TERMINATION OF PARENTAL RIGHTS AND AN ASSESSMENT OF RIGHTS TO SUBSEQUENT CHILDREN IN THE STATE OF ILLINOIS

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I. INTRODUCTION

In the United States, on any given day, there are approximately 424,000 children in the foster care system.[1] In 2019, over 672,000 children spent time in the United States foster care system.[2] Specifically, in Illinois, there are more than 16,000 children in foster care, with approximately 4,400 of those children residing in the Chicago area alone.[3] On any given day this year, that is roughly 16,000 children in the State of Illinois whose biological parents are undergoing judicial proceedings to determine their parental fitness regarding those children.[4] Yet, the effect of a current parental fitness determination may have varying impacts on any subsequent children that the individual parents may later conceive.[5] These variations may be determined by factors such as the length of time between the children's existence, the habits of the parent in question, evidence of any rehabilitative efforts, and the availability, or lack thereof, of an adequate adoption placement for the subsequent child.[6]

Depending upon the judicial district in Illinois, both courts and child welfare agencies will proceed differently in parental rights termination cases.[7] Large discrepancies exist between parental termination proceeding practices in various districts and varying political sectors throughout the State of Illinois.[8] Given the constitutional implications seen throughout the

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1 *Protecting Kids, Providing Hope*, CHILD.'S RTS., https://www.childrensrights.org/newsroom/fact-sheets/foster-care/ (last visited Sept. 27, 2022).

2 *Id.*

3 *Facts About Foster Care*, CHILD.'S HOME & AID, https://www.childrenshomeandaid.org/facts-foster-care/ (last visited Sept. 27, 2022).

4 *See id.*

5 *See generally* Kendra Huard Fershee, *The Parent Trap: The Unconstitutional Practice of Severing Parental Rights Without Due Process of Law*, 30 GA. STATE U. L. REV. 639, 702 (2014).

6 *See generally id.*; *but see In re* Amanda D., 811 N.E.2d 1237, 1242 (Ill. App. Ct. 2004).

7 *See infra* Part IV.

8 *See generally In re* G.L., 768 N.E.2d 367 (Ill. App. Ct. 2002); *see also infra* Part IV.

different approaches to parental rights termination proceedings,[9] and the impact that these proceedings have on the child welfare system in its entirety, there is a grave need for uniformity across the State of Illinois in this specified area of legal practice. More specifically, an assessment of parents whose parental rights have been previously involuntarily terminated to a sibling of the child currently at issue should be implemented to determine whether that individual parent has made sufficient rehabilitative efforts, or life changes, to be considered fit to raise the subsequent child—more simply put, to redeem themselves from their prior conduct.

This note assesses the current practices across the State of Illinois regarding parental rights termination proceedings and the effect those proceedings may have on subsequent children of those parents, the constitutional implications such practices may bring, and a proposal of new practices going forward. More specifically, this note explores the following topics: (1) an overview of federal law regarding parental rights termination proceedings; (2) an overview of Illinois law regarding parental rights termination proceedings and the determination of parental unfitness; (3) an analysis of the variations in legal practice across the State of Illinois in this area of law; (4) a discussion on the need for uniformity across the State of Illinois and how varying approaches to the problem could present different constitutional implications; and, lastly (5) a proposal of a state-wide assessment based on rehabilitative efforts for parental rights to subsequent children born to individuals whose parental rights have been previously involuntarily terminated.

II. FEDERAL LAW ON PARENTAL RIGHTS' TERMINATION PROCEEDINGS

The landmark federal legislation regarding parental rights and termination proceedings in the United States was the Adoption Assistance and Child Welfare Act of 1980 (hereinafter "AACWA").[10] The AACWA established the concept of permanency planning on the federal level and attempted to solve the issue of children being stuck in the foster care system for extended periods of time.[11] Under this legislation, for a state to qualify for federal funding, the state would need to prove that it made *reasonable efforts* to keep the biological family unit intact prior to removing any child from their biological parents.[12] These *reasonable efforts* may reflect a variety of strategies, which combine to make up the permanency planning process

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9 *See infra* Part VI.

10 Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 95 Stat. 500.

11 Cheryl A. DeMichele, *The Illinois Adoption Act: Should a Child's Length of Time in Foster Care Measure Parental Unfitness?*, 30 LOY. U. CHI. L.J. 727, 738-39 (1999).

12 *Id.* at 739 (1999) (citing 42 U.S.C. § 671(a)(15)).

within the child welfare system.[13] However, the AACWA ended up doing the opposite of its intention, ultimately increasing the number of children in the foster care system.[14] The AACWA indirectly contributed to this increase because, although *reasonable efforts* were being made to keep families intact under the Act, frequently those services would begin only after the child was removed.[15] Therefore, the children would remain in the foster care system even longer while the necessary services were being implemented.[16]

As a response to the failure, or adverse impacts, of the AACWA, and the heightened number of children in foster care, Congress enacted the Adoption and Safe Families Act of 1997 (hereinafter "ASFA").[17] The ASFA requires a state to file a termination proceeding petition if a child has remained in foster care for fifteen out of the last twenty-two consecutive months.[18] That being noted, the amount of time that any given case spends being adjudicated now substantially affects a child and family's permanency plan and future.[19] This flaw within the legislation likely has the harshest impact in those urban jurisdictions that are the most overworked.[20] In those jurisdictions, cases tend to take longer due to the heightened number of cases—correlated to the greater population—and the small number of caseworkers available to advocate for a speedy process.[21] This time restraint on adjudication only has three exceptions.[22] The ASFA states that a state is not required to file a termination petition if: (1) a relative takes care of the child; (2) an agency can document a compelling reason why involuntary parental termination would not be in the best interest of the child; or (3) the state failed to provide the family with the services necessary for a successful reunification process.[23]

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13 *Overview*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/permanency/overview/ (last visited Sept. 27, 2022).

14 *See* DeMichele, *supra* note 11, at 740.

15 *Id.* at 738-39.

16 *See id.* at 740.

17 42 U.S.C. § 675; *see* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115; *see also* Vivek S. Sankara, *Child Welfare's Scarlet Letter: How a Prior Termination of Parental Rights Can Permanently Brand a Parent as Unfit*, 41 N.Y.U. REV. L. & SOC. CHANGE 685, 692 (2017); *see also* Lashanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA. J. SOC. POL'Y & L. 318, 324 (2010); *see also* Yeoeun Yoon, Note, *Building Broken Children in the Name of Protecting Them: Examining the Effects of a Lower Evidentiary Standard in Temporary Child Removal Cases*, 2019 U. ILL. L. REV. 743, 767.

18 *See* Yoon, *supra* note 17, at 767.

19 *Id.* at 767.

20 *See generally* Clare Spaulding, *Illinois' Child Welfare System May Be Worse Than Ever*, GOVERNING (Mar. 22, 2022), https://www.governing.com/community/illinois-child-welfare-system-may-be-worse-than-ever (explaining the lack of caseworkers, which draws the inferential that case workers are likely not as prepared and have higher workloads in urban districts, backing up the courts, and justifying many continuances, which in turns creates a longer waiting period).

21 *See id.*

22 *See* DeMichele, *supra* note 11, at 742.

23 *Id.* at 743 (citing 42 U.S.C. § (a)(15)(D)(i)-(iii)).

The ultimate objective of the ASFA is to reduce the amount of time children spend in foster care waiting to be adopted by expediting the termination process and searching for potential adoptive placements before the natural parents' rights are terminated.[24] Specifically, when enacting the ASFA, Congress was primarily concerned with the high statistics of children being removed from their biological families and consequently spending a significant portion of their childhoods in the foster care system.[25] By complying with the provisions of the ASFA to receive federal funding, states have an incentive to rush parental termination proceedings, severing natural parental rights, even if no concrete evidence of abuse, neglect, or maltreatment towards the child at issue exists.[26] These incentives, and rushed procedures, cause a large problem for parents attempting to fix the problems that caused their children to be removed initially.[27] For example, in twelve to fifteen short months, under the ASFA, a struggling parent would need to make significant improvements to their life, including potentially ending a drug or alcohol addiction, receiving training or education, gaining employment, and learning how to implement adequate parenting skills going forward.[28] Even more unsettling is that for parents living in poverty, the fifteen-month time restraint makes it nearly impossible for them to alleviate the situations that likely caused the initial removal of their children.[29] Further, if problems such as addiction or poverty came into play for the removal of an individual's child, even if the problem eventually becomes remedied, the state's actions can cause that parent to never be able to retain custody of children again.[30] For example, for parents with serious substance abuse disorders, the twelve to fifteen-month timeframe may not be sufficient time to complete a substance abuse treatment program.[31] This effect may discourage individuals from seeking treatment at all, which ultimately could result in a subsequent drug or alcohol-exposed birth.[32] Specifically, one of the most problematic aspects of states compliance with the ASFA is that they may forgo any reasonable efforts to reunify a family.[33] In many states, children are often automatically removed from the mother at birth when that specific individual has previously had her parental rights involuntarily

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24 *See* Kathleen Haggard, *Treating Prior Terminations of Parental Rights as Grounds for Present Terminations*, 73 WASH. L. REV. 1051, 1075 (1998).

25 Fershee, *supra* note 5, at 673.

26 *Id*. at 642.

27 *See generally id.* at 677; *see also* Yoon, *supra* note 17, at 767.

28 Fershee, *supra* note 5, at 677.

29 Yoon, *supra* note 17, at 767.

30 *See generally* Sankara, *supra* note 17.

31 *See generally Reasonable and Active Efforts, and Substance Abuse Disorders*, NAT'L QUALITY IMPROVEMENT CTR. (Am. Bar Ass'n Ctr. Child. L.), 2020.

32 *See generally* Therese Grant & Chris Graham, *Child Custody and Mothers with Substance Use Disorder: Unintended Consequences*, ALCOHOL & DRUG ABUSE INST. (Univ. Wash.), June 2015.

33 *See* Fershee, *supra* note 5, at 642-43.

terminated.[34] In this way, the ASFA may be indirectly hindering the passage of any state legislation considering rehabilitative efforts made by individuals regarding their subsequent children.[35]

III. ILLINOIS LAW ON PARENTAL RIGHTS TERMINATION PROCEEDINGS

Most states, including Illinois, have their own statutes and provisions regarding parental rights termination proceedings. New grounds for parental unfitness were added to the Illinois Adoption Act (hereinafter "IAA") in June of 1988,[36] which are still widely used today in the State.[37] Under the IAA, proceedings for involuntary termination of parental rights may be initiated by filing a petition by the State's Attorney or a child welfare agency in accordance with the Illinois Juvenile Court Act (hereinafter "IJCA").[38] The IAA provides that an Illinois court may involuntarily terminate parental rights upon proof, by clear and convincing evidence, that a parent is unfit to care for a child.[39] Proper termination of parental rights in the State of Illinois requires a finding that: (1) the parent is unfit, and (2) termination of the natural parent's rights is in the best interests of the child at issue.[40] Moreover, after a family court or trial court has made a finding of parental unfitness, all other considerations regarding the child shall heed to the best interests of that child.[41]

Regarding termination of parental rights proceedings, the IJCA[42] stands side by side with the IAA.[43] Under the IJCA, an Illinois court is required to consider numerous factors when determining the best interests of a child.[44] Among those factors to be considered are the development of a child's personal identity; the child's sense of attachment; the child's need for permanence, which includes any need for stability and continuity of

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34 *Id.* at 643.

35 As of today, the ASFA is blind to any positive changes that parents-to-be who have previously had their parental rights involuntarily terminated may have made in the interim. In an ideal situation, individuals expecting a child to be born, who believe that they have changed and want to keep the child, could petition the court for a re-determination of fitness concerning the subsequent child at little to no cost.

36 Illinois Adoption Act, 750 ILL. COMP. STAT. 50/ (2021).

37 *See* DeMichele, *supra* note 11.

38 Illinois Juvenile Court Act, 705 ILL. COMP. STAT. 405/2-29(2) (1998).

39 Illinois Adoption Act, 750 ILL. COMP. STAT. 50/1(D) (2021).

40 *See G.L.*, 768 N.E.2d at 372.

41 *See id.* at 373.

42 Illinois Juvenile Court Act, 705 ILL. COMP. STAT. 405/ (2021).

43 Illinois Adoption Act, 750 ILL. COMP. STAT. 50/ (2021).

44 Illinois Juvenile Court Act, 705 ILL. COMP. STAT. 405/1-3(4.05) (2021).

relationships with parental figures, siblings, and other relatives; and the uniqueness of every child and family.[45]

Generally speaking, in Illinois, a finding of parental unfitness as to one child will allow a family court or a trial court to terminate the rights of that individual toward all subsequent children.[46] In most states, including Illinois, when a mother was previously involuntarily divested of her parental rights and gives birth to another child, the State is immediately notified and takes action before the mother ever leaves the hospital.[47] This removal of the newborn is based on the assumption that an earlier parental termination adjudication requires the State to protect that newborn.[48] In this way, any evidence that supported a parent's unfitness determination towards any prior children will continue to serve as a basis for the termination of parental rights towards all of their other children, including those children who were not in existence during the conduct being used as evidence.[49] In part, this presumption is made because of the State's interest in the welfare of the child, but also because of the State's interest in the welfare of society as a whole, which in the case of "failure" of a prospective parent, will bear the cost as custodian for that child.[50] However, these types of presumptions have contributed a large amount to the 16,000 children in foster care within the State of Illinois,[51] and therefore some reform or new assessment criteria should be implemented.

A. Determinations of Parental Unfitness

In the State of Illinois, an *unfit person* is "any person whom the court shall find to be unfit to have a child, without regard to the likelihood that the child will be placed for adoption."[52] Some examples of grounds for parental unfitness include abandonment of the child; failure to maintain a reasonable degree of interest, concern, or responsibility for the child's welfare; substantial neglect of the child if continuous or repeated; extreme or repeated cruelty to the child; habitual drunkenness or addiction to an illegal substance; or a positive test result at birth for a controlled substance in a child's blood, urine, or meconium.[53] Moreover, in Illinois, there is a rebuttable presumption that a parent is unfit to care for a child if more than two findings of physical abuse towards children have been entered previously due to the parent's

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45 *See G.L.*, 768 N.E.2d at 372; *see also In re* J.C., 2021 Ill. App. (4th) 200425-U.
46 *See* Carter Dillard, *Child Welfare and Future Persons*, 43 GA. L. REV. 367, 401 (2009).
47 *See* Fershee, *supra* note 5, at 679.
48 *Id.* at 679.
49 Dillard, *supra* note 46, at 401.
50 *Id.* at 401.
51 *See Facts About Foster Care*, *supra* note 3.
52 Illinois Adoption Act, 750 ILL. COMP. STAT. 50/1.1(D) (2022).
53 *Id.* at 50/1.1(D)(a)-(m).

conduct.[54] This rebuttable presumption can only be overcome by clear and convincing evidence.[55]

A finding of parental unfitness is a prerequisite to addressing the question of whether termination of the parent's rights is in a child's best interests.[56] In determining parental unfitness in Illinois, the State's decision to take action to terminate parental rights due to a parent's previous misconduct is assessed under strict scrutiny.[57] For a state's action to be upheld under strict scrutiny review, the measures taken must be necessary to serve a compelling state interest and narrowly tailored to that interest.[58] The court takes such a strict review of these state policies because the right of a parent to control the upbringing of their children is a fundamental constitutional liberty.[59] Moreover, the United States Supreme Court has found that this liberty interest of parents in the care, custody, and management of their children "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[60] However, for each child, an Illinois court is not supposed to look solely to conduct during an isolated time frame, but rather throughout the entire duration of the period called into question.[61] Yet, upon initial inquiry into parental fitness, Illinois courts are not to consider the best interests of the child at all but, instead, solely focus on whether the parent's conduct stands within the criterion for a ground of parental unfitness as described in the IAA.[62]

More specifically, section 50/1(D)(n) of the IAA provides that a parent may be found unfit if they show an intent to forgo their parental rights, which can be proven by a failure, for a twelve-month period, to (i) visit the child(ren); (ii) communicate with the child(ren) or the child welfare agency in charge of them, although the parent was able to do so; or (iii) maintain contact with or plan for the future of the child(ren).[63]

When deciding a parent's unfitness as to a particular child, an Illinois court may find relevant evidence of the parent's previous neglect or abuse towards their other children, which would ultimately be sufficient to support a finding of unfitness towards the child at hand.[64] Although not always

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54 *Id.* at 50/1.1(D)(f)(1).
55 *Id.* at 50/1.1(D)(f)(1).
56 *See Amanda D.*, 811 N.E.2d at 1238.
57 9 Ill. Jur. Fam. L. § 6:41 (2022).
58 *See In re* D.W., 827 N.E.2d 466, 481 (Ill. 2005); *see also In re* H.G., 757 N.E.2d 864, 871 (Ill. 2001).
59 *See D.W.*, 827 N.E.2d at 481; *see also In re* R.C., 745 N.E.2d 1233, 1241 (Ill. 2001).
60 Santosky v. Kramer, 455 U.S. 745, 753 (1982); *see D.W.*, 827 N.E.2d at 481.
61 9 Ill. Jur. Fam. L. § 6:41 (2022); *see Amanda D.*, 811 N.E.2d at 1243.
62 Illinois Adoption Act, 750 ILL. COMP. STAT. 50/1.1(D); *see G.L.*, 768 N.E.2d at 371.
63 Illinois Adoption Act, 750 ILL. COMP. STAT. 50/1(D)(n); *see G.L.*, 768 N.E.2d at 369.
64 *See In re* D.C., 807 N.E.2d 472, 478-79 (Ill. 2004).

followed, technically, in Illinois, it is still necessary to find, by clear and convincing evidence, that the parent is unfit with respect to each child individually.[65] Yet, at any point, the State's Attorney, the guardian ad litem, or the Illinois Department of Children and Family Services may file a motion requesting the court to find that reasonable efforts to reunify the minor with their biological parent or parents are no longer necessary and recommend that the efforts cease.[66] A court of competent jurisdiction shall grant this sort of motion specifically if it finds that the parent has previously had their parental rights to another child involuntarily terminated.[67] This process cycles numerous children out of their biological parents' homes to a scarce number of foster homes, even if the State's protection may not still be needed.[68]

A prime example of a determination of parental unfitness and an assessment of the best interests of a child in the State of Illinois can be found in the case of *In re G.L.*, which originated in Cook County.[69] In this case, the First District, First Division of the Illinois Court of Appeals affirmed the Cook County trial court's determination of parental unfitness as to the mother's youngest two children.[70] One of the children had remained in foster care for six out of his seven years of life, and the younger child had been removed from his biological mother's custody within two weeks of her giving birth.[71] The court of appeals noted that although the mother previously had her parental rights involuntarily terminated for her oldest three children, the decision to terminate her rights as to other children still required consideration of the best interests of each child as a unique individual.[72]

The State, in this case, alleged that each of the children was actively residing in foster care with foster parents who wished to adopt them, and that termination of the biological parent's rights was in the best interests of each of them.[73] However, the biological mother was able to submit several certifications demonstrating that she had participated in and completed services in an effort to regain custody of her children, including both a residential rehabilitation program and a General Education Development course.[74] The oldest three children had expressed a desire to remain in their current foster care homes but also stated that they wished to continue seeing

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65 *See id.* at 300.

66 Illinois Juvenile Court Act of 1987, 705 ILL. COMP. STAT. 405/2-13.1(1)(a) (1998).

67 *Id.* at 405/2-13.1(b)(i); 405/1-2(1).

68 Such as in cases where the parent has attended parenting classes, received help with an addiction, or other life-improving factors.

69 *G.L.*, 768 N.E.2d 367.

70 *Id.* at 374.

71 *Id.*

72 *Id.* at 374 .

73 *Id.* at 369.

74 *Id.* at 371.

their biological mother.[75] Yet, the youngest two children, at the ages of seven and five, were unable to fully grasp the concepts of termination and adoption.[76] The court of appeals in this case, and this note, both argue that in cases such as this one, there should be some reassessment of the parent's capabilities for each individual child.[77] Otherwise, the State risks removing children from capable, willing, and rehabilitated biological homes into a foster care system that can be unstable under many circumstances.

Another example of parental unfitness determinations in Illinois is in the case of *In re Amanda D.*, originating in McHenry County.[78] In this case, the McHenry County trial court based its determination of a mother's unfitness solely upon her prior conviction for aggravated battery of a child.[79] The aggravated battery of a child conviction was based on the mother's drunken blackout, in which she accidentally fractured her older daughter's arm.[80] However, the mother pled guilty to the crime, served her entire sentence, and then successfully completed an inpatient substance abuse program.[81] The State's main argument in most Illinois parental unfitness determinations is that courts should not wait until children suffer actual abuse or neglect before protecting them and finding their home environment injurious.[82] However, in cases such as these, Illinois courts should look to the rehabilitative efforts of the parents as evidence of a possible turnaround of the parent, possibly proving them fit to parent their subsequent child(ren).

IV. VARIATIONS ACROSS ILLINOIS

Illinois courts disagree on many aspects of judicial proceedings, including the appropriate standard of review to be applied during appeals to termination of parental rights cases.[83] Approximately half of the state courts use the *against the manifest weight of the evidence* standard of review, which allows a reversal of a trial court's decision only if the facts of the case clearly demonstrate that the lower court should have reached the opposite result.[84] Currently, the fourth and fifth divisions of the First District of Illinois Court of Appeals and the Fourth District of Illinois Court of Appeals apply this

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75 *G.L.*, 768 N.E.2d at 371.
76 *Id.*
77 *Id.* at 373-74; *see infra* Part VI.
78 *Amanda D.*, 811 N.E.2d 1237.
79 *Id.* at 1238; *see* Illinois Adoption Act, 750 ILL. COMP. STAT. 50/1(D)(i) (2022).
80 *Amanda D.*, 811 N.E.2d at 1238.
81 *Id.* at 1243.
82 *See* Yoon, *supra* note 17, at 758-59.
83 *See generally G.L.*, 768 N.E.2d 367.
84 *See id.* at 25.

standard of review.[85] Yet, the other half of the state courts employ an *abuse of discretion* standard of review, which allows a reversal of the trial court's decision only if the lower court abused its discretion by acting arbitrarily without conscientious judgment, exceeded the bounds of reason, or ignored recognized principles of law in a way that resulted in substantial prejudice to a party.[86] As of now, the second, third, and sixth divisions of the First District of Illinois Court of Appeals and the Second and Third Districts of Illinois Court of Appeals use this standard.[87]

The varying standards of review, political variations, and the varying discretion of judges across the State of Illinois ultimately lead to varying results across the State,[88] regardless of the precedent that has been set forth by the Illinois Supreme Court. Several examples highlight different decisions across the State.[89] For example, in the case of *In re C.M.*, the trial court initially found that although the natural mother had completed parenting classes, underwent a psychological evaluation, and received substance abuse treatment, she made "minimal" efforts towards reunification.[90] However, on appeal, the Illinois appellate court used the abuse of discretion standard in overturning this decision.[91] Yet, in the case of *In re S.H.*, the court of appeals held that the trial court's decision was not against the manifest weight of the evidence, considering that the respondent had been convicted of two counts of aggravated sexual assault on the five-year-old in question.[92]

Further, in Illinois and other states, differing statutory schemes require the removal of newborn infants from their parent's custody before the mother even leaves the hospital, as a matter of course.[93] This often happens without any concrete evidence of neglect or abuse towards the newborn, generally because the mother's parental rights to a sibling child have been previously involuntarily terminated.[94] In the case of *In re S.D.*, the court stated, "in an adjudicatory hearing to determine neglect [or abuse], a court does not have to wait until a sibling becomes the victim of sexual or physical abuse before

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85 *See id.*; *see also In re* C.M., 744 N.E.2d 916 (Ill. App. Ct. 2001); *see also In re* Sheltanya S., 723 N.E.2d 744, 752 (Ill. App. Ct. 1999); *see also In re* S.H., 672 N.E.2d 403, 404 (Ill. App. Ct. 1996).

86 *See G.L.*, 768 N.E.2d at 373.

87 *See id*; *see also In re* D.L., 760 N.E.2d 542 (Ill. App. Ct. 2001); *see also In re* B.S., 740 N.E.2d 404 (Ill. App. Ct. 2000); *see also* In Int. of Jason U., 574 N.E.2d 90 (Ill. App. Ct. 1991); *see also In re* M.S., 706 N.E.2d 524 (Ill. App. Ct. 1999); *see also In re* D.J.S., 719 N.E.2d 116 (Ill. App. Ct. 1999).

88 *See generally G.L.*, 768 N.E.2d at 373; *see also C.M.*, 744 N.E.2d 916; *see also Sheltanya S.*, 723 N.E.2d 744; *see also S.H.*, 672 N.E.2d 403; *see also D.L.*, 760 N.E.2d 542; *see also B.S.*, 740 N.E.2d 404; *see also Jason U.*, 574 N.E.2d 90; *see also M.S.*, 706 N.E.2d 524; *see also D.J.S.*, 719 N.E.2d 116.

89 *See* sources cited *supra* note 88.

90 *C.M.*, 744 N.E.2d at 926.

91 *Id.*

92 *S.H.*, 672 N.E.2d at 409.

93 Fershee, *supra* note 5, at 643, 679.

94 *Id*. at 643, 679.

the court can find that the sibling is in an environment injurious to [their] welfare."[95]

For example, in the case of *In re D.C.*, a mother appealed a decision of the Peoria County trial court terminating her parental rights to four children.[96] The Illinois Supreme Court affirmed the termination of parental rights as to the mother's oldest three children, but reversed the lower court's decision regarding the mother's youngest child.[97] The highest court in Illinois held that courts in this jurisdiction are required to find, by clear and convincing evidence, that a parent is unfit as to each individual child.[98] In this case, the mother's oldest three children were taken away due to issues relating to the lack of habitable residence and cleanliness of her dwelling, combined with domestic violence between the mother and her boyfriend.[99] Thus, upon giving birth to her youngest child, the newborn infant was immediately taken away and placed into foster care at the hands of the trial court.[100]

In the case of *In re J.C.*, filed in McLean County, Illinois, the State filed a petition to terminate parental rights because it found that the child's environment was injurious to his welfare.[101] This decision was based primarily on the fact that the child was residing with individuals who had been involved in prior adjudications of parental rights in which each of their parental rights to prior-born children had been involuntarily terminated.[102] This McLean County judge opined that the sole focus during parental fitness and the child's best interest hearings should be on the child's welfare and whether parental termination would improve the child's future financial, social, and emotional surroundings.[103]

Another example is illustrated in the case of *In re L.P.*, which originated in Champaign County, Illinois.[104] The mother in this case, while incarcerated, found out that she was pregnant with a subsequent child.[105] After giving birth, the Illinois Department of Children and Family Services immediately took protective custody of the newborn infant.[106] Here, the State filed a petition for adjudication of wardship, alleging specifically that the newborn infant was neglected due to being in an injurious environment.[107] However, the State only showed evidence of the mother's failure to correct conditions that

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95 *In re* S.D., 581 N.E.2d 158, 162 (Ill. App. Ct. 1991).
96 *D.C.*, 807 N.E.2d at 473.
97 *Id.* at 473.
98 *Id.* at 479-80.
99 *Id.* at 474.
100 *Id.*
101 *J.C.*, 2021 IL App (4th) 200425-U2021 Ill. App. Unpub. LEXIS 24, at ¶ 8.
102 *Id.* at ¶ 8.
103 *Id.* at ¶ 34; *see In re* D.M., 784 N.E.2d 304 (Ill. App. Ct. 2002).
104 *In re* L.P., 2019 IL App (4th) 180666-U.
105 *Id.* at *5.
106 *Id.* at *5, *41.
107 *Id.* at *6.

resulted in a prior adjudication of parental unfitness regarding the infant's older sibling—specifically, conditions relating to the mother's history of substance abuse.[108] Yet, the mother was candid and admitted to her caseworker that she used heroin at the beginning of her pregnancy, prior to finding out that she was pregnant.[109] However, in an effort to rehabilitate, the mother had taken three courses and was on a waiting list for a drug treatment course, a parenting course, and to continue her education.[110]

Some Illinois courts of appeal have rejected certain statutory provisions which allow courts to automatically find a parent unfit without actually assessing their current level of fitness.[111] In the case of *In re S.F.*, the First District of the Illinois Court of Appeals struck down a provision that conclusively established grounds for termination of parental rights based upon a parent's previous criminal conviction, which resulted from the death of a child.[112] The First District argues that this automatic presumption denied individuals their right to a rebuttal during parental termination proceedings.[113] These differing outcomes of parental termination cases across the State of Illinois cause confusion and non-uniformity, often making it difficult for adoption workers and case workers to do their jobs effectively.[114]

V. THE NEED FOR UNIFORMITY IN ILLINOIS

Terminating biological parental rights never guarantees that a child will eventually be adopted.[115] Studies have shown that for each year a child spends within the foster care system, the likelihood of that child being adopted decreases by eighty percent.[116] The increase in termination of parental rights after the passage of the ASFA on the federal level and the IAA on the state level has resulted in an influx of legal orphans—children who are legally severed from their natural parents, with no readily available adoptive home.[117] Various factors, such as age, race, and emotional, physical, and mental development levels, make it very difficult to find adoptive homes for some of these children.[118] Yet, in some of these cases, with appropriate

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108 *Id.*
109 *Id.* at *10.
110 *L.P.*, 2019 IL App (4th) 180666-U, at *17.
111 *See* Sankara, *supra* note 17, at 691.
112 *In re* S.F., 2015 IL App. (1st) 143834-U; *see* Sankara, *supra* note 17, at 691.
113 *S.F.*, 2015 IL App. (1st) 143834-U, ¶ 3; *see* Sankara, *supra* note 17, at 691.
114 *See generally* Yoon, *supra* note 17, at 763.
115 *See* Taylor, *supra* note 17, at 325.
116 *See id.* at 325-26.
117 DeMichele, *supra* note 11, at 755.
118 *Id.* at 756.

State assistance, these children would have never been pushed to this orphan status.[119]

Many individuals argue that if children are to live with others, aside from their natural parents, and society is to suffer by taking care of them, they—the public at large—should have a choice.[120] Even more so, healthcare providers have grown concerned that if women are going to be either criminally charged or believe that their children will be automatically taken away from their care, they may avoid medical care altogether,[121] ultimately harming the infant.

On a different note, traditional termination and adoption procedures are occasionally considered inefficient and often thought of as having too long of delays.[122] Critics, and advocates of the ASFA, argue that these delays are necessary under a parent's first determination of unfitness before the court, but become unnecessary during any subsequent termination proceedings.[123] However, the court deciding the case of *In re D.C.* highlighted the fact that expediency is not the only concern in parental rights termination proceedings.[124] The Illinois legislature recognizes that serious delay in the adjudication of abuse, neglect, or dependency cases can cause grave harm to minors and families, and it may frustrate the health, safety, and best interests of the child.[125] However, consistent with federal legislation, the State of Illinois is still to act in a just and speedy manner to determine the best interests of each child.[126] This note argues that while reunification services may be considered expensive, especially when viewing only failed cases, it is still less expensive than leaving the State to try and place children in foster care homes that, by and large, do not exist.[127]

Further, each decision-maker comes with his or her own set of values, thoughts, and practices regarding child-rearing, and may never even meet the children they are ultimately affecting.[128] Additionally, each individual's view of what is "good" for a child is as diverse as the individuals involved.[129] Sometimes, different standards—for example, the differing requisite proof in

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119 *Id.*

120 Julie J. Zitella, Note, *Protecting Our Children: A Call to Reform State Policies to Hold Pregnant Drug Addicts Accountable*, 29 J. MARSHALL L. REV. 765, 790 (1996).

121 *See id.*

122 Haggard, *supra* note 24, at 1075.

123 *Id.*

124 *D.C.*, 807 N.E.2d at 480; *see* Sankara, *supra* note 17, at 689 (explaining that the Constitution has higher values than speed and efficiency).

125 Illinois Juvenile Court Act of 1987, 705 ILL. COMP. STAT. 405/2-14(a) (1998).

126 *Id.*

127 Fershee, *supra* note 5, at 701; *see* Yoon, *supra* note 17, at 747.

128 Judge Carl Funderburk, *Best Interest of the Child Should Not be an Ambiguous Term*, 35 CHILD LEGAL RTS. J. 229 (2013).

129 *Id.* at 234.

different states[130]—continuously cause variations in the outcomes of child dependency cases.[131] A study performed by the National Survey of Child and Adolescent Well-Being noted that some states, including California, Illinois, and Pennsylvania, have some of the highest numbers of children in their child welfare system each year and, coincidentally, also all require some lower standard of proof in parental termination proceedings.[132]

VI. APPROACHES & THEIR CONSTITUTIONAL IMPLICATIONS

The right to parent one's biological children is a highly regarded fundamental liberty interest under the Fourteenth Amendment of the United States Constitution.[133] The right of parents to direct the care, custody, and control of their children is also an element of liberty protected by the Due Process Clause, as well as firmly established under the law.[134] Therefore, a parent's constitutional right to raise his or her children as they see fit is well established throughout our nation.[135] Without some determination of neglect, abuse, or maltreatment, there is no legal basis for intruding into the realm of family privacy.[136] The responsibility of a parent is to raise his or her child with some type of morals and values, and it does not matter whether the court agrees with the morals and values chosen.[137] Courts must respect a parent's standard of care unless it reaches the extent of abuse or neglect, affecting the child's health, welfare, or safety, or creating an imminent risk of harm.[138]

Courts have been increasingly divided over whether individuals who have habitually had their parental rights terminated still obtain a constitutional right to procreation, which should override the interests of both prospective children and society.[139] By procreating, individuals decide a child's fate legally, socially, socioeconomically, and politically.[140] However, parents have a duty not only to refrain from inflicting harm on their children, but also to provide for them under a legal duty of beneficence.[141] Critics persuasively argue that procreation is an act that comes with massive consequences to other individuals, aside from the parents, to which those

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130 For example, preponderance of the evidence versus clear and convincing evidence.
131 Yoon, *supra* note 17, at 762.
132 *Id*.
133 Yoon, *supra* note 17, at 747; *see In re* A.C., 2020 IL App (1st) 200155-U; *see also In re* E.B., 899 N.E.2d 218, 221 (Ill. 2008).
134 Sankara, *supra* note 17, at 689.
135 *See* Funderburk, *supra* note 128, at 236.
136 *See id.* at 246.
137 *Id*. at 255.
138 *See id.* at 247.
139 Dillard, *supra* note 46, at 377.
140 *Id.* at 381.
141 *Id*. at 411.

impacted individuals do not, and usually cannot, consent.[142] Clearly, unborn children cannot consent to be born.[143]

For example, the Supreme Court of Wisconsin had previously upheld a probation order which conditioned a parent from procreating until he could successfully demonstrate that he was adequately capable of supporting children.[144] In this respect, critics argue that parents who have not previously grasped their parental responsibilities should not reasonably be held to still obtain a constitutional right to continue bearing children.[145]

The United States Supreme Court stated in *Santosky v. Kramer* that states are not allowed to terminate parental rights without clear and convincing evidence that parental termination is necessary to protect the child(ren) from those parents.[146] Justice Blackmun highlighted that "when the State initiates a parental rights termination proceeding, it seeks not merely to infringe th[e parent's] fundamental liberty interest, but to end it."[147] Moreover, to determine whether a state statute affords parents sufficient due process, courts must balance three factors: (1) the private interests affected by the proceedings; (2) the risk of error created by the state's chosen procedure; and (3) the countervailing government interest supporting use of the challenged procedure.[148] The private interests generally affected in these cases are the natural parents' desire to raise their children and their fundamental right to the companionship, care, custody, and management of their children.[149] Whereas, the countervailing governmental interest is the need to protect innocent children from abuse and neglect and to expedite termination proceedings when possible.[150] In this instance, the state risks erroneously terminating parental rights under a wrongful finding of unfitness and failing to afford the parent the safeguards required under due process.[151]

In the case of *In re Amanda D.*, the Illinois Court of Appeals for the Second District found a section of the IAA to be unconstitutional, as it violated the mother's substantive due process rights by mandating a determination of unfitness based solely on a prior conviction, without regard to other relevant factors.[152] This determination makes no effort to take into account the passage of time, the circumstances surrounding the crime, or the

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142 *Id.* at 381.
143 *Id.* at 405.
144 *Id.* at 383; State v. Oakley, 2001 WI 103, 245 Wis.2d 447, 629 N.W.2d 20.
145 Dillard, *supra* note 46, at 418.
146 *Santosky*, 455 U.S. 745; *see* Fershee, *supra* note 5, at 683.
147 *See id.*
148 Matthews v. Eldridge, 424 U.S. 319 (1976); *see* Haggard, *supra* note 24, at 1072; *see also Santosky*, 455 U.S. 745; *see also* Yoon, *supra* note 17, at 748.
149 Haggard, *supra* note 24, at 1072.
150 *Id.*
151 *Id.*
152 *Amanda D.*, 811 N.E.2d at 1248.

parent's rehabilitative efforts, if any.[153] Substantive due process limits what the government may do, protecting certain fundamental rights and liberties that are deeply rooted in this nation's traditions and history—including the right to raise one's child.[154]

The United States Supreme Court should make clear that relying solely on evidence of past determinations of parental unfitness cannot serve as proof of unfitness regarding other subsequent children.[155] Moreover, each time a parent conceives a child, the parent should receive the full benefit of the law and their constitutional protections to determine whether they are unfit regarding the particular child at issue.[156] However, concerning the children's constitutional rights, a child has a right to be free from deliberate harm, and that right attaches immediately at birth and will be enforceable by both courts and the State.[157]

Under the IJCA, every child has a right to services necessary for their safety and proper development, including health, education, and social services.[158] Moreover, a parent's right to the custody of their child shall not prevail when the court determines that it is contrary to the health, safety, and best interests of the child.[159]

VII. IMPLEMENTATION OF A STATE-WIDE ASSESSMENT OF REHABILITATIVE EFFORTS

Many states, including Illinois, have authorized an expedited grant of present parental terminations when an individual has lost rights to a previous child.[160] Not all attempts by an individual to rehabilitate themselves should necessarily preclude a determination of parental unfitness.[161] However, in every fitness determination, a parent's efforts to change are still relevant and should be considered.[162] For example, if a parent's previous misconduct relates to a specific child, those findings of unfitness should pertain solely to that child and not be dispositive to that parent's rights to subsequent children.[163] It is agreed that all parents have an affirmative duty to provide care for their extant child(ren),[164] and failure to do so will result in

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153 *Id.* at 1242; *see In re* S.F., 834 N.E.2d 453 (Ill. App. Ct. 2005).
154 *Amanda D.*, 811 N.E.2d at 1241; *see* Sankara, *supra* note 17, at 689.
155 Fershee, *supra* note 5, at 702.
156 *Id.*
157 Funderburk, *supra* note 128, at 254.
158 Illinois Juvenile Court Act of 1987, 705 ILL. COMP. STAT. 405/1-2(3)(b) (1998).
159 *Id.*
160 *See* Haggard, *supra* note 24, at 1066.
161 9 Ill. Jur. Fam. L. § 6:41 (2021).
162 *Id.*
163 *See id.*
164 Dillard, *supra* note 46, at 374.

consequences.[165] Yet, the State must wait for children to come into existence before allowing courts to address whether those parental duties will be fulfilled for each child as an individual, regardless of whether the State anticipates a failure to fulfill those duties.[166]

To ensure that states do not unnecessarily terminate the rights of a fit parent, statutes should require the State to demonstrate, by clear and convincing evidence, that the conditions that led to the prior termination continue to exist.[167] The traditional notion that termination orders must be final to promote stability is challenged by the increasing number of children who are being permanently harmed by statutes that purport to protect their best interests.[168]

Although evidence of neglect, abuse, or maltreatment of other children may be relevant to support a finding of unfitness as to a particular child, it is always necessary to find, by clear and convincing evidence, that the parent is unfit with respect to each child.[169] Contrary to this statement, the State in *In re D.C.*, and in similar cases, argues that a parent who has been proven unfit to parent other children for failing to make reasonable progress is also unfit as to all of their other children, including those later born.[170]

The court, in deciding *In re Amanda D.*, points out that many statutory schemes do not allow for an actual, individualized assessment of unfitness.[171] This court proposed that, going forward, courts should hear evidence of rehabilitation, evidence that an offense occurred under unique circumstances, or a showing of a passage of time that has led the parent to lead a new, upstanding life.[172] For individuals with substance abuse problems, federal and state legislation, specifically the ASFA, can cause particular timing issues.[173] Young individuals whose rights have been terminated may face similar problems. Problems relating to caring for children, inexperience, poor decision-making skills, and lack of appreciation for the consequences of one's actions may all remedy themselves with time,[174] but the current

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165 *See* Illinois Adoption Act, 750 ILL. COMP. STAT. 50/1(D)(n); *see G.L.*, 768 N.E.2d 367.

166 Dillard, *supra* note 46, at 374. Granted, that is not to say that if specific circumstances suggesting immediate abuse or neglect of the infant were to arise that the court should not take action. For example, if a pregnant mother was found guilty of abuse of an extant child within the few months before giving birth, that scenario could be different. Each case should be decided based on its unique characteristics.

167 Sankara, *supra* note 17, at 703.

168 Taylor, *supra* note 17, at 349.

169 *D.C.*, 807 N.E.2d at 479; *see E.B.*, 899 N.E.2d at 220-21; *see also In re* Gwynne P., 830 N.E.2d 508, 514 (Ill. 2005).

170 *D.C.*, 807 N.E.2d at 477.

171 *Amanda D.*, 811 N.E.2d at 1243.

172 *Id.*

173 *See* Taylor, *supra* note 17, at 363.

174 *Id.* at 364.

statutory schemes do not recognize this.[175] Moreover, when the initial placement is due to minority or immaturity, it is more likely that, with time, the deficiency will be corrected.[176]

A. Examples from Other Jurisdictions

Many other states have in place some type of assessment of the passage of time or rehabilitative efforts in determining the rights of parents whose parental rights have been previously involuntarily terminated for subsequent children.[177] For example, in Oregon, courts must determine whether the conditions giving rise to the previous termination proceeding have been improved.[178] Similarly, some states, such as Kentucky, require evidence that the conditions or factors which were the basis for the previous termination finding have yet to have been corrected.[179]

A Kansas trial court terminated a mother's parental rights without any evidence that termination was necessary other than a certified copy of a journal entry from an eight-year-old parental rights termination case involving another child of the mother.[180] On appeal, the court noted that, in Kansas, like in most jurisdictions, they do not allow a defendant to be convicted of burglary upon proof that they were convicted of the same crime eight years ago, and shall not do the same in familial instances.[181]

Similarly, a Florida trial court terminated the rights of a mother of twins based on a termination five years prior.[182] However, the Florida court of appeals determined that the trial court improperly terminated because it failed to provide evidence that the mother suffered from any mental illness, drug addiction, or other impairments that would cause her to be a danger to her children or render her incapable of caring for them.[183] The Florida Supreme Court has recognized that "while a parent's past conduct necessarily has some predictive value as to that parent's likely future conduct, positive life changes can overcome a negative history."[184] In Iowa, a court must conclude that subsequent to the child in need of assistance adjudication, the parents were offered or received services to correct the circumstances which led to

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175 *See generally* Adoption and Safe Families Act of 1997, 42 U.S.C. § 675; *see also* Illinois Adoption Act, 750 ILL. COMP. STAT. 50/1.

176 Taylor, *supra* note 17, at 365.

177 *See* Sankara, *supra* note 17, at 696-703; *see also* Fershee, *supra* note 5.

178 Sankara, *supra* note 17, at 703.

179 *Id.* at 696.

180 Fershee, *supra* note 5, at 691-92.

181 *Id.* at 692.

182 *Id.* at 693.

183 *Id.* at 693-94.

184 *See* Sankara, *supra* note 17, at 697.

the adjudication, and the circumstances continue to exist despite the offer or receipt of services.[185]

On the contrary, the State of Washington has begun to recognize that parents who have mistreated children previously are likely to continue to do so.[186] Commentators on the topic of parental terminations have argued that parents who have previously lost parental rights continue to bring children into this world and promptly demonstrate a tendency to mistreat them.[187] Washington's Department of Social and Health Services ranks a parent's prior serious abuse or neglect of other children as among the highest risk factors for predicting a parent's propensity to maltreat children in the future.[188] There should be an implementation of effective risk assessment and alternative resources to decrease unnecessary removal and separation from the family while still ensuring a safe environment.[189] Kentucky, Minnesota, Missouri, New Jersey, Oklahoma, and Wyoming all have implemented a form of this alternative response with resources in their state-run child welfare systems.[190]

Specifically, in Kentucky, in low-risk cases, alternative resources allow families to assess their needs with a social worker and educate themselves on how to remedy situations without the involvement of law enforcement, attorneys, and judges.[191] One assertion is that Kentucky law in this field protects mothers by mandating that no petition for involuntary termination of parental rights may be filed prior to five days after the birth of a child.[192] Further, regarding pregnant women and new mothers, petitions for involuntary termination of parental rights may not be filed solely based on a finding of use of a non-prescribed controlled substance, assuming that the mother-to-be enrolls in and maintains substantial compliance with a substance abuse treatment program and a regiment of recommended prenatal care.[193] Upon the certified completion of said substance abuse treatment program, or six months after giving birth, any records maintained relating to a positive test for a non-prescribed controlled substance are to be sealed by the court and are not permitted to be used in future criminal cases or parental rights termination cases against that woman.[194]

Even so, in a case that does lead to adjudication in Kentucky, the parents may then show evidence of their efforts to remedy the child's need and avoid

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185 *Id.* at 703.
186 Haggard, *supra* note 24.
187 *Id.*
188 *Id.* at 1055-56.
189 Yoon, *supra* note 17, at 769.
190 *Id.*
191 *Id.*
192 KY. REV. STAT. ANN. § 625.050(5); *see* Robert W. Keats, 5 Ky. Prac. Methods of Prac. 46:4 (2021).
193 KY. REV. STAT. ANN. § 625.050(6).
194 *Id.*

future litigation.[195] For example, in determining the best interests of the child and finding statutory grounds for an order of parental termination, a Kentucky court should consider, among other things, the efforts and adjustments a parent has made in their circumstances and conduct in order to make their home adequate for return of their child.[196] This consideration is highlighted in the case of *C.M.C. v. A.L.W.*[197] In this case, the court found that the evidence presented was sufficient to support the finding that the termination of a mother's parental rights was not warranted or in the best interests of her children.[198] Specifically, the mother was able to show evidence that she was actively attending parenting classes, had received counseling for domestic violence, had been in an abuse-free relationship for several years, was employed, and had received an associate's degree, while still working on her bachelor's degree.[199] This type of analysis of rehabilitative conduct by Kentucky courts is persuasive to the argument made in this note—that the State of Illinois should implement a new assessment of parental rehabilitative efforts prior to terminating parental rights to their subsequent children.

VIII. CONCLUSION

The heightened number of children in the foster care system,[200] combined with a lack of foster care homes to support them,[201] requires the State of Illinois to readdress how it assesses the termination of parental rights. By assessing the rehabilitative efforts of parents who have been previously deemed unfit by the courts and creating a more uniform system of action throughout the State of Illinois, society, child welfare agencies, and family units may benefit.

While ensuring a safe environment for children is a priority, taking a child away from his or her family should not be taken lightly.[202] The rights of parents and protecting them from an over-zealous, sometimes harsh, legal system should also be considered a priority.[203] The consequences of an erroneous termination of parental rights are the unnecessary destruction of a family.[204]

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195 Yoon, *supra* note 17, at 770.
196 *See* Keats, *supra* note 192.
197 C.M.C. v. A.L.W., 180 S.W.3d 485 (Ky. Ct. App. 2005); *see* Keats, *supra* note 192..
198 *C.M.C.*, 180 S.W.3d 485.
199 *Id.* at 494.
200 *See generally Protecting Kids, Providing Hope*, *supra* note 1.
201 *See generally Who Cares 2020: Executive Summary*, THE IMPRINT, YOUTH & FAM. NEWS (Nov. 10, 2020, 6:57 PM), https://imprintnews.org/child-welfare-2/who-cares-2020-executive-summary/49243.
202 *See* Yoon, *supra* note 17, at 744.
203 *Id.* at 744-45.
204 *Id.* at 751.

A consistent notion in both Illinois's and America's criminal justice systems is that our courts try cases, not individuals, and prior bad or criminal acts do not render an individual permanently guilty.[205] This same standard should be applied in cases determining parental rights throughout the State of Illinois, and eventually throughout the United States.

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[205] *See* Sankara, *supra* note 17, at 686.