

Fall 1993

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Recommended Citation

Khristine Ann Heisinger, *Child Support Properly a Factor in Determining Best Interests of Child in Voluntary Termination of Parental Rights*, 58 Mo. L. REV. (1993)

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Child Support Properly a Factor in Determining Best Interests of Child in Voluntary Termination of Parental Rights

*In re R.A.S.*¹

I. INTRODUCTION

Termination of parental rights is available only by statute.² Missouri provides for voluntary termination of parental rights only if the parent whose rights are to be terminated has consented in writing to the termination and if the termination will be in the best interests of the child.³ All Missouri statutory provisions concerning termination of parental rights are to be "construed so as to promote the best interests and welfare of the child."⁴ The factors to be considered in determining the "best interest of the child" are enumerated in the statute,⁵ but they are quite general.⁶

Problems arise when using these guidelines in a proceeding to voluntarily terminate the parental rights of an absent parent. What role does the child's right to parental support play? How strong is the policy of parental support? Are fathers, especially absent or putative fathers, treated differently than mothers in the area of voluntary termination of parental rights? This Note, which focuses on the Western District of the Missouri Court of Appeals' recent decision in *In re R.A.S.*,⁷ addresses these issues. In *R.A.S.*, the court of appeals affirmed the trial court's dismissal of a petition for voluntary termination of the parental rights of an absent father.⁸ The court held that when a parent desires voluntary termination to avoid parental support responsibilities and termination would produce no benefit to the child, the "best interests" requirement is not met and termination should be denied.⁹

1. 826 S.W.2d 397 (Mo. Ct. App. 1992).

2. *In re W.J.F. and H.M.S.*, 648 S.W.2d 210, 214 (Mo. Ct. App. 1983).

3. MO. REV. STAT. § 211.444.1 (1986).

4. MO. REV. STAT. § 211.443 (1986).

5. *Id.*

6. "(1) The recognition and protection of the constitutional rights of all parties in the proceedings; (2) The recognition and protection of the birth family relationship when possible and appropriate; and (3) The entitlement of every child to a permanent and stable home." *Id.*

7. 826 S.W.2d 397 (Mo. Ct. App. 1992).

8. *R.A.S.*, 826 S.W.2d at 401; *see id.* at 398-99.

9. *Id.* at 401.

II. FACTS AND HOLDING

In re R.A.S. involved a voluntary termination of a father's parental rights.¹⁰ The child, R.A.S., was born in 1983 and was eight years old at the time of the termination hearing.¹¹ His mother was eighteen and his father was fifteen at the time of conception.¹² The father asserted that he did not even remember having sexual relations with the mother and suggested that he was intoxicated when it may have happened.¹³ The mother asserted that they had an ongoing sexual relationship.¹⁴ Regardless of which account was correct, he was adjudicated the father after the child's paternity was established through a series of blood tests.¹⁵ The child's mother never denied the father access to the child, but the father never visited the child and never developed a relationship with him.¹⁶ At the time of the hearing, the mother was divorcing another man.¹⁷ No adoption of R.A.S. was planned.¹⁸

The father had been ordered to pay child support, but had paid only a nominal amount.¹⁹ The mother supported her child, but was on public assistance in the form of food stamps.²⁰ The father did not intend to establish any relationship with his son.²¹ He consented to voluntary termination of his parental rights to the child.²² The deputy juvenile officer interviewed the parents and filed a petition to terminate the father's parental rights.²³ The child was not interviewed.²⁴

A hearing was held in the Circuit Court of Callaway County.²⁵ The deputy juvenile officer testified that it would be in the best interests of the child to terminate the father's parental rights.²⁶ Judge Gene Hamilton

10. *Id.* at 398.

11. *Id.*

12. *Id.* at 401.

13. *Id.* at 398.

14. *Id.*

15. *Id.*

16. *Id.* at 398-99.

17. *Id.* at 398.

18. *Id.* at 401.

19. *Id.* at 398.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 399.

24. *Id.*

25. *Id.* at 398.

26. *Id.* at 399.

dismissed the petition for voluntary termination, finding that termination would not be in the child's best interests.²⁷

The father appealed on four points, asserting (1) that if the proceeding had been for involuntary termination of parental rights, there would have been sufficient evidence to find abandonment or neglect and therefore the trial court erred in finding that it was not in the best interests of the child to terminate;²⁸ (2) that the public policy of parental support was a weak policy, insufficient to support the finding that it was not in the best interests of the child to terminate;²⁹ (3) that because he was fifteen and the mother was eighteen at the time of conception, the child was the product of a crime committed by the mother, who thus had "unclean hands" regarding his support obligation to her;³⁰ and (4) that the trial court unconstitutionally discriminated against him on the basis of his gender.³¹

Judge Patricia A. Breckenridge of the Western District of the Missouri Court of Appeals addressed the father's assertions.³² The court held that when the parent consents to termination to avoid parental responsibilities and the child would not benefit from termination, it should not be granted.³³ With respect to the unclean hands assertion, the court said that child support is for the child's benefit, not the mother's, and thus allowing the mother to receive child support would not be tantamount to allowing her to profit from her criminal act.³⁴ The court determined that the equal protection claim was not properly raised,³⁵ but then addressed the issue and concluded that there was no basis for the claim.³⁶ The court affirmed Judge Hamilton's dismissal of the petition for voluntary termination.³⁷

27. *Id.* at 399; *see id.* at 397.

28. *Id.* at 398-99.

29. *Id.* at 398, 399-400.

30. *Id.* at 398, 401. MO. REV. STAT. § 566.040 (1986) creates the crime of sexual assault in the first degree, which occurs when a person has sexual intercourse with another person to whom she is not married and who is fourteen or fifteen years of age.

31. *R.A.S.*, 826 S.W.2d at 398, 401.

32. *Id.* at 398.

33. *See id.* at 400-01.

34. *Id.* at 401.

35. *Id.* The court stated that the father cited "no constitutional provision, state or federal; no statute; or any case which would be applicable to or forbid the allegedly unequal treatment."

36. *Id.*

37. *Id.*

III. LEGAL BACKGROUND

A. Termination of Parental Rights

The power to terminate parental rights is purely statutory; it does not exist at common law.³⁸ This power "demands strict and literal compliance" with the statute granting the power.³⁹ Sections 211.442 through 211.487 of the Missouri Revised Statutes control termination of parental rights.⁴⁰ "The primary concern of the court in any parental rights termination is the best interest of the child."⁴¹ In making this determination, the statute requires a court to consider the following factors: "(1) The recognition and protection of the constitutional rights of all parties in the proceedings; (2) [t]he recognition and protection of the birth family relationship when possible and appropriate; and (3) [t]he entitlement of every child to a permanent and stable home."⁴² The legislature provided for voluntary termination of parental rights when the court "finds that such termination is in the best interests of the child and the parent has consented in writing to the termination of his parental rights."⁴³

The legislature also provided for involuntary termination of parental rights under various circumstances,⁴⁴ such as when a child has been abandoned.⁴⁵ The involuntary termination statute sets out specific lengths of time of abandonment justifying involuntary termination.⁴⁶ The involuntary termination provision analogous to the father's "abandonment" in *In re R.A.S.*⁴⁷ states that a child has been abandoned if "[t]he parent has, without good cause, left the child without any provision for parental support and without making arrangements to visit or communicate with the child, although

38. *In re W.J.F. and H.M.S.*, 648 S.W.2d 210, 214 (Mo. Ct. App. 1983) (citations omitted); *D.J.A. v. Smith*, 477 S.W.2d 718, 720 (Mo. Ct. App. 1972).

39. *W.J.F.*, 648 S.W.2d at 214 (citing *D.E.J. v. G.H.B.*, 609 S.W.2d 472, 474 (Mo. Ct. App. 1980)); see also *D.J.A.*, 477 S.W.2d at 720.

40. See also MO. REV. STAT. Ch. 435 (1986 and Supp. 1992) (statutes on adoption).

41. *In re Y.M.H.*, 817 S.W.2d 279, 282 (Mo. Ct. App. 1991) (citing *In re M.L.W.*, 788 S.W.2d 759, 762 (Mo. Ct. App. 1990)); see also *In re R.L.P.*, 652 S.W.2d 185, 187 (Mo. Ct. App. 1983) (citing *In re L.A.H.*, 622 S.W.2d 319, 322 (Mo. Ct. App. 1981)).

42. *Y.M.H.*, 817 S.W.2d at 282.

43. MO. REV. STAT. § 211.444 (1986).

44. MO. REV. STAT. § 211.447.2 (Supp. 1992).

45. *Id.* § 211.447.2(1).

46. *Id.* The length of time depends on the child's age. *Id.*

47. 826 S.W.2d 397 (Mo. Ct. App. 1992).

able to do so."⁴⁸ This provision "requires both a finding of failure of support and a failure to communicate with or visit the child[] within the statutory period."⁴⁹ In determining whether there has been abandonment a court looks at the parent's intent, which is inferred from his conduct.⁵⁰ "Abandonment is the willful giving up of a child with the intention that the severance be of a permanent nature."⁵¹

Once a ground for involuntary termination has been shown by "clear, cogent and convincing evidence," the court must decide whether termination would be in the best interests of the child.⁵² Thus, the "best interests" requirement applies to any termination of parental rights, whether voluntary or involuntary.⁵³ To further insure that the best interests of the child are carefully considered in termination proceedings, the court must appoint a guardian ad litem for the child.⁵⁴

How does a court decide whether it is in the best interests of a child to terminate parental rights? The statute does not specifically define "best interests" or give a standard or test. There is some guidance, however. The construction statute⁵⁵ must be kept in mind in defining "best interests." The statute advocates the need of every child for a permanent and stable home and indicates a preference, when possible, for that home to be the birth home.⁵⁶ In the involuntary termination statute, the legislature listed the factors to be considered in deciding whether to terminate:

- (1) The emotional ties to the birth parent;
- (2) The extent to which the parent has maintained regular visitation or other contact with the child;
- (3) The extent of payment by the parent for the cost of care and maintenance of the child when financially able to do so

48. MO. REV. STAT. § 211.447.2(1)(b) (Supp. 1992).

49. *In re M.B.A.*, 709 S.W.2d 941, 948 (Mo. Ct. App. 1986) (Prewitt, J., dissenting) (citing *J.H.H. v. J.D.*, 662 S.W.2d 893, 896 (Mo. Ct. App. 1983)).

50. *In re Adoption of W.B.L.*, 681 S.W.2d 452, 455 (Mo. 1984) (citing *In re T.C.M.*, 651 S.W.2d 525 (Mo. Ct. App. 1983)).

51. *In re W.J.F.*, 648 S.W.2d 210, 215 (Mo. Ct. App. 1983) (citing *In re M.J.M.*, 483 S.W.2d 795, 797 (Mo. Ct. App. 1972)).

52. *See In re J.H.D.*, 748 S.W.2d 842, 842-43 (Mo. Ct. App. 1988).

53. MO. REV. STAT. §§ 211.443, 444.1 (1986) & § 211.447.2 (Supp. 1992); *In re Y.M.H.*, 817 S.W.2d 279, 282 (Mo. Ct. App. 1991) (citing *In re M.L.W.*, 788 S.W.2d 759, 762 (Mo. Ct. App. 1990)).

54. *See* MO. REV. STAT. § 211.462 (1986).

55. MO. REV. STAT. § 211.443 (1986). For the text of this section, *see supra* note 6.

56. MO. REV. STAT. § 211.443(2), (3) (1986).

including the time that the child is in the custody of the division or other child-placing agency;

...
(5) The parent's disinterest in or lack of commitment to the child⁵⁷

The Eastern District of the Missouri Court of Appeals, in *In re J.H.H.*,⁵⁸ stated:

While we acknowledge "the best interests of the child" to be among those "imprecise substantive standards that leave determinations unusually open to the subjective values of the judge," . . . in the context of termination of parental rights proceedings it connotes the *parens patriae* interest in providing the child with a permanent home . . . " in which the child will be housed, fed, clothed and educated, at least according to acceptable community standards."⁵⁹

This interest in providing the child with a permanent home seems to come into play in two situations: (1) When an adoption is already contemplated; or (2) when it is evident that the birth family will not be able to provide a permanent home in which the child will be appropriately cared for.⁶⁰ In the latter instance, an alternative source (often an adoptive placement) will be sought.

B. Single Parent Households and Children in Poverty: Why We Need a Strong Policy of Child Support Enforcement

There was a threefold increase in the number of divorces from 1960 to 1980.⁶¹ The number of children involved in divorces over that same time period increased 2.5 times.⁶² In 1960 five percent of births were to unmar-

57. MO. REV. STAT. § 211.447.3 (Supp. 1992).

58. 662 S.W.2d 893 (Mo. Ct. App. 1983).

59. *Id.* at 897 (citations omitted).

60. In *In re Adoption of W.B.L.*, 681 S.W.2d 452 (Mo. 1984), the involuntary termination of the mother's parental rights was upheld on grounds of abandonment and neglect. The child's stepmother had filed a petition to adopt. *Id.* at 454.

61. Lowell H. Lima & Robert C. Harris, *The Child Support Enforcement Program in the United States*, in CHILD SUPPORT 20 (Alfred J. Kahn & Sheila B. Kammerman eds., 1988).

62. *Id.* at 21.

ried women; in 1990 the figure was twenty-seven percent.⁶³ Female-headed families have increased steadily over the years.⁶⁴

The proportion of children living in poverty was fifteen percent in 1970 and rose to twenty percent in 1990.⁶⁵ In 1983, "three-quarters of all children born outside of marriage were [living in poverty]."⁶⁶ In 1991, the U.S. Census Bureau "reported that the likelihood that a child would be living in poverty almost doubled upon the separation or divorce of the child's parents."⁶⁷ Single parent families headed by a female are six times as likely to be poor as two parent families.⁶⁸ It is the "lack of financial support from the absent parent, usually the father, [that] is a major factor in child poverty."⁶⁹

When there is no support, or inadequate support, and the custodial parent (usually the mother) has little or no income, the family likely receives welfare benefits.⁷⁰ Welfare does not, however, bring a family above the poverty level,⁷¹ and "most agree that the poverty level is a very low standard of living."⁷² Surely everyone can think of various adverse effects that living in poverty has on children;⁷³ these effects provide obvious policy reasons supporting the fight against poverty among children.

63. Barbara D. Whitehead, *Dan Quayle Was Right*, THE ATLANTIC MONTHLY, Apr. 1993, at 47, 50. Steven Waldman, *Deadbeat Dads*, NEWSWEEK, May 4, 1992, at 46, 52.

64. Lima & Harris, *supra* note 61, at 21. The number of such families tripled from 1960 to 1973. The percentage these families make up out of all families increased from seven percent to nineteen percent over that time period. *Id.*

65. Whitehead, *supra* note 63, at 48.

66. Lima & Harris, *supra* note 61, at 21.

67. *Id.*

68. Waldman, *supra* note 63, at 46; Whitehead, *supra* note 63, at 47.

69. Alfred J. Kahn & Sheila B. Kammerman, *Child Support in the United States: The Problem*, in CHILD SUPPORT, at 10 (Alfred J. Kahn & Sheila B. Kammerman eds., 1988).

70. Kahn & Kammerman, *supra* note 69, at 11. *See also* Whitehead, *supra* note 63, at 62, 77.

71. Kahn & Kammerman, *supra* note 69, at 11; Paula Roberts, *Ameliorating the Feminization of Poverty: Whose Responsibility?*, 18 CLEARINGHOUSE REV. 883, 885 (1984).

72. Kahn & Kammerman, *supra* note 69, at 11.

73. If not, one can look to many studies, articles and books on the topic. *See, e.g.*, CHILDREN IN POVERTY: CHILD DEVELOPMENT AND PUBLIC POLICY (Aletha C. Huston ed., 1991). For a brief discussion of the effects upon children of economic changes after divorce, see LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 318-21 (1985).

C. History and Current Status of the Policy of Child Support Enforcement

The moral duty of parents to support their children has been long-recognized.⁷⁴ In the middle of the eighteenth century, Blackstone stated:

The duty of parents to provide for the *maintenance* of their children, is a principle of natural law; an obligation . . . laid on them not only by nature herself but by their own proper act, in bringing them into the world; for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish. By begetting them therefore, they have entered into a voluntary obligation, to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus, the children will have a perfect *right* of receiving maintenance from their parents.

[A]nd the manner, in which this obligation shall be performed, is thus pointed out. The father, and mother, grandfather and grandmother of poor impotent persons shall maintain them at their own charges, if of sufficient ability. . . . [A]nd if a parent runs away, and leaves his children, the churchwardens and overseers of the parish shall seize his rents, goods, and chattels, and dispose of them toward their relief.⁷⁵

Addressing the issue of child support, the Missouri Supreme Court in 1957 said that "he who performs a man's part in procreation shall also perform a man's part in providing support for his progeny."⁷⁶

74. SCOTT E. FRIEDMAN, *THE LAW OF PARENT-CHILD RELATIONSHIPS: A HANDBOOK* 101 (1992). For a discussion of history of public child support enforcement policy, see JUDITH CASSETTY, *CHILD SUPPORT AND PUBLIC POLICY: SECURING SUPPORT FROM ABSENT FATHERS* 5-14 (1978); Kahn & Kammerman, *supra* note 69, at 10-13, 24-25; JOSEPH I. LIEBERMAN, *CHILD SUPPORT IN AMERICA: PRACTICAL ADVICE FOR NEGOTIATING AND COLLECTING A FAIR SETTLEMENT* 1-10 (1986).

75. SIR WILLIAM BLACKSTONE, *1 COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS* 447-48 (1765). In addition, various authors writing about child support have quoted Blackstone. See, e.g., FRIEDMAN, *supra* note 74, at 101; Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 *FAM. L.Q.* 1, 6 (1990); LIEBERMAN, *supra* note 74, at ix.

76. *Ivey v. Ayers*, 301 S.W.2d 790, 794 (Mo. 1957). The quote was in reference to one of the main purposes of the Uniform Support of Dependents Law (currently titled Uniform Reciprocal Enforcement of Support Law, MO. REV. STAT. §§ 454.010-.360 (1986 and Supp. 1992)).

More recently, enforcement of child support has become an increasingly important policy.⁷⁷ In the mid-1970s, Congress enacted legislation to strengthen child support enforcement nationwide,⁷⁸ in an attempt to decrease the numbers of families on welfare.⁷⁹ Since that time, the scope and purpose of such legislation has been expanded by Congress to attempt to prevent families from going on welfare by making the services available to nonwelfare families.⁸⁰ The federal act mandates the states to organize child support enforcement agencies.⁸¹ In 1984, Congress strengthened the enforcement power of the states in collecting child support.⁸² The 1984 Child Support Amendments provided for withholding past due support from paychecks, deducting it from federal and state tax refunds, imposing liens on the property of defaulting support obligors, and informing credit companies of high amounts of unpaid child support.⁸³ The 1988 amendments provided that beginning in 1994, child support will be withheld from paychecks whether or not the payee is in arrears.⁸⁴ The states are to establish support guidelines and review child support orders triennially.⁸⁵ The 1988 amendments provide for better tracking and monitoring in the parent location service.⁸⁶ Additionally, Congress established the U.S. Commission on Interstate Child Support, which issued its first report in August 1992.⁸⁷ The Commission seeks nationalization, if not federalization, of child support laws.⁸⁸

The problem of child support enforcement has not been limited to families on welfare.⁸⁹ According to U.S. Census Bureau figures, "[i]n 1983 more than 5 million women were supposed to receive court-ordered child support payments, yet only half received full payments, 25 percent partial

77. See *infra* text accompanying notes 78-108.

78. Krause, *supra* note 75, at 6.

79. See *id.*

80. *Id.*

81. *Id.* at 7.

82. *Id.* at 8-11.

83. *Id.* at 8; see also Diane Dodson & Robert Horowitz, *What to Do About the Growing Problem of Child Support*, 71 A.B.A. J. 133, 133 (1985); Claudia J. Postell, *Unpaid Child Support: A \$3-Billion Debt*, 22 TRIAL 89 (1986).

84. Krause, *supra* note 75, at 11.

85. *Id.*

86. *Id.*

87. Robert G. Spector, *The Nationalization of Family Law: An Introduction to the Manual for the Coming Age*, 27 FAM. L.Q. 1, 3 (1993).

88. *Id.* The entire Spring 1993 issue of the *Family Law Quarterly* is devoted to the reports and recommendations of the Commission. See generally 27 FAM. L.Q. (1993).

89. See *infra* note 90 and accompanying text.

payments, and 25 percent no payment at all. More than 3.7 million additional women raising children alone did not even have support orders.⁹⁰

Missouri complied with the federal requirements by enacting the Enforcement of Support Law,⁹¹ which includes the Uniform Reciprocal Enforcement of Support Law.⁹² The Missouri Division of Child Support Enforcement was created by Missouri Revised Statutes section 454.400.⁹³ The responsibilities of the division include "locating absent parents, establishing paternity, establishing support obligations, monitoring absent parents' compliance with support obligations, enforcing support obligations, and distributing support collections."⁹⁴ Missouri's domestic relations statutes also provide for withholding delinquent child support payments from income.⁹⁵

Missouri also has a criminal nonsupport statute which makes it at least a misdemeanor to knowingly fail to provide, "without good cause, adequate support which such parent is legally obligated to provide for his minor child."⁹⁶ Support includes food, clothes, housing, and health care.⁹⁷ This statute "has as its foundation the object of securing to children from their parent the discharge of the duty of support, and the punishment of those who are so morally bankrupt as to refuse or ignore that obligation."⁹⁸

Both parents have a legal duty to support their minor children.⁹⁹ This duty "cannot be 'bargained away.'"¹⁰⁰ Parents may enter into an agreement compromising the amount of past due child support, but they cannot agree to

90. See Dodson & Horowitz, *supra* note 83, at 133; see also Waldman, *supra* note 63, at 46.

91. MO. REV. STAT. §§ 454.010-.360 (1986 and Supp. 1992); see also MO. CODE REGS., tit. 13, § 30-1.010 (1988).

92. MO. REV. STAT. §§ 454.010-.360 (1986 and Supp. 1992).

93. MO. CODE REGS., tit. 13, § 30-1.010 (1988).

94. *Id.*

95. MO. REV. STAT. § 452.350 (Supp. 1992).

96. MO. REV. STAT. § 568.040.1 (Supp. 1992).

97. MO. REV. STAT. § 568.040.2(3) (Supp. 1992).

98. *State v. Davis*, 675 S.W.2d 410, 415 (Mo. Ct. App. 1984) (quoting *State v. Arnett*, 370 S.W.2d 169, 174 (Mo. Ct. App. 1963)).

99. *Id.*; *Deardorff v. Bohannon*, 761 S.W.2d 651, 655 (Mo. Ct. App. 1988) (citations omitted).

100. *Davis*, 675 S.W.2d at 415 (quoting *Arnett*, 370 S.W.2d at 174); see also *Koenig v. Koenig*, 191 S.W.2d 269, 272 (Mo. Ct. App. 1945).

reduce future support amounts.¹⁰¹ "Only a court has [that] power."¹⁰² A court's primary concern in child support cases is the needs of the children.¹⁰³

The primary purpose of a child support order is "to provide for the welfare of the children."¹⁰⁴ Missouri courts have shown that this state's policy is to look to both parents to provide support. Just because the mother may be able to provide for the children's needs does not mean the father should be relieved of his child support obligation.¹⁰⁵ Courts in Missouri are careful to make sure that a father who asserts that he cannot pay truly cannot do so.¹⁰⁶ In *Hogrebe v. Hogrebe*,¹⁰⁷ the court imputed income to a father who "voluntarily reduced his income." The court said that a father could "not escape responsibility to his family . . . by deliberately limiting his work to reduce his income. . . . Nor may he voluntarily decline to work and then plead lack of income as an excuse for not being able to adequately contribute to his children's needs."¹⁰⁸ Imputing income shows that courts do not want parents evading their obligation to support their children, further demonstrating the important policy of full child support.

D. Specific Cases Addressing Voluntary Termination of Parental Rights in View of Child Support Obligation

The Missouri case of *In re B.L.G.*¹⁰⁹ addressed the issue of whether the trial court was correct in voluntarily terminating the parental rights of an adoptive father.¹¹⁰ The adoptive father had married the birth mother when

101. *Holt v. Holt*, 662 S.W.2d 578, 580 (Mo. Ct. App. 1983).

102. *Id.* "[T]he law in this state is well settled that parents may not enter into an agreement for the payment of child support which will deprive the court of its power to set the amount of support and to change that amount as conditions change. . . . [T]he law prevents the parents from entering into a binding agreement for support, except for obligations which are above and beyond that which the law requires." *Kocherov v. Kocherov*, 775 S.W.2d 539, 540 (Mo. Ct. App. 1989); *see also* *Otten v. Otten*, 632 S.W.2d 45, 48 (Mo. Ct. App. 1982) (citing *Kennedy v. Kennedy*, 575 S.W.2d 833 (Mo. Ct. App. 1978)).

103. *State ex rel. Division of Family Serv. v. Ruble*, 684 S.W.2d 949, 950 (Mo. Ct. App. 1985).

104. *Williams v. Williams*, 510 S.W.2d 452, 455 (Mo. 1974).

105. *Id.*

106. *See infra* text accompanying notes 107-08.

107. 727 S.W.2d 193 (Mo. Ct. App. 1987).

108. *Id.* at 195-96 (citing *Butler v. Butler*, 562 S.W.2d 685, 687 (Mo. Ct. App. 1977) and *Boyer v. Boyer*, 567 S.W.2d 749, 751 (Mo. Ct. App. 1978)).

109. 731 S.W.2d 492 (Mo. Ct. App. 1987).

110. *B.L.G.*, 731 S.W.2d at 494.

the child was nearly three years old.¹¹¹ Two years after the marriage, he adopted the child.¹¹² The parents were divorced¹¹³ and a year later, the adoptive father sought voluntary termination of parental rights.¹¹⁴ No adoption of the child by another man was contemplated.¹¹⁵ The child did not know that his father had adopted him, but he did consider the man to be his father and asked questions about his lack of contact with him.¹¹⁶ The Southern District of the Missouri Court of Appeals said that the issue was whether the termination was in the best interests of the child.¹¹⁷ The court pointed out that the father "was primarily interested in seeking relief from the financial burdens imposed on him by his parenthood and delineated in the . . . dissolution decree."¹¹⁸ The court said that "[c]onsent alone is not sufficient" to terminate parental rights.¹¹⁹ The juvenile officer who files a petition for voluntary termination of parental rights, though not required to by statute, should make a reasonable investigation before filing the petition.¹²⁰ He "must act in a role beyond that of a mere tool of a parent whose primary motivation is that of avoiding parental responsibilities."¹²¹ The court determined that relieving the father of his child support obligations would not be in the child's best interests.¹²²

Other states have similarly viewed the role parental support obligation plays in voluntary termination hearings. The Wisconsin Court of Appeals addressed the issue of voluntary termination of parental rights in *In re A.B.*¹²³ In this case, the mother of the child sought to have the biological father's rights terminated.¹²⁴ The father consented to the termination.¹²⁵ The father said he had not established any kind of relationship with his daughter and thought it would be in her best interests to terminate.¹²⁶ Paternity had been adjudicated and he was ordered to pay \$435 per month in

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 493.

115. *Id.* at 495, 498.

116. *Id.* at 495.

117. *Id.* at 498.

118. *Id.*

119. *Id.* at 499.

120. *Id.*

121. *Id.*

122. *Id.*

123. 444 N.W.2d 415 (Wis. Ct. App. 1989).

124. *Id.* at 416-17.

125. *Id.*

126. *Id.* at 417.

child support.¹²⁷ The Wisconsin statute providing for voluntary termination of parental rights provided that "[t]he best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all [termination] proceedings."¹²⁸ The Wisconsin statute, unlike Missouri's, specifically told a court what factors to consider "in ascertaining the child's best interests."¹²⁹ The court said that "[p]arental rights may not be terminated merely to advance the parents' convenience and interests, either emotional or financial."¹³⁰ "Simply put, no parent may blithely walk away from his or her parental responsibilities."¹³¹ The court concluded that it was not in the daughter's best interests to terminate parental rights as it would cut off a financial support line for her.¹³² The court noted that "[t]ermination of parental rights is also termination of the child's rights."¹³³

The Supreme Court of Alabama considered the appropriateness of termination of a father's rights to his birth child in *Ex parte Brooks*.¹³⁴ In Alabama, termination of parental rights must be in the best interests of the child.¹³⁵ The court determined that it was not the purpose of the statutes providing for termination to be "a means for a parent to avoid his obligation to support his child."¹³⁶ "Convenience of the parents is not a sufficient basis for terminating parental rights. . . . Even if [the father] chooses not to establish contact with his son, [the son's] right to receive support from his father remains."¹³⁷

In *In re D.W.K.*, the Supreme Court of Iowa also addressed these issues.¹³⁸ The father expressed no interest in his child.¹³⁹ He had been ordered to pay seventy-five dollars per month in child support.¹⁴⁰ Iowa's voluntary termination statute provided that "[t]he welfare of the child . . .

127. *Id.* at 416.

128. *Id.* at 418 n.5 (quoting WIS. STAT. § 48.426(2) (1987)).

129. *Id.* at 418-19 (quoting WIS. STAT. § 48.426(3) (1987)). A court is not limited to those factors, however. *See id.*

130. *Id.* at 419 (citing, *inter alia*, *B.L.G.*, 731 S.W.2d at 498-99).

131. *Id.* at 419.

132. *Id.*

133. *Id.* (alteration in original).

134. 513 So. 2d 614 (Ala. 1987) *rev'd sub nom. on other grounds Ex parte Karen Beasley*, 564 So. 2d 950 (Ala. 1990).

135. *Id.* at 616.

136. *Id.*

137. *Id.* at 617.

138. 365 N.W.2d 32 (Iowa 1985).

139. *Id.* at 33.

140. *Id.*

shall be the paramount consideration."¹⁴¹ The court said that allowing termination in this situation would "ultimately . . . open a hatch for a parent to escape his or her duty to support a child."¹⁴² In support of its conclusion, the court cited cases in which fathers tried to avoid paying child support by "willfully refusing to reach [their] reasonable earning capacit[ies]" or "channeling money into unprofitable businesses" or "unreasonably remain[ing] in . . . low-paying job[s]."¹⁴³

E. Discrimination Against Men as Parents

Most issues of "father's rights" seem to deal with a father being denied an equal role as parent in one way or another.¹⁴⁴ It is a relatively new area in the law. The *R.A.S.* court found no basis for the father's assertion of disparate treatment.¹⁴⁵ The parameters of Equal Protection claims as grounds for allowing fathers to voluntarily terminate their parental rights have not been defined by the courts.

141. *Id.* at 34 (quoting IOWA CODE § 600.1A).

142. *Id.* at 35.

143. *Id.* (citations omitted).

144. *See* *Lehr v. Robertson*, 463 U.S. 248 (1983) (unmarried absent father's constitutional rights not violated by receiving no notice of termination proceeding though state actually knew his whereabouts); *Caban v. Mohammed*, 441 U.S. 380 (1979) (violates constitution to allow unmarried women but not unmarried men to block adoption by withholding consent); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (termination was constitutional when only consent of mother was required for adoption of illegitimate children and biological father had never legitimated the child in 11 years); *Stanley v. Illinois*, 405 U.S. 645 (1972) (statutory presumption that unmarried fathers are unfit held unconstitutional); *Adoption of Kelsey S.*, 823 P.2d 1216 (Cal. 1992) (unwed father's effective preclusion from establishing his parental relationship deemed unconstitutional); *In re J.F.*, 719 S.W.2d 790 (Mo. 1986) (allowing no notice of termination of parental rights proceeding to putative fathers who fail to affirm paternity); *State v. Edwards*, 574 S.W.2d 405 (Mo. 1978) (unmarried father cannot be denied same presumption of fitness as a parent that married fathers are given in termination proceedings).

145. *R.A.S.*, 826 S.W.2d at 401. *See supra* note 35 for the court's comment on the matter.

IV. THE INSTANT DECISION

After reciting the facts¹⁴⁶ and the applicable standard of review,¹⁴⁷ the court discussed the father's points of error,¹⁴⁸ focusing primarily on the first two.¹⁴⁹ The father urged that the trial court erred in finding that it was not in R.A.S.'s best interests to terminate parental rights.¹⁵⁰ He contended that the court gave insufficient weight to the negative emotional effects of continuing the legal relationship and gave too much weight to the issue of child support.¹⁵¹ In response, the court of appeals noted that there was no evidence supporting the father's assertion that the relationship, or lack thereof, was adversely affecting the child.¹⁵² The court also questioned the father's concern for the child in making that assertion, given his "total lack of care or concern for R.A.S. . . . demonstrated by his lack of contact with the child."¹⁵³ The father did not "convincingly point out how termination would alter the emotional turmoil R.A.S. experienced as a result of the attitude of [the f]ather."¹⁵⁴

The court observed that the father's argument appeared to be "a transparent attempt to avoid support" of the child.¹⁵⁵ The court briefly recited the statutory basis for voluntary termination of parental rights,¹⁵⁶ and concluded that the phrase "best interests of the child" was the center of the dispute in the case.¹⁵⁷ The father asserted that if this action had sought involuntary termination, it would have been granted and, as such, it met the "best interests of the child" requirement.¹⁵⁸ To support this contention,¹⁵⁹ the father adverted to *In re W.F.J.*¹⁶⁰ and *In re R.L.P.*¹⁶¹ The court distinguished those cases from the instant case on the basis that they were

146. *Id.* at 398-99, 401. See *supra* text accompanying notes 10-27.

147. *R.A.S.*, 826 S.W.2d at 399.

148. *Id.* at 399-401. See *supra* notes 28-31 and accompanying text.

149. See *R.A.S.*, 826 S.W.2d at 398, 399-401. See *supra* notes 28-29 and accompanying text.

150. *R.A.S.*, 826 S.W.2d at 399.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 401.

155. *Id.* at 399.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 399.

160. 648 S.W.2d 210 (Mo. Ct. App. 1983).

161. 652 S.W.2d 185 (Mo. Ct. App. 1983).

involuntary termination proceedings.¹⁶² The court concluded that the instant case more closely resembled *In re B.L.G.*¹⁶³ It discussed *B.L.G.*, "in which the adoptive father of a child attempted to voluntarily terminate his parental rights to his adoptive son after the father's divorce from the child's mother."¹⁶⁴ The court submitted that in *B.L.G.*, there was evidence that the child was confused about the relationship with his absent adoptive father, which caused the child stress.¹⁶⁵ The *R.A.S.* court also noted the similarity to the instant case in that neither father chose to have contact with his child, even though there was no interference by the mother.¹⁶⁶ The court quoted at length from *B.L.G.*:

"Consent [of the parent whose rights are to be terminated] alone is not sufficient. The petition must be filed by the juvenile officer and the evidence must support a finding that termination is in the best interests of the child. . . . [T]he juvenile officer who files the petition must act in a role beyond that of a mere tool of a parent whose primary motivation is that of avoiding parental responsibilities."¹⁶⁷

The court also recited the portion of *B.L.G.* which stated that the adoptive father had orchestrated the whole termination proceeding to relieve himself of his duty of child support, which was not in the best interests of the child.¹⁶⁸

The court then looked to other jurisdictions to support its holding.¹⁶⁹ It cited *Ex parte Brooks*,¹⁷⁰ in which the Alabama Supreme Court held that "convenience [of the parents] is not a sufficient reason for terminating parental rights."¹⁷¹ The *R.A.S.* court also cited the Wisconsin case *In re A.B.*¹⁷² for its statement that "no parent may blithely walk away from his or her parental responsibilities."¹⁷³ Finally, the *R.A.S.* court cited the Iowa case of *In re D.W.K.*¹⁷⁴ for its conclusion that allowing such a termination would

162. See *R.A.S.*, 826 S.W.2d at 400.

163. 731 S.W.2d 492 (Mo. Ct. App. 1987); see *R.A.S.*, 826 S.W.2d at 400.

164. *R.A.S.*, 826 S.W.2d at 400.

165. *Id.* (citing *B.L.G.*, 731 S.W.2d at 495).

166. *Id.* (citing *B.L.G.*, 731 S.W.2d at 496-97).

167. *Id.* (quoting *B.L.G.*, 731 S.W.2d at 499).

168. *Id.*

169. *Id.*

170. 513 So. 2d 614 (Ala. 1987), *rev'd sub nom. on other grounds Ex parte Karen Beasley*, 564 So. 2d 950 (Ala. 1990).

171. *R.A.S.*, 826 S.W.2d at 400 (citing *Brooks*, 513 So.2d at 617 (Ala. 1987)).

172. 444 N.W.2d 415 (Wis. Ct. App. 1989).

173. *R.A.S.*, 826 S.W.2d at 400 (quoting *A.B.*, 444 N.W.2d at 419).

174. 365 N.W.2d 32 (Iowa 1985).

"ultimately . . . open a hatch for a parent to escape his or her duty to support a child."¹⁷⁵

Relying on *Holt v. Holt*¹⁷⁶ and *Koenig v. Koenig*,¹⁷⁷ R.A.S.'s father asserted that the policy of child support was a weak one.¹⁷⁸ He urged that these cases supported his contention because they upheld settlement agreements between parents on past due support "without resort to the courts."¹⁷⁹ The court acknowledged these holdings, but clarified that the settlements upheld concerned *past due* support¹⁸⁰—the rule of law was not applicable to future support,¹⁸¹ and the underlying duty of support was not affected.¹⁸²

The court stressed the seriousness of the policy of child support,¹⁸³ stating that both parents have the duty to support their minor children.¹⁸⁴ It pointed out that there are criminal sanctions for failure to meet child support duties,¹⁸⁵ thus evidencing that the policy is far from weak.¹⁸⁶ The court proclaimed that the duty of child support cannot "be avoided in the guise of a voluntary termination proceeding. The termination of parental rights does not merely sever the rights of the parent to the child, but also severs the child's right to the parent."¹⁸⁷ The court said that even though the child deserved more than minimal legal ties to a parent, terminating those ties was not in his best interests.¹⁸⁸

The court affirmed Judge Hamilton's dismissal of the petition for voluntary termination.¹⁸⁹ In summary, the court said that "[t]he termination of [the f]ather's parental rights would deprive R.A.S. of his future rights to support, affiliation and inheritance without any evidence of a present benefit to R.A.S. resulting from the termination. These circumstances were properly

175. *R.A.S.*, 826 S.W.2d at 400 (quoting *D.W.K.*, 365 N.W.2d at 35).

176. 662 S.W.2d 578 (Mo. Ct. App. 1983).

177. 191 S.W.2d 269 (Mo. Ct. App. 1945).

178. *R.A.S.*, 826 S.W.2d at 399.

179. *Id.*

180. *See id.* at 399-400.

181. *Id.* at 400 (citing *Holt*, 662 S.W.2d at 580).

182. *Id.* at 399 (citing *Koenig*, 191 S.W.2d at 272).

183. *Id.* at 400-01.

184. *Id.* (citing *Deardoff v. Bohannon*, 761 S.W.2d 651, 655 (Mo. Ct. App. 1988)).

185. *Id.* at 401 (citing MO. REV. STAT. § 568.040 (Supp. 1992)).

186. *Id.*

187. *Id.*

188. *See id.*

189. *Id.*

considered by the trial court in its decision that the termination did not serve R.A.S.'s best interests."¹⁹⁰

V. COMMENT

A. *Allowing Voluntary Termination Is No Solution to Disparate Treatment of Fathers*

In *R.A.S.*, the father attempted to "make an equal protection argument claiming that because he is a male he was treated differently than a female similarly situated would be treated."¹⁹¹ He gave no support for his assertion.¹⁹² The court noted that the "[f]ather's indictment of the system is largely dependent upon the illustration of a mother's voluntary termination of her parental rights for the purpose of placing the child for adoption."¹⁹³

It is likely that the father has a valid point in that the law treats males and females differently as parents. Some of the problems seem to arise because of the physiological aspects of biological parenthood—the biological mother usually carries the child and gives birth. She certainly is aware of her parenthood at some time or another. The father can know of his parenthood only through the mother, in a sense. A woman can report the child's father as "unknown" and keep it from him, and the man may never know he has offspring.

All persons should see the unfairness in this. But the solution is not certain. "Father's rights" are relatively new issues in the law, and their future is unclear.¹⁹⁴ Under the guise of Equal Protection, a father should not be allowed to voluntarily terminate his parental rights in a situation such as in *R.A.S.* just because a mother can keep her pregnancy and a child's birth secret from the father and subsequently give that child up for adoption. The father of *R.A.S.* made this very assertion.¹⁹⁵ Surely two wrongs do not make a right.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. See *supra* notes 144-45 and accompanying text.

195. *R.A.S.*, 826 S.W.2d at 401.

*B. Child Support Properly a Factor in Determining
Best Interests of Child*

In *In re R.A.S.*, the Western District of the Missouri Court of Appeals correctly upheld the trial court's dismissal of the petition for voluntary termination of the absent father's parental rights.¹⁹⁶ A termination must be in the best interests of the child¹⁹⁷ and here, it was not in the best interests of R.A.S.¹⁹⁸

Children have a right to adequate support from their parents—both parents.¹⁹⁹ Strong policy concerns require enforcing this right and the corresponding duty of the parent to provide support.²⁰⁰ Many of the current laws on child support were enacted to get families off welfare or to prevent them from having to go on welfare to begin with.²⁰¹ There are many single-parent families in this country,²⁰² and most of them are female-headed.²⁰³ They account for a great number of the children who live in poverty.²⁰⁴ Welfare does not bring a family above that poverty line.²⁰⁵ Lack of enforcement of child support contributes to these problems.

Pervasive problems exist in child support enforcement, as evidenced by the low percentage of mothers who receive the full amount ordered and the high number of women who do not even have a child support order to try to enforce.²⁰⁶ The federal and state governments have done much to try to fix these problems,²⁰⁷ but the results will not be immediately evident. However, the strong policy is manifest.²⁰⁸ It must not be undermined by allowing absent fathers to get out of paying child support by voluntarily terminating their parental rights, in the absence of it being in the best interests of the child.

With an absent parent, the minimal tie that exists is a legal tie. The right to receive support, the right to affiliation, and the right to inherit still

196. *See id.*

197. *See supra* notes 38-60 and accompanying text.

198. *R.A.S.*, 826 S.W.2d at 401.

199. *See supra* notes 99-103 and accompanying text.

200. *See supra* notes 74-107 and accompanying text.

201. *See supra* notes 78-80 and accompanying text.

202. *See supra* notes 61-64 and accompanying text.

203. *See supra* notes 61-64 and accompanying text.

204. *See supra* notes 65-69 and accompanying text.

205. *See supra* note 71 and accompanying text.

206. *See supra* note 90 and accompanying text.

207. *See supra* notes 78-88, 91-98 and accompanying text.

208. *See supra* notes 74-108 and accompanying text.

exist.²⁰⁹ A termination order would sever those rights.²¹⁰ With all the problems of poverty in female-headed households,²¹¹ how could it be in the best interests of the child to take away financial support that could make the difference for the child? This proposition is not meant to suggest that termination should be allowed if a mother is able to adequately provide for the child on her own, or if the absent father has no resources from which to provide child support.²¹² The dangers of such a proposition are too great—no one's financial status is permanent.²¹³

Missouri courts have already held that a father cannot purposefully be underemployed or use other deceptive techniques to get out of paying his child support obligation.²¹⁴ If the court had allowed the father of R.A.S. to voluntarily terminate his rights, it would provide a way out for every absent father in the state, so long as a juvenile officer agreed to file the petition. Termination in those circumstances, without more, is not in the best interests of the child.²¹⁵

There was no plan for R.A.S. to be adopted;²¹⁶ otherwise, termination may have been in his best interests. Adoption by a stepfather would have provided a reinforcing legal bond with the adoptive father and severed legal ties to an absent and uncaring father, thus making the child's home a permanent one.²¹⁷

Thus, the child's right to support is thus properly a factor in determining whether it is in the best interests of a child to terminate parental rights.²¹⁸ If termination would do nothing for the child but sever legal ties and thereby cut off the right to support, termination should be denied.²¹⁹ Perhaps an attorney in *B.L.G.* said it best: "[We] don't want the . . . Juvenile Office to turn into the Acme Termination of Parental Rights Service for fathers who don't want to pay child support."²²⁰

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209. See *R.A.S.*, 826 S.W.2d at 401.

210. See *id.*

211. See *supra* notes 61-73 and accompanying text.

212. See Krause, *supra* note 75, at 6.

213. See *id.*

214. See *supra* notes 106-108 and accompanying text.

215. See *R.A.S.*, 826 S.W.2d at 401.

216. *Id.*

217. See *supra* notes 58-60 and accompanying text.

218. *R.A.S.*, 826 S.W.2d at 399-401.

219. See *id.* at 401.

220. *In re B.L.G.*, 731 S.W.2d 492, 497 (Mo. Ct. App. 1987).