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Teri Baxter

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2014

# Respecting Parents' Fundamental Rights in the Adoption Process: Parents Choosing Parents for their Children

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# **Respecting Parents' Fundamental Rights in the Adoption Process: Parents Choosing Parents for their Children**

**Teri Dobbins Baxter**

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## Respecting Parents' Fundamental Rights in the Adoption Process: Parents Choosing Parents for their Children

Teri Dobbins Baxter\*

### Introduction

The Supreme Court has repeatedly and consistently recognized parents' fundamental right to direct the upbringing of their children. This right is consistent with the presumption that parents will act in the best interests of their children, and courts have cited parents' fundamental rights in holding that states must defer to the judgment of parents with respect to issues ranging from education to religion. In the adoption context, courts and scholars have debated and discussed at length the procedural due process rights of parents whose rights are involuntarily terminated, the rights of alleged or presumed fathers of children born out of wedlock, stepparent and second parent adoptions, the rights of *de facto* parents, and many other issues related to the rights of parents. These are important issues that deserve serious consideration, but there is little precedent or scholarly literature acknowledging that the fundamental right to control the care and custody of their children includes the right to choose adoptive parents when the biological parents voluntarily place a child for adoption.<sup>1</sup>

For some people, discussions of terminating parental rights brings to mind neglectful or abusive parents whose children are taken into state custody for the children's own protection. However, many loving and competent parents make the difficult decision to place their children for adoption; for those parents, the decision to voluntarily terminate their parental rights represents a profound expression of love and a desire to give the child a stable and happy childhood. Moreover, it is a concrete example of a parent making a decision regarding the care, custody, and upbringing of the child. As such, it is a decision within the scope of the parent's fundamental constitutional rights. Consequently, states must recognize and respect the parent's choice of adoptive parents even if the choice is inconsistent with state or federal statutory priorities for adoptive placements. Additionally, as a fundamental constitutional right, it trumps state and federal laws—including the federal Indian Child Welfare Act—to the extent that those laws prevent parents from choosing their child's adoptive parents.<sup>2</sup>

This Article discusses the fundamental rights of parents under the United States Constitution as recognized by the United States Supreme Court and lower federal and state courts, and addresses how state and federal laws either vindicate or violate those rights in the context of

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<sup>1</sup> Throughout this Article, I occasionally use the terms "birth parents" and "biological parents" interchangeably to represent those who currently have legal status as parents and to distinguish them from prospective adoptive parents. I use the terms only when necessary to avoid confusion and to be consistent with statutory language. Once an adoption is finalized, the adoptive parents become the legal parents and have all of the rights and responsibilities that biological parents have, including the right to choose adoptive parents in the event that they choose to voluntarily terminate their parental rights and place the child for adoption. Consequently, when I refer to the constitutional rights of birth parents or biological parents I include parents who have been granted a final decree of adoption.

<sup>2</sup> Of course, the right is not absolute; the prospective adoptive parents must be qualified to adopt in accordance with relevant state law. But the choice of the parent must be considered first and without regard to whether other parties are willing or able to adopt the child.

voluntary adoption placements. Part I examines Supreme Court precedent identifying and exploring the contours of parents' fundamental right to control the care, custody, and upbringing of their children. Part II analyzes the rights of parents in the adoption context and argues that fit parents who choose to voluntarily terminate their rights and consent to the adoption of their children have a constitutional right to choose who will adopt and raise their children.

Part III examines adoption laws in California and Tennessee as contrasting examples of state adoption law schemes and discusses how the statutory structure in each state succeeds or fails to give due deference to parental choice in determining who may adopt their child. The discussion includes recommendations for changes in the text or implementation of the laws when necessary to protect parents' rights. Part IV considers how the unique history and status of Native American tribes led to the enactment of the Indian Child Welfare Act and how its language can be interpreted in a way that deprives parents of Indian children of their fundamental constitutional rights. It concludes with a discussion of how the Indian Child Welfare Act should be interpreted and applied to respect the rights of parents while still fulfilling the purpose of the statute and preventing the further destruction of tribes and Native American culture.

## I. Recognized Rights of Parents Under the United States Constitution

The United States Supreme Court has repeatedly and consistently held that parents have a fundamental constitutional right to control the care, custody, and upbringing of their children.<sup>3</sup> This right was examined at length in *Troxel v. Granville*.<sup>4</sup> In that case, the mother of two girls challenged the constitutionality of a Washington State statute that allowed “[a]ny person” to “petition the court for visitation rights at any time including, but not limited to, custody proceedings.”<sup>5</sup> The court could grant visitation to petitioners “when visitation may serve the best interest of the child whether or not there has been any change of circumstances” and even if the child was in the custody of a fit parent who objected to the visitation.<sup>6</sup>

The girls' paternal grandparents filed a petition seeking an order granting increased visitation beyond what had been allowed by the girls' mother after their father's death. The mother wanted to limit the visits with the grandparents to one short visit per month; in their petition, the grandparents requested two weekends of overnight visitation per month plus two weeks each summer.<sup>7</sup> The trial court found that the visitation would be in the children's best interest and granted the grandparents' petition, ordering visitation one weekend per month, one week during the summer, and four hours on the birthday of each grandparent.<sup>8</sup> The court of appeals reversed the trial court, holding that the grandparents lacked standing to petition for visitation under a proper reading of the statute.<sup>9</sup> The Washington Supreme Court affirmed the court of appeals' ruling, but based their holding on federal constitutional considerations. Specifically, it held that the statute

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<sup>3</sup> *Troxel v. Granville*, 530 U.S. 57 (2000); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>4</sup> 530 U.S. 57 (2000).

<sup>5</sup> *Id.* at 61.

<sup>6</sup> *Id.* The girls' father never married their mother. After he and the mother separated, their father lived with his parents and would regularly bring the girls to their home for weekend visits. *Id.* at 60. He committed suicide in 1993. *Id.* After his death, their mother allowed regular visits with the paternal grandparents for several months, but later sought to decrease the length and frequency of the visits. *Id.* at 60-61.

<sup>7</sup> *Id.* at 61.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 62.

violated parents' fundamental right to rear their children.<sup>10</sup> The United States Supreme Court granted certiorari and affirmed in a plurality decision that generated five separate opinions.<sup>11</sup>

The plurality acknowledged that the Fourteenth Amendment's Due Process Clause protects against government infringement upon certain fundamental rights and interests.<sup>12</sup> "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."<sup>13</sup> The Court did not take issue with the subject matter of the statute, but criticized its failure to give "special weight" to parents' decisions with respect to their children's best interests.<sup>14</sup>

[T]here is a presumption that fit parents act in the best interests of their children. . . . Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.<sup>15</sup>

The trial court erred by failing to accord special weight to the mother's decision regarding visitation with the grandparents.<sup>16</sup> Instead, the judge presumed that visitation was in the best interests of the children and placed the burden on the mother to show that such visits would be harmful.<sup>17</sup> The Court held that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."<sup>18</sup> Accordingly, the statute was held to be unconstitutional as applied in that case.<sup>19</sup>

As Justice Thomas pointed out in his concurring opinion, the plurality opinion and Justice Kennedy's and Justice Souter's concurrences all failed to "articulate the appropriate standard of review."<sup>20</sup> Justice Thomas noted that the Court has held that parents' right to direct the upbringing of children is a fundamental right and he "would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties."<sup>21</sup>

Even though he dissented from the holding in the case, Justice Stevens acknowledged that "[o]ur cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest—absent exceptional circumstances—in doing so without the undue interference of strangers to them and to their child."<sup>22</sup> However,

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<sup>10</sup> *Id.* at 63.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 65.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 66.

<sup>15</sup> *Id.* at 68.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 72.

<sup>19</sup> *Id.* at 73.

<sup>20</sup> *Id.* at 80. Notwithstanding the Court's use of the term "fundamental liberty interests," the plurality opinion did not mention strict scrutiny (the heightened standard of review typically applied in cases alleging violations of fundamental rights).

<sup>21</sup> *Id.* at 80.

<sup>22</sup> *Id.* at 87; *see also id.* at 95 (Justice Kennedy, dissenting) ("[T]here is a beginning point that commands general, perhaps unanimous, agreement in our separate opinions: As our case law has developed, the custodial parent has a

parents' rights are not "absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family."<sup>23</sup> Moreover, Justice Stevens believed that children's liberty interests in "preserving established familial or family-like bonds" should be recognized and considered alongside the interests of the parents.<sup>24</sup> In his view, the Washington statute merely gave individuals with whom the child may have a relationship the right to ask the state to "act as arbiter" between the interests of the parents and the best interests of the child.<sup>25</sup> Justice Stevens thought it clear "that the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child."<sup>26</sup>

By contrast, Justice Scalia viewed "the right of parents to direct the upbringing of their children" as an unenumerated "unalienable Right" retained by the people which the Constitution's enumerated rights "shall not be construed to deny or disparage."<sup>27</sup> As such, Justice Scalia did not believe that "the power which the Constitution confers upon [him] *as a judge* entitles [him] to deny legal effect to laws that (in [his] view) infringe upon what is (in [his] view) that unenumerated right."<sup>28</sup> While he would not overrule the cases finding a substantive constitutional right of parents to direct the upbringing of their children, neither would he expand that right in the context of the *Troxel* case.<sup>29</sup>

While there was no majority opinion, all of the opinions (including the dissents) emphasized the child's right to maintain relationships with third parties and noted the importance of non-related third parties in the lives of many children. The justices may believe that the parent's interest is diminished in those circumstances, but that does not imply a belief that the state or other sovereign (such as a Native American tribe) has a superior right to determine who should raise a child. While some third parties should have standing to file an adoption petition as a general matter, their petitions should be considered only if the parent's choice is deemed unfit. "[I]f a fit parent's decision of the kind at issue [in *Troxel*] becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination."<sup>30</sup> Certainly a parent's decision regarding who should adopt her child is entitled to at least as much weight as a parent's decision regarding who should be able to visit the child.

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constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child.").

<sup>23</sup> *Id.* at 88.

<sup>24</sup> *Id.* at 89. This is consistent with a "best interests of the child" component of the adoption process and does not preclude recognition of parents' rights.

<sup>25</sup> *Id.* at 91.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 91 (quoting the Ninth Amendment to the United States Constitution).

<sup>28</sup> *Id.* at 92 (emphasis in original).

<sup>29</sup> *Id.* The Court did not address the question "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context." *Id.* at 73.

<sup>30</sup> *Id.* at 70.

Parents' constitutional rights in other contexts

Both before and after *Troxel*, much of the discussion of parents' constitutional rights focused on the rights of fathers of children born out of wedlock.<sup>31</sup> In *Stanley v. Illinois* the United States Supreme Court affirmed the constitutional rights of unwed fathers.<sup>32</sup> In that case, an Illinois statute made the children of unwed fathers wards of the state upon their mother's death.<sup>33</sup> Consequently, even if the children's father had acknowledged paternity, provided financial support, and otherwise been a consistent, positive participant in their lives, unwed fathers were presumed to be unfit parents (indeed, not truly parents at all) solely because they were not married to their children's mother.<sup>34</sup>

Peter Stanley, who had lived with his children and their mother for their entire lives, filed suit alleging violation of his rights under the Fourteenth Amendment when the state removed the children from his custody after their mother died and declared them wards of the state.<sup>35</sup> The Supreme Court held that failure to hold a hearing to determine Stanley's fitness as a father before removing his children from his care and placing them in state custody was a violation of his due process rights.<sup>36</sup> Moreover, denying him a hearing while allowing other parents whose children are in their custody to have such a hearing violated his right to equal protection under the Fourteenth Amendment.<sup>37</sup> In so holding, the court noted that it was "clear that, at the least, Stanley's interest in retaining custody of his children is cognizable and substantial."<sup>38</sup>

A decade later, the court decided the case of *Lehr v. Robertson* and denied the equal protection claim of a putative father when the state failed to give him notice of adoption proceedings related to a child.<sup>39</sup> Unlike the father in *Stanley*, the petitioner in *Lehr* had not established paternity or developed a substantial relationship with the child.<sup>40</sup> The court held that "[i]f one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights."<sup>41</sup> Taken together, and in light of other decisions on the subject, the Court has signaled a willingness to recognize and treat men as fathers based on the relationship that the man has established with a child and not solely based on his legal status or a legal finding of paternity. In the adoption context, this means that unwed fathers have

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<sup>31</sup> See, e.g., E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97 (2006) (exploring why biological paternity has constitutional significance); David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 757 (1999) (examining legislative efforts to solve the legal dilemma of biological fathers and proposing an alternate solution).

<sup>32</sup> 405 U.S. 645 (1972).

<sup>33</sup> *Id.* at 646.

<sup>34</sup> *Id.* at 646-47 ("we are faced with a dependency statute that empowers state officials to circumvent neglect proceedings on the theory that an unwed father is not a 'parent' whose existing relationship with his children must be considered").

<sup>35</sup> *Id.* at 646.

<sup>36</sup> *Id.* at 649.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 652.

<sup>39</sup> 463 U.S. 248 (1983).

<sup>40</sup> *Id.* at 267-268.

<sup>41</sup> *Id.*



rights that must be respected and their right to choose adoptive parents must be given deference as well.<sup>42</sup>

Courts have also recognized the rights of *de facto* parents.<sup>43</sup> In *In re Parentage of L.B.*, Page Britain and Sue Ellen Carvin were living together in a romantic relationship and raised a child together for the first six years of the child's life.<sup>44</sup> During that time Carvin shared parenting responsibilities with Britain—the child's biological mother—and was actively involved in her day-to-day care and the decisions regarding her schooling, discipline, and medical care.<sup>45</sup> After the relationship between Britain and Carvin ended, Britain refused to allow Carvin have any contact with the child.<sup>46</sup> Carvin filed a "petition for the establishment of parentage" which was dismissed for lack of standing under the Uniform Parentage Act (UPA). The Court of Appeals reversed, finding that Washington recognized *de facto* parents<sup>47</sup> and holding that Carvin should be allowed to present evidence in support of her petition to be recognized as a *de facto* parent.<sup>48</sup> The Washington Supreme court affirmed the court of appeals ruling.<sup>49</sup>

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<sup>42</sup> When the mother and father disagree on who should adopt their child, the question of how to resolve that conflict can be complex. Clearly both choices should be considered and should be given preference over other prospective adoptive parents, but how courts should choose between the requests of the mother and father is outside of the scope of this Article. Instead, the analysis assumes that the parents are in agreement or that only one parent has legal standing to consent or object to the adoption.

<sup>43</sup> See, e.g., *In re Parentage of L.B.*, 155 Wash.2d 679 (2005) (holding that a woman who had co-parented a child with her same-sex partner (the child's biological mother) had standing to assert rights to visitation with the child after the dissolution of the relationship between the woman and her former partner). At least a dozen states have recognized the rights of *de facto* parents or persons acting in loco parentis to seek custody or visitation. Jeff Adkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM.L.Q. 1, 11 (2013).

<sup>44</sup> *In re Parentage of L.B.*, 155 Wash.2d at 682.

<sup>45</sup> Approximately five years into their relationship, Britain and Carvin decided together to conceive and raise a child and Carvin was subsequently impregnated via artificial insemination. *Id.* at 684.

<sup>46</sup> *Id.* at 685.

<sup>47</sup> The court noted that the terms "*de facto* parent," "*in loco parentis*," and "psychological parent" are often used interchangeably but are not legally equivalent. *Id.* at 692. The court adopted the following definitions:

*In loco parentis*: Latin for "in the place of a parent," this term is temporary by definition and ceases on withdrawal of consent by the legal parent or parents. BLACK'S LAW DICTIONARY 803 (8th ed.2004). While some legal responsibility often attaches to such a relationship, Washington courts and statutes have never considered the same actual parents or akin to actual parents. See also *In re Custody of Brown*, 153 Wash.2d 646, 652, 105 P.3d 991 (2005) (noting "no Washington case recognizes that nonparents are guaranteed the fundamental rights of parents under the doctrine of in loco parentis"). . . .

*Psychological parent*: Psychological parent is a term created primarily by social scientists but commonly used in legal opinions and commentaries to describe a parent-like relationship which is "based ... on [the] day-to-day interaction, companionship, and shared experiences" of the child and adult. JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 19 (1973). As such, it may define a biological parent, stepparent, or other person unrelated to the child. See also BLACK'S, *supra*, at 1145 ("A person who, on a continuing and regular basis, provides for a child's emotional and physical needs."). In Washington, psychological parents may have claims and standing above other third parties, but those interests typically yield in the face of the rights and interests of a child's legal parents. See, e.g., *In re Dependency of J.H.*, 117 Wash.2d 460, 469, 815 P.2d 1380 (1991). . . .

*De facto parent*: Literally meaning "parent in fact," it is juxtaposed with a legally recognized parent. BLACK'S, *supra*, at 448 (defining *de facto* as "[a]ctual; existing in fact; having effect even though not formally or legally recognized").

*Id.* at 692 note 7.

<sup>48</sup> *Id.* at 686.

<sup>49</sup> *Id.* at 683.

In reaching its conclusion, the Washington Supreme Court noted that several other states have recognized *de facto* parents in various contexts<sup>50</sup> and that the statutory scheme in Washington failed to address “all potential scenarios which may arise in the ever changing and evolving notion of familial relations.” Consequently, it was appropriate to consider whether a common law right existed even if the statutory scheme did not recognize *de facto* parents.<sup>51</sup> The court held that “[r]eason and common sense support recognizing the existence of *de facto* parents and according them the rights and responsibilities which attach to parents in [Washington].”<sup>52</sup> In order to be recognized as a *de facto* parent, a petitioner must establish:

(1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature. In addition, recognition of a *de facto* parent is “limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s life.”<sup>53</sup>

Crucially, the court held that *de facto* parents “stand in legal parity” with biological, adoptive, and other legally recognized parents.<sup>54</sup> As such, *de facto* parents’ choice of adoptive parents should be given the same level of deference as other parents.

## II. Parents’ Constitutional Right to Choose Adoptive Parents for their Children

Given the Supreme Court’s recognition of parents’ fundamental rights with respect to childrearing, courts should apply strict scrutiny to any law which disregards or overrules the parents’ decision in these matters.<sup>55</sup> Until termination, parents contemplating placing their children for adoption are in possession all of the rights, obligations, and privileges enjoyed by all other parents. The decision to place the child in the care, custody and control of particular prospective adoptive parents is an exercise of their fundamental rights as parents.<sup>56</sup> Consequently, any state action denying a parent the right to make this choice should be deemed unconstitutional unless the government can establish that doing so is narrowly tailored to further a compelling state interest.<sup>57</sup> The state will rarely be able to meet this burden. While the state certainly has a compelling interest

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<sup>50</sup> *Id.* 702-707 (discussing cases decided by the highest courts of Wisconsin and Massachusetts and citing to cases from Maine, Ohio, Pennsylvania, New Jersey, Rhode Island, Indiana, Colorado, New Mexico).

<sup>51</sup> *Id.* at 706-07.

<sup>52</sup> *Id.* at 707.

<sup>53</sup> *Id.* at 708 (quoting *C.E.W. v. D.E.W.*, 2004 ME 43, 845 A.2d 1146, 1152) (internal citation omitted).

<sup>54</sup> *Id.*

<sup>55</sup> “A constitutional due process challenge based on an alleged infringement of this fundamental right requires the court to apply a strict scrutiny test. The statute at issue must serve a compelling state interest, and it must be narrowly tailored to serve that interest.” *Punsly v. Ho*, 87 Cal. App. 4th 1099, 1107, 105 Cal. Rptr. 2d 139, 145 (2001).

<sup>56</sup> See *Troxel*, 530 U.S. at 65 (“the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court”). The decision to terminate parental rights and place the child for adoption should not be viewed as evidence that the birth parent is incapable or unwilling to act in the child’s best interests. To the contrary, a parent’s voluntary decision to place a child for adoption is often a reflection of the parent’s love and desire to help and protect their children. Thus, there is no justification for declining to recognize their fundamental rights as parents or to recognize only diminished rights.

<sup>57</sup> See *Punsly*, 87 Cal. App. 4th at 1107. Even if the parent’s interest in choosing the adoptive parent was a mere liberty interest triggering rational basis scrutiny, the state has no legitimate interest in choosing the adoptive parents, so long as the parents’ choice meets the state standards for adoption.

in ensuring that adoptive parents are able to provide a safe, loving, and stable home for adopted children, this can be accomplished by requiring all prospective adoptive parents to be evaluated before the adoption is finalized.<sup>58</sup> Allowing biological parents to choose adoptive parents subject to court approval protects the state's interest without violating parents' constitutional rights.<sup>59</sup>

Birth parents may choose adoptive parents that are different than those who would receive preference under state or federal law for many valid reasons. While a grandparent or other close family member may meet the minimal standards for certification as a foster parent or approval as an adoptive parent, the birth parent may have insights into those persons that the state and courts do not have.<sup>60</sup> For example, the family member might have an addiction, illness, anger management problem, an abusive partner, history of financial mismanagement, racist beliefs, or religious intolerance that is not known to those outside of the family and that might not be discovered during a routine home study. That insight might lead the birth parent to conclude that another person or couple would be a better choice to raise the birth parent's child.

Allowing the birth parent to choose adoptive parents without having to justify that choice also spares the parent from having to disclose sensitive or embarrassing information about extended family members or others to the state in order to ensure that the child does not get placed with unsuitable adoptive parents. If that decision will not be upheld, a biological parent may face the unenviable choice of keeping the child and raising him or her in lamentable circumstances (such as extreme poverty, violence or potential violence); giving the child up for adoption to be raised by people unknown to the parent (and of whom the biological parent may not approve); giving the child up for adoption to be raised by people known to the biological parent and of whom the parent does not approve; or revealing the private struggles of family members to social workers and court personnel in order to prevent them from successfully adopting the child. An exception to policies requiring deference to parental choice may be made when the parent has committed a crime or other circumstances indicate that the parent's judgment is clearly suspect but their parental rights have not yet been terminated. For example, a father who has murdered his child's mother and has been arrested should be entitled to less deference with respect to who should adopt his children, even if his parental rights have not yet been terminated and his surrender is technically voluntary.<sup>61</sup>

In addition, if the child is old enough to express an opinion, the child's constitutional rights should be recognized and her or his opinion given thoughtful consideration.<sup>62</sup> While the Supreme Court has never held that children have a constitutional right to choose or even have their opinions heard in adoption proceedings, it has recognized the constitutional rights of children in other contexts.<sup>63</sup> In light of the fact that no decision is likely to have a greater impact on a child's life

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<sup>58</sup> States would retain the power to reject the adoption petition of the prospective adoptive parents selected by the birth parents, but only if they fail to meet criteria applicable to all prospective adoptive parents. In other words, the petition may not be rejected simply because the court (or the state) believes other persons would be a better choice.

<sup>59</sup> Even after formal termination, decisions made by the parent before those rights were terminated (at least with respect to the choice of adoptive parent) should be viewed in the context of a parent's constitutional rights.

<sup>60</sup> See *In re Adoption of B.G.J.*, 281 Kan. 552, 557-58 (2006) (birth mother "knew the background and parenting skills of her extended family and she was adamant not to allow them to have placement of the Child" even though mother's tribe advocated for placement with those family members).

<sup>61</sup> See *In re Sidney J.*, 313 S.W.3d 772 (Tenn. 2010) (man who murdered his wife joined his parents in their petition to adopt his child instead of the maternal grandparents (parents of the murdered wife)).

<sup>62</sup> See *Troxel*, 530 U.S. at 88-89 (Justice Stevens, dissenting) (noting that the Court has recognized the constitutional rights of children in various contexts even though it has not yet elucidated the precise nature of a child's liberty interest in maintaining "family or family-like bonds").

<sup>63</sup> *Id.* at 89 note 8.

than the selection of the person or persons who will raise, guide, and nurture the child, courts should recognize the child's liberty interest in participating in the selection process. However, their limited perspective and experience counsels against giving them veto power or according them deference equal to that of their parents.<sup>64</sup> Balancing the constitutional rights of the parent and the rights of the child can be accomplished without disregarding the parent's choice or subordinating it to the choice or judgment of the state.

### III. Current State Adoption Laws and Parents' Right to Choose Adoptive Parents

State adoption laws vary widely and are often vague and confusing. Some only indirectly respect the birth parents' choice of adoptive parents. As such, they do not sufficiently protect parents' constitutional rights. If courts consistently and expressly recognized parents' constitutional rights despite a lack of clear statutory directives, additional legislation would be unnecessary. However, given the dearth of cases addressing these issues it is impossible to have confidence that the all courts are consistently and adequately protecting parents' rights. In fact, many cases make it clear that courts do not adequately protect parents' right to choose adoptive parents for their children. The laws of Tennessee and California are discussed below to provide contrasting examples that show the degree to which state statutes and regulations can directly and indirectly affect a birth parent's constitutional rights in the adoption context.

#### A. Tennessee Adoption Law

The law of Tennessee demonstrates how parents' rights might not be fully protected. Title 36 of the Tennessee Code outlines the procedures for adopting a child. The statutory scheme allows biological parents to choose adoptive parents by surrendering the child directly to the prospective adoptive parents, thereby giving the prospective adoptive parents standing to petition to adopt the child.<sup>65</sup> However, it is less clear whether, and under what circumstances, the court can disregard the wishes of the biological parents and allow other parties to petition to adopt the child.

Under Tennessee law, a biological parent may voluntarily surrender a child directly to prospective adoptive parents, to the Department of Children and Family Services (DCS), or to a licensed adoption agency.<sup>66</sup> Prior to the surrender, the prospective adoptive parents must request a

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This Court has on numerous occasions acknowledged that children are in many circumstances possessed of constitutionally protected rights and liberties. See *Parham v. J. R.*, 442 U.S. 584, 600, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (liberty interest in avoiding involuntary confinement); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights"); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506-507, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (First Amendment right to political speech); *In re Gault*, 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (due process rights in criminal proceedings).

*Troxel*, 530 U.S. at 89.

<sup>64</sup> "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Parham v. J. R.*, 442 U.S. 584, 603 (1979).

<sup>65</sup> TENN. CODE ANN. § 36-1-111

<sup>66</sup> *Id.* § 36-1-111(c).

home study from the agency, a clinical social worker, or DCS.<sup>67</sup> The home study assesses the physical, emotional, and financial health of prospective adoptive families as well as adequacy of facilities, space, and safety of the residence.<sup>68</sup> A court report must be prepared based on the home study and that report must be reviewed by the court before the court may enter an order giving the prospective adoptive parents guardianship of the child.<sup>69</sup>

The surrender must take place “in chambers before a judge of the chancery, circuit, or juvenile court . . . and the court shall advise the person or persons surrendering the child of the right of revocation of the surrender and time for the revocation and the procedure for such revocation.”<sup>70</sup> The surrender will not be valid unless the person or persons to whom the child is surrendered have physical custody or the right to physical custody of the child at or within five days after the surrender.<sup>71</sup> The persons to whom the child is surrendered must file a copy of the surrender with the court within fifteen (15) days after the surrender, and the court “shall enter such other orders for the guardianship and supervision of the child. . . .”<sup>72</sup>

The statute further outlines the parties who have standing to petition to adopt a child.<sup>73</sup> While the statute allows “[a]ny person over eighteen (18) years of age” to file a petition, “[t]he petitioners must have physical custody or must demonstrate to the court that they have the right to receive custody of the child sought to be adopted . . . unless they are filing an intervening petition seeking to adopt the child.”<sup>74</sup> Thus, under the statute, a party cannot petition to adopt a child if they do not have custody or the right to custody. This effectively limits the class of persons who can file an adoption petition. However, the mention of intervening petitions has caused confusion regarding standing in adoption proceedings.

In *In re Adoption of M.J.S.*, the Court of Appeals of Tennessee was asked to decide whether an intervening petition for adoption could be filed by a party who did not have physical custody or the right to receive custody of a child who had been validly surrendered by the biological mother to a prospective adoptive mother.<sup>75</sup> Langston, the prospective adoptive mother chosen by the biological mother, filed a petition to adopt M.J.S. and the child’s maternal grandparents filed their own adoption petition.<sup>76</sup> After the two cases were consolidated, Langston filed a motion to dismiss the grandparents’ petition.<sup>77</sup> That motion was denied but the trial court later granted Langston’s

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<sup>67</sup> “‘Home study’ means the product of a preparation process in which individuals or families are assessed by themselves and the department or licensed child-placing agency, or a licensed clinical social worker as to their suitability for adoption and their desires with regard to the child they wish to adopt. The home study shall conform to the requirements set forth in the rules of the department and it becomes a written document that is used in the decision to approve or deny a particular home for adoptive placement. The home study may be the basis on which the court report recommends approval or denial to the court of the family as adoptive parents.” TENN. CODE ANN. § 36-1-102 (26).

<sup>68</sup> Tennessee Department of Children's Services home study process in DEPARTMENT OF CHILDREN'S SERVICES ADMINISTRATIVE POLICY, Chapter 16.3 Desired Characteristics of Resource Parents, Chapter 16.4 Resource Home Approval, available at [www.tn.gov/youth/dcsguide/policies/hap16.htm](http://www.tn.gov/youth/dcsguide/policies/hap16.htm).

<sup>69</sup> *Id.* § 36-1-111(a)(2). There are separate provisions to govern situations in which the surrendering party resides in a different state, foreign country, or is incarcerated in a state or federal penitentiary. *Id.* § 36-1-111(h)-(j).

<sup>70</sup> *Id.* § 36-1-111(b).

<sup>71</sup> *Id.* § 36-1-111(d).

<sup>72</sup> *Id.* at § 36-1-111(q). Failure to obtain an order of guardianship must be entered within thirty (30) days after the date of the surrender is grounds for removal of the child from the prospective adoptive parents. *Id.* § 36-1-111(u)(1).

<sup>73</sup> *Id.* § 36-1-115.

<sup>74</sup> *Id.* § 36-1-115(a).

<sup>75</sup> 44 S.W.3d 41 (Tenn. Ct. App. 2000).

<sup>76</sup> *Id.* at 46.

<sup>77</sup> *Id.* at 47.

motion for summary judgment seeking dismissal of the petition, holding that the grandparents lacked standing to file an “independent adoption petition.”<sup>78</sup>

The grandparents then filed a petition to intervene in Langston’s adoption proceeding and Langston filed a motion to dismiss the intervening petition.<sup>79</sup> The trial court ruled that the grandparents lacked standing to petition for adoption, but instead of dismissing the intervening petition, allowed the grandparents to participate in the proceedings for the limited purpose of presenting evidence regarding the best interests of M.J.S. and Langston’s fitness as a parent.<sup>80</sup> Langston’s petition for adoption was ultimately granted and the grandparents appealed.<sup>81</sup>

The Court of Appeals first acknowledged that the statutory scheme gave biological parents a qualified right to choose adoptive parents for their child.

Although a biological parent has the right to make the initial choice of his or her child’s adoptive parent, the biological parent’s right to choose the child’s adoptive parent is not absolute. . . . [T]he biological parent’s choice of an adoptive parent is always subject to the trial court’s determination that the proposed adoption is in the child’s best interests.<sup>82</sup>

The court went on to consider whether the Tennessee statutes governing adoptions allowed an intervening petition when the biological parent has surrendered the child to a prospective adoptive parent.

While the adoption statutes require physical custody or the right to receive physical custody before a petition to adopt can be *granted*, the court held that the statutes allowed any party to *file* an *intervening* petition for adoption.<sup>83</sup>

Although persons who file an intervening petition seeking to adopt a child need not have physical custody or the right to receive custody of the child at the time they file their petition, other provisions of the adoption statutes indicate that, in order to prevail on their petition to adopt the child, the intervening petitioners must meet the statutes’ custody requirement at some point in the adoption proceedings.<sup>84</sup>

Applying this analysis to the case, the court held that the grandparents had standing to file an intervening petition,<sup>85</sup> but did not meet the statutory requirements for adoption.<sup>86</sup> Thus, their petition could not be granted. While this interpretation might seem to make the right to intervene meaningless, the court noted that if trial court had found by clear and convincing evidence that it was in the child’s best interests, the court could have removed M.J.S. from Langston’s custody and placed the child in the custody of any person, including the grandparents.<sup>87</sup> At that point, the grandparents would meet the statutory requirements for adoption and their petition could have been granted.<sup>88</sup>

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 48.

<sup>80</sup> *Id.* at 48. The statutes specifically allowed any person to file a sworn complaint in an adoption proceeding for the purpose of presenting evidence regarding the best interests of the child. *Id.* at 50 (citing TENN. CODE ANN. § 36-1-111(u)(2)).

<sup>81</sup> *Id.* at 48.

<sup>82</sup> *Id.* at 50.

<sup>83</sup> *Id.* at 51 (citing TENN. CODE ANN. § 36-1-115(b)).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 52.

<sup>86</sup> *Id.* at 53.

<sup>87</sup> *Id.* at 55 (citing TENN. CODE ANN. § 36-1-111(v)(4)).

<sup>88</sup> *Id.*

The right to intervene was addressed later by the Tennessee Supreme Court in *In re Sidney J.*<sup>89</sup> In that case, the child's father murdered her mother.<sup>90</sup> The child's maternal grandparents immediately began caring for her and soon after petitioned for and were awarded temporary legal custody.<sup>91</sup> Almost two years later the maternal grandparents filed a petition to adopt Sidney.<sup>92</sup> The paternal grandparents filed an intervening adoption petition.<sup>93</sup> The trial court granted the petition to intervene and, after a comparative analysis to determine which placement would be in Sidney's best interests, granted the paternal grandparents' adoption petition.<sup>94</sup> On appeal, the Court of Appeals held that trial court erred in granting the petition to adopt since the statute only allowed parties with physical custody of the child to successfully petition for adoption and the paternal grandparents never had physical custody or the right to physical custody of Sidney.<sup>95</sup>

The Supreme Court reversed the Court of Appeals' decision, noting that the language referencing intervening petitions would be meaningless if no party were allowed to file an intervening petition.<sup>96</sup> Recognizing its duty to avoid statutory construction that renders any part inoperative,<sup>97</sup> the court concluded "that the trial court properly granted Sidney's paternal grandparents' adoption petition even though Sidney was in the physical custody of her maternal grandparents, the original petitioners, at the time the paternal grandparents filed their intervening adoption petition."<sup>98</sup> The holding in *Sidney J.* can be read consistently with at least part of the Court of Appeals' decision in *M.J.S.* Both opinions held that § 36-1-115(b) allows intervening petitions by parties who do not have physical custody of the child sought to be adopted.<sup>99</sup> However, *Sidney J.* seems to have overruled the court in *M.J.S.* to the extent that it would require physical custody or the right to physical custody before granting an intervening petition to adopt.

In subsequent cases, the Court of Appeals has held that the right to a comparative fitness analysis found in *Sidney J.* does not exist in cases in which a guardianship had been granted to one or more parties.<sup>100</sup> Under Tennessee law, a guardian must consent to the child's adoption.<sup>101</sup> Consequently, if the guardian does not consent to adoption by the intervening party, their petition to adopt cannot be granted and the intervening petition can properly be dismissed.<sup>102</sup> While the maternal grandparents in *Sidney J.* had been awarded temporary custody of the child, no party (including the original petitioners) had guardianship status.<sup>103</sup> Thus, the Tennessee Supreme Court did not address whether an intervening party's petition to adopt could be granted over the objection of a guardian without first terminating the guardianship.

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<sup>89</sup> 313 S.W.3d 772, 773 (2010).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 774.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 775.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 776.

<sup>99</sup> See *Sidney J.*, 313 S.W.3d at 776; *In re M.J.S.*, 44 S.W.3d at 52.

<sup>100</sup> See *In re Don Juan J.H.*, 2011 WL 8201843 (Sept. 7, 2011) (holding that when guardianship has been granted to DCS or any party, the guardianship must be terminated before any other party can adopt the child); *In re Haily A.S.*, 2012 WL 3090311 (same).

<sup>101</sup> TENN. CODE ANN. § 36-1-113.

<sup>102</sup> *Don Juan J.H.*, at \*3; *Haily A.S.*, at \*2. The Tennessee Supreme Court has not ruled on the propriety of this interpretation.

<sup>103</sup> See *Sidney J.*, 313 S.W.3d at 773; *Don Juan J.H.*, 2011 WL 8201843 at \*3.

This distinction between cases with and without guardianships was applied by the Tennessee Court of Appeals in *In re Don Juan J.H.*<sup>104</sup> The Thurmans were Don Juan J.H.'s foster parents and the child had been in their custody for more than seven months when they filed a petition to adopt him.<sup>105</sup> At that time, DCS had been granted partial guardianship of Don Juan and noted its approval of adoption by the Thurmans.<sup>106</sup> The court granted the Thurmans' motion for partial guardianship soon after.<sup>107</sup> The Riddles, who were Don Juan's former foster parents (and who had adopted one of Don Juan's siblings) filed a motion to intervene in the adoption proceedings, alleging that it was in Don Juan's best interests to be adopted by the Riddles.<sup>108</sup>

DCS filed a motion to intervene in their capacity as partial guardians and stated that it believed Don Juan should be adopted by the Thurmans.<sup>109</sup> DCS further argued that unless the guardianships of DCS and the Thurmans were terminated or DCS and the Thurmans consented to adoption by the Riddles, the Riddles had no right to have their petition for adoption granted.<sup>110</sup> The trial court heard evidence presented by the Riddles, Thurmans, and DCS and ruled that the Riddles' intervening petition "did not rise to the level of proof necessary to prevent adoption by the Thurmans, and dismissed the intervening petition." The Riddles appealed, relying on *In re Sidney J.* and alleging that the trial court erred by not conducting a comparative fitness analysis between them and the Thurmans before ruling on the competing adoption petitions.

The Court of Appeals distinguished *Sidney J.* on the grounds that "there was no indication in *Sidney* that there had been any order of guardianship entered, so both sets of grandparents were equally situated."<sup>111</sup> To the contrary, guardianship orders had been granted in favor of both DCS and the Thurmans.<sup>112</sup> Consequently, Tennessee adoption law granted them the right to consent to adoptions and no other party's adoption petition could be granted unless those guardianships were terminated or the guardians consented.<sup>113</sup> Since neither the Thurmans nor DCS consented to adoption by the Riddles, and because their petition did not present evidence sufficient to terminate the guardianships, the Riddles petition was properly dismissed.<sup>114</sup>

### Right of Biological Parents to Choose Adoptive Parents in Tennessee

Tennessee courts have long held that parents have a fundamental right to the care and custody of their children that is protected by the Tennessee Constitution and the United States Constitution.<sup>115</sup> Consequently, there is a presumption that "parental rights are superior to the rights

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<sup>104</sup> *Don Juan J.H.* at 2-3.

<sup>105</sup> *Id.* at \*1.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1-2.

<sup>110</sup> *Id.* at 2.

<sup>111</sup> *Id.* at 3.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> "Parents, including parents of children born out of wedlock, have a fundamental liberty interest in the care and custody of their children under both the United States and Tennessee Constitutions." *Nale v. Robertson*, 871 S.W.2d 674, 678 (Tenn. 1994); *see Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002) (recognizing parents' fundamental rights and citing TENN. CONST. ART. I, § 8: "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.").



of others and continue without interruption unless a biological parent consents to relinquish them, abandons his or her child, or forfeits his or her parental rights by some conduct that substantially harms the child.”<sup>116</sup> This recognition of “superior parental rights” has been applied in cases involving initial custody disputes between a parent and non-parent.<sup>117</sup>

### Procedural pitfalls

While Tennessee’s statutory scheme generally supports the biological parent’s right to choose adoptive parents, a parent must be careful to follow the procedures set out in the statute to ensure that the chosen prospective adoptive parents have the best chance of having their petition to adopt granted. A biological parent who is not aware of the importance of surrendering the child directly to the prospective adoptive parent may leave the child in the custody of a family member or other person, with the intent of choosing another person or persons as adoptive parents. However, without physical custody or the right to physical custody, the prospective adoptive parents will not have standing to file a petition for adoption.<sup>118</sup> They may file an intervening petition if another party files a petition to adopt,<sup>119</sup> but even then they will be subject to a comparative fitness analysis with no statutory requirement that the court afford them special weight as the biological parent’s choice.<sup>120</sup> Moreover, if another party is granted guardianship, that party must consent to the adoption and can choose to withhold that consent from the prospective adoptive parents chosen by the biological parents.

Tennessee’s procedure fails to give adequate weight to the biological parent’s choice and thereby violates their constitutional rights. As the plurality held in *Troxel*, when a fit parent’s decision regarding the rearing of her child is at issue, “the court must accord at least some special weight to the parent’s own determination.”<sup>121</sup> A parent who is voluntarily surrendering her child for adoption—and who has not been found negligent or abusive or otherwise unfit—is presumably a fit parent whose opinion is entitled to deference and her choice of adoptive parent should not be on equal footing with any other petitioner who seeks to adopt the child. Consequently, Tennessee adoption statutes should be amended to require deference to the biological parents’ choice of adoptive parents, notwithstanding statutory requirements of physical custody and the need for consent by the guardian.

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<sup>116</sup> *Blair*, 77 S.W.3d at 141.

<sup>117</sup> *Id.* However, this presumption does not generally apply when a parent seeks to modify a valid custody order in favor of a non-parent.

[W]ith respect to custody modification issues, a natural parent enjoys the presumption of superior rights under four circumstances: (1) when no order exists that transfers custody from the natural parent; (2) when the order transferring custody from the natural parent is accomplished by fraud or without notice to the parent; (3) when the order transferring custody from the natural parent is invalid on its face; and (4) when the natural parent cedes only temporary and informal custody to the non-parents. Consequently, when any of these circumstances are present in a given case, then protection of the right of natural parents to have the care and custody of their children demands that they be accorded a presumption of superior parental rights against claims of custody by non-parents.

*Id.* at 143.

<sup>118</sup> TENN. CODE ANN. § 36-1-115(a) (requiring custody or right to physical custody to have standing to file petition for adoption)

<sup>119</sup> See *In re Sidney J.*, 313 S.W.3d at 776.

<sup>120</sup> See *id.* (noting that the statutes do not provide guidance regarding a comparative fitness analysis).

<sup>121</sup> *Troxel*, 530 U.S. at 70.

### Right to revoke surrender

Tennessee law does provide some protection for parents who surrender their children and consent to adoption. The statutes allow for revocation of the surrender or parental consent and reinstatement of parental rights (with the consent of the parent) if consent is revoked within ten days of the surrender and at any time before the court enters an order confirming parental consent to adoption.<sup>122</sup> At that point, the parent's rights will be restored to the status prior to the surrender or consent.<sup>123</sup> After the time for revocation has passed, the parent's rights are extremely limited and the court will only allow the surrender to be revoked upon proof of fraud, duress, intentional misrepresentation, or proof that the surrender was invalid.<sup>124</sup> Moreover, no surrender or parental consent can be set aside on these grounds unless an action to revoke is initiated within thirty days of the surrender or order confirming parental consent to the adoption.<sup>125</sup>

If the parent does not revoke the surrender or consent to adoption but the court ultimately decides not to approve the adoptive couple chosen by the biological parent, the biological parent does not have an absolute right to reinstatement of parental rights or to custody of the child.<sup>126</sup>

If at any time between the surrender of a child directly to prospective adoptive parents and the filing of an adoption petition or at any time between the filing of an adoption petition and the issuance of the final order of the adoption, it is made known to the court on the basis of clear and convincing evidence that circumstances are such that the child should not be adopted, the court may dismiss the adoption proceedings or, if no adoption proceedings have been commenced, the court may order the surrender or parental consent to prospective adoptive parents to be revoked and may modify or dismiss any order of guardianship previously entered, and may order the reinstatement of parental rights, all in consideration of the best interests of the child.<sup>127</sup>

But while the statute allows for reinstatement of parental rights, it does not *require* reinstatement.<sup>128</sup> Instead, the court may choose to place the child in the custody of DCS or a licensed child-placing agency if it is deemed to be in the best interests of the child.<sup>129</sup>

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<sup>122</sup> TENN. CODE ANN. § 36-1-118(a), (d)(2). A person who executes a surrender may revoke the surrender within ten calendar days of the date of the surrender. *Id.* at §§ 36-1-112(a). A parental consent may be revoked at any time prior to the entry of an order of confirmation of the parental consent by the court. *Id.* § 36-1-112(a)(2)(A)

<sup>123</sup> “A surrender or parental consent that is revoked shall have the effect of returning the child's legal status to that which existed before the surrender was executed, and the department, a licensed child-placing agency, or the person who or that had custody or guardianship of the child prior to the surrender pursuant to any parental status, prior court order or statutory authorization shall continue or resume custody or guardianship under that prior parental status, prior court order, or statutory authority, that had established the custodial or guardianship status of the child prior to the execution of the surrender or parental consent, unless a court of competent jurisdiction shall otherwise determine as specifically provided herein.” *Id.* § 36-1-112(e)(1).

<sup>124</sup> *Id.* § 36-1-112(d).

<sup>125</sup> *Id.*

<sup>126</sup> *See id.* § 36-1-118(a); see also § 36-116(k) (allowing the court to make orders “for the welfare and protection of the child,” including removal of the child from the custody of the prospective adoptive parents).

<sup>127</sup> *Id.* § 36-1-118(a).

<sup>128</sup> *Id.* § 36-1-118(a)-(d).

<sup>129</sup> *Id.* § 36-1-118(e). Alternatively, the child may remain a ward of the court. *Id.*

If DCS or the child-placing agency is awarded guardianship, then it will have authority to place the child for adoption and to consent to adoption of the child.<sup>130</sup> Thus, the parent has no opportunity to choose alternative adoptive parents. Moreover, it is unclear what circumstances would justify a decision not to reinstate parental rights. Since the standard is simply “the best interests of the child” the court seems to have broad discretion in making this decision. Terminating the parental rights of a fit parent then refusing to reinstate those rights when the child is removed from the custody of the chosen adoptive parents and refusing to allow the biological parents to choose alternative parents is an unjust deprivation of their constitutional right as parents to determine the custody, care, and upbringing of the child. At a minimum, the law should be amended to require reinstatement of parental rights unless it is shown by clear and convincing evidence that doing so would result in harm to the child.<sup>131</sup> This heightened standard of proof is appropriate in cases in which the parent voluntarily surrendered the child and there has been no finding of abuse or neglect before or after the surrender. Moreover, absent some compelling reason, biological parents should be allowed to choose alternate prospective adoptive parents if the petition of their original choice is denied.

## B. California Adoption Law

In California, a biological parent may choose an “agency adoption” or an “independent adoption.”<sup>132</sup> “Agency adoption” is defined as “the adoption of a minor, other than an intercountry adoption, in which the department, county adoption agency, or licensed adoption agency is a party to, or joins in, the adoption petition.”<sup>133</sup> “Independent adoption” is “the adoption of a child in which neither the department, county adoption agency, nor agency licensed by the department is a party to, or joins in, the adoption petition.”<sup>134</sup> California provides more options for parents seeking to place their children for adoption and clearer guidelines and protections for parents who wish to choose the adoptive parents for their children.

### Agency Adoptions

The adoption agency serves as an agent of the state in agency adoptions.<sup>135</sup> One or both biological parents relinquishes the child to a department, county agency, or licensed adoption agency by signing a written statement “before two subscribing witnesses and acknowledged before an authorized official [of the state department of social services].”<sup>136</sup> Before accepting the

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<sup>130</sup> *Id.* § 36-1-118(6). But if the court grants legal custody without awarding guardianship, then the custodian does not have authority to place the child for adoption or consent to an adoption.

<sup>131</sup> *See Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that procedural due process requires states to apply a standard of proof equal to or greater than clear and convincing evidence before terminating parental rights).

<sup>132</sup> CAL. FAM. CODE CHAPTER 2 (Agency Adoptions), Chapter 3 (Independent Adoptions).

<sup>133</sup> CAL. FAM. CODE § 8506. A “licensed adoption agency” is “an agency licensed by the department to provide adoption services.” *Id.* § 8530. “Department,” as used in the California Family Code, means the State Department of Social Services. *Id.* § 8518.

<sup>134</sup> *Id.* § 8524.

<sup>135</sup> *Tyler v. Children’s Home Society*, 29 Cal. App. 4<sup>th</sup> 511, 545 (1994) (finding that licensed adoption agencies are fairly characterized as agents of the state).

<sup>136</sup> CAL. FAM. CODE § 8700. “Either birth parent may relinquish a child to the department, county adoption agency, or licensed adoption agency for adoption by a written statement signed before two subscribing witnesses and acknowledged before an authorized official of the department, county adoption agency, or licensed adoption agency.” *Id.* at § 8700(a).

relinquishment, the agency must advise the parents of their rights and the alternatives to relinquishment, and must provide counseling to assist the parent in understanding their feelings about relinquishment and adoption (including long term consequences) and to ensure that the parent makes the decision to relinquish freely.<sup>137</sup> “After accepting a relinquishment, the agency shall provide additional counseling and referral services to the relinquishing parent as needed.”<sup>138</sup>

The relinquishment does not become effective until a certified copy of the relinquishment statement is sent to and filed with the department.<sup>139</sup> Before it becomes effective, it may be withdrawn at the request of the birth parent.<sup>140</sup> The relinquishment becomes final 10 business days after receipt by the department or when the department sends written acknowledgment of receipt, whichever is earlier.<sup>141</sup> After it becomes final, the relinquishment may only be rescinded by “the mutual consent of the department, county adoption agency, or licensed adoption agency to which the child was relinquished and the birth parent or parents relinquishing the child.”<sup>142</sup> If the agency consents to the rescission, the child must be returned to the birth parent within seven working days.<sup>143</sup>

The relinquishment terminates the birth parents’ rights and gives the agency full custody and control of the child until the adoption is finalized.<sup>144</sup> However, the relinquishing parents may name the “person or persons with whom he or she intends that placement of the child for adoption be made.”<sup>145</sup> If the child is not placed with the persons named by the relinquishing parents, or if the child is removed from the home of the named persons before the adoption is granted, then the birth parents have the right to rescind the relinquishment.<sup>146</sup> This right to rescind exists even if the relinquishment previously became final.<sup>147</sup>

Once the birth parents have been given notice that the child was removed from the prospective adoptive parents, the birth parent has thirty days to rescind the relinquishment.<sup>148</sup> The agency must return the child to the parent within seven working days after the request to rescind was made.<sup>149</sup> Alternatively, the relinquishing parent and the department or adoption agency can

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<sup>137</sup> CAL. CODE REGS. TIT. 22, § 35129(a) (2014)

<sup>138</sup> *Id.* § 35129(c).

<sup>139</sup> CAL. FAM. CODE § 8700(e)(1).

<sup>140</sup> *Id.* at § 8700(e)(1).

<sup>141</sup> *Id.* The relinquishment will be final before 10 business days if the department sends written acknowledgment of receipt or if the birth parent signs a waiver of the right to revoke the relinquishment. *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> CAL. CODE REGS. TIT. 22, § 35170

<sup>144</sup> CAL. FAM. CODE § 8700(j), 8704.

<sup>145</sup> *Id.* § 8700(f).

<sup>146</sup> *Id.* § 8700(g).

<sup>147</sup> *Id.* “Notwithstanding subdivision (e), if the relinquishment names the person or persons with whom placement by the department, county adoption agency, or licensed adoption agency is intended and the child is not placed in the home of the named person or persons or the child is removed from the home prior to the granting of the adoption, the department, county adoption agency, or licensed adoption agency shall mail a notice by certified mail, return receipt requested, to the birth parent signing the relinquishment within 72 hours of the decision not to place the child for adoption or the decision to remove the child from the home.” *Id.* § 8700(g).

<sup>148</sup> *Id.* § 8700(h). If the birth parent chooses to rescind, the department or adoption agency must rescind the relinquishment. *Id.* at § 8700(h)(1).

<sup>149</sup> “[T]he agency shall rescind the relinquishment of any parent who, having been notified as provided in Family Code Section 8700(f), delivers, or has delivered by mail or other method, before the end of the 30-day period beginning on the day after the notice was mailed a written request to the agency stating that he or she wishes to rescind his or her relinquishment and/or have the child returned. . . . In all such cases, the agency shall . . . [m]utually agree with the parent regarding the time and place for return of the child if the child is neither detained nor a juvenile court dependent

identify new prospective adoptive parents.<sup>150</sup> In that scenario, the initial relinquishment will be rescinded and a new relinquishment statement will be completed identifying the new prospective adoptive parent or parents.<sup>151</sup> If the parent does not rescind, the department or adoption agency will select new adoptive parents.<sup>152</sup>

The agency typically conducts a home study and places the child with the prospective adoptive parents for a “test period” before the agency will consent to the adoption.<sup>153</sup> If the agency determines that the prospective adoption parents should not be allowed to adopt the child, the agency can terminate the temporary placement and take physical custody of the child at the agency’s discretion.<sup>154</sup> At this point, the birth parents may exercise their right to rescind the relinquishment.<sup>155</sup> However, if the adoption petition has been filed, the child may only be removed from the custody of the prospective adoptive parents with court approval.<sup>156</sup> The agency can refuse to consent to the adoption, but the court has authority to grant the adoption petition over the agency’s objection if the court “finds that the refusal to consent is not in the child’s best interest.”<sup>157</sup>

If the court refuses to remove the child from the home of the prospective parents, the birth parents have no right to object to or prevent the adoption. However, the relinquishment can still be rescinded if the agency consents to the rescission.<sup>158</sup> In that circumstance, the birth parent is entitled to have the child returned to her or his physical custody.<sup>159</sup> At that point, the parent resumes all rights and responsibilities enjoyed before the relinquishment and “the agency adoption petition becomes a nullity because the adoption cannot proceed without the birth parent’s consent.”<sup>160</sup>

### Independent Adoptions

In an independent adoption, the birth parents place the child for adoption using an adoption service provider.<sup>161</sup> The birth parents (and not an agent) must personally select the prospective

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in out-of-home care. . . . The agency shall return the child no later than seven working days from the time the request to rescind is made.” CAL. CODE REGS. TIT. 22, § 35170.

<sup>150</sup> *Id.* §8700(h)(3).

<sup>151</sup> *Id.* § 8700(h)(3).

<sup>152</sup> *Id.* § 8700(h)(2).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* § 8700(g).

<sup>156</sup> *Id.* § 8704(b).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* § 8700(e)(2).

<sup>159</sup> CAL. CODE REGS. TIT. 22, § 35170; § 8700(e)(2); *see also* *In re Michael R.*, 137 Cal. App. 4<sup>th</sup> 126, 143 (2006).

<sup>160</sup> *In re Michael R.*, 137 Cal. App. 4<sup>th</sup> at 143; CAL. FAM. CODE §§ 8704-8706.

<sup>161</sup> CAL. FAM. CODE § 8801.3.

“Adoption service provider” means any of the following:

- (1) A licensed private adoption agency.
- (2) An individual who has presented satisfactory evidence to the department that he or she is a licensed clinical social worker who also has a minimum of five years of experience providing professional social work services while employed by a licensed California adoption agency or the department.
- (3) In a state other than California, or a country other than the United States, an adoption agency licensed or otherwise approved under the laws of that state or country, or an individual who is licensed or otherwise certified as a clinical social worker under the laws of that state or country.
- (4) An individual who has presented satisfactory evidence to the department that he or she is a licensed marriage and family therapist who has a minimum of five years of experience providing professional adoption

adoptive parents based on the birth parent's "personal knowledge of the prospective adoptive parent or parents."<sup>162</sup> Each birth parent, each prospective adoptive parent, and the adoption service provider sign an adoption placement agreement, which must include a statement that the birth parents have been advised of their rights (including notification of alternatives to adoption, alternative types of adoption, the right to counseling and to separate legal counsel at the expense of the prospective adoptive parents).<sup>163</sup> The placement agreement must also include a statement that the birth parents understand that they have the right to revoke the agreement within thirty days after signing it, and that the agreement becomes a permanent and irrevocable consent to adoption on the thirty-first day after signing the agreement.<sup>164</sup>

The thirty day window for revoking an adoption placement agreement in an independent adoption is longer than the time frame allowed under agency adoptions.<sup>165</sup> To effectively revoke the agreement, the birth parents must "[s]ign and deliver to the department or delegated county adoption agency a written statement revoking the consent and requesting the child to be returned to the birth parent or parents."<sup>166</sup> Within that thirty day window, "the birth parent or parents may request return of the child. In such a case the child shall immediately be returned to the parent or parents so requesting."<sup>167</sup> This right to regain physical custody of the child is unqualified. Even if the person or persons with whom the child had been placed believe that the birth parents are unfit or a danger to the child's health or safety, those concerns are not grounds for refusing to immediately return the child.<sup>168</sup> Instead, their "only option is to report their concerns to the investigating adoption agency and the appropriate child welfare agency."<sup>169</sup> This requirement provides strong protection for parents who voluntarily relinquish their children for adoption.

### Right of Biological Parents to Choose Adoptive Parent

California's statutory scheme gives significant but not unlimited power to birth parents in choosing adoptive parents. Both agency and independent adoptions give biological parents the right initially to choose the prospective adoptive parents and the right to revoke consent to the adoption, although the time frame for exercising the right to revoke differs. While agency adoptions give parents a shorter and less predictable time frame for revocation, they have the additional opportunity to rescind the relinquishment and regain custody if the child is not placed with or is removed from the home of the chosen adoptive parents. In an independent adoption,

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casework services while employed by a licensed California adoption agency or the department. The department shall review the qualifications of each individual to determine if he or she has performed professional adoption casework services for five years as required by this section while employed by a licensed California adoption agency or the department.

*Id.* § 8502(a)

<sup>162</sup> *Id.* § 8801(a). Agencies typically provide profiles of hopeful adoptive families which the birth parents can review.

<sup>163</sup> *Id.* §§ 8801.3(b), 8801.5. The birth parents must be advised of their rights at least ten days before the agreement is signed. *Id.* § 8801.3(b)(1)

<sup>164</sup> *Id.* §§ 8801.3(c), 8814.5(a). The birth parent(s) may file a waiver of the right to revoke under specified circumstances. *Id.* at § 8814.5(a)(2). The right to revoke consent is terminated thirty days after signing the agreement or after the waiver has been signed, whichever occurs first. § 8814.5(b).

<sup>165</sup> See discussion *infra* and § 8700(e).

<sup>166</sup> *Id.* § 8814.5(a)(1).

<sup>167</sup> *Id.* 8815(b).

<sup>168</sup> *Id.* § 8815(c).

<sup>169</sup> *Id.* "These concerns shall not be a basis for failure to immediately return the child." *Id.*

birth parents have a longer period within which to exercise the right to revoke the consent to adoption,<sup>170</sup> but if the time for revocation has passed the consent to adoption becomes irrevocable, even if the chosen adoptive parents later withdraw their petition to adopt or the petition to adopt is denied.<sup>171</sup> While the birth parents will be notified of any hearing on withdrawal of the petition to adopt or on the department or agency recommendation that the petition be denied,<sup>172</sup> they will not have the right to regain custody of the child or revoke consent to adoption.<sup>173</sup>

The California provisions have the benefit of clarity and simplicity and they protect the fundamental right of parents, even if that protection is limited. The limits in agency adoptions seem reasonable, in that they have the right to identify the adoptive parents and only the prospective adoptive parents identified by the birth parents have standing to file a petition for adoption.<sup>174</sup> In addition, birth parents have the right to revoke the relinquishment entirely or choose new adoptive parents if the adoption by the originally selected adoptive parents is not completed. However, the limited timeframe for revoking the relinquishment may be constitutionally objectionable.

On the other hand, independent adoptions provide parents with a longer period of time within which to change their minds and revoke the placement agreement (thirty days).<sup>175</sup> However, once the agreement becomes irrevocable, birth parents have no opportunity to regain custody if the chosen adoptive parents withdraw their petition to adopt or the court denies the petition.<sup>176</sup> Moreover, birth parents have no right to choose new adoptive parents, which could arguably violate their fundamental rights.

#### Constitutional rights recognized by California courts

California courts have expressly addressed the constitutional rights of parents, children, and prospective adoptive parents in the adoption process.<sup>177</sup> The courts have recognized that parents have a compelling interest in “the companionship, care, custody and management” of their children.<sup>178</sup> In addition, children have “a fundamental independent interest in belonging to a family unit” and “compelling rights to be protected from abuse and neglect and to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child.”<sup>179</sup> Finally, “it is well established that a prospective adoptive parent with whom a child has been placed for adoption has a liberty interest in continued custody.”<sup>180</sup> While the courts recognize the constitutional rights of birth parents, those rights are typically analyzed in the context of birth parents challenging efforts to terminate their parental rights involuntarily or seeking to overturn

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<sup>170</sup> *Tyler*, 29 Cal. App. 4th at 535.

<sup>171</sup> “The consent may not be revoked after a waiver of the right to revoke consent has been signed or after 30 days, beginning on the date the consent was signed or as provided in paragraph (1) of subdivision (a), whichever occurs first.” CAL. FAM. CODE § 8814.5(b).

<sup>172</sup> *Id.* §§ 8813, 8822.

<sup>173</sup> “Notwithstanding the withdrawal or dismissal of the petition, the court may retain jurisdiction over the child for the purposes of making any order for the child’s custody that the court deems to be in the child’s best interest.” *Id.* § 8804(b).

<sup>174</sup> *In re Michael R.*, 137 Cal. App. 4th at 136; CAL. FAM. CODE § 8704(b).

<sup>175</sup> CAL. FAM. CODE § 8814.5.

<sup>176</sup> *Id.*

<sup>177</sup> *See, e.g.*, *Adoption of Baby Boy D*, 93 Cal. App. 4th 1 (2001).

<sup>178</sup> *Id.* at 9-10 (quoting *In re Marilyn H.*, 5 Cal.4th 295, 306 (1993)).

<sup>179</sup> *In re Marilyn H.*, 5 Cal. 4th at 306.

<sup>180</sup> *Adoption of Baby Girl B.*, 74 Cal.App.4th 43, 51 (1999).

such orders. In those cases, the focus is on the constitutionality of the procedures involved in terminating the parents' rights and not on a substantive right to choose the adoptive parents.

The case of *Adoption of Baby Boy D.*, involved an agency adoption in which the birth mother, Delores, relinquished her child to Bethany Christian Services (Bethany), a licensed adoption agency.<sup>181</sup> Delores viewed profiles of prospective adoptive parents and chose the V's as her child's adoptive parents on February 6.<sup>182</sup> Delores gave birth to Baby Boy D on February 16. On February 18, Delores signed a "Health Facility Minor Release Report" allowing the V's to take the baby home with them. Baby Boy D went home with the V's that day.<sup>183</sup>

On February 19, in accordance with the California adoption statutes, a representative from Bethany reviewed the necessary paperwork with Delores before she signed the required relinquishment form.<sup>184</sup> In addition to the relinquishment form, Delores read and signed a statement of understanding (SOU) that was used by the department of social services (DSS) to advise birth parents of the effect of signing the relinquishment and of the birth parent's rights.<sup>185</sup> The first page of the SOU included a statement in bold typeface: "Before you Sign This Statement of Understanding and the Relinquishment Document, Read Both Very Carefully with Your Social Worker. Be Sure to Ask Questions About Anything You Do Not Understand."<sup>186</sup> It further informed birth parents:

Relinquishing a child means permanently giving the child to the adoption agency so that the agency can choose other parents to adopt the child. . . . You will no longer have any rights as a parent to your child once these documents have been filed with the California Department of Social Services, Adoption Branch.<sup>187</sup>

The SOU also required the birth parent to initial the boxes next to twenty separate advisements and statements, including statements regarding the birth parents' right to an attorney, counseling, notice of alternatives to adoption, and the right to have the adoption agency file the relinquishment form immediately or hold it for thirty days before filing.<sup>188</sup> Delores initialed nineteen of the advisements and statements, but inadvertently failed to initial the box next to the last statement, which read:

I have carefully thought about the reasons for keeping or giving up my child. I have discussed the adoption plan of my child with the adoption agency, and I have decided giving up my child to the agency for adoption is in the best interest of my child. I have read and understand the Statement of Understanding and the relinquishment document. I do not need any more help or time to make my decision. I have decided to relinquish my child permanently to Bethany . . . for adoption and I am signing this freely and willingly.<sup>189</sup>

Although she failed to initial the box, she signed the form less than an inch below that statement.<sup>190</sup> Delores also signed a "Free Will Declaration" which stated that she made the decision to place her

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<sup>181</sup> *Adoption of Baby Boy D.*, 93 Cal. App. 4<sup>th</sup> at 3-4.

<sup>182</sup> *Id.* at 4.

<sup>183</sup> *Id.* at 4.

<sup>184</sup> *Id.* at 4. The relinquishment form had to be sent to and filed with the department of social services in order for the relinquishment to be effective and irrevocable by Delores. *Id.* at 4-5; see Cal. Fam. Code § 8700(e).

<sup>185</sup> *Id.* at 5.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 5.

<sup>188</sup> *Id.* at 5-6.

<sup>189</sup> *Id.* at 6.

<sup>190</sup> *Id.*



child with Bethany of her own free will and based on “full and complete” knowledge of her options.<sup>191</sup>

Delores chose to have Bethany file the documents immediately, and—unaware of the empty box on the SOU—Bethany forwarded the documents to DSS on February 21.<sup>192</sup> DSS received the Relinquishment on or about February 22, but refused to formally acknowledge the relinquishment because of the missing initials in box 20 on the SOU.<sup>193</sup> Instead, it immediately sent a denial of acknowledgment to Bethany, requesting an affidavit from Delores regarding the missing initials. Bethany sent an affidavit from the representative who had worked with Delores, but did not immediately get an affidavit from Delores; that affidavit and a later affidavit from Bethany were rejected by DSS, which insisted upon an affidavit from Delores.<sup>194</sup> By this time, however, Delores had changed her mind about the adoption and on April 11 she went to Bethany’s office to request information on regaining custody of her child and presented a signed statement of revocation.<sup>195</sup>

The V’s filed an application to have the relinquishment declared valid and Delores filed a petition for writ of habeas corpus. In the course of the litigation, Delores testified in her deposition that she when she signed the SOU she “understood at that time that her rights to the child would be terminated when the Relinquishment was filed with DSS,” she “understood that relinquishing the child meant giving him up permanently for adoption,” and “she understood the meaning of each of the advisements in the boxes she did initial and affirmed it was her intent that day to give up her right of custody to the child.”<sup>196</sup> She further acknowledged that the Bethany representative had carefully discussed box 20 with her.<sup>197</sup> Moreover, “Delores testified that she understood the contents of box 20 and intended to initial box 20 at that time; Delores thought she had initialed box 20; it was merely an oversight she did not do so.”<sup>198</sup> After a lengthy evidentiary hearing, the trial court held that the relinquishment was defective and that DSS properly refused to acknowledge it and ordered the child to be returned to Delores on a gradual basis.<sup>199</sup> The V’s appealed.<sup>200</sup>

The court of appeal noted that whether the relinquishment was valid was an issue of statutory interpretation and involved consideration of the constitutional rights of the birth parent, prospective adoptive parents, and the child, and held that the trial court should have conducted an independent review of the facts to determine whether the relinquishment was valid.<sup>201</sup> With respect to Delores’ fundamental constitutional right to the care, custody, and management of her child, the court noted that this right may be waived if the waiver is made knowingly and intelligently.<sup>202</sup> “Given the rights at stake and the independent standard of review, we conclude that the court should have done more than review the action of DSS and determine whether the Relinquishment was complete; it should have determined whether the Relinquishment was valid (i.e., whether it was a knowing, intelligent waiver of parental rights).”<sup>203</sup> Moreover, the court concluded that the

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 5-6.

<sup>193</sup> *Id.* at 7.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 6.

<sup>197</sup> *Id.* at 6

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 9.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 10.

<sup>202</sup> *Id.* (quoting *In re Bridget R.* 41 Cal.App.4th 1483 (1996)); see also *Tyler*, 29 Cal. App. 4th at 546 (“constitutional rights may generally be waived, provided the waiver is knowing, voluntary, and intelligent”).

<sup>203</sup> *Id.* at 11.

Relinquishment could be valid even if DSS refused to acknowledge it because of an error or omission.<sup>204</sup>

In light of Delores' admission that she intended to initial box 20, that her relinquishment was knowing and voluntary that all of the statements in box 20 were true, the court of appeals concluded that the relinquishment—even though incomplete—complied with the objective of assuring voluntary and knowing decision making by birth parents.<sup>205</sup> “To hold the Relinquishment was not valid based on the failure to check one of 20 boxes would be an exaltation of form over substance; something courts should seek to avoid.”<sup>206</sup> Accordingly, the court of appeals held that the relinquishment should have been declared valid by the trial court.<sup>207</sup> The court ordered DSS to receive and acknowledge the relinquishment and to terminate Delores' parental rights.<sup>208</sup>

Similarly, in *Tyler v. Children's Home Society of California*,<sup>209</sup> the court of appeals addressed birth parents' constitutional right to procedural due process in adoption proceedings. The birth mother was an 18 year old college freshman who hid her pregnancy from her family, friends, and roommates and gave birth unattended in her dormitory bathroom while her roommates slept in the next room.<sup>210</sup> The birth father was a freshman at another college.<sup>211</sup> While he knew about the pregnancy, he did not tell his friends or family either.<sup>212</sup> The couple chose to place their daughter for adoption using a licensed adoption agency.<sup>213</sup> The agency representative who worked with the birth parents encouraged the couple to consider keeping the baby and raising her or, alternatively, informing their parents of the child's birth before executing the relinquishment forms.<sup>214</sup> Both parents were adamant that their parents never find out about the pregnancy or the existence of the baby.<sup>215</sup> They chose prospective adoptive parents, signed the relinquishment forms, and elected to have the forms filed immediately rather than held for thirty days.<sup>216</sup> The relinquishment forms were filed with DSS on May 7, 1991, thereby making it final and irrevocable by the birth parents absent the consent of the adoption agency or proof of fraud or undue influence.<sup>217</sup>

In the fall of 1991, having told their parents about the baby and with their parents' encouragement, the birth parents sought to rescind the relinquishment and regain custody of the baby.<sup>218</sup> The adoption agency refused to consent to the rescission, so the birth parents filed a contract action seeking to rescind the relinquishment agreement on the grounds of fraud, coercion, and undue influence.<sup>219</sup> In addition, they identified procedural errors by the adoption agency in the

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<sup>204</sup> *Id.* at 12.

<sup>205</sup> *Id.* at 13.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 13-14.

<sup>209</sup> 29 Cal. App. 4<sup>th</sup> 511 (1994).

<sup>210</sup> *Id.* at 522.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 524 note 5.

<sup>213</sup> *Id.* at 523.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 525.

<sup>217</sup> *Id.* at 525, 528.

<sup>218</sup> *Id.* at 525.

<sup>219</sup> *Id.* at 526.

relinquishment process and claimed that those errors rendered the relinquishments void.<sup>220</sup> After a three week trial the court found in favor of the adoption agency and upheld the relinquishments.<sup>221</sup>

Among the claims considered on appeal was the allegation that the agency's admitted failure to strictly adhere to the statutory and regulatory requirements regarding agency adoptions violated the birth parents' constitutional right to procedural due process.<sup>222</sup> Although the court agreed with birth parents that the adoption agency was a state actor for purposes of its due process analysis,<sup>223</sup> and further affirmed parents' "fundamental liberty interest in the care, custody, and control of their children,"<sup>224</sup> it noted that constitutional rights—including parental rights—can be waived.<sup>225</sup> "In particular, constitutional rights to a parent-child relationship may be waived as long as the waivers are 'voluntary and knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'"<sup>226</sup> The court concluded that the procedures afforded to the birth parents were adequate to ensure that their relinquishment of parental rights was knowing, intelligent, and intelligent; consequently, they were constitutionally sufficient even if they deviate from the statutory and regulatory provisions.<sup>227</sup>

While the courts in *Baby Boy D.* and *Tyler* expressly considered the constitutional rights of the birth parents, they did not address the right to choose the adoptive parents. Instead, as is true in most cases considering parents' constitutional rights, the issue was the validity of the form or procedures for terminating parents.<sup>228</sup> Some cases allowing rescission due fraud, undue influence, or duress do not even mention the birth parents' constitutional rights. Instead, the discussions focus on broader policy concerns,<sup>229</sup> and courts may even rely on contract doctrine to evaluate fraud or duress claims.<sup>230</sup>

In *Hall v. Department of Adoptions*, the birth mother sought to rescind her relinquishment because she alleged that she "was unaware of the consequences of her act of relinquishment because of emotional distress which resulted from abuse by *her husband*; and that she was induced to sign because of duress of *her husband*."<sup>231</sup> There was no allegation that the department of adoptions knew of or was in any way complicit in the husband's conduct.<sup>232</sup> The court held that the complaint failed to state a cause of action for fraud or duress.<sup>233</sup>

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<sup>220</sup> *Id.* at 527.

<sup>221</sup> *Id.* at 526.

<sup>222</sup> *Id.* at 544.

<sup>223</sup> *Id.* at 545.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 545-46.

<sup>226</sup> *Id.* at 546 (quoting *San Diego County Dept. of Pub. Welfare v. Superior Court*, 7 Cal. 3d. 1 (1972) (internal citations omitted)).

<sup>227</sup> *Id.* at 547.

<sup>228</sup> *See, e.g., Cynthia D. v. Superior Court*, 851 P.2d 1307, 1315 (Cal. 1993) (holding that statutory procedure for terminating parental rights "comports with the due process clause of the Fourteenth Amendment because the precise and demanding substantive and procedural requirements the petitioning agency must have satisfied before it can propose termination are carefully calculated to constrain judicial discretion, diminish the risk of erroneous findings of parental inadequacy and detriment to the child, and otherwise protect the legitimate interests of the parents.").

<sup>229</sup> *See, e.g., Hall v. Dept. of Adoptions*, 47 Cal. App. 3d 898, 902 (1975) ("The legislative purpose behind [provisions making relinquishments final and irrevocable after filing unless consented to by the department or adoption agency] is best served and the interests of the child are afforded the greatest recognition by giving continued effect to relinquishments and consents to adoption.").

<sup>230</sup> *See id.*

<sup>231</sup> *Id.* (emphasis in original).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 903.

Even under rules permitting rescission of ordinary contracts, respondent's original complaint was insufficient in stating any cause of action against appellant. Duress or fraud of a third party "renders a transaction voidable by a party induced thereby to enter into it if the other party . . . has reason to know of the fraud . . . [or duress] before he has given or promised in good faith something of value in the transaction or changed his position materially by reason of the transaction . . . ." <sup>234</sup>

The court noted that the case involved "a matter of significantly greater importance than, for example, the recovery of an amount of money under a contract," <sup>235</sup> but the birth mother's constitutional rights were never mentioned or considered.

Even in cases in which the parent's objection to prospective adoptive parents is at issue, the discussion typically focuses on the birth parents' statutory rights and not constitutional rights. For example, in *In re Michael R.*, Tammy, the birth mother, relinquished her son to Nightlight Christian Adoptions (NCA), a licensed adoption agency (an agency adoption) in November 2003. <sup>236</sup> On the relinquishment form, she named Sheryl and Roger M. as the prospective adoptive parents. <sup>237</sup> The M.'s filed a petition to adopt the child in January 2004. <sup>238</sup> In late August 2004, while the adoption petition was still pending, Sheryl M. filed for divorce. <sup>239</sup> The next month, NCA notified Tammy that the M.'s were getting a divorce. Because one of Tammy's desires was that her son be adopted by a two-parent family, she submitted a formal written request to rescind her relinquishment to NCS on September 30. Because the relinquishment was final, Tammy had no right to unilaterally rescind the relinquishment. <sup>240</sup> Sheryl M. filed a petition for temporary guardianship of the child on October 25, which the court granted over Tammy's objection. <sup>241</sup> On November 2 NCS consented to Tammy's rescission of the relinquishment, but was unable to obtain physical custody of the child because of the temporary guardianship. <sup>242</sup>

Sheryl M. petitioned to terminate Tammy's parental rights and amended her adoption petition to designate it as an independent adoption. Tammy moved to dismiss the petition alleging that Sheryl lacked standing to file an independent adoption petition. <sup>243</sup> The trial court held that Tammy had a right to her child after the relinquishment was rescinded and dismissed Sheryl M.'s petition to adopt for lack of standing. <sup>244</sup> On appeal, the court affirmed the trial court's holdings. <sup>245</sup> While the court of appeals discussed the statutory procedures for agency and independent adoptions in significant detail, at no point did the court mention Tammy's constitutional rights as a parent. Indeed, it was clear that Tammy's right to rescind her relinquishment was dependent upon a statute allowing rescission only with the consent of the adoption agency once the relinquishment has become final. <sup>246</sup> Thus, the court did not consider whether birth parents have a constitutional right to rescind relinquishments or revoke consent to an independent adoption if the prospective adoptive

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<sup>234</sup> *Id.* (quoting *Leeper v. Beltrami*, 53 Cal.2d 195, 206 ( ))

<sup>235</sup> *Id.* at 904.

<sup>236</sup> *In re Michael R.*, 137 Cal. App. 4<sup>th</sup> at 132.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *See* CAL. FAM. CODE § 8700(e).

<sup>241</sup> *Id.* at 132-33.

<sup>242</sup> *Id.* at 133.

<sup>243</sup> *Id.* at 134-35.

<sup>244</sup> *Id.* at 135. Sheryl did not come within the class of persons designated to have standing under the statute.

<sup>245</sup> *Id.* at 136-138.

<sup>246</sup> "A relinquishment that has been filed may be rescinded only with the mutual consent of the licensed adoption agency and the birth parent or parents relinquishing the child." *Id.* at 137 (citing CAL. FAM. CODE § 8700(e)).

parents omit facts about themselves that would make them unsuitable to the birth parents, or if the circumstances in the home of the prospective adoptive parents change after the child is placed in their home (through divorce, death of one prospective adoptive parent, or birth of a child).<sup>247</sup> While setting reasonable limits on a parent's right to revoke a relinquishment does not violate their constitutional rights, when the birth parent has been misled by the prospective adoptive parents, an exception to the general rule may be necessary. Applying precedent allowing rescission for fraud may be sufficient to protect parents' constitutional rights under those circumstances.

#### IV. The Indian Child Welfare Act

Federal law poses a potential challenge to parents' constitutional rights in the adoption context if the child meets the definition of an "Indian child" under the Indian Child Welfare Act of 1978 (ICWA).<sup>248</sup> The ICWA was enacted to strengthen Indian<sup>249</sup> families and provide additional protection for parents of Indian children in response to alarming numbers of Indian children being removed from Indian families and placed in non-Indian foster and adoptive homes.<sup>250</sup>

During Congressional hearings that led to enactment of the ICWA, experts testified that many state officials who made determinations about the fate of Indian children were ignorant about or contemptuous of Native American culture and customs.<sup>251</sup> The Congressional findings in the first section of the ICWA reflect concerns about these practices.

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds . . . that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children; . . . [and] that the States, exercising their recognized jurisdiction over Indian child custody proceedings . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.<sup>252</sup>

One prominent example was the custom of Indian children spending substantial time in the care of extended family members, sharing resources and childrearing responsibilities.<sup>253</sup> Non-Indian social workers viewed such arrangements as neglect by the biological parents and too often removed the children from their families and the tribe.<sup>254</sup> In fact, there was testimony that twenty-five to thirty-five percent of all Indian children were in foster care, adoptive homes, or institutions,<sup>255</sup> and that over ninety percent of Indian children who were adopted were placed with

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<sup>247</sup> See CAL. FAM. CODE § 8700, 8815(a).

<sup>248</sup> 25 U.S.C. § 1901 *et seq.* The Indian Child Welfare Act defines "Indian child" to mean "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C.A. § 1903(4). "'Indian child's tribe' means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts." *Id.* § 1903(5).

<sup>249</sup> The term "Indian" is used in this discussion to be consistent with the language in the ICWA and cases discussing its application and interpretation.

<sup>250</sup> See *id.* §§ 1901, 1902.

<sup>251</sup> Kelsey Vujnich, *A Brief Overview of the Indian Child Welfare Act, State Court Responses, and Actions Taken in the Past Decade to Improve Implementation Outcomes*, 26 J. AM. ACAD. MATRIM. LAW 183, 185-86 (2013)

<sup>252</sup> 25 U.S.C. § 1901(4).

<sup>253</sup> *Id.* at 186.

<sup>254</sup> *Id.*

<sup>255</sup> See Vujnich *supra* note 251 at 186 (citing 1978 U.S.C.C.A.N. at 7513).

non-Indian families.<sup>256</sup> The staggering number of children being removed from Indian families and the resulting decimation of tribes led to passage of the ICWA.<sup>257</sup>

The ICWA was intended to protect Indian families and provide greater protection to parents of Indian children in child custody proceedings, including voluntary parental right termination cases.<sup>258</sup> The protection is accomplished by giving tribal courts exclusive jurisdiction over child custody proceedings involving an Indian child who resides or is domiciled on the tribe's reservation<sup>259</sup> and—absent objection by a parent—requires state courts to transfer proceedings to the tribal court upon the petition of any parent, Indian custodian, or the Indian child's tribe.<sup>260</sup> In addition, an Indian child's custodian and the Indian child's tribe have the right to intervene at any time in any state court proceeding for foster care placement, or termination of the parental rights of an Indian child.<sup>261</sup> In addition to jurisdictional provisions, the ICWA establishes procedures that must be followed and grants substantive rights to parents in cases involving voluntary foster care placements and parental right termination and adoption proceedings.<sup>262</sup>

In some respects, the ICWA gives parents greater authority in adoption proceedings than they would have under state law. The clearest example is the parent's right to withdraw consent to adoption at any time prior to entry of a final adoption decree, at which point the child must be returned to the parent.<sup>263</sup> However, with respect to choosing adoptive parents the ICWA poses a significant obstacle. The statute establishes a preference that state and tribal courts must follow when placing Indian children for adoption.

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.<sup>264</sup>

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<sup>256</sup> Cheyanna L. Jaffke, *Judicial Indifference: Why Does the "Existing Indian Family" Exception to the Indian Child Welfare Act Continue to Endure?* 38 W. ST. U. L. REV. 127, 130 (2011).

<sup>257</sup> See Vujnich *supra* note 251 at 187 (noting that Congress passed ICWA in response to concerns that the "very existence of Indian tribes in America was at risk due to the alarmingly high number of children being placed with non-Indian families").

<sup>258</sup> "The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . ." 25 U.S.C. § 1902. See also § 1903 (giving the Indian child's tribe the right to intervene in any state court proceeding for the termination of parental rights).

<sup>259</sup> *Id.* § 1911(a). There is an exception for cases in which federal law grants jurisdiction to the state, but that exception does not apply if the Indian child is a ward of a tribal court. *Id.*

<sup>260</sup> *Id.* § 1911(b). The tribe can choose to decline the request to transfer. *Id.*

<sup>261</sup> *Id.* § 1911(c).

<sup>262</sup> *Id.* § 1913 (requiring consent to foster care placement or termination of parental rights to be in writing and recorded before a judge and no less than 10 days after the birth of the child; allowing parents or Indian custodians of Indian children to withdraw consent to foster placement at any time and requiring return of the child to the parent or Indian custodian; allowing any parent of an Indian child to withdraw consent to termination of parental rights or adoptive placement at any time before final adoption decree is entered).

<sup>263</sup> "In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent." 25 U.S.C.A. § 1913(c). Parents also have an absolute right to prevent the case from being transferred to tribal court. § 1911(b).

<sup>264</sup> 25 U.S.C.A. § 1915(a). It should be noted that the ICWA gives preference to the Indian child's "extended family," which, on its face, would include non-Indian family members. Thus, the law does not appear to require preferring Indian family members over non-Indian family members. § 1915(b)(i). See also § 1903(2) ("extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or

Tribes may establish a different order or preference, which state agencies and courts must follow.<sup>265</sup> Parents have no right to choose adoptive parents under the express language of the ICWA; indeed, it does not even require consideration of the parent's wishes in every case.<sup>266</sup>

Instead, the ICWA merely states that “[w]here appropriate, the preference of the Indian child or parent shall be considered.”<sup>267</sup> The statute gives no indication when it is “appropriate” to “consider” (but not necessarily give any weight to) the preferences of the parent. Consequently, the parent of an Indian child may be forced to choose between keeping the child and raising him or her even when the parent believes that adoption would be in the child's best interests, or allowing the child to be adopted by parents chosen in accordance with the ICWA's provisions, even when the parent believes that the placement is not in the child's best interests. Putting parents in this position violates their constitutional rights under the Due Process clause of the Fourteenth Amendment.<sup>268</sup>

Several states have held that parental preference for a non-Indian adoptive family is “good cause” to deviate from the ICWA placement preference hierarchy.<sup>269</sup> While the ICWA does not define or describe what factors should be considered when deciding whether “good cause” exists, the regulations published by the Bureau of Indian Affairs lists three factors: (1) the placement preference of the biological parents or the child; (2) any “extraordinary physical or emotional needs of the child;” and (3) unavailability of families for placement consistent with the ICWA's preference list.<sup>270</sup> Because these factors are part of the regulations and not the statute, courts have treated them as advisory and not mandatory.<sup>271</sup>

In *In re N.N.E.*, the Iowa Supreme Court considered the state ICWA statute as well as the federal version of the ICWA. The birth mother, Shannon, was a member of the Tyme Maidu Tribe of the Berry Creek Rancheria, a federally recognized Indian tribe located in California.<sup>272</sup> Shannon was living in Iowa when she became pregnant in 2005 and chose to give the child up for adoption.<sup>273</sup> The child was eligible for membership in Shannon's tribe and, therefore, was an Indian child within the meaning of the Iowa and federal versions of the ICWA.<sup>274</sup> Although both the Iowa and federal ICWA preference provisions required the Iowa court to attempt placement with extended family member, members of the child's tribe, another Indian family, or a non-Indian family approved by the child's tribe,<sup>275</sup> Shannon chose a non-Indian family to adopt her child and gave the child to them three days after the child was born.<sup>276</sup> The tribe intervened in the action to

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custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;”). However, the remaining parties on the list of preferences are all foster homes or institutions that are approved by the Indian tribe. Moreover, the tribe can change the preference order such that extended family members could be considered only in the absence of Indian families or members of the Indian tribe are unable or unwilling to adopt the child. § 1915(c).

<sup>265</sup> *Id.* § 1915(c).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> The ICWA has also been challenged on other constitutional grounds, including the Equal Protection grounds.

<sup>269</sup> *See, e.g., In re N.N.E.*, 752 N.W.2d 1, 8 (Iowa 2008); *In re Adoption of Keith M.W.*, 79 P.3d 623, 630-31 (Alaska 2003);

<sup>270</sup> *In re Adoption of B.G.J.*, 133 P.3d 1 (2006) (quoting 44 Fed. Reg. 67,584 (Nov. 1979)).

<sup>271</sup> *In re N.N.E.*, 752 N.W.2d at 7 (describing guidelines as “nonbinding”) *In re Adoption of Keith M.W.*, 79 P.3d at 626 (“the guidelines are only persuasive and are neither exclusive nor binding”).

<sup>272</sup> *In re N.N.E.*, 752 N.W.2d at 4.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 7.

<sup>275</sup> *Id.* at 9; 25 U.S.C.A. § 1911; IOWA CODE § 232B.9(1).

<sup>276</sup> *In re N.N.E.*, 752 N.W.2d at 4.

terminate her parental rights and gave notice of its intent to “exercise its right to preferred placement if Shannon relinquish[ed] her parental rights.”<sup>277</sup>

The trial court ultimately terminated Shannon’s parental rights and the tribe appealed the termination order as well as the order appointing a guardian for the child. The tribe alleged multiple violations of the Iowa and federal ICWA. The appellees (including the child’s appointed guardian, Shannon, and the child’s guardian ad litem) argued that the trial court complied with the state and federal statutes and, alternatively, that the Iowa ICWA was unconstitutional “to the extent that it allows a tribe to interfere with a private adoption.”

The Iowa Supreme Court held that the Iowa ICWA was unconstitutional because it did not allow courts to deviate from the statutory placement preferences when a parent objected or requested placement with a family that was not in the list of preferred adoptees.<sup>278</sup> Instead, parental requests could not be a basis for disregarding the statutory preferences unless the objecting party could prove by clear and convincing evidence that such a placement “would be harmful to the Indian child.”<sup>279</sup> The Iowa Supreme Court found:

Assuming survival of the tribe is a compelling state interest, the Iowa ICWA preferred placement provisions as they apply to voluntary termination of parental rights violate due process because they are not narrowly tailored. The statute makes the rights of a tribe paramount to the rights of an Indian parent or child where, as in this case, the parent who is the tribal member has no connection to the reservation and has not been deemed unfit to parent. Shannon’s fundamental right to make decisions concerning the care of her child is not lessened because she intended to terminate her rights to [her child]. . . . The State has no right to influence her decision [whether to place her child for adoption] by preventing her from choosing a family she feels is best suited to raise her child.<sup>280</sup>

Because the Iowa ICWA was unconstitutional, the court held that the federal ICWA placement preferences should be applied and remanded for that purpose.<sup>281</sup> The federal statute did not suffer from the same constitutional infirmity as the Iowa version because it allowed courts to deviate from the statutory placement preferences for “good cause” and the request of a parent to place the child with someone outside of the statutory preference order has been held to be good cause.<sup>282</sup>

The Supreme Court of Kansas upheld a trial court’s determination that good cause existed to place an Indian child with a non-Indian family in contravention of the ICWA placement preferences when the tribe failed to offer “suitable placements” for the child and the biological mother was adamant that members of her extended family not be allowed to raise her child.<sup>283</sup> “She knew and considered members of her extended Indian family for placement and consciously rejected them . . . .”<sup>284</sup> Likewise the Supreme Court of Alaska upheld trial court find of good cause

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<sup>277</sup> *Id.* at 5.

<sup>278</sup> *Id.* at 8.

<sup>279</sup> *Id.* (quoting IOWA CODE § 232B.9(6)).

<sup>280</sup> *Id.* at 9 (internal citation omitted). The court also noted the biological parent’s unqualified right under Iowa and federal ICWA to withdraw their consent to the termination of parental rights at any time before a final adoption decree is entered. *Id.* at 9.

<sup>281</sup> *Id.* at 9.

<sup>282</sup> *Id.* at 8-9 (citing Bureau of Indian Affairs guidelines listing the request of the biological parents as a proper consideration when determining whether good cause exists not to follow the order of preference in the federal ICWA).

<sup>283</sup> *In re Adoption of B.G.J.*, 133 P.3d at 5.

<sup>284</sup> *Id.*



to deviate from the statutory preferences when the request of the biological mother was a “pivotal”—but not the only—factor considered by the court.<sup>285</sup>

Greater recognition of the constitutional rights of biological parents’ right to place their Indian children in non-Indian adoptive homes has been met with resistance by some tribes and ICWA advocates. Many scholars and concerned advocates have decried state court resistance to the ICWA and, in particular, judicially created exceptions to the ICWA.<sup>286</sup> Much of the objection has been aimed at the “existing Indian family” exception that has been applied by some courts<sup>287</sup> and courts that have applied a “best interests of the child” inquiry when deciding whether “good cause” exists to refuse to transfer proceedings to tribal courts<sup>288</sup> or to deviate from the placement preference order in the ICWA.<sup>289</sup> The constitutional rights of parents of Indian children has been litigated and discussed in scholarly literature with less frequency but equal passion.

Both courts and scholars have cited the language in *Holyfield v. Mississippi Bank of Choctaw* to support interpreting ICWA as elevating the rights and interests of the tribe over those of individual parents.<sup>290</sup> In *Holyfield*, parents who were enrolled members of the Choctaw Indian tribe and who were domiciled on the tribal reservation attempted to place their twin newborns for adoption with a non-Indian couple.<sup>291</sup> The mother gave birth approximately 200 miles away from the reservation and both parents executed consent-to-adoption forms in the county where she gave birth.<sup>292</sup> The babies were placed with the Holyfields, a non-Indian couple, who filed a petition for adoption soon after.<sup>293</sup> The state court entered a final adoption decree in favor of the Holyfields

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<sup>285</sup> In re Adoption of Keith M.W., 79 P.3d 623, 630 (Alaska 2003). The court also considered the child’s emotional bond with the non-Indian adoptive parents and the fact that the adoptive parents chosen by the biological mother agreed to an “open” adoption that would allow her to have contact with the child and could “assist [the adoptive parents] in attending to [the child’s] cultural identity.” *Id.*

<sup>286</sup> See, e.g., Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587 (2002) (arguing for amendment of the ICWA because state courts created their own definitions of key terms in the ICWA and find it inapplicable on the facts in order to retain jurisdiction); Jeanne Louis Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585 (1994) (exploring “how the cultural construction of the Native American operates in the emerging law of concurrent jurisdiction under the Indian Child Welfare Act (ICWA), and perpetuates the subordination of Native American culture, families, and individuals—a subordination that the Act ostensibly counters”).

<sup>287</sup> See Atwood, *supra* note 286 at 588 (“some state courts have found the Act inapplicable under the ‘existing Indian family’ exception”). “If a child or the child’s parents are found to have insufficient ties to the Indian tribe attempting to intervene in a child custody proceeding, some state courts have held that the ICWA does not apply, reasoning that in such cases, ICWA’s state goal of ‘promoting the stability and security of Indian tribes and families’ is not met.” Jennifer Nutt Carleton, *The Indian Child Welfare Act: A Study in the Codification of the Ethnic Best Interests of the Child*, 81 MARQ. L. REV. 21, 31 (1997).

<sup>288</sup> See Carriere, *supra* note 286 at 615-616 (noting that the high courts of Montana, Indiana, Oklahoma, and South Dakota, along with the California Court of Appeals, have held that courts can find good cause to refuse to transfer jurisdiction under § 1911(b) based on the best interests of the child).

<sup>289</sup> See Carleton, *supra* note 287 at 30 (noting that some courts have found that the best interests of the child is “good cause” to not follow the order of preference in § 1915(a)).

<sup>290</sup> See Donna J. Goldsmith, *INDIVIDUAL VS. COLLECTIVE RIGHTS: THE INDIAN CHILD WELFARE ACT*, 13 HARV. WOMEN’S L.J. 1, 7 (1990). “*Holyfield* clarifies the competing interests among mother, child, and tribe, and recognizes that these interests must be prioritized according to tribal custom.” *Id.* Goldsmith argues that “tribal communities prioritize these competing interests differently than many Anglo feminists would, placing emphasis on the child’s and the tribal community’s interests.” *Id.*

<sup>291</sup> 490 U.S. 30 (1989).

<sup>292</sup> *Id.* at 37-38.

<sup>293</sup> *Id.* at 30, 38.

less than three weeks later.<sup>294</sup> Two months after the decree was entered, the Choctaw tribe moved to vacate the adoption decree on the ground that the ICWA gave the tribe exclusive jurisdiction over the adoption proceedings since the parents and children were domiciled on the reservation.<sup>295</sup> The state court overruled the motion and the Supreme Court of Mississippi affirmed, holding that the babies were never domiciled on tribal land, thus the tribe did not have exclusive jurisdiction.<sup>296</sup> The courts relied on the fact that the parents deliberately chose to have the babies born outside of tribal land and the babies had never resided or been physically present on the reservation.<sup>297</sup>

The United States Supreme Court reversed, noting that it was undisputed that the parents were domiciled on the Choctaw reservation at the time of the babies' birth (notwithstanding their departure shortly before the birth) and, for purposes of the ICWA, the babies were also domiciled on the reservation.<sup>298</sup> The Court further noted that the parents' desire to avoid tribal jurisdiction was irrelevant.<sup>299</sup>

Tribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of the Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians. . . . The numerous prerogatives accorded the tribes through the ICWA's substantive provisions . . . must, accordingly, be seen as a means of protecting not only the interests of individual children and families, but also of the tribes themselves.<sup>300</sup>

Although the opinion considered only proper jurisdiction and parents' attempts to unilaterally defeat tribal jurisdiction, this language has been cited in support of a broader argument favoring tribal interests over the rights of parents.<sup>301</sup>

In her article discussing the feminist arguments against and in support of allowing tribes to place children in Indian homes against the wishes of their Indian mothers, Donna J. Goldsmith explains how different cultural norms can justify subordinating individual rights and elevating the interests and rights of the tribe.<sup>302</sup>

The Supreme Court has held that the right to raise one's children is considered an essential and basic civil right. In addition the primary role of parents in the upbringing of their children is well ensconced in Anglo tradition. In contrast, many American Indians perceive themselves as part of the larger cultural group, not as completely autonomous individuals. Every child belongs to both its 'nuclear' family and to the tribe. Prior to the arrival of Anglo-Europeans in North America, an orphaned child was virtually unheard of in Indian tribal societies. The concept that a mother has the right to remove her child from its extended family and community, thereby depriving the child of its heritage, and the community of its valued member, is foreign to American Indian cultures.<sup>303</sup>

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<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 39.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 48-49. "Since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents." *Id.* at 48.

<sup>299</sup> *Id.* at 49

<sup>300</sup> *Id.* at 49.

<sup>301</sup> Goldsmith, *supra* note 290 at 7.

<sup>302</sup> *Id.* at 2, 7.

<sup>303</sup> *Id.* at 7-8.

This concept of the tribe's collective interests as prioritized above (or at least equal to) those of the individual members of the tribe support interpreting the ICWA as allowing tribes and state courts to follow the ICWA placement order even if the parent requests a different placement.

However, there are problems with that analysis and application of the ICWA. First, it assumes that Indians have no power to reject Indian cultural norms and embrace Anglo norms, at least with respect to how their children will be raised. While the member may leave the tribe, the tribe chooses the fate of the members' children. The tribe alone decides whether a child is eligible for membership and may exercise jurisdiction and impose its values on the child without regard to the wishes of the parents or the child.<sup>304</sup> Not only is the child of a member subject to tribal jurisdiction and laws that protect the tribe's interests, but so is the grandchild and perhaps great-grandchild, depending on the will of the tribe and their criteria for membership. In this way, members are completely and irrevocably bound by tribal custom and their rights as citizens of the United States would be likewise curtailed. While it is reasonable to believe that Congress intended for members of the tribe to be allowed to decide custody issues for members who choose to be a part of the Indian community and live in accordance with the values and interests of that community, it is far less clear that Congress intended for those interests and values to trump the rights and values of those who choose not to be a part of the community.

Second, it would apply to non-Indian parents who do not share—and have never shared—the Indian culture's notion of children belonging to the tribe. Infringing on the rights of non-Indian parents because of Indian cultural beliefs and interests cannot withstand constitutional scrutiny. While Goldsmith's explication of tribal values may be correct, that does not mean that Congress intended or even had the authority to enact legislation that would strip parents—Indian and non-Indian—of their constitutional rights when those rights conflict with the values or interests of Indian tribes. “The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.”<sup>305</sup>

The standard of review generally applied to laws infringing on fundamental rights is strict scrutiny, which requires those laws to be narrowly tailored to meet a compelling government interest.<sup>306</sup> As noted above, the ICWA cannot meet this standard. While preserving Indian culture and, in particular, Indian tribes and families is a compelling interest, interpreting the ICWA to infringe on the rights of parents (especially those who may have only tenuous or no ties to Indian culture) is not necessary or narrowly tailored to achieve that interest. Its application is even more objectionable when applied to non-Indian parents. A non-Indian mother is deprived of her fundamental rights for the benefit of a culture with which she has no personal ties. Her culture and values are completely disregarded as irrelevant or at least subordinate to those of the tribe. While individual rights may be foreign to Indian culture, they are the bedrock of American culture as evidenced by our founding and governing documents and hundreds of years of precedent. Indian and non-Indian parents are entitled to embrace those rights and to expect courts to enforce them.

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<sup>304</sup> “Indian” means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43; “Indian child” means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe; “Indian child's tribe” means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts. 25 U.S.C.A. § 1903(3)-(5).

<sup>305</sup> *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946); *Delaware Tribal Bus. Comm. v. Weeks*, 30 U.S. 73, 84 (1977).

<sup>306</sup> *See Roe v. Wade*, 410 U.S. 113 (1973).

Notwithstanding the fundamental rights at issue, it must be noted the Supreme Court has applied a lower standard of review in several cases involving Equal Protection and Due Process challenges to laws that give preferences to Indians over non-Indians or some Indian tribes and not others.<sup>307</sup> “On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. . . . As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.”<sup>308</sup> In *Morton*, the Court held that the statute giving preference to qualified Indians for employment in the Bureau of Indian Affairs was “reasonable and rationally designed to further Indian self-government” and therefore the classification did not violate due process.<sup>309</sup> In *Weeks*, the court applied the lower standard of review and found no equal protection violation when a congressional act distributed funds to some groups of Indians but not others.<sup>310</sup>

However, neither *Morton* nor *Weeks* involved fundamental rights of those challenging congressional action. Thus, application of the lower standard in ICWA cases is not a foregone conclusion. But the strongest argument in favor of heightened review and protecting parents’ constitutional rights is found in the text of the ICWA itself:

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.<sup>311</sup>

This provision should be understood to recognize that parents have fundamental rights under the Fourteenth Amendment to the United States Constitution and those rights provide a higher standard of protection to parents in cases involving voluntary terminations of parental rights in general, and specifically with respect to the biological parent’s right to choose adoptive parents for their children.<sup>312</sup> According to the ICWA, this higher standard of protection should be applied and the constitutional rights of parents should be protected.

The ICWA can be enforced as written in a way that does not violate parents’ right to choose adoptive parents. Courts need only hold that good cause exists as a matter of law to deviate from ICWA’s placement preference order whenever the biological parent chooses adoptive parents that do not conform to the statutory preference order. Not only would a finding of good cause in that situation be consistent with federal guidelines, it respects the constitutional rights of biological parents to direct the custody, care, and upbringing of their children.<sup>313</sup>

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<sup>307</sup> See *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding provision in Indian Reorganization Act that included an employment preference for qualified Indians in the Bureau of Indian Affairs); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977).

<sup>308</sup> *Morton*, 417 U.S. at 554-555.

<sup>309</sup> *Id.* at 555.

<sup>310</sup> *Weeks*, 430 U.S. at 73.

<sup>311</sup> 25 U.S.C.A. § 1921.

<sup>312</sup> Note that this does not require embracing the “existing Indian family doctrine” since the parental choice presumption would apply even if there is an existing Indian family.

<sup>313</sup> See *In re N.N.E.*, 752 N.W.2d at 8; *Troxel*, 530 U.S. at 65.

## **Conclusion**

Fit parents who choose to place their children for adoption are endowed with the same fundamental constitutional rights as other parents, and that includes the right to make decisions regarding the care, custody, and upbringing of those children. Consequently, allowing those parents to choose the adoptive parents who will raise their children is not a mere courtesy; it is a recognition of those rights. While the power to choose adoptive parents is not absolute and must be balanced against the right of the child to be raised in an environment free of abuse or neglect and the state's interest in protecting children from those dangers, states must afford great deference to the parents' choice and overrule it only when their chosen prospective adoptive parents fail to meet the minimum standards applicable to all adoption petitioners. State and federal laws or policies that fail to give sufficient deference to the wishes of the parents are unconstitutional and cannot stand.