

No More Baby Jessicas: Proposed Revisions to the Parental Kidnapping Prevention Act

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On June 3, 1993, the Michigan Supreme Court removed Jessica DeBoer, a two-and-one-half-year-old baby girl, from the only home she had ever known and sent her to live with strangers. The court made the decision to remove the child from her adoptive home and to return her to her biological parents after determining that the biological parents had a "right" to the baby. The court's action was the end result of a two-year-long custody battle in the courts of two different states. Adding to the confusion, the courts were obliged to interpret and rely upon a complicated, infrequently applied, and widely misunderstood federal statute, the Parental Kidnapping Prevention Act ("PKPA").¹ Jessica's highly publicized case brought to light important problems in current adoption law.

Although Congress may not intervene in custody disputes that occur solely within one state, disputes involving residents of two or more states, such as the dispute over Jessica between the Schmidts of Iowa and the DeBoers of Michigan, are subject to federal law. In 1980, Congress enacted the PKPA to deal with the inconsistent and conflicting laws and practices courts use to determine whether they have jurisdiction to resolve disputes between residents of different states who claim rights of custody.² The PKPA requires states to give full faith and credit to the custody decrees of other states, to facilitate the enforcement of custody and visitation decrees of states, and to discourage interstate controversies over child custody.³

Since the statute's enactment, however, courts have differed in their application of the PKPA in cases involving biological parents and third parties, usually prospective adoptive parents, who have legal custody of the child. Some state courts have given full faith and credit to other states' custody determinations, regardless of the basis of the original determination. Other

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1. 28 U.S.C. § 1738A (1988).

2. *In re Baby Girl Clausen*, 502 N.W.2d 649, 657 (Mich. 1993), *stay denied sub nom.* *Darrow v. DeBoer*, 114 S. Ct. 1 (1993).

3. *See id.*

courts have refused to adhere to another state's determination if a "best interest of the child" test was not conducted in making the original custody determination. To date, the United States Supreme Court has refused to intervene and resolve the conflict.⁴

In light of the Supreme Court's refusal to hear the issue, congressional action is required to resolve the conflict and to ensure that there are no more Jessica DeBoer tragedies in the future. This Article suggests that the PKPA, the statute relied on by the Michigan court in determining Jessica's custody, should be amended to provide that courts need not defer to the custody decisions made by courts of other states in disputes between biological parents and custodial third parties if those other state courts did not consider the best interest of the child in making the original custody determination.⁵ Part I of this Article reviews the existing statutory law concerning custody determinations. Part II reviews the theories courts use to make child custody determinations. In Part III, I suggest that courts should use a best interest standard with the primary emphasis on the child's social relationships as the determining factor in custody disputes. I then discuss the criticisms that might be directed at such an approach. Part IV provides a legislative solution to the problem highlighted by the case of Jessica DeBoer.

I. EXISTING STATUTES

The Uniform Child Custody Jurisdiction Act ("UCCJA") was promulgated by the Conference of National Commissioners on Uniform State Laws in 1968 in response to the "chaos in child custody litigation."⁶ The UCCJA was designed to avoid jurisdictional competition resulting in the harmful shifting of children; to promote cooperation between state courts to ensure that a custody decree is rendered in the state that can best decide the case in the interest of the child; to discourage continuing controversies over child custody, thereby ensuring a secure home environment and family relationships; and to avoid relitigation of custody disputes.⁷

4. The Court declined to issue a stay and hear the *Clausen* case, in which the issue was squarely presented. 114 S. Ct. 1 (1993).

5. The best interest standard should be applied only in those cases in which the child already resides and has a significant relationship with a legal custodian, usually a prospective adoptive parent. A third party with whom the child does not reside should not be permitted to argue that it is in the child's best interest to be removed from her birth parent's care unless the third party is able to demonstrate that the birth parent is unfit. This Article is concerned only with cases in which a biological parent attempts to remove a child from the custody and care of her psychological parent (the person whom the child views as her parent). Nothing in this Article should be construed as advocating the removal of a child from a biological parent's custody simply because someone else might be a "better" parent.

6. *The Parental Kidnapping Prevention Act of 1979: Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 6 (1980) [hereinafter *PKPA Hearing*] (statement of Sen. Wallop).

7. UNIF. CHILD CUSTODY JURISDICTION ACT § 1(a), 9 U.L.A. 123 (1968).

Parental Kidnapping Prevention Act

Although the UCCJA was eventually adopted in all fifty states,⁸ by 1979 eleven states still had not adopted the Act.⁹ Those eleven states had become sanctuaries in which kidnappers could live with their kidnapped children.¹⁰ In considering the PKPA, Congress specifically found that the laws and practices by which state courts determined their jurisdiction over custody disputes, as well as the effect given to the custody decisions by courts of other jurisdictions, were "often inconsistent and conflicting."¹¹ Congress also found that state courts were failing to give full faith and credit to the judicial proceedings of other jurisdictions, and that this failure resulted in, among other things, "harm to the welfare of children and their parents and other custodians."¹² For all of these reasons, Congress enacted the PKPA in 1980.

Whereas the UCCJA was only effective in states that had adopted it, the PKPA, by virtue of being a federal law, requires all states to give full faith and credit to the custody decisions of sister states when specific criteria (derived from the UCCJA in most respects) are met.¹³ The general purposes of the PKPA are to promote cooperation between state courts to ensure that custody and visitation determinations are rendered by the courts of the state that can best decide the case in the interest of the child; to ensure greater stability in the child's home environment and secure family relationships; and to avoid jurisdictional competition resulting in the harmful shifting of children from state to state.¹⁴

The PKPA's sponsors thought that the legislation would fill the gaps that they believed existed in the UCCJA,¹⁵ and that it would ensure that custody and visitation decrees would be enforceable in every state, regardless of whether all fifty states eventually adopted the UCCJA.¹⁶ They also hoped that the enactment of the PKPA would force the few states that had not yet adopted the UCCJA to do so.¹⁷

8. UNIF. ADOPTION ACT § 3 cmt. (Draft 1993) (on file with author).

9. *PKPA Hearing*, *supra* note 6 (statement of Sen. Durenberger).

10. *Id.*

11. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7(a)(2), 94 Stat. 3566, 3568.

12. *Id.* at § 7(a)(4), 94 Stat. 3566, 3569.

13. 28 U.S.C. §1738A (1988); *see also* Anne B. Goldstein, *Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act*, 25 U.C. DAVIS L. REV. 845, 850 (1992) [hereinafter *Tragedy of the Interstate Child*].

14. 28 U.S.C. § 1738A (1988).

15. *Tragedy of the Interstate Child*, *supra* note 13, at 850-51. There is no universal agreement as to whether the PKPA supersedes or complements the UCCJA. Therefore, courts have interpreted the conflicting provisions of the two acts in different ways. *Compare In re Baby Girl Clausen*, 502 N.W.2d 649 (Mich. 1993), *stay denied sub nom.* Darrow v. DeBoer, 114 S. Ct. 1 (1993) with *E.E.B. v. D.A.A.*, 446 A.2d 871 (N.J. 1982), *cert. denied sub nom.* Angle v. Bowen, 459 U.S. 1210 (1983).

16. *PKPA Hearing*, *supra* note 6 (testimony of Sen. Durenberger).

17. *Tragedy of the Interstate Child*, *supra* note 13, at 850; *Examination of the Problem of "Child Snatching": Hearing Before the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 50 (1979) [hereinafter *Child Snatching Hearing*] (testimony of Prof. Bodenheimer, Reporter Draftsperson of UCCJA).

Adoption is not mentioned in the PKPA or its legislative history,¹⁸ and it seems unlikely that Congress intended to affect adoption cases. Senate hearings on the statute, for instance, focused solely on the problem of "child snatching"—those cases in which a non-custodial parent illegally spirits away a child from the custodial parent.¹⁹ Because the PKPA refers to "child custody determinations," however, it has been applied to adoption.²⁰ Thus, states that have confronted the issue have given full faith and credit to all custody determinations—including adoption decisions—made in accordance with the PKPA.

While certainty and stability are given priority under the PKPA, the UCCJA provides jurisdictional flexibility and accords the best interest of the child top priority.²¹ On the one hand, the UCCJA includes a best interest of the child standard in every jurisdictional determination.²² On the other hand, it provides jurisdictional flexibility, thereby sacrificing stability and certainty as to child custody jurisdiction, by providing that a state other than the child's home state might have jurisdiction if the child's best interest so requires.²³ This reflects the belief that the best interest of the child may be served if a state with significant connections to the situation, even if it is not the child's "home state," assumes jurisdiction.²⁴ Neither the UCCJA nor the PKPA, however, requires that the child's best interest be considered in the underlying custody determination.

18. Brief of Concerned Academics as *Amici Curiae* in Support of Application for Stay Filed on Behalf of Petitioner Jessica DeBoer at 5, *Jessica DeBoer (a/k/a/ Baby Girl Clausen) v. Roberta and Jan DeBoer and Cara and Daniel Schmidt*, No. A-64 (1993) [hereinafter *Amici Curiae* Brief].

19. *Child Snatching Hearing*, *supra* note 17; *PKPA Hearing*, *supra* note 6.

20. *Amici Curiae* Brief, *supra* note 18, at 6. Both contested and uncontested adoption proceedings have generally been treated as "custody determinations" under the UCCJA and the PKPA. UNIF. ADOPTION ACT § 3 cmt. (Draft 1993) (on file with author).

21. Henry H. Foster, *Child Custody Jurisdiction: UCCJA and PKPA*, 27 N.Y.U. L. REV. 297, 303 (1981).

22. *Tragedy of the Interstate Child*, *supra* note 6, at 940 n.438. See also UCCJA §§ 3(a)(2) ("A court of this State . . . has jurisdiction to make a child custody determination . . . if (2) it is in the best interests of the child that a court of this State assume jurisdiction . . ."), 6 (inquiry as to whether the court of another state was "exercising jurisdiction substantially in conformity with this Act" can, by considering § 3(a)(2), become a best interest inquiry), 7(c) ("In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction."), 12 (inquiry as to whether a decree was "rendered by a court . . . which had jurisdiction under section 3" can, by considering § 3(a)(2), become a best interest inquiry), 13 (inquiry as to whether the court of another state "had assumed jurisdiction under statutory provisions substantially in accordance with this Act" or "was made under factual circumstances meeting the jurisdictional standards of the Act" can, by considering § 3(a)(2), become a best interest inquiry), 14(a)(1) (inquiry as to whether the court of another state "does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act" can, by considering § 3(a)(2) become a best interest inquiry), 9 U.L.A. pt. 1, at 143, 219-220, 233, 274, 276 and 292 (1988).

23. Foster, *supra* note 21, at 302.

24. *Id.*

II. THEORIES COURTS USE TO DETERMINE CHILD CUSTODY

Depending upon the facts of the case, courts making child custody determinations have relied primarily upon the termination of parental rights, the best interest of the child standard, or a consideration of the child's social relationships. In this section, I examine how the courts have dealt with these three standards. In Part III, I conclude that the best interest of the child standard with a focus on the child's social relationships should be the courts' paramount consideration in cases in which a dispute arises between a biological parent and a third party custodian.

A. *Parental Rights*

Biological parents have well-established rights with respect to their children. Many states provide that, as against third parties, a biological parent cannot lose custody of his or her children unless statutory grounds for termination of parental rights have been established.²⁵ Some courts have reached this result by finding tautologically that parents have a constitutionally protected interest in their children and, therefore, that the termination of parental rights is not in the best interest of a child unless the biological parent is found to be unfit.²⁶ The case of Jessica DeBoer illustrates this view and the problems inherent in it.

The case of *In re Baby Girl Clausen* (a/k/a Jessica DeBoer) began when Cara Clausen surrendered the rights to her newborn baby girl. Jan and Roberta DeBoer, both Michigan residents, filed a petition in Iowa to adopt the baby, named Jessica by the DeBoers, shortly after the child's birth.²⁷ On the same day the DeBoers filed their initial adoption petition, the Iowa court terminated the parental rights of both Jessica's biological mother, Cara Clausen, and the man she named as Jessica's father.²⁸ Because Cara lied about the identity of the father, the parental rights of Daniel Schmidt, Jessica's real father, were never terminated.

Nine days after the adoption petition was filed, Cara filed a motion to revoke her release of custody, at which time she admitted she had lied about the identity of the father.²⁹ Three weeks later, Schmidt filed a petition in the Iowa district court seeking to intervene in the adoption proceedings initiated by the DeBoers.³⁰ More than seven months later, the Iowa district court conducted a bench trial on the issues of paternity, termination of parental

25. See *In the Interest of B.G.C.*, 496 N.W.2d 239 (Iowa 1992).

26. See *In re Baby Girl Clausen*, 502 N.W.2d at 660 n.30 (Mich. 1993).

27. *Id.* at 652.

28. *Id.*

29. *Id.*

30. *In re Baby Girl Clausen*, 502 N.W.2d at 652.

rights, and adoption. After another two months, the court ruled that Schmidt had established paternity and that the DeBoers had failed to demonstrate that Schmidt had abandoned Jessica or was otherwise unfit. On this basis, the court ordered the termination proceedings void with respect to Schmidt and held that the DeBoers' petition to adopt the child had to be denied.³¹ Significantly, the court never considered Jessica's best interest, reasoning that such an analysis would not be appropriate unless abandonment was established.³²

The Iowa Supreme Court, though recognizing that Schmidt "had a poor performance record as a parent,"³³ affirmed the lower court and rejected the DeBoers' argument that the best interest of the child needed to be considered.³⁴ Like the lower court, the supreme court held that it could not consider the welfare and best interest of the child unless both parents had consented to the adoption, or the parents' rights were terminated.³⁵ Finding the adoption proceedings to be "fatally flawed," the court remanded the case to the Iowa district court, which then terminated the DeBoers rights as temporary guardians and custodians of the child.³⁶

On the same day that the Iowa court terminated the DeBoers' rights, the DeBoers filed a petition in Michigan asking the court in that state to assume jurisdiction under the UCCJA.³⁷ The Michigan trial court found that it had jurisdiction to determine the best interest of the child. The lower Michigan court reasoned that the failure by the Iowa court to consider Jessica's best interest violated the UCCJA and, consequently, allowed Michigan to modify the Iowa order.³⁸ Reversing the trial court, the Michigan court of appeals concluded that Michigan lacked jurisdiction under the UCCJA, and that the DeBoers lacked standing to bring an action in Michigan.³⁹ The stage was set for the Michigan Supreme Court to hear the case.

In its June 3, 1993, decision, the Michigan Supreme Court concentrated primarily on the issues of standing and jurisdiction. The Michigan Supreme Court affirmed the appellate court's decision that Michigan did not have jurisdiction to modify the Iowa custody orders, that Michigan was simply required to enforce the Iowa order, and that the Michigan trial court had improperly intervened in the case.⁴⁰

The Michigan Supreme Court rejected the DeBoers' contention that the

31. *Id.* at 652-53.

32. *Id.*

33. In the Interest of B.G.C., 496 N.W.2d 239, 245 (Iowa 1992); *see also infra* text accompanying note 62.

34. In the Interest of B.G.C., 496 N.W.2d 239 (Iowa 1992).

35. *Id.* at 245.

36. *Id.*

37. *In re* Baby Girl Clausen, 502 N.W.2d at 653.

38. *Id.*

39. *Id.*

40. *Id.* at 656.

Parental Kidnapping Prevention Act

PKPA required that a best interest of the child analysis be conducted in determining Jessica's custody. Such an interpretation, the court explained, would imply that Congress intended to require all states to use the best interest standard when making custody determinations. The court found that this interpretation conflicted with Congress's intent to ensure that every state enforce other states' custody determinations made consistently with the provisions of the PKPA.⁴¹ The court held that when a custody determination is made consistently with the provisions of the PKPA, the jurisdiction of the court that made the decision is exclusive and continuing as long as that state "remains the residence of the child or of any contestant, and it still has jurisdiction under its own laws."⁴² The court also rejected the DeBoers' construction of the UCCJA,⁴³ stating that a detailed analysis of the UCCJA was unnecessary because enforcement of the Iowa decree was required by the PKPA.⁴⁴

Having rejected the DeBoers' attempts to require a best interest analysis, the court also rejected the argument by Jessica's court-appointed "next friend" that a minor child has the right to bring an action to obtain a hearing at which the child's best interest will be considered.⁴⁵ As the DeBoers had already failed to prove in the Iowa courts that Schmidt was unfit, the Michigan court found that Jessica did not have the right to independently assert rights regarding her custody and care.⁴⁶ Although technically extraneous to the court's holding, the Michigan court rejected Jessica's argument, reasoning that a child may independently assert rights only when the rights of the child come into conflict with the rights of the parent.

In the court's view, such a conflict can occur only when a parent is shown to be unfit.⁴⁷ Absent such a showing, the biological parent's right to custody is not to be disturbed, notwithstanding the preference of the child.⁴⁸ Although the court paid lip service to the notion that the best interest of the child is of "paramount importance," the court stated that it had never interpreted this rule

41. *In re Baby Girl Clausen*, 502 N.W.2d at 658.

42. *Id.*

43. The DeBoers argued that the Iowa custody orders were subject to modification by Michigan courts because the Iowa proceedings were no longer "pending" under the UCCJA at the time the action was filed. They argued that an appeal is no longer pending once a final determination has been made on appeal and, therefore, when the Iowa Supreme Court affirmed the judgment awarding custody to the biological father, thereby denying the DeBoers' request for a rehearing, the decree became final and modifiable. The DeBoers further argued that the only remaining matters in Iowa were hearings to enforce the final order and that insofar as such enforcement proceedings did not involve custody issues, the proceeding with regard to custody was no longer pending. *Id.* at 656-57.

44. *Id.* at 657.

45. *In re Baby Girl Clausen*, 502 N.W.2d at 665.

46. *Id.* at 667.

47. *Id.* at 666.

48. *Id.*

to deprive a parent of custody unless it was shown that the parent was unfit.⁴⁹ The court noted that:

[i]t is a well-established principle of law that the parents, whether rich or poor, have the natural right to the custody of their children. The rights of parents are entitled to great consideration, and the courts should not deprive them of custody of their children without extremely good cause. A child also has rights, which include the right to proper and necessary support; education as required by law; medical, surgical, and other care necessary for his health, morals or well-being; the right to proper custody by his parents, guardian, or other custodian; and the right to live in a suitable place free from neglect, cruelty, drunkenness, criminality, or depravity on the part of his parents, guardians or other custodian. It is only when these rights to the child are violated by the parents themselves that the child becomes subject to judicial control.⁵⁰

The Iowa court had already decided that Schmidt was a fit parent; accordingly, the Michigan court found that Jessica did not have the right to independently assert rights regarding her custody and care.⁵¹

In dissent, Justice Levin took a very different view of Jessica's custody. Justice Levin explained that the focus of the PKPA is not on the interests of the litigants—the biological parents or the persons acting as parents—but rather on the best interest of the child,⁵² and that the PKPA was enacted to protect the child. He stated that the majority, by ignoring the welfare of the child and focusing exclusively on the concerns of competing adults, effectively “reduce[d] the PKPA to a robot of legal formality with results that Congress did not intend.”⁵³ Justice Levin reasoned that because the Iowa court had not considered Jessica's best interest, under the PKPA the Michigan court was not required to comply with the Iowa decree. Accordingly, he would have permitted the DeBoers to litigate the issue of whether transferring the child to the Schmidts was in Jessica's best interest.⁵⁴

Justice Levin noted that the “well established standard for resolving custody disputes between biological parents is the best interests of the child,” and that “many courts apply essentially the same standard for resolving custody disputes between biological parents and third parties”⁵⁵ Quoting the New York court of appeals, Justice Levin stated:

[t]he day is long past . . . when the right of a parent to the custody of his or her child, where the extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. *Instead, in the extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody This . . . reflects more the modern principle that a*

49. *In re Baby Girl Clausen*, 502 N.W. 2d at 666.

50. *Id.* at 667.

51. *Id.*

52. *Id.* at 670 (Levin, J., dissenting).

53. *In re Baby Girl Clausen*, 502 N.W.2d at 671 (Levin, J., dissenting).

54. *Id.* at 672 (Levin, J., dissenting).

55. *Id.* at 669 (Levin, J., dissenting).

Parental Kidnapping Prevention Act

*child is a person, and not a subperson over whom the parent has an absolute possessory interest.*⁵⁶

Relying on Professor Homer Clark's treatise, *Domestic Relations*, Justice Levin stated that if a child is strongly, emotionally and psychologically attached to the non-parent custodian so that the child will suffer serious harm by shifting to another's custody, then the non-parent should be awarded custody.⁵⁷ Justice Levin criticized the parental rights doctrine relied upon by the majority and by the Iowa court, noting that:

the parental rights doctrine has "acquired rigidity from the dubious and amorphous principle that the biological parent has some sort of constitutional 'right' to the custody of his child. This principle comes dangerously close to treating the child in some sense as the property of his parent, an unhappy analogy which the Supreme Court has been guilty of in another context."⁵⁸

According to Justice Levin, the child's right to a best interest determination lies in equity and is not dissipated by a finding of parental fitness.⁵⁹ Justice Levin noted that even in child snatching cases, courts have placed consideration of the child's best interest ahead of punishment of the wrongdoer.⁶⁰

In considering Jessica's best interest, Justice Levin observed that Dan Schmidt had a "dismal record as a father."⁶¹ Justice Levin referred to the Iowa court's finding that Schmidt: "fathered two children prior to [Jessica], a son, age fourteen, and a daughter born out of wedlock, now age twelve. The record shows that [Schmidt] has largely failed to support these children financially and has failed to maintain meaningful contact with either of them."⁶²

Justice Levin gave great weight to the fact that Schmidt had known that Cara Clausen was pregnant, yet had done nothing to assume his rights as a father.⁶³ Finally, he criticized the majority for giving Jessica back to Cara Clausen despite her having fraudulently named someone else as Jessica's father.⁶⁴

A consideration of the *Clausen* case leads to the painful conclusion that the parental rights doctrine treats children as property. Under such a theory, options that might be good for a particular child are not relevant. In fact, even when there is evidence to suggest that an individual is a particularly poor

56. *Id.* (Levin, J., dissenting) (quoting *Bennett v. Jeffreys*, 356 N.E.2d 277 (N.Y. 1976) (emphasis added)).

57. *In re Baby Girl Clausen*, 502 N.W.2d at 670, n.10 (Levin, J., dissenting).

58. *Id.* at 670 (Levin, J., dissenting) (quoting 2 CLARK, DOMESTIC RELATIONS § 20.1, at 532-33 (2d ed. 1987)); cf. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

59. *In re Baby Girl Clausen*, 502 N.W.2d at 682 (Levin, J., dissenting).

60. *Id.* (Levin, J., dissenting). See *Van Houten v. Van Houten*, 156 A.2d 694, 549 N.Y.S.2d 452 (1989) (ordering use of best interest analysis in custody dispute between a mother and father, even though the father had kidnapped his daughter and kept her from her mother for eight years).

61. *In re Baby Girl Clausen*, 502 N.W.2d at 686 (Levin, J., dissenting).

62. *Id.* at 686, n.93 (Levin, J., dissenting). In addition, a judge dissenting in the Iowa case found evidence that Schmidt had abandoned Jessica.

63. *Id.* at 687, n.94 (Levin, J., dissenting).

64. *Id.* at 687 (Levin, J., dissenting).

parent, as both the Iowa and Michigan courts suggested Schmidt was, the child's right to live in a secure and loving environment is subordinated to the parent's ownership interest in the child.

B. *Best Interest of the Child*

In most jurisdictions, judges purport to make custody decisions based on the "best interest" of the child.⁶⁵ Under this standard, if the child's welfare conflicts with the claims of one or more of the parties seeking custody, the child's welfare must prevail.⁶⁶

In perhaps the first application of the best interest test to a dispute between a biological parent and a third party, the New York Court of Appeals considered whether a biological mother, who had been separated from her child for most of the child's life, but who had not legally surrendered, abandoned, or persistently neglected the child, could, nevertheless, be denied custody of the child. In *Bennett v. Jeffreys*,⁶⁷ a newborn child's grandparents, with the acquiescence of the child's then fifteen-year-old mother, had voluntarily, but not formally, placed the child with a friend. Eight years later, the biological mother sought the return of the child.

The New York family court ruled that although the mother had not legally surrendered or abandoned the child and was not unfit, the child should remain with the custodian.⁶⁸ The appellate division reversed and awarded custody to the biological mother. In reversing the appellate division, the New York Court of Appeals reasoned that although parents have a "right" to rear their own children and that children have a "right" to be reared by their parents, certain "extraordinary circumstances," such as surrender, abandonment, persistent neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time, may require a court to award custody of a child to a third party.⁶⁹ Extraordinary circumstances alone, however, do not justify depriving a biological parent of the custody of his or her child. Instead, if extraordinary circumstances are found to exist, the court must make the disposition that is in the best interest of the child.⁷⁰ Finding that neither the family court nor the appellate division had considered all of the appropriate factors in awarding custody,⁷¹ the New York Court of Appeals ordered a new

65. David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 478-79 (1984).

66. HOMER H. CLARK JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 788 (2d ed. 1988).

67. *Bennett v. Jeffreys*, 356 N.E.2d 277 (N.Y. 1976).

68. *Id.* at 280.

69. *Id.* at 278.

70. *Id.*

71. *Bennett*, 356 N.E.2d 277 at 285. The court found that the family court had not considered the qualifications and background of the long-time custodian. Factors the court encouraged the lower court to consider included: the age of the child, the fact and length of custody by the nonparent custodian, the

Parental Kidnapping Prevention Act

hearing so that the best interest of the child could be considered.⁷²

As described above, under *Bennett*, when extraordinary circumstances are found to be present in a given case, the court is required to consider the best interest of the child in making a custody determination. Parental rights are given special consideration, but are not the determining factor. In ascertaining what is in a child's best interest, the court is guided by principles that reflect a "considered social judgment in this society respecting family and parent-hood."⁷³ Courts may consider the advice of psychiatrists, psychologists, and social workers. They may also consider the child's present custody and the psychological trauma that may result from removal.⁷⁴

The New Jersey Supreme Court employed similar logic in deciding *E.E.B. v. D.A.*⁷⁵ In *E.E.B.*, the New Jersey Supreme Court considered whether New Jersey had jurisdiction to modify an Ohio custody determination in an interstate custody dispute. The Ohio courts found that the biological mother's rights had not been terminated and ordered the return of the child to her without conducting a best interest hearing. The New Jersey court's decision focused on whether the lower court had given proper effect to the Ohio determination in light of the full faith and credit provisions of the PKPA and the UCCJA. The court concluded that by declining to determine the best interest of the child, Ohio enabled the New Jersey courts to modify the determination without violating the full faith and credit clause of the federal (PKPA) and state (UCCJA) statutes.⁷⁶

The facts of *E.E.B.* are in some ways similar to those in *Baby Girl Clausen*. One month before the child's birth, the child's mother consulted with the Ohio Welfare Department to find out how to relinquish the child at birth. Three days after the birth, the mother and father signed a "Permanent Surrender of Child" and surrendered custody of the child. Three days later, the welfare department delivered the child to prospective adoptive parents. One week after signing the surrender form, the biological mother orally revoked the surrender. The welfare department did not inform the Ohio juvenile court of the revocation, and the court approved the surrender on the following day.⁷⁷

Two months later, the biological mother instituted a habeas corpus proceeding to regain custody. While the case was making its way through the

circumstances and environment of the child's custodian, the stability of her household, her inability to adopt, her age, and any other circumstances bearing on her adequacy as a parent. In addition, the court stated that the family court should consider the trauma the child would suffer if returned to the mother, as well as the mother's adequacy as a parent. *Id.*

72. *Id.* at 280.

73. *Id.* at 283 (quoting *Matter of Spence-Chapin Adoption Serv. v. Polk*, 274 N.E.2d 431, 436 (N.Y. 1971)).

74. *Id.* at 283-84.

75. 446 A.2d 871 (N.J. 1982).

76. *Id.* at 873.

77. *Id.*

Ohio courts, the adoptive parents moved with the child to New Jersey.⁷⁸ Eventually, the Ohio Supreme Court concluded that the biological mother had validly revoked her consent before the juvenile court approved the surrender.⁷⁹ The adoptive parents petitioned for a rehearing, asserting that the court should have remanded the case for a best interest hearing, but the petition was denied.⁸⁰

Shortly thereafter, the adoptive parents instituted an action in New Jersey. The New Jersey Supreme Court, recognizing that the "psychological bonding between adoptive parents and child may become stronger than natural ties," agreed that New Jersey had jurisdiction over the matter and remanded the matter to the New Jersey chancery division for an expedited best interest hearing.⁸¹ The chancery division decided that it was in the best interest of the child for her to remain with her adoptive parents.⁸²

The biological mother appealed, contending that under the full faith and credit provisions of the PKPA and the UCCJA, the Ohio decree precluded the New Jersey courts from considering the best interest of the child and required New Jersey to enforce the Ohio custody order.⁸³ The adoptive parents argued, however, that because Ohio had declined to conduct a best interest hearing, neither the PKPA nor the UCCJA required the New Jersey courts to give full faith and credit to the Ohio custody order, and that the New Jersey courts had jurisdiction to determine the best interest of the child.⁸⁴

The New Jersey Supreme Court, finding that the PKPA conferred jurisdiction on New Jersey, held that the New Jersey court could conduct a best interest hearing.⁸⁵ The court found that the PKPA permits the courts of one state (the "forum state") to modify the custody determination of another state (the "decree state") if: (1) the decree state has either lost or declined to exercise its jurisdiction, and (2) the forum state has jurisdiction over the matter.⁸⁶ The New Jersey Supreme Court held that even if Ohio still had jurisdiction over the matter, by refusing to hold a best interest hearing, the Ohio courts had failed to exercise their jurisdiction to modify the decree.⁸⁷ The New Jersey Supreme Court held that in light of the fact that New Jersey

78. The adoptive parents moved with the child from Ohio to New Jersey, not to avoid the Ohio court's jurisdiction, but because the father, a member of the clergy, had been appointed pastor of a church in New Jersey. Before leaving Ohio, the adoptive parents notified the Ohio Department of Welfare of their plans and continued to communicate with the department throughout the proceedings. *Id.* at 874.

79. *E.E.B.*, 446 A.2d at 874.

80. *Id.*

81. *Id.*

82. *Id.*

83. *E.E.B.*, 446 A.2d at 874.

84. *Id.*

85. *Id.* at 877.

86. *Id.* at 880.

87. *E.E.B.*, 446 A.2d at 880.

Parental Kidnapping Prevention Act

had been the home of the child for almost three years, New Jersey was the home state of the child and had the most significant contacts to the controversy.⁸⁸ The court also concluded that the UCCJA did not contemplate blind obedience to home state jurisdiction. The appropriate state to decide a child custody dispute is not necessarily the home state, but rather the state best positioned to make the decision based on the best interest of the child.⁸⁹ Therefore, the New Jersey Supreme Court held that New Jersey courts were free to modify the Ohio decree.⁹⁰

In *Lemley v. Barr*,⁹¹ the West Virginia Supreme Court also considered whether a biological mother could regain custody of a child she had willingly relinquished. In *Lemley*, the biological mother, who was three days short of her eighteenth birthday, and the biological father signed papers relinquishing custody of the child in Ohio. Later that day, the child was delivered to its adoptive parents in West Virginia.⁹² One week later, the biological mother, after turning eighteen, signed more papers and received \$400 for her medical expenses. That same day, the biological mother's parents went to the offices of the lawyer conducting the adoption and demanded the child back. The lawyer told them that it was too late. The lawyer neglected to tell them, however, that he had failed to follow an Ohio law requiring that a probate court judge witness and approve the minor's consent to the termination of her parental rights.⁹³

Having unsuccessfully sought the return of the child, the child's biological mother and the child's grandparents instituted a habeas corpus action in Ohio seeking the child's return. A few months later, the Ohio court found that the placement had violated Ohio law and ordered the adoptive parents' lawyers to divulge the names of the adoptive parents.⁹⁴ One year later the court of appeals affirmed.⁹⁵ Two years and two months after the biological mother first brought her petition, the Ohio Supreme Court affirmed the trial court's judgment, and released the names of the child's adoptive parents, stating that the facts suggested that the adoptive parents "were active participants in the private, independent and surreptitious placement for adoption of the minor child without the slightest regard for and in complete contravention of the applicable statutory guidelines for such independent placements."⁹⁶

While the Ohio proceedings were pending, and with full knowledge of

88. *Id.*

89. *Id.* at 879.

90. *Id.* at 877.

91. 343 S.E.2d 101 (W.Va. 1986).

92. *Id.* at 103.

93. *Id.*

94. *Id.*

95. *Lemley*, 343 S.E.2d at 103.

96. *Id.*

those proceedings, the prospective adoptive parents, with whom the child lived in West Virginia, filed for adoption in a West Virginia court.⁹⁷ The biological mother, who discovered the identity of the prospective adoptive parents only when the Ohio Supreme Court affirmed the biological mother's right to custody, filed a separate action in West Virginia to compel the return of the child in accordance with the Ohio judgment.⁹⁸

Two years after the Ohio Supreme Court decision, and over four years after the biological mother's original petition, the West Virginia Supreme Court rendered its initial decision and ordered the lower court to give full faith and credit to the Ohio judgment.⁹⁹ The only issue before the court was whether West Virginia was obligated to give full faith and credit to the Ohio decision. However, the judges of the West Virginia court were concerned about the welfare of the child. Consequently, in its opinion remanding the case for a transfer of custody, the supreme court directed the lower court to order reasonable visitation and to use its sound discretion to reduce the trauma to the child.¹⁰⁰ The adoptive parents then filed a petition for rehearing, claiming that the court had neither heard arguments about nor adequately considered the best interest of the child.¹⁰¹

The supreme court agreed to a rehearing to address the best interest of the child.¹⁰² The court acknowledged that the biological mother was entitled to have the West Virginia court accord the Ohio judgment full faith and credit¹⁰³ and, therefore, to have the West Virginia adoption set aside. Nevertheless, the court held that courts are not bound to deliver children into the custody of any particular claimant, and that courts might permit a child to remain in such custody as the child's welfare required.¹⁰⁴ The court stated that it was not convinced that it was in the best interest of the child to have his physical custody changed.¹⁰⁵ Accordingly, the court remanded the case for further proceedings on the best interest of the child.¹⁰⁶

The court recognized some of the pitfalls of its decision. It quoted the *Bennett* court:

The resolution of custody cases must not provide incentives for those likely to take

97. *Id.*

98. *Id.* at 104.

99. *Lemley*, 343 S.E.2d at 104.

100. *Id.*

101. *Id.*

102. *Id.* at 105.

103. In discussing the need to give the Ohio court judgment full faith and credit, the court did not refer to the PKPA. Instead, the court relied on the full faith and credit clause of the Constitution to find that West Virginia was obligated to enforce the Ohio judgment unless the court found that Ohio lacked jurisdiction. *Lemley*, 343 S.E.2d at 105. The court did, however, find that the UCCJA guided its inquiry into the Ohio court's jurisdiction. *Id.* at 106.

104. *Id.* at 106.

105. *Id.* at 110.

106. *Id.*

Parental Kidnapping Prevention Act

the law into their own hands. Thus, those who obtain custody of children unlawfully, particularly by kidnapping, violence or flight from the jurisdiction of the courts, must be deterred. Society may not reward, except at its peril, the lawless because the passage of time has made correction inexpedient. Yet even then, circumstances may require that in the best interest of the child, unlawful acts be blinked.¹⁰⁷

The West Virginia court recognized that the biological mother's rights were imposed upon and that she had tried to regain possession of the child almost immediately. The court noted, however, that the woman had signed papers on two occasions consenting to the adoption, and that she had accepted money to pay for her medical expenses.¹⁰⁸ The court also questioned the wisdom of taking a five-year-old child away from the only home that he had ever known.¹⁰⁹ Quoting *Bennett*, the court stated:

The day is long past . . . when the right of a parent to the custody of his or her child, where extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. Instead . . . when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody.¹¹⁰

Stating that "the welfare of the child is of paramount and controlling importance and is the 'polar star' by which the discretion of the court will be guided," the court awarded custody to the adoptive parents.¹¹¹

Thus, *Bennett*, *E.E.B.* and *Lemley* are all contrary to *Clausen* in that those courts agreed that there are circumstances in which the best interest of the child warrant awarding custody to a third party even when the biological parents' rights have not been terminated.

C. Child's Social Relationships

The *E.E.B.*, *Lemley* and *Bennett* courts all noted the importance of a child's relationships with its caretakers. These courts reasoned that it was not in children's best interest to be removed from their homes, and, under the rubric of the best interest test, granted custody to the child's caretakers. Other courts making custody determinations in a variety of circumstances have given a more defined meaning to this standard and have explicitly examined the relevance and importance of a child's social relationships.

In fact, in a number of decisions in the last two decades, the Supreme Court has considered a child's social relationships when making custody determinations. In *Quilloin v. Walcott*,¹¹² the Supreme Court limited the

107. *Lemley*, 343 S.E.2d at 108 (quoting *Bennett v. Jeffreys*, 356 N.E.2d 277, 284 (N.Y. 1976)).

108. *Id.*

109. *Id.* at 109.

110. *Id.* (quoting *Bennett v. Jeffreys*, 356 N.E.2d 277, 281 (N.Y. 1976)).

111. *Lemley*, 343 S.E.2d at 109 (quoting *W. Va. Dep't of Human Services v. La Rea Ann C.L.*, 332 S.E.2d 632, 637 (W. Va. 1985)).

112. 434 U.S. 246 (1978).

rights of putative fathers¹¹³ who exhibited only minimal interest in their children. The Court in that case rejected the due process challenge of a putative father who had sought to prevent the adoption of his eleven-year-old child by the mother's husband. The *Quilloin* Court gave the social relationships the child had developed with his mother and her husband¹¹⁴ significantly greater weight than the biological tie between the unwed father and the child. The Court found the mere biological link between an unwed father and his child inadequate to invoke constitutional protections when the biological father had taken no steps to assert his interest in the child.¹¹⁵ The Court held that since there was no social relationship between the unwed father and the child, only the best interest of the child needed to be evaluated in granting the adoption and denying the unwed father's petition to legitimize the child.¹¹⁶

The Court revisited this issue in *Lehr v. Robertson*,¹¹⁷ which limited the rights of putative fathers who have no more than a biological link to their children born out of wedlock. In *Lehr*, an unwed father learned of the adoption proceedings of his child after he filed a petition for paternity. He then sought to vacate an order granting the adoption of his child by the mother's husband.¹¹⁸ The Supreme Court rejected the putative father's assertion that the adoption proceedings were unconstitutional, holding that when a father has no connection other than a biological link to his illegitimate child, his constitutional rights are not violated by an inability to participate in adoption proceedings.¹¹⁹

As in *Quilloin*, the *Lehr* Court emphasized the importance of a father establishing a social relationship with his child in order to receive the protections afforded by the Constitution. The court concluded that a putative father has a constitutionally protected interest in a determination of paternity only if he can demonstrate a substantial relationship with the child.¹²⁰ The Court, quoting Justice Stewart's dissenting opinion in *Caban v. Mohammed*,¹²¹ stated that "[p]arental rights do not spring full-blown from the

113. A "putative father" is the alleged or reputed father of an illegitimate child. BLACK'S LAW DICTIONARY 1237 (6th ed. 1990).

114. The mother and her husband had married when the child was only three years old and had lived with the child since that time. 434 U.S. at 247.

115. *Id.* at 256. The biological father was named on the child's birth certificate, but before the mother's husband attempted to adopt the child, the biological father had made no effort to obtain a court order declaring the child legitimate and capable of inheriting from the father. *Id.* at 249. Moreover, the biological father had never sought legal or actual custody of the child, and he did not object to the child's continuing to reside with the mother and her husband. *Id.* at 247.

116. *Id.* at 255.

117. 463 U.S. 248 (1983).

118. *Id.* at 250.

119. *Id.* at 249-50.

120. *Id.* at 267.

121. 441 U.S. 380 (1979). In *Caban*, a putative father who had established a social relationship with his child challenged a New York statute permitting unwed mothers, but not unwed fathers, to veto the adoption of an illegitimate child. *Id.* at 381-82. The Supreme Court held that the statute violated the

Parental Kidnapping Prevention Act

biological connection between parent and child. They require relationships more enduring."¹²²

In *Smith v. Organization of Foster Families for Equality & Reform*,¹²³ the Court, in expanding the scope of constitutionally protected family relationships, explained the basis of a parent's right to the custody of his child. In *Smith*, several foster parents and foster parent organizations challenged New York's regulatory scheme for removing foster children from their foster homes, alleging that the laws violated the Due Process and Equal Protection Clauses.¹²⁴ The foster parents asserted a constitutional liberty interest in the custody of the foster children, which, they claimed, was not sufficiently protected by the New York foster care system.¹²⁵ Although the Court held the foster families' due process rights were not violated by New York's procedures, the Court recognized that a family's constitutionally protected liberty interest is not determined exclusively by biological relationships.¹²⁶ The Supreme Court stated that individuals in a *de facto* family relationship "may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state law recognition of the relationship."¹²⁷

Thus, the Supreme Court has found that biological parents who have not developed social relationships with their children have a lesser right to custody of those children. In addition, the Court has determined that considering a child's social relationships is valid, useful, and necessary in making custody determinations.

A number of other courts have also considered the child's social relationships in making custody determinations. In *McGaffin v. Roberts*,¹²⁸ the Connecticut Supreme Court affirmed the trial court's decision to award custody

Equal Protection Clause by treating persons differently according to gender. *Id.* at 388. The Court did note, however, that in situations in which the unwed father had not participated in the child's life, denying him veto power in the adoption proceedings of his child born out of wedlock would not violate the Equal Protection Clause. *Id.* at 392-93.

122. *Lehr*, 463 U.S. at 260 (quoting *Caban*, 441 U.S. at 397).

123. 431 U.S. 816 (1977); see also Suzette M. Haynie, Note, *Biological Parent v. Third Parties: Whose Right to Child Custody Is Constitutionally Protected?*, 20 GA. L. REV. 705, 733-35 (1986).

124. 431 U.S. at 818-20.

125. *Id.* at 820.

126. *Id.* at 843. In light of *Smith*, the parental rights doctrine may be unconstitutional because it "assumes that a child's best interests will be served by awarding custody to the natural parent. Since the child's past relationship with the parent and present relationship with a third party are not considered, it may be said that the doctrine is arbitrary and its application an unconstitutional governmental interference." Lucy S. McGough & Lawrence M. Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes*, 27 EMORY L.J. 209, 244 (1978).

127. *Smith*, 431 U.S. at 846.

128. 479 A.2d 176 (Conn. 1984), *cert. denied*, 470 U.S. 1050 (1985); see also Haynie, *supra* note 123, at 725-28.

to the child's grandmother after the child's mother died.¹²⁹ The court found that the child had spent substantial time with her grandmother, developed an emotional relationship with her, and preferred her custody.¹³⁰ The biological father, who had never had custody of the child, challenged the use of the best interest standard. He argued that the trial court's decision violated his constitutional right to custody, because there had been no showing that he was an unfit parent.¹³¹

The Connecticut Supreme Court acknowledged that the relationship between a parent and child is constitutionally protected. Nevertheless, the court held that "[p]ersons other than biological parents may occupy the relationship of parent to the child."¹³² The court found that "genetic connection is not determinative of the issue of the best interest of the child."¹³³ The court upheld the trial court's custody award, finding that the child's interests were best served by remaining in the grandmother's custody.¹³⁴

The events described in a series of articles appearing in the *Chicago Tribune* about a child referred to only as "Sarah"¹³⁵ dramatically demonstrate the weakness of relying on the biological tie between parent and child in making a custody determination. Sarah was born on April 27, 1984, to a heroin-addicted prostitute who abandoned her at the hospital.¹³⁶ The State of Illinois placed Sarah in the care of Joseph and Marge Procopio who raised her for five years, at which time Sarah's biological mother demanded that Sarah be returned to her.¹³⁷

On August 29, 1989, when Sarah was five, a court ordered that she be returned to her biological mother and the mother's companion, despite the fact that several psychiatrists had recommended against it.¹³⁸ After the custody change, the Procopios were forbidden from seeing or attempting to contact Sarah, and the court precluded Sarah from receiving any therapy.¹³⁹

The Illinois appellate court reviewed the decision and criticized the lower court for failing to apply the best interest of the child standard. The appellate

129. *McGaffin*, 479 A.2d at 184-85.

130. *Id.* at 180.

131. *Id.* at 182.

132. *Id.* at 180 (quoting *In re Palmer*, 503 P.2d 464 (1972)).

133. 479 A.2d at 182.

134. *Id.* at 184.

135. Although the *Chicago Tribune* referred to the girl as "Sarah" throughout its reporting, the court documents refer to the child as "Ashley K." See *In re Ashley K.*, 571 N.E.2d 905 (1991). Because the child has become well-known as "Sarah," I will continue to refer to her by that name.

136. 571 N.E.2d at 907 (1991); see also James G. O'Keefe, Note, *The Need to Consider Children's Rights in Biological Parent v. Third Party Custody Disputes*, 67 CHI.-KENT L. REV. 1077, 1078 (1991). Due to the mother's drug abuse during her pregnancy, Sarah was also addicted to heroin and went through withdrawal shortly after birth. 571 N.E.2d at 906.

137. 571 N.E.2d at 911.

138. *Id.* at 915.

139. *Id.* at 917.

Parental Kidnapping Prevention Act

court held that the lower court had erred in attempting to “balance the best interests of [Sarah] with the so-called ‘rights’ of the biological mother and father.”¹⁴⁰ The court stated that a child’s best interest “is not to be balanced against any other interest. In custody cases, a child’s best interest is and must remain inviolate and impregnable from all other factors, including the interests of the biological parents.”¹⁴¹ The court reversed and remanded the case for reconsideration.¹⁴²

Three years after Sarah’s case, in a proceeding reminiscent of Baby Jessica’s story,¹⁴³ the Illinois Supreme Court failed to consider the child’s welfare in making a custody determination. In the case of *In re Petition of John and Jane Doe to Adopt Baby Boy Kirchner*,¹⁴⁴ the mother of a newborn, “Baby Richard,” executed a consent to adoption four days after the child’s birth. The adoptive parents subsequently filed a petition to adopt him. The biological mother did not inform the baby’s father about the adoption, and she refused to provide the father’s name to the adoptive parents or to the adoption agency.¹⁴⁵ The mother told the biological father that the baby had died, and he did not discover that the infant was alive until fifty-seven days after the child’s birth.¹⁴⁶ Upon discovering that the baby was alive, the biological father sought to reclaim the baby. The trial court ruled that the biological father was an unfit parent because he had not shown a reasonable interest in the child within the first thirty days of the child’s life,¹⁴⁷ and the appellate court found that it was in the child’s best interest to remain with the adoptive parents.¹⁴⁸

By the time the Illinois Supreme Court heard the case, Baby Richard was three-and-a-half years old. Nevertheless, the court reversed the appellate court and returned the child to its biological parents, who had since married.¹⁴⁹ The court found that the father’s rights had been improperly terminated because he had never been declared unfit. Since the child had a parent whose rights had not been terminated, the court found that the lower courts had erred in considering the child’s best interest.¹⁵⁰ The court stated that Illinois law

140. *Id.* at 923.

141. *In re Ashley K.*, 571 N.E.2d at 923.

142. *Id.* at 930. By the time the lower court reheard the case, Sarah had been in her biological mother’s custody for two years, and two psychiatrists stated that it would be against Sarah’s interests for her to be moved again. Therefore, the trial court ordered that the biological mother retain custody. See Rob Karwath, *Judge Heeds “Sarah”; Rules for Her Parents*, CHI. TRIB., Oct. 9, 1991, at 1.

143. One point of distinction is important: Baby Jessica’s case involved an interstate custody dispute, whereas Kirchner’s case involved an intrastate dispute.

144. 159 Ill.2d 347, 1994 Ill. LEXIS 83, *cert. denied*, 115 S. Ct. 499 (1994).

145. *Kirchner*, 1994 Ill. LEXIS 83 at *1.

146. *Id.*

147. *Id.* at *3.

148. *Id.*

149. *Kirchner*, 1994 Ill. LEXIS at *5.

150. *Id.* at *3.

protected biological parents in their "preemptive rights to their own children wholly apart from any consideration of the so-called best interest of the child."¹⁵¹ The court was under the impression that "if [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 parents of their right to their own children."¹⁵² The Supreme Court denied certiorari, allowing the Illinois Supreme Court decision to stand.¹⁵³

Thus, Baby Richard, like Baby Jessica before him, may be taken from the people whom he knew as his parents for all of his three and one-half years and sent to live with virtual strangers without any consideration of the effect such a move would have on him.¹⁵⁴ Illinois's governor and state legislature were so appalled by the Illinois Supreme Court's decision in *Kirchner* that they quickly passed a law requiring Illinois courts to conduct best interest hearings in cases in which biological parents seek to have an adoption nullified.¹⁵⁵ Although the Illinois Supreme Court reaffirmed its decision despite the new law,¹⁵⁶ Illinois courts will now be required to conduct a best interest hearing before removing a child from the custody of adoptive parents and returning him or her to biological parents.

Thus, several state courts, at least one state legislature, and the United States Supreme Court have held that biology alone does not define a parent-child relationship. The Supreme Court has also held that, in the absence of a social relationship between a biological parent and his or her child, a mere biological tie with a child is not sufficient to prevent the child's adoption. Congress should extend and codify the reasoning underlying both the Supreme Court's decisions terminating the parental rights of putative fathers in such circumstances, and the reasoning of state courts considering the rights of third parties to retain custody of children to whom they are not genetically related. Such action is needed to prevent biological parents who have not developed social relationships with their children from blocking the adoption of those children by third parties who have developed social relationships with them.

III. CHILD'S SOCIAL RELATIONSHIPS SHOULD PREVAIL

The action of the Illinois legislature, as well as the significant amount of media coverage and commentary surrounding the cases of both Baby Richard

151. *Id.* at *4-5.

152. *Id.* at *5.

153. *cert. denied*, 115 S. Ct. 499 (1994).

154. Baby Richard remains in the care of his adoptive parents pending further proceedings. Adrienne Drell, *Baby Richard Battle Enters New Round; Judge Could Decide to Delay Custody Hearing*, CHICAGO SUN-TIMES, Dec. 27, 1994, at 5.

155. *Illinois Law Puts Child's Interests First*, WASH. POST, July 7, 1994, at A8.

156. Edward Walsh, *Illinois Court Backs Biological Parents*, WASH. POST, July 14, 1994, at A3.

Parental Kidnapping Prevention Act

and Baby Jessica, indicate a growing dissatisfaction with the way such custody disputes have been decided. It appears that there is a growing consensus that children should not be treated like property and that their welfare should be considered in all custody decisions.

In addition to the precedent in case law for an approach requiring courts to consider a child's social relationships in determining custody in disputes between biological parents and custodial third parties, research in the field of child psychology offers compelling support for such an approach.

A. *What Makes A Parent?*

In examining a child's social relationships, a court will seek to determine which person or persons the child views as his or her parent. The question a court should seek to answer when considering a custody dispute between a biological parent and a third party who has been the child's primary caretaker is "who is the parent"? This issue raises serious definitional questions about "parenthood."

As the Supreme Court has recognized, biological ties should not be the trump card in child custody cases.¹⁵⁷ Although the biological conception of parenthood is ingrained in the ethos of our culture, it is not consistent with the modern understanding that parenthood is as much a social, psychological, and intentional status as it is a biological one.¹⁵⁸ Moreover, it is tautological to allow claims of biology to trump the moral claims of those who have no biological connection to a child merely because of the biological connection.¹⁵⁹

In considering the competing claims to a child of "intended parents" and "gestation hosts,"¹⁶⁰ Professor John Hill has argued that the genetic relationship should be accorded very little weight in the determination of parental status.¹⁶¹ He states that:

claims based on the biological similarity of genetic progenitor and child and those predicated on a kind of quasi-property right in the child simply do not withstand sustained scrutiny. Thus, though the genetic tie historically has been accorded great significance, the genetic link per se places the genetic progenitor in the least compelling position of all parties in the procreative relationship.¹⁶²

A biological conception of parenthood is also inconsistent with the sentiment

157. Cf. *Caban*, 441 U.S. at 397 (Stewart, J., dissenting) ("Parental rights do not spring full-blown from the biological connection between parent and child.").

158. John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 419 (1991).

159. *Id.* at 420.

160. An "intended parent" is a person who plans to raise and care for a child. A "gestation host" is a woman who carries and bears the child; she may have been artificially inseminated and donated the egg, or she may have been inseminated with a fertilized egg and have no genetic link with the child.

161. Hill, *supra* note 158, at 418.

162. *Id.*

that persons are not invariably and irrevocably disposed to a role in life—even of parenthood—by virtue of the inexorable workings of biology.¹⁶³

More importantly, children do not share the traditional biological conception of parenthood. Children do not think of relationships in terms of biology or “blood” until late in their development.¹⁶⁴ Instead, children focus on whether someone is their “psychological parent,” that is, the person whom the child thinks of as a parent. Whether any adult becomes the psychological parent of a child is based on continuous day-to-day interaction, companionship, interplay, and mutuality. To a child, a parent may be any person with whom the child has formed an emotional attachment or bond and who fulfills the child’s needs. Whether that person is a biological, adoptive, foster, or common law parent is irrelevant; any one of these people may be a “psychological parent.”¹⁶⁵ But an absent, inactive adult, whatever his or her biological relationship to the child might be, cannot hope to develop the links necessary to become a “psychological parent.”¹⁶⁶

The study of the behavioral/emotional bonds that are formed, developed, and maintained through attachment behavior is called “attachment theory.”¹⁶⁷ Attachment behavior is any form of behavior that is caused by a person attaining or retaining proximity to some other differentiated and preferred individual.¹⁶⁸ Attachments are formed throughout life, but the majority of studies in attachment theory has focused on the initial attachments that an infant makes.¹⁶⁹

Attachment is formed through interaction between the infant and the primary caregiver.¹⁷⁰ Through attachment, preadolescent children form a secure base from which to explore the world and from which they learn and develop social skills.¹⁷¹ The disruption of this attachment has been shown to be psychologically traumatic and damaging throughout childhood, but particularly in the preschool years.¹⁷² Disruption in the continuity of care of a child five years old can affect the child’s emotional development. Such disruption can also reverse achievements, such as those accomplishments that are rooted or developed through interaction with a stable parent figure who is in the process of becoming a psychological parent. For example, recently acquired developments, such as toilet training and talking, may be lost when

163. *Id.* at 420.

164. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 12 (1973).

165. *Id.* at 98.

166. *Id.* at 19.

167. O’Keefe, *supra* note 136, at 1101.

168. *Id.*

169. *Id.*

170. *Id.* at 1102.

171. *Id.* at 1101.

172. *Id.* at 1102.

Parental Kidnapping Prevention Act

a child is removed from her familiar setting.¹⁷³ Moreover, experts have shown that separation from, or loss of, the attached caregiver in early childhood relates to behavioral problems throughout that child's life,¹⁷⁴ including cognitive disturbances, depression, suicide risk, and a generally increased risk of psychiatric disturbance.¹⁷⁵

School-age children removed from their psychological parents will experience the loss of achievements identified with parents. They will resent adults who disappoint them and learn not to care for anyone. Such children are at increased risk of developing antisocial, delinquent, and even criminal behavior.¹⁷⁶ Finally, adolescents who are moved will learn to fear abandonment and rejection. Moreover, they may grow up to treat their own children with the same disregard.¹⁷⁷

Because continuity of care is so important to a child's development, experts have suggested that removing a child from a parent with whom she has emotionally bonded and giving her to a biological parent whom she may not know, with no consideration of the child's welfare, may constitute psychological maltreatment.¹⁷⁸ Such research suggests that custody decisions should be made quickly and permanently.¹⁷⁹ Once a child has been placed in the custody of adoptive or prospective adoptive parents, a biological parent's change of heart should not be enough to allow the revocation of consent to adoption. In placing a child, courts should consider the child's sense of time, and predictions regarding where the child will be wanted and where the child will best be able to maintain a continuous relationship with at least one adult who is or may become the child's psychological parent.¹⁸⁰ The law needs to recognize that after significant time has passed, whatever the cause and whoever may be responsible, the child does not recognize biological parents as his or her psychological parents.¹⁸¹

Given the severity of the repercussions of separating a child from her attachment figure, it is striking that, in making custody determinations, the child's interests are considered only if the child's biological parent is

173. J. GOLDSTEIN ET AL., *supra* note 164, at 33.

174. O'Keefe, *supra* note 136, at 1102.

175. *Id.*

176. J. GOLDSTEIN ET AL., *supra* note 164, at 34.

177. *Id.*

178. O'Keefe, *supra* note 136, at 1105.

179. Moreover, the main purpose of the PKPA was to increase certainty and stability in custody decisions and to prevent shifting children from state to state and from caretaker to caretaker. 28 U.S.C. §1738A, Congressional Findings and Declaration of Purposes of Parental Kidnapping Prevention Act of 1980, Pub. L. 96-611 (1980).

180. J. GOLDSTEIN ET AL., *supra* note 164, at 53.

181. *Id.* at 78. Courts should also bear in mind that the adoptive parents, who are likely to have developed strong attachments to the child, are also prone to suffer tremendous hardship if required to give up the child. CLARK, *supra* note 66, at 628.

considered unfit.¹⁸² Even when a biological parent has involuntarily lost custody of a child, that child's placement need not damage the child. Instead, society should use each child's placement as an occasion to protect that child and future generations by placing the child in a nurturing environment, thereby securing the child's well-being and, consequently, increasing the number of adults who are likely to be adequate parents.¹⁸³ Courts making custody determinations between prospective adoptive parents and biological parents should conduct best interest hearings in which the primary focus would be the nature and extent of the child's relationship with both parties and the possible detriment to the child, should he or she be moved.

B. Criticisms

The emphasis on the child's best interest in custody determinations has often been criticized for (i) failing to provide meaningful guidance to courts, or lacking quantifiable, clearly articulated criteria for judges to apply;¹⁸⁴ (ii) being difficult to define;¹⁸⁵ and (iii) being arbitrary and discriminatory.¹⁸⁶ These concerns are intimately linked: Judges can disguise decisions based on improper factors by vague recitations of general language, and as a result, the real reasons underlying a custody award may be very different from the stated ones.¹⁸⁷ Robert Mnookin argues that virtually any conclusion can be justified under the vague rubric of best interest.¹⁸⁸

Of particular concern is that judges may let class, race, sexual orientation, or other arbitrary criteria serve as proxy for the child's "best interest," thus tipping the scale against broad classes of potential parents. At least one commentator has suggested that some parents may lose their children under the best interest standard because a judge or social worker disapproves of the parent's nontraditional lifestyle or child-rearing patterns.¹⁸⁹ Another commen-

182. O'Keefe, *supra* note 136, at 1103. Although there may be an argument that a child not raised by his or her biological parents may one day want to find his or her biological parents and suffer some degree of trauma from such an event, a discussion of the need children have to discover their biological roots is beyond the scope of this Article. Moreover, it is my view that a judge deciding the custody of a small child will have more immediate concerns than whether or not a child may or may not one day in the distant future need to find his or her biological parents and whether the child will suffer in any way from discovering the identity of those parents.

183. J. GOLDSTEIN ET AL., *supra* note 164, at 111.

184. Robert H. Mnookin, *Child Custody Adjudication: Judicial Foundations in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. 226, 269 (1975).

185. CLARK, *supra* note 66, at 788.

186. Chambers, *supra* note 65, at 481.

187. Mnookin, *supra* note 184, at 269.

188. *Id.* at 274.

189. Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care and the Termination of Parental Rights*, 28 STAN. L. REV. 625, 692, n.268 (1976). A Virginia court recently stripped a mother of custody of her child and awarded the child to his grandmother simply because the mother was a lesbian. Peter Baker, *Virginia Woman Still Waiting to Regain Custody of Son*, WASH. POST, Sept. 5,

Parental Kidnapping Prevention Act

tator has noted that the factors on which judges rely—availability of economic resources, disparate treatment of employed mothers and employed fathers, and the father's remarriage¹⁹⁰—often result in women losing custody of their children. For example, a Michigan judge recently awarded custody of a three-year-old girl to her father because the girl's mother wanted to place the child in day care while she attended college classes at the University of Michigan.¹⁹¹ The father, also a student, was equally unable to care for the child during the day, but could leave the child in the care of his parents.¹⁹² Even more outrageous, the custody battle only arose because the mother sought an increase in child support from eight to twelve dollars a week.¹⁹³

A custody battle between an adoptive couple and a biological parent raises the same concerns. The biological parent may be unmarried and less well-off financially than the adoptive parents, and these factors might sway a judge who believes that a child is better off in a more traditional family environment.

Race and socioeconomic class are other factors that may improperly influence a judge. Andrew Shapiro argues that the case of Gregory K., a Florida boy who sought to "divorce" his biological parents so that he could be adopted by his foster parents, illustrates how socioeconomic standing can affect custody determinations.¹⁹⁴ Mr. Shapiro argues that Gregory's biological

1994, at D5. The appellate court overturned the ruling, but the child remains in the custody of his grandmother pending an appeal to the Virginia Supreme Court. *Id.*

190. Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determination*, 7 WOMEN'S RTS. L. REP. 235, 237 (1982).

191. Sue Chira, *Custody Case Stirs Debate on Bias Against Working Women*, N.Y. TIMES, July 31, 1994, at 31.

192. *Id.*

193. *Id.*

194. Andrew L. Shapiro, *Children in Court—The New Crusade; The Trials of Gregory K.*, THE NATION, Sept. 27, 1993, at 301. It is important to note that because the case took place entirely within the state of Florida, the PKPA did not and could not have been applied to the Gregory K. case. Gregory's case is relevant to this article only insofar as it illustrates the problem of the dichotomy between a poor biological parent and a comparatively wealthy prospective adoptive parent.

A full discussion of foster care and the competing rights and interests of foster parents and biological parents is beyond the scope of this Article. It is worth noting, however, that under most states' parental termination statutes, only an agency may institute termination actions. Nonetheless, in a small number of states, a termination action may be initiated by "any person who has knowledge of the facts, or any interested party." See Claudio DeBellis & Marta B. Soja, Note, *Gregory K: Child Standing in Parental Termination Proceedings and the Implications of the Foster Parent-Foster Child Relationship on the Best Interests Standard*, 8 ST. JOHN'S J. LEGAL COMMENT. 501, 510 (1993) (for example, California, Florida, and South Carolina allow interested parties to initiate a termination action).

It might be argued that applying a best interest test in cases between a biological parent and a foster parent would usually, if not always, lead to a decision in favor of the foster parent, thus providing a disincentive for biological parents to place their children in foster care. To the extent that application of this standard would favor foster parents who have cared for a child for an extended period of time, this may be appropriate. There should be disincentives for placing a child in foster care. Parents should not be allowed to abandon their children whenever caring for them becomes inconvenient. Foster care should be a last alternative. It is intended to serve as a short-term solution to family problems. The Adoption Assistance and Child Welfare Act ("CWA"), 42 U.S.C. § 675(5) (1988), provides that states receiving federal money for foster care maintenance and adoption assistance payments must certify that every child placed in foster care has a dispositional hearing no later than 18 months after the original

mother was portrayed as an unfit mother not because she had failed to visit or contact her son for two years while he was in foster care (which, it should be noted, is sufficient to meet any state's definition of an unfit parent), but because Gregory claimed that his biological mother was "a poor, unemployed, single mother . . . an alcoholic and a pot smoker; and a lesbian who was also promiscuous with men, possibly a prostitute."¹⁹⁵ In contrast, Gregory's foster parents, the Russes, were "a well-off Mormon couple."¹⁹⁶

Gregory K's story is a poor example for an important point. The fact that Gregory's mother had not seen him in over two years, that she had engaged in prostitution and used illegal drugs, contrasted with the fact that Gregory had a stable, loving supportive home in which he wished to remain, was and should have been critical to the judge's decision. Gregory was better off with his foster parents, the Russes, not only financially, but in every way, unless such a high value is placed on living with a biological parent that it outweighs all other factors.¹⁹⁷

It is certainly true that a child should not be removed from loving, but poor, biological parents simply because a wealthier party wants custody of the child; however, the fact that a biological parent has relinquished his or her child for an extended period of time should be relevant in making a custody determination. A child should not need to have been severely beaten or neglected before a biological parent's rights can be terminated and the child allowed to remain living with a stable and supportive family.

The concern that the best interest standard and the concept of children's rights have a disproportionate impact on minority families is unwarranted.¹⁹⁸

placement to determine, among other things, whether the child should be returned to the parents, continue in foster care for a specified period, or be placed for adoption. See *In re Ashley K.*, 571 N.E.2d 905, 918 (Ill. App. 1991); see also 42 U.S.C. § 675(5) (1988). The central purpose of the CWA is to remove children from long-term foster care, either by reuniting them with their parents, by placing them with adoptive parents, or by placing them in some other permanent arrangement. 571 N.E.2d at 918. Therefore, a biological parent who leaves his or her child in foster care for a relatively short time would have little or no chance of having his or her parental rights terminated. In contrast, Gregory had been in and out of foster care several times by the time he sought to terminate his mother's parental rights. Children who are left in foster care for extended periods of time or who move in and out of foster care should have a right to seek (or have the state or other interested party seek) a more secure and stable family environment. Moreover, by passing the CWA, Congress has already expressed its conviction that children must be placed in permanent homes within a reasonable amount of time regardless of whether those homes are those of the children's biological parents.

195. Shapiro, *supra* note 194 at 317.

196. *Id.*

197. A small, radical minority—Concerned United Birthparents ("CUB")—believes that adoption should be abolished, arguing that only biological parents can be a child's "real" parents. These individuals maintain that genetics is the most significant basis for identity and, therefore, that adopted children suffer deep emotional scars and are condemned to search for the missing piece of themselves throughout their lives. This belief would seem to be repudiated by National Council for Adoption statistics that show that only between two and five percent of birth mothers and adoptees search for each other. Lucinda Franks, *The War for Baby Clausen*, THE NEW YORKER, Mar. 22, 1993, at 59.

198. See Shapiro, *supra* note 194, at 317, for the expression of such concerns. See also Wald, *supra* note 189, at 641 (juvenile courts are biased against or insensitive to minority cultures and values).

Parental Kidnapping Prevention Act

Although a discussion of transracial adoption is beyond the scope of this Article, it is worth noting that children are typically placed with adoptive parents of the same race.¹⁹⁹ Current adoption policies consider race, unlike wealth, very significant to a child's development.²⁰⁰ In fact, current policies specifically authorize the consideration of race in adoption decisionmaking.²⁰¹ Therefore, any advantage in such a case would fall to the biological parent, who is of the same race as the child, over the adoptive parents, who may be of a different race. Whether advisable or not, in cases in which a minority biological parent seeks the return of a child who is living with prospective adoptive parents of a different race, the race issue will generally be considered significant to the child's social development and weigh on the side of the biological parents.

Other critics argue that families ought to be preserved—that a biological parent should be given every benefit and every support to regain custody of a relinquished child. Although a full discussion of the "family preservation" movement is beyond the scope of this Article, the concept is problematic. First, as was asked earlier, what constitutes a family? In Gregory's case, was his family with the Russes, where he had been happily ensconced, or with his mother, who had not contacted him in more than two years? In Jessica's case, was her family the DeBoers, who had been her caretakers since birth, or her birth parents, with whom she had no relationship? If a family is defined only as the child's biological parents, one must ask whether this construct is worth preserving, and who benefits from such preservation.

Because the policy of family preservation is not based on the best interest of the child and more specifically on the child's social relationships, I believe the policy is irremediably flawed. Indeed, at least one state court has criticized its state's child welfare agency for failing to consider the best interest of the child in making custody determinations.²⁰² In *Ashley K.*, the Illinois appellate

199. Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 937 (Feb. 1994). Racial matching does not adequately consider the child's best interest nor does it focus on social relationships the child may have developed with foster parents of a different race. This policy may result in many adoptable minority children remaining unadopted due to a dearth of minority parents seeking to adopt. Policies against trans-racial adoption work to the detriment of minority children. Placements of minority children are delayed, often for years, because of racial matching policies with the effect of denying adoptive homes to minority children. See Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1206 (1991).

200. The National Association of Black Social Workers has long been opposed to transracial adoption, stating that "Black children should be placed only with Black families whether in foster care or adoption." Bartholet, *supra* note 199, at 1184 (citing National Association of Black Social Workers, Position Paper (April 1972)), reprinted in R. SIMON & H. ALSKIN, *TRANSRACIAL ADOPTION* (1977) at 50-52.) As a result, most public and private adoption agencies are governed by race matching policies in making placements for children. Bartholet, *supra* note 199, at 1184; see also Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER J. 39 (1993).

201. Bartholet, *supra* note 199, at 1182.

202. See *In re Ashley K.*, 571 N.E.2d 905 (Ill. App. 1991).

court noted that the Illinois Department of Children and Family Services regulations required the Department to consider "whether the parents show an interest in the child's well-being" in deciding whether to return a child to his or her biological parents, but that nowhere in its regulations did the Department specify that the best interest of the child must be considered.²⁰³ The court criticized the Department's evaluation procedures, stating that "[i]f it is not in the best interest of the child in placement to return home . . . it makes no difference whether the parents show an interest in the child's well-being."²⁰⁴

Other efforts to preserve "families" have been suggested. One proposal would provide trial periods ranging from a few weeks to six months during which biological parents could reclaim their children.²⁰⁵ However, such policies could result in shifting of custody, carrying all the accompanying evils discussed in Part III. Allowing biological parents to reclaim children six months after placement would also seriously endanger adoption. How many prospective adoptive parents would want to begin forging a bond with a child knowing that the child might be taken away? Anecdotal evidence suggests that few prospective adoptive parents are willing to take such risks.²⁰⁶ Even if prospective adoptive parents were willing to take this risk, such a policy would be detrimental to the child because, inevitably, adoptive parents would hold back emotionally, fearful of losing the child. This complication would strain an already difficult process of bonding with a new child.

In any case, concern for biological parents who relinquish their children and later change their minds, regardless of their race or economic status, is misplaced. Our sympathy should be for the Gregories, Jessicas, and other children who are given up by their biological parents and placed in loving homes only to be subjected to bitter custody battles years later by the very people who gave them up in the first place.

Although employing a best interest standard raises the specter of the abuse of judicial discretion, this standard does represent a considerable advancement over child custody standards that focus on the parents' interests.²⁰⁷ Forcing parents to articulate their claims to children in terms of the children's welfare expresses a societal preference for protecting children's rather than adults'

203. *Id.* at 923.

204. *Id.*

205. Shapiro, *supra* note 194, at 319.

206. At least two families decided not to adopt American children, choosing instead to adopt children abroad out of a fear that an American birth mother might later demand the return of the child. Lee Hockstader & Marylou Tousignant, *Bringing Home Twice the Joy*, WASH. POST, Oct. 23, 1994, at A6; Interview with Victoria Higman, adoptive mother, Dec. 1, 1994. Ms. Higman stated that she and her husband decided not to adopt an American baby after reading about the case of Jessica DeBoer. She also knows other adoptive parents who made the same decision.

207. See Katharine T. Bartlett, *Re-expressing Parenthood*, 98 YALE L.J. 293, 302 (1988).

Parental Kidnapping Prevention Act

interests.²⁰⁸ While the best interest standard is not without problems, Professor Mnookin seems to have reached the right conclusion when he declares that “while the indeterminate best-interests standard may not be good, there is no available alternative that is plainly less detrimental.”²⁰⁹ This standard can be improved in practice by requiring that court hearings consider only factors relating to the child’s relationships with caretakers and biological parents.

IV. LEGISLATIVE PROPOSAL

In making custody determinations in adoption cases, the judicial focus needs to move away from an examination of the fitness of the biological parents and toward the problem of meeting the child’s needs.²¹⁰ Unfortunately, under current law, the child’s interests are typically balanced against, and subordinated to, the biological parent’s “rights.” If a biological parent has relinquished his or her child and later seeks to reclaim that child, he or she should have to overcome the presumption that, in accordance with the child’s need for continuity, custody ought not to be disturbed.²¹¹ The best way for Congress to encourage states to consider a child’s best interest and the strength of his or her social relationships is to amend the PKPA to provide that in interstate custody disputes, courts need not enforce the orders of other courts that have not conducted a best interest hearing focusing on the child’s social relationship with his or her custodians. States that fail to require courts to hold such hearings will face the possibility that their courts’ custody determinations will not be given full faith and credit in other jurisdictions.²¹²

Congress should implement this policy by amending the PKPA²¹³ to provide that in cases involving contested adoptions where the child already resides with her prospective adoptive parents, courts must hold a hearing and consider the following factors: the extent of the detriment to the child in being moved from the child’s custodial environment; the nature of the relationship between the biological parent(s) and the child; the nature of the relationship between the prospective adoptive parent(s) and the child; and the recommendation of the child’s guardian *ad litem*.

These provisions would force courts making custody determinations in adoption cases to consider the child’s best interest—focusing on the child’s

208. *Id.*

209. Mnookin, *supra* note 184, at 282.

210. See GOLDSTEIN ET AL., *supra* note 164, at 79.

211. *Id.* at 62.

212. It might be argued that it would be more effective simply to require states to conduct a best interest analysis in order to have their custody determinations be given full faith and credit by the courts of other states. However, such a requirement might run afoul of the Tenth Amendment limitations on Congress’s authority to mandate state laws. See *New York v. United States*, 112 S.Ct. 2408 (1992).

213. See Appendix A for the full text of the current PKPA, along with my suggested revisions.

social relationships—and the detriment the child might suffer by being moved. This modified best interest test does not leave courts with as much discretion as the traditional best interest test. Instead, courts would focus on the criteria necessary to determine how the child's social relationships and, consequently, the child's social development would be affected by a particular custody decision. I would also require that a guardian *ad litem* be appointed to make a recommendation regarding the child's custody as an additional precaution to ensure that the child's interests are represented objectively and independently from the interests of the litigants. This approach answers many of the criticisms leveled at the traditional best interest test.

To avoid inciting any prospective litigant from committing illegal acts in the hope of later winning legal custody, under the amended PKPA, litigants would have to have acted in good faith.²¹⁴ Such a provision is necessary in order to avoid child-snatching, forum-shopping, and other illegal means of avoiding a court's custody determination—the problems that led to the enactment of the PKPA in the first place. "Good faith" includes those actions taken by an unhappy litigant to avoid a court's decision so long as those actions are within the law. Appealing a decision or utilizing creative legal means to reach a desired result would fall within the definition of "good faith."²¹⁵ Kidnapping would not.

In addition to these changes, all proceedings undertaken pursuant to the PKPA should be expedited. It is detrimental to children to allow custody debates to drag on for years and years. A child is more easily moved when he or she is three months old than when he or she is three years old. Moreover, failure to act expeditiously in considering such actions unfairly benefits the individual or individuals who have physical custody, as a child will obviously develop closer and stronger ties with the people with whom the child resides.

V. CONCLUSION

By amending the PKPA to include a best interest hearing that focuses on the child's social relationships, Congress and society could insure that courts are considering the child's welfare when his or her custody and future are determined. Even under this revised standard it is possible that Jessica would have been placed with the Schmidts. However, had the PKPA provided that

214. Although some commentators as well as some courts, see *Bennett v. Jeffreys*, 356 N.E.2d 277, 284 (N.Y. 1976), discussed *supra* at text accompanying notes 67-74, have noted that child-snatching should be discounted in considering custody, public policy concerns require a limitation preventing those who would seek to gain legal custody through illegal child-snatching or forum-shopping from doing so.

215. Under such a standard, in the *Clausen* case the DeBoers acted in "good faith," even though they were the ones who prolonged the litigation. If, however, the DeBoers had lived in Iowa and had moved to Michigan to escape the jurisdiction of the Iowa courts, they would not have acted in good faith.

Parental Kidnapping Prevention Act

Michigan was not required to give full faith and credit to the Iowa custody decision because the Iowa court had declined to make a best interest determination, the Michigan court would have been free to consider what was best for Jessica. In addition, an amended PKPA would likely prompt all states to require that a best interest hearing be conducted in the initial custody decision. Under a PKPA-type scheme, courts would move away from a property-based view of children to an understanding that children are people to whom social relationships are just as, if not more, significant than mere biological ties.

APPENDIX A

The PKPA should be revised as follows (proposed additions appear in italics):

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by the court of another State.

(b) As used in this section, the term—

(1) “child” means a person under the age of eighteen;

(2) “contestant” means a person, including a parent, *or, in cases involving a contested adoption, a person acting as a parent*, who claims a right to custody or visitation of the child;

(3) “custody determination” means a judgment, decree or other order of a court providing for the custody or visitation of a child; and includes permanent and temporary orders, and initial orders and modifications; *and includes decrees, judgments, orders of adoption, and orders dismissing or denying petitions for adoption;*

(4) “home State” means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, a person acting as a parent *with whom the child has been living for at least six consecutive months, a prospective adoptive parent, or an agency with legal custody during a proceeding for adoption*, and in the case of a child less than six months old, the State in which the child lived from birth, *or from soon after birth*, with any of such persons. Periods of temporary absence of any such persons are counted as part of the six-month or other period;

(A) except that in cases involving a proceeding for adoption, the “home State” shall be the State in which:

(i) immediately preceding commencement of the proceeding, and not counting periods of temporary absence, the child is in the custody of the prospective adoptive parent(s);

(ii) the child and the prospective adoptive parents are physically present in the State and the prospective adoptive parent has lived in that State for at least 6 months; and

(iii) there is substantial evidence available concerning the child’s present or future care;

(5) “modification” and “modify” refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the

Parental Kidnapping Prevention Act

same child, whether made by the same court or not;

(6) “person acting as a parent” means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) “physical custody” means actual possession and control of a child; and

(8) “State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(c) A child custody determination made by a court of the State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home state of the child on the date of the commencement of the proceeding, or (ii) had been the child’s home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child’s present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment and abuse;

(D)(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child; and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long

as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

- 1) it has jurisdiction to make such a custody determination; and
- 2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination; *and*
- 3) *in cases of contested adoption, where the child has resided with the prospective adoptive parent(s) for at least six months, and if the court finds by clear and convincing evidence that the court of the other State failed to consider:*

A) the extent of the detriment to the child in being moved from the child's custodial environment;

B) the nature of the relationship between the biological parent(s) and the child;

C) the nature of the relationship between the prospective adoptive parent(s) and the child; and

D) the recommendation of the child's legal representative or guardian ad litem.

- 4) *This section shall only apply if the party seeking a new hearing:*
 - i) has acted in good faith; and*
 - ii) has not abused or attempted to abuse the legal process.*

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

(h) In all contested custody proceedings, including adoption proceedings, undertaken pursuant to this Act:

- 1) all proceedings and appeals shall be expedited; and
- 2) *funds shall be made available for states to provide legal counsel to children.*