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Custody Standards in New Mexico: Between Third Parties and Biological Parents, What Is the Trend

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CUSTODY STANDARDS IN NEW MEXICO: BETWEEN THIRD PARTIES AND BIOLOGICAL PARENTS, WHAT IS THE TREND?

I. INTRODUCTION

> [T]here is no class of cases which exercise the judicial mind more feelingly than that where parents come before a judge, demanding restoration of their children to them. It carries with it the force of nature's appeal to the heart.[1]

Popular media today assail us with images of young children who are torn from the arms of their primary caretakers,[2] and restored to the homes of their biological parents, some of whom are strangers to their children. In 1993, there was the much televised saga of Baby Jessica,[3] the case of Baby Richard,[4] and, in 1994, the case of Baby Emily.[5] In 1995, New Mexico had its own case, *In re adoption of J.J.B.*,[6] which pitted the potential adoptive parents, Carla Ann and Kyle David Franz Roth against the biological father, Edward Bookert, in a battle for the custody of an infant identified as J.J.B.[7] These cases illustrate the tension which exists in custody cases between the rights of biological parents and the interests of third parties.[8]

Rather than review the cases of Jessica, Richard, Emily, and numerous other well-documented custody disputes,[9] this Comment explores the trend generally and in New Mexico to elevate the rights of the child and the child's relationship with his

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1. Bustamento v. Analla, 1 N.M. (Gild., A.L.B. ed.) 255, 256 (1857) (one of the first recorded child custody cases in New Mexico).

2. "They are children caught in a tug-of-war, tugging at our hearts as well. You know their names from the headlines: Baby Jessica, Baby Richard, children taken from the parents who raised them and placed with the birth parents who wanted them back." *Dateline: Profile, Broken Bonds, Long Custody Battle for Jill Bond* (NBC television broadcast, July 5, 1996), *available in* WESTLAW, Transcripts database, 1996 WL 6704382.

3. *See* DeBoer v. Schmidt, 501 N.W.2d 193, 194 (Mich. Ct. App.) (per curiam), *aff'd*, 502 N.W.2d 649 (Mich. 1993).

4. *See In re* Doe, 627 N.E.2d 648 (Ill. App. Ct. 1993), *rev'd*, 638 N.E.2d 181 (Ill. 1994).

5. *See* G.W.B. v. J.S.W., 647 So.2d 918 (Fla. Dist. Ct. App. 1994) (En Banc), *aff'd*, 658 So.2d 961 (Fla. 1995).

6. 119 N.M. 638, 894 P.2d 994 (1995).

7. *See id.*

8. This Comment uses the term "third parties" to denote persons who are not the child's biological parents. These persons may be related by blood, such as grandparents or aunts or uncles. They also may be parties who have no genetic relationship to the child, such as foster parents, stepparents, and domestic partners of the biological parent. "Third parties" also may denote agencies, private or public.

Sheila McKeown, Note and Comment, *Traditional Custody Decisions vs. Modern Nonparental Challenges*, 13 J. JUV. L. 42, 46-49 (1992), describes many other groupings of non-biological parents who might express an interest in an adoption proceeding. McKeown defines some of these groups as: *de facto* parents, persons who assume the role of parents on an everyday basis, *see id.* at 46; "psychological parents," persons to whom the child is emotionally attached, *see id.*; "equitable parents," those persons who are elevated to the same status as biological parents by the courts, *see id.* at 47; persons who are "equitably estopped" from asserting their rights, such as surrogate mothers, *see id.* at 48; "functional parents," those parents whose relationship with the child has been created, for example, foster parents or stepparents, *see id.*; persons *in loco parentis* or standing in the shoes of a parent and entitled to parental rights, or domestic partners, couples who do not have a formal marriage, but who may have a contractual arrangement as a substitute, *see id.* at 49.

9. Two law review articles which discuss these cases in depth are: Andrew S. Rosenman, *Babies Jessica, Richard, and Emily: The Need for Legislative Reform of Adoption Laws*, 70 CHI.-KENT L. REV. 1851 (1995), and Paige Kerchner Kaplan, *Putting the Child First in Custody Battles Between Biological Fathers and Adoptive Parents*, 35 SANTA CLARA L. REV. 907 (1995) (discussing the Baby Richard and Baby Jessica cases as a basis for an analysis of suggested reforms in California adoption laws).

caretakers, over the traditional presumption that the rights of biological parents[10] are superior. This trend emerges through the "the best interests of the child" doctrine.[11] Part II discusses the law's evolution that has resulted from the resolution of custody disputes, first generally and, then, in New Mexico. Part III illustrates how the change in custody law has affected custody decisions in New Mexico. Part IV discusses how the definition of the child's best interests has changed due to a shifting emphasis on children's rights and on what has been termed "relationship criteria." In addition, Part IV addresses how this change has affected the way courts apply the "best interests" standard. Part V concludes with three recommendations for improving adoption procedures.

II. THE EVOLUTION OF CHILD CUSTODY STANDARDS

For hundreds of years, fathers triumphed in custody decisions as a matter of "Divine Will."[12] Under early English law, a mother was "entitled to no power [over her children], but only to reverence and respect."[13] Under English common law, a father was entitled to receive the services of his children, but was in turn responsible for their support.[14] In 1839, the tide began to turn when laws were changed to allow mothers to have custody of their children under the age of seven.[15] In 1873, English statutes were further amended to allow mothers to have custody of their children until age sixteen.[16] These statutes formed the basis of the English "tender years" doctrine. [17]

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10. When using the term "biological parent" or "natural parent," this Comment adopts the definition that refers to "the woman who has contributed the egg and who has carried the resulting pregnancy to term, or to the man who has contributed the sperm and/or is considered to be the legal father." Naomi R. Cahn, *Family Issue(s)*, 61 U. CHI. L. REV. 325, 349 n.13 (1994) (reviewing ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING (1993)).

11. "Best interests of the child" is a legal term of art which is still being developed by the courts. However, the Uniform Marriage and Divorce Act lists the following factors to be considered in determining the best interests of the child:

> (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custody; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved.

UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1987).

12. *See* Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 425 (1976).

13. Henry H. Foster & Doris Jonas Freed, *Life with Father: 1978*, 11 FAM. L.Q. 321, 325 (1978) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 453 (Tucker ed. 1803)); *see Ex parte* Devine 398 So.2d 686, 688-89 (Ala. 1981) (citing BLACKSTONE, *supra*, at 453).

14. *See* Foster & Freed, *supra* note 13, at 322.

15. *See* Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 340 (1982).

The reform in English custody law grew out of the case of *Rex v. Greenhill*, 111 Eng. Rep. 922 (K.B. 1836), wherein a mother left the family home with her children, all under the age of six, when the father moved in with his mistress. In order to compel her return, the father brought suit for custody of the children. *See* Klaff, *supra*, at 340. The court could find no law which would allow it to reach a conclusion in the case other than to return the custody of the children to the father. *See id.* This outcome led to a subsequent change in the custody statutes. *See id.* at 339-40. These English statutes, as later amended, became known as the Justice Talfourd's Act, which among other conditions, provided that a father's absolute right to custody of his children was constrained by a showing that he was a fit parent. *See Devine*, 398 So.2d at 689.

16. *See* Klaff, *supra* note 15, at 340.

17. *See id.*; *see also infra* notes 20-23 and accompanying text for a definition of "tender years."

A. *Custody Doctrines in the United States*

1. The "Tender Years" Presumption

In the United States, during the early nineteenth century, fathers were given rights to their children on the basis of "natural law."[18] In 1830, however, the Maryland case of *Helms v. Franciscus* found that "it would violate the laws of nature to 'snatch' an infant from the care of its mother."[19] This decision foreshadowed a change in American law and the beginning of the "tender years" presumption.

The tender years presumption assumes that "the" mother is the natural custodian of children of tender years."[20] The definition of which years constitute the "tender years" has varied over time and according to the social movement of the day.[21] The most extreme version of this theory postulates that biological motherhood, *i.e.*, the ability to bear children and to breastfeed, also creates a special ability which "affects the capacity and willingness to provide mothering."[22] According to this view, this bond cannot be duplicated by a caregiver without a biological (maternal) connection to the child.[23]

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18. *See Devine*, 398 So.2d at 688. As illustrative of the thought of this period, Alabama Supreme Court Chief Justice Sharkey said in his 1842 dissent in *Foster v. Alston*:

> We are informed by the first elementary books we read that the authority of the father is superior to that of the mother. It is the doctrine of all civilized nations. It is according to the revealed law and the law of nature, and it prevails even with the wandering savage, who has received none of the lights of civilization.

Foster v. Alston, 7 Miss. (6 How.) 406, 463 (1842) (Sharkey, C.J., dissenting), *quoted in Devine*, 398 So.2d at 688.

However, Foster and Freed contend that fathers in the United States never had the same absolute custody rights as fathers in England. *See* Foster & Freed, *supra* note 13, at 326. In their article, they review several nineteenth century cases which support their assertion that "[v]ice was its own reward" in deciding custody, meaning that the awarding of custody to either the mother or the father was tempered by the judgment of the court as to whether either were fit parents. *See id.* at 326-27.

19. Helms v. Franciscus, 2 Bland Ch. (Md.) 519, 535 (1830), *cited in Devine*, 398 So.2d at 689.

20. J.B. v. A.B., 242 S.E.2d 248, 250 (W. Va. 1978) (affirming the tender years doctrine).

21. *See id.* at 253. The West Virginia court, while stating that the "tender years" concept was "elastic," suggested that the range might be from infancy to age fourteen. *See id.*

22. Klaff, *supra* note 15, at 362.

23. *See* Odeana R. Neal, *Myths and Moms: Images of Women and Termination of Parental Rights*, 5 KAN. J.L. & PUB. POL'Y 61 (1995) (discussing the theory that the lingering mythology surrounding the tender years doctrine now cuts against women in custody cases). Neal specifically cites *In re Sanjivini K.*, 391 N.E.2d 1316, 1320 (N.Y. 1979), where a woman was chided by the trial judge for placing her own ambition before the needs of her child because she returned to school to complete her education, which necessarily decreased the quantity of time she spent with her child. *See* Neal, *supra*, at 69. Neal postulates that today, women, especially women of color, lose custody of their children for being "bad" mothers. *See id.* at 67.

What is a "bad" mother? Neal says that women are labeled as "bad mothers" by the still mostly white male judiciary, if they are poor, "challenge patriarchy, [or] live their lives outside prescribed codes of conduct" which, as these codes relate to motherhood, entail an expressed desire to be at home with the child even if the mother must work. *See id.* at 65-66. Neal attributes the development of these attitudes toward women's appropriate role to concurrent theories in American law that the parent-child relationship is founded on natural law and on property law, interwoven with mythologies about what type of woman is the "perfect mother." *See id.* at 66. Mary Becker also echoes these same sentiments when she describes "six common biases" against women: "(a) against a sexually active mother, (b) against a mother with less money than a father, (c) against a working mother, (d) against a lesbian mother, (e) against a mother involved in an interracial marriage, and (f) in favor of a remarried father." Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 175 (1992).

Consider that in 1995 a trial court changed the custody of a one-year-old girl from her birth mother to her father because the mother proposed to place the child in daycare while she attended college classes. *See* Ireland v. Smith, 542 N.W.2d 344 (Mich. Ct. App. 1995). The lower court, when weighing the relative advantages of both parent's

Critics of the tender years presumption have somewhat disparagingly called it "wool-sack psycho-sociology."[24] This term refers to the supposed natural bond which links a mother to a young infant. This bonding cannot be duplicated by a father, it is argued, because it begins immediately at birth,[25] and, some argue, in utero.[26]

In addition to the biological arguments discussed above *for* giving custody of young children to their *mothers*, there are two biologically based arguments *against* giving the custody of young children to their *fathers*. The first is the obverse argument for custody by the biological mother: that the presence of the male hormone, androgen, is incompatible with maternal behavior, as it is linked to aggression.[27] The second is that men, lacking female hormones, do not feel any biological stimulus toward mothering behavior.[28]

In the United States from the early 1900s through the mid-1980s, the tender years doctrine formed the basis for awarding child custody to mothers.[29] In 1961, the Minnesota Supreme Court stated: "It is the duty of the court to award custody of a young child to the mother unless to do so would be detrimental to his welfare."[30] Yet as early as 1963, some courts around the country had begun to discard the tender years doctrine as a basis for custody decisions.[31]

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homes, found them equal in most respects. *See id.* However, citing the need to maintain an intact family, the court ruled that custody of the child should be transferred to the father, who proposed to leave the child with his mother during the daytime. *See id.* The Michigan Court of Appeals reversed this decision, stating that the lower court impermissibly considered the mother's daycare arrangements when determining the best interests of the child. *See id.*

24. *See* Roth, *supra* note 12, at 436-37 & n.51.

25. This concept was described in one of the earliest recorded child custody cases: "[A] court of common law will not go so far as to hold nature in contempt, . . . puling [sic] infancy from the bosom of an affectionate mother, and place it in the coarse hands of the father. The mother is the softest nurse of infancy . . . ." Foster & Freed, *supra* note 13, at 330 (quoting Helms v. Franciscus, 2 Bland Ch. (Md.) 519, 544 (1830)); *see* Klaff, *supra* note 15, at 345 (quoting SELMA FRAIBERG, EVERY CHILD'S BIRTHRIGHT: IN DEFENSE OF MOTHERING 59 (1977) ("The mother is the center of an infant's small world, his psychological homebase, and . . . she 'must continue to be so for some years to come.'")).

26. *See* Klaff, *supra* note 15, at 364. This idea of infant bonding is also the basis for the attachment theory, which proposes that all humans have a need as infants to develop a close relationship with a consistent caregiver. *See* Kaplan, *supra* note 9, at 9-11. If this attachment does not take place at a critical period in the child's life, usually from six to nine months, the child will have adjustment difficulties later in life. *See id.* If attachment does not take place at an early age (eighteen months has been suggested), the child may become withdrawn and unresponsive to his environment. *See id.*; *see also infra* notes 152-155, describing the effects of inadequate bonding.

27. *See* Klaff, *supra* note 15, at 363. Is there no role for fathers? *See generally*, DAVID POPENOE, LIFE WITHOUT FATHER (1996) (discussion of the roles that possibly only fathers can fill).

28. *See* Klaff, *supra* note 15, at 363.

29. *See* Randy Frances Kandel, *Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations*, 49 U. MIAMI L. REV. 299, 314 (1994). Kandel explains that in the latter half of the nineteenth century, the prevailing theory was that a child should be raised by at least one person of each gender whose role was determined by "natural law." *See id.* at 318. The contribution of the male was to be "education," which included moral and citizenship education. *See id.* The female role was to provide nurturing. *See id.*

Children were seen as "blank slates" or *tabulae rosae*, upon whom characteristics were to be imprinted. *See id.* However, by the turn of the century, especially because society had become more industrialized and fathers spent more of their day away from home, the role of the father in child rearing was diminished, while that of the solicitous mother became exalted. *See id.*

30. Eisel v. Eisel, 110 N.W.2d 881, 882 (Minn. 1961) (mother awarded custody of eight year old boy who had been in the custody of his father for four years). The court weighed potential disruption to the boy resulting from a change in custody arrangement with what it called "the unique influences of a devoted mother." *Id.* at 884.

31. *See* Coles v. Coles, 204 A.2d 330 (D.C. 1964) (the court found it was not an abuse of discretion for the trial court to award custody to the father). According to the law of the District of Columbia, it was not mandatory that

In 1971, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibited the enforcement of statutes which gave mandatory preferences to men or women on the basis of sex, if the purpose of the statutes was to avoid the necessity of holding hearings based on merit.[32] In 1973, the Supreme Court held that "classifications based upon sex are inherently suspect and must be subjected to strict judicial scrutiny."[33] As a result, some courts were quick to abandon the tender years presumption.[34] Other courts were much slower to drop the presumption. For example, in 1978, the West Virginia Supreme Court still espoused the tender years doctrine,[35] although the court evinced a glimmer of the coming gender neutral standard in stating: "When the socialization pattern changes to the extent that the traditional roles of mother and father are reversed with such frequency that the presumption no longer bears any relation to reality, then the law, perforce of changed circumstances will inevitably change."[36]

2. Gender Neutral Standards: Who Is the "Primary Caretaker"?

During the mid-1970s push for an equal rights amendment to the federal Constitution,[37] courts adopted "gender neutral standards" to replace the maternal preference.[38] In 1980, West Virginia amended its statutes to create a "sex-neutral" standard for determining custody.[39] A year later, the West Virginia Supreme Court of Appeals adopted "the primary caretaker" standard, which it defined as a presumption in favor of the parent who "has taken primary responsibility for the

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custody of a small child be awarded to the mother, although this had been a consistent policy of the District. *See id.* at 332.

32. *See* Reed v. Reed, 404 U.S. 71 (1971) (The Court overruled an Idaho statute which required that if a man and a woman were equally qualified to administer an estate, the man was to be chosen over the woman.). The objective of the Idaho statute was to reduce the number of persons who might apply to be the administrator of an estate, thus reducing the workload of the probate courts by limiting the pool of applicants for estate administer. *See id.* at 76.

33. Frontiero v. Richardson, 411 U.S. 677 (1973) (a married woman sued the Secretary of Defense because dependents of male members of the armed services were defined by different standards than dependents of women members, which in turn affected their eligibility for benefits).

Subsequently, the Supreme Court adopted an "intermediate" level of scrutiny for gender-based classifications. *See* Craig v. Boren, 429 U.S. 190 (1976) (An Oklahoma statute forbade the sale of 3.2 percent beer to males between 18 and 21, but not to women within the same age bracket.).

34. *See* Watts v. Watts, 350 N.Y.S.2d 285 (Fam. Ct. 1973). The *Watts* court stated that applying the tender years presumption controverted legislative findings that the facts in each case should be decided without "sex preconceptions of any kind" to determine a child's best interest. *Id.* at 287. To support its findings that the application of the tender years doctrine was unconstitutional in deciding custody cases, the New York court cited statutes, which recently had been amended to remove the presumption, from Colorado, Florida, and Wisconsin. *See id.* at 288; *see also* Kockrow v. Kockrow, 217 N.W.2d 89 (1974). The *Kockrow* court stated that parents, under a no fault divorce statute, have "an equal and joint right to their [children's] custody and control, and neither has a superior right over the other." *Kockrow*, 217 N.W.2d at 92.

35. *See* J.B. v. A.B., 242 S.E.2d 248 (W. Va. 1978). "[O]ur well-settled law [is] that '[w]ith reference to the custody of very young children, the law favors the mother if she is a fit person, other things being equal . . . .'" *Id.* (quoting Funkhouser v. Funkhouser, 216 S.E.2d 570 (W. Va. 1975)); *see* Settle v. Settle, 185 S.E. 859 (W. Va. 1936)).

36. *J.B.*, 242 S.E.2d at 253.

37. New Mexico has adopted its own equal rights amendment: "Equality of rights under law shall not be denied on account of the sex of any person." N.M. CONST. art. II, § 18. For further discussion, see *infra* note 50.

38. *See* Sheri A. Ahl, *A Step Backward: The Minnesota Supreme Court Adopts a "Primary Caretaker" Presumption in Child Custody Cases:* Pikula v. Pikula, 70 MINN L. REV. 1344, 1349 (1986).

39. *See* W. VA. CODE § 48-2-15 (1980), *cited in* Garska v. McCoy, 278 S.E.2d 357, 360, 361 (W. Va. 1981).

caring and nurturing" of the child.[40] The court enumerated ten factors which indicated that a parent had assumed the role of primary caretaker.[41] These factors revolved around daily childcare tasks such as feeding, grooming, and educating.[42]

3. The "Best Interests" Test Evolves

As the tender years presumption was fading, another standard was evolving: the "psychological parent."[43] Courts in New York began to award custody to third parties

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40. *Garska*, 278 S.E.2d at 358. The *Garska* court's distaste in adopting this new gender neutral standard was thinly veiled in its remark: "While in *J.B. v. A.B.*[, 242 S.E.2d 248 (W. Va. 1978),] we expressed ourselves in terms of the traditional maternal preference, the Legislature has instructed us that such a gender based standard is unacceptable." *Id.* at 361. The court later stated: "[A]ll of the principles enunciated in *J.B. v. A.B.* . . . are reaffirmed today except that wherever the words 'mother,' 'maternal,' or 'maternal preference' are used . . . some variation of the term 'primary caretaker parent' . . . should be substituted." *Id.* at 363.

41. *See id.* The ten "primary caretaker" factors listed by the *Garska* court were as follows:

> (1) preparing and planning of meals; (2) bathing, grooming, and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, *i.e.*, transporting to friends' houses or, for example, to Girl or Boy Scout meetings; (6) arranging alternative care, *i.e.*, babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, *i.e.*, teaching general manners and toilet training; (9) educating, *i.e.*, religious, cultural, social, etc.; and (10) teaching elementary skills, *i.e.*, reading, writing, and arithmetic.

Id.; *see* Regenscheid v. Regenscheid, 395 N.W.2d 375 (Minn. Ct. App. 1986). In *Regenscheid*, the court was asked whether "the trial court abuse[d] its discretion in finding neither parent the primary caretaker and awarding [the father] custody." *Id.* at 378. Rather than focus upon a list of caretaking functions to determine the "primary caretaker" as did the West Virginia court in *Garska*, the *Regenscheid* court considered parenting responsibilities such as arranging for daycare, providing discipline, and supervising school work to determine which parent was the primary caretaker. *See id.* Ultimately, the *Regenscheid* court found that the weighing of the factors did not tip the scale in favor of either parent, and so the court awarded custody to the father, stating that he had developed the "greater emotional bond" with his children. *See id.* at 379.

42. Contrast the *Garska* court's list of tasks, *see supra* note 41, which denotes who should be the primary caretaker, with the concept of "maternal deference," *see generally* Becker, *supra* note 23, at 203-23. This proposed maternal deference standard would allow mothers to make the ultimate decision of who will have custody of the children. *See id.* at 204-05, 223. Becker presents four arguments in support of the maternal deference standard:

> [A maternal deference standard] (a) recognizes women's reproductive labor, competence, and authority; (b) has the potential to yield the proper result in custody disputes more often than current standards to the benefit of caretaking women and their children; (c) could improve the economic situation of divorced women and children in many families in which actual custody remains unaffected; and (d) would give fathers an incentive to change their behavior within marriage.

Id. at 203-04. Becker's premise is that judges do not interfere with family relationships when there is an intact family out of deference to fathers. *See id.* at 205. She suggests that women's economic status would improve if there was a maternal deference standard. *See id.* at 214-15. Under such a standard, women would not respond to threats made by a father in a divorce situation that he will sue for custody if the woman does not decrease her support demands. *See id.* at 215. Baker says that the threat to fathers of automatically losing custody of their children if there is a divorce will alter the behavior of the fathers during the marriage. *See id.* at 216. She cites a study wherein wives contemplated divorce less often if their spouses helped with household tasks. *See id.*

43. A "psychological parent" has been described as any caring adult who shares "interaction, companionship, and . . . experiences" with a child on a day-to-day basis. *See* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD, 19 (1979). The authors also state that whether a child has developed this psychological bond with an adult who is mentally healthy or with one who is unstable is irrelevant—any lessening of the bond is extremely distressing for the child. *See id.* at 19-20. *Compare id. with* Kandel, *supra* note 29, at 322-333.

Kandel sees the idea of the psychological parent as an outgrowth of the "child as patient" model, which was a basis for the prevalence of the tender years doctrine in the early 1900s. *See* Kandel, *supra* note 29, at 323. Kandel stated that one tactic for mothers to strengthen their position in custody decisions was to portray children's natures as "sickly, nervous, and dependent." *Id.* at 322. This vision of children carried over to the 1970s, but the emphasis on physical health was replaced by an emphasis instead on psychological health. *See id.* at 337. Kandel describes this

over the natural parents, if the court found that "extraordinary circumstances" existed and that there was a psychological parental bond between the child and the third party.[44] Courts justified this change by stating that it reflected a societal shift which considered children to have constitutionally protected rights that may trump any possessory interests of their parents.[45]

B. *Custody Doctrines in New Mexico*

1. The "Tender Years" Presumption

By 1941, the tender years doctrine was pervasive in New Mexico.[46] Nine years later, the doctrine still prevailed.[47] When a biological father sued for the custody of his daughter, who had lived with her maternal grandparents after her mother's death, and during the period the father was enlisted in the army, the New Mexico Supreme Court said: "It has long been a policy of the courts that the custody of very young children, particularly girls, should be awarded to the mother. Their ages, sex, health, and physical condition are important elements to be considered."[48] In 1960, the supreme court reaffirmed its adherence to the tender years doctrine, by stating that it was obviously in the best interests of a boy to remain with his mother, instead of visiting Mexico with his father, because the boy was only ten years old.[49]

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period as the "psychologization" of family law, where the threshold question in custody disputes became: "Given the child's delicate, weak, and sensitive nature, and her need for stability and security, what custody rule is best?." *Id.*

44. *See, e.g.*, Doe v. Doe, 399 N.Y.S.2d 977 (Sup. Ct. 1977); Bennett v. Jeffreys, 356 N.E.2d 277 (N.Y. 1976). What are "extraordinary circumstances"? Aaron N. Hoorwitz lists factors such as "[the] prolonged separation . . . from an acquiescent parent, attachment . . . to a non-parent, [and] potential trauma to the child." Aaron N. Hoorwitz, *"Extraordinary Circumstances" in Custody Contests Between Parent and Non-parent*, 10 J. PSYCHIATRY & L. 351, 356 (1982). However, Hoorwitz's list is not exhaustive.

In *Bennett*, the court gave further examples of extraordinary circumstances: "[the] surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time." *Bennett*, 356 N.E.2d at 281 (N.Y. 1976). In *Doe*, the court said "extraordinary circumstances" existed when there had been extended periods when the biological father had not visited his sons and there was almost no relationship between the boys and their father. *See Doe*, 399 N.Y.S.2d at 983. The *Doe* court found these circumstances supported awarding custody of the children to their stepmother who was separated from the children's natural father. *See id.* at 983.

45. *See Bennett*, 356 N.E.2d at 281.

46. *See* Albright v. Albright, 45 N.M. 302, 115 P.2d 59 (1941). In *Albright*, an Arizona court made the original custody determination that a mother would have custody of her three year old child for nine months of the year, stating that a child of tender years belonged with its mother. *See id.* at 303, 115 P.2d at 60. The New Mexico Supreme Court, hearing an appeal of this decision, stated that: "[A]ll social and moral considerations, under most circumstances, echo approval. The controlling consideration when custody of a child is concerned, is, of course, the best interest of the child." *Id.* at 304 (citing *In re* Hogue, 41 N.M. 438, 70 P.2d 764 (1973); *Ex parte* Mylius, 19 N.M. 278, 142 P. 918 (1914)).

47. New Mexico *ex rel.* Day v. Parker, 55 N.M. 227, 230 P.2d 252 (1950) (deciding factor in New Mexico is the child's best interests).

48. *Id.* at 230, 230 P.2d at 254. The court held that remaining with "[t]he only mother the child knows" was the situation which was in the child's best interests. *See id.* at 231, 230 P.2d at 254.

49. *See* Urzua v. Urzua, 67 N.M. 304, 355 P.2d 123 (1960). But, the New Mexico Supreme Court also indicated that when the boy turned twelve he would be at an age when "[he] is going to need a father's influence somewhat. He is going to need a firm hand . . . ." *Id.* at 306, 355 P.2d at 124.

2. "Joint Legal Custody"

By 1989, child custody standards in New Mexico had changed.[50] The state legislature had passed sections 40-4-9 through 40-4-9.1 of the New Mexico Children's Code,[51] which created the presumption that joint legal custody was in the best interests of a child.[52] In 1990, when a divorced mother appealed the award of physical custody of her daughter to the child's father,[53] the New Mexico Court of Appeals stated that it was in the child's best interests to remain with the father, who had provided for her day to day needs.[54]

3. The "Parental Right" Presumption

In New Mexico, there has been an explicit acknowledgment of the "parental right" presumption for decades.[55] This presumption holds that when a dispute exists between biological parents and third parties, "the 'parental right' doctrine is to be given prominent, though not controlling, consideration."[56] New Mexico courts have relied on this presumption when deciding custody cases which pit biological parents against third parties.[57] Increasingly, however, the parental right presumption has not automatically controlled these decisions—both in New Mexico and in other jurisdictions. As children's rights have come into focus, courts have begun to consider the needs of children apart from those of the adults involved in the dispute.

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50. In 1973, a New Mexico Law Review symposium issue assessed the impacts of the passage of a proposed equal rights amendment to the New Mexico Constitution. *See* Jennie D. Behles & Daniel J. Behles, *Equal Rights in Divorce and Separation*, 3 N.M. L. REV. 118, 131-33 (1973). Behles and Behles pointed out that while the New Mexico statute governing child custody at that time, *see* N.M. STAT. ANN. § 22-7-15 (1953) (recodified at N.M. STAT. ANN. § 32A-1-5 (Repl. Pamp. 1995)), provided that parents of minor children had equal rights and duties, the courts generally based their custody decisions on the presumption that a child of tender years should be with his mother. *See* Behles & Behles, *supra*, at 133. Behles and Behles predicted that passage of the New Mexico Equal Rights Amendment would have little effect on custody decisions "[u]ntil . . . society changes its ideas and mores to conform in practice to what the Equal Rights Amendment provides in theory." *Id.*

Nationally, this change may have been foretold by a line of United States Supreme Court cases decided between 1972 and 1983, which dealt with the rights of biological parents, especially unwed fathers. *See* Lehr v. Robertson, 463 U.S. 248 (1983) (biological relationship alone did not entitle a father to assert his rights to his two year old child); Caban v. Mohammed, 441 U.S. 380 (1979) (unwed fathers were no less qualified than unwed mothers to comment on adoption proceedings; Court would have rejected the presumption of a gender-based difference between fathers and mothers, if the father had sustained a relationship with his children); Quilloin v. Walcott, 434 U.S. 246 (1978) (focus should be on protecting the existing family unit (the mother, stepfather, and child) when an unwed father seeks to block the adoption of his child by the husband of the natural mother); Stanley v. Illinois, 405 U.S. 645 (1972) (statute which presumed a biological father to be unfit was unconstitutional). In general, the view of the Supreme Court was that if an unwed father had developed and sustained a relationship with his child, he would be treated on an equal basis with classes of other parents. *See, e.g., Lehr*, 463 U.S. at 261. The unwed fathers' rights were less protected if the fathers had not shown any commitment to raising their children. *See, e.g., Quilloin*, 434 U.S. at 256.

51. N.M. STAT. ANN. §§ 40-4-9 to 40-4-9.1 (Repl. Pamp. 1986).

52. Joint custody means that parents share the authority to make major decisions for their children, but it does not mean equal time sharing or joint physical custody. *See* Barbara L. Shapiro, *Family Law*, 17 N.M. L. REV. 291, 297-98 (1987) (citing N.M. STAT. ANN. §§ 40-4-9 to 40-4-9.1 (Repl. Pamp. 1986)).

53. *See* Brito v. Brito, 110 N.M. 276, 794 P.2d 1205 (Ct. App. 1990).

54. *See id.*

55. *See* Shorty v. Scott, 87 N.M. 490, 492-93, 535 P.2d 1343-44 (1975).

56. *Id.* at 493, 535 P.2d at 1344. "It has long been the rule that '[p]arents have a natural and legal right to custody of their children.'" *Id.* (quoting Roberts v. Staples, 79 N.M. 298, 442 P.2d 788 (1968) (alteration added)).

57. *See* Greene v. French, 97 N.M. 493, 495, 641 P.2d 524, 526 (Ct. App. 1982) (There is a presumption of parental fitness, and between parents and nonparents, the burden should rest with the nonparents to show that the parents are unfit to care for their children.).

Moreover, because children cannot be effective advocates for their own rights,[58] state legislatures and courts have encouraged or mandated that independent advocates, such as lawyers and social workers, be involved in determining which custody award would be in the best interests of the child.[59] This involvement is encouraged even in custody contests between parents and third parties.[60]

If the parental right presumption is not the automatic remedy when a petition for adoption has been set aside, then which standard will control? The New Mexico Supreme Court's answer is: the best interests of the child.

4. The "Best Interests" Test Evolves in New Mexico

New Mexico has a long history of applying the "best interests" standard to custody decisions between third parties and biological parents.[61] However, when weighing factors which determine the child's best interests, New Mexico courts have reached very different conclusions.

In 1915, in *Focks v. Munger*, a biological mother brought a *habeas corpus* proceeding to recover the custody of her child who had lived with a foster mother for ten years.[62] The New Mexico court stated that the foster mother, who sought to keep the child, had "the burden of showing that the welfare of the child" was best served by staying with her.[63] But in 1930, in *Ex parte Pra v. Gherardini*, the New Mexico Supreme Court refused to return a child to the biological mother who had voluntarily

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58. Contrast the idea that children need advocates to protect them with the idea that the current mode of determining children's placements in custody decisions is too protectionist. Kandel argues that children as young as six years are capable of ascertaining which of several custody arrangements are in their own best interests, and that children should be empowered to make these custody decisions on their own. *See* Kandel, *supra* note 29, at 301. Kandel supports his theory by arguing both from a constitutional basis that children have fundamental liberty interests, *see id.* at 349, and from a psychological basis, citing the studies of psychologists Jean Piaget, Lawrence Kohlberg, and Erik Erikson on the development of morality and reasoning in early childhood. *See id.* at 361. Kandel would have the child choose when parents cannot reach a decision. *See id.* at 375. He states that if both parents would be adequate custodians, "*any* choice the child makes is necessarily consistent with his best interests" . . . [and] "poses no greater risk to his well-being than if the choice were made by the parents." *Id.* at 370.

59. *See* MARTHA FINEMAN, INSTITUTE FOR LEGAL STUDIES, UNIVERSITY OF WISCONSIN-MADISON LAW SCHOOL, THE POLITICS OF CUSTODY AND GENDER: CHILD ADVOCACY AND THE TRANSFORMATION OF DECISION MAKING IN THE U.S.A 3, 6-8 (1988) (Working Paper Series 3). Fineman asserts that the introduction of professional child advocates has begun a power struggle between interest groups, wherein the advocates for the children feel their position is morally superior because it is supposedly neutral. *See id.* at 29. Fineman feels this neutrality is tainted, however, because there is no way to objectify the best interest tests. *See id.* Hence, these tests can be applied only on the basis of an advocate's subjective views. Fineman believes that in a effort to be gender neutral, child advocates devalue the activities associated with primary caretaking, especially because these are tasks which are mainly done by mothers. *See id.* Fineman feels that the advocates' recommendations are less vulnerable to criticism, first, because of their supposedly higher moral plane, *see id.* at 15, and, second, because courts are content not to disturb the system because it relieves them of the responsibility of weighing nebulous case-specific best interest factors. *See id.* at 6-8.

60. *See id.*

61. *See* Bustamento v. Analla, 1 N.M. (Gild., A.L.B. ed.) 255, 261 (1857) ("[I]n cases of this kind, the welfare of the children is regarded as well as the right of the parties contesting their claim to their care and custody.").

62. Focks v. Munger, 20 N.M. 335, 149 P. 300 (1915). Although the court referred to the idea of the child's best interests, it ultimately ordered that the child be returned to the biological mother, "the mother who gave him birth, and suckled him as a baby," stating that not to do so "would run counter to the law of nature and to every emotion of the human heart." *Id.* at 341, 149 P. at 301. The court stated that its decision was based on both "human and divine law." *Id.* at 342, 149 P. at 302. Thus, while speaking of "best interests," the court was also applying the maternal preference standard and reflecting the social policy of the time. *See id.*

63. *Id.*

left the child in the custody of her sister nine years earlier.[64] The court stated "the welfare and best interest of the child are the controlling questions for determination" of custody.[65] Although the court cited the same standard in both *Focks* and *Pra*, the court reached opposite custody decisions in each case.

In 1937, in *In re Hogue*, a couple filed a petition to adopt a child who had been left in their custody for three weeks.[66] The child's mother was an employee of the couple, who apparently left their home suddenly, leaving her child behind, and without telling them when she intended to return.[67] When the mother learned that an adoption petition had been filed by her former employers, she returned to claim the child.[68] The petitioners relied on the 1930 *Pra* case, and pleaded that the child be awarded to them under the "best interests of the child" doctrine.[69] The supreme court returned custody of the child to the mother, despite a recommendation from the state Bureau of Welfare that the petitioners should be allowed to adopt the child.[70] The court distinguished its decision from *Pra* by stating that the time the child had been in the petitioner's custody was short (three weeks versus nine years) and that in contemplating the best interests of the child, the factors to be considered were not only economic, but also "spiritual, filial, or social" ones.[71]

In 1942, in *Young v. Young*, the supreme court again held that the "best interests" of children, who had been left to the care of the paternal grandparents, lay in returning them to their natural mother.[72] The court specifically stated that "other things being equal, the natural mother has a superior claim."[73] Yet, in 1950, in *Cook v. Brownlee*, the pendulum swung once again in favor of a child remaining with the "third party" caretaker who had reared him.[74] The supreme court determined that it was in the child's best interests to remain in the custody of his grandfather rather than be reunited with his biological father.[75] The court declared that "[i]n this jurisdiction . . . the welfare of the child has always been the controlling consideration"[76] and that "parents, other things being equal, are entitled to custody of their minor children."[77] The court found in the grandfather's favor, in part because the child expressed a preference to remain in his grandfather's custody.[78]

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64. *See Ex parte* Pra v. Gherardini, 34 N.M. 587, 588, 286 P. 828, 829 (1930); *see also* Padilla v. Clancey, 35 N.M. 9, 288 P. 1048 (1930) (finding that a minor who had lived with two persons, not her parents, from the age of five, would remain with these persons, despite her parents' suit to regain custody).

65. *Pra*, 34 N.M. at 591, 286 P. at 830.

66. *See In re* Hogue, 41 N.M. 438, 439, 70 P.2d 764, 765 (1937).

67. *See id.*

68. *See id.* at 441, 70 P.2d at 767.

69. *See id.* at 440, 70 P.2d at 766. Throughout this case, there is an implication that one of the petitioners' arguments was that they should be awarded custody because they could provide the child with more economic advantages, and that the court should weigh this factor heavily in determining which custody arrangement was in the child's best interests. *See id.*

70. *See id.* at 439, 70 P.2d at 765.

71. *Id.* at 442, 70 P.2d at 768.

72. *See* Young v. Young, 46 N.M. 165, 167, 124 P.2d 776, 777 (1942).

73. *Id.*

74. *See* Cook v. Brownlee, 54 N.M. 227, 220 P.2d 378 (1950).

75. *See id.* at 230, 220 P.2d 378.

76. *See id.* at 229, 220 P.2d at 379.

77. *See id.*

78. *See id.* The preference of the child as to who shall be his caretaker is an element of the "best interests" test. For an enumeration by one court of the factors which comprise this test, see *supra* note 11.

Finally, in 1982, in *In re Adoption of Doe*, the court of appeals found a legislative intent in section 40-7-4(B)(4) of the New Mexico Statutes, which listed the grounds for terminating parental rights, to "give primary consideration to the physical, mental, and emotional welfare and needs of the child."[79] The court interpreted section 40-7-4(B)(4) as a recognition by the state legislature that children's bonds with foster parents may be so strong, that their removal from the foster parents' homes would cause "serious psychological harm."[80] According to the court, the enactment of this legislation was an implicit recognition of children's rights "as well as the rights of their parents."[81]

5. The "Best Interests" Test in New Mexico Today

The application of the "best interests test" arises in two situations: (1) in custody contests between two biological parents or (2) in custody disputes between biological parents and third parties. In New Mexico, when biological parents contest custody between themselves, courts explicitly apply a statutorily mandated "best interests" test.[82] Courts consider the following factors when applying this test:

(1) the wishes of the child's parent or parents as to his custody;
(2) the wishes of the child as to his custodian;
(3) the interaction and interrelationship of the child with his parents, his siblings, and any other person who may significantly affect the child's best interest;
(4) the child's adjustment to his home, school, and community; and
(5) the mental and physical health of all individuals involved.[83]

New Mexico courts also often consider a sixth factor: the potential negative effect that a custody change may have on a child.[84]

In custody disputes between biological parents and third parties, New Mexico no longer automatically chooses the biological parent over the third party. Now, the courts weigh the best interests of the child against the rights of the parents and third parties.[85] *In re Adoption of J.J.B.*[86] is an example of this circumstance.

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79. *In re* Adoption of Doe, 98 N.M. 340, 344, 648 P.2d 798, 802 (Ct. App. 1982) (quoting N.M. STAT. ANN. § 40-7-4(A) (1978) (repealed and recompiled as N.M. STAT. ANN. § 32A-5-15 (Repl. Pamp. 1995))).

80. *See id.* at 346, 648 P.2d at 804 (interpreting N.M. STAT. ANN. § 40-7-4(B)(4) (1979) (repealed and recompiled at N.M. STAT. ANN. § 32A-5-15 (Repl. Pamp. 1995))). A year later in a different case with the same name, *In Re* Adoption of Doe, 99 N.M. 278, 657 P.2d 134 (Ct. App. 1983), the court quoted, with approval, this passage from a North Dakota Supreme Court decision:

> The rights of parents are not proprietary rights but rather are in the nature of a trust reposed in them, subject to their correlative duty to care for and protect the child. The law secures their rights only so long as they shall discharge their obligations. They are not to be enforced to the detriment or destruction of the happiness and well-being of the child . . . .

Id. at 282, 657 P.2d at 138 (quoting *In re* F.H., 283 N.W.2d 202, 214 (N.D. 1979) (omission in *Doe*)).

81. *Doe*, 98 N.M. at 346, 648 P.2d at 804.

82. *See* N.M. STAT. ANN. § 40-4-9(A) (Repl. Pamp. 1994).

83. N.M. STAT. ANN. §§ 40-4-9(A)(1) to 40-4-9(A)(5) (Repl. Pamp. 1994).

84. *See* Schuermann v. Schuermann, 94 N.M. 81, 83, 607 P.2d 619, 621 (1980); *see also* discussion *supra* Part II.B.4 and Part II.B.5.

85. *See* discussion *supra* Part II.B.4 and Part II.B.5.

86. 119 N.M. 638, 894 P.2d 994 (1995).

III. *IN RE ADOPTION OF J.J.B.*: THE TREND ILLUSTRATED IN NEW MEXICO

> The point of greatest emotional tension . . . is the prospect of tearing a young child away from those with whom he has probably developed a strong familial bond and placing him in the custody of another—even though this other is the child's natural parent. The resolution of this case lies in deciding the best interests of the child when a biological parent-child relationship is at issue.[87]

A. *Statement of the Case*

J.J.B. was born on April 14, 1990, in Albuquerque, New Mexico, to Edward Bookert and Ann Medina, an unmarried couple.[88] The couple had lived together for almost ten years at the time of J.B.'s birth, and already had had two other children together.[89] Bookert's name appeared on J.J.B.'s birth certificate.[90] In August of 1990, the couple and their three children moved to Tucson, Arizona, in search of better employment opportunities for Bookert. However, in November of 1990, Medina decided to return to Albuquerque with the children.[91] Two weeks later, Bookert returned to Albuquerque but did not resume living with the family.[92] After spending half a day with the children, Bookert went to Hobbs, New Mexico, to stay with his mother, indicating that he would return to Albuquerque at the end of December, 1990. During the weeks Bookert spent in Hobbs, he telephoned the family frequently and sent Christmas gifts to the children. However, Medina eventually refused to speak with him.[93]

On January 4, 1991, when J.J.B was almost 11 months old, Medina turned him over to the La Familia Adoption Agency and relinquished her parental rights.[94] She also claimed that Bookert had abandoned the family.

Medina did not inform Bookert that she had placed J.J.B. for adoption. However, on the same day the child was turned over to the agency, an agency employee, Gerald Ortiz y Pino telephoned Bookert in Hobbs, and requested his permission to place J.J.B. for adoption.[95] Bookert did not grant permission and repeatedly told Ortiz y Pino that he was the baby's father, and that he would come to Albuquerque to pick up his son.

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87. *Id.* at 651, 894 P.2d at 1007.

88. *See id.* Unless specifically cited, all factual references to *J.J.B.* in the text and in the footnotes of this Comment refer to *J.J.B.*, 119 N.M. at 640-43, 894 P.2d at 996-99.

89. *See id.* at 640, 894 P.2d at 996; *see also In re* Adoption of J.J.B., 117 N.M. 31, 32, 868 P.2d 1256, 1257 (Ct. App. 1993), *aff'd*, 119 N.M. 638, 894 P.2d 994 (1995).

90. Bookert's name appeared on each child's birth certificate. Under New Mexico adoption statutes, an "acknowledged" father is one who "is named with his consent, as the adoptee's father on the adoptee's birth certificate." N.M. STAT. ANN. § 39A-5-3(D)(2) (Repl. Pamp. 1995).

91. Upon arriving in Albuquerque, Medina and the children shared an apartment with Medina's father.

92. The relationship between the couple, which had begun to deteriorate in Arizona, remained difficult in Albuquerque. Medina told Bookert that he was not welcome to live with the family in the apartment.

93. Bookert claims that, during this period, he sent forty dollars to Medina to support the children, but she denies receiving it.

94. Medina stated that she was unable to care for the three children alone.

95. Medina said that she did not inform Bookert of her decision because she was angry with him.

On that same day, January 4, 1991, La Familia placed J.J.B. with Carla and Kyle Roth. The Roths accepted J.J.B. even though they knew that Bookert had not agreed to the termination of his parental rights.[96]

Edward Bookert returned to Albuquerque on Sunday, January 6th, 1991, and telephoned Ortiz y Pino the next day in an attempt to arrange a reunion with J.J.B. However, Ortiz y Pino refused to turn J.J.B. over to Bookert.

On January 18, 1991, Bookert hired an attorney, who wrote to La Familia and stated that Bookert wanted to keep his child.[97] On January 23, 1991, the Roths filed a petition to adopt J.J.B. No notice of this petition was served on Bookert or on his attorney.[98] On March 12, 1991, the Roths amended their petition to allege that because Bookert had not established a "custodial, personal, or financial relationship" with J.J.B., his consent to the adoption was not required.[99]

In March, 1991, Medina had a change of heart and decided to assist Bookert in recovering J.J.B. The couple retained a different attorney to represent the two of them, and they hand-delivered a letter to La Familia on March 14, 1991, demanding the return of J.J.B. to their custody. The agency responded by turning the letter over to the Roths' attorney.

On April 4, 1991, Bookert and Medina each filed responses to the Roth's petition. Medina claimed that her relinquishment was defective. Bookert, now appearing *pro se*, maintained that he had at no time abandoned his children, although he no longer lived with the child's mother. Bookert stressed that he had supported J.J.B. and had maintained communication with him.[100]

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96. In later testimony, Ortiz y Pino acknowledged that Bookert at no time acquiesced to the adoption. Indeed, he testified that Bookert expressed an intention to raise the child himself if Medina or his (Bookert's) mother in Hobbs was unable to do so.

97. Another method by which Bookert could have asserted his rights, in New Mexico after 1993, was by registration with the state's putative father registry. *See* N.M. STAT. ANN. § 32A-5-20 (Repl. Pamp. 1995). The stated purpose of this statute is to "protect the parental rights of fathers who affirmatively assume responsibility for children they may have fathered and to expedite adoptions of children whose biological fathers are unwilling to assume responsibility for their children." *Id.* New Mexico now requires that any petition for adoption which alleges that the consent of the father is unnecessary, contain a verified statement that the putative father registry has been searched. *See* N.M. STAT. ANN. § 32A-5-26 (L) (Repl. Pamp. 1995).

98. To imply Bookert's consent for their adoption of J.J.B., the Roths relied in part on section 40-7-36 of the New Mexico Statutes, N.M. STAT. ANN. § 40-7-36 (Repl. Pamp. 1989) (since repealed), which authorized a court to imply consent when a parent had not communicated with or supported a child for three months.

99. The amended petition cited for support section 40-7-35(A)(4) of the New Mexico Statutes, N.M. STAT. ANN. § 40-7-35(A)(4) (Repl. Pamp. 1989) (repealed and reconstituted at N.M. STAT. ANN. § 32A-5-17 (Repl. Pamp. 1995)).

100. Bookert's attempts to maintain contact with his son are important because of the United States Supreme Court decision in *Lehr v. Robertson*, 463 U.S. 248 (1983). Although the focus of *Lehr* was on procedural due process, the Supreme Court stressed that one of the decisive factors in considering whether an unwed biological father should be awarded custody of his child was whether the father had assumed the rights and responsibilities of parenthood. *See id.* at 261. According to the Court, "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Id.* at 260 (quoting Caban v. Mohammed, 441 U.S. 380, 397 n.16 (1979) (emphasis in *Lehr* omitted)).

A later state case, *In re Raquel Marie X.*, listed indicators of a father's manifestation of responsibility: "public acknowledgement of his paternity, payment of pregnancy and birth expenses, and steps taken to establish legal responsibility." *In re* Raquel Marie X., 559 N.E.2d 418, 428 (N.Y. 1990). The court also ruled that a portion of the New York statute which required that the father live continuously with the mother for six months before a child's placement for adoption, in order to challenge the proceedings, was in violation of the federal Constitution. *See id.* at 426.

On April 9, 1991, the court denied a petition by Medina to return physical custody of J.J.B. to herself in the interim, before a final hearing on the custody issue. At the same hearing, Bookert was denied visitation rights with J.J.B.

On May 22, 1991, the Roths filed a second amended petition. The purpose of this petition was to seek the termination of Bookert's parental rights, which would eliminate the need to procure his consent before the adoption.[101]

On June 7, 1991, Bookert petitioned again for visitation rights.[102] Beginning in November, 1991, Bookert was permitted 45 minute visits with J.J.B., while in the company of a nanny hired by the Roths. Bookert visited approximately thirty times with his son over the next five month period.

In December 1991, the Roths filed a petition which alleged "presumptive abandonment"[103] as a basis for the termination of Bookert's parental rights. In August, 1992, the district court terminated Bookert's parental rights and approved the Roths' adoption petition.[104] The court did not find Bookert was an unfit parent. Instead, the basis for the court's ruling was that J.J.B. had bonded with the Roths and it was in his best interests to remain with them.

Bookert appealed the judgment of the district court and on November 30, 1993, in *In re Adoption of J.J.B.*, the New Mexico Court of Appeals overturned the district court's ruling.[105] The basis for the court of appeals' decision was that the trial court had not explicitly ruled either that Bookert was an unfit parent or that he had abandoned J.J.B.[106]

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101. New Mexico statutes provide that the termination of parental rights can be initiated by a department or agency, or by "any other person having a legitimate interest in the matter, including a petitioner for adoption." N.M. STAT. ANN. §§ 32A-5-16(A)(1) to 32A-5-16(A)(3) (Repl. Pamp. 1995).

There are three grounds recognized in New Mexico for the termination of parental rights: (1) abandonment by the parent; (2) neglect or abuse which is not likely to change in the foreseeable future; and (3) presumptive abandonment. N.M. STAT. ANN. § 32-1-54 (Repl. Pamp. 1989) (repealed and recompiled at N.M. STAT. ANN. § 32A-5-15 (Repl. Pamp. 1995)). For a definition of "presumptive abandonment," see *infra* note 103.

New Mexico also provides that: "A decree of adoption may not be attacked upon the expiration of one year from the entry of the decree." N.M. STAT. ANN. § 32A-5-36(K) (Repl Pamp. 1995). Section 2-401 of the Uniform Adoption Act proposes, however, that "[a] person may not challenge an adoption decree more than six months after it is issued, even if the person was thwarted in his ability to assume parenting responsibilities." UNIF. ADOPTION ACT § 2-401 cmt., 9 U.L.A. 28 (Supp. 1994).

102. Bookert made his appearance on June 7, 1991, through a newly appointed, court-ordered attorney.

103. The elements of presumptive abandonment are whether the child has been in the care of others, whether placed there by court order or otherwise, and whether the following conditions exist:

> (a) the child has lived in the home of others for an extended period of time; (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 no longer prefers to live with the natural parent; (e) the substitute family desires to adopt the child; and (f) a presumption of abandonment created by the conditions described in Subparagraphs (a) through (e) of this paragraph has not been rebutted.

N.M. STAT. ANN. §§ 32A-5-15(3)(a) to 32A-5-15(3)(f) (Repl. Pamp. 1995); *see supra* notes 100-101.

104. A few days before the hearing, Medina, by stipulation, was dismissed as a party. By the time the case went to trial in district court, J.J.B. had lived with the Roths for over one and one-half years. *See In re* Adoption of J.J.B., 119 N.M. 638, 639, 894 P.2d 994, 995 (1995).

105. *See In re* Adoption of J.J.B., 117 N.M. 31, 32, 868 P.2d 1256, 1257 (Ct. App. 1993), *aff'd*, 119 N.M. 638, 894 P.2d 994 (1995).

106. The New Mexico Court of Appeals felt that a court's failure to rule either on Bookert's fitness or his possible abandonment of the child might be grounds for a later constitutional challenge. *See J.J.B.*, 117 N.M. at 36, 868 P.2d at 1261. The court of appeals quoted with approval *Quilloin v. Walcott*, 434 U.S. 426 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977); and *Stanley v. Illinois*, 405 U.S. 645 (1972). *See J.J.B.*, 117

The Roths appealed the court of appeals' judgment that the proposed adoption should be void.[107] On January 5, 1994, Bookert filed a motion with the court of appeals for court-ordered visitation with J.J.B., so that he could maintain a relationship with the child while the appeals process continued.[108] The court of appeals "issued a post-opinion visitation order. The [New Mexico] Department of Children, Youth and Families was required to develop a plan permitting Bookert to maintain regular contact with his son 'during the pendency of the appellate process.'"[109]

The New Mexico Supreme Court affirmed the court of appeals' decision in *In re Adoption of J.J.B.*, on March 30, 1995.[110] The supreme court's decision came four years after J.J.B. had first entered the adoption system.

B. The New Mexico Supreme Court's Ruling

> It was certainly foreseeable that the child could suffer greatly, whichever party were to prevail.[111]

In *J.J.B.*, the New Mexico Supreme Court affirmed the court of appeals' decision in the case.[112] It voided the Roths' adoption petition and held that Bookert should retain his parental rights to J.J.B.[113] Although the supreme court affirmed the court of appeals' judgment "on other legal grounds," it overruled the court of appeals' treatment of New Mexico's presumptive abandonment statute.[114] The supreme court remanded J.J.B.'s custody issue to the trial court for further determination.[115]

In its decision, the New Mexico Supreme Court first considered, and then rejected, the "bright line" rule that without parental consent an adoption must be voided.[116] The court next noted that terminating parental rights and determining child custody "are different issues and must be determined separately."[117] Acknowledging that tradition and public policy in New Mexico give "great weight to the presumption that, when a family breaks up, custody should go to the natural parent,"[118] the court

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N.M. at 36-37, 868 P.2d at 1260-61. What these three Supreme Court cases have in common is their consideration of third parties' rights to the custody of children versus the rights of their natural parents. Under these cases, the New Mexico Court of Appeals felt that there must be separate evidence in the record aside from the allegations of presumptive abandonment. *See id.* at 39, 868 P.2d at 1263.

107. *See J.J.B.*, 119 N.M. at 640, 643-44, 894 P.2d at 996, 999-1000; *see also* 117 N.M. at 32, 868 P.2d at 1257.

108. *See J.J.B.*, 119 N.M. at 644, 894 P.2d at 1000.

109. *Id.* (quoting the New Mexico Court of Appeals).

110. *See id.* at 640, 894 P.2d at 996.

111. *Id.* at 651, 894 P.2d at 1007. The New Mexico Supreme Court was commenting on the actions of La Familia Adoption Agency in placing J.J.B. with the Roths, when the agency knew that the child's father had not consented to the adoption and had made his objection known to the agency before the placement.

112. *See id.* at 640, 894 P.2d at 996.

113. *See id.* at 655, 894 P.2d at 1011.

114. *See id.* at 640, 894 P.2d at 996.

115. *See id.*

116. *See id.* at 651, 894 P.2d at 1007.

117. *Id.*

118. *Id.* at 652, 894 P.2d at 1008.

proposed that "special facts and circumstances . . . [or] unique situations . . . beyond the usual unfit-parent criteria" might justify abandoning this presumption.[119]

The supreme court gave examples of these extraordinary circumstances. First, it posited a change in the circumstances of the natural parent, from fit to unfit.[120] The court also suggested that minimal contact with the biological parent, to such an extent that the child has "significantly bonded" with caretakers other than the biological parents, could be an extraordinary circumstance.[121] Having assumed that the minimal contact is involuntary, the court called for great compassion, and clear and convincing evidence, before considering that the best interests of the child should be paramount.[122] But, the court then voided any presumption that a natural parent seeking custody after the denial of an adoption petition would automatically prevail.[123] Instead, the court said that "[a]n inquiry into extraordinary circumstances is implicitly encouraged"[124] by statute.[125]

The *J.J.B.* court considered four points in reaching its decision to void the proposed adoption and remand the case to the trial court to determine Bookert's parental fitness: (1) whether the termination of parental rights requires a separate showing of parental unfitness[126]; (2) whether presumptive abandonment can be a basis for the termination of parental rights[127]; (3) whether, and to what degree, the biological parents were responsible for the disintegration of the parent-child relationship[128]; and (4) the best interests of the child.[129]

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119. *Id.*

120. *See id.*

121. *See id.* at 653, 894 P.2d at 1009. The supreme court cited *Bennett v. Jeffreys*, 356 N.E.2d 277, 285 (N.Y. 1976), which posited that minimal contact with the biological parents also might be an extraordinary circumstances. *See J.J.B.*, 119 N.M. at 635, 894 P.2d at 1009. In *Bennett*, the New York court also cited the biological mother's lack of her own home, the fact that she was unwed, and the attachment that the child had for her present caretaker, with whom the child had lived for eight years, as examples of extraordinary circumstances. *See Bennett*, 356 N.E.2d at 285; *see also* description of other extraordinary circumstances *supra* note 44.

The *J.J.B.* court cautioned, though, that the standard of proof in a showing of extraordinary circumstances is one of clear and convincing evidence. *See J.J.B.*, 119 N.M. at 653, 894 P.2d at 1009. (This standard is codified in the current New Mexico statutes, *see* N.M. STAT. ANN. § 32A-5-16(H) (Repl. Pamp. 1995)).

122. *See J.J.B.*, 119 N.M. at 651, 894 P.2d at 1007.

123. *See id.*

124. *See id.* at 653, 894 P.2d at 1009. Note that if a biological parent contends that his or her consent to the adoption is invalid, the standard of proof is lower—preponderance of the evidence, not clear and convincing. *See* N.M. STAT. ANN. § 32A-5-36(D) (Repl. Pamp. 1995).

125. *See* N.M. STAT. ANN. § 40-7-51(C) (Repl. Pamp. 1994) (repealed and replaced by N.M. STAT. ANN. §§ 32A-5-36(D), 32A-5-36(H) (Repl. Pamp. 1995)). The statute provides in section 32A-5-36(D) that if the biological parents successfully show that the petition should be dismissed, the court must still determine who shall have custody of the child, based upon the best interests of the child. *See* N.M. STAT. ANN. § 32A-5-36(D) (Repl. Pamp. 1995) (repealing and replacing, in part, N.M. STAT. ANN. § 40-7-51(C) (Repl. Pamp. 1994)). In section 32A-5-36(H), if the adoption petition is denied by a court, the court must then decide the custody of the potential adoptee, based upon a best interests determination. *See* N.M. STAT. ANN. § 32A-5-36(H) (Repl. Pamp. 1995) (repealing and replacing, in part, N.M. STAT. ANN. § 40-7-51(C)(Repl. Pamp. 1994)).

126. *See J.J.B.*, 119 N.M. at 644, 894 P.2d at 1000.

127. *See id.* at 647, 894 P.2d at 1003.

128. *See id.* at 651, 894 P.2d at 1007.

129. *See id.*

Under it first point of inquiry, the *J.J.B.* court held that a separate showing of parental unfitness is not required when considering the termination of parental rights.[130] Under its second point of inquiry, the court identified two factors which must be established in order to prove presumptive abandonment.[131] These two factors are: (1) parental conduct evincing a conscious disregard of obligation owed to the child; and (2) this conduct must lead to the disintegration of the parent-child relationship.[132]

Next, the court considered parental responsibility for the disintegration of the parent-child relationship. The court reviewed Bookert's actions and stated that Bookert had made: "all reasonable efforts under the circumstances to regain custody of his son, and to maintain his relationship with his son."[133] Therefore, the court held that Bookert bore no responsibility for any disintegration of the relationship with his son.[134] Thus, the court found that the plaintiffs had not proven two elements of presumptive abandonment.[135]

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130. The *J.J.B.* court specifically held that parental unfitness may be "implicitly rather than expressly established." *Id.* at 644, 894 P.2d at 1000.

The court reviewed the United State Supreme Court cases of *Lehr v. Robertson*, 463 U.S. 248 (1983); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 426 (1978); and *Stanley v. Illinois*, 405 U.S. 645 (1972). The court used these five Supreme Court cases to illustrate that "parental unfitness" includes a broad spectrum of parental misbehavior. *See J.J.B.*, 119 N.M. at 644-46, 894 P.2d at 1000-02. The court specifically noted that "*Lehr* never mentioned parental unfitness as a necessary requisite under the Due Process Clause for termination of . . . parental rights." *Id.* at 646, 894 P.2d at 1002.

Because parental "unfitness" can be defined by many criteria, the *J.J.B.* court said it was a matter of state law what specific characteristics denote parental unfitness. *See id.* The court then declared that New Mexico's standards of parental fitness are inherent in the New Mexico statute which specifies the grounds for termination of parental rights. *See id.* at 647, 894 P.2d at 1003. The court referred to an earlier court's definition of unfit parental behavior: "parental neglect, abandonment, incapacity, moral delinquency, instability of character, or the inability to provide the child with needed care." *Id.* at 646, 894 P.2d at 1002 (citing Shorty v. Scott, 87 N.M. 490, 494 n.10, 535 P.2d. 1341, 1345 n.10 (1975)). The court said that the presence of any of these factors was an inherent finding of parental unfitness under the broad meaning ascribed by New Mexico statutory law. *See J.J.B.*, 119 N.M. at 647, 894 P.2d at 1003.

131. Although parental unfitness can be implied, the *J.J.B.* court specifically stated that a finding of presumptive abandonment, while a separate ground for the termination of parental rights, was also an implicit finding of parental unfitness. *See id.* The court stated that in order to find presumptive abandonment of a child, there must be strong evidence of abandonment, which exceeds "a mere rational connection between the conditions listed by statute and the presumptive fact." *Id.* at 648, 894 P.2d at 1004. To demonstrate this connection, the court requires that the focus in an evidentiary hearing be on the parent's conduct and not on the parent's subjective intent. *See id.* The parent's conduct is to be specifically analyzed for the effect it has on the child. *See id.*

132. *See id.* In an obvious allusion to the facts of *J.J.B.*, the *J.J.B.* court cited as a specific example of lack of proof of presumptive abandonment the situation of one parent placing her child in the care of others, without the consent of the other parent, and the second parent, despite his good-faith efforts, being unable to maintain contact with the child. *See id.* at 648-49, 894 P.2d 1004-05. In this situation, the second parent bears no responsibility for the disintegration of the relationship. *See id.*

133. *Id.* at 650, 894 P.2d at 1006.

134. New Mexico Supreme Court Justice Franchini dissented over the issue of whether Bookert did bear responsibility for the disintegration of his parent-child relationship with J.J.B. *See id.* at 655, 894 P.2d at 1011 (Franchini, J., dissenting). Justice Franchini cited the fact that Bookert did not specifically request visitation for seven and one-half months, *i.e.*, until July 1, 1991, when Bookert first attempted to get visitation with J.J.B., and that no one prevented Bookert from seeing J.J.B. *See id.* at 656-57, 894 P.2d at 1012-13 (Franchini, J., dissenting). Therefore, Justice Franchini said that although the majority spoke about applying an objective standard in weighing Bookert's behavior, it, in reality, focused on Bookert's subjective intent as evidenced by his pursuit of legal custody. *See id.* at 657, 892 at P.2d 1013 (Franchini, J., dissenting).

135. *See id.* at 652, 894 P.2d at 1007. Specifically, the court found that Bookert bore no responsibility for the second element of abandonment, *i.e.*, the disintegration of the parent-child relationship. *See id.* at 650, 894 P.2d at 1006. The court concluded that Bookert's behavior, *e.g.*, his immediate and insistent attempts to recover his child,

At this point the court affirmed the finding of the court of appeals that the adoption should be abandoned.[136] If the court had ended its review here, the custody of J.J.B. would have been returned to Edward Bookert.[137]

However, the *J.J.B.* court shifted its focus from the rights of the biological parent against third parties to the best interests of the child.[138] The court remanded the decision to the lower court, with instructions to consider: (1) whether Bookert's fitness as a parent has "significantly altered" during the course of the litigation; and (2) whether Bookert was "capable of reestablishing a psychological parent-child bond with J.J.B."[139] Finally, regarding custody and visitation, the lower court was "to consider any custody arrangement, temporary or permanent, or visitation by any persons, that is consistent with the rights of the parent, [and] the best interests of the child."[140]

In *J.J.B.*, the New Mexico Supreme Court seemed to suggest that the child's best interests may not depend upon whether a psychological parent bond was established between the child and the prospective adoptive parents, but rather whether one could be established or restored between the biological parent(s) and the child.[141] Beyond this, the supreme court gave little guidance on how to evaluate the possibility of reestablishing this bond.[142]

IV. WHERE ARE WE NOW?

Courts are in the middle of a shifting of factors to be applied to child custody decisions. The standard which the New Mexico Supreme Court announced in *In re Adoption of J.J.B.* is, nominally, the one which courts generally used in many earlier custody cases: the "best interests of the child." However, while the name of the doctrine has remained the same, the presumptions behind the doctrine have changed. As a basis for the "best interests" standard, the parental right presumption has become less favored in New Mexico and other jurisdictions. Instead, there has been an increased emphasis on both relationship criteria and children's rights in child custody determinations.

Courts have begun to recognize that children are distinct entities from their parents, and have begun to balance the rights and interests of each.[143] This shift

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did not evince a conscious disregard of his child. *See id.* at 650-51, 894 P.2d at 1006-07. Because presumptive abandonment was not proven, there was no implicit finding of parental unfitness. *See id.* at 651, 894 P.2d 1007.

136. *See id.*

137. This result presumes that Bookert, had, by a preponderance of the evidence, overcome the allegations of unfitness and abandonment. *See* N.M. STAT. ANN. § 32A-5-36(D) (Repl. Pamp. 1995); *see also supra* note 124. It ignores however, the last hurdle set by New Mexico statute, that before returning custody of the adoptee to the biological parent, the court will decide if this is in the child's best interests. *See* N.M. STAT. ANN. § 32A-5-36(D) (Repl. Pamp. 1995) (repealing and replacing, in part, N.M. STAT. ANN. § 40-7-51(C) (Repl. Pamp. 1994)); *see also supra* note 125.

138. *See J.J.B.*, 119 N.M. at 651-55, 894 P.2d at 1007-1011.

139. *Id.* at 655, 894 P.2d at 1011.

140. *Id.*

141. *See id.*

142. What was the final disposition in the case? Edward Bookert retained legal custody of J.J.B., but J.J.B. continued to live with the Roths. *See* Scott Sandlin, *Custody Spat Settled: Three to Raise Boy*, ALBUQ. J., Aug. 31, 1996, at A1. An attorney involved in the private settlement said: "Where the child is on a daily basis depends upon the child's needs." *Id.* Note that this arrangement is similar to those reached in divorce proceedings.

143. Some earlier United States Supreme Court cases recognized the liberty interests of children, and weighed

explains the outcome in *J.J.B.* After the decision that Bookert's rights would not be terminated, the case was remanded for a hearing on J.J.B.'s custody. [144] J.J.B. was not immediately returned to his father because the court no longer assumed that returning a child to his parent's custody represented the best interests of the child.[145]

A. *The Trend Toward Emphasizing "Relationship Criteria"*

1. The "Least Detrimental Alternative"

The presumption that parents have a superior right against all others to the custody of their children, except if the parent is unfit or has abandoned the child,[146] has guided courts in their custody decisions. However, increasingly, when this precept is weighed against the "least detrimental alternative" in child custody placements, the least detrimental alternative prevails.[147] The least detrimental alternative concept

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these interests against the interests of parents and of the state. For example, in *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), two high school students wore black armbands to school to protest the Vietnam war and refused to remove them when asked. The Court held that students have rights to symbolic expression which do not disrupt school activities. *See id.* at 519.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that the state could not compel Amish parents to send their children to school after the eighth grade without violating the provisions of the First and Fourteenth Amendments. In his partial dissent, Justice Douglas suggested that children had rights to religious freedoms which were separate from their parents. *See id.* at 241 (Douglas, J., dissenting in part).

In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), at issue was a law which required unmarried women under 18 to secure their parents' consent before obtaining an abortion. The Court specifically refused to give "third parties," including parents within this term, "blanket veto" power over decisions made by a woman and her physician. *See id.* at 74.

144. *See J.J.B.*, 119 N.M. at 655, 894 P.2d at 1011.

145. *See id.*

146. Courts recognize a major exception to the idea that a parent's rights to a child should be terminated if the parent does not maintain contact with his child. *See* Debra Ratterman, *"Detrimental to the Best Interests of the Child": When the Agency's Failure to Make Diligent Efforts or Allow Visitation Can Be Excused in a Termination Action*, 11 CHILDREN'S LEGAL RTS. J. 1, 5 (1990). This exception occurs when a parent attempts to visit his child and to maintain contact with him, but has been prevented by an agency (or another caretaker.) *See id.*

In *J.J.B.*, the New Mexico Supreme Court took specific note that the natural father, Bookert, made attempts to visit his child which were thwarted by the agency which placed his child for adoption. *See J.J.B.*, 119 N.M. 638, 650, 894 P.2d. 994, 1006 (1995). "Bookert bore little, if any, responsibility for disintegration of his relationship with his son." *Id.*

147. Sheila McKeown, Digest, *The Least Detrimental Alternative: Bottom Line Best Interest*, 13 J. JUV. L. 144 (1992).

California has created a two-pronged statutory scheme which explicitly recognizes the concept of the least detrimental alternative. *See id.* First, the state examines parental custody on a case by case basis, to determine if it is the "least detrimental" alternative. *See id.* If the court decides that there is present detriment, the child is removed from the parental home. *See id.* at 145. However, there is an interim period by statute, in which the state makes efforts to reunify the family by providing counseling and other services. *See id.* If, during this period, the parents resolve the conditions which were identified as detrimental to the child, then the child may be returned to the parents. *See id.* at 146. If the reunification attempts are not successful, then the court focuses on alternatives which promote the best interests of the child. *See id.* at 152.

Two cases which illustrate California's application of its two-pronged statutory scheme, based on the least detrimental alternative, are: (1) *In re Andrea G.*, 270 Cal. Rptr.2d 534 (1990), which describes the considerations the court made in determining that a child should not be returned to her biological mother after an eighteen month reunification period; and, (2) *In re Rodrigo S.*, 276 Cal. Rptr.2d 183 (1990), in which the court weighed the potential trauma of removing a child from a foster home where he had developed strong emotional ties and returning him to the custody of his biological father. The court ultimately decided that "a finding of detriment cannot depend solely on the potential loss of attachment to foster parents," but that this potential loss was instead a factor to be weighed in determining the "least detrimental alternative." *Id.* at 189.

focuses on identifying who has become the child's "psychological parent."[148] The selection of the psychological parent as the custodial parent requires choosing "the least detrimental alternative" in child custody decisions.[149] The least detrimental alternative views the rights of children as predominating over the rights of any adults participating in a custody hearing.[150] This is in contrast to the right of biological parents to raise their own children.[151]

The three components of the least detrimental alternative are: (1) a child needs continuity in his "relationships, surroundings, and environment"[152]; (2) a child has

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148. In a recent case, a grandmother argued that the idea of a psychological parent should be expanded to include the concept of a "composite psychological parent," meaning a group of extended family members who have been a psychological parent to the child rather than one single member. *See In re* E.J.H., 546 N.W.2d 361, 364 (N.D. 1996). The *E.J.H.* court stated that while this arrangement does provide the child with stability, it did not compare with the traditional notion of a psychological parent as the one who provides "the daily care and nurturing we have come to associate with a psychological-parent relationship." *Id.* The *E.J.H.* court also said that while natural parents normally have rights over all others to the custody of their children, exceptional circumstances might trigger a best interests analysis as between natural parents and third parties if the "third party seeking custody had a psychological-parent relationship to the child." *Id.*

African-American, Hispanic, and Native American families generally emphasize a "kinship" system in child rearing. *See* Bernadine Dohrn, *Leastwise of the Land: Children and the Law*, 14 CHILDREN'S LEGAL RTS. J. 36, 39 (1993); Susan L. Waysdorf, *Families in the Aids Crisis: Access, Equality, Empowerment, and the Role of Kinship Caregivers*, 3 TEX. J. WOMEN & L. 145, 220 n.10 (1994); Thomas S. Weisner, *The Crisis for Families and Children in Africa: Change in Shared Social Support For Children*, 4 HEALTH MATRIX: J.L. & MED. 1 (1994). Sociologists call this a "socially distributed nuturance" system. *See id.* at 17. Characteristics of such a system include the assumption of parenting roles by many adults in the community who are usually, but not always, related to the children by family ties. *See* Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMPLE L. REV. 1649, 1660 (1995); *see generally*, IRENE I. BLEA, LA CHICANA AND THE INTERSECTION OF RACE, CLASS, AND GENDER (1992); 2 LATINA ISSUES, FRAGMENTS OF HISTORIA (ELLA) (HERSTORY), (Antoinette Sedillo-Lopez ed., 1995) (discussion of Hispanic and Chicana women's roles in society, and the relationship of these roles to child rearing).

In some non-western societies, children's intelligence and abilities are measured in part by their ability to participate in this nuturance system and to care for younger children in the community. *See* Weisner, *supra*, at 21. Mothers' expected roles are substantially different as well. Mothers feel successful when they are able to enmesh their children in this extended system. *See id.* at 16-17. In fact, in observing mothers in some African tribes, researchers found that they had direct exclusive social contact with their children less than a quarter of the time that any social contact was initiated. *See id.* These women were considered, and considered themselves, "good" mothers. *See id.*

149. The authors of the influential book, BEYOND THE BEST INTERESTS OF THE CHILD, *see* GOLDSTEIN ET AL., *supra* note 43, are generally credited with developing and defining relationship criteria as a standard.

150. 1 LEGAL RTS. OF CHILDREN § 2.08, at 52 (Donald T. Kramer ed., 2d ed. 1994).

151. Suzette M. Haynie, Note, *Biological Parents v. Third Parties: Whose Right to Child Custody Is Constitutionally Protected?* 20 GA. L. REV. 705 (1986). "The underlying values in our society, somewhat irrationally, emphasize the special nature of the biological parent-child bond, even though logically the basis for the special recognition of the bond is the actual relationship." *Id.* at 742 n.47.

However, it is my contention that societal values have undergone a change in which an emphasis on psychological bonding has come to the forefront, and that this change in societal values is being reflected in court decisions on custody.

152. *See* GOLDSTEIN ET AL., *supra* note 43, at 31-39. The authors assert that a lack of continuity will have differing effects on a child depending upon what age the disruption occurs. *See id.* at 31. For example, if the disruption occurs when a child is an infant or a toddler, the child will be less able to form strong attachments later in life. *See id.* at 35. Whereas, if the disruption occurs during the life of a school age child, he may blame his new custodians for the abandonment by his former caretakers. *See id.* at 33-34. The implications in child custody disputes are that a child's placement should be determined early in his life, and should be permanent. *See id.*

Madelyn Simring Milchman uses the term "emotionally rejected biologicals" to describe the trauma experienced by children whose biological parents' love for them is at best ambivalent. *See* Madelyn Simring Milchman, *Children's Resiliency Versus Vulnerability to Attachment Trauma in Guardianship Cases*, 23 J. PSYCHIATRY & L. 487 (1995). Milchman states that "bonding trauma" for biological children can be worse than the "adoption trauma" experienced by adoptees. *See id.* at 498-99.

a different sense of time than an adult[153]; and (3) the law cannot make long-range predictions about a child's ability to develop relationships.[154] The least detrimental alternative theory stresses the importance of stability and permanence in a child's life.[155] The difference between the "best interests of the child" and the "least detrimental alternative" is that the least detrimental alternative focuses on what conditions create harm to the child, while the traditional best interests of the child standard centers on meeting the child's psychological needs.[156]

2. Relationship Criteria Is Stressed in Court Decisions

Courts have been reluctant to apply the "best interests standard" in custody disputes between third parties and biological parents.[157] However, third parties have increasingly prevailed in cases where the best interests standard stresses emotional bonds, and the third parties have been able to establish that emotional bonds exist between themselves and the children.[158] In fact, courts have found that the very existence of a "psychological parent" relationship is an "exceptional circumstance" which merits deciding that the best interests of the child lie in maintaining this bond with the nonparents rather than in returning the children to the natural parents.[159] In

153. *See* GOLDSTEIN ET AL., *supra* note 43, at 40-49. The authors theorize that children at different ages view time differently. *See id.* at 40-41. A newborn measures time by his subjective feelings of abandonment after only a few days. *See id.* at 40-42. An older child, on the other hand, who has begun to develop some sense of the external rules of time, may not feel the loss as acutely until a longer period of time has passed. *See id.* Therefore, while adults may equate the passage of time while making a custody decision with gravity and carefulness in the decision-making process, children equate the passage of time with increasing feelings of loss. *See id.* at 42-43.

154. *See id.* at 49-52. This component focuses on predicting whether a child will be able to form a relationship with a "presently available adult." *See id.* at 49. Because a court cannot divine with certainty whether a child will be able to form a relationship with any particular adult, it should select the custodial adult by determining who is presently the child's "psychological parent" (with whom the child has already bonded), rather than selecting an adult who has not yet assumed a primary role in the child's life. *See id.* at 51.

155. Although the book BEYOND THE BEST INTERESTS OF THE CHILD, *see* GOLDSTEIN ET AL., *supra note* 43, was published in 1973, its concepts are still being tested and debated today. Milchman is critical of recent studies which some experts feel have refuted the bonding theory. *See* Milchman, *supra* note 152, at 486. She objects to studies that focus on a trait in children called "resiliency." *See id.* Resiliency describes "characteristics of children who develop successfully despite traumatic childhood environments." *See id.* Milchman argues that the idea that children can successfully "rebond" with their biological parents is attractive to judges who wish to restore child custody to biological parents. *See id.* Examining the policy reasons for embracing this argument, Milchman suggests that the view "minimizes harm to children, while maximizing empathy for parents[,]" *id.* at 486, and also allows judges to express their anger at state systems, which have failed in their effort to reunify the biological family, *see id.* at 489.

Milchman criticizes these studies because they focus on the effects of short-term separations from primary caregivers, as opposed to measuring long-term effects. *See id.* at 491. After discussing the long-term effects of broken bonds in early childhood, Milchman summarizes her position by stating: "While the foundation can be repaired, it cannot be rebuilt as if it had never been damaged. The crack is always there, and the house is never as strong as it should be." *Id.* at 456.

156. What does it mean to find the "least detrimental alternative" when choosing a child placement? The California Supreme Court has defined a "least detrimental placement" away from a child's parents as one which is "essential to avert harm to the child." *In re* B.G., 523 P.2d 244, 258 (Cal. 1974).

Courts have suggested some factors which indicate that detrimental conditions exist: when parents fail to maintain steady employment (demonstrating an inability to meet the child's physical needs), have mental problems which deleteriously affect their interactions with their children, or do not get along with other members of their family. *See, e.g., In re* Andrea G., 270 Cal. Rptr. 2d 534, 536-37 (1990)).

157. *See* Hoorwitz, *supra* note 44, at 351-52.

158. *See infra* note 159 (discussing cases where third parties have prevailed).

159. *See* Daley v. Gunville, 348 N.W.2d 441 (N.D. 1984). In *Daley*, the court while noting that a strong bond

two recent decisions, courts have explicitly abolished the "parental right" presumption.[160]

Although *Shorty v. Scott*[161] first explicitly recognized in New Mexico the parental right presumption in disputes with third parties,[162] New Mexico decisions have consistently stated that the best interests of the children are always a fundamental consideration in the determination of custody. These decisions have emphasized that parents' rights are secondary to the best interests of their children.[163] In fact, the best interests of the child are increasingly measured in New Mexico by considering the stability and the quality of the children's relationships with third parties.

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between a child and a third party was an exceptional circumstance, found that a six-year-old child's best interests lie in remaining in the custody of her grandmother, rather than being returned to her natural mother. *See id.* at 447.

In a more recent case, *In re Stephanie M.*, 867 P.2d 706, (Cal. 1994) (In Bank), the California Supreme Court was asked to determine whether it would be in a child's best interests to be placed in the home of the child's grandmother, or to remain in the home of the foster family with whom she had developed strong emotional ties. The California Supreme Court did not uphold the state's statutory "relative placement preference" which directs that placement with relatives should receive "preferential consideration" if placement with the natural parents is not in the child's best interests. *See id.* at 719-20. Instead, it upheld the decision of the trial court that the factor determining which situation would be in the child's best interest was the child's bond to her foster family. *See id.* at 720.

Contrast *Daley* and *Stephanie M.*, which found in favor of the foster family, with a Pennsylvania court decision, *Chester County Children and Youth Services v. Cunningham*, 636 A.2d 1157 (Pa. 1994). The Superior Court of Pennsylvania held that the foster parents lacked standing to seek the adoption of their foster children over the objections of a child welfare agency. *See id.* at 1160. Judge Beck, in his dissent chastised the Pennsylvania court for its decision, stating that the court should have recognized that "in the ever-evolving arena of child custody and adoption, a party who has shown sincere and sustained concern for the welfare of a child should be permitted to appear in court and seek adoption." *Id.* at 1161; *see also* infra note 180 (describing the recent decision on third party standing by a Colorado court, *In re Custody of C.C.R.S.*, 892 P.2d 245 (Colo. 1995) (En Banc)).

160. In *Rowles v. Rowles*, 668 A.2d 126, 128 (Pa. 1995), the Pennsylvania Supreme Court announced that the presumption that parents have "a *prima facie* right to custody" as against third parties, would no longer determine custody decisions. The court analogized to their reasons for an earlier decision in 1977 to forego the "tender years" presumption preferring mothers custody over fathers, stating that because custody decisions were of such import, presumptions should not be employed, but each case should be decided based on a consideration of "the circumstances and relationships of all the parties involved." *See id.* The court stated that the parental right presumption "reflects an archaic concept that children are proprietary assets of parents" and that the proper consideration henceforth should be a determination of which placement "will best serve the child's interests." *See id.*

In *In re R.C.*, 907 P.2d 901 (Kan. Ct. App. 1995), the Kansas Court of Appeals stopped short of saying that the parental presumption would not apply to any custody dispute between third parties and parents. *See id.* at 906. Instead, the court distinguished between situations where the separation from the parents' custody was voluntary (*e.g.*, where a parent had voluntarily placed a child with a nonparent) versus involuntary (*e.g.*, where the child is taken from the home without the parents consent.) *See id.* The court said that because involuntary termination proceedings, such as a determination that children are "children in need," contain statutory requirements which guarantee due process and require that parental rights only be terminated by clear and convincing evidence, these incorporate the parental right presumption and thus serve to adequately protect parental rights. *See id.* Therefore, the court concluded that "the 'parental preference' doctrine is preempted." *Id.* at 906 (quoting, with approval, *In re* Baby Boy N., 874 P.2d 680 (Kan. Ct. App. 1994)).

161. 87 N.M. 490, 535 P.2d 1341 (1975).

162. For a discussion of the creation of the parental right presumption in New Mexico, see *supra* Part II.B.3.

163. *See* Ridenour v. Ridenour, 120 N.M. 352, 355, 901 P.2d 770, 773 (Ct. App. 1995). *Ridenour* cites the following New Mexico cases as support for the proposition that "New Mexico case law establishes that parents' rights are secondary to the best interests and welfare of the children": *In re Adoption of J.J.B.*, 119 N.M. 638, 652, 894 P.2d 994, 1008 (1995); *Oldfield v. Benavidez*, 116 N.M. 785, 790-91, 867 P.2d 1167, 1172-73 (1994) ("[C]hildren also have certain fundamental rights which often compete with the parents' interests."); and *In re Adoption of Francisco A.*, 116 N.M. 708, 714, 866 P.2d 1175, 1181 (Ct. App. 1993) (citing *In re* Samantha D. 106 N.M. 184, 186, 740 P.2d 1168, 1170 (Ct. App. 1987) ("It is well established in New Mexico that parents do not have absolute rights in their children; rather, parental rights are secondary to the best interests and welfare of the children.")).

This value is reflected in the provisions of section 40-9-2 of New Mexico's Article 9, Grandparent's Visitation Privileges Act.[164] The provisions of section 40-9-2 adopted in 1993, stress the development of a relationship between the grandparent and child.[165] For instance, in *Lucero v. Hart*,[166] when a paternal grandmother requested visitation rights, the court concentrated on the quality of the child's relationships with third parties (the grandparents) and with his parents, in order to ascertain where the child's best interests lay.[167]

3. Relationship Criteria Emphasis Changes Custody Standards in Custody Awards to Parent-like Individuals

The United States Census Bureau defines a family as "two or more persons related by birth, marriage, or adoption who reside in the same household."[168] This definition of "family" no longer fits many households.[169] Scholars urge new definitions of "family" that will accommodate the complex mix of individuals which today make up family units engaged in child rearing.[170] Which constellation of adult-to-child

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164. N.M. STAT. ANN. § 40-9-2(G) (Repl. Pamp. 1994). Section 40-9-2(G) provides that in considering a grandparent's request for visitation, the court shall weigh the following:

> (1) the best interests of the child; (2) the prior interaction between the grandparent and the child; (3) the prior interaction of the grandparent and each parent of the child; (4) the present relationship between the grandparent and each parent of the child; and (5) time-sharing or visitation arrangements that were in place prior to filing of the petition.

Id.

165. *See id.*

166. 120 N.M. 794, 907 P.2d 198 (Ct. App. 1995).

167. *See id.* at 800, 907 P.2d at 204. The *Lucero* court suggested the following criteria:

> (1) the love, affection, and other emotional ties which may exist between the grandparent and the child; (2) the nature and quality of the grandparent-child relationship and the length of time that it has existed; (3) whether visitation will promote or disrupt the child's development; (4) the physical, emotional, mental, and social needs of the child; (5) the wishes and opinions of the parents; and (6) the willingness and ability of the grandparent to facilitate and encourage a close relationship among the parent and the child.

Id. Of the six factors listed by the court only two mention the parents, and one of these stresses the willingness of the grandparents to foster a good relationship between the parent and the grandchild.

168. Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91, 96 n.17 (1990-1991) (quoting _____ Seligman, *Variations on a Theme*, NEWSWEEK-Special Edition, Winter/Spring 1990, at 38)).

169. *See* Treuthart, *supra* note 168, at 97. In fact, it is interesting to note that the Supreme Court has never used the criteria of "marriage" to define a parent-child relationship. *See* Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 366 (1994).

170. Some proposed definitions for individuals who may seek custody, sometimes on an equal basis with the biological parent, are:

> (1) "*Parent-like individuals*." This category includes: "foster parents, stepparents, second-parents," and other relatives and adults "who have lived with the child and acted as parents for a significant period of time." *Id.* at 393. (A "second parent" is someone who has lived with the child's legal parent, but has not married that parent.) *See id.*
>
> (2) "*Legal parents*." This category includes: adults related to a child by "conception, birth, or adoption" or who are "recognized by statute" as having "a right to maintain the relationship" with a child. *Id.* at 362 n.20
>
> (3) "*Non-legal parents*." This category includes: adults "who ha[ve] served as . . . parent[s] to the child," but do not have a legal right to maintain a relationship. *Id.* at 362 n.21.

A "functional" definition of "family" and therefore of family members, also has been proposed. *See* Treuthart, *supra* note 168, at 115. Family members would be defined by examining a particular relationship to see if it has some of these characteristics: "emotional and financial commitment," members who hold "themselves out to society" as

relationships is selected as "parent-like" has drastic effects on the results of custody cases.

The change to looking beyond the "legal," or "biological," definition of parenthood to the underlying parent-child relationship is illustrated by recent developments in child custody awards to same-sex parents who are not biologically related to the child. In the early 1990s, courts found that if two adults ended their relationship, the unrelated same-sex parent had no standing to bring suit in court to maintain his relationship with the biological children of his same-sex partner.[171]

The biological parent's sexual orientation also can play a significant part, as in the recent well-publicized case of Sharon Bottoms, a lesbian who lost the custody of her biological child to her child's maternal grandmother (Bottoms' mother).[172] However, courts in other recent child custody cases have stated that the parents' sexual orientation is "nothing more than a factor"[173] or "presumptively irrelevant" in determining child custody.[174] These cases (two of which were explicitly referred to

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a family, and how much reliance they place on each other for daily support. *See id.*

There are many variations on the above themes. Some researchers propose that a vital test must be whether the individual assumed the "parent-like" role willingly, and has made consistent attempts to maintain the relationship. *See* Holmes, *supra* note 169, at 392.

171. *See, e.g.*, Curiale v. Reagan, 272 Cal. Rptr.2d 520 (Ct. App. 1990); Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991); *In re* Z.J.H., 471 N.W.2d 202 (Wis. 1991). *Curiale* was a case in which two lesbians, Curiale and Reagan, lived together in a committed relationship for five years. *See Curiale*, 272 Cal. Rptr.2d at 521. By mutual agreement, Reagan conceived a child by artificial insemination. *See id.* When the women separated, both agreed in writing that Curiale could share custody. *See id.* However, less than a year later, Reagan withdrew her approval of the agreement. *See id.* Curiale argued that the best interests of the child lay in awarding "legal parental status on those who in reality act as the child's parent." *Id.* at 522. The lower court in California ruled that Curiale was without any standing to bring a suit in court for custody or for visitation. *See id.* at 521-22. The court of appeals confirmed. *See id.* at 522.

A year later, in *Alison D.*, a New York appeals court reached the same conclusion as the *Curiale* court: the non-biological parent in a dissolving same-sex union lacked standing to sue for custody or visitation. *See Alison D.*, 572 N.E.2d at 31. The New York court did, however, note that there was a shift in emphasis to the recognition that "a child is a person, and not a sub-person over whom the parent has an absolute possessory interest." *Id.*

Also, in 1991, despite a Wisconsin statute, *see* WIS. STAT. ANN. § 767.245 (West 1993 & Cum. Ann. 1997), which specifically allowed a petition for visitation to be initiated by a "person who has maintained a relationship similar to a parent-child relationship with the child," *id.*, the Wisconsin Supreme Court in *Z.J.H.* would not recognize the standing of the non-biological parent, a former domestic partner of the biological parent for eight years, to apply for visitation of an adopted son. *See Z.J.H.*, 471 N.W.2d 202, 205, 206-08.

172. Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995). The defendant Sharon Bottoms lost in part because the court found that the "conduct inherent in lesbianism is punishable as a . . . felony." *Id.* at 108. The court went on to describe Sharon Bottoms as "devoted to her son" but "refus[ing] to subordinate her own desires and priorities to the child's welfare." *Id.*

173. *In re* Adoption of a Child by J.M.G., 632 A.2d 550 (N.J. Super. Ct. Ch. Div. 1993). The court found that the non-biological, lesbian mother had been the primary caretaker of the child, and specifically mentioned the psychological bond. *See id.* at 552. Because New Jersey had recently amended its adoption statutes to be more inclusive, the court did not find the adoption proposal in conflict with the state's statutes. *See id.*

174. *In re* Adoption of a Child Whose First Name Is Evan, 583 N.Y.S.2d 997 (Surr. Ct. 1992). Two lesbian parents had raised a six-year-old boy since his birth. *See id.* at 998. The non-biological mother sought to adopt him, without terminating the biological mother's parental rights. *See id.* The court commented that the couples' relationship was, for the child, "a marital relationship at its nurturing supportive best." *Id.* at 999. The court reviewed some of the factors that it considered in deciding that the adoption was in the child's best interests: the child was part of a successfully functioning family unit, there would be no "trauma or change in his daily life," he would get new "important legal rights" (inheritance), . . . and "additional economic security." *Id.* at 998. Plus, the child would be entitled to the "medical and educational benefits" available to the adopting partner through her employment. *See id.*; *see also* Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993). In *B.L.V.B.*, a lesbian couple filed a petition to allow the non-biological mother to adopt the mother's children. *See id.* at 1272. The probate court of Vermont denied the petition, based upon its interpretation of the state's adoption statutes. *See id.* The Vermont Supreme Court

as ones of first impression in their jurisdiction[175]) centered on whether a lesbian partner would be allowed to legally adopt the biological child of her same-sex partner.[176] The court in each case decided it was not necessary to terminate the parental rights of the biological mothers before allowing their lesbian partners to formalize the existing parent-child relationships by adoption. The courts were unanimous in commenting that one of the most important factors was "the psychological importance of the relationship to the child."[177] These rulings by the courts of New Jersey, New York, and Vermont demonstrate the developing trend to elevate the use of relationship-based criteria to determine child custody.

4. Relationship Criteria Changes Adoption Strategies

Twenty years ago, societal pressures and stigmatization limited an unwed parent's options when deciding on the care of his or her children.[178] However, because of changing attitudes, especially towards unwed mothers, these parents are not at the disadvantage they once were. Recent decisions (including *In re adoption of J.J.B.*) show an inclination to focus on the "potential to bond" with future caretakers instead of the existing bond with the current caretakers.[179] This approach implicitly stresses biological ties more heavily than psychological ones. However, again because of societal and legal changes, more would-be adoptive parents are taking natural parents to court. The recognition that "third parties" have any legal standing to challenge a biological parent's claim to the custody of his child is a relatively recent phenomenon.[180]

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disagreed, stating that it was necessary to "look 'not only at the letter of a statute, but also it's reason and spirit.'" *Id.* at 1273, (quoting *In re* S.B.L., 553 A.2d 1078, 1083 (Vt. 1988)). The supreme court decided that the legislative intent was not to terminate the biological parents rights, but to "protect the security of family units by defining the legal rights and responsibilities of children who find themselves in circumstances which do not include two biological parents." *Id.* at 1274. Furthermore, the court stated that: "Society changes and, with it, so do mores . . . . [Denying the adoption by the] second parent serves no legitimate state interest." *Id.* at 1275.

175. *See J.M.G.*, 632 A.2d 550; *Child Whose First Name Is Evan*, 583 N.Y.S.2d 997.

176. As of this writing, same sex marriages are prohibited in all 50 states. In New Mexico, state representative Jerry Lee Alwin, a Republican from Albuquerque, introduced a bill in the 1997 state legislature seeking to ban same-sex marriages, while state representative Patsy Trujillo, a Democrat from Santa Fe, sponsored a bill which would make discrimination based on sexual orientation illegal. *See* Greg Sorber, *Voicing Many Vows*, ALBUQ. J., Feb. 15, 1997, at A-7.

For a discussion in favor of allowing same-sex couples the statutory right to formalize their relationships, and on the effects this would have on child custody, see David Link, *The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples*, 23 LOY. L.A. L. REV. 1055 (1990).

177. *J.M.G.*, 632 A.2d at 552.

178. *See* Janet Hopkins Dickson, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917 (1991).

179. *See id.* at 970.

180. *See, e.g., In re* Custody of C.C.R.S., 892 P.2d 246 (Colo. 1995) (En Banc) (prospective adoptive parents were held to have standing to sue, not under Colorado's Children's Code, which proscribed due process procedures that must be followed before parental rights are terminated and an adoption is approved, but under the Uniform Dissolution of Marriage Act (UDMA), on the basis that they were "nonparents" who had physical custody). The *C.C.R.S.* court defined "nonparents" as "friends, relatives, grandparents, step-parents, or child-care agencies, or . . . any person or agency other than the child's natural parent." *Id.* at 255 n.23.

In *C.C.R.S.*, the prospective adoptive couple had physical custody of the child, initially with the unwed mother's consent, since the day after the child's birth. *See id.* at 247. After six months, the biological mother changed her mind and requested that the couple return the infant. *See id.* The respondents refused, stating that the child had developed a strong psychological bond with the nonparents, and it was in the best interests of the child to remain with them. *See id.*

Because courts increasingly use relationship criteria when awarding custody, parties to disputed adoptions are formulating new strategies. One new tactic for would-be adoptive parents is to gain custody of the child they desire to adopt, and to keep the child in their home for as long as possible through a series of delaying tactics.[181] This strategy strengthens their legal argument that the child's best interest is to remain with their primary caretakers, the would-be adopters to whom they are bonded, while weakening the position of the natural parents.[182]

Perhaps some sympathy for the biological parents can be found in the perception that these potential adopters are, in reality, affluent "baby-buyers," who are manipulating undereducated and impoverished women to "steal" their children.[183] Economic inequalities between the potential adopters and the biological parents may paint a picture of the would-be adopters as persons who are able to form powerful allegiances with adoptive agencies that have "substantial resources [and] can hire any number of expert witnesses."[184] Adding to this image is the criticism that because judges increasingly rely on "experts" to help them decide custody cases, the party who is able to hire the most experts will be the "winner," with the child as the prize.[185]

The *C.C.R.S.* court found that it was in the child's best interests to remain with the prospective adoptive couple. *See id.* at 258. Because the case was decided by applying the UDMA instead of Colorado's Children's Code, the court did not have to find that the biological mother was unfit before it awarded custody to the nonparents. *See id.* at 258. However, in a vigorous dissent, Justice Lohr decried the court's decision, stating that it created a precedent so that "any caretaker, no matter how slight the parent's grant of authority, may gain physical custody of the child and have standing to petition for permanent custody." *Id.* at 259 (Lohr, J., dissenting).

In response to the "Baby Richard" case, *see supra* notes 2 and 4, and accompanying text, the Illinois legislature recently passed new legislation, *see* 750 ILL. COMP. STAT. 50/20a (West 1992), which automatically establishes standing for a third party to sue on the basis that the adoption they sought has been vacated or denied. *See* Joseph Gitlin, *State Law Creates Back Door to Child Custody Cases*, 142 CHI. DAILY L. BULL. 74 (1996). This new legislation is a part of the Illinois Marriage and Dissolution Act, 750 ILL. COMP. STAT. 5/601 (West 1992), and now requires that a best interests hearing be conducted on the custody of the child. *See id.*

181. *See* Robert Rickert, Editorial, *Adoption Business Strategy: Delay Natural Parents Claim*, THE POST-STANDARD, June 13, 1996, at A7, *available in* WESTLAW, ALLNEWSPLUS database, 1995 WL 3731513, at *1. Rickert, an attorney who represents indigent parents who are pursuing custody of their children, takes attorneys and other adoption professionals to task, calling their tactics of delaying natural parents' claims to their biological children unethical and "coldly calculating." *See id.* at A7, 1995 WL 3731513, at *2.

182. *See id.*

One theory concerning the conflicts which arise between biological parents and would-be adopters is that this tension is based upon historical notions of women's value in society, because traditionally, a woman's worth was measured by her ability to bear children. *See* Dickson, *supra* note 178, at 963. Dickson's article discusses how the adoption system developed in the United States, especially noting how societal attitudes have shaped adoption practices. *See id.*

183. *See id.* at 928, 963. Also, recall the 1988 case of surrogate mother Mary Beth Whitehead, whose educational and economic background was scrutinized after she initially refused to surrender the child she bore for an affluent childless couple. *See In re* Baby M, 537 A.2d 1227 (N.J. 1988).

184. Rickert, *supra* note 181, at A7, 1995 WL 3731513 at *2.

185. *See* Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423, 425 n.8 (1993) (citing Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 76 n.2 (1984)); *see generally* FINEMAN, *supra* note 59.

B. *The Emergence of Children's Legal Rights*

As noted earlier, recent years have seen the emergence of the children's rights movement.[186] This rights movement recognizes that children have their own legal rights under the law.[187] While the idea that children may have special rights has been recognized in the United States since the 1960s,[188] its prominence in custody disputes is only now beginning to be felt.

In recent custody cases, courts have recognized and upheld children's rights.[189] Some recent custody decisions from lower courts have focused on the right of

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186. *See* LEGAL RTS. OF CHILDREN, *supra* note 150, § 1.02, at 9. The development of children's rights has been divided into four periods over the last three hundred years. *See id.* § 1.02, at 10. From the early 1600s to the early 1800s children were perceived solely as chattels, the property of their parents. *See id.* Then, from the early 1800s thorough the mid-1800s, the focus was the rescue of children from poverty and the industrial revolution's use of them as laborers. *See id.* The goal was reform of the judicial system to protect children, but not to recognize any independent rights for them. *See id.* The third era was from the late 1800s until the late 1960s. It was during this era that the idea of *parens patriae*, or the state as parent, came to the forefront. *See id.* § 1.02, at 11. The court was to act as a parent in protecting children. *See id.* For the first time, children were segregated from adults in court procedures, and their needs were recognized as different from adults. *See id.* The fourth period is from 1967 continuing into the present. This period has seen the expansion of children's rights. *See id.* § 1.02, at 15.

187. The legal rights of children are broad in scope, including freedom from persecution by parents and society, as well as rights to legal redress. *See id.* § 1.01, at 8. Some of the issues surrounding these rights are parental kidnapping, juvenile or adult offender status, and different courtroom standards in courtroom hearings. *See id.* (For a more extensive listing of these issues, see generally *id.*)

Another commentator has broken children's rights into four categories:

> (A) generalized claims against the world, *e.g.*, the right of freedom from discrimination and poverty; (B) the right to greater protection from abuse, neglect, or exploitation by adults; (C) the right to be treated in the same manner as an adult, with the same constitutional protections, in relationship to state actions; [and] (D) the right to act independently of parental control and/or guidance.

Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV 255, 260 (1979). However, Wald specifically excepts the rights of children in a custody action from falling into any of these categories. *See id.* at 281 n.106.

188. The United States Supreme Court case *In re Gault*, 387 U.S. 1 (1967), is generally considered to have begun a new era in which the children's rights movement gained momentum. The Supreme Court recognized that children may be entitled to the same due process protections afforded adults. *See id.*

In *Lemley v. Barr*, 343 S.E.2d 101 (W.Va. 1986), in the course of deciding a custody dispute between a biological mother and the adoptive parents, the court stated:

> The day is long past . . . when the right of a parent to the custody of his or her child . . . would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right . . . . Indeed, analysis of the cases reveals a shifting of emphasis rather than a remaking of substance. This shifting reflects more the modern principle that a child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of a constitutional magnitude.

Id. at 109 (quoting *Bennett v. Jeffreys*, 356 N.E.2d 277, 281 (W. Va. 1976) (citations omitted in *Lemley*)).

189. One analysis of Supreme Court decisions over forty years focused on children's constitutional rights and identified five principal constitutional issues: due process, equal protection, freedom of expression, privacy, and free exercise of religion. *See* SUSAN GLUCK MEZEY, CHILDREN IN COURT, PUBLIC POLICYMAKING AND FEDERAL COURT DECISIONS 15-31 (1996). These cases were only 1.32 percent of all cases heard between 1953-1993, yet the Court's decisions lead to the expansion of children's rights in just under half of the cases. *See id.* at 17-18. Mezey asserts that the reason children's rights did not receive more attention from the Court was not because the Court was continuing to insist that children are to be protected rather than given increased independence, but because the Court in general has been reluctant to increase individual rights. *See id.* at 26.

This assertion is supported by Peter Irons, who points out that the American Civil Liberties Union (ACLU), which primarily supports "civil-liberties issues," won 90 percent of the cases they tried during the years of the Warren Court (1953-1968) and lost half of all cases they tried under the Burger Court (1969-1986). *See* PETER IRONS, THE COURAGE OF THEIR CONVICTIONS, SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT 9 (1990).

children to have a secure environment.[190] This right also has been characterized as "a fundamental liberty interest" in having a family life.[191]

To illustrate how an emphasis on children's rights can change the outcome in a custody case, consider two recent cases in which courts have explicitly balanced the rights of children to a secure environment with the rights of their natural parents to retain their custody. In both cases, the court found the scale to tip in favor of the children. In *In re Jasmon O.*, the court stated that children have fundamental rights which include having a custody "placement that is stable [and] permanent."[192] It then weighed these rights with the rights of the parents to have the child's "custody and companionship."[193] The court concluded that the child's best interests lay in maintaining the stable relationship she had developed with her foster family, and that this interest outweighed the natural parent's rights.[194] The dissenting judge decried what he termed "this radical new standard."[195] *Jasmon O.* is an example of a court weighing the risk of erring (by infringing on the parent's rights) against the risk of

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190. *See, e.g., In re* Bridget R., 49 Cal. Rptr.2d 507 (1996); *In re* Jasmon O., 878 P.2d 1297 (Cal. 1994) (In Bank). *But see Adoption of Haley A.*, 57 Cal. Rptr.2d 361 (1996), *review granted, In re* Adoption Petition of Mark A., 930 P.2d 401 (Cal. 1997).

191. *See* Richard S. Victor, *Biology, Destiny, and Children's Rights*, 16 THE NAT'L L.J. A21 (March 28, 1994). Victor argues that "family life is a liberty interest protected by the 14th Amendment." *Id.* at A22. Francis Barry McCarthy maintains that the effect of labeling this interest a "family right" is that all members of a family share equally in the interest, and therefore, no particular member's right, *i.e.*, a parent's or a child's, is elevated over that of another. *See* Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV 975, 990-1005 (1988); *see also* Ortner v. Pritt, 419 S.E.2d 907 (W.Va. 1992) (recognizing an "equitable right" in a child to continue to live with a third party (a grandparent) whom the court identified as the child's "psychological parent.")

192. *See Jasmon O.*, 878 P.2d at 1302 (citing *In re* Marilyn H., 851 P.2d 826, 833 (Cal. 1993)).

It is sometimes problematic to identity which rights rise to the level of "fundamental liberty interests." One way is to measure how important the interest is to the child, in the context of his over-all well-being. *See* Lee E. Teitelbaum and James W. Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 FAM. L.Q. 153, 174 (1978). This interest should be compared to the consequences the child would suffer if his liberty interest is infringed upon or denied by the state and/or his parents. *See id.* at 175-79.

Compare this test for fundamental rights with the decision reached in *Reno v. Flores*, 507 U.S. 292 (1993). In *Flores*, the Supreme Court was asked to determine if the government's detention of juvenile aliens and its refusal to release them to private citizens willing to take them into temporary custody violated a fundamental right. *See id.* at 315. The right asserted by the juveniles was freedom from confinement. *See id.* at 302. The *Reno* Court stated that such a right was not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 303 (quoting United States v. Salerno, 481 U.S. 739, 751 (1987) (quoting Synder v. Massachusetts, 291 U.S. 97, 105 (1934))). In *Reno*, the Supreme Court said that freedom from detention was not a fundamental right of children, as "juveniles, unlike adults, are always in some form of custody." *Reno*, 507 U.S. at 303 (quoting Schall v. Martin, 467 U.S. 253, 265 (1984)). The Court found that an institutional placement was not unconstitutional because it was not excessively punitive and the government had a "rationally connected" interest in promoting the children's welfare. *See Reno*, 507 U.S. at 303.

Discussing whether the standard of the "best interests of the child" was relevant to the custody at issue, the *Reno* Court stated that parents or guardians are not required to provide the best available care when minimum child care requirements are met. *See id.* at 303-04. Therefore, the Court concluded there was no constitutional requirement that the government provide "better" care for these juvenile aliens, but simply care which was "good enough." *Id.* at 304-05.

193. *See Jasmon O.*, 878 P.2d at 1307 (citations omitted).

194. *See id.* at 1306-07.

195. *Id.* at 1320. (Baxter, J., dissenting). The dissenting judge was speaking of the court's decision to terminate the rights of the natural father, although, in the words of the court's majority, the natural father had "transformed himself," *Id.* at 1300. *See id.* (Baxter, J., dissenting). The court found the father unfit, though, because it determined that the father had been unable to establish an appropriate psychological bond with the child. *See id.* at 1309-11.

making a wrong decision about custody.[196] The *Jasmon O.* court decided that the risk of serious emotional damage to the child by removing her from the foster home was simply too great.[197]

The California Court of Appeals engaged in an even more extensive discussion of children's protected interests in *In re Bridget R.*[198] At the of beginning its discussion, the court said: "[C]hildren are not merely chattels belonging to their parents, but have fundamental interests of their own [which] . . . are of constitutional dimension."[199] The court stated that, traditionally, the United States Supreme Court has "focused more often upon the rights of parents than those of children."[200] The Supreme Court has defined these parental rights as the interests parents have in the "care, custody, and management of their children . . . ."[201] The California court further stated that courts in that state also have found these parental rights to be "among the most basic of civil rights."[202] Because these parental rights are so important, the court found them "compelling."[203] However, the court then found that children also have "a fundamental and constitutionally protected interest in their relationship with the only family they have ever known."[204] These rights differed from their parents, but were equally compelling.[205] In weighing the compelling rights of the parents against those of the children, the court decided the children's' rights were the superior ones.[206] Once again, the court stressed that the familial interests of children may outweigh the rights of biological parents.

Alternatively, in a more recent California case, *Adoption of Haley A.*, a biological mother petitioned the court for the return of her child, who had been placed with prospective adoptive parents.[207] While recognizing that the would-be adoptive parents had become the child's psychological parents, the court found that the fundamental

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196. *See id.* at 1308-09.

197. *See id.* at 1311-12.

198. 49 Cal. Rptr.2d 507 (1996). The biological parents of twin Indian girls, Bridget and Lucy, voluntarily relinquished their rights to the children, and they were placed with a non-Indian adoptive family at birth. *See id.* at 517. The adoptive parents alleged that the biological parents deliberately hid their Indian heritage at the time of the relinquishment. *See id.* The trial court ordered that the two year old children must be removed from the adoptive home and returned to their biological father's family under the provisions of the Indian Child Welfare Act of 1978 (IWCA), 25 U.S.C. §§ 1901-1963 (1978). *See Bridget R.*, 49 Cal. Rptr.2d at 514-15. The adoptive parents appealed and the California Court of Appeals ruled that a hearing must be held to determine whether the return to the custody of the biological father would be detrimental to the children. *See id.* at 515-16. While there are many complex issues in this case centering around whether the application of ICWA was unconstitutional, the focus of the discussion was whether the children were found to have any fundamental rights and how these rights were weighed against those of the biological parents and third parties. *See id.* at 524-25, 526.

As a direct result of *Bridget R.*, two members of Congress introduced legislation which would limit the application of ICWA to Indian children whose families have "significant" ties to their tribe. *See* Stephanie Stone, *California Appeals Court Remands Twins' Adoption Case for "Existing Indian Family" Test*, WEST'S LEGAL NEWS, Jan. 29, 1996, *available in* WESTLAW, WLN database, 1996 WL 258110.

199. *Bridget R.*, 49 Cal. Rptr. 2d at 514 (citing *In re* Jasmon O., 878 P.2d 1297 (Cal. 1994) (In Bank)).

200. *Id.* at 523.

201. *Id.* (quoting Santosky v. Kramer, 455 U.S. 745, 753 (1982)).

202. *Id.* (quoting *In re* Marilyn H., 851 P.2d 826, 833 (Ca. 1993)).

203. *Id.*

204. *Id.*; *see generally* Stone, *supra* note 198.

205. *See Bridget R.*, 49 Cal. Rptr.2d at 524.

206. *See id.* at 526.

207. *See* Adoption of Haley A., 57 Cal. Rptr.2d 361 (1996), *review granted*, *In re* Adoption Petition of Mark A., 930 P.2d 401 (Cal. 1997).

right of the biological mother to raise her child outweighed the child's interest in a "stable and secure home."[208] In reaching this decision, the *Haley A.* court distinguished its decision from the cases cited by the prospective adopters[209]: *In re Jasmon O.*,[210] *In re Zacharia D.*,[211] *In re Bridget R.*,[212] *In re Adoption of J.J.B.*,[213] and *In re Custody of C.C.R.S.*[214] In *Jasmon O.*, the biological father was originally found to be unfit.[215] In *Bridget R.*, the biological parents had voluntarily relinquished custody of their daughters for adoption.[216] In *Zacharia D.*, the applicable statutes were those concerning dependency and not adoption.[217] In *J.J.B.* the applicable state statutes mandated a hearing on the child's best interests whenever an adoption is not completed, regardless of whether the biological parents have given their consent to the adoption.[218] Finally, in *C.C.R.S.*, there was no intent in the proceedings to terminate the biological mother's rights.[219]

Despite these recent cases, the linchpin for the *Haley A.* court was that the biological mother had not given her consent to the adoption within the statutorily mandated six month period.[220] The court said that unlike the above-mentioned cases, with the exception of the biological father in *J.J.B.*, the biological mother's refusal in *Haley A.* to give her consent to the adoption preserved the supremacy of her fundamental rights over that of her child.[221] In the courts words: "The child of a natural mother who has not fully relinquished her parental rights is not similarly situated to the child of a natural parent or parents who have done so."[222]

C. *Summary*

Despite the outcome in *Haley A.*, the trend in recent child custody decisions is for courts to demonstrate an increasing recognition of children's rights as separate and distinct from those of their parents and third parties. This trend continues to make inroads in the parental right presumption. In the past, the rights of biological parents to their children have been doggedly protected by law as among the most fundamental of rights. Now, in custody disputes, courts are beginning to elevate children's rights above those of their parents, and others. Courts justify this elevation

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208. *Id.* at 379.

209. *See id.* at 377 (discussing *Jasmon O.*), 377 n.17 (discussing *Zacharia D.*), 377-79, (discussing *Bridget R.*), 379-80 (discussing *J.J.B.*), 380 (discussing *C.C.R.S.*), 380-81.

210. 878 P.2d 1297 (Ca. 1994) (In Bank).

211. 862 P.2d 751 (Cal. 1993) (In Bank).

212. 49 Cal. Rptr.2d 507 (Ct. App. 1996).

213. 119 N.M. 638, 894 P.2d 994 (1995).

214. 892 P.2d 246 (Colo. 1995) (En Banc).

215. *See Jasmon O.*, 878 P.2d at 1300.

216. *See Bridget R.*, 49 Cal. Rptr.2d at 515.

217. *See Zacharia D.*, 862 P.2d at 758.

218. *See J.J.B.*, 119 N.M. at 651, 894 P.2d at 246.

219. *See C.C.R.S.*, 892 P.2d at 246.

220. *See* Adoption of Haley A., 57 Cal. Rptr.2d 361, 370 (1996), *review granted, In re* Adoption Petition of Mark A., 930 P.2d 401 (Cal. 1997). Effective January 1, 1995, the California Legislature reduced the period in which a natural mother may revoke her consent to an adoption without the consent of the court from six months to 90 days. *See id.* at 369 n.9, 371 n.13 (citing CAL. FAM. CODE § 8801.3(c)(2) (West 1994 & Cum. Pocket 1997)).

221. *See id.* at 378. The child's fundamental right was to maintain a relationship with her *de facto* family. *See id.* at 379.

222. *See id.* at 381.

as a mandate arising from the "best interests of the child" doctrine. But the meaning of this term is evolving. Courts increasingly question whether biological parenthood gives a status which automatically equates with a child's best interests.[223] Instead, when determing the best interests of any particular child, courts are relying on social science concepts and on an examination of the child's relationships with adults, who may not necessarily be the child's parents.

V. CONCLUSION: WHERE SHOULD WE GO?

An exhaustive discussion of possible reforms in adoption procedures is outside the scope of this Comment. However, three major reforms are needed immediately.

First, *more laws which "regulate" parental responsibility and the adoption process* are needed. Rather than focusing on who has the best right to the child, why not focus on creating laws which stress which "parent-like" adult has assumed responsibility for the child? New laws might include requiring more "pre-birth" responsibilities on the part of both potential fathers and mothers. Most states (including New Mexico) have already established registries for putative fathers.[224] Additional regulations might require prospective fathers to manifest an interest in their child before the child's birth, by providing "child support" and money for pre-natal care.[225] Because of the number of recent incidents involving children who were released through adoptive agencies before there was "clear consent" from both biological parents, it also may be necessary to impose stiffer legal consequences on

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223. *See In re* Zacharia D., 862 P.2d 751 (Cal. 1993) (In Bank). In *Zacharia D.*, the California Supreme Court refused to reunite a "mere biological" father with a young child whom he had not acknowledged for 18 months. *See id.* at 761-63. The court found the court of appeals erroneously recognized a "presumptive right of custody" in the natural father. *Id.* at 764. The court said that the statutorily defined scheme for reunification reflected the results of the legislature's balancing of many fundamental interests. *See id.* at 758.

The strong parental right presumption has not completely vanished. It is only slowly becoming more restricted. But, witness the return of the children of O.J. Simpson, ages eight and eleven years, to their father's custody. Republican Barbara Alby introduced a bill in the California Legislature which would deny any parent custody if they have been convicted of domestic abuse saying: "A serious batterer is deemed responsible for the death of a child's parent and gets to walk away with custody. This is obviously not in the child's best interest." *Change in Custody Law Mulled*, THE CALGARY HERALD, Feb. 12, 1997, at A11, *available in* WESTLAW, ALLNEWS database, 1997 WL 5638016. Another similar bill has been proposed in the California Legislature by Democratic Assemblywoman Sheila Kuehl. *See* Rita Henley Jensen, *What Happens to the Kids of Wife Batterers*, THE SACREMENTO BEE, Jan. 28, 1996, at F6, *available in* WESTLAW, ALLNEWS database, 1996 WL 3280852. Under these proposed California bills, a parent would be deemed presumptively unfit if convicted of a battery. The premise is that not only must the children be protected from possible physical abuse by the batterer, but from psychological harm as well. *See id.*

Currently, two states, Delaware and Florida, have statutes which make domestic violence a rebuttable presumption of child detriment. *See* DEL. CODE ANN. tit. 13 § 705A (196 Supp.); FLA. STAT. ANN. § 61.13 (West 1994 & 1996 Cum. Pocket).

In *Griffin v. Strong*, 983 F.2d 1544 (10th Cir. 1993), the court weighed a wife's interests in her familial right of association with the state's interests in investigating possible child abuse by the woman's husband. *See id.* at 1547-48. The court decided that the liberty interest right of intimate association was not absolute. *See id.* at 1549. Perhaps this same rationale also will be applied to the application of the newly proposed legislation regarding the perpetrators of spousal abuse and their custodial relations with their children.

224. *See* N.M. STAT. ANN. § 32A-5-20 (Cum. Supp. 1996) (putative father registry).

225. "[I]f you are really a sincere guy and you want to put on the cloak of fatherhood, then you should have run down here, not walked." *In re* Zacharia D., 862 P.2d 751, 756 (Cal. 1993) (In Bank) (spoken by the judge to the biological father who was requesting custody of his child for the first time in over a year after the child's birth). The judge went on to say: "A court should also consider the father's public acknowledgement of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and [his] prompt legal action to seek custody of the child." *Id.* at 761 (quoting Adoption of Kelsey S., 823 P.2d 1216, 1237 (Cal. 1992) (In Bank)).

agencies which act too precipitously when placing children for adoption.

Second, *dissemination of more information* is necessary. Unwed mothers should attend counseling to learn about the possible consequences, both emotional and legal, of giving up a child at birth and then subsequently changing their minds. Perhaps this counseling should become a mandatory pre-condition before any mother or father can give their consent for an adoption.[226] Potential fathers should learn about the existence of putative father registries, and what they must do to preserve their parental rights to custody as the biological fathers. Finally, would-be adoptive parents should be strongly cautioned about the turmoil and expense they can expect if an adoption "goes wrong" because there was not full disclosure by all parties, and because the rights of the natural parents were not fully protected at each stage of the adoption process.

Third, and finally, there must be *time limits*. All procedures concerning children should be expedited. Absolute time limits should be made for when any party can assert rights in an adoption proceeding.[227] Most states have set time limits statutorily, but custody battles still can extend beyond these time limits due to legal maneuvering.[228] Expedited procedures would entail, of course, the use of more community resources. But the results of dragging litigation on for years between the parties take their heaviest toll on the children involved.

These are three major areas in which states are making headway, but more reform needs to occur more quickly, or there will be more heartwrenching cases such as Baby Jessica, Baby Richard, and New Mexico's J.J.B. "The door is open to have full justice done in the premises . . . ,"[229] and it "is to the benefit and welfare of the infant to which the attention of the court ought principally to be directed."[230]

SHARON J. FLEMING

226. Currently, New Mexico has such a statute. *See* N.M. STAT. ANN. § 32A-5-22 (Repl. Pamp. 1995) (Persons required to receive counseling; content and form of counseling). However, section 32A-5-22 (D)(1) only requires that any adults required to receive counseling attend such counseling for a minimum of one session. *See id.* at § 32A-5-22(D)(1).

227. New Mexico already has chosen a one year period. *See id.* at § 32A-5-36(K).

228. Recently, the Clinton Administration proposed that legislation be changed to require that court hearings be held no later than 12 months, instead of the usual 18 months after a child enters foster care, to determine if children are eligible for adoption. *See* Ron Fournier, *Clinton Hammers Lengthy Foster Care*, ALBUQ. J., Feb. 15, 1997, at A4. Additionally, the Clinton Administration proposes financial incentives to states for placing children in adoptive homes, and financial aid for training and the recruitment of adoptive parents. *See id.*

229. Bustamento v. Analla, 1 N.M. (Gild, A.L.B. ed.) 255, 261 (1857).

230. *Id.* at 262.