

TERMINATING PARENTAL RIGHTS THROUGH A BACKDOOR IN THE VIRGINIA CODE: ADOPTIONS UNDER SECTION 63.2-1202(H)

*Dale Margolin Cecka **

I. INTRODUCTION

Under private adoption law in Virginia, a parent can lose her parental rights in one court hearing based on a single petition, without any proof of parental unfitness offered, and without the opportunity to object to the adoption of her child. Virginia Code section 63.2-1202(H), pertaining to adoptions where the petitioner is a private party and the consent of the parent is not required, is so streamlined that it can violate the constitutional rights of both biological parents and their children. In 2012, the Virginia General Assembly added more specific language to the statute, but on its face, it is still inadequate to protect the rights of a parent and the best interests of the child.¹

A mother is convicted on narcotics charges and receives a ten-year sentence that will likely be reduced for good behavior.² In anticipation of her incarceration, she gives custody of her three-year-old child, who she has cared for since birth, to the child's aunt. The mother asks the aunt to bring the child to the prison for regular visits, but the aunt feels that bringing a young child to prison is inappropriate, even though the prison has a mother-

* Associate Clinical Professor of Law and Director of the Jeanette Lipman Family Law Clinic, University of Richmond School of Law. J.D., 2004, Columbia Law School; B.A., 1999, Stanford University.

1. Act of Mar. 30, 2012, ch. 424, 2012 Va. Acts 721, 726 (codified as amended at VA. CODE ANN. § 63.2-1202(H) (Repl. Vol. 2012)).

2. The following facts are based off of a case currently being handled by the Jeanette Lipman Family Law Clinic at the University of Richmond School of Law ("Family Law Clinic") (on file with author). After the guardian ad litem's ("GAL") appearance, the GAL contacted the Family Law Clinic for assistance. The clinic took over representation in 2010 and eventually the petitioner withdrew the adoption petition. In June 2013, the petitioner filed a new adoption petition in a different circuit court. The Family Law Clinic is now seeking appointment as counsel on that petition.

child visiting program. The aunt also lives a great distance from the prison and lacks the resource to make frequent trips.

Relations between the mother and aunt deteriorate. The mother is only able to communicate with the aunt and child through letters, but the aunt neither gives the child the letters nor writes reply letters to the mother. Eventually the mother stops sending mail except for Christmas and the child's birthday.

Three years pass and the aunt decides to adopt the now six-year-old child. The aunt is partly motivated to adopt the child to increase her social security benefits. She visits the mother in prison, without bringing the child, and asks the mother to consent to the adoption. The mother denies consent. Nevertheless, the aunt files for adoption, pleading that the mother's consent is not necessary because of the mother's failure to visit or communicate with the child in the prior six months. Because the mother is incarcerated, the court appoints a guardian ad litem ("GAL") to represent the mother's interests.³ The GAL visits the mother once and learns that the mother never received notice of the adoption petition or the hearing date, that she has tried to visit the child, and that she has sent countless letters, but none in the last six months. The GAL appears via telephone on the mother's behalf on the hearing date. Based on his limited knowledge of the case, he attempts to explain the mother's position while acting in his role as a GAL, not as the mother's advocate. The court grants one continuance so the GAL can gather more information and file a written report.

Perhaps adoption is best in the long run for this child and this family. Family law is, after all, exceedingly complicated; there are no easy answers and, in many cases, every party experiences loss. Furthermore, the ultimate determining factor—the best interest of the child—is a moving and highly subjective target, but Virginia Code section 63.2-1202(H) does not account for this subjective nature.⁴ As written and practiced, section 1202(H) allows a court to sever all ties between parent and child, without the parent ever appearing in court.⁵ Even when the parent does appear, it may

3. See VA. CODE ANN. § 53.1-223 (Repl. Vol. 2013); *id.* § 8.01-9 (Repl. Vol. 2007 & Cum. Supp. 2013).

4. See *id.* § 63.2-1202(H) (Repl. Vol. 2012) (failing to even mention "the best interest of the child").

5. See *id.* § 63.2-1202(H), (J) (Repl. Vol. 2012).

be without a court appointed attorney and without the statutory grounds to properly defend herself.⁶ The factual scenario described above is real and not uncommon. The application of section 1202(H) illustrates the principle that bad law makes bad cases.

There are both substantive and procedural due process issues with this code section. It runs afoul of equal protection; parents whose rights are terminated through the private adoption system are treated wholly differently than those whose rights are terminated through government intervention. Additionally, conflicts of interest abound when private parties can terminate parental rights through section 1202(H). This article explores deficits in the statute, in light of constitutional law, other Virginia adoption and termination of parental rights statutes, and other states' codes and jurisprudence. Part II describes the history and practice of the statute. Part III describes the flaws of the statute, including Fourteenth Amendment violations and inherent conflicts of interest. Part IV calls for the revision of section 1202(H) based on recent precedent in which the Supreme Court of Virginia recognized the sanctity of the parent-child relationship and the state's interest in preserving it.

II. LEGISLATIVE HISTORY AND CASE LAW

A. *Section 63.2-1202*

Virginia Code section 63.2-1202, which establishes general provisions regarding parental consent in all adoptions, was originally enacted in 1950.⁷ Adoptions under this statute require the consent of natural birth parents unless a statutory provision dictates otherwise.⁸ This article will refer to adoptions under section 1202(H) as "private" adoptions because section 1202(H) applies when the petitioner is a private citizen, not the state's social ser-

6. *Id.* § 63.2-1202(H) (Repl. Vol. 2012) (recognizing a parent's due process right of notice and the right to be heard in court on the issue of abandonment); *id.* § 63.2-1233 (Repl. Vol. 2012) (giving the court discretion to appoint legal counsel for a birth parent); *see Lassiter v. Dep't of Soc. Servs., of Durham Cnty., N.C.*, 452 U.S. 18, 25 (1981) (noting that an indigent's right to appointed counsel exists only where the litigant "may lose his physical liberty").

7. VA. CODE ANN. § 63.2-1202 (Repl. Vol. 2012).

8. *Id.* § 63.2-1202(A) (Repl. Vol. 2012).

vices agency.⁹ In petitions for private adoptions, the court may terminate the birth parent's custodial rights at the same time that the adoption is granted.¹⁰

In 2006, the General Assembly added section 1202(H), which created an exception to the statutory requirement to obtain parental consent.¹¹ Section 1202(H) obviates the need for the consent of natural parents in cases where a parent has failed to "visit" or "contact" her child for a period of six months prior to the adoption petition filing.¹² The statute amounts this failure to visit or contact her child to an allegation of "abandonment."¹³ In 2012, the General Assembly adopted two additions to section 1202(H) under H.B. 445.¹⁴ The full section is quoted below, with these additions in italics.

No consent shall be required of a birth parent who, without just cause, has neither visited nor contacted the child for a period of six months *immediately* prior to the filing of the petition for adoption *or the filing of a petition to accept consent to an adoption*. The prospective adoptive parent(s) shall establish by clear and convincing evidence that the birth parent(s), without just cause, has neither visited nor contacted the child for a period of six months *immediately* prior to the filing of the petition for adoption *or the filing of a petition to accept consent to an adoption*. This provision shall not infringe upon the birth parent's right to be noticed and heard on the allegation of abandonment. For purposes of this section, the payment of child support, in the absence of other contact with the child, shall not be considered contact.¹⁵

H.B. 445, which took two years to move forward, "did not come from any particular case or incident that arose during an adop-

9. In contrast to "private" adoptions, "public" adoptions involve children who have been taken from their birth parents and placed in the custody of the state, usually because of allegations of abuse or neglect. *See* VA. CODE ANN. § 16.1-283(B)(1)–(2) (Cum. Supp. 2013). Eventually, if the child's safe return to his birth parents is not feasible, the state may file a petition to terminate the parental rights of the parents and free the child for adoption. *See id.* § 16.1-283(A), (B)(1)–(2) (Repl. Vol. 2010).

10. *See id.* §§ 63.2-1202, -1233(2) (Repl. Vol. 2012).

11. Act of Apr. 19, 2006, ch. 848, 2006 Va. Acts 1328, 1330 (codified at VA. CODE ANN. § 63.2-1202(H) (Cum. Supp. 2006)).

12. *See* VA. CODE ANN. § 63.2-1202(H) (Repl. Vol. 2012).

13. *Id.*

14. H.B. 445, Va. Gen. Assembly (Reg. Sess. 2012) (enacted as Act of Mar. 30, 2012, ch. 424, 2012 Va. Acts 721, 726).

15. *Id.*; *see* VA. CODE ANN. § 63.2-1202 (Repl. Vol. 2012). The General Assembly had previously added the last sentence regarding the payment of child support in 2009 with H.B. 2159. H.B. 2159, Va. Gen. Assembly (Reg. Sess. 2009) (enacted as Act of Apr. 8, 2009, ch. 805, 2009 Va. Acts 2431, 2432).

tion proceedings[],” according to its sponsor, Delegate Toscano.¹⁶ It emanated instead from a general legislative concern about the ambiguity of section 63.2-1202.¹⁷ The purpose of H.B. 445 was to clarify for the courts when they could allow an adoption to go forward without gaining consent from a birth parent.¹⁸

Prior to the enactment of section 1202(H) in 2006, courts looked to indicia beyond mere visitation frequency to determine whether “abandonment” had occurred in the private adoption context.¹⁹ Since 2006, only a handful of cases involving section 1202(H) have reached the appellate level.²⁰ These decisions fail to establish a clear standard for abandonment under section 1202(H).²¹ In *Campos v. Hinsch*, the Court of Appeals of Virginia did not address the issue of abandonment but ruled that consent was unnecessary from an incarcerated father who failed to appear at the adoption hearing.²² In *Hughes v. Hughes*, the trial court established abandonment based in part on a home study conducted to determine whether the adoptive parents could adequately parent the child.²³ It is not clear how a study of the adoptive parent’s home could support the claim the birth mother had abandoned her child, but apparently the court was satisfied that the mother had abandoned her child pursuant to section 1202(H).²⁴ *Hughes* contrasts, however, with *Gibson v. Kappel*, a

16. E-mail from Carmen Bingham, Chief of Staff to Delegate David Toscano to Zachary Jesse, Research Assistant for author (June 12, 2013, 5:00 PM) (on file with author).

17. *Id.*

18. *Id.*

19. *See, e.g.*, *Robinette v. Keene*, 2 Va. App. 578, 584–86, 347 S.E.2d 156, 160–61, (1986) (looking at the overall picture of parental involvement and fitness rather than only a specific period of no contact with the child).

20. *See, e.g.*, *Copeland v. Todd*, 282 Va. 183, 715 S.E.2d 11 (2011); *Campos v. Hinsch*, No. 2465-10-1, 2011 Va. App. LEXIS 313 (Va. Ct. App. Oct. 11, 2011) (unpublished decision); *Hughes v. Hughes*, No. 1530-10-1, 2011 Va. App. LEXIS 85 (Va. Ct. App. Mar. 8, 2011) (unpublished decision); *Todd v. Copeland*, 55 Va. App. 773, 689 S.E.2d 784 (2010).

21. *See Copeland*, 282 Va. at 189, 715 S.E.2d at 14; *Campos*, 2011 Va. App. LEXIS 313, at *2; *Hughes*, 2011 Va. App. LEXIS 85, at *5.

22. *Campos*, 2011 Va. App. LEXIS 313, at *1–8; *see* VA. CODE ANN. §§ 63.2-1202(J), -1233(2) (Repl. Vol. 2012 & Cum. Supp. 2013), at *1–8. The trial court specifically held that the appellant’s consent was not required pursuant to Virginia Code section 63.2-1202(J) because the incarcerated appellant failed to appear at the hearing on the petition after notice (notwithstanding his incarceration). *Id.* at *1–5. Furthermore, if consent was required, it was being withheld contrary to the best interests of the child pursuant to Virginia Code section 63.2-1233(2). *Id.* at *4; *see* VA. CODE ANN. § 63.2-1233(2) (Repl. Vol. 2012 & Cum. Supp. 2013).

23. *Hughes*, 2011 Va. App. LEXIS 85, at *3–5.

24. *See id.* at *3–5. While the appellate decision does not illustrate what “other evidence” the court used to establish abandonment, it does note the following facts: the child

subsequent 2011 unpublished custody decision, which explained that mere entrustment of a child to another does not constitute abandonment, even if the parent abdicates parental responsibilities.²⁵

The most significant case interpreting section 1202(H) is the well-known *Copeland v. Todd*.²⁶ The mother, Leslie Todd, rarely saw her child over the course of two years, including a period of one year with entirely no contact.²⁷ Near the end of the two-year period, the foster parent, Lucretia Copeland, requested the mother's consent to adopt the child.²⁸ The mother denied consent and her interest in her child was renewed.²⁹ After the foster parent refused the mother's request for frequent visitations, the mother sought and received court-ordered visitation rights.³⁰ After these visitation rights were established and acted upon, the foster parent petitioned to adopt the child and cited section 1202(H) as obviating the need for the mother's consent.³¹ The trial court granted the adoption—finding the period of no contact between June 2006 and June 2007 sufficient to obviate consent under section 1202(H) because the mother had not visited the children for a period of six months—as well as holding that the mother had withheld her consent to the adoption contrary to the best interests of the child pursuant to sections 63.2-1203 and 63.2-1205.³²

The Court of Appeals of Virginia reversed the trial court's ruling on the issue of the period of no contact under section 1202(H), holding that the statutory language, "prior to" the adoption,

was born with narcotics in her system and removed from the mother's custody shortly after birth; the juvenile and domestic relations ("JDR") court found that the mother and biological father were withholding consent to the adoption contrary to the child's best interests; and the mother failed to appear at the consolidated trial of her appeal of the JDR court's order and the adoptive parent's petition. *Id.* at *1–5.

25. See *Gibson v. Kappel*, No. 0180-11-4, 2011 Va. App. LEXIS 352, at *9 (Va. Ct. App. Nov. 15, 2011) (unpublished decision). In this case, which was a custody dispute, not an adoption case, the court did not dispute the trial court's finding that "[n]either parent has voluntarily relinquished parental rights, nor abandoned the child, though each has clearly abdicated responsibility for the day-to-day care of the child." *Id.*

26. 282 Va. 183, 715 S.E.2d 11 (2011).

27. *Id.* at 188, 715 S.E.2d at 14.

28. *Id.*

29. See *id.*

30. *Id.* at 188–89, 715 S.E.2d at 14.

31. *Id.*

32. *Id.* at 189–90, 715 S.E.2d at 14–15; see also VA. CODE ANN. §§ 63.2-1203, -1205 (Repl. Vol. 2012 & Supp. 2013). Virginia Code sections 63.2-1203 and 63.2-1205 are discussed further in Part II.B.

meant the time immediately prior to the adoption petition.³³ The Supreme Court of Virginia upheld the court of appeals' interpretation.³⁴ In addition, the supreme court rejected the foster mother's argument that the contact between the birth parent and child must consist of a "meaningful or significant visitation," holding that "this interpretation goes beyond the plain meaning of the statute and would require courts to evaluate the quality and value of time spent between a birth parent and child."³⁵

The plain language argument the court embraced allows for many inferences. Perhaps the court did not think it was its duty to make judgment calls about the nature of the contact.³⁶ Maybe the court viewed section 1202(H) as designed to obviate consent based solely on a specific time period without parental contact.³⁷ For whatever reason, the court grasped on to the plain language of section 1202(H). The problem is that even with the 2012 statutory amendments, the plain language of section 1202(H) is ambiguous, procedurally and substantively problematic, and subject to misuse and misinterpretation.

B. Section 63.2-1205

Copeland v. Todd is better known for its holding regarding the constitutionality of Virginia Code sections 63.2-1205 and 63.2-1203, by which a court may grant a private adoption even if the natural parent withholds consent if the court finds that consent is withheld contrary to the best interests of the child.³⁸ *Copeland* is the only case where the Supreme Court of Virginia has ruled on the constitutionality of Virginia's private adoption law.³⁹ Therefore, its reasoning and holding on constitutional questions should be applied to section 1202(H).

33. *Todd v. Copeland*, 55 Va. App. 773, 792–93, 689 S.E.2d 784, 794 (2010); see VA. CODE ANN. § 63.2-1202(H) (Repl. Vol. 2012).

34. *Copeland v. Todd*, 282 Va. 183, 194, 715 S.E.2d 11, 17 (2011).

35. *Id.*

36. *See id.*

37. *See id.*

38. VA. CODE ANN. §§ 63.2-1205, -1203 (Repl. Vol. 2012 & Supp. 2013). While section 62.3-1203 is the code section that actually allows for the adoption to proceed without parental consent when it is withheld contrary to the best interests of the child, section 62.3-1205 provides the standards for determining when this situation actually exists. *See id.*; *Copeland*, 282 Va. at 197–201, 715 S.E.2d at 18–21.

39. *See Copeland*, 282 Va. at 197, 715 S.E.2d at 18.

To understand the constitutional question presented to the Supreme Court of Virginia in *Copeland*, it is important to outline the history of section 63.2-1205. As discussed, consent is necessary to execute parental placement (private) adoptions, unless consent is trumped by another statutory provision, like section 1202(H).⁴⁰ Besides section 1202(H), the other significant statute which obviates parental consent, and is the subject of most appellate litigation regarding parental consent, is section 63.2-1205.⁴¹

Section 63.2-1205 dates back to 1995.⁴² The Virginia General Assembly drafted the statute to read, “In determining whether the valid consent of any person whose consent is required is withheld contrary to the best interests of the child . . . the court shall consider whether the failure to grant the petition for adoption would be detrimental to the child.”⁴³ The requirement to consider “detriment” to the child reflected the extensive constitutional jurisprudence, both by the Supreme Court of the United States and by the Supreme Court of Virginia, defining the scope of parental rights encompassed by the privacy rights implied in the Fourteenth Amendment.⁴⁴ The General Assembly’s use of the phrase “detrimental to the child” in the initial statute setting the standards for determining the “best interests of the child” forced the circuit courts to make specific factual findings of detriment (or harm) to a child in order to justifiably pierce the privacy interests of the parents.⁴⁵

The “detriment” language remained in the statute until the General Assembly made a substantive change in 2006. Since 2006, the statute has read, “In determining whether the valid consent of any person whose consent is required is withheld contrary to the best interests of the child . . . the circuit court . . .

40. See *supra* note 4–5 and accompanying text.

41. VA. CODE ANN. § 63.2-1205 (Repl. Vol. 2012 & Supp. 2013).

42. See Act of Apr. 6, 1995, ch. 772, 1995 Va. Acts 1414, 1438 (codified at VA. CODE ANN. § 63.1-225.1 (Repl. Vol. 1995)); *Copeland*, 282 Va. at 195, 715 S.E.2d at 18 (explaining that the detriment to the child standard was initially codified in Virginia Code section 63.1-225.1).

43. Ch. 772, 1995 Va. Acts at 1438 (codified at VA. CODE ANN. § 63.1-225.1 (Repl. Vol. 1995)).

44. See *infra* Part III.

45. See ch. 772, 1995 Va. Acts at 1438 (codified at VA. CODE ANN. § 63.1-225.1 (Repl. Vol. 1995)). Detriment and harm are used interchangeably by the courts in section 63.2-1205 cases. See, e.g., *Copeland*, 282 Va. at 198–99, 715 S.E.2d at 19–20; *Doe v. Doe*, 222 Va. 736, 747, 284 S.E.2d 799, 805 (1981).

shall consider whether granting the petition pending before it would be in the best interest of the child.”⁴⁶

In *Copeland*, when faced with the question of whether the post-2006 statute is constitutional, the Supreme Court of Virginia first acknowledged the history of section 63.2-1205 and its judicial interpretation.⁴⁷ The court noted that in the absence of a standard in the pre-1995 statute, the court “developed the ‘detriment to the child’ standard [in addition to the ‘best interests’ analysis] in order to balance the child’s best interests with the constitutional rights of the biological parents.”⁴⁸ While the General Assembly codified the “detriment” standard into section 63.2-1205 in 1995, it subsequently excised the language when revamping the adoption sections of the Code of Virginia in 2006 and increased its focus on the “best interests of the child.”⁴⁹

Notwithstanding this seemingly unambiguous change, the court opined that there existed a need to analyze whether termination of parental rights would result in detriment to the child, in addition to inquiring into the child’s best interests.⁵⁰ It noted that a “best interest” analysis could not suffice by itself because

if a mere finding of promotion is all that is required to determine that the birth parent’s consent is withheld contrary to the child’s best interests, a court effectively could divest a natural parent of all rights and obligations with respect to the child simply by finding that placement in the prospective adoptive home is more suitable to the child than placement with the birth parent.⁵¹

The court reinforced this conclusion by citing to the Supreme Court of the United States, which has emphasized that a natural parent has due process rights relating to her relationship with

46. Act of Apr. 19, 2006, ch. 848, 2006 Va. Acts 1328, 1330 (codified as amended at VA. CODE ANN. § 63.2-1205 (Cum. Supp. 2006)); Act of Apr. 7, 2006, ch. 825, 2006, Va. Acts 1262, 1267–68 (codified as amended at VA. CODE ANN. § 63.2-1205 (Cum. Supp. 2006)).

47. *Copeland*, 282 Va. at 195–97, 715 S.E.2d at 17–18.

48. *Id.*, 715 S.E.2d at 17.

49. *Id.*, 715 S.E.2d at 17–18 (“Therefore, although the General Assembly retained the factors previously required to determine whether the failure to grant the petition for adoption would be detrimental to the child, they are now factors relevant to determining whether consent is withheld contrary to the ‘best interests of the child.’”); see Act of Apr. 9, 2005, ch. 848, 2006 Va. Acts. 1328, 1330 (codified as amended at VA. CODE ANN. § 63.2-1205 (Cum. Supp. 2006)); Act of Apr. 7, 2005, ch. 825, 2006 Va. Acts 1262, 1267–68 (codified as amended at VA. CODE ANN. § 63.2-1205 (Cum. Supp. 2006)); Act of Apr. 6, 1995, ch. 772, 1995 Va. Acts 1414, 1438 (codified at VA. CODE ANN. § 63.1-225.1 (Repl. Vol. 1995)).

50. *Copeland*, 282 Va. at 199, 715 S.E.2d at 20.

51. *Id.* at 197–98, 715 S.E.2d at 19.

the child, which cannot be severed by a mere showing that termination of those rights would be in the best interests of the child.⁵²

The court held that the absence of the “detriment” language in the statute was not fatal to the statute’s constitutionality, so long as the statute provides for consideration of parental fitness and detriment to the child.⁵³ The trial court must give consideration beyond whether the granting of the adoption is in the child’s best interest—it must consider factors which protect a parent’s due process rights.⁵⁴ The court found that the eight factors set forth in section 63.2-1205 help the statute pass constitutional muster because they compel the trial court to consider the fitness of the parent and the harm to the child, which is what is constitutionally required of the statute.⁵⁵ The court found that the trial court performed the overarching analysis of the fitness of the parent that the statute demands.⁵⁶ The court concluded, “[T]he Virginia Code’s adoption statutes meet constitutional due process scrutiny because they encompass far more than mere consideration of the child’s best interests as defined in cases involving a contest between natural parents.”⁵⁷

The court bolstered its conclusion by distinguishing the term “best interests of the child” in this particular application from other instances of the phrase in the Virginia Code.⁵⁸ The court noted that, while the phrase “best interests of the child” was germane to custody proceedings in a divorce context, the relative definition this term carried was not the same in the context of adoptions.⁵⁹ Here, in a termination of parental rights proceeding, the phrase took on weightier meaning as a result of the due process considerations of the natural parents.⁶⁰ The court concluded that the trial court “went beyond whether the adoption . . . would be in the child’s best interest” by noting other bases for its decision, in-

52. *Id.* (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)).

53. *Id.* at 199, 715 S.E.2d at 20.

54. *See id.*

55. *Id.*

56. *Id.* at 200, 715 S.E.2d at 20.

57. *Id.*

58. *Id.* at 197, 715 S.E.2d at 19.

59. *Id.*

60. *Id.* at 197–200, 715 S.E.2d at 19–20 (“[W]e hold that the Virginia Code’s adoption statutes meet constitutional due process scrutiny because they encompass far more than mere consideration of the child’s best interests as defined in cases involving a contest between natural parents.”).

cluding the natural mother's parental unfitness and the fact that detriment to the child would result from a continuing relationship between the child and natural parent.⁶¹

The *Copeland* decision has often baffled Virginia scholars and practitioners.⁶² The court begged the constitutional question; the unanimous opinion essentially states that section 63.2-1205 is constitutional because it is constitutional. The court acknowledged that the Supreme Court of the United States has emphasized that a trial court must determine more than the "best interest" of the child to terminate parental rights.⁶³ But the court held that the plain meaning of the phrase "best interest" in section 63.2-1205 means more than "best interest," and, therefore, is constitutional.⁶⁴

Virginia family law expert John Crouch summarizes it best:

Although the wording of the 2006 statute is different from the 1995 statute, in its substitution of "best interest" for "detrimental," the Virginia Supreme Court says that you do not have to do this using exactly that word [detrimental] to conform to *Quilloin*, etc., if you use other words that are adequate The Virginia Supreme Court obviously thinks the law before 1995 was O.K. anyway, and the General Assembly shouldn't have added a "detrimental" test. So contrary to best interest equates with detriment and the present statute constitutionally conforms, and therefore it requires more than best interests—to-wit, best interest.

. . .

So is there at the end of the loop a crucial factor that distinguishes the one best interest from the other any better than that? Apparently it would have to be the only one left here, the factor that the Court of Appeals labored mightily to apply, but felt it just couldn't: the Presumption of Constitutionality.⁶⁵

61. *Id.* at 200, 715 S.E.2d at 20–21 (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Malpass v. Morgan*, 213 Va. 393, 300, 192 S.E.2d 794, 799 (1972)).

62. See PETER N. SWISHER, LAWRENCE D. DIEHL & JAMES R. COTTRELL, 9 FAMILY LAW: THEORY, PRACTICE AND FORMS § 14:3, at 1087 (2013) ("In reversing the Court of Appeals . . . the Court . . . sustained the Court of Appeals with respect to its analysis that the 'best interests' language of § 63.2-1205 and § 63.2-1208 implicitly required as a Constitutional imperative consideration of parental fitness and detriment to the child, . . . [therefore] opinions issued under the prior wording of the statute still provide guidance to the practitioner . . . [even though the statute has since been amended]."); John Crouch, *Virginia Weakens Birth Parents' Constitutional Protection in Adoptions*, VIRGINIA FAMILY LAW APPEALS (Nov. 10, 2011), <http://familylaw.typepad.com/virginiafamilylawappeals/2011/11/virginia-weakens-birth-parents-constitutional-protection-in-adoptions.html>.

63. *Copeland*, 282 Va. at 198, 715 S.E.2d at 19.

64. *Id.* at 197, 200, 715 S.E.2d at 19–20.

65. Crouch, *supra* note 62.

Crouch further explained:

If an appellate court is going to issue rulings directly contradicting all the things the U.S. Supreme Court has explicitly said in all its recent cases on the point, it is well advised to do so at the expense of some group which lacks any powerful constituency or advocacy/interest groups to take up its cause. Natural parents fighting involuntary adoption of their children have long been such a group.⁶⁶

Perhaps another case, in which the trial court fails to analyze the fitness of a parent at all before terminating rights, will pose a better constitutional challenge to section 63.2-1205. For now, the statute stands with an “implicit” requirement that trial courts factor the potential harm to the child into their decisions.⁶⁷ Since *Copeland*, the court of appeals has consistently upheld non-consensual adoptions, as long as the trial court has factored an element of “harm” to the child into its decision.⁶⁸

But *Copeland* leaves the door entirely open on the harm standard in section 1202(H). Should trial courts have to find detriment to the child before dispensing altogether with consent per section 1202(H)? Following *Copeland*, they should at the very least be required to make a *Copeland* style “best interest” finding. And according to Supreme Court jurisprudence surrounding the Fourteenth Amendment, all orders that involuntarily terminate parental rights must contain a finding of parental unfitness.⁶⁹ As it stands now, section 1202(H) requires none of this.

III. THE FLAWS OF SECTION 63.2-1202(H)

Section 1202(H) is fundamentally flawed for a number of reasons. It conflicts with Supreme Court of the United States precedent establishing parenting as a fundamental right. It violates substantive and procedural due process rights. It violates equal protection by treating public and private adoptions differently. Finally, it invites conflicts of interest between the birth and adop-

66. *Id.*

67. *Copeland*, 282 Va. at 194–97, 715 S.E.2d at 17–18 (citing *Malpass v. Morgan*, 213 Va. 393, 399, 192 S.E.2d 798 (1972)).

68. *See, e.g.*, *Graham v. Owens*, No. 0899-12-1, 2012 Va. App. LEXIS 359, at *5–6 (Va. Ct. App. Nov. 13, 2012) (unpublished decision) (considering the “heinous acts” father committed against his other biological child in deciding he was a “risk for any other minor children”).

69. *See Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (quoting *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring)).

tive parents. Multiple states have already struck down or refused to apply adoption statutes similar to section 1202(H) because of these constitutional deficiencies.

A. *Parenting as a Fundamental Right*

The Supreme Court of the United States has long held that parenting is a fundamental right, though the state may intervene under the doctrine of *parens patriae* to protect the interest of a child.⁷⁰ This liberty right has evolved to encompass a range of activities. One of the first analyzed by the Court was the right of parents to make fundamental decisions in the education of their children in *Meyer v. Nebraska*.⁷¹ In *Meyer*, the Court characterized this as a liberty right under the Due Process Clause of the Fourteenth Amendment.⁷² While refraining from defining what, exactly, the liberty right protected by the Fourteenth Amendment guarantees, the Court held that it at least includes the right to “establish a home and bring up children.”⁷³ The Court concluded that a state statute cannot be “arbitrary and without reasonable relation” to the state’s powers.⁷⁴

The Court affirmed this liberty right in *Pierce v. Society of Sisters*, where the Court found that an Oregon law mandating parents to send their young children to public schools “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”⁷⁵ The Court instructed that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”⁷⁶ The Court found that the Oregon law had “no reasonable relation to some purpose within the competency of the State.”⁷⁷

70. See *Santosky v. Kramer*, 455 U.S. 745, 753, 766 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents.”); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

71. 262 U.S. 390, 400–01 (1923).

72. *Id.* at 399–400.

73. *Id.* at 399.

74. *Id.* at 403.

75. 268 U.S. 510, 530, 534–35 (1925).

76. *Id.* at 535.

77. *Id.* at 534–35.

In these early cases, the Court carved out rights such as the right to establish a home, bring up children, and control your child's education. Those rights were protected from government interference without a showing of some reasonable relation to the state's police powers. In *Prince v. Massachusetts*, the Court affirmed both the substantive right of parents and the state's power to properly intervene to protect youths from the dangers of "emotional excitement and psychological or physical injury."⁷⁸

These cases left open the question: is this liberty right analogous to a property right or is it something more? In *May v. Anderson*, decided in 1953, the Court declared the fundamental right to be more than a property right because a state must obtain personal jurisdiction before intervening with any parental rights.⁷⁹ In *Armstrong v. Manzo*, the Court held that due process requires notice to a biological parent before an adoption can take place.⁸⁰

Having begun to recognize procedural due process rights in parenthood as early as 1923, the Court took longer to establish substantive due process rights. In 1972, in *Stanley v. Illinois*, the Court restated that the right to create and raise a family is essential and should be free from technical restraints such as a legal definition based on a marriage ceremony.⁸¹ The Court held that as a matter of both the Due Process and Equal Protection Clauses, the father was entitled to a hearing on his parental fitness before his children could be taken away from him.⁸² While the father's interest was "cognizable and substantial," the state's interest in the children was de minimis absent a finding that Stanley was unfit.⁸³ This was reiterated in *Quilloin v. Walcott*, where the Court held that the Due Process Clause "would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without

78. 321 U.S. 158, 170–71 (1944).

79. 345 U.S. 528, 528–29, 533–34 (1953) (holding that a custody order is not entitled to full faith and credit if the state in which the order originated did not have personal jurisdiction over the parent subject to the order). However, this decision has largely been ignored, and further, the Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction Act obviated the need for personal jurisdiction over a respondent. *Brown v. Brown*, 847 S.W.2d 496, 499 & n.2 (Tenn. 1993); see 28 U.S.C. § 1738A (2006); UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. 307 (1999).

80. 380 U.S. 545, 550 (1965).

81. 405 U.S. 645, 651 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

82. *Id.* at 658.

83. *Id.* at 652, 657–58.

some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."⁸⁴ In the landmark 1982 case *Santosky v. Kramer*, the Supreme Court solidified substantive due process by holding that "a 'clear and convincing evidence' standard of proof" should convey the level of subjective certainty required to satisfy due process when terminating parental rights.⁸⁵

When the state acts within its police power regarding the welfare of children, it should generally adhere to a "best interest" standard.⁸⁶ In the adoption context, as the Supreme Court of Virginia observed in *Copeland*, the words "best interest" trigger vastly different standards depending on whether they are referring to private custody matters or the state's interference with parental rights.⁸⁷ Certainly there needs to be varying forms of deference and standards of proof based upon who the parties are and the nature of the hearing or government intervention. But how can sparsely worded statutes that give no more direction than "best interest" meet the requirements for these multiple levels of analysis? Moreover, in Virginia Code section 63.2-1202(H), the phrase "best interest" does not appear at all.⁸⁸ Parental rights are automatically terminated by a ticking time bomb of six months.⁸⁹

B. *Substantive Due Process*

As discussed, according to the Supreme Court of the United States, a mere finding of "best interest" is not enough to terminate parental rights; the parent must be proven unfit by clear and convincing evidence.⁹⁰ While the Supreme Court of Virginia

84. 434 U.S. 246, 255 (1978) (alteration in original) (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)).

85. 455 U.S. 745, 754 (1982).

86. See, e.g., VA. CODE ANN. § 20-124.2(B) (Cum. Supp. 2013) (requiring courts to give primary consideration to the best interests of the child when determining custody arrangements); *Id.* § 20-124.3 (Cum. Supp. 2013) (defining "best interests of the child" in visitation settings).

87. See *Copeland v. Todd*, 282 Va. 183, 197, 715 S.E.2d 11, 19 (2011). Compare VA. CODE ANN. § 20-124.3 (Cum. Supp. 2013) (defining the "best interest" standard in the custody and visitation context), with *id.* § 63.2-1205 (Repl. Vol. 2012 & Supp. 2013) (defining standards where the child's "best interest" allow the state to interfere with parental rights in the adoption setting).

88. *Id.* § 63.2-1202(H) (Repl. Vol. 2012).

89. *Id.*

90. See *Santosky*, 455 U.S. at 769 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 255

skirted the constitutional issue in *Copeland* by declaring that the words “best interest” in the private adoption context mean more than “best interest,” the substantive due process concerns posed by section 1202(H), as opposed to section 63.2-1205, have not come to the court’s attention.⁹¹ Section 1202(H) decisions virtually never get appealed. Orders are made at the trial levels, but often they cannot go further because of procedural due process, equal protection, and conflict of interest issues, which are fleshed out in the remainder of this article.⁹²

As for substantive due process, the argument the court of appeals made regarding the constitutionality of Virginia Code section 63.2-1205 in *Todd v. Copeland* is relevant here—the detriment of the child standard is constitutionally necessary to protect the due process rights of a non-consenting biological parent; therefore, section 1202(H) is flawed because nowhere do the words “detriment or harm” to the child appear.⁹³ The implication, perhaps, of the language in section 1202(H) is that the child will be harmed by a continued relationship because a parent who has not visited or communicated is an “unfit” parent. But the statute does not direct the court to assess the actual “fitness” of the parent.⁹⁴

Section 1202(H) indicates that a failure to visit or communicate may amount to a finding of “abandonment.”⁹⁵ In section 1202(H), after establishing that a failure to visit for six months may result in an automatic waiver of the need for consent, the legislature inserted the word “abandonment,” even though abandonment is not used anywhere else in the section: “This provision shall not infringe upon the birth parent’s right to be noticed and heard on the allegation of *abandonment*.”⁹⁶

(1978).

91. *Copeland*, 282 Va. at 197–201, 715 S.E.2d at 18–21.

92. See VA. CODE ANN. § 16.1-69.5(a) (Repl. Vol. 2010 & Cum. Supp. 2013) (defining courts not of record); *Id.* § 16.1-241(A)(5) (Cum. Supp. 2013) (defining jurisdiction for termination of parental rights cases); *Id.* § 16.1-296(A) (Repl. Vol. 2010 & Cum. Supp. 2013) (defining appeals from JDR to circuit court in these matters).

93. *Todd v. Copeland*, 55 Va. App. 785, 788–92, 689 S.E.2d 784, 790–93 (2010); see VA. CODE ANN. § 63.2-1202(H) (Repl. Vol. 2012); *Copeland*, 282 Va. at 192, 199, 715 S.E.2d at 15, 20.

94. VA. CODE ANN. § 63.2-1202(H) (Repl. Vol. 2012).

95. *Id.*

96. *Id.* (emphasis added).

This verbiage is confusing. “Abandonment” is a ground for a termination of parental rights in *public* adoptions. But abandonment in public adoptions means something entirely different.⁹⁷ The state can file a petition to terminate a parent’s rights if it can be proven by clear and convincing evidence that: (1) the identity or the whereabouts of the parents cannot be determined; (2) the parents have not come forward to claim the child within three months of the child’s placement in foster care; and (3) diligent efforts have been made to locate the parents, to no avail.⁹⁸ This legal standard for abandonment makes no mention of failure to communicate or visit with the child.

Moreover, in abandonment cases in public adoptions, the alleged abandonment must first be proven, and *then* the court must make a separate finding that the termination is in the best interests of the child.⁹⁹ Section 1202(H), in contrast, allows termination of parental rights by syllogism. According to section 1202(H), lack of visitation or communication over a six-month period equals abandonment, which equals unfitness of the parent and or detriment to the child, which means the parent does not have to even be *asked* if she consents to adoption.¹⁰⁰ These are significant leaps for a legislature or court to make.

Most shockingly, the sacred words “best interest” do not appear in section 1202(H).¹⁰¹ Perhaps the legislature decided that it was implied that the statute requires the courts to make a best interest determination, but the Supreme Court of the United States does not agree with implying rights instead of actually granting them.¹⁰² Although, as discussed above, parenting is a limited fundamental right, this right carries with it obligations, which if ignored, may result in an alteration or termination of parental interests, according to *Quilloin*.¹⁰³ The Supreme Court of Virginia

97. *See id.* § 16.1-283(D) (Cum. Supp. 2013).

98. *Id.*

99. *See id.* Part III.C.2 discusses this bifurcation during proceedings.

100. VA. CODE ANN. § 63.2-1202(H) (Repl. Vol. 2012).

101. *See id.*

102. *See Alexander v. Sandoval*, 532 U.S. 275, 286–88 (2008) (finding that statutory intent in creating a cause of action, even implied, “is determinative . . . [w]ithout it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute”).

103. *See Quilloin v. Walcott*, 434 U.S. 246, 255–56 (1978) (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

hung its entire hat on a thorough “best interest” analysis in *Copeland*, which included requiring the court to consider a list of factors.¹⁰⁴ But these factors are only delineated in section 63.2-1205, which does not govern any part of Virginia Code section 63.2-1202.¹⁰⁵ Section 63.2-1202 does not even meet the ambiguous constitutional standard of *Copeland*.¹⁰⁶

C. *Procedural Due Process*

Virginia Code section 1202(H) has a number of distinct procedural shortcomings. It is unconstitutionally vague. The grounds for waiving consent are not adjudicated separately from the issue of adoption. Shockingly, the words “best interest” are absent from the statute. Lastly, section 1202(H) allows adoptions to take place without proper notice to the parent who is potentially losing a fundamental right.

1. Vagueness

A statute can be unconstitutionally vague if it does not clearly define what behavior is prohibited or the consequences thereof.¹⁰⁷ A number of Virginia criminal statutes have been struck down as vague.¹⁰⁸ Statutes that implicate fundamental rights can also be subject to vagueness analysis.¹⁰⁹ Parental rights are not mere

104. See *Copeland v. Todd*, 282 Va. 183, 192, 715 S.E.2d 11, 18 (2011).

105. Compare VA. CODE ANN. § 63.2-1205 (Repl. Vol. 2012 & Supp. 2013) (requiring an analysis of the best interests of the child), with *id.* § 63.2-1202 (Repl. Vol. 2012) (making no mention of the best interest factors described in 63.2-1205). In fact, the phrase “best interest” does not even appear in section 1202 except in one specific circumstance not pertaining to section (H). See *id.* § 1202(C)(3) (Repl. Vol. 2012). Nowhere does either statutory section reference the other section.

106. Despite “best interest” being paramount in *Copeland*, it is not even mentioned in section 1202(H). Compare VA. CODE ANN. § 63.2-1202(H) (Repl. Vol. 2012), with *Copeland*, 282 Va. at 197, 715 S.E.2d at 19.

107. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)).

108. See, e.g., *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441, 444, 500 (E.D. Va. 1999) (striking down a partial birth abortion statute as impermissibly vague); *Tanner v. City of Va. Beach*, 277 Va. 432, 435, 440, 674 S.E.2d 848, 850, 853 (2009) (striking down a municipal noise control ordinance as inherently vague); *Booth v. Commonwealth*, 197 Va. 177, 177, 179, 88 S.E.2d 916, 916–17 (1955) (finding the term “improper person” unconstitutionally vague and indefinite in a statute relating to the purchase of alcohol); *Commonwealth v. Carter*, 21 Va. App. 150, 155, 462 S.E.2d 582, 585 (1995) (finding a child endangerment statute unconstitutionally vague).

109. See, e.g., *Nunez v. City of San Diego*, 114 F.3d 935, 938, 952 (9th Cir. 1997) (finding a city’s juvenile curfew ordinance unconstitutionally vague and an infringement on the

property rights, and, in fact, many courts have held that child welfare proceedings are “quasi criminal” in nature.¹¹⁰ This is also reflected in privileges in state codes and in the Federal Rules of Evidence.¹¹¹ As one scholar has noted, “[state involvement in child welfare] is less a family matter than a quasi-criminal one,” and an Ohio court noted that termination of parental rights in a child welfare case is equivalent to the death penalty in a criminal case.¹¹² This quasi-criminal nature strongly suggests that laws terminating parental rights should be subject to vagueness analysis.

Virginia Code section 1202(H) is vague compared to other states’ provisions for simultaneously waiving parental consent, terminating parental rights, and granting adoption based on a parent’s lack of communication, visitation, or support. The legal terms of other state statutes are well defined. A number of codes require that the lack of contact must be “willful,” “voluntary,” done “knowingly” or “with intent,” or that the parent must have “refused” any relationship, “notwithstanding the opportunity” or “ability” to do so, or “without justifiable cause.”¹¹³ This type of

freedom of movement and a parent’s fundamental right to rear his or her own child as he or she sees fit); *State v. Stallman*, 519 N.W.2d 903, 910 (Minn. Ct. App. 1994) (finding a city cruising ordinance unconstitutionally vague and a restriction on the fundamental right to travel); *cf. Heying v. State*, 515 N.E.2d 1125, 1125–29 (Ind. Ct. App. 1987) (noting that there is no fundamental right to operate a motor vehicle and the state’s habitual traffic offender statute was not subject to vagueness analysis).

110. *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982) (“[A] natural parent’s desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right.” (quoting *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 27 (1981)) (internal quotations omitted)); *see, e.g., State v. Frazier*, 118 P.3d 224, 231 n.13 (Okla. Civ. App. 2005).

111. *See, e.g., FED. R. EVID.* 414; *FED. R. EVID.* 415; ROBERT A. BARKER & VINCENT C. ALEXANDER, 5 NEW YORK PRACTICE SERIES § 5.40 (2012) (“The rape counselor privilege is not necessarily confined to criminal proceedings . . . but is likely to arise more often in child abuse proceedings, which are quasi-criminal in nature.”). The lines between civil and criminal cases involving children are often blurred. In civil cases involving a claim predicated on an alleged conduct of sexual assault or child molestation, the Federal Rules of Evidence permit admittance of any of the defendant’s prior acts of criminal sexual assault or child molestation. *FED. R. EVID.* 415.

112. *In re Smith*, 601 N.E.2d 45, 55 (Ohio Ct. App. 1991); F. Paul Kurmay, *Children in the Probate Courts of Connecticut Building a Case for Greater Resources*, 14 QUINNIPIAC PROB. L.J. 227, 232 (1999).

113. *See, e.g., ALA. CODE* § 26-10A-9 (2013) (allowing consent or relinquishment to be implied if a parent “[k]nowingly leav[es] the adoptee with others without provision for support and without communication” or does not otherwise maintain a “significant parental relationship with the adopted for a period of six months”); *CAL. FAM. CODE* § 8604(b) (West Cum. Supp. 2013) (obviating the need for consent of a noncustodial birth parent if that parent “for a period of one year willfully fails to communicate with and to pay for the

language indicates that other state legislatures are at least mindful of situations like the one described in the introduction of this article. The Utah Code explicitly states that if an unmarried biological father is “prevented from complying” with steps proscribed by statute to establish a “substantial relationship” with his child by a party with custody of the child, he can legally bypass those steps and establish the relationship, which in turn makes his consent required for adoption.¹¹⁴

Many state legislatures’ parental consent bypass provisions have more teeth than Virginia’s statute. Courts in other states have also strictly construed statutes which bypass parental consent.¹¹⁵ These courts have decided to step in to resolve any breach

care, support, and education of the child when able to do so”); D.C. CODE § 16-304(d) (2013) (obviating the need for parental consent when that parent has abandoned the child and “voluntarily failed to contribute” to the child’s support for six months immediately preceding the filing of the petition for adoption); KY. REV. STAT. ANN. § 199.502(1)(e) (LexisNexis 2007) (obviating the need for parental consent if the parent has “continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child” for six months or more with no reasonable expectation of improvement); MD. CODE ANN., FAM. LAW § 5-3B-22(b) (LexisNexis 2012) (allowing a court to grant an adoption without parental consent if the parent has not had custody of the child for at least one year and if, while the child was in petitioner’s custody, the parent “has not maintained meaningful contact . . . notwithstanding an opportunity to do so”); N.M. STAT. ANN. § 32A-5-18(A) (2013) (allowing consent to an adoption to be implied “if the parent, without justifiable cause” has left the child with others, including the other parent or an agency, for specified periods without communication and provisions for support); N.Y. DOM. REL. LAW § 111(2)(a) (Consol. 2009) (obviating the need for parental consent to adoption if a parent or custodian “*evinces an intent* to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, *although able to do so*”) (emphasis added); OKLA. STAT. tit. 10, § 7505.4-2(B) (2011) (“Consent to adoption is not required from a parent who, for a period of twelve (12) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for adoption, has . . . willfully failed, refused, or neglected to contribute to the support of such minor.”); OR. REV. STAT. § 109.324(1) (2011) (allowing the court to grant an adoption without parental consent if the parent “is believed to have willfully deserted the child or neglected without just and sufficient cause to provide proper care and maintenance for the child for one year” immediately preceding the filing of a petition for adoption); WYO. STAT. ANN. § 1-22-110(a) (2013) (allowing the court to order an adoption without written consent if the court finds that the putative father or non-consenting parent has “[w]illfully failed to contribute to the support of the child for a period of one (1) year immediately prior to the filing of the petition to adopt and has failed to bring the support obligation current”).

114. See UTAH CODE ANN. § 78B-6-121(2) (LexisNexis Supp. 2013).

115. Doe v. Doe III (*In re John Doe*), 266 P.3d 1182, 1184–85 (Idaho Ct. App. 2011) (“In order to ‘willfully’ fail to maintain a normal parental relationship, the parent must have the ability to maintain it and choose not to do so.” (citing Doe I v. Doe II, 228 P.3d 980, 983 (Idaho 2010))); see also *In re Adoption of Jessica Lee T.*, No. 2892-M, 1999 Ohio App. LEXIS 2563, at *6 (Ohio Ct. App. June 2, 1999) (“Under this statute, only where a petitioner can prove by clear and convincing evidence that the non-consenting parent, without

caused by apparent vagueness. Many go further to indicate that “[t]he willfulness of a parent’s conduct is an essential element of [the] statutory definition of abandonment.”¹¹⁶ The Supreme Court of Wyoming explained that “every reasonable intendment is made in favor of the [non-consenting] parent’s claims.”¹¹⁷

In particular, courts scrutinize the behavior of all the parties in non-consent adoptions. A Utah court specifically applied and upheld the Utah provision noted above in a case where the mother had failed to notify the father of the pending adoption when the father “had established a ‘substantial relationship’ with [the] [c]hild and had ‘taken some measure of responsibility’” and was thus entitled to notice.¹¹⁸ In a case where a friendly custody agreement between mother, father, and foster parents went sour, a Tennessee court concluded that there is no “willful failure to visit” when there is “undisputed . . . animosity between the parties,” which contributes to what may appear, at first glance, as a parent’s failure to visit.¹¹⁹ In another Tennessee case, the court of appeals found that the grandparents had not met their burden to establish the mother abandoned the child because they refused to respond to the mother’s visitation requests, failed to place the mother’s name on school records, and rebuffed her attempts to provide financial support in “an obvious attempt to deny [her] the opportunity” to be involved in the child’s life.¹²⁰ A Michigan court

any justification whatsoever, failed to maintain contact with the minor child for one year, will the court permit adoption without parental consent.”).

116. See, e.g., *In re C.T.B.*, No. M2009-00316-COA-R3-PT, 2009 Tenn. App. LEXIS 416, at *11 (Tenn. Ct. App. July 6, 2009) (citing *In re M.L.P.* 281 S.W.3d 387, 392 (Tenn. Ct. App. Mar. 27, 2009); *In re Audrey S.*, 182 S.W.3d 838, 863 (Tenn. Ct. App. Aug. 25, 2005)).

117. *J.W.R. v. R.G.* (*In re Adoption of G.S.D.*), 716 P.2d 984, 988 (Wyo. 1986) (quoting *A.L.T. v. D.W.D.* (*In re Adoption of C.C.T.*), 640 P.2d 73, 74 (Wyo. 1982)); see also *In re Adoption of K.M.M.*, 611 P.2d 84, 84, 86–87 (Alaska 1980) (preventing a stepfather from adopting children where the biological father, who had placed money in a trust for them and written them letters, had not “substantially without justification” failed to meet the requirements of providing care and support for his children); *In re Adoption of McCoy*, 31 Ohio Misc. 195, 201 (Ohio Ct. Com. Pl. 1972) (preventing a stepfather from adopting children where the biological father did not willfully fail to pay support).

118. *T.S. v. L.F.* (*In re Adoption of S.L.F.*), 27 P.3d 583, 585, 587–88 (Utah Ct. App. 2001). The statutory provision the court refers to, section 78-30-414(2)(a), was recodified at the current section 78B-6-12(2) in 2008. UTAH STATE LEGISLATURE, TITLE 78 RECODIFICATION SECTION COMPARISON CHART (OLD-NEW) (2008), available at <http://le.utah.gov/session/2008/pdfdoc/TITLE78RecodificationChartoldNew.pdf>.

119. *In re Adoption A.M.H.*, 215 S.W.3d 793, 796–801, 810–11 (Tenn. 2007) (noting that at one point, an incident occurred at the foster parents’ home resulting in the police telling the biological parents that they would be arrested should they return to the foster parents’ home).

120. *In re Alex B.T.*, No. W2011-00511-COA-R3-PT, 2011 Tenn. App. LEXIS 617, at *3–

summarized it best in a case where the petitioning grandmother admitted she did not allow the child to visit the mother when, for example, a school project was due: “Failure to allow visits and contact does not equate to failure to visit, contact, or communicate.”¹²¹

New York courts have held that parents who are inhibited from complying with procedural measures (for example, to establish their legitimacy) by the potential adoptive parents or by anyone else, may not have their consent waived automatically.¹²² The New York court held that when a father was unable to forge a legal relationship with his child because of the underhanded actions of others, he could not be barred from the protections of a statute designed to establish parenthood.¹²³ Even if a parent has not visited or cultivated a personal relationship with the child, if other parties’ actions cause procedural failures (such as not being able to register with the putative father registry in time), the father’s consent cannot be bypassed.¹²⁴

In Virginia, prior to the enactment of section 1202(H), the Court of Appeals of Virginia had an occasion to define “abandonment” in the private adoption context and eliminate any statutory vagueness. In *Robinette v. Keene*, the court of appeals had to determine if the drastic, improvised, and sometimes hard-to-believe actions of a mother rose to the level of abandonment.¹²⁵ In ruling that they did not, the court recognized a strong presumption in favor of the rights of natural parents—a presumption dashed by the enactment of section 1202(H).¹²⁶

Jessie Robinette learned that her husband Danny was molesting their five-year-old daughter.¹²⁷ The next day Danny’s aunt drove Jessie, the five-year-old daughter, and their two-year-old daughter to a social services center so Jessie could report the in-

5, *9, *12, *25–27 (Tenn. Ct. App. Nov. 15, 2011) (internal quotation marks omitted).

121. *In re Brown*, No. 307158, 2012 Mich. App. LEXIS 915, at *45 (Mich. Ct. App. May 10, 2012).

122. *See, e.g., In re Adoption of Baby Girl S*, 535 N.Y.S.2d 676, 679, 683 (N.Y. Sur. Ct. 1988) (finding consent before adoption by the father necessary when father was “able and willing,” to have a relationship with his child but was prevented from doing so by the mother).

123. *Id.* at 681–83.

124. *Id.* at 679, 682–83.

125. 2 Va. App. 578, 579, 347 S.E.2d 156, 157 (1986).

126. *Id.* at 585–86, 347 S.E.2d at 160–61.

127. *Id.* at 579, 347 S.E.2d at 157.

cident to authorities.¹²⁸ The reporting at the center took longer than expected, and not knowing where she and her five-year-old daughter would be spending the night, Jessie asked the aunt to take the two-year-old daughter home with her until Jessie was able to come get her.¹²⁹ Jessie and the five-year-old daughter spent the night and the following week in a spousal abuse center, and finally, took refuge in Jessie's father's farm.¹³⁰ Jessie did not immediately make arrangements to retrieve the two-year-old daughter from the aunt for multiple reasons: she lacked transportation, there was no phone on the farm, and she feared that going to the aunt's house could let her husband Danny, who had threatened to kill her, know where she and the children were.¹³¹

Unbeknownst to Jessie, after his abuse arrest, Danny made arrangements with a deputy sheriff to find a new home for their daughters.¹³² Almost two months after Jessie had left the house with the daughters, Danny executed an entrustment agreement to place the daughters with Mr. and Mrs. Keene, a couple from the deputy's church who was receptive to providing a home for the daughters.¹³³ On the day the entrustment was executed, a social service worker retrieved the two-year-old daughter from the aunt and visited the farm to speak with Jessie about the five-year-old daughter.¹³⁴ Jessie was not at the farm, and the five-year-old daughter had been left in the care of Jessie's uncle.¹³⁵ The social worker visited multiple times that day to speak with Jessie, but Jessie was never there.¹³⁶ In her last visit, the social worker told Jessie's father to bring either Jessie or the five-year-old daughter to the social services office by 9:00 the next morning.¹³⁷ When Jessie failed to appear at the farm the next morning, Jessie's father took the five-year-old to social services.¹³⁸ Jessie explained away her absence at trial, testifying that the car she was riding in had become disabled on a back road, and the car trouble

128. *Id.*

129. *Id.* at 579–80, 347 S.E.2d at 157.

130. *Id.* at 580, 347 S.E.2d at 157.

131. *Id.*

132. *Id.*, S.E.2d at 157–58.

133. *Id.* at 579–81, 347 S.E.2d at 157–58.

134. *Id.* at 581, 347 S.E.2d at 158.

135. *Id.* at 581–82, 347 S.E.2d at 158.

136. *Id.* at 582, 347 S.E.2d at 158.

137. *Id.* at 581–82, 347 S.E.2d at 158.

138. *Id.* at 582, 347 S.E.2d at 158.

combined with a lack of phone on the farm impeded her from getting back until later the next morning.¹³⁹

The same morning Jessie's father delivered the five-year-old to social services, the juvenile and domestic relations ("JDR") court ordered the five-year-old's removal from Jessie and placed her with the Keenes.¹⁴⁰ Jessie did not sit idly by—she visited with her daughters at the social services office and requested additional visits when the social worker told her that she had a "tight schedule" and could not accommodate further visits.¹⁴¹ A home study revealed Jessie "had obtained adequate housing and appeared to be making sincere efforts in working with Social Services in order to have her children returned home."¹⁴² Two weeks after the five-year-old was removed from Jessie's custody, Danny gave his consent for the Keenes to adopt both daughters.¹⁴³ The Keenes shortly thereafter filed petitions for adoption for both children, alleging Jessie had abandoned the girls and was an unfit mother.¹⁴⁴ Less than a year after Jessie had left her marriage fearing for her and her daughters' safety, and a little over four months after those daughters were placed in the Keene's custody, a judge terminated Jessie's parental rights, ruling that Jessie had abandoned her daughters and was an unfit parent.¹⁴⁵

The court of appeals, in a rare moment of sympathy for a natural parent, seemed appalled at this termination of parental rights.¹⁴⁶ According to the court of appeals, operating *de novo*, both the JDR court and the circuit court had made the decision to permanently sever ties between mother and children absent any "clear, cogent, [or] convincing" proof that Jessie abandoned her daughters or was an unfit parent.¹⁴⁷

Robinette gave us some inkling about what did *not* constitute "abandonment" in the private adoption context before section

139. *Id.*

140. *Id.*

141. *Id.* The two-year-old was placed with the Keenes that day as well. *Id.* at 581, 347 S.E.2d at 158.

142. *Id.* at 583, 347 S.E.2d at 159 (internal quotation marks omitted).

143. *Id.*

144. *Id.*

145. *Id.* at 579–83, 347 S.E.2d at 157, 159.

146. *Id.* at 585, 347 S.E.2d at 160 ("There is not a scintilla of evidence to support the finding that Robinette abandoned [the daughters].").

147. *Id.* at 582–85, 347 S.E.2d at 158–60.

1202(H)'s enactment, but this decision is a one-off. There are systemic roadblocks to addressing any vagueness issues. Terminations of parental rights and adoptions rarely get overturned.¹⁴⁸ Virginia practitioners have observed that trying to appeal a termination of parental rights under most grounds is futile.¹⁴⁹ And since the enactment of the new private adoption statute in 1995, not a single case under section 1202(H) has ever reached the appellate level specifically on the substantive issue of what constitutes "abandonment."¹⁵⁰ This is not for lack of petitions and orders brought under section 1202(H); there are significant procedural and equal protection issues that impede parents' ability to bring appeals.¹⁵¹

The court in *Robinette*, for the first and only time in this context, noted other problems with bringing and successfully arguing appeals—the lack of a JDR court record and irregularities of both JDR and circuit court practice.

The record before us does not contain the record of proceedings in the juvenile and domestic relations district court. The transcript of proceedings in the circuit court indicates that the record was available in the circuit court. The trial court was advised by counsel for the Keenes that the juvenile and domestic relations district court did not terminate Robinette's residual parental rights and did not take further action beyond removal of [the child] from [the great aunt's] home and placement of both children in the Keenes' foster care.

No issue is raised as to the regularity of the proceedings in the juvenile and domestic relations district court. We note, however, that the absence of the record of proceedings in that court, an omission which is not confined to this case, hinders our full consideration of appeals involving parents and their children.¹⁵²

148. See COURT IMPROVEMENT PROGRAM, OFFICE OF THE EXEC. SEC'Y, SUPREME COURT OF VA., TABLE OF APPEALS OF TERMINATION OF PARENTAL RIGHTS CASES TO THE SUPREME COURT OF VIRGINIA AND THE COURT OF APPEALS OF VIRGINIA (2013) [hereinafter TABLE OF APPEALS], available at http://www.courts.state.va.us/courtadmin/aoc/cip/resources/tpr_table.pdf (last updated July 11, 2013). As Richard Crouch puts it, "DSS has always been pretty sure of having any parental right termination upheld on appeal." *Family Law Newsletter*, 26 FAM. L. SEC. NEWSLETTER (Richard E. Crouch ed., Virginia State Bar), Spring 2006, at 31, available at <http://www.vsb.org/docs/sections/family/spring2006.pdf>.

149. *Family Law Newsletter*, *supra* note 148.

150. See TABLE OF APPEALS, *supra* note 148. The Supreme Court of Virginia touched on the issue of abandonment in its evaluation of the phrase "prior to" in section 1202(H) in *Copeland v. Todd*, but the court did not set a clear standard of what constitutes abandonment. See *Copeland v. Todd*, 282 Va. 183, 194, 715 S.E.2d 11, 17 (2011).

151. See, e.g., *infra* notes 212–14 and accompanying text.

152. *Robinette*, 2 Va. App. at 582 n.2, 347 S.E.2d at 158 n.2.

Since the enactment of section 1202(H), it is even harder for a parent to successfully appeal a private adoption granted on abandonment grounds, because the court may waive parental consent and issue the adoption order in one fell swoop.¹⁵³ So even if a parent appears at the hearing for a petition filed under section 1202(H), there is typically no record of any defenses to any aspect of the proceeding.¹⁵⁴ A de novo trial in circuit court may offer a second chance to create a record for appeal, but it is not recorded either, unless the parent hires a court reporter, which is unlikely.¹⁵⁵ Legal errors can slip by in a heartbeat when there is no record.

This is perfectly exemplified by two recent Virginia cases. In *Campos v. Hirsch*, a biological father appealed the termination of his rights by the circuit court.¹⁵⁶ The mother signed an entrustment agreement prior to the birth of the child, giving appellee custody of her child.¹⁵⁷ She mailed a certified letter to the incarcerated father about steps he must take to object.¹⁵⁸ The father never got the letter, and it was returned as unclaimed.¹⁵⁹ During the JDR court proceedings, an appointed counsel represented the father's interests because he was incarcerated.¹⁶⁰ The court did not grant a continuance so the father could be present at the trial, and at the trial, he lost his parental rights due to his failure to appear.¹⁶¹ The father appealed this decision, but the court of appeals upheld it because the appellant failed to file transcripts or written statements of facts pursuant to Supreme Court of Virgin-

153. See VA. CODE ANN. §§ 63.2-1202(H), -1203(A) (Repl. Vol. 2012).

154. See *infra* notes 156–75 and accompanying text.

155. In Virginia, parties must pay for their own court reporters in civil proceedings. See VA. CODE ANN. § 17.1-128 (Repl. Vol. 2010 & Cum. Supp. 2013). One company charges \$130 for the appearance alone. RATE SHEET COOK & WILEY (2013). The party must also cover the parking fees for the reporter, and the actual transcript costs a minimum of \$3.80 per page. See, e.g., *id.* In five years of practice, the author has never seen an indigent party, or a low income party without an attorney, hire a court reporter in any court in Virginia.

156. *Campos v. Hirsch*, No. 2465-10-1, 2011 Va. App. LEXIS 313, at *3 (Va. Ct. App. Oct. 11, 2011) (unpublished decision). Although Mr. Campos's consent could have been bypassed via section 1202(H), the trial court ruled pursuant to section 63.2-1202(J), citing Mr. Campos' failure to appear at the hearing as grounds to obviate consent. *Id.* at *4.

157. *Id.* at *1–2.

158. *Id.* at *2.

159. *Id.*

160. *Id.* at *3–4.

161. *Id.*

ia Rule 5A:8.¹⁶² The court held that the attorney for the father only ever “noted his objections” but did not articulate a basis for objecting.¹⁶³ “Without a transcript or written statement of facts from the hearings themselves, we are unable to determine whether appellant provided the trial court any basis for his request for a continuance, and whether he lodged specific and timely objections to the trial court’s ruling denying his requested continuance.”¹⁶⁴ Mr. Campos lost his parental rights and the right to appeal their loss due to his incarcerated status and not his parenting. The information outlining how he could establish putative parental rights never reached him. The refusal to grant a continuance until he could appear in court essentially predetermined his case on section 63.2-1202(J) grounds before trial. And the lack of a trial record ensured an appeals court would have easy, airtight grounds to dismiss his appeal.

In *Hughes v. Hughes*, the appellant mother objected to the father and stepmother’s petition for adoption.¹⁶⁵ At trial, the mother purposely did not appear because she was in an out-of-state drug treatment program—she instructed her counsel to make a motion for a continuance.¹⁶⁶ No court order forbade her from leaving the program in order to attend court.¹⁶⁷ The judge inquired into whether the mother could have, in fact, been present for the trial, to which her counsel responded that, while she could, she felt that completing her drug counseling was important.¹⁶⁸ While mother’s counsel might have advised her not to attend the trial, no evidence of this was ever entered into the record.¹⁶⁹ The court denied the continuance, and the court then found that the mother had both abandoned the child and withheld consent contrary to the best interests of the child.¹⁷⁰ On appeal, the court of appeals noted that nothing in the record supported the contention that her counsel had told her not to attend her trial date, and the record actually indicated that, if she had wanted to, she could have

162. *Id.* at *6–7; see VA. SUP. CT. R. 5A:8 (Repl. Vol. 2013).

163. *Id.* at *4–5.

164. *Id.* at *7.

165. *Hughes v. Hughes*, No. 1530-10-1, 2011 Va. App. LEXIS 85, at *1 (Va. Ct. App. Mar. 8, 2011) (unpublished decision).

166. *Id.* at *4.

167. *Id.* at *11.

168. *Id.* at *4–5.

169. *Id.* at *8–11.

170. *Id.* at *5.

come.¹⁷¹ “Given appellant’s concessions and the absence of any evidence in the record supporting her allegations against her counsel, it cannot be said that the trial court abused its discretion in denying the continuance motion.”¹⁷² The court also rejected the due process argument, noting that the mother had notice and had chosen not to appear.¹⁷³ Finally, the court dismissed the “ineffective assistance of counsel” argument.¹⁷⁴ The court noted that, again, the arguments the mother put forward went beyond “the record.”¹⁷⁵

On the positive side, the Court of Appeals of Virginia, in some termination of parental rights contexts, has been mindful of procedural protections for parents. In *Carlton v. Paxton*, for example, the court allowed a father to appeal, even though he failed to comply with proper procedures, because the circuit court’s service of the original court order was defective.¹⁷⁶ “As the Supreme Court of Virginia has made plain, these rules have been designed to protect the appellee [adoptive parent in this case], not to penalize the appellant.”¹⁷⁷

In *F.E. v. G.F.M.*, the court of appeals allowed a father to challenge an adoption after the six month statutory time limit because to do otherwise would violate due process.¹⁷⁸ The court held that, “[b]ecause the limitation period contained in Code § 63.1-237 affected father’s fundamental right to maintain [his already established] relationship with his son, we evaluate its constitutionality . . . under the ‘strict scrutiny’ test.”¹⁷⁹ Likewise, if the court of appeals ever *had* an opportunity to rule on a procedural defect of an adoption filed under section 1202(H), strict scrutiny might be applied and some of the procedural roadblocks to addressing vagueness in private adoption may fall due to their lack of narrow tailoring.

171. *Id.* at *10–11.

172. *Id.* at *11.

173. *Id.* at *11–12.

174. *Id.* at *14–15.

175. *Id.*

176. 14 Va. App. 105, 114, 415 S.E.2d 600, 605 (1992).

177. *Id.* at 110, 415 S.E.2d at 602.

178. 35 Va. App. 648, 661, 547 S.E.2d 531, 537–38 (2001).

179. *Id.* at 664, 547 S.E.2d at 539.

2. Lack of Bifurcation

a. Background

As discussed, according to the Supreme Court of the United States, parental rights cannot be terminated without clear and convincing evidence that the parent is unfit.¹⁸⁰ The petitioner, whether an agency or a private person, bears this burden of proof.¹⁸¹

After hearing evidence about a parent's fitness, the court must decide whether terminating the parent's rights is in the child's best interest during what is known as the "dispositional" stage.¹⁸² At this stage, parties may introduce new evidence.¹⁸³ The disposition concludes with the court either entering an order of termination or specifying that another order is in the best interests of the child.¹⁸⁴

To be clear, the court does not reach the dispositional stage until petitioner proves the grounds for termination, based on the parent's behavior.¹⁸⁵ States use different procedures for adjudicating the disposition after a termination of parental rights. Most states hold one hearing but listen to the evidence about the "fitness" of a parent first, and then, if the grounds for termination are proven, decide what is in the best interests of the child.¹⁸⁶ Some courts hold two separate hearings.¹⁸⁷ In either format, the fact finding to determine if the statutory ground for termination exists is wholly separate from the fact finding to determine the disposition.

180. Santosky v. Kramer, 455 U.S. 745, 747–48 (1982).

181. Walker v. Dep't of Pub. Welfare of Page Cnty., 223 Va. 557, 560, 290 S.E.2d 887, 889 (1982).

182. VA. CODE ANN. § 16.1-278.2 (Repl. Vol. 2010 & Cum. Supp. 2013); see Farrell v. Warren Cnty. Dep't of Soc. Servs., 59 Va. App. 375, 385–86, 719 S.E.2d 329, 334 (2012).

183. Farrell, 59 Va. App. at 385, 719 S.E.2d at 334.

184. Susan B. Hershkowitz, *Due Process and the Termination of Parental Rights*, 19 FAM. L.Q. 245, 283 (1985). Another order might be permanent guardianship, with the parent retaining rights.

185. See *id.*

186. See U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD WELFARE INFORMATION GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS (2013), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.pdf; Hershkowitz, *supra* note 184, at 283 n.295.

187. See, e.g., N.Y. SOC. SERV. LAW § 384-b(3)(g) (Consol. 2011).

Many appellate courts have found the separation of issues in this two-step process to be imperative.¹⁸⁸ But states differ on whether the evidence at this dispositional stage must also be clear and convincing.¹⁸⁹ While there must be at least clear and convincing evidence to support the termination of parental rights, the Supreme Court has not weighed in on the standard at disposition.¹⁹⁰

The Supreme Court of Louisiana alluded to one underlying reason for this bifurcation: preserving the “neutrality” of the decision-maker.¹⁹¹ If specific evidence regarding the child’s best interest—for example, testimony about the child’s bond with the potential adoptive parents—is presented at the same time as the evidence about the biological parent’s shortcomings, it might bias the fact-finder. The Supreme Court of California put this principle into practice when it noted that it was unjust for a father’s fitness to be weighed at the same time that evidence regarding the prospective adoptive family was put forward.¹⁹² Others states have made it clear that even if a child might be subjectively better off with another family, this cannot be put forth as evidence

188. See, e.g., *J.M. v. R.P. (In re Adoption of C.A.P.)*, 869 N.E.2d 214, 217–18 (Ill. App. Ct. 2007); *G.L. v. M.P. (In re G.L. & K.A.)*, 768 N.E.2d 367, 372 (Ill. App. Ct. 2002); *Kimock v. Jones*, 47 A.3d 850, 855 (Pa. 2012); *In re T.D.*, 949 A.2d 910, 915–16 (Pa. 2008).

189. The evidentiary standard at disposition is often not specified in state codes. See e.g., N.Y. FAM. CT. ACT § 631 (Consol. Cum. Supp. 2013). Where this is the case, some courts have applied the clear and convincing standard. See, e.g., *In re Adoption of J.S.R.*, 374 A.2d 860, 864 (D.C. 1977); *In re Adoption of Noble*, 349 So.2d 1215, 1216 (Fla. Dist. Ct. App. 1977); *In re Adoption of Children*, 233 A.2d 188, 192 (N.J. Super. Ct. App. Div. 1967); Mark Hardin & Josephine Bulkley, *The Rights of Foster Parents to Challenge Removal and to Seek Adoption of Their Foster Children*, in *FOSTER CHILDREN IN THE COURTS* 299, 321 (Mark Hardin ed., 1983) (noting that most termination statutes require proof by clear and convincing evidence). *But see*, e.g., *In re Adoption of B.A.B.*, 842 S.W.2d 68, 71 (Ark. Ct. App. 1992) (“[I]t is for the probate judge in such cases to weigh the benefits flowing to children from the granting of an adoption As shown by the probate judge’s comments, we are satisfied that the judge carefully considered these . . . interests in making his decision. Based upon our de novo review, we cannot say that his decision was clearly against the preponderance [of the] evidence.”); *Bonnie S.P. v. Phillip P. (In re Adoption of C.D.)*, 729 N.E.2d 553, 559 (Ill. App. Ct. 2000) (“After our review of the record, we find that the circuit court’s decision to give custody to the foster parents was within its discretion and not against the manifest weight of the evidence.”).

190. See *Santosky v. Kramer*, 455 U.S. 745, 769–70 (1982); see *In re Valentine*, 79 S.E.3d 539, 546 (Tenn. 2002) (illustrating how Tennessee statutes and case law use the “clear and convincing” standard of evidence to determine both the grounds for termination and the inquiry into the child’s best interest).

191. *In re Adoption of B.G.S.*, 556 So.2d 545, 555–56 (La. 1990).

192. *Cornelis D. v. Ronald D. (In re Charlotte D.)*, 202 P.3d 1109, 1113–15 (Cal. 2009) (noting that the father’s fitness did not necessarily have to be discussed at the hearing).

for why a parent's rights should be terminated.¹⁹³ Virginia case law also hints at the following principle: "The obligation to comply with the statutory scheme that has been designed by the legislature to protect parents and children cannot be abandoned by a judge under the guise of seeking to 'promote the best interests of a child.'"¹⁹⁴

b. Virginia

Virginia courts adjudicate terminations of parental rights based on the unfitness of a parent in one hearing.¹⁹⁵ When the petition is brought by a state social service agency, it is clear under statute and according to court forms that the grounds for termination and the best interest of the child must be proven on their own merits.¹⁹⁶ But section 1202(H), governing petitions brought by a private person, does not mandate or give the court any avenue for adjudicating the fitness of the parent separately from the best interest evidence. In short, section 1202(H) does not call for any bifurcation.

In order to properly compare section 1202(H) with other states' statutes, we must examine only those statutes that do exactly what section 1202(H) does—waive the need for consent based on abandonment. In fact, several of these statutes specifically require that the waiver hearing be bifurcated from the best interest analysis. According to these statutes, first the trial court must determine that there are *grounds* to waive consent and if that is

193. See, e.g., *Milam v. Evans (In re Adoption of Milam)*, 766 S.W.2d 944, 947 (Ark. Ct. App. 1989); *In re Adoption of Children by G.P.B.*, 736 A.2d 1277, 1281 (N.J. 1999) ("Merely showing that a child would be better off with an adoptive parent rather than with the biological parent is not enough.").

194. *Willis v. Gamez*, 20 Va. App. 75, 82, 455 S.E.2d 274, 278 (1995) (quoting *Malpass v. Morgan*, 213 Va. 393, 398, 192 S.E.2d 794, 798 (1972)).

195. VA. CODE ANN. § 16.1-283(A) (Cum. Supp. 2013).

196. In termination of parental rights actions brought by the state, at the conclusion of the hearing, the court may issue an "Order for Termination of Residual Parental Rights." Order for Termination of Residual Parental Rights, DC-531, available at <http://www.courts.state.va.us/forms/district/dc531.pdf>. According to the form, the court must find "based upon clear and convincing evidence" that a ground for termination exists and in accordance with Virginia Code section 16.1-283(G) that "it is in the child's best interests that the residual parental rights of the above-named parent be terminated." *Id.*

proven, then decide whether *waiving consent* is in the best interests of the child.¹⁹⁷ Virginia's statute does not even come close to requiring this.

3. No Adjudication of Best Interest

In fact, in section 1202(H), according to the plain language, courts are not required to make a finding of "best interest" of the child. The prospective adoptive parent simply has to "establish by clear and convincing evidence that the birth parent(s), without just cause, has neither visited nor contacted the child for a period of six months" and the birth parent's consent is waived.¹⁹⁸ Nowhere do the words "best interest" appear in section 1202(H), nor does section 1202(H) reference the best interest requirements in section 63.2-1205.¹⁹⁹ The court has absolutely no obligation to analyze whether it is in the best interests of the child to waive parental consent or in the best interests of the child to terminate parental rights. The court may simply find that a parent has not visited for a six-month period and waives parental consent.

This is significant because appellate courts in other states have overturned adoptions, despite finding that parent's consent is not necessary, when waiving consent would go against the best interests of the child.²⁰⁰ The Supreme Court of Montana reversed an adoption where the trial court chose not to analyze the child's best interest.²⁰¹ The supreme court specifically held that "[h]aving determined that the nonsupporting parent's consent to adoption is not required, the district court must then exercise its discretion in determining whether the adoption is in the child's best interest."²⁰² The court cited to previous precedent where child support payments were not met by the father, but the father-child relationship was strong enough that severing it would not have been in the best interests of the child, and thus, the termination of pa-

197. See e.g., GA. CODE ANN. § 19-8-10 (Supp. 2013); MASS. GEN. LAWS ch. 210, § 3 (2012); S.D. CODIFIED LAWS § 26-8A-27 (Cum. Supp. 2013); TENN. CODE ANN. § 36-1-113 (Supp. 2012).

198. VA. CODE ANN. § 63.2-1202(H) (Repl. Vol. 2012).

199. *Supra* notes 101-05 and accompanying text.

200. See, e.g., *In re Adoption of V.R.O. & V.N.O.*, 822 P.2d 83, 86-87 (Mont. 1991); *In re B.M.S.*, 949 N.E.2d 111, 114, 117 (Ohio Ct. App. 2011).

201. *In re Adoption of V.R.O. & V.N.O.*, 822 P.2d at 86-87.

202. *Id.* at 86.

rental rights was inappropriate.²⁰³ In Montana, “[t]he natural parent’s rights cannot be terminated . . . independent of the determination that adoption is appropriate” and “[a]doption is not appropriate unless it is found to be in the child’s best interest.”²⁰⁴

Similarly, the Supreme Court of Illinois refused to apply a waiver statute and overturned an adoption because it was against the best interests of the child given the shocking facts.²⁰⁵ The mother gave birth and told the father that the child had died.²⁰⁶ The adoptive parents and their attorney made no attempts to locate the father even though the mother told them she knew who the father was.²⁰⁷ Therefore, the Illinois statute requiring the biological father to show a “reasonable degree of interest in the child within 30 days of his life” did not apply in that case.²⁰⁸

Ohio has held likewise. In a recent case, the appellant presented facts of a birth parent’s waiver of consent as a result of his unjustifiable failure to support his children for the preceding year, and the appellate court upheld the trial court’s order waiving consent.²⁰⁹ However, the supreme court denied the actual adoption petition because the appellate court found that severing the parent-child relationship was against the best interests of the children.²¹⁰ The court concluded, “[n]either we, nor the trial court, may consider these positive factors [about adoption] in a vacuum By weighing these factors against the negative effect of losing their relationship with their biological father . . . the adoption was not in the best interest of the children.”²¹¹

In all of these rulings, judges found technical grounds to waive consent, but because the best interest of the child is always paramount, they either choose not to waive consent or did not terminate the parental rights. These courts had the explicit statutory ability to choose these options. Virginia judges do not; if a parent has failed to visit, it does not matter whether waiving consent is in the best interest—the court does not even have to consider it.

203. *Id.* (citing *In re S.T.V.*, 733 P.2d 841, 842–43 (Mont. 1987)).

204. *Id.* at 87.

205. *In re Doe*, 638 N.E.2d 181, 182–83 (Ill. 1994).

206. *Id.* at 181.

207. *Id.* at 182.

208. *Id.* at 182 (citing 750 ILL. COMP. STAT. 50/1 (1993)).

209. *In re B.M.S.*, 949 N.E.2d 111, 113 (Ohio Ct. App. 2011).

210. *Id.* at 116–17.

211. *Id.* at 117.

4. Lack of Notice

Lack of notice is an inevitable problem with section 1202(H) due to the streamlining of the procedure. If a parent misses the section 1202(H) hearing, she has lost it all: her consent is waived, her parental rights are terminated, and the adoption is granted.²¹² This almost occurred in the case described in the introduction of this article, as it could with any a parent who has been prevented from visiting or contacting her child, at least partially due to the actions of others. If the adoptive and natural parents have strained relations, the adoptive parent may not know, or may claim not to know, where the natural parent is currently living, allowing personal service at a last known address, or worse, by publication.²¹³ This goes against the Supreme Court of the United States principle that “[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.”²¹⁴

D. *Other States Have Struck Down Adoption Statutes on Constitutional Grounds*

Numerous states have struck down private adoption statutes on Fourteenth Amendment grounds. A Louisiana statute required maternal consent in order for a father’s name to be put on a birth certificate, thus giving the mother power over the father’s right to be heard on a matter of adoption.²¹⁵ The Supreme Court of Louisiana found this unconstitutional because “[b]efore a person is deprived of a protected interest, he must be afforded some kind of hearing, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.”²¹⁶ The court held that granting an adoption was not an “emergency situation” that could override the father’s procedural rights.²¹⁷

212. *Cf. supra* notes 132–45 and accompanying text.

213. *See* VA. CODE ANN. §§ 8.01-296, -316, -317 (Repl. Vol. 2007 & Cum. Supp. 2013).

214. *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982).

215. *See* LA. REV. STAT. ANN. § 40:34(B)(1)(a)(iv), (h) (Supp. 2013); *In re B.G.S.*, 556 S.E.2d 545, 548 (La. 1990).

216. *Id.* at 552 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 569–70 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 378–79 (1971)).

217. *Id.* at 555.

A Texas statute provided that if an alleged father did not register with the putative father registry before his child was born or within thirty-one days after birth or take other steps to protect his parental rights, those rights could be terminated without notice, service, or any attempt to locate him.²¹⁸ A Texas trial court found this unconstitutional.²¹⁹ The court struck down the statute, even though there was no actual injury to the appellant, because it did not require due diligence to locate the alleged father, service of process on the alleged father, appointment of an attorney ad litem to represent the alleged father's interests, or a best interest finding.²²⁰

In New York, a statute allowing for extrajudicial consent to an adoption was held unconstitutional on its face because it did not require informing the birth parents that, if they consented, they would not necessarily receive their child back if they withdrew consent; instead, the child's placement would be determined on a "best interest" analysis.²²¹ Invalidating the statute, the court held that a court may not terminate all parental rights by offering a child for adoption where there has been no parental consent, abandonment, neglect or proven unfitness, even though some might find adoption to be in the child's best interests.²²²

Although the Supreme Court of Nebraska found a statute regarding procedures for adjudicating paternity constitutional, it was unconstitutionally applied to a man who had established a familial relationship with his child despite not complying with the statute.²²³ The court noted that "[a]lthough we do not agree

218. TEX. FAM. CODE ANN. §§ 160.402, -404 (West 2008); TEX. FAM. CODE ANN. § 161.002(b)-(d) (West 2008).

219. *In re C.M.D.*, 287 S.W.3d 510, 513 (Tex. App. 2009).

220. *Id.* The appellate court reversed the decision citing no actual injury in the case. *Id.* at 516. Even though it did not rule on the merits, the court suggested in dicta that the unwed father does not have "full constitutional parental rights by virtue of a mere biological relation." *Id.*

221. *In re Sarah K.*, 492 N.Y.S.2d 957, 958 (N.Y. App. Div. 1985); see N.Y. DOM. REL. LAW § 115-b (McKinney Cum. Supp. 1987).

222. *In re Sarah K.*, 492 N.Y. S.2d at 961 (citing *Corey L. v. Martin L. (In re Corey L.)*, 380 N.E.2d 266, 271 (N.Y. 1978)); see also *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (supporting the rights of unwed fathers); *Caban v. Mohammed*, 441 U.S. 380, 387 (1979) (noting that the requirement of consent is a separate question from determining the best interests of the child); *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (explaining that the father's lack of responsibility for the child prevented him from using his veto authority); *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (holding that the father was entitled to a hearing).

223. *Rusti M. v. John J. (In re Adoption of Corbin J.)*, 775 N.W.2d 404, 407 (Neb. 2009).

with John that he is an adjudicated father, we do agree with John's constitutional analysis . . . [T]he challenged statutes were unconstitutionally applied to John," because they "infringed on [his] constitutionally protected parental rights."²²⁴ The court held that the father is entitled to the right to be heard on the matter of adoption.²²⁵

These states examined their statutes in difficult cases and struck them down or refused to apply them when they incorrectly denied constitutional rights. As discussed in Part II, the Supreme Court of Virginia is extremely reluctant to declare an entire statute unconstitutional.²²⁶ But the court would not have to find the statute unconstitutional if the terms of section 1202(H) were narrow and well defined. Revising section 1202(H) would diminish the risk of unconstitutional decisions by Virginia courts.

E. *Equal Protection*

There are a number of equal protection problems with section 1202(H). One of the most striking is that parents whose rights may be terminated under section 1202(H) are not notified of their right to counsel, nor are they appointed counsel if they are indigent, but parents whose rights are on the line in section 63.2-1203, for refusing consent, are.²²⁷ Virginia Code section 63.2-1203 spells it out:

In an adoption proceeding where the consent of a birth parent is required, but the petition for adoption alleges that the birth parent is withholding consent to the adoption, the court shall provide written notice to the birth parent of his right to be represented by counsel prior to any hearing or decision on the petition. Upon request, the court shall appoint counsel for any such birth parent if such parent has been determined to be indigent by the court pursuant to § 19.2-159.²²⁸

In contrast, section 1202(H) has no such provision.

There is no rational basis for treating parents who have allegedly not contacted their children and parents who refuse to con-

224. *Id.* at 409, 411.

225. *Id.* at 413.

226. *See supra* notes 62–65 and accompanying text.

227. *Compare* VA. CODE ANN. § 63.2-1203 (Repl. Vol. 2012), *with id.* § 63.2-1202(H) (Repl. Vol. 2012).

228. *Id.* § 63.2-1203(C) (Repl. Vol. 2012).

sent differently. It could be argued that the parent who has abandoned a child is differently situated than one who refuses consent, because abandonment suggests a parent has not demonstrated any interest in the child. But as discussed, abandonment is only alleged in section 1202(H) and may be the product of multiple factors, such as the restriction of visitation by the petitioner. Also, the parent who has been denied visitation can appear at the hearing and discredit the evidence of abandonment.²²⁹ But what about the parent who has not been personally served because after years of strained relations, the petitioner does not know, or claims not to know, where the parent is located? If she does not appear at the first hearing and no counsel is appointed, she has lost her one opportunity to be heard on the matter. She likely will be deemed unfit and her child will likely be adopted.

Parents in termination of parental rights actions brought by the Virginia Department of Social Services are also appointed counsel if they are indigent.²³⁰ These parents are situated differently than those fighting private adoptions; they have had their children removed and their familial privacy invaded by the state. But the potential result of the two types of termination proceedings is the same: the state severs the legal relationship and all of the rights and responsibilities of the parent it previously recognized.

In fact, several jurisdictions have held that private adoption agencies act as the state for purposes of constitutional protections.²³¹ The Court of Appeals of Utah held in *Swayne v. L.D.S. Social Services* that an adoption agency's conduct in a private adoption constituted sufficient state action to warrant constitutional protection because it is *the state* that cuts off the parental rights.²³² The fact that the adoption agency received no state funding was immaterial to the analysis.²³³ Ultimately it is the state, by the judiciary, that pierces the fundamental right of family priva-

229. *Id.* § 63.2-1202(H) (Repl. Vol. 2012).

230. *Id.* § 16.1-266(D) (Repl. Vol. 2010 & Cum. Supp. 2013).

231. *See* Appeal of H.R. (*In re* Baby Boy C.), 581 A.2d 1141, 1164 (D.C. 1990) (citing *Scott v. Family Ministries*, 135 Cal. Rptr. 430 (Cal. Ct. App. 1976)) (noting that private adoption agencies are state actors under the Establishment Clause); *see also* *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (finding state action when a deprivation is caused by the exercise of a right created by the state and the party can reasonably be defined as a state actor).

232. 761 P.2d 932, 936-37 (Utah Ct. App. 1988)

233. *Id.* at 936.

cy. The petitioner is simply making the case for the state to take action.

This leads to another major equal protection problem. There are vast differences in the treatment of parents in public versus private adoptions in Virginia. Under federal law and Virginia law, the state must make reasonable efforts before and after removing a child, and before filing a termination of parental rights, to preserve and restore the parent-child relationship.²³⁴ There is no such mandate on any private person. In fact, it is the opposite. A private person has total control over the evidence—she can essentially make the parent “unfit” in the eyes of the law by cutting off visitation and/or communication. She creates the grounds for waiver and no one can stop her.

F. *Conflict of Interest*

The equal protection issue regarding treatment of parents in public versus private adoptions hints at the fatal flaw of section 1202(H): the inherent conflict of interest. The party who seeks to adopt the child holds all of the cards. The adoptive parent can *make* the natural parent “unfit” in the eyes of the law by restricting visits and demoralizing the natural parent to the point where she does not communicate with the adoptive family for six months. This is not to say that a biological parent is blameless if she fails to contact her child for six months, but the situation may be more complicated than it appears. This is well illustrated by many of the cases discussed in this article. Surely the legislature did not intend to create a statute, affecting the lives of children, which gives the adoptive parents every incentive to engage in underhanded behavior. Section 1202(H) encourages hostility between parties and among families.²³⁵

Adoptions are so susceptible to conflicts that even in open, consensual adoptions, in which the natural parent *chooses* to place her child for adoption and hand-picks the adoptive parents, most states forbid the same attorney to represent both sides, or at the

234. See Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 471(a)(15)(A)–(B), 94 Stat. 501, 503 (1980); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101(A)(15)(B)(i)–(ii), 111 Stat. 2115, 2116 (1997); VA. CODE ANN. § 16.1-281(A), (B) (Cum. Supp. 2013); *id.* § 16.1-283(C) (Cum. Supp. 2013).

235. Many of the cases documented here involve custody arrangement and adoption petitions among family members (known as “kinship adoptions”).

very least, strongly admonish against it.²³⁶ Virginia explicitly proscribes dual representation in consensual adoptions.²³⁷ The Virginia State Bar recognized that the legal interests of a biological parent, who has *chosen* to give up her child, might still conflict with the legal interests of the parents she has selected.²³⁸ If the Virginia State Bar can identify this potential conflict in adoptions that are by definition uncontested, surely Virginia lawmakers can understand why section 1202(H), as it now reads, is prone to misuse by parties and misinterpretation by the courts.

IV. AN ALTERNATIVE TO AN INHERENTLY FLAWED STATUTE

A. *Recent Recognition of Parental Rights*

The Supreme Court of Virginia recently acknowledged the sanctity of the parent-child relationship and the potential conflicts in private adoptions in the infamous *Wyatt v. McDermott* case.²³⁹ The majority found the allegations in *Wyatt* so “astonishing and profoundly disturbing” that it recognized a cause of action for tortious interference with parental rights.²⁴⁰ The unmarried father, John Wyatt, alleged that he and the baby’s mother had agreed to raise the child together but that, without his knowledge, the mother retained an attorney to arrange for an adoption.²⁴¹ The mother’s attorney worked with the mother to keep Wyatt “in the dark” about the adoption and to hide the birth from him.²⁴² After the birth, the mother transferred custody of the baby to a Utah couple without Wyatt’s knowledge.²⁴³

236. See Pamela K. Strom Amlung, Comment, *Conflicts of Interest in Independent Adoptions: Pitfalls for the Unwary*, 59 U. CIN. L. REV. 169, 178 (1990); Steven H. Hobbs, *Family Matters: Nonwaivable Conflicts of Interest in Family Law*, 22 SEATTLE U. L. REV. 57, 68 (1998).

237. VA. CODE ANN. L. ETHICS OP. 741 (Repl. Vol. 2002) (“The attorney may not, however, represent the adoptive parents . . . and simultaneously undertake to represent the biological parent, even in the form of counseling in regard to anticipated inquiries from the court.”); see also Hobbs, *supra* note 236, at 68.

238. VA. CODE ANN. L. ETHICS OP. 741 (Repl. Vol. 2012).

239. 283 Va. 685, 692, 725 S.E.2d 555, 558 (2012).

240. *Id.* at 703, 725 S.E.2d at 564.

241. *Id.* at 689, 725 S.E.2d at 556.

242. *Id.* at 689–90, 725 S.E.2d at 557.

243. *Id.* at 690, 725 S.E.2d at 557. At the time of the *Wyatt* decision, custody and adoption proceedings were still pending in Virginia and Utah. *Id.* at 690–91, 725 S.E.2d at 557.

Wyatt sued the adoption attorney in Utah, the adoption agency, an employee of the adoption agency, and the adoptive parents alleging multiple claims including tortious interference with parental rights.²⁴⁴ Answering a certified question from United States District Court for the Eastern District of Virginia, the Supreme Court of Virginia recognized a cause of action for tortious interference with parental rights if the complaining parent can prove: (1) a parental relationship with the minor child; (2) that a third party intentionally interfered with the parental relationship; (3) the interference caused harm; and (4) damages resulted from the inference.²⁴⁵ Potential damages for tortious interference with parental rights include not only the cost of securing the parent's rights but also mental anguish and lost companionship.²⁴⁶

In another unusual and recent case, *Layne v. Layne*, the Court of Appeals of Virginia again acknowledged the public policy behind strict construction of rights protecting the parent.²⁴⁷ In *Layne*, parents in a divorce action had agreed that the mother would "relinquish[] her parental rights and any and all claims of parenthood to [the child]."²⁴⁸ The court of appeals held that parents cannot terminate their own rights in a separation agreement.²⁴⁹

Parental rights are sacred, and it is against public policy to treat them lightly. Additionally, it is in the state's interest for children to have legal parents. Accordingly, the Virginia statutory scheme, primarily embodied in section 16.1-283, limits the circumstances for the constitutionally valid termination of residual parental rights.²⁵⁰ That scheme "provides detailed procedures designed to protect the rights of the parents and their child. These

244. *Id.* at 691, 725 S.E.2d at 557.

245. *Id.* at 699, 725 S.E.2d at 562 (quoting *Kessel v. Leavitt*, 511 S.E.2d 720, 765–66 (W. Va. 1998)).

246. *Id.* at 700, 725 S.E.2d at 563.

247. 61 Va. App. 32, 37, 733 S.E.2d 139, 141 (2012) (quoting *Church v. Church*, 24 Va. App. 502, 508, 483 S.E.2d 498, 501 (1977)).

248. *Id.* at 34, 733 S.E.2d at 140 (alterations in original).

249. *Id.* at 37, 738 S.E.2d at 141.

250. *Id.* at 36, 733 S.E.2d at 141 (citing *Rader v. Montgomery Cnty. Dep't Servs.*, 5 Va. App. 523, 526, 365 S.E.2d 234, 235–36 (1988)).

procedures must be strictly followed before the courts are permitted to sever the natural and legal bond between parent and child.”²⁵¹

B. *An Alternative that Achieves the True Intent of 1202(H)*

Perhaps *Wyatt* and *Layne* will give the legislature an incentive to reexamine section 1202(H). By enacting the 2012 amendment the legislature clarified that the intent of section 1202(H) is to terminate the rights of parents who are currently and consistently not showing an interest in or commitment to their children.²⁵² The parent must be unfit at the time the petition is filed.²⁵³ So, for example, a parent who was absent during the child’s infancy, but is now playing a role in his childhood, cannot have her consent to adoption unilaterally waived under the amended statute. This is an implicit acknowledgment by the legislature that familial relationships are fluid and that a minor may form an attachment with a parent at any point during childhood. Adding the parameter of “six months *immediately* prior” suggests that the legislature wanted to reign in the definition of “failure to communicate” that had been used under section 1202(H) from its enactment in 2006 to 2012.²⁵⁴

As described in Part II, prior to 2006, the courts engaged in a much more nuanced analysis of “abandonment.”²⁵⁵ This was appropriate because as the vast body of case law across the country shows, there are an infinite number of circumstances which can appear to be “abandonment” but are actually much more complicated.²⁵⁶

There are valid reasons for Virginia to continue allowing private adoptions, which dispense with the need for consent, even when the petitioning party has unilateral control over the proof of parental unfitness. The legal procedures that enable our children to have loving, stable homes should be as efficient as possible.

251. *Layne*, 61 Va. App. at 36–37, 733 S.E.2d at 141 (quoting *Rader v. Montgomery Cnty. Dep’t of Soc. Servs.*, 5 Va. App. 523, 526 S.E.2d 234, 235–36 (1988)).

252. See Act of Mar. 30, 2012, ch. 424, 2012 Va. Acts 721, 726 (codified as amended at VA. CODE ANN. § 63.2-1202(H) (Repl. Vol. 2012)).

253. *Id.*

254. *Id.*

255. See *supra* notes 125–47 and accompanying text.

256. See *supra* notes 118–21 and accompanying text.

Additionally, legal permanency for a child is a valid reason for a court to simultaneously terminate parental rights and grant adoption in certain circumstances—for example, when a parent does not even know about his child or has displayed utter indifference.

But private adoptions which dispense with the need for parental consent would still be valid under the author's proposed statute. According to the proposal, a party who has cared for the child and has not been involved with the state's social services agency could still bring an adoption petition that waives the need for consent in some limited circumstances, including cases of actual abandonment, consistent and recent failure to contact the child, and if waiver is in the best interest of the child.²⁵⁷ Moreover, it does not require courts to make any qualitative judgments on the nature of the contact. In other words, courts need not "evaluate the quality and value of time spent between a birth parent and child," as the Supreme Court of Virginia refused to do in *Copeland*.²⁵⁸

Lawmakers should not be concerned that some adoptions will "fall through the cracks" under the author's proposed statute. If the criterion of the proposed section 1202(H) are not met, an adoptive parent can always bring a petition under section 63.2-1205, alleging that the parent is withholding consent against the child's best interest. A parent who has made minimal contact with the child and has no bond with him or her will have an extremely difficult time justifying why she is withholding consent. This is illustrated by the vast body of case law granting adoptions under section 63.2-1205.²⁵⁹

Based on analysis of the codes and case law of other states, the author proposes that the General Assembly rewrite Virginia Code section 63.2-1202(H) as follows.

No consent shall be required of a birth parent who:

- (1) has willfully refused to contact, *or*
 - (2) has made no attempt to contact,
- the child *or* the child's custodian(s);

257. See *infra* text accompanying note 260.

258. See *supra* notes 35–36 and accompanying text.

259. See *supra* Part II.B.

Notwithstanding the opportunity or ability to do so, for a period of six months immediately prior to the filing of the petition for adoption or the filing of a petition to accept consent to an adoption;

And where requiring such consent would be contrary to the best interest of the child.

The prospective adoptive parent(s) shall establish by clear and convincing evidence that the birth parent(s), has willfully refused to contact or has not attempted to contact the child or the child's custodian for a period of six months immediately prior to the filing of the petition for adoption or the filing of a petition to accept consent to an adoption. The birth parent shall have the right to be noticed and heard on the allegation of lack of contact. The court shall provide written notice to the birth parent of his right to be represented by counsel, prior to any hearing or decision on the allegation of lack of contact. Upon request, the court shall appoint counsel for any such birth parent if such parent has been determined to be indigent by the court pursuant to § 19.2-159.²⁶⁰

The word "visit" is absent from the proposed statute. Allowing the prospective adoptive parents to make allegations about visitation opens the door for misuse because it would be too easy to create evidence by not allowing the birth parent to visit. A circumstance like incarceration can also be misrepresented or misconstrued to count against the birth parent's effort at visitation when it should not (recall the case described in the introduction of this article).

The proposed statute achieves the legislature's goal of making adoption procedures efficient for children and prospective adoptive parents in cases where a birth parent does not deserve any say in the matter. But it does not do so at the expense of birth parents and children who do.

260. See VA. CODE ANN. § 63.2-1202(H) (Repl. Vol. 2012) (retaining much of the language of the current code while proposing revisions to what action, or inaction, is required to dispense with the need for parental consent).