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I. INTRODUCTION

Nine-year old Mary Jones and seven-year old Lisa Jones have been in foster care since their father died three years ago. Their birth mother, Nan Jones, has a history of emotional problems and has been unable to care for the children since the death of her husband. It appears that Nan will not be able to care for the girls on a full time basis at any time soon. Nan attempts to work with the foster care workers, but because of her emotional problems, she never seems able to completely follow through with the reunification plans developed for her. She visits the children fairly regularly, tries to maintain some telephone contact, and clearly has a great deal of love for them. The social service worker currently assigned to Nan has a concern that if she obtains custody of the girls it would only be for a short time because when Nan's emotional problems reoccur they render her unable to care for herself and her children.

Mary and Lisa's foster family desires to adopt them, but Nan Jones adamantly refuses to consent to adoption. The girls would like to be adopted, but they also want to continue to have contact with their birth mother. They suffered a great loss when their birth father died, and the juvenile court subsequently placed them in foster care. Mary and Lisa are afraid of also losing their mother. The girls are torn between the love they have for their foster parents and the concern and love they have for their birth mother. Mary and Lisa have seen a psychologist who believes it is in the girls' best interests to be adopted so they can have a stable and permanent home.

If Mary and Lisa's foster parents file a petition to adopt the girls, a North Dakota judge has only two options.[1] The judge can

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1. N.D. CENT. CODE § 30.1-27-09 (1976). Guardianship is not included as an alternative because many potential adoptive parents may not wish to pursue that option. Guardianship does not accord the family relationship the same amount of permanence and stability as adoption. While a guardian has many of the powers and responsibilities of a parent, "a guardian is not legally obligated to provide from his own funds for the ward and is not liable to third persons . . . for acts of the ward." *Id.* A court may require a guardian to report on a ward's estate by its own order or upon petition of any person interested in the minor's welfare. Additionally, a guardian may resign, or the ward, if over the age of

terminate the mother's parental rights and allow the foster parents to adopt the children, or she can refuse to terminate the mother's rights and leave the children in foster care.[2] What is the best answer? Under current law can a judge craft a solution that will protect everyone's interests[3] and allow all parties to feel comfortable with the result? The answer is no. This essay suggests that the best outcome for all parties would be a "weak adoption."[4] A weak

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fourteen, or any interested person may file a petition for removal of the guardian. N.D. CENT. CODE § 30.1-27-12 (1976).

2. N.D. CENT. CODE § 14-15-19 (1991). A court may terminate a parent's rights in two different ways even though both methods have the same result. The Revised Uniform Adoption Act provides as follows:

> 1. The rights of a parent with reference to a child, including parental right to control the child or to withhold consent to an adoption, may be relinquished and the relationship of the parent and child terminated in or prior to an adoption proceeding as provided in this section . . . .
> 3. In addition to any other proceeding provided by law, the relationship of parent and child may be terminated by a court order issued in connection with an adoption proceeding under this chapter on any ground provided by other law for termination of the relationship, and in any event on the ground (a) that the minor has been abandoned by the parent, (b) that by reason of the misconduct, faults, or habits of the parent or the repeated and continuous neglect or refusal of the parent, the minor is without proper parental care and control, or subsistence, education, or other care or control necessary for his physical, mental, or emotional health or morals, or, by reason of physical or mental incapacity the parent is unable to provide necessary parental care for the minor, and the court finds that the conditions and causes of the behavior, neglect, or incapacity are irremediable or will not be remedied by the parent, and that by reason thereof the minor is suffering or probably will suffer serious physical, mental, moral, or emotional harm, or (c) that in the case of a parent not having custody of a minor, his consent is being unreasonably withheld contrary to the best interest of the minor . . . .

Id.

The Uniform Juvenile Court Act also provides for the termination of parental rights by a juvenile court who has jurisdiction over a child through the Uniform Juvenile Court Act. N.D. CENT. CODE § 27-20-44 (1991).

> The court by order may terminate the parental rights of a parent with respect to his child if:
> a. The parent has abandoned the child;
> b. The child is a deprived child and the court finds that the conditions and causes of the deprivation are likely to continue or will not be remedied and that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm; or
> c. The written consent of the parent acknowledged before the court has been given.

Id. Once a court orders a termination of parental rights the effect is clear:

> An order terminating parental rights of a parent terminates all of his rights and obligations with respect to the child and of the child to or through him arising from the parental relationship. The parent is not thereafter entitled to notice of proceedings for the adoption of the child by another nor has he any right to object to the adoption or otherwise to participate in the proceedings.

N.D. CENT. CODE § 27-20-46 (1991). *See* Santosky v. Kramer, 455 U. S. 745, 753, 769 (1982) (stating that birthparents retain "a vital interest in preventing the irretrievable destruction of their family life" by a state and that before a state may completely sever those rights, due process requires that the state prove its allegations by clear and convincing evidence).

3. This includes the birthparent(s), the foster parents, and the children's interests.

4. This is a term borrowed from German law, but seems to most adequately describe

adoption is one that terminates most, but not all, of a birthparent's rights to her child(ren). This situation would be similar to the non-custodial visitation rights that courts often grant in divorce proceedings. A birthparent would still retain court ordered and legally enforceable visitation rights, but the adoptive parents would retain custody rights and the right to legally control the child's behavior.

This proposal is similar to open or identified adoption in which the birthparent(s) meet the adoptive parents and are given the opportunity to participate in the selection process.[5] Additionally, the parties exchange identifying information and may agree to future contact and communication.[6] However, once the adoption is final, the adoptive family generally has the final authority over visitation and contact with the child.[7] When disputes occur between the parties, most courts permit the adoptive parents to have total control including the right to forbid visitation by the birth family. A few courts have permitted adoption on the condition of visitation with the birthparents,[8] and some courts have even held adoptive parents in contempt for refusing to abide by a visitation agreement.[9] Most courts, however, have held that visitation rights do not survive an adoption and termination of parental rights.[10] Some courts have even gone so far as to vacate an adoption decree because of a concern that it is inconsistent for a

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the concept. Brigitte M. Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 46 n. 197 (1975).

The ideas in this essay were originally delivered at the 1992 North Dakota Judicial Institute. Because this is an essay and not an exhaustive article, I only intend to present a variety of ideas concerning the termination of parental rights and the adoption of older children. I hope that it will stimulate further thought and discussion on the subject, and perhaps ultimately a change in North Dakota law.

5. Annette Baran & Reuben Pannor, *Perspectives on Open Adoption, in* THE FUTURE OF CHILDREN 119, 121 (Spring 1993).

6. *Id. See, e.g.*, N.D. CENT. CODE §§ 14-15.1-01 to -07 (1991) (providing a statutory scheme for permitting open adoptions which identifies the adoptive parents and birthparent(s)).

7. Baran and Pannor, *supra* note 5, at 121.

8. *See, e.g.*, Weinschel v. Strople, 466 A.2d 1301 (Md. 1983). In *Weinschel*, the birth mother conditioned her consent to the adoption upon retaining regular visitation rights. *Id.* at 1303. The court found that such a condition did not impede the adoption. *Id.* at 1305-06. The court stated that visitation might even foster adoptions "in those cases where the natural parent and adoptive parent are known to each other and the natural parent is reluctant to yield all contact with his or her child." *Id.* at 1306. *See also* Michaud v. Wawruck, 551 A.2d 738, 741 (Conn. 1988) (finding that a written visitation agreement between a birth mother and adoptive parents did not violate public policy).

9. *See, e.g.*, Loftin v. Smith 590 So. 2d 323, 323-26 (Ala. Civ. App. 1991) (affirming the trial court's contempt order against adoptive parents for their refusal to abide by the post-adoption visitation agreement).

10. *See, e.g., In re* M.M., 589 N.E.2d 687, 695 (Ill. App. Ct. 1992) (stating that it is inconsistent with state law to require adoptive parents to allow a continuing relationship between the birthparent and child); O'Quinn v. Bunkley 365 S.E.2d 460 (Ga. Ct. App. 1988) (finding that grandparent visitation rights do not survive termination of parental rights).

birthparent to relinquish all parental rights and still retain visitation rights with a child.[11] Therefore, to effectuate this essay's proposal, the statutory scheme providing for termination of parental rights should be amended to empower a judge to order visitation rights for a birthparent or the members of a birth family.

II. THE PERMANENCY PLANNING MOVEMENT

Under earlier law, a child welfare advocate's typical answer to the above hypothetical question would be to terminate the mother's parental rights so that the girls could finally achieve some permanence and stability in their lives through adoption.[12] Without the finality of adoption, the children could linger in their foster home, never sure of when they might return home or move to yet another foster home.[13] The advocates worried that these children were experiencing uncertainty and trauma due to an indefinite and often excessive time spent in foster care.[14] Because of this concern, a new trend emerged that recommended permanency planning for children in foster care. It attempted to reduce the number of children in foster care by offering immediate assistance to birth families in an initial attempt to try to keep the family

11. Joan Heifetz Hollinger, *Adoption Law, in* THE FUTURE OF CHILDREN 43, 51 (Spring 1993); *see, e.g.*, *In re* Adoption of Topel, 571 N.E.2d 1295, 1299 (Ind. Ct. App. 1991) (holding that contemporaneously executing a visitation agreement and a consent to adoption by a birthparent renders the consent invalid); *In re* Adoption of Jennifer, 538 N.Y.S.2d 915 (N.Y. Fam. Ct. 1989) (finding that a noncustodial parent's consent to a stepparent's adoption that is conditioned upon visitation is invalid).

12. During the eleven years that I practiced law, six of those years were spent working in the Juvenile Justice Unit of Legal Aid of Western Missouri. I spent many hours litigating termination of parental rights cases. At that time my biggest complaint about the juvenile justice system was that it made it too difficult to terminate the rights of birthparents to their children. It appeared that parents were given every opportunity to parent and that courts only considered the parents' interests and rarely the childrens' interests. I argued adamantly in favor of terminations so that children could obtain permanence and stability in their lives instead of growing up in foster care. I worried about the many children living in foster care for the majority of their childhood. Their only alternatives were long term foster care or termination of parental rights and adoption. I now believe that a third alternative should be available for the court that does not require the complete termination of a birthparent's rights.

13. It was the discovery of "foster care drift" (children moving from foster home to foster home while in foster care) that led to the permanency planning movement and pressure by child welfare advocates to either terminate the rights of parents or return children to their birth homes.

14. *See* Cristina Chi-Young Chou, Note, *Renewing the Good Intentions of Foster Care: Enforcement of the Adoption Assistance and Child Welfare Act of 1980 and the Substantive Due Process Right to Safety*, 46 VAND. L. REV. 683 (1993) (discussing the passage of the Adoption Assistance and Child Welfare Act which Congress passed to try to protect children in foster care and to attempt to alleviate the problem of children lost in the foster care system).

together,[15] requiring periodic reviews of children in foster care,[16] and ultimately arguing for the rapid termination of parental rights.[17] Terminations were considered the most important tool because they freed a child for adoption, and adoption was preferred to other types of alternative permanent arrangements.[18] Consequently, in the 1970s and the 1980s, child welfare advocates emphasized the quick termination of parental rights so that children could become secure in permanent adoptive homes. To comprehend this drive for termination of parental rights, one must first understand the background of the permanency planning movement.

Josef Goldstein, Anna Freud, and Albert Solnit designed the theoretical framework for the permanency planning movement in 1973, in the infamous book, BEYOND THE BEST INTERESTS OF THE CHILD which proposed major reform for the child welfare system.[19] For this essay's purpose, the most relevant focus of their message was that children needed to move out of long term foster care or long term temporary placements and into permanent homes that had been secured through the legal process of adoption.[20] This permanency planning program had two fundamental aspects: (1) the child's needs came first, and (2) permanency in relationships was given a paramount position in a child's needs.[21] From these tenets, the concept of the psychological parent was born.[22] Any adult may fulfill the role of psychological parent even though the most typical are foster parents, step parents, significant other adults, or grandparents.[23] The permanency planning

15. Martha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 442 (1983).

16. *Id.* at 442-43.

17. *Id.* at 443.

18. *Id.*

19. *Id.* at 446. *See generally* JOSEF GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973). The authors intended that these concepts be used in both the divorce and child welfare arenas even though domestic relations law never totally accepted their ideas.

20. GOLDSTEIN, *supra* note 19, at 31-39. *See also* Garrison, *supra* note 15, at 452.

21. Garrison, *supra* note 15, at 447.

22. "Psychological parent" refers to any adult who "through interaction, companionship, interplay, and mutuality, fulfills the child's psychological . . . as well as physical needs." *Id. See also* GOLDSTEIN, *supra* note 19, at 98.

23. During the last five years there have been numerous articles dealing with alternative life styles and the concept of psychological parent(s). *E.g.*, Elizabeth A. Delaney, Note, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child*, 43 HASTINGS L. J. 177 (1991) (proposing a broadened definition of legal parent to include a nonbiological, unmarried parent who has satisfied certain conditions of psychological parenthood, even though no biological or adoptive link connects the child to that "psychological parent"); John Lawrence Hill, *What Does it Mean to be a Parent? The Claims of Biology as the Basis for Parental Rights*, 66 N. Y. U. L. REV. 353 (1991) (recognizing the need for a core meaning of

movement asserts that in a custody dispute a psychological parent needs complete custody and sole control over the child including whom the child sees and how the child behaves. The reason for giving this parent total control over the child, including her contacts with other people, is due to a perceived risk of conflicting parental loyalties. Goldstein, Freud, and Solnit assert that this risk of conflicting parental loyalties, the need to avoid the conflict, and the potential harm to the child caused by the discord outweighs the advantage of maintaining contact with other potential parental figure(s).[24] They suggest that permanence and stability require the "exercise of absolute authority and receipt of unquestioned loyalty" by the psychological parent to the exclusion of all others.[25]

The success of the permanency planning crusade required the movement of children out of the foster care system. Children needed to exit foster care either by returning to their birthparent's homes or by being freed for adoption.[26] Adoption requires terminating the rights of those birthparents who are not able to offer a suitable home for their child(ren) within a reasonable amount of time.[27] To achieve this goal, the federal govern-

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"parent" and arguing that "those who first intend to have a child should prevail" as the legal parent over any claim made by a birth mother); Martha Minnow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269 (1991) (arguing for a functional approach in reaching a definition of parent or family and that family and parent should be defined in terms of whether a group of people function as a family and not whether they fit the concept of the "Leave It To Beaver" family).

24. GOLDSTEIN, ET AL., *supra* note 19, at 38 (arguing that children have a difficult time relating with two psychological parents who interact negatively and that this type of situation can produce conditions that may devastate the child and ultimately destroy the child's relationship with both parents). *See also Garrison*, *supra* note 15, at 448.

25. Garrison, *supra* note 15, at 448. Interestingly, even though Goldstein, Freud, and Solnit's theories were widely accepted in the child welfare system, their proposals met with extremely negative responses outside of the foster care context and within the divorcing parent situation. *Id.* at 453. The two situations are different in that most children of divorced parents have recently lived with both parents as opposed to a child in foster care who may only know her parent as a visitor. *Id.* at 456. Further, children in foster care are more likely to have inadequate parents. *Id.* But the key variable remains the same—both have the same potential for loyalty conflicts between parent figures.

The North Dakota Supreme Court has referred approvingly to the concept of psychological parent and a child's need for continuity and stability based on this concept. *E.g.*, Mansukhani v. Pailing, 318 N.W.2d. 748, 751 (N.D. 1982) ("The authors [of BEYOND THE BEST INTERESTS OF THE CHILD] point out that the greatest influence on a child comes from that person or persons the child is used to, fond of, and connected with by experiences, memories, and identification. The person becomes the child's psychological parent in whose care the child feels valued and wanted. With every change in this parent figure, the child's development may regress."); Daley v. Gunville, 348 N.W.2d 441, 445 (N.D. 1984) (stating that when considering a child's best interests a court needs to consider the psychological parents).

26. The only way to remove foster children from the system if they are not returning home is to terminate their birthparents' rights and free the children for adoption.

27. Judith K. McKenzie, *Adoption of Children with Special Needs*, *in* THE FUTURE OF CHILDREN 62, 67 (Spring 1993) (stating that the current foster care system for children needing adoption has three aspects: reunification, preparation for adoption planning (which includes the termination of parental rights) and finally, adoption planning).

ment mandated periodic reviews for foster children, social welfare agencies pressured attorneys to file more terminations, judges granted more terminations, and fewer children entered foster care. Consequently, by the mid 1980s there was a major reduction in the number of children in foster care.[28] Unfortunately, the number has once again increased. 429,000 children lived in foster care in June 1992—that is a 53% increase since 1987.[29] There again needs to be a reduction in the number of children in foster care so these children can achieve some stability in their lives. This essay opines that the permanency planning movement's agenda for the full termination of parental rights with its concomitant focus on destroying all ties with the birthparents may no longer be an acceptable answer to this problem.

III. WHY TERMINATE PARENTAL RIGHTS?

Why do our laws provide a mechanism for the termination of parental rights? In the child welfare arena, there is generally only one reason and that is to free a minor child for adoption.[30] The only way a child can be adopted is to eliminate the birthparents either by death or by the legal termination of their parental rights.[31]

The law requires the severance of the birthparents' rights because in our society parenthood is an exclusive status, and a child may have only one mother and one father at any given time.[32] The exclusive status granted to parenthood appears to be based on the premise of the nuclear family.[33] However, this may now be a faulty premise. Due to increasing changes in our society, such as divorce and the growing acceptance of unwed parents, large numbers of children no longer live in traditional nuclear families.[34] Many children affected by these changes form attach-

28. *Id.* at 65.

29. *Id.* at 63.

30. There is rarely a reason to terminate a parent's rights unless a child is adoptable. For example, it would be very unusual to attempt to terminate the rights of a parent to an institutionalized child.

31. Hollinger, *supra* note 11, at 47 (stating that in order to free a child for adoption there must be either voluntary parental consent or a legitimate basis for dispensing with parental consent, such as a parent's failure to properly provide for a child).

32. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 879 (1984). *See also infra* note 42.

33. *Id.* at 880.

34. *Id.* at 880-81. Two reasons for the demise of the nuclear family seem to be the rising number of divorces and the rising number of unmarried mothers who choose to keep their illegitimate babies instead of relinquishing them for adoption. "Between 1970 and 1988, the number of single parents with children under 18 in the home more than doubled

ments to adults who are not their birthparents[35] but our law refuses to recognize these significant other adults as legal parents if a child already has a living legal parent.[36] Instead, we force these relationships to compete with each other for legal recognition.[37] Consequently, there are many disputed cases with a variety of parties arguing about who should acquire the parental rights to a child.[38] Unfortunately, our law permits only one set of parents to be the "winner." Perhaps it is time to consider another option for dealing with these situations in a more amicable fashion that allows each significant party to preserve some form of legal relationship with the child.[39] That is what this essay suggests.

IV. WHY CHANGE?

A. UNTANGLING THE PROCESS

This essay's proposal specifically concerns the pool of children who already know their parents[40] and have had some contact with them even though perhaps only sporadic. It may be in everyone's best interest to allow all parties to have a variety of legal relationships and ties to a child. This proposal would permit a judge to

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from 3.8 million to 9.4 million." U.S. Census, Population Data, Section 16, March 15, 1990 (*available in* WESTLAW, DIALOG, Cendata database). This was an increase from 13% in 1970 to 21% in 1988. *Id.*

35. Bartlett, *supra* note 32, at 881. These attachments are usually to significant other adults, foster parents, stepparents, grandparents, or other relatives.

36. *Id. See also* Kris Franklin, *A Family Like Any Other Family: Alternative Methods of Defining Family Law*, 18 N. Y. U. REV. L. & SOC. CHANGE 1027 (1990-1991) (examining the differences between the nuclear family and its alternatives and asserting that the nuclear family does not accurately reflect the realities of our society and that what constitutes "the family" has become a hotly contested political issue). *See also* Minow, *supra* note 23 (arguing in favor of a functional notion of family).

37. Bartlett, *supra* note 32, at 881.

38. These usually take the form of contested adoption cases involving foster parents or stepparents.

39. My proposal is directed toward children who already have some type of relationship with their birthparent(s). It may not be as critical in cases dealing with infants who have had no contact with their birthparents and have not had the opportunity to form any kind of bond with them. A number of states, however, now permit open adoption of infants. *See supra* note 6 and accompanying text.

40. This proposal could conceivably affect many contested termination cases. A significant number of the termination of parental rights cases decided by the North Dakota Supreme Court over the past twenty years involved children who knew and had some type of a relationship with their birthparents. *See, e.g.*, Mortenson v. Tangedahl, 317 N.W.2d 107 (N.D. 1982) (terminating the parental rights of a birth father who had lived with his children for twelve years, but after divorce had no significant contact with them); *In re* R.M.B., 402 N.W.2d 912 (N.D. 1987) (terminating a birth mother's rights to her six-year-old daughter who had lived in foster care for several years); *In re* C.S., 417 N.W.2d 846 (N.D. 1988) (terminating a birth mother's rights to her three children, ages six, four and two who had been living in foster care for a significant time); McBeth v. M.D.K., 447 N.W.2d 318 (N.D. 1989) (terminating a birth mother's rights to her two-year-old daughter who had been involved with social services since birth); *In re* A.M.A., 439 N.W.2d 535 (N.D. 1989) (terminating the birthparents' rights to their three children, ages 4 1/2, 3 1/2 and 1 1/2, because of continuing deprivation).

grant an adoption without terminating all of the birthparents' rights. The birthparent would retain certain legally enforceable rights such as reasonable visitation and the right to communicate with the child by telephone or letter. The adoptive parents would still have sole control over the child.[41]

But why add one more alternative to an already confusing statutory scheme?[42] There are a number of reasons to consider this addition. First, allowing a court this option may well settle a number of contested adoption/termination of parental right cases because parents may be more willing to consent to the termination of some of their rights instead of all of them.[43] The lack of ease in the termination process is a major obstacle to adoption.[44] Many potential adoptive families may refuse to go through the tedious court process involved in these types of cases. Additionally, the dispute may psychologically damage the foster child.[45] The child often does not understand the necessity of the court process and the prolonged litigation that accompanies attempts to terminate a parent's rights. Instead, it causes the child to suffer anger and confusion.[46] If all parties could agree on an adoption in which everyone has some rights and responsibilities to the child, it may reduce the number of contested terminations and adoptions. In fact, it may ultimately allow more adoptions to go forward because a birthparent may be more willing to consent to an adoption if it does not terminate all of her rights.[47]

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41. This is similar to a custody/visitation scenario that one sees in divorce cases.

42. *See In re* Adoption of K.S.H., 442 N.W.2d 417, 421 (N.D. 1989) (VandeWalle, J., concurring). In a case in which the court declined to terminate the parental rights of the birth father, Justice VandeWalle stated that:

> [t]he ideal solution to this problem might be statutes that would permit the grandparents to adopt [the child] without the necessity of terminating the natural father's parental rights. But our statutes do not permit such a solution. Our law recognizes no more than one legal father and does not permit adoption without termination of parental rights of the natural parent.

Id.

43. In my experience as a guardian ad litem in many contested adoption/termination of parental right cases, it often appeared that birthparents contested the termination and adoption not necessarily because they anticipated or even desired obtaining custody of their child, but because they believed they loved the child and did not want the child to think they had not fought for her. Additionally, the idea of being totally cut off from their child was just too difficult for many parents, and they could not allow it without a battle. If a parent, however, had a route which allowed her to keep a legal relationship with the child instead of abandoning all of her parental rights, perhaps a parent would find it easier to consent to the adoption. Additionally, a judge may find this to be a more palatable situation. *See supra* note 42.

44. *See* Carol Amadio & Stuart L. Deutsch, *Open Adoption: Allowing Adopted Children to Stay in Touch With Blood Relatives*, 22 J. FAM. L. 59, 82 (1983).

45. *Id.*

46. *Id.*

47. *Id.* (stating that prospective parents may be able to avoid long court battles if birthparents are willing to consent to the termination of some of their rights in return for a

B. THE BIOLOGICAL LIFELINE

Another and perhaps more compelling reason for adding this option is that biology is often a strong source of identity for a child.[48] In many cases it may be in a child's best interests to allow her to have some type of relationship with her birth family. Maybe it is time to redefine our concept of the family so that it includes a very extended family for an adopted child who has known her parents.[49] A number of cultures use adoption alternatives that recognize the importance of the biological family instead of requiring the severance of all ties with that family.[50] French law allows for a limited adoption as well as a regular adoption. In the limited adoption, the adopted child remains partially connected with her birth relatives, keeps a legal right to inherit from her birth family, and has a duty to support them.[51] In Polynesian cultures, an adopted child knows her true parentage, and, if possible, she becomes acquainted with her birth family and any siblings and remains welcome in her birth family's home.[52] The Eskimo culture does not conceal an adopted child's origin from her. Often both families consider the child related to them and she continues to maintain strong bonds with her birth family and siblings.[53] These cultures recognize the importance of biological lifelines for adopted children.

We cannot pretend that the power of biology does not exist for foster children.[54] There have been numerous cases and stories of adoptees searching for their birthparents once they become

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visitation order). As this essay was going to press, a Vermont court agreed to a unique settlement in a contested adoption case between adoptive parents and a birth father. The adoptive parents won physical custody, but they will share legal custody with the birth father. All parties agreed that this solution was in the child's best interests. The birth father's attorney, Peter Langrock, stated that he was unaware of any other settlements similar to this one. *An Unusual Ruling In A Custody Case*, N.Y. TIMES, Aug. 29, 1993, at A28.

48. *See id.* at 65. *See also* Beyer and Mlyniec, *infra* note 54, at 237.

49. This extended family may include birthparents, birth grandparents, siblings, godparents or even previous foster parents.

50. Amadio and Deutsch, *supra* note 44, at 64.

51. *Id.* (citation omitted).

52. *Id.* at 65.

53. *Id.* (citing N. CHANCE, THE ESKIMO OF NORTH ALASKA 19-20 (1966), which discusses open adoptions practiced in the Eskimo culture where the child knows her origin and is often able to maintain strong bonds with both biological parents and siblings).

54. During the six years that I worked with juveniles, it never ceased to amaze me that children almost always desired to return to their biological home, regardless of how badly they had been treated while at home. Many children yearn to be with their birth families, even though it may mean subjecting themselves to more neglect or abuse. *See also* Margaret Beyer and Wallace Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L. Q. 233, 237 (1986) (proposing the birth family as a child's primary lifeline).

adults. Adult adoptees organized themselves and challenged the confidentiality of the adoption process.[55] They wanted to know their heritage. From this mobilization, numerous search groups formed to assist adoptees in their search to locate their birthparents.[56] If the need to find and know one's biological parent is so strong for adoptees who never even knew their birth families, imagine how powerful it must be for children who have some knowledge about their origins. It is time to dispel the myth that adoption completely displaces a child's prior ties to her biological family.[57]

There must also be an acceptance of the fact that it is possible for children to have strong psychological bonds with more than one adult. Just because a child has a strong psychological bond with a stepparent or other significant adult and desires to be adopted does not mean that the child has no psychological bond with a biological parent.[58] Some scholars claim that a person always has at least a psychological attachment to her birthparents even if she had no actual relationship with them.[59] While the courts may create a legal fiction of a new family,[60] they cannot erase memories and psychological bonds.[61] They cannot, for

55. Burton Z. Sokoloff, *Antecedents of American Adoption*, in THE FUTURE OF CHILDREN 17, 24 (Spring 1993) (stating that the earliest group was founded in 1954 and one of the largest and most influential groups is the Adoptee's Liberty Movement Association (ALMA) founded in 1971).

56. Baran and Pannor, *supra* note 5, at 121.

57. Hollinger, *supra* note 11, at 49-50 (stating that the idea that "adoptive relationships should or can substitute completely for the biological ones is now being questioned").

58. Amadio and Deutsch, *supra* note 44, at 75-76, citing A. SOROSKY, ET AL., THE ADOPTION TRIANGLE: THE EFFECTS OF THE SEALED RECORD ON ADOPTEES, BIRTH PARENTS, AND ADOPTIVE PARENTS xii-xiv (1979):

> Erik Erikson described an epigenic development of identity formation in which each period of psychological growth, from birth onward, paves the way for a successful resolution of the classic identity crisis in late adolescence and young adulthood. Erikson viewed the identity process as developing simultaneously along three dimensions: psychobiological, psychosocial, and psychohistorical. The psychobiological dimension includes the internal, psychodynamic concerns, both at a conscious and unconscious level. The psychosocial dimension encompasses the influences and effects of the environment, both intra and extrafamilial. The psychohistorical dimension includes that part of man's identity that relates to his/her sense of geniology, an existential concern that views man as going through a cycle of life stages which are connected to the previous and future generations through the phenomena of birth and death.

Id.

59. Amadio and Deutsch, *supra* note 44, at 76 (stating that this psychological attachment is present in both healthy and troubled relationships between adoptive parents and children).

60. The legal fiction is that the birthparents are no longer the child's parents, and the child should erase all memories of them because she now has a "new family." Suddenly, by court order, a child acquires new parents, a new brother and sister, and perhaps a new dog.

61. Hollinger, *supra* note 11, at 50 (stating that the "legal status of adoption does not erase the history of prior relationships from the memories of older children, nor does it resolve, by itself, the psychosocial conflicts these memories generate or perpetuate").

example, negate the relationship that existed between an eight-year-old child and her biological parents with whom she lived for six years. That lifeline continues even after the adoption of a child.[62]

If the parties fail to acknowledge the child's need for a biological lifeline to her birth family, it may ultimately cause the adoption to break down.[63] The law must recognize this need for a lifeline because it continues to survive even if a child has been separated from her biological family for an extended time.[64] Denying this need ultimately can only harm the child.

Unfortunately, the child welfare system has not sufficiently appreciated the importance of the birth family to the child.[65] Instead, it condemns the birthparent who is not able to care for her child without realizing that the parent's failure may not be caused by a lack of love, but by other factors such as poverty, lack of education, mental illness, and a multitude of other problems.[66] The social welfare and juvenile justice systems need to begin viewing birthparents and their ties to their child(ren) differently. Instead of deciding that because the parents failed, their rights are suddenly subject to forfeiture, perhaps they should look at the child's interests and determine whether the child can be placed in a permanent adoptive home without cutting the lifeline that exists to the biological parent.[67] Some scholars consider the child's relationship with her biological parents to be so critical that:

> [w]hen a child enters care in elementary school and in-home services fail, long-term care by foster parents who are prepared to share the child with biological parents and who are trained to help the child resolve emotional problems from early parental inadequacies may be preferable to open adoption.[68]

Keeping the bond alive between birthparents and their child(ren) may be critical for a child's psychological health. If we can accom-

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62. Beyer and Mlyniec, *supra* note 54, at 238.

63. *Id.*

64. *Id. See also* Hollinger, *supra* note 11, at 50 (stating that even infants enter adoptive relationships with biological bonds).

65. Beyer and Mlyniec, *supra* note 54, at 239. *See also* Bartlett, *supra* note 32, at 907.

66. Beyer and Mlyniec, *supra* note 54, at 239-240.

67. This is assuming that a determination has been made that the child can not be reunited with her birth family in the near future and that she needs some permanence in her life that will only be realized through an adoption. Otherwise, "[a] barely adequate biological parent is preferable to an excellent foster or adoptive parent for the school-age child who has a relationship with the natural family." *Id.* at 242.

68. *Id.* at 248.

plish this and allow an adoption at the same time it may be in a child's best interest.

Many states, including North Dakota, require a judge to consider a child's best interests in an adoption proceeding.[69] Previously, advocates for the permanency planning movement argued that a child's best interests would best be served by moving her into a permanent home, severing all ties with her birthparents, giving her some stability in her life and abating loyalty conflicts.[70] Much of this was based on the maternal deprivation literature which showed that a child's early experiences and need for psychological bonding may seriously affect her development.[71] While this has been generally accepted as true, there is now evidence that suggests that there has been an overemphasis on the role of the psychological parent.[72] The permanency planning movement concentrated on the reduction of loyalty conflicts because of a fear that they would harm the child. Unfortunately, the research has not focused on the amount of harm to a child caused by losing a parent altogether,[73] and that of course is the critical question in a termination of parental rights case. Once parental rights are terminated, the child effectively loses her birthparent and any concomitant rights. Therefore, the question is whether it is in a child's best interests to have a visiting parent that she may never live with or no parent.[74]

As previously stated, one of the main reasons voiced by the permanency planning movement for severing parental rights was to reduce a child's loyalty conflicts. Recent research, however, shows that severing relations with parents or caretakers will not necessarily resolve a child's loyalty conflicts.[75] Research shows that continued contact between birthparents and their children in foster care generally makes the children feel more secure and better about themselves.[76] This is true even for children who were separated from their birth family at a very young age and who only have irregular contacts with their parents after the separation.[77] An early study critically examined the level of emotional

69. *See, e.g.*, N.D. CENT. CODE § 14-15-13(3) (1991) (requiring a court to consider a child's best interests in an adoption proceeding).
70. *See* Garrison, *supra* note 15, at 442-49.
71. *Id.* at 458.
72. *Id.* at 459.
73. *Id.* at 460.
74. *Id.* at 461.
75. Bartlett, *supra* note 32, at 907.
76. Garrison, supra note 15, at 461.
77. *Id.*

security exhibited by foster children and found that children who stayed in contact with previous foster homes were more secure than children who did not have that sort of contact.[78] Another study found that children who received small gifts or letters from their mothers were more self-confident, and preserving ties with a birthparent actually furthered the children's relationship with their foster parents.[79] More recent research revealed the following:

> [O]f 61 foster children age five and older who had been in care for at least one year, the highest level of well-being occurred in those who identified with their natural parents and whose parents visited them; the second highest level occurred in children who identified with foster parents and whose natural parents visited them; much lower levels of well-being occurred in children who identified with foster parents and whose natural parents did not visit them. Because half of the children in this last category had spent most of their lives in their current foster home, the study strongly supports the notion that permanent custody arrangements that permit continued contact between the child and his natural parent are preferable to absolute termination of parental rights.[80]

It is significant that all of the foster care research reveals that continued contact between birthparents and their children in foster care had a positive effect on the children.[81] More important, the studies found that even infrequent visits benefited the children.[82] It appears that a child will benefit much more by living in an environment which encourages her to accept her birthparents as unable (but not necessarily unwilling) to care for her.[83] The data seems to suggest that a visiting parent, even if the visits are only sporadic, may be better than no parent.[84] Perhaps to assist these children to realize their full potential we need to help them

78. *Id.*

79. *Id.* at 461-62.

80. *Id.* (citations omitted).

81. Garrison, *supra* note 15, at 463 (citations omitted). *But see* Marianne Berry, *Risks and Benefits of Open Adoption, in* THE FUTURE OF CHILDREN 125 (Spring 1993) (stating that the effects of open adoption of infants are still murky and that there needs to be further research before concluding that open adoption is totally beneficial to the adoptee). The studies in Berry's article, however, relate more to infant adoptions than to the adoptions of older children.

82. Garrison, *supra* note 15, at 464.

83. *Id.* at 465.

84. *Id.* at 467.

accept whatever love the birthparent is able to give. This will be a very difficult task if a court terminates all of the parents' rights to a child and essentially tells the child that her birthparents are too unfit to ever parent her. A child may receive more benefit from a realization that although her parent is not able to care for her on a full time basis, the parent loves her and wishes to continue some type of relationship with her.[85] Perhaps it is time to realize that many adults have the capability to parent a child in a variety of ways[86] and that children will be better served once the law accepts this premise.

V. A SYSTEM RIPE FOR CHANGE

There already has been a recognition in certain areas of the law that the ideal of the All-American or nuclear family no longer exists. In family law, exclusive parenthood is rarely the norm,[87] and the child welfare system needs to draw upon its experience and start to recognize that children may have important relationships with a number of adults. Family law courts recognize the need to go beyond this concept of exclusive parenthood in divorce and child custody cases.[88] One commentator argues that judicial decisions in the divorce area could be extremely helpful to courts that are deciding termination cases.[89] Family law has consistently recognized the importance of the child-parent relationship and has strived to ensure at least visitation rights for the parent who does not have custody.[90]

Over the last decade, family courts have seen an evolution in the area of child custody upon divorce. Child welfare law may be able to learn from this evolution. Courts now recognize a variety of split or joint custody arrangements that were previously unac-

85. This is not an argument that the complete termination of parental rights is never appropriate. Certainly in some cases, especially of infants and young mothers, it may be in the best interests of both. Also, young children of extremely abusive parents or of parents with very severe mental disturbances may find parental visitation too threatening. Some parents with severe emotional disturbances may be incapable of any meaningful interaction. But, absent extraordinary circumstances, the court should have the option of allowing an adoption along with court ordered visitation by the birthparent(s).

86. This could include a multitude of variations. For example, a child might have three mothers—a foster mother, a birth mother, and a step mother—and each one of these women will have the potential to offer something to a child.

87. *See* Bartlett, *supra* note 32, at 899.

88. In joint custody cases, the courts specifically recognize the importance of both birthparents.

89. *See* Garrison, *supra* note 15, at 478.

90. *See id.* (discussing the difference between divorce decisions and termination decisions but recognizing them as related problems and seeing a need to bring the " 'family law of the poor' [the child welfare system] into alignment with 'private family law' " so that poor people are treated equally).

ceptable, and almost all states now permit some form of joint custody arrangement.[91] The reason for permitting these types of dispositions seems to be a recognition that a child may have bonds and special relationships with a number of different adults and that both parents are important to a child even if visitation with them creates loyalty conflicts.

Additionally, many states are acknowledging the importance of birth families by passing legislation that grants visitation rights to noncustodial grandparents.[92] As long as a child is in a stable adoptive home and has help from her adoptive parents, she may be able to actually benefit from multiple relationships.[93] It is time to recognize that in certain situations courts should not have to choose one set of parents over another. Instead, the legislature needs to create a middle ground that permits both the adoptive parents and birthparents to continue some type of parental ties with the child.[94]

VI. DRAWBACKS

What are some of the major drawbacks to this suggestion? Several leap to mind. The first concern is that potential adoptive parents often may not be willing to adopt children under these types of circumstances because it may intensify any feelings of insecurity they have about the adoption process.[95] Adoptive parents may worry about their entitlement to have and control the adopted child.[96] They may fear that the birthparents will try to disrupt the placement. However, with the adoption of children who have been through the foster care system, it seems that there is a much slighter chance that a birthparent would try to disrupt the placement. The birthparent would know that most of her parental rights had been terminated already and that she only

91. *See, e.g.*, MINN. STAT. § 518.17 subd. 2 (West 1990 & Supp. 1993); MONT. CODE ANN. § 40-4-222 (1991); WIS. STAT. ANN. § 767.24(2) (West 1993).

92. *See, e.g.*, N.D. CENT. CODE § 14-09-05.1 (1993) (permitting grandparents and great grandparents of an unmarried minor to acquire visitation rights if it is in a child's best interest, unless the child has been adopted by someone other than a stepparent or grandparent).

93. Bartlett, *supra* note 32, at 910-11.

94. *Id.* at 944.

95. Berry, *supra* note 81, at 128.

96. *Id.* The recent *DeBoer* case dramatically illustrates the potential conflict between adoptive parents and birthparents, and shows why adoptive parents may worry about their ability to keep custody of a child. DeBoer v. DeBoer, 62 U.S.L.W. 3092 (U.S. July 30, 1993) (forcing adoptive parents to return their adopted daughter to her birthparents after two years of litigation). But note this case involved an infant adoption and not the adoption of an older child.

retained visitation rights as long as it was in the child's best interests.

Another criticism is that this type of situation may only confuse the adopted child so that she will not be able to deal with the differing value systems among multiple parents and any resulting loyalty conflicts.[97] Several courts have assumed that allowing visitation between birthparents and an adopted child would only cause great confusion for the child.[98] However, there seems to be general agreement that if the relationship between birthparents and adoptive parents is clear and positive then the child will be least confused about loyalties.[99]

One other possible criticism is that this option will deplete more judicial resources because it gives a birthparent a statutory right to court enforced visitation—something she would not normally have after the termination of her parental rights.[100] At least one scholar postulates that enforcing visitation for birthparents would not consume a substantially greater amount of judicial resources than are currently being used because this situation is not as likely to have the type of personal conflict that one often sees in domestic relation cases.[101] Hopefully, the parties would be more willing and able to work out any potential problems. Additionally, the types of cases that come to court would involve the type of fact patterns that domestic relation courts are used to handling, and they could be directed by the family law already developed.[102]

The current laws are devised largely for traditional infant adoptions and not for older children who know their birth family, live in the same town as they do, and will likely continue to have contact with the birth family.[103] In order to deal with this different pool of older children, there needs to be another alternative.[104] This alternative should be provided for by statutory amendment because the courts have responded to these disputes in a variety of ways.

In determining whether a family is appropriate for a weak

97. *Id.* at 129.
98. *Id. See supra* note 10.
99. Berry, *supra* note 81, at 129.
100. Garrison, *supra* note 15, at 479.
101. *Id.* at 480.
102. *Id.*
103. Beyer and Mlyniec, *supra* note 54, at 251.
104. Judy E. Nathan, *Visitation after Adoption: In the Best Interests of the Child*, 59 N. Y. U. L. REV. 633 (1984) (discussing statutory visitation rights of birthparents and other relatives both before and after adoption).

adoption, a judge may need to consider the reasons why a parent is unable to ever regain custody, whether the parties were willing to try to work together and whether there is any evidence that continuing biological ties with the birth family would be harmful to the child. Once a judge decides that continuing those ties is in a child's best interests, then she should be able to grant a weak adoption that permits these types of relationships.

VII. CONCLUSION

The real issue here is what is the basic goal of the system? Do we want to punish the parents and accordingly deprive them of their rights? Do we want to protect the child and do whatever is in her best interests? Should the focus in a termination of parental rights case be on the conduct of the birthparents and on whether they are unfit or should it be aimed at trying to determine what is in the best interests of the child? Should it perhaps encompass both? The proposal presented in this essay would allow judges, in appropriate situations, to actually do what is in a child's best interests.