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The Battle for Baby Jessica: A Conflict of Best Interests

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COMMENT

The Battle for Baby Jessica: A Conflict of Best Interests

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INTRODUCTION

> Romance fails us and so do friendships, but the relationship of parent and child, less noisy than all others, remains indelible and indestructible, the strongest relationship upon this earth.[1]

Precisely defining the "parent-child" relationship held the attention of the nation during the Summer of 1993. Indeed, the "summer of children"[2] brought to the media forefront the legal battles of Kimberly Mays,[3] Gregory K.[4] and, most notably, the custody dispute between Jessica DeBoer's biological parents, Cara and Dan Schmidt,[5] and the couple who raised her from birth, Roberta

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1. THEODOR REIK, A PSYCHOLOGIST LOOKS AT LOVE 260 (1944). The late Theodor Reik, a contemporary and associate of Sigmund Freud, examines the origin and nature of love, including the love that exists between parent and child.

2. Richard Cohen, *Class Action*, WASH. POST MAG., Sept. 12, 1993, at W9. Cohen explores the underlying class biases that exist in the context of child custody cases. He refers to the "summer of children," since there were several high-profile child custody cases, including the 1993 case involving Jessica.

3. Kimberly Mays successfully sued to terminate the parental rights of her biological parents after it was revealed that she and another child were switched in a Florida Hospital nursery at birth. When the child they raised as their daughter, Arlena, died of a congenital heart defect in 1988, the Twiggs pursued visitation with their biological daughter. Kimberly objected and a legal dispute followed. Mays v. Twigg, 543 So. 2d 241 (Fla. Dist. Ct. App. 1989).

4. Gregory Kinsley attempted to "divorce" his biological mother who had abandoned him to foster care for most of his life. Gregory initiated the proceeding so that he would be freed for adoption by the Russ family, who was acting as his foster family. Although the Orange County Circuit Court granted his petition, the Florida Court of Appeals reversed the decision, saying that Gregory, as an unemancipated minor, lacked the legal capacity to bring such an action. However, the error was deemed harmless because similar termination petitions were also filed by Gregory's guardian *ad litem* and foster mother. Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993).

5. Cara Clausen married Dan Schmidt, Jessica's biological father, in April 1992.

and Jan DeBoer. The highly publicized fight for Jessica[6] and the resulting decision that awarded custody to the Schmidts has raised many more questions than it has answered about the status of birthparents, adoptive parents and children.

The struggle for Jessica was framed in terms of parental rights versus the best interests of the child. While such a concrete depiction of the custody issues makes good media copy, the legal standards involved are not so simply expressed or applied. As noted by legal scholar Henry Foster[7] over twenty years ago, parental rights and the best interests of the child "constitute the black letter law of custody."[8] Biology and parental fitness, or the "parental rights" doctrine,[9] typically determine a contest between a natural parent and a third party, while the "best interests" standard[10] is reserved

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6. "Jessica" is the name that the DeBoers gave the child, though the courts generally referred to her as Baby Girl Clausen. After the litigation was concluded, the Schmidts renamed her Anna. The Schmidts reportedly "phased-in" her new name over a period of months, first calling the child Jessica, then Jessianna, and ultimately Anna. Michele Ingrassia & Karen Springen, *She's Not Baby Jessica Anymore*, NEWSWEEK, Mar. 24, 1994, at 60.

7. The late Henry H. Foster, Jr., was a Professor of Law at New York University and a former chairman of the Family Law Section of the American Bar Association. He co-authored HENRY H. FOSTER, JR. ET AL., LAW AND THE FAMILY—NEW YORK (2d ed. 1986) and MORRIS PLOSCOWE, ET AL., FAMILY LAW: CASES AND MATERIALS (2d ed. 1972).

8. Henry H. Foster, Jr., *Adoption and Child Custody: Best Interests of the Child?*, 22 BUFF. L. REV. 1, 3 (1972) (urging that neither parental rights doctrine or best interests standard should be applied inflexibly or automatically).

9. The doctrine of parental rights dictates that a biological parent is entitled to custody of his or her child unless he or she is shown to be unfit. Biological parents who cannot or will not fulfill their responsibilities as biological parents can have their parental rights terminated. The most common grounds for termination are child abuse, abandonment, neglect and general unfitness. Once the rights of the biological parents have been terminated, the child is free for adoption. For a discussion of the parental rights doctrine, see Foster, *supra* note 8; James G. O'Keefe, *The Need To Consider Children's Rights in Biological Parent v. Third Party Custody Disputes*, 67 CHI.-KENT L. REV. 1077 (1991) (arguing that the use of the parental rights doctrine as a standard in deciding child custody is no longer realistic); Virginia Mixon Swindell, Comment, *Children's Participation in Custodial and Parental Right Determinations*, 31 HOUS. L. REV. 659 (1994) (advocating that the rights of children should be paramount in the laws that concern them); Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963) (citing third-party custody disputes as offering the greatest opportunity to separate child-oriented from parent-oriented factors in custody dispositions) [hereinafter *Alternatives to "Parental Right"*]. The grounds for termination of parental rights under Iowa law are discussed *infra* note 46.

10. The United States Supreme Court has held that the right of a fit parent to the custody of a minor child is a fundamental liberty interest. *See* Santosky v. Kramer, 455 U.S. 745 (1982). Therefore, although the child's best interests are a determining factor in a contest between natural parents, when the dispute is between a parent and a nonparent, the child's best interests are presumed to be served by an award of custody to a parent. Therefore, an award of custody to a third party may be warranted only if parental unfitness, abandonment, neglect or some other extraordinary circumstance would substantially effect

for disputes between two natural parents.[11]

The parental rights doctrine is often condemned for mechanically reducing the custody decision to the presence or absence of biological ties "without regard to the psychological consequences to the child."[12] The best interests of the child standard, on the other hand, has been criticized as "an amorphous concept which may serve as a basis for rationalization of any result."[13] Regardless of how a party asserts his or her custody claim, "often, custody disputes degenerate into adversary contests between embittered parties both of whom lose sight of the child's welfare."[14]

Ironically, arguing for the consideration of the child's best interests may become less an altruistic pursuit of justice than the legal means to an end. The Supreme Court of Michigan's per curiam opinion rendered in *DeBoer v. Schmidt* (In Re *Baby Girl Clausen*)[15] recognized this, ordering Jessica's surrender to her biological parents, the Schmidts:

> To a perhaps unprecedented degree among the matters that reach this Court, these cases have been litigated through fervent emotional appeals, with counsel and the adult parties pleading that their only interests are to do what is best for the child, who is herself blameless for this protracted litigation and the grief that it has caused . . . . It is now time for the adults to move beyond saying that their only concern is the welfare of the child and to put those words into action . . . .[16]

This Comment does not support either side of the nature versus nurture[17] battle but, does expose the dangers inherent to either

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the child's welfare.

Some courts have begun to consider the child's interests in security and continuity of care as one such circumstance that may warrant denial of parental custody. Carol A. Crocca, Annotation, *Continuity of Residence as Factor in Contest Between Parent and NonParent For Custody of Child Who Has Been Residing With Nonparent—Modern Status*, 15 A.L.R. 5TH 692 (1993). For a detailed discussion of the best interests standard, see Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987) (arguing that following the best interests standard may be unjust toward the parents) [hereinafter Elster, *Solomonic Judgments*]; Foster, *supra* note 8; Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 262 (1975) (suggesting that all available alternatives have more disadvantages than the indeterminate best interests standard).

11. *See* Foster, *supra* note 8, at 3.

12. *Id.* at 4.

13. *Id.* at 2.

14. *Id.* at 15.

15. 502 N.W.2d 649 (Mich. 1992).

16. *Id.* at 668.

17. The phrase "nature versus nurture" inherently refers to the fundamentals of self-definition. Are we primarily a product of environment or genetics? Those who advocate the parental rights doctrine are convinced that children's best interests are served by being

position. Part I examines the facts behind the emotional battle for Jessica's custody and the court proceedings that culminated in her return to the Schmidts. Part II explores the "black letter" standards used to determine custody, the parental rights doctrine and the best interests of the child standard, and whether these standards have the dichotomous objectives with which they are often portrayed. Part III offers insight into the public perception of the battle for Jessica and discusses, in particular, why public opinion was so heavily skewed in the DeBoers' favor.

I. THE FACTS

> This case is, we observe thankfully, an unusual one.[18]

"Baby Girl Clausen" was born in Cedar Rapids, Iowa, on February 8, 1991.[19] Approximately forty hours later her biological mother, Cara Clausen, relinquished her rights to the child. By signing the release of custody form presented to her by an attorney representing the prospective adoptive parents, Jan and Roberta DeBoer,[20] Cara consented to a "complete severance and extinguishment" of her relationship with the child.[21] Cara, unmarried at the time of the child's birth, named Scott Seefeldt as the baby's father.[22] Scott executed a release of custody form four days later, relinquishing his parental rights.[23] After both biological parents had released their rights to the child, she was now free for adoption.[24]

On February 25, the DeBoers, residents of Ann Arbor, Michigan, petitioned the Iowa Juvenile Court for adoption of the child they called Jessica.[25] In the same proceedings, Cara's and Scott's parental rights were officially terminated.[26]

Having been granted custody during the pendency of the adoption proceeding, the DeBoers returned with Jessica to their

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reared by their biological parents. Those who advocate the best interests standard believe that environment (nurture) is the dominant factor in self-determination. For a more detailed discussion of nature and nurture and its effect on children, see *infra* Part II.

18. *In re* B.G.C., 496 N.W.2d 239, 240 (Iowa 1992).

19. *In re* Baby Girl Clausen, 502 N.W.2d 649, 652 (Mich. 1993).

20. *Id.* at 651 n.1.

21. IOWA CODE ANN. § 600A.2 (16) (West Supp. 1994).

22. *Baby Girl Clausen*, 502 N.W.2d at 652.

23. *Id.*

24. Under IOWA CODE ANN. § 600.3(2) (1993), "[a]n adoption petition shall not be filed until a termination of parental rights has been accomplished." *Id.*

25. *Baby Girl Clausen*, 502 N.W.2d at 652.

26. *Id.*

Michigan home.[27] The proposed adoption appeared to be going as planned. Even Clausen gave them her best wishes, writing them a letter that read: "I know you will treasure her and surround her with love, support her, encourage her to dream, to reach for the stars . . . God bless."[28]

Second thoughts soon eroded these positive sentiments. Cara attended a support group meeting of Concerned United Birthparents[29] and listened to other mothers relate their sorrow at giving up their babies.[30] Within two weeks she filed a motion in the Iowa Juvenile Court to revoke her release of custody.[31] According to her affidavit, Cara had lied when she named Scott as the father of her child; the actual father was her ex-boyfriend, Daniel Schmidt,[32] a co-worker at the Iowa shipping factory where Cara worked.[33] Cara had lied about the identity of the baby's father be-

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27. Throughout the custody proceedings, Jessica remained with the DeBoers pending the outcome of the litigation. She was transferred to the custody of the Schmidts and returned to Iowa on August 2, 1993, only after the Supreme Court denied the DeBoers' appeal.

28. ROBBY DEBOER, LOSING JESSICA 17 (1994) [hereinafter LOSING JESSICA].

29. Concerned United Birthparents (CUB) is a national support and search organization for those affected by adoption. The group has local chapters across the country. Founded in 1976, the group urges open adoption—in which biological parents are kept abreast of the child's welfare and, when the child reaches majority, the biological mother and child have the legal option to contact each other. CUB members advocate that women facing the choice of adoption or keeping their infants should provide their children with the benefit of their experiences.

The group has received much criticism, most notably in a 1993 article in *The New Yorker* that profiled Jessica's case. The article portrayed the group as staunchly anti-adoption. Lucinda Franks, *Annals of Law: The War for Baby Clausen*, NEW YORKER, Mar. 22, 1993, at 56. Roberta DeBoer has stated that she viewed CUB as the ultimate "villain" in the legal battle that took place between the DeBoers and the Schmidts for Jessica's custody, claiming that overzealous CUB members convinced the birth mother to regain her parental rights. LOSING JESSICA, *supra* note 28, at 194-95.

30. Nancy Gibbs, *In Whose Best Interest?*, TIME, July 19, 1993, at 44.

31. *In re* Baby Girl Clausen, 502 N.W.2d 649, 651-52 (Mich. 1993). IOWA CODE ANN. § 600A.4 (West 1981 & West Supp. 1994) provides:

> Either a parent who has signed a release of custody, or a nonsigning parent, may, at any time *prior* to the entry of an order terminating parental rights, request . . . revocation of any release of custody previously executed by either parent. If such request is . . . within ninety-six hours of the time such parent signed a release of custody, the juvenile court should order the release revoked. Otherwise, the juvenile court shall order the release or releases revoked only upon clear and convincing evidence that good cause exists for revocation. Good cause for revocation includes but is not limited to a showing that the release was obtained by fraud, coercion, or misrepresentation of law or fact which was material for its execution.

Id. (emphasis added).

32. *Id.*

33. Richard Victor, attorney for Jessica DeBoer, explained that Dan and Cara worked together at an Iowa shipping plant; he as a truck driver and she as a dispatcher. *Crossfire*

cause she was dating Scott when she found out that she was pregnant, and "did not want to create problems by appearing to have another man's baby."[34]

On February 27, Cara told Daniel Schmidt that she suspected he was the father of the child.[35] Ten days later, Daniel met with an attorney to determine how he could assert his parental rights over the baby girl.[36] Although he would be unsure whether he was the child's father until court-ordered blood tests established his paternity, Daniel did not delay action. On March 12, 1991, he filed a request to vacate the termination order; on March 18, he filed an affidavit of paternity.[37]

The Iowa Juvenile Court quickly stopped both biological parents' attempts to obtain custody of the child. Cara's motion to revoke her release was dismissed on the grounds that the juvenile court lacked subject matter jurisdiction once the adoption petition was filed.[38] Daniel's custody claim also was dismissed.[39] Roberta and Jan DeBoer returned to Michigan with their status as Jessica's custodians intact.[40]

A. *Procedural History: Iowa*

Daniel Schmidt subsequently sought relief in the Iowa District Court, petitioning to intervene in the adoption proceedings on the grounds that his parental rights had not been terminated as required by Iowa law.[41] The district court suspended the adoption proceedings and ordered blood tests to establish paternity.[42] As a result of the DeBoers' objections,[43] six months elapsed before the court received results that showed a 99.9% probability that Daniel

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(CNN television broadcast, Aug. 3, 1993).

34. *In re* B.G.C., 496 N.W.2d 239, 246 (Iowa 1992).

35. *Id.*

36. *Id.*

37. *Id.*

38. *In re* Baby Girl Clausen, 501 N.W.2d 193, 194 (Mich. Ct. App. 1993), *aff'd*, 502 N.W.2d 649 (Mich. 1993).

39. *Id.* Though the grounds on which his claim was dismissed were not specifically stated, it is likely that because Schmidt's rights were not terminated in the initial proceedings, there was nothing for the court to reinstate—thus rendering moot Schimdt's request.

40. *Id.*

41. *Id.* IOWA CODE ANN. § 600.3(2) (1993) states: "An adoption petition shall not be filed until a termination of parental rights has been accomplished" except in the adoption of adults and stepchildren. *Id.*

42. *Id.*

43. Richard Victor defended these objections as the DeBoers' natural reaction after Cara had named two different men as the father of her child. *Crossfire* (CNN television broadcast, Aug. 3, 1993).

was Jessica's father.[44] These results also showed a 0% probability that Scott Seefeldt was Jessica's father.[45]

On September 24, 1991, the DeBoers responded to these test results by filing a petition to terminate Daniel's rights, challenging his fitness as a parent.[46] Their petition was based on Daniel's (1) past history as a parent[47] and (2) his alleged abandonment of Jessica.[48] On November 4, 1991, the Iowa District Court held a bench trial on the issues of paternity, termination of parental rights, and adoption.[49] The court held that (1) Daniel had established his paternity by a preponderance of the evidence; (2) the DeBoers failed to establish that Daniel had abandoned Jessica or, that his parental rights should be terminated; and, therefore, (3) a best interests analysis was immaterial.[50] Ruling that the termination proceedings were void with respect to Daniel's parental rights, the court denied the DeBoers' request to adopt Jessica.[51] Roberta and Jan DeBoer were ordered to convey physical custody of the child to Daniel no

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44. *Baby Girl Clausen*, 501 N.W.2d at 194.

45. *Id.*

46. *Id.* Generally, before parental rights may be terminated, there must be some act or event that constitutes an express or implied relinquishment of parental authority, i.e., abandonment or serious neglect, conduct showing unfitness, or a knowing surrender of the child for adoption. After such a triggering event has occurred, the child's best interests become controlling in custody determinations. Foster, *supra* note 8, at 15.

Under Iowa law, parental rights can be terminated if the parent (1) has signed a release of custody and the release has not be revoked; (2) has petitioned for the termination of their parental rights; (3) has abandoned the child; (4) has been ordered to but has failed to financially support the child, without good cause; (5) does not object to the termination after proper notice and reasonable opportunity to object; or (6) the parent does not object to the termination although every reasonable effort has been made to identify, locate and give notice to that parent under Iowa law. IOWA CODE ANN. § 600A.8 (1993).

47. Both the majority and the dissenting opinions of the Iowa Supreme Court noted Daniel's "poor performance record as a parent." *In re* B.G.C., 496 N.W.2d 239, 245 (Iowa 1992). The dissent stated:

> [t]he record shows he (Schmidt) has previously failed to raise or support his other two children. He quit supporting his son, born in 1976, after two years. From 1978 to 1990 he saw him three times. He has another daughter whom he has never seen and has failed to support. He stated the he just never took any interest in her. In every meaningful way he abandoned them.

Id. at 247 (Snell, J., dissenting).

48. *In re* Baby Girl Clausen, 501 N.W.2d 193, 194 (Mich. Ct. App. 1993), *aff'd*, 502 N.W.2d 649 (Mich. 1993). Abandonment of a child is grounds for termination of parental rights in every state. Abandonment statutes generally specify a period of time after which the state may terminate the parent's rights. *See* Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 830.

49. *B.G.C.*, 501 N.W.2d at 194.

50. *Id.*

51. *Id.*

later than January 12, 1992.[52]

Meanwhile, the Iowa Court of Appeals reversed the juvenile court's termination of Cara's parental rights, and remanded the case for further proceedings.[53] The Iowa Supreme Court granted review of that decision and consolidated it with the DeBoers' appeal of the district court's grant of custody to Daniel.[54] The Iowa Supreme Court stayed the physical custody order pending the proceedings,[55] allowing Jessica to remain with the DeBoers in Michigan.

One year after Daniel had established his paternity, the Iowa Supreme Court affirmed both lower court decisions, rejecting the DeBoers' assertions that a best interests analysis governed the issue of termination in an adoption case.[56] Writing for the majority, Justice Larson stated the general rule that "the court may not consider whether the adoption will be for the . . . best interests of the child where the parents have not consented to an adoption."[57]

In compliance with the Iowa Supreme Court's decision, the district court terminated the DeBoers' rights as temporary guardians and custodians of the child, and awarded these duties to Daniel at a physical custody hearing on December 3, 1992.[58] The DeBoers refused to appear at the hearing and were found in contempt of court.[59]

B. *Procedural History: Michigan*

As the DeBoers' rights were being terminated in Iowa, they petitioned the Washtenaw County Circuit Court in Michigan, pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA), to modify the Iowa order granting custody of Jessica to Daniel Schmidt.[60] The DeBoers asserted that Michigan had jurisdiction

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52. *Id.*

53. *Id.* at 195.

54. *Id.*

55. *Id.*

56. *In re* B.G.C., 496 N.W.2d 239 (Iowa 1992).

57. *Id.* at 245.

58. *In re* Baby Girl Clausen, 501 N.W.2d 193, 196 (Mich. Ct. App. 1993); *aff'd*, 502 N.W.2d 649 (Mich. 1993).

59. *Id.* at 195 n.1.

60. *Id.* at 195. The general purposes of the UNIFORM CHILD CUSTODY JURISDICTION ACT §§ 1-28, 9 U.L.A. 111-70 (1968), are:

> (1) to avoid jurisdictional competition and conflict with courts of other states in matters of child custody which . . . resulted in the shifting of children from state to state with harmful effects on their well-being.
>
> (2) to promote cooperation among the courts of the various states, so that the one having the closest connection and most significant evidence concerning the child's

under the UCCJA because Jessica had resided in Michigan for all but three weeks of her life, making Michigan her "home state" under the UCCJA.[61] The DeBoers urged that it was in Jessica's best interests for Michigan to assume jurisdiction in the case[62] and sought a decision that balanced the Iowa courts' rulings with a determination of Jessica's best interests.[63] The Washtenaw County Circuit Court granted the DeBoers' petition for a preliminary injunction, ordering Daniel not to remove Jessica from Washtenaw County.[64]

Daniel entered a motion for summary disposition on December 11, 1992, urging, among other things, that the DeBoers lacked standing to initiate a custody dispute.[65] His motion was denied. Finding that it had jurisdiction to determine Jessica's best interests, the circuit court held a best interests hearing and ordered on February 12, 1993, that Jessica was to remain with the DeBoers.[66]

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care, protection, training and personal relationships will be able to do so; and (3) to deter parental abductions, forum shopping and repetitive litigation, so as to best promote stability of the home environment and secure family relationships for the child.

Id. § 1, 9 U.L.A. at 119. Michigan adopted the UCCJA in 1975. *See* MICH. COMP. LAWS §§ 600.651-673 (1993). For a discussion of the UCCJA, see Christopher Blakesley, *Child Custody—Jurisdiction and Procedure*, 35 EMORY L.J. 291 (1986) (discussing jurisdiction and applicable procedure in the context of child custody cases).

61. *Baby Girl Clausen*, 501 N.W.2d at 195. The UCCJA's definition of "home state" exists in MICH. COMP. LAWS § 600.652(e) (1993):

> Home state means the state in which the child immediately preceding the time involved lived with his or her parents, a parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned.

Id.

62. *Baby Girl Clausen*, 501 N.W.2d at 195. The UCCJA conveys jurisdiction on:

> A court of this state which is competent to decide child custody matters . . . by initial or modification decree or judgement if . . . (b) It is in the best interest of the child that a court of this state assume jurisdiction because the child and his parents. . .have a significant connection with this state and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

MICH. COMP. LAWS § 600.653(1)(b) (1993). The DeBoers urged that a Michigan court could modify the Iowa custody order because the Iowa court did not substantially conform with the UCCJA and undertake a best interests analysis. The DeBoers' reasoning was supported by a unanimous decision of the New Jersey Supreme Court. *See* E.E.B. v. D.A., 446 A.2d 871 (N.J. 1982), *cert. denied*, 459 U.S. 1210 (1983). Both the Michigan Court of Appeals and the Michigan Supreme Court found this reasoning to be without merit. *In re* Baby Girl Clausen, 501 N.W.2d 193, 197 (Mich. Ct. App. 1993), *aff'd*, 502 N.W.2d 649, 656 (Mich. 1993).

63. *Baby Girl Clausen*, 501 N.W.2d at 196.

64. *Id.*

65. *Id.*

66. *Id.*

This determination was never challenged.[67]

Daniel did challenge the circuit court's decision, asserting that (1) the court lacked jurisdiction to intervene because the Iowa court's decision involved adoption, not custody under the UCCJA;[68] (2) as a natural parent, he had a constitutional right[69] to custody of his child, absent a determination that he was unfit, and that no analysis, including that which determines the child's best interests, can override that right;[70] and (3) under the Full Faith and Credit Clause of the United States Constitution,[71] the circuit court was obligated to recognize and enforce the Iowa court's valid judgment.[72] Alternatively, Daniel argued, even if the circuit court had correctly assumed jurisdiction, Roberta and Jan DeBoer lacked standing to initiate a custody action because they were merely third-party custodians with no legal claim to Jessica.[73]

On March 29, 1993, the Michigan Court of Appeals reversed the circuit court's decision, finding that the court lacked jurisdiction under the UCCJA and, that under the Michigan Supreme Court's decision in *Bowie v. Arder*,[74] the DeBoers lacked standing to bring a child custody action.[75]

After this decision, Jessica's "next friend,"[76] Peter Darrow, filed a complaint in the Washtenaw County Circuit Court on Jes-

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67. *Id.*; *see also In re* Baby Girl Clausen, 502 N.W.2d 649, 653 n.9 (Mich. 1993).

68. *Baby Girl Clausen*, 501 N.W.2d at 196; *see* MICH. COMP. LAWS §§ 600.651-.673 (1993).

69. In Stanley v. Illinois, 405 U.S. 645 (1972), the Supreme Court held that under the Due Process Clause of the Fourteenth Amendment, a parent is entitled to a hearing on fitness before his children can be taken away from him. *Id.*

70. *Baby Girl Clausen*, 501 N.W.2d at 196.

71. U.S. CONST. art. IV, § 1.

72. *Baby Girl Clausen*, 501 N.W.2d at 196.

73. *Id.* at 197.

74. 490 N.W.2d 568 (Mich. 1992) (evaluating custody claims of third parties with whom natural parents allowed the children in question to reside for a period of time absent a formal arrangement; holding that a third party cannot attain standing simply by asserting that a change in custody would be in the best interests of the child, without a substantive right to custody of that child).

75. *Baby Girl Clausen*, 501 N.W.2d at 197.

76. A "next friend" is "one who commences an action on behalf of a minor plaintiff and represents such plaintiff under the supervision of the court." Powell v. Monolidis, 408 N.W.2d 525, 529 (Mich. Ct. App. 1987). Although not statutorily defined, Michigan statutes expressly prohibit any (1) physician who performs abortions, (2) person employed by a physician or organization who performs abortions or abortion counseling and referral services, or (3) person who serves as a board member or volunteer to such organization that provides abortions or abortion counseling from acting as a next friend. MICH. COMP. LAWS ANN. § 722.902(d) (West 1993). The circuit court appointed Peter Darrow, a Washtenaw County Attorney, as Jessica's next friend in this new suit.

sica's behalf.[77] The circuit court ordered that Jessica's custody remain unchanged pending this new action.[78] Darrow's complaint requested "child custody, declaratory relief and injunctive relief," and named both the DeBoers and the Schmidts as defendants.[79]

The Supreme Court of Michigan granted the DeBoers leave to appeal the Michigan Court of Appeals' decision as it related to the issues of jurisdiction and standing.[80] The Schmidts were allowed to appeal only the question of whether Darrow's complaint on behalf of Jessica should be dismissed for failure to state a claim on which relief could be granted.[81] All other proceedings were stayed pending the high court's consideration of these issues.[82]

C. *The Decision*

The Supreme Court of Michigan affirmed the court of appeals' decision, holding that the UCCJA and the federal Parental Kidnapping Prevention Act deprived the Michigan courts of jurisdiction over the dispute and required that the Iowa court's decision be upheld.[83] The court also rejected Darrow's next-friend claim on behalf of Jessica, directing that the action be dismissed for failure to state a claim upon which relief could be granted.[84] The court concluded that "[w]hile a child has a constitutionally protected interest in family life, that interest is not independent of its parents' [interest] in the absence of a showing that the parents are unfit."[85]

D. *Parental Rights: The Overriding Factor*

> As tempting as it is to resolve this highly emotional issue with one's heart, we do not have the unbridled discretion of Solomon. Ours is a system of law. . . .[86]

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77. *In re* Baby Girl Clausen, 502 N.W.2d 649, 653 (Mich. 1993). Peter Darrow had been appointed as one of the co-guardians *ad litem* for Jessica in the earlier custody case. *Id.*

78. *Id.* at 653.

79. *Id.* Though the court later chastised this action as simply a way for people like the DeBoers to circumvent the procedures that are required to gain standing, Richard Victor defended the strategy: "[t]he problem is the child was victimized because of the mistakes of the adults, and that was wrong. I represented the best interests of Jessica so that she would have a right to a hearing regardless of the mistakes of the adults." *Crossfire* (CNN television broadcast, Aug. 3, 1993).

80. *Baby Girl Clausen*, 502 N.W.2d at 654 n.11.

81. *Id.* at 654 n.12.

82. *Id.*

83. *Id.* at 652.

84. *Id.*

85. *Id.*

86. *In re* B.G.C., 496 N.W.2d 239, 241 (Iowa 1992).

Under Iowa Code section 600.3(2), "[a]n adoption petition shall not be filed until a termination of parental rights has been accomplished . . . ."[87] Although a termination hearing was held on February 25, 1991, Scott Seefeldt's parental rights were terminated, not those of Daniel Schmidt.[88] Because the termination of Daniel's rights to Jessica was not accomplished, the adoption proceedings were viewed as "fatally flawed" under Iowa law.[89] This conclusion was reached despite the fact that the proceedings were legally completed, since Scott's parental interests were "known" at that time based on the misrepresentations of Cara Schmidt.[90] The Iowa Supreme Court explained the general rule of non-interference with the rights of natural parents as, "simply to better the moral and temporal welfare of the child as against an unoffending parent."[91] In order for the court to terminate Daniel's parental rights and proceed with the DeBoers' adoption request, specific grounds for termination had to be established.[92]

The DeBoers contended that Daniel's parental rights should have been terminated because he had abandoned Jessica, which constitutes grounds for termination under Iowa law.[93] They asserted that Daniel should have acted to secure his parental rights to the child immediately after Cara's pregnancy was known, despite the fact that she had not told Daniel that he was Jessica's father.[94] Calling this assertion "totally unrealistic,"[95] The Iowa Supreme Court affirmed the district court's finding that, under the

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87. IOWA CODE § 600.3(2) (1993).

88. *B.G.C.*, 496 N.W.2d at 240-41.

89. *Id.* at 245.

90. *B.G.C.*, 496 N.W.2d at 247 (Snell, J., dissenting). In 1994, the Iowa legislature adopted § 600A.9A(1), which provides:

> Any biological parent who chooses to identify the other biological parent and who knowingly and intentionally identifies a person who is not the other biological parent in the written release of custody or in any other document related to the termination of parental rights proceedings is guilty of a simple misdemeanor.

1994 Iowa Legis. Serv. § 600A.9A (West).

91. *B.G.C.*, 496 N.W.2d at 245.

92. IOWA CODE § 600.3(2) (1993).

93. *B.G.C.*, 496 N.W.2d at 241 n.1. *See* IOWA CODE § 600A.8(3) (1993). IOWA CODE § 600A.2(17) (West Supp. 1994) defines abandonment as:

> to permanently relinquish or surrender, without reference to any particular person, the parental rights, duties or privileges inherent in the parent-child relationship. The term includes both the intention to abandon and the acts by which the intention is evidenced. The term does not require that the relinquishment or surrender be over any particular period of time.

Id.

94. *B.G.C.*, 496 N.W.2d at 241 n.1.

95. *Id.*

clear and convincing evidence standard,[96] Daniel had not abandoned Jessica.[97] The court further noted that a finding of abandonment would deprive Daniel of his constitutional right[98] to develop a meaningful relationship with his daughter.[99] Because Daniel's rights to Jessica had not been legally terminated and the court did not find grounds to terminate his rights under Iowa law, Jessica's best interests were not considered.[100]

Although the Michigan Supreme Court was able to rest its decision in the DeBoers' appeal on Iowa law and the Iowa court's decision concerning Peter Darrow's motion filed on behalf of Jessica, the court examined Michigan law to determine whether Jessica could initiate a custody proceeding on her own behalf. Darrow urged the following: (1) the UCCJA bestows on children the right to initiate such actions; (2) Jessica has a due process liberty interest in her relationship with her "psychological parents,"[101] the DeBoers; and (3) Jessica's right to equal protection under the Fourteenth Amendment has been violated, since children are treated differently based on whether they are in the care of their "psychological" or biological parents.[102]

The Michigan Supreme Court quickly dismissed the theory arising from the Child Custody Act. The court refused to read the Child Custody Act to allow an action on the child's behalf because the Act consistently differentiates the adult parties from the child and was designed to resolve disputes among the adult parties seeking custody.[103] The court seemed to chastise the DeBoers, calling it a "fiction" that a two year-old might express a preference about her custody, and suggesting that the DeBoers actually were imposing on Jessica what they thought was in her best interests via the

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96. *See* IOWA CODE ANN. § 600A.8 (1992). This burden of proof reflects the *Santosky* standard, which requires that parental unfitness must be found by a standard equal to or greater than clear and convincing evidence. *See* Santosky v. Kramer, 455 U.S. 645, 769 (1982).

97. *B.G.C.*, 496 N.W.2d at 246. In fact, the court felt so strongly to the contrary that it remarked: "[V]irtually all of the evidence . . . suggests just the opposite." *Id.*

98. Stanley v. Illinois, 405 U.S. 645 (1972).

99. *B.G.C.*, 496 N.W.2d at 241 n.1.

100. *Id.* at 245.

101. The concept of psychological parenthood is defined as "the mutual interaction between adult and child, which might be described in such terms as love, affection, basic trust, and confidence." *Alternatives to "Parental Right," supra* note 9, at 158. This definition is based on the work of Anna Freud and others, which eventually resulted in the publication of *Beyond The Best Interest of the Child* in 1973. For a more detailed discussion of "psychological parenthood," see part II.

102. *In re* Baby Girl Clausen, 502 N.W.2d 649, 665 (Mich. 1993).

103. *Id.* at 665 n.44.

next-friend procedure.[104]

In response to Darrow's second and third legal theories, the court used language that closely echoed the Iowa court's language, emphasizing that the right of the natural parent to custody supersedes the child's interest in remaining with a non-parent custodian. While acknowledging that children have a due process liberty interest in their family life, the court insisted that those interests were not independent of a child's biological parents' interests.[105] The court continued by stating that "[t]he mutual rights of the parent and child come into conflict only when there is a showing of parental unfitness . . . despite the preferences of the child."[106] The court cited Michigan case law supporting its finding that Jessica's interests were not actionable separate from her biological parents' interests.[107]

The court responded to Darrow's equal protection claim by relying on the parental rights doctrine. The court observed that "children residing with their parents are not similarly situated to those residing with non-parents,"[108] since the nature of their relationships were fundamentally different.[109] The court ultimately ordered the circuit court to establish a plan for the transfer of custody and to monitor and enforce the transfer process.[110]

An appeal of the decision to the United States Supreme Court proved fruitless. Denying the DeBoers' application for a stay of custody, Justice Stevens maintained:

> [n]either Iowa law, Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education . . . . There is no valid federal objection to the conduct or the outcome of the proceedings . . . .[111]

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104. *Id.* After noting the lack of case authority to support the next friend's position, the court criticized this legal strategy, stating: "[i]t is clear that what is sought in this case is not so much the recognition of a child's right to bring an action, but a procedure by which persons like the DeBoers[] . . . may circumvent those rules." *Id.*

105. *Id.* at 665.

106. *Id.* at 666.

107. *Id.* at 666-67.

108. *Id.* at 668.

109. The court distinguished between the foster family and the natural family:

> The liberty interest in family privacy has its source . . . not in state law, but in intrinsic human rights, as they have been understood in this Nation's history and tradition. Here, however, whatever emotional ties may develop between foster parent and foster child have their origin in an arrangement in which the State has been a partner in the outset.

Id. at 651 (quoting Smith v. Organization of Foster Families, 431 U.S. 816, 845-46 (1977)).

110. *Id.* at 668.

111. DeBoer v. DeBoer, 114 S. Ct. 1 (1993).

On Monday, August 2, 1993, Jessica was returned to her birthparents, Cara and Daniel Schmidt, through a court-appointed intermediary. The transfer took place two years and five months after Cara and Daniel first sought to regain custody of Jessica.

II. IN THE BEST INTERESTS OF THE CHILD: NATURE OR NURTURE?

> We had different degrees of testimony . . . [b]ut every expert testified that there would be serious traumatic injury to the child at this time.[112]

Throughout the numerous proceedings that marked the DeBoers' fight to retain custody of Jessica, they urged a best interests of the child[113] determination. This legal standard soon became the battle cry for the DeBoers' supporters, as well as the catchphrase most often used by the media to report on the case.[114] Where a child's best interests lie would seem to be the most logical place to rest any custody decision, since the child has the greatest stake in the result; yet, best interests hearings are often never held in custody disputes. Frequently, before such a determination can be made, the biological ties of one or both of the "natural" parents[115] must be overcome. So too, the Supreme Court of Michigan could not consider Jessica's best interests in light of Daniel Schmidt's biological link to her. The court characterized the tie between Jessica and Daniel as "natural," but her relationship with the DeBoers as merely "contractual."[116]

Though the court ultimately rested its decision on the technical issues of jurisdiction and standing, the Michigan Supreme Court clearly articulated its judicial preference for the "natural" family over the "foster family." The court launched the substan-

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112. *Baby Girl Clausen*, 502 N.W.2d at 669 (Levin, J., dissenting) (quoting Circuit Judge William Ager).

113. *See supra* note 8 and accompanying text.

114. *See, e.g.*, Joan Beck, *Court Ruling Serves the Law, But Not the Child*, ORLANDO SENTINEL, April, 5, 1993, at A11 (arguing that law cares more about technicalities than the interests of two-year-old Jessica); Anita Creamer, *Taking Custody of Our Senses*, SACRAMENTO BEE, June 8, 1993, at D1 (asking what, in the context of child custody decisions generally and in Jessica's case particularly, about the child's best interests); Gibbs, *supra* note 30, at 44; Ellen Goodman, *Taken From Those She Loves*, WASH. POST, July 31, 1993, at A21 (stating "how little the child's view is counted in the eyes of blind justice"); Mark Patinkin, *When Children Become Chattel*, ST. LOUIS POST-DISPATCH, July 26, 1993, at 7B (discussing how courts are treating children like property instead of giving their interests precedence); Lynn Smith, *A Birth Mother; It's Never in the Best Interest of Children to be Bought*, L.A. TIMES, Aug. 11, 1993, at E1.

115. According to IOWA CODE ANN. § 600A.2(12) (West Supp. 1994): "Natural parent means a parent who has been a biological party to the procreation of the child." *Id.*

116. *In re* Baby Girl Clausen, 502 N.W.2d 649, 651 (Mich. 1993).

tive portion of its opinion by quoting the Supreme Court's decision in *Smith v. Organization of Foster Families*:[117] "[n]o one would seriously dispute that a loving and interdependent relationship with an adult and a child in his or her care may not exist in the absence of blood relationship."[118] However, the court was quick to add that there are limits to claims based on psychological relationships. These limits are the "constitutionally recognized" interests that derive from a blood relationship.[119]

Some experts have argued that natural parents "are credited with an invariable, instinctively based positive tie to the child, although this is frequently belied by evidence to the contrary."[120] Yet, the legitimacy of the biological tie is seldom rejected in the judicial arena and has been likened to a property right,[121] making the welfare of the child a secondary consideration. Professor Katherine T. Bartlett has explained how custody litigation confirms this view of parenthood: "[C]urrent legal thinking . . . causes us to focus on an individual parent's achievement, biological contribution, and 'rights' and thereby conceive parenthood in individualistic, possessory terms."[122]

Though the delineation between natural and unnatural parents represents a bright line for the courts, the child for whom the court is making the custody determination has no conception of biological ties and their implications, at least in the early years of his or her development.[123] The child's emotional attachment does not originate in "the physical realities of his conception and birth,"[124] but is a direct outgrowth of a connection with an adult

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117. 431 U.S. 816 (1977).

118. *Baby Girl Clausen*, 502 N.W.2d at 651 (quoting Smith v. Organization of Foster Families, 431 U.S. 816, 843-44 (1977)).

119. *Id.*

120. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 17 (1973) [hereinafter BEYOND THE BEST INTERESTS OF THE CHILD].

121. In his lengthy dissent, Justice Charles Levin condemns the majority for treating Jessica as if she were a "carload of hay" and focusing their analysis "on whether the biological parents or persons acting as parents have the better 'legal right,' better legal title . . . ." *Baby Girl Clausen*, 502 N.W.2d at 668, 670 (Levin, J., dissenting).

122. Katherine Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 337 (1988) (proposing that the law of child custody be based on a view of parenthood as responsibility and connection rather than possessiveness and rights).

123. According to adoption experts Brodzinsky, Schechter and Marantz, contrary to what pop psychologists suggest, babies "do not emerge from the uterus bonded or attached to their biological parents, nor do they look around and say 'Mama' to the first person visible." DAVID BRODZINSKY ET AL., BEING ADOPTED: THE LIFELONG SEARCH FOR SELF 31-39 (1992). Though they do not deny the capabilities that newborns have been proven to display in recognizing their mother's voice, breast milk, etc., the authors are quick to point out that "recognition is not attachment." *Id.* at 33.

124. BEYOND THE BEST INTERESTS OF THE CHILD, *supra* note 120, at 17.

who meets his or her day-to-day physical and emotional demands.[125]

For the biological parents, the facts of having engendered, borne, or given birth to a child produce an understandable sense of preparedness for proprietorship and possessiveness. These considerations carry no weight with children who are emotionally unaware of the events leading to their births. What registers in their minds are the day-to-day interchanges with the adults who take care of them and who, on the strength of these interchanges, become parent figures to whom they are attached.[126] This concept of "psychological parenthood" is the key to framing a legal argument that a child's best interests require custody to continue with the nonparents. Thus, the best interests standard intrinsically favors the status quo, i.e., the parties in possession of the child.

A singular best interests determination took place throughout the history of Jessica's case. Several expert witnesses testified in the Washtenaw County Circuit Court that Jessica was certain to suffer trauma if she were removed from the DeBoers.[127] On that basis, the court held it was in Jessica's best interests to remain with the DeBoers. This finding later was held immaterial.

While the presence or absence of biological ties may have been a logical factor on which to base custody decisions in the past, the widespread acceptance of "psychological" parenthood has undermined this rigid interpretation of family. Despite the support of the psychiatric community and the overall success of adoption, the legal system clings to a notion of family that stems from biology. As Professor Elizabeth Bartholet explains:

> The term family implies a group linked by blood ties: a married couple are not really a family until they produce a child together; when people talk about "starting a family," they refer not to the creation of a marital relationship but to the production of children. Only our blood relationships are permanent . . . .[128]

Because of this reverence for the biological link, adoption is inherently surrounded by stigma and viewed as the last alternative

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125. *Id.*

126. *Id.* at 12-13.

127. *In re* Baby Girl Clausen, 502 N.W.2d 649, 669 (Mich. 1993) (Levin, J., dissenting) (quoting Circuit Judge William Ager); *see also Primetime Live: "Baby Anna"—An Update on Baby Jessica* (ABC television broadcast, Mar. 10, 1994). On this broadcast, experts were shown testifying in the district court. The experts' predictions about the effect of a possible transfer of custody ranged from a "very significant trauma in [Jessica's] life" to "[w]hatever she has achieved developmentally, she'll probably go backwards." *Id.*

128. ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 169 (1993).

both for birth parents and adoptive parents.[129] This stigma is logically extended to any relationship that does not flow from the traditional concept of family, i.e., those people who are linked by blood. The courts view any relationship defined outside of biology as inferior[130] and existing only at the tolerance of the state.[131] This inherent bias extends naturally to custody decisions and may explain the adherence to parental rights in this context. It may also explain why parental rights and the best interests standards are often construed as having dichotomous objectives and results. Yet, an argument in favor of the child's best interests may not necessarily exclude all consideration of biological ties.

A. *Best Interests and Biology: Mutually Exclusive?*

> Because of the long tradition of viewing adoption as a solution to many problems, professionals and lay people have had trouble accepting the possibility that the solution itself could at times be a problem.[132]

While the bonds associated with psychological parenthood have attained widespread recognition[133] since they were first identified,[134] biological ties cannot be ignored altogether. The approach taken by the DeBoers and their numerous supporters seemed to deny that biological heritage has any meaning. But adoption experts have discovered that adoptees experience loss from the very fact that they are separated from their biological family,[135] a loss they describe as "more pervasive, less socially recognized, and more profound" than death or divorce.[136]

This sense of loss, even for those adoptees who are placed at birth, is felt in the context of the adoptee's search for self, one of the primary dimensions of psychological development. As David Brodzinsky writes: "When you live with your biological family, you

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129. *Id.* at 165.

130. *Id.* at 167. Professor Bartholet observes: "[b]lood strangers who rear and nurture children are unreal, unnatural substitutes for the real thing." *Id.*

131. The Michigan Supreme Court emphasized the distinction between a foster family and a natural family: "[w]hatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the state has been a partner from the outset." *In re* Baby Girl Clausen, 502 N.W.2d 649, 651 (Mich. 1993) (quoting Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977)).

132. BRODZINSKY ET AL., *supra* note 123, at 9.

133. *See* Peggy C. Davis, *"There's a Book Out There . . .", An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987) (documenting the judiciary's indiscriminate acceptance of this work in the context of custody disputes).

134. *See, e.g.*, BEYOND THE BEST INTERESTS OF THE CHILD, *supra* note 120.

135. *See generally* BRODZINSKY ET AL., *supra* note 123.

136. *Id.* at 9.

have guideposts to help you along. You can see bits of your own future reflected in your parents, pieces of your personality echoed in your brothers and sisters."[137] For those that are adopted, there are fewer clues to identity.

In addition to the "genealogical bewilderment" that affects the search for self, coming to terms with the perceived rejection by one's birth parents can also augment an adoptee's negative self-perception. "Once children enter into a period of logical thought . . . they realize that to have been 'chosen', they first had to have come from somewhere—which meant that someone had to give them away."[138] The anger that often accompanies this realization can take two different directions, both of which have a negative impact on a child. For a child who concludes that he or she was "abandoned" or "rejected," the anger is most likely directed at the birth parents; for a child who feels that he or she was "stolen" or "bought," the anger is often directed at the adoptive parents.[139]

For children between the ages of six and eighteen, studies indicate that adoption is a risk factor for certain problems such as low self-esteem, poor academic progress, and certain destructive behavior.[140] The increased vulnerability of adoptees to psychological problems is largely due to their experience of loss. In light of the potential risks associated with adoption, custody decisions that emphasize biological ties seem at least partially justified as being in the child's best interests. Yet, the singular focus on the "rights" of parents undermines arguments framed in biological terms, making them vulnerable to attack from those who advocate the exclusive use of the best interests standard—which centers instead on a child's attachments. Thus, discussions of each standard are expressed in terms of either the parents' rights or the child's rights. This Comment next examines both "black letter" standards and one judicial attempt to temper the results that can emerge from each extreme.

B. *Best Interests Versus Parental Interests*

While responding to a child's best interests seems to be an obvious response to the difficult questions posed by custody disputes, it is clearly a double-edged sword. In one respect, it may be the only means of providing individualized justice for the child subject to a custody proceeding. The best interests standard has been an

137. *Id.* at 13.
138. *Id.* at 71.
139. *Id.* at 78.
140. *Id.* at 9.

improvement over custody rules that focus solely on the parent's interests.[141] This standard "[f]orc[es] parents to articulate their claims to children in terms of the child's welfare [and] expresses a societal preference for protecting children over protecting adults, a preference which, though not inevitable, is easily defended."[142] However, such individualized determinations carry a substantial risk of societal biases impacting the custody decision.

1. *The Case of Baby Girl B.* "The fundamental liberty interests of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . . Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."[143] On June 26, 1991, eighteen year-old Gina Pelligrino was taken to a local Connecticut hospital after a fainting spell. When hospital personnel informed her that she was in active labor, she gave them false answers regarding her name and personal information. After she gave birth, she briefly checked on her child and fled the hospital. She returned home and concealed what had happened from her parents and friends.[144]

On July 31, 1991, Gina's parental rights were terminated following a hearing.[145] Gina was deemed to have received constructive notice of the filing through publication in a New Haven register pursuant to Connecticut law.[146] Approximately four months later,

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141. Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 55 (1994) (observing that, at its inception, the best interests standard was viewed as enlightened and humane because it rescued children from their status as marital property; concluding that the best interests standard is jurisprudentially unsound); *see also* Bartlett, *supra* note 122, at 303.

142. Bartlett, *supra* note 122, at 302-03.

143. *In re* Baby Girl B., 618 A.2d 1, 10 (Conn. 1992) (quoting Santosky v. Kramer, 455 U.S. 745, 753 (1982)).

144. *Id.* at 4.

145. *Id.* at 5. The trial court found that it was in the child's best interests to waive the one-year waiting period for termination of parental rights under Connecticut law. Specifically, Connecticut law provides: "The court may waive the requirement that one year expire prior to the termination of parental rights if it finds from the totality of the circumstances surrounding the child that such a waiver is necessary to promote the best interest of the child." *Id.* at 5 n.4 (citing CONN. GEN. STAT. ANN. § 17a-112(c) (West 1992)).

146. *See id.* at 5 n.3. CONN. GEN. STAT. ANN. § 45a-716(c) (1993) provides:

> If the address of any person entitled to personal service is unknown . . . a judge or clerk of the court shall order notice to be given by . . . publication at least ten days before the date of the hearing. Any publication shall be in a newspaper of general circulation in the place of the last-known address of the person to be notified . . . or if no such address is known, in the place where the termination has been filed.

Id.

after the expiration of the statutory appeal period following a judgment terminating parental rights, Gina stepped forward to reclaim her daughter[147] who already had been placed for adoption with an approved couple.[148]

The Connecticut trial court approved Gina's motion to reopen the judgment terminating her parental rights. Under Connecticut law, jurisdiction to open a judgment terminating parental rights prior to adoption is vested in the trial court. Despite the expiration of the statutory period[149] and the baby's placement with a couple approved for her adoption, she was returned to her biological mother[150] who was living in a homeless shelter at the time of transfer.[151] The Connecticut Supreme Court affirmed the trial court's ruling in December 1994. The fact that the State of Connecticut would transfer an infant child from a secure home to the uncertainty of life in a homeless shelter was hard to comprehend outside the realm of law, and an enormous outcry ensued across the state.[152]

Writing for the majority, Chief Judge Peters recognized the importance of achieving justice for the individual.[153] "[T]he legislature has struck a balance between a strong policy interest in finality of judgments terminating parental rights and an equally strong

147. *Baby Girl B.*, 618 A.2d at 5.

148. *Id.*

149. *Id.* at 6; *see also* CONN. GEN. STAT. ANN. § 52-212a (West 1991), which provides that "[a] civil judgment or decree rendered in the superior court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it is rendered . . . ." *Id.*

150. *Baby Girl B.*, 618 A.2d at 7.

151. Constance Hays, *Custody Reversal in Connecticut Pits the Public Against the Courts*, N.Y. TIMES, July 13, 1992, at B7; *see generally* Gibbs, *supra* note 30.

152. According to *The New York Times*, there were outraged letters to newspapers, petitions urging the return of the baby to the preadoptive parents, calls to change the child-welfare laws, and death threats against Gina Pelligrino. *See* Hays, *supra* note 151, at B7.

If the realities of Baby Girl B's situation were considered in the custody equation, it is doubtful that she would ever have been returned to her natural mother. This was clearly a case of legal line-drawing with the child ending up on the wrong side of the line. As Connecticut Mental-Health Commissioner Albert Jay Solnit remarked: "[t]he best interests of the child were totally ignored. What was worshipped was the technicality of the law and the mystique of blood ties." *See* Gibbs, *supra* note 30, at 48.

However, Gina's lawyer was quick to defend her client, dismissing the tide of popular opinion against Gina as "another topic of public disgust." *See* Hays, *supra* note 167, at B7. She explained that Gina needed public assistance because she quit her job to be with the baby full-time. *Id.*

Ironically, the homeless shelter where Gina planned to take her infant daughter was recommended by the Department of Children and Youth Services because it had a program which taught child-rearing techniques. *Id.*

153. *In re* Baby Girl B., 618 A.2d 1, 20 (Conn. 1992).

policy interest in doing justice in the individual case."[154] However the individual to which he was referring was not the child in question but the parent who had once abandoned her and then reclaimed her.

2. *Cultural Biases.* Though consideration of the child's best interests potentially allows each child to be placed in a home that is best suited to his or her needs, there are strong arguments against this standard. One argument of child welfare advocates is that this standard leads to even less uniformity in custody decisions, making the murky waters of adoptive parenting even less clear.[155] Even more disturbing is the ever-present danger that cultural biases will affect custody decisions that should be entrusted to judicial discretion alone.[156] As Katherine Bartlett observes:

> [T]he best interests of the child is a highly contingent social construction. Although we often pretend otherwise, it seems clear that our judgments about what is best for our children are as much the result of political and social judgments about what kind of society we prefer as they are conclusions based upon neutral or scientific data about what is "best" for children. The resolution of conflicts over children ultimately is less a matter of objective fact-finding than it is a matter of deciding what kind of children and families—what kind of relationships--we want to have.[157]

Two cultural biases that have emerged from custody cases decided under the best interests standard are class bias and life-style bias.

3. *Class Bias.* "[B]ecause they looked as if they'd just stepped out of a Volvo ad, conventional wisdom believed the DeBoers would be better parents."[158] One form of cultural bias that permeated the custody battle for Jessica DeBoer is class bias. Americans were overwhelmingly in favor of the DeBoers,[159] causing one to wonder whether the "proclaimed interest in Jessica's well-being serves as camouflage for middle-class bias."[160] In fact, it is reasonable to conclude that a child who has been demoted in socio-economic class is deprived of certain opportunities.[161] Though this

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154. *Id.*

155. Mnookin, *supra* note 10, at 262.

156. *See, e.g.*, Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966).

157. Bartlett, *supra* note 122, at 303.

158. *See* Ingrassia & Springen, *supra* note 6, at 64.

159. Roberta DeBoer, *From Start, Media Took Sides in Baby Jessica Case*, TOLEDO BLADE, Aug. 23, 1993, at 11A [hereinafter DeBoer, *Media Took Sides*]. Roberta DeBoer is a columnist for the *Toledo Blade*, not Jessica's intended adoptive mother.

160. *Id.*

161. Cohen, *supra* note 2, at W9.

bias is often subliminal to the onlooking public, it is a tension that was recognized throughout the judicial history of Jessica's case. The Iowa Supreme Court made it clear from the beginning of its opinion that "courts are not free to take children from parents simply by deciding [that] another home appears more advantageous."[162] Yet this statement was made in the context of the parental right doctrine. If the court did not have a standard to follow and was simply determining the child's best interests, no doubt the economic positions of the adverse parties would influence the decision.

A group of lawyers and adoptees felt that the controversy over the "Baby B" decision[163] was fueled by class bias—a consensus that the middle-class couple should have triumphed over the teenage welfare mother.[164] The fight between the DeBoers and the Schmidts was portrayed in a similar manner: the educated, comfortable DeBoers versus the truck driver and dispatcher from the Iowa backwater.[165]

It is interesting to consider, as one journalist did, what the reaction of the public would have been if Jessica's biological mother had been something other than an Iowa truck dispatcher.[166] "[H]ad Cara Clausen been a twenty-seven year-old investment banker who surrendered her baby for adoption without legal or other counseling, I bet the media would have cried 'Stop, thief!' "[167] Indeed, it is often the economic disparity between competing parties to a custody dispute that decides the outcome. Some

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162. *In re* B.G.C., 496 N.W.2d 239, 241 (Iowa 1992) (quoting *In re* Burney, 259 N.W.2d 322, 324 (Iowa 1977)). The Supreme Court noted this language in its denial of an application for a stay of the judgment. DeBoer v. DeBoer, 114 S. Ct. 1 (1993). The Supreme Court of Michigan echoed these principles: "[i]t is a well-established principle of law that parents, whether rich or poor, have the natural right to the custody of their children." *In re* Baby Girl Clausen, 502 N.W.2d 649, 667 (Mich. 1993) (quoting Herbstman v. Shiftan, 108 N.W.2d 869, 872 (1961)).

163. *See supra* part II.

164. *See* Mark Pazniokas, *Legislators Urged to Reject Changes Rooted in Emotional Adoption Case*, HARTFORD COURANT, Feb. 27, 1993, at C1.

165. *See* DeBoer, *Media Took Sides*, *supra* note 159; *see also Primetime Live: "Baby Anna"--An Update on Baby Jessica* (ABC television broadcast, Mar. 10, 1994). Diane Sawyer, who conducted the interview, commented:

> [t]he DeBoers were seen as more prosperous, better educated. They lived in a college town. Even though the Schmidts, from Iowa farm country, in fact, had a slightly higher income . . . [w]hen the DeBoers sold their story for a T.V. movie, they were the sophisticates . . . [t]he Schmidts were held up for ridicule.

Id. Sawyer also reported that the DeBoers were portrayed in a made-for-television movie as enjoying dinner in a French restaurant while the Schmidts were shown (falsely) living in a trailer with hubcaps hanging across the front porch. *Id.*

166. DeBoer, *Media Took Sides*, *supra* note 159, at 11A.

167. *Id.*

observers felt that a major thrust of the DeBoers' strategy was simply to drain the Schmidts' financial resources through legal costs and eventually force them to give up.[168] Writing for *The Washington Post*, Richard Cohen aptly summarizes the dangers of class bias: "Having abandoned the firm handhold of the old standard . . . we are heading down a slippery slope at the bottom of which lurks an issue we Americans are reluctant to face: the awful realities and inequalities of wealth and class." [169]

4. *Lifestyle Bias.* Though class bias may manifest itself subtly in the context of a custody decision, a not-so-subtle brand of social manipulation occurs when the morality of a custodial parent is questioned. A recent decision that demonstrates this point involved a Virginia woman and her son. Two year-old Tyler Doustou was removed from his natural mother, Sharon Bottoms, and placed in the custody of his maternal grandmother, Kay Bottoms who initiated the custody action. The sole reason that Sharon Bottoms lost custody of her son was that she is a lesbian and lives with her female lover, April Wade.

Circuit court Judge Buford Parsons, Jr., upheld a juvenile court order which removed Tyler from Sharon's custody because her relationship with Ms. Wade is "illegal, immoral and renders her an unfit parent."[170] Judge Parsons relied on a 1985 state supreme court decision[171] that held that it is not in a child's best interests to award custody to a parent who carries on an active homosexual relationship in the same residence as the child.[172] In that case, the court found "[t]he father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law."[173] Sharon's attorney, Donald Butler, argued that his client's situation was distinct from the decision on which Judge Parsons relied because that custody dispute involved one parent versus another parent, while Sharon's case involved a non-parent versus a parent.[174] However, Judge Parsons reasoned that the " 'extraordinary nature' of Bottoms' moral deficiency trumped any legal presumption" favoring

168. Cohen, *supra* note 2, at W9.

169. *Id.*

170. *See* Stephen Chapman, *A Custody Decision That Poses a Danger to Every Parent*, CHI. TRIB., Sept. 19, 1993., at 3.

171. Roe v. Roe, 324 S.E.2d 691 (Va. 1985).

172. *Id.* at 691.

173. *Id.* at 694.

174. Interview with Donald Butler, *Larry King Live* (CNN television broadcast, Sept. 15, 1993).

the biological parent.[175] Interestingly, even though Kay Bottoms had lived unmarried with a man for seventeen years while she raised her children, the morality of her life was never questioned. This irony caused one journalist to remark: "[t]hat's rather selective Scripture reading, isn't it?"[176]

Though the Bottoms' case did not involve a conflict between birth parents and potential adoptive parents, the implications are the same. A best interests of the child standard can be used to validate certain lifestyles while condemning others as immoral. When the subjective morality of a parent can be used in custody decisions, everyone, apparently is at risk.

Ironically, one of the most famous misapplications of the best interests standard, *Painter v. Bannister*,[177] emerged from the jurisdiction that clung so strongly to biological ties in Jessica's case. In 1966, the Iowa Supreme Court held that it was in four year-old Mark Painter's best interests to remain with his elderly grandparents rather than return to what it viewed as a "Bohemian" lifestyle in San Francisco with his father and new stepmother. Mark was placed temporarily with his maternal grandparents after his mother and sister were killed in a car accident. Mark's father, Harold Painter, had not relinquished or abandoned him, nor was it alleged that he was unfit. Harold simply needed some time to get back on his feet after the tragic loss of his wife and daughter. The court ignored a statutory presumption in favor of the father and awarded custody to the grandparents. Though the court denied that its decision was based on a "choice of one of two ways of life,"[178] the reasoning offered to support its decision belies this denial:

> The Bannister home provides Mark with a stable, dependable, conventional, middle-class, midwest background and an opportunity for a college education and profession, if he desires it. It provides a solid foundation and secure atmosphere. In the Painter home, Mark would have more freedom of conduct and thought with an opportunity to develop his individual talents. It would be more exciting and challenging in many respects, but romantic, impractical and unstable.[179]

As Henry Foster observed, the irony of this decision lies "in the fact that the Iowa court in *Painter* blindly applied the so-

175. *Judge: Lesbian is Unfit Parent*, LEGAL INTELLIGENCER, Sept. 9, 1993, at 5.

176. Kathleen Parker, *The Law Lacks Reason in '90s Custody Cases*, ORLANDO SENT., Sept. 10, 1993, at E1.

177. 140 N.W.2d 152 (Iowa 1966).

178. *Id.* at 154.

179. *Id.*

called best interests rule and ignored the parental interest of the father. Usually, it is the parental rights doctrine which is applied inflexibly and without regard to the psychological consequences to the child."[180] Decisions such as this demonstrate the dangers inherent in legal standards that rely so heavily on judicial discretion.

Professor Jon Elster goes so far as to argue that even in certain situations where custody with a natural parent is likely to be detrimental, the child's interests must be sacrificed for reasons of public policy.[181] He illustrates this assertion with the landmark case of *Palmore v. Sidoti*.[182] In *Palmore*, the Supreme Court overturned the decision of a Florida court, which took custody of a young girl away from her mother who had married a man of a different race. The lower court proclaimed that its decision was in the child's best interests, because the child inevitably would suffer from social stigmatization if allowed to stay with her mother. The Court rejected this reasoning, refusing to validate private biases that lay outside of the law. As Professor Elster concludes, the reasoning against placing the child's interests above all other considerations in situations such as these "will probably be accepted by most defenders of the best interest standard, as the kind of exception that can arise to the best-grounded principles."[183]

C. *Can There Be Compromise?*

> Then the king said, 'Bring me a sword.' He then gave an order: 'Cut the living child in two and give half to one and half to the other."[184]

While the battle between those who advocate nurture and those who believe in nature promises to rage for some time, some courts are utilizing innovative techniques to bridge the gap between interests that are often portrayed as diametrically opposed: those of the adult parties to a custody action and the best interests of the child. In one Addison County, Vermont, family court decision, custody of nine month-old Peter was split between his adoptive mother and his biological father.[185] Though full physical custody was awarded to the mother, biological father Daniel Harriman will have visitation rights and a say in his son's upbringing.[186] This

180. Foster, *supra* note 8, at 4.

181. Elster, *Solomonic Judgments*, *supra* note 10, at 26-28.

182. 466 U.S. 429 (1984).

183. Elster, *Solomonic Judgments*, *supra* note 10, at 26.

184. 1 *Kings* 3:24-25.

185. Sally Johnson, *Adoption's Tangled Web; "Unique" Pact Forged in Custody Battle in Vermont is All Too Rare*, WASH. TIMES, Sept. 30, 1993, at A13.

186. *Id.*

Solomon-like solution to what was a highly-emotional dispute presents a marked contrast to the often all-or-nothing results achieved in most custody decisions.[187] However, it should be noted that this unique settlement was solely due to Mr. Harriman's acquiescence.[188]

Mr. Harriman was estranged from his wife, who was living with another man at the time of Peter's conception. Like Cara Clausen-Schmidt, Angela Harriman lied about the identity of the father. Richard and Donna McDurfee had raised Peter from the day after his birth. Two months after Peter was born, Mr. Harriman stepped forward to make his claim to the child. According to Mr. Harriman's lawyer, Peter Langrock, his client's rights were secure from the outset because he was not only the biological father but also was married to the biological mother when the child was conceived. Thus, "Harriman's rights as a legal father were established by marriage . . . . [T]he law is absolutely clear on that point."[189]

Despite this legal advantage, Daniel Harriman considered the trauma to Peter of taking him away from the people he had lived with from his birth.[190] Rather than appeal, which would have prolonged the pain for everyone involved, the adoptive parents concluded that they would return the child if they lost the first round of the custody dispute in family court.[191]

As Mr. Harriman's lawyer pointed out, the principles underlying a custody decision are not that different from arrangements made in the context of a marital separation.[192] "It really isn't all that different than a separation agreement in which the mother retains physical custody but shares legal custody."[193] Even the child's name reflects the equity of the settlement; Judge Edward Cashman's order requires that the baby be named Peter Elliott Harriman McDurfee.[194]

Compromise solutions are a clear and welcome departure from the winner-take-all nature of an adversarial legal system, and from decisions that express themselves exclusively in terms of either parents' or children's rights. These solutions consider both biologi-

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187. *Id.*

188. *Id.*

189. *A Familiar Custody Case, a Different Decision*, N.Y. TIMES, Aug. 29, 1993, § 1, at 28 [hereinafter *A Familiar Custody Case*].

190. *For Once The Baby Won*, N.Y. TIMES, Sept. 1, 1993, at A18; *see also* Judith Gaines, *Unique Adoption Ruling*, BOSTON GLOBE, Aug. 21, 1993, at 1.

191. *A Familiar Custody Case*, *supra* note 189, at 28.

192. *Id.*

193. *Id.*

194. *Pact is Reached in Vermont Adoption Case*, N.Y. TIMES, Aug. 23, 1993, at A12.

cal and psychological ties between parents/nonparent guardians and the child, both of which are important to future development.

However, the prospects for concession often appear unattractive. That was particularly true for Roberta and Jan DeBoer who, understandably, were unwilling to leave the custody bargaining table with less than what they started with, i.e., sole custody of Jessica. Yet, a compromise decision also would have avoided the all-or-nothing prospects of a court battle. The DeBoers would still have contact with the child they cherished, the Schmidts would have been assured that they would be a part of their daughter's life, and Jessica would have the benefit of two families that love her.

III. Modern Moral Scripts

Perhaps what is most striking about the Jessica DeBoer custody case is that, though Cara and Daniel Schmidt had won every legal battle in Iowa and both Michigan appellate decisions, public opinion was overwhelmingly against them. While the widespread prejudices harbored for Cara and Dan Schmidt may stem from lifestyle and class biases, these biases should not be considered alone. In fact, the subtle intertwining of perceived class inferiority and the "moral offenses" that Cara and Daniel committed worked in concert to cloud the legal issues that confronted the courts and sway public opinion against the birth couple.

Not only were the Cara and Daniel "biological aggressors" trying to take Jessica from Roberta and Jan DeBoer, but they had made some mistakes along the way. Most notably, Cara had falsely named Scott Seefeldt as Jessica's father. But even though Cara had erred in certain respects, an examination of her actions in context renders her mistakes less fatal than the media and public perceived them to be.

A. *The Adoption Mandate*

> I am an unwed mother who kept her child. And I fear no hell after death, for I've had mine here on earth . . . hell hath no punishment like the treatment people give a 'fallen woman.'[195]

Although the social scorn reflected—and obviously felt—in this unwed mother's 1958 letter may not be as prevalent today as it was thirty years ago, the stigma attached to unwed pregnancy is

195. Rickie Solinger, Wake Up Little Susie: Single Pregnancy and Race Before *Roe v. Wade* 33 (1992) (quoting *Letters*, Ladies Home J., Mar. 4, 1958, at 53).

far from removed. Cara Clausen-Schmidt admittedly feared shaming her family in tiny Blairstown, Iowa (population 672), by keeping her illegitimate child.[196] The stark moral code of rural Iowa can best be understood in light of the post-war adoption mandate, prescribed for unwed white females in the post-World War II years.[197]

During the post-War decades, adoption emerged as the alternative for white unmarried mothers regardless of social position.[198] The post-War years began a trend during which the "demand" for white infants far exceeded their "supply."[199] This trend continues and has intensified today.[200] In this era before *Roe v. Wade*, single, pregnant females were considered deviants—damned as either mothers with no rights or females with no right to be a mother.[201] Surrendering an infant for adoption to a "good" home was viewed as rehabilitative for the unwed mother, since such surrender would restore her future prospects "to become properly married."[202] White, unwed mothers were contributors to the white, middle-class family imperative in a dual sense: as (1) providers of babies to infertile couples and, after relinquishing the infant, (2) creators of their own "proper" families.[203] Thus adoption was viewed as a solution from every angle; adoptees were shielded from the stigma of illegitimacy, adoptive parents were spared the heartache of infertility, and birth mothers were afforded a second chance at a "respectable" life.

Though unwed motherhood generally has been socially accepted in the American society of the 1990s, pressure on white females to relinquish their babies and prejudices against those who do not is still very real. Birthparents who relinquish their children in hopes of offering them a better life often are considered heroes. Judge William Ager of the Michigan Circuit Court told Cara and Daniel Schmidt that they too would be "heroes" if they would only give up their fight for Jessica.[204] In contrast, those who keep their children when deemed less than fit by social, if not legal, stan-

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196. Ingrassia & Springen, *supra* note 6, at 62.

197. *See generally* SOLINGER, *supra* note 195.

198. *See id.* at 31 (suggesting that adoption was "the largest single source of adoptable infants").

199. *Id.* at 154 ("By the mid-1950s approximately one in ten marriages were involuntarily childless, the illegitimacy rate not high enough to meet the demand.").

200. It has been estimated that the number of parents seeking healthy infants has exceeded the supply by 40 to 1. *See* Gibbs, *supra* note 30, at 48.

201. *See* SOLINGER, *supra* note 195, at 3.

202. *Id.* at 154.

203. *Id.*

204. *Primetime Live: "Baby Anna"—An Update on Baby Jessica* (ABC television broadcast, Mar. 10, 1994).

dards, are considered selfish.

Those most likely influenced by these arguments are mothers who lack the financial resources to keep their children after carrying them full-term. In our consumption-oriented society, these women are most likely to be taken advantage of by eager adoptive couples. In Cara's case, the transfer of the infant occurred without the benefit of legal or psychological counseling.

If Cara herself had been financially able to care for Jessica, at least to the same level as the Roberta and Jan DeBoer, society may have absolved Cara for her sins.[205] Her indiscretion in falsely naming Scott Seefeldt as Jessica's father may have been dismissed as an understandable by-product of her fragile, post-partem state. Unfortunately for Cara, she did not possess the redeeming quality needed to justify her position, so she was labeled instead as deceitful and selfish for depriving Jessica of what was perceived as a "better life" and the advantages that would accompany it.

B. *Earth Mother Versus Fallen Woman*

> America has this terribly biased opinion that all adoptive parents are saints and all birthparents are trash.[206]

Having changed her mind about relinquishing her child and, unable to afford the opportunities that Roberta and Jan DeBoer apparently were able to provide, Cara Schmidt assumed the villainous role. This role was juxtaposed to pure image of Roberta, who was unable to have children because she had contracted an infection on her honeymoon which rendered her sterile. The fact that a woman would give up her child at all places her in a position to be scorned as one who would commit an act so unnatural. Ironically, upon seeing Jessica for the first time, Roberta DeBoer reportedly exclaimed: "You are so beautiful. How could she have given you up."[207] The media, acutely aware of this express tension between the birth mother and the adoptive mother, seized the opportunity to join the battle. The "unbiased" reports weighed heavily in favor of the DeBoers.

Some of the headlines, published following the Michigan Supreme Court's decision and during the pendency of an appeal to the Supreme Court, demonstrate the media drama that pitted "earth mother" Roberta DeBoer against "fallen woman" Cara

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205. Indeed, out-of-wedlock parenthood has become rather "chic" for those occupying the mid-to-upper social strata.

206. Ingrassia & Springen, *supra* note 6, at 62.

207. Franks, *supra* note 29, at 57.

Schmidt. "Court Ruling Serves The Law, But Not The Child";[208] "Defending Mommy Dearest";[209] "Taking Custody Of Our Senses";[210] "Parental Rights That Wrong Children"[211]—these were just some of the headlines that displayed a sense of disgust at the decision that returned Jessica to her biological parents. In print and on the nightly news, the story of the DeBoers and the Schmidts was much easier to tell, and much easier to sell, if it was told in black-and-white terms. The "earth mother versus the fallen woman" packaging simplified a complex issue. And, though it did not ultimately affect the judicial outcome, the media's interpretation of the story made the DeBoers the favorites in the court of public opinion.

The tendency to assign blame in a custody dispute goes beyond the media's need for a headline. In the nineteenth century, a fault-based presumption was used to determine custody awards. It was thought that "children will be best taken care of and instructed by the innocent party"[212] to a divorce. The fault-based presumption was designed to serve the best interests of the child; however, the overtones of compensatory and retributive reasoning were undeniably present.

John Elster notes that while the formal identification of victim and wrongdoer is no longer part of custody adjudication, underlying perceptions can effect legal decisions just the same. "The idea that the "innocent" . . . party . . . has a special right to custody, and . . . the "guilty" party should be punished by being denied custody, has largely been eliminated from the law, but is sure to live on in the minds of judges . . . ."[213] This apparently natural tendency to assign blame in the context of custody decisions may explain in part why Cara and Daniel Schmidt inevitably were portrayed as villains while Roberta and Jan DeBoer were esteemed as blameless victims.

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208. Joan Beck, *Court Ruling Serves The Law, But Not The Child*, ORLANDO SENT. TRIB., Apr. 5, 1993, at A11.

209. Mary McGrory, *Defending Mommy Dearest*, WASH. POST, July 25, 1993, at C1.

210. Anita Creamer, *Taking Custody of Our Senses*, SACRAMENTO BEE, June 8, 1993, at D1.

211. Elizabeth Bartholet, *Parental Rights That Wrong Children*, SACRAMENTO BEE, July 17, 1993, at B7.

212. Elster, *supra* note 10, at 8 (citing Mnookin, *supra* note 10, at 234 (quoting JOEL BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE 518, 520 (1852))).

213. *Id.* at 30.

IV. CONCLUSION

I must confess, that I, too, began this Comment with the image of "sinful" birthparents and "saintly" prospective adoptive parents burned clearly in my mind. Yet, as the facts behind the headlines revealed themselves, the clarity of first impression was gone. As Cara and Daniel Schmidt seemed less blameworthy and increasingly justified in their actions, my natural reaction was to turn tail and indict the DeBoers. How can anyone claim to represent a child's best interests if the legal machinery for making the claim works against that very interest?[214] Not surprisingly, this approach was equally unsatisfying.

Although the DeBoers lengthened the litigation process and increased Jessica's risk of trauma, the appeals and custody stays they secured were allowed by law and it would be perverse to fault them for making use of every legal avenue available. Unable to blame either party, I have settled for a more complete understanding of the custody dispute that became known as the battle for Baby Jessica. Although this reality should not be shocking, neither the birthparents nor the custodians were blameless in the dispute, nor was either couple unfit to be Jessica's parents.

One of the difficulties unique to custody adjudication is that it renders a decision about the future.[215] Lawyers and judges usually are concerned with rendering a judgment based upon past actions and events. In custody adjudication, past events and actions are evaluated in an attempt to make a prediction about the future.[216] How can one ever evaluate what might have happened if the other party had been awarded custody? Or whether the choice that was made actually served the child's best interests?

Jessica and the life that she builds with her new family is

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214. The National Conference of Commissioners on Uniform State Laws, which began drafting a Uniform Adoption Act in 1951, has renewed its efforts to produce a draft version of the Act, which may have provided procedural safeguards to prevent disputes like those over Jessica. Carol McHugh, *Experts: Adoption Contests Not Common—But Risks Are*, CHI. DAILY L. BULL., Aug. 30, 1993, at 3. Professor Joan Hollinger, the reporter for the Conference's drafting committee, stated that under the draft provisions of the Uniform Adoption Act, the best interests of the child would be considered, but not to the exclusion of the parents' rights. *Id.* To protect the rights of biological parents, an attorney for the prospective adoptive parents would not be allowed to obtain consent to an adoption or relinquishment of parental rights, like the consent obtained in Jessica's case. *Id.* Birth parents could relinquish their rights only to a neutral party. *Id.* Though the chance of the Uniform Adoption Act being finalized in a relatively short period of time is unlikely, *id.*, at least it is a positive step toward addressing the inherent tension between the stringent rights of biology and the manipulable standard which urges that the best interests of the child be paramount.

215. Foster, *supra* note 8, at 3.

216. *Id.*

likely to come under a great deal of scrutiny. Proponents from both sides will be evaluating her existence in terms of the decision that returned her to her biological parents. If she is relatively successful, those supporting parental rights will declare the Michigan Supreme Court's decision correct. If she falls short of some proposed ideal, those that support the best interests standard will pronounce it erroneous. Either way, the true impact of this decision on her life is a question of perspective.