ABANDONMENT V. ADOPTION: TERMINATING PARENTAL RIGHTS AND THE NEED FOR DISTINCT LEGAL INQUIRIES

I. Introduction

The institution of the family enjoys a unique status in American culture. The family unit, bonded together through love and common interests, provides the most effective means for educating children to become capable, knowledgeable adults. The societal benefits that accrue through the family structure are the underlying basis for the development of the law in this area. Family law has developed to promote family integrity and to discourage government intervention in familial affairs. To achieve these ends, certain fundamental parental rights have been developed which give parents broad control over their child's development.

Parental rights are, however, accompanied by parental responsibilities. When a parent disregards these responsibilities, the state may seek to intervene, both on its own behalf and on behalf of the affected child. When a parent's disregard has reached a level so extreme that no viable alternative remains, the state may seek the most drastic of all remedies, the complete severance of the parent-child relationship through termination of parental rights.

Alaska provides two statutory mechanisms for the involuntary termination of parental rights: "child in need of aid" proceedings¹ and adoption proceedings.² Currently, both proceedings are based on objective standards of proof, with the former focusing on prior parental conduct as it evinces abandonment of the child, and the latter focusing on whether a parent's failure to communicate with a child lacks "justifiable" cause.

While both proceedings produce the same result, the involuntary termination of parental rights, differences in both the interests affected and in the likelihood of a wrongful termination necessitate distinct inquiries. Specifically, a potential for abuse of the current objective standard in the adoption context is not present in "child in need of aid" proceedings. To eliminate the possibility that a natural parent may unjustly lose a child through non-consensual adoption, Alaska should

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^{1.} Alaska Stat. § 47.10.010 (Supp. 1989); Alaska Stat. § 47.10.080 (1984).

^{2.} Alaska Stat. §§ 25.23.040-050, 25.23.180 (Supp. 1989).

replace the objective standard in its adoption inquiry with a subjective standard, while maintaining the current practice of separately considering whether an adoption would be in the best interests of the child.

II. THE CONSTITUTIONAL ISSUES INVOLVED IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

The psychological bonds cultivated within the family are the primary means through which children learn and develop into mature, capable adults. The United States Supreme Court has stated that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."³

To safeguard the family structure, federal and state law have developed certain parental rights which give parents priority in controlling their child's development. The United States Supreme Court has described the right to raise one's children as "essential," a "basic civil right of man" and a right "far more precious . . . than property rights." These characterizations have recently led the Court to conclude that a parent's desire for and right to the companionship, care, custody and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection." The parent-child relationship is thus "constitutionally protected," and the cumulative result of the Court's decisions is that "[t]he primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."

The Alaska courts have similarly acknowledged the deference to be accorded the family, and the related right of parents to raise their children. The Alaska Supreme Court has recognized parents' "fundamental natural right . . . to nurture and direct the destiny of their

^{3.} Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977).

^{4.} Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

^{5.} Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

^{6.} May v. Anderson, 345 U.S. 528, 533 (1953).

^{7.} Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)). See also Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

^{8.} Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

^{9.} Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

children,"¹⁰ and has stated that "[i]t would be repugnant to the natural law to deprive a parent of the right to rear his children, except for the most grave reasons."¹¹

The right of parents to raise their children is not absolute, however. With parental rights come parental responsibilities, and when a parent fails to fulfill these responsibilities, the rights and interests of both the child and the state must be considered. In the 1973 case, D.M. v. State, the Alaska Supreme Court addressed the rights and interests of the child: "We acknowledge that parental rights are of serious and substantial import. We note, however, that in recent years the courts have become increasingly aware of the rights of children." In 1976, the court specified the competing interests of parent and child: "The parents' constitutional right to the care and custody of their children must be balanced against the rights of their children to an adequate home and education." 14

A parent's disregard of parental responsibilities also gives rise to certain rights of the state. Just as the parent has an interest in the growth and development of a child, so too does the state. "The State . . . has an independent interest in the well-being of the youth. . . . [T]he State has an interest 'to protect the welfare of the children,' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.' "15 If the state perceives its interest to be in jeopardy, it may intervene to ensure the child's continued development.

The state's right to disregard traditional deference to family integrity, and to intervene in familial affairs, is rooted in the long-established doctrine of parens patriae. ¹⁶ In Prince v. Massachusetts, ¹⁷ the United States Supreme Court applied the parens patriae doctrine when

^{10.} Turner v. Pannick, 540 P.2d 1051, 1055 (1975) (Dimond, J., concurring).

^{11.} Id. See also In re L.A.M., 547 P.2d 827, 832-33 n.13 (Alaska 1976) ("A careful review of the literature, including case law, treatise and law review, indicates that the following have been listed as 'parental rights' protected to varying degrees by the Constitution: (1) Physical possession of the child which, in the case of a custodial parent includes the day-to-day care and companionship of the child. . . .").

^{12.} Parham v. J.R., 442 U.S. 584, 603 (1979).

^{13.} D.M. v. State, 515 P.2d 1234, 1237 (Alaska 1973) (footnote omitted).

^{14.} In re S.D., Jr., 549 P.2d 1190, 1201 (Alaska 1976).

^{15.} Ginsberg v. New York, 390 U.S. 629, 640-41 (1968) (quoting Prince v. Massachusetts, 321 U.S. 158, 165 (1944)).

^{16.} Parens patriae (literally, "parent of the country") originated from the English common law wherein the King was empowered to act as guardian for, inter alia, infants. The doctrine generally refers to the role of the state as guardian of the legally disabled. Black's Law Dictionary 1003 (5th ed. 1979). For history and analysis of the parens patriae doctrine, see Rendleman, Parens Patriae: From Chancery to the Juvenile Court, 23 S.C.L. Rev. 205 (1971).

^{17. 321} U.S. 158 (1944).

it held that a guardian could not permit a minor under her care to distribute pamphlets in violation of child labor laws, even though the guardian believed such distribution was a religious duty.¹⁸ The Court concluded that although the guardian was free to make a martyr of herself, she did not have the right to make a martyr of her minor child.¹⁹

One of the most severe applications of the parens patriae doctrine involves the involuntary termination of parental rights. Involuntary termination represents a drastic alternative. Not only does it generally terminate a parent's child custody rights, but it also severs a parent's visitation and communication rights as well.²⁰ In terminating parental rights, a court makes a value judgment that, when irreconcilable, family autonomy and parental freedom should give way to the state's interest in protecting its children.

Consonant with its desire to preserve family integrity, the United States Supreme Court has acknowledged the harshness of terminating parental rights: "When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. 'If the State prevails, it will have worked a unique kind of deprivation. . . .' "21 In an attempt to balance the competing interests of the natural parents and the state at parental rights termination proceedings, the United States Supreme Court held in Santosky v. Kramer that due process requires that the state prove its allegations by "clear and convincing" evidence.²²

Alaska had imposed the same burden of proof on the state even before the United States Supreme Court's decision in Santosky. In 1979, the Alaska Supreme Court held that "clear and convincing" was the proper evidentiary standard for termination and non-consensual adoption proceedings.²³ Moreover, in reaching its decision in Santosky, the Supreme Court cited Alaska's termination statute,²⁴

^{18.} Id. at 170.

^{19.} Id.

^{20.} Santosky v. Kramer, 455 U.S. 745, 749 (1982).

^{21.} Id. at 759 (quoting Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981)). Indeed, the Washington Court of Appeals has referred to termination as an infringement on rights "more precious to many people than the right to life itself." In re Gibson, 4 Wash. App. 372, 379, 483 P.2d 131, 135 (Ct. App. 1971). In Davis v. Page, 618 F.2d 374, 379 (5th Cir. 1980), aff'd in part, vacated and rev'd in part on reh'g, 640 F.2d 599 (5th Cir. 1981) (en banc), the court in a similar vein stated that "it is not unlikely that many parents would choose to serve a prison sentence rather than to lose the companionship and custody of their children."

^{22.} Santosky, 455 U.S. at 769.

^{23.} In re C.L.T., 597 P.2d 518, 525-26 (Alaska 1979).

^{24.} Alaska Stat. § 47.10.080(c)(3) (1980).

along with the termination statutes of fourteen other states that contained the "clear and convincing" standard.²⁵ Since *Santosky*, both the Alaska Supreme Court²⁶ and the Alaska Legislature²⁷ have reaffirmed the "clear and convincing" standard.

III. MECHANISMS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

Drastic consequences accompany the termination of parental rights. Accordingly, Alaska has clearly limited the means by which parental rights may be terminated. Initially, termination of parental rights may not be based solely on public policy grounds. "Involuntary termination of parental rights may not be accomplished absent some statutorily mandated procedure." 28

Alaska has two statutory mechanisms for the involuntary termination of parental rights: "child in need of aid" proceedings and adoption proceedings. Sections IV and V of this note, respectively, will analyze the issues involved in each of these proceedings.

IV. TERMINATION OF PARENTAL RIGHTS THROUGH "CHILD IN NEED OF AID" PROCEEDINGS

A. The Statutory Framework

The statutory framework for terminating parental rights for the parents of "children in need of aid" provides that the court may find a child to be a "child in need of aid" as a result of the following:

- (A) the child being habitually absent from home or refusing to accept available care, or having no parent, guardian, custodian, or relative caring or willing to provide care, including physical abandonment by
 - (i) both parents
 - (ii) the surviving parent, or
 - (iii) one parent if the other parent's rights and responsibilities have been terminated under [Alaska Stat. §] 25.23.180(c) or [Alaska Stat. §] 47.10.080 or voluntarily relinquished.²⁹

^{25. 455} U.S. at 749 n.3.

^{26.} In re J.R.B., 715 P.2d 1170, 1172 (Alaska 1986); K.T.E. v. State, 689 P.2d 472, 476 (Alaska 1984).

^{27.} ALASKA STAT. § 47.10.080(c)(3) (1984). See infra text accompanying note 30.

^{28.} S.J. v. L.T., 727 P.2d 789, 795 (Alaska 1986) (footnote omitted) (trial court's termination of parental rights solely on public policy grounds was held to be reversible error).

^{29.} ALASKA STAT. § 47.10.010(a)(2)(A) (Supp. 1989).

If the court finds the child to be a "child in need of aid," the court shall:

(3) by order, upon a showing in the adjudication by clear and convincing evidence that there is a child in need of aid under [Alaska Stat. §]47.10.010(a)(2) as a result of parental conduct and upon a showing in the disposition by clear and convincing evidence that the parental conduct is likely to continue to exist if there is no termination of parental rights, terminate parental rights and responsibilities of one or both parents and commit the child to the department or to a legally appointed guardian of the person of the child. . . . ³⁰

B. Abandonment: The Objective Standard and the Role of the Child's "Best Interests"

Physical abandonment by one or both parents is the most common ground for finding a child to be a "child in need of aid." In Alaska, "[t]he test for abandonment has two prongs: (1) has the parent's conduct evidenced a disregard for his or her parental obligations, and (2) has that disregard led to the destruction of the parent-child relationship."³¹

The first prong of the physical abandonment inquiry focuses on parental conduct. Alaska "focuses on the objective conduct of the parents in discharging their parental responsibility. Thus, abandonment is not determined by the parent's subjective intent. . ."³² Alaska's objective standard imposes on the parent "the duty to make reasonable efforts to locate and communicate with his or her child. Token efforts by a parent to communicate with his or her child are insufficient to satisfy this parental duty."³³

In justifying its repudiation of a subjective test for physical abandonment, the Alaska Supreme Court has stated that "[t]he subjective intent standard often focuses too much attention on the parent's wishful thoughts and hopes for the child and too little on the more important element of how well the parents have discharged their parental responsibility."³⁴ Thus, a finding of non-abandonment based solely on subjective intent would be reversible error.³⁵

The Alaska Supreme Court's justification for using an objective standard of abandonment appears to be sound. In abandonment proceedings, both litigants, the parent and the state, have an interest in salvaging the parent-child relationship if at all possible. The parent's

^{30.} Alaska Stat. § 47.10.080(c)(3) (1984).

^{31.} Nada A. v. State, 660 P.2d 436, 439 (Alaska 1983).

^{32.} E.J.S. v. Department of Health and Social Servs., 754 P.2d 749, 751 (Alaska 1988).

^{33.} Id.

^{34.} In re D.M., 515 P.2d 1234, 1237 (Alaska 1973).

^{35.} In re V.M.C., 528 P.2d 788, 793 (Alaska 1974).

interest is manifested by the challenge to the abandonment charge itself. The state's interest stems from the fact that if the parent-child relationship cannot be salvaged, the child will become a ward of the state. The focus on parental conduct allows a court to consider discernible facts, not amorphous intentions. Through a parent's prior conduct, a court may assess the potential for reconstructing a damaged parent-child relationship. Most often, parents control their own actions, and the parent is solely to blame if those actions amount to a breach of parental duties and responsibilities.

There are instances, however, where parents cannot control their relations with the child because the child's whereabouts are unknown. Holding parents to the objective standard in these instances may terminate the rights of parents who desired communication with the child, but who honestly believed such communication was impossible. All cases in this area are necessarily fact specific, and in many cases the relevant facts are not beyond dispute. In E.J.S. v. Department of Health and Social Services, 36 for example, the Alaska Supreme Court affirmed the trial court's finding that a father had physically abandoned his daughter. The abandonment was sufficient to justify termination of his parental rights. The father claimed that he had tried to find his daughter by, for example, contacting his daughter's friends, maternal grandparents and maternal great-grandparents. claims had been disputed at trial.³⁷ The court found that the father's efforts did not constitute "reasonable efforts to locate and communicate with his daughter."38

Alaska has mitigated the potential harshness of the objective abandonment standard by also considering the "best interests" of the child. By considering the best interests of the child, a court may avoid injustice in situations where a reasonableness inquiry might result in the wrongful termination of parental rights. As noted, cases in this area are fact specific, and the crucial facts are often disputed. In close cases, the courts can use the "best interests" factor to promote the goal of family preservation. Parents whose conduct fails to satisfy the objective abandonment standard may nonetheless have a valid reason for their conduct, such as a perceived inability to communicate with the child. In addition, the parent may have shown the kind of love and affection which would make salvaging the family relationship in the child's best interests.

As for the particular role of the child's best interests in the abandonment analysis, Alaska statutory law provides that "in making its dispositional order under [Alaska Statutes section] 47.10.080(c) the

^{36. 745} P.2d 749, 751 (Alaska 1988).

^{37.} Id.

^{38.} Id.

court shall consider the best interests of the child..."³⁹ The Alaska courts have interpreted this statute narrowly, holding that "while the best interests of the child become relevant at some point, there must first be a showing of parental conduct sufficient to justify termination."⁴⁰ Thus, consideration of the child's best interests in a termination proceeding is proper only after the first prong of the abandonment inquiry has been satisfied.⁴¹

C. Procedure Following the Abandonment Determination

If both prongs of the abandonment inquiry are not satisfied, the child must be returned to the custody of his or her natural parents, guardian or custodian; and the termination proceedings must be dismissed.⁴² If, however, the child is found to have been physically abandoned so as to qualify as a "child in need of aid," an additional finding is required before parental rights may be terminated. As noted, Alaska Statutes section 47.10.080(c)(3) requires the state to show, by "clear and convincing" evidence, both that the child is in need of aid as a result of parental conduct and that said parental conduct is "likely to continue" absent a termination of parental rights.⁴³ The "likely to continue" inquiry must be conducted independently of the abandonment inquiry; and a trial court's failure to find that the parent's conduct would likely continue absent termination of rights is reversible error.⁴⁴

^{39.} ALASKA STAT. § 47.10.082 (1984).

^{40.} Nada A. v. State, 660 P.2d 436, 439-40 (Alaska 1983). See also Smith v. Organization of Foster Families, 431 U.S. 816, 862-63 (1977) ("If a State were 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 reason that to do so was thought to be in the children's best interests, I should have little doubt that the State would have intruded impermissibly on "the private realm of family life which the state cannot enter." (Stewart, J., concurring) (emphasis added) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)); In re V.M.C., 528 P.2d 788, 793 (Alaska 1974) ("though the best interests of the child are a valid consideration in deciding the question of abandonment, they cannot be the sole determinant. . . .").

^{41.} See In re B.J., 530 P.2d 747, 749 (Alaska 1975) (stating the two prongs of the abandonment inquiry and noting that "[t]he best interests of the child are relevant to the latter question. . . ." (quoting In re A.J.N., 525 P.2d 520, 523 (Alaska 1974)).

^{42.} ALASKA STAT. § 47.10.080(e) (1984).

^{43.} Id. § 47.10.080 (c)(3). See supra text accompanying note 30.

^{44.} E.A. v. State, 623 P.2d 1210, 1213 (Alaska 1981) (lower court's termination of parental rights without a prior finding that the mother's alcohol problem was likely to continue was grounds for reversal and remand).

V. TERMINATION OF PARENTAL RIGHTS THROUGH NON-CONSENSUAL ADOPTION PROCEEDINGS

A. The Common Scenario and the Fundamental Right to Consent

Adoption-based termination proceedings most often involve divorced parents. In the common scenario, the custodial parent remarries and the stepparent seeks to adopt the child over the objections of the natural, non-custodial parent. Alaska has recognized as a "parental right" protected by the United States Constitution "the right to prevent an adoption of the child without the parents' consent."45 In addition, Alaska has recognized a "residual" parental right "that remain[s] after custody is placed in another . . . the right to consent to an adoption and to withhold consent to prevent an adoption. . . "46 Given the rights at stake in an adoption proceeding, "'where an absolute severance of [the parent-child] relationship is sought, the consent provisions are designed to protect the natural rights of a parent to the custody, society, comfort, and services of the child." To protect natural parents against unjust terminations of their rights, the Alaska Supreme Court has held on numerous occasions that the statutory consent provisions must be strictly construed.⁴⁸

B. The Statutory Framework

Unless a statutory exception applies, consent to the relinquishment of a child through adoption must be given by a party empowered to give such consent.⁴⁹ Such parties include, inter alia, natural parents, guardians and custodians.⁵⁰ Alaska Statutes section 25.23.050 lists the exceptions to the general consent requirement. The statute provides:

- (a) Consent to adoption is not required of
 - (1) ... a parent who has abandoned a child for a period of at least six months;
 - (2) a parent of a child in the custody of another, if the parent for a period of at least one year has failed significantly without justifiable cause, including but not limited to indigency,

^{45.} In re L.A.M., 547 P.2d 827, 832-33 n.13 (Alaska 1976).

^{46.} *Id*.

^{47.} Delgado v. Fawcett, 515 P.2d 710, 712 (Alaska 1973) (quoting *In re Parks'* Petition, 267 Minn. 468, 473, 127 N.W.2d 548, 553 (1964)).

^{48.} See, e.g., D.A. v. D.R.L., 727 P.2d 768, 770 (Alaska 1986); S.M.K. v. R.G.G., 702 P.2d 620, 623 (Alaska 1985); R.N.T. v. J.R.G., 666 P.2d 1036, 1040 (Alaska 1983).

^{49.} See Alaska Stat. § 25.23.040(a) (Supp. 1989) ("Unless consent is not required under [Alaska Stat. §] 25.23.050, a petition to adopt a minor may be granted only if written consent to a particular adoption has been executed. . . .").

^{50.} See id.

- (A) to communicate meaningfully with the child, or
- (B) to provide for the care and support of the child as required by law or judicial decree;
- (5) a parent whose parental rights have been terminated by order of the court. . . . ⁵¹

Alaska Statutes section 25.23.180 states that parental rights, including the right to withhold consent to an adoption, may be terminated at or before an adoption proceeding.⁵² The effect of an adoption-based termination is identical to a termination based on abandonment. The result in both cases is the complete severance of the parent-child relationship.

C. Adoptions: The Objective Standard of "Without Justifiable Cause"

Many adoption proceedings are decided under Alaska Statutes section 25.23.050(a)(2), which states that the parental right to consent to an adoption may be relinquished if a parent has failed "significantly without justifiable cause" to "communicate meaningfully" with a child or to pay court-ordered child support.⁵³ Like the emphasis on parental conduct in the physical abandonment test,⁵⁴ the Alaska Legislature has chosen an objective standard on which to predicate the power to consent. According to the Alaska Supreme Court, in the "justifiable cause" inquiry, "[e]vidence of subjective intent may be admitted to show what the 'cause' for the parent's course of action was, but whether the cause was justifiable must turn on the court's determination of what grounds are objectively acceptable." ⁵⁵

Determining what constitutes "justifiable cause" has been problematic. In *In re K.M.M.*, ⁵⁶ a father's ex-wife began living with his best friend, causing the father emotional trauma. The court held that the father's written communication with his children only at Christmas and on their birthdays was justified, and his consent was still required before his children could be adopted. ⁵⁷ In *In re J.J.J.*, ⁵⁸ on the other hand, the court stated that "failure to support or maintain contact with a child should not be excused by the emotional antagonism

^{51.} Alaska Stat. §§ 25.23.050(a)(1)-(2),(5) (Supp. 1989).

^{52.} Id. § 25.23.180(a).

^{53.} Id. § 25.23.050(a)(2).

^{54.} See supra text accompanying notes 32-35.

^{55.} D.L.J. v. W.D.R., 635 P.2d 834, 839 (Alaska 1981).

^{56. 611} P.2d 84 (Alaska 1980).

^{57.} Id. at 38.

^{58. 718} P.2d 948 (Alaska 1986).

or awkwardness that may exist between former spouses."⁵⁹ The only authority cited by the court in J.J.J. was the dissent in K.M.M., which had stated that "[i]n distinguishing between meaningful and non-meaningful communication it is evident that the legislature intended that the mere symbolic observation of birthdays and holidays would not be enough to maintain the rights of parenthood."⁶⁰ Finally, in D.A. v. D.R.L., ⁶¹ the Alaska Supreme Court, citing K.M.M., affirmed a trial court's finding that "the natural father's emotional difficulty in visiting with the new family justified his failure to communicate with the child."⁶² The dissent claimed that the majority had erred in not following the language of J.J.J. ⁶³

The question of "justifiable cause" has also risen with respect to the effect of imprisonment on a parent's failure to communicate with a child. In R.N.T. v. J.R.G., 64 a divided court addressed this issue. Noting that "parental conduct which causes loss of a parent's right to consent to adoption must be wilful,"65 the court held that imprisonment is not necessarily wilful and therefore "[while] imprisonment does not necessarily preclude a parent from communicating with his children, ... [w]here it does . . . the failure to communicate is properly considered non-wilful and thus justifiable cause."66 The dissent in R.N.T. criticized the majority's approach and argued that "imprisonment . . . cannot be used ipso facto to hold as a matter of law that the parent was justified in not communicating with or supporting his or her children during the course of the imprisonment."⁶⁷ The dissent believed that the proper analysis should consider whether the particular constraints imposed on the imprisoned parent justified the parent's lack of communication.68

These two areas, emotional trauma and incarceration, illustrate the difficulty the courts have had in applying an objective standard to adoption proceedings. Indeed, certain concerns not present in abandonment proceedings make the objective standard more troublesome in the adoption context. In abandonment proceedings, the parent is opposed by the state. The state is not emotionally tied to the child and hence is presumptively able to present a detached analysis capable of objective evaluation. Moreover, parents are usually in control of their

^{59.} Id. at 953.

^{60.} Id. (quoting K.M.M., 611 P.2d at 88-89 (Matthews, J., dissenting)).

^{61. 727} P.2d 768 (Alaska 1986).

^{62.} Id. at 770 (citing K.M.M., 611 P.2d at 88).

^{63.} Id. at 771 (Moore, J., dissenting).

^{64. 666} P.2d 1036 (Alaska 1983).

^{65.} Id. at 1038.

^{66.} Id. at 1039.

^{67.} Id. at 1040 (Compton, J., dissenting).

^{68.} Id. at 1041 (Compton, J., dissenting).

own conduct so that only the parents are to blame if their conduct amounts to a breach of parental duties warranting a termination of parental rights. Adoption proceedings, however, often pit parent against parent. Consequently, both parties are emotionally and psychologically tied to the child. The possibility that one parent may be deceived into relinquishing the power of consent appears to be at a premium in adoption proceedings.

The concern with one parent's manipulation of events manifested itself in a recent adoption proceeding, In re B.S.L. 69 In this case. B.S.L.'s natural parents, Irma and Rick, were never married. When B.S.L. was slightly more than one year old, and the family was living in California, Rick left to find work in Alaska, intending to return for Irma and the child. After Rick left, Irma and B.S.L. returned to Colorado to live with Rick's mother, Rebecca. Upon receiving news that her father was terminally ill, Irma left B.S.L. in Rebecca's care and traveled to California to be with her father. Soon after Irma had left. Rebecca reported to the Department of Social Services that B.S.L. had been neglected and abused, allegations that Rebecca later admitted were false. The Department of Social Services obtained legal custody of B.S.L., and Rebecca obtained physical custody. Rick flew to Colorado, picked up B.S.L., and returned to Anchorage. In speaking with Irma upon her return to Colorado, Rick asked her to come to Alaska but told her she would not be allowed to see B.S.L. Irma did not go to Alaska. Irma consulted a legal aid attorney about obtaining custody of B.S.L., but the attorney told her that he could not help her. Later that year, Irma married and moved to Ohio. Following her marriage. Irma spoke with various social workers and attorneys about obtaining custody of B.S.L., but all to no avail. Irma also remained in contact with Rick's grandmother and asked for photographs of B.S.L. Irma did not send any cards or letters to B.S.L., because she "apparently believed that any attempt by her to communicate with or locate [B.S.L.] would be futile."70 Three years later, Rick's sister and her husband, with whom B.S.L. had been living, petitioned for adoption. The lower court found that Irma had failed without justifiable cause to communicate with B.S.L., and granted the petition over Irma's objection.71

The Alaska Supreme Court affirmed on the grounds that Irma had never actually tried to communicate directly with B.S.L.⁷² In reaching its decision, however, the court appears to have abandoned

^{69. 779} P.2d 1222 (Alaska 1989).

^{70.} Id. at 1224.

^{71.} Id.

^{72.} Id. at 1225.

both policy and precedent. As noted by the dissent, the consent statutes should be strictly construed in favor of the natural parent.⁷³ The dissent also argued that "in circumstances where the child is too young to read or communicate over the telephone, [the Alaska Supreme Court has] relaxed the requirement of meaningful communication under the "without justifiable cause" language of [Alaska Statutes section] 25.23.050(a)(2)(A)."⁷⁴

The court reached its decision despite acknowledging both that Rebecca and Rick had purposefully worked to keep Irma from her child, and that Irma believed any attempts to regain custody of B.S.L. would be futile. With regard to the first of these acknowledgments, the court reconciled its holding with Rick's and Rebecca's conduct by claiming that "the issue in this case is not the conduct of Rick and his mother, but the conduct of Irma." Then, more generally, the court added that "[t]he mere fact that a parent is at some point wrongfully denied access to the child is not dispositive of the issue of justification. The court must consider as well the efforts of the parent to overcome the denial."

If the court is to consider a parent's efforts to overcome wrongful denial of custody, however, it should also be willing to consider the perceived likelihood of success of such efforts. Irma had contacted several attorneys and social workers, all of whom gave her no reason to believe that she had a chance of regaining custody of her child. The court summarized Irma's position when it recognized:

Irma apparently believed that any attempt to communicate [with her child,] short of obtaining physical custody of [B.S.L.] would be blocked by [Rick's family]. Accordingly, her efforts were limited to occasional attempts to obtain custody. Her indigency and her lack of legal sophistication may have contributed to the appearance of half-heartedness that characterized these attempts.⁷⁷

Use of an objective standard under these circumstances had the effect of terminating Irma's parental rights for failing to take actions she believed would be useless. In this instance, the court sent a message that deceit such as the type employed by Rebecca, while perhaps not commendable, is equally not condemnable.

Outside the adoption context, an objective inquiry is plausible because of the interests motivating the respective parties. In a "child in need of aid" proceeding, the state has no ulterior motive, and it is in

^{73.} Id. at 1228 (Rabinowitz, J., dissenting).

^{74.} *Id.* (quoting D.A. v. D.R.L., 727 P.2d 768, 770 (Alaska 1986)). *See also* S.M.K. v. R.G.G., 702 P.2d 620, 624 (Alaska 1985); D.L.J. v. W.D.R., 635 P.2d 834, 840 (Alaska 1981).

^{75.} B.S.L., 779 P.2d at 1225.

^{76.} Id. at 1225 n.3.

^{77.} Id. at 1225.

the state's interest, if at all possible, to salvage the family at issue and return the child to the natural parents. In adoption proceedings, as seen in *B.S.L.*, however, the objective inquiry falters. Competing familial interests increase the likelihood of purposeful deceit by litigants ordinarily at cross-purposes. The two termination proceedings have distinct goals: "an adoption proceeding operates to *replace* a parent, while a child-in-need-of-aid proceeding operates to *emancipate* a child from an offending parent's legal bonds." These distinct goals, and their effects on the underlying proceedings, justify distinct legal standards as well.

D. Alternative Standards for Adoption Proceedings

1. Focus Exclusively on the "Best Interests" of the Child. Alaska considers the question of a child's best interests to be separate from the question of whether parental consent is necessary.

Alaska is not among those states whose approach to allowing stepparent adoptions without the noncustodial parent's consent emphasizes the best interest of the child. Indeed, this court has repeatedly ruled that a child's best interests is not relevant to a determination of whether a noncustodial natural parent's consent is unnecessary.⁷⁹

Statutory law describes the proper role for evaluation of a child's best interests.⁸⁰ The current rule is that a natural parent's rights may be terminated in an adoption proceeding if the court determines "(1) parental consent to adoption is not required; and (2) adoption is in the best interests of the child."⁸¹

A possible alternative would be to eliminate the first prong of the inquiry and base adoptions solely on the best interests of the child. Were Alaska to choose this alternative, it would join, inter alia, Arizona,⁸² the District of Columbia,⁸³ Maryland,⁸⁴ Massachusetts⁸⁵ and

^{78.} Id. at 1226 (emphasis in original).

^{79.} In re J.J.J., 718 P.2d 948, 952 n.12 (Alaska 1986).

^{80.} See Alaska Stat. § 25.23.180(c)(2) (Supp. 1989) ("The relationship of parent and child may be terminated by a court order issued in connection with a proceeding under this chapter...(2) on the grounds that a parent who does not have custody is unreasonably withholding consent to adoption, contrary to the best interest of the minor child..."); Alaska Stat. § 25.23.120(c) (1983) ("If at the conclusion of the hearing the court determines that the required consents have been obtained or excused and that the adoption is in the best interest of the person to be adopted, it may issue a final decree of adoption.").

^{81.} B.S.L., 779 P.2d at 1226 (citing ALASKA STAT. §§ 25.23.050, 25.23.120(c) and 25.23.130(a)).

^{82.} ARIZ. REV. STAT. ANN. § 8-106(c) (1989) ("The court may waive the requirement of consent . . . when after a hearing . . . the court determines that the interests of the child will be promoted thereby. . . .").

^{83.} D.C. CODE ANN. § 16-304(e) (1981) ("The court may grant a petition for adoption without any . . . consents . . . when the court finds . . . that the consent or consents are withheld contrary to the best interests of the child.").

Virginia⁸⁶ as "pure" best interest jurisdictions.⁸⁷ This standard would be advantageous in that any deceit of the type found in *B.S.L.* would not be directly relevant to the final resolution of the proceedings. The "pure" best interest standard presents a serious disadvantage, however. Were one party's deceit to go unnoticed for any period of time (for example, where one parent relocates, leaving the child in the care of other family members, intending to return for the child at a later date), the best interests of the child would appear to dictate that the child not be later returned to the natural parent because of the risk of long-term damage that could result from the severance of cultivated psychological bonds. This disadvantage would be especially acute in situations where the child had been left with family members at a very young age. Cases such as these would leave courts with the nearly impossible task of reconciling the best interests of the child with the constitutionally mandated goal of preserving family integrity.

2. A Subjective Inquiry Combined with Continued Consideration of the Child's Best Interests. A more workable solution would be to alter, rather than eliminate, the first prong of the adoption inquiry. A subjective standard should replace the objective, "without justifiable cause," standard now in use. An example of such a subjective standard might be that a parent's consent would not be required for the adoption of his or her child if said parent failed to communicate, despite knowing the whereabouts of the minor child. A subjective standard would eliminate the possibility of duplicating the result reached in B.S.L., and would, relatedly, render moot any attempted deceit by one of the litigants.

By retaining the best interests aspect of the inquiry, moreover, courts could maintain a degree of objective analysis. Under the best interests prong of the inquiry, for example, a court could consider whether it would be in the best interests of a child to be returned to the

^{84.} MD. FAMILY LAW CODE ANN. § 5-312(b)(1) (Supp. 1989) ("Without the consent of the child's natural parent, a court may grant a decree of adoption to . . . [an] individual who has exercised physical care, custody, or control of a child for at least 6 months, if by clear and convincing evidence the court finds that: (1) it is in the best interest of the child to terminate the natural parent's rights as to the child. . . .").

^{85.} MASS. ANN. LAWS, ch. 210, § 3(a)(ii) (Law. Co-op. 1989) (The consent requirement is eliminated when a petition for adoption is presented if "(ii) the court hearing the petition finds that the allowance of the petition is in the best interests of the child. . . .").

^{86.} VA. CODE ANN. § 63.1-225(D) (Supp. 1989) ("If . . . the court finds that the valid consent of any person or agency whose consent is hereinabove required is withheld contrary to the best interests of the child . . . the court may grant the petition without such consent. . . .").

^{87.} See generally Comment, A Survey of State Law Authorizing Stepparent Adoptions Without the Noncustodial Parent's Consent, 15 AKRON L. REV. 567 (1982).

custody of a parent whose efforts to communicate were not as extensive as they might have been.

By having both subjective and objective aspects of the adoption inquiry, the interests of fairness are more ably served. Courts could continue to focus, as the court did in B.S.L., on the conduct of the non-custodial parent and the steps taken by that parent to overcome obstacles to custody. At the same time, however, courts could also consider the reasons for any actions, or lack thereof, by the non-custodial parent. Compared to Alaska's current standard, the proposed standard better accommodates the interests of both the child and the parent. As such, the proposed standard better promotes the family integrity goal which the United States Supreme Court has so forcefully endorsed.

VI. CONCLUSION

American society views the family as an entity uniquely qualified to foster in children the values and ideals necessary to their becoming capable citizens. To ensure that the family is not carelessly or inadvertently dissolved, the law has developed certain safeguards. Family integrity is accorded undisputed deference, and parents are deemed to have basic rights intended to preserve the family unit.

Unfortunately, parents sometimes disregard the responsibilities which accompany their basic rights. When such disregard occurs, it is within the state's power, through *parens patriae*, to pierce the sanctity of the family structure and, when no alternatives remain, to sever the parent-child relationship through termination of the parent's rights.

Currently, both statutory mechanism for terminating parental rights employ objective standards of proof. The "child in need of aid" procedure focuses on prior parental conduct in determining a parent's abandonment of a child, while the adoption proceeding focuses on whether the parent's failure to communicate with a child lacks "justifiable" cause.

The two parental rights termination proceedings produce the same result. However, the circumstances attendant to a "child in need of aid" proceeding are vastly different from those attendant to an adoption proceeding. The litigants in a "child in need of aid" proceeding are the parents and the state. The state's detached status and its desire to salvage, if possible, the family unit, combined with the parent's control over communication with his or her own child, makes an objective analysis feasible. In adoption proceedings, on the other hand, natural parent is often pitted against natural parent for the custody of their mutual child. The adoption proceeding presents a potential for abuse of the current standards not evident in the abandonment context. Thus, a new standard is needed for adoptions to ensure that

the drastic effect of terminating a parent's rights are not fostered by deceit and wrongdoing. The best way to ensure fairness in the adoption context would be to undertake a subjective inquiry regarding the natural parent's communication efforts, counterbalanced by a consideration of the child's best interests as an additional factor. By employing both subjective and objective inquiries, courts would be better able to harmonize a child's best interests with the well-established goal of family preservation.

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