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IN THE BEST INTEREST OF THE CHILD: WHAT HAVE WE LEARNED FROM BABY JESSICA AND BABY RICHARD?

GREGORY A. KELSON*

No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.¹

Legal training and experience are of little practical help in solving the complex problems of human relations. However, these problems do arise and under our system of government, the burden of rendering a final decision rests upon us.²

INTRODUCTION

For a two-and-a-half-year-old girl, the day began just like any other. She awoke and probably had some breakfast. Her adoptive mother was packing some of her items. The little girl had been told the previous night that she would be moving.³ Later, her adoptive parents took her on a two-hour family outing, her mother in the back seat with the girl sobbing.⁴ She pushed the little girl on her swing and kissed her on the cheek before she finished packing her bag.⁵ At the appointed hour, the adoptive parents' lawyer came for her and strapped her into a car seat in a minivan filled with her possessions.⁶ As she was driven to a police station in Ann Arbor, Michigan, she screamed, "I want my dad. Where's my dad?"⁷ At the police station, she was handed over to her biological parents for a flight to their home in Iowa.⁸

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1. *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977).

2. *Painter v. Bannister*, 140 N.W.2d 152, 153 (Iowa 1966).

3. Desda Moss, *Child's Painful Parting: Jessica Handed to Birth Parents*, USA TODAY, Aug. 3, 1993, at A1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Moss, *supra*, note 3, at A1.

In a Chicago suburb, a four-year-old boy was probably having a similar morning. His adoptive parents also told him that he would be moving.⁹ Later, the biological parents and the adoptive parents' Lutheran pastor arrived at the house.¹⁰ The two couples spent some time playing with the boy, and an hour later the pastor came out of the house to appeal to the crowd that had gathered to remain calm.¹¹ The boy's adoptive mother came out of the house carrying the boy, who was tightly holding on to her.¹² As the biological father—whom the boy had just met—took him from her, he screamed loudly.¹³ The biological father, his wife (the boy's biological mother) and their lawyer climbed into a van and sped off to their home in another Chicago suburb, leaving the boy's adoptive family crying uncontrollably.¹⁴

The little girl in the first scenario was known as Jessica DeBoer to her adoptive parents Jan and Roberta DeBoer, and as "Baby Jessica" to the rest of the country.¹⁵ The little boy in the second scenario was known as "Baby Richard."¹⁶ In both cases, the court of last resort in their home states, Michigan and Illinois respectively, ordered that these children be taken from the only home they ever knew and given to their biological parents, whom they had never met.¹⁷ A determinative factor in both cases was that the biological fathers of the children were never consulted before the adoptions were finalized.¹⁸ Thus, neither state felt that it was appropriate to weigh "the best interest of the child" in ordering final custody.¹⁹

Yet, the rights of children in general²⁰ and in adoption cases

9. Janan Hanan & Peter Kendall, *Wrenching Day for 'Richard' Boy Begins Trip in Tears, Ends It Calmly*, CHI. TRIB., May 1, 1995, § 1, at 1.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Hanan & Kendall, *supra* note 9, at 13.

15. Moss, *supra* note 3, at A1.

16. *'Richard' Inquiry Halted by Bilandic[:]* Illinois Supreme Court Justice Stops Reopening of Case, CHI. TRIB., July 29, 1997 § 1, at 1. The adoptive parents, who were known as John and Jane Doe during the litigation, are Robert and Kimberly Warburton. Baby Richard is now known to his biological parents, Otakar and Daniella Kirchner, as Daniel. *Id.*

17. *In re Doe*, 638 N.E.2d 181, 183 (Ill. 1994), *cert. denied*, 513 U.S. 1303, 1304 (1994); *In re Baby Girl Clausen*, 502 N.W.2d 649, 664 (Mich. 1993) *aff'd*, 509 U.S. 1301, 1301 (Stevens, Circuit Justice 1993).

18. *Clausen*, 502 N.W.2d at 651; *Doe*, 638 N.E.2d at 182.

19. *Clausen*, 502 N.W.2d at 667; *Doe*, 638 N.E.2d at 182.

20. *See, e.g.*, Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 269-85 (1995) (investigating the potential effect of historical analysis on the future of children's rights); Hillary Rodham, *Children Under the Law*, 43 HARV. ED. REV. 487, 505-07 (1973) (arguing that courts should determine the competence of children on a case-by-case basis).

specifically²¹ are issues that have fostered great debate. Both biological parents and third parties, such as adoptive or foster parents, have fought for custody of children without the child having any say in the matter.²²

This Article re-examines both the Baby Jessica and Baby Richard custody cases by defining what exactly is the “best interest of the child” standard that a court should use in applying the law. Part I revisits the cases of Baby Jessica in Michigan and Baby Richard in Illinois. Part II analyzes the best interest of the child standard. Part III investigates what, if any, rights *children* have in adoption proceedings. Finally, Part IV determines steps a court should take in determining custody after a child has reached a certain age.

I. REVISITING BABY JESSICA AND BABY RICHARD

This Section re-examines the cases of Baby Jessica²³ and Baby Richard.²⁴ These cases clarify how the best interest of the child standard should have been applied to these and similar cases. Interestingly, the Baby Jessica case involved a battle of jurisdiction between two states, while the Baby Richard case involved the rights of putative fathers in adoption proceedings.

A. *The Case of Baby Jessica*

Other than the *Baby M* surrogacy case in New Jersey,²⁵ no

21. See Andrew S. Rosenman, Note, *Babies Jessica, Richard, and Emily: The Need for Legislative Reform of Adoption Laws*, 70 CHI.-KENT L. REV. 1851, 1878-90 (1995) (proposing legislative reforms because of recent cases); Michael A. Weinberg, Note, *DeBoer v. Schmidt: Disregarding the Child's Best Interest in Adoption Proceedings*, 23 CAP. U. L. REV. 1099, 1134-38 (1994) (arguing that courts should focus on the best interests of the children instead of parental rights).

22. See, e.g., *Kyker v. Kyker*, 1996 WL 67178, at *8 (Tenn. Ct. App. 1996) (holding that the trial court erred by not considering the best interest of the child); *Martin v. Martin*, 1994 WL 247194, at *4 (Ohio Ct. App. 1994) (affirming custody decision that went against psychologist's recommendation); *Delzer v. Winn*, 491 N.W.2d 741, 746 (N.D. 1992) (holding that improvements in non-custodial parent's life should not change custody terms); *Funk v. Ossman*, 724 P.2d 1247, 1250-51 (Ariz. Ct. App. 1986) (holding best interest of child barred father from providing child with religious indoctrination); *Dale County Dep't of Pensions & Sec. v. Robles*, 368 So. 2d 39, 43 (Ala. Civ. App. 1979) (affirming decision giving custody to parents when no signs of physical abuse were present); *Lewis v. Lewis*, 537 P.2d 204, 209 (Kan. 1975) (affirming decision to not change terms of custody after parent made lifestyle changes).

23. *Clausen*, 502 N.W.2d at 649.

24. *Doe*, 638 N.E.2d at 181.

25. *In re Baby M*, 537 A.2d 1227 (N.J. 1988). This was a custody case between the surrogate mother and biological father of a female child. For a detailed analysis of this case, see generally LORI B. ANDREWS, *BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTANT FATHERS, AND BRAVE NEW BABIES* (1989).

other child custody case has drawn as much attention as that of Baby Jessica.²⁶ This case not only waged a battle for custody of Baby Jessica between her biological and adoptive parents, but also waged a battle for jurisdiction between the states of Iowa and Michigan.

Cara Clausen gave birth to Baby Jessica²⁷ on February 8, 1991.²⁸ Ms. Clausen was not married at the time and decided to give the baby up for adoption.²⁹ She signed a release of custody on February 10, 1991 and named Scott Seefeldt as the father.³⁰ Mr. Seefeldt executed a release of custody form on February 14, 1991.³¹ A hearing followed in juvenile court on February 25, 1991, terminating Ms. Clausen and Mr. Seefeldt's parental rights.³² The court awarded temporary custody of the child to Roberta and Jan DeBoer, who returned to Michigan with the child.³³

Nine days after the DeBoers received custody of Baby Jessica, Ms. Clausen filed a motion to revoke her release of custody.³⁴ In an affidavit, Ms. Clausen said that she lied about the identity of the father and that the real father was Daniel Schmidt.³⁵ Mr.

26. *Clausen*, 502 N.W.2d at 649.

27. The child's biological parents changed her name to Anna Schmidt. Moss, *supra* note 3, at A1. For the sake of clarity in this Article, the Author will refer to the child as Baby Jessica.

28. *Clausen*, 502 N.W.2d at 652.

29. *Id.* See also *In re B.G.C.*, 496 N.W.2d 239, 240 (Iowa 1992) (describing Iowa's proceedings in the Baby Jessica case).

30. Iowa law states that a release of custody "[s]hall be signed, not less than seventy-two hours after the birth of the child to be released, by all living parents." IOWA CODE ANN. § 600A.4(2)(g) (West 1996).

31. *Clausen*, 502 N.W.2d at 652.

32. *Id.*

33. *Id.*

34. *Id.* Ms. Clausen had the right to revoke custody under Iowa law.

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 the juvenile court designated in section 600A.4 to order the revocation of any release of custody previously executed by either parent. If such request is by a signing parent, and is within ninety-six hours of the time such parent signed a release of custody, the juvenile court shall 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 to its execution. In determining whether good cause, other than fraud, coercion or misrepresentation, exists for revocation, the juvenile court shall give paramount consideration to the best interest of the child and due consideration to the interests of the parents of the child and of any person standing in the place of the parents.

IOWA CODE ANN. § 600A.4(4) (West 1996).

35. *Clausen*, 502 N.W.2d at 652.

Schmidt filed a petition to intervene in the DeBoers' adoption proceeding in Iowa District Court.³⁶ The juvenile court denied Ms. Clausen's parental rights revocation and she appealed.³⁷

The Iowa District Court, in the meantime, found that Daniel Schmidt was the real father, that he had not released his parental rights, and that he had not abandoned the baby.³⁸ The court denied the adoption of Baby Jessica and ordered the DeBoers to surrender custody of Baby Jessica to Mr. Schmidt.³⁹ The DeBoers obtained a stay of that order pending further appeal in Iowa.

On December 3, 1992, the DeBoers filed a petition in the Washtenaw Circuit Court of Michigan, asking the court to assume jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA).⁴⁰ The DeBoers asked the court to "enjoin enforcement of

36. *Id.*

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

38. *Id.*

39. *Id.* The Iowa District Court ordered the DeBoers to surrender physical custody of Baby Jessica to Mr. Schmidt by January 12, 1992. *Clausen*, 502 N.W.2d at 65 n.8.

40. The primary purpose of the UCCJA is to avoid jurisdictional competition between states by establishing uniform rules for deciding when states have jurisdiction to make child custody determinations. *Clausen*, 501 N.W.2d 193, 197 (Mich. App. 1993), *aff'd*, 502 N.W.2d 649 (Mich. 1993). During the Baby Jessica litigation, all 50 states and the Virgin Islands had adopted the Act in one form or another. UNIFORM CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 261, 262-65 (West 1999). In 1997, the National Conference of Commissioners on Uniform State Laws approved a new uniform act—the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (prefatory note), 9 U.L.A. 649, 649 (West 1999). This new Act accomplishes two major purposes, according to the prefatory note:

[f]irst, it revises the law on child custody jurisdiction in light of federal enactments and almost thirty years of inconsistent case law. Article 2 of [the] Act provides clearer standards for which States can exercise original jurisdiction over a child custody determination. It also, for the first time, enunciates a standard of continuing jurisdiction and clarifies modification jurisdiction. Other aspects of the article harmonize the law on simultaneous proceedings, clean hands, and forum non conveniens.

Second, [the] Act provides in Article 3 for a remedial process to enforce interstate child custody and visitation determinations. In doing so, it brings a uniform procedure to the law of interstate enforcement that is currently producing inconsistent results. In many respects, [the] Act accomplishes for custody and visitation determinations the same uniformity that has occurred in interstate child support with the promulgation of the Uniform Interstate Family Support Act (UIFSA).

Id. at 649-50.

As of this writing, 12 states have repealed the UCCJA and have replaced it with the UCCJEA. ALA. CODE §§ 30-3B-101 to 30-3B-405 (Supp. 1999); ALASKA STAT. §§ 25.0.300 to 25.30.910 (Michie 1999); ARIZ. REV. STAT. ANN. §§ 25-431 to 25-454 (West Supp. 1999); ARK. CODE ANN. §§ 9-19-101 to 9-19-401 (Michie Supp. 1999); CAL. FAM. CODE §§ 3400 to 3465 (West Supp. 2000); ME. REV. STAT. ANN. tit. 19A, §§ 1731 to 1783 (West Supp. 1999); MINN. STAT. ANN. §§ 518D.101 to 518D.317 (West Supp. 2000); MONT. CODE

the Iowa custody order and find that it was not enforceable, or, in the alternative, to modify it to give custody to the DeBoers.⁴¹ The court issued an *ex parte* temporary restraining order in which the court ordered Baby Jessica to remain with the DeBoers and Mr. Schmidt "not to remove the child from Washtenaw County."⁴² On January 3, 1993, the Washtenaw Circuit Court assumed jurisdiction to determine the best interest of the child and denied Mr. Schmidt's motion for summary judgment.⁴³

ANN. §§ 40-7-101 to 40-7-317 (1999); N.C. GEN. STAT. §§ 50A-1 to 50A-25 (1999); OKLA. STAT. ANN. tit 43, §§ 551-101 to 551-402 (West Supp. 2000); TENN. CODE ANN. §§ 36-6-201 to 36-6-243 (1999); TEX. FAM. CODE ANN. §§ 152.001 to 152.317 (West Supp. 2000). The law will take effect in Connecticut on July 1, 2000. 1999 Conn. Acts 99-185 (Reg. Sess.).

The UCCJA is currently in effect in the following states and territories: ARIZ. REV. STAT. ANN. §§ 25-431 to 25-454 (West Supp. 1999); COLO. REV. STAT. ANN. §§ 14-13-101 to 14-13-126 (West Supp. 1999); CONN. GEN. STAT. ANN. §§ 46b-90 to 46b-114 (West 1995 & Supp. 1999) (until July 1, 2000); DEL. CODE ANN. tit. 13, §§ 1901 to 1925 (1999); D.C. CODE ANN. §§ 16-4501 to 16-4524 (1997); FLA. STAT. ANN. §§ 61.1302 to 61.1348 (West 1997); GA. CODE ANN. §§ 19-9-40 to 19-9-64 (1999); HAW. REV. STAT. §§ 583-1 to 583-26 (1999); IDAHO CODE §§ 32-1101 to 32-1126 (1996); 750 ILL. COMP. STAT. ANN. 35/1 to 35/26 (West 1993); IND. CODE ANN. §§ 31-17-3-1 to 31-17-3-25 (Michie 1997); IOWA CODE ANN. §§ 598A.1 to 598A.25 (West 1996); KAN. STAT. ANN. §§ 38-1301 to 38-1335 (1994); KY. REV. STAT. ANN. §§ 403.400 to 403.620 (Michie 1999); LA. REV. STAT. ANN. §§ 13:1700 to 13:1724 (West 1999); MD. CODE ANN., FAM. LAW §§ 9-201 to 9-224 (1999); MASS. GEN. LAWS ANN. ch. 209B, §§ 1 to 14 (West 1999); MICH. COMP. LAWS ANN. §§ 600.651 to 600.673 (West 1996); MISS. CODE ANN. §§ 93-23-1 to 93-23-47 (1999); MO. ANN. STAT. §§ 452.440 to 452.550 (West 1997); NEB. REV. STAT. §§ 43-1201 to 43-1225 (1998); NEV. REV. STAT. ANN. §§ 125A.010 to 125A.250 (Michie 1998); N.H. REV. STAT. ANN. §§ 456-A:1 to 456-A:25 (1992); N.J. STAT. ANN. §§ 2A:34-28 to 2A:34-52 (West 1987 & Supp. 1999); N.M. STAT. ANN. §§ 40-10-1 to 40-10-24 (Michie 1999); N.Y. DOM. REL. LAW §§ 75-a to 75-z (McKinney 1999); N.D. CENT. CODE. §§ 14-14.1-01 to 14-14.1-30 (1997); OHIO REV. CODE ANN. §§ 3109.21 to 3109.37 (Anderson 1995); OR. REV. STAT. ANN. §§ 109.700 to 109.930 (Michie 1990 & Supp. 1998); PA. CONS. STAT. ANN. §§ 5341 to 5366 (West 1991); R.I. GEN. LAWS §§ 15-14-1 to 15-14-26 (1996); S.C. CODE ANN. §§ 20-7-782 to 20-7-830 (Law Co-op. 1985); S.D. CODIFIED LAWS §§ 26-5A-1 to 26-5A-26 (Michie 1999); UTAH CODE ANN. §§ 78-45c1 to 78-45c-26 (Michie 1996); VT. STAT. ANN. tit. 15, §§ 1031 to 1051 (1989); VA. CODE ANN. §§ 20-125 to 20-146 (Michie 1995); V.I. CODE ANN. tit. 16 §§ 115 to 139 (1996); WASH. REV. CODE ANN. §§ 26.27.010 to 26.27.930 (West 1997); W. VA. CODE §§ 48-10-1 to 48-10-26 (1999); WIS. STAT. ANN. §§ 822.01 to 8.22.25 (West 1994); WYO. STAT. ANN. §§ 20-5-101 to 20-5-125 (Michie 1999).

Both Iowa and Michigan had enacted the UCCJA at the time of the litigation, and all further reference in this Article will be to that Act.

41. *Clausen*, 502 N.W.2d at 653.

42. *Id.*

43. *Id.* at 653. The court further ordered that the child remain in the custody of the DeBoers pending further orders. *Id.* On January 29, 1993, the Iowa District Court found the DeBoers in contempt of court and issued bench warrants for their arrest. *Id.* at 653 n.9. The Iowa Juvenile Court restored Ms. Clausen's parental rights on February 17, 1993. *Id.* On February 12, 1993, the Washtenaw County Circuit Court handed down a bench decision,

The Michigan Court of Appeals reversed the Washtenaw Circuit Court's denial of Mr. Schmidt's summary motion⁴⁴ by concluding that the court lacked jurisdiction under the UCCJA and that, based on another decision,⁴⁵ the DeBoers lacked standing to bring the action.⁴⁶ On May 6, 1993, the Michigan Supreme Court agreed to hear the case.⁴⁷

The Michigan Supreme Court noted:

Interstate enforcement of child custody orders has long presented vexing problems. This arose principally from uncertainties about the applicability of the Full Faith and Credit Clause of the United States Constitution. Because custody decrees were generally regarded as subject to modification, states had traditionally felt free to modify another state's prior order.⁴⁸

The opinion noted that Congress tried to deal with the complexities of child custody cases and the Full Faith and Credit Clause with the passage of the UCCJA.⁴⁹ However, although all fifty states and the United States Virgin Islands have adopted the UCCJA, additional variations and differing interpretations were also adopted.⁵⁰ Congress recognized the various interpretations and adopted the Parental Kidnapping Prevention Act (PKPA) in

finding that "it was in the best interest of the child for her to remain with the DeBoers." *Id.*

44. The court initially denied Mr. Schmidt's application, but reconsidered it on remand from the Michigan Supreme Court. *Id.* at n.10.

45. *Bowie v. Arder*, 490 N.W.2d 568, 570 (Mich. 1992). This case arrived in front of the Michigan Supreme Court in the hopes of resolving several child custody issues:

1) Does the circuit court have subject matter jurisdiction to hear and determine an original third-party custody complaint under the Child Custody Act . . . ? 2) If the circuit court does have jurisdiction over such a claim, does a third party have standing to petition for custody under the act because the child resides with the third party, or resided with the third party in the past? 3) Does the circuit court have subject matter jurisdiction over an original petition for custody under the act where there is no dispute with regard to the custody of a child? and 4) Where there has been no finding of parental unfitness, and absent divorce or separate maintenance proceedings, is a circuit court award of custody to a third party rather than a parent, on the basis of the best interest of the child, a violation of due process?

Id. (citations omitted).

46. *Clausen*, 502 N.W.2d at 653.

47. *Id.* at 654.

48. *Id.* (footnotes omitted). See also U.S. CONST. art. IV, § 1 (prescribing that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," and that the "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof").

49. *Clausen*, 502 N.W.2d at 654.

50. See *supra* note 40 for a list of states adopting the UCCJA and the UCCJEA.

1980.⁵¹ The PKPA requires that state courts “enforce a child

51. *Clausen*, 502 N.W.2d at 655. In adopting the Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-911, 94 Stat. 3568 (codified in scattered sections of 18, 28, and 42 U.S.C.), Congress noted in the “Findings and Purposes” section that

(a) . . .

(1) there is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation of children under the laws, and in the courts, of different States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;

(2) the laws and practices by which the courts of those jurisdictions determine their jurisdiction to decide such disputes, and the effect to be given the decisions of such disputes by the courts of other jurisdictions, are often inconsistent and conflicting;

(3) those characteristics of the law and practice in such cases, along with the limits imposed by a Federal system on the authority of each such jurisdiction to conduct investigations and take other actions outside its own boundaries, contribute to a tendency of parties involved in such disputes to frequently resort to the seizure, restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive re-litigation of cases, obtaining of conflicting orders by the courts of various jurisdictions, and interstate travel and communication that is so expensive and time consuming as to disrupt their occupations and commercial activities; and

(4) among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions, the deprivation of rights of liberty and property without due process of law, burdens on commerce among such jurisdictions and with foreign nations, and harm to the welfare of children and their parents and other custodians.

(b) For those reasons it is necessary to establish a national system for locating parents and children who travel from one such jurisdiction to another and are concealed in connection with such disputes, and to establish national standards under which the courts of such jurisdictions will determine their jurisdiction to decide such disputes and the effect to be given by each such jurisdiction to such decisions by the courts of other such jurisdictions.

(c) The general purposes . . . of this Act are to:

(1) promote cooperation between State courts to the end that a determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child;

(2) promote and expand the exchange of information and other forms of mutual assistance between States which are concerned with the same child;

(3) facilitate the enforcement of custody and visitation decrees of sister States;

(4) discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful

custody determination entered by a court of a sister state if the determination is consistent with the provisions of the Act.⁵²

The Michigan Supreme Court, applying the PKPA, ruled that the Washtenaw Circuit Court lacked jurisdiction under the UCCJA to modify the Iowa custody order because proceedings were still pending in Iowa; that court also held that Michigan was required to enforce the Iowa order.⁵³ The court remanded the case to the Washtenaw Circuit Court to dismiss the action for "failure to state claims upon which relief may be granted."⁵⁴ The final two paragraphs of the opinion are what led to perhaps the scariest day in Baby Jessica's life.

We direct the Washtenaw Circuit Court to enter an order enforcing the custody orders entered by the Iowa courts. In consultation with counsel for the Schmidts and the DeBoers, the circuit court shall promptly establish a plan for the transfer of custody, with the parties directed to cooperate in the transfer with the goal of easing the child's transition into the Schmidt home. The circuit court shall monitor and enforce the transfer process, employing all necessary resources of the court, and shall notify the clerk of this Court 21 days following the release of this opinion of the arrangements for the transfer of custody. The actual transfer shall take place within 10 days thereafter.

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 causes. However, the clearly applicable legal principles require that the Iowa judgment be enforced and that the child be placed in the custody of her natural parents. 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 by assuring that the transfer of custody is accomplished promptly with minimum disruption of the life of the child.⁵⁵

In his dissent, Justice Charles Levin stated that if this had concerned a bale of hay instead of a child, he would have ruled with the majority.⁵⁶

effects on their well-being; and

(6) deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards.

Parental Kidnapping Prevention Act, Pub. L. No. 96-611, § 7, 94 Stat. 3568, 3568-69 (1980).

52. *Clausen*, 502 N.W.2d at 655 (quoting *Thompson v. Thompson*, 484 U.S. 174, 175-176 (1988)).

53. *Id.* at 656.

54. *Id.* at 668.

55. *Id.*

56. *Id.* at 668-69 (Levin, J., dissenting).

At last report, Baby Jessica was developing normally in the home of Cara and Dan Schmidt.⁵⁷ In 1998, Mr. Schmidt noted that Baby Jessica “has no recollection whatsoever of [the adoption battle].”⁵⁸ However, in 1999, both sets of parents in the dispute filed for divorce.⁵⁹ Jan and Roberta DeBoer, Baby Jessica’s adoptive parents, finalized their divorce on October 22, 1999.⁶⁰ The DeBoers stated that “the strain of the custody [battle] was more than their [seventeen-year] marriage could withstand.”⁶¹ Divorce proceedings for Dan and Cara Schmidt were also pending at the time of this Article.⁶²

B. The Case of Baby Richard

The Baby Richard case produced public outcry from just about every citizen in the State of Illinois, including then-Governor Jim Edgar and First Lady Brenda Edgar.⁶³ Similar to the Baby Jessica case, the Baby Richard case involved a custody dispute between the biological and the adoptive parents, but did not involve the UCCJA or the PKPA. Instead, the case focused on the rights of putative fathers.⁶⁴

Otakar Kirchner and Daniella Janikova came to the United States from the former Republic of Czechoslovakia in 1986 and 1988, respectively, and began living together in an apartment in Chicago.⁶⁵ In June 1990, Ms. Janikova announced that she was

There is a . . . child, “a feeling, vulnerable and [about to be] sorely put upon little human being”: Baby Girl Clausen, also known as Jessica DeBoer, who will now be told, “employing all necessary resources of the [Washtenaw Circuit] [C]ourt,” that she is not Jessie, that the DeBoers are not Mommy and Daddy, that her name is Anna Lee Schmidt, and that the Schmidts, whom she has never met, are Mommy and Daddy. This child might, indeed, as the circuit judge essentially concluded, have difficulty trying that on for size at two and one-half years, she might, indeed, suffer an identity crisis.

Id. at 669.

57. *‘Baby Jessica’ Said Doing Well*, ASSOCIATED PRESS, Mar. 10, 1994, available in LEXIS, News Library, CURNWS File.

58. *Five Years Later, Baby Jessica Has Forgotten Custody Battle*, DES MOINES REG., Aug. 5, 1998, at 6 [hereinafter *Five Years Later*].

59. *Update: Baby Jessica*, DES MOINES REG., Oct. 24, 1999, at 7.

60. *Id.*

61. *Id.*

62. *Id.*

63. In fact, Illinois First Lady Brenda Edgar wrote a letter to Otakar Kirchner during the litigation, asking him to drop the lawsuit for the sake of Baby Richard’s best interest. Michael Briggs, *Mrs. Edgar Renews Appeal to Dad*, CHI. SUN-TIMES, Jan. 29, 1995, at 3; Adrienne Drell, *Mrs. Edgar’s Plea: Don’t Take Richard; Governor’s Wife Writes to Father*, CHI. SUN-TIMES, Jan. 27, 1995, at 1.

64. *In re Doe*, 627 N.E.2d 648, 649 (Ill. App. Ct. 1993), *rev’d*, 638 N.E.2d 181 (Ill. 1994).

65. *Id.*

pregnant. The due date was March 16, 1991.⁶⁶ Ms. Janikova stopped working in July 1990 to become a full-time student, and Mr. Kirchner continued working to take care of Ms. Janikova and to provide for her prenatal care.⁶⁷

In January 1991, Mr. Kirchner returned to his native country for approximately thirteen days "to attend to family business related to his gravely ill grandmother."⁶⁸ While he was away, Ms. Janikova received a call from his aunt announcing that Mr. Kirchner had married an old girlfriend in Czechoslovakia and was on his honeymoon.⁶⁹ Ms. Janikova became upset, called Mr. Kirchner in Czechoslovakia, told him she never wanted to see him again, and moved into a shelter for abused women in Chicago.⁷⁰

Ms. Janikova told a friend that she would put the baby up for adoption.⁷¹ On February 11, 1991, Ms. Janikova met with an adoption lawyer and "John and Jane Doe" about the proposed adoption.⁷² Ms. Janikova, the lawyer, and the Does met several times.⁷³ Each time, Ms. Janikova would not reveal the name of the biological father because "she feared that he would assert his parental rights."⁷⁴

66. *Id.*

67. *Id.*

68. *Id.*

69. *Doe*, 627 N.E.2d at 649.

70. *Id.*

71. *Id.*

72. *Id.* at 649-50.

73. *Id.* at 650.

74. *Doe*, 627 N.E.2d at 650. Illinois law requires the father's consent, if the father:

(i) was married to the mother on the date of birth of the child or within 300 days before the birth of the child, except for a husband or former husband who has been found by a court of competent jurisdiction not to be the biological father of the child; or

(ii) is the father under a judgment for adoption or an order of parentage; or

(iii) in the case of a child placed with the adopting parents less than 6 months after birth, openly lived with the child, the child's biological mother, or both, and held himself out to be the child's biological father during the first 30 days following the birth of the child; or

(iv) in the case of a child placed with the adopting parents less than 6 months after birth, made a good faith effort to pay a reasonable amount of the expenses related to the birth of the child before the expiration of 30 days following the birth of the child, provided that the court may consider in its determination all relevant circumstances, including the financial condition of both biological parents; or

(v) in the case of a child placed with the adopting parents more than 6 months after birth, has maintained substantial and continuous or repeated contact with the child as manifested by: (I) the payment by the father toward the support of the child of a fair and reasonable sum, according to the father's means, and either (II) the father's visiting the child at least monthly when physically and financially able to do so and

Mr. Kirchner returned from Czechoslovakia on February 8, 1991 and, after seeing that Ms. Janikova had moved out, began looking for her.⁷⁵ Ms. Janikova, in the meantime, had left the shelter and moved into her uncle's home.⁷⁶ Mr. Kirchner left messages for Ms. Janikova several times at her uncle's house but she would not return his telephone calls.⁷⁷

Ms. Janikova finally met twice with Mr. Kirchner. The first meeting occurred at a restaurant.⁷⁸ At their second meeting, she went to his apartment and the two engaged in sexual intercourse.⁷⁹ Ms. Janikova telephoned Mr. Kirchner the next day and told him that she never wanted to see him again.⁸⁰ Mr. Kirchner continued phoning her but was unsuccessful in reaching her.⁸¹

On March 16, 1991, Ms. Janikova gave birth to Baby Richard.⁸² Four days later, Ms. Janikova executed a "Final and

not prevented from doing so by the person or authorized agency having lawful custody of the child, or (III) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child. The subjective intent of the father, whether expressed or otherwise unsupported by evidence of acts specified in this sub-paragraph as manifesting such intent, shall not preclude a determination that the father failed to maintain substantial and continuous or repeated contact with the child; or

(vi) in the case of a child placed with the adopting parents more than six months after birth, openly lived with the child for a period of six months within the one year period immediately preceding the placement of the child for adoption and openly held himself out to be the father of the child; or

(vii) has timely registered with Putative Father Registry, as provided in Section 12.1 of this Act, and prior to the expiration of 30 days from the date of such registration, commenced legal proceedings to establish paternity under the Illinois Parentage Act of 1984 or under the law of the jurisdiction of the child's birth.

750 ILL. COMP. STAT. ANN. §§ 50/8(b)(1)(B)(i)-(vii) (West Supp. 1999).

75. *Doe*, 627 N.E.2d at 650.

76. *Id.*

77. *Id.* Mr. Kirchner also tried to enlist the help of mutual friends to contact Ms. Janikova, but without success. *Id.* He even gave \$500 to a friend to give to her, but Ms. Janikova refused the money. *Id.*

78. *Id.*

79. *Id.*

80. *Doe*, 627 N.E.2d at 650.

81. *Id.*

82. *Id.* The hospital where Baby Richard was born was not the original hospital in which Ms. Janikova and Mr. Kirchner had planned to have the baby. After the baby's birth, Ms. Janikova refused to identify the father of the baby. *Id.* Mr. Kirchner had checked with the hospital in which they had planned to have the baby on the anticipated due date, and for several days afterwards, each time being told "they had no record of a Daniella Janikova." *Id.*

Irrevocable Consent to Adoption” for the baby.⁸³ On that same day, the Does filed a petition for adoption, stating that the father of the child was unknown.⁸⁴ A notice placed in the *Chicago Daily Law Bulletin* also stated that the father of the child was unknown.⁸⁵ The Does received custody of Baby Richard on March 20, 1991.⁸⁶

On that same day, Mr. Kirchner spoke to Ms. Janikova’s uncle by phone who told him, at Ms. Janikova’s direction, that the baby had died three days after birth.⁸⁷ At that point, Mr. Kirchner suspected that, in fact, the baby was still alive.⁸⁸

Sometime between May 5 and May 10, 1991, a mutual friend finally informed Mr. Kirchner that the baby in fact had not died,

83. *Id.*

84. *Id.*

85. *Doe*, 627 N.E.2d at 650. The notice complied with 750 ILL. COMP. STAT. ANN. § 50/7(A) (West Supp. 1999), which states:

[i]n all such actions petitioner or his attorney shall file, at the office of the clerk of the court in which the action is pending, an affidavit showing that the defendant resides or has gone out of this State, or on due inquiry cannot be found, or is concealed within this State, so that process cannot be served upon him, and stating the place of residence of the defendant, if known, or that upon diligent inquiry his place of residence cannot be ascertained, the clerk shall cause publication to be made in some newspaper published in the county in which the action is pending. If there is no newspaper published in that county, then the publication shall be in a newspaper published in an adjoining county in this State, having a circulation in the county in which such action is pending. In the event there is service on any of the parties by publication, the publication shall contain notice of pendency of the action, the name of the person to be adopted and the name of the parties to be served by publication, and the date on or after which default may be entered against such parties. Neither the name of petitioners nor the name of any party who has either surrendered said child, has given their consent to the adoption of the child, or whose parental rights have been terminated by a court of competent jurisdiction shall be included in the notice of publication.

86. *Doe*, 627 N.E.2d at 650.

87. *Id.* Ms. Janikova’s uncle told Mr. Kirchner on two other occasions after this initial conversation that the baby had died. *Id.* Mr. Kirchner left a message on the uncle’s answering machine on March 26, 1991, saying, “I don’t believe the baby died.” *Id.*

88. *Id.*

[H]e went to Daniella’s uncle’s house [after work about 3:00 a.m.], where Daniella was living. He looked into Daniella’s parked automobile to see if there was an infant’s car seat or baby bottles; he also went through the garbage cans at the curb of the house to see if there were any diapers or other similar items. Otakar also claims that he made inquiry at some hospitals seeking information about Daniella and the birth of the baby, to no avail. He also claims that some friends helped him in searching through official public records for a birth or death certificate. They found nothing.

Id.

but was put up for adoption.⁸⁹ On May 12, 1991, Ms. Janikova moved back in with Mr. Kirchner and confessed to him that the baby had been placed for adoption.⁹⁰

On May 18, 1991, Mr. Kirchner consulted a lawyer about the Does' adoption of Baby Richard.⁹¹ Mr. Kirchner and his lawyer filed an appearance on June 6, and on June 13, they filed a motion for leave of court to file an answer.⁹² The Cook County Circuit Court ruled Mr. Kirchner had no standing in the adoption proceeding.⁹³ Mr. Kirchner and Ms. Janikova married on September 12, 1991, and Mr. Kirchner then filed a petition to declare paternity eleven days later.⁹⁴ On December 9, 1991, the court found that Mr. Kirchner was the biological father of the child.⁹⁵

On December 23, 1991, the Does filed an amended petition to adopt, stating that Mr. Kirchner was an unfit parent and his consent to the adoption was therefore not required under Illinois law.⁹⁶ On May 6, 1992, the court, "by clear and convincing evidence," ruled that Mr. Kirchner was an unfit parent because he failed to "demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a newborn child during the first 30 days after the birth."⁹⁷ The court, in its ruling, stated:

[t]hat brings me to the conclusion that the law must be strictly complied with, and that the law provides for some interest in the reasonable degree of interest for the child in the first thirty days of the child's existence. Had Mr. Kirchner, instead of probing through garbage bags, gone to [legal counsel] at that juncture there would be no such proceedings here. She would have been in Court, that is Daniella Janikova, and she would have been telling the world where the child was and disclosing what interests Mr. Kirchner had in this child. Instead of that in all this time that he wasted trying to contact hospitals, and, again, looking through garbage, he found nothing.⁹⁸

Mr. Kirchner's parental rights were terminated on May 8, 1992, and the court entered a judgment of adoption of Baby Richard on May 13, 1992.⁹⁹

Mr. Kirchner filed an appeal on May 8, 1992, asking the court

89. *Id.*

90. *Id.* at 651.

91. *Doe*, 627 N.E.2d at 651.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *See Doe*, 627 N.E.2d at 651 (basing the claim upon 750 ILL. COMP. STAT. 50/8, 50/14 (West 1999)).

97. *Id.*

98. *Id.*

99. *Id.*

to reverse the judgment and give custody of Baby Richard to the Kirchners.¹⁰⁰ Baby Richard was two years and five months old upon release of the appellate opinion.¹⁰¹ The Kirchners had not yet even seen the child.¹⁰²

In its decision, the court stated that Baby Richard's best interest must be the prevailing factor.¹⁰³ Furthermore, finding that it would not be in the best interest of Baby Richard to "disturb the judgment of adoption," the court upheld the adoption and judgment of the circuit court.¹⁰⁴

On appeal to the Illinois Supreme Court,¹⁰⁵ Justice James Heiple, writing the majority opinion,¹⁰⁶ disagreed with the appellate court's reliance on the best interest of the child standard to the facts of this case.¹⁰⁷ This opinion caused a great outcry from every sector of the state.¹⁰⁸ The public outcry increased the

100. *Id.*

101. *Doe*, 627 N.E.2d at 653.

102. *Id.*

103. *Id.* at 652.

In an adoption, custody or abuse case, . . . the child is the real party in interest. Since the child is the real party in interest, it is his best interest and corollary rights that come before anything else, including the interests and rights of biological and adoptive parents. Here, by inherent necessity, whether or not raised by the embroiled and warring biological and adoptive parents, the best interest of Richard surfaces as the paramount issue in the case. If there is a conflict between Richard's best interest and the rights and interests of his parents, whomever they may be, the rights and interests of the parents must yield and allow the best interest of Richard to pass through and prevail. This tenet allows for no exception.

Id.

104. *Id.* at 654.

105. *In re Doe*, 638 N.E.2d 181 (Ill. 1994).

106. *See id.* at 181-83 (citing no case law for the majority's justification).

107. Justice Heiple's opinion stated:

the appellate court, wholly missing the threshold issue in this case, dwelt on the best interests of the child. Since, however, the father's parental interest was improperly terminated, there was no occasion to reach the factor of the child's best interests. That point should never have been reached and need never have been discussed.

Id. at 182. Justice Heiple further wrote, "[i]f [the] best interests of the child were a sufficient qualification to determine child custody, anyone with superior income, intelligence, education, etc., might challenge and deprive the parents of their right to their own children." *Id.* at 183.

108. Cook County Public Guardian Patrick Murphy, in acknowledging that the ruling would discourage many prospective couples from adopting, noted, "[i]f I were a lawyer advising a family to adopt a kid with an unknown father, I'd say, 'You're crazy.'" Jan Crawford Greenburg, "*Baby Richard*" *Ordered Returned to Birth Parents; Court Rules for Adults' Interests*, CHI. TRIB., June 17, 1994, § 1, at 1. A letter to the editor summed up the entire case.

They allowed "Baby Richard" to be adopted and then changed their minds. At first, they decided to look at his best interest and then they decided not to. This is not fair to him. His whole world as he knows it is

momentum to persuade the court to reconsider the opinion.¹⁰⁹ Many scathing editorials targeted Justice Heiple, because his opinion failed to fully explain the court's reasoning.¹¹⁰

In the court's denial of rehearing,¹¹¹ Justice Heiple blasted the adoptive parents for allowing the litigation to continue for as long as it did.¹¹² However, Justice Heiple did not stop there. He also criticized *Chicago Tribune* syndicated columnist Bob Greene who "used this unfortunate controversy to stimulate readership and generate a series of syndicated newspaper columns in the *Chicago Tribune* and other papers that are both false and misleading."¹¹³ In several paragraphs of his opinion—with citations provided—Justice Heiple said that Mr. Greene was filling his columns with

going to be torn apart. He is going to be taken away from the most important people in the world to him—mommy and daddy.

Susan Cohen, Letter to the Editor, *His World is Gone*, CHI. TRIB., June 25, 1994, § 1, at 22.

109. Former Illinois Governor Jim Edgar tried to enter the case as an amicus party, a move the court rejected. *In re Doe*, No. 76063 (Ill. July 7, 1994) (order denying motion of Governor Jim Edgar to file a brief *amicus curiae*) (on file with the Author). The Author also tried to enter the case as an amicus party and was also rejected. *Id.* (order denying motion of Gregory A. Kelson to file a brief *amicus curiae*) (on file with the Author). Governor Edgar and the Author's motions were denied within 20 minutes of each other—both orders were signed by Justice Heiple.

110. See, e.g., *More Rancor Over "Baby Richard,"* CHI. TRIB., July 14, 1996, § 1, at 26 (stating that:

[w]hatever one thinks of the Illinois Supreme Court's latest action in the "Baby Richard" case, one thing is clear: Justice James Heiple did himself, the court and the cause of justice no good whatever by his intemperate attacks on his critics—no matter how well-deserved he thought such attacks may have been).

One television news anchor in Chicago, who had repeatedly blasted the Illinois Supreme Court in this case during his newscasts, even went so far as to release Justice Heiple's home phone number on a news broadcast and asked viewers to call him at home to voice their opinion on this case. See Mike Royko, *TV Newsmen is a Gas*, CLEVE. PLAIN DEALER, Feb. 16, 1995, at 11B.

111. *Doe*, 638 N.E.2d at 187 (Heiple, J., supplemental opinion denying rehearing).

112. *Id.* at 188. Heiple further stated:

[i]nstead of [the adoptive parents relinquishing custody of Baby Richard to the Kirchners when the adoption was contested by Mr. Kirchner, the adoptive parents] were able to procure an entirely erroneous ruling from a trial judge that allowed the adoption to go forward. The father's only remedy at that stage was a legal appeal which he took. He is not the cause of the delay in this case. It was the adoptive parents' decision to prolong this litigation through a long and ultimately fruitless appeal. Now, the view has been expressed that the passage of time warrants their retention of the child; that it would not be fair to the child to return him to his natural parents, now married to each other, after the adoptive parents have delayed justice past the child's third birthday.

Id.

113. *Id.*

“half-truths, character assassination and spurious argumentation.”¹¹⁴

Justice Heiple spared neither former Illinois Governor Jim Edgar from his wrath nor anyone else in the Illinois General Assembly, for that matter. “The Governor, in a crass political move, announced his attempt to intervene in the case. And the General Assembly, without meaningful debate or consideration, rushed into law a constitutionally infirm statute with the goal of changing the [Illinois] Supreme Court’s decision.”¹¹⁵ Heiple suggested that the Governor and the General Assembly “return to the classroom and take up Civics 101.”¹¹⁶

After the court handed down the decision, the Kirchners and the Does began to negotiate for the transfer of custody of Baby Richard.¹¹⁷ However, on February 28, 1995, Mr. Kirchner, upset with the progress of the negotiations, went to the Illinois Supreme Court and obtained a writ of habeas corpus on behalf of Baby Richard.¹¹⁸ Lawyers for both the adoptive parents and the Cook County Public Guardian requested a stay of this order from United States Supreme Court Justice John Paul Stevens.¹¹⁹ Justice Stevens denied this request.¹²⁰ Although Mr. Kirchner had the legal authority to take Baby Richard from the Does, he said he wanted to wait “to be introduced to the child and get to know him first.”¹²¹

The Does and the Cook County Public Guardian filed with the United States Supreme Court for another stay, this time in front of Justice Sandra Day O’Connor.¹²² Justice O’Connor, perhaps unwilling to overrule a fellow justice, referred the motion to the

114. *Id.* at 188-90.

115. *Id.* at 190. Governor Edgar was running for re-election at the time of this ruling, which is probably what Justice Heiple was referring to in this statement. Soon after the June 16, 1994 ruling, the Illinois General Assembly quickly passed a bill that stated courts must consider the best interest of the child in all adoption matters. See 750 ILL. COMP. STAT. §§ 50/20 and 50/20a (West Supp. 1999) (applying the provisions of the Civil Practice Law and the Best Interest Standard to adoptions). The bill was signed within a few days of passage by Governor Edgar with the hopes that the court would retroactively apply it to the case. *Id.* However, the Illinois Supreme Court specifically ruled that the law did not apply to this case. *In re Kirchner*, 649 N.E.2d 324, 337 (Ill. 1995), *cert. denied*, 515 U.S. 1152 (1995).

116. *Doe*, 638 N.E.2d at 190.

117. Hanan & Kendall, *supra* note 9, § 1, at 3.

118. *Kirchner*, 649 N.E.2d at 329.

119. *O’Connell v. Kirchner*, 513 U.S. 1303, 1305 (Stevens, Circuit Justice 1995).

120. *Id.*

121. Janan Hanna & Louise Kiernan, ‘Baby Richard’ Case Mired in Mistrust; His Best Interests Forgotten as Adults Are to Blame for His Day of Upheaval, CHI. TRIB., May 2, 1995, § 1, at 1.

122. *O’Connell v. Kirchner*, 513 U.S. 1138, 1138 (1995).

full Court.¹²³ The Court denied the motion for the stay.¹²⁴ Justice O'Connor noted, however, that the Illinois Supreme Court had not considered an amendment to the Illinois Adoption Act when it issued its order.¹²⁵

In supporting a stay of ten days after the release of the Illinois Supreme Court's decision or forty-five days after the decision of the United States Supreme Court, whichever came first, Justice O'Connor reasoned, "I believe that in this case, 'disrupting the status quo forthwith . . . has consequences whose disadvantages, from the point of view of the child's interests, outweigh any loss to the [biological father] that may result from a short delay in acquiring custody of the child.'"¹²⁶

When Baby Richard left the Does' home, Mr. Kirchner promised him that he would see his adoptive brother, the Does' older son.¹²⁷ No reports of any such meeting exist. For Baby Richard's eighth birthday, the Does sent the Kirchners a bicycle to give to him, but the Kirchners returned the gift unopened.¹²⁸

In 1997, Otakar and Daniella Kirchner separated, leaving Baby Richard in the custody of Daniella Kirchner.¹²⁹ Mrs. Kirchner filed a motion with the Cook County Circuit Court to restore the parental rights that she abandoned in 1991 when she gave the child up for adoption.¹³⁰ However, because the Does and the Illinois Department of Children and Family Services tried to intervene in the case, the Kirchners asked Cook County Circuit Court Judge Gay-Lloyd Lott to dismiss the motion.¹³¹ Judge Lott refused the motion and ordered an investigation into Baby Richard's home life, effectively reopening the case.¹³² The

123. *Id.*

124. *Id.*

125. The opinion proceeds further:

we can only speculate about the Illinois Supreme Court's rationale for avoiding application of a state law that appears to mandate a "best interests" hearing. The court may have rested its decision on state law grounds, either finding the provision altogether inapplicable in this habeas proceeding or determining that it violated the state constitution.

On the other hand, the court may have rested its decision on a conclusion that [the new law] runs afoul of the Federal Constitution.

Id. at 1139 (O'Connor, J., dissenting) (citations omitted).

126. *Id.* at 1140 (quoting Sklaroff v. Skeadas, 76 S. Ct. 736, 738 (1956) (Frankfurter, J., in chambers)).

127. Janan Hanna, *'Richard' Reunion Planned; Boy Would Meet with Ex-Brother*, CHI. TRIB., Nov. 23, 1995, § 1, at 1.

128. Michael Sneed, *A Sad Note . . .*, CHI. SUN-TIMES, Mar. 17, 1999, at 7.

129. Janan Hanna, *Legal Door Could Reopen in 'Richard' Case; Adoptive Parents Face New Question*, CHI. TRIB., Jan. 21, 1997, § 2, at 1.

130. Janan Hanna, *'Richard' Mom Wants Parental Rights*, CHI. TRIB., July 18, 1997, § 2, at 1 [hereinafter *'Richard Mom Wants Parental Rights'*].

131. John Flynn Rooney, *Order End to New 'Richard' Case: Mother*, CHI. DAILY L. BULL., Aug. 4, 1997, at 1.

132. *Id.*

Kirchners filed an emergency request with the Illinois Supreme Court for a supervisory order to direct Judge Lott to dismiss the case.¹³³ The Illinois Supreme Court issued an unsigned three-sentence order on August 4, 1997, directing Judge Lott to dismiss the case.¹³⁴

II. THE BEST INTEREST OF THE CHILD STANDARD

Countless custody cases in all fifty states have used the standard phrase, "the best interest of the child."¹³⁵ But what exactly is meant by the term "best interest of the child," and how do courts determine this standard? One commentator has stated that "[t]he 'best interest' of a child is a phrase that gets tossed around loosely."¹³⁶ Is it sound legal principle? This Section attempts to answer that question.

A. Definition of Best Interest of the Child Standard

Society places the well-being of children in the hands of adults who are presumably more competent to care for them.¹³⁷ The state has the responsibility, however, to determine who those adults should be.¹³⁸ Usually, the "preferred" adults are the child's biological parents.¹³⁹ Perhaps the next most "preferred" adult would be a blood relative of the biological parents.¹⁴⁰ Custody disputes pitting biological parents against third parties involve "apply[ing] standards that are either parent-focused or child-focused."¹⁴¹ One commentator has noted that regardless of which standard courts apply, both standards have "different hurdles."¹⁴²

133. *Id.*

134. Janan Hanna, *High Court Slams Door Again on 'Richard'*, CHI. TRIB., Aug. 5, 1997, § 2, at 1.

135. *Ex parte* Lipscomb, 660 So. 2d 986, 989 (Ala. 1994); *McQuade v. McQuade*, 901 P.2d 421, 423 (Alaska 1995); *In re Hartley*, 886 P.2d 441, 443 (Colo. 1994); *Shifflet v. Shifflet*, 891 S.W.2d 392, 393 (Ky. 1995); *Hayes v. Rounds*, 658 So. 2d 863, 865 (Miss. 1995); *In re Adam*, 903 P.2d 207, 209 (Mont. 1995); *Seabra v. Trafford-Seabra*, 655 A.2d 250, 253 (R.I. 1995); *Jacobs v. Jacobs*, 895 P.2d 441, 443 (Wyo. 1995).

136. Anthony S. Zito, *Baby Richard and Beyond: The Future for Adopted Children*, 18 N. ILL. U. L. REV. 445, 446 (1998).

137. "Children . . . are presumed to be incomplete beings who are not fully competent to determine and safeguard their interests. They are seen as dependent and in need of direct, intimate, and continuous care by the adults who are personally committed to assume such responsibility." JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 3 (1973).

138. *Id.*

139. *Id.*

140. *Id.*

141. Melanie B. Lewis, Casenote, *Inappropriate Application of the Best Interests of the Child Standard Leads to Worst Case Scenario: In re C.C.R.S.*, 68 U. COLO. L. REV. 259, 261 (1997).

142. *Id.*

On one end of the spectrum, the parental rights standard requires a showing of unfitness of the natural parents before the child's best interests can be considered. On the other end of the spectrum, the child's best interest standard considers only factors affecting the child's welfare with no consideration of the claims of the adults involved.¹⁴³

Critics of the best interest of the child standard cite three reasons why it should not be used in determining custody cases: 1) "it does not provide enough protection for the rights of natural parents;"¹⁴⁴ 2) "by basing custody decisions on psychological ties between the child and nonparents, the best interest standard creates an incentive for nonparents to wrongfully gain custody of a child;"¹⁴⁵ and 3) "[it] has the potential for misuse because the standard is based on vague or nonexistent criteria, opening the custody decision to social biases."¹⁴⁶

Perhaps the best case exemplifying this concept is *Painter v. Bannister*.¹⁴⁷ In this case, a widower left his seven-year-old son in the temporary custody of the boy's maternal grandparents, who would not give custody back to the father even though he had remarried and asked for the return of his son.¹⁴⁸

The opinion points out the economic and social differences between the boy's father and mother's family¹⁴⁹ and states, "[i]t is not our prerogative to determine custody upon our choice of one of two ways of life within normal and proper limits and we will not do so."¹⁵⁰ However, in comparing the households of the father and maternal grandparents, the court stated:

[t]he Bannister home provides [the boy] with a stable, dependable, conventional, middleclass, middle-west 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, [the boy] 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,

143. *Id.* at 261-62 (footnote omitted).

144. *Id.* at 265.

145. *Id.* (footnote omitted).

146. Lewis, *supra* note 141, at 266.

147. 140 N.W.2d 152 (Iowa 1966), *cert. denied*, 385 U.S. 949 (1966).

148. *Id.* at 153.

149. *Id.* at 154. The opinion noted that the boy's mother was a college graduate while his father "flunked out of a high school and a trade school because of a lack of interest in academic subjects, rather than any lack of ability." *Id.* The father, who was the Appellee in this case, did receive his high school diploma after receiving an honorable discharge from the navy. *Id.* He completed two and a half years of college afterwards before dropping out to take a job with a small newspaper. *Id.*

150. *Id.*

impractical and unstable.¹⁵¹

In ruling specifically that the best interest of the child standard prevail over all other factors, the court declared:

[w]e have a great deal of sympathy for a father, who in the difficult period of adjustment following his wife's death, turns to the maternal grandparents for their help and then finds them unwilling to return the child. There is no merit in the Bannister claim that Mr. Painter permanently relinquished custody. It was intended to be a temporary arrangement. A father should be encouraged to look for help with the children, from those who love them without the risk of thereby losing the custody of the children permanently. This fact must receive consideration in cases of this kind. However, as always, *the primary consideration is the best interest of the child and if the return of custody to the father is likely to have a seriously disrupting and disturbing effect upon the child's development, this fact must prevail.*¹⁵²

In reversing the judgment of the Iowa (Story) District Court, the court held:

[w]e do not believe it is for [the boy's] best interest to take him out of this stable atmosphere [of his grandparents' home] in the face of warnings of dire consequences from an eminent child psychologist and send him to an uncertain future in his father's home. Regardless of our appreciation of the father's love for his child and his desire to have him with him, we do not believe we have the moral right to gamble with this child's future. He should be encouraged in every way possible to know his father. We are sure there are many ways in which Mr. Painter can enrich [the boy's] life.¹⁵³

B. Definition of *Parens Patriae*

The State has a major responsibility, as *parens patriae*,¹⁵⁴ to safeguard children. If necessary, the state has the responsibility under this doctrine to remove children from the custody of their parents.¹⁵⁵ One court has noted that:

[w]hile parents enjoy an inherent right to the care and custody of their own children, the State in its recognized role of *parens patriae* is the ultimate protector of the rights of minors. The State has a substantial interest in providing for their health, safety, and welfare, and may properly step in to do so when necessary. . . . This *parens patriae* interest in promoting the welfare of the child favors

151. *Id.*

152. *Painter*, 140 N.W.2d at 156 (emphasis added) (citations omitted).

153. *Id.* at 158.

154. "The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves." BLACK'S LAW DICTIONARY 1137 (7th ed. 1999).

155. *Ex rel. Paul B. v. Hill*, 496 S.E.2d 198, 207 (W. Va. 1997).

preservation, not severance, of natural family bonds. . . . The countervailing State interest in curtailing child abuse is also great. In cases of suspected abuse or neglect, the State has a clear interest in protecting the child and may, if necessary, separate abusive or neglectful parents from their children.¹⁵⁶

Courts have recognized the right of natural parents "to retain custody over and care for their children, and to rear their children as they deem appropriate."¹⁵⁷ This right, however, is not absolute.¹⁵⁸ "The parent's right to custody is subject to the child's interest in his personal health and safety and the state's interest as *parens patriae* in protecting that interest."¹⁵⁹

If placement with the biological family does not serve the best interest of the child, it is the responsibility of the State, in its role as *parens patriae*, to place the child in a home where he can develop normally.¹⁶⁰ However, once the State places the child, that placement is where the child should remain for the remainder of his or her childhood.

III. THE RIGHTS OF THE CHILD IN ADOPTION PROCEEDINGS

This Section analyzes adoption proceedings that have progressed ostensibly without considering a child's "best interests" or a child's constitutional rights.

Courts have traditionally ruled that minor children have no

156. *Id.* (quoting *In re Betty J.W.*, 371 S.E.2d 326, 329 (W. Va. 1988)) (omissions in original).

157. *White v. Chambliss*, 112 F.3d 731, 735 (1997), *cert. denied*, 522 U.S. 913 (1997) (quoting *Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 342 (4th Cir. 1994)).

158. *Id.*

159. *Id.*

160. See Colin McMahon & Susan Kuczka, *19 Kids Found in Filth; Police Describe West Side Apartment As "A Pig Sty"*, CHI. TRIB., Feb. 2, 1994, § 1, at 1 (reporting on perhaps the best example of a state using its powers as *parens patriae* in what became known as the "North Keystone case" in Chicago).

Police found 19 children living in an apartment. *Id.* They also found in the apartment six adults, four women and two men. *Id.* The four women were believed to be the mothers of 15 of the children, one of the males was an uncle to many of the children, the other male was the father to at least one child. *Id.*

The apartment was "like a pig sty," according to one of the police officers who responded to the drug complaint at the apartment. Philip J. O'Connor & Ray Long, *Police Rescue 19 Kids in Filthy Apartment*, CHI. SUN-TIMES, Feb. 2, 1994, at 1. The official police report described the apartment as having "dirty dishes on the floor and in the sink, and in the pantry there was moldy food and cockroaches everywhere." *Id.* Other descriptions mentioned that the ceiling was falling in, there was a foul odor of spoiled food from a malfunctioning refrigerator, and there were feces on the floor. *Id.* The State of Illinois moved in quickly to take custody of the children. Most of the children went into foster care. Ellen Warren, "Keystone Kids" Find World of Good; All 19 Recovering From Life in Squalor, CHI. TRIB., July 30, 1995, § 2, at 1.

legal standing in court unless a guardian, a "next friend," or a guardian ad litem represents them.¹⁶¹ Most states are required "to protect the interests of minor children, particularly those of tender years."¹⁶² "The appointment of a guardian *ad litem* for an infant defendant is not a mere formality, but has for its basis the protection of the rights of one under disability."¹⁶³ A question remains whether children have any rights in adoption proceedings.

A. Adoption Proceedings and the Due Process Clause

Concern exists over whether adoption proceedings comport with traditional notions of due process. The Fourteenth Amendment to the United States Constitution states, in part, "[no] State [shall] deprive any person of life, liberty, or property, without due process of law."¹⁶⁴ The United States Supreme Court has also stated that "[a] child, merely on account of his minority, is not beyond the protection of the Constitution."¹⁶⁵

Furthermore, the Court has noted that the Fourteenth Amendment's guarantee against a state's "deprivation of liberty without due process is applicable to children in juvenile delinquency proceedings."¹⁶⁶ Sadly, an adoptee has not attained the recognition of those rights afforded to juvenile delinquents. However, children should be entitled to "the same constitutional guarantees against governmental deprivations as . . . adults."¹⁶⁷

A child has the right to representation by counsel in an adoption proceeding. One commentator has noted that:

[r]egardless of whether the child or the attorney more correctly perceives what is in fact better for the child, the constitutional purpose of providing a person with representation is to enable him effectively to present *his* views to the court. The fourteenth amendment does not require the "best" result for the person whose

161. See, e.g., *Kingsley v. Kingsley*, 623 So. 2d 780, 784 (Fla. Dist. Ct. App.), *reh'g denied*, 634 So. 2d 625 (Fla. 1994) (holding that a child lacked capacity to initiate a proceeding to terminate his mother's parental rights) (citations omitted). The court stated that:

[t]he necessity of a guardian *ad litem* or next friend, the alter ego of a guardian *ad litem*, to represent a minor is required by the orderly administration of justice and the procedural protection of a minor's welfare and interest by the court and, in this regard, the fact that a minor is represented by counsel, in and of itself, is not sufficient. Unless a child has a guardian or other like fiduciary, a child must sue by his next friend; however, the next friend does not become a party to the suit.

Id. (citations omitted).

162. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

163. *Allen v. Hickman*, 383 P.2d 676, 678 (Okla. 1963).

164. U.S. CONST. amend. XIV, § 1.

165. *Bellotti v. Baird*, 443 U.S. 622, 633 (1979).

166. *Id.* at 634 (citations omitted).

167. *Id.* at 635 (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971)).

interests are at stake; rather, it requires that a person be heard in the proceedings which affect his interests. Since in custody proceedings the child's interests are at stake, due process requires that *his* preferences be expressed and considered.¹⁶⁸

It is important however, that the child's counsel, be it a guardian ad litem or a "next friend," represent the child's interests and not those of the biological parents or third parties.

B. What Issues of Standing Arise for Children in Adoption Proceedings?

Do children have the right to speak in adoption proceedings, or may a court "silence" them because of their age?

Kingsley v. Kingsley involved a minor who brought suit against his natural mother to terminate her parental rights so his foster family could adopt him.¹⁶⁹ The mother claimed that her minor son had no right to initiate a parental rights hearing on his own behalf.¹⁷⁰ The Florida District Court of Appeals agreed and ruled that minors do not have capacity to bring a termination of parental rights action.¹⁷¹

The *Kingsley* decision used incorrect reasoning. Although the State does reserve the right to exert some control in order to protect a child's best interest, the United States Supreme Court has stated that minors are entitled to the same constitutional rights as adults.

Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. . . . The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults.¹⁷²

Justice John Paul Stevens further clarified this point.

The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without

168. JOSEPH GOLDSTEIN ET AL., IN THE BEST INTEREST OF THE CHILD 207 n.18 (1996) [hereinafter IN THE BEST INTEREST OF THE CHILD] (quoting P.K. Milmed, *Due Process for Children: A Right to Counsel in Custody Proceedings*, 4 N.Y.U. REV. L. & SOC. CHANGE 177, 187-88 (1974)).

169. 623 So. 2d 780, 783 (Fla. Dist. Ct. App. 1993), *reh'g denied*, 634 So. 2d 625 (Fla. 1994).

170. *Id.*

171. *Id.*

172. *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (citations omitted).

parental consent. Indeed, such consent is essential even when the young woman is already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible.¹⁷³

Most states require the appointment of a guardian ad litem or a "next friend" to represent the child's interest in any judicial proceeding.¹⁷⁴ The required representation exists because minors do not have the capacity to initiate legal proceedings in their own name.¹⁷⁵ Courts have historically required an adult to represent the child's interest because "if a minor mistakenly brings an action in his own name such defect can be cured by the subsequent appointment of a next friend or guardian *ad litem*."¹⁷⁶

C. Whose Interest Should Prevail?

The Illinois Supreme Court stated that the Illinois Adoption Act was "designed to protect natural parents in their preemptive rights to their own children wholly apart from any consideration of the so-called best interest of the child. If it were otherwise, few parents would be secure in the custody of their own children."¹⁷⁷ The court further noted in the Baby Richard case that "there was no occasion to reach the factor of [Baby Richard's] best interests. That point should never have been reached and need never have been discussed."¹⁷⁸

Another remaining question in solving the equation of the best interest of the child formula in adoption proceedings asks, whose interests should prevail, those of adults or of children? The Baby Richard opinion implied that it should be the adult over the child.¹⁷⁹ A concurring and dissenting opinion in *Kingsley* made this

173. *Id.* at 102 (Stevens, J., concurring in part and dissenting in part).

174. *See, e.g.*, GA. CODE ANN. § 15-11-153(e) (1999); IOWA CODE § 232.89(2) (1997); KY. REV. STAT. ANN. § 625.041(1) (Michie 1998); NEB. REV. STAT. § 43-104.05 (1999); S.D. CODIFIED LAWS § 26-8A-20 (Michie 1999); TEX. CODE ANN. § 107.001(a) (West 1996); UTAH CODE ANN. § 78-7-9(2) (Michie 1999); and VT. STAT. ANN. tit. 15, § 669 (1999).

175. *See e.g., Kingsley*, 623 So. 2d at 783 (quoting *Earls v. King*, 785 S.W.2d 741, 743 (Mo. Ct. App. 1990) as saying "[c]apacity to sue is the right to come into court which exists if one is free of general disability, such as infancy or insanity. Nearly all adults have capacity to sue").

176. *Id.* at 784.

177. *Doe*, 638 N.E.2d at 182.

178. *Id.*

179. Justice Heiple wrote in a supplemental opinion to the Baby Richard case that:

[t]he best interest of the child standard is not to be denigrated. It is real. However, it is not triggered until it has been validly determined that the child is *available* for adoption. And, a child is not available for adoption until the rights of his natural parents have been properly terminated. Any judge, lawyer, or guardian *ad litem* who has even the

point very clear.

Termination of parental rights requires a two step process. First, did the parents do something that the State has determined to be sufficiently egregious to permit forfeiture of their right to continue as parents (abuse, neglect, abandonment, voluntary consent to adoption)? Unless the answer to this first question is affirmative, the second step in the analysis (the best interest of the child) is unnecessary.¹⁸⁰

However, even though courts might consider the best interest of the child in adoption proceedings, final placement of the child is often completed to satisfy the adult parties to the proceedings and not follow what is truly in the child's best interest.¹⁸¹

IV. RECOMMENDATIONS AND CONCLUSION

This Article has provided the background to, and presented the need for, a uniform "best interest of the child" standard that can be implemented in all adoption proceedings in the United States. This is not an easy task, considering the complexity of adoption laws and adoption situations across the United States. Problems concerning biological versus potential adoptive parents must be addressed. Further, there are also situations of families going to court to sue for custody of a child because they feel that the child would be better-off in their custody.¹⁸²

The following includes a plan and several policy recommendations that will make cases such as Baby Jessica and Baby Richard non-existent in the Twenty-first Century.

A. Recommendations

No easy answer exists for the question of how adoptions should be handled that would be in the best interest of all parties involved: biological parents, adoptive parents, and children. How should a court view these parties in proceeding with such cases?

most cursory familiarity with adoption laws knows that.

Id. at 189 (emphasis in original).

180. *Kingsley*, 623 So. 2d at 790 (Harris, C.J., concurring in part and dissenting in part) (footnote omitted).

181. Oftentimes, the best interest of the child standard is not construed according to its apparent meaning:

[t]he child's interests are often balanced against, and frequently made subordinate to, adult interests and rights. Moreover, and less forthrightly, many decisions are "in-name-only" for the best interest of the specific child who is being placed. They are fashioned primarily to meet the needs and wishes of competing adult claimants or to protect the general policies of a child care or other administrative agency.

GOLDSTEIN ET AL., *supra* note 137, at 54 (footnotes omitted).

182. See, e.g., *Bottoms v. Bottoms*, 457 S.E.2d 102, 106 (Va. 1995) (dealing with a grandmother who sued for custody of her grandson from her daughter because the daughter was in a lesbian relationship).

1. *The Child*

a. Courts Should Use the “Best Interest of the Child” Standard

The best interest of the child should be the primary concern in determining custody. This is the law in several states, including Illinois and Michigan.¹⁸³ Justice Heiple wrote in the Baby Richard case that the Illinois Appellate Court, which upheld the adoption of Baby Richard,

wholly miss[ed] the threshold issue in this case, [and] dwelt on the best interests of the child. Since, however, the father’s parental interest was improperly terminated, there was no occasion to reach the factor of the child’s best interest. *That point should never have been reached and need never have been discussed.*¹⁸⁴

b. Courts Should Consider the Age of the Child When Organizing Dockets

A major factor that courts need to consider is the age of the child as he proceeds through the adoption process. By the time the Baby Richard case reached the Illinois Appellate Court, the child was two and a half years old.¹⁸⁵ Litigation should never take this long. The child faces more impediments and emotional trauma if he is removed from his foster/adoptive family at a later age. Courts need to make custody cases such as these a priority in their dockets.

c. Courts Should Treat the Child as a “Party in Interest” to the Proceedings

The courts should realize, as Justice Levin noted in his dissent of the Baby Jessica case, that the child is a party in interest.¹⁸⁶ The child is not property; courts and adult litigants should not treat them as such.

2. *Biological Parents*

a. Courts Should Ensure that Both Biological Parents have an Opportunity to Comment on the Adoption

In both the Baby Jessica and Baby Richard cases, the biological mothers initiated the adoption procedure without involvement of the biological fathers. In the Baby Jessica case, the

183. 750 ILL. COMP. STAT. ANN. 50/20a (West Supp. 1999); MICH. COMP. LAWS ANN. § 722.25 (West 1993 & Supp. 1999).

184. *Doe*, 638 N.E.2d at 182 (emphasis added).

185. See *supra* text accompanying note 101.

186. *In re Baby Girl Clausen*, 502 N.W.2d 649, 699 (Mich. 1993) (Levin, J., dissenting).

mother named another man who was not the biological father so that the adoption would proceed.¹⁸⁷ In the Baby Richard case, the mother told the biological father that his son had died.¹⁸⁸ The father was given reports of the child's "death" with the hopes that such reports would halt any interference in the adoption proceedings.¹⁸⁹ In both cases, although the biological mothers tricked the biological fathers, the fathers maintained legal rights to prevent their children's adoptions.¹⁹⁰ Another factor here is that neither biological mother was married to the biological father at the time of the birth of their children.¹⁹¹

A mechanism must be put into place assuring that *both* biological parents have the opportunity to comment on a proposed adoption of their child. Illinois, in response to the Baby Richard case, instituted a registry for putative fathers that allows individuals to assert their legal rights.¹⁹² States also need to assure that the names of *both* parents are listed on the birth certificate of the child, regardless of whether the father is supporting the child.

b. Courts Should Inquire into the Mental Well-Being of the Biological Parents

Another important issue to consider in the best interest of the child is the psychological well-being of the parents—especially the biological mother. Both mothers in the Baby Jessica and Baby Richard cases gave up their children to spite the biological fathers, but regretted their action afterwards and tried to regain custody of their children through a reversal of the termination of parental rights.¹⁹³ A psychologist should consult with the biological parents to determine the reasons for the adoption and whether it would be in the best interest of the child for them to consent to the adoption. The psychologist's findings should carry some weight, but not be relied on as the final decision—that decision should still rest with the biological parents as to whether they will consent to the termination of their parental rights and adoption of their children by a third party.

187. *Id.* at 658.

188. *Doe*, 638 N. E.2d at 181-82.

189. *Id.*

190. *Clausen*, 502 N.W. 2d at 658; *Doe*, 638 N.E.2d at 182.

191. However, in both cases, Dan Schmidt and Cara Clausen, the parents of Baby Jessica, and Otakar Kirchner and Daniella Janikova, the parents of Baby Richard, did subsequently marry before assuming custody of their children. See *Five Years Later*, *supra* note 58, at 6 (updating marital status of the Schmidts). Hanna, *supra* note 130, at 1.

192. 750 ILL. COMP. STAT. 50/12.1 (West 1999).

193. *Five Years Later*, *supra* note 58, at 6. 'Richard' Mom Wants Parental Rights, *supra* note 130, § 2, at 1.

3. *Adoptive Parents*

Of the three parties of interest, the adoptive parents have probably been the most neglected in the adoption process. Despite the cooperation of the adoptive parents in the adoption process, adoptive parents frequently bear the loss of custody in challenged cases. Adoptive parents should not receive final custody of the child until the court determines that all legal hurdles have been cleared, in terms of assuring the best interest of the child and that parental rights have been properly terminated. Once the adoptive parents receive custody of the child, all legal proceedings should terminate to ensure that the child now has a stable home.

B. Conclusion

Many children in the United States are very fortunate to be raised by their biological parents who give them love, encouragement, and will care for their well-being and interests. However, problems frequently arise regarding the best interest of potentially adoptable children. For many of these children, foster care may be the only way to give them a stable home, although foster placements frequently do not result in permanent homes.

The aftermath of the Baby Jessica and Baby Richard decisions raised fear among adoptive parents, since the possibility arose that biological parents could change their minds at any time and regain custody of their children. Legislative and judicial action are needed to insure that once a child is placed for adoption, that adoption will not be disturbed in the future.

Children are not property. The manner in which a child grows up to become an adult will determine how productive he will be in society. To that end, it is important to provide the child with a stable home, free from distractions, where he can develop normally. Contrary to what courts have held throughout this nation, the best interest of the child should always prevail in adoption proceedings.

