

STATE OF MICHIGAN
IN THE SUPREME COURT

SHANNON BLACKMAN,

Plaintiff-Appellee/Cross-Appellant,

v

TYLER DAVID MILLWARD

Defendant-Appellant/Cross-Appellee.

Supreme Court No. 167867
Court of Appeals No. 367240
Calhoun County Circuit Court
LC Case No. 2019-2623-DS

**APPENDIX LIST TO PLAINTIFF-APPELLEE/CROSS
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LC Case No. 2019-2623-DS

LC: Calhoun County Circuit Court

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**BRIEF OF AMICUS CURIAE MICHIGAN COALITION TO END DOMESTIC
AND SEXUAL VIOLENCE
IN SUPPORT OF APPELLEE SHANNON BLACKMAN**

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STATEMENT OF INTEREST OF AMICUS CURIAE¹

The Michigan Coalition to End Domestic and Sexual Violence (“MCEDSV”) is a nonprofit membership organization comprised of more than seventy nonprofit organizations across the state of Michigan dedicated to the empowerment of all victims of domestic and sexual violence, and human trafficking. MCEDSV seeks to build a legacy in which these forms of violence no longer exist.

MCEDSV regularly participates as amicus curiae in select state and federal cases that present issues of broad importance to victims of domestic and sexual violence such as this one. The case at bar implicates issues that are fundamental to the rights and interests of all victims of sexual violence in Michigan: that survivors of sexual assault, who conceive a child as the result of criminal sexual conduct (“CSC”) or non-consensual sexual penetration, need protection from their perpetrator’s attempts to assert parental rights to their biological child.

In this action, the Court has been asked to consider the interplay between Michigan’s version of the Rape Survivor Child Custody Act (“RSCCA”), MCL 722.1445(2), and the Revocation of Paternity Act (“RPA”), MCL 722.1431 *et. seq.*, the first time such an interpretation would be made by the Court. A decision which interprets RSCCA and RPA to restrict the limited circumstances in which a victim of CSC or non-consensual sexual penetration could seek revocation of paternity, or stop

¹ Pursuant to Michigan Court Rule 7.212(H)(3), amicus curiae and their counsel certify that no counsel for a party authored this brief in whole or in part, and no party, counsel for a party, or any other person made a monetary contribution to fund the preparation or submission of this brief.

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the assertion of parental rights by their perpetrator, could have dire consequences for survivors of sexual assault across the state.

SUMMARY OF THE ARGUMENT

This case is of significance to all Michigan survivors of CSC and non-consensual sexual penetration who become pregnant as a result. Michigan’s RSCCA² requires a court to revoke an acknowledgment of parentage³ for an acknowledged father upon a showing by clear and convincing evidence that the child was conceived as the result of non-consensual sexual penetration. It is undisputed that the Defendant-Appellant (“Defendant”) was convicted of three counts of CSC in the third degree against the Plaintiff-Appellee (“Plaintiff”), in violation of MCL 720.520d(1)(e)(i), for acts that occurred when the Plaintiff was 16 and 17 years old, and a student at the high school where the Defendant was a teacher. The Defendant mischaracterizes his predatory and illegal relationship with the Plaintiff as “consensual,” seeking to normalize his criminal behavior and to prevent the Plaintiff from enjoying the protection of Michigan’s RSCCA.

The Defendant’s bold attempt to shift focus away from his behavior and on to the Plaintiff’s reactions to such behavior should be not be entertained by this Court. Amicus MCEDSV supports the Plaintiff’s position that the lower court properly

² MCL §722.1445(2).

³ Michigan DHHS form DH-0682 is titled Affidavit of Parentage and does require the parties to sign it before a notary public. However, Michigan’s RSCCA refers to the form as an acknowledgment of parentage, and that is how it was referred to by the lower court. As such, those terms are used interchangeably in this brief to refer to form DH-0682.

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revoked the Defendant's paternity pursuant to RPA and Michigan's RSCCA. Survivors of sexual assault and non-consensual penetration, need protection from their perpetrator's attempts to assert parental rights to their biological child.

ARGUMENT

I. THE DEFENDANT'S CHARACTERIZATION OF HIS SEXUAL RELATIONSHIP WITH HIS STUDENT AS CONSENSUAL IS A MISLEADING ATTEMPT TO NORMALIZE HIS CRIMINAL BEHAVIOR.

A. Sexual assault is a destructive societal issue that creates significant harm. The Plaintiff could suffer lifelong consequences as a result of the Defendant's Criminal Sexual Conduct.

Sexual assault is a pervasive problem in our society, particularly for women and girls. Nationally, 90% of adult rape⁴ victims and 82% of juvenile rape victims are female.⁵ One in four women report completed or attempted rape victimization in her lifetime (26.8% or 33.5 million)⁶, and nearly one in four women report sexual coercion victimization (23.6% or 29.4 million).⁷ **Being young increases the risk.** More than

⁴ The word "rape" is often used by policymakers when discussing criminal penetrative sexual acts, including Congress who passed the Rape Survivor Child Custody Act – the subject of this appeal. Amicus points out that states differ over the use of force, fear, and consent in the crime of rape. In fact, Michigan law does not use the term rape in the Michigan Penal Code, MCL §750 *et. seq.*, but instead uses the term Criminal Sexual Misconduct (CSC) to describe prohibited sexual acts of differing degrees. Likewise, the term "sexual assault" may encompass a broad range of non-consensual sexual acts. Amicus stresses that any sexual misconduct, including that which results in pregnancy, is devastating to a victim, whether she is a child molested by an uncle, a teenager coerced into sex by a teacher, a young adult assaulted while intoxicated, or an adult woman forcefully raped by her spouse.

⁵ Howard N. Snyder, Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement* <<https://bjs.ojp.gov/content/pub/pdf/saycrle.pdf>> (accessed January 30, 2024).

⁶ Ruth W. Leemis et al., Centers for Disease Control and Prevention, *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Intimate Partner Violence*, p 3 <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsreportonipv_2022.pdf> (accessed January 30, 2024).

⁷ *Id.* at 4.

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80% of female rape victims reported that the first victimization in their lifetime occurred before age 25 (83.4%, or nearly 28 million), including 49.0% (16.4 million) who were first raped before turning 18.⁸ Nearly 35% (34.9% or 11.7 million) of female rape victims were first victimized between the ages of 11 and 17 years old and 14.0% (about 4.7 million) were a mere 10 years old or younger.⁹ Among female victims, 15.1% (or 5 million) were 25 years or younger at the time of their first rape victimization.¹⁰ Alarminglly, an estimated 10% of K–12 students will experience sexual misconduct by a school employee by the time they graduate from high school.¹¹

Michigan is no exception. The Michigan State Police “2020 Crime in Michigan Annual Report” (most recent available) documents 5,994 reported incidents of CSC involving penetration, 12.5% of all violent indexed crimes.¹² Of the 5,994 incidents, 24.3% of the victims were age 15-19, and 86.2% were female.¹³ Being young and female are significant vulnerabilities for sexual assault in our state.

The Defendant was the Plaintiff’s high school teacher with whom she had a sexual relationship that started when she was just 16 years old. The Defendant was convicted of three separate counts of felonious CSC against the Plaintiff. He was

⁸ *Id.* at 4.

⁹ *Id.* at 4.

¹⁰ *Id.* at 11.

¹¹ Billie-Jo Grant et al., *A Case Study Of K–12 School Employee Sexual Misconduct*, p 1 <https://www.sesamenet.org/_files/ugd/b75d1b_119eeff7f31d4d2898c39084011a4da2.pdf> (accessed January 26, 2024).

¹² Michigan Department of State Police, *2020 Crime in Michigan Annual Report*, p 25 <<https://www.michigan.gov/msp/divisions/cjic/micr/annual-reports/2020-annual-report>> (accessed January 28, 2024).

¹³ *Id.*

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additionally convicted of witness bribing/intimidation/interference, the use of a computer or internet to commit a crime and lying to a police officer during a criminal investigation – all related to his sexual assaults of the Plaintiff. He was first incarcerated in 2018 and remains in prison today. His earliest release date is November 12, 2025, with a maximum discharge date of October 17, 2038.¹⁴ He will be required to register as a sex offender for life.¹⁵ The Defendant committed serious crimes against the Plaintiff, and he was given serious penalties for his behavior. His efforts to now portray their sexual relationship as “normal” and “consensual” is offensive and legally inaccurate.

The Defendant’s crimes against the Plaintiff may, in fact, have long-term consequences. Individuals who are victimized as children report feeling robbed of having a safe and healthy childhood, while also expressing feelings of confusion, guilt, shame, and anger about what was done to them.¹⁶ Many survivors report suffering into adulthood with problems such as depression, anxiety, post-traumatic stress disorder, relationship problems, and further physical or sexual victimization.¹⁷ The Plaintiff should have been able to rely and depend on the Defendant, her teacher, as a trusted adult who was safe. Instead, he betrayed that trust and lured her into an

¹⁴ Michigan Department of Corrections, *Offender Tracking Information System – Offender Profile* <<https://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=569068>>(accessed January 30, 2024).

¹⁵ Restoration of Rights Project, *50-State Comparison: Relief from Sex Offense Registration Obligations* <<https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations/>> (accessed January 30, 2024).

¹⁶ Enough Abuse Campaign, *What is Child Sexual Abuse?* <<https://enoughabuse.org/get-the-facts/what-is-child-sexual-abuse/>> (accessed January 30, 2024).

¹⁷ *Id.*

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illegal sexual relationship that will impact her for the rest of her life. The impact of this relationship is not speculative – the sexual contact that occurred while Plaintiff was a high school student under 18 years old, resulted in her pregnancy and the birth of her son. Laws that prohibit teachers from having sex with minors enrolled in their high school are not a technicality.¹⁸

B. The Defendant’s brief seeks to normalize his abuse of the Plaintiff as consensual adult sex and to shift the blame for his behavior to the Plaintiff.

The Michigan penal code uses the term Criminal Sexual Conduct to describe crimes involving illegal sexual contact of varying degrees. Certain types of sexual contact are prohibited, based on elements such as the age of the actor, age of the victim, and behavior(s) of the actor in accomplishing the contact.¹⁹ For most sexual contact that is not otherwise illegal, the standard for CSC is whether the accused used force or coercion to accomplish the sexual acts.²⁰ For sexual contact that is *per se* illegal, including sexual penetration between a high school teacher and a 16- or 17-year-old student, force or coercion is not an element of the crime, and consent is not a defense.²¹ A child in this situation is legally precluded from consenting to the sexual

¹⁸ The Defendant’s reference to his criminal behavior misses the point entirely: “As a result of Tyler and Shannon’s consensual, albeit statutorily prohibited relationship, criminal charges were brought against Tyler.” (Defendant-Appellant’s Brief on Appeal at page 14). Behavior that is statutorily prohibited is the basis of *every crime*. All criminal behavior in Michigan is prohibited by the Michigan Penal Code. The Defendant appears to be saying that although his behavior was criminally sanctioned, it is somehow not wrong.

¹⁹ MCL §750.520b-e.

²⁰ *Id.*

²¹ *Id.*

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contact. The Defendant's brief is a transparent effort to distract the court from this fact, and to blame the Plaintiff for being the victim of his crimes.

This tactic is not unique to the Defendant and is often used by perpetrators to twist accountability. The acronym DARVO (Deny, Attack, Reverse Victim and Offender roles) describes how perpetrators of interpersonal violence often deflect blame and responsibility when confronted for their abusive behavior.²² When used, the perpetrator denies or minimizes the harms of any wrongdoing, attacks the victim's credibility, and reverses victim and offender roles such that the perpetrator assumes a victimized position and declares the victim to be the true perpetrator.²³ Multiple statements in the Defendant's brief follow this model.

First, the Defendant denies that he victimized the Plaintiff, even though all his related convictions were the result of guilty pleas.²⁴ He blames the Plaintiff for mischaracterizing his conduct, stating that the Plaintiff "*claimed* that she was a 'victim in a crime'" (Defendant-Appellant's Brief on Appeal at 24), and describing her "myriad mischaracterizations of herself as a 'minor' and a 'victim' and of Tyler as a 'rapist'" (Defendant-Appellant's Brief on Appeal at 37). The Defendant even extends this blame to the Plaintiff's attorney, who he accuses of *misrepresenting* the Plaintiff as a "rape victim" (Defendant-Appellant's Brief on Appeal at 24).

²² Harsey & Freyd, *Deny, Attack, and Reverse Victim and Offender (DARVO): What Is the Influence on Perceived Perpetrator and Victim Credibility?*, 29 J. Aggression, Maltreatment & Trauma, 897, 898 (2020).

²³ *Id.*

²⁴ Plaintiff is most certainly a victim, as defined in the William Van Regenmorter Crime Victim's Rights Act MCL 780.752(m) "An individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime."

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The Defendant goes on to attack the Plaintiff's character, raising issues wholly irrelevant to this case: "*Shannon was experiencing a mental health crisis due to mental health distress from an abusive relationship that involved Shannon having an abortion*" (Defendant-Appellant's Brief on Appeal at 17). Finally, the Defendant attempts to reverse the roles between he and the Plaintiff, casting himself as the deserted victim of her new relationship. "...*Shannon ceased communicating with Tyler's mother and now discarded Tyler and his family in pursuit of a new beginning with her new boyfriend and the child they now had in common*" (Defendant-Appellant's Brief on Appeal at 18).

The Defendant wants this Court to believe that the Plaintiff was not harmed by his illegal conduct, and to view him as the true victim in this situation. He shockingly refers to his sexual contact with the Plaintiff as "consensual" more than a dozen times, asking the court to ignore that it **is not normal** for a married high school teacher to have sex with his 16-year-old student and is, in fact, both criminal and abusive. This Court must not accept the Defendant's mischaracterizations and obfuscations and affirm the lower court's revocation of his paternity.

II. THE PLAINTIFF'S COMPLIANCE WITH THE DEFENDANT'S ABUSE SHOULD NOT BE MISTAKEN FOR CONSENT.

A. Perpetrators target and groom victims who are vulnerable, are accessible to them, and whose credibility they believe they can impugn to increase their odds of successfully accomplishing the sexual abuse and decrease their odds of being caught.

Perpetrators of sexual assault do not choose their victims at random. A study from 1996 found "[i]n eight out of 10 cases of rape, the victim knew the person who sexually

assaulted them.”²⁵ According to the Rape, Abuse, and Incest National Network (RAINN) the statistic is even more profound when it comes to children: among cases of child sexual abuse reported to law enforcement, 93% of perpetrators are known to the victim.²⁶ Perpetrators purposefully and intentionally select victims upon whom they can successfully commit a sexual assault - victims who are often perceived by offenders as vulnerable, accessible, and lacking in credibility.²⁷

When teachers target students, it is similarly intentional. Sexual abuse tactics have been found to be used by 30-45% of child sexual abusers - indicating that sexual abuse by a trusted adult (teacher, coach, or other leader) is often preceded by grooming activities designed to prime a child to be lured into a sexual relationship.²⁸ Sexual abuse of students occurs within the context of schools, where students are taught to trust teachers. Schools are also a place where teachers are believed more often than students, and in which there is a power and status differential that privileges teachers and other educators.²⁹ Predatory teachers often target vulnerable

²⁵ National Sexual Violence Resource Center, *Statistics About Sexual Violence* <https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf> (accessed January 30, 2024).

²⁶ RAINN, *Children and Teens: Statistics* <<https://www.rainn.org/statistics/children-and-teens>> (accessed January 30, 2024).

²⁷ Oregon Attorney General’s Sexual Assault Task Force, *Sexual Assault Response Team Handbook*, p 7 <<https://evawintl.org/wp-content/uploads/SART-Handbook-Oregon-09-1.pdf>> (accessed January 30, 2024).

²⁸ Gretchen Oltman & Jeanne Surface, *Preventing Sexual Grooming by Teachers: One State's Legislative Approach*, p 2-3 <<https://digitalcommons.unomaha.edu/cgi/viewcontent.cgi?article=1008&context=edadfacproc>> (accessed January 30, 2024).

²⁹ Carol Shakeshaft, U.S. Department of Education, Policy and Program Studies Service, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, p 31 <<https://www2.ed.gov/rschstat/research/pubs/misconductreview/report.pdf>> (accessed January 30, 2024) (citing Charol Shakeshaft & Audrey Cohan, *In loco parentis: Sexual abuse of students in schools*).

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or marginal students, who are grateful for the attention.³⁰ The process presents the perpetrator to the child as kind, understanding, caring, generous, charming, and accessible. The victim is drawn into this special bond. The perpetrator assures the victim that the relationship is normal by typically telling the target they are more mature than other students, smarter, or extra special.³¹

Children and adolescents may not understand that they have been groomed. Their feelings may be complicated and could include feelings of loyalty, admiration, and love.³² In his brief the Defendant belabors the point that the Plaintiff loved him and wanted to be with him. Assuming that to be true, this only demonstrates that he did an excellent job of grooming her and obscures the key facts: the Defendant was the trusted adult; the Defendant was in the position of authority. His job was to provide education and guidance to the Plaintiff, not to abuse his position to gain access to her and prey on her vulnerabilities for his own sexual gratification. The Plaintiff's feelings toward the Defendant, romantic or otherwise, are irrelevant to the fact that the Defendant committed serious crimes (to which he plead guilty) and that the Plaintiff was his victim.

What administrators should know <<https://files.eric.ed.gov/fulltext/ED372511.pdf>> (accessed January 30, 2024).

³⁰ *Id.*

³¹ Gretchen Oltman & Jeanne Surface, *Preventing Sexual Grooming by Teachers: One State's Legislative Approach*, p 5 <<https://digitalcommons.unomaha.edu/cgi/viewcontent.cgi?article=1008&context=edadfacproc>> (accessed January 30, 2024).

³² NSPCC, *What Parents Need to Know About Sexual Grooming* <<https://www.nspcc.org.uk/what-is-child-abuse/types-of-abuse/grooming/>> (accessed January 30, 2024).

B. The Plaintiff's vulnerability only increased after her pregnancy and childbirth, which helps to explain her acquiescence in acknowledging the Defendant's paternity and relying on his family for help.

The Plaintiff was 16 years old when the Defendant's sexual abuse of her began. The Defendant was the Plaintiff's nearly 30-year-old, married, high school teacher. During her pregnancy the Plaintiff was subjected to the criminal investigation involving the Defendant - which undoubtedly included invasive questioning, court events, and continued interaction with law enforcement. Going through such an investigation would be stressful to any expecting mother, let alone one who was only 17 years old and has indicated, under oath, that she did not have any family support during her pregnancy or childbirth. (Plaintiff's April 28, 2023, Affidavit in Support of Motion to Revoke Parentage).

By the time her child was born in December 2018, the Defendant, whom she had trusted and relied upon, was in jail and the Plaintiff was in the hospital without support and guidance. There is no indication in the record that the Plaintiff had the advice of counsel, or any other adult advice, when she signed the Acknowledgment of Parentage. The Acknowledgment of Parentage instructs the signor(s) that their execution of the document establishes that they are the natural parents of the child – which the Plaintiff and Defendant in this case are. The Plaintiff truthfully completed the form properly naming the Defendant as the biological father of her child. There is nothing on the face of the Acknowledgment of Parentage that advises a mother of the long-term ramifications of acknowledging paternity, and there is no reason to believe the Plaintiff understood those ramifications.

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Furthermore, during this period the Defendant and his family: pressured the Plaintiff to normalize the Defendant's criminal behavior; pressured the Plaintiff to pretend that she and the Defendant had a normal, consensual relationship even though the Plaintiff was a minor, and a victim of the Defendant's criminal behavior; pressured the Plaintiff to marry the Defendant; and pressured the Plaintiff to lie to the police. (Plaintiff's April 28, 2023, Affidavit in Support of Motion to Revoke Parentage). Under the pressure of all of these stressors, it is perfectly normal that the Plaintiff would have both identified the Defendant as the father of her child and welcomed the "assistance" of his family. It has only been after years of growth, outside of the Defendant's influence, that the Plaintiff has been able to unpack what it truly means for a teenager to have a "relationship" with an adult teacher.

C. The relationship dynamics involved in minor sexual abuse can delay a victim's ability to recognize, disclose, and overcome the abuse.

Delayed awareness of their victimization is common for survivors of child sexual abuse. Referencing the men who were victims of Michael Jackson's sexual abuse as children, therapist Beverly Engel explains: "*they did not realize that they had been sexually abused until they were in their thirties. Instead, they considered what allegedly occurred between themselves and Michael Jackson as a love affair in which they consented to all the activities that occurred. This kind of thinking is common for former victims of child sexual abuse*".³³ It is not uncommon for a child or adolescent

³³ Beverly Engel, *Why Adult Victims of Childhood Sexual Abuse Don't Disclose* <<https://www.psychologytoday.com/gb/blog/the-compassion-chronicles/201903/why-adult-victims-childhood-sexual-abuse-dont-disclose>> (accessed January 30, 2024).

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victim to care about the perpetrator and feel protective of him.³⁴ The grooming process often includes the perpetrator separating the child or adolescent from their parents and peers, creating a feeling that she is special to the offender and giving a kind of attention or love to the victim that she needs.³⁵ This confuses the victim's ability to recognize the abuse as abuse, and to ultimately report it as such.

The Michigan Legislature recognized this phenomenon when it passed legislation in 2018 extending the time for bringing an action in both criminal and civil sexual assault cases involving victims who were under 18 years old at the time of the crime. Under this legislation, a criminal indictment can now be filed within 15 years of the abuse, or by the survivor's 28th birthday, whichever occurs later. The law also specifies that criminal proceedings do not need to be brought for a civil action to be filed, and that a civil action can now be brought until the survivor is 28 years old, or three years after the victim discovers that they were a victim of sexual assault.³⁶

In her May 8th, 2018, testimony before the House Law and Justice Committee Michigan Senator Margaret O'Brien, a sponsor of the proposed legislation, described the need for the change in law for survivors of child sexual abuse:

But unfortunately, our Statute of Limitations are so egregious that most children will never see justice a) because they fear if they tell they will lose everything, including their family, because over 90% of the time the perpetrator is either somebody in their family or somebody that they know very well (a family friend, a trusted coach). And so, it's very difficult for these young people to see any sort of justice. For those who do tend to disclose, for men it's an average age of 38 and for women

³⁴ *Id.*

³⁵ *Id.*

³⁶ MCL §767.24(4).

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an average age of 41. So, it takes a very long time, and the statute of limitations have far gone away by the time that happens. And unfortunately, between 25 and 33 percent of survivors, they will never disclose. And this allows the pattern to continue.³⁷

The Plaintiff was a child when the Defendant successfully groomed and perpetrated against her. That she believed she loved the Defendant during their relationship, and even after his incarceration, does not negate the seriousness of the Defendant's crimes. It has taken the Plaintiff time to understand and see the Defendant's behavior for the abuse that it was, and what it means to her - and her child's - futures. The Plaintiff and her child should not be penalized for this very normal victim response.

CONCLUSION AND RELIEF REQUESTED

The Michigan Legislature recognized the vulnerable position victims of sexual assault are in when they become pregnant because of nonconsensual sexual penetration. It specifically expanded legal protections to those victims to protect them from having to parent a child conceived of such an assault with their perpetrator. The Defendant used his position of authority as the Plaintiff's high school teacher to target, groom, and abuse her - criminal acts for which he is in prison. The Plaintiff conceived and gave birth to a child as a result of the Defendant's crimes against her, and the trial court was required, pursuant to Michigan's version of the Rape Survivor's Child Custody Act, to revoke the acknowledgment of Defendant's paternity

³⁷ Michigan House of Representatives, *Michigan House TV* <<https://www.house.mi.gov/VideoArchive/Player?video=LAWA-050818.mp4>> (accessed January 30, 2024) (showing Senator O'Brien's in-house testimony on May 8th, 2018. The video and relevant testimony begins around the 8:50 mark).

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and extinguish his parental rights to the minor child. The Defendant attempts to mischaracterize the parties' relationship as a consensual love affair between two consenting adults, which it never was.

Michigan's RSCCA was passed to protect mothers from having to raise a child with an individual who perpetrated sexual assault against them, precisely the protection the Plaintiff sought and was granted by the lower court. This Court should affirm the lower court's decision to revoke the Acknowledgment of Parentage signed by the parties and terminating the Defendant's parental rights to the minor child.

Respectfully submitted,

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Domestic and Sexual Violence

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 4,929 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

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APPELLEE'S APPENDIX II

TERMINATION OF PARENTAL RIGHTS AS A PRIVATE REMEDY: RATIONALES, REALITIES, AND ALTERNATIVES

Deirdre M. Smith[†]

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[†] Professor of Law, University of Maine School of Law. I am grateful for the valuable comments and feedback of Professors Julia Hernandez and Barbara Herrnstein Smith who reviewed earlier drafts of this Article. I also benefited from the discussion of the Article in a Works in Progress session at the Association of American Law Schools’ Section on Clinical Legal Education Annual Conference in April 2021. I had the benefit of excellent research assistance provided by Margaret O’Neil, Maine Law Class of 2022. Finally, I extend special thanks to Hon. E. Mary Kelly and the other members of the Maine Family Law Advisory Commission, whose thoughtful and careful examination of private termination actions, in which I was honored to participate, informed and shaped the analysis and conclusions in this Article.

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INTRODUCTION

A court order terminating a person’s parental rights—permanently and completely severing their legal relationship with their child—is one of the most extreme measures that the state can take against an individual. As Justice Ruth Bader Ginsberg noted: “[T]ermination adjudications involve the awesome authority of the State ‘to destroy permanently all legal recognition of the parental relationship,’”¹ rendering former parents as “legal nonentities.”² Justice John Paul Stevens observed that, while incarceration is a “pure deprivation of liberty,” terminating parental rights is a “deprivation of both liberty and property, because statutory rights of inheritance as well as the natural relationship may be destroyed.”³ He added: “Although both deprivations are serious, often the deprivation of parental rights will be the more grievous of the two.”⁴

1. *M.L.B. v S.L.J.*, 519 U.S. 102, 128 (1996).
 2. See MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 155 (1994).
 3. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 59 (1981) (Stevens, J., dissenting).
 4. *Id.*

Most people associate such a drastic outcome with public child welfare proceedings, where a state or county child protective services (CPS) agency has removed a child from their home after an investigation into abuse or neglect. In fact, state laws across the country permit private individuals to petition a court to terminate another person's parental rights for many stated reasons.⁵ For example, a court can terminate a parent's rights to allow a child's adoption to proceed without that parent's consent.⁶ Many jurisdictions also permit a parent or other individual to initiate a termination of parental rights ("TPR" or "termination") action based on allegations of abandonment or serious misconduct.⁷ While private termination actions are not uncommon, there has been scant scholarly examination of these matters, their underlying purposes, or their role in contemporary family law.⁸ This Article aims to fill that gap.

Private termination actions are drastic in that they implicate "parental rights" not with reference to limits on the exercise of any specific rights, such as the selection of a child's religion or education but, rather, with reference to the *existence* of a legally recognized parent-child relationship.⁹ After termination, the former parent has no standing to seek involvement in a child's life in the future.¹⁰ A termination order results in complete deprivation of a fundamental constitutional liberty interest with profound and lasting legal—and potentially, in many cases, emotional—consequences for both the former parent and the child.¹¹

I use the term "private" in the Article to refer to TPR court actions initiated by an individual as distinct from a dependency or child protection action initiated by a public CPS agency.¹² While any court

5. See *infra* Part II.

6. See *infra* notes 101-102 and accompanying text.

7. See *infra* notes 110-125 and accompanying text.

8. See Elizabeth Barker Brandt, *Concerns at the Margins of Supervised Access to Children*, 9 J. L. & FAM. STUD. 201, 223 n.98 (2007) ("Very little discussion of private termination of parental rights has occurred in the literature. Most termination of parental rights cases arise in the context of public agency interventions in families.").

9. See *infra* notes 43-59 and accompanying text.

10. Santosky v. Kramer, 455 U.S. 745, 749, 759 (1982).

11. See Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 59 (1981).

12. See MARTIN GUGGENHEIM & VIVEK S. SANKARAN, REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY

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order severing a parent’s legal relationship is a form of state action, the Article is particularly concerned with contexts in which the public family regulation system, as the party seeking and obtaining TPR under the state’s *parens patriae* authority, has no formal role. Private termination actions are brought by individuals to obtain a private remedy, not to serve the public interest. In general, and with relevant and sufficient rationales, providing private remedies is an appropriate core function of law. In the case of private termination proceedings, however, there is little acknowledgment of the most common rationales at play and virtually no examination of the relevance or sufficiency of such rationales.

In most contexts, a private termination serves primarily the petitioners’ interests while undermining the rights of the terminated parent and too often disregarding the interests of the child. Collectively, private termination actions contribute to our contemporary legal system’s too-hasty inclination to separate families and to sever legal ties between a parent and their child permanently. The availability of termination as a private remedy also extends and reifies the realms in which substance use disorders, incarceration, poverty, disability, and mental illness are stigmatized. In this way, private termination actions disproportionately target parents from vulnerable and marginalized communities, especially parents who are low-income.¹³

This Article begins by defining the legal concept of “parental rights” and commenting on its history and the development of various routes to terminate such rights. Terminations are the result either of actions initiated by public CPS agencies or of petitions by private individuals such as another parent, a relative, or a legal guardian of the

DEFENDERS xix (2015) (noting that proceedings brought by a CPS agency “are variously known as ‘dependency,’ ‘child neglect,’ ‘child abuse,’ or ‘child protection,’ depending on the locality.”). Several commentators have adopted the term “family regulation” to refer to the full system of agencies and interventions, of which dependency proceedings are one part. *See, e.g.,* Ava Cilia, *The Family Regulation System: Why Those Committed to Racial Justice Must Interrogate It*, HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. (Feb. 17, 2021), <https://harvardcrcl.org/the-family-regulation-system-why-those-committed-to-racial-justice-must-interrogate-it/>; Cynthia Godsoe, *An Abolitionist Horizon for Child Welfare*, LPE PROJECT BLOG (Aug. 6, 2020), <https://lpeproject.org/blog/an-abolitionist-horizon-for-child-welfare/>; Dorothy Roberts, *Abolishing Policing also Means Abolishing Family Regulation*, THE IMPRINT (June 16, 2020), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480>.

13. *See* Roberts, *supra* note 12.

child.¹⁴ I examine the current state of private termination law, including the contexts in which private petitions are permitted and the standards that courts apply in these actions. I then review the implications of permitting this substantial interference with a fundamental constitutional liberty interest without the accompanying procedural protections that are afforded to parents in most proceedings initiated by public CPS agencies.

In the major portion of the Article, I analyze and critique three rationales—either stated or implied—for private termination actions: to enable a new parent to be added through adoption; to sever the legal connection between a child’s parents in order to protect one of the parents; and to foreclose the possibility of a person’s future exercise of parental rights. In each case, I test the assumption that such an extreme remedy is necessary to serve the stated or implied purpose. As I demonstrate, while the rationales for a TPR may be appropriate in theory, the purposes it is claimed to serve can, in many contexts, be served equally well through another route short of termination. I review several such alternatives, including non-exclusive adoption, de facto or equitable parentage, and minor guardianship, and highlight innovative approaches that have been taken by some states.

A common stated purpose for private termination, for example, is to permit a child’s adoption by the other parent’s new spouse or partner.¹⁵ Such purpose assumes that a child can only have two parents at any time and that the noncustodial parent’s rights must be terminated in order that parental rights be granted to the stepparent, itself a potentially appropriate legal outcome. As I point out, however, contemporary approaches to parentage have increasingly eroded the traditional heteronormative conjugal “dyad” model of parentage.¹⁶ Some states’ courts can now establish or recognize parentage for more than two people in a child’s life. By contrast, in the context of a child’s conception resulting from sexual assault, where the purpose is to

14. See *infra* notes 43-59 and accompanying text.

15. See *infra* notes 279-333 and accompanying text.

16. See Sacha M. Coupet, “Ain’t I A Parent?”: *The Exclusion of Kinship Caregivers from the Debate Over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 618–23 (2010). See *infra* notes 322322–329 and accompanying text.

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prevent further victimization of the assaulted parent, a termination order may be the only route to secure such outcome.¹⁷

I conclude the Article by encouraging courts, attorneys, and policymakers to scrutinize private termination laws and proceedings and, in specific cases, to consider whether the stated purpose of a private termination could be served through a less drastic remedy. The analysis presented in this Article indicates that private terminations should be reserved for those cases where the child was conceived by sexual assault or the petitioner demonstrates through clear and convincing evidence that termination will either provide an identifiable affirmative benefit for the child that cannot be achieved otherwise or prevent serious harm to the child that cannot be avoided through a less “grievous” measure. States should amend their family law statutes to ensure that these alternative measures are available and that needed services and supports for families are provided so that, wherever possible, children can safely remain connected with their parents. Finally, courts must ensure that rigorous procedural protections—at least equivalent to those in dependency proceedings—are extended to persons who are the subject of private petitions to terminate their parental rights.

I. DEFINING “PRIVATE TERMINATION OF PARENTAL RIGHTS”

The establishment and termination of the parent-child relationship are aspects of family law, which is largely a creature of state statutory law.¹⁸ While there is a patchwork of terms and standards employed by states in certain family law topics, there are also trends and common approaches.¹⁹ This Article describes both the broad commonalities and the different ways that states’ laws address the question of when, if ever, a private individual can petition a court to terminate another person’s parental rights. In this first Part, I briefly examine the origins and contemporary significance of each of the three key components of “private termination of parental rights.”

17. See *infra* notes 367–378 and accompanying text.

18. See *United States v. Windsor*, 570 U.S. 744, 766 (2013) (noting that subject to constitutional guarantees, “‘regulation of domestic relations’ is ‘an area that has long been regarded as a virtually exclusive province of the States.’” (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975))).

19. See June Carbone & Naomi Cahn, *Changing American State and Federal Childcare Laws: Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 13 (2017).

A. Defining “Parental Rights”

The term “parental rights” can be used to describe two distinct legal conceptualizations: a person’s *status* or a person’s *authority* over their children.²⁰ This Article is concerned with parental rights under the first conceptualization: that is, rights bearing on a person’s legal relationship to another person (specifically, a child) or, in other words, that person’s “parentage.”²¹ Through such use, the term “parental rights” demarcates the extent of a parent’s authority regarding that other person among a defined group of individuals. That is, who, among a child’s “parents” or parent-like figures, can exercise control over the child, including having custody of and making decisions regarding them.²² Defining and terminating parentage also bears on questions of inheritance and legitimacy to determine who can or cannot inherit property by operation of state law on the basis of a familial connection.²³

Whatever other family relationships may be recognized by the individuals concerned, *legal* relationships among individuals within a family are wholly creations of the state.²⁴ As Professor Clare Huntington notes: “Without the state, there is no family, legally speaking.”²⁵ People are not “family until the state calls it as such,” and the state controls the “entry and exit from the legal status of family.”²⁶

20. See Samantha Godwin, *Against Parental Rights*, 47 COLUM. HUM. RTS. L. REV. 1, 3–5 (2015) (describing “parental rights” as “the special legal powers of parents to control major aspects of their children’s lives”). Constitutional principles identify the extent to which the state may interfere with a person’s authority with respect to their child with respect to *specific* decisions, such as whether to vaccinate and how to educate a child. *Id.*; see MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 37–38 (Harvard Univ. Press 2005).

21. See UNIF. PARENTAGE ACT § 102(16) (UNIF. L. COMM’N 2017) (defining “parentage” as “the legal relationship between a child and a parent of the child.”).

22. See GUGGENHEIM, *supra* note 20, at 49; Tali Marcus, *Cutting Off the Umbilical Cord—Reflections on the Possibility to Sever the Parental Bond*, 25 J. L. & POL’Y 583, 584–88 (2017).

23. See UNIF. PARENTAGE ACT § 203, comment (2017) (noting that the provision “Unless parental rights are terminated, a parent-child relationship established under this [act] applies for all purposes, except as otherwise provided by law of this state other than this [act].” can refer to statutes that preclude inheritance by intestate succession after termination of parental rights).

24. See CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 59 (Oxford Univ. Press 2014).

25. *Id.*

26. *Id.*

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This control extends to the legal status of a marriage and of the parent-child relationship.²⁷ Although the word “parent” is used in common parlance to describe a genetic relative, state law—not biology—determines a person’s legal status as a “parent.”²⁸

The Uniform Laws Commission’s 2017 Uniform Parentage Act (UPA) reflects the many routes through which “parentage” can be established under state law, including genetics, but, also, presumed parentage, acknowledged or intended parentage, use of reproductive technology, adoption, and de facto parenthood.²⁹ A wide range of outcomes turn on the identification of who a child’s legal parents are and on whether a person is determined to be a “parent” versus a “non-parent.”³⁰ Most significantly, a parentage determination confers the legal authority to exercise and enforce the specific powers and to take on the specific responsibilities that accompany the status of “parent.”³¹

Today we often emphasize the affectional and psychological aspects of parenting roles, which can translate into the degree of contact and influence a person has in a child’s life. In its origins, however, the legal status of “parent” has little to do with family intimacy. Rather, it concerns the need to clarify one person’s relationship to another in the contexts of inheritance, property, or labor.³² The definition of “parentage” in *Black’s Law Dictionary* reflects its enduring association with genetic lineage: “The quality,

27. *United States v. Windsor*, 570 U.S. 744, 745–46 (2013) (noting that the “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States”) (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

28. See Douglas NeJaime, *Who is a Parent?*, 43 FAM. ADVOC. 6, 6–7 (2021).

29. See UNIF. PARENTAGE ACT §§ 606–612 (UNIF. L. COMM’N 2017); see generally Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L. J. F. 589 (2018) (addressing the revisions made to the Uniform Parentage Act and how these revisions address many of the critical gaps in parentage law). See also Carbone & Cahn, *supra* note 19, at 14–15 (noting that the determination of legal parentage under contemporary state laws stems from a foundation of biology, function, and “formalities”).

30. GUGGENHEIM, *supra* note 20, at 20 (“[A] myriad of legally significant consequences follow from the formal recognition of parenthood.”). Third parties, such as guardians or grandparents, may be able to obtain certain limited rights and powers with respect to a child, but they retain their “non-parent” status at all times.

31. See Carbone & Cahn, *supra* note 19, at 14 (“Legal parents are those adults upon whom the law confers recognition, imposes financial obligations, and grants standing to seek visitation and custody.”).

32. See Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 647–49 (2014).

state, or condition of being a parent; kindred in the direct ascending line.³³

The contemporary legal conceptualization of “parental rights” is likely related to the evolution of what some have noted as the “rise of the individual” as having a distinct legal status and the corresponding decline of the “family” as having such status.³⁴ This trend over the last hundred years or so is marked by the recognition—through a series of landmark U.S. Supreme Court cases—of a fundamental liberty interest in an individual’s exercise of their role as a parent.³⁵ Court opinions in the first half of the twentieth century confirmed that the Due Process Clause of the Constitution protects that interest when there is unwanted state intrusion in the family, for example, in enforcing child labor laws.³⁶ With recognition of this constitutional protection, obtaining and retaining the legal status of parent takes on greater import.³⁷ As Professor Dana Purvis has observed: “Once the status of legal parent is recognized, it is a profoundly powerful position.”³⁸

To some extent, family law has also increasingly recognized children as individuals who may themselves have “legal rights as against their own mothers and fathers.”³⁹ The state is limited in its ability to enforce a child’s “rights,” however, because, as Professor Lawrence Friedman observes: “Law and society clearly recognize that in general the rights of parents are sacred . . . Parental rights are constitutionally protected.”⁴⁰ Some commentators have noted that “robust protection of parental rights also advances society’s interests

33. *Parentage*, BLACK’S LAW DICTIONARY (11th ed. 2019).

34. See LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW 1* (Harvard Univ. Press 2004).

35. See GUGGENHEIM, *supra* note 20, at 18 (“The subject of parental rights has been profoundly shaped by the Constitution of the United States, even though neither the word ‘parent’ nor ‘child’ appears anywhere in it.”).

36. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (finding no violation of parents’ liberty interest in enforcing child labor laws regarding children of Jehovah’s Witnesses); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (holding that compulsory public school attendance was a violation of parents’ liberty interest); *Meyer v. Nebraska*, 262 U.S. 390, 399, 402–03 (1923) (holding that law prohibiting teaching children foreign language was a violation of parents liberty interest). See also GUGGENHEIM, *supra* note 20, at 25–27.

37. See Purvis, *supra* note 32, at 680.

38. *Id.* at 649.

39. FRIEDMAN, *supra* note 34, at 97. See generally GUGGENHEIM, *supra* note 20 (arguing that children’s rights can serve as a screen for the interests of adults).

40. FRIEDMAN, *supra* note 34, at 97.

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... [by] ensuring that parents discharge their obligations adequately.”⁴¹ Nonetheless, as discussed herein, many jurists are hesitant to make parents’ constitutionally protected interests the predominant consideration in either public dependency proceedings or intra-family disputes, and those interests are too frequently subordinated to the questionably determined consideration of a child’s “best interest.”

B. Defining “Termination of Parental Rights”

“Termination of parental rights” refers, in this Article, to the permanent severing of the legal relationship between a parent and child: that is, to the undoing of legal parentage, for all purposes, throughout the life of both. The parent forever loses their legal status as a parent to that child and all the privileges and rights that flow therefrom.⁴² These rights and privileges include the standing to petition the court to have access to the former child or to exercise some role in their life.⁴³ It means losing not only the prospect of contact rights, but, also, the status to make or participate in decisions about the

41. Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1417 (2020).

42. Some states permit former parents (or the state CPS agency) to petition a court to reinstate the parent’s rights after termination. But such laws, where they exist, strictly limit the circumstances under which this can occur, and generally only when the termination occurred in a dependency case and the child was never adopted. Thus, it is not likely to be a remedy in the contexts in which a parent’s rights are terminated as the result of private action. Where reinstatement is not permitted, some former parents seek to adopt their own former children. *See generally* Lashanda Taylor Adams, *Backward Progress Toward Reinstating Parental Rights*, 41 N.Y.U. REV. L. & SOC. CHANGE 507 (2017) (examining how bias against parents whose rights have been terminated is reflected in reinstatement statutes); Child Welfare Info. Gateway, *Reinstatement of Parental Rights*, <https://www.childwelfare.gov/topics/permanency/reunification/parental-rights/> (last visited Mar. 26, 2022).

43. The Idaho termination statute includes as a ground that the termination would serve the best interest of the child and the parents. IDAHO CODE ANN. § 16-2005 (West 2021). However, an Idaho appeals court has held that a court need not find that a termination is in the best interest of a parent in every case. *Hofmeister v. Bauer*, 719 P.2d 1220, 1222 (Idaho Ct. App. 1986). The court reasoned: “The notion that involuntary termination benefits the parent causes us some disquietude. Parenthood confers long-term benefits of comfort and support that ordinarily outweigh the immediate demands of childrearing. *Even a parent of limited capability may be aggrieved by the loss of these potential benefits.* We cannot indulge in a facile assumption that a mother who neglects her children is better off without them.” *Id.* (emphasis added).

child's upbringing, including their education, religion, and medical care.⁴⁴

A termination order can also mean that a child no longer has the protections and benefits that accompany a legal tie to the former parent, including, in most cases, ongoing child support.⁴⁵ Where a parent-child legal relationship exists, it continues into adulthood in terms of inheritance,⁴⁶ priority for appointment of an adult guardian or conservator, hospital visitation, and countless other contexts where such next-of-kin legal relationship confers access and authority.⁴⁷

By extension, these legal consequences from termination may also have a direct impact on the child's identity and relational rights. Research of the public child protection system has demonstrated the negative psychological effects on children from losing a parent, even one with whom they had only sporadic contact or who was neglectful

44. See Marcus, *supra* note 22, at 583–84.

45. See, e.g., State Dep't of Hum. Servs. ex rel. Overstreet v. Overstreet, 78 P.3d 951, 955 (Okla. 2003) (holding that “termination of parental rights also terminates parental duties” consistent with the approach of a majority of states); Beasnett v. Arledge, 934 So. 2d 345, 348 (Miss. Ct. App. 2006) (holding that “it is an inherent aspect of voluntary termination of parental rights that, just as the entire parent-child relationship terminates, so too does the responsibility to pay child support”); *but see* Ex parte M.D.C., 39 So. 3d 1117, 1120 (Ala. 2009) (holding that “a parent’s obligation to pay child support is not extinguished under the CPA when the parent’s parental rights are terminated”). Cf. Monmouth Cnty. Div. of Soc. Servs. for D.M. v G.D.M., 705 A.2d 408, 410, 412 (N.J. Super. Ct. Ch. Div. 1997) (holding that a private agreement between two parent to terminate the rights of one was void on the basis of public policy, in part of because of a parent’s duty of child support). A termination order usually does not terminate a child support debt accrued prior to the termination, and some statutes preserve a terminated parent’s ongoing obligation to pay child support, such as where the child was conceived from a sexual assault. ARK. CODE ANN. § 9-10-121(d) (West 2021).

46. Some statutes specifically preserve a child’s right to inherit from a parent whose rights were terminated. See, e.g., § 9-10-121(d); Demetrius L. v. Joshlynn F., 365 P.3d 353, 357 (Ariz. 2016). See Richard Lewis Brown, *Undeserving Heirs?—The Case of the “Terminated” Parent*, 40 U. RICH. L. REV. 547, 549 (2006).

47. See Marcus, *supra* note 22, at 588–604 (discussing symbolic and legal implications of the fact that “[p]arenthood is conceived [of] as a status for life and beyond”). For example, under many states’ laws, a parent would be in line of priority for the appointment as the guardian or conservator of an adult child. See Nina A. Kohn, *Matched Preferences and Values: A New Approach to Selecting Legal Surrogates*, 52 SAN DIEGO L. REV. 399, 405–06 (2015).

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in some way.⁴⁸ Further, unless a court order or statute provides otherwise, an order terminating a parent’s relationship to a child also severs the child’s legal relationship with all other relatives of the terminated parent, including their grandparents, aunt and uncles, and even their siblings.⁴⁹ In some instances, the child may continue to have contact with the former relatives—either informally or through an “open adoption” arrangement—but that is not always the case, and there are usually limitations on the enforceability of such arrangements.⁵⁰

The termination of a parent’s rights differs from the appointment of a legal guardian for their child, the child’s placement in foster care, or an award of exclusive parental rights and responsibilities regarding the child to another parent. All of these allow an estranged or noncustodial parent to seek relief from the courts, based on changed circumstances, to increase their rights and access to the child.⁵¹ By contrast, as Justice Blackmun wrote in *Santosky v. Kramer*: “Termination denies the natural parents physical custody, as well as the rights ever to visit, communicate with, or regain custody of the child . . . [T]erminating parental rights is *final* and irrevocable. Few forms of state action are both so severe and so irreversible.”⁵² The Supreme Court of Ohio recently referred to termination of parental rights as “the family law equivalent of the death penalty.”⁵³

Although there are several routes—some quite simple and others requiring more effort—to *establishing* legal parentage, termination

48. See GUGGENHEIM & SANKARAN, *supra* note 12, at 311–14; Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 741, 762–68 (2016); Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 461–74 (1983).

49. See *M.L.B. v S.L.J.*, 519 U.S. 102, 121 (1996) (“In contrast to loss of custody, which does not sever the parent-child bond, parental status termination is ‘irretrievably destructive’ of the most fundamental family relationship.”) (citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)). See also GUGGENHEIM, *supra* note 20, at 37 (discussing how “parental rights doctrine” should be seen more broadly to include the protection of children’s relationships with their parents and family).

50. See JOAN HEIFETZ HOLLINGER, *Overview of Legal Status of Post-Adoption Contact Agreements*, in *FAMILIES BY LAW: AN ADOPTION READER* 159–62 (Naomi R. Cahn & Joan H. Hollinger eds., 2004); HUNTINGTON, *supra* note 24, at 85–86, 130.

51. See Garrison, *supra* note 48, at 445; LINDA D. ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE*, § 17:01 (1994) (“In all states custody awards are modifiable to protect and further the best interests of a child.”).

52. *Santosky v. Kramer*, 455 U.S. 745, 749, 759 (1982).

53. *In re Adoption of Y.E.F.*, 171 N.E.3d. 302, 310 (Ohio 2020).

can only occur through a court's order pursuant to state law.⁵⁴ As Professor Huntington notes: "Just as the state decides when a parent-child relationship begins, it also decides when it ends . . . In this way, the state can end a parent-child relationship, both with the parent's permission and without it."⁵⁵ As a result of the constitutional dimensions of one's status as a parent, once parentage is attained, it cannot be easily removed, at least in theory. Huntington explains: "[T]he law places legal parents in the most privileged position vis-a-vis children, and many of these rights are rooted in the Constitution and thus highly protected. The most fundamental protection is that children cannot be taken away from a legal parent without showing that the parent is unfit."⁵⁶

Historically, the legal mechanisms to terminate parentage have the same original purpose as the mechanisms for its establishment: the clarification of legal relationships between individuals. While there is nothing new about children being raised by people other than their genetic parents, until recent decades there was little need or drive to sever the legal ties with the child's original parents to enable such arrangements.⁵⁷ Today, although parental rights are still recognized as constitutionally protected interests, termination of those rights in a range of contexts is remarkably common, especially for families of color through the public family regulation system.⁵⁸

C. Distinguishing "Public" Versus "Private" Termination of

54. See *M.L.B.*, 519 U.S. at 116 n.8 ("[N]o power other than the State can" issue an "official decree extinguishing . . . parent-child relationships"); *In re A.J.S.*, 492 S.W.3d 674, 676 (Mo. Ct. App. 2016) ("[T]he power of the State to terminate the parental rights of a parent are strictly construed and derive solely from the statute. There is no common law right of a parent to just terminate the parental rights of the other parent.").

55. HUNTINGTON, *supra* note 24, at 59.

56. *Id.* at 61.

57. See MASON, *supra* note 2, at 109; FRIEDMAN, *supra* note 34, at 101.

58. See DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 150–51 (2002); Christopher Wildeman et al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016*, 25 CHILD MALTREATMENT 32, 39–40 (2020); Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J. L. & SOC. POL'Y 303, 313–27 (2006).

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As noted earlier, *private* termination actions are initiated by an individual rather than a public CPS agency in a dependency action.⁵⁹ The proceeding is “private” in the same sense as an express or implied “private right of action” in the context of enforcing one’s civil rights.⁶⁰ While the court’s decision to sever the parent’s legal relationship is a form of state action,⁶¹ the petitioning party seeking and obtaining the termination of parental rights is not the state family regulation system.⁶² More significantly, in TPR proceedings, one or more individuals is seeking termination as a *private remedy* of some kind, that is, to obtain a benefit to that petitioner, rather than to serve a broad public interest, even if the applicable legal standard refers to “the best interest of the child.”⁶³

When a child’s situation comes to the attention of a CPS agency, public employees, usually social workers, will investigate the concerns or allegations.⁶⁴ If they find indications of abuse or neglect,

59. I will refer to all child protection services (CPS) agencies as “the state” in this context.

60. See, e.g., Caroline Bermeo Newcombe, *Implied Private Rights of Action: Definition, and Factors to Determine Whether a Private Action Will Be Implied from a Federal Statute*, 49 LOY. UNIV. CHI. L. REV. 117, 120 (2017) (“A private right of action allows a private plaintiff to bring an action based directly on a public statute, the Constitution, or federal common law.”).

61. See, e.g., *In re Adoption of Y.E.F.*, 171 N.E.3d 302, 311 (Ohio 2020); *In re Adoption of J.E.V.*, 141 A.3d 254, 261 (N.J. 2016).

62. See, e.g., *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (discussing express and implied rights of action for disability discrimination claims). Permitting private citizens to sue an individual in order to obtain a court order depriving another person of their constitutional rights in a context normally reserved for the state, such as TPR, is somewhat analogous to the statutory scheme enacted by Texas in “Senate Bill 8,” the anti-abortion law at the center of the pending U.S. Supreme Court litigation in *U.S. v. Texas* (Docket No. 21-588) and *Whole Women’s Health v. Jackson* (Docket No. 21-463). That law enables private citizens to bring civil actions against and recover damages from abortion providers and others who are found to violate the state’s ban on abortions after six weeks of pregnancy. This approach is seen by some commentators as a troubling new variation on private enforcement actions. See Jeannie Suk Gersen, *The Manifold Threats of the Texas Abortion Law*, THE NEW YORKER (Sept 5, 2021), <https://www.newyorker.com/news/our-columnists/the-manifold-threats-of-the-texas-abortion-law>. Private TPR actions differ in that the target of the claim is the individual whose rights would be compromised, whereas actions brought under SB8 are not filed against individuals seeking abortions.

63. See, e.g., CAL. PROB. CODE § 1516.5 (West 2021); see also *infra* notes 259–272 and accompanying text.

64. See Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 STAN. L. REV. 841, 843 (2020).

or a significant risk of the same, the agency may take any of a wide range of actions based on an assessment of the situation.⁶⁵ At the least severe end of the spectrum, they may refer the family to social services or develop a safety plan to address a specifically identified problem.⁶⁶ At the other end, the agency may initiate a dependency proceeding in state court and, if warranted, seek a court order to remove the child from the parents' home and place the child in foster care or another form of state custody.⁶⁷

The aim of state public dependency proceedings—as set by federal child welfare laws—is to arrive at some kind of a “permanency” outcome that ends the child’s dependence on the state and the court sooner rather than later.⁶⁸ Under federally-guided policy principles, the preferred outcome is the child’s reunification with the parent.⁶⁹ Accordingly, a CPS agency is required to use “reasonable efforts to restore children to the family after removal,” including the provision of supports and services targeted to the family’s needs.⁷⁰

Under federal policy, where reunification cannot be achieved after removal of the child from the family, the next ideal permanency outcome is adoption,⁷¹ which requires severing the child’s legal

65. *See id.*

66. *See id.* 848–54.

67. *See* Elizabeth Fassler & Wanjiro Gethaiga, *Representing Parents During Child Welfare Investigations: Precourt Advocacy Strategies*, 30 ABA CHILD. L. PRAC. 17, 24 (2011); NAT’L CONF. OF STATE LEGISLATURES, *The Child Welfare Placement Continuum: What’s Best for Children?* (Nov. 3, 2019), <https://www.ncsl.org/research/human-services/the-child-welfare-placement-continuum-what-s-best-for-children.aspx>.

68. *See* 42 U.S.C. § 675(5)(E) (2018); Jim Moye & Roberta Rinker, *It’s A Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?* 39 HARV. J. ON LEGIS. 375, 380 (2002). Federal mandates enacted through the 1997 Adoption and Safe Families Act require that a permanency plan is put in place before the child has been in state custody for fifteen out of the previous twenty-two months, with a few exceptions.

69. GUGGENHEIM & SANKARAN, *supra* note 12, at xxii (“[T]he state’s purpose in virtually all [child protection] cases is to help families find ways to be able to raise their children safely.”).

70. MASON, *supra* note 2, at 155.

71. *See* Garrison, *supra* note 48, at 442–46. The Adoption and Safe Families Act of 1997 imposes requirements that promote adoption, not reunification, as a permanency outcome, which can undermine the efficacy of reunification efforts in many instances. *See* Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 643–73 (1999).

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relationship with their existing parents.⁷² Because such severing would deprive each parent of a constitutionally protected interest, if one of the parents does not consent to the adoption, the state must bring a TPR petition.⁷³ In these instances, the state, acting pursuant to its *parens patriae* authority, asks the court to terminate one or more person's parental rights in the name of child welfare, "freeing" the child for adoption.⁷⁴ Importantly, the court may grant the petition only if the state has proven parental unfitness, usually by clear and convincing evidence.⁷⁵

In the "private" TPR context, by contrast, there is no formal role for a state agency in the proceeding even though there may have been a CPS investigation or involvement in the family in the recent past.⁷⁶ In some states, the court may order a public CPS agency to do an assessment or play some other limited role,⁷⁷ but the agency is not the driving force behind the TPR petition. Rather, the petition is filed by one or more private individuals. Most commonly, the petitioner is the child's other parent, either acting alone to seek exclusive parental rights over the child or acting jointly with the parent's new partner who wishes to adopt the child.⁷⁸ Alternatively, such a private petition may be brought by a child's legal guardian or another person in the context of a contested adoption.⁷⁹

Clearly, these privately initiated proceedings involve a set of competing interests differing from those in the public dependency context. Here, the case is a fight between or among individual adults seeking their own status and authority with respect to a child, rather

72. See *infra* notes 259–428 and accompanying text.

73. GUGGENHEIM & SANKARAN, *supra* note 12, at 305–06.

74. *Id.*

75. See *id.* at 293–96, 307–08. There need not be an identified adoptive family in order to grant a petition for TPR. In some instances, a child will continue to be a state "ward" for some period of time after the TPR, potentially the remainder of their minority. Garrison, *supra* note 48, at 475–76.

76. See, e.g., Darla D. v. Grace R., 382 P.3d 1000, 1004 (N.M. Ct. App. 2016); In the Interest of L.F., No. 02-19-00421-CV, 2020 Tex. App. LEXIS 3879, at 2–3 (Tex. Ct. App. May 7, 2020); Zockert v. Fanning, 800 P.2d 773, 777–78 (Or. 2000); Gupta-Kagan, *supra* note 64, at 852–60 (discussing the "hidden foster care system" through which a family changes a child's residence as a result of a CPS agency's threat of more formal intervention in the family).

77. See, e.g., E.K. v. TA., 572 S.W.3d 80, 84 (Ky. Ct. App. 2019).

78. See, e.g., *In re* Adoption of K.L.P., 735 N.E.2d 1071, 1073 (Ill. App. Ct. 2000).

79. See, e.g., *In re* Guardianship of Robert S., No. F060073, 2011 WL 2152626, at *2 (Cal. Ct. App. June 2, 2011).

than the state acting against an individual pursuant to its *parens patriae* authority to protect children.⁸⁰ In private termination proceedings, the court's role is akin to that in contested child custody cases, including third-party proceedings: awarding relief to individuals while ensuring that the result is in the child's best interest.

In private TPR litigation, the absence of the state and of the constituent obligations that accompany its presence can have a substantial impact on the proceedings and outcome. As discussed in Part IV below, some courts conclude that unless the TPR litigation can be considered a form of "state action," fewer procedural protections, including the right to appointed counsel,⁸¹ need to be afforded the parents involved.⁸² Further, petitions brought by individuals are not required to comply with federal policy goals of family preservation.⁸³ A person's parental rights can be severed without any showing of

80. Some states permit a public dependency proceeding to be converted to a private TPR action by individuals who have been awarded custody of the child. *See, e.g.,* A.F. v. L.B., 572 S.W.3d 64, 67 (Ky. Ct. App. 2019); *In re* L.C.R., 739 S.E.2d 596, 597 (N.C. Ct. App. 2013). *See also* GUGGENHEIM, *supra* note 20, at 48–49 ("One of the most deeply contentious issues in American family law a struggle among adults over who gets the bundle of rights parents possess . . . Precisely because of the extraordinary authority over children that the law cedes to parents, it is exceedingly important to ascertain who gets to be counted as a 'parent' under the law and who, as a result, obtains the bundle of rights that parents enjoy.").

81. *See, e.g., In re* G.J.P., 314 S.W.3d 217, 219, 222–24 (Tex. App. 2010) (father had appointed counsel in a dependency TPR proceeding but lost that right when the proceeding was converted into a private TPR action brought by grandparents).

82. *See, e.g., In re* K.L.P. v. R.P., 763 N.E.2d 741, 753 (Ill. 2002) (holding that a parent's right to counsel in private TPR matter stemmed from the "significant state action" from the child's initial placement with a non-parent by a CPS agency); A.W.S. v. A.W., 2014 MT 332, ¶ 17–18, 337 Mont. 234, 339 P.3d 414; *compare with In re* Adoption of Y.E.F., 171 N.E.3d 302, 311 (Ohio 2020) (noting that private TPR is still state action because "only the state has the power to extinguish the parent-child relationship"). *See infra* notes 235–256 and accompanying text.

83. *See, e.g.,* 25 U.S.C. § 1912(d) (2018). The federal Indian Child Welfare Act (ICWA) requirements, however, apply in all termination proceedings involving parental rights "to an Indian child." The broad language of that statute provides: "[a]ny party seeking to effect . . . termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." *Id.* *See also* S.S. v. Stephanie H., 388 P.3d 569, 573–74 (Ariz. Ct. App. 2017) (applying ICWA in a TPR case between parents based on allegations of abandonment).

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failed efforts to reunify or repair the relationship between that parent and their child.⁸⁴

II. THE CONTEXTS IN WHICH A PARENT’S RIGHTS CAN BE TERMINATED WITHOUT DIRECT STATE INVOLVEMENT

This Part will provide a brief overview of the contexts in which the termination of parental rights can happen outside of state-initiated dependency proceedings. The predominant one is adoption, which can involve either voluntary or involuntary termination of a parent’s rights in the context of the proceeding. Some state laws—or courts’ interpretations of the same—allow a parent or other private individual to file a termination petition outside of the adoption context, usually under specific circumstances, such as when a child was conceived from a sexual assault.⁸⁵

A. Termination as Part of Adoption Proceedings

The most common context in which a parent’s rights may be terminated outside of a public dependency proceeding is adoption. A person can seek to adopt another person in a range of scenarios. There may be an arrangement made at or before the child’s birth that someone other than the child’s genetic parents will raise the child. Alternatively, the spouse or partner of a child’s existing parent may seek to establish a formal legal relationship with a child for any number of reasons.⁸⁶ A child’s guardian or other long-term caregiver may seek to adopt the child.⁸⁷ In all contexts, an adopting parent is replacing an existing parent.⁸⁸

84. *See, e.g.,* A.K.H. v. J.D.C., 619 S.W.3d 425, 431 (Ky. Ct. App. 2021); Darla D. v. Grace R., 2016-NMCA-093, ¶ 56, 382 P.3d 1000; *In re* Caroline, 638 N.Y.S.2d 997, 999–1000 (N.Y. App. Div. 1996).

85. *See, e.g.,* ALASKA STAT. ANN. § 25.23.180 (West 2021); N.H. REV. STAT. ANN. § 170-C:5-a (2021); IND. CODE ANN. § 31-35-3.5-3 (West 2021).

86. 1 THOMAS A. JACOBS, CHILDREN AND THE LAW: RIGHTS & OBLIGATIONS § 4:50 (2018); Margaret M. Mahoney, *Family Boundaries: Symposium on Third-Party Rights and Obligations with Respect to Children, Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 88–89 (2006).

87. *See* Guardianship of Ann S., 202 P.3d 1089, 1094–95, 1104, 1106–07 (Cal. 2009); *see also In re* Adoption of L.E., 2012 ME 127, 5–6, 56 A.3d 1234, 1236.

88. BARBARA ANN ATWOOD, CHILDREN, TRIBES, AND STATES: ADOPTION AND CUSTODY CONFLICTS OVER AMERICAN INDIAN CHILDREN 143 (2010); Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1125 (2003); Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 506–07 (1998) (noting that adoption creates a new family unit while “annihilat[ing] the pre-existing unit”).

By operation of law, an adoption severs the legal relationship between any existing parent and the adoptee, unless the existing parent is an adoption co-petitioner or, under some state laws, married to the petitioner.⁸⁹ Adoption “create[s] a new family and destroy[s]—obliterate[s]—the old one.”⁹⁰ For this reason, the status of existing parents and the impact of any adoption on their rights must be addressed before the adoption is finalized.⁹¹ State laws take a few different approaches to this inquiry, but they all operate in essentially similar ways and with similar outcomes.⁹²

Adoption laws have long recognized that, so long as the parent retains some residual rights, they have standing to refuse to consent to the child’s adoption.⁹³ A parent may consent to the adoption of their child, allowing the adoption to sever their legal relationship with the adoptee upon the issuance of the adoption decree.⁹⁴ Such consent must be knowing, informed, and intentional because of the constitutional rights implicated.⁹⁵ An existing parent may not only consent to another person’s adoption of their child, but also join the adoption petition, essentially becoming an adopting parent themselves so that the severance has no actual effect on their rights.⁹⁶ This can occur in an

89. *See, e.g.*, *Wright v. Howard*, 711 S.W.2d 492, 495 (Ky. Ct. App. 1986) (“[T]he adoption judgment itself terminates parental rights by virtue of the provisions of” the adoption statute).

90. *FRIEDMAN, supra* note 34, at 115. *Cf. Rybolt v. Brooks*, 884 N.E.2d 931, 937 (Ind. Ct. App. 2008) (affirming denial of grandparents’ petition to adopt child because of likelihood of continued contact with former parents and noting “It is well known that one of the purposes of adoption is ‘to assure that the severance of family ties by adoption be complete so as to protect the ‘new family union which the law had created.’”) (quoting *Handshoe v. Ridgway*, 870 N.E.2d 517, 521 (Ind. Ct. App. 2007)).

91. *See* JENNIFER FAIRFAX, *ADOPTION LAW HANDBOOK: PRACTICE, RESOURCES, AND FORMS FOR FAMILY LAW PROFESSIONALS* 138–40 (2011); Joan Heifetz Hollinger, *State and Federal Adoption Laws*, in *FAMILIES BY LAW: AN ADOPTION READER* 37, 38 (Naomi R. Cahn & Joan H. Hollinger eds. 2004).

92. *See* FAIRFAX, *supra* note 91, at 138.

93. Cahn, *supra* note 88, at 1118–26 (“The necessity of parental consent to adoption was a critical component in the early adoption statutes.”).

94. FAIRFAX, *supra* note 91, at 146. Although a parent may consent to the termination of their rights through adoption, a parent may not initiate a proceeding to sever their legal relationship to a child. *See* Marcus, *supra* note 22, at 610.

95. *See* FAIRFAX, *supra* note 91, at 147.

96. *See* Mahoney, *supra* note 86, at 89–90.

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adoption by the existing parent's spouse or partner, which I will refer to generally in this Article as "stepparent adoption."⁹⁷

If one of a child's existing parents does not consent to the adoption, a court may allow the adoption to proceed only if that parent's status is addressed through formal adjudication, based on that state's adoption law.⁹⁸ States take two different routes to enable an adoption to proceed in the absence of a parent's consent. The court may determine that the parent's consent is unnecessary or has been waived by the parent due to their actions or inactions with respect to the child, most commonly "abandonment" or a failure to support the child.⁹⁹ A court's finding dispensing with the need for the parent's consent allows the adoption to be finalized, severing that parent's relationship with their child when the adoption decree is issued.¹⁰⁰

Alternatively, a state's law may require an adoption petitioner to petition the court to terminate the non-consenting parent's rights as a predicate to the adoption.¹⁰¹ If the petition to terminate is granted, the former parent loses any power to consent or object to the adoption because they no longer have legal status as a "parent." In this Article, I will refer to both routes as "termination" because, even if the adjudication paths differ somewhat, the legal effect is identical.¹⁰²

Parental consent to adoption is related to the development of requirements for a "putative" father to be recognized as the legal father

97. *See, e.g.*, *Adoption of Isabelle T.*, 2017 ME 220, 175 A.3d 639, 646 (Me. 2017); *Adoption of I.M.*, 180 Cal. Rptr. 3d 818, 820–21, 823 (Cal. Ct. App. 2014); *A.J. v. K.A.O.*, 951 So. 2d 30, 32 (Fla. Dist. Ct. App. 2007).

98. *See MASON*, *supra* note 2, at 150; *see also JACOBS*, *supra* note 86, at § 4:05.

99. *See, e.g.*, *Copeland v. Todd*, 715 S.E.2d 11, 16–17 (Va. 2011); Dale Margolin Cecka, *Terminating Parental Rights Through a Backdoor in the Virginia Code: Adoptions Under Section 63.2-1202(H)*, 48 U. RICH. L. REV. 371, 371–73 (2013). *See infra* notes 132–153 and accompanying text.

100. *See generally* JOAN HEIFETZ HOLLINGER, *ADOPTION LAW AND PRACTICE* § 2.10 (describing exceptions to the requirement of parental consent); 2 ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES* § 14:14 (3d ed. 2009).

101. *See, e.g.*, MICH. COMP. LAWS ANN. § 710.51 (West 2021) ("If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter, and if a parent having custody of the child according to a court order subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent . . ."). *See also* HOLLINGER, *supra* note 100, at § 4.04[1]; *see also* A.K.H. v. J.D.C., 619 S.W.3d 425, 431 (Ky. Ct. App. 2021) (noting distinction between terminating a parent's rights in a specific proceeding and permitting an adoption to proceed without a parent's consent).

102. HOLLINGER, *supra* note 100, at § 4.04[1][d].

of a child. If a man is precluded from establishing his parental rights, then his consent to adoption is not needed.¹⁰³ In their historical overview of adoption, Christine A. Adamec and Laurie C. Miller observe that, before the 1972 U.S. Supreme Court opinion in *Stanley v. Illinois*:

[N]o consideration was given to the desires of a birthfather not married to a child's birthmother. If the birthmother chose adoption for "her" child, then the adoption could go forth.

After the *Stanley* decision and several other subsequent U.S. Supreme Court decisions, states passed a variety of laws designed to protect the paternal rights of the birthfather.¹⁰⁴

As it became easier for a man to claim parental rights as an unmarried father, however, an expanding number of adoption petitioners were in the position of needing a route to ask a court to terminate a father's rights if he did not consent to the adoption.¹⁰⁵ As described by Adamec and Miller: "Today, a crazy quilt of laws nationwide provide for what actions, if any, must be taken" to address the need for consent by unmarried fathers.¹⁰⁶

The "crazy quilt" characterization applies to all aspects of termination in the context of adoption, as states have varied approaches to the proceedings.¹⁰⁷ But the objective of any route is the same: insuring that a parent is unable to block their child's adoption by withholding their consent.

103. See, e.g., *In re Adoption of J.E.V.*, 141 A.3d 254, 260 (N.J. 2016); *In re Adoption of Tobias D.*, 2012 ME 45, ¶ 10, 40 A.3d 990, 993–94.

104. Christine A. Adamec & Laurie C. Miller, *Brief History of Adoption*, in THE ENCYCLOPEDIA OF ADOPTION, at xxxii (3d ed. 2007).

105. See Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2334–35 (2016) (discussing the impact of *Stanley* on adoption practice).

106. Adamec & Miller, *supra* note 104, at xxxii.

107. Some laws include termination or dispensing with the need for consent as procedural step within the adoption proceeding itself. See, e.g., CAL. WELF. & INST. CODE § 366.26(b)(1) (Deering 2021) ("Terminate the rights of the parent or parents and order that the child be placed for adoption and, upon the filing of a petition for adoption in the juvenile court, order that a hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted."), while others set the termination and adoption as separate proceedings. See, e.g., *In re A.A.B.*, 2016 SD 22, ¶ 4–5, 877 N.W.2d 355, 358.

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A less common context for termination of parental rights outside of public dependency proceedings is when one parent seeks to obtain exclusive parental rights to the child by terminating the rights of another parent from whom they are separated. In these contexts, rather than replacing an existing parent with a “new” parent through an accompanying adoption, the termination proceeding only eliminates the parental status of one of a child’s parents.¹⁰⁸ There is even greater variation among courts for this kind of termination proceeding than in adoption contexts, and many states do not permit private termination of parental rights outside of the adoption context at all.¹⁰⁹

Courts generally construe termination statutes strictly; if there is no basis to find jurisdiction over a petition for private termination brought by a parent or other individual, a court will likely reject the petition.¹¹⁰ For example, in states where a TPR statute refers only to the state as a potential petitioning party, courts will not allow parents or any private parties to initiate such proceedings.¹¹¹ Similarly, if such a statute includes clear categories of petitioners, including private parties, but does not include parents among them, a court will construe such categories as excluding parents and reject a parent’s termination petition.¹¹²

For example, in a 2014 opinion in a termination action brought by a child’s mother, the Montana Supreme Court held that that state’s TPR statute allowed termination only in the context of an adoption or in a proceeding initiated by the state.¹¹³ Similarly, a Louisiana appeals court noted prior authority interpreting that state’s TPR statute narrowly to hold: “[T]here is no private right of action to terminate another parent’s parental rights, and there are no circumstances under

108. However, court opinions reveal that parents often bring these petitions as a precursor to a stepparent adoption. *See, e.g.,* Demetrius L. v. Joshlynn F., 365 P.3d 353, 354–55 (Ariz. 2016).

109. HARALAMBIE, *supra* note 100, at § 13:4. *See, e.g., In re Termination of Parental Rights of P.A.M.*, 505 N.W.2d 395, 397–98 (S.D. 1993).

110. *See, e.g., In re John*, 605 A.2d 486, 488 (R.I. 1992).

111. *See, e.g., In re A.J.S.*, 492 S.W.3d 674, 676 (Mo. Ct. App. 2016); *Bergsing v. Cardona*, 2014 MT 237, ¶14, 377 Mont. 270, 274, 339 P.3d 824, 827. *Cf. D.S. v. R.S.*, 717 N.E.2d 557, 560 (Ill. App. Ct. 1999) (noting that while statute 705 ILL. COMP. STAT. ANN. 405 / 2 (West 1998) appears to permit a private party to file a termination petition, only the state may “prosecute” it).

112. *See, e.g., Osborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004).

113. *See Bergsing*, 2014 MT at ¶ 11, 377 Mont. at 273, 339 P.3d at 826.

which one parent may file a petition to terminate the parental rights of another parent.”¹¹⁴ The court reasoned:

Because termination of parental rights is recognized as one of the most drastic actions a state can take against a citizen . . . [a]bsent a clear indication from the Louisiana Legislature that one parent may seek to revoke the parental rights of the other parent . . . we decline to do so.¹¹⁵

Among those states that do allow one parent to petition to terminate the rights of another, some specifically include a child’s parent among the categories of individuals who can bring a termination petition against a parent.¹¹⁶ For example, Alabama amended its termination statute in 2009 to expand the list of those who can file a TPR petition to include not only public CPS or private adoption agencies but also: “[a] parent, child, or any interested person.”¹¹⁷ Similarly, in states with statutes that have broad standing language regarding termination petitions, some state court opinions interpret the categories of potential TPR petitioners to include parents or other individuals even if they are not expressly mentioned.¹¹⁸ A

114. *In re T.E.R.*, 43, 145, p. 6 (La. App. 2 Cir. 03/19/08); 979 So. 2d 663, 667. However, in a later opinion, a Louisiana appeals court recognized that a juvenile court has the discretion to appoint a private attorney to pursue a TPR action. *State ex rel. C.E.K.*, 2017-0409, p. 8 (La. App. 4 Cir. 12/21/17); 234 So. 3d 1059, 1065.

115. *C.E.K.*, 2017-0409 at p. 8, 234 So. 3d. at 1065.

116. *See, e.g.*, N.C. GEN. STAT. ANN. § 7B-1103(a)(1) (West 2021); Thomas R. Young, *Termination of Parental Rights: Who May File a Petition*, in N.C. JUVENILE CODE PRACTICE & PROCEDURE § 3:8 (2021).

117. ALA. CODE § 12-15-317 (2021) (“The Department of Human Resources, any public or private licensed child-placing agency, *parent*, child, or any interested person may file a petition to terminate the parental rights of a parent or parents of a child.”) (emphasis added). *See* IOWA CODE ANN. § 600A.5(1)(a) (West 2021) (“The following persons may petition a juvenile court for termination of parental rights under this chapter if the child of the parent-child relationship is born or expected to be born within one hundred eighty days of the date of petition filing: a. A parent or prospective parent of the parent-child relationship.”). Like Alabama’s law, some other state statutes appear to allow a child to be among the petitioners in a termination action. There is a dearth of caselaw on such petitions, but some practitioners have had success at least establishing the standing of children to seek termination of their parents’ rights. *See also* HARALAMBIE, *supra* note 100, at § 13:4; Priscilla Day, *Should Children Be Able to Divorce Their Parents?*, 11 J. CONTEMP. LEGAL ISSUES 652, 653 (2000).

118. *See, e.g.*, *In re Austin T.*, 2006 ME 28, ¶ 4, 898 A.2d 946, 948 (holding that mother qualified as a “custodian of the child” and therefore had standing to bring

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Florida statute provides that “any [] person who has knowledge of the facts alleged or is informed of them and believes that they are true” may bring a termination petition.¹¹⁹

Some states limit termination petitions filed by a parent to specific circumstances.¹²⁰ For example, Tennessee amended its TPR statute to permit one parent to file a termination petition against another under only three grounds: extreme child sexual abuse; conviction of rape resulting in the child’s conception; or attempting to murder the petitioning parent.¹²¹ As discussed further in the next part, many states permit one parent to petition to terminate the rights of another specifically where the child’s conception resulted from a sexual assault.¹²² Other states permit a parent to petition to terminate the other on the basis of abandonment or a failure to support the

a TPR petition against child’s father); *T.P. v T.W.*, 120 Cal. Rptr. 3d 477, 483 (Cal. Ct. App. 2011). *See also* *Ex parte Johnson*, 474 So. 2d 715, 717 (Ala. 1985) (“[T]here is no logical reason to allow only the state to file a petition to have parental rights terminated. Why should a parent, who has direct knowledge and familiarity with a situation, be required to go to the state to obtain such a result, when it would be more direct for the parent to file the petition?”).

119. FLA. STAT. ANN. § 39.802 (West 2021). *See also* CAL. FAM. CODE § 7841(a) (West 2021) (“An interested person may file a petition under this part for an order or judgment declaring a child free from the custody and control of either or both parents.”); *T.P.*, 120 Cal. Rptr. 3d at 480–81 (interpreting such language to confer standing on mother to bring TPR petition against father). This language has nonetheless been interpreted strictly by Florida courts in “single-parent termination” cases. *See, e.g., In re A.L.R.*, 918 So. 2d 395, 399 (Fla. Dist. Ct. App. 2006) (vacating TPR order on petition brought a mother against the father based on several errors including not analyzing all of the statutory factors and also a lack of assessment of whether the context fit one of the enumerated circumstances under which “the parental rights of one parent may be severed without severing the parental rights of the other parent”).

120. *See, e.g.,* ALASKA STAT. ANN. § 25.23.180 (West 2021); IND. CODE ANN. § 31-35-3.5-3 (West 2021); N.H. REV. STAT. ANN. § 170-C:5 (2021).

121. *See* TENN. CODE ANN. §§ 36-1-113 (West 2021); *see also* ALASKA STAT. ANN. § 25.23.180I(2) (West 2021) (“parent committed an act constituting sexual assault, sexual abuse of a minor, or incest”).

122. *See, e.g.,* IND. CODE ANN. § 31-35-3.5-3 (West 2021) (“[I]f a child was conceived as a result of an act of rape, the parent who is the victim of the act of rape may file a verified petition with the juvenile or probate court to terminate the parent-child relationship between the child and the alleged perpetrator of the act of rape”). *See generally* Judith Lewis, *The Stability Paradox: The Two-Parent Paradigm and the Perpetuation of Violence Against Women in Termination of Parental Rights and Custody Cases*, 27 MICH. J. GENDER & L. 311 (2021) (examining how courts have interpreted parental rights statutes where a child is conceived as a result of rape).

child.¹²³ In many respects, these one-parent termination proceedings are “extreme” custody cases proceedings, in that they resemble custody disputes between parents in terms of the allegations and evidence but with far higher stakes.¹²⁴

III. THE GROUNDS FOR PRIVATE TERMINATION OF PARENTAL RIGHTS

This part provides an overview of the statutory grounds on which a court may base a termination order against a parent in a case initiated by a private individual. Most state TPR laws require a two-step determination: first, there must be specific findings demonstrating the “unfitness” of the parent due to their conduct, condition, or circumstances;¹²⁵ second, there must be a specific finding that the termination of that parent’s rights would be in the best interest of the child.¹²⁶ Such findings, as a matter of constitutional law, must be based on at least clear and convincing evidence.¹²⁷ The requirement of

123. *See, e.g.*, N.C. GEN. STAT. ANN. § 7B-1111(a) (West 2021) (allowing a parent awarded legal custody of a child to petition to terminate the rights of another parent who “has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.”); IOWA CODE ANN. § 600A.8 (West 2021).

124. *See, e.g.*, *In re A.L.R.*, 918 So. 2d 395, 397 (Fla. Dist. Ct. App. 2006) (vacating termination order in case filed by one parent against another when trial court treated proceedings as a custody matter); *S.S. v D.L.*, 944 So. 2d 553, 557 (Fla. Dist. Ct. App. 2007) (noting that TPR cases filed by divorced parents “invit[e] caution to avoid second challenges to custody determinations”). *See generally* D. Marianne Brower Blair, *Parent-Initiated Termination of Parental Rights: The Ultimate Weapon in Matrimonial Warfare*, 24 TULSA L. J. 299 (1988) (examining parent-initiated proceedings to terminate the parental rights of the other parent and how such proceedings are conducted in Oklahoma).

125. *See, e.g.*, COLO. REV. STAT. ANN. § 19-5-105 (West 2021) (listing several different grounds for TPR in adoption context).

126. *See, e.g.*, *In re A.U.D.*, 832 S.E.2d 698, 700 (N.C. 2019) (“Our Juvenile Code provides for a two-stage process for the termination of parental rights—an adjudicatory stage and a dispositional stage . . . If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage. N.C.G.S. § 7B-1110(a) states, in pertinent part, as follows: ‘After an adjudication that one or more grounds for terminating a parent’s rights exist, the court shall determine whether terminating the parent’s rights is in the juvenile’s best interest . . .’”).

127. *See Santosky v. Kramer*, 455 U.S. 745, 768–70 (1982); *Hofmeister v. Bauer*, 719 P.2d 1220, 1224 (Idaho Ct. App. 1986) (applying clear and convincing evidence standard in private termination context and reasoning, “We see no reason

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finding “unfitness” before consideration of a child’s best interest reflects not only constitutional requirements¹²⁸ but also a policy determination that termination should be reserved only as a last resort, when a parent is found unable to function in the role of parent.

Laws concerning these requirements vary greatly across states in two important respects. First, they specify a wide range of grounds for a finding under the initial step in the analysis.¹²⁹ Second, while some state laws provide universal termination standards that apply in public dependency, adoption, and one-parent termination cases, other states have enacted standards that apply only in specific kinds of proceedings.¹³⁰ Where there is a universal standard or something close to that, a private termination case can be based on the same problematic grounds developed and applied in the public family regulation system. These grounds are effectively based on the stigmatization of substance use, poverty, disability, and incarceration, all of which have been employed against families of color in particular.¹³¹ As discussed in Parts IV and V below, standards based on these grounds were developed to serve purposes different from those commonly seen in private termination cases and to be applied with different procedures.

A. Abandonment and Non-Support

From the case law, it appears that the most common grounds on which private termination petitions are based are abandonment, non-support, or other conduct that is deemed an abdication of the role as “parent.” States describe “abandonment” in different ways.¹³² For example, an Alabama law defines abandonment in the termination context as:

why the parental interest should receive less protection from the risk of fact-finding error in a ‘private’ termination case than in a ‘public’ case.”). *But see* Guardianship of Ann S., 202 P.3d 1089, 1101–03 (Cal. 2009) (holding that a parent’s rights can be terminated based only on “best interest of the child” grounds without running afoul of the constitution); *In re H.J.*, 200 A.3d 891, 894 (N.H. 2018) (termination of parental rights requires findings “beyond a reasonable doubt”).

128. *Santosky*, 455 U.S. at 760 n.10.

129. *See* HARALAMBIE, *supra* note 100, at § 13:7.

130. *See, e.g.*, ARK. CODE ANN. § 9-9-220 (West 2021) (permitting TPR in adoption “on any ground provided by other law for termination of the [parent-child] relationship”); CAL. FAM. CODE § 7822 (West 2021).

131. *See* ROBERTS, *supra* note 58, at 33–46.

132. *See* HARALAMBIE, *supra* note 100, at § 13:10.

A voluntary and intentional relinquishment of the custody of a child by a parent, or a withholding from the child, without good cause or excuse, by the parent, of his or her presence, care, love, protection, maintenance, or the opportunity for the display of filial affection, or the failure to claim the rights of a parent, or failure to perform the duties of a parent.¹³³

Statutes may require evidence of specific conduct (or inaction) for a court to infer that a person has intentionally foregone the rights and responsibilities of parenthood.¹³⁴ A statute may, for example, permit a finding of abandonment based on a parent's lack of contact or communication with the child.¹³⁵ Many statutes include specific time frames for a failure to have contact with the child without justifiable cause—some as short as six months—as prima facie evidence of abandonment.¹³⁶ Courts vary in terms of what they consider to be justifiable cause for the lack of contact,¹³⁷ such as interference by the petitioning parent.¹³⁸ In some cases, a parent had limited rights under an existing court order to visit the child, and such

133. ALA. CODE § 12-15-301(1) (2021).

134. *See, e.g.*, C.C. v. L.J., 176 So. 3d 208, 211 (Ala. Civ. App. 2015) (“[A] juvenile court may premise a finding of abandonment only upon evidence indicating that a parent voluntarily, intentionally, and unjustifiably committed the actions or omissions set out” in the statutory standard for abandonment); Darla D. v. Grace R., 2016-NMCA-093, 41, 382 P.3d 1000, 1012 (“Abandonment, in its purest form, requires a complete renunciation of responsibility.”); *In re Adoption of Female Child*, No. 23229, 2003 Haw. App. LEXIS 189, at *7-8 (Haw. Ct. App. June 18, 2003) (noting requirement for “a separate inquiry into the parents’ intent as evinced by such action or from the totality of circumstance” for a finding of abandonment).

135. *See, e.g.*, David S. v. Jared H., 308 P.3d 862, 868, 873 (Alaska 2013) (affirming TPR based on father’s failure to “meaningfully communicate” with child for more than a year) (applying ALASKA STAT. ANN. § 25.23.050 (West 2021)).

136. *See, e.g.*, N.C. GEN. STAT. ANN. § 7B-1111(a)(7) (West 2021); ARIZ. REV. STAT. ANN. § 8-531(1) (2021).

137. *See* Ainsworth v. Nat. Father, 414 So. 2d 417, 421 (Miss. 1982) (Lee, J., dissenting) (criticizing statutory definition of abandonment because “[t]he phrase, ‘made no contact with a child under the age of three (3) for six (6) months or a child three (3) years of age or older for a period of one (1) year’ is meaningless because as many explanations and excuses may be made to the reason for no contact within such short periods as there are broken homes”).

138. *See* David S., 308 P.3d at 868-73 (rejecting a number of arguments advanced by father to support justifiable cause for not communicating with his daughter for more than a year); *see also* Margaret Y. v. John Y., No. 1 CA-JV 19-0051, 2019 Ariz. App. Unpub. LEXIS 1021, at *5-8 (Ariz. Ct. App., Sept. 17, 2019) (rejecting mother’s argument that father “alienated” children against her as the basis for her lack of contact).

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terms may have been sought by the parent now petitioning to terminate the parent's rights.¹³⁹ How a court can assess a parent's true intent in such contexts is questionable. As discussed in Part IV.B, applying the concept of abandonment in the context of private TPR cases can be problematic when, unlike many public dependency cases, there is no predicate requirement of reunification services.¹⁴⁰

A failure to provide financial support to the child can be evidence of abandonment or a distinct ground on which to terminate a parent's rights.¹⁴¹ Many state laws set out a specific period of time for such non-support as a basis for the finding.¹⁴² While some courts require a complete absence of payments to find non-support, some of these laws allow termination if a parent has not made *all* of the child support payments due under a court order, even if the parent had made some payments in the recent past.¹⁴³ A parent's ability to pay support is often considered by courts,¹⁴⁴ but the case law reveals little consideration of whether the parent had access to legal assistance to modify a child

139. *See, e.g., Calvin B. v. Brittany B.*, 304 P.3d 1115, 1120 (Ariz. Ct. App. 2013) ("A parent may not restrict the other parent from interacting with their child and then petition to terminate the latter's rights for abandonment."); *see also S.S. v. Stephanie H.*, 388 P.3d 569, 576 (Ariz. Ct. App. 2017) (affirming dismissal of father's TPR petition against mother on the basis of abandonment where he obtained court orders precluding any contact between her and the children).

140. *See Margaret Y.*, 2019 Ariz. App. Unpub. LEXIS 1021, at *9.

141. *See HARALAMBIE, supra* note 100, at § 13:10.

142. *See id.*; *see also, e.g., OHIO REV. CODE ANN. § 3107.07(A)* (West 2021) (failure "to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year" does not require the parent to consent to the adoption).

143. *See, e.g., GA. CODE ANN. § 15-11-310(a)(3)* (2021) ("The parent has wantonly and willfully failed to comply for a period of 12 months or longer with a decree to support his or her child that has been entered by a court of competent jurisdiction of this or any other state."); *In re Adoption of A.C.B.*, 159 Ohio St. 3d 256, 259, 2020-Ohio-629, 150 N.E.3d 82, 85 ("Whether father has provided the necessary support under the statute [to avoid a finding of non-support] is measured by the terms of the judicial decree.").

144. *See, e.g., In re Adoption of B.R.H.*, 823 P.2d 383, 387 (Okla. Civ. App. 1991) (vacating TPR order for nonsupport because there was "no evidence in the record of the natural father's willful failure to support his son according to his financial ability"); *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999) ("The federal and state constitutions require the opportunity for an individualized determination that a parent is either unfit or will cause substantial harm to his or her child before the fundamental right to the care and custody of the child can be taken away."); *HARALAMBIE, supra* note 100, at § 13:10.

support order earlier to accurately reflect their financial circumstances.¹⁴⁵

Some courts are wary of applying these grounds too liberally or inferring abandonment where a parent has taken steps to place the child in the care of another person because of the parent's limited ability to provide parental care. For example, the Court of Appeals of Kansas affirmed the denial of termination petition brought by a mother against the father alleging abandonment.¹⁴⁶ The court reasoned that abandonment means "to cease providing care for the child . . . combined with a failure to provide substitute care for the child."¹⁴⁷ In that case, the father "did not leave [the child] without financial or emotional support; he left [the child] with Mother."¹⁴⁸

Use of abandonment and non-support grounds is prevalent in the adoption-consent context,¹⁴⁹ as, under many states' laws, a court's finding that a parent has abandoned a child is an acceptable basis on which to waive the requirement of their consent to the adoption or to terminate that parent's rights. For example, Vermont's adoption statute, based on the Model Adoption Act, permits termination of a non-consenting parent's rights based on abandonment, and it sets forth factors that a court must consider, which include non-support and lack of communication.¹⁵⁰ These grounds create a termination presumption, which may be rebutted by the parent, triggering yet another list of factors that must be found by clear and convincing evidence before the parent's rights may be terminated.¹⁵¹

145. See LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 9 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> (noting that "95% of parents in child support cases were unrepresented in [state] courts in 2013.").

146. *In re K.G.*, No. 112115, 2015 WL 3514169, at *12. (Kan. Ct. App. May 22, 2015).

147. *Id.* at *6.

148. *Id.*

149. See *supra* notes 87–107 and accompanying text.

150. See VT. STAT. ANN. tit. 15A, § 3-504(a)(1)–(2) (2021). The grounds for TPR include clear and convincing evidence that: (1) the child is under six months of age and the parent "did not exercise parental responsibility once he or she knew or should have known of the minor's birth or expected birth" or (2) the child is six months or older and the parents "did not exercise parental responsibility for a period of at least six months immediately preceding the filing of the petition." *Id.*

151. See *id.* § 3-504(b).

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Abandonment and non-support may also be grounds in parent-initiated termination petitions outside of the adoption context.¹⁵² However, the case law reveals that many of these cases are adoption-adjacent, meaning that there is a potential adoption petitioner in the picture, and the termination proceeding is a likely precursor to an adoption filing by that person.¹⁵³

B. Abuse of the Child or Other Parent

In addition to abandonment and non-support—that is, a parent’s failure to act in certain ways—many private termination laws include categories of specific conduct as a basis for a private TPR petition. Some laws or court opinions, using standards the same as or similar to those applied in dependency proceedings, permit termination of parental rights based on findings of abuse or neglect of the child,¹⁵⁴ which essentially creates a private right of action for such conduct.¹⁵⁵

152. *See, e.g.*, T.P. v. T.W., 120 Cal. Rptr. 3d 477, 483 (Cal. Ct. App. 2011) (holding that mother has standing to seek termination of father on basis of abandonment outside of the adoption context). *See generally* Wendee M. Hilderbrand, *When One Parent Goes and the Other Parent Stays: The Inconsistency and Inequality of Guaranteeing Absent Parents Permanent Parental Rights*, 56 VAND. L. REV. 1907 (2003) (identifying the inconsistency and inequality present in existing parental rights laws, which prevent a natural parent from terminating the other natural parent’s rights after prolonged abandonment).

153. *See, e.g.*, *In re Angellica W.*, 714 A.2d 1265, 1268 (Conn. App. Ct. 1998) (noting in review of facts that stepmother “would be in a position to adopt” the child if mother’s parental rights were terminated); *Margaret Y. v. John Y.*, No. 1 CA-JV 19-0051, 2019 Ariz. App. Unpub. LEXIS 1021, at *10–11 (Ariz. Ct. App. Sept. 17, 2019) (mentioning children’s bonds with stepmother who wishes to adopt them as part of “best interest” analysis); *In re H.J.*, 200 A.3d 891, 893 (N.H. 2018) (petitioning mother sought TPR so that her husband could adopt children).

154. *See, e.g.*, KY. REV. STAT. ANN. § 199.502(1)(b), (c) (West 2021) (permitting waiver of a parent’s consent to adoption based on findings that the parent “had inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury” or “continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm”); GA. CODE ANN. § 15-11-310(a)(2) (2021) (“The parent has subjected his or her child to aggravated circumstances”). *See* HOLLINGER, *supra* note 100, at § 4.04[1][a][i], [iii].

155. *See, e.g.*, MISS. CODE ANN. § 93-17-7(1) (2021) (cross-referencing public dependency termination standard as grounds for waiving a parent’s objection to adoption); CAL. FAM. CODE § 7823(a)(1) (West 2021) (allowing termination based on evidence that the “child has been neglected or cruelly treated” by one or both parents, including sexual abuse); IDAHO CODE § 16-2005(1)(b) (2021) (“The parent has neglected or abused the child.”); KY. REV. STAT. ANN. § 199.502(1)(b) (West 2021) (“the parent . . . inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury”). *See In re Austin T.*, 2006 ME 28,

Private termination proceedings on such grounds appear to be far less common than those alleging abandonment, likely because conduct rising to the level of abuse or neglect frequently results in intervention by a CPS agency and a dependency proceeding.

Some state statutes permit private termination based on a finding that the parent was convicted of abuse or other violence towards the child's other parent, a sibling, or another family member, even if the child at issue in the case was not harmed or involved.¹⁵⁶ Courts tend, however, to be wary of terminating a parent's rights based solely on allegations of their abuse of the petitioning parent.¹⁵⁷

One category of TPR statutes that is framed a bit differently from the others described here is the laws that permit petitions based on allegations that the child at issue was conceived from a sexual assault.¹⁵⁸ In such contexts, a statute may even dispense with the requirement to consider a child's best interests, addressing only the narrow question about the circumstances of the child's conception.¹⁵⁹ As discussed in Part V.B,¹⁶⁰ this basis for private termination has a distinct policy basis and rationale.¹⁶¹

C. Other Grounds for Proving Parental "Unfitness"

Finally, some statutes and court opinions allow termination orders on the basis of the condition or circumstances only of the parent at issue and are not directly related to the child or to other parent.¹⁶²

¶ 12, 898 A.2d 946, 950 (mother had standing to bring TPR petition under statute applying in dependency proceedings); *see also In re Adoption of K.A.S.*, 499 N.W.2d 558, 560 (N.D. 1993) (noting that TPR in an adoption proceeding may be based on any ground under the Juvenile Act or Parentage Act).

156. *See, e.g., S.S. v. D.L.*, 944 So. 2d 553, 557 (Fla. Dist. Ct. App. 2007) (father allegedly committed sexual abuse of daughter's friend).

157. *See, e.g., In re Termination of Parental Rights of P.A.M.*, 505 N.W.2d 395, 397–98 (S.D. 1993).

158. *See, e.g., VT. STAT. ANN. tit. 15A, § 3-504(a)(4)* (2021); *ME. REV. STAT. ANN. tit. 19-A, § 1658(2)(A)* (2021); *ALASKA STAT. ANN. § 25.23.180(c)(2)* (West 2021); *IND. CODE ANN. § 31-35-3.5-3* (West 2021).

159. *See, e.g., tit. 19-A, § 1658(3-A)(A)*.

160. *See infra* notes 367369–378380 and accompanying text.

161. *In re Adoption of A.F.M.*, 15 P.3d 258, 267 (Alaska 2001).

162. *See Fairfax, supra* note 91, at 147–48 (2011) (noting that grounds for involuntary termination of parental rights of a non-consenting parent may include "mental illness, deficiency, or chronic substance use" and conviction of a felony); *HARALAMBIE, supra* note 100, § 14:14 (noting that grounds for waiving a parent's

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Such allegations are often asserted in conjunction with those of abandonment and non-support.¹⁶³ These grounds have their origins in the Progressive Era’s conceptualization of “neglect” as encompassing not only a parent’s failure to care for a child but also their “unfitness” to occupy the role of a parent, due, for example, to their “immoral behavior” or “drunkenness.”¹⁶⁴ In contemporary laws, such conditions or circumstances of a parent could include their substance use, mental illness, moral character, criminal history, or current incarceration.¹⁶⁵

For example, Vermont’s adoption statute permits termination of a parent’s right to consent if they committed a “crime of violence” or violated a protection order and such crime or violation indicates that the parent is “unfit to maintain a relationship of parent and child with the minor.”¹⁶⁶ Florida’s statute allows a parent’s rights to be terminated for criminal conduct based on the length of incarceration—

consent can include “mental unfitness,” “judicial determination of incompetence,” and incarceration); HOLLINGER, *supra* note 100, § 4.04[1][a][v]–[viii] (discussing grounds for termination of parental rights other than abuse, neglect, and abandonment).

163. *See, e.g.*, *K.S.B. v. M.C.B.*, 219 So. 3d 650, 654–55 (Ala. Civ. App. 2016) (allegations of mental illness and use controlled substances); *Margaret Y. v. John Y.*, No. 1 CA-JV 19-0051, 2019 Ariz. App. Unpub. LEXIS 1021, at *3 (Ariz. Ct. App. Sept. 17, 2019) (allegations of abandonment, mental illness, and substance use); *In re Angellica W.*, 714 A.2d 1265, 1271 (Conn. Ct. App. 1998) (allegations of abandonment and substance use); *In re Interest of L.F.*, No. 02-19-00421-CV, 2020 Tex. App. LEXIS 3879, at *19 (Tex. Ct. App. May 7, 2020) (allegations of substance use and criminal behavior).

164. MASON, *supra* note 2, at 104; *see* ROBERTS, *supra* note 58, at 59–67 (noting how state intervention in families of color is often based on “cultural prejudice” and stereotypes of “Black maternal unfitness”); *In re Adoption of W.K.*, 163 N.E.3d 370, 375 (Ind. Ct. App. 2021) (“Termination cases [based on allegations of parental unfitness] have considered factors such as a parent’s substance abuse, mental health, willingness to follow recommended treatment, lack of insight, instability in housing and employment, and ability to care for a child’s special needs.”).

165. *See, e.g.*, CAL. FAM. CODE § 7824 (Deering 2021) (setting for grounds for termination of rights of “[p]arents suffering from disability due to alcohol, or controlled substances, or moral depravity”); MISS. CODE ANN. § 93-15-121 (2021) (including as potential grounds for TPR a parent’s “severe mental illness or deficiency,” “habitual alcoholism or other drug addiction,” an conviction of any of an enumerated list of felonies); NEV. REV. STAT. ANN. § 128.106 (LexisNexis 2021) (listing several “condition[s]” a court may consider when determining “neglect by or unfitness of a parent” including “[e]motional illness, mental illness or mental deficiency,” “[e]xcessive use of intoxicating liquors, controlled substances or dangerous drugs,” and conviction of a crime “of such a nature as to indicate the unfitness of the parent.”).

166. VT. STAT. ANN. tit. 15A, § 3-504(a)(3) (2021).

”a significant portion of the child’s minority”¹⁶⁷—and a finding that the parent has been convicted one of a list of specific serious violent crimes or falls into one of several enumerated categories of serious “offenders.”¹⁶⁸

While a parent’s failure to visit, contact, or support a child may be due to the parent’s incarceration,¹⁶⁹ courts nonetheless allow findings of “abandonment” or “non-support” in such circumstances.¹⁷⁰ In some state statutes, incarceration alone is a ground for termination, even if the charge involved is unrelated to the parent’s relationship to their child and regardless of the parent’s efforts to contact the child.¹⁷¹ These statutes imply that incarceration in itself is deemed to be an extended failure by the parent to exercise their parental role.¹⁷² Florida’s termination statute, which includes a catchall “harmful to the child” finding for incarcerated parents, suggests that even if the incarceration is not lengthy or for a serious violent offense, it could still be the basis for a termination order.¹⁷³

Substance use is another basis asserted frequently by petitioners in private TPR cases, as revealed in the case law.¹⁷⁴ For example, an Arkansas Appeals Court affirmed the termination of parental rights of a mother who did not consent to her child’s adoption based on her

167. *See, e.g.*, FLA. STAT. ANN. § 39.806(d)(1), (2) (West 2021).

168. *Id.* (“The incarcerated parent has been determined by the court to be a violent career criminal as defined in s. 775.084, a habitual violent felony offender as defined in s. 775.084, or a sexual predator as defined in s. 775.21; has been convicted of first degree or second degree murder in violation of s. 782.04 or a sexual battery that constitutes a capital, life, or first degree felony violation of s. 794.011 . . .”).

169. *David S. v. Jared H.*, 308 P.3d 862, 870 (Alaska 2013) (affirming finding that father’s incarceration did not excuse his failure to communicate with his daughter for more than a year); *In re K.S.*, No. 16-0605, 2016 Iowa App. LEXIS 1088, at *7–9 (Iowa Ct. App. Oct. 12, 2016) (vacating TPR order based on abandonment due to father’s incarceration).

170. *See, e.g., In re H.J.*, 200 A.3d 891, 894–95 (N.H. 2018).

171. *See, e.g., IDAHO CODE* § 16-2005(1)(e) (2021).

172. *See, e.g., id.* (“The court may grant an order terminating the relationship where it finds that termination of parental rights is in the best interests of the child and . . . (e) The parent has been incarcerated and is likely to remain incarcerated for a substantial period of time during the child’s minority.”). *See HARALAMBIE, supra* note 100, § 13:16.

173. FLA. STAT. ANN. § 39.806(d)(3) (West 2021).

174. *See, e.g., In re Interest of L.F.*, No. 02-19-00421-CV, 2020 Tex. App. LEXIS 3879, at *17–18 (Tex. Ct. App. May 7, 2020) (“Mother’s drug use was the most significant danger to the girls’ well-being.”).

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alleged neglect of the child resulting from her chronic alcoholism.¹⁷⁵ Given the potential for recovery from substance use disorders, some courts consider the parent’s efforts to undergo available treatment in their determination.¹⁷⁶ Such considerations by a court, however, sometimes reflect stigma and a judgmental attitude toward substance abuse rather than an informed understanding of either the disorders involved or the challenges of recovery.¹⁷⁷ For example, the Supreme Court of North Dakota affirmed the termination of a father’s rights on the basis of his “deprivation of the children” due to his failure to follow the requirements of his recovery program.¹⁷⁸ While, in fact, a person’s “relapse” is likely to be indicative of the non-linear nature of recovery,¹⁷⁹ the court reasoned that it “demonstrates an indifference toward one’s obligations and responsibilities as a parent.”¹⁸⁰

D. The Best Interests of the Child

As a predicate to terminating a parent’s rights, a court must find that the parent’s conduct, condition, or circumstances demonstrate their “incompetence” or “unfitness” as a parent.¹⁸¹ Most state laws also

175. *Ducharme v. Gregory*, 435 S.W.3d 14, 18–19 (Ark. Ct. App. 2014).

176. *See A.S. C.N.D. v. C.M.A.S.*, 920 N.W.2d 301, 304–05 (N.D. 2018).

177. *See ROBERTS*, *supra* note 58, at 154–57 (discussing the termination of parental rights in public child welfare cases because of the conflict between the short timeline for achieving “permanency” often conflicts with the “clock of parental recovery from substance use” and that courts “sometimes base the decision to terminate parents’ rights based on an erroneous understanding of addiction and the recovery process”); Richard C. Boldt, *Evaluating Histories of Substance Abuse in Cases Involving the Termination of Parental Rights*, 3 J. HEALTH CARE L. & POL’Y 135, 142 (1999); *see also* Jun Sung Hong et al., *Termination of Parental Rights for Parents with Substance Use Disorder: For Whom and Then What?* 29 SOC. WORK IN PUB. HEALTH, 503, 512–14 (2014) (noting the role of compliance with substance use treatment as a factor in termination orders in dependency cases).

178. *A.S. C.N.D.*, 920 N.W.2d at 305.

179. Boldt, *supra* note 177, at 143 (“Often relapses, when identified and addressed, represent a phase in the process of recovery, from which a parent can learn and advance toward the ultimate goal of abstinence.”).

180. *A.S. C.N.D.*, 920 N.W.2d at 304 (quoting *Johnson v. Cass Cnty. Soc. Servs. (In re E.R.)*, 688 N.W.2d 384, 388 (N.D. 2004)); *see* *Alyssa W. v. Justin G.*, 433 P.3d 3, 5–6 (Ariz. Ct. App. 2018) (holding where one parent seeks to terminate the parental rights of another based on substance use, the petitioner must show that treatment options were offered to the parent “but the parent’s alcohol abuse was not amenable to rehabilitative services, or that providing such services would be pointless.”).

181. *See, e.g., In re Adoption of Tobias D.*, 2012 ME 45, ¶ 16, 40 A.3d 990, 996 (“[T]he court may not even contemplate the child’s best interest until it has found at least one ground of parental unfitness”); *see also* MASON, *supra* note 2, at 104.

require a further, distinct analysis of whether the termination would be “in the best interest of the child.”¹⁸² As Professor Jessica Feinberg has explained, “[t]he best interests analysis does not come into play in involuntary termination actions unless the parental unfitness standard is satisfied, and even then it serves only as a safety net to prevent termination of parental rights where it would be contrary to the child’s best interests despite the parent’s unfitness.”¹⁸³

The two standards are, however, often conflated in opinions, and many courts, failing to parse the distinction, appear to give short shrift to the best interest analysis if a finding of “unfitness” is made. Rather, given the flexibility and subjectivity of the standard, as many of its critics note, most courts readily find that, if a parent is determined to be unfit under the first step in the analysis, termination would be in the child’s best interest.¹⁸⁴ But such a finding does not necessarily follow. Courts often use the standard, which is a staple of custody determinations, to transform what should be an analysis of the adequacy of a factual basis to sever a parent’s constitutionally protected interest into a comparison of the adults in a child’s life.¹⁸⁵ A court can easily confuse the crucial question in a termination case (“Is this parent unfit?”) with the central question in a custody case (“Which home is better for the child?”).¹⁸⁶

182. See *supra* note 126 and accompanying text. See JACOBS, *supra* note 86, at § 3:01 (“Some state courts will not enter a termination order without a separate finding of ‘best interest.’ In other jurisdictions, the ‘best interest’ requirement seems implicit in the findings of grounds for severance.”).

183. Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 294 (2019).

184. See, e.g., Janet L Dolgin, *Why Has the Best-Interest Standard Survived?: The Historic and Social Context*, 16 CHILD. LEGAL RTS. J. 2, 2 (1996) (“[I]nvolving children’s interests as the guiding principle in such cases can disguise other agendas that serve neither the particular children at issue nor children in general.”); GUGGENHEIM, *supra* note 20 at 38–40 (“A best interests inquiry is not a neutral investigation that leads to an obvious result. It is an intensely value-laden inquiry. And it cannot be otherwise.” or “The best interest standard necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best.”).

185. See Dolgin, *supra* note 184, at 3 (“By focusing on the traits of potential custodians, the needs and interests of children can become secondary to those of contending adults. In consequence, courts can inadvertently focus on the ‘best interests’ of adults rather than of children.”).

186. See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“We have little doubt that the Due Process Clause would be offended ‘[if] a State were to attempt to force

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Particularly in the context of a contested stepparent adoption, courts tend to frame the best interest analysis not in terms of the impact on the child of severing a parent’s legal relationship with them but in terms of the benefits to the child *of being adopted* by one of their current caregivers.¹⁸⁷ As a result, courts may overlook the potential impact on the child’s short- and long-term interests from the termination, such as those noted earlier.¹⁸⁸ Further, any comparison between an “old” versus “new” parent is inherently disadvantageous to the existing parent, given that the potential adoptive parent is most likely in an active caretaking and co-parenting role with the person who was already awarded physical custody of the child.¹⁸⁹ While federal and state policy around family preservation purport to limit termination in dependency cases even if another family, such as a foster family, might provide a “better” home for a child, this restraint is not prevalent in the private context.¹⁹⁰ I explore the implications of this trend further in Part V.

IV. PROCEDURAL DISPARITIES IN PUBLIC VERSUS PRIVATE

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 interest.” (quoting *Smith v. Org. of Foster Families for Equity & Reform*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring in judgment)).

187. *See, e.g., Sanders v. Savage*, 468 S.W.3d 795, 801 (Ark. 2015) (indicating potential adopting father was a regular part of the children’s lives); *see also, e.g., T.W. v. M.C. (In re Interest of Baby A.)*, 363 P.3d 193, 206–08 (Colo. 2016) (holding that adoptive parents may present evidence of their suitability for placement as part of the child’s best interests).

188. *See supra* notes 45–50 and accompanying text.

189. *See, e.g., In re Noreen G.*, 105 Cal. Rptr. 3d 521, 543 (Cal. Ct. App. 2010) (noting children’s “deep attachment to [their legal] guardians and a secure home with them” as part of best interest analysis in termination of parental rights petition brought by the guardians as part of their adoption petition); *see also, e.g., In re Adoption of K.L.P.*, 735 N.E.2d 1071, 1075 (Ill. App. Ct. 2000) (noting that trial court’s best interest determination in a termination proceeding was based in part on expert testimony that the adoption would be in the children’s best interest).

190. Justice Potter Stewart observed in his concurrence in *Smith v. Org. of Foster Families for Equality & Reform*:

[A]ny case where the foster parents had assumed the emotional role of the child’s natural parents would represent not a triumph of the system, to be constitutionally safeguarded from state intrusion, but a failure. The goal of foster care . . . is not to provide a permanent substitute for the natural or adoptive home, but to prepare the child for his return to his real parents or placement in a permanent adoptive home by giving him temporary shelter in a family setting.

Smith, 431 U.S. at 861–62 (Stewart, J., concurring in judgment).

TERMINATION PROCEEDINGS

Courts must follow demanding standards and ensure robust procedural protections before terminating a parent's rights. States have greater latitude in limiting claims of parentage than in severing a recognized parent-child legal relationship.¹⁹¹ Once someone is deemed a "parent" under state law, constitutional protections limit interference with or deprivation of the rights associated with that legal status.¹⁹² The U.S. Supreme Court spelled out the constitutional implications of termination of parental rights in the 1982 opinion in *Santosky v. Kramer*.¹⁹³ The Court held that, in line with the "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment," a "clear and convincing evidence" level of proof is required to terminate a parent's rights.¹⁹⁴ Justice Harry Blackmun explained in the majority opinion:

[T]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.¹⁹⁵

Thus, the Court reasoned, "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."¹⁹⁶ Private termination cases, especially when brought by one parent against the other, are often litigated and adjudicated much

191. See *supra* note 54 and accompanying text.

192. Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1485–86 (2018).

193. 455 U.S. 745, 747–48 (1982).

194. *Id.* at 753–56 (first citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); then citing *Smith*, 431 U.S. at 845; then citing *Moore v. E. Cleveland*, 431 U.S. 494, 499 (1977); then citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974); then citing *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972); then citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); then citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); and then citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

195. *Santosky*, 455 U.S. at 753; see *M.L.B. v. S.L.J.*, 519 U.S. 102, 116–17 (1996) ("[T]he State's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake.>").

196. *Santosky*, 455 U.S. at 753–54.

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like a child custody dispute between parents. The potential outcome—and often the grounds—in such cases, however, are more like those in a dependency proceeding, the far more common context for termination petitions, than those in a custody case.¹⁹⁷ Statutes do not always provide clear guidance for courts regarding which kind of proceeding should serve as the model for a private TPR matter, which is essentially a hybrid of the two.¹⁹⁸ In the absence of clearly mandated procedures, the private nature of the petition leads many courts to provide fewer procedural protections for the parent who is the subject of the proceeding. This is significant in two key respects: (1) whether, before a parent’s rights can be terminated, the parent is entitled to support and opportunity for rehabilitation and for reunification with their child; and (2) whether the parent is entitled to court-appointed counsel.

A. Opportunities for Rehabilitation and Reunification

When a court conducts a TPR proceeding in a dependency case brought by a public CPS agency, in most instances there has already been a removal proceeding involving “reasonable efforts” at family reunification, a judicial review of the proposed out-of-home placement, and one or more further hearings in which the court has determined that such efforts should not continue.¹⁹⁹ These actions and determinations are prerequisites to a termination order in public dependency cases.²⁰⁰ Such proceedings, which may involve multiple

197. See JACOBS, *supra* note 86, at § 3.02.

198. See, e.g., *In re Austin T.*, 2006 ME 28, ¶8, 898 A.2d 946, 950 (holding that a court should apply the dependency statute’s requirements in post-judgment termination of parental rights action brought by one parent against another); *Ex parte Beasley*, 564 So. 2d 950, 955 (Ala. 1990) (court divided on whether a parent petitioning to terminate other parent’s rights must establish that child is “dependent.”).

199. See *Darla D. v. Grace R.*, 382 P.3d 1000, 1015 (N.M. Ct. App. 2016) (quoting *Thomas-Lott v. Earles*, 2002-NMCA-103, 9, 132 N.M. 772, 777, 55 P.3d 984, 989).

200. *Id.* (“[T]he path to permanency in an abuse and neglect case—whether that means reunification, or alternatively, termination of parental rights and adoption—is staked out by a statutory scheme that contemplates [CPS] involvement at every stage, overseen by the court.”); GUGGENHEIM & SANKARAN, *supra* note 12, at xxii–xxiii (“[C]hild welfare professionals seek to assist families to overcome the obstacles to the safe return of their children and to do so quickly. Only when the parents fail to change their ways or prove unable to raise their children safely for the foreseeable future do the state’s interests and that of parents’ truly diverge [leading to a termination proceeding.]”); 42 U.S.C. § 671(a)(15)(B) (2018); see generally JACOBS, *supra* note 86, at § 2 (describing the dependency process).

court dates and guardian ad litem reports, may last for several months or even longer.²⁰¹ During this time, the state's reunification efforts may consist of a range of services and supports, such as treatment for problems relating to the parents' mental health or substance use or provision of professionally supervised contact between the parents and their child.²⁰² The lengthy and detailed record that results from these efforts, especially the outcome of opportunities provided to parents to rehabilitate and reunify with their children, can assist the court in its termination determination.²⁰³

Private termination determinations, by contrast, are made in a procedural context that lacks most or all of these preliminary steps and findings. Because the state CPS agency is not a party to the petition and the private petitioners are not in a position to provide or arrange services to the parent subject to it, a court cannot, as a practical matter, order "reasonable efforts" at reunification²⁰⁴ as a prerequisite to the TPR—even if such requirement were included in a private termination statute.²⁰⁵ This means that a court may apply an abandonment standard, for example, to a parent who was not provided any opportunity or resources to engage in their child's life. It is all the more questionable to apply an abandonment standard if a parent has never played a role in the child's life but now states that they wish to do so. In some cases of estrangement between the parents, the notification of

201. See, e.g., *Darla D.*, 382 P.3d at 1005.

202. See, e.g., *id.* at 1015 (quoting N.M. STAT ANN. § 32-4-21(B)(10) (West 2009)).

203. See Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 13, 13–14 (2010).

204. 42 U.S.C. §§ 671(a)(15)(B), 672(a)(2)(A)(ii).

205. See, e.g., *In re Adoption of L.E.*, 2012 ME 127, ¶ 13, 56 A.3d 1234, 1238 (holding that a court is not required to order attempts at reunification before granting termination of parental rights petition filed in conjunction with an adoption); *In re T.S.T.*, 571 S.E.2d 416, 418 (Ga. Ct. App. 2002) (holding that father, who petitioned to terminate mother's parental rights to their three children, was not required to comply with the termination of parental rights statute's reunification plan requirements because the statute provided that a reunification plan was only required when the court removed a child from the home and placed it in the custody of the Department of Human Resources); *In re Bush*, 749 P.2d 492, 496 (Idaho 1988) (trial court was not required by statute to make a finding "as to whether the parents could or could not have been rehabilitated prior to a termination of their parental rights" in an action brought by private parties). See also Gupta-Kagan, *supra* note 64, at 875–82 (discussing the disadvantages and risks to the child and family when a CPS agency does not work with a family and provide services under court supervision).

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an adoption and TPR proceeding may be the first time a parent has learned of the current location of their child.²⁰⁶

In a 2017 opinion in an adoption case in which the mother of the child and her current husband had successfully petitioned to terminate the father's rights, *Adoption of Isabelle T.*,²⁰⁷ the Maine Supreme Judicial Court summarized its concerns about the disadvantages for a parent in a private termination proceeding:

There is no state assertion of parental unfitness in private termination/adoption proceedings, and the Adoption Act provides fewer protections for parents than those provided in . . . child protection proceedings. Individuals facing the loss of their rights in [dependency] termination of parental rights proceedings are nearly always provided opportunities for rehabilitation and reunification before a court even considers the termination of their parental rights.

The Adoption Act, on the other hand, does not require—or even authorize—the court to consider rehabilitation or reunification efforts prior to terminating parental rights. A termination action litigated as part of a “private adoption,” where the adoption petitioner—often one parent—seeks to terminate the parental rights of a nonconsenting parent to facilitate an adoption, requires only that the petitioner prove that the grounds for termination have been met in order for the court to permanently terminate that parent's legal rights to his or her child.

In a . . . child protection proceeding, the question of termination is addressed only after a court has decided that the parent's unfitness is so dire that the children must be removed from his or her care. And, even in those circumstances, the parent is nonetheless usually offered multiple opportunities to better his or her parenting abilities and reunify with the children through court-ordered and state-provided services.²⁰⁸

206. See FAIRFAX, *supra* note 91, at 123–36.

207. *Adoption of Isabelle T.*, 2017 ME 220, ¶ 1, 175 A.3d 639, 643.

208. *Id.* at ¶ 11–13, 175 A.3d at 645 (first citing *In re Heather C.*, 2000 ME 99, ¶ 4, 751 A.2d 448, 450; then citing *In re Thomas D.*, 2004 ME 104, ¶ 26, 854 A.2d 195, 203; and then citing *Adoption of L.E.*, 2012 ME 127, ¶ 13, 56 A.3d 1234, 1238). The Maine Supreme Judicial Court vacated the probate court's order terminating a father's rights in that case because he “had no opportunity to receive rehabilitative services, and . . . he has been prohibited from having contact with his children.” *Id.* at ¶ 35, 175 A.3d at 649.

While other courts similarly identify the disadvantages to parents in private versus public termination cases, most of them have not found a *constitutional* dimension to such differences. Rather, courts regard the protections in child protection statutes that give rise to rights to reunification opportunities and the services needed to support them as *statutory* benefits granted to parents involved in dependency matters.²⁰⁹ If a private TPR petition is brought under a different statute—even one that cross-references the statutory grounds for termination in a dependency statute—or the action is one is converted from a dependency to private termination proceeding, there is no entitlement to the same opportunities and services as parents in dependency cases.²¹⁰

Some courts or statutes allow consideration of the extent of opportunities for rehabilitation and reunification in private termination cases, but such allowances are still short of what is *required* in dependency cases. For example, an Arizona appeals court reasoned that because “[s]everance proceedings implicate the same fundamental constitutional liberty interests of a parent, whether commenced by DCS or a private party,” the petitioning party in any TPR proceeding must prove that the parent was offered “reunification services” before the parent’s rights may be terminated.²¹¹ Nevertheless, an individual petitioner has no obligation to do the “offering.” Instead, in a private termination matter, the petitioner must prove that the “parent whose rights are to be severed has either already received or been offered the necessary rehabilitative services from some provider to no avail or that engaging the parent in rehabilitative services would be futile.”²¹² The court held in that case that the petitioning mother had satisfied the burden of proof because the father’s alcoholism was an issue in an earlier parental rights and responsibilities case, as a result of which his rights were already

209. See, e.g., *In re Adoption of Riahleigh M.*, 2019 ME 24, ¶ 27–36, 202 A.3d 1174, 1183–85; *In re Infant Child Skinner*, 982 P.2d 670, 675 (Wash. Ct. App. 1999).

210. See, e.g., *In Re Adoption of M.P.J.*, No. W2007-00379-COA-R3-PT, 2007 Tenn. App. LEXIS 724, at *14 (Tenn. Ct. App. Nov. 28, 2007) (holding that father had no right to rehabilitation services after custody of child was transferred from the state to the child’s aunt who later petitioned to terminate father’s rights); *In re D.C.*, 737 S.E.2d 182, 184–85 (N.C. Ct. App. 2013).

211. *Alyssa W. v. Justin G.*, 433 P.3d 3, 5 (Ariz. Ct. App. 2018).

212. *Id.* at 5–6.

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limited, and he had not sufficiently addressed his alcohol use by the time of the termination proceedings.²¹³ In a more recent opinion, that court limited its earlier holding by stating that there is no entitlement to consideration of reunification services if the alleged grounds for severance of parental rights is abandonment.²¹⁴

Similarly, in response to the concerns raised in *Isabelle T.*, the Maine Legislature amended the state's adoption statute to include language to require a court reviewing a termination petition in the context of an adoption to consider "the extent to which the parent who is the subject of the petition had opportunities to rehabilitate and to reunify with the child or to maintain a relationship with the child, including actions by the child's other parent to foster or to interfere with a relationship between the parent and the child or services provided by public or nonprofit entities."²¹⁵ Even here, however, as in the statutes discussed above that recognize the disadvantages to a parent who is the target of a private TPR petition, no path to reunification or guarantee of services is provided.

California's adoption statute is another example of the far more limited protections for parents subject to TPR orders in the context of a private adoption than those available in a dependency proceeding.²¹⁶ A court may terminate a parent's rights to enable a legal guardian to adopt a child if the guardianship order has been in place for two years or longer and the TPR order is found to be in the child's best interest.²¹⁷ Once the two-year period has passed, the guardian need not prove any specific parental "unfitness" to obtain a TPR order.²¹⁸ As in

213. *Id.* at 7.

214. *See* Margaret Y. v. John Y., No. 1 CA-JV 19-0051, 2019 Ariz. App. Unpub. LEXIS 1021, at *3 (Ariz. Ct. App. Sept. 17, 2019) (citing *Toni W. v. Ariz. Dep't of Econ. Sec.*, 993 P.2d 462, 465–67 (Ariz. Ct. App. 1999)).

215. ME. REV. STAT., tit. 18-C, § 9-204(3-A) (2021); *see* Adoption of Tobias D., 2012 ME 45, ¶ 23, 40 A.3d 990, 998 (holding that a court should consider the extent of a parent's opportunity to form a relationship with the child).

216. CAL. PROB. CODE § 1516.5 (a)(1)–(3) (West 2021).

217. *Id.*; *see, e.g.*, *Guardianship of Ann S.*, 202 P.3d 1089, 1094 (Cal. 2009).

218. *See, e.g.*, *In re Noreen G.*, 105 Cal. Rptr. 3d 521, 543 (Cal. Ct. App. 2010) ("Nothing more must be proved than that termination of parental rights and adoption by the guardian are 'in the 'best interests of the child.'") (quoting *Guardianship of Ann S.*, 202 P.3d at 1129); *In re Guardianship of Robert S.*, No. F060073, 2011 WL 2152626, at *20–21 (Cal. Ct. App. June 2, 2011) (the Supreme Court of California rejected a due process challenge to the statute in a 2009 opinion and reasoned: "[T]he parental fitness standard, which protects parents' interest in child custody, is not necessarily required at a [termination] hearing. By that stage, the parent-child family unit has ceased to exist and the parent's entitlement to custody is not at issue. It

a dependency proceeding, the parent is given a deadline to “fix” the circumstances leading to the child being in the care of another.²¹⁹ In the private guardianship-to-termination context, however, the parents are provided no opportunities or services to make the changes required to terminate the guardianship and stop the clock.²²⁰ The disparity is explicitly noted by the California Supreme Court in a 2009 opinion, *Guardianship of Ann S.*:

Unlike dependency cases, [guardianships] are not regularly supervised by the court and a social services agency. No governmental entity is a party to the proceedings. It is the family members and the guardians who determine, with court approval, whether a guardianship is established, and thereafter whether parent and child will be reunited, or the guardianship continued, or an adoption sought . . .²²¹

Acknowledging this disparity, some courts have held that, prior to a TPR order in a private action, there must be a report or referral to a CPS agency regarding the child at issue.²²² Such a report or referral

would be anomalous to require proof in every case, by clear and convincing evidence, that a mother or father who has had no custodial responsibilities for two or more years is currently an unfit parent.”); *see also Ann S.*, 202 P.3d at 1094–95 (Cal. 2009). In that case, the mother struggled with substance use and enrolled in rehabilitation programs while the guardianship was in place. *Id.* Further, the court wrote that it “would make little sense” to apply a parental unfitness standard there because “[a]s guardianship continues for an extended period, the child develops an interest in a stable, continuing placement, and the guardian acquires a recognized interest in the care and custody of the child.” *Id.* at 1094 (citing PROB. § 1516.5).

219. PROB. § 1516.5 (a)(1)–(3).

220. *Id.*

221. *Ann S.*, 202 P.3d at 1096–97. The Court also noted that there is “no periodic court review of the placement” nor is “the parent given the rehabilitation services that the county provided to parents of dependent children.” *Id.* at 1098 (first citing *Guardianship of Stephen G.*, 47 Cal. Rptr. 2d 409, 415 (Cal. Ct. App. 1995); and then citing *Guardianship of Kaylee J.*, 64 Cal. Rptr. 2d 662, 664–66 (Cal. Ct. App. 1997)). *See generally* Deirdre M. Smith, *Keeping it in the Family: Minor Guardianship as Private Child Protection*, 18 CONN. PUB. INT. L. J. 269, 310–13 (2019) (discussing implications of using minor guardianship as a form of “child protection” outside of the public child welfare system). *See also Noreen G.*, 105 Cal. Rptr. 3d at 534–36 (rejecting mother’s due process challenge to guardianship-to-termination statute on the basis that the statute is unconstitutionally vague because it “fails to give a parent adequate notice as to what actions he or she must take to avoid the termination of his or her parental rights”; the court concluded that the statutory language “in the physical custody of the guardian for a period of not less than two years” provides sufficient notice to parents).

222. *See, e.g., In re Vincent D.*, 65 Conn. App. 658, 661 (Conn. App. Ct. 2001).

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could transform a private case into a quasi-dependency proceeding or, if the allegations against the parent are serious enough, into a full dependency proceeding initiated by the state. For example, two years after the *Ann S.* opinion, a California appeals court vacated a TPR order based in part on the trial court's "critical error" in failing to refer the family to the county CPS agency for an investigation and determination of whether, given the guardian's allegations of parental unfitness, a dependency petition should be filed or "the family offered services."²²³ Such error, the appeals court reasoned, "affected the entire proceeding" because:

It deprived the parents of the opportunity to gain custody of their children through dependency proceedings and deprived them of all the attendant safeguards in those proceedings not available in guardianship proceedings. It allowed the guardianship proceeding to move forward without providing the parents an adequate opportunity to regain custody of their children.²²⁴

A New Mexico appeals court raised similar concerns about parental rights being terminated for adoption by a guardian with no involvement by a public CPS agency.²²⁵ In *Darla D. v. Grace R.*, the court stated that, without such involvement, such private termination petitions "would be ripe for abuse."²²⁶ The court held that the only construction of the state's adoption statute consistent with the policy aims of the state's overall public child welfare scheme is the

223. *In re Guardianship of Robert S.*, 2011 WL 2152626, at *6, *20–21, *24. The court also interpreted *Ann S.* and the statute narrowly as applying only where a parent consents to the guardianship and does not seek to terminate the guardianship prior to the hearing. *Id.* at *20. The court vacated the termination order against both parents, as well as the underlying guardianship, in that case because they had objected to the guardianship "from the outset," gave up custody for only a brief time "in order to find suitable housing" to the family member who became the guardian, and "continued on their path to rehabilitation and were successful at it." *Id.* at *23.

224. *Id.* at *24. The mother asserted in her appeal that the court's failure to make such referral:

deprived her and the agency of a dependency court proceeding, thereby depriving mother and children of all the rights afforded to a family in a dependency proceeding. Mother asserts that if this case had proceeded in the dependency court, she would have been successful in having her children returned to her. She was prejudiced by not having the opportunity to have social services determine if the case should proceed under the dependency law.

Id. at *18.

225. *Darla D. v. Grace R.*, 382 P.3d 1000,1005 (N.M. Ct. App. 2016).

226. *Id.* at 1016.

requirement that such a case be referred to the CPS agency and, so that the parents whose rights would be terminated could have the benefit of the resulting “procedural safeguards,” that the agency make reasonable efforts to reunify a child with their parents “whenever possible.”²²⁷

In neither the California nor the New Mexico cases, however, was it clear that the required referrals to CPS agencies would in fact lead to the provision of appropriate services for the parent and child. Due to limited resources, many CPS agencies or the nonprofits with which they contract only provide services and supports to families who are or likely could be the subject of a dependency proceeding; and, even for those families, the services provided often fall short of what is needed for rehabilitation and reunification.²²⁸

While the disparities discussed here are significant, I do not suggest that private TPR cases should be prosecuted by public agencies. On the contrary, given limits and harms that can result from the full intervention of a child welfare agency into a troubled family situation, such public prosecution is *not* a positive alternative to a private TPR action. There is already far too much state intervention in families; the services provided to parents and children are woefully inadequate; state agencies are too quick to seek orders for the termination of parents’ rights; and courts are too quick to grant such orders. These trends have created a culture in which the United States justice system has become a means of discarding a child’s parents quickly in the name of “permanency,” often for the convenience of agencies seeking to lighten their caseload and of courts themselves

227. *Id.*

228. Martin Guggenheim, *General Overview of Child Protection Laws in the United States*, in GUGGENHEIM & SANKARAN, *supra* note 12, at 2 (noting that a common problem in the operation of child protection laws is parents are required “to secure services that are either unavailable to them or are not needed” in order to regain custody of their children) [hereinafter Guggenheim II]; Jeanne M. Kaiser, *Current Issues in Public Policy: Finding A Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases*, 7 RUTGERS J.L. & PUB. POL’Y 100, 103–04 (2009) (noting that CPS reasonable efforts “routinely contain a mix of parenting classes, anger management workshops, and individual therapy, which when looked at in the context of the needs of the parents involved, appear to have little to no chance of providing any actual help.”).

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seeking to get cases off their dockets.²²⁹ Severing a parent-child relationship for the sake of bureaucratic expedience has only a tenuous connection to securing a child’s “welfare.”

The accelerated timelines for termination to “free” a child for adoption in the public child protection context, as driven by federal law,²³⁰ has likely had a spillover effect in the private termination realm, especially where a state uses a common standard. The impact of the rush to permanency on families of color and on those in poverty or otherwise assigned and held to the margins of our society is especially dire.²³¹ Incarceration is a basis for both public and private termination, as are substance use, untreated mental illness, and poverty (often framed as failing to support a child).²³² In all TPR petitions, parents’ difficult situations tend to be described in stigmatizing narratives of blame.²³³ In the context of a private TPR, the impact is compounded by the fact that parents receive no mandated opportunity or support to avoid the extreme outcome of permanently losing their child. Financial resources, professional supports, compassion, and patience are what lead to the effective rehabilitation and reunification of a parent-child relationship.²³⁴ It is these measures—not intervention and separation—that children and families need and deserve.

B. Right to Court-Appointed Counsel

The context in which courts struggle most conspicuously with the public versus private nature of TPR proceedings is when appeals are brought by parents asserting that they had a right, in such proceedings, to court-appointed counsel. As a California appeals court observed in one such appeal:

229. See ROBERTS, *supra* note 58, at 223; GUGGENHEIM & SANKARAN, *supra* note 12, at xxiii (“Many who have worked in the field . . . do not believe that the intentions of state officials are a sufficient protection against state over-reaching.”).

230. Guggenheim II, *supra* note 228, at 4–6; Garrison, *supra* note 48, at 443–46.

231. See ROBERTS, *supra* note 58, at 109.

232. See CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 1 (2021), childwelfare.gov/pubPDFs/groundtermin.pdf.

233. Matthew I. Fraidin, *Changing the Narrative of Child Welfare*, 19 GEO. J. ON POVERTY L. & POL’Y 97, 98–99 (2021); see *In re Interest of L.F.*, No. 02-19-00421-CV, 2020 Tex. App. LEXIS 3879, at *23 (Tex. Ct. App. May 7, 2020) (holding that evidence mother’s “persistent drug abuse” and “related jail confinement” was sufficient to support best interest finding).

234. Fraidin, *supra* note 233, at 105–08.

A stepparent adoption differs from other parental termination cases in that it is not an action brought by the state and argued by state attorneys. But neither is the adoption proceeding a purely private dispute. The state is called upon to exercise its exclusive authority to terminate the legal relationship of parent and child and establish a new relationship, in accordance with an extensive statutory scheme.²³⁵

Although most states, either through statutes²³⁶ or through courts' holdings based on constitutional principles,²³⁷ now provide that parents targeted by private TPR petitions are entitled to court-appointed counsel, these rules are only recent developments.²³⁸ Several states continue to follow the holding in *Lassiter v. Department of Social Services of Durham County, North Carolina*²³⁹ that due process principles *do not* require appointment of counsel in all civil matters, including private TPR cases.²⁴⁰ A Texas appeals court, for example, ruled as recently as 2020 that, pursuant to *Lassiter*, courts have discretion whether to appoint counsel for parents in private termination actions even though parents in public dependency actions have a statutory right to counsel.²⁴¹

235. *In re Jay R.*, 197 Cal. Rptr. 672, 680 (Cal. Ct. App. 1983).

236. *See, e.g.*, ME. STAT. tit. 18-C, § 9-106(2) (2021) (broad right to counsel for indigent parents in adoption proceedings); ME. STAT. tit. 19-A, § 1658(1-A)(F) (2021) (right to counsel in private termination proceedings brought by another parent).

237. *See, e.g.*, *In re Adoption of Meaghan*, 961 N.E.2d 110, 112 (Mass. 2012) (citing Dep't of Pub. Welfare v. B., 393 N.E.2d 406, 408 (Mass. 1979)) (holding that, notwithstanding absence of statutory right, parents are entitled to counsel in adoption and termination proceedings because of the fundamental constitutional right at stake in proceeding).

238. *In re Adoption of Y.E.F.*, 171 N.E.3d 302, 306, 308 (Ohio 2020).

239. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31–32, (1981).

240. *In re E.K.S.*, 387 P.3d 1032, 1037 (Utah 2016) (citing *Lassiter*, 452 U.S. at 26) (holding that court must undertake *Lassiter* analysis on case-by-case basis to determine right to counsel in privately initiated termination proceedings).

241. *In re L.F.*, No. 02-19-00421-CV, 2020 Tex. App. LEXIS 3879, at *33 (Tex. Ct. App. May 7, 2020) (citing *Lassiter*, 452 U.S. at 32) (holding that due process “did not demand” appointment of counsel in that case because the termination petition “contained no allegations against Mother upon which criminal charges could be based; the case presented no complicated legal issues; and no expert witnesses testified”); *see In re J.C.*, 250 S.W.3d 486, 489 (Tex. Ct. App. 2008) (earlier case before statutory change noting that parents did not have the right to discretionary appointment of counsel in a privately-initiated termination action).

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Where there is no clear statutory right to counsel in a private termination case, courts' determinations of whether to find such right often turns on the extent to which they conclude that the proceeding involves state action, thereby implicating the parents' constitutional rights.²⁴² Some courts conclude that the potential for a termination order pursuant to a statute is sufficient to find there is state action, giving rise to an analysis of the right to counsel under the U.S. Constitution.²⁴³ Such conclusions may be based on the Supreme Court precedent in *Troxel v. Granville*,²⁴⁴ which struck down a grandparents' visitation law, or *M.L.B. v. S.L.J.*,²⁴⁵ an appeal arising from a stepparent adoption case in which the Court held that an indigent parent was entitled to a fee-waived transcript of termination proceedings.²⁴⁶ Other courts conclude there is state action in a private TPR case when a public CPS agency has a specific role in the case, such as conducting an investigation before or during the termination proceedings.²⁴⁷ If state action is found, then courts generally hold that a parent is entitled to court-appointed counsel either on the basis of due process principles²⁴⁸ or, given that parents who are the subject of

242. See *In re* Application to Adopt H.B.S.C., 12 P.3d 916, 920–21 (Kan. Ct. App. 2000) (first citing *In re* K.L.J., 813 P.2d 276, 283 (Alaska 1991); then citing *O.A.H. v. R.L.A.*, 712 So. 2d 4, 6 (Fla. Dist. Ct. App. 1998); and then citing *In re* Adoption of K.A.S., 499 N.W.2d 558, 565–66 (N.D. 1993)).

243. See, e.g., *id.* (first citing *K.L.J.*, 813 P.2d at 283; then citing *O.A.H.*, 712 So. 2d at 6; and then citing *K.A.S.*, 499 N.W.2d at 565–66); *A.W.S. v. A.W.*, 2014 MT 322, 377 Mont. 234, ¶ 14, 339 P.3d 414, 417–18 (Mont. 2014) (first citing MONT. CONST. art. II, § 4; then citing *K.A.S.*, 499 N.W.2d at 566); *In re* Adoption of Y.E.F., 171 N.E.3d 302, 311 (Ohio 2020) (citing *In re* L.T.M., 824 N.E.2d 221, 230 (Ill. 2005)).

244. 530 U.S. 57, 73 (2000).

245. 519 U.S. 102, 107 (1996).

246. *Id.*

247. See, e.g., *In re* Jay R., 197 Cal. Rptr. 672, 680 (Cal. Ct. App. 1983) (basing state action finding on both the “extensive statutory scheme” and the requirement for a CPS investigation of every stepparent adoption petition); *K.A.S.*, 499 N.W.2d at 566 (first citing N.D. CENT. CODE § 14-15-09(1)(i) (2021); then citing N.D. CENT. CODE § 14-15-11(5) (2021)) (state is required to be a named party, although it is not obligated to participate in the proceeding); *Zockert v. Fanning*, 800 P.2d 773, 777–78 (Or. 1990).

248. See, e.g., *In re* Adoption of J.E.V., 141 A.3d 254, 264 (N.J. 2016) (basing holding on the New Jersey Constitution). Applying *Matthews* and *Lassiter*, the court noted: “Both the public and the State have a strong interest in seeing that children are adopted in appropriate cases. Because an adoption terminates parental rights, N.J.S.A. 9:3–50(c)(1), the public, the State, and the parent also share an ‘interest in an accurate and just decision.’” *Id.* at 265–66 (citing *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981)).

a dependency termination action are entitled to counsel, on the basis of an equal protection analysis.²⁴⁹

The Illinois courts' examination of the right to counsel in private termination proceedings provides a good example of the variation among courts on the right to counsel in such cases. An appeals court held that a privately-initiated TPR proceeding in an adoption case involved state action because "respondent's parental rights could be terminated only pursuant to a comprehensive statutory scheme" and "a specific procedure of the state is being challenged."²⁵⁰ On appeal, the Illinois Supreme Court rejected that conclusion, holding that "the mere fact that the state court is the forum for the dispute" was an insufficient basis to find state action.²⁵¹ Instead, based on a fact-specific inquiry of *that* case, the court found state action because the children had been placed in the adoption petitioners' care as the result of an earlier removal proceeding initiated by the state under the dependency statute.²⁵² The court upheld the appeals court's conclusion that the parents' equal protection rights were violated because they would have been entitled to counsel if the termination proceeding had been brought under the dependency statute.²⁵³ The Illinois Supreme Court extended its holding three years later to require the appointment of counsel for any parent who is the subject of a termination

249. See, e.g., *In re S.A.J.B.*, 679 N.W.2d 645, 651 (Iowa 2004); *A.W.S.*, 339 P.3d at 419; *Y.E.F.*, 171 N.E.3d at 313; *Zockert*, 800 P.2d at 779 (quoting *Hale v. Port of Portland*, 783 P.2d 506, 515 (Or. 1988)).

250. *In re Adoption of K.L.P.*, 735 N.E.2d 1071, 1077 (Ill. App. Ct. 2000).

251. *In re Adoption of K.L.P.*, 763 N.E.2d 741, 751 (Ill. 2002) (first citing *People v. Brown*, 660 N.E.2d 964, 970 (Ill. 1995); then citing *People v. DiGuida*, 604 N.E.2d 336, 346 (Ill. 1992); and then citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1698 (2d ed. 1988)).

252. *Id.* Justice Freeman issued a concurring opinion questioning the basis for finding state action on that fact and noting: "The fact that children may have been removed from a parent's custody is legally irrelevant to the question of whether his or her parental rights should be terminated in a subsequent adoption action." *Id.* at 755 (Freeman, J., concurring). Quoting the Supreme Court's holding in *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982), he reasoned: "Regardless of motivations, state action may be found where 'the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'" *Id.* at 756 (Freeman, J., concurring).

253. See *id.* at 754. The court held that the only state interest served in the different treatment of parents depending on whether the termination proceeding was brought under the dependency statute or the adoption state was the cost savings of not providing counsel in the latter, which interest is not "compelling" under a constitutional analysis. *K.L.P.*, 763 N.E.2d at 753.

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proceeding brought under the adoption statute, regardless of the factual context.²⁵⁴

Of course counsel can be a crucial factor in any case but, even if a parent has the right to counsel specifically during the termination proceedings, such right may be of little help to a parent in a disadvantaged position at the start of the proceedings because they lacked access to legal representation in a prior proceeding, for example, a guardianship or custody case in which all of their parental rights were suspended or were allocated to the person now petitioning for a permanent termination of those rights.²⁵⁵ The parent's unfavorable position here is equivalent to having consequences, such as a greater punishment, imposed based on a prior uncounseled plea in a criminal matter.²⁵⁶ Avoidance of such jeopardy is why it is essential that access to counsel be provided to parents well before the proceeding in a TPR case. It ensures the full protection of the parents' rights and may even minimize the risk of a petition being filed.

V. THE PRIVATE REMEDY RATIONALES FOR PRIVATE TERMINATION AND ALTERNATIVES WORTH CONSIDERING

As described above, termination of parental rights is an extreme remedy that eliminates a constitutionally protected interest and permanently severs a legal relationship between two people. The legal relationship between a parent and their child can have power and significance in a range of contexts. This Part examines three explicit or implicit rationales for permitting the severance of this relationship when it is sought by an individual as a private remedy: to allow a non-parent to acquire a legal relationship to a child; to sever the custodial parent's link to the other parent; and/or to foreclose any potential exercise of parental rights in the future. While providing private

254. See *In re Adoption of L.T.M.*, 824 N.E.2d 221, 231–32 (Ill. 2005) (“[A] parent who stands to lose his rights under the Adoption Act if he is found unfit is in a very similar situation to a parent who stands to lose the very same constitutional right, based on the very same finding, in proceedings under the Juvenile Court Act.”).

255. See, e.g., *In re Guardianship of Robert S.*, No. F060073, 2011 WL 2152626, at *19 (Cal. Ct. App. June 20, 2011) (noting when vacating termination order in adoption case brought by her children's legal guardian that the mother did not have counsel when the guardianship order was entered that removed the children from her custody, which was the basis of the later termination order).

256. *Cf. Nichols v. United States*, 511 U.S. 738, 748 (1994) (holding that there is no due process violation for a defendant's prior uncounseled misdemeanor conviction is used to enhance his sentence in a subsequent conviction).

remedies is an appropriate function of law generally, there is little acknowledgment or examination of the role of these rationales in termination of parental rights proceedings outside of the public dependency context.

To understand the underlying policy rationales at work, we need to consider whose interests are served when a parent's rights are terminated. In the public dependency context, the most common rationale for terminating a parent's rights is framed as "permanency" for the child.²⁵⁷ The termination order facilitates a conclusion to the proceeding itself; it ends the state's obligation to support reunification of the family; and it "frees" the child for adoption or for other lasting arrangements.²⁵⁸ In private cases, by contrast, "permanency" of this kind is likely not needed for the child, as the child likely already has a home with a custodial parent or legal guardian.²⁵⁹ Rather, the objective is to render one of the child's parents a legal stranger. While the outcome is often framed in terms of a child's best interest, the primary beneficiary of this result is the petitioner. Therefore, in TPR cases brought by private individuals, the termination order functions more as a remedy for the petitioners than as an exercise of the state's *parens patriae* role towards a child.²⁶⁰ For this reason, the rationales articulated by petitioners or the courts involved here differ from those in the public dependency context, even where the legal effect of the termination order is the same.

The timing of a petition for TPR needed for adoption, for example, reflects the interests served by the termination as a private

257. See Richard Cozzola & Lee Shevell, *Representing Parents at Disposition and Permanency Hearings in* GUGGENHEIM & SANKARAN, *supra* note 12, at 209, 212; CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 1 (2021), childwelfare.gov/pubPDFs/groundtermin.pdf.

258. See ROBERTS, *supra* note 58, at 106-107; CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 1 (2021), childwelfare.gov/pubPDFs/groundtermin.pdf.

259. See, e.g., *Adoption of Isabelle T.*, 2017 ME 220, ¶ 36 175 A.3d 639, 649 ("In the private adoption setting, the permanency concerns that are typically present in state-initiated termination proceedings are not at issue. Here, the children are in a permanent living situation with their mother and stepfather, which, as all the parties testified, is not going to change regardless of the outcome of the termination and adoption processes.").

260. See Blair, *supra* note 124, at 300-01 ("When families break apart, it is not uncommon for parents to harbor feelings of pain, bitterness, and anger toward their former partners . . . For some parents, the opportunity to terminate the parental rights of their ex-spouse provides the ultimate weapon in the arsenal of matrimonial warfare.").

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remedy. In a dependency case, state intervention in the family and a subsequent TPR petition are triggered by the alleged abuse or neglect by parents and the corresponding risk of harm to a child.²⁶¹ By contrast, in an adoption case, the petitioners alone choose when to file for adoption and seek termination.²⁶² As noted earlier, the nonconsenting parent in a contested termination proceeding in an adoption is almost always at a disadvantage because they are being compared with the members of the petitioning family who have been caring for the child.²⁶³

Clare Huntington critiques American family law for having a “reactive approach to family well-being,” which she refers to as “negative family law.”²⁶⁴ She argues that, when the U.S. family law system addresses problems that arise within a family, it favors a “dispute resolution” framework.²⁶⁵ The state does not “nurture strong, stable, positive relationships to help families avoid conflict, and then, when conflict does occur, the state fails to resolve family disputes in a way that would maintain strong, stable, positive relationships.”²⁶⁶ The private remedy rationales examined below are consistent with the pattern Huntington describes. The reactive-negative orientation is evident throughout private termination petitions and proceedings, and especially in the requirement of termination in adoption. The scenarios, standards, and rationales confirm her observation: “When the current legal system is used for family conflicts, it both freezes the relationship at the moment of breakdown and fuels the conflict with the adversarial process, doing nothing to help repair relationships.”²⁶⁷

As discussed above, the availability of termination as a private remedy is also consistent with trends in the law that shift focus from the family as a legal entity to the prominence of individual rights.²⁶⁸ Barbara Ann Atwood has observed: “A singular feature of Anglo-American law that contrasts sharply with the approach of many American Indian tribes is the characterization of parenthood as a

261. *See supra* notes 64–67 and accompanying text.

262. *See supra* notes 86–88 and accompanying text.

263. *See supra* note 189 and accompanying text.

264. HUNTINGTON, *supra* note 24, at 83.

265. *Id.*

266. *Id.*

267. *Id.* at 84.

268. *See supra* notes 34–38 and accompanying text.

rights-based exclusive status.”²⁶⁹ The private remedy rationales fit right in with this rights-based orientation, which encourages legal mechanisms, procedures, and standards that are divisive rather than promoting strong, stable relationships. Termination of parental rights represents a zero-sum victory: the rights enjoyed by the petitioner are expanded through the elimination of another person’s rights.²⁷⁰

Among other aspects of TPR as a private remedy that need examination is the role played by racial, cultural, and socioeconomic factors in determining whether an individual decides to pursue termination as a remedy and even whether they have it available to them as an option. Families in communities of color are less likely to seek the termination of a family member’s parental rights and more likely to be satisfied with an informal caregiving agreement.²⁷¹ For such families, extreme and adversarial measures such as termination may be associated with public CPS agencies as the result of prior intervention and family separation, which target families of color inequitably.²⁷² Further, because private termination proceedings and adoption outside of the public child protection system generally require the use of an attorney, those without means to retain counsel may be less aware of the possibility of terminating another’s parental rights or less likely to pursue it.²⁷³

In addition to examining the rationales at work in private termination cases, this Part also considers whether, in light of the potential adverse consequences of a TPR for the child as well as the parent discussed in Part I.B.,²⁷⁴ there are alternative ways that the

269. ATWOOD, *supra* note 88, at 134. Tribal courts, for example, take a far more inclusive view of the role of multiple adults and “the voice of the collective” in a child’s life and upbringing, and “traditions of kinship care necessarily inform the decision-making of tribal judges” when making custody determinations, including those involving claims by non-parents. *Id.* at 136–39.

270. See Laufer-Ukeles, *supra* note 48, at 744–50 (noting distinction between “individualistic rights” and “relational rights” in family law). GUGGENHEIM, *supra* note 20, at 48–49 (“One of the most deeply contentious issues in American family law is a struggle among adults over who gets to enjoy the bundle of rights parents possess.”).

271. Smith, *supra* note 221, at 320–25.

272. See ROBERTS, *supra* note 58, at 6–10; Gilbert A. Holmes, *The Extended Family System in the Black Community*, in FAMILIES BY LAW: AN ADOPTION READER 119 (Naomi R. Cahn & Joan H. Hollinger eds. 2004); ELISA MINOFF, ENTANGLED ROOTS: THE ROLE OF RACE IN POLICIES THAT SEPARATE FAMILIES 15–19 (2018), cssp.org/wp-content/uploads/2018/11/CSSP-Entangled-Roots.pdf.

273. See ROBERTS, *supra* note 58, at 11, 13.

274. See *supra* notes 43–58 and accompanying text.

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identified rationales could be served. In particular, it considers whether there are measures that could support and enhance relationships or at least reduce conflict, short of a permanent severing of the legal parent-child relationship. These existing and proposed alternative measures include de facto parentage, non-exclusive adoption, minor guardianship, and recognition of degrees of parenthood, along with measures to prevent the abuse of family law litigation. Many of the alternative measures discussed below could serve multiple rationales, while others would address only specific ones.

A. Severance of a Parent's Relationship to a Child to Clear the Way to Add a New Parent Through Adoption

1. The Rationale and Its Origins and Limitations

The most prevalent rationale for a TPR as a private remedy applies in the context of an adoption: to allow a non-parent, such as an existing parent's new spouse or partner, to acquire a legal relationship to a child. Adoption itself has clear legal benefits for the adopting parent and the child. It not only provides a caregiver formal legal status with respect to a child in their care, but it also imposes parental responsibilities on that caregiver.²⁷⁵ Most state adoptions laws, however, are based on a "one in, one out" model, meaning that, to achieve these benefits, it is necessary to terminate the rights of one or both of the child's existing parents.²⁷⁶ To add a parent through an adoption, one must "subtract" a parent in the process.²⁷⁷ And, with the other parent out of the picture legally, the parent and new partner gain a further benefit in exclusive authority over the child. Since they need not confer with or involve the terminated parent, they can effectively remove that person from the child's life.

The Supreme Court of Arizona describes the many benefits to a child and the adopting family from stepparent adoption in a 2016

275. See *Introduction*, in *FAMILIES BY LAW: AN ADOPTION READER* 1, 1 (Naomi R. Cahn & Joan H. Hollinger eds. 2004).

276. See, e.g., *Savage v. Gomez (In re Adoption of Kassandra B.)*, 540 N.W.2d 554, 558 (Neb. 1995) (observing that "termination of [a biological parent's] parental rights is the foundation of our adoption statutes.").

277. Some parents may attempt to adopt their own child, without adding a new parent, for the sole purpose of seeking termination of the other parent's rights through the adoption. Courts are wary of permitting this use of adoption. See, e.g., *In re Adoption by Tamra M.*, 2021 ME 29, ¶ 8, 251 A.3d 311, 313; *In re Adoption of Xavier K.*, 268 P.3d 274, 276 (Alaska 2012).

opinion, *Demetrius L. v. Joshlynn F.*, which affirmed a lower court’s termination of the parental rights of a non-consenting father.²⁷⁸ The petitioning stepfather had “a closing and loving relationship” with the child, D.L., for about six years, treating the child as his son.²⁷⁹ While reviewing the application of the “best interest” standard in that case, the court noted the benefits an adoptee reaps from the adoption:

Adoption obligates the adopting parent legally and financially to the child. . . . Adoption also solidifies the adopting parent’s right to exercise custody and control of the child in the future, serving to advance the child’s wellbeing. . . . An adopted child also stands to inherit from the legal, adopting parent, without losing his or her rights to inherit from the other natural parent whose rights are severed.²⁸⁰

The court then described the benefits to the child, D.L., specifically:

[M]aking D.L. adoptable would affirmatively improve his life in that it would add permanency and stability to the de-facto father-son relationship that Stepfather and D.L. already have. . . . Stepfather is married to Mother, has financially provided for D.L. for about half of D.L.’s life, and fulfills the psychological role of a parent. . . . [A]doption would formalize Stepfather’s obligations to D.L. If Mother becomes incapacitated or dies, Stepfather would be legally and financially responsible for D.L., whose continued custody with Stepfather would be assured.²⁸¹

Finally, the court noted that terminating the father’s rights would “avoid possible negative and psychologically harmful interactions with D.L., who has expressed fear of both Father and Father’s family members.”²⁸²

None of these potential benefits to the child, however, require that the existing father’s legal relationship to the child *be terminated* to

278. 365 P.3d 353, 358 (Ariz. 2016).

279. *Id.* at 354.

280. *Id.* at 357 (first citing ARIZ. REV. STAT. ANN. § 8-117(A) (West 2021); then citing *In re Appeal in Pima Cnty.*, 674 P.2d 845, 847 (Ariz. 1983); then citing ARIZ. REV. STAT. ANN. §§ 14-120(6), (12), -2103(1), -2114(B); and then citing *Champagne v. Ryan (In re Estate of Ryan)*, 928 P.2d 735, 738 (Ariz. Ct. App. 1996)).

281. *Id.* at 357–58.

282. *Id.* at 358 (citing *In re Appeal in Maricopa County Juvenile Action No. JS-500274*, 804 P.2d 730, 737 (Ariz. 1990)).

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achieve these results. The improvements of the child’s relationship to the adopting stepfather are a benefit of the adoption, not of the termination. The only reason those benefits are linked to the termination of the father’s parental rights is that state law predicates an adoption on termination if the existing parent does not consent.²⁸³ If such predicate were removed, the added benefits to a child of legal adoption by a caretaker stepparent could be obtained without any need to terminate the existing parent’s rights. The final benefit to the child described by the Arizona court—avoiding harm from interactions with the father—is a basis for a court to *restrict contact* between the father and child.²⁸⁴ Such restriction of contact between a parent and child is already within the authority of the court outside of the termination context, as in a custody order between separated parents.²⁸⁵

A serious result of tying termination of a non-consenting parent’s rights to an adoption petition is that the merits of the underlying adoption petition, especially the child’s benefit from the adoption, can easily influence the determination of whether the parent’s rights should be terminated.²⁸⁶ Essentially, that determination becomes a choice between who would be the “better” parent—old versus new—particularly when applying the “best interest of the child” standard, as noted in Part III.D.²⁸⁷ Even where statutes appear to require courts to separate the questions, most courts consider the qualities of the proposed new parent when determining if termination is in the child’s best interest.²⁸⁸ This also means that the termination requirement creates a *barrier* to a meritorious and beneficial adoption if the TPR petitioner cannot prove the grounds for termination of the parent’s rights by clear and convincing evidence, although, in such cases, the absence of such a determination is wholly separate from whether it

283. See *Demetrius L.*, 365 P.3d at 355–56 (first citing *Mary Lou C. v. Ariz. Dep’t of Econ. Sec.*, 83 P.3d 43, 50 (Ariz. Ct. App. 2004); then citing *Audra T. v. Arizona Dep’t of Econ. Sec.*, 982 P.2d 1290, 1291 (Ariz. Ct. App. 1998); and then citing *Jose M. v. Eleanor J.*, 316 P.3d 602, 607 (Ariz. Ct. App. 2014)).

284. See *id.* at 358.

285. The court noted that D.L. and the father had had “virtually no contact for years,” and it is unclear whether there had been any prior court determinations of father’s contact rights. See *id.* at 357.

286. See, e.g., *In re Adoption of Syck*, 562 N.E.2d 174, 186 (Ill. 1990) (reversing lower court’s termination of parent’s rights because court had considered child’s best interests as part of its determination of parental unfitness).

287. See *supra* notes 181–189 and accompanying text.

288. See *supra* notes 187–189 and accompanying text.

would be in a child's best interest for the petitioner to *obtain* parental rights.²⁸⁹

Indeed, where the TPR determination for an adoption does not consider the merits of the accompanying adoption petition, it is possible for the TPR to be granted while the adoption petition for which it was a predicate is denied, leaving the child without a legal relationship with either the former parent *or* the proposed new parent.²⁹⁰ In the public dependency context, the child would still be in state custody, and there would still be judicial reviews and a chance for a new permanency plan, such as the identification of new potential adoptive parents, a permanency guardianship, or even reinstatement of a parent's rights.²⁹¹ No such options are available, however, in private adoption-termination cases.

Courts rarely catalog the potential *disadvantages* to a child when a parent's rights are terminated in the context of an adoption. As noted above,²⁹² a child's feelings of connection with the parent are not necessarily severed by the termination of a parent's legal rights,²⁹³ and termination can undermine a child's need for continuity of

289. See Elizabeth J. Aulik, *Stepparent Custody: An Alternative to Stepparent Adoption*, 12 U.C. DAVIS L. REV. 604, 612, 615 (1979); see also Jennifer Wriggins, *Parental Rights Termination Jurisprudence: Questioning the Framework*, 52 S.C. L. REV. 241, 262–63 (2000).

290. See Adoption of Isabelle T., 2017 ME 220, ¶ 10, 175 A.3d 639, 645 (“[T]he background and qualities of the prospective adoptive parent are essential factors to consider in deciding whether termination of parental rights leading to adoption by that individual is in the best interests of the child or children.”). The case law suggests that a failed adoption after private termination is an exceptionally rare occurrence, which is not surprising given that the petitioners likely assume they will prevail on the adoption petition itself when they file.

291. See, e.g., CAL. WELF. & INST. CODE § 366.26(i)(3) (West 2021); 705 ILL. COMP. STAT. ANN. 405/2-28(4)(b) (West 2021); DEL. CODE ANN. tit. 13, § 1116 (b), (c) (West 2021). See generally LaShanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA. J. SOC. POL’Y & L. 318 (2010) (recognizing state and individual initiatives when a child becomes a legal orphan).

292. See *supra* notes 45–50 and accompanying text.

293. See Taylor, *supra* note 291, at 352 (noting that research has found that the parent-child bond continues when children are in foster care and after termination of parental rights); see also Cynthia R. Mabry, *The Psychological and Emotional Ties That Bind Biological and Adoptive Families: Whether Court-Ordered Postadoption Contact is in an Adopted Child's Best Interest*, 42 CAP. U. L. REV. 285, 293–95 (2014); Annette Baran & Reuban Pannor, *Perspectives on Open Adoption*, in FAMILIES BY LAW: AN ADOPTION READER 163, 164, 166 (Naomi R. Cahn & Joan H. Hollinger eds. 2004); HUNTINGTON, *supra* note 24, at 84; Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 129–34 (2013).

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relationships not only with a parent²⁹⁴ but also with members of the extended family related to that parent, such as siblings, grandparents, aunts, uncles, and others.²⁹⁵ Also, if the child’s custodial parent and adopting stepparent divorce, the child may subsequently have limited connection with the adopting stepparent, thus potentially losing their connection with two parents over the course of their childhood.²⁹⁶

The justices’ opinions in a recent Arkansas stepparent adoption case, *Ballard v. Howard*, provides a glimpse of the possible mismatch between the presumed policy goal of a TPR in the adoption context, that is, to permit an adoption to take place, and its actual impact.²⁹⁷ Although the petitioners had proven that the non-consenting father had not provided child support in more than twelve months due to his incarceration and substance use, and that the stepfather had helped raise the five-year-old child since the child’s birth, the trial court declined to grant the adoption and sever the father’s rights.²⁹⁸ The non-consenting father was sixteen years old at the child’s birth and the court observed: “As to what is going to happen in the future, I don’t know, nobody here knows what is going to happen.”²⁹⁹ The court also noted that the child had a close relationship with his extended family on his father’s side and that it was not in the child’s interest to sever that relationship.³⁰⁰ The petitioners’ allegations about the father’s

294. *Ainsworth v. Natural Father*, 414 So. 2d 417, 423 (Miss. 1982) (Lee, J., dissenting) (“[T]he forced adoption now being fostered upon the child has effectively denied his privilege of visitation with his father which is not in the child’s best interest.”).

295. *In re Adoption of A.C.B.*, 159 Ohio St. 3d 256, 2020-Ohio-629, 150 N.E.3d 82, at ¶ 42 (Kennedy, J., dissenting) (“Adoption not only eliminates the noncustodial parent’s parental rights and responsibilities—including the right to visitation and to have a say in the child’s education and religious affiliation—but also severs the child’s legal relationships with the parent, grandparents, and other blood relatives”) (first citing OHIO REV. CODE ANN. § 3107.15 (West 2021); and then citing *State ex. rel. Allen Cnty. Child. Servs. Bd. v. Mercer Cnty. Ct. of Common Pleas, Prob. Div.*, 150 Ohio St. 3d 230, 2016-Ohio-7382, 81 N.E.3d 380, ¶ 31); *In re Interest of Brandon S.S.*, 507 N.W.2d 94, 108 (Wis. 1993) (holding that trial court should have admitted evidence of the potential impact of termination of father’s rights on child’s relationship with paternal grandparents).

296. In an opinion affirming the denial of a petition to annul a child’s adoption by the parent’s domestic partner after the relationship ended, the Maine Supreme Judicial Court observed: “Adoption is a serious and permanent family institution. A child’s legal parenthood cannot be subjected to the fleeting and transitory whims of adult relationships.” *In re Adoption of J.S.S.*, 2010 ME 74, ¶ 13, 2 A.3d 281, 284.

297. *See Ballard v. Howard*, 560 S.W.3d 800, 804 (Ark. Ct. App. 2018).

298. *Id.* at 801.

299. *Id.* at 801–02.

300. *Id.* at 802.

limited parenting abilities “can be addressed with a lot less drastic remedy than adoption.”³⁰¹ In other words, while there was no reason *not* to allow the stepfather to adopt the child in his care, the requirement of termination of the father’s rights led to its denial.

The Arkansas Court of Appeals affirmed the denial and specifically noted that a court can consider the relationship between a child and a parent’s extended family as part of the “best interest” analysis in an adoption case as well as the father’s intention to become more involved in the child’s life after his release from incarceration.³⁰² To support his dissenting position that the trial court’s best interest analysis had focused on the wrong facts, Judge Kenneth S. Hixson emphasized the positive relationship the child had with his stepfather.³⁰³ He pointed to the evidence that the stepfather’s role in raising the child included “changing his diapers, feeding him, teaching him to ride a bicycle, and taking him fishing,” and that the stepfather is “for all intents and purposes, the only father the child knows.”³⁰⁴ The child’s father, by contrast, was “a nonfactor—in fact, a negative factor” in the child’s life.³⁰⁵

Supreme Court of Mississippi Justice Dan M. Lee offered another judicial critique of the rationale for termination in the private adoption context as part of his dissent in a 1982 opinion reversing the denial of a petition for a stepparent adoption.³⁰⁶ Noting the upward trend of divorces and remarriages, he observed:

When the mother remarries, a third party is injected into the existing hostilities between the natural parents which often leads to violence . . . A stepparent is merely an addition to a family, not a replacement for a child’s natural parent. In many cases a child will have close ties to its noncustodial parent, and

301. *Id.*

302. *Ballard*, 560 S.W.3d at 803–04 (first citing *Pippinger v. Benson (In re Adoption of J.P.)*, 385 S.W.3d 266, 278 (Ariz. 2011); and then citing *Hollis v. Hollis*, 468 S.W.3d 316, 322 (Ariz. Ct. App. 2015); see *In re L.Z.*, 616 S.W.3d 695, 698 (Ark. Ct. App. 2021) (affirming denial of adoption petition by “dutiful stepparent” because the steps the father had taken demonstrate the “potential for a positive father/child relationship”).

303. *Ballard*, 560 S.W.3d at 805 (Hixson, J., dissenting).

304. *Id.*

305. *Id.* at 806.

306. See *Ainsworth v. Nat. Father*, 414 So. 2d 417, 422 (Miss. 1982) (Lee, J., dissenting).

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to deny that child and parent the privilege of companionship and love will not always be in the child's best interest.

Adoption laws were passed to provide homes for destitute, homeless and neglected children. Yet ordinary adoption laws are still applied to cases such as this one where the custodial natural parent seeks to terminate the child's relationship with its noncustodial natural parent.³⁰⁷

Other jurists have expressed a similar concern that a parent and new spouse or partner pursue an adoption primarily to cut out the other parent. Justice Sharon L. Kennedy of the Supreme Court of Ohio noted in her dissent from an opinion affirming a TPR in a stepparent adoption case because the existing father fell behind in child support payments: "The majority . . . appears blind to the practical realities of domestic-relations law. Although many people use a stepparent adoption to bring a blended family together, it may also be misused as a tool for removing an existing parent from a remarried parent's life."³⁰⁸

The "subtract-a-parent-to-add-a-parent" rationale for termination of a non-consenting parent's rights is vulnerable to other criticisms as well. In many cases, a parent objecting to the adoption is not asking the court to deny the adoption petition or even to remove the child from the petitioners' care. Rather, the parent simply does not want their *own* connection to the child to be severed completely and permanently.³⁰⁹ Because of the winner-take-all orientation of the one-in-one-out approach to adoption, however, the only way for the parent to have a chance at preventing the termination of their rights is to withhold consent to the adoption itself.

A good example of the reasoning in this critique of the rationale in the stepparent context is the Maine Supreme Judicial Court's opinion in *In re Brandon D.*³¹⁰ The child's mother had moved without providing the father her new address, and her actions limited his engagement with the child.³¹¹ The father, who lived in Florida,

307. *Id.* at 423.

308. *In re Adoption of A.C.B.*, 159 Ohio St. 3d 256, 2020-Ohio-629, 150 N.E.3d 82, at ¶ 42 (Kennedy, J., dissenting).

309. *See Mahoney, supra* note 86, at 90 ("The noncustodial parent who objects to a proposed stepparent adoption is seeking to protect his or her own legal relationship with the child with all of the benefits and obligations for both parent and child associated with this status.").

310. *See In re Brandon D.*, 2004 ME 98, ¶ 14, 854 A.2d 228, 232.

311. *See id.* at ¶ 7, 854 A.2d at 231.

testified that “he believed his children were in good hands and that he respected [the mother and stepfather] for the good job that they had done raising the children.”³¹² He sought only “to be able to telephone the children once or twice a month and write to them.”³¹³ Vacating the probate court’s order, the Supreme Judicial Court held that, rather than basing its TPR determination on whether terminating the father’s rights was in the children’s best interests (regarding which there was “sparse” evidence), the probate court had improperly based it on maintaining the stability of the children’s then-current living arrangements.³¹⁴ The guardian ad litem testified that granting the adoption would be a good outcome because of the children’s relationship with the petitioning stepfather, but also commented: “If there were a way to adopt without terminating, I’d say that would be wonderful. . . .”³¹⁵

A related rationale for terminating an existing parent’s rights in an adoption context is to render the child “adoptable” by clarifying the various legal relationships among the parties,³¹⁶ thereby providing stability and minimizing the potential for future disruption, conflict, and litigation.³¹⁷ However, conflict avoidance alone should not be a sufficient basis to terminate a parent’s rights. A TPR petition can in fact inject a high-stakes conflict into a situation where the noncustodial parent may not otherwise object to a stepparent, relative, or guardian obtaining parental rights, such as in *In re Brandon D.*³¹⁸

Given that “the subtract-a-parent-to-add-a-parent” rationale for termination does not withstand even modest scrutiny, one might

312. *Id.* ¶ 13, 854 A.2d at 232 n.3.

313. *Id.*

314. *See id.* at ¶ 11, 854 A.2d at 231–32.

315. *Brandon D.*, 2004 ME at ¶ 14, 854 A.2d at 32.

316. *See Aulik, supra* note 289, at 609, 630 (“The presence of a noncustodial natural parent further complicates the role and rights of the stepparent” and “Currently, adoption is the only way in which a stepparent can put to rest any conflict between the stepparent and the noncustodial parent.”).

317. *See, e.g., Ballard v. Howard*, 560 S.W.3d 800, 804–06 (Ark. Ct. App. 2018) (Hixson J., dissenting) (emphasizing that adoption by stepparent would provide “stability” for the child). *Mabry, supra* note 293, at 293 (noting that some believe that “having two mothers or two fathers is too confusing” for an adopted child); *Young, supra* note 88, at 510, 530–31 (noting that the normative argument for the “exclusive family” model is that “authority and responsibility are localized, readily identified, and efficient” and that an “old father” is seen as a “potentially destabilizing influence” and a “threat to the stability of the new unit”).

318. *See Brandon D.*, 2004 ME at ¶ 13, 854 A.2d at 232 n.3.

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wonder why it is so prevalent and entrenched. Legal scholars have noted and criticized the persistence of family law’s near-inflexible “rule of two,” which allows recognition of “only two legal parents for each child.”³¹⁹ It is likely that this rigid rule is the actual, unstated rationale linking a TPR requirement to a stepparent’s attempt to obtain legal recognition as a parent through an adoption.³²⁰ While there are a few exceptions, as noted herein, “by and large, family law is reluctant to enlarge the pie of legal parenthood.”³²¹

The rationale requiring a termination of existing parents’ rights in an adoption also reflects an implicit assumption that the ideal family unit is what Professor Sacha Coupet has referred to as the conjugal dyad structure, meaning that a child has only two parents who have (or at one point, had) a commitment to each other.³²² Thus, an existing parent’s rights must be displaced to facilitate the creation of a new dyad through adoption.³²³ As Lawrence Friedman observes: “Adoption holds up the model: the traditional, two-parent, loving, middle-class family, with stability and permanence.”³²⁴ The power of the traditional model, in adoption proceedings as elsewhere, protects heterosexual dyads in particular.³²⁵ Thus, courts are wary when

319. HUNTINGTON, *supra* note 24, at 87.

320. *See id.*; *see, e.g. In re Jay R.*, 150 Cal. App. 3d 251, 263 (Cal. Ct. App. 1983) (describing adoption termination proceedings as an exercise of state authority “to terminate the legal relationship of parent and child and establish a new relationship”).

321. HUNTINGTON, *supra* note 24, at 87.

322. *See, e.g. Coupet, supra* note 16, at 618–24 (describing family law’s “‘rule of two,’ the operative rule constraining parental claims to an exclusively dyadic model” and how the marriage-based legal concept of parent “privileges conjugality”); Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 11 (2008) (“Family law, as part of the larger prevailing culture, has enshrined the number two. By constructing links among sex, marriage and procreation and conceptualizing each as a practice for two, family law takes as its paradigm the couple or pair.”); Lewis, *supra* note 122, at 333–38; Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. & FAM. STUD. 309, 309–14 (2007).

323. Mahoney, *supra* note 86, at 97 (“The all-or-nothing model of adoption . . . reflects traditional understandings about family boundaries in the law. Stepparent adoption involves the replacement of one legal parent figure (the noncustodial parent) with another (the stepparent), thus reflecting the general principle that legal parenthood, limited to two adults at one time, must be created by biology or adoption.”).

324. FRIEDMAN, *supra* note 34, at 117.

325. *See Michael H. v. Gerald D.*, 491 U.S. 110, 118 (1989) (upholding state law marital presumption based in part on reasoning that “California law, like nature itself, makes no provision for dual fatherhood”).

petitioners seek to use adoption to support another model, such as when a child's non-parent relative, such as an aunt or grandfather, and one parent seek legal recognition of their co-parenting arrangement.³²⁶

Over the years, however, due to new reproductive technologies and expanding recognition of equitable or de facto parentage, the two-parent paradigm in U.S. family law has been eroding.³²⁷ Some state laws, using gender-neutral language, now expressly allow a child to have more than two legal parents.³²⁸ The 2017 Uniform Parentage Act, following the trend of some state laws, clarifies the current status of the paradigm: “The court may adjudicate a child to have more than two parents under this [act] if the court finds that failure to recognize more than two parents would be detrimental to the child.”³²⁹ This recognition of the reality and benefits of a child having more than two legal parents undermines the “rule of two.” It thereby also undermines the rationale for the *necessity* of the termination of one or more parents' rights in the adoption context.

2. Alternatives Worth Considering

A child can obtain a legal connection to a caregiver without adoption, and there are also ways adoption can occur without the termination of existing parents' rights.³³⁰ Such alternatives to common practices are not available in all jurisdictions, and they may not be

326. See, e.g., *In re Adoption of M.R.D.*, 145 A.3d 1117, 1118 (Pa. 2016) (holding that maternal grandfather could not petition to adopt minor children while retaining mother's parental rights but terminating father's rights). See generally Coupet, *supra* note 16 (discussing how kinship caregivers have increasingly assumed substantial parental responsibilities but have limited opportunities to carry the title of legal parent).

327. See Jessica Feinberg, *The Boundaries of Multi-Parentage*, 75 SMU L. Rev. 307, 329 (2022); Courtney G. Joslin & Douglas NeJaime, *Multi-Parent Families, Real and Imagined*, 90 Fordham L. Rev. 2561, 2573–74 (2022); Tiffany L. Palmer, *How Many Parents? Multiparent Families are Increasingly Recognized by Law and Society*, 40 FAM. ADVOC. 36, 36–37 (2018).

328. See Jennifer Peltz, *Courts and 'Tri-Parenting': A State-By-State Look*, BOSTON.COM (June 18, 2017), <https://www.boston.com/news/national-news/2017/06/18/courts-and-tri-parenting-a-state-by-state-look/>.

329. UNIF. PARENTAGE ACT § 613(c) (Alternative B) (UNIF. LAW COMM'N 2017). See also ME. REV. STAT. ANN. tit. 19-A, § 1853(2) (West 2021) (“Consistent with the establishment of parentage under this chapter, a court may determine that a child has more than 2 parents.”). Similarly, California enacted a provision to clarify that a court may find that a child has more than two parents, although the Legislative Findings suggested this would be true only in “rare” cases. CAL. FAM. CODE § 3040(3)(d) (West 2021).

330. See *infra* notes 336-362 and accompanying text.

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appropriate in all contexts. But Justice Dan M. Lee, in his above-noted dissent, urged his colleagues to “find alternatives to adoption in cases such as this one where a natural parent’s relationship with his child is being severed forever.”³³¹ And acknowledgement of the underlying add-a-parent rationale of private TPR in adoption enables policymakers to consider whether this extreme result is always needed simply to allow an adoption to proceed.

A. De Facto Parentage

Many states recognize, through laws or court opinions, that a person without a genetic connection to a child but who has “an actual parent-child relationship and proof that that relationship was formed with the consent and encouragement of the child’s legal parent” may be that child’s “de facto” parent, and thereby entitled to parental rights and responsibilities.³³² The 2017 Uniform Parentage Act reflects this option.³³³ Standards and terminology for these equitable parentage doctrines vary among states,³³⁴ but, generally, an individual seeking such status must prove that they “reside[d] with the child for a significant period of time and . . . formed a bonded and dependent relationship with the child which is parental in nature.”³³⁵ Some stepparents can establish legal relationships with the children in their care via adjudication as a de facto parent.³³⁶

331. *Ainsworth v. Nat. Father*, 414 So. 2d 417, 423 (Miss. 1982) (Lee, J., dissenting).

332. Courtney G. Joslin, *De Facto Parentage and the Modern Family*, 40 FAM. ADVOC. 31, 32 (2018) [hereinafter *De Facto Parentage*].

333. See Joslin, *supra* note 29, at 602.

334. See Feinberg, *supra* note 327, at 321; *De Facto Parentage*, *supra* note 332, at 32; Myrisha S. Lewis, *Biology, Genetics, Nurture, and the Law: The Expansion of the Legal Definition of Family to Include Three or More Parents*, 16 NEV. L.J. 743, 748 (2016) (“There are a number of terms in use for individuals who occupy a significant parent-like role in a child’s life. These terms include ‘de facto parents, parents by estoppel, psychological parents, intent-based parenthood, and in loco parentis status’; these terms have different meanings in different jurisdictions.”) (quoting Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1486–87 (2014)).

335. UNIF. PARENTAGE ACT § 609 (comment) (UNIF. LAW COMM’N 2017).

336. See *De Facto Parentage*, *supra* note 332, at 31, 33; see also, e.g., *Libby v. Estabrook*, 2020 ME 71, ¶ 16–19, 234 A.3d 197, 202–203; *In re Parentage of J.B.R.*, 336 P.3d 648, 652–53 (Wash. Ct. App. 2014). See also Aulik, *supra* note 289, at 606 (advocating for “stepparent custody” for “formal recognition” of stepparent as an alternative to adoption that would not require termination of the other parent’s rights); 1 HOLLINGER, *supra* note 100, at § 2.10[3] (noting that legal commentators advocate for “a new kind of legal status” for “blended” family situations “that would be more consensual and would reduce the incidence of hostile litigation.”).

This outcome is the legal equivalent of adoption because the court adjudicates the person as the legal parent of the child for all purposes, at least in some states.³³⁷ It affects all existing parents' rights by "expanding the pie" of parentage with respect to a child, but it does not involve termination of any parent's rights.³³⁸ A de facto parent order can be an alternative to the all-or-nothing stakes of termination of parental rights to achieve a result that would address all parties' objectives.³³⁹ Indeed, for this very reason, a parent who would not consent to their child's adoption might consent to an adjunction of the non-parental caregiver as a de facto parent.³⁴⁰

B. Minor Guardianship

Minor guardianship provides a way to confer parental authority on a non-parent, but short of a parentage adjudication as in the de facto parent context.³⁴¹ Minor guardianship could achieve many of the same objectives as adoption or de facto adjudication, without terminating

337. See, e.g., *Pitts v. Moore*, 2014 ME 59, ¶ 34, 90 A.3d 1169, 1183 ("The role of a de facto parent is no less permanent than that of any other parent; it is a role that may be surrendered, released, or terminated only in limited circumstances as approved by a court."). See *Feinberg*, supra note 327, at 322–23; *De Facto Parentage*, supra note 332, at 33.

338. *De Facto Parentage*, supra note 332, at 34–35.

339. Although de facto parenthood was not yet a well-defined concept in 1982, Justice Lee essentially encouraged something along those lines in his dissent. *Ainsworth v. Nat. Father*, 414 So. 2d 417, 423 (Miss. 1982) (Lee, J., dissenting) ("One alternative would be to award the stepparent equal legal custody of the minor child with the custodial parent, thereby establishing rights of the stepparent while preserving the natural parent's relationship with the child."). Myrisha Lewis has called for recognition of a new but similar form of parentage—what she has dubbed "parentage by *praxi*"—as a better alternative to stepparent adoption "because it focuses on the legal relationship between a previously-recognized legal parent and a possible third parent rather than focusing on the parent-child relationship." Lewis, supra note 334, at 768.

340. I have supervised several cases in our law school's clinic in which we resolved contested adoption-termination actions through an agreed-to de facto parentage adjudication.

341. Many jurisdictions provide other routes to "third-party custody" by non-parents in addition to minor guardianship. See generally Josh Gupta-Kagan, *Children, Kin, and Court: Designing Third Party Custody Policy to Protect Children, Third Parties, and Parents*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 43 (2008) (arguing that states should enact child custody statutes that would permit a broad set of individuals to seek custody). To keep this discussion brief, I focus on minor guardianship because it is the most prevalent legal mechanism available for non-parents to seek custody.

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the existing parents' rights.³⁴² In some cases, the parents' rights may be suspended or subject to the guardian's authority, but in most jurisdictions, a parent can hold a co-guardian status with the guardian, essentially co-parenting through a shared allocation of parental rights.³⁴³ Indeed, prior to the availability of second-parent adoption by unmarried couples, de facto parentage, and marriage equality, some same-sex couples used co-guardianship as an option to confer some parental right on the other parent.³⁴⁴

C. *Non-Exclusive Adoption*

As noted above, most adoption statutes do not allow an adoption to both add a parent and preserve existing parental rights unless the existing parent is also a co-petitioner. This means an existing parent must join the petition or have their rights terminated, voluntarily or involuntarily. Some states, however, rather than requiring termination of a non-petitioning parent, have enacted adoption statutes that either allow an existing parents' rights to continue while the petitioner for adoption gains status as a parent or provide that a court may recognize more than two parents through an adoption.³⁴⁵ Such an outcome would achieve the same result as a de facto parent adjudication. Ideally, this "non-exclusive adoption"³⁴⁶ would result from all parties' consent to such outcome: the prospective adopting parent would sign a consent and waiver before the court, allowing the non-petitioning parent to retain parental rights and responsibilities after the adoption is final.³⁴⁷

In 2013, California enacted the first non-exclusive adoption provision to facilitate adoptions by same-sex couples, but the language

342. See Smith, *supra* note 221, at 301–09.

343. See *id.* at 349; see also *In re Justina S.*, 579 N.Y.S.2d 955, 956 (N.Y. App. Div. 2d Dep't 1992) (child's mother and stepfather petitioned for co-guardianship).

344. See, e.g., *In re Guardianship of I.H.*, 2003 ME 130, ¶ 18–20, 834 A.2d 922, 927–28 (mother and her female partner petitioned to be appointed co-guardians of child).

345. See, e.g., CAL. FAM. CODE § 8617 (West 2021).

346. See generally Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare*, 66(4) ALA. L. REV. 715 (2015) (arguing that child welfare law should permit the non-exclusive adoption of foster children who cannot reunify with their parents) [hereinafter *Non-Exclusive Adoption*]. Some refer to this approach as "third-parent adoption." Palmer, *supra* note 327, at 39.

347. See David D Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 815–19, 822 (1999) (advocating for non-exclusive adoption even over the objection of an existing parent as long as the petitioner can demonstrate an existing de facto parent-child relationship).

in the statute has a potentially broader application.³⁴⁸ Specifically, in the section addressing “existing parents’ responsibilities toward child,” the statute provides that the existing parent will *not* be “relieved of all parental duties towards, and all responsibility for, the adopted child, and have no right over the child”—that is, their rights will not be terminated—if the existing parent and adoption petitioner execute and file a waiver with the court prior to the finalization of the adoption.³⁴⁹ Acknowledging the legacy of the “rule of two,” California simultaneously enacted a provision to clarify that a court may establish parentage for more than two parents of a child.³⁵⁰

Non-exclusive adoption results in the child having an additional parent rather than a “replacement” parent.³⁵¹ Waivers such as those allowed under the California law would address the scenario in *In re Brandon D.* where a parent would not object to the adoption itself, only to the severing of their parental status.³⁵² Similar to the *de facto*

348. See Feinberg, *supra* note 327, at 331–32; *Non-Exclusive Adoption*, *supra* note 346, at 720.

349. CAL. FAM. CODE § 8617 provides in pertinent part:

(a) Except as provided in subdivision (b), the existing parent or parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the adopted child, and have no right over the child.

(b) The termination of the parental duties and responsibilities of the existing parent or parents under subdivision (a) may be waived if both the existing parent or parents and the prospective adoptive parent or parents sign a waiver at any time prior to the finalization of the adoption. The waiver shall be filed with the court. CAL. FAM. CODE § 8617 (West 2021).

350. See CAL. FAM. CODE § 3040(d) (West 2021). However, the Legislative Findings for such provision suggested this would occur only in “rare” cases. Nevada modified its adoption statute in 2021 to permit “one or more adults” to adopt a child and permitting all existing parents to retain their parental rights as long as they were co-petitioners. NEV. REV. STAT. §127.030(1) (2021) (“Each prospective adopting adult and each consenting legal parent seeking to retain his or her parental rights must be a joint petitioner”).

351. In addition to California and Nevada, Alaska, Florida, Oregon, Massachusetts, and Maryland now have adoption laws that permit recognition of three parents. See Palmer, *supra* note 327, at 39. These laws are used primary when a man is a sperm donor for two women and all three wish to have parental rights and responsibilities. See *id.*

352. See *supra* notes 310–315 and accompanying text. There have been apparently a few, isolated instances of a court permitting an adoption by a parent’s new partner without terminating the rights of the other parent, but these are exceptionally rare and do not provide authority for other courts to follow the same route. See Ian Lovett, *Measure Opens Door to Three Parents, or Four*, N.Y. TIMES (July 13, 2012), <https://www.nytimes.com/2012/07/14/us/a-california-bill-would->

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parentage context, a non-petitioning parent might be more likely to consent to a stepparent adoption if their parental rights were not at stake, thus eliminating the need to adjudicate their “unfitness” to permit the adoption to go forward.³⁵³

Professor Josh Gupta-Kagan has advocated for the use of non-exclusive adoption in dependency cases.³⁵⁴ He explains:

Non-exclusive adoption would respect the lived reality of many foster children by legally recognizing all parents in their lives. Biological parents, even those who cannot reunify with their children, retain an important role for many foster children Moreover, creating an additional legal path for foster children to leave foster care to new permanent families may help many children and families find legal options that minimize unnecessary litigation.³⁵⁵

The potential benefits of allowing legal recognition of all parental figures and minimizing litigation apply in the private termination context as well as in the dependency context.

While an outcome similar to non-exclusive adoption can be achieved in many states through de facto parentage, not every stepparent meets the statutory definition of de facto parent, and not every state provides a path to such status. Moreover, even where such status is reflected in state law, the adjudication process for de facto parentage can be difficult for unrepresented litigants to pursue. Thus, wider availability of non-exclusive adoption could extend to more families a mechanism to add a parent without terminating an existing parent’s rights.³⁵⁶

More analogous to the dependency scenario described by Professor Gupta-Kagan, a non-exclusive adoption option may also make it easier for a long-term legal guardian to adopt the child where the parent is not seeking to regain custody of the child and would

legalize-third-and-fourth-parent-adoptions.html (reporting on such an outcome in an Oregon adoption case); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 243 (2009) (noting instances of such outcomes in Alaska, Massachusetts, and Washington adoption cases).

353. See Wriggins, *supra* note 289, at 263–64. I am unaware of any data confirming my assumption that there would be fewer contested adoptions if non-exclusion adoption were available as an alternative.

354. See *Non-Exclusive Adoption*, *supra* note 346, at 716.

355. *Id.*

356. See also Feinberg, *supra* note 327, at 331–32, 335–36, 348, 354–56 (discussing the benefits of non-exclusive adoption and advocating for existing parents’ express consent to non-exclusive adoption arrangements).

consent to the adoption but also does not want to give up their parental rights. It could potentially reduce the number of difficult guardianship termination proceedings by providing guardians a more secure legal status that reflects their role as a primary caregiver for the child, without requiring the parents to relinquish their status as parents or requiring the guardian to prove the parent's current unfitness.³⁵⁷

Non-exclusive adoption would enable a court to allocate parental rights and responsibilities—including, as appropriate, co-parenting, rights of contact, and child support—among the adults who had legal parent status with respect to the child.³⁵⁸ Such allocation orders could be modified the same way as any other parental rights and responsibilities order, to reflect a substantial change of circumstances or an agreement of the parties. Of course, as some commentators have noted, a downside to any multi-parent family is the potential for having to re-litigate the allocation of parental rights and responsibilities among the parents if the multiple parties' spirit of cooperation wanes in the years after the adoption takes place.³⁵⁹

B. To Sever the Legal Connection Between the Child's Parents

1. The Rationale and Its Origins and Limitations

A second rationale for private termination of parental rights regarding a child is to enable a petitioning custodial parent to sever *their* legal connection to the other parent, protecting them from any risk associated with having to engage with the other parent.

This rationale has little to do with the child's interest. A standard child custody order can preclude any contact between the noncustodial parent and the child, protecting the child from harm while leaving the legal parent-child relationship intact.³⁶⁰ Further, a court can allocate the parental rights of parents such that one parent not only has exclusive custody of the child but also has the right to make all

357. See Smith, *supra* note 221, at 336–40.

358. See Carbone & Cahn, *supra* note 19, at 42–52 (discussing potential allocations of rights and responsibilities among multiple parents).

359. See *id.* at 39 (“[T]he greater the number of adults holding parental status, the greater the potential for conflict”); but see Feinberg, *supra* note 327, at 357–58 (noting that concerns about conflict in multi-parent families as compared with two-parent arrangements may be overstated).

360. Feinberg, *supra* note 327, at 359–60 (noting that all jurisdictions permit courts to structure child custody and visitation orders as needed to protect a child from harm and to serve the child's best interests).

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decisions affecting the child, including decisions about their education and health care. Where necessary, a custody order can preclude any form of contact between the noncustodial parent and a child, even the sending of a birthday card.³⁶¹

TPR petitions reflect the fact that, even under such restrictive orders, the relationship with the other parent may nonetheless present ongoing problems for the custodial parent. The noncustodial parent's remaining legal status as a parent means that there is a continuing legal connection between them, even if they have divorced or obtained another formal termination of their relationship. Matters involving children are a rare exception to the legal principle of finality in litigation.³⁶² So long as a person remains a legal parent, they have standing to seek a modification of a court order either to expand their rights or to assert themselves as the child's parent in contexts in which such role is relevant.³⁶³ There are legal standards to meet—such as demonstrating a “substantial change in circumstances”³⁶⁴—but those rarely prevent a noncustodial parent from *initiating* post-judgment proceedings to restore or expand their parent-child contact rights.³⁶⁵ The filing of such proceedings alone, even if the other parent is unsuccessful, can be disruptive and anxiety-provoking for the custodial parent.³⁶⁶

361. ELROD, *supra* note 51, at § 6:15 (“If visitation [by the noncustodial parent] would be inimical to the child’s welfare, it can be denied.”).

362. *Id.* at § 17:01 (“A tension exists between protecting the welfare of a child and providing a finality to decisions . . . The doctrine of res judicata . . . is limited in child custody actions because of the court’s inherent *parens patriae* power.”).

363. *Id.* at § 17:01 (“In all states, [because of the *parens patriae* doctrine, judges retain the power to modify a custody award] to protect and further the best interests of a child.”).

364. *Id.* at § 17:04 (“To further the goal of finality to the litigation, the motion for modification of custody or visitation must allege that a material change of circumstances has occurred since the entry of the original custody and visitation order which makes modification in the child’s best interests.”); Yitshak Cohen, *Issues Subject to Modification in Family Law: A New Model*, 62 DRAKE L. REV. 313, 315 (2014); HARALAMBIE, *supra* note 100, at § 7:4 (“Most states required a showing of changed circumstances prior to modifying a custody order.”).

365. See Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 760 (1985) (criticizing “marked trend toward making custody modifications fairly easy to obtain”).

366. See, e.g., Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 388 (2008); Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 499 (2001); Richard Wolman & Keith Taylor, *Psychological Effects of Custody Disputes on Children*, 9 BEHAV. SCI. & L. 399, 410–412 (1991).

A noncustodial parent can have an emotional interest in maintaining a legal connection to the child or the custodial parent that has nothing to do with the child. They can use their standing to perpetuate litigation—even if futile—to harass their former partner or simply to be able to have an encounter with them in a courtroom.³⁶⁷ While the specter of litigation with a former spouse or partner can be unsettling for anyone, avoiding this possibility is particularly desirable where the noncustodial parent has engaged in extreme violence towards the custodial parent.³⁶⁸

This rationale is especially prominent when the child was conceived as a result of a sexual assault. Research findings suggest that as many as 32,000 rape-related pregnancies occur each year.³⁶⁹ Allowing a rapist to pursue visitation rights may cause re-traumatization of the survivor-parent, sometimes referred to as a “second rape.”³⁷⁰ Termination of the perpetrator’s parental rights not only ensures that there is no relationship between the perpetrator and the child but also that they have no legal connection with the child’s mother; absent termination, the continued “tether” perpetuates the assault.³⁷¹ As National Conference of State Legislators observed: “Rape that results in a child is one of the only violent crimes that legally binds victims to their attackers, through the consequences of that violent act.”³⁷² For this reason, most states permit termination of

367. See Judith Lewis, *supra* note 122, at 331 n.99; ELROD, *supra* note 51, at § 17:1 (“Custody disputes provide opportunities for control over a former partner.”).

368. See *supra* notes 156–157 accompanying text.

369. See Melisa Holmes, et al., *Rape-Related Pregnancy: Estimates and Descriptive Characteristics From a National Sample of Women*, 175 AM. J. OBSTET. GYNECOL. 320, 322 (1996) (more than 32,000 pregnancies per year); Felicia H. Stewart & James Trussell, *Prevention of Pregnancy Resulting from Rape: A Neglected Preventive Health Measure*, 19 AM. J. PREV. MED. 228, 228 (2000) (approximately 25,000 pregnancies each year). See also *Understanding Pregnancy Resulting from Rape in the United States*, CENTERS FOR DISEASE CONTROL (June 1, 2020), <https://www.cdc.gov/violenceprevention/sexualviolence/understanding-RRP-inUS.html>.

370. See Moriah Silver, *The Second Rape: Legal Options for Rape Survivors to Terminate Parental Rights*, 48 FAM. L.Q. 515, 516 (2014).

371. See *id.* at 522.

372. *Parental Rights and Sexual Assault*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Mar. 9, 2020) <https://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx>.

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parental rights when the child was conceived as a result of a sexual assault.³⁷³

While some laws provide that sexual assault is a ground for termination of parental rights specifically in adoption³⁷⁴ or public dependency proceedings,³⁷⁵ most establish TPR as a stand-alone private remedy to be sought by the survivor-parent of the child.³⁷⁶ Many termination laws involving sexual assault as a rationale were enacted by states in response to a federal law that establishes financial incentives for states to enact laws allowing private TPR in this context.³⁷⁷ Colorado's statute includes these legislative findings, which make plain its private remedy rationale:

The general assembly hereby declares that the purpose of this statute is to protect the victim of a sexual assault and to protect the child conceived as a result of that sexual assault by creating a process to seek termination of the parental rights of the perpetrator of the sexual assault . . . The general assembly further declares that *this section creates civil remedies* and is not created to punish the perpetrator but rather to protect the interests of the child *and the victim of a sexual assault*.³⁷⁸

Here too, however, a restrictive custody order could protect the *child* from the perpetrator. The important impact of these laws is the relief they provide to the child's custodial parent, the victim of the

373. *See id.* Nearly all states and the District of Columbia have enacted some form of law that specifically addresses the parental rights of perpetrators. Thirty-two states have laws that allow termination for perpetrators and twenty allow a restriction on parental rights short of complete termination. *Id.*

374. *See, e.g.,* ALASKA STAT. § 25.23.180(c)(1) (2021).

375. *See, e.g.,* CONN. GEN. STAT. § 17a-112 (2021).

376. *See, e.g., id.*

377. *See* 34 U.S.C. §§ 21301–08 (2018). The 2015 Rape Survivor Child Custody Act, part of the Justice for Victims of Trafficking Act, expanded grant funding available to states under the Violence Against Women Act who enact laws that enable parents of children conceived through sexual assault to seek termination of parental rights of the perpetrator. *See id.* The Department of Justice Office of Violence Against Women explained in a press release: “To qualify, the state must have a law that allows the mother of a child conceived through rape to seek court-ordered termination of the parental rights of the rapist with regard to that child, which the court is authorized to grant upon clear and convincing evidence of rape.” U.S. DEPT. OF JUSTICE, FUNDS AWARDED UNDER THE RAPE SURVIVOR CHILD CUSTODY ACT (2016), <https://www.justice.gov/ovw/page/file/1005396/download>.

378. COLO. REV. STAT. § 19-5-105.5 (2021) (emphasis added). Arkansas's law, by contrast, is more explicit a form of punishment against the perpetrator in that it provides that the parent's rights are automatically terminated upon their conviction. *See* ARK. CODE ANN. § 9-10-121 (West 2021). The other parent may petition the court to reinstate the perpetrator's rights. *Id.* § 9-10-121(b).

sexual assault, by severing *their* relationship to the offending parent.³⁷⁹ In fact, Maine's statute goes so far as to provide that if a court finds that the child was conceived from a sexual assault, the court *must* terminate the offending parent's rights; *no* consideration may be given to the child's best interest.³⁸⁰

2. *Alternatives Worth Considering*

In the case of a TPR petition where a child was conceived from a sexual assault, and in contrast to the add-a-parent rationale, there are far fewer alternative routes to protect one parent from harm caused by the other parent having an ongoing legal connection to them through their mutual status as parents of a child. There is, however, an arguable distinction between two possible scenarios: in one, the child was the result of a consensual conception, but their parents' relationship was marked by domestic violence and harassment; in the other, the child's conception resulting from a sexual assault. In the former case, because the conception itself was consensual, the interests of the petitioning parent in the termination are diminished even though the relationship was or became abusive.³⁸¹ It is only in the latter instance that the perpetrator's retaining status as a legal parent would perpetuate an assault and, therefore, only in that instance that there is no alternative private remedy equivalent to the termination of parental rights.

As noted above, a court can allocate all parental rights and responsibilities other than child support to one parent, thereby eliminating any co-parenting obligations and minimizing any need for

379. In a recent opinion, the Superior Court of Pennsylvania held that the parent in that case, who was seeking termination of other parent's rights due to conception from sexual assault, was not required to petition for adoption to achieve such outcome. *In re Interest of Z.E.*, No. 3577 EDA 2018, 2019 WL 3779711, at *8 (Pa. Super. Ct. Aug. 12, 2019). The court noted that the petitioner was not attempting to establish a new parent-child relationship or punish the father for being a negligent parent. *Id.* at *7. "Rather," the court observed, "Mother is looking to sever Father's parental rights to Children as a result of his criminal and sexually predatory behavior perpetrated against Mother for over 20 years, in an effort to put an end to a cycle of abuse, and to provide Children with a chance to grow up in a loving, supportive and caring home with no fear of reprisal from Father." *Id.* at *7.

380. See ME. STAT. tit. 19-A, § 1658(3-A)(A) (2021).

381. See Judith Lewis, *supra* note 122, at 364–66 (discussing similarities and distinction in use of termination of a perpetrator's parental rights as a remedy for those who have experienced interpersonal violence generally, including sexual assault).

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the parents to have any interactions related to the child.³⁸² The risk of serial and harassing litigation can also be limited by a court order addressing the same based on a finding of an abuse of process.³⁸³ Such an order could, for example, require an initial screening by the court before the custodial parent is served and obligated to respond to or participate in the proceedings.³⁸⁴ Restrictions of this kind should be used sparingly, however, and not operate to limit a parent's access to the courts.³⁸⁵

Additionally, some scholars, challenging the current all-or-nothing view of legal parentage, have suggested that there could be degrees of parenthood such that not all legal parents would have equal rights.³⁸⁶ While many state laws are predicated on the assumption that children should have frequent and continuing contact with both parents unless there is a reason not to, based on the child's best interest, at least one scholar has pointed out that this policy goal is not always the best starting point in determining the appropriate level of parental involvement.³⁸⁷

What can be emphasized here, is that few state laws reflect any of the proposed approaches to addressing the problems relating to a legal connection between the parents of a child, short of a termination of the parental rights of one of them.

382. *See id.* at 376–77.

383. *See* 42 AM. JUR. 2D *Injunctions* § 80 (2020).

384. *See id.* (“Injunction restricting frivolous litigation”).

385. *See, e.g.,* Nolette v. O’Neil, 679 A.2d 1084, 1086 (Me. 1996) (holding that trial court exceeded its authority in limiting a party from filing post-judgment motions in a divorce matter for a period of three years absent a “detailed showing of a pattern of abusive and frivolous litigation”).

386. HUNTINGTON, *supra* note 24, at 191 (arguing for “new social norms” are unmarried fatherhood, which will “better reflect [their] abilities and contributions.”); Laufer-Ukeles, *supra* note 48, at 797 (advocating for “clearly defined and hierarchical categories of parenting and care relationships”); Jacobs, *supra* note 322, at 332–35 (advocating for legal reforms that recognize “multiple parenthood” with greater rights for parents who contribute more to caretaking role); Carbone & Cahn, *supra* note 19, at 46–52; Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J. L. & FAM. STUD. 231, 246–50 (2007) (discussing various “models of multiple parenthood”); Young, *supra* note 88, at 54–55 (advocating a model of parenting that recognizes both a “core” parent-child unit and a “potential network of persons who may play supplementary and complimentary roles”).

387. HUNTINGTON, *supra* note 24, at 171 (“[T]he central point is that the state should concern itself with more nurturing strong, stable, positive relationships than with any one particular structure of child and adult relationships.”).

C. To Foreclose Any Future Exercise of Parental Rights

1. The Rationale and Its Origins and Limitations

The third private remedy rationale I examine in this Part is termination as a preventive measure to foreclose any possible future exercise of a person's parental rights. This rationale applies when a petitioning parent or guardian seeks termination of a parent's rights primarily as a hedge against significantly changing circumstances. Thus, a legal guardian may want to block the parent from trying to end the guardianship, thereby ensuring the perpetuation of the current custodial arrangement. Alternatively, a parent or guardian may be concerned that, if they were to die or otherwise be unable to care for the child, the other parent would, undesirably, step in to assert their parental status and take custody of the child.

This rationale bears a superficial resemblance to the permanency rationale of termination in the dependency context. In the child protection realm, "permanency" specifically refers to a resolution of the legal matter and to the involvement of the state in the child's life.³⁸⁸ The child is in limbo—and the ongoing responsibility of the state—when it is uncertain whether the child will be reunified with one or both parents, or cared for in a different setting or family, such as through adoption, permanency guardianship, or some other arrangement.³⁸⁹

In the private termination context, however, a goal of "permanency" addresses a different kind of objective. When a parent or guardian is bringing a TPR action, they aim to obtain *exclusive* parental authority, thereby ensuring that, even if circumstances change, the other parent will never be in a position to exercise parental rights, either by seeking a modification of an existing custody or guardianship order or by asserting their parental status in some other context.

388. Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL'Y 1, 2 (2015) ("Permanency is a pillar of child welfare law . . ."); Mark F. Testa, *The Quality of Permanence - Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 VA. J. SOC. POL'Y & L. 499, 501 (2005).

389. Such arrangements could include third-party custody or emancipation. In some instances, children remain in foster care or state care of some kind after the termination of the parents' rights. See ROBERTS, *supra* note 58, at 112; see Garrison, *supra* note 48, at 426–55.

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Where there is a minor guardianship appointment for a child, its perpetuation is contingent on the continuing need for a guardianship or, where the parent is alive with intact parental rights, that parent's ongoing consent. If a parent demands the return of the child and the guardian does not agree, the parent can petition the court to terminate the guardianship, requiring the parties to litigate the question of the parent's *current* parental fitness.³⁹⁰ The United States Supreme Court held in *Troxel v. Granville* that a "fit" parent is presumed to act in their children's best interests,³⁹¹ and that a court order cannot preclude them from re-assuming a parental role.³⁹² Unless the guardian proves the continued unfitness of the parent, the court must end the guardianship, even if it has been in place for some time.³⁹³ A legal guardian's adoption of the child, however, and the resulting termination of the parent's rights, prevents a parent from later claiming to have addressed the underlying difficulties that led to the guardian's appointment—e.g., substance use, incarceration, youth—and from petitioning to end the guardianship.³⁹⁴ Therefore, where termination of a parent's rights in the context of an adoption petition is brought by the child's guardian, it is not for the purpose of providing legal authority to a non-parent caregiver, because the guardian, as such, already has such status. Rather, its purpose is to ensure that the guardian's legal status with respect to the child cannot be ended through an action on the part of the parent.³⁹⁵

Another concern that may lead to a private termination petition by a legal guardian or a custodial parent is the potential death of the petitioner while the child is still a minor.³⁹⁶ In all U.S. jurisdictions, the death of one parent results in the automatic "devolution" of *all* parental rights to the surviving parent, regardless of the role they have played in a child's life, so long as their rights were not previously

390. See Garrison, *supra* note 48, at 474–76.

391. 530 U.S. 57, 68 (2000).

392. See *id.* at 68–69.

393. See, e.g., *In re Guardianship of Reena D.*, 35 A.3d 509, 514–15 (N.H. 2011) (citing *Troxel*, 530 U.S. at 69).

394. Smith, *supra* note 221, at 335–37.

395. See, e.g., *Sidman v. Sidman*, 249 P.3d 775, 787 (Colo. 2011); *Boddie v. Daniels*, 702 S.E.2d 172, 175–76 (Ga. 2010).

396. Few court opinions expressly address this reason for seeking termination. See, e.g., *In re Appeal in Maricopa Cnty. Juv. Action No. JS-500274*, 804 P.2d 730, 732, 736 (Ariz. 1990) (noting that, at trial, the mother "explained that she sought to terminate [the father's] parental rights so she could name her parents in her will as guardians for [the child].").

terminated by a court.³⁹⁷ A leading treatise on child custody law describes the implications of the devolution of parental rights as follows:

Where one parent survives, even if that parent was a noncustodial parent, the surviving parent is entitled to custody by operation of law. This is true even if the parents were never married, so long as parentage has been or can be established. The best interests of the child generally are not sufficient to deprive a fit surviving parent of custody by operation of law. The deceased parent's testamentary nomination is ineffective to deprive the surviving parent of custody, without a showing that the parent is unfit, has abandoned the child, or that there are similar extraordinary circumstances present. A third party who wishes to contest parental custody must initiate a custody proceeding.³⁹⁸

After the death of a custodial parent, any existing court-ordered allocation of rights between the parents, such as through a divorce or parental rights and responsibilities judgment, is no longer of any effect.³⁹⁹ Moreover, there are then no legal limitations on a noncustodial parent's access to the child or decision-making authority regarding the child.⁴⁰⁰ A guardianship appointment terminates upon the death of the guardian.⁴⁰¹ *In theory*, these provisions mean that a parent who has not exercised or had such rights would, solely as a result of the other parent's or guardian's death (if there is no other parent), thereupon have complete parental authority. This springing authority would include the right to demand that the child come live with that parent, regardless of where they are located and what prior relationship they had (or did not have) with the child.⁴⁰² These implied

397. See HARALAMBIE, *supra* note 100, at § 10:14.

398. *Id.*; see, e.g., ME. STAT. tit. 19-A, § 1502 (2021) ("If one of the parents of a minor child is dead or has abandoned the child, all parental rights respecting the child devolve upon the other parent"); Croxford v. Roberts, 509 A.2d 662, 663 (Me. 1986) (applying the same). See also Lynne Marie Kohm, *Can a Dead Hand from the Grave Protect the Kids from Darling Daddy or Mommie Dearest?* 31 QUINNIPIAC PROB. L.J. 48, 49–50 (2017).

399. See Kohm, *supra* note 398, at 51–52.

400. See, e.g., Stanley v. Penley, 46 A.2d 710, 712 (Me. 1946); see also Jay Frederick Wilks, *Right of Surviving Divorced Parent to Custody of Children*, 19 WASH. & LEE L. REV. 123, 125 (1962).

401. See, e.g., UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 112(a) (UNIF. L. COMM'N 2017).

402. See Spires v. Bittick, 321 S.E.2d 407, 410 (Ga. Ct. App. 1984).

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possible outcomes, however, are not inevitable, as discussed below with “alternatives.”⁴⁰³

The termination of a parent’s rights to prevent the possibility of devolution in the future provides no present-day benefit to the child.⁴⁰⁴ Rather, it serves the hypothesis of what the child’s future best interest would be if their custodial parent dies. It assumes that, based on present-day evidence, the child would forever *definitely* be better off as a legal orphan than ever *potentially* living with the surviving parent.⁴⁰⁵ For that assumption to be appropriate, a court would have to find that the evidence of the noncustodial parent’s past and present-day conduct presents a clear indication that they could *never* safely parent the child and that there is no possibility of rehabilitation. But evidence of conduct is not always clear or clearly predictive, and appropriate assumptions about future circumstances are not always easy to make.

In the short term, the true beneficiary of a termination order based on avoidance of devolution is the custodial parent or guardian; it provides them with peace of mind that the child will never end up in the custody of a parent determined to be unfit. In the longer term, the termination *could* also benefit the child if the custodial parent or guardian *does* die. But, under those circumstances, it would more likely benefit a stepparent or other relative who wants to assume care and obtain legal custody of the child without regard to or interference from the noncustodial parent.

A parent’s estrangement from a child, for whatever reason, creates an uncertainty about their role if circumstances arise that implicate the legal status of their relationship to the child.⁴⁰⁶ Holding the “parent card” could give a parent a particular power or benefit that could be exploited in ways that the other parent or a guardian would want to prevent. The specter of a latent, inequitable, and possibly harmful exercise of an estranged parent’s springing parental authority could be a reason to seek the termination of their parental rights.⁴⁰⁷ For example, an estranged parent could be entitled to inherit from a child

403. See *infra* notes 410, 412–436 and accompanying text.

404. *In re* Appeal in Maricopa Cnty. Juv. Action No. JS-500274, 804 P.2d 730, 736 (Ariz. 1990) (“[The mother’s] wish to make a testamentary nomination of her parents to serve as guardians of [the child] in the event of her own untimely death similarly fails to show any present benefit to [the child].”).

405. See *id.* at 735.

406. See, e.g., *id.* at 737.

407. See Brown, *supra* note 46, at 556–57.

if the child were to predecease that parent.⁴⁰⁸ This is an uncommon scenario, of course, but it can be significant if the child has substantial assets or there is a claim of wrongful death. Under such circumstances, the parent who had cared for the child would need to share the assets or outcome of the claim with the estranged parent, a legal requirement that could seem grossly inequitable. Because kinship relationships can have implications for a lifetime and their legal status can become significant in innumerable contexts, it is understandable that parents or guardians may wish to guard against confusion or results that are absurd or unjust. Termination of a parent's rights is insurance with broad coverage against all such scenarios. This rationale for TPR is understandable, but there may also be less legally drastic alternatives.

D. Alternatives Worth Considering

1. Restrictive Custody Orders

As noted above, most of the immediate concerns about a noncustodial or estranged parent asserting their parental authority in the future can be mitigated or addressed by courts through a restrictive order, such as one that allocates all decision-making authority to the custodial parent.⁴⁰⁹ Such orders, while no longer in effect after a child attains adulthood or if a custodial parent dies before the child attains adulthood, could still serve as determinative evidence against a person

408. *Id.* at 557 (“The right to inherit and the portion of the decedent’s estate to be inherited are determined solely by mechanical application of the intestate succession statutes and not by any assessment of the worthiness of the various potential heirs.”).

409. *See, e.g.*, *In re Marriage of Johnson*, 245 Ill. App. 3d 545, 185 Ill. Dec. 617, 614 N.E.2d 1302 (3d Dist. 1993) (affirming termination of joint custody arrangement where trial court found that arrangement seriously endangered the physical, mental, moral and emotional health of the children” due to one parent’s conduct); *Wood v. DeHahn*, 571 N.W.2d 186, 189 (Wis. Ct. App. 1997) (stating that “it is the court’s responsibility to determine if the noncustodian’s actions are inconsistent such that it is necessary and reasonable to fashion a restrictive order to protect the legal custodian’s major life choice”). *See generally* ELROD, *supra* note 51, at § 6:15 Nonresidential Parent’s Right to Parenting Time (noting that parent’s access to a child may be severely restricted based on a risk of harm to the child from the parent’s “physical violence, abuse (physical, sexual, or emotional), threats of abduction, sexual misconduct, sexual orientation, religious differences of the parents, mental illness, and substance abuse”).

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who seeks to exercise their parental status in a way that may be unjust or inappropriate.⁴¹⁰

2. Limiting the Effects of Devolution Through Minor Guardianship

The potential for devolution of parental rights when the surviving noncustodial parent has abandoned or caused harm to the child is an understandable source of worry for a custodial parent. It is possible for a long-absent surviving parent to demand that their child be delivered to their care; and a child might need to relocate to a distant place to be reunited with a surviving parent with whom they may have had little or no previous relationship.⁴¹¹ A child's remaining non-parent relatives or caretakers, however, are not without tools and options to prevent a risk of harm to the child from the devolution of parental rights.

If, after the death of the custodial parent, the child is in the informal care of a non-parent who wishes to retain custody, that caregiver can petition to be appointed as the child's legal guardian, generally in a probate proceeding.⁴¹² The guardianship appointment would limit the surviving parent's authority over the child without resulting in or requiring the termination of their parental rights.⁴¹³ For example, a stepparent who had raised the child with the deceased parent but has no formal legal relationship with the child could seek such an appointment or, alternatively, de facto parent status.

In fact, most of the reported court opinions discussing devolution arise in the context of contested guardianship, third-party custody, or adoption matters: that is, where a non-parent—most commonly a stepparent⁴¹⁴ or a relative of the deceased custodial parent—petitions

410. See, e.g., *In re Guardianship of Donovan C.*, 2019 ME 118, ¶¶ 14–15, 212 A.3d 851, 844–55; IND. CODE ANN. § 29-3-3-6 (West 2021) (requiring separate proceeding for surviving parent to take custody of a child if “the parent was not granted custody of the minor in a dissolution of marriage decree” and such decree required supervised visitation or suspended “parenting time” entirely).

411. See, e.g., *Spires v. Bittick*, 321 S.E.2d 407, 410 (Ga. Ct. App. 1984) (explaining that a father who had a “lapse in contact with his son” could get custody of his son after the mother's death and “make arrangements to pick up [his son]”).

412. HARALAMBIE, *supra* note 100, at § 10:14. See, e.g., *Donovan C.*, 2019 ME at ¶ 4, 212 A.3d at 853.

413. See Smith, *supra* note 221, at 286.

414. See Stephen Hellman, *Stepparent Custody Upon the Death of the Custodial Parent*, 14 J. SUFFOLK ACAD. L. 23, 26–28 (2000); see also, e.g., *Spires*, 321 S.E.2d at 410 (denying stepparent's petition to adopt child where surviving parent did not

to be appointed as guardian of the child, or to take custody, or to adopt them,⁴¹⁵ and the noncustodial surviving parent objects and seeks custody.⁴¹⁶

A guardianship or other third-party custody litigation strategy is not *certain* to succeed in preventing the surviving parent from assuming custody. Indeed, in light of the superior and constitutionally protected rights of the parent, a guardianship petition would not be granted without a parent's consent or a court finding of unfitness or a similar standard in light of the *Troxel* presumption.⁴¹⁷ Many state courts have long recognized “[t]he natural right of a parent to the care and control of a child” even aside from the constitutional considerations that have been the focus of recent case law.⁴¹⁸ Nevertheless, as a practical matter, a factual record sufficient to support the termination of a parent's rights would almost certainly provide a basis for a court to appoint a guardian over a parent's objection, given that the former requires a higher standard.⁴¹⁹

A few state statutes address disputes between a surviving parent and a non-parent seeking custody of the child.⁴²⁰ Such laws do not limit the actual devolution of rights or established preference for a

consent to the adoption and although his “conduct has not been exemplary in either the prompt payment of child support nor in the persistence in exercise of his rights to visitation” it was not a sufficient basis to terminate his parental rights on the basis of abandonment).

415. *See, e.g.*, HARALAMBIE, *supra* note 100, at § 10:14 (stating that a Montana statute will allow “the noncustodial parent; the surviving spouse of the deceased custodial parent” or “a person nominated by the will of the deceased custodial parent” to “petition for custody following the death of the custodial parent”); *see also* JACOBS, *supra* note 86, at § 6:8.

416. An estranged parent may choose not to seek custody of the child after the other parent's death. If the child is being cared for by a relative or stepparent, the surviving parent may be content to leave that custodial arrangement in place and even consent to appointment of the caregiver as the child's guardian.

417. *See supra* note 390 and accompanying text. *Troxel v. Granville*, 530 U.S. 57, 69 (2000) (“traditional presumption that a fit parent will act in the best interests of his or her child.”).

418. *See, e.g.*, *Merchant v. Bussell*, 27 A.2d 816, 818 (Me. 1942). This is sometimes referred to as the “parental preference” doctrine. ELROD, *supra* note 51, at §§ 1:2, 4:6; JACOBS, *supra* note 86, at § 6:8; 4 A. KIMBERLEY DAYTON ET AL., *ADVISING THE ELDERLY CLIENT* § 37:12.

419. *See, e.g.*, *Donovan C.*, 212 A.3d at 854–55 (affirming appointment of guardian over surviving parent's objection when petitioner proved the parent had abandoned child, applying definition of abandonment from dependency termination statute).

420. *See infra* notes 421–22 and accompanying text.

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child to be raised by a parent.⁴²¹ Rather, they recognize that, with sufficient evidence of the implications for the child's interest, the presumption favoring the parent in such contexts could be rebutted by the non-parent petitioner.⁴²² Maine recently amended its guardianship law to add a rebuttable presumption to the standard for appointment over the objection of a surviving parent.⁴²³ The presumption applies if, at the time of the custodial parent's death, there was a highly restrictive court order in effect that had allocated few if any parental rights to the surviving parent.⁴²⁴

In short, in assessing the third rationale for a TPR, we should recognize that there are already legal mechanisms in most state laws for addressing the care of a child when there is a risk of harm to the child if the surviving parent asserts their parental rights to custody. While the rationale is based on avoiding the risks of devolution at the death of a custodial parent, it is not *inevitable* that a child will end up in the care of that estranged parent by operation of law unless the parent's rights are terminated *before* the custodial parent's death. Given the existence of such mechanisms along with standard child

421. See, e.g., MONT. CODE ANN. § 40-4-221 (West 2021) (providing that “upon the death of a parent” certain categories of people can “request a parenting plan hearing,” including “the natural parent; . . . the surviving spouse of the deceased parent; [and] a person nominated by the will of the deceased parent”).

422. See, e.g., *Watkins v. Nelson*, 748 A.2d 558, 568 (N.J. 2000) (“[I]n custody determinations between a fit parent and a third party, as opposed to claims made between two fit parents, the child's best interests become a factor only after the parental termination standard has been met, rather than the determinative standard itself.”) (applying N.J. STAT. ANN. § 9:2-5 (West 2021)); *In re A.R.A.*, 919 P.2d 388, 392 (Mont. 1996) (holding that statute “does not give the district court authority to deprive a natural parent of his or her constitutionally protected rights absent a finding of abuse and neglect or dependency”). See also *Dodge v. Dodge*, 505 S.E.2d 344, 438 (S.C. Ct. App. 1998); *Bailes v. Sours*, 340 S.E.2d 824, 827 (Va. 1986); *In re B.H.*, 770 N.E.2d 283, 285–87 (Ind. 2002). Some court opinions appear to do a straight “best interest” analysis, but those are of questionable constitutionality. See, e.g., *Freeman v. Rushton*, 202 S.W.3d 485, 488 (Ark. 2005) (holding that best interest of the child is “paramount” in custody dispute between fit surviving parent and grandparents, while dissenting justice raised concerns about the constitutionality of the majority opinion in light of *Troxel*).

423. See ME. STAT. tit. 18-C, § 5-204(2) (2021).

424. *Id.* § 5-204(2)(C)(3) permitting a court to appoint a guardian over the objection of a surviving parent if “[a] prior court order concerning the minor granted another parent, who is now deceased, exclusive parental rights and responsibilities with respect to all aspects of the minor's welfare without reserving for the parent who is now the respondent in the guardianship proceeding any rights to make decisions, to have access to records or to have contact with the minor”).

protection laws that would enable the state to seek custody,⁴²⁵ courts should scrutinize the rationale for terminating a parent's rights for the purpose of precluding any future exercise after a custodial parent's death.

Additionally, a custodial parent could likely strengthen the future position of a nonparent's petition for guardianship in the event of that parent's death by nominating them as a "standby guardian" in a will or other written instrument, as is now permitted under the Uniform Probate Code and several state laws.⁴²⁶ While such nomination would not guarantee the appointment since, if the surviving parent objects, a court would still have to find that parent unfit,⁴²⁷ it could serve as evidence of the parents' respective relationships with the child prior to the custodial parent's death. Advance planning of that kind by a parent anxious to avoid the risks of devolution can provide some peace of mind without requiring the parent to successfully petition to terminate another parent's rights.⁴²⁸

3. Ordering Post-Guardianship Contact Between the Former

425. If a there is immediate risk of harm to the child or if no adult is willing to assume care of the child, a state CPS agency could of course seek custody of the child through a dependency action, but that scenario is likely to be far less common than a private guardianship action. *See, e.g.,* *Webb v. Charles*, 125 Ariz. 558, 560, 611 P.2d 562, 563–64 (Ariz. Ct. App. 1980) (father sought habeas corpus order for custody of child who was placed by the state in custody of grandmother after mother's death).

426. As one commentator has advised:

Putting a clear estate plan in order is absolutely essential [if a parent does not want their child's other parent to assume custody]. A custodial parent should draft and execute a will naming a preferred guardian for the children, setting out the special relationship that individual has with the children, and why that person is most appropriate to act in the best interests of the children. Last will and testament provisions regarding the care of the children might also include facts about how the surviving parent is unfit to gain or regain custody.

Kohm, *supra* note 398, at 57.

427. *Id.* at 52–53. *See also, e.g.,* ME. STAT. tit. 18-C, § 5-203 (2021) (permitting appointment of nominated guardian over objection of other parent if all other requirements for appointment are met).

428. A full discussion of estate planning by parents is outside the scope of this Article, but parents can consider a range of potential tools parents to address the care of a child after the parent's death. *See generally* Richard M. Horwood, *Estate Planning Specifically for the Single Parent*, 25 EST. PLAN. 77 (1998) (examining the estate planning process when a single parent is in the picture); Kohm, *supra* note 398, at 56–61.

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As noted above, a guardian may seek adoption of the child in their care for the primary purpose of obtaining a termination order to prevent the parent from attempting to resume custody of the child. In a high-conflict guardianship termination case, the guardian may be concerned that a parent resuming care will disallow contact between the former guardian and the child once the guardianship ends. If the guardianship appointment was in place for an extended time, there is a risk that the child will suffer harm or trauma if their contact with a former guardian and caretaker is severed wholly and abruptly.⁴²⁹ To mitigate potential harm to the child by the termination of a guardianship, states could amend their guardianship statute, as Maine recently did, to grant courts the limited authority to address just that risk by ordering the ongoing rights of contact between the former guardian and the child after the guardianship is terminated.⁴³⁰

VI. SHOULD WE TERMINATE PRIVATE TERMINATION OF PARENTAL RIGHTS?

This Article has explored how termination of a parent's rights can be obtained by individuals as a form of legal remedy to allow an adoption to proceed, to sever a legal connection between the parents of a child, and to guard against a parent's future exercise of their parental rights. I have argued that the availability of this remedy through the courts comes at a cost, not only to the parent whose rights have been terminated but also potentially to the interests of the child. This practice also undermines family law policy goals and constitutional principles, both of which place high value on the

429. See Jessica Feinberg, *Whither the Functional Parent?: Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 66 (2017) ("If the relationship between a child and an adult with whom he or she has formed an attachment relationship is disrupted, it can be very detrimental to the overall well-being of the child. *Id.* at 65. The disruption of attachment relationships can cause significant both short- and long-term psychological and emotional harm to children."); NAT'L CHILD TRAUMATIC STRESS NETWORK, CHILDREN WITH TRAUMATIC SEPARATION: INFORMATION FOR PROFESSIONALS 1-3, https://www.nctsn.org/sites/default/files/resources/children_with_traumatic_separation_professionals.pdf (last visited Apr. 11, 2022).

430. See, e.g., ME. STAT. tit. 18-C, § 5-211(2) (2021) ("The court terminating a guardianship may enter an order at the time of the termination or the expiration of a transitional arrangement. . . providing for communication or contact, including overnight visitation, between a minor and the former guardian after the termination of the guardianship").

preservation of the parent-child legal relationship, even where a parent is no longer a caregiver. Further, the availability of private TPR on grounds of incarceration, substance use, mental illness, failure to pay child support, and the like through private actions between individuals, in addition to dependency proceedings, expands the ways that parents who are already relegated to the margins of society are vulnerable to the destruction of their legal ties to their children.

As noted in Part III, private terminations of parental rights have the same consequences as termination orders in public dependency proceedings but lack many of the procedural protections of proceedings initiated by a public agency, thus creating inequities and risking erroneous outcomes. One might conclude that a solution to these problems would be to change private termination proceedings so that they more closely resemble dependency actions or even to assign public CPS agencies a role in all termination proceedings. Because, however, as many scholars and advocates have observed, the existing public family regulation system is already excessively oriented around child removal and termination of parental rights,⁴³¹ that is exactly the wrong direction to pursue if solutions are sought to the various problems created by private TPRs.

Instead, we should consider whether, when, or the extent to which termination of a person's parental rights should be available as a private remedy at all. As this Article has discussed, there are few instances in which a petitioner can demonstrate that *termination*, rather than some alternative, is the necessary way to achieve the family's goals and protect the child's interests. As the analysis of rationales indicates, states should permit termination only if the petitioner demonstrates by clear and convincing evidence that a specific affirmative benefit for the child can be provided or that harm to the child or petitioner can be avoided *only* from severing the legal

431. In fact, as Marsha Garrison has noted, public family intervention law should take a cue from private family law's emphasis on preserving the parent-child relationship when parents are living apart. Garrison, *supra* note 48, at 478. For examples of contemporary family intervention reform advocacy. See, e.g., Vivek Sankaran & Christopher Church, *Rethinking Foster Care: Why Our Current Approach to Child Welfare Has Failed*, 73 SMU L. REV. F. 123, 134 (2020); Vivek Sankaran et. al., *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1185 (2019); Erin Miles Cloud, *Toward the Abolition of the Foster System*, 15 SCHOLAR & FEMINIST ONLINE (2019), <https://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/toward-the-abolition-of-the-foster-system/>; Roberts, *supra* note 12.

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relationship.⁴³² For example, where one parent seeks termination of another parent's rights to preclude that parent's access to the child or to avoid co-parenting of the child, the petitioning parent should first demonstrate that a court order already in effect allocating custody and decision-making fully to that parent is inadequate to protect the child from harm.⁴³³

The no-other-alternative approach would still enable a court to grant a termination petition brought by one parent against another based on proof that the child's conception resulted from a sexual assault. The rationale for these petitions is centered on ending the further victimization of the petitioning parent that exists from the continuing legal connection with the perpetrator. The circumstances of those proceedings are sufficiently unique that nothing short of termination of the perpetrator's rights can serve such rationale. However, where one parent seeks termination of another parent's rights to preclude that parent's access to the child or to avoid co-parenting of the child, the petitioning parent should first demonstrate that a court order already in effect allocating custody and decision-making fully to that parent is inadequate to protect the child from harm.⁴³⁴

Several state appellate courts have applied components of the approach for private termination cases I propose here specifically to ensure that termination is a remedy granted only sparingly. The Arizona Supreme Court observed: "[T]ermination of parental rights is not favored and . . . it generally should be considered only as a last resort."⁴³⁵ The court noted the limitations of the usual best interest

432. See *In re Appeal in Maricopa Cnty. Juv. Action No. JS-500274*, 804 P.2d 730, 733 (Ariz. 1990) ("Several courts have noted that termination of parental rights is not favored and that it generally should be considered only as a last resort."). Cf. Gupta-Kagan, *supra* note 64, at 17 (discussing alternatives to termination of parental rights in the dependency context).

433. The Maine Legislature recently enacted such an approach. 2021 Me. Legis. Serv. Ch. 340 (West), *enacting* ME. STAT. tit. 19-A, § 1658(2)(C) (2021) (adding as a ground for termination: "A final order, other than in a protection from abuse matter under chapter 101, that has been in effect for at least 12 months grants the petitioner exclusive parental rights and responsibilities with respect to all aspects of the child's welfare, with the exception of the right and responsibility for support, without reserving for the parent any rights to make decisions, to have access to records or to have contact with the child, and termination of the parent's parental rights and responsibilities is necessary to protect the child from serious harm or the threat of serious harm."). This language is based on a specific recommendation of the Maine Family Law Advisory Commission, for which I have served as a consultant.

434. See *id.* § 1658(3-A)(A).

435. *Maricopa Cnty. Juv. Action No. JS-500274*, 804 P.2d at 733.

analysis in termination cases⁴³⁶ and that, while a child's best interest could be a reason to deny a petition to terminate, it alone is not a sufficient basis to grant one.⁴³⁷ Indeed, the court stressed the point, writing, "A determination of the child's best interest [in a TPR case] must include a finding as to how the child would benefit from a severance *or* be harmed by the continuation of the relationship."⁴³⁸ Termination based on a finding of abandonment alone, for example, cannot be assumed to be in a child's best interest. "Rather," the court explained, "petitioner must prove an affirmative benefit to the child resulting from termination."⁴³⁹ The court reasoned: "[A] parent, even an inadequate one, is better than no parent at all unless the child can somehow benefit from losing his natural parent."⁴⁴⁰

The Alabama Supreme Court has imposed a "no other alternative" standard in private termination cases as well as in public dependency matters.⁴⁴¹ Specifically, courts must apply a two-prong test in a termination petition brought by a custodial parent.⁴⁴² The first

436. *Id.* at 735 ("Petitioner must prove an affirmative benefit to the child resulting from termination . . . This reasoning reflects an unspoken assumption that a parent, even an inadequate one, is better than no parent at all unless the child can somehow benefit from losing his natural parent.").

437. *Id.* at 734 (quoting *Santosky v. Kramer*, 455 U.S. 745, 760 (1982)) ("[U]ntil the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.").

438. *Id.* at 734 (first citing *In re Appeal in Maricopa Cnty. Juv. Action No. JS-6520*, 756 P.2d 335, 343 (Ariz. Ct. App. 1988); then citing *In re Appeal in Pima Cnty. Juv. Action No. S-111*, 543 P.2d 809, 819 (Ariz. Ct. App. 1975); then citing *In re Adoption of Hyatt*, 536 P.2d 1062, 1068 (Ariz. Ct. App. 1975); then citing *In re Appeal in Cochise Cnty. Juv. Action No. 5666-J*, 650 P.2d 459, 463 (Ariz. 1982); and then citing *In re Appeal in Maricopa Cnty. Juv. Action No. JS-6831*, 748 P.2d 785, 788 (Ariz. Ct. App. 1988)).

439. *Id.* at 735 (citing *Juv. Action No. JS-6831*, 748 P.2d at 788).

440. *Maricopa Cnty. Juv. Action No. JS-500274*, 804 P.2d at 735. Several states have adopted post-adoption contact provisions, also known as "open adoption," which apply even in the public dependency context. These recognize that even if a parent's rights are terminated, there may be an underlying emotional or psychological relationship (or the potential for one) that is worth preserving or at least not undermining. Huntington notes that even after a change in legal status "the relationship between former family members typically endures." HUNTINGTON, *supra* note 24, at 85. These measures are beyond the scope of this Article but should be considered as part of a state's overall termination statutory scheme, whether public or private. If private termination is limited to extreme cases, as I discuss here, there will likely be few instances in which continuing contact after termination is appropriate.

441. *Ex parte Beasley*, 564 So. 2d 950, 954 (Ala. 1990).

442. *Id.*

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prong is the application of the termination standard itself.⁴⁴³ The second prong requires the court to “inquire as to whether all viable alternatives to a termination of parental rights have been considered.”⁴⁴⁴ The court reasoned: “Inasmuch as the termination of parental rights strikes at the very heart of the family unit, a court should terminate parental rights only in the most egregious of circumstances.”⁴⁴⁵

Similarly, a Florida appeals court applied the concept of “least restrictive means” drawn from the public dependency statute in a private termination case because the same constitutional interests are implicated.⁴⁴⁶ The court explained that constitutional principles require a petitioner to prove that termination “is the least restrictive means of protecting the child based on a totality of circumstances” and also held that “measures short of termination should be utilized if such measures can permit the safe re-establishment of the parent-child bond.”⁴⁴⁷

An implicit but significant assumption present in many private termination proceedings is that if someone is not up to the role of being a full-time caregiving parent, they are not worthy of being any kind of legal parent and their children are better off with no parent than with a less-than-ideal parent. Such an assumption is evident from routine comparisons between the petitioner and the parent whose rights are at stake and also from the application of the often specious and always nebulous “best interest” standard. Thus, an “affirmative benefit to the child” inquiry should not consist of comparing the parent whose rights are at stake with the petitioner.

In adoption cases in particular, these comparisons set up a false choice for the court. They are based not on children’s interests or the lived reality of what constitutes a child’s “family” from an emotional

443. *Id.*

444. *Id.*

445. *Id.* at 952. Intermediate appellate courts, however, have held that standard is waived in cases of abandonment. *See, e.g.,* K.S.B. v. M.C.B., 219 So. 3d 650, 655 (Ala. Civ. App. 2016) (“We note, however, that ‘the [father], by abandoning [his] child, ‘lost any due-process rights that would have required the juvenile court to explore other alternatives before terminating [his] parental rights.’”) (citing L.L. v. J.W., 195 So. 3d 269, 274 (Ala. Civ. App. 2015)).

446. *See* S.S. v. D.L., 944 So. 2d 553, 557 (Fla. Dist. Ct. App. 2007) (citing B.C. v. Dep’t of Child. & Fam., 887 So. 2d 1046, 1050 (Fla. 2004)).

447. *Id.* at 558 (first quoting W.R. v. Dep’t of Child. & Fam. Servs., 896 So. 2d 911, 915 (Fla. Dist. Ct. App. 2005); and then quoting L.B. v. Dep’t of Child. & Fam., 835 So. 2d 1189, 1196 (Fla. Dist. Ct. App. 2002)).

and psychological perspective, but, rather, on a dubious heteronormative, traditional construct of the family as a conjugal dyad.⁴⁴⁸ In common situations where a child's existing parents are no longer in a relationship or household with each other but the other parent is in a relationship with the proposed new adoptive parent and the objecting parent is not a primary caregiver, the objecting parent is unlikely to prevail after such comparison.

Further, a court's analysis of the competing harms and affirmative benefits to the child from a termination should encompass not only the child's legal relationship with the parties to the proceeding (that is, their parents and a potential adoptive parent) but the potential impact on the child's identity and relationship with extended family. As Professor Dorothy Roberts reminds us: "Children also have an interest in maintaining a bond with their parents and other family members."⁴⁴⁹

State courts can take a cue here from the approach of many tribal courts applying Native laws, which "consider the children's place in the entire extended family in order to make a judgment."⁴⁵⁰ Where a child must live with extended family because "biological parents could not function adequately as parents," such arrangements have traditionally been informal, and practices of "informal adoption," not requiring termination, are now recognized in tribal codes and courts.⁴⁵¹ Two researchers who studied Native child welfare practices found that termination of parental rights is exceptionally rare occurrence in tribal courts, even if the procedure exists on the books

448. See discussion *supra* at notes 319–326 and accompanying text.

449. ROBERTS, *supra* note 58, at 108. See *In re Interest of Brandon S.S.*, 507 N.W.2d 94, 107 (Wis. 1993) (evidence of impact of severing child's relationship with grandparents was relevant in termination in adoption case).

450. ATWOOD, *supra* note 88, at 124 (2010) (quoting *Goldtooth v. Goldtooth*, 3 Navajo Rptr. 223, 226 (Navajo 1982)). The *Goldtooth* court explained: "[I]n Navajo culture and tradition children are not just the children of the parents but they are the children of the clan." *Goldtooth*, 3 Navajo Rptr. at 226.

451. ATWOOD, *supra* note 88, at 145, 147–49. Atwood notes that: "Traditional [Native] adoption is often linked to the Native concept of collative responsibility for the welfare of tribal children." *Id.* at 149. A Navajo court observed: "The Navajo Common Law is not concerned with the termination of parental rights or creating legalistic a parent and child relationship because those concepts are irrelevant in a system which has obligations to children that extends beyond the parents." *In re Interest of J.J.S.*, 4 Navajo Rptr. 192, 195 (Navajo D. Ct. 1983).

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in tribal laws.⁴⁵² They observed that “many tribes actively abhor the idea and will not subject their children to this unthinkable act.”⁴⁵³ Several tribal courts permit a form of non-exclusive adoption, under which a parent retains some residual rights after an adoption decree is awarded, rather than requiring a “permanent cancellation” of the parent-child relationship.⁴⁵⁴ This is in sharp contrast to the rights-based, “winner-take-all” approach in most U.S. state courts.⁴⁵⁵

For a “no other alternative” approach to be meaningful, states must also take two further indispensable steps in addition to adopting that standard, in some form, for private termination cases.

First, states must provide genuine, workable alternatives to termination, such as those described in Part V, so that this drastic measure is not the only route to addressing the purposes of current termination statutes. For example, a state must provide routes to parentage for a caregiver, such as de facto parentage and non-exclusive adoption, that do not include termination of existing parents’ rights as a predicate. Similarly, a guardianship statute can provide courts with the tools they need to address custody on an expedited basis when a child’s custodial parent dies.⁴⁵⁶ Other than in the context of a conception from sexual assault or cases where there is a true risk of harm to the child from the continuation of the legal parent-child relationship itself, alternatives such as those indicated here can address the underlying policy rationales for private TPRs and serve the

452. Terry L. Cross & Kathleen Fox, *Customary Adoption as a Resource for American Indian and Alaska Native Children*, in *CHILD WELFARE FOR THE TWENTY-FIRST CENTURY* 423, 428 (2005).

453. *Id.*; see also ATWOOD, *supra* note 88, at 145–47.

454. ATWOOD, *supra* note 88, at 146–47.

455. *In re Interest of J.J.S.*, 4 Navajo Rptr. at 193 (describing the “American Law of Adoption” as oriented towards parental “duties” such that “when those duties are breached, then the law will take the children away from the natural parents and given them to other parents.”).

456. See, e.g., 2021 Me. Legis. Serv. ch. 340 (West), enacting ME. REV. STAT. ANN. tit. 18-C, § 5-204(2)(C) (2021). This new provision allows a court to appoint a guardian over a surviving parent’s objection if:

(3) A prior court order concerning the minor granted another parent, who is now deceased, exclusive parental rights and responsibilities with respect to all aspects of the minor’s welfare without reserving for the parent who is now the respondent in the guardianship proceeding any rights to make decisions, to have access to records or to have contact with the minor and:

(a) Such order was in effect at the time of the death of the parent awarded exclusive parental rights and responsibilities; and

(b) There is neither a substantial change in circumstances between the time of the entry of the order and the parent’s death nor other facts that would render a finding based on the order to be inequitable or unjust. § 5-204(2)(C).

interests of those involved while also staying true to the principles limiting state interventions in the family, including in private actions.

Second, state laws must ensure that any court applying the no-other-alternative standard follows a set of robust procedural protections throughout the proceedings.⁴⁵⁷ The court must ensure that the parent had opportunities for rehabilitation and reunification and a sufficient period to demonstrate that they are prepared to fulfill at least some rights and responsibilities as a parent. To have the effects wanted here, this *opportunity* for rehabilitation and reunification must include appropriate professional assessments and services. The requirement of such assessments and services suggests a role for public CPS agencies, but they should be granted that role only as part of a broader reorientation of the current public “child protection” system away from family intervention and towards a true child welfare mission.⁴⁵⁸ The availability of services and supports for children and families should not be restricted to those who are in the CPS caseload based on a report of abuse or neglect. There is no reason why providing these cannot be a part of a CPS general mission rather than solely in connection with family intervention or dissolution. States should be able to access federal child welfare funding for this work as well, consistent with the broader objective of “prevention” services reflected in more recent federal child welfare laws.⁴⁵⁹

457. Adoption of Isabelle T., 2017 ME 220, ¶ 14, 175 A.3d 639, 645–46 (“[A]pplication of the Adoption Act, as written, poses a substantial risk to fundamental parental rights that the court must respect by rigorous application of quality of evidence standards and procedural protections . . .”).

458. See Emma Williams, ‘Family Regulation,’ Not ‘Child Welfare’: Abolition Starts with Changing our Language, THE IMPRINT (July 28, 2020, 11:45 PM), <https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586>; see generally Alan J. Dettlaff, et al., *It is not a Broken System, It is a System That Needs to be Broken: The Upend Movement to Abolish the Child Welfare System*, 14 J. OF PUB. CHILD WELFARE 500 (2020) (describing the upend movement—a collaborative movement aimed at abolishing the child welfare system).

459. See Family First Prevention Services Act of 2018, enacted as part of the Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64. The Children’s Defense Fund has described the new law as follows:

Family First includes long-overdue historic reforms to help keep children safely with their families and avoid the traumatic experience of entering foster care, emphasizes the importance of children growing up in families, and helps ensure children are placed in the least restrictive, most family-like setting appropriate to their special needs when foster care is needed.

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Expanded availability of services and supports would also provide courts with useful evidence of the extent to which something short of termination could address the situation leading to the petition.⁴⁶⁰ States could adopt a variation of the Indian Child Welfare Act requirement, for any severance of parental rights in an Indian family, of proof that “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the . . . family and that these efforts have proved unsuccessful”⁴⁶¹ It is likely that the availability of these resources and adoption of these requirements would reduce the number of TPR petitions filed in dependency matters as well as in private cases.

It is also important, relatedly, that courts and agencies—too often in a hurry to resolve matters—allow time for such services to have an effect before concluding that they are futile.⁴⁶² We place a premium on the rapid resolution of disputes in court, and the harsh deadlines in federal child welfare statutes have only contributed.⁴⁶³ As many commentators have argued, while the uncertainty and adversarial aspect of extended litigation can present its own set of problems for children and families, pushing resolutions too quickly risks outcomes that reflect the expiration of timelines rather than the needs or potential benefits of the family.⁴⁶⁴ For any form of active efforts at reunification

Family First Prevention Services Act, CHILDREN’S DEFENSE FUND, <https://www.childrensdefense.org/policy/policy-priorities/child-welfare/family-first/> (last visited Apr. 11, 2022).

460. See Alyssa W. v. Justin G., 433 P.3d 3, 5 (Ariz. Ct. App. 2018) (“We conclude a private party seeking severance on that ground [substance use] must show that the parent was offered reunification services or that such services would have been futile”). See also, *supra* note 203 and accompanying text.

461. 25 U.S.C. § 1912(d). See S.S. v Stephanie H., 388 P.3d 569, 574–76 (Ariz. Ct. App. 2017) (applying ICWA “active efforts” requirement in private termination case between parents); see generally *In re Adoption of T.A.W.*, 383 P.3d 492, 503 (Wash. 2016) (also applying ICWA “active efforts” requirement in private termination case between parents).

462. Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281, 281, 283–84 (2007) (“State courts face pressures to move cases through a busy docket rather than spend the time needed to make informed decisions about individual children.”).

463. *Id.* at 291 (noting how states must adhere to federal timeline or risk loss of funding for child welfare programs).

464. See, e.g., ROBERTS, *supra* note 58, at 136 (“Existing services often fail at prevention or reunification because they do not address the needs of families, are inadequately funded, and do not last long enough.”); JANE WALDEFOGEL, *THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE & NEGLECT* 82–87 (1998) (describing criticisms of contemporary child protection systems).

and rehabilitation to be meaningful and effective, it must be accompanied by patience, flexibility, and compassion.⁴⁶⁵

Finally, where private termination of parental rights is allowed to proceed, courts must ensure that all other rigorous procedural protections are enforced in all related matters, especially the right to effective assistance of counsel for parents who are the subject of such petitions. These protections must be clearly set out in statute or rule and be supported with adequate public funds. Among other protections, these should include, at a minimum, access to professional alternative dispute resolution, informed consent for any agreements, and the appointment of a guardian *ad litem* for the child or children involved. The interests of parents, children, and families deserve nothing short of full access to all such measures.

CONCLUSION

My hope is that this Article has directed more daylight on a private legal mechanism that is both extreme and not uncommon but has received little examination by scholars and advocates of law reform. The need to transform the public family regulation system is acute, and it has understandably demanded the attention and energy of child welfare practitioners and reformers. Reform of that system will be incomplete, however, until privately initiated termination cases are addressed as well. We fall short of protecting family bonds when we do not acknowledge and examine the existence of laws that allow those bonds to be severed under questionable circumstances, without meaningful opportunities for rehabilitation and reunification, and without other procedural protections. Another reason for the lack of attention to these cases may be the fact that the persons who are the targets of termination petitions are often not the most sympathetic individuals, particularly in comparison with the petitioners themselves, who are often members of intact blended families seeking legal recognition and may be a custodial parent who has been victimized by the parent whose rights they seek to terminate. Nevertheless, it is due time to reconsider the extent to which the continued endorsement—or at least tolerance—of the severing of a parent-child relationship as a private remedy has a place in our civil

465. See Katherine Markey & Vivek Sankaran, *Compassion: The Necessary Foundation to Reunify Families Involved in the Foster Care System*, 58 FAM. CT. REV. 908, 909 (2020).

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justice system, what purposes that drastic legal action serves, and whether those purposes can be better served without the destruction of one of the most valued and valuable relationships recognized in the law.

APPELLEE'S APPENDIX III

In the Interest of Z.E.

Superior Court of Pennsylvania

August 12, 2019, Decided; August 12, 2019, Filed

No. 3577 EDA 2018, No. 3624 EDA 2018

Reporter

2019 Pa. Super. Unpub. LEXIS 3026 *; 221 A.3d 260; 2019 WL 6174983

IN THE INTEREST OF: Z.E., A MINOR; APPEAL OF:
M.E., MOTHER IN THE INTEREST OF: J.R.E., A
MINOR; APPEAL OF: M.E., MOTHER

Notice: NON-PRECEDENTIAL DECISION — SEE
[SUPERIOR COURT I.O.P. 65.37](#)

PUBLISHED IN TABLE FORMAT IN THE ATLANTIC
REPORTER.

Subsequent History: Also Reported in the Bound
Volume at: 221 A.3d 261.

Prior History: Appeal from the Order Entered
November 5, 2018. In the Court of Common Pleas of
Monroe County Orphans' Court at No(s): 64 O.C.A.
2018 [*1] .

Appeal from the Order Entered November 5, 2018. In
the Court of Common Pleas of Monroe County Orphans'
Court at No(s): 65 O.C.A. 2018.

Judges: BEFORE: GANTMAN, P.J.E., LAZARUS, J.,
and OTT, J.

Opinion

MEMORANDUM PER CURIAM:

M.E. (Mother) appeals¹ from the orders, entered in the
Court of Common Pleas of Monroe County, denying her
petitions to involuntarily terminate Father's parental
rights to the parties' minor children, J.R.E. (born
(1/2009) and Z.E. (born 3/2012) (collectively, Children).
After careful review, we reverse and remand for further
proceedings.²

¹ On January 14, 2019, our court *sua sponte* consolidated
these appeals. See [Pa.R.A.P. 513](#).

² Neither Father nor Children's Guardian *ad litem* has filed a
brief in this appeal. Attorneys for the Barbara J. Hart Justice

Mother was raped by Father on a daily basis for nearly
twenty years, beginning when she was just a four-year-
old child. The sexual abuse started in Wayne County,
Michigan, where Father lived with Mother, Mother's
mother, and Mother's siblings. The abuse continued
when Mother moved with Father and her two younger
siblings to Wayne and Lackawanna Counties in
Pennsylvania. Mother learned that Father was not her
biological father, but her adoptive father, when she was
eighteen years old.³ Mother moved to Antrim County,
Michigan, [*2] with Father and Mother's brother, after
Mother graduated from high school. In Michigan, Father
held Mother out to be his wife, publically claiming that
they were married.

As a result of Father's continued abuse, Mother bore
Children in 2009 and 2012.⁴ When J.R.E., the parties'
daughter, turned four years old, Mother feared that
Father would start sexually abusing J.R.E. as he had
done to Mother. As a result, Mother reported Father's
history of sexual abuse to Michigan authorities. Father
was arrested in September 2013. In July 2014, Father
entered guilty pleas in Michigan to two counts of
criminal sexual conduct; he was sentenced to two 10-15
year terms of imprisonment on the sexual offenses.⁵

Center, a project of the Women's Resource Center, have
joined in Mother's appellate brief.

³ Mother testified that when she became pregnant with J.R.E.
and feared that the child could suffer deformities as the
product of incest, Father told Mother that he was not her
biological father. Father adopted Mother after he married
Mother's mother, who was pregnant with Mother at the time
they were married. Mother avers that Father is listed on
Mother's birth certificate as her biological father. Termination
Petition, 8/18/18 at ¶ 8.

⁴ Mother testified at the termination hearing that paternity tests
were performed to prove that Father is Children's biological
father. Termination Hearing, 10/29/18, at 24.

⁵ See [Mich.Comp.Laws § 750.520b\(2\)](#). In an unrelated matter,
Father also entered a guilty plea to conspiracy to commit
insurance fraud, involving an arson at his home, at the same

Three months later, in October 2014, Father entered guilty pleas in Michigan to three counts of criminal sexual conduct with a person under thirteen years of age⁶ and was sentenced to three concurrent sentences of 15-50 years' imprisonment. In July 2015, Father entered guilty pleas in Pennsylvania to nine separate counts of sexual crimes, including rape/forcible compulsion,⁷ involuntary deviate sexual intercourse (IDSI) of a person less than 16 years old,⁸ and aggravated indecent assault of a person [*3] less than 16 years old.⁹ Father was sentenced to serve 44-128 years in prison on those charges. Father is required to register as a sexual offender in both Michigan and Pennsylvania. Father is currently incarcerated in Michigan and will be returned to Pennsylvania to serve his Pennsylvania sentence when he finishes serving his sentence in Michigan.

On August 18, 2018, Mother filed petitions to involuntarily terminate Father's parental rights to Children pursuant to [23 Pa.C.S. §§ 2511\(a\)\(7\), \(a\)\(10\)](#) and [\(a\)\(11\)](#) of the [Adoption Act](#).¹⁰¹¹¹² In her petition

time of the sexual criminal conduct pleas. A Michigan judge sentenced him to 4-10 years of imprisonment on that charge.

⁶ [Mich.Comp.Laws § 750.520b\(1\)\(a\)](#).

⁷ [18 Pa.C.S. § 3121](#).

⁸ [18 Pa.C.S. § 3123\(a\)\(7\)](#) (IDSI where complainant less than 16 years of age and offender four or more years older than complainant and complainant and offender are not married to each other).

⁹ [18 Pa.C.S. § 3125\(a\)\(8\)](#) (aggravated indecent assault where complainant less than 16 years of age and offender four or more years older than complainant and complainant and offender are not married to each other).

¹⁰ Under [section 2511\(a\)\(7\)](#), a parent's rights may be involuntarily terminated if "[t]he parent is the father of a child conceived as a result of a rape or incest." [23 Pa.C.S. § 2511\(a\)\(7\)](#).

¹¹ Parental rights may be involuntarily terminated under [section 2511\(a\)\(11\)](#) where "[t]he parent is required to register as a sexual offender under [42 Pa.C.S. Ch. 97 Subch. H](#) (relating to registration of sexual offenders) or [I](#) (relating to continued registration of sexual offenders) or to register with a sexual offender registry in another jurisdiction or foreign country. [23 Pa.C.S. § 2511\(a\)\(11\)](#).

As an aside, we note that Legislation is currently pending to amend [section 2511\(a\)\(9\)](#) to include rape, IDSI, sexual assault

Mother seeks "to protect herself and her young and vulnerable children from further exposure to a convicted child rapist;" she avers that she does not intend to place Children up for adoption, but plans to "continue to exercise full custody over her children until they reach the age of majority." Termination Petition, 8/18/18, at 1, ¶ 16. Mother contends that Father "is a statutorily unfit parent who is not entitled to any physical custody, legal custody, or visitation with his biological children." *Id.* at ¶ 45.¹³ Since Father's incarceration, Mother has been the sole financial provider for Children and has had primary physical and primary legal custody of Children. Father has [*4] not seen or communicated with Children since his arrest in 2013.

After a termination hearing¹⁴ held on October 29, 2018, the trial court denied Mother's termination petitions. Mother filed timely notices of appeal and court-ordered *Pa.R.A.P. 1925(a)(2)(i)* concise statements of errors complained of on appeal. Mother presents the following

and aggravated indecent assault to the list of offenses for which a parent's rights could be involuntarily terminated if he or she has been convicted of one of those crimes. **See** 2019 Bill Text PA S.B. 120 (introduced Jan. 28, 2019). Notably, Father was convicted of three of these listed offenses in Pennsylvania.

¹² Under [section 2511\(a\)\(10\)](#), parental rights may be involuntarily terminated if:

The parent has been found by a court of competent jurisdiction to have committed sexual abuse against the child **or another child of the parent** based on a judicial adjudication as set forth in *paragraph (1)(i), (ii), (iii) or (iv) or (4)* of the definition of "founded report" in *section 6303(a)* (relating to definitions) where the judicial adjudication is based on a finding of "sexual abuse or exploitation" as defined in *section 6303(a)*.

[23 Pa.C.S. § 2511\(a\)\(10\)](#) (emphasis added).

¹³ Mother avers that because Father is her adoptive father, he is also her "legal" father and, thus, [section 2511\(a\)\(10\)](#) applies where she was the child victim of his criminal conduct (rape). **See** Termination Petition, 8/18/18, at ¶¶ 37-39. **See** n.12, *supra*; **see also** [23 Pa.C.S. § 5326](#) (any rights to seek legal or physical custody of child shall be automatically terminated upon adoption).

¹⁴ Children were represented by guardian *ad litem*, Megan M. Reaser, Esquire, at the termination hearing. **See *In re T.S., 192 A.3d 1080, 1092 (Pa. 2018)*** ("[D]uring contested termination-of-parental-rights proceedings, where there is no conflict between a child's legal and best interests, an attorney-guardian *ad litem* representing the child's best interests can also represent the child's legal interests.").

issues for our consideration:

(1) Whether the trial court, by its [o]rders dated November 5, 2018, erred as a matter of law by denying the [p]etition[s] to [i]nvoluntarily [t]erminate [Father's p]arental [r]ights based on lack of a contemplated adoption, pursuant to the Pennsylvania Adoption Act[.]

(2) Whether the trial court, by its [o]rders dated November 5, 2018, erred as a matter of law by imposing the requirement of a contemplated adoption upon [Mother] and not finding, to the extent [*5] the [Adoption] Act required [Mother] to make such a showing, that such requirement violates [Mother's] right to due process under the [Fourteenth Amendment of the United States Constitution](#)[.]

(3) Whether the trial court, by its [o]rders dated November 5, 2018, erred as a matter of law by imposing the requirement of a contemplated adoption upon [Mother] and not finding, to the extent the [Adoption] Act required [Mother] to make such a showing, that such requirement violates [Mother]'s right to equal protection of the laws under the [Fourteenth Amendment of the United States Constitution](#).

(4) Whether the trial court, by its [o]rders dated November 5, 2018, erred as a matter of law by imposing the requirement of a contemplated adoption upon [Mother] and not finding, to the extent the [Adoption] Act required [Mother] to make such a showing, that such requirement violates [Mother]'s rights under the Pennsylvania Constitution, including without limitation [Mother]'s [civil] rights under [Article I, § 26](#) thereof.

Appellant's Brief, at 2-3.

Mother first contends that the trial court erred in denying her petitions to involuntarily terminate Father's parental rights to Children when she established, by clear and convincing evidence, that termination is justified under [23 Pa.C.S. §§ 2511\(a\)](#) and [\(b\)](#) and would [*6] be in Children's best interests.¹⁵ She also argues that the trial court incorrectly determined that termination was

improper where Mother did not aver in her termination petition that an adoption was contemplated pursuant to [23 Pa.C.S. § 2512\(b\)](#).

The statutory authority to terminate parental rights is found in [Subchapter B of Chapter 25](#) (Proceedings Prior to Petition to Adopt) in Pennsylvania's Adoption Act (Act).¹⁶ The Act is "Part III" of [Title 23, our Commonwealth's Domestic Relations Code](#).¹⁷ The foreword to the original Act of 1970 recognized the need to "facilitate the placement for adoption of children who are considered 'unadoptable' under the existing law" and the "difficulty of the existing law[, Act of April 4, 1925, P.L. 127, to address] the technical impediments to an effective final termination of a parent-child relationship." See Appendix to the Legislative Journal, Proposed Adoption Act, 1970, at 182.

The grounds for involuntary termination of parental rights are set forth in [section 2511](#) of the Act. See [23 Pa.C.S. §§ 2511\(a\)\(1\)-\(11\), \(b\)](#). A party petitioning for termination "must prove the statutory criteria for that termination by at least clear and convincing evidence." [In re T.R., 502 Pa. 165, 465 A.2d 642, 644 \(Pa. 1983\)](#). Clear and convincing evidence is defined as "testimony that [*7] is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." [In re Sylvester, 521 Pa. 300, 555 A.2d 1202, 1203-1204 \(Pa. 1989\)](#).

[Section 2512](#) of the Act designates who may file an involuntary termination petition and sets forth the required contents of a petition. [Section 2512](#) states, in relevant part:

(a) Who may file. — A petition to terminate parental rights with respect to a child under the age of 18 years may be filed by any of the following:

(1) Either parent when termination is sought

¹⁶ [23 Pa.C.S. §§ 2101-2938](#).

¹⁷ The current version of "Part III" (Adoption Act) was re-reported as amended and finally approved by the governor on October 15, 1980. This act, known as Act 163, "amend[ed] Title 23 (Domestic Relations) of the Pennsylvania Consolidated Statutes, [by] adding provisions relating to the termination of parental-child relationships and adoptions[,] revising certain provisions of the law relating thereto[,] and making repeals." See H.B. 213 Bill Information History, Regular Session 1979-80.

¹⁵ In involuntary termination of parental rights cases, our review is limited to a determination of whether the decree of the termination court is supported by competent evidence. [Adoption of B.D.S., 494 Pa. 171, 431 A.2d 203, 207 \(Pa. 1981\)](#).

with respect to the other parent.**(2)** An agency.**(3)** The individual having custody [of] or standing *in loco parentis* to the child and who has filed a report of intention to adopt required by [section 2531](#) (relating to report of intention to adopt).**(4)** An attorney representing a child or a guardian *ad litem* representing a child who has been adjudicated dependent under [42 Pa.C.S. § 6341\(c\)](#) (relating to adjudication).**(b) Contents.** — The petition shall set forth specifically those grounds and facts alleged as the basis for terminating parental rights. **The petition filed under this section shall also contain an averment that the petitioner will assume custody of the child until such time as the child is adopted.** If the [*8] petitioner is an agency it shall not be required to aver that an adoption is presently contemplated [or that a person with a present intention to adopt exists].¹⁸

[23 Pa.C.S. § 2512\(a\), \(b\)](#) (emphasis and italics added). In *In re M.R.D.*, our Supreme Court reaffirmed the fact that the parent petitioning for the involuntary termination of the other natural parent's parental rights under [2512\(a\)](#) must accompany that request with an averment that adoption is intended. The Court stated:

[Section 2512\(a\)](#) of the Adoption Act sets forth the parties who may file a petition for involuntary termination, including, *inter alia*, a parent or an agency. [23 Pa.C.S. § 2512\(a\)](#). In contrast to an

¹⁸When an agency petitions to involuntarily terminate an individual's parental rights to his or her child, that child is presumably already in the care and custody of the agency, having been determined to be dependent. "[W]hen a child is in the custody of an approved adoption agency, it is not necessary that adoption be imminent before the agency may petition to have a parent's rights terminated[,] [n]or must a particular adoption plan be established before the agency's petition may be sustained . . . [because] [o]ne of the purposes of the Adoption Act of 1970 was to permit an agency to seek termination of parental rights independently of an adoption." *In re Burns*, 474 Pa. 615, 379 A.2d 535, 541 (Pa. 1977) (citation omitted). Thus, pursuant to [section 2512\(b\)](#), an agency need not aver in its petition to terminate that an adoption is presently contemplated or that a person with a present intention to adopt exists.

agency petition, a parent petitioning to terminate the rights of the child's other parent must file a termination petition containing an averment that the petitioner will assume custody of the child until such time as the child is adopted. [*Id.* at [§ 2512\(b\)](#)]. Thus, the petitioning parent must demonstrate that an adoption of the child is anticipated in order for the termination petition to be cognizable. **[Section 2512\(b\)'s adoption requirement is consistent with the rationale behind permitting the involuntary termination of a parent's rights, which is to dispense with the need for parental consent to \[*9\] an adoption when, by choice or neglect, a parent has failed to meet the continuing needs of the child, rather than to punish an ineffective or negligent parent, or provide a means for changing the surname of the child.](#)**

Id. at 1120 (emphasis added). See *In re B.E., supra* at 156 ("The purpose of the involuntary termination provisions of the Adoption Act is not to punish an ineffective or negligent parent, or provide a means for changing the surname of the child."); see also *In re E.M.I., 57 A.2d at 1285* (same). Thus, when a party does not include in his or her termination petition an averment that there is a corresponding plan for an anticipated adoption, our courts have held that the threshold requirement of [section 2512](#) has not been met and the court will not consider the substantive merits of the petition under subsections [2511\(a\)](#) and [\(b\)](#). See *In re E.M.I., 57 A.3d 1278, 2012 PA Super 270 (Pa. Super. 2012)*.

Here, Mother's petitions allege [sections 2511\(a\)\(7\), \(a\)\(10\), \(a\)\(11\)](#) as the grounds for terminating Father's parental rights; Mother petitioned the court pursuant to [section 2512\(a\)\(1\)](#), as a parent seeking to terminate the rights of the other parent. Mother, however, did not include in her petition "an aver[ment] that an adoption is presently contemplated [or] that a person with a present intention to adopt exists." [23 Pa.C.S. § 2512\(b\)](#). The [*10] trial court found itself "constrained by the requirements of the Adoption Act and by prior appellate court decisions to deny [Mother's] petition for termination . . . [because] there is no[] 'contemplated adoption' to consider." Trial Court Opinion, 11/5/18, at 5.

Historically, our courts have recognized that the purpose of involuntary termination of parental rights is "to dispense with the need for parental consent to an adoption when, by choice or neglect, a parent has failed to meet the continuing needs of the child." *In re Male*

Infant B.E. (In re B.E.), 474 Pa. 139, 377 A.2d 153, 155 (Pa. 1977).¹⁹ Chapter 25 of the Act presupposes a petition for adoption by the individual or agency petitioning to terminate parental rights. Thus, "[a section 2512] termination petition filed by one parent against the other must occur in the context of an anticipated adoption." In re Adoption of M.R.D., 636 Pa. 509, 145 A.3d 1117, 1120 (Pa. 2016); In re E.M.I., supra (petition to terminate natural parent's rights filed by other natural parent under section 2512(a)(1) cognizable only if adoption of child foreseeable). Under such circumstances, termination "permits the child and the adoptive parent or parents to establish a new parent-child relationship." In re B.E., 377 A.2d at 156. Therefore, a natural parent who petitions the court to terminate the rights of the other parent necessarily requires the petitioning parent [*11] also relinquish his or her parental rights in order to free his or her child for adoption. In re Adoption of R.B.F., 569 Pa. 269, 803 A.2d 1195, 1199 (Pa. 2002); 23 Pa.C.S. § 2711(d)(1) (consents necessary to adoption). The only exception to this rule is if the petitioning parent's spouse intends to adopt the child. See 23 Pa.C.S. §2903 (spousal exception provision available only in private family adoptions, upon marriage or remarriage of biological father or mother; where natural parent consents to adoption of child by natural parent's new spouse, natural parent retains parental rights to child).

Our Courts have repeatedly stated that to effectuate an adoption, which is a statutory right, parties must strictly comply with the provisions of the Act. In re Adoption of E.M.A., 487 Pa. 152, 409 A.2d 10, 11 (Pa. 1979); In re R.B.F., 803 A.2d at 1199. Thus, "where no new parent-child relationship is contemplated[, which is the 'singular concern' of the Adoption Act,] . . . the involuntary termination of . . . parental rights . . . is not permitted[.]" In re L.J.B., 18 A.3d at 1108 (citation omitted); In re T.R., 502 Pa. 165, 465 A.2d 642, 644 n.10 (Pa. 1983).

¹⁹ Notably, In re B.E. was decided under 1 P.S. § 312 (repealed and replaced by 23 Pa.C.S. § 2512, effective Jan. 1, 1981). Like current section 2512, section 312 also "indicate[d] that a parent may bring a petition for termination of the parental rights of the other parent only when adoption is contemplated." In re Adoption of L.J.B., 18 A.3d 1098, 1107, 610 Pa. 213 (Pa. 2011), citing In re B.E., 377 A.2d at 155; In re Burns, 379 A.2d at 541. The comment to section 312 noted that the contemplated adoption language of that section "is intended to assure that some agency or person is responsible for the child pending his [or her] adoption." Appendix to the Legislative Journal, Proposed Adoption Act, 1970, Comment, at 185.

Applying section 2512(b)'s contemplated adoption requirement to the unique facts of this case creates an absurd result where Mother, a capable and fit single parent²⁰ who has been the tragic victim of rape committed at Father's hand for decades, cannot remain Children's legal Mother and seek termination of Father's, her rapist's, [*12] parental rights. Children's guardian *ad litem* acknowledges that terminating Father's parental rights would be in Children's best interests. See N.T. Termination Hearing, 10/29/18, at 29 ("I do understand where Mom is coming from and it probably would be in [C]hildren's best interest not to have that tie [with Father] so that he doesn't have that ability to even try [to contact [C]hildren."). Moreover, the trial court recognized that "[t]here are clearly grounds for [termination] under [s]ection 2511(a)(7), (a)(10), and (a)(11), as sought." See Trial Court Opinion, 11/5/18, at 5. It is doubtful that the legislature would have intended such a result where a fit parent seeks to ensure his or her family's safety and prevent them "from further exposure to a sexually violent predator." Appellant's Brief, at 3.²¹ See 1 Pa.C.S. § 1922(1) (General

²⁰ Guardian *ad litem*, Megan Reaser, noted at the termination hearing that Children appear "happy" and "healthy." N.T. Termination Hearing, 10/29/18, at 28.

²¹ We note that House Bill 1682, No. 2253, Session of 2017, was referred to the judiciary committee on July 24, 2017. Bill 1682 would remove the requirement that a parent of a child conceived by rape or incest would have to aver that an adoption is presently contemplated in order to terminate the parental rights of the other offending parent. The Bill, co-sponsored by Representative Michael H. Schlossberg, would add subsection (b)(2) to section 2512, stating "It shall not be required to aver that an adoption is presently contemplated nor that a person with a present intention to adopt exists if any of the following apply: (i) the petitioner is an agency; (ii) the child was conceived as a result of rape or incest." House Bill 1682, No. 2253, Session of 2017, 7/24/17, at 1-2.

We also note that Senate Bill 354, No. 344, Session of 2019, has recently been referred to the judiciary committee. Bill 354 would add subsection (a.1) to 23 Pa.C.S. § 2511, which would impose "mandatory termination" of the rights of a parent where a petition has been filed alleging that the parent has been convicted of, among other things, rape, IDSI and aggravated assault in which the victim of the crimes was the child. In such cases, if those "grounds [are] determined . . . to have been proved and a determination is made by the court that the termination is in the best interests of the child," termination would occur. Senate Bill 354, No. 344, Session 2019, 3/4/19, at 2. While here Children are not the victims of Father's criminal acts, Mother, who is Father's adoptive child, is his

Assembly does not intend a result that is absurd, impossible of execution or unreasonable).²² In fact, in *In re R.B.F.*, our Supreme Court recognized that "[i]t is a settled rule that in the construction of statutes an interpretation is never to be adopted that would defeat the purpose of the enactment, if any other reasonable construction can be found which its language [*13] will fairly bear." [Id. 803 A.2d at 1203.](#)

Mother's position is not unique; in fact, the plight of parents in her exact situation is widespread. In 2015, the 114th United States Congress proposed legislation directing the United States Attorney General to provide grants to states that have laws in place which terminate the parental rights of men who father children through rape.²³ See H.R. 1257, 114th Cong. (2015-2016) (Rape Survivor Child Custody Act). The findings of this act recognize "that there are between 25,000 and 32,000 rape-related pregnancies annually in the United States." *Id.* at § 2, Findings. In 2015, the act became law as part of the Justice for Victims of Trafficking Act. See P.L. No. 114-22 (5/29/15), Title IV — Rape Survivor Child Custody Act, § 404. Currently, 30 states allow for the termination of parental rights of perpetrators of sexual assault who father a child as a result of their actions, while 20 states allow some form of restriction on the parental rights of those perpetrators. National Conference of State Legislatures, [Parental Rights and Sexual Assault](#) (4/17/17), <http://www.ncsl.org/research/human-services/parental->

legal child. Thus, presumably, Father's rights could be mandatorily terminated under this proposed bill were it to be enacted into legislation. We note, however, that the proposed bill does not account for the contemplated adoption requirement under [section 2512](#), a jurisdictional prerequisite to a court's substantive termination analysis -- the issue preventing Mother from terminating Father's rights in this case.

²² Interestingly, a 1979 House of Representative's bill suggested amending the Adoption Act of 1970 to provide for the forfeiture of parental rights in similar circumstances, stating, "No person shall have any parental rights involving children who were conceived as a result of rape for which he was convicted." H.B. 213, Regular Session 1979-1980, § 311.1 (Pa. 1979). Unfortunately, that suggested language was never included in our Adoption Act. It, however, would solve the problem we are presented with today.

²³ The act provides grants to states that have enacted "a law that allows the mother of any child [who] was conceived through rape to seek court-ordered termination of the parental rights of her rapist with regard to that child, which the court is authorized to grant upon clear and convincing evidence of rape." See [34 U.S.C. § 21303.](#)

rights-and-sexualassault.aspx. In addition, "nearly 30 bills [*14] have been introduced in 17 states during the 2017 legislative session addressing some aspect of [the] parental rights . . . of perpetrators." *Id.* Our own state legislature has restricted the custody and visitation rights of perpetrators like Father. See 23 Pa.C.S. § 5329.²⁴ Pennsylvania has yet to do so, however, in the

²⁴ We recognize that under the [Custody Act](#), Part VI of the Domestic Relations Act, Mother can ensure that Father will have no right to legal or physical custody of Children. In 2015, Pennsylvania State Senator Randy Vulakovich authored a Co-Sponsorship Memorandum acknowledging the very situation we are presented with today. In his memo, Senator Vulakovich stated:

Currently, Pennsylvania law only allows for the termination of parental rights of convicted rapists pending adoption. As it stands, if a victim of rape chooses to keep the child conceived as a result of the rape, she could be forced to interact with the perpetrator on a regular basis through visitation. In addition, if a victim chooses to prosecute her abuser and retain parental rights of the child, the abuser could threaten to pursue custody or visitation with the child if the victim does not drop the charges. Furthermore, if the parental rights of the offender are terminated, the obligation to pay child support is also terminated.

Senate Co-Sponsorship Memorandum (Session of 2015-2016) by Senator Randy Vulakovich, 2/6/15 (emphasis added). That same year, **section 5329** of the Custody Act was amended to include language addressing Senator Vulakovich's concerns. That section provides:

(b.1) Parent convicted of certain sexual offenses.--

(1) Notwithstanding any provision of this chapter to the contrary and subject to *paragraph (2)*, **if a parent who is a victim of any of the offenses set forth in this paragraph objects, no court shall [*15] award any type of custody set forth in section 5323 (relating to award of custody) to the other parent of a child conceived as a result of any of the following offenses for which the other parent has been convicted:**

[18 Pa.C.S. § 3121 \[rape\].](#)

* * *

(2) A court may award any type of custody set forth in *section 5323* to a parent who has been convicted of an offense under *paragraph (1)* if:

- (i) the parent who is a victim had an opportunity to address the court;
- (ii) the child is of suitable age and consents to the custody order; and

(iii) the court determines the award is in the best interest of the child.

(3) Paternity of the child shall be established by voluntary acknowledgment of paternity or blood, genetic or other paternity testing acceptable to the court. The cost of the testing shall be borne by the parent who was convicted of the offense.

23 Pa.C.S. § 5329 (b.1) (emphasis added).

Mother is aware of this protection that is afforded to her and Children under **section 5329**, noting in her termination petition that "[b]ecause [Father] pled guilty to two violations of [18 Pa.C.S. § 3121](#) [rape,] he has no right to any physical or legal custody of [Children or any] right to any visitation with [Children]" under **section 5329**. Termination Petition, 8/18/18, at ¶¶ 46-47. Therefore, if Mother appropriately objects, Father will be precluded from having any form of legal or physical custody of Children. While we are confident that **section 5329(b.1)** can effectively prevent Father from exercising his custodial or visitation rights to Children, we sympathize with Mother's prayer to sever all legal ties that Father has to Children.

We also note that pursuant to [23 Pa.C.S. § 4321](#), a parent is liable for the support of his or her unemancipated child, aged 18 years or younger:

[W]hether or not parental rights of the parent have been terminated due to a conviction for any of the following where the other parent is the victim and a child has been conceived as a result of the offense:

- (i) [18 Pa.C.S. § 3121](#) (relating to rape);
- (ii) [18 Pa.C.S. § 3122.1](#) (relating to statutory sexual assault);
- (iii) [18 Pa.C.S. § 3124.1](#) (relating to sexual assault) where the offense involved sexual intercourse;
- (iv) [18 Pa.C.S. § 3124.2](#) (relating to institutional sexual assault) [*16] where the offense involved sexual intercourse; or
- (v) [18 Pa.C.S. § 4302](#) (relating to incest) where the offense involved sexual intercourse.

Paternity of the child under this paragraph shall be established through voluntary acknowledgment of paternity or blood, genetic or other type of paternity test acceptable to the court. The cost of the testing shall be borne by the parent who was convicted of the offense.

[23 Pa.C.S. § 4321\(2.1\)](#). Thus, Father is still responsible to

termination context.

Recent cases discussing [section 2512\(b\)](#)'s contemplated adoption requirement involve situations where the petitioner is seeking termination of the other parent's parental rights as a precursor to the adoption process. See [In re M.R.D., supra](#) (proposed grandparent adoption); [In re L.J.B., supra](#) (same); [In re J.M.](#) (same); see also [In re R.B.F., supra](#) (proposed same-sex parent adoption); [In re E.M.I., supra](#) (same). However, that is simply not the situation in the present case.

First, it is not necessary that Children be adopted. Mother is a fit and able parent who has been singularly caring for her Children's emotional, physical and social well-being their entire lives. Thus, there is no need to establish a "new 'parent-child' relationship." [In re L.J.B., supra](#); [In re T.R., supra](#); [In re B.E., supra](#). Second, Mother has no intention to subvert the adoption process in seeking termination of Father's parental rights to Children. She is not seeking [*17] termination in order to change Children's surname or punish Father for being ineffective or merely negligent. Cf. [In re B.E., supra](#) (case decided over twenty-five years ago, noting "singular concern of the Adoption Act" is to "establish a new 'parent-child' relationship" and in order to achieve that goal, through the termination of the natural parents' rights, must include contemplated adoption). Rather, Mother is looking to sever Father's parental rights to Children as a result of his criminal and sexually predatory behavior perpetrated against Mother for over 20 years, in an effort to put an end to a cycle of abuse, and to provide Children with a chance to grow up in a loving, supportive and caring home with no fear of reprisal from Father. Therefore, requiring Mother to aver a contemplated adoption under [section 2512\(a\)\(1\)](#) defeats the purpose of the statute's enactment. [R.B.F., supra](#). See also [M.R.D., supra](#) (purpose of contemplated adoption provision is to dispense with need for parental consent to an adoption when, by choice or neglect, parent has failed to meet continuing needs of child).

R.B.F. involved two companion cases where same-sex partners of the respective petitioners sought to formalize their parental relationship with the petitioners' [*18] children, while at the same time permit the legal parents to retain their parental rights to children. The Supreme Court remanded the case to the trial court for a hearing

pay support for Children until they become emancipated and reach the age of 19.

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to determine whether petitioners could demonstrate, by clear and convincing evidence, cause as to whether the "purpose of [s]ection 2711(d)'s relinquishment of parental rights requirement will be otherwise fulfilled or is unnecessary under the particular circumstances of [their] case[s]." [803 A.2d at 1203](#). The **R.B.F.** Court relied on [section 2901](#) of the Act upon to support its remand decision, which states, in relevant part:

Unless the court for cause shown determines otherwise, no decree of adoption shall be entered unless the natural parent or parents' rights have been terminated . . . and all other legal requirements have been met.

[23 Pa.C.S. § 2901](#). In coming to its decision, the Court recognized that "there is no other reasonable construction of the [s]ection 2901 'cause shown' language other than to conclude that it permits a petitioner to demonstrate why, in a particular case, he or she cannot meet the statutory requirements." **R.B.F.**, [803 A.2d at 1202-1203](#).

Similarly, we find that the overwhelming evidence of record "shows cause" under [section 2901](#) as to why Mother should be relieved of [section 2512](#)'s contemplated [*19] adoption requirement in order to terminate Father's parental rights.²⁵ Mother has no other legal means to terminate Father's parental rights save for the termination provisions found in the Adoption Act that are a prerequisite to adoption. Where Mother has no intention of placing Children for adoption, she is being held to a requirement that is simply "unnecessary under the particular circumstances of [her] case." [Id. at 1203](#).

Echoing Pennsylvania Supreme Court Justice Debra Todd's views in *In re M.R.D.*,²⁶ "in today's times,

²⁵ The hurdle in this case for Mother is the contemplated adoption requirement. Because we conclude that Mother is excused from the requirement that she place her Children for adoption, this necessarily dispenses with the requirements under **section 2711(d)** that she relinquish her own parental rights to Children or re-marry under [section 2903](#). *Cf. M.R.D.*, [145 A.3d at 1129](#) (where mother petitioned to have father's rights terminated and maternal grandfather adopt child, because she did not meet burden of showing proposed adoption would serve underlying purpose of relinquishment, mother was not excused from requirement that she relinquish her parental rights under **section 2711**).

²⁶ We, too, are cognizant of the ever-changing landscape of the family unit. In fact, in 2016 roughly 23% of children in the United States, under the age of 18, were living in single-

societal norms pertaining to what constitutes a family are constantly evolving." [Id., at 1129](#). The time has come to reevaluate and revisit the adoption and termination of parental rights processes under our current law. To force Mother to either marry so she can have her new spouse adopt Children to fulfill [section 2512](#)'s contemplated adoption requirement, or compel her to relinquish her own parental rights to Children to ensure their safety from Father, is simply senseless and an abomination under the circumstances. **See Commonwealth ex rel. Grimes v. Yack**, [289 Pa. Super. 495, 433 A.2d 1363, 1382 \(Pa. Super. 1981\)](#) ("The relationship between parent and child should be broken only with the greatest reluctance.") (citation omitted). One can hardly envision how forcing Mother [*20] to make this kind of choice promotes the best interests of Children, which is of paramount importance in such matters.²⁷

Thus, we reverse the orders denying Mother's petitions to involuntarily terminate Father's parental rights to Children. In doing so we are mindful to limit the holding of this case to its facts so that "[t]he exercise of such discretion does not open the door to [terminating the parental rights of one parent by another parent when adoption is not contemplated], **R.B.F.**, [803 A.2d at 1202](#), and to "ensure that we do not open the floodgates to . . . gamesmanship." *In re M.R.D.*, [145 A.3d at 1129](#) (where Supreme Court denied mother's petition to terminate father's parental rights, cautioning Mother's actions "open[ed] the door to the misuse of adoption proceedings by spiteful parents as a means to involuntarily terminate the rights of unwanted parents, potentially allowing grandparents, cousins, pastors, coaches, and a litany of other individuals who have a close relationship with a child to stand in as prospective adoptive parents so that termination may be achieved.").

We remand this case to the trial court to proceed with termination proceedings, including a full and proper hearing, as Mother has demonstrated cause for

mother households, like the current case. <https://www.census.gov/data/tables/2018/demo/families/cps-2018.html> (last visited 5/13/19).

²⁷ The irony is not lost on us that the Adoption Act permits "any individual" to adopt a child in this Commonwealth, which necessarily includes a single parent, yet Mother is forced to relinquish her own parental rights and put Children up for adoption under [section 2512](#) if she wants to terminate Father's rights. **See 23 Pa.C.S. § 2312** (section of Adoption Act stating that "[a]ny individual may become an adopting parent.").

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her [*21] non-compliance with the contemplated adoption requirement of [section 2512\(a\)\(2\)](#).

Orders reversed.²⁸ Case remanded for proceedings consistent with this decision. Jurisdiction relinquished.²⁹

Judgment Entered.

Date: 8/12/19

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²⁸ There seems to be no question that, substantively, Father's rights could be involuntarily terminated under [sections 2511\(a\)\(7\)](#) and [\(11\)](#) of the Adoption Act. Moreover, based on the horrific history of abuse that Father perpetrated upon Mother and the circumstances under which Children were conceived, it is also evident that terminating Father's parental rights would benefit the "developmental, physical and emotional needs and welfare of" Children under [section 2511\(b\)](#). However, upon remand the court must conduct the proper involuntary termination inquiries at a hearing.

²⁹ Having disposed of Mother's appeal on the basis of her first issue, we need not address the remaining constitutional issues she raises on appeal.

APPELLEE'S APPENDIX IV

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In re Parentage of D.S.

Appellate Court of Illinois, First District, Second Division

April 27, 2021, Filed

No. 1-19-2257

Reporter

2021 IL App (1st) 192257 *; 197 N.E.3d 92 **; 2021 Ill. App. LEXIS 205 ***; 458 Ill. Dec. 679 ****

In re PARENTAGE OF D.S., a Minor (Colton S.,
Petitioner-Appellant, v. Aura C.-K., Respondent-
Appellee).

with prejudice. Petitioner now appeals, arguing that dismissal was improper because the court failed to address the effect of consent under [section 622\(b\)](#). For the following [***2] reasons, we affirm.

Prior History: [***1] Appeal from the Circuit Court of Cook County. No. 2018 D 8002. Honorable Edward A. Arce Judge, presiding.

[*P2] I. BACKGROUND

Disposition: Affirmed.

[*P3] Respondent was born on April 16, 2001. She has known petitioner since December 2016 and, at some point, had a sexual relationship with him. On December 12, 2017, at the age of 16, respondent gave birth to D.S. in Cook County.

Counsel: For Appellant: Lou Karnezi, of Karnezis Law Group LLC, of Park Ridge.

No brief filed for appellee.

[*P4] On September 12, 2018, pursuant to [section 601 of the Parentage Act](#), petitioner filed a petition to establish parentage and for allocation of parental responsibilities for D.S. In his petition, he alleged that D.S. currently resides with him, that respondent is unfit, and that it is in D.S.'s best interest for petitioner to be adjudicated her father and allocated sole parental and decision-making responsibilities.

Judges: JUSTICE COBBS delivered the judgment of the court, with opinion. Justices Lavin and Pucinski concurred in the judgment and the opinion.

Opinion by: COBBS

Opinion

[**96] [****683] JUSTICE COBBS delivered the judgment of the court, with opinion.

[*P5] On November 13, 2018, respondent filed an answer, *pro se*, denying that she is unfit to exercise parental responsibilities. Respondent also stated that petitioner "is an unfit parent" and that she had requested a paternity test because she did not believe that petitioner was D.S.'s father.

Justices Lavin and Pucinski concurred in the judgment and the opinion.

OPINION

[*P1] Petitioner-Appellant, Colton S., filed a petition seeking a declaration of parentage and allocation of parental responsibilities for D.S., the daughter of respondent-appellee, Aura C.-K. Respondent moved to strike the petition for parentage pursuant to [section 622 of the Illinois Parentage Act of 2015 \(Parentage Act\) \(750 ILCS 46/622](#) (West 2018)), which prohibits the allocation of parental responsibilities to men who father through sexual assault or abuse or otherwise nonconsensual sexual penetration. The court granted respondent's motion and dismissed petitioner's petition

[*P6] On December 24, 2018, respondent filed an "Emergency Motion for Temporary Restraining Order Injunctive and Other Relief and an Immediate Surrender of the Child." In the motion, respondent stated that while she was living at her great-grandmother's [***3] home, "sometime in September/October 2018 D.S. began to live with [petitioner's] parents and [she] would visit and enjoy parenting time on a daily basis." However, after filing the instant petition, petitioner and his parents began to restrict respondent's ability to see D.S. Respondent argued that she did not consent to petitioner's parenting time and that he was in violation of [section 622 of the Parentage Act](#). As such, respondent requested the court order the immediate return of D.S.

to her care. Attached to her emergency motion was an affidavit in which she averred that she was 15 years old, and petitioner was 18 years old when they initiated their sexual relationship. She further averred that petitioner was emotionally and physically abusive throughout their relationship. The court denied the motion, finding that an emergency did not exist.

[*P7] At some point, the Department of Children and Family Services (DCFS) became involved, and on December 28, 2018, DCFS issued a "safety plan," naming petitioner the custodial parent.

[*P8] On January 7, 2019, respondent filed an "Affirmative Petition and/or Motion to **[**97]** **[****684]** Strike Petitioner's Petition to Establish Parentage and for Allocation of Parental Responsibilities" **[***4]** pursuant to [section 622\(f\)](#) of the Parentage Act. Again, respondent argued that allocation of parental responsibilities to petitioner was prohibited under [section 622](#) because conception of D.S. was the result of nonconsensual sexual intercourse and she did not consent to petitioner's parenting time.

[*P9] On February 6, 2019, petitioner filed a response wherein he confirmed that he was 19 years old, and respondent was 16 years old when D.S. was born. Subsequently, on February 13, 2019, petitioner filed a memorandum of law in response to respondent's motion to strike. In the memorandum, petitioner argued that the issue before the court was "whether [respondent] consented to the exercise of [p]etitioner's parental rights." In that regard, he asserted that respondent and her family had consented to petitioner's parenting time and parental responsibilities since D.S. was born and that she is only now objecting to his parenting. Petitioner further argued that it would be in the best interest of D.S. to allow him parental responsibilities.

[*P10] Attached to the memorandum was the DCFS "safety plan" dated December 28, 2018. The document identified the "safety threat" as a caregiver or member of the household, namely respondent, **[***5]** "whose behavior is violent and out of control." The document stated that respondent was required to attend anger management and parenting classes and would only be permitted supervised visits with D.S. at petitioner's parents' house. Additionally, two police reports were also attached to the memorandum as exhibits. In the first, respondent reported an online threat made against her grandmother, and in the second, respondent had been reported to police as missing by her grandmother, but she returned home stating that she had just been

lost in Chicago.

[*P11] A hearing was held, at which counsel for respondent contextualized the issue before the circuit court as one of standing. Prior to receiving evidence, the court commented that it would be a "tight hearing" on the issue of standing and not "fitness." The following testimony was presented.

[*P12] Petitioner testified that he was born on June 1, 1998, and has one child, D.S., with respondent. He confirmed that he is listed on D.S.'s birth certificate as the father. He stated that he met respondent in December 2016.

[*P13] Respondent testified that petitioner is the father of her child and that she was 15 years old when D.S. was conceived. Respondent never **[***6]** complained to the police that petitioner had sexual intercourse with her against her will. She also testified that petitioner was mentally, physically, and verbally abusive towards her but she never called the police to complain about petitioner's abuse because she was afraid. Finally, respondent testified that she did not consent either to petitioner, or to anyone in his family, parenting her child.

[*P14] Amy S., petitioner's mother, testified that she met with representatives from DCFS while respondent was present and, on those occasions, respondent did not complain that the sexual intercourse between her and petitioner was nonconsensual. She further testified that respondent never complained to her that petitioner was abusive.

[*P15] After the hearing, respondent filed a memorandum of law in support of her motion to dismiss, in which she argued that petitioner's reading of the Parentage Act would negate its obvious intent to protect victims from their assailants and would permit rapists to remain involved with their victims and resulting children **[**98]** **[****685]** through coercion or charm. She also argued that a "best interest of the child" analysis is simply not contemplated by [section 622](#). Petitioner filed a reply, reasserting **[***7]** his argument that respondent consented to petitioner's parenting of D.S. "long ago" and that the Act does not support a reading that would allow respondent to simply revoke her consent whenever it is convenient for her.

[*P16] On October 8, 2019, the circuit court dismissed the petition with prejudice. In doing so, the court concluded that respondent has established by "clear and convincing evidence" that petitioner had "committed an act of non-consensual sexual penetration for his

conduct in fathering that child" due to respondent's age, which rendered her "incapable of giving consent to an act of sexual penetration."

[*P17] This appeal followed.

[*P18] II. ANALYSIS

[*P19] As an initial matter, we note that respondent has failed to file a brief in this appeal. Generally, we will not act as an advocate for an appellee who fails to file a brief or search the record for the purpose of sustaining the court's judgment. First Capitol Mortgage Corp. v. Talandis Construction Corp., 63 Ill. 2d 128, 133, 345 N.E.2d 493 (1976). However, failure to file a brief does not require an automatic reversal, and the appellant continues to bear the burden of establishing error. *Id.* at 131-32. "When the record is simple, and the claimed errors are such that this court can easily decide them on the merits without the aid of an appellee's brief, [***8] this court should decide the appeal on its merits." Plooy v. Paryani, 275 Ill. App. 3d 1074, 1088, 657 N.E.2d 12, 212 Ill. Dec. 317 (1995). We find that the record and the issues involved herein are straightforward and clear enough that the appeal should be decided on its merits.

[*P20] A. Standard of Review

[*P21] The issue before us is whether the circuit court erred in dismissing with prejudice the petition to establish parentage and allocate parental responsibility or parental time. Before turning to the merits of petitioner's arguments, we must first determine under which section of the Code of Civil Procedure (Code) the dismissal should be analyzed. See 735 ILCS 5/2-615, 2-619 (West 2018). The circuit court did not identify which section of the Code served as the basis for dismissal, and other than section 622(f) of the Parentage Act, respondent cites no other statutory provision as the basis for which the petition should be stricken. Throughout his brief, petitioner argues, in the main, that dismissal under section 2-615 was not appropriate as there are facts which may be proven which would defeat dismissal. He maintains, however, that dismissal under either section 2-615 or 2-619 of the Code was improper. Thus, reversal is warranted.

[*P22] Section 2-615 provides that a pleading or portion thereof may be stricken because it is substantially insufficient in [***9] law. *Id.* § 2-615. That is, a motion filed under section 2-615 tests the legal

sufficiency of the pleading. Cohen v. McDonald's Corp., 347 Ill. App. 3d 627, 632, 808 N.E.2d 1, 283 Ill. Dec. 451 (2004). In such a case, the court accepts as true all well-pleaded facts and reasonable inferences to be drawn from those facts and determines whether the allegations are sufficient to state a cause upon which relief may be granted. *Id.*

[*P23] On the other hand, a motion to dismiss pursuant to section 2-619 admits the legal sufficiency of the pleading and raises defects, defenses, or other affirmative matters that act to defeat the claim. *Id.* Thus, the issue is whether, after reviewing [***99] [****686] the pleadings, depositions, and affidavits, there is a genuine issue of material fact that precludes dismissal, or whether dismissal is proper as a matter of law. *Id.*

[*P24] In evaluating a circuit court's dismissal, we look at the substance of the motion to dismiss, not its label. See Winters v. Wangler, 386 Ill. App. 3d 788, 793, 898 N.E.2d 776, 325 Ill. Dec. 729 (2008). Respondent stated in her petition or motion to strike that it was filed pursuant to section 622(f) of the Parentage Act. That subsection permits the mother (or guardian of the mother) to file a petition as "an affirmative defense in any proceeding filed by the person described in subsection (a) of this Section regarding the child." 750 ILCS 46/622(f) (West 2018). Section 2-619(a)(9) permits dismissal where "the claim asserted against [***10] defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2018). Because section 622 was intended as an affirmative defense in a proceeding that has already been instituted, we construe respondent's filing as a motion to dismiss pursuant to section 2-619 of the Code, which, as stated, admits the legal sufficiency of the pleading but raises an affirmative defense to defeat the claim.

[*P25] "The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation." Van Meter v. Darien Park District, 207 Ill. 2d 359, 367, 799 N.E.2d 273, 278 Ill. Dec. 555 (2003). "An 'affirmative matter' in this instance is something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." Anderson v. Chicago Transit Authority, 2019 IL App (1st) 181564, ¶ 21, 433 Ill. Dec. 400, 131 N.E.3d 1245. It is the moving party's burden to establish the affirmative matter defeating the nonmoving party's claim. Pruitt v. Pruitt, 2013 IL App (1st) 130032, ¶ 14, 995 N.E.2d 313, 374 Ill.

Dec. 174. In ruling on a section 2-619 motion, all pleadings and supporting documents must be construed in a light most favorable to the nonmoving party, and the motion should be granted where no material facts are in dispute and the defendant is entitled to dismissal as a matter of law. Kheirkhahvash v. Baniassadi, 407 Ill. App. 3d 171, 176, 941 N.E.2d 1020, 347 Ill. Dec. 151 (2011). However, "[i]f the affidavits present [***11] disputed facts, the parties must be afforded the opportunity to have an evidentiary hearing." A.F.P. Enterprises, Inc. v. Crescent Pork, Inc., 243 Ill. App. 3d 905, 913, 611 N.E.2d 619, 183 Ill. Dec. 356 (1993).

[*P26] In the present case, the court held an evidentiary hearing and thus we "must review not only the law but also the facts, and may reverse the trial court order if it is incorrect in law or against the manifest weight of the evidence." Hernandez v. New Rogers Pontiac, Inc., 332 Ill. App. 3d 461, 464, 773 N.E.2d 77, 265 Ill. Dec. 715 (2002) (quoting Kirby v. Jarrett, 190 Ill. App. 3d 8, 13, 545 N.E.2d 965, 137 Ill. Dec. 204 (1989)). A factual finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or the finding itself is unreasonable, arbitrary, or not based on the evidence presented. Offord v. Fitness International, LLC, 2015 IL App (1st) 150879, ¶ 16, 398 Ill. Dec. 450, 44 N.E.3d 479. Because this appeal involves interpretation of the Parentage Act, which is an issue of law, our review is *de novo*. Unzicker v. Kraft Food Ingredients Corp., 203 Ill. 2d 64, 74, 783 N.E.2d 1024, 270 Ill. Dec. 724 (2002). Accordingly, we review whether the trial court's findings of fact are against the manifest weight of the evidence while reviewing the questions of law *de novo* ([**100] Offord, [****687] 2015 IL App (1st) 150879, ¶ 15), and we may affirm the court's dismissal based on any grounds supported by the record (King v. City of Chicago, 324 Ill. App. 3d 856, 859, 755 N.E.2d 143, 258 Ill. Dec. 62 (2001)).

[*P27] B. Parentage Act

[*P28] Section 622 of the Parentage Act, enacted in 2016, is titled "Allocation of parental responsibilities or parenting time prohibited to men who father through sexual assault or sexual abuse" and provides, in pertinent part, as follows:

"(a) This Section applies to a person who [***12] has been found to be the father of a child under this Act and who:

(1) has been convicted of or who has pled guilty or nolo contendere to a violation of

Section 11-1.20 (criminal sexual assault), Section 11-1.30 (aggravated criminal sexual assault), Section 11-1.40 (predatory criminal sexual assault of a child), Section 11-1.50 (criminal sexual abuse), Section 11-1.60 (aggravated criminal sexual abuse), Section 11-11 (sexual relations within families), Section 12-13 (criminal sexual assault), Section 12-14 (aggravated criminal sexual assault), Section 12-14.1 (predatory criminal sexual assault of a child), Section 12-15 (criminal sexual abuse), or Section 12-16 (aggravated criminal sexual abuse) of the Criminal Code of 1961 or the Criminal Code of 2012, or a similar statute in another jurisdiction, for his conduct in fathering that child; or

(2) at a fact-finding hearing, is found by clear and convincing evidence to have committed an act of non-consensual sexual penetration for his conduct in fathering that child.

(b) A person described in subsection (a) shall not be entitled to an allocation of any parental responsibilities or parenting time with that child without the consent of the child's mother or guardian. If the person described in subsection (a) is also the guardian of the child, he does not have the authority to consent to parenting time or the allocation [***13] of parental responsibilities under this Section. If the mother of the child is a minor, and the person described in subsection (a) is also the father or guardian of the mother, then he does not have the authority to consent to the allocation of parental responsibilities or parenting time.

* * *

(f) A petition under this Section may be filed by the child's mother or guardian either as an affirmative petition in circuit court or as an affirmative defense in any proceeding filed by the person described in subsection (a) of this Section regarding the child." 750 ILCS 46/622 (West 2018).¹

¹ "Parental responsibilities" is defined in section 600(d) of the Illinois Marriage and Dissolution of Marriage Act as "both parenting time and significant decision-making responsibilities with respect to a child." 750 ILCS 5/600(d) (West 2018). "Parenting time" is defined in section 600(e) of the Illinois Marriage and Dissolution of Marriage Act as "the time during which a parent is responsible for exercising caretaking functions and non-significant decision-making responsibilities with respect to the child." *Id.* § 600(e).

[*P29] "The cardinal rule of statutory construction is to ascertain and give effect to the legislature's true intent." Unzicker, 203 Ill. 2d at 75. Intent should be determined more from consideration of the reason and necessity, objects, and purposes of the law than from its language. Mashal v. City of Chicago, 2012 IL 112341, ¶ 21, 981 N.E.2d 951, 367 Ill. Dec. 223. The court [**101] [****688] considers statutory language in light of the statute's purposes and evils the law was designed to remedy. *Id.* Details of the statute should be construed in conformity with its dominant purpose. Chrysler Credit Corp. v. Ross, 28 Ill. App. 3d 165, 172, 328 N.E.2d 65 (1975). The court's construction should be in such a manner as will accomplish those objects sought by their enactments. In re Petition of K.M., 274 Ill. App. 3d 189, 195, 653 N.E.2d 888, 210 Ill. Dec. 693 (1995). If the plain language of a statute is clear and unambiguous, we will give that [****14] meaning effect without resort to other aids of statutory construction. Palm v. Holocker, 2018 IL 123152, ¶ 21, 433 Ill. Dec. 104, 131 N.E.3d 462. The court, of course, must view the statute as a whole, construing the words and phrases in light of the other relevant statutory provisions. State ex rel. Leibowitz v. Family Vision Care, LLC, 2020 IL 124754, ¶ 35. Finally, we may not depart from a statute's plain language by reading into it exceptions, limitations, or conditions the legislature did not express. In re Hernandez, 2020 IL 124661, ¶ 18, 443 Ill. Dec. 11, 161 N.E.3d 135.

[*P30] Because the parties were never married, the Parentage Act (750 ILCS 46/101 et seq.) (West 2018) governs the particular proceedings in this case. In enacting the Parentage Act, the General Assembly established a "statutory mechanism that serves to legally establish parent and child relationships in Illinois." In re Estate of Poole, 207 Ill. 2d 393, 404, 799 N.E.2d 250, 278 Ill. Dec. 532 (2003).² The purpose of the Parentage Act is to further the public policy of Illinois to "recognize [] the right of every child to the physical, mental, emotional, and financial support of his or her parents." 750 ILCS 46/102 (West 2018); J.S.A. v. M.H., 224 Ill. 2d 182, 198, 863 N.E.2d 236, 309 Ill. Dec. 6 (2007).

[*P31] Section 622(a) of the Parentage Act identifies the population of men who are prohibited from allocation

²The Parentage Act of 1984 was repealed in its entirety (see Pub. Act 99-85, § 977 (eff. Jan. 1, 2016)) and replaced by the Parentage Act of 2015 (see Pub. Act 99-85, § 101 (eff. Jan. 1, 2016) (adding 750 ILCS 46/101 et seq.)). Section 6-5 in the prior act was retained as section 622 in the current act.

of parental responsibilities or parenting time. Subsection (a)(1) specifically identifies men who were either convicted or pled guilty to a criminal sexual offense. 750 ILCS 46/622(a)(1) (West 2018). Subsection (a)(2) specifically identifies men who fathered children resulting from nonconsensual [****15] sexual penetration, thereby including perpetrators of sexual abuse or sexual assault, but who have not been convicted. Under section 622, a fact-finding hearing is mandated for purposes of determining paternity for men who fit within the definition of subsection (a)(2). *Id.* § 622(a)(2). Significantly, subsection (b), which we characterize as one of the section's several consent provisions, identifies those individuals, generally the mother, who may consent, by means of an affirmative petition, to an offender father's parental responsibilities and parenting time.³ *Id.* § 622(b). The consent provisions are without limitation, conditions, or exceptions.

Subsection (f) sets out the manner in which the mother may either give or object to consent in any proceeding filed by persons identified in [**102] [****689] subsection (a). Overall, section 622 is a legislative acknowledgment that a mother's will was either overborn, such that no consent was given, or that due to the age of minority, no consent could be given for the sexual conduct that produced a child. The practical effect of the section is to prohibit persons described in section (a) from the rights and enjoyment of parenting unless consented to by the mother. In our view, the section promotes Illinois's strong public policy against victimized [****16] women suffering revictimization that would result from an offender father engaging in parental privilege with the victim mother.

[*P32] Petitioner does not dispute the circuit court's finding that there is clear and convincing evidence that petitioner committed an act of nonconsensual sexual penetration which resulted in D.S.'s conception. We agree with the finding as well, as it is supported by the evidence presented at the hearing. "[T]he prescribed age of consent in Illinois is 17 ***." People v. Lloyd,

³Under subsection (c), the mother is given authority to "decline support and maintenance obligations from the father." 750 ILCS 46/622(c) (West 2018). Under subsection (d), the mother is given authority to consent to the father having "inheritance or other rights," otherwise he is not entitled to any. *Id.* § 622(d). And finally, under subsection (e), the mother is given authority to consent to relatives of the father petitioning for parental responsibilities or parenting time. *Id.* § 622(e).

[2013 IL 113510, ¶ 30, 987 N.E.2d 386, 369 Ill. Dec. 759](#); see also [720 ILCS 5/11-1.50\(c\)](#) (West 2018) (the offense of criminal sexual abuse occurs where the victim is "at least 13 years of age but under 17 years of age" and the person who committed the act of sexual penetration is "less than 5 years older than the victim"). Regardless of respondent's testimony that petitioner "forced" her to have sex with him and that he was abusive towards her throughout their relationship, a lack of consent is presumed by law due to respondent's age. Thus, under [subsection \(a\)\(2\)](#), petitioner is prohibited from parenting time with the child. The only contested issue in this case is whether the mother's alleged prior consent to petitioner's parenting time, once given, may be withdrawn.

[*P33] Both petitioner and respondent **[***17]** argued the issue of consent to parental responsibilities and parenting time in their memoranda related to the evidentiary hearing. The circuit court, however, limited the fact-finding hearing to the issue of whether [subsection \(a\)](#) was applicable to petitioner.

The court's order following the hearing did not address consent to parental responsibilities whatsoever. We note the circuit court's mention of "consent" in its order. Clear from the language, however, is that the court's ruling was with regard to the issue of consent to sexual penetration, as opposed to consent to parenting.

[*P34] We believe that the circuit court's ruling, which made no factual findings on the issue of consent, was consistent with the objects of the Parentage Act, protection of the mother's right to withhold consent without fear of coercion by the offender father. Other than [subsection \(a\)\(2\)](#)'s provision for a hearing to determine whether conception resulted from nonconsensual sexual penetration, [section 622](#) mandates no judicial determination of any kind on any issue covered in this provision.

[*P35] Petitioner argues in his brief that respondent's prior consent to petitioner's parenting, which he claims is evidenced by a variety of actions taken prior to the instant **[***18]** action, should foreclose respondent from asserting her rights to decide whether petitioner is permitted to parent the child. Essentially, he argues that the statute should be construed as requiring a judicial determination of whether the mother has previously consented at any point to the father's parenting of the child. He further argues that the DCFS safety plan lends credence to his assertion that respondent had previously consented to his parenting privileges.

[*P36] We note language in the circuit court's order that there was "no evidence in the record that DCFS conducted a fact-finding hearing prior to placing the child **[**103]** **[***690]** with the [p]etitioner." Regardless, although nothing in [section 622](#) of the Parentage Act bars a mother from giving consent without the filing of a petition, neither does anything in the Parentage Act bind her to a prior given consent. To ensure against a victim mother's unwelcome shared parenting with an offender father, or potential coerced consent, the Parentage Act provides a mechanism by which she may statutorily express her intent to either allow or to bar the same. See [750 ILCS 46/622\(f\)](#) (West 2018). No affirmative petition appears in the record. Not only is petitioner's interpretation not **[***19]** supported by the plain language of the statute, but it is also contrary to the legislature's intent to vest in the mother, who conceived as a result of conduct defined in [subsections \(a\)\(1\)](#) or [\(a\)\(2\)](#), complete autonomy to decide the issue of parenting rights. Further, to read the statute as petitioner urges creates the opportunity for an offender father, who might have obtained the mother's consent as a result of coercion, to do exactly that which the Parentage Act seeks to protect against.

[*P37] Petitioner additionally argues that the court's dismissal of his petition is not only contrary to the plain language of the statute, the policy of our state, but also the best interest of the minor child, "the guidepost for all actions involving minor children, and the very purpose of the Act." To be clear, petitioner brought this action under the Parentage Act. Petitioner misses the point of [section 622](#). A determination of parentage does not automatically vest in the father parental rights when fatherhood was the result of what the state has defined as illegal or criminal sexual conduct. Absent a mother's free and unfettered consent, fathers identified in [section 622\(a\)\(2\)](#) of the Parentage Act shall not enjoy either parenting responsibilities or **[***20]** parenting time. [Subsection \(f\)](#) provides the mechanism by which that consent, in the discretion of the mother, may be permitted or barred.

[*P38] Further, [section 622](#) parentage proceedings are not proceedings like those under the Adoption Act ([750 ILCS 50/1 et seq.](#) (West 2018)), the [Juvenile Court Act of 1987 \(705 ILCS 405/1-1 et seq.](#) (West 2018)), or the [Illinois Marriage and Dissolution of Marriage Act \(750 ILCS 5/101 et seq.](#) (West 2018)) in which custody determinations are guided by the overriding principle of the best interest of the child. Notably, this matter was not joined with any other permissible proceeding in which such determinations are required. See 750 ILC

46/611(a) (West 2018) (except as provided in subsection 611(b), a proceeding to adjudicate parentage may be joined with another appropriate proceeding, such as for adoption or termination of parental rights). Further, if under [section 622](#), "in the best interest" were to present as an overriding factor to consent, in cases where a mother is determined to be unfit, as is alleged here, the offender father might be awarded parental privileges, despite his prior offending conduct. Clearly, such a result would be in contravention of the Parentage Act. In any case, had the legislature intended the mother's consent under [section 622](#) to be subject [***21] to a best interest of the child analysis, nothing precluded it from saying so.

[*P39] Petitioner points to no case which construes [section 622\(b\)](#) of the Act, and we are only aware of one, [Deaver v. Jordan, 2020 IL App \(5th\) 200084-U](#).⁴ In [Deaver](#), the circuit court [**104] [****691] granted the father's petition for parenting time. *Id.* ¶ 16. On appeal, the mother argued that the court erroneously interpreted [section 622](#) of the Parentage Act in determining that both she and her adoptive mother had previously consented to the father having parenting time with the child. *Id.* ¶ 22. A divided panel of the Fifth District Appellate Court affirmed the circuit court's ruling, finding that the plain language of [section 622\(b\)](#) allows for allocation of parental responsibilities where the minor mother consents, the evidence supported a conclusion that she had consented, and the best interest of the child would be served by allocating parental responsibilities to the father as he had already established a relationship with the child. *Id.* ¶ 29. The court held that a showing of prior consent was sufficient to nullify the applicability of [section 622](#). *Id.* The court further stated: "The plain language of [622\(b\)](#) does not require a mother's continued or ongoing consent for each exercise of parental responsibility or each [***22] exercise of parenting time by the father." *Id.* The dissent, however, came to the opposite conclusion. The dissent took the position that after finding that the father fit within the definition of [section 622\(a\)\(2\)](#), the court had no authority to enter an order of parental responsibilities

"unless the minor mother is in agreement," which she was not in this case, as evidenced by the contentious legal dispute. (Emphasis in original.) *Id.* ¶¶ 38-39 (Barberis, J., dissenting). The dissent rejected the majority's conclusion that the father was permitted parental responsibilities based on the mother's prior consent. *Id.*

[*P40] We believe that the dissent in [Deaver](#) reached the correct result. Here, respondent filed an affirmative defense to the petition seeking parental responsibilities and parenting time. Even assuming her prior consent, other than filing her affirmative defense to bar parenting time, nothing more in the statute is contemplated and nothing more in the statute is required.

[*P41] We are not unaware of the potential dangers to which petitioner alludes should a mother be permitted to give and then withdraw consent. We trust that the legislature was also aware of this possibility in enacting the statute. However, [***23] we believe that the parenting rights vested exclusively in the mother strike the proper balance under the circumstances addressed by this section of the Parentage Act. Further, as [section 622\(f\)](#) makes available the filing of an affirmative petition, we believe that the likelihood of repeated withdrawals of consent is diminished. We would also point out that it is no more likely that consent, once given, will be withdrawn than it is that once given it would not be. In any case, given the objects of [section 622](#), the possibility that a mother might change her mind is not reason either to graft on exceptions or to ignore the plain language of the Parentage Act.

[*P42] Additionally, the absence in [section 622](#) of any procedural directives to the courts supports a conclusion that the legislature did not intend a mother's consent to be subject to complex and a potentially protracted judicial determination. The legislature's silence in this regard comports with

an interpretation that the mother's consent is to be determined upon the filing of either an affirmative petition or defense, as it would likely be a straightforward determination. We also find it implausible that the legislature intended for the clause to operate on the basis [***24] of prior consent. [**105] [****692] Notably, in the case of a mother, not yet of majority age, any alleged prior "consent" would not be informed or knowing, as it is likely that she would lack knowledge of her legal authority under this section to deny parental privileges to an offender father.

⁴This order was issued pursuant to *Illinois Supreme Court Rule 23* (eff. Apr. 1, 2018) prior to January 1, 2021. Therefore, the recent amendment to *Rule 23(e)(1)* is inapplicable as the Fifth District did not intend for it to serve persuasive value. Even so, this court is not bound by even published rulings from other districts, divisions, or panels. See [O'Casek v. Children's Home & Aid Society of Illinois, 229 Ill. 2d 421, 440, 892 N.E.2d 994, 323 Ill. Dec. 2 \(2008\)](#).

[*P43] Finally, when viewing the plain language of the Parentage Act—a person qualifying under [subsection \(a\)](#) shall not be allocated parental responsibilities without the consent of the mother—the consent clause suggests a present tense. If the legislature had intended nullification of the provision based on the mother's prior consent, it would have used the past tense. For example, the clause may have been worded instead as "unless the mother has consented." Because the clause is written in the present tense, it logically follows that consent is to be determined based upon the mother's filing of an affirmative petition—not by some other means at some other time in the past.

[*P44] We note as an aside that Illinois enacted section 622 around the time when there was a nationwide effort to enact legislation allowing a parent to terminate the parental rights of a person who fathered a child through rape.⁵ This was in no small part due to Congress passing [*P25] the Rape Survivor Child Custody Act to incentivize state legislation with federal funding. See [34 U.S.C. § 21301 \(2018\)](#). It was against this backdrop that Illinois, and several other states, enacted laws to provide agency for a victim-mother who has chosen to raise child, conceived out of rape, and to prevent a revictimization or "a second injustice in finding no legal protection against custody or visitation being awarded to a rapist parent." Anastasia Doherty, *Choosing to Raise a Child Conceived Through Rape: The Double-Injustice of Uneven State Protection*, [39 Women's Rts. L. Rep. 220, 224 \(2018\)](#).

[*P45] Here, our review of the record demonstrates that respondent not only made clear in her pleadings that she does not currently consent to an allocation of parental responsibility to petitioner but, additionally, during the hearing on the issue of parentage, she also testified that she does not consent to him or his family members parenting D.S. Although the circuit court did

not expressly rule on respondent's affirmative defense to the petition, as our review is *de novo*, we do so here and find that, pursuant to [subsection \(b\)](#), petitioner is prohibited from parental [*P26] responsibilities and parenting time. Petitioner's references to respondent's past behavior, police reports, and the safety plan are irrelevant in these proceedings. The only issue is consent, and respondent having presented an affirmative defense, no amendment of petitioner's petition could alter that result.

[*P46] We hold that [section 622\(a\)\(2\)](#) is applicable to petitioner and, pursuant to [section 622\(f\)](#), respondent has presented an affirmative matter cognizable under [section 2-619](#) of the Code. Accordingly, the circuit court did not err in dismissing the petition with prejudice.

[*P47] [*P693] [*P106] That said, having reviewed the record, it does not escape our notice that the minor in this case may require, for its well-being, intervention from the appropriate state agencies charged with ensuring the physical and emotional well-being of minors. The absence of a stable home environment can have long-lasting negative effects on every aspect of a child's development. Here, we hold only that respondent has not consented to petitioner's request for parental responsibilities and parenting time for D.S. Nothing in this court's opinion, however, should be read to impede the activities of any appropriate state agencies in the discharge of their duties on behalf [*P27] of the minor child. Neither, by our holding, are either of the parties foreclosed from the filing of any future petitions.

[*P48] III. CONCLUSION

[*P49] For the reasons stated, we affirm the judgment of the circuit court.

[*P50] Affirmed.

End of Document

⁵Although several other states have statutes prohibiting a father whose child was conceived as a result of sexual assault or nonconsensual sexual intercourse from enjoying parental privileges, none appear identical to statute at issue. For instance, others may require express written consent from the mother, require the court to conduct a best-interests analysis, or some combination of the two before waiving application of the statute. Moreover, these statutes, just as ours, are relatively new and many have not been subjected to judicial interpretation. See Anastasia Doherty, *Choosing to Raise a Child Conceived Through Rape: The Double-Injustice of Uneven State Protection*, [39 Women's Rts. L. Rep. 220, 314-56 \(2018\)](#) (Tables 3 to 6).

APPELLEE'S APPENDIX V

In re Parentage of R.V.

Court of Appeals of Washington, Division Two
March 7, 2022, Oral Argument; June 7, 2022, Filed
No. 55303-1-II

Reporter

22 Wn. App. 2d 300 *; 511 P.3d 148 **; 2022 Wash. App. LEXIS 1172 ***

In the Matter of the Parentage of R.V.

Prior History: [***1] Appeal from Clark Superior Court. Docket No: 19-5-00229-2. Judge signing: Honorable Robert A Lewis. Judgment or order under review. Date filed: 11/30/2020.

Counsel: *Andrew K. Helland* (of *Helland Law Group PLLC*), for appellant.

Anna K. Russo, for respondent.

Judges: Authored by Erik Price. Concurring: Linda Lee, Rebecca Glasgow.

Opinion by: Erik Price

Opinion

[*304] [**150]

¶1 PRICE, J. — C.V. filed a petition to determine the parentage of a child, R.V., asserting that he was the child's father. In response, H.S., R.V.'s mother, filed an allegation of sexual assault, claiming that R.V. was born as a result of sexual assault by C.V. and requesting that he be denied parental rights under [RCW 26.26A.465](#), which precludes establishment of parentage by a perpetrator of sexual assault. After a fact-finding hearing, the trial court found that R.V. was born as a result of C.V.'s sexual assault of H.S. and, therefore, C.V. did not have parental rights with regard to R.V.

[**151]

¶2 C.V. appeals the trial court's order. First, C.V. argues that there was insufficient evidence to support the trial court's determination that R.V. was born as a result of a sexual assault. Second, C.V. argues that [RCW 26.26A.465](#) violates his due process and equal protection [***2] rights—rights he asserts are rooted in his fundamental right to parent. We disagree with both of his arguments. We determine that there was sufficient

evidence for the trial court's finding of sexual assault, and we hold that perpetrators of sexual assault have no fundamental due process rights to parent [*305] children born as a result and are not similarly situated to established parents for the purposes of the equal protection analysis. Accordingly, we affirm the trial court.

FACTS

I. BACKGROUND

¶3 C.V. and H.S. met when H.S. was homeless in 2012. At the time, C.V. was living with Susana Godinez and their four children. Shortly thereafter, H.S. moved in with C.V., Godinez, and the children.

¶4 In 2015, C.V. was convicted of possession of a controlled substance with intent to deliver and ultimately sentenced to 112 months in prison. Just after C.V. was sentenced, H.S. discovered she was pregnant with C.V.'s child. She gave birth to R.V. in August 2016, approximately 9 months after C.V. was incarcerated.

II. PETITION TO DECIDE PARENTAGE

¶5 In 2019, C.V. filed a petition to decide parentage of R.V. In response, H.S. filed a sexual assault allegation, stating that C.V. had repeatedly sexually assaulted [***3] her from 2013 to 2015 and R.V.'s birth was a result of a sexual assault. H.S. requested, pursuant to [RCW 26.26A.465](#), that the court deny C.V. any rights as a parent of R.V. because his conception was the result of sexual assault.

¶6 C.V. denied the allegation, maintaining that he and H.S. had been in a loving and peaceful relationship and requested a fact-finding hearing.

III. FACT-FINDING HEARING

A. TESTIMONY FOR H.S.

1. H.S.'s Testimony

¶7 H.S. testified at the fact-finding hearing that C.V. had been abusive toward her in the five years prior to his incarceration. [*306] H.S. also testified that from the

time she had first started living in C.V.'s home, he threatened her and told her not to leave without his permission. For example, she went out for a walk the first night she was at the home while C.V. was spending a couple nights in jail. When C.V. found out, he said, "Don't you ever go anywhere. ... I'm gonna F you up when I get out of here. You just wait and see." Verbatim Rep. of Proc. (VRP) at 117. Later, she attempted to leave in a car, but C.V. chased her down with a gun and shot at her. H.S. also tried to leave on other occasions, but she said similar threats from C.V. against her and her family [***4] prevented her from doing so.

¶8 H.S. also testified that C.V. did not allow her to have a phone, and although at times she would obtain a prepaid phone, C.V. would take it from her when he found out. And, she did not have access to a vehicle.

¶9 H.S. said that, at some point, C.V. rented a building and locked her in it. C.V. chained the doors so that H.S. could not leave and then would come back and sexually assault her. H.S. said that when she told C.V. that she did not want to have sex, he pistol-whipped her. On a subsequent occasion, C.V. came into H.S.'s room, and she told C.V. that she did not want him to touch her. In response, C.V. slashed H.S.'s mattress with a knife until she let him penetrate her. On other occasions, C.V. behaved in a similarly threatening manner, wielding a gun or a knife when he wanted to have sex with H.S.

¶10 In the months prior to C.V.'s incarceration and during the time period in which R.V. was conceived, H.S. was living in C.V.'s garage in a makeshift bedroom. C.V. would make markings on the door where H.S. was staying to ensure she did not leave without his permission. H.S. testified:

I was only allowed to leave when [C.V.] gave me permission to leave. I didn't [***5] go [**152] into the kitchen unless I had permission to go into the kitchen. I didn't go outside unless I had permission from him to go outside. And he was not home a lot of the time, [*307] so I would just sit there and wait, and wait, and wait for somebody.

VRP at 124. At times, H.S. was not allowed to leave the garage for more than 48 hours.

¶11 During the time period when R.V. was conceived, C.V. repeatedly threatened H.S., saying that he was going to get her pregnant so that she could never leave him, and he would force her to have intercourse with him by using violence. H.S. said that when she would tell C.V. that she did not want to have sex with him, he would brandish his gun or another weapon to threaten

her and then get on top of her. On multiple occasions, C.V. held a pillow over H.S.'s face so that she could not breathe. She testified that she would try to resist:

I was kicking my legs and swinging my arms and he would use his arms and like his elbows and hold my arms down, and he would use all of his body weight to hold the rest of my body down, and he would just leave the pillow on my face, and I would be screaming under my breath, "Please, I'll stop. I'll be good. I'll listen. I'm so sorry." [***6] I have never experienced that close to near death before. I mean, I can't even explain the feeling of being suffocated.

VRP at 126-27. Afterwards, C.V. would bring gifts to H.S. like clothes and jewelry as an apology for his actions.

¶12 Immediately after C.V. went to prison, H.S. moved in with her mother. Two days later, she found out she was pregnant with R.V. There was no evidence that H.S. had intercourse with anyone other than C.V. during the time period of R.V.'s conception.

¶13 H.S. testified that C.V. sent her letters while he was in prison. In one letter, C.V. wrote that he had been waiting for her to send him pictures and he was going to beat someone up if she did not. Frightened for herself and others, H.S. sent C.V. pictures.

¶14 In another letter, C.V. said, "I will never let you go. You are for me and only me. I hope you know that if you are [*308] not for me, you are for nobody. ... Well anyway I will fight anybody for you and for your love." VRP at 133. H.S. interpreted the letter to mean that she could not have another person in her life or be in a relationship with another man. H.S. believed that if she was not with C.V., he might kill her.

¶15 H.S. testified that she felt threatened by the [***7] contents of the letters and was fearful for herself and others. Moreover, C.V.'s repeated statements that he was going to get out of prison and come home soon made her feel like, unless she did what he asked, he would hurt her and her family when he got out.

¶16 H.S. admitted to having sent several letters and pictures to C.V. while he was in prison saying that she loved him and she was glad they were having a baby, but H.S. maintained that she wrote the letters out of fear. H.S. also admitted to having visited C.V. in prison on multiple occasions and asking him to sign an acknowledgement of paternity. She had not sought a protection order against C.V. until after he brought the

paternity action but said that was also out of fear. Additionally, H.S. admitted that around the time she stopped contacting C.V., she became romantically involved with someone else.

2. Additional Testimony

¶17 Other witnesses corroborated aspects of H.S.'s testimony. Pat Meyers, a retired police officer and friend of H.S.'s mother, testified that in August 2015, H.S.'s mother called and informed him that H.S. had told her she had been abused and asked for his help to pick her up. When they got to where H.S. was, she [***8] ran to the vehicle, got in, and said, "Let's go, let's go, let's go. He's looking for me. He said he's going to kill me." VRP at 165. H.S. appeared scared and hysterical. While they drove, H.S. received multiple phone calls from C.V. as she sat crying.

¶18 Regarding H.S.'s testimony that C.V. owned and used guns, Meyers was shown pictures of C.V. and his children [*309] holding guns and pointing the weapons at the camera. Meyers testified that in his opinion as a former law enforcement officer, the guns appeared real. [**153]

¶19 H.S.'s mother testified consistently with Meyers' testimony about the evening that they had picked up H.S. She also said that the next day, C.V. showed up and took H.S. back to his home. She said that while H.S. was living with C.V., she was rarely able to talk with H.S. During the phone conversations they did have, she could hear violence in the background. She would hear screaming and H.S. saying things like "Don't hit me" or "Leave me alone." VRP at 175. When she saw H.S. in person, her arms were bruised and one time there was bruising around her eyes.

¶20 The mother said that after C.V. went to prison, H.S. called and asked her to come get her. C.V.'s home was located in a very remote, [***9] difficult to reach area. When she arrived, H.S. was thin, dirty, and bruised, and she told her mother that C.V. had been beating her and forcing her to have sex with him. Later, C.V. called the mother's home multiple times and threatened that when he got out of jail he was going to take H.S. and "take care of [H.S.'s mother]." VRP at 180.

¶21 H.S.'s cousin also testified. She said that when H.S. was living with C.V., she witnessed H.S. with a black eye. H.S. told her that C.V. had hit her and was forcing her to do things she did not want to do. She said H.S. had called her at one point, but C.V. took the phone and told her he was listening, and then she heard H.S. say,

"Stop hitting me" in the background before hanging up. VRP at 191.

B. TESTIMONY FOR C.V.

1. C.V.'s Testimony

¶22 Prior to the fact-finding hearing, C.V. filed a series of declarations that disputed nearly all of H.S.'s allegations. C.V. stated that he had never threatened or abused H.S. but that they were lovers and H.S. had wanted to get pregnant. [*310] He maintained that H.S. had frequently visited him and communicated with him while he was in prison and provided copies of visit logs and communications to support his statements. C.V. said [***10] that while he had been in prison, H.S. became involved in a relationship with someone else and had filed the petition because she wanted C.V. "out of the picture." Clerk's Papers at 291. C.V. also submitted declarations from himself and other persons who knew him and H.S. to support his statements. In addition, C.V. supplied evidence of payments he had sent to H.S. to help support R.V.

¶23 At the fact-finding hearing, C.V. continued to tell a very different version of events. He stated that there were several vehicles available for H.S.'s use and that after she had lived there for about a year, C.V. purchased for H.S. a car of her own. Starting in 2013, H.S. had told him that she wanted to "have [his] baby," and they were actively trying to get pregnant. VRP at 29.

¶24 C.V. maintained that there had never been any domestic violence issues in his relationship with H.S. He noted that, on one occasion, someone had called the police because he and H.S. were arguing, even though nothing violent had occurred. When police arrived, there were no physical marks on H.S., and although he was taken into custody, he was released the next day.

¶25 C.V. characterized H.S. as excited when she discovered she was [***11] pregnant. H.S. visited him frequently while he was in prison and, after R.V. was born, H.S. and R.V. also had video visits with him, including on the day R.V. was born. H.S. even worked on paperwork to bring R.V. for a visit, although she never actually did. H.S. sent him letters and pictures of herself and R.V. C.V. also financially supported H.S. and R.V. Additionally, he signed an affidavit of paternity for R.V. that H.S. had sent to him, although H.S. never filed it.

¶26 At some point, H.S. met someone else and her communication with C.V. waned. C.V. said about that

time, he [*311] saw a picture from H.S.'s social media of R.V. holding a beer. C.V. got upset with H.S. and sent her a text saying he knew where her boyfriend was, but he denied being angry or threatening.

¶27 During cross examination, C.V. was confronted with letters in which he seemed to be apologizing to H.S. for “put[ting] hands” on H.S., but he denied writing any of them. VRP at 43-45, 81. C.V. did admit that in his letters to H.S., he often said he was going to [*154] get out of prison soon, despite the fact that he was serving a 10 year sentence. He made statements like, “And remember that sooner than later I will come home.” VRP [*12] at 87. However, C.V. maintained that these statements were not intended to be threatening.

¶28 C.V. also admitted to writing letters to H.S., saying things like he hoped she would not run from him again when he got out of prison. But he said these letters were referring to times H.S. would “play games” with him. VRP at 89. He claimed that he was talking about the times H.S. would leave because she was supposedly upset at him and forced him to chase her but, like a game, she would always come back. He maintained that statements like, “Now you are a part of me forever, and now you [can] run but you can’t hide. Now I have you forever, baby. Baby, I’m coming home soon,” and “[I]f you are not for me, you are for nobody” were expressions of love and affection. VRP at 93-94. He also admitted to sending another letter to H.S. after she had apparently broken up with him, saying, “Be Careful. That how you want to do it,” and “[R]emember I said that if you are not for me, you are not for no one. I’ll give my word on that.” VRP at 96-98. He stated that the letter was simply an attempt to persuade H.S. to be with him and let him see R.V. C.V. provided similar explanations for other similar letters.

¶29 C.V. [*13] denied owning or possessing a gun. When confronted with photos showing C.V. and his children pointing guns at the camera, he maintained that the guns in the pictures were merely BB guns.

[*312] 2. Additional Testimony

¶30 C.V. also presented testimony from five different friends and family members who stated that they never observed abuse in C.V. and H.S.'s relationship. However, only one of these witnesses, Godinez, had spent a significant amount of time with C.V. and H.S.

¶31 Godinez testified that although she was upset when C.V. and H.S. became romantically involved, she never

saw any injuries on H.S. and never saw C.V. behave abusively toward H.S. Godinez said that H.S. had a vehicle at her disposal to come and go from C.V.'s home. She also stated that she had seen texts between the two of them talking about trying to have a child together.

IV. TRIAL COURT'S DECISION

¶32 At the conclusion of the fact-finding hearing, the trial court issued its written decision that the birth of R.V. was a result of sexual assault by C.V. and the child was born within 320 days of the sexual assault.

¶33 In its written decision, the trial court noted that interpreting the evidence was difficult because both parties had credibility [*14] issues but stated that there was credible evidence that C.V. and H.S.'s relationship was based on domestic violence. The trial court noted that it did not believe that everything occurred exactly as H.S. had testified and there were issues with her credibility.

[1] ¶34 In its oral decision, the trial court stated that victims of domestic violence often exhibit behaviors that appear to be irrational.¹ The trial court explicitly acknowledged that domestic violence did not necessarily mean that there was sexual assault, but stated that it still was convinced that R.V. was conceived as a result of an assault. [*313] The trial court also stated that C.V. was not a particularly credible witness and the testimonies of other friends and relatives of C.V. who had not spent significant time with C.V. and H.S. were not persuasive. The trial court acknowledged that the testimony of Godinez was more difficult to reconcile as she had lived with both of them and did not seem to have a motive to provide false testimony. However, ultimately, the trial court was convinced by the testimony and evidence that H.S. presented that her sexual assault allegation was true.

¶35 Based on its finding of sexual assault, the trial court determined, [*15] under [RCW 26.26A.465](#), that C.V. was not a parent, dismissed him from the action, and entered a [*155] final parentage order. The trial court subsequently denied C.V.'s motion for reconsideration.

¶36 C.V. appeals.

¹“When findings are incomplete, appellate courts may look to the trial court’s oral decision to interpret the judgment.” [City of Lakewood v. Pierce County, 144 Wn.2d 118, 127, 30 P.3d 446 \(2001\)](#).

ANALYSIS

I. CLEAR, COGENT, AND CONVINCING EVIDENCE

A. LEGAL PRINCIPLES

[2] ¶37 In 2017, the legislature passed a statute precluding the establishment of parentage by a perpetrator of sexual assault. See SUBSTITUTE H.B. 1543, 65th Leg., Reg. Sess. (Wash. 2017). The statute was later codified into the Uniform Parentage Act and provides:

In a proceeding in which a parent alleges that a person committed a sexual assault that resulted in the parent becoming pregnant and subsequently giving birth to a child, the parent may seek to preclude the person from establishing or maintaining the person's parentage of the child.

[RCW 26.26A.465\(2\)](#). “Sexual assault” is defined as “nonconsensual sexual penetration that results in pregnancy.” [RCW 26.26A.465\(1\)](#).

¶38 When a parent makes an allegation under the statute, a trial court must conduct a fact-finding hearing. [RCW 26.26A.465\(5\)](#). [**314] An allegation of sexual assault must be proved by “[c]lear, cogent, and convincing evidence that the person committed sexual assault ... and the child was born within three hundred twenty days after the [***16] sexual assault.” [RCW 26.26A.465\(6\)\(b\)](#).

[3-6] ¶39 Clear, cogent, and convincing evidence requires that the ultimate fact at issue be shown to be “highly probable.” [In re Welfare of Sego, 82 Wn.2d 736, 739, 513 P.2d 831 \(1973\)](#) (quoting *Supove v. Densmoor*, 225 Or. 365, 372, 358 P.2d 510 (1961)). When clear, cogent, and convincing evidence is required, we review a trial court's findings of fact for substantial evidence in light of the “highly probable” test. *Id.* “Substantial evidence’ is evidence sufficient to persuade a fair-minded rational person.” [In re Welfare of A.B., 181 Wn. App. 45, 59, 323 P.3d 1062 \(2014\)](#). Evidence that is sufficient under a preponderance of the evidence burden of proof is not necessarily sufficient under the higher burden of proof of clear, cogent, and convincing evidence. [Sego, 82 Wn.2d at 739](#). Appellate courts do not weigh evidence or make credibility determinations, but we may review the entire record to determine whether the trial court's findings are supported by sufficient evidence. [Id. at 739-40](#); [In re Det. of LaBelle, 107 Wn.2d 196, 219, 728 P.2d 138 \(1986\)](#).

B. APPLICATION

¶40 C.V. argues that the trial court erred in finding that H.S. had shown that R.V. was born as a result of sexual assault by clear, cogent, and convincing evidence. Specifically, C.V. contends that the trial court ignored “credible” evidence showing that R.V. was not the product of sexual assault; H.S. failed to provide testimony about the specific dates of the sexual assault, which is required by the statute; [***17] and the trial court improperly characterized domestic violence as sexual assault. We disagree.

¶41 H.S. presented a significant amount of evidence regarding the assaultive nature of her relationship with C.V. [**315] H.S. testified that during the five years she was living with C.V. he was regularly abusive. During the critical time period when R.V. was conceived (just before C.V.'s incarceration), H.S. testified that she was living in C.V.'s garage, where he repeatedly forced her to have intercourse with him and denied her the ability to leave without his permission. H.S.'s graphic testimony directly supported her allegation that R.V. was conceived through a violent assault.

¶42 H.S. also presented numerous threatening letters that, together with the testimony of her mother, Meyers, and her cousin regarding their interactions with H.S. during and around the time of the sexual assault, corroborated H.S.'s testimony. Viewed as a whole, coupled with the credibility determinations that are within the province of the trial court, sufficient evidence supports the conclusion that H.S.'s relationship with C.V. was one of violence during the time period R.V. was conceived, making her allegations that R.V. [***18] was the result of sexual assault highly probable. [**156]

¶43 C.V. disputes this conclusion with several specific arguments. First, C.V. argues that the trial court ignored, without justification, “credible” evidence showing that R.V. was not the product of sexual assault, including the testimony of Godinez that C.V. never abused H.S. and that H.S. was free to come and go as she wished. However, the trial court did not ignore Godinez's testimony. On the contrary, the trial court explicitly acknowledged this testimony, stating that Godinez's testimony was more difficult to reconcile with its findings and acknowledging that she had no apparent reason to lie. However, in weighing the evidence, the trial court found that the evidence was sufficient to support a finding that sexual assault did occur. C.V. appears to be asking this court to reweigh the evidence or make different credibility findings. Because we do not make credibility determinations, C.V.'s argument fails.

[7] ¶44 C.V. next argues that H.S. failed to provide testimony about specific dates on which she was sexually assaulted, which he claims is required by the statute. However, [*316] the statute does not require proof of a specific instance of sexual [***19] assault. Rather, it requires a showing that a sexual assault was committed and that a child was born within 320 days of the sexual assault. [RCW 26.26A.465\(6\)](#). H.S. presented evidence that she was repeatedly sexually assaulted by C.V. during the entire time period in which R.V. was conceived. Although H.S.'s testimony did not pinpoint the specific instance of sexual assault where she became pregnant with R.V., the statute does not require her to do so. Thus, we determine that this argument fails.

¶45 Finally, C.V. argues that the trial court improperly characterized domestic violence as sexual assault and that evidence of domestic violence was irrelevant to the “narrow” question of sexual assault. This argument ignores the record as a whole. The trial court commented that domestic violence was present in H.S. and C.V.'s relationship, but it also explicitly stated that a finding of domestic violence did not necessarily result in a finding of sexual assault. The trial court's finding that R.V. was a product of a sexual assault was sufficiently supported by H.S.'s testimony about the repeated sexual assaults she endured during the window of R.V.'s conception, which the trial court found to be sufficiently credible. [***20] Therefore, we find that this argument, too, fails.

¶46 Looking at the record as a whole, the trial court's determination that R.V. was born as a result of sexual assault was supported by substantial evidence in light of the highly probable test required by the clear, cogent, and convincing standard imposed by [RCW 26.26A.465](#).

II. CONSTITUTIONALITY OF [RCW 26.26A.465](#)

[8, 9] ¶47 C.V. next argues that [RCW 26.26A.465](#) violates both his substantive due process and equal protection [*317] rights because he possesses the fundamental right to parent R.V.² We disagree.

[10] ¶48 As a preliminary matter, C.V. failed to bring his due process and equal protection arguments at the trial

court level. Therefore, we may refuse to review this claim of error unless C.V. demonstrates a manifest error affecting a constitutional right. See [RAP 2.5\(a\)](#). However, given the significance of the constitutional issues raised by C.V., we are deciding to exercise our discretion and address them. See [RAP 2.5\(a\)](#); [Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 844 \(2005\)](#).

A. DUE PROCESS

1. Legal Principles

[11, 12] ¶49 Under both the state and federal constitutions, no person may be deprived of life, liberty, or property without due process of law. [U.S. Const. amends. V, XIV, § 1](#); [Wash. Const. art. I, § 3](#). These provisions protect a parent's fundamental right to parent their child. [Meyer v. Nebraska, 262 U.S. 390, 399-400, 43 S. Ct. 625, 67 L. Ed. 1042 \(1923\)](#); [In re Welfare of Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 \(1980\)](#).

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[13] ¶50 However, this right is not absolute. [Sumey, 94 Wn.2d at 762](#). A statute may [***21] limit the fundamental right to parent if it passes *strict scrutiny*, meaning it is narrowly tailored to advance a compelling state interest. [In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 \(1998\)](#), *aff'd sub nom. Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)* (plurality opinion). Under this standard, “the state may interfere only ‘if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.’” [Id. at 17](#) [*318] (quoting [Wisconsin v. Yoder, 406 U.S. 205, 234, 92 S. Ct. 1526, 32 L. Ed. 2d 15 \(1972\)](#)).

[14, 15] ¶51 When a due process claim does not involve a fundamental right, the standard of review is *rational basis* review. [In re Det. of Morgan, 180 Wn.2d 312, 324, 330 P.3d 774 \(2014\)](#). Rational basis review requires that the challenged law be rationally related to a legitimate government interest. *Id.*

[16] ¶52 We reviews claims of constitutional error de novo. [Zaitzeff v. City of Seattle, 17 Wn. App. 2d 1, 7, 484 P.3d 470, review denied, 198 Wn.2d 1009 \(2021\), cert. denied, 142 S. Ct. 1123 \(2022\)](#).

2. Application

[17-19] ¶53 C.V. argues that [RCW 26.26A.465](#) violates his substantive due process rights because the statute infringes on his fundamental right to parent and is not narrowly tailored to achieve a compelling state interest

²Although C.V. appears to raise both federal and state due process and equal protection arguments, because the federal and state rights under these clauses are identical, they are each analyzed as one issue. See [State v. Manussier, 129 Wn.2d 652, 672, 679-80, 921 P.2d 473 \(1996\)](#).

and, thus, fails strict scrutiny.³ He argues that the statute is not narrowly tailored because it does not require any analysis as to whether his contact with R.V. is in the best interests of the child. C.V. also maintains that no compelling state interest is advanced by preventing him from establishing paternity without findings [***22] related to potential harm to R.V. We disagree.

¶54 The cornerstone of C.V.'s entire argument is the presumption that his biological role in the conception of R.V. automatically confers on him the constitutionally protected fundamental right to parent. C.V. is wrong. The fundamental right to parent is not necessarily inherent in the fact of a biological relationship. Lehr v. Robertson, 463 U.S. 248, 261, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983). The United States Supreme Court has held that the parent-child [*319] relationship merits constitutional protection only in “appropriate cases”:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

Id. at 256, 262 (footnote omitted) (court holds that due process rights of putative father who had never established relationship with his child [***23] were not violated by failure to provide notice of adoption proceedings).

¶55 Although the Supreme Court and Washington courts have never addressed the precise issue of whether a sexual assault perpetrator has the same rights as other parents, the Seventh Circuit Court of Appeals has interpreted the Lehr decision to mean that where a person commits a sexual assault that results in the birth of a child, the person does not acquire a fundamental right to parent that child. Peña v. Mattox, 84 F.3d 894, 899-900 (7th Cir. 1996) (POSNER, J.).

³C.V.'s brief suggests a possible *procedural* due process claim in addition to a *substantive* due process claim. However, C.V. conceded during oral argument that he was not raising a procedural claim, so we limit our consideration to only a substantive claim.

¶56 In Peña, the court held that the biological father of a child conceived as a result of statutory rape did not have a constitutionally protected interest in the child and, therefore, could not bring a claim related to the adoption of the child. *Id.* Writing for the court, Judge POSNER described the fundamental right of parenthood as not being created solely through biology: “It is not the brute biological fact of parentage, but the existence of an actual or potential relationship that [***158] society recognizes as worthy of respect and protection, that activates the constitutional claim.” Id. at 899. “[N]o court has gone so far as to hold that the mere fact of fatherhood, consequent upon a criminal act [of sexual assault] that our society [***24] does take seriously and that is not cemented ... by [*320] association with the child, creates an interest that the Constitution protects in the name of liberty.” Id. at 900.

¶57 While the sexual assault perpetrator may acquire constitutional rights, they are not the rights of parenthood; rather the perpetrator merely acquires “the procedural rights that the Constitution confers on criminal defendants.” *Id.* Furthermore, Judge POSNER cautioned that a perpetrator should not be rewarded for his sexual assault “by receiving parental rights which he may be able to swap for the agreement ... not to press criminal charges.” Id.

¶58 Other courts have similarly found that perpetrators of sexual assault are not afforded the same constitutional protections that are normally given to parents when, through nonconsensual intercourse, they became biological parents. See Adoption of Kelsey S., 1 Cal. 4th 816, 849 n.14, 823 P.2d 1216, 4 Cal. Rptr. 2d 615 (1992) (deciding that nothing supported finding that father of child resulting from sexual assault committed by father would have due process or equal protection rights with regard to custody or adoption of child); Shepherd v. Clemens, 752 A.2d 533, 542 (Del. 2000) (stating, “No court has held that the mere fact of biological fatherhood, that was the result of a conception during a criminal act and that [***25] is unaccompanied by a relationship with the child, creates an interest that the United States Constitution protects in the name of liberty”); Christian Child Placement Serv. of N.M. Christian Child's Home v. Vestal, 1998-NMCA-098, 125 N.M. 426, 430, 962 P.2d 1261 (holding that person shown to have committed crime of sexual penetration of a minor has not acquired a fundamental right to withhold consent to adoption of a child resulting from the crime).

¶59 We agree with Judge POSNER and these other authorities and hold that a perpetrator of sexual assault

does not, by the mere fact of a biological role, acquire a fundamental right to parent a child resulting from the assault. “[T]he brute biological fact of parentage” does not automatically convey the fundamental right to parent to the sexual [*321] assault perpetrator. [Peña, 84 F.3d at 899](#). Deeply ingrained in our legal system is the concept that a wrongdoer should not be permitted to profit from his wrong. [Id. at 900](#). Rapists will not be rewarded for their crimes simply because they were successful in reproductive mechanics.

¶60 Consequently, the perpetrator is not afforded the same due process rights of a person who is a parent to a child as a result of consensual sexual intercourse. If the perpetrator acquires no additional constitutional rights merely as a result of their biological relationship [***26] to the child, then no heightened constitutional protections are triggered; strict scrutiny review standard would not apply. If strict scrutiny is inapplicable, then the lower rational basis standard applies to [RCW 26.26A.465](#) and the statute will pass constitutional muster so long as it is rationally related to a legitimate government interest.

¶61 We hold that [RCW 26.26A.465](#) survives the rational basis review. There is a legitimate government interest in protecting victims of sexual assault and children birthed as a result of sexual assault from the violent perpetrators. See [34 U.S.C. § 21302](#) (stating that allowing rapists to maintain a relationship with the child resulting from their rape can have a traumatic impact on the survivor and the child). In the Rape Survivor Child Custody Act, Congress encouraged states to enact statutes to allow rape survivors “to petition for the termination of parental rights of the rapist.” [34 U.S.C. § 21302\(7\)](#). It found that “[a] rapist pursuing parental or custody rights causes the survivor to have continued interaction with the rapist, which can have traumatic psychological effects on the survivor, and can make it more difficult for her to recover.” [34 U.S.C. § 21302\(8\)](#). “Rapists may use the threat of pursuing custody or parental rights [***27] to coerce survivors into not prosecuting rape, or otherwise harass, intimidate, or manipulate them.” [34 U.S.C. § 21302\(10\)](#). [**159] “These traumatic effects on the mother can severely negatively impact her ability to raise a healthy child.” [34 U.S.C. § 21302\(9\)](#). [**322]

¶62 Although the perpetrator may also have some interest in maintaining the relationship with the child, that interest is outweighed by the fact that the child was a result of their violent act and outweighed by the strong

interest in protecting the victim parent from the trauma of having to continue to interact with the perpetrator. For these reasons, protection of victims of sexual violence from further harm and the consequent effect on the raising of a child is a legitimate government interest.

¶63 The statute also is rationally related to the government's interest here for at least two reasons. First, the statute is limited to circumstances where the person has not already been adjudicated to be the parent of the child and where an allegation of sexual assault is made within four years of the child's birth. By preventing a trial court from terminating the parentage of a person who may have already established a parent-child relationship with the child, these requirements limit [***28] the statute's reach to those individuals whose involvement with the child has not developed beyond a biological role and, thereby, mitigate against damaging the child's interest in maintaining an existing parental bond.

¶64 Second, the statute requires proof by clear, cogent, and convincing evidence prior to the termination of parental rights. This high standard has been determined by the Supreme Court as satisfying due process even in the context of termination of rights of parents who possess additional constitutional rights to parent (which sexual assault perpetrators do not). [Santosky v. Kramer, 455 U.S. 745, 769, 102 S. Ct. 1388, 71 L. Ed. 2d 599 \(1982\)](#) (plurality opinion). In [Santosky](#), the Court determined that when terminating the constitutional right to parent, striking a fair balance between the rights of parents and the State's interests required more than simply a preponderance of the evidence. [Id. at 769-70](#). By using this same high evidentiary standard, [RCW 26.26A.465](#) then clearly exceeds the standard necessary to meet the rational basis review.

[**323]

¶65 Because [RCW 26.26A.465](#) is rationally related to a legitimate government interest, it satisfies rational basis review and does not violate C.V.'s substantive due process rights.

B. EQUAL PROTECTION

¶66 C.V. next contends that [RCW 26.26A.465](#) violates equal protection because the statute treats him differently [***29] from other established parents.

1. Legal Principles

[20] ¶67 Under the [Fourteenth Amendment to the Constitution](#) and [article I, section 12 of the Washington](#)

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Constitution, equal protection provides that similarly situated persons are entitled to be treated similarly under the law. State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992).

[21] ¶68 An equal protection analysis requires us to first determine whether the person making the claim is similarly situated with other individuals. State v. Osman, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). “A defendant must establish that he received disparate treatment because of membership in a class of similarly situated individuals and that the disparate treatment was the result of intentional and purposeful discrimination.” *Id.* “Although equal protection does not require that the State treat all persons identically, any classification must be relevant to the purpose for the disparate treatment.” *Id.*

[22] ¶69 If we determine that a statute treats similarly situated individuals differently, we then evaluate the statute under an equal protection analysis. To determine whether a statute violates equal protection, we will either apply strict scrutiny, intermediate scrutiny, or rational basis review. State v. Hirschfelder, 170 Wn.2d 536, 550, 242 P.3d 876 (2010). Which test applies depends on the classification and rights involved:

Suspect classifications, such as race, alienage, and national origin, are subject to strict scrutiny. “Strict [***30] scrutiny also applies [*324] to laws burdening fundamental rights or liberties.” “Intermediate scrutiny applies only if the statute implicates both an important right and a semi-suspect class not [**160] accountable for its status.” Absent a fundamental right or suspect class, or an important right or semisuspect class, a law will receive rational basis review.

Id. (citations and internal quotation marks omitted) (quoting Am. Legion Post No. 149 v. Dep’t of Health, 164 Wn.2d 570, 609, 192 P.3d 306 (2008)).

2. Application

[23] ¶70 Similar to his arguments about due process, C.V. argues that RCW 26.26A.465 violates his equal protection rights. He claims that the law unfairly applies different standards to two groups of parents—parents who are accused of sexual assault resulting in the birth of a child and other parents facing termination of their parental rights. He argues that equal protection is violated because RCW 13.34.180 of the dependency statute and RCW 26.33.120 of the adoption statute both require failures by a parent in undertaking their duties

and consideration of the best interests of the child, while RCW 26.26A.465 does not.⁴ We disagree.

¶71 C.V.’s equal protection argument requires these two groups of parents to be similarly situated, but they are not. The parent classes to which C.V. refers involve individuals who possess the fundamental right [***31] to parent. RCW 13.34.180 provides for the termination of the rights of an *established* parent in the context of a dependency. RCW 26.33.120 provides for the termination of the rights of an *established* parent in the context of a potential adoption. Unlike the parents covered in these statutes, C.V. does not have an [*325] established fundamental right to parent R.V. As explained above, perpetrators of sexual violence who become biological parents as a result of an assault do not obtain the same rights of other parents. Rapists are simply not similarly situated with any other class of parents. Without a similarly situated class, C.V.’s equal protection argument fails.

¶72 This conclusion comports with holdings from other courts. While Washington courts have not addressed this precise issue, the Supreme Court has held that where one parent has a substantial relationship with a child and the other does not, the parents are not similarly situated for the purpose of implicating equal protection. Lehr, 463 U.S. at 265-67.

¶73 Similarly the New Mexico Court of Appeals has held that “individuals who commit rape or incest of a child, thereby fathering a child, are not similarly situated to a parent who lawfully fathers a child and is subsequently charged with neglect.” [***32] Vestal, 125 N.M. at 432. When the respondent in Vestal, who was a biological parent as a result of sexual penetration of a 13-year-old child, equated his case to that of an unwed father seeking to exercise parental rights over a child born out of wedlock, the court disagreed:

An individual who has committed criminal sexual penetration of a child, thereby impregnating her, may be an unwed father, but he is not similarly situated to an unmarried man who has fathered a child by a consenting adult women.

⁴C.V. also argues, solely in his reply brief, that the statute violates equal protection because it discriminates on the basis of gender. Because he fails to raise this issue in his opening brief, we decline to address it. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration.”).

Id. at 431-32.

¶74 We agree with these authorities. Accordingly, because C.V. fails to identify another similarly situated class, his equal protection argument fails.

CONCLUSION

¶75 In conclusion, we hold that there was sufficient evidence to support the trial court's conclusion that R.V. was conceived as a result of sexual assault as required under [*326] [RCW 26.26A.465](#). Further, we hold that as a perpetrator of sexual assault that resulted in the birth of a child, C.V. does not have a fundamental right to parent R.V. Without implicating a fundamental right, C.V.'s substantive due process claim is reviewed under a rational basis standard, and [RCW 26.26A.465](#) withstands such review. Finally, we hold that C.V.'s equal protection claim fails. Accordingly, we affirm the superior [***33] court.

[**161] LEE, J., concurs.

Concur by: Rebecca Glasgow

Concur

¶76 GLASGOW, C.J. (concurring) — I agree with the majority that the trial court's ruling was supported by substantial evidence and that CV is not similarly situated to established parents facing termination proceedings for purposes of an equal protection analysis. I also agree with the majority that CV has not acquired a fundamental right to parent and that [RCW 26.26A.465](#) satisfies rational basis review. I write separately to emphasize that even if a fundamental right to parent were implicated, [RCW 26.26A.465](#) would nevertheless survive a strict scrutiny analysis.

¶77 CV contends [RCW 26.26A.465](#) violates substantive due process because it “does not identify any compelling State interest that is being advanced by preventing paternity from being established without any analysis as to potential detriment of the child.” Opening Br. of Appellant at 27. I disagree.

¶78 When reviewing a constitutional challenge to a statute, we presume the statute is constitutional. [Wash. Bankers Ass'n v. Dep't of Revenue, 198 Wn.2d 418, 427, 495 P.3d 808 \(2021\)](#), *pet. for cert. filed*, No. 21-1066 (U.S. Jan. 28, 2022). We “must begin ‘with the assumption that the legislature, which is a coequal

branch of government that is sworn to uphold the Constitution, has indeed considered the constitutionality of its enactments.” [***34] [In re Dependency of I.J.S., 128 Wn. App. 108, 115, 114 P.3d 1215 \(2005\)](#) (quoting [*327] [In re Custody of Osborne, 119 Wn. App. 133, 147, 79 P.3d 465 \(2003\)](#)).

¶79 “A parent's constitutionally protected right to rear [their] children without state interference has been recognized as a fundamental ‘liberty’ interest protected by the [Fourteenth Amendment](#) and also as a fundamental right derived from the privacy rights inherent in the constitution.” [In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 \(1998\)](#), *aff'd sub nom. Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)* (plurality opinion). But a parent's rights “are not absolute and must yield to fundamental rights of the child or important interests of the State.” [In re Custody of Shields, 157 Wn.2d 126, 142, 136 P.3d 117 \(2006\)](#) (internal quotation marks omitted) (quoting [In re Marriage of Allen, 28 Wn. App. 637, 646, 626 P.2d 16 \(1981\)](#)). The State may interfere with the right to parent if it “can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.” [In re Parentage of C.A.M.A., 154 Wn.2d 52, 57, 109 P.3d 405 \(2005\)](#) (quoting [Smith, 137 Wn.2d at 15](#)).

¶80 When the legislature enacted [RCW 26.26A.465](#), it intended to protect both survivors of sexual assault and their children. The legislature first offered parent survivors of sexual assault a process for precluding the person who assaulted them from establishing legal parentage in 2017. See SUBSTITUTE H.B. 1543, 65th Leg., Reg. Sess. (Wash. 2017). At that time, in addition to adopting the section now codified at [RCW 26.26A.465](#) in [Washington's Uniform Parentage Act, chapter 26.26A RCW](#), the legislature simultaneously amended [RCW 26.09.191](#), the statute governing parenting plans and residential time. The legislature amended [RCW 26.09.191](#) to add, [***35] “The court shall not enter an order ... allowing a parent to have contact with a child if the parent has been found by clear and convincing evidence pursuant to [RCW 26.26A.465](#) to have committed sexual assault ... against the child's parent” [*328] and “the child was born within three hundred twenty days of the sexual assault.” [RCW 26.09.191\(2\)\(m\)\(iii\)](#); see LAWS OF 2017, ch. 234, § 2.

¶81 There can be no dispute that the legislature may place limits on the rights and responsibilities that accompany parentage based on a compelling state interest. See, e.g., [In re Custody of L.M.S., 187 Wn.2d](#)

[567, 571, 387 P.3d 707 \(2017\)](#) (explaining that a former statute allowed a nonparent to petition for child custody where there was a threshold showing that “the biological parent is either unfit or that placing the child in the parent’s custody would result in actual detriment to the child’s growth and development”). Sexual assault is a “crime serious enough to call into question[] a person’s capacity to parent.” Anastasia Doherty, *Choosing to Raise a Child Conceived Through Rape: The Double-Injustice of Uneven [**162] State Protection*, [39 Women’s Rts. L. Rep. 220, 267](#) (2018).

¶82 The State has a well-established compelling interest in the safety and welfare of children. “As *parens patriae* the state acts from the viewpoint and in the interests of the child ... [***36] where a child has been harmed or where there is a threat of harm to a child.” [Smith, 137 Wn.2d at 16](#). If a parent’s actions “seriously conflict with the physical or mental health of the child,” the State is not merely permitted to intervene, but has a “responsibility to intervene to protect the child.” [Id. at 25](#) (quoting [In re Welfare of Sumei, 94 Wn.2d 757, 762, 621 P.2d 108 \(1980\)](#)); see also [In re Welfare of A.W., 182 Wn.2d 689, 709, 344 P.3d 1186 \(2015\)](#) (“The State’s primary interest is providing for the health and safety of children.”).

¶83 There is also a compelling state interest in protecting survivors of sexual assault from further contact with and harm by the perpetrator of the assault. See [State v. Lee, 188 Wn.2d 473, 496, 396 P.3d 316 \(2017\)](#) (“[T]he State has a compelling interest in protecting rape victims.”); [State v. Phillips, 6 Wn. App. 2d 651, 676, 431 P.3d 1056 \(2018\)](#) (“The State has a compelling interest in preventing future harm [**329] to the victims of [domestic violence assault] and in protecting children.”); [In re Pers. Restraint of Martinez, 2 Wn. App. 2d 904, 915, 413 P.3d 1043 \(2018\)](#) (“[T]he State has a compelling interest in preventing contact between a [convicted child rapist] and victim where the [rapist] continues to pose a threat to the victim.”), *abrogated on other grounds by* [In re Pers. Restraint of Winton, 196 Wn.2d 270, 474 P.3d 532 \(2020\)](#). Where a pregnant survivor faces the possibility of parenting the resulting child with their rapist, the State has a compelling interest in protecting against possible manipulation of the survivor, not to mention the harm in being forced to subject [***37] their child to their own attacker. Testimony in favor of the 2017 legislation acknowledged that the threat of a custody battle can be used to coerce a sexual assault survivor to refuse to cooperate in a criminal prosecution. S.B. REP. ON SUBSTITUTE H.B. 1543, at 4, 65th Leg., Reg. Sess.

(Wash. 2017). The testimony also emphasized the harm that occurs when a survivor is forced to litigate a parenting issue with their rapist or permit the person who assaulted them to have access to their child. *Id.* at 5.

¶84 Perhaps recognizing the compelling state interests at stake, CV focuses on the “narrowly tailored” requirement in the strict scrutiny analysis. CV cites [RCW 26.09.191\(2\)\(a\)\(iii\)](#) as an example of the legislature’s ability to provide less restrictive means “to address any perceived risk to the child.” Opening Br. of Appellant at 27. [RCW 26.09.191\(2\)\(a\)\(iii\)](#) requires limiting a parent’s residential time where the parent has been found to have committed “sexual assault that causes grievous bodily harm or the fear of such harm or that results in a pregnancy.” [RCW 26.09.191](#) also includes rebuttable presumptions that a person convicted of certain sex offenses, including indecent liberties, “poses a present danger to a child” and “places a child at risk [***38] of abuse or harm.” [RCW 26.09.191\(2\)\(d\), \(e\)](#). CV argues that the Uniform Parentage Act’s conclusive presumption could be more narrowly tailored to align with the rebuttable presumptions in [RCW 26.09.191](#). [**330] But the legislature has clarified that these presumptions “may be rebutted only after a written finding that the child was *not* conceived and subsequently born as a result of a sexual assault committed by the parent requesting residential time.” [RCW 26.09.191\(2\)\(f\), \(g\)](#) (emphasis added). In other words, if the child was conceived as a result of sexual assault, the legislature has assumed the assaultive parent will inherently pose a danger or risk of harm to that child. Thus, the legislature expressly rejected the possibility of providing greater flexibility or allowing fewer restrictions under the circumstances at issue here. In sum, these statutes do not support CV’s assertion that more narrow tailoring has occurred under [chapter 26.09 RCW](#).

¶85 The Washington Legislature has chosen to be on the forefront of protection for rape survivors and their children, and there is support for our legislature’s judgment that permitting a person who committed sexual assault to gain *any* parental rights to a resulting child would be harmful for that child. As noted by the majority, [***39] the United States Congress has recognized that allowing a person [**163] who committed sexual assault resulting in a child to pursue parental rights “can have traumatic psychological effects on the survivor,” which, in turn, “can severely negatively impact [the survivor’s] ability to raise a healthy child.” [34 U.S.C. § 21302\(8\)-\(9\)](#); see majority at 319. Accordingly,

Congress found, “Men who father children through rape should be prohibited from visiting or having custody of those children.” [34 U.S.C. § 21302\(1\)](#).

¶86 Concern with the “domino effect” of allowing those who have perpetrated sexual assault resulting in pregnancy to assert parental rights, which harms the mother’s ability to parent and subsequently harms the child, is echoed in numerous scholarly articles. Rachael Kessler, Note and Comment, *Due Process and Legislation Designed to Restrict the Rights of Rapist Fathers*, [10 Nw. J.L. & Soc. Pol’y 199, 210](#) (2015); see also Jordan S. Miceli, Note, *The Haunting of Her House: How Virginia Law Punishes Women Who Become Mothers* **[*331]** *Through Rape*, [78 Wash. & Lee L. Rev. Online 129, 157 \(2021\)](#) (“[I]f the mother is forced into a legal relationship with her rapist, her mental health may deteriorate as a result of his continual presence in her life. This mental deterioration may affect **[***40]** her parenting and cause the child to suffer.” (footnote omitted)); Margot E.H. Stevens, Note, *Rape-Related Pregnancies: The Need to Create Stronger Protections for the Victim-Mother and Child*, [65 Hastings L.J. 865, 877 \(2014\)](#) (acknowledging that “[t]he circumstances of conception ... can largely influence the stability of the home and development of the child” and that “exposure to domestic violence, which can include sexual assault, ... has been shown to cause adverse behavioral and psychological effects in children”). The Washington Supreme Court Gender and Justice Commission has also recognized studies showing that individuals who perpetrate sexual assault often commit other acts of interpersonal violence, sometimes including physical or sexual abuse of a child. WASH. SUP. CT. GENDER & JUST. COMM’N, *SEXUAL VIOLENCE BENCH GUIDE FOR JUDICIAL OFFICERS 1-1 to 1-14* (Mar. 2019, rev. 2018). Thus, there is ample support for a compelling state interest in avoiding the risk of these harms to survivors of rape and their children. CV does not credibly undermine the legislature’s conclusion that if [RCW 26.26A.465](#) were to provide for *any* legal relationship or contact by the assaultive parent, the risk of concrete harm to the survivor-parent **[***41]** and their child would be too great.

¶87 [RCW 26.26A.465](#) is also narrowly tailored because it applies only where parental rights have not previously been established. As the majority recognizes, [RCW 26.26A.465](#) is intended to preclude the establishment of parental rights for “those individuals whose involvement with the child has not developed beyond a biological role.” Majority at 320. It applies where there has been no prior adjudication of parentage and the child is

younger than four years old. [RCW 26.26A.465\(3\)](#), [\(4\)](#). The statute does not seek to sever established familial relationships.

¶88 CV points out that statutes allowing for termination of parental rights are typically “narrowly drawn because **[*332]** the State must prove that the relationship with the parents harms or potentially harms the child before the court can terminate parental rights.” Opening Br. of Appellant at 27 (quoting [I.J.S., 128 Wn. App. at 118](#)). But because [RCW 26.26A.465](#) is so narrow in the scope of its application, it need not require an individualized inquiry into the potential harm of each relationship. There is no need for a trial court to weigh or consider the possible harm to a child of depriving them of a relationship with a sexually assaulting parent where that relationship does not yet exist. Cf. [Smith, 137 Wn.2d at 21](#) (observing **[***42]** that where a child does not have a “substantial relationship” with a person, harm to the child “cannot reasonably be anticipated as a result of no contact” with that person).

¶89 In some cases, foreclosing the possibility of a child ever knowing their biological parent may be a loss that “cannot be measured.” [Santosky v. Kramer, 455 U.S. 745, 760 n.11, 102 S. Ct. 1388, 71 L. Ed. 2d 599 \(1982\)](#) (plurality opinion). However, it is important to remember that this statute does not simply deprive a child of the theoretical benefit of developing a relationship with one biological parent; it provides **[***164]** the child with the concrete benefit of a fit biological parent whose well-being as a survivor of sexual assault is protected and whose capacity to parent to the best of their abilities is preserved. Moreover, this fit biological parent already has an established relationship with the child.

¶90 When courts disregard how exposure to violence, whether direct or indirect, affects children, they “continue to justify presumptions of parental equality, resulting in custody awards that approximate the nuclear family, resistance to terminating the parental rights of [parents] who are violent, and adherence to the two-parent paradigm.” Judith Lewis, *The Stability Paradox: The Two-Parent Paradigm and the Perpetuation* **[***43]** *of Violence Against Women in Termination of Parental Rights and Custody Cases*, [27 Mich. J. Gender & L. 311, 346 \(2020\)](#). “[T]his deliberate **[*333]** judicial failure to recognize the harm to children justifies creating less stable family units, perpetuating violence.” *Id.* In an effort to protect sexual assault survivors and their children from further violence, the legislature reasonably rejected the outdated inclination to prioritize the nuclear family

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structure and presume a biological father's involvement may be beneficial to a child, regardless of the father's proved sexual assault against the parent who gave birth to the child. This is consistent with the State's *parens patriae* interest.

¶91 And [RCW 26.26A.465](#) applies to preclude the establishment of parentage only where the parent who gave birth to the child submits a petition requesting that the perpetrator be precluded from playing a role in the child's life, the trial court finds that the child was conceived as a result of the perpetrator's sexual assault by at least clear and convincing evidence, the child is still young, and the perpetrator's parentage has not previously been established. Thus, the statute is narrowly tailored to address a specific harm under specific circumstances. Accordingly, [***44] I would hold that [RCW 26.26A.465](#) would survive a strict scrutiny analysis.

¶92 Because I would hold [RCW 26.26A.465](#) constitutional under either a rational basis or strict scrutiny standard of review, I concur.

References

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APPELLEE'S APPENDIX VI

2019000459 AM

STATE OF MICHIGAN 37TH JUDICIAL DISTRICT 37TH JUDICIAL CIRCUIT	COMPLAINT FELONY	CASE NO.: C191342 FY DISTRICT: CIRCUIT:
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District Court ORI: _____ Circuit Court ORI: MI130015J
 _____, Battle Creek, MI 49014 269-969-6530

THE PEOPLE OF THE STATE OF MICHIGAN	Defendant's name and address TYLER DAVID MILLWARD 360 N 30TH ST SPRINGFIELD, MI , 49037	Victim or complainant ON INFO & BELIEF
		Complaining Witness DETECTIVE EDDY

Co-defendant(s) _____ Date: On or about **02/20/18-11/01/18**

City/Twp./Village CALHOUN COUNTY	County in Michigan CALHOUN	Defendant TCN	Defendant CTN 13-19000459-01	Defendant SID 4360599X	Defendant DOB 10/13/1988
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Police agency report no. 13HPPD 19000013	Charge See below	DLN Type: Oper./Chauf	Vehicle Type	Defendant DLN M463809135787
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A sample for chemical testing for DNA identification profiling is on file with the Michigan State Police from a previous case.

Witnesses

DETECTIVE STEVE EDDY **OFFICER ANTHONY TEFFNER** **OFFICER FRANK RUGG**
SHANNON BLACKMAN **SAMMI WOOD-WALTON** **ASHLEY MILLWARD**

STATE OF MICHIGAN, COUNTY OF CALHOUN

The complaining witness says that on the date and at the location described above, the defendant contrary to law:

COUNT 1: WITNESSES - BRIBING/INTIMIDATING/INTERFERING CRIMINAL CASE PUNISHABLE BY MORE THAN 10 YEARS

did willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for a criminal case where the crime was punishable by a maximum term of imprisonment of more than 10 years, or imprisonment for life or any term of years; contrary to MCL 750.122(7)(b). [750.1227B]
 FELONY: 10 Years and/or \$20,000.00. A consecutive sentence may be imposed for any other conviction.

COUNT 2: OBSTRUCTION OF JUSTICE

did commit the crime of obstruction of justice by INDUCING AND/OR PROCURING SHANNON BLACKMAN, A CRIMINAL SEXUAL CONDUCT VICTIM, TO RECALL ALLEGATIONS OF SEXUAL CONDUCT BETWEEN THEM AND TO CLAIM THE POLICE PRESSURED AND MANIPULATED HER INTO MAKING THOSE CLAIMS; contrary to MCL 750.505. [750.505-A]
 FELONY: 5 Years and/or \$10,000.00

Court shall order law enforcement to collect a DNA identification profiling sample before sentencing or disposition, if not taken at arrest.

The complaining witness asks that the defendant be apprehended and dealt with according to law.

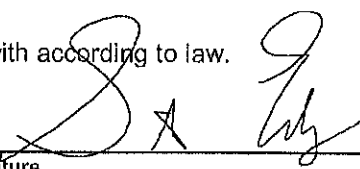
Warrant authorized on _____ by: _____



 Date

02/07/2019

DAVID E. GILBERT (P41934)
PROSECUTING ATTORNEY
CALHOUN COUNTY



 Complaining Witness Signature

02/07/2019

Subscribed and sworn to before me on 02/07/2019

Date



 Judge/Magistrate/Clerk

PO1007

02/07/2019

Bar no.

Court Copy Complaint

CTN: 2019000459 CC1

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STATE OF MICHIGAN
37TH CIRCUIT COURT
CALHOUN COUNTY

**JUDGMENT OF SENTENCE
COMMITMENT TO
DEPARTMENT OF CORRECTIONS**

CASE NO.
2019 000000408-FH

CALHOUN COUNTY JUSTICE CENTER, 161 E. MICHIGAN AVE.
BATTLE CREEK, MI 49014-4015

(269) 969-6518

ORI MI-130015J Police Report No. HPPD190013

THE PEOPLE OF THE STATE OF MICHIGAN

Defendant's name, address, and telephone no.
TYLER DAVID MILLWARD
360 N 30TH STREET
BATTLE CREEK, MI 49037
269/339-2325

CTN/TCN 131900045901	SID 4360599X	DOB 10/13/1988
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Prosecuting attorney's name
TAMARA L. TOWNS
Bar no.
55884

Defendant attorney's name
MELISSA J. HEFFNER
Bar no.
72812

THE COURT FINDS:

1. The defendant was found guilty on 02/28/2019 of the crime(s) stated below.
Date

Count	CONVICTED BY			DISMISSED BY*	CRIME	CHARGE CODE(S) MCL Citation/PACC Code
	Plea*	Court	Jury			
01	G				WITNESS-BRIBE/INTIMIDATE/	750.1227B
02				D	JUSTICE OBSTRUCTION OF	750.505-A

*Insert "G" for guilty plea, "NC" for nolo contendere, or "MI" for guilty but mentally ill, "D" for dismissed by court, or "NP" for dismissed by prosecutor/plaintiff.

- 2. The conviction is reportable to the Secretary of State pursuant to MCL 257.625(21)(b).
- 3. HIV testing and sex offender registration are completed. Defendant's driver's license numb
- 4. The defendant has been fingerprinted according to MCL 28.243.
- 5. A DNA sample is already on file with the Michigan State Police from a previous case. No assessment is required.

IT IS ORDERED:

- 6. Probation is revoked.
- 7. Participating in a special alternative incarceration unit is prohibited. permitted.
- 8. The defendant is sentenced to custody of the Michigan Department of Corrections. This sentence shall be executed immediately.

Count	SENTENCE DATE	MINIMUM			MAXIMUM			DATE SENTENCE BEGINS	JAIL CREDIT		OTHER INFORMATION
		Years	Mos.	Days	Years	Mos.	Days		Mos.	Days	
01	04/08/2019		37		10		04/08/2019		145		

- 9. Sentence(s) to be served consecutively to (If this item is not checked, the sentence is concurrent.)
 each other. case numbers _____

9. The defendant shall pay:

State Minimum	Crime Victim	Restitution	DNA Assess.	Court Costs	Attorney Fees	Fine	Other Costs	Total
\$68.00	\$130.00							\$198.00

The due date for payment is 04/08/2019. Fine, costs, and fees not paid within 56 days of the due date are subject to a 20% late penalty on the amount owed.

- 11. The defendant is subject to lifetime monitoring under MCL 750.520n.
- 12. Court recommendation:

REGISTER AS REQUIRED BY SORA. NO CONTACT WHATSOEVER WITH SHANNON BLACKMAN. MUST COMPLY WITH ALL ORDERS OF THE COURT

04/08/2019
Date

04/09/2019 42351
Judge JOHN JOAN AIZALARY (P42351)
37TH CIRCUIT COURT JUDGE
Bar no.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver the defendant to the Michigan Department of Corrections at a place designated by the department.

(SEAL)

Deputy court clerk

APPELLEE'S APPENDIX VII



BIOGRAPHICAL INFORMATION



MDOC Number:
569068

SID Number:
4360599X

Name:
TYLER DAVID MILLWARD

Racial Identification:
White

Gender:
Male

Hair:
Brown

Eyes:
Blue

Height:
5' 8"

Weight:
180 lbs.

Date of Birth:
10/13/1988 (36)

TYLER DAVID MILLWARD

Image Date:
8/25/2022

MDOC STATUS

Current Status:
Prisoner

Earliest Release Date:
11/12/2025

Assigned Location:
Central Michigan Correctional Facility

Maximum Discharge Date:
10/17/2038

Security Level:
I

ALIASES

None

MARKS, SCARS & TATTOOS

Body Piercing- Lower Left Ear

Scar- Lower Back

Tattoo- Upper Right Arm - Thorns

PRISON SENTENCES

ACTIVE

Sentence 1

Offense:
Criminal Sexual Conduct, 3rd Deg (Student) Minimum Sentence:
5 years 6 months 0 days

0158

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MCL#: 750.520D1E Maximum Sentence:
15 years 0 months

Court File#: 19112651-FH-C Date of Offense:
07/01/2017

County: Branch Date of Sentence:
03/02/2020

Conviction Type:
Plea

Sentence 2

Offense: Criminal Sexual Conduct, 3rd Deg Minimum Sentence:
(Student) 6 years 5 months 0 days

MCL#: 750.520D1E Maximum Sentence:
15 years 0 months

Court File#: 1922618-FH-1 Date of Offense:
06/14/2017

County: St. Joseph Date of Sentence:
06/21/2019

Conviction Type:
Plea

Sentence 3

Offense: Witnesses-Bribing/Intim/Interf. Crim. Minimum Sentence:
Case Punishable 10 Yrs 3 years 1 month 0 days

MCL#: 750.1227B Maximum Sentence:
10 years 0 months

Court File#: 19000000408-FH Date of Offense:
02/20/2018

County: Calhoun Date of Sentence:
04/08/2019

Conviction Type:
Plea

Sentence 4

Offense: Criminal Sexual Conduct, 3rd Deg Minimum Sentence:
(Student) 7 years 0 months 0 days

MCL#: 750.520D1E Maximum Sentence:
15 years 0 months

Court File#: 18000003388-FH Date of Offense:
07/30/2017

County: Calhoun Date of Sentence:
04/08/2019

Conviction Type:
Plea

Sentence 5

Offense: Computers-Internet-Communicating to Minimum Sentence:
Commit Crime-15 Years> 7 years 0 months 0 days

MCL#: 750.145D2F Maximum Sentence:
20 years 0 months

Court File#: 18000002655-FH Date of Offense:
07/24/2017

County:
Calhoun

Date of Sentence:
04/08/2019

Conviction Type:
Plea

INACTIVE

Sentence 1

Offense:
Peace Officer-Lying -4 year or More
Crime Investigation
Minimum Sentence:
1 year 4 months 0 days

MCL#: 750.479C2C
Maximum Sentence:
2 years 0 months

Court File#: 180000002655-FH
Date of Offense:
07/24/2017

County: Calhoun
Date of Sentence:
04/08/2019

Conviction Type: Plea
Discharge Date:
10/17/2020

Discharge Reason:

PROBATION SENTENCES

ACTIVE

None

INACTIVE

None

SUPERVISION CONDITIONS

None

APPELLEE'S APPENDIX VIII

34 USC Ch. 213: RAPE SURVIVOR CHILD CUSTODY

From Title 34—CRIME CONTROL AND LAW ENFORCEMENT
 Subtitle II—Protection of Children and Other Persons

CHAPTER 213—RAPE SURVIVOR CHILD CUSTODY

Sec.	
21301.	Definitions.
21302.	Findings.
21303.	Increased funding for formula grants authorized.
21304.	Application.
21305.	Grant increase.
21306.	Period of increase.
21307.	Allocation of increased formula grant funds.
21308.	Authorization of appropriations.

§21301. Definitions

In this chapter:

(1) Covered formula grant

The term "covered formula grant" means a grant under—

- (A) part T of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796gg et seq.)¹ (commonly referred to as the "STOP Violence Against Women Formula Grant Program"); or
 (B) section 12511 of this title (commonly referred to as the "Sexual Assault Services Program").

(2) Termination**(A) In general**

The term "termination" means, when used with respect to parental rights, a complete and final termination of the parent's right to custody of, guardianship of, visitation with, access to, and inheritance from a child.

(B) Rule of construction

Nothing in this paragraph shall be construed to require a State, in order to receive an increase in the amount provided to the State under the covered formula grants under this chapter, to have in place a law that terminates any obligation of a person who fathered a child through rape to support the child.

(Pub. L. 114–22, title IV, §402, May 29, 2015, 129 Stat. 256.)

EDITORIAL NOTES**REFERENCES IN TEXT**

The Omnibus Crime Control and Safe Streets Act of 1968, referred to in par. (1)(A), is Pub. L. 90–351, June 19, 1968, 82 Stat. 197. Part T of title I of the Act was classified generally to subchapter XII–H (§3796gg et seq.) of chapter 46 of Title 42, The Public Health and Welfare, prior to editorial reclassification as subchapter XIX (§10441 et seq.) of chapter 101 of this title. For complete classification of this Act to the Code, see Short Title of 1968 Act note set out under section 10101 of this title and Tables.

CODIFICATION

Section was formerly classified to section 14043h of Title 42, The Public Health and Welfare, prior to editorial reclassification and renumbering as this section.

STATUTORY NOTES AND RELATED SUBSIDIARIES**SHORT TITLE**

For short title of title IV of Pub. L. 114–22, which is classified to this chapter, as the "Rape Survivor Child Custody Act", see section 401 of Pub. L. 114–22, set out as a Short Title of 2015 Act note under section

10101 of this title.

¹ See References in Text note below.

§21302. Findings

Congress finds the following:

- (1) Men who father children through rape should be prohibited from visiting or having custody of those children.
- (2) Thousands of rape-related pregnancies occur annually in the United States.
- (3) A substantial number of women choose to raise their child conceived through rape and, as a result, may face custody battles with their rapists.
- (4) Rape is one of the most under-prosecuted serious crimes, with estimates of criminal conviction occurring in less than 5 percent of rapes.
- (5) The clear and convincing evidence standard is the most common standard for termination of parental rights among the 50 States, territories, and the District of Columbia.
- (6) The Supreme Court established that the clear and convincing evidence standard satisfies due process for allegations to terminate or restrict parental rights in *Santosky v. Kramer* (455 U.S. 745 (1982)).
- (7) Currently only 10 States have statutes allowing rape survivors to petition for the termination of parental rights of the rapist based on clear and convincing evidence that the child was conceived through rape.
- (8) A rapist pursuing parental or custody rights causes the survivor to have continued interaction with the rapist, which can have traumatic psychological effects on the survivor, and can make it more difficult for her to recover.
- (9) These traumatic effects on the mother can severely negatively impact her ability to raise a healthy child.
- (10) Rapists may use the threat of pursuing custody or parental rights to coerce survivors into not prosecuting rape, or otherwise harass, intimidate, or manipulate them.

(Pub. L. 114–22, title IV, §403, May 29, 2015, 129 Stat. 256.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 14043h–1 of Title 42, The Public Health and Welfare, prior to editorial reclassification and renumbering as this section.

§21303. Increased funding for formula grants authorized

The Attorney General shall increase the amount provided to a State under the covered formula grants in accordance with this chapter if the State has in place a law that allows the mother of any child that was conceived through rape to seek court-ordered termination of the parental rights of her rapist with regard to that child, which the court is authorized to grant upon clear and convincing evidence of rape.

(Pub. L. 114–22, title IV, §404, May 29, 2015, 129 Stat. 257.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 14043h–2 of Title 42, The Public Health and Welfare, prior to editorial reclassification and renumbering as this section.

§21304. Application

A State seeking an increase in the amount provided to the State under the covered formula grants shall include in the application of the State for each covered formula grant such information as the Attorney General may reasonably require, including information about the law described in section 21303 of this title.

(Pub. L. 114–22, title IV, §405, May 29, 2015, 129 Stat. 257.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 14043h–3 of Title 42, The Public Health and Welfare, prior to editorial reclassification and renumbering as this section.

§21305. Grant increase

The amount of the increase provided to a State under the covered formula grants under this chapter shall be equal to not more than 10 percent of the average of the total amount of funding provided to the State under the covered formula grants under the 3 most recent awards to the State.

(Pub. L. 114–22, title IV, §406, May 29, 2015, 129 Stat. 257.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 14043h–4 of Title 42, The Public Health and Welfare, prior to editorial reclassification and renumbering as this section.

§21306. Period of increase

(a) In general

The Attorney General shall provide an increase in the amount provided to a State under the covered formula grants under this chapter for a 2-year period.

(b) Limit

The Attorney General may not provide an increase in the amount provided to a State under the covered formula grants under this chapter more than 4 times.

(Pub. L. 114–22, title IV, §407, May 29, 2015, 129 Stat. 257.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 14043h–5 of Title 42, The Public Health and Welfare, prior to editorial reclassification and renumbering as this section.

§21307. Allocation of increased formula grant funds

The Attorney General shall allocate an increase in the amount provided to a State under the covered formula grants under this chapter such that—

(1) 25 percent ¹ the amount of the increase is provided under the program described in section 21301(1)(A) of this title; and

(2) 75 percent ¹ the amount of the increase is provided under the program described in section 21301(1)(B) of this title.

(Pub. L. 114–22, title IV, §408, May 29, 2015, 129 Stat. 258.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 14043h–6 of Title 42, The Public Health and Welfare, prior to editorial reclassification and renumbering as this section.

¹ So in original. Probably should be followed by "of".

§21308. Authorization of appropriations

There is authorized to be appropriated to carry out this chapter \$5,000,000 for each of fiscal years 2023 through 2027.

(Pub. L. 114–22, title IV, §409, May 29, 2015, 129 Stat. 258; Pub. L. 117–103, div. W, title I, §107, Mar. 15, 2022, 136 Stat. 851.)

EDITORIAL NOTES

CODIFICATION

Section was formerly classified to section 14043h–7 of Title 42, The Public Health and Welfare, prior to editorial reclassification and renumbering as this section.

AMENDMENTS

2022—Pub. L. 117–103 substituted "2023 through 2027" for "2015 through 2019".

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APPELLEE'S APPENDIX IX

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1993 Mi. HB 4064

Enacted, November 29, 1993

Reporter

1993 Mi. ALS 259; 1993 Mi. P.A. 259; 1993 Mi. HB 4064

MICHIGAN ADVANCE LEGISLATIVE SERVICE > 87TH LEGISLATURE (Regular Session) > (Act 259, Public Acts of 1993) > HOUSE BILL NO. 4064

Notice

 [A> UPPERCASE TEXT WITHIN THESE SYMBOLS IS ADDED <A]

[D> Text within these symbols is deleted <D]

Synopsis

AN ACT to amend sections 3, 5, 6, 6b, and 7a of Act No. 91 of the Public Acts of 1970, entitled as amended "Child custody act of 1970,"

section 3 as amended by Act No. 434 of the Public Acts of 1980, section 6 as amended and section 6b as added by Act No. 315 of the Public Acts of 1990, and section 7a as added by Act No. 377 of the Public Acts of 1988, being sections 722.23, 722.25, 722.26, 722.26b, and 722.27a of the Michigan Compiled Laws; and to add sections 6c, 6d, and 6e.

Text

The People of the State of Michigan enact:

Section 1. Sections 3, 5, 6, 6b, and 7a of Act No. 91 of the Public Acts of 1970, section 3 as amended by Act No. 434 of the Public Acts of 1980, section 6 as amended and section 6b as added by Act No. 315 of the Public Acts of 1990, and section 7a as added by Act No. 377 of the Public Acts of 1988, being sections 722.23, 722.25, 722.26, 722.26b, and 722.27a of the Michigan Compiled Laws, are amended and sections 6c, 6d, and 6e are added to read as follows:

Sec. 3. [D> "Best <D][A> AS USED IN THIS ACT, "BEST <A]interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and [D> continuation of the educating <D][A> TO CONTINUE THE EDUCATION <A]and raising of the child in [D> its <D][A> HIS OR HER <A]religion or creed, if any.
- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

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AN ACT to amend sections 3, 5, 6, 6b, and 7a of Act No. 91 of the Public Acts of 1970, entitled as amended
"Child custody act of 1970,"section 3 as amended by A....

- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court [D] deems [D][A] CONSIDERS [A]the child to be of sufficient age to express preference.
- (j) The willingness and ability of each of the [D] parents [D][A] PARTIES [A]to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent [A] OR THE CHILD AND THE PARENTS [A].

[A] (K) DOMESTIC VIOLENCE, REGARDLESS OF WHETHER THE VIOLENCE WAS DIRECTED AGAINST OR WITNESSED BY THE CHILD.

(L) [A][D] (k) [D]Any other factor considered by the court to be relevant to a particular child custody dispute.

Sec. 5. [A] (1) [A][D] When the [D][A] IF A CHILD CUSTODY [A]dispute is between the parents, between agencies[A] , [A]or between third persons, the best interests of the child [D] shall [D]control. [D] When the [D][A] IF THE CHILD CUSTODY [A]dispute is between the parent or parents and an agency or a third person, [D] it is presumed [D][A] THE COURT SHALL PRESUME [A]that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence.

[A] (2) NOTWITHSTANDING OTHER PROVISIONS OF THIS ACT, IF A CHILD CUSTODY DISPUTE INVOLVES A CHILD WHO IS CONCEIVED AS THE RESULT OF ACTS FOR WHICH 1 OF THE CHILD'S BIOLOGICAL PARENTS IS CONVICTED OF CRIMINAL SEXUAL CONDUCT AS PROVIDED IN SECTIONS 520A TO 520E AND 520G OF THE MICHIGAN PENAL CODE, ACT NO. 328 OF THE PUBLIC ACTS OF 1931, BEING SECTIONS 750.520A TO 750.520E AND 750.520G OF THE MICHIGAN COMPILED LAWS, THE COURT SHALL NOT AWARD CUSTODY TO THE CONVICTED BIOLOGICAL PARENT. THIS SUBSECTION DOES NOT APPLY TO A CONVICTION UNDER SECTION 520D(1)(A) OF THE MICHIGAN PENAL CODE, ACT NO. 328 OF THE PUBLIC ACTS OF 1931, BEING SECTION 750.520D OF THE MICHIGAN COMPILED LAWS. THIS SUBSECTION DOES NOT APPLY IF, AFTER THE DATE OF THE CONVICTION, THE BIOLOGICAL PARENTS COHABIT AND ESTABLISH A MUTUAL CUSTODIAL ENVIRONMENT FOR THE CHILD.

(3) NOTWITHSTANDING OTHER PROVISIONS OF THIS ACT, IF AN INDIVIDUAL IS CONVICTED OF CRIMINAL SEXUAL CONDUCT AS PROVIDED IN SECTIONS 520A TO 520E AND 520G OF ACT NO. 328 OF THE PUBLIC ACTS OF 1931 AND THE VICTIM IS THE INDIVIDUAL'S CHILD, THE COURT SHALL NOT AWARD CUSTODY OF THAT CHILD OR A SIBLING OF THAT CHILD TO THAT INDIVIDUAL, UNLESS BOTH THE CHILD'S OTHER PARENT AND, IF THE COURT CONSIDERS THE CHILD OR SIBLING TO BE OF SUFFICIENT AGE TO EXPRESS HIS OR HER DESIRES, THE CHILD OR SIBLING CONSENT TO THE CUSTODY. [A]

Sec. 6. [A] (1) [A][D] The provisions of this [D][A] THIS [A]act [D] , being [D][A] IS [A]equitable in nature [D] , [D][A] AND [A]shall be liberally construed and applied to establish promptly the rights of the child and the rights and duties of the parties involved. This act [D] shall apply [D][A] APPLIES [A]to all circuit court child custody disputes and actions, whether original or incidental to other actions. [D] Such [D][A] THOSE [A]disputes and actions shall have precedence for hearing and assignment for trial over other civil actions.

[A] (2) [A]Except as otherwise provided in section 6b [A] OR 6E [A], if the circuit court of this state does not have prior continuing jurisdiction over [D] the custody of [D]a child, the action shall be submitted to the circuit court of

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AN ACT to amend sections 3, 5, 6, 6b, and 7a of Act No. 91 of the Public Acts of 1970, entitled as amended "Child custody act of 1970," section 3 as amended by A....

the county where the child resides or may be found by complaint or complaint and motion for order to show cause. An application for a writ of habeas corpus or for a warrant in its place to obtain custody of a child shall not be granted unless it appears that this act is inadequate and ineffective to resolve the particular child custody dispute.

Sec. 6b. (1) Except as otherwise provided in subsection (2), a guardian or limited guardian of a child has standing to bring an action for custody of the child pursuant to this act.

(2) A limited guardian of a child does not have standing to bring an action for custody of the child if the parent or parents of the child have substantially complied with a limited guardianship placement plan regarding the child entered into pursuant to section 424a of the revised probate code, Act No. 642 of the Public Acts of 1978, being section 700.424a of the Michigan Compiled Laws.

(3) If the circuit court does not have prior continuing jurisdiction over the [D] custody of a <D] child, a child custody action brought by a guardian or limited guardian of the child shall be filed in the circuit court in the county in which the probate court appointed the guardian.

(4) Upon the filing of a child custody action brought by a guardian or limited guardian of the child, all guardianship proceedings concerning that child in the probate court shall be stayed until disposition of the child custody action. An order of the probate court concerning the guardianship of the child shall continue in force until superseded by an order of the circuit court. If the circuit court awards custody of the child, it shall send a copy of the judgment or order of disposition to the probate court in the county that appointed the guardian or limited guardian for the child.

(5) If a guardian or limited guardian of a child brings a child custody action, the circuit court [D] may <D][A] SHALL <A] request the supreme court pursuant to section 225 of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, being section 600.225 of the Michigan Compiled Laws, to assign the judge of the probate court who appointed that guardian or limited guardian to serve as a judge of the circuit court and hear the child custody action.

[A] SEC. 6C. (1) A THIRD PERSON MAY BRING AN ACTION FOR CUSTODY OF A CHILD IF THE COURT FINDS EITHER OF THE FOLLOWING:

(A) BOTH OF THE FOLLOWING:

(I) THE CHILD WAS PLACED FOR ADOPTION WITH THE THIRD PERSON UNDER THE ADOPTION LAWS OF THIS OR ANOTHER STATE, AND THE PLACEMENT ORDER IS STILL IN EFFECT AT THE TIME THE ACTION IS FILED.

(II) AFTER THE PLACEMENT, THE CHILD HAS RESIDED WITH THE THIRD PERSON FOR A MINIMUM OF 6 MONTHS.

(B) ALL OF THE FOLLOWING:

(I) THE CHILD'S BIOLOGICAL PARENTS HAVE NEVER BEEN MARRIED TO ONE ANOTHER.

(II) THE CHILD'S PARENT WHO HAS CUSTODY OF THE CHILD DIES OR IS MISSING AND THE OTHER PARENT HAS NOT BEEN GRANTED LEGAL CUSTODY UNDER COURT ORDER.

(III) THE THIRD PERSON IS RELATED TO THE CHILD WITHIN THE FIFTH DEGREE BY MARRIAGE, BLOOD, OR ADOPTION.

(2) A THIRD PERSON SHALL INCLUDE WITH AN ACTION FILED UNDER THIS SECTION BOTH OF THE FOLLOWING:

(A) AN AFFIDAVIT SETTING FORTH FACTS RELATIVE TO THE EXISTENCE OF THE PREREQUISITES REQUIRED BY SUBSECTION (1)(A) OR (B).

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AN ACT to amend sections 3, 5, 6, 6b, and 7a of Act No. 91 of the Public Acts of 1970, entitled as amended
"Child custody act of 1970,"section 3 as amended by A....

(B) NOTICE THAT A DEFENSE OR OBJECTION TO A THIRD PERSON'S RIGHT TO BRING AN ACTION FOR CUSTODY MAY BE RAISED AS AN AFFIRMATIVE DEFENSE OR BY A MOTION FOR SUMMARY DISPOSITION BASED ON LACK OF STANDING AS PROVIDED IN THE MICHIGAN COURT RULES.

SEC. 6D. A THIRD PERSON FILING AN ACTION UNDER SECTION 6C SHALL PROCEED AS FOLLOWS:

(A) IF THE CIRCUIT COURT HAS CONTINUING JURISDICTION OVER THE CHILD, THE ACTION SHALL BE FILED IN THE CIRCUIT COURT THAT HAS CONTINUING JURISDICTION OVER THE CHILD.

(B) IF THE CIRCUIT COURT DOES NOT HAVE CONTINUING JURISDICTION OVER THE CHILD, THE ACTION SHALL BE FILED IN THE CIRCUIT COURT IN THE COUNTY WHERE THE CHILD HAS RESIDED FOR THE 6 MONTHS IMMEDIATELY PRECEDING THE FILING OF THE ACTION OR, IF THE CHILD HAS NOT RESIDED IN ANY COUNTY FOR THE 6 MONTHS IMMEDIATELY PRECEDING THE FILING OF THE ACTION, THE ACTION SHALL BE FILED IN THE CIRCUIT COURT IN THE COUNTY HAVING THE MOST SIGNIFICANT CONNECTION WITH THE CHILD.

SEC. 6E. (1) A THIRD PERSON FILING AN ACTION UNDER SECTION 6C SHALL SEND NOTICE OF THE ACTION TO EACH PARTY WHO HAS LEGAL CUSTODY OF THE CHILD AND TO EACH PARENT WHOSE PARENTAL RIGHTS HAVE NOT BEEN TERMINATED.

(2) IN ADDITION TO OTHER POWERS OF THE COURT, IN AN ACTION UNDER SECTION 6C, THE COURT MAY DO ANY OF THE FOLLOWING:

(A) APPOINT AN ATTORNEY FOR A PARENT.

(B) ORDER THAT A NECESSARY AND REASONABLE AMOUNT OF MONEY BE PAID TO THE COURT FOR REIMBURSEMENT OF A PARTY'S ATTORNEY. A PARTY MAY REQUEST AN ORDER UNDER THIS SUBDIVISION. THE MOVING PARTY SHALL ALLEGE FACTS SHOWING THAT THE PARTY IS OTHERWISE UNABLE TO BEAR THE EXPENSE OF THE ACTION. THE COURT SHALL REQUIRE THE DISCLOSURE OF ATTORNEY FEES OR OTHER EXPENSES PAID.

(C) THE COURT MAY AWARD COSTS AND FEES AS PROVIDED IN SECTION 2591 OF THE REVISED JUDICATURE ACT OF 1961, ACT NO. 236 OF THE PUBLIC ACTS OF 1961, BEING SECTION 600.2591 OF THE MICHIGAN COMPILED LAWS. <A]

Sec. 7a. (1) Visitation shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, visitation shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted visitation.

(2) If the parents of a child agree on visitation terms, the court shall order the visitation terms unless the court determines on the record by clear and convincing evidence that the visitation terms are not in the best interests of the child.

(3) A child [D> shall have <D][A> HAS <A]a right to visitation with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health.

[A> (4) NOTWITHSTANDING OTHER PROVISIONS OF THIS ACT, IF A PROCEEDING REGARDING VISITATION INVOLVES A CHILD WHO IS CONCEIVED AS THE RESULT OF ACTS FOR WHICH 1 OF THE CHILD'S BIOLOGICAL PARENTS IS CONVICTED OF CRIMINAL SEXUAL CONDUCT AS PROVIDED IN SECTIONS 520A TO 520E AND 520G OF THE MICHIGAN PENAL CODE, ACT NO. 328 OF THE PUBLIC ACTS OF 1931, BEING SECTIONS 750.520A TO 750.520E AND 750.520G OF THE MICHIGAN COMPILED LAWS, THE COURT SHALL NOT GRANT VISITATION TO THE CONVICTED BIOLOGICAL PARENT. THIS SUBSECTION DOES NOT APPLY TO A CONVICTION UNDER SECTION 520D(1)(A) OF THE MICHIGAN PENAL CODE, ACT NO. 328 OF THE PUBLIC ACTS OF 1931, BEING SECTION 750.520D OF THE MICHIGAN COMPILED LAWS.

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AN ACT to amend sections 3, 5, 6, 6b, and 7a of Act No. 91 of the Public Acts of 1970, entitled as amended
"Child custody act of 1970,"section 3 as amended by A....

THIS SUBSECTION DOES NOT APPLY IF, AFTER THE DATE OF THE CONVICTION, THE BIOLOGICAL PARENTS COHABIT AND ESTABLISH A MUTUAL CUSTODIAL ENVIRONMENT FOR THE CHILD.

(5) NOTWITHSTANDING OTHER PROVISIONS OF THIS ACT, IF AN INDIVIDUAL IS CONVICTED OF CRIMINAL SEXUAL CONDUCT AS PROVIDED IN SECTIONS 520A TO 520E AND 520G OF ACT NO. 328 OF THE PUBLIC ACTS OF 1931 AND THE VICTIM IS THE INDIVIDUAL'S CHILD, THE COURT SHALL NOT GRANT VISITATION WITH THAT CHILD OR A SIBLING OF THAT CHILD TO THAT INDIVIDUAL, UNLESS BOTH THE CHILD'S OTHER PARENT AND, IF THE COURT CONSIDERS THE CHILD OR SIBLING TO BE OF SUFFICIENT AGE TO EXPRESS HIS OR HER DESIRES, THE CHILD OR SIBLING CONSENT TO THE VISITATION.

(6) ~~A~~~~D~~ (4) ~~D~~The court may consider the following factors when determining the frequency, duration, and type of visitation to be granted:

- (a) The existence of any special circumstances or needs of the child.
- (b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
- (c) The reasonable likelihood of abuse or neglect of the child during visitation.
- (d) The reasonable likelihood of abuse of a parent resulting from the exercise of visitation.
- (e) The inconvenience to, and burdensome impact or effect on, the child of traveling to and from the visitation time.
- (f) Whether the visiting parent can reasonably be expected to exercise visitation in accordance with the court order.
- (g) Whether the visiting parent has frequently failed to exercise reasonable visitation.
- (h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent ~~A~~ OR FROM A THIRD PERSON WHO HAS LEGAL CUSTODY ~~A~~. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.
- (i) Any other relevant factors.

~~A~~ (7) ~~A~~~~D~~ (5) ~~D~~Visitation shall be granted in specific terms if requested by either party at any time.

(8) ~~D~~ (6) ~~D~~A visitation order may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of visitation by a parent, including 1 or more of the following:

- (a) Division of the responsibility to transport the child.
- (b) Division of the cost of transporting the child.
- (c) Restrictions on the presence of third persons during visitation.
- (d) Requirements that the child be ready for visitation at a specific time.
- (e) Requirements that the parent arrive for visitation and return the child from visitation at specific times.
- (f) Requirements that visitation occur in the presence of a third person or agency.
- (g) Requirements that a party post a bond to assure compliance with a visitation order.
- (h) Requirements of reasonable notice when visitation will not occur.
- (i) Any other reasonable condition determined to be appropriate in the particular case.

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AN ACT to amend sections 3, 5, 6, 6b, and 7a of Act No. 91 of the Public Acts of 1970, entitled as amended
"Child custody act of 1970,"section 3 as amended by A...

(9) [D] (7) <D>During the time a child is with a parent to whom visitation has been awarded, that parent shall decide all routine matters concerning the child.

(10) [D] (8) <D>Prior to entry of a temporary order, a parent may seek an ex parte interim order concerning visitation. If the court enters an ex parte interim order concerning visitation, the party on whose motion the ex parte interim order is entered shall have a true copy of the order served on the friend of the court and the opposing party.

(11) [D] (9) <D>If the opposing party objects to the ex parte interim order, he or she shall file with the clerk of the court within 14 days after receiving notice of the order a written objection to, or a motion to modify or rescind, the ex parte interim order. The opposing party shall have a true copy of the written objection or motion served on the friend of the court and the party who obtained the ex parte interim order.

(12) [D] (10) <D>If the opposing party files a written objection to the ex parte interim order, the friend of the court shall attempt to resolve the dispute within 14 days after receiving it. If the matter cannot be resolved, the friend of the court shall provide the opposing party with a form motion and order with written instructions for their use in modifying or rescinding the ex parte order without assistance of counsel. If the opposing party wishes to proceed without assistance of counsel, the friend of the court shall schedule a hearing with the court that shall be held within 21 days after the filing of the motion. [D] (11) <D>If the opposing party files a motion to modify or rescind the ex parte interim order and requests a hearing, the court shall resolve the dispute within 28 days after the hearing is requested.

[A] (13) <A>[D] (12) <D>An ex parte interim order issued pursuant to this section shall contain the following notice:
NOTICE:

1. You may file a written objection to [D] the <D>[A] THIS <A>order or a motion to modify or rescind [D] the <D>[A] THIS <A>order. [D] 2. The <D>[A] YOU MUST FILE THE <A>written objection or motion [D] must be filed <D>with the clerk of the court within 14 days after you were served with [D] the <D>[A] THIS <A>order. [D] A <D>[A] YOU MUST SERVE A <A>true copy of the objection or motion [D] shall be served <D>on the friend of the court and the party who obtained the order.

[A] 2. <A>[D] 3. <D>If you file a written objection, the friend of the court [D] shall <D>[A] MUST <A>try to resolve the dispute. If the friend of the court cannot resolve the dispute and if you wish to bring the matter before the court without the assistance of counsel, the friend of the court [D] shall <D>[A] MUST <A>provide you with form pleadings and written instructions and [A] MUST <A>schedule a hearing with the court.

Section 2. Sections 6c to 6e as added by this amendatory act are remedial in nature and apply retroactively.

History

Filed with the Secretary of State November 29, 1993

MICHIGAN ADVANCE LEGISLATIVE SERVICE

End of Document

APPELLEE'S APPENDIX X

ACKNOWLEDGMENT OF PARENTAGE ACT
Act 305 of 1996

AN ACT to prescribe procedures for and the contents of acknowledgments of parentage; to state the effects of those acknowledgments; to provide procedures and criteria for revoking acknowledgments; and to prescribe powers and duties of certain state officers and employees.

History: 1996, Act 305, Eff. June 1, 1997.

The People of the State of Michigan enact:

722.1001 Short title.

Sec. 1. This act shall be known and may be cited as the "acknowledgment of parentage act".

History: 1996, Act 305, Eff. June 1, 1997.

722.1002 Definitions.

Sec. 2. As used in this act:

(a) "Acknowledged parent" means an individual who has established a parent-child relationship under this act.

(b) "Acknowledgment" means an acknowledgment of parentage executed as provided in this act.

(c) "Child" means a child conceived and born to a woman who was not married at the time of conception or the date of birth of the child, a child that the circuit court determines was born or conceived during a marriage but is not the issue of that marriage, or a child that is born to an individual who gave birth to a child conceived through assisted reproduction.

(d) "Court" means the circuit court.

(e) "State registrar" means that term as defined in section 2805 of the public health code, 1978 PA 368, MCL 333.2805.

History: 1996, Act 305, Eff. June 1, 1997;—Am. 2024, Act 31, Eff. Apr. 2, 2025.

722.1003 Acknowledgment of parentage; form; validity; signatures; witness; copy.

Sec. 3. (1) If a child is born out of wedlock, a man is considered to be the natural father of that child if the man joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgment of parentage.

(2) If a child born out of wedlock is conceived by assisted reproduction as defined in the assisted reproduction and surrogacy parentage act, an individual is considered to be the natural parent of that child if the individual joins with the individual who gave birth to the child and acknowledges that child as their child by completing a form that is an acknowledgment of parentage.

(3) If a child is born to a married individual who gave birth to a child conceived by assisted reproduction as defined in the assisted reproduction and surrogacy parentage act, their spouse is considered to be an acknowledged parent by completing a form that is an acknowledgment of parentage.

(4) An acknowledgment of parentage form is valid and effective and establishes the parentage of a child if signed by individuals eligible to acknowledge parentage as set forth in subsections (1), (2), and (3) and those signatures are each notarized by a notary public authorized by the state in which the acknowledgment is signed or witnessed by 1 disinterested, legally competent adult. The witness must be an employee of 1 of the following: a hospital, publicly funded or licensed health clinic, pediatric office, friend of the court, prosecuting attorney, court, department of health and human services, county health agency, county records department, head start program, local social services provider, county jail, or state prison. The witness must sign and date the acknowledgment of parentage form and provide his or her printed name, address, and place of employment. An acknowledgment may be signed any time during the child's lifetime.

(5) The birth parent and the acknowledged parent must be provided a copy of the completed acknowledgment at the time of signing.

History: 1996, Act 305, Eff. June 1, 1997;—Am. 2014, Act 409, Eff. Mar. 30, 2015;—Am. 2024, Act 31, Eff. Apr. 2, 2025.

722.1004 Acknowledgment as basis for court ordered child support, custody, or parenting time; relationship and status of child.

Sec. 4. An acknowledgment that complies with this act and is filed with the state registrar establishes parentage and is the equivalent to an adjudication of parentage of the child and confers on the acknowledged parent all rights and duties of a parent, and the acknowledgment may be the basis for court ordered child support, custody, or parenting time without further adjudication under the paternity act, 1956 PA 205, MCL

722.711 to 722.730, or under the assisted reproduction and surrogacy parentage act. The child who is the subject of the acknowledgment bears the same relationship to the birth parent and the acknowledged parent as a child born or conceived during a marriage and has the identical status, rights, and duties of a child born in lawful wedlock effective from birth.

History: 1996, Act 305, Eff. June 1, 1997;—Am. 2024, Act 31, Eff. Apr. 2, 2025.

722.1005 Acknowledgment of parentage; filing with state registrar; review; maintenance as permanent record; procedures and payment for issuance; basis for preparation of new birth certificate.

Sec. 5. (1) A completed original acknowledgment of parentage shall be filed with the state registrar. Upon receipt of an acknowledgment, the state registrar shall review the form. If it appears to be properly completed and notarized or each signature is witnessed as provided under section 3, the state registrar shall file the acknowledgment in a parentage registry in the office of the state registrar. An acknowledgment filed with the state registrar shall be maintained as a permanent record in a manner consistent with section 2876 of the public health code, 1978 PA 368, MCL 333.2876.

(2) The state registrar shall issue a copy of an acknowledgment filed in the parentage registry under the procedures and upon payment of the fee prescribed by section 2891 of the public health code, 1978 PA 368, MCL 333.2891.

(3) Upon filing, the completed acknowledgment form may serve as a basis for preparation of a new certificate of birth as provided in section 2831 of the public health code, 1978 PA 368, MCL 333.2831.

History: 1996, Act 305, Eff. June 1, 1997;—Am. 2014, Act 409, Eff. Mar. 30, 2015.

722.1006 Grant of initial custody.

Sec. 6. After completion of an acknowledgement of parentage signed according to section 3(1) that complies with this act is filed with the state registrar, the mother has initial custody of the minor child, without prejudice to the determination of either parent's custodial rights, until otherwise determined by the court or otherwise agreed upon by the parties in writing and acknowledged by the court. This grant of initial custody to the mother does not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time.

History: 1996, Act 305, Eff. June 1, 1997;—Am. 2006, Act 105, Imd. Eff. Apr. 7, 2006;—Am. 2024, Act 31, Eff. Apr. 2, 2025.

722.1007 Notices.

Sec. 7. The acknowledgment of parentage form must include at least all of the following written notices to the parties:

- (a) The acknowledgment of parentage is a legal document.
- (b) Completion of the acknowledgment is voluntary.
- (c) For acknowledgments of parentage signed according to section 3(1), the mother has initial custody of the child, without prejudice to the determination of either parent's custodial rights, until otherwise determined by the court or agreed by the parties in writing and acknowledged by the court. This grant of initial custody to the mother does not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time.
- (d) Either parent may assert a claim in court for parenting time or custody.
- (e) The parents have a right to notice and a hearing regarding the adoption of the child.
- (f) Both parents have the responsibility to support the child and to comply with a court or administrative order for the child's support.
- (g) Notice that signing the acknowledgment waives the following:
 - (i) Blood or genetic tests to determine if the man is the biological father of the child.
 - (ii) Any right to an attorney, including the prosecuting attorney or an attorney appointed by the court in the case of indigency, to represent either party in a court action to determine if the man is the biological father of the child.
 - (iii) A trial to determine if the man is the biological father of the child.
- (h) That in order to revoke an acknowledgment of parentage, an individual must file a claim as provided under the revocation of parentage act.

History: 1996, Act 305, Eff. June 1, 1997;—Am. 2006, Act 105, Imd. Eff. Apr. 7, 2006;—Am. 2012, Act 161, Imd. Eff. June 12, 2012;—Am. 2024, Act 31, Eff. Apr. 2, 2025.

722.1008 Acknowledgment of parentage; preparation or approval of form; availability to public.

Sec. 8. The state registrar shall prepare or approve the form used for acknowledgment of parentage. The form shall conform as closely as possible to section 7, federal requirements, and the needs of other appropriate state agencies. The state registrar shall make the form available to the public through the family independence agency, prosecuting attorneys, and hospitals as provided in section 21532 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.21532 of the Michigan Compiled Laws.

History: 1996, Act 305, Eff. June 1, 1997.

722.1009 Appointment of next friend or guardian ad litem; effect of signing by minor parent.

Sec. 9. In proceedings under this act, the court may appoint a next friend or guardian ad litem to represent a minor parent at the court's discretion. A minor parent may sign an acknowledgment of parentage with the same effect as if he or she were of legal age.

History: 1996, Act 305, Eff. June 1, 1997.

722.1010 Consent to court jurisdiction.

Sec. 10. Except as otherwise provided by law, a mother and father who sign an acknowledgment that is filed as prescribed by section 5 are consenting to the general, personal jurisdiction of the courts of record of this state regarding the issues of the support, custody, and parenting time of the child.

History: 1996, Act 305, Eff. June 1, 1997.

722.1011 Repealed. 2012, Act 161, Imd. Eff. June 12, 2012.

Compiler's note: The repealed section pertained to notices included in acknowledgment of parentage form.

722.1012 Validity of prior acknowledgment.

Sec. 12. This act does not affect the validity of an acknowledgment signed before the effective date of this act. The procedures for determination of a claim for revocation apply to all acknowledgments, including those signed before the effective date of this act.

History: 1996, Act 305, Eff. June 1, 1997.

722.1013 Effective date.

Sec. 13. This act shall take effect June 1, 1997.

History: 1996, Act 305, Eff. June 1, 1997.

APPELLEE'S APPENDIX XI

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Act No. 96
Public Acts of 2016
Approved by the Governor
May 3, 2016
Filed with the Secretary of State
May 3, 2016
EFFECTIVE DATE: August 1, 2016

**STATE OF MICHIGAN
98TH LEGISLATURE
REGULAR SESSION OF 2016**

Introduced by Reps. Lyons, Faris, Brinks, Hughes, Garcia, Crawford, Price, Hooker, Glenn, Cox, Heise, Webber, Guerra, Pscholka, Chatfield, LaVoy, Kelly, Love, Schor, Driskell, Pagan, Glardon, Santana and Franz

ENROLLED HOUSE BILL No. 4481

AN ACT to amend 1970 PA 91, entitled "An act to declare the inherent rights of minor children; to establish rights and duties to their custody, support, and parenting time in disputed actions; to establish rights and duties to provide support for a child after the child reaches the age of majority under certain circumstances; to provide for certain procedure and appeals; and to repeal certain acts and parts of acts," by amending sections 5 and 7a (MCL 722.25 and 722.27a), section 5 as amended by 1993 PA 259 and section 7a as amended by 2015 PA 50.

The People of the State of Michigan enact:

Sec. 5. (1) If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence.

(2) Notwithstanding other provisions of this act, if a child custody dispute involves a child who is conceived as the result of acts for which 1 of the child's biological parents is convicted of criminal sexual conduct as provided in sections 520a to 520e and 520g of the Michigan penal code, 1931 PA 328, MCL 750.520a to 750.520e and 750.520g, or a substantially similar statute of another state or the federal government, or is found by clear and convincing evidence in a fact-finding hearing to have committed acts of nonconsensual sexual penetration, the court shall not award custody to that biological parent. This subsection does not apply to a conviction under section 520d(1)(a) of the Michigan penal code, 1931 PA 328, MCL 750.520d. This subsection does not apply if, after the date of the conviction, or the date of the finding in a fact-finding hearing described in this subsection, the biological parents cohabit and establish a mutual custodial environment for the child.

(3) An offending parent is not entitled to custody of a child described in subsection (2) without the consent of that child's other parent or guardian.

(4) Notwithstanding other provisions of this act, subsection (2) does not relieve an offending parent of any support or maintenance obligation to the child. The other parent or the guardian of the child may decline support or maintenance from the offending parent.

(5) A parent may assert an affirmative defense of the provisions of subsection (2) in a proceeding brought by the offending parent regarding a child described in subsection (2).

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(6) Notwithstanding other provisions of this act, if an individual is convicted of criminal sexual conduct as provided in sections 520a to 520e and 520g of the Michigan penal code, 1931 PA 328, MCL 750.520a to 750.520e and 750.520g, and the victim is the individual's child, the court shall not award custody of that child or a sibling of that child to that individual, unless both the child's other parent and, if the court considers the child or sibling to be of sufficient age to express his or her desires, the child or sibling consent to the custody.

(7) As used in this section, "offending parent" means a parent who has been convicted of criminal sexual conduct as described in subsection (2) or who has been found by clear and convincing evidence in a fact-finding hearing to have committed acts of nonconsensual sexual penetration as described in subsection (2).

Sec. 7a. (1) Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.

(2) If the parents of a child agree on parenting time terms, the court shall order the parenting time terms unless the court determines on the record by clear and convincing evidence that the parenting time terms are not in the best interests of the child.

(3) A child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health.

(4) Notwithstanding other provisions of this act, if a proceeding regarding parenting time involves a child who is conceived as the result of acts for which 1 of the child's biological parents is convicted of criminal sexual conduct as provided in sections 520a to 520e and 520g of the Michigan penal code, 1931 PA 328, MCL 750.520a to 750.520e and 750.520g, or a substantially similar statute of another state or the federal government, or is found by clear and convincing evidence in a fact-finding hearing to have committed acts of nonconsensual sexual penetration, the court shall not grant parenting time to that biological parent. This subsection does not apply to a conviction under section 520d(1)(a) of the Michigan penal code, 1931 PA 328, MCL 750.520d. This subsection does not apply if, after the date of the conviction, or the date of the finding in a fact-finding hearing described in this subsection, the biological parents cohabit and establish a mutual custodial environment for the child.

(5) A parent may assert an affirmative defense of the provisions of subsection (4) in a proceeding brought by the offending parent regarding a child described in subsection (4).

(6) Notwithstanding other provisions of this act, if an individual is convicted of criminal sexual conduct as provided in sections 520a to 520e and 520g of the Michigan penal code, 1931 PA 328, MCL 750.520a to 750.520e and 750.520g, and the victim is the individual's child, the court shall not grant parenting time with that child or a sibling of that child to that individual, unless both the child's other parent and, if the court considers the child or sibling to be of sufficient age to express his or her desires, the child or sibling consent to the parenting time.

(7) The court may consider the following factors when determining the frequency, duration, and type of parenting time to be granted:

(a) The existence of any special circumstances or needs of the child.

(b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.

(c) The reasonable likelihood of abuse or neglect of the child during parenting time.

(d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.

(e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.

(f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.

(g) Whether a parent has frequently failed to exercise reasonable parenting time.

(h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.

(i) Any other relevant factors.

(8) Parenting time shall be granted in specific terms if requested by either party at any time.

(9) A parenting time order may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of parenting time by a parent, including 1 or more of the following:

(a) Division of the responsibility to transport the child.

(b) Division of the cost of transporting the child.

(c) Restrictions on the presence of third persons during parenting time.

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(d) Requirements that the child be ready for parenting time at a specific time.

(e) Requirements that the parent arrive for parenting time and return the child from parenting time at specific times.

(f) Requirements that parenting time occur in the presence of a third person or agency.

(g) Requirements that a party post a bond to assure compliance with a parenting time order.

(h) Requirements of reasonable notice when parenting time will not occur.

(i) Any other reasonable condition determined to be appropriate in the particular case.

(10) Except as provided in this subsection, a parenting time order shall contain a prohibition on exercising parenting time in a country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction. This subsection does not apply if both parents provide the court with written consent to allow a parent to exercise parenting time in a country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction.

(11) During the time a child is with a parent to whom parenting time has been awarded, that parent shall decide all routine matters concerning the child.

(12) Prior to entry of a temporary order, a parent may seek an ex parte interim order concerning parenting time. If the court enters an ex parte interim order concerning parenting time, the party on whose motion the ex parte interim order is entered shall have a true copy of the order served on the friend of the court and the opposing party.

(13) If the opposing party objects to the ex parte interim order, he or she shall file with the clerk of the court within 14 days after receiving notice of the order a written objection to, or a motion to modify or rescind, the ex parte interim order. The opposing party shall have a true copy of the written objection or motion served on the friend of the court and the party who obtained the ex parte interim order.

(14) If the opposing party files a written objection to the ex parte interim order, the friend of the court shall attempt to resolve the dispute within 14 days after receiving it. If the matter cannot be resolved, the friend of the court shall provide the opposing party with a form motion and order with written instructions for their use in modifying or rescinding the ex parte order without assistance of counsel. If the opposing party wishes to proceed without assistance of counsel, the friend of the court shall schedule a hearing with the court that shall be held within 21 days after the filing of the motion. If the opposing party files a motion to modify or rescind the ex parte interim order and requests a hearing, the court shall resolve the dispute within 28 days after the hearing is requested.

(15) An ex parte interim order issued under this section shall contain the following notice:

NOTICE:

1. You may file a written objection to this order or a motion to modify or rescind this order. You must file the written objection or motion with the clerk of the court within 14 days after you were served with this order. You must serve a true copy of the objection or motion on the friend of the court and the party who obtained the order.

2. If you file a written objection, the friend of the court must try to resolve the dispute. If the friend of the court cannot resolve the dispute and if you wish to bring the matter before the court without the assistance of counsel, the friend of the court must provide you with form pleadings and written instructions and must schedule a hearing with the court.

(16) As provided in the servicemembers civil relief act, 50 USC 501 to 597b, if a motion for change of parenting time is filed during the time a parent is on deployment, a parent may file and the court shall entertain an application for stay. The court shall presume that the best interests of the child are served by not entering an order modifying or amending a previous judgment or order, or issuing a new order, that changes the parenting time that existed on the date the parent was called to deployment, unless the contrary is established by clear and convincing evidence, at which time the court may enter a temporary parenting time order. When a temporary parenting time order is issued under this subsection, the court may include a limit on the period of time that the temporary parenting time order remains in effect. At any stage before final judgment in the proceeding, the parent may file an application for stay or otherwise request a stay of proceedings or file an application for an extension of a stay. The parent and the custodial child are not required to be present to consider the application for stay or extension of a stay. The application for stay or extension of a stay is sufficient if it is a signed, written statement, certified to be true under penalty of perjury. The same conditions for the initial stay apply to applications for an extension of a stay.

(17) The parent shall inform the court of the deployment end date before or within 30 days after that deployment end date. Upon notification of a parent's deployment end date, the court shall reinstate the parenting time order in effect immediately preceding that period of deployment. If a motion for change of parenting time is filed after a parent returns from deployment, the court shall not consider a parent's absence due to that deployment in making a determination regarding change of parenting time. Future deployments shall not be considered in making a best interest of the child determination.

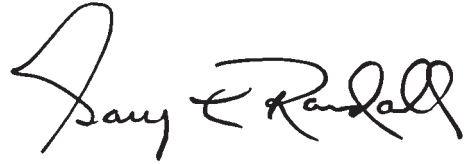
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(18) If the deploying parent and the other parent share custody, the deploying parent must notify the other parent of an upcoming deployment within a reasonable period of time.

(19) As used in this section, "offending parent" means a parent who has been convicted of criminal sexual conduct as described in subsection (4) or who has been found by clear and convincing evidence in a fact-finding hearing to have committed acts of nonconsensual sexual penetration as described in subsection (4).

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.

This act is ordered to take immediate effect.



Clerk of the House of Representatives



Secretary of the Senate

Approved

Governor

APPELLEE'S APPENDIX XII

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Act No. 178
 Public Acts of 2016
 Approved by the Governor
 June 12, 2016
 Filed with the Secretary of State
 June 14, 2016
 EFFECTIVE DATE: September 12, 2016

**STATE OF MICHIGAN
 98TH LEGISLATURE
 REGULAR SESSION OF 2016**

Introduced by Senator Jones

ENROLLED SENATE BILL No. 858

AN ACT to amend 2012 PA 159, entitled “An act to provide procedures to determine the paternity of children in certain circumstances; to allow acknowledgments, determinations, and judgments relating to paternity to be set aside in certain circumstances; to provide for the powers and duties of certain state and local governmental officers and entities; and to provide remedies,” by amending sections 13 and 15 (MCL 722.1443 and 722.1445), section 13 as amended by 2014 PA 374.

The People of the State of Michigan enact:

Sec. 13. (1) An original action under this act shall be filed in the circuit court for the county in which the mother or the child resides or, if neither the mother nor the child reside in this state, in the circuit court for the county in which the child was born. If an action for the support, custody, or parenting time of the child exists at any stage of the proceedings in a circuit court of this state or if an action under section 2(b) of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.2, is pending in a circuit court of this state, an action under this act shall be brought by motion in the existing case under rules adopted by the supreme court.

(2) In an action filed under this act, the court may do any of the following:

- (a) Revoke an acknowledgment of parentage.
- (b) Determine that a genetic father is not a child’s father.
- (c) Set aside an order of filiation or a paternity order.
- (d) Determine that a child was born out of wedlock.

(e) Make a determination of paternity and enter an order of filiation as provided for under section 7 of the paternity act, 1956 PA 205, MCL 722.717.

(3) A judgment entered under this act does not relieve a man from a support obligation for the child or the child’s mother that was incurred before the action was filed or prevent a person from seeking relief under applicable court rules to vacate or set aside a judgment.

(4) A court may refuse to enter an order setting aside a paternity determination, revoking an acknowledgment of parentage, determining that a genetic father is not a child’s father, or determining that a child is born out of wedlock if the court finds evidence that the order would not be in the best interests of the child. The court shall state its reasons for refusing to enter an order on the record. The court may consider the following factors:

- (a) Whether the presumed father is estopped from denying parentage because of his conduct.
- (b) The length of time the presumed father was on notice that he might not be the child’s father.
- (c) The facts surrounding the presumed father’s discovery that he might not be the child’s father.
- (d) The nature of the relationship between the child and the presumed or alleged father.

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- (e) The age of the child.
- (f) The harm that may result to the child.
- (g) Other factors that may affect the equities arising from the disruption of the father-child relationship.
- (h) Any other factor that the court determines appropriate to consider.

(5) The court shall order the parties to an action or motion under this act to participate in and pay for blood or tissue typing or DNA identification profiling to assist the court in making a determination under this act. Blood or tissue typing or DNA identification profiling shall be conducted in accordance with section 6 of the paternity act, 1956 PA 205, MCL 722.716. The results of blood or tissue typing or DNA identification profiling are not binding on a court in making a determination under this act.

(6) If the case is a title IV-D case, the court may appoint an attorney approved by the office of child support to represent this state's interests with respect to an action or a motion under this act. The court may appoint a guardian ad litem to represent the child's interests with respect to the action or motion.

(7) A court shall not issue an order under this act that sets aside a judgment or determination of a court or administrative agency of another state, even if the judgment or determination is being enforced in this state, or that is inconsistent with 28 USC 1738A or 28 USC 1738B.

(8) This act does not establish a basis for termination of an adoption and does not affect any obligation of an adoptive parent to an adoptive child.

(9) This act does not establish a basis for vacating a judgment establishing paternity of a child conceived under a surrogate parentage contract as that term is defined in section 3 of the surrogate parenting act, 1988 PA 199, MCL 722.853.

(10) A common law action that was available before June 12, 2012 to set aside a paternity determination or to determine that a child is born out of wedlock remains available until June 12, 2014, but is not available after June 12, 2014.

(11) Except for an action filed under section 15(2), a court, in its discretion, may order a person who files an action or motion under this act to post an amount of money with the court, obtain a surety, or provide other assurances that in the court's determination will secure the costs of the action and attorney fees if the person does not prevail. The court, in its discretion, may order a nonprevailing party, including a mother who is a nonprevailing party under section 15(2), to pay the reasonable attorney fees and costs of a prevailing party.

(12) A court may extend the time for filing an action or motion under this act. A request for extension shall be supported by an affidavit signed by the person requesting the extension stating facts that the person satisfied all the requirements for filing an action or motion under this act but did not file the action or motion within the time allowed under this act because of 1 of the following:

- (a) Mistake of fact.
- (b) Newly discovered evidence that by due diligence could not have been found earlier.
- (c) Fraud.
- (d) Misrepresentation or misconduct.
- (e) Duress.

(13) If the court finds that an affidavit under subsection (12) is sufficient, the court may allow the action or motion to be filed and take other action the court considers appropriate. The party filing the request to extend the time for filing has the burden of proving, by clear and convincing evidence, that granting relief under this act will not be against the best interests of the child considering the equities of the case.

(14) An alleged father may not bring an action under this act if the child is conceived as the result of acts for which the alleged father was convicted of criminal sexual conduct under sections 520b to 520e of the Michigan penal code, 1931 PA 328, MCL 750.520b to 750.520e.

(15) An action may not be brought under this act if the child is under court jurisdiction under chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.1 to 712A.32, and a petition has been filed to terminate the parental rights to the child, unless the court having jurisdiction under chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.1 to 712A.32, first finds that allowing an action under this act would be in the best interests of the child.

Sec. 15. (1) If an action is brought by an alleged father who proves by clear and convincing evidence that he is the child's father, the court may make a determination of paternity and enter an order of filiation as provided for under section 7 of the paternity act, 1956 PA 205, MCL 722.717.

(2) If an action is brought by a mother who, after a fact-finding hearing, proves by clear and convincing evidence that the child was conceived as a result of nonconsensual sexual penetration, the court shall do 1 of the following:

- (a) Revoke an acknowledgment of parentage for an acknowledged father.
- (b) Determine that a genetic father is not the child's father.

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(c) Set aside an order of filiation for an affiliated father.

(d) Make a determination of paternity regarding an alleged father and enter an order of revocation of paternity for that alleged father.

(3) Subsection (2) does not apply if, after the date of the alleged nonconsensual sexual penetration described in subsection (2), the biological parents cohabit and establish a mutual custodial environment for the child.

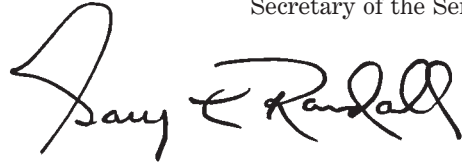
(4) As used in this section, "sexual penetration" means that term as defined in section 520a of the Michigan penal code, 1931 PA 328, MCL 750.520a.

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.

This act is ordered to take immediate effect.



Secretary of the Senate



Clerk of the House of Representatives

Approved

.....
Governor

APPELLEE'S APPENDIX XIII

PATERNITY REVOCATION/ESTABLISHMENT S.B. 557 (S-2) & 558-560: ANALYSIS AS PASSED BY THE SENATE
[Please see the PDF version of this analysis, if available, to view this image.]

Senate Bill 557 (Substitute S-2 as passed by the Senate)
 Senate Bills 558, 559, and 560 (as passed by the Senate)
 Sponsor: Senator Steven Bieda (S.B. 557 & 558) Senator Rick Jones (S.B. 559 & 560)
 Committee: Judiciary

Date Completed: 12-1-11

RATIONALE

Under Michigan law, a man who claims to be a child's father--sometimes called a putative or alleged father--typically may not bring a paternity action if the child's mother was married to another man--the "presumed" father--between the time the child was conceived and the time he or she was born. The only exception applies to situations in which there has been a prior court determination, such as in a divorce judgment, that the mother's husband is not the child's father. Many people believe that alleged fathers should be able to establish their legal paternity under additional circumstances. In some situations, for example, a child is conceived during an extramarital relationship after the woman has left her husband, but she then returns to him. In other cases, a child is conceived by a man and an unmarried woman and the woman marries another man before the child is born. Sometimes, under either scenario, the mother allows the biological father to establish a relationship with the child, and then terminates that relationship. In these and similar situations, the biological father cannot bring a paternity action even if he and the child's mother acknowledge his paternity or DNA testing shows that he is the father, and even if the mother's marriage ends in divorce--unless the divorce judgment includes a determination, based on clear and convincing evidence, that the husband is not the child's father. In addition, although a presumed father can contest his paternity in a divorce proceeding, he may or may not be able to do so at another time, depending on the court and the judge. It has been suggested that Michigan law should allow these types of actions under certain circumstances.

CONTENT Senate Bill 557 (S-2) would enact the "Revocation of Paternity Act" to establish procedures for actions to determine that a presumed father was not a child's father and for actions to set aside an acknowledgment of parentage or an order of filiation. The bill would do the following:

- Allow a child's mother, presumed father, or alleged father, or the Department of Human Services, to file an action to determine that the child was born out of wedlock for the purpose of establishing paternity, under various sets of criteria.**
- Allow an action to revoke an acknowledgment of parentage to be brought by the child's mother, the acknowledged father, an alleged father, or a prosecuting attorney.**
- Allow an action to set aside an order of filiation to be brought by the affiliated father, the mother, or an alleged father, if the affiliated father had failed to participate in the court proceedings that determined filiation.**
- Allow a court to deny an order if it would not be in the child's best interests, and specify factors the court could consider.**
- -- Require the court to order the parties to participate in and pay for blood or tissue typing or DNA identification profiling, and provide that the results would not be binding on the court.**
- Set deadlines for filing an action under the Act and allow the court to extend a deadline under certain circumstances.**

Senate Bill 558 would amend the Acknowledgment of Parentage Act to require an acknowledgment form to indicate that a claim to revoke an acknowledgment would have to be filed under the Revocation of Paternity Act. The bill also would repeal a section of the current Act

that provides for a claim of revocation of an acknowledgment.

Senate Bill 559 would amend the Paternity Act to provide that a court would have continuing jurisdiction over proceedings to determine an action to set aside an order of filiation under the Revocation of Paternity Act.

Senate Bill 560 would amend the Estates and Protected Individuals Code to provide that a man would be considered a child's natural father for purposes of intestate succession if he were determined to be the father in an action under the Revocation of Paternity Act, in the case of a child who was born out of wedlock or born or conceived during a marriage but not the issue of that marriage.

Senate Bills 558, 559, and 560 are tie-barred to Senate Bill 557.

Senate Bill 557 (S-2) is described in detail below.

Action to Establish Paternity

The following provisions would govern an action to determine that a presumed father was not a child's father. ("Presumed father" would mean a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth.) An action under these provisions could be brought by a complaint filed in an original action or by a motion filed in an existing action, as appropriate under the proposed Act and rules adopted by the Supreme Court.

Action by Child's Mother. A court could determine that the child was born out of wedlock for the purpose of establishing his or her paternity if the child's mother filed an action; the mother identified the alleged father (a man who by his actions could have fathered the child) by name in the complaint or motion commencing the action; and both of the following applied:

- The presumed father, the alleged father, and the child's mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child.
- The action was filed within three years after the child's birth (unless the action were filed within one year after the bill's effective date).

Alternatively, a court could determine that the child was born out of wedlock for the purpose of establishing his or her paternity if the child's mother filed an action; the mother identified the alleged father by name in the complaint or motion commencing the action; and either of the following applied:

- The presumed father, having the ability to support or assist in supporting the child, had failed or neglected, without good cause, to provide regular and substantial support for the child, or had failed to comply substantially with a support order, for at least two years before the action was filed.
- The child was less than three years old (unless the action were filed within one year after the bill's effective date) and the presumed father lived separately from the child.

In addition, under either set of circumstances, if the child were determined to be born out of wedlock, the court would have to determine the child's paternity or paternity would have to be established under the law of Michigan or another jurisdiction.

Action by Presumed Father. A court could determine that the child was born out of wedlock for the purpose of establishing his or her paternity if the presumed father raised the issue in a divorce action between himself and the mother or if he filed an action within three years after the child's birth. The requirement to file within

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three years after the child's birth would not apply to an action filed within one year after the bill's effective date.

Action by Alleged Father. A court could determine that a child was born out of wedlock for the purpose of establishing the child's paternity in an action filed by an alleged father, under three sets of criteria.

Under the first set of criteria, all of the following would have to apply:

- The alleged father did not know or have reason to know that the mother was married at the time of conception.
- The presumed father, the alleged father, and the child's mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child.
- The action was filed within three years after the child's birth (unless it were filed within one year after the bill's effective date).

Under the second set of circumstances, the alleged father could not have known or have had reason to know that the mother was married at the time of conception, and either of the following would have to apply:

- The presumed father, having the ability to support or assist in supporting the child, had failed or neglected, without good cause, to provide regular and substantial support for the child, or had failed to comply substantially with a support order, for at least two years before the action was filed.
- The child was less than three years old (unless an action were filed within one year after the bill's effective date) and the presumed father lived separately from the child.

In addition, under each of the first two sets of criteria, the court would have to determine the child's paternity or paternity would have to be established under the law of Michigan or another jurisdiction if the child were determined to be born out of wedlock.

Under the third set of criteria, a court could determine that a child was born out of wedlock for the purpose of establishing the child's paternity if an alleged father filed an action and both of the following applied:

- The mother was not married at the time of conception.
- The action was filed within three years after the child's birth (or within one year after the bill's effective date).

Action by the DHS. If a child were being supported in whole or in part by public assistance, a court could determine that the child was born out of wedlock for the purpose of establishing his or her paternity if the Department of Human Services (DHS) filed an action and either of following applied:

- The presumed father, having the ability to support or assist in supporting the child, had failed or neglected, without good cause, to provide regular and substantial support for the child, or had failed to comply substantially with a support order, for at least two years before the action was filed.
- The child was less than three years old (unless the action were filed within one year after the bill's effective date) and the presumed father lived separately from the child.

In addition, the court would have to determine the child's paternity or paternity would have to be established under the law of Michigan or another jurisdiction if the child were determined to be born out of wedlock.

Revocation of Acknowledgment of Parentage

The following provisions apply to an action to set aside an acknowledgment of parentage.

The bill would allow the mother, the acknowledged father (the man who executed the acknowledgment of parentage), an alleged father, or a prosecuting attorney to file an action for revocation of an acknowledgment of parentage. The action would have to be filed within three years after the child's birth or within one year after the date the acknowledgment was signed, whichever was later. This requirement would not apply to an action filed within one year after the bill's effective date.

The action would have to be supported by an affidavit signed by the person who filed the action, stating facts that constituted one of the following:

- Mistake of fact.
- Newly discovered evidence that by due diligence could not have been found before the acknowledgment was signed.
- Fraud.
- Misrepresentation or misconduct.
- Duress in signing the acknowledgment.

If the court found that the affidavit was sufficient, the court would have to order blood or tissue typing or DNA identification profiling, as required under the bill.

The person filing the action would have the burden of proving, by clear and convincing evidence, that the acknowledged father was not the father of the child.

The court clerk would have to send a copy of an order of revocation to the State Registrar, who would have to vacate the acknowledgment of parentage and could amend the birth certificate as prescribed by the order.

Whether an action for revocation was brought by a complaint in an original action or by a motion in an existing action, the prosecuting attorney, an attorney appointed by the county, or an attorney appointed by the court would not be required to represent any party regarding the action for revocation.

(These provisions are similar to the section of the Acknowledgment of Parentage Act that Senate Bill 558 would repeal (MCL 722.1011). Currently, a claim for revocation of an acknowledgment may be brought only by the mother or the man who signed it, the child, or a prosecuting attorney. The proposed requirements for an affidavit are the same as the existing requirements. Currently, however, if the affidavit is sufficient, the court is permitted, but not required, to order blood or genetic tests at the expense of the claimant. The provisions in Senate Bill 557 (S-2) regarding the burden of proof, the State Registrar, and representation of a party are generally the same as current law.)

Revocation of Order of Filiation

The following provisions would apply to an action in which a child had an affiliated father (a man who had been determined in a court to be the child's father).

If paternity had been determined based on an affiliated father's failure to participate in the court proceedings, the mother, an alleged father, or the affiliated father could file a motion with the court that made the determination, to set aside the determination. The motion would have to be filed within three years after the child's birth or within one year after the date of the order of filiation, whichever was later. This requirement would not apply to an action filed within one year after the bill's effective date.

If the court determined that the motion to set aside the order of filiation should be denied, the court would

have to order the person who filed the motion to pay the reasonable attorney fees and costs incurred by any other party because of the motion.

Authority of the Court

In an action filed under the proposed Act, the court could do any of the following:

- Revoke an acknowledgment of parentage.
- Set aside an order of filiation or a paternity order.
- Determine that a child was born out of wedlock.
- Make a determination of paternity and enter an order of filiation as provided in the Paternity Act.

Denial of Order; Child's Best Interests

A court could refuse to enter an order setting aside a paternity determination or determining that a child was born out of wedlock if the court found by clear and convincing evidence that the order would not be in the child's best interests. The court could consider the following factors:

- Whether the presumed father was estopped from denying parentage because of his conduct.
- The length of time the presumed father was on notice that he might not be the child's father.
- The facts surrounding the presumed father's discovery that he might not be the child's father.
- The nature of the relationship between the child and the presumed or alleged father.
- The child's age.
- The harm that could result to the child.
- Other factors that could affect the equities arising from the disruption of the father-child relationship.
- Any other factor that the court determined appropriate to consider.

The court would have to state on the record its reasons for refusing to enter an order.

Blood or Tissue Typing; DNA Profiling

The court would have to order the parties to an action or motion under the proposed Act to participate in and pay for blood or tissue typing or DNA identification profiling to assist the court in making a determination. Blood or tissue typing or DNA ID profiling would have to be conducted in accordance with a section of the Paternity Act. The results would not be binding on the court.

Extension of Time for Filing

A court could extend the time for filing an action or motion under the proposed Act. A request for extension would have to be supported by an affidavit signed by the person requesting the extension, stating facts that he or she satisfied all of the requirements for filing an action or motion but did not file within the time allowed because of one of the following:

- Mistake of fact.
- Newly discovered evidence that by due diligence could not have been found earlier.
- Fraud.
- Misrepresentation or misconduct.
- Duress.

If the court found that the affidavit was sufficient, the court could allow the action or motion to be filed and take other action it considered appropriate. The party filing the request would have the burden of proving, by clear and convincing evidence, that granting relief under the Act would not be against the best interests of the child considering the equities of the case.

Other Provisions

An alleged father could not bring an action under the proposed Act if the child were conceived as a result of acts for which the alleged father was convicted of criminal sexual conduct.

An original action under the proposed Act would have to be filed in the circuit court for the county where the mother or the child resided or, if neither the mother nor the child resided in Michigan, in the circuit court for the county where the child was born. If an action for the support, custody, or parenting time of the child existed at any stage of the proceedings in a circuit court of Michigan, an action under the Act would have to be brought by motion in the existing case under Supreme Court rules.

If an action were brought by an alleged father who proved by clear and convincing evidence that he was the child's father, the court could make a determination of paternity and enter an order of filiation as provided in the Paternity Act.

A judgment entered under the proposed Act would not relieve a man from a child support obligation for the child or the child's mother that was incurred before the action was filed, or prevent a person from seeking relief under applicable court rules to vacate or set aside a judgment.

A court could not issue an order under the Act that set aside a judgment or determination of a court or administrative agency of another state, even if the judgment or determination were being enforced in Michigan.

If a case were a Title IV-D case, the court could appoint an attorney approved by the Office of Child Support to represent the State's interests with respect to an action or motion under the proposed Act. The court also could appoint a guardian ad litem to represent the child's interests. ("Title IV-D case" would mean an action in which services are provided under Part D of the Title IV of the Social Security Act, which provides for Temporary Assistance for Needy Families.)

The proposed Act would not establish a basis for termination of an adoption or affect any obligation of an adoptive parent to an adoptive child.

The Act would not establish a basis for vacating a judgment establishing paternity of a child conceived under a surrogate parentage contract.

A common law action that was available before the Act's effective date to set aside a paternity determination or to determine that a child was born out of wedlock would remain available until two years after that date but then would not be available.

In its discretion, a court could order a person who filed an action or motion under the Act to post an amount of money with the court, obtain a surety, or provide other assurance that in the court's determination would secure the costs of the action and attorney fees if the person did not prevail. The court also could order a nonprevailing party to pay the attorney fees and costs of a prevailing party.

MCL 722.1007 (S.B. 558) 722.720 (S.B. 559) 700.2114 (S.B. 560)

BACKGROUND

The Paternity Act authorizes the circuit court to determine the paternity of a child born out of wedlock, in an action filed by the child's mother or father, or, if the child is receiving public assistance, by the Department of

Human Services. A child is considered to be born out of wedlock if he or she is born to a woman who was not married at the time of conception or birth, or if the court has made a determination that the child was born or conceived during a marriage but is not the issue of the marriage.

Historically, under what is known as Lord Mansfield's Rule, if a child was born or conceived during a marriage, neither the mother nor the father could present evidence that the child was not legitimate. ("[T]he declarations of a father or mother, cannot be admitted to bastardize the issue born after marriage...") In effect, there was an irrebuttable presumption that the mother's husband was the legal father. The rule was overturned by the Michigan Supreme Court in a 1977 decision, *Seraphin v Seraphin* (401 Mich 629), which found that the reasons for the rule either no longer applied or were not valid. While the Court allowed the question of a child's legitimacy to be raised during divorce proceedings, it concluded that there still was a strong presumption of legitimacy that could be rebutted only by clear and convincing evidence.

In 1991, in *Girard v Wagenmaker* (437 Mich 231), the Court addressed the issue of whether a putative father may bring a suit for a determination of the paternity of a child born while the mother was legally married to another man. The Paternity Act's definition of "child born out of wedlock" includes "a child that the court has determined to be born or conceived during a marriage but not the issue of that marriage" (emphasis added). The Girard Court interpreted this language and held that a putative father does not have standing to bring a paternity suit unless there has been a prior court determination that the mother's husband is not the father.

Although Girard interpreted the Paternity Act as it was written in 1985, the definition of "child born out of wedlock" is virtually the same, and the Girard holding remains current law. As the Court of Appeals stated in a January 2011 opinion (*Pecoraro v Rostagno-Wallat*, 291 Mich App 303), "In Michigan, a child conceived and born during a marriage is legally presumed the legitimate child of that marriage and the mother's husband is the child's father as a matter of law. A third party may not rebut this legal presumption unless there first exists a judicial determination arising from a proceeding between the husband and wife that declares the child is not the product of the marriage."

ARGUMENTS (Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument It is not unusual for a man and a woman to conceive a child when she is married to another man. In many cases, a married couple is separated when the woman and another man have a relationship, and she then returns to her husband, or the married couple's relationship ends but they never divorce because they cannot afford to, the man has disappeared, or both. At other times, a man and an unmarried woman conceive a child and she then marries someone else before the child is born. While some situations involve deception, others simply involve a change of heart or mind

In any case, the child's biological father cannot bring a paternity suit unless a court has determined in a prior action (usually a divorce) that the mother's husband is not the child's father; the child then is legally considered born out of wedlock. Without such a determination, an alleged father does not have standing to bring a paternity action even if the mother acknowledges that he is the child's father, he has begun to raise the child as his own, and he has DNA test results showing a 99.9% probability that he is the biological father.

While there still may be reasons of policy and practicality to presume that a child was fathered by the mother's husband, that presumption has been rebuttable in Michigan since 1977. Requiring a prior court determination of illegitimacy before a putative father can bring a paternity action, however, has closed the courtroom door to many men who have fathered children and want the opportunity to raise them or be part of their lives. In some cases, these men are the only father their child knows until the mother terminates their relationship, often severing the child's relationship with extended family members as well.

The bills would address multiple types of scenarios and relationships by allowing legal proceedings if specified criteria were met. An action could be brought by a child's mother, a man who claimed to be a child's father, a man who was married to a child's mother when the child was conceived or born, a man who had signed an acknowledgment of parentage, or a man whom a court had determined to be a child's father. Depending on

the circumstances, any of these individuals might have a legitimate reason to challenge a presumption or legal finding of paternity or to obtain a judicial determination that a man is a child's father.

Under current law, as discussed above, if a child has a presumed father, an alleged father has no standing unless a court has determined that the presumed father is not that child's father. Although a presumed father or a child's mother may contest that presumption in a divorce proceeding, whether he or she can do so otherwise depends on the court and the judge. An acknowledged father currently may bring an action to revoke the acknowledgment of parentage; the legislation would retain these provisions but also allow an alleged father to bring such an action. In addition, an affiliated father currently may bring an action to set aside the order of filiation under court rules for setting aside a judgment. In this and the other situations, the proposed Act would create separate legal proceedings, identify who would have standing, and set specific new limits.

In addition to the individual parties, the State has an interest in ensuring that the actual father of a child is responsible for the payment of child support and medical expenses. This legislation could help families avoid or end government assistance and become self-sufficient.

In short, the bills would bring fairness, compassion, and modernity to the law, while ensuring that the child's best interests were the primary consideration.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bills would have an indeterminate fiscal impact on State and local government. To the extent that the bills led to an increase in the caseloads of the various circuit courts, the State and local units of government could incur some increase in administrative costs. Any increase in costs, however, would be offset to some degree by a corresponding increase in relevant filing fees, motion fees, and other court-imposed fees or payments.

Fiscal Analyst: Matthew Grabowski

Analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent. sb557-560/1112

APPELLEE'S APPENDIX XIV



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

Telephone: (517) 373-5363
Fax: (517) 373-1986

RECEIVED BY MSC 7/22/2025 2:52:42 PM

Senate Bill 858 (as enacted)
Sponsor: Senator Rick Jones
Senate Committee: Judiciary
House Committee: Criminal Justice

PUBLIC ACT 178 of 2016

Date Completed: 6-22-16

RATIONALE

Reportedly, more than 25,000 pregnancies in the United States each year are the result of rape, and about one-third of the victims of those assaults choose to raise the child. It also has been reported that rapists sometimes use the pregnancy to further abuse, harass, and manipulate their victims by, among other things, seeking custody or parenting time. To combat this problem, the Federal Rape Survivor Child Custody Act was enacted in 2015 to offer increased grant funding to states that authorize petitions to terminate a person's parental rights to a child based on clear and convincing evidence that the child was conceived through rape. It was suggested that Michigan law be brought into conformity with the new Federal standard.

CONTENT

The bill amends the Revocation of Paternity Act to do the following:

- Require a court to take an action revoking paternity if a child's mother proves by clear and convincing evidence that her child was conceived as a result of nonconsensual sexual penetration.
- Provide that the revocation of paternity requirement does not apply if the biological parents later live together and establish mutual custody of the child.
- Excuse a mother who brings an action under the bill from a provision under which a person who files an action under the Act may be required provide financial assurance that the costs of the action will be covered if the person does not prevail.
- Include a mother who is a nonprevailing party in an action brought under the bill in a provision allowing the court to order a nonprevailing party to pay the prevailing party's costs.

The bill will take effect on September 12, 2016.

Action to Show Conception by Nonconsensual Penetration

The Act allows various parties to bring an action to determine that a presumed father is not the father of a child or an action to set aside an acknowledgment of parentage or order of filiation.

(A presumed father is a man presumed to be a child's father by virtue of his marriage to the child's mother at the time of conception or birth. Under the Acknowledgement of Parenting Act, a man who has affirmatively held himself out to be a child's father may execute an acknowledgment of parentage; the man then is an acknowledged father. "Order of filiation" means a judicial order establishing an affiliated father, and "affiliated father" means a man who has been determined in a court to be a child's father.)

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Under the bill, if an action is brought by a mother who, after a fact-finding hearing, proves by clear and convincing evidence that her child was conceived as a result of nonconsensual sexual penetration, the court must do one of the following:

- Revoke an acknowledgment of parentage for an acknowledged father.
- Determine that a genetic father is not the child's father.
- Set aside an order of filiation for an affiliated father.
- Make a determination of paternity regarding an alleged father and enter an order of revocation of paternity for the alleged father.

(An alleged father is a man who by his actions could have fathered a child. "Genetic father" means a man whose paternity has been determined solely through genetic testing under the Paternity Act, the Summary Support and Paternity Act, or the Genetic Parentage Act.)

The requirement that a court take an action described above does not apply if, after the date of the alleged nonconsensual sexual penetration, the biological parents cohabit and establish a mutual custodial environment for the child.

Costs of Action

The Revocation of Paternity Act authorizes a court, in its discretion, to order a person who files an action or motion under the Act to post an amount of money with the court, obtain a surety, or provide other assurances that in the court's determination will secure the costs of the action and attorney fees if the person does not prevail. That provision does not apply to an action brought by a mother under the bill.

The court, in its discretion, also may order a nonprevailing party to pay the reasonable attorney fees and costs of a prevailing party. The bill includes in this provision a mother who is a nonprevailing party in an action brought under the bill.

MCL 722.1443 & 722.1445

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Congressional findings in the Rape Survivor Child Custody Act suggest that men who father children through rape should not be allowed to be awarded visitation or custody with regard to those children, and that a rapist's pursuit of those rights can cause psychological trauma to the rape survivor and negatively affect her ability to raise a healthy child. According to Judiciary Committee testimony on a similar bill by an attorney and advocate for survivors and children of rape, rapists typically sue for custody when they learn that there is a child as a result of the sexual assault. Often, this occurs when the mother applies for public aid, which triggers a claim for support from the biological father. The rapist then can use the situation to manipulate his victim. For instance, he might use a potential custody or parenting time dispute as leverage to persuade the mother to drop any claims of criminal sexual conduct, or use parenting time as an opportunity to assault her again. Even if the rapist's actions do not go that far, just requiring a mother to negotiate or mediate with her assailant could traumatize her yet again. The bill will protect rape survivors and their children from being revictimized by the attacker.

Supporting Argument

A rapist should not be allowed to exercise parental rights to a child conceived as a result of sexual assault. The bill requires the court to take actions to ensure that a biological father cannot secure parental rights if it finds by clear and convincing evidence in a fact-finding hearing that the child had been conceived through nonconsensual sexual penetration. This will help to ensure that rapists are not able to exercise parental rights, including custody and parenting time, to children they father through forced sexual activity.

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Supporting Argument

The Federal Act authorizes the U.S. Attorney General to increase the funding provided to a state under certain grant programs if the state has a law allowing the mother of a child conceived through rape to seek court-ordered termination of the rapist's parental rights and authorizing the court to grant termination based on clear and convincing evidence of rape. According to the Congressional findings listed in that Act, the most common standard for termination of parental rights among the U.S. states and territories and the District of Columbia is clear and convincing evidence; however, only 10 states had statutes allowing rape survivors to petition for termination of the rapist's parental rights based on clear and convincing evidence that the child was conceived through rape. The findings also cite U.S. Supreme Court approval of the clear and convincing evidence standard as satisfying due process for allegations to restrict or terminate parental rights.

The bill includes the clear and convincing evidence standard for various actions to prevent a rapist from gaining parental rights to a child. This will bring Michigan law into conformity with the parameters necessary to qualify for additional Federal funding under the Rape Survivor Child Custody Act.

Opposing Argument

The bill is unnecessary. In the Child Custody Act, Michigan Law already bars a custody award to a parent convicted of criminal sexual conduct resulting in the birth of a child. Public Act 96 of 2016 (House Bill 4481), which will take effect on August 1, 2016, recently amended that provision to bar a custody award in the case of a child conceived as the result of a violation of a substantially similar statute of another state or the Federal government or if the biological parent is found by clear and convincing evidence in a fact-finding hearing to have committed acts of nonconsensual sexual penetration that resulted in the birth of a child.

In addition, by excusing the legal parentage of a man who fathered a child by nonconsensual sexual penetration, the bill could allow an offender to escape any further obligation for child support or reimbursement of the State for public assistance granted to the child.

Response: The bill complements provisions of the Child Custody Act and fills gaps in the protections offered by Public Act 96. While Public Act 96 provides an important enhancement to the protections offered to sexual assault victims and their children in custody and parenting time cases, it only addresses rights of access to a child without providing for termination of parental rights. The Child Custody Act's focus on rights of access to children falls short of protecting victims and their children from having to deal with paternity issues. This could lead to uncertainties about other laws that govern parental rights and responsibilities. For instance, a perpetrator who was recognized as a child's legal father could be an heir if the child predeceased him and would have a right of interest in the adoption of the child. In addition, Public Act 96 does not allow a sexual assault victim to take the initiative to protect herself and her child from contact with the assault perpetrator. It specifies that a victim-parent may assert an affirmative defense in response to a proceeding brought by the offending parent. Senate Bill 858, on the other hand, requires the court to take certain actions regarding paternity if a an action is brought by a mother who proves by clear and convincing evidence that her child was conceived as a result of nonconsensual sexual penetration.

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bill will have an indeterminate fiscal impact on State and local government. The provisions of the bill could lead to an increase in hearings to terminate parental rights. An increase in hearings could increase incremental resource demands on circuit court systems.

In 2015, the Federal government enacted the Rape Survivor Child Custody Act which, among other things, provided increased formula grants for states that have in place a law that allows the mother of any child who was conceived through rape to seek court-ordered termination of the parental rights of her rapist with regard to that child, which the court is authorized to grant upon clear and convincing evidence of rape. The maximum allowed grant increase is 10% of the average of the total amount of funding provided to the state in the past three years under the STOP Violence

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Against Women Formula Grant Program and the Sexual Assault Services Program. The increased funding is for a two-year period and can be reauthorized up to four times. For Michigan, the maximum increase would be approximately \$400,000 per year.

Fiscal Analyst: Ryan Bergan

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.

APPELLEE'S APPENDIX XV

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Legislative Analysis



DOMESTIC VIOLENCE PROTECTIONS

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4476 as enacted
Public Act 93 of 2016
Sponsor: Rep. Harvey Santana

Analysis available at
<http://www.legislature.mi.gov>

House Bill 4477 as enacted
Public Act 91 of 2016
Sponsor: Rep. Klint Kesto

House Bill 4478 as enacted
Public Act 94 of 2016
Sponsor: Rep. Robert L. Kosowski

House Bill 4480 as enacted
Public Act 95 of 2016
Sponsor: Rep. Kurt Heise

House Bills 4479 and 4788 as enacted
Public Acts 87 and 88 of 2016
Sponsor: Rep. Amanda Price

House Bill 4481 as enacted
Public Act 96 of 2016
Sponsor: Rep. Lisa Posthumus Lyons

House Committee: Criminal Justice
Senate Committee: Judiciary
Complete to 8-9-16

BRIEF SUMMARY: The bills amended a number of acts addressing subjects related to domestic violence.

House Bill 4476 amends the Revised Judicature Act (RJA) to:

- Require a hearing to determine the appropriateness of mediation of a contested issue in a domestic relations action if a personal protection order (PPO) for domestic violence, stalking, or another order had been issued against one of the parties, or one or both parties were involved in a child abuse or neglect proceeding, unless the protected party requested mediation.
- Require the mediator to screen for a history of domestic violence.
- Require the mediator to screen during the mediation process for coercion or violence that would make the process unsafe for any participant.

House Bill 4477 amends the RJA to revise the service of process in actions being appealed to the state Supreme Court or Court of Appeals if a court order had been issued that prohibits the disclosure of the address of the party being served.

House Bill 4478 amends the RJA and allows a PPO for domestic violence to prohibit the subject of the order from harming or taking an animal for which the petitioner has an ownership interest.

House Bill 4479 amends the Michigan Penal Code and treats an assault or assault and battery directed against a pregnant woman in the same manner as domestic violence for purposes of enhanced penalties for repeat offenses. House Bill 4788 amends the Code of Criminal Procedure to place the felony penalty created by House Bill 4479 within the sentencing guidelines.

House Bill 4480 amends the Child Custody Act and specifies, for purposes of determining the best interests of a child in a custody dispute, that reasonable actions taken by one parent to protect the child or themselves from sexual assault or domestic violence by the other parent may not be considered negatively by the court when looking at the willingness and ability of that parent to facilitate and encourage a close parent-child relationship with the other parent.

House Bill 4481 also amends the Child Custody Act and, in general, prohibits the granting of custody or parenting time for a child conceived by sexual assault to a biological parent convicted of that assault under another state or federal law, if similar to Michigan's, or to a parent who was found in a fact-finding hearing to have committed nonconsensual acts involving penetration.

BRIEF FISCAL IMPACT: Generally, except to the extent that they would increase various correctional and courts costs, the bills would have minimal or no fiscal impact. For more information, see **Detailed Fiscal Impact**, later in the summary.

DETAILED SUMMARY:

House Bill 4476 adds a new section to the Revised Judicature Act (MCL 600.1035, proposed). Under the bill, in certain situations, a court is prohibited from submitting a contested issue in a domestic relations action, including post judgment proceedings, unless the court first conducts a hearing to determine whether mediation is appropriate. The hearing is required if either of the following apply:

- A personal protection order (PPO) has been issued under Sections 2950 (domestic violence) or 2950a (stalking) or another order has been entered protecting one party and restraining the other. However, the court could order mediation if the protected party requests mediation.
- One or both of the parties is involved in a child abuse or neglect proceeding. However, the court could order mediation if a parent protected by an order in the proceeding requests mediation.

In a domestic relations mediation, the mediator would be required to make reasonable inquiry as to whether either party has a history of coercive or violent relationship with the other party; this would include the use of the domestic violence screening protocol for mediation provided by the State Court Administrative Office as directed by the state Supreme Court.

Further, a mediator must make reasonable efforts throughout the domestic violence relations mediation process to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant, or that would impede the achievement of a voluntary and safe resolution of issues.

"Domestic relations action" would mean any of the following:

- An action for divorce, separate maintenance, annulment or affirmation of marriage, paternity, family support under the Family Support Act, the custody of minors under the Child Custody Act, or grandparenting time under Section 7b of the Child Custody Act.
- A proceeding ancillary or subsequent to an action listed above and that relates to the custody of a minor, parenting time with a minor, or the support of a minor, spouse, or former spouse.

House Bill 4477 amends the Revised Judicature Act to revise the service of process in actions that are appealed to the state Supreme Court or Court of Appeals when a court order has been issued that prohibits the disclosure of the address of the party being served (MCL 600.227 and 600.316). Typically, one party to an action will serve process or papers directly on the other party.

Instead, under the bill, if a court order has been entered in an action appealed to the state Supreme Court or Court of Appeals (COA) that prohibits the disclosure of the address of a party to the action or that prohibits a party from contacting another party, the party who is serving process or papers would instead deliver sufficient extra copies to the clerk of the Supreme Court or COA with a request that the clerk, a sheriff, deputy sheriff, police officer, or an appointed court officer serve the process or papers on the protected party. Process or papers received under this provision would be served by the clerk, sheriff, deputy sheriff, police officer, or court officer at the confidential address provided to the court under Michigan court rules by the protected party. If no confidential address had been provided, service would be made at the last known address of the protected party as provided by the COA or trial court.

House Bill 4478 amends Section 2950 of the Revised Judicature Act, which establishes the procedure for personal protection orders in situations involving domestic violence (MCL 600.2950). An individual may petition the family division of circuit court to enter a personal protection order (PPO) to restrain or enjoin a spouse, a former spouse, an individual with whom he or she has had a child in common, an individual with whom he or she has or has had a dating relationship, or an individual residing or who once resided in the same household as the petitioner from doing one or more of several listed actions, such as entering onto the premises.

To the current list of actions, the bill adds any of the following with the intent to cause the petitioner mental distress or to exert control over the petitioner with respect to *an animal* in which the petitioner has an ownership interest:

- Injuring, killing, torturing, neglecting, or threatening to injure, kill, torture, or neglect the animal. A restraining order that enjoins conduct under this provision would not prohibit the lawful killing or other use of the animal as described in Section 50(11) of the Michigan Penal Code (MCL 750.50). [Section 50 does not prohibit the lawful killing or use of an animal in certain listed uses, such as when hunting, fishing, horse racing, rodent control, or in certain scientific research.]
- Removing the animal from the petitioner's possession.
- Retaining or obtaining possession of the animal.

A petitioner has an "ownership interest" in an animal if the petitioner has a right of property in the animal or keeps or harbors the animal, the animal is in the petitioner's care, and/or the petitioner permits the animal to remain on or about premises occupied by the petitioner. "Neglect" would mean the term as defined in Section 50 of the Michigan Penal Code (MCL 750.50). The bill also makes numerous changes of a technical or editorial nature.

House Bill 4479 amends the Michigan Penal Code (MCL 750.81). The bill creates a new crime of assault and battery against a pregnant woman. Under the bill, a person who assaults or batters a pregnant woman and who knows that the woman is pregnant is guilty of a misdemeanor for a first offense, punishable in the same manner as for simple assault or domestic violence—imprisonment for not more than 93 days and/or a fine not to exceed \$500. Subsequent offenses will carry the same penalties that currently only apply for repeat domestic violence offenses. Thus, a second offense is to be a misdemeanor punishable by imprisonment for not more than one year and/or a fine of not more than \$1,000. A third or subsequent offense is a felony punishable by imprisonment for up to five years and/or a fine of not more than \$5,000.

[The Michigan Penal Code currently makes it a felony to intentionally assault and/or batter a pregnant individual if the person intended to cause a miscarriage or stillbirth, or death or great bodily harm to the embryo or fetus, or acted in wanton or willful disregard of the likelihood that the natural tendency of the person's conduct is to cause a miscarriage or stillbirth or death or great bodily harm to the embryo or fetus and the person's conduct resulted in a miscarriage or stillbirth by that individual or death to the embryo or fetus (MCL 750.90a).

The code also makes it a crime to intentionally assault and/or batter a pregnant individual if the conduct results in a miscarriage or stillbirth (15-year felony), great bodily harm to the embryo or fetus (10-year felony), serious or aggravated physical injury to the embryo or fetus (1-year misdemeanor), or physical injury to the embryo or fetus (93-day misdemeanor), MCL 750.90b.]

House Bill 4480 amends the Child Custody Act (MCL 722.23). In actions involving a dispute of a minor child's custody, the court establishes the rights and duties as to the child's custody, support, and parenting time. In making these decisions, the court relies on the best interests of the child. The term "best interests of the child" is defined to mean the sum total of several factors specified in the act that are to be considered, evaluated, and determined by the court.

One of the listed factors is the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. The bill adds that a court may not consider negatively for the purposes of this factor any reasonable action taken by a parent to protect a child or that parent from sexual assault or domestic violence by the child's other parent.

House Bill 4481 amends the Child Custody Act (MCL 722.25 and 722.27a). Generally speaking, in disputes involving a child who is conceived as the result of an act for which one of the child's biological parents is convicted under Michigan's criminal sexual conduct statutes, the parent who was convicted cannot be awarded custody or parenting time. The bill extends the bar to custody or parenting time so that it applies also to a biological parent who was convicted of a substantially similar statute of another state or the federal government, or who was found by clear and convincing evidence in a fact-finding hearing to have committed acts of nonconsensual sexual penetration. As is the case currently, these provisions would not apply if, after the date of the conviction or of the date of the finding in a fact-finding hearing, the biological parents cohabit and establish a mutual custodial environment for the child.

In addition, the bill specifies that an offending parent is not entitled to custody of the child without the consent of that child's other parent or guardian. "Offending parent" would mean a parent who has been convicted of criminal sexual conduct as described in the act or who has been found by clear and convincing evidence in a fact-finding hearing to have committed acts of nonconsensual sexual penetration.

If an offending parent initiated a custody or parenting time action, the parent (mother) could assert an affirmative defense that the child had been conceived as a result of a sexual assault. The bill applies this provision in both a proceeding brought by a biological father who had been convicted of sexual assault and also to one found to have committed acts of nonconsensual sexual penetration in a fact-finding hearing described above.

Further, a denial of custody does not relieve an offending parent of any support or maintenance obligation to the child. Although, the other parent or the guardian of the child would be able to decline support or maintenance from the offending parent.

House Bill 4788 amends the sentencing guidelines portion of the Code of Criminal Procedure to specify that a violation of 750.81(5), the domestic assault or assault of a pregnant individual with prior convictions would be a Class E felony against a person with a maximum term of imprisonment of five years (MCL 777.16d). (Underlining denotes new language.) The bill was tie-barred to House Bill 4479, meaning that it could not take effect unless House Bill 4479 was also enacted into law.

DETAILED FISCAL IMPACT:

HB 4476 – The bill would have no fiscal impact on state or local units of government.

HB 4477 – The bill could have a minimal fiscal impact on the state and on local units of government for delivering sufficient extra copies of the process or papers to the courts and depending on the method chosen for serving the papers or process, if the state or local government were delivering a copy to a protected party.

HB 4478 – To the extent that the bill, by allowing a PPO to prohibit certain acts against a family pet or other animal owned by the petitioner, results in a greater number of criminal contempt cases, it would increase costs related to county jails and/or local probation supervision. The costs of local incarceration in a county jail and local misdemeanor probation supervision vary by jurisdiction. Any increase in penal fine revenues would increase funding for local libraries, which are the constitutionally-designated recipients of those revenues.

Regarding fiscal implications for the Department of Health and Human Services, to the extent that the bill's provisions result in additional violations by individuals under the age of 17 that result in juvenile delinquency criminal contempt cases, any increased costs for additional juvenile delinquency incarceration or probationary expenses would be paid in equal amounts by the county where the individual resides, from that county's Child Care Fund, and by the state.

HB 4479 – To the extent that the bill results in a greater number of convictions, it would increase costs on state and local correctional systems. New felony convictions would result in increased costs related to state prisons, county jails, and/or state probation supervision. New misdemeanor convictions would increase costs related to county jails and/or local misdemeanor probation supervision. The average cost of prison incarceration in a state facility for Fiscal Year 2015 is roughly \$35,000 per prisoner per year, a figure that includes various fixed administrative and operational costs. The costs of local incarceration in a county jail and local misdemeanor probation supervision vary by jurisdiction. State costs for parole and felony probation supervision in FY 2015 average about \$3,600 per supervised offender per year. Any increase in penal fine revenues would increase funding for local libraries, which are the constitutionally-designated recipients of those revenues.

HB 4480 – The bill would have no fiscal impact on state or local units of government.

HB 4481 – To the extent that the bill results in a greater number of hearings and determinations on child custody and child support, it would increase costs for the judiciary and local court funding units. The fiscal impact would depend on the increase in caseloads and related administrative costs.

HB 4788 would have no fiscal impact on state or local units of government.

DISCUSSION OF THE BILLS:

HB 4476: Mediation can be an effective process in resolving issues in domestic relations cases, such as divorces, custody, or parenting time. Currently, under Michigan court rules, judges may order mediation if both parties agree to mediation, if one party moves to enter

mediation, or on the court's own initiative (even without consent of the parties). If one or both parties are the subject of a personal protection order or involved in a child abuse or neglect proceeding, however, a court cannot order mediation unless it first conducts a hearing to determine if mediation is appropriate. In addition, court mediators are required to follow an established protocol that includes screening for domestic violence.

The bill aims at strengthening the above protections by placing language in statute requiring a mediator to screen—throughout the entire mediation proceeding—for conduct on the part of the parties that is coercive or violent or that would make mediation physically or emotionally unsafe for any participant. This is important because in situations where violence or abuse has been alleged, but not substantiated, it can be difficult to accurately assess the appropriateness of mediation in the beginning. This is especially true when parties are not using attorneys, as some batterers/abusers are said to use the mediation process to discover certain facts in order to manipulate the other party. Ongoing screening suggests the court would modify the mediation proceedings to utilize options that would mitigate one party's ability to unduly influence the other.

In another matter, the bill as introduced would have prohibited a court from ordering mediation if a PPO for domestic violence had been issued against one or both of the parties, regardless of whether the protected party wanted to enter mediation. Knowledgeable observers say that fear and intimidation are often used by batterers to manipulate their targets, and the bill's prohibition on mediation for cases in which a PPO had been issued appeared to add protections to the battered party. However, the prohibition could have forced a battered party to unwillingly testify against the batterer in open court, even if that party preferred and felt capable of using the less adversarial mediation process. The enacted version instead allows mediation if the protected party requests it and if the court first conducts a hearing to determine if mediation is appropriate based on the facts and particulars of that case. Including this exception to an otherwise outright ban acknowledges that mediation can be successful even in acrimonious situations when the parties are separated into different rooms or even different buildings.

Moreover, the enacted version prohibits mediation from being ordered if either or both of the parents are involved in a child abuse or neglect proceeding unless a hearing determined mediation was appropriate; however, if the protected parent requests mediation, the court could still order mediation. As enacted, the bill does not appear to conflict with the court rule requiring a hearing to determine appropriateness of mediation in cases involving domestic violence or child abuse or neglect.

HB 4477: Sometimes, a person who is a party in a court case needs to be protected from one of the other parties. For example, in a divorce involving domestic violence or abuse against the children, the battered party or parent having custody may need to move to a secret location and not disclose the address for their own or the child's safety. However, court proceedings require certain documents to be delivered from one party to the other by service of process. If one party is in hiding, service of process may inadvertently disclose the location and put the person or persons in physical or emotional jeopardy. The bill addresses this concern by revising how service of process is performed. If a court has

ordered the address of a protected party from being disclosed, documents sent to that party by the other would instead be delivered to the court. From there, a clerk or officer of the court, or a law enforcement officer, would serve the documents on the other party. Such a system, although adding an extra step, would add important protections not just in domestic relations cases but in any case in which disclosure of a party's whereabouts could endanger that party's safety.

Opponents say that the bill discriminates against licensed professional private investigators, who serve most of the process in the state, according to a representative of their professional association. These professionals, though not public servants, are required by law to keep details of their investigations confidential. Thus, it would be appropriate to hire them to deliver the service from the court to the protected individual. However, the bill as currently worded only allows a court to use court personnel or local law enforcement, who, opponents say, are not held to the same level of confidentiality as the private investigators.

HB 4478: The bill adds *not harming or removing an animal* to the list of actions or conduct that a person who is the subject of a personal protection order (PPO) can be ordered by the court not to do. Animal and domestic violence advocates say that research shows a relationship between abusing animals and abusing humans. Further, studies show a significant number of women delayed leaving an abusive situation for fear that the family pet would be harmed or killed (18-48 percent). Seventy-one percent of women surveyed in women's shelters said their pet had been harmed, killed, or was threatened with harm. Since many shelters do not accommodate pets, and due to the strong emotional connection between humans and their pets, this keeps many people and/or their children in danger of physical or emotional harm.

The bill addresses the issue of intentional acts towards pets and animals by including on a domestic violence PPO form that an individual can be restrained or enjoined (1) from actual or threatened abuse towards an animal in which the petitioner has an ownership interest, (2) from removing the animal from the petitioner's possession, or (3) from keeping or obtaining possession of the animal. The bill applies to any animal, from the family cat or dog to livestock such as a horse, though would not apply to certain activities not considered to be animal abuse such as racing a horse, hunting, fishing, trapping, and scientific research subject to state regulations. Enactment of the bill will strengthen protections for those suffering from actual or threatened abuse, and may encourage more shelters or community organizations to provide accommodations for house pets and larger animals when someone must leave an abusive or dangerous situation.

A concern was expressed, however, that including so many specific instances in the list of actions prohibited in a PPO, would result in the last box on the form, which currently is for "any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence," being seen as only for extraordinary protections. If so, the bill would inadvertently prevent it from being applied to more common situations but ones that may indeed need to trigger protections.

HB 4479: The bill would create a separate crime category for assaulting or battering a woman who the perpetrator knows is pregnant. Michigan law does criminalize intentional attacks on pregnant women, but these are triggered only when actual harm is done to the embryo or fetus. If the fetus or embryo is not harmed, the incident is treated as a simple assault (unless the perpetrator and victim had a domestic relationship). Regardless of whether or not the embryo or fetus is harmed, many feel that a person who deliberately assaults or batters a pregnant woman should be subject to stricter penalties, especially for repeat offenses. Under the bill, a first offense would be punishable in similar manner to a simple assault or first domestic violence offense. Repeat offenses would be treated like subsequent domestic violence offenses which carry increased penalties; e.g., a third or subsequent offense would be a felony. As worded, the bill does not give a fetus protected class status, and therefore does not constitute a threat to the health and well-being of women of child-bearing age.

However, some might argue that Michigan law already provides appropriate prohibitions for assault and assault and battery, with harsher penalties for assaultive crimes against any person, pregnant or not, that involve weapons or incidents causing injuries or death. When an assault or battery incident results in harm to the fetus or embryo, there are already enhanced penalties in place. And pregnant women assaulted or battered by a current or past domestic partner already are protected by the current enhanced penalties. Attaching those same enhanced penalties in place for domestic violence crimes to an assault and battery of any pregnant woman raises some questions.

For example, because domestic violence is a crime of repetition with threats of harm and beatings used to manipulate and control a victim, it is appropriate to provide enhanced penalties for repeat offenses even if the victim is not physically harmed. But the bill as written applies the enhanced penalties for repeat offenses against a pregnant woman even to incidents involving strangers or mere acquaintances. Throwing a cell phone at someone during an argument, a shove, grabbing someone's arm, or even a slap in the face—even when no physical injury occurs—can result in a conviction for assault or battery. These incidents could be years or decades apart and not be a pattern of abuse typical of domestic violence. Yet, a third offense under the bill would result in a five-year felony even with no injuries to the mother or fetus or embryo, whereas an assault in which the fetus or embryo is physically injured is a 93-day misdemeanor under current law. Thus, the appropriateness of expanding the application of the enhanced penalties for repeat assault or battery against any pregnant woman when no injury occurs must be examined carefully with a view as to what the measure would actually accomplish.

Further, testimony offered raised the argument that if the purpose of the bill is to increase protection against a vulnerable population, that there are other populations deserving of extra protections against assault or assault and battery, as well. Some listed examples include assaults against the elderly or a person with a diagnosed mental illness or a developmentally disabled person.

HB 4480: Currently, in custody decisions, the court must consider whether a parent is willing and able to facilitate and encourage a close and continuing parent-child relationship

between the child and the other parent. But, when there is abuse or there are threats of abuse in the home towards a parent or one or more children by the other parent, the first parent may have to make the difficult decision to leave the home with the children. A parent who fears for their own safety or the safety or well-being of the children may refuse to allow contact by that other parent or refuse to abide by parenting time orders. Some parents may even stay in an abusive home longer out of fears that attempts to protect the children or themselves may be held against them later in custody actions.

The bill addresses this concern by specifying that reasonable actions taken by one parent to protect themselves or the children from sexual assaults or domestic violence at the hand of the child's other parent may not be considered negatively when the court makes a determination about the best interests of the children. Supporters feel that for parents experiencing domestic abuse, or fearing their child may be vulnerable to being abused sexually, one barrier keeping them from seeking safety will be removed. Restricting applicability to actions deemed "reasonable" will give guidance to both the courts and parents that not all actions taken by the parent will be acceptable in the eyes of the court and not count against them. For example, an instance where a parent moves the children into a shelter to spare them from the trauma of seeing a physical altercation between the parents while at the same time the parent is willing to cooperate with a plan of visitation may be looked upon differently by the court than when one parent is simply hiding a child from the other parent by various means.

HB 4481: The bill addresses the very sensitive issue regarding custody and parenting time when the child in question was conceived by rape but the sexual assault did not result in a conviction. Currently, if a child is conceived by an act for which one of the biological parents was convicted of a criminal sexual conduct offense, Michigan law prohibits custody or parenting time from being awarded to the offender. The bill does several things. First, it will amend the provision to also apply to convictions under the law of another state or the federal government, if similar.

Secondly, if there had not been a rape conviction, but the biological father was found in a fact-finding hearing—by clear and convincing evidence—to have committed acts of nonconsensual sexual penetration that resulted in the child's conception, the court could not order custody or parenting time. However, the offending parent could be entitled to custody with the consent of the other parent.

The bill is considered necessary because not all rapes result in conviction of the perpetrator. First of all, not all rapes are prosecuted. It is up to a prosecutor, not the victim, whether or not to try a case. Secondly, if DNA evidence had been destroyed or lost, there may not be enough evidence to convict the perpetrator. Or a jury may have decided in favor of the defense because of the high "beyond a reasonable doubt" threshold. Moreover, some victims may choose not to report the rape or pursue prosecution for reasons of their own, only to discover months later that they are pregnant. In some cases, perpetrators have threatened to fight the women they impregnated for custody if they pursued prosecution, promising not to see the child if they drop the case but later filing for custody or parenting time anyway.

The bill will create a pathway for women in these situations to present what evidence they have to the court. Only if the evidence is sufficient to reach the clear and convincing threshold—generally meaning at least 75 percent conclusive—would the bill's provisions be triggered. This is the same level of proof in many civil actions and second only to "beyond a reasonable doubt." This level of proof should also protect innocent parents from having custody or parenting time denied just because the other parent alleges the sex was not consensual.

Enactment of the bill will protect women whose attackers use custody or parenting time actions to manipulate or further victimize them. Knowing that they will not be successful in a court action, yet may be ordered to pay child support, may deter them from pursuing seeking custody or parenting time. In addition, the bill would allow a woman or the child's guardian to cut off all contact by declining child support and maintenance from the offending parent.

It is important to note that the bill does not terminate the offending parent's parental rights, only custody and parenting time, both of which can be revisited by the courts at a future time.

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

APPELLEE'S APPENDIX XVI

Advertisement



SAGINAW

Assistant prosecutor fired for case that granted rapist joint custody

Updated: Oct. 20, 2017, 8:40 p.m. | Published: Oct. 20, 2017, 7:40 p.m.

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Custody agreement suspended for rapist after Sanilac County Court hearing



By [Michael Kransz](#) | mkransz@mlive.com

SANDUSKY, MI -- The assistant prosecutor who handled the paternity case in which a rapist was granted joint custody has been fired.

Sanilac County Assistant Prosecutor Eric G. Scott was fired Wednesday, Oct. 18, a day after a judge ruled 27-year-old Christopher Mirasolo should not have any custody or parenting time over the child conceived nine years ago when Mirasolo raped a 12-year-old girl.

According to a press release from the Sanilac County Prosecutor's Office, Scott was fired for his handling of the case.

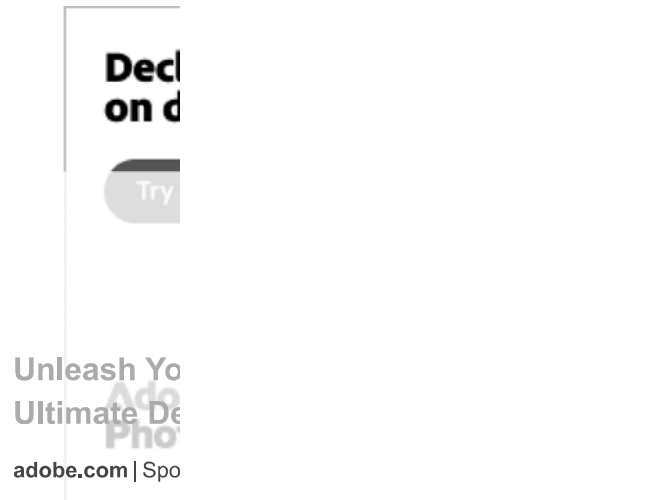
"This action is the result of the prosecutor's review of the office policy, procedures and the legal review of Mr. Scott's handling of the paternity case involving Christopher Mirasolo," the release states.

Sanilac County Probate Judge Gregory S. Ross, who granted the joint custody order on Sept. 22, said prosecutors never presented him with information that the child in question was conceived when Mirasolo raped the mother.

Instead, the paternity case was presented to him as a "routine" joint custody order consented to by both the mother and Mirasolo, Ross said.

Sanilac County Prosecutor James V. Young called the situation a "paternity case that went horribly wrong."

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He said staff errors were due to changes made to sexual assault custody and paternity law in late 2016 that allow for the mother to contest Mirasolo having any rights over the child.

"We should've caught it and we didn't," Young said.

The case made national and international headlines and provoked further anger when it was discovered Mirasolo spent only a year in jail for the rape.

While sexually assaulting a child under 13 is potentially a life offense, Mirasolo pleaded to attempted third-degree criminal sexual conduct, according to court clerks.

When he was on probation for that charge, he sexually assaulted two other minors in 2010, according to Michigan Department of Corrections records.

Young declined to comment on why Mirasolo was given a plea deal. He said that's a topic for another time and doesn't pertain to the paternity case at hand.

After Ross reversed the decision Tuesday, he ordered prosecutors to draw up another paternity case in which Mirasolo does not have any custody or parenting time over the child.

Mirasolo never sought custody over the child, nor does he now, according to his lawyer.

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The case began in July when the mother requested financial assistance from the Michigan Department of Health and Human Services, Young said.

The department said that, because of the rape, there was good cause allowing the mother and child to receive benefits without pursuing paternity action, but a miscommunication resulted in the prosecutor's office pursuing the case, Young said.

Scott could not be immediately reached for comment.

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Around the Web

MICHIGAN

Judge, prosecutor vow changes over custody, rape case



Mike Martindale

DetroitNews-Unknown

Published 12:49 p.m. ET Oct. 17, 2017 | Updated 11:15 p.m. ET Oct. 17, 2017

Sandusky — A Sanilac County judge and prosecutor vowed Tuesday to take action to avoid a repeat of a controversial ruling that granted a twice-convicted rapist partial custody of a child conceived during his sexual assault of a 12-year-old girl in 2008.

During a brief hearing, Judge Gregory Ross rescinded his Sept. 22 decision that granted parental rights to sex offender Christopher Mirasolo, while county Prosecutor James Young apologized “for the manner in which this case was handled.”

Both officials said they would review office procedures to prevent a similar situation.

Young also acknowledged mistakes in how the case was handled.

“The ball was dropped at several stages, and the result was a week of confusion, misinformation and publicity that cast a shadow over the many good people who work in the social service and legal agencies of our county,” he said.

Ross’ decision to grant Mirasolo partial custody sparked widespread outrage and brought international attention to this rural county of just over 40,000 people along Lake Huron in Michigan’s Thumb region.

At a rally of more than 100 supporters outside the courthouse before Tuesday’s hearing, the child’s mother, now 21, who has identified herself by her first name, Tiffany, criticized prosecutors for their handling of the custody case and a plea deal that resulted in Mirasolo serving less than seven months in jail in 2009 for assaulting her.

“I’ve been raped three times,” she said. “Once by the rapist and twice by the Sanilac County Prosecutor’s Office.”

Young singled out the state Department of Health and Human Services for not passing along information about Tiffany's pregnancy or Mirasolo's conviction. Ross said he relies on the prosecutor's office for such information before ruling on custody matters.

A DHHS spokesman said last week that matters involving parental rights are made by local officials, not the state.

Mirasolo could have been sentenced to 25 years to life for the sexual assault of Tiffany, but was allowed to plead guilty to a lesser charge of attempted third-degree criminal sexual conduct.

He was released from jail in July 2009. In March 2010, he sexually assaulted a 14-year-old Deckerville girl and later pleaded guilty to fourth-degree criminal sexual conduct. Mirasolo was paroled in July 2016, according to a state corrections database.

The judge pushed back against claims on Tuesday that he didn't pay enough attention to the case.

"It has been suggested that I 'rubber stamped' this order," Ross said. "I do not rubber stamp orders. I felt it was routine. I did not 'rubber stamp' it.

"I do believe given the way this consent order was presented, I should have been advised the defendant raped the plaintiff. Mr. Young advised he is reviewing his procedures. He is doing what he can to correct the mistake and see that it doesn't happen again."

When asked if anyone in the prosecutor's office had been disciplined or reprimanded for not passing on information to Ross, Young said "no," but added the investigation was continuing.

"Procedures need to be reviewed," Ross said. "The Family Division of the Circuit Court will be reviewing its procedures also. This should not happen to anyone."

Mirasolo was given custody after paternity tests proved he was the biological father of the child, an 8-year-old boy.

A consent agreement signed by Ross ordered Mirasolo to pay child support and granted him joint legal custody and "agreed upon parenting time." The boy's mother sought out attorney Rebecca Kiessling to file objections.

The judge insisted Tuesday "there was nothing unusual in the consent judgment that caused me to investigate further," and said he didn't need to hear any additional arguments before

canceling his earlier ruling.

Kiessling said her client was never consulted nor signed the consent document. Last week, Ross stayed his ruling granting parental rights to Mirasolo.

Kiessling, while pleased with Ross' action Tuesday, said the case is not over.

"My client deserves child support from (Mirasolo), and the judge did not address that or other matters," Kiessling said. "I'm afraid we might have to be back here to get her the child support she is entitled to."

During a rally on the courthouse lawn Tuesday, the victim and her mother read letters they sent to another Sanilac County judge before Mirasolo was sentenced almost nine years ago.

Portions of the letters indicate court officials were advised in late December 2008 of the 12-year-old's pregnancy and her wish that Mirasolo's parental rights be terminated.

Speakers at the rally, including Kiessling, called for removal of some of the officials involved, including Ross and Young.

Ross said that "the first business day following the filing of plaintiff's objections and motion being advised of the rape, I stayed the consent judgment and scheduled this hearing."

"I will admit there are judges smarter than me, but I do have a reputation for being knowledgeable in the law, thorough, prepared and honest," Ross said. "... And when a mistake is made, I am quick to correct it."

Young said he had no intention of stepping down and that "others are entitled to their opinions." He declined to discuss whether it was appropriate for his office to negotiate plea agreements with Mirasolo in the two sex assault cases.

"That's a discussion for another day," he said.

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