

Independent Adoption: In Whose Best Interest?

In the last two years, this nation has witnessed the stirring conclusions to two highly-contested adoption cases.¹ On August 2, 1993, the birth parents of two-and-a-half-year old "Baby Jessica" removed the tearful child from the home of the people she had come to know as her parents.² Likewise, on April 30, 1995, the estranged birth parents of four-year-old "Baby Richard" took the distraught child from the only home he had ever known.³ The "Baby Jessica" case⁴ and the "Baby Richard" case⁵ are two well-publicized contested adoptions that have catapulted the current state of adoption law into the public eye.⁶ The public asks how and why this could have happened to these innocent children, while adoptive parents live in fear of the proverbial "knock at the door."⁷

More than 100,000 adoptions are granted in this country every year.⁸ These adoptions occur in essentially two forms: agency

¹ *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992) and *In re Petition of Doe to Adopt Baby Boy Janikova*, 638 N.E.2d 181 (Ill.), cert. denied, 115 S. Ct. 499 (1994).

² Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 967 (1994) (observing that the nation "watched transfixed as [Baby Jessica] was dragged sobbing, from the arms of her prospective adoptive mother"); Kristen Korn, *The Struggle for the Child: Preserving the Family in Adoption Disputes Between Biological Parents and Third Parties*, 72 N.C. L. REV. 1279, 1279 (1994) (noting that most of this country watched on August 2, 1993 as Baby Jessica was taken away "from the only parents she had ever known"). See also Mark Hansen, *Fears of the Heart*, ABA J., Nov. 1994, at 58 (taking note of three of the most publicized adoption cases, involving Baby Jessica, Baby Richard, and Baby Emily).

³ Alex Rodriguez, *Traumatic Day Tries Neighbor's Emotions*, CHI. SUN TIMES, May 1, 1995, at 1.

⁴ *B.G.C.*, 496 N.W.2d at 239.

⁵ *Janikova*, 638 N.E.2d at 181.

⁶ Korn, *supra* note 2, at 1280 (referring to the media attention given to these disputes between birth parents and third parties); see also Elizabeth Bartholet, *What's Wrong with Adoption Law?*, 30 TRIAL 19, 19 (1994) (observing that the Baby Jessica case "focused attention on problems with U.S. adoption laws").

⁷ Korn, *supra* note 2, at 1280 (explaining that media accounts of disputes between birth parents and adoptive parents "have struck fear into the hearts of adoptive parents who are now afraid of losing their children to biological parents"); Bartholet, *supra* note 6, at 19 (commenting that the public reaction to these contested adoption cases "indicates a widespread sense that something very wrong is happening" and that "[p]opular sympathy is with the parents who have invested years of nurturing over those whose claims are based on biology").

⁸ Joan Heifetz Hollinger, *Adoption Law*, 3 THE FUTURE OF CHILDREN 43, 44 (1993). There may be as many as 150,000 to 160,000 adoptions granted each year. *Id.*

These adoptions are governed by international, federal, and state law. *Id.* at 45 (noting that adoption is complicated by the number of governments that have the authority for regulation, by the number of federal statutes, and by constitutional principles). Aside from each state's laws on adoption, the Indian Child Welfare Act, fed-

adoption⁹ and independent adoption.¹⁰ For better or for worse, the traditional method of agency adoption appears to be giving way to the more controversial independent adoption.¹¹

AGENCY ADOPTION

In New Jersey, adoption agencies are nonprofit organizations, approved and regulated by the Department of Human Services.¹² State statute governs the standards by which these agencies select adoptive parents.¹³ The law specifically prohibits discrimination against prospective parents on the basis of gender, race, national origin, age, religion, or marital status.¹⁴ The law provides, how-

eral immigration and naturalization laws, the federal Adoption Assistance and Child Welfare acts, federal welfare, Social Security laws, tax laws, and United States Supreme Court rulings all affect adoptions. *Id.* at 45-46; *see, e.g.*, *In re Adoption of a Child of Indian Heritage*, 111 N.J. 155, 166 (1988) (considering the applicability of the Indian Child Welfare Act). The existing state adoption laws are not uniform and are not uniformly applied by courts, lawyers, or child welfare agencies. Hollinger, *supra*, at 45. When children are brought from one state to another, the parties "must also comply with the Interstate Compact on the Placement of Children." Mark T. McDermott, *Agency Versus Independent Adoption: The Case for Independent Adoption*, 3 THE FUTURE OF CHILDREN 146, 148 (1993).

Due to the plethora and complexity of the laws governing adoption, many efforts have been made to achieve uniformity. Hollinger, *supra*, at 46. These efforts include the Uniform Adoption Act, the Uniform Parentage Act, the Interstate Compact on the Placement of Children, the Model Act for the Adoption of Children with Special Needs, and the Convention on Intercountry Adoption. *Id.*

⁹ N.J. STAT. ANN. § 9:3-39.1 (West 1993) (directing that approved agencies may place, offer to place, and "materially assist in the placement of" children for adoption in New Jersey). In an agency adoption, birth parents surrender their child and relinquish all parental rights to an adoption agency. McDermott, *supra* note 8, at 146.

¹⁰ McDermott, *supra* note 8, at 146. In an independent adoption, birth parents surrender their child and relinquish their parental rights to the prospective adoptive parents. *Id.* Independent adoption includes intrafamily adoption and international adoption. Hollinger, *supra* note 8, at 44, 45 (stating that "[h]alf or more of all adoptions are by stepparents or other relatives"). The intrafamily adoption is the least regulated of all adoptions. *Id.* at 44. The number of adoptions of children born outside the United States by American citizens is increasing rapidly. *Id.* at 45; *see generally* Jorge L. Carro, *Regulation of Intercountry Adoption: Can the Abuses Come to an End?*, 9 AM. J. FAM. L. 135 (1995) and Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT'L & COMP. L.J. 187 (1994).

¹¹ McDermott, *supra* note 8, at 146.

¹² N.J. STAT. ANN. § 9:3-38(a) (West 1993) (defining an approved agency as "a non-profit corporation, association or agency, including any public agency, approved by the Department of Human Services for the purpose of placing children for adoption").

¹³ *Id.* at § 9:3-40.

¹⁴ *Id.* The Supreme Court of New Jersey has held that adoption agencies may not require prospective adoptive parents to hold membership in an established religion. *In re Adoption of "E"*, 59 N.J. 36, 51, 279 A.2d 785, 793 (1971). Such a requirement would violate New Jersey case law, state statute, and the First Amendment of the

ever, that an agency may consider these factors to determine whether a particular placement serves a child's best interests.¹⁵ Because the demand for healthy, adoptable infants is significantly greater than the supply,¹⁶ agencies are able to establish demanding criteria for prospective parents.¹⁷ In effect, the agencies may discriminate in the name of the child's best interests.¹⁸

Aside from the rigid and discriminating criteria, agency adoptions are also criticized for the lengthy process and great expense.¹⁹ It can take longer than six years²⁰ and more than \$20,000 to adopt a child through an agency.²¹ The irrevocable surrender and permanent termination of parental rights provided by agency

United States Constitution. *Id.* In *Adoption of "E"*, the court held that the prospective adoptive parents' lack of belief in a "Supreme Being" was not grounds for denial of the adoption. *Id.* at 50, 279 A.2d at 792. The court explained that, although there may be an inquiry into the moral fitness of the prospective parents, religious belief or lack thereof cannot be controlling. *Id.*

¹⁵ N.J. STAT. ANN. § 9:3-40 (West 1993). Agencies are permitted to match adoptive parents and children based on common religious beliefs and may establish priorities regarding racial background and ethnic and cultural heritage. Hollinger, *supra* note 8, at 48.

¹⁶ Lisa J. Trembly, *Untangling the Adoption Web: New Jersey's Move to Legitimize Independent Adoptions*, 18 SETON HALL LEGIS. J. 371, 371-72 (1993). The number of healthy adoptable infants has decreased due, at least in part, to the availability of contraceptives, the legalization of abortion, and societal acceptance of single mothers. *Id.* at 372; see also Hollinger, *supra* note 8, at 44 (stating that fewer babies born out of wedlock are relinquished for adoption).

¹⁷ McDermott, *supra* note 8, at 147.

¹⁸ *Id.* (observing that the standards imposed on prospective parents by agencies are sometimes arbitrary and have no relationship to the ability to be adequate parents). Some adoption agencies use age, religious preference, and residence as qualifications for prospective parents. *Id.*; see also Trembly, *supra* note 16, at 372 (noting the shortage of infants and the rigid criteria used by agencies). Agencies also consider marital status and whether the prospective parents already have a child. Trembly, *supra* note 16, at 372. The criteria used by these agencies do not necessarily predict who will be competent parents. *Id.* at 372-73. The child's age, medical history, and social history have been found to be the most important factors in successful placements, not the ethnic, racial, or religious characteristics of the parents. Hollinger, *supra* note 8, at 48-49. The imposition of the rigid criteria often harms the children by delaying placement for so long that the children risk being deprived of permanent placement. *Id.* at 48.

¹⁹ See *infra* notes 20-21 and accompanying text.

²⁰ Trembly, *supra* note 16, at 373 (explaining that waiting periods for agency adoptions range from three to six years); see also McDermott, *supra* note 8, at 147 (observing that long waiting periods are typical with agency adoptions). Other sources indicate that the waiting period can last from two to 10 years. Trembly, *supra* note 16, at 397 (citing NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATION AND RESOURCES 6, 175 (1989)).

²¹ Trembly, *supra* note 16, at 373. Some sources declare that agency adoptions can cost \$30,000 or more. *Id.* at 373 n.11 (citing Diane Guernsey, *Adoption: The Chosen Child*, TOWN & COUNTRY, May 1993, at 96).

adoption, however, greatly outweighs these disadvantages.²²

There can be no adoption, agency or otherwise, without a valid termination of the biological parents' rights.²³ Parental rights, though, are fundamental, constitutionally-protected rights²⁴ and cannot be severed without due process.²⁵ A New Jersey statute clearly articulates the steps an agency must take to permanently terminate those parental rights.²⁶ When those steps are followed correctly, the birth parents' rights are permanently terminated.²⁷ In contrast, the termination of parental rights in independent adoption demands greater scrutiny by the court²⁸ and entails

²² Compare *In re B.G.C.*, 496 N.W.2d 239, 245 (Iowa 1992) and *In re Petition to Adopt Baby Boy Janikova*, 638 N.E.2d 181, 183 (Ill.), cert. denied, 115 S. Ct. 499 (1994) (independent adoption cases where the court ordered the return of children to birth parents whose rights could not be terminated) with *Lavigne v. Family and Children's Soc'y*, 11 N.J. 473, 482, 95 A.2d 6, 11 (1953) (agency adoption case where the court found that the surrender of the child to the agency was irrevocable and refused to return the child to the birth parents).

²³ *In re Baby M*, 109 N.J. 396, 428, 537 A.2d 1227, 1243 (1988) (citing *In re Adoption of Children by D.*, 61 N.J. 89, 95, 293 A.2d 171, 173-74 (1972)).

²⁴ *In re Adoption of a Child by D.M.H.*, 135 N.J. 473, 480, 641 A.2d 235, 238, cert. denied, 115 S. Ct. 43 (1994) (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)); *In re Adoption of Children by L.A.S.*, 134 N.J. 127, 132, 631 A.2d 928, 930 (1993) (recognizing that parental rights are surrounded by extraordinarily strong protections and that "[t]he right of a biological parent to enjoy a relationship with his or her child is fundamental and constitutionally protected"); *New Jersey Div. of Youth and Family Servs. v. A.W.*, 103 N.J. 591, 599, 512 A.2d 438, 442 (1986) (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)) (observing that parental rights have been found to be fundamental, constitutionally protected, essential, basic rights, and more precious than property rights).

²⁵ *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982). The *Santosky* Court addressed the evidentiary standard for cases concerning the termination of parental rights. *Id.* The Court held that a state must "support its allegations by at least clear and convincing evidence," *id.* at 748, before a parent's rights may be completely and irrevocably severed. *Id.* at 747.

²⁶ N.J. STAT. ANN. § 9:3-41(a) (West 1993).

²⁷ *Id.* (directing that the surrender of parental rights is irrevocable).

²⁸ *Id.* § 9:3-48(a). Because children are surrendered from one private party to another, New Jersey state statute directs that the court receiving the complaint for adoption shall

[d]eclare the child to be a ward of the court . . . [a]ppoint an approved agency to make an investigation and submit a written report to the court which shall include: . . . the facts and circumstances surrounding the surrender of custody by the child's parents . . . an evaluation of the child and the [prospective adoptive parents] and any other person residing in the prospective home; and . . . any fees, expenses or costs paid by or on behalf of the adopting parent in connection with the adoption.

Id. Further, the agency

shall, if it is able to, contact the birth parent and confirm that counseling . . . has either been provided or waived by the birth parent. If not previously provided, the agency shall advise the parent of the availability of such counseling through the agency and shall provide such counsel-

greater risk for the prospective adoptive parents.²⁹

In an agency adoption, the biological parent must execute a "surrender" instrument.³⁰ The surrender cannot be obtained until seventy-two hours after the birth of the child.³¹ Prior to the signing of the surrender instrument, the agency must inform the parents that the instrument is a surrender of parental rights, manifesting the permanent end of the parent/child relationship.³² The agency must also offer counseling to the parents prior to the execution of the surrender.³³ When these steps have been followed, the surrender of parental rights is deemed "irrevocable."³⁴ In the absence of fraud, duress, or misrepresentation, the parental rights are permanently terminated and the adoption may proceed.³⁵ With these safeguards in place, the inherent risks of adoption, such as losing a

ing if requested. . . . The agency shall further confirm that the birth parent has been advised that the decision of the birth parent not to place the child for adoption or the return of the child to the birth parent can not be conditioned upon the repayment of expenses by the birth parent to the adoptive parent.

Id. The cost of this investigation is borne by the prospective adoptive parents. *Id.*

²⁹ McDermott, *supra* note 8, at 148 (explaining the emotional and financial risks of independent adoption). If a birth parent objects to the adoption, the court may deny the adoption and return custody of the child to the birth parents. *See, e.g., Sees v. Baber*, 74 N.J. 201, 226, 377 A.2d 628, 641 (1977). *See also infra* note 77 (discussing the financial risks of independent adoption).

³⁰ N.J. STAT. ANN. § 9:3-41(a) (West 1993) (directing that the "[s]urrender of a child to an approved agency for the purpose of adoption . . . shall be by a signed instrument").

³¹ *Id.* § 9:3-41(e) (explaining that "[a] surrender of a child shall not be valid if taken prior to the birth of the child . . . [or] . . . if taken within 72 hours of the birth of the child"). The statute also explains that a denial of paternity at any time, including prior to birth, is deemed a surrender for the purpose of adoption of the child. *Id.*

³² *Id.* § 9:3-41(a). The agency is instructed to "inform the person executing the surrender that the instrument is a surrender of parental rights by the signatory and means the permanent end of the relationship and all contact between the parent and child." *Id.*

³³ *Id.* The statute directs that the surrender is valid and binding, regardless of "the age of the person executing the surrender and shall be irrevocable except at the discretion of the approved agency taking such surrender or upon order or judgment of a court of competent jurisdiction setting aside such surrender upon proof of fraud, duress or misrepresentation by the approved agency." *Id.*

³⁴ *Id.*

³⁵ *Id.* The adoptive parent(s) must file a complaint for adoption with the court after the child has been in the home for at least six months. N.J. STAT. ANN. § 9:3-47(a) (West 1993). The prospective parent(s) may file the complaint before the end of the six-month period, at which time the court may schedule and hold an in-camera "hearing to resolve all matters except finalization of the adoption." *Id.* §9:3-47(a) and (c). The adoption agency must file a written report with the court, describing the surrender of the child and evaluating the prospective parent(s), the child, and any other person who resides in the prospective home. *Id.* §9:3-47(b). If the court finds that the best interests of the child will be promoted by the adoption, based upon the

child because a birth parent changes his or her mind, are minimized.³⁶

The Supreme Court of New Jersey has long recognized the value of the irrevocable surrender of parental rights in agency adoptions.³⁷ In *Lavigne v. Family and Children's Society of Elizabeth*,³⁸ a married couple surrendered their child to an agency and executed a valid surrender instrument with full knowledge of its effect.³⁹ Nine months after the surrender, the father contacted the agency seeking the return of the child.⁴⁰ The agency advised the father that the surrender was irrevocable.⁴¹ The Supreme Court of New Jersey determined that the surrender was indeed irrevocable.⁴² The court instructed that requiring a surrender to be irrevocable "embodies a sound public policy."⁴³ If adoption agencies are to function, the court reasoned, agencies must be permitted to plan for children without interference.⁴⁴

agency's report and evidence presented at the hearing, the court will enter a judgment of adoption. *Id.* §9:3-47(d).

³⁶ *OSee, e.g., L. Jean Emery, Agency Versus Independent Adoption: The Case for Agency Adoption*, 3 *THE FUTURE OF CHILDREN* 139, 141 (1993) (emphasizing the importance of the comprehensive services that adoption agencies provide to birth parents, who are struggling "with the question of whether to relinquish their child for adoption," such as: (1) informing birth parents of available resources and helping them obtain these services; (2) providing birth parents "with a clear statement regarding their legal rights, obligations, and responsibilities"; (3) supporting birth parents when they consider "what their decision will mean to them and to their child"; (4) assisting "in transferring parental rights to the agency"; (5) completing the termination of parental rights; (6) assisting in separating birth parents from the child; and (7) assisting birth parents "in coping with their emotional conflicts and grief").

³⁷ *See, e.g., Lavigne v. Family and Children's Soc'y*, 11 N.J. 473, 482, 95 A.2d 6, 11 (1953).

³⁸ *Id.*

³⁹ *Id.* at 476-77, 95 A.2d at 7-8. The parents originally surrendered the child, at the age of seven months, to the defendant for temporary placement in a foster home because the father was suffering severe emotional disturbances, attributed in part to the child. *Id.* at 475-76, 95 A.2d at 7. Seven months later, the child was returned to the parents because the foster parents were no longer able to care for the child. *Id.* at 476, 95 A.2d at 8. Two months later, the parents again surrendered the child to the defendant and executed a formal surrender and consent to the child's adoption. *Id.* at 476-77, 95 A.2d at 8. The court found that the parents fully understood the effect of signing the surrender. *Id.* at 477, 95 A.2d at 8.

⁴⁰ *Id.* at 478, 95 A.2d at 8.

⁴¹ *Id.* The Superior Court, Chancery Division, granted the plaintiffs' request for the return of the child. *Id.* at 475, 95 A.2d at 7. The Superior Court, Appellate Division, affirmed the decision of the lower court. *Id.* The defendant petitioned the appellate division for a rehearing or for remand for additional testimony, but the motion was denied. *Id.* The defendant petitioned the Supreme Court of New Jersey for certification, which was granted. *Id.*

⁴² *Lavigne*, 11 N.J. at 482, 95 A.2d at 11.

⁴³ *Id.* at 481-82, 95 A.2d at 10-11.

⁴⁴ *Id.* at 482, 95 A.2d at 11.

The *Lavigne* court verbalized an opinion that has recently been the center of great debate, litigation, and legislation.⁴⁵ The court commented that adoption agencies benefit society because they are unselfish, experienced, nonprofit associations.⁴⁶ In contrast, the court stressed, independent adoptions are detrimental to society because they involve private, inexperienced individuals with personal motives that do not include the best interests of the child.⁴⁷

INDEPENDENT ADOPTION

Independent adoption is by no means a new method of adoption, having been used as early as the 1930s.⁴⁸ It is only in recent years, however, that the number of independent adoptions has exceeded agency adoptions.⁴⁹ Independent adoptions take two forms: direct placement and private placement.⁵⁰ Direct placement occurs when the birth parents and the prospective adoptive parents arrange the adoption without the assistance of a third party.⁵¹ Private placement occurs when a third party, referred to as an intermediary, introduces the birth parents to the prospective adoptive parents.⁵²

⁴⁵ See, e.g., Hansen, *supra* note 2, at 58 (listing the recent, well-publicized contested adoption cases, each one an independent adoption); Korn, *supra* note 2, at 1279-80 (observing that the rash of contested independent adoptions has generated debate among sociologists and legal scholars regarding the rights of birth parents, third parties, and the welfare of the child); N.J. STAT. ANN. § 9:3-39.1 (West 1993) (approving the use of intermediaries in independent adoptions, thus legalizing private placement adoption and making independent adoption more available).

⁴⁶ *Lavigne*, 11 N.J. at 482, 95 A.2d at 11.

⁴⁷ *Id.* Numerous other courts have voiced similar opinions about private adoption. See, e.g., *Sees v. Baber*, 74 N.J. 201, 216-17, 377 A.2d 628, 636 (1977) (holding that the decision to return the child to the birth mother was supported by the fact that "the adoption was attempted through an unsupervised and unregulated private placement"). The *Sees* court expressed further support for agency adoptions, explaining that "agency adoptions are designed to protect natural parents from precipitous decisions. They serve as well the interests of adoptive parents and the welfare of the child." *Id.* at 217, 377 A.2d at 636, (citing *State v. Wasserman*, 75 N.J. Super. 480, 489, 183 A.2d 467, 472 (App. Div. 1962), *aff'd.*, 39 N.J. 516, 189 A.2d 218 (1963)). The Supreme Court of New Jersey continues to express this opinion regarding private adoptions. *In re Baby M*, 109 N.J. 396, 422, 537 A.2d 1227, 1240 (1988) (citing *Sees*, 74 N.J. at 217, 377 A.2d at 636)). In the infamous *Baby M* case, the court explained that although private placement adoption is permitted in New Jersey, it is very much disfavored. *Id.*

⁴⁸ McDermott, *supra* note 8, at 146.

⁴⁹ *Id.*

⁵⁰ Trembly, *supra* note 16, at 378.

⁵¹ *Id.*

⁵² *Id.*

Until 1994, New Jersey prohibited the use of intermediaries in adoption.⁵³ Prior to 1994, therefore, direct placement was the only form of independent adoption permitted in New Jersey.⁵⁴ The Legislature, however, recently amended the adoption statute and provided for the use of intermediaries, thus legalizing private placement adoption.⁵⁵

On a national level, there has been an increase in independent adoptions.⁵⁶ Experts cite a variety of reasons for this increase.⁵⁷ First, with an agency adoption, birth parents are typically not involved in the selection of adoptive parents.⁵⁸ Some birth parents are more comfortable surrendering a child for adoption when they have personally selected the adoptive parents.⁵⁹ Independent adoption makes this possible, and the contact between the birth parents and adoptive parents can also result in a more "open" adoption.⁶⁰

⁵³ N.J. STAT. ANN. § 9:3-39 (West 1977) (repealed 1993) (prohibiting any "person, firm, partnership, corporation, association or agency" from placing or materially assisting "in the placement of any child for adoption in New Jersey unless such person shall be the parent or guardian of the child, or such firm, partnership, corporation, association or agency shall be an approved agency").

⁵⁴ *Id.*

⁵⁵ N.J. STAT. ANN. § 9:3-39.1 (West 1993) (permitting intermediaries to place, offer to place, and materially assist in placing children for adoption). An "intermediary" is defined as "any person, firm, partnership, corporation, association or agency, who acts for or between any parent and any prospective parent or acts on behalf of either in connection with a placement for adoption of the parent's child." *Id.* § 9:3-38(1). Intermediaries may "not receive money or other valuable consideration in connection with the placement of a child for adoption." *Id.* Any "person, firm, partnership, corporation, association, intermediary or agency other than an approved agency which pays, seeks to pay, receives, or seeks to receive money or other valuable consideration in connection with the placement of a child for adoption shall be guilty of a crime of the second degree." *Id.* § 9:3-39.1(d).

⁵⁶ McDermott, *supra* note 8, at 146 (stating that "more newborns are placed each year through independent adoption than through private agency adoption" in this country).

⁵⁷ See *infra* notes 58-68 and accompanying text.

⁵⁸ McDermott, *supra* note 8, at 147; Trembly, *supra* note 16, at 399.

⁵⁹ McDermott, *supra* note 8, at 147 (stating that one explanation birth parents offer for their preference of independent adoption is the "desire to play an active role in the selection of the adoptive parents").

⁶⁰ *Id.* (noting that the openness of independent adoptions provides many benefits, such as psychological benefits to the birth parents, the adoptive parents, and the child). Specifically, birth parents better cope with their feelings of loss when they have met the adoptive parents. *Id.* at 148. The child benefits by receiving answers to questions about origin and may not suffer the void that interferes with identity formation. *Id.* The adoptive parents benefit by lessened fears of losing the child. *Id.*

A truly open adoption is one in which the adoptive parents agree "to allow a birthparent or another relative to maintain contact with a child after an adoption is final." Hollinger, *supra* note 8, at 50. See also *id.* at 50-51 (discussing open adoptions).

The applicable New Jersey statute provides that

Second, in an agency adoption, the child is often placed in temporary foster care while the birth parents' rights are terminated.⁶¹ In an independent adoption, the child can be placed with the prospective adoptive parents immediately.⁶² Many birth parents prefer to place an infant in his or her future home without delay and without the risks of danger known to exist in foster care.⁶³ Proponents of agency adoption argue, however, that there is greater risk in placing a child in the prospective parents' home without the type of approval an agency will first obtain.⁶⁴

[a]ll records of proceedings relating to adoption, including the complaint, judgment and all petitions, affidavits, testimony, reports, briefs, orders and other relevant documents, shall be filed under seal by the clerk of the court and shall at no time be open to inspection or copying unless the court, upon good cause shown, shall otherwise order.

N.J. STAT. ANN. § 9:3-52 (West 1993). The result of this statute, and ones like it in each state, is "a permanent veil of secrecy between adoptive and biological families." Hollinger, *supra* note 8, at 51. See *id.* at 51-55 (discussing the benefits and detriments of sealed adoption records and proposed solutions); see generally Jason Kuhns, *The Sealed Adoption Records Controversy: Breaking Down the Walls of Secrecy*, 24 GOLDEN GATE U. L. REV. 259 (1994) (reviewing the history of sealed adoption records, statutory authority, constitutional challenges, changing views, and the need for reform).

⁶¹ Trembly, *supra* note 16, at 397; McDermott, *supra* note 8, at 148-49.

⁶² McDermott, *supra* note 8, at 147 (stating that birth parents prefer independent adoption because the child can "go directly into the physical custody of the adoptive parents rather than into temporary foster care"). In an independent adoption, the prospective adoptive parents are commonly present at the hospital and may even be in the birthing room during the birth. *Id.* at 150. The prospective adoptive parents may also have access to the child between birth and release from the hospital. *Id.* Further, the child is often discharged from the hospital directly to the prospective adoptive parents. *Id.*

⁶³ Trembly, *supra* note 16, at 399 (asserting that many parents have fears concerning the child's placement in foster care); see also Stacy Robinson, *Remedying Our Foster Care System: Recognizing Children's Voices*, 27 FAM. L. Q. 395, 395 (1993) (stating that "under the current foster care system, the state often fails to protect the child from harm").

⁶⁴ Emery, *supra* note 36, at 144 (explaining that children are often placed in the prospective adoptive home before a home study is done).

Although the New Jersey Legislature made independent adoption more available by approving private placement adoptions, the Legislature added a safeguard for the children in such adoptions. N.J. STAT. ANN. § 9:3-39.1(a) (West 1993). The New Jersey statute only allows the intermediary to place a child with a person approved for placement "by an approved agency home study which consists of the agency's formal written assessment of the capacity and readiness of the prospective adoptive parents to adopt a child." *Id.* § 9:3-39.1(a)(4).

Unfortunately, in direct placement adoptions, a home study is not necessarily completed until some time after the child is received in the prospective adoptive parents' home. *Id.* § 9:3-48. The statute provides that when "a person receives a child into his home for the purpose of adoption other than from an approved agency, a complaint for adoption shall be filed within 45 days after receipt of the child." *Id.* § 9:3-44. When the court receives the complaint, the court shall appoint an approved agency to make an evaluation of the child and of the prospective adoptive parents

A third possible reason for the increase in independent adoptions is that prospective adoptive parents may provide financial assistance to the birth parents.⁶⁵ In New Jersey, prospective parents may pay, provide, or reimburse birth parents for medical and hospital expenses connected with the birth or illness of the child.⁶⁶ In addition, the birth mother may receive reasonable living expenses, such as payment for food, clothing, and shelter.⁶⁷ The statute also provides for payment of vocational, religious, psychological, or similar counseling services.⁶⁸

The benefit of financial assistance is an additional source of controversy⁶⁹ and a significant risk for the prospective parents.⁷⁰ New Jersey requires that a report to the court include fees and expenses paid by or on behalf of the adoptive parents with regard to the adoption.⁷¹ This purported safeguard may not be at all effective in prohibiting the buying and selling of children.⁷² Excessive fees will not be exposed until the child has been in the home of the

"and any other person residing in the prospective home." *Id.* § 9:3-48(a). Thus, a child may live in a home for 45 days or longer before any home study is completed.

The prospective adoptive parents' "[f]ailure to file the complaint in a timely manner shall not be a sole basis for refusal of the adoption but the failure shall require the filing, with the complaint, of an affidavit setting forth the reasons for the delay." *Id.* § 9:3-44.

⁶⁵ Hollinger, *supra* note 8, at 49 (observing that birth mothers prefer to deal with those "who will pay for pregnancy and birth-related medical and living expenses").

⁶⁶ N.J. STAT. ANN. § 9:3-39.1(e) (West 1993).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Hollinger, *supra* note 8, at 49. All states "decry baby selling, and most prohibit finder's fees to agencies or other intermediaries." *Id.*

⁷⁰ See *infra* note 77 (explaining the financial risks of independent adoption).

⁷¹ N.J. STAT. ANN. § 9:3-55 (West 1993). The statute directs that in every adoption, other than an intrafamily adoption, the prospective adoptive parents

shall file before the complaint is heard . . . a detailed report which shall be signed and verified by each prospective parent and shall disclose all sums of money or other valuable consideration paid, given or agreed to be given to any person, firm, partnership, corporation, association or agency . . . to whom the consideration was given or promised. The report . . . shall include but not be limited to expenses incurred or to be incurred by or on behalf of a prospective parent in connection with (1) The birth of the child; (2) The placement for adoption of the child with the prospective parent; (3) Medical or hospital care received by the mother or the child during the mother's pre- and postnatal period; and (4) Services relating to the adoption or to the placement for adoption, including legal services, which were rendered or are to be rendered to or for the benefit of the prospective parent, either parent of the child or any other person or agency.

Id.

⁷² See *infra* notes 73-74 and accompanying text.

prospective parents for several months.⁷³ This excessive payment may not be enough to invalidate the placement. If the court determines that the placement is otherwise in the best interests of the child, the court may approve the adoption and leave punishment to criminal or licensing authorities.⁷⁴ This practice will not deter prospective parents from offering financial incentives to birth parents and will only encourage a market, open only to the affluent, for adoptable infants.

Additionally, in any type of adoption, there is always the possibility that a birth parent will change his or her mind about surrendering the child.⁷⁵ In an agency adoption, the prospective parents will usually be spared most of the agency fees if a birth parent changes his or her mind prior to the termination of parental rights.⁷⁶ In an independent adoption, however, the birth parents are under no obligation to reimburse the prospective parents for any fees or expenses received.⁷⁷ This may leave prospective par-

⁷³ N.J. STAT. ANN. § 9:3-48 (West 1993) (directing that in an independent adoption, the preliminary hearing on the complaint is held "not less than two or more than three months from the date of the filing of the complaint"). Given that prospective adoptive parents have 45 days to file the complaint and then at least two months until the preliminary hearing date, the report detailing financial assistance may not be received by the court for more than three months after the child is received.

In an independent adoption, the agency report to the court must also include "any fees, expenses or costs paid by or on behalf of the adopting parent in connection with the adoption." *Id.* § 9:3-48(a)(2)(c). The agency report must be filed ten days prior to the date of the preliminary hearing. *Id.* § 9:3-48(a)(4). Again, financial disclosures will not be received by the court for as long as three months following the surrender of the child due to the 45 days permitted for filing of the complaint and the minimum two month wait for the preliminary hearing. See *In re Adoption of a Child* by D.M.H., 135 N.J. 473, 489, 641 A.2d 235, 242, 243 (1994) (noting that the prospective adoptive parents did not file the complaint for adoption until 10 months after the surrender of the child and acknowledging that prospective adoptive parents may or may not bring adoption actions within a reasonable time).

⁷⁴ Hollinger, *supra* note 8, at 49 (explaining that "[u]pon finding that a proposed adoption involves unlawful placement activities but is otherwise in the best interest of a child, many courts will approve the adoption and will leave the punishment of the unlawful activities to the criminal or licensing laws").

⁷⁵ Trembly, *supra* note 16, at 403.

⁷⁶ McDermott, *supra* note 8, at 148-49 (explaining that in an agency adoption, the child is often placed in temporary foster care until the birth parents' rights have been terminated and, thus, if the birth parents change their mind, the prospective adoptive parents will not have to pay some, if not all, of the agency's fees).

⁷⁷ *Id.* at 148 (stating that one of the financial risks of an independent adoption is that prospective adoptive parents may have already paid attorney's fees and medical expenses when the birth parents change their mind and will most likely not be reimbursed); Hollinger, *supra* note 8, at 49 (explaining that prospective adoptive parents "assume the risk of not being reimbursed for expenses they have paid on behalf of a birthparent who does not consent to an adoption or who revokes consent"); N.J. STAT. ANN. § 9:3-48(a)(2)(c) (West 1993) (directing that in an independent adop-

ents without the child they had hoped to adopt and without the resources to begin the process again.⁷⁸

Further, receiving substantial financial assistance may cause the birth parents to feel obligated to continue with the adoption.⁷⁹ In *In re Adoption of One Child by R.A.C.*,⁸⁰ the birth mother agreed to an independent adoption prior to giving birth.⁸¹ The prospective adoptive parents paid the birth mother's medical and hospital expenses.⁸² Following the child's birth, the birth mother became unhappy with the decision to surrender the child, but proceeded with the surrender because she felt committed to the prospective adoptive parents.⁸³

If the birth mother in *R.A.C.* could feel too committed to change her mind upon receipt of only the basic medical expenses, certainly birth parents who receive payment for additional expenses, such as food, clothing, shelter, and counseling, will feel even more obligated to follow through with an adoption. Unregulated financial assistance, therefore, creates serious problems. As demonstrated by *R.A.C.*, birth parents may feel significant pressure to surrender the child.⁸⁴ Birth parents who proceed with a surrender due to feelings of obligation may subsequently object to the adoption. Those objections can result in litigation that is financially and emotionally costly.⁸⁵

The most significant disadvantage of independent adoption involves the termination of parental rights.⁸⁶ The safeguards of an

tion, the court-appointed approved agency shall contact the birth parent and "confirm that the birth parent has been advised that the decision of the birth parent not to place the child for adoption or the return of the child to the birth parent can not be conditioned upon the repayment of expenses by the birth parent to the adoptive parent").

⁷⁸ McDermott, *supra* note 8, at 148 (noting that prospective adoptive parents "will most likely not be reimbursed by the birthparents").

⁷⁹ Emery, *supra* note 36, at 144 (explaining that the practice of payment for housing and medical services "creates a sense of obligation on the part of the birthparents to the adoptive parents which may unfairly influence the birthparents' decision"). The longer the birth parents receive financial assistance from the prospective adoptive parents, the greater the pressure to surrender the child will become. *Id.* The birth parents may not feel as though they are able to rethink their decision. *Id.*

⁸⁰ 154 N.J. Super. 513, 381 A.2d 1232 (App. Div. 1977), *certif. denied*, 75 N.J. 607, 384 A.2d 837 (1978).

⁸¹ *Id.* at 515, 381 A.2d at 1233.

⁸² *Id.*

⁸³ *Id.* at 516, 381 A.2d at 1233.

⁸⁴ *Id.*

⁸⁵ See generally *R.A.C.*, 154 N.J. Super. 513, 381 A.2d 1232.

⁸⁶ See *supra* note 22 (illustrating the importance of termination of parental rights and the different outcome in contested adoption cases depending upon whether the adoption was independent or through an agency).

agency adoption—such as an experienced, disinterested agency obtaining an informed surrender—are not present when a birth parent surrenders a child directly to a prospective parent.⁸⁷ Thus, the state must provide alternative safeguards to ensure that a parent's fundamental, constitutional right to enjoy a relationship with his or her child is not severed without due process.⁸⁸

When a child is properly surrendered to an adoption agency,

⁸⁷ As the court in *Lavigne v. Family and Children's Society* observed, independent adoptions are a disadvantage to society because they involve private, inexperienced individuals with personal motives that do not include the best interests of the child. *Lavigne*, 11 N.J. at 482, 95 A.2d at 11.

⁸⁸ N.J. STAT. ANN. § 9:3-48 (West 1993). Upon receipt of the complaint for adoption, the court must "[d]eclare the child to be a ward of the court and declare that the plaintiff shall have custody of the child subject to further order of the court." *Id.* § 9:3-48(a)(1). The court must

[a]ppoint an approved agency to make an investigation and submit a written report to the court which shall include: (a) the facts and circumstances surrounding the surrender of custody by the child's parents and the placement of the child in the home of the plaintiff; (b) an evaluation of the child and of the plaintiff and the spouse of the plaintiff if not the child's parent and any other person residing in the prospective home; and (c) any fees, expenses or costs paid by or on behalf of the adopting parent in connection with the adoption.

Id. § 9:3-48(a)(2).

The statute further provides that the agency shall contact the birth parent to confirm that counseling was provided or waived and, if not provided, shall offer such counseling. *Id.*

The court must set a date for a preliminary hearing for the purpose of determining "the circumstances under which the child was relinquished by his parents and received into the home of the plaintiff, the status of the parental rights of the parents, the fitness of the child for adoption and the fitness of the plaintiff to adopt the child and to provide a suitable home." *Id.* § 9:3-48(b).

If, after the preliminary hearing, the court finds that the birth parents do not have rights as to custody of the child by . . . their failure to make timely objection to the adoption or their substantial failure to perform the regular and expected parental functions of care and support of the child, although able to do so, or their inability to perform these functions which is unlikely to change in the immediate future; . . . the court shall . . . terminate the parental rights.

Id. § 9:3-48(c).

The process, however, is not complete at that time. The court must schedule a final hearing date on the adoption complaint no sooner than six months from the date of the preliminary hearing. *Id.* Further, the appointed adoption agency must visit the prospective adoptive parents' home from time to time and make another written report to the court at least 15 days prior to the final hearing. *Id.* § 9:3-48(d). If the appointed agency recommends the adoption, the court may dispense with the final hearing and enter a judgment of adoption immediately "if the court is satisfied that the best interests of the child would be promoted by the adoption." *Id.* § 9:3-48(e). If the court proceeds with a final hearing and "the court is satisfied that the best interests of the child would be promoted by the adoption, the court shall enter a judgment of adoption." *Id.* § 9:3-48(f).

the birth parents' rights are irrevocably terminated.⁸⁹ In an independent adoption, however, the court must make a legal finding that the birth parents' rights should be terminated.⁹⁰ In many cases, the courts have refused to terminate parental rights.⁹¹ Lengthy court battles concerning the termination of these rights are often waged between birth parents and prospective adoptive parents.⁹² The often inevitable surrender of a child to virtual strangers begs the question: How can this process be in the best interests of the child?

The only available answer comes from reviewing the two-step analysis a court makes when considering approving an independent adoption.⁹³ The threshold issue for the court is whether the birth parents' rights should be terminated.⁹⁴ It is only after the court terminates those parental rights that the court will consider whether placement with the prospective adoptive parents is in the child's best interests.⁹⁵

⁸⁹ See *supra* notes 32-35 and accompanying text (explaining that the valid surrender of a child to an adoption agency is "irrevocable").

⁹⁰ N.J. STAT. ANN. § 9:3-48(c) (West 1993).

⁹¹ *B.G.C.*, 496 N.W.2d 239, 246 (Iowa 1992); *Janikova*, 638 N.E.2d 181, 182 (Ill.), *cert. denied*, 115 S. Ct. 499 (1994).

⁹² See *generally*, *B.G.C.*, 496 N.W.2d at 239; *Janikova*, 638 N.E.2d at 181.

⁹³ See *infra* notes 94-95 and accompanying text.

⁹⁴ See, e.g., *B.G.C.*, 496 N.W.2d at 245 (stating that statutory grounds for termination must be established before a determination concerning the best interests of the child); *Janikova*, 638 N.E.2d at 182 (explaining that the father's parental rights could not be terminated and that this precluded any consideration of the child's best interests).

⁹⁵ See, e.g., *Janikova*, 638 N.E.2d at 182 (articulating that the threshold issue is the termination of parental rights and, if termination is appropriate, then the issue becomes what is in the child's best interests). *But cf.* *Sorentino v. Family & Children's Soc'y of Elizabeth*, 72 N.J. 127, 367 A.2d 1168 (1976) (*Sorentino I*) and *Sorentino v. Family & Children's Soc'y of Elizabeth*, 74 N.J. 313, 378 A.2d 18 (1977) (*Sorentino II*).

In *Sorentino I*, an adoption agency coerced a young birth mother to surrender her child. *Sorentino I*, 72 N.J. at 129, 367 A.2d at 1169. Three months later, the birth parents attempted to regain custody of their child, but were denied by the agency. *Id.* The birth parents sought legal advice, but were advised to delay legal action until the mother reached the age of 18. *Id.* The birth parents eventually filed for custody, but the child was in the care of the prospective adoptive parents for almost two years by the time the case was argued before the Supreme Court of New Jersey. *Id.* at 130, 367 A.2d at 1169.

The supreme court noted its role as *parens patriae* and its responsibility to preserve children from harm. *Id.* at 132, 367 A.2d at 1171. The court was willing to consider the bonding between the child and prospective adoptive parents in spite of the invalid surrender. *Id.* at 132-33, 367 A.2d at 1171. The case was remanded to the chancery division for a ruling on custody, wherein the birth parents were to establish that the risk of serious psychological harm would not become a reality. *Id.* at 133, 367 A.2d at 1171.

In the Baby Jessica case,⁹⁶ the Supreme Court of Iowa determined the fate of an infant, originally surrendered for adoption shortly after her birth.⁹⁷ The birth parents, Cara and Scott, signed releases of their parental rights and the court terminated those rights.⁹⁸ Later, Cara asserted that a man named Daniel was actually the birth father.⁹⁹ Daniel interceded in the adoption case to advance his parental rights.¹⁰⁰ The district court determined that Daniel was the baby's father.¹⁰¹ Because Daniel had not released his parental rights, the court ordered that the prospective adoptive

On remand, the chancery division granted custody to the prospective adoptive parents. *Sorentino II*, 74 N.J. at 317, 378 A.2d at 20. In *Sorentino II*, the Supreme Court of New Jersey upheld the trial court's ruling and went on to consider the termination of the birth parents' rights. *Id.* at 320, 321-26, 378 A.2d at 21-24. The court analyzed the situation under the newly-enacted Adoption Act, which required a birth parent to have forsaken his or her parental obligations before his or her rights could be terminated. *Id.* at 322, 378 A.2d at 22.

The court pushed aside the invalid surrender and focused instead upon the birth parents' conduct. *Id.* at 324, 378 A.2d at 23. The court observed that, due to the birth parents' delay in instituting an action for custody, no parent/child relationship existed. *Id.* The court noted that a paramount concern underlying the Adoption Act was the maintenance of the parent/child relationship. *Id.* This policy, the court reasoned, would not be defeated by terminating the birth parents' rights in this case because no parent/child relationship existed. *Id.*

Importantly, the *Sorentino II* court distinguished the decision in *Sees v. Baber*. *Id.* at 325, 378 A.2d at 24. The court emphasized that *Sees* involved an independent adoption and furthered two important policies of the Adoption Act. *Id.* at 326, 378 A.2d at 24. The court explained that *Sees* "furthers the policy of protecting the natural parent from making a hurried or abrupt decision to give up the child, and it promotes the policy of the Act to encourage adoptions made through approved agencies . . . and to discourage adoptions through private placements where the interests of adoptive parents are served at the expense of the interests of the child." *Id.*

⁹⁶ *In re B.C.G.*, 496 N.W.2d 239 (Iowa 1992).

⁹⁷ *Id.* at 241. Cara signed a release of custody approximately 40 hours after the child's birth. *Id.* at 243. Iowa law provides that such a surrender shall not be signed "less than seventy-two hours after the birth of the child." *Id.*

⁹⁸ *Id.* at 240-41. The court terminated Cara and Scott's parental rights at a preliminary hearing and the prospective adoptive parents took custody of the child at that time. *Id.* at 241.

⁹⁹ *Id.* Cara later moved to set aside the termination of her parental rights in juvenile court. *Id.* She also asserted at that time that Daniel was the real father, and she informed Daniel of that fact. *Id.* The juvenile court did not rule on Cara's motion because the court determined that it did not have jurisdiction because the adoption petition had been filed in the district court. *Id.* at 242. Cara appealed the juvenile court's decision. *Id.* at 241. The court of appeals remanded the case to the juvenile court for a ruling on Cara's motion and the prospective adoptive parent's claim that Cara waived the 72-hour waiting period for surrender of parental rights. *Id.* at 244. The district court granted further review of the court of appeals decision and upheld that decision. *Id.* at 241, 244. The district court explained that it is possible for a birth mother to waive the 72-hour waiting period. *Id.* at 243.

¹⁰⁰ *Id.* at 241.

¹⁰¹ *B.G.C.*, 496 N.W.2d at 241.

parents surrender the baby to him.¹⁰² The prospective adoptive parents obtained a stay of the order transferring custody to Daniel and appealed to the Supreme Court of Iowa.¹⁰³

Understandably, the prospective adoptive parents argued that the surrender would not be in the best interests of the child.¹⁰⁴ The supreme court explained in very certain terms, however, that the best interests of the child are not grounds for determining whether to terminate a birth parent's rights.¹⁰⁵ Because the father's rights could not be terminated under Iowa state law, the court ordered the prospective adoptive parents to return the child to her birth father.¹⁰⁶

Similarly, in the Baby Richard case,¹⁰⁷ the Supreme Court of

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 245. The court acknowledged that it is an alluring argument to insist that the placement with the prospective adoptive parents is in the best interests of the child. *Id.*

¹⁰⁵ *Id.* The court explained that "statutory grounds for termination must be established. . . ." *Id.* The court emphasized that "parental rights may not be terminated solely on consideration of the child's best interest. . . ." *Id.*

¹⁰⁶ *Id.* at 241. The court concluded that the adoption proceedings were fatally flawed because Daniel's parental rights were not, and could not be, terminated. *Id.* at 245.

The battle did not end with the supreme court's decision in September 1992. The prospective adoptive parents petitioned for a stay of the Supreme Court of Iowa's order. *DeBoer v. DeBoer*, 114 S. Ct. 11, 11 (1993). That petition was denied. *Id.* The prospective adoptive parents began a new battle in the Michigan courts challenging the Supreme Court of Iowa's order denying the adoption and granting custody to the birth parents. *DeBoer v. Schmidt*, 502 N.W.2d 649, 653-54 (Mich. 1993). The Supreme Court of Michigan held that the Iowa judgment must be enforced and encouraged the adults to proceed with the transfer of custody promptly. *Id.* at 668. Another petition was brought to Justice Stevens, as Circuit Justice for the Sixth Circuit, for a stay of the Supreme Court of Michigan's order. *DeBoer v. DeBoer*, 114 S. Ct. 1, 1 (1993). Justice Stevens denied the request for a stay, reasoning that there was "neither a reasonable probability that the Court [would] grant certiorari nor a fair prospect that, if it did so, it would conclude that the decision below is erroneous. . . ." *Id.*

The decision of the Supreme Court of Iowa denying the adoption and transferring custody was made on September 23, 1992. *B.G.C.*, 496 N.W.2d at 239. With appeals, petitions for stays, requests for rehearings, and other proceedings, Baby Jessica spent another year adjusting to a home with her prospective adoptive parents, only to be surrendered to her birth parents, complete strangers, on August 2, 1993. Korn, *supra* note 2, at 1279. Justice Stevens noted that the prospective adoptive parents "claim that Jessica's best interests will be served by allowing them to retain custody of her rests, in part, on the relationship that they have been able to develop with the child after it became clear that they were not entitled to adopt her." *DeBoer v. DeBoer*, 114 S. Ct. 1, 1-2 (1993).

¹⁰⁷ *In re* Petition of Doe to Adopt Baby Boy Janikova, 638 N.E.2d 181 (Ill.), *cert. denied*, 115 S. Ct. 499 (1994).

Illinois reviewed the contested adoption of a three-year-old boy.¹⁰⁸ The birth mother, Daniella, executed a consent to the child's adoption four days after the child's birth.¹⁰⁹ Daniella refused to release the name of the child's father to the prospective adoptive parents.¹¹⁰ Daniella later informed the birth father, Otakar, that the child died shortly after birth.¹¹¹ Fifty-seven days after the child's birth, Otakar discovered that the child was alive.¹¹² Otakar contested the pending adoption, but the trial court terminated his parental rights.¹¹³ The decision of the trial court was affirmed by the court of appeals based upon the child's best interests.¹¹⁴

On appeal, the Supreme Court of Illinois reversed the lower courts.¹¹⁵ The court explained that the child's best interests can only be considered after the birth parents' rights have been terminated.¹¹⁶ At first glance, this result indicates a very cold, sterile application of a two-part test. On the contrary, the court recognized the terrible circumstances of the case and pointed out that any fault could be assigned to the birth mother and/or to the prospective adoptive parents.¹¹⁷ The court noted that the birth mother

¹⁰⁸ *Id.* at 182.

¹⁰⁹ *Id.* at 181. Daniella began living with the birth father, Otakar, in the fall of 1989. *Id.* at 182. In June 1990, Daniella became pregnant. *Id.* Otakar supported Daniella until the last month of her pregnancy. *Id.* During the last month of Daniella's pregnancy, Otakar traveled to Czechoslovakia to be with his gravely-ill grandmother. *Id.* While Otakar was there, Otakar's aunt called Daniella and advised her "that Otakar had resumed a former romantic relationship with another woman." *Id.* Daniella left her and Otakar's apartment, refused to speak with Otakar when he returned from Czechoslovakia, gave birth to her son at a different hospital than previously arranged, and thereafter consented to the child's adoption. *Id.*

¹¹⁰ *Id.* Daniella indicated to the attorney for the prospective adoptive parents that she knew the father's identity. *Id.* Daniella would not release his name and the attorney made no efforts to ascertain his name or address. *Id.*

¹¹¹ *Id.*

¹¹² *Janikova*, 638 N.E.2d at 182.

¹¹³ *Id.* The trial court found "that Otakar was an unfit parent . . . because he had not shown a reasonable degree of interest in the child within the first 30 days of his life." *Id.* Based upon that finding, the trial court held that Otakar's consent to the adoption was unnecessary. *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 183.

¹¹⁶ *Id.* at 182. The majority opinion is barely more than one page and emphasizes that the threshold issue is not the best interests of the child. *Id.* The court also commented that Illinois adoption laws "are neither complex nor difficult of application." *Id.* Particularly, the court took note of the law that places "the burden of proof on the adoptive parents in establishing . . . the relinquishment and/or unfitness of the natural parents," *id.*, and the law that demands "a good-faith effort to notify the natural parents of the adoption proceedings." *Id.*

¹¹⁷ *Janikova*, 638 N.E.2d at 182. The court stressed how unfortunate it was that the child involved was only three years old. *Id.*

deceitfully tried to deprive the birth father of his parental rights.¹¹⁸ In addition, the court observed that the prospective adoptive parents failed to make the required good-faith effort to notify the birth father and should have relinquished custody of the baby when the birth father asserted his parental rights.¹¹⁹

While contested adoption cases in New Jersey have not been as publicized or notorious as the Baby Jessica and the Baby Richard cases, the New Jersey courts have considered similar issues and have reached similar results.¹²⁰ As early as 1910, the New Jersey courts applied the two-part test governing approval of independent adoptions.¹²¹ In *Wood v. Wood*,¹²² the Court of Errors and Appeals considered a contested adoption and found that the birth mother's actions constituted abandonment of her child.¹²³ The court ruled that such abandonment was an appropriate basis for terminating the mother's parental rights.¹²⁴ The court, after determining that the placement was in the best interests of the child, approved the adoption.¹²⁵

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See *infra* notes 122-186 and accompanying text (discussing the New Jersey cases that have applied the same two-part test that was utilized in the Baby Jessica and Baby Richard cases).

¹²¹ *Wood v. Wood*, 77 N.J. Eq. 593, 597, 77 A. 91, 93-94 (E. & A. 1910).

¹²² 77 N.J. Eq. 593, 77 A. 91 (E. & A. 1910). The plaintiff sought to adopt her niece, Loretta. *Id.* at 593, 77 A. at 92. When Loretta was six years old, her father brought her to his two sisters and asked that they "take her and bring her up and have her educated." *Id.* at 594, 77 A. at 92. The father explained that Loretta's mother would not look after Loretta properly. *Id.* Thereafter, Loretta lived with her two aunts and occasionally visited her parents, who made no objection to this arrangement until Loretta was 12 years old. *Id.* Loretta's father had since died and Loretta's mother wanted Loretta to come back because her other children "had had to 'rough it,' [and] she thought Loretta ought to do the same." *Id.* at 594, 595, 77 A. at 92. The aunts did not want to return Loretta to her mother. *Id.* at 595, 77 A. at 92. Loretta's mother went to Loretta's school, "took her and compelled her to go with her." *Id.*, 77 A. at 93. Loretta's mother then explained that she wanted Loretta to be raised as a Catholic, not Presbyterian as her aunts had chosen. *Id.* at 595, 596-97, 77 A. 93.

¹²³ *Id.* at 597, 77 A. at 93-94. The court explained that the mother's course of conduct indicated "that there was a settled intention to forego parental rights and to leave the child permanently in the care of her aunts, for the reason that it was considered by both parents to be for the child's good." *Id.* The court stated that Loretta's mother should not be permitted to reassert her parental rights to the detriment of the child. *Id.*, 77 A. at 94.

¹²⁴ *Id.* at 598, 77 A. at 94. The court concluded that the mother's conduct amounted to an abandonment under the adoption statute. *Id.*

¹²⁵ *Id.* at 597, 598, 77 A. at 93. The court examined the care provided by the aunts as well as the character of the aunt seeking adoption. *Id.* at 596, 597, 77 A. at 93. The court found that Loretta had been happy and content with the aunts and that the aunts had always provided for her. *Id.* at 596, 77 A. at 93. The court also noted that the aunts are "people of truthfulness and of unusual refinement and cultivation for

Following the guidance of cases like *Wood v. Wood*,¹²⁶ the Supreme Court of New Jersey in *In re Adoption of Children by D.*¹²⁷ reversed a judgment of adoption.¹²⁸ The trial court granted the adoption, reasoning that it was in the children's best interests.¹²⁹ On appeal, the Supreme Court of New Jersey emphasized the necessity of a preliminary determination that the rights of a birth parent can and should be terminated prior to a decision concerning a child's best interests.¹³⁰ The court found that the birth father had not forsaken his parental obligations and, therefore, his rights could not be terminated and the adoption could not proceed.¹³¹

their station in life, and no doubt are as fond of Loretta as they could be if she were their own child." *Id.*

¹²⁶ See also *Ziezel v. Hutchinson*, 91 N.J. Eq. 325, 326, 328, 109 A. 300, 300, 301 (E. & A. 1920) (awarding custody to the birth father because there was no legal consent to adoption and no proof of parental unfitness).

¹²⁷ 61 N.J. 89, 293 A.2d 171 (1972). The case involved the contested adoption of two children by their stepfather. *Id.* at 92, 293 A.2d at 172. In unreported opinions, the trial court granted the adoption and the appellate division affirmed the trial court's decision. *Id.* at 91, 293 A.2d at 173. The birth father "had been found guilty of several juvenile and criminal offenses," *id.* at 96, 293 A.2d at 174, occurring prior to and after his marriage to the birth mother. *Id.* The later offenses were the result of a narcotics addiction. *Id.* The birth father was incarcerated several times, including a three-year period of incarceration. *Id.* His father or the birth mother brought the children to visit him during this three-year incarceration. *Id.* The birth mother and birth father became divorced while the birth father was incarcerated. *Id.* Upon his release, the birth father visited the children every week; the children were "willing and eager to see him." *Id.*

¹²⁸ *Id.* at 99, 293 A.2d at 176.

¹²⁹ *Id.* at 97, 293 A.2d at 175.

¹³⁰ *Id.* at 95, 293 A.2d at 174. The court first emphasized the importance and strength of the parent-child relationship. *Id.* at 93, 293 A.2d at 173. The court stated that a "child's relationship with the parent is of such significance that all doubts are to be resolved against its destruction." *Id.* The court also stressed that the rationale of the New Jersey cases is that "the best interests of the child cannot validly ground a judgment of adoption without it first having been determined that the parental rights of the non-consenting parent can and should be terminated." *Id.* at 95, 293 A.2d at 174. The court noted that some decisions may have expressed or suggested that the child's best interests were of paramount importance "without regard to whether parental obligations could be said to have been forsaken." *Id.* The court directed that any of those suggestions or expressions are "disapproved." *Id.*

¹³¹ *Id.* at 97, 293 A.2d at 175. The court observed that "it is clear from the record that he loves his children and that they are fond of him." *Id.* at 96-97, 293 A.2d at 174. The birth father, as well as his parents, continued to visit the children until the birth mother refused visitation without child support payments. *Id.* at 97, 293 A.2d at 174. The birth father had just obtained employment and requested an additional six months of visitation after which time "he would try to work out a support agreement." *Id.*, 293 A.2d at 174-75. The birth mother had already decided that she wanted her new husband to adopt the children and refused the birth father's request; the adoption complaint was filed shortly thereafter. *Id.*, 293 A.2d at 175. The birth father did not want to aggravate the situation, so he stopped trying to see the children. *Id.* The children were disappointed when his visits ceased. *Id.* The birth father offered to pay

The Supreme Court of New Jersey has generally adhered to this two-part test governing the approval of independent adoptions.¹³² The first part of this test, regarding the termination of

\$20 a week in child support, but his offer was refused. *Id.* The birth father deposited that money in a bank account from that time forward. *Id.* At the adoption hearing, the birth father "demonstrated that he had not used drugs since the commencement of his [three year] incarceration" and that he was succeeding in his job, bringing home a steady income. *Id.* The trial court granted the adoption over the birth father's objection, stating that the adoption was in the best interests of the children. *Id.* at 91, 97, 293 A.2d at 172, 175.

The supreme court explained that a criminal record is not sufficient grounds for terminating parental rights. *Id.* at 97, 293 A.2d at 175. The court relied on the strong evidence of the birth father's rehabilitation and evidence that he had not forsaken his parental rights. *Id.* at 97-98, 293 A.2d at 175.

¹³² See *supra* notes 121-131 and *infra* notes 137-186 and accompanying text (demonstrating that the New Jersey Supreme Court has consistently applied the two-part test in independent adoptions); but cf. *Sorrentino I* and *Sorrentino II*, *supra* note 95 (establishing that the supreme court did not apply the two-part test in one agency adoption).

In some cases, the New Jersey Division of Youth and Family Services will bring a case seeking guardianship of a child, generally so that the child may be placed for adoption. The legal standard for terminating parental rights in those cases is not the same as in independent adoptions. See *New Jersey Div. of Youth and Family Servs. v. A.W.*, 103 N.J. 591, 604-11, 512 A.2d 438, 445-49 (1986) (establishing the test for termination of parental rights in guardianship cases). In *A.W.*, the court established a four-part test for determining whether to terminate parental rights. *Id.* The court explained that, in a termination proceeding, the trial court must determine that "(1) [T]he child's health and development have been or will be seriously impaired by the parental relationship," *id.* at 604, 512 A.2d at 445, "(2) [t]he parents are unable or unwilling to eliminate the harm and delaying permanent placement will add to the harm," *id.* at 605, 512 A.2d at 445, "(3) [t]he court has considered alternatives to termination," *id.* at 608, 512 A.2d at 447, and "(4) [t]he termination of parental rights will not do more harm than good." *Id.* at 610, 512 A.2d at 448.

The *A.W.* test was refined by the Supreme Court of New Jersey in *In re Guardianship of J.C.*, 129 N.J. 1, 18, 608 A.2d 1312, 1320 (1992). *J.C.* involved the bonding between children and foster parents. *Id.* at 5, 608 A.2d at 1313. The issue was "whether the parental rights of a natural mother should be terminated based on the need to protect children from potential harm that may result from being separated from foster parents with whom the children may have formed parental bonds." *Id.* The *J.C.* court refused to allow termination based solely upon bonding and directed courts to view a child's relationship with his or her foster parent "not in isolation but in a broader context that includes as well the quality of the child's relationship with his or her natural parents." *Id.* at 18, 608 A.2d at 1320. The court emphasized that it is not enough to show "that the child has a strong relationship with the foster parents or might be better off if left in their custody." *Id.* at 19, 608 A.2d at 1320. The court concluded that the Division of Youth and Family Services "must prove by clear and convincing evidence that separating the child from his or her foster parents would cause serious and enduring emotional or psychological harm." *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 768 (1982)).

The level and effect of a child's bonding with his or her foster parent, therefore, becomes only a part of the four part test to determine whether termination of parental rights is appropriate; it is not the only test. *Id.* The second factor of the *A.W.* test requires a finding that "[t]he parents are *unable* or *unwilling* to eliminate the harm." *A.W.*, 103 N.J. at 605, 512 A.2d at 445 (emphasis added). This part of the test is

parental rights, is governed by statute.¹³³ Under current New Jersey law, the court may terminate parental rights in an independent adoption if the birth parent fails to make a timely objection to the adoption.¹³⁴ If, however, the birth parent objects to the adoption, the statute permits the court to terminate the birth parent's rights only in two situations: (1) when the birth parent is able to perform parental functions and has failed to do so; or (2) when the birth parent is unable to perform parental functions.¹³⁵ Parental functions include, but are not limited to, maintaining a relationship with the child so that the child perceives the birth parent as his or her parent, communicating with and visiting the child, and providing financial support for the child.¹³⁶

Perhaps the most notable contested adoption case in New Jersey was decided in 1977.¹³⁷ In *Sees v. Baber*,¹³⁸ the birth mother executed a consent to adoption when the child was three days old and then surrendered the child to the prospective adoptive parents in the hospital parking lot the following day.¹³⁹ Two days later, the

satisfied where the Division of Youth and Family Services establishes, by clear and convincing evidence, that separation of the child and foster parent will "cause serious and enduring emotional or psychological harm," *J.C.*, 129 N.J. at 19, 608 A.2d at 1320 (citing *Santosky*, 455 U.S. at 768).

The A.W. four-part test was recently codified by the New Jersey Legislature in N.J. STAT. ANN. § 30:4C-15.1 (West 1991).

¹³³ N.J. STAT. ANN. § 9:3-48(c) (West 1993).

¹³⁴ *Id.* § 9:3-48(c). The court may terminate the birth parents rights if, "upon completion of the preliminary hearing the court finds that: . . . [t]he parents of the child do not have rights as to custody of the child by reason of . . . their failure to make timely objection to the adoption." *Id.* § 9:3-48(c).

¹³⁵ *Id.* The pertinent statute directs that:

[a] judgment of adoption shall not be entered over an objection of a parent communicated to the court by personal appearance or by letter unless the court finds: (1) that the parent has substantially failed to perform the regular and expected parental functions of care and support of the child, although able to do so, or (2) that the parent is unable to perform the regular and expected parental functions of care and support of the child and that the parent's inability to perform those functions is unlikely to change in the immediate future.

Id. § 9:3-46(a).

¹³⁶ N.J. STAT. ANN. § 9:3-46(a) (West 1993). There is a presumption that the parent has "failed to perform the regular and expected parental functions of care and support if the court finds that the situation . . . has occurred for six or more months." *Id.*

¹³⁷ *Sees v. Baber*, 74 N.J. 201, 377 A.2d 628 (1977).

¹³⁸ 74 N.J. 201, 377 A.2d 628 (1977).

¹³⁹ *Id.* at 206, 207, 377 A.2d at 631. The birth mother first considered agency adoption. *Id.* at 205-06, 377 A.2d at 630. Two days prior to giving birth, the birth mother met with a physician, who suggested an independent adoption. *Id.* at 206, 377 A.2d at 631. When she gave birth, the birth mother was advised that she was not committed to surrender the child and that she was also entitled to counseling. *Id.* The birth mother executed a consent to adoption three days after the child's birth. *Id.* at 206,

birth mother changed her mind and requested that the child be returned to her.¹⁴⁰ The prospective adoptive parents denied this request and the birth mother sued for the immediate return of the child.¹⁴¹

The trial court denied the request, explaining that by consenting to the adoption and voluntarily surrendering her child, the birth mother had forsaken her parental obligations and, thus, her parental rights should be terminated.¹⁴² Specifically, the trial court found it relevant that the birth mother's decision was not one made on the spur of the moment, was not a hurried, abrupt decision, and was not made under personal stress.¹⁴³ Further, the trial court observed, there was no evidence of coercion, fraud, overreaching, undue influence, or pressure.¹⁴⁴ The birth mother appealed the decision, but the appellate division affirmed the trial court.¹⁴⁵

On appeal, the Supreme Court of New Jersey reversed the lower courts' rulings, applying the traditional two-part test and determining that the birth mother's parental rights could not be terminated.¹⁴⁶ The court explained that to terminate the birth mother's parental rights, the birth mother must have willfully and continuously neglected or failed to perform the natural, regular obligations of support and care of her child.¹⁴⁷ Specifically, the court continued, the birth mother's conduct must amount to intentional abandonment or substantial neglect of parental duties and parental claims without a reasonable expectation of any reversal in the near future.¹⁴⁸

The lower courts relied upon the birth mother's consent to

207, 377 A.2d at 631. The birth mother was not advised that, upon receipt of the adoption pleadings, she had 20 days to contest the adoption or that she could change her mind after executing the consent form. *Id.* at 207, 377 A.2d at 631. The next day, the birth mother and the child were released from the hospital and the birth mother surrendered the child to the prospective adoptive parents at that time. *Id.*

¹⁴⁰ *Id.* The birth mother's mother immediately contacted the physician who had arranged the independent adoption. *Id.* The prospective adoptive parents' attorney was also notified that day. *Id.*

¹⁴¹ *Id.* at 208, 377 A.2d at 631.

¹⁴² *Id.*, 377 A.2d at 632.

¹⁴³ *Sees*, 74 N.J. at 208, 377 A.2d at 632.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 209, 210, 377 A.2d at 632, 633.

¹⁴⁷ *Id.* at 210, 377 A.2d at 633.

¹⁴⁸ *Id.* at 210-11, 377 A.2d at 633 (quoting *In re Adoption of Children by D.*, 61 N.J. 89, 94-95, 293 A.2d 171, 173 (1972)).

the adoption and voluntary surrender of the child.¹⁴⁹ In contrast, the Supreme Court of New Jersey held that those actions alone were insufficient grounds for terminating the birth mother's rights.¹⁵⁰ The court explained that consent and voluntary surrender are only grounds for termination when the child is surrendered to an approved adoption agency.¹⁵¹ The court clearly expressed that the decision not to terminate the birth mother's rights in this case was based upon the fact that this was a non-agency adoption.¹⁵² To terminate parental rights in an independent adoption, the court instructed, there must be significant additional conduct evidencing relinquishment or abandonment of parental status.¹⁵³

The court indicated that such additional evidence exists where the birth parent considered adoption for many months prior to the child's birth, does not object to the adoption for many months following the surrender of the child, or does not object until receiving notice of the hearing on the adoption.¹⁵⁴ The court therefore distinguished the 1974 case *In re Adoption by R.D.*¹⁵⁵ In that case,

¹⁴⁹ *Id.* at 216, 377 A.2d at 636.

¹⁵⁰ *Id.* The court reviewed the legislative history concerning the effect of consent and surrender in a termination proceeding. *Id.* at 211, 377 A.2d at 633. Previously, the court noted, consent to adoption was statutory grounds for adoption. *Id.* The court explained, however, that "consent was eliminated as an independent or alternative statutory basis for adoption, at least with respect to private or non-agency placements." *Id.* at 211-12, 377 A.2d at 634. The notion of abandonment "became an equivalent or substitute for consent, embracing 'any conduct' reflecting 'a settled purpose' to repudiate parental status." *Id.* at 211, 377 A.2d at 633 (citing *Wood v. Wood*, 77 N.J. Eq. 593, 597, 77 A. 91, 93-94 (E. & A. 1910) and *Winans v. Luppie*, 47 N.J. Eq. 302, 305, 20 A. 969, 971 (E. & A. 1890)). The court asserted that the elimination of consent as grounds for independent adoption resulted from the Legislature's desire to protect parental rights. *Id.* at 212, 377 A.2d at 634.

¹⁵¹ *Id.*

¹⁵² *Id.* at 216, 377 A.2d at 636. The court commented that the decision to not terminate the birth mother's parental rights was "buttressed by the important fact that the adoption was attempted through an unsupervised and unregulated private placement of the child." *Id.* The court observed that "[t]he thrust of the legislative approach is to encourage adoptions through approved agencies," *id.* at 217, 377 A.2d at 636, because such agencies are "designed to protect natural parents from precipitous decisions [and] . . . serve as well the interests of adoptive parents and the welfare of the child." *Id.*

¹⁵³ *Sees*, 74 N.J. at 213-14, 377 A.2d at 635.

¹⁵⁴ *Id.* at 214-15, 377 A.2d at 635. The court provided specific examples of sufficient evidence, such as considering adoption for more than six months prior to a child's birth, raising no objection until six months after a child's birth, failing to demand the return of the child until receiving notice of the preliminary hearing, or failing to object until the actual hearing. *Id.*

¹⁵⁵ *Id.* at 214, 377 A.2d at 635 (citing *In re Adoption of a Child by R.D.*, 127 N.J. Super. 311, 317 A.2d 383 (App. Div.), *certif. denied*, 65 N.J. 292, 321 A.2d 253 (1974)).

the birth mother considered adoption for more than six months prior to the child's birth and then raised no objection to the adoption until the formal adoption proceedings began, six months after she surrendered the child.¹⁵⁶ The court in *Adoption by R.D.* was justified in terminating the birth mother's parental rights, the *Sees* court explained, because the birth mother's conduct constituted an intentional relinquishment of parental claims.¹⁵⁷

Further, the *Sees* court distinguished the 1963 case *In re Adoption of D.*,¹⁵⁸ where the birth parents' rights were also terminated over their objection.¹⁵⁹ In *Adoption of D.*, the birth parents considered adoption for several months prior to the child's birth and did not object to the adoption until two months after the surrender of the child.¹⁶⁰ The *Sees* court expressed that such behavior was grounds for terminating parental rights.¹⁶¹

The Supreme Court of New Jersey most recently considered a contested adoption in 1994 in *In re Adoption by D.M.H.*¹⁶² In that case, the birth mother made the decision to surrender her child for adoption approximately one month prior to the child's birth.¹⁶³ One year later, the birth mother objected to the adoption

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* Although the *Adoption by R.D.* court relied on the element of consent, the *Sees* court asserted that there was significant additional evidence of abandonment or relinquishment of parental rights to justify terminating those rights. *Id.*

¹⁵⁸ *Sees*, 74 N.J. at 214, 377 A.2d at 635 (citing *In re Adoption of D.*, 78 N.J. Super. 117, 187 A.2d 628 (1963)).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* While the *Adoption of D.* court emphasized the consent to adoption, the *Sees* court reasoned that there was additional evidence of abandonment or relinquishment of parental rights to justify the termination of those rights. *Id.*

¹⁶² 135 N.J. 473, 641 A.2d 235 (1994), *cert. denied*, 115 S. Ct. 433 (1995).

¹⁶³ *Id.* at 478, 641 A.2d at 237. The birth mother, Jeanne, was "twenty years old, unmarried, and the mother of an infant boy," *id.* at 477, 641 A.2d at 237, when she became pregnant in 1989. *Id.* Jeanne first considered abortion and then considered giving the child up for adoption. *Id.* The prospective adoptive parents, Donna and Steve, contacted Jeanne through a mutual acquaintance and began discussing adopting her unborn child. *Id.* at 477-78, 641 A.2d at 237. Jeanne finally decided to give her child up for adoption very late in her pregnancy, but she stated that her decision was not a snap decision and that she had enough time to think about it. *Id.* at 478, 641 A.2d at 237. Donna, Steve, and Jeanne agreed that Jeanne would receive pictures of the child, would be able to visit the child, and "would be informed as to the child's progress." *Id.* Jeanne gave birth to a healthy baby boy on July 22, 1990, and surrendered him to Donna and Steve on July 27, 1990. *Id.* On October 15, 1990, Jeanne knowingly and voluntarily signed a form consenting to the adoption. *Id.* Jeanne spoke to Donna and Steve approximately once a month after the surrender. *Id.* The day before the child's first birthday, Jeanne saw the child for the first time since she surrendered him. *Id.* at 479, 641 A.2d at 237.

and filed a complaint for custody.¹⁶⁴ The trial court ruled that the birth mother had intentionally abandoned the child, but refused to terminate the birth mother's parental rights.¹⁶⁵ The court explained that it was reasonable to expect that the birth mother would reverse her conduct and, thus, the court could not terminate her parental rights under the adoption statute.¹⁶⁶ Although the court denied the adoption, the court allowed the prospective adoptive parents to retain custody, subject to visitation by the birth mother.¹⁶⁷

The trial court's ruling was reversed on appeal.¹⁶⁸ The appellate division found that the birth mother's intentional abandonment of the child was final and terminated the birth mother's parental rights.¹⁶⁹ The Supreme Court of New Jersey affirmed the appellate division's ruling.¹⁷⁰ The supreme court emphasized the strength of the parent-child relationship and the constitutional protection afforded that relationship.¹⁷¹

The court found that the mother's conduct constituted intentional abandonment, a necessary finding under the statute in effect at that time.¹⁷² The court explained that "intentional abandonment" exists where a birth parent has willfully forsaken his or her obligations, despite being physically and financially able to meet

¹⁶⁴ *Id.*, 641 A.2d at 238. Jeanne wrote a letter objecting to the adoption on July 16, 1991. *Id.*, 641 A.2d at 237. On July 22, 1991, Jeanne filed a complaint for custody. *Id.*, 641 A.2d at 238. Jeanne alleged that she wanted the child back as early as four months after the surrender. *Id.* Jeanne claims that she did not say anything because she was afraid that, if she did, Donna and Steve would not let her see the child. *Id.*

¹⁶⁵ *Id.* at 480, 641 A.2d at 238.

¹⁶⁶ *Id.* The trial court explained that state statute provided "for the reversal of conduct demonstrating intentional abandonment." *Id.* at 480, 641 A.2d at 238 (citing N.J. STAT. ANN. § 9:3-48(c)(1) (West 1993)).

¹⁶⁷ *D.M.H.*, 135 N.J. at 480, 377 A.2d at 238.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* The appellate division did not interpret the statute "to permit the reversal of conduct constituting intentional abandonment." *Id.* The appellate division held that the intentional abandonment was final. *Id.*

¹⁷⁰ *Id.* at 495, 641 A.2d at 246. The supreme court terminated visitation by Jeanne pending appeal. *Id.*

¹⁷¹ *Id.* at 480, 641 A.2d at 238. The supreme court explained that extraordinarily strong protections surround parental rights. *Id.* The supreme court noted that "[t]he right of a biological parent to enjoy a relationship with his or her child is fundamental and constitutionally protected." *Id.* (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) and *In re Adoption of Children by L.A.S.*, 134 N.J. 127, 132, 631 A.2d 928, 930 (1993)).

¹⁷² *Id.* at 481, 485, 641 A.2d at 238-39, 241 (citing N.J. STAT. ANN. § 9:3-48(c)(1) (West 1993)).

those obligations.¹⁷³ While the term "intentional abandonment" is no longer in the New Jersey statute, the current standard is essentially unchanged.¹⁷⁴ The termination of parental rights today requires a finding that the birth parent is able to perform parental functions and has failed to do so.¹⁷⁵

The *D.M.H.* court articulated a variety of factors to be evaluated when considering termination of parental rights.¹⁷⁶ First, the court identified surrender of the child and consent to the adoption as salient factors.¹⁷⁷ Further, the court found that the nature of the decision to surrender the child is important.¹⁷⁸ Specifically, the court explained, the decision must be deliberative, informed, and voluntary to permit termination of parental rights.¹⁷⁹

The court cautioned, however, that in an independent adoption, surrender and consent are not determinative.¹⁸⁰ Citing *Sees v. Baber*, the court instructed that a birth parent can have a change of mind, within a reasonable time, that may prohibit the termination of his or her parental rights.¹⁸¹ The court enumerated additional factors for consideration, where the birth parent has changed his

¹⁷³ *D.M.H.*, 135 N.J. at 481, 641 A.2d at 239 (quoting *L.A.S.*, 134 N.J. at 134-35, 631 A.2d at 932).

¹⁷⁴ N.J. STAT. ANN. § 9:3-48(c)(1) (West 1993). The *D.M.H.* court observed that abandonment exists when "a parent has willfully forsaken obligations, although physically and financially able to discharge those obligations." *D.M.H.*, 135 N.J. at 481, 641 A.2d at 239 (quoting *L.A.S.*, 134 N.J. at 134-135, 631 A.2d at 932). Similarly, the current statute provides for termination upon a showing that the parent has substantially failed "to perform the regular and expected parental functions of care and support of the child, although able to do so." N.J. STAT. ANN. § 9:3-48(c)(1).

¹⁷⁵ N.J. STAT. ANN. § 9:3-48(c)(1).

¹⁷⁶ *D.M.H.*, 135 N.J. at 482-83, 641 A.2d at 239-40.

¹⁷⁷ *Id.* at 482, 641 A.2d at 239.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (citing *In re Adoption of One Child by R.A.C.*, 154 N.J. Super. 513, 518, 381 A.2d 1232, 1234 (App. Div. 1977), *certif. denied*, 75 N.J. 607, 384 A.2d 837 (1978) and *In re Adoption of a Child by R.D.*, 127 N.J. Super. 311, 319, 317 A.2d 382, 386 (App. Div.), *certif. denied*, 65 N.J. 292, 321 A.2d 253 (1974)). For example, the court observed that such decisions should not be made on the "spur-of-the-moment" and should be considered for several months prior to the birth of the child. *Id.*

¹⁸⁰ *Id.* at 483, 641 A.2d at 239 (citing *In re Baby M*, 109 N.J. 396, 433-34, 537 A.2d 1227, 1246 (1988)).

¹⁸¹ *D.M.H.*, 135 N.J. at 483, 641 A.2d at 239-40 (citing *Sees v. Baber*, 74 N.J. 201, 208, 377 A.2d 628, 632 (1977)). The court cautioned that this change of mind must "occur within a reasonable period of time after the surrender of the child for adoption." *Id.*, 641 A.2d at 239. The court observed that parental rights have not been terminated when the change of mind occurred two days after surrender and that parental rights have been terminated when the change of mind occurred four to six months after the surrender. *Id.*, 641 A.2d at 239-40 (citing *Sees*, 74 N.J. at 215, 377 A.2d at 635, *Adoption by R.D.*, 127 N.J. Super. at 318, 317 A.2d at 385, and *In re Adoption of One Child by R.A.C.*, 154 N.J. Super. 513, 518, 381 A.2d 1232, 1235 (App. Div. 1977), *certif. denied*, 75 N.J. 607, 384 A.2d 837 (1978)).

or her mind.¹⁸² The court stated that it is relevant to consider whether the birth parent communicated his or her change of mind to the adoptive parents.¹⁸³ Further, the court directed that the birth parents' prompt and diligent action to procure the return of their child is a necessary consideration.¹⁸⁴

The court held that it was appropriate to terminate the birth mother's parental rights in this case.¹⁸⁵ The court reasoned that the birth mother voluntarily surrendered her child, consented to the adoption, and failed to withdraw her consent immediately, promptly, or within a reasonable time.¹⁸⁶

Contested independent adoptions in New Jersey have been subject to settled guidelines and standards that make it clear that prospective adoptive parents should be wary of involvement in an independent adoption and that birth parents should know their rights. First and foremost, prospective adoptive parents need to be aware that the birth parents have the legal right to change their mind, even following the birth and surrender of the child. Second, birth parents need to make their decisions with the knowledge that there is only a short time for any doubts to surface; those doubts

¹⁸² *Id.* at 482, 641 A.2d at 239.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 485, 641 A.2d at 241. The court concluded that the record fully supported the trial court's determination that Jeanne intentionally abandoned the child. *Id.* The supreme court observed that Jeanne's surrender and consent were deliberative and informed, not the result of a snap decision. *Id.* at 483, 641 A.2d at 240. The court further noted that Jeanne knowingly signed the consent form three months after the surrender of the child. *Id.* at 483-84, 641 A.2d at 240. Additionally, the court observed that Jeanne's surrender and consent were voluntary; there was no evidence that she was financially or physically unable to meet her parental responsibilities. *Id.* at 484, 641 A.2d at 240. Also, the court commented that Jeanne did not take prompt, diligent steps to regain custody of her child: she did not attempt to exercise parental functions and did not request the return of the child until one year after the surrender. *Id.* The court remarked that Donna and Steve relied upon Jeanne's decision to surrender her child and her consent to the child's adoption. *Id.* The court mentioned that the child had bonded with Donna and Steve, but apparently the court did not rely on that bonding in deciding to terminate Jeanne's parental rights. *Id.* at 485, 641 A.2d at 241.

¹⁸⁶ *D.M.H.*, 135 N.J. at 485, 641 A.2d at 241. The court further considered whether Jeanne's intentional abandonment could be "reversed" as suggested by the trial court. *Id.* The supreme court rejected the appellate division's suggestion that "[a]bandonment is abandonment. . . [and is] a terminal act not subject to reasonable expectation of reversal." *Id.* at 486, 641 A.2d at 241. The supreme court reasoned that a person's conduct may change over time. *Id.* at 487, 641 A.2d at 241. The court maintained that those "obligations encompass the performance of the regular and expected functions of care and support of the child." *Id.* at 488, 641 A.2d at 242. In this case, the court concluded, Jeanne's "actions failed to overcome the conduct that amounted to the intentional repudiation of her parental obligations." *Id.*

must be resolved immediately or their parental rights are in serious jeopardy. Finally, the judicial system must find a way to deal with contested adoptions on an emergent or expeditious basis. Regardless of how established the law may be, the emotional well-being of a child is not served when the appeal process can last years.

CONCLUSION

When one compares the sparsity of litigation arising from agency adoptions with the volume and length of litigation arising from independent adoptions, it is easy to draw the conclusion that independent adoptions are not in anyone's best interests.¹⁸⁷ Finding solutions, however, is a much more difficult task. If adoption is viewed as a process through which childless parents can obtain a child, independent adoption has distinct advantages: shorter waiting periods; immediate placement of the child in the prospective adoptive home; no risk of discrimination by an agency; and a more open adoption.¹⁸⁸ If, however, adoption is seen as the process through which society provides homes for parentless children, the independent adoption loses its appeal.¹⁸⁹ The risks of lengthy litigation, great expense, and black or "grey" market babies cannot be in the best interests of any child.¹⁹⁰

Many of the criticisms of agency adoption are valid, such as long waiting periods, potential discrimination, and temporary foster placement.¹⁹¹ Perhaps the solution lies not with alternative methods of adoption, such as independent adoption, but with changes to the agency system. For example, the agencies could pre-approve prospective adoptive parents and avoid placing children in foster care. Also, the agencies could offer birth parents some input in the selection of adoptive parents, thus allowing the more open adoption often preferred by birth parents.¹⁹² The

¹⁸⁷ Hansen, *supra* note 2, at 58 (listing several contested independent adoption cases); see *supra* notes 80-186 and accompanying text (reviewing contested independent adoptions).

¹⁸⁸ Emery, *supra* note 36, at 144 (asserting that "adoption is a service to the child and that the goal of adoption is to find parents for children, not children for parents"); see *supra* notes 59-68 and accompanying text (discussing the advantages of independent adoption).

¹⁸⁹ See *supra* notes 69-92 and accompanying text (analyzing the disadvantages of independent adoption).

¹⁹⁰ See *supra* notes 16-21 and accompanying text (reviewing the disadvantages of agency adoption).

¹⁹¹ *Id.*

¹⁹² McDermott, *supra* note 8, at 147 (including the birth parents' desire to select adoptive parents as one of the reasons for selecting independent adoption over agency adoption).

lengthy wait is an inevitable obstacle when the demand for children exceeds the supply.¹⁹³ This obstacle should not justify the inherent risks of independent adoption.

Solutions do not come easily when an issue is as fraught with emotion as this one is. Presently, however, people are able to transfer custody of children in a significantly unregulated manner.¹⁹⁴ The legal and emotional battles that have followed are a call for change. The sooner that change occurs, the better for the future of children and parents in our society.

Susan A. Munson

¹⁹³ See *supra* note 16-17 (referring to the low supply of and high demand for healthy, adoptable infants).

¹⁹⁴ New Jersey law only regulates an independent adoption after the child has been surrendered. N.J. STAT. ANN. § 9:3-48 (West 1993). The prospective adoptive parents are given 45 days to file the complaint for adoption. *Id.* § 9:3-44. It is upon receipt of this complaint that the court appoints an agency to investigate the circumstances surrounding the surrender, including any money or valuable consideration exchanged. *Id.* § 9:3-48(a).