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## Parent-Initiated Termination of Parental Rights: The Ultimate Weapon in Matrimonial Warfare

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# TULSA LAW JOURNAL

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## PARENT-INITIATED TERMINATION OF PARENTAL RIGHTS: THE ULTIMATE WEAPON IN MATRIMONIAL WARFARE

D. Marianne Brower Blair\*

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## I. INTRODUCTION

When families break apart, it is not uncommon for parents to harbor feelings of pain, bitterness, and anger toward their former partners.<sup>1</sup> All too frequently, the children become a focal point for continuing the

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1. *E.g.*, J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 26 (1980). *See, e.g.*, W. HODGES, INTERVENTIONS FOR CHILDREN OF DIVORCE: CUSTODY, ACCESS AND PSYCHOTHERAPY 11, 56 (1986).

battle when the marriage has ended.<sup>2</sup> For some parents, the opportunity to terminate the parental rights of their ex-spouse provides the ultimate weapon in the arsenal of matrimonial warfare. In the process, children become innocent victims.

Oklahoma courts have maintained a longstanding practice allowing one parent to initiate proceedings to terminate the parental rights of the other parent, typically in divorce or post-divorce actions. In 1985, the Oklahoma Supreme Court temporarily halted this practice in *Davis v. Davis*<sup>3</sup> on the ground that parents had no statutory authority to seek such a remedy under existing Oklahoma law. In 1986, the Oklahoma legislature responded by amending the statute<sup>4</sup> which sets forth the grounds for termination of parental rights in state-initiated juvenile proceedings. The statute now authorizes a parent or guardian of a child to file a petition to terminate parental rights upon some of the same grounds. The legislature's grant of statutory authority remedies the standing defect underlying the Oklahoma Supreme Court's decision in *Davis*. Nevertheless, serious questions about the wisdom and constitutionality of parent-initiated termination proceedings remain.

Parent-initiated actions to terminate parental rights<sup>5</sup> deserve special scrutiny because they differ from terminations in adoption and juvenile

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2. See *infra* notes 228-33. Although post-marital disputes are the context in which the parent-initiated termination proceedings have been examined by the Oklahoma appellate courts, parent-initiated proceedings could also involve parents who have never been married to each other. Although the bulk of psychological research has focused on divorced couples, it is reasonable to surmise that many of the same psychological forces would affect parents who separated after living together and their children.

3. 708 P.2d 1102 (Okla. 1985) superseded by statute as stated in *L.R.R. v. R.D.R. In re Adoption of R.R.R.*, 763 P.2d 94, 100 n.18 (1988).

4. OKLA. STAT. tit. 10, § 1130 (Supp. 1987). As amended by the Oklahoma legislature in 1986, § 1130 allowed a parent or guardian to petition to terminate the parental rights of another parent for any of the grounds available for termination in juvenile proceedings initiated by the state. In 1987, § 1130 was amended to limit the grounds available to a parent or guardian petitioning for termination to three. For a discussion of the grounds currently available for parent-initiated termination, see *infra* notes 24-36 and accompanying text.

5. The focus of this article, parent-initiated proceedings to terminate the parental rights of the other parent, instituted under the authority of OKLA. STAT. tit. 10, § 1130 (Supp. 1987), should be distinguished from stepparent adoptions. Although the termination of the rights of a parent is frequently accomplished, both involuntarily and voluntarily, in an adoption action brought by the other parent's new spouse, technically this action is not parent-initiated but stepparent initiated. Under OKLA. STAT. tit. 10, §§ 60.3, 60.12 (1981 & Supp. 1987), only the stepparent is eligible to adopt. Therefore, technically speaking, only the stepparent is a proper petitioner. Nevertheless, since natural parents have been occasionally included as petitioners in stepparent adoptions, the distinction should be clarified. Many of the concerns raised in parent-initiated termination proceedings may also arise in the context of stepparent adoptions. This article's focus, however, is the constitutionality and wisdom of termination proceedings where no one is immediately prepared to assume the parental role of the terminated parent.

proceedings in a significant respect. The immediate goal of adoption and juvenile proceedings is to replace the natural parent or parents with an adoptive parent or parents in the near future.<sup>6</sup> By contrast, no one is normally waiting to fill the empty parental role following parent-initiated termination.<sup>7</sup> This crucial difference raises serious concerns about whether parent-initiated terminations can ever be justified on the ground that they serve the interests of the child involved in such a proceeding.<sup>8</sup> The circumstances under which parent-initiated terminations arise also substantially reduce the likelihood that termination is necessary to prevent "imminent or actual harm to the child," a finding recognized by Oklahoma courts as a constitutional prerequisite to termination of parental rights.<sup>9</sup> Instead of protecting a child from harm or promoting the child's welfare, the circumstances under which parent-initiated terminations are conducted suggest that such terminations often may be extremely detrimental to the child involved.<sup>10</sup> Given the fundamental nature of the interests of both the parent facing termination and the child, the above factors suggest that parent-initiated termination proceedings are both constitutionally infirm and contrary to a fundamental tenet of family law that imposes upon the court the duty to act in the best interests of the child.<sup>11</sup> Moreover, parent-initiated termination proceedings under Oklahoma's current legislative scheme bear a tremendous potential for misuse as an additional sanction for nonpayment of support<sup>12</sup> or as simply another weapon to serve the emotional or financial needs of the parent or parents.<sup>13</sup>

Part II of this article provides an overview of the legal effect of termination of parental rights and compares the grounds and procedural context of termination in parent-initiated proceedings, juvenile proceedings, and adoptions.

Part III is an examination of the three purposes for which parent-initiated termination ostensibly has been employed: (1) to protect a child from harm and promote the child's welfare, (2) to sanction a parent for

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6. See *infra* notes 51-56 and accompanying text. This distinction was emphasized by Justice Opala in the majority opinion in *Davis*, 708 P.2d at 1112, in the context of construing legislative intent and rejecting the 1985 version of § 1130 as a source of authority for private parent-initiated termination proceedings.

7. See *infra* notes 37-39 and accompanying text.

8. See *infra* notes 171-213 and accompanying text.

9. See *infra* notes 136-170 and accompanying text.

10. See *infra* notes 171-213 and accompanying text.

11. See *infra* notes 120-28 and accompanying text.

12. See *infra* notes 214-25 and accompanying text.

13. See *infra* notes 226-39 and accompanying text.

nonpayment of support, and (3) to serve the needs of one or both parents. Initially, the constitutional rights of both a defending parent and the child involved in a termination proceeding are discussed. The commitment by Oklahoma's courts and legislature to the concept that termination should only be imposed when it serves the best interests of the child is then addressed. The part next explores the alternatives that exist to meet the concerns that parent-initiated termination might legitimately address and examines the significant detriment to the child that termination can cause. The conclusion is made that parent-initiated termination is unnecessary to protect a child from harm and fails to serve a child's best interests. Examination of the other two purposes suggests that neither satisfies constitutional requirements nor the public policy concern that termination serves the interests of the child. Therefore, Oklahoma's practice of allowing one parent to seek termination of the other parent's rights outside of juvenile and adoption proceedings should be abolished.

Part IV discusses several important procedural protections guaranteed by Oklahoma statute or common law to litigants or the child in juvenile termination proceedings that have not been addressed by the legislature or the Oklahoma courts in the context of parent-initiated proceedings.<sup>14</sup> The right of a defending parent to a jury trial, court-appointed counsel for indigents, and an elevated burden of proof should be provided regardless of the type of proceeding in which the parent is threatened with termination.<sup>15</sup> Moreover, the need for independent counsel for the child, extensive investigation, and expert testimony are at least as important, and arguably more so, in parent-initiated termination proceedings.<sup>16</sup> Until parent-initiated proceedings are abolished, these procedural protections must be guaranteed in order to protect the constitutional rights of the parent whose rights are to be terminated, to protect the constitutional rights of the child, and to decrease the risk that parent-initiated termination proceedings will be used for improper purposes.

## II. OKLAHOMA'S STATUTORY FRAMEWORK FOR TERMINATION OF PARENTAL RIGHTS

In Oklahoma, termination of parental rights can be accomplished in three types of proceedings: parent- or guardian-initiated proceedings,<sup>17</sup>

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14. See *infra* notes 240-323 and accompanying text.

15. See *infra* notes 241-94 and accompanying text.

16. See *infra* notes 295-323 and accompanying text.

17. OKLA. STAT. tit. 10, § 1130 (D) (Supp. 1987). See *infra* note 24 for full text.

juvenile proceedings, and adoption proceedings.<sup>18</sup> Before exploring these proceedings in greater depth, it is important to define the scope and effect of terminating parental rights.

Whether issued in parent-initiated proceedings, juvenile proceedings, or adoption proceedings, an Oklahoma court order terminating parental rights permanently extinguishes the affected parent's right to custody of the child, the right to visit the child, the right to control the child's training and education, the right to earnings of the child, and the parent's right to inherit from or through the child.<sup>19</sup> Termination of parental rights does far more, however, than simply terminate all *rights* the parent might derive from the parent-child relationship. By statute, termination of parental rights terminates the *parent-child relationship itself*,<sup>20</sup> and thus has the effect of extinguishing the parental duties and responsibilities created by the relationship. *Severance of the parental bond in termination proceedings therefore terminates not only the rights of the parent, but also the rights of the child which emanate from the relationship.* Following termination of a parent's rights, the *child* is deprived

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18. Two other types of proceedings which are similar to termination of parental rights are proceedings to free a child from the parent's dominion pursuant to OKLA. STAT. tit. 10, § 9 (1981), and relinquishment pursuant to OKLA. STAT. tit. 10, §§ 27-31 (1981 & Supp. 1986). Actions to free a child from a parent's dominion require a showing of abuse of parental authority. Such proceedings do not contemplate a complete severance of the parent-child relationship, however, as the statute specifically provides for the subsequent enforcement of the parental duties of support and education.

OKLA. STAT. tit. 10, §§ 27-31 allows parents to voluntarily relinquish their rights and duties with respect to the permanent care or custody of a child to relatives within the fourth degree without a court order, and to others pursuant only to a court order. For a discussion of relinquishments in anticipation of adoption, see *infra* notes 62 & 67 and accompanying text.

The effect of relinquishments that purport to permanently relinquish all parental rights and duties, and which are not subsequently followed by an adoption, is unclear. Case law construing the effect of relinquishment in this context is nonexistent. Title 10, § 31 provides that a parent who relinquishes care and custody of a child cannot recover custody absent a court finding of neglect of the child on the part of its foster parents, guardian, or custodian. The fact that the statute does not require relinquishing parents to adopt back their child suggests that the parental bond is not completely severed. *Cf. In re Richmond*, 484 P.2d 880, 882 (Okla. 1971) (where mother relinquished child to Associated Catholic Charities under the Juvenile Code for purposes of adoption, and court had placed child as ward of court with the agency, court had authority to modify its order upon mother's request for revocation of consent because mother's rights had not yet been terminated.)

19. OKLA. STAT. tit. 10, § 1132 (1981). See *infra* note 21 for full text.

20. *Id.* The Oklahoma Supreme Court has described the purpose of termination proceedings as severance of the parental bond. *Lane v. State (In re T.H.L.)*, 636 P.2d 330, 332 (Okla. 1981). The court's most recent pronouncement underscored its finality: Termination of parental rights "is the unmitigated cessation of all natural and legal rights the parent has in his/her child, and a permanent parting of all bonds linking parent to child." *R.E. v. State (In re A.E.)*, 743 P.2d 1041, 1047 (Okla. 1987) (footnote omitted).

of the right to support from that parent,<sup>21</sup> as well as the benefits of guidance, companionship, and a continuing social relationship with the parent. Only the right of the child to inherit from the parent is specifically

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21. Termination of parental rights is generally regarded throughout the United States as abolishing not only all parental rights, but also all parental obligations including the duty to support the child. Parker, *Dissolving Family Relations: Termination of Parent-Child Relations—An Overview*, 11 U. DAYTON L. REV. 555, 556 & n.6 (1986) (excerpted from L. WARDLE, C. BLAKESLY & J. PARKER, *FAMILY LAW IN THE UNITED STATES* (1986)). Summarizing the various state termination statutes, including Oklahoma's, Parker observed that "[t]he only vestiges of the parent-child relationship that are sometimes statutorily retained are inheritance and religious affiliation." *Id.* at 557 (footnotes omitted). Of the 28 state statutes Parker summarized, only Arizona explicitly retains the duty of support past entry of an order terminating parental rights. ARIZ. REV. STAT. ANN. § 8-539 (1974). "An order terminating the parent-child relationship shall divest the parent and the child of all legal rights, privileges, duties and obligations with respect to each other except the right of the child to inherit and support from the parent. This right of inheritance and support shall only be terminated by a final order of adoption." *Id.*

Although the Oklahoma statute defining the effect of termination of parental rights, OKLA. STAT. tit. 10, § 1132 (1981), does not specifically address the duty of support, a close reading of this and corresponding statutes and case law supports the conclusion that the effect of termination of parental rights in Oklahoma is not intended by the legislature to depart from the generally understood meaning of termination nationwide. Section 1132 provides:

The termination of parental rights terminates the parent-child relationship, including the parent's right to the custody of the child and his right to visit the child, his right to control the child's training and education, the necessity for the parent to consent to the adoption of the child and the parent's right to the earnings of the child, and the parent's right to inherit from or through the child. Provided, that nothing herein shall in any way affect the right of the child to inherit from the parent.

*Id.*

First, the statutory language declaring that "termination of parental rights terminates the parent-child relationship" clearly abrogates the duty of support. The Oklahoma Supreme Court, in describing the parental duty to provide children with support and education that is set forth in OKLA. STAT. tit. 10, § 4 (1981), has specifically declared that this duty arises out of the parent-child relationship. *LeCrone v. LeCrone*, 596 P.2d 1262, 1264 (Okla. 1979). The court has also stated that the "rights and duties of the parents are reciprocal." *Green v. Hight (In re Guardianship of Hight)*, 148 P.2d 475, 480 (Okla. 1944). If the parent-child relationship creates the duty of support, it follows that severance of the relationship terminates the duty of support.

Second, the specific retention in § 1132 of the child's right to inherit subsequent to termination suggests that other rights of the child arising out of the relationship are not similarly preserved.

No Oklahoma case authority has been found which recognizes or enforces a duty of support subsequent to termination of a parent's rights. A recent Oklahoma Supreme Court opinion, *Merrell v. Merrell*, 712 P.2d 35 (Okla. 1985), provides by implication further evidence that termination of parental rights terminates the parent's duty to support. In *Merrell* the natural father challenged the lower court's refusal to dismiss an application for contempt citation, despite Merrell's claim that his duty to pay child support ended in 1977 when a court had declared his child eligible for adoption without his consent. No final decree of adoption was ever entered. The Oklahoma Supreme Court held that the declaration of eligibility for adoption without consent did not itself effect a termination of parental rights, and that only "the decree of adoption itself would terminate the parental rights." *Id.* at 37. Since "the 1977 adjudication concerned only petitioner's right to consent to the adoption of the parties' minor child rather than the full panoply of rights and obligations between petitioner and the child, it is apparent that the statutory duty to support the minor child continued in force and effect." *Id.* at 39 (footnote omitted). The court further reasoned that "[i]f the section 60.7 hearing had been found to terminate all parental ties to the affected parent, the child would be deprived of the possibility of support from that parent even though an adoptive parent had not come forth to take up the burden." *Id.* The court's equation of termination of parental rights with termination of



preserved by statute following termination proceedings.<sup>22</sup> Thus, termination of parental rights is a misnomer, for the drastic effect of such an order is to deny permanently both the parent and, with the exception of a possible inheritance, the child of any future rights and benefits that could be derived from a continuation of the relationship.

### A. *Parent-Initiated Termination Proceedings*

#### 1. Involuntary Termination

Involuntary termination of a parent's rights at the instigation of the other parent is authorized by title 10, section 1130(D) of the Oklahoma Statutes. Most frequently this remedy is sought by the initiating parent in a post-decree divorce proceeding or in a separate action initiated after the divorce of the natural parents.<sup>23</sup> Recently amended in 1987, section 1130 now provides that a parent or guardian of a child may petition the court to terminate the rights of a parent, without that parent's consent, on two grounds: (a) the parent entitled to custody has abandoned the child, or (b) the parent without custody has willfully failed to contribute to the support of the child during the preceding year, as required by court order or decree, or in the absence of an order, consistent with the parent's means and earning capacity.<sup>24</sup> The only ground available for

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the duty of support in adoption certainly supports the conclusion that a termination of parental rights under OKLA. STAT. tit. 10, § 1130 similarly extinguishes the duty to pay child support.

Finally, when the legislature has wanted to make it clear that the duty of support is retained following court proceedings that deny a particular parental right, it has done so. In OKLA. STAT. tit. 10, § 60.6 (Supp. 1986), the legislature specifically provided that a court's determination that a child born out of wedlock could be adopted without the consent of the father or putative father "shall not, by itself, act to relieve such father or putative father of his obligation" to provide support for the child. *Id.* The final decree of adoption terminates the rights and responsibilities of the natural parents. *Id.* § 60.16 (Supp. 1987). The legislature has not included a similar provision retaining the duty of support of a parent whose rights have been terminated under tit. 10, § 1130.

22. OKLA. STAT. tit. 10, § 1132 (1981).

23. See *McNeely v. Delmer*, 734 P.2d 1294, 1295-96 (Okla. 1987) (separate post-divorce termination action); *Griffith v. Griffith*, 730 P.2d 524, 525 (Okla. 1986) (post-divorce motion); *Davis v. Davis*, 708 P.2d 1102, 1104-05 (Okla. 1985) *superseded by statute as stated in* *L.R.R. v. R.D.R.* (*In re R.R.R.*), 763 P.2d 94 (Okla. 1988) (post-divorce proceeding); *Yarborough v. Yarborough*, 708 P.2d 1100, 1101 (Okla. 1985) (post-divorce proceeding); *In re Boyer*, 490 P.2d 1076, 1077 (Okla. 1971) (post-divorce proceeding filed by mother to have both her rights and father's rights terminated so that children could be placed for adoption); *D.S. v. J.H.* (*In re James*), 593 P.2d 1095, 1096 (Okla. Ct. App. 1978) (separate post-divorce termination action).

24. OKLA. STAT. tit. 10, § 1130 (Supp. 1987). The full text of § 1130 provides:

A. The finding that a child is delinquent, in need of supervision or deprived shall not deprive the parents of the child of their parental rights, but a court may terminate the rights of a parent to a child in the following situations:

1. Upon a written consent of a parent, including a parent who is a minor, acknowledged as provided in paragraph (4) of Section 60.5 of this title, who desires to terminate his parental rights; provided that the court finds that such termination is in the best interests of the child; or

involuntarily terminating the noncustodial parent's rights is thus willful failure to pay child support during the preceding year.

2. A finding that a parent who is entitled to custody of the child has abandoned it; or

3. A finding that:

- a. the child is deprived, as defined in this chapter, and
- b. such condition is caused by or contributed to by acts or omissions of his parent, and

- c. termination of parental rights is in the best interests of the child, and

- d. the parent has failed to show that the condition which led to the making of said finding has not been corrected although the parent has been given three (3) months to correct the condition; provided, that the parent shall be given notice of any hearing to determine if the condition has been corrected. The court may extend the time in which such parent may show the condition has been corrected, if, in the judgment of the court, such extension of time would be in the best interest of the child. During the period that the parent has to correct the condition the court may return the child to the custody of its parent or guardian, subject to any conditions which it may wish to impose or the court may place the child with an individual or an agency; or

4. A finding that a parent who does not have custody of the child has willfully failed to contribute to the support of the child as provided in a decree of divorce or in some other court order during the preceding year or, in the absence of such order, consistent with the parent's means and earning capacity; or

5. A conviction in a criminal action pursuant to the provisions of Sections 843, 845, 1021.3, 1111 and 1123 of Title 21 of the Oklahoma Statutes or a finding in a deprived child action either that:

- a. the parent has physically or sexually abused the child or a sibling of such child or failed to protect the child or a sibling of such child from physical or sexual abuse that is heinous or shocking to the court or that the child or sibling of such child has suffered severe harm or injury as a result of such physical or sexual abuse, or

- b. the parent has physically or sexually abused the child or a sibling of such child or failed to protect the child or a sibling of such child from physical or sexual abuse subsequent to a previous finding that such parent has physically or sexually abused the child or a sibling of such child or failed to protect the child or a sibling of such child from physical or sexual abuse; or

6. A conviction in a criminal action that the parent has caused the death of a sibling of the child as a result of the physical or sexual abuse or chronic neglect of such sibling; or

7. A finding that all of the following exist:

- a. the child is deprived, as defined in this chapter, and

- b. custody of the child has been placed outside the home of a natural or adoptive parent, guardian or extended family member, and

- c. the parent whose rights are sought to be terminated has been sentenced to a period of incarceration of not less than ten (10) years, and

- d. the continuation of parental rights would result in harm to the child based on consideration of the following factors, among others: the duration of incarceration and its detrimental effect on the parent/child relationship; any previous incarcerations; any history of criminal behavior, including crimes against children; the age of the child; the evidence of abuse or neglect of the child or siblings of the child by the parent; and the current relationship between the parent and the child and the manner in which the parent has exercised parental rights and duties in the past, and

- e. termination of parental rights is in the best interests of the child.

Provided, that the incarceration of a parent shall not in and of itself be sufficient to deprive a parent of his parental rights; or

Abandonment,<sup>25</sup> the other ground available for involuntary termination under section 1130(D), applies only to parents "entitled to custody" of a child. The Oklahoma Supreme Court has recently confirmed that when full legal custody of a child has been awarded to one parent, the noncustodial parent is not "entitled to custody" within the meaning

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8. A finding that all of the following exist:
- a. the child is deprived as defined in this chapter, and
  - b. custody of the child has been placed outside the home of a natural or adoptive parent, guardian or extended family member, and
  - c. the parent whose rights are sought to be terminated has a mental illness or mental deficiency, as defined by paragraphs f and g of Article II of Section 6-201 of Title 43A of the Oklahoma Statutes, which renders the parent incapable of adequately and appropriately exercising parental rights, duties and responsibilities, and
  - d. the continuation of parental rights would result in harm or threatened harm to the child, and
  - e. the mental illness or mental deficiency of the parent is such that it will not respond to treatment, therapy or medication and, based upon competent medical opinion, the condition will not substantially improve, and
  - f. termination of parental rights is in the best interests of the child.

Provided, a finding that a parent has a mental illness or mental deficiency shall not in and of itself deprive the parent of his parental rights.

B. Unless otherwise provided for by law, any parent or legal custodian of a child who willfully omits or neglects, without lawful excuse, to perform any duty imposed upon such parent or legal custodian by law to furnish necessary food, clothing, shelter or medical attendance for such child, upon conviction, is guilty of a misdemeanor. As used in this section, the duty to furnish medical attention shall mean that the parent or legal custodian of a child must furnish medical treatment in such manner and on such occasions as an ordinarily prudent person, solicitous for the welfare of a child, would provide; such parent or legal custodian is not criminally liable for failure to furnish medical attendance for every minor or trivial complaint with which the child may be afflicted. Any person who leaves the state to avoid providing necessary food, clothing, shelter or medical attendance for such child, upon conviction, is guilty of a felony and shall be punished by imprisonment in the State Penitentiary for a period not exceeding one (1) year. Nothing in this section shall be construed to mean a child is endangered for the sole reason the parent or guardian, in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination for the treatment or cure of disease or remedial care of such child; provided, that medical care shall be provided where permanent physical damage could result to such child; and that the laws, rules and regulations relating to communicable diseases and sanitary matters are not violated. Nothing contained herein shall prevent a court from immediately assuming custody of a child and ordering whatever action may be necessary, including medical treatment, to protect his health or welfare. Psychiatric and psychological testing and counseling are exempt from the provisions of this act.

C. An order directing the termination of parental rights is a final appealable order.

D. A parent or guardian of a child may petition the court to terminate the parental rights of a parent or the parents of a child for any of the grounds listed in paragraphs 1, 2 or 4 of subsection A of this section. A prior finding by a court that a child is delinquent, deprived or in need of supervision shall not be required for the filing of such petition by the parent or guardian. *Id.* (footnote omitted).

25. The meaning of the term "abandonment" under § 1130 was recently discussed by the Oklahoma Supreme Court in *McNeely v. Delmer (In re McNeely)*, 734 P.2d 1294 (Okla. 1987), which focused on what abandonment is not:

We are persuaded by the plain language of § 1130(A)(2) and hence hold that a parent *like this mother* [a woman whose ex-husband had full formal legal custody of the daughter], who has not failed to discharge any court-imposed obligation or some well-defined legal

of section 1130(D) merely because that parent was entitled to visitation. Thus, a noncustodial parent cannot have his or her parental rights terminated under section 1130(D) based upon abandonment of the parent's visitation rights.<sup>26</sup> Since the vast majority of termination proceedings *initiated by parents* are brought by custodial parents seeking to terminate the rights of noncustodial parents,<sup>27</sup> the primary ground for parent-initiated involuntary termination actions is willful failure to support.

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duty and *who bore no custodial responsibility*, does not come within the purview of 'abandonment' as a statutory ground for parental bond's severance.

*Id.* at 1297.

An Oklahoma Court of Appeals has defined "abandonment," for purposes of § 1130(B), as "a conscious disregard of the obligations . . . a parent owed her child to such an extent that . . . the parent-child relationship had been destroyed." The court conceded that the concept of abandonment is "somewhat elastic" and "to a large extent considered a question of fact for trial court determination." *Russell v. O'Neill (In re O'Neill)*, 554 P.2d 864, 871 (Okla. Ct. App. 1976). *O'Neill* is the only reported case in the last 35 years in which abandonment has successfully been used as a ground in juvenile or parent-initiated terminations. (*D.S. v. J.H. (In re James H.)*, 593 P.2d 1095 (Okla. Ct. App. 1978) was subsequently withdrawn and disapproved by the Oklahoma Supreme Court. *See infra* note 26.) In *O'Neill*, the mother, during a period of separation from her husband, left her child for over a year with a family the mother barely knew, rarely visited the child, and failed to contribute to his support. On this basis she was found to have abandoned the child, and her parental rights were terminated. One judge dissented from the finding that the mother's conduct constituted abandonment, on the ground that the mother had requested the return of the child in an earlier action, although she had voluntarily given the child back to petitioners within several days, and on another occasion had requested his return.

26. *McNeely v. Delmer (In re McNeely)*, 734 P.2d 1294, 1297 (Okla. 1987). In *McNeely*, the custodial father attempted to terminate the parental rights of his ex-spouse on grounds of abandonment, since she had visited her daughter only twice in eleven years. The court found she was not entitled to custody within the meaning of § 1130(A)(2). *See supra* note 25. The court withdrew and disapproved an earlier decision, *D.S. v. J.H. (In re James H.)*, 593 P.2d 1095 (Okla. Ct. App. 1978), in which the parental rights of a noncustodial mother were terminated on grounds of abandonment because she did not visit or contact the child for a period of over six years. The court found in *In re James H.* that although the mother was not the parent with custody since the divorce, she was "entitled to custody" within the meaning of § 1130(A)(2) because her parental rights had not been terminated and she had been entitled to visitation. The court's opinion relied upon an earlier Oklahoma Supreme Court opinion, *In re Boyer*, 490 P.2d 1076 (Okla. 1971), in which the words, "entitled to custody," were interpreted by the court more expansively, applying to any parent whose parental rights had not been terminated or relinquished. The court in *Boyer*, however, was interpreting the original 1968 version of § 1130 in which a parent "entitled to custody" could have his or her rights terminated for willful neglect to provide the child with support or education. Revisions of § 1130, the Oklahoma Supreme Court's withdrawal *In re James H.*, and the court's finding that the noncustodial mother in *McNeely* was a parent not "entitled to custody" compel the conclusion that the earlier broad definition of "entitled to custody" has been rejected by the court. Thus, under the current § 1130(A)(2), when custody of a child has been awarded to one parent, the noncustodial parent does not fall within the section's purview.

27. All reported parent-initiated termination cases were instituted by custodial parents seeking termination of noncustodial parents' rights. *See McNeely v. Delmer (In re McNeely)*, 734 P.2d 1294 (Okla. 1987); *Griffith v. Griffith*, 730 P.2d 524 (Okla. 1986); *Yarborough v. Yarborough*, 708 P.2d 1100 (Okla. 1985); *Davis v. Davis*, 708 P.2d 1102 (Okla. 1985) *superseded by statute as stated in L.R.R. v. R.D.R. (In re R.R.R.)*, 763 P.2d 94 (Okla. 1988); *Mullins v. Mullins*, 606 P.2d 573 (Okla. 1980) *overruled*, *Davis v. Davis*, 708 P.2d 1102 (Okla. 1985); *In re Boyer*, 490 P.2d 1076 (Okla. 1971); *In re James H.*, 593 P.2d 1095 (Okla. Ct. App. 1978) *withdrawn*, *In re McNeely*, 734 P.2d 1294 (Okla. 1987).

In describing the two statutory grounds available for parent-initiated involuntary termination proceedings, section 1130 does not explicitly require that the court find termination to be in the best interests of the child.<sup>28</sup> This omission is anomalous and worrisome. Several of the grounds for termination listed in section 1130 that are restricted to termination in juvenile proceedings do specifically require a finding that termination of parental rights is in the child's best interests.<sup>29</sup> The remaining grounds restricted to juvenile proceedings involve severe or repeated child abuse.<sup>30</sup> While there is authority to support the argument that a court must always specifically find termination of parental rights to be in the child's best interest,<sup>31</sup> the omission of this requirement is indeed troubling and could, inappropriately, be taken as a signal that termination in parent-initiated proceedings could be used to serve other goals.<sup>32</sup>

## 2. "Voluntary" Termination

Under section 1130, termination of parental rights in parent-initiated proceedings may also be accomplished by written consent of a parent who desires to terminate his or her parental rights.<sup>33</sup> In order to terminate parental rights based upon the parent's written consent, section 1130 requires the court specifically to find that such termination is in the best interests of the child.

Although "voluntary" terminations are accomplished with the written consent of the parent whose rights are forfeited, an examination of the circumstances under which many consents are signed indicates they are clearly not "desired" in the true sense of the word. As with involuntary termination, termination on the basis of written consent in parent-initiated proceedings often occurs in the context of divorce or post-divorce proceedings. Frequently consent is obtained after criminal charges or an application for contempt citation for failure to pay child support has been filed or threatened against the parent who subsequently signs the written consent.<sup>34</sup> "Voluntary" is thus an inappropriate description

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28. OKLA. STAT. tit. 10, § 1130(A)(2) and (4) (Supp. 1987).

29. *Id.* § 1130(A)(3), (7), and (8).

30. *Id.* § 1130(A)(5) and (6).

31. *See infra* notes 120-31 and accompanying text.

32. Most troubling is the temptation to use termination of parental rights to sanction a parent, *see infra* notes 214-25 and accompanying text; or to serve the personal interests of the parent initiating the termination action, *see infra* notes 226-39 and accompanying text.

33. OKLA. STAT. tit. 10, § 1130(A)(1) (Supp. 1987). *See supra* note 24 for full text.

34. No published opinions have been found regarding the circumstances under which these voluntary consents in parent-initiated proceedings are signed. Based on the author's observations during practice in Oklahoma, it appears that many parents who consent to a termination of their

of many consents that are signed to avoid the prospect of impending imprisonment for contempt<sup>35</sup> or criminal failure to support.<sup>36</sup>

### 3. Absence of Parental Replacement

Regardless of whether a parent-initiated termination proceeding brought under section 1130 is involuntary or based upon consent, there is no requirement that someone be waiting to assume through adoption the role of the parent whose rights are terminated. There is also no indication that freeing the child for adoption is a primary purpose of a termination proceeding in this context.<sup>37</sup> Normally these proceedings are initiated by the custodial parent in an attempt to terminate the parental rights of the noncustodial parent. They typically occur in an ongoing divorce or custody action or in a post-decree proceeding.<sup>38</sup> If a stepparent were waiting in the wings to adopt the child, there would be no reason to proceed under section 1130 to terminate parental rights and then bring a separate adoption action. The parties could accomplish the same result, based on willful nonpayment of support, in a proceeding for stepparent adoption under the adoption statutes.<sup>39</sup> A child who loses a parent through parent-initiated termination proceedings under section 1130

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parental rights do so under the threat of a contempt proceeding for nonpayment of child support. Frequently the custodial parent threatens to file or does file an application for contempt and agrees to drop the proceeding if the noncustodial parent will consent to termination of his or her parental rights.

35. Punishment for indirect civil contempt, which includes failure to pay court ordered child support, OKLA. STAT. tit. 12, § 1291(D) (Supp. 1987), is a fine of up to \$500 and/or imprisonment in the county jail for up to six months. OKLA. STAT. tit. 21, § 566 (Supp. 1984).

36. See OKLA. STAT. tit. 10, § 1130(B) (Supp. 1987) (See *supra* note 24 for full text), OKLA. STAT. tit. 21, §§ 851, 853 (1981), 852 (Supp. 1987).

37. On the other hand, a termination proceeding initiated by a guardian of a child under § 1130 may well be motivated, at least on the part of the guardian, by the desire to free the child for adoption.

38. See *supra* notes 23 & 27.

39. See OKLA. STAT. tit. 10, § 60.3 (1981), which provides that the husband or wife of a child's parent is eligible to adopt the child. OKLA. STAT. tit. 10, § 60.6 (Supp. 1987) which sets forth the grounds for determining a child eligible for adoption without the consent of its parent, provides in relevant part:

A child under eighteen (18) years of age cannot be adopted without the consent of its parents, if living, except that consent is not required from:

.....

2. A parent who, for a period of twelve (12) months immediately preceding the filing of a petition for adoption of a child, has willfully failed, refused, or neglected to contribute to the support of such child:

a. in substantial compliance with a support provision contained in a decree of divorce, or a decree of separate maintenance or an order adjudicating responsibility to support in a reciprocal enforcement of support proceeding, paternity action, juvenile proceeding, guardianship proceeding, or orders of modification to such decree, or other lawful orders of support entered by a court of competent jurisdiction adjudicating the duty, amount, and manner of support, or

is therefore unlikely to have someone who is immediately prepared to fill the empty parental role and legally assume the parental obligation to support the child.

### B. *Termination of Parental Rights in Juvenile Proceedings*

The state may seek to terminate the parental rights of one or both parents of a child in juvenile proceedings<sup>40</sup> initiated by the district attorney.<sup>41</sup> Before the court may terminate a parent's rights in a juvenile action, the court must first adjudge the child a ward of the court on the grounds that the child is delinquent, deprived, in need of supervision, or in need of treatment.<sup>42</sup> If the evidence presented at the adjudication hearing fails to support any of these allegations, the petition initiating the juvenile proceeding must be dismissed.<sup>43</sup> The court has no authority to issue any order of disposition, including an order terminating parental rights. If the child is determined to be a ward of the state, a dispositional hearing is held at which the court takes evidence "helpful in determining the proper disposition best serving the interest of the child and the public" and issues a dispositional order.<sup>44</sup> Periodic review hearings and dispositional hearings must follow if the child is removed from the custody of the parents.<sup>45</sup> Termination of parental rights is one of several orders a judge may issue at the disposition stage.<sup>46</sup> However, the judge must first

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b. according to such parent's financial ability to contribute to such child's support if no provision for support is provided in a decree of divorce or an order of modification subsequent thereto; or and *where any of the above conditions exist it shall not be necessary to terminate parental rights under Section 1130 of this title prior to the adoption of said child.* Provided that any decree of adoption heretofore entered by any court of appropriate jurisdiction within the State of Oklahoma wherein termination of parental rights, as prescribed in Section 1130 of this title, was not obtained shall not be invalid on the ground that such termination of parental rights was not obtained. . . .

*Id.* (Emphasis added).

40. OKLA. STAT. tit. 10, §§ 1116 (Supp. 1986), 1130 (Supp. 1987).

41. *Id.* § 1103 (Supp. 1982). Juvenile proceedings may also be filed by a person authorized by court rule to make a preliminary inquiry to determine if further action is necessary. The statute indicates that the Department of Human Services may contract to perform this preliminary intake. *Id.* Regardless of who files the petition, it is the district attorney who must prepare and prosecute the case. *Id.* § 1109 (Supp. 1986).

42. OKLA. STAT. tit. 10, §§ 1114 (Supp. 1986) 1115 (1981). *Davis v. Davis*, 708 P.2d 1102, 1109 (Okla. 1985) *superseded by statute as stated in* L.R.R. v. R.D.R. (*In re* R.R.R.), 763 P.2d 94 (Okla. 1988); *Marian P. v. State (In re Lyni P.)*, 626 P.2d 864, 866 (Okla. 1981) *overruled* on other grounds by *Mann v. Oklahoma Dep't of Instits. (In re Jerry L.)*, 662 P.2d 1372 (Okla. 1983).

The terms "delinquent child," "deprived child," "child in need of supervision," and "child in need of treatment" are defined in OKLA. STAT. tit. 10, § 1101 (Supp. 1987).

43. OKLA. STAT. tit. 10, § 1113 (1981).

44. *Id.* § 1115 (1981).

45. *Id.* § 1116(B) (Supp. 1987).

46. *Id.* § 1116(A).

ascertain whether the constitutional<sup>47</sup> and statutory<sup>48</sup> standards for termination have been met, the parents have been properly notified,<sup>49</sup> and termination of one or both parents' rights is in the best interests of the child.<sup>50</sup>

Termination of parental rights in juvenile proceedings is normally accomplished with the goal of freeing the child for adoption.<sup>51</sup> While an impending adoption is not a statutory prerequisite to termination in juvenile proceedings, the legislative scheme clearly suggests that adoption is the preferred next step in the disposition of a child following termination of parental rights. Title 10, section 1116.1 of the Oklahoma Statutes mandates a review every six months of any dispositional order removing a child from the custody of its parents "until such time as the child is returned to the custody of said parent or parents and the conditions which caused the child to be adjudicated as deprived have been corrected or the parental rights of said parent or parents are terminated and a final adoption decreed."<sup>52</sup> Title 10, section 1116 further requires that periodic dispositional hearings be held following the initial dispositional hearing for any child placed in foster care, at which the court is directed to consider whether "the rights of the parents of the child should be terminated and the child placed for adoption or legal guardianship."<sup>53</sup> Moreover, title 10, section 1133 of the Oklahoma Statutes provides that after termination of parental rights has taken place, "a court may award custody of the child to any qualified person or agency with authority to consent to the adoption of the child, or the court, in its discretion, may reserve the

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47. See *infra* notes 86-101 and accompanying text.

48. The statutory grounds for termination are set forth in title 10, § 1130. See *supra* note 24 for full text.

49. OKLA. STAT. tit. 10, § 1116(C) (Supp. 1987) provides that "[t]he court may not terminate the rights of a parent who has not been notified that the parental rights might be terminated."

50. In *William K. v. Rebecca K.* (*In re Adoption of A.G.K.*), 728 P.2d 1, 4-5 (Okla. Ct. App. 1986), the court concluded that § 1130 vested the court with power to decline to terminate parental rights even if the statutory grounds were satisfied and that such discretion was granted by § 1130 "to avoid a termination that the court finds to be contrary to the best interests of the child—the protection of which is the primary purpose for and paramount objective of all the children-oriented provisions of Title 10." See *Davis v. Davis*, 708 P.2d 1102, 1106 (Okla. 1985) *superseded by statute as stated in L.R.R. v. R.D.R.* (*In re R.R.R.*) ("In short, the entire Juvenile Code must be viewed as creating *public/state* remedies to be administered in the best interests of minors who fall within its contemplation."); *In re J.L.*, 578 P.2d 349, 351 (Okla. 1978).

As previously mentioned, a finding that termination of parental rights is in the best interests of the child is specifically included as a requirement of several of the statutory grounds under § 1130 (Supp. 1987). See § 1130(A)(1), (3), (7), and (8).

51. *Davis*, 708 P.2d at 1112.

52. OKLA. STAT. tit. 10, § 1116.1(A) (Supp. 1983).

53. *Id.* § 1116(B) (Supp. 1987).



authority to consent to the adoption of the child."<sup>54</sup> In *Davis*, the Oklahoma Supreme Court concluded that "[t]he terms of § 1133(A) clearly indicate that terminating parental rights under § 1130—*without the imminent prospect of adoption*—defeats the purpose of the statute."<sup>55</sup> Oklahoma's legislative scheme in this regard is in harmony with other states which have articulated that the goal of termination of parental rights in juvenile proceedings is to permit a child to be adopted by parents who can provide a stable, loving home environment.<sup>56</sup>

The expanded grounds available for terminating parental rights in juvenile proceedings are consistent with facilitating this goal. In addition to the grounds available for parent-initiated termination proceedings—abandonment, willful failure to support, and consent—section 1130 allows termination in juvenile proceedings on the following grounds: (1) failure within a three-month period to correct parental conduct which caused or contributed to an adjudication that the child is deprived;<sup>57</sup>

54. *Id.* § 1133(A) (1981).

55. *Davis*, 708 P.2d at 1112, n.53 (emphasis in original).

56. See N.Y. SOC. SERV. LAW § 384-b(1)(b) (McKinney 1983), which provides, in reference to termination of parental rights:

It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights and freeing the child for adoption.

Similarly, in *In re Laura F.*, 33 Cal. 3d 826, 840, 662 P.2d 922, 932, 191 Cal. Rptr. 464, 473 (1983) Justice Byrd comments in her dissent, "Even a cursory glance through the [California] statutory scheme (Civ. Code, § 232 et. seq.) reveals a clear legislative intent that parental rights are not to be terminated unless there is at least some realistic possibility that the child or children will be adopted thereafter."

This approach to termination has also been recognized by commentators. Parker, *supra* note 21, at 565-66; See Wald, *State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 691 (1976). Wald suggests that termination of parental rights should not be permissible where permanent placement is not feasible, and that adoption is the generally preferred method of permanent placement. *Id.*

There are rare occasions in which permanent placement can be better accomplished by allowing foster parents or a relative, with whom the child has been placed and become strongly attached, to become legal guardians. This occurs in those instances where the relative or foster parents are unable, for good reasons, to adopt. See Wald, *supra*, at 697, 699. Such an alternative allows the child to continue a relationship with the psychological parents, and provides the child with someone to fill the parental role under circumstances where the child's needs for emotional and financial support should be met.

57. "Deprived child" is defined in OKLA. STAT. tit. 10, § 1101(4) (Supp. 1987) as follows:

[A] child who is for any reason destitute, homeless, or abandoned or who does not have the proper parental care or guardianship or whose home is an unfit place for the child by reason of neglect, cruelty, or depravity on the part of his parents, legal guardian, or other person in whose care the child may be, or who is a child in need of special care and treatment because of his physical or mental condition including a child born in a condition of dependence on a controlled dangerous substance, and his parents, legal guardian, or other custodian is unable or willfully fails to provide said special care and treatment, or who is a handicapped child deprived of the nutrition necessary to sustain life or of the medical

(2) a conviction or finding in a juvenile proceeding of physical or sexual abuse of the child or sibling in a heinous or shocking manner or causing severe harm or injury; (3) a conviction of abuse or neglect which caused the death of the child's sibling; (4) a sentence of imprisonment for ten or more years to the parent of a deprived child, if the child has not been placed with a relative or guardian, and continuation of the parental relationship would result in harm to the child; or (5) mental illness or retardation of the parent of a deprived child, if the condition will not substantially improve, the child has not been placed with a relative or guardian, and continuation of the parental relationship would result in harm to the child.<sup>58</sup> The statute specifically requires the court to make a finding that termination of parental rights is in the best interests of the child when termination is based on failure to correct deprivation, imprisonment, or mental illness or retardation. Pursuant to a 1987 amendment of section 1130, these five grounds were specifically excluded from use in termination proceedings initiated by parents or guardians outside of juvenile proceedings.

### C. Adoption Proceedings

A final decree of adoption in Oklahoma terminates the relationship between the natural parents and the adopted child. Hence it extinguishes all parental rights and responsibilities of the natural parent to the adopted child.<sup>59</sup> An exception applies, of course, to an adoption by a stepparent. Such an adoption would not terminate or affect the relationship of the natural parent who is the stepparent's spouse at the time of the adoption.<sup>60</sup>

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treatment necessary to remedy or relieve a life-threatening medical condition in order to cause or allow the death of said child if such nutrition or medical treatment is generally provided to similarly situated nonhandicapped or handicapped children, provided that no medical treatment is necessary if, in the reasonable medical judgment of the attending physician, such treatment would be futile in saving the life of the child, or who is, due to improper parental care and guardianship, absent from school for fifteen (15) or more days or parts of days within a semester or four (4) or more days or parts of days within a four-week period without a valid excuse as defined by the local school boards if said child is subject to compulsory school attendance, or whose parent or legal custodian for good cause desires to be relieved of his custody. No child who, in good faith, is being provided with treatment and care by spiritual means alone in accordance with the tenets and practice of a recognized church or religious denomination by a duly accredited practitioner thereof shall be considered, for that reason alone, to be a deprived child pursuant to any provision of Sections 1101 through 1506 of this title. The phrase dependent and neglected shall be deemed to mean deprived.

*Id.*

58. See *supra* note 24 for full text of § 1130.

59. OKLA. STAT. tit. 10, § 60.16(1) (Supp. 1984).

60. *Id.* § 60.16(2).

Because adoptions are permitted without the consent of a natural parent under certain circumstances, the adoption statutes provide another opportunity for involuntary termination of parental rights. A child may be adopted without the consent of a natural parent if the parent, for a twelve month period immediately preceding the filing of the adoption action, willfully fails to pay child support in substantial compliance with a court order or, if no order exists, according to the parent's financial ability.<sup>61</sup> Unless the parent's rights have been previously terminated in some other proceeding,<sup>62</sup> no other ground is available for adoption of a child of a marriage<sup>63</sup> without the natural parent's consent. Similarly, the mother of a child born out of wedlock,<sup>64</sup> whose rights have not previously been terminated, cannot involuntarily lose her parental rights through adoption on any other ground.<sup>65</sup> A father of a child born out of wedlock, however, may have his rights terminated involuntarily through adoption without his consent if he: (1) willfully failed to pay support, as described above; (2) failed to take steps to legally acknowledge the child, claim paternity, or exercise parental rights and duties, or; (3) waived the right to notice of the hearing in writing or did not appear at a termination hearing after receiving proper notice.<sup>66</sup>

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61. *Id.* § 60.6(2) (Supp. 1986).

62. The child of a parent whose rights have been previously terminated under OKLA. STAT. tit. 10, § 1130 or under § 29.1 may be adopted without obtaining further consent from that parent. OKLA. STAT. tit. 10, § 29.1 (Supp. 1986) establishes a proceeding in which an adoption agency to which a child has been relinquished by the natural mother for adoption can petition the court to terminate the rights of the father, on the basis of one of the grounds set forth in § 1130 or § 60.6.

63. In Oklahoma the term "child of a marriage," previously referred to as "legitimate," *see* OKLA. STAT. tit. 10, §§ 1.1, 1.2 (1981), includes children born in wedlock, OKLA. STAT. tit. 10, § 1 (1981). In addition, children born within ten months after the dissolution of a marriage are presumed to be children of the marriage, and children born before wedlock become children of the marriage by the subsequent marriage of their parents. OKLA. STAT. tit. 10, § 2 (1981). OKLA. STAT. tit. 10, § 55 (1981) further provides that:

The father of an illegitimate child by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth. The status thus created is that of a child adopted by regular procedure of court.

*Id.*

64. *See supra* note 63. In Oklahoma, a child previously referred to as "illegitimate" is now referred to as a "child born out of wedlock." OKLA. STAT. tit. 10, § 1.1 (1981).

65. *Id.* § 60.6 (Supp. 1987).

66. *Id.* Section 60.6 specifically provides:

A child under eighteen (18) years of age cannot be adopted without the consent of its parents, if living, except that consent is not required from:

.....

3. The father or putative father of a child born out of wedlock if:
  - a. prior to the hearing provided for in Section 29.1 of this title, and having actual knowledge of the birth or impending birth of the child believed to be his child, he fails to acknowledge paternity of the child or to take any action to

Just as parents may consent to termination in actions under Title 10, section 1130, parents may also voluntarily consent to termination of their parental rights through adoption, including a stepparent adoption.<sup>67</sup>

Termination of parental rights in adoption may involve some of the same pitfalls examined in this article in the context of parent-initiated termination proceedings. Stepparent adoptions<sup>68</sup> and consents given under duress of contempt or criminal charges both provide opportunity for terminations motivated by the emotional or financial needs of one or both parents rather than the needs of the child.<sup>69</sup> The primary ground

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legally establish his claim to paternity of the child or to exercise parental rights or duties over the child, including failure to contribute to the support of the mother of the child to the extent of his financial ability during her term of pregnancy, or

b. at the hearing provided for in Section 29.1 of this title:

(1) he fails to prove that he is the father of the child, or

(2) having established paternity, he fails to prove that he has exercised parental rights and duties toward the child unless he proves that prior to the receipt of notice he had been specifically denied knowledge of the child or denied the opportunity to exercise parental rights and duties toward the child. As used in this subparagraph, specific denial of knowledge of the child or denial of the opportunity to exercise parental rights and duties toward the child shall not include those instances where the father or putative father fails to prove to the satisfaction of the court that he made a sufficient attempt to discover if he had fathered the child or to exercise parental rights and duties toward the child prior to the receipt of notice, or

c. he waives in writing his right to notice of the hearing provided for in Section 29.1 of this title, or

d. he fails to appear at the hearing provided for in Section 29.1 of this title if all notice requirements continued in or pursuant to Section 1131 of this title have been met.

A determination that the consent of the father or putative father of a child born out of wedlock to the adoption of the child is not required shall not, by itself, act to relieve such father or putative father of his obligation to provide for the support of the child as otherwise required by law.

*Id.*

67. *Id.* § 60.5 (Supp. 1986). Section 60.5 sets forth procedures for parental consent to an adoption of a child in writing, acknowledged before a judge. OKLA. STAT. tit. 10, §§ 27, 28, 29, 30 (1981), also provide for a proceeding through which a natural parent may voluntarily relinquish her parental rights in writing and acknowledged before the court, for purposes of adoption.

68. *See supra* note 5.

69. Two cases illustrate such parental motivations. In *William K. v. Rebecca K.* (*In re Adoption of A.G.K.*), 728 P.2d 1, 6 (Okla. Ct. App. 1986), the appellate court concluded that the father and stepmother devised a scheme to discourage the natural mother from paying child support in order to terminate the mother's parental rights so the stepmother could adopt the child. In *In re Adoption of Gregory*, 495 P.2d 1275, 1275-76 (Okla. 1972), the evidence showed the natural mother and her husband had steadfastly refused several offers of child support payments and returned payments so that they could file for stepparent adoption without the father's consent. In both cases, the courts refused to permit adoption without consent on the ground that the nonpayment was not willful.

for involuntary consent in adoptions—willful failure to support—similarly creates the risk that the termination will be viewed as a child-support sanction without due consideration for the child's best interests.<sup>70</sup> Even in adoption proceedings, termination solely on the basis of willful failure to support may in many instances fail to satisfy the high standards constitutionally required to terminate parental rights.<sup>71</sup> Nevertheless, the legislative goal for adoption proceedings is clearly to provide a child with a strong parental relationship and not simply to dissolve a parental relationship. Because the parent whose rights have been terminated in adoption proceedings will be replaced by an adoptive parent who will assume parental responsibilities, the potential adverse impact upon the child, although still present, may be reduced. For that reason, termination of parental rights in adoption proceedings must be evaluated separately and is not the focus of this article.

### III. PARENT-INITIATED TERMINATION: BOTH UNCONSTITUTIONAL AND CONTRARY TO TRADITIONAL PRINCIPLES OF FAMILY LAW AND PUBLIC POLICY

#### A. *Parent-Initiated Termination—Neither Essential nor Successful in Achieving the Only Permissible Justification for Termination*

The only defensible justification for any termination of parental rights is that this drastic measure is essential to protect a child from harm and to promote the child's welfare, and that under the circumstances, these goals cannot be accomplished by less restrictive alternatives. This conclusion is compelled by constitutional doctrine which recognizes a fundamental right of parents to participate in the upbringing

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70. See *infra* notes 214-25 and accompanying text for a discussion of this problem in the context of parent-initiated proceedings.

71. See *infra* notes 87-101 for a discussion of the standards for deprivation of a fundamental liberty interest compelled by substantive due process.

The suggestion that termination of parental rights in adoption proceedings on the sole basis of willful failure to support does not satisfy constitutional standards is discussed in Comment, *Termination of Parental Rights: Should Nonpayment of Child Support Be Enough?*, 67 IOWA L. REV. 827 (1982). The author concludes that using termination to force compliance with state child support laws was not the least restrictive alternative available to accomplish this objective and thus constitutionally infirm.

An additional argument may be made that in cases where the child's financial needs are being fully met by another parent or a third party, termination for nonsupport, even in adoption proceedings, does not satisfy the only compelling state interest properly justifying termination—protection of the child from harm. See *infra* notes 147 to 149 and accompanying text for a discussion of this problem in the context of parent-initiated proceedings.

of their children,<sup>72</sup> and which should be extended to recognize a reciprocal right of the child to preservation of that fundamental relationship.<sup>73</sup> It is further supported by a basic tenet of domestic law that in both private disputes regarding custody, and in juvenile proceedings, the court must act to promote the child's best interests.<sup>74</sup>

Parent-initiated termination proceedings under Oklahoma's current statutory scheme violate the constitutional rights of both the parent and child whose relationship is severed. The circumstances under which these proceedings are initiated, and the permissible statutory grounds for bringing them, indicate that termination is not necessary to protect the child from harm. Legitimate concerns intended to be addressed by the Oklahoma legislature can in fact be met by less restrictive alternatives.<sup>75</sup> Moreover, both constitutional and traditional family law doctrine are further contravened because parent-initiated terminations are, in most cases, actually detrimental to the interests of the child.<sup>76</sup>

### 1. Constitutional Protection Afforded the Fundamental Rights of Parents

The United States Supreme Court has recognized on numerous occasions that parents have a fundamental right under the fourteenth amendment of the United States Constitution to an ongoing relationship with their children.<sup>77</sup> In *Lassiter v. Department of Social Services*, a case involving termination of parental rights in juvenile proceedings, the Court acknowledged that "[t]his Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference

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72. See *infra* notes 77-86 and accompanying text.

73. See *infra* notes 102-19 and accompanying text.

74. See *infra* notes 120-35 and accompanying text.

75. See *infra* notes 137-70 and accompanying text.

76. See *infra* notes 174-213 and accompanying text.

77. *E.g.*, *Lehr v. Robertson*, 463 U.S. 248, 256-58 (1983) ("[T]he relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection."); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981) *reh'g denied*, 453 U.S. 927 (1981); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential'. . .").

and, absent a powerful countervailing interest, protection.'"<sup>78</sup> In a subsequent case examining procedures to terminate parental rights, *Santosky v. Kramer*, the Court declared:

The 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.<sup>79</sup>

This interest has been described by the Court as "far more precious than any property right."<sup>80</sup> The purpose of a parental rights termination proceeding, the Court warned, is "not merely to infringe that fundamental liberty interest, but to end it."<sup>81</sup>

The Oklahoma Supreme Court, in the context of reviewing numerous parental rights termination cases, has also repeatedly recognized the fundamental nature of a parent's right to a relationship with a child, derived from both the United States Constitution and the Oklahoma Constitution.<sup>82</sup>

The doctrine of substantive due process<sup>83</sup> guarantees that government actions<sup>84</sup> that impair rights deemed fundamental will be strictly

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78. 452 U.S. 18, 27 (1981).

79. 455 U.S. 745, 753 (1982). In *Santosky* the Court held the grounds for termination must be established by clear and convincing evidence. *Id.* at 769. See *infra* notes 277-91 for a more detailed discussion of this case.

80. *Santosky*, 455 U.S. at 758-59; *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (quoting *May v. Anderson*, 345 U.S. 528, 533 (1953)). *Accord* *Rivera v. Minnich*, 107 S. Ct. 3001, 3005 (1987).

81. *Santosky*, 455 U.S. at 759.

82. *E.g.*, *R.E. v. State (In re A.E.)*, 743 P.2d 1041, 1044 (Okla. 1987); *In re J.N.M.*, 655 P.2d 1032, 1035 (Okla. 1982); *Coleman S. v. Department of Insts. Social and Rehab. Servs. (In re Sherol A.S.)*, 581 P.2d 884, 888 (Okla. 1978).

83. The guarantee that neither the federal nor state governments may deprive a person of life, liberty, or property without due process of law, found in the fifth and fourteenth amendments to the United States Constitution, has been construed as the source of authority for judicial review of the substance of legislation enacted by Congress or the state legislatures. Under the doctrine of substantive due process, legislation which is found to impair rights regarded by the court as fundamental are strictly scrutinized by the court and will be found invalid unless the legislation is necessary to promote a compelling state interest. J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* 350-51 (3d ed. 1986) [hereinafter J. NOWAK]. Those rights which have been recognized by the United States Supreme Court as fundamental and deserving of strict scrutiny in the modern (post-1937) era are extremely limited, and have been described as rights regarded by the Court as "essential to individual liberty in our society." J. NOWAK, *Id.* at 367.

84. The protection afforded individual rights and liberties by the fourteenth amendment, and indeed by most of the United States Constitution and its amendments, shields individuals only from governmental action, frequently referred to as "state action." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1688 (2d ed. 1988); J. NOWAK, *supra* note 83, at 421. Although parent-initiated termination proceedings brought pursuant to § 1130(D) are initiated by private parties rather than the state, the fact that this practice is authorized by Oklahoma statute provides the requisite state

scrutinized by the court.<sup>85</sup> Under this vigorous standard of review, the governmental action will not be upheld unless it is *necessary to achieve a compelling state interest*.<sup>86</sup> Thus, Oklahoma law, which allows a parent's fundamental right to a relationship with his or her child to be completely extinguished, can survive constitutional challenge only when termination of parental rights is necessary to achieve a compelling state interest.

### a. A Compelling State Interest

What compelling state interest can justify termination of parental rights? The Oklahoma Supreme Court has insisted that there is only one answer to this question: protection of the child from harm.<sup>87</sup> The court

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action. The enactment of a statute, which is challenged as impairing a fundamental right or establishing a constitutionally invalid classification, is clearly state action. L. TRIBE, *supra* at 1688. Moreover, termination of parental rights is certainly a "public function," i.e., an activity performed almost exclusively by the government. If private parties "assume the role of the state by engaging in these governmental functions then they subject themselves to the same limitations on their freedom of action as would be imposed upon the state itself." J. NOWAK, *supra* note 83, at 426. Only the state, through its legislature and judiciary, can terminate the legal status of parenthood. Therefore, legislative authorization to private parties to initiate such proceedings in state courts on grounds regulated by the state legislature does not relieve the state of meeting the high standards required by substantive due process and equal protection when terminating parental rights in a parent-initiated proceeding.

This conclusion is reinforced by a line of United States Supreme Court decisions considering the constitutionality of various procedures used to allow termination in adoption proceedings brought without the consent of the natural parent whose rights are to be terminated. In addressing the rights of fathers of children born out of wedlock, the court acknowledged the fundamental nature of parental rights, regardless of the fact that these actions were initiated by private parties. *Lehr v. Robertson*, 463 U.S. 248, 260-61 (1983); *Quilloin v. Walcott*, 434 U.S. 246, 255-56 (1978). In both cases the Court found that the fathers were not entitled to a higher standard of constitutional protection because they had never had a significant custodial, personal, or financial relationship with the child. The Court recognized, however, that had the unwed fathers participated at some point in the care of the child, their parental rights, like those of fathers of children born in wedlock, would be afforded substantial protection under the due process clause. See *Lehr*, 463 U.S. at 261; *Quilloin*, 434 U.S. at 255-56.

85. J. NOWAK, *supra* note 83, at 357, 367, 370, 530-31, 693.

86. J. NOWAK, *supra* note 83, at 530.

87. *Davis v. Davis*, 708 P.2d 1102, 1109 (Okla. 1985) *superseded by statute as stated in L.R.R. v. R.D.R. (In re R.R.R.)*, 763 P.2d 94 (Okla. 1988) ("The integrity of the family unit and preservation of the parent-child relationship command the highest protection in our society. Intrusion upon the privacy and sanctity of that bond can be justified only upon demonstration of a *compelling state concern*. Public interest lies in protecting the child from harm. Absent the element of harm, intervention by the state is impermissible." (footnotes omitted)); *In re J.N.M.*, 655 P.2d 1032, 1035 (Okla. 1982); *Williams v. Mashburn (In re Baby Girl Williams)*, 602 P.2d 1036, 1039 (Okla. 1979); *Coleman S. v. Department of Insts. Social and Rehab. Servs. (In re Sherol A.S.)*, 581 P.2d 884, 888 (Okla. 1978). It was in *Sherol*, that the Oklahoma Supreme Court first pronounced this interest:

The purpose of termination is to protect children from HARM suffered by reason of either neglect or the intentional actions of their parents. Termination is not a means by which the State of Oklahoma, through its juvenile courts and the Department, can exact conformity from its citizen-parents through the imposition of an "acceptable" common value system and "lifestyle." There is no authority in our Juvenile Code which allows the State to interfere with family relationships where *harm* to children is not involved. This is, of course, a



determined that this is a "notion of constitutional dimension," declaring that "[t]he fundamental integrity of the family unit . . . is subject to intrusion and dismemberment by the State only where a 'compelling' State interest arises and protecting the child from *harm* is the requisite State interest."<sup>88</sup>

Similarly, the United States Supreme Court has observed in dicta that the due process clause would undoubtedly be offended if "a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."<sup>89</sup> A principal concern with using "best interests of the child" as a sole basis for termination is that cultural bias or judicial preference for certain lifestyles will promote termination of the rights of parents in poor, minority, or nontraditional families even though the child is not endangered or harmed by the parent's conduct.<sup>90</sup> Thus, a finding

notion of constitutional dimension. The fundamental integrity of the family unit, which has found protection in the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Ninth Amendment, is subject to intrusion and dismemberment by the State only where a "compelling" State interest arises and protecting the child from *harm* is the requisite State interest.

*Id.* at 888. (footnotes omitted).

In reaching this conclusion, the court relied in part upon several lower federal court cases which had endorsed the same standard: *Alsager v. District Court*, 406 F. Supp. 10, 23 (S.D. Iowa 1975) ("[T]o sustain its compelling interest burden, the state must show that the consequences, in harm to the children, of allowing the parent-child relationship to continue are more severe than the consequences of termination."), *aff'd*, 545 F.2d 1137 (8th Cir. 1976); *Roe v. Conn.*, 417 F. Supp. 769, 779 (M.D. Ala. 1976). *See Sims v. State Dep't of Public Welfare*, 438 F. Supp. 1179, 1190-91 (S.D. Tex. 1977), *rev'd*, 442 U.S. 415 (1979).

Although the Oklahoma Supreme Court's reference to the Juvenile Code in *Sherol* is to a portion of § 1130 that has subsequently been revised, the court's reiteration of this standard in *Davis* subsequent to amendment of § 1130, its recognition that the requirement of protection from harm was a "notion of constitutional dimension," and its citation to lower federal court cases which find that termination of parental rights require a showing of harm to the child, all support the conclusion that in Oklahoma protection of the child from harm remains the only constitutionally sufficient interest justifying termination of parental rights.

88. *Sherol*, 581 P.2d at 888. *See* note 87 for the full text of this quotation.

89. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), *quoting* *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring). In 1982, the United States Supreme Court in a footnote in *Santosky v. Kramer* again observed: "Nor is it clear that the State constitutionally could terminate a parent's right *without* showing parental unfitness." 455 U.S. 745, 760 n.10 (1982).

The United States Supreme Court has not directly addressed whether a finding that existing or threatened harm to the child is the only compelling state interest justifying termination of parental rights which will satisfy the requirements of substantive due process. This issue was directly raised in *Doe v. Delaware*, which was dismissed by the Court, after noting probable jurisdiction for want of a properly presented federal question. 450 U.S. 382, 383 (1981). *See Parker, supra* note 21, at 563.

90. *See Sherol*, 581 P.2d 884, 888, 890-91 (1978) ("Termination is not a means by which the State . . . can exact conformity from its citizen-parents through the imposition of an 'acceptable' common value system and 'lifestyles.'") (*See supra* note 87 for full text of this quotation); *In re J. P.*,

that termination is in the child's best interests, while certainly crucial to any termination, is not *by itself* a sufficient ground in Oklahoma to terminate parental rights.<sup>91</sup> A finding that termination is necessary to protect the child from harm is essential.

Although the Oklahoma Supreme Court's pronouncement of the "protection from harm" standard was made in the context of termination

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648 P.2d 1364, 1376 (Utah 1982) ("To allow a court to decide who can best provide a child intellectual stimulation could chill the propagation and perpetuation of disfavored political, philosophical, and religious views within the privacy of the family circle. Unlike the standard of 'parental fitness,' which imposes a high burden on the state in an adversary proceeding, the standard of 'best interest' of the child provides an open invitation to trample on individual rights through trendy redefinitions and administrative or judicial abuse.") See generally *Dasovick v. A.B. (In re R.D.S.)*, 259 N.W. 2d 636, 638 (N.D. 1977) ("Evidence which compares the child-rearing skills of the mother and of the foster parents cannot alone form the basis of a finding of harm to the child, provided the mother's efforts meet minimum standards of care."); *c.f.*, *Santosky v. Kramer*, 455 U.S. 745, 763, (1982) ("Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, . . . such proceedings are often vulnerable to judgments based on cultural or class bias."); Wald, *supra* note 56, at 651.

For a good illustration of this problem, see *Petition of New England Home for Little Wanderers*, 367 Mass. 631, 328 N.E. 2d 854 (1975).

91. There is substantial disagreement among the various states as to whether the "best interests of the child" alone is a sufficient basis for termination of parental rights. Many courts have held it is not sufficient. See *In re Baby Girl M.*, 37 Cal. 3d 65, 67-68, 688 P.2d 918, 919-20, 207 Cal. Rptr. 309, 310-11 (1984) (In adoption proceedings, the court found, based on statutory interpretation, that natural father's parental rights could not be terminated by considering only the best interests of child, without first considering whether an award of custody to him would be detrimental to the child.); *In re Appeal in Maricopa County*, 120 Ariz. 82, 584 P.2d 63, 65 (Ariz. Ct. App. 1978) (statute authorizing termination of parental rights does not authorize termination merely because termination may be "in the best interest of the child."); *In re R.D.S.*, 259 N.W.2d 636, 638 (N.D. 1977) (Based upon North Dakota's statutes, the court found "best interest of the child" was not the primary question in a termination proceeding and a finding that the child has or will suffer serious harm is required. A showing of parental misconduct without a showing of resultant harm to the child was not sufficient); *In re William L.*, 383 A.2d 1228, 1233 (Pa. 1978) (Child cannot be removed from home absent showing child has been "subjected to abuse or suffered serious harm, or that threat of such harm is real and substantial and cannot be alleviated by . . . less drastic" means.); *Contra, e.g.*, *Washington County Dep't of Social Services v. Clark*, 296 Md. 190, 461 A.2d 1077 (Md. 1983); *Adoption of a Minor*, 378 Mass. 793, 389 N.E.2d 90 (1979) (stepparent adoption). One commentator suggests that even in these cases of termination based solely on the ground that it serves the child's best interests, "evidence of serious parental neglect or harm is usually found." H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 893-94, n.6 (2d ed. 1988).

Some courts have found termination on the "best interest" ground alone to violate substantive due process. See *In re J.P.*, 648 P.2d 1364, 1377 (Utah 1982) (substantive due process requires proof of unfitness); *Franz v. United States*, 707 F.2d 582, 604 (D. C. Cir. 1983); *Roe v. Conn.*, 417 F. Supp. 769, 779 (M. D. Ala. 1976); *In re R.W.*, 495 So.2d 133, 135 (Fla. 1986) (State must show abandonment, abuse or neglect to permanently terminate parental rights.); *In re Brooks*, 228 Kan. 541, 618 P.2d 814, 820-22 (1980). However, other courts have upheld the constitutionality of using a "best interest" standard to terminate. *E.g.*, *In re J.S.R.*, 374 A.2d 860, 862-63 (D.C. 1977); *Petition of New England Home for Little Wanderers*, 367 Mass. 631, 328 N.E.2d 854, 859 (1975) (However, court found best interest test incorporates elements of unfitness, and termination without unfitness permissible only if long separation and attachment to adoptive parent would cause harm to child if returned to parent).

proceedings initiated by the state, there is no reason why the same compelling state interest should not be required to terminate parental rights in parent-initiated proceedings brought under the same statute. The rationale behind imposition of this rigorous standard is to provide the utmost protection to the intrinsic human right to a relationship with one's child. This right is no less fundamental because it is threatened in a proceeding initiated by a private party rather than by the state. Ultimately, only the state has the power to strip a parent of the legal rights and responsibilities associated with parenthood, and the fact that it chooses to allow a private party to initiate the proceeding does not diminish the state's responsibility to exercise its power only when justified by the same compelling state interest: the need to protect a child from harm.

Moreover, the same high standard must be imposed regardless of whether the parent threatened with termination is a custodial parent or a noncustodial parent. Parents threatened with termination of their parental rights in juvenile proceedings have frequently been denied physical and legal custody of their child for lengthy periods prior to initiation of termination proceedings. However, this factor has not affected the courts' willingness to afford them the highest constitutional protection.<sup>92</sup> Similarly, where legal custody of a child is with another parent rather than the state at the onset of termination proceedings, judicial opinion has acknowledged the fundamental nature of the noncustodial parent's right to a continuing relationship with his or her child. The noncustodial parent's relationship has been afforded the same formidable constitutional protection<sup>93</sup> in those instances where the parent has had a significant custodial, personal, or financial relationship with the child at one

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92. In *Santosky v. Kramer*, 455 U.S. 745 (1982), the state of New York had legal and physical custody of one child for approximately five years and of the other child approximately four years before petitioning to terminate the parent's rights in a juvenile proceeding. Nevertheless, the Court observed "[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." *Id.* at 753. Accordingly, the Court afforded significant weight to the parents' interest in its procedural due process analysis. See also, e.g., *In re J.N.M.*, 655 P.2d 1032, 1036 (Okla. 1982) (Juvenile proceeding in which termination hearing was held approximately two years after the state took temporary physical and legal custody of children, but court acknowledged fundamental nature of parents' rights and held substantive due process forbids termination absent showing of actual or imminent harm to a child.); *Williams v. Mashburn (In re Baby Girl Williams)*, 602 P.2d 1036, 1040 (Okla. 1979) (Child placed in legal and physical custody of relatives seven days after birth and was never in mother's custody prior to termination proceedings initiated 10 1/2 months later, yet court held due process required a showing that termination was necessary to protect child from harm.)

93. An Oklahoma appellate court, in *Blevins v. Thomas (In re Adoption of Blevins)*, 695 P.2d 556 (Okla. Ct. App. 1984), specifically acknowledged that the noncustodial father, threatened with termination of his parental rights in a stepparent adoption proceeding, was entitled to "the full

time.<sup>94</sup> Thus, termination of the rights of both noncustodial and custodial parents in parent-initiated proceedings in Oklahoma cannot be constitutionally accomplished without proof that such termination is necessary to achieve the compelling state interest of protecting the child from harm.

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panoply of procedural and substantive safeguards associated with constitutional protections of fundamental rights." *Id.* at 560. *Cf.* *O.K.H. v. J.L.H.* (In re Adoption of J.L.H.), 737 P.2d 915, 920 (Okla. 1987) (Stepparent adoption denied for failure to meet clear and convincing evidence standard); *William K. v. Rebecca K.* (In re Adoption of A.G.K.), 728 P.2d 1, 7 (Okla. Ct. App. 1986) (In stepparent adoption case, court held both noncustodial parent and child must be accorded fundamentally fair procedures.).

Courts from other states have similarly recognized the fundamental nature of the rights of a noncustodial parent threatened with termination. *See, e.g., In re Adoption of McMullen*, 691 P.2d 17, 21 (Kan. 1984); *In re Adoption of J.S.R.*, 374 A.2d 860, 863 (D.C. 1977). *Cf. In re Baby Girl M.*, 37 Cal. 3d 65, 73-5, 688 P.2d 918, 924-25, 207 Cal. Rptr. 309, 314-16 (1984). A scholarly and thorough discussion of the issue can be found in *Franz v. United States*, 707 F.2d 582, 594-602 (D.C. Cir. 1983). Following an extensive discussion of applicable case law and analysis of the considerations underlying the considerable constitutional protection afforded parent-child relationships, the court concluded that the constitutional interests of a noncustodial father, whose rights to contact with his children were effectively cut off by a federal witness protection program, were "roughly comparable to the interests of a parent and child in a viable nuclear family." *Id.* at 602. Thus the court afforded the noncustodial father the same degree of constitutional protection guaranteed a custodial parent faced with termination of parental rights. Central to the court's decision was the recognition that both parent and child depend heavily on "ties with the other for his sense of self-worth." *Id.* at 599. The court observed "that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his offspring." *Id.* at 599. The court also observed "that the emotional stability of children of divorced parents is often tied to the quality of their continuing relationships with their non-custodial parent." *Id.* at 601 (citations omitted).

Further support is implied in two United States Supreme Court opinions. In *Quilloin v. Walcott*, 434 U.S. 246, *reh'g denied*, 435 U.S. 918 (1978), in a unanimous opinion by Justice Marshall, the Court clearly suggested, in dicta, that a married parent who was separated or divorced and no longer living with his child would be entitled to the same constitutional protection as a married parent with whom a child resides. The Court observed that "even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage." *Id.* at 256. Subsequently, in *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) the Court observed that a parent's fundamental liberty interest is not foreclosed by a loss of temporary custody (four to five years in *Santosky*). *Cf. Caban v. Mohammed*, 441 U.S. 380 (1979) (the rights of a noncustodial father of a child born out of wedlock with whom he had previously lived and supported were protected under the equal protection clause, because the state law was found to discriminate between unwed mothers and fathers by allowing adoption without the consent of unwed fathers).

94. In *Lehr v. Robertson*, 463 U.S. 248, 262-65 (1983), the United States Supreme Court refused to afford an unwed father, who had never had any significant custodial, personal, or financial relationship with his child, the same constitutional protection guaranteed to a parent who had had such a relationship, such as the father in *Caban*, 441 U.S. at 380. The Court allowed the father's rights to be terminated in a stepparent adoption proceeding without notice, because he had not followed the statutory scheme to register his intent to claim paternity or otherwise protect his rights. Similarly, in *Quilloin*, the Court upheld adoption of a child without the father's consent or any showing of his unfitness, suggesting that he was not entitled to full constitutional protection because he had never lived with the child nor had he petitioned to legitimate the child in the 11 years prior to the adoption proceedings. *Quilloin*, 434 U.S. at 255-56.

*b. Necessity and the Least Restrictive Alternative*

Even though the interests of a state are sufficiently compelling, if the means chosen by the government for achieving these interests *unnecessarily* impair a fundamental right, the governmental action will not withstand strict scrutiny by the court.<sup>95</sup> The requirement of "necessity" dictates that when a statute significantly interferes with the exercise of a fundamental right in order to serve compelling governmental objectives, it must be "closely tailored to effectuate only those interests."<sup>96</sup> The statute is not sufficiently tailored to the governmental purpose if it is grossly overinclusive or underinclusive.<sup>97</sup> The requirement of "necessity" further demands that if a state can achieve its goal by a less restrictive alternative, impairment of a fundamental right will not be upheld.<sup>98</sup> According to the United States Supreme Court, "if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'"<sup>99</sup> This principle has been used by the United States Supreme Court to strike down statutes restricting fundamental familial rights,<sup>100</sup> and has been acknowledged by lower federal and state courts as a vital component of the constitutional protection afforded individuals threatened with termination of their parental rights.<sup>101</sup> Accordingly, termination of parental

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95. *E.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). See J. NOWAK, *supra* note 83, at 530.

96. *Zablocki*, 434 U.S. at 388. *Accord, e.g.*, *Carey v. Population Serv. Int'l*, 431 U.S. 678, 685 (1977); *Roe v. Wade*, 410 U.S. 113, 155 (1973).

97. In *Zablocki*, 434 U.S. at 390-91, one governmental objective, protection of the ability of marriage applicants to pay child support, was held to be an insufficient justification for statutory restrictions on the fundamental right to marry. The statute was found both grossly underinclusive, by failing to limit other new financial commitments, and substantially overinclusive, by preventing marriage of individuals who might be better able to pay child support if they remarried.

98. *E.g.*, *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 51, *reh'g denied*, 411 U.S. 959 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). See *Zablocki*, 434 U.S. 374, 389-91 (1978).

99. *Dunn*, 405 U.S. at 343 (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

100. *Zablocki*, 434 U.S. at 388-91 (1978) (Court held a state statute restricting the right to marry unconstitutional on equal protection grounds because it failed to serve some of state's professed objectives, and another objective could be achieved by less restrictive alternatives). *Cf. Doe v. Bolton*, 410 U.S. 179, 194-95, *reh'g denied*, 410 U.S. 959 (1973).

101. *Franz v. United States*, 707 F.2d 582, 607 (D.C. Cir. 1983) (Government witness protection program could not effectively terminate father's parental rights, at request of mother, where government could arrange contacts of children with father that would not jeopardize the safety of children, mother, or witness. Father, in this case, was not the person from whom the program was providing protection; protection was necessitated by a stepparent's connections with organized crime.); *Roe v. Conn*, 417 F. Supp. 769, 779 (M.D. Ala. 1976) (The state's interest, however, would be "compelling enough to sever entirely the parent-child relationship only when the child is subjected to real physical or emotional harm and less drastic measures would be unavailing."); *In re Brooks*, 618 P.2d 814, 822 (Kan. 1980) ("The drastic remedy of termination of parental rights should not be utilized unless the court is satisfied there is no realistic alternative and so finds."); *In re Adoption of Blevins*, 695

rights in parent-initiated proceedings is constitutionally valid only if: 1) protection of the child from harm—the compelling state interest—is in fact served by termination of one parent's rights, 2) the statute is not impermissibly overinclusive or underinclusive, and 3) protection of the child from harm cannot be accomplished by a less restrictive alternative.

## 2. A Child's Fundamental Right to Preservation of the Parent-Child Relationship when Child's Welfare Would be Promoted

Familial relationships are reciprocal. Since the courts have irrefutably affirmed a parent's ability to enjoy an ongoing relationship with his or her child as an intrinsic human right,<sup>102</sup> no less recognition should be given to the fundamental nature of a child's interest in the preservation of a relationship with the child's parent.<sup>103</sup> For a child, the maintenance

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P.2d 556, 560 (Okla. Ct. App. 1985); *In re William*, 383 A.2d 1228, 1233 (Pa. 1978), cert. denied, 439 U.S. 880 (1978). See *In re J.N.M.*, 655 P.2d 1032, 1036 (Okla. 1982). But cf. *In re R.J.M.*, 266 S.E.2d 114, 117-118 (W. Va. 1980) (Court acknowledged by implication constitutional and statutory requirement that termination not be exercised if less restrictive alternative is available, but court's approval of termination in that case raises questions as to its adherence to the principle.)

102. E.g., *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977). See *supra* notes 77-81 and accompanying text.

103. The fundamental nature of the child's interest in retaining the parental bond has received some recognition from the courts. Although the United States Supreme Court has not explicitly pronounced a fundamental right on the part of a child to continue a relationship with a natural parent, the Court has observed that the consequences of termination are far-reaching for the child and that, "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Santosky v. Kramer*, 455 U.S. 745, 760 & n.11, 765 (1982). See *Lehr v. Robertson*, 463 U.S. 248, 270 (1983) (White, Marshall, Blackmun, J.J., dissenting) ("If 'both the child and the [putative father] in a paternity action have a compelling interest,' [citation to *Little v. Streater*, 452 U.S. 1, 13 (1981)] it cannot be disputed that both the child and the putative father have a compelling interest in the outcome of a proceeding that may result in the termination of the father-child relationship.").

One Oklahoma appellate court has specifically held that a child has a fundamental liberty interest in the continuation of the parent-child relationship. The court in *William K. v. Rebecca K.* (*In re Adoption of A.G.K.*), 728 P.2d 1 (Okla. Ct. App. 1986), held in a stepparent adoption action that: [T]o the extent the statute authorizes abrogation of a substantial parental right affecting the child—particularly where the annulment has the ultimate effect of a complete termination as here—without consideration of or regard for the child's fundamental liberty interest in its continuation, the statute is constitutionally infirm. It offends the child's state and federal constitutional due process rights—both procedural and substantive [citation to U.S. Constitution amend. V, IX, and XIV, § 1; Okla. Constitution art. 2, § 7]—and deprives her of other rights guaranteed by the fifth, fourteenth and ninth amendments, including equal protection of the laws (citation omitted).

*Id.* See *infra* note 114 for more extensive discussion of this case.

In two lower federal court cases in which the children were named parties, the courts gave some implied recognition to the fundamental nature of the children's interests as well as those of their parents threatened with termination. *Franz v. United States*, 707 F.2d 582, 599-602 (D.C. Cir. 1983) (Following lengthy consideration of the impact of separation on the emotional wellbeing of the children as well as the parent, the court held: "In light of these considerations, we conclude that the constitutional interests asserted by the plaintiffs [father and children, by father as next friend] are, in

of ties to his or her parent is no less vital to emotional well being<sup>104</sup> than continuity of the bond is for the parent. Termination of parental rights, by abrogating the parent's legal right to visitation,<sup>105</sup> normally forecloses the child's opportunity to visit or communicate with the parent until the child reaches the age of majority. The child is further deprived of the right to financial support from the parent whose rights have been terminated.<sup>106</sup> The effect of termination in many states is to strip the child of all legal rights emanating from the parent-child relationship.<sup>107</sup> In Oklahoma, only the right of the child to inherit from the natural parent is preserved.<sup>108</sup> Thus, the child, as well as the parent, has fundamental rights derived from the parent-child relationship that deserve heightened constitutional protection.<sup>109</sup>

One cannot argue, however, that because the child also has fundamental interests that emanate from the parental bond, it promotes the child's welfare to preserve the relationship in all circumstances. Clearly

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critical respects, roughly comparable to the interest of a parent and child in a viable nuclear family." *Id.* at 602. The court then proceeded to apply strict scrutiny to the effective termination created by a government witness program.); *Roe v. Conn.*, 417 F. Supp. 769, 777 (M.D. Ala. 1976) ("[T]he Constitution recognizes as fundamental the right of family integrity. This means that . . . the State's severance of Plaintiff Wambles' [mother's] parent-child relationship and of Plaintiff Roe's [child's] child-parent relationship will receive strict judicial scrutiny.")

Some support for the constitutional dimension of children's rights in the context of relationships with their parents has also been suggested by commentators. *See Parker, supra* note 21, at 572-74; *cf. Roth, The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 446-47 (1976-77) (Roth suggests a child's rights in a custody dispute are entitled to constitutional protection).

104. *See infra* notes 177 to 209 and accompanying text. The District of Columbia Court of Appeals in *Franz v. United States*, 707 F. 2d 582, 599 (D.C. Cir. 1983), recognized the "profound importance of the bond between a parent and child to the emotional life of both. [citation omitted]" The court observed:

Frequently each party to the relationship depends heavily on his ties with the other for his sense of self-worth, for his very self-definition. To rephrase the point in the language of entitlements, a parent's right to the preservation of his relationship with his child derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his offspring. A child's corresponding right to protection from interference in the relationship derives from the psychic importance to him of being raised by a loving, responsive, reliable adult.

*Id.* (citations omitted).

105. OKLA. STAT. tit. 10, § 1132 (1981). *See supra* notes 19-20 and accompanying text.

106. *See supra* notes 20-21 and accompanying text.

107. *See, e.g.*, GA. CODE ANN. § 15-11-80 (Supp. 1988); IDAHO CODE § 16-2011 (1979); N.D. CENT. CODE § 27-20-46 (1974); TENN. CODE ANN. § 37-1-148 (1984).

108. OKLA. STAT. tit. 10, § 1132 (1981). Several states take a similar approach. *See, e.g.*, MONT. CODE ANN. § 41-3-611(1) (1987); WYO. STAT. § 14-2-317 (1986).

109. It has been well-established that children, as well as adults, "are protected by the Constitution and possess constitutional rights." *Carey v. Population Services*, 431 U.S. 678, 692 (1977) (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976)). *Accord Bellotti v. Baird*, 443 U.S. 622, 633 (1979).

there are some instances in which termination of parental rights is necessary to protect a child from harm,<sup>110</sup> less restrictive alternatives cannot provide adequate protection,<sup>111</sup> and the harm caused by the termination is less severe than the harm caused by continuing the relationship.<sup>112</sup> It makes little sense to argue that the *child's* constitutional rights require enhanced protection for preservation of the parent-child relationship in these situations.<sup>113</sup> Rather, the courts should recognize that a child has a fundamental right to preservation of a parent-child relationship when continuing the relationship promotes the child's welfare. In essence, recognition of this right infuses into the constitutional analysis the additional requirement that a court cannot terminate a parent-child relationship unless the termination is found to be in the best interests of the child.<sup>114</sup>

"Constitutionalizing" this requirement as an additional element of the judicial analysis for termination should not create conflict between the rights of the child and the constitutional rights of a parent threatened with termination,<sup>115</sup> nor should it foster the additional risks of cultural

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110. Protection of a child from harm, of course, is the interest recognized by Oklahoma courts as substantially compelling to satisfy the requirements of substantive due process in regard to termination of parental rights. *See supra* notes 87-88.

111. *See supra* notes 98-101.

112. In describing the compelling state interest required by substantive due process to terminate parental rights, the court in *Alsager v. District Court*, 406 F. Supp. 10 (S.D. Iowa 1975), held "that terminations must only occur where more harm is likely to befall the child by staying with his parents than by being permanently separated from them." *Id.* at 24. *See also Parker, supra* note 21, at 574-80.

113. By way of illustration, an easy example of such a situation might be if a very young child has been repeatedly and severely physically abused by the parents, even after counseling and a temporary removal of the child from the home; the child has been in foster care with a family hoping to adopt her and has formed deep emotional ties to the prospective adoptive family; and expert psychological evaluation has confirmed that the child has significant fear of the natural parents and is emotionally and psychologically bonded to the prospective adoptive family rather than the natural parents.

114. One Oklahoma appellate court has already explicitly recognized such a finding is required by both the Federal Constitution and the Oklahoma Constitution. In *William K. v. Rebecca K. (In re Adoption A.G.K.)*, 728 P.2d 1 (Okla. Ct. App. 1986), a stepparent adoption appeal brought by a natural mother whose child was found eligible for adoption without her consent, the court held: "When the state authorizes destruction of familial bonds it must provide both parent and child with fundamentally fair procedures which, among other things, require that petitioners allege and prove by at least clear and convincing evidence that the extinguishment of the natural parent-child relationship is in the best interest of the child." *Id.* at 7. The appellate court found that the failure of the trial judge "to concern himself with the child's interests in having her natural parental bonds preserved" violated the child's rights as guaranteed by the fifth, fourteenth, and ninth amendments of the United States Constitution and Oklahoma Constitution, art. 2, § 7. *Id.* *See also Alsager v. District Court*, 406 F. Supp. 10, 24 (S.D. Iowa 1975); *Parker, supra* note 21 at 574-80; *Wald, supra* note 56 at 690-91.

115. Courts have perhaps been hesitant to focus on the constitutional interests of the child in termination proceedings because of the problems with defining the constitutional rights of the child.



bias anticipated from use of the "best interests" standard as the *sole criteria* for termination.<sup>116</sup> This is because termination will continue to be prohibited unless it is *necessary* to protect a child from harm, thus giving due constitutional protection to the fundamental rights of the parent. Moreover, imposition of the "protection from harm" standard is regarded by the Oklahoma Supreme Court as consistent with serving the child's best interests.<sup>117</sup> The imposition of an additional requirement

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As noted above, the argument that the child has a constitutional right to the *benefits* of the parent-child relationship makes sense only in situations where the child is benefited more than harmed by the relationship. On the other hand, where the child's fundamental interest is more accurately defined as the right to preservation of the relationship when continuing the relationship promotes the child's welfare, there is the risk that this will be misconstrued as a constitutional right of the child to have "the best interests of the child" be the sole criteria for termination. Such a construction would be erroneous and should be avoided because it places no limitations on judicial discretion, creates greater risks that cultural bias will occur, and fosters conflict between the recognition of constitutional rights of both the parent and the child. See *supra* note 90 and accompanying text.

For example, the conflict between parental rights and children's rights in the context of termination frequently occurs where one side argues termination is in the best interests of the child and the other side contends termination is unjustified because the parent is not unfit, see, e.g., *In re Adoption of J.S.R.*, 374 A.2d 860 (D.C. Ct. App. 1977); *Washington County Dept. of Soc. Serv. v. Clark*, 296 Md. 190, 461 A.2d 1077 (1983); *In re New England Home for Little Wanderers*, 367 Mass. 631, 328 N.E.2d 854 (Mass. 1975). The classic example is where a child would suffer serious psychological harm from separation from prospective adoptive parents with whom the child has lived for a lengthy period, even though the parent is not at the time of the termination hearing unfit. See *In re Adoption of J.S.R.*, 374 A.2d at 860. If a child's constitutional right is to have the sole criteria become what is in his or her best interests and if unfitness is the alternate standard required to provide adequate protection to the parent, the court is faced with choosing between conflicting rights. Using Oklahoma's present standard and including as an *additional* requirement that termination be in the child's best interest, however, avoids this conflict. Termination cannot be accomplished unless it is necessary to protect a child from harm *and* it is in the child's best interests.

Although detailed discussion of this is beyond the scope of this article, use of the protection from harm standard favored by Oklahoma courts rather than the "unfitness" standard further reduces the potential for conflict. By framing the compelling state interest in terms of protection of the child from harm rather than protection from an unfit parent, the conflict presented in the above hypothetical is more readily resolved. In most instances, the tests achieve the same result because "unfitness" incorporates the concept that the parent would be harmful. In rare instances, however, the parent may not be unfit but returning custody to the parent could cause extreme psychological damage. If the court finds that the child would suffer permanent psychological damages from separation from prospective adoptive parents and return to a natural parent whom the child has never known, the court might constitutionally terminate on the basis that it was necessary to protect the child from harm and promoted the child's welfare. For one example of consideration of serious psychological harm as grounds for termination, see *Sorentino v. Family and Children's Society of Elizabeth*, 74 N.J. 313, 378 A.2d 18 (1977). Undue reliance on psychological harm, however, must be avoided due to the risk that courts might expansively define protection from psychological harm to promote their conception of a proper lifestyle. Such an interpretation would clearly be erroneous and harmful. When harm is of a psychological nature, a most narrow interpretation must be applied (i.e. permanent psychological damage which could not be overcome by counseling, gradual re-introduction to natural parent, or other alternative steps, and corroborated by expert psychological testimony).

116. See *supra* note 90 and accompanying text.

117. *Davis v. Davis*, 708 P.2d 1102, 1109 & n.33, (Okla. 1985) (dictum) *superseded by statute as stated in L.R.R. v. R.D.R. (In re R.R.R.)*, 763 P.2d 94 (Okla. 1988). See *In re T.H.L.*, 636 P.2d 330, 332 (Okla. 1981); *In re C. G.*, 637 P.2d 66, 71 (Okla. 1981); *Sweet v. Johnson (In re Sweet)*, 317 P.2d

that the court specifically find termination to be in the child's best interests insures that termination will not be allowed in cases where some risk of harm can be shown if the parental relationship continues, but the detriment to the child would be greater if the parental bond is severed.

Requiring that termination of parental rights must be in the child's best interests is hardly a novel idea, and as the following section indicates, Oklahoma statutes<sup>118</sup> and common law<sup>119</sup> already enforce this requirement. By elevating the requirement to one of constitutional dimension, however, the fundamental nature of the benefits that the child derives from the parent-child relationship are given the recognition and heightened constitutional protection to which they are entitled.

### 3. Common Law and Statutory Prohibition of Termination if Not in the Best Interests of the Child

The Oklahoma Supreme Court has frequently endorsed the concept that in matters of custody and state intervention in family life, the courts must promote the welfare of the child involved. The duty of the court to act in the best interests of the child in disputes relating to a child's custody has been a fundamental tenet of Anglo-American law,<sup>120</sup> well

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231, 235 (Okla. 1957) ("Parents have by nature, as well as by law, the legal right to the custody of their minor children . . . and, by reason of this, as well as the importance of the influence and protection afforded by parental affection to the best interests of children, especially those of tender years, in respect to their temporal, mental and moral welfare, (where such affection is manifest) it is presumed, in the absence of a strong and clear showing to the contrary, that their best interests are served by letting them remain with their parents.").

See also *In re Brooks*, 228 Kan. 541, 548, 618 P.2d 814, 821 (1980) ("[T]he welfare of children is always a matter of paramount concern, but the policy of the state proceeds on the theory that their welfare can best be attained by leaving them in the custody of their parents and seeing to it that the parents' right thereto is not infringed upon or denied." (quoting *In re Kailer*, 123 Kan. 229, 230-31, 255 P. 41, 42 (1927)); cf. *Santosky v. Kramer*, 455 U.S. 745, 766-67 (1982) ("Yet while there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds.").

118. OKLA. STAT. tit. 10, § 1130 (Supp. 1987). See *infra* notes 126-28 and accompanying text.

119. See *infra* notes 120-23 and accompanying text.

120. H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 788 (2d ed. 1988). See Cochran, *The Search for Guidance In Determining the Best Interests of the Child At Divorce: Reconciling The Primary Caretaker and Joint Custody Preferences*, 20 U. RICH. L. REV. 1, 2 (1985); C. FOOTE, R. LEVY, & F. SANDER, *CASES AND MATERIALS ON FAMILY LAW* 855 (3d ed. 1985).

This duty to act in the best interest of the child should be distinguished from what has been referred to as the "case-by-case best interests of the child" standard which is frequently used as the "test" to award custody in initial custody proceedings between two parents. H. CLARK, *supra*, at 797-98; Cochran, *supra*, at 3. While that standard explicitly reflects the state's underlying duty, other standards which have been employed, such as the "primary caretaker preference," were also fashioned with the ultimate intention of promoting the child's welfare. H. CLARK, *supra*, at 798; Cochran, *supra*, at 2 ("Many different rules have been established in the name of the interests of the child.").

recognized by the Oklahoma Supreme Court in all types of custody actions.<sup>121</sup> Similarly, the ability of states, through juvenile proceedings, to intervene in familial relationships for the protection of the child is derived from the doctrine of *parens patriae*, the concept that the sovereign must protect and promote the welfare of those unable to protect themselves.<sup>122</sup> The Oklahoma Supreme Court has clearly pronounced the court's duty in proceedings initiated under the Juvenile Code: "[T]he entire Juvenile Code must be viewed as creating *public/state* remedies to be administered in the best interest of minors who fall within its contemplation."<sup>123</sup> Parent-initiated proceedings to terminate another parent's rights are clearly a type of custody proceeding,<sup>124</sup> since the effect of termination is to deprive one parent of all future right to custody or visitation with the child, and such proceedings are instituted in Oklahoma under the authority of the Juvenile Code.<sup>125</sup> Termination of parental rights in parent-initiated proceedings under circumstances where termination fails to serve the child's best interests would thus contravene a fundamental principle of family law well recognized by Oklahoma courts

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121. Oklahoma courts have repeatedly reaffirmed their recognition that in custody proceedings, the paramount consideration is the best interests of the child. *E.g.*, *Gorham v. Gorham*, 692 P.2d 1375 (Okla. 1984); *Rice v. Rice*, 603 P.2d 1125 (Okla. 1979). This is true regardless of the type of proceeding and standard or test that is applied. *See, e.g.*, *Gorham*, 692 P.2d at 1378-79 (initial custody determination using "case-by-case best interests of child" test); *Boatsman v. Boatsman*, 697 P.2d 516, 518-19 (Okla. 1984) (modification action applying "change of circumstances" test, wherein the court declared that "ultimately all child custody matters must be determined on the best interest of the child" and held that "[t]he ability to modify the decree upon a showing of 'change of circumstances' offers adequate opportunity for the parties and the court to protect the interests of the child."); *Grover v. Phillips (In re Grover)*, 681 P.2d 81, 83 (Okla. 1984) (Custody dispute between natural parent and third-party, for which test in Oklahoma is unfitness of parent, in which court stated: "In recognizing and giving full effect to the tenured right of a natural parent to the custody of his or her natural child, the overriding consideration is the best interest of the child.").

122. *E.g.*, *Davis v. Davis*, 708 P.2d 1102, 1106 (Okla. 1985) *superseded by statute as stated in* *L.R.R. v. R.D.R. (In re R.R.R.)*, 763 P.2d 94 (Okla. 1988); *In re William L.*, 477 Pa. 322, 337-39, 383 A.2d 1228, 1235-36 (Pa. 1978). *See Santosky v. Kramer*, 455 U.S. 745, 766 (1982); *Coleman, Standards for Termination of Parental Rights*, 26 WAYNE L. REV. 315, 321 (1980).

123. *Davis*, 708 P.2d at 1106. *See also* *William K. v. Rebecca K. (In re Adoption of A.G.K.)*, 728 P.2d 1, 5 (Okla. Ct. App. 1986) (Court recognized that the protection of the best interests of the child is the "primary purpose for and paramount objective of all children-oriented provisions of Title 10.").

124. *Cf.* OKLA. STAT. tit. 10, § 1604 (1981), the definitional section of the Oklahoma Uniform Child Custody Jurisdiction Act, which defines "custody determination" as "a court decision and court orders and instructions providing for the custody of a child, including visitation rights. . ." and defines "custody proceeding" as "proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect or dependency proceedings."

125. OKLA. STAT. tit. 10 § 1130(D) (Supp. 1987), the source of authority for parent-initiated termination of parental rights proceedings, is part of Chapter 51 of Title 10, referred to by the Oklahoma Supreme Court as the Juvenile Code. *Davis*, 708 P.2d at 1105.

and frustrate the underlying rationale for the state's assertion of authority.

It is also clear that the Oklahoma legislature's vision of the role of the courts in custody matters and juvenile proceedings is to promote the welfare of children. This is evidenced by numerous statutory mandates that custody decisions<sup>126</sup> and various types of state intervention authorized by the Juvenile Code,<sup>127</sup> including termination of parental rights,<sup>128</sup> be evaluated in accordance with the best interests of the child.

Unfortunately, title 10, section 1130 of the Oklahoma Statutes, which authorizes termination of parental rights, only requires a specific finding that termination is in the child's best interests when termination is based on certain grounds, and omits mention of a specific finding of best interests for the grounds used in parent-initiated proceedings.<sup>129</sup> One Oklahoma appellate court has recognized that the fact that the legislature provided in the introductory paragraph of section 1130 that a court "may" terminate parental rights upon the grounds recited therein, indicates that the court is granted discretion to decline termination even where a ground is satisfied if termination is contrary to the best interests of the child.<sup>130</sup> While that construction is undoubtedly correct and consistent with the objectives of "all the children-oriented provisions of title

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126. OKLA. STAT. tit. 12, § 1275.4 (Supp. 1983), which governs the award of custody in actions for divorce or separate maintenance, provides: "In awarding the custody of a minor unmarried child or in appointing a general guardian for said child, the court shall consider what appears to be in the best interests of the physical and mental and moral welfare of the child." OKLA. STAT. tit. 10, § 21 (Supp. 1983), which governs custody actions initiated by parents who are separated, also requires that the court award custody "in accordance with the best interests of the child." See also OKLA. STAT. tit. 10, § 21.1 (Supp. 1983). Section 21.1 requires custody be awarded to parents or third parties in a certain order of preference, in accordance with the best interests of the child.

127. See, e.g., OKLA. STAT. tit. 10, § 1104.1(D) (Supp. 1984), which provides in part: "No order of the court providing for the removal of an alleged or adjudicated deprived child from his home shall be entered unless the court finds that the continuation of the child in his home is contrary to the welfare of the child."; OKLA. STAT. tit. 10, § 1114(A) (Supp. 1986), which provides: "If the court finds that the allegations of the petition [alleging a child is delinquent, deprived, in need of supervision or in need of treatment] are supported by the evidence, and that it is in the best interest of the child and the public that he be made a ward of the court, the court shall sustain the petition, and shall make an order of adjudication. . . ."; OKLA. STAT. tit. 10, § 1115(a) (1981), allowing admission at the dispositional hearing of "all evidence helpful in determining the proper disposition best serving the interest of the child and the public. . . ."

128. OKLA. STAT. tit. 10, § 1130 (Supp. 1987) explicitly provides that termination of parental rights in juvenile proceedings cannot be accomplished on the grounds of consent, deprivation with failure to timely correct conditions leading to deprivation, incarceration, or mental illness without a specific finding by the court that termination of parental rights is in the best interests of the child.

129. *Id.*

130. *William K. v. Rebecca K. (In re Adoption of A.G.K.)*, 728 P.2d 1, 4-5 (Okla. Ct. App. 1986) (emphasis added) (dictum).

10,"<sup>131</sup> the current language of section 1130 could be subject to misinterpretation.

The risk that this oversight may mislead courts in parent-initiated proceedings is not totally hypothetical. In *Davis v. Davis*,<sup>132</sup> a parent-initiated proceeding, the trial judge considering termination of a father's rights for nonpayment of support stated that he interpreted the statute to give him no choice but to terminate upon proof of willful failure to support for the preceding year. Although the court of appeals reversed, holding that the trial judge was mistaken in his belief that section 1130 left him without any choice in the matter of termination, the language of the statute clearly fosters such an error.<sup>133</sup> In a subsequent parent-initiated termination proceeding, *Griffith v. Griffith*, the Oklahoma Supreme Court similarly observed that the trial judge's termination order on the grounds of nonsupport "was not based upon a finding by the court that

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131. The appellate court in *In re A.G.K.*, 728 P.2d at 4-5, based its interpretation in part upon the fact that protection of the best interests of the child "is the primary purpose for and paramount objective of all the children-oriented provisions of Title 10."

132. 708 P.2d 1102, 1105 n.7 (Okla. 1985). The Oklahoma Supreme Court observed from the record that the trial judge stated when rendering his order:

The statute appears to be a rather harsh remedy, but I don't see anything that shouldn't be followed. It's very clear that father or parent who fails to contribute to the support of the child for a period of over one year, or during the preceding year, has their [sic] rights terminated. So, I don't see that the Court has any choice under the statute but to terminate parental rights.

*Id.*

Although it was the 1981 version of § 1130 that the trial court was interpreting in *Davis*, the relevant portion of the statute being interpreted, § 1130(A)(4), is identical to the version of § 1130, as most recently amended in 1987, currently in force.

133. *Davis*, 708 P.2d at 1105.

The same error was committed by the trial judge in a step-parent adoption proceeding regarding interpretation of tit. 10, § 60.6 of the Oklahoma Statutes. Section 60.6 sets forth as one ground for adoption without consent of a natural parent the willful failure of the parent to contribute to the child's support, in substantial compliance with a court order or according to the parents' financial ability if no order exists. The trial judge in *In re A.G.K.*, 728 P.2d 1 (Okla. Ct. App. 1986), was interpreting the 1981 version of tit. 10, § 60.6, which is comparable to the current version, Okla. Stat. tit. 10, § 60.6 (Supp. 1986), in that it allows adoption without consent for nonpayment of support without specifying that the court must make a finding that adoption without the consent of the natural parent is in the best interests of the child. The court of appeals observed that the trial judge's pre-decisional remarks indicated that "he considered himself bound to conclude that the mother's consent to adoption of her child was not necessary if he found her conduct satisfied one or more of the grounds set out in § 60.6." *In re A.G.K.*, 728 P.2d at 4. The appellate court sympathized with the judge's error by implying that the statute was misleading, but found that the statute must be construed to vest in the trial court the inherent discretion to allow or deny adoption without the consent of the natural parent, depending upon what the best interests of the child require. *Id.* at 5. The appellate court found that consideration of the child's interests was constitutionally compelled to protect the child's fundamental rights. *Id.* at 7. It is also consistent with the fact that protection of the child's best interests is the primary purpose for and paramount objective of all children-oriented provisions of title 10. *Id.* at 5.

termination would be in the best interests of the children.”<sup>134</sup>

Despite the risk of misinterpretation created by the current language of section 1130, recognition by both Oklahoma’s appellate courts and legislature of the courts’ duty in custody and juvenile proceedings to promote the best interests of the child makes it readily apparent that termination of parental rights should not be ordered unless it also achieves this goal. Since parent-initiated termination proceedings do not promote the child’s welfare, as argued below,<sup>135</sup> they should be abolished. Even if parent-initiated termination proceedings are not abolished, section 1130 should be revised to eliminate the risk of misinterpretation and make it abundantly clear that termination of parental rights can *only* be accomplished after a specific judicial finding that termination is in the best interests of the child regardless of who initiates the action or the particular ground used as the basis for termination.

In sum, the constitutional, common law, and statutory restrictions on termination of parental rights require that termination must be necessary to protect the child from harm and serve the best interests of the child. The following two sections discuss why parent-initiated termination proceedings in Oklahoma do not meet these requirements.

#### 4. Parent-Initiated Termination Proceedings Unnecessary to Protect a Child from Harm

Close inspection of the statutory grounds and circumstances under which parent-initiated termination proceedings are brought in Oklahoma reveals that involuntary parent-initiated proceedings cannot survive the constitutional test for extinguishing a fundamental right.<sup>136</sup> Termination in this context is unnecessary to protect a child from harm because under current Oklahoma law, less restrictive alternatives are available to remedy legitimate concerns regarding the *child’s* welfare.

One ground available in parent-initiated proceedings to terminate

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134. 730 P.2d 524, 526 (Okla. 1986) (The court reversed the order of termination on the ground that § 1130(D) was not in effect at the time the termination order was issued and the court thus had no statutory authority to terminate in a parent-initiated action at that time.).

135. See *infra* notes 174-211 and accompanying text.

136. See *supra* notes 83-101 and accompanying text for a full discussion of the constitutional standard in Oklahoma, based on decisions of the United States Supreme Court and Oklahoma Supreme Court, for terminating a parent’s fundamental right to an ongoing relationship with her child.

the rights of the other parent without that parent's consent is abandonment by a custodial parent.<sup>137</sup> While in some cases a child may have been "abandoned" by being left in the care of persons who are fully meeting the child's physical, mental, emotional, and financial needs, this may not always be the case.<sup>138</sup> Certainly, the "harm" from which the child is to be protected when abandoned by a custodial parent would be the potential or actual lack of physical care, financial support, guidance, education, and emotional support that every child needs. Even in cases where the child's needs are being fulfilled by caregivers who have assumed these responsibilities, the fact that the abandoning parent retains legal custody may cause instability and uncertainty that could be harmful for the child.

Nevertheless, while abandonment might cause harm to the child, in cases in which the other parent seeks termination on this ground a much less restrictive alternative exists to protect the child. The noncustodial parent can simply seek legal custody of the child by filing a motion to modify custody.<sup>139</sup> Certainly, in any case where the actions of the custodial parent amount to abandonment justifying termination of the custodial parent's rights, standards for transferring legal custody to the noncustodial parent would be satisfied.<sup>140</sup> The harm from which the child is to be protected would then be averted since the petitioning parent, by obtaining legal and physical custody, would presumably be in a position to fulfill the child's needs. Moreover, the abandoning parent would not be excused from the duty to provide future financial support,

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137. OKLA. STAT. tit. 10, § 1130(A)(2) (Supp. 1987). See *supra* note 24 for the full text of § 1130.

138. Cf. *Russell v. O'Neill (In re O'Neill)*, 554 P.2d 864, 865 (Okla. Ct. App. 1976) (child was well cared for by the individuals with whom the child was left by the "abandoning parent").

139. OKLA. STAT. tit. 12, § 1277 (Supp. 1987) authorizes a court to modify a previous order awarding child custody, entered in an action for divorce, annulment or legal separation, either before or after final judgment in the action, "whenever circumstances render such change proper." Custody orders entered in other types of proceedings are similarly subject to modification. See *Grose v. Romero*, 193 P.2d 1014, 1016 (Okla. 1948) (guardianship proceeding).

140. In order for a custody order to be modified, the burden of proof rests with the parent asking that custody be changed to show "(a) that, since the making of the order sought to be modified, there has been a permanent, substantial and material change of conditions which directly affects the best interests of the minor child, and (b) that, as a result of such change in conditions, the minor child would be substantially better off, with respect to its temporal and its mental and moral welfare, if the requested change in custody be ordered." *Gibbons v. Gibbons*, 442 P.2d 482, 485 (Okla. 1968). E.g., *Hornbeck v. Hornbeck*, 702 P.2d 42, 45-46 (Okla. 1985); *Boatsman v. Boatsman*, 697 P.2d 516, 517 (Okla. 1984). "Abandonment is conduct demonstrating a conscious disregard of the obligations a parent owes her child to such extent that the parent-child relationship is destroyed." *Russell v. O'Neill (In re O'Neill)*, 554 P.2d 864, 871 (Okla. Ct. App. 1976). If a parent petitioning for termination of parental rights could prove abandonment, then surely the abandoning parent's conduct would constitute a change of conditions which directly affects the best interests of the minor child and indicates the child would be better off with a change of custody.

as would be the case where the abandoning parent's rights were terminated.<sup>141</sup>

Even in the extremely unlikely event that a noncustodial parent would petition to terminate a custodial parent's rights but be unable to assume legal custody, transferring custody to an appropriate caregiver through guardianship proceedings<sup>142</sup> would more directly serve to protect the child from harm than would termination of the abandoning parent's rights.<sup>143</sup> If no appropriate caregiver exists, the state should assume responsibility through juvenile proceedings<sup>144</sup> making *parent-initiated* proceedings unnecessary. In short, under any circumstances in which a parent would seek involuntary termination of the other parent's rights on the ground of abandonment, the "harm" from which the child is to be protected can be remedied by a change of custody, a much less drastic means.

The other ground available to one parent who seeks the involuntary termination of the other parent's rights is willful nonsupport.<sup>145</sup> This ground is only available to terminate the parental rights of noncustodial parents.<sup>146</sup> The only "harm" from which the child could be protected by termination on this ground is inadequate financial support and any resulting deprivation.

In the first place, termination of parental rights on the ground of willful nonpayment of support is grossly overinclusive because it allows termination of a fundamental right regardless of whether it is necessary

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141. See *supra* note 21 and accompanying text.

142. OKLA. STAT. tit. 30, § 2-101 (Supp. 1988) authorizes the court to appoint a guardian for a minor "when it appears necessary or convenient." However, the Oklahoma courts have repeatedly held that where custody is awarded to a third person rather than the natural parents, the parents "must be affirmatively, not comparatively, shown to be unfit with the evidence of unfitness clear and conclusive and the necessity for depriving the parent of custody shown to be imperative." *Weber v. Linch*, 579 P.2d 213, 215 (Okla. Ct. App. 1978). *E.g.*, *Haralson v. Haralson*, 595 P.2d 443, 445 (Okla. 1979).

143. If the petitioning parent were permanently unable to care for the child and desired to allow the child to be adopted, a parent-initiated termination proceeding under § 1130 is not necessary to accomplish this goal. The petitioning parent could relinquish her parental rights to the state, pursuant to OKLA. STAT. tit. 10, §§ 28 (Supp. 1986), 29 (1981) and the state could institute juvenile proceedings and seek termination under § 1130(B). Alternatively, termination of the abandoning parent's rights could be sought, on application of the consenting parent pursuant to § 60.7 (Supp. 1983) on grounds of willful failure to support for the preceding twelve months according to the abandoning parent's financial ability to contribute to the child's support.

144. The state may petition the court to adjudicate the child deprived, see OKLA. STAT. tit. 10, §§ 1101(4) (Supp. 1987), 1103 (Supp. 1982), on grounds of abandonment, and request that custody be given to the Department of Human Services and the child placed in foster care, or the state can seek termination of parental rights. *Id.* §§ 1116 (Supp. 1986), 1130 (Supp. 1987).

145. OKLA. STAT. tit. 10, § 1130(A)(4) (Supp. 1987). See *supra* note 24 for full text of § 1130.

146. *Id.*



to protect a child from financial hardship. In many cases where a non-custodial parent is willfully failing to pay the full amount of court-ordered support, or according to the parent's means if no order of support is in effect, the custodial parent may still be able to meet the child's financial needs.<sup>147</sup> While the nonpayment of support is certainly undesirable and unfair to the custodial parent in these situations, it should not be grounds to extinguish a fundamental right when it is not necessary to the compelling state interest—protection of the child from harm. In *Zablocki v. Redhail*,<sup>148</sup> the United States Supreme Court rejected one justification for a statute restricting the fundamental right to marry because it was substantially overinclusive: it restricted the right to marry for many persons whose ability to support their children would not be impaired by the marriage.<sup>149</sup> Section 1130 must be viewed as similarly overinclusive because it allows termination of parental rights on grounds of willful nonpayment even when the child is not harmed by the nonpayment.

An even more serious flaw is that termination of parental rights on grounds of willful nonsupport bears *no logical relationship* to the alleviation of the harm from which the child is to be protected—inadequate financial support. Entering an order terminating parental rights contributes nothing to the custodial parent's ability to collect back support from

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147. *Id.* § 1130. Section 1130 authorizes a parent to petition to terminate the parental rights of the other noncustodial parent if the noncustodial parent has willfully failed to contribute to the support of the child as provided in a court order or, if no support order was in effect, in accordance with the parent's ability to pay. The statute makes no distinction between situations in which the child to be supported has suffered any financial deprivation or hardship or, for that matter, any consequences whatsoever, and situations in which the child has suffered no harm. *Id.* It is interesting to note that in more than one instance where one parent has filed proceedings to terminate the other parent's rights on the basis of nonsupport, the petitioning parent has at some point refused a tender of child support or consciously discouraged the noncustodial parent from paying support. *Davis v. Davis*, 708 P.2d 1102, 1105 n.6 (Okla. 1985), *superseded by statute as stated in* L.R.R. v. R.D.R. (*In re R.R.R.*), 763 P.2d 94 (Okla. 1988); *In re Adoption of Gregory*, 495 P.2d 1275, 1276 (Okla. 1972); *William K. v. Rebecca K.* (*In re Adoption of A.G.K.*), 728 P.2d 1,8 (Okla. Ct. App. 1986). Such conduct on the part of the custodial parent would suggest the parent's conviction that the child's financial needs were being adequately met without the support and that the parent's true goal was termination of the parental rights of his or her ex-spouse. *See also* *Mullins v. Mullins*, 606 P.2d 573, 574 (Okla. 1980) ("A child may be receiving excellent care from the custodial parent, while the noncustodial parent refuses to obey a court order to contribute to the child's support.").

148. 434 U.S. 374 (1978).

149. *Id.* at 390. In *Zablocki*, the Court examined the constitutionality of a Wisconsin statute which denied the right to marry to Wisconsin residents who were noncustodial parents obligated by court order to pay child support, unless the marriage applicant could demonstrate compliance with the support obligation and that the children were not then nor likely to become public charges. *Id.* at 375. The Court found the statute substantially overinclusive when justified as serving the interests of children by providing incentive to pay support, because in many cases marriage could substantially improve the financial situation of the marriage applicant. *Id.* at 390.

the parent whose rights have been terminated.<sup>150</sup> Termination of a non-custodial parent's rights thus produces no income for the child, and, paradoxically, it extinguishes that parent's duty to support the child following termination.<sup>151</sup> In the context of parent-initiated proceedings, termination thus makes no sense whatsoever as a remedy for the financial hardship the child may have suffered from the past nonpayment of support. It serves only to increase the financial hardship that nonpayment of support may have caused by canceling the obligation for future support. The fact that some courts have interpreted section 1130 to allow termination even after all back support has been tendered<sup>152</sup> further belies the notion that termination on the grounds of willful nonsupport is necessary or even intended to protect the child.

A proponent of termination on the ground of nonpayment of support might argue that it is the *threat* of termination of parental rights which protects children from financial hardship, because the availability of such a remedy might motivate noncustodial parents to pay support. The contention that the mere prophylactic effect of retaining the option to terminate constitutes a compelling state interest is certainly of dubious constitutional validity. The compelling state interest recognized as a justification for termination—protection of the child of the parent whose rights are to be terminated—is twisted to become protection of children not involved in the terminated relationship, even though this may be at the expense of the child whose parental relationship is severed.<sup>153</sup> Extinguishing the benefits to be derived from the parent-child relationship for both parent and child, on the theory that other children may be protected, is grossly unfair to the parent and particularly to the child involved. Moreover, such a justification allows termination based only upon the speculation that other parents might be persuaded to pay child support as a result of the retention and application of termination on the

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150. Termination of parental rights does nothing to enhance collection of the overdue child support under the many methods now available in Oklahoma. For a discussion of these methods, see *supra* note 176.

Section 1130(D) is subject to the same criticism made by the United States Supreme Court in *Zablocki* of the Wisconsin statute restricting the right to marry, i.e., it prevents exercise of a fundamental right "without delivering any money at all into the hands of the applicant's prior children." *Zablocki*, 434 U.S. at 389.

151. See *supra* note 21 and accompanying text.

152. *Davis v. Davis*, 708 P.2d 1102, 1105 n.6. (Okla. 1985), *superseded by statute as stated in* L.R.R. v. R.D.R. (*In re R.R.R.*), 763 P.2d 94 (Okla. 1988). The trial court in *Davis* ordered termination after the father had tendered into court \$2,200 in back due support. This decision was overturned on appeal on other grounds.

153. See *infra* note 174-211 and accompanying text.

ground of nonpayment. Ironically, the validity of the theory is undermined every time termination is ordered on the ground of nonpayment, because the court's finding of willful nonpayment confirms that the parent in that case was *not* motivated to pay by the threat of termination of parental rights. Moreover, allowing a fundamental right to be abolished on the basis of a compelling state interest that is speculative fails to meet the standard of strict scrutiny, which requires that the action impairing a fundamental right be "closely tailored"<sup>154</sup> to achieve the compelling state interest.

Even if the motivation to pay support is regarded as a compelling state interest, there are many less restrictive alternatives available in Oklahoma to motivate noncustodial parents to pay support. Willful nonpayment of support may be criminally prosecuted, with punishment ranging up to ten years imprisonment.<sup>155</sup> Parents who willfully disobey court orders providing for payment of child support can also be imprisoned through civil contempt proceedings for up to six months and fined up to \$500.<sup>156</sup> Through garnishment or income assignment proceedings, up to fifty to sixty-five percent of a parent's earnings can be withheld and applied toward payment of support and arrearages.<sup>157</sup> A parent's state and federal income tax returns may be intercepted.<sup>158</sup> A lien in the amount of the arrearage may be placed against the parent's real and personal property.<sup>159</sup> Information regarding child support arrearages exceeding \$1000 may be released to consumer reporting agencies.<sup>160</sup> Parents can be ordered by the court to post a bond, security, or other guarantee to ensure payment of child support.<sup>161</sup> Parents found to be unemployed or underemployed can be ordered to participate in job finding or job training programs.<sup>162</sup> Thus, termination of parental rights on the ground of willful nonpayment of support is not necessary to motivate noncustodial parents to pay child support and thereby protect children from financial hardship.

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154. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). See J. NOWAK, *supra* note 83 at 530.

155. OKLA. STAT. tit. 21, §§ 851 (1981), 852 (Supp. 1987), 853 (1981).

156. OKLA. STAT. tit. 12, § 1291(D) (Supp. 1987); OKLA. STAT. tit. 21, § 566 (Supp. 1984).

157. OKLA. STAT. tit. 12, § 1171.2 (Supp. 1985).

158. 42 U.S.C. § 664 (1986) (federal tax refund intercept); OKLA. STAT. tit. 68, § 205.3 (Supp. 1985) (state tax refund intercept).

159. OKLA. STAT. tit. 12, § 1289.1 (Supp. 1987).

160. OKLA. STAT. tit. 56, § 240.7 (Supp. 1987).

161. OKLA. STAT. tit. 12, § 1277.5 (Supp. 1985).

162. OKLA. STAT. tit. 56, § 240.10 (Supp. 1987).

In *Zablocki v. Redhail*,<sup>163</sup> the United States Supreme Court considered the constitutionality of a Wisconsin statute that restricted the fundamental right to marry of noncustodial parents who were behind in child support or whose children were public charges. The state's proffered justification for this statute was to promote the welfare of children by providing incentive for the applicant to make support payments.<sup>164</sup> The Court rejected this justification on the ground that restriction of the fundamental right was unnecessary to achieve the state's interest, because wage assignments, contempt proceedings, and criminal penalties available under Wisconsin law were already available to exact compliance with support obligations, and were at least as effective as the statute under scrutiny without impairing a fundamental right.<sup>165</sup> If the United States Supreme Court has rejected the infringement of one familial relationship because less restrictive alternatives were available to motivate the payment of child support, it should be abundantly clear that any effort to justify the abolition of another fundamental familial relationship under the same rationale, when identical alternatives exist in Oklahoma to motivate payment of support, will similarly fail to survive strict constitutional scrutiny.<sup>166</sup>

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163. 434 U.S. 374 (1978).

164. *Id.* at 389.

165. *Id.* at 389-90.

166. One Oklahoma appellate court rejected a similar constitutional challenge to OKLA. STAT. tit. 10, § 60.6 (Supp. 1987), which allows adoption without the consent of a parent who has willfully failed to substantially comply with a support order for a period of twelve months preceding the filing of the adoption petition. In *Blevins v. Thomas (In re Adoption of Blevins)*, 695 P.2d 556, 559 (Okla. Ct. App. 1984), a father contended § 60.6(3) violated his rights to substantive due process and equal protection because less restrictive means were available to provide support for children that do not interfere with the fundamental right of a parent-child relationship. In a puzzling opinion, the court acknowledged that where a fundamental right has been impinged, the court should determine whether the state has chosen "the least restrictive alternative" to meet its compelling state interest. The court then totally failed to consider whether a less restrictive alternative existed. Instead, the court simply found that the compelling state interest for the statute was to protect a child from harm suffered by financial abandonment and from the ills of protracted foster care (which wasn't a necessary option in that case or in most cases brought under § 60.6 or by custodial parents), and held this interest outweighed the father's right. Had the court in *Blevins* actually considered the less restrictive alternatives available, rather than paying mere lip service to the test, it would have reached the same conclusion as the United States Supreme Court in *Zablocki*, namely, that less restrictive alternatives are available to provide support. Even so, § 60.6 and § 1130 are distinguishable, because termination in anticipation of adoption at least replaces a parent with another who will assume the responsibility to support. An analysis of less restrictive alternatives is even *less* likely to result in upholding parent-initiated termination proceedings under § 1130, where no parent will assume the responsibilities of the terminated parent.

See also Comment, *Termination of Parental Rights: Should Nonpayment of Child Support Be Enough?*, 67 IOWA L. REV. 827, 832-33 (1982) (arguing an Iowa statute allowing termination for nonpayment of support is unconstitutional because less restrictive alternatives exist in Iowa to compel support).

Although abandonment and willful nonpayment of support are the only grounds on which the Oklahoma legislature will permit a parent to institute proceedings to involuntarily terminate the parental rights of the other parent, proponents of parent-initiated termination may contend that in some cases proceedings brought for nonpayment of support are in reality motivated by the concern that visitation with the noncustodial parent is harmful to the child. As the following section discusses, denial of visitation is frequently extremely detrimental to a child.<sup>167</sup> Moreover, the legislature has clearly not chosen parent-initiated termination as a method for remedying harmful effects of visitation, and to use the statute in this manner flouts legislative intent.

Presumably, one reason the legislature has not included harmful effects of visitation as a ground for parent-initiated termination proceedings is that termination is not necessary to protect the child from the perceived harm. Therefore, this ground would fail to survive constitutional analysis. Frequently, any harmful effects of visitation can be avoided by placing restrictions upon the conditions, time, or manner in which the visitation takes place.<sup>168</sup> Even in those infrequent cases in which, with the support of expert testimony, it appears the noncustodial parent is so physically or psychologically abusive that any form of visitation is detrimental to the child,<sup>169</sup> the court has the option to terminate visitation rights without terminating the entire parent-child relationship. By terminating only the parental right to visitation, the court ensures that the child would be protected but still entitled to ongoing financial support from the noncustodial parent. Moreover, if the situation should later change and visitation would again be beneficial, the court through subsequent modification could reinstate the noncustodial parent's visitation rights.<sup>170</sup> Terminating parental rights, on the other hand, denies a child the opportunity to establish a relationship with the parent at a later

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167. See *infra* notes 177-211 and accompanying text.

168. Frequently Oklahoma courts place restrictions upon the time, place, or manner in which visitation is exercised in order to protect a child from a risk of harm from physical or sexual abuse or substance abuse of the parent. Typical restrictions are to require that visitation take place in the presence of a third party, such as a grandparent or in extreme cases, a social worker; to prohibit overnight visitation; to prohibit driving by the noncustodial parent while with the children; or to require counseling for the noncustodial parent as a condition for the exercise of visitation. See *Gamble v. Gamble*, 477 P.2d 383, 388 (Okla. 1970) (supervised visitation unnecessary on facts presented.).

169. Oklahoma courts have consistently followed a rule that only in exceptional cases should a parent be denied the right to visit with his or her minor child, where custody is awarded to the other parent. *Gamble*, 477 P.2d at 388; *Bradford v. Bradford*, 327 P.2d 684, 686 (Okla. 1958).

170. *Bradford*, 327 P.2d at 686. See OKLA. STAT. tit. 12, § 1277 (Supp. 1987).

time when changes in the parental behavior or in the child may make visitation desirable.

In sum, a review of the limited grounds available for parent-initiated proceedings establishes that involuntary termination under section 1130(D) cannot survive constitutional analysis. Because it allows termination of many relationships in which the child is suffering no harm, section 1130(D) is impermissibly overinclusive. Even in situations where harm has occurred or could occur, parent-initiated termination is unnecessary to protect the child because Oklahoma law provides alternatives which provide the same protection but do not impair fundamental rights. Moreover, these alternatives avoid some of the detrimental effects termination has on the child.

##### 5. Failure of Parent-Initiated Termination Proceedings to Serve the Best Interests of the Child

Because severance of the fundamental relationship between parent and child deprives the child of crucial benefits, full protection for the constitutional rights of the child requires preservation of the parent-child relationship whenever the detriment to the child created by termination is greater than the harm which would result if the relationship continues.<sup>171</sup> A termination which fails to serve the best interests of the child also violates a fundamental principle of family law recognized by the Oklahoma courts and legislature.<sup>172</sup> Thus, termination of parental rights should only be allowed after a specific judicial finding that termination is in the best interests of the child. Because a new parent will assume the responsibility of meeting the child's emotional and financial needs, termination in the context of adoption and juvenile proceedings may, under some circumstances, be in the best interests of a child. However, termination in parent-initiated proceedings, whether voluntary or involuntary, does not serve a child's best interests<sup>173</sup> and may be significantly detrimental to the welfare of the child involved.

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171. See *supra* notes 102-19 and accompanying text.

172. See *supra* notes 120-31 and accompanying text.

173. Ordinarily, termination does not serve the best interests of the child because it is not necessary to protect the child from harm, and can cause significant psychological harm and financial hardship. It might be argued that on rare occasions, a unique set of circumstances could arise in which parent-initiated termination could be in the child's best interests if: the child was extensively physically or sexually abused; termination of visitation did not allay the child's fears; independent psychological testimony established that the mere possibility that the court could someday reinstate visitation was causing serious psychological damage to the child; the child was unlikely to benefit from visitation in the future; and financial hardship for the child would not result from termination. However, it is extremely unlikely that such a case would in fact arise. Experts in sexual abuse

As previously mentioned, termination of parental rights exacerbates any financial deprivation the child has endured because it extinguishes the duty to pay child support.<sup>174</sup> Although parents whose rights are subject to termination in parent-initiated proceedings have already failed to meet their financial obligations, the effect of termination is to prevent the child from benefiting from future child support otherwise collectible until the child reaches the age of majority,<sup>175</sup> either through voluntary payment or through utilization of stringent statutory procedures now available to collect child support.<sup>176</sup> For some children, this lost support may mean that necessities such as food, shelter, clothing, and medical care

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generally agree that even an abused child is better off having some relationship with both parents. *See* Tulsa World, Aug. 28, 1988 at 7, col. 5. If such a case were to arise, it might be appropriately resolved under a proceeding to free a child from a parent's dominion pursuant to OKLA. STAT. tit. 10, § 9 (1981), without terminating the duty to support, or through a juvenile proceeding initiated by the state. Preservation of parent-initiated proceedings to address such a remote possibility would disserve the interests of numerous children whose parents might attempt to expand the loophole or use termination for improper purposes. Moreover, the grounds for parent-initiated terminations do not indicate that this was the type of situation the legislature intended to address with parent-initiated proceedings. *See supra* notes 167-70. In fact, the 1987 amendment to § 1130(B), deleting the child abuse grounds for parent-initiated proceedings, suggests that the legislature did not intend that parent-initiated termination be used for this purpose.

174. *See supra* note 21.

175. In Oklahoma, a child is entitled to support by the parents until the child reaches eighteen, or, if the child is dependent and still regularly and continuously attending high school, through the age of eighteen. OKLA. STAT. tit. 12, § 1277 (Supp. 1987).

176. Within the past ten years, methods for collection of child support have been greatly expanded and strengthened, in part due to the mandate of the federal Child Support Enforcement Amendments of 1984. 42 U.S.C. § 651 (1985). *See, e.g.*, OKLA. STAT. tit. 12, §§ 1171.2 (Supp. 1985), 1171.3 (Supp. 1986), 1171.4 (Supp. 1985), 1277.4 (Supp. 1985) (creating procedures for voluntary and mandatory income assignment); *Id.* § 1277.5 (Supp. 1985) (authorizes court to require security, bond, or other guarantee to ensure payment of child support); *Id.* § 1277.3 (1981) (allows collection of 10% interest on child support arrearages); *Id.* § 1289.1 (Supp. 1987) (procedure to obtain lien upon real and personal property for arrearage in child support payments); *Id.* § 1291 (Supp. 1987) (allows child support arrearages, in certain circumstances, to become a judgment by operation of law); *Id.* §§ 1171.2 (Supp. 1985), 1173.1 (Supp. 1986) (provisions for garnishment of 50% to 65% of disposable earnings for child support and order for continuing garnishment for child support); OKLA. STAT. tit. 68, § 205.3 (Supp. 1985) (state tax refund intercept for child support arrearages); 42 U.S.C. § 664 (1986) (federal tax refund intercept); OKLA. STAT. tit. 56, § 240.1-8 (Supp. 1985) (expedited administrative proceedings and availability of assistance from Department of Human Services to collect child support); *Id.* § 240.7 (Supp. 1985) (provision for release of child support arrearage information to consumer reporting agencies); *Id.* § 240.10 (Supp. 1987) (administrative proceeding to require unemployed or underemployed parent in arrears to participate in job finding or job training programs).

In addition, criminal enforcement remedies, OKLA. STAT. tit. 21, §§ 851 (1981), 852 (Supp. 1987), 853 (1981); contempt proceedings, OKLA. STAT. tit. 12, § 1289.1 (Supp. 1987), OKLA. STAT. tit. 21, § 566 (Supp. 1984); and interstate collection proceedings under the Uniform Reciprocal Enforcement of Support Act, OKLA. STAT. tit. 12, § 1600.1-38 (1981), are still available to collect child support.

The new enforcement mechanisms appear to be achieving some success. The Department of Human Services reported a 25.8% increase in child support collected from fiscal year 1985 to fiscal year 1986 and another 29.7% increase in child support collected from fiscal year 1986 to fiscal year

will not be adequately provided. Even if the custodial parent can meet the child's basic physical needs, the child may nonetheless forego educational opportunities and other occasions for cultural enrichment that could have been afforded by continuing financial support.

In addition to potential financial hardship, termination of parental rights can cause significant psychological and emotional damage to the child because it extinguishes a parent's right to visitation. Recent literature and case studies by psychologists and social scientists indicate that cutting a child off from all contact with a natural parent can have significantly detrimental effects.<sup>177</sup> For example, studies show that children who do not have substantial contact with both parents suffer reduced I.Q. and cognitive performance.<sup>178</sup> Infrequent visitation has similarly been linked with poor school performance by children who had performed satisfactorily prior to the separation or divorce.<sup>179</sup> Studies also

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1987. 1986-1987 OKLA. DEPT. OF HUM. SERV. ANN. REP. 88; 1985-1986 OKLA. DEPT. OF HUM. SERV. ANN. REP. 50.

The Family Support Act of 1988, Public L. No. 100-485, — Stat. — (1988), recently enacted by Congress, requires further reform of the states' child support enforcement statutes which should enhance future child support collection efforts.

177. See Bruch, *And How Are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States*, 2 INT. J. OF L. AND THE FAM. 106 (1988). Bruch observes that, consistent with the developing ideas regarding what serves children's welfare, "custody law has increasingly emphasized maintaining relationships with all important figures in the child's life," responding to research literature which emphasizes the benefits for the children of continued contact with the noncustodial parent—usually the father. *Id.* at 110.

Bruch notes that the influential book by J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1979), which recommends that the custodial parent have unilateral control over the nature and extent of the other parent's contact with child, met with a hostile reception. Although it influenced custody law for a period of time, movement has now swung in the opposite direction and their recommendation has been uniformly rejected. *Id.* at 108-09.

178. Miller, *Joint Custody*, 13 FAM. L. Q. 345 (1979) (citing Santrock, *Relation of Type and Onset of Father Absence to Cognitive Development*, 43 CHILD DEVELOPMENT 445 (1972)). This article discusses a study which compared I.Q. and achievement test scores for father-absent and father-present third and sixth grade boys. The study found that father absence due to divorce, desertion or separation had the most negative impact on test scores. *Id.* at 358. In H. BILLER, *FATHER, CHILD AND SEX ROLE: PATERNAL DETERMINANTS OF PERSONALITY DEVELOPMENT* (1971), a summary of the results of six studies of middle and lower class children suggests father-absent children suffer from intellectual deficits, score lower on intelligence and aptitude tests, and are more hampered in their cognitive functioning than children from the same classes whose fathers are present. *Id.* at 57-59.

179. J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 283 (1980). Wallerstein and Kelly conducted a study of 60 families over the five years following divorce. The study included counseling parents and children for six weeks around the time of the divorce, a follow-up interview one year to 18 months following the divorce, and a follow-up interview five years after the divorce. The study dealt primarily with custodial mothers and noncustodial fathers. The majority of the families in the study were white and middle or upper class. In their report, they observed that the father's nonavailability to a child and an erratic, infrequent visiting pattern were significant factors affecting the poor school performance for the group of children who had begun to fail only in the aftermath of the separation and divorce. *Id.*



suggest a correlation between the absence of a father during childhood and poor occupational adjustment and unemployment later as an adult.<sup>180</sup> Destruction of the relationship between a child and parent may also inhibit the proper development of conscience and moral guidelines.<sup>181</sup>

While any divorce is emotionally traumatic for the children involved, infrequent visitation or an absence of visitation with the noncustodial parent has been found to contribute significantly to long-range clinical depression and other disabling symptomatic behavior. Psychologists Wallerstein and Kelly studied sixty families over a five-year period following divorce<sup>182</sup> and consistently found that the children who were not visited or rarely visited by their fathers suffered a high incidence of depression.<sup>183</sup> Both at the eighteen-month follow-up visit,<sup>184</sup> and even more markedly at the interview five years after the divorce, most of the children not visited suffered from underlying or overt depression accompanied by disabling symptomatic behaviors.<sup>185</sup> These children grieved for the absent parent<sup>186</sup> and experienced a sense of rejection and low self-esteem.<sup>187</sup> The psychologists observed that "the unvisited or poorly visited child was likely to feel unloved and unloveable."<sup>188</sup> By contrast, evaluation five years after the divorce revealed that in children of both sexes and all ages, good relationships with the noncustodial parent appeared to be linked to high self-esteem and the absence of depression.<sup>189</sup>

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180. H. BILLER, *supra* note 178, at 76. One of the several studies reported by Biller found Peace Corps volunteers whose fathers were absent during their childhood were much more likely not to complete their scheduled overseas tours. *Id.*

181. Magid & Oborn, *Children of Divorce: A Need for Guidelines*, 20 FAM. L. Q. 331, 335 (1986). (Dr. Magid is a licensed clinical psychologist and director of psychology sciences at Golden Medical Clinic in Golden, Colorado; Dr. Oborn, an M.S.W. and Ph.D., has engaged in private practice in clinical social work since 1965 specializing in domestic and family relations); H. BILLER, *supra* note 178, at 64-66 (summarizing several psychological studies, including one of seventh grade boys which found father-absent boys scored consistently lower than father-present boys on a variety of moral indexes); D. LYNN, *THE FATHER: HIS ROLE IN CHILD DEVELOPMENT* 266-67 (1974).

182. See J. WALLERSTEIN & J. KELLY, *supra* note 179.

183. J. WALLERSTEIN & J. KELLY, *supra* note 179, at 309.

184. J. WALLERSTEIN & J. KELLY, *supra* note 179, at 172.

185. J. WALLERSTEIN & J. KELLY, *supra* note 179, at 248. At least some portion of the failure of noncustodial parents to visit was related to resistance or refusal to comply by the custodial parent. *Id.* at 125, 170-71. In other cases, the failure to visit was by choice of the noncustodial parent, resulting from a variety of psychological factors. *Id.* at 123-31.

186. J. WALLERSTEIN & J. KELLY, *supra* note 179, at 208.

187. J. WALLERSTEIN & J. KELLY, *supra* note 179, at 208, 218.

188. J. WALLERSTEIN & J. KELLY, *supra* note 179, at 218.

189. J. WALLERSTEIN & J. KELLY, *supra* note 179, at 219. Even children who were doing poorly at the initial assessment showed significant improvement with increased visiting by the noncustodial parent. *Id.*

Other psychological studies have reached the same conclusions.<sup>190</sup>

Separation from a natural parent can be harmful regardless of the age of the child. Even a toddler who loses contact with a natural parent may perceive the separation as abandonment.<sup>191</sup> One study reported that children who experienced total abandonment by a parent at a very young age later experienced grief, sadness, and a longing for the relationship. These emotions were frequently accompanied by "searching behavior," where the child looks at the faces of people in stores hoping to have instant recognition of the parent about whom they have no memory.<sup>192</sup> Disruption of the parental bonding process, even for very young children, may induce rage. According to social scientists, this rage "can simmer for years and some day manifest itself in a variety of forms, ranging from antisocial criminal acts to suicide and abuse or neglect of their own children."<sup>193</sup>

A child's social development may also be significantly impaired by termination of one parent's visitation rights.<sup>194</sup> Relationships with peers, for example, can be negatively affected.<sup>195</sup> In addition, psychologists report that "[a]dult clients who lost contact with one parent during the early years often exhibit numerous difficulties in developing and/or maintaining ongoing attachments as an adult."<sup>196</sup> Furthermore, a child's development of sex role identification may be impaired. Because fathers have traditionally been the noncustodial parents, several studies have focused on the effect of the father's absence on a child's sex-role identification.<sup>197</sup> The relationship between father and son is particularly

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190. See W. HODGES, INTERVENTIONS FOR CHILDREN OF DIVORCE 8, 60-62 (1986) (Hodges, associate professor of psychology at the University of Colorado, suggests that abandonment by a noncustodial parent is particularly devastating for a child because the child determines he or she is unloveable and suffers a loss of self-esteem.); H. BILLER, *supra* note 178, at 77 (summarizes studies indicating children whose fathers are absent are more likely to exhibit depression and feelings of loss to a pathological degree).

191. P. WOOLLEY, THE CUSTODY HANDBOOK 103-04 (1979).

192. W. HODGES, *supra* note 190, at 14, 61 (Hodges, summarizing the study of L. TESSMAN, CHILDREN OF PARTING PARENTS (1978), reports one ten year old rode all over town on his bicycle the day his stepfather was to adopt him, hoping to recognize his biological father whom he had not seen since he was two.)

193. Magid & Oborn, *supra* note 181, at 334.

194. Magid & Oborn, *supra* note 181, at 335; H. BILLER, *supra* note 178, at 68-70.

195. H. BILLER, *supra* note 178, at 68-70, 76, 77, 109, 111 (Biller's summaries of studies of paternal absence reported that development of successful peer relationships for both boys and girls was impaired.)

196. Magid & Oborn, *supra* note 181, at 336. Biller reported that a study indicated the absence of a father early in a daughter's life was significantly related to difficulty the daughter had as an adult in interactions with males. H. BILLER, *supra* note 178, at 110-111. For similar findings regarding adolescent girls, see D. LYNN, *supra* note 181, at 260-62.

197. H. BILLER, *supra* note 178. See also D. LYNN, *supra* note 196, at 255.

important to the development of a young boy's sexual identification.<sup>198</sup> The importance of the father-daughter relationship in the daughter's sex role development has also received recent recognition.<sup>199</sup>

Proponents of parent-initiated termination proceedings might argue that in many of these cases the existing relationship between the parent to be terminated and the child is less than ideal. Visitations may already be irregular and marred by the conflict existing between the two parents. Psychologists have recognized, however, that biological parents continue to be significant in a child's development, even when only intermittent and inadequate contact has occurred,<sup>200</sup> and even if the child's relationship with a parent during the marriage was not particularly strong.<sup>201</sup> One reason for this is the function the biological parents serve as a source of identity for a child.<sup>202</sup> A child's self-perception is molded by what the child "knows and imagines about the biological family,"<sup>203</sup> and a child's sense of self-respect is influenced by characteristics the child perceives as most likeable about the parents.<sup>204</sup> Moreover, children who do not have regular contact with a biological parent or parents fantasize about the absent parent, and their desire for love from that parent may create unrealistic images of the lost parental love.<sup>205</sup> It is important for the child's development for the child to be able to see his or her biological parents

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198. H. BILLER, *supra* note 178, at 2, 3, 5, 6, 8, 13 & 18 (Biller observes that a relationship with the father is of particular importance during the first three years of life, which are crucial in the formation of an individual's sex role orientation.). See J. WALLERSTEIN & J. KELLY, *supra* note 179, at 68-69.

199. H. BILLER, *supra* note 178, at 105-112.

200. Beyer & Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L. Q. 233, 237 (1986) (Beyer is a clinical psychologist practicing in Washington, D.C.); J. WALLERSTEIN & J. KELLY, *supra* note 179, at 122, 307.

201. Wallerstein and Kelly found that a child's distress following separation from the noncustodial parent was not affected by the quality of the parent-child relationship prior to separation. Intense longing for the noncustodial parent occurred among children whose prior relationship ranged from abusive and critical to warm and caring. J. WALLERSTEIN & J. KELLY, *supra* note 179, at 53, 54, 68. More surprising was the fact that eighteen months after separation, there was no correlation between the visiting pattern and frequency and the strength of the pre-divorce parent-child relationship. J. WALLERSTEIN & J. KELLY, *supra* note 179, at 122. Moreover, while the majority of the visiting parents were fathers, they found the role of the visiting parent was not sex-linked and the characteristics of the visiting relationship appeared tied to the visiting role itself. J. WALLERSTEIN & J. KELLY, *supra* note 179, at 122.

202. Beyer & Mlyniec, *supra* note 200, at 237. See generally J. WALLERSTEIN & J. KELLY, *supra* note 179, at 238.

203. Beyer & Mlyniec, *supra* note 200, at 238.

204. Beyer & Mlyniec, *supra* note 200, at 238.

205. Beyer & Mlyniec, *supra* note 200, at 238; J. WALLERSTEIN & J. KELLY, *supra* note 179, at 156 (Even where the noncustodial parent was psychologically ill, the psychologists observed that prohibiting visitation could boomerang because children, "out of their own intense need, can all too readily idealize the parent they are prohibited from seeing.").

from an accurate perspective.<sup>206</sup> Children can benefit from resumption of visitation, even when it has been irregular or absent for some period of time.<sup>207</sup> Moreover, even when the child's relationship with the noncustodial parent has some detrimental aspects, it is important to maintain it in some form to protect the child from the sense of loss and rejection that would follow if the relationship were destroyed.<sup>208</sup>

The importance of visitation to children is further affirmed by responses given during interviews of children of divorced families. In their five-year study of sixty divorced families, Wallerstein and Kelly documented that children in the sole custody of one parent after divorce generally desire *more* contact with the noncustodial parent than traditional visitation arrangements typically provide. Wallerstein and Kelly reported that "[c]omplaints about insufficiency of parental visits were heard not just from those youngsters who rarely saw the absent parent, but from many who were being visited rather frequently as well. . . . The intense longing for greater contact persisted undiminished over many years."<sup>209</sup>

The Oklahoma courts have recognized that visitation between a child and his or her parent is not just a right of the parent, but also is intended to serve the needs of the child. In *Looper v. McManus*, the Oklahoma Court of Appeals observed that "[v]isitation is not solely for the benefit of the adult visitor but is aimed at fulfilling what many conceive to be a vital, or at least a wholesome contribution to the child's

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206. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 85 (1969) ("No matter what type of parents the child has, sooner or later he must see them in accurate perspective and eliminate whatever fantasies he may have had about them.").

207. See J. WALLERSTEIN & J. KELLY, *supra* note 179, at 253. Wallerstein and Kelly reported that six children refused to visit a father who sought to maintain contact, due to the youngsters' intense alignment with an angry mother. Several years later some of these children resumed visiting and established friendly relationships with the parent. See W. HODGES, *supra* note 190, at 61.

208. Wallerstein and Kelly observed:

Some of these visiting relationships could even be considered detrimental to development, because they infanticized the child or hurt his feelings or exploited the relationship to help the adult. Nevertheless, they played a significant role in protecting the child against the pain of loss and the psychological impact of that loss. Even in these poor relationships the father's presence kept the child from worrying about abandonment and total rejection and the nagging self-doubts which followed. The father also provided a presence, however limited, which diminished the child's sense of vulnerability and aloneness, and total dependency on one parent. And finally, the father's presence muted the intensity of the child's conflicts and feelings which otherwise focused on the mother. The maintenance of some continuity in the father-child relationship, unless the relationship was psychologically or physically destructive of the child's well-being, appeared preferable to complete loss of contact, even though the relationship may have been impoverished from its conception or gradually deteriorated during the years.

J. WALLERSTEIN & J. KELLY, *supra* note 179, at 239.

209. J. WALLERSTEIN & J. KELLY, *supra* note 179, at 134.

emotional well-being by permitting partial continuation of an earlier established close relationship."<sup>210</sup>

In sum, when one parent initiates proceedings to terminate the rights of the other parent, there is no one before the court who will immediately undertake the responsibility of meeting the child's financial and emotional needs, as in adoption proceedings, and no agency that will immediately begin efforts to find a replacement parent, as is the goal of most juvenile proceedings.<sup>211</sup> Termination thus deprives the child of the financial, emotional, and psychological benefits which would be derived from preservation of the relationship, with no corresponding benefit. As discussed in the previous section, any harm that termination is sought to prevent can be avoided by less restrictive alternatives which are not accompanied by the same detrimental effects that termination has on the child.<sup>212</sup> For this reason, termination of parental rights in parent-initiated proceedings fails to serve the best interests of the child. Thus, both voluntary and involuntary parent-initiated proceedings violate the constitutional rights of the child<sup>213</sup> and also contravene the fundamental principle long adhered to by the Oklahoma courts and legislature, that in matters relating to the care and custody of children, the courts must act to serve the best interests of the child.

#### B. *Inappropriate Justification of Termination of Parental Rights as a Sanction for Nonpayment of Child Support*

If parent-initiated termination of parental rights does not promote the welfare of the child, what other reasons exist for allowing parent-initiated termination proceedings? With respect to involuntary termination, there is a real risk that termination of parental rights may be used as the ultimate sanction for nonpayment of child support, and that the best interests of the child will be overlooked in the zeal to punish the recalcitrant parent.<sup>214</sup>

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210. 581 P.2d 487, 488 (Okla. Ct. App. 1978) (court granted visitation rights to a stepmother who had acted as surrogate parent to a young child for several years).

In *Bingham v. Bingham*, 629 P.2d 1297 (Okla. Ct. App. 1981), the appellate court observed that an agreement between parents denying the father visitation rights deprived the children of the "companionship, training, care and nurturing to which they [were] entitled." *Id.* at 1300.

211. *See supra* notes 51-56 and accompanying text.

212. *See supra* notes 137-70.

213. *See supra* notes 102-19.

214. This fear is not totally hypothetical. Indeed the trial judge in *Davis v. Davis*, 708 P.2d 1102, 1105 & n.7 (Okla. 1985), *superseded by statute as stated in L.R.R. v. R.D.R. (In re R.R.R.)*, 763 P.2d 94, 100 n.18 (Okla. 1988), when considering termination of a father's rights for nonpayment of support in a parent-initiated proceeding, stated that he interpreted the statute to require him

Evidence that termination is often viewed primarily as a sanction is found in arguments of proponents of parent-initiated termination proceedings who contend that it is unjust to allow an irresponsible parent to "escape his responsibilities, but continue to enjoy the benefits of parenthood, including visitation, rights of inheritance and rights to the children's earnings."<sup>215</sup> Termination has been described as a remedial right of the child entitled to support,<sup>216</sup> and it has been argued that to deny this right to a child without an adoptive parent waiting in the wings is a denial of equal protection.<sup>217</sup>

Such arguments lose sight of the ultimate goal to be accomplished by the termination of parental rights. If termination is constitutionally justified, it can only be because it is necessary to protect the child from harm.<sup>218</sup> The mere infliction of punishment upon a nonconforming parent is not a sufficiently compelling state interest to justify abolition of a fundamental right. But the parent's rights aside, burdening the child with the detrimental effects of termination<sup>219</sup> is hardly an equitable solution for punishing the parent. Extinguishing all rights of the child clearly fails to serve the *child's* best interests.

Moreover, many alternatives exist to punish a parent who has failed to pay support. Willful nonpayment of support may be punished with up to ten years imprisonment through criminal prosecution<sup>220</sup> and with imprisonment up to six months and a \$500 fine through civil contempt proceedings.<sup>221</sup> Other methods and strategies for collection exist, such as

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to terminate the father's rights upon proof of willful failure to support for the preceding year, even though the father had tendered to the court the sum of the arrearages. By declaring that the court had no choice, the clear implication was that he felt he had no discretion to even consider the child's best interests. Although the court of appeals reversed, holding the judge was mistaken in his belief he had no choice, the language of the statute clearly fosters such an approach.

215. *Mullins v. Mullins (In re Mullins)*, 606 P.2d 573, 574 (Okla. 1980) In *In re Mullins*, the Oklahoma Supreme Court upheld the validity of parent-initiated termination proceedings brought under the authority of title 10, § 1130. *In re Mullins* was subsequently overruled in *Davis*, 708 P.2d at 1111, which held that parents had no standing to institute termination proceedings under the statutory scheme then existing. This quote from *In re Mullins* was also included in Judge Wilson's dissent in *Davis*, 708 P.2d at 1116.

216. *Davis*, 708 P.2d at 1115 (Wilson, J., dissenting).

217. *Id.* at 1117-18 (Kauger, J., dissenting).

218. *See supra* notes 87-94.

219. *See supra* notes 174-211.

220. *See* OKLA. STAT. tit. 21, §§ 851 (1981), 852 (Supp. 1987), 853 (1981).

221. OKLA. STAT. tit. 21, § 566 (Supp. 1984).

income assignment,<sup>222</sup> garnishment,<sup>223</sup> tax refund interception,<sup>224</sup> and release of child support arrearage information to consumer reporting agencies,<sup>225</sup> which are not implemented for punishment but certainly have negative effects on the noncomplying parent. Thus, even if punishment were considered a compelling state interest, termination is unnecessary to accomplish this goal.

Utilization of termination of parental rights as a sanction for non-payment of support therefore violates the constitutional rights of both the parent and the child. Because termination deprives the child of important benefits and can cause the child significant harm, any attempt to justify use of termination to punish a parent must be rejected.

### C. *Inappropriate Use of Parent-Initiated Termination to Serve the Needs of Parents*

The ability of one parent to initiate proceedings to terminate the other's parental rights creates a substantial risk that the proceedings will be employed to serve the emotional needs of the initiating parent rather than the child. In the vast majority of cases, parent-initiated termination proceedings are brought by parents who are divorced or separated from the other parent.<sup>226</sup> Separation, particularly in divorce, frequently creates significant hostility on the part of one parent toward the other.<sup>227</sup> The availability of termination proceedings provides the ultimate opportunity to get even.<sup>228</sup>

It is not uncommon for custodial parents to communicate to their attorneys a strong desire that their ex-spouses have no visitation with their children. Frequently the motivation expressed is a preference to

222. *E.g.*, OKLA. STAT. tit. 12, §§ 1171.2 (Supp. 1987), 1171.3 (Supp. 1986), 1171.4 (Supp. 1985), 1277.4 (Supp. 1985).

223. *E.g.*, OKLA. STAT. tit. 12, §§ 1171.2 (Supp. 1985), 1173.1 (Supp. 1986).

224. OKLA. STAT. tit. 68, § 205.3 (Supp. 1985); 42 U.S.C. § 664 (Supp. 1986).

225. OKLA. STAT. tit. 56, § 240.7 (Supp. 1985).

226. *See supra* note 23.

227. Following their five-year study of 60 divorced families in the San Francisco area, Wallerstein and Kelly observed that "[f]our-fifths of all the men and an even higher proportion of the women expressed anger and bitterness toward their spouses. Thus in almost every family [studied], there was at least one, if not two, angry parents." The authors perceived the women as clearly more hostile than the men, and found that the intensity of their anger was greater. They described bitter and explosive interactions between the parents as the hallmark of the divorce experience for most of the youngsters. J. WALLERSTEIN & J. KELLY, *supra* note 179, at 26.

228. In *Gamble v. Gamble*, 477 P.2d 383 (Okla. 1970), the court commented upon the truth of the trial judge's remark from the bench: "The Court is also aware — I run into it all the time in these divorce cases — each parent likes to use the children to get back at their husband or wife. In other words, if everything else fails, they will go to that angle." *Id.* at 388. In *Gamble*, the court denied a mother's request for restrictions upon the father's visitation. *Id.* at 383.

have their ex-spouses out of their lives completely and to avoid the communication, contact, and resulting stress that visitation normally necessitates.<sup>229</sup> Although the majority of custodial parents do make some effort to observe visitation rights, the resistance of a significant number of custodial parents to visitation is well documented by psychologists who have studied the interaction of parents and children following divorce.<sup>230</sup> In their five-year study of divorced families, Wallerstein and Kelly reported that one-fifth of the custodial parents saw no value whatsoever in continued contact by the noncustodial parent with the children and actively tried to sabotage the visitation.<sup>231</sup> Some of the custodial parents within this group sought assistance from attorneys to discontinue the visitation.<sup>232</sup>

Evidence that personal motivations have prompted the filing of parent-initiated termination proceedings is found in the fact that some initiating parents have actively discouraged payment of support or even refused a tender of back due support so as not to prejudice their chances of obtaining termination of the other parent's rights.<sup>233</sup>

The risk that termination is being sought to serve the interest of a

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229. Wallerstein and Kelly reported that visitation "evoked in both parents the ghosts of the failed marriage and the fantasies of what might have been." Even where there was little or no contact, they observed that visitation was stressful because it presented a continuing opportunity for the "replay of anger, jealousy, love, mutual rejection, and longing between the divorcing adults." Particularly during the first year following separation, the great majority of both women and men found visitation "moderately or severely" stressful. The psychologists observed that one-third of the children studied were "consistently exposed to intense anger at visiting time." J. WALLERSTEIN & J. KELLY, *supra* note 179, at 125.

230. J. WALLERSTEIN & J. KELLY, *supra* note 179, at 125-26, 170.

231. J. WALLERSTEIN & J. KELLY, *supra* note 179, at 125. One mother reportedly became so distraught that she smeared dog feces on her husband's face when he arrived to see the children.

232. J. WALLERSTEIN & J. KELLY, *supra* note 179, at 126. See *Bingham v. Bingham*, 629 P.2d 1297, 1298-1300 (Okla. Ct. App. 1981) (Mother "bartered away the children's right to be parentally and financially supported" by father in exchange for father's agreement to forgo his right to visitation, an agreement which the court observed had the practical effect of terminating the parental rights of the father.).

233. *E.g.*, in *Davis v. Davis*, 708 P.2d 1102, 1105 n.6 (Okla. 1985), *superseded by statute as stated in L.R.R. v. R.D.R. (In re R.R.R.)*, 763 P.2d 94 (Okla. 1988), the father tendered to the court the sum of \$2,200 when he was served with the motion to terminate his parental rights. The mother refused the money and advised the judge at trial, "I want his rights terminated, so I didn't accept the money."

See also *William K. v. Rebecca K. (In re Adoption of A.G.K.)*, 728 P.2d 1, 7 (Okla. Ct. App. 1986) (Custodial father discouraged payment of child support with interest of obtaining termination in stepparent adoption); *In re Adoption of Gregory*, 495 P.2d 1275, 1276 (Okla. 1972) (Custodial mother continually refused attempts to pay support in order to terminate father's rights in stepparent adoption); *Griffith v. Griffith*, 730 P.2d 524, 525 (Okla. 1986) (Where noncustodial mother was under no court order to pay support, custodial father filed two motions, one to establish child support and one to terminate her parental rights under § 1130, but at the hearing on his motions he elected to proceed only on the petition to terminate.).



parent is not limited to involuntary parent-initiated proceedings. Parents may also have their own interests at heart when they voluntarily consent to termination of their parental rights.<sup>234</sup> A parent may surrender such rights as part of an agreement with a custodial parent to avoid contempt proceedings, criminal prosecutions, or the negative effects of other collection efforts that might be pursued.<sup>235</sup> A parent who consents to termination may simply want to avoid the responsibility of paying child support altogether.<sup>236</sup>

Although parent-initiated termination of parental rights may serve the interests of one, or occasionally, both parents, it fails to serve the best interests of the child.<sup>237</sup> In parent-initiated termination proceedings, however, the parents are the active litigants. Where the focus is the desire and demand for relief of one parent and the alleged misconduct of the other, it is easy to lose sight of the child's best interests.<sup>238</sup> In cases of voluntary termination, in which frequently both parents agree to the termination of one parent's rights, the risk that the child's best interests will not receive adequate attention is even greater. By contrast, juvenile proceedings are brought by the state with the primary purpose of protecting children from harm and ensuring their welfare.<sup>239</sup>

Parent-initiated termination proceedings should not be retained to serve the personal interests of one or both parents. Because these termination proceedings violate the constitutional rights of both the child and a parent whose rights are involuntarily terminated, and fail to serve the child's best interests whether termination is voluntary or not, the practice of allowing parents to initiate termination proceedings must be abolished.

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234. Termination upon written consent of a parent in parent-initiated proceedings is authorized in OKLA. STAT. tit. 10, § 1130(A)(1), (D) (Supp. 1987).

235. See *supra* notes 220-25 and accompanying text.

236. See *supra* note 21. Cf. *Bingham v. Bingham*, 629 P.2d 1297, 1299-1300 (Okla. Ct. App. 1981) (father agreed to waive all rights to visitation at divorce in return for provision in decree which relieved him of the duty of support).

237. See *supra* notes 174-213.

238. See *Griffith v. Griffith*, 730 P.2d 524, 525 (Okla. 1986) (In parent-initiated termination proceeding, the Oklahoma Supreme Court observed that the trial court's order terminating parental rights was not based upon a finding of the court that termination would be in the best interests of the children.); *Davis v. Davis*, 708 P.2d 1102, 1105 n.7 (Okla. 1985) *superseded by statute as stated in* *L.R.R. v. R.D.R. (In re R.R.R.)*, 763 P.2d 94 (Okla. 1988). See *supra* notes 132-34 and accompanying text for discussion of *Davis* regarding the trial judge's conviction that he had no choice but to terminate if willful nonsupport was proven.

239. See *R.E. v. State (In re A.E.)*, 743 P.2d 1041, 1048 (Okla. 1987); *Davis*, 708 P.2d at 1109; *In re Betty C.*, 632 P.2d 412, 414 (Okla. 1981); *In re Daniel, H.*, 591 P.2d 1175, 1177-78 (Okla. 1979).

IV. NECESSITY FOR GUARANTEE OF ADEQUATE PROCEDURAL PROTECTIONS UNTIL PARENT-INITIATED TERMINATION PROCEEDINGS ARE ABOLISHED

In recent years, the Oklahoma courts and legislature have confirmed the rights of parents threatened with termination of parental rights to several important procedural protections in juvenile proceedings. Among these are the parent's right to a jury trial, the right to court-appointed counsel if the parent is indigent, and the right to an elevated standard of proof. The courts and legislature have also confirmed the right of the child to appointment of independent counsel. In addition, juvenile proceedings normally require extensive investigation by professionals prior to the termination determination. However, these same protections have not been addressed by the Oklahoma courts and legislature in the context of parent-initiated proceedings. This disparity compounds the risk that the child's welfare will not be protected in parent-initiated proceedings.<sup>240</sup>

A. *Right to Jury Trial*

In 1987, the Oklahoma Supreme Court in *R.E. v. State (In re A.E.)*<sup>241</sup> determined that a parent threatened with termination of parental rights in the dispositional hearing of a juvenile proceeding has a right to trial by jury mandated by the Oklahoma Constitution, article 2, section 19, and the Oklahoma Juvenile Code.<sup>242</sup> The court specifically declined to decide whether a parent threatened with termination in a parent-initiated proceeding possessed the same right to a jury trial. The majority based its recognition of the right to jury trial in juvenile proceedings on both the fundamental nature of the right subject to extinction, and on principles of constitutional and statutory construction and

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240. See *supra* notes 137-213 and accompanying text.

241. 743 P.2d 1041, 1043-48 (Okla. 1987). The right to a jury in adjudicatory hearings is guaranteed by OKLA. STAT. tit. 10, § 1110 (Supp. 1986), and is well recognized by the courts. *J.V. v. State (In re L.M.H.)*, 572 P.2d 1283, 1285 (Okla. 1977). *In re A.E.*, however, overruled a line of cases which previously held the right to jury trial did not apply to dispositional hearings, including termination proceedings. See, e.g., *Wilson v. Foster*, 595 P.2d 1329, 1331 (Okla. 1979); *In re L.M.H.*, 572 P.2d at 1286.

242. OKLA. STAT. tit. 10, § 1101-1506 (Supp. 1987). At least one other state recognizes a statutory right to jury trial in a parental rights termination proceeding. *LP v. Natrona County Dep't of Pub. Assistance & Social Serv. (In re GP)*, 679 P.2d 976, 983 (Wyo. 1984) (state-initiated proceeding). Several other states have no statutory or constitutional right to a jury trial in parental rights termination proceedings. *In re Baby Boy Bryant*, 9 Kan. App. 2d 768, 689 P.2d 1203, 1209 (1984); *Mays v. Department for Human Resources*, 656 S.W.2d 252, 253 (Ky. Ct. App. 1983); *Rodriguez v. Colon (In re Colon)*, 144 Mich. App. 805, 377 N.W.2d 321, 328 (Mich. Ct. App. 1985).

history. While the former argument clearly applies equally to parent-initiated termination proceedings, it is not as clear that the constitutional and statutory construction is as readily transferable.

The majority in *In re A.E.* placed significant emphasis on the recognition in numerous cases by both the United States Supreme Court and the Oklahoma Supreme Court that a parent's right to the companionship, care, and custody of his or her child is a fundamental right deserving heightened procedural protection.<sup>243</sup> Applying principles of procedural due process, the court proclaimed that the "opportunity to be heard must be meaningful and appropriate to the nature of the interest involved in the case,"<sup>244</sup> and that "parental rights are too precious to be terminated without the full panoply of protections afforded by the Oklahoma Constitution."<sup>245</sup> The court further observed that recognition of the right to jury trial would best achieve the primary goal of promoting the best interests and welfare of the child.<sup>246</sup> Because parent-initiated termination proceedings extinguish the same fundamental right, and the court is under a similar obligation to deny termination if it would be detrimental to the child's welfare, due process compels that identical procedural protection be afforded.

The right to jury trial, however, has traditionally been premised on a constitutional or statutory source of entitlement. In juvenile actions, the right to jury trial in Oklahoma is supported by article 2, section 19 of the Oklahoma Constitution, which was amended in 1969 specifically to provide for jury trials in "juvenile proceedings." The majority in *In re A.E.* determined that termination proceedings instituted by the state under title 10, section 1130 were juvenile proceedings within the meaning of the Oklahoma Constitution.<sup>247</sup>

Although extending this argument to parent-initiated proceedings is more problematic, an extension of the court's reasoning is not foreclosed. While traditionally the term "juvenile proceedings" has referred to actions initiated by the state on behalf of children,<sup>248</sup> the legislature chose to authorize parents to initiate termination proceedings by amending section 1130 of the Juvenile Code. Thus, it is arguable that since such proceedings are governed by the Juvenile Code, the term "juvenile

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243. *In re A.E.*, 743 P.2d at 1044, 1047-48.

244. *Id.* at 1047.

245. *Id.* at 1048.

246. *Id.*

247. *Id.* at 1046-48.

248. See *Davis v. Davis*, 708 P.2d 1102, 1105-06 (Okla. 1985), *superseded by statute as stated in* *L.R.R. v. R.D.R.* (*In re R.R.R.*), 763 P.2d 94, 100 n.18 (Okla. 1988).

proceedings" as used in the Oklahoma Constitution should be construed broadly to afford the right to jury trial to litigants in parent-initiated termination proceedings.

This construction is supported by the fact that any other construction would appear to violate the rights of procedural due process and equal protection that must be afforded to parents threatened with loss of fundamental parental rights in parent-initiated proceedings. As discussed above, procedural due process, guaranteed by the fourteenth amendment of the United States Constitution, requires that the fundamental nature of a right in jeopardy strongly favors heightened procedural protections.<sup>249</sup> The equal protection clause of the fourteenth amendment further requires that review by a jury cannot be made available to litigate certain rights and then be arbitrarily withheld from a subgroup litigating the same issues.<sup>250</sup> In *Wilson v. Foster*, the Oklahoma Supreme Court recognized that the federal equal protection clause, as well as article 5, section 59 of the Oklahoma Constitution, precluded affording trial by jury to parents in juvenile adjudicatory hearings but denying jury trial to divorced parents whose juvenile hearings had been combined with post-divorce motions filed by the other parent, when no real and substantial distinctions existed between the two groups.<sup>251</sup> As the dissenters in *In re A.E.* forcefully argued, there is similarly no rational basis for providing the right to jury trial to parents threatened with termination in juvenile dispositional hearings but denying it to parents risking the same loss in actions initiated by the other parent.<sup>252</sup> The equal protection clause of the United States Constitution and article 5, sections 46<sup>253</sup> and 59<sup>254</sup> of the Oklahoma Constitution forbid such unequal treatment. The Oklahoma Constitution, therefore, must either be

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249. *Santosky v. Kramer*, 455 U.S. 745, 761 (1982).

250. See *Humphrey v. Cady*, 405 U.S. 504 (1972); *Baxstrom v. Herold*, 383 U.S. 107 (1966). (In both cases, the Court held that where jury trial was available in commitment proceedings it cannot arbitrarily be withheld from ex-convicts.)

251. *Wilson v. Foster*, 595 P.2d 1329, 1332-33 (Okla. 1979) (In *Wilson*, the noncustodial father's motion for change in custody was consolidated with a juvenile proceeding initiated by the state against the mother.), *overruled on other grounds* *R.E. v. State (In re A.E.)*, 743 P.2d 1041 (Okla. 1987). See *supra* note 241.

252. *R.E. v. State (In re A.E.)*, 743 P.2d 1041, 1051 (Okla. 1987) (Opala, J., dissenting).

253. OKLA. CONST. art. V, § 46, provides in pertinent part: "The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing: Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts . . ." *Id.*

254. OKLA. CONST. art. V, § 59, provides: "Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted." *Id.*

construed or amended to guarantee the right to jury trial to parents defending both juvenile *and* parent-initiated termination proceedings. Absent such a construction or amendment, this unconstitutional disparity in procedural protection provides yet another reason to abolish parent-initiated termination proceedings.

**B. *Right of Indigent Parents to Court-Appointed Counsel***

In title 10, section 1109 of the Oklahoma Statutes, the legislature has guaranteed to indigent parents the right to court-appointed counsel "if a petition has been filed alleging that the child is a deprived child, a child in need of supervision, or a child in need of treatment, or if termination of parental rights is a possible remedy."<sup>255</sup> The Oklahoma Supreme Court has further recognized in *In re Chad S.*, a juvenile proceeding, that procedural due process imposes an obligation upon the court in a termination proceeding to advise indigent parents of their right to court-appointed counsel.<sup>256</sup>

The language of both title 10, section 1109 and its counterpart, title 10, section 24, suggests that the statutory right to court-appointed counsel is applicable to indigent parents threatened with termination in parent-initiated proceedings as well as in juvenile proceedings. The fact that the legislature describes those actions "in which termination of parental rights is a possible remedy" as a separate category from deprived actions leaves room to construe section 1109 as requiring appointment of counsel in all termination proceedings, including parent-initiated proceedings. Although section 1109 is part of the Juvenile Code, which pertains mostly to state-initiated proceedings, section 1130 of the Juvenile Code

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255. OKLA. STAT. tit. 10, § 1109(b) (Supp. 1986) provides:

B. If the parents, guardian, or other legal custodian of the child requests an attorney and is found to be without sufficient financial means, counsel shall be appointed by the court if a petition has been filed alleging that the child is a deprived child, a child in need of supervision, or a child in need of treatment, or if termination of parental rights is a possible remedy, provided that the court may appoint counsel without such request, if it deems representation by counsel necessary to protect the interest of the parents, guardian or other legal custodian. If the child is not otherwise represented by counsel, whenever a petition is filed pursuant to the provisions of Section 1103 of this title, the court shall appoint a separate attorney, who shall not be a district attorney, for the child regardless of any attempted waiver by the parent or other legal custodian of the child of the right of the child to be represented by counsel.

*Id.*

256. *In re Chad S.*, 580 P.2d 983, 985-86 (Okla. 1978).

authorizes parent-initiated termination proceedings. Moreover, additional statutory authority mandating court-appointed counsel for indigent parents who desire counsel is found in title 10, section 24.<sup>257</sup> Section 24 is not limited to juvenile proceedings and appears in the first chapter of title 10, entitled General Provisions, rather than in the Juvenile Code. The Oklahoma Supreme Court in *In re Chad S.* recognized both section 1109(b) and section 24(a) as statutory authority mandating the appointment of counsel for indigent parties to a termination proceeding. Thus, a strong argument can be made that indigent parents subject to termination in parent-initiated proceedings have a statutory right to court-appointed counsel.<sup>258</sup>

Recognition of a constitutional right to court-appointed counsel in parent-initiated proceedings is also appropriate. Although the Oklahoma Supreme Court's initial recognition of a constitutional right to court-appointed counsel was based upon federal precedent which has now been overturned,<sup>259</sup> the due process clause of the Oklahoma Constitution<sup>260</sup> provides ample authority to support the continued viability of the requirement that counsel be appointed for indigent parents. Moreover, the decision of the Oklahoma Supreme Court is clearly the more enlightened approach and has been widely adopted by other states.<sup>261</sup>

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257. OKLA. STAT. tit. 10, § 24 (1981) provides:

(a) When it appears to the court that the minor or his parent or guardian desires counsel but is indigent and cannot for that reason employ counsel, the court shall appoint counsel. In any case in which it appears to the court that there is such a conflict of interest between a parent or guardian and child that one attorney could not properly represent both, the court may appoint counsel, in addition to counsel already employed by a parent or guardian or appointed by the court to represent the minor or parent or guardian, provided that in all counties having public defenders, said public defenders shall assume the duties of representation in proceedings such as above.

(b) In all cases other than in counties where public defenders are appointed, the court shall, where counsel is appointed and assigned allow and direct to be paid by the county in which the proceedings or trial is held, out of the court fund of said county, a reasonable and just compensation to the attorney or attorneys for such services as they may render. Provided, that such attorney shall not be paid a sum to exceed One Hundred Dollars (\$100.00) for services rendered in preliminary proceedings, and such compensation shall not exceed Two Hundred Fifty Dollars (\$250.00) for services rendered during trial.

*Id.*

258. *In re Chad S.*, 580 P.2d at 985.

259. In *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 31-32 (1981), *reh'g denied*, 453 U.S. 927 (1981), the United States Supreme Court held that the due process clause of the Federal Constitution does not require the right to court-appointed counsel be afforded to indigent parents in every case involving termination of parental rights, but instead the existence of a due process right must be determined on a case-by-case basis.

260. OKLA. CONST. art. II, § 7 provides: "No person shall be deprived of life, liberty, or property, without due process of law." *Id.*

261. See, e.g., *V.F. v. State*, 666 P.2d 42 (Alaska 1983) (due process right to court-appointed counsel in termination proceeding based on Alaska Constitution); *Rodriguez v. Padilla*, (*In re Rodriguez*), 34 Cal. App. 3d Supp. 510, 110 Cal. Rptr. 56 (1973) (recognition of right under United States

Procedural due process analysis requires balancing the private interests at stake, the probable value of the additional procedure at issue in reducing the risk of erroneous deprivation of the private interest, and the governmental interest, including the fiscal and administrative burdens the additional procedural requirement would entail.<sup>262</sup> In both parent-initiated and juvenile proceedings, the private interests at stake, i.e., the benefits to be derived by both parent and child from continuation of the parental relationship, are fundamental intrinsic human rights deserving the highest procedural protection.<sup>263</sup> In addition, counsel for a parent threatened with termination of parental rights is equally necessary in juvenile and parent-initiated proceedings to reduce the risk of erroneous deprivation. Attorneys serve a vital function in investigating and presenting information a lay person would not perceive as relevant. Moreover, the issues to be resolved in parent-initiated termination actions involve questions of willful behavior and the best interests of the child. Such questions require more than readily obtainable objective facts<sup>264</sup> and should involve direct and cross-examination of expert witnesses.<sup>265</sup> Defending a termination action necessitates expertise, experience, and skill on the part of the examiner, as well as a thorough

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Constitution); *In re D.B.*, 385 So. 2d 83 (Fla. 1980), *cert. denied*, 479 U.S. 1043 (1987) (due process right to counsel based on both United States and Florida Constitutions); *Chambers v. District Court*, 261 Iowa 31, 152 N.W.2d 818 (1967); *In re Johnson*, No. CJ 84 0952, slip op. at 6 (La. Ct. App. Feb. 26, 1985); *Danforth v. State Dept. of Health & Welfare*, 303 A.2d 794 (Me. 1973) (right to counsel based on United States and Maine Constitutions in juvenile proceeding to remove child from parent's custody); *Reist v. Bay County Circuit Judge*, 396 Mich. 326, 241 N.W.2d 55 (1976) (right to counsel based on United States and Michigan Constitutions); *Department of Social Servs. v. Trowbridge (In re Trowbridge)*, 155 Mich. App. 785, 401 N.W.2d 65 (1986); *B.L.E. v. Elmore*, 723 S.W.2d 917 (Mo. Ct. App. 1987); *State v. Caha*, 190 Neb. 347, 208 N.W.2d 259 (1973); *Crist v. Division of Youth and Family Servs.*, 128 N.J. Super. 402, 320 A.2d 203 (N.J. Super. Ct. Law Div. 1974), *aff'd and modified*, 135 N.J. Super. 573, 343 A.2d 815 (N.J. Super. Ct. App. Div. 1975) (Affirmed right to counsel and modified regarding source of compensation for appointed attorneys); *Kurtis v. Jeri B. (In re Ella B.)*, 30 N.Y.2d 352, 334 N.Y.S.2d 133, 285 N.E.2d 288 (1972); *In re Reed*, No. L-87-374, slip. op. at 2 (Ohio Ct. App. May 13, 1988) (right to counsel found in Federal and Ohio Constitutions); *State v. Jamison*, 251 Or. 114, 444 P.2d 15 (1968); *In re Adoption of R.I.*, 455 Pa. 29, 312 A.2d 601 (1973), *appeal dismissed and cert. denied*, 429 U.S. 1032 (1977); *Department of Human Servs. v. Pepper*, No. 85-292-II, slip. op. (Tenn. Ct. App. Oct. 8, 1986) (right to appointed counsel on appeal under circumstances of case); *In re Welfare of Luscier*, 84 Wash. 2d 135, 524 P.2d 906 (1974) (right to counsel based on Federal and Washington Constitutions); *State ex rel Lemaster v. Oakley*, 203 S.E.2d 140 (W. Va. 1974). *Cf. In re Clark*, 281 S.E.2d 47 (N.C. 1981) (In action in which parent *did* have court-appointed counsel, failure of act, prior to its recent amendment to require court-appointed counsel, did not render it constitutionally defective.).

262. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

263. See *supra* notes 77-82 and accompanying text. This was acknowledged even in the majority opinion in *Lassiter*, 452 U.S. at 27.

264. See OKLA. STAT. tit. 10, § 1130 (Supp. 1987).

265. *Lassiter*, 452 U.S. at 30. See *infra* notes 313-23 and accompanying text.

knowledge of both substantive and evidentiary law. In 1966, the *Columbia Journal of Law and Social Problems* conducted a survey of family court judges in Kings County, New York. The survey reported that 66.7% of the judges responding indicated that respondent's lack of representation by counsel in neglect proceedings hindered the court's development of the facts. The survey also reported that 72.2% stated that without counsel it was more difficult to conduct a fair hearing and protect respondent's rights.<sup>266</sup> In the same study, it was discovered that findings of neglect and placements outside the home occurred significantly more frequently when respondent parents were unrepresented.<sup>267</sup>

Although the argument has been made in juvenile proceedings that the risk of erroneous deprivation may be especially great when an individual opposes the state,<sup>268</sup> a similar disparity exists when the initiating parent is represented and the defending parent is not. The attorney for

266. Note, *Representation in Child-Neglect Cases: Are Parents Neglected?*, 4 COLUM. J.L. & SOC. PROBS. 230, 235 (1968).

267. *Id.* at 241-43. The study determined that 79.5% of the cases in which the parents were unrepresented resulted in findings of neglect, as compared to 62.5% in cases where the parents were represented throughout the proceeding. Absence of an attorney had an even greater effect at the disposition stage as the following summary of their findings indicates:

<u>Disposition</u>	<u>Parents Represented by Counsel Throughout Proceedings</u>	<u>Parents Unrepresented by Counsel</u>
Children placed outside the home.	18.2%	40.6%
Discharged under court supervision.	45.4%	39.6%
Discharged without court supervision.	9.1%	5.0%
Petition dismissed after findings.	9.1%	3.0%
Other.	18.2%	11.8%

*Id.*

Regarding the results of this survey, one commentator observed:

Since there is no evidence indicating that the average respondent who can retain counsel is better or less neglectful than one who cannot, the conclusion seems inescapable that a significant number of cases against unrepresented parents result in findings of neglect solely because of the absence of counsel. In other words, assuming a basic faith in the adversary system as a method of bringing the truth to light, a significant number of neglect findings (followed in many cases by a taking of the child from his parents) against unrepresented indigents are probably erroneous. It would be hard to think of a system of law which works more to the oppression of the poor than the denial of appointed counsel to indigents in neglect proceedings.

Note, *Child Neglect: Due Process for the Parent*, 70 COLUM. L. REV. 465, 476 (1970). See *Crist v. Division of Youth and Family Servs.*, 128 N.J. Supp. 402, 320 A.2d 203, 208-09 (N.J. Super. Ct. Law Div. 1974) (court relied upon survey and above note in recognizing due process right to court-appointed counsel), *aff'd and modified*, 135 N.J. Super. 573, 343 A.2d 815 (N.J. Super. Ct. App. Div. 1975).

268. *Santosky v. Kramer*, 455 U.S. 745, 763 (1982) (juvenile proceeding in which United States Supreme Court recognized that due process required that the allegations in a termination proceeding must be proven by clear and convincing evidence).



the initiating parent will be far more familiar with the substantive, evidentiary, and procedural issues to be encountered than an unrepresented parent defending a termination action. The attorney will also be more skilled in developing the expert testimony that should be required.<sup>269</sup>

Finally, the governmental interest in promoting the welfare of the child, equally present regardless of who initiates the proceedings,<sup>270</sup> is best served by ensuring that counsel represents both the initiating and defending parties to achieve an accurate and just decision.<sup>271</sup> The government also has an interest, in both juvenile and parent-initiated proceedings, in minimizing administrative costs. Nevertheless, as the United States Supreme Court,<sup>272</sup> the Oklahoma Supreme Court<sup>273</sup> and legislature,<sup>274</sup> and the majority of other states<sup>275</sup> have determined, the private interests of parent and child are far more significant than the state's pecuniary interest in avoiding the cost of compensation to court-appointed attorneys. Moreover, when the state authorizes a private party to undertake functions traditionally reserved to the state,<sup>276</sup> the state must bear the relatively minor additional cost of extending the same procedural protections to the defendants that exist if the state were bringing the action. In sum, regardless of whether the proceeding is initiated by the state or the other parent, due process entitles indigent parents defending termination proceedings to a court-appointed attorney. If indigent defendants in parent-initiated proceedings are not being appointed counsel, then one more reason exists to abolish parent-initiated proceedings.

269. See *infra* notes 313-23 and accompanying text.

270. See *supra* notes 120-28 and accompanying text.

271. *Santosky*, 455 U.S. at 766-67 ("As *parens patriae*, the State's goal is to provide the child with a permanent home. . . . Yet while there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds."); *Lassiter*, 452 U.S. at 27 ("Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision.").

272. *Lassiter*, 452 U.S. at 28 ("But though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here, particularly in light of the concession in the respondent's brief that the 'potential costs of appointed counsel in termination proceedings . . . is [sic] admittedly *de minimus* compared to the costs in all criminal actions.'").

273. See *In re Chad S.*, 580 P.2d 983, 986 (Okla. 1978).

274. See OKLA. STAT. tit. 10, §§ 24 (1981), 1109(b) (Supp. 1986).

275. See *supra* note 261. In *Lassiter*, 452 U.S. at 34, the Court observed that 33 states and the District of Columbia provided statutorily for the appointment of counsel in termination cases. See also Parker, *supra* note 21, at 594 n.222.

276. See *Davis v. Davis*, 708 P.2d 1102, 1108 n.24 and 1111 (Okla. 1985), *superseded by statute as stated in L.R.R. v. R.D.R.* (*In re R.R.R.*), 763 P.2d 94 (Okla. 1988).

C. *Right to Impose an Elevated Burden of Proof on Party Seeking Termination*

Both the United States Supreme Court, in *Santosky v. Kramer*,<sup>277</sup> and the Oklahoma Supreme Court, in *In re C.G.*,<sup>278</sup> have held that procedural due process requires that the party seeking termination must prove the allegations necessary to terminate parental rights by clear and convincing evidence. Although both *Santosky* and *In re C.G.*<sup>279</sup> addressed the issue in the context of juvenile actions, the underlying rationale applies equally well to parent-initiated proceedings. Both courts emphasized the fundamental nature of the private interests at stake for both the defending parent and the child.<sup>280</sup> Moreover, the government's interest in protecting children<sup>281</sup> is present in both types of proceedings, as is the less significant pecuniary interest in minimizing cost to the state.<sup>282</sup>

While examining the risk of erroneous deprivation, the United States Supreme Court in *Santosky* buttressed its recognition of the elevated standard by observing the disparity in resources between an individual defendant and the state. The agency, which had no predetermined limits restricting the sums it could spend prosecuting, employed an attorney expert in the field and a social worker who investigated the family.<sup>283</sup> In reality, however, the differences between state- and parent-initiated proceedings are far less striking than the similarities. In many instances, a parent seeking termination of the other parent's rights may have significant resources and far more ability to invest them in prosecuting a termination action than an overworked district attorney with a huge

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277. 455 U.S. 745 (1982).

278. 637 P.2d 66, 70 (Okla. 1981). (The Oklahoma Supreme Court determined that the elevated standard was required by the due process clause of the OKLA. CONST., art. II, § 7. See note 260 for full text.)

279. Although the proceeding in *In re C.G.* was a juvenile proceeding prosecuted by the state, the court noted it was unclear from the record whether the grandparents as custodians or the Department of Human Services was the moving party in the termination proceeding. 637 P.2d at 68, n.2.

280. *Santosky*, 455 U.S. at 758-59; *In re C.G.*, 637 P.2d at 70-71 ("The clear and convincing standard balances the parent's fundamental freedom from family disruption with the state's duty to protect children within its borders. It places an appropriately heavy burden upon the § 1130 petitioner (termination-seeking party) to overcome the law's policy which identifies the child's best interests with that of its natural parents.").

281. *Santosky*, 455 U.S. at 767; *In re C.G.*, 637 P.2d at 70-71.

282. See *supra* notes 272-75 and accompanying text.

283. *Santosky*, 455 U.S. at 763.

caseload.<sup>284</sup> Private parties, as well as the state, can retain expert witnesses and attorneys who specialize in family and juvenile law. The advantage that the state may have in juvenile proceedings because the child is usually in state custody<sup>285</sup> is paralleled by the fact that parent-initiated proceedings are usually initiated by the custodial parent.<sup>286</sup> Moreover, other factors examined in *Santosky* affecting the allocation of risk are identical for both state- and parent-initiated proceedings. Imprecise substantive standards which leave determinations open to the unusual discretion and subjective values of the judge<sup>287</sup> are applied in both state- and parent-initiated proceedings, which utilize some of the same grounds.<sup>288</sup> Parents defending termination actions against the state or another parent may be subject to repeated termination efforts.<sup>289</sup> Of paramount importance, however, is the fact that in both state- and parent-initiated proceedings, a standard that equally allocates the risk of error between termination and failure to terminate does not reflect the relative severity of the consequences.<sup>290</sup> The Court in *Santosky* observed that in juvenile proceedings, erroneous failure to terminate results in preservation of the child in foster care, an "uneasy status quo," whereas erroneous termination results in unnecessary destruction of the natural family.<sup>291</sup> In parent-initiated proceedings, erroneous failure to terminate should have no detrimental effects for the child, who is likely to remain in the initiating parent's custody. Erroneous termination, on the other hand, unnecessarily deprives both parent and child of the benefits of the parental relationship.<sup>292</sup> Thus, there is at least as great a need, if not a greater need, for an elevated standard of proof in parent-initiated termination proceedings to reduce the risk of erroneous termination.

Fortunately, in Oklahoma there is every indication that the courts will impose the burden of proof by clear and convincing evidence upon parents initiating termination actions. The Oklahoma Supreme Court has already declared that in adoption proceedings initiated by private

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284. For example, in 1987 two district attorneys in Tulsa county assigned to the Juvenile Bureau handled 6,924 referrals. Of the referrals, 1,990 cases were actually filed in 1987, giving each a caseload of approximately 995 for the year. Telephone interview with Stephen Rouse, District Attorney, Tulsa County Juvenile Bureau, (October 10, 1988).

285. *Santosky*, 455 U.S. at 763.

286. See *supra* note 27.

287. *Santosky*, 455 U.S. at 762.

288. OKLA. STAT. tit. 10, § 1130 (Supp. 1987). See *supra* notes 24, 33 & 58 and accompanying text.

289. *Santosky*, 455 U.S. at 764.

290. *Id.* at 765-66.

291. *Id.* at 765-66.

292. See *supra* notes 137-70 and accompanying text.

parties, the clear and convincing evidence standard of persuasion "must be met to warrant judicial severance of the parental bond," due to the fundamental nature of parental rights.<sup>293</sup> There is some evidence that the lower courts have followed this cue in parent-initiated termination proceedings. In *Yarborough v. Yarborough*,<sup>294</sup> the only parent-initiated action which refers to the standard of proof, the Oklahoma Supreme Court observed that the trial court had applied the clear and convincing evidence standard.

#### D. *Right of the Child to Court-Appointed Counsel*

The Oklahoma Supreme Court determined in *In re T.M.H.*<sup>295</sup> that children involved in termination proceedings have a statutory right to court-appointed independent counsel. The statutory authority and rationale upon which the court relied confirm unmistakably that this right extends to parent-initiated termination proceedings. The court found that appointment of counsel for children was mandated by both title 10, section 1109(b)<sup>296</sup> of the Juvenile Code, which provides for appointment of counsel for a child in proceedings "wherein termination of parental rights is a possible remedy," and title 10, section 24,<sup>297</sup> which, from its placement in the chapter on General Provisions, apparently applies to all actions relating to children. As discussed above in the context of a parent's right to counsel,<sup>298</sup> these statutes are clearly intended to include parent-initiated termination proceedings as well as those initiated by the state.

In *In re T.M.H.*, the court observed that the statutes guaranteed a child court-appointed counsel when requested, when it appeared to the court that it was necessary to protect the interests of the child,<sup>299</sup> or when a conflict of interest existed between a parent or guardian and the

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293. *In re C.M.G.*, 656 P.2d 262, 265 (Okla. 1982); *In re Adoption of Darren Todd H.*, 615 P.2d 287, 290 (Okla. 1980). In *Darren Todd* the court observed that the standard of clear and convincing evidence is used in other civil actions, including actions between private parties such as fraud actions, "where the interests at stake are deemed more substantial than mere loss of money." *Id.*

294. 708 P.2d 1100, 1101 (Okla. 1985).

295. 613 P.2d 468, 470-71 (Okla. 1980). Several other states also provide counsel for a child in termination of parental rights hearings. For a recent list of statutory authorities from twenty states providing for counsel for the child, see Parker, *supra* note 21, at 594 n.223. In addition, some states provide for appointment of a guardian ad litem. *Id.* at 595, n.224.

296. See *supra* note 255 for full text of § 1109(b).

297. See *supra* note 257 for full text of § 24.

298. See *supra* notes 257-58 and accompanying text.

299. 613 P.2d at 469-70 (citing OKLA. STAT. tit. 10, § 1109).

child.<sup>300</sup> However, the court was convinced that "in all termination proceedings there are potential conflicts between the interests of the children and those of both the state *and the parents*."<sup>301</sup> Because this potential conflict exists in all termination hearings, the court held that "independent counsel must be appointed to represent the children if termination of parental rights is sought."<sup>302</sup> Although *In re T.M.H.* was a juvenile proceeding, its holding did not appear to be limited to juvenile actions and its rationale is equally applicable to parent-initiated proceedings. The court observed that beneath each side's argument, made in terms of the best interests of the child, lay the desire of counsel for the parties to prevail for their client, who is not the child.<sup>303</sup> Only an attorney for the child can present and cross-examine witnesses with the sole interest of promoting the welfare of the child.<sup>304</sup> If the court found that even the attorneys for the state, whose ultimate goal is to protect the child,<sup>305</sup> had potential conflicts with the interests of the child, it is clear that the need for independent counsel for the child is even greater when the litigants are two parents, who clearly have personal interests which may conflict with the child's.<sup>306</sup>

Unfortunately, despite the clear application of both the underlying statutes and the court's decision in *In re T.M.H.*, the Oklahoma courts have not uniformly appointed counsel in parent-initiated termination hearings.<sup>307</sup> Of the four termination cases<sup>308</sup> instituted by a parent which have reached the Oklahoma Supreme Court during the past three years,

300. *Id.* at 470 (citing OKLA. STAT. tit. 10, § 24 (Supp. 1987)).

301. *Id.* at 470-71 (emphasis added).

302. *Id.* at 471.

303. *Id.* at 470. In a California ethics opinion, the State Bar Committee on Professional Ethics observed that an attorney for a parent in a custody proceeding does not represent the child's interest and a significant conflict of interest exists between the parent and child, such that it would be a breach of professional ethics for an attorney for a parent to suggest that counsel be appointed for the child, under circumstances where such appointment would be unusual. Cal. St. Bar Comm. on Prof. Ethics, Formal Opinion No. 1976-37, Reprinted in 1 CAL. FAM. L. REP. 1126 (1977).

304. *In re T.M.H.*, 613 P.2d 468, 470 (Okla. 1980).

Many commentators have used similar arguments to support the need for independent counsel for the child even in custody proceedings. *E.g.*, Note, *Custody Disputes Arising From Divorce: The Child's Need for Counsel in Pennsylvania*, 87 DICK. L. REV. 351 (1983); Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55 (1969); See Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 55 MASS. L.A. 229 (1970); Landsman & Minow, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising From Divorce*, 87 YALE L.J. 1126 (1978).

305. *Davis v. Davis*, 708 P.2d 1102, 1106 (Okla. 1985), *superseded by statute as stated in* L.R.R. v. R.D.R. (*In re R.R.R.*), 763 P.2d 94 (Okla. 1988). See *supra* notes 122-23, 126-28.

306. See *supra* notes 226-39.

307. The Oklahoma courts also do not yet appear to be appointing independent counsel for children in adoption proceedings. See, *e.g.*, *In re Adoption of J.L.H.*, 737 P.2d 915 (Okla. 1987); *In*

it appears from the opinions that counsel was appointed for the child in only one case, *Yarborough v. Yarborough*.<sup>309</sup> It is interesting to note that of the four cases, only in *Yarborough* does the opinion's summary of the record disclose any consideration by the trial judge regarding whether termination was in the best interests of the minor child.<sup>310</sup> Failure to appoint independent counsel for a child involved in parent-initiated termination proceedings further increases the significant risk that termination will be allowed when it fails to serve the interests of the child<sup>311</sup> and will in fact be used inappropriately to accomplish other purposes.<sup>312</sup>

#### E. *Necessity for Independent Expert Testimony*

Termination of parental rights in juvenile proceedings normally takes place only after extensive investigation has been conducted by social workers employed by the Oklahoma Department of Human Services and a civilian review board.<sup>313</sup> This investigation frequently involves

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*re* Adoption of A.G.K., 728 P.2d 1 (Okla. Ct. App. 1986). In neither case does an attorney for the child appear as counsel of record for the minor child.

Although the Oklahoma Supreme Court has not directly decided the issue of whether a child has the statutory right to appointment of independent counsel in adoptions, the majority in *Davis*, 708 P.2d at 1110, observed in dicta that in proceedings for adoption without consent under OKLA. STAT. tit. 10, § 60.6, counsel for the child is not required. No authority was cited in support of this statement, however, and it should be observed that Justice Opala, who wrote the majority opinion in *Davis*, dissented in *In re* T.M.H. and expressed strong disagreement with the requirement that counsel must be appointed to represent children in every case brought under OKLA. STAT. tit. 10, § 1130.

308. *In re* McNeely, 734 P.2d 1294 (Okla. 1987); *Griffith v. Griffith*, 730 P.2d 524 (Okla. 1986); *Yarborough v. Yarborough*, 708 P.2d 1100 (Okla. 1985); *Davis*, 708 P.2d 1102.

309. *Yarborough*, 708 P.2d at 1101.

310. *Id.* Even in *Yarborough*, it appears this was not considered until the original order terminating the father's rights was vacated following a motion for a new trial and the case was reopened to consider in an evidentiary hearing whether the best interests of the child would be served by severing the parental rights. The opinion does not indicate at what stage the counsel for the child was appointed.

311. *See supra* notes 171-213.

312. *See supra* notes 214-39.

313. OKLA. STAT. tit. 10, § 1115 (1981) (At dispositional hearing court may consider oral and written reports and adjourn hearing to receive reports); *Id.* § 1115.1 (Supp. 1983) (Department must prepare placement plan for any child placed outside the home, including inter alia, history of child and family, statement of conditions to be alleviated and methods to be used to correct conditions or achieve permanent placement, special programs available to child and parent, and conduct expected of parent prior to child's return home); *Id.* § 1116.1 (Supp. 1983) (requirement that the department prepare a report for each review hearing, every six months after removal of deprived child from home, containing summary of physical, mental and emotional condition of child, the conditions of the foster home, efforts of the parents to correct problems, and recommendations for further disposition; requirement that court must inquire as to extent of casework services being given parent and child; provision that attorney for child may also submit a report at each review hearing); *Id.* § 1116.3 (Supp. 1983) (requirement that citizen review boards appointed by judge review the case of every deprived child in placement every six months and submit findings and recommendations to the court regarding appropriateness of goals and objectives of placement plan and services provided to child and parent); *Id.* § 1135 (Supp. 1986) (requirement that Department of Human Services review and

obtaining medical or psychological evaluations.<sup>314</sup> Reports on this investigation are then considered by the court in determining whether termination is in the best interests of the child.<sup>315</sup>

Currently, there is no statutory requirement of independent expert testimony in parent-initiated termination proceedings. However, the need for expert evaluation is particularly critical if these actions continue to be allowed. The use of expert evaluation in inter-parental custody disputes has become commonplace and is increasingly regarded as essential.<sup>316</sup> Since custody determinations are always modifiable,<sup>317</sup> obviously the need for expert evaluation is far more critical in termination proceedings in which the parental bond is completely severed and the decision to terminate is final.<sup>318</sup> If it becomes apparent that termination was not in the child's best interests, neither the child nor the terminated parent may seek modification of the decision.<sup>319</sup>

The likelihood that parent-initiated actions could be misused as sanctions<sup>320</sup> or vehicles to serve the parents' needs<sup>321</sup> magnifies the need for independent expert evaluation to determine whether termination is truly necessary to protect a child from harm and would serve the child's best interests. Because termination has such a devastating impact on a

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assess each child committed to it to determine appropriate placement, which review must include an investigation of the personal and family history of the child, his environment, and any physical or mental examinations that are necessary.).

314. OKLA. STAT. tit. 10, § 1120 (Supp. 1986) (provision for court-ordered examination of child by physician or qualified mental health professional); *Id.* § 1135 (Supp. 1986) (provision for Department of Human Services to obtain any physical or mental examinations considered necessary for a child committed to custody of the Department).

315. OKLA. STAT. tit. 10, § 1115(a) (1981).

316. See Litwack, Gerber & Fenster, *The Proper Role of Psychology in Child Custody Disputes*, 18 J. FAM. L. 269, 282-300 (1979-80); Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 77 (1969). *Contra* Okpaker, *Psychology, Impediment or Aid in Child Custody Cases*, 29 RUTGERS L. REV. 1117 (1976).

317. OKLA. STAT. tit. 12, § 1277 (Supp. 1987). See *supra* note 139.

318. OKLA. STAT. tit. 10, § 1118 (1981) provides: "Any decree or order made under the provisions of this title may be modified by the court at any time; provided, however, that an order terminating parental rights or an order certifying the juvenile as an adult may not be modified." *Id.*

319. *Id.* In rare instances a parent whose rights had been terminated could seek to adopt back his or her own child. To do so, however, the parent must fall within a category of persons eligible to adopt, set forth in § 60.3 (1981), and either obtain the consent of the child's legal parent(s) or prove that grounds exist under § 60.6 (Supp. 1986) to adopt without their consent. Because the effect of this adoption would be to terminate the rights of the legal parent(s), unless the adoptive parent is married to the only legal parent at the time of the adoption; and because the legal parent would normally be the one who sought termination in the first place, it is extremely unlikely that adoption by a terminated parent would occur following parent-initiated termination.

320. See *supra* notes 214-19 and accompanying text.

321. See *supra* notes 226-36 and accompanying text.

child's emotional and psychological well-being,<sup>322</sup> at least one independent expert should be an experienced child psychologist or psychiatrist experienced at working with children of divorced parents. This level of expertise is needed because the expert must be capable of assessing whether continuation of the parental relationship constitutes a threat to the child that could not be alleviated by less restrictive means,<sup>323</sup> such as restriction or termination of visitation, and must have sufficient training in child development to foresee the psychological and emotional impact termination will have upon the child in later years.

While the parties may choose to employ their own experts, it is important that the court appoint an independent expert who will not be influenced by the desires of either party.<sup>324</sup> Compensation to this expert could be assessed as costs at the end of the proceeding, although the state may ultimately bear the burden of this cost if the parent to whom the cost should be assessed is indigent.

As long as the state allows parents to seek a remedy with such drastic consequences, it must provide procedures which afford defending parents their statutory and constitutional due process rights, and guarantee children affected that advocates and independent professional experts will be provided to attempt to focus the proceedings on the need to protect them from harm and promote their best interests.

## V. CONCLUSION

Parent-initiated proceedings to terminate parental rights, whether voluntary or involuntary, should be abolished. Such proceedings are constitutionally defective from the perspective of both a parent whose rights are involuntarily terminated and the child, each of whom possess fundamental interests in the benefits of an ongoing relationship. Moreover, because parent-initiated proceedings fail to serve the child's needs and offer the child no compensatory benefit, they contravene a fundamental policy long-endorsed by the Oklahoma courts and legislature that termination should never be allowed unless it serves the best interests of the child.

Involuntary termination of parental rights in actions initiated by the other parent cannot withstand the strict judicial scrutiny mandated by

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322. See *supra* notes 177-210 and accompanying text.

323. See *supra* notes 136-70 and accompanying text.

324. See Swann, *The Dangers in Using Court-Appointed Experts in Child Custody Cases*, THE JUDGES JOURNAL 17 (Winter 1988).



substantive due process when a fundamental right is extinguished. The circumstances under which these proceedings are initiated, and the permissible statutory grounds for bringing them, indicate that termination in this context is unnecessary to protect a child from harm. Under some circumstances, the statute is grossly overinclusive. More importantly, any legitimate concerns regarding the child's welfare that parent-initiated termination could address can be remedied by less restrictive alternatives under current Oklahoma law.

Because a child also has fundamental interests that emanate from the parental bond, recognition and heightened constitutional protection must be extended to the right of the child to preservation of the parent-child relationship when continuation of the relationship promotes the child's welfare. Parent-initiated termination actions, whether voluntary or involuntary, violate this constitutional right because such proceedings fail to serve the child's best interests. Termination deprives the child of the right to future financial support and exposes the child to a significant risk of psychological and emotional damage by abolishing the right of visitation. Because adoption is not the immediate goal of parent-initiated termination, normally no one is waiting to assume the responsibilities of the terminated parent. Thus, the child realizes no benefit to compensate for the detrimental effects of parent-initiated termination.

The Oklahoma courts and legislature have consistently maintained that in custody matters and juvenile proceedings, the court's duty and paramount concern is to serve the best interests of the child. Parent-initiated termination proceedings thus contravene a fundamental principle of family law and frustrate the underlying rationale for the state's intervention in familial relationships.

Although termination is only justified when it serves a child's best interests and is necessary to protect the child, the statutory provisions for parent-initiated termination create the risk that termination will be used simply to sanction a parent for willful failure to pay support. Use of termination as a sanction violates the parent's constitutional rights because less restrictive alternatives for punishment are available. Perhaps the greater injustice, however, is that termination in the context of parent-initiated proceedings punishes the parent at the expense of the child.

Finally, providing parents the opportunity to initiate termination proceedings, whether voluntary or involuntary, creates a substantial risk that termination will be employed to serve the emotional or financial needs of the parent(s) rather than the child. The negative consequences

of termination for the child and the absence of any overriding benefit compel the conclusion that retention of parent-initiated termination proceedings to satisfy a parent's personal needs is unjustifiable.

Thus, constitutional and public policy considerations dictate that the statutory grant of authority to parents to initiate termination proceedings should be eliminated. If this is not immediately accomplished, the Oklahoma courts and legislature must take several measures to guarantee adequate procedural protections in parent-initiated proceedings. First, the ambiguity in section 1130 must be resolved by requiring, through amendment or judicial pronouncement, that termination of parental rights can be ordered only after the trial court makes a specific judicial finding that termination is in the best interests of the child, regardless of who initiates the action. Second, the right to jury trial, currently recognized for parents threatened with termination in a juvenile proceeding, should be afforded defendants in parent-initiated proceedings. Third, indigent parents defending parent-initiated termination actions must be guaranteed a right to court-appointed counsel. Fourth, the party seeking termination must be required to establish the necessary allegations by clear and convincing evidence. Fifth and of particular importance, the court must ensure the appointment of independent counsel for every child whose parental bond is threatened in parent-initiated actions, a right currently afforded children in juvenile termination proceedings. Finally, in every parent-initiated termination proceeding, the court should require that an independent expert—a child psychologist or psychiatrist—conduct an assessment of the need for termination and whether termination is in the best interests of the child.

Provision of these procedural protections, however, will not cure the constitutional defects or policy problems with parent-initiated termination. Absence of these protections merely compounds the deficiencies of parent-initiated proceedings and increases the risk that termination in such proceedings will be used for inappropriate purposes.

