and of those who have children but may not be able to care for them. The desire to adopt and the shortage of adoptable babies lead many people to look to the orphanages of foreign countries for children who are available either because they were orphaned by war or abandoned by parents who simply could not cope with war or life-threatening poverty. The difficulty arises over the question of whether these children were "really" free for adoption or whether eager and overcrowded orphanages simply gave away children whose biological parents never intended to give them up for adoption but became separated from them accidentally in wartime or placed them temporarily with every intention of later reclaiming them. The controversy hit the public press most notably around the time of the Vietnam babylift and, like most of the controversy in this area, will never be fully resolved. In at least two cases Vietnamese mothers have crossed the world and reclaimed children adopted during the Vietnam babylift of 1975. See Christensen v. Christensen, 31 Ill. App. 3d 1041, 335 N.E.2d 581 (1975); Popp v. Lucas, 7 Fam. L. Rep. (BNA) 2162 (Conn. Sup. Ct. 1980). With chapter 81 the Wisconsin Legislature evidently hoped to ease the process for adoptive parents while still requiring some assurance that the children who are the subjects of these proceedings have really been freed for adoption by their parents. Again, it is too soon to tell whether this law will fulfill its purpose.

63. Id. § 48.837(4)(c).
64. Anonymity is impossible because the petition must allege the names of the birth parents and of the proposed adoptive parents. Id. § 48.837(2)(b). Also, the birth parents and proposed adoptive parents must attend a hearing together. Id. § 48.837(5).
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biological parents' rights immediately after approval of the child's placement in the adoptive home, thereby foreclosing the possibility that a biological parent may reclaim the child after an adoptive placement.

In chapter 330 the legislature revised both the substance and the procedure for termination of parental rights, adoptive placement and adoption. Chapter 330 is used by biological parents who wish to terminate their rights and place their children with an agency for adoption (voluntary terminations) and by agencies which seek to terminate parental rights in order to free children for adoption (involuntary terminations).

With the enactment of chapter 330 the legislature retained much of the old law governing voluntary termination of parental rights based on the consent of the parent. The legislature made sweeping changes in the area of involuntary terminations. It eliminated the old grounds for involuntary termination of parental rights, which included nonsupport, debauchery, habitual use of intoxicating liquor or drugs so as to harm the child, and inability for a prolonged indeterminate period of time to provide care and protection necessary for the child's health, morals or well-being. The old grounds were replaced by six, new, carefully defined grounds.

65. Id. § 48.837(6).
66. See In re 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). This is a tragic and much publicized case in which a biological parent did upset an adoptive placement because under the old law a consent to adoption could be revoked before the adoption became final upon a showing that revocation would further the child's best interest.
68. Compare Wis. Stat. § 48.40(1) (1977) with Wis. Stat. § 48.41 (1981-1982) and Wis. Stat. § 48.84(1)(a) (1977) with Wis. Stat. § 48.91(2)(b) (1981-1982). The major changes are that all adoptions must be preceded by a termination of parental rights, not a consent to adoption, and that, with the exception of parents consenting to a stepparent's adoption, consent to termination must be given before a judge of a court of record. See In re D.L.S., 112 Wis. 2d 180, 332 N.W.2d 293 (1983) (discussing the level of voluntariness required and the duties of a trial court to ascertain the voluntariness of a minor mother's consent).
70. Id. § 48.415 (1981-1982).
C. Present Grounds for Terminating Parental Rights

1. Abandonment

The new law retains abandonment as a ground for termination of parental rights, but defines it in terms of three different types of parental noninvolvement. The first definition covers the child literally left on the church steps or in a stranger’s garage. In that case, the agency or the county concerned with the child’s welfare need only wait sixty days for an interested parent to appear before commencing proceedings to free the child for adoption.

The second basis of abandonment deals with the child placed outside the parent’s home after a CHIPS proceeding. Rights may be terminated after the parent fails to communicate with the child for a period of six months or more if the court warned the parent at the time of the CHIPS hearing that this is a ground for termination. This ground is clearly intended to cover the child whose parent simply gives up after a court order placing the child.

The third section covers the more problematic situation of a parent who leaves a child with a relative or friend and does not visit, call or write to the child although access to the child remains available. Here the legislature set a time limit of one year before termination proceedings may be initiated on the basis of abandonment. This time limit recognizes that voluntary placements between relatives or friends may be interpreted quite differently, especially after the parent and the caretaker disagree as to who is to raise the child.

The parent may rebut the presumption of abandonment established under these definitions. For example, evidence that illness, injury or military service prevented the parent from communicating with the child might reasonably be considered a rebuttal of abandonment, as might evidence that the parent was driven away from the child, or that the parent reasonably believed that stepping out of a tense fam-

71. Id. § 48.415(1).
72. Id. § 48.415(1)(a)(1).
73. Id. § 48.415(1)(a)(2).
74. Id. § 48.415(1)(a)(3).
75. See, e.g., In re J.L.W., 102 Wis. 2d 118, 306 N.W.2d 46 (1981).
ily situation was in the child’s interest. However, the burden of defeating a finding of grounds for termination decisively shifts to the parent who fails to communicate with the child for the specified period.

This section shows the legislature’s concern for speedy termination and adoption of children if, but only if, the parent-child relationship is interrupted to the point where it is likely that the relationship no longer exists. It is important to note that abandonment, undefined, remains a ground for finding the child to be in need of protection or services.77 If an abandonment occurs which does not meet the definition for termination of parental rights, the court may intervene, but only for the purpose of restoring or strengthening the family relationship,78 not for the purpose of ending it. The legislature has struck a balance between the child’s need for early placement and the interests of the parent, child and the state in preserving the integrity of families.79

2. Continuing Need of Protection or Services

Section 48.415(2) is central to the whole legislative scheme because it deals with the question of how long a child must be allowed to remain in foster care while that child’s parent is given additional chances to prepare to raise the child.80 How much time should be allowed to elapse before a court may step in and free the child for adoption over the parent’s objections? In the case of a parent who refuses to remedy the conditions that caused the court to place the child, the legislature has established a one-year limit.81 In the case of a parent who is unable to remedy the conditions and is not progressing, a two-year limit was set.82 In both cases the responsible agency must have made a diligent effort to follow the court ordered treatment plan and the parent must have been told by the court ordering the initial removal in the CHIPS proceeding that termination could result if the parent did not do whatever was necessary for the

77. Id. § 48.13(2).
78. Id. § 48.355(1).
79. Id. § 48.01(1)(b).
80. Id. § 48.415(2).
81. Id. § 48.415(2)(a).
82. Id. § 48.415(2)(b).
child’s return.\textsuperscript{83}

The legislature has created a system under which parents are encouraged to seek return of children. Courts must tell parents what is required to secure return of children and to warn parents of the possible consequences of not moving quickly to remedy conditions which led to placement.\textsuperscript{84} Agencies are required to make a true effort to prepare parents and children for reunion.\textsuperscript{85} But there is a clear end of the road after which the focus can and should shift to finding a permanent arrangement for a child whose parents have not, for whatever reason, readied themselves to make a home for the child.\textsuperscript{86}

\begin{itemize}
\item \textsuperscript{83} Id. § 48.415(2).
\item \textsuperscript{84} Id. § 48.356.
\item \textsuperscript{85} Id. § 48.415(2).
\item \textsuperscript{86} Legislation has been introduced which would erase the distinction between parents who refuse and parents who are unable to do what is necessary for the child’s return. The bill would allow termination of parental rights after the child has been out of the home for one year if the parents have not remedied the problems and there is a substantial likelihood the parent will not remedy the problems in the future. Wis. A.B. 251, §§ 3-5 (1983). This change would be unfortunate. A major purpose of the changes in the termination grounds was to make them as clear and specific as possible and to avoid, as far as possible, the exercise of unduly wide discretion in the factfinding stage of terminations. Wis. Stat. § 48.415(2) (1981-1982) does this by requiring, for those parents alleged to be unable to remedy the condition requiring the child’s removal from the home, proof of two years of effort toward restoring the family. While this ground does require a prediction by the factfinder as to whether the parent will in the future be able to have the child returned, that prediction will be based on evidence of two years experience with the parent. In our opinion, one year of effort to restore the family will not, in many cases, provide a sufficient basis for any accurate prediction and could result in the destruction of families which could have been restored. In proceedings which are, as the Santosky Court noted, “often vulnerable to judgments based on cultural or class bias,” the factfinder should not be allowed to make predictions without a solid basis of fact extending over a reasonable period of time. Santosky v. Kramer, 455 U.S. 745 (1982). The one year time limit is reasonable where there is evidence of neglect or refusal to remedy the conditions requiring the child’s removal. But in the hazier situation of the parent who is trying but has not yet succeeded, more time is needed.

Allowing a reasonable time is especially necessary given the realities of the social service system. There is often a delay between the time the court orders that the child be removed and treatment be provided and the time treatment actually begins. New social workers may be assigned either at the beginning or during the year of treatment which again causes delay. The same agency which must make diligent efforts to restore the family must also decide if a termination petition will be filed, a decision which must be made well before the year of placement is over. One year of placement is often substantially less than the equivalent of one year of diligent efforts by the agency.
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3. Continuing Parental Disability

Section 48.415(3) allows termination of parental rights where the parent is currently hospitalized and has been hospitalized for two out of the past five years for mental illness or developmental disability which is likely to continue indefinitely and where the parent or family has not arranged for an alternative placement for the child.87 This section has been widely criticized by advocates for the mentally ill and the developmentally disabled on the ground that it discriminates against these parents on the basis of the nature of their handicap instead of focusing on inability to plan for a child.88 On the other hand, the previous article states that disability alone should be a sufficient ground to trigger an inquiry into whether termination would be in the child’s best interest.89 While societal prejudice against those with mental illnesses, mental retardation, cerebral palsy and epilepsy may not be as great as it used to be, it is still substantial.90 To allow social workers and courts to consider whether a child might be better off with a parent who does not suffer from one of these disabilities is to invite prejudice and to discourage the provision of services which could allow the family to function.

Section 48.415(3) allows termination of parental rights without first making an effort to preserve the biological family through the CHIPS system in those rare cases where the parent’s condition is so serious that long-term inpatient treatment is required.91 The severity of the parent’s condition gives rise to the conclusion either that a viable parent-child relationship cannot be formed or that the danger to the child is too great to take a chance.

4. Continuing Denial of Visitation Rights

Section 48.415(4) provides the basis for a custodial par-

88. Conversation with Robert Goldstein, Director, United Cerebral Palsy of Milwaukee (Mar. 4, 1983).
89. Hayes & Morse, supra note 3, at 486.
ent to move for the involuntary termination of the noncustodial parent’s rights in order to clear the way for a stepparent adoption.\textsuperscript{92} In an action affecting marriage a court can deny visitation to a noncustodial parent if it finds that visitation would endanger the child’s physical or emotional health.\textsuperscript{93} Under section 48.415(4) a denial of visitation rights by the family court which continues for two years creates grounds for termination of the noncustodial parent’s rights provided that the petitioning parent can demonstrate that the noncustodial parent still would not be entitled to visitation if he or she asked for it.\textsuperscript{94}

Section 48.415(4) is difficult to prove. However, the risk to the child of erroneous failure to terminate is small. Whether or not termination and adoption by the stepparent occurs, the child will continue to live in a familial relationship with the custodial parent and stepparent. While stepparent adoptions are important, protecting the relationship, or at least the possibility of a relationship, between children and noncustodial parents is also important.

5. Repeated Abuse

Section 48.415(5) allows termination of rights if the parent has more than once caused death or injury to one or more children living in the parent’s household resulting in two or more felony convictions.\textsuperscript{95} At first blush this standard appears absurdly high. Why should a parent be allowed to kill or injure two children or injure one child twice before the best interest of the child can be considered in a termination proceeding?

First, the law does not leave endangered children unprotected. Section 48.13(3) allows the court to intervene through the CHIPS system if a child is the victim of sexual or physical abuse.\textsuperscript{96} The court may order the child’s removal from the home if necessary.\textsuperscript{97} If efforts to restore the family

\textsuperscript{92} Id. \textsuperscript{93} Id. \textsuperscript{94} Id. \textsuperscript{95} Id. \textsuperscript{96} Id. \textsuperscript{97} Id.
fail, parental rights may be terminated.\textsuperscript{98}

Second, judicial discretion should be carefully limited in the emotionally charged area of child abuse. The thought of an injured child arouses protective feelings in most adults. The vision of a parent who abuses his or her own child sparks anger and disgust. The very definition of abuse causes violent disagreement.\textsuperscript{99} To allow consideration of whether termination is in a child's best interest based on abuse invites punitive terminations or terminations without a careful consideration of the likelihood that the parent-child relationship can be strengthened or restored.

Termination of parental rights on the ground of child abuse is the most frequently criticized subsection of the statute. Legislative changes are therefore likely.\textsuperscript{100} However, any change must retain a sufficiently specific definition of the conduct which gives rise to termination so that immediate termination is possible only in the most aggravated situations of abuse. Other abused children should be protected through the CHIPS system while treatment is provided to the family.\textsuperscript{101}

6. Failure to Assume Parental Responsibility

Section 48.415(6), the final basis for establishing grounds to terminate rights, deals specifically with the rights of out of wedlock fathers.\textsuperscript{102} It is one of the areas of the law sharply criticized in the previous article.\textsuperscript{103} This section was created to balance the rights of these fathers to raise their children

\textsuperscript{98} Id. § 48.415(2).

\textsuperscript{99} For two extreme views on the issue of child abuse, compare the Swedish law, which makes illegal any physical punishment of children, see Adamo, New Rights for Children and Parents in Sweden, CHILDREN TODAY, Nov.-Dec. 1981, at 15, with the defense position in State v. Killory, 173 Wis. 400, 243 N.W.2d 475 (1976), in which the defendant, a psychologist and psychology professor convicted of child abuse, said his treatment of his niece was not abuse but rather a treatment program.

\textsuperscript{100} Legislation has been introduced which would allow termination based on a showing that "the parent has exhibited a pattern of behavior which threatens the health of the child" and has either been convicted of a felony for causing death or injury to a child or children or has more than once had a child removed from his or her home in a CHIPS proceeding because of physical or sexual abuse inflicted by the parent. Wis. A.B. 251, § 6 (1983).

\textsuperscript{101} Wis. STAT. § 48.01(1)(b), (e), (g) (1981-1982).

\textsuperscript{102} Id. § 48.415(6).

\textsuperscript{103} Hayes & Morse, supra note 3, at 482-91.
against the competing rights of the out of wedlock mothers to place the children for adoption without interference. Although interpretations about constitutional guidelines set down by the United States Supreme Court vary, the Wisconsin Legislature has mandated, with limited exceptions, that parents, including out of wedlock fathers, must have a chance to raise their children before the children can be adopted by others.

In the context of an entire system that gives biological parents a first chance to raise children, even if these parents are young men, the debate about the rights of out of wedlock fathers is overblown. Many young men, far from trying to stop adoption, willingly terminate their rights in order to avoid any future financial responsibility. Section 48.415(6) makes it fairly easy to terminate an uninterested father's rights and, in fact, erects some effective barriers against frivolous protests by men who simply wish to block an adoption but have no interest in taking parental responsibility. The definition of "failure to assume responsibility" is so inclusive that it places the burden on the father to show that he is a responsible, caring man before he is given the opportunity to try to raise the child or to have a say in the child's placement. For instance, evidence of nastiness to the mother during pregnancy, or of simply ignoring her during preg-


106. In light of Caban v. Mohammed, 441 U.S. 380 (1979), Quilloin v. Walcott, 434 U.S. 246 (1978), and especially Lehr v. Robertson, 103 S. Ct. 2985 (1983), it would not offend the due process clause if the legislature enacted a requirement that an out of wedlock father must himself be currently capable or have family members currently capable of taking custody in order to block termination of his rights and the child's placement for adoption. Such a standard would adequately protect the father's right to raise his child and protect the child's right to have a parent.

Indeed, the Lehr decision seriously undercuts any constitutional claims certain out of wedlock fathers have to notice of termination proceedings, let alone to their custodial rights which could defeat a mother's desire to have a stepfather adopt a child. Wisconsin's statute may be more protective of out of wedlock fathers' rights to notice than is now required by the United States Constitution. Such protection may still, of course, be required by the Wisconsin Constitution's due process clause. Wis. Const. art. I.

nancy, may be used against him.\footnote{See \textit{In re Baby Girl K.}, 113 Wis. 2d 429, — N.W.2d — (1983), a case decided just as this article was going to press. \textit{Baby Girl K.} was a four-to-three decision, accompanied by two dissenting opinions, in which the court affirmed the termination of an imprisoned, out of wedlock father's rights chiefly because of his conduct during the first five months of the mother's pregnancy. During that time he was not yet in prison and appears to have been living with the mother.} Failing to support her during pregnancy, if the ability and opportunity were present, will also have a negative impact. A father may face a termination proceeding even if he has shown continued interest in a baby from the day of its birth and has sought to raise the child, or to have a relative raise the child, simply because he and the mother had a falling out when she confronted him with news of the pregnancy and he did not immediately behave chivalrously.\footnote{See \textit{State ex rel. Lewis v. Lutheran Social Servs.}, 68 Wis. 2d 36, 227 N.W.2d 643 (1975). Jerry Rothstein, the appellant in the \textit{Lewis} case, carried the legal battle for unwed fathers in Wisconsin all the way to the United States Supreme Court, but he never did get to see his child. Applying a "fitness at the time of initial hearing" test, the Wisconsin Supreme Court upheld a trial court determination that Mr. Rothstein had, in effect, abandoned the fetus by behaving like a cad to the mother in the early months of her pregnancy. The facts that Mr. Rothstein had changed his mind before the child's birth, had diligently pursued a chance to see the child since birth, and was now "fit" were ignored and the adoption of the child, accomplished secretly while the case challenging the denial of Mr. Rothstein's rights was on appeal, was never disturbed. While the termination did not arise under Wis. \textsc{Stat.} § 48.415(6) (1981-1982), the language of the final decision is similar to the provision of that statute which was enacted eight years later.} This resistance to giving

\footnote{In the previous article, it was argued that an imprisoned father, unable to have contact with a baby born after his incarceration, might be able to use his "reprehensible" conduct to block termination. See \textit{Hayes & Morse}, supra note 3, at 484. We think the length of imprisonment and the type of conviction are important and that not all imprisoned fathers of babies should have their rights terminated. For example, a father in jail a short time for a minor offense might have a perfectly reasonable case for actual custody upon his release and for placement of the baby with his relatives in the meantime.}
the minority of men who fight the termination a chance to raise the children is unaccountable — unless the underlying objection is that the requirement of any participation by the father makes the mother think twice about termination and consider alternatives, including placement with the father, which would make adoption unnecessary.

A woman dealing with an unwanted pregnancy faces difficult choices. Her decision to have an abortion or to place the child for adoption may be influenced by her desire not to have continuing contact with the father. Notifying him of the child's birth and facing the possibility that he will ask for custody may be a painful requirement for her. If the father does block the termination and obtain custody, the mother will not, in all likelihood, be allowed to sever her relationship with the child, even if she still wishes to do so. She will face dealing indefinitely with an emotional tie to a child she did not intend to raise but now has not been allowed to place as she wished. Knowing that the father or his family might seek custody may well prompt some mothers either not to carry the pregnancy to term or not to attempt placement for adoption in the first place.

A balancing of interests, however difficult, must be made. During a pregnancy, the father has no control over whether the mother will have the baby at all.\(^{110}\) After the child's birth, the mother has the undisputed right to keep the child and care for it until and unless a court removes custody from her.\(^{111}\) It is only in the case where the mother seeks to place the child for adoption that the father's rights begin to interfere with her choices. Painful though this may be for the woman facing a former lover in a hostile situation, it is simply in keeping with the general rule that the biological family of a child gets a first chance to raise the child before the child is given to others.

\(^{110}\) See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (holding that neither spousal consent nor a blanket parental consent for abortions can be required). Clearly the unmarried father has no standing to prevent an unmarried mother's abortion.

D. The Dispositional Phase

Once grounds for termination have been established at the factfinding hearing, the court enters the dispositional phase of the proceeding.112 The question for the court then becomes: "Should we terminate parental rights?" At this stage the child's best interest becomes the paramount consideration. The legislature has delineated factors which focus on the question of whether termination will do more good than harm.113 These factors include: the likelihood of adoption, the quality of the child's relationship with the parent and the wishes of the child. Punitive termination is discouraged by use of these factors, and the statute makes it clear that termination should not proceed automatically from a finding that grounds do exist.114

IV. Termination in the Wisconsin Supreme Court: The Unfitness Test

A. In re J.L.W.

At the same time the legislature was revising the whole system for termination of parental rights, the Wisconsin Supreme Court was deciding a difficult case arising under the 1977 termination of parental rights law.115 The recent case of In re J.L.W.116 has caused a storm of controversy among those lawyers, judges and social workers who work with the termination statutes. Although the legislature has deleted the parental fault language from the grounds for termination of parental rights, the Wisconsin Supreme Court appears to have added the test of parental unfitness to the standards for termination the legislature enacted.117

The facts of J.L.W. are simple, although capable of different interpretations. The case involved two sisters struggling over an infant. One sister was married and childless. The other sister was divorced, the mother of two teenagers,

112. Id. § 48.424(4).
113. Id. § 48.426(3).
114. Id. § 48.427(2); id. § 48.01(1)(b). See also J. Goldstein, A. Freud & A. Solnit, supra note 13, at 7-11.
117. Id. at 135, 306 N.W.2d at 55.
and employed as a nurse in a Boston hospital. When the nurse became pregnant, her friends and the father of the child encouraged an abortion, but she decided to give birth to the baby. Thereafter she vacillated between whether to keep the baby or to let the childless sister and her husband raise the baby. The maternal grandmother became involved on the side of the childless sister. The mother literally went back and forth on the issue of placement, but ultimately decided to reclaim and raise her child herself. The married sister and her husband decided to fight to keep the child and petitioned the children’s court for guardianship, then termination of parental rights.

The petition was filed under the old termination law and alleged that the mother had “abandoned” the child and had “totally, substantially, continuously and repeatedly refused or neglected to provide J.L.W. with parental care, protection, maintenance and support,” and that she had “totally, substantially and continuously neglected to provide J.L.W. with subsistence, education and other care although she was financially able to do so.”

The jury found grounds did exist for termination; the judge found that termination was in J.L.W.'s best interest and entered an order for termination. The mother appealed and won a unanimous order for J.L.W.'s immediate return to her. The decision was based on the court's holding that “except under unusual circumstances like those presented in Quillioin, the due process protections of the state and federal constitutions prohibit the termination of a natural parent’s rights, unless the parent is unfit.”

In its decision, the court relied on the holding of Stanley v. Illinois, that “as a matter of due process of law, Stanley was entitled to a hearing on his fitness before his children were taken from him.” The court also relied on a state-

118. *Id.* at 121, 306 N.W.2d at 48. No grounds for termination of parental rights would have existed if the new law had been in effect, since the mother did not fail to visit or communicate with the child for a full year. Wis. Stat. § 48.415(1) (1981-1982).

119. *In re J.L.W.*, 102 Wis. 2d at 136, 306 N.W.2d at 55.

120. 405 U.S. 645 (1972).

121. *In re J.L.W.*, 102 Wis. 2d at 133, 306 N.W.2d at 53 (quoting *Stanley*, 405 U.S. at 649).
ment in *Quilloon v. Walcott*,\(^{122}\) that there was little doubt that the Due Process Clause would be offended [were] "a State to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reasons that to do so was thought to be in the children's best interest."\(^{123}\)

In both *Stanley* and *Quilloon* (and, indeed, in later decisions\(^{124}\)) the Court wrestled with the rights of out of wedlock fathers in custody or adoption proceedings. Before the *Stanley* decision, out of wedlock fathers had almost no legal rights to their biological children and were treated as strangers to the children,\(^{125}\) except for the duty to support. This was in sharp contrast to the rights accorded all mothers and married fathers who generally had to do something "wrong" under applicable state law, usually put in terms of neglect or other fault, before losing either custody or parental rights to their children.\(^{126}\) Stanley was an out of wedlock father who had lived with and supported his children. Upon the death of their mother, the children were declared wards of the state and placed with court appointed guardians.\(^{127}\) Under the Illinois law challenged in *Stanley*, out of wedlock fathers could lose custody of their children based solely on evidence that their mother was dead, while children of married parents and unmarried mothers could not be removed from the parent's custody unless there was a showing of neglect under the Illinois statute.\(^{128}\) Thus, the term "hearing on his fitness as a parent"\(^{129}\) was used in the *Stanley* opinion as a kind of judicial shorthand for "hearing on the issue of whether the

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123. *In re J.L.W.*, 102 Wis. 2d at 134, 306 N.W.2d at 54 (quoting *Quilloon*, 434 U.S. at 255 (quoting *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 862-63 (1977))).
128. *Id.* at 646.
129. *Id.* at 650.
children were neglected under applicable law."

The term unfit was not defined except in reference to Illinois's neglect statutes nor was it used to create a separate standard for removal of children.

In the *Quilloin* case the Court decided the question of whether an out of wedlock father who had never had legal custody of, lived with or legitimated his child had the same right in a contested adoption as married fathers, that is, the right to block the adoption by withholding his consent unless he had been adjudicated unfit. The court said "no." It concluded that, while "some showing of unfitness" would no doubt be required to "force the breakup of a natural family," under these facts a showing of best interest was all that was required. As in *Stanley*, the Court did not make any attempt to define unfitness, but rather used the term as a shorthand for what parental conduct might result in the forfeiture of parental rights under state law.

In *J.L.W.* the Wisconsin Supreme Court went one step beyond the *Stanley* and *Quilloin* decisions in holding that, except in unusual circumstances, parental unfitness must be found in addition to the grounds for termination of parental rights as determined by the legislature. This requirement of a finding of parental unfitness in termination cases raises the difficult question of what unfitness means.

### B. The Definition of Unfitness

Unfitness is a concept as slippery as the term "best interest" and is almost as susceptible to manipulation by decision-makers who are personally offended by a parent's conduct. Unfitness has never been clearly or consistently defined in the many cases in which the word appears. Instead, "unfit" seems to be a label attached to a set of facts which describe someone whose custodial rights it appears should

130. *Id.* at 658.
132. *Id.* at 255 (quoting Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 862-63 (1977)).
133. *Quilloin*, 434 U.S. at 255.
134. "While her actions may have constituted statutory grounds for termination, they do not demonstrate her unfitness as a parent." *In re J.L.W.*, 102 Wis. 2d at 137, 306 N.W.2d at 55 at 55.
be taken away. 135 Some cases say that to be unfit is to be immoral, or at least imply that in discussing a parent's conduct. 136 Other cases, where the trial court did not or could not make a finding of unfitness, employ a broader definition and hold that, since the welfare of the child is the controlling consideration, the inquiry into fitness may extend to whether parental characteristics exist that would make it harmful to the child to award or to return custody to the parent. 137 This effectively equates unfitness with a finding that custody with the parent is not in the child's best interest.

In any event, most of the Wisconsin cases which define or discuss unfitness are custody disputes between parents or between a noncustodial parent and a relative. 138 These cases illustrate the observation of many custody lawyers that trial

135. See, e.g., In re Guardianship of Schmidt, 71 Wis. 2d 317, 237 N.W.2d 919 (1976); Farwell v. Farwell, 33 Wis. 2d 324, 147 N.W.2d 289 (1967); State ex rel. Tuttle v. Hanson, 274 Wis. 423, 80 N.W.2d 387 (1957).
136. See, e.g., Sommers v. Sommers, 33 Wis. 2d 22, 146 N.W.2d 428 (1966); Bliffert v. Bliffert, 14 Wis. 2d 316, 111 N.W.2d 188 (1961).
137. See, e.g., Dees v. Dees, 41 Wis. 2d 435, 164 N.W.2d 202 (1969); Belisle v. Belisle, 27 Wis. 2d 317, 134 N.W.2d 491 (1965); Seelandt v. Seelandt, 24 Wis. 2d 73, 128 N.W.2d 71 (1964).
138. Parental "unfitness" has been a required finding in two types of cases: first, in cases where a child's custody in a family court action, usually a divorce, is sought by a third party; and, second, in cases arising under pre-1975 divorce law, where a father sought custody of a child. Under the pre-1975 law there was a strong preference for maternal custody and fathers were practically forced to show unfitness of the mother in order to gain custody. See Welker v. Welker, 24 Wis. 2d 570, 129 N.W.2d 134 (1964).

For an illustration of the confusion regarding the definition of unfitness as well as a disagreement over whether unfitness need be found before a long absent father can be deprived of legal custody, compare Ponsford v. Crute, 56 Wis. 2d 407, 202 N.W.2d 5 (1972) with Mawhinney v. Mawhinney, 66 Wis. 2d 679, 225 N.W.2d 501 (1975). In the latter case, the court backed away from a firm standard favoring parents in all cases where return of children was sought by a noncustodial parent despite that parent's long absence. The Mawhinney court restored a fair amount of judicial flexibility apparently removed in the earlier case, holding that under the circumstances described, unfitness need not be shown. A concurring opinion said that unfitness had been clearly demonstrated. These two cases are typical of two long lines of cases involving noncustodial fathers litigating custody cases against the bereaved parents of deceased custodial mothers. The cases in which the court gives the children to the fathers emphasize the rights of fit parents. See, e.g., Ponsford, 56 Wis. 2d at 413, 202 N.W.2d at 8.

The cases in which the court leaves the children with grandparents emphasize the necessity of giving trial courts the flexibility to make decisions in the best interests of children. See State ex rel. Tuttle v. Hanson, 274 Wis. 423, 80 N.W.2d 387 (1957); Rattel v. Hayter, 244 Wis. 261, 12 N.W.2d 135 (1943); In re Custody of Collentine,
courts and the Supreme Court decide all custody cases on the facts, in trying to promote what appears to be the child's best interest and to avoid the application of rules which seem too inflexible for the particular case.

In *In re Termination of Parental Rights to A.M.K.* the Wisconsin Court of Appeals discussed the definition of unfitness in the context of a termination of parental rights case. The biological father in *A.M.K.* appealed the termination of his parental rights on several grounds including the claim that the due process clauses of the state and federal constitutions do not allow termination of parental rights without consideration and rejection of less drastic alternatives to termination. The court held that an examination of less drastic alternatives to termination "is implicit in a finding of unfitness." The court stated that 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 their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended, should be superseded or interfered with."

This definition of unfitness is a modification of the best

214 Wis. 619, 254 N.W. 118 (1934); Sheers v. Stein, 75 Wis. 44, 43 N.W. 729 (1889); *In re Stillman Goodenough*, 19 Wis. 291 (1865).

For cases where custody has been transferred to others at the time of divorce, see *Dees v. Dees*, 41 Wis. 2d 435, 164 N.W.2d 282 (1969); *Belisle v. Belisle*, 27 Wis. 2d 317, 134 N.W.2d 491 (1965). In both of those cases the court grappled with the question of whether the parent once found unfit because of emotional instability could force return of the child upon a showing of current fitness. The *Dees* case held that current fitness is not enough — the parent must show that return is in the child's best interest. The *Belisle* court simply found continued "instability" despite the lack of any such finding by the trial court. Neither court was able to define unfitness; in both cases the obvious controlling consideration was the court's reluctance to move a child from a grandparent with whom the child was happy and well adjusted. One is forced to conclude that the effect of requiring findings of "unfitness" in unusual custody cases may be to cause courts to develop even more convoluted definitions and distinctions having no real general application in order to justify achieving a perceived right result in individual cases.

139. 105 Wis. 2d 91, 312 N.W.2d 840 (Ct. App. 1981).
140. *Id.* at 101, 312 N.W.2d at 845.
141. *Id.*
142. *Id.* at 102, 312 N.W.2d at 846 (quoting Lemmin v. Lorfeld, 107 Wis. 264, 266, 83 N.W. 359, 360 (1900)).
interest test at the dispositional stage of a termination case. The court may not terminate parental rights based on a finding that termination is in the child’s best interest. It must find that the termination is essential to the child’s welfare. To make this finding the court must find that alternatives to termination which would adequately protect the child’s welfare do not exist.

The standard articulated by the court in *A.M.K.* is consistent with the philosophy of the Children’s Code because of its application of the least restrictive alternative concept to termination of parental rights and because it can be read to emphasize the effect on the child of the continuation of parental rights instead of the morality or character of the parent. If this is the standard to be applied, however, there is no reason to use the term “unfit.”

Under the old law, which contained parental fault language, consideration of parental unfitness made sense. Under the new law, which focuses on the parent-child relationship, the concept is out of place. The use of an unfitness standard has not added noticeable clarity or certainty to custody law and carries with it implications of immorality and fault which are not necessarily relevant to the issues in a termination case. The use of the term can also be a gratuitous cruelty to the parent who then not only must forever lose rights to the child but also must forever bear the label “unfit parent.”

The *J.L. W.* holding clearly requires development and clarification by the Wisconsin courts. The supreme court

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143. Wis. Stat. § 48.355 (1981-1982), which governs disposition of delinquency and CHIPS cases, states:

48.355 Dispositional Orders. (1) INTENT. In any order under s. 48.34 or 48.345 the judge shall decide on a placement and treatment finding based on evidence submitted to the judge. The disposition shall employ those means necessary to maintain and protect the child’s well-being which are the least restrictive of the rights of the parent or child and which assure the care, treatment or rehabilitation of the child and the family. Wherever possible the family unit shall be preserved and there shall be a policy of transferring custody from the parent only where there is no less drastic alternative.

144. See supra text accompanying notes 134-36.

145. See e.g., Dees v. Dees, 41 Wis. 2d 435, 164 N.W.2d 282, 284 (1969).

146. With *In re Baby Girl K.*, 113 Wis. 2d 429, — N.W.2d — (1983), the court has begun the process of limiting *J.L. W.* Unfortunately, in our opinion, the court
has never hesitated to correct a holding in the child welfare

chose not to examine the whole rationale for use of the unfitness test under the new statutory framework. Nor did the court further define the meaning of unfitness within the context of a termination proceeding. Instead, the court's four-member majority held that the unfitness test is simply not required in cases against out of wedlock fathers who have not lived with the child and said that "the specific holding [in J.L.W.] related only to a parent who had physical custody of the child for the first four months of the child's life and whose every action from the time she learned of her pregnancy showed a concern for the child she was to bear." *Id.* at 446, — N.W.2d at —. Justice Day, the author of the *J.L.W.* decision, is also the author of the *Baby Girl K.*, decision, and it appears from the latter decision that meeting the *J.L.W.* unfitness test is still a requirement in all termination cases except those involving out of wedlock fathers who have never lived with their children.

It is too soon to assess the long range impact of *In re Baby Girl K.*. The majority appears to be overwhelmingly concerned with interpreting the law in a way that almost ensures ratification of an out of wedlock mother's decision to place a baby for adoption so long as a trial court can pick enough facts out of voluminous and conflicting testimony about the parents' personal relationship to make a case that the man failed to establish a parental relationship with the child. Facts may be construed against the father at every turn, and each attempt to show concern may be dismissed as an attempt to harass the mother or to regain her attention. The object, it appears, is to ensure adoption for social policy reasons.

Indeed, the court gratuitously speaks of the problems of growing welfare rolls and the problems of illegitimacy in order to explain its decision to affirm the trial court's finding that the father had failed to establish a parental relationship with Baby Girl K. We cannot, of course, know what the trial court, or the appellate court would have done had Baby Girl K.'s father been out of jail, but still impecunious, yet eager and ready to assume her custody and move in with his own relatives. If given custody, he would have been a candidate for Aid to Families with Dependant Children and he also might have provided a warm, nurturing environment for his child. We hope that the court, in this holding, is not adopting a policy that an out of wedlock father's bid for custody should be defeated for economic reasons by a more comfortably situated prospective adoptive family so long as the birth mother has chosen adoption for the baby. We fear, however, that that is where the reasoning of *In re Baby Girl K.* leads.

If we are correct, then the gender based distinction between out of wedlock fathers and out of wedlock mothers is far sharper than a simple reading of Wis. Stat. § 48.415(6) (1981-1982) would require.

In the case of out of wedlock mothers, the court has been extremely protective of the mothers' rights to raise their children, even if that requires several years of foster care placement, paid for by public funds, before the mothers can assume custody. See *In re D.L.S.*, 112 Wis. 2d 180, 332 N.W.2d 293 (1983), a case dealing with the rights of an out of wedlock mother, was a unanimous opinion authored by Justice Abrahamson, one of the dissenters in *Baby Girl K.* In fairness, it must be noted that Justice Abrahamson based her dissent in *Baby Girl K.* on her contention that section 48.415 creates an unconstitutional gender based distinction because it is not rationally related to a legitimate state purpose.

Our own position is that section 48.415 creates a legitimate gender based distinction between out of wedlock fathers and out of wedlock mothers, but that the *In re Baby Girl K.* court carried the distinction much too far by abandoning a barrier (the unfitness test) applied in all other cases to protect parents facing involuntary termination of their rights. The end result of the actual case is probably not a bad one; failure
area if it appears that a previous decision adversely affected the child protection system.\textsuperscript{147} Since the United States Supreme Court has never expressly required a finding of unfitness before parental rights may be terminated,\textsuperscript{148} and in light of the changes in the termination of parental rights law, the court would be amply justified in holding that the Constitution requires a finding that termination of parental rights is essential to the child's welfare but does not require that this finding be put in terms of "unfitness."

V. THE SYSTEM AS A WHOLE

Taken together, chapters 81, 330 and 354 of the Wisconsin Statutes express a coherent legislative philosophy which is both child-centered and protective of the legitimate claims of biological parents. With very limited exceptions, the first aim of the child protection system is protection or repair of the biological family's power and integrity.\textsuperscript{149} Forced intervention, therefore, is limited to cases where danger to a child is demonstrated. Complaints from neighbors or ex-spouses or former friends that the house is dirty or the child is foul-mouthed should not trigger forced intervention; a complaint that a two-year-old is alone in the house should and will.\textsuperscript{150}

The next aim of the system is to direct intervention toward strengthening the family not to punish the parent for being "bad."\textsuperscript{151} If the child needs immediate protection, services can and should be provided. However, the services should be part of a clear and specific treatment plan which includes conditions for return of the child, the type of services to be provided, and the persons responsible for carrying out the plan. No placement can last for more than one year to terminate might have kept Baby Girl K. in foster care for a long period during her father's imprisonment with no assurance that upon his release he would have been able or willing to take custody and actually raise his daughter. Faced with this difficult fact situation, however, we wish that the court had either dealt with the issue of defining parental unfitness or abandoned the concept, rather than just abandoning the test in a difficult case.

\textsuperscript{147} See Mawhinney v. Mawhinney, 66 Wis. 2d 679, 225 N.W.2d 501 (1975); Ponsford v. Crute, 56 Wis. 2d 407, 202 N.W.2d 5 (1972).
\textsuperscript{148} See supra text accompanying notes 118-33.
\textsuperscript{149} Wis. Stat. § 48.01(1)(b) (1981-1982).
\textsuperscript{150} See id. § 48.13(10).
\textsuperscript{151} See id. § 48.355(1).
without court review.  

Finally, if there is a placement outside the home after a CHIPS proceeding, the court is required to warn the parent that, unless the conditions leading to placement are remedied, a termination of parental rights is possible and the children might, indeed, be "adopted out." Once warned, the parent who cannot or will not make the changes necessary to resume responsibility can forever lose his or her right to reclaim the child — not because the parent is "bad," but because the child cannot wait forever in limbo for a parent who is not making the progress necessary to be able to act as a parent and caretaker. Only in very aggravated situations can a parent's rights be terminated without being given a chance and some help in restoring the family.

Clarity and accountability are the basic features of the child protection and termination system as it is currently structured. If people do their jobs, children neither drift away in foster care nor get returned to homes where they will be subjected to serious abuse.

Problems arise when people do not do their jobs. First, if there has not been fair warning to parents in a CHIPS proceeding, if the court's dispositional order was vague or inadequate, if the social worker ignored the treatment plan and simply let the child remain in foster care without making any effort to work with the parent, grounds for termination will not exist. Unfortunately, it is possible that a child who would be better off if parental rights were terminated and adoption occurred must remain in foster care or, worse, be returned to a dangerous home because a social worker, judge or prosecutor did not do his or her job. But the legislature decided that the welfare of all children will be best protected by a system which demands a high level of responsibility on the part of those who seek to intervene in or terminate a bio-

152.  Id. § 48.355(4).  Cf. Wis. Stat. § 48.35 (1975). Under this statute the court could transfer custody of a dependent or neglected child until age 18 and never review the child's status unless someone took the initiative to file a petition for modification. Children could be moved innumerable times with no notice to the parent or the court.
154.  Id. § 48.415(2).
155.  Id. § 48.415(1)(c)1, (3), (5).
logical family. These demands are enforced by making them part of the very grounds for terminating parental rights. This certainly should be a powerful incentive to those in the system who are concerned with acting in the best interests of children.\textsuperscript{156}

Second, more important problems arise when the public is unwilling or unable to spend the money necessary to implement good laws. The shortage of money is probably the single biggest problem in the child protection system. If there were money to pay for homemakers, or even parttime housekeepers for disabled parents or parents in crises, for example, many child removal cases might never arise. If there were money for "time out" day care for parents who felt they were in danger of lashing out at children, fewer abuse cases would arise. If there were money to subsidize visitation between impoverished parents and their children in foster homes on the other side of the county, more parents could stay in close contact with their children during periods of separation. If there were adequate funding, court workers' caseloads could be reduced to the point where investigations of when to intervene might be more thorough and the services provided to parents and children might become more meaningful and more effective.

\textbf{VI. Conclusion}

Far from ignoring the question of a child's best interest, the Wisconsin Legislature and Supreme Court have sought to give content to a term that has been bandied about carelessly, used as a wedge between parents and children and stretched to paper over cracks in law or logic. Wisconsin has a system which presumes at the outset that children should be raised by their biological parents when feasible and which puts teeth into its standards for judicial intervention. By limiting dangerous discretion, the legislature and the court have not made it impossibly hard to place children for

\textsuperscript{156} See \textsc{J. Goldstein, A. Freud & A. Solnit}, \textit{supra} note 13, at 54 & app. II, para. 40.0, at 195, in which the authors object to making children pay for the grievous wrongs done to their parents and imply that social workers and agencies should be liable in tort for their professional failings. This is an interesting idea, but it probably is politically and fiscally unrealistic.
adoption. They have made it harder to force placement and adoption. The debate over whether these changes promote the best interests of children will continue.

The new laws are not perfect and may well need some changes. However, the fact that some alterations may be necessary should not obscure the fact that the basic structure of the new system is a good one. We hope that those seeking easier terminations will not succeed in persuading the legislature or the courts to change this new ordering of rights before it has had a chance to be proven as effective.