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Adoption Reform in Ohio

A COMPREHENSIVE ADOPTION REFORM BILL was considered by the 110th Session of the Ohio General Assembly. Proposed Substitute House Bill 900 was passed by the House, but the session concluded before a vote was taken on it by the Senate.¹ The proposed Bill would have modified existing procedural aspects of the outmoded adoption process in Ohio. Rather than take a piecemeal approach the House had repealed the past adoption laws and proposed an entirely new Chapter 3107 concerning adoption, and would have amended a portion of Chapter 51. Besides routinely setting forth definitions,² outlining procedure,³ and setting forth the jurisdiction of the Probate Court⁴ the proposed statute made a number of significant changes. There was a redefinition of those persons who could be adopted.⁵ Those who can adopt would have been expanded from "any proper person" to specific types of persons, including an unmarried adult, an unmarried father of the person to be adopted and in certain instances a married person without his spouse joining as petitioner.⁶ Further, the consent provisions as to whose consent is required⁷ and whose consent is not required⁸ would have been expanded to include among others, putative fathers in certain specified instances. In addition, an accounting of all disbursements made with regard to an adoption would have been required in order to more closely monitor private adoptions.⁹ The last area of major change would have been in the case of refusal of agency consent and the right of prospective parents who have been refused as adoptive parents to a declaratory judgment.¹⁰

This note will treat the three areas of the proposed Bill which seem significant: the need for agency consent in adoption proceedings; the rights of putative fathers in adoption proceedings; and independent adoptions. While a complete separation of the social and legal

¹ Sub. H.B. 900, 110th Ohio General Assembly (1973-74) [hereinafter referred to as "Bill" or "Proposed Bill"]. State Representative Harry J. Lehman indicated that the bill will be reintroduced in the next session of the general assembly in substantially the same form. Telephone interview with Rep. Harry J. Lehman (D-16), Cleveland, Ohio, January 14, 1975.

² Proposed Bill § 3107.01.

³ Proposed Bill § 3107.05.

⁴ Proposed Bill § 3107.04.

⁵ Proposed Bill § 3107.02.

⁶ Proposed Bill § 3107.03.

⁷ Proposed Bill § 3107.06.

⁸ Proposed Bill § 3107.07.

⁹ Proposed Bill § 3107.10.

¹⁰ Proposed Bill § 5103.161.

consequences of the proposed changes is not always possible, this note will focus primarily on the legal ramifications in these particular areas by sampling the laws of various states with an emphasis on Ohio law as it relates to the proposed adoption procedure.

Agency Consent in Adoption Proceedings

Consent to an adoption by an agency¹¹ which has custody of a child is normally not required unless there is a statute specifically requiring such consent.¹² Problems arise, however, when such consent is required by the agency¹³ and the agency refuses to give its consent. The consequences of this refusal have been the subject of some litigation and have been dealt with in various ways by state legislatures and the courts. In the past, an agency's refusal to consent when statutorily required was most frequently treated as the final word, thus allowing little room for judicial review. Some courts considered the agencies or welfare departments to be standing in loco parentis¹⁴ to the children awarded to them. Under this view the lack of the agency's consent was analogous to lack of parental consent, without which consent a valid decree in adoption could not

¹¹ For convenience the term "agency" will be used herein to connote all properly licensed agencies, welfare departments and similar organizations.

¹² See, e.g., *In re Adoption of a Minor*, 291 N.E.2d 729 (Mass. Sup. Jud. Ct. 1973); *In re Alexander*, 206 So. 2d 452, 453 (Fla. Dist. Ct. App. 1968); *Anderson v. Pima Cty. Dept. of Public Welfare*, 77 Ariz. 339, 271 P.2d 834 (1954); *In re Adoption of McDonald*, 43 Cal. 2d 447, 274 P.2d 860 (1954).

¹³ Consent is normally required of the natural parents unless they voluntarily surrender, abandon, or willfully fail to support the child, at which time an agency acquires custody, either temporary or permanent, and thereafter responsibility for the child, including a right to consent in adoption proceedings if permanent custody has been given to the agency. See OHIO REV. CODE ANN. §§ 3107.06(D), 2151.03 and 2151.04 (Page 1972). See also *In re Custody of a Minor*, 308 N.E.2d 911, 914 (Mass. App. 1974) (in order for agency to have right to consent, consent of parent must be obviated under specific statutory conditions then in effect; incompetency is not one of the conditions necessary to obviate the mother's consent under existing statute therefore the mother's consent cannot be disregarded); *In re G.F.C., Jr.*, 314 A.2d 486 (D.C. App. Jan. 23, 1974) (abandonment and voluntary failure to support; court also stated that consent was not required of natural parents if withheld contrary to best interests of child); *In re Perez*, 14 Ill. App. 3d 1019, 1020, 304 N.E.2d 109, 110-11 (1973) (in order for the court to empower a guardian to consent to adoption without natural parent's consent, the natural parent must be found to be unfit as shown by clear and convincing evidence).

¹⁴ An individual is said to stand in loco parentis when he assumes the legal obligations of parenthood without going through the legal formalities of adoption. See 59 AM. JUR. 2d *Parent and Child* § 88 (1971) and cases cited therein. A legal guardian stands in loco parentis. See 39 AM. JUR. 2d *Guardian and Ward* § 65 (1968) and cases cited therein. *Sturup v. Mahan*, 305 N.E.2d 877, 882 & n. 3 (Ind. 1974). See also *In re Adoption of Wyatt*, 4 Ohio Misc. 47, 210 N.E.2d 935 (P. Ct. 1965); *Commonwealth v. Gard*, 362 Pa. 85, 66 A.2d 300 (1949), *rev'g* 162 Pa. Super. 415, 421, 58 A.2d 73, 76 (1948) ("guardian has such authority over ward as is necessary for proper execution of the guardian's duties, however, . . . rights of the guardian exist solely for the benefit and thus are not absolute rights to be acceded to in all circumstances, but are rights which may be regulated, controlled or denied by the court when necessary in the promotion of the best interests of the ward."); *In re Bolling's Adoption*, 83 Ohio App. 1, 82 N.E.2d 135 (1948); *State ex rel Frederick*, 119 Mont. 143, 173 P.2d 626 (1946).

be awarded.¹⁵ The trend, however, has been towards giving the courts the power to review the refusal of an agency to consent, either under statutory revisions or enlightened interpretations of older statutes;¹⁶ this has been particularly true in circumstances where the refusal has been arbitrary or unreasonable.¹⁷

In general, the courts have overridden agency refusal when it was based on a single negative factor.¹⁸ For example, while the age of the prospective adoptive parents is an important factor for consideration in adoption, it will not be allowed to destroy the opportunity for adoption if it is the only negative factor.¹⁹ This is particularly true where the alternative is placement with a public agency.²⁰ Another important factor is the race of the child and of the adoptive parents. Many agencies try to avoid problems in this area by not accepting

¹⁵ *Petition of Sherman*, 241 Minn. 447, 63 N.W.2d 573 (1954) (where refusal was conclusive even though not supported by evidence of child's best interests); *In re Adoption of Kitchens*, 116 Cal. App. 2d 254, 253 P.2d 690 (1953) (agency "assumes the role of parent, with full rights to and responsibilities for the care of the child; . . . that thereafter, in the role of acting parent, the agency, rather than the natural parent, must give its consent to the adoption of the child before the court has jurisdiction to award it to the adopting parents. . . ."); *In re Dougherty's Adoption*, 358 Pa. 620, 58 A.2d 77 (1948), (child's welfare to be considered only after consent requirements met); *State ex rel Frederick v. District Court*, 119 Mont. 143, 173 P.2d 626 (1946).

¹⁶ Since the overriding objective in nearly all adoption proceedings is the best interest of the child, some courts construe statutes in such a way as to sustain, rather than defeat, such an objective. *In re Estate of Neil*, 187 Neb. 364, 369, 191 N.W.2d 448, 451 (1971) ("Adoption statutes in light of their humanitarian aspects and purposes, are given liberal rather than strict construction."); *Compare In re Barnett's Adoption*, 54 Cal. 2d 370, 354 P.2d 18, 6 Cal. Rptr. 562 (1960), and consider the best interest of the child over agency's consent, or lack of it in *Finn v. Finn*, 11 Ill. App. 3d 385, 297 N.E.2d 1 (1973), and *Crump v. Montgomery*, 220 Md. 515, 154 A.2d 802 (Ct. App. 1959), even where such refusal is not arbitrary and unreasonable. *In re Adoption of D.S.*, 107 Cal. App. 2d 211, 236 P.2d 821 (1951).

¹⁷ *Lewis v. Louisville & Jefferson Cty. Children's Home*, 309 Ky. 655, 218 S.W.2d 683 (Ct. App. 1949); *McKinney v. Quertermous*, 306 Ky. 169, 206 S.W.2d 473, 474 (Ct. App. 1947) (court has jurisdiction to grant adoption over objection of Department of Welfare); *In re McKenzie*, 197 Minn. 234, 266 N.W. 746 (1936).

¹⁸ *In re Adoption of Tachick*, 60 Wis. 2d 540, 548, 210 N.W.2d 865, 869 (1973):

The weight to be given to a factor in determination of best interest of a child in an adoption case differs from case to case because of its interrelation; a factor may be almost controlling in a given case and rather insignificant in another situation.

See also *In re Bonez*, 50 Misc. 2d 1080, 272 N.Y.S.2d 587 (Fam. Ct. 1966); *In re Barnett's Adoption*, 54 Cal. 2d 370, 354 P.2d 18, 6 Cal. Rptr. 562 (1960); *In re Adoption of McDonald*, 43 Cal. 2d 447, 274 P.2d 860 (1954) (although in this case several factors were considered).

¹⁹ *In re Adoption of Tachick*, 60 Wis. 2d 540, 210 N.W.2d 865 (1973); *In re Haun*, 31 Ohio Misc. 9, 277 N.E.2d 258 (C.P. 1971), *aff'd*, 31 Ohio App. 2d 63, 286 N.E.2d 478 (1972); *In re Alexander*, 206 So. 2d 452, 453 (Fla. Dist. Ct. App. 1968) (age of parents probably reason for lack of consent, but other evidence indicated that petitioners were well-suited to be adopting parents of child and best interests of child would be promoted by such adoption); *In re Shields' Adoption*, 4 Wis. 2d 219, 89 N.W.2d 827 (1958); *Frantum v. Dept. of Pub. Welfare*, 214 Md. 100, 133 A.2d 408 (Ct. App. 1957), *cert. denied*, 355 U.S. 882 (1957); *In re Adoption of Brown*, 85 So. 2d 617 (Fla. 1956).

²⁰ *In re Adoption of Brown*, 85 So. 2d 617, 618 (Fla. 1956) quoting from 2 C.J.S. *Adoption of Children* § 8 (1972).

children of a particular race, or, if they do, by making an effort to match the child with parents of the same race. Again, however, while race is a relevant and important consideration, it cannot be the sole ground for refusal of consent in an adoption.²¹

Religion is another factor which is often given careful consideration. But important constitutional questions are presented with respect to religious requirements,²² particularly where the religious factor is the sole reason for denial.²³ A few states require children to be placed with parents or agencies of the same religious background as the natural parents.²⁴ More frequently statutes take into account the religions of the parties, and, where practical, the child is placed with adopting parents of the same faith.²⁵ While most adoptions affect children too young to have religious beliefs of their own, the argument is sometimes made that the natural parent or parents should be entitled to control the religious training of their child.²⁶ Such an argument is difficult to justify in light of the fact that the natural parents are not permitted to control any other aspect of the child's training after adoption. In fact, natural parents are said to lose all rights to the child once the adoption has been consummated.²⁷

Ohio's existing statute²⁸ has no definitive provisions allowing the court to waive an agency's consent where the agency refused to give

²¹ *In re Adoption of Baker*, 117 Ohio App. 26, 185 N.E.2d 51 (1962), wherein the court approved an adoption of a child of white and Puerto Rican parents by American husband and Japanese wife, primarily, however, because the child was hard to place. However, the court said ordinarily a child should be placed in a family having same racial, religious and cultural backgrounds, but such a placement is not precluded. *See also* OHIO REV. CODE ANN. § 3107.05(E) (Page 1972) (as to statutory requirements); *In re Adoption of a Minor*, 228 F.2d 446 (D.C. Cir. 1955).

²² *Dickens v. Ernesto*, 30 N.Y.2d 61, 281 N.E.2d 153, 330 N.Y.S.2d 346 (1972); *In re Adoption of "E"*, 59 N.J. 36, 279 A.2d 785 (1971), *rev'g* 112 N.J. Super. 326, 271 A.2d 27 (1970).

²³ *In re McKenzie*, 197 Minn. 234, 266 N.W. 746 (1936).

²⁴ *See, e.g.*, ME. REV. STAT. ANN. tit. 22, §3795 (Supp. 1964); MD. ANN. CODE art. 16, § 67 (1973) (can only place with adopting parents of different religion with natural parents' consent); R. I. GEN. LAWS ANN. § 14-1-41 (1970) (court shall select person or agency with same religious faith). However, these types of statutes raise serious constitutional questions.

²⁵ OHIO REV. CODE ANN. § 3107.05(E) (Page 1972) (agency report to take into account religious background); *Dickens v. Ernesto*, 30 N.Y.2d 61, 281 N.E.2d 153, 330 N.Y.S.2d 346 (1972).

²⁶ *In re Spence-Chapin Adoption Serv. v. Polk*, 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937 (Ct. App. 1971) (so long as mother has not abandoned child nor found unfit); *In re Doe*, 167 N.E.2d 396 (Ohio Juv. Ct. 1956).

²⁷ OHIO REV. CODE ANN. § 3107.13(D) (Page 1972) ("parents . . . shall be divested of all legal rights . . . once child has been legally adopted."); *Doe v. Roe*, 37 App. Div. 2d 433, 326 N.Y.S.2d 421, 425 (1971) (adoption destroys parental relationship between child and natural parents and creates a new status between child and adoptive parents).

²⁸ OHIO REV. CODE ANN. § 3107.06(D), (Page 1972).

it. The legislature was motivated to cope with the problem of an agency's refusal as a result of court decisions' treating such refusal.²⁹

At present, the Ohio statute requires the consent of an agency that has been given permanent custody of a child by contract with the parents.³⁰ The agency is the only one authorized to give such consent after permanent surrender,³¹ even if later, in the case of an illegitimate child, the natural parents marry and wish to rescind such consent. As previously noted, Ohio's present statutes do not explicitly provide a means to contend with an agency's refusal and, until recently, the Ohio courts strictly construed the applicable statutes to mean that an adoption is invalid without agency consent in a case where such consent is necessary.

Nor did the Legislature show any independent inclination towards changing the situation. Indeed, Section 5103.161(A) of the proposed Bill, which would have provided that no agency could deny consideration of an initial application by prospective adopting parents solely on grounds of race, religion, age, sex, income level or marital status,

²⁹ For a survey of Ohio case law on agency refusal see notes 31-53 *infra* and discussion in the accompanying text. Wisconsin faced the same problem as Ohio in this situation, and its legislature followed the same path of reform of its adoption statute. Prior to the Wisconsin legislation dealing with the circumstances of agency refusal, one Wisconsin court held in *In re Adoption of Tschudy*, 267 Wis. 272, 65 N.W.2d 17 (1954), that without the State Department of Public Welfare's consent, the county court lacked jurisdiction and could not grant the adoption. The statutory provision in effect at the time provided that if the permanent care, custody, or guardianship of a child has been judicially transferred to the State Department of Public Welfare, adoption *may* be granted on consent of the Department. This provision was construed by the court to require the consent of the Department as a *necessary* prerequisite in order to grant adoption. The court strongly suggested in dicta that it was powerless to review such a refusal, and therefore, was compelled to render the judgment against the adoption, although calling upon the legislature to change the law. The statutory provision with regard to agency consent was thereafter amended, and the newer statute dispensed with consent if the agency's refusal was arbitrary, capricious or not based on substantial evidence. This resulted in another holding by the same court, *In re Shields' Adoption*, 4 Wis. 2d 219, 89 N.W.2d 827 (1958), wherein it was decided that consent could not be dispensed with merely on a finding that the child's welfare would be promoted by the adoption. Rather, in order to dispense with the guardian's consent it would have to be shown either

(1) that the guardian's refusal to consent is not based on a bona fide belief that such refusal 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.

Id. at 224, 89 N.W.2d at 830. The court, however, was not authorized to waive such consent merely because it disagreed with the guardian's appraisal of the facts in a given situation. Again, the court in dicta strongly suggested reform in the adoption laws. The court commented that under the original revision of the provision eliminating the guardian's absolute veto power over adoption, which was promptly introduced after *In re Adoption of Tschudy*, the court would have been authorized to waive the need for the guardian's consent upon a determination that such refusal was contrary to the best interests of the child. Instead, the bill, as finally passed, gave the court a more limited power to waive such consent, and then only upon a finding that the guardian was acting in an arbitrary, capricious manner or without substantial evidence. Once again, as a result of strong dicta, the legislature amended the adoption provisions to their present form waiving agency consent upon a finding that such a refusal would be contrary to the best interests of the child. WIS. STAT. ANN. §§ 48.84-85 (Supp. 1974).

³⁰ OHIO REV. CODE ANN. § 3107.06(D) (Page 1972).

³¹ *In re Bolling's Adoption*, 83 Ohio App. 1, 82 N.E.2d 135 (1948).

had its genesis in the 1972 case of *In re Haun*.³² In *Haun* the prospective parents were 68 and 55 and had had temporary custody of the child since birth, and in fact, the child, who had been seriously ill at birth, had made a substantial recovery under the foster care of the Hauns. Further, the Hauns previously had been successful foster parents to over thirty children, had three children of their own, and were the adoptive parents of one other child. The standards set out by the agency concerning maturity, stability, financial ability to care for and love of the child had clearly been met. The agency refused to give its consent solely on the basis of the age of the petitioners.³³

While recognizing that it is of grave importance to take many factors into account in determining both the suitability of petitioners and the best interests of the child, the court concluded that "extraordinary emphasis on a single negative factor in the face of remarkably unanimous opinion that by all other standards the appellees [petitioners] are outstandingly qualified . . ." ³⁴ is unwarranted, and the refusal of an agency to consent to an adoption "seems an example of a loss of the spirit of the *whole* adoption system while holding to the letter of *part* of it." ³⁵ Even though under the present Code agency consent is required,³⁶ the court determined that such denial was subject to judicial review for a determination as to whether the agency had acted "unreasonably, arbitrarily or capriciously". The agency argued that its right was absolute and its consent superior to all other considerations. However, the court felt that a reasonable interpretation of Ohio Revised Code Sections 3107.06(D) and 3107.09³⁷ was to give effect to the purposes of both sections, and that an agency's denial of consent was only one factor, albeit an important one, for the probate court to consider in its determination of the qualifications of the adoptive parents and best interests of the child.³⁸

The *Haun* decision was reinforced by a case decided in May of 1974, similarly concerned with the refusal of an agency to consent in adoption cases. In *State ex rel Portage Cty. Welfare Dept. v. Summers*,³⁹ the Ohio Supreme Court entertained the same question: *to wit*, "whether a 'certified organization' as defined in RC 3107.01(C),

³² *In re Haun*, 31 Ohio Misc. 9, 277 N.E.2d 258 (C.P. 1971), *aff'd*, 31 Ohio App. 2d 63, 286 N.E.2d 478 (1972).

³³ *Id.* at 69, 286 N.E.2d at 482.

³⁴ 31 Ohio App. 2d at 70, 286 N.E.2d at 482.

³⁵ *Id.* at 70, 286 N.E.2d at 482.

³⁶ OHIO REV. CODE ANN. § 3107.06(D) (Page 1972).

³⁷ OHIO REV. CODE ANN. § 3107.09 (Page 1972) requires that adoptive parents be "suitably qualified to care for and rear the child, and that the best interests of the child will be promoted by the adoption. . . ."

³⁸ 41 U. CIN. L. REV. 704 (1972).

³⁹ 38 Ohio St. 2d 440, 61 O.2d 604, 1974-1 O.2d 1074.

by its failure to consent to an adoption, can deprive the Probate Court of jurisdiction over an adoption proceeding."⁴⁰ In that case, Grover and Doris Hanna were the foster parents of the child in question. The child had been placed with them after her permanent surrender by her mother to the welfare department in accordance with Ohio Revised Code Sections 5103.15 and 5103.16. The child, Antoinette, remained in the Hanna household over two and one-half years and on several occasions the Hannas allegedly requested the welfare department to consent to their adoption of the child. The record did not show whether or not the department ever considered or rejected their application. In August, 1972, Antoinette was taken out of the Hanna home and placed in another home, whereupon the Hannas petitioned for adoption of the child in the Portage County Probate Court.

In accordance with Ohio Revised Code Section 3107.05, the welfare department filed its report with the probate court, failing to recommend the Hannas for adoption of the child for three stated reasons: (1) hereditary factors, including intellectual potential⁴¹ and race;⁴² (2) economic factors;⁴³ and (3) age factor.⁴⁴ In addition, the report disclosed two other negative factors. The Hannas, according to the investigator, had a "preconceived mold"⁴⁵ of what a girl should be, which would thwart the child's natural development. Second, the investigator indicated that placement of Antoinette with the Hannas would not be without the consequences of an "upheaval factor"⁴⁶ — that is, not having lived with the Hannas for nearly two months, replacement with them would retard the child's establishment

⁴⁰ *Id.* at 149, 311 N.E.2d at 10.

⁴¹ The report explained "intellectual factor": The child tested at high-average in I.Q. testing which could probably be even higher in a stimulating environment. The Hannas were not well educated but recognized the need for college education and offered the opportunity to their own children. *Id.* at 145 & n.2, 311 N.E.2d at 8 & n.2.

⁴² The Hannas are caucasian and Antoinette is black.

⁴³ Mr. Hanna was employed as a plumber with an annual income of \$13,500.

⁴⁴ At the date of the report in October, 1972, Antoinette was three years old, and Mr. and Mrs. Hanna were 51 and 46 years old, respectively.

⁴⁵ *State ex rel Portage Cty. Welfare Dept. v. Summers*, 38 Ohio St. 2d 144, 147, 311 N.E.2d 6, 9 (1974), "the Hannas are not attuned to the idea of women's liberation, . . . seem to have a rigid, predetermined view of what a girl should be — specifically a petite, shy, feminine, tiny, little lady like Antoinette. . . ."

⁴⁶ *Id.* at 147-48, 311 N.E.2d at 9. "The upheaval factor refers to the effect on a child separated from its mother figure." The investigator's "report indicated Antoinette had been out of the Hanna home for two months, which in enough time for a three year old to transfer affections to her new family, and felt an evaluation should be made of the effect of another move on her basic trust, . . ." as it takes a little longer each time a child is moved to establish his trust in a parent figure again. However, the court indicates that the upheaval factor in this case "would be the result of a permanent removal of Antoinette from the Hanna home, rather than a resumption of custody by the mother-figure." *Id.* at 148 & n.6, 311 N.E.2d at 9 & n.6, *citing* Comment, Appendix I, 11 J. FAM. LAW 285, 305-309 (1971), and Inker, *Expanding the Rights of Children in Custody and*

The court concluded however, that while refusal of consent does not impair the probate court's jurisdiction, the recommendations and reports of such agencies are to be considered, along with all other available evidence, to enable the court to decide in accordance with Ohio Revised Code Section 3107.09: "(1) whether the petitioner is suitably qualified to care for and rear the child, and (2) whether the best interests of the child will be promoted by the adoption."⁵³

As previously noted, these cases were the decisive factor in attempting to change the existing law and the proposed Bill paid deference to them in those cases where prospective parents are rejected solely due to a single negative factor. It would have provided that, in the event the agency finds the applicants not suitable as adopting parents, the applicants would have had the right to file a complaint with the probate court for a declaratory judgment to determine their suitability.⁵⁴ At the adoption hearing, consideration would be given to such factors as age, financial and emotional stability, the ability to care for and love the child, and the best interests of the child without placing undue weight on any single factor. However, a finding of suitability by the probate court in such an action would not confer a right or priority in the applicants in any subsequent placement of a child by a court or agency. Although it is questionable that prospective adoptive parents should have any rights to a particular child, it would seem that in cases where they have fostered the child for a period of time they should have some priority over the parents or agency who previously gave up the child. Hopefully, this consideration would play a role in the court's evaluation of a child's best interests.⁵⁵

⁵³ *Id.* Virtually all courts consider the best interests of the child to be the prime, if not the only, consideration in adoption proceedings even against the interests of the natural and prospective parents, but such discretion is not without limits. *Szemler v. Clements*, 202 S.E.2d 880 (Va. 1974); *McDonald v. McDonald*, 13 Ill. App. 3d 87, 299 N.E.2d 787 (1973); *In re Adoption of Hiatt*, 69 Wyo. 373, 242 P.2d 214 (1952); *In re Griffin*, 15 Ohio Supp. 101, 30 Ohio Op. 367 (C.P. 1945). However, a few courts balance competing interests of the child, natural parents, and prospective parents and consider the welfare of the child the paramount, but not the only consideration in adoption proceedings. *In re Adoption of Keithley*, 206 N.W.2d 707 (Iowa 1973); *In re Adoption of Tachick*, 60 Wis. 2d 540, 210 N.W.2d 865 (1973); *In re Adoption of Clark*, 183 N.W.2d 179 (Iowa 1971). See also OHIO REV. CODE ANN. § 3107.09 (Page 1972); *In re Adoption of "E"*, 59 N.J. 36, 279 A.2d 785 (1971), *rev'g* 112 N.J. Super. 326, 271 A.2d 27 (1970).

⁵⁴ Proposed Bill § 5103.161(C). This appears to be a novel approach. But see *Rockefeller v. Nickerson*, 36 Misc. 2d 869, 233 N.Y.S.2d 314 (Sup. Ct. 1962) wherein the court implied applicability of mandamus if the agency denial was arbitrary or unreasonable.

⁵⁵ *People ex rel Scrapetta v. Spence-Chapin* A.S. 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971). Four days after birth to an unwed mother, the child known as "Baby Lenore" was turned over to an adoption agency and shortly thereafter formally surrendered by the mother to the agency for adoption. About one month later the mother revoked her consent to the adoption and when refused she filed a petition for a writ of habeas corpus requesting return of the child. New York County Supreme Court granted the writ which decision was affirmed on appeal. In New York, adoptive parents were not allowed to intervene in this action and to avoid the New York decree the adoptive parents moved

The proposed Bill specifically would not have required consent of any legal guardian or lawful custodian, other than the parents, having permanent custody of a child should such party fail to consent within thirty days of the request, or who, after examination of his reasons for withholding consent, is found by the court to be refusing unreasonably.⁵⁶ By deleting language contained in the present statute referring to an agency's consent, the proposed Bill would not have made it as clear as perhaps it could have that such custodian or guardian includes an agency.⁵⁷ Such implication is obvious when other sections of the present and proposed provisions are read. Section 3107.08(A) (2) of the proposed Bill referred to agency consent and further, under present Ohio Revised Code Section 3103.15, which would not have been revised by the legislature, a parent or parents could have entered into an agreement surrendering permanent custody to the agency, thereby empowering the agency to consent to the adoption, thus bringing such agency under the consent provisions of the proposed Bill. In addition, Section 5103.161 of the proposed Bill treating agency refusal as discussed extensively heretofore obviously considered an agency as one of those whose consent is required under proper circumstances. Therefore, since it was clearly the intent to include agencies as one of those classes of "persons" required to give consent, such inclusion should have been specifically set forth within proposed Section 3107.06(A) (3). In the alternative, "person" should have been defined in Section 3107.01 so as to include an agency having permanent custody of the child. Either of these alterations would have dispelled any doubt that, in those cases where the authority exists, agency consent is required (1) as long as given within thirty days, and (2) refusal is not unreasonable.

Rights of Putative Fathers in Adoption Proceedings

Traditionally, putative fathers have been given no rights with respect to the children they have sired.⁵⁸ In fact, a great many jurisdictions do not require consent of the putative father, nor is he given notification of the adoption proceedings,⁵⁹ even when he was legally

(Continued from preceding page)

to Florida where they have a right to be heard. Subsequently, in a suit filed in Florida, the adoptive parents were given custody of the child.

While both courts looked to the best interests of the child, the Florida court was concerned with the mother-figure, which person is not necessarily the natural mother, and the upheaval factor. For an excellent analysis of these factors see Comment, 11 J. FAM. LAW 285 (1971). See also Inker, *Expanding the Rights of Children in Custody and Adoption Cases*, 5 FAM. L.Q. 417 (1971); Katz, *The Adoption of Baby Lenore: Problems of Consent and the Role of Lawyers*, 5 FAM. L.Q. 405 (1971).

⁵⁶ Proposed Bill § 3107.07(F).

⁵⁷ See OHIO REV. CODE ANN. § 3107.06(D) (Page 1972).

⁵⁸ Doe v. Roe, 37 App. Div. 2d 433, 326 N.Y.S.2d 421 (1971); Thomas v. Children's Aid Society, 12 Utah 2d 235, 364 P.2d 1029 (1961).

⁵⁹ Doe v. Roe, 37 App. Div. 2d 433, 326 N.Y.S.2d 421 (1971).

obligated to support the child.⁶⁰ Virtually all jurisdictions require only the consent of the mother in adoption proceedings⁶¹ since she is considered the sole parent of an illegitimate child.⁶² Even when the natural mother's rights have been terminated due to her death, unfitness, voluntary consent or the like, some jurisdictions still refuse to consider the father's right to be superior even to those of other persons.⁶³ But some more recent decisions have taken the opposite approach, considering the putative father's rights as superior to those of all but the mother, subject only to the requirements of his fitness and the best interests of the child.⁶⁴

Authorities question the constitutionality of any classification (particularly where the father is known), wherein the father is presumed unfit and the mother presumed fit, labeling it unreasonable with no real basis in fact except expediency in the adoption process.⁶⁵ Today's trend sets its mark between these two diverse treatments, according the putative father some basic rights which may be swept under the broad scope of the equal protection and due process clauses of the Constitution.⁶⁶ However there persists a reluctance of the courts

⁶⁰ *Id.* at 436, 326 N.Y.S.2d at 425.

⁶¹ *In re Adoption of Irby*, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879, (D.C. App. 1964); *Thomas v. Children's Aid Society*, 12 Utah 2d 235, 364 P.2d 1029 (1961).

⁶² The majority position is exemplified in an Oregon statute:

The consent of the mother of the child is sufficient . . . and for all purposes relating to the adoption of the child the father of the child shall be disregarded just as if he were dead.

ORE. REV. STAT. § 109.326 (1969), *cited in* Comment, 13 J. FAM. LAW 115, 119 (1973); *See* Tabler, *Paternal Rights In the Illegitimate Child: Some Legislative Complaints on Behalf of the Unwed Father*, 11 J. FAM. LAW 231 (1971) [hereinafter referred to as Tabler]. *See also* OHIO REV. CODE ANN. § 3107.06(B) (1) (Page 1972); *Franklin v. English*, 126 Ga. App. 400, 190 S.E.2d 919 (1972); *In re Doe*, 11 N.C. App. 560, 181 S.E.2d 760 (1971); *In re Adoption of a Minor*, 338 Mass. 635, 156 N.E.2d 801 Sup. Jud. Ct. 1959); *Ex Parte Combs*, 150, N.E.2d 505 (Ohio C.P. 1958).

⁶³ *In re Adoption of A*, 226 A.2d 823 (Del. 1967), wherein the paternal grandparents were given superior rights to the putative father's in the adoption of the child after termination of the natural mother's rights.

⁶⁴ *In re Guardianship of Harp*, 6 Wash. App. 701, 703, 495 P.2d 1059, 1061 (1972). Although this right is diluted since no consent of the father or notice is required to be given to him under common law provisions. *In re Aronson*, 263 Wis. 604, 58 N.W.2d 553 (1953).

⁶⁵ *Stare ex rel Lewis v. Lutheran Soc. Servs.* 47 Wis. 2d 420, 178 N.W.2d 56, 65 (1970) (dissenting opinion) (also brings in the question, "If a child born out of wedlock has recognized right to have a mother and a family relationship, why must he be denied a father?"). *See also*, Comment 13 J. FAM. LAW 115, 121 (1973); 4 LOYOLA U.L.J. 176, 181-183 (1973). *Contra*, *In re Mark T.*, 8 Mich. App. 122, 154 N.W.2d 27, 37 (1967) where the court stated: "The legislative classification has a substantial basis in experience, is reasonable, and is essential to a workable adoption program."

⁶⁶ *See generally* Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581 (1972). On the constitutional requisites of: (1) *Notice*, *see*, Comment, 1968 U. ILL. L.F. 232; *People ex rel. Slawek v. Covenant Children's Home*, 52 Ill. 2d 20, 284 N.E.2d 291 (1972). (2) *Consent*, *see*, *People ex rel. Slawek v. Covenant Children's Home supra*. (3) *Custody*, *see*, *In re J.H.*, 313 A.2d 874 (D.C. App. Jan. 14, 1974) (where there was no evidence indicating that adoption would not be in the best interests of the child, the lower court erred in denying

and legislatures to accord the putative father rights equal to those of the mother.⁶⁷

In the recent landmark case of *Stanley v. Illinois*⁶⁸ the Supreme Court reversed a decision of the Illinois Supreme Court and held the denial to unwed fathers of a fitness hearing accorded to all other parents to be a denial of the due process and equal protection clauses of the Constitution.⁶⁹

Although it is too soon to gauge the entire scope of *Stanley*, the decision has clearly caused extreme concern in the courts and legislatures and has been the subject of commentary in numerous articles.⁷⁰ As a result of *Stanley*, the courts have vacated several decisions which denied putative father various rights.⁷¹ Further, in October, 1972, representatives of the American Bar Association and Child Welfare

(Continued from preceding page)

petition of adoption by the father of the illegitimate child, where consent of the mother and agency had been given for the petition to be granted); Marcus, *Equal Protection: The Custody of the Illegitimate Child*, 11 J. FAM. LAW 1 (1971); Note, WIS. L. REV. 1262. (4) *Visitation rights*, see, 27 OHIO ST. L.J. 738 (1968); Tabler, *supra* note 62, at 231.

⁶⁷ *State ex rel Lewis v. Lutheran Soc. Servs.*, 47 Wis. 2d 420, 432-33, 178 N.W.2d 46, 62, 63 (1970), *vacated*, *Stanley v. Illinois*, 405 U.S. 645 (1972). The court held that lack of notice to the putative father prior to termination of parental rights, not required under the Wisconsin statute, does not violate equal protection clause of fourteenth amendment, and quoted from *In re Welfare of Brennan*, 270 Minn. 455, 461-62, 134 N.W.2d 126, 131 (1965):

It would appear that because disputes of this kind are not common, the right of the out-of-wedlock father to notice and to be heard has either been overlooked or intentionally omitted. This may be explained by historical experience from which it is assumed that the overwhelming percentage of fathers of out-of-wedlock children are not interested in their children, in recognizing them, in supporting them, in legitimating them, or especially in seeking their custody. Moreover, it should be realistically conceded that few of the fathers in this group would be able to present anything like a rational argument that the child's best interests would be served by recognizing the father's desire to obtain custody of the child.

Accordingly, it would appear that the laws with reference to the adoption of children and the termination of parental rights have been drafted with a view to facilitating the work of welfare agencies in the adoption process. The welfare agencies see the procedure used by the father in this action as a threat to the adoption agency program. They apprehend that if the father can in any way interfere with the adoption process it may be anticipated that he will continue to seek custody of the child long after it has been placed in an adoptive home; that many previous placements may be jeopardized; and that many qualified couples will, because of the risk, be discouraged from making application to an agency.

⁶⁸ 405 U.S. 645 (1972), *rev'g and remanding In re Stanley* 45 Ill. 2d 132, 256 N.E.2d 814 (1970).

⁶⁹ *Id.*

⁷⁰ See, e.g., Comment, 13 J. FAM. LAW 115, (1973); 4 LOYOLA U.L.J. 176 (1973). See also Hession, *Adoptions After "Stanley" — Rights for Father's of Illegitimate Children* 1973 ILL. BAR J. 350.

⁷¹ *Rothstein v. Lutheran Soc. Servs.*, 405 U.S. 1051; *State ex rel Lewis v. Lutheran Soc. Servs.* 47 Wis. 2d 420, 178 N.W.2d 56 (1970). See also *Guardianship of Harp*, 6 Wash. App. 701, 495 P.2d 1059, 1062, (App. Div. 1972), wherein court stated it was obvious "the filiation and adoption statutes are now unconstitutional insofar as they fail to recognize the newly determined constitutional rights of the father [Stanley]."

League of America met to study the implications of *Stanley*, the result being the promulgation of the following statement with respect to rights of putative fathers:

At the present time there is no unanimity as to the constitutionally required legal rights of fathers of children born out of wedlock. There are those who hold that all known fathers must be notified as part of any action to terminate parental rights, whether voluntary or judicial. Others hold that only fathers who have formally or informally acknowledged paternity need to be notified.

The Child Welfare League of America recognizes that until the legal position is clarified it would be safer, from a legal standpoint, to notify all known fathers. However, as the standard-setting agency in child welfare, the League believes that in order to protect the best interest of the child, the preferred social policy would be to involve only those fathers who have either acknowledged paternity or been so adjudicated.

We, therefore, urge member agencies, and others, to advocate policies which would accept, as constitutional and secure, procedures which do not require the involvement of fathers who have neither acknowledged paternity nor been adjudicated as such.⁷²

Notwithstanding *Stanley*, Ohio is one of those jurisdictions in which the mother of an illegitimate child is considered the sole parent for purposes of consent to the adoption proceedings.⁷³ Since the father of an illegitimate child is not considered as a parent of such child, he is also denied the right to notice of the adoption proceedings in Ohio, as he is not one of those whose consent is required in such proceedings.⁷⁴ These provisions are clearly a deprivation of the illegitimate father's constitutional rights, particularly those of due process, *i.e.* the right to notice and the right to be heard.

A classification is made between the mother and father of an illegitimate child which presumes the mother is fit and the father unfit. Such classification has no basis in fact and it is clear that

⁷² The Child Welfare League Newsletter 1, 6 (Fall-Winter 1972), as cited in Comment, 13 J. FAM. LAW 115, 135-36 (1973).

⁷³ OHIO REV. CODE ANN. § 3107.06(B) (1) (Page 1972).

⁷⁴ OHIO REV. CODE ANN. § 3107.04 (Page 1972). See also *In re H*, 37 Ohio Misc. 123, 305, N.E.2d 815, 816 (C.P. 1972), wherein an Ohio court in considering the question of whether the putative father had a right to custody under *Stanley*, distinguished the *Stanley* situation where the father had sired and raised the child, whereas, in this case, the father had sired but not raised the child. Consequently the court held the father had no right to custody, as against the mother, noting that the fact the father had not raised the child was dispositive of the case.

a putative father should be put on the same footing as the mother: he should have the right to consent to the adoption proceedings within a reasonable time, and should also have the right to notice to such proceedings. This should be the case whether or not he had been adjudicated the father. In those cases where the putative father does care about the disposition of his child he will come forward within a reasonable time, and where he does not, his rights to notice and consent can then be waived. However, it cannot be presumed that he does not care to be notified and heard in such proceedings without giving him a chance to do so. The argument is frequently made that the time element of requiring notice to be given and consent required of a putative father will unduly delay the adoption process. The fallacy of this position is obvious. The time it takes to process an adoption is already lengthy; where a reasonable time element is required to give a concerned father the opportunity to present his viewpoints the additional time required would be minimal. Further, it seems ludicrous to deprive a person of his constitutional rights just to save a few days' time in an already lengthy process.

In response to *Stanley* and the statement made by the American Bar Association and Child Welfare League of America, the proponents of the proposed Bill acknowledged the need for the consent for adoption of the putative father in two instances. The first situation which would have required consent occurs when the putative father is charged with being the father in a bastardy proceeding under Ohio Revised Code Section 3110.01 or Section 3111.03.⁷⁵ The second situation exists when the putative father has filed an application under Section 2105.18 of the Code acknowledging he is the father of the child. He may make such an acknowledgment either after marriage to the mother, whether before or after the birth of the child, or if the father and mother do not marry, upon consent of the mother or the child's custodian after the child's birth.⁷⁶ Although both of these situations involve court proceedings in which the fatherhood of the child is ultimately determined by judicial decree as recommended by the League, it affords no right of consent to putative fathers whose fatherhood may be in doubt. In addition, both instances require affirmative action by the mother, specifically, a complaint charging bastardy, consent to marry, or acknowledgment that the person alleging fatherhood is indeed the father. It appears unlikely, particularly in an illegitimate child adoption situation, that the mother will take any of these actions. Under proposed Section 3107.05(A)(9) of the Bill, the petition of adoption had to contain the name of *any* individual whose consent to the adoption is required, but who has not con-

⁷⁵ Proposed Bill § 3107.06(A)(6)(1) (consent of putative father required if he is charged with being a father in a legal proceeding).

⁷⁶ Proposed Bill § 2105.18(A)(5)(a).

sented.⁷⁷ Thus if the mother does not know who the father is, or should she choose not to reveal the name of the father, file a bastardy complaint, nor acknowledge the alleged father's fatherhood, consent will not be required of the father and his name and address will not be revealed under this section. Notwithstanding the fact that the father may have met one of the Section 3107.06(A)(6)⁷⁸ requirements, the proposed Bill further would have specified that consent to adoption is not required of the putative father if he fails to file an objection with the courts and in some cases even where he does file such objection.⁷⁹

Besides limiting the situations in which consent of the putative father is needed, the proposed Bill would have restricted the father's right to be notified of the adoption. Only if he fell within the scope of Section 3107.06, or was involved in bastardy or fatherhood proceedings, would the reputed father have received notice.⁸⁰ With these restrictive measures the legislature had sought to expedite the adoption procedure by limiting the rights of certain putative fathers. Whether the balance they have struck is equitable is a query that must await the response of future litigation.

But in light of *Stanley* and its progeny it seems doubtful that the proposed Bill would have accorded putative fathers their full rights guaranteed under the Fourteenth Amendment. An analogous situation existed in *Armstrong v. Manzo*⁸¹ where the United States Supreme Court held that a child's father, who was divorced from the child's mother, was deprived of his rights under the due process clause of the Constitution when he had not been given notice of the adoption proceedings of their child. The father had been charged with failing to contribute to the support of his child, one of the special circumstances under Texas law which eliminates the requirement of the father's consent.⁸² The mother gave her consent to the adoption, and the judge of the juvenile court gave his consent in lieu of the father's. No notice of the filing or pendency of the adoption proceedings was given to the father, even though his whereabouts were well known to the mother. The natural father was unaware of the proceedings until

⁷⁷ Proposed Bill § 3107.05(A)(9) (petition shall contain the name of any person whose consent is required even if their consent is withheld, and the reason for such lack of consent).

⁷⁸ See text accompanying notes 75 and 76 *supra*.

⁷⁹ Proposed Bill § 3107.07(B) (conditions under which consent to adopt is not required of the putative father).

⁸⁰ OHIO REV. CODE ANN. § 3107.04 (Page 1972) (conditions for appointing a next friend to the child and directions for giving notice of a hearing to the child's parents if parent's consent is required by the statute).

⁸¹ *Armstrong v. Manzo*, 380 U.S. 545 (1964), *rev'g and remanding* 371 S.W.2d 407 (1965).

he received notification of the adoption from the adoptive father (present husband of the natural mother), whereupon the petitioner immediately filed a motion to set aside the adoption decree on grounds that he had not had notice.⁸³ The Texas court did not vacate the adoption decree, but set a date for a hearing requiring the petitioner to show that he had not failed to support his child. At the conclusion of the hearing the court denied the natural father's motion and confirmed the adoption decree.⁸⁴ The Supreme Court felt the issue to be whether failure to notify the father of the pendency of the adoption proceedings was a deprivation of due process, thereby invalidating the adoption decree, and if so, whether the hearing on his motion served to cure its constitutional invalidity.⁸⁵ The Court stated:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.⁸⁶

The Court further observed that a subsequent hearing would not have cured the deficiency since a different burden of proof was required, specifically, the petitioner had to prove compliance with support requirements.⁸⁷

Yet under the proposed Bill, even if the putative father had filed a timely objection, he could have been denied the right of consent to the adoption if the court found any of the grounds set forth in proposed Section 3107.07(B) to be present: namely, willful abandonment of the child, failure to support the child, or abandonment of the mother of the child during her pregnancy and up to the time of either her surrender of the child or the placement of the child in the home of the petitioner.

Furthermore, the Bill could be criticized for its failure to go far enough in providing notice and consent to such father since it would have required affirmative action that the mother may be unwilling to give. An alternative suggested by Chief Justice Hallows of the Wisconsin Supreme Court in his dissenting opinion in *State v. Lutheran Social Services of Wisconsin and Upper Michigan*,⁸⁸ was to require a mother, petitioning for termination of parental rights and placing a child for adoption, to disclose the identity of the father. An appropriate

⁸³ *Id.* at 548.

⁸⁴ *Id.* at 548.

⁸⁵ *Id.* at 549.

⁸⁶ *Id.* at 550, quoting from *Miliken v. Meyer*, 311 U.S. 457 (1940) and others.

⁸⁷ *Armstrong v. Manzo*, 380 U.S. 545, 551 (1964).

⁸⁸ 47 Wis. 2d 420, 441-2, 178 N.W.2d 56, 67 (dissenting opinion).

method could then be employed to notify the father. This relatively simple provision would enable the father, if inclined, to either consent or object to the proceedings; termination of parental rights would thus be decided on the merits with input coming from both parents. If, after reasonable notice requirements had been met, the father failed to appear, the court could consent on his behalf and only then would his consent be waived.

It has also been suggested that notice by publication be given in cases where the mother refuses to name the father. Such publication would be directed to such unknown respondents in the form, to "All Whom It May Concern".⁸⁹ Of course, a reasonable time would have to be given for concerned persons to respond, however, those with an interest in the proceedings would tend to respond quickly. Due process could thus be met in a minimum of time and would be strictly controlled by statute thereby avoiding unnecessary delay in the adoption process — delay which, in the end, can only disturb the child's well being.

Independent Adoptions

Possibly the most controversial issue raised in the adoption process involves independent or private placement of children. Not only is there a paucity of statistical data on this issue, but the nature of the practice makes difficult attempts to accurately gauge this adoptive method's extent. What can be ascertained, however, is that the private adoption of children, through contact with an attorney or physician, has become a prevalent practice across the country. Although it is perfectly legal to adopt children privately,⁹⁰ some commentators feel that the practice amounts to buying children, creating a "gray market" of adoption.⁹¹

According to a recent survey,⁹² the cost of adopting a child varies greatly, particularly when agencies are bypassed and inde-

⁸⁹ *Stanley v. Illinois*, 405 U.S. 645, 647 & n.9 (1972); Hession, *Adoptions After "Stanley" — Rights for Father's of Illegitimate Children* 1973 ILL. BAR J. 350, 354; Comment, 13 J. FAM. LAW 115, 125 (1973).

⁹⁰ OHIO REV. CODE ANN. § 5103.16 (Page 1972) provides, however, that prior to placement other than through certified agency, natural parent or parents must appear in probate court to apply for approval of the placement. See also *In re McTaggart*, 4 Ohio App. 2d 359, 212 N.E.2d 663 (1965). Every state except Connecticut, Delaware, and Maryland allow private adoptions. Camarow, *The Discouraging New Math of Adopting a Child*, MONEY, June, 1974, at 86 [hereinafter referred to as Camarow].

⁹¹ Placements made by physicians, lawyers and ministers who, although well meaning cannot offer the protection of agency and raise price of adoption from hundreds to thousands of dollars. Note, *Moppets on the Market: The Problem of Unregulated Adoptions*, 59 YALE L. J. 715 (1950) (hereinafter referred to as Moppets); Camarow, *supra* note 90, at 78.

⁹² Camarow, *supra* note 90.

pendent means are employed.⁹³ Part of this variance results from a continuously increasing demand to adopt that is largely unsatisfied by a supply which has been diminishing substantially as a result of legalized abortions, more unwed mothers willing to keep their illegitimate children and improved birth control methods.⁹⁴ While increased scarcity of children to adopt creates a "rich man's market", it does have the healthy side effect of increasing the interest of prospective adopting parents in adoption of children previously considered unadoptable, such as foreign, handicapped, older and racially mixed children.⁹⁵

Proponents of independent adoptions argue that investigations made of prospective adopting parents are unnecessarily harsh, agency standards are too strict and rigid, and exclusive reliance on such criteria may prevent placement of many adoptable children.⁹⁶ Added to these objections is the disheartening time delay that prospective parents invariably experience during the adoption process. Proponents also contend that if independent placements are prohibited a "black market" will be created, or that those wishing to adopt privately will cross state lines into jurisdictions where it is permitted. The appropriate solution they propose is to monitor rather than abolish independent adoptions in Ohio.⁹⁷

On the other hand, those wishing to ban independent adoptions claim that insufficient investigation goes into the adoption process if done privately, and, if an investigation is made at all, it is often conducted by a person possessing few, if any, appropriate qualifications. Furthermore, in independent adoptions it is not uncommon for the natural parent or parents and adopting parents to have knowledge of each other's identity which may lead to problems after the adoption. Often, natural parents, particularly natural mothers in illegitimate child situations, are not fully apprised of their rights and may consent, only to try to regain custody of the child at some future date; which,

⁹³ Most government agencies are free, while private agencies vary widely from a token \$15 to \$1,500. However, most agencies are flexible, and may drastically reduce bill to whatever the adopting parents can afford. In addition to agency costs, there is a fee charged by the lawyer who handles the court proceedings, which runs around \$250-\$350. Most attorneys handling adoptions in consort with an agency tend to keep their fees down. On the other hand, fees in private placements are rarely less than \$3,000 and may run as high as \$6,000 or \$7,000. Camarow, *supra* note 90, at 80, 84.

⁹⁴ *Id.* at 78.

⁹⁵ *Id.* at 79.

⁹⁶ Issac, *Children Who Need Adoption*, THE ATLANTIC MONTHLY, Nov. 1963, at 45. However, as a consequence of reexamination of criteria, there has been some relaxation of rules, the rationale being, a less than perfect home is better than an institution. Mitchell, *Kentucky Law Relating to Placement of Children for Adoption*, 53 KY. L.J. 223 (1965). See also Uhlenhopp, *Adoption in Iowa*, 40 IOWA L. REV. 228 (1955) for pros and cons of private placement.

⁹⁷ Interview with Keith Pape, Chief, Columbus Bureau, WEWS, Cleveland, Ohio, May 2, 1974.

depending on the circumstances of the consent and the state of the adoption proceedings, may not be possible.⁹⁸ A significant argument against independent adoptions is the fact that some of the placements border on illegality.⁹⁹ Technically, no one should profit in an adoption proceeding; only legitimate costs, such as expenses for the child's birth, and fees to lawyers for time expended being permitted, otherwise, the "gray market" evolves into a "black market."¹⁰⁰

In Ohio there are staunch supporters on both sides of the independent adoption question. According to recent interviews,¹⁰¹ the Franklin County courts highly favor such adoptions, and grant hundreds each year. In contrast, the practice in Cuyahoga County greatly restricts independent adoptions, allowing an attorney only two such adoptions annually. Additionally, the Cuyahoga County Probate Court urges attorneys to cooperate with an agency in an independent adoption thereby hopefully avoiding the pitfalls of such private adoptions. Unfortunately, this practice makes the adoption more expensive by adding on the agency's fees, and, in cases where the private adoption is legitimate and costs are being kept as low as possible, some prospective parents may simply be unable to afford the added cost. For them it becomes a question of whether the safeguards afforded by cooperation with an agency are worth the added expense. Rarely is the decision facile — and too often are the consequences unpleasant.

The present statute with regard to placement of children for adoption in Ohio allows private adoptions.¹⁰² In a case where the child is not placed or received for adoption through one of the welfare divisions or authorized agency, the parents of such a child prior to placement must have "personally applied to, and appeared before, the probate court of the county in which such parent or parents reside or in which the person or persons seeking to adopt said child reside for approval of the proposed placement. . . ."¹⁰³ The court after an independent investigation by a qualified person experienced in adoption matters may then grant its approval to such an adoption.

This statute would not have been repealed by the enactment of the proposed Bill, however, it would have been modified somewhat by adding a new section requiring an accounting of all disbursements made or promised to be made by the prospective adoptive parents in connection with the child's birth, and services relating to adoption or placement of

⁹⁸ See, e.g., *People ex rel Scarpetta v. Spence-Chapin A.S.*, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971).

⁹⁹ Camarow, *supra* note 90, at 86; Mitchell, *supra* note 96; Uhlenhopp, *supra* note 96; *Moppets*, *supra* note 91.

¹⁰⁰ Camarow, *supra* note 90, at 88.

¹⁰¹ Pape Interview, *supra* note 97.

¹⁰² OHIO REV. CODE ANN. § 5103.16 (Page 1970).

the child for adoption by any party involved.¹⁰⁴ Further, the court would have required that all expenses and fees, including those of physicians, attorneys, hospitals and agencies, be approved by the court prior to entry of the decree for adoption.¹⁰⁵

The proposed Bill seemed to be an attempt to placate both sides of the independent adoption question by still allowing private adoptions while restricting their operation. It is questionable that taking a middle of the road position would have been the answer to the problem. Those persons who charge exorbitant fees and expenses would certainly not be curtailed by restrictions easily circumvented. Therefore, a "black market" would still probably persist at a cost even greater than it is now. On the other hand those persons who genuinely keep within the guidelines of private adoptions as to costs and the like will more than likely do so with or without restrictions of any kind.

It would have been wiser to do away with independent adoptions as they are now conducted even at the risk that persons wishing to adopt would go outside of the state. Under present practice, it is strongly urged by some counties to go through agencies anyway. Despite all the faults of agency adoptions, they do afford safeguards which independent adoptions do not. Namely, the investigation made as to prospective adoptive parents is usually more thorough than court appointed investigations because of time and funds. Further, greater care is taken to apprise parents, particularly mothers of illegitimate children, their rights once the adoption takes place, by thorough counseling of such parents. This, in almost all cases, alleviates the problem of a parent's attempt to revoke consent with sometimes dire consequences. Rarely, if ever, do the natural parent and adoptive parents know each other's identity in an agency placement whereas in private adoptions identity of each other is likely. Lastly, the adoptive parents are safeguarded in situations where the child to be adopted by them through an agency is deformed or undesirable to them for some other reason. This safeguard is rarely available in independent adoptions. While it still may take too long and the questions asked of adoptive parents too rigorous when placements are made through adoption agencies, it would seem these factors are far outweighed by the positive reasons for such adoptions as noted above.

Conclusion

Notwithstanding any other factors in the adoption proceeding, the prime consideration is the best interests of the child. The House had gone a long way in its proposed Bill to safeguard and put such child's interests above all else.

¹⁰⁴ Proposed Bill § 3107.10(A).

¹⁰⁵ Proposed Bill § 3107.10(B).

In the area of agency consent this concern would have been probably most apparent. No longer would agencies have been allowed to give a carte blanche disapproval to an adoption without good reason. Further, prospective adoptive parents would have been given a right to declaratory judgments where they have been turned down for one reason or another. In both of those circumstances, it would have been not only the prospective parents, but the child who benefitted. By allowing the court to look at the merits of each case and the people involved, it could have then determined what is best for the child in a particular instance, not by using arbitrary standards, but the whole of the circumstances surrounding the adoption.

This would also have been seen in the case of the situation of putative fathers. When such a father is afforded his rights the child would also have benefitted. Rather than presuming the father to be unfit because the child is illegitimate, the father is and should be presumed fit as is the mother. Instead the best interests of the child would have been considered as to which if either of the parents should have custody of the child or give consent to the child's adoption. The proposed Bill certainly took a step in the right direction in rendering due process and equal protection rights to fathers in these situations. However, there are certain deficiencies in that it would have limited those situations where a putative father's consent is required, denied his consent in some circumstances and restricted such a father's right to notification.

Less obvious, but nevertheless a consideration in independent adoptions, is the best interest test. Needless to say, the chances of the child growing up normally and in a good environment for that particular child are greatly enhanced where thorough investigations are made into the prospective parents and where there is little chance of identifying the real parents. Further, revocation of consent is not as likely where the consenting parent is thoroughly apprised of his rights before the adoption, and there is less chance that a child will be taken from one home to another until the situation is righted.

The proposed Bill would have alleviated the most glaring problems in the adoption process. Yet, as noted earlier, there are several areas which should be given further consideration in the 111th Session. It cannot be overlooked, however, that the House took positive steps in revamping the outmoded adoption code, which is definitely a step in the right direction.¹⁰⁶

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¹⁰⁶ For an excellent analysis of present adoption laws and suggested reforms see, Yost, *Adoption Laws of Ohio: A Critical and Comparative Study*, 21 CLEVE. ST. L. R. 1 (1972). As this issue goes to press, the aforementioned proposed Bill is being re-introduced in the General Assembly as H.B. 126.