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SOUTH CAROLINA ADOPTION LAW: OUT OF THE CRADLE INTO THE TWENTY-FIRST CENTURY*

I. OVERVIEW

Recently married, Jane and Adam looked forward to starting a family together.¹ Although they were blessed with the birth of a beautiful daughter, April, who brought them a great deal of happiness, they wanted to give her a little brother or sister. For six years, to no avail, they tried to have another child. Jane described those six years as follows:

After years of countless infertility tests, fertility drugs, doctors and hospitals, I finally became pregnant about two years ago. We waited a while before telling our daughter about the baby. She was so excited when we did tell her. A week later, I had a miscarriage. This was devastating to all of us, especially our daughter, because she could not understand.

We went right ahead with more tests and fertility drugs and little hope from doctors of ever becoming pregnant again. We finally decided to stop all the tests, because it was draining us emotionally, mentally, and financially. Our doctor talked with us about adoption. After much prayerful consideration, we decided adoption “was” for us, and we decided to try to adopt.²

As Jane and Adam continued their hopeful vigil for another child, fifteen-year-old Hester was in the ninth grade. Hester became pregnant by her high school boyfriend and decided that, in good conscience, she could not keep the baby. After considering the alternatives, Hester decided to place her child for adoption. Hester’s doctor referred her to an attorney. After reviewing the

* The author expresses his appreciation to Professors Randall M. Chastain and Eldon D. Wedlock of the University of South Carolina School of Law, and his father, Fletcher D. Thompson of Thompson, Sinclair and Anderson in Spartanburg, South Carolina, for their invaluable assistance in the preparation of this Note.

1. Names in this case have been changed to protect the privacy of the parties.

2. Letter from adoptive mother to birth mother (names and date withheld for reasons of confidentiality) [hereinafter Letter from adoptive mother].

attorney's background file on prospective parents, Hester decided that Jane and Adam were best suited to raise her child. The attorney then contacted the couple and informed them of this possibility. Six weeks later Hester gave birth to a healthy baby boy; the adoption was completed, and April had a new baby brother.

Hester wrote a letter to her son to be opened when he matured enough to understand and appreciate its significance. The letter, in part, reads as follows:

To my baby,

I just want you to know that this was done purely out of love. Believe me it wasn't easy! I want you to understand that I am only 15 and really not capable of taking care of you at this time in my life. . . . I'm doing this because I want the best out of life for you. I really don't know exactly how much of this you will understand. I love you with all my heart and I always will. I never will stop thinking about what I have done, but I know from the bottom of my heart that who ever gets you will love you too! There will always be a place in my heart for you. . . . I wanted to give another person the chance to love you as much as I do. It's so hard to think about being without you but I think you will be with me in my heart . . . ³

Upon receiving Hester's child into their lives, Jane wrote Hester a letter, hoping to allay the young birth mother's fears. She wrote:

I received the letter^{4,5} yesterday that you wrote to your baby. I have read the letter many times and have cried each time. When we learned about you and the baby about six weeks ago, I was so excited that I immediately broke out in a rash! It was hard for us to believe that this was really happening. During the past six weeks, I have been overcome with many emotions. I have prayed for your well being as well as that of the baby. . . . Our daughter has been praying for a baby for years now. Anytime that she gets to "wish" for anything, (blowing out candles on a birthday cake, etc.) it's always for a baby. . . . Your baby will be given our love just as if I had had him myself. . . . My husband is a good, loving father. He will take plenty of time to be there for his child. He really

3. Letter from birth mother to infant child (names and date withheld for reasons of confidentiality).

likes "to play" and take care of children. He is already planning what he is going to do with "his son." I hope that this letter will relieve you of some of your anxiety that you are having at this time. Please note that you are constantly in my thoughts and prayers and that this will not stop once the baby is born. I wish you all the best in the future to come!⁴

Bringing a family together for a lifetime of happiness and love is one of the most rewarding legal endeavors for all parties involved. Equally important, adoption allows a hardworking young woman the opportunity to reach her potential without letting a mistake saddle her with responsibilities too great for her years. With these rich rewards, however, come weighty legal responsibilities and ethical obligations.

Any oversight by an adoption attorney easily can jeopardize the future of the adoptive family's life together. To be responsible for a child's removal from a family who has loved and cared for the child since birth is a burden no attorney wishes to bear. The bond established between the adoptive family and the child is undeniable⁵ and develops long before the birth of the child.⁶ The loss of even a *potentially* adoptable baby is routinely characterized as if the child "had died."⁷

Ethical obligations are equally important. The adoptive family provides extremely personal information and relies on the attorney's complete confidentiality. The attorney's counseling also is essential at this emotionally charged time. Further, the attorney's relationship to the birth mother is susceptible to charges of overreaching and coercion as young girls are asked to make adult decisions affecting the rest of their lives.

4. Letter from adoptive mother, *supra* note 2.

5. One attorney recalls bringing a baby into her new adoptive home to find the entire extended family awaiting her arrival. After a few moments of excited and emotional introduction, the adoptive grandmother, without a hint of irony, remarked "I think she has my eyes." This story characterizes the almost instantaneous bonding that often develops between an adoptive family and their adopted child. See Interview with Anonymous Member of the South Carolina Bar (December 18, 1988) (name withheld for reasons of confidentiality).

6. "For the past six weeks I feel as if I have been helping you carry him, in my heart." Letter from adoptive mother, *supra* note 2.

7. Describing her feelings upon learning that a birth mother had decided not to place her child for adoption, the prospective adoptive mother wrote, "We were devastated. It was as if someone had died again. This was the way we had felt after the miscarriage." *Id.*

This Note explores the attorney's role as practitioner and the far-reaching ethical considerations that accompany the practice of adoption law. The focus is on private adoption of unrelated children. Additionally, this Note suggests a philosophical framework through which an attorney's ethical obligations can be viewed. South Carolina's new adoption law⁸ is discussed in detail, compared to prior law, and examined constitutionally.

II. SOUTH CAROLINA'S PUBLIC POLICY FAVORING ADOPTION

Adoption in South Carolina finds its earliest roots in two recorded instances from the 1720s.⁹ Robert Stephens and his wife, after the death of their only daughter, took in and raised an orphan nephew, John Vicardge.¹⁰ At their death, they left their entire estate to John. Similarly, William Crook and his wife took in and raised their niece, who was not an orphan.¹¹ These cases apparently were arrangements of convenience among families instead of legally cognizable adoptions. In fact, "[t]he adoption of a child was a proceeding unknown to the common law. The transfer of the natural right of the parents to their children was against its policy and repugnant to its principles."¹² Adoption "is not a natural right"; it exists solely by virtue of statutory authority that "must be strictly construed."¹³ In effect, "[t]he general rule is that adoption of a child authorized by the laws of the state gives it the status of a child of the adoptive parent."¹⁴

Despite lack of a common-law precursor to statutory adoption law, South Carolina courts have demonstrated unswerving support for adoption. The courts have stated unambiguously that "[t]he state supports adoption in all ways."¹⁵ A precise

8. See S.C. CODE ANN. §§ 20-7-1650 to -1820 (Law. Co-op. 1976 & Supp. 1988).

9. See Kawashima, *Adoption In Early America*, 20 J. FAM. L. 677, 690 (1982).

10. See *id.*

11. See *id.*

12. *Driggers v. Jolley*, 219 S.C. 31, 36, 64 S.E.2d 19, 21 (1951).

13. *Ferguson v. Finch*, 310 F. Supp. 1251, 1254 (D.S.C. 1970); accord *Goff v. Benedict*, 252 S.C. 83, 86, 165 S.E.2d 269, 270 (1969).

14. *Cribbs v. Floyd*, 188 S.C. 443, 452, 199 S.E. 677, 682 (1938).

15. *Frasier v. McClair*, 282 S.C. 491, 496, 319 S.E.2d 350, 353 (Ct. App. 1984). The *Frasier* court even stated this policy in poetic terms, quoting the following anonymous poem entitled *The Adoptive Mother's Answer*:

Not flesh of my flesh

statement of the court's policy in favor of adoption is found in *Bradley v. Children's Bureau of South Carolina*.¹⁶ In *Bradley* the South Carolina Supreme Court recognized "that children are at times born into circumstances wherein their natural parents cannot or will not care for them, the State in its role as *parens patriae* developed the adoption process to assure stable homes for these children."¹⁷ Unfortunately, South Carolina adoption practices have not always promoted the stable home environment that purportedly follows the adoption process. Further, the profit motive of some attorneys superseded the best interests of the adopted child as some attorneys circumvented the adoption statutes or exploited the absence of necessary safeguards in the statutes.¹⁸

Not bone of my bone
But still miraculously
My own.
Never forget
For a single minute —
You didn't grow under my heart
But in it.

282 S.C. at 496, 319 S.E.2d at 353 (quoting *In re Shehady's Estate*, 83 N.M. 311, 313, 491 P.2d 528, 530 (1971)).

Another earlier case is reknown more for its hyperbolic flair than its instructive insights.

[T]he homes of many childless parents have been brightened and made happier because the [adoption] law. . . . [O]therwise they would have spent their early years in ignorance and vice, and in such surroundings have grown up to young manhood or young womanhood, simply to swell the overflowing ranks of the vicious and criminal classes of society.

Cribbs v. Floyd, 188 S.C. 443, 454, 199 S.E. 677, 682 (1938).

South Carolina's policy favoring adoption is mirrored by national leaders on both sides of the aisle. For example, now-President George Bush, when accepting the Republican party's nomination as its presidential candidate, stated, "We must change from abortion — to adoption. I have an adopted granddaughter. The day of her christening we wept with joy. I thank God her parents chose life." Acceptance Speech of Vice President George Bush (Republican National Convention, New Orleans, Louisiana, August 18, 1988). Senator Lloyd Bentsen, the Democratic candidate, stated, "I'm an adopted father, [I] have an adopted child, and certainly, I think adoption is the appropriate alternative." Interview with Senator Lloyd Bentsen, *This Week with David Brinkley* (ABC television broadcast, October 23, 1988).

16. 275 S.C. 622, 274 S.E.2d 418 (1981).

17. *Id.* at 625-26, 274 S.E.2d at 420.

18. See *infra* notes 19-33 and accompanying text.

III. SOUTH CAROLINA'S NOTORIOUS HISTORY OF ADOPTION

In an article entitled "Newborn Fever; Flocking to an Adoption Mecca,"¹⁹ *Time* magazine described the "hundreds of couples who flock" to South Carolina each year seeking its "unique blend of lax laws, aggressive lawyers and open-minded newspapers that accept classified ads from couples seeking babies."²⁰ Couples from around the country advertised in South Carolina newspapers. One classified ad read as follows:

ADOPTION: Loving, financially secure, college educated couple. Much love & happiness to give to adopted white newborn. We invite you to live with us. Share our vacations. Live like a queen. All expenses paid. Legal and confidential. Please consider this an opportunity for a new start for you in a booming area (Houston).²¹

Another couple chose not to limit their adoption possibilities: "Happily married couple wish to adopt white newborn and/or toddler up to 2 years"²² Couples arrived by the hundreds to South Carolina in search of adoptive children because "South Carolina's adoption laws [were] full of loopholes large enough to wheel a baby carriage through."²³

Liberal waiver provisions diluted the few precautions provided in the South Carolina statutes. For example, judges could waive the required six-month waiting period before a final adoption.²⁴ This practice allowed couples to fly into the state and leave the same day, baby in arms and adoption complete.²⁵ Although one state statute required a home study to be conducted of prospective adoptive couples in interstate adoptions to ascertain their fitness,²⁶ this requirement routinely was waived.²⁷

19. *Newborn Fever, Flocking to an Adoption Mecca*, TIME, Mar. 12, 1984, at 31 [hereinafter *Newborn Fever*].

20. *Id.*

21. *Id.*

22. *The State*, February 27, 1984, at 7-A, col. 4 (emphasis added).

23. *Id.*, February 29, 1984, at 1-A, col. 5.

24. *See* S.C. CODE ANN. § 10-2587.11 (Michie Supp. 1975).

25. *See Newborn Fever*, *supra* note 19, at 31.

26. *See* S.C. CODE ANN. § 20-7-1980 (Law. Co-op. 1976).

27. A review of the records of the South Carolina Children's Bureau by *The State*, a Columbia, South Carolina newspaper, indicated that the majority of out-of-state adoptions handled by one of South Carolina's busiest adoption attorneys "illegally circumvent[ed] the Interstate Compact on Children." *The State*, February 27, 1984, at 7-A, col.

Similarly, the law required a home study of prospective parents from within the state, but this requirement was waivable for "good cause."²⁸ Good cause was found more often than not.²⁹

The most striking deficiency in South Carolina's earlier adoption statute led *The State* newspaper to proclaim on page one that "South Carolina Is The Nation's Baby-Buying Supermarket."³⁰ South Carolina Senator Nick Theodore admitted that South Carolina earned a national reputation as a "baby selling capital" because "[t]here was no law whatsoever. Our law is void when it comes to selling of a child."³¹ An attorney in the Greenville, South Carolina Solicitor's Office stated that "[s]elling children should be illegal, but in South Carolina it is not. It's only immoral, and that is something that we cannot enforce."³² South Carolina's notoriety did not go unnoticed by the national press. One solicitor was quoted in the *New York Times* as stating "I researched it and had an assistant research it and we were unable to find a law in South Carolina that prohibits the outright sale of children."³³

5.

28. S.C. CODE ANN. § 10-2587.10 (Michie Supp. 1975).

29. Of thirty-nine adoptions completed by one Charleston law firm in 1982, no home study was reported for thirty-two of those adoptions. See *The State*, February 27, 1984, at 7-A, col. 5. Of twenty-four Charleston County adoptions in 1981, no home studies were reported. See *id.* The apparently indiscriminate waiver of home studies may have contributed to the deaths of four infants. An article in *The State*, a Columbia, South Carolina newspaper, describes the tragedy as follows:

The distraught Georgia woman begged an upstate South Carolina obstetrician to find her one more baby: Her own three had all died mysterious crib deaths and she was unable to bear more children.

Touched by the woman's grief, the doctor did find a baby. . . . Two weeks later the fourth baby was also dead, and the woman confessed she had smothered him against her breast, as she had the other three, while her husband was at work.

Id. March 1, 1984, at 1-A, col. 6.

30. *Id.*, February 26, 1984, at 1-A, col. 1.

31. *Id.*, June 7, 1984, at 1-C, col. 4.

32. *Newborn Fever*, *supra* note 19, at 31. The controversy centered around the report of Simpsonville, South Carolina woman who claimed to have sold her baby for \$3,500, then changed her mind and demanded that her child be returned. See *N.Y. Times*, March 4, 1984, at L31, col. 1.

33. *Id.* at L31, col. 3. The South Carolina Attorney General reached a similar conclusion. "In summary, the law in South Carolina concerning the prohibition against the sale or gift of a child is presently uncertain. Loopholes exist within our present laws which permit such sales or gifts in various forms. This office, therefore, recommends that the general assembly enact legislation closing those loopholes." R. CHASTAIN, *THE LAW OF DOMESTIC RELATIONS IN SOUTH CAROLINA* 169 (1986) (quoting unpublished Op. Att'y Gen.

IV. AN ANSWER TO THE CALL FOR REFORM: THE SOUTH CAROLINA ADOPTION ACT

A. *Baby Selling Outlawed*

On June 15, 1984, the front-page headline of *The State* newspaper proclaimed: "Legislature Outlaws Sales of Babies";³⁴ the South Carolina legislature had answered the call for reform. The statute enacted mandated that "[n]o person may sell or buy a minor child, or request, or accept, receive, or pay any fee . . . as consideration for relinquishing the custody of a child for adoption."³⁵ If found guilty, a person could be fined \$10,000, imprisoned for ten years, or both.³⁶ This statute was the state's first step toward erasing its besmirched national image as South Carolina joined the forty-nine other states that prohibit the sale of children.³⁷

The statute allows "reasonable costs" to be assessed if they are "reimbursement for expenses incurred"³⁸ such as "actual medical [costs]," or "reasonable living expenses incurred by the mother . . . for a reasonable period of time."³⁹ Conversely, other states, North Carolina, for example, do not permit any payments to the birth mother, even for hospital expenses or prenatal care.⁴⁰ One North Carolina attorney fears that these strict regulations discourage women from visiting their doctors during pregnancy,⁴¹ a dangerous result avoided by the South Carolina statute. Although South Carolina's statute had partially filled a blatant legislative void, Senator Nick Theodore called the Act "a stopgap measure" and recognized that the challenge lay ahead to address the other "complex" adoption law issues.⁴²

to William B. Traxler, Jr., Solicitor for the Thirteenth Judicial Cir. (April 30, 1984)).

34. *The State*, June 15, 1984, at 1-A, col. 1.

35. S.C. CODE ANN. § 16-3-1060 (Law. Co-op. Supp. 1988).

36. *See id.*

37. *See Baby Brokers: How Far Can a Lawyer Go?*, 9 NAT'L L.J. 22 (1987).

38. S.C. CODE ANN. § 16-3-1060 (Law. Co-op. Supp. 1988).

39. *Id.* § 20-7-1690(F).

40. *See* N.C. GEN. STAT. § 48-37 (1984).

41. *See Adoption Debate Reopened*, 74 A.B.A. J., 30, 31 (March 1, 1988).

42. *See The State*, June 15, 1984, at 1-A, col. 1.

B. Investigation and Reports

In May 1986 the South Carolina legislature met that challenge, passing a thoroughly revised version of the Adoption Act. Perhaps acknowledging that the legal loopholes of the former statutes were larger than their content, the legislature enacted sweeping changes. The Act became effective December 3, 1986. Responding to one of the most abused features of the pre-1986 act, the new statute mandates home studies of prospective adoptive couples, and the liberal waiver provisions are eliminated. The statutory pre-placement investigation requires a detailed evaluation.⁴³ If an adoptive couple does not receive a child within one year, the investigation must be updated before final placement.⁴⁴

The new Act requires both an examination of the biological parents' medical history and a postplacement investigation of the adoption home.⁴⁵ A detailed list of the requirements for these investigations is set forth in the statute.⁴⁶ For example, the South Carolina Department of Social Services must certify persons conducting these investigations,⁴⁷ and a directory of all certified investigators is available. These investigation and reporting provisions are important additions to the Act. Previously, secretaries of adoption attorneys — hardly disinterested parties — reportedly handled some investigations.⁴⁸ Qualified professionals now handle this important task. These investigations hopefully will prevent the tragic reoccurrence of another woman asking her doctor to give her just "one more baby."⁴⁹

43. See S.C. CODE ANN. § 20-7-1740 (Law. Co-op. Supp. 1988).

44. See *id.*

45. See *id.* § 20-7-1750.

46. See *id.*

47. See *id.* These investigators may charge a reasonable fee subject to approval by the Department. See *id.* For information, contact the South Carolina Department of Social Services, Post Office Box 1520, Columbia, S.C. 29202-1520.

48. See *The State*, Feb. 29, 1984, at 1-A, col. 6.

49. See *supra* note 29.

C. Interstate Adoption

1. The Requirement of Unusual or Exceptional Circumstances

Not only is the legislative purpose of the Adoption Act “to provide for the well-being of the child,”⁵⁰ the Act also is designed, given the small number of adoptable children presently available,⁵¹ to afford South Carolinians the opportunity to adopt.⁵² The statute allows nonresidents to adopt only in certain prescribed instances, for example when the child has special needs,⁵³ public notoriety has surrounded the child,⁵⁴ or one of the adoptive parents is in the military.⁵⁵ Finally, the statute permits interstate adoptions when “there are unusual or exceptional circumstances such that the best interests of the child would be served by the placement with or adoption by nonresidents of this State.”⁵⁶

No four words have provoked more confusion or disagreement at the adoption bar than “unusual or exceptional circumstances.”⁵⁷ The phrase is not new to South Carolina adoption law; it can be found in the statutory language as early as 1975,⁵⁸ yet courts routinely waived this requirement.⁵⁹ Under the present statute, however, the court must include in its order “specific findings of fact as to the circumstances allowing . . . adoption of a child by a nonresident.”⁶⁰

Legislative history of the Act reveals that the “unusual and exceptional circumstances” language arose as much from politi-

50. S.C. CODE ANN. § 20-7-1647 (Law. Co-op. Supp. 1988).

51. See *infra* notes 302-305 and accompanying text.

52. “Children may be adopted by or placed for adoption with residents of South Carolina only . . .” S.C. CODE ANN. § 20-7-1647 (Law. Co-op. Supp. 1988).

53. See *id.* § 20-7-1670(a).

54. See *id.* § 20-7-1670(b).

55. See *id.* § 20-7-1670(d).

56. *Id.* § 20-7-1670(e).

57. See *infra* notes 62-68 and accompanying text.

58. See *id.* § 10-2587.4 (Michie Supp. 1975).

59. “One reason South Carolina has become a mecca for adoptive couples from other states is its loose and indefinite provision for out-of-state adoptions. State law says out-of-state parties may adopt a child here ‘under unusual or exceptional circumstances,’ but it does not provide any guideline for determining what is unusual or exceptional.” The State, Feb. 29, 1984, at 19-A, col. 2-3.

60. S.C. CODE ANN. § 20-7-1670 (Law. Co-op. Supp. 1988).

cal compromise as it did from substantive policy. During the debates on the adoption bill, two vocal camps developed — one in favor of granting broad authority for interstate adoption, the second advocating a total ban on out-of-state adoption. The compromise language resolved tension surrounding the bill and secured its passage. Nevertheless, the compromise also created another tension: uncertainty surrounding what factors constitute “unusual or exceptional circumstances” and how adoptions can be finalized absent this knowledge.

The March 1988 amendments eased this tension by providing a pre-birth hearing to determine the existence of “unusual or exceptional circumstances.”⁶¹ Therefore, if an attorney is unsure if an interstate adoption satisfies the “unusual or exceptional circumstances” test, this uncertainty can be resolved without subjecting the parties to the emotional anguish inherent in a failed adoption.

No South Carolina court has yet defined “unusual or exceptional circumstances.” Some family court judges maintain that the legislature designed the Act to prevent interstate adoption entirely, and staunchly refuse to grant these adoptions under any circumstances.⁶² Other judges, routinely upon motion of the adoptive couple, find “unusual or exceptional circumstances” to exist.⁶³ Unfortunately, but not unexpectedly, this dichotomy may prompt judge-shopping in some jurisdictions. The need for legislative or judicial definition of this language is obvious.

The following factual scenarios, developed through interviews with adoption attorneys and family court judges statewide, provide guidance as to what will likely satisfy the test in courts:

(1) A birth mother testifies that because of her close friendship with the out-of-state adoptive family, she will place the child for adoption only with them. If not allowed, she will abort the child or not place the child for adoption.

(2) Given the special obligations placed on the adoptive family in an open adoption⁶⁴ of nonblood related persons, an

61. *See id.*

62. Telephone interviews with South Carolina Family Court judges (January - July 1989).

63. *Id.*

64. “An open adoption occurs when, prior to the adoption, it is agreed in writing that the child will have continuing contact with one or more members of his or her biological family after the adoption is completed.” Amadio and Deutsch, *Open Adoption*:

adoptive family's willingness to undertake these obligations may be considered unusual and exceptional circumstances.

(3) An adoptive family pays the living and prenatal expenses of a birth mother who agrees to place her child for adoption with that family. The adoptive family later moves out of state prior to the birth of the child.

(4) One of the legislative purposes of the Act is to allow South Carolina residents the opportunity to adopt.⁶⁵ If the adoptive family has strong ties to the state, such as extended family members living in South Carolina, this legislative purpose arguably is achieved and therefore constitutes unusual and exceptional circumstances.

(5) The birth mother has expressed more than the usual curiosity about the adoptive family and a court fears the confidentiality of the adoption process could be jeopardized.

A second tier of arguments that can be made in attempting to satisfy the "unusual or exceptional circumstances" requirement focus on the birth mother's view of the best interest of the child. Examples of these arguments are as follows:

(1) The mother desires to have the child raised by adoptive parents of a specified religion.

(2) The adoptive family is selected from a list of nonidentifying background profiles as being best suited to give the child a happy home.

The difficulty with this second tier of arguments is that the Act does not specify how a child's best interest should be determined: are a child's best interests solely a matter of judicial discretion, or do the wishes of the birth mother deserve substantial deference?

First, one may argue that the person giving up her rights in a child should be the last person to determine the best interests of that child. This approach, however, would operate to discourage adoptions; many birth mothers consent only because they believe their child will be placed in a home they consider suitable.

Second, if a birth mother offers her consent to an adoption

Allowing Adoptive Children to "Stay in Touch" With Blood Relatives, 22 J. FAM. L. 59, 60 (1983).

65. See *supra* notes 50-52 and accompanying text.

contingent on her child being placed with a certain family, a strong argument exists that the State cannot justifiably place a child anywhere but in the home selected by the birth mother. South Carolina courts have recognized the principle that the birth mother's consent "lies at the foundation of our adoption statute."⁶⁶ If that consent is granted based on a birth mother's belief that her child is to be placed with a certain family or a family possessing certain specified characteristics, the State cannot place the child with another family without obtaining the birth mother's unconditional consent or approval of the new adoptive family. Any other result would condone a state-sponsored manipulation of the birth mother's freedom of choice and erode the consent agreement, which purportedly is the foundation of the adoption statute.

Admittedly, to elevate the birth mother's desires to a different level probably would strip much force from the "unusual or exceptional circumstances" language. Nevertheless, given the safeguards of the Interstate Compact on the Placement of Children⁶⁷ and the constitutionally protected relationship a birth mother enjoys with her child,⁶⁸ the State's interest in limiting adoptions to South Carolina residents pales in comparison.

2. *The Interstate Compact on the Placement of Children*

The State's interest in protecting children is at the core of the adoption statute.⁶⁹ It is most compelling concerning the children placed out of state. In that case, the State has no assurance that the same protections and services that it provides will be available in the receiving state. The need for regulation of interstate placements gave rise to the Interstate Compact on the Placement of Children (Compact).⁷⁰ South Carolina, along with forty-nine other states, is a member of the Compact, which is "a

66. *Hucks v. Dolan*, 288 S.C. 468, 470, 343 S.E.2d 613, 614 (1986).

67. See *infra* notes 69-83 and accompanying text.

68. See *infra* notes 154-172 and accompanying text.

69. "The purpose of this subarticle is to . . . provide for the well-being of the child" S.C. CODE ANN. § 20-7-1647 (Law. Co-op. Supp. 1988).

70. See S.C. CODE ANN. § 20-7-1980 (Law. Co-op. 1976 & Supp. 1988). The exceptions are New Jersey, the District of Columbia, Puerto Rico, and Guam. See Oney, *Legal Aspects of Interstate Adoptions*, 38 J. Mo. B. 428 (1982).

contract among the states that enact it.”⁷¹ The Compact contains ten articles that provide the scope of its coverage, the procedures for interstate adoptions, and the protections mandated. In an effort to safeguard both the child and the parties involved in the child’s adoption, the Compact: (1) provides the sending state the opportunity to obtain home studies and evaluations of the proposed adoptive family;⁷²

(2) allows the receiving state the opportunity to insure that the placement is not “contrary to the interests of the child”⁷³ and that the receiving state’s laws and policies have been followed before placement is approved;⁷⁴

(3) guarantees the child’s legal and financial protection by fixing these responsibilities with the sending individual;⁷⁵

(4) insures that the sending individual does not lose jurisdiction over the child after the child moves to the receiving state;⁷⁶ and

(5) the Adoption Act also allows the sending individual the opportunity to obtain reports on the child’s adjustment and progress in the placement.⁷⁷

Each state appoints an administration to oversee compliance.⁷⁸ Out-of-state placements are subject to the Compact if the receiving and sending states are members of the Compact,⁷⁹ however, some requirements of the Compact may be waived if the receiving party is a close relation to the adoptive child.⁸⁰

71. The Secretariat to the Ass’n of Adm’rs of the Interstate Compact on the Placement of Children, *Guide to the Interstate Compact on the Placement of Children* 3 (June 1985). The purpose of the Act is “to cooperate with [party states] in the interstate placement of children.” S.C. CODE ANN. § 20-7-1980 (Law. Co-op. 1976).

72. See S.C. CODE ANN. § 20-7-1980(1)(a)-(c) (Law. Co-op. 1976).

73. *Id.* § 20-7-1980(3)(d).

74. *Id.* § 20-7-1980(3)(a).

75. See *id.* § 20-7-1980(5)(a).

76. See *id.* § 20-7-1980(5).

77. See *id.* § 20-7-1740(B) (Law. Co-op. Supp. 1988).

78. See § 20-7-1980(7). South Carolina’s Compact Administrator currently is James L. Solomon, Jr., Commissioner of the South Carolina Department of Social Services. The Deputy Administrator for Adoption Services currently is Ms. Mary Jo Morrison, South Carolina Department of Social Services, P. O. Box 1520, Columbia, South Carolina 29202 (803) 734-5670.

79. “The Interstate Compact on the Placement of Children is hereby enacted into law and entered into with all other jurisdiction legally joining therein in form substantially as follows: . . .” *Id.* § 20-7-1980.

80. See *id.* § 20-7-1980(8)(a).

State placements made in violation of the Compact constitute a violation of the "laws respecting the placement of children of both the state in which the sending agency is located or from which it sends or brings the child and of the receiving state."⁸¹ Both jurisdictions may levy penalties on violators.

Additionally, since 1980, several courts have ordered that illegally placed children be returned to the sending state. In *In re Adoption of T.M.M.*⁸² the Montana Supreme Court ordered the adoptive child removed from the home of the adoptive family and returned to the birth mother based on the adoptive parents' failure to comply with terms and procedures of the Compact. In another instance the courts of the sending state assumed jurisdiction over the child, removed the adoptive child from the perspective family's care, and placed the child in a foster home. The court ordered that the adoptive couple have a home study, but before completion of the study, the birth mother revoked her consent to adopt, and the child was returned to the birth parents.⁸³ Because adoption laws differ so greatly among the states, any adoption attorney attempting to make an interstate placement must have knowledge of both the sending and receiving states' child placement laws and approach interstate adoptions with considerable caution.

D. Consent to Adoption by Birth Mother

South Carolina case law has decreed that "[c]onsent lies at the foundation of our adoption statute. The court cannot issue a valid adoption decree unless the parent has consented or forfeited her . . . parental rights through abandonment or misconduct."⁸⁴ The Act defines consent as "the informed and voluntary release in writing of all parental rights,"⁸⁵ and prohibits consent obtained through duress or coercion.⁸⁶ Clearly, therefore, the coercive tactics used by some lawyers to obtain the birth mother's consent negate the public policy behind the adoption law.⁸⁷ Be-

81. *Id.* § 20-7-1980(4).

82. 186 Mont. 460, 608 P.2d 130 (1980).

83. *See* Oney, *supra* note 70, at 429.

84. *Hucks v. Dolan*, 288 S.C. 468, 470, 343 S.E.2d 613, 614 (1986).

85. *See* S.C. CODE ANN. § 20-7-1650(f) (Law. Co-op. Supp. 1988).

86. *See id.* § 20-7-1700(A)(10).

87. One attorney threatened pregnant women with jail sentences if they would not

hind this egregious conduct lies the notion that birth mothers considering adoption “‘are a bunch of welfare bimbos’ who get more consideration for their rights than they deserve.”⁸⁸

The most delicate task for the adoption attorney perhaps is obtaining the birth mother’s consent, a task requiring high ethical standards.⁸⁹ Developing a relationship of mutual trust and respect is essential to this process. One important element in a birth mother’s decision is her feeling that every interested party, including the adoptive parents’ attorney, wants the best for her and her child. An insensitive word or act — as simple as failing to return a phone call — could jeopardize an adoption. Throughout the pregnancy, the adoption attorney repeatedly should confer with the birth mother, gauge her need for reasonable living expenses,⁹⁰ and assess her state of mind concerning the adoption. Additionally, the attorney should inform her of her legal rights involving adoption and may offer emotional support.⁹¹

Another important step suggested by statute is for an adoption attorney to refer the pregnant woman to trained counselors⁹² to ensure that a woman’s decision to place her child for adoption, in fact, is her settled intention.⁹³ This practice protects not only the emotional psyche of the birth mother, it also

sign the consent form. See *Baby Brokers: How Far Can a Lawyer Go?*, 9 NAT’L L.J. 22, 24 (1987)[hereinafter *Baby Brokers*]. One young woman was lied to about her stage of pregnancy, advised that she was four months pregnant, not two months, therefore effectively eliminating the abortion alternative. See *60 Minutes: Baby For Sale* (CBS television broadcast, July 27, 1975).

88. The State, Feb. 26, 1984, at 6-A, col. 6 (quoting an unidentified South Carolina family court judge).

89. See *infra* notes 294-312 and accompanying text.

90. See S.C. CODE ANN. § 20-7-1690(F)(1) (Law. Co-op. Supp. 1988).

91. A lawyer should advise her client of the possible effect of each legal alternative, bringing to this decision-making process the fullness of her experience and objective viewpoint. In assisting her client to reach a proper decision, a lawyer should point out those factors that may lead to a decision that is *morally*, as well as legally, permissible. She may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client and not for herself. See CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-8 (1989) (emphasis added).

92. S.C. CODE ANN. § 20-7-1700(A)(8) (Law. Co-op. Supp. 1988) states that the birth mother must understand that no consent should be given if she needs or desires “psychological or legal advice, guidance, or counseling.”

93. See Telephone interview with Laurie T. Williams, Ph.D., P.C., Clinical Psychologist, Professional Psychotherapy Associates, Harriman, Tennessee 37748 (June 30, 1989).

protects the prospective adoptive parents from the loss of a child they have grown to love.⁹⁴ Additionally, prior counseling may evidence the voluntariness of her consent.

Surprisingly, most birth mothers are not aware that the attorney has a vested interest in persuading them to give up their babies,⁹⁵ with the result that the attorney is particularly susceptible to charges of overreaching and coercion. Therefore, the attorney's disclosure of his financial relationship with the prospective adoptive family is essential. Further, he must explain the full gambit of the birth mother's legal options.⁹⁶

The Act also dictates the content of the consent form.⁹⁷ At the core of the birth mother's consent to adoption are three basic principles: (1) that she understands she is forfeiting all rights and obligations with respect to the child;⁹⁸ (2) that once her consent is given it cannot be withdrawn except by order of the court upon a showing that it is in the best interests of the child *and* was not voluntary;⁹⁹ and (3) that after the final decree of adoption, her consent is irrevocable.¹⁰⁰ To prevent later charges of coercion and involuntariness, some attorneys' consent forms require the birth mother to initial each statement separately.

An additional precaution prescribed by statute is that the consent form be signed in the presence of two witnesses, one of whom must be a family court judge, an attorney who does not represent the prospective adoptive couple, or a person certified by the Department of Social Services.¹⁰¹ While the statute allows the attorney representing the couple to be one of the two witnesses, this practice poses ethical questions. Clearly, the birth mother's willingness to sign a consent form is in the attorney's

94. See *infra* note 7.

95. See L. McTAGGART, *THE BABY BROKERS* 276 (1980).

96. At least one South Carolina attorney asserts that the attorney representing the adoptive parents should not undertake the task of informing the birth mother of her legal rights. In fact, this attorney argues that the potentiality of charges of overreaching is so great that the attorney should have no contact with the birth mother. Instead, he should direct all inquiries to the birth mother's attorney. The birth mother's attorney arguably can champion the birth mother's needs more aggressively and will explain comprehensively the birth mother's legal alternatives. Interview with anonymous member of South Carolina Bar (March 18, 1989) (name withheld for reasons of confidentiality).

97. See S.C. CODE ANN. § 20-7-1700(A) (Law. Co-op. Supp. 1988).

98. See *id.* § 20-7-1700(A)(6).

99. See *id.* § 20-7-1700(A)(7).

100. See *id.*

101. See *id.* § 20-7-1705(1)-(3).

professional and financial interest. The attorney is thus subject to charges of overreaching or coercion, so he should not serve as a witness if possible. If no other person is available who meets the statutory requirements, the attorney should give the other witness an opportunity to talk with the birth mother alone and uninterrupted so that he can form his own opinion concerning the birth mother's state of mind. Then, when the birth mother is prepared to sign, the attorney may enter the room and witness the signing.

Timing of the signing of the consent form presents additional opportunities for later claims of involuntariness. The Adoption Act does not address the question of when a release may be signed. The Draft ABA Model State Adoption Act proposes that a "consent . . . of a biological mother may not be taken until forty-eight (48) hours after birth of the adoptee."¹⁰² This provision is designed to "insure clear thinking on the part of the mother, yet [be] short enough that the consent can be taken before the infant leaves the hospital."¹⁰³ To further these aims, at a minimum, adoption attorneys should follow a self-imposed rule to refrain from offering the consent form for signature until twenty-four hours after birth. Even then, the attending physician should verify that the birth mother is fully aware of her actions.

E. Withdrawal of Consent

Every adoption attorney fears receiving a notice of withdrawal of consent from a birth mother. To an adoptive family, this could be catastrophic. For this reason, the adoptive family should be cautioned that even though a birth mother rarely has the child returned to her custody, this situation is not inconceivable. There are three possible categories of withdrawal of consent cases: (1) consents that are *void ab initio*; (2) consents that are involuntary or obtained through coercion or duress; and (3) consents that are voluntary, yet the birth mother later changes her mind and seeks to have the child returned.

Certainly, if the natural parent never signed the consent

102. ABA Model State Adoption Act § 11, reprinted in 19 FAM. L.Q. 103, 113 (1985) (Tentative Draft 1984).

103. *Id.* (quoting comments to draft).

form or her signature was obtained through fraud, an adoption will be considered null and void.¹⁰⁴ Further, if the natural parent attempted to reserve the right to visit the child after the adoption decree is entered, the court will find that this conditional relinquishment is "inconsistent with consent"¹⁰⁵ and declare the consent invalid.

The second category of consent withdrawal arises when a birth mother alleges that her consent arose through duress, coercion, or was for some other reason involuntary. South Carolina Code Section 20-7-1720¹⁰⁶ sets out two basic requirements for withdrawal of consent: (1) the consent must have been involuntarily given *and* (2) the withdrawal of consent must be in the best interest of the child. To allow withdrawal of consent only upon a showing of lack of voluntariness or duress would eliminate the "best interests" requirement. Therefore, a close reading of the statute indicates that absent fraud or an invalid consent, a birth mother's consent cannot be withdrawn even if it was not fully voluntary unless she can also satisfy the best interests of the child test. Under some circumstances, the harshness of this statutory mandate is difficult to justify. If, however, a birth mother could prove that her consent was granted under excessively coercive circumstances, this may rise to the level of fraud and thereby render the consent invalid.

South Carolina courts are reluctant to find that the consent was involuntary. For example, in *Phillips v. Baker*,¹⁰⁷ sixteen-year-old Lisa Phillips gave birth to a baby girl on January 25, 1982. The next day Lisa signed a consent to adoption form. On January 27, the Bakers took the child home from the hospital and filed an adoption petition. A week later, Lisa changed her mind and filed a petition to withdraw consent. The court found the consent, which was signed in the presence of the birth mother's parents, her attorney, and a hospital social worker, to be voluntary.¹⁰⁸ The court adopted a rigid standard for estab-

104. See *Wold v. Funderburg*, 250 S.C. 205, 157 S.E.2d 180 (1967); see also *Lowe v. Clayton*, 264 S.C. 75, 212 S.E.2d 582 (1975).

105. *McLaughlin v. Strickland*, 279 S.C. 513, 517, 309 S.E.2d 787, 790 (Ct. App. 1983); see also *In re Anonymous Member of the South Carolina Bar*, Order of South Carolina Supreme Court, February 21, 1989.

106. S.C. CODE ANN. § 20-7-1720 (Law. Co-op. Supp. 1988).

107. 284 S.C. 134, 325 S.E.2d 533 (Ct. App. 1985).

108. See 284 S.C. at 137, 325 S.E.2d at 535.

lishing duress: the birth mother must show “a condition of mind produced by improper extensive pressure or influence that *practically destroys* the free agency of a party and causes him to do an act or form a contract not of his own volition.”¹⁰⁹

The *Phillips* court also recognized that the traditional view was that consent could be withdrawn anytime before the final adoption decree.¹¹⁰ The court, however, noted the following:

[T]he more modern trend disallows the revocation of consent voluntarily given particularly where the adoptive parents have taken the child into their home in *reliance* upon the consent. . . . [T]he right to revoke consent is not absolute, and . . . the trend is in favor of enforcing consent when voluntarily given and accompanied by reliance on the part of the adoptive parents. The South Carolina statutory adoption scheme leaves the question of withdrawal in the judge’s discretion, assuming the Consent to Adopt is on file.¹¹¹

109. *Id.* (quoting *Cherry v. Shelby Mut. Plate Glass & Casualty Co.*, 191 S.C. 177, 183, 4 S.E.2d 123, 126 (1939)) (emphasis added). Additionally, the court determined whether withdrawal of consent was in the child’s best interests. After carefully examining Lisa’s home environment, the court discovered that her father had referred to the unborn child as a “bastard” who would not be welcomed in his home. *See id.* at 136, 325 S.E.2d at 534. The adoptive parents were found to be “mature, settled individuals.” *Id.* Lisa argued that in considering the best interests of the child, presumptive weight should be given her biological relationship, not the maturity and stability of the adoptive couple. *See Domestic Relations, Annual Survey of South Carolina Law*, 38 S.C.L. REV. 111, 114 (1986) [hereinafter *Domestic Relations*]. While this decision is described by the trial judge as “not easy,” 284 S.C. at 136, 325 S.E.2d at 535, the court found that the best interests of the child demanded continued custody of the adoptive family. The Act clearly states that “when the interest of a child and an adult are in conflict, the conflict must be resolved in favor of the child.” S.C. CODE ANN. § 20-7-1647 (Law. Co-op. Supp. 1988). Some jurisdictions assert that “the status of the natural parent is so vital in determining the best interest of the child that it may offset . . . the cultural and material advantages the adoptive parents might provide.” *See Domestic Relations, supra* at 109. Even so, the blood relationship is not given conclusive weight but only is considered as one factor; when a great difference exists between the parties’ cultural and material factors, the biological tie probably will not tip the scale. *See id.* Apparently, therefore, a birth mother begins withdrawal of consent proceedings with the scales of justice weighed against her claim. This presumption against the birth mother is particularly true when the child has been in the adoptive home long enough for familial bonds to develop. In *Phillips* the child had been in the adoptive home for two years when the Supreme Court heard the case, and the family had “formed a bonding relationship with the child.” 284 S.C. at 136, 325 S.E.2d at 535.

110. *See* 284 S.C. at 137, 325 S.E.2d at 535.

111. *Id.* (quoting *Ellison v. Camby*, 269 S.C. 48, 51, 236 S.E.2d 197, 198 (1977)) (emphasis added) (citations omitted). *Compare* *Driggers v. Jolley*, 219 S.C. 31, 64 S.E.2d 19 (1951) (family court lost jurisdiction to proceed with adoption when natural parents

Section 20-7-1720 codifies this modern trend and removes the requirement of reliance. Had the *Phillips* decision been made after the passage of section 20-7-1720, the best interests analysis would have been unnecessary since voluntariness had been established.

The third category of consent arises when a birth mother grants her consent to an adoption freely and voluntarily. The statute clearly gives this birth mother no recourse. Further, even if involuntariness can be established, the birth mother may not attempt to withdraw her consent after the final adoption decree.¹¹²

F. Termination of Parental Rights: Abandonment of Children

The natural parents' consent to adoption is not required if their parental rights have been judicially terminated.¹¹³ Parental

withdrew their consent) *with* *Ellison v. Camby*, 269 S.C. 48, 236 S.E.2d 197 (1977) (filing of consent and adoption to be in best interests of child; must be sufficient to allow adoption).

112. See S.C. CODE ANN. § 20-7-1720 (Law. Co-op. & Supp. 1988).

113. See S.C. CODE ANN. § 20-7-1695(A)(1) (Law. Co-op. Supp. 1988); see also *Ginn v. Ginn*, 278 S.C. 217, 217, 294 S.E.2d 42, 43 (1982) ("Appellant's parental rights in his minor daughter were terminated, thereby permitting respondent . . . to adopt the child without appellant's consent.").

The Children's Code does not provide a precise analytical framework for the termination of parental rights. While the termination of parental rights (TPR) statute, S.C. CODE ANN. § 20-7-1560 to -1582 (Law. Co-op. 1976) provides one procedure for the termination of parental rights, the Adoption Act provides another means by which a parent's consent to an adoption is not required. See S.C. CODE ANN. 20-7-1690 (Law. Co-op. Supp. 1988). These two provisions differ in three significant ways, and these differences dictate to the adoption attorney when the respective statutes should be employed. First, the TPR statute is broad, allowing termination of parental rights for a myriad of reasons such as drug addiction and mental incapacity. See S.C. CODE ANN. § 20-7-1572(6) (Law. Co-op. 1976).

Also, the standard used in the abandonment portion of the TPR statute is subjective, requiring intent to abandon. See *infra* note 118 and accompanying text. Conversely, the Adoption Act only has an abandonment provision and mandates that a purely objective determination be made. See S.C. CODE ANN. § 20-7-1690 (Law. Co-op. Supp. 1988). Therefore, as to a charge of abandonment, a defending parent can more easily satisfy the TPR statute than the Adoption Act.

The second difference between these statutes is that both are not always available. For example, while the Adoption Act procedure has the practical effect of terminating parental rights by specifying those parents whose consent to an adoption is not necessary, this procedure must be used in conjunction with an adoption proceeding. See *id.* § 20-7-1690. If no adoption proceeding is pending, the TPR statute is the sole procedure

rights may be terminated on various objective grounds including child abuse or neglect,¹¹⁴ parental alcohol or drug addiction, mental illness, or extreme physical incapacity.¹¹⁵ A more difficult issue is posed in determining a parent's subjective state of mind. This subjective inquiry is required in analyzing cases of child abandonment — another ground for judicial termination of parental rights.

Code sections 20-7-1572(3) and (4), which provide for orders terminating parental rights (TPR), define child abandonment.¹¹⁶ While these sections do not specifically employ the term “abandonment,” they embody the notion generally referred to as abandonment.¹¹⁷ The subjective nature of the inquiry is apparent because the court must find an intent to abandon.¹¹⁸ While

available. A conflict between these statutes was anticipated by § 20-7-1582, which states that adoption law supersedes the TPR statute and cannot modify the Adoption Act unless specifically provided. *See id.*

This conflict gives rise to the third difference between these statutes: to whom they apply. The Adoption Act states that a mother must always give her consent to an adoption. *See id.* § 20-7-1690. On the other hand, only certain categories of biological fathers have the right to withhold consent, and the adoption statute specifically delineates what acts are considered to be abandonment. Section 20-7-1695, however, states that notwithstanding this different treatment of mother and father under § 20-7-1690, consent is not required of either father or mother whose parental rights have been terminated under the TPR statute. The difficulty with reading these statutes consistently is that the Adoption Act mandates one standard of conduct for fathers, none for mothers, *see id.* § 20-7-1690, and the TPR draw no such distinctions. *See id.* § 20-7-1572. Therefore, the only interpretation that would allow the mandates of § 20-7-1690 to stand would be to disallow the TPR statute from being applied to the father in an adoption proceeding and allowing the TPR statute from applying to a birth mother. Of course, if a biological father's rights had been terminated in a prior proceeding under the TPR statute, his consent to a later adoption proceeding would not be necessary. *See id.* § 20-7-1695.

In short, when an adoption proceeding is pending, a mother's rights should be analyzed under the TPR statute and the father's rights under § 20-7-1690. If no adoption proceeding is pending, both the mother and father's rights should be analyzed under the TPR statute.

The obvious equal protection and substantive due process problems with this statutory scheme are many. *See infra* notes 152-279 and accompanying text.

114. *See* S.C. CODE ANN. § 20-7-1572(1) (Law. Co-op. 1976).

115. *See id.* § 20-7-1572(6).

116. *See id.* § 20-7-1572(3), (4).

117. The supreme court has stated that “abandonment denotes ‘any conduct on the part of the parent which evinces a settled purpose to forego all duties and relinquish all parental claims to the child.’” *Donahue v. Lawrence*, 280 S.C. 382, 385-86, 312 S.E.2d 594, 597 (Ct. App. 1984) (quoting *McCormick v. McMurray*, 260 S.C. 452, 455, 196 S.E.2d 642, 643 (1973)).

118. *See Bevis v. Bevis*, 254 S.C. 345, 351, 175 S.E.2d 398, 400 (1970) (“A voluntary act or a conscious disregard of the obligations owed by a parent to the child” must be

the trial judge will be accorded wide discretion,¹¹⁹ a finding of abandonment requires clear and convincing proof.¹²⁰

Most cases concerning abandonment¹²¹ focus on whether a parent has "willfully failed to visit a child"¹²² who has lived outside the home of either parent for a period of six months.¹²³ While some parents simply admit they have no excuse for not visiting the child,¹²⁴ most parents defending termination proceedings deny the willfulness of their abandonment. For instance, if the custodial parent remarries, moves out of state, and the custodial parent's "antagonistic attitude" makes visitation "inadvisable, if not impossible," parental rights will not be terminated.¹²⁵ Also, a defending parent successfully argued that she "despaired of exercising her visitation rights because of [the custodial parent's] conduct in placing strict limitations on her rights to visit her daughter."¹²⁶ Nevertheless, this type of defense cannot be a subterfuge for the defending parent's inadequate efforts.¹²⁷

Some judicial support is found for the notion that the trauma of a separation may be a defense to a failure to visit the child in the custody of an estranged spouse. For example, the court of appeals in *Donahue v. Lawrence*¹²⁸ stated in dicta that "[a]ssuming there was some trauma following the parties' separation and divorce, there is no evidence that this trauma continued."¹²⁹

found.).

119. See *id.* at 351, 175 S.E.2d at 402; accord *Ginn v. Ginn*, 278 S.C. 217, 218, 294 S.E.2d 42, 43 (1982) (family court acted within its discretion in terminating father's parental rights).

120. See *Cooley v. Cooley*, 296 S.C. 119, 121, 370 S.E.2d 896, 897 (Ct. App. 1988).

121. See *infra* notes 122-151 and accompanying text. Much of the cited authority was decided prior to the enactment of the present abandonment statute. These cases, however, have been included in this discussion because the prior statute was similar to our present statute. The courts' analysis, therefore, is instructive.

122. S.C. CODE ANN. § 20-7-1572(4) (Law. Co-op. 1976).

123. See *id.* § 20-7-1572.

124. See, e.g., *Donahue v. Lawrence*, 280 S.C. 382, 387, 312 S.E.2d 594, 597 (Ct. App. 1984) ("I do not have any good excuse for not visiting my children.").

125. See, e.g., *D'Augustine v. Bush*, 269 S.C. 342, 348, 237 S.E.2d 384, 387 (1977).

126. *Wilson v. Higgins*, 294 S.C. 300, 304, 363 S.E.2d 911, 914 (Ct. App. 1987).

127. See *Ginn v. Ginn*, 278 S.C. 217, 219, 294 S.E.2d 42, 43-44 (1982) (parent's claim that he could not visit his child because his former wife had an unlisted phone number did not pass judicial muster).

128. 280 S.C. 382, 312 S.E.2d 594 (Ct. App. 1984).

129. 280 S.C. at 387, 312 S.E.2d at 597.

If for reasons beyond the defending party's control, the parent cannot visit the child, other efforts must be made to communicate with the child. For example, when a father was imprisoned, his failure to write adequately or communicate with his child was held to be evidence of intent to abandon the child.¹³⁰ Financial inability to travel is also a defense to abandonment.¹³¹ The defending party must, however, communicate in some manner with the child.¹³² Even a paraplegic parent is responsible for visiting the children despite his infirmity;¹³³ if he can travel to job interviews, then he can travel to see his children.¹³⁴ In short, a defending parent, claiming that his lack of visitation was not willful, must have a persuasive excuse.

Similarly, defending parents often claim that their failure to contribute to the support of their child was not willful. If the defending parent claims that he cannot afford to offer any contribution of support to his child, yet the evidence demonstrates that he has \$7,000 in the bank, his argument will be short-lived.¹³⁵ Equally as damaging to a defending party's claim of financial distress is an admission on cross-examination that he was making monthly payments of \$169 on a new truck, but paying nothing toward his \$100 monthly support obligation.¹³⁶

On the other hand, if the facts show that a parent's failure to offer support was "motivated largely by financial necessity and not from a settled purpose to relinquish all parental claims to her child,"¹³⁷ abandonment will not be found. If, however, indifference to the rights of the child¹³⁸ precipitated this financial

130. See *Hamby v. Hamby*, 264 S.C. 614, 618, 216 S.E.2d 536, 538-39 (1975). In dicta, the court of appeals stated that "poor financial circumstances may partially explain the failure to visit the children even once in five years. Connecticut is a considerable distance from South Carolina." *Leone v. Dilullo*, 294 S.C. 410, 413, 365 S.E.2d 39, 41 (Ct. App. 1988).

131. See *Leone*, 294 S.C. at 413, 365 S.E.2d at 41.

132. See *id.*

133. See *Jamison v. Jamison*, 285 S.C. 603, 330 S.E.2d 671 (Ct. App. 1985).

134. See *id.* at 607, 330 S.E.2d at 672-73.

135. See *Ginn v. Ginn*, 278 S.C. 217, 294 S.E.2d 42 (1982).

136. See *Berry v. Ianuario*, 286 S.C. 522, 335 S.E.2d 250 (Ct. App. 1985).

137. *McCormick v. McMurray*, 260 S.C. 452, 456, 196 S.E.2d 642, 644 (1973).

138. See *Leone v. Dilullo*, 294 S.C. 410, 413, 365 S.E.2d 39, 41 (Ct. App. 1988). See *Hamby v. Hamby*, 264 S.C. 614, 618, 216 S.E.2d 536, 538 (1975), where a defending parent claimed his inability to provide support for his child was due to his imprisonment. The court, unimpressed, stated, "His actions during periods of freedom indicate little, if any, concern for his child. He . . . voluntarily pursued a course of lawlessness which

necessity, this defense will not suffice. In fact, a defending party may be responsible for exploring alternative avenues of support for his children. In *Leone v. Dilullo*¹³⁹ the children resided with their aunt and uncle. The court cited as evidence of abandonment the mother's failure to seek child support from the father. Similarly, in *Jamison v. Jamison*,¹⁴⁰ the court cited as evidence of abandonment a father's failure to seek Social Security insurance benefits for his child as the dependent of a disabled person.

Along with the parent's intent to abandon the child, the court will examine the best interests of the child before terminating parental rights based on abandonment.¹⁴¹ In one instance, the court found that evidence did not support a finding that the defending parent intended to abandon her child. Nonetheless, it considered the mother's "immoral conduct," as contrasted with the conduct of children's current custodian.¹⁴² While the court did not terminate the mother's rights, it did concede that the "argument is not without some appeal."¹⁴³

Although the best interests of the child are not addressed in the statutory definition of abandonment,¹⁴⁴ the court, at its discretion, may fashion its own brand of justice. In *Wilson v. Higgins*¹⁴⁵ the court of appeals stated that the best interest of the child may be "the primary or paramount consideration" in termination proceedings.¹⁴⁶ Under *Wilson* a defending parent must withstand challenges on two fronts: his conduct must not meet the statutory definition of abandonment, and the trial judge cannot view the termination as in the best interests of the child. *Wilson*, however, is in discord with the South Carolina Supreme

resulted in his imprisonment and inability to perform his parental duties." *Id.* at 618, 216 S.E.2d at 538.

139. 294 S.C. 410, 414, 365 S.E.2d 39, 41 (Ct. App. 1988).

140. 285 S.C. 603, 606, 330 S.E.2d 671, 672 (Ct. App. 1985).

141. *See* *Bevis v. Bevis*, 254 S.C. 345, 175 S.E.2d 398 (1970). The supreme court stated that in determining abandonment "the best interest of the child as well as the rights of parents are involved, and the completeness of the relinquishment of parental rights to constitute abandonment must be determined upon the basis of due consideration of both." *Id.* at 351, 175 S.E.2d at 400.

142. *See id.* at 355, 175 S.E.2d at 402.

143. *Id.*

144. *See* S.C. CODE ANN. § 20-7-1507(1) (Law. Co-op. 1976) (pre-1984 Code); *see also* *Mann v. Walker*, 285 S.C. 194, 328 S.E.2d 659 (Ct. App. 1985).

145. 294 S.C. 300, 305, 363 S.E.2d 911, 914 (Ct. App. 1987) (quoting 43 C.J.S. *Infants* § 40(b) (1978)).

146. *See id.* at 305, 363 S.E.2d at 914.

Court's decision in *Goff v. Benedict*¹⁴⁷ and its own ruling in *Hudson v. Blanton*.¹⁴⁸ In *Goff* the supreme court stated the following:

The right of the appellant to her child should not be disregarded, and, where she has neither consented to the adoption nor has forfeited her parental rights by the abandonment of the child or by any misconduct on her part, the decree of adoption must be refused, *even though the adoption would result in benefits to the child*.¹⁴⁹

The supreme court's ruling is the better approach. While it is satisfying on a visceral level to allow the best interest of the child to be dispositive of every judicial inquiry, such precedent could have undesirable ramifications. For many newborns, childless families who are eager to adopt arguably could provide better emotional and financial support for the children. The logical extension of *Wilson* could allow the rights of parents whom society views as less able to provide for the best interests of the child to be disregarded in favor of a family who could provide a more socially acceptable home environment. While the best interests of the child appropriately is the "primary, paramount and controlling consideration of the court in all child custody controversies,"¹⁵⁰ this amorphous standard cannot strictly govern proceedings, which forever terminate parents' liberty interests in their children. The fluid, unpredictable nature of the best interest standard is constitutionally flawed, interfering with the fundamental right of parenthood without articulating a clear guideline for a defending parent's conduct.¹⁵¹

147. 252 S.C. 83, 165 S.E.2d 269 (1969).

148. 282 S.C. 70, 316 S.E.2d 432 (Ct. App. 1984).

149. 252 S.C. at 89, 165 S.E.2d at 272 (emphasis added).

150. *Cook v. Cobb*, 271 S.C. 136, 140, 245 S.E.2d 612, 614 (1978).

151. "Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula." *United States v. Cardiff*, 344 U.S. 174, 176 (1952) (citation omitted). See *infra* notes 152-279 and accompanying text.

V. THE GREAT MORASS: DECIPHERING THE UNWED FATHER'S RIGHTS

A. *The Supreme Court Offers Some Guidance*

No aspect of adoption law possibly is more riddled with confusion and as potentially volatile than an unwed father's rights concerning the placement of his child for adoption. For many years this inquiry received little more than perfunctory attention. Unwed fathers received virtually no constitutional protection, and courts and legislatures were openly hostile to an alleged father's claims of parental rights.¹⁵² Typically, courts and legislatures considered unwed fathers ill-suited parents who routinely ran from paternity suits and responsibilities to their children and who should not be allowed to interfere once the birth mother placed her child for adoption.¹⁵³

While this approach served the interests of judicial economy, the unwed father's interests were not well served nor, arguably, were the best interests of the child. In *Stanley v. Illinois*¹⁵⁴ the Supreme Court challenged continued reliance on these long-standing stereotypes, recognizing that an unwed father's rights were deserving of constitutional protection.¹⁵⁵ The Court "emphasized the importance of the family"¹⁵⁶ and noted that "[t]he rights to conceive and to raise one's children have been deemed 'essential,'"¹⁵⁷ and "'basic civil rights of man.'"¹⁵⁸ The Court stated, "'It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations

152. See Note, *The Unwed Father and the Right to Know of His Child's Existence*, 76 Ky. L.J. 949, 949-50 (1987-88).

153. See Washington Post, Nov. 28, 1988, at D16, col. 6.

154. 405 U.S. 645 (1972).

155. In *Stanley* Peter and Joan Stanley lived together intermittently for 18 years in a nonmarital relationship. The union produced three children. Upon Joan's death, the children were placed with court-appointed guardians because Illinois law required children of unwed fathers to become wards of the state upon the mother's death. The court found that Peter's procedural due process rights had been deprived and ordered a hearing on his fitness as a parent before the children could be removed from his custody. See *id.* at 649.

156. *Id.* at 651.

157. *Id.* (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

158. *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

the state can neither supply nor hinder.’”¹⁵⁹

In *Caban v. Mohammed*¹⁶⁰ the Court expanded *Stanley*, stating that “broad, gender-based distinctions [in adoption statutes are not] required by any universal difference between maternal and paternal relations at every phase of a child’s development.”¹⁶¹

The protections announced in *Stanley* and *Caban* were not, however, unconditional. In *Quillion v. Walcott*¹⁶² and *Lehr v. Robertson*¹⁶³ the Court explored the limits of an unwed father’s rights. In these two cases, the unwed fathers’ relationships with the children were less substantial than those implicated in *Stanley* or *Caban*. The Court termed this difference “both clear and significant,”¹⁶⁴ announcing that an unwed father’s interest in his child merits constitutional protection only in “appropriate cases.”¹⁶⁵ The Court stressed that “the rights of the parents are a counterpart of the responsibilities they have assumed”¹⁶⁶ and an inextricable linkage exists between “parental duty and parental right[s].”¹⁶⁷ The Court explained that “[w]hen an unwed fa-

159. *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166, *reh’g denied*, 321 U.S. 804 (1944)).

160. 441 U.S. 380 (1978). Obdiel Caban and Maria Mohammed lived in a nonmarital relationship for five years. The relationship produced two children. Caban contributed to the children’s support, was listed as the father on their birth certificates, and lived with them as their father. Mohammed left Caban, remarried, and petitioned for the adoption of the children. Caban cross-petitioned to adopt the children. The New York statute held that only the mother’s consent was required for adoption of an illegitimate child; the father’s consent was not necessary. Mohammed, therefore, could block Caban’s petition for adoption although Caban could not. This gender-based distinction was found to violate the equal protection clause. *See infra* notes 248-266 and accompanying text.

161. *Id.* at 389.

162. 434 U.S. 246, *reh’g denied*, 435 U.S. 918 (1978). In *Quilloin* an unwed father attempted to block the adoption of his biological child. Quilloin and the unwed mother, Walcott, had “never married each other or established a home together.” *Id.* at 247. Quilloin provided irregular support to his child, and visits had a “disruptive effect on the child.” *Id.* at 251. Further, for over eleven years, Quilloin had not sought to legitimize his child.

163. 463 U.S. 248 (1982). Lehr and Robertson lived together for approximately two years in a nonmarital relationship. Following birth of the child, Lehr neither lived with Robertson nor provided financial support to either Robertson or the child. Additionally, and of great significance to the Court, Lehr did not enter his name in New York State’s putative father registry. *See id.* at 251.

164. *Id.* at 261.

165. *Id.* at 256.

166. *Id.* at 257.

167. *Id.*

ther demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,'¹⁶⁸ the Constitution requires substantial protection of this interest."¹⁶⁹

The Court cautioned that "the mere existence of a biological link does not merit equivalent constitutional protection."¹⁷⁰ "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, . . . as well as from the fact of blood relationship."¹⁷¹ The Court summarized its position as follows:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.¹⁷²

B. The South Carolina Statute

These constitutional principles are, to varying degrees, reflected in the Adoption Act. Before analyzing those provisions which are constitutionally suspect, an overview of the relevant provisions of the statute is required.

Two sections of the Act directly concern a father's rights regarding the adoption of his child. First, section 20-7-1690¹⁷³ mandates those persons from whom consent to an adoption is required and then section 20-7-1734¹⁷⁴ governs those persons entitled to notice of adoption proceedings.

168. *Id.* at 261 (quoting *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)).

169. *See id.* at 261.

170. *Id.*

171. *Id.* (quoting *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972))).

172. *Id.* at 262 (footnote omitted).

173. S.C. CODE ANN. § 20-7-1690 (Law. Co-op. Supp. 1988).

174. *Id.* § 20-7-1734.

1. *Consent: Section 20-7-1690*

The statute takes a tiered approach to determining whose consent to adoption is required. The child's legitimacy and the age of the child at the time of adoption determine these tiers. The statute contemplates four categories of fathers:

(1) fathers who conceive a child while married to the birth mother;

(2) fathers who are married to the birth mother at the time of the child's birth;

(3) unwed fathers of children to be placed for adoption more than six months after birth;

(4) unwed fathers of children to be placed for adoption six months or less after birth.

Section 20-7-1690(A)(2) addresses the first two categories.¹⁷⁵ This section requires consent from the "parents . . . of a child conceived or born during the marriage of the parents."¹⁷⁶ Absent a showing of a father's unfitness, the father enjoys the same rights as the birth mother under this provision. The biological father effectively can block an adoption regardless of the mother's consent.

The statute specifies a two-part test for the third category of father.¹⁷⁷ Unlike the father who was married to the birth mother at time of conception or birth, the father of a child conceived and born outside of wedlock must satisfy the court that his interest in the child is so substantial that his consent to adoption should be required. The section states that the father of a child to be placed for adoption more than six months after the child's birth must have "maintained substantial and continuous or repeated contact with the child."¹⁷⁸ This contact is demonstrated by "payment by the father toward the support of the child of a fair and reasonable sum, based on the father's financial ability."¹⁷⁹ In addition, the biological father must satisfy one of two other requirements. He must either visit¹⁸⁰ the child at least monthly, when he is physically and financially able and

175. *See id.* § 20-7-1690(A)(2).

176. *Id.*

177. *See id.* § 20-7-1690(A)(4).

178. *Id.*

179. *Id.* § 20-7-1690(A)(4)(a).

180. *See id.* § 20-7-1690(A)(4)(b).

when he is not prevented from visiting by the custodian, or he must regularly communicate with the child.¹⁸¹

The statute requires an objective evaluation of the father's behavior. His "subjective intent . . . if unsupported by evidence"¹⁸² of these acts is not controlling. The statute, however, does carve out one exception to the requirement of "substantial and continuous or repeated contact."¹⁸³ A father who lives with the child for six months within the one-year period immediately preceding placement and who openly holds himself out as the father of the child will satisfy the substantial and continuous contact requirement. Therefore, these live-in fathers are treated the same under the statute as fathers in categories one and two discussed above.

Consent is required from the fourth category of father — unwed fathers of children placed for adoption within six months of birth — if he fulfills one of two requirements.¹⁸⁴ First, the father must have lived with the birth mother or child continuously for six months and have held himself out to be the child's father.¹⁸⁵

Second, if the father fails to satisfy this requirement, his consent is nevertheless required if he has paid a fair and reasonable sum, based on his financial ability, for the child's support, expenses incurred in connection with the mother's pregnancy, or expenses from the birth of the child.¹⁸⁶ The Act, therefore, requires the father's consent if he paid the birth mother's pregnancy expenses, but did not contribute to the expenses incurred during delivery or the child's support and did not visit the child for six months. Moreover, the "fair and reasonable sum" language in the statute refers to the amount paid in any one of the three categories of expenses outlined in section 20-7-1690(A)(5)(b). If the father paid the entire amount of *one* of the three categories, he need not contribute a fair and reasonable sum toward the other two categories.

181. See *id.* § 20-7-1690(A)(4)(c).

182. *Id.* § 20-7-1690(A)(4). But see S.C. CODE ANN. § 20-7-1572(4) (Law. Co-op. 1976) (requiring "willful" abandonment).

183. S.C. CODE ANN. § 20-7-1690(A)(4) (Law. Co-op. Supp. 1988).

184. See *id.* 20-7-1690(A)(5)(a). Note that the father need not live *continuously* with the *child* for six months.

185. See *id.*

186. See *id.* § 20-7-1690(A)(5)(b).

If the father's consent is required, only termination of his parental rights¹⁸⁷ or proof of his mental incapacity¹⁸⁸ can overcome this requirement. When the attorney secures the father's consent using the same punctilious procedures used to obtain the birth mother's consent, the adoption can go forward.¹⁸⁹ As discussed previously, the father's interest in his child reaches constitutional dimensions, and the precise statutory requirements for informed, voluntary consent must be followed. As with the birth mother, the contents of the father's consent are specified by statute¹⁹⁰ and the two-witness requirement also is in force.¹⁹¹

2. Notice: Section 20-7-1734

Section 20-7-1734 requires that notice of adoption proceedings must be given to several classifications of persons.¹⁹² If a father has consented to an adoption, no further contact is required.¹⁹³ On the other hand, if a father's consent was not required under section 20-7-1690, he must be given notice of the proceedings¹⁹⁴ by personal service of summons.¹⁹⁵ Notice may be effected by publication, if personal service is not possible, or in a manner the court allows.¹⁹⁶

The notice must state that the father has thirty days to respond by filing his notice of intent to "contest, intervene, or otherwise respond"¹⁹⁷ and that his failure to respond within this

187. See *id.* § 20-7-1695(A)(1). See *supra* notes 113-151 and accompanying text.

188. See S.C. CODE ANN. § 20-7-1695(A)(2) (Law. Co-op. Supp. 1988).

189. See *id.* § 20-7-1734(A).

190. See *id.* § 20-7-1700.

191. See *id.* § 20-7-1705.

192. See *id.* § 20-7-1734(B)(1)-(7). Of particular note is subsection (B)(2), which requires notice of "any person . . . required to give consent . . . pursuant to [§ 20-7-1690(A) or (B)] from whom consent . . . cannot be obtained." *Id.* § 20-7-1734(B)(2). The language "from whom consent . . . cannot be obtained" is misleading. This section does not require notice to fathers who refuse to give their consent to an adoption; their refusal, of course, terminates the adoption proceeding. The section pertains to fathers who, though entitled to give consent, cannot be located. See Telephone interview with Ms. Ann Cushman, Former Director of Research, Joint Legislative Committee on Children and staff to committee that adopted Adoption Act (June 27, 1989).

193. See S.C. CODE ANN. §§ 20-7-1734(A), (B)(1) (Law. Co-op. Supp. 1988).

194. See *id.* § 20-7-1734(B)(3).

195. See *id.* § 20-7-1734(D).

196. See *id.*

197. *Id.* § 20-7-1734(E)(1).

time constitutes consent.¹⁹⁸ If the father responds within thirty days, he is afforded “an opportunity to appear and to be heard before the final hearing on the merits of the adoption.”¹⁹⁹ Although the statute does not define what standard the court shall apply to the father’s argument, apparently he must prove that the adoption is not in the best interests of the child.²⁰⁰ If the father fails the consent requirement of section 20-7-1690, the notice requirement of section 20-7-1734 does not offer him a bright prospect of gaining custody of his child.²⁰¹

C. Constitutional Implications

To the drafters’ credit, the Act sets forth some bright lines and objective standards by which a father’s rights may be determined. Although this gives some certainty as to the father’s rights, attorneys still should proceed with caution. The Supreme

198. *See id.* § 20-7-1734(E)(3).

199. *See id.* § 20-7-1734.

200. Traditionally, a parent’s rights regarding a child are measured by only two standards: the fitness standard which is used in terminating parental rights, *see supra* notes 113-151 and accompanying text, and the best interests standard that is used in child custody proceedings. *See Cook v. Cobb*, 271 S.C. 136, 140, 245 S.E.2d 612, 614 (1978). The statute apparently does not contemplate the fitness standard because a father’s failure to satisfy the requirements of S.C. CODE ANN. § 20-7-1690 (Law. Co-op. Supp. 1988), in itself is a virtual restatement of the TPR statute, the statute by which fitness is judged. Therefore, a father’s failure to satisfy § 20-7-1690 almost certainly would predict failure at the notice hearing if the fitness standard were employed.

One may argue that the notice hearing is provided solely to determine whether a father meets the strict requirement of § 20-7-1690, and if he does not satisfy the requirements, the father may not contest the adoption. This interpretation, however, is not supported by the statute. The notice hearing section expressly provides that notice must be provided “the father of a child whose consent . . . is not required” under § 20-7-1690. *See* § 20-7-1734(B)(3). Therefore, the notice hearing statute assumes that the notice hearing is provided for another reason other than determining whether § 20-7-1690 is satisfied. Thus, the only logical purpose of the notice hearing is to provide a father the opportunity to argue that, despite his failure to satisfy § 20-7-1690, the adoption is not in the best interests of the child. This interpretation was, in fact, the intent of the statute’s drafters. *See* Telephone interview with Ms. Anne Cushman, former Director of Research, Joint Legislative Committee on Children and staff to committee that drafted the Adoption Act (June 27, 1989).

201. Despite the father’s biological link, proving that the adoption is not in the best interests of the child is a rigorous standard. Often, the father is unmarried and cannot offer the stable and economically secure environment that the adoptive couple possess. Although a matter of judicial discretion, the father’s burden is especially great if he has already failed the consent requirement of S.C. CODE ANN. § 20-7-1690 (Law. Co-op. Supp. 1988).

Court has not squarely addressed the full dimensions of the father's rights respecting a child placed for adoption. The following are constitutional attacks a father might successfully make against the Act.

1. *Due Process*

The fourteenth amendment states that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”²⁰² As previously noted, the father's interest in the care, custody, and rearing of his child is protected under the due process clause regardless of his marital status.²⁰³ Section 20-7-1690(A)(5)²⁰⁴ of the Act is most vulnerable to due process attack. This section addresses the requirements for obtaining a father's consent prior to adoption of a child six months old or less, the fourth category of father outlined above, who receives only limited protection.²⁰⁵ The notice requirement²⁰⁶ provides merely for “an opportunity to appear and to be heard before the final hearing on the merits of adoption.”²⁰⁷ While this hearing satisfies a father's right to procedural due process, forcing a father to satisfy a best interests standard in many cases effectively nullifies his ability to adopt. From this substantive due process vantage point, the statute is constitutionally suspect.²⁰⁸

a. *Due Process Protection for Fathers Who Do Not Know of the Existence of Their Child.*

The statute states that the father must have “paid a fair and reasonable sum”²⁰⁹ in order for his consent to an adoption to be required. If the father was unaware of the child's existence prior to the notice hearing, he cannot block the adoption by

202. U.S. CONST. amend. XIV.

203. See *supra* notes 152-172 and accompanying text.

204. S.C. CODE ANN. § 20-7-1690(A)(5) (Law. Co-op. Supp. 1988).

205. See *supra* notes 184-186 and accompanying text.

206. See S.C. CODE ANN. § 20-7-1734 (Law. Co-op. Supp. 1988).

207. *Id.*

208. Substantive due process “bars certain arbitrary governmental actions regardless of the fairness of the proceedings used to implement them.” See *Daniels v. Williams*, 474 U.S. 327, 337 (Stevens, J., concurring), *aff'd*, 474 U.S. 344 (1986).

209. S.C. CODE ANN. § 20-7-1690(A)(5)(b) (Law. Co-op. Supp. 1988) (emphasis added).

withholding his consent even if he arrives at the hearing ready, willing, and able to offer the requisite financial and emotional support. Instead, he faces the more difficult "best interests of the child" standard imposed at the notice hearing. Even in situations where a father's consent is required under section 20-7-1690, the statute allows an adoption to go forward absent that consent if the father cannot be located and does not respond to the notice of the adoption within thirty days.²¹⁰

A father seeking custody and care of his child could argue that the requirements set forth in section 20-7-1690 outlining when a father's consent is necessary, and the "constructive consent" aspects of section 20-7-1734, violate his right of substantive due process if he does not know of the existence of the child. Under this theory, the father could assert that before a court eliminates his liberty interest in his child, he has the right to establish a parent-child relationship.²¹¹

No South Carolina or Supreme Court case addresses this issue. *Lehr v. Robertson*,²¹² however, held that a father's liberty interest in his child must be protected if he "grasps that opportunity and accepts some measure of responsibility for the child's future." His failure to seize this opportunity denies him this protection.²¹³ The Supreme Court decision failed to consider

210. See *id.* § 20-7-1734(E)(3). The statute provides that failure to respond to the notice within thirty days constitutes "consent to adoption." *Id.* The statute is unclear in a situation when a father whose consent is required under section 20-7-1690, but who could not be located prior to receiving the notice of the adoption proceeding, comes forward to block the adoption. The statute affords him only the same "opportunity to appear and to be heard" that a father is afforded whose consent is not required under this statute. See *id.* Whether a best interest standard will be applied or whether the father at this time may refuse to grant his consent, thereby blocking the adoption, is unclear. To determine that a father's consent is required under section 20-7-1690, yet demand that he meet a harsher accountability under section 20-7-1734 solely because the parties to the adoption were unable to locate the father before the notice proceeding seems inconsistent. One way to reconcile this dichotomy is to allow the "opportunity to appear" language to demand different standards of judicial review depending on the degree of the father's liberty interests in his child. See *supra* note 200.

211. This argument is also viable for those fathers who attempt to block an adoption of a child older than six months. Regardless of the child's age, the father may argue this point when he fails to meet the statutory requirements of § 20-7-1690 because he did not know the child existed. On the other hand, because of the father's enhanced opportunity to learn of the existence of an older child, this argument is most effective under the provisions of section 20-7-1690(A)(5).

212. 463 U.S. 248, 262 (1982).

213. See *id.* at 262.

“whether a . . . father could be deprived of that opportunity in the first place.”²¹⁴ Further, the Court stated that “[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by ‘com[ing] forward to participate in the rearing of his child,’ . . . his interest in personal contact with his child requires substantial protection under the Due Process Clause.”²¹⁵ Some commentators argue that “the right to know [of the child’s existence] is a necessary prerequisite to the opportunity to develop a protective relationship between the father and the child.”²¹⁶ Arguably, notice by publication is not sufficient to alert a father that his opportunity to “enjoy the blessings of the parent-child relationship” is terminated.²¹⁷

In a letter to Family Court Judge Robert R. Mallard, Assistant South Carolina Attorney General B. J. Willoughby addressed this problem.²¹⁸ The Attorney General determined that the father was on constructive notice of the child’s existence because of his sexual relations with the birth mother stating: “He does become aware of the possibility that his actions may result in the conception of a child.”²¹⁹

Even if conceded that a father must accept responsibility for his sexual activity by imposing a duty on him to investigate the consequences of his actions, a difficult situation arises when the birth mother thwarts the father’s efforts to learn of her pregnancy. Certainly, a father’s interest should not be terminated if, although exercising due diligence, he is unable to locate the birth mother or learn of her condition.²²⁰ A birth mother simply may refuse to identify the father²²¹ or offer a straw man to sign

214. Note, *supra* note 152, at 977.

215. 463 U.S. at 261 (quoting *Caban v. Mohammed*, 441 U.S. 380, 392 (1982)) (citation omitted).

216. Note, *supra* note 152, at 988.

217. 463 U.S. at 262.

218. See Letter from South Carolina Assistant Attorney General B.J. Willoughby to Family Court Judge Robert R. Mallard (Oct. 13, 1981). Willoughby focused on the problem of an “alleged father [who] did not come forward because he was unaware of the pregnancy.” *Id.*

219. *Id.*

220. To avoid public notoriety, birth mothers often leave their hometowns for several months prior to birth of their children. Upon a birth mother’s return, the child could have already been placed for adoption and the father’s hopes of blocking the adoption effectively thwarted.

221. A myriad of reasons could underlie a birth mother’s refusal to name the father, such as: (1) the father may be married and the birth mother seeks to protect both of

the consent form, claiming him as the father of the child.²²² If a father, despite this subterfuge, discovers the birth and comes forward at the time of the notice hearing, it would be a violation of substantive due process to force him to meet a best interests standard when he is able and willing to "grasp that opportunity and accept . . . responsibility for his child's future."²²³

The Supreme Court stated that a father does not have a constitutionally protected interest if he does "not accept[] some measure of responsibility for the child's future,"²²⁴ but the father's constitutional interests cannot be dismissed if he has done everything in his power to come forward and "grasp that opportunity."²²⁵ Assistant Attorney General Willoughby's reasoning is more persuasive in a situation when, after exhaustive efforts, the father's identity or whereabouts are unknown and the adoption must proceed.²²⁶ On the other hand, when the birth mother conceals her pregnancy from the father, his interest should be protected, rather than subjected to the more difficult notice hearing standard before he may intervene.²²⁷

b. Due Process Protection for the Father Who Fails to Live With or Contribute Toward the Birth Mother and Child

Even if the father knew of the pregnancy, the consent requirements of section 20-7-1690 are subject to substantive due

them from public embarrassment; (2) the birth mother may have been jilted by the father and does not want to be reminded of the relationship; (3) she may be embarrassed by her promiscuity and does not want to admit to the casualness of the child's conception; or (4) she may not want to risk the father's intervention into the adoption process.

222. Adoption attorneys may fear that straw men, friends of the birth mother willing to pose as the father, often are named. Additionally, some attorneys may fear that birth mothers sometime allege rape, thereby avoiding the consent requirement under S.C. CODE ANN. § 20-7-1734(C) (Law. Co-op. Supp. 1988).

223. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

224. *Id.*

225. *Id.*

226. Admittedly, at some point the adoption proceedings cannot be further delayed in hopes of the father's appearance. At this time, after all available procedures for notifying the father have been exhausted, offsetting concerns of delay in securing a home for the child bolster this "constructive notice" argument. See *infra* notes 242-246 and accompanying text.

227. One commentator proposes enactment of a statute under which a birth mother's refusal to name the father, if within her knowledge, would subject her to "imprisonment for a period not to exceed [two years], become criminally liable for a sum not to exceed [\$5,000], or both." Note, *supra* note 152, at 1003 n.407.

process attack. The Act mandates that the father must live with the birth mother or child for six months immediately preceding the adoption²²⁸ or contribute toward the expenses of the birth mother or child.²²⁹ Standing alone, this first requirement seems patently unconstitutional. Certainly, the State cannot dictate with whom the father must live in order to protect his liberty interest in his child.²³⁰

Furthermore, a father's refusal to contribute to prenatal care or expenses associated with the birth should not deprive him of his liberty interest in his child. The birth father has no cognizable interest in his child prior to birth. The Supreme Court denies him a right to veto his wife's abortion,²³¹ and the Court describes a woman's decision of whether to bear a child as "the right of the *individual*."²³² Given the individualistic nature of the birth mother's liberty interest in the fetus, a father may claim that the State cannot impose a duty towards a fetus when the law grants him no commensurate right. His obligations must begin only at the birth of the child,²³³ and therefore, the requirements of section 20-7-1690(5)(A) violate his substantive due process rights. When a father comes forward to block the adoption of an infant child, he is demonstrating "a full commitment to the responsibilities of parenthood" at the earliest possible moment, and his liberty interest in his child therefore "acquires substantial protection under the Due Process Clause."²³⁴

228. See S.C. CODE ANN. § 20-7-1690(5)(a) (Law. Co-op. Supp. 1988).

229. See *id.* § 20-7-1690(5)(b).

230. "[F]reedom to marry the person of one's choice is 'one of the vital personal rights essential to the orderly pursuit of happiness.'" L. TRIBE, AMERICAN CONSTITUTIONAL LAW 415 (2d ed. 1988) (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)). Equally vital is a person's right to choose not to marry. *Cf. Bodie v. Connecticut*, 401 U.S. 371 (1971) (marriage and divorce are such fundamental rights that indigents cannot be charged a fee to obtain a divorce).

231. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

232. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis in original).

233. Arguably, a father's obligation may begin in the third trimester of pregnancy, when the woman's right over the fetus gives way to recognition of a compelling state interest in the child. See *Roe v. Wade*, 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973).

234. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

D. Summary of Due Process Attack on the South Carolina Adoption Statute and Proposed Statutory Solutions

When a child is born, the father has an "inchoate"²³⁵ right in that child which receives constitutional protection only if he strives to develop the "parent-child relationship."²³⁶ If the father is unaware of his child's existence, he is not allowed the opportunity to transfer this inchoate right into a relationship deserving constitutional protection. Therefore, the consent requirements of section 20-7-1690 violate substantive due process if they deny him this opportunity. Further, in the case of an infant adoption, even if the father knows of the pregnancy and has failed to live with the birth mother or child or contribute toward their support, a father cannot be denied the opportunity to develop the parent-child relationship. The father has no cognizable interest in the fetus; therefore, his obligation to the child must commence at birth.²³⁷ Thus, section 20-7-1734 also may violate the father's substantive due process rights if it imposes preparation obligations on the father.

The only alternative available to a father under this statute is to appear at the notice hearing and "be heard before the final hearing on the merits of the adoption."²³⁸ The adoption statute is silent as to the weight a family court judge should place on the father's effort to block an adoption and seek custody. A father may argue that a best interest standard should not be applied. Instead, the father should be allowed to block an adoption simply upon a showing of fitness.

Obviously, at some moment, if the father fails to intervene, although unaware of the existence of the child, his interest in the child must give way to the child's best interests. The familial relationship that develops between a child and his adoptive parents deserves deference. One commentator suggests that the Court has recognized "the desirability of preserving family units already in existence and allow[ing] the value of what might be called a 'complete,' if artificially created family unit to trump the value of the biological father's relationship with the

235. *Id.* at 261 n.17.

236. *Id.* at 261.

237. See *supra* notes 231-234 and accompanying text.

238. S.C. CODE ANN. § 20-7-1734(E) (Law. Co-op. Supp. 1988).

child.”²³⁹ In fact, the Supreme Court noted that “biological relationships are not exclusive determination[s] of the existence of a family.”²⁴⁰

These statements by the Court and South Carolina’s strong public policy in favor of adoption²⁴¹ combine to militate in favor of securing some ascertainable date after which the father’s unexercised interest gives way to the child’s interest, the adoptive parents’ interest, and the state’s interest in finality of court proceedings. The following are suggested changes to accomplish this end and secure the biological father’s substantive due process rights:

(1) In section 20-7-1690(A)(5), the words “but only if” should be repealed. Section 20-7-1690(5)(a) and (b) should be repealed in their entirety.

(2) Section 20-7-1734(D) should be amended to read as follows:

Any person or agency entitled to notice pursuant to this section must be given notice that adoption proceedings have been initiated. Notice must be given in the manner prescribed by law for personal service of summons in civil actions. *The best efforts of the parties to an adoption, including the birth mother, adoptive parents, and the guardian ad litem, must be used to effect this notice.* If notice cannot be effected by personal service, notice may be given by publication or by the manner the court decides will provide notice.²⁴²

(3) The language following section 20-7-1734(E)(3) should be amended to read as follows:

When notice of intent to contest, intervene, or otherwise respond is filed with the Court within the required time period, a person or agency whose consent or relinquishment is not required under § 20-7-1690 must be given an opportunity to appear and be heard, before the final hearing on the merits of the adoption, as to the best interests of the child.

When notice of intent to contest, intervene, or otherwise respond is filed with the Court within the required time period, a

239. L. TRIBE, *supra* note 230, at 1417 n.24.

240. *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 843 (1977).

241. See *supra* notes 9-17 and accompanying text.

242. The italicized portion of the statute indicates the proposed amendments.

person or agency whose consent or relinquishment is required under § 20-7-1690 must be given an opportunity to appear and be heard before the final hearing on the merits of the adoption, and may at that time withhold consent and thereby terminate the adoption proceedings.

When actual notice of the adoption proceedings is not given a person or agency whose consent or relinquishment is required under § 20-7-1690, that person or agency may intervene at any time prior to the final adoption decree and may at that time withhold consent and thereby terminate the adoption proceedings.²⁴³

This amendment undoubtedly would be criticized for giving a father the right to veto an adoption over the birth mother's wishes. One commentator noted that the decision to place a child for adoption "is almost always a difficult one, made possible only by the mother's conviction that she is doing what is best for the child. For many unwed mothers, knowing that the child's father might successfully challenge the adoption could make her decision traumatic."²⁴⁴ One fear is that mothers may "keep their babies if there is any uncertainty surrounding immediate and final adoption placement."²⁴⁵

These arguments are unpersuasive; a father's liberty interest in his child should not be cast aside simply to allow a birth mother to feel more comfortable in her decision to allow adoption. True, the birth mother's uncertainty as to the prospect of the father gaining custody of her child may affect her decision to offer consent. Nevertheless, a simple procedure would protect both a father's rights and a birth mother's need for certainty: secure the father's consent prior to granting her own consent. Not only would this allow the mother's decision to be unencumbered by concerns about the father's intervention into the adoption process, but it would be an effective incentive for birth mothers to reveal the father's identity to the court.²⁴⁶ If the

243. The statute mandates that "[t]he final hearing on the adoption petition must not be held before 90 days and no later than six months after the filing of the adoption petition." S.C. CODE ANN. § 20-7-1760(A) (Law. Co-op. Supp. 1988). After the final decree, the consent, actual or constructive, is irrevocable. *See id.* § 20-7-1720.

244. Note, *The Punative Father's Due Process Rights to Notice and a Hearing*, 1986 B.Y.U. L. REV. 1081, 1093-94 (citations omitted).

245. *Id.* at 1094 n.47.

246. *See supra* notes 220-227 and accompanying text.

birth mother still chooses not to identify the father, she bears the risk that the father may intervene. In short, this reformed adoption scheme balances the interests of all parties concerned and refuses to recognize the historical stereotypes that characterize fathers as “invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children.”²⁴⁷

2. *Equal Protection*

The Adoption Act, sections 20-7-1690(A)(1)-(4), is also vulnerable to an equal protection attack.²⁴⁸ The statute states that consent is required of any mother who was unmarried at the child’s birth.²⁴⁹ Conversely, the statute requires the father have “substantial and continuous”²⁵⁰ contact with the child in order for his consent to be required. In short, the statute draws a gender-based classification that may deprive men of their parental rights.

The Supreme Court repeatedly has held that gender-based distinctions must meet “the burden of showing an ‘exceedingly persuasive justification’ for the classification.”²⁵¹ Further, status distinctions between unwed mothers and unwed fathers “‘must serve important governmental objectives and must be substantially related to achievement of those objectives’ in order to withstand judicial scrutiny under the Equal Protection Clause.”²⁵²

In *Caban v. Mohammed*²⁵³ the Court addressed the issue of disparate treatment between unwed fathers and unwed mothers in adoption proceedings. The New York statute under attack provided the following: “[C]onsent to adoption shall be required as follows: . . . (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock; [and] (c) Of the

247. *Caban v. Mohammed*, 441 U.S. 380, 394 (1979).

248. “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

249. See S.C. CODE ANN. § 20-7-1690(A)(3) (Law. Co-op. Supp. 1988).

250. *Id.* § 20-7-1690(A)(4).

251. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)).

252. *Caban v. Mohammed*, 441 U.S. 380, 388 (1979) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976), *reh’g denied*, 429 U.S. 1124 (1977)).

253. 441 U.S. 380 (1979).

mother, whether adult or infant, of a child born out of wedlock²⁵⁴

Further, the New York statute made parental consent unnecessary "where the parent has abandoned or relinquished his or her rights in the child or has been adjudicated incompetent to care for the child."²⁵⁵ Under the statute, the unwed mother could block the adoption, yet the unwed father had "no similar control over the fate of his child, even when his parental relationship [was] substantial."²⁵⁶

The Court found that the statute violated the unwed father's equal protection right despite the birth mother's attempts to justify the statute's disparate treatment. First, the birth mother argued that "'a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does.'"²⁵⁷ The Court rejected this contention.²⁵⁸

The birth mother next argued that one justification for differential treatment rested on the State's interest in promoting adoption of nonmarital children.²⁵⁹ Again, the Court summarily dismissed this argument.²⁶⁰

The Court acknowledged that "special difficulties attendant upon locating and identifying unwed fathers at birth [may] justify a legislative distinction between mothers and fathers of newborns, but these difficulties need not persist past infancy."²⁶¹ The Court went on to state that "[w]hen the adoption of an older child is sought, the State's interest in proceeding with

254. *Id.* at 385 (quoting N.Y. DOM. REL. LAW § 111 (McKinney 1977)).

255. *Id.*

256. *Id.* at 386-87.

257. *Id.* at 388 (quoting Transcript of Oral Argument, at 41).

258. *See id.* at 389. The Court noted that the "present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother." The Court held that "gender-based" distinctions are not "required by any universal difference between maternal and paternal relations at every phase of a child's development." *Id.*

259. *See id.* at 391.

260. *See id.* The Court noted that the statute did not "bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children." *Id.* While the Court recognized that some unwed fathers would attempt to prevent the adoption of their illegitimate children, "[t]his impediment to adoption usually is the result of a natural parental interest shared by both genders alike; it is not a manifestation of any profound difference between the affection and concern of mothers and fathers for their children."

261. *Id.* at 392 (footnote omitted).

adoption cases can be protected by means that do not draw such an inflexible gender-based distinction.”²⁶²

The father must concede that the Court allows gender-based discrimination based on a woman’s unique ability to give birth.²⁶³ Further, he must concede that “[q]uite apart from the physical experience of pregnancy itself, an experience which of course has no analogue to the male, there is the attachment the experience creates, partly physiological and partly psychological, between mother and child.”²⁶⁴ As *Caban* mandates, however, the Court will not condone these distinctions after the reasons for the gender distinction cease to exist.

The “similarly situated” argument wains with each passing month after the child’s birth. Therefore, the requirements placed on unwed fathers of children older than six months must satisfy the test of being substantially related to important governmental interests. The *Caban* court already noted that these governmental objectives do not exist.²⁶⁵ The distinction only furthers outdated sexual stereotypes of the unwed father whose familial concern for his child is suspect and his contribution to the child’s welfare, sparse. The following commentary develops this point:

[N]o reason exists, outside of social custom and stereotyped notions of the proper roles for women and men to support a gender-based distinction in parental rights and obligations. It does not serve the needs of women, men, or — most importantly of children — to presume that either gender has a monopoly on nurturance, love, concern, or the willingness to support and care for children. An official presumption that unwed fathers are uninterested, however, can surely help to create or perpetuate such a result. Indeed, the judicial exclusion of fathers from the full parental rights has been said to contribute to the anger and resentment of some fathers and to leave, however unjustifiably, to an unwillingness to participate in child rearing when offered the opportunity and to a high rate of delinquency in payment of child support even when Court ordered.²⁶⁶

262. *Id.*

263. See *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

264. L. TRIBE, *supra* note 230, at 1340.

265. See *supra* notes 253-264 and accompanying text.

266. See Brief *Amicus Curiae* of the American Civil Liberties Union and the ACLU

The South Carolina Act, as with the statute implicated in *Caban*, requires the consent of parents of a child born in wedlock.²⁶⁷ Also, like the New York statute, the birth mother must always consent.²⁶⁸ The statutes, however, differ in that New York never requires the consent of an unwed father, although the South Carolina statute requires his consent, but only if he has maintained "substantial and continuous" contact with the child.²⁶⁹ Some may argue that this distinction should save the South Carolina statute from constitutional attack. After all, the Court in *Caban* stressed that "where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."²⁷⁰ Arguably, the hurdles placed in the path of the unwed father under the South Carolina statute simply define what acts constitute the required participation by the father in rearing the child.

What this argument fails to recognize is that the unwed mother also may fail to exercise the requisite degree of interest in her child, yet she bears no commensurate responsibility for demonstrating that interest. *Caban* clearly stated that "maternal and paternal roles are not invariably different in importance."²⁷¹ To allow "overbroad generalizations"²⁷² to dictate the rights of unwed fathers in adoptive proceedings "excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of the fathers."²⁷³ Therefore, though the state may withhold the privilege of vetoing an adoption from either parent if that parent has failed to "come forward and participate in the rearing of [the] child,"²⁷⁴ this determination cannot be based only on the father's conduct and allow a mother's participation to be pre-

of San Diego and Imperial Counties in Support of Appellant, in *McNamara v. County of San Diego*, Department of Social Services, No. 87-5840.

267. See *id.* § 20-7-1690(A)(2).

268. See *id.* § 20-7-1690(A)(3).

269. See *id.* § 20-7-1690(A)(4).

270. 441 U.S. 380, 392 (1979).

271. *Id.* at 389.

272. *Id.* at 394 (citing *Califano v. Goldfarb*, 430 U.S. 199, 211 (1977)).

273. *Id.* (emphasis added).

274. *Id.* at 392.

sumptively sufficient.

Although neither statute requires the parents' consent if their parental rights have been terminated,²⁷⁵ an unwed father still must leap the additional hurdle of section 20-7-1690. This disparate treatment is compounded because requirements for showing abandonment under section 20-7-1572 are greater than the requirements necessary for a father's consent to be denied under section 20-7-1690.²⁷⁶

Just as the justifications for the disparate treatment between unwed fathers and unwed mothers in *Caban* failed judicial scrutiny, so must any justifications for the South Carolina classifications. Therefore, to avoid equal protection attack on section 20-7-1690, the following amendments are proposed:

(1) Section 20-7-1690(A)(3) should be amended to read as follows: "The mother of a child born when the mother was not married."

(2) Section 20-7-1690(A)(4)(a)-(c) should be amended to read: "The father of a child born when the father was not married to the child's mother, if the child was placed with the prospective adoptive parents more than six months after the child's birth."²⁷⁷

These legislative amendments, if adopted, would continue to further the legislative purpose of the Adoption Act by establishing "fair and reasonable procedures for the adoption of children."²⁷⁸ Moreover, these amendments would rebuke the "overbroad generalizations"²⁷⁹ that serve only to perpetuate archaic stereotypes of the proper roles of men and women in familial relationships.

275. See S.C. CODE ANN. § 20-7-1695(A)(1) (Law. Co-op. Supp. 1988).

276. See *supra* notes 113-151 and accompanying text, outlining the statutes requirement of "willful" abandonment as juxtaposed with the adoption statute's refusal to recognize the father's "subjective intent." S.C. CODE ANN. § 20-7-1690(A) (Law. Co-op. Supp. 1988).

277. The Court has expressed "no view whether . . . a statute addressed particularly to newborn adoptions, setting forth more stringent requirements concerning the acknowledgment of paternity or a stricter definition for abandonment" would survive an equal protection attack. *Caban v. Mohammed*, 441 U.S. 380, 392 n.11 (1979). Therefore, the suggested statutory changes would not repeal § 20-7-1690(A)(5). As previously discussed, see *supra* notes 202-247 and accompanying text, this section is vulnerable to a due process attack.

278. S.C. CODE ANN. § 20-7-1647 (Law. Co-op. Supp. 1988).

279. 441 U.S. at 394.

VI. ENTER THE MIDDLEMAN: THE BABY BROKER

As the South Carolina General Assembly began considering legislation in the wake of the state's notorious national attention, Francis Lewis, the Executive Director of the Children's Bureau of South Carolina admitted that "[w]e are aware of very few outright cash payments for children."²⁸⁰ He did, however, acknowledge the presence of a more rampant and subtly invidious practice: people making substantial profit as "middlemen in the private adoption business."²⁸¹

Even though the legislature mandated that "[u]nder no circumstances may a person . . . receive . . . compensation . . . as consideration for . . . consent"²⁸² to an adoption, it may have underestimated a powerful force in the adoption process: the baby broker. In a television exposé of the lurid aspects of the adoption business, *60 Minutes* characterized the arrangement as follows:

Abortions are up, the birth rate is down, and still there are thousands of couples who want children and cannot have them. . . . [T]hey want healthy white infants — and they are scarcer than ever. Adoption agencies tell people to forget it. They don't even have waiting lists anymore.

Enter a middleman, to meet the law of supply and demand — a lawyer who, for a fee, sometimes a fee as high as \$15,000, will find a baby for a childless couple.²⁸³

Unfortunately, *60 Minutes* broadcast a conservative estimate of the fees charged by some of these baby brokers. Richard Gitelman of Coral Springs, Florida, who is not an attorney, operates what he terms "a private adoption referral service in the South."²⁸⁴ Gitelman uses classified advertising, often in rural areas, to identify young, pregnant women willing to place their children for adoption. He promises them spending money, new maternity clothes, and full coverage of medical expenses. He

280. The State, Mar. 1, 1984, at 8-A, col. 5.

281. *Id.*, June 15, 1984, at 1-A, col. 4. Lewis warned that "[i]f society sanctions adoptions as a business in which people make a profit, then it has to be regulated better. When babies become a commodity the same market factors take over, and we'll have a situation where the middle man is making the money." *Id.* at 13-A, col. 1.

282. S.C. CODE ANN. § 20-7-1690(F) (Law. Co-op. Supp. 1988).

283. *60 Minutes: Baby For Sale* (CBS television broadcast, July 27, 1975).

284. N.Y. Times, Oct. 29, 1987, at 1B, col. 3.

supplies round trip air fare for the young women to a state with accommodating laws, where she awaits her delivery. Upon birth her child is placed for adoption. Mr. Gitelman runs his business largely from his home where he deals with hundreds of prospective adoptive families awaiting his telephone call. While the birth mothers receive no other money, Gitelman receives fees possibly as high as \$50,000.²⁸⁵ In a recent conversation with a South Carolina adoption attorney, Mr. Gitelman quoted his fee as \$15,000.²⁸⁶ Whichever fee is correct, it includes no payment to the birth mother, no medical expenses, or attorney's fees; it is solely Gitelman's fee for arranging the deal.

Another baby broker operating in South Carolina claims that "God makes all the placements. We only do his clerical bidding."²⁸⁷ To do "God's work," Seymour Kertz charges \$14,000 for the placement: a \$1,500 nonrefundable application fee and the remaining \$12,500 on delivery.²⁸⁸ Kertz, who heads the Friends of Children Adoption Agency of Atlanta, places black-bordered advertising in telephone books seeking pregnant women to give up their babies for adoption.²⁸⁹ The advertisement in the 1984 Columbia, South Carolina directory cost an estimated \$9,000.²⁹⁰

To monitor the business transactions of baby brokers in South Carolina, the Act requires that all fees received in connection with an adoption be reported to the court.²⁹¹ As of January 1989, however, Richard Gitelman still searched for an adoption attorney in South Carolina who could handle the legal work generated by the unending flow of pregnant women Gitelman proposes to send to South Carolina to give birth.²⁹² Gitelman main-

285. *See id.* at col. 4.

286. Interview with anonymous member of the South Carolina Bar (February 15, 1989) (name withheld for reasons of confidentiality). Mr. Gitelman refused to confirm either figure. Telephone interview with Richard Gitelman (July 14, 1989).

287. *The State*, Feb. 26, 1984, at 6-A, col. 6.

288. *See id.* at col. 5.

289. The current "Friends of Children" advertisement can be found in GREATER SPARTANBURG SOUTHERN BELL-BELLSOUTH COMPANY *Yellow Pages* 3 (Oct. 1988 - Oct. 1989).

290. *See The State*, Feb. 26, 1984, at 1-A, col. 2.

291. S.C. CODE ANN. § 20-7-1775 (Law. Co-op. Supp. 1988).

292. Telephone interview with an anonymous member of the South Carolina Bar (February 15, 1989) (names withheld for reasons of confidentiality). Mr. Gitelman refused to comment on this point. Telephone interview with Richard Gitelman (July 14, 1989).

tains that South Carolina law, despite the requirement of disclosure of all fees paid in connection with an adoption, does not prohibit his type of business.²⁹³ Before analyzing the expense and fee provisions of the Adoption Act, a philosophical framework for that analysis must be explored. The following framework is applicable both to an adoption attorney's practice and to the court's scrutiny of the adoption process.

VII. PHILOSOPHICAL FRAMEWORK FOR ADOPTIONS

Some commentators express little concern over the money trail flowing after some newborn infants. One South Carolina family court judge once stated the following:

Even if baby selling does exist, what's so horrible about that? If the child is going to a home with good parents who can give it all the love and security it will ever need, why should we care if the parents paid \$50,000 for the privilege? The child is happy, the parents are happy, so what is the harm?²⁹⁴

The judge, speaking of women who offer their children for adoption, offers the following justification for his position:

Their mothers are the scum of the earth, the dregs of society, and if they kept the children, they'd raise them over in the Franklin Trailer Park on welfare and give them no father figure, or only a fleeting father figure with all their boyfriends in and out. Those little babies would have no stability in their lives, getting dumped on their welfare mama's welfare mama or welfare grandmama, and sooner or later we'd see them here in family court with cigarette burns where their ears used to be and marks where she's beat them with an electric cord.²⁹⁵

In short, this judge seems to assert that a person's ability to pay signifies his fitness as a parent and that whatever his qualifications, he certainly outclasses the ignorant poor.

The judge's comments embody two of the most pervasive fallacies of adoption law — fallacies that, if not exposed, pose serious consequences to the child, birth mother, adoptive parents, and ultimately to the society that tolerates them. First, the

293. *See id.*

294. *Newborn Fever*, *supra* note 19, at 31.

295. *The State*, Mar. 1, 1984, at 1-A, col. 5.

judge's comments fail to recognize that adoption is a life-altering and emotionally charged process for the birth mother, one which demands the full protection of the court.²⁹⁶ Francis Lewis, the former Executive Director of the Children's Bureau of South Carolina, contrasts the judge's viewpoint as follows:

The women involved are almost all from "nice," middle-class families, and most of them care very deeply about their babies. They grieve. They send letters and pictures to go in the babies' files in case they ever want to know why they were given up. They want their children to be well provided for, but they want most for their children to be loved.²⁹⁷

While the paramount focus should be on the welfare of the child, the birth mother's rights must be protected and her dignity maintained. Instead, all too often, the birth mother is viewed more as a manufacturer, the child as merchandise, and the adoptive parents as customers.²⁹⁸

The second fallacy underlying the judge's comments is that because adoption attorneys provide a service, market forces adequately protect the parties and society from any undesirable consequence of their business relationship. Outspoken conservative spokeswoman Phyllis Schlafly agreed: "Where there is a willing seller and an eager buyer, and the baby moves from an unwanted environment into a home with loving adoptive parents, where's the crime? . . . If there is such a thing as a victimless crime, this is it."²⁹⁹ One attorney claimed that "[c]hildren are not brokered; the high costs and cash payments are just 'part of the process. . . .' You know, this kind of thing happens in every area, [for instance in] [r]eal estate"³⁰⁰

If the bar demands no higher degree of financial accountability for the practice of adoption law than is required in the practice of real estate law, an infant is relegated to equal status with metes, bounds, and access to city water. If society allows

296. In determining the rights of the parties to an adoption, one court cautioned the bench to be mindful that "humble status and indigence are the honorable condition of many, and often the fruitful soil of virtue, discipline, and aspiration." *McClary v. Follett*, 226 Md. 436, 442, 174 A.2d 66, 69 (Ct. App. 1961).

297. *The State*, March 1, 1984, at 8-A, col. 6.

298. See L. McTAGGART, *supra* note 95, at 339 (1980).

299. This comment later earned Ms. Schlafly a 1978 Ms. MAGAZINE Ayn Rand Free Enterprise Award. See *id.* at 317.

300. *Id.*

adoption to be governed solely by market forces and if adoption is thought of in terms of market rhetoric, it condones a perverse twist of the free market system, in turn diminishing personhood generally.

If a capitalistic baby industry were to come into being[,] . . . how could any of us, even those who do not produce infants for sale, avoid subconsciously measuring the dollar value of our children? How could our children avoid being preoccupied with measuring their own dollar value? This makes our discourse about ourselves (when we are children) and about our children (when we are parents) like our discourse about cars.³⁰¹

This philosophical thesis may be rejected by some in favor of the invisible hand of market forces. Assuming for the sake of these dissenters that no moral distinction exists between the sale of an automobile and an infant, the market forces at play in adoption nonetheless require strict judicial scrutiny of the fees involved — not because of the product involved, but because of the unfair market conditions this product generates.

According to the National Committee for Adoption, adoptions between unrelated persons declined by 38% between 1971 and 1982.³⁰² More abortions, greater contraceptive use, and the lessening social stigma of single parenthood all contribute to this decline.³⁰³ Experts estimate that one in five couples of reproductive age have difficulty conceiving.³⁰⁴ The ratio of parents seeking to adopt and the number of adoptable babies is as disproportionate as 100 to 1.³⁰⁵

This adoption market is fueled by young couples' emotional search for an adoptable child, not by the informal judgment of a dispassionate shopper. Some couples' sense of desperation drives them to seek adoptable children by placing notices on cars at shopping center parking lots, on park benches, and on railroad overpasses.³⁰⁶ Jeff Rosenberg, the Director of Adoption Services for the National Committee for Adoptions states that "I have had very legitimate couples tell me that they would do anything,

301. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1926 (1987).

302. See N.Y. Times, April 5, 1987, at A30, col. 4.

303. See *id.*

304. See *id.* at 10C, col. 5.

305. See *id.*, June 26, 1986, at 1C, col. 2.

306. See *id.*, Apr. 5, 1987, at 1A, col. 4.

literally anything, to have a baby. It's a real desperation."³⁰⁷

For some of the fortunate few couples who find an adoptable baby and can afford the fees involved, their sense of relief can be blinding. One adoptive mother stated that "[w]hen you're about to get a child, you don't care about the bill. . . . You're not going to bargain for a child."³⁰⁸ Furthermore, the nature of the deal allows baby brokers to secure their fortunes with impunity; adoptive couples seldom consider themselves victims.³⁰⁹ Those adoptive parents who do feel victimized often are reluctant to come forward for fear that their child may be taken away.³¹⁰

Given the volatility of the adoption market, even the most vociferous supporter likely would agree that free market principles cannot adequately protect the interests of the parties to an adoption contract. Even Judge Richard Posner, the preeminent advocate for unrestrained free market principles, would draw the line here. After a brief flirtation with the idea of a free baby market,³¹¹ he recently recanted, acknowledging that he "did not advocate a free market in babies."³¹² The baby broker's relationship with the adoptive couple is the classic example of unequal bargaining positions, and courts and legislatures must be ready to correct the imbalance.

VIII. A MATTER OF JUDICIAL DISCRETION: EXPENSES AND FEES

Baby selling is illegal³¹³ and an "ugly and barbaric practice."³¹⁴ Yet, some do accept a practice where a middle man, a baby broker, charges exorbitant prices to a family for the privilege of adopting a child. One commentator has asked, "Is morally 'wrong' for a girl to hold up her baby for sale, but okay for

307. *Id.*, Oct. 29, 1987, at 6B, col. 5.

308. *Baby Brokers*, *supra* note 87, at 24.

309. See L. McTAGGART, *supra* note 95, at 276.

310. See *id.*

311. See Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978).

312. Posner, *Mischaracterized Views*, 69 JUDICATURE 321 (1986).

313. See S.C. CODE ANN. § 16-3-1060 (Law. Co-op. Supp. 1988).

314. Editorial Notes, *Survey of New Jersey Adoption Law*, 16 RUTGERS L. REV. 379, 407 (1962). One particularly egregious instance of baby selling occurred in California, where a man was convicted of attempting to sell his two-year-old daughter for \$90,000. See N.Y. Times, July 27, 1986, at 1A, col. 2.

anyone else to do so[?]"³¹⁵ When originally passed in 1986, the Adoption Act addressed this inconsistency: "Under no circumstances may a parent . . . receive a fee . . . for consent . . . for the purpose of adoption. However, costs may be assessed as they are reimbursements for expenses incurred or fees for services rendered."³¹⁶ The June 7, 1988 amendments expanded this section as follows: "Under no circumstances may . . . any person receive a fee . . . for giving a consent . . . for the purpose of adoption" Costs, however, may be assessed and payment made for "reasonable attorney's fees and costs for actual services rendered [and] reasonable fees to child placing agencies."³¹⁷ By allowing payment only of *reasonable* attorneys' fees for *actual* services rendered, the legislature demonstrated its intent to halt the practice of those who make a life's work of exploiting couples' desire for an adoptable baby. Representative David Wilkins, who introduced the adoption bill in the state House of Representatives, stated that the General Assembly was aware of the baby brokering stories in the press when it penned the June 1988 amendments.³¹⁸ Representative Wilkins feels that the legislature designed the changes to promote tough judicial scrutiny of the baby brokering problem.³¹⁹

As for adoption referral services such as Richard Gitelman's, a close reading of the statute reveals that paying for these services is impermissible. To qualify for compensation, the services must be conducted by a duly licensed child-placing agency, as required by law,³²⁰ or by an attorney. While Section 20-7-1690(f)(5) allows reimbursement for "costs for actual services rendered," the statute contemplates only those costs incurred by an attorney.³²¹ The statute clearly enumerates each

315. L. McTAGGART, *supra* note 95, at 317.

316. S.C. CODE ANN. § 20-7-1690(D) (Law. Co-op. Supp. 1986).

317. S.C. CODE ANN. § 20-7-1690(F) (Law. Co-op. Supp. 1988).

318. See Telephone interview with Representative David Wilkins, Chairman of the South Carolina House Judiciary Committee (Jan. 14, 1989).

319. See *id.*

320. See S.C. CODE ANN. § 20-7-1650(e) (Law. Co-op. Supp. 1988). Mr. Gitelman makes the tenuous argument that after introducing the birth mother and adoptive couple, he removes himself from the adoption process. Therefore, because his services take place before the actual adoption proceeding begins, his fees need not be reported to the court nor satisfy judicial scrutiny. Such a tortured construction negates the policy behind the act. Telephone interview with Richard Gitelman (July 14, 1989).

321. See *id.* § 20-7-1690(F)(5).

exception to the prohibition against the transfer of funds. To allow compensation for nonlawyers under the section designated for attorneys would be a strain of statutory construction. Even if allowed, \$50,000 surely exceeds what could be considered costs for “actual services rendered.”

The definition of “reasonable attorney fees for actual services rendered”³²² likely will be a topic of great speculation as to what constitutes both reasonable fees and “actual services.” One New Jersey court wrestled with the construction of a similar statute, stating that “receipt of compensation for legitimate legal services performed in an adoption” is permitted; however, fees that were “more like a broker’s fee or finder’s fee” would be disallowed.³²³ For example, efforts spent securing the birth mother’s consent, preparing documents, and filing motions clearly are actual services. Although consulting with a birth mother about her child’s potential adoption would be an actual service, once a birth mother consented to an adoption, the attorney would be prohibited from charging the adoptive parents merely for the *opportunity* to adopt a child. This would be a finder’s or broker’s fee in excess of the actual services the attorney provided the adoptive parents.

The Committee on Professional and Judicial Ethics of the State Bar of Michigan stated, “There is no place in this kind of a situation for finder’s fees, commissions or bonuses” and that these payments are “not only professionally unethical, but morally wrong.”³²⁴ The New York State Legislature correctly labeled independent adoptions that “involved a payment of money in consideration of the placements [as] . . . ‘black market’ or ‘bootleg’ placement[].”³²⁵ Practically speaking, however, these pronouncements may be of little help. One commentator has recog-

322. *Id.* In Mr. Gitelman’s defense, he claims to incur extremely high expenses related to the identification of potential birth mothers. If Mr. Gitelman were an attorney and his expenses could be documented, the statute would not prohibit charging a reasonable fee for those services. Clearly, this statutory fee provision is fact specific and requires strict judicial scrutiny.

323. *In re Adoption of a Child by N.P.*, 165 N.J. Super. 591, 596, 398 A.2d 937, 940 (Ct. Law. Div. 1979).

324. State Bar of Mich. Comm. on Professional and Judicial Ethics, Op. 156 (1953), reprinted in 38 Mich. St. B.J., 205, 207 (1959).

325. Joint Legislative Committee on Interstate Cooperation, Report of the Special Committee on Social Welfare (N.Y. Leg. Doc. 1949, No. 62) (noted in *In re Adoption of E.W.C.*, 89 Misc. 2d 64, 75, 389 N.Y.S.2d 743, 751 (1976)).

nized that "[w]hen a 'professional fee' is charged, it is often difficult to ascertain whether the fee went towards 'professional services' or actually went to the adoption *placement activity* (or, as perhaps most frequently happens, went for some kind of combination of the two)."³²⁶

To aid the court in this inquiry, the Act requires a fully itemized accounting of all disbursements at the final hearing of an adoption,³²⁷ which the adoptive couple must verify under penalty of perjury.³²⁸ Although not required by statute, a family court judge would be well advised to investigate the source of the couple's referral to the attorney handling the adoption. A systematic investigation of these referral sources would alert the bench to otherwise undisclosed transactions. This accounting is the "mechanism for alerting the court to any irregularities."³²⁹

Even though brokers' fees are not allowed by the statute, courts still must grapple with the reasonableness of the fees for compensable services.³³⁰ Although a survey conducted by the *New York Times*³³¹ indicates that fees for independent adoptions generally range from \$1,500 to \$3,500, the South Carolina Code of Professional Responsibility provides the factors by which individual cases must be analyzed.³³² A failure to scruti-

326. Note, *Babes and Barristers: Legal Ethics and Lawyer-Facilitated Independent Adoptions*, 12 HOFSTRA L. REV. 933, 961 (1984) (emphasis in original).

327. See S.C. CODE ANN. § 20-7-1775 (Law. Co-op. Supp. 1988).

328. See *id.*

329. Model State Adoption Act § 21 commentary, *reprinted in* 19 FAM. L.Q. 103, 121 (1985) (Tentative Draft 1984).

330. This is especially difficult given the "fact-sensitive nature of independent placement activities." See Note, *supra* note 152, at 959.

331. N.Y. Times, June 26, 1986, at C10, col. 6.

332.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

nize closely adoption fees and payments scores of forum-shopping attorneys around the country that South Carolina's baby market is still open for business — producing the same national notoriety that the Act seeks to eliminate. Such strict judicial scrutiny will affirm the bar's high calling: "Impress upon yourself the importance of your profession; consider that some of the greatest and most important interests of the world are committed to your care. . . . In all the civil difficulties of life, men depend upon your exercised faculties and your spotless integrity."³³³

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(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

S.C. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1989).

333. S. SMITH, *Master, What Shall I Do to Inherit Eternal Life?*, in *THE LAWYER THAT TEMPTED CHRIST* (1824), reprinted in 29 CAN. B. REV. 720, 720 (1951).