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The Illinois Adoption Act: Should a Child's Length of Time in Foster Care Measure Parental Unfitness?

“[U]nless we are concerned about justice for the parent, we may be unlikely to achieve justice for the child.”¹

I. INTRODUCTION

When Angie Yarwood was twelve years old, state social workers placed her in a foster home because they were convinced that her mother had beaten her.² Although Angie's parents adamantly denied these charges, Judge Borst made Angie a temporary “dependent” of the state and ordered Angie's parents to participate in psychological and substance abuse evaluations, parenting classes, and, most importantly, intensive counseling for domestic violence.³ Initially, Angie's parents were not receptive to counseling.⁴ Nine months after sending Angie to foster care, social workers concluded that any further therapy for her parents was futile.⁵ The social workers subsequently terminated state-funded counseling services and informed Angie's foster parents that they would likely become Angie's guardians.⁶

Four months after the social workers terminated counseling, Judge Borst told Angie's parents to return to counseling; failure to do so would result in them losing Angie for good.⁷ One month later, Angie's parents did return to counseling.⁸ At this point, the state assigned them to a new therapist who had extensive experience with “tough” families.⁹ Angie's parents made progress with their new therapist over the following months.¹⁰ As a result, the therapist

1. Alfred Kadushin, *Beyond the Best Interests of the Child: An Essay Review*, 48 SOC. SERV. REV. 508, 514 (1974).

2. See Heath Foster, *A Child Welfare Odyssey: 12-Year-Old Angie Suffered Bruises and the State Stepped In—After That, Nothing Was Simple*, SEATTLE POST-INTELLIGENCER, June 17, 1998, at A1.

3. See *id.*

4. See *id.*

5. See Heath Foster, *Parents Confront Troubled Past Counseling and Cooperation Precede Decision on Angie's Future*, SEATTLE POST-INTELLIGENCER, June 18, 1998, at A1.

6. See *id.*

7. See *id.*

8. See *id.*

9. See *id.*

10. See *id.*

eventually recommended that the state return Angie to her parents.¹¹ Judge Borst allowed Angie to return home to her family twenty-five months after removal, as long as her parents continued counseling.¹²

This story illustrates that some parents are able to regain custody of their children from foster care if given enough time to correct the problems that prompted the intervention of the child welfare system. In June of 1998, however, the Illinois Legislature added a new parental unfitness ground to the Illinois Adoption Act (“Adoption Act”).¹³ Under this new criterion, the court would have had to consider Angie’s parents “unfit” for the purpose of terminating their parental rights once Angie had been in foster care for fifteen months.¹⁴

This new unfitness ground was part of a large legislative package, which the Illinois General Assembly enacted in order to comply with the provisions of the federal Adoption and Safe Families Act of 1997 (“ASFA”).¹⁵ ASFA emphasizes the termination of parental rights and adoptions as the primary means of moving children out of foster care more quickly.¹⁶ By creating this new unfitness ground, however, Illinois places unnecessary emphasis on the termination of parental rights—more emphasis than required by the federal government.¹⁷

This Comment will begin by briefly examining the history of the Adoption Act from its inception.¹⁸ Specifically, this article will focus on the evolution of the grounds for terminating the parental rights of “unfit” parents.¹⁹ The Comment will then examine the provisions of

11. *See id.*

12. *See id.* The judge allowed her return in spite of the fact that the social workers believed Angie would be “better off” with her foster parents. *See id.* The therapist noted that the relevant question was not who would make the best parents for Angie but whether Angie’s own parents had made enough progress to ensure Angie’s safety. *See id.*

13. The Adoption Act provides a new ground for ascertaining parental unfitness, measuring parental unfitness by the length of time a child has been in foster care and rendering a parent unfit if a child has been in foster care for “15 out of 22 months.” *See* Act of June 30, 1998, Pub. Act No. 90-608, sec. 40, § 50/1(D)(m-1), 1998 Ill. Legis. Serv. 1575, 1627 (West) (to be codified at 750 ILL. COMP. STAT. § 50/1(D)(m-1)); *see also infra* Part III.B (discussing the newly enacted “15 out of 22 month” parental unfitness provision).

14. In fact, Angie had been in foster care for 25 months—10 months longer than this new criterion. *See Foster, supra* note 5, at A1.

15. *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

16. *See id.*

17. *See id.* ASFA contains no provisions regarding parental unfitness grounds. *See id.*

18. *See infra* Part II.A.1.

19. *See infra* Part II.A.1-3.

ASFA²⁰ and discuss how its philosophy regarding achieving permanency for children in foster care differs from its predecessor, the federal Adoption Assistance and Child Welfare Act of 1980 (“AACWA”).²¹ Next, the Comment will briefly explore the underlying and predominant theoretical basis that legislators, lawyers, and social workers have used to approach child welfare for the past thirty years and will then present criticisms of this theoretical basis.²² This Comment will then discuss Illinois’ response to ASFA and explain how the enactment of the new “fifteen out of twenty-two months” ground for parental unfitness transcends the mandated provisions in ASFA.²³ This Comment will argue that this new unfitness ground will fail to achieve permanency for Illinois’ foster children.²⁴

Further, this Comment will contend that the new unfitness ground disregards the importance of a child’s biological parents and families and fails to protect the rights of biological parents in the context of termination proceedings.²⁵ The Comment then proposes that the Illinois General Assembly repeal the “fifteen out of twenty-two month” unfitness ground and argues that the need for improved social work practice and services for families before parental unfitness can be measured with accuracy and care.²⁶ Further, these suggested improvements will allow Illinois to utilize the already existing parental unfitness grounds more effectively, giving Illinois sufficient means to terminate rights when parents truly are not capable of caring for their children.²⁷

II. BACKGROUND

Illinois legislation concerning the termination of parental rights and the adoption of children has changed significantly since its inception.²⁸ Illinois’ first adoption statute contained only two paragraphs and did not address parental unfitness standards.²⁹ Over time, however, the

20. See *infra* Part II.B.

21. See Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.) (amended 1997); see also *infra* Part II.B.1 (highlighting the provisions of the Adoption Assistance and Child Welfare Act).

22. See *infra* Part II.B.3.

23. See *infra* Part III.

24. See *infra* Part IV.A.

25. See *infra* Part IV.B-C.

26. See *infra* Part V.A.

27. See *infra* Part V.

28. See *infra* Part II.A.1-3.

29. See Act of Feb. 22, 1867, 1867 Ill. Laws 133, 133-34 (repealed 1874).

Illinois General Assembly has given increased attention to children and their adoption by creating and periodically expanding the circumstances or “grounds” under which Illinois can terminate parental rights.³⁰ As a result, the Illinois Adoption Act currently contains nearly twenty-five parental unfitness grounds.³¹

A. *The History of the Illinois Adoption Statute*

1. The Early History of Adoption in Illinois

The Illinois General Assembly addressed the adoption of children for the first time in 1867 with the passage of a session law entitled “An Act to Provide for the Adoption of Minors.”³² This session law set forth simple requirements regarding adoption in two sections.³³ Section one addressed the manner of an adoption proceeding itself.³⁴ This section explained that any person could initiate an adoption proceeding by filing a petition in the circuit or county court of his or her residence.³⁵ Section two discussed the rights of the child’s guardian or relative within the context of the adoption proceeding.³⁶ Specifically, this section allowed the guardian or relative of the child to file an objection to the proposed adoption.³⁷

The Adoption Act has evolved quite slowly.³⁸ Illinois law relating to the adoption of children remained relatively unaltered³⁹ until 1874 when the Illinois General Assembly revised the 1867 session law and also added six new sections.⁴⁰ The 1874 revisions addressed several

30. *See infra* Part II.A.2-3.

31. *See* Act of June 30, 1998, Pub. Act No. 90-608, sec. 40, 1998 Ill. Legis. Serv. 1575, 1625-28 (West) (to be codified at 750 ILL. COMP. STAT. § 50/1).

32. Act of Feb. 22, 1867. It should be noted that throughout this article the terms “session law” and “act” will be used interchangeably.

33. *See id.* §§ 1-2.

34. *See id.* § 1.

35. *See id.* The first section of the 1867 session law required the following two factors to be met in order for such an adoption petition to be granted: (1) proof that either the child’s father, mother, or guardian had consented to the adoption; and (2) proof that the adoption would be “to the interest of the child.” *Id.*

36. *See id.* § 2.

37. *See id.* If the court found “good reason” for the guardian or relative’s objection, then the 1867 session law then required the court to reject the adoption petition. *See id.*

38. *See infra* Part II.A.2 (noting that after 1907, the Illinois General Assembly did not significantly alter the Illinois Adoption Act until 1945).

39. However, in 1873, the Illinois General Assembly made minor changes to the first section of the 1867 Act. *See* Act of Apr. 25, 1873, 1873 Ill. Laws 126 (repealed 1945). (providing more detail regarding the property rights of adopted children than initially contained in the 1867 Act).

40. *See* Act of Feb. 27, 1874, 1874, ch. 4, 1874 ILL. REV. STAT. 128 (repealed 1945). It

new issues regarding the adoption of children, including the necessary findings for entering an adoption decree.⁴¹ These findings included: (1) natural parents deserting the child for a period of one year preceding the adoption petition to the court; (2) if neither parent was living, the child's guardian or next of kin's consent to the adoption; or (3) proof that the child had no living parents, guardian, or next of kin capable of giving consent.⁴² Additionally, the person applying for the adoption had to be able to nurture the child and provide the child with a proper education.⁴³ The 1874 revisions also addressed the legal effect of the adoption in regard to the child's natural parents⁴⁴ and the child's wishes regarding the adoption.⁴⁵

Reflecting the Illinois General Assembly's increased concern for an adopted child's well-being, the Illinois General Assembly changed the Adoption Act significantly in 1907.⁴⁶ The 1907 amendments added parental unfitness grounds to the requisite findings for entering an adoption decree.⁴⁷ The 1907 amendments entitled a court to deem a parent unfit if it found one of the following criteria:

- (1) depravity; (2) open and notorious adultery or fornication;
- (3) habitual drunkenness for the space of one year prior to the filing of the petition; (4) extreme and repeated cruelty to the child; (5) abandonment of the child; or (6) desertion of the

should be noted that the Illinois General Assembly repealed the 1867 Act, along with almost all other Illinois legislation enacted prior to 1870, with the passage of the "Repeals Act" on March 31, 1874 in force July 1, 1874. *See* Repeals Act, 3 ILL. STAT. 332-56 (Gross 1874).

41. *See* Act of Feb. 27, 1874 § 3.

42. *See id.*

43. *See id.*

44. *See id.* § 8 (stating that an adoption deprived the child's natural parents of all legal rights with respect to the child).

45. *See id.* § 4 (providing that consent of the child was needed in any adoption proceeding involving a child fourteen years of age or older).

46. *See* Act of May 25, 1907, 1907 Ill. Laws 3 (repealed 1945). Presently, under Illinois law, a finding of parental unfitness is only the first step in terminating parental rights. *See In re Adoption of Syck*, 562 N.E.2d 174, 183 (Ill. 1990). In addition to a finding of parental unfitness, a court must also conclude that the termination of parental rights is in the child's "best interest." *See id.* Moreover, parental unfitness must be proven by "clear and convincing" evidence rather than by a preponderance of the evidence. *See Santosky v. Kramer*, 455 US 745, 769 (1982). However, in cases involving the termination of Indian parental rights, Congress requires "evidence beyond a reasonable doubt" reasoning that "the removal of a child from the parents is a penalty as great [as], if not greater, than a criminal penalty." *Id.* (citing H.R. REP. NO. 95-1386, at 22 (1978), *reprinted in* 1978 U.S.C.A.N. 7530, 7545).

47. *See* Act of May 25, 1907 § 3. While adding parental unfitness as one of the requisite findings for entering an adoption decree, the 1907 amendments retained consent to the adoption by either of the child's living parents, guardian, or near relative as a possible ground for entering the adoption decree. *See id.*

child for more than six (6) months preceding the filing of the adoption petition.⁴⁸

In addition to the new parental unfitness grounds, the 1907 amendments authorized adoptions in cases where a court had previously deprived the natural parent of his or her custody of the child.⁴⁹ In these cases, however, the court also required the consent of the child's court appointed guardian before authorizing an adoption.⁵⁰

2. The Enactment of the Illinois Adoption Act of 1945 and its Subsequent Evolution

The Illinois General Assembly did not make significant changes to Illinois' Adoption Act again until 1945.⁵¹ Specifically, the Illinois General Assembly repealed the Act of 1874 and enacted the Adoption Act of 1945 ("Act of 1945").⁵² The Act of 1945 was Illinois' first comprehensive statute regarding the adoption of children.⁵³ The Act of 1945 contained several substantive changes to the provisions guiding the adoption of children.⁵⁴ First, the Act of 1945 mandated that before the state could grant an adoption petition, the state needed proof that the child had resided with the prospective adoptive parents for at least six consecutive months preceding the filing of the adoption petition.⁵⁵ In addition, the Act of 1945 required the state to investigate the

48. *Id.* In 1997, the Illinois General Assembly added a similar "desertion" provision relating more specifically to the abandonment of newborns in the hospital. *See infra* note 95 and accompanying text (noting the addition of the desertion of a newborn to Illinois' parental unfitness criterion).

49. *See* Act of May 25, 1907 § 3 (making it less difficult for courts to authorize adoptions).

50. *See id.*

51. *See* Adoption Act of 1945, 1945 Ill. Laws 9 (repealed 1959). The Illinois General Assembly, however, made minor changes to Illinois' Adoption Act prior to 1945 with the passage of session laws in 1933, 1935 and 1939. *See* Act of July 6, 1933, 1933 Ill. Laws 8 (repealed 1959) (adding more detail to the content of an adoption petition, defining illegitimate child, and making minor changes with respect to the grounds for granting an adoption petition); Act of June 27, 1935, 1935 Ill. Laws 5 (repealed 1959) (adding additional requirements to the contents of the adoption petition); Act of March 22, 1939, 1939 Ill. Laws 12 (repealed 1959) (repealing sections five through seven of the 1874 Act relating to the inheritance and property rights of adopted children and adopting parents).

52. *See* Adoption Act of 1945 § 9-1.

53. *See generally* JOAN GITTENS, POOR RELATIONS—THE CHILD OF THE STATE OF ILLINOIS, 1818-1990, at 246-47 n.2 (1994) (noting that Illinois did not have an effective adoption statute until 1945).

54. *See* Adoption Act of 1945 § 1-9.

55. *See id.* § 1-2(4). Further, if the child had not resided in the prospective adoptive home for the required time period, then the Act of 1945 required the prospective adoptive parents to detail the reasons for the failure. *See id.*

character, reputation, and religious faith⁵⁶ of the prospective adoptive parents.⁵⁷ Finally, the Act of 1945 required the state to inquire whether the prospective parent was the appropriate person to adopt the child and whether the child was appropriate for adoption.⁵⁸

In addition to the revisions regarding prospective adoptive parents, the Act of 1945 also added a new provision that authorized adoptions.⁵⁹ Specifically, the court could enter an adoption decree if it found that the natural parents had surrendered the child to a licensed child welfare agency for adoption.⁶⁰ Further, the Act of 1945 also contained the following notable revisions: (1) a provision stating that whenever possible, the court must give custody to petitioners who had the same religious affiliation as the child;⁶¹ (2) a provision precluding the inspection of the records of the adoption proceedings unless a specific court order granted otherwise;⁶² and (3) a provision giving any “aggrieved” person the right to appeal the adoption.⁶³

Building on the substantial changes enacted in 1945, the Illinois General Assembly added two new possible findings for granting an adoption petition in 1953.⁶⁴ First, a court could grant an adoption

56. *See id.* § 3-1. Whenever possible, the Illinois General Assembly sought to place a child with parents who held the same religious faith as the child. *See also id.* § 4-2; *infra* note 61 and accompanying text (noting Illinois’ continuing emphasis on the religious faith of the adopting parent in an adoption decision).

57. *See* Adoption Act of 1945 § 3-1. These requirements mark a sharp contrast to the original 1867 Act that placed no restrictions whatsoever on who could adopt a child and simply required the adoption to be “in the interest of the child.” Act of Feb. 22, 1867, 1867 Ill. Laws 133 (repealed 1874); *supra* note 35 (noting that the first section of the 1867 law created this requirement).

58. *See* Adoption Act of 1945 § 3-1 (reflecting further the Illinois General Assembly’s growing consciousness regarding an adoptive child’s well-being by ensuring a good match between prospective parent and child).

59. *See id.* § 4-1(4).

60. *See id.* In addition, the Act of 1945 required the consent of the child welfare agency. *See id.* It should also be noted that this provision supported a natural parent’s decision to voluntarily “surrender” his or her child for adoption when that parent felt that he or she could not care for the child. *See id.*

61. *See id.* § 4-2.

62. *See id.* § 6-2. For a discussion of the benefits of open and cooperative adoption procedures see Annette Ruth Appell, *The Move Toward Legally Sanctioned Cooperative Adoption: Can it Survive the Uniform Adoption Act?*, 30 FAM. L. Q. 483, 516 (1996).

63. *See* Adoption Act of 1945 § 7-2. While not delineated by the Illinois General Assembly in 1945, “aggrieved” persons in an adoption proceeding would most likely include the adopted child’s natural parents or a member of the adopted child’s natural family.

64. *See* Act of July 13, 1953, § 4-1(4 $\frac{1}{2}$)(a)-(b), 1953 Ill. Laws 1061, 1062-63 (repealed 1959). The Illinois General Assembly continued to focus on the adopted child’s well-being by recognizing that both minor parents and mentally ill parents may be incapable of caring for their children. *See id.*

petition if it found that a child's natural parents were minors, that they wanted the child to be adopted, and that they had expressed such desire in writing.⁶⁵ Second, a court could grant an adoption petition when the court found that the child's natural parents were mentally ill for a three year period prior to the adoption proceeding.⁶⁶ The 1953 Act required that two qualified physicians corroborate the parent's mental illness.⁶⁷

3. The Adoption Act of 1959 Until the Present

In 1959, the Illinois General Assembly again turned its attention to the adoption of children when it repealed the Act of 1945 in its entirety and enacted the Adoption Act of 1959 ("Act of 1959") in its place.⁶⁸ The two acts significantly differed on the determination of parental unfitness.⁶⁹ Specifically, the Act of 1959 placed the grounds for parental unfitness in a new definition section rather than in the Act of 1945's section addressing the grounds or findings necessary to grant an adoption.⁷⁰ Moreover, the Act of 1959 added a new parental unfitness ground that rendered a parent unfit if the parent had neglected or mistreated the child.⁷¹

After passing the Act of 1959, the Illinois General Assembly added

65. *See id.* § 4-1(4 $\frac{1}{2}$)(a). In addition, the 1953 amendments also required the appointment of a guardian *ad litem* on behalf of the minor parents, and the guardian *ad litem's* consent to the adoption. *See id.* A guardian *ad litem* is:

a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation, and the status of guardian *ad litem* exists only in that specific litigation in which the appointment occurs.

Black's Law Dictionary 706 (6th ed. 1990).

66. *See* Act of July 13, 1953 § 4-1(4 $\frac{1}{2}$)(b). Like cases involving minor parents, the 1953 amendments also required the appointment of a guardian *ad litem* on behalf of the mentally ill parents and the consent of such guardian *ad litem* to the adoption. *See also supra* note 65 and accompanying text (defining guardian *ad litem*).

67. *See* Act of July 13, 1953 § 4-1(4 $\frac{1}{2}$)(b). In order to use this ground for adoption, the 1953 Act also required a finding that the parent had no hope of recovering from the mental illness in the foreseeable future. *See id.*

68. *See* Adoption Act of 1959, 1959 Ill. Laws 1269 (repealed 1967).

69. *See id.* § 1(D). However, the Act of 1959 resembled the Act of 1945 in that it contained the six grounds for determining parental unfitness initially enacted in 1907. *See supra* note 48 and accompanying text (listing the six grounds that were enacted to determine parental unfitness).

70. *See* Adoption Act of 1959 § 1(D). In addition, to "unfit person," the 1959 Act also defined child, related child, parent, agency, mentally ill, and mentally deficient for purposes of an adoption proceeding. *See id.* § 1 (A)-(C), (E)-(G); *see also supra* notes 51-63 and accompanying text (highlighting various provisions of the 1945 Adoption Act).

71. *See* Adoption Act of 1959 § 1(D)(g).

three new grounds for finding parental unfitness in 1967.⁷² These three new grounds focused on the parent's relationship with the child and addressed the following issues: (1) the extent that the child's natural parent demonstrated concern for the child's welfare;⁷³ (2) the parent's continuous or repeated neglect of the child;⁷⁴ and (3) the parent's failure to protect the child from harmful conditions within the child's environment.⁷⁵ The Illinois General Assembly also revised the pre-existing ground of neglect or misconduct.⁷⁶ The revised statute no longer required a court to adhere to previous findings, decrees, orders, and judgments from other proceedings affecting or determining parental rights.⁷⁷ The revised statute, however, still bound courts to follow decrees that the state had procured in termination proceedings under the Adoption Act or the Juvenile Court Act.⁷⁸

The Illinois General Assembly further amended the 1959 Act in 1973 by including a ground for unfitness⁷⁹ if a parent failed to make reasonable efforts to rectify the conditions that prompted the removal

72. See Act of July 31, 1967 § 1(D)(b), (d), (f), 1967 Ill. Laws 2273, 2274.

73. See *id.* § 1(D)(b). See generally Diane Geraghty, *Ending Family Ties: Termination of Parental Rights in Illinois*, 79 ILL. B. J. 572, 573 (1991) (discussing the judicial treatment of this ground). Geraghty discusses the difficulty of proving parental unfitness under this ground. See *id.* In 1973, the Illinois General Assembly placed a special emphasis on a lack of concern for newborns by adding a ground that rendered a parent unfit if he or she failed to show a reasonable interest in the newborn thirty consecutive days after birth. See Act of Sept. 14, 1973, Pub. L. No. 78-854, § 1(D)(k), 1973 Ill. Laws 2616, 2617.

74. See Act of July 31, 1967 § 1(D)(d).

75. See *id.* § 1(D)(f). See generally Geraghty, *supra* note 73, at 573 (explaining that this grounds will support a finding of unfitness even where the parent did not personally inflict the harm).

76. See Act of July 31, 1967 § 1(D)(g); see also *supra* notes 73-74 and accompanying text (establishing that, as of 1959, a parent could be declared unfit for neglecting or mistreating his or her child).

77. See Act of July 31, 1967 § 1(D)(g).

78. See *id.* § 1(D)(g); 705 ILL. COMP. STAT. 405/1-2, 2-13 to -29 (West 1993). While not containing any definitions of parental unfitness, the Juvenile Court Act contains various provisions relating to the termination of parental rights. See 705 ILL. COMP. STAT. 405/2-13 to -29. The state typically files an adoption petition under the Juvenile Court Act in cases where the Juvenile Court has entered a finding of abuse, neglect or dependency with respect to that child. See Geraghty, *supra* note 73, at 574-75. However, even if a petition for an involuntary adoption originates under the Juvenile Court Act, a finding of unfitness as defined under the Adoption Act must still be found in order to terminate parental rights. See 705 ILL. COMP. STAT. 504/2-29(4). For an overview of the procedural differences between the Adoption Act and Juvenile Court Act, see Geraghty, *supra* note 73, at 574-75.

79. It should be noted that a 1973 amendment added a parental unfitness ground relating to newborns. See Act of Sept. 14, 1973, Pub. L. No. 78-854, § 1(D)(k), 1973 Ill. Laws 2612, 2617; see also *supra* note 73 (explaining the 1973 requirement that a parent must show interest in the newborn thirty consecutive days after birth).

of the child.⁸⁰ The 1973 ground gave a parent twenty-four months⁸¹ after an adjudication of neglect under section 2-4 of the Juvenile Court Act to make such efforts.⁸²

Concern for child safety and welfare prompted the Illinois General Assembly to add significant new grounds for finding a parent unfit in 1977.⁸³ Specifically, the 1977 amendment deemed a parent unfit under the following circumstances: (1) if the court made two or more previous findings of physical abuse to any child under section 4-8 of the Juvenile Court Act;⁸⁴ (2) if the court entered a criminal conviction for the death of any child as a result of physical child abuse; or (3) a finding of physical child abuse stemming from the death of any child under section 4-8 of the Juvenile Court Act.⁸⁵ Further, the 1977 amendment deemed a parent unfit if he or she failed to stay in contact⁸⁶ with the child or to make plans for the child's future.⁸⁷ The Illinois General Assembly also revised the habitual drunkenness ground to include a parent's addiction to drugs.⁸⁸

80. See Act of Sept. 14, 1973 § 1(D)(l).

81. In 1977, The Illinois General Assembly shortened this time period to twelve months. See Act of Sept. 8, 1977, Pub. L. No. 80-558, § 1(D)(m), 1977 Ill. Laws 1779, 1780.

82. See Act of Sept. 14, 1973 § 1(D)(l). Entitled "Neglected minor," Section 2-4 of the Juvenile Court Act stated that a neglected child included any minor under 18:

(a) who is neglected as to proper or necessary support, education as required by law, or as to medical or other remedial care recognized under State law or other care necessary for his well-being, or who is abandoned by his parents, guardian or custodian; or (b) whose environment is injurious to his welfare or whose behavior is injurious to his own welfare or that of others.

Juvenile Court Act of 1965, 37 ILL. REV. STAT. § 702-4 (1973) (repealed 1987).

83. See Act of Sept. 8, 1977 § 1(D)(f),(n).

84. Entitled "Findings and Adjudication," Section 4-8 of the Juvenile Court Act provided:

If the court finds under 2-4 of this Act that the minor is neglected or under Section 2-5 of this Act that the minor is dependent the court shall then find whether such neglect or dependency is the result of physical abuse to the minor inflicted by a parent, guardian or legal custodian and such finding shall appear in the order of the court.

Juvenile Court Act of 1965, 37 ILL. REV. STAT. § 704-8(2) (1977) (repealed 1987).

85. See Act of Sept. 8, 1977 § 1(D)(f). For the relevant text of Section 4-8 of the Juvenile Court Act of 1965, see *supra* note 84.

86. The 1977 amendment deemed a parent unfit if the parent failed to stay in contact with the child for a period of 12 months. See Act of Sept. 8, 1977 § 1(D)(n). In assessing a parent's contact, the 1977 amendment also required the courts to consider steps taken by the child welfare agency to strengthen the child's relationship with the parent. See *id.*

87. See *id.* However, this new ground stated that any communication or contact by a parent with a child that lacked affection and concern did not constitute reasonable contact. See *id.*

88. See *id.* § 1(D)(k). This addition was quite significant given the prevalence of

Throughout the 1980s and 1990s, the Illinois General Assembly added several new grounds⁸⁹ for determining parental unfitness, including, but not limited to: (1) evidence of a parent's intent to forgo his or her parental rights;⁹⁰ (2) an inability to parent due to a mental illness or mental impairment;⁹¹ (3) a finding of physical abuse of the child coupled with a criminal conviction of aggravated battery of the child;⁹² (4) substantial and continuous neglect of any child residing in the household that resulted in the death of the child;⁹³ (5) a finding of

substance abuse in proceedings for child abuse and neglect. *See infra* Part IV.C (explaining the effect of substance abuse on adoption proceedings).

89. This expansion of parental unfitness grounds has led to an increase in the number of children who are legally "free" for adoption. *See* Letter from Christine B. Crum, Director of Operations, Circuit Court of Cook County, Child Protection Division, to author (Sept. 15, 1998) (on file with the author) (reflecting a steady increase in both the number of termination petitions filed and parental rights terminated throughout the 1990's) [hereinafter Crum Letter]. Unfortunately, however, the number of adoptive homes for children has not kept pace with this increase. *See Talk of the Nation: Adoptions for Abused and Neglected Children in Foster Care* 10 (National Public Radio broadcast, Nov. 18, 1997) (transcript available in 1997 WL 15382360) (stating that Cook County terminated close to 7,000 parental rights in 1996 while only 1,500 adoptions occurred) [hereinafter *Talk of the Nation*]. As a result, these terminations have created a cadre of "legal orphans"—children legally severed from their natural parents without an awaiting adoptive home. *See id.* "I agree permanence should be the goal but in some case[s] permanence will not be there, and I don't want to move too many kids—it's [creating] legal orphans." *Id.*

90. *See* Act of Sept. 11, 1981, Pub. L. No. 82-437, § 1(D)(n), 1982 Ill. Laws 2278, 2279. Intent to forgo parental rights could be demonstrated by a failure for twelve months "(i) to visit the child, (ii) to communicate with the child or agency, although able to do so and not prevented from doing so by an agency or by court order, or (iii) to maintain contact with or plan for the future of the child, although physically able to do so." *Id.* The Illinois General Assembly made further amendments to this ground in 1986 by adding a clause relating specifically to unmarried fathers. *See* Act of Sept. 24, 1986, Pub. L. No. 84-1427, § 1(D)(n)(2), 1986 Ill. Laws 3700, 3702. This clause stated that an unmarried father demonstrated his intent to forgo his parental rights by a failure

(i) to commence legal proceedings to establish his paternity . . . within 30 days of being informed . . . that he is the father . . . of the child . . . or (ii) to make a good faith effort to pay a reasonable amount of the expenses related to the birth of the child and to provide a reasonable amount for the financial support of the child. . . .

Id.

91. *See* Act of Sept. 26, 1983, Pub. L. No. 83-870, § 1(D)(p), 1983 Ill. Laws 5623, 5625. Under the 1983 session law, an inability to discharge parental responsibilities had to be supported by "competent evidence from a psychiatrist or clinical psychologist of mental impairment, mental illness[, or] mental retardation . . . and there [had to be] a sufficient justification to believe that such inability to discharge parental responsibilities . . . extend[ed] beyond a reasonable time period." *Id.* For a discussion of judicial interpretation of this grounds, *see* Geraghty, *supra* note 73, at 573-74.

92. *See* Act of Aug. 30, 1989, Pub. L. No. 86-403, sec. 2, § 1(D)(q), 1989 Ill. Laws, 2520, 2522-23.

93. *See* Act of Jan. 28, 1996, Pub. L. No. 89-0704, § 1(D)(d-1), 1996 Ill. Laws 3963,

drugs at birth in the child's urine when the biological mother of such child had at least one other child adjudicated neglected,⁹⁴ or (6) abandonment of the newborn in a hospital or any setting that suggested the parent wanted to relinquish his or her parental rights.⁹⁵

B. Federal Statute: Adoption and Safe Families Act of 1997

1. Prior Legislation and Motivation for the Act

On November 18, 1997, President Clinton signed into law the most extensive federal child welfare legislation in nearly two decades: the Adoption and Safe Families Act ("ASFA").⁹⁶ The ASFA significantly changed and clarified a wide range of policies that the Adoption Assistance and Child Welfare Act ("AACWA") had established.⁹⁷

The AACWA introduced the landmark concept of "permanency planning"⁹⁸ to federal child welfare legislation.⁹⁹ The AACWA intended for permanency planning to curb the problem of "foster care

3970.

94. See Act of June 23, 1997, Pub. L. No. 90-13, sec. 5, § 1(D)(r), 1997 Ill. Legis. Serv. 1193, 1195 (West).

95. See Act of June 25, 1997, Pub. L. No. 90-28, sec. 10-25, § 1(D)(2-1),(2-2), 1997 Ill. Legis. Serv. 1792, 1857 (West 1997).

96. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.A.); see also Bill Grimm, *Adoption and Safe Families Act Brings Big Changes in Child Welfare*, 28 YOUTH L. NEWS, 1, 1 (1997) (noting that ASFA will affect "everybody" and marks the most substantial change in federal child welfare policy since the enactment of AACWA in 1980). See generally Lisa Carpenter, Note, *Changing the Balance: Rhode Island's Amended Termination of Parental Rights Statute*, 50 WASH. U. J. URB. & CONTEMP. L. 153, 156-63 (1996) (describing a broader historical overview of the federal government's treatment of child welfare and child custody).

97. See Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified in scattered sections of 42 U.S.C.A.) (amended 1997). Congress enacted the AACWA in 1980 to assist the states in protecting and caring for abused and neglected children. See Jennifer Ayres Hand, *Preventing Undue Terminations: A Critical Evaluation of the Length-Of-Time-Out-Of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251, 1258 (1996).

98. One working definition of permanency planning is "the systematic process of carrying out, within a brief time-limited period, a set of goal-directed activities designed to help children live in families that offer continuity of relationships with nurturing parents or caretakers and the opportunity to establish life-time relationships." David J. Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children*, 26 LOY. U. CHI. L. J. 183, 185 n.6 (1995) (quoting Anthony N. Maluccio & Edith Fein, *Permanency Planning: A Redefinition*, 62 CHILD WELFARE 195, 197 (1983)).

99. See 42 U.S.C.A. § 675(5)(C) (West 1991) (amended by ASFA in 1997). However, some states such as New York, California, and South Carolina began implementing the idea of permanency planning into their child welfare policies as early as the 1970's. See Ayres Hand, *supra* note 97, at 1258 n.44.

drift”—children “stuck” in the foster care system for extended periods of time while bouncing from foster home to foster home with little or no contact with their biological families.¹⁰⁰ In order to qualify for federal funding, the AACWA required states to make “reasonable efforts” to prevent the removal of a child from the home.¹⁰¹ Similarly, the AAWCA required states to make reasonable efforts to reunify the family if the state removed the child.¹⁰² Further, the AACWA mandated that state child welfare agencies develop a case plan¹⁰³ for each child under its care.¹⁰⁴ The AACWA also demanded that courts and administrative agencies review cases every six months and conduct dispositional hearings for the child after eighteen months.¹⁰⁵

Despite the AACWA’s asserted goals of moving children out of foster care and into stable placements more swiftly,¹⁰⁶ both legislators and child welfare agencies became increasingly dissatisfied with the functioning of the child welfare system throughout the 1990s.¹⁰⁷ The

100. See Ayres Hand, *supra* note 97, at 1256. In 1959, Henry S. Maas and Richard E. Engler Jr. initially introduced the notion of “Foster Care Drift” in their seminal work, *Children in Need of Parents*. See *id.* at 1256 n.28 (citing HENRY S. MAAS & RICHARD E. ENGLER JR., *CHILDREN IN NEED OF PARENTS*, 1 (1959)).

101. See 42 U.S.C.A. § 671(a)(15).

102. See *id.* For a comprehensive examination of the 1980 “reasonable efforts” standard, see Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223 (1989-1990).

103. The 1980 federal legislation defined “case plan” as a written document that includes, among other things, a discussion of the appropriateness of the “type of home or institution in which a child is to be placed.” 42 U.S.C.A. § 675(1)(A).

104. See *id.* § 675(5)(B), (C).

105. See *id.* The AAWCA required courts to address the child’s permanency plan at the dispositional hearing. See *id.*

106. According to the drafter of the AACWA, the Act attempted to “lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes.” S. REP. NO. 96-336, at 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1448, 1450.

107. During the congressional hearings on ASFA, David S. Liedermann, Executive Director of the Child Welfare League of America testified that:

[d]espite improvements and progress, the nation’s collective response to abused, neglected and abandoned children is failing to provide both protection and permanence for many children. There are many reasons for this, not the least of which is the tripling in the number of children reported abused and neglected since 1980, the failure of state, Federal and local targeted resources to keep pace with this rise.

Encouraging Adoption, 1997: Hearings on H.R. 867 Before the Subcomm. on Human Resources of the Ways and Means Comm., 105th Cong. 36 (1997) (statement of David S. Liedermann, Executive Director of the Child Welfare League of America) [hereinafter *Encouraging Adoption*, statement of David S. Liedermann]; see also Gail Vida Hamburg, *Childhood Spent Waiting Through No Fault of Their Own Foster Children Just Need a Home Series: When Parents Fail*, CHI. TRIB., July 12, 1998, § 13, at 1. (noting that the

child welfare system was not achieving safety or permanence for children.¹⁰⁸ This dissatisfaction arose as a result of several factors, such as the record-high number of children in the foster care system nationwide,¹⁰⁹ the increasing length of time children remained in the foster care system,¹¹⁰ and the perception that states were reunifying children with their biological families without a concern for their safety as a result of the reasonable efforts requirement.¹¹¹ These factors

foster care system as part of the larger child-welfare system is in crisis).

108. See *Encouraging Adoption*, statement of David A. Liedermann, *supra* note 107, at 36.

109. See Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 63 Fed. Reg. 50,058 (1998) (to be codified at 45 C.F.R. pt.1355-56) (proposed Sept. 18, 1998) [hereinafter Title IV-E Foster Care Eligibility Reviews] (listing the doubling of the number of children in foster care since the 1980's as a primary source of the dissatisfaction with the performance of the child welfare system); H.R. REP. NO. 105-77, at 7-8 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2740 (noting that after many years of growth in the 1980s and 1990s, the nation's foster care caseload has peaked at 500,000). Upset over the burgeoning numbers of children in foster care was also evident during the debates of AFSA, with one Congressman stating "[f]ive hundred thousand. That is right, one-half of one million. That is how many children are languishing in foster care as we debate this bill today. The major goal of Federal and State policy . . . is to move these children to permanent placements as quickly as possible." 143 CONG. REC. H2012, H2015 (daily ed. Apr. 30, 1997) (statement of Rep. Shaw); see also Dana Mack, *We Can't Help Kids By Destroying Families*, L.A. TIMES, Dec. 1, 1997, at B5 (noting that the "[g]rowing concern for the more than 500,000 American children in foster care prompted Congress to pass legislation intended to expedite adoptions"). Illinois, along with the rest of the nation has also experienced unprecedented growth in the number of children under the care and custody of the foster care system. See *Adoption Promotion Act of 1997: Hearings on H.R. 867 Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong. 36 (1997) (statement of Jess McDonald, Director of Illinois Department of Children and Family Services) [hereinafter *Adoption Hearings*, statement of Jess McDonald]. Specifically, Jess McDonald informed Congress that between June 1986 and June of 1995, the size of the substitute care population in Illinois expanded at an average annual rate of 15 % from 13,734 to 47,862. See *id.*

110. The House Report on ASFA noted that "[r]ecent studies have shown that in some States, the average child removed from the home because of family problems spends almost three years in foster care." H.R. REP. NO. 105-77, at 8, *reprinted in* 1997 U.S.C.C.A.N. 2740. Additionally, during his testimony before the House Ways and Means Subcommittee, United States Senator Mike DeWine emphasized that children are spending too much time in foster care and noted that ASFA takes "important steps such as limiting the amount of time that the youngest children spend in foster care." See *Adoption Promotion Act of 1997: Hearing on H.R. 867 Before the Subcomm. On Human Resources of the House Comm. On Ways and Means*, 105th Cong. 10 (1997) (statement of Sen. DeWine) [hereinafter *Adoption Hearings*, statement of Sen. Mike DeWine]; see also 143 CONG. REC. H2012, H2018 (daily ed. Apr. 30, 1997) (statement of Rep. Burton) (emphasizing that children wait an average of two and a half years for courts to terminate parental rights); Hamburg, *supra* note 107, at 2 (stating that prior to ASFA, children averaged three and one half to five and one half years in foster care).

111. See 143 CONG. REC. H2012, H2018 (daily ed. Apr. 30, 1997) (statement of Rep. Burton) ("In the last decade child welfare has grown into an enormous bureaucratic

prompted Congress to reassess its approach to the child welfare system and served as the main impetus for the enactment of the ASFA in 1997.¹¹²

2. Provisions of ASFA

The philosophical theory regarding how best to achieve “permanence for children” is probably the most important change resulting from the passage of the ASFA.¹¹³ Rather than emphasizing the preservation and reunification of families as the AACWA does,¹¹⁴ the ASFA pushes states to implement legislation favoring the speedy termination of parental rights and an expedited adoption process.¹¹⁵ In order to receive federal funding, the ASFA requires states to establish a new time line for filing a petition to terminate parental rights.¹¹⁶ This new time line is based on a child’s length of stay in the foster care

system that is biased toward preserving the family at any cost.”); Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 63 Fed. Reg. at 50,061 (noting that confusion and misinterpretation of the reasonable efforts standard have caused states to return children to natural parents without a regard to child safety); see also Grimm, *supra* note 96, at 2 (discussing how both the child welfare field and Congress have blamed the “reasonable efforts” requirement for urging child welfare agencies to return children to unsafe homes).

112. See Title IV-E Foster Care Eligibility Reviews, 63 Fed. Reg. at 50061 (listing four reasons for passing AFSA); see also H.R. REP. NO. 105-77, at 7-9, *reprinted in* 1997 U.S.C.C.A.N. 2740-41 (explaining the background and need for the legislation).

113. See Heath Foster, *Move Toward Permanent Homes is on a Faster Track*, SEATTLE POST-INTELLIGENCER, June 18, 1998, at A10 (noting that ASFA marks a major shift in philosophy and focuses less on the reunification of biological families and more on the rapid placement of children in a permanent and safe setting even if not with biological parents).

114. See *id.* (noting that until last year, the federal law emphasized the significance of biological families and presumed that even when cases involved abuse, states should make all efforts to bring families back together). Additionally, during the congressional debates on ASFA, Congressman Shaw noted the federal law’s former emphasis and stated, “[f]ederal statutes now put too much emphasis on providing all kinds of services to rehabilitate troubled families.” 143 CONG. REC. H2012, H2015 (daily ed. Apr. 30, 1997) (statement of Rep. Shaw).

115. See *D.C. Adoption and Foster Care Program Revisions, 1998: Hearings on H.R. 867 Before the D.C. Subcomm.*, 105th Cong. 10 (1998) (statement of Rep. Dave Camp) (noting that the goal of AFSA “is to make adoption easier”); H.R. REP. NO. 105-77, at 7, *reprinted in* 1997 U.S.C.C.A.N. 2739 (stating that AFSA will expectedly substantially increase the number of adoptions in the years ahead); 143 CONG. REC. H2012, H2013 (daily ed. Apr. 30, 1997) (statement of Rep. Pryce) (noting that one way to ensure that abused and neglected children have a happy life is to speed up the adoption process). Despite ASFA’s new focus on adoptions, ASFA continues the federal family preservation and support services program initially enacted in 1980. See 42 U.S.C.A. § 629(a) (amended 1997) (West Supp. 1998). For an overview and discussion of these provisions, see Grimm, *supra* note 96, at 7.

116. See 42 U.S.C.A. § 675(5)(E) (West Supp. 1998) (amending 42 U.S.C. § 675(5) (West 1991)).

system.¹¹⁷ The ASFA provides that a state *must* file a termination petition if a child has been in foster care for fifteen out of the most recent twenty-two months.¹¹⁸ The ASFA, however, does provide three exceptions to this mandated provision.¹¹⁹ First, the State need not file a termination petition if a relative cares for the child.¹²⁰ Second, the ASFA suspends the termination requirement if the state agency has documented a compelling reason explaining why filing is not in the best interest of the child.¹²¹ Third, the state need not file the termination requirement if it failed to provide the child's family with the services necessary to safely reunite the child with his or her parents.¹²²

117. *See id.* Jess McDonald opposed this provision and expressed concern that requiring states to initiate the termination of parental rights fails to consider cases where children have strong ties to biological families. *See Adoption Hearings*, statement of Jess McDonald, *supra* note 109, at 4-5. He also explained that this requirement fails to give states the flexibility to decide in an individualized manner what is in the best interest of the child. *See id.* at 5. For a critique of strict timelines for the initiation of termination of parental rights, see Ayres Hand, *supra* note 97, at 1267-88.

118. *See* 42 U.S.C.A. § 675(5)(e). Congress intensely debated this portion of ASFA and altered it several times before they finally enacted it. *See* Grimm, *supra* note 96, at 4. In an initial stage of the legislation, Congresswoman Kennelly supported a plan that mandated termination petitions in cases where children were under ten years of age and had been in the foster care system for 18 months. *See id.* Congressman Tiahart supported a mandated termination petition for children who had been in foster care for twelve months. *See id.* In response to the Tiahart approach, Congresswomen Kennelly stated:

Mr. Chairman, I agree with the author of the amendment that the current child welfare system sometimes errs on the side of the parent without significant regard for a child's safety. Obviously, that is one of the reasons why the gentleman from Michigan [Mr. Camp] and I did introduce this bill. However, I feel that the legislation before us makes it clear that a child's safety has to be the paramount concern, and it requires States to move more quickly in finding permanent homes for children. But if the current system sometimes overemphasizes family reunification, the Tiahart amendment would swing, I feel, the pendulum too far the other way by not giving States enough opportunity to restore families.

143 CONG. REC. H2012, H2027 (daily ed. Apr. 30, 1997) (statement of Rep. Kennelly) (alteration in original).

119. *See* 42 U.S.C.A. § 675(5)(E)(i)-(iii).

120. *See id.* § 675(5)(E)(i).

121. *See id.* § 675(5)(E)(ii).

122. *See id.* § 675(5)(E)(iii). This last requirement will likely have the most impact because a paucity of timely and appropriate services for parents is a ubiquitous problem in child welfare. *See* Grimm, *supra* note 96, at 4. The problem is most notable in the area of substance abuse, which is often present in child abuse and neglect cases. *See id.* at 4-5; *Adoption Promotion Act of 1997: Hearings on H.R. 867 Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong. 51 (1997) (statement of Mary Lee Allen, Director of Child Welfare Division, Children's Defense Fund) [hereinafter *Adoption Hearings*, statement of Mary Lee Allen] ("It is the absence of services that often delays final permanency decisions."); Marsha Garrison, *Why*

Further, in an effort to redress the perceived shortcomings of the former reasonable efforts requirement and to place the health and safety of the child first, the ASFA adds three new exceptions to the reasonable efforts requirement.¹²³ The ASFA does not require reasonable efforts if one of the following exists: (1) the parent has forced the child to experience one of a number of aggravated circumstances such as torture, abandonment, or sexual abuse;¹²⁴ (2) the parent has killed another one of his or her children or aided, abetted, attempted, conspired, or solicited another to do so;¹²⁵ or (3) the state has terminated the parent's rights with respect to a sibling of the child who is the focus of the proceeding.¹²⁶

Additionally, the ASFA sets a new time frame for permanency hearings of children.¹²⁷ Under the ASFA, permanency hearings must occur within twelve months from the time the child entered foster care.¹²⁸ This is a departure from the eighteen-month time frame that the AAWCA formerly permitted.¹²⁹ The ASFA also alters the nature

Terminate Parental Rights?, 35 STAN. L. REV. 423, 428 (1983) (arguing that many agencies do little to help parents regain custody of their children and that caseworkers give minimal attention to the family problems that necessitate the removal of the child); Richard Wexler, *Saving the Children*, PITTSBURGH POST-GAZETTE, June 7, 1998 at 1, available in 1998 WL 5254869 (noting that states have afforded parents "next to nothing" with respect to services and that states have given parents "cookie cutter" service plans with no corresponding commitment from the child welfare system to provide services). For a substantial examination of this problem with respect to children, see Karoline S. Homer, *Program Abuse in Foster Care: A Search for Solutions*, 1 VA. J. SOC. POL'Y & L. 177, 182-202 (1993).

123. See 42 U.S.C.A. § 671(a)(15)(D)(i)-(iii). In 1996, Congress also narrowed the circumstances in which the reunification requirement applies. See Grimm, *supra* note 96, at 2 n.9. Specifically, Congress amended the Child Abuse Prevention and Treatment Act to require that by October 3, 1998, each state adopt and implement "provisions, procedures, and mechanisms" to prohibit states from returning a child to a parent who has committed one of the several enumerated crimes. See *id.* (citing 42 U.S.C.A. § 5106(a)(b)(2)(A)(xii)).

124. See 42 U.S.C.A. § 671(a)(15)(D)(i).

125. See *id.* § 671(a)(15)(D)(ii).

126. See *id.* § 671(a)(15)(D)(iii).

127. See *id.* § 675(5)(C).

128. See *id.*

129. See *id.* § 675(5)(C) (referring to the federal legislation prior to ASFA). During her testimony about H.R. 867, Mary Lee Allen, Director of the Child Welfare Division of the Children's Defense Fund, questioned the impact that this provision would have and stated:

[i]t is important to remember that for 17 years states have had the option to hold permanency hearings at 12 months (the new time frame for H.R. 867) and according to the U.S. General Accounting Office, at least 18 states now do so; some states also require that termination petitions be filed at particular times if children are still in care, yet there are still almost 100,000 children in care awaiting permanent families. Services must be added to H.R. 867 along with

of the determinations made at permanency hearings.¹³⁰ Rather than the former practice of the court determining the “future status of the child,”¹³¹ ASFA requires courts to choose from a list of four options to determine a “permanency plan” for the child.¹³² The options include returning the child to the parent, placing the child for adoption, referring the child for legal guardianship, or placing the child in a different planned permanent living arrangement.¹³³

The ASFA also attempts to boost adoptions by providing states with additional financial incentives for placing children into permanent adoptive homes.¹³⁴ Specifically, the ASFA provides states with \$4,000 for each finalized adoption that they achieve and an additional \$2,000 for each special needs adoption that they achieve.¹³⁵ Several other ASFA provisions include¹³⁶ expanded rights for foster parents, preadoptive parents, and relatives;¹³⁷ an assessment of state performance in protecting children;¹³⁸ a study on the coordination of substance abuse treatment and child protection services;¹³⁹ documentation of state

the procedural changes already in the bill in order to benefit children.

Adoption Hearings, statement of Mary Lee Allen, *supra* note 122, at 57.

130. See 42 U.S.C.A. § 675(5)(C) (West 1991 & Supp. 1998).

131. *Id.* § 675(5)(C) (West 1991).

132. See *id.* § 675(5)(C) (Supp. 1998).

133. See *id.* A permanent living arrangement for a child could include living with a “fit” and “willing” relative. See H.R. REP. NO. 105-77, at 13 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2745.

134. See 42 U.S.C.A. § 673b (West Supp. 1998).

135. See *id.* § 673b(d)(1).

136. For a summary of the Adoption and Safe Families Act of 1997 in its entirety, see Child Welfare League of America, *Summary of The Adoption and Safe Families Act of 1997* (visited September, 1998) <<http://www.cwla.org/cwla/publicpolicy/p1105-89summary.html>>

137. See 42 U.S.C.A. § 675(5)(G).

138. See *id.* § 679(b).

139. See *id.* § 613 note Coordination of Substance Abuse and Child Protection Services (West Supp. 1998), *amended by* Child Support Performance and Incentive Act of 1998, Pub. L. No. 105-200, Sec. 410(a), 112 Stat. 645 (to be codified at 42 U.S.C.A. § 613). The study will address “the extent and scope of the problems of substance abuse in the child welfare population; the types of services and the outcome of services delivered to this population; and legislative recommendations to the Committees on Ways and Means and Finance.” H.R. REP. NO. 105-77, at 18-19 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2751. Congress added this provision because of the high prevalence of substance abuse in child abuse and neglect cases. See *id.* Specifically, substance abuse “appears in up to 80% of the substantiated abuse and neglect cases.” *Id.* Further, child welfare agencies have cited substance abuse, along with abuse and neglect and economic hardship, as one of the three most common reasons that children enter the foster care system. See *id.* One Senate version of the bill would have facilitated a parent’s entry into substance abuse treatment programs as well as emphasized that states place children and parents together in residential treatment centers. See Grimm, *supra* note 96, at 5 n.29. (citing S. 611, 105th Cong. 1997)). Such legislation would obviate

efforts to place children in adoptive homes;¹⁴⁰ and criminal record checks for prospective foster and adoptive parents.¹⁴¹

3. Theoretical Basis of ASFA

a. "Psychological Parent" Theory

The concept of "permanency planning for children" has been a central tenet of child welfare policy over the past thirty years.¹⁴² Policy makers began implementing this concept into child welfare policy¹⁴³ in response to the "psychological parent" theory developed by Joseph Goldstein, Anna Freud, and Albert J. Solnit.¹⁴⁴ Under the "psychological parent" theory, a child's different sense of time and need for continuity is paramount in any decision.¹⁴⁵ Further, a child's healthy psychological development is contingent upon a stable and uninterrupted relationship with one care giver—the "psychological parent."¹⁴⁶ The child's biological parent, however, is not the only person in a child's life who can fulfill the role of the child's "psychological parent."¹⁴⁷ Rather, a "psychological parent" may be anyone who, "through interaction, companionship, interplay, and mutuality, fulfills the child's psychological . . . as well as . . . physical

the need to separate the child and parent during recovery. *See id.* Congress, however, removed the provisions from this bill and replaced them with a "substance abuse study." *See* 42 U.S.C.A. § 613n. Coordination of Substance Abuse and Child Protection Services.

140. *See* 42 U.S.C.A. § 675(1)(E).

141. *See id.* § 671(a)(20)(A)(i)-(ii).

142. *See* Ayres Hand, *supra* note 97, at 1256.

143. As mentioned, policymakers first statutorily recognized the concept of "permanency planning" in 1980 with the passage of the AACWA. *See supra* text accompanying notes 98-105 (discussing AACWA's treatment of "permanency planning"). They further reflected this concept in the provisions of ASFA. *See supra* text accompanying notes 113-122, 127-133 (discussing ASFA's treatment of "permanency planning").

144. *See* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 3 (1973) [hereinafter GOLDSTEIN ET AL.]. For a discussion of the impact of Goldstein, Freud and Solnit, *see* Garrison, *supra* note 122, at 446 ("[t]he permanency program owes much of its design . . . to Joseph Goldstein, Anna Freud, and Albert Solnit."); *see also* Ayres Hand, *supra* note 97, at 1257 ("[A]t the heart of the permanency planning concept lies the notion of the 'psychological parent' as developed in the collaborative works of Joseph Goldstein, Anna Freud, and Albert Solnit.").

145. *See* GOLDSTEIN ET AL., *supra* note 144, at 31-32 ("[C]ontinuity of relationships, surroundings, and environmental influence are essential for a child's normal development"); *see also id.* at 40 ("A child's sense of time, as an integral part of the continuity concept, requires independent consideration.").

146. *See id.* at 19.

147. *See id.*

needs.”¹⁴⁸ The psychological parent theory further argues that since a child is intensely sensitive to separations from their “psychological parent,”¹⁴⁹ even a brief disruption to this relationship can profoundly damage a child.¹⁵⁰ Based on these principles, Goldstein, Freud, and Solnit harshly criticized the laws governing foster care.¹⁵¹ They specifically advocated for child welfare policies that would not disrupt the relationship between a child and his or her “psychological parent” absent the gravest of circumstances.¹⁵² In light of this emphasis, it is not surprising that the psychological parent theory has served as the primary rationale for terminating the rights of biological parents.¹⁵³

b. Criticisms of the “Psychological Parent” Theory

Policymakers have widely accepted the psychological theory since its inception.¹⁵⁴ Despite this acceptance, however, critics have faulted the psychological parent theory for its unreliable research methods.¹⁵⁵ Specifically, the theory inaccurately assumes that separation and discontinuity are the major causes of distress and harm to children.¹⁵⁶ Further, the psychological parent theory overemphasizes the “exclusivity” of the parent-child relationship without regard for the child’s ability to maintain multiple attachments.¹⁵⁷ Moreover, critics argue that the psychological parent theory seriously underestimates the importance of biological ties and the potential psychological damage

148. *Id.* at 98.

149. *See id.* at 11.

150. *See id.* at 40-42.

151. *See id.* at 99.

152. *See id.* (proposing a model child placement statute that would minimize the disruptions of continuing relationships between a psychological parent and child).

153. *See* Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE, 397, 403 (1996); *see also* Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 348 (1996) (“As a result of permanency planning mandates, terminations of parental rights skyrocketed.”).

154. *See* Garrison, *supra* note 122, at 446-47 (“[E]very subsequent proposal to reform the child welfare system has drawn its vocabulary and central ideas from this [“psychological parent theory”] framework”).

155. *See* Johnson, *supra* note 153, at 405-6; *see also* Garrison, *supra* note 122, at 457 (stating that Goldstein, Freud, and Solnit fail to provide their readers with any studies, theoretical work, or other evidence that support their proposals).

156. *See* Johnson, *supra* note 153, at 406-07.

157. *See id.* at 407 (noting that the theory does not recognize the “myriad of caretaking relationships a child may enjoy”); *see also* Michael S. Wald, *State Intervention on Behalf of “Neglected” Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 672 (1976) (arguing that child welfare policy should reflect findings that children benefit from “two sets of parents”).

that may result from cutting a child off from his or her family of origin.¹⁵⁸ Critics of the psychological parent theory point out that the biological family is the primary lifeline and source of identity for children.¹⁵⁹ They further argue that even inadequate parents continue to be significant in a child's development.¹⁶⁰ In light of the significant role that biological parents play in a child's life, critics have urged a more balanced approach to child welfare than the psychological parent theory formerly offered.¹⁶¹ Specifically, critics have suggested an approach that places less emphasis on the termination of parental rights and allows for the maintenance of a child's relationship with both the "psychological parent" and the biological parents.¹⁶² Critics maintain that this type of approach would better ensure the healthy development of children.¹⁶³

III. DISCUSSION

In June of 1998, the Illinois General Assembly responded to the

158. See Johnson, *supra* note 153, at 408; see also Margaret Beyer & Wallace J. Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L.Q. 233, 239 (1986) ("The importance of the birth family to the child has not been sufficiently appreciated in the child welfare system"). Additionally, in his seminal article on termination of parental rights and adoption of foster children, Robert Borgman, a child psychologist specializing in dependent children, argued that ongoing contact with a child's birth family benefits children. See Robert Borgman, *Antecedents and Consequences of Parental Rights Termination for Abused and Neglected Children*, LX CHILD WELFARE 391, 402 (1981).

159. See Byer & Mlyniec, *supra* note 158, at 237-38.

160. See *id.* Beyer and Mlyniec argue:

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. What a child knows and imagines about the biological family helps to mold the child's self-perception. The child's self-respect derives from characteristics most likeable about the parents.

Id.; see also Fernando Colon, *Family Ties and Child Placement*, 17 FAMILY PROCESS 289, 289 (1978) (discussing the "primacy of [a] child's experience of biological-familial continuity in establishing [his or her] sense of self and personal significance").

161. See Johnson, *supra* note 153, at 409-10; see also Garrison, *supra* note 122, at 474 (arguing that the child's need for permanence may justify depriving a parent of custody, but does not always justify completely severing the child-biological parent relationship through the termination of parental rights).

162. See Johnson, *supra* note 153, at 409-10; see also Garrison, *supra* note 122, at 474.

163. See Johnson, *supra* note 153, at 409-10; see also Garrison, *supra* note 122, at 474.

ASFA¹⁶⁴ by enacting the Senate Bill 1339.¹⁶⁵ The Illinois Department of Children and Family Services (“DCFS”) was the primary drafter¹⁶⁶ of Senate Bill 1339.¹⁶⁷ Further, DCFS incorporated the bill, in part, into section 2/13 of the Juvenile Court Act (“section 2/13”).¹⁶⁸ Section 2/13 creates strict time lines for one to initiate proceedings to terminate

164. See S. Res. 3, 92nd Legis. Day 5-6 (Ill. 1998). During the second reading of Senate Bill 1339, Senator Karpeil stated “[i]t implements—this amendment implements provisions of the Federal Adoption and Safe Families Act of 1997, which passed the federal level in November. We have—Illinois has until July of this year to implement the changes in our laws to bring us into compliance with the new federal law.” *Id.*

165. See Act of June 30, 1998, Pub. Act No. 90-608, 1998 Ill. Legis. Serv. 1575 (West) (to be codified in scattered sections of 20, 210, 225, 325, 410, 705, 740, 750 ILL. COMP. STAT. (West 1998)). Senator Karpel introduced Senate Bill 1339 on February 10, 1998. See Synopsis of Senate Bill 1339 (Ill. 1998). On May 22, 1998, the Illinois General Assembly enacted this bill into law with no dissent in the Senate and with 95 yeas, 11 nays and 12 votes of present. See S. Res. 3, 92nd Legis. Day, 35-36 (Ill. 1998); H.R. C.C.R.1, 130th Legis. Day 70 (Ill. 1998).

166. See Review of Senate Bill 1339 (June 11, 1998) (unpublished materials, on file with the Loyola University Civitas Childlaw Clinic). In addition to DCFS, the Office of the Governor, the Offices of the Cook County Public Guardian, Public Defender and State’s Attorney, and Child Care Association of Illinois, among others, helped to draft Senate Bill 1339. See Telephone Interview with Terry Lotsoff, Supervisor of the Termination Unit, Office of the State’s Attorney of Cook County (September 4, 1998) (stating that he personally drafted parental unfitness grounds (i), (k), and (q) of Senate Bill 1339) [hereinafter Lotsoff Interview]; Telephone Interview with Ron Mormon, Executive Director, Child Care Association of Illinois (September 17, 1998) (noting that Child Care Association and the Cook County Public Defender’s office among others took part in the discussions surrounding the contents of Senate Bill 1339); Letter from Thomas J. Grippando, Office of the Cook County Public Guardian, to Steven Schnorf, Office of the Governor (Oct. 24, 1996) (on file with the author) (recommending the use of California statutory framework, which sets the deadline for parents to correct the conditions in fifteen months, as a model for Illinois) [hereinafter Grippando Letter].

167. Other provisions of Senate Bill 1339 include, but are not limited to, the following: changes regarding the availability of family preservation services; the removal of the requirement that the court make a finding that reasonable efforts are not appropriate or have been unsuccessful prior to the discontinuation of reasonable efforts by DCFS; a definition of the circumstances for the secured confinement of children who are abused, neglected, and dependent; expansion of the rights of prospective adoptive parents including the right to participate in administrative reviews; the diminishment of considerations of race and ethnicity in matching a child with adoptive and foster families; the revision of expedited termination provisions; the addition of new criterion to the “best interest” of the child definition; the expansion of notice requirements by requiring notice of allegations of abuse and neglect to both foster parents and relative care givers; the allowance for the early termination of reasonable efforts to reunify children and families. See Act of June 30, 1998, Pub. Act No. 90-608, 1998 Ill. Legis. Serv. 1575 (West) (to be codified in scattered sections of 20, 210, 325, 410, 705, 750 ILL. COMP. STAT.).

168. See Act of June 30, 1998, Pub. Act No. 90-608, sec. 30, § 405/2-13(4.5)(a), 1998 Ill. Legis. Serv. 1575, 1597 (West) (to be codified at 705 ILL. COMP. STAT. 405/2-13 (4.5)(a)).

parental rights.¹⁶⁹ The provisions of section 2/13 generally reflect the provisions that the federal government has mandated in ASFA on this issue.¹⁷⁰ Unlike section 2/13, which initiates a termination proceeding based on a child's length of time in foster care by requiring the State's Attorney to file a termination petition, the Adoption Act actually defines parental unfitness based on the child's length of time in the foster care system.¹⁷¹ Senate Bill 1339 also incorporates a new parental unfitness ground for purposes of terminating parental rights into the Adoption Act.¹⁷² Also, unlike section 2/13, the new parental unfitness ground in the Adoption Act does not reflect any of the ASFA mandated provisions for states.¹⁷³

169. See Act of June 30, 1998 § 405/2-13(4.5)(a).

170. Compare Act of June 30, 1998 § 405/2-13(4.5)(a) (delineating the various circumstances under which DCFS must request the State's Attorney to file a termination petition), with 42 U.S.C.A. § 675(5)(E) (West Supp. 1998) (mandating states to initiate proceedings to terminate parental rights for certain children in foster care). Both Section 2/13 and ASFA require the filing of a petition to terminate parental rights if a child has been in foster care fifteen of the most recent twenty two months. See 42 U.S.C.A. § 675(5)(E); Act of June 30, 1998 § 405/2-13(4.5)(a). Section 2/13, however, slightly differs from ASFA regarding the initiation of termination proceedings. Specifically, ASFA requires the filing of a petition for the termination of parental rights under the following circumstances:

[I]f a court of competent jurisdiction has determined a child to be an abandoned infant or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such as voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent

42 U.S.C.A. § 675(5)(E). Unlike the provisions in ASFA, however, section 2/13 triggers the filing of termination petition if the parent has committed, attempted to commit or solicited the first or second degree murder of *any* child. See Act of June 30, 1998 § 405/2-13(4.5)(a)(iii). Further, rather than generally referring to felony assault as a trigger for filing a termination petition as in ASFA, the Illinois statute specifically lists the crimes of aggravated battery, aggravated battery of a child, felony domestic battery and aggravated criminal sexual assault. See *id.*

171. See Act of June 30, 1998, Pub. Act No. 90-608, sec. 40, §50/1(D)(m-1), 1998 Ill. Legis. Serv. 1575, 1625 (West) (to be codified 750 ILL. COMP. STAT. 50/1(D)(m-1)). Specifically, Section 50/1(D)(m-1) provides that a parent is unfit if:

a child has been in foster care for 15 months out of any 22 month period which begins on or after the effective date of this amendatory Act of 1998 unless the child's parent can prove by a preponderance of the evidence that it is more likely than not that it will be in the best interests of the child to be returned to the parent within 6 months of the date on which a petition for termination of parental rights is filed under the Juvenile Court Act of 1987.

Id.

172. See *id.*

173. Compare Act of June 30, 1998 § 50/1(D)(m-1) (rendering a parent unfit if a child has been in foster care 15 out of the most recent 22 months), with 42 U.S.C.A. § 675(5)(E) (requiring the state to initiate termination proceedings if a child has been in

A. *Section 2/13 of the Juvenile Court Act*

The Illinois General Assembly, both in compliance with and in response to the ASFA, incorporated the new legislation into the Juvenile Court Act under section 2/13.¹⁷⁴ Per the ASFA's mandate, section 2/13 provides that if a child has been in foster care for fifteen out of the most recent twenty-two months,¹⁷⁵ then DCFS must request the State's Attorney to file a petition or motion for the termination of parental rights.¹⁷⁶ After filing such a termination petition, the State's Attorney must then prove that the parent is unfit under one of the existing parental unfitness grounds in order to terminate parental rights.¹⁷⁷ Additionally, section 2/13 includes three exceptions to the requirement that a state file a termination petition if a child has been in foster care for fifteen out of twenty-two months.¹⁷⁸ First, the State need not file a termination petition if a relative cares for the child.¹⁷⁹ Second, Illinois provides an exception to the initiation of termination proceedings in cases where DCFS has documented a "compelling reason" why filing such a petition would not be in the best interest¹⁸⁰ of the child.¹⁸¹ Finally, Illinois permits an exception to the fifteen out

foster care for 15 out of the most recent 22 months).

174. See Act of June 30, 1998 § 405/2-13(4.5)(a).

175. Section 2-13(4.5)(b) defines the date that a child enters foster care as the earlier of: "(1)[t]he date of a judicial finding at an adjudicatory hearing that the child is an abused, neglected, or dependent minor; or (2) 60 days after the date on which the child is removed from his or her parent, guardian, or legal custodian." *Id.* § 405/2-13(4.5)(b)(1)-(2).

176. See *id.* § 405/2-13(4.5)(a)(i). Section 2-13's 15 out of 22 month time frame for filing a petition to terminate parental rights reflects the federal language in ASFA. See 42 U.S.C.A. § 675(5)(E).

177. See Act of June 30, 1998 § 50/1(D).

178. See Act of June 30, 1998 § 405/2-13(4.5)(a)(i)-(iii); These exceptions are identical to the ones created in ASFA. See 42 U.S.C.A § 675(5)(E)(i)-(iii).

179. See Act of June 30, 1998 § 405/2-13(4.5)(a)(i).

180. Senate Bill 1339 amended the "best interest" criterion to be used in determining a permanency decision for a child by adding: "[t]he child's need for permanence which includes the child's need for stability and continuity of relationships with parent figures and with siblings and other relatives." See *id.* § 405/1-3(4.05)(g). Other "best interest" criterion include:

- (a) the physical safety and welfare of the child, including food shelter, health and clothing; (b) the development of the child's identity; (c) the child's background and ties, including familial, cultural, and religious; (d) the child's sense of attachments; (e) the child's wishes and long term goals; (f) the child's community ties, including church, school, and friends . . . ; (g) the uniqueness of every family and child; (h) the risks attendant to entering and being in substitute care; (i) and the preferences of the persons available to care for the child.

Id.

181. See *id.* § 405/2-13(4.5)(a)(ii).

of twenty-two months requirement for filing a termination petition if the court has made a finding within the preceding twelve months that DCFS has not made reasonable attempts to reunify the child with his or her family.¹⁸² With the addition of the above provisions to section 2/13 of the Illinois Juvenile Court Act, Illinois satisfied ASFA's federal requirements with respect to the initiation of termination of parental rights for children who are in the foster care system.¹⁸³

B. ASFA's Impact on the Adoption Act

In addition to the new provisions in section 2/13, the Illinois General Assembly incorporated the fifteen out of twenty-two month time line into the Adoption Act.¹⁸⁴ By making this change, the Illinois General Assembly further emphasized termination of parental rights as the primary method for achieving permanence for children.¹⁸⁵ Although the ASFA did not require this, the Illinois General Assembly used the fifteen out of twenty-two month time line as a new ground for proving parental unfitness.¹⁸⁶ Specifically, under the new ground, a

182. *See id.* § 405/2-13(4.5)(a)(iii). The Illinois exception regarding reasonable efforts to reunify the child with his or her family differs slightly from the analogous exception in ASFA. *See* 42 U.S.C.A. § 675(5)(E)(iii). Specifically, Illinois requires that a finding of no reasonable efforts on the part of the state be made "within the preceding 12 months" whereas ASFA simply provides an exception to the filing of the petition if "[t]he State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home . . ." *Id.*; *see also* Act of June 30, 1998 § 405/2-13(4.5)(a)(iii). Thus, by providing a specific time frame in which a finding of no reasonable efforts must be made, the Illinois General Assembly narrows this exception. *See id.* § 405/2-13(4.5)(a)(iii).

183. *Compare* Act of June 30, 1998 § 405/2-13(4.5)(a) (instructing DCFS to request that the State's Attorney initiate termination of parental rights proceedings when certain circumstances are met), *with* 42 U.S.C.A. § 675(5)(E) (specifying situations in which the states must initiate termination of parental rights proceedings for a foster child).

184. *See* Act of June 30, 1998, Pub. Act No. 90-608, sec. 40 § 50/1(D)(m-1), 1998 Ill. Legis. Serv. 1575, 1626 (West) (to be codified 750 ILL. COMP. STAT. 50/1(D)(m-1)).

185. During the House debate over the "15 out of 22 months" provisions contained in Senate Bill 1339, House sponsor of the bill, Representative Thomas Dart stated:

The thought here was, as I say, A, to comply with some of the federal guidelines that have come down, but, B, to end this unending cycle that we have right now where we have children that are languishing in foster care forever and ever and ever and this would be . . . nearly grounds for it, which would have to be proved up and have to go in front of the court, nonetheless, to show that this a grounds that they should follow through on.

H.R. 90-CCR.1, 130th Legis. Day 12 (Ill. 1998).

186. *Compare* Act of June 30, 1998 § 50/1(D)(m-1) (using the 15 out of 22 month time frame as a parental unfitness ground), *with* 42 U.S.C.A. § 675(5)(E) (West Supp. 1998) (using the 15 out of 22 month time frame solely as the basis to file a termination petition). While a total of 11 members of the House of Representatives voted against

court may find a parent unfit if the child has been in foster care for fifteen out of the most recent twenty-two months.¹⁸⁷

C. Differences Between Section 2/13 and the Illinois Adoption Act

The use of the fifteen out of twenty-two month time line to measure parental unfitness in the Adoption Act significantly differs from the

Senate Bill 1339 in its entirety, only one member, Representative Davis, actively challenged the provision that incorporated the fifteen out of twenty two month time line into the Adoption Act as a means to measure parental unfitness. *See* H.R. 90-CCR 1, 130th Legis Day 31 (Ill. 1998). Specifically, Representative Davis argued:

[s]o actually, though, this Bill states, we're talking about dates, the date of entering foster care is more of a determiner if the parent gets the child back, [t]han if the child, the parent is ready to receive the child. How many months are we giving the parent to prepare him or herself to be a parent. . . . If I didn't know, if I didn't know better, I would go along with this Bill, Representative Dart, but I know of cases, I have talked to the Department of Children and Family Services. I have said to them, 'Mrs. Blank Blank and her mother want her children. They are capable of caring for their children. They have gone through 12 months of parenting classes twice. They have been to a psychiatrist. They've done everything the department has required of them, and yet, they refuse to give them back their children. This is flawed legislation.

Id.

187. *See* Act of June 30, 1998 § 50/1(D)(m-1). In addition to the ground rendering a parent unfit based in a child's length of stay in foster care, Senate Bill 1339 also added several other new parental unfitness grounds. These grounds included:

(i) Depravity. Conviction of any one of the following crimes shall create a presumption that a parent is depraved which can be overcome only by clear and convincing evidence: (1) first degree murder . . . or conviction of second degree murder . . . of a parent of the child to be adopted; (2) first degree murder or second degree murder of any child . . . (3) attempt or conspiracy to commit first degree murder or second degree murder of any child . . . (4) solicitation to commit murder of any child . . . ; or (5) aggravated criminal sexual assault . . .

(k) Habitual drunkenness or addiction to drugs, other than those prescribed by a physician, for at least one year immediately prior to the commencement of the unfitness proceeding. There is a rebuttable presumption that a parent is unfit under this subsection with respect to any child to which that parent gives birth where there is a confirmed test result that at birth the child's blood, urine, or meconium contained any amount of a controlled substance . . . or metabolites of such substances . . . and the biological mother of this child is the biological mother of at least one other child who was adjudicated a neglected minor under subsection (c) of Section 2-3 of the Juvenile Court Act of 1987.

(q) The parent has been criminally convicted of aggravated battery, heinous battery, or attempted murder of any child.

Id. §50/1(D)(i),(k),(q). Terry Lotsoff, Supervisor of Termination Unit in Cook County Juvenile Court, Office of the State's Attorney in Cook County drafted these grounds. *See* Lotsoff Interview, *supra* note 166. Mr. Lotsoff did not write the 15 out of 22 month unfitness ground. *See id.*

purpose of section 2/13.¹⁸⁸ Specifically, section 2/13's sole purpose is to initiate termination proceedings after a child has been in foster care for fifteen out of twenty-two months.¹⁸⁹ The initiation of termination proceedings under section 2/13 does not have an impact on the separate determination of whether a parent is unfit for purposes of terminating his or her parental rights.¹⁹⁰ Indeed upon initiating the termination proceedings that section 2/13 requires, the state must still proceed to prove that the parent is unfit under one of the parental unfitness grounds contained in the Adoption Act.¹⁹¹ Unlike section 2/13, however, the fifteen out of twenty-two month time line, as used in the Adoption Act, in and of itself renders a parent unfit.¹⁹²

188. See Act of June 30, 1998, Pub. Act No. 90-608, sec. 30, § 405/2-13(4.5)(a), 1998 Ill. Legis. Serv. 1575, 1597 (West) (to be codified 705 ILL. COMP. STAT. 405/2-13(4.5)(a)).

189. See Act of June 30, 1998 § 405/2-13(4.5)(a). It is questionable, however, whether Representative Thomas Dart, the House sponsor of Senate Bill 1339, was aware of the important difference between the use of the fifteen out of twenty-two month time line in section 2-13 as the trigger to file a termination petition and the use of the fifteen out of twenty-two month time line in the Adoption Act as a grounds for proving parental unfitness. See H.R. 90-CCR 1, 130th Legis. Day 12 (Ill. 1998). Specifically, when Representative Dart was asked about the new 15 out of 22 month parental unfitness ground, he responded "[i]f 15 out of 22 months that the requirement to file a petition is a federal requirement. A lot of what we are doing are making changes to comply with the federal law" *Id.*

190. See Act of June 30, 1998 § 405/2-13(4.5)(a). Indeed, section 2/13 does not address parental unfitness and simply states:

With respect to any minors committed to its care pursuant to this Act, the Department of Children and Family Services shall request the State's Attorney to file a petition or motion for termination of parental rights and appointment of guardian of the person with power to consent to adoption of the minor under Section 2-29 if (i) a minor has been in foster care for 15 months of the most recent 22 months

Id.

191. See *id.* Indeed, section 2/13 states that a petition for termination may be filed "under Section 2-29" of the Juvenile Court Act if a minor has been in foster care for fifteen out of twenty two months. See *id.* (emphasis added). Section 2-29 states, "[a] finding of the unfitness of a parent must be made in compliance with the Adoption Act, without regard to the likelihood that the child will be placed for adoption, and be based upon clear and convincing evidence." 705 ILL. COMP. STAT. ANN. 405/2-29(4) (West Supp. 1998), amended by Act of June 30, 1998, Pub. Act. No. 90-608 sec. 30, § 2-29, 1998 Ill. Leg. Serv. 1575, 1625-29 (West).

192. See Act of June 30, 1998 § 50/1(D)(m-1). Section 50/1 states "[t]he grounds of unfitness are any one or more of the following" *Id.* Section 50/1 lists the new parental unfitness ground contained in subsection m-1:

Pursuant to the Juvenile Court Act of 1987, a child has been in foster care for 15 months out of any 22 month period which begins on or after the effective date of this amendatory Act of 1998 unless the child's parent can prove by a preponderance of the evidence that it is more likely than not that it will be in the best interests of the child to be returned to the parent within 6 months of the date on which a petition for termination of parental rights is filed under the

Additionally, as part of this new unfitness ground, the Illinois General Assembly provides a parent with the opportunity to rebut the presumption of unfitness.¹⁹³ Specifically, a parent can show that it will be in the child's best interest to return to that parent within six months from the date of the termination petition.¹⁹⁴ Further, the Illinois General Assembly provided for the tolling of the statute during any time period in which the court finds that the state failed to make reasonable efforts¹⁹⁵ to reunify the child with his or her family.¹⁹⁶ This tolling, however, only applies if it meets one of two requirements.¹⁹⁷ First, where the court finds no reasonable efforts within sixty days of the state's actual failure to make reasonable efforts.¹⁹⁸ Second, where the parent filed a motion specifically requesting a finding of no reasonable efforts within sixty days of the reasonable efforts failure.¹⁹⁹

The Illinois General Assembly fully complied with the requirements of the ASFA by enacting the provisions of Senate Bill 1339 incorporated into section 2/13.²⁰⁰ The Illinois General Assembly, however, decided to extend Senate Bill 1339 beyond the requirements of the AFSA when it implemented those provisions of the bill incorporated into the parental unfitness grounds of the Adoption Act.²⁰¹

Juvenile Court Act of 1987.

Id.

193. The statute requires a parent to make this showing by a preponderance of the evidence. *See id.* § 50/1(D)(m-1).

194. *See id.* This exception was suggested by the Public Guardian's office and was modeled after the California statutory framework for permanency for children. *See* Grippando Letter, *supra* note 166, at 4. Specifically, in California the court will not terminate parental rights even if the child has been in the child welfare system for 15 months if the court makes a finding that the child is likely to return home within the next six months. *See* CAL. WEL. & INST. CODE § 366.21(e) (West Supp. 1999).

195. The Illinois General Assembly, however, neither defined nor addressed what reasonable efforts on the part of the state requires or entails. *See* 750 ILL. COMP. STAT. ANN. 50/1 (West 1993 & Supp. 1998), *amended by* Act of June 30, 1998 sec. 40, § 50/1 1998 Ill. Legis. Serv. 1575, 1625-29 (West)).

196. *See* Act of June 30, 1998 § 50/1(D)(m-1).

197. *See id.*

198. *See id.*

199. *See id.*

200. *Compare* Act of June 30, 1998, Pub. Act No. 90-608, sec. 30, § 405/2-13(4.5)(a), 1998 Ill. Legis. Serv. 1575, 1597 (West) (to be codified at 705 ILL. COMP. STAT. 405/2-13 (4.5)(a)) (containing the required federal 15 out of 22 month time frame for initiation of termination proceedings), *with* 42 U.S.C.A. § 675(5)(E) (mandating states to adopt the 15 out of 22 month time frame).

201. *Compare* Act of June 30, 1998 § 50/1(D)(m-1) (using the 15 out of 22 month time frame to measure parental unfitness), *with* 42 U.S.C.A. § 675 (5)(E) (West Supp. 1998) (using the 15 out of 22 month time frame to initiate termination proceedings).

IV. ANALYSIS

A. Increase in "Legal Orphans"

The Illinois General Assembly's decision to measure parental unfitness based on the child's duration in foster care clearly lightens the state's burden in proving that a parent is unfit.²⁰² The state may prove a parent is unfit by merely showing that the child has been in foster care for fifteen out of the most recent twenty-two months.²⁰³ Unlike other existing grounds measuring parental unfitness,²⁰⁴ the new ground does not require the state to present any qualitative data regarding the parent's capability of or interest in parenting.²⁰⁵ Given this lightened burden, it is likely that Illinois more frequently will find parents unfit thereby resulting in more terminations of parental rights.²⁰⁶

While the new ground will likely result in an increase in the number of parental rights terminations, whether it will actually help children achieve permanency is questionable.²⁰⁷ Rather, this increase in the number of parents whose rights are terminated will result in an increase in "legal orphans"—children legally severed from their natural parents without an awaiting adoptive home.²⁰⁸ Specifically, on any

202. See Act of June 30, 1998 § 50/1 (D)(m-1).

203. See *id.*

204. See *supra* Part II.A.3 (discussing the grounds for parental unfitness in Illinois existing before the Act of June 30, 1998); note 187 and accompanying text (providing an overview of the grounds for parental unfitness in Illinois added or amended by the Act of June 30, 1998).

205. See Act of June 30, 1998 § 50/1 (D)(m-1).

206. Indeed, even before the enactment of this new ground, the termination of parental rights in Cook County has significantly increased. See *supra* note 89 and accompanying text (discussing the rise in the number of termination of parental rights in Cook County). Specifically, in 1993, the State's Attorney of Cook County filed 1,207 termination petitions, and the court terminated the rights of 958 parents. See Crum Letter, *supra* note 89, at 2. By 1997, however, the Cook County filed 5,990 termination petitions and the court terminated the rights of 3,743 parents. See *id.* As of February 20, 1998, Cook County Juvenile Court terminated the rights of 4,997 parents. See *id.* at 3.

207. See Eileen Finan, *Adoption Challenge Mounts*, CHI. TRIB., Oct. 1, 1998, § 2, at 3. ("Although the law is a 'positive thing as it looks at time from a children's perspective,' it also means that an increasing number of children are waiting for permanent homes"). In a memorandum to Lead Attorneys and Supervisors, Patrick T. Murphy, Public Guardian of Cook County stated that "[o]ften, an order terminating parental rights merely creates a statistical illusion of movement and provides no benefit to the child" Memorandum from Patrick T. Murphy, Public Guardian of Cook County, to Juvenile Court Lead Attorneys and Supervisors 3 (Aug. 17, 1998) (on file with the author) [hereinafter Murphy Memorandum].

208. See *Talk of the Nation*, *supra* note, 89, at 9-10.

given day in the United States, at least 107,000 of the 507,000 children currently in foster care are legally free and awaiting adoption.²⁰⁹ In Illinois, there are presently 1,300 children awaiting adoptive homes as a result of parental rights terminations by the state.²¹⁰ The numbers for Cook County are even more startling.²¹¹ In just one of the several termination courtrooms in Cook County Juvenile Court, the state has “legally orphaned” over 600 children, leaving them with little hope for adoption.²¹² Further, in 1997, an average of 375 children in Cook County awaited adoption at any one time.²¹³ By August of 1998, this number increased to 449 children.²¹⁴ Factors such as age,²¹⁵ race,²¹⁶ and emotional and developmental problems²¹⁷ make it difficult, if not impossible, to find adoptive homes for some of these “waiting” children.²¹⁸ Despite these astonishing statistics, Illinois’ new parental unfitness ground makes termination of

209. See Amanda Spake, *Adoption Gridlock*, U.S. NEWS & WORLD REP., June 22, 1998, at 31.

210. See Hamburg, *supra* note 107, § 13, at 1.

211. See Finan, *supra* note 207, at A.

212. See Murphy Memorandum, *supra* note 207, at 3.

213. See Finan, *supra* note 207, at A.

214. See Finan, *supra* note 207, at A.

215. A child’s age has a large impact on his or her likelihood of adoption. See Spake, *supra* note 209, at 34. Many adoptive parents fear that older children are incapable of forming healthy attachments. See *id.* As a result, infants are four times more likely to be adopted than older children. See *id.* Additionally, as documented by the Child Welfare League of America, 97% of the children awaiting adoption in 1997 were older than one year of age. See MICHAEL R. PETIT & PATRICK A. CURTIS, *CHILD ABUSE AND NEGLECT: A LOOK AT THE STATES*, 1997 CWLA STAT BOOK 117 (1997).

216. Fifty-five percent of all adoptable children in the U.S. are minorities, with African-Americans comprising four-fifths of this percentage. See Spake, *supra* note 209, at 32. In Illinois, of the 449 children awaiting adoption as of August 1998, 400 are African-American. See Finan, *supra* note 207, at A. Many social workers have been uncomfortable with transracial adoptions and some attribute this discomfort to the National Association of Social Workers’ label of transracial as “genocide.” See Spake, *supra* note 209, at 34. Presently, only four percent of all adoptions are transracial. See *id.*

217. Many parents fear that foster children will have attachment disorders—the “psychological reaction to past hurt at the hands of a caregiver.” Spake, *supra* note 209, at 34. Indeed, Alicia Lieberman, Director of the Child Research Project at San Francisco General Hospital noted that “[a]ttachment disorder has become the boogeyman of adoption” *Id.*

218. See Malcolm Bush & Harold Goldman, *The Psychological Parenting and Permanency Principles in Child Welfare: A Reappraisal and Critique*, 52 AMER. J. ORTHOPSYCHIATRY, 223, 229 (1982) (noting that “[t]hese are children who, for one reason or another, cannot or do not . . . wish to be adopted”); see also Borgman, *supra* note 158, at 403 (“In theory, all children may be potentially ‘adoptable,’ but in practice the probability is unacceptably low for finding adoptive parents who are willing and able to cope constructively with children who show grossly unacceptable behavior.”).

parental rights easier and stubbornly pushes adoption as the necessary panacea to the failures of the child welfare system.²¹⁹

Further, the money Congress provided through the ASFA in hopes of boosting adoptions will not remedy the vast shortage of adoptive homes needed.²²⁰ Specifically, Congress allocated twenty-million dollars as a bonus to those states that successfully place children in adoptive homes.²²¹ Critics estimate, however, that this money will pay for only 4,000 more adoptions nationwide.²²² Moreover, Congress failed to finance more staff to handle the terminations and adoptions that the federal law mandates.²²³ This lack of federal funding coupled with Illinois' new parental unfitness grounds is likely to increase the number of "legal orphans" in Illinois.

Finally, by making it easier to find a parent unfit and, consequently, to terminate parental rights, Illinois also fails to recognize the crucial role that birth families²²⁴ play in a child's developmental and emotional life.²²⁵ Illinois fails to recognize that many older children may have formed deep attachments to their birth parents and siblings and, therefore, may resist adoption altogether.²²⁶ By ignoring a child's

219. See H. R. 90-CCR 1, 130th Legis. Day 32 (Ill. 1998) (remarking that Illinois' new parental unfitness ground is "moving down the wrong road") (statement of State Representative Davis). During the debate over Illinois' new parental unfitness ground, State Representative Davis stated:

Instead of . . . continuing with trying to reunite families, you have taken that out of the current legislation. You're removing that, the reunification of families, and you're hastening the time in which you can take somebody's children and, based upon the number of months they're in foster care, it's going to be the determiner of if the state now owns this child and there is no parent anymore. I don't think we have that right

Id.

220. See *Children in Limbo- A Shameful Slowness in Providing Permanent Homes*, PITTSBURGH POST-GAZETTE, May 24, 1998, at 1, available in 1998 WL 5253050.

221. See *id.*

222. See *id.*

223. See *id.*

224. It is important to note that when a child becomes "legally free," it is not only the child's parent or parents that lose the legal right to have contact with the child but also the child's grandparents and siblings. See Ayres Hand, *supra* note 97, at 1268 n.97 (citing MARK I. SOLER ET AL., REPRESENTING THE CHILD CLIENT (MB) No. 16, ¶4.14[2] (July 1996)). Cf. Borgman, *supra* note 158, at 397-98 (explaining that "[s]ome [children] were unwilling to relinquish contact with siblings and other relatives to whom they were attached when they told, honestly, that the continuation of such relationships could not be guaranteed").

225. See *supra* Part II.B.3(b) (discussing the criticisms of the psychological parent theory).

226. See Robert Borgman, *The Consequences of Open and Closed Adoption for Older Children*, LXI CHILD WELFARE 217, 219 (1982) ("Most older children, however, find it extremely difficult, if not impossible, to suddenly erase 10 or more years of

biological links in favor of easy terminations, the unfitness ground leaves Illinois children with the worst of both worlds—the constructive “death” of their entire biological family and a continuation of foster care “limbo” with no permanent home.

B. Lack of Adequate Protections for Parents

Illinois' new parental unfitness ground is also flawed because the protection that it attempts to provide parents is inadequate.²²⁷ Particularly, the Illinois General Assembly attempts to provide parents with protection by allowing the court to toll the time that accumulates against a biological parent in instances where the state has failed to make reasonable efforts to reunify a child with his or her biological parent.²²⁸ As poor quality and limited availability of services for biological parents involved in the child welfare system are historical and ubiquitous problems, this parental protection is extremely important, if not essential.²²⁹ To apply, however, the parent must file a motion requesting a finding of no reasonable efforts within sixty days of the time period when reasonable efforts were inadequate.²³⁰ This requirement is problematic since it is doubtful that the state will ever apprise parents of this protection, or at the very least, apprise them in the time that the statute proscribes.²³¹ A parent cannot rely on his or her caseworker to notify the parent of this protection since the

relationships, experience, and family history without endangering their basic security and self identity.”).

227. See Act of June 30, 1998, Pub. Act No. 90-608, sec. 40, § 50/1(D)(m-1), 1998 Ill. Legis. Serv. 1575, 1627 (West) (to be codified at 750 ILL. COMP. STAT. 50/1(D)(m-1)).

228. See *id.*

229. See *supra* note 122 (providing a list of relevant sources). Further, in a statewide survey on child abuse and neglect proceedings in Illinois conducted between November, 1996 and April, 1997 by the Chapin Hall Center for Children at the University of Chicago, 76% of the respondents identified delays in access to necessary services as preventing timely permanence for children. See Clark M. Peters & Sheila M. Merry, *Child Abuse and Neglect Proceedings in Illinois Jurisdictions Outside Cook County*, THE CHAPIN HALL CENTER FOR CHILDREN AT THE UNIV. OF CHIC., Dec. 1997, at 25-26. The Chapin Hall Study reported that the issues raised most frequently by survey respondents and interviewees concerned the limited service choices available to address the needs of troubled families. See *id.* at 26. Respondents were also concerned about the frequent turnover for caseworkers in both public and private agencies. See *id.* Respondents also felt that “there simply aren’t enough competent, caring caseworkers available to meet the substantial needs.” *Id.*

230. See Act of June 30, 1998 § 50/1(D)(m-1); see also *supra* notes 195-199 and text (explaining when the statute is tolled).

231. See *infra* notes 233-38 and accompanying text (discussing the overwhelming workload of the Cook County Public Defender’s Office and how this adversely affects their clients’ cases).

caseworker is the very person charged with failing to maintain contact with the parent and to make the requisite reasonable efforts at reunification.²³²

Moreover, the parents cannot rely on their attorney either. In at least half of the jurisdictions in Illinois, Public Defenders represent ninety percent of parents involved in abuse and neglect proceedings.²³³ A study conducted by the University of Chicago's Chapin Hall for Children has identified the Public Defender's Office in Cook County, as being significantly understaffed and critically in need of additional training to provide better advocacy for their clients.²³⁴ Further, the study has criticized the overwhelmed Cook County Public Defender's Office for consistently failing to adequately prepare clients for court proceedings from the onset and for failing to move cases forward in the best interests of their clients.²³⁵ In light of the high numbers of children and families involved in abuse and neglect proceedings in Cook County,²³⁶ a high number of parents in Illinois will be unaware that they have the power to toll the "unfitness clock" that is running against them. As a result, even if the state cannot attribute a child's

232. In addition, in a 1993 Annual Client Evaluation conducted by the Illinois Department of Children and Family Services, only about one-third of the responding biological parents had received the "Parent Notice" that explains the state procedures with respect to temporary custody, guardianship, termination of parental rights and obtaining information from the Department of Children and Family Services about their child. *See* ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES, 1993 FINAL REPORT ON THE ANNUAL CLIENT EVALUATION 58 (Sept. 1993). Further, according to DCFS procedures, a separate handbook containing information about the rights and duties of parents must be given to parents no later than the initial case review. *See id.* Just over 30% of responding parents, however, reported that they had received such notice or handbook. *See id.*

233. *See* PETERS & MERRY, *supra* note 229, at 22.

234. *See* Sheila M. Merry et al., Discussion Paper, *Timeliness and Delay in the Cook County Juvenile Court Child Protection Division*, THE CHAPIN HALL CTR. FOR CHILDREN AT THE UNIV. OF CHICAGO, Nov. 1997, at 29 (noting that court personnel pointed to the limited number of service appeals filed by Public Defenders as indication of the Public Defender's failure to advocate for their clients during the post dispositional phase of the proceedings).

235. *See id.* Concerns were also raised regarding the poor management practices of the Public Defender's Office. *See id.* Unlike other attorney's offices, the Public Defender's Office does not utilize a "lead attorney" in each courtroom to supervise other attorneys and to cover cases when necessary. *See id.* This lack of hierarchy adds to the inadequate training received by Public Defenders since inexperienced attorneys lack the guidance and support that a lead attorney would provide. *See id.*

236. Specifically, in 1997, DCFS indicated 9,686 families for abuse and neglect and reported 17,871 children as abused and neglected. *See* ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES, CHILD ABUSE AND NEGLECT STATISTICS, ANNUAL REPORT—FISCAL YEAR 1997 10 (1997). The DCFS report defines "indicated" as "sufficient and (credible) evidence has been established to lead a reasonable person to conclude that abuse or neglect did indeed occur." *Id.* at 3.

extended length of time in foster care to a parent's "lack of fitness," the state may still prove the parent unfit under the new "fifteen out of twenty-two month" unfitness ground if he or she failed to toll the statute.²³⁷ This shortcoming is simply unacceptable for both parents and children, and it truly underscores Illinois' failure to recognize the necessity of biological parents in the lives of children.²³⁸

C. *Conflicts with the Timeline for Recovering Substance Abusers*

By characterizing a parent as unfit based on the "fifteen out of twenty-two month" timeline, the Illinois legislature fails to consider the implications for children whose parents are recovering from substance abuse.²³⁹ For many children both nationwide and in Illinois,²⁴⁰ parental substance abuse forces them into the child welfare system.²⁴¹ Therefore, a myriad of other services, such as drug and alcohol treatment for the parent, is their path out of the system.²⁴² Unfortunately, drug treatment programs can take a considerable amount of time.²⁴³ Additionally, it is common for drug addicts to experience periods of relapse, thereby lengthening the duration of treatment even further.²⁴⁴ Ascertaining an individual's prognosis for success is challenging due to the wide range of substances that people abuse, the varying quality of treatment programs, the severity of addiction, the addict's readiness for recovery, and the differing definitions of a successful "recovery."²⁴⁵ It is certain, however, that the longer an

237. See Act of June 30, 1998, Pub. Act No. 90-608, sec. 40, § 50/1(D)(m-1), 1998 Ill. Legis. Serv. 1575, 1627 (West) (to be codified at 705 ILL. COMP. STAT. 50/1(D)(m-1)).

238. See *supra* Part II.B.3(b) (discussing the criticisms of the psychological parent theory).

239. See *Parental Substance Abuse-Implications for Children, the Child Welfare System, and Foster Care Outcomes Testimony Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong. 2 (1997) [hereinafter *Ross Hearings*] (statement of Jane L. Ross, Director of Income Security Issues Health, Education, and Human Services Division) (noting that when parental substance abuse is an issue in a foster care case, it may be difficult to reconcile the goals of making permanency decisions in shorter time periods and making reasonable efforts to reunite families).

240. See Jeanne C. Marsh et al., *DASA/DCFS Initiative: Evaluation of Integrated Services for Substance Abusing Clients of the Ill. Public Child Welfare System* (prepared for the Ill. Dep't. of Alcohol and Substance Abuse and the Ill. Dep't of Children and Family Services), July, 1998, at 1 (noting the long standing awareness of caseworkers in Illinois that a significant portion of their clients are drug dependent).

241. See *Ross Hearings*, *supra* note 239, at 1.

242. See *id.* at 2.

243. See *id.*

244. See *id.* at 7.

245. See *id.* at 8.

individual remains in treatment, the greater their chances for improvement and responsible behavior.²⁴⁶ In light of the complex factors surrounding drug addiction, fifteen months may be insufficient to determine²⁴⁷ whether a parent is likely to succeed in a drug treatment program.²⁴⁸ These complex factors and uncertainties also may make it quite difficult for a recovering parent to prove that he or she will be ready to care for the child in six months, thereby effectively rebutting the statute's presumption of unfitness.

V. PROPOSAL

A. *Better Social Work Practice and the Use of Other Parental Unfitness Grounds*

Rather than relying on a new parental unfitness ground based on the number of months a child has been in foster care, Illinois should instead focus its efforts on improving the quality of social work practice in the child welfare arena and the level of services that are available to parents who lose custody of their children because of abuse and neglect.²⁴⁹ While legislators have criticized child welfare for placing reunification efforts above child safety, it is questionable whether appropriate and individualized services have actually been available to parents in the past.²⁵⁰

246. See *id.* at 8-9 (“[E]ven when the parent is engaged in drug treatment, treatment may last up to 1 or 2 years, and recovery is often characterized as a lifelong process with the potential for recurring relapses.”).

247. Also, the general lack of quality community-based drug treatment programs makes it difficult for parents to overcome an addiction in the time frame allotted by the Illinois legislature. See Wendy Chavkin et al., *Drug-Using Families and Child Protection: Results of a Study and Implications for Change*, 54 U. PITT. L. REV. 295, 296 (1992) (“A lack of drug treatment programs and other necessary medical care makes it impossible for many women to obtain the treatment they need and desire.”); Dale Russakoff, *1997 Law Redefines Child-Protection Policies in Place Since 1980*, WASH. POST, Jan. 18, 1998, at A23 (noting that during the ASFA debates, some senators were concerned that many addicted parents would miss deadlines due to the scarcity of drug treatment centers programs).

248. See *Ross Hearings*, *supra* note 239, at 8 (“[E]xpeditious time frames may require that permanency decisions be made before it is known whether the parent is likely to succeed in drug treatment.” (footnote omitted)).

249. As stated by Catherine Ryan, Chief of the Cook County State's Attorney's Office Juvenile Justice Bureau: “[T]he most serious problem is the nature of services that have or haven't been offered to the parents. We can pass all the laws we want. If we don't do the social work that's involved, we can't really implement those laws.” Louise Kiernan, *Kids Wait Years for Fresh Starts, Terminations-of-Parental-Rights Cases Pile Up in Illinois, Prolonging Adoption Procedures and Keeping Abused or Neglected Children in Limbo*, CHI. TRIB., Feb. 9, 1997, §1, at 1.

250. See *supra* notes 247-48 and accompanying text (discussing the impediments

Further, by seriously committing itself to better social work practice and social work services, Illinois will make its existing parental unfitness grounds more meaningful.²⁵¹ Specifically, the use of ground (b),²⁵² which renders a parent unfit for failing to maintain a reasonable degree of interest, concern, or responsibility as to the child's welfare will become a more effective tool for proving a parent unfit.²⁵³ Likewise, ground (m),²⁵⁴ which characterizes a parent unfit if that parent fails to make reasonable efforts for the entire nine-month period after the child has been adjudicated abused, neglected, or dependent, under either Section 2-3²⁵⁵ or Section 2-4²⁵⁶ of the Juvenile Court Act of 1987 will become a better tool for terminating parental rights.²⁵⁷ Since the basis of these two grounds is a qualitative assessment of the parent's interactions with and attitude regarding the child, as well as the parent's progress and use of treatment, the state can make a stronger case to terminate parental rights under these grounds if the social worker has approached the case with care, competency and consistency.²⁵⁸ The state can also make a stronger case under these

created by inadequate availability of drug treatment facilities).

251. See 705 ILL. COMP. STAT. ANN. 50/1(D)(a)-(t) (West 1993 & West Supp. 1998), amended by Pub. Act No. 90-608, sec. 40, 1998 Ill. Legis. Serv. 1575, 1625 (West) and Pub. Act No. 90-665, sec. 174, 1998 Ill. Legis. Serv. 1903, 2469 (West).

252. See *id.* § 50/1(D)(b).

253. See *id.* § 50/1(D)(b).

254. See *id.* § 50/1(D)(m).

255. See 705 ILL. COMP. STAT. ANN. 405/2-3. Section 2-3(1)(a) provides in part that those who are neglected include:

any minor under 18 years of age who is not receiving the proper or necessary support, education as required by law, or medical or other remedial care recognized under State law as necessary for a minor's well-being, or other care necessary for his or her well-being, including adequate food, clothing and shelter, or who is abandoned by his or her parents or other person responsible for the minor's welfare, except that a minor shall not be considered neglected for the sole reason that the minor's parent or other person responsible for the minor's welfare has left the minor in the care of an adult relative for any period of time

Id.

256. See *id.* § 405/2-4. Section 2-4 defines a dependent child as any minor under 18 years of age:

- (a) who is without a parent, guardian or legal custodian;
- (b) who is without proper care because of the physical or mental disability of his parent, guardian or custodian; or
- (c) who is without proper medical or other remedial care recognized under State law or other care necessary for his or her well being through no fault, neglect or lack of concern by his parents, guardian or custodian

Id.

257. See *id.* § 50/1(D)(m).

258. See Borgman, *supra* note 158, at 392.

grounds if the services offered to the parent were truly sufficient to meet that parent's complex and individual needs.²⁵⁹

B. *Consideration of Likelihood of Adoption*

In addition to repealing the new ground for measuring parental unfitness, Illinois should refuse to terminate parental rights when a child's potential for adoption is limited.²⁶⁰ Weighing this factor is essential given the fact that terminations occur far more frequently than adoptions.²⁶¹ As mentioned, this trend has rendered thousands of children "legal orphans."²⁶² In order to avoid this damaging possibility, Illinois should protect a child's existing parental link despite its weakness.²⁶³ Indeed, many children in foster care maintain a deep psychological and emotional bond to their biological parents and families. Thus, terminating rights with no adoptive home in sight is shortsighted since it may harm a child's identity and esteem while failing to achieve the goal of permanency.²⁶⁴ Moreover, this approach is consistent with many commentators, including social workers, psychologists, and lawyers who argue against terminations unless "a high probability for adoption exists."²⁶⁵

C. *Consideration of Child's Age and Bond to Biological Parent*

Finally, Illinois should consider a child's age and attachment to a parent when deciding whether to terminate parental rights and consider alternatives to terminating parental rights when a strong bond exists. As discussed, many children continue to remain emotionally attached to their biological parents after the state has placed them in foster care.²⁶⁶ This is particularly true in cases involving older children who may have lived with a biological parent for many years.²⁶⁷ Therefore, in cases where a bond is particularly strong, possibilities such as long-

259. *See id.* ("The quality of service[s] surely affects whether a child returns home.").

260. *See Ayres Hand, supra* note 97, at 1276. By using this approach, fewer children will become "legal orphans" as a result of a termination proceeding. *See id.*

261. *See supra* Part IV.A (discussing the increase in "legal orphans").

262. *See supra* Part IV.A.

263. *See Ayers Hand, supra* note 97, at 1276.

264. *See supra* Part IV.A.

265. Ayres Hand, *supra* note 97, at 1276; *see also* Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care-An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 122 (1995); Borgman, *supra* note 158, at 402 (pointing out that one scholar went so far as to propose that no parental rights termination should become final until the child is legally adopted).

266. *See supra* Part IV.A.

267. *See Borgman, supra* note 226, at 219.

term foster care or placement of the child with a relative of the parent should be considered since they allow the parent-child relationship to continue. As a result, these alternatives may provide healthier outcomes for the family than would termination and complete severance.²⁶⁸ The court should examine these factors during the best interest phase²⁶⁹ of the termination proceeding and the Illinois General Assembly should explicitly list them as best interest criterion.²⁷⁰

VI. CONCLUSION

Illinois' use of the "fifteen out of twenty-two months" time line as a ground to measure parental unfitness fails to recognize the significant role that biological families play in the lives of foster children. Further, this new ground will fail to move children out of the foster care system more quickly because adoptive homes are scarce. This will not help children achieve permanency. Instead, by severing children's important ties to their biological families with no prospects for adoption, this new ground will increase the already high number of Illinois' "legal orphans." This essentially leaves Illinois' children with the worst of both worlds—no biological parents and continuation in the foster care system. Use of this new ground will also short-change parents by failing to adequately protect them from the frequent and historical failure of the state to make competent and committed efforts towards family reunification. It further short-changes them by failing to realistically take into account the complexities of substance abuse and substance abuse treatment. In light of these shortcomings, Illinois should abandon this ground and commit itself to better social work practice and services. Finally, in order to achieve healthier outcomes for children, Illinois should contemplate a child's likelihood for adoption as well as a child's age and attachment to a biological parent before making any decision to terminate parental rights.

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268. See Ayers Hand, *supra* note 97, at 1273.

269. See *supra* note 46 and accompanying text (explaining that to terminate parental rights, a court must find that a parent is unfit and that the termination of parental rights is in the child's "best interest").

270. A child's sense of attachment is already listed as a "best interest" criterion in Illinois, however, the child's age is not. See *supra* note 180 (describing the "best interest" criterion).