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## Not Perfect, but Better than Most: South Carolina's TPR Process and Its Surprisingly Fair Treatment of Incarcerated Parents

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**NOT PERFECT, BUT BETTER THAN MOST: SOUTH CAROLINA'S TPR PROCESS  
AND ITS SURPRISINGLY FAIR TREATMENT OF INCARCERATED PARENTS**

I. INTRODUCTION .....	697
II. STATUTORY TPR APPROACHES .....	700
A. <i>Overview of the Various Statutory Approaches</i> .....	700
B. <i>South Carolina's Statutory Approach</i> .....	702
III. JUDICIAL TREATMENT OF SOUTH CAROLINA'S TPR STATUTE.....	703
A. <i>Beyond the Letter of the Law: Two Judicially Created         Requirements that Have Helped to Further Enhance         South Carolina's TPR Process</i> .....	703
B. <i>When Termination Strikes: Courts' Treatment of the         TPR Statute When Termination is Deemed Proper, and         the Disturbing Trend that Has Arisen in the Prisoner Parent         Context When Termination Occurs</i> .....	706
IV. RECOMMENDATIONS FOR REFORM IN SOUTH CAROLINA .....	709
A. <i>Follow Wisconsin's Lead and Amend the State's TPR Statute         so that All Courts Are Required to Look at Certain         Factors When Addressing the Best Interests of the Child</i> .....	710
B. <i>Amend the State's TPR Statute to Permit the Post-         Termination Restoration of Parental Rights so that the         State Can Begin to Combat the Growing Legal Orphan Problem</i> .....	711
C. <i>Provide Notice to Prisoners of Their Parental Requirements         While in Prison so that the Need for the Termination of         Prisoner Parental Rights Diminishes</i> .....	712
V. CONCLUSION .....	713

I. INTRODUCTION

The United States has the largest prison population in the world.<sup>1</sup> An estimated 2.3 million people are in U.S. prisons today, representing a 500% increase since 1980.<sup>2</sup> This increase has led to prison overcrowding and budget shortfalls,<sup>3</sup> as many state governments have been saddled by budget constraints<sup>4</sup>

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1. NAACP Supports Legislation to Help States Reduce Prison Populations, NAACP, <http://www.naacp.org/action-alerts/entry/naacp-supports-legislation-to-help-states-reduce-prison-populations/> (lasted visited May 9, 2011).

2. *Id.*

3. *Id.*

and the growing burden of funding and supporting a “rapidly expanding penal system.”<sup>5</sup> However, the increasingly frequent issue of the termination of a prisoner’s parental rights is too often overlooked in the context of the problems that accompany an expanding prison population.

As of 2007, 52% of all prisoners were parents;<sup>6</sup> moreover, nearly 1.7 million children had a parent in prison, which represents an 82% increase since 1991.<sup>7</sup> Because so few of these children live in two-parent homes, most are placed either in a relative’s home or in foster care.<sup>8</sup> This removal of children from the natural parent’s home, coupled with the average state prison sentence for nonviolent criminal offenses resting at 51.6 months,<sup>9</sup> has resulted in many children being separated from their parents for extended periods and has forced courts to entertain actions involving the termination of parental rights.

Incarcerated parents are of particular concern in South Carolina. The number of prisoners in the state who are parents is considerable: 78% of women in prison in South Carolina are mothers, and 62% of male prisoners are fathers.<sup>10</sup> Accordingly, this high incarceration rate has increased actions to terminate parental rights.

South Carolina, just as every other state in the Union, statutorily permits a court to terminate an individual’s parental rights.<sup>11</sup> This decision, however, does not come without great consideration. The South Carolina Supreme Court has stated that “[t]he termination of the legal relationship between natural parents and a child presents one [of] the most difficult issues [it] is called upon to decide.”<sup>12</sup> This difficulty arises because “termination of parental rights is both total and irrevocable. Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child, to participate in, or even to know

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4. Sara Murray, *States Face Budget Shortfalls of \$26.7 Billion*, WALL ST. J., Dec. 8, 2010, at A4.

5. NAACP Supports Legislation to Help States Reduce Prison Populations, *supra* note 1.

6. SARAH SCHIRMER ET AL., THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991–2007, at 2 (2009).

7. *Id.*

8. *Id.* at 1.

9. Stephanie Sherry, Note, *When Jail Fails: Amending the ASFA to Reduce its Negative Impact on Children of Incarcerated Parents*, 48 FAM. CT. REV. 380, 380 (2010) (citing Matthew R. Durose & Christopher J. Mumola, U.S. Dep’t of Justice, *Profile of Nonviolent Offenders Exiting State Prisons*, BUREAU JUST. STAT. FACT SHEET, Oct. 2004, at 1, 3 tbl.8, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pnoesp.pdf> (tbl.8 (2004))).

10. Cindy Landrum, *Children, with Parents in Prison*, J. WATCHDOG (July 19, 2010, 6:01 AM), <http://www.journalwatchdog.com/crime/702-the-children>.

11. S.C. CODE ANN. § 63-7-2570 (2010 & Supp. 2010); *Grounds for Involuntary Termination of Parental Rights*, CHILD WELFARE INFORMATION GATEWAY, [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/groundtermin.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.cfm) (last visited May 9, 2011).

12. S.C. Dep’t of Soc. Servs. v. Cochran, 364 S.C. 621, 626, 614 S.E.2d 642, 645 (2005).

about, any important decision affecting the child's religious, educational, emotional, or physical development."<sup>13</sup>

Additionally, the decision to terminate parental rights forces courts to weigh "the protection of family integrity [against] the protection of children."<sup>14</sup> Courts, out of respect for "family autonomy," do try to limit state intervention in familial relations.<sup>15</sup> However, the concern for family autonomy conflicts at times with the state's interest in guaranteeing a child's "safety and well-being" when he is incapable of caring for himself.<sup>16</sup> Consequently, courts throughout the country have determined that when a parent's care, or lack thereof, endangers a child's well-being, the family's interest must give way to the state's interest in the protection of minors.<sup>17</sup>

This determination has created a number of issues, including whether a parent's incarceration jeopardizes the well-being of the child. Many states have concluded that incarceration does jeopardize a child's well-being and have listed imprisonment as a statutory ground for termination of parental rights (TPR).<sup>18</sup> The remaining states, however, have reasoned that incarceration alone is not enough to warrant the commencement of a TPR action.<sup>19</sup> Surprisingly, South Carolina, a state sometimes viewed as unsympathetic to prisoners,<sup>20</sup> is a member of the latter group.<sup>21</sup>

Despite South Carolina's balanced approach to TPR in the prison context, however, some concerns with the current process exist. In particular, the state legislature needs to recognize that (1) the "best interests" prong of South Carolina's statutory TPR test needs further development to ensure that all courts address certain factors when handling TPR actions, (2) the statute allows for the creation of legal orphans, and (3) incarcerated parents deserve some added protections in the statute. Therefore, this Comment contends that although South Carolina has a TPR process superior to that of many other states, the South

13. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 39 (1981) (Blackmun, J., dissenting) (footnote omitted).

14. Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 64 (1995).

15. *Id.*

16. *Id.*

17. *See id.* at 64–65.

18. *See Maryann Zavez, Use of the Adoption and Safe Families Act at 15/22 Months for Incarcerated Parents*, 33 VT. L. REV. 187, 189 (2008) (citing ARLENE E. LEE ET. AL., CHILD WELFARE LEAGUE OF AM., THE IMPACT OF THE ADOPTION AND SAFE FAMILIES ACT ON CHILDREN OF INCARCERATED PARENTS 11 (2005)).

19. *See id.* at 190–91.

20. *See ACLU Calls for Independent Audit of South Carolina Department of Corrections*, ACLU (Aug. 26, 2008), <http://www.aclu.org/prisoners-rights/aclu-calls-independent-audit-south-carolina-department-corrections> ("[N]umerous complaints during the past several years from prisoners in South Carolina . . . complain about grossly inadequate medical and mental health care, involuntary drugging and physical restraint of inmates with mental illness, sexual assault, overcrowding[,] and harsh disciplinary measures without due process.").

21. *S.C. Dep't of Soc. Servs. v. Ledford*, 357 S.C. 371, 376, 593 S.E.2d 175, 177 (Ct. App. 2004).

Carolina General Assembly needs to address the three issues listed above to better ensure that the best interests of the children involved in TPR actions are served and that prisoner parents are given a fair opportunity to retain their parental rights. In so contending, Part II of this Comment discusses the various ways in which states statutorily approach the termination of parental rights for incarcerated parents and demonstrates why South Carolina's extensive, fact-driven analysis is most appropriate. Part III addresses South Carolina TPR case law and the ways in which South Carolina courts have interpreted and treated the state's TPR statute. Finally, in Part IV, this Comment offers some recommendations for how the legislature can resolve the three concerns noted above.

## II. STATUTORY TPR APPROACHES

### A. *Overview of the Various Statutory Approaches*

The termination of parental rights ends the legal parent-child relationship, severing all "privileges, immunities, duties, and obligations" that exist between a parent and child.<sup>22</sup> For this reason, some courts view TPR as the "most serious" matter that a family court considers.<sup>23</sup> States handle TPR for incarcerated parents in a variety of ways. Some states provide for TPR if the parent is imprisoned for a certain length of time, while others weigh external factors before reaching a decision to terminate.<sup>24</sup> Most states' statutes, however, provide that incarceration is grounds for a TPR proceeding to commence.<sup>25</sup> Consequently, it should surprise few that these statutes, in conjunction with an increasing number of incarcerated parents, have resulted in a substantial increase in incarcerated parent TPR proceedings each year.<sup>26</sup>

By 2005, TPR statutes in thirty-six states listed a parent's incarceration as an element to be considered in a TPR proceeding.<sup>27</sup> Twenty-five of these states use the length of the parent's prison sentence as a determining factor in whether incarceration is grounds for a TPR action.<sup>28</sup> Some of these states specify exactly how long a parent must be imprisoned, while others speak in broader terms. For instance, Utah requires that the parent be imprisoned for only one year before

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22. S.C. CODE ANN. § 63-7-2590(A) (2010). The only right that remains is a child's right to inherit from the parent, which is terminable solely by a final adoption order. *Id.*

23. Joiner *ex rel.* Rivas v. Rivas, 335 S.C. 648, 654, 518 S.E.2d 51, 54 (Ct. App. 1999).

24. See Steven Fleischer, Note, *Termination of Parental Rights: An Additional Sentence for Incarcerated Parents*, 29 SETON HALL L. REV. 312, 325-26 (1998).

25. See Zavez, *supra* note 18, at 189 (citing LEE ET AL., *supra* note 18, at 11).

26. See *id.* (citing LEE ET AL., *supra* note 18, at 20) ("From 1992 to 2002, the number of TPR proceedings [involving incarcerated parents] per year increased from 113 to 394.").

27. *Id.* (citing LEE ET AL., *supra* note 18, at 11).

28. Zavez, *supra* note 18, at 189 (citing LEE ET AL., *supra* note 18, at 11).

statutory grounds for a TPR action exist,<sup>29</sup> while other states, such as Florida, require that “the state show the incarceration will last a ‘substantial portion of the period of time before the child will attain the age of 18 years.’”<sup>30</sup>

Other states that consider the parents’ incarceration in the TPR process provide that the committal of certain crimes is grounds for TPR.<sup>31</sup> For example, Massachusetts allows for the commencement of a TPR action when a parent faces imprisonment for crimes such as murder or assault of the child or another child in the parent’s household.<sup>32</sup> Although few commentators have criticized this latter group of states, some have argued that focusing on the length of the parent’s prison sentence helps create a “commit a crime and lose your child policy” due to long prison sentences and stern drug laws.<sup>33</sup>

This criticism largely stems from the fact that in many states, the predominant consideration when determining whether termination is proper is whether the parent satisfied a statutory basis for TPR.<sup>34</sup> These courts may look at the best interests of the child in question, but “the burden to demonstrate unfitness or abandonment is greatly diminished or nonexistent because criminal status essentially provides the basis for termination.”<sup>35</sup>

A minority of states, however, have concluded that imprisonment alone is not sufficient for a TPR proceeding to arise.<sup>36</sup> These jurisdictions correctly reason that “[s]tates that terminate parental rights based on incarceration status may permanently sever the important, positive relationship that a parent and child share.”<sup>37</sup> Consequently, these states require their courts to look at the

29. Zavez, *supra* note 18, at 189 (citing UTAH CODE ANN. § 78-3a-408(2)(e) (West 1953 & Supp. 2002)).

30. Mimi Laver, *Incarcerated Parents: What You Should Know When Handling an Abuse or Neglect Case*, 20 CHILD LAW PRAC. 145, 152 (2001) (quoting FLA. STAT. ANN. § 39.806(1)(d) (2001)).

31. *See id.* at 153.

32. *See, e.g.*, MASS. GEN. LAWS ch. 210, § 3 (West 2010) (“The department of social services shall file a petition . . . to dispense with parental consent to adoption, custody, guardianship or other disposition of the child . . . [if] the parent has been convicted by a court of competent jurisdiction of the murder or voluntary manslaughter of another child of such parent . . . or of any assault constituting a felony which results in serious bodily injury to the child or to another child of the parent . . .”).

33. Sherry, *supra* note 9, at 381 (quoting CHARLENE WEAR SIMMONS, CALIFORNIA LAW AND THE CHILDREN OF PRISONERS 3 (2003)) (internal quotation marks omitted).

34. Raquel Ellis et al., *The Timing of Termination of Parental Rights: A Balancing Act for Children’s Best Interests*, RES. BRIEF (Child Trends, Wash. D.C.), Sept. 2009, at 1, 4, available at [http://www.childtrends.org/Files/Child\\_Trends-2009\\_09\\_09\\_RB\\_LegalOrphans.pdf](http://www.childtrends.org/Files/Child_Trends-2009_09_09_RB_LegalOrphans.pdf). In a study of twenty family court judges throughout the United States, Child Trends, a nonprofit, nonpartisan research center, found that “[n]early all judges reported that the factor most critical to consider in determining whether to terminate parental rights is whether the parents have met state statutory grounds for TPR.” *Id.*

35. *See* Fleischer, *supra* note 24, at 313.

36. *See id.* at 334–35 (“These states consider the varied psychological effects of incarceration and understand the need for an approach that focuses on the child’s best interests and makes individualized determinations prior to terminating a parent’s rights.”).

37. *Id.* at 314–15.

support for, relationship with, and time away from the child, in conjunction with the child's best interests, to determine if TPR is proper.<sup>38</sup>

### *B. South Carolina's Statutory Approach*

South Carolina's TPR statute states that the purpose of allowing TPR proceedings

is to establish procedures for the reasonable and compassionate termination of parental rights where children are abused, neglected, or abandoned in order to protect the health and welfare of these children and make them eligible for adoption by persons who will provide a suitable home environment and the love and care necessary for a happy, healthful, and productive life.<sup>39</sup>

The South Carolina Department of Social Services (SCDSS) or any interested party may file an action for TPR<sup>40</sup> with the family court, which possesses exclusive jurisdiction over TPR proceedings.<sup>41</sup> The petitioner must not only prove at least one of the eleven grounds listed for TPR, but also must show that TPR is in the best interests of the child.<sup>42</sup> Though all eleven grounds are potentially relevant to an incarcerated parent, four main provisions are of particular concern for imprisoned parents: willful failure to visit the child, willful failure to support the child, abandonment, and the child's residing in foster care for fifteen of the most recent twenty-two months.<sup>43</sup> If the court finds that one of

38. *See id.* at 335.

39. S.C. CODE ANN. § 63-7-2510 (2010 & Supp. 2010).

40. S.C. CODE ANN. § 63-7-2530(A) (Supp. 2010).

41. § 63-7-2520 (2010).

42. § 63-7-2570 (2010 & Supp. 2010).

43. *See id.* The following provisions are most relevant to incarcerated parents in South Carolina:

(3) The child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to visit the child. The court may attach little or no weight to incidental visitations, but it must be shown that the parent was not prevented from visiting by the party having custody or by court order. The distance of the child's placement from the parent's home must be taken into consideration when determining the ability to visit.

(4) The child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to support the child. Failure to support means that the parent has failed to make a material contribution to the child's care. A material contribution consists of either financial contributions according to the parent's means or contributions of food, clothing, shelter, or other necessities for the care of the child according to the parent's means. The court may consider all relevant circumstances in determining whether or not the parent has wilfully failed to support the child, including requests for support by the custodian and the ability of the parent to provide support.

....

(7) The child has been abandoned as defined in Section 63-7-20.

the grounds for TPR has been met and that termination is in the best interests of the child, the court may issue an order that permanently terminates the prisoner's parental rights.<sup>44</sup> South Carolina's TPR statute, in conjunction with judicial interpretation of the statute, has helped create one of the more fair TPR processes in the country.

### III. JUDICIAL TREATMENT OF SOUTH CAROLINA'S TPR STATUTE

#### *A. Beyond the Letter of the Law: Two Judicially Created Requirements that Have Helped to Further Enhance South Carolina's TPR Process*

As noted above, South Carolina courts are required to apply a two-part test in all TPR proceedings.<sup>45</sup> Courts must first determine if there is "clear and convincing evidence" that at least one of the statutory grounds has been met.<sup>46</sup> If that standard is satisfied, courts must then reason whether termination is in the child's best interests.<sup>47</sup> In making this determination, however, courts have not simply applied the law as written, but have incorporated requirements not found in the statute.

First, the Court of Appeals has held that an incarcerated parent cannot be subjected to a TPR action for failure to visit or support a child when that failure results from actions or policies that SCDSS or any other governmental entity institutes.<sup>48</sup> In *South Carolina Department of Social Services v. Wilson*, the Court of Appeals reversed the family court's TPR order and held that SCDSS's preventing an incarcerated father from visiting his children, coupled with prison policies that prevented him from earning an income, did not demonstrate the father's willful choice to ignore his parental responsibilities.<sup>49</sup>

In *Wilson*, a father of three was convicted of distributing cocaine.<sup>50</sup> Two years after the conviction, SCDSS took all three children into emergency protective custody because of their mother's neglect.<sup>51</sup> During this time, the father repeatedly sought to visit his children, but SCDSS refused his requests.<sup>52</sup> The father also found it impossible to provide monetary aid to the children, as

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(8) The child has been in foster care under the responsibility of the State for fifteen of the most recent twenty-two months.

*Id.*

44. § 63-7-2580(A) (2010).

45. See § 63-7-2570 (2010 & Supp. 2010).

46. See S.C. Dep't of Soc. Servs. v. Cochran, 356 S.C. 413, 417, 589 S.E.2d 753, 755 (2003) (citing Santosky v. Kramer, 455 U.S. 745, 747-78 (1982); Richland Cnty. Dep't of Soc. Servs. v. Earles, 330 S.C. 24, 32, 496 S.E.2d 864, 868 (1998)).

47. See § 63-7-2570.

48. See S.C. Dep't of Soc. Servs. v. Wilson, 344 S.C. 332, 338-40, 543 S.E.2d 580, 583-84 (Ct. App. 2001).

49. *Id.*

50. *Id.* at 334, 543 S.E.2d at 581.

51. *Id.*

52. *Id.*



prison policies prevented him from earning an income.<sup>53</sup> SCDSS filed an action to terminate the father's parental rights "because he failed to visit and support the children for a six-month period."<sup>54</sup> The family court agreed and ordered TPR,<sup>55</sup> but the Court of Appeals reversed.<sup>56</sup>

The Court of Appeals reasoned that "[t]o determine whether a parent's failure to support or visit during the time of incarceration evinces a settled purpose to forego parental responsibilities requires a comprehensive analysis of all of the facts and circumstances."<sup>57</sup> Here, the father's failure to support or visit his children stemmed not from his own desire or actions but from SCDSS decisions and penitentiary policies.<sup>58</sup> The court first looked at the parent-child relationship before the father was incarcerated and found that "[t]here [was] no evidence in the record that the father failed in his parental responsibilities to support or provide the children with a stable home prior to his incarceration."<sup>59</sup> The court then looked at the father's relationship with his children while incarcerated.<sup>60</sup> The father visited with the children early in his imprisonment, but these visitations ceased when SCDSS took custody of the children.<sup>61</sup> Despite the father's repeated requests to see his children, SCDSS refused his attempts.<sup>62</sup> Consequently, the court held that SCDSS failed to prove by clear and convincing evidence that the father willfully failed to support or visit his children.<sup>63</sup> More importantly, the court recognized that South Carolina courts cannot terminate the parental rights of an incarcerated individual when that parent's failure to visit or support stems solely from the actions or policies of SCDSS or another government actor.<sup>64</sup>

South Carolina courts also have held that the "best interests" prong is the "paramount consideration" for courts and that it should be far more heavily weighed than the first prong.<sup>65</sup> For example, in *Charleston County Department of Social Services v. Jackson*,<sup>66</sup> the Court of Appeals reversed the family court's TPR order, holding that termination would not be in the child's best interests despite the existence of statutory grounds for TPR.<sup>67</sup> In *Jackson*, the father was

53. *Id.* at 338, 543 S.E.2d at 583.

54. *Id.* at 335, 543 S.E.2d at 581.

55. *Id.* at 335, 543 S.E.2d at 581–82.

56. *Id.* at 340, 543 S.E.2d at 584.

57. *Id.* at 339, 543 S.E.2d at 584.

58. *See id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 339–40, 543 S.E.2d at 584.

64. *See id.* at 338–39, 543 S.E.2d at 583–84.

65. *See, e.g., S.C. Dep't of Soc. Servs. v. Sims*, 359 S.C. 601, 605, 598 S.E.2d 303, 306 (Ct. App. 2004); *Doe v. Baby Boy Roe*, 353 S.C. 576, 579, 578 S.E.2d 733, 735 (Ct. App. 2003) (citing *S.C. Dep't of Soc. Servs. v. Smith*, 343 S.C. 129, 133, 538 S.E.2d 285, 287 (Ct. App. 2000)).

66. 368 S.C. 87, 627 S.E.2d 765 (Ct. App. 2006).

67. *Id.* at 101–04, 627 S.E.2d at 773–75.

incarcerated for first degree assault and robbery in New York three months before his child was born.<sup>68</sup> Less than a year later, the father confirmed his paternity of the child and “tried to send [the c]hild his limited inmate earnings.”<sup>69</sup> These efforts failed, however, because the mother and child moved to South Carolina without informing the father.<sup>70</sup> For the next four years, the father wrote hundreds of letters to government officials, agencies, and other organizations in an effort to find his son.<sup>71</sup> Meanwhile, the Charleston County Department of Social Services (DSS) removed the child from the mother’s custody and terminated her parental rights because of abuse and abandonment.<sup>72</sup>

Largely through his own efforts, the father finally located his son in August of 2000, and spent much of the next year writing DSS and expressing his wish to establish regular communication with DSS and his child.<sup>73</sup> His efforts went mostly unnoticed, however, and approximately twelve months later, DSS instituted a TPR action against the father.<sup>74</sup> After several continuances, the family court agreed with DSS that TPR was appropriate and ordered the termination of the father’s parental rights.<sup>75</sup> The court found that in addition to statutory TPR grounds being present, termination was in the child’s best interest.<sup>76</sup>

The father appealed, arguing, among other things, that TPR was not in his son’s best interest.<sup>77</sup> The Court of Appeals agreed, noting that the father’s connection with his child was a constitutionally protected “fundamental liberty interest.”<sup>78</sup> More importantly, however, the court looked to the child’s adoptability, the impact TPR would have on the child’s stability, the incarcerated parent’s concern for the child’s well-being, and the parent’s relationship or potential relationship with the child.<sup>79</sup>

Although the court found that statutory grounds for TPR had been satisfied due to the child’s residing in foster care for fifteen of the most recent twenty-two months,<sup>80</sup> it reasoned that TPR was not in the best interests of the child: “Unless long-term incarceration alone is enough to terminate parental rights, which is not the case in South Carolina, we cannot discern any evidence . . . indicating termination would be in [the c]hild’s best interests.”<sup>81</sup> The court first considered

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68. *Id.* at 91, 627 S.E.2d at 767–68.

69. *Id.* at 91, 627 S.E.2d at 768.

70. *Id.* at 91 n.2, 627 S.E.2d at 768 n.2.

71. *Id.* at 91, 627 S.E.2d at 768.

72. *Id.* at 92, 627 S.E.2d at 768.

73. *Id.* at 92–94, 627 S.E.2d at 768–69.

74. *Id.*

75. *Id.* at 95, 627 S.E.2d at 769–70.

76. *Id.* at 95, 627 S.E.2d at 770.

77. *Id.* at 102, 627 S.E.2d at 774.

78. *Id.* at 104, 627 S.E.2d at 775 (citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

79. *Id.*

80. *Id.* at 101–02, 627 S.E.2d at 773.

81. *Id.* at 104, 627 S.E.2d at 774–75.

the future stability of the child and the potential for adoption, finding that while the child's foster parents wished to remain as such, they had expressed no interest in adopting the child.<sup>82</sup> Thus, the court determined that terminating the father's parental rights would "not ensure future stability for [the c]hild."<sup>83</sup> Furthermore, the court reasoned that preserving the father's parental rights would not affect his son's living situation, because the father—still incarcerated—would not receive custody.<sup>84</sup> Instead, the father would simply keep the "right to connect with" and the duty to support his child.<sup>85</sup> Finally, while the father's relationship with his son was "faint," it was "nevertheless existent," as his clear desire to provide emotional and monetary support to the child was evidence of his concern for the child's welfare.<sup>86</sup> Therefore, with all these factors present, the court determined that despite the statutory grounds for TPR, termination was not in the best interests of the child.<sup>87</sup>

*B. When Termination Strikes: Courts' Treatment of the TPR Statute When Termination is Deemed Proper, and the Disturbing Trend that Has Arisen in the Prisoner Parent Context When Termination Occurs*

The court's holding in *Jackson*, however, does not mean that South Carolina courts will not order TPR. In fact, in the prison context, courts have shown a willingness to order TPR when an incarcerated parent demonstrates an aversion to, or disinterest in, contacting or supporting the child.<sup>88</sup>

For instance, in *South Carolina Department of Social Services v. Parker*,<sup>89</sup> the Court of Appeals affirmed the family court's TPR order, holding that termination of a prisoner's parental rights was in the best interests of the child because the incarcerated father willfully failed to visit and support his child.<sup>90</sup> In *Parker*, the father was imprisoned on drug charges shortly after his daughter's birth.<sup>91</sup> The child initially resided with her mother following the father's incarceration, but, due to the mother's drug addiction and neglect, the Richland County Department of Social Services (DSS) took custody of the child and placed her in foster care.<sup>92</sup> When the child was almost two years old, DSS filed

82. *Id.* at 102–03, 627 S.E.2d at 774.

83. *Id.* at 103, 627 S.E.2d at 774.

84. *Id.*

85. *Id.*

86. *Id.* at 103–04, 627 S.E.2d at 774–75.

87. *Id.* at 104, 627 S.E.2d at 775.

88. *See, e.g., S.C. Dep't of Soc. Servs. v. Truitt*, 361 S.C. 272, 281–82, 603 S.E.2d 867, 872–73 (Ct. App. 2004); *S.C. Dep't of Soc. Servs. v. Ledford*, 357 S.C. 371, 376–78, 593 S.E.2d 175, 177–78 (Ct. App. 2004).

89. 336 S.C. 248, 519 S.E.2d 351 (Ct. App. 1999).

90. *Id.* at 259, 519 S.E.2d at 356–57.

91. *See id.* at 251–53, 519 S.E.2d at 352–54.

92. *Id.* at 251–52, 519 S.E.2d at 353.

an action seeking to terminate the father's parental rights.<sup>93</sup> The father contested, but the family court granted TPR, citing the father's lack of contact with and support of the child as well as his incarceration.<sup>94</sup>

In affirming the family court's ruling, the Court of Appeals emphasized that the father made no attempt to locate the child between the time of his incarceration in 1994 and his receipt of the summons and complaint for TPR in 1996.<sup>95</sup> Although the father made some efforts to locate his daughter after being served, he never attempted to visit with her during the proceedings.<sup>96</sup> Furthermore, despite the fact that the father earned between \$30 and \$35 each month, he spent the money on cigarettes, hygiene products, and telephone calls, instead of financially supporting his child.<sup>97</sup> Although the father claimed that he was unaware of his obligation to pay child support, the court said that he was not entitled to receive such notice under the law.<sup>98</sup> The court, therefore, found that the father met the statutory grounds for TPR because he willfully failed to support and visit his child.<sup>99</sup>

Upon concluding that statutory grounds for TPR existed, the court then held that the family court was correct in determining that TPR was in the best interests of the child.<sup>100</sup> Unlike the extended analysis of the "best interests" prong in *Jackson*, the court provided only a brief discussion<sup>101</sup> of what South Carolina courts have called "the paramount consideration" in a TPR action.<sup>102</sup> Disregarding factors such as the child's potential for adoption and the potential for a relationship between the child and her father, the court focused squarely on the existence of an "enduring relationship," stating, "[P]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."<sup>103</sup> In looking to the facts at hand, the court found that

[a]n enduring relationship [was] not present between [the] father and [the child]. Father has seen his daughter only once, when she was 2 months old. He will not see her again until she is ten years old. Had Father made a recognizable effort to visit with his daughter, or to

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93. *Id.* at 253, 519 S.E.2d at 353.

94. *Id.* at 253, 519 S.E.2d at 353–54.

95. *Id.* at 256, 519 S.E.2d at 355–56.

96. *Id.* at 256–58, 519 S.E.2d at 356.

97. *Id.* at 258, 519 S.E.2d at 356.

98. *Id.*

99. *See id.* at 256, 519 S.E.2d at 355.

100. *Id.* at 259, 519 S.E.2d at 357.

101. *Id.* at 258–59, 519 S.E.2d at 356–57.

102. *See cases cited supra* note 65.

103. *Parker*, 336 S.C. at 259, 519 S.E.2d at 356 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)) (internal quotation marks omitted).

provide support for her, there may have been evidence of an “enduring relationship.”<sup>104</sup>

Therefore, the court held that the lack of an enduring relationship, coupled with the father’s willful failure to support and visit the child, warranted affirmation of the family court’s holding that termination was appropriate.<sup>105</sup>

Many may contend that the court’s decision in *Parker* to terminate the incarcerated father’s parental rights was the correct decision. The father had shown little interest in the child and had not provided the child with any financial support.<sup>106</sup> Nonetheless, the court’s limited analysis of the “best interests” prong is troubling. More concerning, however, is that the court’s treatment of the “best interests” prong in *Parker* may be the norm when an incarcerated parent has not established or attempted to establish an enduring relationship. The case of *South Carolina Department of Social Services v. Ledford*<sup>107</sup> illustrates this point.

In *Ledford*, the Court of Appeals once again provided minimal discussion of the “best interests” prong in holding that sufficient evidence supported the family court’s finding that the incarcerated father effectively abandoned his daughter and that termination of his parental rights was proper.<sup>108</sup> In *Ledford*, the child’s father was incarcerated twice before the child reached the age of six.<sup>109</sup> During the second incarceration, the father and mother divorced, and soon thereafter, the father lost contact with both the mother and his child.<sup>110</sup> The child initially resided with her mother after the father was imprisoned, but after only a short time, the child was placed in SCDSS emergency protective custody because of the mother’s drug abuse and eventual disappearance.<sup>111</sup> Approximately two years later, SCDSS filed for the termination of the father’s parental rights on grounds of abandonment and willful failure to visit and support.<sup>112</sup> The family court agreed with SCDSS and terminated the father’s parental rights.<sup>113</sup>

In affirming the family court’s ruling, the Court of Appeals found that clear and convincing evidence demonstrated that the father had abandoned his daughter.<sup>114</sup> While in prison, the father made only two attempts to contact his daughter,<sup>115</sup> and even after he learned that SCDSS had custody of the child, he

104. *Id.* at 259, 519 S.E.2d at 356–57.

105. *Id.* at 259, 519 S.E.2d at 357.

106. *See id.* at 256–58, 519 S.E.2d at 355–56.

107. 357 S.C. 371, 593 S.E.2d 175 (Ct. App. 2004).

108. *Id.* at 377, 593 S.E.2d at 177–78.

109. *Id.* at 373, 593 S.E.2d at 176.

110. *Id.* at 373–74, 593 S.E.2d at 176.

111. *Id.* at 374, 593 S.E.2d at 176.

112. *Id.* at 374–75, 593 S.E.2d at 176.

113. *Id.* at 375, 593 S.E.2d at 176.

114. *See id.* at 377, 593 S.E.2d at 178.

115. *See id.* at 376, 593 S.E.2d at 177. On the first attempt, the father asked prison officials to help locate the child, but they refused, and the father did nothing further. *Id.* at 374, 593 S.E.2d at

showed no interest in changing her living arrangements.<sup>116</sup> The court did not base its finding of abandonment on the father's incarceration alone; rather, it also noted that the father had not ensured "that his daughter was continually cared for."<sup>117</sup>

However, similar to its opinion in *Parker*, the court provided minimal discussion of the "best interests" prong of the statutory TPR test.<sup>118</sup> For instance, the court did not discuss the child's adoptability and the impact TPR could have on the child's stability. Instead, in one sentence, it stated that TPR was in the child's best interest because of the lack of recent communication between father and daughter, and because of testimony from the child's guardian ad litem and foster mother stating that termination was best for the child.<sup>119</sup>

South Carolina courts clearly have been instrumental in helping to give added protections to prisoner parents in the TPR process through policies such as those found in *Wilson* and *Jackson*. However, as seen in *Parker* and *Ledford*, courts have also simultaneously minimized the "best interests" inquiry when the incarcerated parent has not established or attempted to establish an enduring relationship with the child. Consequently, this Comment argues that courts should stringently apply a "best interests" analysis in all TPR actions, regardless of whether the parent has formed or attempted to form an enduring bond with the child.

#### IV. RECOMMENDATIONS FOR REFORM IN SOUTH CAROLINA

As detailed above, South Carolina has arguably one of the better TPR approaches in the country. Unwilling to recognize imprisonment alone as sufficient for a TPR order,<sup>120</sup> South Carolina's extensive, fact-driven analysis is one that many states would do well to emulate. Nonetheless, as discussed earlier and more fully developed below, problems do exist in South Carolina's approach. In particular, the TPR statute provides little guidance to courts on which factors to apply when considering the best interests of the child; the TPR process is susceptible to the legal orphan problem; and the TPR statute fails to provide some basic protections that all incarcerated parents deserve. To combat these problems, the General Assembly should consider the following revisions to the TPR statute.

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176. On the second attempt, he tried to send the child a birthday card via the child's half sister, but the card was returned as undeliverable. *Id.*

116. *Id.* at 376, 593 S.E.2d at 177.

117. *Id.* at 376–77, 593 S.E.2d at 177–78.

118. *Id.* at 377, 593 S.E.2d at 177–78.

119. *Id.* at 377, 593 S.E.2d at 178.

120. *See* S.C. CODE ANN. § 63-7-2570 (2010 & Supp. 2010).

*A. Follow Wisconsin's Lead and Amend the TPR Statute so that All Courts Are Required to Look at Certain Factors When Addressing the Best Interests of the Child*

In construing South Carolina's two-part TPR test, courts have emphatically stated that the "best interests" prong is the "paramount consideration."<sup>121</sup> However, the TPR statute provides courts with little guidance on how to make a proper "best interests" determination.<sup>122</sup> The statute states only that TPR must be in the best interests of the child and thus grants courts wide discretion in determining whether TPR would lead to such a result. Courts have considered factors such as "the length of time a child has lived with prospective adoptive parents, the stability of the child's current placement, the bond between the children in a sibling group, . . . the importance of maintaining a sibling group in the same placement," the child's progress while in foster care, and the bond between the child and the child's natural family and prospective adoptive parents.<sup>123</sup> Though all of these factors certainly are relevant to the best interest discussion, case law demonstrates that courts do not employ them uniformly.<sup>124</sup>

In contrast with South Carolina, Wisconsin requires each court to consider, at a minimum, six factors in evaluating a child's best interest:<sup>125</sup> the likelihood of post-termination adoption, the child's age and health, whether the child has developed a relationship with the parent, the child's wishes, the duration of the child's separation from the parent, and whether the child's post-termination living situation will be more stable.<sup>126</sup>

By adopting these factors, South Carolina would achieve the goals of uniformity and clarity. Uniformity would reduce the likelihood of judge-specific outcomes and could reduce appeals as well. Moreover, by mandating that courts address adoptability, the legislature would help prevent the "legal orphan" problem because it would preclude courts from freeing children from their biological parents when those children are unlikely to be adopted due to age or disability.

121. See cases cited *supra* note 65.

122. See § 63-7-2570 ("The family court may order the termination of parental rights upon a finding . . . that termination is in the best interest of the child. . .").

123. Children's Law Center, *Termination of Parental Rights*, CHILD L. CENTER, 8, <http://childlaw.sc.edu/firmPublications/TerminationofParentalRights.pdf> (last visited May 10, 2011).

124. *Compare* S.C. Dep't of Soc. Servs. v. Parker, 336 S.C. 248, 256–59, 519 S.E.2d 351, 355–56 (Ct. App. 1999) (terminating an incarcerated father's parental rights because he had failed to form an enduring relationship with the child), *with* S.C. Dep't of Soc. Servs. v. Janice C., 383 S.C. 221, 230–231, 678 S.E.2d 463, 468 (Ct. App. 2009) (refusing to terminate a mentally disabled mother's parental rights because the children had found stability in foster care, the mother would be able to visit the children in foster care, and no adoptive parents had been identified at the time of the TPR action.).

125. WIS. STAT. § 48.426(3) (2010).

126. *Id.*

*B. Amend the State's TPR Statute to Permit the Post-Termination Restoration of Parental Rights so that the State Can Begin to Combat the Growing Legal Orphan Problem*

The goal in granting a TPR order is to make children “eligible for adoption by persons who will provide a suitable home environment.”<sup>127</sup> However, terminating a parent’s parental rights does not ensure that the child will be adopted.<sup>128</sup> When adoption does not occur, the “children are left in legal limbo.”<sup>129</sup> This has been termed the “legal orphan” problem.<sup>130</sup> By terminating parental rights without addressing adoptability, courts unintentionally create legal orphans.

Termination of the legal relationship between a parent and child has detrimental social, financial, and emotional effects on the child.<sup>131</sup> These effects, combined with the often unstable living situation of children who are not adopted post-TPR, can lead these children down a path of future unemployment, poverty, and homelessness. Because of these risks, South Carolina should consider amending its TPR statute—which provides that terminations are permanent<sup>132</sup>—to allow for post-termination reinstatement of parental rights.

As of 2010, at least ten states had passed or were considering laws that would permit the restoration of parental rights.<sup>133</sup> These laws are evidence of states’ recognition of the extensive problems associated with legal orphans.<sup>134</sup>

For example, Hawaii’s TPR statute provides that once termination has been effective for at least a year, the parent or child-placing agency may petition the court to reconsider its order if “the child has not been adopted or placed in a prospective adoptive home.”<sup>135</sup>

South Carolina’s General Assembly could also provide for the possible reinstatement of parental rights by amending the TPR statute to allow a parent to regain parental rights if (1) two years have passed and the child is not adopted and is in foster care, (2) the parent has been rehabilitated, and (3) the reinstatement of parental rights is in the best interest of the child. This amendment would not mandate that the child be placed in the natural parent’s custody. Instead, it would simply allow for visitation and reinstatement of the basic privileges and requirements of parenthood. It would also implicitly

127. S.C. CODE ANN. § 63-7-2510 (2010).

128. LaShanda Taylor, *Resurrecting Parents of Legal Orphans: Un-terminating Parental Rights*, 17 VA. J. SOC. POL’Y & L. 318, 325 (2010).

129. *Id.* (citing Greta Cushing & Sarah B. Greenblatt, *Vulnerability to Foster Care Drift After the Termination of Parental Rights*, 19 RES. ON SOC. WORK PRAC. 694, 698 (2009)).

130. Kirstin Andreasen, Comment, *Eliminating the Legal Orphan Problem*, 16 J. CONTEMP. LEGAL ISSUES 351, 351 (2007).

131. Taylor, *supra* note 128, at 326–27.

132. See S.C. CODE ANN. §§ 63-7-2580 (2010).

133. Taylor, *supra* note 128, at 331.

134. See *id.*

135. HAW. REV. STAT. § 571-63 (LexisNexis 2010).



recognize the importance of the parent–child relationship, which is critical to a child’s development:

The biological family is the primary lifeline for children. . . . Although only intermittent contact may have occurred, biological parents, even when inadequate, continue to be significant in a child’s development. The biological family is the source of identity for a child. Children feel part of the biological family and its roots: they resemble their parents, possess some personality traits of their parents, and have the family health problems. . . . Although their hopes are often unrealistic, children wish that their biological parents would provide those elements of nurturing which they have not provided in the past.<sup>136</sup>

This proposed amendment not only would allow a rehabilitated parent, whether incarcerated or not, to begin forming the familial bond children desperately need and wish for, but also would greatly help eliminate the legal orphan problem.

*C. Provide Notice to Prisoners of Their Parental Requirements While in Prison so that the Need for the Termination of Prisoner Parental Rights Diminishes*

South Carolina’s General Assembly can also amend the state’s TPR statute to provide additional protection to incarcerated parents. First, prisoner parents can be unaware of their obligation to pay child support while imprisoned. Earning meager or no wages, incarcerated parents in TPR proceedings have argued that no request was made on them for support.<sup>137</sup> To provide added protection to imprisoned parents in this context, the legislature should amend section 63-7-2570(4) of the South Carolina Code back to its pre-1992 form.

Before 1992, a court could not issue a TPR order on the basis of a parent’s failure to provide support “unless the child’s custodian requested support from the parent.”<sup>138</sup> Now, however, whether a parent has been asked to pay support is merely one factor for a court to consider in determining if the parent has willfully failed to support a child.<sup>139</sup> By requiring that a request for support be made before failure to support becomes a basis for termination, South Carolina

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136. Margaret Beyer & Wallace J. Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L.Q. 233, 237–38 (1986) (footnote omitted) (citing Fein, Maluccio, Hamilton, and Ward, *After Fostercare: Outcomes of Permanency Planning for Children*, 62 CHILD WELFARE 485 (1983)).

137. See *supra* note 98 and accompanying text.

138. *Stinecipher v. Ballington*, 366 S.C. 92, 100, 620 S.E.2d 93, 97 (Ct. App. 2005).

139. See S.C. CODE ANN. § 63-7-2570(4) (2010); *Stinecipher*, 366 S.C. at 100, 620 S.E.2d at 97 (citing S.C. CODE ANN. § 20-7-1572(4) (Supp. 2004)); *S.C. Dep’t of Soc. Servs. v. Cummings*, 345 S.C. 288, 296, 547 S.E.2d 506, 510 (Ct. App. 2001). The text of former section 20-7-1572 is now found in section 63-7-2570.

would not only provide the parent with fair notice of his or her obligation, but also potentially reduce the number of TPR actions brought.

The legislature also should consider requiring SCDSS to provide each imprisoned parent with written notice of the statutory grounds for a TPR order. This would address the failure to support issue discussed above and would attend to the problem of incarcerated parents not communicating with their children. Parents may begin the prison sentence with attempts to contact the child, but due to difficulties or unsuccessful attempts, give up on establishing a line of communication, unaware that such actions are grounds for TPR.

## V. CONCLUSION

South Carolina has one of the better TPR approaches in the United States. Due to efforts by both the legislature and the courts, South Carolina employs a detailed, fact-driven TPR approach that disallows a TPR order solely because a parent is incarcerated. By doing so, the state has taken great strides in ensuring not only that the best interests of the children involved in TPR actions are served, but also that incarcerated parents are given a fair opportunity to retain their parental rights. South Carolina can continue to improve its approach, however, by amending its TPR statute to include guidance on applying the “best interests” prong of the TPR test and by addressing the statute’s tendency to create legal orphans. Addressing these weaknesses of the state’s TPR process will ensure that South Carolina’s approach remains favorable and becomes one of the strongest approaches in the country.

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