

March 1993

Gregory K.: Child Standing in Parental Termination Proceedings and the Implications of the Foster Parent-Foster Child Relationship on the Best Interests Standard

Claudio DeBellis

Marta B. Soja

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

Recommended Citation

DeBellis, Claudio and Soja, Marta B. (1993) "Gregory K.: Child Standing in Parental Termination Proceedings and the Implications of the Foster Parent-Foster Child Relationship on the Best Interests Standard," *Journal of Civil Rights and Economic Development*: Vol. 8 : Iss. 2 , Article 6.
Available at: <https://scholarship.law.stjohns.edu/jcred/vol8/iss2/6>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

NOTES

GREGORY K.: CHILD STANDING IN PARENTAL TERMINATION PROCEEDINGS AND THE IMPLICATIONS OF THE FOSTER PARENT-FOSTER CHILD RELATIONSHIP ON THE BEST INTERESTS STANDARD

Traditionally, the state has protected citizens unable to defend their own interests.¹ Although parents are generally the protec-

¹ See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). "Acting to guard the general interest in [the] youth's well-being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways." *Id.*; *People v. Walton*, 161 P.2d 498, 501 (Cal. 1945). The curfew in question was a necessary exercise of the state's authority. *Id.* *Contra* *Kent v. United States*, 383 U.S. 541, 555-56 (1966). "There is much evidence that some juvenile courts . . . lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *Parens Patriae* capacity . . ." *Id.*; Gilbert T. Venable, Note, *The Parens Patriae Theory and the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894, 896 (1966). The concept of *parens patriae* can be traced back to English common law in *Eyre v. Shaftsbury*, 2 P.Wms. 103, 24 Eng. Rep. 659 (Ch. 1722). *Id.* at 896-97. "[T]he king, as *Parens Patriae*, hath the protection of all his subjects; and in particular manner is to take care of all those who by reason of their want of understanding are incapable of taking care of themselves and their own affairs." *Id.* at 895. "It is incomprehensible that the [state] should not possess the power to come to the aid of helpless children who are suffering abuse at the hands of their parents or guardians." *Id.* at 897. See generally THEODORE J. STEIN, *CHILD WELFARE AND THE LAW* 26-28 (1991) (discussing historical roots of *parens patriae* doctrine).

The idea that the king should act as "parent of the nation" was the basis of the *parens patriae* theory accepted by the American courts. See Venable, *supra*, at 897; see also Jacqueline Y. Parker, *Dissolving Family Relations: Termination of the Parent-Child Rela-*

tors of their children,² they sometimes fail to fulfill their parental duties. In such situations, the state, as *parens patriae*, must intervene on the child's behalf.³ *Parens patriae* means "parent of the country," and signifies the state's well-established duty to intervene on behalf of individuals under legal disability.⁴ In a limited number of situations, the state's obligation to intervene is limited by the constitutional concepts of freedom of expression and the right of privacy.⁵ These exceptions to the state's overall role as

tions—An Overview, 11 U. DAYTON L. REV. 555, 556 (1986). The justification for invoking the modern day *parens patriae* includes: (1) a child, by definition, lacks capacity and experience; (2) society as a whole has much to gain from a child who will tomorrow be a productive adult; and (3) a child who is not raised properly may later become a delinquent. *Id.*

² See *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982). Parents' rights are rooted in the Fourteenth Amendment's grant of liberty. *Id.*; *Parham v. J.R.*, 442 U.S. 584, 602 (1979). "[P]arents possess what a child lacks in maturity, experience, and capacity for the judgment required for making life's difficult decisions [H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Id.* at 602; *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972). The Amish parents had the right to remove their children from the public school system. *Id.*; *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Parents' interest in the care and custody of their children is a fundamental liberty. *Id.*; *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). It was the parents' right to choose appropriate mental and religious training for their children. *Id.*; *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). Parents have the fundamental right to control the education of their children. *Id.* See generally Alison M. Brumley, Comment, *Parental Control of a Minor's Right to Sue in Federal Court*, 58 U. CHI. L. REV. 333, 341-46 (1991) (discussing scope and limit of parental authority).

³ See *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 828 (1977). The family court has the authority to intervene and order that a child be placed into the foster care system if it finds that the child was abused or neglected. *Id.*; see also *New York v. Ferber*, 458 U.S. 747, 764 (1982). The state has a compelling interest in protecting children from being exploited in pornographic depictions. *Id.*; *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). It is a considerable risk to expose minors to sexually explicit material. *Id.*; *In re Phillip B.*, 156 Cal. Rptr. 48, 51 (Cal. Dist. Ct. App. 1979). The state may justifiably intervene where parents fail to provide a minor with adequate medical treatment. *Id.*; *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769, 771-72 (Ill. 1952). The state was permitted to order a blood transfusion for a minor, over the objections of the parents who were Jehovah Witnesses, forbidden to receive blood from other human beings. *Id.*; *In re Cicero*, 101 Misc. 2d 699, 702-03, 421 N.Y.S.2d 965, 968 (Sup. Ct. Bronx County 1979). The state may intervene and over objections of the parents, order an operation on a newborn infant to correct a *spina bifida* abnormality. *Id.* See generally Jennifer Bellah, Comment, *Appointing Counsel for the Child in Actions to Terminate Parental Rights*, 70 CAL. L. REV. 481, 487-88 (1982) (state should secure stable adoptive home if security and stability is lacking in biological family home); *Parker*, *supra* note 1, at 564-65. The state's interest is based on a need for child protection when the parents fail to fulfill their role. *Id.*; *Venable*, *supra* note 1, at 905. "Against these sacred private interests [of the parents] stand the interests of society to protect the welfare of the children, and the state's assertion of authority to that end. . . ." *Id.*

⁴ See *Parker*, *supra* note 1, at 566. *Parens patriae* represents the "historical doctrinal foundation for protecting children from abuse and neglect." *Id.*; see also BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). "*Parens Patriae*, literally 'parent of the country,' refers traditionally to the role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane. . . ." *Id.*

⁵ See *Bellotti v. Baird*, 443 U.S. 622, 647-48 (1979). The statute requiring a minor to get parental consent for an abortion was an unwarranted intrusion on a child's right to privacy, and therefore, unconstitutional. *Id.*; *Tinker v. Des Moines Indep. Community Sch.*

parens patriae, however, do not represent a general principle that would allow a state to neglect its duty in favor of recognizing a child's constitutional rights.⁶ Thus, if the state finds that a child has been abused or neglected, it can, regardless of a child's right to privacy, institute a proceeding to terminate parental rights.⁷ Any party seeking parental termination must first demonstrate standing.⁸ Generally, the state or a state-authorized agency, deriving its power from the *parens patriae* doctrine, will petition the court for the termination.⁹ Recently, however, in *In re Gregory K.*,¹⁰ a

Dist., 393 U.S. 503, 509 (1969). The state is prohibited from suppressing a child's freedom of expression in school. *Id.* The state must respect the child's fundamental right to freedom of expression. *Id.* at 511. "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id.*; *In re Gault*, 387 U.S. 1, 41 (1967). Children have the right to counsel in juvenile delinquency proceedings. *Id.*

⁶ See *H.L. v. Matheson*, 450 U.S. 398, 411 (1981). A statute requiring immature and dependent minors to notify their parents before undergoing an abortion is constitutional. *Id.*; *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944). While children have constitutional rights, the state's power "to control the conduct of children reaches beyond the scope of its authority over adults." *Id.*; Venable, *supra* note 1, at 911. "While a child should not be reprimanded for expressing unpopular views or participating in peaceful demonstrations, it is submitted that the fact that he is engaged in a protected activity should not insulate him from *parens patriae* power." *Id.*

⁷ See *In re K.S.*, 713 S.W.2d 858, 865 (Mo. Ct. App. 1986) (prior neglect or abuse by parent may justify parental termination if in child's best interests); see also *In re J.H. v. R.F.H.*, 572 So. 2d 629, 633 (La. Ct. App. 1990) ("best interests of children dictate termination of parental rights"); *In re T.K.*, 568 So. 2d 636, 642 (La. Ct. App. 1990) (parental termination is warranted if in best interests of children); *In re P.E.B.*, 708 S.W.2d 315, 319 (Mo. Ct. App. 1986) ("[e]ven though reunification of the family is the desired outcome in [parental termination proceedings], the best interests of the children are controlling"); *Nebraska v. Brungardt*, 319 N.W.2d 109, 114 (Neb. 1982) (father's "inability to secure and maintain employment, his use and abuse of drugs, and his propensity to physical violence all indicate to a sufficient degree that he is an unfit parent and that the best interests of the children . . . are best served by the termination of . . . parental rights"); *Nebraska v. Linden*, 306 N.W.2d 151, 155 (Neb. 1981) (cardinal issue in parental rights' termination cases is determining best interests of child); *In re Parker*, 368 S.E.2d 879, 884 (N.C. Ct. App. 1988) (court must issue order of parental termination unless it "determine[s] that best interests of child require that parental rights of such parent not be terminated" (quoting N.C. GEN. STAT. § 7H-289.31(a))); *In re Carlita B.*, 408 S.E.2d 365, 368 (W. Va. 1991) (in parental termination cases, court must consider best interests of child, including "whether continued association with siblings in other placement is in such child's best interests" (explaining *James M. v. Maynard*, 408 S.E.2d 400, 410 (W. Va. 1991))).

⁸ See *infra* notes 28-31 and accompanying text (discussing general standing principles).

⁹ See, e.g., CAL. CIV. CODE § 232.9 (Deering 1990) ("The State Department of Social Services, . . . [a public] adoption agency . . . may initiate an action . . . to declare a child free from the custody and control of [the] parents."); FLA. STAT. ANN. § 39.461(1) (West 1992 & Supp. 1993) (Florida provides for "authorized agent of the department" to initiate parental termination proceedings); N.J. STAT. ANN. § 9:2-18 (West 1992 & Supp. 1993) ("An approved agency . . . may institute an action . . . seeking the termination of the rights of the parents. . . ."); N.Y. SOC. SERV. LAW § 384-b(3)(b) (McKinney 1984) ("A proceeding under this section may be originated by an authorized agency. . . ."); 23 PA. CONS. STAT. ANN. § 2512(a)(2) (1991) ("A petition to terminate parental rights . . . may be filed by . . . an agency.").

¹⁰ No. JU90-5245 (Fla. Cir. Ct. Oct. 13, 1992).

Florida juvenile court granted a child standing to initiate the termination of his natural mother's parental rights.¹¹ The Florida Court of Appeals for the Fifth District, however, appropriately held that the child lacked the requisite capacity to initiate such a proceeding.¹²

In 1984, Gregory Kingsley, then four years old, was placed in the custody of his biological father.¹³ During the following four years, his natural mother, Rachel Kingsley, failed to maintain contact with Gregory.¹⁴ In 1989, a report was filed under the Florida Protective Services System alleging neglect and physical abuse by Gregory's father.¹⁵ At that time, Ms. Kingsley regained custody of Gregory only to place him voluntarily in foster care five months later.¹⁶ Stating that her intent was to relinquish custody for only a month, Gregory's mother, in fact, left him in the custody of the state for approximately eleven months.¹⁷ Thereafter, Ms. Kingsley regained custody until October of 1990, when the Department of Health and Rehabilitative Services ("HRS") received a report stating that Gregory needed foster care because he was emotionally disturbed and his mother "could not cope with [him] any longer."¹⁸ One week after HRS received this report, they removed Gregory from Ms. Kingsley's custody and placed him in foster care.¹⁹ During the eleven months that Gregory was in the care of his foster family, he repeatedly declared his desire to be adopted.²⁰ Consequently, in June of 1992, Gregory, who was then twelve years old, instituted a proceeding to terminate his natural

¹¹ *Id.* at 1.

¹² *Kingsley v. Kingsley*, 1993 Fla. App. LEXIS 8645, at *6-7 (Fla. Ct. App. Aug. 18, 1993).

¹³ *Gregory K.*, No. JU90-5245, slip op. at 4 (Fla. Cir. Ct. Oct. 13, 1992); see also Petitioner's Complaint at 3, *In re Gregory K.*, No. JU90-5245 (Fla. Cir. Ct. June 9, 1992) (complaint noted that there was dispute between natural mother and natural father as to whether mother consented to the arrangement or whether natural father forcibly took the children).

¹⁴ Petitioner's Complaint at 3-4, *Gregory K.*, (No. JU90-5245) (natural mother did not visit Gregory for period of four years while child was with father).

¹⁵ *Id.* at 4 (report alleged "neglect, conditions in the home which were hazardous to health, inadequate supervision and physical abuse").

¹⁶ *Id.*

¹⁷ *Id.* Ms. Kingsley left Gregory in the state's custody until August 1990. *Id.*

¹⁸ *Id.* (mother told HRS that she wished to place child up for adoption).

¹⁹ Petitioner's Complaint at 5, *Gregory K.*, (No. JU90-5245).

²⁰ *Id.* at 9. Gregory had consistently stated to numerous individuals, on many occasions, the desire to terminate his relationship with his natural parents and to seek adoption with his foster family. *Id.* He asked his foster parents to adopt him and they expressed a similar desire. *Id.*

mother's parental rights.²¹

Writing for the lower court, Judge Thomas S. Kirk held that Gregory had legal standing to pursue termination of the parent-child relationship.²² Judge Kirk reasoned that Gregory was entitled to the same constitutional rights enjoyed by "all natural persons."²³ Further, the court found it to be in Gregory's best interests to sever his ties with his natural mother.²⁴ In making this determination, a controlling factor the court considered was the bond that Gregory had developed with his foster family.²⁵

The Court of Appeals, however, concluded that Gregory lacked the capacity to initiate a parental termination proceeding.²⁶ The court maintained that the "disability of nonage" prevents a minor from instituting such an action.²⁷

This Comment explores two issues pertaining to parental termination proceedings, which are the subjects of recent debate within the legal community. Part I discusses whether a child has standing to institute a parental termination proceeding by tracing the

²¹ See *In re Gregory K.*, No. JU90-5245 (Fla. Cir. Ct. Oct. 13, 1992).

²² Order on Standing, *In re Gregory K.*, No. CI92-5127 (Fla. Cir. Ct. July 20, 1992).

²³ *Id.* In determining that Gregory had standing, the court cited four sections of Article I of the Florida Constitution: Section 2 guarantees to "all natural persons the right to pursue happiness"; section 9 guarantees that "all natural persons shall be afforded due process of law"; section 21 guarantees that "all natural persons shall be afforded access to the courts of this state"; and section 23 guarantees that "all natural persons shall have the right to make private choices." *Id.*

²⁴ See *Gregory K.*, No. JU90-5245, slip op. at 9 (Fla. Cir. Ct. Oct. 13, 1992); see also *infra* notes 108-113 and accompanying text (discussing *Gregory K.* court's best interests analysis).

²⁵ See *Gregory K.*, No. JU90-5245, slip op. at 9; see also *infra* notes 108-113 and accompanying text (discussing foster family's influential role in determination of best interests in *Gregory K.*).

²⁶ *Kingsley v. Kingsley*, 1993 Fla. App. LEXIS 8645, at *6-7 (Fla. Ct. App. Aug. 18, 1993). Although the Court of Appeals found that Gregory lacked standing, the court concluded that the trial court's error was harmless because separate petitions for termination of parental rights were filed on Gregory's behalf by his foster father and foster mother, the guardian ad litem, and HRS. *Id.* In addition, the court held:

(2) the applicable burden of proof in all termination of parental rights proceedings is clear and convincing evidence; (3) the record supports the trial court's findings of clear and convincing evidence of abandonment; (4) the trial court erred when it tried the termination and adoption proceedings simultaneously, but such error was harmless; and (5) the trial court committed reversible error when it entered the adoption order.

Id.

²⁷ *Id.* at *7. The Court of Appeals reasoned that, traditionally, courts have held that unemancipated minors do not have the requisite legal capacity to initiate legal proceedings in their own name. *Id.*; cf. *Twigg v. Mays*, No. 88-4489-CA-01, slip op. at 6-7 (Fla. Cir. Ct. Aug. 18, 1993). In *Twigg*, the Circuit Court for the Twelfth Judicial Circuit ruled that Kimberly Mays had standing to institute a proceeding to terminate her natural parents rights. *Id.* The *Twigg* court followed the reasoning in *Gregory K.*, and held that because Kimberly was a natural person under the Florida Constitution, she, like all other natural persons, should be afforded access to the courts of Florida. *Id.*

history of child standing and examining the standing requirements of parental termination proceedings. This section also examines the soundness of granting a child standing to terminate parental rights. Part II discusses the "best interests" standard and the extent to which the relationship between a child and his foster parents should be considered in this evaluation. This section also compares *Gregory K.* with a recent New York Court of Appeals case, which held that the rights of biological parents are always superior, and hence, the relationship between foster parent and foster child should not be considered in the best interests determination.

I. STANDING

A. Generally

The United States Constitution guarantees all natural persons access to the courts of this country.²⁸ Before a court can adjudicate a matter, however, it must determine that the parties to the action have standing.²⁹ In order to demonstrate standing, a party must show that he or she has an individual or representative capacity, or possesses a tangible interest in the lawsuit.³⁰ Once a

²⁸ See U.S. CONST. amend. V. The Fifth Amendment provides, in pertinent part: "[N]o person [shall] be . . . deprived of life, liberty, or property, without due process of law." *Id.*; see also *Ruiz v. Estelle*, 679 F.2d 1115, 1153 (5th Cir. 1982). Access to the courts of this country is a "fundamental constitutional right." *Id.*; *Atkins v. United States*, 556 F.2d 1028, 1040 (Ct. Cl. 1977). "It is a fundamental principle . . . that access to the courts . . . should be made available to all citizens at all times." *Id.*

²⁹ See U.S. CONST. art. 3, § 2, which provides, in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and], the Laws of the United States . . . [and] to Controversies . . . between Citizens of different States; [and] between Citizens of the same State . . ." *Id.*; see also *Baker v. Carr*, 369 U.S. 186, 204 (1962). Before a federal court can adjudicate a matter, it must find that the legal rights of the litigants are in actual controversy. *Id.*; *Selz v. Una*, 73 U.S. 327, 333-34 (1867). "Interposition of a court of equity cannot be successfully invoked . . . unless the party asking relief is able to show that he has a legal or equitable right or title in the subject-matter of the controversy." *Id.* See generally Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 71-87 (1984). The author discusses general principles of standing and traces the metamorphosis of standing in federal courts. *Id.*

³⁰ See *Dafoe v. Dafoe*, 69 N.W.2d 700, 703 (Neb. 1955). The court stated that "it is necessary . . . that . . . [the plaintiff] . . . have . . . a remedial interest which the . . . forum can recognize and enforce." *Id.*; see also *Mixon v. Grinker*, 157 A.D.2d 423, 427-28, 556 N.Y.S.2d 855, 858-59 (1st Dep't 1990). The court held that the plaintiff, a not-for-profit corporation advocating the rights of homeless persons, had standing in its representative capacity to bring an action to require the city to provide noncongregate housing to HIV-infected homeless persons; but only upon a determination that such persons could not, due to illness, poverty, health problems, or unfamiliarity with legal process, seek relief on their own behalf. *Id.*; *Leo v. General Elec. Co.*, 145 A.D.2d 291, 295, 538 N.Y.S.2d 844, 847 (2d Dep't 1989). Several fishermen's associations had standing to seek monetary and injunctive relief

party has demonstrated standing, the court can invoke its jurisdiction to settle the dispute.³¹

B. Child Standing

It is a well-settled rule that children cannot bring an action on their own behalf, nor can they defend a suit brought against them.³² Rather, the law requires that children be represented by a legally competent person.³³ The rationale for this rule can be traced back to the common-law concept of *prochein ami*, the child's "next friend" or legal representative.³⁴ This common-law concept represents the general rule in the United States.³⁵ The state has

from a river polluter in their representative capacity because the relief would benefit those members actually injured. *Id.*; *Grant v. Cuomo*, 130 A.D.2d 154, 159, 518 N.Y.S.2d 105, 108 (1st Dep't 1987), *aff'd*, 73 N.Y.2d 820, 534 N.E.2d 32, 537 N.Y.S.2d 115 (1988). A child abuse organization had standing to compel New York City to comply with statutory provisions requiring that the city investigate reports of child abuse within 24 hours. *Id.* The abused children were not themselves able to seek a judicial remedy, and it was not likely that parents or caretakers, the objects of the claims of abuse or maltreatment, would undertake to secure a remedy. *Id.*; *Abrams v. N.Y.C. Transit Auth.*, 48 A.D.2d 69, 70-73, 368 N.Y.S.2d 165, 166-69 (1st Dep't 1975). The petitioner did not have standing to bring suit because his rights were not "directly and specifically" affected. *Id.*

³¹ See *Halpin v. Perales*, 153 Misc. 2d 932, 934, 583 N.Y.S.2d 722, 724 (Sup. Ct. Albany County 1992). Once a plaintiff demonstrates standing, a court can invoke its jurisdiction. *Id.* In order to satisfy the standing requirements, the plaintiff has to demonstrate that: (1) he has suffered injury in fact, and (2) that the interest he is asserting is one which is within the interest sought to be protected by the statute. *Id.*; see also *Norwick v. Rockefeller*, 70 Misc. 2d 923, 929, 334 N.Y.S.2d 571, 577 (Sup. Ct. New York County 1972). The court held that once the petitioning party demonstrates a "personal stake" in the outcome, the court could settle the dispute. *Id.*

³² See *Pintek v. Superior Court*, 277 P.2d 265, 268 (Ariz. 1954). A minor was not permitted to petition the court in his behalf, instead, the court required that a guardian initiate the intestacy proceeding. *Id.*; see also *Allen v. Hickman*, 383 P.2d 676, 678 (Okla. 1963). The appointing of a law guardian was obligatory and based upon safeguarding the interests of children; it is not just a mere formality. *Id.*

³³ See FED R. Civ. P. 17(c) which provides:

Infants or Incompetent Persons. When an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Id.; FLA. R. Civ. P. 1.210(B). The Florida Legislature codified the identical provision in its rules of civil procedure. *Id.*; The terms "next friend" and "guardian ad litem" are used interchangeably. *Id.*; see also ROBERT HOROWITZ & SETH G. HUNTER, *LEGAL RIGHTS OF CHILDREN* 74 (1984). It is the traditional rule that minors cannot initiate proceedings on their own behalf, but must be represented by a competent adult. *Id.*

³⁴ See HOROWITZ & HUNTER, *supra* note 33, at 74. The child's "next friend" and "guardian ad litem" are concepts that grew out of the common law "prochein ami." *Id.*; see also BLACK'S LAW DICTIONARY 1206 (6th ed. 1990). "Prochein ami" is defined as some friend who will appear as a plaintiff on behalf of the child. *Id.*

³⁵ See, e.g., *Domann v. Pence*, 326 P.2d 260, 262 (Kan. 1958) (infant sued for injuries

traditionally shielded children from the adversarial system because children are deemed to lack the requisite capacity and experience to function in such an environment.³⁶ Shielding children from the courtroom is but another manifestation of the state's obligation as *parens patriae*.³⁷

C. *Standing in Parental Termination Proceedings*

Traditionally, the United States government has followed a policy of nonintervention with respect to family disputes.³⁸ This policy has been established, in part, by this country's constitutional respect for the privacy of the family unit, which is often capable of resolving most of its own disputes.³⁹ Consequently, the law

sustained in car accident through "next friend"); *Johnston County v. Ellis*, 38 S.E.2d 31, 38 (N.C. 1946) ("next friend" represented minors in foreclosure proceeding); *In re Eltingon's Estate*, 192 Misc. 836, 840, 77 N.Y.S.2d 492, 496 (Sur. Ct. New York County 1947) (minor petitioned court to reopen prior decrees via special guardian).

³⁶ See *Planned Parenthood v. Danforth*, 428 U.S. 52, 72 (1976). The *Danforth* Court recognized the vulnerability of children and made absolutely clear that minors are not suited to make certain complex decisions. *Id.* The court stated, in pertinent part, that: "Certain decisions are . . . outside the scope of a minor's ability to act in his own best interest." *Id.*; see also HOROWITZ & HUNTER, *supra* note 33, at 73. American courts have traditionally taken the view that children are legally incompetent and/or disabled. *Id.* The disability exists because of lack of experience and maturity, which prevents children from understanding the full implications of a situation. *Id.*; John D. Goetz, Note, *Children's Rights Under the Burger Court: Concern for the Child but Deference to Authority*, 60 NOTRE DAME L. REV. 1214, 1219 (1985). "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Id.* (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)); cf. *Brumley*, *supra* note 2, at 352. A child's ability to make mature decisions varies with the subject-matter involved. *Id.* Although it is the state's duty to protect children, it has been suggested that in certain, less complex situations, experienced children should have the right to make their own decisions. *Id.*

³⁷ See *supra* notes 3-4 and accompanying text (state has duty, under doctrine of *parens patriae*, to protect those who, because of their want of understanding, are unable to protect themselves; this concept clearly includes children who lack experience, maturity, and knowledge of fully competent adults).

³⁸ See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). "[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Id.*; see also Martin Guggenheim, *The Right to be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 109 (1984). "The traditional family relationship, according to the Supreme Court, has 'its origins entirely apart from the power of the State,' is 'deeply rooted in our nation's history and tradition.'" *Id.* (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977)); Goetz, *supra* note 36, at 1226. "The traditional view, long recognized by the Supreme Court, is that 'the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'" *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

For a fictional account of society under complete paternalism, see ALDOUS HUXLEY, *BRAVE NEW WORLD* (1946).

³⁹ See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879, 888-89 (1984) (discussing importance of family in today's society); see also Stephen W.

presumes that the natural parents will advance the best interests of their child.⁴⁰

In the United States, however, many children are subjected by their parents to abuse and neglect.⁴¹ In these situations, the presumption in favor of parental autonomy is obviated by the state's role, as *parens patriae*, to intervene on the child's behalf.⁴² If the state then determines that returning the child to the natural parents would endanger the child's welfare, it can initiate and subsequently order the termination of parental rights.⁴³ The act

Hayes & Michael J. Morse, *Adoption and Termination Proceedings in Wisconsin: Straining the Wisdom of Solomon*, 66 MARQ. L. REV. 439, 440-41 (1983). American society places a great deal of importance on the family unit. *Id.* It is additionally noted that courts have recognized the family's constitutional right to privacy. *Id.*

⁴⁰ See Bartlett, *supra* note 39, at 887-88 (law does not create parental rights, rather, it presumes such rights exist); Gloria Christopherson, *Minnesota Adopts a Best Interests Standard in Parental Rights Termination Proceedings*: In re J.J.B., 71 MINN. L. REV. 1263, 1267 (1987) ("Presumption has always been that parents will provide better care for their children than the state could provide."); Susan B. Fallek, *In the Child's Best Interests: Termination of Parental Rights in Minnesota*: In re J.J.B., 10 HAMLINE L. REV. 693, 704 (1987) (presumably, natural parents are best suited to care of their children); Brumley, *supra* note 2, at 342 (parents have an innate affection for their children and are therefore most able to determine what is best for them); Goetz, *supra* note 36, at 1226 ("primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Hayes & Morse, *supra* note 39, at 440-41 (citing authority of parents over children as basic principle in Anglo-American culture); Robyn-Marie Lyon, Note, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 683 (1987) (normal presumption is that parents will do what is best for their children); Monrad G. Paulsen, Comment, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 679 (1966) ("In America, raising children is the business of the parents, not of government.").

⁴¹ SAMUEL M. DAVIS & MORTIMER D. SCHWARTZ, CHILDREN'S RIGHTS AND THE LAW 170-71 (1987). Many children are abused and neglected in the United States today. *Id.*; see Fallek, *supra* note 40, at 710-11. There is a high incidence of abuse and neglect in today's society. *Id.*; Howard Davidson, *Not to Worry*, ATLANTA J. & CONST., Oct. 2, 1992, at A13. "Child maltreatment in this country now constitutes, in the words of the U.S. Advisory Board on Child Abuse, a 'national emergency.'" *Id.*

⁴² See, e.g., DAVIS & SCHWARTZ, *supra* note 41, at 166-69. Neglectful and abusive parenting justifies state intervention. *Id.*; Fallek, *supra* note 40, at 711. Child abuse and neglect statistics tend to increase the state's intervention in order to ensure the proper welfare of children. *Id.*; Parker, *supra* note 1, at 586-96. Parental termination may be permitted because of abandonment or physical and mental incapacity of the parents. *Id.* Other grounds for termination of parental rights include general unfitness, neglect, or even child abuse. *Id.*; Brumley, *supra* note 2, at 343. The state can intrude upon parents' traditional domain if the parents are guilty of abuse or neglect, or if there is some other significant governmental interest that supports the intrusion. *Id.*; see also LAURA M. PURDY, IN THEIR BEST INTEREST? 17 (1992). "[I]t is clear that many children are now neglected and abused." *Id.* Children should not be subjected to abuse or neglect. *Id.* The termination of parental rights is, in certain situations, a formidable solution. *Id.*

⁴³ See MARK HARDIN & ANN SHALLECK, COURT RULES TO ACHIEVE ACTIVE PERMANENCY FOR FOSTER CHILDREN: SAMPLE RULES AND COMMENTARY 97 (1985). The termination of parental rights via a parental termination proceeding extinguishes the rights and duties of the natural parents toward the child. *Id.* The parent no longer has the duty to financially support the child. *Id.* Moreover, the parent has no right to visit and communicate with the child. *Id.*; Parker, *supra* note 1, at 557. Once the termination proceeding is complete, the

whereby a natural parent's rights are terminated is one with profound consequences, as it transforms a family into nothing more than a group of strangers.⁴⁴ As a result of this severity and the courts' reluctance to intrude into the family unit, states have enacted legislation specifically setting forth how such proceedings should be conducted and who has standing to initiate them.⁴⁵ In most states, parental-termination statutes permit an agency to institute the action.⁴⁶ Other states have broader parental-termination provisions, whereby the action may be initiated by "any person who has knowledge of the facts"⁴⁷ or "any interested party."⁴⁸

1. The Prudence of Granting Children Standing

New York and Pennsylvania have drafted statutes that leave little room for interpretation and prevent children from initiating parental-termination suits.⁴⁹ These statutes reserve serious deci-

only vestige of the parent-child relationship that remains is religious affiliation. *Id.*

⁴⁴ See HARDIN & SHALLECK, *supra* note 43, at 97. "The [action] to terminate parental rights is profoundly serious." *Id.* This action is severe because, "typically, termination of parental rights results in a total severance of the normal parent-child relationship, rendering the family into strangers." *Id.*; see also Parker, *supra* note 1, at 557. Parental termination has far-reaching consequences. *Id.*; Bob Cohn, *Johnny, Put Down Those Legos and Turn Off the Nintendo. Your Lawyer's on the Phone.*, NEWSWEEK, Sept. 21, 1992, at 88. "Indeed severing the parent-child tie is always considered the last resort." *Id.*

⁴⁵ See Parker, *supra* note 1, at 558 (after discussing termination of parental rights in child abuse and neglect cases, the exacting termination procedure is discussed); see also STEIN, *supra* note 1, at 71 (courts scrutinize parental termination statutes very closely); Cohn, *supra* note 44, at 88 ("presumption for keeping the child with his natural parents is rightfully strong. . . .").

⁴⁶ See N.Y. SOC. SERV. LAW § 384-b(3)(b) (McKinney 1984) (permitting only authorized agency or foster parent to originate proceeding); 23 PA. CONS. STAT. § 2512(a) (1991) (granting only parents, agency, and individuals having custody authority to file petition to terminate); see also Martha Matthews, *The Sadness Behind the Sensational*, THE RECORDER, Oct. 8, 1992, at 8 ("Usually, the social services agency . . . brings a termination petition."); cf. Deborah Sharp & Carol J. Castaneda, "Divorced" Youth in a New Role, USA TODAY, Sept. 28, 1992, at 3A (discussing unique right of 12 year old in *Gregory K.* to terminate parental rights).

⁴⁷ FLA. STAT. ANN. § 39.461(1) (West 1992 & Supp. 1993).

⁴⁸ See, e.g., CAL. CIV. CODE § 233 (Deering 1990) (petition may be filed by an interested party); S.C. CODE ANN. § 20-7-1564 (Law. Co-op. 1976) (same); Dep't of Social Servs. v. Pritchett, 374 S.E.2d 500, 501-02 (1988) (interpreting South Carolina statute as including foster parents); *In re Eugene W.*, 105 Cal. Rptr. 736, 741 (Cal. 1972) ("interested person," under California statute, is one with "direct, and not merely consequential, interest in the action").

⁴⁹ See, e.g., N.Y. SOC. SERV. LAW § 384-b(3)(b) (McKinney 1984) which provides:

A proceeding under this section may be originated by an authorized agency or by a foster parent authorized to do so pursuant to section three hundred ninety-two of this chapter or to section one thousand fifty-five of the family court act or, if an authorized agency ordered by the court to originate a proceeding under this section fails to do so within the time fixed by the court, by a law guardian or guardian ad litem of the child on the court's direction.

Id.; 23 PA. CONS. STAT. § 2512(a) (1991) provides:

sions to a specified group of mature individuals, not to vulnerable, inexperienced, and short-sighted children. Florida's parental-termination statute,⁵⁰ on the other hand, provides that "any person who has knowledge of the facts alleged" has standing to petition the court to terminate the rights of the natural parents.⁵¹ Few cases, however, have interpreted this statute's broad language.⁵²

The lower court in *Gregory K.*, nonetheless, interpreted the statute to include a twelve-year-old child.⁵³ In so doing, the court granted children the right to petition for the termination of their

(a) Who may file—A petition to terminate parental rights with respect to a child under the age of 18 years may be filed by any of the following:

- (1) Either parent when termination is sought with respect to the other parent.
- (2) An agency.

(3) The individual having custody or standing in loco parentis to the child and who has filed a report of intention to adopt required by section 2531 [relating to report of intention to adopt].

(b) Contents—The petition shall set forth specifically those grounds and facts alleged as the basis for terminating parental rights. The petition filed under this section shall also contain an averment that the petitioner will assume custody of the child until such time as the child is adopted. If the petitioner is an agency it shall not be required to aver that an adoption is presently contemplated nor that a person with a present intention to adopt exists.

(c) Father not identified—If the petition does not identify the father of the child, it shall state whether a claim of paternity has been filed under section 8303 [relating to claim of paternity].

Id.; see *In re Dana Marie E.*, 123 Misc. 2d 112, 115, 473 N.Y.S.2d 1008, 1010 (Family Ct. Queens County 1983) (city commissioner entitled to originate termination proceedings); *In re V.S.*, 90 Misc. 2d 139, 142, 394 N.Y.S.2d 128, 130 (Sur. Ct. New York County 1977) (foster care agency could institute termination proceedings); *In re Adoption of J.F.*, 572 A.2d 223, 225 (Pa. Super. Ct. 1990) (wife of natural parent not entitled to institute termination proceedings); *In re Adoption of Crystal D.R.*, 480 A.2d 1146, 1151 (Pa. Super. Ct. 1984) (foster parents have no right to initiate parental termination proceedings); Joseph R. Carrieri, Gregory K.: *A Termination of Parental Rights Case*, N.Y.L.J., Oct. 8, 1992, at 1 (no such action would lie in New York because statute drafted very carefully).

⁵⁰ FLA. STAT. ANN. § 39.461(1) (West 1992 & Supp. 1993).

⁵¹ *Id.* § 39.461(1) of the Florida statute provides, in pertinent part: "Any person who has knowledge of the facts alleged may file a petition for termination of parental rights." *Id.*

⁵² See *In re C.B.*, 561 So. 2d 663, 666 (Fla. Dist. Ct. App. 1990). Paternal grandmother qualified as one "who ha[d] knowledge of the facts" pursuant to FLA. STAT. ANN. § 39.461(1). *Id.*; FLA. STAT. ANN. § 39.404 (West 1992 & Supp. 1993). Chapter 39 of the Florida Code also deals with dependency proceedings. *Id.* Such a provision is analogous to § 39.461(1) because it employs the same language, *i.e.*, "any person who has knowledge of the facts alleged." *Id.* It should follow, therefore, that the manner in which the Florida judiciary is interpreting § 39.404(1) will be the manner in which it interprets § 39.461(1). *Id.*; see, *e.g.*, *In re J.M.*, 579 So. 2d 820, 822 (Fla. 1991). Under a chapter 39 dependency proceeding, a guardian ad litem is included within meaning of a person "who has knowledge of the facts." *Id.*; *Norris v. Rockefeller*, 568 So. 2d 1316, 1317 (Fla. 1990). Court-appointed guardians fall within the meaning of the statute. *Id.*; *In re J.M.*, 560 So. 2d 343, 343 (Fla. 1990). Maternal grandparents have standing to file a petition pursuant to FLA. STAT. ANN. § 39.404(1). *Id.*

⁵³ Order on Standing, *In re Gregory K.*, No. C192-5127, ¶ 9 (Fla. Cir. Ct. July 20, 1992) (Gregory had clear knowledge of facts to form basis for a petition); see also Matthews, *supra* note 46, at 8 ("The Florida court had reached the unremarkable conclusion that Gregory was a 'person' with 'knowledge of the facts' sufficient to bring his own petition.").

natural parent's rights.⁵⁴ The court's rationale for granting Gregory standing was based solely upon fundamental constitutional rights.⁵⁵ The court asserted that Gregory qualified as a "natural person" within the meaning of the Florida Constitution, and therefore, had a right of access to the Florida courts.⁵⁶ Additionally, the court stated that minors should be entitled to due process, and the constitutional freedom to make private choices without fear of state intervention.⁵⁷

In contrast, the Court of Appeals held that Gregory, being a minor, lacked the legal capacity to initiate or maintain an action for the termination of parental rights.⁵⁸ The appellate court held that an adult person of reasonable judgment and integrity is required to conduct the litigation for a child.⁵⁹ Further, the court held that the lower court misconstrued the Florida parental termination statute, and stated that the term "any other person who has knowledge of the facts alleged" does not include children.⁶⁰ The appellate court, however, determined that this error was harmless, and did not overrule the lower court's order granting standing.⁶¹

While the United States Supreme Court has extended constitutional rights to children, the Court has clearly stated that these

⁵⁴ Order on Standing, Gregory K. (No. CI92-5127) (Gregory qualified as "any person with knowledge of the facts alleged"); see also Betsy Hart, *Family Will Pay*, ATLANTA J. & CONST., Oct. 2, 1992, at A13 ("The typical 12-year-old [boy] isn't responsible . . . enough to consistently do his chores and homework. Now we're to believe that Gregory Kingsley decided to sue his parents . . . and see it through to victory all on his own.").

⁵⁵ Order on Standing, Gregory K. (No. CI92-5127) (delineating rights Gregory was entitled to under Florida Constitution).

⁵⁶ Order on Standing, Gregory K. (No. CI92-5127) (Florida Constitution "guarantees to all natural persons the right to pursue happiness").

⁵⁷ *Id.* ¶ 4. The *Gregory K.* court held that "all natural persons have the right to make private choices." *Id.* "[T]he right of privacy set forth in the Florida Constitution extends to every natural person and that minors, as natural persons, are entitled to the same privacy rights which are afforded to persons who have reached the age of majority." *Id.* ¶ 5 (citing *In re T.W.*, 551 So. 2d 1186 (Fla. 1989)).

⁵⁸ 1993 Fla. App. LEXIS 8645, at *6-7 (Fla. Ct. App. Aug. 18, 1993).

⁵⁹ *Id.* at *9. (citing *Garner v. I.E. Schilling Co.*, 174 So. 837, 838 (Fla. 1937)).

⁶⁰ *Id.* at *8-9 (citing *In re C.B.*, 561 So. 2d 663, 666 (Fla. Dist. Ct. App. 1990)). The language of the Florida Parental Termination provision, "any other person who has knowledge," does not include children but rather only those mature individuals that are in "peculiar position so that such knowledge can be reasonably inferred." Examples of a person in a "peculiar position such that knowledge can be reasonably inferred" include: the judge familiar with the file, the child's guardian or attorney, or "friends of the parties who, because of their proximity, would be expected to have such knowledge." *Id.*

⁶¹ *Id.* at *12. The appellate court held that the lower court's error granting standing was improper but harmless. *Id.* The court so decided because Gregory was not the only individual to file a petition on his behalf. *Id.* Separate petitions were filed by his foster father, guardian ad litem, HRS, and his foster mother. *Id.*

rights are not as extensive as those afforded to adults.⁶² There are occasions when the state must protect children from their naivety and immaturity, and as a result, circumscribe their rights.⁶³ The lower court in *Gregory K.*, however, did not intervene on Gregory's behalf.⁶⁴ The court allowed Gregory, who was not yet a teenager, the freedom to make a very serious decision without any showing that he was cognizant of its profound ramifications.⁶⁵

The relevant inquiry in determining child standing should be whether the state has a duty to intercede and protect children from their inexperience and immaturity. Courts must, pursuant to this duty of *parens patriae*, determine whether children are capable of protecting their own interests before they allow children to make decisions that will impact the rest of their lives.

2. Maturity: The Test to Determine Child Standing

Joseph Goldstein believes that children should have the protection of both their parents and the state until they reach adulthood.⁶⁶ Opponents, in contrast, advocate that children should be

⁶² See, e.g., *New York v. Ferber*, 458 U.S. 747, 761-65 (1982) (state can regulate obscenity with respect to minors to greater extent than if adults involved); *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (delineating and explaining reasons why children not afforded full extent of constitutional rights); *McKeiver v. Pennsylvania*, 403 U.S. 528, 533 (1971) (right to jury trial in juvenile court proceeding not required); *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) ("state may deprive children . . . [right to vote,] deprivations that would be . . . intolerable [to] adults"); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) ("The state's authority over children's activities is broader than over like actions of adults.")

⁶³ See *Baird*, 443 U.S. at 635. The justification for not extending a child's rights to those of an adult is based upon the vulnerability of the infant. *Id.* The Court stated: "[A]lthough children are protected by the same constitutional guarantees [as adults] . . . the state is entitled to adjust its legal system to account for children's vulnerability. . . ." *Id.* The Justices noted that children lack the knowledge and understanding required to make certain complex decisions and therefore merit the protection of the state. *Id.*; *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976). While the Supreme Court granted children the right to give effective consent to terminate a pregnancy, the Court specifically limited its holding to children who were mature enough to understand their decisions. *Id.*; *Brumley*, *supra* note 2, at 339-40. The state often has the authority to infringe upon a child's constitutional rights in order to safeguard the child's interest. *Id.*; William Grady & Terry Wilson, *Kids Find Court, Not Mom, Dad, Have Last Word*, CHI. TRIB., Aug. 2, 1992, at C1. Children do not have the requisite capacity to understand complex situations, such as the termination of parental rights. *Id.* Therefore, the authors conclude that "[i]t would be the worst idea in the world if . . . children [were given] the right to sue." *Id.*; *supra* notes 3-4 and accompanying text (discussing state's duty to protect those unable to protect themselves).

⁶⁴ Order on Standing, *In re Gregory K.*, No. CI92-5127 (Fla. Cir. Ct. July 20, 1992).

⁶⁵ *Id.*

⁶⁶ See JOSEPH GOLDSTEIN, ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD 9-14* (1973) [hereinafter GOLDSTEIN, *BEYOND THE BEST INTERESTS*]. Although children should be afforded respect, they are competent enough to "fend" for themselves. *Id.* Children have not developed the cognitive skills that competent adults possess. *Id.*

presumed able and competent regardless of their age.⁶⁷ The former is a more rational approach as it safeguards the welfare of children. The latter makes the mistake of treating children like adults, regardless of their cognitive ability and experiences, placing children in a vulnerable position. Nevertheless, a standard whereby all children would be prohibited from making their own decisions is overly restrictive. Such a standard infringes upon the privacy of those children who possess sufficient cognitive ability and experience to make informed decisions. Courts must fashion a test to distinguish between children who are able to make such decisions from those who require the state's assistance.

Recent Supreme Court case law specifies groups of children entitled to make informed decisions, free of state intervention.⁶⁸ In *Bellotti v. Baird*,⁶⁹ the Supreme Court held that a statute requiring a minor to obtain parental consent before undergoing an abortion was unconstitutional.⁷⁰ The statute was invalidated because it prevented fully competent children from making serious decisions by themselves.⁷¹ The Court, however, did not invalidate the state's duty to protect the child from her inexperience.⁷² In order to safeguard the interests of the child, the Court held that a child must first demonstrate that she is well informed and sufficiently mature to decide to undergo an abortion.⁷³ Thereafter, the child would be free to make the decision, as would any other competent adult.⁷⁴ A court can also relax its obligation to safeguard a child's welfare if the child meets certain requirements set forth in eman-

⁶⁷ See RICHARD FARSON, *BIRTHRIGHTS* 9 (1974). Children, no matter how young, have the potential to act for themselves. *Id.* "Children, like adults, should have the right to decide matters which affect them most directly." *Id.* at 27. Children should not have to get permission for those activities that adults can do without permission. *Id.*; JOHN HOLT, *ESCAPE FROM CHILDHOOD* 18 (1974). The rights, privileges, duties, and responsibilities of adult citizens should be made available to children of all ages. *Id.*; CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 33 (Patricia A. Vardin & Ilene N. Brody eds., 1979). The presumption that all children are incompetent is unduly restrictive. *Id.* A more appropriate presumption is that all individuals, including children, be presumed competent until proven otherwise. *Id.*

⁶⁸ See *Bellotti v. Baird*, 443 U.S. 622, 647-48 (1979) (statute requiring minor to obtain parental consent for abortion was unwarranted intrusion on child's right to privacy and, therefore, unconstitutional); see also *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976) (granted child right to give effective consent to terminate pregnancy).

⁶⁹ 443 U.S. 622 (1979).

⁷⁰ *Id.* at 651.

⁷¹ *Id.* at 643-44.

⁷² *Id.* at 635.

⁷³ *Id.* at 643.

⁷⁴ *Id.*

cipation statutes.⁷⁵ Under emancipation statutes, children may be relieved of their legal disability if they can demonstrate to the court that state protection is unnecessary.⁷⁶

⁷⁵ See, e.g., CAL. CIV. CODE § 64 (Deering 1990), which provides, in pertinent part:

(a) A minor may petition the superior court of the county in which he or she resides or is temporarily domiciled for a declaration of emancipation. The petition shall be verified and shall set forth with specificity all of the following facts:

(1) That he or she is at least 14 years of age.

(2) That he or she willingly lives separate and apart from his or her parents or legal guardian with the consent or acquiescence of his or her parents or legal guardian.

(3) That he or she is managing his or her own financial affairs; and evidence of this the minor shall complete and attach a declaration of income and expenses as provided in Section 1285.50 of the California Rules of Court.

(4) That the source of his or her income is not derived from any activity declared to be a crime by the laws of the State of California or the laws of the United States.

Id.; CONN. GEN. STAT. ANN. § 46b-150 (West 1993), which reads, in pertinent part:

Any minor who has reached his sixteenth birthday and is residing in this state or any parent or guardian of such minor may petition the superior court for juvenile matters for the district in which either the minor or his parents or guardian resides for a determination that the minor named in the petition be emancipated. The petition shall be verified and shall state plainly:

(1) The facts which bring the minor within the jurisdiction of the court,

(2) the name date of birth, sex and residence of the minor,

(3) the name and residence of his parent, parents or guardian, and

(4) the name of the petitioner and his relationship to the minor. Upon the filing of the petition the court shall cause a summons to be issued to the minor and his parent parents or guardian in the manner provided in section 46b-128.

Id.; N.C. GEN. STAT. §§ 7A-717 (Michie 1992), which reads, in pertinent part:

Any juvenile who is 16 years of age or older and who has resided in the same county in North Carolina or on federal territory within the boundaries of North Carolina for six months next preceding the filing of the petition may petition the court in that county for a judicial decree of emancipation.

Id.; OR. REV. STAT. ANN. § 109.555 (1992), which provides, in relevant part:

(1) A juvenile court upon the written application of a minor who is domiciled within the jurisdiction of such court is authorized to enter a decree of emancipation in the manner provided in OR. REV. STAT. ANN. § 109.565. A decree of emancipation shall serve only to:

(a) Recognize the minor as an adult for the purposes of contracting and conveying establishing a residence suing and being sued and recognize the minor as an adult for purposes of the criminal laws of this state.

(b) Terminate as to the parent and child relationship the provisions of OR. REV. STAT. ANN. § 109.010 until the child reaches the age of majority.

(c) Terminate as to the parent and child relationship the provisions of OR. REV. STAT. ANN. § 109.053, 109.100, 419.513, 419.515 and 419.519.

(2) A decree of emancipation shall not affect any age qualification for purchasing alcoholic liquor the requirements for obtaining a marriage license nor the minor's status under OR § 109.510.

Id.

⁷⁶ See N.C. GEN. STAT. ANN. § 7A-718(6) (Michie 1992). In North Carolina, before the court emancipates the child, the child must show the court how he or she intends to live on his or her own. *Id.*; OR. REV. STAT. ANN. § 109.565(1)(c) (1992). In Oregon, the relevant inquiry is "[w]hether the [child] can demonstrate to the satisfaction of the court that the [child] is sufficiently mature and knowledgeable to manage the minor's affairs without parental assistance." *Id.*; Sanford N. Katz et al., *Emancipating Our Children—Coming of Legal Age in America*, 7 FAM. L.Q. 211, 214 (1973). A reoccurring theme in both common law emancipation and statutory emancipation is that the child be of sufficient maturity and knowledge. *Id.* at 232-38; DAVIS & SCHWARTZ, *supra* note 41, at 39-42. The authors provide

The state's duty, as *parens patriae*, is similarly limited by medical consent statutes.⁷⁷ In both Mississippi and Arkansas, for example, children who can demonstrate sufficient maturity are entitled to make their own decisions regarding their medical treatment.⁷⁸

Courts should apply the standards found in *Bellotti*, the emancipation statutes, and medical consent statutes. Further, courts should be convinced that a child is mature and experienced, and that the implications of a decision to terminate parental rights are fully understood. These suggestions, however, should not be considered all-inclusive in evaluating a child's maturity. A more comprehensive analysis is needed. Such an evaluation should begin with the presumption that all children require the protection of the state. Thereafter, a court should determine the standard of proof the child must meet to establish that the child is of sufficient maturity and experience. Children that are less than six years of age should prove to the court, beyond any reasonable doubt, that they are mature and competent. Between the ages of six and twelve, children should carry this burden by clear and convincing evidence. Once children reach the age of thirteen, they should be required to carry their burden by a preponderance of the evidence.

Once the standard of proof has been established, the court should determine whether the child is of sufficient maturity and understanding by examining the child's: (1) scholastic achievement; (2) intellectual ability; (3) ability to solve both everyday and complex theoretical problems; (4) "street smarts"; (5) behavior under both normal and stressful stimuli; (6) attention span; (7) exposure to the community, *i.e.*, association with groups and organizations; (8) extracurricular pursuits; (9) peers and their age, competency, and maturity; (10) ability to distinguish right from wrong and reality from imagination; (11) role model(s); (12) self-esteem and resistance to peer pressure; (13) psychiatric evalua-

an overview of common law and statutory emancipation. *Id.*

⁷⁷ See, *e.g.*, ARK. CODE ANN. § 20-9-602 (Michie 1991). Before a child is allowed to consent to medical treatment the state requires that they demonstrate that they are either emancipated or of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment or procedures for himself. *Id.*; MISS. CODE ANN. § 41-41-3 (1972) (same).

⁷⁸ See ARK. CODE ANN. § 20-9-602(7) (Michie 1991) ("any unemancipated minor of sufficient intelligence to understand and appreciate the consequences of a proposed surgical or medical treatment or procedures, for himself"); MISS. CODE ANN. § 41-41-3(h) (1991) (same).

tion; (14) recognition and respect for authority; and (15) ability to meaningfully discern between "natural," "adoptive," and "foster" parents. This is not an exhaustive list of factors, rather, it emphasizes the importance of a detailed, in-depth evaluation of a child's maturity. Although the concept that a child must be required to prove maturity to terminate parental rights is not widely accepted in this country, it does find support in another common-law jurisdiction.⁷⁹ A determination of a child's maturity must be made before children are permitted to terminate the rights of their natural parents.

II. DETERMINING THE BEST INTERESTS OF THE CHILD: THE FOSTER PARENTS' INFLUENCE

As a general rule, an important factor in parental termination proceedings is whether such termination is in the best interests of the child.⁸⁰ A natural parent's rights cannot be terminated, how-

⁷⁹ See Jan Colley, "Divorce" Teenager Made Word of Court, Nov. 6, 1992, available in LEXIS, Nexis Library, News File. A fourteen-year-old, pursuant to the 1989 Children Act, demonstrated that he was mature enough to understand the ramifications of his decision and was entitled to initiate parental termination proceedings. *Id.*; Gavin Cordon, *How 11-Year-Old "Divorced" Her Parents*, Nov. 11, 1992, available in LEXIS, Nexis Library, News File. In England, minors are entitled to seek "divorce" from their parents pursuant to the 1989 Children Act, provided that the court is satisfied that the child is of "sufficient age and understanding." *Id.*

⁸⁰ See *D.M. v. State*, 515 P.2d 1234, 1237 (Alaska 1973) (best interests constituted relevant factor in parental termination proceeding); see also *In re K.S.*, 515 P.2d 130, 132 (Colo. 1973) (paramount consideration is child's best interests); *In re A.B.E.*, 564 A.2d 751, 754 (D.C. 1989) ("legal touchstone" in any parental rights termination proceeding is best interests of child, and this interest is "controlling"); *Elrod v. Hall County Dep't of Family & Children Serv.*, 220 S.E.2d 726, 728 (Ga. 1975) (child's welfare is paramount); *In re Ramelow*, 121 N.E.2d 41, 44 (Ill. 1954) (primary interest is child's welfare); *In re Wardle*, 207 N.W.2d 554, 556 (Iowa 1973) (primary consideration is welfare and best interests of child); *Stubbs v. Hammond*, 135 N.W.2d 540, 543 (Iowa 1965) (primary concern is welfare of child in custody proceedings); *In re D.O.*, 806 S.W.2d 162, 166 (Mo. 1991) (primary concern of court in parental termination hearing is best interests of child); *In re Vikse*, 413 P.2d 876, 878 (Mont. 1966) (court must be concerned with child's best interests); *Sernaker v. Ehrlich*, 468 P.2d 5, 6 (Nev. 1970) (primary consideration and dominant purpose is child's best interest); *In re Montgomery*, 316 S.E.2d 246, 251 (N.C. 1984) (child's welfare or best interests is paramount); *Wilson v. Wilson*, 153 S.E.2d 349, 351 (N.C. 1967) (best interests or child's welfare is paramount consideration); *In re Dake*, 180 N.E.2d 646, 649 (Ohio 1961) (primary consideration is child's welfare); *In re Vilas*, 475 P.2d 615, 617 (Okla. 1970) (judge was guided by child's best interests "in respect to its temporal and its mental and moral welfare"); *State ex rel. Juvenile Dep't v. Zinzer*, 533 P.2d 355, 357 (Or. 1975) (primary consideration is best interests of children); *State ex rel. Juvenile Dep't v. Wade*, 527 P.2d 753, 761 (Or. 1974) (same); *State ex rel. Juvenile Dep't v. Patton*, 485 P.2d 653, 654 (Or. 1971) (same); *In re Sego*, 513 P.2d 831, 833 (Wash. 1973) (courts attempt to protect rights of parents and children, giving primary consideration to child's welfare); *State ex rel. Lewis v. Lutheran Social Services*, 227 N.W.2d 643, 647 (Wisc. 1975) (paramount consideration is child's best interests); see also GOLDSTEIN, *BEYOND THE BEST INTERESTS*, *supra* note 66, at 7 (law must treat child's interests as paramount, which is "in society's best inter-

ever, simply because such an action would be in the child's best interests.⁸¹ Rather, termination is conditioned upon a finding of abandonment, neglect, or abuse.⁸²

Generally, the best interests standard is most relevant in cases involving adoption, foster care, and divorce custody.⁸³ Determining a child's best interests involves consideration of the views of the child, the parents, the state, as well as even the child's attorney.⁸⁴ Some states utilize the best interests standard in termination of parental rights statutes,⁸⁵ while others leave this decision primarily to the discretion of the courts.⁸⁶

ests"); Fallek, *supra* note 40, at 725 (from psychological perspective, there is little dispute that child's best interests are "paramount" in decisions affecting circumstances in which children will live); Daniel W. Clark, Note, *Best Interests: The Courts' Polar Star Illuminates Foster Parents' Concerns*, 65 N.C. L. REV. 1317, 1328 (1986) (North Carolina parental termination statute's basic premise regards child's best interests as "pivotal factor" in deciding termination proceedings).

⁸¹ See *In re Massey*, 341 N.E.2d 405, 406 (Ill. 1976) (parents' unfitness or consent warrants termination of parental rights); see also *In re Wardle*, 207 N.W.2d 554, 556, 561 (Iowa 1973) (adjudication of neglect or dependency can lead to parental termination); *S.K.L. v. Smith*, 480 S.W.2d 119, 123 (Mo. 1972) (specific conditions must exist before terminating parental rights); *Berrien v. Greene County Dep't of Pub. Welfare*, 217 S.E.2d 854, 855 (Va. 1975) (best interests did not justify parental termination without demonstrating mother's unfitness).

⁸² See *In re C.O.*, 541 P.2d 330, 331 (Colo. 1975) (neglect can lead to parental termination); see also *In re Griffin*, 210 N.W.2d 665, 667 (Iowa 1973) (adjudication of neglect can result in parental rights' termination); *In re Hartman*, 199 N.W.2d 26, 28 (Neb. 1972) (neglect of children by natural mother resulted in termination of her parental rights); *In re R.W.B.*, 241 N.W.2d 546, 548-49 (N.D. 1976) (minor child subject to neglect and abuse lead to termination of parental rights); *In re H.*, 206 N.W.2d 871, 872 (N.D. 1973) (court terminated natural mother's rights because it found child to be "deprived"); *Magallon v. State*, 523 S.W.2d 477, 479 (Tex. 1975) (before parental termination, court must find conduct to cause present danger to physical or emotional well-being of child).

⁸³ See *Brumley*, *supra* note 2, at 354 (best interests is "governing standard with regard to children in family law cases involving adoption, foster care, and custody after divorce").

⁸⁴ See *Christopherson*, *supra* note 40, at 1284 (best interests standard serves competing interests of parent, child, and state); see also *Hayes & Morse*, *supra* note 39, at 440 (natural parents, child, and state are involved in termination and adoption proceedings).

⁸⁵ See, e.g., COLO. REV. STAT. § 19-4-102 (1986) (if court believes after hearing that best interests of parties, including child, does not require parental termination, then court shall issue order dismissing the petition); CONN. GEN. STAT. ANN. § 17-a-112 (West 1992) (requires showing of clear and convincing evidence that termination is in child's best interests); DEL. CODE ANN. tit. 13, § 1108 (1981) (court shall terminate parental rights if it finds it to be in best interests of child); HAW. REV. STAT. § 571-63 (1993) (termination of parental rights must be necessary for "protection and preservation" of the best interests of child); IDAHO CODE § 16-2005(e) (Supp. 1992) (if termination is in best interests of child, court may grant order terminating parental rights); IND. CODE ANN. § 31-6-5-4 (West Supp. 1992) (termination proceeding requires analysis of best interests of child); WIS. STAT. ANN. §§ 48.415, 48.426, 48.427 (West 1992) (best interests standard and factors to be weighed).

⁸⁶ See, e.g., *In re R.H.N.*, 710 P.2d 482, 485 (Colo. 1985) (best interests of child should be considered with respect to termination of natural parents' rights); *Daber v. Division of Child Protective Servs.*, 470 A.2d 723, 726 (Del. 1983) (court may terminate parental rights if facts justifying termination of parental rights exist and termination is in child's best interests); *Burk v. Department of Health and Rehab. Serv.*, 476 So. 2d 1275, 1277 (Fla. 1985) (parents' rights to custody of their children may only be taken away where welfare of

A. *Best Interests Pursuant to State Statutes*

Few parental termination statutes define what constitutes the best interests of the child.⁸⁷ Several statutes, however, provide that several factors be considered in ascertaining a child's best interests: (1) the child's physical and emotional needs, as well as the need for a stable family unit; (2) the child's attachment to the natural or foster parents; (3) the length of the child's separation from the natural parents; and (4) the child's ability to become a member of the substitute home.⁸⁸ Other statutes, conversely, do not enumerate such factors, leaving it to the courts to determine the child's best interests in an *ad hoc* manner.⁸⁹

B. *The Policy Underlying the Determination of Best Interests*

The purpose of the best interests standard is to promote and protect the welfare of the child.⁹⁰ It is well established that children have a definite interest in securing a stable home.⁹¹ Further, a child's mental and physical well-being is substantially depen-

best interests of child requires termination of parental rights); *J.K.C. v. Fountain County Dep't of Pub. Welfare*, 470 N.E.2d 88, 92-93 (Ind. 1984) (must show that termination is in child's best interests); *In re J.J.B.*, 390 N.W.2d 274, 280 (Minn. 1986) (child's best interests determination lacked specific guidelines); Andrea Charlow, *Awarding Custody: The Best Interest of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 268 (1986) (some states leave best interests determination primarily to court's discretion).

⁸⁷ See Christopherson, *supra* note 40, at 1273 (few states which have adopted best interests approach in parental termination statutes offer definition of "best interests").

⁸⁸ See, e.g., FLA. STAT. ANN. § 39.467(2)(f) (West 1992) (court must consider (1) child's ability to form significant relationship with parental substitute, and (2) likelihood that child will enter into more stable and permanent relationship as result of parental termination); GA. CODE ANN. § 15-11-81(a) (1992) (court shall consider child's need for secure and stable home); ME. REV. STAT. ANN. tit. 22, § 4055(2) (1993) (court must consider: (1) child's attachment to relevant persons; (2) length of attachment and separation from relevant persons; and (3) child's ability to integrate into substitute placement or back into parents' home, when deciding whether to terminate parental rights); WIS. STAT. ANN. § 48.426(3)(f) (1992) (court shall consider whether child will be entering into more permanent and stable family relationship if parental rights are terminated).

⁸⁹ See, e.g., *In re Three Minor Children*, 406 A.2d 14, 19 (Del. 1979) ("best interests" standard is undefined in termination statute, therefore, flexibility in analyzing facts in particular context must be applied); see also Clark, *supra* note 80, at 1328 (regardless of statutory language, best interests standard remains highly subjective, with court discretion playing strategic role).

⁹⁰ See Christopherson, *supra* note 40, at 1286 (consideration of child's best interests furthered Juvenile Court Act's purpose of protecting children's welfare). *But see id.* at 1284 (best interests standard also protects the natural parents' interests, since state must show parental unfitness before it can institute legal proceedings interfering with family matters).

⁹¹ See Bellah, *supra* note 3, at 488 (legislature has noticed that children have a "strong interest in having a secure and stable home"); see also JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* 11 (1979) [hereinafter GOLDSTEIN, *BEFORE THE BEST INTERESTS*] (every child entitled to "permanent place in a family of his own").

dent upon the continuation of stable personal relationships.⁹² A permanent home is vital for a child to develop a healthy family relationship and to avoid tension generated by the uncertainty of care and custodial arrangements.⁹³

When a child experiences the death of a parent, divorce, foster care, or adoption, continuity and stability are interrupted.⁹⁴ There is a strong interest in terminating parental rights if a physically and emotionally secure substitute home is available, and the natural parents have been unable to provide a nurturing environment for the child.⁹⁵ Accordingly, the best interests goal of state intervention⁹⁶ involves protecting both a child's physical and psychological well-being.⁹⁷

C. Foster Parents and the Best Interests of the Child

The term "foster parent" is defined as an adult who is not a relative of the natural parents, and who is granted physical custody of a child, either by the child's natural parents or by a child welfare agency.⁹⁸ Parental responsibility is divided among the agency, the foster parents, and the natural parents.⁹⁹ Typically, the agency retains legal custody over the child, the foster parents are responsible for the child's day-to-day supervision, and the natural par-

⁹² See Bartlett, *supra* note 39, at 902 ("child's healthy growth depends in large part upon the continuity of his personal relationships"); see also GOLDSTEIN, BEFORE THE BEST INTERESTS, *supra* note 66, at 8-9 ("ongoing interactions between parents and children become for each child the starting point for an all-important line of development that leads toward adult functioning").

⁹³ See, e.g., *In re David B.*, 154 Cal. Rptr. 63, 71 (Cal. Dist. Ct. App. 1979) (longer child is without permanence, greater threat to child's physical and emotional development); see Bellah, *supra* note 3, at 488-89 (stressing importance of permanence in child's upbringing); see also Bartlett, *supra* note 39, at 904 (permanence is achieved when child feels a tie to a family; absence of sense of permanence may cause child to have difficulty learning self-control and absorbing a value system).

⁹⁴ See Bartlett, *supra* note 39, at 902 ("divorce, death of a parent, foster care, or adoption intrude on a child's family life").

⁹⁵ See Bellah, *supra* note 3, at 489 (if "physically and emotionally stable substitute home is available," child has interest in terminating parental rights).

⁹⁶ See *supra* notes 3-4 and accompanying text (discussing circumstances of state intervention in state's role as *parens patriae*).

⁹⁷ See GOLDSTEIN, BEYOND THE BEST INTERESTS, *supra* note 66, at 4 (best interests standard concerns promotion of child's emotional and physical health).

⁹⁸ *Id.* at 23 (explaining foster care system).

⁹⁹ See *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 826-27 n.16 (1977) (foster child's "loyalties, emotional involvements, and responsibilities" are divided among three categories of adult authority figures); see also Bartlett, *supra* note 39, at 939-40 (describing foster care system organization). See generally Michael Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 645 (1976) (describing existing foster care system).

ents reserve authority for certain decisions, such as consent to medical treatment for the child.¹⁰⁰ Because the state retains custody over the child, foster parents experience difficulty in securing legal custody.¹⁰¹

Foster parents, however, do possess the requisite standing to assert the claim that they have a constitutionally protected liberty interest in the integrity of their family unit.¹⁰² Further, foster parents have standing to intervene in independent proceedings to terminate natural parents' rights.¹⁰³

Foster parents often seek the termination of natural parental rights upon request by the agency to surrender their foster child.¹⁰⁴ Desire for such termination is typically triggered by the

¹⁰⁰ See *Smith*, 431 U.S. at 827-28 n.20. Generally, children are placed in foster care either by voluntary placement or by court order. *Id.* at 824. Voluntary placement involves the natural parent's signing a written agreement transferring the "child's care and custody to an authorized child welfare agency." *Id.* at 816. On the other hand, children may enter foster care via court order if abused or neglected by their natural parents. *Id.* at 828. In this situation, the consequences of foster care placement do not significantly differ from voluntary placement, except that the parent is not entitled to the child's return upon demand. *Id.*

¹⁰¹ See *Bartlett*, *supra* note 39, at 940 (because state welfare agency has legal custody over child, both foster and legal parents may experience problems securing or regaining legal custody).

¹⁰² See *Smith*, 431 U.S. at 842 n.45. The child's foster parents challenged New York procedures by which foster parents could contest removal of their foster children. *Id.* at 819-20. The foster parents claimed that these procedures infringed upon the foster family's "liberty interest" under the Fourteenth Amendment in the integrity of their family unit. *Id.* at 839. The Supreme Court held that foster parents had standing based on alleged injury to the child or to the foster family. *Id.* at 841-42 n.44 & 45.

¹⁰³ See CONN. GEN. STAT. § 46b-129(i) (1986) (foster parent shall have standing in matters concerning placement or revocation of commitment of foster child living with foster parent); N.J. REV. STAT. § 30:4C-61(c)(5) (Supp. 1992) (notice of hearing shall be provided to temporary caretaker); see also *In re Diana P.*, 424 A.2d 178, 180 (N.H. 1980) (foster parent had standing to petition for parental termination because of lengthy role in *loco parentis* to child); *In re D.Y.F.S. v. D.T.*, 410 A.2d 79, 82 (N.J. 1979) (foster parents entitled to intervention to present testimony in parental termination proceedings); *Harris County Child Welfare Unit v. Caloudas*, 590 S.W.2d 596, 598-99 (Tex. 1979) (foster parent had standing to bring adoption petition concerning child already in their custody). *But see In re Juvenile Appeal*, 449 A.2d 165, 166 (Conn. 1982) (foster parents did not have standing in parental termination proceeding); *Mendez v. Brewer*, 626 S.W.2d 498, 499-500 (Tex. 1982). The foster parents lacked standing to join as a party to a termination proceeding where the sole interest which was alleged by the foster parents in intervening was their wish to adopt the child, if the parent-child relationship with the natural parents was terminated. *Id.* Though foster parents often provide long-term family care for their foster child, they "routinely fare worse in custody disputes with parents than do other third party caretakers." *Id.* *Bartlett*, *supra* note 39, at 940. Foster parents are typically "denied standing to object" when the state requests the foster parents to surrender their foster child. *Id.* Further, even if standing is granted, foster parents are unlikely to succeed, especially if the child may be reunited with the natural family. *Id.*

¹⁰⁴ See Michael G. Walsh, *Standing of Foster Parent to Seek Termination of Rights of Foster Child's Natural Parents*, 21 A.L.R. 535, 540 (4th ed. 1983). The agency may ask the foster parents to surrender the child in order to "place the child in another foster home so as to prevent the strengthening of the bond between the foster child and the foster parents, to make the child available for adoption by third persons, or to return the child to the home

development of a strong bond between the foster child and the foster parent.¹⁰⁵ As Justice William Brennan observed in *Smith v. Organization of Foster Families for Equality & Reform*:¹⁰⁶ "It is not surprising that many children, particularly those that enter foster care at a very early age and have little or no contact with their natural parents during extended stays in foster care, often develop deep emotional ties with their foster parents."¹⁰⁷

Foster parents face various difficulties and frustrations in their relationship with their foster child.¹⁰⁸ They are required to "assume the role of substitute parents, performing all the tasks of natural parents, yet [are] expected not to form a deep emotional attachment" to the child.¹⁰⁹ While a child's emotional bond with his foster parents should be a factor in determining a child's best interests, it is a subject of recent controversy in the legal community.

of its rehabilitated natural parents." *Id.*

¹⁰⁵ See Bellah, *supra* note 3, at 486 (foster parents may become their foster child's "de facto" parents through development of a strong psychological bond); see also GOLDSTEIN, *BEYOND THE BEST INTERESTS*, *supra* note 66, at 17-20, 98 (psychological parent is defined as "one who, on a continuing day-to-day basis, through interaction, companionship, interplay and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs").

¹⁰⁶ 431 U.S. 816 (1976).

¹⁰⁷ *Id.* at 836. While foster parents may have a constitutionally protected liberty interest in the integrity of the foster family unit, stemming from the psychological relationship with the child, the pre-removal procedures adopted by New York were constitutionally sufficient. *Id.* at 836. Federal courts, however, continue to hold that foster parents do not have a liberty interest in their relationship with a foster child, and therefore, are not entitled to due process protections. *Id.*; see also *Rivera v. Marcus*, 696 F.2d 1016, 1019 (2d Cir. 1982). The foster parent's due process rights had not been violated when her foster children were removed from her care without a hearing. *Id.*; *Kyees v. County Dep't of Pub. Welfare*, 600 F.2d 693, 698 (7th Cir. 1979). Foster parents have a limited constitutionally protected liberty interest in their relationship with their foster children such that due process is required to be fulfilled. *Id.*; *Drummond v. Fulton County Dep't of Family and Children's Serv.*, 563 F.2d 1200, 1208 (5th Cir. 1977). The relationship between a foster parent and his foster child was not within a constitutionally protected familial right to privacy as protected under Fourteenth Amendment. *Id.*; *Crim v. Harrison*, 552 F. Supp. 37, 41 (N.D. Miss. 1982). Foster parents had "no liberty or property interests entitling them to due process protection." *Id.*; *Sherrard v. Owens*, 484 F. Supp. 728, 741 (W.D. Mich. 1980). Foster parents "had no reasonable expectation . . . that liberty right had developed . . . which would be protected from state intervention." *Id.*

¹⁰⁸ See *HOROWITZ & HUNTER supra* note 33, at 18 (foster parents face "variety of dilemmas and frustrations in their relationship with their foster children").

¹⁰⁹ *Id.* This expectation holds true even if foster parents have cared for a particular foster child for many years. *Id.* Further, foster parents become frustrated because they lack "full legal control and responsibility" over their foster children, and have been prohibited from increasing such control. *Id.*; GOLDSTEIN, *BEYOND THE BEST INTERESTS*, *supra* note 66, at 19, 40-42. Foster parents may be characterized as "psychological" parents. *Id.*; see also STEIN, *supra* note 1, at 76. Traditionally, "foster parents were 'admonished' not to form emotional ties to [their foster] children." *Id.*

1. *Gregory K.*

In *Gregory K.*, Judge Kirk concluded that the termination of Ms. Kingsley's parental rights was in the "manifest best interests of the child," and that "this was established by clear and convincing evidence."¹¹⁰ Judge Kirk applied section 39.467(2) of the Florida Statute on Termination of Parental Rights to arrive at this determination.¹¹¹ This section explicitly takes into consideration the relationship a child has formed with a foster parent in order to determine the child's best interests.¹¹²

Specifically, the statute considers the following: (1) the child's capability to develop a significant relationship with a parental substitute and the probability that the child will enter into a more stable and permanent family resulting from parental termination; (2) the length of time that the child has lived in a stable, healthy environment, and the child's desire to continue living in this environment; and (3) the depth of the relationship between the child and the present parental substitute.¹¹³

¹¹⁰ *In re Gregory K.*, No. JU90-5245, at 9 (Fla. Cir. Ct. Oct. 13, 1992).

¹¹¹ *Id.* (citing Proceedings Relating to Juveniles, Termination of Parental Rights § 39.467 (1992)).

¹¹² *Id.*

¹¹³ *Id.* The statute reads, in pertinent part:

(1) In a hearing on a petition for termination of parental rights, the court shall consider the grounds for termination and the manifest best interests of the child. The need for termination of parental rights shall be established by clear and convincing evidence.

(2) For the purpose of determining the manifest best interests of the child, the court shall consider and evaluate all relevant factors, including, but not limited to:

(a) The ability and disposition of the parent or parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under state law in lieu of medical care, or other material needs.

(b) The capacity of the parent or parents to care for the child to the extent that the child's health and well-being will not be endangered upon the child's return home.

(c) The present mental and physical health needs of the child and the future needs of the child to the extent that such future needs can be ascertained based on the present condition of the child.

(d) The love, affection, and other emotional ties existing between the child and the child's present parent or parents, siblings, and other relatives and the degree of harm to the child arising from the termination of parental rights and duties.

(e) The likelihood of an older child remaining in long-term foster care upon termination of parental rights due to emotional or behavioral problems or any special needs of the child.

(f) The child's ability to form a significant relationship with a parental substitute and the likelihood that the child will enter into a more stable and permanent family relationship as a result of permanent termination of parental rights and duties.

(g) The length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(h) The depth of the relationship existing between the child and the present custodian.

The *Gregory K.* court also considered: (1) the inability of Gregory's natural mother to provide for his needs; (2) the probability that Gregory's health and well-being would be endangered if he returned to his mother; (3) Gregory's special developmental needs, and how they were best met with his foster parents, the Russ family; (4) the lack of any bond between Gregory, his natural parents, and natural siblings; (5) the length of time Gregory was in foster care (approximately thirty-four of the last thirty-six months of his life); (6) the availability of permanent family placement with the Russ family; (7) the length and stability of Gregory's placement with the Russ family (approximately eleven months), and the significant bond which had formed between Gregory and the Russ family; (8) Gregory's preference to be adopted by the Russ family, which he repeatedly expressed, and Gregory's maturity as a twelve-year-old, allowed him sufficient understanding and experience to express a reasonable preference; (9) the guardian ad litem's recommendation for the termination of Gregory's natural parents' rights, and the determination that it was in Gregory's best interests to be placed in the care of the Russ family; and (10) the unavailability of a suitable permanent custody arrangement with a relative of Gregory's mother, because of the lack of any connection between Gregory and his natural family.¹¹⁴

Indeed, the *Gregory K.* court, as well as the Florida legislature, valued the role of the foster family in determining a child's best interests.¹¹⁵ Consideration of the foster-family's influence should

(i) The reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

(j) The recommendations for the child provided by the child's guardian ad litem or legal representative.

(k) Any suitable permanent custody arrangement with a relative of the child.

Id.

¹¹⁴ *Gregory K.* (No. JU90-5245) at 9-10.

¹¹⁵ *Id.*; see also D.C. CODE ANN. § 16-2353 (1989 & Supp. 1992). The District of Columbia's parental termination statute provides, in pertinent part:

(b) In determining whether it is in the child's best interests that the parent and child relationship be terminated, a judge shall consider each of the following factors:

(1) the child's need for continuity of care and caretakers and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages;

(2) the physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child;

(3) the quality of the interaction and interrelationship of the child with his or her parent, siblings, relative and/or caretakers, including the foster parent; . . .

(4) to the extent feasible, the child's opinion of his or her own best interests in the

be a vital factor in the best interests analysis. This approach recognizes that there are numerous situations in which a foster parents' rights must be taken into account and, in certain instances, circumvent the natural parents' rights. Further, courts must acknowledge the foster parent-foster child relationship if the severance of a strong bond would cause the child substantial psychological or emotional harm.

2. New York's Approach to the Foster Parents' Influence

Contrary to the *Gregory K.* decision, the New York Court of Appeals announced in *In re Michael B.*¹¹⁶ that the fitness of the biological parents must be the primary factor in determining a child's best interests.¹¹⁷ The New York Court of Appeals, therefore, severely restricted the foster-parents' influence.¹¹⁸ *Michael B.* involved an appeal from a custody determination and centered upon the meaning of the statutory term "best interests of the child."¹¹⁹ The court, in assessing what constituted the "best interests of the child," concentrated on what weight should be given to the foster

matter; and

(5) evidence that drug-related activity continues to exist in a child's home environment after intervention and services have been provided pursuant to section 106(a) of the Prevention of Child Abuse and Neglect Act of 1977, effective September 23, 1977. *Id.*; WIS. STAT. ANN. § 48.426 (West 1992). The Wisconsin statute provides, in pertinent part:

(2) Standard. The best interests of the child shall be the prevailing factor considered by the court in determining the disposition of all proceedings under this subchapter.

(3) Factors. In considering the best interests of the child under this section the court shall consider but not be limited to the following:

- (a) The likelihood of the child's adoption after termination.
- (b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.
- (c) Whether the child has substantial relationships with the parent of other family members, and whether it would be harmful to the child to sever these relationships.
- (d) The wishes of the child.
- (e) The duration of the separation of the parent from the child.
- (f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

Id.

¹¹⁶ 80 N.Y.2d 299, 604 N.E.2d 122, 590 N.Y.S.2d 60 (1992).

¹¹⁷ *Id.* at 309, 604 N.E.2d at 127, 590 N.Y.S.2d at 65 ("a biological parent has a right to the care and custody of a child, superior to that of others, unless the parent has abandoned that right or is proven unfit to assume the duties and privileges of parenthood").

¹¹⁸ *Id.*, 604 N.E.2d at 128, 590 N.Y.S.2d at 66 ("because of the statutory emphasis on the biological family as best serving a child's long-range needs, the legal rights of foster parents are necessarily limited").

¹¹⁹ *Id.* at 303, 604 N.E.2d at 124, 590 N.Y.S.2d at 62.

child's relationship with his foster family.¹²⁰

In *Michael B.*, the child was voluntarily placed in foster care by his mother.¹²¹ Michael, then three months old, was placed in the care of a foster family, where he remained for more than five years.¹²² Approximately two years after Michael's placement with his foster family, Catholic Child Care Society (the "Agency") sought to terminate his biological parents' rights.¹²³ The Agency alleged that for more than a year following Michael's placement in foster care, Michael's parents had failed to maintain contact with him and plan for his future, even though they were financially capable of doing so.¹²⁴ Subsequently, Michael's father, a long-time alcohol and substance abuser, sought custody of his son.¹²⁵

Custody of the child was conditioned on several factors. Specifically, Michael's father was mandated to: (1) enroll and cooperate in a parental skills program; (2) periodically submit to drug testing; (3) obtain suitable housing; and (4) submit a plan for his children's care during the work day.¹²⁶ At the end of this conditional period, Michael's father was still unemployed and had not submitted to drug testing.¹²⁷ The family court, however, was satisfied that "there seemed to be substantial compliance" with the conditions.¹²⁸ The legal guardian,¹²⁹ on the other hand, presented a re-

¹²⁰ *Id.*, 604 N.E.2d at 124, 590 N.Y.S.2d at 62. "The biological father on one side (appellant) and respondent foster parents (joined by respondent law guardian) on the other, each contend that a custody determination in their favor is in the best interest of the child, as that term is used in Social Services Law § 392(6), the statute governing dispositions with respect to children in foster care." *Id.* at 303-04, 604 N.E.2d at 124, 590 N.Y.S.2d 62.

¹²¹ *Michael B.*, 80 N.Y.2d at 304, 604 N.E.2d at 124, 590 N.Y.S.2d at 62. Michael's mother was unmarried at the time of his birth and listed no father on his birth certificate. *Id.*, 604 N.E.2d at 124, 590 N.Y.S.2d at 62. At that time, Michael's four siblings were also in foster care, residing in different homes. *Id.*

¹²² *Id.*, 604 N.E.2d at 125, 590 N.Y.S.2d at 63.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* Michael's mother never appeared in the proceeding and a finding of permanent neglect as to her was made when the child turned two years old. *Id.* The mother died shortly thereafter. *Id.*

¹²⁶ *Michael B.*, 80 N.Y.2d at 304-05, 604 N.E.2d at 125, 590 N.Y.S.2d at 63.

¹²⁷ *Id.* at 305, 604 N.E.2d at 125, 590 N.Y.S.2d at 63.

¹²⁸ *Id.*

¹²⁹ See BLACK'S LAW DICTIONARY 706 (6th ed. 1990). "A guardian ad litem is a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation." *Id.*; see also Brian G. Frase, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. L. REV. 16, 29 (1976). The guardian ad litem is legally obligated to act in the child's best interests. *Id.*; Tara Lea Muhlhauser, *From 'Best' to 'Better': The Interests of Children and the Role of a Guardian Ad Litem*, 66 N.D. L. REV. 633, 641-42 (1990). The role of a guardian ad litem is to "provide information to the court, explore options or alternatives, and to negotiate with and among the systems or institutions having an interest in the

port indicating that Michael might suffer severe psychological damage if removed from his foster home.¹³⁰ The guardian, therefore, argued for a best interests hearing based on Michael's strong relationship with his foster family and the lack of any relationship with his natural father.¹³¹

The Court of Appeals held that returning a child to his biological family was the primary goal of the foster care system.¹³² The court addressed the legal standards for determining a child's best interests¹³³ and ruled that the fitness of the biological parents must be the chief factor in determining the child's best interests.¹³⁴ Specifically, the court maintained: "A biological parent has a right to the care and custody of a child, superior to that of others, unless the parent has abandoned that right or is proven unfit to assume the duties and privileges of parenthood, even though the State perhaps could find 'better parents.'"¹³⁵ Further, the court reasoned that focusing on Michael's bond with his foster family would "undermine the very objective of foster care."¹³⁶ The

case." *Id.*

¹³⁰ *Michael B.*, 80 N.Y.2d at 305, 604 N.E.2d at 125, 590 N.Y.S.2d at 63.

¹³¹ *Id.* The family court questioned its authority to hold such a hearing, but stayed the order directing Michael's release to his natural father pending its determination. *Id.* Michael's siblings, then approximately twelve, eight, seven, and six years old, were discharged to the father and Michael's litigation continued. *Id.* Subsequently, the family court ordered Michael's release to his natural father, concluding that Michael had been "wrongfully held in foster care." *Id.* at 305-06, 604 N.E.2d at 126, 590 N.Y.S.2d at 64.

¹³² *Id.* at 309, 604 N.E.2d at 127, 590 N.Y.S.2d at 65. Subsequent to the Court of Appeals decision, the family court, on the issue of the father's fitness, concluded that he was "fit, available and capable of adequately providing for the health, safety and welfare of the subject child" and that it was "in the child's best interest to be returned to his father." *Id.* at 306, 604 N.E.2d at 126, 590 N.Y.S.2d at 64. The Appellate Division reversed the family court's order and awarded custody to the foster parents pursuant to Social Services Law § 392(6)(b). *Id.* at 306-07, 604 N.E.2d at 126, 590 N.Y.S.2d at 64. The court looked to Michael's lengthy stay and psychological relationship with his foster family, which it felt gave rise to extraordinary circumstances meriting an award of custody to the foster parents. *Id.* Further, the appellate court concluded that the evidence "overwhelmingly demonstrate[d] that Michael's foster parents [were] better able than his natural father to provide for his physical, emotional, and intellectual needs." *Id.* at 307, 604 N.E.2d at 126, 590 N.Y.S.2d at 64.

¹³³ *Id.* at 312-15, 604 N.E.2d at 130-32, 590 N.Y.S.2d at 68-70.

¹³⁴ *Id.* at 314, 604 N.E.2d at 131, 590 N.Y.S.2d at 69. The court posited that a "child is not the parent's property, but neither is a child the property of the State." *Id.* at 309, 604 N.E.2d at 127, 590 N.Y.S.2d at 65. Further, the court reasoned that by "[l]ooking to [both] the child's rights [and] the parents' rights to bring up their own children, the Legislature has . . . declared that a child's need to grow up with a 'normal family life in a permanent home' is ordinarily best met in the child's 'natural home.'" *Id.*, 604 N.E.2d at 127, 590 N.Y.S.2d at 65 (citing N.Y. Soc. Serv. Law § 384-b[1][a][i], [ii]).

¹³⁵ *Michael B.*, 80 N.Y.2d at 309, 604 N.E.2d at 127, 590 N.Y.S.2d at 65.

¹³⁶ *Id.* at 313, 604 N.E.2d at 130, 590 N.Y.S.2d at 68. The court reasoned that "to use the period during which a child lives with a foster family, and emotional ties that naturally eventuate, as a ground for comparing the biological parent with the foster parent" acts

court, however, could not make a final ruling on Michael's custody since during the pendency of the appeal, Michael's father admitted to neglecting the children in his custody.¹³⁷

Concurring with the majority opinion in result only, Judge Joseph W. Bellacosa differed with the court's analysis of the best interests standard.¹³⁸ Judge Bellacosa argued that courts, in their fulfillment of the state's role as *parens patriae*, should be afforded greater flexibility in determining a child's best interests.¹³⁹ Judge Bellacosa endorsed the Appellate Division's focus on Michael's strong relationship with his foster family.¹⁴⁰ Judge Bellacosa observed that the "nuances, complexity and variations of human situations make the development and application of the . . . best interests of the child exceedingly difficult," and thus, a broader view of the best interests determination affords a more realistic consideration of these human conditions.¹⁴¹ This approach represents a more comprehensive standard in the determination of a child's best interests and also properly values any potentially strong bond that a child may establish with the foster family.

It is undisputed that extremely close emotional bonds may de-

against the goal of the foster care system "as a resource for parents in temporary crisis, who are then at risk of losing their children once a bond arises with the foster families." *Id.*

¹³⁷ *Id.* at 317, 604 N.E.2d at 133, 590 N.Y.S.2d at 71. The petition alleged that Michael's father was an alcoholic, used controlled substances, and abused the children. *Id.*, 604 N.E.2d at 133, 590 N.Y.S.2d at 71. The court ordered a new hearing in family court to determine whether Michael's father was a fit parent. *Id.* at 318, 604 N.E.2d at 132-33, 590 N.Y.S.2d at 71-72.

¹³⁸ *Id.* at 318, 604 N.E.2d at 134, 590 N.Y.S.2d at 72. Judge Bellacosa agreed with Judge Judith Kaye's opinion that Soc. SERV. LAW § 392(6)(b) "cannot be used to award permanent custody to foster parents within that statute's intended operation and integrated structure." *Id.*

¹³⁹ *Michael B.*, 80 N.Y.2d at 319, 604 N.E.2d at 134, 590 N.Y.S.2d at 72.

¹⁴⁰ *Id.* at 320-21, 604 N.E.2d at 135, 590 N.Y.S.2d at 73. The Appellate Division concluded:

In light of the lengthy period of time during which Michael resided with and psychologically bonded to his foster parents and given the potential for emotional as well as physical harm to Michael should permanent custody be awarded to his natural father, we find that . . . the best interests of this child will be served by allowing him to return to his foster parents. In view of the testimony presented during the best interests hearing, this court concludes that Michael's natural father is incapable of giving him the emotional support so vital to his well-being. The testimony presented . . . indicated that an emotional void still existed between Michael and his father despite the eight to nine months during which they resided together prior to the best interests hearing and that this void showed no signs of being abridged.

Id.

¹⁴¹ *Id.* at 320, 609 N.E.2d at 134, 590 N.Y.S.2d at 72. Judge Bellacosa argued that his approach "better . . . promote[d] the best interests of this youngster with reasonable finality and the best interests of all others affected by the operation of these rules." *Id.*

velop between a foster parent and a foster child.¹⁴² These bonds usually form when a child has lived with a foster family continuously over a period of time, and where contact with the natural parents has been minimal or nonexistent.¹⁴³ This recognition is predicated upon the principle that "every child requires continuity of care, an unbroken relationship with at least one adult who is and wants to be directly responsible for his daily needs."¹⁴⁴ Notwithstanding the protection traditionally accorded to relationships between children and their natural parents, bonds between foster children and foster parents merit protection as well. Indeed, "rights which are normally secured over time by biological or adoptive parents may be lost by their failure to provide continuous care for their child and earned by those who do."¹⁴⁵ The New York Court of Appeals' view is overly restrictive and represents an inadequate approach to determining a child's best interests. The ideas advocated by Judge Bellacosa in *Michael B.* and those espoused by Judge Kirk in *Gregory K.* are more sensible because they allow the law to protect real families, not those in name only.

CONCLUSION

Since terminating a natural parent's rights carries profound consequences, a decision to allow a child standing in such a pro-

¹⁴² See *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 845 n.52 (1977) ("emotional ties between foster parent and foster child are in many cases quite close, and undoubtedly in some as close as those existing in biological families").

¹⁴³ See HOROWITZ & HUNTER, *supra* note 33, at 18 (foster parent becomes true "psychological" parent when child has lived with foster family for long period and where contact with biological parents has been virtually missing).

¹⁴⁴ See GOLDSTEIN, *BEYOND THE BEST INTERESTS*, *supra* note 66, at 40 (authors recognize need to protect psychological ties that develop over time between foster child and adults who provide for child's day-to-day care).

¹⁴⁵ See GOLDSTEIN, *BEFORE THE BEST INTERESTS*, *supra* note 66, at 10. When a child is abandoned or separated from the natural parents for a long period of time, a psychological bond may form between the child and a parental substitute; such a relationship deserves protection from state intervention. *Id.*; see also *Smith*, 431 U.S. at 843. "[B]iological relationships are not exclusive determinations of the existence of a family." *Id.*

[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . [n]o one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.

Id. at 844.

ceeding warrants careful scrutiny. The child must display sufficient maturity and understanding to demonstrate that state protection is unnecessary.

Once the standing requirement is satisfied, the court must evaluate the child's best interests to determine whether the termination of natural parents' rights is proper. Courts must recognize the bond established between a foster parent and a foster child. It is vital to protect such a bond in order to promote a child's healthy mental and emotional development. The *Gregory K.* decision and the *Michael B.* concurrence appropriately valued this bond.

Courts have a responsibility to protect children's rights, as well as a corresponding duty to moderate how these rights are exercised. Ultimately, a court must safeguard a child's interests by protecting the child from his immaturity, and by promoting stability in the child's family environment.

Claudio DeBellis & Marta B. Soja