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Domestic Relations

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he refuses to order discovery when adequate reasons are stated. Illustrating its liberal viewpoint, the court said,

> That it was desired that the state's evidence remain undisclosed, partakes of the nature of a game, rather than judicial procedure. The state in its might and power ought to be and is too jealous of according a defendant a fair and impartial trial to hinder him in intelligently preparing his defense and in availing himself of all competent material and relevant evidence that tends to throw light on the subject-matter on trial.[23]

Other states present various degrees of liberality.[24]

In forecasting the effect of the Thompson decision in Washington, it must be remembered that a defendant is not, by that case, entitled as of right to discovery. The case has opened the door in Washington for a trial court to order discovery. Already the case has made its presence felt. In *State v. Olsen,*[25] the court upheld a contempt order against a coroner for refusing to turn over an autopsy report to a defendant who was granted discovery by the trial court. The big test of just how far Washington has gone will come when, under facts similar to the *Thompson* case, the trial court denies discovery. Will the supreme court overrule and call the denial an abuse of discretion, or will it continue to follow the old cases where discovery was denied? The answer will be a strong indication of Washington's place on the scale of liberality in granting pre-trial discovery in criminal cases.

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DOMESTIC RELATIONS

Domestic Relations — Adoption — Necessity of Consent by Natural Parent — Constitutional Aspects. In the recent case of *In re Candell's Adoption*[1] the Washington court held that a father's consent

[23] 312 P.2d at 701, quoting from State v. Tippett, 317 Mo. 319, 296 S.W. 132, 135 (1927).

[24] For example, Oklahoma follows a carefully limited discovery rule. "Only because of the peculiar circumstances of this case are we impelled to deny the writ of prohibition herein prayed for." State *ex. rel.* Sadler v. Lackey, 319 P.2d 610, 615 (Okla. Crim. App. 1957) (order granting discovery upheld). Because a recording made to the county attorney was not evidence nor applicable to the "essence of the case," discovery of it was denied. Application of Killion, 338 P.2d 168 (Okla. Crim. App. 1959).

Louisiana presents an unusual situation. State v. Dorsey, 207 La. 928, 22 So.2d 273 (1945), held that refusal to allow defendant to inspect his confession deprived him of a fair and impartial trial, thereby making discovery of confessions a right in Louisiana. Later cases strictly limit the Dorsey rule to confessions. State v. Haddad, 221 La. 337, 59 So. 2d 411 (1951), held that a defendant is not entitled to any witnesses' statements or reports in police or district attorney's hands.

[25] 154 Wash. Dec. 275, 340 P.2d 171 (1959).

[1] 154 Wash. Dec. 279, 340 P.2d 173 (1959).

to the adoption of his child is not necessary if a divorce decree has not given him custody or visitation rights or imposed support obligations.

The mother had obtained a default divorce decree in Colorado, the family domicile, which gave her "full and complete custody" of the child and also the right to remove the child from the state. It was further decreed that the wife should support the child and that the husband should be relieved of all liability therefor as between the parties. There was no mention of visitation rights.

When the mother and her new husband petitioned to adopt the child, the father contended that the failure to mention visitation rights did not amount to a denial of such rights, and since he was not denied such rights, his consent was necessary under the Washington statute.[2] The court, in holding that his consent was not necessary, said that the statute did not require that visitation rights be specifically denied, only that they not be granted. The court reached this decision on two grounds. First, aside from the statute, the effect of granting full and complete custody to one parent is to deprive the other of any portion of such custody. Second, the legislature, by periodic amendment of the particular statute, has set an arbitrary definition to guide the court which is in partial derogation of prior case law under earlier statutes. Therefore, the court reasoned, the statute means what it says, and there is no exception for those who rely on an "inherent right" of visitation.

It is debatable whether the construction adopted fits the statutory scheme as well as would a strict interpretation holding that the statute dispensing with the parent's consent applies only where a parent has been specifically deprived of custody and visitation. Most courts construe adoption statutes strictly, since they are in derogation of the parent's natural rights.[3] In this case the rule seems particularly harsh when it is noted that the non-consenting parent, the father, had ac-

[2] RCW 26.32.040 reads in part: "No consent for the adoption of a minor shall be required as follows: ... (2) From a parent who has been deprived of the custody of the child by a court of competent jurisdiction, after notice: *Provided,* that a decree in an action for divorce, separate maintenance, or annulment, which grants to a parent any right of custody, control, or visitation of a minor child, or requires of such parent the payment of support money for such child, shall not constitute such deprivation of custody..."

There is wide variation among states as to circumstances and actions sufficient to dispense with consent. For a comprehensive compilation of the various provisions in these statutes, see 24 ROCKY MT. L. REV. 359 (1952); Note, 7 ARK. L. REV. 130 (1953).

[3] Note, 27 CHI-KENT L. REV. 308, 311. In *In re* Lease, 99 Wash. 413, 419, 169 Pac. 816 (1918), the court said: "But when we are reminded of the conclusive and far-reaching effect of an adoption decree and that it is not a mere custody decree, like in a guardianship or other similar proceeding, every consideration of fairness to the nat-

tually made visits to the child and had paid $660.15 for child support without being ordered to do so by any court.[4]

The future hazards caused by the court's rule should be pointed out to any client who contemplates entering into an agreement which fits the *Candell* pattern. One simple method of avoiding the rule's impact would be to provide for visitation rights; or if that is objectionable, nominal support payments might be included.

A client in circumstances similar to those of Mr. Candell has two other possible bases for avoiding the rule, the first being factual distinctions. The court emphasized that Mr. Candell had had opportunity to have the necessary provisions (support, visitation or custody) included in the divorce decree or to have the decree modified thereafter to include them. If the divorce were *ex parte*[5] a parent would not have had such an opportunity at the time of the divorce. Further, if he had not known the whereabouts of the child, he would not have had an opportunity to seek modification of the decree. However, when a parent has known the whereabouts of his child, whether he has had an opportunity to be heard so that the rule should come into operation would probably depend upon the reasonableness of the length and circumstances of the delay in seeking a modification of the decree.

The second possibility for avoiding the rule is to argue that there is a denial of due process[6] in the statutory procedure as interpreted by the court. The question of constitutionality of the non-consent provision, as interpreted, was not raised or mentioned. The Supreme Court has not squarely ruled on the general question,[7] although several of the state courts have.

There are without doubt some inherent constitutional limitations which govern a state's action affecting the parent-child relationship, as is indicated by an examination of cases concerning deprivation of

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ural parents dictates that the provisions of our statute prescribing the conditions under which consent may be dispensed with should receive a strict construction."

See also, *In re* Todhunter's Adoption, 33 Ohio L. Abs. 567, 35 N.E.2d 992 (1941); *In re* Hope, 30 Wn.2d 185, 191 P.2d 289 (1948); *In re* Walker, 170 Wash. 454, 17 P.2d 15 (1932); Annot., 91 A.L.R. 1387 (1934).

[4] Brief for Appellant, pp. 3, 5, *In re* Candell's Adoption, 154 Wash. Dec. 279, 340 P.2d 173 (1959). The respondent pointed out that these facts, while set forth in the Affidavit Opposing Adoption, were not offered in evidence. Brief for Respondent, p.3, *In re* Candell's Adoption, *supra*. This may explain the court's failure to mention or consider the above facts.

[5] Of course, in an *ex parte* divorce the court has jurisdiction over the status of marriage but lacks personal jurisdiction over the defendant because of lack of personal service within the state or because he is not a resident of the state. If a divorce were *ex parte* and the children secreted, the lack of opportunity to be heard on any question involving the children might also amount to a denial of due process.

[6] U.S. CONST. amend XIV, § 1; WASH. CONST. art. 1, § 3.

parents of custody of their children or those involving the many and varied children-questions provoked by a divorce.[8] These same limitations, or at least the same basic principles provoking the limitations, should be applied in adoption cases. However, some courts fail to recognize the common questions and limitations.

It is hornbook law that one of the fundamental requirements for due process is an opportunity to be heard. Some courts have said that lack of notice of the adoption proceeding is a denial of due process.[9] The Washington court is one of the few courts that has held that notice is not necessary,[10] although the statute now requires that notice be given with one exception.[11] The question of receipt of notice is one of procedural due process.[12] However, if notice is received and

[7] May v. Anderson, 345 U.S. 528 (1953), involved the question of whether one state must give full faith and credit to a custody order incorporated into a divorce decree granted in another state. The Supreme Court held that there was no requirement to give full faith and credit. When the divorce was ordered, the mother (defendant in the divorce action) and the children were out of the state of Wisconsin, the domicile of the family prior to the divorce. The majority said that Wisconsin had to have personal jurisdiction in order to deprive the mother of her personal right to the children's immediate custody. If this reasoning were applied to the adoption problems, it might be argued that a parent must be afforded an opportunity to litigate deprivation. See the discussion in the latter part of this Note.

[8] *E.g.*, it has been held to be a denial of due process if the actual relief granted in a default divorce varies from the complaint, State *ex rel.* Adams, 36 Wn.2d 868, 220 P.2d 1081 (1950) (alimony not requested in the complaint, but granted in the decree); Sheldon v. Sheldon, 47 Wn.2d 699, 289 P.2d 335 (1955) (complaint alleged defendant fit to have custody and requested that defendant be granted custody, but decree found defendant unfit and gave custody to plaintiff). See also, Reed v. Reed, 338 P.2d 350 (Okla. 1959) (requiring notice of a surname change to parent not having custody).

[9] Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81 (1931); Adoption of Simpson, 203 Ore. 472, 280 P.2d 368 (1955); *In re* Knott, 138 Tenn. 349, 197 S.W. 1097 (1917); Pearce v. Harris, 134 S.W.2d 859 (Tex. Civ. App. 1939); Lacher v. Venus, 177 Wis. 558, 188 N.W. 613 (1922); Schiltz v. Roenitz, 86 Wis. 31, 56 N.W. 194 (1893).

[10] *In re* Beers, 78 Wash. 576, 139 Pac. 629 (1914). See also, *In re* Asterbloom's Adoption, 63 Nev. 190, 165 P.2d 157 (1946); Booth v. Robinson, 120 Ohio St. 91, 165 N.E. 574 (1929), *appeal dismissed* and *cert. denied*, 280 U.S. 519 (1929).

The Beers case is rather surprising in light of two earlier cases, State *ex rel.* LeBrook v. Wheeler, 43 Wash. 183, 86 Pac. 394 (1906), and Beatty v. Davenport, 45 Wash. 555, 88 Pac. 1109 (1907) (dictum that notice constitutionally necessary). The Beers case held that notice was not needed where consent was also unnecessary. But see *In re* Force, 113 Wash. 151, 193 Pac. 698 (1920) (distinguishing the Beers case on the basis, *inter alia*, that the parent by his conduct had abandoned any right even if the decree had lodged such right in him).

[11] RCW 26.32.080.

[12] Care must be taken not to confuse cases saying that notice of the adoption is necessary for constitutional purposes and cases holding that notice, or consent, is necessary for jurisdictional purposes. It is commonly said that since adoption was unknown at common law and the power of the courts to grant it comes from a statute, the court lacks jurisdiction unless there is a strict compliance with the statute. *In re* Gustafson, 28 Wn.2d 526, 183 P.2d 787 (1947); Platt v. Magagnini, 110 Wash. 39, 187 Pac. 716 (1920); *In re* Lease, 99 Wash. 413, 169 Pac. 816 (1918); Lacher v. Venus, 177 Wis. 558, 188 N.W. 613 (1922); Annot., 24 A.L.R. 427 (1923); Annot., 76 A.L.R. 1077 (1932). But see, James v. James, 35 Wash. 655, 77 Pac. 1082 (1904). Under this reasoning, notice and consent may become jurisdictional facts, not constitutional necessities. If notice is not given, the decree is not entitled to full faith and credit, McAlhany v. Allen, 195 Ga. 150, 23 S.E.2d 676 (1942). See also Stumberg, *Status of Children in*

an appearance made in an adoption proceeding, the problem is: what will the non-consenting parent argue? It would seem that the only issue he is permitted to argue is whether or not his consent is necessary.[13] Yet the effect of an adoption is to cut off all rights of the natural parent to custody, visitation, inheritance, and services of the child—a total and permanent deprivation. In the ordinary divorce situation where custody is specifically in issue, the court merely determines which parent is the more suitable to have custody at that time. Total deprivation, therefore, is not an issue. Under the *Candell* holding the adoption decree permanently settles the question without giving one party the opportunity to be heard on this extremely important question.[14] It would seem that this is a denial of substantive due process. This might not be true if the divorce court has specifically deprived the non-consenting parent or if such deprivation has occurred in some later proceeding. There would then be some justification for refusing to reconsider, in adoption proceedings, the question of suitability of the non-consenting parent to have custody. The same is true of the parent has, by his actions, indicated an abandonment of the child, since there is little practical difference between a voluntary or involuntary relinquishment in this particular context.

Cases considering possible denial of due process in connection with non-consent provisions are singularly lacking in careful analysis of the complete problem. Much of the confusion stems from failure to distinguish between the various factual situations in which the question of constitutionality can be raised.

A number of the early cases discussing consent provisions are concerned with inheritance problems, typically involving collateral attacks on the adoption by relatives attempting to defeat the claim of an adopted child on his adopting-parent's estate.[15] It is not too diffi-

the Conflict of Laws, 8 U. CHI. L. REV. 42 (1940). If a court says another court did not have jurisdiction, its conclusion may be based upon two possible grounds: The first court did not comply with its own jurisdictional requirements, *e.g.,* the giving of notice, or the second court may regard notice or consent as constitutionally necessary. The former ground seems to be the most common. See cases cited *supra.*

[13] One court has said that it is not proper to receive in the adoption proceedings evidence as to the parent's suitability to have custody. *In re* Todhunter's Adoption, 33 Ohio L. Abs. 567, 35 N.E.2d 992 (1941). This issue can be heard in a separate action, since custody decrees can be modified if a change in circumstances warrant it, Reynolds v. Reynolds, 45 Wn.2d 394, 275 P.2d 421 (1954); Martin v. Martin, 27 Wn.2d 308, 178 P.2d 284 (1947). If the petition for modification is filed before the adoption petition, it is not improper to consolidate the hearing of the two petitions, modify the custody decree, and deny the adoption, *In re* Gustafson, 28 Wn.2d 526, 183 P.2d 787 (1947). There is no indication what the holding would be if the modification petition were filed after the adoption petition. An adoption is by nature a final determination, so that a court would lack jurisdiction to modify a prior custody decree which had been abrogated by an adoption

cult to conclude that there has been no denial of due process when the injured party—the non-consenting parent—has not complained. A related class of cases concerns the policy of inheritance by adopted children.[16] These cases concern the policy of succession of property by adopted children rather than the policy with respect to the actual adoption of children, and, therefore, the constitutional question is completely different.

Two Massachusetts cases are probably the most frequently cited and quoted in modern cases where the constitutionality of adoption-consent provisions is in issue.[17] The cases have had great influence and, therefore, a detailed analysis of them is warranted.

In the first case, *Stearns v. Allen*,[18] the issue was not constitutionality but, rather, whether a state had jurisdiction to order an adoption when the father was domiciled in a foreign country. In holding that the state did have jurisdiction, the court made several statements sometimes quoted when the issue is constitutionality:

> But the Commonwealth has jurisdiction, for many purposes, of persons dwelling here who retain their domicile elsewhere. They are subject to our criminal laws... The Commonwealth may provide for them ...and may exercise such control of them as is necessary for their protection if they are unable to take care of themselves. Adoption in-

[14] It would seem that the only issues before a divorce court are those specifically raised *and* those over which the court has jurisdiction. See note 8 *supra;* May v. Anderson, 345 U.S. 528 (1953), note 7 *supra*; Hopson v. Hopson, 221 F.2d 839 (D.C. Cir. 1955) (wife may obtain support after *ex parte* divorce to which she was not party); Adams v. Abbott, 21 Wash. 29, 56 Pac. 931 (1899) (property in this state, not controlled by *ex parte* divorce decree elsewhere). But see, Lynn v. Lynn, 302 N.Y. 193, 97 N.E.2d 748 (1951).

The court placed great emphasis on Mr. Candell's opportunity to litigate custody. This is the result of an improper characterization of adoption: adoption is a deprivation, not a mere change in custody. Any action Mr. Candell might have brought would not have concerned deprivation. The consideration as to custody and deprivation, while similar, are normally treated different. See discussion in latter part of this casenote. See also, *In re* Messmer, 52 Wn.2d 510, 326 P.2d 1004 (1958).

[15] *In re* William's Estate, 102 Cal. 70, 36 Pac. 407 (1894); Stearns v. Allen, 183 Mass. 404, 67 N.E. 349 (1903); Nugent v. Powell, 4 Wyo. 173, 33 Pac. 23 (1893).

[16] Limiting the inheritance of an adopted child to personalty: Brown v. Finley, 157 Ala. 424, 47 So. 577 (1908); Mott v. First Nat'l Bank, 98 Fla. 444, 124 So. 36 (1928); Fisher v. Browning, 107 Miss. 729, 66 So. 132 (1914). But see, Brewer v. Browning, 115 Miss. 358, 76 So. 267 (1917); Finley v. Brown, 122 Tenn. 316; 123 S.W. 359 (1909). Forbidding inheritance from collateral relatives of adopting parents: Tankersley v. Davis, 128 Fla. 507, 175 So. 501 (1937); *In re* Riemann's Estate, 124 Kan. 539, 262 Pac. 16 (1927); Boaz v. Swinney, 79 Kan. 332, 99 Pac. 621 (1909); Anderson v. French, 77 N.H. 509, 93 Atl. 1042 (1915). If a child is adopted in a state permitting such types of inheritance, it is not a denial of due process not to allow the child to inherit property in another state where the legislature has forbidden it, as it is within the constitutional power of the state to regulate its real property and policy of inheritance: Hood v. McGehee, 237 U.S. 611 (1915); RESTATEMENT (SECOND), CONFLICT OF LAWS § 247, comment *d* (1934).

[17] Purinton v. Jamrock, 195 Mass. 187, 80 N.E. 802 (1907); Stearns v. Allen, 183 Mass. 404, 67 N.E. 349 (1903).

[18] *Supra* note 17.

> volves a change of status. So far as the adopting parents are concerned, the change cannot be made without their consent. So far as an infant child is concerned, the state, as his protector, may make the change for him. The natural parents of the child should be considered, and their natural rights should be carefully guarded; but their rights are subject to regulation by the state, and, if these come into conflict with the paramount interests of the child, it is in the power of the state, by legislation, to separate children from their parents when their interests and the welfare of the community require it.... If the child is actually dwelling in the state, although his father's domicile is elsewhere, the state may as well provide for his adoption as to provide for him in other ways.... The incidental effect upon the status of the natural parents is only in regard to certain rights of property and the right of control. From the necessity of the case... it is enough to establish jurisdiction which is binding upon the natural parent if he is given reasonable notice of the pendency of the proceedings, and an opportunity to be heard.[19]

The foregoing quotation suggests that the main factors to consider are the necessity of the case (benefit to the child) and the interests of the community. All the factors and weight which should be accorded them are subsequently discussed. However, an important consideration in evaluating the *Stearns* case is that it involved an attack on an adoption to prevent the child from inheriting from the adopting-parent's estate. There were also indications that the child had been abandoned by his father, although this is not specifically stated.

In the second influential Massachusetts case, *Purinton v. Jamrock*,[20] the question of the constitutionality of a non-consent provision was directly in issue. In addition to quoting from *Stearns*, the court said:

> We do not regard the constitutionality... [of the consent provisions of the adoption statute] as now open to question [citing authorities][21]

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[19] 67 N.E. at 350. The fact that a state furnishes certain benefits to a child or that a child is subject to the jurisdiction of a state for certain purposes is not necessarily relevant when considering the constitutionality of adoption procedures (although frequently relied upon) or even when considering jurisdiction for that matter. See preceding discussion of consent and notice as jurisdictional requirements, note 12 *supra*. See also, Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925).

The same is true of the fact that the parent's rights are subject to regulation by the state. Just what and when a state may regulate is an open question. It is interesting to compare the statements made in some of the adoption cases with those made in cases involving deprivation of parents of their children by the state. *E.g.*, in *In re* Hudson, 13 Wn.2d 673, 126 P.2d 765 (1942), the court said at 693, 694: "Parents . . . primarily have the constitutional right to the custody and control of such minor children...." In the quotation from the Stearns case cited in the text, note the use of the expression "incidental effect" in referring to the same right of custody and control.

[20] 195 Mass. 187, 80 N.E. 802 (1907).

[21] The authorities relied upon are largely not in point: *In re* Stevens' Estate, 83 Cal. 322, 23 Pac. 379 (1890) (administrative type adoption procedure is constitutional and there is no constitutional necessity for judicial proceeding); Van Matre v. Sankey, 148

> .... Nor have the parents any inherent right of property in their minor child, of which they can in no way be deprived without their consent. They are natural guardians of their child, entitled to its custody, with the right to appropriate its earnings.... But this right is not an absolute and uncontrollable one. It will not be enforced to the detriment or destruction of the happiness and well being of the child.... The right of the parents is not an absolute right of property, but is in the nature of a trust reposed in them, and is subject to their correlative duty to care for and protect the child; and the law secures their right only so long as they shall discharge their obligations.[22]

The above quotation is probably valid as long as the factual situation is kept in mind. The mother had demonstrated that she was unfit to have custody by her conduct and by her neglect of the child. She was finally deprived of her child *in a special deprivation proceeding* some years before the adoption petition was filed. She had not attempted to regain custody of the child, which she could have done, nor had she even made inquiries about the child for more than two years prior to the filing of the adoption petition. When this factual background of the *Purinton* case is considered, it is difficult to understand how the rationale can be applied without analysis in a pattern where custody issues in a prior action do not decide total deprivation, but merely decide which parent is more suitable to have custody at *that* time.

The two Massachusetts cases illustrate a "weighing" of factors approach commonly used in other constitutional concepts. The rights of an individual are weighed against those of another or against those of the State, representing society as a whole. Usually some compromise is made so that the best interests of both are protected. However, it has been difficult to apply in adoption cases for the reason that the rights of the parents and of the state concerning a child are not clear cut or fully defined.

Parents are commonly given rights of inheritance,[23] but this is a right given by statute which can also be taken away by statute.[24] A

Ill. 536, 36 N.E. 628 (1893) (finding jurisdictional compliance with Pennsylvania adoption statute by Pennsylvania court and no constitutional limitation on giving effect to an adoption ordered in another state); State v. Meyer, 63 Ind. 33 (1878) (adoption statute did not conflict with state constitutional provision concerning escheats for common school fund). Nugent v. Powell, 4 Wyo. 173, 33 Pac. 23 (1893), involved a collateral attack on an adoption by relatives interested in preventing the adopted child from inheriting from the adopting parent. The court said that there was no violation of the non-consenting parent's constitutional rights because he had abandoned the child; but it also pointed out that the adoption was not conclusive upon the non-consenting parent.

[22] 80 N.E. at 805.

[23] *E.g.*, RCW 11.04.020, 11.04.100.

[24] *In re* Todhunter's Adoption, 33 Ohio L. Abs. 567, 35 N.E.2d 992 (1941). See also, Hood v. McGehee, 237 U.S. 611 (1915).

parent has a right to a child's services and earnings,[25] although this too is subject to being forfeited or lost.[26] The only important right, if it can be truly called such, is that of custody and control. As a general rule, parents have a natural and legal right to the custody of their minor children; however, it is only a prima facie right and not absolute.[27]

The state, however, also has a wide range of generally undefined power with respect to the care and custody of minor children within the state in matters affecting their welfare.[28] If the parent has *not* neglected or abandoned the child or otherwise demonstrated that he or she is not a proper person to have custody, the Washington court has said that a parent cannot be deprived even temporarily of his or her natural and legal right to custody.[29] This statement was made in a case where the juvenile court had attempted to deprive the parents of custody of a daughter who needed an operation. Although this is not quite the same as the adoption question, it illustrates that there is some limit to the state's power to step in and deprive the parents of a child, even for the child's welfare.

The courts have also, perhaps unwittingly, weighted the scales against the parent. When weighing the parents' rights and the state's rights in the adoption cases, the courts seem to treat those of the parents as rather insubstantial for the reason that the state has some rights also. There is no attempt to evaluate the state's rights to see whether there is any ground for comparison or conflict. Such an analysis of the state's right would seem to be essential before any logical "weighing" can be done.

Another factor frequently discussed by the courts is the welfare of the child. There is probably no one who would dispute that this is the key matter. However, for some reason the courts seem to assume that adoptions are good per se. How a court can reach this decision without considering the suitability of the contesting parent to have custody is a puzzling question. One court has said that it would be error to consider this matter at the adoption proceeding.[30] If in a divorce proceeding one parent is awarded custody, this does not mean

[25] American Products Co. v. Villwock, 7 Wn.2d 246, 109 P.2d 570 (1941); Purinton v. Jamrock, 195 Mass. 187, 80 N.E. 802 (1907). See also, Annot., 132 A.L.R. 1010 (1941).
[26] 67 C.J.S., *Parent & Child* § 36 (1955).
[27] *Id.* at § 11.
[28] Prince v. Massachusetts, 321 U.S. 158 (1944).
[29] *In re* Hudson, 13 Wn.2d 673, 126 P.2d 765 (1942).
[30] Note 13 *supra.*

necessarily that the other is unfit unless there is a finding to that effect. It means only that the one awarded custody was more suitable to have custody *at the time of the award.* It would seem to be only reasonable to have a present determination of whether the non-consenting parent is suitable to have custody. It is not altogether impossible that he might be more suitable, all factors considered, than the adopting parents.

When it is realized that a court weighs the rights of the state and the welfare of the child without careful investigation or consideration, against the rights of a parent—which seem to be characterized by the courts as insubstantial, qualified, or conditional—it is not difficult to see why the parent has been unsuccessful in any contention that the non-consent provision of the adoption statute is unconstitutional. Although a few courts have indicated that there might be some due process limitations on the non-consent provisions of an adoption statute, or have shown concern for and careful consideration of a non-consenting parent's right,[31] others have found no constitutional limitations or have not carefully analyzed the basic factors.[32] It is to be hoped that the Washington court will in the future give the due process considerations more complete analysis, as they do in deprivation and divorce questions involving children, and eliminate the hardships and injustices that the *Candell* case so strikingly illustrates.

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GOVERNMENT REGULATION

Government Regulation—Fair Trade Regulation—"Non-signer" Provision Unconstitutional. By a five to four decision, the Washington Supreme Court recently brought to an end twenty-five years of effective "fair trade" regulation in this state.

In *Remington Arms Co. v. Skaggs*[1] the plaintiff-producer brought an action to enjoin the defendant-retailer from selling the plaintiff's products at less than the minimum price established by the plaintiff in fair

[31] Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81 (1931); *In re* Knott, 138 Tenn. 349, 197 S.W. 1097 (1917); Lee v. Purvin, 288 S.W.2d 405 (Tex. Civ. App. 1955); Lacher v. Venus, 177 Wis. 588, 188 N.W. 613 (1922); Schiltz v. Roenitz, 86 Wis. 31, 56 N.W. 194 (1893).

[32] Succession of Pizzillo, 223 La. 328, 65 So.2d 783 (1953); Winter v. Director, Dept. of Welfare, 217 Md. 391, 143 A.2d 81 (1958); *In re* Asterbloom's Adoption, 63 Nev. 190, 165 P.2d 157 (1946); Booth v. Robinson, 120 Ohio St. 91, 165 N.E. 574 (1929); Adoption of Simpson, 203 Ore. 472, 280 P.2d 368 (1955); *in re Beers,* 78 Wash. 576, 139 Pac. 629 (1914).

[1] 155 Wash. Dec. 1, 345 P.2d 1085 (1959).