

well-being, however, currently remains unrecognized as a significant interest of the child deserving protection in custody disputes.⁷²

B. "Family" Is Not Based Solely on Biology

Recent judicial decisions have discussed the implications of custody disputes between biological parents and "psychological parents."⁷³ 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.⁷⁴ 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.⁷⁵ A psychological parent can be either a biological parent or any other caring adult.⁷⁶ 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 393348, 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*, 436 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 13, at 98.

75. *Id.* at 22, 23, 27.

76. *Id.* at 19.

tentive adult may not be a psychological parent, however, even if the adult is a biological parent.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.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.⁷⁹

*Smith v. Organization of Foster Families for Equality and Reform*⁸⁰ concerned a class action by foster parents challenging the constitutionality of procedures for removing foster children from foster homes.⁸¹ In its analysis, the Court acknowledged that the existence of a family is not necessarily dependent upon biological relationships.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.⁸³ This language fully comports with the concept of "psychological relationships."⁸⁴

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

77. *Id.*

78. 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) (accorded great deference to parent-child relationship).

79. For an analysis of how the emotional relationship between parents and children affects the constitutional rights of parents, see *infra* text accompanying notes 80-103.

80. 431 U.S. 816 (1977).

81. *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.

82. *Id.* at 843.

83. *Id.* at 844 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972)).

84. For the definition of a psychological parent, see *supra* text accompanying notes 74-77.

85. For an analysis of the issue of biological relationships in the context of unwed father cases, see *infra* text accompanying notes 86-101.

For example, *In re Doe*¹⁴³ involved a dispute between the biological parents and the adoptive parents of a child.¹⁴⁴ 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.

143. 627 N.E.2d 648 (Ill. App. Ct. 1993), *rev'd*, 638 N.E.2d 181 (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).

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."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.¹⁴⁶ Most courts utilizing the best interests standard approach termination decisions in this manner.¹⁴⁷ *Egly v. Blackford County Department of Public Welfare*¹⁴⁸ involved a determination of the correct standard to be applied in terminating parental rights.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.¹⁵⁰

Courts using either form of the best interests standard recognize that the biological parent possesses a constitutional right to a child.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."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 1232 (Ind. 1992).

149. *Id.* at 1233.

150. *Id.* at 1234. 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.

151. See *In re Doe*, 627 N.E.2d 648, 652 (Ill. App. Ct. 1993) (recognizing parents' interest in child), *rev'd*, 638 N.E.2d 181 (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); *Egly v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1234 (Ind. 1992) (recognizing parental rights are of constitutional dimension); *L.B.A. v. H.A.*, 731 S.W.2d 834, 835 (Ky. Ct. App. 1987) ("It is unquestioned that the best interest of the child is a major factor to be considered in resolving a case involving termination of parental rights; but the Supreme Court . . . has recognized that the rights of the natural mother must also be given weight."); *In re Kristopher B.*, 486 A.2d 277, 282 (N.H. 1984) (noting parent has fundamental rights); *In re K.S.H.*, 442 N.W.2d 417, 419 (N.D. 1989) (recognizing parent's fundamental, natural right to children is of constitutional level); *State ex rel. West Va. Dep't of Human Servs. v. Cheryl M.*, 356 S.E.2d 181, 188 (W. Va. 1987) (noting constitutional considerations mandate preservation of parental rights); *In re J.L.*, 761 P.2d 985, 989 (Wyo. 1988) (noting parental rights are constitutional interests).

152. *In re J.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.¹⁵³ These courts reason that this course of action enables persons to whom the child has become emotionally attached to institute adoption proceedings.¹⁵⁴

A problem with the best interests standard, however, involves its propensity for vagueness.¹⁵⁵ Critics contend that because it sweeps so broadly, the "best interest" standard "allow[s] jurists to impose their own moral preferences in their rulings."¹⁵⁶ 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."¹⁵⁷ Occasionally, courts use a parental rights test under the guise of implementing the best interest standard.¹⁵⁸ This circumstance occurs when a presumption arises that placement with the biological parents constitutes the best interests of the child.¹⁵⁹

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.J.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.

155. Curtis, *supra* note 16, at 149, 154.

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.

157. *In re J.P.*, 648 P.2d 1364, 1376 (Utah 1982).

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.

Significant HARM

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.¹⁶⁶ These effects may ultimately lead to behavioral disorders.¹⁶⁷ Separations profoundly impact children because they have not yet developed the adult ability to cope with threats to their emotional security.¹⁶⁸ Thus, it is *not* the biological tie that bonds a child to an adult, but the psychological relationship.¹⁶⁹ The law, therefore, should protect this relationship, regardless of whether or not the psychological parent is also the biological parent.¹⁷⁰

The notion that the child is a person whose full individual rights should be recognized by law is not new.¹⁷¹ 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.¹⁷²

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.

D.M. v. State, 515 P.2d 1234, 1237 (Alaska 1973).

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.*

169. Curtis, *supra* note 16, at 152.

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.¹⁷³ In implementing this "psychological parent" standard, the court must first determine which parent is the psychological parent.¹⁷⁴ 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.¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷

One court already *de facto* employs the psychological parent standard. *In re J.M.P.*¹⁷⁸ 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.¹⁷⁹ The court, however, declared that the revocation of consent did not prevent the adoption if it remained within the best interests of the child.¹⁸⁰ The court described the best interests of the child standard as one depending on the child's health, psychology and welfare.¹⁸¹ In its analysis, the court considered three factors: (1) the fitness of each adult involved; (2) the existence of a psychological relation-

merous 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).

173. Boskey & McCue, *supra* note 161, at 25.

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 537-38.

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.*

Best Interest
determined by
the child
Standard
health,
psychology
& welfare
of psychological
parent
Standard

ship between the child and the adoptive parent; and (3) the relationship between the natural parent and the child.¹⁸² 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."¹⁸³ 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.¹⁸⁴

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.¹⁸⁵ 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.¹⁸⁶ 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.¹⁸⁷

IV. TESTING THE SOLUTION

*In re B.G.C.*¹⁸⁸ involved a dispute between the biological parents of a baby girl and her potential adoptive parents, the DeBoers.¹⁸⁹ The child had been placed in the DeBoer's home shortly after separation from the biological mother.¹⁹⁰ 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.

187. Curtis, *supra* note 16, at 155.

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.¹⁹¹ 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.¹⁹² 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.¹⁹³

The decision of *In re B.G.C.* appears to reflect the jurisdictional/dispositional standard.¹⁹⁴ Alternatively, the Iowa court could have terminated the parental rights of the father based on the analysis set forth in *Quilloin* and *Lehr*.¹⁹⁵ The use of the psychological parent standard is consistent with this analysis.¹⁹⁶ The court, however, simply did not acknowledge or recognize that its decision clearly disregarded the child's right to her family.¹⁹⁷ 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.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 *Twigg v. Mays*¹⁹⁹ alleged Kimberly Mays was their biological daughter after a switch at birth with the biological daughter of Robert Mays.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.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."²⁰² The court also emphatically stated that Robert Mays is the psychological parent of Kimberly and her relationship with him constitutes a "family relationship."²⁰³ Finally, the court expounded that any other determination would be detrimental to Kimberly.²⁰⁴ In refusing to acknowledge the rights of the biological parents, the court implicitly applied the psychological parent standard in the *Twigg* case.

V. CONCLUSION

The law has long recognized that children have "a right to a stable and healthy environment . . ."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

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.

199. No. 88-4489-CA-01, 1993 WL 330624 (Fla. Cir. Ct. 1993).

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.*

201. *Id.* at *3.

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.

203. *Id.* at *5.

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.*

205. *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.²⁰⁶ 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."²⁰⁷

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.