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THE EFFECT OF DOMESTIC VIOLENCE ON PARENTAL RIGHTS IN KANSAS AFTER *IN RE ADOPTION OF A.P.*

[*IN RE ADOPTION OF A.P.*, 982 P.2D 985 (KAN. CT. APP. 1999)]

I. INTRODUCTION

Children are the future. We have been inundated with this idea since the day we were born. Teachers, parents, the news media, and many others have taken it upon themselves to ensure that everyone realizes and believes that if the next generation fails, so will our country and even our world. It seems, however, that a great many judges and legislative leaders have forgotten this lesson.

The Kansas Court of Appeals decision, *In re Adoption of A.P.*,<sup>1</sup> however, has propelled Kansas into a trend that is beginning to sweep the country. Following this trend, judges and state legislatures alike are starting to decide cases and construct laws to serve the best interests of children by considering how domestic violence affects them. *In re Adoption of A.P.* prompted the Kansas Legislature to enact a law establishing a presumption of parental unfitness in a case where one parent kills the other parent of a child.<sup>2</sup> This comment will explore the issue of termination of parental rights in the context of the trend toward protection of children. It will show that protection is needed for children who experience domestic violence and that termination, custody, and visitation laws, which consider domestic violence between parents a strike against the parental record of the perpetrator, are helpful tools in ending the circle of domestic violence in this country.

II. CASE DESCRIPTION

T.P. (hereinafter Appellant), the natural father of A.P., was convicted of the first-degree murder of A.P.'s natural mother, P.H., on August 25, 1997.<sup>3</sup> The trial court record shows that on the night of the murder, Appellant had been drinking before an argument ensued be-

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1. 982 P.2d 985 (Kan. Ct. App. 1999).

2. See *In re Adoption of A.P.*, 982 P.2d 985, 992-93 (Kan. Ct. App. 1999); see also KAN. STAT. ANN. § 38-1585 (Supp. 1998).

3. See *In re Adoption of A.P.*, 982 P.2d at 987. Initials were used to maintain the anonymity of the minor child involved in this case. See *id.*

tween himself and A.P.'s mother, regarding the payment of bills.<sup>4</sup> During the argument, Appellant retrieved his gun, loaded it, cocked it, and told P.H. to shoot him as he handed her the gun.<sup>5</sup> Appellant became concerned when P.H. took the gun, so he tried to wrestle it away from her.<sup>6</sup> The gun went off and the bullet hit P.H. in the arm, shattering her humerus.<sup>7</sup> A second bullet hit her in the head, a fact which Appellant could not explain.<sup>8</sup> He testified that he did not know how the gun got recocked or how it discharged.<sup>9</sup>

Appellant also testified that after realizing that P.H. had been shot, he picked her up to carry her out to the car in order to take her to the hospital.<sup>10</sup> He did not do so, however, because he did not want A.P. to see her in that condition.<sup>11</sup> Thus, Appellant held A.P. in the garage while he washed the blood off his hands and then called 911.<sup>12</sup>

Colby, Kansas Chief of Police, Randall Jones, testified that there were no signs of a struggle.<sup>13</sup> Kansas Bureau of Investigation (KBI) special agent, Mark Kendrick, similarly testified that it appeared that P.H. had been sitting on the couch and probably never knew what occurred.<sup>14</sup>

Appellant was convicted and sentenced to life in prison for his crime.<sup>15</sup> S.O., A.P.'s maternal aunt, was appointed the guardian and conservator of A.P.<sup>16</sup> Appellant consented to this arrangement.<sup>17</sup>

S.O. and T.O., S.O.'s husband, petitioned the court to adopt A.P. in October of 1997.<sup>18</sup> A.P.'s maternal grandparents filed a petition in support declaring that S.O. and T.O. were good parents and would be good role models for A.P. in her developmental years.<sup>19</sup> Appellant refused to consent and filed an answer objecting to the adoption.<sup>20</sup>

A.P.'s maternal aunt and uncle then asked the court to terminate

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4. See Brief of Guardian Ad Litem at 2, *In re Adoption of A.P.*, 982 P.2d 985 (Kan. Ct. App. 1999) (No. 98-81719-A).

5. See *id.*

6. See *id.*

7. See *id.*

8. See *id.*

9. See *id.*

10. See *id.*

11. See *id.*

12. See *id.*

13. See *id.* at 3.

14. See *id.*

15. See *In re Adoption of A.P.*, 982 P.2d 985, 987 (Kan. Ct. App. 1999). At minimum, Appellant will serve twenty-five years in Lansing State Penitentiary. See *id.*

16. See *id.*

17. See *id.*

18. See *id.*

19. See *id.*

20. See *id.* Appellant also stated in his answer and petition "that he had not been found to be an unfit parent, his parental rights had never been terminated, and at the time of the filing of the petition, A.P. had not been found to be a child in need of care under the KCCC." *Id.*

Appellant's parental rights.<sup>21</sup> They also asked that he be determined an unfit parent and A.P. be designated as "a child in need of care."<sup>22</sup> Appellant filed an objection to the petition, along with an executed petition requesting that his sister and brother-in-law adopt A.P., a situation to which he consented.<sup>23</sup>

At the hearing regarding the motion to terminate Appellant's parental rights, the trial court ruled that "the action was a proceeding filed pursuant to Kansas Statutes Annotated section 59-2136 and the petition requested a determination under Kansas Statutes Annotated section 59-2136(h)(2) that A.P.'s father was an unfit parent and that his consent to the adoption was unnecessary."<sup>24</sup> The court established that certain determinations should be made, under Kansas Statutes Annotated section 38-1583, in terminating a parent's rights.<sup>25</sup> In making these considerations, the court decided the evidence proved that Appellant "was unfit by conduct rendering him unable to properly care for A.P. and the conduct was unlikely to change in the foreseeable future."<sup>26</sup> Consequently,

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21. *See id.* Parental rights can be terminated pursuant to Kansas Statutes Annotated section 59-2136. According to this statute, parental rights may be terminated upon a showing by clear and convincing evidence of any of the following:

- (1) the father abandoned or neglected the child after having knowledge of the child's birth;
- (2) the father is unfit as a parent or incapable of giving consent;
- (3) the father has made no reasonable efforts to support or communicate with the child after having knowledge of the child's birth;
- (4) the father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth;
- (5) the father abandoned the mother after having knowledge of the pregnancy;
- (6) the birth of the child was the result of rape of the mother; or
- (7) the father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition.

KAN. STAT. ANN. § 59-2136(h)(1)-(7) (1993 & Supp. 1998). A termination of parental rights under this statute is designed to dispense with the need of obtaining consent for adoption from the parent. *See* KAN. STAT. ANN. § 59-2136(a).

22. *See In re Adoption of A.P.*, 982 P.2d at 987. This would be done under Kansas Statutes Annotated section 38-1583 and sections 38-1501 through 38-1593 respectively. Determining A.P. to be a child in need of care would open the door to a termination of parental rights consideration. *See* KAN. STAT. ANN. § 38-1583(a) (1993 & Supp. 1998). Once Appellant's parental rights are terminated, A.P. can be adopted. *See* KAN. STAT. ANN. § 59-2136.

23. *See In re Adoption of A.P.*, 982 P.2d at 987.

24. *Id.* The trial court in Jefferson County held two days of hearings on this matter. *See id.*

25. *See id.* *See also* KAN. STAT. ANN. § 38-1583(b)(2), (5). The trial court considered several factors in terminating Appellant's parental rights. *See In re Adoption of A.P.*, 982 P.2d at 987. It found by clear and convincing evidence that Appellant had participated in violent and inappropriate conduct toward A.P. that fell under Kansas Statutes Annotated section 38-1583(b)(2), conduct which affects the emotional and physical well-being of a child. *See id.* at 988. The court also considered the fact that Appellant had been found guilty of first-degree murder and will serve at least twenty-five years. *See id.*

The court was allowed to consider this pursuant to Kansas Statutes Annotated section 38-1583(b)(5). There was clear and convincing evidence that Appellant "had a propensity toward, and had engaged in, numerous incidents and outbursts of violence and displays of outrage against P.H.," ending in her murder. *Id.* at 988. The trial court also stated that Appellant did nothing to adjust to his circumstances to accommodate his child's needs, even though he knew his prior conflicts and incidents had caused anguish and injury to others. *See id.*

26. *In re Adoption of A.P.*, 982 P.2d at 988.

the court terminated Appellant's parental rights.<sup>27</sup>

### III. BACKGROUND

#### A. General Policy

In addition to dealing with the deep-seated idea that family is a private issue not to be interfered with by the courts,<sup>28</sup> judges and legislatures have also tangled with the idea of parents' rights. Courts have recognized that the right to raise and educate one's children as one sees fit is a liberty interest protected by the Fourteenth Amendment's Due Process Clause and by a person's fundamental right to privacy.<sup>29</sup> That fundamental right cannot be taken away without compelling reasons.<sup>30</sup> A nonexhaustive list of such reasons are listed in the Kansas statute that authorizes the termination of parental rights.<sup>31</sup>

The American court system has struggled to balance the protection of parental rights with the protection of children. Historically, the general rule has been that if a natural parent is able to take care of a child and desires to do so, then the natural parent's wishes should be considered above the wishes of others.<sup>32</sup> Being with the natural parent was, in the past, usually considered to be in the best interest of the child.<sup>33</sup>

This general rule has caused courts to fail to recognize a connection between domestic violence and harm to children.<sup>34</sup> This failure was based on many people's beliefs that while a father may be abusive toward his wife, he can still be a good and loving parent.<sup>35</sup>

Domestic violence and domestic murder are today becoming an

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27. *See id.*

28. *See* Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1083 (1991).

29. *See* *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Pierce v. Society of the Sisters of the Holy Name of Jesus and Mary*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (discussing the Supreme Court's view that parents have a fundamental right to raise their children as they see fit); *see also In re J.L.*, 891 P.2d 1125, 1129 (Kan. Ct. App. 1995) (discussing that Kansas recognizes parents' fundamental rights to raise their children as they see fit and to have custody of their children).

30. *See In re J.L.*, 891 P.2d at 1129. ("Procedural due process operates to place restraints on governmental actions which deprive individuals of 'liberty' or 'property' interests.")

31. *See* KAN. STAT. ANN. § 38-1583(b)(1)-(8) (1993 & Supp. 1998). For a listing of the factors that the court should take into account when determining whether parental rights should be terminated *see infra* part III.B.

32. *See In re Adoption of Sharp*, 419 P.2d 812, 814 (Kan. 1966) (favoring the rights of natural parents over third parties); *see also In re the Guardianship of Williams*, 869 P.2d 661, 670 (Kan. 1994) (following the parental preference doctrine).

33. *See* R. Todd Ehlert, Comment, *Family Law: Don't Disobey the Parental Preference Doctrine* [In re Guardianship of Williams, 869 P.2d 661 (Kan. 1994)], 34 WASHBURN L.J. 119, 129 (1994) ("Placing a child in the parent's custody achieves the child's best interests.")

34. *See* Amy Haddix, Comment, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 CAL. L. REV. 757, 770 (1996).

35. *See id.*

exception to the aforementioned general rule.<sup>36</sup> State legislatures and courts are beginning to realize that there is a relationship between domestic violence and the best interests of children warranting the consideration of domestic violence in custody and termination of parental rights proceedings.<sup>37</sup>

There are still numerous states, however, that refuse to allow domestic violence evidence to be considered in termination of parental rights proceedings.<sup>38</sup> Courts insist on holding the parent-child relationship up on a pedestal, above all others.<sup>39</sup> This resistance against considering domestic violence most likely stems from the lack of training judges receive regarding how to deal with domestic violence and how it affects children.<sup>40</sup> Courts have a tendency to only focus on parental behavior if the behavior affects the child directly, as with child abuse.<sup>41</sup> This produces an unwanted result of inconsistent case law concerning domestic murder and termination of parental rights.<sup>42</sup>

#### *B. The Process for Termination of Parental Rights and Adoption in Kansas*

An examination of the process for termination of parental rights and adoption in Kansas makes it easier to understand the court's rationale in *In re Adoption of A.P.* Chapter 38 of the Kansas statutes encompasses the Kansas Code for Care of Children (KCCC).<sup>43</sup> A parent's constitutional rights to raise his or her children may be terminated under the KCCC.<sup>44</sup> To do so, the court must first conclude that the child is a child in need of care.<sup>45</sup> The definition of a child in need of care is laid out in section 38-1502(a)(1) through (12) of the Kansas Statutes Anno-

36. See *id.* at 768-69.

37. See Cahn, *supra* note 28, at 1062; see also 750 ILL. COMP. STAT. 50/1 (West 1993 & Supp. 1999); KAN. STAT. ANN. § 38-1585 (Supp. 1998); WASH. REV. CODE § 13.34.130 (1993 & Supp. 1999); Howard A. Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 FAM. L.Q. 357, 358-59 (1995).

38. See Haddix, *supra* note 34, at 771; see also ALA. CODE § 26-18-7 (1993 & Supp. 1998).

39. See Danice M. Kowalczyk, Note, *Lizzie's Law: Healing the Scars of Domestic Murder-an Emerging National Model*, 64 BROOK. L. REV. 1241, 1245 (1998).

40. See Davidson, *supra* note 37, at 359-60. For a long time, social workers, judges, attorneys, and others have not acknowledged the link between domestic violence and child maltreatment. See *id.* at 359. It is still a problem today. Training for dealing with domestic violence and child mistreatment is usually given separately from one another causing no links to be made between the two. See *id.* at 360.

41. See Kowalczyk, *supra* note 39, at 1253; see also Cahn, *supra* note 28, at 1084.

42. See Kowalczyk, *supra* note 39, at 1253-54.

43. KAN. STAT. ANN. §§ 38-1582 to 38-1585 (1993 & Supp. 1998).

44. See *id.*

45. See *In re J.L.*, 891 P.2d 1125, 1126 (Kan. Ct. App. 1995) (holding that a child must be adjudicated as a child in need of care before a parent's rights may be terminated under Chapter 38). The court in *In re Adoption of A.P.* used the chapter 38 criteria, but was quick to point out that this was not a child in need of care proceeding and A.P. did not have to be adjudicated as a "child in need of care" for her father's parental rights to be terminated in a chapter 59 adoption proceeding. *In re Adoption of A.P.*, 982 P.2d 985, 990 (Kan. Ct. App. 1999).

tated.<sup>46</sup> Anyone who may be seen as an interested party may ask that parental rights be terminated in a child in need of care proceeding.<sup>47</sup> At the hearing, many factors will be taken into account when determining whether parental rights should be terminated, they are as follows:

- (1) Emotional illness, mental illness, mental deficiency or physical disability of the parent, of such duration or nature as to render the parent unlikely to care for the ongoing physical, mental and emotional needs of the child;
- (2) conduct toward a child of a physically, emotionally or sexually cruel or abusive nature;
- (3) excessive use of intoxicating liquors or narcotic or dangerous drugs;
- (4) physical, mental or emotional neglect of the child;
- (5) conviction of a felony and imprisonment;
- (6) unexplained injury or death of another child or stepchild of the parent;
- (7) reasonable efforts by appropriate public or private child caring agencies have been unable to rehabilitate the family; and
- (8) lack of effort on the part of the parent to adjust the parent's circum-

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46. KAN. STAT. ANN. § 38-1502(a)(1)-(12) (1993 & Supp. 1998). The statute provides:

(a) Child in need of care means a person less than 18 years of age who:

- (1) Is without adequate parental care, control or subsistence and the condition is not due solely to the lack of financial means of the child's parents or other custodian;
- (2) is without the care or control necessary for the child's physical, mental or emotional health;
- (3) has been physically, mentally or emotionally abused or neglected or sexually abused;
- (4) has been placed for care or adoption in violation of law;
- (5) has been abandoned or does not have a known living parent;
- (6) is not attending school . . . ;
- (7) . . . does an act which, when committed by a person under 18 years of age is prohibited by state law, city ordinance or county resolution but which is not prohibited when done by an adult;
- (8) while less than 10 years of age, commits any act which if done by an adult would constitute the commission of a felony or misdemeanor . . . ;
- (9) is willfully and voluntarily absent from the child's home without the consent of the child's parent or other custodian;
- (10) is willfully and voluntarily absent at least a second time from a court ordered or designated placement, or a placement pursuant to court order, if the absence is without the consent of the person with whom the child is placed or, if the child is placed in a facility, without the consent of the person in charge of such facility or such person's designee;
- (11) has been residing in the same residence with a sibling or another person under 18 years of age, who has been physically, mentally or emotionally abused or neglected, or sexually abused;
- (12) or while less than 10 years of age commits the offense defined in Kansas Statutes Annotated section 21-4204a and amendments thereto.

*Id.*

47. See *In re J.D.D.*, 908 P.2d 633, 635-36 (Kan. Ct. App. 1995); see also KAN. STAT. ANN. §§ 38-1581(a)-(b)(1), 38-1505(a) (1993 and Supp. 1998). The first step in this process is for an attorney—preferably—to file a petition or motion requesting termination of parental rights on behalf of the third party. See KAN. STAT. ANN. § 38-1582(a). The court will then set a time and place for the hearing and give notice of the hearing to all of the child's grandparents or closest relatives and to the preadoptive parents or relatives providing care. See KAN. STAT. ANN. § 38-1582(b)(1). A guardian ad litem will be appointed to represent the child and present arguments in favor of the best interests of the child. See KAN. STAT. ANN. § 38-1505(a). Counsel may be appointed for an indigent parent at any time during the proceeding. See KAN. STAT. ANN. § 38-1505.

stances, conduct or conditions to meet the needs of the child.<sup>48</sup>

This statute also provides that the opinions and wishes of a parent convicted of an offense, as provided in Kansas Statutes Annotated section 38-1585(a)(7), may be disregarded by the courts when considering the placement of the child.<sup>49</sup> A party whose parental rights have been terminated may appeal the termination under Kansas Statutes Annotated section 38-1591.<sup>50</sup>

When parental rights have been terminated, a child may be placed in temporary care,<sup>51</sup> or if it appears that adoption is possible, the court will enter one of two orders. One possibility is for the court to enter an order granting custody of the child to a person of "good moral character" and whose consent will be the only consent needed for adoption.<sup>52</sup> The alternative would be for the court to enter an order granting custody to the proposed adoptive parents.<sup>53</sup> Consent to the adoption would then be entered by those parents.<sup>54</sup>

The procedure for adoption is governed by chapter 59 of the Kansas statutes and the Kansas Adoption and Relinquishment Act.<sup>55</sup> The procedure closely resembles the procedure described above for termination of parental rights under the KCCC.<sup>56</sup>

48. KAN. STAT. ANN. § 38-1583(b)(1)-(8), (e) (1993 & Supp. 1998). Subsection (e) of this statute provides—with regard to the factors—that any one of the factors "alone may, but does not necessarily, establish grounds for termination of parental rights." *Id.* The determination is to be made after considering all the factors that apply to the situation. *See id.*

49. *See* KAN. STAT. ANN. § 38-1583(h) (1993 & Supp. 1998), which states:

If a parent is convicted of an offense as provided in subsection (7) of Kansas Statutes Annotated section 38-1585 and amendments thereto or is adjudicated a juvenile offender because of an act which if committed by an adult would be an offense provided in subsection (7) of Kansas Statutes Annotated section 38-1585 and amendments thereto, and if the victim was the other parent of a child, the court may disregard such convicted or adjudicated parent's opinions or wishes in regard to the placement of such child.

*Id.*

50. KAN. STAT. ANN. § 38-1591 (1993 & Supp. 1998). This statute provides that "an appeal may be taken by any interested party from any adjudication, disposition, termination of parental rights or order of temporary custody in any proceedings pursuant to this code." *Id.* The appeal is to be to a district judge and it "shall be heard within 30 days from the date the notice of appeal is filed." *Id.*

51. *See* KAN. STAT. ANN. § 38-1543 (1993 & Supp. 1998).

52. *See* KAN. STAT. ANN. § 38-1584(b)(1)(A) (1993 & Supp. 1998).

53. *See* KAN. STAT. ANN. § 38-1584(b)(1)(B).

54. *See* KAN. STAT. ANN. § 38-1584(b)(1)(B)(2). This statute also provides instructions for placing children in long term foster care when adoption does not appear to be in the near future. *See id.*

55. KAN. STAT. ANN. §§ 59-2128 to 59-2136 (1993 & Supp. 1998). These statutes construct the Kansas Adoption and Relinquishment Act.

56. *See* KAN. STAT. ANN. §§ 59-2128 to 59-2134. The first step in beginning an adoption proceeding, as with a termination proceeding, is filing a petition. *See* KAN. STAT. ANN. § 59-2128. The petition is to be filed by the person wishing to adopt the child. *See id.* It should state, among other facts required by the statute: the name, residence, and address of the petitioner; the name of the child, date of birth, and place of residence; and the facts relied upon as eliminating the necessity for consent, if consent has not been obtained. *See* KAN. STAT. ANN. § 59-2128(a)(1)(A)-(G). Further information that must be filed with the petition is provided in Kansas Statutes Annotated section 59-2130. *See* KAN. STAT. ANN. § 59-2130. Once the petition has been filed, the court will fix a time and place for the hearing. *See* KAN. STAT. ANN. § 59-2133. Notice is then given to the parents, unless their rights have been previously terminated. *See id.* Pending a hearing, the court will enter an

Consent is an important requirement in adoption cases. Its importance stems from a natural parent's fundamental right, recognized by the United States Supreme Court, to the custody of his or her children.<sup>57</sup> Unfitness of the natural parent is, however, an exception to this right.<sup>58</sup>

There are several requirements for proper consent. Consent is to be given by the living parents, if any.<sup>59</sup> The consent must be given within six months prior to the filing date of the petition.<sup>60</sup> It must be voluntarily given and is final unless the consenting party can prove by clear and convincing evidence that the consent was not voluntarily given.<sup>61</sup> The legal guardian may give consent if the parents' consent has been deemed unnecessary under Kansas Statutes Annotated section 59-2136(h).<sup>62</sup> Under this provision the court has the power to terminate the parental rights of a parent present at an adoption proceeding upon a finding by clear and convincing evidence of any of the seven factors listed in the statute.<sup>63</sup>

Another requirement for adoption is that the petitioner must obtain an assessment by a court approved social worker.<sup>64</sup> The assessment will be made after the social worker has observed the child in the petitioner's home and has investigated the background of the petitioner.<sup>65</sup> This requirement can, however, be waived upon request by the child's grandparents or the court.<sup>66</sup>

A valid decree of adoption bestows upon the adoptive parents all the rights and duties of the adoptive child.<sup>67</sup> The state of Kansas then issues a new birth certificate and attaches it to the original.<sup>68</sup>

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order providing for the care and custody of the child. See KAN. STAT. ANN. § 59-2131. A hearing will then be held to consider the adoption. See KAN. STAT. ANN. § 59-2134.

57. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("Natural parents have a fundamental liberty interest in the care, custody, and management of their child."); see also *Sheppard v. Sheppard*, 630 P.2d 1121, 1127 (Kan. 1981) ("It is clear under our decisions and those of the United States Supreme Court that a natural parent's right to the custody of his or her children is a fundamental right which may not be disturbed by the state or by third persons, absent a showing that the natural parent is unfit.").

58. See *Sheppard*, 630 P.2d at 1127.

59. See KAN. STAT. ANN. § 59-2129 (1993 & Supp. 1998).

60. See KAN. STAT. ANN. § 59-2114(b) (1993).

61. See *id.* § 59-2114(a). The burden of proof is on the consenting party and it must be alleged and proven before the final decree of adoption is entered. See *id.*

62. KAN. STAT. ANN. § 59-2129.

63. See KAN. STAT. ANN. § 59-2136(h)(1)-(7) (1993 & Supp. 1998). See *supra* note 21 for a listing of the seven factors.

64. See KAN. STAT. ANN. § 59-2132(a) (1993 & Supp. 1998).

65. See KAN. STAT. ANN. § 59-2132(e).

66. See KAN. STAT. ANN. § 59-2132(h).

67. See KAN. STAT. ANN. § 59-507 (1993).

68. See KAN. STAT. ANN. § 65-2423 (1993).

## IV. ANALYSIS

## A. Arguments and Reasoning in the Case

In *In re Adoption of A.P.* the Appellant sought to prevent the termination of his parental rights.<sup>69</sup> The court held that:

[a] court may consider factors listed in the KCCC for terminating parental rights when making a determination of parental unfitness in an adoption proceeding, [the] father's conviction for [the] mother's murder was properly considered in determining unfitness, [the] finding that [the] father was unfit was supported by evidence, [the] father's objections to alleged defects in [the] petition were waived, and [the] petition substantially complied with statutory requirements.<sup>70</sup>

Thus, Appellant's parental rights were terminated by the court.

The court, based on the doctrine of *in pari materia*, used the unfitness factors listed in Kansas Statutes Annotated section 38-1583 of the KCCC to define unfitness as used in section 59-2136(h) of the Kansas Adoption and Relinquishment Act.<sup>71</sup> The Appellant objected to the use of the KCCC factors in the adoption proceeding.<sup>72</sup>

Kansas Statutes Annotated section 59-2136(h) provides that parental rights of a parent who appears at an adoption proceeding may be terminated upon the finding of clear and convincing evidence of the presence of any of the seven factors.<sup>73</sup> The court recognized that al-

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69. See *In re Adoption of A.P.*, 982 P.2d 985, 988-92 (Kan. Ct. App. 1999).

70. *Id.* Appellant made many arguments, all of which the court rejected. See *id.* Appellant first argued that the trial court had erred in finding that he was an unfit parent. See *id.* at 988. He argued that the court must find that he failed all seven of the factors listed in Kansas Statutes Annotated section 59-2136(h) for his rights to be terminated. See *id.* Appellant offered no support for this argument. See *id.* The court pointed out that the statute clearly states that parental rights may be terminated upon a finding of *any* of the seven factors. See *id.* Appellant also argued that the court could not have found sufficient evidence to support a finding that he was cruel and abusive toward A.P. See *id.* at 990. The court replied that by killing A.P.'s mother, Appellant had deprived his child of the love and affection she would have received from her mother and that this alone was enough to constitute cruel and abusive behavior. See *id.* Next, Appellant asserted that the petition for adoption was deficient. See *id.* at 991. The court quickly disposed of this issue, holding that Appellant waived this issue by not asserting it until a post-trial motion. See *id.* It also found that the petitioner had substantially complied with the requirements of Kansas Statutes Annotated section 59-2128. See *id.* at 992. Finally, Appellant argued that the court erred in not hearing the adoption petition entered by his sister and brother-in-law since he had consented to that adoption. See *id.* at 992. He claimed that it was unnecessary to terminate his parental rights since he had given his consent. See *id.* The court ruled that any issue regarding this adoption petition was rendered moot when A.P.'s paternal aunt and uncle withdrew their petition for adoption on July 22, 1998, after A.P.'s father's parental rights had been terminated. See *id.*

71. See *id.* at 990 ("The KCCC was the logical statutory framework for the trial court to draw upon in determining parental unfitness since the term 'unfit' is not defined in the Kansas Adoption and Relinquishment Act."). The court was quick to point out that consideration of the factors listed in the KCCC does not mean that the court found A.P. to be a child in need of care. See *id.* This was an adoption proceeding, not a child in need of care proceeding. See *id.* The court's determination of Appellant as unfit was simply a means of dispensing with the requirement of his consent. See *id.*

72. See *id.* at 988. Appellant argued that for the court to use the factors in the KCCC, A.P. had to be adjudicated as a child in need of care. See *id.* He stated that A.P. was never found to be a child in need of care and therefore the court's application of those factors was incorrect. See *id.*

73. See *id.* at 989.

though Kansas Statutes Annotated section 59-2136(h) authorizes the termination of parental rights upon a finding that a parent is unfit, it does not disclose a definition of unfitness or factors to be considered in determining if a parent is unfit.<sup>74</sup>

The court stated that the Kansas Legislature had assisted in constructing a “working definition of parental unfitness.”<sup>75</sup> Kansas Statutes Annotated section 38-1583 provides a “nonexhaustive list” of eight factors that the court is to consider in determining if a parent is unfit “by reasons or conduct which renders the parent unable to care properly for a child and the conduct or condition is unlikely to change in the foreseeable future.”<sup>76</sup> The court stated that the eight factors listed under section 38-1583(b)<sup>77</sup> and the four additional factors listed under section 38-1583(c)<sup>78</sup> help define parental unfitness.<sup>79</sup> The court then confirmed that the twelve factors mentioned above were a “logical statutory framework for the trial court to draw upon” since the term “unfit” was not defined in the Kansas Adoption and Relinquishment Act.<sup>80</sup>

This application of factors from one statute to define a term in another statute, *in pari materia*, is supported by case law.

It is a longstanding rule that in construing one statute relating to the same subject matter or having the same general purpose as another, both statutes may be construed together to determine the intent of the legislature

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74. See *id.* See also KAN. STAT. ANN. § 59-2136(h)(2) (1993 & Supp. 1998) (providing no definitions or factors relating to unfitness). The court relied on *In re Vallimont*, in defining the term “unfit.” It stated:

While the standard of fitness required of parents is difficult to specify without being somewhat ambiguous, conduct which makes a parent unfit may be defined within limits. There is no statutory definition of the word ‘unfit.’ It therefore must be given its ordinary significance, having due regard to the context. In general, the word means unsuitable, incompetent, or not adapted for a particular use or service. As applied to the relation of rational parents to their child, the word usually although not necessarily imports something of moral delinquency. Parents who treat the child with cruelty or inhumanity, or keep the child in vicious or disreputable surroundings, are said to be unfit. Parents who abandon the child, or neglect or refuse, when able so to do, to provide proper or necessary support and education required by law, or other care necessary for the child’s well being are said to be unfit. Violence of temper or inability or indisposition to control unparental traits of character or conduct, might constitute unfitness. So, also, incapacity to appreciate and perform the obligations resting upon parents might render them unfit, apart from other moral defects.

*In re Adoption of A.P.*, 982 P.2d at 989 (citing *In re Vallimont*, 321 P.2d 190, 196 (Kan. 1958)).

75. *In re Adoption of A.P.*, 982 P.2d at 989.

76. *Id.*

77. KAN. STAT. ANN. § 38-1583(b) (1993 & Supp. 1998).

78. KAN. STAT. ANN. § 38-1583(c). The additional four factors are:

- (1) failure to assure care of the child in the parental home when able to do so;
- (2) failure to maintain regular visitation, contact, or communication with the child or with the custodian of the child;
- (3) failure to carry out a reasonable plan approved by the court directed toward the integration of the child into the parental home; and
- (4) failure to pay a reasonable portion of the cost of substitute physical care and maintenance based on ability to pay.

*Id.*

79. See *In re Adoption of A.P.*, 982 P.2d at 989.

80. *Id.* at 990.

as to such subject matter or purpose.<sup>81</sup>

As stated by the Appellee, there was no harm done by considering the section 38-1583 criteria.<sup>82</sup> The evidence resulted in a conclusive finding of unfitness under section 38-1583. Surely that evidence would be sufficient to satisfy the section 59-2136 criteria, as long as the evidence was clear and convincing, as required by that statute.<sup>83</sup> By using the doctrine of *in pari materia*, the court was able to define unfitness as used in the Kansas Adoption and Relinquishment Act and to preserve the legislative intent behind statutes that terminate parental rights.

### B. Kansas Legislation Resulting from this Case

Domestic violence is an epidemic in our country. Studies show that more than 3.3 million children each year are exposed to domestic violence.<sup>84</sup> The United States Department of Justice statistics show that each year from 1992 to 1996, more than 960,000 women were victimized by an intimate.<sup>85</sup> Statistics also show a direct link between domestic violence and children. Seventy percent of men who abuse their wives or female partners also abuse their children.<sup>86</sup> In addition, children who are exposed to violence at home are more likely to experience emotional and behavioral problems.<sup>87</sup> They are apt to isolate themselves, solve problems with violence, suffer from anxiety, and may experience developmental set backs.<sup>88</sup> Male children who are exposed to domestic violence are at a significantly higher risk to abuse their own partners in the future.<sup>89</sup>

In the past, although most states would consider evidence of domestic violence between parents when deciding custody cases, they were reluctant to consider the same evidence in a more serious termination case.<sup>90</sup> As a result, our leaders neglected to protect children from

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81. Florida, Department of HRS *ex rel.* Petit v. Breeden, 901 P.2d 1357, 1363 (Kan. Ct. App. 1995). See also Clark v. Murray, 41 P.2d 1042, 1042 (Kan. 1935); *In re* Adoption of Baby Girl H v. Thompson, 739 P.2d 1, 4 (Kan. Ct. App. 1987) (construing a Chapter 59 statute *in pari materia* with a Chapter 38 statute).

82. See Brief of Appellee at 12, *In re* Adoption of A.P., 982 P.2d 985 (Kan. Ct. App. 1999) (No. 98-81719-A).

83. See *id.*

84. See Bonnie E. Carlson, *Children's Observations of Interparental Violence*, in BATTERED WOMEN AND THEIR FAMILIES: INTERVENTION STRATEGIES AND TREATMENT PROGRAMS 147, 159-60 (Albert R. Roberts ed., 1984).

85. See U.S. DEPARTMENT OF JUSTICE, VIOLENCE BY INTIMATES, BUREAU OF JUSTICE STATISTICS FACTBOOK 37 (1998).

86. See K.J. WILSON, WHEN VIOLENCE BEGINS AT HOME 30 (1997).

87. See William Arroyo & Spencer Eth, *Assessment Following Violence—Witnessing Trama*, in ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN 27-29 (Einat Peled et al. eds., 1995).

88. See WILSON, *supra* note 86, at 31-32.

89. See Davidson, *supra* note 37, at 369.

90. See Merry Hofford et al., *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 199 (1995). State termination statutes usually authorize termination of parental rights under three broad rationales: neglect, abandonment, and parental

domestic violence. Today, most states, through legislation, have taken that step toward consideration of domestic violence in custody cases.<sup>91</sup> Even though few have applied it in parental rights termination cases,<sup>92</sup> considering domestic violence seems to be the trend in family law today.<sup>93</sup>

The Kansas termination statute has allowed the consideration, in termination proceedings, of a conviction of the parent of a felony for awhile.<sup>94</sup> Recently, however, the Kansas legislature enacted a new law, which goes a step further. This new law is the direct result of *In re Adoption of A.P.*<sup>95</sup> and other similar cases. Kansas Statutes Annotated section 38-1585(a)(7) provides as follows:

It is presumed . . . that a parent is unfit by reason of conduct or condition which renders the parent unable to fully care for a child, if the state establishes by clear and convincing evidence that: a parent has been convicted of capital murder . . . , murder in the first degree . . . , murder in the second degree . . . or voluntary manslaughter . . . , or if a juvenile has been adjudicated a juvenile offender because of an act which if committed by an adult would be an offense as provided in this subsection, and the victim of such murder was the other parent of the child.<sup>96</sup>

Thus, the burden of proof shifts to the parent for a rebuttal of that presumption.<sup>97</sup> This legislation allows the court to disregard the convicted parent's opinions and wishes as to the adoption or placement of the child.<sup>98</sup>

This new statute has thrust Kansas into a trend encompassing the country in which domestic violence and domestic murder are being used as rationales for terminating parental rights.

The hearings heard in the Senate Judiciary Committee shed light on the legislative intent behind this statute. There were seven people

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unfitness. See *In re C.M.J.*, 663 N.E.2d 498 (Ill. App. Ct. 1996) (applying the unfitness rationale); *In re Adoption of Baby Boy S.*, 822 P.2d 76 (Kan. Ct. App. 1991) (applying the abandonment rationale); *In re T.G.*, 965 S.W.2d 326 (Mo. Ct. App. 1997) (applying the abuse/neglect rationale).

91. See Audrey E. Stone and Rebecca J. Fialk, *Backlash Against the Abused Victim in Custody Disputes*, 4 DOMESTIC VIOLENCE REP. 17, 17 (1999). Over forty states currently take into account domestic violence between parents in custody battles. See *id.*

92. See, e.g., 750 ILL. COMP. STAT. 50/1 (West 1993 & Supp. 1999); WASH. REV. CODE § 13.34.130 (1993 & Supp. 1999)

93. Interview with Nancy Maxwell, Professor of Family Law, at Washburn University School of Law (Sept. 22, 1999). See also Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994*, 29 FAM. L.Q. 253, 253 (1995). The Violence Against Women Act, 42 U.S.C. §§ 13931 - 14040 (1994 & Supp. 1998), passed by the U.S. Congress in 1994 exemplifies the present trend in family law. The U.S. Congress used the Act to mandate that crimes against women be treated with the same seriousness as racially motivated crimes. See *id.* This Act seemed to set the trend in motion. Many states passed their custody and termination statutes which consider domestic violence in the years following.

94. See KAN. STAT. ANN. § 38-1583(b)(5) (1993 & Supp. 1998).

95. 982 P.2d 985, 992-93 (Kan. Ct. App. 1999).

96. KAN. STAT. ANN. § 38-1585 (Supp. 1998).

97. See *id.* ("The burden of proof is on the parent to rebut the presumption [of unfitness] by clear and convincing evidence.")

98. See *In re Adoption of A.P.*, 982 P.2d at 993.

who testified in support of this bill on March 10, 1998.<sup>99</sup> All of the witnesses stressed the need for this bill, dubbed "Phoebe's law,"<sup>100</sup> to ensure the protection of the children of Kansas in cases of domestic murder, by presuming that the convicted parent is unfit.<sup>101</sup> Testimony included personal stories of cases of domestic murder<sup>102</sup> and expert opinions.<sup>103</sup>

The testimonies heard in the Senate Judiciary Committee and throughout the legislature hit a nerve in lawmakers. A similar bill had been presented in 1994, but had not passed.<sup>104</sup> This time the bill passed and was signed into law by Governor Bill Graves on April 23, 1998.<sup>105</sup>

This law does provide protection to the children of Kansas, but it has one potential flaw. It states that there is a presumption of unfitness if a parent has been convicted of capital murder, first or second-degree murder, or voluntary manslaughter.<sup>106</sup> However, it conditions this on the victim of "such murder" being the other parent of the child.<sup>107</sup> The word "murder" creates ambiguity in that voluntary manslaughter is not murder.<sup>108</sup> This provision should read "such crime"<sup>109</sup> to ensure that the

99. See generally *Persons Convicted of Murder or Manslaughter, Parental Rights may be Terminated if Victim was Other Parent of Child: Hearing on H.B. 2820 Before the Senate Comm. on Judiciary*, 1998 Legis., Reg. Sess. (Kan. 1998).

100. See *id.* (statement of Representative Jim Morrison). Representative Morrison made his support for the bill known during this hearing. See *id.* He named the bill "Phoebe's Law" for a woman in his district murdered by her husband (A.P.'s mother). See *id.* He cited the Massachusetts law, known as "Lizzie's Law," as precedent for this type of statute dealing with domestic murder and children. See *id.* He requested that "Phoebe's Law" be passed without haste as the Massachusetts legislature did when passing "Lizzie's Law." See *id.*

101. See *id.*

102. See *id.* (statement of Verna Bagby and Gene Osborne). Verna Bagby and Gene Osborne gave emotional testimony in support of the bill. See *id.* Both had experienced first hand what it was like to have their daughters murdered by their daughters' husbands and for the husbands to retain custody of the children. See *id.*

103. See *id.* (statement by Susan Arnold, Executive Director, Best Interest of the Child, Inc.). Arnold asked that lawmakers enact tougher laws that would demand criminals take responsibility for their actions. See *id.* She testified that:

[I]n the state of Kansas an individual convicted of a capital crime or murder automatically loses many of his rights as a citizen. He or she cannot ever purchase a firearm, vote, hold a liquor license or certain other state licenses. But, in the current system, even if you commit a heinous crime of murder of your child's other parent, there is nothing in the statutes that addresses this as a reason to sever your parental rights. These life in prison felons have nothing better to do than control their children like puppets through our court system.

*Id.* Arnold asked the committee members to pass this bill so that children would be able to rebuild their lives with a new, stable family instead of being tied to a jailed parent who has murdered their other parent. See *id.*

104. See H.B. 2852, 1994 Leg., Reg. Sess., Ch. 301 § 9 (Kan. 1994).

105. See HOUSE JOURNAL, 1998 Leg., Reg. Sess. (Kan. 1998). House Bill 2820 was first introduced in the House on February 4, 1998. See *id.* at 1161. In depth hearings were held in both the House and Senate Judiciary Committees throughout the remaining part of the session. See *id.* at 1163, 1297, 1331. The bill passed in its final form in the House on April 10, 1998, with a vote of 121 to 0 in favor. See *id.* at 1973-74. It passed the Senate on the same date, with similar overwhelming support, 40 to 0 in favor of the bill. See SENATE JOURNAL, 1998 Leg., Reg. Sess. at 1617-18 (Kan. 1998).

106. See KAN. STAT. ANN. § 38-1585(a) (7) (Supp. 1998).

107. See *id.*

108. Interview with Nancy Maxwell, Professor of Family Law, at Washburn University School

statute incorporates all crimes intended.<sup>110</sup> As it stands now, this defect in the statute could potentially result in litigation as to the true meaning of the statute. Parents convicted of voluntary manslaughter<sup>111</sup> could attempt to use the language to show that the legislators wanted only convicted murderers to have their parental rights terminated. There is little in the committee hearing minutes that would prove otherwise.

Despite this flaw, the enactment of this statute shows that Kansas has turned away from the general family law rule that it is always in the best interest of the child to remain with his or her natural parents.<sup>112</sup> Kansas lawmakers have now realized that is not always the case. This new statute breaks from the traditional family law idea of protecting the rights of parents. Instead, Kansas lawmakers have begun to protect children's rights, despite the fact that the new law limits parental rights commonly considered as constitutionally protected. It seems that the statistics mentioned above, in addition to facts such as the ones in this case,<sup>113</sup> have finally made lawmakers realize the old rule had to be replaced. Thus, they have stepped forward to protect these children through the enactment of Kansas Statutes Annotated section 38-1585.

### C. Statutes in Other Jurisdictions

Other states besides Kansas have taken the initiative and joined in the trend toward considering domestic violence in proceedings regarding children. States like Massachusetts, New York, Louisiana, Washington, and Illinois are giving a new meaning to children's rights.

In August of 1997, Massachusetts passed what is known as "Lizzie's Law."<sup>114</sup> It was the first law of its kind in the country.<sup>115</sup> The law provides that in the case of one parent murdering another, the child cannot be forced to visit the surviving parent in prison because the convicted murderer's visitation privileges are suspended.<sup>116</sup> This law was passed after five year old Elizabeth Thompson's father was convicted of

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of Law (Sept. 22, 1999).

109. *Id.*

110. *See Id.*

111. Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1477 (1996). The Bureau of Justice Statistics found that only thirty-seven percent of the sixty-eight percent of husbands charged with the first-degree murder of their wives were convicted of that offense. *See id.* Thirty-two percent were convicted of manslaughter. *Id.*

112. *See Ehlert, supra* note 33.

113. *See In re Adoption of A.P.*, 982 P.2d 985, 985 (Kan. Ct. App. 1999); *see also* KAN. STAT. ANN. § 38-1585 (Supp. 1998). The passage of this statute would not have changed the outcome of *In re Adoption of A.P.* If this statute had been in place at the time of this case, however, it would have been a much easier case to try. A.P.'s father would have been presumed unfit and had the burden of proving otherwise. *See* KAN. STAT. ANN. § 38-1585(b).

114. MASS. ANN. LAWS ch. 209, § 37 (Law. Co-op. 1994 & Supp. 1999).

115. *See Kowalczyk, supra* note 39, at 1243.

116. *See* MASS. ANN. LAWS ch. 209, § 37.

murdering her mother, and her father demanded that Elizabeth visit him in prison.<sup>117</sup> The Massachusetts legislature protected Elizabeth's right not to visit the "bad man"<sup>118</sup> (as Elizabeth referred to her father) in prison by enacting this law. Supporters of "Lizzie's Law" would like it to be expanded to apply to custody cases as well.<sup>119</sup>

New York has also taken steps to recognize the part domestic violence plays in the lives of children. New York's statute, known as the *Lee-Anne Cruz Memorial Act*, is similar to the Massachusetts act, but it goes one step further and applies to custody cases.<sup>120</sup> In addition, the New York Supreme Court, Appellate Division, First Department, recently handed down a decision stating that a pattern of domestic violence between parents that is witnessed by their children constitutes neglect per se.<sup>121</sup>

The Louisiana custody statute goes beyond both the Massachusetts and New York statutes by providing that a presumption is created that no parent with a history of domestic violence shall be awarded custody of a child.<sup>122</sup> The presumption may be rebutted by evidence that the parent has successfully completed a treatment program, is not abusing drugs or alcohol, and that it is in the best interests of the child for the parent to have contact with the child.<sup>123</sup>

The Washington State Legislature also has included murder of a parent by the other parent as a consideration in termination proceedings.<sup>124</sup> This Act, however, creates no presumption. It is weighted the same as any other consideration listed in the statute.<sup>125</sup>

Illinois amended its termination statute in 1994 to provide that if a parent is convicted of first-degree murder or second-degree murder of a parent of the child in question, a presumption of unfitness is created.<sup>126</sup> The parent can overcome that presumption by clear and convincing evidence of fitness.<sup>127</sup> This statute closely resembles the Kansas statute, although the Kansas statute includes voluntary manslaughter in its list of convictions.<sup>128</sup>

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117. See Kowalczyk, *supra* note 39, at 1242.

118. See Don Aucoin, *Murder Victim's Family Asks Lawmakers to OK "Lizzie's Law"*, BOSTON GLOBE, July 2, 1997, at B2. (quoting Elizabeth Thompson).

119. See Kowalczyk, *supra* note 39, at 1279.

120. See *id.* at 1270; see also N.Y. DOM. REL. LAW § 240 (McKinney 1998 & Supp. 1999).

121. See *In re Lonell*, 673 N.Y.S.2d 116, 116 (App. Div. 1998).

122. See LA. REV. STAT. ANN. § 9:364 (West Supp. 1999).

123. See *id.*

124. See WASH. REV. CODE § 13.34.130 (1993 & Supp. 1999).

125. See *id.*

126. See 750 ILL. COMP. STAT. 50/1 (West 1993 & Supp. 1999); see also *In re C.M.J.*, 663 N.E.2d 498, 501 (Ill. App. Ct. 1996).

127. See *In re C.M.J.*, 663 N.E.2d at 501.

128. See KAN. STAT. ANN. § 38-1585(a)(7) (Supp. 1998).

## V. CONCLUSION

*In re Adoption of A.P.* and similar cases induced the Kansas Legislature to pass laws to protect children. Kansas Statutes Annotated section 38-1585 is one of a few laws of its kind in the United States. Kansas, Massachusetts, Illinois, New York, Louisiana, and Washington are setting examples for others to follow. Perhaps because of the efforts of a few, someday every child in the United States will be protected.

In the future, under these laws, children who have experienced the pain of the death of their mother or father at the hand of their other parent, will be protected from contact with that parent and from having to experience the same atrocity again.

Those children can now be placed with loving adoptive parents without having to wait for their convicted parent to consent to their adoption. By keeping children away from violent parents they are less likely to be abusers themselves. Thus, we are also removing them from the circle of domestic violence. Although not the only answer, it is a step toward ending the domestic violence epidemic. The application of this law prevents the children, who are our future, from being placed in the hands of murderers.

Amy E. Wilbur