

EXAMINING RISKS TO CHILDREN IN THE CONTEXT OF PARENTAL RIGHTS TERMINATION PROCEEDINGS

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INTRODUCTION

The clinical examination in the context of a parental rights termination hearing can be a critical factor in determining the eventual child placement decision. This discussion is drawn from the author's experience conducting such forensic evaluations as well as a perspective regarding the role of the expert witness in cases of this type. The vast majority of cases involving child placement and foster care do not result in contested parental rights litigation. Some children are returned to their parents or family, other cases are resolved through some type of long-term foster placement, and in other cases the parent relinquishes his or her parental ties. Thus, the cases that go to litigation are in many ways atypical. There are several things that can occur prior to these cases reaching litigation that can facilitate a positive outcome and placement for the children in question. The focus of

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the conference for which this article was prepared¹ was on identifying effective approaches from psychological, social work, policy, or legal perspectives that can prevent litigation that exacerbates conflicts and problems for the children.

One notable and distressing finding encountered in the course of conducting examinations in the context of parental rights termination hearings has been the extent of relevant psychological data that remained uncovered, even though psychologists had completed examinations and extensive casework services had been provided for years. This illustrates the potential significance of comprehensive clinical examination in gathering relevant data and informing the court regarding the case in question. Conversely, it is recognized that the stress of lengthy litigation may impact negatively on all parties, including the children. Therefore, cases that go to litigation run the risk of additional stress on the children and other parties, yet there exists the opportunity for more thorough examination and resulting data that the court can use in deciding the case. This observation reinforces the theme of this discussion, that is, there are both risks and benefits associated with each placement decision. Most cases are resolved without an actual hearing on parental rights termination, thus avoiding the stress and expense of litigation. In other cases, as the adversarial process proceeds, the case will be examined more thoroughly and relevant data regarding the children and families will become available to the court. Furthermore, through the close examination and study of specific cases, the relevant issues and alternative perspectives are defined more clearly. Over the past eight years, the author has had the opportunity to serve as an expert examiner for the State of New Jersey, Division of Youth and Family Services, as well as for attorneys representing parents who were the subject of complaints filed by the Division. The ideas, reasoning, and analysis that follow reflect this experience as well as an appreciation of the relevant literature.

It has been said that the correct answer to most questions in psychology is "it depends." As a result of training in research methodology, psychologists acquire an appreciation of interaction effects. That is, the impact of any particular independent variable (such as separation) will be influenced or determined by a host of other variables (such as the nature of the separation; the circumstances prior to the separation; the circumstances following the separation; the child's age and gender; the child's strengths, weaknesses, and other relationships; and so on). No simple unidirectional model will adequately address complex relationships of this type. Through clinical training, a sense of the uniqueness of each case is gained, which is a

1. Like the other articles in this symposium issue, this article was initially prepared for presentation at an April 1994 conference entitled *Helping Families in Crisis: The Intersection of Law & Psychology*. For further details of the conference, see Nancy Goldhill, *Psychology and Legal Debates on the Child Welfare System*, 22 N.Y.U. REV. L. & SOC. CHANGE 295 (1996).

further extension of the idea of interaction effects. The clinical examination is a study of an individual case focused on both common and unique characteristics. Although clinical examination is informed by knowledge of norms, trends, and typical patterns, it is recognized that deviation from the norm and error in measurement may be part of the enterprise. Thus, a cautious and critical application of normative data is required due to certain problems with the generalizability of psychological data,² particularly as it applies to child custody and placement.³

As a result, there are certain premises that guide the following discussion. These premises include: (1) contested parental rights termination cases are atypical; (2) research data require critical review; (3) the impact of separation will vary based upon a variety of other existing factors; and (4) each case has relevant unique characteristics.

The question of the application of normative data will be discussed further below. What follows is a presentation of general psycholegal questions in parental rights termination. That is, what are the legal issues before the court and how can psychologists and other mental health experts assist the court in addressing these issues. This includes a review of "psychological parent" theory and its impact on the formulation of issues in parental rights termination cases. This Article critiques "psychological parent" theory and argues that adherence to "psychological parent" theory leads to a limited assessment paradigm⁴ that omits essential elements in the examination of risks to children in many cases. The term "limited separation paradigm" is introduced to describe the deficient conceptual perspective that derives from "psychological parent" theory. Case material is used to illustrate the process of examination of risks to children in parental rights termination cases and how the "limited separation paradigm" obscures significant aspects of the risks to children.

I.

PSYCHOLEGAL QUESTIONS IN PARENTAL RIGHTS TERMINATION

Termination of parental rights is always a sensitive and difficult issue. According to Grisso, it involves "the degree of risk to children that society is willing to take, relative to its interpretation of the rights of parents" and

2. See Elizabeth F. Loftus & John Monahan, *Trial By Data: Psychological Research as Legal Evidence*, 35 AM. PSYCHOLOGIST 270, 278 (1980) (stating that it is difficult to generalize based on psychological studies because of the differences between laboratory simulations and actual legal situations).

3. See Thomas R. Litwack, Gwendolyn L. Gerber & C. Abraham Fenster, *The Proper Role of Psychology in Child Custody Disputes*, 18 J. FAM. L. 269, 277-80 (1980) (explaining why child custody theories can never be truly confirmed by empirical studies).

4. See generally Matthew B. Johnson & Luis Torres, *Bonding and Contested Parental Rights Termination: The New Jersey "JC" Case, Part I*, 12 AM. J. FORENSIC PSYCHOL. 2 (1994).

also "the state's intrusion to sever a relationship recognized almost universally as having no equal for intimacy and privacy."⁵ Melton, Petrila, Poythress, and Slobogin stress that courts appreciate that parental rights termination is a grave step often regarded as more severe than imprisonment, though judges also recognize that, without termination of parental rights, some children are denied stable, permanent homes.⁶

Several authors have discussed the court's dilemma in parental rights termination cases. In a review of case law relevant to termination of parental rights, Smith identifies certain states as "parents' rights jurisdictions" and other states as "child focused jurisdictions."⁷ That is, according to Smith, the law in certain states maintains a presumption toward preserving the natural parents' ties with the child, while other states are more responsive to the child's needs irrespective of parents' rights. Smith notes a growing appreciation for the rights of children consistent with the views of Goldstein, Freud, and Solnit,⁸ but adds that social judgments favor "natural parents," and that constitutional due process protections continue to support birth parents in termination proceedings.⁹ Kadushin critiques the adversarial notion of competing rights between parents, children, and third parties, and points out that, unless justice is achieved for the parent, it is unlikely that justice will be achieved for the child.¹⁰ Alexander, focussing on another aspect of the same dilemma, reviews the efforts in many states to prevent, by statute, indefinite foster placement where parental rights block adoption.¹¹ Alexander recommends a supplement to an Arizona statute to insure that the court monitor parents' efforts toward rehabilitation to correct past abusive circumstances.¹² Bush and Goldman explain, however, that adoption is not a realistic alternative for a large proportion of the children in foster care, and that placement plans consistent with each child's specific circumstances are necessary.¹³ Sales and colleagues, in their

5. THOMAS GRISSO, *EVALUATING COMPETENCIES* 206 (1986).

6. GARY B. MELTON, JOHN PETRILA, NORMAN G. POYTHRESS & CHRISTOPHER SLOBOGIN, *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 323 (1987).

7. Stephanie H. Smith, *Psychological Parents vs. Biological Parents: The Courts' Responses to New Directions in Child Custody Dispute Resolution*, 17 J. FAM. L. 545, 548-52 (1979).

8. *Id.* at 550 (citing JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 105 (1973)).

9. *Id.* at 575.

10. Alfred Kadushin, *Beyond the Best Interests of the Child: An Essay Review*, 48 SOC. SERV. REV. 508, 514 (1974).

11. See Mary J. Alexander, *Protecting Children from Parents Who Provide Insufficient Care—Temporary and Permanent Statutory Limits on Parental Custody*, 1980 ARIZ. ST. L.J. 953, 956 (1980) (discussing advantages of statutes providing for termination of parental rights following an adjudication of neglect or drug dependency, but cautioning adequate notification to parents and careful evaluation of effects of rehabilitation on parental fitness).

12. *Id.*

13. See Malcolm Bush & Harold Goldman, *The Psychological Parenting and Permanency Principles in Child Welfare: A Reappraisal and Critique*, 52 AM. J. ORTHOPSYCHIATRY

review of state statutes regarding relinquishment and termination of parental rights, focus on the case of a family in Iowa.¹⁴ During the five-year period between the state trial court's termination of parental rights and the federal district court's ruling that the termination was unconstitutionally vague, the children were placed in multiple foster homes as well as several juvenile home placements.¹⁵ Clearly, termination had not provided the children with stable homes.

The above issues and competing concerns shape decisions to terminate or maintain parental rights. The relevant statutes and body of case law comprise the public policy framework within which psychologists and other mental health experts are called on to offer testimony and opinions. It is essential for the expert to be knowledgeable regarding the legal criteria operative in the particular jurisdiction. Each state has specific statutory guidelines and caselaw precedent relevant to termination of parental rights. It is a mistaken assumption that the "best interests of the child" is the universal criteria in all child custody dispositions. The role of the expert is to provide specialized information and contribute to the deliberation within the legal context. The ultimate legal question is decided by the court and involves considerations beyond the scope of psychologists' expertise.¹⁶

The expert witness informs the decision-making process with scientific and clinical data. The specialized knowledge provided by experts may include informing the court of relevant psychological research findings and theories, and/or providing data derived from examination of parties. Typically, clinical examinations report case-specific findings in relation to normative data, trends, and common outcomes. Often, questions are raised regarding the generalizability of the available research to the questions before the court. This is particularly true as it relates to questions of child development where there are limitations on the factors that can be controlled in studies. This problem is discussed by Loftus and Monahan¹⁷ and

223, 229 (1982) (explaining that permanent placement is not necessarily the primary concern in all cases).

14. BRUCE D. SALES, D. MATTHEW POWELL, RICHARD VAN DUIZEND & ASSOC., A.B.A. COMM'N ON THE MENTALLY DISABLED, DISABLED PERSONS AND THE LAW: LEGISLATIVE ISSUES 25-26 (1982).

15. *Id.*

16. As Grisso notes, the balance of interests required in termination of parental rights decisions

requires social and moral judgments of the utmost gravity. . . . Even setting aside the moral quality of the legal question, mental health professionals apparently have little empirical foundation with which to foresee the long-range effects of termination of parental custody on a child. A child's "best interest" must consider not only the child's immediate care, but also such unpredictable matters as the effects of termination on the child when, as an adult, his or her relationship with the parent has been irreparably altered across time.

GRISSE, *supra* note 5, at 206. See also MELTON, PETRILA, POYTHRESS & SLOBOGIN, *supra* note 6, at 364 (arguing that the testimony of mental health professionals should not address social or moral policy issues).

17. Loftus & Monahan, *supra* note 2, at 278.

Litwack, Gerber and Fenster.¹⁸ In addition, Loftus and Monahan raise the further question that, if the data are generalizable to the issues before the court, do the data apply to the instant case?¹⁹ Sound and relevant empirically-derived psychological data are probabalistic, not absolute. Statistical methodology is based upon conventional (and arbitrary) levels of significance which are not one hundred percent reliable. The case before the court may be atypical in a variety of ways.

This is not to suggest that knowledge of prior findings and scientific research data are irrelevant, but that they require critical evaluation in terms of their relevance to the specific questions before the court.²⁰ In the aftermath of the New Jersey Supreme Court decisions in *In re J.C.*²¹ and *In re K.L.F.*,²² Dyer argued for maintaining a scientific basis for expert testimony in parental rights termination cases.²³ It remains to be defined, however, just what makes expert testimony "scientific," and the term can be used to elevate testimony in a manner that can be misleading. Does scientific testimony mean that the expert cites a study, or an empirical study, or a study published in a blind reviewed journal, or several such studies, or only studies that have been replicated? Does testimony that refers to empirically derived psychological test data qualify as scientific? Do experts have an obligation to point out the difficulties with the generalizability of the reported findings or the social/political factors that influence which type of questions are researched? This type of critical review of "scientific" testimony is essential.

Parental rights termination hearings are chiefly concerned with the facts and specific circumstances of the instant case. The ultimate legal question, that is, the decision to terminate or maintain parental rights, is not a decision based solely upon empirical findings. Rather, it is a value-laden decision based on social policy, competing priorities, and law. In that the ultimate question is a matter of law (and, arguably, morality), it is beyond the realm of the mental health professional's expertise. However, experts can give compelling testimony and recommendations within the domain of their expertise.²⁴

In a rebuttal to critiques of psychologists' involvement in child custody disputes, Litwack, Gerber, and Fenster outline an approach to conducting

18. Litwack, Gerber & Fenster, *supra* note 3, at 277-80.

19. Loftus & Monahan, *supra* note 2, at 276-78.

20. See Frank J. Dyer, *Scientific Credibility of the Expert in Guardianship Proceedings*, 43 N.J. PSYCHOLOGIST 1, 29-32 (1993).

21. 608 A.2d 1312 (N.J. 1992).

22. 608 A.2d 1327 (N.J. 1992).

23. See generally Dyer, *supra* note 20.

24. See generally Johnson & Torres, *supra* note 4 (describing how testimony drawn from clinical examinations, review of theories, and research findings was provided in a parental rights termination case, and also describing how the expert resisted answering questions beyond the scope of his expertise).

such evaluations.²⁵ Litwack, Gerber, and Fenster point out that the most that can be inferred from empirical research is that broad generalizations have limited applicability to any individual case. They argue that the real test for expert testimony in contested child custody cases is not whether the expert can provide the court with reliable long-term predictions about placement outcomes, but rather whether the expert can provide the court with relevant information that would not otherwise be available. Litwack and his colleagues also note that experts often offer conclusions and recommendations without a sufficient accounting of the data and reasoning that led to the conclusory statements. An expert's credentials and experience are of little value unless his or her testimony is supported by concrete, verifiable evidence and reasonable analysis. The expert examiner's knowledge of the prevailing legal considerations and relevant psychological literature, coupled with his or her skill in conducting the examination, will determine the expert's effectiveness in acquiring essential data and informing the court. Litwack, Gerber, and Fenster proposed four general functions that mental health experts can provide for the courts in cases of disputed child custody. The first is discovery. That is, the expert can bring to the court's attention feelings, attitudes, and personality factors that require consideration, as well as the interaction among family members. Second, psychological methods and instruments can be useful in identifying covert aspects of relationships and emotions. Psychologists and psychiatrists can also contribute by articulating emotions that children (and adults) find difficult to express. A third function suggested by Litwack and his colleagues is highlighting otherwise overlooked or neglected aspects of the case. The fourth function advocated is analyzing and reformulating data already available.

II.

COMPETING THEORIES OF THE CHILD'S BEST INTERESTS

A. "Psychological Parent" Theory

"Psychological parent" theory is referred to in numerous custody cases as the primary rationale for terminating the rights of absent parents.²⁶ "Psychological parent" theory was developed and espoused by Joseph Goldstein, Anna Freud, and Albert J. Solnit in their book entitled *Beyond*

25. Litwack, Gerber & Fenster, *supra* note 3, at 282-94.

26. See, e.g., *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 839 (1977) (discussing the claim that the psychological tie between the foster family and child creates a "liberty interest" in foster children which entitles the foster parents to a hearing before a child can be removed from their custody); *Montgomery County Dep't of Social Servs. v. Sanders*, 381 A.2d 1154, 1159 (Md. Ct. Spec. App. 1977) (discussing the theory that lengthy separation from the parent strains parent-child bonds while forging a "psychological link" between child and surrogate parent).

The Best Interests of the Child.²⁷ This work, and two subsequent volumes,²⁸ identified and outlined major issues in child placement.

Goldstein, Freud, and Solnit define the “psychological parent” as “one who, on a continuing . . . basis, through interaction, companionship, interplay, and mutuality, fulfills the child’s psychological needs for a parent, as well as the child’s physical needs.”²⁹ Under the “psychological parent” theory, it is day to day interaction, companionship, and shared experience—as opposed to biological connections—that are critical to the formation of a child’s bonds of attachment to the “psychological parent.”³⁰ For this reason, the child can form this bond with a person other than the parent of origin. Evidence of such attachments to surrogate parents has been shown in adoptive families and other situations where a caring adult is present.³¹ This bonding is often the object of scrutiny by courts guided by the “psychological parent” theory.³²

Goldstein, Freud, and Solnit claim that the longer a child, especially a young child, is separated from a parent of origin, the greater the likelihood that the child will bond with another adult who fulfills the role of the “psychological parent.” Thus under their theory, placement decisions are in large part based on the length of time of this separation, under the assumption that the duration of the separation is indicative of the child’s disassociation from the bonds with the parent of origin and the increased bonding with the foster or adoptive parent fulfilling the role of the “psychological parent.”³³ Goldstein, Freud, and Solnit believe that removal of a child after these bonds have been formed would lead to great psychological damage, particularly when the child was placed in the “psychological parent’s” home at a very young age.

While it is appropriate to consider the separation from the adoptive or foster parent as well as the parent of origin as a major factor in custody hearings,³⁴ no one theory can adequately describe, analyze, and weigh the importance and impact of such complex personal relationships. Therefore, it is advised that courts utilize a number of factors, besides “psychological

27. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

28. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* (1979); JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT J. SOLNIT & SONJA GOLDSTEIN, *IN THE BEST INTERESTS OF THE CHILD* (1986).

29. GOLDSTEIN, FREUD, & SOLNIT, *supra* note 27, at 98.

30. *Id.* at 19.

31. *Id.*

32. See Vanessa L. Warzynski, *Termination of Parental Rights: The Psychological Parent Standard*, 39 VILL. L. REV. 737 (1994) (“[C]ourts have been struggling for years with the termination of parental rights where the child is emotionally attached to a third party.”).

33. GOLDSTEIN, FREUD, & SOLNIT, *supra* note 27, at 40-42.

34. *Id.* at 31-34.

parent" theory, in determining the best placement for the child.³⁵ Understandably, courts are reluctant to rely on any one factor or theory in determining custody. The courts properly view their role as necessitating an evaluation of numerous factors, individual to each case, in order to make the placement decision.³⁶

B. Critiques of "Psychological Parent" Theory

The very language of the term "psychological parent" is problematic, in that it juxtaposes two notions of parenthood in a false dichotomy: "psychological" versus "biological" parenthood. This conception obscures important aspects of the relationship between a child and her biological parents by implying that biological parentage, without the benefit of an ongoing relationship, is solely an organic and physiological happenstance. In fact, there are profound psychological aspects to the relationship that one has with one's biological parents, whether that relationship is overt or covert.³⁷ This is why the term "family of origin" is preferable to the term "biological" family. The term "family of origin" includes and acknowledges potential relationships with siblings, extended family, and heritage, in addition to parents. The term "family of origin" does not dichotomize parenthood nor does it exclude other parental relationships.

There are other more substantial conceptual difficulties with the "psychological parent" theory as it was articulated by Goldstein, Freud, and Solnit.³⁸ The Goldstein, Freud, and Solnit "psychological parent" theory is based in large part on the works of John Bowlby, an early pioneer in the study of child development. In the 1950s, Bowlby advanced the idea that children are likely to suffer intellectually, physically, and emotionally if they are deprived of the care of a permanent mother figure during the first two years of life.³⁹ Bowlby's impressions were based largely on observations of children separated from their parents because they required institutionalization or hospitalization.

Bowlby's perspective was reviewed and debated within the field of child development. As early as 1956, O'Connor surveyed the available research and noted that the data "undermine confidence in the hypothesis of

35. See, e.g., *Montgomery County Dep't of Social Servs.*, 381 A.2d at 1163 (awarding custody to child's natural mother is based on consideration of factors such as fitness of parents, possibility of maintaining natural family ties, preference of child, and length of separation from natural parents).

36. *Id.* ("[T]he court should examine the totality of the situation . . . avoiding focussing on any single factor . . .").

37. See Margaret Beyer & Wallace J. Mylniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 *FAM. L.Q.* 233, 247 (1986) (discussing the private, personal relationship children maintain with absent "biological" parents).

38. GOLDSTEIN, FREUD & SOLNIT, *supra* note 27, at 17-20.

39. JOHN BOWLBY, *CHILD CARE AND THE GROWTH OF LOVE* 18-32 (1953).

maternal deprivation and resulting social, intellectual and physical inadequacy."⁴⁰ O'Connor further noted that, "[i]t never emerges clearly whether or not the results of deprivation are due to some unstated lack of mothering, or to the unstimulating nature of the institution environment."⁴¹

Despite the limited empirical foundation of Bowlby's notion of the deleterious effects of "maternal deprivation," the idea had a certain appeal among mental health professionals and therefore gained acceptance within that community. This appeal stemmed from two sources. First, Bowlby's perspective converged with certain elements of psychoanalytic theory which represented the prevailing wisdom in the field during the period. Second, the male-dominated mental health professions inherently favored Bowlby's theory because it reinforced the notion that it was best for the mother to stay at home and raise her children.

Another problem with the "psychological parent" theory lies in its basic assumptions. A fundamental premise of the "psychological parent" theory is that providing and maintaining continuity in parent-child relationships is essential to a child's development.⁴² Goldstein, Freud, and Solnit argue that separation and discontinuity are major causes of distress and harm throughout different periods of childhood.⁴³

Separation, however, may not be the damaging factor early theorists thought it to be.⁴⁴ Arguably, disturbed family relationships, as much as separation itself, lead to negative outcomes.⁴⁵ For example, evidence strongly links child delinquency to interpersonal conflict, such as parental divorce, but not to parental death.⁴⁶ The evidence suggests that the inability to form close meaningful relationships is not due to separation or the breaking of relationships, but rather stems from the initial failure to establish relationships.⁴⁷

40. N. O'Connor, *The Evidence for the Permanently Disturbing Effects of Mother Child Separation*, 12 ACTA PSYCHOLOGICAL 174, 188 (1956).

41. *Id.* at 189.

42. See GOLDSTEIN, FREUD, & SOLNIT, *supra* note 27, at 31-34, 38.

43. *Id.* at 32-34.

44. See, e.g., Michael Rutter, *Maternal Deprivation, 1972-1978: New Findings, New Concepts, New Approaches*, 50 CHILD DEV. 283, 284 (1979) (arguing that distress syndrome is linked to the process of attachment and bonding where bond disruption is not synonymous to separation).

45. *Id.* at 284 (pointing out studies which showed that children removed from their homes by authorities had behavior disturbances which preceded the removal and that, while children's problems may be exacerbated during the transition period following divorce, improvement tends to follow two years after divorce).

46. *Id.* at 284 (pointing out a study which showed that among delinquent boys, those from intact homes with persistent family problems were more likely to become recidivists than those from broken homes or intact homes without serious problems).

47. *Id.* at 283-84.

Extensive review of the effects of parent-child separation on children indicates that a child's separation from his or her family constitutes a potential cause of short-term distress, but that separation is of little direct importance as a cause of long-term disorder.⁴⁸ In considering the consequences which follow separation, a host of variables are relevant, such as the reasons for the separation, the pattern of care during the separation, the child's age and maturity, and the quality of family relationships both before and after separation.⁴⁹ In addition, research indicates that, when negative results of separation do occur, the child can improve if provided proper care.⁵⁰

Another difficulty with the "psychological parent" theory perspective of Goldstein, Freud, and Solnit stems from the fact that they refer to the "psychological parent" relationship as though it were a single relationship that a child has with a single caretaker.⁵¹ Again, the term is used as though it were a dichotomous variable. Although Goldstein, Freud, and Solnit acknowledge that each parent—father and mother—may be a "psychological parent,"⁵² the theory does not appreciate the myriad of caretaking relationships a child may enjoy. Children exhibit behaviors indicating attachment and bonding in relation to their siblings, peers, father, and other adult caretakers, as well as to their mother.⁵³ Though they are not qualitatively different, these attachments typically vary in terms of strength or intensity.

The dichotomous notion of the "psychological parent" theory can also be challenged on the ground that "psychological parent" status is an irrelevant consideration in a significant portion of cases involving older children in need of placement.⁵⁴ These children cannot or do not wish to go home to their family of origin, yet they do not wish to be adopted.⁵⁵ Their desire for residential stability is not tied to a relationship with any set of "psychological parents."⁵⁶

The focus of Goldstein, Freud, and Solnit on a single "psychological parent" attachment apparently stems from a concern for protecting children from the conflicts of competing parental claims. They note that loyalty conflict is likely to arise when children maintain relationships with

48. See Michael Rutter, *Parent-Child Separation: Psychological Effects on the Children*, 12 J. CHILD PSYCHOL. & PSYCHIATRY 233, 255 (1971). See also Peggy C. Davis, *Use and Abuse of the Power to Sever Family Bonds*, 12 N.Y.U. REV. L. & SOC. CHANGE 557, 563-66 (1983-84) (citing Rutter's finding that no long-term effects of parent-child separation can be proven).

49. Michael Rutter, *Separation Experiences: A New Look at an Old Topic*, 95 J. PEDIATRICS 147, 147 (1979).

50. Rutter, *supra* note 48, at 254 (arguing that, while family discord can negatively affect a child, the effect can be dissipated if the child later lives in a harmonious home).

51. GOLDSTEIN, FREUD & SOLNIT, *supra* note 27, at 18-19.

52. *Id.*

53. Rutter, *supra* note 44, at 286-87.

54. See Bush & Goldman, *supra* note 13, at 234-35.

55. *Id.* at 229.

56. *Id.*

parental figures who do not have an amicable relationship with one another.⁵⁷ However, they fail to note that being denied a relationship with a parent of origin is also likely to cause loyalty conflict, precipitate distress due to loss, and bring on anxiety and fear of being banished in a manner similar to the lost parental figure.⁵⁸

Children in foster care and adoption suffer further psychological damage as a result of being cut-off from their family of origin or prior foster family.⁵⁹ A child may be precipitously denied contact with the family of origin if that child becomes distressed following a parental visit.⁶⁰ A child's symptoms, however, may be the result of a number of causes, including inappropriate behavior on the part of the visiting parental figure, the foster parent's anxiety about the visit, a sense of loss in the child activated by contact with the noncustodial parent, or the child's feelings of guilt about being disloyal to one or another of the parental figures.⁶¹ Interpreted through the "psychological parent" theory lens, however, distress following a visit with a parent is easily and summarily explained as the inevitable result of the child's successful relationship with its "psychological parent." In fact, these situations warrant sensitive clinical evaluation, interpretation, and treatment, rather than further separation from the family of origin and more loss.

Indeed, several empirical studies indicate beneficial effects resulting from children maintaining contact and visits with their family of origin during placement.⁶² Cutting the child off from parents can lead the child to have misconceptions of the parent resulting in a disruptive psychological impact on the child.⁶³ Absent parents can be idolized and thus become a barrier to the child forming an intimate relationship with parental surrogates.⁶⁴ Alternatively, absent parents can be denigrated in the child's mind, which may have a negative impact on the child's own self-esteem and self-conception.⁶⁵

57. GOLDSTEIN, FREUD & SOLNIT, *supra* note 27, at 17-19.

58. See Fernando Colón, *Family Ties and Child Placement*, 17 FAM. PROCESS 289, 294 (1978) (noting that denying visitation buries rather than deals with the issue of loyalty).

59. See *id.* at 296-304 (explaining that a child "cut-off" from a family of origin or prior foster family may have difficulties developing relationships).

60. See Johnson & Torres, *supra* note 4, at 54-55 (providing examples which demonstrate that a child's anxiety about visitation may be merely a reaction by the child to the foster parent's anxiety).

61. *Id.*

62. See, e.g., Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 461-65 (1983) (pointing out that greater emotional security and self-confidence, higher self-esteem, and improved ability to form relationships with a foster family are among the benefits of maintaining parental contact).

63. *Id.* at 466 (arguing that separating a child completely from the parent interferes with her ability to mourn her loss).

64. *Id.* at 465-66 (arguing that fixation on a possible reunion with an idealized parent hinders that child's ability to form constructive relationships with surrogates).

65. *Id.* at 465-71 (noting that children identify with the image they make of their parents, and therefore negative views of their parents can harm a child's own self-esteem).

The Goldstein, Freud, and Solnit "psychological parent" theory is also deficient in its lack of a developmental focus. It seems to suggest that children can be transplanted from one family setting to another, where past relationships are out of sight, out of mind. Although infants evidence no interest in biological ties and warmly respond to present caretakers, this should not be taken as an indication that ties to the family of origin will have no meaning to these infants as they grow and develop. Children develop relationships rather indiscriminately with adults who are responsive to them, whether the adult caretakers are adequate, inadequate, or abusive.⁶⁶ Yet, there are special psychological connections that children have with their parents of origin, regardless of whether the parents of origin are absent or present.⁶⁷ The family of origin is a source of identity for the child—the child may resemble the parents of origin and may share personality traits or even health problems with them.⁶⁸ No other love will substitute for that which the child imagines would be bestowed by the parent of origin.⁶⁹ These ideas and feelings typically do not emerge until preadolescence, and can take on a dramatic form in adolescence.⁷⁰ It is during the ages of six through eighteen that adopted children are likely to become troubled by the adoption, grieve the loss of the family of origin, and may exhibit psychological, behavioral, and academic problems.⁷¹

A cornerstone of the Goldstein, Freud, and Solnit "psychological parent" theory is the theorists' perception of the child's concept of time.⁷² According to the theory, the significance of the child's conception of time in the context of parental absence depends upon the duration and frequency of the absence, as well as upon the child's age or developmental period,⁷³ focusing on internal factors, such as the child's sense of urgency, that influence the child's reaction to parental absence.⁷⁴

66. See Beyer & Mylniec, *supra* note 37, at 247 ("A long-standing foster relationship, no matter how temporary in law, introduces a new family to a child. While it may not necessarily introduce permanence, either socially or legally, it does create new bonds to which the child must adjust and which must be severed if termination is to be followed by adoption by yet a third set of caretakers.").

67. *Id.* at 237 ("[B]iological parents, even those having inadequate or infrequent contact, continue to be significant in a child's development").

68. *Id.* at 237-38.

69. See *id.* at 238 ("[T]he child's desire for parental love demonstrates the continuing connection to the biological family. No one else's love will be what the child imagines a parent's to be. Even the most caring foster or adoptive parents will not fully compensate for what was lost earlier in childhood.").

70. See *id.* ("[A]n adolescent's normal identity can result in a reassertion of the original connection, irrespective of the biological parents inadequacy and the foster or adoptive parents' love").

71. DAVID MARANTZ BRODZINSKY, MARSHALL D. SCHECHTER & ROBIN HENIG, *BEING ADOPTED: THE LIFELONG SEARCH FOR SELF* 9 (1992).

72. GOLDSTEIN, FREUD & SOLNIT, *supra* note 27, at 40-49 (arguing that placement decisions should reflect the child's sense of time, not the parents').

73. *Id.* at 40-42 (noting that, the younger the child, the shorter the period of absence required to create a breach in continuity with devastating effects upon the child).

74. *Id.* at 31-34, 40-42.

Because a child's concept of time differs from that of an adult, agencies, courts, and parents, as well as clinical evaluators, should give due consideration to the urgency children feel.⁷⁵ Clinical examination, however, needs to focus on external as well as internal factors. External factors relate to the circumstances surrounding the absence, including the environment and support provided to the child during the absence of the parent(s). Specifically, it is important to determine whether the surrogate environment supports the child's relationship with the absent parent because a child's reaction to a period of parental absence will be determined largely by the degree to which the surrogate environment supports the absent parental figure. For example, if a three-year-old were left for day care with the paternal grandmother who believed that her daughter-in-law should be home caring for the child rather than pursuing a career, there is a greater likelihood that the child would be less tolerant of the mother's absence than if the child were cared for in an environment that was supportive of the mother's career. Because of the individualized nature of each case, fixed formulas, with time frames that dictate child placement decisions derived from the relationship between the child's age and the length of a parental figure's absence,⁷⁶ are inadequate.

Generally, it is in the interest of the child's self-esteem and self-conception that the surrogate caretaker support the absent parent. Critical remarks or a judgmental attitude made by the surrogate about the absent parent often create or exacerbate distress for the child. Unfortunately, foster placement, adoption, and similar situations can create such an environment. For example, social class differences can alienate foster parents from the child's family of origin.⁷⁷ Such alienation, in combination with attitudes supported by the Goldstein, Freud, and Solnit "psychological parent" theory in favor of foster parents and against parents of origin, can precipitate a loyalty conflict for the child.

Among those involved with child placement, a certain mindset exists which envisions benevolent foster parents and agency caseworkers rescuing innocent children from inadequate and cruel parents of origin. These assumptions may be true in some cases. However, caseworkers and even psychologists acting as expert witnesses for courts cannot allow themselves to become blinded by this mindset; if they do, they will be unable to effectively identify strengths in a specific family of origin or deficits in a specific foster or preadoptive family.⁷⁸

75. *Id.* at 42-49.

76. GOLDSTEIN, FREUD & SOLNIT, *supra* note 27, at 46 (advocating quick adoption decisions and extremely short appeal periods in order to minimize disruptions to the child's continuity of care).

77. See Davis, *supra* note 48, at 571 (listing extreme social class differences and restrictive agency policy against informal communications as a factor resulting in the alienation of foster parents from biological parents).

78. See analysis of Case A, *infra* part IV.A.

Although the Goldstein, Freud, and Solnit theory would deny children certain parental figures in favor of others, children actually can embrace relationships with several "psychological parents."⁷⁹ It is crucial for foster agencies and courts to maintain and nurture these multiple relationships for the developmental benefit of the child.

III.

EXAMINING RISKS TO CHILDREN PRESENTED BY COMPETING PLACEMENT OPTIONS

Each state grants the authority to family or juvenile courts to sever parental rights without the consent of the parent in certain circumstances.⁸⁰ Many statutes specify that termination requires a finding that the parent is "unfit" or "incompetent" to provide for the child.⁸¹ The question of the parent's fitness addresses considerations of whether the parent is free from impairment and disability, as well as the morality of the parent's conduct and behavior.⁸² Grisso states that legal interpretations have been focussed lately on the risks posed to the child by the parent's condition (or "unfit" state), rather than merely the determination of whether the parent is or is not "unfit."⁸³ Grisso also points out that some courts have focused the question of termination of parental rights on the basis of judgments of the parent's condition, the parent's future behavior, and its likely impact on the child in question.⁸⁴

In New Jersey, the *Sorentino* decision(s) established a basis for terminating the parental rights of a fit parent.⁸⁵ In *Sorentino*, the New Jersey Supreme Court upheld the termination of parental rights on the grounds

79. See *infra* part III and sources cited therein.

80. GRISSE, *supra* note 5, at 191.

81. *Id.*

82. See, e.g., *Moss v. Vest*, 262 P.2d 116, 121 (Idaho 1953) (holding that a mother who had pled guilty to lewdness misdemeanor was properly found unfit for custody); *Widdoes v. Widdoes*, 278 A.2d 100, 106 (Md. Ct. Spec. App. 1971) (upholding determination that mother's relationship with a married man who was not the child's father rendered her an unfit parent); *In re Richard*, 280 S.W. 2d 466, 472 (Mo. 1955) (citing mother's "marital misconduct" in denying her writ of habeas corpus to obtain custody of her child).

83. GRISSE, *supra* note 5, at 191. See also, e.g., *In re Baby M*, 537 A.2d 1227, 1242-43 (N.J. 1988) (explaining the unfitness standards codified in New Jersey statutes governing termination of parental rights). Although a determination of parental unfitness is more exacting than the obviously vague legal standard "best interests of the child" utilized in custody cases, courts have tremendous discretion in assessing whether to terminate parental rights. See Martin Guggenheim, *The Political and Legal Implications of the Psychological Parenting Theory*, 12 N.Y.U. REV. L. & SOC. CHANGE 549, 551 (1983-84).

84. *Id.*

85. See *Sorentino v. Family & Children's Soc'y*, 367 A.2d 1168 (N.J. 1976), *appeal after remand*, 378 A.2d 18 (N.J. 1977). The initial *Sorentino* decision stated that the parent could be denied parental rights even though it was found that the mother's initial surrender of the child was not voluntary, but rather that the mother was "coerced" as a result of "undue pressure from the adoption agency" involving "threats of harassment." *Sorentino*, 367 A.2d at 1169.

that the child would be seriously harmed if removed from the proposed adoptive parents to whom the child had established a substantial relationship.⁸⁶ The case involved a child placed in a preadoptive home at the age of one month who remained with the family for a period of thirty-one months.⁸⁷ The justices stated that the court must protect the child from the serious harm that would result from a transfer of custody.⁸⁸

As a result of the final *Sorentino* decision (which was in large part consistent with the Goldstein, Freud, and Solnit "psychological parent" theory), the risks inherent in removing a child from foster or proposed adoptive parents became a primary focus of inquiry, especially in those cases where the state child welfare agency could not reasonably argue that the parent was unfit. The risks associated with the child's loss of his or her family of origin were often ignored or inadequately articulated. The Goldstein, Freud, and Solnit "psychological parent" theory suggests that the loss of the family of origin was an inconsequential consideration and that the sole focus of inquiry was the identification of the "psychological parent" as defined by the theory. Where the court and/or psychological examiners accepted "psychological parent" theory, the assessment or fact-finding process became limited. This was referred to as a "limited assessment paradigm" in a prior publication⁸⁹ discussing the New Jersey Supreme Court decision in *In re J.C.*⁹⁰

This "limited assessment paradigm" or "limited separation paradigm" became a frequently employed approach (or litigation strategy) utilized by the child welfare agency to argue for the termination of parental rights. The state would retain expert psychologists to characterize and describe the harm that would result from removing the child from the "psychological parent," that is, the foster or preadoptive home. This was a crucial part of the state's argument where the family of origin was willing and able to resume care of the child.⁹¹ In addition, "psychological parent" theory and the resulting "limited separation paradigm," with the focus on preserving the relationship with the "psychological parent," became the basis for limiting and restricting a child's visitation with the family of origin during foster

86. *Sorentino*, 378 A.2d at 21.

87. *Id.* at 19.

88. *Id.* at 21. The *Sorentino* decisions involved a parent who placed her child with a private adoption agency which did not have the obligation to work toward family reunification, unlike when children are placed with the state child welfare agency. See Legal Services of New Jersey Brief of *Amicus Curiae* at 15, *In re J.C.*, 608 A.2d 1312 (N.J. 1992) (No. 34,126) (stating that the termination of parental rights in the context of adoption is different from termination of those rights by the state because "an adoption agency, unlike [the state child welfare agency], has no obligation to help the family prevent placement or achieve reunification.").

89. See Johnson & Torres, *supra* note 4, at 54.

90. 608 A.2d 1312 (N.J. 1992).

91. See *In re J.C.*, 608 A.2d 1312 (N.J. 1992). See also Johnson & Torres, *supra* note 4; *infra* notes 113-20 and accompanying text; part IV.A., *infra*.

placement.⁹² The less contact the child had with the family of origin, the stronger the "psychological parent" relationship would become, according to the theory. Once the "psychological parent" relationship reached some (arbitrary) level of strength, psychologists could be brought in to argue that the child would be "harmed" if the "psychological parent" relationship was threatened or severed.⁹³

The expert opinions provided by psychologists and other mental health professionals are often scientifically questionable⁹⁴ and at times irresponsible, as in instances where an expert psychologist relies on reports from the state child welfare agency workers, neglects to examine the birth parent, and reaches a conclusion that the parent was incapable of caring for a child.⁹⁵ This type of expert testimony often went unchallenged due, in part, to the system of *pro bono* representation of indigent parents in New Jersey.⁹⁶ The *pro bono* system operated in such a way that the indigent parent would be represented by an attorney inexperienced in trying a case of this type and with little incentive for studying this area of law.⁹⁷ Further, these *pro bono* attorneys are routinely offered experts from a list of psychologists who have an on-going contractual relationship with the state child welfare agency that has brought the charges against the parent. This results in the peculiar situation wherein the attorney representing the respondent-parent will choose an expert who has a financial relationship with the plaintiff.

In addition, parental rights termination does not automatically lead to stable adoptive placement.⁹⁸ There are also risks associated with being

92. See Johnson and Torres, *supra* note 4, at 55.

93. *Id.* at 41 (noting that an expert psychologist stated that a seven-year-old child would suffer "permanent scars" if removed from a nine-month family placement). See also analysis of Case A, *infra* part IV.A. (stating that the proposed adoptive parents eventually abandoned their efforts to adopt the same child, and that she was reunited with her family of origin).

94. See Ronald G. Silikovitz & Phillip H. Witt, *The Role of the Psychologist in Guardianship Proceedings*, 42 N.J. PSYCHOLOGIST 39, 39-40 (1992) (explaining that psychologists "bonding evaluations" often did not reflect the available scientific knowledge).

95. See Peggy C. Davis, 'There's a Book Out. . .,' *An Analysis of Judicial Absorption of Legislative Fact*, 100 HARV. L. REV. 1539, 1556 (1987) (discussing the difficulty resulting from experts' reliance on data supplied by the child welfare agency). Another example of irresponsible expert testimony is when a psychologist neglects to report the unremarkable findings of five different personality tests, yet extensively reports the pathological implications of a sixth test.

96. See CECELIA ZALKIND, ASSOCIATION OF CHILDREN OF NEW JERSEY, *THE PRO BONO ATTORNEY'S MANUAL* (1988) (describing New Jersey's *pro bono* system for representing indigent parents in parental rights termination cases).

97. See *id.* at Introduction (citing "lack of training for *pro bono* attorneys" as a cause of delay and other problems); see also Kathleen E. Kitson, *Protecting Children While Protecting Parents*, N.J. FAM. LAWYER, June 1994, at 149, 151.

98. See SALES, POWELL, VAN DUIZEND, & ASSOC., *supra* note 14, at 25; Bush & Goldman, *supra* note 13, at 232 (noting the significant number of children in foster care who cannot or do not wish to go home, yet who do not want to be adopted). See also Robert Borgman, *Antecedents and Consequences of Parental Rights Termination for Abused and*

adopted and, though the risk may be relatively small among the overall population of adoptions, given that contested parental rights termination cases are a special subgroup in which the birth parent does not voluntarily consent to adoption and the proposed adoptive parents actively battle the birth parent(s) for the child, these factors are likely to increase the risks, as suggested by Borgman's findings.⁹⁹ Borgman reports that, "many [children] felt that acceptance of adoption would be an expression of disloyalty toward the biological family, and older children often influenced their younger siblings in that belief."¹⁰⁰ Borgman also observes that children whose birth mothers were less adequate were more likely to accept adoption in contrast to those children whose birth mothers appeared more competent. Among his concluding remarks, Borgman states that "involuntary terminations of parental rights by court order seemed to create more serious problems for the children than it solved."¹⁰¹

Many children maintain significant psychological ties to their family of origin even though their family of origin does not provide custody.¹⁰² Colón has described the various risks associated with children losing their family of origin.¹⁰³ Colón explains that a permanent cut-off in family ties results in a grief-type experience, as though there were the death of a loved one.¹⁰⁴ The usual life passages such as adolescence, marriage, childbirth, deaths, or divorce often reactivate the feelings of separateness from the family of origin.¹⁰⁵ Garrison also cites data that indicate that children in placement benefit from contact with their family of origin in terms of greater emotional security and self-confidence, higher self-esteem, and improved ability to form relationships with a foster family.¹⁰⁶ With adoption, some children are at risk of losing intimate contact with and connection to their family, ethnic, or cultural heritage. In other cases, some children are at risk of being raised by people who harbor resentment and hostility toward their parents or family of origin.¹⁰⁷ In addition to the risk of loss of the family of origin itself, when children are to be adopted as a result of

Neglected Children, 60 CHILD WELFARE 391, 396-97 (1981) (arguing that a greater chance exists for the disruption of adoption or the lack of adoptive placement where the parental rights are involuntarily terminated by the court). It should be kept in mind that Borgman studied a small sample specific to a particular locale.

99. See Borgman, *supra* note 98, at 396-97.

100. *Id.* at 398.

101. *Id.* at 402.

102. See Cases A and C, part IV, *infra*.

103. See generally Colón, *supra* note 58.

104. *Id.* at 290.

105. *Id.* at 305. Colón also suggests ways for late adoptees (those with conscious and preconscious memories of their family of origin) and early adoptees (those without such memories) to maintain some connection with the family of origin and thus minimize the distress associated with the separation. *Id.* at 304-09.

106. Garrison, *supra* note 62, at 461-65.

107. See Case A, part IV.A., *infra*.

some perceived inadequacy in their parents (as opposed to when the parents voluntarily consent to the adoption), a significant risk of a negative impact on the child's identity and self-esteem results. When the message is that the parents were inadequate to provide care and the child cannot visit or even see the family of origin, the child must either disconnect psychologically from the family of origin, with the resultant loyalty conflict, or accept some injury to their self-esteem for maintaining some identification with the "defective" family.¹⁰⁸ Unfortunately, the uncritical acceptance of the Goldstein, Freud, and Solnit "psychological parent" theory within some quarters, in both the legal and mental health community, has resulted in a frequent failure to recognize risks associated with the loss of the family of origin.

Several factors contributed to the ready assimilation of the Goldstein, Freud, and Solnit "psychological parent" theory, the *Sorentino* decisions, and their implications among psychologists.¹⁰⁹ The *Sorentino* decisions elevated the value of psychological testimony in cases of this type with its focus on preventing psychological harm, in effect making the decision friendly to the profession of psychology. Mental health experts (and the courts) typically recognize the value of maintaining each child's relationship with the noncustodial parent following divorce, yet children in foster care often lost this protection.¹¹⁰ Stated differently, mental health professionals often try to focus exclusively on the child's interest, and from the professionals perspective (though not necessarily the child's), poor parents had little of value to offer their children.¹¹¹ An additional reason why many psychologists did not respond critically to the implications of *Sorentino* decisions was because many of the psychologists who maintained an ongoing professional interest in this area of consultation were on contract with the state child welfare agency in New Jersey to provide a range of treatment and consultation services. In effect, the state had a panel of experts lined up to conduct examinations and provide testimony consistent

108. Certification In Support of Emergent Relief at 4, *In re J.C.*, (N.J. Super. Ct. Ch. Div. 1990) (No. FG-09-000003-90).

109. See Silikovitz & Witt, *supra* note 94, at 39-40 for a brief and very clear discussion of some of these issues.

110. See Johnson & Torres, *supra* note 4, at 55. Although it could be argued that this differential consideration by clinical examiners is related to "best interest" considerations, it also reflects the fact that the parents of children in foster care are typically poor and are unlikely to pursue civil remedies against psychologists as do the aggrieved parents in divorce actions.

111. It is the author's impression that benign motives often result in recommendations that children be severed from their family of origin and placed with more middle-class families. A variation on this theme is depicted in the popular film, *Little Man Tate* (Orion, 1991), where an intellectually gifted young boy is separated from his working-class mother upon the advice of a child development expert who promises to nurture the child's genius. See also Garrison, *supra* note 62, at 432-37 (discussing the history of the dual tracts in family law, and describing how the parental rights of the poor have not been afforded the same protection by the law as the parental rights of those of means).

with "psychological parent" theory. There was no similar mechanism to obtain expert psychologists for the attorneys representing the parents of children placed in foster care.¹¹²

The limited separation paradigm, which had become a prevailing perspective in analysis of parental rights termination cases of this type in the aftermath of the *Sorentino* decisions, was critically reviewed in the course of the examinations and testimony in *In re J.C.*¹¹³ The risks of loss of the family of origin were considered as well as the risks associated with the separation from the proposed adoptive parents.¹¹⁴ The dichotomous conception of the "psychological parent" or "bonding" relationship was also critically reviewed.¹¹⁵ The question of the harm that would stem from separation was reformulated.¹¹⁶ It was pointed out that the separation experience alone would not determine the entire course of the child's development and that multiple variables would intervene and influence the effects of the separation.¹¹⁷ A key factor was the interpersonal environment that would be provided after the separation.¹¹⁸ The New Jersey Supreme Court, in an unanimous decision, overturned the trial courts' termination of parental rights in *J.C.* and remanded the case for further hearings.¹¹⁹ The Court acknowledged that there were credible opposing views held by experts and recognized the substantial literature critical of "psychological parent" theory.¹²⁰

112. See Kitson, *supra* note 97, at 151 (commenting on the state's resources of experts and agency witnesses).

113. 608 A.2d 1312 (N.J. 1992). See Johnson & Torres, *supra* note 4, at 53-55 (describing the way in which *In re J.C.* broadened the standard used by trial courts when deciding whether to terminate parental rights); see also Kitson, *supra* note 97, at 151-52 (explaining that the decisions in *J.C.* and *In re K.L.F.*, 608 A.2d 1327 (N.J. 1992), protect children's rights in fundamental ways, including recognition of the value and importance of each child's relationship with the family of origin); Lawrence S. Lustberg, *Striking Two Blows for the Right to Remain a Parent*, N.J. L.J., June 28, 1993, at 18 (commenting that the *J.C.* and *K.L.F.* decisions established a high burden upon the state seeking to terminate the rights of parents of origin).

Even prior to *J.C.*, New Jersey courts had begun to criticize the limited separation paradigm and adopt a wider view, in order to take into account the many relationships held by the child. See, e.g., *Division of Youth and Family Services v. T.C.*, 598 A.2d 899, 908-10 (N.J. Super. Ct. App. Div. 1992), *cert. denied*, No. 34,448 (N.J. June 30, 1992).

114. *J.C.*, 608 A.2d at 1320; Johnson & Torres, *supra* note 4, at 44-51.

115. *J.C.*, 608 A.2d at 1320-21; Johnson & Torres, *supra* note 4, at 40-41.

116. Johnson & Torres, *supra* note 4, at 42.

117. *J.C.*, 608 A.2d at 1320; Johnson & Torres, *supra* note 4, at 49.

118. *J.C.*, 608 A.2d at 1314; Johnson & Torres, *supra* note 4, at 42.

119. *J.C.*, 608 A.2d at 1324.

120. *Id.* The two children in question were eventually returned to their birth mother. See Case A, part IV.A., *infra*.

IV. CASE STUDIES

The examination of risks to children in parental rights termination cases requires complex considerations. Case illustrations can help demonstrate how the various considerations were concretely examined in specific cases. The following three cases are presented to illustrate many of the issues discussed above.¹²¹

A. Case A

The first case described is the *J.C.* case, the legal ramifications of which are discussed above. The mother (an immigrant from South America) of two female children originally arranged a voluntary placement with the child welfare agency. At that time, the older child was age twenty-five months, and the younger child was age eight months. The children were thereafter returned to the mother's care three months later, with continued supervision by the child welfare agency. Nine months later, another child was born. When the third child was two months old, the mother again placed the children with the child welfare agency. The mother was unable to care for the children due to a variety of problems including substance abuse, lack of a stable residence, lack of social supports, and spousal violence.

The mother's parental rights were terminated at a hearing three years after the children were placed, although the mother had obtained an apartment, held a job, maintained visits, and denied any further drug abuse. The judge cited the "bonding" of the children to their respective preadoptive families as one of the reasons for the decisions.

The mother, who was originally represented by a *pro bono* attorney, obtained new legal representation. An appeal was filed on her behalf, arguing that the court had relied on expert findings on "bonding" improperly because the expert's report was proffered after the conclusion of the hearing and thus not subject to cross-examination. The appellate court granted a new hearing focused solely on the question of bonding. Prior to the hearing, the mother relinquished her parental rights to the youngest child, who was two months old when placed. Therefore, the hearing was focused on the two older children, who were in two different preadoptive placements. Examinations were conducted by the author,¹²² and testimony was provided that addressed the risks resulting from separating the children from the foster families as well as the risks of separation from the family of origin. The examination found no evidence that the oldest child was attached

121. The facts of the cases discussed are drawn from the author's recollection and case records on file with the author.

122. The author was assisted in the examinations by Luis Torres, Psy.D. Details of the examination approach and findings is provided in Johnson & Torres, *supra* note 4, at 37, 40-50.

or “bonded” to her preadoptive family in any substantial way. It was noted, however, that the single examination session had not provided adequate time to assess the question, given the child’s complex placement history.¹²³ The child had been placed with this particular family for eighteen months and, at the time of the examination, she was seven years old. The child showed a significant amount of attachment to her birth mother, which appeared more substantial than her relationship with any other parental figure. Yet, there was evidence that the child was emotionally disturbed, and it was questionable whether the mother was capable of providing custodial care. The author also explained to the court that the child could be harmed by a loss of her relationship with her birth mother. The proposed adoptive mother was noted to be especially anxious in her interaction with the child and further professional evaluation of their relationship was recommended.

With regard to the second child, there was evidence that she was attached to both her preadoptive mother and her birth mother. The second child had been placed with her foster family for four and a half years, and was six years old at the time of the examination. Also, the second child reported to the examiner that she had been admonished by her preadoptive mother for speaking of her birth mother.

The author pointed out in his testimony that a separation for either child would not determine the entire course of the child’s life. Various positive and negative factors would intervene throughout each child’s development. The trial judge again terminated the mother’s parental rights, but the decision was reversed by the New Jersey Supreme Court.¹²⁴ Consistent with the Supreme Court’s directive, more extensive evaluations were conducted on remand. The author and Luis Torres, Psy.D., were again retained by the attorney representing the birth mother. The state child welfare agency retained an expert, a licensed psychologist, and who had not been involved in the case prior to the Supreme Court decision. The preadoptive parents for the oldest child failed to come in for examination. They subsequently gave up custody of the child due to her behavior problems, and, reportedly, their recognition that the child maintained a desire to have contact with her mother. The child had a short-term placement in a residential center and was returned to her mother.

The second child, her proposed adoptive mother, and the birth mother were examined by the author and the expert retained by the child welfare agency. The author’s examination revealed significant deficits on the part

123. The child had been placed with at least two other families since her mother placed the three children.

124. See discussion of *In re J.C.*, 608 A.2d 1312 (N.J. 1992), *supra* notes 113-20 and accompanying text. See also Johnson & Torres, *supra* note 4, for a discussion of the implications of the decision.

of the preadoptive mother. The preadoptive mother made an effort to conceal her own considerable illiteracy as well as the child's school failure. The expert for the child welfare agency did not examine the proposed adoptive mother nor review the school records. The child's report card indicated that she was frequently late and stated explicitly on two different grading cycles that the child needed more help with homework. It was evident from the grades that failure was likely, although the proposed adoptive mother denied knowledge of the child's school difficulty. In addition, the preadoptive mother did not know the name of the child's school teacher for the current or past school year. Further, the foster mother harbored hostility toward the child's birth mother that was expressed to the child. The proposed adoptive mother was unwilling to meet with the birth mother and stated that, if the child were returned to the birth mother, the child could not visit the foster mother's home. The child welfare agency records indicated prior problems in the foster mother's home and stated the home should be limited to two children between the ages of three and seven, although at the time of the examinations on remand, there were two other children in the home, ages seven and ten, in addition to the child at issue. Agency records also stated that, due to their lack of Hispanic homes and the great number of placements, they had overcrowded the foster mother's home. The expert examiner retained by the child welfare agency wrote explicitly in her report that the psychological adjustment of the proposed adoptive mother was not evaluated. As a result of the clinical examinations, the multiple risks associated with the child's continued placement with the proposed adoptive home were identified and presented. The original trial judge returned the child to her mother.

A critique of the limited separation paradigm allowed a more thorough picture of the children's needs to emerge. On remand, the first child's preadoptive placement disrupted in a manner similar to that described in Borgman's study.¹²⁵ Although the proposed adoptive parents relinquished custody of the child, the child welfare agency remained reluctant to return her to her mother's care. A certification in support of emergency relief was filed with the appellate court in which the author stated, "by the [child welfare agency] continuing to thwart these efforts at reunification, a message continues to be conveyed to [the child] that her mother is somehow defective, or inadequate, or dangerous . . . negative messages she received about her mother erode her own identity and self-esteem."¹²⁶ The appellate court ordered the child welfare agency to focus its casework services on reuniting the child with her mother, and the mother assumed custody shortly thereafter.

125. See *supra* notes 98-101 and accompanying text.

126. Certification In Support of Emergent Relief at 4, *In re J.C.*, (N.J. Super. Ct. Ch. Div. 1990) (No. FG-09-000003-90).

The examination conducted on the second child revealed substantial problems in her proposed adoptive home, which the expert retained by the child welfare agency had overlooked or ignored. As a result of comprehensive clinical examinations, the author and his colleague were able to fully inform the court of the multiple risks associated with the child's continued placement at the proposed adoptive home. This case illustrates how expert consideration of factors outside the "psychological parent" theory paradigm was critical to a comprehensive examination and resolution of the parental rights termination case.

B. Case B

The author was retained by the child welfare agency to evaluate four-year-old, female twins (twins I and II) and their proposed adoptive mother. The specific referral questions involved the level of "bonding" between the foster mother and children, the foster mother's commitment to the children, and the likely impact of visitation between the children and the birth mother.

Though twins I and II were born with symptoms of drug withdrawal, they were discharged from the hospital in the care of their mother of origin with supervision by the child welfare agency. Within two months they were removed from the care of the mother of origin following an arm injury to twin I and the subsequent discovery of several prior fractures for which the mother of origin had no explanation. At the age of four months, the twins were placed in the same foster home they were in at the time of the examination.

The proposed adoptive home consisted of the sixty-seven-year-old mother, her retired and partially disabled husband, their twenty-six-year-old daughter by birth and two other female foster children (age nine and ten). The foster mother and her husband were ministers and presided over a small church in an urban community. The foster mother reported that she had raised more than twenty-five foster children over the years. The twenty-six-year-old adult daughter was a college graduate employed as a recreation director of a long-term care facility.

Evaluation revealed that the twins demonstrated appropriate cognitive and social development as well as typical attachment behaviors with both the foster mother and her adult daughter, although twin I reportedly suffered periodic anxiety with constipation. The foster mother expressed her continued commitment to the children and her daughter stated she would assume complete responsibility for their care in the case of the death or disability of her mother.

The twins were two of nine children born to their mother of origin. The mother of origin was serving a prison term for the fatal abuse of another female infant who was born after the removal of twins I and II. All the surviving siblings were in the care of a paternal relative and twins I and

II had regular visits with these siblings. The author examined the mother of origin at the incarceration center. Though her mood was elevated and there were some signs of grandiosity, no delusions were elicited and there was no overt psychosis. Her intellectual level was assessed as average range. She related a history of physical and sexual abuse, as well as neglect, during her childhood.

The mother of origin, however, expressed little insight or appreciation of her inadequacy as a parent. She attempted to justify her past drug abuse. She acknowledged administering the fatal blow that killed her infant daughter but stated it was due to her being mentally and physically sick. She had been unwilling to tell anyone of her distress and had a long history of reluctance to seek psychiatric help. She stated, "I try to hide what's wrong with me. . . . I was afraid they were gonna take me to a hospital and lock me up and give me shock treatment."

Given the condition of the mother of origin, her lack of insight, and the limited supervision at the incarceration center, the author recommended that visitation remain curtailed. The mother's fitness was in doubt and her rehabilitation was unlikely. The author also opined that the twins had been seriously harmed as a result of the acts, omissions, and deficits of the mother of origin. The mother of origin was not capable of caring for the twins, nor was it likely that she could in the future. Yet, the expert psychologist for the birth mother stated that the mother of origin had the intelligence to rehabilitate herself and that she would benefit from psychiatric medication. The trial court terminated the birth mother's parental rights. There was no appeal.

In Case B, the mother of origin of the twins was substantially impaired. She lacked insight into her condition and was unwilling to seek treatment. She had harmed the children in the past, and it was the author's opinion that she would not be able to care for them in the future. The primary focus of the clinical evaluation was her fitness as a parent rather than the effect of separation from the preadoptive home. The facts of Case B illustrate the importance of the expert psychologist's ability to identify and target the relevant issues in a case. The scope of an expert clinical examination is best determined by the facts of the case at hand, not by the parameters of a limited paradigm.

C. Case C

A *pro bono* attorney retained the author to conduct examinations and offer recommendations in a parental rights termination case involving a thirteen-year-old girl and her mother of origin. The daughter was removed from her mother's care at age seven as a result of her mother's failure to maintain a home. There was periodic visitation between the child and her

mother. The child remained in the same foster home for the six years between separation and the time of the examination. The foster family sought to adopt her.

Prior to the child's removal from her mother of origin, the child welfare agency had provided various services such as money for rent, food, and utilities. It was reported that the mother was a drug abuser and that the child's school attendance was irregular. There had been prior periods of foster placement. The mother tested positive for the HIV virus a year after the child's removal. The child's father and adult siblings were reportedly unwilling to assume responsibility for her care.

The court questioned whether the mother of origin was competent to proceed with the parental rights termination hearing given her psychiatric condition, as indicated by her statements indicating paranoid delusional thoughts. The court ordered the author to conduct an examination and to present findings on the question of the mother's competence before proceeding with any examinations on the question of guardianship.

The author's examination revealed that the mother of origin suffered from a psychiatric condition with psychosis. She attended therapy sessions at a local mental health clinic but refused to take psychiatric medication due to the adverse side effects she experienced.

The reasoning of the mother of origin was impaired due to her condition, but the impairment did not intrude upon all spheres of her functioning. She knew what was at stake in the parental rights proceedings, and she understood the roles of her attorney and the opposing counsel. Though a medical work-up was needed to rule-out other disease processes, the clinical picture was consistent with paranoid schizophrenia. The author's report stated that the extent of disability associated with a diagnosis of paranoid schizophrenia was quite varied. The available data indicated that she could manage her affairs and thus she was not incompetent;¹²⁷ however, the report also pointed out that her condition could deteriorate rapidly.

After the author submitted his report, the *pro bono* attorney informed him that the child had run away from the foster home, had gone to stay with her mother of origin, and had requested to stay there. The child welfare agency agreed to allow the child to stay with her mother but was not willing to provide support services for the mother. It seemed apparent to the author that there had been too much focus by the court on the mother's disability and too little focus on the child's enduring attachment to her mother and family of origin.

Consistent with "psychological parent" theory, the child welfare agency tried to deny the child's ties to her less capable mother of origin, rather than appreciate and respect her emotional ties to several parental

127. See *In re D.K.*, 497 A.2d 1298, 1308-09 (N.J. Super. Ct. Ch. Div. 1985) (discussing the relevant factors for proving incompetency).

figures. This concept of maintaining multiple ties is especially relevant to children who are late-adoptees.¹²⁸ Unfortunately, without extensive support services, it was unlikely that the mother would be able to provide for the child; thus another child care crisis was likely.

Case C again illustrates a disrupted preadoptive placement. It also illuminates how the "psychological parent" theory's presumption of single parental attachment often blinds child welfare workers and psychologists to recognize the strong attachment and loyalty many children feel toward their family of origin, despite long-term separation.¹²⁹

In case C, the child welfare agency was willing to devote considerable resources to severing the child's ties to her family of origin but was unwilling to provide support for the child in the home of the family of origin. This behavior belies the child welfare agency's commitment to discovering and serving the child's interests. On the other hand, it fits squarely within the "psychological parent" theory perspective. This case reveals the need for psychologists and social workers who are knowledgeable about diverse family dynamics and open-minded about theories of family structure variations to provide training and consultation to child welfare workers and administrators.

CONCLUSION

In parental rights termination cases, and particularly in those cases where the family of origin seeks to maintain ties with the child, there are multiple risks that require examination. The Goldstein, Freud, and Solnit "psychological parent" theory, as it has been applied to parental rights termination cases, has been used to focus on those risks associated with the loss of continuity of care while neglecting those risks associated with a loss of the family of origin. Actually, there are risks and potential benefits inherent in each placement option. There are benefits associated with the maintenance of continuity of care as well as benefits associated with children being reunited with their actual parents, siblings, and extended family. The question is: how are these abstract ideals operative in the concrete circumstances of a particular case?

Comprehensive examination by experts requires an open inquiry unencumbered by a theoretical perspective that ignores certain aspects while focussing on others. Specifically, it is argued here that experts should avoid perpetuating the assumption of the sanctity of a single "psychological parent" relationship in need of protection from other competing parental relationships, as propounded by the Goldstein, Freud, and Solnit "psychological parent" theory. Each case has relevant unique characteristics, and it is important that expert examiners approach each case with an appreciation

128. See *supra* notes 70-71 and accompanying text.

129. See *supra* notes 62-71 and accompanying text.

for the unique considerations of the case rather than a theoretical perspective that limits the focus of the examination. Research data are also important, but data require critical review to determine their relevance to the questions before the court. There is no unitary outcome resulting from the separation of a child from a care provider. There are a multitude of contextual factors in each case that will influence the outcome in such a situation. Experts best serve the court by articulating the specific contextual factors in each case, rather than by offering conclusions based on theoretical assumptions. Theories are valuable in guiding inquiry, but where adherence to a theory interferes with the recognition of relevant facts, the theory becomes an obstacle to true discovery.

Finally, we must remain vigilant in our effort to prevent and reduce risks to children. Our compassion, our sense of justice, and our concern for society and the quality of life we all live requires no less.