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Comment

TERMINATION OF PARENTAL RIGHTS: THE "PSYCHOLOGICAL PARENT" STANDARD

I. INTRODUCTION

Baby Jessica spent last Monday morning visiting her pediatrician and playing in the park with her parents. When they got home, around noon, her dad started packing her toys, her clothes and her Winnie the Pooh videos into the red van that had been sitting in their driveway. At 2 o'clock, the toddler's small world exploded. Jan and Roberta DeBoer tried through their tears to explain that they still loved her, that none of this was her fault. Then they shook with grief as the child was carried screaming from the house and placed in the van to leave them forever.1

Although moving, the story of Baby Jessica is not uncommon.2 Baby Jessica's story represents one of the many cases in recent years involving a

1. Geoffrey Cowley et al., Who's Looking After the Interests of Children?, Newsweek, Aug. 16, 1993, at 54. This scene signaled the end of a two year dispute between the DeBoers, Jessica's potential adoptive parents, and the Schmidts, Jessica's biological parents. A court had just held that while Jessica's best interests were furthered by allowing her to remain with the DeBoer's, her interests were not dispositive. In re B.G.C., 496 N.W.2d 239, 245-46 (Iowa 1992). For an in depth discussion of In re B.G.C., see infra notes 188-98 and accompanying text. This case can be contrasted with the recent decision in Twigg v. Mays, in which a Florida court noted that it "seldom will be in the children's best interests to wrench them away from their legal fathers and judicially declare that they now must regard strangers as their fathers." Twigg v. Mays, No. 88-4489-CA-01, 1993 WL 330624 (Fla. Cir. Ct. Aug. 18, 1993) (quoting Department of HRS v. Privette, 18 FLW S226 (Fla. Apr. 8, 1993)). Both cases raise issues regarding the rights of children and the scope of "family." Cowley, supra. For a discussion of Twigg see infra text accompanying notes 199-204.

2. See Jonathon Sidener, Adults in Tug of War over Toddler; Dad Fights Adoption by Ex-Lover's In-Law, ARIZ. REPUB., Oct. 11, 1993, at Al; John Wilkens, Birth Dad Loses Battle to Gain Son; Ruling Lets San Diego Family Retain Custody of Child, SAN DIEGO UNION-TRIB., Oct. 19, 1993, at Al. A similar custody dispute arose in San Diego, between prospective adoptive parents, John and Peggy Stienbeck, and biological parents, Mark King and Stephanie Harman, over a two-year old boy, Michael. Wilkens, supra, at Al. Harman and King were unmarried when Michael was conceived and gave him up for adoption. Id. The day after the birth, however, King filed a petition for custody. Id.

Another similar case has arisen in Arizona between a prospective adoptive mother, Cheryl Weyermiller, and biological parents, Jeff Rhodes and Mary Pat Tyler. Sidener, supra, at Al. Rhodes claims that Tyler only recently informed him that he is the father of a nineteen-month old son. Id. As a result, the consent to adoption may be invalid. Id.
court's decision to remove a child from the custody of "psychological parents" and return the child to biological parents.3 Courts have been struggling for years with the termination of parental rights in situations where the child is emotionally attached to a third party.4 While guidelines and standards have been developed to deal with these situations, the issue remains unresolved.5

The Baby Jessica case, In re B.G.C.,6 has received enormous press and media coverage.7 This attention stems in part from the widespread opinion that the outcome was cruel and unjust to Baby Jessica.8 The case has prompted many commentators to question the judicial system's predomin-

3. Lynn Smith, Rallying Cry for Adoptive Parents' Rights; Families: A Grass-Roots Committee Wants to Reform Adoption Laws to Avoid Another Baby Jessica Dispute. But Some Say Birth Parents Could Lose Out, L.A. TIMES, Oct. 20, 1993, at E1 [hereinafter Smith, Adoptive Parents' Rights] (recognizing existence of hundreds of other such custody cases). Through interaction, companionship, interplay and mutuality on a continuing day-to-day basis, a psychological parent is one who fulfills not only the child's physical needs, but also the child's psychological needs for a parent. In this Comment, "parent" refers to either or both types of parents.

4. For a discussion of these cases, see infra notes 110, 119, 136-37 and accompanying text. The termination of parental rights involves the complete severance of all legal bonds between the biological parent and child. Orman W. Ketcham & Richard F. Babcock, Jr., Statutory Standards for the Involuntary Termination of Parental Rights, 29 Rutgers L. Rev. 530, 531 (1976). "In the eyes of the law, a parent whose rights have been terminated becomes a stranger to the child, with no right to custody, visitation, or communication." Id. For a list of jurisdictions that have addressed the issue of terminating parental rights in situations where the child is emotionally attached to a third party, see infra notes 105, 114, 130.

5. For an analysis of the standards currently being applied in termination of parental rights cases, see infra notes 104-61 and accompanying text.

6. 496 N.W.2d 239 (Iowa 1992). B.G.C. represents the name "Baby Girl Clausen." "Clausen" is the biological mother's maiden name. Id.


rant stance on the rights of children. In particular, the controversy has sparked recognition of the problems with standards and guidelines currently applied by courts in deciding whether to terminate parental rights.

Defining the nature of this problem remains difficult because termination decisions encompass so many issues. For example, any solution must take into account the rights of parents, the rights of children and the limitations on state intervention into family life. In order to properly account for these factors, courts must necessarily determine their scope. Each factor alone, however, presents an independent issue subject to debate. Thus, it is easy to understand why the particular standards and guidelines courts employ in making termination decisions create tremendous controversy.

Cases such as In re B.G.C. involve legal battles between biological parents and psychological parents for the custody of minor children. Reso-


In addition, a national organization called the DeBoer Committee for Children's Rights is attempting to change laws so that the best interests of the child are considered in every custody case. Smith, Adoptive Parents' Rights, supra note 5, at E1.

10. For a discussion of the standards currently being applied in termination of parental rights cases, see infra notes 104-61 and accompanying text.

11. For a discussion of a proposed solution that takes all these rights into account, see infra notes 162-87.

12. For an analysis of the evolution of the right of parents, see infra text accompanying notes 24-58. For an analysis of the current status of children's rights, see infra notes 59-72 and accompanying text.


Custody disputes also arise when children in foster care become emotionally attached to their foster family and vice versa. See Paul v. Steele, 461 N.E.2d 983 (Ill.
Solution of these cases depends largely on the weight a court accords to the respective rights and interests of the parties involved. The interests of the biological parents and the psychological parents, however, are not the only interests implicated. Courts and parties to the dispute often forget that the child being fought over also has interests deserving protection. In addition, the particular weight given to each of the interests remains outside objective measurement because such determination rests within the discretion of the court. For these two reasons, the outcome of termination cases across the country has produced inconsistency and uncertainty in the law.

The dilemma in third-party custody disputes results from the fact that children's rights are often neither recognized nor respected. First, this Comment analyzes the evolution of the law with respect to both parental rights and the rights of children. Second, this Comment addresses the status of the law with respect to the definition of "family" in light of the psychological parent concept. Third, this Comment discusses the cur-

14. For a listing of jurisdictions and the emphases they place on these respective interests, see infra notes 110, 118, 136-37 and accompanying text. 
15. For a discussion of the interests of the child, see infra notes 162-84 and accompanying text.
17. For a discussion of the different outcomes in termination cases, see infra notes 104-61 and accompanying text.

Historically, rights in society have been ascribed only to adults. Children have been treated paternally; their conduct has been controlled by parents or others in authority. Such control has been justified, in the paternalist view, by the need to protect children from themselves and others. It is argued that children cannot be responsible for their own welfare because by their nature they lack an adequate conception of their own present and future interests. They are said to want instant gratification and to be incapable of fully rational decisions.

Well-intentioned though this view may be, its implicit claim that adults do have an adequate conception of children’s interest, and that they are always willing to act upon this conception, is open to serious question. In fact, parents often do not know what is best for their children, and children often can make sensible decisions for themselves about their own lives. In addition, the parents, however wise, may have interests and preferences which do not coincide with those of the child. Id. (citations omitted).
19. For an analysis of the evolution of parental rights and the rights of children, see infra text accompanying notes 24-72.
20. For a discussion of the liberty interest in the maintenance of a "family," see infra text accompanying notes 73-103.
rent judicial standards that are applied and why they remain deficient.\textsuperscript{21} Fourth, this Comment proposes a solution and analyzes the proposed solution with respect to two recent controversial cases.\textsuperscript{22} Finally, this Comment suggests that the proposed solution alone recognizes all of the liberty interests at stake.\textsuperscript{25}

II. Analy

A. Development of Parental Rights and Rights of Children

At English common law, children were perceived as economic assets.\textsuperscript{24} A father had a legal right to the custody of his child.\textsuperscript{25} This principle emerged from the historical view of children as chattel.\textsuperscript{26} Even as recently as eighteenth century America, "[c]hildren were regarded as chattels of the family . . . ."\textsuperscript{27}

This harsh view of children as property paved the way for the doctrine of \textit{parens patriae}.\textsuperscript{28} This doctrine was derived from the English Chancery Courts' guardianship over infants, idiots and lunatics.\textsuperscript{29} This guardianship

\textsuperscript{21} For the current standards being applied in termination of parental rights cases, see infra text accompanying notes 104-61.

\textsuperscript{22} For a discussion of the proposed solution in light of several present controversial cases, see infra notes 162-204 and accompanying text.

\textsuperscript{23} For a discussion and analysis of the proposed solution, see infra text accompanying notes 205-06.

\textsuperscript{24} \textit{Henry H. Foster, Jr., A "Bill of Rights" For Children} 4 & n.6 (1974). In 10th century England, a parent retained the power to kill an unweaned child or sell a child under the age of seven into slavery. Lucy S. McGough & Lawrence M. Shindell, \textit{Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes}, 27 \textit{Emory L.J.} 209, 209 (1978). While murder of children was prohibited by the 17th century, society still lacked power to intervene into the parent-child relationship. \textit{Id.} at 209-10. Parents were not even required to provide their children with necessities. \textit{Id.} at 210.


\textsuperscript{26} See, e.g., Campbell v. Wright, 62 P. 613, 614 (Cal. 1900) (noting father's right to custody of child is property right); Kennedy v. Meara, 56 S.E. 243, 247 (Ga. 1906) (recognizing parent has property right in child, entitling parent to due process protection); see also Lynn M. Akre, \textit{Struggling With Indeterminacy: A Call for Interdisciplinary Collaboration in Redefining the "Best Interest of the Child" Standard}, 75 \textit{Marq. L. Rev.} 628, 634 (1992) (discussing historical development of child custody).


\textsuperscript{28} \textit{Id.} \textit{Parens patriae} power grants courts the authority and duty to remove a child from the custody of its parents where the child has suffered physical detriment such as abuse or neglect. McGough & Shindell, \textit{supra} note 24, at 211. For a history of the doctrine of \textit{parens patriae}, see Lawrence B. Custer, \textit{The Origins of the Doctrine of Parens Patriae}, 27 \textit{Emory L.J.} 195 (1978).

ship was initially exercised to ensure that feudal duties were transferred to
the minor after the minor's parents died.\textsuperscript{30} It gradually evolved, however,
into an exercise of state power in private custody cases.\textsuperscript{31} This power al-
lowed state intervention into decisions traditionally made by the parent,
when the state determined it necessary for the child's welfare.\textsuperscript{32}

American courts applied \textit{parens patriae} power in both private and pub-
lic custody disputes.\textsuperscript{33} Traditionally, the power was invoked to protect
children from their parents in cases of abuse and neglect.\textsuperscript{34} Courts apply-
ing the doctrine in private custody disputes held that parental unfitness
was required before termination of parental rights could occur.\textsuperscript{35} The re-
quirement of unfitness, however, was based on the belief that the state's
interests were served because the biological parent best fostered the
child's welfare, rather than on the belief that a parent's right to their child
was absolute.\textsuperscript{36}

The power of \textit{parens patriae} evolved as the Industrial Revolution
brought about a new awareness of children.\textsuperscript{37} Advances in nutrition,

\begin{itemize}
\item 30. \textit{Id.} at 1222. When a knight died leaving minor children, the lord of the
manor was entitled to all the profits of the deceased knight's land while the chil-
dren remained minors. Custer, \textit{supra} note 28, at 199. During their minority, these
children were referred to as "wards." \textit{Id.} When the wards reached majority, how-
ever, the lord was required to transfer the land to them. \textit{Id.}
\item 31. \textit{Id.} Initially, the English Chancery Courts only exercised the \textit{parens patriae}
power on behalf of the state ward and not on behalf of others. \textit{Id.} The Chancery
Court extended the power to exceptional private custody cases by the early 19th
century on the premise that all young children required the state's beneficent pro-
tection, not just the propertied wards. \textit{Id.} These courts claimed equity jurisdic-
tion in protecting children from immoral and heretical parents. \textit{Id.}
\item 32. Akre, \textit{supra} note 26, at 635.
\item 33. \textit{Developments, supra} note 29, at 1222. Private custody disputes involved the
equity courts' employment of \textit{parens patriae} authority delegated by the legisla-
tures. \textit{Id.} The opinions of 19th century American courts of equity indicate that \textit{parens patriae}
power to terminate the legal custody rights of a natural parent was limited
to situations where: (1) the child was competent to choose between the parties to
the custody dispute; and (2) there was an affirmative showing of parental unfit-
ness. \textit{Id.} at 1223.
\item Conversely, use of \textit{parens patriae} authority in public custody disputes distorted
the power by expanding it to uphold statutes providing for state intervention into
the family. \textit{Id.} at 1224. In this context, the power was used to uphold child neglect
and delinquency statutes. \textit{Id.}
\item 34. \textit{Id.} at 1221.
\item 35. \textit{Id.} at 1223.
\item 36. \textit{Id.} An opinion by Judge Story written in 1824 clearly reflects this view.
As to the question of the right of the father to have the custody of his
infant child, in a general sense it is true. But this is not on account of any
absolute right of the father, but for the benefit of the infant, the law
presuming it to be for his interest to be under the nurture and care of his
natural protector, both for maintenance and education.
\textit{Id.} at 1223 n.160.
723-24 (1976). In medieval times, upon reaching the age of seven or eight, the
child left home to begin work in the fields or shops. \textit{Id.} at 723. Thus, the Indus-
trial Revolution brought about dramatic changes in institutions, technology and
\end{itemize}
disease prevention, and medicine extended the average life span of a child. Consequently, the length of a child's relationship with the parent increased and parenthood developed an intrinsic "psychological meaning," thus the parent-child relationship evolved from a purely economic relationship to an emotional relationship. Nevertheless, use of parens patriae power has waned in recent decades. In its place, the notion of the child as an individual, whose rights should be recognized under the law, has emerged.

Today, children are no longer perceived as parental property. Thus, parents may not treat their children as such. Nevertheless, under the United States Constitution, parental rights have been deemed more fundamental than property rights. The United States Supreme Court has consistently recognized parental rights to children under the Fourteenth Amendment. Meyer v. Nebraska was the first explicit recognition of the customs permitting children to stay at home and spend more time with parents.

Id. at 725-24.

38. Id. at 724. Previously, the majority of children rarely lived to adolescence due to the proliferation of mysterious illnesses for which no cure existed. Id. at 723-24.

39. Id. at 724. Development of the "psychological parent-child relationship" resulted from the prolonged duration of the parent-child relationship. Id. Because children lived longer, parents could attach themselves emotionally to their children for sixteen to eighteen years instead of six to eight years. Id. The notion of family thus changed and parents came to view their children as their "replacements." Id. This view raised parents' hopes for immortality. Id. at 725. Accordingly, parents foresaw their children fulfilling the aspirations that they remained powerless to achieve. Id.

40. Ketcham & Babcock, supra note 4, at 534-35.

41. Id. at 535.


43. See Lehr v. Robertson, 463 U.S. 248, 258 (1983) (stating relationship of love and duty in family unit is liberty interest entitled to constitutional protection); Fantosky v. Kramer, 455 U.S. 745, 753 (1982) (recognizing fundamental liberty interests of parents in care, custody and management of child); Bellotti v. Baird, 443 U.S. 622, 638 (1979) (noting parental authority is consistent with notion of individual liberty); Parham v. J.R., 442 U.S. 584, 602 (1979) (stating parental right and duty to prepare children for obligations); Quillino v. Walcott, 434 U.S. 246, 255 (1978) (recognizing relationship between parent and child is constitutionally protected); Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 849 (1977) (recognizing right to raise children as essential); Planned Parenthood v. Danforth, 428 U.S. 52, 73 (1976) (recognizing parental discretion is protected); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (emphasizing importance of rights to raise children and family); May, 345 U.S. at 533 (stating right to raise children is far more precious than property right); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents."); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (noting right to raise children is basic civil right of man); Pierce v. Society of Sisters, 268 U.S. 510, 518 (1925) (suggesting right of parents to send children to
parental right to custody and control.45 In Meyer, the Supreme Court stated that parents have a right to "establish a home and bring up children."46 Pierce v. Society of Sisters,47 decided only two years after Meyer, reaffirmed the parental right to "direct the upbringing and education of the children under their control."48 In emphasizing parental rights over children, the Court stated that those who raise the children have the rights and duties to control the fates of those children.49 In both Meyer and Pierce, the Court classified the parental rights involved as "liberty" interests.50

The Court further interpreted parental rights over children in Prince v. Massachusetts.51 Prince involved a parent's right to give a child religious training.52 The Prince Court held "[i]t is cardinal . . . that the custody, schools is essence of personal liberty and freedom); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (holding right of individual to bring up children is liberty). The Fourteenth Amendment of the United States Constitution provides that "[n]o state . . . shall deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

44. 262 U.S. 390 (1923).

Meyer v. Nebraska involved a Fourteenth Amendment challenge to a Nebraska statute that prohibited the teaching of foreign languages to children not yet in eighth grade, in parochial or public schools. 262 U.S. 390, 397 (1923). A teacher was charged under the statute with unlawfully teaching a student the subject of reading in the German language. Id. at 396. The Supreme Court of Nebraska held the statute came within the state's police powers because its purpose ensured that the English language become the "mother tongue" of all the children reared in the state. Id. at 398. The United States Supreme Court reversed and held that the liberty to bring up one's children "may not be interfered with, under the guise of protecting the public interest." Id. at 400. The Nebraska statute was based on the fear that "[t]o allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to . . . educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country." Id. at 398. Quite clearly, the law was born of the anti-German bias of the war years. Woodhouse, supra, at 1004. In fact, sixteen other states besides Nebraska had similar language laws. Id.

46. Meyer, 262 U.S. at 399.
47. 268 U.S. 510 (1925).
48. Id. at 534-35. Pierce involved the challenge to a statute known as the Compulsory Education Act. Id. at 530. The Act required all parents and/or guardians to send children between the ages of eight and sixteen to public schools. Id. This statute stemmed from "anti-Catholic and anti-foreign prejudice and the conviction that private and parochial schools were breeding grounds of Bolshevism." Woodhouse, supra note 45, at 1018.
49. Pierce, 268 U.S. at 535.
50. See Pierce, 268 U.S. at 534-35 (holding act in question unreasonably interfered with liberty of parents to raise children); Meyer, 262 U.S. at 400 (stating liberty may not be interfered with, under guise of protecting public interest).
52. Id. at 164. The appellant in Prince appealed from a conviction for violating Massachusetts' child labor laws proscribing children under the age of 18 from
care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.\(^{58}\)

Perhaps the most zealous affirmation of parental rights was articulated in Stanley v. Illinois.\(^{54}\) The Stanley Court further clarified the scope of parental rights by holding that a parent has a constitutional right to a hearing determining "fitness" before such a negative determination can be made and before a child may be taken from the custody of a parent.\(^{55}\)

In Parham v. J.R.,\(^{56}\) parental rights were further extended to allow a parent to commit a minor child to a state mental hospital without a hearing.\(^{57}\) While conceding that children have important interests at stake in these situations, the Court, nevertheless, limited such rights by applying

selling any newspapers, magazines or other merchandise in the streets. \(^{Id.}\) at 160-61. Appellant was a Jehovah's Witness and the legal custodian of her nine year old niece. \(^{Id.}\) at 161. As such, the nine year old was accustomed to preaching and distributing certain pamphlets to persons on the streets. \(^{Id.}\) at 161-62. On the evening of her arrest, appellant allowed her niece to help her preach and distribute these materials after the girl had asked appellant if she could go with her. \(^{Id.}\) at 162. When questioned by a school attendance officer, appellant admitted she had supplied the girl with the materials and said, "neither you nor anybody else can stop me . . . This child is exercising her God-given right and her constitutional right to preach the gospel, and no creature has a right to interfere with God's commands." \(^{Id.}\)

Appellant challenged the statute on two grounds—freedom of religion under the First Amendment and parental rights under the Fourteenth Amendment. \(^{Id.}\) at 164. In deciding the case in favor of the appellant, the Court recognized the right of children to exercise their religion and the right of parents to encourage their children to practice religious beliefs. \(^{Id.}\) at 165.

\(^{53}\) \(^{Id.}\) at 166. The Court emphasized, however, that the rights to care and custody may be limited in order to protect the child's well-being. \(^{Id.}\)

\(^{54}\) 405 U.S. 645 (1972). Stanley involved a statute which provided that illegitimate children became wards of the state upon the death of their mother. \(^{Id.}\) at 646. The statute was premised on a determination that unwed fathers were presumptively unfit. \(^{Id.}\) at 650. In analyzing the constitutionality of this presumption, the Court reiterated the magnitude of the parent's interest in a child, and held the law has never "refused to recognize those family relationships unlegitimatized by a marriage ceremony." \(^{Id.}\) at 651.

\(^{55}\) \(^{Id.}\) at 658.

\(^{56}\) 442 U.S. 584 (1979).

\(^{57}\) See \(^{Id.}\). Parham involved a challenge to a Georgia statute that allowed a parent to commit a child to a state mental hospital. \(^{Id.}\) at 591. The requirements included the parent or guardian's application and an observation by the superintendent of the hospital to determine whether any evidence of mental illness existed. \(^{Id.}\)

The appellees were two children who had been committed to a state mental hospital by their respective parents. \(^{Id.}\) at 589-90. They argued that a liberty interest arose in not being unnecessarily admitted to a mental hospital and that this interest outweighed the traditional rights of parents. \(^{Id.}\) at 602. Nevertheless, the Court respectively held the statute was constitutional and refused to subordinate the rights of the parents to raise their child to the rights of the child. \(^{Id.}\) at 602, 620. The Court, however, qualified this conclusion by stating that the child's rights and the nature of the decision to commit combine to prevent parents from exercising absolute and unreviewable discretion in such circumstances. \(^{Id.}\) at 604.
the presumption that parents generally act in the best interests of their children.\footnote{58}

Although the scope of parental rights in decisions regarding the upbringing of children remains broad, parents do not have absolute rights.\footnote{59} Children have also been accorded constitutional protection, although not in an amount comparable to that accorded adults.\footnote{60} The United States Supreme Court first extended this protection to children through In re Gault.\footnote{61} The Gault Court explicitly held that the rights articulated in the Fourteenth Amendment and the Bill of Rights equally apply to children as well as adults.\footnote{62} The Court, consequently, emphasized that minors are entitled to the “essentials of due process and fair treatment.”\footnote{63} The Supreme Court has continued to broaden the scope of children’s rights with decisions upholding a minor’s rights to free speech, privacy, protection against double jeopardy and a “beyond a reasonable doubt” standard in juvenile delinquency proceedings.\footnote{64}

\footnote{58} Id. at 602-04. “[H]istorically it has [been] recognized that natural bonds of affection lead parents to act in the best interests of their children.” Id. at 602 (citing 1 W. BLACKSTONE, COMMENTARIES 447 (Henry W. Ballantine ed., 1915)).

\footnote{59} See Parham, 442 U.S. at 604 (stating parents do not have absolute and unreviewable discretion in deciding whether to institutionalize a child); Stanley, 405 U.S. at 652 (recognizing state’s power to separate child from parent in cases of neglect or abuse); Prince v. Massachusetts, 321 U.S. 158, 170 (1943) (“Parents may be free to become martyrs themselves[,] [b]ut it does not follow they are free, in identical circumstances, to make martyrs of their children . . . .”)


\footnote{61} 387 U.S. 1 (1967). The minor of In re Gault was arrested for making obscene phone calls. Id. at 4. No notice of the charges or of the minor’s right to counsel was given to the minor’s parents. Id. at 5. In addition, no sworn testimony was taken by the complainant, nor did the complainant appear at the juvenile hearing. Id. The Court held the minor was entitled to notice of the charges filed against him, notice of his right to counsel, and the sworn testimony of the complainant subject to cross-examination. Id. at 33-34, 41, 57.

\footnote{62} Id. at 13.

\footnote{63} Id. at 30.

Later, the Supreme Court, in *Bellotti v. Baird*, reaffirmed a minor’s right to privacy. The Court held unconstitutional a Massachusetts statute requiring minors to obtain parental consent in order to have an abortion. Nevertheless, although minors have now secured the right to decide to have an abortion without parental consent, parental notification of this decision may still be required.

Over time, children have made significant advances in the fight for recognition of their rights. Nonetheless, children still have not been afforded all the constitutional rights secured by adults. Some courts still have not recognized that the child, as well as the parent, has an interest in the parent-child relationship. Three notable justifications have been asserted for withholding the full rights of children. These reasons include: first, "the peculiar vulnerability of children, [second,] their inability to make critical decisions in an informed, mature manner and [third,] the importance of the parental role in child rearing." It is precisely for these reasons, however, that children should be provided special protection.

In addition to the right to be free from physical abuse and neglect, one such special protection that should be afforded to children includes the right to psychological well-being. The child’s right to psychological

66. Id. at 651. The statute failed to pass constitutional muster for two reasons. First, the legislation arbitrarily denied a mature and fully competent minor the ability to decide to terminate her pregnancy. Id. Second, the statute required parental notification without allowing a minor a judicial determination as to her maturity in making the abortion decision alone, or alternatively, as to whether an abortion was in her best interest. Id.
67. H.L. v. Matheson, 450 U.S. 398 (1981). The Matheson Court upheld a statute requiring minors to notify parents before they could obtain an abortion. Id. at 409-10. This case signaled the reluctance of the Court to further expand children’s rights. See id. at 410 (observing society’s basic structure recognizes parental right to raise child in deciding that parental notice requirement does not violate rights of minor).
68. See Ware v. Estes, 409 U.S. 1027 (1972) (declining to review lower court decision upholding school system’s right to use corporal punishment); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (plurality) (denying minor’s right to jury trial in juvenile court); Foster, supra note 24, at 5 ("Legal processes and doctrines which are applied to children do not always square with the egalitarian principles and constitutional protection accorded to adult criminals even though the former may have had a greater need for protection."); Michael J. Dale, *The Supreme Court and the Minimization of Children’s Constitutional Rights: Implications for the Juvenile Justice System*, 13 Hamline J. Pub. L. & Pol’y 199 (1992); see also Hillary Rodham, *Children Under the Law, in The Rights of Children* 1 (Harvard Educational Review, ser. no. 9, 1974) (advocating extension of adult rights to children and seeking legal recognition of children’s special needs and interests).
69. For a discussion of the Michigan Supreme Court’s rejection of the argument that children too have a liberty interest in preserving their family, see infra note 197.
71. See *Goldstein*, supra note 13 (advocating use of psychological parent standard in child custody cases). Children have a moral right and should have a legal right: (1) to be regarded as persons within the family, at school and before the
well-being, however, currently remains unrecognized as a significant interest of the child deserving protection in custody disputes.  

B. "Family" Is Not Based Solely on Biology

Recent judicial decisions have discussed the implications of custody disputes between biological parents and "psychological parents." A psychological parent fulfills not only the child's physical needs, but also the child's psychological needs through continuing interaction, companionship, interplay and emotional mutuality on a day-to-day basis. Psychological parent-child relationships can occur when a child is placed in foster care or in the home of a relative or a close friend "temporarily" by a biological parent, or when a child is awaiting a final decree of adoption while living with potential adoptive parents. A psychological parent can be either a biological parent or any other caring adult. An absent or inat-

law; (2) to receive parental love and affection, discipline and guidance, and to grow to maturity in home environments that enable them to develop into mature and responsible adults; (3) to be supported, maintained and educated to the best of parental ability, in return for which they have the moral duty to honor their mothers and fathers; (4) to receive fair treatment from all in authority and to be heard and listened to; (5) to earn and keep their own earnings, and to be emancipated from the parent-child relationship when that relationship has broken down and they have left home due to abuse, neglect, serious family conflict or other sufficient cause, and when their best interests would be served by termination of parental authority; (6) to be free of legal disabilities or incapacities save where such are convincingly shown to be necessary and protective of their actual best interests; (7) to seek and obtain medical care, treatment and counseling; and (8) to receive special care, consideration and protection in the administration of law and justice so that their best interests always are a paramount factor. Foster, supra note 24, at xv.

72. For a discussion of the protection given a child's right to psychological well-being in custody disputes, see infra notes 104-61 and accompanying text.

73. See In re B.G.C., 496 N.W.2d 239, 240-41 (1992) (involving dispute between biological parents and potential adoptive parents). For an analysis of In re B.G.C., see infra text accompanying notes 188-98. See also In re Anthony D., 1993 WL 399349, at *9 (Conn. Super. Ct. June 30, 1993) (involving custody dispute between biological parent and foster parents); Twigg v. Mays, No. 88-4489-CA-01, 1993 WL 330624, at *3 (Fla. Cir. Ct. Aug. 18, 1993) (involving custody dispute between biological parents and man who raised child since birth); Monroe v. Monroe, 621 A.2d 898, 906-07 & n.9 (Md. 1993) (involving custody dispute between biological mother and man who originally was believed to be biological father, but was not); Doe v. Mitchell, 244 N.W.2d 827, 843 (Mich. 1976) (recognizing that psychological parent-child relationship may be more important than biological parent-child relationship), overruled by Bowie v. Arder, 490 N.W.2d 568 (Mich. 1992); Branson v. Branson, 411 N.W.2d 395, 401 (N.D. 1987) (Levine, J., concurring and dissenting) (recognizing importance of bonding that exists between children and psychological parents); In re Stell, 783 P.2d 615, 622 (Wash. Ct. App. 1989) (declining to reject psychological parent theory); Snyder v. Scheerer, 446 S.E.2d 299, 301 (W. Va. 1993) (recognizing that nonparent with whom child resides for long time becomes psychological parent).

74. Goldstein, supra note 15, at 98.

75. Id. at 22, 29, 27.

76. Id. at 19.
tentative adult may not be a psychological parent, however, even if the adult is a biological parent.\textsuperscript{77}

The Supreme Court has not directly addressed the issue of the rights of the parties in custody disputes between biological parents and psychological parents.\textsuperscript{78} Nevertheless, the Court has recognized that constitutional rights are not accorded to parents merely because of the biological factor, but because of the emotional relationship between the child and the adult.\textsuperscript{79}

*Smith v. Organization of Foster Families for Equality and Reform*\textsuperscript{80} concerned a class action by foster parents challenging the constitutionality of procedures for removing foster children from foster homes.\textsuperscript{81} In its analysis, the Court acknowledged that the existence of a family is not necessarily dependent upon biological relationships.\textsuperscript{82} Further, the Court maintained that the significance of the family "stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children," in addition to the blood relationship.\textsuperscript{83} This language fully comports with the concept of "psychological relationships."\textsuperscript{84}

The significance of biological relationships has also arisen in the context of the rights of unwed fathers.\textsuperscript{85} In *Quilloin v. Walcott*,\textsuperscript{86} the Court was

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item See *In re Doe*, 627 N.E.2d 648, 662 (Ill. App. Ct. 1993), rev'd 638 N.E. 2d (Ill.), *cert. denied sub nom.* Baby Richard v. Kirchner, 115 S. Ct. 499, *and cert. denied sub nom.* Doe v. Kirchner, 115 S. Ct. 499 (1994); (Tully, P.J., dissenting) (citing *Carey v. Population Service International*, 431 U.S. 678 (1977), for proposition that although Supreme Court has not directly addressed third-party custody disputes, Court has extended right of privacy to include contraception, because all persons, married or unmarried, maintain "a fundamental right to bear and beget a child"); see also *Parham v. J.R.*, 442 U.S. 584 (1979) (according great deference to parent-child relationship).
\item For an analysis of how the emotional relationship between parents and children affects the constitutional rights of parents, see *infra* text accompanying notes 80-105.
\item 431 U.S. 816 (1977).
\item Id. at 818-20. The action in *Smith* arose when children were removed from their foster families without a hearing on the removal. *Id.* The appellee foster parents in *Smith* contended that when a child lives in a foster home for over a year, psychological ties develop between children and foster parents creating a "psychological family." *Id.* at 839. As a "family," appellees argued they had a liberty interest in protecting that family. *Id.* Thus, appellees suggested that a foster child cannot be removed from the family unless due process is satisfied. *Id.* The Court held that even if the foster families had a liberty interest in the survival of the family, the procedures satisfied the constitutional requirements of due process. *Id.* at 856.
\item Id. at 843.
\item Id. at 844 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972)).
\item For the definition of a psychological parent, see *supra* text accompanying notes 74-77.
\item For an analysis of the issue of biological relationships in the context of unwed father cases, see *infra* text accompanying notes 86-101.
\end{enumerate}
\end{footnotesize}
confronted with an issue similar to that raised in Stanley. Quilloin involved an unwed father who sought to contest the adoption of his biological child. In holding in favor of the adoptive father, the Court refused to provide the unwed father with the traditional constitutional protection given to biological parents on the ground that he had never had nor sought actual or legal custody of his child. Moreover, the Court did so without an adjudication as to "unfitness." The Court stated the adoption would "give full recognition to a family unit already in existence." Quilloin indicates that the Court does not intend to accord biological parents absolute rights to their biological children. The explicit recognition by the Quilloin Court of existing families may pertain to situations in which the child has formed a psychological parent-child relationship other than with biological parents.

In Lehr v. Robertson, the Court was again faced with determining the rights of an unwed father. The Court recognized that the liberty interest

86. 434 U.S. 246 (1978).
88. Quilloin, 434 U.S. at 247. The mother of the child and appellant never married or established a home with each other. Id. Three years after the birth of the child, the mother remarried. Id. She consented to the adoption of the child by her new husband. Id. Over appellant's objections, the trial court granted the adoption absent a finding of unfitness. Id.
89. Id. at 255.
90. See id.
91. Id.
92. See id. at 255 ("[T]he result of the adoption in this case is to give full recognition to a family unit already in existence 

93. 463 U.S. 248 (1983). Appellant was the father of a child born on November 9, 1976. Id. at 250. Appellant and the mother of the child did not marry. Id. at 249. The mother, however, married another man eight months after the birth of the child. Id. at 250. When the child was approximately two years old, the mother and her husband filed a petition to adopt the child in the Family Court of Ulster County, New York. Id. Thereafter, the Ulster County Court entered an order of adoption. Id. Prior to the adoption order, appellant had neither visited nor provided financial support for the child. Id. at 252.

Appellant, however, claimed that the adoption was invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment because he was given neither advance notice of the adoption, nor an opportunity to be heard before the adoption was granted. Id. The Court noted that under New York law, before entering an adoption order for children born out of wedlock, notice must be given to several classes of possible fathers of those children. Id. at 251. Notice must be given to fathers registered in New York's "putative father registry," identified as: the father of the child on the child's birth certificate, the man living openly with the child and the child's mother and holding themselves out to be the father of the child, the man named the father by the mother in a sworn statement and married to the mother before the child was six months old. Id. at 250-51. Appellant did not fall into any of the above classes. Id. at 251-52. Appellant contended, however, that he was still entitled to notice and a hearing because he had filed a petition for visitation and paternity in the Westchester County Family Court, of which the Ulster County Court judge had knowledge, before appellant had knowledge of the adoption proceeding. Id. at 252-53. Appellant claimed he was
at stake in cases involving the constitutional rights of biological parents consists of the "relationship of love and duty in a recognized family unit." This interpretation of "liberty interest" compelled the Court to decline constitutional protection to a biological father who had never supported and rarely seen his daughter since birth. Significantly, the Court held that "the mere existence of a biological link does not merit equivalent constitutional protection." In its analysis, the Court emphasized that family results from emotional attachments and not necessarily from blood relations.

Both the Quilloin and Lehr Courts decided custody in favor of the potential adoptive father over the biological father. This trend signifies that the argument supporting recognition of a child's right to a psychological parent-child relationship merits consideration. Further, Stanley is not inconsistent with this proposition as the father's interests in Stanley were weighed against those of the state, and not those of a third party claiming a psychological parent-child relationship. In fact, the Stanley decision can be readily reconciled with the Supreme Court's recognition of a child's right to a psychological parent-child relationship. In Stanley, the Court found in favor of a father who already enjoyed a psychological parent-child relationship with his children. Thus, a liberty interest in "familial" bonds, including those between children and psychological parents, exists and deserves legal recognition.

entitled to due process on the grounds that a putative father's actual or potential relationship with his child constitutes a liberty interest under the Fourteenth Amendment. Id. at 255.

94. Id. at 258.
95. Id. at 261.
96. Id.
97. Id. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children ... as well as from the fact of blood relationship." Id. (quoting Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977) (quoting Wisconsin v. Yoder, 406 U.S. 205, 291-33 (1972))).
98. For a discussion of the Quilloin and Lehr decisions, see supra notes 86-97 and accompanying text.
100. Stanley, 405 U.S. at 666 (Burger, C.J., dissenting) ("[Stanley] ... loved, cared for, and supported these children from the time of their birth until the death of their mother.")
101. See Lehr, 463 U.S. at 261 (recognizing liberty interest in family relationships stems from emotional attachments and not necessarily genetic bonds); Quilloin v. Walcott, 434 U.S. 246, 255 (1977) (recognizing liberty interest in maintaining family unit where father of family was not biological father, but rather psychological father); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) ("[F]reedom of personal choice in matters of ... family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.").
Although an analysis of the foregoing decisions suggests that "family" is not based solely on biology, nonetheless, the standards currently applied by courts in deciding to terminate parental rights do not reflect this conclusion.\(^\text{102}\) Hence, the failure to incorporate the correct notion of "family" into current judicial standards contributes to the seeming injustice of decisions in termination proceedings.\(^\text{103}\)

C. Current Standards Employed in Termination of Parental Rights Cases

The legal standard courts apply in parental termination cases range from the strict "parental rights" standard at one extreme to the "best interests of the child" standard at the other.\(^\text{104}\) Although courts often claim to utilize one standard or the other, most courts actually employ a balancing test.\(^\text{105}\) Because no two courts apply exactly the same standard, inconsistency and uncertainty in the law linger.\(^\text{106}\) Consequently, parents involved in custody disputes lack adequate guidance in decision-making.

1. The "Parental Rights" Standard

The parental rights standard focuses on the "inherent and retained rights involved in family relationships."\(^\text{107}\) This standard is derived from

\(^{102}\) For an analysis of the various standards currently being applied in termination of parental rights cases, see infra notes 104-61 and accompanying text.

\(^{103}\) See, e.g., In re B.G.C., 496 N.W.2d 239, 246 (Iowa 1992) (holding child who lived for two and one half years with potential adoptive parents must be returned to biological parents on grounds that biological parents had constitutional right to raise child). For a discussion of the B.G.C. case, see infra notes 188-98 and accompanying text.

\(^{104}\) For a description of the standards employed by various jurisdictions, see infra notes 106-61 and accompanying text.


In an effort to maintain consistency, the classifications in this Comment reflect the most recent or most cited decisions from the highest courts in each state.

\(^{106}\) This conclusion reflects the author's opinion after thoroughly researching the standards applied by courts in almost every state.

the common law notion that the custody of a child constitutes an exclusive right of the father.\(^{108}\) The parental right standard is further supported by cases such as Stanley in which the Court held that "the private interest . . . of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."\(^{109}\) As in Stanley, other courts utilizing the parental rights standard rarely address the interests of the child.\(^{110}\)

To sever the rights of natural parents under the parental rights standard, the party arguing for termination must prove the biological parent is unfit.\(^{111}\) The definition of "unfitness" varies from state to state.\(^{112}\) Re-

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1980) (noting burden of proof in termination of parental rights subject to assumption that natural parents serve child's best interests); Brito v. Brito, 794 P.2d 1205, 1208 (N.M. Ct. App. 1990) (recognizing parental rights doctrine creates presumption that child's best interests are served with child in custody of natural parents); *In re Grover*, 681 P.2d 81, 83 (Okla. 1984) ("[T]he preference accorded by law to the natural parent to the custody of his or her child determines that the best interests of the child will be served by awarding custody to the natural parent."); *Alternatives to "Parental Rights" in Child Custody Disputes Involving Third Parties*, 75 YALE L.J. 151, 155 (1963) (hereinafter *Alternatives*) ("[T]he parental right doctrine is sometimes justified today through the assumption that a natural parent will most adequately fulfill his [or her] child's needs.").


110. See S.O. v. W.S., 643 P.2d 997, 1006 (Alaska 1982) (stating appropriate inquiry in decision to terminate parental rights in favor of nonparent is natural parent's fitness); Roche v. Roche, 152 P.2d 999, 1000 (Cal. 1944) ("[Parental] right can only be forfeited by a parent upon proof that the parent is unfit to have such care and custody."); *In re Marriage of Matzen*, 600 So. 2d 487, 488 (Fla. Dist. Ct. App. 1992) (holding absent finding of unfitness, right of natural parent is paramount); Blackburn v. Blackburn, 292 S.E.2d 821, 825 (Ga. 1982) ("[W]here a third party sues the custodial parent to obtain custody of a child and to terminate the parent's custodial rights in the child, . . . the parent is entitled to custody of the child unless the third party shows by 'clear and convincing evidence' that the parent is unfit."); Paul v. Steele, 461 N.E.2d 983, 985 (Ill. 1984) ("The parental rights of a nonconsenting parent may be terminated only upon an adjudication of unfitness."); Sheppard v. Sheppard, 630 P.2d 1121, 1127 (Kan. 1981) ("It is clear under our decisions . . . that a natural parent's right to the custody of his or her children is a fundamental right which may not be disturbed by the state or by third persons, absent a showing that the natural parent is unfit.")., *cert. denied*, 455 U.S. 919 (1982); Wade v. Geier, 743 P.2d 1070, 1075 (Okla. 1987) ("[A]bsent a showing of unfitness the . . . natural parent would be entitled to custody as against anyone else."); *In re J.P.*, 648 P.2d 1364, 1377 (Utah 1982) (noting that child's welfare is paramount consideration but not sole consideration, and that state only has *parens patriae* authority to assume parental role if natural parent is shown unfit or dysfunctional); *In re H.J.P.*, 789 P.2d 96, 101 (Wash. 1990) (stating that court must find unfitness to sever parental rights).

111. See S.O., 643 P.2d at 1006 (recognizing parent must receive custody in custody dispute between parent and nonparent unless parent has been proven unfit); Blackburn, 292 S.E.2d at 825 (holding that unfitness must be proven to terminate custody); Paul, 461 N.E.2d at 985 (holding parental rights can be terminated only if court determines natural parent is unfit); Sheppard, 630 P.2d at 1121 (striking down statute that allowed third party to take custody of minor child even
regardless of its varying definition, however, unfitness must always be demonstrated by “clear and convincing” evidence.\textsuperscript{118} Although courts employing the parental rights standard do not determine terminations based on the “best interests of the child,” the preference inherently accorded to parental rights is generally perceived as promoting the “best interests of the child.”\textsuperscript{114}

when natural parent remains fit); \textit{Wade}, 743 P.2d at 1075 (stating that natural parent entitled to custody of child over all others absent showing of unfitness); \textit{In re J.P.}, 648 P.2d at 1377 (“[A] mother is entitled to a showing of unfitness, abandonment, or substantial neglect before her parental rights are terminated.”).

112. Recognizing the variety of interpretations of “unfit,” the Kansas Supreme Court defined the word as follows:

There is no statutory definition for the word “unfit.” It therefore must be given its ordinary significance, having due regard to the context. In general, the word means unsuitable, incompetent, or not adapted for a particular use or service. As applied to the relation of rational parents to their child, the word usually although not necessarily imports something of moral delinquency. Parents who treat the child with cruelty or inhumanity, or keep the child in vicious or disreputable surroundings, are said to be unfit. Parents who abandon the child, or neglect or refuse, when able so to do, to provide proper or necessary support and education required by law, or other care necessary for the child’s well being are said to be unfit. Violence of temper or inability or indisposition to control unparental traits of character or conduct, might constitute unfitness. So, also, incapacity to appreciate and perform the obligations resting upon parents might render them unfit, apart from other moral defects. \textit{Sheppard}, 630 P.2d at 1127-28 (citing \textit{In re Vallimont}, 321 P.2d 190 (Kan. 1958)).

113. See Santosky v. Kramer, 455 U.S. 745 (1982). Petitioners in Santosky were the natural parents of three children. \textit{Id}. at 751. In 1973, the Family Court sought to terminate the parental rights of the petitioners after incidents reflecting parental neglect. \textit{Id}. At the time, the standard for finding “neglect” was a “fair preponderance of the evidence” standard. \textit{Id}. Petitioners challenged the constitutionality of the standard. \textit{Id}. The Family Court rejected the challenge and weighed the evidence under the fair preponderance of the evidence standard and terminated the petitioner’s parental rights. \textit{Id}.

In its analysis, the Supreme Court emphasized that natural parents retain a fundamental liberty interest in the upbringing of their children. \textit{Id}. at 753. In light of this interest, the Court held that the “fair preponderance of the evidence” standard violated the Due Process Clause of the Fourteenth Amendment. \textit{Id}. at 756. The standard failed to reflect an adequate level of certainty for a situation in which a significant deprivation of liberty is threatened. \textit{Id}. Therefore, the Court mandated that the minimum standard of “clear and convincing” evidence is necessary in proceedings to terminate parental rights. \textit{Id}; see also \textit{In re Marriage of Matzen}, 600 So. 2d at 488 (requiring clear and convincing evidence to show natural father is unfit); \textit{Blackburn}, 292 S.E.2d at 825 (requiring clear and convincing evidence to show that parent is unfit or otherwise not entitled to custody); \textit{Paul}, 461 N.E.2d at 987 (requiring clear and convincing evidence to forfeit parental right to child).

114. See \textit{S.O.}, 643 P.2d at 1004 (requiring consideration of unfitness, abandonment and welfare of child in custody disputes between parents and nonparents); \textit{In re Marriage of Matzen}, 600 So. 2d at 488 (considering unfitness or whether custody with natural parent will be detrimental to welfare of child); \textit{Sheppard}, 630 P.2d at 1124-25 (“[T]he policy of the state proceeds on the theory that their [children’s] welfare can best be attained by leaving them in the custody of their parents and seeing to it that the parents’ right thereto is not infringed.
Courts that apply the strict parental fitness standard oppose any consideration of the child's psychological well-being. These courts sever biological relationships in favor of psychological parent-child relationships only where the biological parent has "abandoned" the child.

This analysis remains faulty, not because courts require a finding of abandonment, but rather in how courts define abandonment. Courts should consider the child's psychological well-being in determining whether the parent has abandoned the child. Such determinations should be based "not on the intention of the adult, but rather on the impact such a leave taking has on the child."  

upon."); In re Grover, 681 P.2d 81, 83 (Okla. 1984) ([T]he preference accorded by law to the natural parent to the custody of his or her child determines that the best interests of the child will be served by awarding custody to the natural parent.); In re J.P., 648 P.2d at 1377 (discussing principle that child's welfare is "paramount consideration" not incompatible with "parental fitness" standard).

For a list of cases disregarding any consideration of the child's psychological well-being, see supra note 114.

For a list of cases illustrating this proposition, see supra note 110. Generally, courts applying the parental rights standard recognize the psychological well-being of the child only in their assumption that the child is psychologically better off in the custody of its natural parents. This assumption contains a flaw, however, because even though the biological parent has an advantage and perhaps a greater potential for establishing a psychological relationship with his or her child, no such advantage exists after the child has been in the custody of and formed a psychological relationship with a third party. Id.; cf. Alternatives, supra note 107, 161-62 ("Both the parental rights doctrine and the procedural devices favoring the natural parent are defensible in these terms only by an intuitive but incomplete psychological generalization—that a 'blood tie' between parent and child will eventually result in more and better love and, hence, in a more adequate psychological development of that child.").

Goldstein, supra note 13, at 78.

Id. When the focus is on the child's psychological well-being rather than on the adult, both the requisite finding of abandonment and the best interests of the child are being taken into account. Some courts have recognized that a child's psychological well-being can be taken into account. Ketcham & Babcock, supra note 4, at 587; see, e.g., In re Jennifer "S", 330 N.Y.S.2d 872 (Sur. Ct. N.Y. County 1972), which states:

Too often a preoccupation with parental rights tends to blur the essential right of an infant to the limb of foster care (or shelter boarding care) and secure a permanent parental home either with his natural or adoptive parents. Parental "rights" must not be emphasized to the point of denying the child a parental "home." The courts have tended to evade or avoid the superior right of an infant to the protection of a permanent home as the most essential element of its emotional well being, by repeated assertions that the best interests of an infant always rest with the blood-related parent, unless the parent is unfit, or has surrendered the child irrevocably for adoption, or has "abandoned" the child intentionally. This may be so, if the concept of abandonment be construed by the courts liberally enough so that the constitutional rights of the infants, rarely asserted, are not derogated or infringed. That the courts have sometimes harkened sufficiently to infants' constitutional rights, is illustrated not only by the parental unfitness doctrine, but also by the strong probative weight given to older infants' expressed desire for a home
2. Jurisdictional/Dispositional Standard

Unlike the strict parental fitness standard, the jurisdictional/dispositional standard takes into consideration both the rights of the parents to raise the child and the "best interests of the child." Courts using this

other than the parental home, if such other home is suitable and reasonable.

*In re Jennifer*, 330 N.Y.S.2d at 876-77.

A New Mexico state statute has explicitly defined "abandonment" to include an aspect of the psychological well-being of children. See *In re Samantha D.*, 740 P.2d 1168, 1171 (N.M. Ct. App. 1987). In interpreting the statute in a case involving the termination of the parental rights of the biological mother, the New Mexico Court of Appeals stated:

We cannot agree with appellant that Section 32-1-54 is vague or ambiguous. Section 32-1-54(C) provides that in order for a rebuttable presumption of abandonment to be created, all of the conditions of Section 32-1-54(B)(4) must exist:

B. The court shall determine parental rights with respect to a minor child when:

(a) the child has been placed in the care of others, . . . either by a court order or otherwise and the following conditions exist:

(b) the parent-child relationship has disintegrated;

(c) a psychological parent-child relationship has developed between the substitute family and the child;

(d) if the court deems the child of sufficient capacity to express a preference, the child prefers no longer to live with the natural parent; and

(e) the substitute family desires to adopt the child.

*Id.* (citations omitted). Based on its analysis of the statute, the court found that "abandonment" must be determined from the viewpoint of the child and not the parent. *Id.*

119. There are currently fifteen states that apply the jurisdictional/dispositional standard. See *In re Juv. Action No. JS-500274*, 804 P.2d 730, 734 (Ariz. 1990) ("[B]est interests of the child are a necessary, but not exclusively sufficient, condition for an order of termination."); *In re Baby Girl B.*, 618 A.2d 1, 10 (Conn. 1992) (requiring strict compliance with statutory criteria before consideration of child's best interests); Black v. Gray, 540 A.2d 431, 434 (Del. 1988) (holding best interests of child must be determined after statutory requirements for termination have been met); Woodruff v. Keale, 637 P.2d 760, 768-69 (Haw. 1981) (noting termination of parental rights in Hawaii takes parents' rights into account before considering best interests of child); *In re Aragon*, 818 P.2d 310, 315 (Idaho 1991) ("[O]nce a statutory ground for termination is found, the magistrate must determine what is in the best interest of the child."); *In re N.H.*, 383 N.W.2d 570, 574 (Iowa 1986) (noting even if all grounds for termination are found, termination must still be in best interest of child); Petit v. Holifield, 443 So. 2d 874, 877 (Miss. 1984) (providing once abandonment, desertion or unfitness is established, best interests of child may be considered); *In re B.H.M.*, 799 P.2d 1090, 1095 (Mont. 1990) (noting best interests test is proper after initial finding of dependency, abuse or neglect); Champagne v. Welfare Div. of Nev., 691 P.2d 849, 854 (Nev. 1984) (requiring both jurisdictional grounds and dispositional grounds for termination); *In re Baby M.*, 537 A.2d 1227, 1242 (N.J. 1988) (stating substantial harm to child must be shown before termination despite best interests language); *In re Montgomery*, 316 S.E.2d 246, 250-51 (N.C. 1984) (prohibiting termination of parental rights where statutory grounds are present if not in child's best interest); *In re Beasley*, 840 P.2d 78,
standard determine whether to terminate parental rights based on a two-step analysis. In Champagne v. Welfare Division of Nevada State Department,\(^{120}\) the Nevada Supreme Court set forth a clear explanation of this standard. First, a court must find "jurisdictional" grounds for a termination of parental rights.\(^{121}\) The Champagne court held that jurisdictional grounds exist when the biological parent forfeits rights related to the child.\(^{122}\) If deemed "unsuitable," a parent forfeits all rights in the child.\(^{123}\) A parent may be rendered unsuitable if he or she neglects the child, abandons the child, becomes unfit or fails to make an effort to remedy the situation that initially caused the child to be taken from the biological parent.\(^{124}\) Other courts applying this standard base their findings of jurisdictional grounds on respective state statutes for involuntary termination of parental rights.\(^{125}\) Although abandonment, unfitness and neglect are grounds for termination in the majority of states, many other grounds exist on which courts can rely.\(^{126}\)

85 (Or. 1992) (requiring satisfaction of both statutory grounds and child’s best interest test to terminate parental rights); In re Coast, 561 A.2d 762, 770 (Pa. Super. Ct. 1989) (stating child’s best interest is considered only after parent’s incapacity is proven by clear and convincing evidence), appeal denied, 575 A.2d 560 (Pa. 1990); In re Kristen B., 558 A.2d 200, 203 (R.I. 1989) ("[T]he primary step before any termination of parental rights is that there be a finding of parental unfitness. Once this fact is established, the best interests of the child outweigh all other considerations."); In re Drinnon, 776 S.W.2d 96, 100 (Tenn. 1988) (stating parental rights severed only by clear and convincing evidence that it is in child’s best interest); In re C.E.W., 368 N.W.2d 47, 54 (Wis. 1985) (limiting best interests standard to dispositional stage of proceeding).

120. 691 P.2d 849 (Nev. 1984). Champagne involved the consolidation of four cases in which appeals were brought by parents challenging the state’s termination of their parental rights. Id. at 849.

121. Id. at 854.
122. Id.
123. Id. at 855.
124. Id.
125. For a list of courts that apply the jurisdictional/dispositional standard, see supra note 119.

126. E.g., Idaho Code § 16-2005(d) (Supp. 1993). The Idaho statute provides that an order granting termination of parental rights is also appropriate where the "parent is unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe the condition will continue for a prolonged indeterminate period and will be injurious to the health, morals or well-being of the child." Id. Under this statute, each of the grounds for termination is independent. See id.

After determining the existence of jurisdictional grounds to terminate parental rights, the court must then ascertain whether "dispositional" grounds to terminate parental rights exist. Dispositional grounds are found if the court determines severance of parental rights of the biological parent is in the best interests of the child. The court may consider the child's interests only if it reaches this second step. Even if it concludes a parent is unfit, the court is not required to terminate parental rights. While courts have some discretion to weigh the child's interests, both jurisdictional and dispositional grounds must be found before the court terminates parental rights under this standard.

Courts employing a jurisdictional/dispositional standard subordinate the child's rights and needs to the biological parents' rights. This standard does not consider the psychological well-being of the child unless the child is adjudged to be abused, abandoned, neglected or some other statutory ground for termination is satisfied. This standard is deficient in that it considers only the child's right to physical well-being, and not the child's right to psychological well-being.

adjust, extreme or deep-seated antipathy by child toward parent, parental deficiency, or parent convicted of certain offenses; MONT. CODE ANN. § 41-3-609(1)(b),(c) (1993) (abandonment or child adjudicated youth in need of care); NEV. REV. STAT. § 128.105(1)-(6) (1998) (abandonment, neglect, unfitness, failure of parental adjustment, risk of serious physical, mental or emotional injury to the child if returned to, or remains in, the home of parent, only token efforts by parent to support or communicate with child, prevent neglect, avoid being unfit parent, or eliminate risk of serious physical, mental or emotional injury to child); N.C. GEN. STAT. § 7A-289.32(2)-(4), (7), (8) (1989) (abuse or neglect, child willfully left in foster care for more than twelve months, parental failure to pay portion of cost of care for child in foster home, mental retardation of parent, or willful abandonment); 29 PA. CONS. STAT. ANN. § 2511(a)(1)-(5) (1991) (failure to perform parental duties, incapacity, abuse, neglect, parent presumptive, but not natural father of child, abandonment, or child removed from care of parent for at least six months); R.I. GEN. LAWS § 15-7-7(1)(a)-(d) (1988) (neglect, unfitness, child in care of governmental child-placement agency for at least six consecutive months, abandonment); WASH. REV. CODE ANN. § 26.33.120(1) (West Supp. 1994) (failure to perform parental duties under circumstances showing substantial lack of regard for parental obligations and best interests of child); WIS. STAT. ANN. § 48-415 (West 1987) (abandonment, continuing need of protection or services, continuing parental disability, continuing denial of visitation rights, child abuse and failure to assume parental responsibility). For a detailed chart of the fifty states and their grounds for termination as of 1980, see Mary S. Coleman, Standards for Termination of Parental Rights, 26 WAYNE L. REV. 315, 326-27 (1980).

128. Id. at 857.
129. Id. at 854. "If it is decided that the biological parent's behavior does not violate minimum standards of parental conduct so as to render the parent unfit, then the analysis ends and termination is denied." Id.
130. Id. at 857.
131. Id. at 854.
132. For a list of statutes and their respective grounds for termination of parental rights, see supra note 126.
3. "Best Interest of the Child" Standard

The current trend considers judicial termination of parental rights using the "best interests of the child" standard. Nevertheless, the majority of courts do not sever parental rights solely on the basis of the best interests of the child. Fears arise, that if taken to its logical conclusion, application of this standard "could lead to a redistribution of the entire minor population among the worthier members of the community . . . ."

Courts that apply the "best interests" standard can be divided into two categories. The first category consists of courts considering only the best interests of the child in termination proceedings. The second category includes courts balancing the interests of the child with the interests of the parent. These courts make the best interests of the child a


134. For a list of courts that do not terminate parental rights solely on the basis of the best interests of the child, see infra note 137.


137. Twelve courts fall in this category. See In re R.H.N., 710 P.2d at 486 ("[T]he best interests of the child should be considered . . . with respect to termination of the natural parent's rights . . . ."); Egly v. Blackford County Dep't of Pub. Welfare, 592 N.E.2d 1292 (Ind. 1992) (considering parents' inability to meet responsibility as parents and best interests of child); L.B.A. v. H.A., 731 S.W.2d 834, 835 (Ky. Ct. App. 1987) (recognizing that rights of natural mother must be considered together with best interests of child in determining custody/termination of parental rights); In re Christina H., 618 A.2d 228, 231 (Me. 1992) (noting that inquiry as to children's best interest is separate and distinct from inability of parents to protect children or assume responsibility for them); In re J.J.B., 390 N.W.2d 274, 279 (Minn. 1986) (requiring balancing of parent and child interests in determination of whether to continue or terminate relationship); In re M.B., 386 N.W.2d 877, 883 (Neb. 1986) (applying test of combination of best interests of child and evidence of fault or neglect of parents to terminate parental rights); In re Kristopher B., 486 A.2d 277, 282 (N.H. 1984) (terminating parental rights necessi-
specific factor in the termination decision along with the degree of parental fault. 138


Not all of these courts acknowledge the balancing of parent and child interests. See In re R.H.N., 710 P.2d at 486 ("[T]he best interests of the child should be considered . . . with respect to termination of the natural parent's rights . . . ."); Eggly, 592 N.E.2d at 1234 (considering parents' inability to meet responsibility as parents and best interests of child); L.B.A., 731 S.W.2d at 885 (recognizing rights of natural mother must be considered together with best interests of child in determining custody/termination of parental rights); Christina H., 618 A.2d at 231 (finding that inquiry as to children's best interest remains separate and distinct from inability of parents to protect children or assume responsibility for them); M.B., 386 N.W.2d at 883 (applying test of combination of best interests of child and evidence of fault or neglect of parents to terminate parental rights); K.S.H., 442 N.W.2d at 419 (determining that termination of parental rights involves recognizing parents' fundamental rights to children and considering best interest of child as one factor); Higby, 611 N.E.2d at 406 (determining that whether to terminate parental rights involves examination of suitability of parent and child's best interests); Ward, 408 S.E.2d at 923 (stating that terminating parental rights requires court to examine best interests of child and likelihood that conditions of parent will be corrected); Cheryl M., 356 S.E.2d at 188 (reversing lower court termination of parental rights where mother was denied meaningful improvement period to demonstrate ability to care for child); JL, 761 P.2d at 989 (holding that rights of parent are implicit consideration when determining best interests of child). Nonetheless, based on their rationales and holdings, it is clear that a balancing occurs.

For example, Higby involved the termination of the parental rights of a biological father. Higby, 611 N.E.2d at 404. In its analysis, the court held that the state was permitted to terminate the parental rights of the biological father, if it constituted the best interests of the child. Id. at 405. In determining the best interests of the child, the court recognized it must consider the eight conditions listed in the statute. Id. The court maintained, however, that finding that one of the eight conditions exists was not required to terminate parental rights. Id.

Although the court explicitly rejected a pure "best interests of the child" standard, it implied courts must balance the best interests of the child with the suitability of the parent. See id. at 406. The court observed that "elements of parental "unfitness" figure strongly in the 'best interests' test, while elements of 'best interests of the child' weigh in any consideration of whether a parent is fit to have custody of his child." Id. (quoting In re Cunningham, 991 N.E.2d 1034, 1039 (Ohio 1979)).

138. For a list of these courts, see supra note 137.
Court, however, employed and articulated this standard. The *In re R.W.*¹³⁹ court stated that "[t]he juvenile court is empowered to terminate parental rights if the court finds by clear and convincing evidence that this is in the child’s best interest."¹⁴⁰ This language sounds similar to the language used by many courts applying the jurisdictional/dispositional standard.¹⁴¹ Instead of finding parental fault *prior* to considering the best interests of the child, however, these courts rely solely on factors designed to determine whether termination is in the best interests of the child.¹⁴²

¹³⁹ 577 A.2d 253 (Vt. 1990). *In re R.W.* involved the termination of parental rights by application of the state. *Id.* at 253. The biological mother of the child was only sixteen years old at the time of the child’s birth. *Id.* Four months after birth, the child was placed in foster care. *Id.* Thereafter, a petition to terminate the mother’s parental rights was filed by the state and granted by the court. *Id.* The mother appealed on the grounds that the court did not establish that she would be unable to resume parental duties within a reasonable period of time. *Id.* The court found the child’s right to a stable home life, coupled with the uncertainty as to when the mother would be able to resume her parental duties, sufficiently justified termination of her parental rights. *Id.* at 254.

¹⁴⁰ *Id.* at 253 (citing *In re J.R.*, 570 A.2d 154, 160-61 (Vt. 1989)).

¹⁴¹ For a list of courts applying the jurisdictional/dispositional standard, see supra note 119.

¹⁴² For a list of courts applying the pure best interests standard, see supra note 136. Some of the factors relied upon in determining the “best interests of the child” are statutory. Others have been enumerated in the case law of the state. The four factors that the *In re R.W.* court used to determine whether parental rights should be terminated are set forth in a Vermont statute. 577 A.2d 253, 253 (Vt. 1990). The statute provides:

§ 5540. BEST INTERESTS OF THE CHILD

At the time of the review under section 5531 of this title, a modification hearing under section 5532 of this title, or at any time a petition is filed by the department of social and rehabilitation services for custody of a minor without limitation as to adoption, the court shall consider the best interests of the child in accordance with the following:

(1) The interaction and interrelationship of the child with his natural parents, his foster parents if any, his siblings, and any other person who may significantly affect the child’s best interests;

(2) The child’s adjustment to his home, school, and community;

(3) The likelihood that the natural parent will be able to resume his parental duties within a reasonable period of time; and

(4) Whether the natural parent has played and continues to play a constructive role, including personal contact and demonstrated love and affection, in the child’s welfare.


Factors enumerated in a Maryland statute include:

(1) the timeliness, nature, and extent of the services offered by the child placement agency to facilitate reunion of the child with the natural parent;

(2) any social service agreement between the natural parent and the child placement agency, and the extent to which all parties have fulfilled their obligations under the agreement;

(3) the child’s feelings toward and emotional ties with the child’s natural parents, the child’s siblings, and any other individuals who may significantly affect the child’s best interest;

(4) the child’s adjustment to home, school, and community;
For example, *In re Doe* involved a dispute between the biological parents and the adoptive parents of a child. In finding for the adoptive parents, the court held that a "child's best interest is not part of an equation. It is not to be balanced against any other interest. In adoption cases, like custody and abuse cases, a child's best interest is and must remain invio-

(5) the effort the natural parent has made to adjust the natural parent's circumstances, conduct or conditions to make it in the best interest of the child to be returned to the natural parent's home, including:

(i) the extent to which the natural parent has maintained regular contact with the child under a plan to reunite the child with the natural parent, but the court may not give significant weight to any incidental visit, communication, or contribution;

(ii) if the natural parent is financially able, the payment of a reasonable part of the child's substitute physical care and maintenance;

(iii) the maintenance of regular communication by the natural parent with the custodian of the child; and

(iv) whether additional services would be likely to bring about a lasting parental adjustment so that the child could be returned to the natural parent within an ascertainable time, but the court may not consider whether the maintenance of the parent-child relationship may serve as an inducement for the natural parent's rehabilitation; and

(6) all services offered to the natural parent before the placement of the child, whether offered by the agency to which the child is committed or by other agencies or professionals.

*In re Adoption No. 09598, 551 A.2d 143, 147-48 (Md. Ct. Spec. App. 1989)* (quoting Md. CODE ANN., FAM. LAW § 5-313 (1984)). The Adoption court applied a best interests test which accounted for parental fault within that analysis. See id. This outcome contrasts with courts applying the jurisdictional/dispositional standard in that parental fault in the above test is required to be found in conjunction with the child's best interests, rather than before the child's best interests as in the jurisdictional/dispositional analysis.


144. *Id.* The biological mother in Doe was not married to the biological father. *Id.* at 649. Four days after the birth of the child, the biological mother signed a consent form giving her child up for adoption. *Id.* The biological father, however, had not signed a consent to give the child up for adoption because he had been told that the child had died at birth. *Id.* at 650. In the meantime, the potential adoptive parents filed a petition to adopt the child. *Id.*

Approximately two months after the birth of the child, the biological father was informed that the child had, in fact, been given up for adoption. *Id.* Shortly thereafter, the biological father contacted an attorney for the purpose of reclaiming the child. *Id.* at 651. The biological father then filed a petition to declare paternity. *Id.* The court found that the biological father was indeed the biological father of the child. *Id.* The potential adoptive parents, however, filed an amended petition to adopt the child contending that the biological father was unfit, and therefore, his consent to the adoption was unnecessary. *Id.* The petition alleged the biological father had not demonstrated a reasonable degree of interest or responsibility for the welfare of the child in the first thirty days after its birth. *Id.*

The trial court entered an order that the biological father was unfit; and therefore, his consent to the adoption was not required. *Id.* On appeal, the *Doe* court held that the best interests of the child come before either the interests of the biological parents or the potential adoptive parents. *Id.* at 652.
late and impregnable from all other factors, including the interests of the parents."\(^\text{145}\)

Courts also apply the best interests standard when addressing the interests of the parent in conjunction with the interests of the child, rather than considering only the interests of the child.\(^\text{146}\) Most courts utilizing the best interests standard approach termination decisions in this manner.\(^\text{147}\) *Egly v. Blackford County Department of Public Welfare*\(^\text{148}\) involved a determination of the correct standard to be applied in terminating parental rights.\(^\text{149}\) The court held that before parental rights could be terminated, four factors must be met, one of which consisted of proof that the termination would be in the best interests of the child.\(^\text{150}\)

Courts using either form of the best interests standard recognize that the biological parent possesses a constitutional right to a child.\(^\text{151}\) Nevertheless, courts also recognize "the importance of emotional and psychological stability to a child's sense of security, happiness and adaptation, as well as the degree of unanimity among child psychologists regarding the fundamental significance of permanency to a child's development."\(^\text{152}\) As

\(^{145}\) Id. (emphasis added).

\(^{146}\) For a list of courts applying the best interests of the child standard in conjunction with the parent's interests, see *supra* note 137.

\(^{147}\) Of the twenty courts that apply the best interests standard, twelve courts balance the interests of the child and parents rather than considering solely the interests of the child. For lists of jurisdictions applying each standard, see *supra* notes 136-37.

\(^{148}\) 592 N.E.2d 1292 (Ind. 1992).

\(^{149}\) Id. at 1293.

\(^{150}\) Id. at 1294. The court implied that circumstances exist in which the best interests of the child will outweigh the rights of the parents. For example, the court stated:

Although parental rights are of a constitutional dimension, the law allows for the termination of those rights when parents are unable or unwilling to meet their responsibilities as parents. This includes situations not only where the child is in immediate danger of losing his life, but also where the child's emotional and physical development are threatened.

*Id.*


\(^{152}\) *In re J.B.*, 390 N.W.2d 274, 279 (Minn. 1986); *see also In re R.H.N.*, 710 P.2d 482, 486 (Colo. 1985) (recognizing court may consider child's emotional ties
a result, several of these courts have concluded that when a child has been out of the custody of his or her biological parents for a long period of time, often the child’s best interests include termination of that relationship. Critics reason that this course of action enables persons to whom the child has become emotionally attached to institute adoption proceedings. A problem with the best interests standard, however, involves its propensity for vagueness. Critics contend that because it sweeps so broadly, the “best interest” standard “allow[s] jurists to impose their own moral preferences in their rulings.” In expressing disdain for the “best interest of the child” standard, one court stated that “the standard of ‘best interest’ of the child provides an open invitation to trample on individual rights through trendy redefinitions and administrative or judicial abuse.” Occasionally, courts use a parental rights test under the guise of implementing the best interest standard. This circumstance occurs when a presumption arises that placement with the biological parents constitutes the best interests of the child. Contrary to the presumption applied by many courts today, the best interests of a child are not always served by the care of the biological parent, even where that parent is judicially deemed fit, because the child may

to third party in terminating parental rights); In re J.M.P., 528 So. 2d 1002, 1014 (La. 1988) (“There is little disagreement within the profession of child psychology as to the existence of the phenomenon of the child-psychological parent relationship and its importance to the development of the child.”); In re Samantha D., 740 P.2d 1168, 1171 (N.M. Ct. App. 1987) (listing as factor to consider in terminating parental rights, existence of psychological parent-child relationship between child and substitute family).

153. See In re J.F.B., 390 N.W.2d at 280 (“[W]here . . . the record demonstrates a long-term placement characterized by a repeated failure of reasonable efforts to reunite the family, the trial court should appropriately determine what action most readily promotes the best interests of the child.”); In re Michael B., 604 N.E.2d 122, 131 (N.Y. 1992) (recognizing continued foster care may be appropriate even though natural parent has not been found unfit in cases where child is so long in custody of nonparent that psychological trauma is grave enough to threaten destruction of child).

154. For a list of these courts, see supra note 151.


156. Steven Mintz, Children, Families and the State: American Family Law in Historical Perspective, 69 DENV. U. L. REV. 635, 635 (1992). The amount and complexity of the potential determinative factors for the best interests of a child, the tendency of different courts to focus on different factors, and the failure to adopt guidelines designed to aid in this factual inquiry all led to this conclusion. Alternatives, supra note 107, at 153-54. Most courts applying the best interests standard, however, employ various procedures that increase the chances of the biological parent winning the dispute. Id. at 154.


158. Curtis, supra note 16, at 154; see also Alternatives, supra note 107, at 154 (“In effect, the courts seem to have created a continuum from a neutral determination of the best interest of the child to a disguised application of the parental right doctrine.”).

159. Alternatives, supra note 107, at 154-55.
suffer severe psychological damage when removed from his or her "psychological" parents.\(^{160}\) Rather, the best interests of the child are assured only by protecting the child's psychological well-being as well as the child's physical well-being.\(^{161}\)

III. PROPOSED "PSYCHOLOGICAL PARENT" STANDARD

A child's psychological relationship with a parent-figure continues to be much more complex and fragile than appearances may indicate.\(^{162}\) "The psychological parent concept is based on two major principles: 1) normal child development in our society depends on a stable relationship with a caring adult; [and] 2) traumatic disruptions of the parent-child relationship may cause lasting psychological harm as well as immediate disturbance."\(^{163}\) A stable, continuous and caring relationship is critical to a child's development.\(^{164}\) A child separated from his or her psychological parent may suffer separation anxiety, trauma, distress, a profound sense of loss and setbacks in the quality of his or her future emotional attachments.\(^{165}\) The long-range effects on a child victimized by a traumatic dis-

160. See Goldstein, supra note 13, at 4 (observing that while decisionmakers elevate child's right to physical well-being over parental rights, they subordinate child's psychological well-being to parental rights).

161. Id. Childhood development is critical to an individual's personality structure. Alternatives, supra note 107, at 157. Therefore, if the psychological well-being of the child is not given primary consideration in determining custody disputes, personality disturbances are more likely to occur. Id. Often, the factors considered in determining what is in the best interests of a child include the psychological well-being of the child. Id. The traditional approaches to the factors involved in "best interests of the child" analysis are now being displaced by analysis of the child's problems and how they might be resolved. James Boskey & John W. McCue, Alternative Standards for the Termination of Parental Rights, 9 SETON HALL L. REV. 1, 4 (1978).

162. Goldstein, supra note 13, at 17. The manner in which the child's needs are met and protection is given ultimately determines the child's response to the external environment. Id. at 18. For example, if the child's needs are met by a loving and attentive parent figure, as opposed to an impersonal caretaker, the child develops an interest in his surroundings rather than remaining involved only in his or her own body. Id. With this positive parenting, a child develops emotional needs for affection and companionship. Id. Conversely, the child who is denied affection and companionship may develop mental deficiencies. Id.

163. Curtis, supra note 16, at 172. While disagreements arise as to the exact nature of causes and effects, the theories' main propositions have consistently been substantiated. Id. For an analysis of criticisms of the psychological parent doctrine, see Curtis, supra note 16, at 172-76.

164. Id. at 151. "Numerous studies demonstrate that when a child is deprived of the opportunity to develop affectionate bonds early in life, his physical, intellectual, and emotional development may be seriously retarded . . . ." Id. The effects of this type of deprivation are long-lasting and not easily remedied. Id. at 151-52.

165. Goldstein, supra note 13, at 33. Disruption in the parent-child relationship produces different consequences depending upon the age of the child. Id. at 32. If the child is under five years old, achievements rooted in interactions with the parent figure are negatively affected. Id. at 33. Examples of lost achievements are cleanliness, speech and toilet training. Id. If the child is school-aged, achieve-
ruption of the psychological parent-child relationship include lack of self-esteem, trust and ability to care for others. These effects may ultimately lead to behavioral disorders. Separations profoundly impact children because they have not yet developed the adult ability to cope with threats to their emotional security. Thus, it is not the biological tie that bonds a child to an adult, but the psychological relationship. The law, therefore, should protect this relationship, regardless of whether or not the psychological parent is also the biological parent.

The notion that the child is a person whose full individual rights should be recognized by law is not new. None of the current standards, however, adequately consider the parental rights and the child's rights to both physical and psychological well-being. The "psychological parent" standard, however, proposes to do just that. Many commentators advocate application of this standard.

ments based on the child's identification with the parents' demands, prohibitions and social ideals disintegrate. Id. It is, therefore, unlikely that the child will identify with any set of substitute parents. Id. at 33-34. The child is apt to resent the parent figures who have disappointed him and make the substitute parents scapegoats for wrongs of the previous parent figures. Id. at 34.

The following is a psychological evaluation noting the effects of removing a child from his or her foster home:

Removing [the child] from the [foster parents'] home and replacing him with his mother . . . would constitute an extreme and unconscionable psychological assault upon him, removing him from the only family he has ever known and from people with whom he has profound and healthy emotional attachments and placing him into a home where he is a total stranger, where a quite different style of life is practiced and where fairly extensive and continuing family stresses . . . are prominent.


166. Curtis, supra note 16, at 152. These problems affect not only the individual, but society as well, because the child will interact with others and may eventually become a parent. Id.

167. Id. (noting Goldstein's proposal). Children who have suffered multiple placements at a young age may display disruptive, dissocial, delinquent or even criminal behavior. Goldstein, supra note 13, at 34.

168. Goldstein, supra note 13, at 12. The inability of children to cope with such threats stems from their lack of developed intellectual and reasoning capacities. Id. "Consequently, they respond to any threat to their emotional security with fantastic anxieties, denial, distortion of reality, reversal or displacement of feelings—reactions which are no help for coping, but rather put them at the mercy of events." Id.


170. Id. (citing J. Goldstein ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 59, 99 (1973)).

171. See generally Foster, supra note 24 (proposing "Bill of Rights for Children"); Rodham, supra note 68 (advocating extension of adult rights to children); Worsfold, supra note 18 (discussing rationale for extending children full rights of adults).

172. See Goldstein, supra note 13, at 53 (advocating least detrimental available alternative for safeguarding child's growth and development standard); Alternatives, supra note 107, at 157 (proposing psychological best interests test in third party custody disputes); Boskey & McCue, supra note 161, at 5-13 (discussing nu-
The crux of the "psychological parent" standard lies in the concept that successful personality development results not from the biological relationship, but the psychological relationship between adult and child. In implementing this "psychological parent" standard, the court must first determine which parent is the psychological parent. This assessment can be achieved by evaluating three basic factors: (1) the continuity of the relationship between child and adult in terms of proximity and duration; (2) the love of the adult toward the child; and (3) the affection and trust of the child toward the adult. If the court establishes the existence of a psychological parent-child relationship, no further inquiry is necessary, and custody should be awarded to that parent. Accordingly, if the court establishes that the child retains a psychological relationship with both the biological parent and a third party, custody should be given to the biological parent.

One court already de facto employs the psychological parent standard. In re J.M.P. centered around a private adoption dispute. After giving her child up for adoption, the biological mother attempted to regain parental rights to the child by revoking her consent to the adoption within the statute’s allotted time frame. The court, however, declared that the revocation of consent did not prevent the adoption if it remained within the best interests of the child. The court described the best interests of the child standard as one depending on the child’s health, psychology and welfare. In its analysis, the court considered three factors: (1) the fitness of each adult involved; (2) the existence of a psychological relationship; and (3) the number of standards used in terminating parental rights; Ketcham & Babcock, supra note 4, at 541 (noting when child has entered into psychological parent-child relationship with nonparent, rights of natural parent approach limits).

174. Alternatives, supra note 107, at 160. This is accomplished by inquiring into the "affection-relationship" between the child and adult. Id. The "affection-relationship" forms during the first year of a child’s life and is the basis for all future interpersonal relationships. Id.
175. Id. at 162. "Continuity may provide a basis for inferring that an unbroken relationship of warmth and affection has existed over a period of time sufficient to have established a secure relationship with the adult." Id.
176. Id. at 163. This award would allow the child to continue his or her personality development in a continuous and stable environment, avoiding the trauma of separation and potential negative future effects. Id. at 163-64. In any case, the child should not be separated from the psychological parent except in very rare circumstances. Ketcham & Babcock, supra note 4, at 587-38.
177. The author suggests that the psychological parent standard advocated does not necessarily favor a third party over the biological parent. Rather, it merely favors the psychological well-being of the child.
178. 528 So. 2d 1002 (La. 1988).
179. Id. at 1005. The statutory period within which the natural mother could revoke her consent to the adoption was thirty days. Id. at 1005 n.1.
180. Id. at 1012.
181. Id. at 1013. The court stated that the basic notion underlying the best interests of the child standard constitutes "nothing less than the dignity of the child as an individual human being." Id.
ship between the child and the adoptive parent; and (3) the relationship between the natural parent and the child. The court found it "should prefer a psychological parent . . . over any claimant (including a natural parent) who, from the child's perspective, is not a psychological parent." In discussing the scope of the biological parent's rights, the court held that a child who lacks an emotional attachment to the biological parent and who perceives the adoptive parent as a psychological parent, should be placed with the adoptive parents to spare the child mental and emotional harm, regardless of whether the biological parent is fit.

The "psychological parent" standard, thus justifies termination of parental rights only where the biological parent has deprived the child of a loving and caring relationship enabling normal personality development. Although the child's right to maintain or establish a parent-child psychological parent relationship "lacks the venerable legal credentials" of a biological parent's natural right, courts increasingly recognize this interest. Without continued recognition of the psychological parent standard, litigation over termination of parental rights may evolve into "fitness contests" subject to the whims of the courts, akin to state reallocation of children.

IV. Testing the Solution

In re B.G.C. involved a dispute between the biological parents of a baby girl and her potential adoptive parents, the DeBoers. The child had been placed in the DeBoer's home shortly after separation from the biological mother. The DeBoers were the only parents the child had

182. Id.
183. Id.
184. Id. at 1015-16.
185. Ketcham & Babcock, supra note 4, at 536-37.
186. Id. at 537.
188. 496 N.W.2d 239 (Iowa 1992).
189. Id. at 240-41. A baby daughter was born to Cara Clausen on February 8, 1991. Id. at 240. Ms. Clausen decided to put the child up for adoption. Id. In relinquishing her rights, however, she named "Scott" as the biological father of the baby when in fact he was not. Id. at 241. Soon after the hearing terminating the parental rights of both Ms. Clausen and Scott, Ms. Clausen moved to set aside the termination on the grounds that the release of parental rights signed by her was defective. Id. She also claimed that "Daniel Schmidt" was the biological father of the child. Id. The motion was denied. Id.
190. In re Clausen, 502 N.W.2d 649, 652 (Mich. 1993), stay denied, DeBoer v. DeBoer, 1145 S. Ct. 1 (1993). In re Clausen and In re B.G.C. consist of the same facts but were decided by different courts, the former decided by the Michigan Supreme Court and the latter decided by the Iowa Supreme Court. After the Iowa Supreme Court decision of In re B.G.C., which dismissed the petition for adoption and remanded to determine the biological father's parental rights, the district court on remand ordered a termination of the DeBoers' rights as temporary guardians and custodians of the child. Id. at 653. As a result, the adoptive parents, the DeBoers, filed a petition in the Washtenaw Circuit Court of Michigan, asking.
ever known. The Iowa Supreme Court determined that the parental rights of the biological father could not be terminated in the absence of conduct forfeiting his right to withhold consent to the adoption. Further, the court held it could not consider the best interests of the child unless and until statutory grounds for termination were found to exist.

The decision of In re B.G.C. appears to reflect the jurisdictional/dispositional standard. Alternatively, the Iowa court could have terminated the parental rights of the father based on the analysis set forth in Quilloin and Lehr. The use of the psychological parent standard is consistent with this analysis. The court, however, simply did not acknowledge or recognize that its decision clearly disregarded the child’s right to her family. The DeBoers’ were truly the child’s psychological parents.

the court to assume jurisdiction over the case under the Uniform Child Custody Jurisdiction Act (UCCJA). Id. The petition requested the court to enjoin the enforcement of the Iowa custody order in favor of the biological parents or modify it, giving custody to the DeBoers. Id. After conflicting decisions by the Washtenaw Circuit Court and the Michigan Court of Appeals, the case was appealed to the Michigan Supreme Court. Id. at 653-54. The Michigan Supreme Court held that the Iowa Supreme Court’s decision must be enforced. Id. at 667, 668. Further, it held that the Iowa court was not required to conduct a hearing as to the best interests of the child. Id.

191. Id. at 652. The child had resided with the DeBoers since shortly after her birth. Id.

192. In re B.G.C., 496 N.W.2d at 245.

193. Id. The DeBoers contended that statutory grounds for termination need not be established because the best interests of the child should decide the issue of termination in an adoption case. Id. The court stated it could not interfere with the rights of the natural parents in order to give effect to the best welfare of the child. Id. Further, the court held it could only consider the best interests of the child where the natural parents have forfeited their right to withhold consent. Id.

194. For a discussion of the jurisdictional/dispositional standard, see supra text accompanying notes 119-32.

195. For an analysis of the decisions in Quilloin, see supra text accompanying notes 86-92. For an analysis of Lehr, see supra text accompanying notes 93-97.

196. For an explanation of the “psychological parent” standard, see supra text accompanying notes 162-87.

197. In re Clausen, 502 N.W.2d 649, 665 (Mich. 1993), stay denied, DeBoer v. DeBoer, 1145 S. Ct. 1 (1993). The court in Clausen rejected the contention that children are persons under the Constitution and that the constitutionally protected liberty interests in “family” apply equally to both parents and children. Id. Instead, the Michigan court held that while children do have a liberty interest in their family life, their interests are not independent of the biological parents’. Id. Further, the Michigan court rejected the view that children residing with third parties are similarly situated as children residing with parents. Id. at 668. Thus, the Clausen court failed to recognize the explicit language in the Supreme Court decisions of Lehr and Smith, noting that the liberty interest in “family” is a function of the intimate relationship between parent and child, and not of biological relationships. Id. at 665.
Little doubt exists that the child will suffer the trauma and behavioral problems that psychoanalysts have predicted.\footnote{198}

Another recent custody dispute involved a child that was neither voluntarily given up by the biological parents, nor placed with the third party by a court, nor legally adopted by the third party. The plaintiffs in \textit{Twigg v. Mays}\footnote{199} alleged Kimberly Mays was their biological daughter after a switch at birth with the biological daughter of Robert Mays.\footnote{200} Approximately 15 years after the birth of both children, the plaintiffs discovered facts uncovering the switch and sought a judicial declaration that Kimberly Mays was their biological child.\footnote{201} Although blood tests showed, by a 95\% probability, that Kimberly was the biological daughter of the plaintiffs, the court held that "[t]o declare the plaintiffs to be the natural parents of Kimberly Mays requires more than evidence that they may be her biological parents."\footnote{202} The court also emphatically stated that Robert Mays is the psychological parent of Kimberly and her relationship with him constitutes a "family relationship."\footnote{203} Finally, the court expounded that any other determination would be detrimental to Kimberly.\footnote{204} In refusing to acknowledge the rights of the biological parents, the court implicitly applied the psychological parent standard in the \textit{Twigg} case.

\section*{V. Conclusion}

The law has long recognized that children have "a right to a stable and healthy environment . . . ."\footnote{205} Thus, in instances where a child has developed a psychological parent-child relationship with a third party, the standard used in terminating parental rights should guarantee this right. The current confusion in the law results in an inability to ascertain the correct standard applicable under a particular set of circumstances. Such

\footnote{198}{For a discussion of the possible psychological effects of separating a child from his or her psychological parent, see supra notes 165-68 and accompanying text.}
\footnote{199}{No. 88-4489-CA-01, 1993 WL 330624 (Fla. Cir. Ct. 1993).}
\footnote{200}{Id. at *2. Neither plaintiffs nor defendant, however, knew of the alleged switch until ten years later. Id. Robert Mays has raised Kimberly since birth. Id.}
\footnote{201}{Id. at *3.}
\footnote{202}{Id. at *4. The court acknowledged that the meaning of "more" is not clear. Id. Initially, the parties stipulated to a visitation plan, however, Kimberly stopped the visitation in October of 1990. Id. at *2. Thereafter, the Twiggs attempted to obtain custody of Kimberly, even though Kimberly stated she does not wish to see the Twiggs. Id. At a final hearing on the matter, the court found it would be detrimental to Kimberly to enforce visitation with the Twiggs against Kimberly's will. Id. at *3.}
\footnote{203}{Id. at *5.}
\footnote{204}{Id. In justification of its holding, the court stated that because of these proceedings, Kimberly "has not been able to develop as a normal teenager and has suffered profound assaults upon her mental, and possibly physical, health." Id. Further, Kimberly views the Twiggs as a constant source of danger to her family. Id.}
\footnote{205}{\textit{In re E.M.}, 466 N.W.2d 168, 175 (S.D. 1991).}
uncertainty causes the child, as well as both the losing and prevailing parties, to suffer emotional damage.

The proposed psychological parent standard favors neither the rights of the biological parent, nor the third party desiring custody, nor the interests of the state. The sole consideration focuses on the welfare of the child. Courts have demonstrated that children maintain a fundamental right to be raised in a healthy and stable environment. Courts have further established that children have the right to a parent-child relationship. Moreover, Supreme Court decisions such as Stanley, Smith, Quilloin and Lehr suggest that the “familial relationship” does not solely refer to the blood relation between parent and child. Thus, the proposed psychological parent standard constitutes the only standard accounting for the interests of both the parents and the child. “It is the real tie—the reality of an ongoing relationship—that is crucial . . . and that demands protection of the state through law.”

Thus, the proposed psychological parent standard allows courts faced with termination questions to avoid the heartless and potentially destructive decisions resulting from adherence to the archaic notion of children as property. Further, the psychological parent standard reflects a more flexible judicial approach which avoids violation of the constitutional right of parents to raise their children.

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206. For an analysis of these cases, see supra text accompanying notes 80-103.
207. Goldstein, supra note 13, at 80.