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NOTES

DISPENSING WITH PARENTAL CONSENT IN INDIANA ADOPTION PROCEEDINGS

During the January-June period of 1964, 14,733 children were under the care or supervision of the Indiana Department of Public Welfare. Some of these children had been placed temporarily for any number of reasons: because of an emergency such as sickness or death in the family, because of desertion by one of the parents, or because the parent was finding some means of support. Others had been placed permanently because their parents simply were unwilling or unable to care for them. However, it is lamentable how many temporary placements become permanent. In many instances, after placing a child in an agency the parent visits him for a while, gradually loses interest, and eventually abandons him completely. For many of the child’s most formative years he is cared for by an agency or in a succession of foster homes, never knows his natural parents, and lacks the essentials which make for a wholesome family life. Even though there are eligible couples eager to adopt them, a substantial number of these children who are otherwise available for adoption are deprived of a chance of finding a new home solely because their natural parents, although long since having defaulted in all parental responsibilities, are unwilling to consent to an adoption. Because of this, each of these children must carry with him the adult-size burden of knowing that his parents are alive and know where he is but do not want

1. DEPT OF PUBLIC WELFARE, STATE OF INDIANA, CHILD WELFARE SERVICES TABLE 2 (1964). Of those 14,733 children, 1,949 were placed in institutions, 4,112 were placed in boarding homes, 354 were placed in free homes, 1,829 were placed in adoptive homes (adoptions that had not yet been consummated because of the six to twelve months trial period), and 15 in work or wage homes. Also, 4,823 children were placed in their own homes, 4,520 on a free basis and 303 on a pay basis. The number of children placed with relatives is also sizeable; 1,022 were placed on a free basis and 426 on a pay basis. It is important to note that some of these children would be non-adoptable regardless of parental consent because of infirmities.

2. Comment, 59 YALE L.J. 715, 717-18 (1950); Interview with Director, Children’s Bureau, Department of Public Welfare of the State of Indiana, in Indianapolis, October 1964.

3. Interview with Director, Children’s Bureau, Department of Public Welfare of the State of Indiana, in Indianapolis, October 1964.

4. Ibid.

5. Ibid. Cases are not uncommon where children have been under foster care for ten to fifteen years.

6. Ibid. It is important to point out that many of these children otherwise available for adoption would not be adopted even after being freed for adoption because they are members of minority groups in which the rate of adoption is significantly low.
him. Because their parents cannot care for them or do not want them, these unadoptable children are for practical purposes orphans just as surely as are those children whose parents are dead. A negligible number of these children have perhaps been lucky in that their parents have given them up so they can be adopted. The others are not so fortunate, for while their parents have shrugged off all responsibility for the child, they still fail to make the final move to free their children so that a real and permanent home can be found for them.

The Welfare and Health Council of New York City made a study of 4,021 children in fourteen foster-care agencies, twenty-eight percent of the total number of children in the care of all the voluntary child-care agencies in New York City. It was estimated that adoption would be a sound plan for 773 of the children, almost twenty percent. Of these 773 children, 632—eighty percent—were considered legally unavailable for adoption, and the primary reason for unavailability was the difficulty of obtaining parental consent. Similar statistics are not available for Indiana, but there is no reason to believe that the conclusions reached would be different in Indiana.

The basic rule in cases of adoption without the consent of the parents is that the rights of the parent must prevail unless he is clearly shown to have foregone all parental responsibilities toward the care and welfare of his child. The person seeking to adopt the child has the burden of proving that the living parents of the child have violated their natural and legal obligations to the child in such a manner that they come within the terms of the Indiana statute authorizing waiver of consent of the natural parents. If what the parents have done or have failed to do is not named in the statute as grounds for dispensing with consent, then the child simply cannot be adopted without the parents' consent.

Consequently, there is a need for a workable means to remove the necessity, under suitable circumstances, for obtaining parental consent as a prerequisite to adoption. Finding such means is not an easy task, however, for proceedings terminating parental rights involve several interests which must be recognized and balanced if a fair result is to be reached.

8. Id. at 6.
9. Id. at 10-11.
11. In re Adoption of Bryant, 134 Ind. App. 480, 189 N.E.2d 573 (1963). Consequently there is a legal presumption that the parent is fit and that his home is a good one, and the burden of proof is upon the contender to show that the parent is unfit.
I. The Nature of the Rights Involved

When the "rights" in a child are at issue the interests of three parties necessarily are involved—the parent, the child, and the state—and each interest must be properly balanced against the others to effectuate the most desirable result. As a general rule the parents have the right to the control and custody of their children, a right which has been recognized as a constitutionally protected right by the Supreme Court of the United States. The liberty guaranteed by the fourteenth amendment to the Constitution includes not only freedom from bodily restraint but also the right to marry, to establish a home, to bring up children, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The right, however, of parents in their child is not an absolute, paramount proprietary right but is in the nature of a trust imposed on them by the state and carries the reciprocal obligation to maintain, care for, and protect the child. The law secures the parents in their right only so long as they shall discharge these correlative obligations. If the parents have failed to discharge their obligations toward their child, the courts may temporarily or permanently, wholly or partially, terminate the parents' rights in him under the long standing equitable power of parens patriae. The state's obligation to protect children in need of care consequently is derivative from the child's right to such protection and may be exercised when the parents

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12. See, e.g., Duckworth v. Duckworth, 203 Ind. 276, 281, 198 N.E. 773, 774 (1932) ("'Of the many ties that bind humanity, that which unites the parent and child is the earliest and most hallowed . . . and in all civilized countries it is regarded as sacred.' . . . Therefore, 'parents have the natural right to the custody of their children,' and 'where one parent is dead the surviving parent, if fit, has the right to the custody.' "); Dailey v. Dailey, 128 Ind. App. 588, 596, 149 N.E.2d 304, 308 (1958) ("Under the decisions and opinions of the courts of Indiana, ordinarily a parent who is of good character and reasonably able to provide for his child is entitled to its custody as against others.");

13. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1924) ("The child is not the mere creature of State. Those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for adult obligations"); Meyer v. Nebraska, 262 U.S. 390 (1923). See also Atkinson v. Usrey, 224 Ind. 155, 146 N.E.2d 489 (1946) (holding that any procedure which fails to extend fundamental and established rights of the parent fails of due process).


15. See, e.g., Gilchrist v. Gilchrist, 225 Ind. 367, 372, 75 N.E.2d 417, 419 (1947) ("The rights of parents, however, are not absolute. They must yield to the welfare of the child."); Luellen v. Younger, 194 Ind. 411, 417, 143 N.E. 163, 164 (1924) ("... the common law right to the custody and control of minor children is no longer unlimited or inalienable, and continues only so long as such custody and control are properly exercised.");

have not fulfilled their obligations. Therefore, since they are not absolute, the constitutionally protected rights of a parent in his child are subject to the power of the state and may be restricted and regulated by appropriate legislative or judicial action.  

In balancing the interests the judiciary enjoy a great amount of discretion, and many of their rulings have been arbitrarily based on presumptions and burdens of proof. In the past these presumptions and burdens of proof have been framed in favor of the natural parent in the adjudication of adoption cases. However, there has been a modern revolution in thinking about the rights of children. From court decisions and writing on adoption has emerged a new level of concern over the rights of the parties involved. This concern has culminated in the belief among some courts and writers that the child himself has a right to some minimum level of care and opportunity apart from the interest of the state in his future and in contrast to an earlier near total concern with the rights of the parent in him. In "Courts no longer make the natural right of parents with respect to children the chief basis of their decisions. The individual interest of parents which used to be the one thing regarded has come to be almost the last thing regarded as compared with the interest of the child and the interest of society."  

In Indiana, however it seems that this attitude has not yet found full expression. In fact, at present, the balance of interests in Indiana, as reflected in the statutes and the cases interpreting them, seems inequitable. The weight of justice often appears to favor the natural parents in opposition to the rights and best interests of the child.  

II. THE PRESENT LAW  
A. The Indiana Dependency and Neglect Proceedings  
Parental rights may be temporarily and perhaps permanently, wholly, or partially terminated in dependency and neglect proceedings under the Indiana Juvenile Court Act. It is in these proceedings that the interests

17. State v. Bailey, supra note 16, at 329, 61 N.E. at 731: "The natural rights of a parent to the custody and control of a child are subordinate to the power of the state and may be restricted and regulated by municipal laws."  
18. "We have in this country some vague idea of a level of care and opportunity for children that should be the minimum, and this is translated into the law with varying degrees of definiteness." Baker, Uphold Rights of Parent and Child, The Child, Aug. 1948. p. 29; Simpson, The Unfit Parent, 39 U. Det. L.J. 347 (1962).  
19. POUND, SPIRIT OF THE COMMON LAW, 189 (1921). However, it is important to note this merely is descriptive of the current trend in the law today and not at all descriptive of the situation in Indiana.  
20. IND. ANN. STAT. §§ 9-3201 to -3225 (Burns 1956).  
As parens patriae the state has assumed the power to take abandoned and neglected children from their parents for the welfare of all infants. Johnson v. White Circuit Court, 255 Ind. 602, 77 N.E.2d 298 (1947). Under the ancient common law, the king, as
of the child receive greatest recognition. It is well-established as a general rule that the welfare and best interests of the child are the controlling elements in the determination of all disputes as to dependency and neglect, and the court will make such order for the child’s disposition as will better his welfare without reference to the wishes of the parties or parental rights.  

While the legal rights of the parents are entitled to consideration in dependency and neglect proceedings, such rights are secondary and subordinate to the child’s present and future welfare. However, it is important to note that in such proceedings the parents’ legal rights should not be lost sight of as an influential factor; and the parents should not forfeit these rights unless their conduct or circumstances generally render it essential to the safety and welfare of the child in some important respect, physically, intellectually, or morally.

In the Juvenile Court Act the legislature has defined who dependent or neglected children are, and the courts are directed to assume responsi-
obility for dependent children (that is, those who have been abandoned and are without adequate means of support) through public welfare agencies and foster homes. Similarly, when the parents fail to perform legally recognized duties owed by them to their children, the court will declare the infant to be a neglected child and remove him from the harmful environment created by them. The cases decided under the Juvenile Court Act suggest that dependency and neglect are not necessarily based on the conduct of the parent but on the circumstances of the child. Consequently, a child may be dependent or neglected when the care that his parents provide or secure for him is so inadequate or detrimental that he would be better off in an institution or foster home or under the supervision of a public agency; but even though a child is deserted by his parents he is not dependent or neglected within the meaning of the statute if someone is giving him parental-type care. In dependency and neglect proceedings the parents' rights are usually only temporarily terminated; and provision usually is made to enable the parents to regain their rights on a showing of changed conditions. Under the Juvenile Court Act the first hearing may result in either a "temporary" or "permanent" termination of the parents' rights, but either result may be the same since the parent may re-open the case to regain the child after either a "temporary"

5) Is in an environment dangerous to life, limb or injurious to the health or morals of himself or others.

However, such a child receiving care from an authorized agency need not necessarily come to the attention of the court.

See also Orr v. State, 70 Ind. App. 242, 251, 123 N.E. 470, 473 (1919): "It is not the province of the courts to determine generally what conditions or exigencies will warrant the state in seizing the children of its citizens and making them wards of the state, such being a legislative function, which cannot be delegated to the courts."

25. Bradburn v. Bradburn, 209 Ind. 61, 197 N.E. 905 (1935); Bullock v. Robertson, 160 Ind. 521, 522, 65 N.E. 5 (1902) ("It is reasonable and just that the courts should have this power for the benefit of infants. Their custody should not depend upon the accident of possession. The real question is to whom should they be entrusted for their own good and that of society."); IND. ANN STAT. § 9-3207 (Burns 1956).


27. It has been held that a child who was a ward of the juvenile court and was receiving county aid was a "dependent child." Dumas v. Deckard, 105 Ind. App. 674, 17 N.E.2d 481 (1938). The courts also have held that a child lacked parental care and guardianship and was neglected where she had been left in a home with friends, was visited by the father while intoxicated, and had at various times been left where liquor was consumed, Watson v. Department of Pub. Welfare, 130 Ind. App. 659, 165 N.E.2d 770 (1960); and a child has been held to be neglected within the meaning of the statute where it appeared that the child's mother practically made her house a brothel, Nunn v. State, 55 Ind. App. 37, 103 N.E. 439 (1913). However, a child who was abandoned by his parents and who was taken by grandparents into their home and treated with great affection as a member of the family was held not to be a "dependent" or "neglected" child within the meaning of the statutory definitions. Orr v. State, 70 Ind. App. 242, 123 N.E. 470 (1919).

28. IND. ANN. STAT. § 9-3215 (Burns 1956) provides for the placing of a child who has been found dependent or neglected in an institution, foster home, or other agency approved home.
or "permanent" termination. Even so, the courts are very reluctant to terminate permanently in dependency or neglect proceedings, and in the rare cases where permanent termination is decreed, the court may state that although a decree of permanent termination has been entered, the parents may still be able to regain their rights.

It is debatable, however, whether an irrevocable "permanent" termination is within the intended scope of the Juvenile Court Act. It appears that juvenile court legislation is intended to afford a means by which a child may receive the guidance and control that should have been provided by his parents. Thus many feel that the primary purposes of the Juvenile Court Act are met by temporary care, looking toward an improvement in parental circumstances and that an irrevocable "permanent" termination of parental rights is not within the spirit or letter of the act. It is clear that the act itself does not speak of "permanent" termination.

29. IND. ANN. STAT. §§ 9-3201 to -3225 (Burns 1956).
30. Hogg v. Peterson, 245 Ind. --, 198 N.E.2d 767 (1964). Judges seem reluctant to deprive permanently except in unusual circumstances, for they feel the parent may be able to produce the right type of home for a child, an event which would warrant his return to the home.
31. IND. ANN. STAT. § 9-3201 (Burns 1956): The purpose of this act is to secure for each child within its provisions such care, guidance and control, preferably in his own home, as will serve the child's welfare and best interests of the state; and when such child is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents.

The principle is hereby recognized that children under the jurisdiction of the court are subject to the discipline and entitled to the protection of the state, which may intervene to safeguard them from neglect or injury and to enforce the legal obligations due to them and from them.

It appears that part of the basis of the early juvenile court law was the Elizabethan Poor Law, under 43 Elizabeth, ch. 2. The statute made minimum provisions for the care of children, it prescribed no standards, and it explicitly placed the decision of apprenticing children out within the administrator's unconfined discretion. The statute is silent about parental rights, and in fact not until the early 1900's did the courts start talking about parental rights. It appears that the special legal provisions were designed not to solve the causes and problems of destitution but to minimize the cost to the public of maintaining the destitute. For an excellent discussion of the early Elizabethan Poor Law and also of the Field Draft Codes of New York, which were the first statutes in America codifying the common law in this area, see Ten Brock, California's Dual System of Family Law, 16 STAN. L. REV. 257 (1964).
32. The sections in controversy are IND. ANN. STAT. §§ 9-3201 to -3225 (Burns 1956). However, it is interesting to note that § 9-2808, applying to the disposition of juvenile dependents and delinquents, makes provision that "all children declared public wards under the provision of this act shall remain public wards until they reach the age of twenty-one (21) years, unless they shall upon a proper showing made be returned to their parents or other legal guardian, or adopted in the manner prescribed by law." (Emphasis added.) However, this still does not tell us whether this section falls under the non-consensual provisions of the Adoption Act. It merely tells us that if the child is adopted, he may no longer remain a public ward. Consequently, we are still faced with the problem of whether or not the Juvenile Court Act operates to terminate parental rights permanently.
Nevertheless, the supreme court in a recent decision held that the Juvenile Court Act may, when coupled with the Adoption Act, operate to sever permanently the rights of parents in their child. In *Hogg v. Peterson*, two children, after notice had been given to their parents, were made “permanent wards of the Stark County department of public welfare” under the Juvenile Court Act following the sentencing of the parents to prison.\(^3\) It was held that notice to and consent of the parents to the subsequent adoption of the children was unnecessary under the provision of the adoption statute which provides that notice and consent are necessary if the parents have been “legally deprived of their parental rights over such child for reasons other than economic.”\(^4\) It appears unquestionably that this is authority for the proposition that the Juvenile Court Act can operate in conjunction with the adoption statute to terminate parental rights permanently.

The early case of *Egoff v. Madison County Board of Children’s Guardians* clarifies the issue.\(^35\) In that case it appeared that in proceedings under the Board of Children’s Guardians Act,\(^36\) to which the parents were parties, custody of the child had been given to the Board of Children’s Guardians “until the further order of the court.”\(^37\) The court held that the parents were not entitled to notice of subsequent adoption proceedings brought by third persons, since they already had been fully divested of the custody and control of the child. In effect the court held that the parents’ rights had been permanently terminated under the wardship proceedings.

The Board of Children’s Guardians Act has since been amended and the powers and duties of such boards have been transferred to the county departments of public welfare.\(^38\) In 1959 the legislature amended the Juvenile Court Act\(^39\) to authorize Departments of Public Welfare to file petitions for wardship in cases of dependent or neglected children. However, even though the county departments of public welfare have assumed the duties and powers of the boards of children’s guardians, they can still

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33. 245 Ind. ———, 198 N.E.2d 767, 768 (1964).
34. IND. ANN. STAT. § 3-120 (Burns 1946).
35. 170 Ind. 238, 84 N.E. 151 (1908).
36. IND. ANN. STAT. § 52-505 (Burns 1964). It appears that this statute also has its roots in the Elizabethan Poor Law. Many other states followed the early law and had enactments much the same as the Board of Children’s Guardians Act in Indiana. See, e.g., CAL. STAT. 1858, ch. CLXXII, § 6, whereby town officers were given authority in the case of any child, “who, or whose parents are, or shall become, chargeable to any such town or city.” Ten Broek, supra note 31, at 963.
38. IND. ANN. STAT. § 52-1121 (Burns 1964).
39. IND. ANN. STAT. § 9-3208 (Burns 1956).
act under the statute applicable to the board of children’s guardians,\textsuperscript{40} and as enunciated in \textit{Egoff}, this statute may also operate in conjunction with the adoption act to permanently terminate parental rights.

Consequently, the weight of authority appears to support the proposition that the juvenile court proceeding can be used, in some cases, to terminate permanently the rights of parents in their child. However, it seems that when proper cognizance is taken of the purposes and functions of the Juvenile Court Act, the \textit{Hogg} and \textit{Egoff} results should not be accepted unquestionably but rather with hesitation.\textsuperscript{41}

It seems probable that in a great majority of dependency and neglect proceedings the parents and the court consider a termination of parental rights to be only temporary and even in cases where the termination is denominated “permanent” it is not considered to be irrevocably permanent by either court or parent. As in \textit{Hogg} and \textit{Egoff}, however, either a temporary or permanent termination\textsuperscript{42} can, without notice to the parents, become irrevocable by the subsequent adoption of the child. Thus a proceeding brought to temporarily terminate parental rights for a relatively minor parental act or omission can result in an irrevocable permanent termination and thus result in a gross injustice to parental rights. Furthermore, such proceedings do not practically operate to free children for adoption because the final irrevocable termination of parental rights is not accomplished\textsuperscript{43} until the adoption itself has been granted.

B. The Indiana Adoption Statute

Since dependency proceedings are apparently inadequate to deal with the problem of lack of consent, whatever solution is available in the present law must lie in the adoption statute.\textsuperscript{44} However, in Indiana the

\textsuperscript{40} IND. ANN. STAT. § 52-505, 52-1121 (Burns 1964).

\textsuperscript{41} For an excellent discussion of juvenile court legislation in Indiana see Note, 29 IND. L.J. 475 (1954). It appears that the purposes of the early Elizabethan statutes from which modern juvenile court statutes evolved were to take care of specific needs; and in the later statutes adopted in Indiana (the Juvenile Court Act and the Board of Children’s Guardians Act) these needs were expanded. Consequently, as applied to the Juvenile Court Act’s operation, the court has either misinterpreted history in the \textit{Hogg} decision or has done what the statute required it to do. The question is whether or not this is socially desirable.

\textsuperscript{42} The termination in \textit{Egoff} was temporary (“until the further order of the court”), 170 Ind. at 241, 84 N.E. at 153, and in \textit{Hogg} the termination was permanent (“to be made a permanent ward of the court”) 245 Ind. at —, 198 N.E.2d at 768.

\textsuperscript{43} The parents can have their rights restored at any time by a showing of sufficiently changed conditions. See text accompanying note 30 supra.

\textsuperscript{44} While adoption is a practice of antiquity with its main roots in the Roman law, the right of adoption was unknown to the common law. See, e.g., Humphries \textit{v.} Davis, 100 Ind. 274 (1884). See also Brosman, \textit{The Law of Adoption}, 22 COLUM. L. REV. 332, 335 (1922), for an excellent discussion of the roots of the adoption proceeding. The object of the ancient adoption laws was not necessarily to protect children unwanted by their parents. The Roman law used adoption to bolster the position of the family by
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weight of authority seems to be that the adoption statute should be strictly construed in favor of the rights of the natural parent. The only notable exception to this general rule is found in Emmons v. Dinelli. In Emmons the parent rested her case on the argument that since adoption is statutory and the statute is in derogation of the common law, it must be strictly construed in favor of the rights of the natural parent. The parent-appellant contended that the rule of strict construction is uniformly applied by courts in support of parental rights and that this is especially true in cases in which it is claimed that a parent's misconduct has made his consent unnecessary. However, the supreme court in Emmons rejected these principles in part and stated that "the object and purpose of our statute relating to this matter is manifestly to give to unfortunate children who have been bereft of love and parental care the benefits of a home, and of such parental care, and the law should receive a liberal construction to effect this purpose." At the same time the supreme court in Emmons held that the statute, being in derogation of the common law, should be strictly construed in its procedural requirements, implying that it should receive a liberal construction as to the welfare of the child and affirming the rules laid down in earlier cases.

However, in the more recent case of In re Adoption of Bryant, the appellate court stated that no court could seriously disagree with any of the rules laid down in Emmons but went on to state that "since the relationship between parent and child is a bundle of human rights of such fundamental importance, it has generally been held that adoption statutes being in derogation of the common law should be strictly construed in

adding strength to it. Huard, Law of Adoption: Ancient and Modern, 9 Vand. L. Rev. 743-45 (1956). The first Indiana adoption statute was enacted in 1855, Ind. Acts 1855, ch. 56, §§ 1-6, at 122, and with amendments throughout the years culminated in the present Indiana Adoption Act passed in 1941, Ind. Acts 1941, ch. 146 at 438, and amended in 1943, Ind. Acts 1943, ch. 40, § 5, at 89.

45. See, e.g., In re Adoption of Bryant, 134 Ind. App. 480, 189 N.E.2d 593 (1963); In re Adoption of Chaney, 128 Ind. App. 603, 150 N.E.2d 754 (1958).
46. 235 Ind. 249, 133 N.E.2d 56 (1956).
47. 235 Ind. 249, 258, 133 N.E.2d 56, 60 (1956).
48. Child v. Dodd, 51 Ind. 484 (1885); In re Adoption of Bryant, 134 Ind. App. 480, 189 N.E.2d 593 (1963).
49. Emmons v. Dinelli, 235 Ind. 249, 261, 133 N.E.2d 56, 61 (1956). In two cases decided the year prior to Emmons, the supreme court held that the dominant and ultimate consideration in an adoption case is the best interests of the child. Rhodes v. Shirley, 234 Ind. 587, 129 N.E.2d 60 (1955); Rhodes v. Virgile, 234 Ind. 598, 129 N.E.2d 65 (1955).
favor of a worthy parent and the preservation of such relationship.”

This is not to say that it is presumed that the natural parent is fit and that
his home is a good one but rather that the natural parent-child relationship
should be preserved if at all possible. The court went on to state, however,
that the rules laid down in Emmons “need [to] be tempered by the rule
that neither should the statute be so liberally construed that it would de-
stroy safeguards erected for preservation of family relationships.” The
fact that In re Adoption of Bryant was decided by an appellate court and
Emmons was decided by the supreme court of Indiana is relevant. In re
Adoption of Chaney also was decided subsequent to the Emmons de-
cision; and although it also is an appellate court case, it gives support to
the argument that since adoption proceedings in Indiana are purely
statutory and in derogation of the common law, the statutes must be
construed strictly as to all procedural requirements and “strictly followed
in all essential particulars.” The court, in stating the rule of strict con-
struction, approved of the Emmons decision and apparently interpreted
Emmons as applying the rule of strict construction. The Chaney decision
was approved by the court in In re Adoption of Bryant.

In light of these subsequent decisions by the appellate courts of the
state, the argument that the rule of strict construction in Emmons goes
only to the procedural aspects and not the substantive law does not have
much weight. The supreme court has not yet had opportunity to pass
on the issue raised by these cases, and doubt remains whether the rule of
strict construction, well-imbedded as to procedural requirements, also
applies with respect to substantive standards, despite the contrary language
in Emmons. It also appears that the courts have gone far in protecting
the rights of a parent, even though in these cases and others like them
it was claimed that, owing to his misconduct, the parent’s consent to the
adoption was not required.

In sum, through the adoption cases seems to run a strong judicial
tendency to help bind the parent and child in their natural relationship; in
contrast, the disposition of a minor in a dependency or neglect case is not
controlled by hard and fast rules of law, and the judge is allowed to
exercise a great deal of discretion with regard to what is best for the

51. Ibid.
53. Emmons v. Dinelli, 235 Ind. 249, 133 N.E.2d 56 (1956); In re Adoption of
Bryant, 134 Ind. App. 480, 189 N.E.2d 593 (1963); In re Adoption of Chaney, 128 Ind.
App. 603, 150 N.E.2d 754 (1958); In the Matter of the Adoption of Force, 126 Ind.
minor's present and future welfare and happiness. It appears that the basis for distinguishing between the standards for custody and for adoption is the finality involved in each. It is only natural that, where some basic right is to be terminated irrevocably rather than temporarily, additional safeguards be established to protect the one losing his rights. Thus, in adoption proceedings, except where the case is clear for one side, courts are inclined to favor the natural parents on the basis of a belief that the natural parent-child relationship is inherently better than the adoptive relationship. The validity of this assumption has been questioned as the result of research, and consideration of the typical situation in the usual home from which children being considered for adoption come also casts doubt upon this assumption. Half the children considered for adoption are illegitimate, and frequently the natural parent contesting the adoption is an unwed mother. It has been suggested that the unwed mother is often neurotic, psychopathic, or mentally defective and uses the child as a weapon against her parents and herself. At best she is subject to social and emotional pressures not conducive to supplying a stable home life. Even when the child is not illegitimate, the mere fact that the child was placed for adoption suggests that perhaps adverse emotional or financial factors exist in the natural home, whereas the whole adoption process aims at selectivity in adoptive parents.

Adoption creates an artificial relation of parents and child and severs the natural parent-child relationship. It is obvious on general legal principles that such a change should not be made without the consent of the natural parents unless they have forfeited their rights by some misconduct, and the statutes of Indiana so provide. In general, there can be no adoption in the absence of consent given in accordance with statute, unless the ultimate fact of abandonment or desertion is found to exist.


55. Judge Robert E. Dempesy, recently retired as senior judge of Westchester Family Court, New York, summed up the attitude of the courts when he said, "As long as there is any possibility of having the youngster restored to his parents, it should be followed to the nth degree." Evansville Sunday Courier and Press, February 7, 1965, Parade Magazine, p. 4.


59. IND. ANN. STAT. § 3-120 (Burns 1946).

60. Emmons v. Dinelli, 235 Ind. 249, 133 N.E.2d 56 (1956). Specifically the statute requires the written consent of living parents; the consent of the child if he is over fourteen years of age; the consent of a parent who is a minor must be accompanied
Of the state adoption statutes all but South Carolina's contain a provision for dispensing with the consent of a parent who has failed to fulfill his obligations in certain ways. In Indiana, consent is not required if the parent has abandoned or deserted his child for six months or more immediately preceding the date of the filing of the petition, has been deprived of his parental rights over the child for reasons other than economic, or is unknown. In addition, the court, in its discretion, need not require the filing of the consent of the father where he has failed to pay support money for a period of one year immediately prior to the filing of any proceedings.

In Indiana, the question of whether or not a parent has acted in such a way as to dispense with his consent does not arise until the adoption proceeding itself. Thus in many instances, such as the case of abandonment, there has been no prior judicial determination of whether the parents are so guilty of misconduct that their consent may be dispensed with. As a result, the judge in the adoption proceeding is faced with two distinct questions: Whether the natural parents have so conducted themselves that their parental rights should be permanently terminated and whether the child should be adopted by the petitioners. These questions present separate problems and involve different policy factors. The mere fact that the child's welfare would be promoted by the adoption is not enough to cut off the natural parents' rights; and the unfitness of the natural parents does not establish the fitness of the petitioners. Yet, if the two issues are considered in the same proceeding, it is difficult to keep them separate and to examine them objectively. The legal issues tend to

by the written approval of the local investigating agency and, if none, of the state department of public welfare; and in every case where the child has been born out of wedlock the consent of the mother is sufficient, except where the paternity of the child has been established by law and the father is adequately supporting the child or where for any reason the court deems it advisable that the father be heard. IND. ANN. STAT. § 3-120 (Burns 1946).


62. This is only after diligent inquiry and publication has been made and if the fact that the parents are unknown appears by indorsement on the petition and by the oath or affirmation of two disinterested persons. IND. ANN. STAT. § 3-120 (Burns 1946).

63. Ibid.

64. Ibid. After the child has resided with his new parents during a supervisory period, IND. ANN. STAT. § 3-117 (Burns 1946), and new emotional attachments have been established, the petition for adoption is filed with the issue of consent then being litigated. The proceedings to adopt a child are purely ex parte, and no adversary except living parents is contemplated. Johnson v. Smith, 203 Ind. 214, 176 N.E. 705 (1931); Brown v. Brown, 101 Ind. 340 (1884). Whether or not the order of adoption shall be made upon the petition is a matter the statute places exclusively in the discretion of the court. Leonard v. Honisfager, 43 Ind. App. 607, 88 N.E. 91 (1909).


become confused, the identity of the adoptive parents is learned by the natural parents, and the door is left open for interference in the child's new home and perhaps for blackmail by the natural parents. Consequently, child-care agencies will not place a child in a home for the purpose of adoption unless the natural parents have surrendered the child for adoption.” They refuse to take the risk of creating new emotional ties when the child, in all probability, might be taken from its new home in just a few months. Thus, in effect the child is administratively unadoptable as long as the parents refuse to consent to the adoption. And in the great majority of cases where the parents fail to consent voluntarily and consent cannot be obtained by operation of law, it is the welfare of the child that suffers while the parent maintains his parental rights or the privilege of regaining them.

It is clear that under the Indiana Adoption Act the court may, in its discretion, not require the filing of the consent of the father where he has failed to pay support money for a year immediately prior to the filing of any proceedings. By clear statutory language the judge has been bestowed with a great deal of discretion in his right to dispense with the consent of the father. It appears that even if a father intentionally refused to pay support for his child, he might retain the privilege of blocking the adoption by refusing to consent to it.

The law is not entirely clear as to just what constitutes “failure of support.” In Emmons v. Dinelli the court stated that the mere lack of support payments is not “failure to support” within the statute dispensing with consent. Thus it appears that the courts are willing to look at extenuating circumstances and decide each case on its own particular facts.

69. Interview with Director, Children's Bureau, Department of Public Welfare of the State of Indiana, in Indianapolis, October 1964.
70. Ibid.
71. IND. ANN. STAT. § 3-120 (Burns 1946). It is interesting to note that the statute only applies to the failure of support by the father and makes no mention of the failure of support payments of the mother. In the vast majority of cases it is the mother who retains custody and receives the support payments for the child. Consequently the omission of the mother's failure of support payments for the child appears not to have been inadvertent.
72. This discretion held by the judge is interwoven throughout the Adoption Act. See Leonard v. Honisfager, 43 Ind. App. 607, 88 N.E. 91 (1909).
73. 235 Ind. 249, 133 N.E.2d 56 (1956).
74. In In re Adoption of Bryant, 134 Ind. App. 480, 189 N.E.2d 593 (1963), it was stated that the father did not fail to support his child within the statute dispensing with consent of the father to an adoption in the event that the father has failed to support the child where the father and mother were divorced before the birth of the child and the mother rejected the father's offer of support.
If the parents have been deprived of their parental rights for reasons other than economic, their consent to an adoption may be dispensed with.\textsuperscript{75} It appears that the Juvenile Court Act may operate in conjunction with this provision of the adoption statute to allow the child to be adopted without the consent of the parents. Because of the paucity of cases in this area, it is difficult to determine how effective this provision really has been. However, it does appear that the effect of the provision has been minimal in freeing unwanted children for adoption.

A third situation in which consent of the natural parents is unnecessary in an adoption proceeding is when the child is adjudged to have been abandoned. Specifically, the statute provides in part that the consent of the parent or parents may be dispensed with if the child is adjudged to have been abandoned or deserted for six months or more immediately preceding the date of the filing of the petition.\textsuperscript{76} There seems to be a practical unanimity in the cases as to the definition of the word "abandonment" when used in the adoption statute: abandonment exists when the parent's conduct evidences a settled purpose to forego all parental duties and relinquish all parental claims to the child for the time prescribed by statute.\textsuperscript{77} And the overwhelming weight of authority in the adjudicated cases supports a requirement that the relinquishment be complete and absolute.\textsuperscript{78} Therefore, the rules in the adjudicated cases seem uniformly clear with reference to the essential elements of abandonment under the adoption statutes. The difficulty has arisen in the application of the legal definition of abandonment to the facts of the particular case; consequently, just what facts satisfy the definition is not clear.

In the \textit{Emmons} case for a period of nearly four years prior to the filing of the adoption proceedings the child was "bereft of a home and parental care."\textsuperscript{79} During this period the natural parent imposed the burden of providing a home and care for her infant daughter upon the child's parental aunt, although she could have kept the child with her in the home of her parents. During all this time she was loath to assume her parental duty to care for the child, even temporarily. Testimony indicated that she showed little affection for the child. She did, however, maintain some interest in the child during this period by visiting her at irregular intervals and giving her occasional presents and monetary gifts totalling about 200 dollars. During nearly all of the four year period the mother

\textsuperscript{75} \textit{Ind. Ann. Stat.} § 3-120 (Burns 1946).
\textsuperscript{76} \textit{Ibid.}
\textsuperscript{78} \textit{Ibid.}
\textsuperscript{79} 235 Ind. 249, 265, 133 N.E.2d 56, 64, (1956).
was employed. What then, on these facts, must be the position of the court on the subject of the "abandonment or desertion" of a child by a parent who manifestly intends to keep and enjoy the privileges of parenthood but refuses to assume its corresponding duties and responsibilities over an extended and indeterminate period?

Many of the states require the abandonment to be willful, but the Supreme Court of Indiana in *Emmons*, seizing upon the fact that "willful" is omitted from the statute, concluded that "the careless and negligent failure to perform the duties of parenthood is a significant element in the offense of abandonment or desertion, which neglect is to be considered regardless of any actual intention or settled purpose by the parent to relinquish the proprietary claim of the parent to the child." Even so, the court found that there was a sufficient "willful" withholding of parental companionship, support, care, and protective sympathy and affection for the child by the mother to constitute "abandonment," that the abandonment had existed for the statutory period, and that the best interests of the child would be served by the adoption.

However, in the case of *In the Matter of the Adoption of Force*, a mother took her child from her home in Jasonville to Richmond where she sought employment. In Richmond the mother left the child with relatives of its father and during the nine months the child was left with the relatives the mother visited it from one to three times a week. Then she sought to retake the child but was forcibly restrained by the relatives. The court held that the mother had not abandoned the child because it found no evidence of a "settled purpose to forego all parental duties and relinquish all parental claims to the child."

The *Force* case is distinguishable from the *Emmons* case in several particulars. The most obvious distinction is the time involved in the two cases. In *Emmons* the mother had entrusted the care of the child to others over a four year period. A period of such duration might supply the evidence of "settled purpose" which the court found lacking in the *Force* case. In addition, in *Emmons*, the mother's visits were much less frequent than those of the mother in *Force*. The evidence in *Emmons* that the mother could have kept the child with her and that she showed little

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81. *Emmons v. Dinelli*, 233 Ind. 249, 269, 133 N.E.2d 56, 65 (1956). This case emphasizes the carrying out of parental duties: "Of what importance is it to a child if his parents do not 'intend' to rob him of the nurture, love and security of a happy home, if such a home is not provided?" *Ibid.*
82. 126 Ind. App. 156, 131 N.E.2d 157 (1956).
83. *id.* at 166, 131 N.E.2d at 161.
affection for it and the apparent lack of such evidence in Force further distinguish the cases. Both the Emmons court and the Force court used the same definition of abandonment. The results in the two cases indicate the importance of degree in the facts on which abandonment is based, but they do not suggest any very specific guides to use in determining whether or not there is abandonment.

It is certain, however, that the mere giving up by the parent of the possession of his child does not indicate abandonment. In the recent case of In re Adoption of Bryant, the father and mother were divorced four months after marriage and before the mother realized she was pregnant. Upon the birth of the child the father acknowledged it, gave it his name, and agreed with the mother that she should have custody. He visited the child frequently and supported it after the mother's death. The mother cared for the child for twelve months before she was killed in an auto accident. Fourteen days after her death the father was in court resisting the adoption of the child by the mother's parents. The court held on these facts that the father had not abandoned the child for purposes of the provision dispensing with the consent of a parent in the event the parent has abandoned the child, for the only period of time which the decree of the local court could have operated (six months immediately preceding the filing of the adoption petition) was the period during which the mother of the child was alive and during which the child was not bereft of home and parental care but, quite the contrary, had both. Therefore, to find abandonment in a case such as this would require the court to hold as a matter of law that the mere acquiescence of the father in the mother's custody of his child would constitute a relinquishment of parental rights. And this the court clearly could not do, for there was not an evincement here of a "settled purpose" or "intention" to forego any parental duties or obligations. To the contrary, the father's contributions to the child's support indicated an intent to recognize his parental duties and responsibilities.

Under the present adoption procedure, a child apparently neglected by its natural parents might reside in a foster home for a considerable length of time; and later, at the adoption hearing, if it is found the child has not been abandoned the court is still confronted with the necessity of deciding the issue of custody between devoted foster parents to whom the child is strongly attached and a natural parent who has not legally abandoned his child and whose absence may have been justified. Even if

the foster parents receive custody, "legal title" and claims to the child's filial obligation remain with the natural parents. While the adoptive parents may have assumed all parental responsibilities, the natural parents may continue to show just enough interest in the child to preclude adoption.

In addition to the heavy burden of proof resting upon those seeking to establish abandonment and the persistence of the courts in resolving all doubt in the natural parents' favor, abandonment seems to be a "continuing process." Even though their previous conduct showed an intent to abandon, natural parents may change their minds and might successfully reclaim their child from a foster home on the eve of adoption.

III. Termination Legislation and the Statutes Involved

A small number of jurisdictions have attempted to deal with the problems resulting from lack of parental consent by providing statutorily for a separate procedure to terminate the rights of parents prior to an adoption proceeding. This termination proceeding is primarily used to determine the fitness of the parents; and if the parent is deemed unfit and likely to continue to be so, parental rights will be irrevocably terminated and the child freed for adoption. One purpose and effect of such legislation has been to more evenly balance the interests of the parent and child. In addition, termination legislation separates the issues of the unfitness of the natural parents and the fitness of the adoptive parents so that they may be examined more objectively. When there is a contest the natural parents' rights are finally terminated in one action and cannot be reopened in a subsequent proceeding for adoption. Only with judicial termination

87. For a complete analysis of reciprocal rights and duties between parent and child see 4 VERNIER, AMERICAN FAMILY LAWS 3-111 (1936).

88. See, e.g., CALIF. WELFARE & INSTITUTIONS CODE § 701 (1949); CONN. REV. STAT. §§ 17-43a (Supp. 1959); DEL. CODE ANN. tit. 13, § 1103 (1955); LA. REV. STAT. §§ 9:403-404 (1951); N.J. STAT. ANN. § 9-6-1 (1939); WIS. STAT. § 48.40 (1955); WYO. STAT. ANN. §§ 14-53 (1957). See also Note, 23 U. KAN. CITY L. REV. 241 (1954-55); Simpson, supra note 61, for a comparison of the various termination statutes. The Department of Health, Education and Welfare also has a proposed statute for the termination of parental rights, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, CHILDREN'S BUREAU, LEGISLATIVE GUIDES FOR THE TERMINATION OF PARENTAL RIGHTS AND RESPONSIBILITIES, PUB. No. 394 (1963), and the Uniform Adoption Act contains a termination of parental rights provision, HANDBOOK OF THE NAT'L CONFERENCE ON UNIFORM STATE LAWS 217 (1953). The Uniform Adoption Act leaves what is meant by judicial termination of parental rights to be decided by the various state courts, each applying its own law. The act itself neither defines judicial termination nor does it specify procedure for procuring termination. While some may feel this approach is wise, it seems that the Uniform Act has not established any standards or guides other than pointing out the need for such a statute, and consequently the force of the Uniform Adoption Act is insignificant.

89. Simpson, supra note 61, at 367. The parents' rights referred to include the right to regain custody, to have reasonable visitation, to determine religious affiliation, and to consent to an adoption. It is interesting to note that in Wisconsin and Delaware,
is there a complete and irrevocable divestment of all legal rights, privileges, duties, and obligations of the parent and child with respect to each other; and so only with judicial termination is the child's status as legally free for adoption made certain.  

An advantage over the dependent child proceeding is that it is clear from the start that the purpose of the termination procedure is to irrevocably sever the rights of the parents in the child and to place him for adoption. There are many possible dispositions under the dependency and neglect statutes, and courts commonly permit a child to be returned to his parents even after "permanent" termination on a showing of changed conditions.

Indiana presently provides for the issue of abandonment to be litigated in the adoption proceedings.  

However, if the parties and proceedings in abandonment were kept separate, termination of parental rights would not be mixed with problems of placing the child with adopting parents.  

With separation, judicial evaluation of new and old parents will no longer be biased by comparing them. Moreover, separation of the parties insures the secrecy necessary to prevent anxiety and possible strife. The use of a procedure for the prior termination of parental rights becomes very important in these abandonment cases. If the parent is going to object, he must do so at the hearing rather than show up during the waiting period prior to adoption and announce himself ready to take over the care of the child again. Consequently, one of the primary purposes of judicial termination of parental rights legislation is to enable agencies, with a clear conscience, to place children where formerly they hesitated to do so for fear the natural parents would withhold consent and prevail against the adoption and there was no other way to test the case except by adoption.

Following the termination of parental rights the court may transfer
the "care, control and custody" of the child to an authorized agency, which then has authority to consent to the child's adoption.\footnote{95}

The purpose of termination legislation is to provide for voluntary\footnote{96} and involuntary severance of the parent-child relationship and for substitution of parental care and supervision by a judicial process which will safeguard the rights and interests of all parties concerned and promote their welfare and that of the state. Implicit in a modern termination statute would be the philosophy that wherever possible family life should be strengthened and preserved and that the act of severing the parent-child relationship is of such vital importance as to require a judicial determination.\footnote{97}

Termination of parental rights, which judicially orphans a child, should be contemplated only with the view of creating new and permanent rights through adoption.\footnote{98} In the case of a non-adoptable child, such as one with a serious defect or deformity, no useful purpose would be served by invoking the termination statute, since custody or guardianship proceedings would adequately protect the child while preserving whatever potential benefits, such as inheritance, might result in the future from the continued natural relationship.\footnote{99}

The termination statute would work on inheritance rights in the same manner that termination by adoption has in the past.\footnote{100} The Children's Bureau of the United States Department of Health, Education and Welfare apparently takes the view that the statute should operate to terminate the rights of the child to inherit from the natural parents.\footnote{101} This seems to be the most reasonable view, for if the statute operates to irrevocably sever the parental rights over the child, there logically should be left no semblance of rights in the child in relation to the parent either

\footnote{95}{See, \emph{e.g.}, \textit{Wis. Stat. §§ 322.04(2), 48.40-47 (1955)}; \textit{Comment, 59 Yale L.J. 715 (1950)}.}
\footnote{96}{Termination legislation should include provision for voluntary termination at the request of parents who want the parent-child relationship ended. It also appears that the majority of termination cases would be voluntary, and a great proportion of these would involve unmarried mothers. \textit{U.S. Dept of Health, Educ. & Welfare, op. cit. supra, note 88}.}
\footnote{97}{\textit{Ibid.}}
\footnote{98}{\textit{Note, 13 Wyo. L.J. 185, 189 (1958).} It appears that the County Department of Public Welfare would work in conjunction with other public and private agencies to arrange a suitable home for the child.}
\footnote{100}{The decree of the court in an adoption proceeding establishes the heirship of the adopted child, and the adopted child is entitled to inherit on the same basis as a natural child. \textit{Patterson v. Browning, 146 Ind. 160, 44 N.E. 993 (1896)}; \textit{Jones v. Leeds, 41 Ind. App. 164, 83 N.E. 526 (1908)}.}
presently or in the future. 102

Of the termination statutes now in existence the Children's Code of Wisconsin 103 seems to be the most progressive and the most far-reaching, and it has often been proposed as a guide for the drafting of similar legislation in other states. By the Wisconsin act the right to petition for the termination of parental rights is not limited to authorized agencies, but anyone may bring the action. 104 Either an agency or an individual having actual custody of the child should be able to petition to terminate the natural parents' rights. The Department of Health, Education and Welfare 105 follows closely this same provision on who may petition. It is recommended by the Department that those permitted to file a petition for involuntary termination should include (a) either parent where termination is sought with respect to the other parent, (b) the guardian of the child's person or his legal custodian or the person standing in loco parentis to the child, (c) an authorized agency, and (d) any other person having a legitimate interest in the matter. It is submitted that this broad authorization of several parties to file a petition is wise, for such a provision more nearly assures that if a child is being neglected or deprived his case will be heard.

The grounds for termination under the Wisconsin statutes are not confined to abandonment but also include lack of care and protection, absence of support, habitual use of drugs and liquor, and mental deficiency. 106 The progressive nature of the Wisconsin statute is exemplified

102. It may be argued that there is strong reason for not terminating the inheritance rights of the child by such a termination statute, for this may leave the child without the right of parental inheritance if he is not subsequently adopted. If the natural parents wished to disinherit they could do so by will.

103. Wis. Stat. §§ 48.01-997 (1955). The Children's Code was the result of one and a half years of work by a committee of the Legislative Council and replaced the then existing law. Wis. Sen. J. 1731 (1955). Many of the substantive changes made were of a minor nature; the major changes affected juvenile court jurisdiction, under which the provisions for termination of parental rights fall.


The court may, upon petition, terminate all rights of parents to a minor in either of the following cases:
1) With the written consent of the parents to the termination of their parental rights; or
2) If it finds that one or more of the following conditions exist:
   a) That the parents have abandoned the minor; or
   b) That the parents have substantially and continuously or repeatedly refused to give the minor necessary parental care and protection; or
   c) That, although the parents are financially able, they have substantially and continuously neglected to provide the minor with necessary subsistence, education or other care necessary for his health, morals, or well being or have
in its recognition of the habitual use of drugs or liquor and mental deficiency as grounds for termination. The present Adoption Act in Indiana does not recognize the use of drugs or liquor as grounds for dispensing with consent, nor does the Juvenile Court Act specifically mention them, although they might be covered under the section which defines a “neglected child” in part as one who “has not proper parental care or guardianship.”107 The need for the inclusion of such a provision in a termination statute is obvious if the act is to have the broad coverage which it needs to assure the result intended by it—more protection for the child’s welfare.

Under the old law in Wisconsin as interpreted by the attorney general the rights of a mentally deficient parent could not be terminated on grounds of abandonment or neglect but only by waiting two years and having a re-examination of the parent for mental deficiency. This created cases of very real hardship for children whose mentally deficient parents disappeared before the two year period had passed; the parent’s rights could not be terminated and the child could not be placed in a permanent home.

After study of the problem, the child welfare committee concluded that the important question in determining whether the parent’s rights should be terminated is not the parent’s mental deficiency since some mentally deficient persons are adequate parents. The question is whether the mental deficiency makes the parent incapable of giving the child proper parental care and protection. Therefore the new law gives the juvenile court the power to terminate rights of a parent found mentally deficient under chapter fifty-one, if it finds that because of his mental deficiency the parent is and will continue to be incapable of giving his child proper

3) The parental rights of parents who have been found mentally ill under ch. 51 may be terminated if grounds for termination under sub. 2(a) to (d) existed prior to the time of finding the mental illness.

parental care and protection.\textsuperscript{109}

For a number of years there has been concern over the problems resulting when parents of young children become mentally ill. Sometimes this mental illness is of a long duration, and when the parent recovers he is a complete stranger to the child. Sometimes the parent never recovers and as a result, the child may live in a foster home during all of his childhood. This type of situation is particularly bad in the case of an illegitimate child whose mother is mentally ill, for such a child has no other parent to look after him. On the other hand, it is pointed out that mental illness is not the fault of the parent any more than physical illness is. No one would suggest terminating the rights of a parent who has contracted tuberculosis. Furthermore, great progress has been made by medical science in the treatment and cure of mental disease; cases considered hopeless and incurable today may not be so in the near future. Therefore, the Wisconsin statute makes no change in the state's old law, which did not recognize mental illness to be a ground for terminating parental rights. However, in those cases where prior to the mental illness the parent had abandoned or neglected his child so that grounds for terminating his rights exist in that area, the court is allowed to terminate the parent's rights even though the parent is incompetent because of the adjudication of mental illness.\textsuperscript{110} It appears that Indiana has no specific provision relating to either mental deficiency or mental illness in either its Adoption Act or its Juvenile Court Act, and it seems that such provisions, operating as they do in the Wisconsin act, would be wise inclusions in a termination of parental rights act.

The Indiana Adoption Act requires a minimum six-month period of abandonment\textsuperscript{111} whereas the Wisconsin act in a somewhat novel approach has placed no time limit on abandonment.\textsuperscript{112} It appears that the omission of a time limit, after which the act of abandonment is said to have commenced, would prevent unscrupulous parents from hedging just under the time limit. This omission of a time limit for abandonment in a termination of parental rights act would be for the best interest of the child. The Department of Health, Education and Welfare appears to have the most favorable approach in this area when it states, "[T]he criterion should be lack of parental efforts to maintain the parent-child relationship rather than a specific time period of no contact between parent and child. Here the emphasis would be on the parent's intention to forsake the parent-child relation-

\textsuperscript{109} Wis. Stat. § 48.40(2) 67 (1955).
\textsuperscript{110} Wis. Stat. § 48.40(3) (1955).
\textsuperscript{111} Ind. Ann. Stat. § 3-120 (Burns 1946).
\textsuperscript{112} Wis. Stat. § 48.40(2) (a) (1955).
The Wisconsin act provides that after the hearing has been held, if the court finds that any of the conditions outlined in the statute exist, it may terminate the parents’ rights.¹¹²

IV. CONCLUSION

In the past the courts have often justified their very strict requirements for a finding of abandonment on the ground that, although there was no abandonment and no adoption order could be made without the consent of the parents, custody of the child nevertheless might be given to foster parents. It has been quite conscionable for the courts in the past to allow the child to remain with the foster parents while at the same time the natural parents’ rights were not completely terminated. This practice has given effect to the long-honored tradition that the protection of the rights of natural parents is to be carried to a further degree in adoption proceedings than in custody cases.¹¹³ However, under a termination statute, reluctance in finding an abandonment will have much graver consequences than merely allowing the child to remain with his foster parents. If the child in the termination proceeding is found not to be abandoned he will be denied the possibility of being placed in an adoptive home and of becoming part of a family; for many years he will be transferred from home to home, never having the benefits of a family life. Because of these consequences of a failure to find abandonment, it seems that one by-product of such legislation would be a more liberal definition of abandonment;¹¹⁴ and the logical result will be that more children will ultimately be freed for adoption. Such a statute seems to be the only sound way in which to balance more evenly the right of the child in adoption proceedings while protecting the rights of all those involved and making for a more efficient and workable proceeding.

Although our social system has long recognized it, the law is slowly moving to guarantee a right to an education for any child; perhaps the time is also coming when it will be recognized that a child has a moral and legal right to a parent who will support him and provide him with the love and affection that a settled home life brings.

¹¹⁴ WIS. STAT. § 48.43 (1955). The remaining provisions of the Wisconsin statute are clear and not in need of further discussion, and since they do not conflict with present dependency statutes in Indiana or the non-consensual provisions of the Indiana Adoption Act, they could be included in a termination of parental rights act adopted in Indiana.
¹¹⁵ In re Adoption of Bryant, 134 Ind. App. 480, 189 N.E.2d 593 (1963).