Family Law: Case Notes

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The problem of finding new parents for orphaned or abandoned children is one of ancient lineage. The code of Hammurabi contained sections on adoption, and both Greek and Roman law had well-developed adoption procedures. The practice was not recognized by the English or American common law, however, and until the latter half of the nineteenth century very few American jurisdictions provided any means of legally adopting a minor other than by a special act of the state legislature. Beginning with Massachusetts in 1851, all American jurisdictions established statutory procedures for termination of parental rights and adoption. Not surprisingly, these statutes varied widely. Some provided, in effect, for little more than judicial ratifications of private arrangements; others laid down stringent qualifications and "matching" criteria for potential adoptive parents.

Nevertheless, modern adoption provisions follow a general pattern, theoretically consisting of two separable processes: first, the termination of the rights and responsibilities of the child's present legal guardians; and, second, the creation of a new parent-child relationship. In practice, however, the two processes often become most inextricably intertwined, sometimes with disastrous results.

The operation of this statutory process was at issue in State ex rel. Portage County Welfare Dept. v. Summers, 38 Ohio St. 2d 144, 311 N.E.2d 6 (1974).

1 See generally, Huard, Law of Adoption: Ancient and Modern, 9 VAND. L.REV. 743 (1956).
2 The only exceptions were Texas and Louisiana, whose legal systems were based in large measure on civil law models.
3 For an excellent article dealing with the development of adoption law in the United States, see Presser, Historical Background of the American Law of Adoption, 11 J. FAM. L. 443 (1971).
4 "Legal guardian" encompasses a broader spectrum of legal entities than does "parent"—e.g., court-appointed individual guardians, orphanages, and welfare departments, as well as biological parents.
5 See, e.g., In re Adoption of Morrison, 260 Wis. 50, 49 N.W.2d 759 (1951). In Morrison, the illegitimate child of a minor was placed with the petitioners six days after birth, with the minor's consent. The petitioners promptly sought adoption. A year later, the mother withdrew her consent, touching off a legal battle which culminated in the mother winning back her child, at the age of four, from the only home it had ever known. (The court found that the minor mother's consent was invalid because her guardian ad litem had not consented to the adoption, although it was conceded that the mother had freely and knowingly consented.)
rel. Portage County Welfare Department v. Summers. The subject of the case was Antoinette, a four-year-old black girl who was placed under the care of the county welfare department by her unwed mother shortly after birth. At the age of twelve days, Antoinette was placed with experienced foster parents, the Hannas. The foster parents were middle-aged whites. Subsequently the mother surrendered legal custody to the welfare department.

Almost three years after the placement of Antoinette the welfare department removed her from the Hanna home, apparently because the foster parents had become too attached to her. The Hannas promptly petitioned for an interlocutory order of adoption, which the probate court proposed to grant despite the welfare department's disapproval and refusal to consent. The welfare department then sought, and was granted by the court of appeals, a writ prohibiting the probate court from issuing any adoption order in the case, on the ground that it had exceeded its jurisdiction by entering an interlocutory order of adoption without the consent of the child's legal guardian.

The Hannas appealed to the Ohio supreme court, which reversed the court of appeals and held that the probate court's jurisdiction over the adoption proceeding was not impaired by the guardian's refusal to consent.

The central issue in the case, and the subject of this case note, is the nature and scope of the consent requirement in adoption proceedings, especially the consent of legal guardians other than biological parents. In particular, the impact of Ohio's statute governing the consent of guardians other than parents, Ohio Revised Code § 3107.06, will be examined in light of the Summers decision.

II. ADOPTION IN OHIO: PROCEDURE AND STANDARDS

Ohio's adoption statutes are, in many respects, typical of those

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6 38 Ohio St. 2d 144, 311 N.E.2d 6 (1974).
7 The couple had previously cared for 59 foster children. Id. at 146, 311 N.E.2d at 7-8 (1974).
8 At the time of the original placement, the husband was forty-eight and the wife forty-three.
9 This procedure is allowed by Ohio Rev. Code Ann. §§ 5103.15-.16 (Page 1970). Section 5103.03 outlines the process by which agencies are registered for this purpose. But see Stanley v. Illinois, 405 U.S. 645 (1971), holding that even the father of an illegitimate child has a due process right to a hearing before being deprived of his right to custody of the child.
10 38 Ohio St. 2d at 148, 311 N.E.2d at 9 (1974). The welfare department disapproved of the adoption in its capacity as next friend and refused to consent in its capacity as legal guardian.
in use throughout the United States. The adoption process is commenced by the filing of a petition with the probate court by the prospective adoptive parents. The court then sets a date for a hearing on the petition, to be held thirty to sixty days after its filing, gives notice of the hearing to the parents of the child and to its legal guardian, if any, and appoints a “next friend.” The statute requires the “next friend” to be a person or organization “qualified by training and experience” to investigate the proposed adoption, and in cases in which a public welfare or private charitable organization is involved, the organization itself must be appointed “next friend.” The next friend examines the qualifications of the petitioners, the condition of the child, and the suitability of the proposed adoption and files a written report approving or disapproving the proposed adoption.

The qualifications of the petitioner are left largely to the discretion of the court, which is instructed by the code to consider the petitioner’s physical, mental and emotional health, personal integrity, and his or her ability to promote the welfare of the child. The phrase “best interests of the child” summarizes the other general groups of factors to be investigated by the next friend in making its recommendation on the suitability of the adoption. This concept overlaps somewhat with “petitioner’s suitability,” as, for example, in the petitioner’s ability to promote the welfare of the child. It also takes into consideration the mental and physical condition of the child, its cultural, religious, and racial background, and its attitude toward the adoption, in those cases in which that can be ascertained.

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13 Id. § 3107.03 (Page 1972). It has been held that the probate courts in Ohio have exclusive jurisdiction over all adoption matters. In re Adoption of Biddle, 168 Ohio St. 209, 160 N.E.2d 550 (1958).
14 Ohio Rev. Code Ann. § 3107.04 (Page 1972). The necessity of notice to the child’s natural parents may be relieved if they fall into one of the exceptions of § 3107.06(B): where they are dead or mentally incompetent; where they have willfully failed to support the child for two years; and where they have surrendered custody of the child to a certified organization. It should be noted that where an attempt is made to terminate a natural parent’s right to custody of a child for neglect, as under Ohio Rev. Code Ann. § 2151.23 (Page 1968), the Supreme Court has recently recognized that all natural parents have a right to a hearing to determine their fitness. See Stanley v. Illinois, 405 U.S. 645 (1971), in which the father of an illegitimate child was held entitled to such a hearing on due process grounds.
15 Id. § 3107.05 (Page 1972).
16 Id.
17 Id. § 3107.05(A) (Page 1972).
18 Id. § 3107.05 (Page 1972). In large measure the “best interests of the child” has been a formless concept, susceptible of application to whatever end a court might have in mind. In Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152 (1966), for example, a young boy’s father
At the hearing, the petitioners, the next friend, the child (if over twelve), and other persons whose interests are deemed relevant by the court are examined by the probate judge to determine three things: whether the various statutory requirements for adoption have been met; whether the petitioners are suitable adoptive parents; and whether the proposed adoption is in the best interests of the child. If positive answers can be given to all three questions, the court enters an interlocutory adoption order. The child is then placed under the petitioners’ care for a period of six months. During that time the next friend is to visit the petitioners’ home at reasonable intervals and, at the end of that period, is to submit a written report to the court.

At the end of the six-month period, if the court has not revoked the interlocutory order, it enters a final order of adoption, making the adoptive child the legal equivalent of the natural child of the petitioners.

Ohio’s consent statute, Ohio Revised Code §3107.06, whose meaning is the key issue in Summers, is typical of its contemporaries:

No final decree or interlocutory order of adoption shall be

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left him in the care of his maternal grandparents shortly after the accidental death of the child’s mother. When the father sought to claim his son a year later, the grandparents petitioned to adopt him. The adoption was upheld by the Supreme Court of Iowa, which conceded that the father was not unfit, but held that the “stable, conventional, middle-class” (i.e. Iowan) grandparents were better suited to oversee the child’s development than his “unstable, unconventional, artsy, and probably intellectually stimulating” father. In effect, the “best interests of the child” were subsumed within the court’s philosophical predilections.

There have been attempts, mostly scholarly, to provide more or less objective criteria for the “best interests of the child,” and so to attempt to limit the tendency of courts to read their own prejudices into the phrase. In Katz, Foster Parents Versus Agencies: A Case Study in the Judicial Application of “The Best Interests of the Child” Doctrine, 65 Mich. L. Rev. 145 (1966), Professor Katz presents broad categories of interests which courts reasonably ought to seek to promote under the general rubric of the “best interests of the child”: (1) order and integrity in the family structure, and family loyalty; (2) financial security; (3) health and education; and (4) morality and respect. For a more specific statement of Katz’s formulation, see the text accompanying note 107 infra. See also Foster, Adoption and Child Custody: Best Interests of the Child?, 22 Buffalo L. Rev. 1 (1972); J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1973).

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10 If he is over twelve and has lived with the petitioners less than eight years, § 3107.09 requires that he be examined by the court. (In these conditions, the consent of the child is required. There is no authority forbidding the examination of a younger child, and presumably a court may exercise its discretion and do so.)


21 Id. A final order may be entered at the hearing in “step-parent” cases or where the child was legally placed in the petitioner’s home six months before the hearing.

22 Id. § 3107.10 (Page 1972).

23 Id. § 3107.11 (Page 1972). The final order may be entered upon application of the petitioner, or upon the motion of the court or of an interested party.

24 Id. § 3107.13 (Page 1972).
entered by the probate court unless there is filed with the court written consents to the adoption, verified or acknowledged by the following:

\[\begin{align*}
\text{(D) By any department, county welfare department or board, certified organization, or person or persons having the permanent custody of the child.}
\end{align*}\]

The problem faced by the court in Summers was that Ohio's consent statute, like those of several other states, appears to make the consent of a child's legal guardian an absolute jurisdictional prerequisite for any adoption proceeding. There have been essentially three judicial responses to such requirements. Some courts have accepted guardian consent as a jurisdictional requirement. Others have reduced it to a matter of judicial discretion on the theory that the legislature could not have intended to make the broad jurisdiction of the court in adoption matters subject to an absolute veto in a guardian. And a few jurisdictions have evaded consent requirements by ingenious and somewhat labored constructions of statutory language. The Summers decision represents a fourth approach, which is essentially a constitutional assault on the validity of such requirements.

III. THE PROBLEM OF CONSENT

The matter of consent in adoption proceedings has been, and remains, a source of uncertainty and hesitation for both courts and legislatures. The roots of the difficulty can be traced back to the medieval period, when children represented a marketable property interest to their guardians. This original common law concern was gradually transformed, with the rise of concern for the welfare of children, into a somewhat mystical doctrine that the biological parents of a child had a right to raise children as they saw fit. In any event, it was assumed that the natural parents were almost always the persons most qualified to see to a child's needs. A typical statement of the legal viewpoint appears in People ex rel. Portnoy v. Strasser:

No court can, for any but the gravest reasons, transfer a child

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25 See, e.g., In re Adoption of Tschudy, 267 Wis. 272, 65 N.W.2d 17 (1954); In re Adoption of Zavasky, 241 Minn. 447, 63 N.W.2d 573 (1954).
26 See, e.g., In re McFarland, 223 Mo. App. 826, 12 S.W.2d 533 (1928).
29 Id.
from its natural parent to another person, . . . since the right of a parent, under natural law, to establish a home and bring up children is a fundamental one and beyond the reach of any court.\textsuperscript{20}

Whether this view can be justified in light of modern conditions is debatable. Its rationale can be traced back to the biblical injunction to “be . . . fruitful, and multiply; bring forth abundantly in the earth and multiply therein.”\textsuperscript{31} Historically this notion of a right, and indeed, a duty, to produce children presented no particular problem, economic or otherwise since high infant mortality rates tended to offset any tendency toward excess in the exercise of the “right.” And at least arguably, the relatively rigid standards and cohesiveness of pre-industrial European and American communities tended to insure that parents exercising their “right” would raise their children more or less properly. The existence of these conditions did not provide any theoretical underpinning for “the right to keep and bear children,” but they made its exercise sufficiently harmless to leave the theory unchallenged.

These conditions have, for the most part, ceased to exist (if in fact they ever really existed) in the United States. The rise of modern medicine has in large measure eliminated childhood mortality as a check on the “right to children.”\textsuperscript{32} Similarly, the increasing mobility of American life has broken down the cohesiveness and rigidity of the small town and largely extinguished the range of informal pressures that formerly worked to insure some conformity in child-rearing, leaving only the blunt instrument of the law in its place.

The result is that the notion of a natural right of parenthood remains, despite the passing of the conditions which made its existence initially tolerable. However debatable its viability, its effect on adoption law is nonetheless clear. Most state statutory schemes allow adoption without parental consent only where the parent is dead, mentally incompetent, or has abandoned the child.\textsuperscript{33}

However substantial the policy reasons for requiring parental

\textsuperscript{20} 303 N.Y. 539, 542, 104 N.E.2d 895, 896 (1952).

\textsuperscript{31} Genesis 9:7 (King James).

\textsuperscript{32} In 1915, for example, the infant death rate was 99.9 per thousand live births. By 1973 the rate had fallen to 17.6 per thousand. U.S. Bureau of the Census, Statistical Abstract of the United States: 1974, 51 (1974).

\textsuperscript{33} Ohio waives consent in these three instances, and where the parent has executed a permanent surrender to a certified agency. See Ohio Rev. Code Ann. 3107.06(B) (Page 1972). It should also be noted that under the terms of Ohio Rev. Code Ann. § 2151.23 (Page 1968), the juvenile court has the power to terminate a natural parent's right to custody of a child. A good, although dated summary of state adoption statues may be found in 4 C. Vernier, American Family Laws 346 (1936).
consent to adoption, they are largely inapplicable in the case of adoptions through child care agencies, which comprise the bulk of modern placements. In most of these adoptions the rights of the natural parents of the child are severed by a formal surrender to the child care agency before the child is placed with potential adoptive parents.

This process effectively places the child-care agency *in loco parentis*, with full power to consent to adoption. In fact, its power to give or to withhold consent is often greater than that of the natural parents, since most older adoption statutes make no provision for review of guardians' refusals to consent and specify no circumstances in which their refusal to consent can be waived. Ohio’s consent section is typical in this respect. The rationale for this lack of review seems to be that since child care agencies are professionally devoted to finding homes for children, they will not withhold consent from any reasonably fit adoptive parent.

Where such statutes are in effect, a child care agency's power of consent virtually makes it the arbiter of the adoption process. Its refusal to consent can deprive the supervising court of jurisdiction over the adoption, as was held in *In re Adoption of Tschudy* and *In re Adoption of Zavasky*, both of which construed consent statutes very similar to Ohio’s. The court in *Tschudy* held that consent was essential to jurisdiction in adoption proceedings and found no basis for distinction between the consent of an agency or guardian and that of a natural parent. *Zavasky* noted that the purpose of agency guardianship is simply to provide protection for minors until a suitable adoptive home can be found. While admitting that it appeared to be unreasonable to allow such an agency an unreviewable power of consent, the court nonetheless held that the statute did just that, and

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34 See generally, *In re Adoption of McKenzie*, 197 Minn. 234, 266 N.W. 746 (1936); Annot., 104 A.L.R. 1464 (1936).
35 Id. § 3107.06 (Page 1972).
36 *Id.* § 3107.06 (Page 1972).
37 *In re* Alexander, 206 So. 2d 452 (Fla. App., 1968).
38 267 Wis. 272, 65 N.W.2d 17 (1954).
39 241 Minn. 447, 63 N.W.2d 573 (1954).
40 Wisconsin’s statutes were subsequently amended to provide for a hearing in the event of a guardian’s refusal to consent, with the sole criterion for decision on the petition to be that of the best interest of the child, if it was found that the guardian’s refusal was arbitrary, capricious or unsupported by substantial evidence. Wis. Stat. § 48.85 (1971). More recently, Wisconsin has dropped the requirement of guardian consent entirely. Wis. Stat. Ann. § 48.84 (Supp. 1974). *But see In re Dougherty’s Adoption*, 358 Pa. 620, 58 A.2d 77 (1948), which proposed a sort of “agency rationale” for a statutory consent requirement. The court held that the natural parents of the child surrendered custody to an adoption agency with the intention of thereby promoting the child’s welfare and that therefore the consent of the agency, as the designated agent of the natural parents, was essential to jurisdiction in adoption of the child.
left the task of producing a remedy to the legislature.\textsuperscript{41}

Not all jurisdictions have construed consent statutes so strictly, however. \textit{In re McFarland}\textsuperscript{42} dispensed with the consent of a guardian by noting that the declared purpose of the state adoption statutes was the furtherance of the best interests of the child. Reading this \textit{in pari materia} with the consent statute,\textsuperscript{43} the court held that, while the adoption code was to be strictly construed, the construction should not be so strict as to destroy the essentially liberal intent of the law, which was, in the court's view, the finding of homes for children.

\textit{Ratcliffe v. Williams}\textsuperscript{44} took a different tack in dispensing with the consent of a guardian. The court in that case observed that the Arkansas consent statute\textsuperscript{46} appeared to set out those instances in which the court could proceed without the consent of the natural parents (a requirement that the court viewed as jurisdictional). It concluded that since the section calling for the consent of guardians\textsuperscript{46} appeared in a list with other exceptions to parental consent, the mere existence of a guardian fulfilled the jurisdictional requirement, and thus allowed the court to waive the guardian's consent at its discretion.\textsuperscript{47}

\textsuperscript{41} It is noteworthy that \textit{In re Adoption of McKenzie}, 197 Minn. 234, 266 N.W. 746 (1936), cited approvingly by the Ohio supreme court in \textit{Summers}, is distinguished in \textit{Zavasky}. McKenzie turned on a provision (now found at \textit{Minn. Stat.} § 259.24 l(e) (1971)) which states that when no parent or guardian qualified to consent can be found, the state commissioner \textit{may} consent. However, Zavasky, like Summers, dealt with a certified agency to which custody of a child had been given, and the governing statutory language in the case, \textit{Minn. Stat.} § 259.24 l(f), is practically identical to Ohio's § 3107.06(D) in its requirement of consent.

\textsuperscript{42} 223 Mo. App. 826, 12 S.W.2d 523 (1928).


\textsuperscript{44} 220 Ark. 807, 250 S.W.2d 330 (1952).

\textsuperscript{45} \textit{Ark. Stat. Ann.} § 56-106 (1971): (a) The adoption of a child shall not be permitted without the written consent verified by affidavit, of its parents or parent, if living, except as follows:
(b) The consent of a parent or parents may be dispensed with if the court, upon competent evidence, makes one of the following findings:
(I) . . . (child abandoned for more than six months)
(II) . . . (parent cannot be found)
(III) . . . (parent insane or otherwise incapacitated)
(IV) A guardian of the child has been appointed by an order of the Probate or Juvenile Court giving the guardian authority to consent to adoption without notice to or consent of the child's natural parents. In this case, the written verified consent of the guardian shall be sufficient.

\textsuperscript{46} \textit{Id.} § 56-106(b)(IV) (1971).

\textsuperscript{47} Ohio's consent statute, \textit{Ohio Rev. Code Ann.} § 3107.06 (Page 1972), does not lend itself to this ingenious analysis, since under its numbering arrangement consent of a certified agency appears to be the equivalent of the consent of the natural parents, and not merely a waiver of it.
The modern trend of legislation seems to favor discretionary judicial review of guardians' refusals to consent and in some instances legislatures have repealed sections requiring consent of guardians other than parents. The Uniform Adoption Act typifies this tendency in its handling of guardian consent. It requires the consent of "any person lawfully entitled to custody of the minor or empowered to consent," noting that this includes "agencies authorized to place the child." But it also provides that the consent of such guardians may be dispensed with where the guardian fails to respond in writing to a request for consent, or where the court finds the written reasons given for withholding consent to be unreasonable.

IV. THE Haun-Summers APPROACH

Ohio's consent law is framed in the same clear, hard language as the statutes construed in Tschudy and Zavasky. Its apparently jurisdicitional nature was confirmed in In re Ramsey, in which the consent of a child's natural parent was held to be indispensable in matters of adoption. The only statutory exceptions to this requirement are the death or mental incapacity of the parent, his wilful failure to support the child for two years, or his execution of a formal surrender of the child. These exceptions tend to be narrowly con-
strued.\textsuperscript{57}

The issue of agency consent did not arise until 1971 in \textit{In re Haun}.\textsuperscript{58} There the aging foster parents of a young girl petitioned for her adoption. The welfare department\textsuperscript{59} refused to consent, citing as its reason the petitioners’ ages.\textsuperscript{60} The trial court nonetheless granted the petition, on the theory that the legislature could not have intended to completely frustrate adoptions clearly in the best interest of the child, especially where consent was improperly or unreasonably refused. In its holding the trial court relied to a considerable extent on a Tennessee case, \textit{Young v. Smith},\textsuperscript{61} construing an analogous statute. The theory developed in that case, and adopted by the probate court in \textit{Haun}, was that the purpose of the adoption consent statute was not to give guardians complete control over the process by withholding consent, but rather simply to provide reasonable notice to all parties having an interest in the proposed adoption, so that their various claims might be heard in court. The matter of consent was thus reduced from a jurisdictional prerequisite to just one of the issues bearing on the best interests of the child.

In affirming the trial court in \textit{Haun}, the court of appeals\textsuperscript{62} noted that it need not have nullified the consent requirement so completely in order to permit itself to enter an adoption order. The court observed that the primary concerns of the drafters of the adoption statutes seemed to be the finding of “suitably qualified” persons to adopt children and the promotion of the “best interests of the child.”\textsuperscript{63} Reading this section, which states the “purposes” of the adoption code, \textit{in pari materia} with the consent statute,\textsuperscript{64} it concluded that in order to give effect to both sections, the courts must have jurisdiction to review refusals of guardian consent and power to over-ride “arbitrary, unreasonable, or capricious”\textsuperscript{65} refusals by guardians other than natural parents.

The \textit{Haun} decisions were not far out of line with the modern

\textsuperscript{57} See, e.g., \textit{In re Earhart’s Adoption}, 117 Ohio App. 73, 190 N.E.2d 468 (1961); \textit{In re Peters’ Adoption}, 113 Ohio App. 173, 177 N.E.2d 541 (1961).

\textsuperscript{58} 31 Ohio Misc. 9, 277 N.E.2d 258 (Cuyahoga C.P. 1971), aff’d. 31 Ohio App. 2d 63, 286 N.E.2d 478 (1972).

\textsuperscript{59} The welfare department had legal custody of the child by virtue of the natural mother’s surrender. Note 9 supra.

\textsuperscript{60} The husband was sixty-eight, and the wife fifty-five. 277 N.E.2d at 261.

\textsuperscript{61} 191 Tenn. 25, 231 S.W.2d 365 (1950).

\textsuperscript{62} 31 Ohio App. 2d 63, 286 N.E.2d 478 (1972).

\textsuperscript{63} OHIO REV. CODE ANN. § 3107.09 (Page 1972).

\textsuperscript{64} As did the court in \textit{In re McFarland}, 223 Mo. App. 826, 12 S.W.2d 523 (1928). See \textit{supra} note 42.

\textsuperscript{65} 31 Ohio App. 2d at 67, 286 N.E.2d at 481 (1972).
trend of legislative and judicial thinking. They remained, however, somewhat problematic in their attempts to evade the language of the consent section and the "purpose" section, which states that before any adoption order can be entered, the other sections of the code (including the consent section) must be complied with to the court's satisfaction. The difficulty presented by this requirement is that it immediately precedes the "best interests" language of the statute, strongly suggesting that the legislature considered it fully as important as the matter of "best interests," rather than subordinate to it, as the Haun courts viewed it.

Moreover, the Haun decisions were made relatively easy for the courts by the peculiar facts presented there. The child sought by the petitioners had been suffering from a rather severe neurological disorder at the time of her placement with the Hauns. Under their care, she had improved to a state of good health and normal development. Unrebutted expert testimony indicated that there existed a real possibility of severe regression by the child if she were removed from their charge. Further, even the welfare department conceded that the petitioners were, apart from their advanced ages, extremely well-qualified to adopt the child.

The facts of Summers do not as readily lend themselves to a finding of capriciously or arbitrarily withheld consent as do those in Haun. The petitioners were not as well-established financially as those in Haun, and there was some indication that the child in Summers was of above-average intelligence and might be somewhat "held back" by the relatively unstimulating atmosphere in the petitioners' home. And, as in Haun, the petitioners in Summers were overage.

Despite these indications of a less-than-perfect parent-child match and the refusal of the welfare department to consent, the probate court was prepared to enter an interlocutory adoption order. At this point the court of appeals intervened in response to the welfare department's petition for a writ of prohibition against the probate court. The appellate court granted the writ on the basis of a literal reading of the consent and "purpose" sections of the adoption

45 An excellent analysis and able critique of the trial court's decision in Haun can be found at 41 U. Cin. L. Rev. 704 (1972).
46 It has been held elsewhere, however, that economic well-being beyond some "minimum standard" is not a material fact to be considered in an adoption proceeding. In re P. 114 N.J. Super. 584, 277 A.2d 566 (App. Div. 1971), discussed in 26 Rutgers L. Rev. 693. See also Lee v. Thomas, 297 Ky. 858, 181 S.W.2d 457 (1944).
47 28 Ohio St. 2d at 146, 311 N.E.2d at 7-8 (1974).
The court noted that the probate court was the only one empowered to handle adoption matters, and observed that it was authorized to enter adoption orders only if it was satisfied that the other sections of the adoption code had been complied with. Since the legal guardian of the child involved in the case had not consented, the court held that the probate court had exceeded its jurisdiction by failing to observe an express statutory limitation on that jurisdiction.

Such a literal construction of adoption statutes is not unheard of, but it is out of step with the modern trend of statutory construction in such matters. The majority opinion of the court of appeals made no mention of the *Haun* decisions. The court did not attempt to use the review power asserted by the *Haun* courts to determine if the agency's refusal of consent was reasonable, even though it might be argued that the refusal of consent in *Summers* was not arbitrary, capricious, or unreasonable.

The refusal of the court of appeals to take a more liberal view of the adoption statutes prompted a vigorous dissent by Judge Hofstetter. He noted the broad power of the probate court to deal in matters of adoption and observed that the legislature had laid down no guidelines for guardians on which consent or refusals thereof could be based. He argued that the legislature could not have intended to make such decisions purely the affair of an administrative agency or other guardian like the welfare department, with no opportunity for a potential adopter to secure a review of the agency's decision.

The dissent contended that it would be a denial of due process

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72 Under the terms of *Ohio Rev. Code Ann.* § 3107.06(D) (Page 1972).
73 See, e.g., *In re Adoption of Tschudy*, 267 Wis. 272, 65 N.W.2d 17 (1954); and *In re Adoption of Zavasky*, 241 Minn. 447, 63 N.W.2d 573 (1954).
76 Such an argument might run as follows: The Hannas are a lower-middle-class couple with apparently fairly strong ideas on the directions in which a girl's personality should develop. 38 Ohio St.2d at 147, 311 N.E.2d at 9. There is some indication that Antoinette is more intelligent than her potential adoptive parents. 38 Ohio St. 2d at 145, 311 N.E.2d at 8. If she becomes attuned at a later stage to certain ideas—e.g., women's liberation—there is a strong possibility of fairly violent conflict with her adoptive parents. This conflict, combined with the racial difference between her and the Hannas, could lead them to reject her, with potentially disastrous consequences. In light of these facts and probabilities, the refusal of the welfare department to consent is reasonable and not capricious or arbitrary.
77 *State ex rel. Portage County Welfare Dept. v. Summers*, No. 517 (Ohio App. 1973) (Hofstetter J., dissent at 1.).
78 *Id.* at 2.
to allow possibly arbitrary refusals of consent to adoption petitions without allowing some court to review such decisions. Judge Hofstetter cited the appellate court holding in *Haun* as support for his position, although he conceded that *Haun* had not been decided in express "due process" terms.

The dissent concluded that the probate court had properly exercised its jurisdiction in reviewing the welfare department's refusal to consent and in so doing had effectively eliminated the need for that consent. Judge Hofstetter contended that the court had thus preserved its jurisdiction.

The opinion of the supreme court distinguished the case from *Ramsey*, which held that parental consent was essential to the court's jurisdiction unless waived by one of the express statutory exceptions. The court framed the issue to be decided as the determination of the foundations and limits of the authority of the probate court rather than a determination of the jurisdictional effect of the consent statute. This is in noticeable contrast to the opinion of the court of appeals, which viewed the case strictly in terms of the limitations imposed by the consent statute.

By setting up the case as one concerning the proper scope of judicial authority, rather than as a simple matter of statutory interpretation, the court provided itself with a broader legal terrain on which to operate. The court was able to move beyond the language of the statutes themselves to develop a rationale grounded in constitutional and public policy goals.

Having thus opened a broader field on which to operate, the court observed that the probate court had exclusive jurisdiction over adoption matters and full power to dispose of cases properly before it, except as limited or denied by statute. The court then conceded that the language of the consent statute, "no . . . decree or . . . order of adoption shall be entered by the probate court unless . . . ." was on its face an express statutory limitation on the power of the court, and further admitted that "the clarity of its language permits no construction."

Up to this point, the court's argument closely parallels that of the court of appeals and almost ineluctably suggests that an affir-

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80 38 Ohio App. 2d at 150, 311 N.E.2d at 10.
82 164 Ohio St. 567, 132 N.E.2d 469 (1956).
83 38 Ohio St. 2d at 149, 311 N.E.2d at 10, citing *Ohio Rev. Code Ann.* § 2101.24 (Page 1968).
ance of the lower court was in the offing. However, the court then took advantage of its broader formulation of the issue as one of judicial power. It slipped past the statutory question into a discussion of the proper limits of that power. The court asserted that one of the proper functions of the judicial power is “to adjudicate upon and protect the rights and interests of individual citizens.” It then proceeded to place adoption squarely within the range of that power by observing that adoption concerned “every legal right” with respect to the child.

The court’s argument thus far is, on its face, needlessly general, and apparently pointless. Had the court simply wished to establish that adoption was properly within the realm of judicial power and involved personal rights, it could have easily done so by reference to the adoption code, which provides that the probate court has jurisdiction over the adoption process and enumerates the personal and property rights affected by it. That it did not do so suggests that the court was seeking to raise its analysis of the issue to a constitutional level, rather than to treat it simply as a matter of statutory interpretation. This suggestion is strongly reinforced by the court’s approval of the Haun decisions, and is evidenced by a quotation from the probate court’s opinion: “... it is in the spirit of the law to maintain the paramount authority of the courts in the protection of private rights.” This language indicates that the supreme court was recasting the issue of guardian consent as a matter of due process of law.

This posture of the court is confirmed by the standard set out by the court for its evaluation of the consent statute. Instead of adopting the presumption of “rationality” usually accorded by courts to statutory schemes, the court stated that where statutory provisions encroach on the power of the courts, the provisions are to be carefully scrutinized. Applying this standard to the consent statute, the court observed that it would be anomalous to grant jurisdiction over adoption to the probate court and then to allow a legal guardian to frustrate that jurisdiction at will without any obligation to justify its action. The court concluded that this would be an “impermissible
invasion" of the probate court's jurisdiction over adoption matters, and held that the consent statute could not operate to divest the court of jurisdiction.91

In effect, this holding read the agency consent section92 completely out of the adoption consent statute, and left the "next friend's report" required of such agencies,93 with its attendant recommendations, as the agency's sole input into the adoption process. The thoroughness which the court brought to its task of removing the statutory limits on the probate court's jurisdiction is strikingly evident in its restatement of the statutory criteria to be used by the probate court in adoption cases. The "purpose" section of the adoption code94 sets out three issues for the probate court: first, whether the court is satisfied that the requirements of the adoption statutes have been satisfactorily complied with; second, whether the petitioners are suitably qualified to adopt; and third, whether the proposed adoption is in the best interests of the child. Yet the supreme court made no mention of the first requirement of statutory compliance in its recaptulation of the issues for the probate court,95 although it acknowledges the existence of all three issues in the statute by quoting it in a footnote. In so doing, the court apparently regarded the "statutory compliance" requirement as referring only to the consent statute, at least in the case of agency guardians, and thus as surplusage once the consent requirement was removed as to agencies.

The decision in Summers effectively nullified the agency consent section96 because of its conflict with the supreme court's view of the judicial function. Yet, somewhat surprisingly, the court ignored both Haun and Judge Hofstetter's dissent below and refused to forthrightly declare that the consent section was a deprivation of the petitioners' (or even, perhaps the child's) right of due process of law under the fourteenth amendment and article I, § 16 ("due course of law") of the Ohio Constitution. It should be noted, however, that no other jurisdiction has felt it necessary to declare an agency consent statute unconstitutional, perhaps because of uncertainty as to whether or not refusal to consent by an agency deprives an adoption petitioner of a "right."97

91 38 Ohio St. 2d at 151, 311 N.E.2d at 11.
93 Id. § 3107.05.
94 Id. § 3107.09.
95 38 Ohio St. 2d at 152, 311 N.E.2d at 12.
97 For a discussion of a "right" to adopt or be adopted, see Grossman, Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings, 17 Buffalo L. Rev. 303, 336 (1968).
A second and more prosaic explanation for nullification without an express declaration of unconstitutionality can be found in article IV, § 2 of the Ohio Constitution, which forbids the supreme court to declare a statute unconstitutional without the concurrence of at least six of its seven members unless a court of appeals has already held the statute unconstitutional. Since two justices of the supreme court agreed with the holding in a separate opinion, this may be the more likely explanation of the outcome. In their concurring opinion, the justices agreed that the agency consent section, as it stood, was an impermissible legislative invasion of the probate court's jurisdiction. But they disagreed with the majority holding that all such invasions would be improper. The concurrence contended, rather, that if the legislature drafted appropriate limitations on agencies' power to withhold consent, as it had for natural parents, a refusal to consent which did not exceed those limits would deprive the probate court of jurisdiction. Since the concurring justices believed that a proper consent requirement could be drafted by the legislature, they were unwilling to join in a holding that agency consent statutes were per se unconstitutional. The court was thus left unable to take the final step toward expressly declaring the agency consent section unconstitutional rather than merely "impermissible."

V. THE IMPLICATIONS OF Summers

The effect of Summers is the vitiation of the consent requirement as applied to child care agencies. It passes beyond the holding in Haun in that it does not require a finding of capricious, arbitrary, or unreasonable refusal in order to permit a probate court to proceed without the consent. The consent section, at least insofar as it concerns "certified agencies," thus becomes a repetition of the investigation section, which requires agencies having custody to file "next friend" reports approving or disapproving the proposed adoption on the basis of, among other things, the petitioners' suitability as adoptive parents and their ability to promote the welfare of the child. From the standpoint of statutory interpretation it might be said that the "purpose" section has been ruled superior to and controlling

83 OHIO REV. CODE ANN. § 3107.06(B) (Page 1972). See text accompanying note 33 supra.
89 OHIO REV. CODE ANN. § 3107.05 (Page 1972).
100 Id. Other factors to be considered under § 3107.05 are the petitioner's mental and physical health, emotional stability, and personal integrity, the child's mental and physical condition, his family background, and the circumstances of his placement away from his natural parents.
over the consent section, with the result that, if a court is "satisfied" that consent should have been given under the consent section, it can proceed as if it had been given.

The most striking consequence of the *Summers* decision is the change it makes in the position of child-care agencies in Ohio. Before *Summers*, and its precursor, *Haun*, there was no reason to believe that such agencies were not fully *in loco parentis*. As such, they exerted as much influence on the adoption process as natural parents under the rule laid down in *Ramsey*. At least arguably, the power of such agencies was even greater, since while the statute specified situations in which the consent of natural parents could be dispensed with, it provided no analogue for the consent of agencies. In *Summers*, however, the consent of natural parents was expressly distinguished from that of agencies, and the strict rule in *Ramsey* was retained, at least for the moment, as regards natural parents. Ohio has thus joined the modern trend in judicial reasoning which views children's agencies not as substitute parents, but rather as mere agents under the *parens patriae* power of the state, and as such, subject to supervision and review by the courts charged with the well-being of minors.

The reduction in the power of child-care agencies was necessary to redress the balance between adoption petitioners and agencies, but the handling of the matter in *Summers* raises the fear that the balance may have been tipped too far. The value of professional investigative and evaluative organizations in successful and beneficial placements and adoptions has long been recognized, and courts have frequently held that great weight should be attached to their recommendations.

The reasons for this reliance are fairly simple. Judges generally lack the time, staff, and often the educational background necessary for effective investigations of the sort necessary in child placement cases. Thus they find it simpler and are in fact often required, as in Ohio, to solicit the recommendations of competent professionals, who will be able, hopefully, to impartially advise the court as to what action will be in the best interest of the child.

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164 Ohio St. 567, 132 N.E.2d 469 (1956).
165 Ohio Rev. Code Ann. § 3107.06(B) (Page 1972).
166 Grossman, supra note 97, at 343.
167 Lukas, Babies are Neither Vendible nor Expendable, 5 Record of N.Y.C.B.A. 88, 103 (1950). See also Katz, note 28 supra.
The potential danger created by the *Summers* decision lies in the fact that while loosening the grip of agencies on the adoption process, it made no attempt to remind the courts of the value of those agencies' expertise in predicting the likelihood of success of particular placements. This may lead some courts to conclude that they are at liberty to ignore professional recommendations and to operate strictly on the basis of their own personal beliefs about the child's best interests.108

This omission by the court is at least partially redeemed by its attempt to provide courts with guidelines in determining the best interests of the child. These guidelines, which include opportunities for the child to be

\[ \ldots \text{physically and emotionally secure; to become economically independent; to secure an education and develop skills; to respect people of different races, religions, and national, social, and economic backgrounds; to become socially responsible and honorable, and to have a sense of family loyalty}^{109} \]

serve both to limit the scope of possible judicial caprice in adoption and to help fill in the otherwise vague statutory framework of the "best interests of the child."110

A further noteworthy and potentially beneficial element of the *Summers* decision is its handling, or rather its non-handling, of the interracial aspect of the case. Its stress on the preferability of adoption over long-term institutionalization or shuttling among foster

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108 Two rather disturbing examples of results wrought by courts when left to decide for themselves the "best interests of the child" are discussed in Katz, *supra* note 28. See also Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152 (1966) (see note 18 *supra*); and People ex rel. Scarpetta v. Spence-Chapin Adoption Service, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S. 65 (1971), discussed in Foster, *Adoption and Child Custody: Best Interests of the Child?*, 22 BUFFALO L.REV. 1 (1973), and Comment, *The Adoption of Baby Lenore: Two Interpretations of a Child's Best Interests*, 11 J. FAM. L. 285. In Scarpetta, an unwed mother insisted on offering her child for adoption, and executed a formal surrender shortly after its birth. The infant was promptly placed with adoptive parents. One month later, the mother changed her mind and sought a writ of habeas corpus to recover the child. The New York courts granted the writ on the theory that the mother had a superior natural right to the child, notwithstanding her surrender of it. The adoptive parents fled with the child to Florida. The mother followed and attempted to enforce her habeas corpus writ through a full faith and credit claim. Florida's courts refused to honor the writ, holding that by her voluntary surrender the mother had irrevocably severed her ties with the child. Both states' courts purported to base their holdings on the "best interests of the child," but in neither case did they ever expressly consider what the child's best interests might require.

109 38 Ohio St. 2d at 152, 311 N.E.2d at 12 n.8, citing 64 Mich. L.REV. 756, 763 (1966).

110 A very rough outline of the factors to be considered may be found in *Ohio Rev. Code Ann.* § 3107.05 (Page 1972), which outlines the subjects to be covered in the next friend's report. *See* note 101 *supra*. 
homes, and its citation to the Grossman article (which recommended easing agency and judicial restrictions on interracial adoption to lessen the backlog of unplaced, institutionalized black children) are a clear affirmance of In re Baker, which held that, while it may be important to match petitioners and children on cultural and racial bases, the crucial consideration is that of finding a good home for the child.

The concurrence of Justice Herbert points up a final factor to be considered in adoption cases—that of the effect on the child of repeated transfers from one home to another. There is evidence that such transfers are emotionally and psychologically crippling, and that the damaging effects on the child increase with advancing age and repetition of transfers. The effect of this "upheaval factor" is an increasing unwillingness or inability of the child to develop emotional relationships or attachments to foster parents, as well as to other people generally. This matter was raised by the welfare department in the trial court as a reason for its refusal to consent, and became something of an issue because of the time involved in the appellate process. With the increased power of the probate court to override refusals of consent under the Summers decision, this should not present as great a problem in the future.

VI. CONCLUSION

Although it can be argued that unnecessary violence was done to the language of the Ohio consent statute, the decision reached in Summers represents a necessary corrective to the power and control which child-care agencies had gained over the adoption process as a result of their rapid growth since the adoption statutes were enacted. Its strength is also its weakness, however, in that it may lead courts to ignore the valuable professional advice such agencies have

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111 38 Ohio St. 2d at 154, 311 N.E.2d at 13.
112 Id. at 146, 311 N.E.2d at 8 n.3.
116 In the hands of agencies, the "upheaval factor" could take on the character of a self-fulfilling prophecy, since the agency has the power to move children from home to home.
117 For discussions of the "upheaval" problem, see the articles cited 38 Ohio St. 2d at 147, 311 N.E.2d at 9 n.6. See also Foster, note 108 supra, at 12-13. For a new approach to the whole concept of psychological parenthood, see In re P, 114 N.J. Super. 584, 277 A.2d 566 (App. Div. 1971).
118 120 LAWS OF OHIO 434 (1943).
to offer and to pursue their own, sometimes unjustifiable, views of the best interests of the child.

The possibility of such abuse is at least partially mitigated by the guidelines set out by the court as constituting those "best interests." The court's attitude as to interracial adoption is also commendable, in light of the ongoing problem of finding adoptive homes for black children. Its notice of the "upheaval factor" is also a welcome recognition of a problem too often ignored by courts. But perhaps most importantly, Summers has opened a new line of attack on obsolete and ill-considered agency consent requirements in adoption cases.

Douglas E. Ebert

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119 The general absence of such guidelines from state adoption schemes has been greatly criticized. See, e.g., Katz, note 28 supra, at 170.