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Twisted Interests: People in Interest of S.A.H. and the State of Open Adoptions in South Dakota

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TWISTED INTERESTS: *PEOPLE IN INTEREST OF S.A.H.** AND THE STATE OF OPEN ADOPTIONS IN SOUTH DAKOTA

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In People in Interest of S.A.H., *the South Dakota Supreme Court held that open adoptions, or post-adoption visitation by the natural parents, while not prohibited under South Dakota law when in the best interests of the child, should only be mandated when the trial court finds that it is in the best interests of the child by clear and convincing evidence. The court also instructed trial courts to weigh the needs of the child, the effect on integration with the new family, and the potential effect on the pool of other prospective adoptive parents. This decision, while securing judicial enforcement of consensual open adoptions, presents an inordinately difficult standard for mandating open adoptions.*

I. INTRODUCTION

Contemporary psychological research and surveys of adopted children indicate that the nondisclosure and secrecy which typically accompanies adoptions in late twentieth century America can cause problems for adopted children.[1] As part of the movement away from the confidential treatment of adoption records, many states now provide for voluntary registers for information about birth parents which the adopted children may consult.[2] Further, some adoption agencies now provide for "open adoptions" which allow the adopted child to retain some degree of contact with her birth parents.[3] Today, new approaches toward adoption are often the

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* Pending final publication of this note, the South Dakota Legislature amended S.D.C.L. sections 25-6-17 and 26-8A-27, abrogating the power of circuit courts to mandate open adoptions and declaring that natural parents shall retain no post-termination rights (including visitation) other than any final visitation as allowed by the state's Department of Social Services. Because of the article's continued significance in contributing to a better understanding of the concerns of those affected by the adoption process, publication was not discontinued.

1. Nathan M. Simon and Audrey G. Senturia, *Adoption and Psychiatric Illness*, 122 THE AMERICAN JOURNAL OF PSYCHIATRY 858 (1966) [hereinafter Simon and Senturia]. The "nonrelative adoption is a specific stress associated with increased incidence of psychiatric illness of a specific type." *Id.* at 867. Research data and case histories indicate that very few adoptees are provided with enough background information to incorporate into their own ego and are more vulnerable to identity conflicts as adolescents. ARTHUR D. SOROSKY, ANNETTE BARAN AND REUBEN PANNOR, THE ADOPTION TRIANGLE 221 (1978) [hereinafter SOROSKY].

2. *See, e.g.*, S.D.C.L. § 25-6-15.3 (1992). See *infra* note 106 for the provisions of this statute and related commentary.

3. *See, e.g.*, ADOPTION LAW & PRACTICE VOL. 2 128 (Joan H. Hollinger, ed., 1988 & Supp. 1993) (citing DALLAS MORNING NEWS, November 10, 1992) (reporting that at least 20% of the placements of the century old Gladney Adoption Center in Texas are now open adoptions). Diane Propert, director of Family Options, a Holmdel, New Jersey adoption agency, says she supports the increasing trend for open adoptions among conventional agencies. Carrie Stetler, *How Adoption Works*, THE STAR LEDGER (Newark), February 9, 1997, at 6. Of the 106 placements Propert has handled in the last ten years, about 60 sets of families have chosen to keep in touch by mail. *Id.* The Catholic Social Services adoption agency in St. Louis advocates open adoption using the agency as an intermediary after a careful matching process between the families. Nor-

topic of discussion, debate and controversy.[4]

In *People in Interest of S.A.H.*,[5] a deaf and mentally impaired couple had their parental rights terminated when the trial court determined that they were unable to care for their baby.[6] Subsequent motions by the mother, father and child for an open adoption were denied.[7] In the appeal that followed, the South Dakota Supreme Court found no prohibition against open adoptions in South Dakota, but affirmed the trial court's denial of an open adoption to S.A.H. and his handicapped parents.[8] The court held that open adoptions were judicially enforceable so long as in the best interests of the child.[9] But the court restricted judicially mandated open adoptions when parental rights had been terminated to cases where it could be shown by clear and convincing evidence that an open adoption would serve the child's best interests.[10] The South Dakota Supreme Court further instructed trial courts to engage in a three-part weighing process when determining whether to mandate an open adoption.[11]

S.A.H. imposes a high evidentiary standard and rather complex tripartite weighing exercise whenever a parent or child moves for some degree of continuing contact after the termination of parental rights.[12] *S.A.H.* also restricts the grant of visitation privileges to "people who acted in a custo-

man Mendoza, *Circle of Love - Adoption Creates New Families, New Thankfulness*, ST. LOUIS DISPATCH, November 28, 1996, at 1. The Arizona Children's Home placed 16 infants last year, most in open adoptions. Alexa Haussler, *Open Adoption Helps Teen Mom Keep in Touch with Her Child*, ARIZONA DAILY STAR, March 28, 1996, at 1A. Some agencies, such as the Independent Adoption Center in Pleasant Hill, California, and Pact in San Francisco, even specialize in open adoptions. Laura Castaneda, *The Costs of Adoption - It Can Be Expensive But There is Lots of Support*, SAN FRANCISCO CHRONICLE, September 30, 1996, at E1. Founded in 1984, Adoptions from the Heart was the first open adoption agency on the East Coast. Alison Delsite, *Opening Their Hearts and Homes*, HARRISBURG PATRIOT, June 3, 1996, at A1. In fact, in Alberta, open adoptions now outnumber confidential ("provincial") adoptions by about 30 to one. *Adoption Opens Up in 90's Alberta*, CALGARY HERALD, October 21, 1996, at A4. For a definition of the term "open adoption" see *infra* note 108.

4. Lawrence Caplan, *An Open Adoption- I*, NEW YORKER, May 21, 1990 at 40-60; Lawrence Caplan, *An Open Adoption- II*, NEW YORKER, May 28, 1990, 73-95 [hereinafter Caplan II] (describing the travails of an open adoption). *See also,* LAWRENCE CAPLAN, OPEN ADOPTION (1990) (containing a nonfiction account of an informally-arranged open adoption and the emotional strains on the natural mother); KATHLEEN SILBER AND PATRICIA MARTINEZ DORNER, CHILDREN OF OPEN ADOPTION AND THEIR FAMILIES (1990) [hereinafter SILBER] (documenting the experiences of adopted children from open adoptions); James Lardner, *Open Adoption and Closed Minds*, WASHINGTON POST, Dec. 31, 1989, at C3 (detailing the prejudices at work against open adoptions); The Immediate Family (1989) (starring Glenn Close, James Woods and Mary Stuart Masterson; cinematically depicting an informal open adoption of a newborn and the associated conflicting emotions and interests); Laurie A. Ames, *Open Adoptions: Truth and Consequences*, 16 LAW AND PSYCHOLOGY REVIEW 137 (1992) [hereinafter Ames] (explaining how the "best interests of the child" seems caught between the fears of both the adoptive and the biological parents).

5. People in Interest of S.A.H., 537 N.W.2d 1 (S.D. 1995).

6. *Id.* at 3.

7. *Id.* at 4.

8. *Id.* at 6-7.

9. *Id.* at 6. "[T]his court finds no prohibition against open adoption." *Id.*

10. *Id.* at 7.

11. *Id.* For the three-part weighing process, see *infra* note 66 and accompanying text.

12. See *infra* notes 66, 212-229 and accompanying text for this balancing test and criticism of it.

dial or parental role for the child" and requires the appointment of a guardian ad litem to enforce any post-adoption visitation orders.[13] *S.A.H.* unnecessarily complicates the already difficult decision-making process judges must engage in when determining a child's future.[14] In addition to the already vague "best interests of the child" standard,[15] trial courts in South Dakota must now also weigh other interests, including the interests of a hypothetical pool of potential adoptive parents, when considering whether to mandate open adoptions.[16]

This note discusses the facts and procedure of *People in Interest of S.A.H.* and recites the advantages and disadvantages to open adoptions considered by the court.[17] The background explains the history of adoptions and the current trend towards disclosure and honesty in the adoption process.[18] The background also examines the law surrounding adoptions in South Dakota and cases from other jurisdictions dealing with the question of open adoption.[19] The analysis points out the inconsistencies between the South Dakota Supreme Court's holding and case law of other states cited by the court, as well as how the holding goes against contemporary psychological insights into the adoption process and South Dakota's "best interests of the child" standard.[20] Ultimately this note suggests that the

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13. *S.A.H.*, 537 N.W.2d at 7.

14. Peggy C. Davis, *Use and Abuse of The Power to Sever Family Bonds*, 12 N.Y.U. REV. OF L. & SOC. CHANGE 557 (1983) [hereinafter Davis]. The author, a family court judge, writes of the difficulty in making decisions about an adopted child's future: "In the faces of the children and in the faces of their biological and foster parents, I saw the enormity of the decisions I was required to make and struggled to anticipate the immediate and long-term effects those decisions would have upon their lives." *Id.* at 558.

15. See *infra* notes 193-94 and accompanying text for criticism of the application of the best interests standard.

16. *S.A.H.*, 537 N.W.2d at 7.

17. See *infra* notes 59-62 and accompanying text for both the advantages and disadvantages of open adoption arrangements.

18. See *infra* notes 77-108 and accompanying text for an explanation of the history and current trends in adoption practices.

19. See *infra* notes 147-85 and accompanying text for a summary of the case law on open adoption.

20. See *infra* notes 212-50 and accompanying text for a criticism of the case's unreasonably high evidentiary standard, unduly complex balancing test and other restrictions on the adopted child's future which frustrate the child's best interests from being judicially carried out.

There are no research data to answer the question of whether having contact with the birthparents improves a child's adjustment to adoption. TALKING WITH YOUNG CHILDREN ABOUT ADOPTION, MARY WATKINS AND SUSAN FISHER 46 (1993) [hereinafter WATKINS AND FISHER]. Research on the effects of adoption on the adopted child is limited since most adoption records are closed. RUTH G. MCROY, HAROLD D. GROTEVANT AND KERRY L. WHITE, OPENNESS IN ADOPTION: NEW PRACTICES, NEW ISSUES 1 (1988) [hereinafter MCROY]. Few studies exist on open adoption because the practice is such a recent one in America and most of the children of open adoptions are still too young to interview. *Id.* at 115-18. However, records are open in most countries outside the United States where open adoptions are common and research might be conducted in those countries. KAREN LIPTAK, ADOPTION CONTROVERSIES 33 (1993) [hereinafter LIPTAK]. Drawing from a number of informal interviews with children whose parents' parental rights had been terminated, a family court judge noted that a number of those children, despite years of care, still remained adamant in their wish to maintain contact with their biological families. Davis, *supra* note 14, at 558. Although the research is limited, "[s]o far, in many cases in this country, open adoption seems to be working well." LIPTAK at 33.

court could have accomplished more by saying less and by granting the motions for an open adoption for S.A.H. and his biological parents.

II. FACTS AND PROCEDURE

S.A.H. was born May 22, 1993 to two hearing and mentally impaired parents.[21] J.H., the mother, had planned the pregnancy which resulted in the birth of S.A.H., though she never married the father.[22] Immediately upon J.H.'s discharge from the hospital, her son was taken from her and placed in foster care by the Department of Social Services.[23] Thereafter, the parents were only allowed to visit their child for a few hours a week, during which time the Department of Social Services used a sign language interpreter to try to teach them the numerous skills required for parenting an infant child.[24]

A.B., the father, was largely indifferent to S.A.H. and once remarked that the child would bring in a lot of government money.[25] But J.H. bonded with her child and displayed a loving attitude toward him during the visitations as she learned to diaper, burp and feed him.[26] Unfortunately, she failed to master all the skills that the Department of Social Services was trying to impart.[27] She failed to understand age appropriate behavior and hit the child when he pulled her hair, yelled at the child for spitting up, and when the child began to cry, J.H., too, became agitated and began to cry.[28] Sometimes she argued openly with the father during the visitations, ignoring the child and throwing objects against the wall.[29] At other times she smoked while holding S.A.H., unable to understand how a

21. *S.A.H.*, 537 N.W.2d at 3. The child is not hearing-impaired and his development was reported as normal. Appellant Child's Brief at 4, *S.A.H.*, 537 N.W.2d 1 (No. 18822) [hereinafter Appellant Child's Brief]. J.H., the mother, lives independently in an apartment complex and works full time. Appellant Mother's Brief at 4, *S.A.H.*, 537 N.W.2d 1 (No. 18770) [hereinafter Appellant Mother's Brief]. She does well at her job and is prompt, pleasant and well liked. *Id.* at 6. S.A.H.'s mother always tries to be cooperative; she is also an organized person, has learned to use the Rapid City bus system and is able to keep her own appointments. *Id.*

22. *S.A.H.*, 537 N.W.2d at 3. J.H. had become pregnant against the wishes of her boyfriend, the father ("A.B."). State Appellee's Brief at 3, *S.A.H.*, 537 N.W.2d 1 (No. 18770, 18779, 18822) [hereinafter State Appellee's Brief]. At one point, A.B. wanted J.H. to have an abortion but she refused. *Id.* A.B. tried to force J.H. to terminate her pregnancy and threatened to call the police if the doctor would not abort the child. *Id.* at 13. This was J.H.'s second child; her first was the product of an incestuous relationship with her uncle and the child had been taken from her at birth nine years earlier. Appellant Mother's Brief at 3.

23. *S.A.H.*, 537 N.W.2d at 3.

24. Appellant Mother's Brief at 4.

25. *Id.* A.B. had previously suffered from depression and psychotic episodes, and was known to drink beer and wine and smoke marijuana three times a week. State Appellee's Brief at 2. At the final Dispositional Hearing, social worker Julie Johnson testified that she had no doubts that the father, A.B., loves his son. Appellant Father's Brief at 7, *S.A.H.*, 537 N.W.2d 1 (No. 18779) [hereinafter Appellant Father's Brief].

26. Appellant Mother's Brief at 4, 7.

27. *S.A.H.*, 537 N.W.2d at 4. J.H. did learn to prepare her son's formula and warm his bottle. Appellant Mother's Brief at 7.

28. *S.A.H.*, 537 N.W.2d at 3. The state pointed out that whenever the mother is frustrated "she 'screams' and 'hollers' and stomps off whatever job she is doing." State Appellee's Brief at 13.

29. *S.A.H.*, 537 N.W.2d at 3.

lit cigarette could be harmful to her baby.[30] Despite these parental shortcomings, J.H. was able to recognize other potential hazards to her child and respond appropriately.[31]

One day after S.A.H.'s five month birthday, the state filed an abuse and neglect petition.[32] In the three months before the hearing, several professionals evaluated the parents.[33] These professionals testified at the hearing both on the bonding that had occurred between J.H. and her child and the inability of A.B. and J.H. to care for their child.[34]

The trial court concluded that S.A.H. was abused or neglected.[35] Next, the trial court found by clear and convincing evidence that it would be in the best interests of S.A.H. to terminate his parents' parental rights and place the infant for adoption.[36] As the Department of Social Services indicated that it would not pursue open adoptions, the only means for guaranteeing some form of continuing contact between S.A.H. and his parents would have been by a court-mandated open adoption.[37] The mother, fa-

30. *Id.* J.H. had also once left S.A.H. alone in the bath. *Id.* Social workers had to intervene to care for the child when J.H. fell asleep during visitations. *Id.*

31. Appellant Mother's Brief at 7. One visit when S.A.H. was playing on the floor and reached for a piece of plastic, J.H. got up, took the plastic away and put her child back in the middle of the floor. *Id.*

32. *S.A.H.*, 537 N.W.2d at 3.

33. *Id.* at 4.

34. *S.A.H.*, 537 N.W.2d at 4; Appellant Mother's Brief at 4-17. Expert testimony was heard from Kay Lindgren, a clinical social worker, Dawn Kugler, a clinical psychologist, Dr. Howard Dickman, a psychologist, Lee Pfeiffer, a child psychologist, Pat Rippentrop, a clinical therapist, Terri Stuck, a clinical therapist and Dr. Val Farmer, a clinical psychologist. Appellant Mother's Brief at 4-17; State Appellee's Brief at 4-5. Three witnesses testified for the Department of Social Services. State Appellee's Brief at 8. Testimony was elicited from J.H.'s sister who had observed J.H. and S.A.H. during a two week Christmas vacation at the sister's home. *Id.* at 15. Joyce McGill also presented a CASA report. *Id.* at 25.

35. *S.A.H.*, 537 N.W.2d at 4. The Honorable John F. Konenkamp was the presiding judge. Appellant Mother's Brief at 1. S.D.C.L. section 26-8A-2 defines an "abused or neglected child" as a child:

> (1) Whose parent, guardian, or custodian has abandoned the child or has subjected the child to mistreatment or abuse;
> (2) Who lacks proper parental care through the actions or omissions of the child's parent, guardian, or custodian;
> (3) Whose environment is injurious to the child's welfare;
> (4) Whose parent, guardian or custodian fails or refuses to provide proper or necessary subsistence, supervision, education, medical care, or any other care necessary for the child's health, guidance or well-being;
> (5) Who is homeless, without proper care or not domiciled with the child's parent guardian or custodian through no fault of the child's parent, guardian, or custodian;
> (6) Who is threatened with substantial harm;
> (7) Who has sustained emotional harm or mental injury as indicated by an injury to the child's intellectual or psychological capacity evidenced by an observable and substantial impairment in the child's ability to function within the child's normal range of performance or behavior, with due regard to the child's culture; or
> (8) Who is subject to sexual abuse, sexual molestation or sexual exploitation by the child's parent, guardian, custodian, or any other person responsible for the child's care.

S.D.C.L. § 26-8A-2 (1992). The trial court found specifically that S.A.H. was abused or neglected as defined by subsections (2)-(6). *S.A.H.*, 537 N.W.2d at 4.

36. *S.A.H.*, 537 N.W.2d at 4.

37. Appellant Mother's Brief at 29. "Unless the open adoption is mandatory, it will not receive the support of the Department and therefore will not take place." *Id.* The Department's opposition was apparently based on their inexperience in dealing with open adoptions. *Id.* Although the Department would not consider an open adoption handled through their agency,

ther, and child therefore moved for an open adoption even though the parents' rights had been terminated.[38] The trial court denied the motions and all three parties appealed.[39]

On appeal, the South Dakota Supreme Court affirmed the findings of abuse and neglect and the termination of parental rights.[40] The court reasoned that even though the parents had never had custody of their son, S.A.H. had been endangered during the visitations.[41] Further, the court rejected the mother's argument that the Department of Social Services had failed to provide her with the necessary services to enable her to develop adequate parenting skills, noting that children should not be required to wait for parenting skills which may never develop.[42]

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they would not deny a private open adoption. *Id.* at 25. J.H. argued that this was inconsistent, assuming that the best interest of the child is the Department's concern in any adoption. *Id.* at 25-26.

38. *S.A.H.*, 537 N.W.2d at 4. The mother, father and child all were represented by separate counsel. State Appellee's Brief, cover page. S.A.H. appealed only the termination of his parents' rights without any right to continuing contact with them. Appellant Child's Brief at 7-18. S.A.H. joined his mother in pointing to South Dakota's neighbor to the north which has recognized open adoptions within a proceeding for involuntary termination of parental rights. Appeallant Child's Brief at 17; In the Interest of C.K.H., 458 N.W.2d 303, 305 (N.D. 1990). S.A.H. also pointed out that in the era of the Americans with Disabilities Act, when the law is insuring handicapped persons the right to access to employment, public facilities and businesses, the trial court was denying handicapped parents the right to have access to their own child. *Id.* at 17-18; 42 U.S.C. §§ 12101-12213 (1990).

A.B., the father, did not raise the issue of visitation with his son, but appealed only on the trial court's findings of abuse or neglect and subsequent termination of parental rights. Appellant Father's Brief at 11-20. The father also noted that although three appeals (father, mother and child) had been consolidated, the parties' positions were vastly different. *Id.* at 10. "S.A.H. is a minor child . . . J.H. and A.B. are not, and never have been married. They are both mentally and hearing impaired. The similar disabilities created a bond between them, but also provided the basis for conflict." *Id.*

39. *S.A.H.*, 537 N.W.2d at 4. Both the mother and father raised the issues of whether the trial court had erred in finding their son abused and neglected and in finding that termination of both parents' rights was the least restrictive alternative commensurate with the best interests of S.A.H. State Appellee's Brief at 2. S.A.H. and his mother raised the issue of whether the trial court should have mandated an open adoption. *Id.* S.A.H. contended that he had "a right to know his birth parents, and that the physical and mental handicaps of Parents do not justify that such right be set aside." Appellant Child's Reply Brief at 5, *S.A.H.*, 537 N.W.2d 1 (No. 18822) [hereinafter Appellant Child's Reply Brief].

40. *S.A.H.*, 537 N.W.2d at 5. Circuit Judge Caldwell wrote the opinion for the majority. *Id.* at 3. Justice Konenkamp disqualified himself, having been the presiding judge at the trial level. *Id.* at 7.

41. *Id.* at 5. The court noted that evidence of probable inadequate care in the future could serve as a basis for termination of parental rights. *Id.* (citing People in Interest of A.R.P., 519 N.W.2d 56, 61 (S.D. 1994); Matter of J.A.H., 502 N.W.2d 120, 126 (S.D. 1993)).

42. *Id.* at 6 (citing *A.R.P.*, 519 N.W.2d at 62). The court noted that the parents had made very little progress in improving their parenting skills. *Id.*

J.H. pointed to testimony that the parenting instruction had been very confusing, often attempting to impart a number of steps to accomplish quite rapidly. Appellant Mother's Brief at 10. The parents were asked several questions at a time without enough time to answer. *Id.* Many times the subject would change abruptly. *Id.* The Department of Social Services did not use any of the child care books developed specifically for the deaf, nor the visual hands-on techniques that have been developed to teach deaf couples, and was resistant to the use of a sign language interpreter. *Id.* at 5, 22. The only parenting classes that the mother received consisted of social workers watching the visits, noting any mistakes, and then going in and showing the mother the correct ways of doing things. *Id.* at 4. These "parenting classes" did not start until two months after S.A.H.'s birth. *Id.* at 7. Dorothy Jennings, the parent support specialist for the Department of Social Services who assisted J.H., had never worked with deaf parents before and had difficulty finding an interpreter. *Id.* at 6, 7.

After affirming the termination of parental rights, the court proceeded to determine whether open adoptions are an enforceable right in South Dakota.[43] This was a case of first impression.[44] J.H., the mother, argued that S.D.C.L. section 26-8A-29[45] gave the court continuing jurisdiction over the action and the child until the adoption is fully completed, thus empowering the trial court to order an open adoption.[46] She noted that the trial court had believed that an open adoption could be in S.A.H.'s best interests if the adoptive parents agreed to it.[47] But because the Department of Social Services would not support open adoptions, S.A.H. could not secure any degree of post-adoption contact with his biological parents unless it were mandated.[48] J.H. emphasized that the South Dakota Supreme Court had previously held that the child's best interests, not the convenience of the state, is the paramount interest.[49]

The state divided the open adoption question into three sub-issues.[50] First, the state argued that the court could not order an open adoption since S.D.C.L. section 26-8A-27,[51] vesting custody of the child in the Department of Social Services upon termination of parental rights, had been interpreted as mandatory in *Matter of Z.Z.*[52] If the custody of the child is

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43. *S.A.H.*, 537 N.W.2d at 6.

44. *Id.*

45. S.D.C.L. § 26-8A-29 (1992). The statute reads, in pertinent part:

> In any action involving the termination of parental rights of both parents or any surviving parent, the court has continuing jurisdiction of the action and of the abused or neglected child for purposes of review of status of the child until the adoption of the child is fully completed. . . . The court may issue any orders or decrees necessary to protect the child, to preserve the child's welfare and to facilitate the adoption of the child by the court or another court of competent jurisdiction without delay. . . .

Id.

46. Appellant Mother's Brief at 28.

47. *Id.* at Appendix B, 1.

48. Appellant Mother's Brief at 28.

49. *Id.* The mother cited *Matter of J.A.H.* which affirmed a trial court's order for the Department of Social Services to provide long-term protective supervision of a child when the state argued that such a task would be nearly impossible. *Id.* (citing *J.A.H.*, 502 N.W.2d at 125). The mother also cited *In the Interest of C.K.H.* which relied on statutes similar to South Dakota statutes regarding grounds for termination of parental rights to order open adoption for a disabled parent unable to care for her child through no fault of her own. Appellant Mother's Brief at 28 (citing *C.K.H.*, 458 N.W.2d 303; N.D. CENT. CODE § 27-20-44 (1991); N.D. CENT. CODE § 27-20-46 (1991); S.D.C.L. § 26-8A-27 (1992)).

50. State Appellee's Brief at 35.

51. S.D.C.L. § 26-8A-27 (1992). The statute directs the trial court as follows:

> On the completion of a final dispositional hearing regarding a child adjudicated to be abused or neglected, the court may enter a final decree of disposition terminating all parental rights of one or both parents of the child if the court finds, by clear and convincing evidence, that the least restrictive alternative commensurate with the best interests of the child with due regard for the rights of the parents, the public and the state so requires. . . .
>
> Upon the entry of the final decree of disposition terminating the parental rights of both parents or of the surviving parent, the court shall vest the department of social services with the custody and guardianship of the person of the child for the purpose of placing the child for adoption and authorizing the appropriate personnel of the department to consent to the adoption of the child without need for any notice or consent of any parent of the child. . . .

Id.

52. 494 N.W.2d 608, 610 (S.D. 1992) (holding that the issue as to the guardianship of a child

mandatorily vested in the Department, the state reasoned, whether to permit visits between S.A.H. and his biological parents would ultimately be a matter for the adoptive parents to decide.[53] The state further argued that an open adoption would not have been appropriate in S.A.H.'s case, even if S.D.C.L. section 26-8A-29 does override S.D.C.L. section 26-8A-27.[54] However, if the court decided that mandatory open adoptions were indeed precluded by S.D.C.L. section 26-8A-27, the state requested that the court recognize consensual open adoptions.[55] Thus not one of the four parties argued against open adoptions when agreed to by the adoptive parents; the question was when, if ever, a court could mandate such an arrangement.

The court in *S.A.H.* approached the issue of open adoptions by citing cases from other jurisdictions on both sides of the issue and reviewing South Dakota's law regarding adoption.[56] No prohibition against post-adoption visitation by natural parents was found to exist in South Dakota.[57] However, the court found that while the trial court had the discretion to mandate an open adoption, it had not abused its discretion by refusing to do so in the present case.[58]

The court's reasoning included consideration of both the advantages and disadvantages of open adoptions.[59] The most compelling argument for open adoptions, the court opined, is the psychological need of the child to know his past and his ancestral, religious, ethnic and cultural background.[60]

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raised by the grandfather after termination of the mother's parental rights was moot because custody and guardianship of the child had mandatorily vested with the Department of Social Services for purposes of placing the child for adoption). State Appellee's Brief at 35.

53. State Appellee's Brief at 36. As the presiding Circuit Court Judge, Justice Konenkamp had written a letter to the prospective adoptive parents which said, in part:

> The mother has a sincere capacity for love, and for grief, and very much wants to play a role, even a limited one, in her child's life. . . . With regular contact over time and on terms you control, such a visitation arrangement could be beneficial to the child. . . . If you wish to give further consideration to allowing the child's mother visitation, you are free to contact the child's lawyer. . . . If you decide to decline the mother's request, that will end the matter, unless you alone decide to reconsider.

Id. at A20.

54. *Id.* at 36-38. J.H., the mother, argued in her reply brief that the question of whether the circuit court should have ordered an open adoption in the present case was a separate one not raised by the notice of review and therefore precluded by S.D.C.L. section 15-26A-22 from being raised on appeal and cited Speckels v. Baldwin, 512 N.W.2d 171, 176 (S.D. 1994) (citing A.L.S. Properties, Silver Glen v. Graen, 465 N.W.2d 783, 787 (S.D. 1991)). Appellant Mother's Reply Brief at 8.

55. *Id.* at 38-39. The state phrased the question thus: "If SDCL 26-8A-27 is mandatory and the Court cannot order an open adoption, should this Court provide some guidance for the Department, adoptive parents and birth parents to let them know, one way or another, whether post-adoption visitation agreements are allowable or enforceable under South Dakota law?" *Id.* at 38. "The State submits that, in view of SDCL 27-8A-27 and the nature of an open-adoption agreement, such open adoptions should be allowable in cases when they are in the child's best interests *if* the adoptive parents agree to the post-adoption visitation." (emphasis in original) *Id.* at 38-39.

56. *S.A.H.*, 537 N.W.2d at 6. The opinion made no reference toward the apparent conflict between S.D.C.L. sections 26-8A-27 and 26-8A-29, nor to S.D.C.L. section 25-6-2, South Dakota's adoption statute. S.D.C.L. § 25-6-2 (1992 & Supp. 1996).

57. *S.A.H.*, 537 N.W.2d at 6.

58. *Id.*

59. *Id.* at 6-7.

60. *Id.* at 7 (citing Morse v. Daly, 704 P.2d 1087, 1090 (Nev. 1985)).

The court emphasized that visitation is not a natural parental right, but rather that visitation should be used as a flexible device to promote the child's interests.[61] The disadvantages associated with open adoptions listed by the court included the possible interference with the child's relationship with his adoptive parents and the potential "chilling effect" on the potential pool of adoptive parents.[62] The court also discussed the issue of bonding between the child and adoptive parents as a factor in the analysis.[63] When affection exists between the child and the biological parents, "the court should not thwart that affection, unless the best interests of the child are served."[64]

After considering the advantages and disadvantages associated with open adoptions, the court articulated the test that trial courts should employ when determining whether to mandate an open adoption when parental rights are terminated.[65]

> The trial court should not mandate the parameters of the new family unit unless the court finds by clear and convincing evidence that the child's best interests are served thereby. The trial court should carefully weigh: 1) the psychological needs of the child to know his ancestral, religions, ethnic and cultural background; 2) the effect open adoption will have on the child's integration with his adoptive family; and 3) the effect open adoption will have on the pool of prospective adoptive parents.[66]

The court concluded its discussion with three final caveats that trial courts should consider in the context of open adoptions.[67] First, the court restricted the possible grant of post-adoption visitation to those individuals

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61. *S.A.H.*, 537 N.W.2d at 7 (quoting Reeves v. Bailey, 126 Cal.Rptr. 51, 56 (1975)).

62. *S.A.H.*, 537 N.W.2d at 7 (citing Matter of Adoption by D.M.H., 641 A.2d 235 (N.J. 1994)). If visitation would subject the child to an on-going dispute between the natural parents and the adoptive parents, visitation should be denied. *Id.* (citing People *ex rel.* Wilder v. Spence-Chapin Services to Families & Children, 403 N.Y.S.2d 454, 455 (N.Y. Sup. Ct. 1978)).

The court cited *Matter of Adoption of Francisco A.* for the proposition that open adoptions can work to deter otherwise qualified parents from adopting and noted that the trial court had voiced this same concern. *Id.* (citing Matter of Adoption of Francisco A., 866 P.2d 1175, 1182 (N.M. Ct. App. 1993)). The court stated that the interests of adoptive parents should be considered, but that their rights were secondary to the interests of the child. *Id.* at 6 (citing *Matter of Adoption of Francisco A.*, 866 P.2d at 1181).

63. *S.A.H.*, 537 N.W.2d at 7.

64. *Id.* (citing Roquemore v. Roquemore, 80 Cal.Rptr. 432, 434 (Cal. Ct. App. 1969)). The court proclaimed that the determination of whether open adoption serves the best interests of the child must be made on a case by case basis. *Id.*

65. *S.A.H.*, 537 N.W.2d at 7. Presumably, an open adoption would be upheld in other instances, such as in consensual or conditional adoptions so long as an open adoption would be consistent with the best interests of the child. *S.A.H.* states that:

> One approach considers post-adoption visitation on a case by case basis guided by what is in the best interests of the child. (citation omitted) . . . Another approach believes that adoption terminates all rights of the natural parents and therefore, post-adoption visitation is not an enforceable right. (citations omitted) . . . After a review of South Dakota law regarding adoption, this Court finds no prohibition against open adoption. . . . The best interests of the child is the guiding force behind our adoption and dependency and neglect statutes (citation omitted).

S.A.H., 537 N.W.2d at 6.

66. *S.A.H.*, 537 N.W.2d at 7.

67. *Id.*

who had previously acted in a parental or custodial role for the child.[68] Next, the court noted that the trial court may reconsider open adoption at any time in the future if the child's best interests are jeopardized.[69] Finally, if and when a court does mandate open adoption, "a guardian ad litem should be appointed to enforce the visitation order."[70]

Justice Sabers in his dissent joined the portion of the majority's opinion which discussed the successes of open adoptions in providing for the psychological needs of the child to know his natural parents.[71] He also agreed with the majority's definition of visitation as a flexible device to promote the child's welfare.[72] However, Justice Sabers stated that "[a]lthough interference with the relationship between the adoptive parents and the child is the major disadvantage to open adoption, *it need not be* because it can be controlled by the court."[73] Noting, as the majority did, that visitation should be reconsidered whenever the child's best interests are jeopardized, Justice Sabers felt that in this case visitation should have been granted because the least restrictive alternative in the child's best interests would have been a limited form of open adoption.[74] Justice Sabers did not specifically join the majority's opinion invoking a clear and convincing standard and a three-part balancing test for mandating open adoptions.[75] Neither did he mention the restriction of visitation rights to persons who acted in certain roles in the child's life, nor the strong recommendation for appointing guardians ad litem to enforce visitation orders.[76] The conclusions of the court from which Justice Sabers dissented, as well as the absence of a workable standard for determining when open adoption may be in a child's best interests, will be the focus of this note.

III. BACKGROUND

A. THE HISTORY OF ADOPTIONS

Adoption is an ancient concept, dating back to the first organization of humans into tribal units.[77] As the practice evolved, adoption was fre-

68. *Id.* The court cited *Adoption of Francisco A.* and stated that the reason for restricting visitation to parent/custodian-types was to prevent visitation rights from being granted "to any person who happens to feel affection for the child." *Id.* (citing *Adoption of Francisco A.*, 866 P.2d at 1181).

69. *Id.* (citing *Adoption of Francisco A.*, 866 P.2d at 1181). This is the point which Justice Sabers honed in on in his dissent: "Obviously, as stated by the majority, the trial could 'consider [and control] how visitation will affect the adoption' and 'reconsider open adoption at any time the child's best interests are jeopardized.'" *Id.* at 9 (Sabers, J., dissenting).

70. *Id.* (citing Matter of Adoption of Children by F., 406 A.2d 986, 989 (N.J. Super. Ct. Ch. Div. 1979).

71. *S.A.H.*, 537 N.W.2d at 8 (Sabers, J., dissenting).

72. *Id.*

73. *Id.* (emphasis in original).

74. *Id.* "In this case, more could be gained than lost by open adoption and if problems later developed, visitation could be suspended indefinitely or otherwise controlled by the court." *Id.*

75. *Id.*

76. *Id.*

77. SOROSKY, *supra* note 1, at 26. See also, Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956) [hereinafter Huard] (tracing the development of

quently employed to secure the transmission of property at death through inheritance as well as a means of providing children for infertile couples.[78] Adoption is probably the most univeral tool for assuring continuity of the family utilized by societies in all ages.[79] During antiquity, the meaning of the blood tie was so strong that the only acceptable method of initiating nonrelatives was to make them artificial blood relatives by adoption.[80] Adoption meant complete severance from one's original family, with the promise of allegiance and total loyalty to the new family.[81] To seek one's origins or to question one's true identity was seen as dangerous and ungrateful, just as it is today.[82]

However, in early America traditional adoptions were "open" in the sense that there was full disclosure of the adoptive statuts of the child to the child as well as a continuation of the child's relationship with the birth parents, if they were living.[83] Most adoptions were arranged informally.[84]

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adoption practices since ancient times); James J. Lawton and Seymour Z. Gross, *Review of Psychiatric Literature on Adopted Children*, 11 ARCHIVES OF GENERAL PSYCHIATRY, 635 (1964) [hereinafter Lawton] (pointing out the inconsistent application of law and cultural mores to the institution of adoption in Western cultures); SOROSKY, *supra* note 1, at 26 (noting the parallels between the development of American and Roman adoption laws; in both, the law changed gradually to reflect changes in the societal structure and mirror the societal needs of a growing country/empire); KRISTEN ELIZABETH GAGER, BLOOD TIES AND FICTIVE TIES: ADOPTION AND FAMILY LIFE IN EARLY MODERN FRANCE 37-70 (1996) [hereinafter GAGER] (tracing the evolution of adoption law in France from antiquity to the early modern period).

78. SOROSKY, *supra* note 1, at 26-27. Justinian's code of law provided that in addition to inheriting from the adoptive parents, the adoptee could retain the right to inherit from the biological parents. *Id.* Cicero complained of adoptions where the adoptive parents were capable of begetting children themselves. CICERO, THE SPEECHES: PRO ARCHIA POETA, POST REDITUM IN SENATU, POST REDITUM AD QUIRTES, DE DOMA SUA, ETC. 175 (N.H. Watts, trans., 1923).

79. Annette Baran, Reuben Panor and Arthur D. Sorosky, *Open Adoption*, 21 SOCIAL WORK 97 (1976) [hereinafter Baran]. *See* HENRY SUMMER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 120-128 (1861) (arguing that early patriarchal civilizations would not have been able to mature without the custom of adoption because without it primitive tribes could not have absorbed each other). Hindu law describes twelve different kinds of adoptions. SOROSKY, *supra* note 1, at 28. The Code of Hammurabi, a part of ancient Babylonian law (circa 2000 B.C.), stated that if a man takes a child in his name and adopts and rears him as a son, the grown-up son may not be demanded back. John Francis Brosnan, *The Law of Adoption*, 22 COLOM. L. REV. 332, 333 (1922) [hereinafter Brosnan]. *See also* Huard, *supra* note 77, at 743-45 (noting the practice of adoption among the ancient Greeks, Slavonic Russians, Poles, Romans, Teutonic aristocracies and Celtic clan associations); Exodus 2:10 (narrating how an Egyptian princess adopted Moses); Esther 2:5-8 (telling how the Hebrew Mordecai adopted his niece Esther); Brosnan at 334-35 (noting that today Italy, Spain, Germany, Japan and Native American tribal customs all recognize adoptions). Adoption is one of the oldest legal fictions. Huard, *supra* note 77, at 743.

80. Huard, *supra* note 77 at 743.

81. *Id.* at 744-45.

82. *See, e.g.*, SOPHOCLES, THREE TRAGEDIES 47-97 (H.D.F. Kitto, trans., 1962) (narrating how King Oedipus gouged out his own eyes in horror upon learning of the circumstances surrounding his own adoption). The dim view taken towards seeking one's origins survives today as well: adoptees suffer from a primal anxiety in probing for information about their birth parents because it is seen as immoral, even criminal. BETTY JEAN LIFTON, LOST AND FOUND: THE ADOPTION EXPERIENCE 74 (1979) [hereinafter LIFTON]. Adoptees fear that if they venture too far into such forbidden terrain that they might disapppear into the abyss; that they might be "[o]pening a dark and frightening tunnel which might have no end." *Id.*

83. *See* SOROSKY, *supra* note 1, at 28-32 (describing early adoption practice in the United States). Perhaps the most widespread practice of open adoption in America has been in the black community where there has been a long tradition of informal adoptions by relatives. Caplan II, *supra* note 4, at 76. Adoptions by stepparents or relatives remains popular in American society at

Often, the biological mother and adoptive parents lived in the same household.[85] This was the typical adoption arrangement in many non-Western cultures: the adopted child grew up knowing her natural parents, though she was raised by her adoptive parents.[86]

Although adoption was an incident of civil law and incorporated into the Code of Napoleon, adoption was unknown at common law, and is thus wholly dependent upon statute.[87] Because the common law was silent on

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large as well, constituting over half of the 104,000 adoptions in 1986. *Id.* at 89. Early American adoption laws contained no provisions for confidentiality and adoptees could easily obtain copies of their birth certificates. *Id.* at 76. "It was not until the nineteen-twenties that states drew the veil of confidentiality over adoptions." *Id.* The reason for this development seems to have been the view that infertility was a curse and illegitimacy marked the child as a "bad seed." *Id.*

84. SOROSKY, *supra* note 1, at 30. The apprenticeship system gave orphaned children surrogate families and was a useful practice in both Britain and colonial America. *Id.*

85. Lawrence W. Cook, *Open Adoption: Can Visitation with Natural Family Members be in the Child's Best Interests?*, 30 J. FAM. LAW 471, 473 (1992) [hereinafter Cook]. Cook describes earlier adoption practices in the United States:

> In rural areas, it was a common practice for married couples to take in an unwed pregnant woman, care for her during the pregnancy and then adopt her child. The parties would often develop a close and friendly relationship. The natural mother could directly observe the adoptive parents' care for the child, thus enhancing her confidence that the child would receive proper care.

Id. Nothing indicates that this practice caused problems for either set of parents, nor that birth parents would later return to harass the adoptive families. Baran, *supra* note 79, at 98. "The adoptive parents could tell the child of its birth heritage convincingly and with first-hand knowledge and understanding. There was an openness in such situations, and a good feeling was transmitted to the adoptee." *Id.*

86. LIPTAK, *supra* note 20, at 33. The United States' approach to adoptions appears to be in the minority; adoption is practiced in most countries without the insistence on confidentiality, secrecy and finality. *Id.* For example, on the Polynesian island of Mokil, where one in three children are adopted, the biological mother relinquishes the adoptee after weaning, but maintains a close and affectionate relationship with the child as he grows up. Lawton, *supra* note 77, at 635. The Hawaiian adoption was open; the adopted child was told of her adoptive status and became well acquainted with her biological parents and biological brothers and sisters if there were any. E.S. CRAIGHILL HANDY AND MARY KAWENA PUKUI, THE POLYNESIAN FAMILY SYSTEM IN KA'U, HAWAII 71-72 (1958). As Handy and Pukui have pointed out,

> Children could not be adopted without the full consent of both true parents, lest some misfortune befall the child, and when consent had been given the child was handed to the adopting parents by the true parents with the saying, "*Ke haawi aku nei maua i ke keiki ia olua, kukae a na'au*" (We give the child to you, excrement, intestines and all).

Id. at 72. Open adoption advocates often cite Oceania adoptions, where "adoptees know their biological families and tend to add to their circles of kinship rather than substitute one for another as proof that the model is well established, and not the radical innovation it is sometimes made out to be." CAPLAN II, *supra* note 4, at 91. Even today in the Eskimo culture, the adopted child maintains strong bonds with both sets of parents and the adoptive parents usually treat the adopted child with the same warmth and affection as their natural children. NORMAN A. CHANCE, THE ESKIMO OF NORTH ALASKA 19-20 (1966).

87. Hockaday v. Lynn, 98 S.W. 585, 586 (Mo. 1906) (noting that adoption was an incident of civil law and incorporated into the Napoleonic code); Long v. Dufur, 113 P. 59, 62 (Or. 1911) (holding that because adoption statutes, being in derogation of the common law, must be strictly construed, an adoption is invalid where improperly acknowledged); Fisher v. Robinson, 198 A. 81, 82 (Pa. 1938) (finding an adoption invalid based on a strict reading of the adoption statute and noting that adoption is entirely dependent upon statute). Except for Louisiana and Texas, adoption did not arise anywhere in the United States absent statutory authority. Huard, *supra* note 77, at 748. In England, the absence of legal adoption opportunities often complicated the emotional needs of childless couples. SOROSKY, *supra* note 1, at 78.

The South Dakota Supreme Court has found an adoption between Native Americans invalid despite the adoption being in compliance with tribal custom, based on a strict reading of the statutory requirements for adoption. Henry v. Taylor, 16 S.D. 424, 425, 93 N.W. 641, 642 (1903). "The right of adoption is purely statutory, and unknown to the common law, and repugnant to its

adoptions, Roman law was used as a guide when the early United States began to develop its adoption laws.[88] Roman law was based on the needs and rights of the adoptive parents.[89] American adoption law, however, focused early in its infancy on protecting the welfare of the adopted child.[90] This adoptee-centered approach, which came to be known as the "best interests" formula, was an important contribution to the law of adoption.[91]

In the American colonies, the care of orphans was usually vested with relatives according to the will of the deceased, and when there were no relatives, orphans were usually apprenticed, or "bound out."[92] With the great shortage of labor in the colonies, orphans were in great demand, and it was said that America could absorb all the orphans of the mother country.[93] The first legal regulations in the United States were passed to control the wholesale distribution and sale of children to homes where they could be used as cheap labor.[94]

In the twentieth century, nonrelative adoptions arranged by agencies became more prevalent.[95] In agency placements, the parents relinquish their child to the agency before placement, surrendering all rights and responsibilities, with the agency assuming guardianship of the child in the interim period.[96] Adoption has become less a source of cheap labor, and

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principles; and the provisions of the statute must be strictly followed, and every condition prescribed therein strictly complied with." *Id.* (quoting *Ex parte* Clark, 25 P. 967, 968 (Cal. 1891) (holding an adoption invalid for want of strict compliance with statutory requirements despite the fact that the natural parents had acquiesced for several years during which time a warm affection sprung up between the child and adoptive parents)).

88. Huard, *supra* note 77, at 747; Stephen B. Presser, *The Historical Background of the American Law of Adoptions*, 11 J. FAM. L. 443, 446 (1971) [hereinafter Presser]. Adoption was not legally possible in England until the Children Act of 1926. Huard, *supra* note 77, at 746 (citing 17 HALSBURY, THE LAWS OF ENGLAND §§ 1406-1423 (2d ed. 1935)).

89. Presser, *supra* note 88, at 446. "There were two broad purposes that Roman adoption law served: (1) to avoid extinction of the family, and (2) to perpetuate rites of family religious worship." *Id.*

90. Huard, *supra* note 77, at 748. "The true genesis of our adoption laws, whatever their exact vintage, seems to lie in the increasing concern for the welfare of neglected and dependent children." *Id.*

91. *Id.* at 749. The use of the best interests formula was a consistent trend between the 1850's and 1950's. SOROSKY, *supra* note 1, at 32. "The welfare of the child is a totally modern concept, difficult as that may be for us to believe." *Id.* at 28. In the ancient world, there was no visible concern for the adoptee's interests because the primary purpose of adoption was the continuity of the adopter's family. HUARD, *supra* note 77, at 745.

92. SOROSKY, *supra* note 1, at 30.

93. *Id.* Adoption was more successful in the New World because of the egalitarian culture, the abundance of natural resources and the need for more "laboring hands." *Id.*

94. *Id.* at 31. "The earliest adoption statute is variously reported to be that of Mississippi in 1846 and Massachusetts in 1851." Huard, *supra* note 77, at 748 (citing Catherine N. McFarlane, *The Mississippi Law on Adoptions*, 10 MISS. L.J. 239, 240 (1938); Fred L. Kuhlmann, *Intestate Succession By and From the Adopted Child*, 28 WASH. U.L.Q. 221, 222-23 (1943)). The passing of the first adoption laws in the United States may have been a response to the flow of groups of "street urchins" into East Coast cities. JUDITH S. MODELL, KINSHIP WITH STRANGERS: ADOPTION AND INTERPRETATIONS OF KINSHIP IN AMERICAN CULTURE 22 (1994) [hereinafter MODELL]. Adoption laws regulated a profitable market of children being distributed to uninvestigated homes. *Id.* "With adoption law, the state implemented an ideology of civil responsibility for children." *Id.* at 23.

95. SOROSKY, *supra* note 1, at 34.

96. *Id.* Conversely, in independent adoptions, the birth mother retains legal custody until

more a means of providing fulfillment in the lives of infertile couples.[97] In line with the goal of providing "a home for every child," initially the interests of the child were held secondary to the interests of the adopters, who were seen as doing the child a favor.[98]

By the late 1930's, most states, in a spirit of reform, made efforts to erase the stigma of the adopted child's past and to insure equal treatment of adopted children with their nonadopted siblings.[99] If the original birth certificate was sealed and replaced with a new birth certificate and a new identity, the adopted child could be "reborn" as the child of the new family.[100] Through the 1940's, agencies often advised the adoptive parents against disclosing the adoptive status of the child and to treat the child as the couple's own.[101] Adoptive parents often found it easiest to tell the child that her birth parents had died.[102]

In the 1950's, a growing concern developed with the need for honesty

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court action, so she may request the return of the child in the months after placement, but before the final hearing. *Id.*

97. *Id.* "People adopt children for exactly the same reasons they choose to have children biologically — they want a family; they want a child; they want a way to express and give love. They want this child so badly that the words echo in their brain: 'I want a child.'" EDMUND BLAIR BOLLES, THE PENGUIN ADOPTION HANDBOOK 3 (1993) [hereinafter BOLLES].

98. SOROSKY, *supra* note 1, at 34.

99. *Id.* at 37-38. "As the competition for perfect babies grew, the rewards for being perfect adoptive parents increased. These rewards took the form of increased guarantees of anonymity and confidentiality." Baran, *supra* note 79, at 97.

100. SOROSKY, *supra* note 1, at 38. South Dakota provides that "the state department of health shall issue a new certificate of birth in the new name of the child and with the name of the adopting person" unless the court, adoptee or adoptive parents request otherwise. S.D.C.L. § 34-25-16.1 (1994). An exception for adult adoptees is also provided for; in that case a new birth certificate is issued only if requested in the petition for adoption. S.D.C.L. § 25-6-20 (1992).

101. SOROSKY, *supra* note 1, at 34. The anonymity of the birth parents served to erase the disgrace of illegitimacy and protect the new family from unwanted intrusions. *Id.* at 38.

102. *Id.* at 35. Betty Jean lifton has written:

> Countless modern adoptive parents who found the natural parents a threat and inconvenience once they had produced the baby, have resorted to such measures. What easier way to get rid of excess characters than to kill them off from the beginning. . . . The number of adopted adults I've met with parents wiped out in automobile crashes is staggering.

BETTY JEAN LIFTON, TWICE BORN: MEMOIRS OF AN ADOPTED DAUGHTER 12-13 (1975). Several authors have advised that parents tell their young child that his biological parents are dead, reasoning that secure, well-loved children are not easily damaged. LIFTON, *supra* note 82, at 290 n.3.

Because it was felt that differences in appearance could severely hamper a child's ability to identify with his adoptive parents, concern was given to matching physical features and racial antecedents. H.J. Sants, *Genealogical Bewilderment in Children With Substitute Parents*, 47 CHILD ADOPTION 32-42 (1965) [hereinafter Sants]. Agencies even attempted to match religions, backgrounds and attempted to find adoptive parents with similar temperaments and talents as the child. Florence Clothier, *Placing the Child for Adoption*, 26 MENTAL HYGIENE 257, 268 (1942) [hereinafter Clothier]. One doctor recommended placing highly strung children with not so highly strung parents. R.L. Jenkins, *Adoption Practices and the Physician*, 103 J. AM. MED. ASS'N 403, 406 (1934) [hereinafter Jenkins]. Another author related the story of a thirteen-year-old quadriplegic girl:

> One family wanted to adopt her and was not frightened by the fact that she was permannetly paralyzed from the neck down; however, the adoption was barred by the girl's social worker because the girl was a Catholic and the adopting family was Mormon — as though families were lining up for this unfortunate girl.

BOLLES, *supra* note 97, at 31. Although this attempt to match similarities may have increased compatibility between parent and child, their importance was exaggerated. SOROSKY, *supra* note 1, at 35.

and clarity in the relationship between the adoptive parents and the adoption agency.[103] The trend towards disclosure of adoptive status was accompanied by "chosen baby" explanations which inadvertenly suggested to the child that there was indeed something mysteriously wrong about being adopted.[104] Telling the child that he was "chosen" implied that he had been cruelly rejected by the birth parents, leading to feelings of mistrust of adults and of being unwanted, which often persisted into later life.[105]

Today, most experts advocate that, save for actual identification, the adoptive parents should be provided with all background information on the natural parents.[106] Although some parents wait until the child is older

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103. SOROSKY, *supra* note 1, at 37. During the 1950's and 1960's there was a surplus of babies available for adoption, but during the 1970's a shortage of babies developed because of efficient contraception, liberalized abortion laws and the increasing acceptance of unwed mothers keeping their children. *Id.* at 35. Prospective adopters either waited longer, accepted "hard-to-place" children, or resorted to illegal black-market adoptions. *Id.* The demand for adoptees still far outstrips the supply. Linda F. Smith, *Adoption — The Case for More Options*, 1986 UTAH L. REV. 495, 523 (1986) [hereinafter Smith].

104. SOROSKY, *supra* note 1, at 87. For example, in 1934 one doctor wrote that "[t]he knowledge [of the child's adoption] need not interfere with the child's sense of security in his parents; indeed, clever parents sometimes capitalize on the fact to add to the child's security by pointing out that he was selected because they wanted him especially." Jenkins, *supra* note 102, at 407. *See also* VALENTINA WASSON, THE CHOSEN BABY (1939) (articulating the "chosen baby" explanation for the adopted child); Kitte Turmell, *How We Told Our Adopted Children*, 14 CHILD 104 (1950) (explaining how the authors told their adopted children of their adopted status); LOUISE RAYMOND AMANN, ADOPTION AND AFTER 71-96 (1974) (suggesting appropriate methods for informing children that they were adopted). Parents were encouraged to tell the child that they "love him so much that they got him specially." Simon and Senturia, *supra* note 1, at 864. This attitude seems to be an awkward attempt to suppress hostility and offer the child as a "consolation prize" to make up for his "lost biological parents." *Id.*

105. SOROSKY, *supra* note 1, at 87. The "specialness" of the adopted child also may "reinforce the reaction formation against the unconscious hostility of the parents and make it more difficult to set realistic limits with the adopted child." Simon and Senturia, *supra* note 1, at 864. "What does it mean to be chosen? This is what the Adoptee must keep asking himself. It is like a Zen koan. It is like the riddle the Sphinx put to Oedipus. Saints are chosen. And so are untouchables." LIFTON, *supra* note 82, at 19.

106. SOROSKY, *supra* note 1, at 36. "Secret" adoptions have not been part of good adoption agency practice for years. Caplan II, *supra* note 4, at 78. *But see* WATKINS AND FISHER, *supra* note 20, at 2 (noting a split between experts who believe children should be told about adoption early and those who contend that it should be done as late as possible); Lawton, *supra* note 77, at 641 (concluding that there is little agreement on the issue of how much to tell the adoptive parents about the natural parents). A South Dakota statute provides that:

> The department of social services shall maintain a voluntary registry for those adoptees and natural parents who have presented a consent regarding the release of identifying information about themselves. Any consent shall indicate to whom the information may be released and whether the adoptee desires release of this identifying information after his death. A person who uses this voluntary register may revoke his consent at any time.

S.D.C.L. § 25-6-15.3 (1992). One unanswered question regarding the operation of this registry is whether information regarding brothers or sisters, who may be the adoptee's only living link to the past, may be released. Alice B. Rokahr, *The Plight of Adoptees*, 31 S.D. L. REV. 710, 721 (1986). The South Dakota statute also provides for the release of nonidentifying information to the adoptive parents or adoptee upon reaching the age of eighteen. S.D.C.L. § 25-6-15.2 (1992). Such nonidentifying information includes the nationality, ethnic background, race, education, height, weight, hair color, eyes, skin, talents, hobbies, special interests, religion, health, general occupation and age (but not birthdate) of the natural parents, as well as whether the termination of the parental rights was voluntary or involuntary, whether there were any siblings prior to the adoptee's birth and the relationship between the natural parents (ie. whether married or not). *Id.* Information may be withheld "only if it is of such a nature that it would tend to identify a biological relative of the adoptee." *Id.* South Dakota further provides for the disclosure of information in the adoption records including the names of the parents upon court order but only when the

to "tell him he was adopted," this can be a mistake.[107] Recognizing this view, some states now provide for "open adoptions" which provide for ongoing physical and emotional contact between the adoptee and the natural parents after the child has been adopted.[108]

B. How Adoptions Affect The Parties Involved

In any adoption, at least three possibly conflicting interests are present: the biological parent(s), the adoptive parent(s), and the child(ren). The first party in this "adoption triangle" is the adopted child, or adoptee.[109] Modern psychological theories attempt to explain the insecurities adopted children often experience.[110] Freud proposed that in a normal

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department of social services or licensed adoption agency has received notice of the petition for disclosure of such information. S.D.C.L. § 25-6-15 (1992).

107. SILBER, *supra* note 4, at 48. When the parents wait until the child is a preadolescent to reveal the child's adoptive status, the child's trust in his parents can be damaged and she may feel that she has "lived a lie." *Id.*

108. See *infra* notes 142-146 and accompanying text for states which have considered this form of adoption. The term "open adoption" should be distinguished from an "independent adoption" which is an "adoption completed without the help or aid of a licensed social service agency." WILLIAM MEEZAN, SANFORD KATZ AND EVA MANOFF RUSSO, ADOPTIONS WITHOUT AGENCIES: A STUDY OF INDEPENDENT ADOPTIONS 1 (1978). An open adoption has been defined as an "adoption in which the birth parents meet the adoptive parents, participate in the separation and placement process, relinquish all legal, moral, and nurturing rights to the child, but retain the right to continuing contact and to knowledge of the child's whereabouts and welfare." BARAN, *supra* note 79, at 97. Another author has defined open adoption in terms of contact between the parents: "[Open adoptions are] adoptions that are to some degree open so that birthparents and adoptive parents exchange information and establish contact with each other." LIPTAK, *supra* note 20, at 30. Some definitions emphasize a consensual element to the process:

> An "open" adoption occurs when parties to an adoption voluntarily relinquish various aspects of the confidentiality that traditionally surrounds the adoption process. There are varying degrees of openness in open adoptions, ranging from a simple exchange of names between the natural and adoptive parents to express written agreements allowing visitation between the adoptee and the natural family.

Cook, *supra* note 85, at 472-73. Others have defined open adoption as "when, prior to the adoption, it is agreed in writing that the child will have continuing contact with one or more members of his or her biological family after the adoption is complete." Carol Amadio and Stuart L. Deutsch, *Open Adoption: Allowing Children to "Stay in Touch" With Blood Relatives*, 22 J. FAM. L. 59, 60 (1983) [hereinafter Amadio]. In a case involving a "mandatory" open adoption, one court, after citing the Amadio definition, noted that:

> The case before us does not present an "open adoption" because the parties have not agreed to continuing visitation. Nonetheless, the inherent power of the lower court to incorporate into an adoption decree a visitation order for its future consideration is not unlike the power by the courts which have granted open adoption.

Morse, 704 P.2d at 1090 n.2. Some courts do not label the concept of an open adoption as such, but refer to the arrangement as "limited post-adoption visitation for the benefit of the child." Petition of Dept. of Social Serv., 467 N.E.2d 861, 863 (Mass. 1984). South Dakota has defined open adoption simply as the biological parents' right to continued contact with the child after adoption. *S.A.H.*, 537 N.W.2d at 6. The definition used herein is the South Dakota version: judicially enforceable post-adoption contact with the adopted child by the natural parents, but also includes potential visitation rights by non-parents.

109. SOROSKY, *supra* note 1, at 45.

110. *See* E. Wellisch, *Children Without Genealogy — A Problem of Adoption*, 13 MENTAL HEALTH 41-42 (1952) [hereinafter Wellisch] (stating that it is the adopted child's loss of knowledge of and relationship to his own genealogy which deprives him of a normal emotional development). One study found that adopted children were twice as likely to experience psychological problems. Michael Humphrey and Christopher Ounsted, *Adoptive Families Referred for Psychiatric Advice Part I — The Children*, 109 BRIT. J. PSYCHIATRY 599, 600 (1963) [hereinafter Humphrey and Ounsted]. *See also* MCROY, *supra* note 20, at 33-42 (outlining the main features

child's development there were episodes of doubt where the child wondered if she was, in fact, the biological child of her parents.[111]

Children establish their identities, in part, through their parents.[112] Nearly every child fantasizes at some point about being adopted and having biological parents of great power or wealth, especially when the child is frustrated or angry.[113] This "family romance" fantasy normally represents a brief stage, but the adopted child accepts the idea that he came from highly exalted or lowly born parents as reality.[114] The adopted child *has* two sets of parents, and cannot use the fantasy as a game like the biological child can because for the adopted child it is not fantasy, but fact.[115] Thus, while the non-adopted child quickly accepts the ambivalence that it is possible to both love and hate the same person, the adopted child may split the good and bad into images of two sets of parents, attributing the good images to one parental set and the bad to the other.[116] Some feel that such a capability of keeping the good and bad images disparate can lead to problems for the adopted child.[117]

As the adopted child reaches adolescence, further problems such as aimless roaming, running away, and impulse-ridden outbursts may manifest themselves.[118] When the child acts out his conflicts with outbursts directed at family members, teachers, and peers, it can be interpreted, in part, as an attempt to try out a series of identities secondary to fantasies about the birth parents.[119] Behaviors such as running away seem designed to test

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and issues raised by attachment theory, goodness-of-fit theory, cognitive developmental theory, cognitive dissonance theory, family systems theory, and adoptive kinship theory as applied to adoptive family relationships).

111. SIGMUND FREUD, THE STANDARD EDITION OF THE COMPLETE WORKS OF SIGMUND FREUD, VOL IX 237-238 (James Strachey, trans. 1959).

112. *Id.* at 237. "For a small child, his parents are at first the only authority and the source of all belief." *Id.* Erik Erikson described identity formation as an epigenetic development in which psychological growth is based, in part, on the person's sense of their own genealogy. SOROSKY, *supra* note 1, at 13-14.

113. Marshall D. Schechter, *Observations on Adopted Children*, 3 ARCHIVES OF GENERAL PSYCHIATRY 21, 29 (1960).

114. *Id.*

115. *Id.* Schechter calls this the "princess fantasy," or the fantasy of having exalted parents. *Id.*

116. *Id.* Since adopted children actually have two sets of parents, they are capable of keeping the good and bad images diffused. *Id.*

117. *Id.* Adopted children may experience problems in superego and ego-ideal formation, with subsequent disturbances in object relations. *Id.* at 29-30. They may suffer deep emotional disturbances, and learning problems, and the effect on the child's personality can be devastating. *Id.* Adopted children face unusual challenges in development such as grieiving for the loss of the life in a biological family, grasping the meaning of being adopted and shaping an identity while dealing with the added dimension of geological bewilderment. Caplan II, *supra* note 4, at 75. Although the challenges are routinely evident, they are often misdiagnosed as problems such as attention-deficit disorder. *Id.*

118. Max Frisk, *Identity Problems and Confused Conceptions of the Genetic Ego in Adopted Children During Adolesence*, 31 ACTO PAEDO PSYCHIATRICA 6 (1964) [hereinafter Frisk]. Frisk lists the difficulties of adopted children as including overt or covert aggression, strong anxiety-depressive symptoms, lying, pilfering, obesity, hypochondria and "vegetative disturbances." *Id.* at 8. Once adopted children reach adulthood, however, the incidence of psychiatric problems declines. Simon and Senturia, *supra* note 1, at 865.

119. Simon and Senturia, *supra* note 1, at 864.

whether the adoptive parents love them and won't abandon them as their birth parents did, or as counterphobic attempts at covering up abandonment fears.[120] Finally, adolescent adopted children may wander about restlessly, perhaps symbolically searching for their birth parents.[121] This has been called the "roaming phenomenon."[122]

Although the non-adopted child pays little attention to his genealogy, for the adoptee, a lack of knowledge about the birth parents and ancestors may cause maladjustment.[123] Many adoptees express a fear of falling in love with an unknown birth relative, and while rare, this has been known to actually happen.[124] The more open the communication about all adoption-related matters, the less likely the adolescent is to resort to excessive fantasizing or acting out in order to fill the "identity lacunae."[125]

Aside from the adoptee, contemporary writers also have examined the effect adoption has on the birth parents. Many writers refuse to use the words parent or mother and callously employ terms such as "biological conceiver" or "the other woman."[126] Yet birth parents never really forget their child, and for some the relinquishment results in deep emotional scars.[127] Adoption agencies often insist on the birth parents' permanent anonymity, feeling that the birth parents deserve to be left alone.[128] Yet most birth parents would welcome a reunion with the child they gave up.[129]

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120. SOROSKY, *supra* note 1, at 108, 112. The adolescent adoptee is particularly vulnerable to feelings of rejection or loss since she has already experienced the loss of the birth parents, in addition to the loss experienced as she emancipates herself from her natural parents. *Id.* at 112.

121. Frisk, *supra* note 118, at 10.

122. SOROSKY, *supra* note 1, at 114. A variant of this phenomenon is a state of turning inward as some adolescent adoptees become dreamy, inaccessible and preoccupied with fantasies about the birth parents. *Id.*

123. Wellisch, *supra* note 110, at 41-42. A child's lack of knowledge about his genealogy can result in a vague feeling within the child that some injustice has been done to him which may lead to an irrational rebellion against his adoptive parents and the world and eventually might even lead to delinquency. *Id.* at 42. *See also* Sants, *supra* note 102, at 32 (labelling this maladjustment "genealogical bewilderment"); Frisk, *supra* note 118, at 9 (stating that a lack of family background knowledge in the adoptee prevents the development of a healthy "genetic ego" which, when obscure, is replaced by a "hereditary ghost").

124. SOROSKY, *supra* note 1, at 124. Gager notes Marguerite de Navarre's *Heptameron* which contains a tale in which the abandonment of a daughter ultimately results in unwitting brother-sister incest. GAGER, *supra* note 77, at 5. One family counseling center director has warned that "failure to inform the child of the identity of his natural siblings increases the opportunity for incest." W. Homer Reddick, *Sibling Rights in Legal Decisions Affecting Children*, 25 JUV. JUST., Nov. 1974, at 3 [hereinafter Reddick].

125. SOROSKY, *supra* note 1, at 119. "Those who support open adoption say that, for the adoptee open adoption leads to clarity, and closed adoption leads to confusion about who one's 'real' parents are." LIPTAK, *supra* note 26, at 39. Open adoption is seen by its supporters as being a way to ease the psychological challenges which adoptees face. Caplan II, *supra* note 4, at 75.

126. SOROSKY, *supra* note 1, at 50.

127. *Id.* at 56. The experience has been likened to a "psychological amputation." *Id.* Birthparents suffer a loss of parenthood and experience the typical stages of grief: shock, denial, anger, depression and acceptance. SILBER, *supra* note 4, at 22. Open adoption has consistently been observed to enable birthparents to more successfully navigate, though not eliminate, the normal feelings of grief. *Id.*

128. SOROSKY, *supra* note 1, at 50.

129. *Id.* at 50-54. In 1976, interviews with 38 birth parents who had their babies adopted during the first six months of life between one and 33 years ago, 82 percent said yes when asked

Finally, the adoptive parents form the third part of the adoption triangle.[130] Couples adopt children for a number of reasons including humanitarian concerns for unwanted orphans, sterility, needing a child to bestow love upon and needing a child from whom to receive love.[131] The relationships in an adoptive family are often subject to strains not found in the typical biological family.[132] Especially difficult for the adoptive parents is revealing the adoption and discussing the birth parents with their child.[133] Many adoptive parents are insecure in their role as parents and feel that any interest by the child in the birth parents is an indication that they have failed as parents.[134] The adoptive parents worry that their child might be rejected or humiliated by the birth parents, about reopening the trauma of

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whether they would be interested in a reunion with the child they had relinquished if the adoptee desired to meet them upon reaching adulthood. *Id.* at 53. In a letter from a birth parent:

> I believe it is my right to take a look at the human being I carried for nine months in my uterus. She is a part of me, although I make no claim on her as a "mother" in the true sense of the word. If she is not interested in a relationship with me, I will back off.

Id. at 69.

130. SOROSKY, *supra* note 1 at 47-72. "The birth parent has been the mysterious 'hidden' parent around whom the adoptee and adoptive parent have been able to weave positive and negative fantasies." *Id.* at 14.

131. Penelope Phipps, *Adoption: A Study of the Problems Involved in Child Guidance Cases from the View-Point of a Psychiatric Social Worker*, 12 MENTAL HEALTH 98, 99 (1953) [hereinafter Phipps]. Probably about 60% of parents adopt to create or complete a family where fertility is believed to be impaired. Humphrey and Ounsted, *supra* note 110, at 599. Reasons parents have for adopting a child can also include needing to prove themselves capable of raising a child, wanting to fulfill their own unsatisfied ambitions or even protesting at being unable to have a child after a hysterectomy. Phipps at 99. *See also* Clothier, *supra* note 102, at 266-68 (listing motives of adoptive parents in adopting). Couples who wait years in hopes of having a child of their own and later seek to adopt may be over-protective and over-solicitous while parents who fail to appreciate the child's needs and adopt solely to fulfill a sense of virtue may be equally dangerous. Jenkins, *supra* note 102, at 404. "The underlying reasons for adoption and the attitude of the parents toward it are undoubtedly the cause of the majority of problems [that adoptive parents have to face]." Phipps at 100.

132. *See* DAVID KIRK, SHARED FATE 50-51 (1964) [hereinafter KIRK] (discussing the impact of contemporary adoption practices on the adoptive parents). Adoptive parents tend to be oversensitive to their adopted child's first expressions of independence. Frisk, *supra* note 118, at 8. "This sensitivity may be based on an inferiority complex originating from their incapacity to have children of their own." *Id.*

133. KIRK, *supra* note 132, at 48-49. One author has noted that it is often the adoptive parents who perceive real or fantasized threats from the real parents who experience the most difficulty in telling their child of her adoption. Phipps, *supra* note 131, at 102-103. These parents feared that they might be rejected in favor of the real parents. *Id.* at 103. If the adoptive parents do give their child information about her biological parents, they will have more specific occasions to think of the child as different from themselves and this may complicate the bonding process with their adopted child, at least for the adoptive parents. KIRK, *supra* note 132, at 48-49. When it comes to arranging post-adoption visitation schedules with the child's biological parents, "[i]t is the adoptive parents who are often the most resistant to open adoption, with fears that some call irrational and others feel are justified." LIPTAK, *supra* note 20, at 32-33.

134. SOROSKY, *supra* note 1, at 73. For couples who choose to adopt because they are unable to beget children themselves, additional stress factors may be present:

> Whatever realities are known and acknowledged in a marriage about the situation leading to childlessness, frequently the overwhelming consideration is the parents' fantasies about their inability to have children. . . . Sometimes conscious or preconscious hostility to the marriage partner who is responsible for the inability to have children barely covers the unconscious hostility to the children.

Simon and Senturia, *supra* note 1, at 863. Some adoptive parents feel profoundly resentful that the biological parents are in any way bound up in their child's identity. BOLLES, *supra* note 97, at 249. *See also* Humphrey and Ounsted, *supra* note 110, at 389 (noting the insecurity that many adoptive parents have about their role as parents).

the birth mother's relinquishment of her baby, or that they will somehow "lose" their child to the birth parents.[135] Adoptive parents often feel that the birth parents relinquished all their parental rights by giving their child up for adoption, including any right to contact or approach the child.[136] However, more and more adoptive parents are feeling less threatened by the adoptee's quest for genealogical information or encounters with the birth parents, realizing that the adoptee's needs cannot be accurately comprehended by nonadopted persons.[137]

C. THE LAW OF OPEN ADOPTIONS IN THE UNITED STATES

Open adoptions are seen by many as a way to relieve the psychological challenges of the adoptive process.[138] Under this view, post-adoption visi-

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135. SOROSKY, *supra* note 1, at 85-86. One account of the fears that adoptive parents harbor about the birth parents reads:

> My husband and I adopted our first daughter, Stacy, 13 years ago. Before Stacy's adoption, our opinion of birthparents was ill-defined. Our fantasies about these people ranged from the birthmother being a fertile but uncaring woman to the birthfather being an irresponsible cad. Our most frightening vision was that they both were indecisive in their decision to place Stacy. Could they become villanous kidnappers who would one day reappear to claim their own?

KATHLEEN SILBER AND PHYLIS SPEEDLIN, DEAR BIRTHMOTHER: THANK YOU FOR OUR BABY 3 (1983) (exploring open adoption through letters of participants in the open adoption process).

136. SOROSKY, *supra* note 1, at 86. Adoptive parents may have difficulty interacting with birthparents because they have no "script" for the kinship, no "map" and no terms for the birthparents. MODELL, *supra* note 94, at 201.

137. SOROSKY, *supra* note 1, at 85. One writer recommends that: "[a]dopted children should never be able to remember a time when they didn't know they were adopted, although, of course, what adoption means can only be understood slowly." BOLLES, *supra* note 97, at 250. Lifton writes that:

> It gets down to a basic attitude of honesty that should run through the parent/child relationship at all times. Children are aware when something is being witheld. There are indirect messages, such as family members never commenting on the child's physical relatedness to others - like eyes resembling Aunt Lucy's or a chin like Grandpa's - while making these casual associations with each other. Blood-related people do not realize the frequency of these biological references, but Adoptees do.

LIFTON, *supra* note 82, at 202-03. Conversely, in open adoption arrangements, it has been suggested that adoptive parents actually bond quicker with their adopted children because they feel as if they have actually been given permission to be the child's parents. Caplan II, *supra* note 4, at 76. "Currently it appears that open adoption may produce extremely satisfying relationships for adoptive parents and birthparents who mutually agree to have ongoing contact." MCROY, *supra* note 20, at 26. However, "the idea that confidentiality in adoption protects members of the adoption triad from emotional trauma continues to prevail even though there is almost a total lack of research on the issues involved." *Id.* at 10.

138. *See, e.g.*, SIBLER, *supra* note 4, at 7 (explaining how open adoption was designed to help adopted children cope with questions about his biological parents and reduce the risk of emotional problems for the adoptee). Although open adoptions have been criticized because there is not enough data to know the long-term effects on the child, the problems associated with traditional adoption are well known and it should be recognized that there is no such thing as a perfect adoption. *Id.* at 17. A study of 21 adoptive couples of open adoptions found that "despite initial fears, anxieties, and concerns, none of the respondents regretted participating in an open adoption." Deborah H. Siegel, *Open Adoption of Infants: Adoptive Parents' Perceptions of Advantages and Disadvantages,* 38 SOCIAL WORK 15, 17-18 (1993). Adoptive parents practicing open adoptions worry significantly less about their infants' attachment, feel more secure, and have lower levels of anxiety about birthparents wanting to reclaim their child. Deborah R. Silverstein and Jack Demick, *Toward and Organizational-Relational Model of Open Adoption,* 33 FAMILY PROCESS 111, 122 (1994). A recent study of 1,268 adoptive parents in California revealed that adoptive parents seem cautiously comfortable with post-placement contact between their child and the biological parents. Marianne Berry, *Adoptive Parents' Perceptions of, and Comfort with,*

tation by the natural parents may benefit children by protecting them from the psychological harm that might result from complete severance from their former families and allowing more adoptions to take place when natural parents otherwise favor an adoption, but are unwilling to lose all contact with their children.[139] However, such arrangements may disrupt the development of the new relationship between adoptees and their adoptive parents.[140] Nationwide, there is a split of authority on the question of open

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Open Adoption, 72 CHILD WELFARE 231, 252 (1993) [hereinafter Berry]. In a recent pilot study an average of 4.5 years after the adoption, 93.8 percent of biological and adoptive parents showed satisfaction with having their adoptions open when safeguards were provided by choice of a level of openness, preparation, and a written mediated adoption agreement. Jeanne Etter, *Levels of Cooperation and Satisfaction in 56 Open Adoptions,* 72 CHILD WELFARE 257 (1993). 94 percent of the biological parents were satisfied and 100 percent of the adoptive parents were satisfied with an open adoption. *Id.* at 263. The mean number of visits planned per year was 2.4, though 52.5 percent reported having more contact than planned. *Id.* However, the more control the adoptive parents have over postadoption contact, the less frequent the visits. Berry, *supra* at 234. A review of empirical studies and databases of open adoptions supports cautious optimism about adoptive and biological parents' responses to openness in their relationship. Harriet E. Gross, *Open Adoption: A Research-Based Literature Review and New Data,* 72 CHILD WELFARE 269 (1993). Post-adoption contact with the biological parents is working, and every indication suggests that more and more adoptive and biological families are entering into open arrangements. *Id.* at 283. A study of the fourth party to the adoption triangle, the public, found that most adults (52 percent) appear to be in favor of open adoptions. Elizabeth Lewis Rompf, *Open Adoption: What Does the "Average Person" Think?,* 72 CHILD WELFARE 219, 227 (1993).

139. SOROSKY, *supra* note 1, at 207-08. More children might be available for adoptions if open adoptions were allowed because in a number of cases the birth parents want to relinquish their child for adoption, but are unwilling to sever all ties to their child. *Id.* The social problems associated with illegitimate adolescent births might be reduced by offering women the possibility of visitation rights with their children after adoption as an alternative to abortion or traditional adoption. Cook, *supra* note 85, at 476-77. The prospect of continued emotional ties with their children would make adoption a most appealing option to parents unable to properly care for their children. *Id.* at 478. Additionally, an increase in the number of adoptable children could relieve the foster care system of some of its burden and provide childless couples with a larger pool of potential adoptees from which to choose. *Id.* Some agencies acknowledge that the reason they institute the practice of open adoptions is to increase placements. MCROY, *supra* note 20, at 69.

McRoy, et al., list the positive attributes of open adoption: many birthmothers would not place their babies without some elements of openness; face-to-face meetings serve to reaffirm the adoptive parents' decision to adopt; birthparents can better heal the pain of adoption by meeting the loving, caring parents; the child can understand that the birthmother is not rejecting her, but is only concerned about her welfare; birthparents are extremely protective of the family unit and would do nothing to disturb it; and children will have better mental health when adoptive parents cope with the adoption realistically and provide them with as much information as possible about the birthparents. *Id.* at 61. *See also* Mardell Groth, Deborah Bonnardel, Donald A. Devis, Jennifer C. Martin and Helen E. Vousden, *An Agency Moves Toward Open Adoption of Infants,* 66 CHILD WELFARE 247 (1987) (finding a consensus among adoptees at an Atlanta, Georgia adoption agency that more openness in their adoptions would have minimized their feelings of rejection and provided them with a more complete picture of who they are).

140. Ames, *supra* note 4, at 150-51. Some adoptive parents fear the concept of open adoptions because they envision scenerios where the natural parents revoke their consent to the adoption itself. *Id.* at 150. Another writer notes that it may be in the best interests of the child to know his own parents, even when the arrangement confuses the parents. MODELL, *supra* note 94, at 232. The discomfort adoptive parents have about open adoption arises not from a sense that it might not be best for the child, but because it violates notions of parenthood. *Id.* at 233. "Open adoption depends on the optimistic notion that people can handle unfamiliar, even unprecedented, relationships." Caplan II, *supra* note 4, at 79. McRoy, et al., list some of the perceived risks of open adoption as including: unending contact; a lack of control over the situation; unpredictability; disruption of the child's environment; difficulties with closure for the birthmother; social workers abdicating their responsibilities in open adoptions; conflicts between the families;

adoptions.[141]

Although courts may consider these competing views when addressing the validity of open adoption, their initial analysis generally focuses on statutory requirements, since adoption is entirely dependent on statute.[142] Many states have statutes expressly addressing post-adoption visitation, usually by grandparents or in adoptions by step-parents or other natural relatives.[143] Nonetheless, courts must often reach a decision without any explicit statutory guidance.[144] While one approach considers open adoptions enforceable so long as in the best interests of the child,[145] other courts reason that post-adoption visitation is unenforceable since adoption terminates all rights of the natural parents.[146]

The open adoption issue can arise in a variety of situations: when consent to adoption is conditioned upon visitation rights, when consent to adoption is unconditional, when parental rights are terminated involuntarily, or even years after the final adoption decree.[147] The prospective adop-

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and the difficulty the child might have in understanding why the birthmother relinquished her, but kept a later-born child. McRoy, *supra* note 20, at 47.

141. *S.A.H.*, 537 N.W.2d at 6. *See generally* Danny R. Veilleux, Annotation, *Postadoption Visitation by Natural Parent*, 78 A.L.R. 4th, 218 (1990 & Supp. 1994) [hereinafter Veilleux] (listing cases on both sides of the issue). An early version of the Model State Adoption Act and Model State Adoption Procedures as proposed by the Department of Health, Education and Welfare in 1980 sought to resolve this conflict in favor of consensual open adoptions involving birth relatives. 45 Fed. Reg. 10,622, 10,625 (1980). Later versions of the act omitted reference to open adoption due to its focus on "special needs children" and a need to shorten the act. Amadio, *supra* note 108, at 61 n.7 (citing an Interview with Richard Mandel, Legal Advisor to the Committee to Draft the Model Adoption Act (January, 1982)). "Adoption's function of satisfying corresponding, and changing, social and personal needs suggests that the adoption world will always be unsettled. . . ." Caplan II, *supra* note 4, at 92.

142. Veilleux, *supra* note 141, at 223-24. *Matter of Adoption of Francisco A.* cites a number of cases explicitly holding that the issue of how to reconcile statutes granting visitation rights with adoption statutes that give full authority to adoptive parents is for the legislature to decide: Poe v. Case, 565 S.W.2d at 613 (Ark. 1978); Hicks v. Enlow, 764 S.W.2d at 71 (Ky. 1989); *In re* Adoption of G.D.L., 747 P.2d 282 at 284-85 (Okla. 1987); *In re* Adoption of Ridenour, 574 N.E.2d at 1063 (Ohio 1991); State *ex rel.* Grant and Keegan, 836 P.2d at 169 (Or. App. 1992); *In re* Petition of Nearhoof, 359 S.E.2d at 589, n.3. (W. Va. 1987); *In re* Adoption of Gardiner, 287 N.W.2d 555, 556 (Iowa 1980); L.F.M., 507 A.2d at 1157 (Md. App. 1986); Olson v. Flinn, 484 So.2d 1015, 1017 (Miss. 1986). "In other opinions that view is implicit in the approach the courts take in deciding the case. None of these decisions recognizes an inherent power to order visitation in the best interests of the child irrespective of legislative power or policy." *Matter of Adoption of Francisco A.*, 866 P.2d at 1197 (Hartz, J. concurring).

143. *Matter of Adoption of Francisco A.*, 866 P.2d at 1192.

144. *Id.* at 1196-97.

145. *S.A.H.*, 537 N.W.2d at 6. The court cited Spencer v. Franks, 195 A. 306 (Md. 1937); *Petition of Dept. of Social Serv.*, 467 N.E.2d at 861; Kambitch v. Ederle, 642 S.W.2d 690 (Mo. 1982); *Morse v. Daly*, 704 P.2d at 1087; *Matter of Adoption of Children by F.*, 406 A.2d at 986; Katterman v. DiPiazza, 376 A.2d 955 (N.J. Super. Ct. App. Div. 1977); *In re* Adoption of Halloway, 732 P.2d 962 (Utah 1986). *Id.*

146. *S.A.H.*, 537 N.W.2d at 6. The court cited Matter of W.E.G., 710 P.2d 410 (Alaska 1985); Marckwardt v. Superior Ct. for the County of L.A., 198 Cal.Rptr. 41 (1984); People in Interest of M.M., 726 P.2d 1108 (Colo. 1968); Matter of C.O.W., 519 A.2d 711 (D.C. Ct. App. 1987); Calderon v. Torres, 445 So.2d 1040 (Fla. Ct. App. 1984); Sanders v. Sanders, 498 So.2d 1063 (Fla. Ct. App. 1986); *In re* M.M., 619 N.E.2d 702 (Ill. 1993); *In re* Adoption of Herbst, 535 P.2d 437 (Kan. 1975); Jouett v. Rhorer, 339 S.W.2d 865 (Ky. 1960); Matter of C.P., 717 P.2d 1093 (Mont. 1986); Lisa W. v. Thomas M., 604 N.Y.S.2d 474 (N.Y. Fam. Ct. 1993); Matter of Fox, 567 P.2d 985 (Okla. 1977); *In re* Adoption of Deaing, 572 S.W.2d 929 (Tenn. Ct. App. 1978); *In re* A.V.D., 815 P.2d 277 (Wash. Ct. App. 1991); Matter of Adoption of R.D.S., 787 P.2d 968 (Wyo. 1990). *Id.*

147. *In re* Custody of Atherton, 438 N.E.2d 513 (Ill. App. Ct. 1982). There, the court held that

tive parents may or may not consent to the adoption, or, as in *S.A.H.*, the adoptive parents may be as yet undetermined.[148] In some cases the preference of the child is an issue.[149] In other cases, the question may be whether to enforce an out-of-state adoption decree incorporating post-adoption visitation.[150] Further complications arise with respect to whom is claiming visitation rights - a natural parent,[151] a step-parent,[152] a grandparent,[153] and so on,[154] as well as how broad the post-adoption visitation rights should

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a visitation agreement reached several years after a child's formal adoption and later repudiated is unenforceable as an attempt to circumvent a custody determination reached in prior adoption proceedings. *Id.* at 516. The court noted, however, that its decision was based solely on its inability to give effect to the agreement, and that this would not preclude the natural mother from reestablishing her rights within the powers of the court. *Id.*

148. *S.A.H.*, 537 N.W.2d 1.

149. *See, e.g., Matter of Adoption of Children by F.*, 406 A.2d 986 (granting an open adoption where two daughters aged eleven and nine desired continued contact with their natural father). In *S.A.H.*, a guardian ad litem had been appointed for the child and the guardian ad litem joined the natural parents in their motion for a mandatory open adoption. Appellant Child's Brief at 3. For a discussion of the often conflicting roles of the guardian ad litem, see *infra* notes 230-237 and accompanying text.

150. Rogers v. Williamson, 489 S.W.2d 558 (Tex. 1973) The Texas court reasoned that it would not violate public policy to enforce an adoption decree incorporating an agreement where the natural father consented to an adoption and the natural mother and stepfather agreed to permit the natural father visitation rights. *Id.* at 561. The court then remanded for a determination of whether visitation was presently in the child's best interests. *Id.*

151. *Matter of Adoption of Francisco A.*, 866 P.2d at 1191 (Hartz, J. concurring). Justice Hartz noted that

> Evaluation of the policy concerns . . . may differ substantially depending on whether the adoptive parents are strangers to the natural parents or whether, say, the adoptive parent is married to a natural parent. For example, when a child needs to be placed for adoption, adoptive parents may find visitation by strangers to be a major intrusion. . . . In contrast, in a step-parent adoption, visitation by a former relative (such as an ex-spouse) is likely to be only a continuation of a prior intrusion.

Id.

152. *See* Evans v. Evans, 488 A.2d 157 (Md. 1985) (reversing a decree which vacated stepmother visitation).

153. *See* People *ex rel.* Sibley v. Sheppard, 429 N.E.2d 1049 (N.Y. Ct. App. 1981) (permitting a grandparent visitation with her grandchild over the objections of the adoptive parents); Mimkon v. Ford, 332 A.2d 199 (N.J. 1975) (sustaining the right of a grandparent to visitation with her granddaughter who had been adopted by a second wife of the child's father). *See also In re* Estate of Zook, 399 P.2d 53 (Cal. 1965) (holding an estate tax on bequests to close relatives applicable to a grandmother's bequest to her grandchild with whom she had maintained close contact following the grandchild's adoption); Peter A. Zablotsky, *To Grandmother's House We Go: Grandparent Visitation After Stepparent Adoption*, 32 WAYNE L. REV. 1 (1985) [hereinafter Zablotsky] (arguing for a case-by-case approach to grandparent visitation); Phyllis C. Borzi, *Statutory Visitation Rights of Grandparents: One Step Closer to the Best Interests of the Child*, 26 CATH. U. L. REV. 387 (1977) [hereinafter Borzi] (advocating the best interests of the child standard for determining grandparent visitation). The majority of states that have addressed the question of grandparent visitation in stepparent or relative adoptions have allowed them. Stephen W. Hayes & Judith A. Ogorchok, *Terminating Parental Rights*, 62 WIS. LAW., June, 1989, at 25.

In South Dakota, courts have been granted the statutory authority to award grandparents reasonable visitation rights in a divorce proceeding adjudicating custody of the child if it is in the child's best interests. S.D.C.L. § 25-4-52 (1992). *See, e.g.,* Strouse v. Olson, 397 N.W.2d 651 (S.D. 1986) (holding that grandmother's visits were not in the children's best interests where the visits were stressful because of animosity between the father and the grandmother and the children testified that they no longer wished to visit their grandmother). Grandparent visitation granted pursuant to this statute terminates upon the placement of the child for adoption. S.D.C.L. § 25-4-54 (1992).

154. *See Morse*, 704 P.2d 1087 (affirming the trial court's power to reserve jurisdiction to consider a petition for visitation from the adoptee's "step grandparent" at a later date); *Matter of*

be.[155]

1. *Adoption by Unconditional Consent*

In the 1937 case of *Spencer v. Franks*,[156] a Maryland appellate court invalidated the portion of an adoption decree which permitted occasional visitation by both biological parents.[157] While the natural father had unconditionally consented to the adoption, the natural mother, unable to care for her child, had not.[158] The adoptive mother, who was the natural father's half sister, and her husband opposed post-adoption visitation, claiming that judicially enforced visitations were affecting the child's fragile health.[159] The court concluded that the adoptive parents could best determine what was in the child's best interests, and had the legal right to do so, but suggested that the court could order post-adoption visitation if and when it would clearly further the child's welfare.[160]

However, in *Katterman v. DiPiazza*,[161] the natural mother unconditionally consented to the adoption of her son by the mother's parents (the child's maternal grandparents).[162] The court found that the lower court had improperly denied the mother's later request for post-adoption visitation without establishing that it would be in her son's best interests.[163] The boy was fifteen years old and had run away on several occasions to be with his natural mother, but the adoptive parents refused all visitation between them.[164] The court noted the probative value of agency reports indicating

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Adoption of Anthony, 448 N.Y.S.2d 377 (incorporating a provision allowing an adopted child visitation with his biological siblings into the adoption decree); *See also* Brashear v. Brashear, 228 P.2d 243, 246 (Idaho 1951) (holding that in determining custody of children subsequent to a divorce, one consideration should be the desirability of keeping siblings together); *In re* Patricia W., 368 N.Y.S.2d 180 (N.Y. Fam. Ct. 1977) (dealing with visitation by siblings); Reddick, *supra* note 124, at 31 (arguing that siblings should not be separated in adoption proceedings).

155. *See* Matter of Adoption of Jennifer, 538 N.Y.S.2d 915 (N.Y. Fam. Ct. 1989) (distinguishing consensual situations with very limited visitations from more liberal open adoptions).

156. 195 A. 306 (Md. Ct. Spec. App. 1937).

157. *Id.* at 312.

158. *Id.* at 308.

159. *Id.*

160. *Id.* at 311. The court imposed a "clear and satisfactory proof" threshold that the child's best interests would require judicially enforced visits with the natural mother. *Id.* Justice Hartz in *Matter of Adoption of Francisco A.* characterized *Spencer* as containing only "brief, vague dictum" that courts may issue visitation despite the absence of an agreement between the adoptive and natural parents. *Matter of Adoption of Francisco A.*, 866 P.2d at 1196 n.7 (Hartz, J. concurring). *Spencer* was ignored 49 years later when the Maryland court held post-adoption visitation was not allowed by a grandparent after the parent's rights had been terminated and the adoptive parents and child objected to visitation. L.F.M. v. Dept. of Social Serv., 507 A.2d 1150 (Md. 1986).

161. 376 A.2d 955 (N.J. Super. Ct. Ch. Div.).

162. *Id.* at 956.

163. *Id.* at 956. "[I]t was improper to . . . deny the child access to the love and affection of his natural mother in the absence of a determination that it is in the child's best interests to do so." *Id.* The court also stated: "We recognize the responsibility of the court as *parens patriae* of all minor children transcends all other considerations when there exists a potential for serious psychological harm to the child." *Id.* at 956 n.1 (citing Sorentino v. Family & Children's Soc'y, 367 A.2d 1168 (N.J. 1976)).

164. *Id.* at 956.

the boy's strong desire for visitation with his natural mother.[165]

2. *Adoption Conditioned Upon Visitation Rights*

In *McLaughlin v. Strickland*,[166] the father consented to the adoption of his daughter by her stepfather, reserving the right to visitation.[167] The mother told the father that he could retain visitation rights if he consented to the adoption.[168] The court held that the subsequent consent was insufficient and did not meet the requirements of the adoption statute.[169]

Conversely, in *Matter of Adoption of Children by F.*,[170] visitation privileges between two daughters and their natural father were incorporated into an adoption decree by a stepfather.[171] The natural father had consented to the adoption on the condition that the court preserve the daughers' right to visit him at their option.[172] Both children expressed a desire that the court permit continued visitation with their natural father.[173] The court emphasized the father's consent to the adoption as well as the existence of a present viable relationship between the father and his daughters.[174] Because the adoptive parents had already interfered with attempted visits from the natural father, the court appointed a guardian ad litem to enforce the visitation order.[175]

3. *Adoption Granted Without Consent*[176]

The court in *Kambitch v. Ederle*[177] denied post-adoption visitation rights to a natural unwed father where the father's consent to the adoption was not required because he had willfully neglected to care and provide for the child.[178] The court noted that some jurisdictions had granted visitation

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165. *Id.* at 957. Justice Morgan dissented, stressing the right of parents to decide with whom their child should be permitted to associate. *Id.* at 958 (Morgan, J. dissenting).

166. 309 S.E.2d 787 (S.C. Ct. App. 1983).

167. *Id.* at 789.

168. *Id.* Upon being served with the petition for adoption, the father contacted an attorney but did not retain him and never filed an answer to the petition. *Id.* The mother failed to mention her intent to change the child's last name because she felt "he would disagree with that right from the very beginning." *Id.* When the father did retain his own attorney, he filed papers requesting permission to withdraw his consent and contest the adoption. *Id.*

169. *Id.* at 790. The court reasoned:

> If an adoption is to be based on consent, the consenting natural parents must agree to relinquish all rights to the child. A qualified consent which attempts to reserve rights in the natural parents is not sufficient to constitute consent to the adoption required by law.

Id. at 790 (citing *In re* Adoption of Singer, 326 A.2d 275 (Pa. 1974). *See also* Smith v. Hartman, 674 P.2d 176 (Wash. 1984) (voiding an adoption decree permitting the adoption of a child by her stepfather with visitation by the natural father because the trial court lacked the requisite statutory power to do so).

170. 406 A.2d 986 (N.J. Super. Ch. Div. 1979).

171. *Id.* at 989.

172. *Id.*

173. *Id.* at 988.

174. *Id.* at 989. The court also emphasized the natural mother's prior conduct in frustrating the natural father's attempts to maintain a relationship with his children. *Id.*

175. *Id.*

176. This was the situation in the S.A.H. case. *S.A.H.*, 537 N.W.2d 1.

177. 642 S.W.2d 690 (Mo. Ct. App. 1982).

178. *Id.* at 693. The father provided only sporatic financial support and made infrequent visits

rights to unwed fathers.[179] However, noting that since the father had not supported the child and post-adoption visitation was not clearly in the child's best interests, the court denied the request for an open adoption.[180]

On the other hand, *Re Dana Marie E.*[181] held that any future adoption order of a twelve year old girl must contain a provision for continued visitation with her natural mother.[182] The court had terminated the mother's parental rights because she was unable to care for her child due to her mental illness and dispensed with the need to obtain her consent to her daughter's adoption.[183] The mother had cared for the girl until she was five years old, and thereafter they visited with each other when the mother was not hospitalized.[184] Although the court believed that post-adoption visitation would ordinarily be inappropriate, the court felt that visitation would be in the child's best interests with teenagers who had had consistent contact with their parents and wished to continue seeing them.[185]

D. THE "BEST INTERESTS" STANDARD

The birth of the "best interests of the child" standard is usually traced to Justice Cardozo's opinion in *Finlay v. Finlay*.[186] The roots of the standard go back further, however, as the legal focus which shifted from the adoptive parents to the child paralleled society's growing concern for adopted children.[187] Cardozo wrote that courts must exercise their *parens*

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to the child. *Id.* at 692. The trial court also found that the father did not show affection or provide parental guidance to the children. *Id.*

179. *Id.* at 693 (citing A.L. Frechette, Annotation, *Right of Putative Father to Visit Illegitimate Child,* 15 A.L.R. 3D 887 (1967); 7 C.J. *Bastards* 935 (1916)).

180. *Id.* at 694. The court's language suggests that visitation rights could be granted if clearly required by the best interest of the child. *Id.* One later justice characterized this as "only the barest dictum." *Matter of Adoption of Francisco A.,* 866 P.2d at 1196 n.7 (Hartz, J., concurring). The court in *Kambitch* also denied the grandmother's motion to intervene in order to establish visitation rights. *Kambitch v. Ederle,* 642 S.W.2d at 694 (citing Aegerter v. Thompson, 610 S.W.2d 308 (Mo. Ct. App. 1980)). The grandmother had visited the child frequently, assisted the natural mother financially and formed a close and affectionate bond with the child as well as the mother. *Id.* at 692.

181. 492 N.Y.S.2d 340 (N.Y. Fam. Ct. 1985).

182. *Id.*

183. *Id.* at 343-44. The mother suffered from paranoid schizophrenia. *Id.* at 342.

184. *Id.* at 342.

185. *Id.* at 343. The court also cited to Matter of Raana Beth, 355 N.Y.S.2d 956 (ordering visitation for a natural father after a finding that he had abandoned the child) and Matter of Joyce T., 478 N.E.2d 130 (N.Y. Ct. App. 1985) (upholding the termination of parental rights of two mentally retarded parents, but specifically noting that it had not reached the question of an open adoption). *See also* Adoption of Abagail, 499 N.E.2d 1234 (Mass. 1986) (affirming the denial of post-adoption visitation where not raised at trial where a mildy retarded mother's parental rights had been terminated but recognizing that visitation might be appropriate in such a situation when in the child's best interests); Petition of Dept. of Social Serv. to Dispense with Consent to Adoption, 467 N.E.2d 861 (Mass. 1984) (recognizing that post-adoption visitation rights by a natural parent whose parental rights were involuntarily terminated could be considered).

186. 148 N.E. 624 (N.Y. 1925). *See, e.g.,* Courtney R. Baggett, *Sexual Orientation: Should It Affect Child Custody Rulings,* 16 LAW & PSYCHOLOGY REVIEW 189 (1992) (claiming that Justice Cardozo first enunciated the best interest standard).

187. Chapsky v. Wood, 26 Kan. 650 (1881) (cited in Ralph J. Podell, Harry F. Peck and Curry First, *Custody — To Which Parent?,* 56 MARQ. L. REV. 51 (1972)); SOROSKY, *supra* note 1, at 33-45.

patriae powers as a wise and affectionate parent, to do what is in the best interests of the child.[188]

Currently, the best interests of the child standard is employed in a variety of situations including custody, adoption, abuse and neglect, guardianship, termination of parental rights, and disposition following juvenile court proceedings.[189] The best interests standard was first codified as part of the 1877 Revised Codes of the Territory of Dakota in the context of custody determinations.[190] However, it was not until 1994 that the standard became a part of South Dakota's adoption statute.[191]

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188. *Finlay*, 148 N.E. at 626. *Parens patriae* means literally "parent of the country" and refers to the role of the state as sovereign and guardian of children and other incompetents to protect their best interests and care for those who cannot care for themselves. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

189. Note, *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, 70 VA. L. REV. 1303, 1313-14 (1984). *See* S.D.C.L. § 25-5-7.1 (1992) (incorporating the best interests of the child standard into joint legal custody determinations); S.D.C.L. § 26-7A-3 (1992) (allowing a transfer of dependency and delinquency proceedings to the county of the child's residence if in the best interests of the child); S.D.C.L. § 26-7A-5 (1992 & Supp. 1996) (providing for the best interests standard in juvenile court proceedings); S.D.C.L. § 26-8A-25 (1992) (including the best interests standard among criteria for determining the continued placement of a child separate from the home); S.D.C.L. § 26-8A-27 (1992) (requiring a consideration of the child's best interests when parental rights are terminated).

190. DAK. CIVIL CODE § 127 (1877). The statute directed judges to be guided by "what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; and if the child be of a sufficient age to form an intelligent preference, the court or judge may consider that preference in determining the question." *Id. See* LeAnn Larson LaFave, *Origins and Evolution of the "Best Interests of the Child" Standard*, 34 S.D. L. REV. 459, 459-72 (1989) [hereinafter LaFave] (tracing the history of the best interests standard in the context of custody adjudications in South Dakota).

191. S.D.C.L. § 25-6-2 (1992 & Supp. 1996). Prior to being amended the statute read: "Any minor child may be adopted by any adult person in the cases and in the manner prescribed by law. The person adopting the child must be at least ten years older than the person adopted." *Id.* (1992). The 1994 amendment altered the statute to read:

> Any minor child may be adopted by any adult person. However, the person adopting the child must be at least ten years older than the person adopted.
>
> In an adoption proceeding or in any proceeding that challenges an order of adoption or order terminating parental rights, the court shall give due consideration to the interests of the parties to the proceedings, but shall give paramount consideration to the best interests of the child.

Id. (Supp. 1996). Senator Barbara Everist proposed this amendment in response to the concerns of two of her constituents who had adopted a baby girl through a private attorney, after which the natural father, whose parental rights had not been properly terminated, returned to claim the child. Telephone Interview with Senator Barbara Everist (Mar. 20, 1997) [hereinafter Everist interview]. The bill was defeated in 1993, but interest mounted as the "Baby Jessica" cases unfolded and the bill passed when it was re-introduced the following session. *Id.* The "ghastly spectacle" of the Baby Jessica cases culminated in a ruling by the Michigan Supreme Court that the adopted child be returned to her natural father, whose parental rights had never been terminated, more than two years after a couple had attempted to adopt her. Nancy Gibbs, Andrea Sachs and Sophronia Scott Gregory, *In Whose Best Interest?*, TIME, July 19, 1993, at 46 [hereinafter Gibbs, Sachs and Gregory]; Linda Lea M. Viken, *Calling in the Feds: The Need For an Impartial Referee in Interstate Child Custody Disputes*, 39 S.D. L. REV. 469, 469-72 (1994); In Interest of B.G.C., 496 N.W.2d 239 (Iowa 1992); *In re* Clausen, 502 N.W.2d 649 (Mich. 1993). The Time article correctly predicted that the public interest surrounding the case was "bound to fuel the movement to change the way the law is applied." Gibbs, Sachs and Gregory at 48. The legislative intent behind the amendment to South Dakota's adoption statute was to put more focus on the child and less on the parents. Everist Interview.

E. Application of the "Best Interests" Standard

While aiming for the best interests of the child in proceedings involving children is a worthy ideal, it has been criticized as vague and amorphous, frequently leading to unpredictable and inconsistent results.[192] Because the standard is so subjective, it offers the court little or no guidance.[193] Despite the difficulty in applying the standard, few would argue

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192. Henry H. Foster, *Adoption and Child Custody: Best Interests of the Child*, 22 Buff. L. Rev. 1 (1973) [hereinafter Foster] (criticizing cases which have applied the best interests standard erroneously). Foster writes:

> In the individual case no matter what the result, reasons for the decision are expressed in terms of the child's best interests. . . . [T]he controlling principle of a child's best interests is an amorphous concept which may serve as a basis for rationalization of any result and because of an unfortunate judicial — and human — tendency to stereotype relationships.

Id. at 1-2. A family court judge has written that "when I was called upon to reconfigure families, I began to wonder whether I knew, or anybody knew, what precisely was in the best interests of the child." Davis, *supra* note 14, at 559. "[M]any imply that we understand exactly what sort of upbringing a child needs and precisely which factors cause psychiatric disorder in children. But we do not, and it is our failure to *recognize* our ignorance which has led to these confident but contradictory claims." Michael Rutter, *Parent-Child Separation: Psychological Effects on the Children*, 12 J. Child Psychology & Psychiatry & Allied Disciplines 233, 234 (1971) (emphasis in original). One respected scholar has written:

> Deciding what is best for a child often poses a question no less ultimate than the purposes and values of life itself. Should the decisionmaker be primarily concerned with the child's happiness or with the child's spiritual and religions training? Is the primary goal long-term economic productivity when the child grows up? Or are the most important values of life found in warm relationships? In discipline and self-sacrifice? Are stability and security for a child more important than intellectual stimulation?
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> . . . [I]f one looks to our society at large, one finds neither a clear concensus as to the best child-rearing strategies, nor an appropriate hierarchy of ultimate values. The answer, in short, is indeterminite.

Robert H. Mnoonkin, In the Interest of Children 18 (1985) [hereinafter Mnoonkin]. "The concept of 'children's best interests,' unlike such concepts as distance or mass, has no objective content. Whenever the word 'best' is used, one must always ask 'according to whom?' The state, the parents, and the child might all be sources of views . . . ." David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 Mich. L. Rev. 477, 488 (1984) [hereinafter Chambers]. Chambers reasons that:

> Under a state-defined view of children's needs, some other qualities, such as the child's adherence to some set of conventional moral norms, might be considered especially important, but they are unlikely to be considered more important than these qualities that relate so centrally to people's capacities to live day by day without debilitating anxiety or depression.

Chambers at 498 n.62.

193. Foster, *supra* note 192, at 1-2. *See, e.g.,* People *ex rel.* Scarpetta v. Spence-Chapin Adoption Services, 269 N.E.2d 787 (N.Y. 1971), *cert. denied*, 404 U.S. 805 (1971) (involving the voiding of an adoption). *Scarpetta* is the famous "Baby Lenore Case" where a natural mother who had executed a formal surrender of her baby to an agency after fourteen counseling interviews with the agency where she steadfastly rejected alternatives to adoption prevailed in a habeas corpus action brought after the baby had been placed with a family. Foster, *supra* note 192, at 7-14. *See also* Painter v. Bannister, 140 N.W.2d 152, 155-56 (Iowa 1966), *cert denied*, 385 U.S. 949 (1967) (determining that a four-year-old's welfare would be better served by remaining on a farm with his grandparents rather than returning him to his father and new step-mother in the "arty, Bohemian, and probably intellectually stimulating" atmosphere of San Francisco). *See also* Hal Painter, Mark, I Love You (1967) (narrating the events surrounding the *Painter* case). One author observed that:

> There is a bitter irony in the fact that the Iowa court in *Painter* blindly applied the so-called best interests rule and ignored the parental rights of the father. Usually, it is the parental rights doctrine that is applied inflexibly and without regard to the psychological consequences to the child. . . . The point, of course, is that no test should be applied exclusively or inexorably, but at most should merely serve as a guideline in weighing or balancing all relevant considerations.

that courts should always aim for the child's best interests when providing for their care or structuring their families.[194] The standard ensures that the child's interests will remain paramount, while recognition of sub-interests or secondary standards may work to erode the single most important consideration: the child's best interests.[195]

1. *Guardians ad litem*

Guardians ad litem are typically appointed to represent the child's interests in judicial proceedings affecting the child,[196] yet the duties of the guardian ad litem are rarely defined with precision.[197] Given these uncer-

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Foster, *supra* note 192, at 4-5. Foster also criticizes the *Scarpetta* case. *Id.* at 7-12. By way of contrast, Anglo-American law had much less difficulty resolving custody disputes before the last century when, instead of the amorphous best interests standard, the father was simply awarded custody since he had a property interest in his children while the mother had none. *Id.* at 2.

194. *See* UNIF. ADOPTION ACT, 9 U.L.A. 72 (pt. 1) § 19(c) (1969) (containing best interests of the child language regarding the termination of parental rights); UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 124 (pt. 1) § 1(a)(2) (1968) (stating that its purpose is to ensure the best interests of the child); UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 561 § 402 (1973) (recommending that the best interests of the child govern custody dispute resolutions). Joseph Goldstein, author of *Beyond the Best Interests of the Child*, has noted that society could easily say that certain interests override the child's, but in that case society ought not to operate a policy while insisting that it is actually in the child's best interests. *Interview with Joseph Goldstein*, 12 N.Y.U. REV. L. & SOC. CHANGE 575, 578 (1983-1984) [hereinafter Goldstein interview].

195. *See, e.g.*, *In re* Marriage of Tweeten, 563 P.2d 1141, 1143 (Mont. 1977) (holding that "[i]t is important to remember the best interest of the parent, or detriment to the parent, is not the test") (overruled by Markegard v. Markegard, 616 P.2d 323, 325 (Mont. 1980) (overruling *Tweeten* insofar as the "tender years" presumption)).

196. James Kenneth Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565, 593 (1976) [hereinafter Genden]. "Child advocacy is an important tool in protecting the rights of children if there is no assurance that there will be any party before the court capable of fully representing the child." *Id. See also* Linda L. Long, *When the Client is a Child: Dilemmas in the Lawyer's Role*, 21 J. FAM. L. 607 (1983) [hereinafter Long] (detailing the difficulties involved in serving as a guardian ad litem).

197. Long, *supra* note 196, at 607-640. "The role of the guardian ad litem or counsel for the child may be that of independent investigator and advisor to the court, advocate for the child's wishes, advocate for the child's best interests, or some combination of these various roles." LaFave, *supra* note 190, at 523. "The scope of such representation, however, is unclear." *Id. See, e.g.*, In Interest of Steveon, R.A., 537 N.W.2d 142, 144 n.2 (Wis. Ct. App. 1995) (disqualifying a guardian ad litem for a conflict of interest and noting that the guardian ad litem does not represent the child *per se*, but rather represents the "concept of the child's best interest."). Besides this confusion about the role the guardian ad litem is to fill, it is often difficult for the guardian ad litem herself to determine what she is to advocate. MNOONKIN, *supra* note 192, at 43. One writer has noted that:

> The central dilemma for a child advocate lies in deciding whether his function is to represent the wishes of the child or to represent his conception of the child's best interests. . . . The most ethically awkward position occurs when a young client capably articulates his views, which diverge from the attorney's conception of the child's best interests.

Genden, *supra* note 196, at 588-89. The distinguishing feature of a guardian ad litem is that she makes decisions based on her own view of what is in the best interests of the child and is not bound procedurally or substantively by the child's expressed desires. ANN M. HARLAMBIE, THE CHILD'S ATTORNEY 6 (1993) [hereinafter HARLAMBIE]. Legitimate questions have been raised about the ability of guardians ad litem to make these independent best interests judgments and whether the guardian ad litem is actually more of a pretrial judge. *Id.*

Although the guardian ad litem has unique opportunities to promote the welfare of the child and other parties, a thoughtless, uninformed or biased guardian ad litem can do considerable harm. JANE ROWE, PARENTS CHILDREN AND ADOPTION: A HANDBOOK FOR ADOPTION WORKERS 264 (1966). It is improper for the guardian ad litem to influence in any way the decision of the parties concerning the child. *Id.* at 265. This can create a real dilemma when he finds the

tainties and the costs of guardians ad litem, some controversy exists as to whether their appointment should be mandated or simply made on a case by case basis.[198] In South Dakota, trial courts may appoint a guardian ad litem in civil proceedings whenever it is proper for the protection of the child.[199]

2. *Restricting the Child's Best Interests*

Often, the determination of a child's best interests is either colored with secondary considerations or even supplanted by other interests entirely.[200] In South Dakota, for example, the "tender years" doctrine for many years co-existed with the "best interests of the child" standard in the context of custody determinations.[201] Repealed in 1979,[202] the doctrine presupposed that the custody of a child of tender years should be given to

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people concerned need help in coming to a decision. *Id.* Further, it is very difficult for the guardian ad litem to obtain "a complete picture" because of the lack of time and the fact that her official status will be seen as something of a threat. *Id.* at 267. Even more troubling, there are few assurances that the guardian ad litem is being responsive to the child's interests and is not simply pressing for the guardian ad litem's own unconstrained visions of those interests. MNOONKIN, *supra* note 192, at 43.

198. *Compare* LAFAVE, *supra* note 190, at 523 n.503 (noting that some scholars advocate a case by case assessment of the advisability of the appointment of a guardian ad litem) *and* Harvey R. Sorkow, *Best Interests of the Child: By Whose Definition?*, 18 PEPP. L. REV. 383, 387 (1991) (arguing that a guardian at litem should be mandatory in all child custody disputes). Genden writes that:

> [Child advocacy] is likely to be costly, either to the parties or to the public authority. Additional participants may increase the burden of supervision on the court. Child advocacy could easily be corrupted into a pro forma gesture that will deaden the court's concern for the welfare of the child. The appointment of a child advocate may also increase the trauma of the trial for a minor by propelling him into a conflict laden situation. . . . Given these costs and risks, the appointment of a child advocate should not be mandatory in every case.

Genden, *supra* note 196, at 594. Especially in the context of a custody dispute, the additional costs of guardians ad litem may directly impede the presentation of meritous evidence at trial. Roger M. Baron, *Child Custody Determinations in South Dakota: How Should South Dakota Courts Decide Child Custody Cases*, 40 S.D. L. REV. 411, 414-415 (1995) [hereinafter Baron]. New Jersey allows the qualified use of guardians ad litem. Matter of Adoption of a Child by Mercado, 442 A.2d 1078, 1079 (N.J. Sup. Ct. 1982); Matter of Adoption by J.J.P., 419 A.2d 1135, 1140 (N.J. Sup. Ct. 1980). A District of Columbia appellate court has held that where competing parties in a proceeding are given the opportunity for a thorough hearing, the petition is vigorously contested and witnesses are cross-examined, the interests of the adoptee can be fully presented without the appointment of a guardian ad litem. In re Female Infant, 237 A.2d 468, 469 (D.C. 1968) (citing *In re* Adoption of a Minor, 120 F.2d 720, 721 (D.C. Cir. 1941). Conversely, South Carolina provides for mandatory appointment of guardians ad litem in all adoption proceedings. S.C. CODE ANN. § 20-7-1732 (Law. Co-op, Supp. 1996).

199. S.D.C.L. § 15-6-17(c) (1984 & Supp. 1996). *See* Matter of Guardianship of Petrik, 544 N.W.2d 388 (S.D. 1996) (involving the appointment of a guardian ad litem who filed a personal injury suit against the child's grandparents). Courts often appoint a guardian ad litem when a dispute centers on the desires of the parents (and grandparents) rather than the best interests of the child. *Id.* at 391 (citing Dees v. Dees, 164 N.W.2d 222, 287 (Wis. 1969); Mawhinney v. Mawhinney, 225 N.W.2d 501, 504 (Wis. 1975)). South Dakota law also states that a guardian ad litem "may" appear for the child in hearings on a petition for adoption. S.D.C.L. § 25-6-12 (1992 & Supp. 1996).

200. LaFave, *supra* note 190, at 471-79.

201. DAK. CIVIL CODE § 127 (1877). That statute read, in part:

> As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor or business, then to the father.

the mother.[203]

A standard which *may* have been abandoned in South Dakota is the parental-rights doctrine, invoked in custody disputes between parents and non-parents.[204] While the "best interests of the child" standard applies in

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Id. See also S.D. REV. CODE OF 1919 § 222; S.D. CODE OF 1939 § 14.0505; S.D.C.L. § 30-27-19(2) (1976).

202. S.D.C.L. § 30-27-19(2) (Supp. 1979). The doctrine was legally dead long before it was repealed. LAFAVE, *supra* note 190, at 472. Concerns about the presumption's constitutionality had been brimming before 1979. Stephanie A. Chester, Comment, *The Tender Years Presumption: Do the Children Bear the Burden?*, 21 S.D. L. REV. 332 (1976). That comment noted:

> There is an underlying flaw in the apparent adherence of the courts to the statutory purpose of protecting the child's best interests. This flaw surfaces when the presumption is equated with the child's welfare. . . . To define best interests in terms of maternal custody not only forecloses further inquiry into a consideration of which parent will best protect the child's welfare, but it also ignores the empirical data demonstrating that "mothering" is a function independent of the sex of the individual performing it.

Id. at 334. A gender-neutral best interests standard is now in place. S.D.C.L. § 30-27-19(2) (1984); Martin v. Martin, 306 N.W.2d 648, 650 (S.D. 1981). "[The South Dakota Legislature] desired that neither parent be given custodial preference due to their respective sex." *Id.*

203. Howells v. Howells, 113 N.W.2d 553, 535 (S.D. 1962). *See generally* LaFave, *supra* note 190, at 470-72 (outlining the history and application of the tender years presumption).

204. S.D.C.L. § 30-27-23 (1984) (repealed 1993). That statute provided:

> Of persons equally entitled to the custody in other respects, preference is to be given as follows:
> (1) To a parent;
> (2) To one who was indicated by the wishes of a deceased parent;
> (3) To one who already stands in the position of a trustee of a fund to be applied to the child's support;
> (4) To a relative.

Id. See, e.g., Langerman v. Langerman, 336 N.W.2d 669 (S.D. 1983) (disturbing a father's right to custody in favor of the maternal grandparents upon a showing of father's drunken driving jeopardizing the safety of his children, alcoholism, live-in female companions, transient lifestyle and multiple criminal convictions when the child was old enough to see and recognize the improprieties as such).

The parental preference statute was repealed in 1993. S.D.C.L. § 30-27-23 (repealed by 1993 S.D. Laws ch. 213 § 170). In fact, the legislature repealed S.D.C.L. chs. 30-26 through 30-32 in their entirety, inadvertently removing the "best interests of the child" standard from custody determinations. 1993 S.D. Laws ch. 213, §§ 169-175; Baron, *supra* note 198, at 417 n.26. However, South Dakota courts continued to apply the best interests standard until it was reenacted a few years later. Baron, *supra* note 198, at 417 n.26. Baron writes:

> The legislative repeal of this section was in connection with the revision of title 30 of the South Dakota Codified Laws relating to probate and guardianship procedure and also included the repeal of the "best interests of the child" standard. Unlike the legislative reenactment of the "best interests of the child" standard in 1994, there has been no similar effort by the South Dakota legislature to reenact the parental preference. It remains to be seen whether the South Dakota courts will continue to afford a preference to a parent over a nonparent in custody determinations.
>
> Some sort of parental preference is appropriate, however, not to the degree previously recognized under South Dakota law. . . . The present requirement of proof of unfitness is too stringent and results in placements which are *not* necessarily in the child's best interests.

Id. at 426 (emphasis in original) (citing S.D.C.L. § 30-27-19 (repealed 1993); S.D.C.L. § 30-27-23 (repealed 1993); S.D.C.L. § 25-4-45 (Supp. 1996)). Since Baron's article, *D.G. v. D.M.K.* was decided, which seemed to apply the parental preference doctrine when a former boyfriend of a child's mother sought visitation after supporting and caring for the child for years. D.G. v. D.M.K., 1996 S.D. 144, 557 N.W.2d 235 (1996). The South Dakota Supreme Court noted that the right to visitation is derived from custody. *Id.* at ¶ 46 (citing *In re* Sedelmeier, 491 N.W.2d 86, 89 (S.D. 1992)). Although the court described the man's intentions as "admirable" and the five-year-old child feared being separated from him, no legal basis was found for the man to assert custody or visitation absent extraodinary circumstances. *Id.* at ¶¶ 17, 39, 46, 47 (citing Cooper v. Merkel, 470 N.W.2d 253, 255-256 (S.D. 1991)). *Cooper* denied a man visitation rights with a child when the man had lived with the mother and child for seven years. *Cooper v. Merkel*, 470

custody disputes between parents, in custody conflicts between parents and non-parents, a presumption operates that parents are best able to nurture their children.[205] Thus the inquiry centers on parental unfitness rather than the child's interests, which are often lost in the process.[206] Only if the parent is unfit does the focus shift back to the child's best interests.[207]

Concerns collateral to the child's best interests are often discernable in adoption cases and statutes.[208] These secondary interests may be injected into the analysis by way of presumptions or in more subtle fashions.[209] Courts also restrict the availability of certain custody or visitation arrangements, presumably on the assumption that certain arrangements can never be in the child's best interests.[210] Nevertheless, the best interests of the child formula, though at times altered or diluted, remains the guiding

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N.W.2d at 254, 256 (repeatedly citing *Langerman v. Langerman*, 336 N.W.2d 669). And *Langerman* had explicitly relied on the provisions of S.D.C.L. section 39-27-23, quoting it in its entirety in a footnote. *Langerman v. Langerman*, 336 N.W.2d at 670 n.1.

205. *See generally* Michael B. Thompson, *Child-Custody Disputes Between Parents and Non-Parents: A Plea for the Abrogation of the Parental-Right Doctrine in South Dakota*, 34 S.D. L. REV. 534 (1989) [hereinafter Thompson] (tracing the development and criticizing the application of the parental-rights doctrine).

206. *See* Matter of Guardianship of Sedelmeier, 491 N.W.2d 86, 87 (S.D. 1992) (invoking the parental rights doctrine in declining to consider a petition for guardianship of an eleven-year-old boy by neighbors who had provided the boy's primary care since he was two years old without a showing of gross parental unfitness). The boy required hospitalization for psychological problems shortly after returning to live with his mother but the trial court refused to appoint a psychologist to evaluate the boy. *Id.* at 87-88. "Without unfitness being established, there is no necessity to look to the best interests of the child." *Id.* at 87.

207. *Langerman*, 336 N.W.2d at 670. Thompson notes that this case was the first time the South Dakota Supreme Court had decided in favor of non-parents when the parental rights doctrine was at work. Thompson, *supra* note 205, at 548. The *Langerman* court emphasized the bonding that had formed with the grandparents since they had been the primary caretakers of the children since birth. *Langerman*, 336 N.W.2d at 672.

208. *See, e.g.*, D.C. CODE ANN. § 16-208 (Supp. 1955) (since repealed). The stated purpose of the District of Columbia's 1954 adoption law was to offer threefold protection to:

> (1) the adoptive child, from unnecessary separation from his natural parents and from adoption by persons unfit to have such responsibility; (2) the natural parents, from hurried and abrupt decisions to give up the child; and (3) the adopting parents, by providing them with information about the child and his background, and protecting them from subsequent disturbance of their relationships with the child by natural parents.

Id. This three-part balance of the interests of the child, the child's biological parents, and the child's adoptive parents bears a striking resemblance to the three-part balancing test set out in *S.A.H. S.A.H.*, 537 N.W.2d at 70. See *supra* note 66 and accompanying text for this balancing test. Besides requiring consideration of interests other than the child's, courts can also require higher standards of proof as a means of giving weight to those secondary interests. *Spencer v. Franks*, 195 A. at 311 (requiring "clear and satisfactory" proof). For a discussion of the facts and holding of *Spencer v. Franks*, see *supra* notes 156-160 and accompanying text.

209. *See Roquemore v. Roquemore*, 80 Cal.Rptr. at 434 n.4 (stating that courts must, in addition to the best interests of the child, consider whether visitation will unduly interfere with the adoptive relationship).

210. The jurisdictions which deny open adoption arrangements entirely might be grouped in this category. *See infra* note 146. So might the *per se* denial of visitation rights to certain groups of people be premised on the idea that such visitation rights by these persons can never be in the child's best interests. *See S.A.H.*, 537 N.W.2d at 7 (stating in dictum that courts should only grant post-adoption visitation to people who acted in a custodial or parental role for the child to prevent visitation from being granted to any person who happens to feel affection for the child). It should be noted that although the *S.A.H.* court cited *Adoption of Francisco A.*, for this proposition, the court in that case also gave a reason for the limitation as a sort of compromise in reducing the availability of visitation since visitation rights infringe on the parent's custody rights. *Adoption of Francisco A.*, 866 P.2d at 1181.

standard.[211]

IV. ANALYSIS

A. THE TEST AND THE EVIDENTIARY STANDARD

In the Interest of S.A.H. imposed a three-step weighing process as well as a high evidentiary standard before an open adoption may be ordered.[212] In the future, when parental rights are terminated and the child or parent(s) move for an open adoption, a court can only grant the motion when it finds the child's best interests are served "by clear and convincing evidence."[213] The South Dakota Supreme Court cited no cases on point for this heightened standard.[214] Indeed, such a hurdle is misplaced. In South Dakota, when a trial court finds that a child's best interests would be served by mandating an open adoption, *S.A.H.* directs that the trial court not order an open adoption unless it can find by clear and convincing evidence that the child's welfare would be advanced.[215] It is unclear why in numerous cases a child's best interests should be frustrated when the "clear and convincing" standard has not been reached, but one possible explanation is that the heightened requirement serves to protect adoptive parents who may be uncomfortable with the concept of an open adoption.[216]

In addition to the heightened evidentiary standard, *S.A.H.* directs trial courts to "carefully weigh" three separate considerations: the child's needs, the impact on integration with the new family and the effect on the

211. *See, e.g.,* Matter of B.E., 287 N.W.2d 91 (S.D. 1979) (holding that if a child's best interests can be reasonably assured by less intrusive measures than terminating parental rights, a trial court is required to employ those measures). The least restrictive alterative is viewed from the child's point of view. Matter of S.W., 398 N.W.2d 136, 139 (S.D. 1986); *In re* R.Z.F., 284 N.W.2d 879, 882 (S.D. 1979). Phillips notes that "the one common threat binding these states [which recognize open adoptions] is the necessity of showing that the visitation agreement is in the best interests of the child." B. Lee Phillips, *Open Adoption: A New Look at Adoption Practice and Policy in Texas* 43 BAYLOR L. REV. 407, 420 (1991).

212. *S.A.H.* 537 N.W.2d at 7. See *supra* notes 65-66 and accompanying text for a fuller explanation of this evidentiary standard and balancing test.

213. *Id.*

214. *Id.* Of the seven cases cited by the court for the conclusion that post-adoption visitation is an enforceable right, only the dictum of the 60-year-old case of *Spencer v. Franks* imposed a heightened evidentiary standard. *Spencer v. Franks*, 195 A. at 311. The language that the Maryland court used was actually "clear and satisfactory proof" and the reasoning for this seems to have been rooted in the Maryland adoption statute which made the decree of adoption itself presumptive. *Id.* at 311. In 1986, the Maryland court ignored *Spencer* in holding that where the natural parents' rights have been terminated and the child has been placed for a confidential adoption, visitation cannot be granted (in that case to a grandparent) over the objections of the adoptive family and the child's guardian. *L.F.M.*, 507 A.2d at 1160. The Missouri Court of Appeals, in dictum, observed that "generally" post-adoption visitation rights have been granted only when provided by statute, when the father has supported the child, or when "clearly required by the best intersts of the child." *Kambitch v. Ederle*, 642 S.W.2d at 694.

215. *S.A.H.*, 537 N.W.2d at 7.

216. *See, e.g., Adoption of Francisco A.*, 866 P.2d at 1181 (resolving the question of open adoptions, in part, by effecting a sort of compromise between the child's best interests and the adoptive parents'). However, the court in *S.A.H.* did proclaim that "[a]lthough the interests of adoptive parents should be considered, parental rights are secondary to the interests of the child." *Id.* at 6 (citing *Matter of Adoption of Francisco A.*, 866 P.2d at 1181).

pool of adoptive parents.[217] The first and second of these considerations, the psychological needs of the child and the effect an open adoption would have upon the child's integration with her new family, are potentially sub-issues within the best interests of the child doctrine; a child's best interests will always include a smooth integration with her new adoptive family.[218]

The last item in the weighing exercise, consideration of the impact of open adoption on "the pool of prospective adoptive parents" is both disconcerting and counter-intuitive.[219] Presumably, courts should be mindful of the effect that vesting visitation privileges with the natural parents might have on the individual child's placement opportunities.[220] Some potential adoptive parents may prefer to adopt children who do not have the right to contact their natural parents via a judicially mandated open adoption.[221] Some of *those* couples will have such strong feelings against open adoption that they opt not to adopt, rather than adopt an "open adoption child."[222] The potential pool of adoptive parents with whom the child could be placed would accordingly be depleted to some degree.[223] Inferably, the potential adoptive parents remaining in the pool would be less qualified as parents and caregivers than those who had been eliminated by the specter of open adoption.[224] The child would then face either a delay in placement, or placement with a less satisfactory family than he would have without the judicially mandated open adoption.[225]

Distilled, however, the directive is either simply a restatement of the

217. *Id.* at 7. See *supra* note 66 and accompanying text for this three-part balancing test.

218. See *supra* notes 109-125 and accompanying text for a description of the psychological impact adoption has on adopted children. *See also* DAVIS, *supra* note 14, at 567 (noting that "there is evidence that the severance of biological ties has harmful effects that are independent of, and may occur regardless of, success or failure in achieving continuity in an adoptive home").

219. *S.A.H.*, 537 N.W.2d at 7. The court makes this directive earlier as well: "As noted by the trial court, mandating open adoption may very well have a chilling effect on the potential pool of adoptive parents. Courts should consider how visitation will affect the adoption." *Id.* (citing *Matter of Adoption of Francisco A.*, 866 P.2d at 1182).

220. Another plausible interpretation of this directive would be that trial courts are to reconsider the cumulative effect that each judicially mandated visitation might have on future adoptions as more and more couples become wary of the prospect of open adoption: "[E]ven if visitation in the particular case may improve the child's welfare, perhaps that improvement cannot be justified if the possibility of court-ordered visitation deprives *other* children of adoptive parents." *Matter of Adoption of Francisco A.*, 866 P.2d at 1189 (Hartz, J. concurring) (emphasis added). *But see* Amadio, *supra* note 108, at 59-60 (suggesting that permitting post-adoption visitation agreements could generally encourage rather than discourage adoptions).

221. *See* SOROSKY, *supra* note 1, at 73 (noting that although some adoptive parents feel particularly threatened about any contact with the natural parents, there is no evidence to substantiate these fears).

222. *See In re Adoption of Ridenour*, 574 N.E.2d at 1063 (employing similar reasoning).

223. *Id.* "If pre-conditions are imposed on the adoptive parent-child relationship . . . many potential adoptive parents will be deterred from adopting." *Id.*

224. In order to fully assess the effects a judicially mandated open adoption might have upon the potential pool of adoptive parents, the court would also have to assume that potential parents would also consider the fact that if the open adoption arrangement turned out to be unworkable or unsatisfactory, the courts could suspend or eliminate visitation privileges of the natural parents. *See S.A.H.*, 537 N.W.2d at 8 (Sabers, J., dissenting) (arguing that visitation can be suspended or otherwise controlled by the court if problems develop).

225. *S.A.H.*, 537 N.W.2d at 7. At the close of the majority's opinion, the court wrote, "[t]he [trial] court found that Child's best interests required there be no impediments to his adoption." *S.A.H.*, 537 N.W.2d at 7.

best interests of the child standard (ie. it is usually in the child's best interests to be adopted without delay and by "quality parents"); or, a distinct consideration is being imposed which is potentially adverse to the individual child's interest.[226] Regardless, children would be better served without relying on such a strained set of inferences to determine their best interests.[227] While it is possible that a mandated open adoption may eliminate some potential adoptive parents from the pool, it does not necessarily follow that those parents were best for that child, nor that a slight delay in placement always outweighs a termination of all contact with the natural parents.[228] Instead of a cumbersome weighing exercise and heightened evidentiary standard, the familiar best interests formula and a flexible approach would better serve children's welfare in the context of open adoptions.[229]

B. Guardians ad litem: a Help or a Hindrance?

In *S.A.H.*, the court ruled that "[i]f a court mandates open adoption and thus grants post-adoption visitation, a guardian ad litem should be appointed to enforce the visitation order."[230] The court cited *Matter of Adoption of Children by F.*, where a natural father had consented to the adoption of his two daughters by a stepfather on the condition that the natural father retain visitation privileges and the natural mother had repeatedly frustrated his attempts to visit his daughters.[231] "Accordingly," that court wrote, "a guardian ad litem will be appointed by this court whom the children may contact to enforce this right [to visit the father], should their natural mother or adoptive father attempt in the future to frustrate their attempt to maintain a relationship with their natural father."[232] The Superior Court of New Jersey in no way indicated that it advised ap-

226. Goldstein Interview, *supra* note 194, at 578. As alluded to earlier, Goldstein's view is that "[s]ociety could certainly say that there is something more important than the well-being of a particular child . . . but if society adopts that policy then it seems to me it ought to adopt it recognizing that it can't operate that policy and then say, this is for the child's best interests." *Id.* "We confuse the proper aims of a given adoption (to benefit a particular child) with the aims of the institution of adoption." Smith, *supra* note 103, at 545.

227. An equally plausible position is that post-adoption visitation can actually facilitate the adoption of some children. Smith, *supra* note 103, at 545. Further, open adoption can address the social problems created by the number of unwed, impoverished mothers. *Id.* at 550.

228. *See Matter of J.A.H.*, 502 N.W.2d at 125 (holding that the child's best interests, rather than the convenience of the state, is the paramount interest). It should also be noted that even if widespread open adoptions cause the pool of potential adoptive parents to shrink somewhat, there is still a much greater demand for adoptees than the supply can meet. Smith, *supra* note 103, at 523. The demand of potential adoptive parents seeking healthy infants outstrips the supply by 40 to one. Gibbs, Sachs and Gregory, *supra* note 191, at 48.

229. *S.A.H.*, 537 N.W.2d at 8 (Sabers, J. dissenting). "We do not yet know enough to be able to lay down didactic laws about adoption placements." Clothier, *supra* note 102, at 257.

230. *S.A.H.*, 537 N.W.2d at 7.

231. 406 A.2d at 986. See *supra* note 170-175 and accompanying text for a discussion of the facts. The father sought to maintain contact with his daughters if the daughters elected to visit him. *Id.* at 989. The court emphasized the existence of consent to the adoption, the existence of a viable relationship between the father and his daughters, and the mother's prior attempts at frustrating the ability of the natural father to maintain a relationship with his children. *Id.*

232. *Id.*

pointing a guardian ad litem in all future open adoptions, yet the *S.A.H.* court cited that opinion for the proposition that whenever a motion for a mandatory open adoption is granted, a guardian ad litem "should" be appointed.[233]

Not only does *S.A.H.* misapply the case to which it cites, but the policy surrounding the appointment of guardian ad litems is not advanced by strongly recommending them in all mandatory open adoption cases. Guardians ad litem are appointed to advocate for the child's rights when the child's rights are in jeopardy because of the intersection of multiple interests.[234] But guardians ad litem are costly, cumbersome, and often counterproductive.[235] Moreover, questions are often raised about the ability of guardians ad litem to make independent best interests judgments, especially when his or her interests diverge from those of the biological or adoptive parents.[236] Because the appointment of guardians ad litem may work an additional procedural hindrance on the parties, appointment should be made only when necessary.[237] A blanket rule for guardians ad litem is clearly misplaced.

C. Further Complications

The court in *S.A.H.* wrote that if affection exists between the child and his biological parents, "the court should not thwart that affection unless the best interests of the child are served."[238] This language would appear to apply to situations where the child to be adopted is older and has formed

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233. *S.A.H.*, 537 N.W.2d at 7.

234. *See generally*, Genden, *supra* note 196, at 593-95 (recommending guardians ad litem in juvenile proceedings and certain other types of cases when necessary).

235. Baron, *supra* note 198, at 414-15. *See also Female Infant*, 237 A.2d 468 (holding that where competing parties in a proceeding are given the opportunity for a thorough hearing, the petition is vigorously contested and witnesses are cross-examined, the interests of the adoptee can be fully presented without the appointment of a guardian ad litem). Genden notes that the appointment of a guardian ad litem may exacerbate the psychological pressures the child feels from the trauma of litigation. Genden, *supra* note 196, at 592. See *supra* notes 196-199 and accompanying text for further criticisms of the overuse of guardians ad litem.

236. Harlambie, *supra* note 197, at 6.

237. LaFave, *supra* note 190, at 523 n.503. In the context of custody determinations, LaFave has noted:

> Some commentators advocate appointment of counsel for the child in all contested custody cases. Others take the view counsel should be appointed only when the child is old enough to state a preference. Still others advocate appointment of a guardian ad litem only when a child is too young to state a preference. The position advocated here is the majority view, favoring a case-by-case judicial assessment of the advisability of a guardian ad litem appointment.

Id.

238. *S.A.H.*, 537 N.W.2d at 7. The court cited *Roquemore v. Roquemore*, 80 Cal.Rptr. at 434. The language the court cited originally appeared in *Estate of Zook*, which concerned the question of bonding with the adoptive family in the context of an inheritance tax and whether that tax applied to adoptees. *Estate of Zook*, 399 P.2d 53. Ultimately, the *Roquemore* court held that whether visitation rights should be granted depended on the best interests of the child and whether visitation rights would unduly hinder the adoptive relationship. *Roquemore*, 80 Cal.Rptr. at 435. The *S.A.H.* opinion is unclear whether the clear and convincing evidentiary standard also applies when bonding exists between the child and his natural parents or whether the standard is lowered to some lesser threshold such as a preponderance of the evidence.

greater emotional attachments to his biological parents.[239] However, injecting a child's bond with his natural parents as a factor into the determination of what sort of adoption would be best for the child is problematic.[240] First, it strives to give effect to the biological parent's interests rather than the child's. Assuming that a child's interests are advanced by an open adoption in a particular case, why should the mandatory decree of an open adoption turn on whether there has been parental bonding? The obvious answer is that it shouldn't, and that the courts are (understandably) empathizing with parents who have bonded with their child and stand to have that child taken away by the courts.[241]

The second problem with bonding as a factor is that it seems to rest on the assumption that a child's best interests are less advanced by an open adoption when it is likely that the child will have no memories of her natural parents because the adoption took place when she was an infant.[242] This assumption ignores modern psychological literature which emphasizes the needs of adoptive children to know their biological parents, especially when the child has no memory of her natural parents.[243] Further, this assumption contains echoes of the outdated policy from earlier this century of attempting to erase, whenever possible, all traces of the adoptee's adoptive status.[244]

Lastly, the court in *S.A.H.* restricted the possible grant of post-adoption visitation to those people who had acted in either a parental or custodial role for the child.[245] The reasoning for this, the court wrote, is to prevent visitation rights from being granted "to any person who happens to

239. *See Matter of Adoption of Children by F.*, 406 A.2d at 989 (noting the father's viable relationship with his daughters in granting a right to visitation); In re Adoption of Child by P., 277 P.2d 566, 572 (N.J. Sup. Ct. 1971) (emphasizing the importance of bonding). This position has some support in the psychological literature: For the child adopted in early infancy, "we believe separation from the biological or temporary foster parents cannot be considered a major trauma." Simon and Senturia, *supra* note 1, at 864. Severing an older child's relationships with natural family members can be detrimental to the child's emotional and psychological well-being and impede the formation of future developments. Cook, *supra* note 85, at 475.

240. *See* Amadio, *supra* note 108, at 76 (stating that a person always has a psychological attachment to her biological parents which does not depend on the actual relationship with her biological parents).

241. *Spencer v. Franks*, 195 A. at 311. That court wrote:

> In every situation it is the court's duty to consult the welfare of the child rather than the affection of the natural mother. Sentimental emotions aroused by the display of maternal desire for the occasional companionship of the child must be subdued if their indulgence will be prejudicial to the welfare of the child.

Id. (citing Barnard v. Barnard, 145 A. 614 (Md. Ct. App. 1929)).

242. *See* SILBER, *supra* note 108, at 168-69 (stating that it is "unrealistic to expect a child of age 3 or 10 to simply 'forget' his birthparents"). Frequently, however, adoption social workers will oppose open adoptions for older children because of the birthparents' history of problems, including possible abuse of the child. *Id.* at 169.

243. Amadio, *supra* note 108, at 81-83; Ames, *supra* note 4, at 145; Wellisch, *supra* note 110, at 40-41. Studies of adopted children have found that keeping in touch with biological relatives can strengthen the adoptive relationships. Caplan II, *supra* note 4, at 76. Anthropology also supports the position that adoption should not always be exclusive and secret, regardless of the bonding factor. Smith, *supra* note 103, at 543.

244. See *infra* notes 99-102 and accompanying text for an analysis of the this policy.

245. *S.A.H.* 537 N.W.2d at 7.

feel affection for the child."[246] The specter of trial courts granting post-adoption visitation rights, enforceable in the courts, to every neighbor, friend, teacher, or den mother who happened to have affection for the child conjures a parade of horribles. Indeed, the judicial grant of visitation rights or less intrusive rights of contact between the child and natural parents should be exercised sparingly, and oftentimes only to those who acted in a custodial or parental role to the child: natural parents, foster parents, or guardians. Yet in some situations it might arise that a trial court finds a child's best interests would be advanced by granting visitation rights to, for example, a sibling[247] or a grandparent.[248] Under *S.A.H.*, this would not be possible unless the person had acted in a parental or custodial role to the child.[249] A *per se* rule excluding such persons is flawed because in some cases it will frustrate the child's best interests.[250]

V. CONCLUSION

In *People in Interest of S.A.H.* the South Dakota Supreme Court declared that open adoptions are not prohibited when in the best interests of the child. The *S.A.H.* decision, however, imposed multiple restrictions on this particular form of adoption, regardless of the child's best interests, and stated that open adoptions should only be mandated when it can be shown that such would be in the child's best interests by "clear and convincing" evidence. Furthermore, the court affirmed the denial of an open adoption in the case before it, even though the guardian ad litem for the child himself had moved for an open adoption.

While South Dakota has now joined an increasing number of states which have approved the use of open adoptions when in the child's best interests, an unwieldy, disservingly high evidentiary threshold and three-part balancing test now interfere with the granting of open adoptions, even when the child's best interests would be advanced by such an arrangement. Under this decision, the best interests of the child standard survives, but in a distorted and unworkable form.

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246. *Id.* (citing *Adoption of Francisco A.*, 866 P.2d at 1181).

247. See *supra* note 154 for authority dealing with sibling visitation. Baran, et al. contend that future meetings should be arranged when sibling groups must be separated in the adoption process. Baran, *supra* note 79, at 100.

248. See *supra* note 153 for a partial list of cases considering the question of grandparent visitation and the South Dakota statute addressing grandparent visitation after a divorce. "[V]irtually all authorities now agree that grandparent visitation can be in the best interests of the child." Zablotsky, *supra* note 153, at 1. Every state legislature except Nebraska's has enacted statutes recognizing grandparent visitation rights in certain circumstances. *Id.*

249. *S.A.H.*, 537 N.W.2d at 7.

250. Visitation should be viewed as a flexible device which can be modified later if necessary to conform to the child's best interests. *S.A.H.*, 537 N.W.2d at 8 (Sabers, J., dissenting). *See* Borzi, *supra* note 153, at 400 (arguing that to assume that adoption is a bar to judicial determinations of grandparent visitation abrogates the duties the state owes to the child).