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## Biology is Important, But Does Not Necessarily Always Constitute a "Family": A Brief Survey of the Uniform Adoption Act

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**BIOLOGY IS IMPORTANT, BUT DOES NOT NECESSARILY  
ALWAYS CONSTITUTE A "FAMILY": A BRIEF SURVEY OF THE  
UNIFORM ADOPTION ACT**

I. INTRODUCTION

The 1990's has been a decade filled with doubt surrounding adoption. Cases such as Baby Jessica,<sup>1</sup> Baby Richard,<sup>2</sup> and Baby Emily<sup>3</sup> left those seeking to adopt in a state of panic and uncertainty as they watched these children stripped from their adoptive families.<sup>4</sup> After the Baby Jessica controversy, the solution to the chaos was uniformity in adoption laws and resulted in the Uniform Adoption Act [hereinafter "UAA"].<sup>5</sup> The UAA is a result of compromise that sought to balance

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<sup>1</sup> DeBoer v. Schmidt (*In re Clausen*), 501 N.W.2d 193 (Mich. Ct. App. 1992), *aff'd*, 502 N.W.2d 649 (Mich. 1993) (holding that a child's former temporary custodians, whose adoption petition was denied when custody was awarded to the natural parents, lacked standing to litigate regarding custody of the child and the natural parent's right to custody is not to be disturbed absent parental unfitness).

<sup>2</sup> *In re Adoption of Doe*, 627 N.E.2d 648 (Ill. App. Ct. 1993), *rev'd*, 638 N.E.2d 181 (Ill. 1994), *cert. denied sub nom.* Doe v. Kirchner, 115 S.Ct. 499 (1994).

<sup>3</sup> *In re Adoption of Baby E.A.W.*, 658 So.2d 961 (Fla. 1995), *cert. denied sub nom.* G.W.B. v. J.S.W., 116 S. Ct. 719 (1996). "[A]doption offers significant legal, economic, social, and psychological benefits not only for the children who might otherwise be homeless, but also for parents who are unable to care for their children, for adults who want to nurture . . . children, and for state governments ultimately responsible for the well-being of children." Joan Heifetz Hollinger, *Adoption And Aspiration: The Uniform Adoption Act, The Deboer-Schmidt Case, and the Quest for the Ideal Family*, 2 DUKE J. GENDER L. & POL'Y 15, 18 (1995). *See also*, Annette Ruth Appell, *Blending Families Through Adoption: Implications For Collaborative Adoption Law And Practice*, 75 B.U. L. REV. 997, 1003 (1995). Legal adoption has only recently been accepted in American jurisprudence, it is purely a creature of statute as it did not exist at common law. *Id.* at 1003-04. Massachusetts passed the earliest adoption statute in 1851 and thereafter, other states began to follow that lead by enacting their own adoption laws. *Id.* at 1004. "[B]y the middle of this century, adoption had become a mechanism to provide children - -usually infants - - to 'worthy' infertile couples seeking to build families." *Id.* at 1005.

<sup>4</sup> Mishannock Robbins Arzt, Comment, *In the Best Interests of the Child: The Uniform Adoption Act*, 25 STETSON L. REV. 835, 839 (1996). Cases like these, "demonstrate what is wrong with contemporary adoption law. There is no valid reason for the future of an adopted child to be in limbo for a period of over three years." *Id.* at 885.

<sup>5</sup> The National Conference of Commissioners on Uniform State Laws (NCCUSL), a non-profit organization of lawyers, judges, law professors appointed by governors of every state to draft proposed legislation on a variety of topics, approved the Uniform Adoption Act (hereinafter UAA) on August 4, 1994 by an overwhelming majority. Hollinger, *supra* note

the competing interests of all those involved in the adoption process,<sup>6</sup> while keeping the focus on the one most affected—the CHILD.<sup>7</sup> Vermont is one of the only states that has modeled its adoption laws in large part on the Uniform Adoption Act.<sup>8</sup> The UAA recognizes that adoptive families are the "legal equivalent" to biological families.<sup>9</sup> While recognizing biology is very important, the UAA contends that this biological fact alone will not be enough to trump the rights of adoptive parents and the child by ensuring stability and finality in adoptions.<sup>10</sup> The child is the one with the most at stake and deserves protection from "transfer trauma" in contested

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3, at 40 n.5.

<sup>6</sup> *Id.* at 17. "In its final form, the Uniform Adoption Act represents . . . a compromise between the contrasting outlooks on the ideal family . . ." *Id.* Its purpose was to provide "fair mechanisms" for resolving adoption disputes. *Id.*

<sup>7</sup> "The 'best interests' standard pervades the UAA and applies to every stage of the adoption proceeding. For example, UAA s. 3-703(a) prohibits the granting of an adoption unless the court determines that the adoption will be in the best interests of the minor." Joel D. Tenenbaum, *Introducing The Uniform Adoption Act*, 30 FAM. L. Q. 333, 336 (1996).

<sup>8</sup> Maryann Zavez & Angela Clark, *Adoption Under Vermont's New Adoption Statute*, 22-DEC VT. B.J. & L. DIG. 35, 35 (1996). Like the UAA, Vermont allows any person to adopt another for the purpose of creating the relationship of parent and child. 15A VT. STAT. ANN. s. 1-102(a) (1996). *See also* 15A VT. STAT. ANN. s. 2-201, 2-204(b) (stating that any person interested in adopting must be found suitable to be an adoptive parent pursuant to a placement evaluation done either prior to placement or after the adoption petition has been filed); 15A VT. STAT. ANN. s. 6-105(a), 6-105(b)(1), 6-105(b)(2), 6-112 (addressing disclosure requirements modeled after the UAA). *See also e.g.*, Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 FAM. L. Q. 345, 377 (1996). The UAA has been subjected to intense criticism from certain lobbying groups. *Id.* "Most of the critics are either hostile to adoption, or at a time when we are experiencing a general cutback in many vital public services, want much more public agency control over adoption practices that the UAA leaves to a combination of private determination and judicial oversight." *Id.* Other states such as Michigan have adopted the UAA in part which serve to supplement their existing adoption statutes. *Id.*

<sup>9</sup> Hollinger, *supra* note 8, at 378. The emotional and psychological aspects surrounding the adoptive parents and the child are able to flourish under the UAA. *Id.* If people can get beyond the idea that blood is everything that makes a family, the UAA will gain more support. *Id.*

<sup>10</sup> *Id.* *See also*, Philip S. Welt, *Adoption and the Constitution: Are Adoptive Parents Really 'Strangers Without Rights?'*, 95 ANN. SURV. AM. L. 165 (1995). "The bias for genetic linkage harms the opportunity of adopted children to have and maintain a meaningful relationship and gives no regard . . . for the well-intentioned persons who have not wronged anyone." *Id.* at 253. Adoptive parents who care for and nurture the adopted child deserve protection under the Constitution. *Id.*

adoptions.<sup>11</sup>

This Comment addresses the problems that adoptive families have confronted and explores certain provisions of the Uniform Adoption Act. Part II will discuss the historical constitutional protections afforded the traditional family which explains the notion that "biology equals family."<sup>12</sup> Part III discusses unwed fathers' attempts to assert their parental rights to their child.<sup>13</sup> Part IV of this Comment emphasizes the psychological implications of adoption on all parties involved.<sup>14</sup> With this in mind Part IV then takes a step by step look at three important and controversial cases decided in the 1990's including Baby Jessica, Baby Richard, and Baby Emily.<sup>15</sup> Part V gives a brief survey of certain provisions of the UAA and explores the commentary on the particular provisions.<sup>16</sup> Part VI concludes with the opinion that the UAA is a commendable attempt to prevent more tragic stories in adoption.<sup>17</sup> Its consent requirements, with the exception of when the birth father's consent is required, and its finality provisions should be adopted by more states.<sup>18</sup>

## II. HISTORICAL CONSTITUTIONAL PROTECTIONS OF FAMILY AND RELATED MATTERS

### A. *Protection of the Parent-Child Relationship*

In the early case of *Meyer v. Nebraska*<sup>19</sup> the Supreme Court invalidated a law

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<sup>11</sup> Suellyn Scarnecchia, *A Child's Right to Protection from Transfer Trauma in a Contested Adoption Case*, 2 DUKE J. GENDER L. & POL'Y 41 (1995). The author of this article asserts children in contested adoption cases "have the right to be considered persons who may be significantly affected by the loss of their established families." *Id.* at 47. These children need to be recognized and seriously protected. *Id.* The child has a liberty interest under the Fourteenth Amendment and if the child is removed from an established home, they are likely to suffer serious emotional harm. *Id.* at 53-54. "If the danger confronting this child were physical injury, no one would question her right to invoke judicial process to protect herself . . . ." *Id.* at 54. From the child's point of view, there is little or no difference between physical and psychological injury. *Id.*

<sup>12</sup> See *infra* notes 19-42 and accompanying text.

<sup>13</sup> See *infra* notes 43-77 and accompanying text.

<sup>14</sup> See *infra* notes 78-92 and accompanying text.

<sup>15</sup> See *infra* notes 93-126 and accompanying text.

<sup>16</sup> See *infra* notes 127-187 and accompanying text.

<sup>17</sup> See *infra* notes 188-193 and accompanying text.

<sup>18</sup> *Id.*

<sup>19</sup> 262 U.S. 390 (1923).

making it a crime to teach foreign language to children.<sup>20</sup> Justice McReynolds, writing for the majority, explained that "liberty" denotes not merely freedom from restraint and the right to contract, but also to marry, establish a home, bring up children and those privileges are long recognized as essential to the "orderly pursuit of happiness by free men."<sup>21</sup> The Constitution does not mention the word "family" but the Court has recognized that "family matters" and freedom of personal choice in those matters are constitutionally protected fundamental liberty interests.<sup>22</sup>

In *Moore v. City of East Cleveland*,<sup>23</sup> the Court invalidated a zoning ordinance, which prohibited "extended families" from living in the same household, on substantive due process grounds.<sup>24</sup> "Family" as defined in the ordinance excluded

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<sup>20</sup> *Id.* The Court reversed the conviction of a teacher who violated a state law prohibiting the teaching of foreign language to young children. *Id.* Justice McReynolds found that the Nebraska law materially interfered with the calling of modern language teachers by not allowing pupils to acquire knowledge. *Id.* at 401. To the Court, there was no adequate justification for these restraints on liberty. *Id.*

<sup>21</sup> *Id.* at 399. This case implied that parents are free to direct the upbringing of their children and also to direct their education. *See also generally*, *Roe v. Wade*, 410 U.S. 113 (1973) (invalidating a Texas statute that criminalized abortion, stating this invaded an individual's right to privacy in the context of procreation). "The Court's recognition of the family's 'sanctity' thus derives from and contributes to the emphasis placed on the importance of the parent-child relationship." *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding an Oregon law requiring children to attend public schools unconstitutional in that it interfered with the liberty of parents to direct the upbringing and education of children); *See* Kirsten Korn, Comment, *The Struggle for the Child: Preserving the Family in Adoption Disputes Between Biological Parents and Third Parties*, 72 N.C. L.REV. 1279, 1291 (1994).

<sup>22</sup> *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that a Wisconsin law stating that any resident having minor issue not in his custody and which he is under an obligation to pay could not marry without court approval was violative of the right to privacy and due process). *See also* *Cleveland Bd. of Education v. LaFleur*, 414 U.S. 632 (1974) (stating that freedom of choice in family matters is protected by due process clause of the Fourteenth Amendment). *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that there is a constitutional right to privacy which protects the use of contraceptives within the marriage relationship); *But see* *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that parental rights are limited and when the state's interest in protecting children is compelling, even though contrary to the parent's interests, the state as *parens patriae* may properly restrict the parent's control over the child).

<sup>23</sup> 431 U.S. 494, (1977) (plurality opinion). In *Moore*, a zoning ordinance was at issue that limited occupancy of a dwelling to members of a "single" family. *Id.* Mrs. Moore was convicted of violating the ordinance. *Id.*

<sup>24</sup> *Id.* at 499. A four justice plurality stated that the right of a family - - even a non-traditional one - - to live together is a liberty interest protected by the due process clause.

Moore's extended family.<sup>25</sup> The plurality articulated that the family is rooted in tradition and must be protected as a "fundamental liberty interest" because of the parent's role in instilling values in their children.<sup>26</sup> This case is significant because the Court extended the liberty interest in "family" to non-nuclear families.<sup>27</sup>

### *B. Child Protected*

Traditionally a child was viewed as property and was under the exclusive control of the father.<sup>28</sup> In the 1920's however, the Supreme Court began to realize that children are "people" under the Constitution and have rights that deserve protection.<sup>29</sup> The first case to explicitly address the rights of children was *Tinker v. Des Moines Independent School District*,<sup>30</sup> where the Court held that the school was violating the child's First Amendment rights by not allowing him to wear an armband in protest of the Vietnam War.<sup>31</sup>

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*Id.*

<sup>25</sup> *Id.* at 496. Mrs. Moore shared a home with her son and two grandsons. *Id.*

<sup>26</sup> *Id.* The plurality stated "ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of aunts, uncles, . . . and especially grandparents . . . has roots equally venerable and equally deserving of constitutional recognition." *Id.* at 504. "The Court's recognition of the family's sanctity thus derives from and contributes to . . . importance of the parent-child relationship." See Korn, *supra* note 21, at 1291.

<sup>27</sup> *Moore*, 431 U.S. at 503-04. Even though the state's interest in preventing overcrowding, congestion, and burdens on public schools were legitimate, the ordinance was not substantially related to those ends. *Id.* at 499-500. The plurality noted that these such arrangements were not uncommon. *Id.* at 505. Justice Brennan stated, "The 'extended family' that provided generations of early Americans with social services and economic and emotional support in times of hardship, and was the beachhead for successive waves of immigrants . . . remains . . . a pervasive living pattern." *Id.* at 508.

<sup>28</sup> See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 452-53 (Berkowitz & Thorne, eds., Garland Publishing 1978) (1783). The presumption that favors the liberty interest of the biological relationship grew out of this old, now discredited common law theory that children are the property of their biological parents. Welt, *supra*, note 10 at 207.

<sup>29</sup> See Korn, *supra* note 21, at 1287. "Ironically, this protection of children's rights grew out of cases recognizing the rights of parents in the parent-child relationship." *Id.*

<sup>30</sup> 393 U.S. 503 (1969).

<sup>31</sup> *Id.* at 511. The Court recognized that the child should be able to "express himself" and by not allowing the armband, this right was violated. *Id.* The state's interest in controlling school conduct was outweighed by the individual right of expression. *Id.* The court stated "[t]hey [children] are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." *Id.*

In the adoption context, the Court has "never recognized a child's independent right to maintain familial relationships with non-biological relationships."<sup>32</sup> This stems from the case of *Santosky v. Kramer*<sup>33</sup> when the Court announced that a State must prove its case by clear and convincing evidence to terminate parental rights.<sup>34</sup> According to the Court, even when blood relationships are strained,<sup>35</sup> biological parents retain a vital interest in preventing destruction of that family life.<sup>36</sup>

### C. Foster Parents

Foster parents are generally not protected within the ambit of "family." In *Smith*

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<sup>32</sup> Scarnecchia, *supra* note 11, at 45. See also *In re Doe*, 638 N.E.2d 181 (Ill. 1994) (stating that the child's interests were irrelevant); *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992) (holding that parental rights should not be terminated even if in the best interest of the child). *In re Clausen*, 502 N.W.2d 649 (Mich. 1993) (holding that Baby Jessica had to be returned to her biological father who had not been notified of the adoption despite Jessica living with her adoptive parents for over two years).

<sup>33</sup> 455 U.S. 745 (1982).

<sup>34</sup> *Id.* The right of a fit parent to the custody of a minor child is a fundamental liberty interest and due process is violated if those rights could be terminated by anything less than clear and convincing evidence. *Id.* at 745. At issue was a New York statute that required only a preponderance of the evidence standard to terminate parental rights if the state officials found a child to be neglected. At the time of this case, at least fifteen other states required "clear and convincing" evidence of unfitness (i.e. neglect, abandonment) before their rights could be terminated. *Id.* at 748. The court explained that the consequence of an erroneous termination is the unnecessary destruction of the natural family and therefore due process mandates a higher standard. *Id.* at 746.

<sup>35</sup> *Santosky*, 455 U.S. at 753, "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody to the State." *Id.* See also *DeBoer v. DeBoer*, 509 U.S. 1301, 1302 (1993) ("Neither [state] law . . . nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education."); *Turner v. Pannick*, 540 P.2d 1051 (Alaska 1975) (stating that parental custody is preferable and will be refused only if it is clearly detrimental to the child); *In re Adoption of Doe*, 543 So.2d 741, 751 (Fla. 1989) ("[H]istory has demonstrated that, unless unfit, the best interests of the child lies with the natural parents.").

<sup>36</sup> *In re Adoption of Doe*, 543 So. 2d 741, 751 (Fla. 1989). An award of custody to a third party is warranted only upon a finding of parental unfitness, abandonment, neglect or some other extraordinary circumstance which substantially affects the child's welfare. Bernadette Weaver-Catalana, Comment, *The Battle For Baby Jessica: A Conflict of Best Interests*, 43 BUFF. L. REV. 583, 615 n.9 (1995).

*v. Organization of Foster Families*,<sup>37</sup> the foster parents challenged a New York law that regulated the process for removing foster children from their homes.<sup>38</sup> The Court sought to define the word "family." The majority concluded that a relationship is a family if it "stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children."<sup>39</sup> The foster parents contention was that their "family" deserved protection as a fundamental liberty interest.<sup>40</sup> The Court was not willing to go so far as to protect foster parents, and concluded that the relationship between foster parents and children was not protected under the Fourteenth Amendment.<sup>41</sup> What is important is that the Court did say that adoption is "the legal equivalent of biological parenthood."<sup>42</sup> These cases, in recognizing that "family" is a fundamental

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<sup>37</sup> 431 U.S. 816 (1977). When speaking of federal constitutional rights in adoption, this means the constitutional rights of the specific individuals. Welt, *supra*, note 10 at 179.

<sup>38</sup> *Smith*, 431 U.S. at 819-20. Under the statute at issue, an agency that placed the child was required to notify the foster parents only 10 days before the child would be removed from their care – the foster parents could challenge the removal if they requested a conference with the department to do so. *Id.* at 829-30. If it was decided that the child was to be removed, the foster parents could appeal for a hearing. *Id.* at 830. Also, if the child was being transferred to a different foster family instead of the child's natural parents, the foster parents were entitled to request a full hearing before removal. *Id.* at 831. The foster parents here argued that these procedures did not contain adequate safeguards against arbitrary removal. *Id.* at 842.

<sup>39</sup> *Id.* at 844. The Court recognized the emotional attachments that come from everyday interaction and that a loving relationship can develop despite the absence of a blood relationship. *Id.*

<sup>40</sup> *Id.* at 842-43. The foster parents introduced evidence of emotional attachment and argued their case on the basis that they were indeed a family, and just because it was not traditional, it still deserved constitutional protection. *Id.* at 839. The Court however, concluded that since the relationship was the result of contract, state law controls over the expectation of the foster parents. *Id.* at 845.

<sup>41</sup> This decision was however, very important for adoptive parents because it extended the definition of "family" beyond those with biological connections. Robin DuRocher, Commentary, *Balancing Competing Interests In Post-Placement Adoption Custody Disputes*, 15 J. LEGAL MED. 305, 326 (1994).

<sup>42</sup> *Smith*, 431 U.S. at 844 n.51. See also, *Thelen v. Catholic Social Services*, 691 F.Supp. 1179, (E.D. Wis. 1988) (holding that prospective adoptive parents have a liberty interest in their family unit and deserves constitutional protection). Writing for the majority, Justice Brennan articulated that the Fourteenth Amendment does protect certain areas of family life from state intrusion. See *Smith*, 431 U.S. at 846-47. The Court also emphasized the importance and existence of emotional bonds that do in fact form in foster families and stated that a foster family is not "a mere collection of unrelated individuals." *Id.* at 844. However, the Court distinguished the foster family from the natural family by stating that



liberty interest and deserves protection, led to the cases of unwed fathers who started asserting their rights as the biological father.

### III. THE UNWED FATHERS' CONTROVERSY

Historically, the unwed father was not constitutionally protected and could be completely excluded from the adoption process.<sup>43</sup> Then in *Stanley v. Illinois*<sup>44</sup> the Supreme Court held that a state may not deny a father custody of his child without a hearing.<sup>45</sup> The challenged statute conclusively presumed that an unwed father was not "fit" and did not have a right to custody.<sup>46</sup> The Court concluded that "as a matter

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foster parents get their power solely from the State and the contractual nature removes the foster family from the traditional recognition and protection of family privacy. *Id.* at 845. The second reason the Court stated for not addressing whether foster parents have a "fundamental liberty interest" was that acknowledging liberty interests of foster parents would conflict with the absolute rights of natural parents to have their children returned to them. *Id.* at 846. The Court noted:

It is one thing to say that individuals may acquire a liberty interest in arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right - an interest the foster parent has recognized by contract from the outset.

*Id.*

<sup>43</sup> Ardis L. Campbell, Annotations, *Rights of Unwed Father To Obstruct Adoption of His Child by Withholding Consent*, 61 A.L.R. 5<sup>th</sup> 151 (1998). At common law, unwed father's rights to an illegitimate child was not legally protected. Korn, *supra* note 21, at 1297. This was because there was a presumption that unwed fathers whose identity was questionable were irresponsible and not very concerned about their children. *Id.*

<sup>44</sup> 405 U.S. 645 (1972).

<sup>45</sup> *Id.* at 652. Stanley, the unwed father, lived with his children and the mother off and on but when the mother died, the children were removed from the home by the State. Under Illinois law, the children of unwed fathers became the wards of the State upon death of the mother. *Id.* at 645. The State defended the statute by asserting its interest in protecting the welfare of the child and the best interests of the community. *Id.* at 652. The State claimed that by presuming unwed fathers to be "unfit" to take custody, their interest would be furthered. *Id.* at 652, 656-57. The State also claimed that men were not naturally inclined to rear children. *Id.* at 654.

<sup>46</sup> *Stanley*, 405 U.S. at 649-50. According to the statute he was not a "parent" because he and the mother were not married. *Id.* The Court stated that this presumption of unfitness was not defensible under the Constitution. *Id.* at 651. The Court reasoned that the state's interest in protecting the welfare of children could also be served by allowing a fit, unwed

of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing . . . the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment."<sup>47</sup> The Court recognized a father's "private interest" in the children he has raised.<sup>48</sup>

However, the Court would prove that this "private interest" was not automatic in every unwed father case in *Quilloin v. Walcott*.<sup>49</sup> The Supreme Court announced that the ruling in *Stanley* was not universal and did not apply to every man who became a father.<sup>50</sup> Quilloin argued to the Supreme Court that the Georgia statute requiring a father to first legitimate his child before allowing him to block an adoption, violated his due process and equal protection rights.<sup>51</sup> The majority denied Quilloin's challenges by focusing not on biology, but on the nature of his

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father to have custody. *Id.* 652-53. If the father is "fit" then the state "spites its own articulated goals" with a presumption of unfitness. *Id.* at 653. The *Stanley* Court was the first to recognize that an unwed father had a constitutionally protected interest in his relationship with his child. *Id.* at 652.

<sup>47</sup> *Id.* at 649. Considered the first victory for the rights of unwed fathers, the *Stanley* decision was rather misleading. "It appeared that the court was guaranteeing all unwed fathers the constitutionally based right to a determination of unfitness before their rights to their offspring could be extinguished. Yet such an interpretation would prove to be overbroad as the Court would later demonstrate . . ." in its decision in *Michael H. v. Gerald D.*, 491 U.S. 110 (1988). Scott A. Resnik, *Seeking The Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoptions*, 20 SETON HALL LEGIS. J. 363, 382 (1996).

<sup>48</sup> *Stanley*, 405 U.S. at 651. "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and absent a powerful countervailing interest, protection." *Id.* at 651. This case was decided before *Santosky*, 455 U.S. 745 (1982), which established the clear and convincing standard for terminating parental rights.

<sup>49</sup> 434 U.S. 246 (1978).

<sup>50</sup> *Id.* at 256. Quilloin had impregnated a woman who later married another man. Her new husband wanted to adopt the child and Quilloin tried to prevent the adoption in order to preserve his visitation rights even though he had not provided any financial or parental support for his child. *Id.* at 247-48.

<sup>51</sup> *Id.* The Georgia courts did not allow him to prevent the adoption because of his failure to legitimize his child and they also cited that it was in the child's best interests to prevent him from doing so. *Id.* at 249-50. Quilloin did not petition for legitimation of his child at any time during the eleven years between the child's birth and the filing of Walcott's adoption petition. *Id.* at 249. In particular, Quilloin argued that he was entitled to the same power to block an adoption as unwed mothers and married or divorced parents were entitled under Georgia law. *Id.* at 246.

relationship with the child.<sup>52</sup> The Court reasoned that since "he never exercised actual or legal custody over his child . . . never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child,"<sup>53</sup> he was not entitled to block the adoption.<sup>54</sup>

A year later, the Court held a New York statute unconstitutional as violating the Equal Protection clause of the Fourteenth Amendment in *Caban v. Mohammed*.<sup>55</sup> The statute required only the mother's consent for the adoption of her child. The father, Caban, argued that he had a right to maintain his relationship with the children when he had been a fit parent.<sup>56</sup> The Court stated that the statute was

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<sup>52</sup> *Id.* 255. "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected." *Id.* In evaluating Quilloin's equal protection claim, the Court stated that the statute's distinction between divorced and unwed fathers was justifiable. *Id.* at 256. Divorced or separated fathers generally had established some relationship with their child and taken some responsibility whereas Quilloin had not. *Id.* The Court noted that he had not even attempted to legitimate his child for over 11 years and held that he was not deprived of equal protection. *Id.* at 249.

<sup>53</sup> *Id.* at 256.

<sup>54</sup> *Id.* Under any standard of review, the State was within its bounds in recognizing the lack of relationship the father had with his child and that adoption in this case was in the child's best interests. *Id.* at 256. "[I]f a father was not going to make an effort to establish a relationship with his offspring . . . he was not entitled to the parental privileges which would give him a voice in his child's future custodial arrangement." See Resnik, *supra* note 47, at 383. If the father does not accept responsibility and participate in the child's care, the Court would allow the state to terminate his parental rights. Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise his Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971, 976 (1992).

<sup>55</sup> 441 U.S. 380 (1979). The Court considered the rights of an unwed father who did not have present custody of his child but did have custody in the past. *Id.* Abdiel Caban and Maria Mohammed had two children together and lived and raised them together for five years. *Id.* at 382. They later separated and both remarried. *Id.* Maria and her new husband initiated adoption proceedings. *Id.* New York, applying its law at the time, granted the petition and Caban appealed to the Supreme Court. *Id.* Caban's biological rights were terminated. *Id.* at 383. Caban had also maintained contact with his children and had visitation rights, but those were terminated also when the stepfather adopted the children. *Id.* at 383-84. Under the New York statute the biological father could only block an adoption if he could show it was in the child's best interests. *Id.* at 386-87.

<sup>56</sup> *Id.* at 385. Caban, when making this argument, seemed to be relying on *Quilloin*, because the Court seemed to emphasize "relationship" in the opinion. See *Quilloin*, 434 U.S. 246 (1978).

defective because it treated "unmarried parents" differently on the basis of sex.<sup>57</sup> The majority further stated that where a father has developed a substantial relationship with his children, he could not have his rights terminated merely because he did not marry the mother.<sup>58</sup>

Supporting the "relationship" analysis of these prior cases, the Supreme Court in *Lehr v. Robertson*<sup>59</sup> held that Lehr had not developed a substantial relationship with his child therefore, his rights were not violated.<sup>60</sup> Lehr had never lived with his child, never supported the child, and rarely saw the child even though he knew of the child's existence.<sup>61</sup> In its analysis, the Court reiterated that biology alone was not

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<sup>57</sup> *Caban*, 441 U.S. at 388-89. Since the statute allowed for an unmarried mother's consent, but not the unmarried father's; this violated his right to equal protection. *Id.* Gender based distinctions must serve important governmental objectives and must be substantially related to the achievement of those objectives in order to withstand scrutiny under the Equal Protection clause. *Id.* The Court rejected the state's first argument that the distinction was justified because there is a fundamental difference between maternal and paternal relations. *Id.* at 388. This could possibly be a justification when the child is born, but the generalization is less acceptable the older the child gets and more opportunity for a father to establish a relationship with the child. *Id.* at 389-91. The Court rejected the state's other argument that the distinction is substantially related to the state's interest in providing for illegitimate children by allowing adoptions. *Id.* The statute also failed because it did not distinguish between fathers who had established a relationship with their child and those who had not. *Id.* at 392.

<sup>58</sup> *Id.* at 394. "Substantial relationship" is not clearly defined but *Caban* implies that a father who establishes his paternity and grasps the opportunity to care and nurture his child is a relationship that warrants protection. The decisions in *Stanley* and *Caban* support the proposition that a blood relationship coupled with an actual parent-child relationship warrants protection under the Fourteenth Amendment. *See Korn, supra* note 13, at 1300.

<sup>59</sup> 463 U.S. 248 (1983).

<sup>60</sup> *Id.* John Lehr and Lorraine Robertson had a child together but did not marry. Robertson then married less than a year after the child's birth and the new couple sought to have Jessica adopted by the stepfather. *Id.* at 250. The issue was whether Lehr was entitled to advance notice that his child was involved in an adoption proceeding. *Id.* at 250-52. Lehr definitely would have been entitled to this notice if he had filed with New York's putative father registry. *Id.* at 251. Since Lehr did not file with the state's putative father registry, which is one where an unwed/putative father files his name with the State so that he will be notified of any proceedings with regard to his child, he was never notified that his child was the subject of an adoption proceeding. *Id.* at 252. He later found out about this proceeding and sought to intervene but it was to no avail. *Id.* at 253.

<sup>61</sup> *Lehr*, 463 U.S. at 252.

sufficient to establish a "liberty interest" and therefore require due process of law.<sup>62</sup> The Court distinguished between fathers who have earned a right to be heard because they've established a substantial relationship with their child, and those who have not earned rights because they have failed to establish that relationship.<sup>63</sup>

Questions of unwed fathers' rights were further complicated in the case of *Michael H. v. Gerald D.*,<sup>64</sup> where the Court denied an unwed father's opportunity to establish paternity.<sup>65</sup> This was denied even after showing that he had developed a relationship with his child.<sup>66</sup> The California statute at issue imported a conclusive presumption that a child of a married woman was the child of that marriage unless the husband was impotent or sterile.<sup>67</sup>

Relying on the prior cases of unwed fathers, Michael H. asserted that his

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<sup>62</sup> *Id.* at 259-60. *Lehr*'s contention was just that—that a putative father's relationship with his child born out of wedlock was an "interest in liberty" which cannot be destroyed without due process and therefore he had a right to notice and an opportunity to be heard before that interest was taken away. *Id.* at 255. The Court disagreed stating that if the biological father did not have a relationship with his child and was not part of the child's life, then he is not entitled to constitutional protection. *Id.* at 265. The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. *Id.* at 262-63. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. *Id.* If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie. *Id.* at 261-62. Parental rights are linked to parental duties and when the biological father takes responsibility, then his rights will be protected. *Id.* at 257-58.

<sup>63</sup> *Id.* The *Lehr* test requires a biological father to demonstrate his "relationship" with his child before qualifying for due process protection and then proceed to argue the flaws in any statutory scheme. *Id.* at 261-64. Since *Lehr* had not "demonstrate[d] a full commitment to the responsibilities of parenthood" he was not entitled to demonstrate his dislike of the statute. *Id.* at 261.

<sup>64</sup> 491 U.S. 110 (1989).

<sup>65</sup> *Id.* The mother was married to Gerald D. but had an affair with Michael H. and conceived the child at issue. *Id.*

<sup>66</sup> *Id.* at 114. Not only did Michael H. show that he had a relationship with his child, the paternity test revealed a ninety-eight percent chance that Michael was in fact the father. *Id.* Since the mother resided with Michael for a few months every year because of her career, Michael had developed a loving relationship with his child. The mother however, eventually just starting denying him visitation; that is when he brought suit to establish his paternity. *Id.*

<sup>67</sup> *Id.* at 113 (citing CAL EVID. CODE s. 621 (West Supp. 1989)).

relationship with the child plus the biological tie warranted constitutional protection.<sup>68</sup> The plurality did not agree and stated that he had misinterpreted the prior cases.<sup>69</sup> Thus, Michael H's relationship with his daughter was not a constitutionally protected liberty interest.<sup>70</sup>

Writing for the dissent, Justice Brennan opined that the prior cases indeed had produced a theme of recognizing "biology plus"<sup>71</sup> and is deserving of constitutional protection.<sup>72</sup> "Five members of the Court refuse to foreclose the 'possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to . . . another man at the time of the child's conception and birth.'<sup>73</sup> The plurality has "recanted" from its previous opinions which stated the importance of natural fathers grasping their opportunity to "develop a relationship with their offspring."<sup>74</sup>

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<sup>68</sup> *Id.* at 121.

<sup>69</sup> *Id.* They reasoned that the decisions were based "upon the historic respect- -indeed, sanctity would not be too strong a term- -traditionally accorded to the relationships that develop within the unitary family." *Id.* at 123. (plurality opinion). "There is no merit to Michael's substantive due process claim that he has a constitutionally protected 'liberty' interest in the parental relationship he has established with Victoria, . . ." *Id.* at 111. The state has a substantial interest in protecting the marital family, "even modern statutory and decisional law, demonstrate that society has historically protected, and continues to protect, the marital family against the sort of claim Michael asserts." *Id.*

<sup>70</sup> *Michael H.*, 491 U.S. at 122 (1989). Why this dramatic shift? The Court said he had not been denied an interest "so rooted in the tradition . . . to be ranked as fundamental." *Id.* Even the child asserted her own rights to maintain a relationship with both fathers which the Court quickly rejected; "multiple fatherhood has no support in the . . . traditions of this country." *Id.* at 130-31.

<sup>71</sup> This term has been used by courts and commentators to describe the theme of biological ties plus a parent-child relationship that can serve to protect father's rights. *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

<sup>72</sup> *Michael H.*, 491 U.S. at 142-43 (Brennan, J., dissenting). Although this case cast doubt on prior ones, lower courts have continued to accept the view that biology plus a substantial relationship warrants protection. *See Resnik, supra* note 47, at 387-88.

<sup>73</sup> *Michael H.*, 491 U.S. at 136. "Only one Member of the Court fully endorses Justice SCALIA'S view of the proper method of analyzing questions arising under the Due Process Clause." *Id.* Nevertheless, the plurality decides the case on history and denies Michael H's rights. *Id.* at 137.

<sup>74</sup> *Id.* at 163. "Michael eagerly grasped the opportunity to have a relationship with his daughter (he lived with her; he declared her to be his child; he provided financial support for her) and still, with today's opinion, his opportunity has vanished. He has been rendered a stranger to his child." *Id.*

After this line of cases, many states rewrote their consent and notice statutes to better protect the biological father.<sup>75</sup> More and more fathers also decided to challenge the termination of their parental rights.<sup>76</sup>

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<sup>75</sup> Some states that required absolute consent include: ALA. CODE s. 26-10A-7(5) (1998); ARIZ. REV. STAT. ANN. s. 8-106(A)(1)(b) (West 1998); DEL. CODE ANN., tit. 13, s. 1106 (a) (1998); D.C. CODE ANN. s. 16-304(b)(2)(A) (1998); IOWA CODE ANN. s. 600.3 (West 1999); PA. CONS. STAT. ANN., tit. 23, s. 2711 (a)(3) (West 1999); WASH. REV. CODE ANN. s. 26.33.160(1)(b) (West Supp. 1998); WYO. STAT. s. 1-22-109(a)-(iv) (1998); MO. ANN. STAT. s. 453.040(1)-(3) (West 1999). Other states require "conditional consent" which gives putative fathers consent and notice rights if they meet certain prescribed criteria such as legitimating the child, providing financial aid to the mother, or father's name appears on the birth certificate. See Resnik, *supra* note 47, at 392.

<sup>76</sup> See generally, *In re L.W.*, 613 A.2d 350 (Dist. Col. Ct. App. 1992) (recognizing that unwed father had grasped his opportunity to parent his child); *Vineyard v. Hood*, 930 S.W.2d 575 (Tenn. Ct. App. 1996) (holding that a statutory provision allowing an unmarried woman to prevent a putative father from filing a petition to legitimate his child violated his constitutional rights under both the 14<sup>th</sup> Amendment and the Tennessee Constitution); *In re E.C.B.*, 691 So.2d 687 (La. Ct. App. 1997) (holding that the father's consent to adoption was necessary and that he had established sufficient parental responsibility to veto the adoption). For recent cases where the court found that the unwed father's consent was not required, see generally, *In re A.S.B.*, 688 N.E.2d 1215 (Ill. App. 1997) (stating that putative father's reliance on information from the mother that child was not his, did not preclude the State from relying on his failure to assert responsibility for the child as a statutory ground to terminate his parental rights); *In re Kailee*, 594 N.E.2d 941 (N.Y. 1992) (holding that consent was not required where father knew of the mother's plans for adoption, avoided the mother's attorney, never expressed an interest in the child during the period prior to birth and manifested no willingness or ability to assume full custody); *In re Adoption of B.G.H.*, 930 P.2d 371 (Wyo. 1996) (concluding that biological father did not show any interest in and responsibility for the child and his objection to the fitness of the adoptive mother was not valid); *Raymond A.A. v. Doe*, 663 N.E.2d 919 (N.Y. App. Div. 1995) (determining that the unwed father was not entitled to veto the adoption even though the birth mother fraudulently concealed the child's birth, because father failed to manifest responsibility until six months after learning of the birth); *In re Baby Girl U.*, 672 N.E.2d 603 (N.Y. 1996) (holding that father had no constitutionally protected interest in retaining custody and consent was not required based on the fact that he had made no effort to assert his rights during the six months prior to the child's placement for adoption). For cases holding that the father's consent was required see, *In re Clausen* (known as Baby Jessica), 502 N.W.2d 649 (Mich. App. 1992) (holding that natural father did not abandon his rights by failing to act immediately to protect them when he learned of mother's pregnancy); *T.J.B. v. E.C.*, 652 A.2d 936 (Pa. Super. Ct. 1995) (stating that unwed fathers' rights may not be terminated involuntarily for his failure to make reasonable efforts in keeping contact with his child unless the father knows or has reason to know of child's birth).

These cases, with the exception of *Michael H.*, would seem to stand for the proposition that "relationships" with children is an important if not the most important factor in determining whether a parent may block the adoption.<sup>77</sup> But this theme did not prevail in contested adoptions between the adoptive and biological parents.

#### IV. PSYCHOLOGICAL IMPLICATIONS SURROUNDING ADOPTIONS AND THE THREE EXTRAORDINARY CASES OF THE 1990'S

When the biological mother or father makes the decision to give up their child, they often later doubt that decision.<sup>78</sup> The psychological implications discussed are exemplified in three cases decided in the 1990's and the reader must keep in mind that the decision to give up a child is not an easy one. However there is also a serious bond that undoubtedly develops between the adoptive parents and the child

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<sup>77</sup> Welt, *supra* note 10, at 207-08. See also Toni L. Craig, Comment, *Establishing the Biological Rights Doctrine to Protect Unwed Fathers in Contested Adoptions*, 25 FLA. ST. U.L. REV. 391 (1998). These unwed father cases leave the following implication: an unwed father has a constitutionally protected right to establish a relationship with his child "if the biological mother decides to give birth to the child and is not married to another man, and if he does not delay assuming his parental role." *Id.* at 403. An unwed father who promptly asserts his interest in his newborn child when the biological mother is attempting to place his child for adoption at-birth, should also be granted similar constitutional protection to establish a relationship with that child. The biological rights doctrine would assure such protection. *Id.* The issue of just how much responsibility an unwed father must assume before gaining this constitutional protection to establish a relationship with his is still in variance. *Id.* at 437. "States vary greatly in their approaches to deciding which fathers should be recognized as fathers and how much protection their interests deserve." *Id.* The genetic link between a biological father and his child plus the father's intent to assume parental responsibility should "trigger full constitutional protection" of his interests. *Id.* An unwed father should be presumed fit to have custody of his child when contesting an adoption of that child. *Id.*

<sup>78</sup> Appell, *supra* note 3, at 998. "In addition to the positive aspect of providing children with permanent homes, adoption involves a series of losses." *Id.* Birth parents mourn the loss of their biological child and often wonder about their whereabouts and if the child is being well taken care of. *Id.* at 999. Adoptive parents mourn the fact that they did not give birth to their new child. *Id.* Adopted children mourn the loss of their biological roots, their sense of identity and how they are connected genetically with this world. *Id.* These "losses" are inherent in adoption and serve to undermine the myth that adoption is a solution to everyone's problems. *Id.* The adoptive family can not always simply replace the birth family. *Id.* "Although the adoptive family can provide the child with love, nurture, and security, it cannot provide the adoptee with the physical, genetic, or ethnic connection that the adoptee shares uniquely with the birth family." *Id.*



that should not be overlooked.

### A. *The Natural Parents*

Traditionally, birthmothers who gave up their children for adoption encountered social stigmatization because of their unmarried status.<sup>79</sup> Unwed mothers could expect disdain and anger from their families.<sup>80</sup> Biological mothers face the difficult decision of whether to give up their child and people fail to recognize that the mother is suffering.<sup>81</sup> They often have second thoughts of whether they made the right decision.<sup>82</sup>

Although more attention had traditionally focused on the mother's emotions, biological fathers also have an emotional stake in the adoption process.<sup>83</sup> This is

<sup>79</sup> DuRocher, *supra* note 41, at 310. Well into the twentieth century, unwed women were "unfit" members of society. "It was commonly believed that the women reaped what they had sowed, and as such, were experiencing righteous punishment for their sins." *Id.*

<sup>80</sup> *Id.* Unwed mothers were thought of as poverty stricken and ignorant. Some commentators even held the view that they were "seriously neurotic" or mentally disturbed. *Id.*

<sup>81</sup> *Id.* at 312. Contemporary stigma that attaches to biological mothers includes a "middle-class bias" that shifts the public's emotions to the adoptive parents who live a middle class life. *Id.* at 311. But what people fail to recognize is that the mother is suffering too in many situations. *Id.* The decision to give up her child is an emotional and stressful period for mothers because they feel very vulnerable. *Id.* See also W. Meezan, S. Katz, & E.M. Russo, ADOPTIONS WITHOUT AGENCIES: A STUDY OF INDEPENDENT ADOPTIONS, 9 (1978); Smith, *Which Side to Take in the Adoption Triangle?; It's Never in the Best Interests of the Child to be Bought*, L.A. TIMES, Aug. 11, 1993, at E1 (quoting a birth mother: "For the first years (after the birth), I would eye small children, especially little girls and try to do this mental calculation and compare. As I got older, it got harder . . . I would wake up in the middle of the night sweating after dreams. If I read in the newspapers that 25 Girl Scouts were killed going over the side of a mountain, I'd think, 'How will I ever know if one of those could have been my daughter?'"). See also Audra Behne, *Balancing the Adoption Triangle: The State, the Adoptive Parents and the Birth Parents - - Where Does the Adoptee Fit in?*, 15 IN PUB. INTEREST 49, 57-58 (1996-97). Birth parents do not just forget they gave up a child and go one. *Id.* In most circumstances the child is relinquished because the mother cannot provide for it and wants the assurance of love, care, and security that an adoptive family in a normal situation can provide. *Id.*

<sup>82</sup> W. MEEZAN, S. KATZ, & E.M. RUSSO, *supra* note 81, at 5. "Birthmothers, especially, suffer when they are convinced, often through inappropriate pressure, to give up their babies." See also Hollinger, *supra* note 3.

<sup>83</sup> DuRocher, *supra* note 41, at 314. Evidence indicates that "many fathers also are distressed by the adoption process." *Id.*

especially true when the father does not know that the child has been placed in an adoptive home.<sup>84</sup> The point that is being made, is that everyone in the adoption process is suffering in some way or another. People should not be too quick to judge that one person or another is better suited to care for the child.

### *B. The Child*

Although the concept of psychological parenthood has gained support, adoption experts contend that adoptees experience loss from the very fact that they are separated from their biological family.<sup>85</sup> There is a sense of loss, even for those who are placed at birth, and a search for self.<sup>86</sup> The children start to realize that they were given away which often leads to feelings of anger and abandonment.<sup>87</sup>

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<sup>84</sup> *Id.* If the father doesn't find out until after the child is placed, the impact can be "traumatic." *Id.* "One commentator noted that the father who is unaware of his child's adoption, 'forever loses every opportunity to experience the joys and heartaches of accompanying his son or daughter through his or her life-being there and watching as the child grows from infancy to adulthood.'" *Id.*

<sup>85</sup> Weaver-Catalana, *supra* note 36, at 600. "Psychological parenthood" is meant to describe the day-to-day interchanges with those who care for them and who they become attached to. *Id.* at 599. "This concept of 'psychological parenthood' is the key to framing a legal argument that a child's best interests require custody to continue with the nonparents." *Id.* Even with this recognition, the legal system still clings to the notion of family that stems from biology. *Id.* See also Appell, *supra* note 3, at 998-999 (discussing the fact that all three parties involved in adoption experience some type of "loss").

<sup>86</sup> Weaver-Catalana, *supra* note 36, at 600. A biological family gives guideposts to help children. They see bits of themselves reflected in your parents and pieces of your personality in your siblings. *Id.* at 601. Also coming to terms with the "perceived rejection by one's birth parents can also augment an adoptee's negative self-perception." *Id.* See also Hollinger, *supra* note 3, at 40. Blood is important, and those children who are separated from their natural parents by "artificial social arrangements" may suffer worse in these ideal circumstances with adoptive parents than they would if allowed to remain with their biological parents. *Id.* See also Appell, *supra* note 3, at 999-1000. Adoptees whether adopted at birth or as children "frequently feel a deep and enduring need throughout childhood and adulthood to know or learn about their birth parents." *Id.* at 999. This need originates from a deeply felt psychological and emotional need, a need for roots and a sense of completeness. *Id.* Adoptees will often also experience significant "challenges to their identity formation by virtue of these missing elements. This does not suggest, however, that adoption is a failure or that adoptees are inordinately susceptible to pathology." *Id.* at 999-1000.

<sup>87</sup> Weaver-Catalana, *supra* note 36, at 601. The anger that accompanies this realization can take two different forms both of which have a negative impact on the child. "For a child who concludes that he or she was 'abandoned' or 'rejected', the anger is most likely directed

There is, however, the other side to this. Some suggest that "biological attachment" is simply not present when the child has been placed as an infant and has never known its natural parents.<sup>88</sup> If courts refuse to acknowledge this, they can more easily deny children standing in the proceedings that directly affect their lives.<sup>89</sup>

Children develop significant attachment to their primary caregivers. There is evidence that children develop severe depression, separation anxiety, or sleep disturbances after undergoing court-ordered visits (visitation) with biological parents.<sup>90</sup> The presumption that biology is best, does not place enough emphasis on the caregiving performed by the child's "psychological parents."<sup>91</sup> This debate between biological and psychological parenthood continues to pervade our society

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at the birth parents; for a child who feels that he or she was 'stolen' or 'bought', the anger is often directed at the adoptive parents." *Id.* Studies have indicated that children between age six and eighteen, who have been adopted are more prone to have low self-esteem, poor academic progress, and certain destructive behavior. *Id.*

<sup>88</sup> Korn, *supra* note 21, at 1315 (1994). It is natural that the foster family holds the same place in the child's life and fulfills the same socializing functions as a biological family. The same is true of the prospective adoptive family. *Id.* "Prospective adopting parents who have lived with their children for a significant amount of time fulfill the same role as biological parents in their custody, care, and nurture." *Id.* The law's bias in favor of blood ties and "against the ties that link children to those who have loved and nurtured them but who have not conceived them is so fundamental that . . . only within the very recent past have terms such as 'biologism,' 'natalism,' 'biological determinism,' or 'biological fundamentalism' been coined to describe the deep-seated prejudice against families that are not biologically based." Alexandra Dylan Lowe, *Parents And Strangers: The Uniform Adoption Act Revisits The Parental Rights Doctrine*, 30 FAM. L.Q. 379, 383 (1996).

<sup>89</sup> Korn, *supra* note 21, at 1316.

<sup>90</sup> Lowe, *supra* note 88, at 384-85. Those who doubt the strength of a child's attachment to those the child perceives to be the parents should consider testimony of those who have witnessed firsthand the pain of children "whose ties to their psychological parents have been threatened by the parental rights doctrine [a doctrine that presumes that a child's best interests lie in being raised by a fit biological parent]." *Id.* One account of a court-ordered visit between a child and her biological parents that she barely knew gives a sense of the trauma she can be experienced by children who spend time with her "stranger" parents: the child appeared very distressed and did not want to go with her biological parents. *Id.* at 384. Her behavior became very regressive and she suddenly broke into tears. *Id.* While she was crying she repeatedly stated "I want my real mommy, referring to her foster mother." *Id.*

<sup>91</sup> *Id.* at 385. The parental rights doctrine "devalues" caregiving which flows from the other, non-biological parents. *Id.* It ignores the deep mutual love which is formed by a parent who meets the child's physical and emotional needs. *Id.*

and there may never be a consensus. However, it is critically important to be aware that everyone involved in the adoption process has a lot of emotion and heartache at stake.<sup>92</sup> The next three cases illustrate just how emotion-laden the adoption process can be, most significantly the child.

### C. *Baby Jessica*

Baby Jessica was born on February 8, 1991 and approximately forty hours later her biological mother relinquished her rights to the child. Cara Clausen consented to a "complete severance and extinguishment" of her relationship with the child.<sup>93</sup> The named father also consented and the baby was free for adoption.<sup>94</sup> Jan and Roberta DeBoer, who lived in Michigan, petitioned the Iowa Juvenile Court to adopt the child.<sup>95</sup> The DeBoer's were granted custody pending the adoption proceeding where the child they called Jessica remained throughout the subsequent litigation.<sup>96</sup>

Within two weeks, Cara Clausen filed a motion to revoke her release of

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<sup>92</sup> In addition to the biological parents' and the child's trauma, adoptive parents face similar emotions and possible stigma. DuRocher, *supra* note 41, at 324. Traditionally, a woman's worth was determined by her child-bearing capacity. *Id.* Sterile women were even thought of as evil or defective and infertility was thought to be caused by the woman's behavior such as stress or an inability to perform sexually. *Id.* Adoptive mothers, face "the wrath of public disdain." *Id.* Some of these old views still exist, and "today's career women are often perceived as responsible for their infertility because they selfishly postpone having children." *Id.* Couples who adopt may also be perceived as powerful people who have the money to shop for babies. *Id.* at 325. The cost of adoption and upbringing of children is very high, but financial status alone does not mean the adoptive parents are simply seeking to exploit those who give up their children. *Id.* "It is clear that adoptive parents also have undeniable interests in the adoption process." *Id.* They are put in an inherently risky situation with developing emotions towards the child they hope will soon be theirs. *Id.*

<sup>93</sup> *In re Clausen*, 502 N.W.2d 649, 651 (Mich. 1993) (citing IOWA CODE ANN. s. 600A.2(16) (West Supp. 1994)). Cara was unmarried at the time and she named Scott Seefeldt as the baby's father. *Id.* at 652. Scott released custody four days later which also relinquished his parental rights. *Id.* It would be later found out that he was not the real father and Cara Clausen had lied about the natural father. *Id.*

<sup>94</sup> Under IOWA CODE ANN. s. 600.3(2) (West 1999), in order for an adoption petition to proceed, the parental rights must first be terminated.

<sup>95</sup> *Id.* at 652. In the same proceeding, the court terminated the biological parents rights. *Id.*

<sup>96</sup> *Id.* Everything was going as planned and seemed normal. Even the mother, Cara, wrote the DeBoers a letter saying "I know you will treasure her and surround her with love, support her, encourage her to dream . . ." Robby DeBoer, *LOSING JESSICA*, 17 (1994).

custody.<sup>97</sup> She told Dan Schmidt that he might be the actual father of the child. Daniel then met with an attorney to determine if and how he could assert his parental rights.<sup>98</sup> The Iowa Court dismissed Cara's motion to revoke her release and also dismissed Daniel's custody claim.<sup>99</sup> Daniel then filed in District Court for custody on the ground that his parental rights had not been terminated.<sup>100</sup> Six months went by before the court received the results of Daniel's paternity test. The test established in fact that he was the father by ninety-nine percent probability.<sup>101</sup> The DeBoers responded by filing a petition to terminate his rights based on his past history as a parent and his alleged abandonment of Jessica.<sup>102</sup> The Court denied the DeBoer's adoption petition, based on the finding that the prior termination proceeding was void as to Daniel.<sup>103</sup>

The Iowa Supreme Court affirmed the lower court's decision and rejected the

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<sup>97</sup> *In re Clausen*, 502 N.W.2d at 651-52 (Mich. 1993). In her affidavit, Cara said she had lied when she named the father, and that the actual father was her ex-boyfriend Dan Schmidt. *Id.* She claimed that the reason for lying was because she was dating Scott Seefeldt at the time and did not want to cause problems by having another man's baby. *In re B.G.C.*, 496 N.W.2d 239, 246 (Iowa 1992).

<sup>98</sup> *In re B.G.C.*, 496 N.W.2d 239, 246 (Iowa 1992). He filed a request to vacate the termination order and filed an affidavit that established his paternity. *Id.*

<sup>99</sup> *DeBoer v. Schmidt (In re Clausen)*, 501 N.W.2d 193, 194 (Mich. Ct. App. 1993), *aff'd*, 502 N.W.2d 649 (Mich. 1993). The court dismissed Cara's motion on lack of subject matter jurisdiction grounds. *Id.* The DeBoers then returned to Michigan with their status as Jessica's custodian. *Id.* Daniel then filed in the Iowa District Court petitioning to intervene in the adoption proceedings. *Id.*

<sup>100</sup> *Id.* The district court suspended the proceedings and ordered a blood test to establish paternity. *Id.*

<sup>101</sup> *In re Clausen*, 501 N.W.2d at 194.

<sup>102</sup> *Id.* Under Iowa law, parental rights can be terminated if the parent: (1) has signed a release of custody, (2) has petitioned for the termination of their parental rights, (3) has abandoned the child, (4) has been ordered but has failed to financially support the child, (5) does not object to the termination after notice and an opportunity to object or (6) parent does not object even after all reasonable efforts were made to find the parent. IOWA CODE ANN. s. 600A.8 (West 1999).

<sup>103</sup> *DeBoer v. Schmidt*, 501 N.W.2d at 194. The DeBoers were ordered to give physical custody to Daniel. *Id.* The court also said that since his rights were not terminated; a best interests of the child analysis was not necessary. *Id.* Meanwhile the Iowa Court of Appeals reversed Cara's termination rights order and remanded the case for further proceedings. The Iowa Supreme Court granted review and consolidated it with the DeBoer's application of the order to deny returning Jessica to Daniel. *Id.* However, during the in between time, the court ordered Jessica to remain with the DeBoer's. *Id.* This was just added time that Jessica and the DeBoer's could get used to one another and act as a family.

DeBoer's claim that a best interests determination must be made.<sup>104</sup> So the DeBoer's petitioned a circuit court in Michigan to modify the Iowa order which granted custody to Daniel Schmidt.<sup>105</sup> They claimed that Michigan had jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act because Jessica had resided in Michigan for all but three weeks of her life.<sup>106</sup> The Michigan Court granted their petition for a preliminary injunction ordering Daniel not to remove Jessica from Michigan.<sup>107</sup> The Court of Appeals reversed on lack of standing and lack of jurisdiction grounds.<sup>108</sup> Finally, the Supreme Court of Michigan affirmed the reversal and held the action to be dismissed.<sup>109</sup>

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<sup>104</sup> *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992). The court stated that "a court may not consider whether the adoption will be for the . . . best interests of the child where the parents have not consented to the adoption." *Id.* at 245.

<sup>105</sup> *DeBoer*, 501 N.W.2d at 195 (Mich. Ct. App. 1993), *aff'd*, 502 N.W.2d 649 (Mich. 1993).

<sup>106</sup> UNIF. CHILD CUSTODY JURISDICTION ACT, s. 1, 9 U.L.A. 123 (1968). The DeBoer's were trying to assert that Michigan was Jessica's home state under this act. The purposes of the Act are as follows:

- 1) to avoid jurisdiction complications and conflict with courts of other states in matters of child custody, to prevent shifting of the child from state to state. 2) to promote cooperation among the courts of the various states, so that the one having the closest connection and most evidence concerning the child's care, protection, and personal relationships will be able to do so 3) to deter parental abductions, forum shopping, and repetitive litigation to provide stability for the child.

*Id.* The "home state" refers to the state in which the child lived with his or her parents, a parent, or someone acting as a parent, for at least six consecutive months.

<sup>107</sup> *DeBoer*, 501 N.W.2d at 196. Daniel challenged the decision on lack of jurisdiction grounds under the UCCJA and also under the Full Faith and Credit Clause of the United States Constitution. *Id.* Daniel also argued that even if the court had jurisdiction, the DeBoers lacked standing to initiate a custody action because they were third parties with no legal claim to Jessica. *Id.* at 197.

<sup>108</sup> *Id.* at 197. After this, Jessica's "next friend", one who commences an action on behalf of a minor plaintiff and represents them under the supervision of the court, brought an action on behalf of Jessica for custody to remain with the DeBoers. The court ordered Jessica to remain with the DeBoers pending this new action. *In re Clausen*, 502 N.W.2d at 653 (Mich. 1993).

<sup>109</sup> *Id.* at 652. The court concluded that "[w]hile a child has a constitutionally protected interest in family life, that interest is not independent of its parents' in the absence of a showing that the parents are unfit." *Id.* On the question of whether Jessica, through her next friend, could initiate a proceeding on her own behalf to determine custody, the Michigan Supreme Court concluded that a natural parent's right was paramount to the child's. *Id.* at 666-67. Justice Levin dissented, "[t]here is a third party, the child. She, too, is a person with a liberty interest under the constitution. But, says the majority, that interest

*D. Baby Richard*

Similar facts that surrounded the Baby Jessica controversy were also present in the Baby Richard case.<sup>110</sup> The trial court found against the father who was trying to assert his parental rights to block the adoption of his son, saying that he had failed to demonstrate a reasonable degree of interest or responsibility as to his newborn child.<sup>111</sup>

After two years of Richard living with his adoptive family, the Illinois Supreme Court vacated the adoption holding that the trial court's determination was not supported by the evidence.<sup>112</sup> The Court reasoned that a natural parent has a "preemptive" right (not just a presumptive one) to their child "wholly apart from any consideration of the so-called best interests of the child."<sup>113</sup>

The adoptive parents appealed to the United States Supreme Court asserting that Baby Richard has a "constitutionally protected liberty interest in remaining in the

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cannot be asserted by the DeBoers because they have no standing." *In re Clausen*, 502 N.W.2d 649, 689 (Mich. 1993)(Levin, J., dissenting). He stated that he would avoid reaching that question "until it is necessary to grapple with that momentous issue." *Id.* The United States Supreme Court denied an application for stay of custody. *DeBoer v. DeBoer*, 114 S.Ct. 1 (1993). Justice Stevens stated that neither Iowa, Michigan, or federal law authorizes unrelated persons to have custody when the natural parents have not been found to be unfit, simply because they may be better able to provide for the child. *Id.* If baby Jessica had been returned when she was only a month old, instead of two and half years later, the psychological ramifications would have been a lot less to all those involved. See Hollinger, *supra* note 5, at 23.

<sup>110</sup> *In re Doe*, 627 N.E.2d 648 (Ill. App. Ct. 1993), *rev'd*, 638 N.E.2d 181 (Ill. 1994), *cert. denied sub nom.* 513 U.S. 994 (1995).

<sup>111</sup> *Id.* at 651. The court ruled that his consent was not required and granted the adoption based on the mother's consent and the child's best interests. *Id.*

<sup>112</sup> *In re Doe*, 638 N.E.2d at 182. All the while the adoptive parents were living with what they thought in good faith was a final adoption order. They felt they should not be punished for a series of appeals that they did not initiate. Once again, as in the Baby Jessica case, the mother had lied about the father and then went ahead and consented to the adoption. See Hollinger, *supra* note 3, at 30-31.

<sup>113</sup> *In re Doe*, 638 N.E.2d at 182. The Court went so far as to say that adoptive parents are strangers to the child. *Id.* at 188-90. The time spent with them was a "wrongful breakup of a natural family." *Id.* at 190. The trauma to the child from the separation from the parents he had been living with was insignificant. *Id.*

family of . . . his adoptive parents."<sup>114</sup> The Court did not agree and stated that it is a "regrettable fact that the state court entered an erroneous adoption decree [two years earlier] and that the delay in correcting that error had such unfortunate effects on innocent parties."<sup>115</sup>

### *E. Baby Emily*

Emily was born on August 28, 1992 and given up for adoption three days later by her natural mother.<sup>116</sup> Emily was adopted by Steve and Angel Welsh. Gary Bjorklund, Emily's biological father consistently declared his unwillingness to relinquish his parental rights and consent to the adoption.<sup>117</sup> Before Emily was taken from the hospital, Gary's attorney informed the adoptive parents that he wanted custody of his baby girl. But the biological mother pleaded with the adoptive parents to proceed and that is exactly what they did.<sup>118</sup> The Welshes took Baby Emily home.

In the court battle that followed, the Welshes claimed that Gary had abandoned Emily therefore, his consent was no longer required.<sup>119</sup> They said that since Gary neglected the mother during pregnancy, it proves that he abandoned his child.<sup>120</sup> The

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<sup>114</sup> O'Connell v. Kirchner, 513 U.S. 1303, 1304 (1995). The claim was based on a procedural due process theory. *Id.* The adoptive parents also asserted that they had a liberty interest in maintaining their relationship with Richard. *Id.* The court however, did not agree and concluded that Richard and the adoptive parents had received all process due them. *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *In re Adoption of Baby E.A.W.*, 647 So.2d 918, 919 (Fla. Ct. App. 1994), *aff'd*, 658 So.2d 961 (Fla. 1995), *cert. denied sub nom. G.W.B. v. J.S.W.*, 516 U.S. 1051 (1996).

<sup>117</sup> *Id.* at 921. The father testified that he was contacted by the attorney in the adoption proceeding and before Emily was even born, he said he would not give her up. *Id.* The attorney however, sought and obtained a pre-birth order claiming that the father had waived his rights. *Id.* Gary then got his own attorney to represent him. *Id.*

<sup>118</sup> *Id.* at 922. The court stated that "the natural parents' relationship was at best a love-hate situation in its initial stages and deteriorated to the hate side . . . after the pregnancy." *Id.* The biological mother, Linda Benco, had left Gary claiming that he was abusive and unsupportive. She even conditioned her consent on the fact that Gary would not get custody and if he did, she would bring an action to revoke her relinquishment and consent. *See Joe Newman, Florida Supreme Court to Decide Baby Emily's Fate*, THE PALM BEACH POST, April 3, 1995 at 1B.

<sup>119</sup> FLA. STAT. s. 63.032 (14) (1992). This statute allowed the court to consider the conduct of the father towards the mother during the pregnancy. *Id.*

<sup>120</sup> *In re Adoption of Baby E.A.W.*, 647 So.2d at 921.



trial court found in favor of the biological father.<sup>121</sup> Unfortunately, thirteen months later a rehearing was granted because Emily did not have an attorney to represent her interests in the first trial.<sup>122</sup> This time, upon hearing near identical evidence and testimony, the trial judge found that Gary had abandoned Emily.<sup>123</sup>

The Florida Court of Appeals also faulted Gary for not providing financial and emotional support to the mother during the pregnancy.<sup>124</sup> The appellate court, not certain whether they could consider this "emotional support" theory, certified an appeal to the Florida Supreme Court which answered in the affirmative.<sup>125</sup>

It is reassuring to know that these three cases sparked significant controversy, commentary, and attempts to rewrite statutes to better protect all the parties involved.<sup>126</sup>

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<sup>121</sup> "Under any definition of abandonment, the natural father has not, in fact, abandoned the natural mother or the child. He has exhibited every available means of attempting to contest the adoption, and his desire to . . . be with his natural daughter was unrefuted during the time of the hearing." Mike Wilson, *Baby Emily: Whose Life Is This Anyway*, ST. PETERSBURG TIMES, Jan. 24, 1995 at 1A.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* One may wonder how in the world the judge came to the opposite conclusion after speaking his words on abandonment in the first trial. Craig, *supra* note 77, at 418-26. This is why adoption can be so traumatic for all of the parties involved. At times, such as in this case, nothing seems to make much sense.

<sup>124</sup> *In re Adoption of Baby E.A.W.*, 647 So.2d at 922. The Court of Appeals was a 6-5 decision with the majority holding that Gary had indeed abandoned Emily and therefore, his consent was not necessary for the adoption. The court did not even consider the issue of Emily's best interests: "because the Court has found that the natural father abandoned the minor child, it is unnecessary . . . to delve into the question of the best interest of the child . . . ." *Id.*

<sup>125</sup> *In re Adoption of Baby E.A.W.*, 658 So.2d 961 (Fla. 1995). The Court concluded that a trial court may consider lack of emotional support by the father of the mother during pregnancy. *Id.* at 965. The statute in question "allows a court to consider the father's conduct toward the child's mother - - not toward the child, as the certified question says - - during the pregnancy." *Id.* at 963. Substantial competent evidence supported finding that the birth father abandoned his child, and that his consent thus was not required for adoption; father showed little to no interest in birth mother or unborn child, father provided no financial or emotional support after birth mother moved out of his home, evidence suggested that father might have continued his passive stance toward birth mother and unborn child had he not been contacted about adoption, and, even after he was contacted, he still did not provide support to mother or unborn child. *Id.*

<sup>126</sup> See Resnik, *supra* note 47, at 378.

A final lesson to be drawn from the trilogy of Jessica, Richard, and Emily is that

In 1994, the National Conference of Commissioners on Uniform State Laws, adopted the Uniform Adoption Act.<sup>127</sup> The guiding principle of the UAA is a desire to promote the welfare of the children.<sup>128</sup> Comments by the drafters indicate that the goals are to promote certainty, predictability and most importantly stability.<sup>129</sup>

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people really care about this issue. The saga of Baby Jessica catalyzed a national dialogue on adoption and lead to formation of a nationwide children's rights organization. The ongoing fight for Baby Emily has mobilized public calls for the reformation of Florida's adoption laws. And the Baby Richard controversy so flared public temperament that it lead to an acrimonious dispute between the Governor of Illinois and the state's supreme court. In a free society state intrusions into the sacred realm of family relations are subject to close public scrutiny. When the law operates clumsily in this sphere or fails to protect the interests of the parties it was designed to protect, the legal system fails itself and society.

*Id.* at 379-80.

<sup>127</sup> Hollinger, *supra* note 3, at 40 n.5.

<sup>128</sup> Arzt, *supra* note 4, at 842. The comments indicate that the best way to promote the welfare of children in adoption proceedings is to first eliminate confusion of inconsistent state laws and then draft adoption provisions that are certain and stable. *Id.* "The problem in adoption law is that the law simply fails to address many issues. For example, Florida adoption law does not specify who may place a child for adoption or what preference order an agency must give to prospective adoptive families in agency adoptions." *Id.* The UAA addresses these issues and many more including the procedures required from placing a child for adoption through challenging an adoption decree. *Id.* "Thus, because of its detail, the Act leaves less room for adoptions to be subjected to challenge and less room for children to be exposed to potential harm. The Act's provisions are a step toward a more child-centered approach to adoption." *Id.* The UAA is divided into eight articles: (1) General Provisions; (2) Adoption of Minors; (3) General Procedure for Adoption of Minors; (4) Adoption of Minor Stepchild by Stepparent; (5) Adoption of Adults and Emancipated Minors; (6) Records of Adoption Proceeding: Retention, Confidentiality, and Access; (7) Prohibited and Permissible Activities in Connection with Adoption; (8) Miscellaneous Provisions. Arzt, *supra*, note 4 at 842-43; *see also* 9 U.L.A. 1 (1994). This Section of the Comment only addresses certain Articles and Provisions.

<sup>129</sup> Arzt, *supra* note 4, at 842. The Act first sets forth some general definitions. "Legal custody" is distinguished from "physical custody" because a person who the child is living with may not be the same or the only person with a legal right to make decisions about the minor's care or the legal responsibility to provide that care. Legal custody means the right and duty to exercise continuing general supervision of a minor. UNIF. ADOPTION ACT (1994) s. 1-101, 9 U.L.A. 1 (Supp. 1998). The term includes the right and duty "to protect, educate, nurture, and discipline the minor and to provide the minor with food, clothing, shelter, medical care, and a supportive environment. *Id.* "This distinction is important, for example, in determining who has the legal authority to place a minor for adoption" in section

## V. THE UNIFORM ADOPTION ACT: A BRIEF SURVEY

A. *Anyone May Adopt*

Allowing any person to adopt eliminates any prejudices and biases against certain individuals such as homosexuals and non-married but cohabiting couples.<sup>130</sup>

B. *Article II: Placing the Child for Adoption*

## 1. Birth Parents May Select Adoptive Parents

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2-101. Unif. Adoption Act (1994)(hereinafter "U.A.A.") s. 1-101, cmt., at 6. "Parent" means any person who is legally recognized as a mother or father and having the legal status of such. Also included in the term are men and women whose consent to the adoption of a minor is required by the Act. *Id.* Article 2, Part 1, also recognizes two kinds of adoptive placements: (1) direct placement – also sometimes known as private placement where an agency is not involved, and (2) placement by an agency – where the biological parent places the child with an agency or where a child goes after the State terminates a parent's rights. *Id.* Also important to the knowledge of adoption is the distinction between three types of adoption. (1) Confidential and closed: in this type of adoption there is no disclosure or sharing of identity of any party to the adoption; (2) Identified: in this type of adoption the birth parents specify a certain family or a certain family specifies the child they wish to adopt; (3) Open: here, both the birth parents and adoptive parents have some knowledge about each other and may disclose as much information or as little as they wish. Tenenbaum, *supra* note 7, at 334.

<sup>130</sup> U.A.A. s. 1-102. Article I of the Act says that anyone may adopt or be adopted. The National Council for Adoption does not agree with this provision and would limit who can adopt by requiring stricter guidelines and some legal relationship. Arzt, *supra* note 4, at 888 n. 54. They would not allow joint adoption by two single persons with no legal relationship. *Id.* Once an adoption is finalized, the child and the adoptive parents have a legal relationship. The parent-child relationship between the child and biological parents is then terminated. U.A.A. s. 1-102. The Act further provides that "a decree of adoption does not affect any right or benefit vested in the adoptee before the decree becomes final." *Id.* s. 1-106. The Comment to this section provides:

The Act protects an adoptee's interest in any right or benefit acquired - - vested - - before the adoption is final. Section 3-706 indicates when and for what purposes a decree of adoption is 'final.' For example, an adoptee may become entitled to insurance proceeds or Social Security benefits or to a share of the estate of a birth parent or relative before the decree of adoption or a court order terminating the relationship between the adoptee and the birth parent is issued - - in other words, before the adoptee is the legal child of the adoptive parents.

U.A.A. s. 1-106, cmt., at 9.

Article II of the Act discusses the actual placement of the child for adoption purposes.<sup>131</sup> Birth parents may personally select the adoptive parents which allows them to have a say in the future welfare of their child.<sup>132</sup> This serves the purpose of "keeping a window open . . . so that members of the triad are not lost to each other . . . ."<sup>133</sup> If placement of a child is made by an agency, then section 2-104(a)(1) gives an order of preference to be used. First preference goes to the person actually selected by the birth parent and this gives the birth parent(s) a sense of security by knowing they chose their child's future family.<sup>134</sup>

## 2. The Preplacement Evaluation: Too Premature

The adoptive parents must also receive a favorable pre-placement evaluation before a child may be placed with them.<sup>135</sup> This evaluation however, is premature because it is based on only one visit and one interview with the prospective family.<sup>136</sup>

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<sup>131</sup> *Id.* s. 2-101 – 2-408. Section 2-101 says who may place a minor child up for adoption. An example is a parent with legal and physical custody of the child. 2-102 states that the birth parents or guardians shall personally select the prospective adoptive parents.

<sup>132</sup> U.A.A. s. 2-102. This is significant because in my view, the birth parents may subsequently not feel as helpless and guilty when they give up their child.

<sup>133</sup> See Appell, *supra* note 3, at 1013. It may also facilitate postadoption contact and encourage the adults involved to work together. *Id.* The term "cooperative adoption" has been defined as a form of open adoption based on an agreement between the parties where there will be some form of future contact. "It provides a process through which the adults interested in the child work collaboratively before and after consummation of the adoption to insure that . . . all parties involved in the triad are respected, and particularly that the dual needs of the adoptee for stability and heritage are met." Annette Ruth Appell, *The Move Toward Legally Sanctioned Cooperative Adoption: Can it Survive The Uniform Adoption Act?*, 30 FAM. L.Q. 483, 500 (1996). Appell argues that the Act will hinder cooperative adoption because it provides "no mechanism for the enforcement of post-adoption contact agreements, except in stepparent adoptions." *Id.* at 484-85.

<sup>134</sup> U.A.A. s. 2-104(a)(1). If this person is not selected, the child is placed where the agency determines it would be in that child's best interests. This article also requires the person placing the child to disclose certain background information. *Id.* s. 2-104(c).

<sup>135</sup> *Id.* s. 2-201(a). The evaluator must complete this evaluation within forty five days after requested. *Id.* s. 2-203(b). The evaluator bases his or her conclusion on a personal interview and a visit to the residence of the prospective adoptive family. *Id.* s. 2-203(c).

<sup>136</sup> *Id.* The evaluation must include the following information regarding the applicant: age, nationality, marital status, family history, physical and mental health history, property holdings and income statement, criminal convictions, and charges for domestic violence. *Id.* s. 2-203(d). This evaluation may be premature since it is based on only one visit and interview with the prospective family. How can anyone really know whether a certain

If this evaluation raises no "specific concern" then the individual is determined to be a suitable adoptive parent.<sup>137</sup> To counter this virtually uninformed evaluation the UAA requires fingerprinting of the individual and a post-placement evaluation.<sup>138</sup>

### 3. Consent Requirements Allow Birth Parents To Make Better Decisions<sup>139</sup>

In order to make the consent procedure more concrete, consent must be in the form of a written document if it is a direct placement.<sup>140</sup> A very important requirement is that a parent or guardian may not consent until after the child is born.<sup>141</sup> In order to make the decision to give up a child more reliable, the parent must first be advised of the consequences of consent, what counseling services are available (although not mandatory), the consequences of misidentifying a parent, the procedure for releasing information about the parent, and the procedure for consensual release of the parent's identity.<sup>142</sup>

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family is best suited for a particular child based on this limited process? *But see* Tenenbaum, *supra* note 7, at 340 (arguing that since no adoption may be finalized without a favorable pre-placement evaluation this protects the child from being placed arbitrarily).

<sup>137</sup> U.A.A. s. 2-204(b). One thing that may raise a specific concern about the suitability of a prospective adoptive parent is a record of child abuse or domestic violence. *Id.* s. 2-203(d)(7).

<sup>138</sup> *Id.* s. 2-203(e). The post-placement evaluation is done and if a minor is in fact placed with an individual who is unsuitable then action is taken by the Department of Health and Rehabilitative Services. *Id.* ss. 2-205 – 207.

<sup>139</sup> Tenenbaum, *supra*, note 7 at 337-38; Hollinger, *supra*, note 8 at 358-59. Section 2-401 states who consent is required from before a child may be adopted. In direct placement, both the birth mother and the child (if over twelve years) must consent. A birth father's consent is required if he falls into a certain category such as one who has openly received the minor into his home or has provided reasonable and consistent financial support. U.A.A. s. 2-401.

<sup>140</sup> *Id.* s. 2-401(a). The court can grant a petition to adopt only if the birth mother, the birth father under certain circumstances, the child's guardian, and any adoptive or legally recognized parent has executed a consent. *Id.*

<sup>141</sup> *Id.* s. 2-404(a). This allows the birth parent(s) to be more confident in their decision. Then if they change their mind after seeing the child, they are not obligated to consent. The UAA's consent provisions ensure that consent is knowing and voluntary and also to prevent the birth parents from having second thoughts. Tenenbaum, *supra* note 7, at 337-38.

<sup>142</sup> U.A.A. s. 2-404(e). The Act also opines that persons who can verify the consent should be those who have knowledge about adoption law and have no conflicts of interest. *Id.* s. 2-405, cmt., at 34. The verifier must also certify that he or she explained the consequences and the contents of the consent document. This is to ensure that the signer cannot later claim misunderstanding of the terms. *Id.* s. 2-405(d).

The adoptive parents must also sign a statement that it is their intention to adopt the child and also to return the child if consent is not executed or is revoked within the time allowed.<sup>143</sup>

Despite these well-crafted consent requirements, in the special case of an unwed father, the conditions the father must meet in order to invoke his consent rights place too much emphasis on financial support and whether or not the father is married to or intends to marry the birth mother.<sup>144</sup> The birth mother can easily prevent the father

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<sup>143</sup> *Id.* s. 2-405(e). Section 2-102(d) also provides that if consent has not been executed by the time of placement, the birth parent(s) must sign an agreement stating that the transfer is meant for the purpose of relinquishing the child for adoption. The prospective adoptive parents must then acknowledge responsibility for the child and also acknowledge that if the requisite consent is not executed within a specific time, they must return the child to the parent. *Id.* This is an important section because it gives the birth parents time to decide while making sure the prospective adoptive parents realize that nothing is final until the consent is executed. Tenenbaum, *supra* note 7, at 337-38. The consent document must state that relinquishment was voluntary and is final. U.A.A. s. 2-406. Also, the UAA mandates consent by unknown fathers only if there is a possibility that they will receive actual notice. *Id.* 2-401.

<sup>144</sup> *Id.* s. 2-401(a)(1). The birth father's consent is required if he falls into any one of the following categories:

- (a) the man, if any, who is or has been married to the woman if the minor was born during the marriage or within 300 days after the marriage was terminated or a court issued a decree of separation; attempted to marry the woman before the minor's birth by a marriage solemnized in apparent compliance with law . . . has been judicially determined to be the father of the minor or has signed a document that
- has the effect of establishing his parentage of the minor, and
  - (A) has provided, in accordance with his financial means, reasonable and consistent payments for the support of the minor and has visited or communicated with the minor; or
  - (B) after the minor's birth, but before the minor's placement for adoption, has married the woman who gave birth to the minor or attempted to marry her by a marriage solemnized in apparent compliance with the law, although the attempted marriage is or could be declared invalid; or
  - (iv) has received the minor into his home and openly held out the minor as his child

. . . .  
*Id.* This has been criticized as not adequately protecting the rights of unwed fathers. See Resnik, *supra* note 47, at 416. "The UAA simply does not adequately protect the rights of putative fathers in the context of newborn adoptions. For example, consent rights are virtually non-existent under the UAA for any unwed father in the common case where the birth mother surrenders the adoptee at birth. Consent rights are only vested in men who marry or attempt to marry the birth mother." *Id.* at 416-17.

from meeting such conditions which may lead to forfeiture of his consent rights.<sup>145</sup>

#### 4. Revocation of Consent or Relinquishment

An individual may revoke consent in writing, at will, within 192 hours after the child's birth which is an extremely short period of time.<sup>146</sup> Critics contend that this

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<sup>145</sup> Resnik, *supra* note 47, at 417. The birth mother can prevent the unwed father from "being able to meet either of the 'parenting responsibilities.' By surrendering the child at birth . . . both the putative [unwed] father's opportunity to form a relationship with the child and his ability to receive the child into his home" become nullified. *Id.* "Without consent rights, an unwed father's only chance to win custody of his child lies in his ability to defend his entitlement to parental rights under [UAA section] 3-504. Here again the demands upon the unwed father are severe and easily complicated by an uncooperative birth mother." *Id.* The father must make a timely assertion of his rights, manifest an ability and willingness to assume responsibility of his child plus pay reasonable support expenses and visit regularly with the child. *Id.* If the baby is surrendered at birth, the putative father could be prevented from assuming these responsibilities. *Id.* Further, if the prospective adoptive parents know that the father must pay certain expenses or forfeit his rights, the adoptive parents have an additional incentive to cover these costs thereby making it impossible for the father to effectuate his financial responsibility. *Id.* "[I]t is problematic that in both the parental rights and consent context the UAA places so much emphasis on financial payments when determining the putative father's eligibility for rights." *Id.* at 418. By making the father's rights contingent upon monetary payments, the UAA seems to announce that financial contribution is the primary source of parental obligation, not emotional support. *Id.* This works to the disadvantage of poor men who have the willingness and desire to raise and love their children. *Id.* See also DuRocher, *supra* note 41, at 341 (stating that the UAA's guidelines could have dealt with fathers' rights more effectively).

<sup>146</sup> U.A.A. s. 2-408. This provision is particularly important considering the cases that were reviewed in Part IV of this Comment. In all of those cases, the issue surrounding the legality of the adoption was that of consent by a birth parent. See *supra* notes 70-105 and accompanying text. After that time, consent may be revoked only if a court finds it was the product of fraud or duress and the person seeking revocation must prove it by clear and convincing evidence. U.A.A. s. 2-408. However, even if a birth parent establishes that one of the stated conditions occurred it does not automatically give them the right to custody. *Id.* s. 2-408, cmt., at 37-8. The court must first determine if it would be in the best interests of the child. *Id.* Consent may also be revoked if: the consent document specifies that it is not final unless another consent is executed within a specified time, a court decides not to terminate the parental relationship, or if in a direct placement, the prospective adoptive parents withdraw their adoption petition or it is denied. *Id.* 2-408(b)(3). Section 2-409 allows a birth parent who has relinquished a child to an agency to revoke relinquishment within 192 hours of birth or if both parties agree to revoke. *Id.* 2-409(a)(2). Critics contend

allows birth parents' rights to be trumped by the adoptive parents' rights.<sup>147</sup> However, there is absolutely no time limit within which a parent must consent, they may take as much time as they need to make the best possible decision.<sup>148</sup> One authority on the subject asserts that the rationale for this limited time frame is "[h]aving a longer time would allegedly make it more difficult for the parent to achieve closure on this emotionally difficult decision."<sup>149</sup> It is clear that the requirements of consent and the revocation period seek to protect both birth parents

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that there is not enough protection in this area for birth parents by allowing the birth mother only eight days after the child's birth to revoke consent. Tenenbaum, *supra* note 7, at 337. However, there is no time limit within which a parent must consent. *Id.* at 337-38. "The only exception is that if a birth parent executes a consent **within** the first eight days . . . the parent may revoke the consent up until the eighth day." *Id.* at 338. For example, if the parent consents on the third day after the birth of the child, the parent would only have five days to revoke. *Id.* If the birth parent(s) do not revoke consent after the eighth day, it is irrevocable unless the fraud or duress is shown by "clear and convincing" evidence. *Id.*

<sup>147</sup> Sarah Clarke Wixson, Casenotes & Comments, *And Baby Makes Three: The Rights of the Child, the Adoptive Parents and the Biological Parents Under The Uniform Adoption Act*, 33 IDAHO L. REV. 481, 488 (1997). "[T]he crux of the problem becomes who is entitled to determine what is in the child's best interest – the biological parent, the State, the adoptive parent or the child." *Id.* at 488-89. See also *In re Doe*, 638 N.E.2d 181 (Illinois 1994), *cert. denied*, 115 S.Ct. 499 (1994). The court stated that biological parents have "preemptive rights to their own children wholly apart from any consideration of the so-called best interests of the child." *Id.* at 182. "[I]f it were otherwise, few parents would be secure in the custody of their own children. If best interests were sufficient qualification to determine child custody, anyone with superior income, intelligence, education, etc., might challenge and deprive the parents of their right to their own children." *Id.* at 182-83.

<sup>148</sup> Tenenbaum, *supra* note 7, at 337. "A parent need not consent until he or she is ready to do so." *Id.* Since the UAA allows this grace period and disallows consent before the child is born, it insures (or at least attempts to insure) that the parents will think about their decision before finalizing it. *Id.*

<sup>149</sup> Hollinger, *supra* note 8, at 359. It would also undermine the sense of legitimacy which is forming in the new adoptive family. In fact, it is evident in the states that allow for a longer revocation time, that "best interests" litigation is instituted which is what is trying to be avoided. *Id.* at 360. It is more fair and honest then to make it clear to the birth parents that once they consent voluntarily and knowingly, they cannot undo the consent unless extraordinary circumstances are present. *Id.* Article III sets out the procedures to be followed in the adoption process. The Court must appoint a lawyer to any indigent, minor, or incompetent person whose parental relationship may be terminated. U.A.A. s. 3-201(a). Also, in order to protect the welfare of the minor, the court must make an interim order for custody "according to the best interest of the minor" where the child remains during the pendency of the proceeding. *Id.* s. 3-204.



and adoptive parents.<sup>150</sup>

### C. Article III Procedures

#### 1. Attorney Would Serve Minor Child's Interests Better Than Guardian Ad Litem

One very important provision requires the court to appoint a guardian ad litem for a minor child in a contested adoption.<sup>151</sup> This is arguably inadequate and some child advocates suggest that courts go further and appoint an attorney for the child.<sup>152</sup> Guardian ad litem may be attorneys, but are not required to be under the Act, and it is suggested that an attorney would act as a better advocate for the child.<sup>153</sup>

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<sup>150</sup> The UAA is attentive to the constitutional rights of birth parents by making sure that the consent is knowing and voluntary. Hollinger, *supra* note 8, at 360. The UAA also requires that the consent can be executed only after full disclosure of the consequences and prohibits consent if not made knowingly and voluntarily. Tenenbaum, *supra* note 7, at 338. When the consent is executed by the birth parent they must be offered legal and emotional counseling and a review of the consequences of the consent. *Id.* "The UAA goes to great lengths to protect the birth parents' rights to due process." *Id.* It also seeks to protect the adoptive parents and the child by ensuring finality in adoption. *Id.*

<sup>151</sup> U.A.A. s. 3-201(b). This is intended to encourage the court and the contestants "to pay attention to the needs of the minor, including the need for expeditious resolution of the dispute." *Id.* s. 3-201, cmt., at 42. The term "expeditious" is extremely important because the longer the process is drawn out, the more attachment the child experiences with whomever they are living. Other specifications in this section include that there is no right to a jury in the proceeding, 3-202, the petition required to adopt under 3-304(a), and the required contents of that petition. *Id.* ss. 3-202 – 3-304.

<sup>152</sup> Lowe, *supra* note 88, at 422. The attorney would serve as an advocate of the child and would allow the attorney to put on witnesses, experts, and cross-exam witnesses. *Id.* at 422-23.

<sup>153</sup> *Id.* at 422. A guardian acts more as an independent investigator who interviews parents, teachers, etc. to get the overall picture and then makes representations. *Id.* An attorney would actually represent the child as a party to the case. *Id.* Therefore, the child's interests may be more fully exerted in court. *Id.* An attorney will better prepare for trial by making an investigation into the facts, go through discovery, select and prepare witnesses, challenge evidence and credibility of the opposing party's witnesses and cross examine them. *Id.* at 422-23.

## 2. Notice

Notice under the UAA is sufficient for most affected parties.<sup>154</sup> Again however, it does not adequately protect the birth father's rights; the father must defend his entitlement to parental rights.<sup>155</sup> The UAA requires consent, therefore notification, to fathers who have "demonstrated" their parentage.<sup>156</sup> There is however actual incentive for the mother to disclose the accurate identity of a possible father or his whereabouts by subjecting the proceeding to delay and even civil penalties to the mother.<sup>157</sup>

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<sup>154</sup> To ensure that interested parties are notified, the Act sets out certain individuals who must receive notice within twenty days after the petition to adopt has been filed. Examples include an agency whose consent to the adoption is required or an individual other than the petitioner who has legal or physical custody of the minor. U.A.A. s. 3-401(a).

<sup>155</sup> Craig, *supra* note 77, at 427. The UAA affords protection to fathers who have actually demonstrated a willingness and desire to be a part of the child's life. U.A.A. s. 3-401. Who receives notice depends on whose consent is needed. If the mother claims not to know of the identity of the biological father, the court must attempt to identify him. U.A.A. 3-404(a). Once identified, the father must receive notice. *Id.* 3-401(a)(3). Any other man named as the father must also be notified. *Id.* If the court finds at any time that an unknown father of an adoptee may not have received notice, the court must determine whether he can be identified and located. *Id.* s. 3-404(a). However, mere eagerness to assert a claim to the child is not enough. *See* Lowe, *supra* note 88, at 403. A father must provide certain financial expenses or take the child into his home. U.A.A. s. 2-401(a)(1), *supra* note 140. *See also* Tenenbaum, *supra* note 7, at 339. The UAA focuses more on what the consequences to the child would be if the father were permitted to block the adoption. Hollinger, *supra* note 3, at 28.

<sup>156</sup> Mothers who falsely identify the biological fathers can prevent the father from assuming his responsibilities. Resnik, *supra*, note 47 and 141. Then the father must defend his rights by showing an excuse for non-performance before the child is placed for adoption. U.A.A. s. 3-504(c)(3)-(d). This section also places the burden of finding the father on the birth mother, the court, and the adoptive parents. *Id.*

<sup>157</sup> Subsection (e) provides incentive for the mother to accurately name the biological father to receive notice. It states:

if . . . the woman who gave birth to the minor adoptee fails to disclose the identity of a possible father or reveal his whereabouts, she must be advised that the proceeding for adoption may be delayed or subject to challenge if a possible father is not give notice of the proceeding, that the lack of information about the father's medical and genetic history may be detrimental to the adoptee, and that she is subject to a civil penalty if she knowingly misidentified the father.

*Id.* s. 3-404(e). This is significant because this notice can prevent challenges to adoptions and the horrible consequences to the child involved. *See* Canaday v. Gresham, 362 So.2d 82 (Fla. Ct. App. 1978) (holding the final adoption decree void because the father had not

However in the cases of "thwarted" fathers,<sup>158</sup> even after the father has made his case, a court may terminate a father's rights if it finds by clear and convincing evidence that failure to do so would be detrimental to the child.<sup>159</sup>

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received notice and his whereabouts could have been identified).

<sup>158</sup> "Thwarted father" is used to describe a father who has been prevented from asserting his rights to the child perhaps because the mother has lied about his identity or lied to the actual father about her pregnancy, discussed earlier. Craig, *supra* note 77, at 429.

<sup>159</sup> U.A.A. s. 3-504 (d), (e). This section gives the court broad discretion to balance the father's assertion of rights against the risk of substantial harm to the child if the father's assertion was allowed to proceed to block an adoption. Lowe, *supra* note 88, at 410. The Court can terminate the father's rights for reasons including: the circumstances of the minor's conception, parent's behavior during pregnancy or since birth, detriment to the minor, quality of the parent/child relationship, or the effect of a custody change on the minor (along with other reasons). U.A.A. s. 3-504(d). This represents a "sharp turn away from the traditional parental rights doctrine" and toward the child's best interests standard. Lowe, *supra* note 88, at 410. This detriment to the child standard gives leeway to guardians and attorneys to bring in expert testimony on the implications of attachment theory. *Id.* at 423. One argument to be made is on the basis of attachment theory. *Id.* at 412. Attachment theory considers the child's attachment to their primary caretaker who, in turn, provides the basis for the child's sense of trust, self-reliance, and competence. *Id.* Disruption of this attachment has been shown to be "psychologically traumatic and damaging, particularly in the pre-school years, but throughout childhood." *Id.* The UAA Comments specifically state:

In determining for how long and for what purposes the potential interests of a thwarted biological father should be protected, this Act balances: 1) the birth mother's interest in placing her child for adoption without interference from a man whom she believes has no genuine interest in the child, 2) the minor's interest in remaining with suitable prospective adopters with whom the minor may already have bonded, 3) the minor's interest in being raised by biological parents, especially if, in addition to the biological connection, there is also evidence of the father's parental capacity, 4) the efforts by the birth mother or others to interfere wrongfully with the father's efforts to grasp his parental opportunities, and 5) society's interest in protecting minors against legal limbo' and detrimental disruptions of custodial environments in which they are thriving.

U.A.A. s. 3-504, cmt., at 56-7. In Toni L. Craig's article, *supra* note 77, at 404, he argues that the Federal Constitution mandates a "biological rights" standard when an unwed father is contesting the adoption of his child. *Id.* This standard must be used because the unwed father has a fundamental right in his parental relationship with his child. *Id.* at 405. The UAA is inconsistent with that standard. *Id.* at 429. "[T]he UAA's provisions are so laden with requirements for the father to assume financial responsibility . . . they may preclude consideration of emotional support." *Id.* at 438 n.248.

### 3. Petition To Terminate Parental Rights Similar To Most State Statutes<sup>160</sup>

Before any adoption is final, the biological parents' rights must be terminated and a court must conduct a hearing to determine whether this is the appropriate action.<sup>161</sup>

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<sup>160</sup> Under Section 3-501 generally, a parent or guardian, a stepparent, a prospective adoptive parent or an agency can file a petition to terminate the relationship between the child and the biological parents. U.A.A. s. 3-501. The action authorized by this section has the same effect as an action under a State's general statutes regarding termination of parental rights to a minor child. *Id.* Article 3 Part 5, cmt. In most States, the grounds for terminating rights are physical or sexual abuse, neglect, abandonment, failure to support, and persistent failures to improve an already "shaky" relationship. *Id.* However, unlike an action to terminate under the typical child protection laws, which can be brought only by the State or the department, an action to terminate under Part 5 may be brought by a parent or guardian who has selected a prospective adoptive parent for a minor, by a prospective adoptive parent, or by an agency that is placing the minor. *Id.*

<sup>161</sup> Wanda Ellen Wakefield, Annotation, 22 A.L.R. 4<sup>th</sup> 774, *Validity of State Statute Providing for Termination of Parental Rights*, 774 (1981). Every state has some statutory provision where the State can step in "to protect the health, safety, and well-being of its infant citizens from endangerment by abusive, neglectful, or simply unavailable parents . . ." *Id.* For cases upholding the termination of parental rights, *see generally In re M.W.*, 764 P.2d 1279 (Mont. 1988) (holding that the procedure for terminating father's parental rights on grounds of abandonment was constitutional since he continued to have responsibility for the child after divorce and he consistently failed to meet his obligations); *Hergenreder v. Madden (In re Adoption of J.R.M.)*, 899 P.2d 1155 (Okla. 1995) (concluding that statute allowing adoption to proceed without parental consent when there had been failure to provide court-ordered support does not violate parent's procedural or substantive due process rights); *In re Chubb*, 773 P.2d 851 (Wash. 1989) (stating that statute requiring court to find alcoholic mother unfit as a parent based upon her past and future inability to remedy conditions was constitutional where state's objective had a substantial relation to protect the interests of the child); *In re C.O.W.*, 519 A.2d 711 (D.C. 1987) (holding that statute authorizing termination of parental rights did not violate due process by permitting comparison between the natural parent and foster parent because child's relationships with others was important in determining whether termination was required); *In re Baby Boy N.*, 874 P.2d 680 (Kan. App. 1994) (holding that statute permitting termination of father's parental rights after he had knowledge of the pregnancy but did not support the mother during the six months prior to child's birth was not unconstitutional even though statute did not require a finding of parental unfitness); *In re L.D.B.*, 924 P.2d 642 (Kan. App. 1996) (stating that statute creating a presumption of unfitness in termination case from prior finding of unfitness and thereby shifting the burden of proof to the parents to prove their fitness was constitutional); *Rodarte v. Cox*, 828 S.W.2d 65 (Tex. App. 1991) (holding that statutes allowing a party, other than the State, such as a foster parent, to seek termination of

The UAA sets forth reasonable and normal grounds for termination such as failing to pay reasonable expenses or failing to visit on a regular basis.<sup>162</sup> One section is somewhat liberal by allowing parental rights to be terminated if otherwise the minor's psychological well-being is at risk or failure to terminate the relationship would be detrimental to the minor.<sup>163</sup> Overall the UAA protects birth parents from arbitrary termination of their parental rights while protecting the child from harmful situations.<sup>164</sup>

#### 4. Finality Provision Under The UAA Achieves Its Goals of Certainty and Stability<sup>165</sup>

The objectives of finality and security in adoption proceedings are realized in the

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the natural parent's rights in the child did not violate natural parent's due process rights since the State has a compelling interest in promoting the welfare of the child).

<sup>162</sup> Grounds for termination include a parent's failure to: (i) pay reasonable expenses in accordance with their financial means, (ii) continue to make financial payments for support of the minor, (iii) visit consistently with the minor, (iv) manifest a willingness and an ability to assume both legal and physical custody of the minor. U.A.A. s. 3-504 (c). This portion of the Act also provides for a determination of whether the termination will be in the child's best interests. One other significant provision allows for termination if the biological parent has been convicted of a crime of violence or violating a restraining order and the facts of such violation indicate that the parent is unfit to have a relationship with the minor. *Id.* s. 3-504(c)(3).

<sup>163</sup> *Id.* s. 3-504 (d)(3), (4). In making a determination as to whether failure to terminate would be detrimental to the minor the court shall consider any relevant factor. *Id.* s. 3-504 (e). The "psychological" injury ground for termination is somewhat unique to the Act. This can potentially give rise to even more controversy surrounding termination. Allowing termination for "psychological" injury may lead down a slippery slope by allowing anyone to assert that the child is suffering emotionally. This does not mean that psychological trauma does not occur, but courts should require a high burden on the party asserting this if it is not accompanied by some other legitimate reason for termination. If the Court declines to terminate, the adoption petition must be dismissed. U.A.A. s. 3-506(a). If the rights are terminated, then a petition to adopt may be heard. *Id.*

<sup>164</sup> Hollinger, *supra* note 8, at 358. The UAA is committed to the integrity of adoptions by "being scrupulously attentive to the constitutionally protected rights of birth parents." *Id.* at 360.

<sup>165</sup> Arzt, *supra*, note 4 at 875-88. Once a petition to adopt is finalized, there is only a six month limitation to challenge the validity of the adoption. U.A.A. s. 3-707. "A basic policy of this Act is to facilitate the completion of consensual adoptions, expedite the handling of contested adoption or termination proceedings, and secure the finality of decrees of adoption and orders terminating parent-child relationships." *Id.* s. 3-707, cmt

finality provisions of the UAA.<sup>166</sup> The child's need for stability obviated the need to allow only certain persons to challenge the adoption and only within a specified time frame.<sup>167</sup>

#### 5. The UAA Does Not Address Foster Children Adequately<sup>168</sup>

Courts have refused to recognize that children have a protected liberty interest in their familial relationships whether by genes or emotion.<sup>169</sup> The UAA largely ignores the number of children in foster care by not allowing them to take more control of their destiny.<sup>170</sup> There are currently large numbers of children in foster care whose need for stability is greater than for infants because they can be moved from one foster home to the next.<sup>171</sup> Advocates of foster children having a voice in

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<sup>166</sup> *Id.* at 875-88. An appeal from a decree of adoption must be heard expeditiously. U.A.A. s. 3-707(a). Also those who waived notice or failed to respond to the adoption proceedings, may not challenge the adoption. *Id.* 3-707(b).

<sup>167</sup> U.A.A. s. 3-707, cmt. The decision to allow challenges within the six month time frame is for certain reasons. "The first reason is the desire to minimize the risks of serious harm to minor children and their adoptive families which arise if the finality of adoptions and termination orders is not secure." *Id.* Second, if the procedures of this Act are followed in good faith, there are likely to be few cases in which a challenge will be successful. *Id.* Therefore, six months is a sufficient time frame to serve the ultimate goal of finality. *Id.* See also Hollinger, *supra* note 3, at 29 ("The Act is . . . in accord with recent decisions on the importance of finality in adoption proceedings, assuming good faith efforts have been made to abide by due process requirements before the adoption decree is approved.")

<sup>168</sup> Lowe, *supra* note 88, at 415. Generally a parent, guardian, stepparent, prospective adoptive parent or an agency may file a petition to terminate the relation between the child and the biological parents. U.A.A. s. 3-501. This is where foster children should be able to file a petition according to foster children advocates.

<sup>169</sup> Scarnecchia, *supra* note 11, at 46-7; Wixson, *supra* note 147, at 496.

<sup>170</sup> For example, under UAA 3-501, foster children are excluded from the group of persons that may initiate a termination of parental rights proceeding. See also Wixson, *supra* note 147. This can be very significant in cases where the child is old enough to have their own independent opinion of whom they want to live with and whom they want to care for them and develop a family with. See Lowe, *supra* note 88, at 415. "Nor have courts found that minor children have standing to request the state to terminate the rights of their parents even when the children are the subject of a dependency proceeding alleging parental abuse or neglect." Hollinger, *supra* note 3, at 37.

<sup>171</sup> Appell, *supra* note 133, at 496. "[C]hildren need some measure of assurance that their placement is permanent, a guarantee which is often absent from foster care." *Id.* Foster children need more options than the traditional adoption alternatives. *Id.* See also Wixson, *supra* note 147, at 495. Usually the goal of foster care is eventual reunification of the child and biological parent. *Id.* However, in order to be reunited the biological parent has certain

their care claim that "when it becomes clear that the child cannot return to her natural home, . . . the child's right to be raised in a permanent and healthy home outweighs the natural parents' right to maintain legal ties with the child."<sup>172</sup> Shouldn't these children have some voice in how much emotional scarring they can take?<sup>173</sup>

#### D. General Provisions

##### 1. Best Interests of the Child Standard Pervades The UAA<sup>174</sup>

One pervasive criticism is that the UAA does not really address the best interests of the child; this contention is not well-grounded. Although there is no mandatory overall rule of construction for applying the "best interests" standard, the UAA is "replete with specific provisions."<sup>175</sup> For example, section 3-703(a) prohibits the granting of an adoption unless the court determines that the adoption will be in the

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changes to make such as drug rehabilitation which can take years. *Id.* All the while the child is living with foster parents and developing a relationship with them. *Id.* See also, e.g., *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993) (holding that eleven year old boy who filed his own petition for termination of his biological parents' rights in order to be adopted by his foster parents did not have standing but stated that his minor status was harmless error because his guardian ad litem also filed a petition so termination was granted).

<sup>172</sup> Wixson, *supra* note 133, at 497. See also Christina Dugger Sommer, Note, *Empowering Children: Granting Foster Children the Right to Initiate Parental Rights Termination Proceedings*, 79 CORNELL L. REV. 1200, 1209 (1994), citing JANE KNITZER & MARY ALLEN, CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES, 1 (1978). Foster children can be moved from one foster home to the next while the State has not yet terminated the biological parents' rights. *Id.*

<sup>173</sup> Wixson, *supra* note 147, at 496. Advocates of children's rights would also agree that foster children, especially those old enough to have their own opinion, should be able to protect themselves from further emotional harm. *Id.* It is important to note here, that advocates of foster children who would permit them to initiate a termination proceeding, do not imply that it should be done merely at the whim of the child. *Id.*

<sup>174</sup> A criticism of the UAA is that it emphasizes the "rights of adults" instead of the "best interests of children." Tenenbaum, *supra* note 7, at 336. See also Behne, *supra* note 81, at 75 (stating that opponents of the act contend that it fails to address the rights of birth parents and children, instead it protects adoptive parents).

<sup>175</sup> Hollinger, *supra* note 8, at 357. Such provisions include the ultimate judicial decision to grant the adoption petition based on the child's best interests and avoidance of detriment to the child. *Id.*

bests interests of the minor.<sup>176</sup> The child's needs are taken into account in every stage.<sup>177</sup>

Proponents of traditional "parent-focused standards argue that a change to a purportedly child-focused standard would represent a disturbing erosion of critical due process protections that serve the interests of both parents and children."<sup>178</sup>

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<sup>176</sup> U.A.A. s. 3-703. See also Tenenbaum, *supra* note 7, at 336, arguing that the UAA protects the child's interests throughout. The Act also makes it illegal to place the child with anyone who has not received a favorable pre-placement evaluation. *Id.* The Act allows a child's foster, de facto, or psychological parent to have standing to adopt taking into account the child's needs. *Id.* The Act also considers the biological parents' support, behavior, and mistreatment of the child. Lowe, *supra* note 88 at 400. The grounds for terminating parental rights is broader under the Act than in most state statutes, and are intended to supplement not supplant existing state statutes. *Id.* at 425 n.98. It takes all factors together to determine if they lack parental fitness to establish or maintain a parent-child relationship, or if failure to do so would be detrimental to the child. *Id.* at 400. See also Hollinger, *supra* note 8, at 355 (stating that the "UAA's goal is to promote the welfare of minor children by ensuring that they will be raised by birth or adoptive families who are committed to and capable of caring for them, and by facilitating only those adoptive placements that are genuinely conducive to a child's welfare").

<sup>177</sup> Lowe, *supra* note 88, at 422. The child must be appointed a guardian ad litem so that their needs are taken into account. *Id.* Further, even though the UAA allows for broader termination of parental rights, it still protects the birth parents from unwarranted intrusion. See also Hollinger, *supra* note 8, at 358. Minor children may not be adopted without parental consent or appropriate grounds for involuntary termination of rights. *Id.* Even though it may seem that parental rights are terminated at whim, that is simply not true. See generally, Roth v. Bookert, (*In re J.J.B.*), 868 P.2d 1256 (N.M. Ct. App. 1993) (holding that termination of parental rights on grounds of child's interests alone, absent showing of parental unfitness fails to satisfy constitutional due process).

<sup>178</sup> Wixson, *supra* note 147, at 489. Proponents of the traditional biological parent standard argue that a custody hearing is not intended to balance the interests of the child against the parent's interest in raising the child, rather, it "pits the State directly against the parents." *Id.* State intervention protects the child and makes sure that the child's basic needs are met. *Id.*, citing Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 64-66 (1995). Proponents of biology also argue that there is a lack of uniform understanding of the "best interests" standard which raises concerns about its applicability and whether it's applied to assure the child the best situation or just the adoptive parents with better surroundings. *Id.* See also Tenenbaum, *supra* note 7, at 335. "The more outspoken critics of the UAA are clearly anti-adoption and argue that biological ties should never be disrupted or terminated, even after an adoption has been accomplished." *Id.* This seems at odds with the fact that large numbers of children who would benefit from "the stability, care, love and



Commentators also argue that the best interests test is not meaningful and that courts applying this test actually fail to examine the child's interests.<sup>179</sup>

It is further argued that the "best interests" standard may create cultural biases.<sup>180</sup> One possible bias is class bias, where the "proclaimed interest in [the child's] well-being serves as a camouflage for middle-class bias."<sup>181</sup> There may also be "lifestyle bias."<sup>182</sup> This occurs when the morality of the custodial parent is questioned in not so subtle ways such as denying custody to a homosexual parent.<sup>183</sup> This bias however, has been challenged and may not be as prevalent as it once was.<sup>184</sup> For example, New York law finds that sexual orientation is facially irrelevant to a child's

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nurturing that an adoptive family could provide" would otherwise not have these benefits. *Id.* The "best interests of the child" standard is almost always used in custody disputes between two biological parents. Welt, *supra*, note 10, at 219. However, as between a biological parent and an adoptive parent, "it is not the sole criterion - -much less the sole constitutional criterion" for other judgments involving children. *Id.* Even if it were shown that a particular couple would be the best providers for the child, that child would not be removed from the biological parents' custody absent some compelling reason. *Id.*

<sup>179</sup> *Id.* Courts instead "seek to implement an agenda for the adult parties involved. One commentator has formulated three myths that sustain the 'best interests of the child' standard: first, that [it] . . . can be defined and known empirically; second, that the 'best interests' standard is objective and responsive to children; and third, that the 'best interests of the child' may be congruent with any of the involved constituents." *Id.*

<sup>180</sup> Weaver-Catalana, *supra* note 36, at 604. Two cultural biases have emerged from cases decided under a best interests standard, class bias and life-style bias. *Id.*

<sup>181</sup> *Id.* "Though this bias is often subliminal to the onlooking public, it is a tension that was recognized throughout the judicial history of [baby] Jessica's case." *Id.* at 604-05. Indeed a group of lawyers and adoptees that followed the case, opined that the controversy was fueled by a class bias, the DeBoers were educated and lived comfortably as compared to the truck driver father of Jessica who was seeking custody. *Id.* at 605. This contention does have merit; often Americans place too much emphasis on wealth and class in adoption disputes. *Id.* at 606.

<sup>182</sup> *Id.* "Two year-old Tyler Doustou was removed from his natural mother, . . . [t]he sole reason that Sharon Bottoms lost custody of her son was that she is a lesbian and lives with her female lover, April Wade." *Id.*

<sup>183</sup> *Id.* In the case of Tyler Doustou, the juvenile court judge said it is not in the best interests of a child to live with a parent who carries on a homosexual relationship in the home that the child would live. *Id.*

<sup>184</sup> Betty Levinson, *Legal Issues Facing the Non-Traditional Family: Adoptions*, 232 PLI/EST 355, 424 (1994). New York's adoption statute has no requirement of marriage for a partner of a biological parent to be allowed to adopt the child. *Id.*

best interests determination.<sup>185</sup>

## 2. The UAA Gives Incentive To Birth Parents To Seek Counseling<sup>186</sup>

The UAA strongly encourages counseling to birth parents and adoptees. It does not make counseling mandatory but it does provide that agencies or the adoptive parents can pay for counseling or other services that the birth parent(s) or child wish to pursue.<sup>187</sup>

## VI. CONCLUSION

There is no easy answer in adoption law when trying to adequately protect all of the interested parties. The Uniform Adoption Act "provides a good general framework" and while it is not perfect it is a major initiative in the field of children's rights.<sup>188</sup> The UAA focuses on the recognition that adoptive families are "legally

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<sup>185</sup> *Id.* at 431, (citing *Guinan v. Guinan*, 102 A.2d 963 (N.Y. 1984)). In *Guinan*, the lesbian mother was awarded primary custody of her three children and the father appealed saying that the mother was a lesbian and should not be given custody, 102 A.2d at 964. The trial court's decision was affirmed and the court adopted a "nexus test for determining when a parent's sexual orientation should be an issue in a custody dispute." Levinson, *supra* note 184, at 431. The court stated that "[a] parent's sexual indiscretions should be a consideration in a custody dispute only if they are shown to adversely affect the child's welfare." *Id.* This nexus test was then followed in *M.A.B. v. R.B.*, 510 N.Y.S.2d 960 (Sup.Ct. 1986) (stating that without a showing of harm, sexual orientation of a divorcing parent is irrelevant to the child's best interests, and similarly an adoptive parent's sexual orientation should also be irrelevant). Other jurisdictions have supported this view also and have adopted the nexus test to determine whether the sexual orientation of a parent has a detrimental effect on the child. Levinson, *supra* note 184, at 454-55.

<sup>186</sup> Tenenbaum, *supra* note 7, at 337. "The UAA lists several types of services that a birth parent must be offered regardless of indigence." *Id.* The UAA envisions and encourages more services than what was previously available. *Id.* The Act doesn't force them to go to counseling but the parent is free to choose which services they want to go to and the parents are actually encouraged to seek such counseling. See U.A.A. s. 7-103 and 7-104.

<sup>187</sup> *Id.* "Numerous procedures - - including access to both psychological and legal counseling as well as to information about the meaning of and options to adoption - - ensure that a decision by a parent to relinquish a minor child and consent to the child's adoption is informed and voluntary." See Hollinger, *supra* note 8, at 358.

<sup>188</sup> Wixson, *supra* note 147, at 511. "In its desire to enable adoptions to occur for the benefit of more and more diverse children and parents, the UAA wisely steers clear of overly-regulating the behavior of the parties to an adoption." Hollinger, *supra* note 8, at 378. See also Lowe, *supra* note 88, at 399.

equivalent" to biological families.<sup>189</sup> It still protects biological ties but the adoptive parents' rights are not trumped when it is not warranted.<sup>190</sup> "An established relationship between adoptive parents and their adopted child . . . warrants federal constitutional protection that 'supersedes state law and provides even greater protection for certain family relationships'."<sup>191</sup> The UAA is a commendable attempt to prevent the recurrence of the tragic stories earlier discussed<sup>192</sup> by providing for certainty, stability, and expeditious resolution of disputes and prevent emotional trauma to children.<sup>193</sup>

States who have not seriously considered the Uniform Adoption Act need to rethink who it is that adoption law is trying to protect. The consent requirements, with additional consent rights provided to birth fathers, and finality provisions are extremely important and should be adopted.<sup>194</sup> It is time to abandon the "traditional" view that "blood and genes" is what constitutes a family in all adoption situations.<sup>195</sup>

Carrie L. Wambaugh

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<sup>189</sup> Hollinger, *supra* note 8, at 378.

Within this formal structure, the emotional and psychological aspects of adoptive parent and child relationships can flourish. Once it is clear that an adoptive family is in all ways an authentic family, it is also possible both within the UAA and in the multifaceted world beyond it, to acknowledge and affirm the differences between biological and adoptive parent-child relationships. Precisely because the UAA does not allow genetic ties by themselves to trump the interests of children in having secure legal and emotional ties to the people who are actually parenting them, the Act will eventually gain more support among those who can get beyond the view that families are exclusively the product of 'blood and genes.'

*Id.*

<sup>190</sup> Lowe, *supra* note 88, at 400. The UAA starts with the premise the biological parents are "fit" and requires clear and convincing proof of unfitness before termination of their parental rights is warranted. *Id.*

<sup>191</sup> Welt, *supra* note 10, at 318. "Statutory and decisional law that permit biological parents to revoke consent and reestablish their custody status any time before the final order of adoption, and, in the case of the absent biological father, subsequent to the final order of adoption, are fundamentally unfair to adoptive families and unsettling to adoptions in general." *Id.*

<sup>192</sup> Lowe, *supra* note 88.

<sup>193</sup> See Wixson, *supra* note 147, at 511.

<sup>194</sup> However, the consent requirements as to birth fathers is not adequate; birth father's need to have consent rights in all circumstances in order to give them the protection they deserve.

<sup>195</sup> Hollinger, *supra* note 8, at 378.