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Throwing out the Baby with the Bath Water: Adoption of Kelsey S. Raises the Rights of Unwed Fathers above the Best Interests of the Child

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THROWING OUT THE BABY WITH THE BATH WATER: *ADOPTION OF KELSEY S.* RAISES THE RIGHTS OF UNWED FATHERS ABOVE THE BEST INTERESTS OF THE CHILD

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Respect for human rights begins with the way society treats its children.[1]

I. INTRODUCTION

Until recently, California law was clear in cases where an adoption was being contested by an unwed biological father: *Judges were instructed to act in the best interests of the child.*[2] In February of 1992, the California Supreme Court changed the rules.

In *Adoption of Kelsey S.*,[3] the court held that if an unwed father contesting an adoption arranged by the child's mother promptly comes forward and "demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process[4] prohibits the termination of his parental relationship absent a showing of his unfitness as a parent."[5] The court believed that unless the father was unfit, continuing the father's parental relationship best served the child's interests.[6]

This decision changed the balance of interests the California courts traditionally weighed. The motive behind the *Kelsey S.* ruling was to reward unwed biological fathers who act responsibly.[7] But it is the children who bear the cost of this "reward" due to the court's express creation of an exception to the traditional "best interests of the child" standard.[8] As a result of *Kelsey S.*, courts now must first consider the biological father's rights before considering the child's welfare.

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1. UNITED NATIONS CENTRE FOR HUMAN RIGHTS, GENEVA, HUMAN RIGHTS FACT SHEET NO. 10, THE RIGHTS OF THE CHILD 1 (1990) [hereinafter UNITED NATIONS CENTRE].

2. CAL. CIV. CODE § 7017(d)(2) (West 1993) (The court "may consider all relevant evidence, including the efforts made by the father to obtain custody, the age and prior placement of the child, and the effects of a change of placement on the child."). This code section has remained unchanged since the outcome of Adoption of Kelsey S., 1 Cal. 4th 816, 823 P.2d 1216, 4 Cal. Rptr. 2d 615 (1992), and is now located in California Family Code § 7664(b). *See* CAL. FAM. CODE § 7664(b) (West 1994).

3. 1 Cal. 4th 816, 823 P.2d 1216, 4 Cal. Rptr. 2d 615 (1992).

4. *See* Stanley v. Illinois, 405 U.S. 645 (1972) (defining due process rights as requiring procedural protection of parent's interest in care, companionship, and custody of his or her children). The Due Process Clause can be found in the Fifth and Fourteenth Amendments to the United States Constitution. U.S. CONST. amend. V, XIV. "There are two aspects: procedural, in which a person is guaranteed fair procedures and substantive which protects a person's property from unfair governmental interference or taking." BLACK'S LAW DICTIONARY 500 (6th ed. 1990). *See infra* text accompanying notes 46-61.

5. *Kelsey S.*, 1 Cal. 4th at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

6. *Id.*

7. John Johnson, *A Question of Rights*, L.A. TIMES, Oct. 4, 1992, at B3.

8. *Kelsey S.*, 1 Cal. 4th at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

Adoption custody disputes involve balancing the best interests of a child, the rights of adoptive parents, and the sometimes dubious claims of a biological parent who may have done little for the child since birth, or even since conception.[9] *Kelsey S.* elevates biological parents' interests over the rights of both adoptive parents and children. As a result, California adoption law has taken a giant step backward from primarily considering the best interests of the child. By not restricting the focus of the court to considering primarily the best interests of the child first, the *Kelsey S.* holding merely encourages the use of children as pawns in a custody game played out by adults.[10]

While a biological father in an adoption contest is entitled to equal protection,[11] this Note argues that courts should not stress a father's constitutional rights at the expense of a child's best interests. Instead, courts should place the child's interests first. Part II of this Note discusses the development of the laws surrounding adoption custody proceedings. Part III outlines the facts of *Kelsey S.* and the trial court's findings. Part IV examines the California Supreme Court's reasoning and explains why it reversed the trial court's ruling. Part V argues that the California Supreme Court erred in putting the biological father's rights ahead of the child's rights. Instead a child's psychological bond to his or her adoptive parents should be the paramount factor in determining the proper adoption test—namely, the best interests of the child. Finally, Part VI concludes that the court should primarily consider this psychological bond *first* when making its determination of who receives custody in the best interests of the child.

II. HISTORICAL FRAMEWORK

A. *History of Adoption*

Legal adoption does not exist in the common law; it is a purely statutory creation.[12] While early adoption was used, for example, in ancient Rome as a means to secure an heir in order to strengthen or

9. *The Child Has an Interest, Too*, L.A. TIMES, Dec. 8, 1993, at B6.

10. During any custody dispute the process is "regrettably and undeniably a zero-sum contest. The child is the prize. One contestant wins; one contestant loses." *In re* Jasmon O., 8 Cal. 4th 398, 436, 878 P.2d 1297, 1318, 33 Cal. Rptr. 2d 85, 106 (1994) (Baxter, J., dissenting).

11. Stanley v. Illinois, 405 U.S. 645, 651-52 (1972); *Kelsey S.*, 1 Cal. 4th at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

12. BLACK'S LAW DICTIONARY 49 (6th ed. 1990); *see also* Smith v. Organization of Foster Families, 431 U.S. 816, 856 (1977) (stating that in foster care custody dispute, were it not for state's creation and maintenance of foster care program, relationship for which constitutional protection was asserted would not even exist).

extend a family line, adoption did not exist in the Anglo-Saxon tradition.[13] English Common Law recognized neither the right to adopt nor the right to be adopted.[14] Adoption laws began in the United States in the late nineteenth century when the colonial practices of apprenticeship and indenture became inadequate to provide for dependent children.[15]

The adoption process is now defined as the means by which a parent-child relationship is established between persons petitioning to adopt and the adoptee.[16] Only recently have courts adopted the best interests of the child standard in determining custody disputes.[17] Traditionally, the parental-rights doctrine was applied, in which the rights of the parent were superior to those of the child.[18] Such parental rights were closer to property rights than to the rights currently recognized in today's adoption cases.[19] Previously, the superiority of parental rights extended to the rights of adoptive parents; any laws concerning adoption were procedural, aimed at guaranteeing the contractual integrity of the transaction.[20] As one commentator noted, "[f]rom Roman times to the mid-nineteenth century, [children] were treated as something akin to property and had rights which might be

13. JEROME SMITH & FRANKLIN I. MIROFF, YOU'RE OUR CHILD: THE ADOPTION EXPERIENCE 2 (1987).

14. *Id.*

15. *Id.*

16. BLACK'S LAW DICTIONARY 49 (6th ed. 1990). Adoption is defined:

> Legal process pursuant to state statute in which a child's legal rights and duties toward his natural parents are terminated and similar rights and duties toward his adoptive parents are substituted. To take into one's family the child of another and give him or her the rights, privileges, and duties of a child and heir.

Id.

17. See Quilloin v. Walcott, 434 U.S. 246, 256, *reh'g denied*, 435 U.S. 918 (1978) where a woman's new husband was allowed to adopt her child because the child's biological father had forfeited his parental rights by not: (1) marrying the mother; or (2) seeking to establish a relationship with the child. The Court essentially relied upon the best interests test to permit the adoption where there was, in effect, no father in existence. *See id.* at 251; *see also* John L. Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 364 (1991) (arguing that genetic relationship, in itself, should be accorded very little moral weight in determination of parental status in surrogacy-adoption cases).

18. Hill, *supra* note 17, at 363.

19. *Id.* at 363, 418; *see also* Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 488-91 (1973) ("Children were regarded as chattels of the family and wards of the state, with no recognized political character or power and few legal rights.") *Id.* at 489.

20. SMITH & MIROFF, *supra* note 13, at 2-3. Initially adoption laws were focused upon the protection of the adoptive parent's rights. Procedures to protect them included sealing the birth and adoption records, and issuing new birth certificates in the adoptive parents' names. *Id.* at 3.

characterized as falling somewhere between those of slaves and those of animals."[21]

B. Best Interests

The twentieth century brought great progressive reforms, including the increased importance of protecting children's health and welfare.[22] Modern concern for children as individuals established both the best interests standard and the concept of parental fitness as limits to the absolute parental-rights doctrine.[23] The best interests of the child is now the standard that the United States Supreme Court considers to be of primary concern in cases where putative fathers assert their parental rights.[24] This standard focuses on what would serve the best interests of the child rather than on the claims of the parties competing to become the custodial parents.[25]

The "best interests" formula has been the foundation for adoption cases in our courts since 1881[26] and, as such, is a distinctly American contribution to the history of adoption law.[27] The landmark case of *Chapsky v. Wood*[28] adopted the best interests of the child standard as the sole criterion for deciding child custody.[29] The *Chapsky* court decided that the father's right to custody of the child would "depend mainly upon the question whether such custody will promote the welfare and interest of such child."[30] Since then, courts have reasoned that the paramount consideration in awarding custody will be what best promotes the child's welfare.[31] Courts adhering to the best interests standard focus *solely* on the child with neither competing party

21. Cynthia P. Cohen, *Relationships Between the Child, the Family and the State*, *in* PERSPECTIVES ON THE FAMILY 293, 297 (Robert C.L. Moffat et al. eds., 1990).

22. SMITH & MIROFF, *supra* note 13, at 3.

23. Hill, *supra* note 17, at 364.

24. *See, e.g.*, Quilloin v. Walcott, 434 U.S. 246, 255, *reh'g denied*, 435 U.S. 918 (1978).

25. Hill, *supra* note 17, at 363.

26. Chapsky v. Wood, 26 Kan. 650 (1881).

27. SMITH & MIROFF, *supra* note 13, at 14-15. While the best interests test began in America, it is now considered of primary importance in other countries as well. UNITED NATIONS CENTRE, *supra* note 1, at 8, 15-16.

28. 26 Kan. 650 (1881).

29. *Id.* at 653-58. The *Chapsky* court ruled that the best interests of the child would be promoted by comparing the prospective parents': (1) wealth; (2) social position; (3) health; (4) educational advantages; (5) moral training; (6) ability to care for the child; and (7) affection for the child. *Id.* at 655-57.

30. *Id.* at 653.

31. Christopher A. Jeffreys, Note, *The Role of Mental Health Professionals in Child Custody Resolution*, 15 HOFSTRA L. REV. 115, 121 (1986). This is also true for adoption in other United Nations countries. UNITED NATIONS CENTRE, *supra* note 1, at 1, 15. "In all actions concerning children, whether undertaken by public or private social welfare institu-

bearing the burden of proof: Instead, each party must attempt to show that granting *them* custody would be in the child's best interests.[32]

C. *Best Interests Difficult to Apply*

In determining best interests, each jurisdiction applies a "parental presumption"—that placement of a child with his or her biological parents is generally in the best interests of that child.[33] However, in some cases courts have acknowledged that the biological parents' rights may conflict with the child's interests—for example, *Parham v. J.R.*[34] recognized that parents' rights are limited in cases of abuse and neglect, since the presumption that parents act in the best interest of the child no longer applies.[35] In these cases the presumption that parents act in the best interests of the child does not apply.[36]

The Uniform Marriage and Divorce Act[37] suggests that in determining best interests a court should consider all relevant factors, including:

> (1) the wishes of the child's parent or parents as to his custody;
> (2) the wishes of the child as to his custodian;
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
> (4) the child's adjustment to his home, school, and community; and
> (5) the mental and physical health of all individuals involved.[38]

It is difficult to apply these factors to a custody dispute involving an infant since the child is usually too young to indicate his or her wishes. In addition, the question of who is the "parent" is often the exact

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tions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." *Id.*

32. Peggy Blotner, *Third Party Custody and Visitation: How Many Ways Should We Slice the Pie?*, 1989 DET. C.L. REV. 163, 167 (1989).

33. Hill, *supra* note 17, at 364.

34. 442 U.S. 584 (1979).

35. Other instances include cases where children are physically abused, mentally abused, or neglected by their parents; where children choose a different religion from their parents; where parents seek to alienate their children's property; or where parents seek to withhold necessary medical treatment. *Id.* at 630-31.

36. This is particularly true in lengthy custody cases. *See id.* at 604.

37. UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 561 (1987).

38. *Id.*

question being placed before the court attempting to make this best interests determination.

In California, Division 8 of the Family Code, entitled "Custody of Children,"[39] requires a court to consider the health, safety, and welfare of the child, any history of abuse by a parent—whether against the child or against another parent, the nature and amount of contact with both parents, as well as any other relevant factors.[40] Again, this standard is almost impossible to apply to cases of infant adoption: it would be difficult to determine the future actions of any parties, and neither party may have had the opportunity to have much contact with the child.

D. Moving Away from Best Interests in Favor of Parent's Constitutional Rights

Prior to the *Kelsey S.*[41] decision, the United States Census Bureau issued a report called "Fertility of American Women," revealing that for the most recent statistical year (July 1989 to June 1990) one in every four births was out of wedlock.[42] In *Kelsey S.*, the California Supreme Court recognized that the determination of an unwed parent's rights is of great concern.[43] With single parenthood and pregnancies of unmarried partners occurring more frequently, these issues are being increasingly addressed in the media.[44] Courts are no longer able to ignore these issues.[45] The United States Supreme Court has recently been forced to address many issues that in the past were either too socially unacceptable to be publicly addressed, or involved such a small segment of the population that the issue never reached the Court.

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39. CAL. FAM. CODE §§ 3000-3425 (West 1994).

40. *Id.* § 3022. This section was taken from the California Civil Code sections in place at the time of *Kelsey S.* without substantive change. *See* CAL. CIV. CODE § 4608 (1983).

41. 1 Cal. 4th 816, 823 P.2d 1216, 4 Cal. Rptr. 2d 615 (1992).

42. *Id.* at 830 n.6, 823 P.2d at 1223 n.6, 4 Cal. Rptr. 2d at 622 n.6 (citing United States Census Bureau, *Fertility of American Women: June 1992*).

43. *Id.*

44. The question of best interests of the child in adoption custody disputes has been a focus of magazines, television dramas, and television talk shows. *See, e.g.*, Terry O'Neill, *Special Report on Birthfather Rights*, ADOPTIVE FAMILIES, Sept./Oct. 1994, at 8-12; *L.A. Law: She's MY Baby* (NBC television broadcast, Feb. 17, 1994); *Geraldo: My Baby . . . Don't Take My Baby: Birth Parents vs. Adoptive Parents* (CBS television broadcast, Sept. 20, 1994).

45. Looking at a comparable group of never-married women 18 to 44 years old, 24% had borne a child in 1992, compared to only 15% in 1982. United States Census Bureau, *Fertility of American Women: June 1992*, at xv.

In *Stanley v. Illinois*[46] the United States Supreme Court recognized that an unwed father who has developed a relationship with his child has a constitutional interest in maintaining a continuing role in the child's life.[47] The Court left unanswered the question, however, whether the biological father of a newborn, with whom the father has not *had the opportunity* to develop a relationship, has a legal interest in, and thus, the right to veto the adoption of his child. The *Stanley* Court defined due process rights as requiring procedural protection of a parent's interest in the care, companionship, and custody of his or her child.[48]

Six years later in *Quilloin v. Walcott*,[49] the Court limited its holding in *Stanley* by finding that Georgia's application of the best interests of the child standard did not violate a biological father's due process rights.[50] The Court rejected the father's equal protection argument on the ground that he had "never exercised actual or legal custody over his child, and . . . never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[51]

Approximately one year later, however, the Court invalidated a New York statute, recognizing a biological father's equal protection rights.[52] The statute allowed a child to be adopted by its biological mother and her husband *without* the biological father's consent.[53] In 1983, the Court addressed the amended version of this New York statute in *Lehr v. Robertson*.[54] The amendment required that mothers of illegitimate children notify the father of pending adoption proceedings if the father has filed a notice of intent to claim paternity of the child.[55] This time the Court *rejected* the father's equal protection claim. The Court relied on its rationale in *Quilloin*—that the existence of "a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child."[56] In *Lehr*, the father had never established a

46. 405 U.S. 645 (1972).
47. *Id.* at 649.
48. *Id.* at 651.
49. 434 U.S. 246 (1978).
50. *Id.* at 256.
51. *Id.*
52. Caban v. Mohammed, 441 U.S. 380 (1979).
53. *Id.* at 385.
54. 463 U.S. 248 (1983).
55. *Id.* at 250-51.
56. *Id.* at 266-67.

relationship with the child.[57] The Court therefore reasoned that the biological parents were not similarly situated for purposes of equal protection analysis.[58]

In *Michael H. v. Gerald D.*,[59] which is somewhat analogous to *Kelsey S.*, at least one Justice of the United States Supreme Court acknowledged that biological fathers *do* have a protected liberty interest in their relationships with their children.[60] However, a majority of the Justices also held that a biological father's attempt to establish a relationship with his child is either a very important[61] or a determinative factor.[62]

III. STATEMENT OF *KELSEY S.*—THE TRIAL COURT

Kari S. gave birth to Kelsey on May 18, 1988.[63] She was not married to the child's natural father, Rickie M.[64] The father objected to Kari S.'s decision to place the baby for adoption because he wanted to raise the child.[65] On May 20, 1988, Rickie M. filed an action in the Santa Clara County Superior Court seeking to establish his parental relationship with Kelsey, and to obtain custody of the child.[66] That same day the court issued an order temporarily awarding him custody.[67]

On May 24, 1988, the prospective adoptive parents, Steven and Suzanne A., filed an adoption petition under California Civil Code section 226[68] alleging that they needed only the mother's consent to adopt Kelsey as there was no "presumed father" under California Civil Code section 7004, subdivision (a).[69]

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57. *Id.* at 267.
58. *Id.*
59. 491 U.S. 110 (1989).
60. *Id.* at 133 (Stevens, J., concurring).
61. *Id.* (Stevens, J., concurring); *see Kelsey S.*, 1 Cal. 4th at 837, 823 P.2d at 1228, 4 Cal. Rptr. 2d at 627.
62. *Michael H.*, 491 U.S. at 142-43 (Brennan, J., dissenting) (citing Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); and Stanley v. Illinois, 405 U.S. 645 (1972)); *see Kelsey S.*, 1 Cal. 4th at 837, 823 P.2d at 1228, 4 Cal. Rptr. 2d at 627.
63. *Kelsey S.*, 1 Cal. 4th at 821, 823 P.2d at 1217, 4 Cal. Rptr. 2d at 616.
64. *Id.*
65. *Id.*
66. *Id.* at 822, 823 P.2d at 1217-18, 4 Cal. Rptr. 2d at 616-17.
67. *Id.*, 823 P.2d at 1218, 4 Cal. Rptr. 2d at 617.
68. CAL. CIV. CODE § 226 (West 1982) (repealed 1991).
69. *Kelsey S.*, 1 Cal. 4th at 822, 823 P.2d at 1218, 4 Cal. Rptr. 2d at 617; CAL. CIV. CODE § 7004(a) (West 1983) (repealed 1993) (asserting that male is presumed to be natural father of child if he meets certain conditions). In this case the relevant condition would be if "he

Two days later, the trial court modified its May 20 order and awarded temporary custody to Kari S., prohibiting visitation by both the prospective adoptive parents and the natural father.[70] On May 31, 1988, the prospective adoptive parents filed a petition under California Civil Code section 7017[71] to terminate the natural father's parental rights.[72] The court consolidated this petition with the adoption proceedings, but decided to allow visitation with the child by both the natural father and the prospective adoptive parents.[73]

While the parties subsequently stipulated that Rickie M. was the child's natural father, the court ruled that he was not a "presumed father" within the meaning of California Civil Code section 7004, subdivision (a)(4).[74] Under this provision of the Civil Code, a man becomes a presumed father if "[h]e receives the child into his home and openly holds out the child as his natural child."[75]

The trial court held extensive hearings under California Civil Code section 7017[76] to determine whether it would be in the child's best interest to allow Rickie M. to retain his parental rights and whether to allow the adoption to proceed.[77] Although the child's attorney advocated that Rickie M. should retain his parental rights,[78] the court found that the child's best interests required termination of Rickie M.'s parental rights.[79]

Rickie M. appealed, contending that the trial court erred by: (1) concluding that he was not the child's presumed father;[80] (2) not granting him a parental placement preference;[81] and (3) applying an

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receives the child into his home and openly holds out the child as his natural child." *Id.* This provision is now codified without substantive change. *See* CAL. FAM. CODE § 7611 (West 1994).

70. *Kelsey S.*, 1 Cal. 4th at 822, 823 P.2d at 1218, 4 Cal. Rptr. 2d at 617.

71. CAL. CIV. CODE § 7017(d) (West 1983) (repealed 1994) (current version at CAL. FAM. CODE § 7664 (West 1994)).

72. *Kelsey S.*, 1 Cal. 4th at 822-23, 823 P.2d at 1218, 4 Cal. Rptr. 2d at 617.

73. *Id.*

74. *Id.* at 823, 823 P.2d at 1218, 4 Cal. Rptr. 2d at 617.

75. CAL. CIV. CODE § 7004(a)(4) (West 1983) (repealed 1993) (current version at CAL. FAM. CODE § 7611(d) (West 1994)).

76. CAL. CIV. CODE § 7017 (West 1983) (repealed 1994) (current version at CAL. FAM. CODE §§ 7660-7666 (West 1994)).

77. *Kelsey S.*, 1 Cal. 4th at 823, 823 P.2d at 1218, 4 Cal. Rptr. 2d at 617.

78. *Id.*

79. *Id.*

80. *Id.*

81. A parental placement preference is defined in California's Civil Code. CAL. CIV. CODE § 4600(c) (West 1983) (repealed 1994) (current version at CAL. FAM. CODE § 3041 (West 1994)).

incorrect standard of proof.[82] The Sixth District Court of Appeal rejected all three contentions and affirmed the trial court's judgment.[83]

IV. THE CALIFORNIA SUPREME COURT'S DIVISION OF *KELSEY S.*

A. The Majority

On February 20, 1992, the California Supreme Court reversed the lower court. The court held that the federal constitutional guarantees of equal protection[84] and due process[85] preclude the state from terminating an unwed father's parental rights on nothing more than a showing of the child's best interests.[86] The majority also concluded that Civil Code section 7004—a provision of the Uniform Parentage Act[87]—was unconstitutional as applied.[88] Section 7004 provides that a man is a presumed father of a child if he meets certain conditions including: (1) he is either married to the child's mother, or (2) has

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> Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child.

Id. (repealed 1994) (current version at CAL. FAM. CODE § 3041 (West 1994)).

82. *Kelsey S.*, 1 Cal. 4th at 823, 823 P.2d at 1218, 4 Cal. Rptr. 2d at 617.

83. *Id.*

84. Equal protection guarantees that persons will not be denied rights, privileges, and protections provided to others similarly situated. BLACK'S LAW DICTIONARY 537 (6th ed. 1990). The Equal Protection Clause "requires that persons under like circumstances be given equal protection in the enjoyment of personal rights and the prevention and redress of wrongs." *Id.* at 537 (citing *In re* Adoption of Richardson, 251 Cal. App. 2d 222, 239, 59 Cal. Rptr. 323, 334 (1967)).

85. *See supra* notes 4-6 and accompanying text.

86. *Kelsey S.*, 1 Cal. 4th at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

87. CAL. CIV. CODE §§ 7000-7021 (West 1983) (repealed 1994) (current version at CAL. FAM. CODE §§ 7600-7730 (West 1994)); 9B U.L.A. 287-345 (1987 & Supp. 1994) (giving parental rights in relationship to children). The Uniform Parentage Act has currently been adopted by eighteen states: Alabama, ALA. CODE §§ 26-17-1 to 26-17-21 (1992); California, CAL. FAM. CODE §§ 7600-7730 (West 1994); Colorado, COLO. REV. STAT. ANN. §§ 19-4-101 to 19-4-129 (Bradford 1986); Delaware, DEL. CODE ANN. tit. 13, §§ 801-818 (1993); Hawaii, HAW. REV. STAT. §§ 584-1 to 584-26 (1985); Illinois, ILL. ANN. STAT. ch. 750, para. 45/1-45/26 (Smith-Hurd 1993); Kansas, KAN. STAT. ANN. §§ 38-1110 to 38-1130 (1993); Minnesota, MINN. STAT. ANN. §§ 257.51-257.75 (West 1992); Missouri, MO. ANN. STAT. §§ 210.817 to 210.852 (1987); Montana, MONT. CODE ANN. §§ 40-6-101 to 40-6-135 (Vernon 1994); Nevada, NEV. REV. STAT. §§ 126.011-126.391 (Michie 1991); New Jersey, N.J. STAT. ANN. §§ 9:17-38 to 9:17-59 (West 1993); New Mexico, N.M. STAT. ANN. §§ 40-11-1 to 40-11-23 (Michie 1994); North Dakota, N.D. CENT. CODE §§ 14-17-01 to 14-17-26 (1991); Ohio, OHIO REV. CODE §§ 3111.01-3111.19 (Anderson 1990); Rhode Island, R.I. GEN. LAWS 1956 §§ 15-8-1 to 15-8-27 (1988); Washington, WASH. REV. CODE ANN. §§ 26.26.010-26.26.905 (West 1986); and Wyoming, WYO. STAT. §§ 14-2-101 to 14-2-120 (1977). 9B U.L.A. 287-345 (1987) and at 6 (Supp. 1994).

88. *Kelsey S.*, 1 Cal. 4th at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

attempted to marry the child's mother, (3) he has consented to be named as the child's father on the child's birth certificate, or (4) he "receives the child into his home and openly holds out the child as his own."[89] A presumed father must consent to placing a child up for adoption, as opposed to a "natural father" whose consent is unnecessary.[90] The court found that the statute violated the federal constitutional guarantee of equal protection and due process for unwed fathers, as it gives an unwed mother the power to unilaterally prevent the biological father from attaining the status of presumed father.[91] The problem is that in order to qualify as a presumed father, the biological father must receive the child into his home and openly hold the child out as his natural child[92]—actions easily prevented or frustrated by the biological mother.[93]

The court defined three classes of parents created by the statutory scheme: (1) mothers; (2) biological fathers who are presumed fathers; and (3) biological fathers who are not presumed fathers (that is, natural fathers).[94] The "difficult constitutional question"[95] was whether a *natural father's* federal constitutional rights are violated if his child's biological mother is unilaterally allowed to preclude him from obtaining the same legal right as a *presumed father*—specifically, the right to withhold consent to his child's adoption by third parties.[96] Hence, the majority invoked the Equal Protection Clause as the first step in its analysis,[97] considering the best interests of the child only *after* equal protection and due process have been satisfied.[98]

The majority's concern focused on the court's treatment of the natural father:

> A natural father's consent to an adoption of his child by third parties is not required unless the father makes the required showing that retention of his parental rights is in the child's best interest. Consent, however, is required of a mother and a presumed father regardless of the child's best interest. The

89. *Id.*

90. CAL. CIV. CODE § 7017(d) (repealed 1994) (current version at CAL. FAM. CODE § 7664 (West 1994)).

91. *Kelsey S.*, 1 Cal. 4th at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

92. CAL. CIV. CODE § 7004(a)(4) (repealed 1993) (current version at CAL. FAM. CODE § 7611(d) (West 1994)).

93. *Kelsey S.*, 1 Cal. 4th at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

94. *Id.* at 825, 823 P.2d at 1219, 4 Cal. Rptr. 2d at 618.

95. *Id.* at 830, 823 P.2d at 1223, 4 Cal. Rptr. 2d at 622.

96. *Id.*

97. *Id.* at 826, 823 P.2d at 1220, 4 Cal. Rptr. 2d at 619.

98. *Id.* at 850, 823 P.2d at 1237, 4 Cal. Rptr. 2d at 636.

> natural father is therefore treated differently from both mothers and presumed fathers.[99]

As a result, before his consent to an adoption is required, the natural father must initially show that the child would be better off remaining in his custody. As the majority clearly noted, however, the natural father's consent is rarely needed because "the trial court's determination is frequently that the child's interests are better served by a third party adoption than by granting custody to the unwed natural father."[100]

Addressing this constitutional question, the California Supreme Court held that California Civil Code section 7004 violated the federal constitutional guarantees of equal protection and due process for unwed fathers.[101] The court remanded the case to the trial court to decide whether the biological father's conduct—after learning that he was the biological father—demonstrated a sufficient commitment to his parental responsibilities.[102]

If the trial court determines that the commitment was not sufficient, the biological father has suffered no deprivation of his constitutional rights.[103] If the required commitment is found, however, the biological father's constitutional rights were violated to the extent that he was deprived of the same statutory protection granted to the mother regarding the placement of the child for adoption.[104] In sum, if the court feels the necessary commitment has been shown, absent a showing of abandonment or unfitness, the biological father *cannot* be deprived of his right to be consulted regarding the adoption of his child.[105]

B. Justice Mosk's Dissent

In dissent, Justice Mosk stated that his concern for the child's welfare prevented him from joining the majority.[106] He stated that it is settled law that the court "should not reach constitutional questions

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99. *Id.* at 825, 823 P.2d at 1219, 4 Cal. Rptr. 2d at 618.

100. *Id.* at 824, 823 P.2d at 1219, 4 Cal. Rptr. 2d at 618.

101. *Id.* at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

102. *Id.* at 850, 823 P.2d at 1237, 4 Cal. Rptr. 2d at 636. The court does not explicitly state what would be necessary to demonstrate a full commitment to one's parental responsibilities. It merely refers to "responsibilities—emotional, financial, and otherwise." *Id.* at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

103. *Id.* at 850, 823 P.2d at 1237, 4 Cal. Rptr. 2d at 636.

104. *Id.*

105. *Id.* at 850-51, 823 P.2d at 1237-38, 4 Cal. Rptr. 2d at 636-37.

106. *Id.* at 852, 823 P.2d at 1239, 4 Cal. Rptr. 2d at 638 (Mosk, J., dissenting).

unless absolutely required."[107] By invoking the Equal Protection Clause, Justice Mosk believed the majority was attempting to justify its result, and that it had ignored the potential ramifications of its reasoning.[108] Justice Mosk maintained that attempting to support a desired result "does not justify . . . throwing out the innocent baby with the statutory bath water."[109]

Justice Mosk noticed that the majority's reasoning could lead to "unfortunate results" in widespread cases.[110] Citing *Lehr v. Robertson*,[111] he proclaimed that the issue was a simple factual one: If a biological father accepted responsibility for the child's future, then he is entitled to the benefits of the parent-child relationship.[112] However, if he fails to accept the responsibility, "the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie."[113]

Justice Mosk found the majority's reasoning unsound and fraught with future dangers.[114] He concurred only with the result—reversing the judgment of the court of appeal and remanding the case to the trial court for further proceedings.[115] However, given his belief that the majority's analysis could be injurious to children in other adoption custody disputes, he refused to join the court's reasoning.[116]

Justice Mosk proposed that it was not necessary to address the constitutional issue because an alternate legal solution existed.[117] By applying the doctrine of equitable estoppel[118] the court could determine if either the biological mother or the adoptive parents, or both, were at fault in denying the biological father the chance to become a

107. *Id.* (Mosk, J., dissenting) (emphasis added) (citing People v. Williams, 16 Cal. 3d 663, 667, 547 P.2d 1000, 1003, 128 Cal. Rptr. 888, 891 (1976)).

108. *Id.* at 852-53, 823 P.2d at 1239, 4 Cal. Rptr. 2d at 638 (Mosk, J., dissenting).

109. *Id.* at 853, 823 P.2d at 1239, 4 Cal. Rptr. 2d at 638 (Mosk, J., dissenting).

110. *Id.* at 853-54, 823 P.2d at 1239-40, 4 Cal. Rptr. 2d at 638-39 (Mosk, J., dissenting).

111. 463 U.S. 248 (1983) (holding that unwed father has constitutionally protected parental rights where he participated in raising children, and developed relationship with children).

112. *Kelsey S.*, 1 Cal. 4th at 854, 823 P.2d at 1240, 4 Cal. Rptr. 2d at 639 (Mosk, J., dissenting) (quoting Lehr v. Robertson, 463 U.S. 248, 262 (1983)).

113. *Id.* (Mosk, J., dissenting) (quoting Lehr v. Robertson, 463 U.S. 248, 262 (1983)).

114. *Id.* at 852, 823 P.2d at 1239, 4 Cal. Rptr. 2d at 638 (Mosk, J., dissenting).

115. *Id.* (Mosk, J., dissenting).

116. *Id.* (Mosk, J., dissenting).

117. *Id.* at 852-53, 823 P.2d at 1239, 4 Cal. Rptr. 2d at 638 (Mosk, J., dissenting).

118. Equitable estoppel prevents a party from employing a defense that was created by the party's own objectionable behavior. *Id.* at 853, 823 P.2d at 1239, 4 Cal. Rptr. 2d at 638 (Mosk, J., dissenting).

presumed father.[119] If the biological mother or adoptive parents prevented the biological father from becoming a presumed father by denying him access to the child, they must be prevented from using the biological father's lack of contact with the child as a defense.[120] In addition to the preference to avoid a constitutional determination whenever possible, the potential results were determinative for Justice Mosk in choosing this legal doctrine.[121]

V. ANALYSIS

A. Kelsey S. *Places the Biological Parents First*

An adoption proceeding weighs and balances the competing interests of the birth parents, the adoptive parents, and the child who is the subject of that proceeding. In recent tradition, courts have focused on the child's interests.[122] However, the *Kelsey S.* court addressed the critical issue of whether the law treats parents equally.[123] Thus, the court subordinated the child's interests, contrary to the traditional approach in adoption proceedings.[124]

The traditional best interests standard is grounded upon the premise that certain individuals, like children, are unable to, or incapable of, taking care of themselves.[125] Consequently, children need social institutions designed to safeguard their well-being.[126] Nevertheless, the majority in *Kelsey S.* seemed to ignore the best interests standard, and rigidly applied the Equal Protection Clause to the rights of the biological parents without being flexible or sensitive to the child's needs.[127] The court in *Kelsey S.* read *Stanley v. Illinois*[128] and other United States Supreme Court cases to mean that the due process rights of the father come first, before any other considerations.[129]

No justifiable reason exists, however, to assume that family relationships are more important to the biological father than they are to the child. In fact, a child's vulnerability probably makes such relation-

119. *Id.* (Mosk, J., dissenting).
120. *Id.* (Mosk, J., dissenting).
121. *Id.* at 852-54, 823 P.2d at 1239-40, 4 Cal. Rptr. 2d at 638-39 (Mosk, J., dissenting).
122. *See supra* notes 22-32 and accompanying text.
123. *Kelsey S.*, 1 Cal. 4th at 844, 823 P.2d at 1233, 4 Cal. Rptr. 2d at 632.
124. *Id.*
125. *See* Rodham, *supra* note 19, at 493.
126. *See id.* at 487.
127. *Kelsey S.*, 1 Cal. 4th at 852, 823 P.2d at 1239, 4 Cal. Rptr. 2d at 638 (Mosk, J., dissenting).
128. 405 U.S. 645 (1972).
129. *Kelsey S.*, 1 Cal. 4th at 830-31, 823 P.2d at 1223, 4 Cal. Rptr. 2d at 622.

ships even more important to the child.[130] At a minimum, a child's interest in either maintaining or terminating the familial relationship is as important as a parent's: The effects of sending a child back to "live with complete strangers can be far more devastating than the disappointment of a parent in the loss of a parent/child relationship."[131]

Courts have long recognized that a minor's status is unique. In *Bellotti v. Baird*,[132] the United States Supreme Court stated that the unique role of the family in our society "requires that constitutional principles be applied with *sensitivity and flexibility* to the special needs of parents and children."[133] Moreover, under circumstances that are particularly relevant to custody disputes, the best interests of the child standard is supposed to apply when the family is not able to meet a child's needs.[134] The Court in *Bellotti* recognized that children are protected by the Constitution, but articulated three reasons why children's rights could not be equated with those of adults: (1) their peculiar vulnerability; (2) their inability to make critical decisions in an informed, mature manner; and, (3) the importance of the parental role in child rearing.[135]

While a father may be entitled to certain protections, the Court failed to address the question of how these protections can be reconciled with a child's right to remain with the only parents the child has ever known. Given a reluctance or an inability to resolve this problem, some commentators believe that the child's needs should always be placed ahead of other interests.[136] In order to meet these needs,

130. George H. Russ, *Through the Eyes of a Child, "Gregory K.": A Child's Right to Be Heard*, 27 FAM. L.Q. 365, 373 (1993). This vulnerability was eloquently expressed by Justice Levin in his dissent to *DeBoer v. Schmidt*, where he stated "[i]t is only because this child cannot speak for herself that adults can avert their eyes from the pain that she will suffer." DeBoer v. Schmidt (*In re* Clausen), 502 N.W. 2d 649, 689 (Mich.) (Levin, J., dissenting), *stay denied sub nom.* DeBoer v. DeBoer v. Schmidt, 114 S. Ct. 1, *and stay denied sub nom.* DeBoer v. DeBoer v. Schmidt, 114 S. Ct. 11 (1993).

131. Russ, *supra* note 130, at 385.

132. 443 U.S. 622 (1979).

133. *Id.* at 634 (emphasis added).

134. EVA R. RUBIN, THE SUPREME COURT AND THE AMERICAN FAMILY 165-67 (1986).

135. *Bellotti*, 443 U.S. at 633-39. Since the United States Supreme Court has not defined the child's interest in family life as one of "constitutional magnitude," there is no uniform, national rule to require courts to protect this interest. Jerry A. Behnke, Comment *Pawns or People?: Protecting the Best Interests of Children in Interstate Custody Disputes*, 28 LOY. L.A. L. REV. 728 n.233 (1995).

136. *See, e.g.*, JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979) (arguing that child's interest in psychological relationships with its caretaker parents should be protected in custody determination proceedings).

permanency in parental relationships must be paramount.[137] In fact, one commentator suggests that

> the Supreme Court's characterization of parental rights as fundamental is based on the idea that parents need these legal rights to protect their children and promote their best interests against outside intrusion. When parental rights . . . conflict with the independent legal rights of the child, . . . parental rights should no longer be regarded as fundamental.[138]

B. Psychological Bonds Should Be Paramount to Biological Bonds

Undoubtedly, the development of secure emotional ties between parent and child has long-lasting significant effects. Infants who fail to form a close bond with any adult are likely to be unable to form enduring, close relationships in later stages of their lives.[139] The importance of the opportunity to develop a secure relationship with at least one parental figure early in childhood has been clearly established.[140] However, it has not been proven that this relationship must be between the child and a biological parent; what is important is the psychological bond with a parental figure.[141] Therefore, it is the psychology, not the biology, of the relationship that is paramount.[142] When a child has been placed with adoptive parents for an extended period of time, bonds develop that cannot be disturbed without the same harm that would result from removing a child from a loving biological family.[143]

Completely and permanently severing these early relationships usually disrupts a child's ability to develop any meaningful future ties.[144] Separation and loss at an early age may result in developmental injuries including, but not limited to, uncommitted, superficial ties

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137. *Id.*

138. Alison M. Brumley, *Parental Control of a Minor's Right to Sue in Federal Court*, 58 U. CHI. L. REV. 333, 343 (1991) (citation omitted).

139. *See* Leslie M. Singer et al., *Mother-Infant Attachment in Adoptive Families*, 56 CHILD DEV. 1543, 1544, 1550 (1985) (stating that while mother-neonatal bonding is not necessary, adoption should take place in infancy to facilitate close attachment and bonding).

140. *Id.* at 1550.

141. *See id.*

142. *See* GOLDSTEIN ET AL., *supra* note 136, at 105-11.

143. Russ, *supra* note 130, at 387.

144. Memorandum from Linda Kreger, Ph.D. to DeBoer Committee for Children's Rights 2 (1993) (regarding psychological effects of transfer of "Baby Jessica" from adoptive parents to biological parents) (on file with author).

to people; detachment in relationships; extreme mood swings; difficulties in learning; emotional blocks; and memory suppression.[145]

According to Mary Beth Seader, vice president of the National Council for Adoption in Washington, D.C., the number of American infants adopted remains fairly constant at 25,000 to 30,000 annually.[146] Ms. Seader also cites a General Accounting Office study which indicates that ten percent of parents who adopted children from outside the United States did so because they did not trust the permanence of domestic adoptions.[147] Adoptive parents generally feel that "claims of biology cannot be deemed to trump invariably the moral claims of those who entertain no biological connection with the child."[148]

The United States Supreme Court has cautioned that biological relationships do not determine exclusively the existence of a family.[149] In analyzing a foster parent's[150] liberty interest in maintaining a relationship with a foster child, the Court has emphasized the emotional attachments that arise from daily familial association.[151] This reasoning would apply equally well to adoption cases when the child already has been placed with the adoptive parents.

In foster care situations, the state removes the child from his or her biological parent(s) because of neglect or abuse and places the child with a foster family for board and care on only a *temporary* basis.[152] This way foster parents are aware from the beginning that they are expected to give the child up at a moment's notice.[153] In adoption cases, however, at least one of the child's parents has abandoned the child or has volunteered to give up the child permanently.[154] So while foster child custody cases are decided under different statutes, the fo-

145. *Id.* at 1-2.

146. Rhonda Hillbery, *Adoptive Parents Fear That Recent Cases Erode Rights*, L.A. TIMES, Aug. 11, 1993, at A5.

147. *Id.*

148. Hill, *supra* note 17, at 420.

149. Smith v. Organization of Foster Families, 431 U.S. 816, 843 (1977).

150. A "foster parent" is defined as "[o]ne who has performed the duties of a parent to the child of another by rearing the child as his or her own child." BLACK'S LAW DICTIONARY 656 (6th ed. 1990).

151. *Smith*, 431 U.S. at 844.

152. GOLDSTEIN ET AL., *supra* note 136, at 23-24. *See also* Rodham, *supra* note 19, at 490-92 (The state's interest in protecting children "has long justified state interference with parental prerogatives and even termination of all parental rights.") *Id.* at 490.

153. GOLDSTEIN ET AL., *supra* note 136, at 24-26.

154. *Id.* at 22-23.

cus is similar: to give the child a home, whether temporary or permanent.[155]

Under former California Civil Code section 232, a court hearing an action to terminate parental rights when a child has been in an out-of-home placement supervised by the juvenile court[156] must consider: (1) whether "return of the child to his parent or parents would be detrimental to the child"; and (2) whether "the parent or parents have failed during such period, and are likely to fail in the future" to provide a home for the child, to provide care and control for the child, and to maintain an adequate parental relationship with the child.[157] This is equivalent to a finding of unfitness, which is necessary at some point in the proceedings as a matter of due process before parental rights may be terminated.[158]

In *In re Jasmon O.*[159] Jasmon's biological father argued that Jasmon's best interests would be served by transferring custody to him, rather than by terminating his parental rights.[160] However, Justice Mosk, writing for the majority this time, concluded that detriment to the child and parental inadequacy warranted termination of the father's parental rights.[161] Evidence showed that the biological father had failed to form a substantial bond with Jasmon and that visitation with her father caused Jasmon great general anxiety, deep separation anxiety, and depression.[162]

Jasmon had been placed in foster care six months after her birth in 1987 and was seven-and-a-half years old at the time of the California Supreme Court decision in her case.[163] The court cited *Kelsey S.* as it discussed unwed fathers' rights to establish parental relationships, explaining that while a parent has a fundamental right to maintain the

155. "[T]he child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding." UNITED NATIONS CENTRE, *supra* note 1, at 13.

156. A juvenile court has "special jurisdiction, of a paternal nature, over delinquent, dependent, and neglected children." BLACK'S LAW DICTIONARY 867 (6th ed. 1990). This is in contrast to a "family law" court which is concerned with such subjects as "adoption, amendment, divorce, separation, paternity, custody, support and child care." *Id.* at 605.

157. CAL. CIV. CODE § 232(a)(7) (West 1983) (repealed 1994) (current version at CAL. FAM. CODE § 7828(a)(2) (West 1994)).

158. *In re* Jasmon O., 8 Cal. 4th 398, 439, 878 P.2d 1297, 1321, 33 Cal. Rptr. 2d 85, 109 (1994) (Baxter, J., dissenting); *Kelsey S.*, 1 Cal. 4th at 850-51, 823 P.2d at 1237, 4 Cal. Rptr. 2d at 636.

159. 8 Cal. 4th 398, 878 P.2d 1297, 33 Cal. Rptr. 2d 85 (1994).

160. *Id.* at 407, 878 P.2d at 1299, 33 Cal. Rptr. 2d at 87.

161. *Id.*

162. *Id.* at 409-10, 878 P.2d at 1301, 33 Cal. Rptr. 2d at 89.

163. *Id.* at 407, 878 P.2d at 1299, 33 Cal. Rptr. 2d at 87.

parent-child bond and to the care, custody, and companionship of his or her child, it is not an *absolute* right.[164] This right may be severed when necessary to protect a child's welfare.[165]

This court focused on "balanc[ing] the interest of parents and children in each other's care and companionship, with the interest of abandoned and neglected children in finding a secure and stable home."[166] While stressing that the child's interest should not be the sole factor in making placement decisions,[167] the court found that "after a child has spent a substantial period in foster care and attempts at reunification have proved fruitless, the child's interest in stability outweighs the parent's interest in asserting the right to the custody and companionship of the child."[168] The court held that the trial court referee had not erred in relying exclusively on evidence that it was not in the child's best interests to disrupt her psychological bond with her foster parents.[169]

The majority specifically cautioned that this opinion was not "intended to affect proceedings outside the dependency setting, as for example, in family law custody disputes."[170] However, the court's rationale easily could be extended to adoption custody cases—it should be "within the court's discretion to decide that a child's interest in stability has come to outweigh the natural parent's interest in the care, custody and companionship of the child."[171]

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164. *Id.* at 419, 878 P.2d at 1307, 33 Cal. Rptr. 2d at 95.

165. *Id.*

166. *Id.*

167. *Id.* at 419-20, 878 P.2d at 1307-08, 33 Cal. Rptr. 2d at 95-96.

168. *Id.*, 878 P.2d at 1307, 33 Cal. Rptr. 2d at 95.

169. *Id.* at 414, 878 P.2d at 1304, 33 Cal. Rptr. 2d at 92; *see, e.g.*, AMERICAN PSYCHOLOGICAL ASSOCIATION, GUIDELINES IN CHILD CUSTODY EVALUATIONS IN DIVORCE PROCEEDINGS 4 (1994). While "[p]arents competing for custody, as well as others, may have legitimate concerns . . . the child's best interests must prevail." *Id.* The focus of a custody evaluation involves:

> (a) an assessment of the adults' capacities for parenting, including whatever knowledge, attributes, skills, and abilities, or lack thereof, are present; (b) an assessment of the psychological functioning and developmental needs of each child and of the wishes of each child where appropriate; and (c) an assessment of the functional ability of each parent to meet these needs, including an evaluation of the interaction between each adult and child.

Id.

170. *Jasmon O.*, 8 Cal. 4th at 422, 878 P.2d at 1309, 33 Cal. Rptr. 2d at 97.

171. *Id.* at 419, 878 P.2d at 1307, 33 Cal. Rptr. 2d at 95. An interesting analytical experiment concerns how the *Kelsey S.* court would apply the *Jasmon O.* standard to its facts and vice versa. If the *Kelsey S.* court were faced with the facts in *Jasmon O.* in an adoption custody case—rather than a dependency case—the court most likely would focus on the biological father's constitutional rights to determine whether he had demonstrated a full commitment, reasonable under the circumstances, to his parental responsibilities. Based

The emotional bonds formed between children and their parental figures are particularly important when there are postplacement custody changes. Emotional and psychological attachments develop between a child and parent in a very short period of time.[172] According to psychiatric professionals, removing a child from the only parents he or she has ever known, substantially after placement, is not only traumatic and painful for the child, but may cause permanent psychological damage as well.[173] "In this respect California law turns the conventional function of the adoption system—to serve the child's best interests—on its head."[174] Postplacement changes in custody can harm the child—the very person the adoption system is designed to protect.

Furthermore, the current system treats adoptive parents like second-class citizens.[175] Authorities expect them to be able to turn a child over at a moment's notice—something society would find unfathomable in the case of a biological parent.[176] Yet adoptive parents are not secondary citizens; they have been screened as fit parents by either a state agency or a private, state-licensed agency.[177] They have provided support and care, and in most cases, have become the psychological parent to the child. In addition, psychologists note that a child is likely to be traumatized if custody changes.[178] Therefore, the adoptive parents with whom the child has been living would seem to

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upon the facts presented in *Jasmon O.*—in which the father repeatedly attempted but was unable to develop a bond with his child—it appears possible that the court may have found his behavior sufficient to constitute a full commitment to his responsibilities.

Alternatively, if the *Jasmon O.* court applied its standard for dependency cases to the facts presented in *Kelsey S.*, the child's best interests would be balanced against the biological father's constitutional rights. Applying this test, the two-and-a-half-year-old child's interest in stability would possibly outweigh the father's interest in asserting the right to the custody and companionship of his child. Thus, had either court applied its standard to the facts of the other case, a different result would probably have been rendered in each case.

172. "A psychological parent-child relationship equivalent to that between biological parent and child may develop between unrelated persons in as little as one year." Behnke, *supra* note 135, at 716 n.189.

173. GOLDSTEIN ET AL., *supra* note 136, at 33-34; Janet H. Dickson, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 978 (1991).

174. Dickson, *supra* note 173, at 978-79.

175. *Id.* at 982. "California law also unjustifiably casts adoptors in the role of unwilling, unknowing temporary babysitters." *Id.* at 979.

176. *Id.*

177. *Id.* at 982.

178. *See supra* notes 139-45 and accompanying text; *see also* Comment, *Adoption: Psychological Parenthood as the Controlling Factor in Determining the Best Interests of the Child*, 26 RUTGERS L. REV. 693 (1973) (arguing that psychological parenthood rather than genetic parenthood be controlling factor in determining child's best interests).

be the better candidates when considering the child's interest in a custody dispute.[179]

The *only* thing that tips the scale in favor of the biological parent is the genetic tie to the child.[180] The California Supreme Court, however, has said that biological ties *alone* are insufficient to determine custody.[181] While a biological father has a unique chance to build a psychological tie with his child,[182] if the child has been placed with adoptive parents at an early age, the adoptive parents have the *same chance* to build emotional ties that are as significant as biological ones.[183]

C. *Future Uncertainty*

As noted above, Justice Mosk viewed the majority's decision as creating needless uncertainty that will work to the "disadvantage of all parties—but especially the child."[184] This uncertainty is especially apparent in determining the biological father's rights. The majority stated that "[o]nce the father knows or reasonably should know of the pregnancy, he must promptly attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit."[185] But it could be several years before a father either becomes aware of the pregnancy or achieves circumstances allowing him to care for a child. This test leaves an adopted child's status uncertain for an indefinite period.

While Justice Mosk's dissent reflected his concern for the welfare of the child,[186] it does not go far enough. Fundamentally, Justice Mosk based his reasoning on the premise that as long as an alternate legal theory was available to decide an issue, "[i]t is settled law that we should not reach constitutional questions . . . ."[187] Therefore, even if Justice Mosk's position had prevailed, courts would not have been required to place a child's interests above a biological parent's. However, if we are truly concerned with a child's welfare, we must have a

179. Dickson, *supra* note 173, at 982.

180. *Id.*

181. *Kelsey S.*, 1 Cal. 4th at 838, 823 P.2d at 1228, 4 Cal. Rptr. 2d at 627 (citing *In re* Raquel Marie X., 559 N.E.2d 418 (N.Y.), *cert. denied*, 498 U.S. 984 (1990), *rev'd*, 570 N.Y.S.2d 604 (1991), for New York high court's analysis of U.S. Supreme Court decisions).

182. *Id.*

183. Dickson, *supra* note 173, at 983.

184. *Kelsey S.*, 1 Cal. 4th at 852, 823 P.2d at 1239, 4 Cal. Rptr. 2d at 638 (Mosk, J., dissenting).

185. *Id.* at 849, 823 P.2d at 1236-37, 4 Cal. Rptr. 2d at 635-36.

186. *Id.* at 852, 823 P.2d at 1239, 4 Cal. Rptr. 2d at 638 (Mosk, J., dissenting).

187. *Id.* (Mosk, J., dissenting).

legal doctrine that places a child's interests ahead of any other party's. Justice Mosk's dissent fell short because it failed to call for such a doctrine—in truth it did little to dissuade courts from viewing children as nothing more than genetic property.[188]

D. *Post*-Kelsey S.

1. Legislation

The *Kelsey S.* decision has prompted movement for reform of state adoption laws. The National Conference of Commissioners on Uniform State Laws has initiated drafting a model act on adoption to help standardize state laws; this movement has been prompted in part by vague state laws regarding fathers' rights.[189] Joan Hollinger, the nation's foremost expert on adoption,[190] is working currently with a committee to draft the nation's Uniform Adoption Act.[191] This proposed act is intended to promote the welfare of children involved in adoption. The act has three primary concerns: (1) protect birth parents from unwarranted termination of their parental rights; (2) require expedited hearings for all adoptions; and, (3) appoint a legal advocate for children whose well-being is threatened by protracted or contested adoption proceedings.[192] Ms. Hollinger, along with eighteen other experts in family and constitutional law, wrote an amicus brief to the United States Supreme Court in the recent "Baby Jessica"[193] case,[194] arguing that the child had "an independent liberty interest in maintaining her ties to the only family she had ever known, the family created by her would-be adoptive parents."[195]

188. Once a child has been with an adoptive family for an extended period, the child is better off remaining with that family. However, placing the child's interests first does not prevent a court from deciding that a child is better off with a biological parent. A court must base its decision on the facts of a given situation. The critical distinction is, therefore, that in making its decision, a court should consider what is best for the child.

189. *See* Gretchen Kell, *She Wrote the Book: Hollinger's Studies Will Be at Center Stage as We Enter a New Era in Adoption Laws* 1, 8 (1994); Hillbery, *supra* note 146, at A5.

190. Kell, *supra* note 189, at 1.

191. *Id.* The National Conference of Commissioners on Uniform State Laws voted on the committee's final draft in the summer of 1994. It was approved and will be submitted to the states with a request that they enact it. *Id.* at 8. The American Bar Association House of Delegates is scheduled to vote on the act at its 1995 midyear meeting. Mark Hansen, *Fears of the Heart*, A.B.A. J., Nov. 1994, at 58, 60.

192. Kell, *supra* note 189, at 1, 8.

193. DeBoer v. DeBoer v. Schmidt, 114 S. Ct. 1 (1993).

194. Kell, *supra* note 189, at 8. Citing interstate jurisdictional rules it did not wish to address, the U.S. Supreme Court never granted certiorari. *Id.* For a complete discussion of interstate jurisdictional concerns in custody cases, see Behnke, *supra* note 135.

195. Kell, *supra* note 189, at 8.

In addition, The DeBoer Committee for the Rights of the Child[196] has organized efforts to persuade state legislators—including those in California[197]—to amend state laws to provide adoptive parents with stronger legal standing in adoption cases, and to incorporate the best interests standards into custody decisions.[198] The committee's mission is to work for the protection of children through legislative and judicial reform, and to "urge the courts to hold the best interest of the child above all other considerations."[199]

In California, a bill authored and proposed by State Senator Charles Calderon would give unwed fathers ninety days after birth to begin "showing concern" and gain custody.[200] This bill would both broaden unwed biological fathers' rights while at the same time narrow those rights by giving these unwed fathers *up to ninety days after the birth* to begin showing concern and thereby gain custody.[201] In contrast, the *Kelsey S.* ruling requires that such concern be shown *as soon as* the father knows or should know about the pregnancy.[202] If the father knows about the pregnancy early—for example, during the first trimester of the pregnancy—the California proposal would give the father up to three months after the child's birth, potentially one year longer than *Kelsey S.* would have required. If, on the other hand, the father does not discover the child's existence until more than ninety days after birth, the father will have no case—unlike the standard implemented under *Kelsey S.*

2. Cases

In re Michael B.[203] was the first case decided after the California courts wrote *Kelsey S.*[204] As a result of the *Kelsey S.* decision, Peggy and John Stenbeck may have to return their two-and-one-half-year-

196. The DeBoer Committee for Children's Rights was formed in 1993 out of concern for a two-year-old girl from Ann Arbor, Michigan, who faced being removed from the only home and parents she had ever known. *Mission Statement*, HEAR MY VOICE (The DeBoer Committee for Children's Rights), at 1 (Oct. 1993) [hereinafter *Mission Statement*].

197. Minutes of Meeting, DeBoer Committee for Children's Rights, Orange County/Los Angeles Chapter 2 (Feb. 5, 1994) (on file with author).

198. Hillbery, *supra* note 146, at A5.

199. *Mission Statement*, *supra* note 196, at 1.

200. Tony Perry, *Adoption Battle Raises Painful Questions*, L.A. TIMES, Aug. 7, 1993, at A1, A22 [hereinafter Perry, *Adoption Battle*].

201. *Id.*

202. *See Kelsey S.*, 1 Cal. 4th at 849, 823 P.2d at 1236-37, 4 Cal. Rptr. 2d at 635-36.

203. 8 Cal. App. 4th 1698, 11 Cal. Rptr. 2d 290 (1992).

204. Tony Perry, *Unwed Father May Halt Custody Bid Over Concern for Son*, L.A. TIMES, Oct. 20, 1993, at A3 [hereinafter Perry, *Unwed Father*].

old adopted son Michael to Mark King, his biological father.[205] King is a high school dropout with a history of drug and alcohol abuse.[206] He was twenty-one years old when he impregnated Michael's mother, who was only fifteen at the time.[207] Although King initially agreed to the adoption, he later changed his mind while recuperating from an attempted suicide.[208] While King has indicated that he may not press for custody if it causes his son additional trauma, he has yet to decide whether he will appeal the initial ruling that gave the Stenbecks temporary guardianship.[209]

In *In re Raquel Marie X.*,[210] the New York Court of Appeals held that unwed fathers have the right to prevent their child's adoption if they are (1) willing to assume custody of the child, and (2) promptly manifest parental responsibility.[211] This holding resulted in removing a child from her home of two years with her adoptive parents and returning the child to her biological father.[212] The uncertainty that Justice Mosk foresaw in *Kelsey S.*[213] became a reality in this case.

Justice Armand Arabian, part of the *Kelsey S.*[214] majority, held differently in *In re Zacharia D.*[215] Justice Arabian felt that the idea of returning the child to an "indifferent" father who did not assert his parental claim until the child was over a year old "elevates the rights of a biological father above the child's interest in stability and permanency . . . ."[216] Here, after the biological father failed to come forward for more than a year after the child was born, the adoptive parents were allowed to finalize Zacharia's adoption.[217] The biological father challenged the adoption, alleging that he was unaware he was the father until that time.[218] He would have met the *Kelsey S.* test by coming forward to demonstrate a parental commitment as soon as he

205. Perry, *Adoption Battle*, *supra* note 200, at A22.
206. *Id.*
207. *Id.*
208. *Id.*; Perry, *Unwed Father*, *supra* note 204, at A3, A19.
209. Perry, *Unwed Father*, *supra* note 204, at A3.
210. 559 N.E.2d 418 (N.Y.), *cert. denied*, 498 U.S. 984 (1990), *rev'd*, 173 A.D.2d 709, 570 N.Y.S.2d 604 (1991).
211. *Id.* at 424.
212. *Id.* at 429.
213. *See supra* notes 106-21 and accompanying text.
214. 1 Cal. 4th 816, 823 P.2d 1216, 4 Cal. Rptr. 2d 615 (1992).
215. 6 Cal. 4th 435, 862 P.2d 751, 24 Cal. Rptr. 2d 751 (1993).
216. *See id.* at 454, 862 P.2d at 764, 24 Cal. Rptr. 2d at 764; *The Child Has an Interest, Too*, *supra* note 9, at B6.
217. *The Child Has an Interest, Too*, *supra* note 9, at B6.
218. *Id.*

learned of the pregnancy.[219] Since the biological father later lost his parental rights after a probation violation stemming from a felony drug conviction,[220] the court was probably acting in the child's best interests. Nonetheless they were not determining this case in the manner prescribed in *Kelsey S.* After an adoption has been finalized, adoptive parents should have a higher degree of certainty that their relationship with the child will no longer be at risk.

3. A new direction

Robert Fellmeth, a law professor at the University of San Diego and director of the Children's Advocacy Institute, expressed concern that the *Kelsey S.* decision is "dangerous" both to the Stenbecks and to other prospective adoptive parents.[221] Professor Fellmeth interprets the *Kelsey S.* decision as a regression from society's current "paternalistic attitude of protecting children to the 19th-Century view that children are property."[222] At the very least, Professor Fellmeth hopes for a legislative response to the *Kelsey S.* ruling that would restore some version of the best interests standard.[223]

The *Kelsey S.* majority left time limits regarding the biological father's opportunity to come forward an open question. By requiring that the biological father demonstrate parental responsibility either as soon as he learns of, or as soon as he should reasonably know of, the pregnancy,[224] the court failed to acknowledge that this could be a long period of time, especially to a child. What if the father does not learn that he is the natural father until after the baby is born? How much time can elapse after the baby has been placed with an adoptive family? What if the child is three, six, or ten years old? By more clearly defining the time during which a biological father must assert his rights, the court could have prevented needless uncertainty.

VI. CONCLUSION

Adoption custody disputes involve the conflicting interests of the state, the child's biological parents, the prospective adoptive parents, and of course, the child, who is at the heart of the dispute. Each party has strong interests in the outcome of the case. In addition, adoption

219. *Kelsey S.*, 1 Cal. 4th at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.
220. *The Child Has an Interest, Too*, *supra* note 9, at B6.
221. *See* Perry, *Adoption Battle*, *supra* note 200, at A22.
222. *Id.*
223. *Id.*
224. *Kelsey S.*, 1 Cal. 4th at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

custody disputes involve deeply felt emotions. These decisions, although dramatically affecting the home and family, have the greatest impact upon the children themselves. Children develop bonds quickly and these bonds, whether developed with the adoptive or the birth parents, should not be ripped apart so casually. The California Supreme Court's decision in *Kelsey S.*[225] placed the rights of the birth father before the rights of the child. The decision gave little consideration to the child's right to remain with the parents with whom she had already bonded. The court should have, at the very least, given the child's rights *equal weight* with those granted to the biological parent.

There is an important need for certainty and finality in adoption proceedings. Unfortunately, California law does not recognize the harm in removing a child from an adoptive home after the child has developed close bonds.[226] By creating expedited adoption procedures, like those proposed by Hollinger's Uniform Adoption Act,[227] we can minimize this harm.

The rights of prospective adoptive parents must be reconciled with the state's interest in protecting the rights of the natural parents. Above all, if custody determination ultimately is to secure the welfare of the child, courts must first look to the best interests of the child.

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225. 1 Cal. 4th 816, 823 P.2d 1216, 4 Cal. Rptr. 2d 615.

226. This could happen even as much as three years after birth and initial placement, as in *Kelsey S.*

227. The Act was finalized in early August 1994 and is being reviewed by the American Bar Association. *Adoption Cases Spur Children's Welfare Act*, L.A. TIMES, Aug. 31, 1994, at E3; Hansen, *supra* note 191, at 58-59.

* This Note is dedicated in loving memory to my grandmother Kitty Boone.