LOST AND ALONE ON SOME FORGOTTEN HIGHWAY

ASFA, Binsfeld and the Law of Unintended Consequences

December 2005

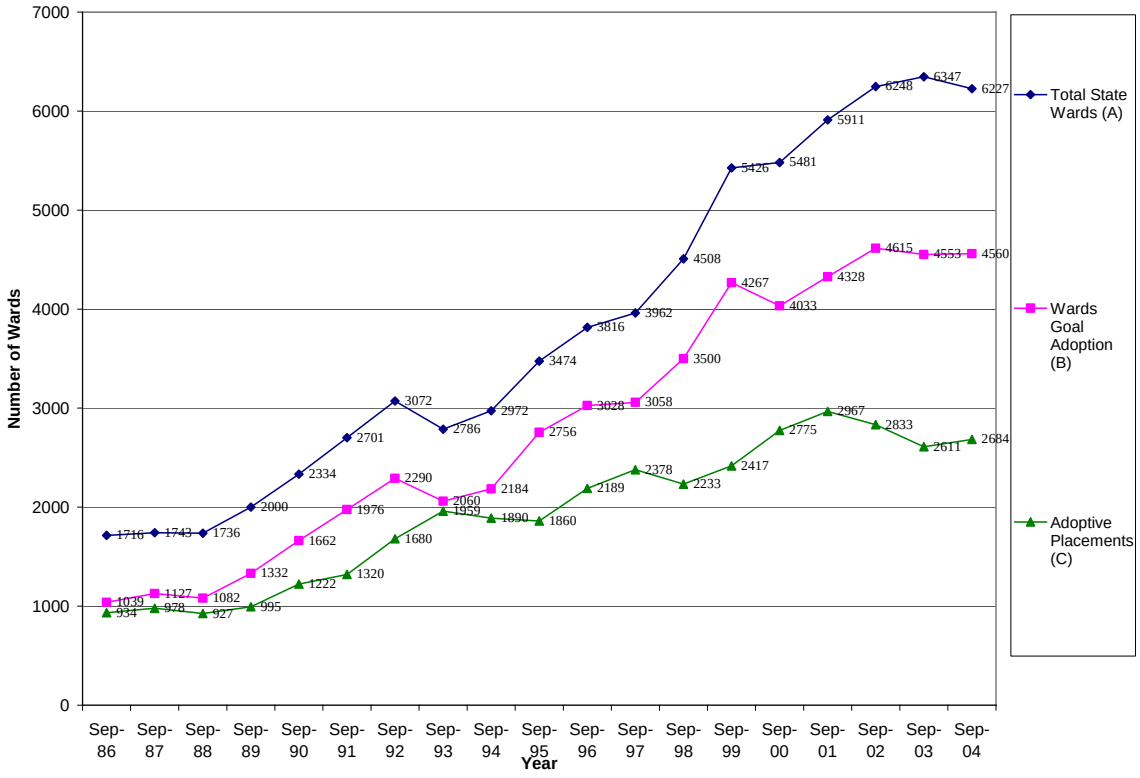
Author: Honorable Kenneth L. Tacoma, Chief Judge, Wexford County Probate Court

There is a disadvantaged people-group in our society that is expanding rapidly. It is comprised of children and young people who have never known the ties and support that come from having a reliable family. I have seen the faces and studied the cases of some of these young people, and the loneliness and alienation that I have seen is heartbreaking. These people are the new generation of state-created orphans.[1]

Between the late 1980's and mid-1990's, there was a growing awareness of the problems facing children in foster care placement. The system itself failed to serve many of the needs of the children who were frequently shifted from one foster home to another and left "in limbo" for unreasonable lengths of time with no finality in their legal status. The harm to children from these problems and the perceived need for stability and permanence led the Michigan legislature to attempt to address these issues by changes to the Michigan Juvenile Code.[2] Substantial changes were first enacted in 1988[3], and in 1996 massive amendments were made to both the juvenile code and related statutes dealing with child protection following the recommendations of the Binsfeld Commission; these changes became commonly known as the Binsfeld amendments.[4] At the federal level, the Adoption and Safe Families Act of 1997 (ASFA) also added substantive requirements to state laws by making provisions to expedite litigation, promote resolution and effect permanency in child abuse/neglect cases a condition of federal funding.[5] The evidence now appears clear that an unintended result of these laudable legislative efforts has been an unprecedented increase in involuntary termination of parental rights by the state, with a secondary consequence that we now have more rootless children, children without any legal family ties, than we had in the entire child protection system prior to these laws.[6]

The following graph using data from the Michigan Department of Human Services (DHS) shows the trends in numbers and situations of children who have been made wards of the state.[7]

Graph 1
Total State Ward Population
1986 - 2004

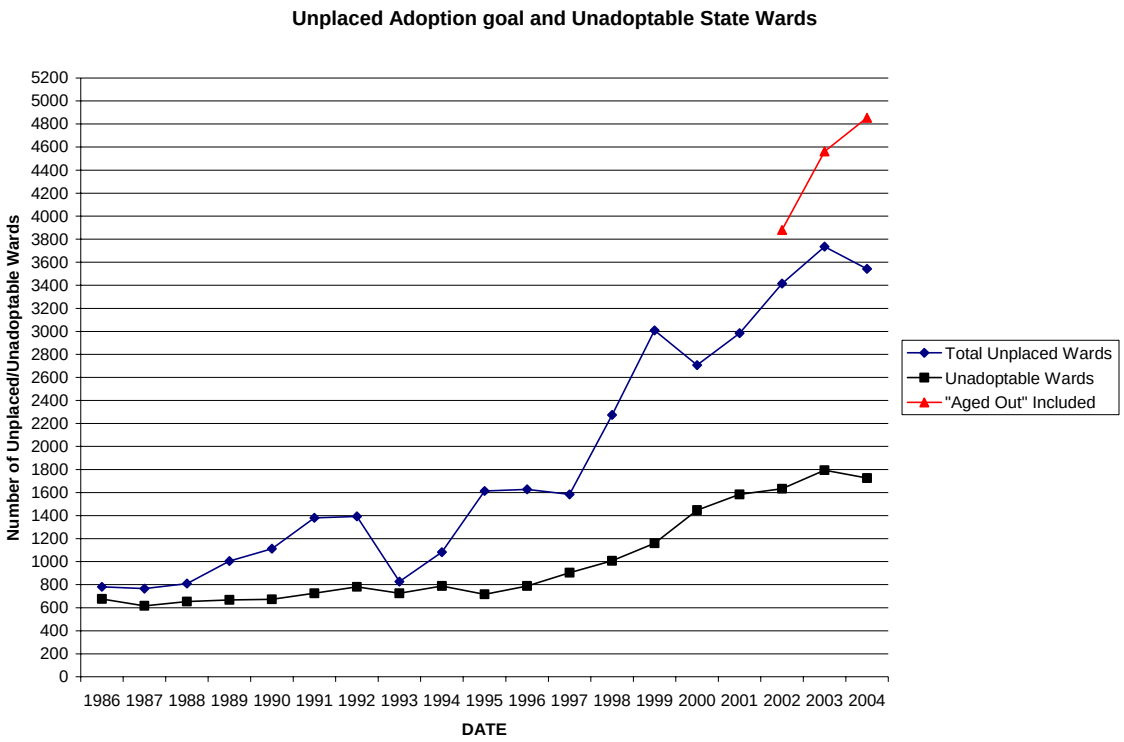


Using the data from this graph, we can derive the number of state wards who have been made orphans and are either unadoptable or are available for adoption, but without identified prospects.[8]

TABLE 2

	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Total Unplaced Wards (A-C)	782	765	809	1005	1112	1381	1392	827	1082	1614	1627	1584	2275	3009	2706	2984	3415	3736	3543
Unplaced Adoption Goal Wards (B-C)	105	149	155	337	440	656	610	101	294	896	839	680	1267	1850	1258	1401	1782	1942	1818
Unadoptable Wards (A-B)	677	616	654	668	672	725	782	726	788	718	788	904	1008	1159	1448	1583	1633	1794	1725

Finally, we can use these numbers to show directly the increase of state-created orphans in Michigan who are left without any family ties.



A few observations on these statistics are in order:

*Perspective is important - over the past two decades the birthrate in Michigan has actually been *falling* - from 137,626 live births in 1986 to 130,850 live births in 2003 - approximately a 5% decrease.[9] The overall downward trend in birthrates means that the number of children to whom parental rights have been terminated as a percentage of all children in the state has gone up even more dramatically than it initially appears.

* In 1986 there were 105 unplaced adoption goal wards; in 2003 and 2004 there were 1,942 and 1,818, respectively - a staggering increase of approximately 1,750%.

* The number of unadopted plus unadoptable wards in 2004 (3,543) is over twice the number of *total state wards who were in the system in 1986* (1,716).

* The most disturbing of these statistics is the number of unadoptable wards, that is, wards where adoption is not even perceived as a viable goal. In 1986 there were 677 such unadoptable wards; by 2004 the number was over 2 ½ times higher, at 1,725. It is also noteworthy that this number had been quite stable historically, staying in the range between 600 and 800 during the decade between 1986 and 1996.

*As distressing as these statistics are, these numbers seriously understate the problem in at least three ways:

1. These statistics do not include children who have "aged out" of the system. As time goes on, more and more children "age out" of the system by reaching adulthood and are no longer counted as part of the "Total State Wards" group.[10] According to their Office of Communications, DHS only began to track these numbers recently, but they report reliable data that in 2002, 2003 and 2004 respectively, 465, 362, and 484 youth aged out

of system; this would add over 1,300 young people to the total number of unadopted/unadoptable wards. Emancipation does not change the fact that they are state-created orphans - they just no longer have any formal ties or associations at all - not even the occasional visit by a DHS foster care worker. The short line on the "State Orphans" graph illustrates the result when these "aged out" young people are added cumulatively to the wards who are still under the state's jurisdiction.

2. These statistics do not include children who are not made state wards after termination of parental rights. There are children over whom the Court retains jurisdiction in cases where parental rights are terminated. These "Court Wards" are not included in the state data, although in 2004, for example, 124 wards would be included in this group.[11]

3. These statistics do not include the children who, although initially adopted, return to the jurisdiction of the court and are placed in foster care or institutional placement because of "failed adoptions". They usually return as delinquent wards, so the parental rights of the adoptive parents may well be left in place. Again, these young people are not reflected in the state data, and I was unable to find any statistics showing the size of this group. The numbers may well be much larger than one might initially suspect, however, as in the last year alone I have had four such young people in my relatively low-volume court. The heartbreak and distress to both the returning-to-the-system wards and to the adoptive parents who had struggled valiantly to raise these damaged children is palpable.

Although the cumulative provisions of the Michigan and federal legislation certainly must be considered when assessing the cause of these trends, I believe three particular provisions contained in the amendments to the Michigan Juvenile Code post-1988 have lead to this surge in permanent state wards, based on my experience and anecdotal evidence I have gathered from other Family Division judges. All three are the result of statutory mandates which strip discretion from DHS decision-makers and the court and replace that discretion with arbitrary statutory rules.

The first provision is the "one year rule" contained in MCL 712A.19a.[12] The practical result of this statute is to make termination of parental rights not only the default option, but also the mandated case plan if a child remains in foster care for one year after initial placement. Only an affirmative showing that it is "clearly not in the child's best interests" can stave off a termination proceeding - a nearly impossible task for the parents, child or the DHS. This provision forces many cases into a termination mode even if other options (such as continued work with the parent(s) on a case service plan, long-term foster care or long-term relative placement) might be available for consideration.

The second mandate driving these termination cases is the presumption in favor of termination of parental rights found in MCL 712A.19b(5), which *requires* the court to terminate parental rights if statutory grounds are proven "unless the court finds termination of parental rights to the child is clearly not in the child's best interests." [13] Once again, this is nearly an impossible standard for the parent(s), child or DHS to rebut. It is noteworthy that several appellate cases have confirmed this statutory scheme against constitutional challenge and that the Michigan Supreme Court has held that so long as the court is able to consider the entire record for facts to consider in the best interests findings, the statutory presumption requiring termination must stand.[14] Having presided in many trials of this nature, I can say with assurance that very little, if any, evidence is typically introduced in a systematic way on the "best interests"

issue, and that in the absence of such evidence, I have been forced by the legal standard to terminate parental rights, even when it could be reasonably assumed that the child(ren) would probably not be adopted.

The third provision driving the surge in termination cases is the expansion of situations where a mandatory termination of parental rights petition must be filed. Section 18 of the Child Protection Law requires the DHS to file a petition and include a request for termination of parental rights in several factual situations.[15] While certainly in most cases the presence of the kinds of abuse or neglect enumerated in the statute justifies and should require termination of parental rights, the removal of discretion from professionals continues the pressure for more termination cases to be filed and results in more permanent state wards.

The number of children made orphans by these provisions requires the conclusion that this is a problem which should be revisited, and as a basis for discussion, I suggest the following changes be made in the law.

First, the mandatory "one year rule" should be statutorily modified or better, eliminated. Often the rule is implicated in cases where the child(ren) are the subject of neglect (such as a parent's persistent, treatment resistant drug abuse or instability from transient meretricious relationships by a young mother so typical in these cases), rather than active abuse, in which the long term likelihood of building a successful family should be considered on a case-by-case basis. As it is now, all players must approach the case as "one year and out".

Second, the current presumption insisting on termination if the statutory grounds are proven should be reversed. Whatever reasons and arguments led to this draconian presumption being legislatively adopted, in view of what has happened, I can see no reason that the state should not be held to the same burden of proving by clear and convincing evidence that it affirmatively *IS* in a child's best interests to terminate rather than shift the burden to the parents (or child(ren)) to prove that it is *NOT* in the child(ren)'s best interests to terminate. Requiring the state to prove both statutory grounds and child(ren)'s best interests by this high standard would put the issue of best interests front and center in the litigation and lead to a better examination of the child(ren)'s overall life circumstances.

Third, we need to expand alternatives to the litigation of these cases to termination of parental rights. In some pilot programs, alternative dispute resolution in the form of Permanency Planning Mediation has been shown to expedite the processing of abuse and neglect cases and generally produce more favorable outcomes.[16] These programs encouraging mediated solutions should continue to be studied, and if they continue to show favorable results, aggressively pursued.

Fourth, we need to develop, either legislatively or by informed judicial accretion, a set of factors to measure best interests in these circumstances as the best interest factors in the Child Custody Act of 1970 simply are not appropriate because those factors presuppose a choice between fit and adequate parents.[17] In my opinion, the factors which should be considered in a termination case are quite different and should include at a minimum the following:

A. *The age of the child.* Michigan law already recognizes the right of a minor who is 14 years or older to participate in adoption and guardianship decisions by requiring consent of the minor at that age.[18] Shouldn't this recognition be extended to severance of the parent-child relationship and a 14 year-old given an absolute veto in a termination proceeding? Further, the common law rule of thumb for attaching legal responsibility (under 7, not responsible; between 7

and 14, factually determined based on the emotional and mental maturity of the child; over 14 presumed responsible) has much to recommend it in eliciting the child's input in the termination decision. Finally, age is a very important consideration because it is empirically demonstrable that the younger a child is, the more adoptable he or she is. In the most recent reporting period of adoptions finalized by the DHS and private agencies, for example, 47.32 % involved children under 6 years of age, and 70.42 % of all adoptions involved children under 10 years of age.[19]

B. *The attitude of the child toward the termination.* This is related to, but analytically distinct from, the issue raised above. Even at a very young age, children recognize the parental relationship and for some it is very important, even in the face of objectively unacceptable abuse or neglect. Indeed, many children ultimately return to their biological roots, even in successful adoptions, demonstrating the importance of considering this issue.[20] In one of my recent termination cases involving a boy, (7 years old when proceeding were initiated and 8 at the termination stage of proceedings), the child has refused to accept the termination, essentially making adoption impossible and vowing to go back to his parents as soon as he grows up.[21] This refusal to accept adoption as a possibility in some cases should be taken into account.

C. *The type and extent of the neglect and abuse that lead to Court jurisdiction.* Some forms of child abuse (severe sexual abuse, for example) are so devastating that virtually nothing can be done to restore the child, and termination of parental rights is required not only for permanent protection of the child, but also as society's statement of opprobrium toward the perpetrator. At the other extreme, we see cases where a young, hapless mother either is unable to maintain a adequate, clean home or lacks the emotional strength to divest herself of a pernicious "boyfriend". After a year of struggle to change the situation, termination proceedings are required by law to be initiated.

D. *The strength and nature of the parent-child bond.* Another related but distinct consideration is the bonding between the child and parent in the particular case. Some parent-child bonds are weak, some strong. Some are unhealthy, but others may be appropriate, despite the parent's deficiencies in other parenting areas.[22] The court should consider expert evaluation on this point, giving increasing consideration to preserving a parent-child relationship as the bonding is shown to be stronger and more appropriate as we move along the continuum. We must come to the point where we accept the idea that we can adequately protect children even when we have no intention of returning the child to the care of a deficient parent, and it may be better in some circumstances to leave the parent-child bond in place. Permanent foster care arrangements or guardianships may be more desirable than adoption in a larger class of cases than we have been willing to accept in the naiveté we held when we thought that termination would automatically lead to adoption.

E. *The probability that the child will be adopted.* In some cases, it is quite apparent even at the time of the termination trial that the child will be unadoptable absent a set of extraordinary fortunate circumstances for the child. At the other extreme, it may be clear that a prospective adoptive home is just waiting for the child to be free for adoption. The law clearly and rightly prohibits the comparison of prospective homes when determining whether or not jurisdiction over the child should be taken.[23] Those reasons are not present when jurisdiction is already asserted, the grounds for termination are proven and the issue has been reduced to the child's best interest. We should not only permit but also solicit evidence on the likely landscape of the child's life if termination is ordered. The risks associated with "comparison-shopping" are eliminated once an objective determination of statutory neglect and abuse has been made and we

have reduced the decision to the least-harmful option, which is really what all these cases involve.

F. *The economic factors.* Termination of parental rights, as a practical matter, removes the parents' legal duty to support and the child's legal right to inherit or receive governmental entitlement benefits derived from the parent.[24] It may sound crass to raise this as factor to consider, economic best interests are a reality and I see no principled reason they should not be considered in the mix. In one case I had a few years ago, the father of children to whom rights had been terminated was killed in a car crash a few months after termination. The wrongful death benefits were paid over to siblings of the decedent, to the exclusion of the children since rights had been terminated. While it is not appropriate or possible to speculate that such a possible economic benefit might occur in many cases, more predictable and settled economic rights can and should properly be considered.

* * * * *

The rush to termination of parental rights embodied in the legislation of the past two decades has proven to be the wrong answer to very important initial questions of how to best protect children, both from abuse and neglect and from an unstable foster care system. The decision to make termination of parental rights the default response came because policymakers underestimated or overlooked several realities:

1. Children can be protected from abuse and neglect by removing them from the situation - termination of parental rights within a defined period adds nothing to their physical or emotional protection without looking at what lies ahead in their lives beyond termination.[25]
2. Termination of parental rights does nothing to protect children from the problem of shifting and unstable foster placements when adoption cannot be achieved. If a foster care placement collapses for an unadopted/unadoptable child, he or she will still be passed along to another foster home or residential placement (which in my experience is even less stable than foster home placements). All that has changed is that one possible placement, the biological parents, has been completely eliminated.
3. We need more and better information from the social and medical sciences on the innate strength of the natural parent-child bond, even in unhealthy situations. There seems to be something which attaches early, and very strongly, in human relationships. I have observed this in other human relationships as well, and refer to it as the "jerk syndrome" - "He may be a jerk, but he's MY jerk." These relationships appear irrational and impossible to understand from the outside - and often prove to be dangerous - but we make a mistake to ignore or deny it, as it seems to spring from some primordial human need to belong.
4. It was a totally unrealistic assumption to believe that the supply of adoptive families could absorb the numbers of new wards available for adoption, particularly when the additional children come from the child protection system. In spite of tax incentives, adoption subsides, promotion programs, post-adoption support services and other tools to try to place these children, the numbers show that it won't be done, and our group of state-created orphans will continue to grow.

Unfortunately, as things stand now, we are witnessing one of the great ironies in the legislative world of good intentions gone bad. The number of rootless and alienated permanent

state wards has exploded, and these children and young people are still caught in the foster care system from which they were to be rescued. We have made things worse, not better.

**********ENDNOTES**********

---

1. This article expands and updates an earlier effort in which I first looked at this issue a few years ago. Tacoma, The *Binsfeld Legislation and the Law of Unintended Consequences,* INTER-COM, March, 2001.

2. MCL 712A.1 et seq.

3. 1988 PA 224.

4. 1997 PA 163 through 1997 PA 172.

5. PL 105-89; 42 USC §§ 620 - 679.

6. This issue is also beginning to receive general media attention; see, for example, Barbara White Stack, *Federal Adoption Law Spurs Rise in Legal Orphans - Legislation Intended to Increase Adoptions Led to Increase in Kids With No Parents at All* (Pittsburg Post-Gazette, December 26, 2004). The author claims that, as of the date the article was written, 117,395 children nationwide have been made state-created orphans since ASFA was passed.

7. The data is taken from DHS information that can be found on their website at www.michigan.gov/dhs , Adoption Reports and Statistics.

8. Note that these statistics include only children who have been made State Wards as a result of termination proceedings. Although this is by far the most common result in litigation terminating parental rights, as discussed *infra*, some children are made direct wards of the court.

9. Michigan Department of Community Health, Records and Health Data Development Section, Table 1.17, *Live Births by Plurality*. Birthrates in the period between 1986 and 2003 (the last year reported) vary significantly from year-to-year, from a high of 153,080 in 1990 to a low of 129,518 in 2002. Overall, however, there is a clear downward trend in birthrates in Michigan.

10. Jurisdiction is not necessarily terminated when a person reaches 18 years of age. Pursuant to MCL 712A.2a(1), jurisdiction of the court may continue for 2 additional years for wards properly found within the jurisdiction of the court before reaching the age of 18.

11. Michigan Department of Human Services, *December 2004 Foster Care Fact Sheet.*

13. The corresponding court rules which govern procedure in termination of parental rights cases contain substantially the same provisions at MCR 3.977.

14. See *In re Trejo Minors*, 462 Mich 341 (2000) and cases cited therein.

15. MCL 722.638. The types of abuse in which mandatory termination petitions must be filed tracks the definition of "aggravated circumstances" set out in ASFA where reasonable efforts for family reunification are not required, but as noted earlier in the context of the "one year rule", when carefully compared, Michigan's standard is slightly stricter than federal law requires. See 42 USC §671(15)(D) to compare the ASFA provisions with MCL 722.638.

16. Anderson and Whalen, *Permanency Planning Mediation Pilot Program, Evaluation Final Report*, prepared for the Michigan State Court Administrative Office, June, 2004.

17. MCL 722.23.

18. See MCL 710.43(2); MCL 700.5212, 5213, and 5219.

19. Michigan Department of Human Services website, *AFCARS Adoption Reporting System, State Ward Finalized Adoptions by Age Group, October 1, 2003 - September 30, 2004.*

20. Again, dealing on the anecdotal level, I have seen many cases where this has occurred, often to the heartbreak of both the adoptee and adopting parents. Also, the regular traffic from adult-adoptees seeking information about their biological family pursuant to MCL 710.68 et seq. shows the draw of this human impulse. In 2004, for example, SCAO statistics show 843 requests filed for Release of Adoption Information and 283 Petitions for Appointment of a Confidential Intermediary. Michigan Supreme Court, 2004 Annual Report, Circuit Court Statistical Supplement, *2004 Court Caseload Report, Proceedings Under Adoption Code*.

21. The following quotation appears consistently in the quarterly foster care reports in the case, which may be more a reflection of the inertia produced by modern word processing data storage than the actual continuing attitude of the child, but it does nicely illustrate the point: "N*** was very upset and angry with his parent's (sic) rights being terminated. He said he was going to get a gun and 'shoot the judge' and 'slit his throat'. He said he was not going to let anyone adopt him or his siblings. He was going to live with the M***'s (foster parents) until he was 18 and then go back and live with his parents." *In re TR, ER, VR, CR, NR, CR, BR, and AR*, Wexford County Circuit Court No. 01-15868-NA.

22. It is beyond the scope of this article to explore in depth the strength of parent-child bonding, but the following excerpt from the testimony of a very experienced and well-credentialed PhD child psychologist in one of the termination trials I handled is instructive: "...I would have to say at this stage out of the thousands and thousands of kids that I have evaluated in my career, I used to say not more than a handful, I could easily say now not more than two handfuls have ever wanted anything other than to go home. And I've seen kids that have been burned half to death that wanted to go back to the people that burned them...." *In re CS, IS, and DH*, Wexford County Circuit file NA-14360-99.

23. In *Fritts v. Krugh*, 354 Mich 97 (1958), at 115 this oft-quoted standard appears: "It is totally inappropriate to weigh the advantages of a foster home against the home of the natural and legal

parents. Their fitness as parents and the question of neglect of their children must be measured by statutory standards without reference to any particular alternative home which may be offered the children." This must certainly be the rule for obtaining jurisdiction; any rule which admitted of choosing between homes would place every citizen at risk of losing his or her children at the caprice of the state because, by comparison, there would always be a better possible home. No parent could withstand the scrutiny of such invidious comparisons - a fact that I, like most parents, had pointed out to me by my own children in their younger years when I denied them some benefit which other parents "always" conferred upon their children.

24. Arguably the holding of In *re Evink*, 214 Mich App 172 (1995), app denied 453 Mich 874 (1996), could be extended to require that child support continue to be charged and collected against the biological parent(s) in cases in which the child is not adopted; as a practical matter I think most, if not all, Family Division judges allow child support orders to terminate upon involuntary termination of parental rights if rights are terminated as to both parents. It seems a bit unfair to allow the state to sever the legal rights of parents while continuing to insist on enforcing the legal responsibilities.

25. Indeed, termination of parental rights may actually provide *less* protection than continued wardship since after termination, the court loses jurisdiction to enter orders against the biological parents. In some cases where the biological parent(s) continue to show up around the child(ren) - such as sporting events, school functions, etc. - the foster or adoptive parents are forced to resort to the cumbersome and inappropriate remedy of the anti-stalking personal protection order.