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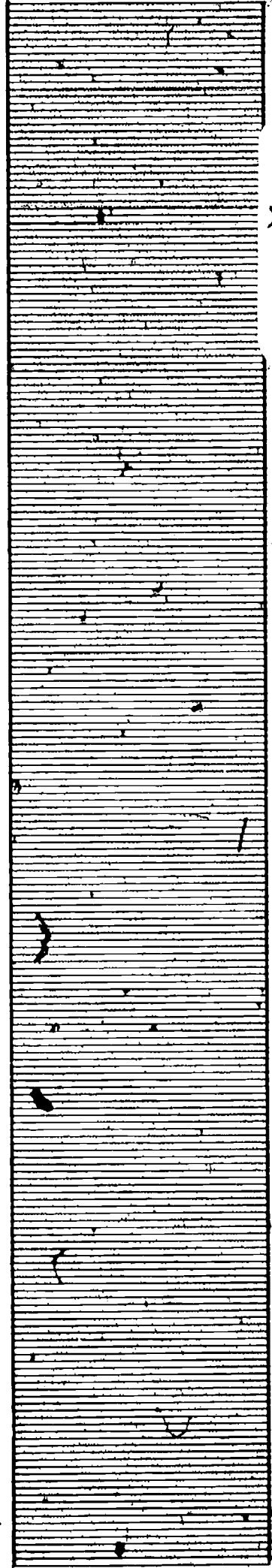
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IDENTIFIERS \*Special Needs Children

ABSTRACT There is national concern for the estimated 100,000 "special needs" children who are not quickly adopted because of age, race, ethnic background, sibling relationship, medical condition, or physical, mental or emotional handicaps. That concern has been translated into concrete recommendations in the form of a model act written by the Department of Health and Human Services. This document reproduces the original text of the model act along with extensive comments. The model act is not law or a federal regulation and only presents recommendations to the states for adding to their existing adoption laws. While some provisions are applicable to all adoptions, others are relevant only to the adoption of children with special needs. Key recommendations include: financial assistance to families who adopt special needs children; expanding the legal grounds for freeing children for adoption; requiring a state adoption administration to focus on the special needs children waiting for adoption; guaranteeing that people interested in adopting a special needs child get a "family assessment"; providing a full genetic and medical history to adoptive parents; considering the wishes of de facto parents and special needs-children in decisions about adoption; and penalizing anyone who leaks confidential information pertaining to an adoption. (CB)

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# model state legislation



## Model Legislation Series National Committee For Adoption

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Thursday  
October 8, 1981

### Part IV

## Department of Health and Human Services

Office of the Secretary

### Model Act for the Adoption of Children With Special Needs

### Includes Section-by-Section Comments and Analysis

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The National Committee For Adoption is a non-profit national organization concerned about adoption and related issues. It was founded to provide accurate information about adoption and to work on an agenda that included, among other items, getting the Federal government to issue an acceptable Model Adoption Act for Special Needs Children.

The National Committee For Adoption receives no money from the Department of Health and Human Services or any other government agency.

All comments and analysis provided herein, with the exception of the reprinted verbatim material from the Federal Register on the Model Act for the Adoption of Children with Special Needs, are those of the authors, Candace P. Mueller and William L. Pierce. Although Ms. Mueller and Mr. Pierce are staff members of the National Committee For Adoption, Inc., their comments and analysis do not necessarily reflect the opinions or views of the National Committee For Adoption, its Board, its Member Agencies or individual supporters.

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# PREFACE

There are thousands of "waiting children" in America. You've seen their pictures and read about them, the "special needs children". They're the estimated 100,000 children who aren't quickly adopted because of age, race, ethnic background, sibling relationship, medical condition, or physical, mental or emotional handicaps.

It's a sad and expensive situation. With many parents willing to provide permanent homes for the children through adoption and with their care costing taxpayers at least half a billion dollars a year, special needs children were an appropriate subject of national, Congressional concern.

Now that concern has been translated into concrete recommendations. Richard S. Schweiker, Secretary of the Department of Health and Human Services, issued a final Model Act for the Adoption of Children With Special Needs, published October 8, 1981, in the Federal Register. This Model Act offers State legislatures, governors and adoption advocates several concrete suggestions for eliminating barriers to the adoption of special needs children.

Here are the key recommendations States could adopt:

- Provide financial assistance to families who adopt special needs children but can't afford to pay the full costs of the special care they often need.
- Expand the legal grounds for freeing children for adoption so that they do not linger in inappropriate foster care or institutional care.
- Require a State Adoption Administration to focus its energies on the waiting children, to cut the red tape, and to work cooperatively and responsively with the hundreds of private, non-profit adoption agencies.
- Guarantee that people who are interested in adopting a special needs child get a "family assessment" — free and within 6 months after filing a request for a home study.
- Provide a full genetic and medical history to adoptive parents so they can have information if new medical or other problems come up.
- Consider the wishes of "de facto" — psychological — parents in any decision about adoption.
- Ask the children what they prefer, if a relationship has been established with a de facto parent.
- Penalize (by a fine of up to \$10,000 or up to six months imprisonment, or both) anyone who "leaks" confidential information pertaining to an adoption.

It's a "model act" not law, so the major impact of Secretary Schweiker's action is putting the Federal government "on record" with recommendations to the States. The Model Act's not a "Federal regulation", either so no State will be required to implement the ideas.

We in the National Committee For Adoption believe it's a beautiful idea to help homeless children be adopted and the new Model Act can work "miracles" for waiting children.

All the States need do is get busy and add parts or all of the recommendations to their existing adoption laws. For once, nearly everyone agrees. Washington has come up with a good plan that deserves careful study by the States.

William L. Pierce  
April 23, 1982

## **SPROESSER WYNN, ESQ.**

Sproesser Wynn played a unique role in helping create the positive social institution of adoption in the United States. He was a major factor in developing the Edna Gladney Home of Fort Worth, Texas, into one of the nation's pre-eminent comprehensive social service agencies providing adoption. He played a major role in designing and maintaining Texas' adoption laws. On the national scene, he had many key roles but perhaps none was more critical than his last. He served as the representative of the American Bar Association on the Advisory Panel to the Department of Health, Education and Welfare charged with carrying out the direction of Congress to prepare model legislation which would help eliminate barriers to the adoption of special needs children. With a few other Advisory Panel members, Mr. Wynn worked to make that legislation positive. When it became clear that the Advisory Panel and related support personnel were not following Congressional intent, Mr. Wynn, in a thoughtful statement, pointed out the dangers of such an approach not only to those who had been served by adoption in the past but also those who would require those unique services in the future. Sadly, Mr. Wynn became seriously ill and died before the Advisory Panel completed its work. Happily, Mr. Wynn's thorough and sensitive approach to adoption and his concern about the approach taken by the Advisory Panel were well-received. Across the nation, people criticized the problems Mr. Wynn had identified and suggested workable, positive alternatives. Eventually, those good ideas were accepted by the Federal government. The result was the publication of this Model Act, in final form, with none of the major flaws identified by Mr. Wynn and with many significant breakthroughs for America's waiting children, children with "special needs." No more fitting living memorial could exist for the gentle, brilliant, hard-working man of the law who so loved children, than this Model Act for the Adoption of Children with Special Needs. It is a fitting and final capstone to an illustrious career of service to America's children and families.



Assistant Secretary  
Washington DC 20201

October 23, 1981

William L. Pierce  
President  
National Committee for Adoption  
1346 Connecticut Avenue, N.W.  
Washington, D. C. 20036

Dear Mr. Pierce:

I am pleased to have this opportunity to reaffirm my personal endorsement of the Model Act for the Adoption of Children with Special Needs.

The National Committee for Adoption and its many members can do much to promote State legislative enactment of this model legislation.

Thank you for your support on this important achievement.

Sincerely,

Dorcas R. Hardy  
Assistant Secretary  
for Human Development Services

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Model Act for Adoption of Children With Special Needs; Final Legislation

AGENCY: Department of Health and Human Services.

ACTION: Publication of final model State Legislation.

**SUMMARY:** Title II of the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978 [Pub. L. 95-266], which was signed into law on April 24, 1978, mandates issuance of model State adoption legislation by the Secretary of Health and Human Services. Pursuant to this Act, draft model State legislation proposed by the Model Adoption Legislation and Procedures Advisory Panel was published for comment in the Federal Register on February 15, 1980. Comments on the Panel's proposal were received from 17,202 persons, including 9,038 petitioners. After review of the comments and further study of the issues, and in accordance with Pub. L. 95-266, the Department herein is publishing final model legislation, entitled the Model Act for the Adoption of Children with Special Needs.

The major distinction between the draft version of the model legislation published previously and the final version published now is the particular focus in the final version on special needs children, i.e., the large numbers of children who are not readily placed in adoptive homes because of characteristics such as age, race, ethnic background, sibling relationship, medical condition, or physical, mental, or emotional handicap. These children often remain in institutional or foster care throughout childhood, deprived of the benefits of permanent home environments and loving families. Because of the tragic dimensions of this problem for these children and in keeping with the intent of Congress as revealed by the legislative history of Pub. L. 95-266, the Secretary has determined that the model legislation should concentrate on the elimination of barriers to the permanent adoption of special needs children.

To encourage and facilitate such adoptions, the final Model Act provides for financial assistance to families who adopt special needs children, expands the grounds for adjudications freeing such children for adoption, clarifies the roles of adoption agencies and State adoption administrations in arranging and providing support services for adoption, and includes various other provisions to promote and assist the

This Model Act is the Department of Health and Human Services' (HHS) final version. This publication supercedes the proposed draft model legislation prepared by an Advisory Panel which was published for comment in 1980. The proposed version did not necessarily represent the Department's position. This final Model Act does represent a formal statement from the Department of Health and Human Services.

This final Model Act concentrates on eliminating the barriers to the permanent adoption of special needs children—school-aged, handicapped and minority children in need of permanent families. This Act, while limited to special needs adoption, should be seen as a supplement and/or complement to a State's compilation of adoption laws. Some provisions may be applicable to all adoptions, if the State wishes to use them. Other provisions are only relevant to the adoption of children with special needs and would not be beneficial if applied to the adoption of children from other nations or the adoption of healthy newborns.

The Model Act includes provisions that

- provide financial assistance to families who adopt special needs children;
- expand the grounds for adjudications freeing such children for adoption;
- clarify the roles of adoption agencies and State adoption administrations in arranging and providing support services for adoption.



The Model Act does not address issues related to infant adoption, such as

- revocation of relinquishment;
- putative fathers;
- private (unlicensed or non-agency) adoptive placement.

The Model Act ensures that medical information, and social and genetic history about an adopted child are available, while protecting the privacy of birth parents and the adoptive family. These are laudable provisions.

Finally, it is important to emphasize that this is "simply model state legislation." State legislatures may choose to enact all, or parts, or none of this Model Act.

The comments received on the proposed draft model were considered in preparing this final Model Act.

The Commissioner of the Administration for Children, Youth and Families is now Clarence E. Hodges. The telephone number is (202) 755-7762. The address is the same.

permanent adoptive placement of special needs children.

Several sections included in the earlier draft of the model legislation which were not relevant to facilitating the adoption of special needs children were omitted from the final version. These include provisions concerning revocation of relinquishment, putative fathers, and private (unlicensed) adoptive placement.

The provisions on adoptive records were rewritten to protect the privacy of birth parents while assuring that adoptees and adoptive families have access to information concerning the adoptee's medical and genetic history.

The legal status of this final Model Act should be emphasized. It is not Federal law nor Federal regulation, nor does it set conditions for the receipt of Federal aid. It is simply model State legislation, all or parts of which individual State legislatures may choose to enact into State law.

**DATES:** The recommendations of the Model Adoption Legislation and Procedures Advisory Panel were published in Volume 45, Number 33 of the *Federal Register* of February 15, 1980 at page 10622. Comments were solicited and reviewed following that publication and were considered in the preparation of the final version. As this is simply model legislation, parts or all of which State legislatures have the option to enact, there is no "effective date".

**ADDRESS:** For further information please write to: Warren Master, Acting Commissioner, Administration for Children, Youth and Families, 400 6th Street, S.W., Washington, D.C. 20201.

Dated: September 25, 1981.

Approved:

Richard S. Schweiker  
Secretary.

**Model Act for the Adoption of Children With Special Needs**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

September 1981

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**Introduction**

The development of the Model Act for the Adoption of Children with Special Needs was mandated by the United States Congress in Title II of Pub. L. 95-260, the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978. In Title II—Adoption

Opportunities, Congress found that many thousands of children with special needs remain in institutional or foster care because of barriers which exist to the adoption of these children. As one means to eliminate these barriers, Congress provided for the development and issuance of model adoption

This Act is to facilitate adoption of children with special needs, only.

This states that the law concentrates on barriers in the operation of voluntary adoption agencies. The statement could be used in a destructive way by anti-agency forces. This statement should be amended to read "The Model Act also encourages a partnership between public and voluntary adoption agencies to see that children are adopted."

It's important to remember...this is only suggested legislation from HHS.

The Act is written so that portions can be enacted separately. Our review of the entire Act reveals that this is probably the best way to use the Model.

legislation and procedures which can be used by the States and territories of the United States to facilitate the adoption of children with special needs.

#### *Philosophy of the Model Act*

The Model Act is the first comprehensive adoption law for children with special needs developed under Federal sponsorship. It has been written at a time when national attention has been focused on the many children in institutional or foster care for whom adoption might offer a permanent family. To increase the likelihood that children with special needs who need adoption services are identified and then placed for adoption, the Model Act focuses on ameliorating or eliminating various obstacles to adoption which exist in present law and practice. The Model Act concentrates on those obstacles which an adoption law can reasonably be expected to reach: the barriers in the legal process and in the operation of public and voluntary adoption agencies. The Model Act also provides for a range of adoption services to these children. Counseling and other services are made available to birth parents, adoptive parents, and prospective adoptive parents at critical junctures throughout the adoption process. The purpose of these services is to provide all parties with the full information they need to make informed decisions, decisions which will have a life-long effect both for themselves and for a child.

#### *Use of the Model Act*

The Model Act appears at an opportune time, when attention has been drawn to the need to improve adoption services to children with special needs and their families. The Model Act is suggested legislation for the States to enact. It is not Federal law or regulation, nor will States be required to enact it in order to receive Federal reimbursement for services. Each State remains free to select from among the many provisions of the Model Act those which it finds will improve its existing adoption services for children with special needs and their birth and adoptive parents. The severability of the various provisions is expected to increase the likelihood that the Model Act will be used as Congress intended: To eliminate barriers to adoption and to provide home environments for waiting children with special needs who would benefit by adoption. States will not have to undertake complete revisions of their adoption laws but can follow an incremental approach by selecting specific provisions which address their most critical needs. Nor will a State be

confronted with a dilemma if it finds certain portions of the Model Act to be unnecessary or inconsistent with its philosophy and practice of adoption; the various parts can be severed without major redrafting of the titles and sections which remain.

#### Preamble

The legislature finds that family life is optimal for the rearing of children with special needs, and that there are many special needs children in the State who are without permanent families. It further finds that for those children, age, race, ethnic background, handicap, or the need to be placed with siblings must not preclude the benefits of family life. It is the policy of this State that adoption is a positive social and legal process intended as a service to include those children with special needs.

#### Title I—General Provisions

##### Section 101. Policy and Purposes

(a) *Philosophy of Act.* It is the policy of this State to encourage the adoption of children with special needs who are without permanent families and who would benefit by adoption. Although there are qualified persons seeking to adopt special needs children, many such children remain in institutions or foster homes because of legal and other barriers to their placement in permanent adoptive homes. It is the intention of this State to facilitate the elimination of such barriers to adoption and to promote the provision of stable and loving family environment of special needs children who are without permanent families.

(b) *Purposes of Act.* The purposes of this Act are to provide adoption services without cost to each child with special needs in the State who needs such services; and

(1) To provide procedures and services which will safeguard and promote the interests of each child with special needs who is in need of adoption and which will protect the rights of all parties concerned;

(2) To provide legal procedures for promptly terminating parental rights after the birth parents have been provided or offered appropriate services and cannot or choose not to care for their special needs child;

(3) To establish a system which will identify each special needs child who is in need of adoption services, and which will monitor and assure that such services are provided;

(4) To identify persons willing to assume the responsibilities and accept the privileges of parenthood, and to encourage them to apply their parenting

Severability of the sections is very important so that certain sections which are unnecessary or inconsistent with your State's philosophy and practice of adoption need not be considered.

Again, the limitation of this Act to the barriers to adoption of children with special needs is stated.

Section 101 (b) is confusing and needs clarification. Since adoption services are provided to children, it is obvious that the cost of services cannot be paid by the children who are the primary beneficiaries of the service. The first sentence of 101 (b) should be restated to read: "provide adoption services without charging a fee." Most certainly, adoption services cost—and services of high quality do have a corresponding cost. This purpose would be very problematic to NCFR if it were carried out for all adoptions in a State, or if it were implemented without exception. NCFR questions whether it was HHS' purpose to prohibit those—whether agencies or adoptive parents—who believe in the principle of paying one's own way, no matter how modest the payment, from exercising their rights. A philosophy of no fee for service will be acceptable to few State legislatures.

The Act is providing for reasonable reimbursement to agencies and assuring that profiteering does not occur. However, it would be better if this section stated that "any reimbursement paid to any agency placing a special needs child for adoption is for the actual cost of providing such services."

This commentary on fees should be amended to reflect your State's philosophy on appropriate fees for adoption service.

Many special needs children are now placed for adoption by voluntary agencies without any involvement or cost to the State. It is unlikely that HHS intended to increase the involvement of the State, or to supplant already successful voluntary arrangements with State agency activities. Most States will want to allow voluntary solutions and services to exist so long as they are wholly or partially funded by the voluntary agencies or through fees.

skills and desires on behalf of children with special needs who are in need of adoption;

(5) To provide financial assistance to make possible the adoption of any child with special needs;

(6) To assure that any reimbursement paid to any agency placing a special needs child for adoption is reasonable and does not exceed the cost of the services provided.

(c) *Construction.* The provisions of this Act shall be liberally construed to effectuate the purposes thereof.

#### *Commentary to Section 101*

The purpose of the Model Act for the Adoption of Children with Special Needs, hereafter referred to as the Model Act, address a number of serious problems in the delivery of adoption services by the States.

Many children with special needs who need adoption services are not receiving them. A primary purpose of the Act is to assure that adoption services are provided to these children, whether in institutional, foster, or other substitute care—formal or informal, public or voluntary. Often children with special needs do not receive services because of State or agency failure to identify such children as adoptable. Such failure may be due to the lack of adequate case review or to obstacles which could be removed through legal or other action, particularly the termination of parental rights, or through interstate efforts to recruit adoptive parents for children formerly viewed as unadoptable. The identification of children with special needs in need of adoption, removal of obstacles to their adoption, and vigorous recruitment of appropriate adoptive families are all express purposes of the Act.

The costs associated with adopting a child with special needs may constitute a further obstacle to adoption. The Act provides for a financial subsidy to persons who adopt special needs children. In addition, the Model Act prohibits the charging of fees by agencies. Voluntary agencies who provide services to children with special needs and their birth and adoptive parents will be reimbursed for these services by the State, since they receive no direct public support. See Model Act section 107 (hereinafter cited as M.A.)

#### *Section 102. Definitions.*

(a) As used in this Act, unless the context otherwise requires:

(1) "Adoptee" means a person of any age who has been legally adopted.

(2) "Adoption" means the judicial act of creating the legal relationship of

parent and child where it did not exist previously.

(3) "Adoptive parent" means an adult who has become the mother or father of a child through the legal process of adoption.

(4) "Adult" means a person 18 or more years of age.

(5) "Agency" means any entity authorized pursuant to the laws of any jurisdiction within the United States to place children preliminary to adoption.

(6) "Birth parent" means the mother or father of genetic origin of a child, but does not include a putative father of a child.

(7) "Child" means a son or a daughter by birth or by adoption, who has special needs and is under the age of 18 years.

(8) "Court" means the [ ] court.

(9) "De facto parent" means a person, other than a parent, who has exercised physical care, custody, or control of a child for at least eighteen months, has developed a parental relationship with the child based upon significant emotional and psychological ties between them, and wishes to assume the status of *de facto* parent.

(10) "Family assessment" means a comprehensive study of prospective adoptive parents or, in the case of single parent adoptions, of a prospective adoptive parent by an agency for the purpose of determining whether the prospective adoptive parent can provide a suitable adoptive home for a specific child with special needs or a category of children having certain special needs.

(11) "Genetic and social history" means a comprehensive report, when obtainable, on the birth parents, siblings to the birth parents, if any, other children of the birth parents, if any, and parents of the birth parents, which shall contain the following information:

- (a) Medical history;
- (b) Health status;
- (c) Cause of and age at death;
- (d) Height, weight, eye and hair color;
- (e) Ethnic origins; and
- (f) Where appropriate, levels of educational and professional achievement.

(12) "Guardian *ad litem*" means an attorney or other person appointed by the court during litigation to represent the interest of a party.

(13) "Health history" means a comprehensive report of the child's current health status and medical history, including neonatal, psychological, physiological, and medical care history.

(14) "Minor" means a person under eighteen years of age who has not been emancipated according to the laws of this State.

(5) This definition includes the term "entity," which implies that individuals could be defined as an agency. The definition of agency should read: "Agency" means a public or voluntary agency, licensed by any jurisdiction within the United States, and expressly empowered to place children as a preliminary to a possible adoption.

(6) Putative fathers are excluded from the definition of "birth parent." This is excellent.

(7) The definition is limited to "who has special needs." This is an important and appropriate limitation.

(10) Although not necessarily the point of this definition, the eligibility of single parents is emphasized here.

(11) Many who are advocating improving genetic and social history information want to have access to information about the religious practice, upbringing or beliefs, if any, of the birth parents. Add a new part: "(g) Religion or religious practice, if any, of the birth parents."

(15) "Parent" means the birth or adoptive mother, or the birth or adoptive father whose parental rights have not been terminated.

(16) "Parent-child relationship" means the rights, powers, privileges, immunities, duties, and obligations existing between parent and child, as defined by State law.

(17) "Putative father" means any man not deemed or adjudicated under the laws of a jurisdiction of the United States to be the father of genetic origin of a child and who claims or is alleged to be the father of genetic origin of such child.

(18) "Relinquishment" means the informed and voluntary release in writing of all parental rights with respect to a child by a parent to an agency for the purpose of the adoption of the child.

(19) "Special needs" means those characteristics of age, race, ethnic background, sibling relationship, medical condition, and physical, mental, or emotional handicap which constitute a barrier to the adoption of a child.

(b) As used in this Act, pronouns of the masculine gender include the feminine.

#### *Commentary to Section 102*

The following definitions should be noted:

"Agency." Adoption agencies which exclusively serve American Indian families and are expressly so empowered by Indian tribal law should be considered agencies for the purposes of this definition.

"Birth parent." Several different terms are presently used in various States and agencies to denote a child's mother or father of genetic origin—"biological" parent, "natural" parent, "birth" parent, "original" parent, "genetic" parent—and there is some controversy surrounding the use of each of these terms. Arguments have been raised, for example, that "natural" implies that an adoptive parent is unnatural, and "genetic" and "biological" seem overly technical for general usage. The term "birth parent" is used in the Model Act because of the increasing preference for the use of that term among the individuals to whom it refers.

"Child." The provisions of the Model Act are designed only for children with special needs who need adoption services or who have already been adopted. Thus, the narrow definition of child as one "who has special needs." See M.A. section 102(a)(19) for the definition of "special needs."

"Court." The court designated by the legislature in this definition will be that court with jurisdiction over all the types

(19) This definition is crucial to the overall use of the Model Act. Here "special needs," as referred to in the definition of "child," is defined.

"Biological" or "genetic" are more precise terms and should be used, notwithstanding the fact that they are "technical." This is a Model Act, not writings for "general useage." "Birth parent" is frequently preferred by biological or genetic mothers but the term is far less appropriate when applied to biological or genetic fathers. These fathers are frequently not involved with or present at the birth of the baby.

This commentary states clearly that "child" has a narrow definition—so that the provisions of the Model Act are designed only for children with special needs.

of proceedings set out in the Model Act: termination of parental rights (and perhaps the related area of child abuse and neglect adjudications), child custody and child placements, adoption, and appointment of guardians. Because of the broad knowledge and expertise which should reside in this court, it is recommended that the court be a division of, or equal in stature to, the highest trial court of general jurisdiction. See ABA Comm. on Standards for Judicial Administration, *Standards Relating to Court Organization*, section 1.10 (1974).

"De facto parent." This concept is introduced in the Model Act in order to confer some legal standing upon persons who, as a result of assuming parental caretaking responsibilities for an extended time, develop a parental relationship with a child based upon strong emotional and psychological bonds. For example, a foster parent with custody of a special needs child for the required time might be a *de facto* parent, provided that sufficient emotional ties have developed. Short-term interruptions of the physical caretaking function, as in the case of a child intermittently hospitalized during the foster care period, should not preclude the foster parent from fitting the definition of *de facto* parent.

"Minor." The age limit specified here may require adjustment in accordance with individual State law.

"Parent." There are two circumstances in which an identifiable birth parent would not be considered to be the present parent of a child. The first is where the birth parent's rights have been terminated. If the child is subsequently adopted, the adoptive parent is thereafter the "parent" unless and until his rights are terminated. If the child has not been adopted, the child's court-appointed guardian exercises the authority of a legal parent, but the child has no present parent. The second situation is where the child was born under circumstances in which State law has presumed another man to be the child's father, as when conception occurred as the result of intercourse between the child's married mother and a man not her spouse. The law presumes that such a child is the product of the marital union; the legal father of the child is the mother's husband unless he asserts evidence to rebut the presumption. Similarly, the legal father of a child born as the result of artificial insemination would be the spouse of the woman who so conceived rather than the sperm donor.

All "parents," as defined in this subsection, possess full legal rights with

Here the commentary goes well beyond the purpose of the Act. A policy on artificial insemination donors is stated: no legal responsibility as father of a child. This sentence should simply be deleted from this Act. Artificial insemination would seldom be relevant to special needs adoption. Therefore the final sentence of the "parent" paragraph should be deleted.



Commentary reinforces the exclusion of putative fathers from the rights of birth parents. Good.

(a). line 5 reads "not"; it should read "no."

No new rights are to be extended to putative fathers by this Act.

(b) If the definition of "agency" is not amended, then this section should read: "A special needs child may be placed for adoption by a public or voluntary agency, licensed or approved as meeting the requirements of licensing." If, as recommended above, the definition of "agency" is changed, this new language would not be required.

The commentary states a good policy here: termination of parental rights should not be contingent upon the availability of an adoptive home.

respect to their children. The Model Act does not distinguish between the parental rights of wed and unwed birth parents, nor between the parental rights of birth mothers and birth fathers. Because the definition of "birth parent" expressly excludes putative fathers, however, the term "parent" likewise does not extend to them.

"Special needs" The definition of the conditions which, singly or in some combination, constitute special needs is derived from section 473(c)(2) of Public Law 96-272, the Adoption Assistance and Child Welfare Act of 1980. To be eligible for services under the Model Act, children in need of adoption must have one or more of the characteristics or conditions listed in the definition.

*Section 101 Who May Be Adopted:  
Who May Place a Special Needs Child  
For Adoption*

(a) *Who may be adopted.* Any minor who has been characterized a child with special needs may be adopted if the requirements of this Act are met, and such minor has not living parent or the parental rights of all living parents and of any putative father of such minor have been terminated according to the laws of this State or of another jurisdiction. Nothing in this Act shall be deemed to establish any new rights of putative fathers beyond those rights otherwise established under existing law.

(b) *Who may place a special needs child for adoption.* A special needs child may be placed for adoption by an agency only.

*Commentary to Section 101*

This section sets forth the principle that termination of parental rights should in every case precede a court decree of adoption. Because parental rights are terminated prior to adjudication of the adoption petition, the only consent required for a child's adoption under the Model Act is that of the guardian of the child's person or of an agency empowered to consent to the adoption of a special needs child following a formal relinquishment by the child's parent. It should be noted that although the termination of parental rights is a precondition to adoption, this provision does not make termination contingent upon the availability of an adoptive home.

There are three major reasons for bifurcating the adoption process. A two-step adoption process provides the most beneficial framework for agency efforts on behalf of the children with special needs who have been in the foster care system for too long. Many of these children have been considered ineligible

for adoption because their parents, while not effectively exercising custodial rights of parental responsibilities, nonetheless refuse to consent to their adoption. The fact that termination of parental rights, such a proceeding should be initiated without delay. In addition, when termination of parental rights can be accomplished prior to placement of the special needs child for adoption, the child and potential adoptive parents will benefit from knowing that the child is legally free for adoption.

*Section 104. Character and Effect of Termination of Parental Rights and of Adoption of a Child With Special Needs*

(a) *Effect of relinquishment and termination of parental rights.* A relinquishment to an agency or a judicial order terminating the relationship between a parent and a child with special needs divests the parent and the special needs child of all legal rights, powers, privileges, immunities, duties, and obligations with respect to each other, except that:

(1) No relinquishment or termination order entered pursuant to this Act shall deprive a child with special needs of any benefit due him from any third person, agency, State, or the United States; nor shall any action under this Act affect any rights and benefits that such child derives as a member of an American Indian tribe;

(2) The right of the special needs child to inherit from and through the parent whose rights have been terminated shall be eliminated only by a final order of adoption;

(3) Any debt incurred by the parent on behalf of a son or daughter with special needs prior to the termination of parental rights shall be enforceable against the parent; and

(4) No relinquishment to an agency shall deprive a child with special needs of any right to support due him under any other law.

(b) *Effect of adoption.* Adoption creates the legal relationship of parent and child. There is no legal distinction between an adoptee and a person not adopted except that adoption of a child shall not affect any right to benefits conferred by the Federal government, or any legal rights created by law for an American Indian child.

*Commentary to Section 104*

**Subsection (a).** Because termination of parental rights itself does not substitute a new parent for the parent whom the child loses, this subsection protects against the loss of inheritance or other rights and benefits to which a child may be eligible through the parent whose

The sentence beginning with the words "The fact," on line 5 is the result of typographical error. Insert the following sentence instead: "The fact that termination of parental rights is a mandatory first step in the adoption process should help to determine what course of action is best for a child. If there are grounds for termination of parental rights, such a proceeding should be initiated without delay."

The rights of Indian children to their benefits are preserved with this exception.

Inheritance from birth parents is possible after termination of parental rights but only before the final order of an adoption. This precedent should not be encouraged. Eliminate Section 104 (a) (2).

The commentary provides an expanded discussion of what kinds of benefits should be provided from parents whose rights have been terminated.

Using "birth family" is inappropriate. Not all children are part of a "family" in the technical, legal sense. Substitute, as stated above in the discussion of "birth parent," "biological" or "genetic" for "birth" wherever "birth" appears in this context in the Model Act.

This section mandates a review, at least annually, of every child with special needs who is in foster care.

This section recognizes the unfortunate but realistic circumstance of a child growing up in foster care, since this is the best plan for some children. The court is required to review these cases as well.

rights are terminated. Hence the provision implements, for State benefits, a policy comparable to that enabled under Title II of the Social Security Act. For example, a child with special needs who has been receiving social security benefits on the basis of a parent's disability is eligible to continue to receive such benefits until and, in some instances, after, he has been adopted by another person; custody or other parental rights with respect to the child are not eligibility criteria. 42 U.S.C. 402(d) (1976). An example of a benefit due from a third person would be a gift by trust or will made to the child as the son or daughter of the named parent. Such a gift, likewise, will not be lost by the termination of parental rights.

**Subsection (b).** Most adoption statutes contain a provision similar to this one, stating the principle that the adoptive family, for all legal purposes, supersedes the birth family. This Model Act provision, likewise, emphasizes the character of adoption as a process with lifelong implications for the family and the social relationships of the parties involved. Upon completion of the adoption, the adoptee becomes in all legal respects as the birth son or daughter of the adopting persons, and, through them, acquires relationships to other adoptive family members. These new relationships are, for inheritance and all other purposes, equivalent to those of a son or daughter born to the adoptive parents.

#### *Section 105. Jurisdiction of Courts*

(a) Exclusive and continuing jurisdiction. The [ ] court shall have exclusive original jurisdiction over all proceedings arising under this Act. The court may make orders necessary or appropriate thereto and relating to the placement and care of children, and shall review at least annually the case of every child with special needs over whom it has retained jurisdiction, until the child is adopted or attains majority.

(b) Jurisdiction after child reaches majority. The court having jurisdiction over a child with special needs with respect to whom parental rights have been terminated but who has not been adopted may, for good cause shown, continue its jurisdiction after the child reaches majority, but shall review the continuation of its jurisdiction at least annually.

#### *Commentary to Section 105*

**Subsection (a).** The principle is well established that all proceedings relating to the custody of children and their personal guardianship and welfare should be under the exclusive

jurisdiction of one court with broad authority. See ABA Comm. on Standards for Judicial Administration, *Standards Relating to Court Organization* section 1.10 (1974). Such a court is more likely to foster consistent and informed application of the law and judicial discretion than a variety of specialized courts with overlapping jurisdiction.

It is highly recommended that statutes or court rules regarding venue consider primarily the residence of the child, and that transfer of venue be required when a proceeding involving a child is brought in one county while another proceeding involving the same child is pending in another county.

**Subsection (b).** This provision allowing the court to retain jurisdiction beyond the age of majority is intended to meet the need of handicapped or other persons who could remain eligible for financial assistance or other governmental benefits as long as there is a judicial mandate for such services.

Annual court review of continued jurisdiction is explicitly required, not only under this subsection, but also under termination of parental rights and adoption titles of this Act. See M.A. sections 206, 502. Mandatory periodic judicial review is also required for all other cases in which the court retains jurisdiction. Such review helps to assure that children with special needs do not remain in the foster care system merely due to inadvertence of the court or agency involved and to move these children more rapidly toward a stable long-term placement.

#### *Section 106. Governing Law*

(a) *Full faith and credit.* Full faith and credit shall be given to the public acts, records, and judicial proceedings of an American Indian tribe or another State or jurisdiction of the United States. The courts and agencies of this State shall extend recognition, in accordance with applicable principles of comity, to the public acts, records, and judicial proceedings of a jurisdiction outside the United States whenever the interests of the child or the adopted person will be served thereby.

(b) *Law governing American Indian children.* The validly enacted laws of the United States relating to termination of parental rights and adoption of American Indian children shall be given effect in any case to which they apply.

#### *Commentary to Section 106*

**Subsection (a).** In spite of the constitutional mandate of "full faith and credit," which provides some uniformity of treatment to citizens beyond the boundaries of their own States, the lives

The provision for full faith and credit is to be given to another State's or Country's laws. It is clear that the interests of the adoptee should be served by this recognition. Why this section covers intercountry adoptions is not clear. The second sentence of 106 (a) should be dropped.

of adoptees have traditionally been plagued with legal uncertainties. The fact that a decree of adoption is recognized by a State different from the issuing State does not assure consistent treatment of all adoptees, since the legal effects accorded the adoptive status, particularly with respect to matters of inheritance, vary among the States.

Although an adoption may not be subject to attack in the State which granted it, the courts of other States need not apply the same statute of limitations, or may cite due process considerations in overturning the decree. Unless each of the jurisdictions of the United States enacts a uniform adoption law, there will continue to be some element of uncertainty in the legal implications of adoption for the parties directly and indirectly involved. Two points should be made regarding these uncertainties. First, the courts and officials of each State should strive to build a record that will tend to withstand collateral attack and merit full faith and credit. And second, courts considering arguments based upon the principle of full faith and credit should seek to protect the interests of the adoptee.

**Subsection (b).** The regulation of affairs of federally-recognized Indian tribes is primarily within the province of the Federal government. For that reason, any valid Federal law regarding the subject of this Act supersedes State law in all circumstances to which the Federal law applies.

*Section 107. Fees*

(a) *Charging of fees prohibited.* No agency, public or voluntary, shall charge fees:

(1) For adoption services to children with special needs who are the responsibility of an agency, or to the birth or prospective adoptive parents of such children; or

(2) For postadoption services to the adoptive family of any child with special needs who, immediately prior to adoption, was the responsibility of an agency.

(b) *Reimbursement of expenses.* The State adoption administration shall reimburse voluntary agencies which provide adoption or postadoption services to persons to whom fees may not be charged pursuant to subsection (a) hereto. Such reimbursement shall not exceed the actual cost of services provided, and shall be in accordance with purchase of service rates established by the State adoption administration.

(c) *Penalty for illegal fees.* Any person, agency, association, or corporation who charges a fee,

Section 107, concerning fees, is problematic. It may be better to completely rewrite this section to take into account the philosophy and practice of your State. An analysis of the fiscal impact of the section, as written, should be undertaken by a State as a first step in considering changes in its adoption laws.

(1) This section should state that the collection of fees should be allowed if it is the policy of the agency or is the wish of the families being served to pay a fee.

(2) "Post adoption services" are not defined. Providing any kind of social service to an adoptee or adoptive family without recognizing the cost to the State or voluntary agency is impractical.

(b) The Model Act falls short of requiring that actual costs of services be reimbursed by the State adoption administration, although it does recognize the importance of establishing purchase of services rates.

receives, or accepts payment of cash or other consideration in violation of this Section 107 shall be guilty of [misdemeanor].

*Commentary to Section 107*

The Preamble to the Model Act establishes the principles that adoption is a service to children, and that children with special needs should not be denied the benefits of family life. In keeping with this philosophy, the Model Act abolishes fees for services to these children, their birth parents, and their prospective adoptive families. By their nature, fees may act as deterrents to families who seek to adopt a child; they may erect psychological or very real financial barriers to families, thereby reducing the chances a child has to be adopted.

A primary purpose of the Model Act is to remove barriers to the adoption of special needs children awaiting adoption. Proscription of fees for services to or on behalf of these children removes one of the obstacles to their adoption.

The financial burden for the extension of adoption services is transferred back to the State through the requirement that it reimburse voluntary agencies. Implementation of the philosophy of the Model Act demands that comprehensive services be available at no cost if the thousands of special needs children awaiting adoption are to be placed with permanent families. Legislators debating enactment of the Model Act, when weighing the benefits against the potential for increased costs, should consider the potential for continued (and perhaps even increased) costs to the State of not enacting this provision: the expense of keeping a special needs child in foster care, including social and medical services, or the expense of a child re-entering the foster care system if an adoption breaks down because the necessary postadoption services were not available. In addition, any financial argument must be balanced against the social benefits of securing permanent homes for the waiting children.

*Section 108. Priority of Proceedings. Judicial Review*

(a) *Priority on court calendar.* Judicial proceedings for emergency protection of children, termination of parental rights, and adoption of children with special needs, and objections thereto, shall be considered to have the highest priority and shall be advanced on the dockets of trial and reviewing courts so as to provide for their earliest practicable disposition. An adjournment or continuance of a proceeding under this

(c) This penalty clause should be amended to apply to those payments which are received which exceed the actual cost of services provided. The penalty for "child-brokers" should be more serious. For example: "Any violation of Section 107 (amended) shall be punished with a fine of no more than \$20,000 or imprisonment of no longer than 10 years, or both."

Although the commentary discusses the deterrent effect charging fees may have, the other side of the coin should also be raised: In a time of scarce public resources for human services, we question the advisability of an outright prohibition of any charging of fees. Some voluntary agencies may have a long-standing, working policy of requiring fees, and some who receive service may want to financially contribute for the services, in effect to offset the tax costs to other citizens.

The cost-benefit nature of adoption is real, although the literature is seeing an increasing debate about the concept of "permanency" being primarily sold for its benefits to taxpayers. Services provided to those with an ability to pay should not be provided solely from tax revenues.

The commentary implies that postadoption services are to be provided to prevent an adoption from disruption. A more detailed description of this important set of services to be mandated is needed.

It should be remembered that, in some instances, the most appropriate "permanent homes" are being provided by foster care institutions and homes.

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30 days is the time limit to file an appeal of a court decision.

The word "apeal" should read "appeal".

A statute of limitation is provided as a way to assure permanency for an adopted child. The period after the decree of termination of parental rights or the final adoption decree, during which the decree can no longer be questioned, should be six months, not a year.

Act shall not be granted without a showing of good cause therefor.

(b) *Judicial review.* Any party aggrieved by an order, judgment, or decree of the court in a suit for emergency protection of children, termination of parental rights, or adoption may, within thirty days after notice of its entry, file notice of an appeal to the [ ] court. Procedures for an appeal are governed by the rules applicable to appeals from the [ ] court in civil cases. A petition for the child's adoption may not be heard pending the appeal of a decree terminating a parent-child relationship.

(c) *Priority of appeals.* Appeals from orders under this Act shall be given priority in the reviewing court and shall take precedence over all other matters, except for already docketed appeals from orders in other termination or adoption proceedings and other matters which are given priority by specific statutory provision. No postponements, continuances, recesses, or adjournments for longer than three days shall be granted except with the consent of all the parties, and none shall be granted after the appeal has been docketed for sixty days. An appeal from an order under this Act shall be decided within ninety days of filing.

(d) *Decree judgment-proof after one year.* Subject to the disposition of an appeal, upon the expiration of one year after a decree of termination of parental rights or of adoption is issued, such decree cannot be questioned by any person including the petitioner, in any manner upon any grounds whatsoever, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction over the parties or over the subject matter.

#### *Commentary to Section 108*

**Subsection (a).** The policy articulated supports the right of children with special needs to have matters regarding their interests adjudicated with the greatest promptness. The provision pays deference to the great significance which the passage of time has in the life of a young person. The requirement that a person who requests a continuance must show cause for the postponement is designed to discourage unnecessary delay.

**Subsection (b).** The time limits imposed upon appeals are deemed the maximum that should be allowed in light of the commitment to affording stability and permanence to the children with special needs who come within the court's jurisdiction.

**Subsection (d).** The interest of an adopted child in a stable and permanent family also underlies the one-year statute of limitations which is imposed upon collateral attack of termination or adoption decrees. The rationale of the present provision, which is intended to cut off attacks based upon any error, is grounded upon a balancing of the interests of the child with special needs, other parties, and society. When such a child has been in an adoptive home for one year or more, that child's right to continuation of a stable and permanent family environment outweighs the right of a parent who, for whatever reason, has not been involved enough with the child to have had knowledge of the decree in question; the child's right also outweighs society's interest in protecting the integrity of the judicial process in cases of fraud.

*Section 109. Severability*

If any provision of this Act or the applicability thereof is held invalid, the remaining provisions of this Act shall not be affected thereby.

*Commentary to Section 109*

The severability clause is a common device to ensure the continued effectiveness of other provisions of the Model Act in the event that any single section or subsection is declared invalid.

*Section 110. Effective Date*

This Act shall take effect on \_\_\_\_\_

*Commentary to Section 110*

Generally, an effective date should be set at three to six months after enactment to afford sufficient time to adopt whatever administrative changes are necessary to implement the Act.

*Section 111. Prior Laws Repealed*

The following laws or portions thereof are hereby repealed [suspended] by this Act:

*Commentary to Section 111*

Since many States already have statutes dealing with child abuse and neglect, child protective services, termination of parental rights, foster care and adoption, each State which adopts parts or all of this Model Act should make a special attempt to maintain consistency as to definitions and other aspects of adoption law.

As a part of setting an effective date for the Act, there should be instructions to the State adoption administration to allow opportunity for public review and comment on the proposed regulations—especially by representatives of the voluntary agency sector.



**Title II—Termination of Parental Rights of a Child With Special Needs****Section 201. Relinquishment of Parental Rights With Respect to a Child With Special Needs; Voluntary Judicial Termination of Parental Rights With Respect to a Child With Special Needs**

Voluntary relinquishments may be made to an agency at the agency instead of in a court. This is good. It also underscores the need to define "agency" carefully, as we have suggested above.

Relinquishment of special needs children may involve difficult decisions for parents who determine that they cannot "cope" with a baby or child with a physical or mental handicap. Counseling may also be needed for those parents who believe they cannot cope with special needs infants, but would consider making an adoption plan instead of choosing abortion or withholding treatment or food from a handicapped infant.

If the agency is doubtful of the parents' understanding of the voluntary relinquishment, the agency can assist the parent in petitioning for court termination.

(a) *Effect of relinquishment.* A voluntary relinquishment to an agency shall be effective to terminate the parental rights of the person executing it and shall transfer from the parent to the agency all powers of such parent, including the right to place a special needs child for adoption and to consent to the adoption of the child. Relinquishment of a child by one parent does not diminish the parental rights of the other parent of the child, nor does it relieve either parent of a duty otherwise provided by law to support the child until such child has been adopted or such parent's parental rights have been terminated by judicial decree.

(b) *Relinquishment by American Indian parent.* A voluntary relinquishment by an American Indian parent who is a member of a federally-recognized tribe shall conform to requirements of Federal law.

(c) *Procedures for relinquishment.* Except as provided in the following subsection (d), procedures for a voluntary relinquishment of a special needs child shall be the same as for voluntary relinquishments generally.

(d) *Counseling of parent prior to relinquishment.* Prior to taking a relinquishment, the agency shall counsel the parent of a special needs child regarding relinquishment, adoption, and the alternatives to relinquishment, and shall assist him in understanding and exploring the assistance and services which may be available to his special needs child if he chooses not to relinquish the child.

(e) *Court termination required when parents fail to understand process.* If the agency doubts the comprehension by the parent of the meaning or consequences of relinquishment, or if the parent so requests, the agency shall not proceed to take a relinquishment, but shall assist the parent in petitioning the court for voluntary termination of parental rights.

(f) *Procedures for voluntary judicial termination of parental rights.* Except as provided in the following subsection (g), procedures for voluntary judicial termination of parental rights with respect to a special needs child shall be the same as for voluntary terminations generally.

(g) *Confirmation of counseling.* At the hearing on a petition for voluntary termination of parental rights, the court shall ascertain that the petitioner has been counseled by the agency regarding termination and adoption and regarding the assistance and services which may be available to his special needs child if he chooses not to terminate his rights as to the child, and that the petitioner voluntarily chooses to terminate his rights.

(h) *Disposition upon denial of petition.* Where the court denies a petition for voluntary termination of parental rights, the court shall order an agency to assess the needs of the child, the care the child is receiving, and the plan of the unsuccessful petitioner for the child with special needs. The agency shall submit a report on its investigation to the court within thirty days of such order.

*Commentary to Section 201*

There are two means by which a parent may give up a special needs child for adoption: by signing a legally binding relinquishment of parental rights, or by petitioning a court for termination of parental rights.

More than fifteen States presently allow a parent to relinquish a child to a licensed agency without court involvement or approval. In these States relinquishments are given binding legal effect as of the time of execution, or as of the expiration of a period of time in which the parent may revoke the relinquishment. The Model Act similarly provides for the finality of an agency relinquishment. See M.A. sections 201(a), 208. The arguments against such a method of terminating parental rights—that parents might be subject to undue agency pressure to give up their children and that due process protections of parents' and children's rights cannot be assured—are outweighed by a number of factors favoring agency relinquishments as one option for parents. Many parents are intimidated by judicial proceedings, and will use the services of an agency to place their children for adoption so that they can be spared the personal trauma of a court appearance. Some parents may wish to avoid the delays inherent in judicial proceedings, or the expense of hiring legal representation for a court appearance.

Parents' preferences between the two methods of termination will vary, as will the needs and preferences of agencies to which parents come for assistance in relinquishing their children with special needs. There will be cases in which agency personnel question the competence or understanding of the relinquishing parent; in those cases, the

The Model Act clearly provides for the validity and finality of a voluntary relinquishment taken by an agency at the agency.

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The Act does not preclude agencies from petitioning the court for review of all voluntary relinquishments.

Section 202 presents many problems. Although the right to petition for restoration of parental rights after one year—and the child has not been adopted—is clearly stated, there is no discussion of how the birth parents will be informed of the status of the child. What is implied is that the birth parents have an automatic right to an up-to-the-minute status report on the child on the eleventh month and 29th day after their rights have been terminated. If the goal is permanent, appropriate homes for children, then birth parents should not be encouraged to re-enter the lives of the children they have terminated their rights to. ~~This section should be eliminated; or, at the least, the petition for restoration of parental rights should include a provision for waiver of such rights.~~

Section 202 should be eliminated.

If Section 202 is not eliminated, the following 11 words should be inserted at the beginning of the first sentence of Section 202, to read: "Unless the right to such petition has been waived in writing, any time. . . ."

agency should have the opportunity to take the proceeding before a court. The agency would then assist the parent in filing a petition to terminate parental rights.

**Subsection (b).** This subsection brings to the attention of adoptive practitioners the fact that there are distinct Federal requirements applicable to relinquishments by American Indian parents who are members of federally-recognized tribes.

**Subsections (d) and (g).** These provisions protect against ill-considered relinquishments or termination by parents whose feelings of inability or unwillingness to rear their special needs child might be mitigated by information regarding available community resources.

**Subsection (e).** Subsection (e) requires the agency to remove the relinquishment to a court if a parent so requests or if doubts arise regarding the parent's mental competence or comprehension. Although this removal is mandated when such doubts arise, it should be noted that an agency is never required to take relinquishments without judicial supervision; if an agency prefers to take all of its parents before the court for judicial termination of the relationship between a parent and a child with special needs, the Model Act does not prevent such a policy.

*Section 202. Restoration of Parental Rights Relinquished or Voluntary Terminated With Respect to a Child With Special Needs*

(a) *Petition for restoration of parental rights.* Any time after one year after the execution of a relinquishment or issuance of a decree of voluntary termination of parental rights, if the special needs child as to whom parental rights were relinquished or terminated has neither been adopted nor is in an adoptive placement, the parent whose rights were relinquished or terminated may petition the [ ] court for restoration of parental rights. However, upon fifteen days notice to the petitioner and the court having jurisdiction of the petition, and unless otherwise ordered by the court, an agency may place a child for adoption during the pendency of the petition and such placement will have the effect of terminating the petition. In the case of an adoptive placement made during the pendency of such a petition, the prospective adoptive parent(s) with whom the child is placed shall be notified by the agency of the petition prior to placement.

(b) *Appearance by guardian or agency.* Any guardian of the child's person and the agency to which the child was relinquished shall have the

right to receive notice and appear at the hearing to show cause why such restoration or rights should not occur. If the court finds upon clear and convincing evidence that restoration of parental rights would be in the best interest of the child with special needs, it shall order restoration.

*Commentary to Section 202*

The restoration of the parent-child relationship provided by this section is a provision appropriate to circumstances which can arise when termination of parental rights is a proceeding legally separate and distinct from adoption.

While termination of parental rights is a crucial first step in facilitating adoptive placement of the many children who have languished for years in a "temporary" foster care situation, it may actually contribute to instability for some children with special needs. When adoptive placements break down or are never effectuated, children whose parents surrendered them with expectations that they would be adopted into permanent home environments, may instead be living with temporary caretakers who cannot provide them with stability or permanence. If so desired by the parent and if the child is not in an adoptive placement, the parent may petition to resume the parental role.

*Section 203. Procedures for Involuntary Termination of Parental Rights With Respect to a Child With Special Needs*

(a) *General procedures.* Except as provided in this Section and Sections 204, 205, 206, 207, and 208, procedures for suits involving involuntary termination of parental rights with respect to a child with special needs shall be governed by the laws and rules applicable to involuntary termination of parental rights generally.

(b) *Filing a petition.*

(1) A petition seeking involuntary termination of the relationship between a parent and a child with special needs may be filed by any person or entity otherwise entitled under existing law to file such a petition and by:

(A) A public or voluntary child placement, child-caring or adoption agency having responsibility for the special needs child;

(B) Either parent with respect to the other parent;

(C) The guardian of the special needs child;

(D) Any attorney for or guardian *ad litem* of the child appointed in a prior proceeding, acting as friend of the child in the instant proceeding; or

This situation can be corrected by providing appropriate temporary arrangements rather than canceling the relinquishment.

Sections 203 (b) (1) should be amended by replacing the word "entity" with the word "agency."

(E) A *de facto* parent of a special needs child, as defined in Section 102 of this Act.

(2) A child placement or child-caring agency having custody of any special needs child it has reason to believe has been abandoned shall promptly seek an adjudication of [neglect or abandonment consistent with State statute]. The circumstances constituting abandonment are defined in Section 203.

*Commentary to Section 203*

**Subsection (b).** Included in the list of persons eligible to petition for involuntary termination of parental rights of a child with special needs are those deemed to have a legitimate interest in the welfare of the child with special needs.

(1)(A)—There will be cases in which an agency with custody, guardianship, or other legal interest in a child will deem it in the child's best interest to seek involuntary termination of parental rights. Such an agency need not be an "agency" as defined in Section 102 of the Model Act; any child placement agency, whether or not authorized to place for adoption, may petition, as may a child-caring agency.

The distinction between these two types of agencies is that a child placement agency is a public or voluntary agency authorized to place children for foster care or adoption, or both; a child-caring agency is one such as a group home or a residential treatment center which is authorized only to exercise custody and control of children, but not to perform placement services.

(1)(B)—A parent may petition for involuntary termination of the parental rights of the child's other parent.

(1)(C) and (1)(D)—The child's present legal custodian or guardian may petition to sever the parent-child relationship. A guardian *ad litem* or attorney for the child appointed in previous proceedings regarding the child may also petition for involuntary termination of parental rights.

(1)(E)—In some instances, the child's *de facto* parent is in the best situation to know the child, the frequency and quality of contacts between the child and the birth parent, and the efforts of any involved agency in fostering a permanent, stable situation for the child.

*Section 204. Assessment of Child With Special Needs and Report*

(a) *Assessment required in contested actions.* A court with jurisdiction of a contested suit for involuntary termination shall order an assessment of needs of the child with special needs who is the subject of the suit. Such

The word "lfgitimate" should read "legitimate."

assessment shall be conducted by a non-party agency selected by the court. Reasonable costs for the assessment shall be paid or reimbursed by the State adoption administration.

(b) *Time for completion of assessment: court's use of report.* A report of the assessment shall be submitted within thirty days after the court directive, unless the court grants a request for an extension. The report may be introduced into evidence in accordance with the rules of evidence. In the absence of an objection, the report may be used by the court whether or not introduced into evidence, in deciding whether the petition for involuntary termination of parental rights shall be granted.

(c) *Contents of assessment.* The assessment shall include but not be limited to the physical, mental, and emotional conditions of the child and parents, history of intrafamily relationships, services offered in an attempt to reunify the family, the proposed plan to meet the special needs of the child, and the wishes of the child according to his maturity of judgment.

*Commentary to Section 204*

When the parent whose parental rights are subject to involuntary termination appears and contests the petition, the judge is required to order an assessment of the child's needs and to delay adjudication of the petition until a report of the assessment has been submitted to the court. The court will need full information on the background and condition of the child to evaluate adequately the factors making up the grounds for involuntary termination.

*Section 205. Grounds for Involuntary Termination of Parental Rights With Respect to a Child With Special Needs*

(a) *Grounds for involuntary termination of parental rights.* An order of the court for involuntary termination of the legal parent-child relationship shall be rendered if the court finds that the termination is in the best interest of the child, and that one or more of the following circumstances or any other grounds for involuntary termination otherwise provided by State law, exist:

(1) The identity or location of the parent is unknown and the parent has not claimed the child for a period of sixty days after the child is found, despite diligent efforts to ascertain the parent's identity and location;

(2) As a ground for an order of involuntary termination against the father or putative father, the child was conceived as the result of an act of forcible rape; or, as a ground for an

Delete "reasonable" and substitute "actual" because what is "reasonable" to a court may be substantially less than "actual" costs incurred by an agency. It is in the narrow financial self-interest of the State adoption administration that courts not set "actual" costs to be reimbursed. There are precedents, in foster care cost reimbursement cases, where State agencies denied "actual" costs and the voluntary agencies had to bring suit to obtain fair and full reimbursement for their actual costs.

The word "delligent" should read "diligent."

"Incest" is not defined here. Review State law and supply an appropriate definition.

This section refers to the rights of the parents of an infant to have up to 60 days to claim the baby. If the 60-day period passes, the baby is considered abandoned and involuntary relinquishment proceedings can begin. This length of time should not apply to adjudicated fathers of newborn infants with special needs. The delay is not necessary, if appropriate services have been provided to the father prior to the baby's birth.

order of involuntary termination against the father, putative father, or mother, the child was conceived as the result of an act of incest;

(3) The child has been adjudicated to have been abused (or neglected or dependent—insert appropriate term from State statute) in a prior proceeding. In determining whether termination of parental rights would be in the best interest of the child in such case, the court shall consider and make written findings regarding the factors contained in subsection (b) of this Section 205 and the following conditions or acts of the parent:

(A) Emotional illness, mental illness, mental deficiency, or use of alcohol or controlled substances rendering the parent unable to care for the immediate and ongoing physical or psychological needs of the child; or

(B) Any proven act or acts of abuse or neglect toward any child in the family subsequent to the adjudication of abuse or neglect; or

(C) Repeated or continuous failure by the parents, although physically and financially able, to provide the child with adequate food, clothing, shelter, or education as defined by law, or other care and control necessary for his physical, mental, or emotional health and development; but a parent who, legitimately practicing his religious belief, does not provide specified medical treatment or education for a child, is not for that reason alone a negligent parent;

(4) The child has been out of the physical custody of the parent for one year; or the parent, including the father whose paternity has been adjudicated, has failed to take physical custody of the child within sixty days of the birth or adjudication; and:

(A) The conditions which led to the separation still persist, or similar conditions of a potentially harmful nature continue to exist;

(B) There is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future; and

(C) The continuation of the legal parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent family.

In determining whether termination of parental rights would be in the interest of the child under this subsection (4), the court shall consider and make written findings regarding the factors contained in subsection (b) of this Section 205;

(5) The child has been out of the physical custody of the parent for a period of eighteen months and;

(A) The child has developed an emotionally stable relationship with his *de facto* parent;

(B) The *de facto* parent has expressed an intent to adopt the child; and

(C) The child wishes to be adopted by the *de facto* parent.

(b) *Factors to be considered in certain instances.* In determining whether to terminate parental rights under subsections (a)(3) or (a)(4) of this section, the court shall consider and make written findings regarding:

(1) The timeliness, nature, and extent of services offered or provided to the parent and the child to facilitate reunion of the child with the parent;

(2) The terms of any social service contract agreed to by an authorized agency and the parent, and the extent to which all parties have fulfilled their obligations under such contract;

(3) The feelings and emotional ties of the child with respect to his parents; and

(4) The effort the parent has made to adjust his circumstances, conduct, or conditions to make it in the best interest of the child to return him to his home, including:

(A) The extent to which the parent has maintained regular visitation or other contact with the child as part of a plan to reunite the child with the parent;

(B) The payment of a reasonable portion of substitute physical care and maintenance if financially able to do so;

(C) The maintenance of regular contact or communication with the custodian of the child; and

(D) Whether available additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within a reasonable period of time.

(c) *Factors to be considered in all instances.* Where any of the circumstances in subsections (a)(1) through (a)(5) of this Section 205 exist, the court shall consider:

(1) The contents of the assessment and report, if any, submitted pursuant to Section 204 of this Act;

(2) The specific benefits to the child of continuing the legal parent-child relationship;

(3) The wishes of the child regarding termination of the legal parent-child relationship.

(d) *Rehabilitation of parent.* The maintenance of a legal parent-child relationship for the purpose of rehabilitation of a parent shall not be sufficient grounds for continuation of such relationship.

(e) *Deprivation of custody through divorce, separation, act of other parent.* Notwithstanding any other provisions of this section 205, no legal parent-child relationship may be terminated solely

The wishes of the child to be adopted should be taken into consideration, although some age limitation should be set so that younger children are not put in the position of having to "want to be adopted" by the *de facto* parent. (C) should read: "The child wishes to be adopted by the *de facto* parent, if over the age of ten."

This provision is child-focused, and very good.



because a parent has been deprived of the legal custody of a child by reason of a divorce or a legal separation, or of the physical custody of a child by the act or conduct of the other parent of the child.

*Commentary to Section 205*

The section sets forth several supplemental grounds for involuntary termination of the legal relationship between a parent and a child with special needs. These grounds are in addition to grounds for involuntary termination otherwise provided by State law.

Subsections (a), (b), (c). Subsection (a) articulates supplemental grounds for a court order terminating the legal parent-child relationship; subsections (b) and (c) add a number of factors the court must consider in various termination situations.

With regard to the nature of the grounds for termination, several questions are often debated: whether the State's termination of the parent-child relationship ought to be based upon parental unfitness or upon consideration of the child's "best interests," and, if both criteria are used, what relative weight should be accorded to each.

In the Model Act the court is directed to consider both the best interests of the special needs child and parental conduct indicating unfitness or non-involvement. Both factors should be weighed before a termination order is entered. The decision as to what course of action would be in the child's best interests is to be made with specific reference to the type of parental conduct alleged in the petition.

*Parental Conduct.* Except for the prior adjudication of abuse or neglect (subsection (a)(3)), the parental conduct criteria for termination of parental rights all constitute some degree of non-involvement in the child's past or present life. These are grounds which presume such inability, unsuitability, or lack of interest in parenting the child that further consideration of parental conduct is unnecessary.

When the child has never been in the physical custody of his parents, or when the child has been out of the parent's care for a year or more (subsection (a)(4)), the potential for the parent's initial or renewed involvement with the child must be considered before the parental conduct criterion for termination is met. That potential will be influenced by the current conditions surrounding the child which characterize him as a special needs child.

In the type of situation delineated in subsection (a)(5), a parent who cannot

be faulted for misconduct or lack of present parenting ability nevertheless may be deemed to have forfeited the parent-child relationship. In these cases the parental conduct criterion is included in the Model Act in response to the need to remove obstacles to adoption of children who have long been in need of permanent homes. Some of these children have been in the long-term care of foster parents willing to adopt them but unable to do so because of the belated reappearance of a parent. The parent, perhaps out of touch with the child for many years through no fault of his own (perhaps having been lost to the agency, or neglected by an understaffed agency, or not understanding the legal means for regaining custody of the child), may be capable of reassuming custody and parenting his child. In such a case, if the child wishes to remain in his present home and be adopted, the birth parent's interest in custody and control of the child has effectively been superseded by that of a new family unit whose right to continued integrity should not be violated.

Where the child has previously been adjudicated to have been abused or neglected (subsection (a)(3)), the "parental conduct" criterion for termination of parental rights is deemed to have been met, and the second standard, the child's best interests, is controlling in the determination to terminate parental rights.

*Best Interests of the Child.*

Subsections (b) and (c) are intended to provide guidance to the court in determining whether, given certain parental conduct or circumstances, termination of parental rights would be the child's best interests.

In two sets of circumstances—prior abuse or neglect, and absence from the parent's care for a year or failure of the parent to take custody of his child—the child's best interests are deemed to be inextricably related to the parent's demonstrated potential to care for the child in the future. This potential is defined by specific acts or omissions of the parent with respect to the child or his siblings. Subsection (b) requires that, if termination is sought pursuant to subsections (a)(3) and (a)(4), the services offered to the family by the State be considered in evaluating the parent's past efforts and future parenting potential.

Where prior abuse or neglect has been found (subsection (a)(3)), it is critically important that agency intake and service practices reflect an understanding of families which abuse or neglect their children. Treatment

This provision deals with assessments of the child in order to determine whether an involuntary termination of parental rights should occur. The "heritage" phrase is ambiguous. The "child's wishes" phrase should include "if over the age of 10."

The "heritage phrase" may have implications for the adoption plan—by subtly reflecting a bias against or actually banning trans-racial, trans-cultural or trans-religious placements.

This section of commentary suggests just one more factor to consider, in conjunction with more important grounds for termination of parental rights. Therefore, "to remain in touch with his heritage" is not be a primary consideration.

services should be offered by trained workers who have the capacity to encourage positive growth.

Where the child has been out of the parent's physical custody for a year or the parent has not taken physical custody of his child (subsection (a)(4)), and where there has been a prior adjudication of neglect or abuse (subsection (a)(3)), the court must also consider whether the parent maintained regular visits, assumed reasonable support and maintenance obligations, and cooperated with the agency (subsection (b)(4)). These factors are important indices of whether additional services are likely to bring about a lasting parental adjustment which will permit the child's return to the parent. Where parental contact has been sporadic, such as sending an annual birthday card, and does not indicate any pattern of ability to sustain ongoing communication, the court should probably regard such contact as insignificant evidence of parental interest in the child.

In conjunction with the grounds enumerated in subsection (a)(1) through (5), the court should always consider the assessment of the child, the opportunities the child will have to remain in touch with his heritage, and the child's wishes regarding termination.

Subsection (d). Subsection (d) provides that, although the parent's need for a relationship with the child may be considered, such a need may not control the court's decision regarding termination of that relationship.

Subsection (e). Divorce, separation, or unlawful deprivation of the custody of a child do not constitute parental conduct criteria upon which a termination action can be based. This subsection eliminates any ambiguities with respect to these issues which may be created by the grounds for termination in subsection (a).

*Section 206. Disposition of Petition for Involuntary Termination of Parental Rights With Respect to a Child With Special Needs*

(a) *Disposition upon granting petition.* If, after considering all the evidence at the adjudicatory hearing, the court finds that sufficient grounds exist for involuntary termination of the legal parent-child relationship, it shall:

- (1) Enter an order terminating the legal parent-child relationship; and
- (2) If such order has the effect of terminating the parent-child relationship with respect to both parents or to the last surviving parent, appoint an individual or Agency guardian of the child's person. The guardian of the child's person shall report to the court

within ninety days on a permanent placement plan for the child with special needs. At least every six months thereafter, a report shall be made to the court on the implementation of such plan. The court shall review the plan for the special needs child no less than once a year.

(b) *Denial of petition.* (1) If the court finds that sufficient grounds for involuntary termination of the legal parent-child relationship do not exist, it shall make an appropriate order with respect to the custody and protection of the special needs child, and may either continue its jurisdiction or dismiss the petition as may be appropriate in the circumstances.

(2) If the court finds that the services or social service contract as described in Section 206 (b)(1) and (b)(2) of this Act were insufficient or inadequate, the court may order an agency to develop a plan of service for the child with special needs and his parents.

(3) Any order the court makes under subsection (b)(1) of this Section 206 shall specify what residual rights and responsibilities remain with each living parent, and shall designate the period of time the order shall remain in effect, with mandatory review by the court no later than six months thereafter and at subsequent intervals of not more than one year.

(c) *Court reviews of permanent placement plan.* In conducting reviews pursuant to subsections (a)(2) and (b)(3) of this Section 206, the court or a hearing officer designated by the court shall hold a hearing and require the presence of the guardian of the child's person or any other person the court or the hearing officer deems necessary to conduct the review.

*Commentary to Section 206*

Subsection (a). If the court finds that the dual criteria of parental conduct and best interests of the child with special needs have been met, it must enter an order terminating parental rights. Since the rights of one parent may be terminated without affecting the rights of the other, it is possible that the entry of a termination order would not necessitate the appointment of a legal guardian for the child. If the child will be left without a guardian, however, the court must appoint one.

Any person or agency appointed as guardian pursuant to this subsection must report back to the court on the completed placement plan for the child. This mandate attempts to ensure that, following a termination decree, a child in fact is adopted or settled into a permanent placement. By retaining jurisdiction, a judge has the power to

- This provision mandates a: 90-day limitation to submit a permanent plan for a child free for adoption; 6 month limitation for reports to the court on implementation of the plan; one year limitation on court review.

hold a hearing and to make further orders should that be deemed necessary.

**Subsection (b).** Where the court finds that grounds do not exist to grant the petition for termination of parental rights, the petition may be dismissed. Even if the court dismisses the petition for termination, it retains the power to enter further orders to protect the welfare of the special needs child. Depending on the circumstances surrounding a particular case, it may be in the child's best interest for the court to continue its jurisdiction so the court can monitor the case through periodic reviews until such time as facts warrant a further hearing on the petition.

**Subsection (c).** The importance of periodic case review in assuring that a child receives appropriate adoptive and other services is widely acknowledged. See M.A. Section 201(b) (commentary). Many States require regular court review of the cases of children who are under the jurisdiction of the court. To prevent these reviews from becoming a *pro forma* submission of a social services report which receives scant judicial attention, this subsection requires a court hearing at which serious consideration of the child's situation is much more likely to occur. The hearing does not demand rigid procedural formality and may be held by a court official other than a judge. Personal testimony by individuals familiar with the child's case should, however, be required.

**Section 207. Court Order Granting Termination of Parental Rights of a Child With Special Needs**

**(a) Form and content of orders.** Every order the court makes pursuant to Section 206 of this Act shall be in writing and shall recite the findings upon which the order is based, including findings pertaining to the jurisdiction of the court. Every order must fix responsibility for the support of the child with special needs.

**(b) Finality of orders.** Except as otherwise provided for an interlocutory order, all orders are final, effective, and binding on all persons after the date of entry unless stayed pending an appeal.

**Commentary to Section 207**

The requirement that every order be in writing and recite the findings upon which it was based will facilitate meaningful appellate review. The order must also fix responsibility for the child's support with the birth parent whose rights have not been terminated or the guardian of the child's person, as appropriate.

This provision allows an exception for interlocutory decrees.

The fact that all orders are deemed to be final from the date of entry ensures that an aggrieved party may take an immediate appeal.

*Section 208. Effect of Termination Decree or Relinquishment of a Child With Special Needs*

(a) *Effect of termination.* Upon relinquishment of a special needs child or termination of parental rights with respect to a child with special needs through a court decree, the parent ceases to be the legal parent of the child as to whom rights have been terminated, as set forth in Section 104 of this Act. No such parent has a right to notice of proceedings for adoption of the special needs child by another or to object to the adoption or otherwise to participate in the proceedings.

(b) *Parental rights independently terminable.* The legal parent-child relationship may be terminated with respect to one parent without affecting the legal relationship between the special needs child and the other parent.

(c) *Agency to provide notice if termination challenged.*

(1) If the validity of a relinquishment or court order terminating parental rights with respect to a child with special needs is challenged in a court of this State, the court in which such challenge is filed shall:

(A) Notify any agency to which the child was relinquished, which is presently responsible for the child, which placed the child for adoption, or which provided postplacement services; and

(B) Hold a hearing to determine if any notice shall be provided the child and if so, the nature of the notice. At such hearing the court may appoint an attorney *ad litem* to represent the child.

An agency which is notified under section (c)(1)(A) of this section shall notify the adoptive parents of a child who has been adopted or, if the child has not been adopted, the prospective adoptive parents, if any. Such notice shall inform the parties of the pendency of the challenge and of their right to be heard regarding such challenge. The agency issuing such notice shall certify to the court in which the attack was filed that the requirements of this subsection have been met.

(2) If the validity of a relinquishment or court order terminating parental rights with respect to a child with special needs is challenged in a court of any other jurisdiction, any agency of this State which learns of such challenge by any means shall notify the agency responsible for the child prior to his placement or adoption, which in turn

This child-focused provision effectively eliminates the possibility of "open adoptions" so that the parents who have relinquished can intervene in the adoption planning. This provision is basically in conflict with the provision in Section 202 allowing birth parent involvement after one year. This is another reason why we recommend that Section 202 should be deleted—or significantly amended.

The agency involved in the adoption is to be notified if a relinquishment or termination proceeding is being challenged.

The agency must then notify the prospective adoptive parents or adoptive parents of such action.

Even when challenges are issued in another jurisdiction, the agency involved in the adoption must be notified.

shall notify the adoptive or proposed adoptive parents, if any, of the pendency of a proceeding which may affect their status with respect to the child.

*Commentary to Section 208*

Subsection (a). The provisions follows the traditional approach of divesting both parent and child of all rights towards one another, except that the child's right to inherit from his birth parent is terminated only upon a final order of adoption. See M.A. Section 104. This approach is consistent with a public policy commitment to the best interests of the child.

This subsection underscores the finality of the decree and the fact that following termination a parent will have no standing to object to an adoption or other planning on behalf of the child with special needs.

Subsection (c). Whenever a relinquishment or termination decree is collaterally attacked, the special needs child and any adoptive or prospective adoptive parents clearly have a vital stake in the outcome of the action. The adoptive or prospective adoptive parents or agencies which have an interest in the child should be provided with notice and made parties to a collateral attack. This provision assures a complete examination of the issues, and apprises these parties of the potential modification in legal status of the child.

More important, however, providing notice to adoptive or proposed adoptive parents prevents their belated discovery of a matter of critical importance to them. For prospective adoptive parents, the possible reversal of the termination of parental rights may affect their decision to commence adoption proceedings. For adoptive parents this early notification and, perhaps, intervention in the collateral attack proceedings may prevent an extended legal battle with potential harmful consequences for the child.

The agency serves as a conduit for the provision of notice in these cases. This protects the anonymity of the birth and adoptive parents, and prevents birth parents from discovering the whereabouts of a child as to whom they have no rights at that point.

Agencies of one State which learn of a collateral attack filed in another jurisdiction are required to notify the agency responsible for the child prior to placement or adoption, which in turn shall notify the adoptive or prospective adoptive parents of the challenge. If the agency which learns of the out-of-state challenge to the termination of parental rights is not the agency that was responsible for the child prior to

The commentary again emphasizes the finality of the termination decree which therefore eliminates the legal right of either birth parent (or prospective adoptive parents) to an "open adoption." This is a good, child-focused provision.

Here the commentary discusses the important role of the agency involved in the adoption to be an intermediary (or conduit) for the notice of attack on the adoption. In this way the identification of the birth parents to the adoptive parents and vice versa is not disclosed and confidentiality can be maintained. Good.

placement or adoption, it shall ascertain the identity of the agency which has or had responsibility for the child from the State adoption administration.

*Section 209. Authority and Duties of Guardian of Child's Person*

(a) *Authority to consent.* The guardian of the child's person has the authority, without limitation to consent to marriage and enlistment in the military service of the United States, to consent to any medical, psychiatric, or surgical treatment, and to consent to the adoption of the child unless the child has a living parent whose rights have not been terminated.

(b) *Right to custody of child.* The guardian of the child's person has the right to physical custody of the child or to determine an appropriate placement for the child, subject to the review of the court. When he does not have physical custody of the child, the guardian of the child's person or his designee has the duty of reasonable visitation with the child.

(c) *Responsibilities.* The guardian of the child's person has the responsibility to ensure that the child receives adequate support, care, nurture, and education, and to ensure that the child has legal representation in legal actions.

(d) *Reports to court.* An individual or agency appointed as guardian of the child's person shall report to the court within ninety days on a permanent plan for the child. At least every six months thereafter, a report shall be made to the court on the implementation of such plan.

*Commentary to Section 209*

The terms "legal custodian" and "legal custody" are frequently confused with "guardianship" in discussions of child welfare laws of different States. The occasions for appointment of a guardian of a child's person differ from State to State. The distinction between the two terms is frequently blurred, particularly when States make use of concepts such as "temporary guardianship" or "permanent custody."

The concept of "guardian" is usually broader than that of "custodian" or "legal custodian." As used in the Model Act, the authority and duties of a guardian encompass those of the legal custodian and also include the authority to make decisions permanently affecting the child's welfare, including consent to the adoption. However, to provide enough flexibility to accommodate variations in State law, the Model Act also presumes that a court may appoint a guardian without terminating parental rights. See M.A. section 206(b). Also in



Take note that the term "guardian" is consistent with your State usage.

the interest of flexibility, the definition of "guardian" does not preclude delegation of the physical custody of the child while still maintaining the duty of overseeing the child's physical care and control through visitation.

Legislatures considering enactment of the Model State Adoption Act may need to adjust these definitions to fit previously established usages in their own jurisdictions.

### **Title III—Adoption Services For Children With Special Needs**

#### *Section 301. Duties of the State Adoption Administration*

It is the duty of the State to ensure that all children with special needs in the State who need adoption services receive them in an appropriate and timely fashion and to ensure that all adoption services provided to these children meet accepted standards of practice. To promote the effective discharge of these duties, [there is hereby created] the State adoption administration, [which] shall have responsibility for the [administration] [supervision] of all public adoption programs for children with special needs within the State and shall, at a minimum, have the following duties:

(a) *Regulation of Agencies.* Consult with the [State licensing agency] to develop regulations designed to ensure that all public and voluntary providers of adoption services to children with special needs meet accepted standards of practice.

(b) *Linkages with foster care; case planning and review system.* Establish linkages between adoption services and public and voluntary foster care services, to ensure that adoption is evaluated as one option for special needs children in foster care, and that adoption services are available for children according to their special needs. To carry out this responsibility, the State adoption administration shall implement or cause to be implemented a short-term and long-term case planning system in all public and voluntary adoption agencies in the State and shall cooperate with the [State foster care agency] in conducting periodic case reviews. All children with special needs in the care or the responsibility of public and voluntary adoption agencies in the State shall be included in the case planning and case review systems.

(c) *Specialized programs for children with special needs; recruitment of adoptive parents.* To meet the needs of children with special needs:

(1) Provide specialized programs, staffed by persons whose skills are

In Section 301 (a), the word "providers" should be replaced by "agencies." The definition of agency should already be amended (p. 7). All agencies should be encouraged to meet provisions for accreditation as well as accepted standards of practice. Individuals or entities, if allowed under State law, should be required to meet the requirements of an "agency."

This part of Section 301 (b) should be examined carefully by adoption agencies. Some questions to consider are: What if a voluntary agency does only healthy newborn adoptions with no public funds? Will the State impose a special needs case planning system on that agency? Will the State implement a case planning system for members of the clergy, lawyers, physicians and others who engage in adoption or serve as intermediaries and who, as often as agencies, have cause to come into contact with special needs children?

specifically suited to meeting the special needs of such children; and

(2) Regularly recruit or ensure the recruitment of adoptive parents to meet the special needs of such children.

(d) *Family assessments.* Provide or ensure the provision of a family assessment to any adult, married or unmarried, who applies to adopt a child with special needs.

(e) *Persons to be served.* Provide or cause to be provided preplacement, placement postplacement, and postadoption services:

(1) For all children with special needs who are the responsibility of the State and for whom adoption is the plan; and

(2) As appropriate, for the birth parents, prospective adoptive parents, and adoptive parents of such children.

(f) *Public information.* Publish and disseminate information to the public regarding adoption programs and services for children with special needs within the State. Such information shall include, at a minimum:

(1) The numbers and characteristics of the special needs children available for adoption;

(2) The requirements for persons who seek to adopt a child with special needs; and

(3) The steps in the adoption process, and the services and financial assistance available to persons who adopt a child with special needs.

(g) *Public education.* Conduct a program of public education on adoption of children with special needs.

(h) *Adoption resource exchange.* Establish and maintain, or cause to be established and maintained, a Statewide adoption resource exchange or listing service of children with special needs awaiting adoption and potential adoptive parents of such children.

(i) *Training of staff.* Provide or ensure the provision of appropriate training for persons performing services leading to the adoption of children with special needs and required by this Act.

(j) *Statistics.* Keep statistics relating to adoption which will be designed to present a true and accurate account of adoption services provided to children with special needs within this State and to such children outside this State whose physical custodian or guardian is a resident of this State. The court and each agency shall provide such statistical information to the State adoption administration as may be required by it in order to carry out the purposes of this subsection (j).

(k) *Forms.* Develop forms which may be employed to implement the provisions of this Act.

(d) This section is problematic. Although it is important to provide a family assessment in a timely fashion for each person or couple who might provide an appropriate home for a special needs child, this section reads that any adult is entitled to such an assessment. It thus creates a new kind of entitlement program. It should be noted that the responsibility for the assessment rests with the public State Adoption Administration—not the voluntary agencies.

(e) Preplacement, placement, postplacement and postadoption services are never defined. Requiring such services means that they will need to be carefully regulated to assure fiscal feasibility.

(j) Statistics are only as useful as they are available. A required report, at least annually, should be made available to the public at modest cost or free.

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(l) This is an important activity which is virtually left to administrative rule-making for specifics. It may be preferable to specify, in more detail, what is appropriate in legislation.

(l) *Standards for record keeping.*  
Establish standards for the compiling and maintenance of agency records.

*Commentary to Section 301*

The opening sentence of the section is a statement of policy, emphasizing the affirmative duty of the State to strive to provide permanent homes through adoption for the State's children with special needs.

The State adoption administration created or designated by the legislature may be an already existing unit within the State government. The individual public agencies which provide adoption services will usually provide foster care services as well, so the umbrella State adoption administration will be intimately involved with the operation of public foster care programs. The precise administrative role of the umbrella authority will be determined by whether the State's social service system is State-administered or county-administered and State-supervised.

**Subsection (a).** This provision is an essential element in a scheme to provide adoption services of high quality on a Statewide basis for children with special needs. The positive and negative sanctions inherent in the licensing and regulation processes, although not the only tools for maintaining or upgrading agency performance, are among the most effective. Licensing and regulation serve not only to eliminate poor service providers; agencies are encouraged, by the very existence of mandatory standards, to keep their performance from falling to unacceptable levels. Because States have their own licensing statutes and regulations, the Model Act has not addressed this matter *per se*.

**Subsection (b).** The linking of adoption resources with the foster care system is a vital first step in serving the large numbers of children who are spending their childhood in "temporary" foster care. A recent nationwide study of children in such temporary care showed that forty-five percent had already spent more than two years in foster care. U.S. Dept. of Health, Education and Welfare, National Study of Social Services to Children and their Families 120 (1978). (See also H. Maus, "Children in Long-Term Foster Care," 48 *Child Welfare* 321 (1969).)

One problem in serving these children has been the inability to identify them. Some States have already met this problem by instituting mandatory administrative foster care case reviews similar to this subsection.

Because of the close organizational link between public adoption and public foster care agencies, the duty of the

"Falling," not "falling."

State adoption administration under this subsection should be fairly simple within the public sector. The more complicated task will be linking voluntary foster care services with public adoption services, and public foster care with voluntary adoption resources.

**Subsection (c).** A primary value of a Statewide adoption authority is its ability to equitably distribute State adoption funds and resources to serve the children who need them most. Through use of the statistical data compiled pursuant to subsection (j), the Statewide agency can identify broad segments of the foster care population for whom special recruitment of potential adoptive parents may be needed. The importance of active recruitment of appropriate families is illustrated by the frequent disparity between the types of child needing adoption and the types of children that unrecruited applicants are willing to adopt.

**Subsection (d).** Closely related to the State's duty to oversee active recruitment of adoptive parents suitable to the population of waiting children with special needs is the duty to provide family assessments to applicants who respond to these special recruitment efforts. The problem of allocation of agency resources between providing family assessments and performing other adoption services is a longstanding one. M.A. § 303 (commentary). However, the value of providing these assessments to all persons who express an interest in adopting a child with special needs cannot be overemphasized.

**Subsection (e).** In addition to providing Statewide planning and coordination, the State agency is responsible for ensuring the provision of adoption services to all children with special needs and their families.

**Subsection (f) and (g).** Public information and education is an essential part of the recruitment process. Awareness of the types of children with special needs needing homes, and of the State assistance which may be provided to adoptive children and families (for example, adoption assistance, *see* Title IV of the Model Act), can be useful in recruiting potential adoptive parents. Public education also fosters greater understanding of issues and attitudes which affect the lives of children with special needs and their families.

**Subsection (h).** As of July 1980, forty States had established State adoption exchanges. Child Welfare League of America, Inc., *A Report of 10 Regional Needs Assessment Workshops to Develop and Strengthen Adoption*

This "task" of public-voluntary cooperation may be less complicated than implied in this section of commentary. The sentence is negative and not necessary. Delete the final sentence of the paragraph.

In fact, the value of providing assessments indiscriminately has been overemphasized. In times of limited resources and staff, this "entitlement" to an assessment to anyone is over-zealous.

This commentary assumes that regional and national exchanges effectively find homes for waiting children. This may or may not be so.

The role of social workers is not specifically mentioned; it should be, since these are social services to children and families.

Since accountability is to be sought, these statistics should also reflect the numbers placed by the public sector and voluntary sector, with an accurate and full cost-of-placement per case stated. The costs should also be identified as from public funds or other funds, such as voluntary donations or fees, and include administrative or indirect costs attributable to the activity.

*Exchanges (1960).* The remaining States provide some information and referral services to assure that all potential adoptive homes in the State may be considered in the search for a family for any particular child. It should be emphasized that this resource is of optimal value only when it is actively used as a recruitment tool. The State adoption exchange should be linked with all State adoption agencies and with any available regional or national exchanges to facilitate planning for the adoption of children with special needs.

*Subsection (i).* While the State adoption administration can be expected to offer special expertise and training resources, the training programs pursuant to this subsection should be jointly planned by the State agency and the local agency involved, as the latter can draw upon the unique perspective and particular problems of its own workers. As those most directly involved in adoption services, adoptees, adoptive parents, and birth parents should not be overlooked as training resources in the preparation of these programs. Trainees should include not only adoption personnel, but also foster care workers, lawyers, judges, court officials, and other citizens having an interest in the adoption of children with special needs.

*Subsection (j).* The maintenance of statistical data by the State agency is necessary to facilitate planning of adoption programs for children with special needs, to account for the interstate movement of children, and to monitor the provision of services of public and voluntary agencies.

The statistics kept pursuant to this subsection should include, but need not be limited to: (1) The number and characteristics (such as age, sex, race, ethnicity, handicap, length of time in care) of children with special needs in foster care for whom adoption is the appropriate plan, and a division of the numbers of such children according to those whose parents' rights have and have not been terminated, and the number and characteristics of those who have no living legal parent but who have not been placed for adoption, as well as those children with special needs placed for adoption by agencies within the State; (2) the number and characteristics of special needs children placed into subsidized adoptions; (3) the number and characteristics of birth parents of children with special needs to whom adoption services have been provided, with such data to be collected in three categories: Those whose parental rights were terminated through relinquishment, through voluntary court actions, and

through involuntary court action; and (4) the numbers of inquiries from potential adoptive applicants, applications to agencies for family assessment and adoption, applicants who have received family assessments and have been approved as adoptive families, and approved applicants who have had children placed in their home for adoption.

**Subsection (l).** The importance of good recordkeeping in adoption practice is increasingly recognized. Information in individual case records serves as a base for compiling of agency and State data concerning placement and adoption of children with special needs. Agency records of parental relinquishment are vital in documenting due process safeguards. Furthermore, agency records often are the primary source of the child's medical and social history prior to adoption.

*Section 302. Adoption as the Plan for the Child With Special Needs*

(a) *Determination that adoption is the best plan for the child.* A child with special needs shall be placed for adoption only upon a determination by the agency responsible for planning for the child that adoption is the best available plan to meet the physical and emotional needs of the child during his minority. Such a determination shall be made only after consideration of alternative short-term and long-term plans for meeting the needs of the child for a family and home.

(b) *Purpose of services to parents.* The services to parents offered under Section 201 of the Act shall be provided with the primary purpose of assisting the parents in arriving at the best available permanent plan for their special needs child. Provisions of such services to a parent shall not be dependent upon the decision of such parent to relinquish a child with special needs for adoption.

*Commentary to Section 302*

**Subsection (a).** The provision imposes upon the agency having responsibility for the child with special needs the legal duty of making an affirmative decision that adoption is preferable to other possible alternatives for the child's long-term care, before the child is placed for adoption.

**Subsection (b).** The services referred to are the counseling and referral services of the agency to the parents. See M.A. Sections 201. A parent cannot make an informed decision regarding the special needs child's best long-term interest without knowledge of alternative resources and arrangements.

This is a good statement about record-keeping; however, there are no specifics on where, for how long, to maintain what records—in a confidential manner. This section will require careful and considered rule-making.

Section 302 (b) makes a positive statement about the importance of serving the parents as well as possible in order to be sure that the adoption choice is indeed the result of an informed decision. The services cannot be provided as a quid pro quo to relinquishing a child for adoption! This is good social work practice.

(1) Allows legal-risk placements with adoptive parents, as long as the agency has informed the parents, in writing, that the child's parental rights have not yet been terminated.

(b) Single individuals are included as eligible adoptive parents for children with special needs.

(c) Priority for a family assessment is to be given to any person who applies and "expressly requests to adopt a special needs child." This section further complicates the "entitlement to assessment" present in Section 301, by requiring that the assessment be provided within 6 months. Again, due to fiscal limitations, states will be hard pressed to implement this very expensive provision [see pages 35 and 37].

(d) "Restrictive criteria unrelated to the potential parent's ability to care for a special needs child" needs to be defined or else this section needs to be deleted.

(f) (1) This provision can be used by parents to collect information needed. Especially important is the current health assessment.

*Section 303. Placement for Adoption of a Child With Special Needs*

(g) *Actions required before placement of a child.* An agency shall make a placement for adoption of a special needs child only:

(1) When there is satisfactory evidence that all parental rights over the child have been terminated according to the laws of this State or of another jurisdiction, except that a child may be placed in the home of the prospective adoptive parents of the child prior to the termination of all parental rights if the agency informs the prospective adoptive parents, in writing, that the child may not be adopted if parental rights are not terminated; and

(2) When a family assessment of the prospective adoptive parent or parents has been completed and has found the prospective parent or parents suitable for the special needs child in question.

(h) *Who may apply for a family assessment.* Any adult, married or unmarried, may apply to an agency for a family assessment. If an applicant is married, the application shall be made by both spouses jointly.

(c) *Priority for receipt of family assessment.* Any person who applies to the State adoption administration and expressly requests to adopt a specific child or type of child with special needs shall be given priority for a family assessment. The assessment may be performed by the State adoption administration or by another public or voluntary agency, but the State adoption administration shall ensure that any applicant described in this subsection (c) receives an assessment within six months of his request therefor.

(d) *Arbitrary eligibility criteria prohibited.* An agency shall not exclude from consideration as a potential adoptive parent the foster parent of a special needs child solely because of his status as the child's foster parent, or any applicant solely by virtue of restrictive criteria unrelated to the potential parent's ability to care for a special needs child.

(e) *Denial of application.* When an agency denies the application of a person who has applied to adopt pursuant to subsection (c) of this section, the agency shall inform the applicant, in writing, of the denial and of the reasons therefor.

(f) *Agency responsibilities prior to placement of a child with special needs.* Before making a placement for adoption of a child with special needs, an agency shall:

(1) Obtain a current health assessment of the child, including any necessary psychiatric and psychological

evaluation, and the present physical, intellectual, and emotional needs of the child;

(2) Compile a written report describing the services provided to the birth parents of the child;

(3) Determine that adoption is the best available permanent plan for the child;

(4) Complete a family assessment of the prospective adoptive parent or parents, including their suitability for the child to be placed, and prepare a written report thereof;

(5) Compile a detailed written health history and genetic and social history of the child, including information from the current health assessment referred to in (1) above, which:

(A) Excludes information which would identify any birth parent or members of a birth parent's family and is set forth in a document that is separate from any document containing such identifying information;

(B) Shall be retained by the agency until at least sixty years after the attainment of majority of the child, and an agency which ceases to function as an agency shall transfer to the State adoption administration any documents and information retained pursuant to this subsection (f)(5);

(C) Shall be supplemented throughout the period of time referred to in (B) above with any further information received by the agency which is relevant to the child's health history or genetic and social history but which excludes information identifying any birth parent or member of a birth parent's family;

(D) Shall be available, throughout the period of time referred to in (B) above, only to:

(i) The adoptive parents of the child or, in the event of the death of the adoptive parents, the child's guardian;

(ii) The adoptee upon reaching the age of eighteen;

(iii) In the event of the death of the adoptee, the adoptee's spouse if he is the legal parent of the adoptee's child or the guardian of any child of the adoptee;

(iv) In the event of the death of the adoptee, any progeny of the adoptee who is age eighteen or older.

(6) Provide to the prospective adoptive parent or parents a copy of the health history and genetic and social history compiled in accordance with subsection (5) above; and

(7) Provide such other services as may be necessary to carry out the purposes of this Act.

(g) *Reports.* The report required by subsection (f)(2) of this section hereof shall be submitted to the court with the petition for termination of parental rights or, if such petition is not filed, with the petition for adoption. All other

(A) Requires identifying information to be excluded from written reports shared with adoptive parent.

(B) The written records are required to be retained for 60 years. It should be 99 years. This provision also requires an agency to transfer its records to the State adoption administration, if it should cease operations, which is good.

(D) Access is limited to the adoptee and his family. Birth parents have no access to these records. States may want to consider including birth parents for updating the health history and genetic and social history of the child, as well as for allowing access to non-identifying information.



(h) This section is a good model for confidentiality of adoption records. The only access to the sealed records is through court order. The health history, and genetic and social history can only be disclosed by the adoption agency.

This is a good approach to limiting some agencies' workers, who presently have broad latitude in disclosing information.

(i) This punishment is appropriately severe enough for the seriousness of tampering with confidential adoption files.

In (i), the word "in" should appear between the word "information" and the word "violation."

reports required by this subsection (f), shall be retained by the agency and used to prepare the report accompanying the petition for adoption. If any information for any report required by this subsection (f) cannot be obtained, the report shall state the reasons therefor.

(h) *Confidentiality of records.* Notwithstanding any law concerning public hearings and records, all court files containing records of judicial proceedings conducted under this Act, and any health, genetic and social, medical, and any other information relating to children with special needs submitted to the court in such proceedings, shall be kept in separate sealed files and withheld from public inspection by anyone, including the adoptee, the adoptive parents, other parties to the adoption proceedings, the birth parents, or any other persons, except under court order. In the absence of a court order, the only information relating to the birth parents or members of a birth parent's family which may be disclosed is the health history and genetic and social history compiled pursuant to subsection (f)(5) of this section; this information may be disclosed by the adoption agency only, and only as provided by subsection (f)(5) of this section.

(i) *Penalty.* A person who knowingly obtains or discloses information or aids and abets another in obtaining or disclosing information or who willfully destroys or fails to record or preserve information violation of the provisions of this Title, shall be punished by a fine of up to \$10,000 or up to six months imprisonment, or both.

*Commentary to Section 303*

The section sets out the adoptive placement procedures which agencies must follow for children with special needs.

Subsection (a). When a child with special needs is placed with a family, the parties involved should understand that the placement cannot lead to adoption unless the child is legally free for adoption; that is, unless all parental rights with respect to the child have been terminated. See M.A. Section 103(a). The fact that a child has been freed for adoption prior to placement relieves the child, the prospective adoptive parents and agency of the uncertainty inherent in the birth parents' continued legal interest in the child. When placement occurs only after termination of parental rights, all parties' efforts may be wholeheartedly devoted to the creation of a viable

family bond between child and adoptive parents.

There will be some special circumstances, however, in which it may be in the interest of a child with special needs to be placed with a prospective adoptive family before all parental rights have been terminated. This section would not preclude such placements. When an agency has located an appropriate adoptive family for a child with special needs and the process of terminating the rights of an uninvolved parent has just begun, the child should not be expected to forego the benefits of living with the potential adoptive family for the months necessary to complete termination proceedings.

Under the Model Act such pre-termination placements are subject to the State's foster care regulations and licensure requirements. It should be emphasized, however, that these are a special category of foster care placement since all parties have, at the outset, a set of expectations which are quite different from the usual expectations of foster care placements. Because of the hazards inherent in combining the role of foster parent with the status of potential adoptive parent, two points should be emphasized.

First, such placements with prospective adoptive families should occur only when clearly appropriate conditions exist. There should be a strong likelihood that all parental rights will be terminated within a short time after the placement, as, for example, when one parent has already relinquished, the other parent is absent and has not been located after good faith efforts, and a court hearing to involuntarily terminate his parental rights has already been scheduled.

Second, the potential adoptive family with whom a child with special needs is placed prior to termination of all parental rights should be made fully aware, by the placing agency or the court, that the change from a foster care to an adoptive placement is contingent upon termination of all parental rights with respect to the child.

Subsection (c). The limited resources of adoption agencies and the consequent delays in applicants' obtaining approval as potential adoptive parents are well known. To facilitate the elimination of barriers to the adoption of children with special needs and to provide permanent and loving home environments for these children, the Model Act attempts to assure optimal use of agency resources for the adoptive placement of children with special needs. Providing family assessments to applicants willing to adopt older, handicapped and other

The commentary expands upon the use (and usefulness) of legal-risk placements.

While it is understandable that priority is an important element of getting waiting families approved for the adoption of children with special needs, this required priority action should not interfere with approving couples for infants—so that infants can be placed into adoptive homes as soon as possible.

The word "answer" should read "answers."

The appropriate, non-arbitrary grounds an agency can use to screen out some applicants should be listed. As Subsection (b) now stands, it is too broad and needs defining.

Since the purpose of the 60-year retention of health records is to provide access to information which may bear on his own health or the health of his children, our recommendation for a 99-year retention rule is even more viable.

special needs children is a crucial step in facilitating placement of these children.

Subsection (d). The first restriction imposed by subsection (d) relates to two traditionally controversial issues: (1) Should foster parents be precluded from eligibility as adoptive parents in order to maintain integrity of the foster care system? (2) If not precluded, should foster parents be given priority consideration to be adoptive parents for children who have been in their care? Subsection (d) explicitly answer the first of these questions in the negative. With respect to the second issue, some foster parents (i.e., *de facto* parents) should indeed receive priority consideration as adoptive parents. Some of the factors which an agency might find relevant in designating particular foster parents as eligible for priority consideration are: length of time the child has been placed with the foster parents, evidence of emotional and psychological bonds between the child and the foster parents, and the effects of this relationship upon the special needs child's total development.

Subsection (e). As one means of preventing an agency from screening out applicants arbitrarily, this subsection requires the agency to notify an applicant, in writing, of the denial of his application and to include a statement of the reasons for the denial. An application to adopt might be denied on the basis of objective criteria, independent of the family assessment, or on the basis of the findings of that assessment. Denial may be appealed in accordance with Section 305 of the Model Act.

Subsection (f). The provision for an extensive record of the adoptee's health and genetic history is of particular importance for special needs children, many of whom may suffer some health disorder. The purpose of the sixty-year retention requirement is to ensure that a biological child of the adoptee will have access to information which may bear on his own health or the health of his children.

#### *Section 304. Postplacement Services for Children With Special Needs*

(a) *Postplacement services and report required.* After a placement for adoption of a special needs child is made, the agency which made the placement shall provide or cause to be provided supportive services to the adoptive family and the child with special needs until the planned adoption has been completed. Such services shall include periodic visitation and may include counseling. The agency shall provide

reports on the placement as required by the court.

(b) *Agency services to ensure timely filing of adoption petitions.* The agency which is providing postplacement services shall inform the adoptive family that a petition for adoption shall be filed within twelve months of the special needs child's placement for adoption, and shall provide such services as are appropriate to assist the adoptive family to file the petition in a timely manner.

(c) *Removal of a child with special needs from adoptive placement; agency and court responsibilities.* If, after the placement has been made and before the final decree of adoption, the agency providing postplacement services determines that the placement is no longer in the interests of the child with special needs, the agency which placed the child shall:

If no interlocutory decree of adoption has been entered, remove the child or cause the child to be removed from the custody of the prospective adoptive parents only after ten days' notice and an opportunity to appeal the removal in accordance with Section 805 of the Act, except that no prior notice shall be required if the agency determines that the child is in immediate danger; or

(2) If the court has entered an interlocutory decree of adoption, immediately recommend to the court that the child with special needs be removed from the custody of the prospective adoptive parents and state the grounds upon which removal is recommended. The court shall provide the prospective adoptive parents an opportunity to be heard before ordering removal of the child, unless the court finds the child to be in immediate danger.

(d) *Dismissal of petition and vacation of interlocutory decree.* If the child with special needs is removed from the custody of the prospective adoptive parents, the court shall dismiss any petition for adoption which has been filed and vacate any interlocutory decree of adoption which has been entered.

(e) *Agency services to unsuccessful petitioners.* The agency which provided postplacement services to a family from which a special needs child was removed pursuant to subsection (c) hereof shall offer and, upon the family's request, provide such counseling services as may be necessary to assist the family in adjusting to the removal of the child.

*Commentary to Section 304*

Subsections (a) and (b). In order to maximize the positive character of

The word "if" should be capitalized.

(1) Not only must the assessment be completed within six months, it has to have begun within two months (60 days). This time limit is introduced here in the appeals section for the first time.

(b) Appeals must be filed within 60 days. It seems ironic that an individual is given as much time to appeal as an agency is given to begin a complex assessment service.

(c) The State agency is also required to react within the same 60 day limitation.

agency involvement with the adoptive family after placement, the provision mandates performance of supportive services as well as the traditional reporting function performed by the agency at this stage.

Subsection (c). Fair hearing procedures have been imposed upon an agency which decides to remove a special needs child from the custody of the proposed adoptive parents. Unless the child is in immediate danger, notice of the intent to remove and the grounds for such action must be timely provided to permit the adoptive applicants to seek administrative appeal of the agency decision. If an interlocutory decree of adoption has been entered, however, the agency cannot remove the special needs child without prior approval of the court.

Section (e). The agency which provided postplacement services should continue its involvement with the proposed adoptive family in the event that a child with special needs is removed from their home. Counseling services should be offered to aid in their adjustment to the child's removal.

#### *Section 305. Agency Appeals*

(a) *Right of appeal.* Any person who meets one or more of the following criteria shall have the right of appeal to the State adoption administration:

(1) Is entitled to a family assessment under Section 303(c) of this Act and has been refused a family assessment to which he is entitled, or has not had a family assessment begun within sixty days or completed within six months after his application to the agency; or

(2) Has been notified by an agency that his application to adopt a child with special needs has been denied; or

(3) Has applied for, but been refused, financial assistance for the adoption of his foster child; or

(4) Has received notice that a child with special needs is to be removed from an adoptive placement in his home.

(b) *Time for filing appeal.* An appeal pursuant to this section shall be filed within sixty days of the action which constitutes the basis for the appeal, except that an appeal of the removal of a special needs child from an adoptive placement shall be filed within ten days of receipt of notice from the agency of the intended removal of the child.

(c) *Time limit on agency action on appeal.* All appeals to the State adoption administration shall be approved or denied within sixty days of the date the appeal is filed.

#### *Commentary to Section 305*

This section provides an appeal process for aggrieved parties and specifies time limitations for bringing

such appeals. The purposes of the provision are to achieve certainty for the legal status of the special needs children involved, to facilitate their adequate placement, and to protect agencies from untimely challenges to their relinquishment and placement procedures.

**Subsection (a).** Subsection (a) enumerates a variety of grounds upon which parties adversely affected by agency action may bring an appeal to the State adoption administration.

**Subsections (b) and (c).** Such administrative appeal must be filed with the State adoption administration within the sixty-day limitation period. The adoption administration is then required to act upon an appeal within sixty days after it is filed.

#### **Title IV. Adoption Assistance For Children With Special Needs**

##### *Section 401. Purpose and Administration*

The State adoption administration shall establish an ongoing program of adoption assistance payments to make possible the adoption of every child with special needs who might not be adopted without financial assistance.

##### *Commentary to Section 401*

Adoption assistance may be viewed as a new program financed in part with Federal financial participation, or it may be seen as a continuation of a State's existing adoption subsidy program since some children with special needs may not be eligible for assistance payments matched with Federal funds. In such cases adoption assistance and services under this title may be funded from State foster care appropriations or other State sources.

The concept of adoption assistance for children with special needs is not new, although until the 1970's the idea was slow to gain acceptance in the face of the traditional idea that an adoptive family should assume full responsibility for the needs of the adoptee. Since the first adoption subsidy act was passed by the New York State Legislature in 1978, forty-nine States and two jurisdictions have enacted legislation to subsidize adoptions. The purpose of these laws is to provide financial assistance to assure the adoption of children whose handicap, age, minority background, or sibling group membership might otherwise prevent their placement and adoption.

It has been shown that the assistance concept can facilitate the adoption of children with special needs, and at the same time save communities a sizable portion of the expenditures which would

1968, not 1978, is the date of enactment of the first adoption subsidy act.

This statement is important to assure the best possible family recruitment. Vigorous recruitment of the most desirable adoptive families is encouraged here.

If adoption assistance can cover such expenses related to the adoption process such as legal and court costs, then it should be through this mechanism that adoption fees are subsidized for those unable to pay.

A means test is allowed for "general adoption assistance" to cover normal living expenses of the child.

be necessary to keep the same children in foster and institutional care.

As stated in the comments accompanying the Model State Subsidized Adoption Act published by HEW, an adoption assistance program is meant to be a part of the usual, ongoing child welfare services of a State. It is not intended to discourage vigorous recruitment of the most desirable adoptive families for children with special needs waiting in the foster care system to be adopted.

For a more comprehensive discussion of the Model State Subsidized Adoption Act and for model regulations to accompany the Act, see U.S. Dept. of Health, Education, and Welfare, *Subsidized Adoption in America (1976)*.

*Section 402. Eligibility for Adoption Assistance*

(a) *Requirements for eligibility.* Any child with special needs who is potentially eligible for adoption assistance who is the responsibility of an agency, legally free for adoption, and not likely to be adopted by reason of one or more special needs, such as:

- (1) Physical or mental disability,
- (2) Emotional disturbance,
- (3) Recognized high risk of physical or mental disease,
- (4) Age,
- (5) Sibling relationship, or
- (6) Racial or ethnic factors.

(b) *Certification of unconditional eligibility.* A child who is potentially eligible for adoption assistance pursuant to subsection (a) hereof must be certified as eligible by the State adoption administration. Any child who meets one or more of the requirements of subsection (a) of this section shall be certified as unconditionally eligible after reasonable efforts to find an appropriate adoptive family who would adopt the child without adoption assistance have proved unsuccessful, except that when the child has developed significant emotional ties with his foster parents who seek to adopt him, no such efforts are required.

(c) *Means test.* There shall be no income eligibility test (means test) for the prospective adoptive parent(s) of a special needs child certified under subsection (b) of this section in determining eligibility for adoption assistance to cover medical and other expenses which are related to the child's special needs, or to cover expenses related to the adoption process, such as the legal and court costs of adoption. An income eligibility test shall be applied in determining eligibility for general adoption assistance to cover expenses

unrelated to the child's special needs or the adoption process.

(d) *Notification of eligibility.* Any agency or person who has physical custody of a child with special needs shall be notified in writing when the child is certified as eligible for adoption assistance.

*Commentary to Section 402*

To be potentially eligible for adoption assistance pursuant to this section, the child must be in the custody of a public or voluntary agency and be legally free for adoption. In addition, the child must be unlikely to be adopted for reasons like those enumerated in subsection (a). A child who meets the above criteria must be certified as eligible for adoption assistance by the State adoption administration.

There will be many children in need of adoption assistance who do not meet the criteria for Federal financial participation and States will have to utilize State funding to provide for the special needs of these children. However, States will need to draft regulations ensuring that no Federal reimbursement is claimed for children eligible under Model Act for adoption assistance but not eligible for Federal financial participation.

Subsection (a). Regarding the enumerated reasons for which a child might be certified as unconditionally eligible for a subsidy under subsection (a), the following deserve comment: "Emotional disturbance"—the cause for such a disturbance is irrelevant. "Recognized high risk of physical or mental disease"—an example would be the occurrence of an injury at birth or the potential of an inherited condition which could manifest itself in mental or physical disability later in life. "Age"—the exact age criterion may vary; any age is relevant so long as it is a factor inhibiting the child's adoption. "Sibling relationship"—this factor refers to sibling groups who should be placed as a unit whenever possible. "Racial or ethnic factors"—these criteria are general because they will vary according to geographic area and social climate.

The "reasonable efforts" that must be made to find an adoptive family for a child with special needs prior to certifying him as unconditionally eligible for adoption assistance should include affirmative recruitment of adoptive parents, use of adoption resource exchanges, and referral to appropriate specialized agencies. For the child who has developed significant emotional ties with his foster parents and whose foster parents wish to adopt him, no search for another adoptive family is required.

This section includes a broader eligibility than the eligibility under P.L. 96-272, as well as the Federal I.R.S. deduction for "special needs" adoptions. Therefore, it should be recognized that enacting this section will not result in eligibility for Federal matching funds for all children.

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The subsidy is a benefit to meet the special need of a child, not to assist a family to adopt.

Adoption assistance may begin before the adoption is finalized.

The adoption assistance payment is limited to the allowance for such a child under foster family care.

Certification for the assistance payment must be made annually.

**Subsection (c).** It should be emphasized that the basis for the adoption assistance is the special need of the child. Hence subsection (c) prompts consideration of the family's financial ability to meet medical and other expenses related to the child's special needs, as well as expenses related to the adoption process.

**Section 403. Adoption Assistance Agreement**

**(a) Requirements of assistance agreement; when assistance payments may begin.** Before any adoption assistance payments may be made to the prospective adoptive parents who have been determined to be eligible for adoption assistance, there must be a written agreement between the parent(s) entering into the assisted adoption and the State adoption administration through its designated agency. This agreement must be completed within one year after the final decree of adoption.

**(1)** Adoption assistance in individual cases may commence with the adoptive placement, or at the appropriate time after the interlocutory or final decree of adoption, and will vary with the needs of the child as well as the availability of other resources to meet the child's needs.

**(2)** The assistance may be for special services only or for money payments, and either for a limited period or for a long term, or for any combination of the foregoing. The amount of the time-limited or long-term adoption assistance may in no case exceed that which would be allowable from time to time for such child under foster family care, or in the case of a special service, the reasonable fee for the service rendered.

**(b) Annual certification of eligibility.** When adoption assistance is for more than one year, the adoptive parents shall present an annual certification that:

**(1)** The adopted child remains under their care; and

**(2)** The conditions which caused the child to be certified as eligible for adoption assistance continue to exist.

**(c) Continuing special need required for certification.** For the purpose of the annual recertification, the special need(s) which caused the child to be certified shall be deemed to continue to exist if the child was certified as eligible pursuant to:

**(1)** Subsections (a)(1) or (a)(2) of Section 402 of this Act, and the physical or mental disability or emotional disturbance has not been corrected; or

**(2)** Subsection (a)(3) of Section 402 of this Act, and the recognized high risk of

physical or mental disease continues to exist; or

(3) Subsections (u)(4), (u)(5), or (u)(6) of Section 402 of this Act.

(d) *Duration of assistance; modification.* The adoption assistance agreement shall be continued in accordance with its terms but only so long as the adopted child is the legal dependent of the adoptive parents and the child's condition continues, except that in the absence of other appropriate resources provided by law and in accordance with regulations issued pursuant to this Act, it may be continued after the adopted child reaches majority. Termination or modification of the assistance agreement may be requested by the adoptive parents at any time.

(e) *Certification not affected by adoptive parents' residence or change of child's residence.* A child who is a resident of another State when eligibility for assistance is certified by that State shall be considered certified and eligible to receive assistance by this State upon becoming a resident of this State, subject to the annual recertification requirements of this section. The domicile or residence of the adoptive parents at the time of application for adoption placement, legal decree of adoption, or thereafter shall not affect the certification of a child who has been certified as eligible for adoption assistance by this State.

#### Commentary to Section 403

**Subsection (a).** It is anticipated that, in virtually all cases, the adoption assistance agreement will be completed prior to the final decree of adoption. However, there may be unusual circumstances which would justify an exception to this general rule.

Assistance payments may begin after an agreement is signed—as early as the time of placement or after an interlocutory or final adoption decree has been issued. Adoption assistance may be made available for costs related to the adoption process, such as legal and court costs of adoption, other costs incidental to adoption placement, or costs for medical treatment or other needs.

Time-limited assistance is designed to help with expenses of integrating the child into the family or to provide funds for a specific short-term service. Long-term adoption assistance is designed for children who cannot be adopted unless their long-term financial needs are met by subsidy. The ceiling on the subsidy is accord with foster family allowances as based on current practice in a majority of the States. One objective of the adoption assistance program is to

Assistance after the age of majority should be provided through State and other programs for persons who have reached majority.

(e) This requires the State enacting this legislation to recognize the certification for eligibility for adoption subsidy from another State. Therefore, if adoptive parents eligible for an adoption subsidy from another State move to the State enacting this legislation, the financing of the subsidy is the responsibility of the State enacting this legislation.

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provide permanent adoptive homes for children in foster care at no more cost to the State than foster care.

**Subsections (b), (c), and (d).** These subsections have been drafted to give the State the flexibility to provide adoption assistance with either Federal or non-Federal funds. Such variations can be covered by the State regulations accompanying the Model Act. For example, Federal financial participation may be available only until the child reaches age 18 (or 21 if a physical or mental handicap is established). A State may, however, deem it necessary in some cases to extend financial assistance for a limited period of time to allow a child to complete schooling, for instance. Also, some children under the program will need special care, treatment, and services for an indeterminate period, and the termination of the subsidy at the age of maturity could work a hardship for them before other benefits can be found.

For the purposes of recertification, a special need "continues to exist" (subsection (c)) unless there has been a change in the child's need for the services or support which the adoption assistance provides. If the special need is a medical handicap which eventually warrants no further therapy, the assistance to provide such therapy would terminate. But if the special need is a characteristic which makes general support payments necessary in order to find a permanent home for the child, the special need—and hence the assistance—should be continued until the child no longer needs to be supported.

**Subsection (v).** Since the adoption assistance is designed to provide a child in special circumstances with a permanent adoptive home, certification of the child in another State or interstate movement of the adoptive family should not affect such assistance.

This needs clarification: how would movements of people affect responsibility for payments?

This needs clarification: how would movements of people affect responsibility for payments?

**Title V. Adoption Proceedings for Children With Special Needs**

*Section 501. Procedures for the Adoption of a Child With Special Needs*

Except as provided in section 502, court procedures for the adoption of a child with special needs shall be governed by the laws and rules applicable to adoptions generally.

*Section 502. Plan for the Special Needs Child*

(a) *Retention of jurisdiction.* If the court denies a petition for adoption, the court may not terminate its jurisdiction until or unless another court or agency accepts or assumes jurisdiction sufficient to plan for the care of the child with special needs and to cause the plan to be implemented. However, if the placement of the child with special needs was made pursuant to the Interstate Compact on the Placement of Children and the jurisdiction of the sending agency has not been legally terminated under Article V(a) of the Compact, the court shall not exercise its jurisdiction in a manner contrary to or inconsistent with the Compact.

(b) *Plan for the child.* If the court which denies a petition for adoption retains jurisdiction over the child with special needs, it shall order such child removed from the home and care of the petitioner, unless the court approves an agency plan for continued placement for foster care with the unsuccessful petitioner. The agency which made the placement for adoption or another agency shall, with the approval of the court, make a plan for the child with special needs which takes into consideration those factors which characterize him as a child with special needs. Where appropriate the plan shall include arrangements for another placement of the special needs child for adoption. If adoption is not practicable, the plan shall include a full statement of the reasons therefor and the measures to be taken to secure an alternative

Section 502 (a) contains the only mention of the Interstate Compact on the Placement of Children in the Model Act. Here the Compact takes priority over the procedures of the court with jurisdiction.

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The court is given the responsibility of keeping track of a child which is not adopted, by requiring six month reports and an annual hearing on the child's situation.

The "final word" of this Model Act re-emphasizes once again the important overall goal and philosophy of this Act: adoption for children with special needs who can benefit from permanent homes.

permanent placement for the child with special needs.

(c) *Report and review of plan.* The plan shall be filed with the court, and the agency or person responsible shall file with the court a report thereon at least every six months until the child with special needs is adopted or until the court otherwise terminates its jurisdiction. No less frequently than once a year, the court or a hearing officer designated by the court shall hold a hearing and require the person or agency responsible for the special needs child to personally appear and report on the progress toward implementation of the plan.

*Commentary to Section 502*

**Subsection (a).** The provision is designed to assure that future proceedings involving a special needs child who is the subject of an unsuccessful petition for adoption shall be conducted before a court familiar with the child and his circumstances, including his unique special needs. The court which denied the petition for adoption may, however, terminate its jurisdiction if there is good cause. Circumstances established good cause include the fact that another court of this or another State presently has or previously had jurisdiction over the special needs child, or that a second adoption petition is filed by a family whose residence is elsewhere.

**Subsections (b) and (c).** The requirement that a long-term plan for the child with special needs be submitted to the court and regularly reported upon protects the child from becoming an inappropriate resident of foster care institutions through the simple inadvertence of agency personnel, and encourages efforts to again place the child for adoption if possible. Adoption remains the plan of preference and, therefore, an explanation is required if the plan submitted does not find adoption to be practicable for the child with special needs.

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## **A Concluding Note About the National Committee For Adoption Analysis**

The comments and analysis included in this document were shared with pertinent staff of the Department of Health and Human Services but the Department and none of the Department's staff have any responsibility for the content of those comments or analysis. Discussions were held in December, 1981, and March, 1982, with Department staff in order to achieve the clearest interpretation possible of the Department's meaning and intentions in regard to its Final Model Act.

## **DOCUMENTATION PACKET AVAILABLE**

To assist those who wish to study the background of the Model Act, NCFA has prepared a documentation packet which may be purchased from NCFA. The packet contains an analysis of the comments on the Model Act prepared by the American Public Welfare Association, a copy of the Advisory Panel's draft, and NCFA materials — as well as the minority report prepared by Sproesser Wynn, an Advisory Panel Member who was the Chairman of the American Bar Association Committee on Adoption. The packet contains 353 pages and is available at NCFA's reproduction costs of 10 cents per page. Orders for the packet must include \$35.30 for the packet, plus appropriate postage (the materials weigh 24 oz.). NCFA will mail the packet book rate to those who add 10% for postage and handling. For the U.S. Postal Service's Express Mail handling, add \$9.70. All orders, except from NCFA member agencies, must be prepaid.



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