

## NOTES

ADOPTION—PSYCHOLOGICAL v. BIOLOGICAL PARENTHOOD IN DETERMINING THE BEST INTERESTS OF THE CHILD—*In re P, & wife*, 114 N.J. Super. 584, 277 A.2d 566 (App. Div. 1971).

Four days after birth, an infant girl born out of wedlock was placed in the custody of plaintiffs by *N*, her natural mother. *N* had voluntarily relinquished all parental rights to the child and thereafter plaintiffs instituted an action seeking adoption.<sup>1</sup>

Approximately two and one-half months after placement of the child with plaintiffs, *N* and the natural father, whom *N* had subsequently married, contested the adoption application, requesting the child's return. Approximately one year after the action was commenced, the trial court decided that the interests of the infant would best be served by returning her to her natural parents. Subsequently, plaintiffs moved for a new trial and this motion was denied. However, transfer of the child from plaintiffs to the natural parents was stayed pending appeal attacking both the judgment and the denial of plaintiffs' motion.<sup>2</sup>

The New Jersey Superior Court, Appellate Division, concluded that the order which called for the transfer of the infant to her natural parents was improper, and reversed and remanded the case for entry of judgment in favor of plaintiffs.<sup>3</sup> While noting that caution should be exercised in severing the natural ties between parent and child, the court acknowledged that the controlling factor was the best interests of the child.

[W]here the natural parent . . . voluntarily, freely and understandingly gives consent, with a present resolution to abandon parental rights, that consent should be considered irrevocable and binding, absent fraud or some overriding equitable consideration, and assuming that such a result is not inimical to the welfare of the child.<sup>4</sup>

The current New Jersey Adoption Act,<sup>5</sup> unlike earlier legislation,<sup>6</sup>

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<sup>1</sup> *In re P, & wife*, 114 N.J. Super. 584, 586, 277 A.2d 566, 567 (App. Div. 1971).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 595, 277 A.2d 572.

<sup>4</sup> *Id.* at 591, 277 A.2d 570.

<sup>5</sup> N.J. STAT. ANN. §§ 9:3-17 *et seq.* (1960). For an excellent analysis of the 1954 Adoption Act, see Note, *Survey of New Jersey Adoption Law*, 16 RUTGERS L. REV. 379 (1962).

<sup>6</sup> The earliest New Jersey legislation on the subject of adoption was enacted in 1877 (Law of March 9, 1877, ch. 83, §§ 1-6, [1877] N.J. Laws 123-27) and was subsequently

does not make parental consent a statutory prerequisite to an action for adoption.<sup>7</sup> The sole reference to consent<sup>8</sup> provides that where the parent or parents have surrendered the custody of their minor child to an approved agency by written consent, such consent is binding on the parents. This consent is irrevocable, except at the discretion of the agency or upon order or judgment of the court setting aside the surrender upon proof of fraud, duress, or misrepresentation.<sup>9</sup>

In an adoption proceeding, where parental consent has been revoked, the best interests of the child<sup>10</sup> and the rights of the natural

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amended more than 15 times, culminating in the Adoption Act of 1954 (Law of July 23, 1953, ch. 264, §§ 1-20, [1953] N.J. Laws 1768-78). For an excellent review of pre-1954 adoption laws, see Silberman, *Adoption in New Jersey—An Analysis of Its Legal Effects and Consequences*, 1 *RUTGERS L. REV.* 250 (1947).

The previous law (Law of May 22, 1951, ch. 104, §§ 1-2, [1951] N.J. Laws 509-11) contained a detailed consent codification. Specifically, it required the written consent of (1) the child's parents; (2) one parent if the other was dead, unknown or mentally incompetent, or had forsaken parental obligations or was divorced from the father or mother of the child because of his or her adultery, desertion or extreme cruelty; (3) the legal guardian if both parents were disqualified under circumstances described in (2) *supra*; (4) the Department of Institutions and Agencies, or any orphanage, children's home or society incorporated in this state and appointed next friend if there was no guardian; or (5) any orphanage or children's home or society incorporated under New Jersey law for the care of children, or the State Board of Child Welfare which had acquired custody and control of the child, by grant of the parents or by other legal means. Moreover, it was required that documentary proof be presented in the court for reasons pertaining to the absence of parental consent. Additionally, consent of either parent was declared binding, irrespective of the age of such parent at the time such consent was granted.

<sup>7</sup> *In re Adoption By B*, 63 N.J. Super. 98, 102, 164 A.2d 65, 67 (App. Div. 1960) (legislature, in 1954 Act, eliminated parental consent in a case like the present one); *In re Jacques*, 48 N.J. Super. 523, 526-27, 138 A.2d 581, 582-83 (Ch. 1958) (parental consent no longer a statutory prerequisite); *In re Adoption of D*, 78 N.J. Super. 117, 124, 187 A.2d 628, 632 (Union County Ct., P. Div. 1963) (parental consent no longer required by statute where no approved agency involved).

<sup>8</sup> N.J. STAT. ANN. § 9:3-19.1 (1960).

<sup>9</sup> The courts have established the exception to irrevocability of parental consent to an adoption by considering N.J. STAT. ANN. § 9:3-19.1 (1960) together with N.J. STAT. ANN. § 9:2-16 (1960) (part of N.J. STAT. ANN. §§ 9:2-14 *et seq.*, dealing with child custody). *In re T*, 95 N.J. Super. 228, 236, 230 A.2d 526, 530 (App. Div. 1967).

<sup>10</sup> *In re P*, & wife, 114 N.J. Super. 584, 589-90, 277 A.2d 566, 569-70 (App. Div. 1971); see *In re Adoption By B*, 63 N.J. Super. 98, 104, 164 A.2d 65, 68 (App. Div. 1960) (best interest of the child is primary concern in adoption proceedings vis-à-vis the natural rights of the parents); *In re Adoption of D*, 78 N.J. Super. 117, 124, 187 A.2d 628, 629 (Union County Ct., P. Div. 1963) (best interest of child is controlling). See also, *In re Jacques*, 48 N.J. Super. 523, 533, 138 A.2d 581, 586 (Ch. 1958), wherein the court stated:

An infant begins to feel that this world is a good place through the faces he begins to recognize. These faces need not be those of his natural father and mother. He only knows that they are the ones who comfort him and brush away his fears and tears and in whom he places his love and trust. To destroy this trust would result in a feeling of rejection just at a time when his outlook on life is being formed. . . .

. . . A parent, by transplanting his offspring into another family and surrender-

parent<sup>11</sup> have been the criteria employed by the courts in determining whether or not the adoption should be granted. Of course, where the parent is found to be unfit or unwilling to assume parental obligations, his right to custody will be terminated,<sup>12</sup> and the court will not have to contend with the issue of consent in rendering the final judgment.

Prior to the enactment of the present Act, the courts, in contested adoption proceedings, were divided on the question of how much emphasis should be placed on the right of the natural parents vis-à-vis the best interests of the child. One opinion was that parental consent must continue up to the final adoption judgment.<sup>13</sup> Another was that parental rights are to be considered, but the best interests of the child are paramount.<sup>14</sup> In determining which criteria to apply in resolving contested adoption proceedings, the courts have considered the public policy of the present Adoption Act, namely:

(a) to protect the child from unnecessary separation from his natural parents, from adoption by persons unfit for such responsibility, and from interference by his natural parents after he has been established in an adoptive home;

(b) to protect the natural parents from hurried or abrupt decisions to give up the child; and

(c) to protect the adopting parents from assuming responsibility for a child without sufficient knowledge of the child's heredity and capacity for physical and mental development, and, having accepted a child for adoption, from later disturbance of their relationships to the child by the natural parents.<sup>15</sup>

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ing all care of it for so long a time that its interest and affection all attach to the adopted home, may thereby seriously impair his right to have back its custody by judicial decree.

<sup>11</sup> For use of the "parental consent" test in an adoption proceeding, see *In re N*, 96 N.J. Super. 415, 233 A.2d 188 (App. Div. 1967); *In re Schult*, 14 N.J. Super. 587, 590, 82 A.2d 491, 493 (Hudson County Ct., P. Div. 1951), wherein it was stated:

[W]here the law provides that parental consent is an essential prerequisite in adoption, it means the intelligent, deliberate and voluntary consent of the parent, . . . and such consent must continue up until the actual judicial approval of the adoption.

<sup>12</sup> N.J. STAT. ANN. § 9:3-24 (A), (C) (1960).

<sup>13</sup> *In re Schult*, 14 N.J. Super. 587, 590, 82 A.2d 491, 492-93 (Hudson County Ct., P. Div. 1951); see *Gardner v. Hall*, 132 N.J. Eq. 64, 79-84, 26 A.2d 799, 808-11 (Ch. 1942), *aff'd per curiam*, 133 N.J. Eq. 287, 31 A.2d 831 (Ct. Err. & App. 1943) (absent abandonment parental consent is essential to binding adoption judgment).

<sup>14</sup> *E.g.*, *Lavigne v. Family & Children's Soc'y of Elizabeth*, 11 N.J. 473, 479, 95 A.2d 6, 9 (1953) (welfare of the child to be the controlling consideration in an adoption proceeding); *In re Adoption of D*, 78 N.J. Super. 117, 124, 187 A.2d 628, 632 (Union County Ct., P. Div. 1963) (parental rights not to be ignored, but best interests of child overriding factor).

<sup>15</sup> N.J. STAT. ANN. § 9:3-17 (1960); *In re Adoption of N*, 96 N.J. Super. 415, 422, 233 A.2d 188, 191-92 (App. Div. 1967); *In re T*, 95 N.J. Super. 228, 236, 230 A.2d 526, 530 (App. Div. 1967); *In re Adoption of D*, 78 N.J. Super. 117, 122, 187 A.2d 628, 630 (Union County Ct., P. Div. 1963). See N.J. STAT. ANN. § 9:3-27 (1960).

The trend of present authority has been to subordinate the rights of the natural parents in determining the best interests of the child.<sup>16</sup> The majority position has been that while caution should be exercised in severing the child-parent relationship, the welfare of the child is the dominant consideration.<sup>17</sup> Although initially a natural parent has a right to custody of the child, that right is secondary to the primary responsibility of the state, as *parens patriae*, in promoting the child's welfare and best interests.<sup>18</sup>

As indicated previously, this was the view adopted in *In re P*,

<sup>16</sup> 114 N.J. Super. at 589, 277 A.2d at 569; *In re Adoption of D*, 78 N.J. Super. 117, 124, 187 A.2d 628, 632 (Union County Ct., P. Div. 1963). See *Lavigne v. Family & Children's Soc'y of Elizabeth*, 11 N.J. 473, 479-80, 94 A.2d 6, 9 (1953); *In re Guardianship of B.C.H.*, 108 N.J. Super. 531, 537, 262 A.2d 4, 7 (App. Div. 1970); *In re Adoption of B*, 63 N.J. Super. 98, 104, 164 A.2d 65, 68 (App. Div. 1960); *In re Jacques*, 48 N.J. Super. 523, 533, 138 A.2d 581, 586 (Ch. 1958); *In re Guardianship of C*, 98 N.J. Super. 474, 492, 237 A.2d 652, 662 (Union County Juv. & Dom. Rel. Ct. 1967).

<sup>17</sup> Jurisdictions following the majority position include *Massachusetts*, *In re Adoption of a Minor*, 338 Mass. 635, 156 N.E.2d 801 (1959); *Missouri*, *In re G.K.D.*, 332 S.W.2d 62 (Mo. Ct. App. 1960); *North Dakota*, *McKay v. Mitzel*, 137 N.W.2d 792 (N.D. Sup. Ct. 1965) (custody dispute); *Oregon*, *Dugger v. Laules*, 216 Or. 188, 338 P.2d 660 (1959).

Jurisdictions following the minority position include *California*, *Moffit v. Moffit*, 242 Cal. App. 2d 580, 51 Cal. Rptr. 683 (1966) (custody dispute); *Georgia*, *Mills v. Mills*, 218 Ga. 686, 130 S.E.2d 221 (1963) (custody dispute); *Kentucky*, *Berry v. Berry*, 386 S.W.2d 951 (1965) (custody dispute); *New York*, *People ex rel. Scarpetta v. Spence-Chapin Adoption Serv.*, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971).

See generally 2 AM. JUR. 2d *Adoption* §§ 23-78 (1962); Finlay & Gold, *The Paramount Interest of the Child in Law and Psychiatry*, 45 AUSTR. L.J. 82, 92 (1971) (discusses the role of psychiatric testimony in custody proceedings); Lasok, *The Legal Status of the Putative Father*, 17 INT. & COMP. L.Q. 634, 638-39 (1968) (discussion of English adoption case, *Re C.* (M.A.) (an infant) 1 All E.R. 838 (1966), with fact situation similar to *In re P*, & wife; lower court's ruling in favor of returning the infant to natural parent was affirmed on appeal, notwithstanding psychiatric evidence that separation of the infant from the prospective adopting parents might be harmful to the infant's personality development); Michaels, *The Dangers of a Change of Parentage in Custody and Adoption Cases*, 83 L.Q. REV. 547 (1967) (opined that psychological criteria used in determining best interest of child will become more important when medical profession is able to quantify degree of harm to the child upon being returned to the natural parent—so long as uncertainty exists in area of medical research, supremacy of parental rights in parent-stranger adoption disputes will continue); Simpson, *The Unfit Parent: Conditions Under Which a Child May Be Adopted Without the Consent of His Parent*, 39 U. DET. L.J. 347 (1962); Comment, *Family Law—Custody of Children*, 59 KY. L.J. 529, 534 (1970) (distinguishing between biological and psychological parent); Comment, *Revocation of Parental Consent to Adoption: Legal Doctrine and Social Policy*, 28 U. CHI. L. REV. 564 (1961); Note, *Divorce—The Welfare and Best Interest of the Child*, 5 WILLAMETTE L.J. 82 (1968); Note, *Custody of Minor Children—Award To A Fit Parent May Be Reversed On Appeal If For The Best Interests of The Child*, 7 J. FAMILY L. 81 (1967) (comment on *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, cert. denied, 385 U.S. 949 (1966), where the Supreme Court of Iowa reversed lower court's decision holding that a fit parent may be deprived of his child's custody if the best interests of the child are served); Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963).

<sup>18</sup> *In re Adoption By B*, 63 N.J. Super. 98, 104, 164 A.2d 65, 68 (App. Div. 1960).

& wife,<sup>19</sup> and is consistent with the earlier decision of *In re Adoption of D.*<sup>20</sup> In the latter case, a written consent was executed by the natural parents and the care and custody of their three and one-half year old child was transferred to plaintiffs. Three months later, adoption proceedings were commenced, at which time the natural parents revoked their original consent. While cognizant of the parents' rights, it was held that the cardinal principle controlling adoptions is the best interests of the child.<sup>21</sup> In finding for plaintiffs, the court said that:

Where a consent is voluntarily, freely and understandingly given, with a resolution to abandon parental rights, it appears . . . unreasonable to hold that parents can arbitrarily . . . withdraw such consent and expect the court to return the child concerned to them. This seems especially true where in reliance upon the consent the child's entire status has changed, as has the status of the adoptive parents who have proceeded in good faith to make the child a part of their family group and have adequately provided for the child. Certain bonds of affection have developed, and the child's adjustment to her new home and family environment is normal and fixed; her memory of the past, because of her tender age, has substantially diminished or completely disappeared.<sup>22</sup>

Arguments favoring the rights of natural parents are presented in *Lavigne v. Family and Children's Society of Elizabeth*,<sup>23</sup> where Justice Wachenfeld in his dissenting opinion stated:

There is no law or legislative mandate, prior to adoption, forever closing the door to recapture by parents whose responsibility and parental instincts are reawakened and normalized by the impact of physical separation. The natural parents of a child are entitled, against all the world, to its custody, and only the primary consideration of the child's welfare has priority over this frequently expressed doctrine. Abandonment, even though it occur, can be repented of and, subject to the child's best interests, parental rights and custody can be again acquired.<sup>24</sup>

Consistent with this viewpoint is *In re N.*,<sup>25</sup> where it was held that the ties between parent and child should not be severed unless there is "clear and convincing" evidence which establishes unfitness, abandonment, or neglect by the natural parent.<sup>26</sup> The position there espoused was that:

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<sup>19</sup> 114 N.J. Super. at 591, 277 A.2d at 570.

<sup>20</sup> 78 N.J. Super. 117, 187 A.2d 628 (Union County Ct., P. Div. 1963).

<sup>21</sup> *Id.* at 125, 187 A.2d at 632.

<sup>22</sup> *Id.* at 126, 187 A.2d at 633.

<sup>23</sup> 11 N.J. 473, 95 A.2d 6 (1953).

<sup>24</sup> *Id.* at 484, 95 A.2d at 12.

<sup>25</sup> 96 N.J. Super. 415, 233 A.2d 188 (App. Div. 1967).

<sup>26</sup> *Id.* at 423, 233 A.2d at 192.

[O]ur current laws do recognize, as a matter of public policy, that parental rights are essential factors for judicial consideration in an adoption contest. The parental relationship is an integral part of the "best interests" test; otherwise, any person could adopt a child if he were potentially a better parent than the child's natural mother or father. The welfare of a child is inextricably bound up with the rights of the parent.<sup>27</sup>

The phrase, "in the best interests of the child," has proved to be an amorphous generalization which varies in definition from court to court.<sup>28</sup> Due to the importance of this phrase, the establishment of guidelines has been, and continues to be, a necessity. The court, in *In re P, & wife*, by incorporating into the best interests test the criteria of psychological parenthood, *i.e.*, the mutual interaction between adult and child described in terms of love, attention, basic trust, and confidence, has finally begun the development of more precise standards for determining the child's best interests.<sup>29</sup> The court reasoned that during the first three to five months of life an infant begins to form what is termed a "focused relationship" with the mother. In the next six months, an "affection relationship" begins to develop between the child and mother, at which time the child may experience "stranger anxiety." If the infant is separated from the mother during the latter period, the experience could be severely traumatic and upsetting to the child.<sup>30</sup>

In analyzing this reasoning, a more detailed understanding of the psychological theories upon which it was based is required. The emo-

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<sup>27</sup> *Id.* The court distinguished between a custody proceeding and an adoption proceeding. When custody is at issue the court is much more likely to make a temporary grant, always subject to reconsideration, on the basis of the welfare of the child in light of advantages and opportunities offered by competing parties, but deeper and broader considerations are demanded in adoption proceedings where parent-child relationship is sought to be permanently severed.

<sup>28</sup> The test followed here, if it is a test in any sense of the word, does not gain meaning by mere repetition, nor do its words express limitations characteristic of our traditions in the role of government. Under its sanction the wholesale removal of children from parents, and their placement in State-controlled institutions may, under some conceptions of government, be justified as being in accord with their "best interests." The terms "welfare" and "best interests," however pleasing may be their sound, afford little in the way of a guide. Where the issue is fitness, the character, behavior and circumstances of particular individuals provide boundaries within which evidence can be confined and with respect to which rational decisions can be made. Where the issue is nothing more specific than welfare, the range of inquiry is virtually unlimited, with corresponding room for arbitrary or personal decision.

Giacopelli v. Florence Crittenton Home, 16 Ill. 2d 566, 567, 158 N.E.2d 613, 619 (1959). *In re Jackson*, 164 Kan. 391, 399-400, 190 P.2d 426, 432-33 (1948). See also cases cited notes 7. & 11 *supra*.

<sup>29</sup> 114 N.J. Super. at 594, 277 A.2d at 571.

<sup>30</sup> *Id.*

tional interaction between parent and child, defined in terms of love, trust, and identification, is considered essential for the child's successful development and is the basis of psychological parenthood.<sup>31</sup> Although a biological parent has a potential for establishing a sound psychological relationship with the child, this potential significantly diminishes the longer the child is in the care and custody of a third party.<sup>32</sup> Any prior relationship with the biological parent deteriorates to the point that it is supplanted by the latter relationship. A child may, with the passage of time, learn to look upon the third party as his true parent. At this point, a return of custody to the natural or biological parent would have a severely disruptive effect on the existing psychological relationship that has developed, and would work considerable emotional harm upon the child.<sup>33</sup>

Schafer<sup>34</sup> has postulated that permanent object relations (such as with a parent figure) do not become possible until the child sees others as separate beings clearly distinct from one another and from his own "self." This identity differentiation occurs around the middle of the first year, with some authorities suggesting that its formation may begin as early as three months of age.<sup>35</sup> Concurrent with this is the establishment of a focused relationship with a specific parent-figure.<sup>36</sup> Assuming there is no interruption of this parent-child interaction, a growing and intensifying affection or love relation with the parent-figure evolves.<sup>37</sup> The foundations of basic trust in the world

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31 See E. ERIKSON, *Growth and Crises of the "Healthy Personality,"* in PERSONALITY IN NATURE, SOCIETY AND CULTURE 185-225 (C. Kluckhohn & H. Murray eds. 1953); Freud, *Some Remarks on Infant Observation*, 8 PSYCHOANAL. STUDY OF THE CHILD 9, 16-17 (1953); see generally J. BOWLBY, *CHILD CARE AND THE GROWTH OF LOVE* (1953).

32 See A. FREUD & D. BURLINGHAM, *INFANTS WITHOUT FAMILIES* 53, 57-58, 63-126 (1944).

33 Heinicke, *Some Effects of Separating Two-Year-Old Children from their Parents: A Comparative Study*, 9 HUM. RELAT. 105-76 (1956); Hill & Price, *Childhood Bereavement and Adult Depression*, 113 BRIT. J. PSYCHIAT. 743 (1967).

34 Schaffer, *Objective Observations of Personality Development in Early Infancy*, 31 BRIT. J. MED. PSYCH. 174, 179 (1958).

35 Yarrow, *Research in Dimensions of Early Maternal Care*, 9 MERRILL-PALMER QUART. 101-14 (1963); Yarrow, *Separation from Parents During Early Childhood*, in REVIEW OF CHILD DEVELOPMENT RESEARCH 89 (Hoffman & Hoffman eds. 1964) [hereinafter cited as CHILD DEVELOPMENT].

36 Authorities cited note 35 *supra*. See also 1 J. BOWLBY, *ATTACHMENT AND LOSS*, 265-68 (1969).

37 Freud, *supra* note 31, at 17; CHILD DEVELOPMENT *supra* note 35, at 98. See also Bowlby, *The Nature of the Child's Tie to His Mother*, 39 INT'L J. PSYCHOANAL. 350 (1958) (infant undergoes a stage-wise development process, according to which various instinctual components of the child's attachment behavior to the mother do not become integrated and focused on one specific individual until the second half of the first year). See generally Bowlby, Ainsworth, Boston, & Rosenbluth, *The Effects of Mother-Child Separation: A Follow-Up Study*, 29 BRIT. J. MED. PSYCHOL. 211-47 (1956); Bowlby, *Separation Anxiety: A Critical Review of the Literature*, 1 J. CHILD PSYCHOL. & PSYCHIAT. 251-69 (1960).

around him now develop and the child begins to formulate secure associations with others.<sup>38</sup> An absent or destitute parental relationship may be responsible for regression and retardation of a child's emotional and intellectual development.<sup>39</sup> The trauma of separating a child from the custody of an adult with whom an affection-relationship exists may psychologically be equivalent to orphaning that child. While he will probably form a new affection-relationship with another parent-figure, this interaction may be of lesser quality and strength.<sup>40</sup>

In ascertaining the effects of separation, one of the major variables to be considered is the age of the child.<sup>41</sup> Although chronological age is useful as an indicator, it is not by itself a sensitive index of the depth of the relationship with the psychological parent. Even though some studies suggest that focused relationships are established by the time the child is six months old, other criteria must also be examined. A study of the effects of separation in early infancy indicates that a focused individualized relationship with a parent-figure does not appear suddenly but develops gradually.<sup>42</sup> Therefore, it is likely that the significance of separation for the child will vary with the stage of development of the focused relationship rather than with the child's chronological age.

Bowlby has suggested that a child passes through at least four phases during which a focused relationship with the parent-figure develops.<sup>43</sup> During the first phase, lasting from birth to about twelve weeks, the infant generally cannot distinguish one person from another. Infantile behavior toward others during this phase is marked by tracking movements of the eyes, grasping, reaching, smiling and babbling. During the second phase, lasting until about six months of age, the infant is able to distinguish between the parent-figure and others and begins to focus his attention on the former. Thus, the infant is more apt to respond positively to the sight and sounds of the mother than to a stranger.<sup>44</sup>

With the onset of the third stage, the focused relationship be-

<sup>38</sup> Authorities cited note 37 *supra*.

<sup>39</sup> Spitz, *Hospitalism*, 1 PSYCHOANAL. STUDY OF THE CHILD 53 (1945); Spitz, *Anaclitic Depression*, 2 PSYCHOANAL. STUDY OF THE CHILD 313 (1946). See also Finlay & Gold, *supra* note 17, at 93, for a review of psychoanalytic considerations in custody proceedings.

<sup>40</sup> Authorities cited note 39 *supra*.

<sup>41</sup> CHILD DEVELOPMENT, *supra* note 35, at 121; Ainsworth, *The Effects of Maternal Deprivation: A Review of Findings and Controversy in the Context of Research Strategy*, in DEPRIVATION OF MATERNAL CARE, PUBLIC HEALTH PAPER NO. 14, GENEVA: WORLD HEALTH ORGANIZATION 97, 101 (1962).

<sup>42</sup> CHILD DEVELOPMENT, *supra* note 35, at 122; Schaffer, *supra* note 34, at 177-79.

<sup>43</sup> J. Bowlby, *supra* note 36.

<sup>44</sup> *Id.* at 266.



tween the child and parent-figure intensifies and the friendly and indiscriminate responses to others wane. At this point, the child may experience "stranger anxiety," manifested by alarm and withdrawal reactions in the presence of strangers. This phase begins between six and seven months and may continue throughout the second year and into the third. The fourth phase overlaps the third and is marked by the beginning of a complex emotional or affection relationship between the child and parent-figure. The child begins to acquire insight into the parent-figure's feelings and motives, providing the groundwork for the developing affection-relationship.<sup>45</sup>

Imprinting studies in animals have revealed specific stages in an animal's development at which it is most sensitive to maternal separation.<sup>46</sup> On the basis of these studies, Yarrow has hypothesized that there may be a specific developmental period in the child's personality growth during which vulnerability to separation is greatest. He theorizes that the most sensitive time is the period during which the infant is in the process of establishing the affection-relationship with the parent, between six months and two years of age. A break in the relationship with the parent during this period could be *traumatic* and the effects could be *permanently damaging* to the growth of the child's personality.<sup>47</sup>

It is further maintained by Yarrow that the psychological situation of the infant during the first six months is very different from that of a child during the second year.<sup>48</sup> As a result of the perfection of motor skills and language development, the child moves from a situation of almost complete immobility and dependence on the parent, to increased independence and mastery of his environment. On this basis, he suggests that separation would be less traumatic to the child past two years of age than to the completely helpless, dependent infant.<sup>49</sup> Thus, there appears to be a complex interaction between the type of separation, the age of the child, and the degree of traumatic reaction.

This concept of "changing vulnerabilities" suggests the need for an awareness of:

- (1) particular developmental sensitivities and focal conflicts at different ages;
- (2) the quality of the relationship with the parent prior to separation;

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<sup>45</sup> *Id.* at 267-68.

<sup>46</sup> Hess, "Imprinting" in *Animals*, in *FRONTIERS OF PSYCHOLOGICAL RESEARCH* 13-17 (S. Coopersmith ed. 1964).

<sup>47</sup> *CHILD DEVELOPMENT*, *supra* note 35, at 122.

<sup>48</sup> *Id.* at 123.

<sup>49</sup> *Id.*

- (3) the character of parental care subsequent to the initial separation;
- (4) the character of the relationship with the parent during temporary separation;
- (5) the duration of the separation experience;
- (6) subsequent reinforcing experiences, and
- (7) the role of constitutional factors.<sup>50</sup>

In recent years there has been renewed consideration of congenital factors in aggravating or modifying the impact of early adverse experiences. Studies have shown the existence of basic differences and sensitivities in response predispositions among infants at birth or during the first month of life.<sup>51</sup> These differential sensitivities and dispositions may influence the impact experienced by the child.

Buxbaum<sup>52</sup> has applied a Freudian interpretation to the type of trauma suffered by a child when separated from its parent-figure. An infant, as it matures, passes through various phases of psychological development.<sup>53</sup> Children's reactions to the trauma of separation will depend on their phase of development and on their individual experiences and conflicts. This concept is referred to as "'phase-specific' traumata."<sup>54</sup>

When the child has developed object relationship and recognition, separation from the parent-figure may impair the continued development of such relationships. After the infant has established a strong dependency on the parent-figure, separation may cause depression and a lessening of ego functions. If a deep-rooted trust in the parent-figure exists, aggression and guilt feelings may result from separation. Further, if the child has reached the oedipal phase and has achieved the ability to love in the sense of adult love, separation reactions may be largely in the form of oedipal conflicts and fantasies.<sup>55</sup>

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<sup>50</sup> *Id.* at 121-27.

<sup>51</sup> *Id.* at 126.

<sup>52</sup> E. BUXBAUM, *TROUBLED CHILDREN IN A TROUBLED WORLD* (1970).

<sup>53</sup> *Id.* at 7-22. In the first year of life the infant is in the oral phase where it is totally dependent on the mother. During this time the mouth is an erogenous zone and affords the infant the greatest pleasure. The second year brings on the anal phase where the child exhibits a growing control over his bodily functions and where ego development is in full force. Later stages of development include the phallic phase, where the child experiences strong genital feeling; the oedipal phase, where, having established his sexual identity, the child develops a strong love attachment with the parent of the opposite sex and, correspondingly, strong death wishes for the other parent; and the latency phase, where the strong love attachment and death wishes are sublimated.

<sup>54</sup> *Id.* at 28.

<sup>55</sup> *Id.* at 28-29.

It is to be noted that the studies discussed heretofore were generally short-term in scope. In fact, few longitudinal follow-up studies have been performed to determine how well the child functioned as an adult. Additionally, the data from these follow-up studies were somewhat contradictory and did not establish a firm relationship between adult personality disorder and childhood separation trauma.<sup>56</sup>

Other studies have shown that multiple mother-figures may not necessarily be detrimental to the child.<sup>57</sup> Although a child establishes an affection-relationship with the first parent-figure, he may extrapolate this later in life to other parent-figures with whom he comes into contact.<sup>58</sup> Assuming that the quality of love, affection, and attention is the same, an affection-relationship of equivalent intensity may develop with the other parent-figure.<sup>59</sup> Furthermore, another study indicated that increasing disturbance and progressive deterioration in behavior were not inevitable consequences of separation.<sup>60</sup> The quality of substitute maternal care was shown to influence the severity of the separation reaction. Infants provided with adequate mother-substitutes did not manifest the severe reactions of children having inadequate mother-substitutes.<sup>61</sup> It was also found that the duration of the separation influenced the possibility of recovery.<sup>62</sup> It was concluded that recovery *was possible* if the infants were reunited with their mothers within *three months*.<sup>63</sup> While it is generally accepted that short-term trauma may result from separation of the child from the parent-figure, the long term effects of such a separation have not been well-defined.<sup>64</sup>

In view of the importance of childhood development to the personality structure of the individual, it is apparent that personality disturbance would be most likely if psychological well-being were given only secondary consideration in determining the placement of a child in an adoption proceeding.<sup>65</sup> Primary concern for the psychological, rather than the physical and material welfare of the child, is implicit

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<sup>56</sup> CHILD DEVELOPMENT, *supra* note 35, at 99, 103, 106, 127.

<sup>57</sup> Mead, *A Cultural Anthropologist's Approach to Maternal Deprivation*, in DEPRIVATION OF MATERNAL CARE, PUBLIC HEALTH PAPER NO. 14, GENEVA: WORLD HEALTH ORGANIZATION, 45-62 (1962); Rabin, *Some Psychosexual Differences between Kibbutz and Non-Kibbutz Israeli Boys*, 22 J. PROJ. TECH. 328-32 (1958).

<sup>58</sup> CHILD DEVELOPMENT, *supra* note 35, at 110, 112.

<sup>59</sup> *Id.*

<sup>60</sup> Spitz, 2 PSYCHOANAL. STUDY OF THE CHILD, *supra* note 39, at 321.

<sup>61</sup> *Id.* at 335.

<sup>62</sup> *Id.* at 330-31.

<sup>63</sup> *Id.* at 330.

<sup>64</sup> CHILD DEVELOPMENT, *supra* note 35, at 99, 127-28.

<sup>65</sup> Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 157 (1963).

in several of the criteria employed by the courts in connection with the application of the "best interests test." For instance, some past considerations have included the extent of love between the child and the parent, the effects of the disruption of existing relationships, and the character and personality of the competing parties.<sup>66</sup>

This concern indicates an awareness of the desirability of employing psychological criteria in guarding the child's welfare in an adoption proceeding. It has been suggested that the aim of a psychological "best interests test" would be to identify the existing affection or love relationship<sup>67</sup> of the particular child involved in the adoption proceeding. The relationship could be inferred from a consideration of the continuity of the relationship between child and adult in terms of intensity and duration, the love of the adult for the child, and the affection and trust of the child for the adult.<sup>68</sup>

An unbroken relationship between child and adult would be good evidence of a developing emotional affiliation. On the other hand, intermittent interactions between the child and adult would suggest poorly formed affection ties. Additionally, consideration of the adult's feelings toward the child, and even toward himself, would help determine whether the adult was able to enter into a viable relationship with another person. Finally, the child's own attitude toward the adult may suggest the existence of an affection-relationship.<sup>69</sup>

In recognizing the importance of the psychological well-being of the child and in subordinating the rights of the biological parents, *In re P, & wife*, has taken a rational approach to determining the disposition of a child in a contested adoption proceeding. However, caution must be exercised in extending the court's holding to other situations. Specifically, this case must be viewed as circumscribed by its facts, namely, an adoption pertaining to a child of very tender years, where the child has not developed an affection-relationship with the biological parent prior to transfer of custody to the third party.

In more complicated situations, for example, where the child to be adopted has been with the biological parents for several years so that an affection-relationship has developed, the problems of the court in rendering a proper decision become more complex and difficult. Consideration of only the psychological relationship between the child and parent-figure may not be justified in the latter situations. Additionally, in cases where the parent has contested the adoption of the

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<sup>66</sup> See cases cited notes 7 & 10 *supra*.

<sup>67</sup> Note, *supra* note 65, at 162-63.

<sup>68</sup> See generally Erikson, *supra* note 31, at 190-97.

<sup>69</sup> *Id.*

infant within a few weeks after commencement of the adoption action, but where judicial delay has prevented a speedy adjudication, the natural parent's right to the child should be considered, coupled with the psychological best interests of the child.

Another situation could involve a parent's voluntary surrender of the child to an agency where there is fraud, duress, or misrepresentation accompanying the surrender. By statute,<sup>70</sup> New Jersey courts can revoke the surrender. In this instance the natural parent's right should also be considered coupled with the child's psychological best interests, notwithstanding the running of the six or seven month interaction period.

A myriad of factual situations can therefore be envisioned where attention to only the psychological best interests of the child, without consideration of natural parental rights, would lead to a morally and judicially unsound decision. In short, each case will have to be evaluated on its own merits in determining whether to place primary emphasis on psychological criteria vis-à-vis parental rights. Use of psychological criteria in determining whether or not an affection-relationship exists may require additional input in order for the court to render a fair and equitable decision.

*Arnold D. Litt*

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<sup>70</sup> N.J. STAT. ANN. § 9:2-16 (1960).