ADOPTION, THE TERMINATION OF PARENTAL RIGHTS AND *BABY M*

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The unique though not unexpected feature of the opinion of the New Jersey Supreme Court in *In re Baby M*,[1] is how little it has to do with the concept of surrogacy. Although the case received national publicity as the first time the issue of surrogacy was fully presented to an American court, the real issue of concern was not surrogacy itself, but rather the proper standards for the termination of parental rights.[2]

That the case should focus on this issue is not surprising, as the court was not asked to approve or disapprove the concept of surrogacy, an issue that the court quite properly noted is one for a legislative rather than a judicial body,[3] nor to declare the respective rights of parties under an executory surrogate parent contract, but rather to decide the question of whether there was a sufficient basis to sever the relationship between Baby M[4] and her biological mother, Mrs. Whitehead.[5]

There are three different statutory bases for the termination of parental rights in New Jersey.[6] Both the "general" termination statute[7] and the "surrender" termination statute[8] were inap-

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1 *In re* Baby M, 109 N.J. 396, 537 A.2d 1227 (1988).

2 For an alternative discussion on the termination of parental rights, see Hornstein, *Termination of Parental Rights*, 7 N.J. FAM. LAW., Feb. 1988, at 117.

3 *Baby M*, 109 N.J. at 411, 537 A.2d at 1235.

4 Although the child's name now seems to be firmly established as Melissa, she will be referred to in this article as "Baby M," the name by which she was known in the litigation.

5 As a result of her divorce and remarriage, the mother's name is now Gould, but she will be referred to herein as Mrs. Whitehead, the name used in the litigation.

6 *See generally*, Boskey & McCue, *Alternative Standards for the Termination of Parental Rights*, 9 SETON HALL L. REV. 1 (1978).

7 N.J. STAT. ANN. § 30:4C-15 (West 1981). The general termination statute provides four bases for the termination of parental rights. The first and second require either that a conviction of abuse, abandonment, neglect or cruelty has been entered against the parent of the child or that the child has been adjudged delinquent, neither of which was true in this case. The third and fourth grounds require, as a predicate to the action, that the child is or has been, under the care or custody of the New Jersey Division of Youth and Family Services, similarly making them inapplicable to the case at bar.

plicable by their terms to the situation in the *Baby M* case. Termination of parental rights, therefore, if it were to occur, would have to have been justified under the termination of parental rights provisions of the New Jersey adoption law,[9] or under some new or nonstatutory legal doctrine.

The action for the termination of parental rights has been described by judges as being one of the most painful processes in which they are obligated to participate. Not only is the parent-child relationship constitutionally protected,[10] but the emotional consequences of such a termination are often extreme. Nonetheless, the termination of parental rights may often be necessary for the protection of the child from a parent who is unwilling or unable to provide the child a suitable upbringing. The extreme nature of the relief, and the need to give all due deference to the underlying constitutional privilege, has meant that the relief should only be granted in extraordinary cases where no other suitable solution is available, unless the remedy is fully and voluntarily agreed to by the surrendering parent.

Actions for the termination of parental rights can be divided into two classes: those where a parent (or parents) voluntarily surrenders rights with regard to a child, and those where the termination is involuntary, made over the objection of the parent. In the first class of cases, voluntary surrender, the essential question which must be addressed is whether the surrender was truly voluntary. A number of issues can arise in making that determination.

The first question to be answered is whether the surrender falls within the provisions of the New Jersey adoption statute.[11] Under that statute, a surrender must be evidenced

> by a signed instrument acknowledged by the person executing the same before an officer authorized to take acknowledgements or proofs in the State in which the instrument is executed, such officer first having made known the contents of the instrument to the person making the acknowledgment and having been satisfied as to the identity of the person executing

[8] *Id.* § 9:2-18 (West 1976). The surrender termination statute requires, for its applicability, that the child in question be under the supervision of an approved agency. Baby M was never under agency supervision, and the statute is, therefore, inapplicable by its own terms.

[9] *See id.* §§ 9:3-41, -45, -48(c)(1) (West Supp. 1988).

[10] *E.g.* Stanley v. Illinois, 405 U.S. 645 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[11] *See* N.J. STAT. ANN. §§ 9:3-37 to -41.1 (West Supp. 1988). This statute establishes the conditions for a surrender to be directly enforceable.

> the surrender, which the officer shall certify on the instrument of surrender or on a paper attached thereto.[12]

Such a surrender is only fully effective, however, if the recipient of the surrender (the party receiving custody and guardianship of the child in question) is an "approved agency."[13]

Where an approved agency receives such a surrender, "[s]uch surrender shall constitute relinquishment of such person's parental rights in or guardianship or custody of the child named therein and consent by such person to adoption of the child."[14] The special authority granted to such agencies to receive children on the basis of direct surrender is granted to them on the assumption that they will assure that the surrender is not being provided under duress,[15] and that the agency will have

> 1. Offered [the surrendering parent(s)] counseling that fully explores alternative plans for the child, including but not limited to temporary foster care, day care and care by relatives;
> 2. Informed [the surrendering parent(s)] that only legal parents or legal guardians have the right to custody and control of their child and to surrender their child for adoption;
> 3. Prepared [the surrendering parent(s)], along with the child for surrender and separation;
> 4. Referred [the surrendering parent](s) to other community resources when the agency cannot provide needed services;
> 5. Informed [the surrendering parent(s)] that the agency may contact them in the future if the adult adoptee or adoptive family or emancipated minor requests information or wishes to meet the birth parents;
> 6. Advised [the surrendering parents(s)] that they may sign a written agreement at any time indicating their willingness to be contacted and/or provide information if requested by the adoptee or adoptive family; and
> 7. Asked [the surrendering parent(s)] to update and submit to the agency their address(es) and/or any significant medical information required on the Medical Information Form, so that the medical information could be shared with the adoptive family and/or the adult adoptee.[16]

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[12] *Id.* § 9:3-41(a).

[13] An "approved agency" is defined as "a nonprofit corporation, association or agency, including any public agency, approved by the Department of Human Services for the purpose of placing children for adoption in New Jersey." *Id.* § 9:3-38(a) (West Supp. 1988).

[14] *Id.* § 9:3-41(a).

[15] This requirement is incorporated in the Manual of Standards for Adoption Agencies. *See* N.J. ADMIN. CODE tit. 10, § 121A-5.4 (1987).

[16] *Id.* § 121A-5.4(c).

In addition, the agency is required to "ensure that the birth parents understand the terms of the surrender and realize that the agency will assume custody and will have the right to consent to the adoption of the child," among other things, "and ensure that the full terms of this understanding are delineated in writing signed and dated by the birth parent(s) and agency."[17]

With the provision of these protections and assurances, the surrender granted to the agency "constitute[s] relinquishment of [the surrendering parent's]. . . parental rights in or guardianship or custody of the child named therein and consent by such person to adoption of the child."[18] Moreover, such a surrender "shall be valid and binding without regard to the age of the person executing the surrender."[19] With one exception this is the only manner in which a direct surrender of a child for placement is fully effective in New Jersey.[20] Moreover, even with these protections, a surrender granted to an approved agency is not immune from attack by a birth parent, and may be set aside on a finding of fraud, duress, mistake of fact, or such other basis as would allow the rescission of a civil contract.[21]

Where a surrender is given to one other than an approved agency, the effectiveness of the surrender is even more open to question. There is no statutory authority for honoring such a surrender, and the language of the adoption statute makes it quite clear that such surrender has no *per se* legal effect. The surrender may serve as some evidence of the intent of a parent to surrender his or her parental rights, so that a child may be adopted, or of the failure of the parent to meet the standards for objecting to an adoption,[22]

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[17] *Id.* § 121A-5.4(d).

[18] N.J. STAT. ANN. § 9:3-41(a).

[19] *Id.*

[20] The exception is that a New Jersey approved agency may accept a surrender from an agency approved to place children for adoption in another state or foreign country. *Id.* § 9:3-41(b).

[21] *See* Sorentino v. Family and Children's Soc'y of Elizabeth, 72 N.J. 127, 367 A.2d 1168 (1976). This is not to say that every such objection will be honored, *In re* D., 61 N.J. 89, 293 A.2d 171 (1972), but only that the surrender's validity is open to appropriate question. *See also* Sorentino v. Family and Children's Soc'y of Elizabeth, 74 N.J. 313, 378 A.2d 18 (1977).

[22] Section § 9:3-46(a) of New Jersey Statutes Annotated provides for a parent who has not executed a surrender pursuant to section 9:3-41 (which would apply in any case where a surrender was not given to an approved agency) to enter an objection to the adoption of his or her child. N.J. STAT. ANN. § 9:3-46(a) (West Supp. 1988). The section provides that:

> No judgment of adoption shall be entered over an objection of such parent . . . unless the court finds that such parent has substantially failed to perform the regular and expected parental functions of care and sup-

but it does not, in and of itself, provide a basis for the termination of parental rights. The court must, in the course of the preliminary hearing[23] in an adoption action, confirm the failure of the parents to meet the standards for objecting to the adoption[24] or determine that the parents have lost their rights to the child under the standards set forth in the statute.[25]

In the *Baby M* case, the fundamental claim was that the contract signed by the parties[26] could serve as a surrender of parental rights on the part of the Whiteheads[27] so as to permit the adoption of the child by Mrs. Stern, the wife of the father of the child.[28] In order for that claim to succeed, the contract had to serve as a complete surrender or it would have been necessary to prove that an independent basis for the termination of Mrs. Whitehead's parental rights existed.

Although substantial proofs regarding Mrs. Whitehead's parenting abilities and relationship with the child were presented in the case, there could be little question that the statutory standard

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> port of the child, which shall include maintenance of an emotional relationship with the child.

Id.

[23] The preliminary hearing is required in any case where the child to be adopted is not received from an approved agency N.J. STAT. ANN. 9:3-48 (West Supp. 1988).

[24] N.J. STAT. ANN. § 9:3-46(a) (West Supp. 1988).

[25] The standard is "failure to make timely objection to the adoption . . . or intentional abandonment or very substantial neglect of parental duties without a reasonable expectation of a reversal of that conduct in the future." *Id.* § 9:3-48(c)(1).

Some trial courts have suggested that the standards set forth in section 9:3-48(c)(1) of New Jersey Statutes Annotated must be met in every case, but a careful reading of the statute makes it clear that if the standard presented in section 9:3-46(a) is met, there is no need to deal with the section 9:3-48(c)(1) standard for termination as the parents would not have been able to make a timely and effective objection under the earlier section.

[26] The contract included as parties Mr. Stern, the biological father, Mrs. Whitehead, the biological/surrogate mother, and Mr. Whitehead, the then husband of Mrs. Whitehead.

[27] Mr. Whitehead, although not the biological father of the child, possessed, at least arguably, parental rights with regard to the child as the husband of the biological mother. It is interesting to note that the wife of the biological father apparently does not have similar rights although her biological relationship to the child is not distinguishable from Mr. Whitehead's. This derives from the traditional rule that the husband of the mother, but not the wife of the father, is, at least rebuttably, presumed to be the biological father of the child. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 310-11 (2d ed. 1987).

[28] The contract provided, among other things, that

> 1. MARY BETH WHITEHEAD . . . agrees . . . [to] terminate all parental rights to said child . . . . [and]
>
> 2. . . . RICHARD WHITEHEAD . . . acknowledges that he will do all acts necessary to rebut the presumption of paternity . . . .

Baby M, 109 N.J. at 470, 537 A.2d at 1265 (Appendix A).

for termination of parental rights was not met. Having attempted to maintain custody of the child,[29] Mrs. Whitehead had made full efforts to perform the "regular and expected parental functions of care and support of the child," and an "emotional relationship" had been established by virtue of her attempts to maintain custody and the visitation ordered by the court.[30] Thus Mrs. Whitehead met the standards of the adoption statute to qualify as having a right to object to the adoption of the child.[31]

Having established Mrs. Whitehead's right to object to the adoption, the remaining question is whether her objection was entitled to be honored. There was clearly no "intentional abandonment or very substantial neglect of parental duties,"[32] and thus no basis for the termination of her parental rights.

An alternative argument made to and by the trial court was that the court had an inherent power to terminate Mrs. Whitehead's parental rights on the basis of the best interests of child.[33] This argument has powerful appeal since the responsibility of the courts as

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[29] Even if it were found that she had been unable to fulfill these functions, it would not have been fatal to her claim if the cause of her inability were intervention by third parties (including the court) against her will. *See* Sorentino v. Family and Children's Soc'y of Elizabeth, 72 N.J. 127, 367 A.2d 1168 (1976). If her inability had been personal, i.e., due to mental or psychological deficiency, other issues would have arisen, and termination might have been allowed despite the inability, A.L. v. P.A., 213 N.J. Super. 391, 517 A.2d 494 (App. Div. 1986), if it was necessary for the best interests of the child, but in this case there was no serious indication that she would have been unable to provide suitable care for the child as either custodial or visiting parent.

[30] The child was voluntarily placed in her custody shortly after birth and remained in her custody during the period of her flight to Florida. In addition, she was, appropriately, provided with regular visitation during the pendency of the action and she exercised the visitation on a consistent basis maintaining a parent-child relationship with her daughter.

[31] N.J. STAT. ANN. § 9:3-46 (West Supp. 1988).

[32] *Id.* § 9:3-48(c)(1) (West Supp. 1988).

[33] Authority for this approach can be found although the courts have not directly adopted it. In New Jersey Div. of Youth and Family Servs. v. A.W., 103 N.J. 591, 512 A.2d 438 (1986), the court appears to move beyond the statutory grounds to allow the termination of parental rights in order to protect the interests of the subject children. In that case the court pointed out that:

> A court analyzing the ability of the parents to give their children care should not look at the parents to determine whether they are themselves unfit or whether they are the victims of social circumstances beyond their control; it should only determine whether it is reasonably foreseeable that the parents can cease to inflict harm upon the children entrusted to their care. No more and no less is required of them than that they will not place their children in substantial jeopardy to physical or mental health.

Id. at 607, 512 A.2d at 447.

parens patria[34] is a serious one and the goal of protecting the best interests of children is one that has been broadly recognized.[35]

Assuming the propriety of such a standard for the termination of parental rights, however, the question remains as to the proper interpretation to be given to the phrase "best interests of the child." It is clear that the term is not a comparative one, and that the courts are not to determine the "better interests" of a child.[36] As the appellate court pointed out in *In re Cope*, "[i]t is not a choice between a home with all the amenities and a simple apartment, or an upbringing with the classics on the bookshelf as opposed to the mass media, or even between parents or providers of vastly unequal skills."[37] If the courts were to allow such a standard to apply, the effect would be to allow any would-be parent from a suburban home to select most children from the inner city, take them into their homes, and then adopt them, depriving them of all contact with their former families.

Rather than comparative, the standard for best interests must be an absolute one based on a demonstration that the child's "health and development have been or probably will be impaired . . . or that the parent is incapable of caring for the child or unwilling to do so."[38] Among the important considerations is the state's public policy of maintaining the integrity of the biological family.[39] Even if the biological family is not functioning, the goal of preserving biological ties is still deemed of importance and, where a child is removed from a parent's home, an effort will generally be made to place that child with other biological relatives.[40] Similarly, in a divorce situation, one biological parent's spouse will generally not be allowed to adopt the spouse's child without the consent of the other biological parent.[41] The same rule applies even where the biological parents were not married to each other, unless the standards for

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[34] For a discussion of the doctrine of *parens patriae*, see generally Boskey & McCue, *supra* note 6, at 18.

[35] *See, e.g.*, N.J. STAT. ANN. § 9:3-37 (West Supp. 1988) (establishing best interests of children as a primary basis for the interpretation of the adoption law).

[36] *In re* Cope, 106 N.J. Super. 336, 340-41, 255 A.2d 798, 801 (App. Div. 1969).

[37] *Id.*

[38] *Id.*

[39] *See* New Jersey Div. of Youth and Family Servs. v. B.W., 157 N.J. Super. 301, 308, 384 A.2d 923, 926 (Camden County Ct. 1977).

[40] *See* New Jersey Div. of Youth and Family Servs. v. A.W., 103 N.J. 591, 609, 512 A.2d 438, 448 (1986).

[41] *See, e.g.*, *In re* J.J.P., 175 N.J. Super. 420, 419 A.2d 1135 (App. Div. 1980); *In re* Neuwirth's Estate, 155 N.J. Super. 410, 382 A.2d 972 (Monmouth County Ct. 1978).

termination of that parent's rights have been met.[42]

It is clear that in the *Baby M* case these standards could not be met, and, thus, even if an inherent power of termination of parental rights on the basis of "best interests" exists, that standard could not be met. Mrs. Whitehead was and remains the biological parent of Baby M, and the lack of any showing of incapacity to care for the child or necessary implication of direct harm to the child, from her exposure to her mother, means that parental rights could not be severed. The inconvenience of maintaining a relationship between the mother and a child who would be living with her father and his wife, and the discomfort of that couple in dealing with the situation is understandable, but it is a problem that is dealt with on a regular basis in post-divorce custody situations and not infrequently in the case of nonmarital children. The situation, while in many ways possibly detrimental to the child, supports the fundamental goal of allowing the child to know and maintain a relationship with his or her biological parents.

What then have been the consequences of the *Baby M* decision on the law of termination of parental rights in New Jersey? The first consequence is the continued recognition of the fact that a grant of a surrender to one other than an approved agency is not binding[43] and requires review by a court before it can be effective.[44] Even more important is the recognition that such agreements cannot be irrevocable and are subject to a right of rescission.[45]

Also of substantial importance is the court's confirmation of the fact that a surrender for purposes of adoption cannot be granted

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[42] *In re* A.R., 152 N.J. Super. 541, 378 A.2d 87 (Union County Ct. 1977). The same implication can be drawn from *In re* Mercado, 182 N.J. Super. 628, 442 A.2d 1078 (App. Div. 1982).

[43] "[I]t is not clear that there could be any 'order or judgment of a court of competent jurisdiction' validating a surrender of custody as a basis for adoption when that surrender was not in conformance with the statute." *Baby M*, 109 N.J. at 430, 537 A.2d at 1244. The court continues by pointing out that only surrenders to an approved agency meet this criterion.

[44] Indeed it can be argued from the opinion that the private surrender has no effect, see *id.* at 433-34, 537 A.2d at 1246, although the better view would appear to be that it may be some evidence of the propriety of terminating parental rights in an appropriate case.

[45] *Id.* at 430, 537 A.2d at 1244. The court notes especially the following statutory language:

> Except as otherwise provided by law or by order or judgment of a court of competent jurisdiction or by testamentary disposition, no surrender of the custody of a child shall be valid in this State unless made to an approved agency . . . ."

Id. (quoting N.J. STAT. ANN. § 9:2-14 (West 1976)).

prior to the birth of the child.[46] This rule, which has been widely assumed to exist without confirmation in the case of the biological mother, is now clearly applicable as well to the biological father.[47] One policy basis for this rule is that the natural mother is

> irrevocably committed [to the surrender of her rights in the absence of such a rule] before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a $10,000 payment, is less than totally voluntary.[48]

The New Jersey Supreme Court further recognized that the rights of the biological parents of a child are not determined by their marital status. The court noted specifically the language of the Parentage Act that, "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents"[49] and the accompanying statement of the Assembly Judiciary Committee to the bill enacting the statute confirmed, "the principle that regardless of the marital status of the parent, all children and *all parents* have equal rights with respect to each other."[50]

Another issue of importance is the court's rejection of the use of money to induce a surrender of parental rights. The court's starting point makes it clear how fundamental it perceived the issue of money for custody or termination to be.

> This [the surrogacy contract] is the sale of a child, or, at

[46] The court notes that "[t]he contract's basic premise, that the natural parents can decide in advance of birth which one is to have custody of the child, bears no relationship to the settled law that the child's best interests shall determine custody." *Id.* at 434, 537 A.2d at 1246 (citations omitted). This applies even with regard to a surrender to an approved agency under the terms of the statute: "We construe the statute to allow a surrender only after the birth of the child." *Id.* at 431, 537 A.2d at 1245.

[47] The court notes the rights of the biological father in the strongest terms: "The surrogacy contract violates the policy of this State that the rights of natural parents are equal concerning their child . . . . 'The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.' " *Id.* at 435-36, 537 A.2d at 1247 (quoting N.J. STAT. ANN. § 9:17-40 (West Supp. 1988)).

[48] *Id.* at 437, 537 A.2d at 1248.

[49] *Id.* at 436-37, 537 A.2d at 1247 (citing N.J. STAT. ANN. § 9:17-40 (West Supp. 1988)).

[50] *Id.* at 436, 537 A.2d at 1247 (quoting ASSEMBLY JUDICIARY, LAW, PUBLIC SAFETY & DEFENSE COMM., STATEMENT TO SENATE NO. 888, L.1983, c.17, 200th Leg., 2d Sess. (1983)).

the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father. Almost every evil that prompted the prohibition of the payment of money in connection with adoptions exists here.[51]

The adoption statute prohibits the payment or acceptance of any money or other valuable consideration in connection with the placement of a child for adoption.[52] An express exception is made for the fees or services of an approved agency and for the payment or reimbursement of medical, hospital or other similar expenses incurred in connection with the birth or any illness of the child,[53] and an exception is necessarily implied for reasonable attorney fees for legal services in connection with the placement of the child.[54] To attempt to assure that this section is not violated, the statute requires the adoptive parent, except in relative and stepparent adoptions, to file a detailed verified report of all sums paid in connection with the adoption.[55] If it appears that the provisions on payment for adoption have been violated, the court is directed to refer the matter to the appropriate county prosecutor.[56]

The court noted that the problem of payment of money in adoption cases was even more apparent in the case of surrogacy. In adoption cases the payment does not produce the problem (if it is appropriate to describe the birth of a child in this manner), whereas with surrogacy the issue of the purchase of the woman's procreative capacity is the primary function of the payment.[57] The fundamental issues are the introduction of a middle person, motivated primarily if not exclusively by profit, who is unlikely to assure that the appropriate protections are provided to the surrendering mother where those protections might cost the broker his or her fee,[58] and the fact that the payment of money may, in many cases, lead the biological parent to make a decision that is inappropriate for his or her needs and that of the child. Again, the court focuses clearly on the fact that allowing payment to control the decision compromises the

[51] *Id.* at 437-38, 537 A.2d at 1248.

[52] N.J. STAT. ANN. § 9:3-54(a) (West Supp. 1988).

[53] *Id.* § 9:3-54(b).

[54] The full bounds of this exception have never been determined, but, as it is clear that an attorney may not participate in the arrangements for or the actual placement, the exception appears to be quite limited. *See In re* N.P., 165 N.J. Super. 591, 398 A.2d 937 (Law Div. 1979); *but see In re* I.T., 164 N.J. Super. 476, 397 A.2d 341 (App. Div. 1978) (limiting the effect of this section to raising the possibility of criminal prosecution rather than preventing the adoption).

[55] N.J. STAT. ANN. § 9:3-55 (West Supp. 1988).

[56] *Id.* § 9:3-55(b).

[57] *Baby M*, 109 N.J. at 438, 537 A.2d at 1248.

[58] *Id.* at 439, 537 A.2d at 1249.

needed focus on the best interests of the child.[59]

In conclusion, it is clear that, at least one of the primary foci of the *Baby M* decision was the appropriate bases for termination of parental rights. The court has reaffirmed its prior views as to the care needed in dealing with these actions and has mandated strict scrutiny, not only of the legal processes, but also of the pre- and extra-legal processes involved in such actions. The court is to be commended for the careful scrutiny it has given to these policy issues and for its recognition of the need to protect first the interests of children and second the interests of all participants in the process.

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[59] *Id.*, 537 A.2d at 1248-49.