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THE NEED TO CONSIDER CHILDREN'S RIGHTS IN BIOLOGICAL PARENT V. THIRD PARTY CUSTODY DISPUTES

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INTRODUCTION

In 1940, Dr. Seuss, author of children's stories, published a book[1] about a kindly elephant, Horton, and "a lazy bird,"[2] Mayzie. Mayzie is up a tree, sitting on an egg and definitely not liking it, because "It's work"[3] and she would rather play. Mayzie decides that she wants to be free and take a vacation. Horton the elephant passes by the tree where Mayzie is sitting on her egg. Mayzie cajoles, flatters and pleads and eventually gets Horton to agree to sit on the egg while Mayzie takes a brief rest. She promises to hurry back but instead goes to Palm Beach for an extended vacation. She has so much fun in Florida that she decides never to return to her nest. Meanwhile, Horton faithfully sits on the nest, through the cold and wet of thunderstorms, through the freezing snow and sleet of winter and despite the ridicule of his friends who go off to play without him. Through all of the adversity Horton remembers his promise to Mayzie to sit on the egg and protect it, saying to himself, "I meant what I said [a]nd I said what I meant . . . . An elephant's faithful [o]ne hundred per cent!"[4] Even when faced with the guns of hunters, Horton steadfastly maintains his position on the egg. The hunters sell Horton, the tree and the egg to a circus and Horton is put on public display. But he never leaves the egg. After Horton has been sitting on the egg for fifty-one weeks, Mayzie, still on vacation, decides to visit the circus and runs into Horton. During their unexpected meeting, the egg begins to hatch. Mayzie starts screaming that the egg is hers. "The work was all done. Now she wanted it back."[5] Horton sadly backs down off of the tree. Well, when the egg hatches, what emerges is a tiny, baby elephant with wings.

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1. DR. SEUSS, HORTON HATCHES THE EGG (1940).
2. *Id.* This book has no page numbers.
3. *Id.*
4. *Id.*
5. *Id.*

In Dr. Seuss' story it is clear that the baby elephant and Horton belong together. Horton has put in the time, the energy and the caring which might be expected from a parent. The little animal that emerges from the egg demonstrates, through its own form, that it has responded to Horton's parental attention and has become Horton's child. A parent-child relationship has developed and Horton is obviously more the parent of the little elephant with wings than is Mayzie the bird. In the story, Horton and the baby are sent home to the jungle together, happy. It would be a rare person who would not have a sense of rightness about this ending. However, courts in many jurisdictions of this country would have given the baby to Mayzie.

In late 1988, a situation in Florida attracted national attention.[6] Kimberly Mays, a ten-year-old girl, had been raised since birth by Robert Mays. Barbara Mays, Robert's wife and Kimberly's mother, had died of cancer in 1981. Another couple, Ernest and Regina Twigg, also raised a ten-year-old daughter, Arlena. In 1988, Arlena died of a congenital heart defect. Blood tests prior to Arlena's death revealed that Arlena was not the biological daughter of the Twiggs. Because the only other caucasian baby born in Hardee Memorial Hospital at the time of Arlena's birth was Kimberly Mays, the Twiggs initiated legal action to have blood tests done on Kimberly to determine if she was in fact their biological child. Throughout a year of legal battle, Robert Mays resisted the efforts of the Twiggs. Finally, after Ernest and Regina agreed not to seek custody, Mr. Mays agreed to the blood tests which, in fact, showed to a 99.999% certainty that Kimberly was the Twiggs' biological daughter. Kimberly's initial reaction upon hearing the results was "Oh Daddy, I don't want to go."[7] The Twiggs have kept to their agreement and have not sought custody. With the help of mental health professionals, visitation arrangements are being negotiated. Robert and Kimberly over a ten year period had lived as father and daughter and felt about each other as a father and daughter feel about each other. For ten years, Robert Mays cared for Kimberly as a parent, for example, enduring the anxiety and sleepless nights of a parent, devoting the time, energy and financial resources a parent would devote to his child. Cognitively and emotionally, Kimberly perceived Robert as her father. In her reality, he was her father. Robert was the only father Kimberly ever knew. Yet, in many jurisdictions of this country the Twiggs, as Kimberly's biological parents, would have an excellent chance of obtaining custody.

6. Michelle Green et al., *Every Parent's Nightmare: A Hospital Nursery Swap Throws Two Florida Families Into Disarray*, PEOPLE, Dec. 11, 1989, at 77.

7. *Id.*

In a series of articles,[8] the *Chicago Tribune* reported the true story of a girl referred to as "Sarah."[9] Sarah had been born on April 27, 1984, of a heroin-addicted mother who abandoned her at the hospital.[10] Sarah's mother had reportedly never seen a doctor throughout the pregnancy.[11] Because of the mother's drug abuse during the pregnancy, Sarah was also addicted to heroin and went through withdrawal after birth.[12] Shortly after birth, Sarah was put into the care of Joseph and Marge Procopio. The couple raised Sarah until the biological mother resurfaced, reportedly off drugs and demanding the return of her child.[13]

On August 29, 1989, when Sarah was age five, "begging not to be taken from the house,"[14] she was given, by order of the juvenile court, to the custody of the biological mother and the mother's boyfriend. Dr. David Zinn, a psychiatrist with Northwestern Memorial Hospital, had evaluated Sarah prior to the custody change and had recommended against it,[15] but his recommendation was not followed by the judge.[16] Dr. Bennett Leventhal of the University of Chicago evaluated Sarah after

8. Rob Karwath, *Judge Heads 'Sarah': Rules for Her Parents*, CHI. TRIB., Oct. 9, 1991 (News), at 1; Rob Karwath, *Keep 'Sarah' With Parents*, CHI. TRIB., Oct. 8, 1991 (Chicagoland), at 1; Rob Karwath, *'Sarah' Case Judge Will Need Wisdom of Solomon to Rule*, CHI. TRIB., Oct. 6, 1991 (Chicagoland), at 1; Rob Karwath, *'Sarah' Case Judge: Let Me Live With My Parents*, CHI. TRIB., Oct. 5, 1991 (News), at 1; Rob Karwath, *Ex-Foster Father Disputes Risks of Regaining Custody of Sarah*, CHI. TRIB., Oct. 3, 1991 (Chicagoland), at 5; Rob Karwath, *Doctor Calls Mother of 'Sarah' Fit*, CHI. TRIB., Sept. 27, 1991 (Chicagoland), at 4; Rob Karwath, *New Custody Battle Begins for 'Sarah,'* CHI. TRIB., Sept. 20, 1991 (Chicagoland), at 2; Rob Karwath, *'Sarah's' Former Foster Parents File Papers to Regain Custody*, CHI. TRIB., Aug. 14, 1991 (Chicagoland), at 4; Rob Karwath, *'Sarah' Judge is Off Abuse Cases*, CHI. TRIB., Aug. 6, 1991 (Chicagoland), at 4; Bob Greene, *A Single Word That Sarah Needs to Hear*, CHI. TRIB., Sept. 22, 1991 (Tempo), at 1; Bob Greene, *For Sarah, the Final Chapter Begins*, CHI. TRIB., Sept. 15, 1991 (Tempo), at 1; Bob Greene, *Sarah Gets Her Visit Then Doors Close*, CHI. TRIB., Aug. 4, 1991 (Tempo), at 1; Bob Greene, *How the Judge Quit on Sarah*, CHI. TRIB., June 23, 1991 (Tempo), at 1; Bob Greene, *Sarah Wins: Justice at Last*, CHI. TRIB., Apr. 21, 1991 (Tempo), at 1; Bob Greene, *'I Believe the Judge Was Wrong,'* CHI. TRIB., Dec. 3, 1990 (Tempo), at 1; Bob Greene, *Judge Bars Sarah From Seeing Her Lost Family*, CHI. TRIB., Nov. 30, 1990 (Tempo), at 1; Bob Greene, *Doctor's Rx for Sarah: Visiting Her Lost Family*, CHI. TRIB., Nov. 18, 1990 (Tempo), at 1; Bob Greene, *Red Tape Tangles Sarah's Case Again*, CHI. TRIB., Sept. 23, 1990 (Tempo), at 1; Bob Greene, *Finally, a Victory for Sarah*, CHI. TRIB., July 29, 1990 (Tempo), at 1; Bob Greene, *Sarah's Future in Judge's Hands*, CHI. TRIB., July 15, 1990 (Tempo), at 1; Bob Greene, *Help, Hope May Be Too Late for Sarah*, CHI. TRIB., June 24, 1990 (Tempo), at 1; Bob Greene, *Defenseless, Sarah Has Learned to Hate*, CHI. TRIB., June 3, 1990 (Tempo), at 1; Bob Greene, *Thompson: Time to Hear From Sarah*, CHI. TRIB., May 20, 1990 (Tempo), at 1; Bob Greene, *Thompson Steps in on Sarah's Case*, CHI. TRIB., May 6, 1990 (Tempo), at 1; Bob Greene, *State Orders Grief for a Little Girl*, CHI. TRIB., Apr. 29, 1990 (Tempo), at 1.

9. Bob Greene, *State Orders Grief for a Little Girl*, CHI. TRIB., Apr. 29, 1990 (Tempo), at 1.

10. Bob Greene, *Thompson Steps in on Sarah's Case*, CHI. TRIB., May 6, 1990 (Tempo), at 1.

11. Greene, *supra* note 9, at 1.

12. *Id.*

13. Bob Greene, *I Believe Judge Was Wrong*, CHI. TRIB., Dec. 3, 1990 (Tempo), at 1.

14. *Id.*

15. Bob Greene, *Judge Bars Sarah From Seeing Her Lost Family*, CHI. TRIB., Nov. 30, 1990 (Tempo), at 1.

16. Juvenile Court Judge Walter Williams. *Id.*

the custody change and recommended that visitation with the Procopios be arranged, but the judge did not follow these recommendations.[17] Sarah was taken from her home and handed over to her biological mother. Because the biological mother had "physically given birth, she was considered to be Sarah's family."[18] Dr. Zinn referred to the custody change under these conditions as "state-sanctioned child abuse"[19] which will cause "irreparable harm."[20] He further stated that Sarah has experienced the change of custody as the "death of the only parents she had ever known."[21] Ultimately, the result was that a child was separated from those people she perceived to be her parents and given to a woman whom the state said is her mother because of a biological connection, but whom she essentially did not know.[22]

The Illinois Appellate Court[23] reviewed the decision made in the case of Sarah and vigorously criticized the decision of Juvenile Court Judge Walter Williams to attempt to balance the best interests of the child with the rights of the biological parents. Justice Rizzi pointed out that the sole standard which should be used in Illinois is the best interest of the child standard.[24] The Appellate Court reversed and remanded so that the Juvenile Court might decide the case accordingly.[25] Sarah, however, had been in the custody of her natural parents for two years since she was taken from the custody of the Procopios. Two psychiatrists, Dr. Larry Feldman and Dr. Bennett Leventhal, stated that they believed that at this time, it would be contrary to the child's best interest to be removed from her home for a second time.[26] Juvenile Court Judge Robert Smierciak therefore ordered that the natural parents retain custody.[27]

17. *Id.*

18. Bob Greene, *Doctor's Rx for Sarah: Visiting Her Lost Family*, CHI. TRIB., Nov. 18, 1990 (Tempo), at 1.

19. Bob Greene, *Thompson: Time to Hear From Sarah*, CHI. TRIB., May 20, 1990 (Tempo), at 1.

20. Bob Greene, *Finally, a Victory for Sarah*, CHI. TRIB., July 29, 1990 (Tempo), at 1.

21. *Id.*

22. Greene, *supra* note 15, at 1. With publication of this case, Governor Thompson introduced legislation into the State Assembly to make it "easier to remove parental rights from unfit men and women." Bob Greene, *Help, Hope May Be Too Late for Sarah*, CHI. TRIB., June 24, 1990 (Tempo), at 1.

23. In the Interest of Ashley K., 571 N.E.2d 905, *appeal denied*, 580 N.E.2d 115 (Ill. App. Ct. 1991).

24. *Id.* at 923.

25. *Id.* at 930.

26. Rob Karwath, *Keep 'Sarah' With Parents*, CHI. TRIB., Oct. 8, 1991 (Chicagoland), at 1.

27. Rob Karwath, *Judge Heeds 'Sarah': Rules For Her Parents*, CHI. TRIB., Oct. 9, 1991 (News), at 1. Illinois is generally considered a jurisdiction which will apply the best interests of the child standard in biological parent vs. third party custody disputes. *See infra* notes 97-103 and accompanying text. Even in Illinois, however, the type of situation which arose in the "Sarah" case is not unique. *See, e.g.*, *In re* Violetta B., 568 N.E.2d 1345 (Ill. App. Ct. 1991). In this case, the trial

In custody disputes between biological parents and third parties, several jurisdictions apply the doctrine of parental rights,[28] that is, unless the natural parent can be shown to be an unfit parent, the natural parent has a right to have custody of the child over any third party. In these jurisdictions, factors regarding the best interest of the child, including consideration of the question of who is the psychological parent[29] of the child, are not addressed until the natural parent can be proven to be unfit.

This Note will argue that use of the parental rights doctrine as a standard in deciding child custody is no longer realistic. Part I will look at the history of the relationship between parental rights and children's rights and the emergence of the perception that constitutional protection extends into the family system. Part II will examine, in more detail, the best interest standard and the parental rights doctrine as applied in biological parent vs. third party custody disputes.[30] Part III will address recent Supreme Court decisions in family law and scientific advances in the area of human reproduction which indicate that the definition of parenthood in strictly biological terms is no longer feasible. Part IV will discuss developmental psychology, particularly attachment theory.[31] Using principles from attachment theory, this Note will then argue that the best interests of the child are most likely to be served if recognition is given to the child's need to maintain the relationship with that individual the child perceives, on a psychological and emotional level, to be his or her parent. Further, given the seriousness of the likely harm to the child,

court had removed a four-year-old child from the home of a foster parent with whom the child had lived since she was four months old and gave custody to the natural grandmother. The trial court did not give weight to the testimony of three mental health professionals who testified that it would be in the best interest of the child to remain with the foster parent. The trial court said that the emotional bonding between the child and foster mother would not have occurred except for the misconduct of DCFS. *Id.* at 1352. The appellate court reversed on best interest grounds, taking into account the testimony of the three mental health workers. *Id.* at 1352-54. The dissent, however, argued for affirming the decision of the trial court in order to promote the goal of reunification of the natural family, which, the dissent seems to state, would in itself be in the child's best interest. *Id.* at 1354-59.

28. *See generally* Suzette M. Haynie, Note, *Biological Parents v. Third Parties: Whose Right to Child Custody Is Constitutionally Protected?*, 20 GA. L. REV. 705 (1986); Gregory S. Hilderbran, Note, In Re Baby Girl Eason: *Balancing Three Competing Interests in Third Party Adoptions*, 22 GA. L. REV. 1217 (1988); Stephanie H. Smith, Note, *Psychological Parents vs. Biological Parents: The Courts' Response to New Direction In Child Custody Dispute Resolution*, 17 J. FAM. L. 545 (1978-79).

29. *See generally* Haynie *supra* note 28; Hilderbran, *supra* note 28; Smith, *supra* note 28.

30. There are a number of ways that custody disputes between biological parents and third parties can arise. For purposes of this Note, I will concentrate on those situations where the child has been in the physical custody of the third party for a period of time sufficient for an emotional connection in the form of a parent-child relationship to develop.

31. *See generally* 1 JOHN BOWLBY, ATTACHMENT AND LOSS (1969); 2 JOHN BOWLBY, ATTACHMENT AND LOSS (1973); 3 JOHN BOWLBY, ATTACHMENT AND LOSS (1980).

this Note will argue that it is inconceivable not to consider the child's best interest when giving priority to parental rights means removing the child from the custody of the child's psychological parents.

I. HISTORY OF THE DEVELOPING RELATIONSHIP BETWEEN PARENT'S RIGHTS AND CHILDREN'S RIGHTS

The relationship between the rights of the parent and the rights of the child has been anything but stable. The idea of children having rights, or for that matter being anything but property, is a relatively recent development legally. In early Roman law, the father had complete control over his children. They were his to do with as he pleased, whether that meant selling them or putting them to death.[32] In tenth century England, a parent could kill an unweaned child or sell a child under the age of seven into slavery.[33] One commentator has divided the history of how the law has treated children during the past four hundred years into four eras: the early 1600s to the early 1800s; the early 1800s to the mid-1800s; the late 1800s to 1967; and 1967 to present.[34] The first era, early 1600s to early 1800s, was a period when children were considered essentially property of parents, particularly their father. In the seventeenth century, a father could not legally murder his children but he could still sell custody of his children without interference by the government. Further, the parent could not be prosecuted for neglect unless the child was incapacitated due to "infancy, disease or accident."[35] The Massachusetts Stubborn Child Law has been frequently used as a prime example of parents' almost total authority over their children during the seventeenth century.[36]

> If a man have a stubborn or rebellious son, of sufficient years and understanding (viz.) sixteen years of age, which will not obey the voice of his Father, or the voice of his Mother, and that when they have chastened him will not harken unto them: then shall his Father and Mother being his natural parents, lay hold on him, and bring him to the Magistrates assembled in Court and testify unto them, that their son is stubborn and rebellious and will not obey their voice and chastisement, but lives in sundry notorious crimes, such a son shall be put

32. Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 425-26 (1976-77); Paul Sayre, *Awarding Custody of Children*, *in* SELECTED ESSAYS ON FAMILY LAW 588, 609 (1950).

33. Lucy S. McGough & Lawrence M. Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes*, 27 EMORY L.J. 209, 209 (1978).

34. Robert M. Horowitz & Howard A. Davidson, *Children's Rights: A Look Backward and a Glance Ahead*, *in* LEGAL RIGHTS OF CHILDREN 1, 2-3 (1984).

35. McGough & Shindell, *supra* note 33, at 210.

36. Horowitz & Davidson, *supra* note 34, at 3.

to death.[37]

Until the nineteenth century, the family was the central unit of society. The family, in an agrarian, land-oriented culture, was the primary provider for emotional, physical, economic, social, religious, and educational needs. Historically, the family in America was a patriarchy.[38] The father of the family was essentially the ruler of the family, organizing the family's activities, settling disputes, and taking responsibility for the welfare of the family. The mother and children were to serve the father in preserving the welfare of the family.[39]

The beginning of the nineteenth century marks the beginning of the second era.[40] The Industrial Revolution began at this time and, with it, a de-emphasis of the family. Cities grew and with them, factories. The family became less and less the self-contained unit than it had been as men moved out of the home to find work.[41] The role of the family began to change from that of primary economic provider to the locus of child-rearing. The father began to be seen as less the owner of property and lord of the family unit and more as guardian of the children.[42] Coupled with this change in perception of the family was the rise of the women's rights movement, as evidenced by the first women's rights convention, held in 1848.[43] Gradually, there came to be a change in perception regarding children, from seeing them as instruments to be used, primarily by the father, for the welfare or survival of the family to viewing them as beings requiring nurturing and protection. The women's rights movement fostered this perception as well as the perception of the mother as the primary source of nurturing in the home while the father was the economic provider, working outside the home. As the nineteenth century progressed, there emerged an increasing societal concern regarding the welfare of children. Social reformers voiced concern about the detrimental effects of urban living on children.[44] In *Ex parte Crouse*, a court for the first time referred to the state's *parens patriae* right to protect

37. John R. Sutton, *Stubborn Children: Law and the Socialization of Deviance in the Puritan Colonies*, 15 FAM. L.Q. 31 (1981).

38. PAUL B. HORTON & CHESTER L. HUNT, SOCIOLOGY 225 (1964).

39. William F. Ogburn, *The Family and Its Functions*, *in* SELECTED ESSAYS ON FAMILY LAW, *supra* note 32, at 20-21 (1950); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 235-37 (1985).

40. Horowitz & Davidson, *supra* note 34, at 3.

41. *Id.*

42. *See generally* GROSSBERG, *supra* note 39; Ogburn, *supra* note 39, at 22.

43. GROSSBERG, *supra* note 39, at 244.

44. Horowitz & Davidson, *supra* note 34, at 3; Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 737 (1988).

children.[45] In 1874, a woman was prosecuted and convicted in New York for physical abuse of her daughter.[46] However, because there were no child abuse laws at that time, the prosecution was carried out with reference to the local anti-cruelty-to-animals statutes.[47] Changes were being made in assumptions regarding custody. Prior to the nineteenth century, the father was seen as having custody of his children over the mother's interests, to the point of the father being able in his will to appoint a guardian for his children other than the mother.[48] With the increased emphasis on child nurturing in the family, the rise of the women's movement and the perception of the mother as the nurturing parent, the paternal presumption of custody lost ground.[49] Increasingly after the mid-nineteenth century, there arose a maternal preference in custody disputes between a mother and a father.[50] In fact, later in the nineteenth century, the tender years doctrine was developed, the "presumption that the welfare of a child of tender years is normally best protected by placing it in the mother's custody."[51]

Coming out of the nineteenth century's concern for the welfare of children, the best interests of the child standard for deciding custody disputes between parents saw its beginnings in the late nineteenth and early twentieth centuries.[52] Some commentators have proposed that the use of the best interest standard is actually simply a result of the court acting in its *parens patriae* role, deciding what is best for the child independent of the wishes of the parents.[53] The determination of the best interests of the child is done by the court through a consideration of relevant factors. The factors looked at tend to include the desires of the child's parents;

45. Horowitz & Davidson, *supra* note 34 at 3 (citing 4 Whart. 9 (1838)).

46. McGough & Shindell, *supra* note 33, at 210.

47. *Id.*

48. GROSSBERG, *supra* note 39, at 243.

49. *Id.* at 244-47.

50. Interestingly, one of the first cases, in English law to limit the custody rights of the father, Shelley v. Westbrooke, 37 Eng. Rep. 850 (1817), involved the poet Percy Bysshe Shelley. When Shelley left his wife to run away with Mary Wollstonecraft Godwin, the author of Frankenstein, his wife killed herself. When Shelley attempted to get custody of his two children, the court refused to permit him to do so, referring to his immoral lifestyle. *See* Frank La Budde, *Recent Decisions—Family Law—Child Custody—Tender Years Presumption in Child Custody Cases Held Unconstitutional Gender-Based Discrimination.* Ex Parte Devine, 398 So.2d 686 (Ala. 1981), 12 CUMB. L. REV. 513, 516 (1982).

51. Howard A. Davidson & Katherine Gerlach, *Child Custody Disputes: The Child's Perspective, in* LEGAL RIGHTS OF CHILDREN, *supra* note 34 at 232, 235.

52. Davidson & Gerlach, *supra* note 51, at 236-37.

53. Davidson & Gerlach, *supra* note 51, at 237. See, Note, *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1221-42 (1980) [hereinafter *The Constitution and the Family*], for a history of the *parens patriae* doctrine, its developing relation to parental rights and to children's rights and a discussion of possible constitutional limitations on the state's *parens patriae* role. *See also* GROSSBERG, *supra* note 39, at 236-37.

the child's preferences; the child's needs, including those related to special mental or physical conditions; the child's sex and age; and each parent's respective fitness to care for the child.[54] Historically, courts have looked at each parent's moral rectitude in assessing parental fitness, but more recently have tended to regard only those qualities of the parent which may positively or adversely affect the child.[55] Although there are some recognized difficulties in implementation of the best interest standard, it is the currently accepted standard for resolution of custody disputes between natural parents.[56]

The beginning of the third era of development in the rights of children is marked with the establishment of the first statewide juvenile court system, in Illinois, in 1899.[57] By mid-century, all but two states had established state juvenile court systems.[58] The juvenile court system brought the state's *parens patriae* role into full blossom. The court was seen as a "compassionate parent figure."[59] Children were not yet perceived as having legal rights.[60]

In the twentieth century, the Supreme Court has, in a series of cases, affirmed fundamental rights regarding families and parenthood. In *Loving v. Virginia,*[61] the Supreme Court considered the constitutionality of a Virginia miscegenation statute which made it illegal for individuals of different races to marry. The Court, in finding the statute unconstitutional and in affirming the right to marry, stated "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[62] The Court referred to the right to marry as a "fundamental freedom."[63] In *Zablochi v. Redhail,*[64] the Supreme Court struck down a Wisconsin statute which essentially made it illegal for an individual to marry who was behind in child support payments. The Supreme Court referred to the right to

54. Davidson & Gerlach, *supra* note 51, at 237-38. *See also* 24 AM. JUR. 2D *Divorce and Separation* § 974 (1983).

55. Davidson & Gerlach, *supra* note 51, at 237.

56. For a discussion of the issues and difficulties in implementation of the best interest standards, see generally Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 236 (1975). Chapsky v. Wood, 26 Kan. 650 (1881), is generally cited as one of the early cases which used the best interest of the child standard. *See* Davidson & Gerlach, *supra* note 51, at 237; Sayre, *supra* note 32, at 592.

57. Horowitz, *supra* note 34, at 4.

58. *Id.*

59. *Id.*

60. *Id.*

61. 388 U.S. 1 (1967).

62. *Id.* at 12.

63. *Id.*

64. 434 U.S. 374 (1978).

marry as one of "fundamental importance"[65] and specifically stated that it was "reaffirming the fundamental character of the right to marry."[66] The idea that parenthood is worthy of constitutional protection[67] is seen as having its beginnings in the cases of *Meyer v. Nebraska*[68] and *Pierce v. Society of Sisters*.[69] In *Meyer*, the Supreme Court held that among the liberty interests protected by the Fourteenth Amendment is the right "to marry, establish a home and bring up children."[70] The Supreme Court in *Pierce* invalidated an Oregon statute which mandated that all children attend public schools holding that the statute unreasonably invaded a constitutionally protected liberty interest of parents.[71] Nineteen years after the Supreme Court issued the *Pierce* decision, it decided the case of *Prince v. Massachusetts*.[72] In this case the Court clearly stated that it recognized a "private realm of family life which the state cannot enter."[73] The *Prince* court, however, also clearly stated that the privacy right of the family is not absolute: "[but] the family itself is not beyond regulation in the public interest."[74] The Court stated that the state has a right to regulate the family in certain ways to provide needed protection for the child and for society.[75] Justice Rutledge powerfully summed up this aspect of the opinion of the Court as follows: "Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[76] In 1974, the Supreme Court in *Cleveland*

65. *Id.* at 383.

66. *Id.* at 386.

67. Francis B. McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 986 (1988). *See also The Constitution and the Family, supra* note 53, at 1162.

68. 262 U.S. 390 (1923). In *Meyer*, the Supreme Court held unconstitutional a Nebraska statute which prohibited the teaching of subjects in foreign languages and the teaching of foreign language prior to eighth grade. The Court held that this statute violated the Fourteenth Amendment liberty interests of parents.

69. 268 U.S. 510 (1925). In *Pierce*, the Supreme Court held as unconstitutional an Oregon statute mandating that all children attend public schools, again stating that the statute violated Fourteenth Amendment liberty interests of parents.

70. 262 U.S. at 399.

71. 268 U.S. at 534-35.

72. 321 U.S. 158 (1944). In *Prince*, the Supreme Court upheld the conviction of a woman who allowed minors to distribute religious materials on a public street in violation of Massachusetts child labor laws. *Id.* at 171. The *Prince* Court makes strong statements in support of the rights of parents to control the raising of their children but also clearly indicates that parental rights are not absolute. *Id.* at 166.

73. *Id.* at 166.

74. *Id.*

75. *Id.* at 166-67. The Court gave as examples the State's right to require school attendance, regulate child labor, prohibit the parent from exposing the "community or the child" to disease.

76. *Id.* at 170.

Board of Educators v. LaFleur[77] held as unconstitutional mandatory unpaid maternity leave for public school teachers. In finding a violation of constitutionally protected due process, the Court said, "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the due process clause of the Fourteenth Amendment."[78]

The twentieth century has also seen the legal system increasingly addressing specifically the rights of children. As the first case in which the Supreme Court began to recognize the constitutionally protected rights of children, *In re Gault*[79] is viewed as the start of the fourth era in the development of children's rights.[80] In this case the Supreme Court held that a juvenile faced with proceedings to determine if he is a delinquent, which may result in institutionalization, has certain due process rights provided by the Fourteenth Amendment, for example, the right to notice of charges,[81] the right to counsel,[82] and the privilege against self-incrimination.[83] In *Tinker v. Des Moines Independent Community School District,*[84] the Supreme Court considered the constitutionality of a school regulation prohibiting students from wearing black armbands in protest of the war in Vietnam. The Court held that the prohibition against the armbands violated the students' constitutional right of freedom of expression,[85] thus indicating that children have First Amendment rights. Perhaps of even greater significance, Justice Fortas, in delivering the opinion of the Court, stated that the students were "persons under our constitution. They are possessed of fundamental rights which the state must respect."[86] In *Planned Parenthood of Central Missouri v. Danforth,*[87] the Supreme Court held as unconstitutional the state law requirement that a girl under the age of eighteen obtain a parent's written permission before obtaining an abortion. In *Danforth*, the Court

77. 414 U.S. 632 (1974).

78. *Id.* at 639-40.

79. 387 U.S. 1 (1967). See also Donald N. Bersoff, *Representation for Children In Custody Decisions: All That Glitters Is Not* Gault, 15 J. FAM. L. 27 (1976-77), for a discussion of the generalization of the *Gault* holding, regarding the need for legal representation of children, to the area of custody disputes.

80. Horowitz, *supra* note 34, at 4; Michael S. Wald, *Children's Rights: A Framework for Analysis,* 12 U.C. DAVIS L. REV. 255, 266 (1979).

81. *Gault, supra* note 79, at 33-34.

82. *Id.* at 41.

83. *Id.* at 55. See Charles R. Tremper, *Respect for the Human Dignity of Minors: What the Constitution Requires,* 39 SYRACUSE L. REV. 1293, 1321-24 (1988), for a discussion of *Gault* as the seminal case in recognizing minors as "persons" under the law.

84. 393 U.S. 503 (1969).

85. *Id.* at 511.

86. *Id.*

87. 428 U.S. 52 (1976).

made the clear statement that "constitutional rights do not mature and come into being magically only when one attains the state-defined age of maturity. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[88] In *Carey v. Population Services, International*,[89] the Supreme Court held unconstitutional a statute prohibiting distribution of contraceptives to minors under the age of sixteen as violating the minor's right to privacy, which "in connection with decisions effecting procreation extends to minors as well as adults."[90] There is other evidence of the legal system giving increasing regard to the rights of children as persons under the law[91] and as beings separate from their parents. In custody disputes between parents, most states by statute or case law give consideration to the child's preference in applying the best interest standard.[92] Georgia state law mandates that the child's preference be respected unless the chosen parent is shown to be unfit.[93]

It is clear then that there has been a progression in the way that the law views children. Children were once viewed only as the property of the father. Later, although they were still viewed as property, more attention was paid to their need for special care. In this century, American law has begun to recognize that children are persons under the Constitution and have constitutional rights, as well as needs and preferences, separate from those of their parents, that deserve legal recognition.

II. PARENTS' RIGHTS AND CHILDREN'S RIGHTS IN THIRD PARTY CUSTODY DISPUTES

Society's perspective on the parent-child relationship has clearly gone through numerous changes over time in the ways parents and children have been perceived in relation to each other and in relation to society.[94] A contemporary legal situation which brings to light this changing perspective on the parent-child relationship is the battle between the biological parent and a third party for the custody of the child. As noted above, this type of conflict may arise when a child is raised by an adult other than the biological parent for an extended period of time. This

88. *Id.* at 74.

89. 431 U.S. 678 (1977).

90. *Id.* at 693.

91. An interesting extension of "minors" being viewed as persons under the law is a Louisiana law under which an *in vitro* fertilized ovum is considered to be a "judicial person." LA. REV. STAT. ANN. § 9:123 (West 1990). Louisiana law further provides that disputes regarding the *in vitro* fertilized ovum are to be resolved using the best interests standard. LA. REV. STAT. ANN. § 9:131 (West 1990).

92. For a general discussion, see 67A C.J.S. *Parent and Child* § 11 (1978 & Supp. 1990).

93. GA. CODE ANN. § 19-9-1 (1990).

94. *See supra* notes 32-93 and accompanying text.

situation may arise, for example, when a parent who feels unprepared for parenthood permits the child's grandparents to raise the child, or when a child has been placed in foster care by the state. It may also occur when a child has been raised by one of his natural parents and a stepparent, the natural parent who has raised the child dies and the other natural parent disputes the custody with the stepparent.[95] The adult, with whom the child has been left, and the child develop a parent-child relationship. The biological parent then demands the return of the child and a custody battle ensues. To settle the issue, courts will then use either the parents' rights standard or the best interest of the child standard, depending upon the jurisdiction.[96]

In the jurisdictions using the best interest of the child standard, the court will give custody of the child to the adult, whether the biological parent or the third party, who, in the court's opinion, will serve the child's best interest. Typical of the position taken in the best interest jurisdictions is that "[t]he question of legal custody is decided under the best interest of the child standard (citation omitted) without having to establish parental unfitness."[97] *Painter v. Bannister*[98] is a case frequently used as an example of a biological parent versus third party custody dispute decided in a "best interest" jurisdiction. In *Painter*, the Supreme Court of Iowa awarded custody of a boy, Mark, to his natural grandparents, who had cared for the boy for two years after the mother's death, rather than to Mark's natural father. When, after two years, Mark's father wished to have the boy return to live with him, the grandparents contested. The Iowa Supreme Court, referring to the "stable atmosphere"[99] of the grandparent's home and using the best interest standard, awarded custody to the grandparents. This court also gave qualified sig-

95. Obviously another way that this situation can occur is through a mix-up of babies shortly after birth, at the hospital, as in the situation with the Twiggs family, *supra* notes 6-7 and accompanying text.

96. *See generally* Haynie, *supra* note 28; Hilderbran, *supra* note 28; McGough & Shindell, *supra* note 33. It is difficult to determine how many jurisdictions adhere to which standard. Applications and distinctions between the standards can be blurred so that commentators often disagree about which jurisdictions do what. *See* Katherine 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, 881-82 (1984). One commentator has used the idea of a "continuum" between parental rights standard and the best interests of the child standard. Note, *Jurisdiction, Standing, and Decisional Standards in Parent-Nonparent Custody Disputes*—In re Marriage of Allen, 626 P.2d 16 (Wis. Ct. App. 1981), 58 WASH. L. REV. 111, 115 (1982). For attempts at classifying jurisdictions, see Haynie, *supra* note 28, and Smith, *supra* note 28.

97. Montgomery v. Roudez, 509 N.E.2d 499, 501-02 (Ill. App. Ct. 1987). In *Montgomery*, as is typical of best interest jurisdictions, the third party had to demonstrate "standing," i.e., that the child was not in custody of a biological parent at the time the action was brought. *Id.*

98. 140 N.W.2d 152, *cert. denied*, 385 U.S. 949 (1966).

99. *Id.* at 158.

nificance to the statement of a psychologist, who had evaluated the boy, that Mark psychologically regarded the grandparents as his actual parents.[100]

The concept of "psychological parent" has frequently been an essential concept in biological versus third party custody disputes.[101] This concept is defined as follows:

> A psychological parent is 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. The psychological parent may be a biological (citation omitted), adoptive, foster, or common-law (citation omitted) parent, or any other person. There is no presumption in favor of any of these after the initial assignment at birth (citation omitted).[102]

The concept of "psychological parent" has influenced the thinking of courts, particularly in best interest jurisdictions.[103] These courts espouse the idea that the best interests of the child are best served by placing the child with the adult with whom the child actually has the parent-child relationship, whether or not that adult is the biological parent.

In the parental rights jurisdictions, the courts tend to operate on the rule that the biological parent has an overriding right to his or her child and the best interests of the child should not be considered in determining custody unless the biological parent can be shown to be unfit.[104] It will be illustrative to look at relevant cases from states generally considered to be parental rights jurisdictions, such as Arkansas and Georgia.[105] In *Stamps v. Rawlins*[106] the Supreme Court of Arkansas decided a custody battle between a five-year-old boy's natural mother and stepfather. The court decided for the boy's natural mother, stating "[O]ur case law specifically establishes a preference for natural parents in custody matters, and provides that the preference must prevail unless it is established that the natural parent is unfit."[107] The *Stamps* court does not provide a rationale for this position but rather cites to the authority of a prior case, *Goins v. Edens*.[108] The *Goins* court, likewise, cites to a number of prior

100. *Id.* at 157-58.

101. *See generally* Symposium, *The Impact of Psychological Parenting on Child Welfare Decision Making*, 12 N.Y.U. REV. L. & SOC. CHANGE 483 (1983-84); Haynie, *supra* note 28.

102. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTEREST OF THE CHILD 98 (1973).

103. Symposium, *supra* note 101, at 485-88. *See also* Haynie, *supra* note 28.

104. *See* Haynie, *supra* note 28; Smith, *supra* note 28.

105. Haynie, *supra* note 28, at 708-12; Smith, *supra* note 28, at 548; *see generally* McGough & Shindell, *supra* note 33.

106. 761 S.W.2d 933 (Ark. 1988).

107. *Id.* at 935.

108. 394 S.W.2d 124 (Ark. 1965).

cases, among them *McGraw v. Rose*.[109] The pattern then continues with *McGraw*[110] citing to *Hazelip v. Taylor*[111] and *Hazelip*[112] citing to *Verser v. Ford*.[113] In *Verser v. Ford*, a three-year-old girl, whose mother died in childbirth, had lived with her grandparents since a few days after birth. The father of the girl remarried and sought custody of the girl. The grandparents resisted and a custody battle ensued. The 1881 Arkansas Supreme Court made a fairly strong statement regarding whom it believed to be the preferred custodian.

> It is one of the cardinal principles of nature and of law that, as against strangers, the father, however poor and humble, if able to support the child in his own style of life, and of good moral character, cannot, without the most shocking injustice, be deprived of the privilege by any one whatever, however brilliant the advantage he may offer. It is not enough to consider the interests of the child alone. As between the father, too, and the mother, or any other near relation of the infant, where sympathies on either side of the tenderest nature may be relied on with confidence, the father is generally to be preferred. In the great majority of cases, his greater ability and knowledge of the world renders him the fittest protector, although that is not the test. The preference is conceded to the ties of duty and affection, and attends the primary obligation of the father to maintain, educate and promote the happiness of the child, according to his own best judgment and the means within his power. Any system of jurisprudence which would enable the Courts, in their discretion and with a view solely to the child's best interests, to take from him that right and interfere with those duties, would be intolerably tyrannical, as well as Utopian.[114]

The *Verser* court appears to be saying that the father has a right to custody of his child, even over the rights of the mother. The court also indicates both that this right in some ways overrides the consideration of the best interests of the child—"[i]t is not enough to consider the interests of the child alone"[115]—and that custody by the father is in the child's best interests. It seems to be assumed that the father will best be able to serve the interests of the child because the father has "greater ability and knowledge of the world"[116] and because "of ties of duty and affection,"[117] apparently arising out of the father's biological connection with the child. Clearly, no one any longer believes, if anyone ever did,

109. 271 S.W.2d 912 (Ark. 1954).
110. *Id.* at 914.
111. 190 S.W.2d 982 (Ark. 1945).
112. *Id.* at 983.
113. 37 Ark. 27 (1881).
114. *Id.* at 29-30.
115. *Id.* at 30.
116. *Id.*
117. *Id.*

that a father is better suited than anyone else to care for a child because of his greater ability and worldliness. Further, it would be difficult to argue that the biological connection between parent and child necessarily implies behavior by the parent arising out of "duty and affection,"[118] particularly after one looks at the records of any state children and family service agency.

Interestingly, and, for purposes of our discussion, very significantly, the *Verser* court did not in fact award custody of the child to the father, but to the grandparents. In awarding custody to the grandparents, the court referred to "exceptional cases" and stated that "this delicate discretion [of awarding custody to someone other than the father] will be more freely exercised in behalf of one whose ties of affection are next to those of the father himself, upon whom the accompanying moral obligations would devolve in case of the father's death."[119] However, the court seems to have based much of its decision on the care that the child had received from the grandparents, particularly, the grandmother—"There has been all of a mother's care, and scarcely less than a mother's affection . . . she is in a safe asylum, surrounded by those who may be trusted to guard her anxiously against pernicious influences"[120]—and the relationship which, with the father's agreement, had developed between the child and her grandmother—"By his assent ties have been woven between the grand-mother and grand-daughter, which he is under strong obligation to respect, and which he ought not wantonly and suddenly to tear asunder."[121] The court clearly stated that the father was not unfit—"The father has shown himself to be a moral man, with the means of discharging his parental obligations."[122]

Verser v. Ford is one of the primary cases cited as authority to support the use of the parental rights doctrine in Arkansas. The case was decided in 1881. The historical context of that case was clearly one different from contemporary American society. The father was still considered the lord of the family, with his wife and children subservient to him. The father was seen as the only one competent to direct the family. The tender years doctrine was in its infancy.[123] *Chapsky v. Wood*,[124] one of the cases seen as at the beginning of the best interest doctrine, was decided the same year. Society has changed significantly; perceptions of

118. *Id.*
119. *Id.*
120. *Id.* at 30-31.
121. *Id.* at 31.
122. *Id.*
123. Davidson & Gerlach, *supra* note 51, at 234.
124. 26 Kan. 650 (1881); Davidson & Gerlach, *supra* note 51, at 237.

what is real have changed and most of the assumptions upon which the paternal rights statement of *Verser* and the parental rights doctrine of later cases are based are no longer considered to be true. Yet the paternal rights position of *Verser*, through a line of cases, is used as authority for the parental rights doctrine. In addition, the *Verser* case, used ultimately to support the position that a parent has a right to custody of his or her child unless the parent be shown to be unfit and only then can the best interest of the child be considered, was in fact decided upon best interest of the child criteria, taking into account the relationship of the child with the third party and despite the natural parent being perceived as a fit parent. It would seem that this case, while giving lip service to the accepted view of the time that the father is lord of the home, was actually decided for the benefit of the child, using what might be considered today as a children's rights standard.

An investigation into Georgia biological parent versus third party custody dispute cases leads to similar results. *Mitchell v. Mitchell*[125] is a case involving a custody dispute between a child's father and maternal grandparents. The court in *Mitchell* quotes *Larson v. Gambrell*,[126]

> [A]n award of child custody to 'a third party' must be based upon more than the best interests of the child because such an award is in derogation of the right to custody of the parent, in whose custody the law presumes the child's best interest will be served. Thus, it is only when the present unfitness of the parent is established by clear and convincing evidence that the trial judge is authorized to consider an award of custody to third parties.[127]

Neither the *Mitchell* court nor the *Larson* court attempted to justify this presumption but simply cited to previous cases, *Larson* citing to *Childs v. Childs*.[128] The *Childs* court restated the same doctrine and cited to *Heath v. Martin*,[129] among other cases, again without attempting to justify the doctrine other than by citing to previous authority. The pattern continues with *Heath* citing to *Hill v. Rivers*,[130] *Hill* citing to *Sloan v. Jones*,[131] and *Sloan* citing to *Miller v. Wallace*.[132] In *Miller*, the Georgia court decided the custody of a child who had lived with her maternal grandparents for an undisclosed period of time. The custody dispute was

125. 363 S.E.2d 159 (Ga. Ct. App. 1987).
126. 276 S.E.2d 686 (Ga. Ct. App. 1981).
127. *Mitchell*, 363 S.E.2d at 163 (quoting *Larson*, 276 S.E.2d at 688).
128. 227 S.E.2d 49 (Ga. 1976).
129. 167 S.E.2d 153 (Ga. 1969).
130. 37 S.E.2d 386 (Ga. 1946).
131. 62 S.E. 21 (Ga. 1908).
132. 76 Ga. 479 (1886).

between the child's father and the child's maternal grandparents.[133] The *Miller* court stated,

> *Prima facie*, the right of custody of an infant is in the father, and when this right is resisted, upon the ground of his unfitness for the trust or other cause, a proper regard to the sanctity of the parental relation will require that the objection be sustained by clear and satisfactory proofs. . . . The rights of the father, on the one hand, and the permanent interest and welfare of the infant, on the other, are both to be regarded, but *the right of the father is paramount*, and should not be disregarded, except for grave cause. The breaking of the tie that binds them to each other can never be justified without the most solid and substantial reasons, established by plain proof.[134]

The court decided for the father. But even in using the parental rights doctrine as the basis for this decision, the court felt a need to address the welfare of the child, for example, "The defendant's [father's] means of taking care of his child are more certain and ample than the means of those of the [grandparents] who would deprive him of her control."[135] Again, as in Arkansas, Georgia's parental rights doctrine is traced through a direct line of cases to a case decided at a time where societal and legal perspectives and basic assumptions are clearly different from those of today. *Miller* was decided in 1886, at a time when the father was considered supreme in the family, a time at the beginning of the best interest doctrine, and prior to any recognition that children might be legal persons themselves with rights of their own. Even so, even at this time, the *Miller* court clearly did not feel comfortable ignoring child interest issues.[136]

One Georgia case, *Blackburn v. Blackburn*,[137] seems to use recent decisions by the United States Supreme Court to support the parental rights doctrine. In *Blackburn*, the Georgia Supreme Court decided a custody dispute between a child's natural mother and the child's paternal grandmother in favor of the natural mother.[138] The court said that because this case involved a third party and the rights of a parent might be terminated, the court had to evaluate whether the natural parent was unfit and whether that parent's unfitness must be proven under a "clear and convincing" standard.[139] The *Blackburn* court quoted the United States Supreme Court in *Santosky v. Kramer*,[140] stating that " 'freedom

133. *Id.* at 483.
134. *Id.* at 486-87 (second emphasis added).
135. *Id.* at 492.
136. For another discussion of Georgia law, see McGough & Shindell, *supra* note 33, at 222-41.
137. 292 S.E.2d 821 (Ga. 1982).
138. *Id.* at 826.
139. *Id.* at 825.
140. 455 U.S. 745 (1982).

of personal choice in matters of family life is a fundamental liberty interest' " and therefore "the trial court [must] find 'clear and convincing evidence' of a parent's unfitness prior to terminating the parent's rights in his child."[141] The *Blackburn* court indicated that the clear and convincing standard mandated by the Supreme Court "forestalls arbitrary State interference with the integrity of the family unit."[142]

To take the analysis a step further, it would be useful to look at *Santosky*. The *Santosky* Court, in arriving at its statement that family life is a liberty interest to be protected by the Fourteenth Amendment,[143] cited to, among other cases, *Meyer v. Nebraska*[144] and *Prince v. Massachusetts*.[145] In *Meyer* the Court held that among the liberty interests protected by the Fourteenth Amendment is the right "to marry, establish a home and bring up children."[146] In *Prince* the Supreme Court said, "It is cardinal with us 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,"[147] and referred to "the private realm of family life which the state cannot enter."[148]

In a biological parent versus third party custody dispute, a common scenario is that the child has not been in the physical custody of the biological parent for an extended period of time. The third party has raised and cared for the child and frequently the child and the third party have formed a relationship typical of what would be expected in a parent-child relationship. An essential question then becomes one of definition. Where is the "family unit" whose integrity[149] needs to be protected and where is the "private realm of family life" protected from state intrusion? Is the "family" the relationship developed over time between the child and the third party or is it some conceptual, ephemeral entity somehow connected with the natural parent's biological connection to the child? For that matter, who is the parent? Is the parent the individual who has actually provided for the "care and nurture of the child" in preparing the child to meet his or her "obligations" to society

141. *Blackburn*, 292 S.E.2d at 825 (quoting *Santosky*, 455 U.S. at 753, 769).
142. *Blackburn*, 292 S.E.2d at 825.
143. *Santosky*, 455 U.S. at 753.
144. 262 U.S. 390 (1923).
145. 321 U.S. 158 (1944).
146. 262 U.S. at 399.
147. 321 U.S. at 166.
148. *Id.*
149. Integrity is defined as "an unimpaired or unmarred condition . . . [; and] the quality or state of being complete or undivided." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (Philip B. Grove, Ph.D. et al. eds., 1986).

or is the parent the individual who has a biological connection to the child because of a relatively brief episode of sexual intercourse, perhaps years earlier? It would seem to make the most sense to decide that the real family is the one where familial relations have developed and that the real parent is the individual who acted like a parent and formed a parent-child relationship with the child. The child involved would definitely answer this way.[150] Courts in parental rights jurisdictions follow the doctrine that the natural parent has a right to his or her biological child unless the parent can be shown to be unfit and only if the parent is shown to be unfit are the best interests of the child considered. Courts in these jurisdictions would therefore answer in favor of the biological parent and theoretically not consider the child's perspective unless the natural parent should be shown to be unfit.

III. THE REDEFINITION OF PARENTHOOD AND FAMILY AS A RESULT OF LEGAL AND SCIENTIFIC DEVELOPMENTS

It would seem to be beneficial at this time to look at the question of how the law defines "parent" and "family." For purposes of this discussion, I will primarily examine six relatively recent Supreme Court cases: *Stanley v. Illinois*,[151] *Quilloin v. Walcott*,[152] *Caban v. Mohammed*,[153] *Lehr v. Robertson*,[154] *Moore v. City of East Cleveland*,[155] and *Smith v. Organization of Foster Families*.[156] *Stanley* involved a father of three children who lived unmarried with their mother and participated in raising the children until she died. According to Illinois law, upon the mother's death, the children became wards of the state. The father contested, seeking custody. The Supreme Court upheld the father's right to custody of the children.[157] In *Caban*, a man and a woman lived together unmarried for five years and produced two children. Both parents took an active part in caring for the children.[158] The father continued to maintain relationships with the children after he and the woman sepa-

150. Tremper, *supra* note 83, argues that minors have a constitutionally protected right to be treated with dignity. "Taking the child's preference into account, even if it ultimately is overruled, constitutes the difference between being and nothingness that is central to dignity." *Id.* at 1314.

151. 405 U.S. 645 (1972).

152. 434 U.S. 246 (1978).

153. 441 U.S. 380 (1979).

154. 463 U.S. 248 (1983).

155. 431 U.S. 494 (1977).

156. 431 U.S. 816 (1977). For similar discussion of these cases, see, John L. Hill, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y. U. L. REV. 353 (1991); Haynie, *supra* note 28; Francis B. McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975 (1988).

157. *Stanley*, 405 U.S. at 646, 657-59.

158. *Caban*, 441 U.S. at 382, 389.

rated. Eventually the woman married another man and when her husband filed for adoption, the father of the children contested the New York law which gave the mother exclusive right to consent to the adoption because the children were illegitimate.[159] The Supreme Court decided in favor of the natural father on equal protection grounds and referred to the substantial relationship the natural father had established and maintained with the children.[160] In contrast are the cases of *Quilloin* and *Lehr*. In both of these cases, a biological father attempted to stop the adoption by the child's mother's husband.[161] In both of these cases, the biological father had not supported the child and had never developed a parental relationship with the child.[162] In both of these cases, the Supreme Court permitted the adoptions.[163] These four cases taken together give the impression that what was significant was not the biological connection but the parent-child relationships which the fathers did or did not form with their children. The *Lehr* Court clearly connected parental rights and parental responsibilities, stating that the "rights of the parents are a counterpart of the responsibilities they have assumed."[164] This seems to be just one step short of saying that someone who has not acted as a parent in assuming parental duties and responsibilities will not be considered to be a parent legally. The cases of *Moore v. City of Cleveland*[165] and *Smith v. Organization of Foster Families*[166] touched upon the issue of how "family" is to be defined legally. In *Moore* the Court addressed a Cleveland housing ordinance which restricted housing units to one family. A woman who lived with her son and two grandsons was told by the city that her group was not a single family and that they would have to move into separate dwellings. The woman contested the ordinance and the Supreme Court decided in her favor, holding that her extended family was in fact a family, despite the fact that it was not a nuclear family, and therefore was entitled to constitutional protection. Of significance to our discussion is a statement made in the Court's opinion: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values,

159. *Id.* at 382-83.
160. *Id.* at 393-94.
161. *Quilloin*, 434 U.S. at 247; *Lehr*, 463 U.S. at 249-50.
162. *Quilloin*, 434 U.S. at 251-56; *Lehr*, 463 U.S. at 249-50.
163. *Quilloin*, 434 U.S. at 257; *Lehr*, 463 U.S. at 267-68.
164. *Lehr*, 463 U.S. at 257-58.
165. 431 U.S. 494 (1977).
166. 431 U.S. 816 (1977).

moral and cultural."[167] In our hypothesized biological parent versus third party custody dispute, the child's relationship with the third party passes to the child, the "cherished values, moral and cultural." Yet, in parental rights jurisdictions, this relationship would in effect not be considered a "family."

In *Smith v. Organization of Foster Families* a group of foster parents and organizations challenged New York City and New York State procedures for removal of foster children from foster homes, arguing that the procedures violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The foster parents lost.[168] However, the Court in dicta made statements indicating that a family is determined by factors other than biology: "But biological relationships are not exclusive determination [sic] of the existence of a family. The basic foundation of the family in our society, the marriage relationship, is of course not a matter of blood relation. Yet its importance has been strongly emphasized in our cases."[169] Later, the *Smith* Court clearly indicated that the importance of the family is to be seen in emotional factors:

> Thus the 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 "promoting a way of life" through the instruction of children, *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972), as well as from the fact of blood relationship.[170]

The six cases considered together reveal an emerging trend of seeing the significance of the parental role and familial relationship not in terms of biological connection but in terms of emotional relationships. This trend is counter to the importance placed on biological connection by courts in parental rights jurisdictions in deciding biological parent versus third party custody disputes.[171]

167. 431 U.S. at 503-04.

168. The Court decided against the foster parents, in part, on grounds that the foster parent program was a state-created entity, created for a specific purpose, and therefore, for that reason and for contractual reasons, the foster parents could not expect the system to operate differently. *Smith*, 432 U.S. at 845-46.

169. *Id.* at 843. The Court also pointed out that the relevant custodian of the children in Prince v. Massachusetts, 321 U.S. 158 (1944), was in fact not a parent but an aunt. *Smith*, 431 U.S. at 843.

170. *Id.* at 844.

171. A concept which offers a basis other than biology for defining "parent" is the concept of equitable parent. In Atkinson v. Atkinson, 408 N.W.2d 516 (Mich. Ct. App. 1987), the Michigan Court of Appeals granted the visitation rights as a natural father to a man who had been proven by blood test not to be the biological father of a four-year-old boy. They based the decision on the doctrine of equitable parent. The man and boy had seen each other as being father and son for four years. When the mother filed for divorce, she revealed that her husband had not been the biological father of the boy through blood tests. This court, however, held that, since under Michigan law, a man who takes on the status of a father, and who acts and presents himself as such to the world, can be estopped from denying his paternal responsibilities, that man also should have the rights of a

Some of the most striking developments which have significant impact on how the parent-child relationship is perceived legally are those technological developments related to conception, that is, *in vitro* fertilization and surrogacy.[172] These developments put into question the very definitions of parent and child. As one author put it,

> Surrogacy is one of the most hotly contested questions of our time. The ramifications of the answer our courts and legislatures reach may affect personal and economic liberty in unforeseen ways (footnote omitted.) The answer will profoundly affect the way our society views the relationship between parent and child and, consequently, the reality of the relationship between parents and children of the future and the power of the state to regulate that relationship.[173]

For instance, in surrogacy, a woman contracts either to be impregnated with the sperm of a man via artificial insemination[174] or to carry the fertilized ovum of a woman physically unable to carry a pregnancy. As part of the contract, the surrogate mother agrees to give up custody of the child after the birth to the man or couple who provided the genetic material and who were the intended parents.[175] On the other hand, artificial insemination can also be used in the situation where a couple wishes to have a child and the husband is infertile. The couple can contract with a sperm donor to have the wife impregnated via artificial insemination. The statutes of many states provide that the sperm donor will have no rights or responsibilities as a parent.[176] This apparent inconsistency

father. *See also* Nicholas S. Andrews, Note, *Atkinson v. Atkinson: Adoption of the Equitable Parent*, 1988 DET. C. L. REV. 119; Rebekah F. Visconti, Note, *The Legal Relationship of a Nonbiological Father to His Child: A Matter of Equity*, 66 U. DET. L. REV. 97 (1988).

172. For a discussion of the inadequacies of defining the parent in surrogacy situations in terms of biological contribution see Hill, *supra* note 156. Irma S. Russell, *Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising From Surrogacy Contracts*, 27 J. FAM. L. 585 (1988-89); Denise S. Kaiser, Note, *Artificial Insemination: Donors Rights in Situations Involving Unmarried Recipients*, 26 J. FAM. L. 793 (1987-88); Natalie L. Clark, *New Wine in Old Skins: Using Paternity-Suit Settlements to Facilitate Surrogate Motherhood*, 25 J. FAM. L. 483 (1986-87); Harry D. Krause, *Artificial Conception: Legislative Approaches*, 19 FAM. L.Q. 185 (1985); George J. Annas, *Fathers Anonymous: Beyond the Best Interest of the Sperm Donor*, 14 FAM. L.Q. 1 (1980).

173. Russell, *supra* note 172, at 593.

174. Artificial insemination is defined as "[m]echanical injection of viable semen into the vagina." TABOR'S CYCLOPEDIC MEDICAL DICTIONARY (13th ed. 1977).

175. Courts seem to generally support the awarding of the custody of the child to the intended parents. *See, e.g.*, Seth Mydans, *Surrogate Denied Custody of Child*, N.Y. TIMES, Oct. 23, 1990, at A14. Even in the case of *In re* Baby M, 537 A.2d 1227 (N.J. 1988), where the New Jersey Supreme Court held the surrogacy contract as illegal and therefore invalid, the court awarded custody of the child to the man who had contracted with the surrogate, in effect recognizing his parenthood.

176. *See e.g.*, OR. REV. STAT. § 109.239 (1989):

> Rights and obligations of children resulting from artificial insemination; rights and obligations of donor of semen. If the donor of semen used in artificial insemination is not the mother's husband: (1) Such donor shall have no right, obligation or interest with respect to a child born as a result of artificial insemination; and (2) A child born as a result of artificial insemination shall have no right, obligation or interest with respect to such donor.

opens even further the question of who will be considered a parent.[177]

Defining parenthood in terms of biology is no longer practical or feasible. It would seem to make more sense to define parent in terms of the actual relationship with a child. The concept of "psychological parent"[178] would provide a sound basis for this definition. "Psychological parent" takes into account the relevant realities of the situation under consideration. It considers that person to be a parent who has actually acted as a parent, who has assumed the responsibilities of a parent, who has formed a parent-child relationship with the child in question and whom the child perceives and relates to as a parent. From the perspective of society, it is the child's relationship with the psychological parent which is ensuring that the child does not have to be cared for by the state and it is in that relationship the child will be taught what he or she needs to learn to be a productive member of society.

There is a trend to emphasize emotional bonding at least as much as biology in certain Supreme Court custody cases.[179] Because of technological developments, defining parenthood in terms of biology is becoming increasingly unfeasible.[180] The legal rights of children have been increasingly recognized.[181] Yet, in antithesis to these trends, courts in parental rights jurisdictions decide biological parent versus third party custody disputes solely based on biology and without regard to any emotional bond that may have formed between the child and the third party and without regard to the child's rights or interests.

IV. ATTACHMENT THEORY IN CHILD CUSTODY DISPUTES

In parental rights jurisdictions, unless the biological parent can be proven to be unfit, the interests of the child are not considered in biological parent versus third party custody disputes.[182] When these interests carry considerable weight for the child, this can be a significant omission. In this section, this Note will present a brief discussion of attachment

177. Hill, *supra* note 156, at 355, points out that in a surrogacy arrangement, there could be as many as five individuals who could conceivably claim to be a parent: the sperm donor, the egg donor, the surrogate (gestational host), and the two individuals not biologically related to the child but who intend to raise the child.

178. GOLDSTEIN ET AL., *supra* note 102.

179. *See supra* notes 151-170 and accompanying text. For further discussion, see, *The Constitution and the Family*, *supra* note 53, at 1270-313; Hilderbran, *supra* note 28, at 1223-29; Haynie, *supra* note 28, at 729-35.

180. *See supra* notes 172-77 and accompanying text.

181. *See supra* notes 79-93 and accompanying text.

182. *See* Haynie, *supra* note 28; Smith, *supra* note 28.

theory[183] and of the possible implications of this theory for child custody determinations.[184]

Attachment theory is the "best supported theory of socio-emotional development."[185] Attachment theory focuses on a behavioral/emotional bond or attachment,[186] which is formed, mediated, maintained, and developed[187] through attachment behavior. "Attachment behavior is conceived as any form of behavior that results in a person attaining or retaining proximity to some other differentiated and preferred individual."[188] Attachments are formed throughout life[189] but the majority of study in attachment theory has focused on the initial attachment that the human infant makes[190] and that attachment is most relevant to this discussion.

Attachment behavior is universal to all children.[191] The attachment forms a "secure base"[192] for children from which to explore the world, learn and develop social skills, at least through adolescence,[193] and probably into adulthood.[194] The young child will explore away from the attachment figure, investigating the world and other people. Then when the child feels fearful, the child will rush back to the security of the attachment figure. This type of behavior can be seen in some variations throughout the years of major development. The ambivalence the adolescent exhibits toward a parent is an example of this process, the adolescent at times wanting closeness with the parent and at times distancing himself. The attachment with the caregiver is the basis for formation of self-reliance, competence,[195] and a capacity to form relationships.[196]

Two points of attachment theory are particularly relevant to this discussion. The first is that the attachment is formed through interaction

183. *See generally* 1 BOWLBY, *supra* note 31; 2 BOWLBY *supra* note 31; 3 BOWLBY *supra* note 31.

184. *See* Mitchell E. Radin, *The Role of the Lawyer for the Preschool Child in Custody Litigation*, 9 J. PSYCHIATRY & L. 431 (1981), for a discussion of the usefulness to a child custody attorney to have knowledge of attachment theory.

185. JOHN BOWLBY, A SECURE BASE 28 (1988).

186. MARY D. SALTER AINSWORTH ET AL., PATTERNS OF ATTACHMENT 302 (1978).

187. *Id.*

188. 3 BOWLBY, *supra* note 31, at 39.

189. Mary D. Salter Ainsworth, *Attachments Beyond Infancy*, AM. PSYCHOLOGIST, Apr. 1989, at 709; Willard W. Hartup, *Social Relationships and Their Developmental Significance*, AM. PSYCHOLOGIST, Feb. 1989, at 120; 1 BOWLBY, *supra* note 31, at 206.

190. MARK T. GREENBERG ET AL., ATTACHMENT IN THE PRESCHOOL YEARS 3 (1990).

191. BOWLBY, *supra* note 185, at 28.

192. AINSWORTH, *supra* note 186 at 20; BOWLBY, *supra* note 185, at 163.

193. BOWLBY, *supra* note 185, at 163.

194. AINSWORTH, *supra* note 189; 1 BOWLBY, *supra* note 31, at 20.

195. GREENBERG, *supra* note 190, at 185.

196. *Id.* at 31.

between the infant and the primary caregiver. For example, the infant signals the need for care through crying and the caregiver then provides care. The attachment is with the primary caregiver but that caregiver does not have to be the biological parent. Bowlby states:

> Although, throughout this book the text refers usually to "mother" and not to "mother-figure," it is to be understood that in every case reference is to the person who mothers a child and to whom he becomes attached. For most children, of course, that person is also his natural mother.[197]

The second point of relevance to our discussion is that disruption of this attachment with the primary caregiver has been shown to be psychologically traumatic and damaging, particularly in pre-school years,[198] but throughout childhood.[199] Spitz[200] has described some of the extremely harmful effects young children may suffer due to separation from the attachment figure. He reports on institutionalized infants separated from their primary caregiver. He reports that for the first six months the children seem to do fine. After that first six months, however, the children begin to exhibit symptoms of what Spitz refers to as anaclitic depression. At first the children become weepy and clinging. Then, their weeping becomes wailing. The children experience weight loss and the child's development is retarded. Then the children begin to refuse contact. Insomnia, weight loss, facial rigidity, and physical illness develop.[201] Spitz noticed that anaclitic depression occurs more frequently and in much more severe forms during separations prior to which there existed good mother-child relations. Spitz and others have shown that separation or loss in early childhood of the attached caregiver relates to conduct problems throughout childhood[202] and later in life, cognitive disturbances,[203] depression,[204] suicide risk,[205] and a generally increased risk of psychiatric disturbance.[206]

James Robertson[207] discusses the issue of emotional and psychological damage to a child resulting from separation from the primary

197. 1 BOWLBY, *supra* note 31, at 29.

198. GREENBERG, *supra* note 190.

199. JOHN ROBERTSON, YOUNG CHILDREN IN HOSPITAL 19 (1970).

200. RENE SPITZ, THE FIRST YEAR OF LIFE 268 (1965).

201. *Id.* at 277. Spitz notes that if deprivation from emotionally nurturing figures is prolonged and severe, irreversible deterioration can occur, at times leading to death. *Id.* at 278-79.

202. GREENBERG, *supra* note 190, at 225.

203. BOWLBY, *supra* note 185, at 99.

204. 3 BOWLBY, *supra* note 31, at 248, 257.

205. *Id.* at 310.

206. *Id.* at 295.

207. ROBERTSON, *supra* note 199.

caregiver. The context is long-term hospitalization. Referring to the children separated from the mother-figure, Robertson says:

> The behaviour of all of these children made great difficulties for their families for some years afterwards. Eight years after discharge the individual outcomes are varied, but each child has a residue of impairment of personality and mental functioning of a kind that was broadly predictable on the basis of their emotional states at time of discharge from the long-stay hospital.[208]

Developmentally, the separation from the attached figure is a psychological trauma, an emotional injury. Without the availability of the attachment figure, the child no longer feels safe and is no longer able to deal with the world from a position of security in which to learn to function socially and manage his own feelings, particularly anger and sadness, in the social context. Robertson is focusing primarily on children under age four, but he is quick to state that this age is arbitrarily chosen.[209] He suggests that the damaging effects of the child's separation from the attachment figure are sufficiently significant to warrant changes in hospital procedures. He spends a good portion of his book discussing his recommended changes, including admission of mother and child together so that the separation does not occur.[210] If the temporary separation of the hospitalized child from the attachment figure can cause such significant and long-lasting psychological disturbance, how much more so the permanent loss of the attachment figure when custody of a child is removed from the third-party parent, perhaps the only parent the child has ever known, and given to the biological parent. Given that one of the more current and respected schools of developmental psychology describes so persuasively the harm, some of it extremely serious, that may befall a child separated from his or her attachment figure, it is incomprehensible that jurisdictions which advocate the parental rights doctrine consider interests of the child only if the child's natural parent is shown to be unfit.

V. SUMMARY, DISCUSSION, AND CONCLUSION

The purpose of this Note has been to argue that the use of the parental rights doctrine in child custody disputes, where use of that doctrine justifies not even considering the child's interest, is a practice that is no longer supportable. This Note has discussed the development of the legal rights of children. Children have progressed from being considered only

208. *Id.* at 19.
209. *Id.* at 87.
210. *Id.* at 36.

property. Within the past few decades it has been recognized that children are persons under the Constitution with rights, in most ways equal to adults. Recent legal developments in recognizing emotional bonding as at least important as biological connection in defining parenthood and family, make the definition of parent by biology alone particularly unpersuasive. Technological developments, particularly in the areas of surrogacy and *in vitro* fertilization, have put the law in a position where defining parenthood via biological connection is unworkable. Yet, in the face of all of this, some jurisdictions define parenthood strictly by biological connection. Further, in mandating that unless that biologically-defined parent can be proven to be unfit the interests of the child are not to be considered, these jurisdictions return to the time when children were treated as property, without legal rights.[211]

To further emphasize the gravity of this lack of respect for the rights of children in the use of the parental rights doctrine, attachment theory sheds light on the severity of damage that can be done. When a child has been cared for and raised by an adult, that child and adult form an emotional bond. The child becomes attached to the adult as a source of security needed for health and future growth and development. This attachment is particularly significant when the adult has raised the child from infancy. The adult and child have a parent-child relationship. When the adult is not a biological parent to the child, in parental rights jurisdictions, a biological parent can demand custody of the child. Unless the biological parent can be proven to be an unfit parent, the child's custody will be awarded to the biological parent. Theoretically, in a parental rights jurisdiction, no consideration will be given to the psychological damage that will be done to the child at the loss of the attachment figure, the adult who has raised the child. Attachment theory is very clear, however, that damage likely will be done. Psychological damage may take the form of developmental problems later in childhood or of psychiatric disorders in adulthood, such as depression, suicidism, and chronic inability to form meaningful relationships.

Psychological maltreatment has been defined as "acts of omission and commission which are judged by community standards and professional expertise to be psychologically damaging."[212] In light of attach-

211. If the Supreme Court in the case of *In re* Gault, 387 U.S. 1 (1966), could hold that a boy about to be committed to the state juvenile detention center for five years deserved due process protection, a child faced with the loss of perhaps the only "parents" he knows, and the possibility of being moved from what he feels to be his "home" to someplace strange for the rest of his minority, is at least equally deserving of due process protection.

212. Stuart N. Hart & Marla R. Brassard, *A Major Threat to Children's Mental Health, Psychological Maltreatment*, AM. PSYCHOLOGIST, Feb. 1987, at 160.

ment theory, the practice in parental rights jurisdictions of removing children from the adults with whom they are emotionally bonded and giving them to biological parents whom they may not even know or at least not view as attachment figures, with no consideration of the welfare of the child, would seem to fall into this definition of psychological maltreatment. Most states permit removal of a child from a home if the child is a victim of psychological maltreatment,[213] but, courts in parental rights jurisdictions make decisions which have the effect of psychological maltreatment.

"A positive ideology of children as valuable in their own right rather than in the manner in which they meet the needs of caretakers is essential to providing for the welfare of children."[214] This ideology is singularly lacking where a child can be permanently removed from his or her home, without consideration of the socio-emotional cost to that child, in response to the perceived rights of a biological parent. It is in society's interest to promote the welfare of children.

> Children are ever the future of society. Every child who does not function at a level commensurate with his or her possibilities, every child who is destined to make fewer contributions to society than society needs, and every child who does not take his or her place as a productive adult diminishes the power of that society's future.[215]

213. Gary B. Melton & Howard A. Davidson, *Child Protection and Society: When Should the State Intervene?*, AM. PSYCHOLOGIST, Feb. 1987, at 172.

214. Hart & Brassard, *supra* note 212, at 163.

215. Frances D. Horowitz & Marion O'Brian, *In the Interest of the Nation: A Reflective Essay on the State of Our Knowledge and the Challenges Before Us*, AM. PSYCHOLOGIST, Feb. 1989, at 441, 445.