581 A.2d 1141
District of Columbia Court of Appeals.

Appeal of H.R.
(In the Matter of BABY BOY C.)

No. 86-1426.
|
Argued March 3, 1988.
|
Decided Aug. 29, 1990.

Adoption petition was filed for child born out of wedlock. The Superior Court, Virginia L. Riley, J., granted petition, and natural father appealed. The Court of Appeals, in an opinion by Ferren, J., in which the Chief Judge joined in part, held that: (1) statutory best interest of child standard applicable to adoption by unrelated persons incorporates preference for fit unwed father who has grasped his opportunity interest, which can be overridden only by clear and convincing evidence that it is in best interest of child to be placed with unrelated persons; (2) natural father's "opportunity interest" in gaining custody of child remained intact, considering statutory and due process violations in giving father notice of adoption petition; and (3) remand was necessary due to trial court's application of best interest standard without incorporating parental preference.

Remanded.

Rogers, C.J., filed opinion concurring in part and dissenting in part.

Belson, J., filed dissenting opinion.

West Headnotes (13)

[1] Adoption
Examination and Approval by Court

Statutory best interest of the child standard must be applied in determining whether to grant petition for adoption filed by unrelated persons. D.C.Code 1981, §§ 16-304(e), 16-309(b)(3).

1 Cases that cite this headnote

[2] Adoption
Necessity of Consent in General

Adoption statute incorporates into best interest of child standard a preference for fit unwed father who has grasped his opportunity interest in seeking relationship with child, which preference can be overridden only by showing by clear and convincing evidence that it is in best interest of child to be placed with unrelated persons. D.C.Code 1981, §§ 16-304(e), 16-309(b)(3).

13 Cases that cite this headnote

[3] Adoption
Review

Clearly erroneous rule was applicable to trial court's findings of fact and conclusions of law in adoption proceeding, even though findings and conclusions were adopted practically verbatim from proposed findings and conclusions submitted by potential adoptive parents and child placement agency, where minor changes by trial court indicated that findings and conclusions ultimately represented judge's own determinations. (Per Ferren, J., with Chief Judge concurring separately.).

1 Cases that cite this headnote

[4] Adoption
Notice

Constitutional Law
Adoption

Information which child placement agency furnished to unwed father failed to provide minimum notice required by due process to enable father to assert his right to custody of child at meaningful time and in meaningful manner, where letters sent by agency to African father did not inform father of his basic right to seek custody of child and of

his right to participate at court hearing that would be scheduled to determine permanent placement of child, but rather merely told father that he had right to acknowledge or deny paternity and that effort had to be made to inform father of plans for adoption, and provided father with adoption consent forms. (Per Ferren, J., with Chief Judge concurring separately.) U.S.C.A. Const.Amends. 5, 14.

2 Cases that cite this headnote

[5] **Adoption**
Notice

Child placement agency's role as state actor in adoption process requires that it provide natural father with a certain minimum amount of information concerning his procedural rights in adoption proceeding. (Per Ferren, J., with Chief Judge concurring separately.) U.S.C.A. Const.Amends. 5, 14.

Cases that cite this headnote

[6] **Adoption**
Notice

Unwed father was denied his procedural rights under statute when court failed to provide him with "immediate" notice of prospective adoptive parents' filing of petition to adopt his son. (Per Ferren, J., with Chief Judge concurring separately.) D.C.Code 1981, §§ 16-304, 16-306.

2 Cases that cite this headnote

[7] **Adoption**
Notice

Practice of Family Division of providing notice to interested parties only upon issuance of show cause order in adoption proceeding violates statute commanding that due notice of pending adoption proceeding be sent "immediately" to natural parents. (Per Ferren, J., with Chief Judge concurring separately.) D.C.Code 1981, § 16-306(a).

Cases that cite this headnote

[8] **Adoption**
Notice

Constitutional Law
Adoption

Child placement agency violated unwed father's constitutional right to procedural due process by failing to use due diligence to find father in order to provide timely service of required immediate, official notice of adoption proceedings; agency did not obtain addresses of father's relatives, did not tell court of other possible addresses for father, did not attempt to update information upon being told by mother that father's address could have changed and upon learning from father that he was about to move to another country. (Per Ferren, J., with Chief Judge concurring separately.) U.S.C.A. Const.Amends. 5, 14.

1 Cases that cite this headnote

[9] **Constitutional Law**
Form and Adequacy

Due process requirement that "means employed" reflect actual desire to inform absent party of proceedings applies not only to form of service chosen but also to efforts to ensure that such service is effective. (Per Ferren, J., with Chief Judge concurring separately.) U.S.C.A. Const.Amends. 5, 14.

Cases that cite this headnote

[10] **Adoption**
Notice

Constitutional Law
Adoption

To satisfy unwed father's constitutional right to due process prior to allowing adoption of child, child placement agency would have to engage in due diligence to locate father. (Per Ferren, J., with Chief Judge concurring separately.) U.S.C.A. Const.Amends. 5, 14.

Cases that cite this headnote

[11] **Adoption**
Notice

Unwed father did not have responsibility to keep child placement agency informed of his current address if he wished to have prompt notice of adoption proceeding, where there was no indication whatsoever in any information which agency sent to father that there was pending judicial proceeding, let alone that agency and father were "parties" to that proceeding, but instead father only knew that agency was seeking his consent to adoption of his child. (Per Ferren, J., with Chief Judge concurring separately.) U.S.C.A. Const.Amends. 5, 14.

Cases that cite this headnote

[12] **Adoption**
Exceptions;Relinquishment or Forfeiture of Parent's Rights in General

Adoption
Notice

Unwed father's "opportunity interest" in developing relationship with his child remained intact, and preference for custody by father arose in adoption proceeding, despite natural father's failure to take action with respect to child after learning that mother desired to place child for adoption, where notice given to father of legal procedures involved in adoption process and child placement agency's role in those procedures was insufficient, father had not been given immediate notice of adoption petition, and agency did not undertake diligent efforts to ascertain father's whereabouts. (Per Ferren, J., with Chief Judge concurring separately.) U.S.C.A. Const.Amends. 5, 14; D.C.Code 1981, §§ 16-304, 16-306.

20 Cases that cite this headnote

[13] **Adoption**
Review

Remand of adoption petition was necessary, where trial court failed to apply best interest standard of adoption statute as interpreted to include presumption in favor of fit natural parent over stranger to child, but instead found that best interest of child warranted adoption due to psychological impact on child from transfer from prospective adoptive parents to natural father. (Per Ferren, J., with Chief Judge concurring separately.) D.C.Code 1981, §§ 16-304(e), 16-309(b)(3).

18 Cases that cite this headnote

Attorneys and Law Firms

***1142** Thomas C. Jones, Jr., Washington, D.C., for appellant. Thomas R. Spradlin, Washington, D.C., entered an appearance.

***1143** David S. Klontz, with whom Michael P. Bentzen, Washington, D.C. was on the brief, for appellees.

Before ROGERS,[*] Chief Judge, and FERREN and BELSON, Associate Judges.

Opinion

PER CURIAM.

In this appeal from an order of adoption, this court addresses the question whether H.R., a natural father who seeks custody of his child, grasped his "opportunity interest" in developing a relationship with his child, and, if so, whether the trial judge applied the correct standard in concluding that Baby Boy C.'s best interest called for his adoption by the O. family over H.R.'s objection.

[1] [2] *Lehr v. Robertson,* 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983), recognizes that a noncustodial father has a constitutionally protected "opportunity interest" in developing a relationship with his child. The Division agrees that the statutory best interest of the child standard must be applied in determining whether to grant a petition for adoption filed by unrelated persons, that the statute incorporates into the best interest standard a preference for a fit unwed father who has grasped his opportunity interest, and that this preference can be overridden only by a showing by clear and convincing evidence that it is in the best interest of the child to be placed with unrelated persons. Because the best interest

standard, as applied by the trial court, did not incorporate such a parental preference, a majority concludes that a remand is required to apply the best interest standard as properly formulated. The dissenting judge would affirm the trial judge's ruling that H.R. did not grasp his "opportunity interest" and would hold that reversal and remand are inappropriate in any event because of the trial judge's determination concerning the effect that transfer from the adoptive parents would have upon the child.

FERREN, Associate Judge:

This case concerns the constitutional and statutory rights of an unwed father, appellant H.R., a citizen of Zaire who has been seeking custody of his infant (now seven-year-old) son, Baby Boy C. The child's mother, L.C., is a United States citizen who conceived the child while serving as a Peace Corps volunteer in Zaire. She returned to the United States and, ten days after the child was born in August 1983, relinquished her own parental rights to the Barker Foundation, a licensed child placement agency in the District of Columbia, to facilitate adoption of the child. In September 1983, Barker placed the child with adoptive parents, Mr. and Mrs. O., who, the same day, filed a petition for adoption in Superior Court. Although, upon leaving Zaire, L.C. had told H.R. she was pregnant, a mutual friend told H.R. in July that L.C. had had an abortion. H.R. was not aware that he had a son until sometime in October 1983, when L.C. informed H.R. that they had a child which she had placed for adoption. At this time, however, L.C. did not inform H.R. that he had rights concerning the child, even when he expressed his intent to assume custody of the child himself. Similarly, although the Barker Foundation sent H.R. two letters seeking his consent to adoption, the agency never informed him of his right to seek legal custody, or of Barker's role in the adoption process, or of the pending legal proceeding. In fact, for eighteen months, from October 1983 to April 1985, H.R. received no notice, official or otherwise, that a judicial proceeding had been initiated that could cut off all his legal rights to his child, despite the fact that throughout this period he was in contact intermittently with L.C. and with Barker, asking for information about his legal rights and manifesting a desire to take custody of his son. It was not until April 1985, after the trial court had issued an interlocutory decree of adoption and Baby Boy C. was 20 months old, that H.R. finally received notice of the court proceeding in the form of an order to show cause why a ***1144** final adoption decree should not be granted to Mr. and Mrs. O., coupled with an order for H.R. to appear before the court in June 1985 to provide testimony on the issue. After several hearings on the petition held in June 1985 and over the next eleven months, the trial court granted the petition of Mr. and Mrs. O. to adopt Baby Boy C. as being "in the best interests of the child."

H.R. contends the adoption proceedings which granted custody of Baby Boy C. to the O. family (1) violated his statutory and constitutional rights to immediate, adequate notice of the adoption proceedings, including due diligence to assure he received notice, and (2) applied the wrong test by ordering the adoption in "the best interests of the child" without granting him a custodial preference as a natural parent, absent a showing of unfitness. He therefore urges us to remand this case for application of a "fitness" test whereby H.R. would assume custody of Baby Boy C. unless the court found him unfit to be a parent.

I conclude that H.R.'s constitutional and statutory rights have been violated and that the court applied the wrong legal test in granting the adoption. I further conclude that when an unwed, noncustodial father has not abandoned his "opportunity interest" in developing a relationship with his child, the Constitution mandates that we construe our "best interests" standard under the adoption statute to include a custodial preference for a "fit" parent. In this case, I conclude as a matter of law that, because of unlawful state action, H.R. cannot be said to have abandoned his "opportunity interest." Under the circumstances, therefore, the court should have awarded custody to H.R. if found "fit" to be a parent, unless clear and convincing evidence demonstrated that such custody would have been detrimental to the "best interest" of Baby Boy C. Because the trial court incorrectly applied a more traditional "best interest" test that did not begin with a presumption of custody for a "fit" natural parent, and because we, as an appellate court, cannot properly apply the correct test on this record, we vacate the judgment and remand the case for further proceedings.

I. FACTS AND PROCEEDINGS

A. *Case History*

[3] Baby Boy C.'s mother, L.C., met H.R. in the village in Zaire where she was teaching. [1] At the time, appellant

was on leave from his law studies at the university in Kinshasa, Zaire. In April 1983, when L.C. learned she was pregnant, the Peace Corps immediately evacuated her to Washington, D.C. Upon her departure, L.C. wrote a letter to H.R. informing him that she was pregnant and that he was the father. She hinted that she planned to have an abortion, saying that what she would have to go through in the United States would exhaust her physically and emotionally and that she would return to Zaire in two weeks. She also said that she did not want anyone to know about the matter. L.C. never went back to Zaire. In July, a mutual friend of L.C. and H.R. told H.R. that L.C. had had an abortion in Washington, D.C. In fact, however, L.C. gave birth to Baby Boy C. in the District on August 5, 1983. Ten days later, L.C. relinquished her parental rights to the Barker Foundation.

In early August 1983, when he was visiting the dean's office at the University of ***1145** Kinshasa from which he had graduated in June, H.R. happened upon a letter from the Barker Foundation postmarked over two months earlier in May. The letter notified him that L.C. was expecting to give birth to a child in July. [2] Along with its letter, Barker sent three forms: an "Admission of Paternity and Consent to Adoption" form, a "Statement of Non-Paternity and Consent to Adoption" form, and a biographical data form. Neither the letter nor the accompanying forms indicated that H.R. had the right not to consent to the adoption and the right to seek custody of his child himself. Upon receiving this information, H.R. immediately wrote a letter to L.C. in care of her parents, in order to ascertain what in fact had occurred over the past several months. L.C. received this letter in mid-September, after she had left Washington to attend graduate school in Chicago. Because she was unsure of H.R.'s whereabouts and afraid that her letter might be intercepted and read by his relatives, L.C. answered the letter without mentioning the birth of Baby Boy C. or the plans for adoption. L.C., however, gave H.R. a telephone number where she could be reached. [3]

On September 22, 1983, the Barker Foundation placed Baby Boy C. with the O. family. On the same day, the O. family filed a petition for adoption in Superior Court. No notice was sent to inform H.R. of a formal adoption proceeding seeking to terminate his parental rights to Baby Boy C. in favor of a new adoptive family. [4] On September 29, 1983, the court issued an order of reference, directing Barker to investigate the truth of the allegations contained in the petition for the purpose of determining whether Baby Boy C. was "a proper subject for adoption and if the home of the petitioners is a suitable one" and to file a report in ninety days.

In October 1983, after receiving L.C.'s response to his letter in which she had acknowledged receiving his letter but had not mentioned a baby, H.R. called her and learned for the first time that he had a son. According to L.C.'s testimony at the eventual hearings in this case, H.R. did not have a good understanding of United States adoption procedures and thought ***1146** that L.C. had abandoned the child. Both in this conversation and in one that followed in the same week, she said, L.C. informed H.R. that she had given up her parental rights to the child, that Baby Boy C. had been placed in a loving home where he was being well cared for, and that they would never be able to see the child again. L.C. also urged H.R. to send his autobiographical information to the Barker Foundation. According to H.R.'s testimony at the same hearings, however, he asked L.C. to send the baby to him in Zaire, but L.C. had responded that, although she had considered sending him the child, she had decided against it. In November, believing that H.R. did not really comprehend the adoption process, L.C. wrote H.R. another letter, describing her sense of loss in giving up their child but stating her belief that Baby Boy C. was "at home" and loved by his adoptive parents and older brother. According to H.R., he responded by informing L.C. of his opposition to the adoption and offering to take the baby if she did not want to raise him herself. He further testified that he had difficulty grasping the idea that L.C. had really given up all her rights to the child.

In December 1983, in compliance with the court's order of reference, Barker submitted its report to the trial court and its formal consent to the adoption petition. Barker recommended entry of an interlocutory decree of adoption. In the report, Barker indicated that it had been unable to contact H.R., who had a statutory right to notification of, and presence at, a hearing on the adoption petition. Barker added that it had tried to reach H.R. at the university at Kinshasa but had received no response to its letter. Alice Avery, the Barker social worker responsible for the Baby Boy C. case, testified at the hearing that, although she had told the court she did not know H.R.'s whereabouts, Barker had not contacted L.C. to ask if she had heard from H.R. Nor, said Avery, had

the agency attempted to contact H.R. or to update his address since mailing the consent forms to the university seven months earlier. Although the report provided the names of H.R.'s many siblings in Zaire, Avery testified that she had not pressed L.C. to provide their addresses because L.C. preferred the university address for reasons of confidentiality. Avery also testified that the report did not tell the court that L.C. had other possible addresses for H.R. Baby Boy C. was now four months old.

On January 17, 1984, H.R. called the Barker Foundation, having received a Christmas card from L.C. in which she had expressed her growing emotional distance from the adoption and noted what a wonderful gift (a son) the O. family had received for Christmas that year. Telephone communication was difficult; H.R., a native French speaker who understands some English, speaks French almost exclusively. Because Avery, the Barker social worker, did not speak French, one of Barker's secretaries who knew some French spoke with H.R. and recorded notes of the conversation. According to these notes, H.R. acknowledged his paternity. H.R. also requested clarification of the forms he had received in August and indicated that he did not understand the portion of the documents requiring him to give up his rights, particularly his right to see his son. H.R. told the secretary that the mails in Zaire were very bad and that he would be more likely to receive correspondence addressed to him in care of the Peace Corps in Zaire, an address Barker could obtain from L.C. According to the secretary's notes, H.R. also told her that he was expecting, shortly, to take a trip to France or to Canada during which he hoped to come to the United States to see his child. At no time during this conversation did Barker communicate to H.R. that he had a right to seek custody of his son, that a formal adoption proceeding had been instituted in which he had a right to contest his child's adoption, or that Barker had just recommended entry of an interlocutory decree of adoption in favor of the O. family.

Two days later, on January 19, 1984, Avery received a letter of January 12, 1984, from L.C. stating that she had recently received a letter from H.R., that H.R. did not consent to the adoption, that he would ***1147** ask for the baby as soon as possible, and that he planned to be studying in Canada in March and might come to Chicago or Washington at that time. In this letter, L.C. expressed strong opposition to H.R.'s gaining custody of the baby. [5]

On January 25, 1984, Judge Schwelb denied the petition for an interlocutory decree of adoption, noting his concern "that all reasonable steps have not been taken to contact [H.R.]." The judge observed that Barker's December report listed many of H.R.'s siblings, thereby suggesting "it would probably not be difficult to contact him." The judge stated that the court should not entertain the petition for adoption until proof was offered that "all reasonable steps to locate H.R. had been exhausted." According to Judge Schwelb, "[a]n Order to Show Cause directed to his last known address, without further reasonable inquiry into his present whereabouts, will *not* be sufficient." (Emphasis in original.)

Barker filed an addendum to its January report on February 1, 1984, informing the court of H.R.'s January 17 telephone call, his willingness to acknowledge paternity, his lack of clarity about the documents he received, particularly those pertaining to giving up his legal rights, and suggesting that he could be contacted in care of the Peace Corps in Kinshasa, Zaire, an address which L.C. could provide. The agency also summarized the letter it had received from L.C. reporting that H.R. desired custody of Baby Boy C. as soon as possible, that he had marked "no" on the consent forms, and that he planned to come to Canada in March. The addendum did not inform the court that H.R. had directly informed Barker in the January 17 telephone conversation that he might be travelling in France or Canada and that he hoped to come to the District of Columbia to see the baby. The report also failed to mention that H.R. had told Barker that mail delivery in Zaire was terrible, a fact suggesting, perhaps, an alternative form of service of process would be better.

On February 6, 1984, Barker sent H.R. a letter, translated into French, in which it purported to clarify the documents it had sent him. The letter was sent by Worldwide Courier to H.R. in care of the Peace Corps in Zaire. It stated in relevant part:

> Following your telephone call of January 17, 1984, I would like to try to explain to you the documents that we have sent you. These documents explain the adoption procedure.
>
> ... Since April 23, when she returned to the United States, [L.C.] has been in contact with the Barker Foundation.... [L.C.] takes comfort in knowing that her

child will be brought up by highly qualified parents who are ready to accept the ensuing responsibilities.

Legally, adoption in the United States must conform to strict procedures administered by the Courts, following which the child takes the name of his adoptive parents and enjoys the same rights and privileges and status as their own children. The laws concerning adoption protect the rights of the child, of the biological parents, and of the adoptive parents. After [L.C.] signed the documents giving up her rights as a parent, all responsibility for the child was transferred to the adoptive parents at the moment in which the child was placed with them.

Moreover, the law requires that an effort be made in good faith to inform the biological father of the plans for adoption. The documents that were sent to you in May 1983 and the letters from [L.C.] informed you of this. The letter that you received from the Barker Foundation requires your cooperation by requesting you to sign the documents of consentment to the adoption and to supply particulars that can be imparted to the adoptive parents and eventually to your child.

I can well imagine that you found this very painful and we wish to help you in ***1148** this matter in a way that is satisfactory for you. At the same time, we hope not to have to bring up again the matter of the adoption by this excellent family and who, according to [L.C.] and the adoption agency, meets the best interests of the child.

Do not hesitate to get in touch with us regarding this matter. [6]

Again, Barker did not mention that H.R. had a legal right to seek custody or that Barker was a party to formal adoption proceedings seeking to terminate H.R.'s parental rights in favor of the O. family. Nor did Barker provide any information about that proceeding. The letter also did not inform H.R. that Barker was gathering information for the court, including information ascertained in its communications with H.R., for the court's use in determining Baby Boy C.'s best interests. [7]

On March 5, 1984, Barker filed with the court another addendum to its December report, stating that it had sent H.R. a letter "inform[ing] him of the placement, the agency's work with [L.C.] and *his rights as the putative father of the child.*" (Emphasis added). The addendum also related the substance of L.C.'s February telephone conversation with H.R. in which he had told her that he could not accept the all-or-nothing nature of adoption (which would not allow him to see his child) and that he intended to seek custody for himself. The report noted that L.C. was satisfied that Baby Boy C.'s placement with the O. family was in his best interests and "that she is willing to assist in any way she is able to prevent the placement from being disrupted." After this addendum was received, internal court memoranda suggest that the court considered but did not issue an order to show cause why the adoption should not be granted. According to testimony and exhibits presented at the hearing, such a show cause order has been the vehicle through which the court gives notice to interested parties in a contested adoption case or when consent to adoption has not been obtained. Baby Boy C. was now seven months old.

In late April 1984, H.R.'s government sent him to Paris, France, to obtain a doctorate in international law, rather than to Canada as he had expected. H.R. and his wife, whom he had married in December 1983, telephoned L.C. twice in early May 1984 to inform her of their current situation. Appellant testified that during these conversations he asked L.C. to inform the Barker Foundation that he intended to come to the United States to take custody of Baby Boy C. when he had saved enough money. At the hearings, H.R. and L.C. had different recollections of this conversation. L.C. testified that H.R. told her he would consent to the adoption, and she passed this information on to Barker in a May 8, 1984 letter. H.R. testified that he had expressed his absolute opposition to the adoption but had said that he would consider sending in the biographical data form to Barker. Although appellant had given L.C. his Paris address during their telephone conversations, L.C. did not provide this address to Barker.

On May 22, 1984, Barker filed L.C.'s May 8 letter with the court, along with her letter of January 12 and an affidavit of Avery, stating that appellant was planning to sign the consent forms. The affidavit gave appellant's address as the Peace Corps in Zaire, even though H.R. had indicated in January that he might be moving to France and L.C. had informed Barker that H.R. in fact had just written to her from France. In June, L.C. wrote to H.R., stating that she did not want to hear from him again and sending him photographs of Baby Boy C. taken at birth. The baby was now ten months old.

On July 23, 1984, the court ordered Barker to translate a show cause order into French, ordering H.R. to appear in court on October 15, 1984, "to show cause ... why an order should not be made granting the ***1149** petition for adoption." Although, at this point, H.R. had received no notice that an adoption petition had been filed, the order commented that H.R. had "not initiated any action to either formally consent or to oppose the adoption." The order was sent to H.R. on August 15, 1984, by registered mail in care of the Peace Corps in Zaire.[8] Although Barker had not communicated directly with H.R. since January and had received intervening information indicating that he was in regular contact with L.C.-who had just reported him to be in Paris-no effort was made to ascertain H.R.'s current whereabouts. This was true despite the fact that Judge Schwelb's order in January denying the interlocutory decree of adoption had stated that the Order to Show Cause should not be issued unless specific inquiries were made as to H.R.'s current address. Neither the receipt nor the Order to Show Cause was returned to the court. H.R., who was living in Paris at the time the letter was mailed, testified that he did not receive it. Baby Boy C. was now one year old.

On October 15, 1984, Judge Riley entered an interlocutory decree of adoption in favor of the O. family, to become final on April 15, 1985, unless set aside for good cause shown. The order declared, among other things, that H.R. was withholding his consent to the adoption contrary to the best interests of the child. H.R., who had never received notice of the judicial adoption proceeding, was not present at the show cause hearing. According to H.R.'s later testimony, after three months of attempting unsuccessfully to gain assistance at the United States embassy, he finally met an official there who referred him to an American lawyer working in Paris. On November 30, 1984, on the advice of his attorney, H.R. formally acknowledged paternity in writing and filed it with his attorney. After his attorney had advised him that Barker was a legal adversary whom he must inform of his intention to seek custody in order to protect his legal rights, H.R. wrote a letter informing Barker that if it was not going to permit him the right to visit the child or to make decisions about the baby's future, H.R. was ready to assume custody of his child. H.R. also provided his Paris address. Although H.R. mailed this letter on December 1, 1984, Barker did not receive it until February 6, 1985. Barker filed a translation of this letter with the court but did not respond to it.

On February 25, 1985, appellant wrote Barker again, advising that he had retained an attorney and had admitted paternity. On the advice of his attorney, he asked Barker to inform the court that he did not intend to abandon his child. He stated that he would like to gain custody of his child by Baby Boy C.'s second birthday. He proposed that, once he gained custody, the O. family be allowed visitation rights during vacations. Barker received this letter on March 3, 1985, and filed it with the court on March 11, along with a translation. Again, Barker did not respond to H.R.'s letter. On April 5, Barker filed a final report, recommending entry of a final decree of adoption by the O. family.

On the basis of H.R.'s December 1, 1984, and February 25, 1985, letters to Barker, in which he expressed a refusal to consent to the adoption and indicated he had retained legal counsel, on March 21, 1985, Judge Riley issued an order to show cause as to whether the interlocutory decree of adoption should be set aside for good cause shown. On April 15, 1985, after considering the brief of the O. family and the Barker Foundation, Judge Riley ordered the interlocutory decree of adoption extended until June 30, 1985. The court also ordered H.R., through counsel, to file pleadings giving evidence as to why adoption of Baby Boy C. would not be in the child's best interests and to appear before the court before June 30, 1985 to give testimony on the issue. This order, served on H.R. at his Paris address, as well as on his attorney, was the first communication ***1150** he had received informing him of the adoption proceeding against him. Baby Boy C. was 20 months old at this time.

B. *June 1985 Hearing*

On June 28, 1985, H.R. appeared before the Family Division of Superior Court and moved to set aside the interlocutory decree of adoption. Hearings before Judge Riley began that day and were held on five other occasions throughout the next ten and one-half months. After an initial four-month delay to accommodate H.R., further hearing dates were again delayed for seven months to accommodate the court's schedule.[9] Testimony was taken from H.R., L.C., the O. family, Avery, a former Peace Corps volunteer who knew L.C. and H.R., Dr. Allen E.

Marans, an expert for the O. family qualified in child psychiatry, child-psychoanalysis, child development and adoption, and Dr. Joseph D. Noshpitz, an expert for H.R. qualified in child psychiatry but not qualified as an expert in adoption. Deposition testimony of H.R. and his wife was also admitted.

Dr. Marans, testifying in July 1985 on behalf of the O. family, had met with Baby Boy C., both adoptive parents, and Baby Boy C.'s older adoptive brother on several occasions during late June and early July 1985, both at his office and in the family home. Dr. Marans described Baby Boy C. as a happy, healthy, normal three-year-old child, fully integrated into the O. family. He said that the O. parents were emotionally stable, exceptionally sensitive parents, who were slightly overprotective of Baby Boy C. Concerning the effects of removing Baby Boy C. from the O. family, Dr. Marans stated that, although a child at three days or six weeks of age would suffer no permanent scar from a change in custody, such a change would be "devastating" to a child of 23 months, the age of Baby Boy C. at the time Dr. Marans testified. He described the period of life between one and one-half and two years as the rapprochement period, a critical time of integration when the child reaches a stage of separation and independence from the parents. Although the child is able to view other persons as separate individuals, the child can become quite frightened in realizing that the parents are not nearby. The effect is devastating if the parent does not return to remind the child of his or her past security. Dr. Marans testified that a child of 23 months would not be able to accept the natural father as a substitute for the only parents the child had known. He also testified that if the child were removed from the family at three years of age, the effect still would be devastating, but different, since three-year-olds are in the process of character development. Dr. Marans believed that Baby Boy C. had developed very strong ties to his adoptive parents and older brother.

Dr. Noshpitz met with Baby Boy C., his adoptive parents, and brother and with H.R. and his wife sometime after Dr. Marans did. Dr. Noshpitz testified in May 1986 when Baby Boy C. was three months shy of three years old. Like Dr. Marans, Dr. Noshpitz also testified that the O.s were warm and loving parents deeply attached to Baby Boy C. He also testified that Mr. and Mrs. R. were a devoted couple who could provide a loving home for Baby Boy C.[10] Concerning a transfer of custody, Dr. Noshpitz agreed with Dr. Marans that a transition in custody is more effective the earlier it takes place. He was concerned, however, that Baby Boy C. would suffer feelings of wonder and anger at a later stage when he learned that he was adopted and that his natural father had sought, but been denied, custody. Dr. Noshpitz advocated a period of transition over several years, during which H.R. and his wife would gradually assume custody. Dr. Noshpitz, agreeing with Dr. Marans, recommended against an immediate order transferring custody of Baby Boy C. to H.R. and his wife, stating that such transfer ***1151** "would create great turmoil and great pain" and would have "long-range, very traumatic effects" on the child's future development.

Dr. Marans testified in rebuttal that an arrangement of the sort proposed by Dr. Noshpitz was naive because it ignored the negative psychological effects such a plan would have on the child's security and identity. He agreed that Baby Boy C. would experience anger and resentment at learning that his natural father had sought to raise him, but he opined that the experience would not destroy the boy's personality. Dr. Marans further testified that Dr. Noshpitz's proposal was imaginative but completely untried and ignored the strength of the child's attachment to those who nurture him. Dr. Marans stated that the gradual transfer plan would create an everlasting sense of insecurity in Baby Boy C. and undermine his ability to trust in others.

C. *Trial Court Decision*

In Proposed Findings of Fact and Conclusions of Law submitted to the trial court after completion of the hearings, H.R. argued that the Barker Foundation and the O. family had violated the District of Columbia adoption statute by not providing H.R. with immediate notice of the filing of the adoption petition. H.R. also argued that Barker and the O. family had deprived him of due process of law by failing to inform him of his legal right to seek custody of Baby Boy C. and by failing diligently to ascertain H.R.'s whereabouts for purposes of serving him with the adoption petition. H.R. contended that, by failing to receive notice of the official adoption proceeding, he was precluded from coming forward to assert his constitutionally protected liberty interest in developing a relationship with his son before the baby had developed a relationship with the O. family. *See Lehr v. Robertson,*

463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983). H.R. then argued that he was entitled to custody of Baby Boy C. because he was fit to serve as his father; a best interests-of-the-child standard should not be applied, he said, because it failed to recognize his liberty interest in a relationship with his child-something that the O. parents did not have. According to H.R., the application of a best interests analysis would encourage adoption agencies to thwart a natural father's statutory and constitutional rights to notice and to deprive him of an opportunity to be heard at a meaningful time and in a meaningful manner. Under that analysis, he said, in the end the child's relationship with the adoptive parents would always enable those parents to prevail, without regard to the natural father's interests. H.R. argued, finally, that even if a best interests standard were applied, it would be more harmful to Baby Boy C. in the long run to be cut off from his natural father.

In its decision issued on September 11, 1986, the trial court rejected H.R.'s due process arguments. [11] The court concluded that H.R. had received all the constitutional protection he was due under Supreme Court jurisprudence. According to the court, "the efforts of Barker Foundation to contact [H.R.] far exceed[ed] the procedural protections upheld in *Lehr*." Even accepting H.R.'s argument under *Lehr* that natural fathers possess a so-called "opportunity interest" in developing a relationship with their children, the court concluded that H.R. had failed to grasp that opportunity and was himself responsible for some of the delay in receiving official notice of the adoption because he had failed to keep Barker informed of his changes of address. The court stated that H.R. had received a full and fair opportunity to present whatever arguments he had in support of his position that the adoption petition should be denied. The court concluded, moreover, that Barker had no obligation to inform H.R. of his legal rights. Finding lawful and appropriate-and applying-the "best interests of the child" standard, the trial court credited Dr. Marans' testimony over that of Dr. Noshpitz, who, according to the court, was not an expert in adoption and who admitted that his proposal for custody was untried and without precedent in adoption ***1152** situations. The court concluded that the "devastating" effect of removing Baby Boy C. from the O. family "could not be removed by the experimental and unprecedented gradual transition and custody that Dr. Noshpitz propose[d]." The court granted the petition for adoption by the O. family, finding by clear and convincing evidence, *see In re J.S.R.,* 374 A.2d 860, 864 (D.C.1977), that this was in the best interests of Baby Boy C.

II. OUTLINE OF OPINION

District of Columbia law governing custody of minor children has developed somewhat haphazardly since 1897. Significant amendments to the adoption and Family Division statutes in the 1970's, however, make statutory resolution of the present case at best a guess. These legal developments-covered next in Part III.-comprise an important background for understanding the claim of an unwed, noncustodial father, such as H.R., to custody of his child. Under the guardianship statute, D.C.Code § 21-101 (1989), there has long been a presumption favoring a natural parent's custody of a minor child, absent a showing of parental unfitness, when another adult or the welfare authorities have sought custody. In other contexts, however, courts have kept the parent on an equal footing with other would-be custodians and have decided custody in the "best interests of the child". They have done so, for example, under the adoption statute, *id.* §§ 16-304(e), -309(b)(3), the neglect statute, *id.* § 16-2320(a), and the statute governing termination of parental rights, *id.* §§ 16-2353, -2359(f) (1989). In considering the rights of an unwed, noncustodial father confronted by strangers seeking adoption of his child upon its surrender by the mother at birth, a court confronts a question without a discernible answer: whether, under the adoption statute, the child's "best interests" should be defined by reference to the parental preference favoring the father under the guardianship statute, or should be resolved by considering the father's and the adoptive parents' respective claims without giving priority to either. I believe that any statutory analysis would yield an arbitrary result derived either from selection of statutory canons of construction or from the court's own policy views. Such a result can be avoided by focusing on constitutional considerations which the Supreme Court has imposed on the analysis.

Beginning in the early 1970's and extending into the 1980's, the Supreme Court has issued significant constitutional decisions bearing on an unwed father's rights. This important legal chapter is analyzed in Part IV. Here I conclude that, despite the absence of a substantive statutory right, the unwed father has a substantive, constitutionally protected liberty interest under the fifth amendment-now commonly called an "opportunity interest"-in gaining custody of his child.

Part V. considers whether appellant H.R.'s "opportunity interest" is still intact. I conclude that it is. State action, violating H.R.'s right to procedural due process under the fifth amendment, has interfered with H.R.'s early assertion of his claim-his "opportunity"-for custody of Baby Boy C. This interference tolled the running of the period within which H.R. had to make a timely assertion of his interest in custody.

Finally, in Part VI., I consider how to apply the father's "opportunity" interest in a contested adoption proceeding. I conclude that when, as here, an unwed, noncustodial father has not lost his "opportunity interest," the Constitution entitles him, if found fit to be a parent, to the benefit of a preference of the sort long established under the guardianship statute, D.C.Code § 21-101 (1989), *i.e.,* to a custodial preference over would-be adoptive parents unless the court finds by clear and convincing evidence that the father's custody would be detrimental to the best interests of the child. I trace our local caselaw in this area, much of which comprises constitutional rulings in the late 1970's, and conclude that, while our decisions routinely have applied a "best interests" test without a parental preference, none is directly on point and none would preclude the result reached here. As a consequence, because ***1153** the trial court applied a traditional "best interests" balancing test, not a "fitness" test with its parental preference, we must reverse and remand for further proceedings.

III. DISTRICT OF COLUMBIA STATUTORY AND COMMON LAW

In cases contesting child custody, the courts of this jurisdiction have issued two lines of decisions which we occasionally have said may be difficult to reconcile: (1) those awarding custody to the natural parent absent a showing of unfitness (a "fitness" test), and (2) others permitting termination of parental rights in the "best interests of the child" without a required showing of parental unfitness (a "best interests" test). [12] Analysis of these cases shows they do not clearly reveal an answer to the claim to custody by an unwed, noncustodial father when the mother surrenders their child at birth for adoption by strangers.

A. *Statutory and Common Law Through 1976*

In this jurisdiction, the awarding of custody in the "best interest" of the child as the "paramount" consideration originated in *Wells v. Wells,* 11 App.D.C. 392, 395 (1897), a case in which each divorcing spouse, as a natural parent, had an equal claim to custody. *See also Seeley v. Seeley,* 30 App.D.C. 191, 193 (1907) (same), *cert. denied,* 209 U.S. 544, 28 S.Ct. 570, 52 L.Ed. 919 (1908). Five years after *Wells,* in a case where the father of eleven-year-old twins died and their mother remarried-and the children's maternal grandmother and aunt sought custody-the court, citing *Wells,* acknowledged once again that the "paramount consideration" was the "permanent advantage and welfare of the children." *Beall v. Bibb,* 19 App.D.C. 311, 313 (1902). But, to that end, the court recognized the mother's "preferential claim" over any nonparent, absent a finding of unfitness based, for example, on "abandonment" or "misconduct." *Id.* at 313-14 (citing cases from other state courts).

In light of *Beall,* the guardianship statute has been construed over the years to give natural parents, including a surviving parent, priority-absent a showing of unfitness-over a variety of nonparents who have contested the custody of minor children. *See* D.C.Code § 21-101 (1989); *Shelton v. Bradley,* 526 A.2d 579 (D.C.1987) (unwed father prevails over maternal grandmother); *Davis v. Jurney,* 145 A.2d 846 (D.C.1958) (mother prevails over husband's sister); *Bell v. Leonard,* 102 U.S.App.D.C. 179, 251 F.2d 890 (1958) (mother prevails over sister of child's alleged father); *see also Johnson v. Lloyd,* 211 A.2d 764 (D.C.1965) (mother prevails over married couple with whom four-year-old child had resided for over three years); *Jackson v. Fitzgerald,* 185 A.2d 724 (D.C.1962) (father prevails over maternal grandmother). [13]

In another relatively old case, *In re Stuart,* 72 App.D.C. 389, 394, 114 F.2d 825, 832 (1940), the court similarly applied a parental preference in reversing a trial court ruling on a petition filed by the Probation Department of the Juvenile Court. The trial court found that a fifteen-year-old child living with her mother did not have "adequate parental care," within the meaning ***1154** of the Juvenile Court Act. 52 Stat. 596, ch. 309 (June 1, 1938). In contrast with the decisions discussed in the preceding paragraph, the trial court awarded custody to an unrelated person with whom the child, apparently,

had never resided. The court of appeals reversed, ruling that the trial court's finding of inadequate parental care was "without warrant" in the evidence and thus violated the 1938 Act's incorporation of the natural parents' inherent constitutional "right" and "liberty" to "direct the upbringing and education of their children," absent "cruelty" or "neglect" or "unfit[ness] in character or mode of life." *Stuart,* 72 App.D.C. at 394, 396, 114 F.2d at 830, 832 (citing *Pierce v. Society of Sisters,* 268 U.S. 510, 533, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925)).

In contrast with the cases in which parental preference was considered a rebuttable presumption (*i.e., Beall, Seeley, Shelton, Davis, Bell, Johnson, Jackson,* and *Stuart*), later courts shifted to a "best interests" test, without regard to parental preference, in cases where a natural parent had earlier surrendered custody of her child to the welfare authorities (voluntarily or otherwise) or to an adoptive family and later sought to regain custody. *See In re N.M.S.,* 347 A.2d 924 (D.C.1975) (foster parents, not mother, awarded custody in best interests of nine-year-old girl whom mother had voluntarily surrendered to Social Rehabilitation Administration when child was four days old); *In re LEM,* 164 A.2d 345 (D.C.1960) (mother permanently deprived of parental right to minor child, committed for two-and-one-half years to Child Welfare Division for lack of "adequate parental care," whose best interests lay in Division's being in position to consent to adoption); *Cooley v. Washington,* 136 A.2d 583 (D.C.1957) (custody determination reversed for application of best interests criteria to contest over thirteen-year-old boy between natural mother-who had surrendered child for adoption by her sister and brother-in-law, both now deceased-and child's stepmother, the brother-in-law's second wife); *Holtsclaw v. Mercer,* 79 U.S.App.D.C. 252, 145 F.2d 388 (1944) (foster parents of three-and-a-half year-old child retained custody in child's best interest when mother, who had relinquished child at birth, sought to regain custody on ground she had consented to arrangement under duress). [14]

Three of these four cases reflect the court's view that in "seeking to regain-not retain-custody," *N.M.S.,* 347 A.2d at 927, the natural parent by her earlier actions has put herself on an equal footing with the state, or with another nonparent, and thus, as a result, "what is best for the child, rather than the natural right of the parent, is the controlling factor." *Holtsclaw,* 79 U.S.App.D.C. at 252, 145 F.2d at 388. Put another way, "the probable welfare of the child is the controlling consideration[,] and all questions of superior rights are entirely subordinated." *Cooley,* 136 A.2d at 585 (footnote omitted). In sum, in a situation where there previously had been an acknowledgement or finding of unfitness resulting in a temporary withdrawal of custody from the natural parent, in a subsequent custody proceeding the fitness test yielded to a best interests test. Implicit in these rulings, with their language subordinating parental rights to a child's welfare, is the following understanding: although a child's interests ordinarily may be best served by granting custody to a fit parent, it is possible in some circumstances that the child's interests may be better served by someone other than a concededly fit parent.

***1155** The fourth "best interests" case, *LEM,* added another dimension. It recognized that the prospect for adoption is an especially significant concern in evaluating the child's best interests. 164 A.2d at 347. As a consequence, the court authorized termination of parental rights with a view to facilitating adoption, although not in connection with an adoption proceeding itself. The opinion noted that "[n]o attack is made on the court's statutory power to act as it did, and indeed none could be sustained in view of the court's plenary power in this area." *Id.,* 164 A.2d at 349.

Whatever the merits of this last observation at the time, it no longer applied to the statutory scheme adopted in 1970. *See* D.C.Code §§ 16-2301 to -2337 (1973) (incorporating Pub.L. 91-358, title I, § 121(a), 84 Stat. 535 (July 29, 1970)). In *In re C.A.P.,* 356 A.2d 335 (D.C.1976), we stated that D.C.Code § 16-2320(a) (1973), while permitting the termination of parental rights, did so "only in the context of an adoption proceeding.... [T]he *sine qua non* is that the adoptive parents petition the court for the child" pursuant to D.C.Code §§ 16-301 to -315 (1973). *C.A.P.,* 356 A.2d at 338; *see White v. N.E.M.,* 358 A.2d 328 (D.C.1976) (same). We held that Super.Ct.Neg.R. 18(c), which,-in apparent implementation of a catchall provision, § 16-2320(a)(5) [15] -expressly permitted termination of parental rights "in the best interest of the child" without regard to a pending adoption proceeding was, in essence, a nullity. *See C.A.P.,* 356 A.2d at 336 & n. 1, 339 & n. 13, 344. As a result of *C.A.P.,* parents enjoyed greater protection of their parental rights; a court could consider terminating parental rights only if an adoption petition was pending.

Within the realm of adoption, however, the courts virtually ignored the parental rights of fathers of children born out-of-wedlock. In 1976, when *C.A.P.* was decided, the adoption statute did not require the consent of the father of a child born out-of-wedlock. *See* D.C.Code § 16-304(b)(2)(A), (C) (1973). Aside from constitutional considerations, any question of parental rights in an adoption proceeding as to a child born out-of-wedlock focused exclusively on the rights of the mother. But, even the rights of unwed mothers, as well as those of married parents, were statutorily limited. It is true that adoption was typically premised on consent, *see id.* § 16-304(b), or on an earlier relinquishment of parental rights, *see id.* § 16-304(a), coupled with a finding (among others) that "the adoption will be for the best interests of the prospective adoptee," *id.* § 16-309(b)(3). The court, however, could grant the petition for adoption without a particular consent under certain circumstances: if the parent could not be located or had abandoned the child, *id.* § 16-304(d), or if the court found, after a hearing, that the consent was "withheld contrary to the best interests of the child," *id.* § 16-304(e). *Cf.* D.C.Code § 16-202 (1951) (consent may be dispensed with when investigation has shown "extraordinary cause"). In this respect, the adoption statute reflected the same "best interest" test which had been applied for dispositions of neglected children whose natural parents had voluntarily or involuntarily surrendered custody.

The caselaw development through 1976, therefore, reflects the following:

1. In a contest over custody of a minor child between a parent and a foster parent, or between a parent and the District of Columbia child welfare authorities, the natural parent would prevail absent a showing of unfitness (including neglect)-with the following significant exception.

2. When there had been a surrender of custody to the child welfare authorities at ***1156** the instance of the natural parent, or pursuant to court order upon a petition by the welfare authorities and a showing of neglect, any subsequent custody decision would be made exclusively with reference to the best interests of the child, and the parent would stand on no better footing than other participants (such as foster parents) seeking custody. Theoretically, therefore, a non-parent could obtain legal custody of the child in this situation without showing (current) parental unfitness.

3. After the *C.A.P.* decision in 1976, the courts could continue with a variety of dispositions for neglected children, such as foster care, in the best interests of the child, but they had no authority to terminate parental rights for neglect or otherwise, except in connection with an adoption proceeding.

4. As to children born out-of-wedlock, the court could approve an adoption in the child's best interests after the mother had relinquished her parental rights, or with the consent of the mother (or, when appropriate, by overriding her refusal to consent), without notice to, or consent of, the father-even if he were known.

B. *Statutory Developments: Termination of Parental Rights*

Effective September 23, 1977, the Council of the District of Columbia in effect overruled *C.A.P.* by amending the law to permit termination of parent and child relationships "in the best interests of the child," D.C.Code § 16-2353 (Supp. V 1978), wholly apart from an adoption proceeding (as then codified at D.C.Code § 16-301 to § 16-315 (1973 & Supp. IV 1977)). This statutory "best interests" test for termination proceedings, codified in the same section of the current D.C.Code, reflected the language of a considerable body of caselaw and paralleled the long-standing approach under not only the statutes governing dispositions of neglected children, *see, e.g.,* D.C.Code § 16-2320(a) (1973), but also our local adoption statutes, *see, e.g.,* D.C.Code § 16-203(c) (1951) ("the change will be for the best interests of adoptee"); *id.* § 16-309(b)(3) (1989) ("the adoption will be for the best interests of the prospective adoptee"). In contrast with the adoption statute, however, and even as amended, the termination statute continues to focus on the capabilities of the natural parent, thereby allowing that parent to defend against attacks on his or her capabilities wholly apart from, and not in comparison with, other custodians or potential adoptive parents.

C. *Statutory Developments: Adoption*

Could there be, however, any reason to believe that, in contrast with the termination statute, D.C.Code § 16-2353 (1989), the adoption statute, with its traditional "best interests" language, *see* D.C.Code §§ 16-304(e), -309(b)(3) (1989), nonetheless incorporated a parental preference with a corresponding "fitness" test under some circumstances? Of the seven custody cases applying a fitness test discussed earlier-*Beall, Shelton, Davis, Bell, Johnson, Jackson,* and *Stuart*-only one, *Bell,* concerned a petition for adoption. That aspect of the case was not material to the analysis, which was the same in all these cases without regard to the type of custody sought. As elaborated below, I perceive no basis for saying that termination of parental rights of a non-consenting parent under the adoption statute can be divorced from analysis under the termination statute.

More specifically, absent a parent's consent to adoption (or earlier relinquishment of parental rights), a court cannot enter an interlocutory decree of adoption under D.C.Code § 16-309(b) (1989)[16] and override a ***1157** parent's refusal to consent as "contrary to the best interests of the child," *id.* § 16-304(e) (1989),[17] unless the parent's custodial rights are terminable under criteria such as those identified in the termination statute, *id.* § 16-2353 (1989) (grounds for termination of parent and child relationship).[18] *Cf. In re D.R.M.,* 570 A.2d 796, 804-05 (D.C.1990).[19] Thus, even if the birth mother were to consent to an adoption, the court could not terminate the parental rights of the nonconsenting father through an adoption proceeding-assuming his consent were required-unless, as to him, § 16-2353-type criteria were met.

As indicated earlier, however, consent to adoption of a child born out-of-wedlock traditionally has been limited to the mother; the unwed father, at least as a matter of statutory law, has had no standing to object. *See* D.C.Code § 16-304(b)(2)(A), (C) (1973). But in 1976, perhaps in anticipation of constitutional requirements,[20] the adoption statute was amended to require the consent of a father of a child born out-of-wedlock. *See* D.C.Code § 16-304(b)(2)(A) (Supp. IV 1977) (incorporating D.C. Law 1-87 (Oct. 1, 1976) which struck paragraphs C and D, and modified paragraph A).[21]

Accordingly, given the fact that an unwed father was now entitled to notice and to consent-or to object-to an adoption proceeding when the mother elected, for example, to surrender the child for adoption at birth, we must ask whether the *Beall-Davis-Bell-Jackson-Johnson-Shelton* line of cases grants the father-who has never been formally charged with neglect or other elements of unfitness-a custodial preference in such circumstances. In *Shelton,* a 1987 case, we applied the guardianship statute, D.C.Code § 21-101 (1989), see *supra* note 13, in granting custody to the child's unwed father-with whom the child had lived "on some occasions," 526 A.2d at 580-over the maternal grandmother upon the death of the child's mother. There was no issue of unfitness or neglect. We recognized that the custodial presumption in the father's favor is rebuttable only "by clear and convincing evidence of abandonment, unfitness, or other circumstances which render the parent's custody detrimental to the best interests of the child." *Id.* (citations omitted). At first blush, therefore, it would appear this statute should apply on behalf of the father when a mother puts a child up for adoption, for ***1158** the statute is not limited to cases of a surviving parent. *See Davis; Bell.*

On the other hand, it is not clear that the guardianship statute, with its parental preference, is intended in all cases to prevail over the adoption statute, with its "best interests" test. It is difficult to conclude, purely as a matter of statutory construction, that an unwed, noncustodial father who has not helped attend to the child before or after birth belongs exclusively in the guardianship arena, not in the adoption-termination arena. This is especially true because the guardianship statute is almost ninety years old, see *supra* note 13, whereas the fathers of children born out-of-wedlock were not even party to the adoption process until 1976.

It is one thing to say that, as between a natural parent and another relative or family friend-both of whom have had a relationship with the minor child-the parent presumptively should have custody, which is what the *Beall* to *Shelton* line of cases under the guardianship statute stands for. It is not as easy to find statutory support for the proposition that, when an unwed mother surrenders her child for adoption and the father is nowhere to be found at the time the adoption agency takes physical custody, the guardianship statute nonetheless accords that father-if ever found-presumptive custody. It is just as persuasive to say that, in such circumstances, any such presumptive custody has been rebutted by the father's ostensible abandonment of the child, putting the statutory burden on him and on the would-be adoptive parents to

assert their respective claims on an equal footing under the "best interests" test, as in *Holtsclaw, Cooley, LEM,* and *N.M.S.*

To make matters even more complicated, one can imagine an unwed father whose claim to custody, as in *Shelton,* appears so deserving relative to any other solution that he should be accorded presumptive custody. One can also imagine unwed fathers whose indifference to the child has been so obvious that his refusal to consent to adoption after the mother has surrendered the child should not be enough to trigger a presumption favoring his right to custody over an adoptive family, even if he is not demonstrably unfit. The District of Columbia adoption and termination statutes, however, as well as our local caselaw, provide no basis for concluding that some unwed fathers are entitled to a custodial preference while others are not.

Accordingly, it would appear that selecting one statutory approach or the other in a particular case, in the absence of any relevant legislative history whatsoever, would be a decision for the court to make in a relatively new context based either on an arbitrary selection among canons of statutory construction or on policy-oriented criteria selected by the court. We could take either approach and purport to make a sound statutory construction, but either has obvious limitations in the absence of an easily accessible statutory answer.

There is a better approach. Given recent caselaw development in the Supreme Court, in this court, and in other courts around the country, it is clear that the judiciary has employed the Constitution to provide substantive content to unwed fathers' custodial claims. Fifty years ago in *Stuart,* the United States Court of Appeals for the District of Columbia Circuit construed the Juvenile Court Act of 1938 to conform to the court's understanding of constitutional requirements: a custodial preference for the custodial parent, absent a showing of unfitness in a neglect case.[22] If the Constitution were so to require in the context of an unwed, noncustodial father, then the question of statutory construction would be resolved, as in *Stuart,* by constitutional imperative. Having "read ahead," so to speak, I am satisfied that constitutional analysis provides a more useful approach to the question-"fitness" ***1159** test or "best interest" test?-than a rendezvous with canons of statutory construction or with our own reasoned (or instinctive) policy views.

I therefore turn to recent constitutional developments, in order to learn where a noncustodial, unwed father stands in a proceeding for adoption of his child by strangers. How prophetic for this context, if at all, was *Stuart's* ruling that the Constitution protects a natural parent's "inherent" right to custody absent unfitness? *See id.,* 72 App.D.C. at 394, 396, 114 F.2d at 830, 832.

IV. THE UNWED FATHER'S "OPPORTUNITY INTEREST"

A. *Supreme Court Caselaw*

H.R. contends he has a substantial "liberty" interest under the due process clause in developing a parental relationship with his son. I agree. The Supreme Court has long recognized that state intervention in the relationship between a parent and child is subject to constitutional oversight, *see Pierce v. Society of Sisters,* 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 399-401, 43 S.Ct. 625, 626-27, 67 L.Ed. 1042 (1923). And, of course, fifty years ago in *Stuart* the United States Court of Appeals identified "the liberty of parents to direct the upbringing and education of their children" as a constitutional right. 72 App.D.C. at 396, 114 F.2d 825. More recently, the Supreme Court has reiterated "that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection." *Lehr,* 463 U.S. at 257, 103 S.Ct. at 2991. The Court, however, in discussing the interests of unwed fathers in preventing termination of their relationships with their children, has treated differently the claims of fathers who have had custodial relationships with their children by the time of the termination proceeding and those who have not.

In *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), the state placed the children of unwed parents in guardianship after their mother's death over objection of their natural father, who had lived with and supported them all their lives. The Court held, as a matter of due process and equal protection, that the state could not deprive the father of custody without notice, hearing, and proof of his unfitness for parenthood.

Several years later, moreover, in *Caban v. Mohammed,* 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979), the

Court struck down a New York statute that permitted consent to adoption exclusively by the mother of a child born out-of-wedlock. As in *Stanley,* the natural father had lived with his two children and their mother, and supported them, for several years. After the mother had left with the children, remarried, and gained legal custody, the mother's new husband sought to adopt the children over the natural father's objection. The New York courts applied the statute and granted the adoption. The Supreme Court reversed, holding that, by permitting such adoption without consent of the father, the statute imposed a gender-based discrimination that did not bear a substantial relation to some important state interest, in violation of the equal protection clause. The Court eschewed discrimination

> against unwed fathers ... when their identity is known and they have manifested a significant paternal interest in the child. The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children.

Id. at 394, 99 S.Ct. at 1769.

In contrast, in *Quilloin v. Wolcott,* 434 U.S. 246, 255, 98 S.Ct. 549, 554, 54 L.Ed.2d 511 (1978), where the unwed father had not "at any time, had, or sought, actual or legal custody of his child," the Court upheld an adoption decree terminating the father's parental rights under Georgia's "best interests of the child" standard and granting legal custody to the eleven-year-old child's mother and stepfather. In upholding the adoption, the Court stated that due process would no doubt be violated if the state were "to attempt to force the breakup of a natural family" on the basis ***1160** of the "children's best interest" without some showing of parental unfitness. *Id.* (quoting *Smith v. Organization of Foster Families For Equality and Reform,* 431 U.S. 816, 862-63, 97 S.Ct. 2094, 2119, 53 L.Ed.2d 14 (1977) (Stewart, J., concurring in judgment)). But, the Court noted, the result of the adoption was "to give full recognition to a family unit already in existence." *Quilloin,* 434 U.S. at 255, 98 S.Ct. at 555. The Court implied that the outcome would have been different if the proposed adoption had placed "the child with a new set of parents with whom the child had never before lived." *Id.*

Read together, these cases say that an unwed natural father who has had a custodial relationship with his child cannot be ousted as a parent at the mother's behest-absent a showing of his unfitness-in favor of a foster parent (*Stanley*) or an adoptive stepfather (*Caban*), but that an unwed father who has not developed a custodial relationship, though fit to be a parent, can lose his parental rights to an adoptive stepfather when the best interests of the child preclude disruption of "a family unit already in existence" (*Quilloin*). [23]

What, then, is to occur if an unwed father (1) has never had a relationship with his child but (2) seeks custody when a "proposed adoption would place the child with a new set of parents with whom the child had never before lived"? *Quilloin,* 434 U.S. at 255, 98 S.Ct. at 555. The Court addressed that question-at issue in this case-in *Lehr.* Basically, the Court concluded the answer turns on how early and persistently the natural father pursues his interest in taking custody of the child so as to justify keeping the father presumptively first in line, so to speak, when the natural mother elects to put the child up for adoption.

According to the Court in *Lehr,* when an unwed father "demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' *Caban,* 441 U.S. at 392, 99 S.Ct. at 1768, his interest in personal contact with his child acquires substantial protection under the Due Process Clause." *Lehr,* 463 U.S. at 261, 103 S.Ct. at 2993. The Court noted that "the mere existence of a biological link does not merit equivalent constitutional protection." *Id.* But,

> [t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. *If he grasps that opportunity and accepts some measure of responsibility for the child's future,* he may enjoy the blessings of the parent-child relationship and make uniquely

> valuable contributions to the child's development.

Id. at 262, 103 S.Ct. at 2993 (emphasis added). Thus, the Court has characterized the unwed, noncustodial father's protectible liberty interest as an "opportunity" he must "grasp[ ]." Courts and commentators accordingly have relabelled this particular liberty interest of a natural father as his "opportunity interest." *See In re Baby Girl Eason,* 257 Ga. 292, 358 S.E.2d 459 (1987); Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 OHIO ST. L.J. 313, 351-53 (1984) [hereinafter Buchanan, *Constitutional Rights*]. It follows that a noncustodial, unwed father who has grasped his opportunity interest will, as a matter of ***1161** substantive constitutional right, be in the same position as the custodial father in *Stanley:* entitled to an "individualized hearing on fitness." 405 U.S. 645, 657 n. 9, 92 S.Ct. 1208, 1215 n. 9. *See* Buchanan, *Constitutional Rights,* at 354, 373.

Because a noncustodial father may not grasp the opportunity to develop a relationship with his child in a timely, meaningful manner, his eventual assertion of his opportunity interest may be too late and thus not entitled to the constitutional protection available to a custodial father. In *Lehr,* for example, the Court upheld against a due process challenge an adoption decree granting legal custody to the child's mother and stepfather, even though the natural father had not been notified of, or allowed to participate in, the adoption proceeding. By the time the petition for adoption was filed, Lehr had failed to establish a parental relationship with his two-year-old daughter attributable in large part to the mother's desire to prevent contact between them. Significantly, however, Lehr also had failed to submit his name to New York's putative father registry, an action that would have guaranteed he received notice of any action to terminate his parental rights. *Lehr,* 463 U.S. at 250-52, 103 S.Ct. at 2987-89. The Supreme Court concluded that, under the circumstances, the New York statutory scheme, designed "to protect the unmarried father's interest in assuming a responsible role in the future of his child," provided sufficient process by guaranteeing putative fathers "who have never developed a relationship with the child the opportunity to receive notice simply by mailing a postcard to the putative father registry." *Id.* at 262 n. 18, 103 S.Ct. at 2993 n. 18. Because Lehr did not have a significant custodial, personal, or financial relationship with his child at the time notice would have been sent, *id.* at 263, 103 S.Ct. at 2994, and because he had failed to take advantage of his statutory right to establish a legal tie, the Court concluded there was no due process violation in terminating his parental rights without advance notice. *Id.* at 265, 103 S.Ct. at 2995. According to the Court, Lehr's failure to avail himself of state statutory protections meant that he was not entitled to notice. "The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights." *Id.* at 265, 103 S.Ct. at 2995. In short, the Supreme Court concluded that the putative father registry scheme afforded Lehr the minimum notice *Stanley* required, *see Lehr,* 463 U.S. at 263-64 & n. 20, 103 S.Ct. at 2994-95 & n. 20, and that the proposed adoption was responsive to *Quilloin's* support for recognition of a family unit already in existence. *Id.* at 262 & n. 19, 103 S.Ct. at 2994 & n. 19.

Lehr, therefore, "limits the situations in which the state must take account of a father with only an opportunity interest." Buchanan, *Constitutional Rights,* at 354. But *Lehr* implies that an unwed father who does grasp his opportunity interest may be as constitutionally protected as the custodial father in *Stanley. See* Buchanan, *Constitutional Rights,* at 373.

B. *Grasping the "Opportunity Interest"*

Lehr is significant, therefore, especially for the present case, because the Supreme Court announced for the first time how an unwed father can receive constitutional protection of his interest in a child with whom he has not had a custodial relationship. *Lehr* makes clear that, in a proceeding to determine child custody, a noncustodial, unwed father who moves quickly and responsibly can achieve constitutionally mandated priority over prospective adoptive parents who have received the child at birth and do not yet have an established family relationship with that child. *See* Buchanan, *Constitutional Rights,* at 373. I therefore turn, more specifically, to what it means for a noncustodial father to grasp his opportunity interest in a manner entitling him to constitutional protection.

As *Lehr* illustrates, a natural father who fails promptly to assert his opportunity interest in developing a relationship with his child may forever lose that interest. *See Eason,* 257 Ga. at 295, 358 S.E.2d at 462 ***1162** (opportunity

interest "not indestructible"). Elizabeth Buchanan notes, moreover, that

> [c]hildren are not static objects. They grow and develop, and their proper growth and development require more than day-to-day satisfaction of their physical needs. Their growth and development also require day-to-day satisfaction of their emotional needs, and a primary emotional need is for permanence and stability.... That need for early assurance of permanence and stability is an essential factor in the constitutional determination of whether to protect a parent's relationship with his or her child. The basis for constitutional protection is missing if the parent seeking it does not take on the parental responsibilities timely. The opportunity is fleeting. If it is not, or cannot, be grasped in time, it will be lost.

Buchanan, *Constitutional Rights,* at 364 (footnotes omitted).

Of course, once the state places an infant with a prospective adoptive family, the natural father is precluded from establishing a parental relationship with his child, and any failure to establish personal, custodial, or financial ties with the child after such placement cannot automatically be characterized as abandonment. On the other hand, at least two courts have found relevant to a finding of abandonment the fact that a natural father knew of the mother's pregnancy but failed to express an interest in a parental role or to assume any responsibility for the pregnancy or the newborn before adoptive parents assumed custody of his child near the time of the child's birth. *See, e.g., In re Adoption of Baby Boy D,* 742 P.2d 1059, 1068 (Okla.1985) (unwed father not entitled to substantial constitutional protection where he knew of pregnancy, yet made no attempt to assist mother financially during pregnancy, pay for expenses related to childbirth, or learn when and where child was to be born), *cert. denied,* 484 U.S. 1072, 108 S.Ct. 1042, 98 L.Ed.2d 1005 (1988); *In re Adoption of Doe,* 543 So.2d 741, 749 (Fla.1989) (not unconstitutional to deny substantial due process protection to father who fails to provide prebirth assistance to mother when he is able and assistance is needed). As the Supreme Court of Florida recently stated:

> Because prenatal care of the pregnant mother and unborn child is critical to the well-being of the child and of society, the biological father, wed or unwed, has a responsibility to provide support during the prebirth period. [A] natural father's argument that he has no parental responsibility prior to birth and that his failure to provide prebirth support is irrelevant to the issue of abandonment is not a norm that society is prepared to recognize. Such an argument is legally, morally, and socially indefensible.

Id. at 746.

In sum, a court evaluating a father's assertion of his opportunity interest is entitled to focus on the extent of the father's involvement as soon as he learns of the pregnancy. On the other hand, the court must also recognize the limitations state action can impose on a noncustodial father once the child is placed with another family.

Given the caselaw to date, I believe the question whether a particular unwed, noncustodial father's opportunity interest will be entitled to substantial protection under the due process clause depends upon application of such factors as (1) the presence or absence of an established relationship between the child and an existing family; (2) whether the father has established a custodial, personal, or financial relationship with his child, or assumed responsibilities during the mother's pregnancy; (3) the impact, if any, of state action on the father's opportunity to establish a relationship with his child; (4) the age of the child when the action to terminate parental rights is initiated; and (5) the natural father's invocation or disregard of statutory safeguards designed to protect his opportunity interest. Considering these factors, I conclude that, when an unwed mother has relinquished her right to custody of a child at birth for adoption by strangers, the unwed father's interest in developing a custodial relationship with his child is entitled to substantial constitutional protection if he has early on,

and continually, done all that ***1163** he could reasonably have been expected to do under the circumstances to pursue that interest. *See Eason,* 257 Ga. at 295, 358 S.E.2d at 462 (unwed fathers gain from biological connection an opportunity interest to develop relationship with children which is constitutionally protected); *In re Adoption of Lathrop,* 2 Kan.App.2d 90, 95, 575 P.2d 894, 898 (1978) (due process requires that natural father who asserts desire for custody of infant child have rights paramount to those of non-parents); *In re Adoption of Baby Boy Doe,* 717 P.2d 686 (Utah 1986) (termination of unwed father's parental rights violated due process where father unable to assert his rights under statute because he did not know of birth of child); *Ellis v. Social Services Dept.,* 615 P.2d 1250, 1256 (Utah 1980) (due process violated where parental rights are terminated under statute and father not permitted to show he was not afforded a reasonable opportunity to comply with statutory requirements); *Shoecraft v. Catholic Social Serv. Bureau, Inc.,* 222 Neb. 574, 578, 385 N.W.2d 448, 451 (1986) (statutory scheme requiring unwed father to file intent to claim paternity within five days of child's birth may well violate due process rights where father did not know of birth) (dicta), *appeal dismissed,* 479 U.S. 805, 107 S.Ct. 49, 93 L.Ed.2d 10 (1986).

C. *Distinguishing* Lehr v. Robertson

Before evaluating whether H.R. can be said to have grasped his opportunity interest sufficiently to warrant constitutional protection, we must understand how *Lehr*-where the father was deemed to have abandoned that interest-differs from the present case in several important respects.

In the first place, there are substantial factual differences. This case concerns the rights of a natural father when (1) the natural mother relinquishes her rights to custody of her child at birth, and (2) the petition for adoption is filed by strangers when the child is still an infant. *Lehr,* in contrast, concerned a stepfather's adoption of a child who, at the time the petition for adoption was filed, had lived for two years in an existing family unit with her natural mother and adoptive father, as in *Quilloin.* This factual difference has two important implications. First, the *Lehr* opinion made much of Lehr's failure to have developed a father-daughter relationship with his two-year-old child by the time the adoption petition was filed (even though the mother had taken steps to prevent that relationship). It is impossible, however, to find a failed parental relationship under the facts of the present case. Here, when H.R. finally learned that L.C. had continued her pregnancy to term and given birth to Baby Boy C., the state had already placed the child in an adoptive home, cutting off any possibility for H.R. to establish a parental, custodial, or financial relationship with his child until the official adoption proceedings were resolved. Second, the Supreme Court was unwilling to grant Lehr a constitutionally protected interest because recognition of the natural father's interest at the time the adoption petition was filed would have meant disrupting an existing family relationship among the natural mother, stepfather, and child. Again, in contrast, there were no established family relations in place when the Barker Foundation placed one-month-old Baby Boy C. with the O. family and the adoption petition was filed. Recognition that fathers of newborn infants have a substantial liberty interest in developing parental relations with their children does not disrupt established family relations. *See Quilloin,* 434 U.S. at 255, 98 S.Ct. at 554 (upholding step-parent adoption resulting in "full recognition [of] a family unit already in existence" and implying outcome would have been different if proposed adoption had placed "the child with a new set of parents with whom the child had never before lived"). As Elizabeth Buchanan notes:

> [W]hen a natural mother formally consents to the adoption of her child by strangers, whether the child is an infant or an older child, the effect of her consent is legal authorization of the placement of the child was a new set of parent figures, not the validation of an already existing parent-child relationship.... Protection of the father's opportunity interest in such circumstances would not ***1164** run afoul of the public value in early permanence and stability because there would be no present permanence and stability. Protection of the father's opportunity interest, on the other hand, assuming his willingness to take on all of the parental responsibilities, including providing a home for the child, would assure

> permanence and stability for the future.

Buchanan, *Constitutional Rights,* at 366-67.

There is a second major difference between *Lehr* and this case. In *Lehr,* private action alone denied the establishment of parental ties between Lehr and his daughter by the time the adoption petition was filed. In the present case, however, state intervention cut off H.R.'s ability to establish parent-child relations with Baby Boy C. Under District of Columbia law, child placement agencies are delegated the government function of accepting the relinquishment of parental rights from natural parents and locating suitable adoptive homes, as well as investigating and reporting to the court about the suitability of the placement and consenting to the adoption. *See* D.C.Code § 32-1007 (1989); D.C.Code §§ 16-304(d), -307, -309 (1989). Before the adoption petition was filed in this case, the Barker Foundation, a District-licensed child placement agency, was permitted to seek the termination of H.R.'s parental rights before Baby Boy C. had even been born; to accept L.C.'s relinquishment of her parental rights; and to place the baby with the O. family without H.R.'s prior consent or a judicial determination that the placement was suitable for the child. [24] These acts taken by Barker, as well as the proceedings in the Superior Court, constituted state action under the due process clause. *See Swayne v. L.D.S. Social Servs.,* 670 F.Supp. 1537, 1543-44 (D.Utah 1987) (private adoption agencies initiating adoption, and thus terminating parental rights, deemed state actor for purposes of challenging statute); *Scott v. Family Ministries,* 65 Cal.App.3d 492, 506-07, 135 Cal.Rptr. 430, 434 (1976) (private licensed adoption agencies held state actors in context of establishment clause); *see also Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982) (state action when deprivation is caused by exercise of right or privilege created by state and party causing deprivation may fairly be called state actor). As Elizabeth Buchanan suggests:

> [r]ecognition of an opportunity interest in unwed fathers requires a conclusion that if the two elements of a constitutionally protected parent-child relationship are the biological link and commitment to and exercise of custodial responsibility, the state may not deny biological parents the opportunity to establish a protected custodial relationship.
>
> Buchanan, *Constitutional Rights,* at 351 (footnotes omitted).

When state action blocks the opportunity for development of a parental relationship between the natural father and child and creates an environment for the development of parental ties between strangers and that child, the state may not then lawfully deny the father his opportunity interest on the basis that the child has developed family relations with prospective adoptive parents before the adoption petition is filed or between the time of the filing and the hearing on the petition. *See Lathrop,* 2 Kan.App.2d at 95, 575 P.2d at 898 (putative father, who had been prevented from bestowing parental care on child from time of its birth by adoptive parents, cannot be faulted, nor can his parental rights be lessened, by virtue of failing to perform parental responsibilities).

The third major distinction between this case and *Lehr* is that District of Columbia law provides for immediate notice to a natural father upon the filing of a petition for adoption, D.C.Code § 16-306(a) (1989), whereas the New York statute at issue in ***1165** *Lehr* provided for notice only to certain classes of putative fathers. As elaborated above, the Supreme Court found Lehr's failure to use the available statutory protection fatal to his constitutional claim. Lehr's failure to register had rendered him, under New York law, a nonparty to the adoption proceeding. H.R., however, unlike Lehr, was guaranteed a right to immediate notice of the filing of the adoption petition under District of Columbia law. D.C.Code § 16-306(a) (1989). By statute, the required initiative is on the government or its designated agent, not on the putative father. The Supreme Court's deference in *Lehr* to state legislative schemes for protecting natural fathers' rights, therefore, must result in a corresponding deference here: judicial recognition of H.R.'s statutory right to immediate notice in evaluating whether he grasped his opportunity interest. The onus placed on Lehr under the New York statute in no way can be used to diminish H.R.'s right to rely on placement of the burden elsewhere under our local law: the burden rests on the District of Columbia.

In short, *Lehr,* while recognizing an unwed father's "opportunity interest," reaffirms the *Stanley-Caban-Quilloin* concern about disturbing existing family relationships and the *Quilloin* concern about the failure of the father to assert his interest in timely, committed fashion. Whereas *Lehr* therefore clarifies the burden the

unwed father must carry-timely, continual assertion of his "opportunity interest"-*Lehr* does not deal with the issue of what happens when unlawful state action both interferes with assertion of the opportunity interest and facilitates creation of a prospective adoptive family intended to take the child from the father. We should not hesitate to conclude, however, that in such circumstances a natural father cannot be held to have abandoned his opportunity interest. *See Eason,* 257 Ga. at 296, 358 S.E.2d at 463 ("unwed father has a constitutionally protected interest which cannot be denied him through state action"). There may be other reasons why he should not be entitled to custody but not this one.

V. VIOLATIONS OF H.R.'S CONSTITUTIONAL AND STATUTORY RIGHTS

A. *State Action Affecting H.R.'s "Opportunity Interest"*

I conclude, on this record, that H.R. has not abandoned his opportunity interest in developing a relationship with Baby Boy C. because state action unlawfully interfered with H.R.'s rights. Before explaining this conclusion, however, I outline the context.

At the time the Barker Foundation and the O. family initiated adoption procedures, H.R. did not even know that his son had been born. L.C. had left Zaire, hinting that she would get an abortion and return to Africa within a couple of weeks. This intention was confirmed by a mutual acquaintance who told H.R. in July that L.C., in fact, had had an abortion in Washington, D.C. When H.R. received the letters from Barker in August 1983, postmarked in May, stating that L.C. "has recently been working with our agency with a view to placing the child she expects in July, 1983 for adoption," H.R. had every reason to believe that an intervening abortion had mooted these plans. Nonetheless, he sought to learn what had happened and finally, in October 1983, learned that he was indeed the father of a child. Unfortunately for H.R., Barker had already placed Baby Boy C. with the O. family, eliminating any possibility for the development of custodial, financial, or emotional ties between himself and his son. The only way H.R. could have grasped his opportunity interest would have been to assert his legal rights to custody at a judicial proceeding. Again, unfortunately for H.R., neither L.C. nor Barker nor the court notified him that there was a pending judicial proceeding that vitally affected his legal rights to his son. Moreover, H.R.'s own efforts to identify the judicial proceeding proved fruitless. In sum, by cutting off the possibility of a current parent-child relationship, and then failing to inform H.R. for more than eighteen months of the legal proceeding which offered him his only means of ensuring a future relationship with his son, the District of Columbia-primarily the Barker Foundation as a state actor-deprived H.R. ***1166** of any greater opportunity than he asserted to become a parent to his child.

If the District's (including Barker's) actions were lawful-if the burden to learn the facts and the law were entirely on H.R.-then presumably the failure to grasp his opportunity for custody of Baby Boy C. would have been his own responsibility. But, the reality is otherwise. State action violated H.R.'s procedural rights guaranteed by the due process clause of the Constitution and by the law of the District of Columbia. The trial court erred as a matter of law in holding otherwise. [25]

As background for this conclusion, we should note that the Supreme Court has held the state may not deprive a person of a liberty or property interest without affording that individual notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.* Moreover, a court assessing whether a litigant has been afforded a right to be heard must "look to the realities" of the case before it, *Greene v. Lindsey,* 456 U.S. 444, 451, 102 S.Ct. 1874, 1879, 72 L.Ed.2d 249 (1982), in assessing whether the opportunity to be heard has been granted, as the Constitution demands, "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).

B. *Failure to Provide H.R. with Adequate Notice; Court-ordered Interim Guidelines*

[4] I agree with H.R.'s argument that the information Barker furnished him failed to provide the minimal notice required by due process to enable him to assert his right to custody of Baby Boy C. at a meaningful time and in a meaningful manner.

In its initial letter to H.R. mailed in May 1983, Barker told H.R. that he had a right to acknowledge or deny paternity and provided him with forms to enable him to consent to the adoption. Barker's February 1984 letter, sent in response to H.R.'s request for clarification concerning his rights, stated only that "the law requires that an effort be made in good faith to inform the biological father of the plans for adoption" and that Barker's May 1983 letter, with accompanying consent forms, had informed him of this. Neither of these letters, however, informed H.R. of his basic right to seek custody of Baby Boy C. and of his right to participate at a court hearing that would be scheduled to determine the permanent placement of his child. [26]

This court in *Ford v. Turner,* 531 A.2d 233 (D.C.1987), held that the personal representative of an estate was deprived of procedural due process when the police seized guns from the decedent's apartment and failed to notify the representative about the seizure and her right to a hearing to contest it. District of Columbia law provided that within thirty days after the police department's property clerk assumed custody of a dangerous article, any person could file with the clerk a claim for possession ***1167** of the item. The law, however, did not provide for notification to parties whose property had been seized. The representative eventually learned that the guns were in police custody and wrote to the property clerk on several occasions, challenging the authority of the clerk to retain the guns and suggesting that she might seek to regain possession. The clerk replied only once but did not explain why he would not turn over the guns. Nor did he tell the representative how she could regain possession. We concluded that "the failure to give [the representative] notice 'reasonably calculated' to inform her of the reasons why the Property Clerk held the guns and of the means by which [she] could challenge [the clerk's] continued custody of them violated due process." *Id.* at 237-38 (citing *Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 14, 98 S.Ct. 1554, 1562, 56 L.Ed.2d 30 (1978) ("The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.' " (citation omitted))). We stated that, "[a]t a minimum, she was entitled to notice that certain property had been seized, that the District sought to retain the property pursuant to specified authority, and that a claimant could take particular steps to challenge the District's action." [27] *Id.* at 238.

[5] As the Supreme Court recognized in *Santosky v. Kramer,* it is " 'plain beyond the need for multiple citation' that a natural parent's 'desire for and right to "the companionship, care, custody and management of his or her children" ' is an interest far more precious than any property right." 455 U.S. 745, 758-59, 102 S.Ct. 1388, 1397, 71 L.Ed.2d 599 (1982) (quoting *Lassiter v. Dept. of Social Servs.,* 452 U.S. 18, 27, 101 S.Ct. 2153, 2159, 68 L.Ed.2d 640 (1981) (citation omitted)). I believe that Barker's role as a state actor in the adoption process requires that it provide a natural father a minimum amount of information concerning his procedural rights in an adoption proceeding. Barker's May 1983 letter with consent forms and its February 1984 follow-up letter fell far short of providing this minimally required constitutional protection.

According to the statute governing placement of children in family homes, rules and regulations were to be promulgated by a committee composed of social service, licensing, and charitable organization representatives, reviewed annually, and amended when necessary, subject to approval of the Mayor. D.C.Code § 32-1003 (1988). Regulations were not issued, however, until a notice of proposed rulemaking was published on January 26, 1990 seeking comments on proposed regulations. *See* 37 D.C.Reg. 859 (Jan. 26, 1990). [28] Unfortunately, these regulations, which have recently become effective, 37 D.C.Reg. 3033-3071 (May 11, 1990), in respects relevant to this case are inadequate. Adopted as a new chapter 16 for 29 DCMR, §§ 1600-1645.1 (1990), the regulations are entitled "Standards of Placement, Care, and Services for Child-Placing Agencies." As to notice to birth parents, these regulations provide:

> 1629.1 When one or more individuals have been named as the possible birth father, the child-placing agency shall notify all named individuals of the plan for adoption by certified or registered mail return receipt requested.
>
> ***1168** 1629.2 The child-placing agency shall report to the court a birth parent's failure to respond to a notice of a plan for adoption, if the

> birth parent fails to respond within thirty (30) days of receipt of notification. [29]

37 D.C.Reg. 3058 (1990). The regulations, however, do not define the "plan for adoption" of which the parent is entitled to notice. But even if that "plan" can be fairly inferred to some extent, there is no indication the plan covers what appears to be a significant omission that cannot be overlooked: there is no required notice of the birth parents' rights in respect of custody.

Given the absence of adequate regulations, and in light of the rights at stake, I believe we should announce additional guidelines to govern child-placement practices until such time as the concerns they identify can be incorporated into formal regulations. A child placement agency, upon notification of the mother's intent to relinquish her parental rights to the agency, should inform the putative father that (1) the mother (named) of a child has stated her intent to relinquish her parental rights to her child to the agency; (2) as a child placement agency licensed by the District of Columbia, it seeks to place the child for adoption by new parents, but if the putative father acknowledges paternity he himself has a right to seek custody of the child; (3) if the putative father does want custody, he should inform the child placement agency immediately of his intentions and should retain an attorney; (4) assertion of the putative father's right to custody may involve a formal legal proceeding before the Family Division of the Superior Court (address provided), at which a judge will preside; (5) before the formal proceeding occurs, the putative father will receive notice of the hearing of the case and an order to appear; and (6) any information which the putative father provides the child placement agency shall be included in a report to the Family Division on the placement agency's recommendation for the best placement of the child. [30]

If the putative father cannot be located until after the mother has relinquished her rights and the child has been placed in an adoptive home, the foregoing notification should be amended accordingly. If the putative father is not located until after the filing of the petition for adoption, the agency letter seeking his consent to the adoption should inform the putative father of the docket number of the case in addition to the above-required information. Any written communication the child placement ***1169** agency has with the putative father after the filing of the petition should contain the name and address of the court, the docket number of the case, and the name of the presiding judge.

I recognize that a child placement agency supporting termination of parental rights and approval of a proposed adoption is in a potentially difficult position when acting as agent for the court in officially notifying the putative father-who may have objections-about the situation. The court, however, is not limited to relying on the placement agency to provide the required notice. Pursuant to D.C.Code § 32-1010 (1988), the "Department of Human Services is authorized to make such investigations and inspections as are necessary to carry out the provisions of" the statute and, as a consequence, could work with the court to notify the putative father if the court-or the child placement agency-were to prefer that approach.

C. *Failure to Provide H.R. with Immediate Notice*

[6] H.R. also claims he was denied his procedural rights under District of Columbia law when no effort was made to give him "immediate" notice of the filing of the adoption petition. His point is well taken. Local statutory law provides natural parents a right to notice of, and participation in, adoption proceedings concerning their children. *See* D.C.Code §§ 16-304, -306 (1989). Given the fleeting nature of a noncustodial, unwed father's opportunity interest in gaining custody of his child, his constitutional right to notice of the adoption proceeding will be ephemeral unless he is given notice immediately upon the filing of an adoption petition. This constitutional imperative is reflected in D.C.Code § 16-306(a) (1989), which requires that

> due notice of pending adoption proceedings shall be given to each person whose consent is necessary thereto, *immediately* upon the filing of the petition. The notice shall be given by summons, by registered letter sent to the addressee only, or otherwise as ordered by the court. [Emphasis added.]

H.R.'s statutory-and constitutional-right to notice, therefore, was violated when the court failed to provide him with *immediate* notice of the filing of the O. family petition to adopt Baby Boy C. The failure to provide

H.R. with immediate notice appears to have been not an oversight but the normal practice of the Family Division of the Superior Court.[31] The hearing testimony of Alice Avery of the Barker Foundation confirmed that, as a regular practice, the Family Division sends notice of an adoption proceeding to the opposing parties when a show cause order is issued, *not* immediately upon the filing of the petition.

[7] I conclude that the Family Division practice of providing notice to interested parties only upon the issuance of the show cause order violates the statute. In this jurisdiction, the legislature has decided to protect both the participation rights of natural parents (among others whose consent to an adoption is required) and the best interests of the child by providing *immediate* ***1170** notice of a pending adoption proceeding. Immediate notice informs interested persons of their legal rights to participate in the proceeding and allows them, if they so desire, to register their opposition and to obtain a hearing as early as practicable. Immediate notice also furthers the best interests of the child in the earliest possible resolution of the adoption process. Because the development of a child's relationship with parental figures is of critical importance in resolving the ultimate placement, minimizing the time expended in the adoption proceeding is crucial. Waiting until issuance of the show cause order to notify a known, interested party of the proceeding is not a reasonable interpretation of the statutory command that due notice of a pending adoption proceeding be sent "immediately." Accordingly, the procedures of the Family Division should be changed to comply with the statute-and the Constitution.

D. *Failure to Use Due Diligence to Find H.R.*

[8] **[9]** H.R.'s final contention concerning deprivation of his procedural rights, with which I also concur, is that Barker violated his constitutional right to procedural due process by failing to use due diligence to find H.R. in order to provide timely service of the required immediate, official notice of the adoption proceedings. According to H.R., the delay engendered by Barker's lack of diligence caused him to be unable to assert his legal rights early enough to prevail at the custody hearing. *Mullane* established the fundamental principles for determining the constitutional sufficiency of notice for due process purposes:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information....
>
> * * * * * *
>
> [P]rocess which is a mere gesture is not due process. *The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.*

339 U.S. at 314-15, 70 S.Ct. at 657 (emphasis added) (citations omitted). *Mullane's* requirement that the "means employed" reflect an actual desire to inform the absent party of the proceedings applies not only to the form of service chosen but also to the efforts to ensure that such service is effective.

[10] This court has held that violations of the Superior Court rules which provide for notice and opportunity to be heard have the effect of denying a litigant due process of law. *Evans v. Evans,* 441 A.2d 979, 980 (D.C.1982). In *Bearstop v. Bearstop,* 377 A.2d 405, 408 (D.C.1977), this court described the kind of information which plaintiffs, unable to achieve personal service of process in a divorce proceeding, should provide the court before the court allows notice by publication pursuant to the Domestic Relations Rules:

> (1) the time and place at which the parties last resided together as spouses; (2) the last time the parties were in contact with each other; (3) the name and address of the last employer of the defendant either during the time the parties resided together or at a later time if known to the plaintiff; (4) the names and addresses of those relatives known to be close to the defendant; and (5) any other information which could furnish a fruitful basis for further inquiry by one truly bent on

> leaning the present whereabouts of the defendant.

We held that the plaintiff, using this basic information, should detail for the Family Division the particular efforts which had been made to ascertain the defendant's address. *Id.* As Judge Schwelb said in his January 25, 1984, denial of petitioner's petition for an interlocutory order of adoption in this case, "the rights of the father here in question are certainly not less significant than those at issue in *Bearstop.*" *See also Matter of E.S.N.,* 446 A.2d 16, 17-18 (D.C.1982) (requirements of due diligence met in ***1171** proceeding to terminate parental rights where appellant had not been heard of for six years and no record of his residence existed, social worker contacted appellant's brother and aunt and hired an investigator, and "[a]ll possible leads were explored and affidavits regarding these efforts were presented in court and made part of the record"). Accordingly, the efforts to locate H.R. at a minimum had to incorporate the due diligence required in *Bearstop.*

Barker's efforts did not approach the standard of diligence required to satisfy due process. Barker assumed a casual attitude toward ascertaining H.R.'s whereabouts. Avery's testimony indicates that Barker did not obtain the addresses of H.R.'s relatives because L.C. wanted to keep the entire matter as confidential as possible. In Barker's crucial December 1984 report to the court, Avery wrote that L.C. did not know H.R.'s whereabouts; but Avery admitted on deposition that she did not tell the court that L.C. had other possible addresses for H.R. *See Kickapoo Tribe of Oklahoma v. Rader,* 822 F.2d 1493, 1499-1500 (10th Cir.1987) (due process rights of natural father violated when state human services agency did not make diligent efforts to provide him with personal service: (1) social worker did not press mother of child for father's address or ask her if she had communicated with him; (2) social worker knew of father's relatives but did not attempt to gain information concerning his whereabouts from them, nor did he inform court that relatives could be located). Avery also admitted that her statement that L.C. did not know H.R.'s address was based on an August conversation she had had with L.C. four months before the submission of the December report. Indeed, at deposition, Avery admitted that she had been relying on old information and had not made an attempt to update it, despite the fact that L.C. had told Avery that the university address would not be good after July 1983. *See In re Marriage of McDaniel,* 54 Or.App. 288, 294, 634 P.2d 822, 825 (1981) (no due diligence in locating father in custody dispute where, among other things, affidavit of mother failed to indicate when her inquiries concerning father's whereabouts occurred " 'so as to show that they were made recently enough that a diligent person would be justified in relying upon them at the time of application for an order authorizing service ... by publication' ").

In January 1984, Judge Schwelb explicitly told Barker that an Order to Show Cause "directed to H.R.'s last known address, without further reasonable inquiry into his present whereabouts," would not be sufficient. Yet, in August 1984, Judge Mencher was only in a position to issue an Order to Show Cause to an old address, one in Zaire, which Barker had obtained *seven months earlier.* More specifically, at the time of the August 1984 Order to Show Cause, Barker knew or should have known that H.R. was no longer in Zaire. In H.R.'s January 17, 1984 phone conversation with Barker, he had mentioned that he was planning to go to Canada or France in the spring and that he hoped to come to the District of Columbia to see the baby. In May 1984, Barker had received correspondence from L.C. indicating that H.R. in fact was in Paris. And yet, three months later, rather than calling L.C. to ascertain H.R.'s Paris address, Barker instead allowed the court to mail the show cause order to an address which H.R. had given Barker seven months earlier.

H.R. never received the August 1984 Order, and in October 1984 an interlocutory decree of adoption was entered for petitioners, Mr. and Mrs. O. In February 1985, after H.R. retained an attorney, Barker received a letter from H.R. in which he stated he refused to consent to the adoption. That letter contained H.R.'s Paris address, which then became the basis for all further communication with him. Also in February, H.R. wrote another letter to Barker stating that he had retained a lawyer and had formally admitted paternity. H.R. asked Barker to inform the court that he did not intend to abandon his child. Barker never answered either of these letters. The only notification H.R. ever received from anyone informing him of the adoption proceeding was an order from Judge Riley issued in April 1985, more than ***1172** one year after Barker's February 1984 letter-and at a time when his son was already twenty months old-extending the interlocutory decree of adoption to June 30, 1985, and informing H.R. that he must file pleadings and appear at a hearing on that date. [32]

[11] I reject the trial court's assertion (as well as Judge Belson's assertion, see *post* at p. 1202, n. 11) that H.R. had the responsibility to keep the "parties," in this case Barker, informed of his current address if he wished to have prompt notice of the legal proceeding. There was no indication whatsoever in any of the information Barker sent to H.R. that there was a pending judicial proceeding, let alone that Barker and H.R. were "parties" to that proceeding. More specifically, Barker never informed H.R. that there was an adoption petition pending in a court of law and that H.R., pursuant to District of Columbia law, was entitled to notice of and participation in a hearing on that petition. Perhaps we could attribute some legal significance to H.R.'s failure to keep Barker informed of his whereabouts if-but only if-Barker had informed H.R. that it needed to be updated on his changes of address because it was serving as an investigator for a court that would be sending H.R. notice of a hearing in which Barker would be challenging H.R.'s rights to custody of his son. As it was, H.R. only knew that the Barker Foundation was seeking his consent to the adoption of his child-consent which he was unwilling to give.

E. *Summary of Violations of H.R.'s Rights*

[12] In sum, the Barker Foundation and the court denied H.R. the following procedural rights, guaranteed by the due process clause: (1) notice of the legal procedures involved in the adoption process, and the agency's role in those procedures; (2) immediate notice of the adoption petition, filed by the O. family, which initiated the official judicial proceeding to terminate H.R.'s parental rights (a statutory violation as well); and (3) diligent efforts by the Barker Foundation to ascertain H.R.'s whereabouts, in order to assure the required immediate notice of the judicial proceeding so that H.R. could exercise his rights to seek custody of his child at a meaningful time and in a meaningful manner. Given the communications he did receive, H.R. did all he could reasonably have been expected to do to claim custody of his child. [33] For these reasons, H.R.'s "opportunity interest" remained intact.

VI. APPLICATION OF THE PROPER STANDARD FOR TERMINATING AN UNWED, NONCUSTODIAL FATHER'S PARENTAL RIGHTS WHEN THE MOTHER PUTS A CHILD UP FOR ADOPTION AT BIRTH

A. *Custodial Preference for a "Fit" Parent Whose "Opportunity Interest" is Still Intact*

Because state action violated H.R.'s rights to due process, I have concluded that H.R. has not abandoned his "opportunity interest" in parenting Baby Boy C. I therefore turn to H.R.'s contention that, in resolving custody for Baby Boy C., the trial court erred in applying the "best interests of the child" standard required by D.C.Code § 16-2353 (1989) (termination), see *supra* note 18, and *id.* § 16-304(e) (adoption), see *supra* note 17. H.R. claims that, because he had a constitutionally protected liberty interest in developing parental relations with Baby Boy C. and did all he could reasonably be expected to do under the circumstances to grasp his opportunity to protect that interest, he was entitled to custody-absent his "unfitness" as a parent. He adds that application of the "best interests" standard is especially inappropriate ***1173** here because procedural violations delayed his awareness of the situation in a way that made it impossible for him to prevail under that standard as traditionally applied (*i.e.,* by comparing a noncustodial parent with a custodial family with whom the child has lived happily for awhile). In short, H.R. claims that, because he would be a "fit" parent, the illegally established relationships between Baby Boy C. and the O. family cannot form the basis of a decision to deny him parental rights.

Lehr makes clear that a natural father who has not abandoned his "opportunity interest" has a constitutionally protected interest in establishing parental relations when the natural mother relinquishes their child for adoption at birth. *Eason,* 257 Ga. at 296, 358 S.E.2d at 463. [34] I believe this means that ordinarily in such circumstances, if the court finds the natural father would be a "fit" parent, he is entitled to custody. *See id.* (applying fitness standard on due process and equal protection grounds); *see also Jermstad v. McNelis,* 210 Cal.App.3d 528, 258 Cal.Rptr. 519 (1989) (construing "best interests" standard in light of *Lehr* to create parental preference over prospective adoptive parents when natural parent has diligently pursued opportunity to establish custodial relationship); Buchanan, *Constitutional Rights,* at 373. This means, in legal effect, that as a matter of constitutional law, an unwed, noncustodial father who has not lost his opportunity interest has maintained a

sufficient connection with his child to receive the custodial preference-the presumptive right to custody-specified in the guardianship statute, D.C.Code § 21-101 (1989), as interpreted by *Shelton* and the earlier cases. In short, the due process clause constitutionalizes the applicability of the guardianship statute to an unwed, noncustodial father who has grasped his opportunity interest within the meaning of *Lehr.*

It is conceivable, however, that even granting custody to a "fit" parent who has not abandoned his "opportunity interest" could be detrimental to the best interests of the child under certain circumstances-as I shall elaborate later. *Lehr* and earlier Supreme Court cases do not address, let alone foreclose, that possibility, and irrespective of a natural parent's fitness, I do not believe the Constitution, any more than the District's guardianship statute, requires an award of custody that clear and convincing evidence shows would be adverse to the child's best interests.[35] On the other hand, I believe *Lehr* and *Stanley* taken together do afford substantive as well as procedural protection, mandating at least a custodial preference for a fit parent who has not abandoned his opportunity interest. *See Jermstad,* 210 Cal.App.3d at 548, 258 Cal.Rptr. at 531; Buchanan, *Constitutional Rights,* at 373.

Accordingly, I conclude the Constitution requires us to construe the "best interests" language under the adoption statute, D.C.Code §§ 16-304(e), -309(b)(3) (1989), to mean that, when a natural father who has not abandoned his "opportunity interest" seeks custody of an infant child whom the mother has surrendered for adoption at birth, he shall be entitled-as under the guardianship statute-to custody if he ***1174** would be a "fit" parent, unless the adoptive parents persuade the court with clear and convincing evidence[36] that failure to terminate the father's parental rights would be detrimental to the best interests of the child.

Because, however, this court's decisions in a number of instances have sustained our local statutes against constitutional attack by permitting termination of parental rights and adoption in "the best interests of the child," without employing a presumption favoring custody by a "fit" parent, we must examine more precisely how parental "fitness" and the child's "best interests" relate under those cases. Only by doing so can we determine whether our caselaw permits this division of the court to take the approach I believe is constitutionally required here. *See M.A.P. v. Ryan,* 285 A.2d 310, 312 (D.C.1971) (as matter of internal policy, no division of this court will override prior decision of this court; such result can only be accomplished by this court en banc).

B. *District of Columbia Caselaw on Constitutional Challenges to Adoptions and Other Terminations of Parental Rights*

In three pre-*Lehr* adoption cases, this court, applying the statutory "best interests" standard, affirmed, against a due process, not a statutory, challenge, the termination of an objecting parent's parental rights in favor of an adopting family-without a finding of parental unfitness. *In re P.G.,* 452 A.2d 1183 (D.C.1982); *In re J.O.L.,* 409 A.2d 1073 (D.C.1979), *vacated and remanded,* 449 U.S. 989, 101 S.Ct. 523, 66 L.Ed.2d 286 (1980), *cert. denied,* 454 U.S. 832, 102 S.Ct. 131, 70 L.Ed.2d 110 (1981); *Matter of Adoption of J.S.R.,* 374 A.2d 860 (D.C.1977). We concluded in *J.S.R.* that the "best interests" standard requires the judge first to apply a variety of factors, such as those set forth in the Uniform Marriage and Divorce Act § 402,[37] *see J.S.R.,* 374 A.2d at 863 n. 11; *but see D.R.M.,* 570 A.2d at 804-05 (suggesting that § 16-2353 termination criteria are relevant and applicable), and then to select "the least detrimental of the available alternatives" for custody. *Id.* at 863; *see P.G.,* 452 A.2d at 1184. We did not employ a custodial preference for a fit natural parent.

In the most recent of these cases, *P.G.,* we noted that appellant, the child's natural father, had separated from the child's mother (with whom he had been living) while the mother was pregnant; that the child had lived with the prospective adoptive family for about a year and four months at the time of the trial court order; and that only the biological tie favored the father. "[A]ll else is decisively in favor of the adoption petition." 452 A.2d at 1184. We then discussed *Stanley, Quilloin,* and ***1175** *Caban,* stressing that the case at bar, like *Quilloin,* concerned a child who had become part of an existing family unit. *P.G.,* 452 A.2d at 1184-85. We concluded that our due process analysis in *J.S.R.,* applying a "best interests" test without a necessary finding of parental unfitness, controlled "[i]n the absence of subsequent contrary Supreme Court authority." *P.G.,* 452 A.2d at 1185.

Then came *Lehr* in 1983. Until the present case, we have not had occasion to consider *Lehr's* impact on the

proposed termination of parental rights of an arguably fit parent in the adoption context. We have, however, published seven opinions on termination of parental rights in neglect cases under D.C.Code § 16-2353 (1989), *supra* note 18, of relevance here-only one of which touched on *Lehr,* indirectly, in a concurring opinion. I turn now to those seven opinions.

In *In re K.A.,* 484 A.2d 992 (D.C.1984), both parents had abandoned their daughter at age five to foster care, although witnesses testified that the father, the appellant, had achieved a "close relationship" with the child even though he had visited her only eight times in three years. *Id.* at 996. The trial court, applying the § 16-2353(b) factors, *supra* note 18, terminated parental rights, over the father's objection, in the interest of stabilizing the child's relationship with her foster family. We affirmed, concluding that the *P.G.* line of cases controlled in the absence of a custodial relationship between parent and child. Significantly, however, we stated, in effect, that a fitness analysis might be required if a natural parent had custody at the time of the termination proceeding:

> [W]e do not wish to rule out, just as the Supreme Court in *Quilloin v. Walcott* did not want to preclude, a more prominent role for a concern for the natural parents' rights, if and when the case demands. Where custodial parents' rights are threatened with possible termination, it may be appropriate for the court to analyze the four statutory factors spelled out in § 16-2353(b) first with respect to the natural parents facing rights termination. *And only if the results of that analysis are unsatisfactory would the court then proceed to apply the factors to the other, potential custodians seeking parental status.* But that is for another case on another day.

K.A., 484 A.2d at 998 (emphasis added). Interestingly, this court did not advert to *Lehr,* perhaps because the facts showed abandonment by the objecting father, as well as an established foster family relationship with the child.

In another 1984 neglect case, *In re M.M.M.,* 485 A.2d 180 (D.C.1984), where there was no custodial or other meaningful relationship between the child and his natural mother-who was mentally ill and violent-we sustained termination of the objecting mother's parental rights in favor of a "loving" foster family. We reiterated *K.A.'s* message that if the natural mother had brought up the child and had custody at the time of the hearing, the Constitution might have required the court to apply the § 16-2353(b) factors first with respect to the mother's fitness before considering other potential custodians. *M.M.M.,* 485 A.2d at 184 n. 4. Again, there was no mention of *Lehr;* the facts made the opportunity doctrine inapplicable.

Three years later in *In re C.O.W.,* 519 A.2d 711 (D.C.1987), a termination proceeding concerning a neglected and sexually abused child who was in a prospective adoptive home (although an adoption petition was not before the court), we again affirmed the termination of parental rights over the natural mother's objection. The mother argued that § 16-2353(b) was facially unconstitutional because only parental fitness should be considered at the termination hearing. We disagreed, citing *J.S.R., K.A.,* and *M.M.M.,* again noting that the result might have been different if the mother had retained custody, *see C.O.W.,* 519 A.2d at 714 n. 3. Appellant, however, had another argument: the "best interest" test "inevitably invites a comparison of the natural parent and foster family in which the natural parent will always fall short," and thus termination will often be based "on economic and cultural factors that ***1176** were found objectionable by the Supreme Court in *Santosky v. Kramer,* 455 U.S. 745 [102 S.Ct. 1388, 71 L.Ed.2d 599] (1982)." *C.O.W.,* 519 A.2d at 714. Without squarely ruling on this argument, we noted that the trial court had avoided "possible constitutional infirmities that might arise if it appeared that all the court had done was to make a direct comparison of the natural parent and the foster home." *Id.* The trial court first addressed the child's "special need" as a result of sex abuse (by unknown persons), then in effect found the mother unfit, and "[o]nly then" turned to an evaluation of the child's current placement. *Id.* We implicitly approved that approach. *Lehr,* again, was apparently irrelevant.

A year later in *Appeal of U.S.W.,* 541 A.2d 625 (D.C.1988), we sustained termination of parental rights in another neglect case over objection of the noncustodial father. The child-a victim of fetal alcohol syndrome

and fetal hydantoin syndrome-had special needs for occupational and physical therapy. The trial court found that both parents, who were alcoholics and unable to hold steady jobs, were unable to meet their child's needs and that both were " 'seriously deficient in skills and insight needed to raise [C.E.W.]' "; the foster parents were especially suitable because they "were given training in infant stimulation." *Id.* at 625, 626. Concurring specifically, Judge Rogers noted that the father had "regular and consistent interest" in the child, in contrast with the "intermittent interest" of the father in *K.A., U.S.W.,* 541 A.2d at 627 (Rogers, J., concurring). Judge Rogers also noted that by the time of the hearing, a prospective adoptive home was "no longer available." *Id.* The judge agreed, however, that clear and convincing evidence supported the termination of parental rights in the child's "best interests" because the father "has long had difficulty overcoming his own problems and has failed." *Id.* The father did not challenge expert testimony that termination would improve the child's prospects for adoption, and "[n]o claim is made that the father had been denied his 'opportunity interest' in his child." *Id.* at 627-28 (citing Buchanan, *Constitutional Rights*). Judge Rogers, therefore, acknowledged possible impact of *Lehr.* [38]

The present case is thus the first in which we must consider an effort to terminate the parental rights of an apparently fit natural father who, although a noncustodial parent, had not abandoned his "opportunity interest" in gaining custody. As indicated earlier, we believe that under these circumstances Supreme Court caselaw culminating in *Lehr* mandates, as a matter of due process, that a fit parent must prevail over a prospective adoptive family unless clear and convincing evidence ***1177** demonstrates that the natural parent's custody would be detrimental to the best interests of the child. We have already recognized that the Constitution may require consideration of a custodial parent's fitness, as a virtually controlling factor, before permitting termination of parental rights in favor of another custodian. *K.A.,* 484 A.2d at 998; *see C.O.W.,* 519 A.2d at 714 n. 3; *M.M.M.,* 485 A.2d at 184 n. 4. We have also recognized "possible constitutional infirmities" if a court were to terminate even noncustodial parental rights by merely comparing the natural parent with a prospective custodial family to determine the child's best interests. *C.O.W.,* 519 A.2d at 714. Finally, at least one judge has heretofore recognized that a noncustodial parent's "opportunity interest" must be considered in appropriate cases. *See U.S.W.,* 541 A.2d at 627-28 (Rogers, J., concurring). Given this evolution of our caselaw-and our first opportunity to consider *Lehr* directly-I perceive no barrier to concluding that, by identifying a parent's protectible "opportunity interest" as a basis for evaluating the right to custody, the *Stanley-Lehr* line of Supreme Court cases mandates substantial constitutional protection of a fit noncustodial parent whose "opportunity interest" in custody is still intact.

This conclusion means that although the applicable statutes, § 16-304(e), *supra* note 17, and § 16-2353(a) and (b), *supra* note 18, prescribe a "best interests," not a "fitness," test, we must construe "best interests" in a manner that preserves statutory constitutionality. *Jermstad,* 210 Cal.App.3d at 550, 258 Cal.Rptr. at 532; *see also Stuart,* 72 App.D.C. at 396, 114 F.2d 825. Furthermore, Justice Traynor explained 35 years ago why, in any event, a child's best interests normally are achieved through custody of a fit parent:

> The objection to the rule that custody must be awarded to the parent unless he is unfit carries the harsh implication that the interests of the child are subordinated to those of the parent when the trial court has found that the best interests of the child would be served by giving his custody to another. The heart of the problem, however, is how the best interests of the child are to be served. Is the trial court more sensitive than the parent to what the child's best interests are, better qualified to determine how they are to be served? *It would seem inherent in the very concept of a fit parent that such a parent would be at least as responsive as the trial court, and very probably more so, to the best interests of the child.* [Emphasis added.]

In re Guardianship of Smith, 42 Cal.2d 91, 94-95, 265 P.2d 888, 891 (1954) (en banc) (Traynor, J., concurring); *see N.M.S.,* 347 A.2d at 927 ("ordinarily a child's best interest is served by being with a fit parent"); *In re B.G.,* 11 Cal.3d 679, 693, 114 Cal.Rptr. 444, 454, 523 P.2d 244, 254 (1974) (en banc) (parent fit to exercise custody may have better understanding of best interests than does juvenile court).

In sum, I construe D.C.Code §§ 16-304(e) and 16-2353 to incorporate a parental preference in determining the best interests of the child when an unwed, noncustodial father is fit and has not abandoned his opportunity interest. *See Jermstad,* 210 Cal.App.3d at 533, 550, 258 Cal.Rptr. at 520, 532 (civil code provision incorporating "best interests" standard for termination of parental rights, read in light of federal constitutional law, accords natural father parental preference where he has diligently pursued opportunity to establish custodial relationship, and thus best interests of child may not be measured by comparing father's circumstances with those of putative adoptive parents). Given controlling Supreme Court authority subsequent to the *J.S.R.-P.G.* line of cases, *see P.G.,* 452 A.2d at 1184, I conclude *in the context at issue* that a "best interests" analysis which justifies termination of parental rights in an adoption proceeding without a finding of parental unfitness-or a finding by clear and convincing evidence that custody in a fit parent would be detrimental to the best interests of the child-no longer is available. *See Frendak v. United States,* 408 A.2d 364, 379 n. 27 (D.C.1979) (court may decline to follow prior decision when there has been subsequent change in governing ***1178** law). A court in this context, therefore, cannot constitutionally use the "best interests" standard to terminate the parental rights of a "fit" natural father who has timely and continually asserted his parental rights and, instead, grant an adoption in favor of strangers simply because they are "fitter." *Cf. C.O.W.,* 519 A.2d at 714 (trial court resolved issue of parental fitness before evaluating child's current placement). "The opportunity for [constitutional] protection of a custodial relationship is illusory if it is subject to being nipped in the bud by application of an unprotected best interest of the child comparison with prospective adoptive parents." *Jermstad,* 210 Cal.App.3d at 550, 258 Cal.Rptr. at 532.

Accordingly, I now apply the "best interests" standard to reflect the presumptive custodial rights of a fit natural father who has not surrendered his "opportunity interest" as defined by *Lehr*.

C. *The "Best Interests" Standard and Parental "Fitness"*

As indicated earlier, the assumption that a natural parent's fitness incorporates the child's best interests may be suspect on occasion. There conceivably can be circumstances in which clear and convincing evidence will show that an award of custody to a fit natural parent would be detrimental to the best interests of the child. I therefore turn to the meaning of parental "fitness" and to the kinds of situations that could cause the court, despite a father's fitness, to terminate his parental rights.

In the first place, I do not believe a parent would be "unfit" only if the District of Columbia had grounds to intervene and take the child away if the parent had custody. *But see Michael U. v. Jamie B.,* 39 Cal.3d 787, 796 n. 8, 218 Cal.Rptr. 39, 45 n. 8, 705 P.2d 362, 368 n. 8 (1985). Nonetheless, the § 16-2353(b) factors, see *supra* note 18-as applied to the natural parent-are of central concern: the child's prospects for "continuity of care" in a "stable and permanent home"; the parent's "physical, mental, and emotional health"; the "quality of the interaction" between parent and child; and, "to the extent feasible, the child's opinion." *See K.A.,* 484 A.2d at 998. Thus, in cases such as *M.M.M.,* where the objecting mother was mentally ill and at times violent, or *C.O.W.,* where the mother had serious emotional problems, or *U.S.W.,* where there was a parental history of alcohol abuse and an inability to hold jobs, a "fitness" analysis as such apparently would have justified the termination.

If, however, a parent is not found unfit, under what circumstances, if any, could an award of custody to the parent be detrimental to the best interests of the child, such that termination of parental rights in favor of adoptive parents might be justified? In allowing for such a possibility, I do not try to define its contours or even to provide many examples. I am merely saying that presumptive custody for a "fit" parent subject to rebuttal in the child's best interests is not constitutionally precluded; I do not try to speak definitively on the scope of a "best interests" exception. I provide only minimal guidance in the form of suggesting considerations.

More than likely, given a common-sense application of the "best interests" exception, a parental preference will evaporate where circumstances beyond the control of the noncustodial, fit parent have created a situation that signals harm if the child is turned over to his or her parent. In California, for example, in applying a statutory "detriment" or "actual harm" exception to the "fitness" test, an appellate court concluded that negative evidence about the father was not necessary to a finding of detriment and then justified termination of the parental rights of a fit, noncustodial natural father solely because of

the psychological harm that would result from removing the child from a prospective adoptive home where she had lived for five years. *In re Baby Girl M.,* 236 Cal.Rptr. 660 (Cal.App. 4 Dist.1987). [39] We do not have the California statute or its history, but the ***1179** most obvious, and possibly the only, basis for denying custody to a fit parent in the best interests of the child would be a finding based on clear and convincing evidence that parental custody would actually harm the child.

In sum, under the adoption statute, D.C.Code § 16-304(e) (1989), as applied to an ***1180** unwed, noncustodial father who has not lost his "opportunity interest," the trial court shall consider, first, the fitness of the father. If, for example, the court finds him generally fit, the court must deem him presumptively entitled to custody, subject to rebuttal only by clear and convincing evidence that the child's best interests require the court to deny the father custody. I would leave it to the trial courts to implement this approach case by case. I merely add that in allowing for the possibility that a fit natural father may lose parental rights because the best interests of the child would preclude a transfer of custody-despite the father's best possible effort to preserve his "opportunity interest"-we should not foreclose the possibility of a damages remedy, however inadequate, for violations of the father's statutory and constitutional rights that may have caused prejudicial delay.

D. *Resolution of This Case*

[13] I turn, now, to the final issue: whether H.R. is a "fit" parent for Baby Boy C. and, if so, whether there is clear and convincing evidence that granting H.R. custody would be detrimental to the best interests of the child.

Where, as here, this court concludes that a new statutory interpretation, informed by constitutional requirements, should be applied by the trial court exercising its discretion, but the trial court has applied the statute differently in accordance with tradition, we ordinarily remand to afford the parties the benefit of the trial court's application of the proper standard. *See Wright v. United States,* 508 A.2d 915, 919-20 (D.C.1986). On the other hand, if our review of the record were to indicate that, despite the violations of H.R.'s constitutional and statutory rights, the trial court could only have awarded custody of Baby Boy C. to the O. family under the proper standard applying the parental preference, we would be obliged to affirm as a matter of law. *See Johnson v. United States,* 398 A.2d 354, 364 (D.C.1979) ("facts may leave the trial court with but one option it may choose without abusing its discretion").

Although the trial court made no explicit findings about H.R.'s fitness to be a parent, the record strongly supports a finding that he is fit. Moreover, both of the expert witnesses who testified concerning the effects of a transfer of custody on Baby Boy C. assumed that H.R. would be a fit father, and Dr. Noshpitz explicitly so testified. I therefore proceed (solely for the sake of analysis) from this assumption.

Despite H.R.'s fitness for fatherhood, however, both experts agreed that removing Baby Boy C. from the O. family would damage him psychologically. The trial court also found that the untried and unprecedented gradual transition proposed by Dr. Noshpitz could not eliminate the "devastating" effect of removing Baby Boy C. from the O. family. Under the circumstances, therefore, a remand of the case for application of the custodial preference arguably would not be necessary or appropriate; although the trial court's ruling was erroneously premised, one might be able to argue from the record that the trial " 'court, properly instructed, *inevitably* would [have] reach[ed] the same result.' " *Wright,* 508 A.2d at 920 (quoting *Ibn-Thomas v. United States,* 407 A.2d 626, 636 (D.C.1979)).

On the other hand, we are given the trial court's incorrect application of the "best interests" standard, since H.R. was not evaluated for fitness and with a parental preference. And, we are given at least one expert who proposed a gradual transitional approach to custody that conceivably could have affected the trial court's view of the situation under the "best interests" standard correctly applied with a parental preference. On this record, therefore, I am not prepared to conclude that the "best interests" standard, even as newly interpreted, should be applied to deny H.R., the father, custody as a matter of law when there is no negative evidence about the father and thus the only possible harm would be the psychological impact on the child of a transfer from one fit custodian to another.

Accordingly, the trial court must rule once again, with full freedom to reopen the proceedings as needed to inform

the court ***1181** about relevant events during the period that has elapsed since the last trial court order and the impact of those events on this petition. *See In re A.B.E.,* 564 A.2d at 758; *In re Baby Girl M.,* 37 Cal.3d 65, 74 & n. 12, 207 Cal.Rptr. 309, 316 & n. 12, 688 P.2d 918, 925 & n. 12 (1984) (en banc); *Michael U. v. Jamie B.,* 39 Cal.3d at 796, 218 Cal.Rptr. at 45, 705 P.2d at 368 (1985). In ordering a remand, however, we are aware that, because of the death of the trial judge in this case, a new judge will have to take over-a judge who, at this point, will be in no better position than we are to evaluate and apply the facts of record. I assume the court will first want to hear from counsel as to how the passage of time has affected their positions. If the case cannot be settled, perhaps Dr. Marans, Dr. Noshpitz, and others (if necessary) who are familiar with the record, could be recalled to help the court evaluate the factual record more thoroughly before the court itself applies the correct legal test. Although the trial court will be dealing with the child as of 1990, the court should be free to reevaluate Judge Riley's ruling of 1986, helped by expert testimony not available to us, with a view to deciding whether the court is in a position now to apply the correct legal test to the evidence as of 1986. If that would be possible and the court were to decide in favor of the adoptive parents, that would end the matter (subject to the right of appeal); if the court were to conclude custody should have been awarded to H.R., then the court might wish to reopen the proceedings for consideration of developments since 1986.

The judgment awarding custody of Baby Boy C. to the O. family should therefore be reversed and remanded. [40]

VII. POSTSCRIPT

Judge Belson argues that H.R. had sufficient actual notice about Baby Boy C., early enough, to make H.R.'s constitutional and statutory rights to notice superfluous, or at least the failure to comply with those rights harmless. I profoundly disagree. H.R. did not learn for sure that he had a child until October 1983, a month after Barker had placed Baby Boy C. with the O. family. In October 1983, L.C. told H.R. that the baby had been placed in an adoptive home and that they would never be able to see him again. No later than November 1983, H.R.-who had difficulty comprehending the adoption process in the absence of any notice containing his rights-told L.C. that he wanted the baby if she were unwilling to raise him herself. In January 1984, H.R. called Barker, acknowledged paternity, and expressed confusion about giving up his rights. Barker learned, just days later, that H.R. had written to L.C. and had explicitly refused to consent to adoption.

No one disputes that Barker learned early on, of H.R.'s unwillingness to consent to adoption, and that everyone in authority failed to assure that H.R. knew what his legal rights were, including his right to seek custody in a proceeding already underway to consider the child's adoption by strangers. Judge Belson, nonetheless, would require H.R. to have used his own imagination to carry out a veritable laundry list of additional self-help efforts to preserve his "opportunity interest" under *Lehr* in gaining custody of his child. My colleague has it backwards; he assumes that preservation of the father's "opportunity interest"-an accomplishment requiring legal action-is a matter of intuition. Due process is premised on another understanding: ***1182** legal consequences, including the loss of rights, flow only from failure to act upon adequate notice. The burden of telling H.R. his rights and obligations lay with Barker and the court; H.R. did not have a responsibility, at his peril, to find out or intuit what others were required by law to tell him but did not.

The concern, moreover, is not merely lack of notice of the adoption proceeding but, more broadly, the lack of notice of the right to seek custody, of whom to contact, of how to proceed, and of how quickly action must be taken. All this Judge Belson imputes to H.R.'s responsibility for self-help in the context of a foreign national whose child has been taken by the state before the father even knew the baby was born, who confronted undisclosed legal procedures with which he was altogether unfamiliar, and whom Barker-as representative of the state-made little effort to contact even though Barker had access to more current address information than it used. In short, because state action-and inaction-violated H.R.'s rights to due process, he cannot be said to have abandoned his opportunity interest in parenting Baby Boy C.

Judge Belson justifies his approach by embracing concepts of actual and constructive notice. He says he is "satisfied that the amount and quality of notice afforded appellant overcame his claims of deprivation of procedural due process," *post* at 135, citing as his authority a case standing for the proposition that notice to a close corporation regarding allegedly fraudulent importation of bark tea

provided actual notice to one of the two shareholder-officer-employees, and constructive notice to the other, of their potential personal liability for a civil penalty. *See United States v. United Priority Products, Inc.,* 793 F.2d 296, 300 (Fed.Cir.1986). Unquestionably, each defendant in that case personally received the entire notice he or she was entitled to for an explanation of personal exposure-in sharp contrast with the defaults of notice to which H.R. was entitled. The fact that Judge Belson offers a long list of self-help measures H.R. should have taken in order to learn of his rights suggests that my colleague relies less on actual notice than on constructive or inquiry notice as a sufficient basis for terminating a father's right to seek custody of his infant child. The Constitution and our local statutes afford considerably more protection than that, as elaborated earlier.

Judge Belson also would affirm, even assuming inadequate notice to H.R., on the ground that "the finding of the devastating effect upon Baby Boy C. that would be caused by his removal from the O. family mandates the ultimate finding that a transfer of custody to H.R. would be detrimental to Baby Boy C.'s best interests or, in Judge Ferren's terminology, would actually harm the child." *Post* at [1192]. In the end he may be right. The problem is, however, that the trial court's finding that removal of the child from the O. family would be "devastating" was made in the context of applying the traditional "best interest of the child" standard without consideration of the parental preference or the fitness of the father, H.R. But even if we assume that the trial court made this finding in a vacuum, we cannot properly assume that the court's application of that finding, while looking through the prism of an erroneous legal test, would be the same when looking through another prism intended to grant presumptive custody to a fit natural father as against strangers.

In this case the trial judge asked herself whether custody in the adoptive family or in the natural father would be in the "best interest" of the child-considering each to be on an equal footing-and ruled in favor of the adoptive family, finding that a transfer of custody would be "devastating" to the child. If, however, the judge had to begin with a presumption of custody in a fit natural father-a presumption that the child's best interests lay in the father's custody-we cannot be sure either that the judge would have found that a transfer would be devastating or, in any event, that it would be so devastating that, on balance, the father should be denied custody because it would be contrary to the child's best interests (or, as I would prefer, because it would bring actual harm to the ***1183** child).[41] In *Malat v. Riddell,* 383 U.S. 569, 572, 86 S.Ct. 1030, 1032, 16 L.Ed.2d 102 (1966), the Supreme Court-interpreting a word in a tax statute differently from the interpretation given by the district court-stated the applicable rule:

> Since the courts below applied an incorrect legal standard, we do not consider whether the result would be supportable on the facts of this case had the correct one been applied. We believe, moreover, that the appropriate disposition is to remand the case to the District Court for fresh fact-findings, addressed to the statute as we have now construed it.
> *Malat* makes clear that the legal implications of any fact-finding, no matter how simple, cannot be divorced from the applicable rule of law. It is the law that gives those facts significance and, ultimately, their true meaning.

ROGERS, Chief Judge, concurring:
In this appeal from an order of adoption, the court must determine whether H.R. grasped his opportunity interest and, if so, whether the trial judge applied the correct standard in concluding that Baby Boy's best interest called for his adoption by the O family over his natural father's objection. I join Judge Ferren in concluding that H.R. has grasped his opportunity interest under the unusual circumstances presented by this case, and that H.R.'s statutory right to receive immediate notice of the adoption proceeding was violated. Because I also conclude that the trial judge failed to apply the best interest standard of the adoption statute, as long interpreted to include a presumption in favor of a fit natural parent over a stranger to the child, I join Judge Ferren in concluding that a remand is required. Accordingly, I join Part I (Facts and Proceedings) and Part V (Violations of H.R.'s constitutional and statutory rights) of Judge Ferren's opinion. I am unable to join his formulation of the post-*Lehr*[1] standard based on his view that *Lehr* creates, as a matter of substantive due process, a parental preference. In my view it is unnecessary to reach the constitutional issue that he presents. Further, I find no occasion to apply the guardianship statute to adoptions. Rather, the statutory best interest standard for adoption must apply. I also find no occasion to address

the adequacy of the child placement regulations (see Part V(B) of Judge Ferren's opinion).

The statutory standard in the District of Columbia for determining custody disputes between a natural parent and a stranger has been long settled. In *Davis v. Jurney,* 145 A.2d 846 (D.C.1958), the court stated:

> The controlling principle by which the courts must be guided in cases of this kind is well settled. The paramount concern is the child's welfare and all other considerations, including the rights of a parent to the child, must yield to its best interests and well-being. While no precise formulae can be devised to aid the court in its determination as to what is best for the child, certainly the application of this broad principle does not demand that the right of a parent be ignored. Under our Code the father and mother are the natural guardians of their minor children. Case law has affirmed this by recognizing the preferential claim of a natural parent in contests involving nonparents. With added consistency the Court of Appeals recently stated in *Bell v. Leonard:*
>
> " 'Except where a nonparent has obtained legal and permanent custody of a child by adoption, guardianship or otherwise, he who would take or withhold a child from mother or father must sustain the burden of establishing that the parent ***1184** is unfit and that the child's welfare compels awarding its custody to the nonparent. * * * In other words, the burden rests, not, for instance, upon the mother to show that the child's welfare would be advanced by being returned to her, but rather upon the nonparents to prove that the mother is unfit to have her child and that the latter's well-being requires its separation from its mother.' *People ex rel. Kropp v. Shepsky,* [305 N.Y. 465, 469, 113 N.E.2d 801, 804 (1953)]; *Skeadas v. Sklaroff,* [84 R.I. 206, 122 A.2d 444, *cert. denied,* 351 U.S. 988, 76 S.Ct. 1051, 100 L.Ed. 1501 (1956)]; *People ex rel. Fentress v. Somma, Sup.,* [127 N.Y.S.2d 169 (1953)]." [102 U.S.App.D.C. 179, 184, 251 F.2d 890, 895 (1958)] [footnotes omitted].
>
> The foregoing represents no new principle of law, but merely reflects the wisdom of human experience that children ordinarily will be best cared for by those bound to them by the ties of nature. Where compelling circumstances are shown and the best interests of the child require an award to someone else, the court has but one choice. However, such an award can only be justified after the welfare and best interests of the child and the legal and natural rights of the parent have both been carefully considered.

145 A.2d at 849. [2]

Bell v. Leonard, supra, 102 U.S.App.D.C. 179, 251 F.2d 890, quoted in *Davis v. Jurney,* was an adoption case. In *Bell* the natural mother sought to regain custody of her nine-year-old daughter from a stranger who wanted to adopt the child. *Id.* at 180, 251 F.2d at 891. The mother, who had been in "sore straits, jobless yet caring for the infant," had initially agreed to let Bell, a stranger to the child, take care of the child while she worked during the week. *Id.* When the mother sought to take her child on weekends, Bell protested and the upset mother decided she should reclaim her child altogether. *Id.* The mother filed habeas corpus petitions seeking custody of her child but was unsuccessful, apparently because she was planning to leave the country for a period of several years. Bell filed a petition for adoption of the child. *Id.* at 181, 251 F.2d at 892. When the ***1185** mother returned to the country three years later, the trial court granted her request for custody and dismissed Bell's petition for adoption. [3] *Id.* The U.S. Court of Appeals for the District of Columbia Circuit affirmed, pointing to the presumption that children are better off with their natural mother, and that a fit natural mother is entitled to her own child as against the claim of a stranger even where the stranger has had custody of the child for a number of years. *Id.* at 184, 251 F.2d at 895. [4]

This was in accord with the long-standing principle in this jurisdiction that the paramount consideration in awarding custody is "the permanent advantage and welfare of the children." It also is consistent with the guardianship provisions upon survivorship of a parent. Thus, where the father is deceased and "the mother is a proper person, able and willing to provide properly for the wants of her children ..., the law recognizes the priority of her right to their custody and control." *Beall v. Bibb,* 19 App.D.C. 311, 313 (1902). In *Beall v. Bibb,* the mother's custody was opposed by the children's maternal grandmother and maternal aunt who had maintained custody of the twin eleven-year-old children for at least the past four years. *Id.* at 311. The court observed that transfer of custody to a particular person or deliberate abandonment would, under ordinary conditions, be very strong evidence of a lack of fitness on the part of the natural parent. Thus, the revived claims of such parents may only be denied,

however, if the relations between the children and the nonparent custodians had become such that to sever them would be "necessarily cruel or painful." *Id.* at 314. *See also Shelton v. Bradley,* 526 A.2d 579 (D.C.1987) (under D.C.Code § 21-101 (1981), statutory presumption of custody in surviving natural parent).

Accordingly, the interpretation of the statutory standard for adoption under our Code is fully consistent with recognition of the constitutional right of a natural father not to be denied his opportunity interest in seeking custody of his child.[5] District of Columbia caselaw suggests a well-established presumption to determine custody disputes between a natural parent and strangers favoring the award of custody to the natural parent, absent an affirmative showing of unfitness, as consistent with the best interest of the child. *See, e.g., In the Matter of N.M.S.,* 347 A.2d 924, 927 (D.C.1975) (ordinarily a natural mother cannot be deprived of child absent showing of unfitness or inability to care for child); *Johnson v. Lloyd,* 211 A.2d 764 (D.C.1965) (to withhold a child from its natural parent there must be proof that the natural parent is unfit and that the child's welfare compels awarding custody to the nonparent, child's welfare being "inextricably bound up" with the right of the parent).[6]

***1186** In recent opinions the court has addressed a series of constitutional challenges to the adoption and termination of parental rights statutes.[7] Finding no constitutional basis for requiring a determination of unfitness as a precondition to the termination of a natural parent's custodial rights, the court did not refer (at least not explicitly) to a custodial preference for a fit natural parent.[8] Rather, the court simply viewed the best interest of the child as the dispositive factor. In three of the recent cases, the court rejected constitutional challenges to our interpretation of the statutory standard for adoption, and in so doing relied on decisions referring to circumstances in which a natural parent would forfeit his custodial rights.[9] In no case has ***1187** the court indicated that it abandoned or qualified the long held interpretation of the statutory best interest standard.[10] Indeed, as recently as 1985, the court noted the pervasiveness of the best interest standard, going back to the end of the last century in *Wells v. Wells,* 11 App.D.C. 392, 395 (1897), as the accepted test in child custody cases between spouses, between a natural parent and foster parents, in child neglect proceedings, and in adoptions involving a stranger. *In re D.I.S.,* 494 A.2d 1316 (D.C.1985) (citations omitted) (affirming adoption by grandmother and removing child from foster family notwithstanding consideration of psychological bonding of child and continuity of care).[11]

Nothing in *Lehr* suggests that the statutory interpretation is constitutionally defective. In *Lehr,* the Supreme Court held narrowly. The natural father in that case claimed that he was entitled to notice and a hearing before his child could be adopted. The lower court and the Supreme Court rejected his claim, holding instead that his right to due process was protected by the registry system established under state law. 463 U.S. at 265, 103 S.Ct. at 2995. The Court so held notwithstanding the father's active efforts to assert his rights to custody of his child. Justice Stevens discussed the nature and effect of the natural father's opportunity interest, commenting that when an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, in other words, preserves his "opportunity interest" in custody, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. *Id.* at 261, 103 S.Ct. at 2993. Accordingly, the Court concluded that the state must provide sufficient means to efficiently exercise one's rights, that is, sufficient means to seize one's opportunity interest and attain custody of their child. Nevertheless, the natural father, who had filed a petition seeking a determination of paternity and visitation privileges before the decree of ***1188** adoption was entered, did not prevail on his due process (or equal protection) claim.

Judge Ferren's more expansive reading of the holding in *Lehr,* adopting the analysis in a law review article that *Lehr* creates a substantive due process right in a natural parent to custody, see opinion at 1158-1159, would require this court to overturn its previous decisions about the elements of the constitutional standard. Neither *Lehr,* nor pre-*Lehr* Supreme Court decisions interpreted in light of *Lehr,* require such an overhaul of our law. While the Court refers to a natural father's parental interest in the care and custody of his child as deserving of "substantial protection under the Due Process Clause," *Lehr,* 463 U.S. at 261, 103 S.Ct. at 2993, nothing in *Lehr* indicates that the Court was talking about a substantive, rather than a procedural, due process right incorporating a parental preference. Indeed, by affirming the constitutionality of a statutory limitation on the category of natural fathers whose parental rights

are protected and denying Mr. Lehr, who continually tried to assume responsibility for his child, a right to notice and hearing before the adoption decree was issued and his parental rights were terminated, the majority in *Lehr* retreats from the broader position taken by the dissent in recognition of the valuable interest in parenting one's own child. *See Lehr, supra,* 463 U.S. at 272-73, 103 S.Ct. at 2999 (White, J., dissenting). Even were there some implicit substantive due process right protecting a natural father's interest in taking care and custody of his child, nothing in *Lehr,* either alone or in conjunction with *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), *Caban v. Mohammed,* 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979), and *Quilloin v. Walcott,* 434 U.S. 246, 255, 98 S.Ct. 549, 554, 60 L.Ed.2d 297 (1978), suggests that the best interest standard is inconsistent with due process or that the natural father's right is preeminent. [12] Indeed, since *Lehr* the Court has made clear that a natural father's right to a relationship with his child is not unlimited and can be defeated by a statutory presumption even in the absence of a hearing before termination of his parental rights. *Michael H. v. Gerald D.,* 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989). [13] The provision in the District of Columbia Code requiring that a natural parent must be "immediately" notified of an adoption proceeding meets the requirements of due process as defined by *Lehr. See Michael H. v. Gerald D., supra,* 109 S.Ct. at 2347 (Stevens, J., concurring). *Lehr* does not, in my view, provide further constitutional protection to H.R. [14]

***1189** Under our adoption statute, a natural father, who has not abandoned his opportunity interest in seeking custody of his child, is entitled to custody of the child, where the mother has surrendered her parental rights in favor of adoption of the child by a stranger(s), absent a showing that such custody would not be in the best interest of the child. As between such a natural parent and strangers to the child, the burden of proof is on the strangers to show by clear and convincing evidence that the best interest of the child requires custody be placed with the strangers. This burden will not be easily met where the parent is deemed to be fit since that circumstance ordinarily will embrace the concept that a fit parent will be responsive to the best interests of the child. [15] An exception may arise where the child is residing in a preexisting unit. *See Quilloin, supra,* 434 U.S. 246, 98 S.Ct. 549 (no violation of substantive due process by use of best interest of child standard where natural father never had and never sought custody). [16]

This formulation of our standard is consistent with the District's legislative policy emphasizing the primacy of the best interest of the child who is sought to be adopted while giving full recognition to the natural parent's opportunity interest. [17] *Lehr* does ***1190** not require that we abandon our interpretation of the best interest standard. Indeed, *Lehr* does not abandon or revise the Court's emphasis on a child's best interest, *see Quilloin v. Wolcott, supra,* 434 U.S. 246, 98 S.Ct. 549. In addition, since the District of Columbia has never adopted by statute the "detrimental" or "harm" standard as appeared in a now repealed California statute and as appears in the Uniform Parentage Act, there is no basis to import that standard into our law. [18] Nor is there any indication that the legislature has abandoned the fit parent presumption underlying the best interest standard for adoption. [19]

***1191** Accordingly, in an adoption proceeding to which the natural father does not consent, the trial court must first determine whether the father has grasped his opportunity interest. If so, then the court must determine whether the father is a fit parent. [20] If he is a fit parent, then he is presumed to be entitled to custody of his child. That presumption is rebuttable, however, upon a showing, by clear and convincing evidence, that the best interests of the child require that the child be placed in the custody of the stranger(s). In sum, while the applicable statute prescribes a "best interests" standard in determining custody, I would affirm the court's long held interpretation of D.C.Code § 16-304(e) incorporating a parental preference in determining the best interest of the child when a noncustodial parent is fit and has not abandoned his opportunity interest. This is consistent with *Lehr,* and also with the statutory standard applied in this jurisdiction in recognition of the reality that only on rare occasions will custody with a fit natural parent fail to coincide with the best interests of a child.

Because the trial court failed to consider H.R.'s parental preference, a remand is required. *Armstrong v. Manzo,* 380 U.S. 545, 551, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965) (reversing judgment confirming adoption decree and remanding case where failure to timely notify natural father of adoption proceedings placed burden on him that he otherwise would not have had); *see Davis v.*

Jurney, supra, 145 A.2d at 850 (where fitness is necessary issue for disposition of custody of 9 year old child and there is no indication what trial judge would have found regarding natural parents' fitness, a remand for a new hearing is required) (citing *Schroeder v. Schroeder,* 133 A.2d 470 (D.C.1957) (new trial where error of law)); *cf. Bazemore v. Davis,* 394 A.2d 1377 (D.C.1978) (en banc) (remanding in absence of trial court's determination of best interest of child in custody dispute between natural parents). H.R. argued in pleadings before the trial court that the burden was on the O. family to show by clear and convincing evidence that it would be in the child's best interest to be placed with them. The record reveals that the trial court placed, and continued to place even after the evidentiary hearings had begun, an affirmative burden upon H.R. to come forward, in order to prevent the interlocutory decree of adoption from becoming final, with "evidence as to why the adoption would not be in the child's best interests," ignoring the preference favoring the natural parent.[21] While the trial court's final order permitting the adoption by the O. family includes a finding that the O. family established by clear and convincing evidence that it is in Baby Boy C.'s best interest to remain with the O. family, it is not clear that the trial court recognized at any point throughout the proceedings that the best interest standard includes a preference favoring the natural parent. Indeed, the trial court's finding that H.R. had not grasped his opportunity interest and its conclusion of law that a finding of unfitness ***1192** was unnecessary were consistent with the trial court's view that the burden remained with H.R. Combined with the absence of any reference to the parental presumption, the record demonstrates that the prior legal standard was not applied in assessing whether the O. family had demonstrated by clear and convincing evidence that the child's best interests required the permanent severing of any relationship between H.R. and his child. This court is not in a position to second guess the outcome had the trial court applied the best interest standard incorporating the parental preference in H.R.'s favor.

The division is in agreement that the "best interest" standard of our adoption statute incorporates a rebuttable presumption in favor of a fit unwed father who has grasped his opportunity interest. Accordingly, upon remand the trial court should give effect to H.R.'s unabandoned opportunity interest in the custody of Baby Boy C., in determining whether H.R. is a fit parent, and if so, whether the O. family has demonstrated, by clear and convincing evidence, that Baby Boy C.'s best interest require his custody to be placed in the O. family with or without visitation or other rights by H.R.

BELSON, Associate Judge, dissenting from the result:
I disagree with the result reached by Chief Judge Rogers and Judge Ferren for two reasons.

First, I disagree fundamentally with their holding that "as a matter of law" H.R. cannot be deemed to have "abandoned" his so-called "opportunity interest" in developing a parent-child relationship with Baby Boy C. *Cf. Lehr v. Robertson,* 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983). The relevant facts as found by Judge Virginia Riley, the most salient of which are not disputed, demonstrate that H.R. could readily have grasped his "opportunity interest" but failed to do so despite having received notice of the birth of his son in ample time to "come forward to participate in the rearing of his child." *Caban v. Mohammed,* 441 U.S. 380, 392, 99 S.Ct. 1760, 1768, 60 L.Ed.2d 297 (1979).

Second, even if we should assume, *arguendo,* that H.R. had seized his opportunity interest under *Lehr* and *Caban,* H.R. still would not be entitled to prevail in his opposition to the adoption of Baby Boy C. by the O. family because the trial court credited the testimony of an expert witness, Allen E. Marans, M.D., that removal of Baby Boy C. from the only family he had ever known would have a "devastating" effect on the child. Even if H.R. should be found a "fit" father (as Dr. Marans assumed he was) who had seized his opportunity interest, the finding of the devastating effect upon Baby Boy C. that would be caused by his removal from the O. family mandates the ultimate finding that a transfer of custody to H.R. would be detrimental to Baby Boy C.'s best interests or, in Judge Ferren's terminology, would "actually harm" the child. (Opinion of Ferren, J., at 1182). Under any view of applicable law advanced in the three opinions of this division, the result reached by the trial court must be affirmed because of this unassailable finding of fact.[1]

I.

I restate the facts only to the extent necessary to demonstrate two points: 1) as the trial court determined, H.R. failed to grasp the opportunity interest that *Lehr* and

antecedent authority recognized in unwed fathers, despite having received actual notice of the planned adoption one or two days following Baby Boy C.'s birth; and 2) the record fully supports the trial judge's unqualified finding of the devastating effect upon Baby Boy C. of separation from the O. family.

H.R. and L.C.'s relationship lasted from April, 1982, when they met in Zaire, through November, 1982, when they stopped seeing each other. L.C. was one week pregnant with Baby Boy C. at the ***1193** time of their last meeting. Throughout the eight-month period that they were "going together" H.R. was engaged to be married to a Zairian woman, E.R.,[2] then living in Paris. H.R.'s marriage to E.R. took place in December, 1983. At that time, E.R. was in Paris and H.R. was in Zaire. The trial court found that H.R. told E.R. about Baby Boy C. in April, 1984, when H.R. joined E.R. in France, eight months after the child's birth.

L.C. left Zaire in April, 1983, when she was five months pregnant, and gave birth to Baby Boy C. in Washington, D.C. on August 5, 1983. Ten days after Baby Boy C.'s birth, having heard nothing from appellant since her departure from Zaire, L.C. relinquished her parental rights to the Barker Foundation, a licensed child-placement agency, so that Baby Boy C. might be placed for adoption. During this period, both L.C. and Barker wrote to appellant at his university.

Upon her departure from Zaire, L.C. had written appellant H.R. a letter informing him that she was pregnant and that he was the biological father. By letter dated May 31, 1983, when L.C. was at least six months pregnant (and elective abortion no longer an option), Barker notified H.R. that L.C. had been working with Barker "with a view to placing the child she expects in July, 1983, for adoption." Significantly, the letter invited H.R. *to telephone Barker collect* if he wished to have any more information. In addition, although the letter did not notify appellant that a specific court proceeding had been initiated concerning the adoption of Baby Boy C. (which, of course, was not so at the time the letter had been mailed and received), the letter referred to "placement for the child," advice by Barker's "legal counsel," that the documents sent with the letter could "not be subpoenaed for use in any *other* proceeding" (emphasis added), that the forms must be "notarized," and that the Barker Foundation was "licensed through the Department of Human Services of the District of Columbia." (quoted in Opinion of Ferren, J., at 1145).

Appellant H.R. received this correspondence from Barker within a few days of Baby Boy C.'s birth and approximately one month after graduating from a university with a degree in law. Rather than telephoning Barker for more information, as suggested in Barker's letter, or contacting American lawyers in Zaire or officials at the U.S. Embassy in Zaire, appellant wrote a letter to L.C. on August 12, 1983, in care of her parents, stating in part that if she later married a racist, she should send the child to him to raise "if life with her husband is impossible."

Appellant used the mails to write L.C. although they were slow and unreliable. L.C. received his August 12, 1983, letter sometime in mid-September. Appellant also failed to write to Barker or to fill out the forms. Thus, the record supports the trial judge's finding that, during the crucial weeks following the birth of Baby Boy C., appellant was not seizing his opportunity interest.

Not having heard from appellant, the Barker Foundation placed Baby Boy C. with the O. family on September 22, 1983. On the same day, the O. family filed a petition for adoption in the Superior Court.

During October, 1983, appellant received confirmation, through two telephone calls he placed to L.C., that a child had been born, a boy, that L.C. had given up her parental rights to the boy, that Baby Boy C. had been placed in an adoptive home, and that a court was involved. In these telephone conversations, L.C. encouraged him to contact the Barker Foundation. L.C. testified that H.R. supported her decision to put Baby Boy C. up for adoption. In November and December 1983, L.C. wrote appellant two letters describing what she knew of Baby Boy C.'s adoptive placement and expressing her belief that the child was well cared-for.

After receiving these letters, appellant finally made a telephone call to the Barker Foundation. This call was placed on January 17, 1984, five and one-half months after Baby Boy C.'s birth and appellant's receipt ***1194** of Barker's May, 1983, letter. In response to a question on cross-examination as to why he waited from August, 1983, until January, 1984, to telephone Barker, H.R. testified: "It is a matter of temperament. I preferred first to examine

the situation before making a decision." By this time, Baby Boy C. had been with the O. family for four months, and H.R. had not made any effective effort to assume the role of a parent.

There was some disagreement as to what appellant H.R. told Barker about his wishes for Baby Boy C. H.R. testified that he told Barker he wanted to "recuperate" or pick up his son. Appellant also testified that he "requested clarification on the situation" of his child. Barker understood appellant to request only clarification of the forms (and the trial court so found). What is not in dispute is that appellant informed Barker that he would be more likely to receive correspondence addressed to him in care of the Peace Corps in Zaire. At the same time, appellant told Barker that he was expecting to take a trip to France or to Canada shortly, during which he hoped to come to this country to see the child.

Appellant acknowledged that he received a letter sent by Barker on February 6, 1984, concerning the adoption procedures in the United States and testified that it made him determined to fight to gain custody of Baby Boy C. At about the time the letter was sent, appellant called L.C., but did not contact the Barker Foundation either to voice his opposition to the adoption or to fill out the forms. Appellant testified that he did not seek an American lawyer in Zaire because he was soon to leave the country, and that he decided not to consult with the American Embassy in Zaire because "[i]t wasn't necessary" to consult with anyone familiar with U.S. law on adoption. He stated, however, that "I can understand that the court would expect that I could contact an American lawyer." By this time, the child was over six months old, and H.R. was still taking no effective steps to assert his interest in custody.

In late April, 1984, appellant's government sent him to Paris, France, to continue his law studies, rather than to Canada. Appellant telephoned L.C. twice in early May, 1984, and informed her of his situation. Appellant testified that during these conversations he asked L.C. to inform the Barker Foundation that he intended to come to the United States to take custody of Baby Boy C. when he had saved enough money. He acknowledged, however, that when he telephoned her to wish her a happy Mother's Day, he promised her that he would think about consenting to the adoption.

L.C. had a different understanding of their conversation. On May 8, 1984, she wrote Barker a letter in which she stated:

> Good news.... [Appellant] is in Paris, planning to try to find a job there or to return to his position in Zaire. He said he wanted to wish me a happy mother's day.... Tho [sic] he didn't have much to offer, he felt the best gift he could give was to sign the papers. He either already has or will sign them & send them in.

H.R. was in France approximately six months before contacting an attorney in September, 1984. After his attorney advised him that he must take action if he wished to gain custody of Baby Boy C., appellant wrote a letter to the Barker Foundation, informing Barker for the first time of his Paris address and stating:

> I have reflected a lot on this situation and fear that we probably have different points of view concerning what would be considered in the best interests of the child. Since [Baby Boy C.] has been rejected by his mother I do not believe that it is in his best interests that I distance myself from him. On the contrary, having been deprived of the person who would have been a marvelous mother for him, there only remains for him his true father, before any other solution.
>
> Therefore I cannot give my consent to any plan which would result in separating him further from his biological parents.
>
> I regret not being able to accept this full adoption project for the benefit of ***1195** people who are foreign and unknown to [L.C.], [Baby Boy C.], and myself.
>
> *Therefore I am ready to recover the child as soon as you [Barker] feel yourself no longer able to exercise [L.C.'s] rights as she would have exercised them if she still had rights to the child.*

(Emphasis added). Although appellant mailed this letter on December 1, 1984, Barker did not receive it until February 6, 1985. As the last paragraph of the letter reveals, H.R. remained ambivalent about assuming his role as a father. Baby Boy C. was over 16 months old when Barker received it, and H.R. was still equivocating about his possible role as a parent.

On February 25, 1985, appellant wrote Barker another letter advising that he had retained an attorney and had admitted paternity. He asked Barker to inform the court that he did not intend to abandon his child to anyone but L.C. In addition, he stated that he would like to gain custody of Baby Boy C. by his second birthday. He proposed that once he gained custody, Mr. and Mrs. O., appellees, be given visitation rights during vacations.

The trial at which the foregoing facts were elicited also occasioned the testimony of two child psychiatrists. Dr. Allen Elias Marans testified that based on his interviews with Baby Boy C. and the O. family, he thought that the family was doing an outstanding job of raising Baby Boy C. Dr. Marans concluded that removal of Baby Boy C., then 23 months of age, would be "devastating" to Baby Boy C. Dr. Marans viewed the rapprochement period that Baby Boy C. was then going through as a crucial developmental stage. Removing Baby Boy C. from the only family he had ever known would mean, in Dr. Marans' view, that "his full potential could never be reached either in the intellectual or emotional range." Removing Baby Boy C. from his prospective adoptive family would jeopardize his trust of future relationships. Such a change would cause the child to regress, as well. While agreeing that the effect of removing Baby Boy C. from his adoptive home could cause a "permanent scar," Dr. Marans acknowledged during cross-examination that if Baby Boy C. were to be removed at age three, rather than at twenty-three months, the problems would be more of a nature of "character development" than "gross impairment." On the subject of returning Baby Boy C. to his natural father, Dr. Marans noted that the "biological tie does not compensate for the nurturing that has taken place." Dr. Marans concluded that it was in the best interest of Baby Boy C. to remain with his adoptive family.

Dr. Joseph Noshpitz, the expert called by H.R., testified that based upon his interview with the O. family, he found them "wholesome people by and large, decent people. I have no problem feeling pretty good about them...." Dr. Noshpitz also acknowledged that they were very much in love with Baby Boy C. Dr. Noshpitz also had the opportunity to interview H.R. and E.R. and found them devoted to each other. Dr. Noshpitz thought that if H.R. were granted custody of Baby Boy C. the transfer of custody should not be immediate. Instead, he would recommend a "transfer be made gradually and stepwise over a period of perhaps several years; that there be a process of transition into which all the people involved would have to engage and within which they would have to participate." Dr. Noshpitz agreed with Dr. Marans concerning the inadvisability of an immediate transfer of custody from the O. family to H.R. and stated that it would "create great turmoil and great pain, great confusion, and I would not recommend it." He later agreed that such an immediate transfer to H.R. would "create harm to the child...." Although Dr. Noshpitz advocated a gradual transfer of custody or really a form of joint custody between H.R. and the O. family, he was unaware of any studies to back up his theory. Dr. Marans, who was present for Dr. Noshpitz' testimony, testified that he considered Dr. Noshpitz' plan for a gradual transfer of custody "naive." Dr. Marans further testified that such a joint custody arrangement would be damaging to the child. He stated: "This child needs to be protected from the deluding and undermining impact of having two sets of parents at this time, with all the ***1196** split loyalties and sense of loss and loss of identity and everything else. That is to me unquestionable." Dr. Marans reiterated his earlier view that the "best interests of the child are served by this child's continuing the stable, sensitive working unit that his family represents now...." During cross-examination, Dr. Marans stated that upon learning that he was separated from his natural father who had sought him Baby Boy C. would experience "anger and resentment but not destruction of [his] personality as there would be now." The court credited Dr. Marans' testimony.

On September 11, 1986, after holding hearings over an extended period, the court granted the petition for adoption by appellees.

The court's order was accompanied by findings of fact and conclusions of law. The court's findings included the following:

> Tearing Baby Boy [C.] away from Petitioners' family and granting Respondent custody would force the child not only to leave the only home he has ever known, but also to adjust to an entirely new home, culture, family, and language. This indeed would be devastating to the child. The damaging effects could not be removed by the experimental and unprecedented gradual transition

> and custody that Dr. Noshpitz proposes.

Thus, the court found that H.R.'s "refusal to consent to the adoption is contrary to Baby Boy C[ ]'s best interests" and that "Petitioners and Barker have established by clear and convincing evidence that it is in Baby Boy C[ ]'s best interests that he remain with Petitioners' family, and that Petitioners' petition for adoption be granted." I point out, parenthetically, that the foregoing quotation answers the concern expressed by Chief Judge Rogers that the trial court misallocated the burden of proceeding or persuasion, at least at the early stages of the hearing. (Opinion of Rogers, C.J., at 1191-1192). It is clear that when Judge Riley considered the entire record, she placed the appropriate burden on petitioners and Barker. [3]

The court expressly found that in the past appellant's intentions regarding his seeking custody of Baby Boy C. were ambivalent, a finding clearly supported by the record. The court noted that appellant waited several months before contacting Barker for the first time; that in appellant's January 17, 1984, telephone call he did not seek custody but only sought clarification of the documents that had been sent (thus rejecting H.R.'s testimony that he refused to consent to adoption in this call); that he did not respond to Barker's February, 1984, letter; that although appellant stated in his December 1, 1984, letter that he would not consent to the adoption, he did not specifically seek custody until his February 25, 1985, letter, in which he asked for custody before Baby Boy C.'s second birthday, five months later.

The court also found that appellant had never offered to provide financial support for Baby Boy C., except for an ambiguous offer to L.C. in the fall of 1983, and had never inquired into the child's health and welfare. The court concluded that appellant

> did not make any attempt to establish a custodial, personal, or financial relationship with [Baby Boy C.] until, in July 1985, the Court asked him whether he had ever given or offered any gifts to [Baby Boy C.].... If [appellant] truly were interested in establishing a meaningful relationship with his child, he would not have allowed geographical separation to prevent him from establishing that relationship.... [4]

***1197** In addition, the court concluded: "[T]he efforts of [the] Barker Foundation and the court to contact [appellant] far exceed[ed] the procedural protections upheld in *Lehr*. Through such efforts, [appellant] was contacted, and he received his due-process hearing." The court observed that appellant had learned of the pregnancy by May, 1983, and of the proposed adoption by August, 1983: by October, 1983, he had confirmed the fact of the child's birth and the placement with the appellees; and by February, 1984, at the latest, when Barker sent its second letter, he was on notice that the proposed adoption involved a court proceeding, requiring "compliance with specific court-administered procedures." The court noted that although appellant claimed he did not understand American law on adoption, he could have consulted the American Embassy or the American law firm in Zaire to ascertain his legal rights, something he declined to do. H.R. testified that in Zaire, adoptions involve the courts and government agencies.

The trial judge also concluded that after appellant received Barker's reply, "he frustrated the Court's efforts to give him notice of the adoption proceedings by failing to notify Barker of his move from Zaire to France," an action which he testified he felt he had no obligation to take. In addition, the court observed that although appellant stated that he moved to France to be in a better position to come to this country to obtain custody of his son, he did not come here until fourteen months later when he was ordered to do so by the court. Indeed, the first time appellant applied for entry to the United States was May 15, 1985. H.R. further testified that the idea of going to the United States in late 1983 after learning he had a son did not occur to him. During this time, he did not ask Barker for the name of the court or infer from Barker's letterhead, which bore a District of Columbia address, that the court might be located in the District of Columbia. Rather, he "insisted that he need not have come forward in this adoption proceeding until he received 'official notice' of the proceeding."

As we discuss in more length below, the salient facts support the trial judge's ruling that because H.R. did not take the steps that were reasonably available to assert his rights as a father, he did not become entitled to substantial constitutional protection afforded unwed fathers who do

so, and that it is in Baby Boy C.'s best interests that he remain with the O. family.

II.

The Supreme Court has dealt with the extent to which the due process clause affords protection to an unwed natural father's biological relationship with his child in just a handful of cases. In these cases, "the Court has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed." *Lehr v. Robertson,* 463 U.S. 248, 257, 103 S.Ct. 2985, 2991, 77 L.Ed.2d 614 (1983).[5] In *Lehr,* the Supreme Court dealt with the procedural due process protection the state must give an unwed father who wishes to develop his ***1198** "opportunity interest" in a relationship with his child. The father in *Lehr* had never supported and had rarely seen the two-year-old daughter he claimed as his own, but he had made efforts to locate her and her mother. The father and mother had lived together during the pregnancy and the father had visited the mother and infant in the hospital following the infant's birth. The mother had never identified him as the father, nor had the father entered his name on the State of New York's putative father registry. But, one month after the mother and her husband commenced an adoption proceeding, in which the putative father was not a party, the putative father filed a petition for paternity and visitation rights. The state court granted the petition for adoption without considering the petition for paternity. The United States Supreme Court upheld the state court's action, concluding that the state had afforded the unwed father adequate procedural protection.

The Court emphasized that " '[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.' " *Lehr, supra,* 463 U.S. at 260, 103 S.Ct. at 2993 (quoting *Caban, supra,* 411 U.S. at 397, 99 S.Ct. at 1770) (emphasis removed). The Court also stated:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

463 U.S. at 262, 103 S.Ct. at 2993-94 (footnote omitted).

Observing that the "right to receive notice was completely within [the father's] control," *Id.* at 264, 103 S.Ct. at 2995-he could have mailed a postcard which would have caused his name to be entered on the putative father registry-and that he was presumptively capable of asserting and protecting his own rights, the Court concluded that due process was not offended by the state court's insistence on strict adherence to the procedural requirements of the statute. *Id.* at 264-65, 103 S.Ct. at 2994-95. *Lehr* thus held that the biological father did not have an absolute right to notice and a hearing.[6] Having failed to develop a relationship with his child or to communicate his interest in that regard by placing himself on the putative father registry, Lehr was found not entitled to the hearing he sought.

The Court in *Lehr* compared the factual situation of that case with those presented in the three earlier Supreme Court precedents:

> The difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban,* and the potential relationship involved in *Quilloin* and this case, is both clear and significant. When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," *Caban,* 441 U.S. at 392 [99 S.Ct. at 1768], his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." *Id.* at 389 n. 7 [99 S.Ct. at 1766 n. 7]. But the mere existence of a biological link does not merit equivalent constitutional protection.

Id. at 261, 103 S.Ct. at 2993. As applied to this case, this language supplies the context for the trial judge's ruling that appellant's interest here was not entitled to substantial

protection under the due process clause because appellant had not in fact ***1199** come forward to participate in the rearing of his child.

Like the father in *Lehr,* appellant cannot claim that he has established an actual parent-child relationship with Baby Boy C. In fact, he has never seen his son. Unlike the father in *Lehr,* however, appellant neither saw L.C. after the first week of her pregnancy, nor contributed to L.C.'s financial support during her pregnancy and the birth of their child. *See In re Adoption of Doe,* 543 So.2d 741, 745-46 (Fl.1989) (unwed father's conduct during pregnancy in failing to provide any support to the mother relevant).

I observe that my colleagues would tilt the playing field in H.R.'s favor by framing the question to be whether H.R. "abandoned" his opportunity. (Opinion of Ferren, J., at 1144; Opinion of Rogers, C.J., at 1188). The Supreme Court, on the other hand, has spoken in terms of the unwed father's affirmative duty to "come[e] forward" to participate in the rearing of his child. *Lehr, supra,* 463 U.S. at 261, 103 S.Ct. at 2993; *Caban, supra,* 441 U.S. at 392, 99 S.Ct. at 1768.

The record strongly supports the trial judge's finding that the notice appellant received gave him sufficient information to enable him to come forward in timely fashion to establish a father-son relationship if he was then disposed to do so and to enable him to assert seasonably his legal rights as a natural father.

In sum, I would affirm the trial judge's rejection of appellant's attempt to attribute to Barker or the court either his failure to come forward and establish a parental relationship with Baby Boy C. or his failure to assert his legal claims more expeditiously and thereby improve his chances of gaining custody of the child. Rather, I am satisfied that the amount and quality of notice afforded appellant overcame his claims of deprivation of procedural due process.[7] *See United States v. Priority Products, Inc.,* 793 F.2d 296, 300-01 (Fed.Cir.1986) (Even in absence of notice required by statute, actual notice of administrative proceeding satisfied due process requirements by notifying shareholder that he could be sued in his individual capacity).

Even assuming that the trial court erred in failing to provide prompt notice of the filing of the petition (itself or through Barker) as required by D.C.Code § 16-306(a) (1989 Repl.), I would conclude that the notice actually afforded appellant by the court, Barker, and L.C. rendered harmless any error involved in failing to comply with the statute. I will return to the statutory notice issue after completing the analysis of appellant's due process claim.

A chronological analysis of appellant's course of conduct as it related to his interest in assuming the role of Baby Boy C.'s parent will demonstrate how H.R. failed to grasp his opportunity to assume the role of ***1200** Baby Boy C.'s father. When Baby Boy C. was born on August 5, 1983, appellant had a strong claim to the opportunity to develop a relationship with his son and to his son's custody. Only L.C.'s claim was as strong, but she planned to, and subsequently did, relinquish all her parental rights. Not yet having been placed with a family, Baby Boy C. had developed no ties with others which might have served to undercut appellant's potential relationship with his child. From that time until Baby Boy C. was placed with the O. family on September 22, 1983, almost seven weeks later, appellant possessed a full opportunity to come forward to commence a relationship with his child. Furthermore, appellant was notified of the plans for adoption through Barker's May 31, 1983, letter, which he received within days of the child's birth. There was testimony from Barker that, had appellant come forward at that time, he would have been given custody of Baby Boy C. Appellant, however, failed to respond to Barker, even to the extent of taking up Barker's offer to make a collect telephone call, or to indicate any interest in custody of the child for himself.

Appellant's opportunity to assert his parental rights began to wane when the Barker Foundation, not having heard from him, placed Baby Boy C. for adoption. At that point, the O. family, rather than appellant, began to develop a parent-child relationship with Baby Boy C., and it became stronger as time passed. With the strengthening of the bonds between Baby Boy C. and the prospective adoptive family, appellant's opportunity to develop a relationship with his child withered. Appellant maintains that he has always professed his strong love for the child, at least to L.C. Even if that is so, he failed to express it in a way that would have established a relationship with the child at a time when bonding was critical.[8] During this time appellant undertook none of the normal parental responsibilities that would have helped him develop a relationship with his child. Rather, he communicated with L.C. sporadically. Appellant acknowledges that as late as

May of 1984 when Baby Boy C. had been with the O. family for approximately eight months, he told L.C. he would consider consenting to adoption. [9]

Well into this period of diminishing opportunity, on December 1, 1984, appellant decided to convey to Barker, whom he knew to have legal custody to the child, his definitive refusal to consent to the adoption. This he did by letter, which was not received until February 1985, when Baby Boy C. was eighteen months old. Another letter expressing the same message was received shortly thereafter.

Once the court received word of appellant's refusal to consent, it extended the interlocutory decree of adoption to allow appellant to appear before it to oppose the adoption. When appellant appeared, he was accorded a full evidentiary hearing. By that time, however, as both Dr. Marans and Dr. Noshpitz testified, the relationship between Baby Boy C. and his adoptive parents ***1201** had become so complete that to remove him from the O. family would be devastating.

Unlike my colleagues on the panel, the trial judge did not find in appellant's actions, from the time he was given prompt notice of his paternity until the hearing in the Superior Court some twenty-two months later, the "com[ing] forward to participate in the rearing of the child," *Caban, supra,* 441 U.S. at 392, 99 S.Ct. at 1768, or the assumption of parental responsibility which would warrant substantial protection of his interest in personal contact with his child under the due process clause. [10] *Lehr, supra,* 463 U.S. at 261, 103 S.Ct. at 2993. The record supports the trial judge's ruling.

Judge Ferren's opinion includes the following finding, joined essentially by Chief Judge Rogers: "Given the communications he did receive, H.R. did all he could reasonably have been expected to do to claim custody of his child." Judge Ferren goes on to conclude, in part on the basis of the foregoing finding, that H.R.'s " 'opportunity interest' remained intact." (Opinion of Ferren, J., at 1172). The former of these quoted passages presents two problems. The first is that it is an appellate finding of fact. The second is that it is plainly wrong. H.R. could reasonably have been expected to do many, if not most, of the following:

-At the time of Baby Boy C.'s birth, he could have made the collect phone call that Barker offered in order to confirm that he was a father.

-He could have written Barker directly and posed any questions he had.

-He could have gone to the U.S. Embassy in Kinshasa for assistance in learning about the facts and American adoption practices.

-He could have secured the advice of an American attorney in Kinshasa.

-He could have used his Peace Corps contacts or other English-speaking acquaintances to contact Barker or others if communication in English was any problem.

-As events unfolded, he could have kept Barker informed of his address.

-He could have telephoned or written the Embassy of Zaire in Washington for assistance in looking into the matter.

-Knowing that Barker was located in the District of Columbia, he could have contacted the District of Columbia courts for information, and to express interest in custody, if he was, in fact, interested.

-He could have made a firm commitment to Barker to come and assume custody of the child as soon as possible.

-He could have offered and sent support or gifts for the child or the mother before the trial court questioned him on this in July, 1985.

-He could have offered to pay money in support of L.C. during pregnancy, and at the time of birth.

-He could have maintained contact with L.C. after she left Zaire in April, 1983.

Far from doing "all he could reasonably have been expected to do," H.R. failed to do any of the foregoing.

In observing that the trial court should be sustained in its finding that H.R. failed to grasp his opportunity, I am not unmindful of the difficulties of this case. Yet, it was for appellant to find some means of initiating a relationship with his son. A clear statement of his intention to assume

full custody, a modest contribution to Baby Boy C.'s support, some attempt to visit his child early on or, above all, an effort to assume custody at the earliest possible time manifested by a clear statement of his intention to do so-any of these things would have lent some support to appellant's claim, as an unwed father, to the ***1202** rights of a parent. But the virtually complete absence of such beginnings leaves appellant outside of the area in which substantial protection is available to him under the due process clause. [11]

Appellant's failures are the more egregious because he is a well-educated person-he had completed law school and was on the way to becoming a member of the legal profession, both in his native Zaire and in France, at the time of the events in question here. He had the ability to know all he needed to know to go about the task of building a relationship with his son and asserting his claim to legal recognition of that relationship. He failed to do so. Thus, it cannot be said that Barker or the trial court thwarted his assertion of his rights or created a conflict between the father's interest and the best interests of his child.

Returning to the matter of the asserted error of the trial court in failing, on its own or through Barker, to notify H.R. of the filing of the petition for adoption, D.C.Code § 16-306(a) (1989 Repl.), any error involved was harmless for at least two reasons. The first is that H.R. received adequate notice of the adoption proceedings. The second is that, as demonstrated in Part III of this opinion below, the trial court should be affirmed in any event because of the devastating effect upon Baby Boy C. of his being taken from the O. family.

As I noted earlier in my description of the facts, an important contribution to H.R.'s notification was the Barker letter that informed appellant of the expected birth of Baby Boy C. almost contemporaneously with the birth itself, and which also told appellant generally of plans to place the child for adoption. At the very least, the letter put a legally trained man who had impregnated a woman on notice that he should find out if he was indeed a father. All he had to do to find out was to make a collect telephone call to Barker. Two telephone conversations with L.C. in October 1983, confirmed for appellant, *inter alia,* the fact of the actual birth of the child, his placement with an adoptive home, and the involvement of a court. A belated telephone conversation with Barker the following January gave appellant more information, and the communications recited at length above then followed.

Under the circumstances, H.R. was not seriously disadvantaged by the lack of immediate notice of the filing of the petition. Indeed, if he had moved forward first with inquiries upon the receipt of the Barker letter at the time of Baby Boy C.'s birth with a clear indication that he wished to take custody of the child, it is most probable that no petition would ever have been filed. A witness for Barker so testified.

Consideration of the obvious purpose of the statutory notice provision also undercuts H.R.'s position. Although D.C.Code § 16-306 calls for immediate notice of the filing of an adoption petition, there is no more than an incidental connection between the statutory notice required under the D.C.Code and the opportunity discussed in *Lehr* for a father to assert his interest in being a parent to his child. There is no requirement that the petition be filed shortly after birth; often circumstances do not permit that. Nor need the petition be filed promptly after placement of a child with the potential adopting parents. The timing of the filing of the petition is left to the adoptive parents, who presumably would be guided by the adoption agency. Under ***1203** the statute, the petition could be filed after the father has substantially lost his opportunity to act as a parent. The purpose of the statutory notice requirement is obviously to give the natural parent an opportunity to participate in the adoption proceedings, not to prompt an unwed father to seize his opportunity to act as a parent.

Turning to the purpose of § 16-306, *i.e.,* to permit H.R. to participate in the proceedings, patently it was satisfied because H.R. participated fully in lengthy hearings. His only possible complaint about the proceedings, that they did not take place before Baby Boy C. began to bond with the O. family is, as I have demonstrated, attributable directly to H.R.'s failure to come forward when he could have.

III.

There is a second and independent ground that requires us to affirm the trial court. Under any and all of the theories of how to decide adoption cases set forth in the three

opinions of this division, a finding that the child would be "devastated" by reason of being taken away from the adoptive parents and given to a natural parent requires that the child be left with the adoptive parents if they are otherwise qualified. In such a case, as all members of this division recognize, the best interests of the child require that result. Here the trial court made such a finding, and the record strongly supports it. This court commits a serious legal error that may have equally serious human consequences by failing to give effect to this dispositive finding.

The interests of the adoptive parents do not figure directly in the best interests test. It is not their interests, but the child's that we consider. But where there has been close family bonding, their interests and the child's are reciprocal, and they suffer similarly from a misapplication of the law. Notwithstanding the strong interest of a natural father in rearing his own son, in a case such as this, where a trial on the merits has produced a dispositive finding that is supported by the record, there is no reason to subject Baby Boy C. and his adoptive parents to the agony and uncertainty of a second trial.

The most likely result of the majority's vote will be further proceedings in the trial court at which, presumably, further expert testimony will be adduced, probably from the experts who testified before, and possibly from other experts, who will have examined or reexamined members of the O. family. In what is apparently an effort to alleviate the anxiety and suffering that will be caused by this remand, Judge Ferren's opinion offers suggestions about the manner in which the proceedings on remand may be approached by the judge who is designated to replace the late Judge Riley. (Opinion of Ferren, J., at 1180-1181). As I understand, it is suggested that before the court decides whether it is necessary to reopen the record, "perhaps Dr. Marans, Dr. Noshpitz, and others (if necessary) who are familiar with the record, could be recalled to help the court evaluate the factual record more thoroughly before the court itself applies the correct legal test." (Opinion of Ferren, J., at 1181). It is not clear what the experts could do that would assist the court. As Judge Ferren acknowledges, they could not be asked to help the court apply a legal standard. Nor is it suggested how they could factor into their existing testimony a preference in favor of a natural parent which the majority must presume could somehow affect their view of the devastating impact upon the child that a transfer would have. The same passage of Judge Farren's opinion goes on to suggest that if upon application of the "correct legal test to the evidence as of 1986," the trial court "were to decide in favor of the adoptive parents, that would end the matter (subject to the right of appeal)." But, the opinion continues, "if the court were to conclude custody should have been awarded to H.R., then the court would have to reopen the proceeding for consideration of developments since 1986." (Opinion of Ferren, J., at 1181). It is not explained why, given the reversal of the trial judge's order that the majority is entering, the adoptive parents are entitled to treatment preferential to that extended to H.R. My view is that it is not necessary legally to extend ***1204** this form of solicitude to the adoptive parents (and Baby Boy C.) because the appropriate course for this court is to act on the existing record, heed the strength of the finding that the child would be devastated by his removal from the O. family, and affirm the ruling of the trial court.

It is not necessary to repeat here the record support for Judge Riley's finding of the harm which will befall Baby Boy C. if he is taken from the O. family. (See p. 1192, *supra,* and Opinion of Ferren, J., at pp. 1150 to 1151). Such a removal from the only family he has ever known, according to Dr. Marans, would be "devastating" to Baby Boy C. and would impair his future development. The trial court credited Dr. Marans' testimony that Baby Boy C. would be seriously harmed by removal from the O. family. That should end this case.

The postscript to Judge Ferren's opinion would justify ignoring these dispositive findings of fact on the ground that they were made "in the context of applying the traditional 'best interest of the child' standard without consideration of the parental preference or the fitness of the father, H.R." But it can readily be seen that this matter of "context" has no bearing on the dispositive finding we are addressing. Even if we presume the fitness of the father and acknowledge his preferred status, the ultimate determination that the best interest of the child requires that he remain with the O. family is mandated by the trial judge's findings concerning the consequences upon the child of a removal of the O. family. Judge Riley credited expert testimony that the transfer would be "devastating" to the child, that the child's removal from his adoptive family's home would cause a "permanent scar," and that the child's "full potential could never be reached either in the intellectual or emotional range" if he were taken from the O. family.

Judge Ferren's postscript posits that we cannot properly assume "that the court's findings, while looking through the prism of one legal test, would be the same when looking through another prism intended to grant presumptive custody to a fit natural father as against strangers." This position misconstrues the factfinding function. The trial judge in this case was making a straightforward finding of fact when she found that the transfer of the child from the O. family would be "devastating." [12] She was not applying a legal test. A judge acting as a factfinder, for example, can make a finding that the arm was broken, the traffic light was red, or that the physician misdiagnosed the patient's physical or mental illness. The judge then determines the legal consequences of the factfinding. In this case, Judge Riley found factually that the child would be devastated by being taken from the O. family. Her best interest finding followed inexorably. [13] It should be affirmed.

IV.

Although I disagree with the conclusion reached by the majority, I agree essentially with them on the test to be applied once an ***1205** unwed father is found to have diligently pursued his opportunity interest under *Lehr.* A fit father, including an unwed father who has come forward promptly and undertaken to act as a father, should presumptively be entitled to custody of his child when the mother has relinquished her rights and put the child up for adoption, unless it is demonstrated that the best interests of the child require otherwise. The statutory standard of "best interests" of the child means that the child's interests are paramount, with a rebuttable presumption that placing the child in the custody of a fit natural father who has come forward and undertaken to act as a father will ordinarily be in the child's "best interests."

In this case, H.R. did not earn the presumption. Even if he had, the best interests of Baby Boy C. would nevertheless require that he remain with the O. family. For the reasons I have given, I dissent.

All Citations

581 A.2d 1141

Footnotes

* Judge ROGERS was an Associate Judge of this court at the time of argument. Her status changed to Chief Judge on November 1, 1988.

1 The trial court's findings of fact and conclusions of law in this very complex case are adopted practically verbatim from the proposed findings and conclusions submitted by petitioners, Mr. and Mrs. O., and the Barker Foundation. Thirty-five of the fifty paragraphs of findings of fact are verbatim; eleven of the remaining fifteen contain only grammatical or single word changes, and four add or delete several sentences. The legal analysis, while also practically verbatim, contains several changes of emphasis. Although a stricter standard of review is in order when a trial judge adopts verbatim the proposals of one party, *Leftwich v. Leftwich,* 442 A.2d 139, 142 (D.C.1982), we believe that the changes made by the trial court, although minor, indicate that the " 'findings and conclusions ultimately represent the judge's own determinations.' " *District Concrete Co. v. Bernstein Concrete Corp.,* 418 A.2d 1030, 1035 (D.C.1980) (quoting *Sullivan v. Malarkey,* 392 A.2d 1057, 1061 (D.C.1978)). Accordingly, the "clearly erroneous" rule applies. *Id.*

2 The text of the form letter was as follows:

> Ms. [L.C.] has recently been working with our agency with a view to placing the child she expects in July, 1983 for adoption. She has named you as the father and we would be grateful for your cooperation in planning the best possible placement for the child. We are advised by legal counsel of The Barker Foundation that the enclosed documents must be maintained by us in strict confidence and the documents may not be subpoenaed for use in any other proceeding. The Barker Foundation is a reputable agency which is licensed through the Department of Human Services of the District of Columbia and has been in existence for over thirty years. Many babies have been placed through our agency.
>
> We have enclosed two forms: (1) an admission of paternity, which, if signed, must also be notarized; and, (2) a denial of paternity, which may be signed without notarization. *Please return both the original and the copy of whichever paternity form you sign.* We are also enclosing a background information form which will provide us with details about you and your family history. Even if you sign the denial of paternity form, we would respectfully request that you fill

> in the background form and return it to the Barker Foundation if there is the slightest chance that this child is yours. Names and addresses need not be included but since many families have histories of allergies, diabetes, etc., you will understand that this information could be crucial to the child. For matching purposes, we would appreciate it if you would enclose a snapshot.
>
> We fully understand what a difficult situation this is for you and we want to help in any way that we can. If you wish to have any further information, please call me collect at (202) 363-7751. Your cooperation in filling out and sending the above information will ensure that you will not hear from us again if this is your wish.

(Emphasis in original). The trial court's factual finding that this notice gave H.R. actual notice of the adoption is clearly erroneous. At best, this notice informed H.R. that in May 1983 L.C. had been contemplating giving their baby up for adoption.

3 L.C. wrote to H.R. in the care of a friend in Zaire, an address suggested by Katy, their mutual friend, whom L.C. had accidentally encountered in Washington.

4 D.C.Code § 16-306(a) (1981), discussed *infra* at [1161-1162, 1165-1167], provides that "due notice of pending adoption proceedings shall be given to each person whose consent is necessary thereto, immediately upon the filing of a petition." Barker did not provide the court with H.R.'s address at this time.

5 L.C. reminded Avery that Avery had "said that it would be hard for the biological father to claim the child after s/he had been living with his or her adoptive family for a year and a half." L.C. also stated that she hoped her notifying Barker of H.R.'s "response of 'no' to the adoption" did not put Barker in "an awkward position legally."

6 The court's factual finding that this letter placed H.R. on notice that there was a pending court proceeding involving the proposed adoption is clearly erroneous.

7 The court's factual finding that H.R. knew of Barker's role in the adoption proceeding is clearly erroneous.

8 The trial court found that the delay in issuing the show cause order after H.R.'s January 17, 1984 telephone call to Barker was due to the need to translate the show cause order into French. No good explanation for the seven-month delay appears in the record, however, and the court's finding is not supported by the evidence presented.

9 The court's finding that the delay between the July 1985 hearings and the May 1986 hearing resulted from difficulties encountered in accommodating H.R.'s study schedule in France is clearly erroneous.

10 It was undisputed that both the O.s and the R.s possessed the financial resources to care for Baby Boy C.

11 The trial court apparently ignored H.R.'s contention that D.C.Code § 16-306(a) (1981) required that he be given immediate notice of the filing of the adoption petition.

12 *See Shelton v. Bradley,* 526 A.2d 579, 580 n. 3 (D.C.1987) (referring to "a potential conflict between these two lines of cases"); *In re N.M.S.,* 347 A.2d 924, 927 (D.C.1975) (referring to reconciling the holdings by reference to "the differing factual situations" or to "the proposition that ordinarily a child's best interest is served by being with a fit parent").

13 D.C.Code § 21-101 (1989), relied on in *Shelton,* provides:

> (a) The father and mother are the natural guardians of the person of their minor children. When either dies or is incapable of acting, the natural guardianship of the person devolves upon the other.
>
> (b) This section does not affect the power of a court of competent jurisdiction to appoint another person guardian of the children when it appears to the court that the welfare of the children requires it.

When *Davis* and *Bell* were decided, these subsections were located in separate provisions of the D.C.Code, *see* D.C.Code §§ 21-101, -108 (1951), respectively. They are both traceable to 31 Stat. 1369, ch. 854, § 1123 (Mar. 3, 1901), which was in effect when *Beall* was decided but was not cited there.

14 *See also In re Lambert,* 86 A.2d 411 (D.C.1952) (in proceeding to determine best interests of children found to be without adequate parental care, mother not entitled to jury trial). By the time *N.M.S.* was decided, the "best interests" test had been incorporated into the statute governing dispositions of children who were "found to be neglected," *see* D.C.Code § 16-2320(a) (1973) (incorporating Pub.L. 91-358, title I, § 121(a), 84 Stat. 535 (July 29, 1970)). The courts in *LEM, Cooley,* and *Holtsclaw* cited caselaw for the "best interests" test from this and other jurisdictions. The court in *LEM* cited *Bell* and *Davis,* among other cases, but did so, in context, not for purposes of applying a parental preference but for the proposition that the fitness of a parent at the time of the hearing is more important than past conduct in determining present qualifications.

15 D.C.Code § 16-2320(a) (1973) provided for "any of the following dispositions which will be in the best interest of the [neglected] child:" (1) remaining with the parent, guardian, or other custodian subject to various conditions; (2) placing the child under "protective supervision"; (3) transferring legal custody to a public agency, child placing agency, or qualified relative or other individual; (4) committing the child for "medical, psychiatric, or other treatment;" and-as implemented in

part by Super.Ct.Neg.R. 18(c)-"(5) [m]ak[ing] such other disposition as may be provided by law as the [Family] Division deems to be in the best interests of the child and the community."

16 D.C.Code § 16-309(b) (1989) provides in relevant part:

> (b) After considering the petition, the consents, and such evidence as the parties and any other properly interested person may present, the court may enter a final or interlocutory decree of adoption when it is satisfied that:
> (1) the prospective adoptee is physically, mentally, and otherwise suitable for adoption by the petitioner;
> (2) the petitioner is fit and able to give the prospective adoptee a proper home and education;
> (3) the adoption will be for the best interests of the prospective adoptee; and
> (4) the adoption form has been completed by the petitioner pursuant to section 10 of the Vital Records Act of 1981.

17 D.C.Code § 16-304(e) (1989) provides:

> The court may grant a petition for adoption without any of the consents specified in this section, when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interest of the child.

18 D.C.Code § 16-2353 (1989) provides:

> (a) A judge may enter an order for the termination of the parent and child relationship when the judge finds from the evidence presented, after giving due consideration to the interests of all parties, that the termination is in the best interests of the child.
> (b) In determining whether it is in the child's best interests that the parent and child relationship be terminated, a judge shall consider each of the following factors:
> (1) the child's need for continuity of care and caretakers and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages;
> (2) the physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child;
> (3) the quality of the interaction and interrelationship of the child with his or her parent, siblings, relative and/or caretakers, including the foster parent; and
> (4) to the extent feasible, the child's opinion of his or her own best interests in the matter.

19 *But see In re J.S.R.,* 374 A.2d 860, 863 n. 11 (D.C.1977) (suggesting reliance on similar factors in the Uniform Marriage and Divorce Act § 402, 9A U.L.A. 561 (1987)); *see also In re J.O.L.,* 409 A.2d 1073, 1075 (D.C.1979) (court suggests still another list of factors in considering appeal of grant of stepfather's adoption petition), *vacated and remanded,* 449 U.S. 989, 101 S.Ct. 523, 66 L.Ed.2d 286 (1980), *cert. denied,* 454 U.S. 832, 102 S.Ct. 131, 70 L.Ed.2d 110 (1981).

20 *See Caban v. Mohammed,* 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979).

21 The authority of the court to grant a petition for adoption despite a parent's lack of consent remained unchanged. D.C.Code § 16-304(e) (1989).

22 The *Stuart* court, in effect, saved the constitutionality of the 1938 Act, as applied, by construing its "purposes" section in a way that required a parental preference. *See Stuart,* 72 App.D.C. at 394, 396, 114 F.2d at 830, 832. The court did not find a statutory basis for that preference aside from constitutional requirements. In any event, the "purposes" provision so construed, D.C.Code § 11-902 (1940), is no longer in the District of Columbia Code.

23 In *Michael H. v. Gerald D.,* 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), a majority of the Court upheld a California statute that, except in limited circumstances, denied natural fathers the right to establish their paternity of children conceived during, and born into, marriages between the children's mothers and other men. A plurality opinion reasoned that even though Michael H. had begun to establish a parental relationship with his daughter, he had no constitutional right to "substantive parental rights ... of a child conceived within and born into an extant marital union that wishes to embrace the child." *Id.* at 2344. Justice Stevens, concurring in the judgment, "would not foreclose the possibility that a constitutionally protected relationship between natural father and his child might exist in a case like this," but he concluded that the California statute was not unconstitutional because it did not prevent Michael H. from asserting a right to visitation. *Id.* at 2347 (Stevens, J., concurring in the judgment).

24 Other state actions which vitally affected H.R.'s opportunity to develop a relationship with his child were Barker's investigation of the backgrounds of L.C., H.R., and the O. family for the court; its certification to the court in December, 1983, that the O. family was suitable for adoption of Baby Boy C; and its consent to the O. family's petition for adoption, also in December, 1983.

25 H.R. also contends that the Barker Foundation, through the actions of Alice Avery, intentionally misrepresented his rights concerning Baby Boy C. and committed fraud on the court when it told the court in December of 1983 that his whereabouts were unknown. The trial court addressed these legal issues only indirectly and summarily in a statement, adopted verbatim from the petitioner's proposed findings of facts and conclusions of law, that it "specifically rejects any

allegation or suggestion by [H.R.] that Barker or its counsel in any way sought to mislead either [H.R.] with respect to the nature of this proceeding or the Court with respect to [his] whereabouts or his intentions as to seeking custody *vel non* of Baby Boy [C.].” Because the trial court did not comprehensively address the fraudulent misrepresentation claims, I do not reach these issues on appeal-except to say I do believe the trial court erred in asserting that the record contained no evidence supporting such claims.

26 Avery of the Barker Foundation testified that if H.R. had come forward before the placement of Baby Boy C. with the O. family, Barker would have placed the child with him and not with adoptive parents. Unfortunately for H.R., he did not know of the child's birth or of his rights at that time.

27 We also concluded that the representative might be entitled to damages under 42 U.S.C. § 1983 (1982) to remedy not only monetary harms inflicted as a result of the violation of her procedural due process rights but also mental anguish and suffering she experienced. *See Ford,* 531 A.2d at 240.

28 Until these regulations were proposed, adoption procedures were governed by an outdated 1969 Adoption Manual, prepared by the Committee on Regulations and containing suggested forms for use by licensed child-placing agencies. The Manual was published at a time when unmarried fathers had no statutory rights to notice of custody hearings concerning their children. Thus, there have been no regulations governing notification to natural fathers regarding the adoption of their children. Effective March 1, 1985, however, there has been a “Statement of Policies and Procedures” issued by the Superior Court Family Division, Adoption Branch, that increased an unwed father's chances to receive notice. Some of these procedures have been incorporated into the new regulations.

29 The new regulations also require specified efforts to locate birth parents:

> 1632.1 If one or both birth parents cannot be located, the child-placing agency responsible for preparing the investigative report and recommendations for a proposed adoption shall make efforts to locate the missing natural parent. The efforts shall be documented in the record.
>
> 1632.2 The child-placing agency shall document that the following resources have been used in the efforts to locate the missing parent(s) and the results of their use:
>
> (a) Vital Statistics Branch of the Office of Policy and Planning of the Department of Human Services for birth, marriage and death records;
>
> (b) DHS Child Support Locator;
>
> (c) Military Locator;
>
> (d) Court criminal records;
>
> (e) Metropolitan area telephone books;
>
> (f) Metropolitan area hospital records (if they can be released);
>
> (g) Public assistance, Medicaid, motor vehicle, and police records (if they can be released); and
>
> (h) Family and friends of both birth parents (if appropriate).
>
> 1632.3 If a birth parent does not name the other birth parent, the child-placing agency or petitioner shall make a good faith effort to obtain the information from the known parent. If the name of the unknown parent is not given, and an affidavit is required by the court, the child-placing agency shall file an affidavit outlining the known parent's reason for refusing to give the information.
>
> 1632.4 If the birth mother names two or more possible fathers, the child-placing agency shall attempt to locate all of the alleged fathers. Paternity may be judicially determined.

30 The trial judge stated she believed it would have been improper for Barker to give legal advice to H.R. in response to his inquiries but that it would have been appropriate for Barker's letter to suggest that H.R. consult an attorney and to supply H.R. with the address of the court and the docket number of the case.

31 The Adoption Procedures Information Manual, published in or after 1983 by the Family Division to guide pro se petitioners and inexperienced attorneys, does not mention, in explaining adoption procedures under the D.C.Code, that notification to the parties must occur upon filing of the petition for adoption. Rather, the Manual provides three different scenarios for notifying the parties of the hearing on the petition: (1) In an adoption proceeding where a formal opposition has been filed, the case is automatically set on the Adoption calendar for a court hearing after the agency report and recommendation has been received, and notice of the hearing date is mailed to the attorneys representing all parties. (2) When the agency reports that a party has expressed opposition during the course of the investigation, the opposing party is notified of the hearing date by an Order to Show Cause (why the adoption should not be granted) sent by registered mail, return receipt requested, and the hearing is then placed on the Adoption calendar, which is heard weekly by a Family Division judge. (3) Where formal adoption consents have not been obtained, the court issues an order to show cause to the particular party at the last known address by registered mail, return receipt requested, to answer in writing by a specified date. If no

response or consent is received, the adoption is granted as uncontested; if a contested response is received, the court will direct that a contested hearing date be set, and an order to show cause will be sent to notify all concerned parties.

32 The court order erroneously stated that H.R.'s communications to Barker "reveal[ed] his awareness of the pending Court proceedings." It is worth noting that once he was aware of the court proceeding, H.R. communicated his receipt of the order and appeared as requested.

33 In dissent, Judge Belson characterizes this conclusion as an "appellate finding of fact." *Post* at 1201. To the contrary, it expresses the legal test-the conclusion of law-required for deciding whether a natural father, under the circumstances, has grasped his "opportunity interest."

34 In *Eason,* the Georgia Supreme Court noted that the state awards custody to unwed mothers unless they are unfit for parenthood and held that the state must award custody to unwed fathers under the same standard, rather than permitting placement of children with adoptive parents while denying custody to unwed fathers under a "best interests of the child" standard. 257 Ga. 292, 296, 358 S.E.2d 459, 463 (1987). Baby Girl Eason had been placed for adoption when she was three days old, and at the time of the appeals court decision she was nine months old and had lived with her adoptive parents for virtually all her life. According to the Supreme Court of Georgia, the decisions in *Stanley, Caban, Quilloin,* and *Lehr,* taken together, dictates that if the child's natural father has not abandoned his opportunity interest and would be a fit parent, he will be entitled to custody of the child. *Id.; see also Doe v. Chambers,* 188 Ga.App. 879, 879, 374 S.E.2d 758, 760 (1988) (issue at custody hearing was not whether adoptive parents were more qualified to raise child but whether natural father was fit to do so).

35 Recall that presumptive custody of a natural parent under the guardianship statute, D.C.Code § 21-101 (1989), is rebuttable "by clear and convincing evidence of abandonment, unfitness, or other circumstances which render the parent's custody detrimental to the best interests of the child." *Shelton,* 526 A.2d at 580.

36 "Proofs made in a termination proceeding must satisfy the clear and convincing evidentiary standard." *In re K.A.,* 484 A.2d 992, 995 (D.C.1984) (citing D.C.Code § 16-2359(f) (1989); *Santosky v. Kramer,* 455 U.S. 745, 755, 102 S.Ct. 1388, 1395, 71 L.Ed.2d 599 (1982)).

37 The Uniform Marriage and Divorce Act § 402, which has not been adopted as such in the District of Columbia, provides:

> The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:
>
> (1) the wishes of the child's parent or parents as to his custody;
>
> (2) the wishes of the child as to his custodian;
>
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
>
> (4) the child's adjustment to his home, school, and community; and
>
> (5) the mental and physical health of all individuals involved.
>
> The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

9A U.L.A. 561 (1987). The trial court applied similar factors, and we approved, in *J.O.L.,* 409 A.2d at 1075. It is unclear why, in the adoption context, in announcing criteria for determining the child's "best interest" under D.C.Code § 16-304(e) (1989), *supra* note 17, this court in *J.O.L.* and in *J.S.R.* did not refer to the factors specified for a termination proceeding under *id.* § 16-2353(b), *supra* note 18. In *D.R.M.,* 570 A.2d at 804-05, we all but said that § 16-2353(b) criteria are applicable in conjunction with adoptions under §§ 16-304(e) and -309(b)(3).

38 In *In re A.B.E.,* 564 A.2d 751 (D.C.1989), we recently reversed a termination of parental rights in a neglect case "[i]n the absence of any substantial good to be achieved for this child." *Id.* at 757. Although the relationship between the objecting father and the nine-year-old son had been violent over the years, the trial court found that some of their interactions had been "fruitful" and that the father "genuinely loved his son." *Id.* at 755. Significantly, the "trial court's findings show a child without a permanent home and without a reasonable opportunity of finding one." *Id.* at 757. *A.B.E.* makes clear, therefore, that termination of parental rights is to be viewed with skepticism, even as to a parent of questionable fitness, when such termination is unlikely to help achieve a suitable alternative, permanent placement.

In contrast, in *In re A.W.,* 569 A.2d 168 (D.C.1990), we sustained the trial court's termination of a natural mother's parental rights to a two-year-old son. The trial court found the mother unfit for custody of her child and unlikely to be fit "in the near future." *Id.* at 169. The court also found the boy "very suitable for adoption," *id.* at 170, though without an actual prospect for adoption. We distinguished *A.B.E.* and concluded that the existence of a prospective adoptive parent was not "an indispensable condition" of termination on these facts. *Id.* at 171-73. *But see In re A.W.,* 569 A.2d at 169, 174 (D.C.1990) (Rogers, C.J., dissenting) (likelihood of child's timely adoption is integral part of mandated assessment of whether child's long term needs would most adequately be served by terminating parental rights).

Finally, in *In re D.R.M.,* 570 A.2d 796 (D.C.1990)-although warning against "an adoption juggernaut," *id.* at 807, when a natural parent has not established a relationship with her child within a year after birth-we sustained an adoption over the opposition of a nonconsenting, noncustodial natural mother who contended the trial court had incorrectly applied the criteria for terminating parental rights under D.C.Code § 16-2353(b) (1989), *supra* note 18.

39 California has had an interesting history of applying the "detriment" or "actual harm" standard. Years after the decision in *In re Guardianship of Smith,* discussed earlier in the text, the California legislature adopted statutes which the California Supreme Court held applicable to unwed parents and construed to provide, in various situations, that unless both parents consented to adoption when the mother relinquished her parental rights, the father was entitled to custody of the child, as against a prospective adoptive parent, unless an award to the father would be "detrimental to the child." *See In re Baby Girl M.,* 37 Cal.3d 65, 69, 74, 207 Cal.Rptr. 309, 312, 316, 688 P.2d 918, 921, 925 (1984) (en banc). (Ten years earlier, the California Supreme Court had construed "detrimental to the child" to mean "actually harmful to the child." *In re B.G.,* 11 Cal.3d 679, 683, 114 Cal.Rptr. 444, 446, 523 P.2d 244, 246 (1974) (en banc)).

A year after *Baby Girl M.,* the California Supreme Court, applying the detriment standard, held as a matter of law that the trial court had abused its discretion in concluding that an award of temporary custody to a teenage natural father would not be detrimental to the infant child. *Michael U. v. Jamie B.,* 39 Cal.3d 787, 218 Cal.Rptr. 39, 705 P.2d 362 (1985). The California Supreme Court noted that the father was unemployed, had serious academic difficulties, was a discipline problem at school, and lacked maturity and judgment. 39 Cal.3d at 793-94, 218 Cal.Rptr. at 43-44, 705 P.2d at 366-67. The court said that the father was not " 'unfit' in the sense that, if he received custody of Eric, the state would have grounds to intervene and remove the child." 39 Cal.3d at 796 n. 8, 218 Cal.Rptr. at 45 n. 8, 705 P.2d at 368 n. 8. But, the court added that placement with the father could, nonetheless, be detrimental to the child "depending on the child's current circumstances and the available placement alternatives." *Id.*

A few years later, in reviewing the remand proceeding for *In re Baby Girl M.,* 236 Cal.Rptr. 660 (Cal.App. 4 Dist.1987), the intermediate appellate court sustained the trial court's termination of the unwed father's parental rights. Although there was no question of the natural father's fitness as a parent, the court found detriment to the child based solely on the psychological harm that would result from removal from the adopting parents' home, where the child had lived for five years (from two months of age through the period of the second appeal). The appellate court cited footnote 8 of the lead opinion in *Michael U.* (quoted above) "distinguish[ing] 'detriment' from the concept of 'unfitness' ", concluded that "negative evidence regarding the father" is not "a necessary predicate to a finding of detriment," and noted that all five concurring justices in *Michael U.* "clearly expressed their view that harm resulting from the separation of the child and the prospective adoptive parents *in and of itself* can constitute 'detriment' sufficient to support the termination of parental rights...." 236 Cal.Rptr. at 664-65 (emphasis in original). The court noted, finally, that in the meantime the California legislature had "responded to the Supreme Court's [1984 en banc] *Baby Girl M.* decision by amending [the law and] specifying the 'best interests' test as the only applicable standard." 236 Cal.Rptr. at 666.

Accordingly, in administering the "detriment" standard, the California courts have construed unfitness very narrowly but have been willing to find a disqualifying detriment by reference not only to a fit father's negative qualities but also to circumstances that did not adversely reflect on the father's fitness.

In 1989, a California appellate court came to grips with *Lehr* in applying the "best interests" test prescribed by the legislature after the Supreme Court's *Baby Girl M.* decision. In *Jermstad v. McNelis,* the court held that the applicable provision of the civil code incorporating a "best interests" standard, "read in the light of the federal constitutional law, accords the natural father a parental preference to the custody of his child where ... the father has diligently pursued an opportunity to establish a protected custodial relationship. The preference precludes measuring the best interests of the child by comparison of his [the father's] circumstances with those of the putative adoptive parents." 210 Cal.App.3d 528, 533, 258 Cal.Rptr. 519, 520 (1989); *see id.* at 532, 258 Cal.Rptr. 519. The California court found there was no "compelling indication" that the natural father could not "be an adequate parent," 210 Cal.App.3d at 553, 258 Cal.Rptr. at 534; and, because the appellee natural mother (who favored the putative adoptive parents) did not request a "statement of decision," the court assumed the trial court made whatever findings were "necessary to sustain the judgment," 210 Cal.App.3d at 553, 258 Cal.Rptr. at 533. Thus, the court did not have to confront the possibility that actual harm to the child could arise from a transfer of custody from the prospective adoptive parents to the natural father even if fit. It is unclear how the California Supreme Court would address that issue today.

Interestingly, the Uniform Commissioners have adopted a "detriment" standard similar to the statute once in force in California. *See* UNIFORM PUTATIVE AND UNKNOWN FATHERS ACT § 6(d), 9B U.L.A. 33 (Supp.1990) (where the natural father's "failure to establish a familial bond is justified, and the father has the desire and potential to establish the bond ... the court may terminate the parental rights of the father ... only if failure to do so would be detrimental

to the child"); *In re Guardianship of D.A. McW.,* 429 So.2d 699, 703-04 (Fla.Dist.Ct.App.1983) (natural parent of child born out-of-wedlock should be denied custody only where parent is disabled from exercising custody or such custody will be detrimental to welfare of child).

40 In view of the policy of finality, especially in adoption proceedings, I believe the "best interests" standard, incorporating a parental preference as elaborated in this opinion, should apply to this case and any other pending appeal on the date of this decision but otherwise should have prospective application only. *See In re C.A.P.,* 359 A.2d 11, 13 (D.C.1976) ("The decision will be binding on any case wherein the judgment has not become final at the time of our decision in this case, but shall not have any retroactive application to proceedings already completed on that date.") *Id.* I would afford appellant H.R., presumably a "one-time litigant," the benefit of our ruling as a "reward ... for efforts expended in promoting the progress of the law." *Mendes v. Johnson,* 389 A.2d 781, 791 (D.C.1978) (en banc). Because my colleagues do not perceive a parental preference in this context as a departure from prior law, they do not have to reach the prospectivity-retroactivity issue.

41 A trial judge, of course, does not apply a legal standard, as such, during the process of finding facts; but, contrary to Judge Belson's analysis, *post* at 1203-1204 & notes 12, 13, a judge's belief that a particular legal standard applies may cause the judge to perceive some facts, relevant to that standard, in a particular way. If a different legal standard were applicable, the judge might perceive and articulate the same factual data in a different way-especially facts, as in this case, incorporating a judgment of psychological impact, in contrast with more objectively verifiable facts, such as color, or historical facts, such as the time an event occurred.

1 *Lehr v. Robertson,* 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983).

2 *Davis v. Jurney* involved a natural mother's attempt to regain custody of her nine-year-old son who had been living with relatives of the boy's father for about six years pursuant to a written agreement. *Id.* at 847-48. The parents of the child entered into the agreement during a period of time in which they were suffering marital problems. Despite their attempts to preserve the marriage, the parties eventually divorced. The mother visited her son regularly throughout this period of time, however, and exchanged letters with the custodial relatives and her son during an extended stay out of the country which revealed strong ties of affection. *Id.* at 848. When the mother returned to the District of Columbia, she, with affirmative support from her former husband, sought custody of the child. The relative objected and sought to retain their custody of the boy.

The trial judge determined that the relatives were fit and proper persons and that the welfare of the child would best be served by awarding custody to them. *Id.* at 848. The mother appealed contending that the trial judge improperly relied on the agreement between the parties and failed to consider her preferential claim as the natural mother of the child. *Id.* at 848.

The court of appeals, after reciting the controlling principle quoted above, remanded the case for a new hearing with instructions to apply the proper standard, namely that where evidence does not show an intent on the part of a natural parent to abandon her rights to custody, the strangers (relatives of the child's father) must bear the burden of establishing the natural parent's unfitness by evidence concerning, but not exclusively, the natural parent's association with the child over the years, her efforts to obtain custody of him and her present suitability to assume the responsibilities of parenthood. *Id.* at 850.

The rationale of the court was that of Justice Traynor, who, concurring in *In re Guardianship of Smith,* 42 Cal.2d 91, 94, 265 P.2d 888, 891 (1954) (en banc), wrote:

> The objection to the rule that custody must be awarded to the parent unless he is unfit carries the harsh implication that the interests of the child are subordinated to those of the parent when the trial court has found that the best interests of the child would be served by giving his custody to another. The heart of the problem, however, is how the best interests of the child are to be served. Is the trial court more sensitive than the parent to what the child's best interests are, better qualified to determine how they are to be served? It would seem inherent in the very concept of a fit parent that such a parent would be at least as responsive as the trial court, and very probably more so, to the best interests of the child.

3 The three-year period was apparently viewed by the trial judge as a period of probation for the natural mother during which her fitness "might the more certainly be developed." *Id.* at 182, 251 F.2d at 893.

4 The court quoted from *People ex rel. Portnoy v. Strasser,* 303 N.Y. 539, 542, 104 N.E.2d 895, 896 (1952):

> No court can, for any but the gravest reasons, transfer a child from its natural parent to any other person * * * since the right of a parent, under natural law, to establish a home and bring up children is a fundamental one and beyond the reach of any court, *Meyer v. State of Nebraska,* 262 U.S. 390, 399 [43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923)] * * *.

Id. at 183 n. 17, 251 F.2d at 894 n. 17.

5 The District of Columbia adoption statute, D.C.Code § 16-309(b) (1989 Repl.), provides:

> the [trial] court may enter a final or interlocutory degree of adoption when it is satisfied that:
> (1) the prospective adoptee is physically, mentally, and otherwise suitable for adoption by the petitioner;
> (2) the petitioner is fit and able to give the prospective adoptee a proper home and education;
> (3) the adoption will be for the best interest of the prospective adoptee; and
> (4) the adoption form has been completed by the petitioner pursuant to section 10 of the Vital Records Act of 1981.

The best interest standard has been a part of the District's adoption statute for generations. *See, e.g., In re Adoption of a Minor,* 79 U.S.App.D.C. 191, 193 & n. 6 & 196 n. 17, 144 F.2d 644, 646 & n. 6 & 649 n. 17 (1944) (discussing D.C.Code § 16-201 (1940)).

6 In *N.M.S.,* the natural mother sought to regain custody of her nine and one half year old daughter whom she had voluntarily surrendered to the Public Welfare Department when the child was four days old because she felt that, for financial and other reasons, she was temporarily unable to care for the child. 347 A.2d at 925. The court declined to struggle with what it viewed as the "abstract" question of whether a fit parent is subordinate to the best interest of the child, observing that "there are many varying degrees of fitness, and best interest is hardly an expression of precise meaning." *Id.* at 927. Hypothesizing a potential conflict among prior decisions about which right or interest is superior, that of the natural parent or child, the court suggested that "[p]robably the holdings can be reconciled by the differing factual situations or perhaps on the proposition that ordinarily a child's best interest is served by being with a fit parent." *Id.* (*contrasting Johnson v. Lloyd,* 211 A.2d 764 (D.C.1965); *Jackson v. Fitzgerald,* 185 A.2d 724 (D.C.1962); *Davis v. Jurney,* 145 A.2d 846 (D.C.1958); *Bell v. Leonard,* 102 U.S.App.D.C. 179, 251 F.2d 890 (1958), *with Cooley v. Washington,* 136 A.2d 583 (D.C.1957); *In re Lambert,* 86 A.2d 411 (D.C.1952); *Holtsclaw v. Mercer,* 79 U.S.App.D.C. 252, 145 F.2d 388 (1944)). Also in *Shelton v. Bradley, supra,* the court noted in passing a conflict between prior decisions regarding whether parental unfitness had to be demonstrated, but did not need to resolve the matter since a presumption was explicitly set forth in the statute at issue. 526 A.2d at 580-81 n. 3. A review of the cases in which the court has commented on a possible conflict indicates, however, that they follow the fit-parent presumption where parents have not abandoned their opportunity interest in custody.

> Judge Ferren's commendable effort to categorize the cases is flawed insofar as he suggests that the cases involving a mother who has surrendered her child to a stranger and is seeking to regain custody place the natural mother on the same footing as the stranger who is seeking custody of the child. See Ferren, J., opinion at 1152-1153. The quote from *Davis v. Jurney* and the discussion of *Bell v. Leonard* and *Beall v. Bibb,* make clear the error of his interpretation. See pp. 1143-1144, *supra,* and note 18, *infra.* Our cases have not diminished the presumption in favor of the fit natural parent; rather, the court has noted that the fact of prior surrender is a factor to be taken into account-no more-in evaluating the parent's present fitness.

7 The Termination of Parental Rights Act, D.C.Code § 16-2353(b) (1989 Repl.), was enacted in 1977 and provides in relevant part:

> In determining whether it is in the child's best interests that the parent and child relationship be terminated, a judge shall consider each of the following factors:
> (1) the child's need for continuity of care and caretakers and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages;
> (2) the physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child;
> (3) the quality of the interaction and interrelationship of the child with his or her parent, siblings, relative and/or caretakers, including the foster parent; and
> (4) to the extent feasible, the child's opinion of his or her own best interests in the matter.

8 *E.g. In re U.S.W.,* 541 A.2d 625 (D.C.1988) (termination of parental rights on account of neglect by natural parents); *In re C.O.W.,* 519 A.2d 711 (D.C.1987) (same); *In re M.M.M.,* 485 A.2d 180 (D.C.1984) (same); *In re K.A.,* 484 A.2d 992 (D.C.1984) (termination of rights of natural parents who abandoned child).

9 Thus, in *In re J.O.L.,* 409 A.2d 1073 (D.C.1979), *vacated and remanded,* 449 U.S. 989, 101 S.Ct. 523, 66 L.Ed.2d 286 (1981), the court rejected a challenge to the constitutionality of the adoption statute as applied to a natural parent objecting to an adoption and referred only to the trial judge's findings in concluding that there was clear and convincing evidence that the children's best interest lay in remaining in a family unit with the stepfather and not with the natural father who had failed to visit the children for five years.

> In *In re P.G.,* 452 A.2d 1183 (D.C.1982), the court again rejected a constitutional due process challenge to the statute, holding that no decision of the Supreme Court required a finding of unfitness of the natural parent before the rights could be terminated over his objection. The court distinguished *Caban v. Mohammed,* 441 U.S. 380, 99 S.Ct. 1760,

60 L.Ed.2d 297 (1979) as involving the equal protection clause, and noted that in *Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), the Court "carefully refrained from any constitutional holding regarding the substantive criteria, limiting its attention to the standard of proof." 452 A.2d at 1185. The court also noted that *Quilloin v. Wolcott,* 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) held that due process is satisfied by the best interest standard "at least where the effect is simply to recognize an existing family unit,"-in that case the child had lived with the adoptive family for 9 years-but declined to address the required standard where the child has not already been integrated into the adoptive family for some time. *Id.* at 1184-85.

J.O.L. and *P.G.* relied, in turn, on *In re J.S.R.,* 374 A.2d 860 (D.C.1977), where the court held that the Constitution did not require a finding that a natural parent is unfit before an adoption by a stranger could be ordered but that clear and convincing evidence was required that a natural parent's consent to the adoption was being withheld contrary to the best interest of the child. 374 A.2d at 864 ("We find nothing offensive to constitutional mandates in our statutory standard which focuses on the best interest of the child rather than solely on the status or abilities of the natural parent."). The court quoted, with apparent approval, *Winter v. Director, Dept. of Welfare,* 217 Md. 391, 143 A.2d 81 (1958) in which the court upheld the statute permitting adoption without the parents' consent. In *Winter,* the court stated that the parent has "no inherent right of property in a child, and the right the parent has to the custody and rearing of his children is not an absolute one, but one that may be forfeited by abandonment, unfitness of the parent, or where some exceptional circumstances render the parents' custody of the child detrimental to the best interests of the child." 217 Md. at 396, 143 A.2d at 84.

10 The facts in several cases make clear that the parental preference had been overcome by clear and convincing evidence. *See In re K.A., supra,* 484 A.2d 992 (natural parents abandoned child); *In re J.O.L., supra,* 409 A.2d 1073 (father had not visited children for five years, children who lived with natural mother and her husband, and viewed the husband as their "real father" and experienced emotional distress upon obligatory visits with natural father; questions also were raised about natural father's mental health and use of illegal drugs); *In re J.S.R., supra,* 374 A.2d 860 (the child had never known his natural mother, had experienced personality damage from four years of changing foster home placements, and was gaining confidence in his potential adopters' home; natural mother was a victim of multiple sclerosis, dependent on others for most of her physical needs, and had voluntarily surrendered custody of child at birth because she was unable to care for him).

11 In *D.I.S.,* the court acknowledged, however, that the right of a natural parent to raise his child is constitutionally protected, albeit not absolute. 494 A.2d at 1326 & n. 16 (*citing In re J.S.R., supra,* 374 A.2d at 863; *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)).

12 *Stanley* and *Caban* hold unconstitutional a statutory presumption of unfitness absent an individualized determination (*Stanley*) and statutory differentiation between the natural parents with regard to consent to adoption (*Caban*). *Quilloin* upholds the constitutionality of a best interest of the child standard in the face of a natural father's claim that an unfitness determination was required where the natural father had never had or sought actual or legal custody of his eleven year old child and where the result of adoption was to give recognition to a family unit already in existence. 434 U.S. at 254-55, 98 S.Ct. at 554. The instant case does not fall within the dictum in *Quilloin* that due process would be offended if "a State were to attempt to force the breakup of a natural family over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." 434 U.S. at 255, 98 S.Ct. at 555 (quoting *Smith v. Organization of Foster Families,* 431 U.S. 816, 862-63, 97 S.Ct. 2094, 2119, 53 L.Ed.2d 14 (1977) (Stewart, J., concurring in the judgment). Of course, here, while H.R. did not abandon his opportunity interest, the proposed adoption by the O. family, like that in *Quilloin,* would not place Baby Boy C with a new set of parents with whom he had never before lived.

13 In *Michael H.,* the Court upheld the constitutionality of a statutory presumption that a child born to a woman living with her husband is a child of the marriage. The Court rejected the natural father's claims that there is a constitutionally protected liberty interest in a parental relationship and that protection of the marital union of natural mother and husband is an insufficient state interest to support termination of that relationship.

14 *Lehr* did not hold that the actions of the natural father were insufficient to constitute his seizing of his opportunity interest in a general sense. The Court held only that New York had established a statutory mechanism for seizing one's opportunity interest and failing that, other efforts would not suffice to overcome the defect in the father's failure to register under state law. Hence, this court remains free to decide what factual circumstances constitute a seizing of one's opportunity interest. The District of Columbia's statutory right to immediate notice of an adoption proceeding, however, is a critical factor in deciding whether H.R. seized his opportunity interest. The uncertainties and vagueness about the existence of Baby Boy

C and exactly what the natural mother had done explain to my satisfaction that prior to the time that H.R. should have been notified formally of the adoption proceeding he did not abandon his opportunity interest.

The factual circumstances of this case are unusual. The natural father is not a citizen or resident of the United States, and both his cultural and legal background are foreign to the United States. Ideas about raising a child are different in Zaire and concepts of child custody under the civil law system differ in significant respects from the American common law and statutory system. French, not English, is his native language. Furthermore, there was evidence that his financial circumstances did not make it possible for him to come immediately to the United States upon learning that in fact a child had been born. Significantly, however, when he learned of the formal adoption proceeding, he appeared before the court. Our dissenting colleague unrealistically and, in my view, unreasonably burdens H.R. with knowledge of what American courts would expect a United States citizen to do to demonstrate his commitment to his child, as, for example, by offering to pay support. Of course, support was never at issue here. More importantly, H.R. did far more than offer token support; he wrote immediately to the mother after receiving Barker's first letter and called her, in October 1983, when he had received her response to his letter and asked her to send the baby to him. Then, in January 1984, he called Barker and advised he could not consent to the adoption. Given cultural differences and the delay of the mails, H.R.'s responses were consistent with seizing his opportunity interest; indeed, as Judge Ferren points out, he could do little more than appear in the adoption proceeding, of which he did not, as the statute required, receive immediate notice.

15 *See Davis v. Jurney, supra,* 145 A.2d at 849 (parental preference “reflect[ing] the wisdom of human experience” is overcome only by “compelling circumstances”).

16 Furthermore, the concept of best interest of the child is sufficiently broad to enable the trial judge to recognize that requiring the child to “make some sacrifice to be with his natural parent or adjust to a new environment ... does not necessarily mean that his welfare will be correspondingly impaired.” Again, in the words of Justice Traynor:

> It may not be the best interests of the child to have every advantage. He may derive benefits by subordinating his immediate interests to the development of a new family relationship with his parent, by giving as well as receiving. Thus, although a change in custody from an outsider to a parent may involve the disruption of a satisfactory status quo, it may lead to a more desirable relationship in the long run.

In re Guardianship of Smith, supra, 42 Cal.2d at 96, 265 P.2d at 891-92. Courts likewise have recognized that an extended family may include the natural parent. *In re Baby Girl M,* 191 Cal.App.3d 786, 236 Cal.Rptr. 660, 662 (1987) (quoting trial judge's orders). *See In the Matter of D.I.S., supra,* 494 A.2d at 1323, 1325 (statute provides flexible framework for case by case determination of the best interest of the child) (citing *Bazemore v. Davis,* 394 A.2d 1377, 1383 (D.C.1978) (en banc)).

17 It also is consistent with the Supreme Court's decisions in *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Caban v. Mohammed,* 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979); and *Quilloin v. Wolcott,* 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978). See note 12, *supra. See* Ferren opinion at 1157-1158. The court's concern about established family relationships is relevant, notwithstanding that at the time the child was placed with the prospective adoptive parents there was no established family relationship. *See* Ferren opinion at 1161. Time having passed, the fact that Baby Boy C has been living with the prospective adoptive parents throughout the trial and appellate court proceedings cannot be ignored since early permanence and stability may exist by the time a custody decision is rendered upon remand. *See* also Ferren opinion at 1174-1176.

18 At most, our standard contemplates the type of circumstances discussed in *Beall v. Bibb, supra.* Where the preferential claims of a parent were lost by contract, or forfeited by abandonment or misconduct, the court suggested that this would “afford very strong evidence of the want of natural affection and the lack of fitness for the charge,” and, thus “if the succeeding custodians are fit and capable persons under whose care the welfare of the children is reasonably secure, and the relations between them have become such that to sever them would be *necessarily cruel or painful,* the revived claims of the parents may well be denied.” 19 App.D.C. at 314 (citations to state cases omitted). *See In re B.G.,* 11 Cal.3d 679, 114 Cal.Rptr. 444, 446, 454-55, 523 P.2d 244, 246, 254-55 (1974) (en banc) (California statute prescribing harm as a factor); UNIFORM PUTATIVE AND UNKNOWN FATHERS ACT § 6(d) (1988).

19 Judge Ferren's caselaw and statutory analysis, see opinion Part III, seeks to categorize cases based on issues not presented and gives insufficient attention to language in opinions indicating awareness of the statutory interpretation of the adoption statute to include a parental preference. To suggest that prior decisions ignored precedent is misleading when the issues were different.

Judge Ferren's analysis also is based on speculation that the Council of the District of Columbia intended to abandon the long-standing parental preference aspect of the best interest standard when the Council enacted Title VI of the Prevention of Child Abuse and Neglect Act of 1977. All that statute did was to authorize the termination of parental rights

in an independent neglect proceeding rather than as part of an adoption proceeding. *In re A.W.,* 569 A.2d 168, 171 (D.C.1990). The legislative history indicates that the Council intended to facilitate the adoption of children. *Id.* at 171-72; see also *id.* at 174-75 (two-fold motivation for statutory change: to hold social services agencies accountable for children adjudicated neglected, and to authorize termination of parental rights in *unusual circumstances* in a neglect proceeding) (dissenting opinion, Rogers, C.J.). Indeed, the legislative history makes clear that the Council was concerned that unfit parents were hindering the adoption prospects of their children. Hence, the Council's focus was hardly on examining the differences between neglect and relinquishment cases. Enactment of the Title IV is fully consistent with the presumption that a child's best interest is with a fit parent. In any event, there is nothing to suggest that the Council's action was motivated by any constitutional concern or disagreement with judicial interpretation of the adoption statute.

Similarly, Judge Ferren's reliance on the amendments adopted by Congress in the D.C. Court Reform and Criminal Procedure Act of 1970, Pub.L. 91-358, § 121(a), Title I, 84 Stat. 522, is misplaced. Section 121(a) concerns Family Division Proceedings relating to juvenile delinquency, neglect, and persons in need of supervision. It addressed the circumstances warranting state intervention in a family. Congress left the District's adoption statute untouched. It is important not to confuse an adoption proceeding with a proceeding to terminate parental rights, since the latter proceed irrespective of the pendancy of an adoption proceeding and does not need to consider the rights of the natural parent vis a vis the prospective adoptive parents.

Furthermore, his reliance on *In re Stuart,* 72 App.D.C. 389, 394, 114 F.2d 825, 830 (1940), as a basis for constitutionalizing our inquiry, is misplaced. The court's reference to the constitutional rights of natural parents arose in the context of state intervention to deprive the natural parents of custody of their child on the ground that they had failed to provide adequate care and support. The issue on appeal was the sufficiency of the evidence to support the Juvenile Court order placing custody with a stranger. The statute authorized the removal of the child from the custody of her parents "only when his welfare or the safety and protection of the public cannot be adequately safeguarded without such removal." 114 F.2d at 832. The court noted that "[u]nder our constitutional system, the citizen has more than a revocable privilege to possess and rear his children." *Id.* Acknowledging that the right was not absolute, the court defined the limited exceptions in terms of cruelty or neglect or a parent "unfit in character or mode of life ..., [such that] the state for the welfare of the child and society may interfere." *Id.* at 832-33. The court reversed on the basis of the evidence of the mother's care for the child in the face of the father's refusal to provide child support. No such state intervention is at issue in the instant appeal and nothing in *Stuart* is contrary to our holdings that the constitutional right is not absolute.

20 *See In re D.R.M.,* 570 A.2d 796, 804-05 (D.C.1990) (in determining best interest of child, court may consider any factor which appears relevant under the circumstances; no abuse of discretion to consider factors under D.C.Code § 16-2353(b)); *In the Matter of K.A. supra,* 484 A.2d at 998 ("it may be appropriate" to apply the first four factors in D.C.Code § 16-2353(b) where custodial parents are threatened with possible termination of their rights and only if the analysis is unsatisfactory to apply the factors to other potential custodians) (dictum ("But that is for another day.")).

21 Unfortunately we are not the first court to recognize that the state's failure to accord the natural father his statutory right to notice has caused his claims to be adversely affected as a result of the passage of time during which his child has been living with the petitioning adoptive family. *See In re Baby Girl M., supra,* 236 Cal.Rptr. at 665 n. 6 (quoting *In re Reyna,* 55 Cal.App.3d 288, 304, 126 Cal.Rptr. 138, 148 (1976)). Indeed, in an analogous situation this court has recently cautioned against the "adoption juggernaut." *In re D.R.M., supra* note 20, 570 A.2d at 807-08.

1 For the most part, I agree with Chief Judge Rogers' statement of the applicable law, and join in her opinion except for its first paragraph and its last two paragraphs, footnotes 12 and 14, and except to the extent it incorporates views set forth in Judge Ferren's opinion.

2 Because the trial court referred to H.R.'s wife as E.R., I will do the same.

3 Chief Judge Rogers' further concerns (Opinion of Rogers, C.J., at 1191-1192) about the manner in which the trial judge weighed the evidence concerning the child's best interest are entirely met, in my view, by the additional fact that the trial judge made her finding of the devastation that would be visited upon the child by the transfer of custody to H.R. on the basis of the testimony of an expert who presumed that H.R. would be an ideal parent.

4 Judge Ferren's recitation of facts, and his postscript as well, fail to take the foregoing conclusion into account when they set forth as fact portions of H.R.'s testimony which are inconsistent with it and were not specifically credited by the trial judge.

5 I agree with Chief Judge Rogers' analysis of *Lehr,* but differ with her view, contrary to the finding of the trial judge, that "[t]he uncertainties and vagueness about the existence of Baby Boy C. and exactly what the natural mother had done explain to my satisfaction that prior to the time that H.R. should have been notified formally of the adoption proceeding he

did not abandon his opportunity interest." (Opinion of Rogers, C.J., at 1189). The recitation of facts earlier in this opinion makes it clear that H.R. knew enough early on to have acted. For example, in a letter written to L.C. a few days after his child's birth, H.R. said that if life with her future husband is impossible, L.C. could send the child to him to raise. In any event, if there were uncertainties, H.R. could have resolved them with a telephone call. I add that it is unrealistic to posit, as both Chief Judge Rogers and Judge Ferren do, that H.R.'s obligation to come forward somehow ceased the day the adoption petition was filed.

I also agree with Chief Judge Rogers' analysis of the development of adoption law in the District of Columbia and its recognition of a parental preference. Her opinion, however, fails to reconcile its acknowledgment of the best interests of the child principle with the trial judge's clear and fully supported finding of devastation to Baby Boy C. if he should be taken from the only home he has known.

6 As discussed below, appellant's complaint does not relate to the hearing he received, but rather to timely notice. It is clear that, unlike the father in *Lehr,* appellant received a full hearing, and the court "listen[ed] to his opinion of where the child's best interests" lay. *Lehr, supra,* 463 U.S. at 262, 103 S.Ct. at 2994.

7 The trial court found that appellant had received actual notice of the adoption plans and concluded that this was adequate for due process purposes under the facts of this case. The court's determinations are consistent with the evidence. The cover letter to Barker's forms which appellant received in August 1983, informed him that the child would be placed for adoption and that adoption was a "proceeding." In October, 1983, shortly after the petition was filed, L.C. informed appellant that she had given up her parental rights and that Baby Boy C. had been placed in an adoptive home where the parents were white and the child's older adoptive brother was racially-mixed. Appellant understood L.C. to say that she had gone before a court to renounce her rights. Therefore, appellant had notice of the substance of the petition for adoption shortly after it was filed.

Furthermore, appellant presented no evidence that the failure to provide him notice of the petition for adoption prevented him from taking advantage of his "opportunity interest." Indeed, the evidence shows that he did not grasp his opportunity, despite having notice. The trial court found that he did not tell his fiancée that he had fathered a child until many months after the child's birth. He also testified that he did not come to this country at that time because he did not have enough money to do so, a reason inconsistent with an assertion that his inactivity was the product of lack of notice. H.R. also testified, in any event, that the idea of coming to the United States in the fall of 1983 did not occur to him. Under these circumstances, the actual notice that appellant received satisfied any due process right to notice, and also rendered harmless any failure to give notice required by the adoption laws of the District of Columbia, as discussed below.

8 Even though appellant testified that it would have been difficult for him to provide support because of the relatively low salaries in Zaire and the unfavorable monetary exchange rate, the provision of at least some support is important not only to show one's interest and ability to take care of a child but also to indicate one's intention to assume full custody.

9 Appellant's failure to come forward distinguishes this case from *In re Baby Girl Eason,* 257 Ga. 292, 358 S.E.2d 459 (1987) (when father who had moved out of state learned from receipt of adoption petition that the mother had given up their child for adoption, father immediately filed for legitimation when baby was two months old), and *In re Baby Girl M.,* 207 Cal.Rptr. 309, 688 P.2d 918, 37 Cal.3d 65 (1984) (after father was informed of mother's relinquishment of their baby, father filed for custody before infant turned one month old). In these cases, the father, upon learning of the child's birth and the relinquishment of rights by the mother, sought legitimation and custody for himself without hesitation. Both children were still very young infants and there was no evidence that they had developed ties to a prospective adoptive family.

In my view, the decision of a California intermediate court in *Jermstad v. McNelis,* 210 Cal.App.3d 528, 258 Cal.Rptr. 519 (1989) cited in Judge Ferren's opinion, lends little support to Judge Ferren's broad reading of *Lehr. See In re Adoption of Kelsey S.,* 218 Cal.App.3d 130, 266 Cal.Rptr. 760, 765 (1990) (disagrees with *Jermstad's* broad reading of *Lehr*), *petition for review granted,* 269 Cal.Rptr. 74, 790 P.2d 238 (1990).

10 The postscript of Judge Ferren's opinion, at page 1181, would appear to exempt an unwed father from the requirement to "come forward to participate in the rearing of his child" unless he has been given formal notice of a legal proceeding. As I read the Supreme Court authorities, they are dealing on the human level with the behavior that can be expected of the father of a newborn child who is interested in acting as a parent, regardless of notice of a legal proceeding involving the child. *See Lehr, supra,* 463 U.S. at 261, 103 S.Ct. at 2993.

11 In addition, H.R. exacerbated the trans-oceanic difficulties of communication by failing to keep Barker informed of his current address. To impose, as Judge Ferren's opinion would, upon an adoption agency or the court's continuing duty to inquire under circumstances like those before the court would place an unreasonable burden on the adoption process. It would allow anyone who wished to contest an adoption and was moving from place to place simply to sit back and wait for the court or the agency to locate him. As a result, adoption proceedings could become prolonged and much less certain.

In addition, unwed mothers who had relinquished their parental rights could be subjected to continued inquiries that could be emotionally painful. Weighed against these burdens is the simple task of sending a change of address notice to the appropriate parties or making a collect telephone call to Barker. To the extent the majority absolves appellant from any responsibility to keep Barker informed of his whereabouts, I disagree.

12 *Malat v. Riddell,* 383 U.S. 569, 86 S.Ct. 1030, 16 L.Ed.2d 102 (1966), cited in Judge Ferren's postscript at 1177-1178 casts no shadow upon this finding of fact. The “change of law” relating to parental fitness and parental preference within the best interests standard, a change recognized only in Judge Ferren's opinion, could not affect the context within which Judge Riley made her finding of devastation to this child.

13 Judge Ferren reasons that if the judge had begun with “a presumption that the child's best interests lay in the father's custody” we cannot be certain “either that the judge would have found that a transfer would be devastating or, in any event, that it would be so devastating that, on balance, the father should be denied custody....” (Opinion of Ferren, J., at 1182). To the contrary, I submit it is entirely unrealistic to suggest that a finding that the best interests of the child call for transfer to H.R. would be compatible with the judge's acceptance of the testimony of Dr. Marans concerning the devastating and scarring effect of such a transfer of custody. In any event, the parental preference was given effect when the trial judge required the adoptive parents and Barker to prevail by clear and convincing evidence. While in my view it was not necessary to apply a clear and convincing test where an unwed natural father had not seized his opportunity interest, the fact is that Judge Riley did apply such a test, and the adoptive parents prevailed. Her ruling should be affirmed.

666 A.2d 1
District of Columbia Court of Appeals.

In re T.J., M.D., & C.J., Appellants.

Nos. 94–FS–140, 94–FS–274 and 94–FS–277.
|
Argued May 11, 1995.
|
Decided Sept. 21, 1995.
|
Rehearing and Rehearing En
Banc Denied April 17, 1996.

Foster mother, who was white lesbian, sought to adopt African-American boy, and boy's great-aunt sought custody of boy. The natural mother, who was unable to care for the child because she was mentally ill, desired great-aunt to have custody of the child. The Superior Court, District of Columbia, Stephen F. Eilperin, J., granted adoption petition of foster mother and denied custody complaint of great-aunt. The Court of Appeals, King, J., held that: (1) unless parent is not competent to make decision, parent's choice of custodian for the child must be given weighty consideration which can be overcome only by showing, by clear and convincing evidence, that custodial arrangement is clearly contrary to child's best interest, and (2) custody should be granted to great-aunt.

Reversed and remanded.

West Headnotes (18)

[1] Adoption
Review

Appellate court reviews trial court's order granting adoption for abuse of discretion, and determines whether trial court exercised its discretion within range of permissible alternatives, based on all the relevant factors and no improper factor.

2 Cases that cite this headnote

[2] Adoption
Review

In evaluating trial court's exercise of discretion regarding adoption petition, appellate court assesses whether trial court has applied correct burden of proof and then evaluates whether trial court's decision was supported by substantial reasoning drawn from firm factual foundation in the record.

1 Cases that cite this headnote

[3] Child Custody
Findings and verdict by jury

Unless parent is not competent to make such a decision, parent's choice of fit custodian for the child must be given weighty consideration which can be overcome only by showing, by clear and convincing evidence, that the custodial arrangement and preservation of the parent-child relationship is clearly contrary to child's best interest.

14 Cases that cite this headnote

[4] Adoption
Weight and Sufficiency

Child Custody
Disputes between parent and non-parent, in general

Before rejecting great-aunt's custody petition and severing child's relation with his parents, sister, and other relatives by granting foster mother's adoption petition, trial court had to find by clear and convincing evidence both that the custody arrangement chosen by the mother, which would be to put child with the great-aunt, would clearly not be in the child's best interest and that parent's consent to adoption by foster mother was withheld contrary to child's best interest; even though child's natural mother was unable to care for him because of her mental illness, she had the capacity to designate a suitable and willing custodian and had done so.

11 Cases that cite this headnote

[5] **Adoption**

Rights, duties, and liabilities created in general

Adoption has the legal effect of severing all rights and duties between the adoptee and his natural parents, their issue and collateral relatives. D.C.Code 1981, § 16–312(a).

Cases that cite this headnote

[6] **Adoption**

Examination and approval by court

Child Custody

Degree of proof

For purposes of determining whether adoption should have been allowed by foster mother or whether, as mentally ill mother desired, custody should have been granted to great-aunt, trial court should not have disposed of merits of mother's retention of custody of child herself as against merits of prospective adopter's claim, applying a clear and convincing standard, and then weighed great-aunt's custody petition against adoption petition, applying the preponderance of the evidence standard; mother's wishes should not have been placed on equal footing with other factors, and ruling on adoption that effectively would terminate parental rights must be supported by clear and convincing evidence.

2 Cases that cite this headnote

[7] **Infants**

Alternative remedies or placement

Availability of suitable family member, willing to assume legal custody of the child, is important consideration in court's decision whether to terminate parent-child relationship.

2 Cases that cite this headnote

[8] **Infants**

Dependency, permanency, and rights termination in general

Ruling that effectively terminates parental rights must be supported by clear and convincing evidence.

Cases that cite this headnote

[9] **Constitutional Law**

Parent and Child Relationship

Natural parents have fundamental liberty interest in the care, custody and management of their children, which is protected by the Fourteenth Amendment, which gives parents the freedom to make personal choices in the matters of family life. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

[10] **Infants**

Dependency, Permanency, and Termination Factors;Children in Need of Aid

Natural parents do not lose their constitutionally protected interest in the care, custody, and management of their children simply because they have not been model parents or have lost temporary custody of their children; even when blood relationships are strained, parents retain vital interest in preventing irretrievable destruction of their family life. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

[11] **Adoption**

Natural Parents, Necessity of Consent in General

Absent termination of parental rights or some other finding that parents should not longer be permitted to influence child's future, parents' rights necessarily include right to consent, or withhold consent, to child's adoption. D.C.Code 1981, §§ 16–304, 16–2361(b).

2 Cases that cite this headnote

[12] **Adoption**

Natural Parents, Necessity of Consent in General

If parent, through no fault of her own is unable to properly care for her child as a result of mental illness, parent still has right to consent or withhold consent to child's adoption, and this right to consent must be guarded just as zealously as the Constitution guards the right of a natural parent to the custody and companionship of his or her child. D.C.Code 1981, §§ 16–304, 16–2361(b).

1 Cases that cite this headnote

[13] **Child Custody**

Incidents and Extent of Custody Award

Unless child's parents have in some manner forfeited right to direct upbringing of their children, parents have the right to determine what is in their child's best interest; that right includes the right to raise the child if physically or mentally able to do so, or, if not, the right to determine who should raise the child.

2 Cases that cite this headnote

[14] **Child Custody**

Interest or role of government

Infants

Interest, role, and authority of government in general

Where parent-child relationship is intact, state may only intrude in that relationship in very limited circumstances in the public interest, or for protection of child; normally, such intervention does not permanently sever the parent-child relationship.

Cases that cite this headnote

[15] **Child Custody**

Weight and Sufficiency

For purposes of determining custodian of child if natural parent is unable by reason of mental illness to take care of her child, trial court should give effect to mother's choice of custodian for her child absent showing, by clear and convincing evidence, that the choice would be clearly contrary to the child's best interest.

2 Cases that cite this headnote

[16] **Child Custody**

Degree of proof

Preponderance of the evidence standard should not have been used to weigh foster mother's interest in adopting child against natural mother's right to preserve relationship of parent and child and to exercise her choice of great-aunt as custodian for child while mother was unable to care for child personally due to mother's mental illness; however, if mother had not sought to preserve family relationship and had not supported suitable family member as custodian for child, or if parental rights had been terminated, then trial court could have employed preponderance standard in resolving competing petitions of foster mother for adoption, and great-aunt for custody.

3 Cases that cite this headnote

[17] **Adoption**

Exceptions;relinquishment or forfeiture of parent's rights in general

Infants

Dependency, permanency, and rights termination in general

Where parents have unequivocally exercised their right to designate a custodian for their child, i.e., made their own determination of what is in the child's best interest, the court can "terminate" the parents' right to choose only if the court finds by clear and convincing evidence that the placement selected by the parents is clearly not in a child's best interest, and the consent to adoption has been withheld by the parent contrary to the child's best interest; nonparent seeking adoption must carry the burden of proof.

11 Cases that cite this headnote

[18] **Adoption**

Examination and approval by court

Child Custody

Disputes between parent and non-parent, in general

Foster mother, who was white lesbian seeking to adopt African-American boy, failed to show by clear and convincing evidence that natural mother's custody choice, the child's great-aunt, was clearly not in the child's best interest, and, thus, custody would be granted to great-aunt, where although child was attached to foster mother, there was overwhelming evidence that great-aunt would ensure that boy would be in the company of his cousins and sister, and natural mother, who was unable to care for the child because she was mentally ill, had expressed preference for the great-aunt. D.C.Code 1981, § 16–2353(b).

3 Cases that cite this headnote

Attorneys and Law Firms

***4** Gregory W. Stevens, appointed by the court, Alexandria, VA, for appellant M.D.

Shirin Ikram, appointed by the court, Potomac, MD, for appellant C.J.

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Carla Rappaport, with whom Diane Weinroth, Washington, DC, was on the brief, for appellee.

Susan M. Hoffman, Jennifer Lear, and Anne R. Price, Washington, DC, were on amicus brief, for Consortium for Child Welfare.

Before WAGNER, Chief Judge, and STEADMAN and KING, Associate Judges.

Opinion

KING, Associate Judge:

T.J., a five-year old boy ("adoptee," "child," or "T.J."), M.D., T.J.'s maternal great-aunt ("great-aunt"), and C.J., T.J.'s mother, ("mother," "natural mother," or "C.J."), are appealing the Superior Court's order granting the adoption petition of M.H., T.J.'s foster mother, ("foster mother") and denying the custody complaint of the great-aunt. The neglect, adoption, and custody cases were consolidated, and the adoption and custody issues were tried before Judge Stephen F. Eilperin in November 1993. The parties to the consolidated cases were the District of Columbia ("District"); the child, through his court-appointed guardian *ad litem;* the foster mother, the adoption petitioner; the great-aunt, the custody complainant; and, the child's parents, the mother and D.L. ("the father"). At trial, the District, the guardian *ad litem,* and both the child's parents supported the great-aunt's custody petition. We reverse.

I. Procedural History

A. The Neglect Case

The proceedings began in the trial court as a petition filed by the government on April 17, 1991, pursuant to D.C.Code § 16–2301 *et seq.,* alleging that the child, then 19 months old, was a neglected child. Following an initial court hearing, held the same day, the court found probable cause to support the neglect allegations and placed the child in shelter care with the D.C. Department of Human Services ("DHS"). The child was subsequently placed at St. Anne's Infant and Maternity Home ("St. Anne's"), an institutional facility for neglected children, where he remained for approximately one year. On January 23, 1992, following a trial on the neglect petition, Judge Gregory E. Mize adjudicated the child neglected pursuant to D.C.Code § 16–2301(9)(C), [1] because of the mother's mental illness. Judge Mize specifically rejected a neglect adjudication pursuant to D.C.Code § 16–2301(9)(B), because the child was not without "proper care or control, subsistence, education ... or other care or control necessary for his physical, mental or emotional health." DHS then, through a private foster-care agency on contract with DHS, For Love of Children ("FLOC"), placed the child in foster care with the foster mother and J.S., her female companion. On March 31, 1992, following a disposition hearing on the neglect case, the trial court entered a disposition order committing the child to DHS.

***5** Thereafter, the trial court conducted regular review hearings in the neglect case during which the court received information on the mother's condition, including

psychiatric evaluations and assessments. On July 8, 1992, the great-aunt appeared in court and expressed interest in obtaining custody of the child. On November 5, 1992, having been advised that DHS and FLOC would be recommending an immediate change in placement for the child to the great-aunt's home, the foster mother filed a petition to adopt the child. On May 24, 1993, the great-aunt filed a complaint for custody, which was consolidated with the neglect and adoption cases.

B. The adoption petition and custody complaint dispositions

The trial court conducted a seven-day fact-finding hearing on the adoption petition and custody complaint on November 15–19 and 22–23, 1993, at which the foster mother, her partner, and the great-aunt testified. The mother, who appeared briefly on one day of the proceedings, did not testify. The father did not appear. Both the child's parents, however, supported the great-aunt's custody complaint. A total of sixteen witnesses testified, and a number of reports and exhibits were received into evidence. On January 7, 1994, the trial court entered an order granting the foster mother's adoption petition, denying the great-aunt's custody complaint, and effectively terminating the mother's parental rights.

Concluding that there was no real possibility that either biological parent could raise the child, the court found, by clear and convincing evidence, when pitting the foster mother against the natural parents, that the parents were withholding their consent to the adoption contrary to T.J.'s best interest. In the contest for custody between the great-aunt and the foster mother, the court found, by a preponderance of the evidence, that it was in the best interest of the child to grant the foster mother's adoption petition. The court found that both the foster mother and the great-aunt would provide T.J. with a warm and loving home, and that he would have a clearer sense of his racial, cultural, and family identity if he was raised by the great-aunt with his extended family. Nevertheless, because of the strong attachment that had formed between the child and the foster mother, the court determined that the risk of harm to the child if he was removed from his foster mother's care outweighed those considerations. Thus, concluded the trial judge, it was in the child's best interest to be adopted by the foster mother. This consolidated appeal followed. Because the parties contentions focused on the weight of the evidence and the parties' relative evidentiary burdens, we will set forth the evidence in some detail.

II. Facts

A. Events leading to the Custody and Adoption Petitions

The child, an African–American boy, was born September 15, 1989, to mother, C.J., and father, D.L. He lived with his mother until he was nineteen months old. The mother suffers from a chronic mental illness (schizoaffective disorder) which, even with treatment, renders her unable to take care of her son on any kind of long-term basis. The child's father has never lived with the mother or the child, has never been involved in the child's life, and has no plans to assume care of the child.

The child was first brought to DHS's attention by his mother in November 1990, when she requested that DHS temporarily place her son in its care because she was experiencing mental problems and was afraid she would not be able to provide appropriate care for him. Several days later, DHS returned the child to her care. Over the next five months, on about four occasions, the mother requested and received emergency care placement for the child for periods of three to ten days because she was overwhelmed with the task of caring for him. On some of these occasions, the child was placed with his great-aunt. In February 1991, the mother placed the child in voluntary foster care at St. Anne's for one month, after which he was returned to her care. On April 17, 1991, the mother again indicated her inability to care for the child and the District filed a neglect petition alleging, *inter alia,* that the mother was unable to care for the child due ***6** to mental illness. The child, then nineteen months old, was placed at St. Anne's. During that period, the great-aunt was unwilling to care for the child for an extended period without the mother's consent or a court order giving her custody. The great-aunt testified that she was seeking to avoid a repetition of the conflicts she had encountered with the mother, including threats of violence and vandalism to her home by the mother, which occurred ten years earlier, when the great-aunt assumed custody of A.J., the mother's twelve-year old daughter, who is T.J.'s sister.

The child remained at St. Anne's for approximately one year pending a fact-finding hearing and disposition. During that time, he experienced behavioral, emotional, learning, and speech problems attributed to his early

chaotic life with his mother. St. Anne's initiated behavioral, language and speech therapy, which continued some time after his placement with his foster family. The mother visited the child frequently during his stay at St. Anne's, and the great-aunt visited him once, because she would not "go over [the mother's] head" by visiting the child. On July 8, 1992, three months after the child was committed to foster care with the foster mother, the great-aunt appeared in court and expressed an interest in obtaining custody of the child. She later filed a custody complaint on May 24, 1993.

B. The Foster Care Placement

The foster mother became a foster parent through FLOC, an organization which administers a program for foster care. Before M.H. became T.J.'s foster mother, she, and her companion, J.S., attended a FLOC training program, where they were instructed that foster care is a temporary service, with a goal of returning the child to the birth family, first to the birth parents, if possible, and then to birth relatives. The foster mother signed a contract to that effect.

In the first few months while the child lived with his foster mother, he continued to exhibit severe behavioral and emotional problems—tantrums, hysterical crying, physical aggression, sleep problems, aimless and unfocused movement and motor activity, destructive play, and inability to relate to people. Additionally, he only spoke between ten to twenty words. He became clingy towards his foster mother, making separation from her very difficult, and was withdrawn and non-responsive towards others at school and home. His behavior improved after a few months in foster care. The child became talkative, his tantrums subsided, and he displayed a significant interest in physical activity. At the home of his foster mother, the child has his own room and access to a recreation room, a den, and a backyard in which he can play. The child attends an interracial kindergarten and interacts well with children there. He attends church and has friends of various races. The foster mother and her companion, who are both white, have taken the child to various African–American festivals and celebrations, read books to him with African–American characters and have posters of Martin Luther King and of black children portrayed in a positive way. The child is fully integrated into his foster family, his school and church, and his multi-cultural, multi-racial neighborhood and community. The foster mother has a close network of friends and acquaintances, both married and single, through school, work, church and her neighborhood.

When the child was first placed with his foster mother, the agency goal was reunification with his mother. The foster mother complied with the court-ordered visitation with his natural mother and great-aunt, but made no attempts to add extra visits, lengthen visits or add makeup visits. The FLOC social worker testified that she found it difficult to get the foster mother and her companion to cooperate with regard to permanency planning. The relationship between FLOC and the foster mother deteriorated to the extent that FLOC notified the foster mother in writing that she had breached their contract, and would be terminated as general foster parent, retaining that status only as to T.J. during the pendency of this case.

In July 1992, DHS referred T.J.'s case to its "Project 237." [2] The Project 237 social ***7** worker assigned to T.J.'s case determined that reunification with his mother was not feasible. On July 6, 1992, the social worker contacted the foster mother's companion, and initiated discussion as to whether the foster mother and her companion would be interested in adopting the child. The social worker also contacted the great-aunt, who indicated that she was not prepared to offer the child a home at that time. The social worker informed the great-aunt of the upcoming court review scheduled for July 8, 1992. The great-aunt attended the July 8, 1992 review hearing, and the judge, without addressing the issue of the child's permanent placement, authorized experimental, overnight/weekend visits for the child with his great-aunt at FLOC's discretion. The social worker testified that the great-aunt did not begin visits with the child until September 11, 1992, followed by a late October visit. Both these meetings took place at FLOC. After these two visits, the FLOC social worker indicated that she wanted to schedule weekend visits, and the foster mother's companion indicated that she did not think it was appropriate because of the child's reactions and regressions after visits with his mother, and during and after the two visits with his great-aunt at FLOC. It was at that point that the foster mother and her companion learned that FLOC would be recommending an immediate change of placement for the child at the scheduled November 18, 1992 court review. The foster mother testified that after consulting with various child mental health professionals, including the child's

therapist, she filed the instant petition for adoption on November 5, 1992.

At the November 18, 1992 review hearing, the judge rejected the agency's recommendation for an immediate change of placement, instead ordering an independent psychiatric assessment to evaluate the child's psychological bonding and the effect, if any, a move to his great-aunt's home would have on him. He also ordered a home study of both the great-aunt and the foster mother by the Court's Social Services Division, and experimental, overnight/weekend visits with the great-aunt at FLOC's discretion, but not to exceed once every two weeks.

C. The Parties' Backgrounds

The trial court made the following findings of fact concerning the relevant parties. M.H. and J.S., the foster mother and her companion, are a white lesbian couple who have been together for over five years. M.H., then thirty years old, is an attorney, and J.S., then forty-nine years old, has a masters degree in developmental and educational psychology, and is employed as a sociologist with the Children's Defense Fund. They both have extensive experience with children's issues through their professional and volunteer work. They are a stable, emotionally mature couple, who have established a comfortable home together in a multi-racial, multi-cultural, upper middle-class neighborhood. They are both actively involved in their church's educational and public service activities. They have a network of friends available to take care of the child should it become necessary, but have no relatives on whom they could rely.

M.D., then sixty years old, is the adoptee's great-aunt by marriage, who lives in a single-family home with a fenced-in backyard in the Mount Pleasant area of the District of Columbia. She has successfully raised eight children of her own. She has previously provided a home for the adoptee's mother, and she has had custody of the adoptee's sister, A.J., the natural mother's twelve-year old daughter, since the girl was two years old.[3] Two of the great-aunt's older sons live with her, and her other children visit with her regularly. Her home is the hub of a large and extended African–American family where the child has several individuals responsible for meeting his needs. As of November 1993, the adoptee, who had spent ***8** approximately twenty-five weekends in the great-aunt's home, appeared, to various observers, to be comfortable there and to interact warmly with the individuals in the home, especially his sister.

One of the great-aunt's sons, G.P., is a narcotics investigator with the Metropolitan Police Department who lives with his wife and two children, ages eleven and seven. The great-aunt takes care of G.P.'s children every weekend, and G.P. and his wife expressed a willingness to help with the adoptee should the need ever arise. The great-aunt's daughter, R.L., a management specialist at Walter Reed Army Medical Center, is married with two children, a three-year old and a ten-year old. The great-aunt takes care of these children while R.L. is at work. The trial court found that R.L. and her husband stand ready to offer the adoptee a home should anything happen to the great-aunt. The trial court recognized that the great-aunt is "an extraordinary person. She is a strong, loving, dignified, highly moral, religious person." She has significant experience in raising her own children, and the trial court found that she has also raised the adoptee's sister with love, care and skill, and that the sister is a well-adjusted twelve-year old who excels in school and has a firm sense of herself.

D. The Expert Opinions as to T.J.'s Best Interest

The trial court heard testimony from two psychiatrists called in support of the foster mother's adoption petition, two psychologists called in support of the great-aunt's request for custody, and several other experts regarding the impact on the child of a change of placement from the foster mother's home to the great-aunt's home. The expert opinions were divided as to which placement would serve the child's best interest. The witnesses for each side agreed that both the great-aunt and the foster mother were able to provide safe, loving, nurturing home environments and a proper education for the child. All the witnesses also acknowledged the advantage of placement with the great-aunt, who was able to provide the benefits of her extended family and its connection to the African–American culture and male role-models. The experts disagreed, however, on the extent of the child's attachment to the foster mother, and the harm to the child that would result if he were returned to his family.

1. The Experts who Supported the Great-aunt's Custody Complaint

The great-aunt called Dr. Ronald Wynne, a forensic psychologist, who testified that he had examined the child

and found that a bond existed between the great-aunt and the child, and between the child and his sister. He found the child's relationship to his sister to be significant to his development, stating:

> I like the relationship between those two children. She's crazy about him and he seems to be crazy about her. They are likely to have a relationship that would last 60, 70, 80 years, closely bonded. That would be wonderful.

Dr. Wynne also testified that living in the great-aunt's multi-generational home would strengthen the child's self-image and his experience of family. Dr. Wynne opined that the transition to the great-aunt's care would go well because the child was able to bond with the great-aunt, and that there would be no enduring consequences if he were placed with her.

Dr. Beverly Davis, the administrator for the District's Family Services Administration, also testified on the great-aunt's behalf. She opined that the best place for the child was with his great-aunt, stating that the evidence of the great-aunt's ability to be a good parent to the child was her ongoing success with his sister. Dr. Davis concluded that the child is really part of his great-aunt's family:

> African–American families have a long standing tradition of having extended kin who may not be biologically related, but are related in terms of the relationship of that family. And that is exceedingly important in our definition of self and has been one of the hallmarks that I think have been important in terms of our own survival as a people.

She agreed with Dr. Wynne on the significance of the child being raised in his great- ***9** aunt's home but gave no opinion on the psychological impact the change to the great-aunt's household would have on him.

Dr. Frederic Phillips, a clinical psychologist who specializes in child-family psychology, was called by the child's guardian *ad litem,* strongly advocated the child's move to his great-aunt's home. He testified that a child is expected to attach to the foster parent, and, indeed, that an important quality of a good foster-care arrangement is such an attachment. He testified, however, that the existence of an attachment does not become the "riveting reason for what should happen in the permanent interest of that child." Dr. Phillips echoed both Drs. Wynne's and Davis's opinion on the advantages of the great-aunt's home in terms of providing the child with a strong sense of his cultural, racial, and gender identity. He opined that the child's racial identity was a process that could not be created merely with pictures of Martin Luther King and an occasional visit with a black, male role model. He determined that the child would be able to move through the transition process comfortably with appropriate social work.

2. Experts Supporting the Petition for Adoption

Dr. Floyd Galler, a child and adult psychiatrist, testified that the child had developed an attachment to his foster mother that should not be broken. He opined that taking the child from the foster mother would inflict permanent scarring, short-term sadness, a life-long risk of depression and difficulty forming a conscience. Dr. Galler testified that, in a trans-racial adoption, there are special steps that adoptive parents can take to supplement the child's upbringing, to help the child develop a comfortable sense of his or her racial identity. Dr. Galler did not believe that the benefits of placing the child with the great-aunt outweighed the risk of moving him.

Dr. James Eagan, a child and adult psychiatrist, testified that the most important psychological task for a child to develop to become a healthy adult is to form an attachment to a caretaker or several caretakers. Dr. Eagan believed that moving the child from his foster mother would substantially increase the risk that he would not be able to attach again. Dr. Eagan opined that it was in the child's best interest to remain in the foster mother's home. Ms. Betty Brooks, the child's therapist, also testified in support of the adoption.

Dr. Galler, Dr. Eagan, and Ms. Brooks all testified that moving the child would be harmful in light of his early chaotic life, his history of multiple moves and institutionalization, his early and severe behavioral and emotional problems and delays, and his strong, trusting, parent-child attachment to his foster mother. No matter what he was told, the child would view the move to his great-aunt's home as an abandonment by the "parents" he

had come to trust; severing the attachment would result in long-term serious harm to the adoptee, who was still a vulnerable child. Finally, these experts testified that contrary to the potential harms faced by the child if he were moved, no "affirmative" harm would result if he were allowed to be adopted by the foster mother.

III. The Trial Court's Findings

The trial judge found that the adoptee, who had been a seriously disturbed child, had "blossomed" into a happy, active, normal, although still vulnerable little boy and that this was attributable to the foster mother's extraordinary parental abilities and her consistent nurturing and love. The judge found that against long odds, the child had succeeded in establishing a son/mother attachment with his foster mother, and that bond should not be severed. The trial court set forth the evidentiary burdens of the great-aunt and the foster mother as follows:

> To the extent these cases are a contest between [the great-aunt and the foster mother], neither enjoys a presumption that she should prevail. What is best for [the child] is to be decided by a preponderance of the evidence. And although they stand on equal footing in terms of their evidentiary burdens [, the great-aunt] as the choice of [the child's] parents and as a close family member obviously has weighty considerations in her favor.

***10** The court then addressed the evidentiary burden of the foster mother versus the natural parents, focusing on the ability of the natural parents to raise the child themselves, and ruled that the foster mother "must convince the court by clear and convincing evidence that the parent['s] opposition to the adoption is contrary to [the child's] best interest." While acknowledging that the parents' wishes were important considerations in deciding whether the great-aunt should have custody, or whether the foster mother should be allowed to adopt, the court gave no significant weight to that factor. Indeed, the trial court gave the parents' wishes no more weight than it gave any other factor. The trial court then granted the adoption petition and denied the custody complaint of the great-aunt, finding:

> For me the pre-eminent reasons for approving [T.J.'s] adoption, despite my confidence in his great-aunt's competence to provide him a warm and loving home, are [the adoptee]'s fierce attachment to [the foster mother], the wonders she has accomplished with him, her extraordinary parental abilities, and the serious risk that pulling [the adoptee] away from her will permanently scar his development.

The court concluded that, "[i]n my judgment these considerations, on balance, outweigh his parents['] wishes and the advantages to being raised by [the great-aunt] in the company of his extended family." In short the trial court found, by a preponderance of evidence, that the foster mother should prevail over the custodian chosen by the parents.

IV. Standard of Review

[1] **[2]** We review a trial court's order granting an adoption for abuse of discretion, and determine whether the trial court "exercised its discretion within the range of permissible alternatives, based on all the relevant factors and no improper factor." *In re Baby Boy C.,* 630 A.2d 670, 673 (D.C.1993), *cert. denied,* 513 U.S. 809, 115 S.Ct. 58, 130 L.Ed.2d 16 (1994). In evaluating the trial court's exercise of discretion, we assess whether the court has applied the correct burden of proof. *See Santosky v. Kramer,* 455 U.S. 745, 757 n. 9, 102 S.Ct. 1388, 1397 n. 9, 71 L.Ed.2d 599 (1982); *Appeal of H.R.,* 581 A.2d 1141, 1182–83 (D.C.1990). We then evaluate whether the trial court's decision is "supported by substantial reasoning drawn from a firm factual foundation in the record." *In re D.I.S.,* 494 A.2d 1316, 1323 (D.C.1985).

V. Legal Analysis

This case presents the issue of what right, if any, a mother[4] (parent) retains, with respect to the selection of a custodian for her child, where: the mother's parental rights have not been terminated; she has not relinquished those rights; she is not mentally incompetent to plan

for her child's future, but is unable by reason of her mental condition to take personal care of her child; and she has not been adjudicated as a mother who failed, voluntarily, to provide proper parental care. We have never had occasion to resolve this issue, although we have acknowledged its existence:

> [w]hen there are competing petitions for adoption, there is a complex, unresolved question whether the child's noncustodial mother, whose parental rights have not been terminated, *can dictate the result by consenting to adoption by one of the parties but not the other.*
> *In re Baby Girl D.S.,* 600 A.2d 71, 87 (D.C.1991) (emphasis added). In dicta we suggested that the mother's choice could be overcome only by a very strong showing on the prospective adopter's part:
>
> > if ... the party who does not receive the mother's consent must prove by clear and convincing evidence that such consent is unreasonably withheld, in the best interest of the child, when that party seeks to ***11** adopt, this does not strike us an inappropriate burden.
>
> *Id.* at 89.

[3] We now take the step, not taken in *Baby Girl D.S.,* and hold that unless it is established that the parent is not competent to make such a decision, a child and the natural parents share a vital interest in preventing erroneous termination of their natural relationship, and, therefore, a parent's choice of a fit custodian for the child must be given weighty consideration which can be overcome only by a showing, by clear and convincing evidence, that the custodial arrangement and preservation of the parent-child relationship is clearly contrary to the child's best interest. *See Santosky,* 455 U.S. at 760, 102 S.Ct. at 1398.

[4] **[5]** In reaching this conclusion, we emphasize that in this case the natural mother of the minor child, T.J., who is unable to care for him personally by reason of her mental condition, nevertheless has the capacity to designate a suitable and willing custodian and has done so. The trial court found the designated custodian, a family member, to be a strong, loving, dignified, highly moral, religious person, with significant experience raising her own children, and who had under her care and custody for ten years, T.J.'s sister, a well-adjusted twelve-year old who excelled in school. Under these circumstances, before rejecting the designated custodian's petition and severing the child's relation with his parent, sister, and other relatives in the context of a consolidated adoption proceeding, the trial court must find by clear and convincing evidence both that the custody arrangement chosen by the mother would clearly not be in the best interest of the child and that the parent's consent to adoption is withheld contrary to the child's best interest.[5] *In re J.S.R.,* 374 A.2d 860, 864 (D.C.1977).

[6] **[7]** **[8]** The trial court erred in bifurcating two interrelated issues, disposing of the merits of the mother's retention of custody of the child herself as against the merits of the prospective adopter's claim, applying a clear and convincing standard, and then weighing the great-aunt's petition for custody against the petition for adoption applying the preponderance of the evidence standard. The major fallacy in this approach is that it gave far too little weight to the mother's right to choose the custodian for her child by applying an incorrect standard of proof to that consideration.[6] In short, the trial court erred in placing the mother's wishes on an equal footing with the other factors it considered.[7] The trial court effectively ruled that the mother's parental rights should be terminated when it determined that as between the mother and the prospective adopter, adoption was in the child's best interest and the mother's consent was withheld contrary to that interest. We have said that termination of parental rights is an extreme remedy. *In re L.L.,* 653 A.2d 873, 890 (D.C.1995). Therefore, a ruling which effectively terminates parental rights, as this one did, must be supported by clear and convincing evidence. *J.S.R., supra,* 374 A.2d at 864; *see also In re D.R.M.,* 570 A.2d 796, 804–05 (D.C.1990).

[9] **[10]** **[11]** **[12]** The Supreme Court has recognized that natural parents have a "fundamental liberty interest in the care, custody, and management of their children" which is protected by the fourteenth amendment,[8] and ***12** gives parents the freedom to make personal choices in matters of family life. *Santosky,* 455 U.S. at 753, 102 S.Ct. at 1394–95.[9] Furthermore, natural parents do not lose this constitutionally protected interest "simply because they have not been model parents or have lost temporary custody of their child[ren].... Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family

life." *Id.* We have held that state intervention in the parent/child relationship is subject to constitutional oversight, *In re Baby Boy C.,* 630 A.2d at 673, and we have recognized that absent termination of parental rights or some other finding that the parents should no longer be permitted to influence the child's future, the parents' rights necessarily include the right to consent, or withhold consent, to the child's adoption. *Baby Girl D.S.,* 600 A.2d at 86 n. 21; D.C.Code § 16–304 (1989) (consent to adoption); D.C.Code § 16–2361(b) (negating notice requirement of adoption statute once parental rights have been terminated). This right to consent must be guarded just as zealously as the Constitution guards the right of a natural parent to the custody and companionship of his or her child. [10] *See D.S. v. F.A.H.,* 684 S.W.2d 320, 323 (Ky.1985) (court should consider any less drastic measure other than termination of parental right, to accomplish the child's best interest); *Davis v. Jurney,* 145 A.2d 846, 849 (D.C.1958) (even though all considerations, including parents' rights, must yield to the child's best interest, application of that broad principle does not demand that the right of a parent should be ignored). *But see In re Violetta B.,* 210 Ill.App.3d 521, 154 Ill.Dec. 896, 903, 568 N.E.2d 1345, 1352 (1991) (best interest of child is paramount even to parents' constitutional rights).

We find substantial further support for the conclusions we reach in *Freeman v. Chaplic,* 388 Mass. 398, 446 N.E.2d 1369 (1983), which involved a custody conflict between the maternal step-grandmother, Freeman, and the paternal grand-parents, the Chaplics, for custody of a thirteen-year old girl, Lynn–Marie. The birth mother had consented to the Chaplics' custody petition and refused to consent to Freeman's petition. Focusing its inquiry on the mother's ability to care for the child, and the provisions that she made for those times when she was unable to do so, the court held that "[a]s a general matter, granting custody to a party opposed by the parents where neither the parents nor the parents' nominee is unfit or unsuitable ... would raise serious constitutional difficulties." *Freeman,* 446 N.E.2d at 1375. The thirteen-year old child who was the subject of this custody conflict had been living with Freeman, with whom she had a close, loving relationship, in a custody arrangement precipitated by the mother's hospitalization because of a nervous breakdown. After the Chaplics filed a petition for guardianship, to which both natural parents consented, they were appointed guardians with custody. The child adjusted well in the Chaplics' household, developing a warm relationship with her two siblings who were also in the Chaplics' custody.

The trial court, over the natural parents' objection, revoked the decree appointing the Chaplics guardians with custody, and appointed Freeman as custodian. [11] Among the ***13** trial court's findings were the following: (1) both the Chaplics and Freeman were fully capable of caring for Lynn–Marie; (2) the birth mother possessed the capacity to assent to the appointment of the Chaplics as guardians with custody of the child; (3) assent by the parents should be given little weight because the father has had little contact with the child, and the mother was suffering from emotional problems; (4) the parents' custody choice was designed to maintain the closest possible ties between the child and her parents, siblings, and paternal grandparents, the Chaplics; and (5) that the appointment of Freeman would serve the child's best interest. *Freeman,* 446 N.E.2d at 1372. On the basis of the last finding, the trial court vacated the appointment of the Chaplics and awarded Freeman custody.

The Supreme Judicial Court of Massachusetts reversed, holding that where the trial court found the parents fit and competent to make decisions about the child's future, and their choice of custodian was also suitable, the judge is bound to honor the parents' wishes, to the extent permitted by statute, on the choice of a custodian. Furthermore, "ties of affection which exist between a child and a person who has had custody of the child *must yield to the desires of the parents to raise the child in a fit environment.*" *Id.* at 1376 (emphasis added).

A Florida court has also recognized that the mother's custody choice must be given weighty consideration. In *Berhow v. Crow,* 423 So.2d 371 (Fla.1982), a teenage birth mother gave custody of her daughter to the Berhow family, who then became licensed foster parents in California where they were registered as the child's parents with the consent of the natural mother. Shortly thereafter, the natural mother died, and the Berhows petitioned to adopt the child with the consent of the birth father, in a California court. During the pendency of that proceeding, however, the maternal grandparents, under false pretense, removed the child from the Berhow home, took her to Florida, and adopted her there, without notifying the Berhows. Upon learning of the adoption, the Berhows moved to vacate the adoption order, but the trial court denied the motion on the ground that the Berhows

lacked standing to challenge the adoption. The court of appeals reversed, holding that the Berhows, as the birth mother's choice of custodian, had "demonstrated a due process liberty interest in maintaining their close family relationship with [the child.]" *Berhow,* 423 So.2d at 371. The Berhows, therefore, had standing to challenge the adoption and should have received notice of the adoption proceedings. *Id.* at 373. The court found dispositive the fact that the child had been placed with the Berhows for more than temporary care by the natural mother. *Id.*

Finally, a New York court granted an adoption to the mother's choice of custodian because the authorized agency providing foster care also supported the adoption. *In re Guardianship of the D. Children,* 177 A.D.2d 393, 576 N.Y.S.2d 136 (1991). The natural mother had voluntarily placed both her infant sons in foster care with a Mrs. Harding. Shortly thereafter, the natural mother died, the grandmother's custody petition was denied, and an appeal was taken. The appellate court held that the grandmother did not have precedence for custody over the adoptive parents selected by the authorized agency.[12] *Id.; but see Worley v. Jackson,* 595 So.2d 853 (Miss.1992) (the parental choice must yield to the judge's determination of what is in the children's best interest, unless that determination is manifestly wrong); *In re Stephanie M.,* 7 Cal.4th 295, 27 Cal.Rptr.2d 595, 867 P.2d 706 (1994), *cert. denied,* 513 U.S. 908, 115 S.Ct. 277, 130 L.Ed.2d 194 (1994) (parent's choice of custodian not within the child's best interest).[13]

***14** There was substantial evidence in this case that the mother was unable to care for the adoptee herself, and the trial court so found by clear and convincing evidence—a finding which we do not fault. There was no evidence, however, that the mother was incapable of making decisions about her son's future. To the contrary, there is considerable undisputed evidence in this record that the mother always ensured that someone would provide for the child's needs when she believed she was unable to do so herself. For example, in the neglect proceedings Judge Mize specifically found that:

> [t]he evidence demonstrates that actions were taken with forethought by the mother to assure that [the adoptee] was properly taken care of by another.[14]

The mother selected a suitable custodian, the child's great-aunt. The trial court described the great-aunt as an "extraordinary ... strong, loving, dignified, highly moral, religious person" who has successfully raised eight of her own children. The trial court also found that the great-aunt has been raising the child's older sister for ten years, "with love, care and skill, [and the sister] is a well-adjusted 12 year-old, who excels in school and has a firm sense of herself." Finally, the great-aunt has a strong family-support network who "stand ready" to offer the child a home should anything happen to her.

It is significant, in our view, that there is no evidence that the mother made any decision harmful to the child, or that the trial court found that the great-aunt was in any way unfit or unsuitable to be his custodian. Granting the great-aunt custody of the child would strengthen the natural bonds of the family, permit the child to be raised with his sister, and preserve the relationship with his mother and other members of his extended family. On the other hand, granting the foster mother's adoption petition ignores the mother's constitutional rights to participate in decision-making relating to the rearing of her child without a formal finding that she has forfeited her right to do so. Granting the foster mother's adoption petition would also sever the child's connection with his blood relatives. In holding that the trial court here failed to properly take into account the mother's rightful role in her son's future, we endorse the observation of the Supreme Court in *Moore v. East Cleveland,* 431 U.S. 494, 505, 97 S.Ct. 1932, 1938–39, 52 L.Ed.2d 531 (1977), which the Supreme Judicial Court of Massachusetts in *Freeman* also found weighty:

> Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfaction of a common home. Decisions concerning child rearing, which ... have [been] recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household—indeed who may take on major responsibility for rearing of the children. Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come

> together for mutual sustenance and to maintain or rebuild a secure home life.

Freeman, 446 N.E.2d at 1375 n. 11.

[13] **[14]** Unless a child's parents have in some manner forfeited the right to direct the upbringing of their children, the parents have the right to determine what is in their child's best interest. *See Appeal of H.R.,* 581 A.2d at 1177 (Ferren, J.) ("It would seem inherent in the very concept of a fit parent that such a parent would be at least as ***15** responsive as the trial court, very probably more so, to the best interest of the child."), citing *In re Guardianship of Smith,* 42 Cal.2d 91, 265 P.2d 888, 891 (1954) (en banc) (Traynor, J., concurring). That right includes the right to raise the child if physically or mentally able to do so, or, if not, the right to determine who should raise the child. [15] *Id.*

[15] Taking all of these considerations into account, we conclude, on the facts of this case, that the mother's choice of a suitable custodian and the household in which her son should be reared should have been accorded far greater weight by the trial court, and it was error for the court not to give effect to the mother's choice of custodian for her child absent a showing, by clear and convincing evidence, that the choice would be clearly contrary to the child's best interest. *See Freeman,* 446 N.E.2d 1369; *Berhow,* 423 So.2d 371; *In re Guardianship of the D. Children,* 576 N.Y.S.2d at 137; *see also, D.S. v. F.A.H.,* 684 S.W.2d at 322 (where mother's inability to care for her child is neither self-imposed nor deliberate, placement with a family member must be considered prior to termination of parental rights).

We agree with the foster mother's observation that the child's best interest should be the determining factor for the trial court. The natural mother's views, however, at least under the circumstances presented here, must be taken into consideration in determining what is in the child's best interest. *See Appeal of H.R.,* 581 A.2d at 1177. Moreover, in this case the guardian *ad litem, i.e.,* the child's representative, DHS, and FLOC, the agency with legal custody of the child, all support the mother's choice of custodian. *See In re Guardianship of the D. Children,* 576 N.Y.S.2d at 137 (blood relative has no precedence for custody over adoptive parents selected by the authorized agency).

VI. Conclusion

Having held, on the facts of this case, that the parents' choice of custodian should have been accorded far greater weight, we turn now to a discussion of the applicable legal standard, mindful that the determination of what is in the child's best interest cannot be accomplished by imposing formulas, doctrines, presumptions, or a rigid hierarchy of placement alternatives. *See In re D.G.,* 583 A.2d 160, 165 (D.C.1990); *In re D.I.S.,* 494 A.2d at 1323; *Bazemore v. Davis,* 394 A.2d 1377, 1383 (D.C.1978) (en banc). Before doing so, we note preliminarily that, contrary to the foster mother's contention, we do not understand the appellants' argument to be that the trial court should have elevated some other right or interest above the child's best interest. The issue is whether the trial court applied the correct evidentiary standard, and whether the trial court required the parties to bear the appropriate evidentiary burden, in weighing the factors that guide the best interest analysis.

In deciding between the competing petition of the foster mother and the great-aunt the court applied a preponderance of the evidence standard to determine the child's best interest, stating:

> The best interest standard calls upon the court to look at [the child's] life from many perspectives—[the child's] bonding or attachment with those who wish to bring him up; his parents wishes; the trauma he would face if moved from the [foster mother to the great-aunt's] care; how that move would affect his growth as a person; the difficulties and prejudices [the child] would be faced with as a result of a transracial lesbian adoption; the advantages and support offered by an extended family; the respective abilities of each side to give [the child] a real sense of his cultural, ethnic and biological heritage; as well as the potential of each to share their love ***16** and to give [the child] a real sense of himself.

For the court, the "pre-eminent reasons" for granting the foster mother's adoption petition, despite being confident that the great-aunt was a fit custodian, was the adoptee's attachment to the foster mother, the progress he made while in her care, and the risk of a permanent emotional scar if he were removed from her. Finally, the court ruled that by a preponderance of the evidence, on balance, these considerations outweighed his parents' wishes, and the advantages of being raised by his great-aunt in the company of his extended family.

[16] We hold that the court erred in applying the preponderance of the evidence standard when weighing the foster mother's interest against the mother's right to preserve the relationship of parent and child and to exercise her choice of the great-aunt as custodian. If the mother had not sought to preserve the family relationship and had not come before the court supporting a suitable family member as custodian for the child, or if parental rights had been terminated, then the trial court would be correct in employing the preponderance standard in resolving the competing petitions of the foster mother and the great-aunt. *In re D.I.S.,* 494 A.2d at 1325–26. However, this is not simply a case of competing petitions for adoption between unrelated parties. It is a case between a natural mother, who seeks to preserve the relationship of parent to child, and who designated a suitable custodian to care for her child, and an unrelated party who seeks to adopt him.

[17] Where the parent(s) have unequivocally exercised their right to designate a custodian, *i.e.,* made their own determination of what is in the child's best interest, the court can "terminate" the parent(s)' right to choose only if the court finds by clear and convincing evidence that the placement selected by the parent is clearly not in the child's best interest, and the consent to adoption has been withheld by the parent contrary to the child's best interest. The non-parent seeking adoption must carry that burden of proof. [16]

[18] Applying these considerations to the facts presented here, we conclude that the foster mother failed to show by clear and convincing evidence [17] that the mother's custody choice was clearly not in the adoptee's best interest. There is overwhelming record support for the court's finding that the great-aunt would be a fit custodian. Moreover, custody with the great-aunt would ensure that T.J. would be in the company of his cousins and sister. With respect to those relationships the trial court found that T.J. enjoys the company of his cousins and is very attached to his sister. The mental health experts who testified were divided on the issue of the extent and degree of harmful ***17** consequence to the child if there was a change of placement.

Placing particular emphasis on the adoptee's attachment to the foster mother, [18] the trial court concluded that the evidence "on balance" favored granting the foster mother's adoption petition. If the mother had expressed no preference, that ruling, on this record, may well have been within the acceptable range of the court's exercise of discretion. *See In re Baby Girl D.S.,* 600 A.2d at 82. The trial court, however, did not find, and we think from this record, could not find, by clear and convincing evidence, that placement of the child with the great-aunt would be clearly contrary to the child's best interest. [19] Indeed, the trial court found as fact that the great-aunt was a highly moral and dignified person, with significant experience raising her own children, and who was raising T.J.'s sister, a well-adjusted twelve-year old.

For all of these reasons we conclude that the trial court erred in rejecting the custodial arrangement selected by the mother. In so concluding, we echo the sentiment expressed in T.J.'s brief:

> T.J. has a family ... that is supportive, that loves him and is willing and able to care for him. In this country, it still means something to have a family with which one shares biological and cultural identity where a child can grow up.

See also In re D.I.S., 494 A.2d at 1324 (under similar circumstances, the trial court granted grandmother's adoption petition "because of the extensive support group of relatives available to assist the grandmother").

VII. Our Resolution of This Appeal

The judgment granting the foster mother's adoption petition is therefore reversed, and the case remanded to the trial court to vacate the orders granting adoption and

denying custody, and to enter an order granting custody to the child's great-aunt. [20] See *In re L.L., supra,* 653 A.2d at 889–90.

Reversed and remanded.

All Citations

666 A.2d 1

Footnotes

1 D.C.Code § 16–2301(9) in relevant part provides:

> The term "neglected child" means a child:
> (A) who has been abandoned or abused by his or her parent, guardian, or other custodian; or
> (B) who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his or her physical, mental, or emotional health, and the deprivation is not due to the lack of financial means of his or her parent, guardian, or other custodian; or
> (C) whose parent, guardian, or other custodian is unable to discharge his or her responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity.
> * * * * * *

2 A special corrective action project developed to address the need for permanency planning in cases of children who had been in foster care for more than eighteen months with an unmet case plan goal of "reunification." Project workers investigated whether reunification remained a realistic goal and, if not, developed alternative permanency recommendations.

3 C.J., the natural mother of T.J., is also the natural mother of A.J., the twelve-year old girl who has been cared for by the great-aunt for ten years. Apparently A.J. and T.J. have different fathers.

4 Our discussion applies, of course, to the right of natural parents with respect to the placement of their child. Here, the father consented to the custody request by the great-aunt, but has not otherwise played any role in the raising or decision-making relating to the child. The mother was the initial custodian of the child, and it is her role in this case that is central to this controversy. As a result, we will generally refer to the rights of the mother, with the understanding this is a handy reference which applies to natural parents in general.

5 Adoption has the legal effect of severing all rights and duties between the adoptee and his natural parents, their issue and collateral relatives. D.C.Code § 16–312(a) (1989).

6 The availability of a suitable family member, willing to assume legal custody of the child, is an important consideration in the court's decision whether to terminate the parent-child relationship. *See In re Baby Girl D.S.,* 600 A.2d at 83–84.

7 The trial court set forth eight considerations it weighed, including the wishes of the parents, in applying the best interest standard. Those considerations are set forth in a quote from the trial court's written opinion, *infra* at pp. 15–16.

8 Constitutional protections, applicable to the states through the fourteenth amendment, although not directly applicable to the District of Columbia, extend to the District through the due process clause of the fifth amendment. *Orange v. Bd. of Elections and Ethics,* 629 A.2d 575, 579 n. 5 (D.C.1993), citing *Bolling v. Sharpe,* 347 U.S. 497, 499, 74 S.Ct. 693, 694 n. 5, 98 L.Ed. 884 (1954).

9 *See also Quilloin v. Walcott,* 434 U.S. 246, 255, 98 S.Ct. 549, 554–55, 54 L.Ed.2d 511 (1978); *Smith v. Organization of Foster Families,* 431 U.S. 816, 845, 97 S.Ct. 2094, 2110, 53 L.Ed.2d 14 (1977); *Moore v. East Cleveland,* 431 U.S. 494, 499, 97 S.Ct. 1932, 1935–36, 52 L.Ed.2d 531 (1977); *Cleveland Bd. of Education v. LaFleur,* 414 U.S. 632, 630–40, 94 S.Ct. 791, 801–02, 39 L.Ed.2d 52 (1974); *Stanley v. Illinois,* 405 U.S. 645, 651–52, 92 S.Ct. 1208, 1212–13, 31 L.Ed.2d 551 (1972); *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); *Pierce v. Society of Sisters,* 268 U.S. 510, 534–35, 45 S.Ct. 571, 573–74, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 626–27, 67 L.Ed. 1042 (1923).

10 We do not speak here of situations where a parent withholds consent to an adoption, but has not devised any alternative plans for the permanent placement of the child. Nor are we addressing the standard to be applied in those circumstances where the parent has been found in a judicial proceeding to have abused the child. We are dealing only with the custody wishes of a parent who, through no fault of her own, is unable to care properly for her child.

11 During the pendency of this action, the natural mother was adopted by the Chaplics and was living with them along with her other two children.

12 The appellate court did not indicate how much weight, if any, was given to the mother's choice of custodian, although this may be because the mother's choice coincided with that of the authorized agency. But, even assuming the court did not rule on the basis of the mother's choice, that case nonetheless provides support for our holding in this case, because the court ruled on the basis of the choice made by the agency authorized to permanently place the children. In this case, both FLOC and DHS also favored the great-aunt as the custodian of the child.

13 Both of these cases are factually distinguishable from this case: In *In re Stephanie M.,* the parents had physically abused the child and the court found that their choice of custodians, the maternal grandmother or, in the alternative, the aunt, would be unable to protect the child from further physical abuse by the parents. In *Worley v. Jackson,* the maternal grandparents who were the mother's choice sought temporary custody on grounds that they had *in loco parentis* status. The court found that no *in loco parentis* status existed, and awarded the paternal grandparents custody because, among other considerations, they sought to have permanent, as opposed to temporary custody, which was in the best interest of the children. Furthermore, the court found that such a custodial arrangement in no way impaired the mother's future parental rights.

14 Thus, the court adjudicated T.J. neglected under D.C.Code § 16–2301(9)(C), due to the mother's mental illness and not pursuant to § 16–2301(9)(B) because, "T.J. was not without proper care or control, subsistence, education ... or other emotional health." *See supra,* note 1.

15 Thus, where the parent/child relationship is intact, a state may only intrude in that relationship in very limited circumstances in the public interest, or for the protection of the child. Normally, such intervention does not permanently sever the parent/child relationship. *See, e.g., In re A.C.,* 573 A.2d 1235, 1246–47 (D.C.1990); *Prince v. Massachusetts,* 321 U.S. 158, 167, 64 S.Ct. 438, 442–43, 88 L.Ed. 645 (1944) (citing *People v. Pierson,* 176 N.Y. 201, 68 N.E. 243 (1903) (the right to practice one's religion does not include liberty to expose the child to communicable diseases, ill health or death).

16 The application of the preponderance of the evidence standard in *D.I.S., supra,* 494 A.2d at 1316, a case where there were competing petitions for adoption by two non-parents, is inapposite under the facts of this case, In *D.I.S.,* the court distinguished the case from *J.S.R., supra,* 374 A.2d at 864 where we applied the clear and convincing standard, observing that the issue in *J.S.R.* was whether a natural parent, who has a constitutionally protected interest in raising his own child, is withholding consent to the adoption contrary to the child's best interest. In *D.I.S.,* the mother was deceased and the father consented to one of the competing petitions. Thus, the father did not seek to preserve, as the mother does in this case, the parent-child relationship; he was willing to have that relationship terminated in favor of one of the competing non-parents. The circumstances are quite different where a mentally or physically disabled parent is seeking to preserve the parent-child and family relationship through the support of a custodial plan for his or her child's care as set forth in a petition for custody which is being considered along with a petition for adoption filed by an unrelated person. For the reasons previously stated, the higher clear and convincing standard must apply because of the parent's protected interest in determining the upbringing of his or her child, and because the issues concern the termination of those rights.

17 A preponderance of the evidence is "proof which leads the [fact finder] to find that the existence of the contested fact is more plausible than its non-existence." *In re D.I.S.,* 494 A.2d at 1326 (quoting MCCORMICK ON EVIDENCE § 339 (E. Clearly 3d ed. 1984)). The standard of clear and convincing proof requires evidence that will "produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *District of Columbia v. Hudson,* 404 A.2d 175, 179 n. 7 (D.C.1979) (en banc) (citation omitted).

18 We do not minimize the significance of this consideration. As we emphasized in *In re L.L.,* 653 A.2d at 884–86, the governing statute requires that the trial court give weight to the child's need for continuity of care, the emotional needs of the child, and the child's attachment to the foster mother. See D.C.Code § 16–2353(b) (1989). The same statute, however, requires the trial court to consider the child's interaction with others including parents and siblings. As noted in the text the great-aunt has raised T.J.'s sister for ten years and, as the trial court found, T.J. is "very attached" to the sister.

19 The trial judge's opinion evidences the strength of the competing considerations in his mind and his difficulty of decision. As we read his opinion, he invoked the preponderance standard, but would have himself ruled differently under the clear and convincing test we today hold applicable.

20 This conclusion is reached with the recognition that an initial order for child custody is always open to modification by the court where warranted by a change of circumstances affecting the child's best interest.

879 A.2d 682
District of Columbia Court of Appeals.

In re Petition of D.B.; S.B., Appellant.

Nos. 04–FS–1043, 04–FS–1044.
|
Argued June 23, 2005.
|
Decided July 28, 2005.

Synopsis

Background: In child neglect proceeding, following removal of child from mother's custody and commitment of child to Child and Family Services Agency (CFSA), child's paternal grandparents filed motion seeking permanent guardianship of child. The Superior Court, Carol A. Dalton, Magistrate Judge, granted motion. Mother filed motion for review. The Superior Court, Lee F. Satterfield, J., denied motion as untimely. Mother appealed.

Holdings: The Court of Appeals, Reid, J., held that:

[1] mother's motion for review of magistrate's order was timely;

[2] requiring mother to exercise her supervised visitation with child in New Jersey did not violate mother's visitation rights;

[3] granting discretion to grandparents to cease mother's visitation if she acted inappropriately did not violate mother's visitation rights; and

[4] requirement that mother enter therapy and undergo medication assessment as condition for her continued visitation with child did not violate mother's visitation rights.

Affirmed.

West Headnotes (9)

[1] Infants
Reference

Mother's motion for review of magistrate's order in child neglect proceeding, in which magistrate awarded permanent guardianship of child to paternal grandparents, was timely, though it was not filed within ten-day period following entry of order of judgment as required by Superior Court Family Division rule governing filing and service requirements for motions for review of hearing commissioner's order of judgment, as rule governing computations of time, providing for three-day mailing extension, applied, as did provision of rule excluding intervening Saturdays, Sundays, and holidays. Civil Rule 77(d); Rule 6(a, e) (2001); General Family Rule D(e).

Cases that cite this headnote

[2] Infants
Reference

When a magistrate judge makes findings out of the presence of counsel or parties, and the Superior Court clerk is required to serve a notice of the entry of that judgment by mail, three additional days should be added to the period of time prescribed by Superior Court Family Division rule governing filing and service requirements for motions for review of hearing commissioner's order of judgment. Civil Rule 77(d); Rule 6(a, e) (2001); General Family Rule D(e).

Cases that cite this headnote

[3] Infants
Reference

Three-day mailing extension set forth in rule governing computations of time refers to business days, not calendar days, and does not begin to run until ten-day time period set forth in rule of the Superior Court Family Division

governing filing and service requirements for motions for review of hearing commissioner's order of judgment has expired; by separating the time into two separate periods, the rule setting forth three-day mailing extension period invokes provision of the same rule excluding Saturdays, Sundays, and legal holidays. Civil Rule 6(e) (2001); General Family Rule D(e).

Cases that cite this headnote

[4] **Infants**
Visitation issues
Infants
Discretion of lower court

The proper disposition of a neglected child, including the question whether a non-custodial parent should be granted visitation rights, is committed to the sound discretion of the trial court; the exercise of that discretion is reviewable only for abuse.

1 Cases that cite this headnote

[5] **Courts**
Abuse of discretion in general

Judicial discretion must be founded upon correct legal principles, and a trial court abuses its discretion when it rests its conclusions on incorrect legal standards.

Cases that cite this headnote

[6] **Courts**
Abuse of discretion in general

An informed choice among the alternatives requires that the trial court's determination be based upon and drawn from a firm factual foundation; just as a trial court's action is an abuse of discretion if no valid reason is given or can be discerned for it, so also it is an abuse if the stated reasons do not rest upon a specific factual predicate.

Cases that cite this headnote

[7] **Infants**
Visitation issues

Requiring mother to exercise her supervised visitation with child in New Jersey where child resided with paternal grandparents, who had been named child's permanent guardians in child neglect proceeding, did not violate mother's visitation rights; there was ample evidence that child should live with her grandparents, mother presented no evidence that she was unable to travel to New Jersey, she failed to explain why she never accompanied her mother on trips to New Jersey, and, even if mother was unable to travel to New Jersey, guardianship order required grandparents to take child to see mother in District of Columbia at least three times per year.

Cases that cite this headnote

[8] **Infants**
Visitation issues

Granting discretion to child's paternal grandparents to cease mother's supervised visitation with child if mother acted inappropriately did not violate mother's visitation rights, in child neglect proceeding in which grandparents had been named child's permanent guardians; there was no evidence supporting mother's contention that grandparents would misuse their discretion to improperly prevent mother from visiting child, and grandmother testified that she does not want to interrupt relationship between child and her parents and that she believed that child should have a good relationship with her mother and father.

1 Cases that cite this headnote

[9] **Infants**
Visitation issues

Requirement that mother enter therapy and undergo medication assessment as condition for her continued supervised visitation with child did not violate mother's visitation rights with child, whose paternal grandparents had been named child's permanent guardians

in child neglect proceeding; mother had been diagnosed with borderline personality disorder, she was unable to control her anger or her hurtful comments, grandmother testified that during telephone conversation between mother and child, mother used profanity and upset child such that child hung up the telephone, and court-appointed psychiatrist testified that, without proper treatment and medication, it was "unlikely" that mother was capable of acting appropriately around child.

Cases that cite this headnote

Attorneys and Law Firms

***684** Hagos Haile, for appellant S.B.

Thalia E. Meltz, Potomac, MD, appointed by the court, for appellee D.B.

Laurie P. McManus, for appellees D.C. and J.W.C., Jr.

Stacy L. Anderson, Assistant Attorney General, with whom Robert J. Spagnoletti, Attorney General for the District of Columbia, and Edward E. Schwab, Deputy Attorney General, were on the brief, for appellee District of Columbia.

Before TERRY, REID and GLICKMAN, Associate Judges.

Opinion

REID, Associate Judge:

In this case, appellant S.B., the biological mother of D.B., appeals from the trial court's order denying her motion to review a magistrate judge's order of judgment as untimely. S.B. challenged the order of a magistrate judge granting permanent guardianship of D.B. to the child's paternal grandparents. She argues on appeal that (1) her motion for review of the magistrate judge's order was timely pursuant to Super. Ct. Gen. Fam. R. D(e) and Super Ct. Civ. R. 6(3); (2) the order effectively and improperly terminates her right to visit her daughter; and (3) several conditions imposed on her by the magistrate judge's visitation schedule were not based on sufficient evidence.

We hold that Super. Ct. Civ. R. 6(e) applies to motions for review filed in the Superior Court under Super. Ct. Gen. Fam. R. D (e), and that S.B.'s motion was therefore timely. However, we conclude that the magistrate judge's guardianship order placing D.B. with her paternal ***685** grandparents in New Jersey, and conditioning visitation on S.B.'s willingness to receive therapy and undergo a medication assessment, did not effectively terminate S.B.'s visitation rights. We therefore affirm the judgment of the trial court.

FACTUAL SUMMARY

D.B. was born on February 26, 1995, to S.B. Her biological father, D.L., is presently incarcerated in Ohio and has consented to the proposed guardianship. On March 31, 2000, when D.B. was five-years-old, the District of Columbia, through the Child and Family Services Agency ("CFSA"), filed a petition in the Superior Court alleging that D.B. had been neglected based on allegations of sexual abuse. The petition asserted that D.B. had been sexually assaulted by an "unknown adult male" while "she was outside playing at her cousin's ... home," and that upon learning of the assault, S.B. failed to report the incident to the police or have D.B. medically examined as recommended by her pediatrician; moreover, she continued to leave D.B. in her cousin's care. D.B. was released to her mother on the conditions that she stay away from her cousin's home and receive therapy. S.B. entered into a stipulation of neglect on August 1, 2000.

On February 8, 2001, after a disposition hearing in the Superior Court, D.B. was removed from her mother's care and placed with her paternal aunt, S.L. S.B. was granted unsupervised visitation with her daughter at the discretion of D.B.'s social worker. On May 15, 2001, D.B. was again released to her mother, this time under the protective supervision of the Superior Court. The placement was conditioned on S.B.'s participation in weekly therapy classes, D.B.'s participation in both individual and family therapy classes, and that D.B. continue to receive her daily medication.

D.B. remained with her mother until January 11, 2002, at which time she was removed from her mother's care because the Superior Court found that she was "not getting [her] medicine" and she was "not going to

school." D.B. was placed in a therapeutic foster home. On February 5, 2002, S.B. entered into a second stipulation, acknowledging that she had failed to comply with the terms of the court's February 8, 2001 dispositional order. S.B. admitted that she had failed to take D.B. "to many of her therapy sessions" and "most of the family therapy [sessions]," and that during the 2001–2002 school year, D.B. had "been absent 21 times and tardy 32 times." The Superior Court revoked protective supervision and committed D.B. to the care of the CFSA. On April 30, 2002, the case was transferred to a magistrate judge.

The permanency goal, following a June 17, 2002 hearing before the magistrate judge, was changed to adoption or guardianship by a relative. In July of 2002, in accordance with this goal, D.B. was conditionally released to D.C. and J.W.C., her paternal grandparents, who live in Willingsboro, New Jersey. S.B. was granted supervised visitation with her daughter every other weekend; [1] D.B.'s maternal grandmother, M.D., was granted unsupervised visitation. On September 29, 2003, the C.'s filed a motion for guardianship, seeking permanent guardianship of D.B. pursuant to D.C.Code § 16–2381 *et seq.* (2001). A guardianship pre-trial hearing was held on January 14, 2004. After reviewing the psychological report of S.B. prepared by a court-appointed psychiatrist, and observing that "the mother's behavior is ... out of control," the magistrate judge limited S.B.'s visitation with ***686** D.B. to one supervised telephone call per week. The magistrate judge also denied S.B.'s "oral motion to change [D.B.'s] placement."

On March 25, 2004, the magistrate judge convened a hearing on the C.'s motion for guardianship. The appellees presented the testimony of Kelly Calaway, the CFSA supervisor assigned to D.B.'s case, and that of the potential guardians, D.C. and J.W.C. Dr. Galler, a court-appointed psychiatrist, testified in regards to S.B.'s ability to safely visit with her daughter.

Ms. Calaway opined that it was in D.B.'s best interests for the C.'s to be granted guardianship. She observed that in the nearly two years that D.B. had lived with the C.'s in New Jersey, S.B. had only visited her on two occasions, and that both visits occurred in Washington, D.C., when the C.'s drove S.B. to see her mother. S.B. had never traveled to New Jersey, even though M.D., D.B.'s maternal grandmother, had traveled from Washington, D.C. to New Jersey four times. Ms. Calaway did not believe "that distance was a factor" in S.B.'s failure to visit her daughter; rather, she believed that the "relationship between S.[B.] and the C.'s" may have interfered with "setting up visitation." Ms. Calaway also observed that in the nine weeks preceding the guardianship hearing, S.B. missed three phone calls with D.B.

D.C. testified that she has a very strong bond with D.B., that D.B. views her as her mother, that she is committed to loving D.B. as her own child, and that it is D.B.'s desire to remain in New Jersey. D.C. observed that D.B. has changed for the better since moving to New Jersey. When D.B. first moved to New Jersey, "[s]he was out of control." "She would throw tantrums," and "[i]f she was asked to do something, she would huff and puff, stomp up the steps, [and be] very disruptive." But now, "[s]he's in control." "She stops and she tries to think before she opens her mouth, before she do[es] something that she knows she['s] not supposed to do." D.C. also observed that D.B. is very close with D.C.'s daughter, I.C., and that "[t]hey shop, ... bike ride.... play soccer .... [and] bond as sisters."

In regards to visitation, D.C. testified that she does not "want to interrupt the relationship between D. and her parents." She believed that D.B. "should have a good relationship with her mother and with her father," and that she "would like to see the visitations continue between [the two]" because this "will help D.[B.] to develop a more emotional attachment to her mother." D.C. stated that she supports "regular phone contact, [and] supervised visits between D. and her mom." In the nearly two years that D.B. lived in New Jersey, she had only missed one scheduled visitation in Washington, D.C., due to an "emergency." She had, however, traveled to Washington "four times" so that D.B. could visit with her mother. Finally, D.C. acknowledged that D.B.'s visits with her mother were not always positive, and that S.B. had "upset" D.B. on several occasions. [2]

Dr. Galler diagnosed S.B. with a "borderline personality disorder." He found that S.B. "has almost no insight into herself [or] ...[her] problems," and that she has "almost no[ ] capacity to empathize and understand the workings of other people's minds." He explained that "[s]he's just unable to comply with either common sense or the social worker, as well as the grandparents who are currently taking ***687** care of her," and that "[s]he cannot control her angry outbursts ... [or] her hurtful comments." In regards to visitation, Dr. Galler recommended that if S.B.

could act "appropriately" with her daughter, that she be granted "supervised visits at least 4 times a year." He also concluded that supervised phone visitation might also be granted if she acted appropriately. Dr. Galler stressed his belief that without proper treatment and medication, it was unlikely that S.B. was capable of acting appropriately around her daughter.

At the conclusion of the guardianship hearing, the magistrate judge awarded guardianship of D.B. to the C.'s. The magistrate judge found that the C.'s had established by "clear an[d] convincing [evidence] ... that guardianship should be granted," noting that the C.'s have a "strong bond" with D.B., while the "interaction between [D.B.] and her mother ... is horrendous." The judge recognized that D.B. had expressed a desire to remain with the C.'s. The judge also found that "[a]ll of [D.B.'s] needs are being cared for [by the C.'s]," that there was "a lot of love and affection in the [C.'s] home," and that D.B. was "flourishing" in New Jersey. By contrast, the magistrate judge determined that S.B.'s "inappropriate behavior" "raise[d] serious concern[s]" and was "not healthy for the child."

In regards to what she considered to be the "crucial issue," that of visitation, the magistrate judge concluded that S.B. should have four supervised visits with her daughter annually, and that the C.'s were responsible for transporting D.B. to Washington D.C. three times per year. In reaching this decision, the magistrate judge noted that S.B. had never visited her daughter in New Jersey, even though S.B.'s mother had traveled there on four separate occasions. The magistrate judge also concluded that "[v]isitation [was to be] at the discretion of the caretakers," and that the C.'s could "suspend visitation as soon as [S.B.'s] behavior [was] inappropriate."

On June 9, 2004, the magistrate judge issued a written order of her findings of fact and conclusions of law. On the issue of visitation, the magistrate judge concluded:

> [V]isitation and contact between [S.B.] and the child are subject to the following conditions: ... 1) at the discretion of and to be supervised by the [C.'s]; 2) conditioned on [S.B.] being in weekly therapy and receiving a medication assessment by a psychiatrist and to follow the medication recommendations; 3) to be suspended by the [C.'s] if [S.B.'s] behavior during a visit is inappropriate; 4) to occur in Washington, D.C. at least three (3) times per year, it is the [C.'s] obligation to bring [D.B.] to Washington, D.C. for these visits and [S.B.'s] obligation to keep the [C.'s] abreast of her telephone number and address. The visits are only if requested by the mother. [S.B.] may arrange with the [C.'s] to visit [D.B.] in New Jersey as appropriate. [S.B.] may have some telephone access to [D.B.] during reasonable hours. The [C.'s] may supervise these telephone calls to monitor the appropriateness of the conversation.

On June 29, 2004—twenty days after the order was entered—S.B. filed a motion for review of the magistrate judge's order in the Superior Court. Recognizing that the motion might be untimely, S.B. asserted that the time for filing her motion should be extended by Super. Ct. Civ. R. 6(e), [3] ***688** which provides that "3 days shall be added to the prescribed period" when "notice ... is served upon the party by mail." [4] On July 13, 2004, the Superior Court denied S.B.'s motion for review as untimely. It observed that "[p]ursuant to Family Court Rules D(c) and (e), a motion for review of a magistrate judge's order must be filed within ten days of the entry of the judgement or order." [5] Even "assuming that the motion was timely filed," the Superior Court concluded that the magistrate judge's "Findings of Fact and Conclusions of Law ... are supported by the record."

ANALYSIS

S.B. contends that it was an abuse of discretion for the magistrate judge to award the C.'s permanent guardianship because it will effectively terminate her "visitation rights" with D.B. She claims that the magistrate judge's decision to place D.B. more than 150 miles from Washington, D.C., "with a permanent guardian who has [had a] bad relationship with [S.B.]," "is tantamount to the termination of [her] visitation rights."

S.B. also contends that the conditions imposed on her right to visit D.B., "such as the weekly therapy and medical assessment by a psychiatrist," were not "based upon a firm factual foundation." She asks that the guardianship order "be declared illegal," and for "a more reasonable placement of her child."

Applicability of Super. Ct. Civ. R. 6(e).

Before reaching the merits of S.B.'s appeal, we must decide whether her motion for review of the magistrate judge's order, which was filed in the Superior Court on June 29, 2004, was timely. The government maintains that it was not; it argues that under Rule D (e) of the Superior Court's General Rules of the Family Division, S.B. had ten days from the date the order was entered in which to file a motion of review in the Superior Court. Given that S.B. did not file her motion within ten days as prescribed by Rule D(e), and that a magistrate judge's order is not an appealable order, the government claims that S.B. has waived her right to appeal. It also rejects S.B.'s contention that Super. Ct. Civ. R. 6(e) may be used to extend the time in which a motion for review may be filed in the Superior Court.

While a panel of this Court has not had the opportunity to consider whether Rule 6(e) is applicable to Super. Ct. Gen. Fam. R. D, we have held that the rule applies similar circumstances. For example, in *Wallace v. Warehouse Employees Union # 730,* 482 A.2d 801, 807 (D.C.1984), we concluded that Rule 6(e) was applicable to Rule 59(e) motions for reconsideration, even though "the literal language of Rule 6(e) cause[d] us to pause, since it refers to 'service' rather than 'entry.' " Nevertheless, we held "that when a judgment is rendered outside the presence of the parties or counsel and, therefore, notice is mailed pursuant to Rule 77(d), three additional days are added to the period of time prescribed in Rule 59(e), pursuant to Rule 6(e)." *Id.* at 806. Our reasoning for applying ***689** Rule 6(e) in that case, that "[i]t would not be reasonable to require that when a case is taken under advisement the parties must on every day thereafter check the records of court to find if action ha[d] been taken, in order that they may have the full four days contemplated by the rules," *see id.* at 806 (quoting *United Retail Cleaners & Tailors Ass'n of D.C. v. Denahan,* 44 A.2d 69, 70 (D.C.1945)), is equally applicable in this case.

Similarly, in *Denahan, supra,* the Court was asked to "answer ... the question ... whether Rule 6(e) applies to motions for new trials" made pursuant to Rule 52(a). 44 A.2d at 69. In finding Rule 6(e) applicable to Rule 52(a), we noted that it would be incongruous for the length of time a litigant had to move for a new trial to vary depending on whether the trial court's judgment was "made in open court" or "sent by mail." *Id.* at 70. We reasoned:

> It seems evident to us that the rules of the trial court intend that a party shall have four days after verdict or finding in which to decide whether to file a motion for new trial .... If appellant's position is correct, then in this case and similar cases the period for filing the motion for new trial would be reduced to three days; and we do not think that the rules intended that where the finding is made in open court the parties shall have four days, and where decision is reserved and notice is sent by mail the parties shall have only three days for filing their motion. There is no basis in reason for such discrimination.

Denahan, 44 A.2d at 70. We therefore concluded that "a reading of the rules as a whole requires that when finding is made out of the presence of counsel or parties, notice of such action shall be given by mail, and that in such a situation the time for filing a motion for new trial is by Rule 6(e) enlarged by one day." *Id.* at 70. *See also Faggins v. Fischer,* 853 A.2d 132, 136 (D.C.2004) (noting that since the Court's decision in *United Retail Cleaners & Tailors Ass'n of D.C. v. Denahan,* Rule 6(e) applies "where the Superior Court clerk is required by Rule 77(d) to serve a notice of the entry of a judgment by mail upon parties not in default").

[1] **[2]** The same reasoning found in *Wallace* and *Denahan* which permitted the Court to apply Rule 6(e) to both Rule 59(e) and Rule 52(a), respectively, is equally persuasive here. When a magistrate judge makes "finding[s] ... out of the presence of counsel or parties," *Denahan, supra,* and "the Superior Court clerk is required by Rule 77(d) to serve a notice of the entry of [that] judgment by mail," *Faggins, supra,* we believe that "three additional days [should be] added to the period of time prescribed [by Rule D(e)]," *see Wallace,* 482 A.2d at 806.

"We therefore hold that Rule 6(e) applies to [Rule D(e)] motions, and that [S.B.] had an additional three days within which to file [her] motion [in the Superior Court]." *Wallace,* 482 A.2d at 808.

[3] We also note that in *Faggins, supra,* the Court held that the additional three-day time period for filing a motion contained in Rule 6(e) is calculated separately from the ten-day period found in Rule 59(e). 853 A.2d at 137–38. Applying *Faggins* here, we hold that "the three-day mailing extension in Rule 6(e) refers ... to business days," *id.* at 137, not calendar days, and does "not begin to run until" Rule D(e)'s ten-day time period has expired, *see Singer v. Singer,* 583 A.2d 689, 690 (D.C.1990). "By separating the time into two separate periods," the three-day period of Rule 6(e) "invoke[s] the provision of Rule 6(a) excluding Saturdays, Sundays, ***690** and legal holidays." [6] *Faggins,* 853 A.2d at 138 (citation and internal quotation marks omitted).

In this case, the magistrate judge issued her written findings of fact and conclusions of law, granting permanent guardianship to the C.'s, on June 9, 2004. Pursuant to Super. Ct. Gen. Fam. R. D (e)(1), [7] S.B. had "10 days after the entry of the order of judgment" in which to file her motion for review in the Superior Court. [8] Excluding intervening Saturdays, Sundays, and holidays, *see* Super. Ct. Civ. R. 6(a), S.B. had until June 24, 2004, to file her motion. [9] This would make her June 29, 2004 motion untimely. However, because we have concluded that Rule 6(e) is applicable to Rule D(e) motions for review, S.B. had "an additional three days within which to file [her] motion." *Wallace, supra,* 482 A.2d at 808. Thus, excluding both the June 11th Day of Mourning, which counts as a holiday, and a single intervening weekend, which fell on June 26 and 27, 2004, S.B. actually had until June 29, 2004, to file her motion. Her motion, filed on that exact day, was therefore timely.

The Permanent Guardianship Order and Visitation

Having concluded that S.B.'s motion was timely filed, we now consider her claim that the magistrate judge's guardianship order violated her visitation rights by, first, placing D.B. in a location that is inaccessible to her, second, giving the C.'s the discretion to cease visitation if she acts inappropriately, and third, requiring her to enter therapy and undergo a medication assessment as a condition for continued visitation.

[4] **[5]** **[6]** "The proper disposition of a neglected child, including the question whether a non-custodial parent should be granted visitation rights, is committed to the sound discretion of the trial court; the ***691** exercise of that discretion is reviewable only for abuse." [10] *In re Ko. W.,* 774 A.2d 296, 303 (D.C.2001) (citing *In re D.M.,* 771 A.2d 360, 370 (D.C.2001)) (other citations omitted). "Judicial discretion must, however, be founded upon correct legal principles, and a trial court abuses its discretion when it rests its conclusions on incorrect legal standards." *In re J.D.C.,* 594 A.2d 70, 75 (D.C.1991) (citations omitted). "An informed choice among the alternatives requires that the trial court's determination be based upon and drawn from a firm factual foundation." *Johnson v. United States,* 398 A.2d 354, 364 (D.C.1979). "Just as a trial court's action is an abuse of discretion if no valid reason is given or can be discerned for it, so also it is an abuse if the stated reasons do not rest upon a specific factual predicate." *Id.* (citing *Monroe v. United States,* 389 A.2d 811, 821 (D.C.1978)) (other citation omitted).

[7] We are not persuaded that the trial court abused its discretion in placing specific conditions on S.B.'s visitation. [11] First, there was ample evidence for the magistrate judge to conclude that D.B. should live with the C.'s, her paternal grandparents, in New Jersey. The testimony demonstrated that the C.'s have provided D.B. with a loving and stable home for two years; they take her to school, doctor's appointments and soccer games; they buy her presents and supply her day-to-day needs; and that, in general, she is "flourishing" in New Jersey. By contrast, S.B. presented absolutely no evidence that she is unable to travel to New Jersey or that she even wants to visit with D.B. more than three times per year. Moreover, S.B. failed to explain why she never accompanied her mother, M.D., on any of her four trips from Washington, D.C., to New Jersey. Even if we were to assume, *arguendo,* that S.B. is unable to travel to New Jersey, we would note that the guardianship order requires the C.'s to take D.B. to see her mother in the District of Columbia at least three times per year. [12] This requirement is consistent with Dr. Galler's recommendation that S.B. be limited to four supervised visits with D.B. per year.

[8] Second, there is no evidence supporting S.B.'s contention that the C.'s will misuse their discretion to improperly prevent S.B. from visiting her daughter. D.C.

testified that she does not "want to interrupt ***692** the relationship between D.[B.] and her parents," and that she believed that D.B. "should have a good relationship with her mother and with her father." D.C. explained that she "would like to see the visitations continue between [S.B. and D.B.]" because this "will help D.[B.] to develop a more emotional attachment to her mother." Moreover, while Ms. Calaway, the CFSA supervisor, testified that the "relationship between S.[B.] and the C.'s" may have interfered with "setting up visitation" in some instances, there is no evidence showing that the C.'s were responsible, or that their relationship with S.B. will necessarily foreclose future visitations.

[9] Third, there was sufficient evidence for the magistrate judge to condition S.B.'s visitation with D.B. on her willingness to enter weekly therapy and undergo a medication assessment. Dr. Galler diagnosed S.B. with "borderline personality disorder," and testified that she "has almost no insight into herself and to [her] problems," that she "has no, very little or almost no, capacity to empathize and understand the workings of other people's minds even," and that "[s]he cannot control her angry outbursts ... [or] her hurtful comments." Importantly for the magistrate judge's consideration, S.B.'s inability to control her anger or her hurtful comments appears to extend to her relationship with her daughter. For example, D.C. testified that during one telephone visit, S.B. actually "used profanity on the phone," which "upset D.[B.] terribly to the point that D.[B.] hung the phone up." Dr. Galler concluded that without proper treatment and medication, it was "unlikely" that S.B. was capable of acting appropriately around her daughter. Given the strength of Dr. Galler's testimony, and that S.B. offered no evidence to contradict his expert opinion or demonstrate that she was capable of behaving appropriately when visiting with her daughter, we conclude that it was not an abuse of discretion for the magistrate judge to require S.B. to attend weekly therapy and undergo medication assessment. We cannot say that the conditions imposed by the magistrate judge "do not rest upon a specific factual predicate." *Johnson, supra,* 398 A.2d at 364.

For the foregoing reasons, we affirm the judgment of the trial court.

So ordered.

All Citations

879 A.2d 682

Footnotes

1 S.B.'s visits were to be supervised by the paternal grandparents, the C.'s.

2 J.W.C. testified that he is very close to D.B., and that they "go shopping," "bike ride," "play basketball," and play "soccer in the backyard." J.W.C. stated that he is committed to raising D.B. until she is an adult.

3 Super. Ct. Civ. R. 6(e) (2001) provides:

> *Additional time after service by mail.* Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

4 S.B. also asked the Superior Court to review her motion "in its discretion." S.B. argued that her counsel was in California for a week "attending his daughter's High School graduation," and that there was a "communication problem" when "[her] telephone number was changed."

5 The Superior Court also concluded that S.B. had not established "excusable neglect" for her failure to file the motion in ten days.

6 Super. Ct. Civ. R. 6(a) (2001) provides, in relevant part:

> When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

7 Super. Ct. Gen. Fam. R. D(e)(1) (2004 Suppl.) provides:

> *Review of hearing commissioner's order or judgment.* (1) Upon motion. With respect to proceedings and hearings under paragraphs (b) and (c) of this Rule, a review of the hearing commissioner's order or judgment, in whole or in part, shall be made by a judge designated by the Chief Judge to act on all motions for review under this Rule upon motion of a party. Such motion shall be filed and served on all parties not later than 30 days after entry of the order or judgment with respect to a motion made pursuant to paragraph (b) of this rule and 10 days after the entry of the order of judgment with respect to a motion made pursuant to paragraph (c) of this rule. The motion for review

shall designate the order, judgment, or part thereof, for which review is being sought, shall specify the grounds for the objection to the hearing commissioner's order, judgment, or part thereof, and shall include a written summary of any evidence presented before the hearing commissioner relating to the grounds for the objection. Within 10 days after being served with said motion, a party may file and serve a response, which shall describe any proceedings before the hearing commissioner which conflict with or expand upon the summary filed by the moving party. The judge designated by the Chief Judge shall review those portions of the hearing commissioner's order or judgment to which objection is made, and may affirm, reverse, modify, or remand, in whole or in part, the hearing commissioner's order or judgment and enter an appropriate order of judgment.

8 *See Wallace,* 482 A.2d at 806 n. 14 ("Judgment is entered when set forth on a separate document and notation is entered on the docket.") (citing Super. Ct. Civ. R. 58).

9 A day of mourning for former President Ronald Reagan was observed on Friday, June 11, 2004.

10 This is the first time that this Court has had the opportunity to review a permanent guardianship order issued pursuant to D.C.Code § 16–2381 *et. seq.* (2004 Suppl.), the District's newly enacted permanent guardianship statute. However, because that part of the statute relevant to the issue of visitation, § 16–2389(c), gives the trial court discretion to limit visitation between the biological parent and child, we review the trial court's order only for an abuse of that discretion.

11 D.C.Code § 16–2389 (2004 Suppl.) specifically lists those rights which S.B. did not lose as a result of the guardianship order. Section (c) provides:

> Entry of a guardianship order does not terminate the parent and child relationship, including:
> (1) The right of the child to inherit from his or her parents;
> (2) The parents' right to visit or contact the child (except as limited by the court);
> (3) The parents' right to consent to the child's adoption;
> (4) The parents' right to determine the child's religious affiliation; and
> (5) The parents' responsibility to provide financial, medical, and other support for the child.

However, as is plain from the language of § 16–2389(c)(2), the magistrate judge was free to limit S.B.'s right to visit her daughter if it was in her best interests.

12 In the nearly two years that D.B. lived in New Jersey, D.C. had only missed one scheduled visitation due to an "emergency." D.C. had, however, brought D.B. to see her mother "four times."

900 A.2d 677
District of Columbia Court of Appeals.

In re A.G.; B.G., Appellant.

Nos. 04–FS–451, 04–FS–739.
|
Submitted Dec. 13, 2005.
|
Decided June 1, 2006.

Synopsis

Background: In context of neglect proceedings, the Superior Court, Hiram E. Puig-Lugo, J., awarded permanent guardianship of father's child to child's maternal aunt and uncle. Father appealed.

Holdings: The Court of Appeals, Steadman, Senior Judge, held that:

[1] as matter of first impression, preponderance of evidence standard governing petition for permanent guardianship did not violate due process;

[2] trial court's failure to personally interview 11-year-old child in order to determine whether she preferred to live with maternal aunt and uncle or father was not reversible error; and

[3] trial court's decision to leave decision regarding father's visitation with child to discretion of aunt and uncle did not violate father's constitutional right to maintain relationship with child.

Affirmed.

West Headnotes (7)

[1] Constitutional Law
Guardianship

Guardian and Ward
Evidence

Statute authorizing trial court to grant petition by neglected child's maternal aunt and uncle for permanent guardianship based on preponderance of the evidence standard, rather than clear and convincing evidence standard governing termination of parental rights proceedings, did not violate father's due process rights; guardianship did not operate as final and absolute termination of father's parental rights, father retained right to move to terminate guardianship at any time, and trial court on such motion would be required to order termination of guardianship if termination was in best interests of child. U.S.C.A. Const.Amend. 14; D.C. Official Code, 2001 Ed. § 16–2388(f).

5 Cases that cite this headnote

[2] Constitutional Law
Parent and Child Relationship

Parents have a due process right to make decisions concerning the care, custody, and control of their children. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[3] Constitutional Law
Parent and Child Relationship

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.

2 Cases that cite this headnote

[4] Infants
Dependency, permanency, and rights termination in general

To completely terminate parental rights, the government must support its allegations by at least clear and convincing evidence.

2 Cases that cite this headnote

[5] **Constitutional Law**
Factors considered;flexibility and balancing

In determining whether a proceeding comports with due process, the court must balance (1) the private interests affected by the proceeding; (2) the risk of error created by the jurisdiction's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[6] **Guardian and Ward**
Persons who may be appointed

Trial court's failure to personally interview 11-year-old neglected child, who was subject of permanent guardianship proceedings, in order to determine whether she preferred to live with maternal aunt and uncle or father did not invalidate finding that awarding aunt and uncle permanent guardianship was in child's best interest; although child had expressed desire to live with mother, there was no testimony or evidence indicating that she had ever expressed desire to live with father, and father was free to call child as witness to testify as to her wishes or introduce any such evidence but failed to do so. D.C. Official Code, 2001 Ed. § 16–2383(d).

1 Cases that cite this headnote

[7] **Guardian and Ward**
Custody and control of person

Trial court's decision to leave decision regarding father's visitation with neglected child to discretion of child's maternal aunt and uncle, who had been awarded permanent guardianship of child, did not violate father's constitutional right to maintain relationship with child; trial court did not prohibit father from contacting or visiting child, aunt and uncle indicated willingness to permit father visitation with child, and father retained right to petition for modification of guardianship order if aunt and uncle denied visitation. D.C. Official Code, 2001 Ed. § 16–2389(c)(2), (d).

2 Cases that cite this headnote

Attorneys and Law Firms

***678** Ardelia L. Davis, Alexandria, VA, appointed by the court, was on the brief for appellant B.G.

Robert J. Spagnoletti, Attorney General for the District of Columbia, and Edward E. Schwab, Deputy Attorney General, and Stacy L. Anderson, Assistant Attorney General, were on the brief for appellee.

Joseph W. Jose, Washington, DC, appointed by the court, filed a statement in lieu of brief for appellees J.R. and S.R.

A.R. Marblestein–Deare, appointed by the court as guardian ad litem, filed a statement in lieu of brief for A.G.

Before GLICKMAN and KRAMER, Associate Judges, and STEADMAN, Senior Judge.

Opinion

STEADMAN, Senior Judge:

The natural father of A.G., a minor child within the neglect system, appeals the trial court's decision to award "permanent guardianship" to the child's maternal aunt and uncle under the relatively new Foster Children's Guardianship Act, D.C.Code § 16–2381 *et seq.*, which became effective in 2001.[1] The Act provides that guardianship decisions shall be based upon "a preponderance of the evidence." D.C.Code § 16–2388(f). The principal issue on appeal addresses whether the due process clause of the Constitution requires the more demanding standard of "clear and convincing evidence." We hold that it does not. We also reject appellant's further arguments, including whether the trial court abused its discretion in failing to obtain first-hand A.G.'s opinion of her own best interests in the matter and in failing to specify the frequency of visitation between appellant and A.G. Accordingly, we affirm the trial court's order.

I. Facts

In 2001, L.G., who is A.G.'s mother, entered a stipulation of neglect. Consequently, the trial court placed A.G., with her maternal aunt and uncle, J.R. and S.R., and initially set the permanency goal as reunification with L.G. At the time, A.G. was eight years old. Following the passage of two years, the court changed A.G.'s permanency goal to permanent guardianship with J.R. and S.R.

In 2004, L.G. consented when the R.s petitioned for guardianship, but A.G.'s father, B.G., opposed the petition. The trial ***679** court held a hearing to determine whether it was in A.G.'s best interest to grant the guardianship petition. At the hearing, J.R. and S.R. both testified, as did A.G.'s two social workers. A.G.'s first social worker testified that the R.s are fit and proper caretakers of A.G., and that they "provide a safe and nurturing environment for her." The social worker observed "positive interaction" between the R.s and A.G., and a closeness between A.G. and the R.s' own children. The social worker and appellant had no contact with one another. A.G. had never expressed a desire to live with her father, and indeed, had never even mentioned him. A.G.'s second social worker likewise testified that she had had no contact with appellant, and that the R.s properly cared for A.G. Neither social worker recommended that A.G. be placed with appellant.

The R.s testified that A.G. was a "normal," "helpful," and "very outgoing" girl, and that she got along well with the R.s' own children. While A.G. was in the custody of her aunt and uncle, appellant did not call, provide financial child support, or send birthday cards or gifts to A.G. The R.s testified that if he wanted to, appellant would be welcome to come visit his daughter, so long as he was respectful of their situation.

Appellant did not testify or present any other evidence, and his counsel opposed the petition on the basis of appellant's status as the natural father. The trial judge analyzed the facts under the statutory factors set forth under § 16–2383(d), and concluded, "looking at all of the evidence presented, there is *preponderant evidence* that it is in A.G.'s best interest that she be placed with Mr. and Mrs. R., that they become her permanent, legal guardians" (emphasis added).

II. "Preponderance of the Evidence" Standard

[1] We face here, as a matter of first impression in this jurisdiction, the argument that § 16–2388(f)[2] of the guardianship statute is unconstitutional on its face because it permits the trial judge to grant a petition for permanent guardianship upon a "preponderance of the evidence" standard, rather than the more demanding standard requiring "clear and convincing" evidence.

We must first decide whether we may or should review this issue at all on this appeal. Appellant never objected to the trial court's use of the preponderance standard when it ruled on the guardianship issue. However, before us, appellees have not asserted that appellant waived the argument and that as a result we are to apply, at most, a "plain error" standard of review. The District's brief actually appears to invite plenary decision whether the preponderance standard survives constitutional attack, as applied to these guardianship proceedings. Therefore, the District might well be said to have "waived its waiver argument." *In re T.L.,* 859 A.2d 1087, 1090 n. 6 (D.C.2004) (quoting *United States v. Delgado–Garcia,* 362 U.S.App. D.C. 512, 515, 374 F.3d 1337, 1340 (2004)). Moreover, this constitutional issue of first impression has been briefed and involves important legal rights. In this posture, we elect to address the issue notwithstanding appellant's failure to raise any objection before the trial court. *See id.*; *In re K.A.,* 484 A.2d 992, 997 (D.C.1984) (addressing ***680** constitutional attack on termination of parental rights statute, despite that appellants raised it for the first time on appeal).

[2] **[3]** **[4]** We turn to the merits of appellant's claim. It is a basic principle that "[p]arents have a due process right 'to make decisions concerning the care, custody, and control of their children.' " *In re A.H.,* 842 A.2d 674, 684 n. 14 (D.C.2004) (quoting *Troxel v. Granville,* 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)). "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). In light of these constitutional considerations, to completely terminate parental rights, the government must "support its allegations by at least clear and convincing evidence."[3] *Id.* at 748, 102 S.Ct. 1388.

[5] Though we have held that the preponderance standard in the context of *neglect* proceedings is constitutional, *In re N.H.,* 569 A.2d 1179 (D.C.1990), neither the Supreme Court nor this court has had occasion to decide whether the clear and convincing standard-constitutionally mandated for termination of parental rights-also applies to the recently enacted permanent guardianship status in neglect proceedings.[4] However, in examining statutes similar to our guardianship act, both the Colorado Supreme Court and the Washington Court of Appeals have held-and we agree-that for statutes terminating only some of a parent's rights to his or her child, the preponderance of the evidence standard does not violate the Constitution's due process requirements.[5] *In re R.W.,* 10 P.3d 1271, 1276 (Colo.2000) (en banc); *Dependency of F.S.,* 81 Wash.App. 264, 913 P.2d 844, 846–47 (1996), petition for review denied, 130 Wash.2d 1002, 925 P.2d 988. Both courts apply the three-prong standard of ***681** *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) as articulated in the parental rights context in *Santosky, supra.* These cases require that a court balance (1) the private interests affected by the proceeding; (2) the risk of error created by the jurisdiction's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. *Mathews, supra,* 424 U.S. at 334–35, 96 S.Ct. 893; *Santosky, supra,* 455 U.S. at 754, 102 S.Ct. 1388. In substance, "the greater the deprivation, the greater the procedural protection provided to parents." *In re R.W., supra,* 10 P.3d at 1276. The similar analysis of the Colorado and Washington courts is in our judgment compelling and, without extensive reiteration, we follow and adopt it.

The preponderance standard complies with due process requirements of the Constitution because § 16–2388(f), like the statutes analyzed in the Washington state and Colorado cases, does not operate as a final and absolute termination of the natural parents' rights. Indeed, the statute explicitly retains many important rights for the natural parents: "Entry of a guardianship order does not terminate the parent and child relationship, including: [t]he right of the child to inherit from his or her parents; [t]he parents' right to visit or contact the child (except as limited by the court); [t]he parents' right to consent to the child's adoption; [t]he parents' right to determine the child's religious affiliation; and [t]he parents' responsibility to provide financial, medical, and other support for the child." D.C.Code § 16–2389(c). Because "the impact of guardianship is not tantamount to termination," the statute does not call for the strictures of the clear and convincing standard.[6] *Dependency of F.S., supra,* 913 P.2d at 847.

Moreover, with respect to the risk of error, the statute reserves to the parent, under the court's continuing jurisdiction, the right to move to terminate the guardianship order at any time, and the court must do so if it would be in the best interests of the child. D.C.Code §§ 16–2389, –2390. The statute's lack of permanency further weighs in favor of the preponderance standard. *See* D.C.Code § 16–2390 (court's jurisdiction lasts until the child's eighteenth birthday, at which point the guardians' legal rights to the child expire). Because the court's interference between the natural parent and his child under the guardianship statute is significantly less than with the termination of parental rights,[7] the lower preponderance standard is accordingly warranted. *See Dependency of F.S., supra,* 913 P.2d at 846 (holding that the preponderance standard provides adequate due process because the guardianship order "results in neither an irreversible decision nor a complete severance of the parent's contact with the ***682** child"); *In re R.W., supra,* 10 P.3d at 1278 (preponderance standard is constitutional "[b]ecause Petitioner is not deprived of all her parental rights, and because the trial court retains jurisdiction to modify its existing order"). In sum, because we are confident that the preponderance standard set forth under § 16–2388 comports with the Constitution's due process demands and carefully balances the natural parent's rights against the best interests of the child, the statute is not violative of the Constitution. *In re A.B.E.,* 564 A.2d 751, 754–55 (D.C.1989) ("While the rights of the natural parents to bring up their children are subject to the protection of the Due Process and Equal Protection Clauses of the Fourteenth Amendment ... these rights are not absolute, and must give way before the child's best interests" (citations omitted)).

III. Other Issues

[6] Using the "preponderance of the evidence" standard, the trial court properly applied the § 16–2383(d) factors, and we therefore affirm.[8] Appellant argues that the trial court erred in granting the guardianship petition because it never personally interviewed A.G., who was by then

eleven years old, to ask her whether she would rather be with her father or with her aunt and uncle. Under § 16–2383(c), the trial court had the task of deciding whether permanent guardianship with the R.s would be "in the child's best interest." Under § 16–2383(d), the court is required to consider each of five factors, the fourth of which is "[t]o the extent feasible, the child's opinion of his or her own best interests in the matter." As to that factor, the trial judge found that "A. has expressed at times a desire to be reunited with her mother. But there has been no testimony presented and no reports submitted maintaining that she has expressed a desire to reside with her father." Appellant was free to call A.G. as a witness to testify as to her wishes, press the court to interview the child personally, or introduce other evidence suggesting the child's preference for the father, but appellant did not do so. In this posture, we see no basis to overturn the trial court. *See In re A.R.,* 679 A.2d 470, 476–77 (D.C.1996) (trial judge did not err by declining either to interview the child in chambers or to attempt to expand in some other way the evidentiary record presented by the parties); *In re I.B.,* 631 A.2d 1225, 1232 (D.C.1993) (trial court "probably should have heard from [twelve-and eight-year-old children] directly, either in an informal interview in chambers or in the more formal setting of the courtroom," but no abuse of discretion in failing to do so). [9]

[7] Appellant also claims that the trial judge erred in that its "decision to leave ***683** visitations to the sole discretion of the guardians had the effect of violating [appellant's] constitutional right to maintain a relationship with his daughter." Whether appellant has a constitutional right to visit his daughter is irrelevant to this case, because the trial court did not prohibit him from doing so. Section 16–2389(c)(2) of the guardianship statute expressly provides that a parent retains the "right to visit or contact the child (except as limited by the court)." The statute simply provides that "[t]he guardianship order *may* specify the frequency and nature of visitation or contact between relatives and the child." § 16–2389(d) (emphasis added). The statute's lack of mandatory language plainly makes this an optional undertaking. *In re D.B.,* 879 A.2d 682, 690–91 (D.C.2005) (trial court's decision regarding visitation rights of a non-custodial parent reviewed for abuse of discretion). A.G.'s guardians indicated a willingness to permit appellant's visits with his daughter; should they deny such permission in the future, appellant is free to petition the court for a modification of the guardianship order. *Id.* at 691 ("there is no evidence supporting [mother's] contention that the [guardians] will misuse their discretion to improperly prevent [mother] from visiting her daughter"). [10]

For the foregoing reasons, the order appealed from is

Affirmed.

All Citations

900 A.2d 677

Footnotes

1 The "permanent guardianship" provided for in this act relates only to children within the neglect system, and should not be confused with the guardianship provisions contained in D.C.Code § 21–2001, *et seq.,* which relate to protected or incapacitated individuals.

2 "The court may enter, modify, or terminate a guardianship order after considering all of the evidence presented, including the Mayor's report and recommendation, and after making a determination based upon a preponderance of the evidence that creation, modification, or termination of the guardianship order is in the child's best interests." D.C.Code § 16–2388(f).

3 Our statutory law so provides. D.C.Code § 16–2359(f) (2005) ("[a] judge may enter an order permanently terminating the parent and child relationship after considering all of the evidence presented and after making a determination based upon clear and convincing evidence that termination of the parent and child relationship is in the best interest of the child").

4 Prior to the enactment of the 2001 statute, it appears that there was no intermediary status between foster parent and adoptive parent. *See In re Baby Boy C.,* 630 A.2d 670, 677 (D.C.1993) (child psychiatry expert suggesting a compromise whereby, through "some kind of legal arrangement," the child could remain with the custodial adults, but with visitation rights for the natural father). According to the legislative history of this statute, the result was that too many children were forced to spend their youth migrating from one foster home to another. D.C. Council Report on Bill 13–763 at 1. To help remedy this problem, the legislation was intended to make permanent guardianship a more viable option for children whose parental rights had not been terminated. *Id.*

5 California's intermediate appellate courts have also considered the issue, but there seems to be a split of authority which has yet to be resolved by that state's highest court. Compare *In re Guardianship Stephen G.,* 40 Cal.App.4th 1418, 1429–32, 47 Cal.Rptr.2d 409 (1995) (due process requires clear and convincing evidence in guardianship proceedings) and *In re Guardianship Jenna G.,* 63 Cal.App.4th 387, 391, 74 Cal.Rptr.2d 47 (1998) (same) with *In re Guardianship Diana B.,* 30 Cal.App.4th 1766, 1774, 36 Cal.Rptr.2d 447 (1994) (preponderance standard sufficient for guardianship proceedings). Other courts have indicated, without square holdings, that, in the context of family law, the clear and convincing standard should be limited to termination of parental rights. *See, e.g., Kent K. v. Bobby M.,* 210 Ariz. 279, 110 P.3d 1013, 1017 (2005); *In re Joshua Z.,* 26 Conn.App. 58, 63, 597 A.2d 842 (1991).

6 The preponderance standard also could tend to further the guardianship statute's stated purposes of ensuring "that the constitutional rights of all parties are recognized and enforced in all proceedings conducted pursuant to this subchapter while ensuring that the fundamental needs of children are not subjugated to the interests of others." D.C.Code § 16–2381(2). The statute strikes this balance by "encompass [ing] a number of procedures aimed at protecting children from emotional and physical harm while at the same time seeking to repair and maintain family ties." *In re R.W., supra,* 10 P.3d at 1275. It provides for "a measure of flexibility ... to allow the State to provide permanence for a child without terminating the parent's rights. The statute provides for secure placement of the child while authorizing both visitation between parent and child and continuing involvement by state agencies." *Dependency of F.S., supra,* 913 P.2d at 847.

7 The termination of parental rights "divests the parent and the child of all legal rights, powers, privileges, immunities, duties and obligations with respect to each other." D.C.Code § 16–2361.

8 The District also contends that, in any event, appellant's opposition to the guardianship petition was properly denied because he failed to prove himself to be a fit, unwed father who had seized his "opportunity interest," under the rubric of *Appeal of H.R.,* 581 A.2d 1141 (D.C.1990). While the District's position appears to have considerable merit on this record, we need not address that issue definitively, since we perceive no abuse of discretion in the trial judge's decision based on the factors set forth under D.C.Code § 16–2383(d). *See In re K.A., supra,* 484 A.2d at 997–98 (a finding of parental unfitness, separate from application of the five statutory "best interest" factors, is unnecessary to terminate parental rights, "particularly where the natural parent no longer has custody").

9 We note, however, that our view might have been otherwise if the child's preference had been called into question by opposing evidence, or if A.G. had been a few years older. *See* § 16–2383(b) ("If the child is 14 years of age or older, the court shall designate the permanent guardian selected by the child unless the court finds that the designation is contrary to the child's best interests").

10 Appellant contends that he failed to receive notice of the neglect proceedings. No such claim is shown to have been made before the trial court. Moreover, as the government points out, the claim is belied by the record, which shows that appellant or his counsel was present from the early stages of the neglect proceedings.

964 A.2d 595
District of Columbia Court of Appeals.

In re Petition of T.W.M.;
T.B., Appellant;
and
S.E., Appellant.

Nos. 06–FS–1537, 06–FS–1552.
|
Argued Oct. 30, 2008.
|
Decided Feb. 5, 2009.

Synopsis

Background: In child protection proceedings, the Superior Court, Odessa F. Vincent, J., entered order granting foster parent's petition for adoption and denying competing adoption petition filed by relative.

Holdings: Natural parents appealed. The Court of Appeals, Washington, C.J., held that:

[1] child's natural parents did not forfeit their right to have weighty consideration given to their choice of caregiver for child by failing to properly parent child themselves;

[2] caregiver chosen by child's natural parents was entitled to weighty consideration;

[3] trial court abused its discretion in concluding that placement of child with foster parent was in child's best interest because relative was not fit custodian; and

[4] reconsideration of adoption was required.

Reversed and remanded with instructions.

West Headnotes (13)

[1] Adoption
Review

In reviewing a trial court's order granting adoption for abuse of discretion, the reviewing court assesses whether the trial court applied the correct standard of proof, and then evaluates whether its decision is supported by substantial reasoning drawn from a firm factual foundation in the record.

3 Cases that cite this headnote

[2] Infants
Placement or Custody

Natural parents of child being placed for adoption did not forfeit their right to have weighty consideration given to their choice of caregiver for child by failing to properly parent child themselves.

4 Cases that cite this headnote

[3] Infants
Placement or Custody

Infants
Guardians and guardianships

Infants
Adoptive placement

Parents whose parental rights are intact do not lose the right to have their choice as to their child's adoption or guardianship being accorded substantial weight simply because they have not been model parents or have lost temporary custody of their children.

2 Cases that cite this headnote

[4] Constitutional Law
Parent and Child Relationship

Parental liberty interests are fundamental, not fleeting, and a court will not deny constitutional deference accorded to parents merely because their blood relationships are strained or parenting skills are poor.

Cases that cite this headnote

[5] Infants

Construction, operation, and effect in general

Natural parents lose their fundamental interests in dictating their child's future upon a formal termination of parental rights. D.C. Official Code, 2001 Ed. § 16–2361.

Cases that cite this headnote

[6] **Infants**

Rights of subject parent or party in general

As long as natural parents' parental rights remain intact, their indiscretions or parenting failures alone will not act to automatically sever their right to join in decision-making related to the rearing of their child.

Cases that cite this headnote

[7] **Adoption**

Examination and approval by court

Caregiver chosen by child's natural parents was entitled to weighty consideration, in proceedings on competing petitions for adoption, despite natural parents' neglect of child and lack of relationship with child, where natural parents' parental rights were intact at time of adoption proceedings.

5 Cases that cite this headnote

[8] **Adoption**

Examination and approval by court

While a trial court considering a petition for adoption may inquire as to a natural parent's reasoning for selecting a particular caregiver, it cannot deny the parent's choice weighty consideration simply because it does not approve of parent's calculations or reasoning.

Cases that cite this headnote

[9] **Adoption**

Examination and approval by court

Infants

Adoptive placement

Infants

Relatives in general

Trial court abused its discretion, in proceedings on competing petitions for adoption filed by child's foster parent and by child's relative, in concluding that placement of child with foster parent was in child's best interest because relative was not fit custodian, where relative was natural parents' designated custodian, foster parent failed to establish by clear and convincing evidence that child's placement with relative was clearly contrary to child's best interest, and court focused on collateral and irrelevant matters, and disregarded expert conclusions endorsing relative for adoption, in finding relative unfit.

5 Cases that cite this headnote

[10] **Infants**

Dependency, permanency, and rights termination in general

Infants

Disposition, placement, and custody

In a case where there are competing petitions for placement of a child and one of the petitioners is favored by the natural parent, the party without the parent's consent has the burden of establishing by clear and convincing evidence that placing the child with the parent's preferred caregiver is contrary to the child's best interest.

5 Cases that cite this headnote

[11] **Adoption**

Persons who may adopt others

Infants

Disposition, Placement, and Custody

Child's foster parent failed to carry her burden, in proceedings on competing petitions for adoption, of establishing by clear and convincing evidence that child's placement with relative, who was natural parents' designated custodian, was clearly contrary to child's best interest; relative had stable job that allowed her to provide for child, displayed early interest in child and was

committed to being in child's life, enrolled child in extracurricular activities, took child to social events, and gave child an opportunity to build relationship with her relatives, child developed very strong sibling-like relationship with relative's son, and social workers assigned to child's case all unequivocally endorsed relative's adopting child.

Cases that cite this headnote

[12] Adoption

Persons who may adopt others

Prospective adoptive parent's concealment of her marital status on adoption petition and during initial adoption proceedings, without more, was insufficient basis for finding that prospective adoptive parent was unfit, especially where trial court was aware of prospective parent's actual marital status prior to commencement of trial and prospective parent was divorced well before date of trial, rendering largely irrelevant her original claim that she had never been married.

Cases that cite this headnote

[13] Adoption

Review

Reconsideration was required, in proceedings on competing petitions for adoption, despite failure of petitioning relative to appeal from denial of her petition and passage of several years since court–ordered termination of relationship between child and relative, where trial court abused its discretion in granting petition filed by child's foster parent and grant of such petition both disregarded natural parents' designation of relative as custodian for their child and terminated their parental rights.

Cases that cite this headnote

Attorneys and Law Firms

***597** Stephen L. Watsky for appellant, T.B.

Joanne Schamest for appellant, S.E.

Larry Banks Blackwood, Guardian Ad Litem, for T.E.

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Linda Singer, Attorney General for the District of Columbia at the time the statement was filed, Todd S. Kim, Solicitor General, Donna M. Murasky, Deputy Solicitor General, and Catherine Ferrando, Assistant Attorney General, filed a statement in lieu of brief, for the District of Columbia.

Before WASHINGTON, Chief Judge, and FISHER and BLACKBURNE–RIGSBY, Associate Judges.

Opinion

WASHINGTON, Chief Judge:

Appellants T.B. and S.E., the natural parents of T.E. ("the child"), appeal the Superior Court's order granting the adoption petition of T.W.M., the child's foster mother, and denying the competing adoption petition of A.E., T.E.'s second cousin and the natural parents' choice of caregiver for the child. We reverse and remand.

I.

BACKGROUND

A. Neglect Determination & Foster Care

T.E. was born prematurely on October 9, 2001, to Appellants T.B. (the father) and S.E. (the mother). S.E. left the child at the hospital, and on November 29, 2001, T.E. was placed in foster care. S.E. was not able to care for the child due to her substance abuse problems, so she was allowed only two-hour weekly supervised visits with T.E. On November 30, 2001, a ***598** petition was filed alleging that T.E. was a neglected child pursuant to D.C.Code §§ 16–2301(9)(B) and (C) (1997 Repl.).[1] On January 31, 2002, S.E. stipulated to neglect pursuant to D.C.Code § 16–2301(9)(C). T.B. did not participate in the

neglect proceedings, as he was incarcerated at the time and did not appear before the neglect judge.

Following a Disposition Hearing, on January 15, 2002, the neglect judge placed T.E. in her mother's protective supervision while she participated in the Nurture for Life ("NFL") drug treatment program. The NFL program provided S.E. with housing, substance abuse therapy, parenting classes, and General Equivalency Diploma (GED) study courses. S.E. absconded from the program in October 2002, leaving T.E. behind. Subsequently, the child was placed in foster care with her maternal aunt, who was already caring for several of T.E.'s siblings.

On October 18, 2002, at a Permanency Hearing, the neglect judge committed T.E. to the Child and Family Services Agency ("CFSA") and determined that she should remain in her maternal aunt's custody. The neglect judge also allowed Appellants supervised visits with T.E. and set forth certain criteria with which S.E. and T.B. had to comply if they wished to regain custody of T.E. Subsequently, on November 21, 2002, T.E. was removed from her maternal aunt's care and placed in foster care with T.W.M.

B. A.E.'s Involvement

Shortly after T.E. was placed into foster care with T.W.M., A.E., T.E.'s second cousin, contacted CFSA about getting custody of the child. A.E. is a divorcee[2] and single mother with a stable job. CFSA arranged supervised visits between A.E. and T.E., which began January 18, 2003.[3] A.E. consistently met with the child whenever the visits could be arranged.

A.E. and T.E. developed a good relationship, as did T.E. and A.E.'s young son. A.E. took the child to festivals, family gatherings, various sporting events, and the circus. A.E. enrolled her in gymnastics classes, and bought clothing and shoes for T.E.

On March 13, 2003, the permanency goal for T.E. was changed from reunification to adoption by A.E., and on May 5, 2003, the court ordered unsupervised, overnight weekend visits between A.E. and T.E. A.E. picked up the child from CFSA Saturday ***599** mornings and returned her on Sunday evenings.

On August 1, 2003, T.B. executed a Consent of Biological Parent ("consent") to the adoption of T.E. by petitioner A.E. On September 3, 2003, T.W.M., T.E.'s licensed foster mother, filed a petition to adopt T.E. The father's consent to adoption was filed September 16, 2003, and three months later S.E. joined T.B. in consenting to the adoption of T.E. by A.E., although S.E.'s consent was not filed until January 13, 2004.

C. The Hair Episode

During a Permanency Hearing on November 16, 2004, before the Honorable Odessa Vincent, A.E. suggested that T.W.M. had improperly cut parts of T.E.'s hair, while T.W.M. asserted that the child's hair loss was due to A.E. braiding her hair too tight. In support of her allegation, T.W.M. presented to the trial court a report from T.E.'s physician dated March 23, 2004, which indicated that the child's hair was being braided too tight. After viewing T.E.'s scalp in court, the trial court ordered that the child's hair only be loosely braided and not put in tight braids like cornrows.

In December 2004, T.W.M. noticed that T.E. was suffering from blisters and pimples on her scalp. On January 7, 2005, T.W.M. argued to the trial court that T.E.'s reaction was a result of someone tightly cornrowing the child's hair again, in violation of the court's November 16th order. Based on the representation by T.W.M., the trial court placed visitation restrictions on A.E. until the matter could be resolved. On February 15 and 16, 2005, the trial court held an evidentiary hearing on the hair issue, during which both petitioners testified. After the hearing, the trial court ordered both petitioners to cease doing T.E.'s hair, and it further ordered that only a particular professional hair stylist handle T.E.'s hair needs.

On May 3, 2005, Judge Vincent received a letter from the selected stylist alleging that someone other than she had braided, and cut or shaved, T.E.'s hair. At a Status Hearing held two days later, both petitioners denied knowledge of, or responsibility for, T.E.'s hair loss. Despite the petitioners' attestations that they had not violated the court's order, Judge Vincent removed the child from T.W.M.'s home and placed her in another foster home until the court issued its final decision on the adoption petitions in April 2006. During that period of time, the petitioners were only allowed supervised visits with T.E.

D. Trial on Adoption Petition

After the competing adoption petitions were consolidated, Judge Vincent oversaw a four-day trial, which began on September 29, 2005. Both petitioners testified. S.E. and T.B. testified in support of A.E.'s petition for adoption, as did at least three social workers assigned to T.E.'s case.

The social workers believed that either A.E. or T.W.M. would be a good caregiver for the child; but in the interest of maintaining familial relationships, they opined that placing the child with A.E. would be in T.E.'s best interest. Because none of the social workers offered compelling evidence that would distinguish the two petitioners in terms of ability to parent T.E., the court appeared to give more consideration and weight to the experts' testimony.

The first expert, Child Psychiatrist Floyd B. Galler, testified about his February 2005 psychiatric evaluation of T.E. and both petitioners. After separately observing both petitioners with T.E. for approximately one-half hour each, Dr. Galler determined that A.E.'s parenting skills were ***600** not particularly good, especially as compared to T.W.M.'s parenting skills which he deemed superior. However, the doctor further testified that, based on his attachment study, T.E. saw A.E. as her "psychological parent"—the person T.E. essentially felt she wanted to take care of her. Dr. Galler admitted that he questioned his own conclusion since T.E. had spent most of her life with T.W.M., while the child had only spent a limited amount of time with A.E. However, after mulling the matter over in a very interesting critical self-examination on the stand, the doctor concluded that his opinion supporting A.E.'s adoption petition was sound.

Another expert, Dr. Roselyn E. Epps, Chief of Dermatology at Children's National Medical Center, was called to testify regarding T.E.'s scalp conditions. Dr. Epps had examined T.E. on July 13, 2005, and diagnosed the child as having tinea capitis, a scalp fungal infection, and alopecia areata, a hair loss condition. The doctor did not opine on the cause of T.E.'s scalp conditions, noting that her blistering and hair loss could have been caused by any number of things, including stress or bacteria. And since the cause of both scalp conditions was unknown, Dr. Epps was unable to say with certainty whether it was the braiding, or other conduct, causing T.E.'s scalp problems. However, the doctor did note that both conditions were common and treatable with medication.

The Guardian ad Litem ("The Guardian") did not testify at the trial. But shortly after the trial concluded on October 25, 2005, the Guardian submitted to the trial court a recommendation in favor of A.E.'s petition for adoption. In the Guardian's recommendation, he factually summarized the circumstances of both petitioners and determined that they were both qualified and generally comparable, but he ultimately favored A.E. over T.W.M. given A.E.'s age and family structure.

On May 19, 2006, after the trial concluded, the trial court ordered CFSA to place T.E. with T.W.M. and to terminate contact between A.E. and T.E. Six months later, on November 22, 2006, the trial court issued an order denying A.E.'s adoption petition and granting T.W.M.'s competing petition.

E. Trial Court's Order

After hearing all of the evidence, the trial court made several significant factual and legal findings in its Memorandum and Order entered November 22, 2006. First, in its findings of fact, the trial court credited the testimony of Dr. Epps, and concluded that T.E.'s scalp irritation and hair loss was due to her naturally occurring scalp conditions. But because the cause of T.E.'s scalp condition was inconclusive, the trial court independently concluded that T.E.'s scalp conditions were exacerbated by A.E.'s practice of tightly braiding T.E.'s hair.

With respect to the psychiatric evaluation of A.E., the trial court rejected Dr. Galler's conclusion that A.E. was T.E.'s "psychological parent", because Dr. Galler did not use the same procedures for evaluating T.E. with T.W.M. as he did when evaluating T.E. with A.E., and he did not use additional procedures to confirm his initial conclusions. Further, according to the trial court, Dr. Galler's conclusions were questionable because there was some indication that T.E. had an "as if personality"—i.e., she learned to get along wherever she was and became attached to whomever the caregiver was at the time.

The trial court concluded as a matter of law that Appellants' choice of caregiver for T.E. was not entitled to deference because the parents had failed to grasp their opportunity interest in raising T.E. However, ***601** the trial court alternatively concluded that, even if Appellants' chosen caregiver was entitled to deference, A.E. was not a fit custodian for T.E. because she possessed deficient parenting skills, lacked moral soundness, and physically

abused T.E. by braiding her hair too tightly. Based on the above findings of fact and conclusions of law, the trial court granted T.W.M.'s petition for adoption. [4] T.B. and S.E. timely appealed. [5]

On appeal, the natural parents contend that the trial court erred by failing to give their choice of caregiver, A.E., weighty consideration; and to the extent that it gave A.E. sufficient consideration, Appellants argue that the trial court abused its discretion by granting T.W.M.'s adoption petition because it erred in finding that A.E. was not a fit caregiver for T.E.

II.

STANDARD OF REVIEW

[1] "We review the trial court's order granting adoption for abuse of discretion, and determine whether the trial court 'exercised its discretion within the range of permissible alternatives, based on all the relevant factors and no improper factors.' " *In re T.J.,* 666 A.2d 1, 10 (D.C.1995) (quoting *In re Baby Boy C.,* 630 A.2d 670, 673 (D.C.1993)). In that review, we assess whether the trial court applied the correct standard of proof, and then evaluate whether its decision is "supported by substantial reasoning drawn from a firm factual foundation in the record." *Id.* (quoting *In re D.I.S.,* 494 A.2d 1316, 1323 (D.C.1985)).

III.

ANALYSIS

A.

[2] **[3]** **[4]** **[5]** **[6]** As an initial matter, the trial court concluded that Appellants had forfeited their right to have their chosen caregiver receive weighty consideration because they failed to grasp their "opportunity interest", in this regard, by failing to properly parent the child. The trial court's conclusion, however, is not supported by our prior decisions. [6] In cases ***602** involving placement of a child, we have held that "a parent's choice of a fit custodian for the child must be given *weighty consideration* which can be overcome only by a showing, by clear and convincing evidence, that the custodial arrangement and preservation of the parent-child relationship is clearly contrary to the child's best interest." *T.J., supra,* 666 A.2d at 11 (emphasis added). [7] Our holding in *T.J.* is premised on the notions that natural parents have a "fundamental liberty interest ... in the care, custody, and management of their child[ren]" and they do not lose their constitutionally protected interest in influencing their child's future "simply because they have not been model parents or have lost temporary custody of their children." *Id.* at 11–12 (quoting *Santosky, supra,* 455 U.S. at 753, 102 S.Ct. 1388). Parental liberty interests are fundamental, not fleeting; and we will not deny constitutional deference accorded to parents merely because their blood relationships are strained or parenting skills are poor. *See Santosky, supra,* 455 U.S. at 753, 102 S.Ct. 1388. Certainly, natural parents lose their fundamental interests in dictating their child's future upon a formal termination of parental rights. D.C.Code § 16–2361 (2008) (divesting parents of all legal rights, powers and privileges relating to child and eliminating parent's right to participate in adoption); *see In re A.T.A.,* 910 A.2d 293, 297 n. 3 (D.C.2006) (mother had no right to have her chosen caregiver receive weighty consideration because her parental rights had been properly terminated). However, as long as natural parents' parental rights remain intact, their indiscretions or parenting failures alone will not act to automatically sever their right to join in decision-making related to the rearing of their child. *See Santosky, supra,* 455 U.S. at 753, 102 S.Ct. 1388; *see, e.g., In re C.T.,* 724 A.2d 590 (D.C.1999) (father facing termination of parental rights ("TPR") was entitled to have his caregiver preference given sufficient consideration); ***603** *In re F.N.B.,* 706 A.2d 28, 31–32 (D.C.1998) (mother facing TPR allowed to choose preferred caregiver although she was unable to parent due to substance abuse problems); *T.J., supra,* 666 A.2d at 12 (mother's choice entitled to weighty consideration although she was unable to parent child due to mental illness). Thus, to conclude that natural parents forfeit their fundamental parental interests because they are unable to parent their child, is a rationale that runs contrary to our precedent.

[7] **[8]** Here, Appellants neglected the child, and they do not dispute that they had little relationship with her. Furthermore, Appellants admit that their inability to care for T.E. personally, is largely due to self-inflicted infirmities, namely incarceration and substance abuse.

But regardless of their infirmities, their parental rights had not been terminated at the time they selected a caregiver for T.E. Because their parental rights were intact at the time of the adoption proceeding, Appellants had not forfeited their right to choose a caregiver for T.E. merely because they were unfit to personally parent the child. [8] By concluding otherwise, the trial court failed to properly consider natural parents' rights to direct their child's future through choosing a fit caregiver; and it was an error to find that Appellants had forfeited these rights due to their own dereliction. *See T.J., supra,* 666 A.2d at 14; *see also C.T., supra,* 724 A.2d at 598 (reversing and remanding where trial court failed to give requisite weighty consideration to neglectful parent's preference that children be placed with cousin); *F.N.B., supra,* 706 A.2d at 33 (reversing and remanding for trial court to sufficiently consider mother's choice of custodian before terminating her parental rights). Therefore, Appellants' chosen caregiver was entitled to weighty consideration. [9]

B.

[9] Notwithstanding its initial conclusion, the trial court subsequently determined that even had it given Appellants' chosen caregiver, A.E., weighty consideration, placement of the child with T.W.M. was in T.E.'s best interest because A.E. was not a fit custodian. The record, however, ***604** does not support the trial court's conclusion that placing T.E. with A.E. would be contrary to the best interest of the child. Therefore, the trial court's decision denying A.E.'s petition in favor of T.W.M's petition was an abuse of discretion. [10]

[10] "Where the parents have unequivocally exercised their right to designate a custodian, [ ] the court can 'terminate' the parents' right to choose only if the court finds by clear and convincing evidence that the placement selected by the parents is clearly not in the child's best interest [.]" *T.J., supra,* 666 A.2d at 16. Thus, under the standard as articulated in *T.J.,* in a case where there are competing petitions for placement of a child and one of the petitioners is favored by the natural parent, the party without the parent's consent has the burden of establishing by clear and convincing evidence that placing the child with the parent's preferred caregiver is contrary to the child's best interest. *Id.* In light of this standard and the evidence adduced at trial, we conclude that T.W.M. failed to establish by clear and convincing evidence that placing T.E. with A.E. was clearly contrary to T.E.'s best interest.

[11] While we are loath to second guess a trial judge who has heard the evidence and is much closer to the situation than we are on appeal, nothing in our review of the record suggests that A.E. would not have been a fit caregiver for T.E. In fact, the record confirms that A.E. had a stable job that allowed her to provide for the child, and she eagerly sought to care for her. A.E. displayed an early interest in T.E., and she was committed to being in the child's life. Immediately after A.E. was awarded unsupervised weekend visits with T.E., A.E. became actively involved in the child's life, enrolling her in extracurricular activities and taking her to various social events. A.E. also introduced T.E. to her extended family, giving the child an opportunity to build a relationship with her relatives. And through her interaction with A.E., T.E. developed a very strong sibling-like relationship with A.E.'s son. Moreover, there is evidence in the record that A.E. was more than willing to undertake the steps necessary to provide for T.E., including secure a loan to purchase a larger home in anticipation of T.E. coming to live with her. Finally, the CFSA social workers assigned to T.E.'s case all unequivocally endorsed A.E.'s adopting T.E. Based on this evidence, we have no trouble concluding that A.E. was a fit caregiver for T.E.

Instead of weighing the factors critical to determining whether A.E. was a fit caregiver for T.E., the trial court focused on collateral matters to support its conclusion that there was clear and convincing evidence of A.E.'s unfitness to parent T.E. [11] For instance, the trial court asserted that A.E. was "physically abusive" to T.E. because it concluded that A.E.'s braiding the child's hair tightly in cornrows caused her to develop blisters on her scalp and lose hair. Dr. Epps testified that T.E. had two scalp conditions, and her blisters and hair loss could have been caused by a number of things other than braiding, including stress and bacteria. Nothing was offered to contradict the doctor's testimony. When looking at whether ***605** an adoption petitioner would serve in the child's best interest, a trial court may consider "any factor which appears relevant under the circumstances to allow the judge to make an informed and rational judgment." *See In re D.R.M.,* 570 A.2d 796, 804 (D.C.1990) (discussing the "elastic nature" of the best interest of the child standard). However, to consider that which is not supported by clear and convincing evidence,

is improper. Thus, the trial court's conclusion here was in error.

The trial court also concluded that A.E. had deficient parenting skills based on a bonding study conducted by Dr. Galler, which noted that A.E. was too intrusive in T.E.'s play during playtime. The trial court, however, failed to consider that, despite Dr. Galler's findings (which were based on a single half-hour observation of T.E. and A.E.), Dr. Galler still unequivocally endorsed A.E. to adopt T.E. because of the strong bond between the two. Given this endorsement, A.E.'s parenting skills could not have been so poor as to make her parenting clearly contrary to the child's best interest. [12]

[12] The trial court also found A.E. unfit because she concealed her marital status on her adoption petition and during the initial adoption proceedings. [13] The trial court condemned A.E.'s non-disclosure as evidence of "deficient moral character." We find it particularly odd that before trial the trial court was not so bothered by A.E.'s non-disclosure that it exercised its authority to allow her to correct her petition, yet at trial it ultimately denied her petition because of the initial non-disclosure. We note that A.E. was divorced well before the date of trial, and so A.E.'s former-husband, with whom she had never lived and with whom she had barely any contact, was not a particularly relevant factor in determining whether she was a fit caregiver for T.E.

We certainly do not condone adoption petitioners deliberately concealing information from the trial court or CFSA. *See In re M.L.P, supra,* 936 A.2d at 322–24 (affirming trial court's dismissal of adoption petition in competing adoption where foster mother deliberately concealed marital status). And we concede that an adoption petitioner's moral fitness may be relevant to determining whether he or she would serve in the child's best interest. But we cannot conclude on the facts of this case, that A.E.'s concealment of her marital status was clear and convincing evidence that placing T.E. with her was contrary to T.E.'s best interest, particularly in light of the evidence adduced at trial that A.E.'s former husband had been incarcerated for almost the entirety of their marriage and that A.E. had been granted a divorce well before the trial court's ruling in this case. The trial court should not have denied A.E.'s adoption petition absent sufficient showing that placement with her was clearly contrary to T.E.'s best interest.

[13] Accordingly, the trial court abused its discretion in denying A.E.'s petition for adoption and granting T.W.M.'s ***606** petition. Despite reaching that conclusion, however, this court is not in a position to order the trial court to grant A.E.'s petition for adoption because A.E. failed to appeal from the trial court's order and because several years have passed since the trial court ordered that the relationship between A.E. and T.E. be terminated. Perhaps A.E. is no longer interested in adopting T.E.; even if she is, she may be precluded by principles of *res judicata* from seeking to do so. Given the passage of time, it may be in the child's best interest that she remain with T.W.M. Nevertheless, Appellants were prejudiced because the trial court's decision misapplied the law relating to their designation of a custodian for their child, and the adoption decree terminated their parental rights. The matter of T.E.'s adoption must be considered anew. For these reasons, it is:

ORDERED that the trial court's judgment terminating parental rights, denying A.E.'s adoption petition and granting T.W.M.'s adoption petition is reversed and the case is remanded to the trial court with instructions to vacate the order. It is

FURTHER ORDERED that the trial court issue an order to reinstate the neglect case and determine anew whether T.B. and S.E. consent to the adoption by T.W.M. or whether they are withholding their consent against the best interest of T.E.

So ordered.

All Citations

964 A.2d 595

Footnotes

1 In relevant part, D.C.Code § 16–2301(9) states:
The term "neglected child" means a child:
(A) who has been abandoned or abused by his or her parent, guardian or custodian; or

(B) who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his or her physical, mental, or emotional health, and the deprivation is not due to the lack of financial means of his or her parent, guardian, or other custodian; or

(C) whose parent, guardian, or other custodian is unable to discharge his or her responsibilities to and for the child because of incarceration, hospitalization or other physical or mental incapacity.

2 A.E. married in June 1993, at the age of 21, and the couple had a child shortly thereafter. Her husband was arrested a few months after they were married, and he was later convicted of multiple counts of armed robbery. After he began serving a lengthy prison sentence, A.E. estranged herself from her husband, serving only as a communication conduit between him and their son. She finally divorced him in October 2004. However, when A.E. sought foster home certification in 2000 and when she petitioned for adoption of T.E. in May 2003, she indicated that she had never been married.

3 On January 27, 2003, the permanency goal for T.E. was changed from reunification to guardianship after Appellants failed to comply with the neglect judge's orders.

4 In the final section of its order, the trial court by and large dismissed the Guardian and social workers' recommendations favoring A.E.'s adoption petition because, as the trial court concluded, the Guardian and social workers favored A.E. adopting T.E. solely because it would preserve familial relations.

5 We note that A.E. did not appeal the trial court's order denying her adoption petition. Furthermore, although the Guardian filed a brief contesting the trial court's order, the Guardian did not comply with our procedures by filing an appeal; therefore, the Guardian's brief was not considered.

6 The trial court misapplies the concept “grasping opportunity interest” here as it misses the point of our decision in *Appeal of H.R.,* 581 A.2d 1141 (D.C.1990) and misapplies the opinion's language in the process. In *H.R.,* a trial court erroneously denied a noncustodial father custodial preference as a natural parent in an adoption proceeding, and the adoption was granted over the father's objection. *H.R., supra,* 581 A.2d at 1143. We held that a noncustodial father's interest in developing a custodial relationship with his child will be entitled to substantial protection if he has grasped his opportunity interest—i.e., he has “early on, and continually, done all that he could reasonably have been expected to do under the circumstances to pursue his interest in the child.” *Id.* at 1163. The parental interest asserted in *H.R.* is wholly different than the interest asserted by Appellants here. In *H.R.,* the interest at issue concerned a noncustodial natural parent's right to assume custody of his child and prevent permanent termination of his parental rights. As we determined in *H.R.,* a parent may exercise this custodial interest depending upon factors which relate to that parent's pursuit of the child and involvement in his or her life. *Id.* at 1162 (noting five factors including the custodial, personal, or financial relationship with the child). The issue at present regards natural parents' interests in dictating their child's future before they voluntarily terminate their parental rights. This exercise of interests does not hinge on the quality of the parents' involvement in the child's life or the parents' custodial relationship with the child. We reiterate, that parents whose parental rights are intact do not lose the right to have their choice as to their child's adoption or guardianship being accorded substantial weight “simply because they have not been model parents or have lost temporary custody of their children.” *T.J., supra,* 666 A.2d at 12 (quoting *Santosky, supra,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)). Accordingly, the parental interests asserted in the two cases do not align. Accordingly, *H.R.'s* concept of “grasping opportunity interest” has no place here.

7 We first articulated and applied the “weighty consideration” concept in *T.J.,* a case involving two parties competing for custody. *T.J., supra,* 666 A.2d at 11. In *T.J.,* a natural mother who was unable to care for her child due to a mental illness, chose the child's great-aunt to be his custodian caregiver so that the mother could preserve a relationship with the child. *Id.* at 16. Despite evidence that the great-aunt was a suitable caregiver, the trial court did not give the mother's designated custodian weighty consideration when it granted the foster mother's adoption petition over the great-aunt's custody petition. *Id.* Reversing the trial court's grant, we asserted that the mother, whose parental rights had not been terminated, had a “right to ... exercise her choice of the great-aunt as custodian.” *Id.* Moreover, we concluded that the foster mother had not met her burden as she “failed to show by clear and convincing evidence that the mother's custody choice was clearly not in the [child's] best interest.” *Id.* Thus, the trial court could not ignore the natural mother's exercise of her parental rights, which were still intact, when such exercise was not clearly contrary to the best interest of her child.

8 Weighty consideration does not apply in cases where parental rights have been terminated. *See A.T.A., supra,* 910 A.2d at 297 n. 3 (acknowledging that the trial court did not have to give weighty consideration to mother's choice because her parental rights had been terminated); *see also* D.C.Code § 16–2361(b) (2008) (eliminating parent's participation in adoption once parental rights are terminated).

9 The trial court also indicated that the Appellants' choice of caregiver was not entitled to weighty consideration because it doubted that the parents sufficiently reflected upon their decision and thoroughly investigated A.E.'s fitness as a parent.

While the trial court may inquire as to a natural parent's reasoning for selecting a particular caregiver, it cannot deny the parent's choice weighty consideration simply because it does not approve of his or her calculations. This is not to suggest, however, that a natural parent's reason for choosing a caregiver is irrelevant; rather, a parent's reason should be considered to the extent it impacts the best interest of the child. For instance, if a parent's reason indicates that he or she has chosen a particular caregiver because that caregiver would return the child to the parent or permit the parent to be around the child despite a court's order forbidding such interaction, the court may find that the caregiver is not in the best interest of the child in light of that reason. *See, e.g., In re B.J.,* 917 A.2d 86, 90 (D.C.2007) (mother's preference for relative placement not in children's best interests where it would mean regular contact between children and mother who led dangerous and unstable life); *In re T.M.,* 665 A.2d 950, 952 (D.C.1995) (mother's choice denied where she chose relative caregiver with goal of regaining custody of child after trial court determined mother's future involvement in child's life was not in child's best interest).

10 We need not reach the issue of whether granting T.W.M.'s petition for adoption was in the child's best interest by determining whether or not T.W.M. was a suitable caregiver for T.E.

11 "The standard of clear and convincing proof requires evidence that will 'produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.' " *T.J., supra,* 666 A.2d at 17 n. 17 (citation omitted).

12 We also note that the trial court never inquired into the well-being of A.E.'s 10–year old son, whom she had raised on her own. Certainly, her son's situation would have shed some light on A.E.'s parenting skills beyond that which could have been observed within a brief 30–minute window.

13 A petitioner must disclose his or her marital status as required by the adoption petition. *See* Super. Ct. Adopt. R. 7(b)(15) (2005). A court may sanction a party by dismissing an adoption petition if that party intentionally failed to present or knowingly misrepresented information on his or her petition. *See* Super. Ct. Adopt. R. 11; *see also In re M.L.P,* 936 A.2d 316, 322–24 (D.C.2007).

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983 A.2d 1012
District of Columbia Court of Appeals.

In re C.B.; I.B., Appellant.

Nos. 07-FS-438, 07-FS-449.
|
Argued Jan. 22, 2009.
|
Decided Nov. 25, 2009.

Synopsis

Background: Mother appealed from decision of the Superior Court, S. Pamela Gray, Magistrate Judge, and Cheryl M. Long, Reviewing Judge, denying her motion for review of guardianship order.

[Holding:] The Court of Appeals, Reid, J., held that case would be remanded to trial court with instructions to promptly reopen the adjudicatory guardianship hearing to permit the parties to examine aunt, uncle and the therapist on the record concerning child's relationship with aunt.

So ordered.

West Headnotes (2)

[1] Guardian and Ward
Review

Because all of the parties were not informed about child's negative comments to magistrate judge about child's aunt and neither mother nor guardian ad litem were given opportunity to examine aunt and uncle on the record about child's comments and their impact on suitability of aunt and uncle as permanent guardians of child, case would be remanded to trial court with instructions to promptly reopen the adjudicatory guardianship hearing to permit the parties to examine aunt, uncle and the therapist on the record concerning child's relationship with aunt. D.C. Official Code, 2001 Ed. §§ 16-2383(d)(3), § 16-2388(c).

Cases that cite this headnote

[2] Criminal Law
Cross-examination and impeachment

While the extent of cross-examination of a witness with respect to an appropriate subject of inquiry is within the sound discretion of the trial court, complete denial of the opportunity to cross-examine is impermissible, and interrogation by the judge is not a sufficient substitute for cross-examination by counsel. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

Attorneys and Law Firms

***1012** Leslie J. Susskind, appointed by the court, for appellant.

Alice Stevens, Assistant Attorney General for the District of Columbia, with whom Peter J. Nickles, Attorney General, Todd S. Kim, Solicitor General, and Donna M. Murasky, Deputy Solicitor General, were on the brief, for appellee.

Lewis Franke, Bethesda, appointed by the court, for appellees, A.B. and E.B.

Before WASHINGTON, Chief Judge, REID, Associate Judge, and PRYOR, Senior Judge.

Opinion

REID, Associate Judge:

I.B., appellant and biological mother of C.B., challenges the Family Court's order denying her motion for review of a Magistrate Judge's order of October 31, 2006, "Findings of Fact, Conclusions of Law and Order Appointing Permanent Guardians and Closing Neglect Case," ("the guardianship order"). We deem it unnecessary to address most of I.B.'s arguments, either because she failed to raise them in the trial court, or because they are related to the primary issue before us. I.B. challenges the guardianship order, in part, because she claims that there was insufficient record evidence to satisfy the statutory factors set forth in D.C.Code § 16-2383(d),

particularly subsection (d)(3) pertaining to the quality of the interaction and interrelationship between C.B. and one of the petitioners. Because only the Magistrate ***1013** Judge examined evidence provided by three "witnesses" pertaining to that factor, and since the parties did not have an opportunity to examine or cross-examine these "witnesses," we are constrained to remand this matter to the Family Court with instructions to reopen the "adjudicatory [guardianship] hearing" to permit the parties to examine and cross-examine A.B., E.B., and the therapist.

FACTUAL SUMMARY

This case has had a long and contentious history. The record and the Magistrate Judge's findings of fact show that the District of Columbia filed a neglect petition pertaining to C.B., who was born in 1993, because her mother failed to pick her up from school when C.B. was four years old. A hearing on the neglect petition revealed that I.B. abused substances, including cocaine and alcohol, had mental health issues, often left her children alone, and lived with C.B. and her then fifteen-year-old son in a vermin-contaminated and cluttered residence, with little food. In February 1998, the Family Court concluded that I.B.'s children were neglected under D.C.Code § 16-2301(9)(B) because I.B. was unable to discharge her parental responsibilities. The Family Court initially placed C.B. in the care of relatives who retained custody of C.B. until sometime around 2000, when A.B., C.B.'s maternal uncle, and his wife, E.B., agreed to take custody of C.B.

Thereafter, the Child and Family Services Agency ("CFSA") and the Family Court explored permanency goals of reunification (with I.B.) and guardianship. A.B. and E.B. filed their motion for permanent guardianship in October 2003.[1] Hearings on the motion commenced on June 28, 2004, and continued on September 20, November 2, and November 22, 2004. The parties filed a joint stipulation that C.B. ***1014** wanted to live with her biological mother, I.B. Lori Gloster, CFSA's social worker assigned to C.B.'s case from the end of July 2002 to May 2004, testified that C.B. was then in the care of A.B. and E.B., and was "a very pleasant 11-year old" who was "very, very bright ..., very articulate[,] ... very well-rounded, well adjusted" and "in good health." Ms. Gloster made monthly visits to the home of A.B. and E.B. where she observed the interaction of the family with C.B., including the three biological children of A.B. and E.B. C.B. had "blended into the family," and she had "a very good relationship" with A.B. and E.B. There was adequate food in the home; C.B. was an honor roll student in school; and she commented to Ms. Gloster that "she likes it there at the home" and that A.B. and E.B. "take very good care of her" and "they are fair." C.B. shared a room with her cousin, one of A.B. and E.B.'s children.

Ms. Gloster had difficulty getting in touch with I.B. when she was assigned as C.B.'s social worker. She began to communicate with I.B. by e-mail to arrange for supervised weekly visits between I.B. and C.B. She was unable to arrange the first visit until September 2002, but the supervised visits were "pretty consistent after that." The last supervised visit between I.B. and C.B. occurred in September or October of 2003. Thereafter I.B. was to have arranged unsupervised visits with C.B. through A.B. and E.B. However, after the supervised visits ended, there were no visits between C.B. and I.B. until February 2004. Ms. Gloster recalled that in January when she visited C.B., the child "just burst into tears ... because she was so upset ... her mom was making up excuses about visits." Ms. Gloster called I.B. the next day to tell her what had happened and "how important the visits were to C.[B.]"

I.B. refused services that CFSA sought to arrange, saying "she already had mental health services, and she already had housing, and she didn't need parenting." When Ms. Gloster asked I.B. to "provide ... information of the services that she was receiving," I.B. failed to do so. Sometimes I.B. "would hang up" on Ms. Gloster. The social worker was not aware of any financial support for C.B. from I.B., even though I.B. maintained that she was employed by the Department of Mental Health. Ms. Gloster had no contact with the putative father of C.B., and was not aware of any contact between him and C.B. On cross-examination by counsel for I.B., Ms. Gloster asserted that the supervised visits between C.B. and I.B. went "very well," and that C.B. "loved to visit with her mother." Ms. Gloster never visited I.B.'s home and could not verify I.B.'s employment because I.B. "would not give [Ms. Gloster] any information about her employment or the services she was getting." Ms. Gloster discussed reunification with I.B. and the services she would have "to participate in in order to have C.[B.] returned" to her; I.B. "refused them."

A.B.'s testimony centered on C.B.'s integration into the structure of his immediate family (wife and three children) as well as his church, his love for C.B., his wife's love for her, and his view of C.B. as his daughter. He discussed efforts to involve I.B. in family activities, especially birthday parties and holiday celebrations. He expressed willingness to provide a home for C.B. as long as the need existed. He sought guardianship of C.B. because he did not want his sister's (I.B.'s) parental rights to be terminated. A.B. was concerned about C.B.'s emotional state when she first arrived in his home, and he arranged therapy for her. A.B. expressed concern about I.B.'s erratic visits with C.B. and was concerned about unsupervised visits between C.B. and her mother because ***1015** of his belief that I.B. abused alcohol. A.B. acknowledged that I.B. gave him money for C.B., bought items for C.B. that she needed, and she called to request visits with C.B.

I.B. opposed the proposed guardianship of her brother and his wife, A.B. and E.B. According to the testimony of I.B., she earned a Bachelor of Administration degree in business management. She lived in a one-bedroom apartment with her son; she obtained the apartment through the Department of Mental Health. She was being treated for depression with group therapy and medication. She complained about her difficulty in arranging visits with C.B., her brother's failure to take or return some of her calls, and his non-compliance with court orders. She maintained that she has a good relationship with C.B., engages in activities with the child such as window shopping, watching movies, and going to church. She has purchased clothes, shoes and other things for C.B. In her opinion, C.B. was not receiving good care from A.B. and E.B. C.B. told her that she has been spanked and left home alone. I.B. claimed that she had been a victim of robbery, rape and assault, and had been molested by her father and brother. She insisted that her children were not neglected. She denied that she had ever tested positive for cocaine, and she claimed that she takes a lot of medicine and lives around "a lot of unscrupulous people." In her view, she did not need services offered by CFSA because she had obtained parenting skills through COPE (Creating Opportunities for Parent Empowerment).

I.B.'s father testified that he visits the home of A.B. and E.B. at least once a week. He described their home as "[a] wholesome home environment" with a "family relationship." In his view, C.B. was "well taken care of." He sees his daughter, I.B., once or twice a month. Within the two months prior to his testimony, he had seen I.B. in an intoxicated state. He knew she was intoxicated "[f]rom having been around her all her life and smelling [the alcohol and seeing] the way she responds ... in conversations, her total reactions." She is "[v]ery indifferent[,][v]ery loud." When I.B. is not drinking, she is "normal." In response to a cross-examination question as to whether I.B.'s father had ever seen his daughter "with any drinks in her hand," he replied, "Yes I have."

Although the guardianship hearings took place in Fall 2004, the Magistrate Judge did not issue findings of fact and conclusions until October 31, 2006. The delay apparently is attributable to efforts to work out a visitation schedule for I.B. At a hearing on February 3, 2005, which the Magistrate Judge described as "technically permanency" to be "follow[ed] up with [a] status hearing," the judge announced that "guardianship would be awarded to" [A.B. and E.B.] because she "absolutely believe[d] that that is in the child's best interest at this time," and she did not "believe that [I.B. was] in a position at this time to care for [C.B.]," but that she (the judge) needed to figure out the visitation arrangement. The hearing became quite contentious as I.B. took issue with the Magistrate Judge's pronouncements and the judge indicated that I.B. "behave[d] like a child." In addition, counsel for A.B. expressed frustration with trying to work out visitation with I.B. The Magistrate Judge expressed her desire that A.B. and I.B. "behave like adults, behave like sister and brother." The judge also made clear that "C.[B.] loves her mother, ... wants to spend time with her mother," and the judge "want[ed] [I.B.] to be healthy enough and appropriate with her daughter," but at that time the judge did not believe that I.B. could manage "all the day-to-day" care. The judge further stated ***1016** that A.B. was "doing an incredible job raising [C.B.] ..., a great job [and][t]hat's why [he] gets guardianship," but that C.B. "deserves time with her mother." In her written order of February 3, 2005, the Magistrate Judge ordered I.B. and A.B. to "participate in mediation to address issues of visitation," and in the interim ordered supervised visitation.

On February 25, 2005, the guardian *ad litem* and A.B. and E.B. filed a motion "to reopen the record for an evidentiary hearing on visitation, for a stay of issuance of guardianship order and for a guardianship order provision that limits overnight visitation," which the

Magistrate Judge granted on March 8, 2005. Apparently the impetus for the motion was an alleged incident that had occurred in mid-December 2004 when C.B. remained in her mother's home overnight instead of being returned to A.B.'s home. [2]

During an April 20, 2005 "guardianship/permanency hearing," counsel for I.B. asserted that I.B. wanted her daughter back and would like to have weekly visits. I.B. complained about visitation arrangements and about allegedly not having an opportunity to testify at the neglect hearing, and A.B. also complained. The Magistrate Judge attempted to resolve their disagreements. Another discussion of visitation took place at a May 17, 2005 permanency hearing. A.B. asserted that he had "done everything [he] possibly could to make C.B. available [to visit] I.B. as often as [he] possibly could" but that his concern revolved around C.B.'s very late night returns after 10:00 p.m. and as late as 1:00 a.m. I.B. took issue with A.B.'s statement and became angry, stating that she was "not an imminent danger to the community" and that "[t]here is no reason for someone to doubt or have to monitor [her] activities." As I.B. continued her statements, ignoring the judge's efforts to stop her, the Magistrate Judge stated that "it just doesn't help when you go off on those rampages." I.B. insisted that it was not a rampage and declared that she was "disgruntled because this is a corrupt system." She continued: "For seven years, my kids weren't neglected. How do you expect me to act?" As the discussion and disagreement continued about what time I.B. would return C.B. after visits, the Magistrate Judge began to think in terms of having a neutral agency observe the visits and to give the court "a really honest assessment ... of how those visits are going." I.B. protested and insisted that the judge was "looking at it from one side" because she did not intend to return C.B. to her custody.

During an evidentiary hearing on June 17, 2005, held in response to the guardian *ad litem* and A.B. and E.B.'s motion for an evidentiary hearing on visitation, A.B. testified that, over the past three months, visits between C.B. and I.B. had been "pretty regular," and that the "big issue" concerned the time when C.B. returned from a visit or overnight stay with her mother. He reported that on the previous night when he returned home, C.B. was not there. He went to I.B.'s home to get C.B. and a "tug of war" ensued over where C.B. would stay that night. He also recounted other incidents in which I.B. picked up C.B. without his knowledge or ***1017** that of his wife. He expressed his and his wife's "frustrat[ion] with the situation."

The Magistrate Judge questioned the social worker assigned to C.B. since May 11, 2004, Lisa Stevens Collins, who described I.B.'s home as a one bedroom apartment that was clean. I.B. at times was supervising another child (not her son) while C.B. was visiting. The son, who resided with his mother, expressed concerns about I.B. being intoxicated but Ms. Stevens did not confirm the intoxication report. [3]

At the conclusion of the social worker's testimony, the Magistrate Judge informed the parties that she wanted to talk with C.B. "to get a sense of her comfort level in all of this and a sense of how she spends her time with her mom, how she spends her time generally as a child, even at home with [A.B. and E.B.] and how well she's basically cared for when she's visiting ...; whether she's happy or whether she is the rag doll ... being tugged on, ... being fought over because that's what's happening...." The judge indicated that she might "have Beyond Behaviors visiting with mom and C.[B.] to see whether or not mom is appropriate and who's coming in and out of her home, and whether she has beer in the refrigerator and [whether] she's downing beers."

The judge spoke with C.B. on the record but out of the presence of the parties; a court staff member was present during the interview. C.B. told the judge: "I don't want to live with my aunt any more. I don't have a problem with my uncle, just my aunt." C.B. stated that her aunt "makes [her] do a lot of work," and that when she's tired, her aunt wakes her up. After C.B. ran away to her mother's house, things got worse and her mother and uncle were fighting. C.B. gets along with her cousins. She enjoys being with her mother and they have fun. Her aunt is "real strict," would be "in her face," imposed time limits on getting the dishes done, and assigned her to do the dishes alone on Sundays; she did not "mind washing the dishes" but did not want "fussing" at her or time limits for getting the job done. C.B. asked whether it was possible during the summertime to "spend ... some weeks" with I.B.

At the June 27, 2005 hearing, the Magistrate Judge declined to issue the guardianship order because the issue of visitation had not been resolved. The judge summarized her June 17 on-the-record conversation with C.B., but she

did not mention C.B.'s comments about her aunt. The judge depicted C.B. as "torn between her uncle and her mom," as a person who loved and adored her uncle but who would not be happy without visits with her mother. She believed that I.B. "takes seriously the time she has with C.[B.], and what she does with her.... They go to the movies, they go window shopping, ... she's teaching her to cook. She's supervising her." Her basic concern was the sleeping arrangement when C.B. visited her mother "because [C.B.'s] between the couch, the floor, and [her mother's] bed." The judge informed the parties that she needed information due to the conflict between A.B. and I.B., and specified that she wanted Beyond Behaviors, the social worker and the guardian *ad litem* to visit I.B.'s home while C.B. was there for one summer month. She explained to I.B. that she ***1018** would have to cooperate with the process and to give the designated persons "full access" to her home. When A.B. and E.B. asked about the guardianship order, the judge responded: "I'm not issuing it right now" because the judge "want[ed][her] order to reflect" the visitation schedule. The judge ordered C.B. to stay with I.B. from July 5, after 6:00 p.m. to August 7 until 8:00 p.m.

During a review hearing on August 15, 2005, the Magistrate Judge announced that she was thinking "placement" and "not thinking so much visitation any more." The guardian *ad litem* reported that he had made one visit to I.B.'s home while C.B. was there. C.B. "seemed to be very happy" and voiced a desire to stay longer. I.B. "was quite pleasant" and the relationship between I.B. and C.B. "seemed to be fine." The judge said that CFSA and Beyond Behaviors made similar reports; that Beyond Behaviors reported that C.B. wanted to stay with I.B. for one year during the school year. The District requested an updated mental health evaluation of I.B. A.B. revealed that he had had no problems visiting C.B. during the summer when she was with her mother, and that C.B. went on vacation with his family and everyone had a good time.

The parties reconvened on September 15, 2005; I.B. was not present. Although the Magistrate Judge apparently had revealed to A.B. in mid-June 2005, C.B.'s negative comments about E.B., she had not informed others, including I.B. and her attorney, and the guardian *ad litem.* The judge stated that C.B. was "unhappy" and "doesn't feel that E.B. is the nicest person in the world." C.B. "doesn't like being with [E.B.], she feels that [E.B.] is mean to her and treats her differently when [A.B.] is not at home." C.B. "adores her uncle, just loves him...." The judge's "thinking was to see where the mother was, because the child wanted to be with her mom, and [she] wanted to try to make that happen if [she] could." That is why she allowed C.B. to be with her mother during the summer months and arranged for Beyond Behaviors to observe. But, said the judge, "[I.B.] is not doing anything to help me in this process." The judge apparently referred to I.B.'s avoidance of calls from Beyond Behaviors and attempts to schedule visits to her home.

The Magistrate Judge inquired whether A.B. had spoken with E.B. regarding C.B.'s concerns. He responded that there had been a "big blow up" but he had E.B. and C.B. to "sit and talk." They had "talked about [the concerns] extensively" and he "sought counseling through [their] ministry for [his] wife" and for him. Before signing the guardianship order, the judge "need[ed] to know that C.B.'s comfortable and that there is some accord between [E.B.] and [C.B.]." A general discussion between the judge and A.B. and his counsel followed. The judge expressed some ambivalence about what to do since C.B. desired to live with her mother but the judge could not "just reunify [C.B. with I.B.] without feeling confident that it is the thing to do," but that C.B. could spend two weeks to a month in the summer "once guardianship is granted." The possibility of family therapy was explored. At the April 3, 2006 hearing, relationships between the parties, including that between I.B. and A.B., appeared to be more cooperative and the discussions centering on therapy were generally positive.

By the time of the June 15, 2006 hearing, the Magistrate Judge was moving toward a permanency goal of guardianship. The judge reviewed a therapy report which disclosed that C.B. "has adjusted and adapted to [A.B. and E.B.'s] home, and ... as long as [C.B. can continue to have visits with I.B.], then everything ***1019** should be okay and stable." A.B., E.B., and C.B. were present in court, but I.B. was not. I.B.'s attorney had called her and left messages; she reiterated that I.B. wanted C.B. to be returned to her care. The Magistrate Judge spoke with E.B. and C.B. without the presence of counsel for A.B. and E.B. According to the judge's report, C.B. no longer wanted family therapy but did desire individual therapy; and C.B. "feels that she and her aunt can talk about things." The judge declared that "it is in [C.B.'s] best interest to be with her aunt and uncle, that that is at this time ... the most appropriate place for her to be."

The judge decided not to put any conditions on visitation between C.B. and I.B. and to instead, issue a "reasonable visitation" order. Overnight visits would be allowed "as long as things are appropriate."

The Magistrate Judge issued the written guardianship order on October 31, 2006. Her findings of fact concentrated on the testimony given at the evidentiary hearing but did not explicitly discuss the statutory factors contained in the guardianship statute. The judge reached at least two substantive conclusions: (1) A.B. and E.B. "established by a preponderance of evidence that permanent guardianship is in the child's best interests"; and (2) "Termination of parental rights, or return to the parent is not appropriate for the child because the father[ ] [is] not involved [4] and the mother is not able, at this time, to provide and care for the child." Moreover, the judge found that "the proposed permanent guardian is suitable and able to provide a safe and permanent home for the child," and that I.B. "is not ready to provide a safe and nurturing home environment for [C.B.] and it would not be in [C.B.'s] best interest to reunify with [I.B.] at this time." The court declared that C.B. "has done well in the care of [A.B. and E.B.] and it would be contrary to her best interest to disrupt the only home she has known for six years."

The Reviewing Judge issued a twenty-five page "Memorandum Opinion and Order Denying Mother's Motion for Review" on March 28, 2007. [5] The Reviewing Judge apparently conducted a *de novo* review of the record prior to affirming the Magistrate Judge's decision to establish the guardianship and to close the neglect file. Contrary to I.B.'s argument, the judge saw nothing in either the guardian *ad litem's* report on his July 30, 2005 visit to I.B.'s home, or the August 7, 2005 report of Beyond Behaviors, which supported a finding that I.B. was capable of parenting C.B., or which was helpful to the determination of permanency for C.B. Two subsequent reports from Beyond Behaviors revealed I.B.'s "fail[ure] to make herself available to Beyond Behaviors." Thus, despite some comments favorable to I.B. in both the guardian *ad litem's* and Beyond Behaviors' reports, the judge concluded that neither demonstrated I.B.'s ability to parent C.B. nor served as a basis for ordering reunification of mother and daughter.

The Reviewing Judge rejected I.B.'s due process assertion, which was based primarily on the time lapse between the end of the 2004 evidentiary hearing and the ***1020** Magistrate Judge's issuance of her order in October 2006. The judge saw nothing problematic about "the unique, extended visit experiment" during which C.B. stayed with her mother for one summer month, even though "the Magistrate Judge had pushed the limits of the disfavored approach of 'wait and see.' "

With respect to I.B.'s argument about the alleged absence of findings under the factors set forth in D.C.Code § 16-2383(d), the reviewing court declared that "[t]here is no requirement in the Code that the trial court's opinion express the analysis of the factors in any particular format or that the findings of fact literally include each factor's technical code citation." The court examined each of the statutory factors in the context of the Magistrate Judge's findings and determined that the Magistrate Judge not only considered the statutory factors, but also that her decision "rationally reflects that the trier of fact weighed them [6] in favor of granting guardianship."

In discussing the third factor set forth in D.C.Code § 16-2383(d)(3), consisting of "the quality of the interaction and interrelationship of the child with his or her parent, siblings, relatives, and caretakers, including the proposed permanent guardian," the reviewing court emphasized the Magistrate Judge's findings that I.B. "did not consistently attend the visits" with C.B. scheduled from July 2001 to July 2002; that "[s]he frequently arrived late or did not come at all, which left [C.B.] feeling dejected." Thus, I.B. "caused" "observable and documented emotional distress ... to her daughter." These findings were supported, in part, by the testimony of Ms. Gloster, and demonstrated that "the 'quality of [I.B.'s] interaction with [C.B.] was detrimental to the child, because of the way in which the mother failed to be sufficiently consistent with visiting opportunities." In discussing the Magistrate Judge's findings concerning C.B.'s interactions with A.B. and E.B., the reviewing court relied on the reference to Ms. Gloster's testimony and the testimony of A.B., but did not explicitly mention C.B.'s negative comments about E.B. The court described the findings on the third statutory factor as "balanced" and "reflect[ing] thoughtful consideration and weighing of the child's solid 'interaction' between caretakers who are pro-active in managing her therapeutic needs with the child's conflicted feelings," that is, the child's desire not "to lose her connection to her biological mother."

As for I.B.'s contention that the Magistrate Judge "did not obtain the child's express, personal consent for the establishment of the guardianship," the reviewing court cited the words of D.C.Code § 16-2383(b) specifying that: "If the child is 14 years of age or older, the court shall designate the permanent guardian selected by the child unless the court finds the designation is contrary to the child's best interests." The court pointed out that C.B. was only thirteen-years-old at the time, and that, "[p]lainly, the law does not require consent from any child who has not attained the age of 14 years."

With regard to the allegedly erroneous factual finding that I.B. had made only "sporadic visits" to C.B., and I.B.'s complaint that A.B. and E.B. were not allowing her to see her daughter, the Reviewing Judge stated that the visitation complaint was "ultimately resolved in favor of the guardians," and "revolved around credibility ***1021** factors." Furthermore, the court asserted that given I.B.'s "longstanding mental health problems and alcohol abuse ..., it makes no sense to return [C.B.] to her mother, especially not as an abrupt move after being out of the mother's care for six years."

ANALYSIS

[1] Given the Magistrate Judge's factual findings, reflecting considerable time spent on this case, and the Reviewing Judge's extensive analysis of the record, we center our attention on only one of I.B.'s contentions-her central claim that there was insufficient record evidence to show that the statutory factors contained in D.C.Code § 16-2383(d) were met and that the guardianship was in C.B.'s best interest. Our review prompts no concern except with respect to one aspect of one factor-D.C.Code § 16-2383(d)(3), the quality of the interaction between C.B. and the guardians. While the Reviewing Judge discusses the interaction of C.B. and her uncle, A.B., she does not focus on the negative testimony which C.B. gave about her aunt on June 17, 2005. That testimony was taken by the Magistrate Judge out of the presence of the parties and their counsel. The judge apparently informed A.B. of this testimony shortly after it was given, but not until September 2005 did the Magistrate Judge tell the others, including I.B. and her counsel, that C.B. was "unhappy," "doesn't feel that E.B. is the nicest person in the world," "doesn't like being with [E.B.]," and "feels that [E.B.] is mean to her and treats her differently when [A.B.] is not at home."

We turn now to the statute which guides our review of this case. The District of Columbia Foster Children's Guardianship Act ("the Guardianship Act"), D.C.Code §§ 16-2381 (2009 Supp.), is designed to "[e]ncourage stability in the lives of certain children who have been adjudicated to be neglected and have been removed from the custody of their parent by providing judicial procedures for the creation of a permanent guardianship...." D.C.Code § 16-2381(1); *see also W.D. v. C.S.M.*, 906 A.2d 317, 326 (D.C.2006) (quoting § 16-2381). The Guardianship Act attempts to ensure that "the constitutional rights of all parties" are safeguarded and "the fundamental needs of children" are addressed. D.C.Code § 16-2381(2). As we explained in *In re A.G.*, 900 A.2d 677 (D.C.2006):

> The statute strikes this balance by "encompass[ing] a number of procedures aimed at protecting children from emotional and physical harm while at the same time seeking to repair and maintain family ties." It provides for "a measure of flexibility ... to allow the [District] to provide permanence for a child without terminating the parent's rights." The statute provides for secure placement of the child while authorizing both visitation between parent and child and continuing involvement by [District] agencies.

Id. at 681 n. 6 (citations omitted). Moreover, the Guardianship Act explicitly states the standards for the issuance of a guardianship order by the Family Court; D.C.Code § 16-2383(c) provides:

> (c) The court may issue a guardianship order only if the court finds that:
>
> (1) The permanent guardianship is in the child's best interests;
>
> (2) Adoption, termination of parental rights, or return to parent is not appropriate for the child; and
>
> (3) The proposed permanent guardian is suitable and able to provide a safe and permanent home for the child.

Undoubtedly, to assist in striking the balance between the constitutional rights of all parties and the fundamental needs of ***1022** the child, the Guardianship Act requires the Family Court to schedule "an adjudicatory hearing" in accordance with D.C.Code § 16-2386. Section 16-2388

grants to "[e]very party ... the right to present evidence, to be heard in his or her own behalf, and to cross-examine witnesses called by another party." D.C.Code § 16-2388(c). In addition, § 16-2388(d) mandates that "[a]ll evidence which is relevant, material, and competent to the issues before the court shall be admitted." The adjudicatory hearing and the procedures and standards outlined in § 16-2388(c) and (d) will enable the Family Court to perform its ultimate task under § 16-2388(f), determining the best interests of the child: "The court may enter, modify, or terminate a guardianship order after considering all of the evidence presented, ... and after making a determination based upon a preponderance of the evidence that creation, modification, or termination of the guardianship order is in the child's best interests."

Despite the extensive and sensitive work of the Magistrate Judge and the Reviewing Judge in this case, what gives us pause in examining the statutory provisions and the record before us is (1) the mandate in § 16-2388(c) that a party "shall have the right to ... cross-examine witnesses called by another party" during an adjudicatory hearing; and (2) the explicit language in § 16-2388(d) that "[a]ll evidence which is relevant, material, and competent to the issues before the court shall be admitted." C.B.'s comments to the Magistrate Judge on June 17, 2005, about E.B. clearly were relevant to part of the third factor in § 16-2383(d), "the quality of the interaction and interrelationship of [C.B.] with ... the proposed permanent guardian," but all of the parties were not informed about C.B.'s negative comments about her aunt until September 2005, and neither I.B. nor the guardian *ad litem* were given an opportunity to examine A.B. and E.B. on the record about C.B.'s comments and their impact on the suitability of A.B. and E.B. as permanent guardians of C.B.

The Magistrate Judge apparently realized that C.B.'s negative comments about E.B. and her unhappiness based on her perception that her uncle's wife treated her differently from the other children in the household would affect the guardianship decision. Therefore, the judge appeared to adopt a twofold strategy: determine whether reunification still might be a viable option and work to resolve the difficulties between C.B. and E.B. While the Magistrate Judge's approach is understandable, it conflicted with the statute's concept of an adjudicatory hearing and the right of every party to cross-examine witnesses called by another party. Technically, the court "called" E.B. and A.B. and questioned them about C.B.'s relationship with E.B. Nevertheless, on September 15, 2005, when A.B. responded to the questions of the judge, he was testifying, in essence, in behalf of the petitioners, A.B. and E.B. Moreover, when the judge spoke with A.B. and E.B. on June 15, 2006, they also were testifying, in essence, as witnesses for the petitioners. In addition, the therapist who authored the report stating that C.B. "has adjusted and adapted to [A.B. and E.B.'s] home," which the Magistrate Judge reviewed on June 15, 2006, was testifying for the petitioners. Yet, I.B. and the guardian *ad litem* did not have an opportunity to examine A.B., E.B. or the therapist in June 2006.

[2] " 'Where a witness cannot be examined, the search for the truth is severely impaired.' " *Tyree v. Evans,* 728 A.2d 101, 103 (D.C.1999) (quoting *Curry v. United States,* 658 A.2d 193, 199 (D.C.1995)). While "[t]he extent of cross-examination [of a witness] with respect to an appropriate ***1023** subject of inquiry is within the sound discretion of the trial court," ... "[a] complete denial of the opportunity to cross-examine ... is impermissible." *Id.* (internal quotation marks and citations omitted; second alteration in original); *accord, In re L.D.H.,* 776 A.2d 570, 573 (D.C.2001). Furthermore, "interrogation by the judge is not a sufficient substitute for cross-examination by counsel." *Tyree, supra,* 728 A.2d at 105.

Despite the obvious passage of time since the issuance of the guardianship order in October 2006, in light of D.C.Code §§ 16-2388(c), (d), and (f) and the legal principles pertaining to a party's right to examine or cross-examine witnesses, our review of the record in this matter constrains us to remand this case to the trial court with instructions to promptly reopen the adjudicatory guardianship hearing to permit the parties to examine A.B., E.B., and the therapist on the record concerning C.B.'s relationship with E.B. Following that testimony, the Magistrate Judge should modify her findings and conclusions under D.C.Code § 16-2383(d)(3) and issue a revised order; the Reviewing Judge should review the revised findings, conclusions, and the revised order.

So ordered.

All Citations

983 A.2d 1012

Footnotes

1 The motion was filed under D.C.Code § 16-2383 which provides:

> Grounds for the creation of a permanent guardianship.
>
> (a) A guardianship order may not be entered unless the child has been adjudicated to be neglected pursuant to section 16-2317 and has been living with the proposed permanent guardian for at least 6 months.
>
> (b) If the child is 14 years of age or older, the court shall designate the permanent guardian selected by the child unless the court finds that the designation is contrary to the child's best interests.
>
> (c) The court may issue a guardianship order only if the court finds that:
>
> (1) The permanent guardianship is in the child's best interests;
>
> (2) Adoption, termination of parental rights, or return to parent is not appropriate for the child; and
>
> (3) The proposed permanent guardian is suitable and able to provide a safe and permanent home for the child.
>
> (d) In determining whether it is in the child's best interests that a permanent guardian be designated, the court shall consider each of the following factors:
>
> (1) The child's need for continuity of care and caretakers, and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages;
>
> (2) The physical, mental, and emotional health of all individuals involved to the degree that each affects the welfare of the child, the decisive consideration being the physical, mental, and emotional needs of the child;
>
> (3) The quality of the interaction and interrelationship of the child with his or her parent, siblings, relatives, and caretakers, including the proposed permanent guardian;
>
> (4) To the extent feasible, the child's opinion of his or her own best interests in the matter; and
>
> (5) Evidence that drug-related activity continues to exist in a child's home environment after intervention and services have been provided pursuant to section 6-2104.01 § 4-1301.06a. Evidence of continued drug-activity shall be given great weight.

2 CFSA sent a report to the Magistrate Judge detailing the report of the incident during which I.B.'s son believed his mother had been drinking. The son had difficulty waking I.B. and when she finally awoke they had an altercation. The social worker who prepared CFSA's report visited C.B. in late January 2005. According to the social worker, C.B. "stated that she wanted to remain in the home of [A.B. and E.B.] due to the fact, that [they] are able to take care of her"; I.B. "smokes, which makes her cough"; and "as long as she can visit her mother, she wants to remain in the home of [A.B. and E.B.]."

3 Although I.B.'s son was listed as a proposed witness at the evidentiary hearing, he did not testify. An "unidentified speaker" at the June 17, 2005 hearing, reported that I.B. had filed an assault complaint against her son and he had "to stay away from his mother's house ... [and that] he [was] afraid to testify because [I.B. was] going to kick him out of the house...." I.B. stated that the assault charge was "supposed to have been ... dropped."

4 By that time, C.B.'s father had been located and he gave his consent to the proposed guardianship.

5 I.B. contended that the Magistrate Judge (1) abused her discretion and made "a serious factual error" regarding record evidence; (2) denied I.B. due process by issuing an order based on "testimony that was two years old"; (3) failed to make "specific findings pursuant to D.C.Code [§] 16-2383(d)"; and (4) erred "in finding that the visits between [I.B.] and [C.B.] were sporadic."

6 The statutory factors include "continuity of care," the "physical, mental, and emotional health of all individuals involved ...," quality of the child's "interactions and interrelationship" with the parent and proposed permanent guardian, and the child's opinion of her best interests. *See* D.C.Code § 16-2383(d), *supra* note 1.

982 A.2d 809
District of Columbia Court of Appeals.

Pamela FIELDS, Appellant,
v.
Gary MAYO, et al., Appellees.

No. 06–FM–623.
|
Argued Oct. 21, 2008.
|
Decided Oct. 29, 2009.

Synopsis

Background: Biological father filed a complaint for permanent custody of his biological child, and maternal great aunt, who had had custody of child for several years, lodged an answer and a counterclaim for custody. The Superior Court, J. Michael Ryan, J., granted sole legal and physical custody of child to biological father, and aunt appealed.

Holdings: The Court of Appeals, Reid, J., held that:

[1] custody by child's biological father was in child's best interests, even though biological mother, who had forfeited her rights, had entrusted maternal great aunt with custody of child; and

[2] although, as an advocate for the child, the position taken by the guardian ad litem could serve as an inference of a child's preference, such an inference could not reasonably be drawn in this case.

Affirmed.

West Headnotes (7)

[1] Child Custody
In loco parentis;de facto parents

Maternal great aunt, who had had custody of child for several years, qualified as a "de facto parent" under statute providing that a de facto parent may file a complaint for custody of a child or a motion to intervene in any existing action involving custody of the child, and thus, aunt would not have the burden of demonstrating by clear and convincing evidence that custody of child by his biological father would be detrimental to child's best interests. D.C. Official Code, 2001 Ed. §§ 16–831.01(1)(B), 16–831.03.

Cases that cite this headnote

[2] Child Custody
Child Custody

Constitutional Law
Parent and Child Relationship

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.

Cases that cite this headnote

[3] Child Custody
Abuse or neglect of child

Mother forfeited her right to parent child by failing to spend much time with him and by having virtually no involvement in child's schooling or his social life, and in this context, mother's liberty interest in designating a caretaker for child, namely maternal great aunt, was not absolute and had to yield to the child's best interests and well-being.

Cases that cite this headnote

[4] Child Custody
Right of biological parent as to third persons in general

Custody by child's biological father was in child's best interests, even though biological mother, who had forfeited her rights, had entrusted maternal great aunt with custody of child.

Cases that cite this headnote

[5] **Child Custody**
Child's preference of custodian

As an advocate for the child, the position taken by the guardian ad litem can, in appropriate circumstances, serve as an inference of a child's preference.

Cases that cite this headnote

[6] **Child Custody**
Child's preference of custodian

Child Custody
Presumption for mother or father

Although, as an advocate for the child, the position taken by the guardian ad litem could serve as an inference of a child's preference, such an inference could not reasonably be drawn in custody dispute between father and maternal great aunt; guardian ad litem informed trial court that child did have a "view" of the situation and was not really conscious of what was going on, and guardian ad litem's assessment that child's view was "not terribly probative" did not lead to strong, perhaps not even a reasonable, inference, that guardian ad litem's recommended disposition, that child remain with aunt, reflected child's actual preference.

Cases that cite this headnote

[7] **Child Custody**
Discretion

Child Custody
Welfare and best interest of child

In any child custody case, the controlling consideration is the best interest and welfare of the child, and the determination of the best interest and welfare of the child is entrusted to the sound discretion of the trial court.

Cases that cite this headnote

Attorneys and Law Firms

***810** Peter C. Pfaffenroth, with whom Jeffrey T. Green was on the brief, for appellant.

Scott L. Cunningham, Guardian Ad Litem, filed a statement in lieu of brief, for A.W.

Before RUIZ and REID, Associate Judges, and STEADMAN, Senior Judge.

Opinion

REID, Associate Judge:

Appellant, Pamela Fields, the maternal great aunt of A.W., a minor, appeals from the trial court's order granting "sole legal and physical custody of [A.W.] ... to [appellee,] Gary Mayo," A.W.'s biological father.[1] Ms. Fields contends, in part, that the case should be remanded to the trial court for consideration as to whether she should be recognized as a "de facto parent" under ***811** D.C.Code § 16–831.01 *et seq.* (2008 Supp.), a statute enacted after the entry of the trial court's order in this case, and after the filing of her brief in this court. She maintains that the trial court committed error by improperly applying a presumption in favor of Mr. Mayo as a biological parent, and concomitantly, imposing on her, the de facto parent, the burden of establishing by clear and convincing evidence that custody of A.W. by Mr. Mayo "would be detrimental to [A.W.'s] best interests." She also complains that the trial court (1) ignored K.W.'s wishes and K.W.'s "fundamental interest regarding the custody of her son," and (2) failed to "give sufficient weight" to the recommendations of the guardian *ad litem.* Discerning neither prejudicial error nor abuse of discretion, we affirm the trial court's judgment.

FACTUAL SUMMARY

This case began on August 12, 2003, when Mr. Mayo filed a complaint for permanent custody of his biological son, A.W. Mr. Mayo amended his complaint on October 8, 2003, and Ms. Fields, who then had had custody of A.W. for several years, lodged an answer and a counterclaim for custody. During a proceeding which extended over seven days, beginning on December 14, 2004 and ending on September 26, 2005, the trial court heard testimony from several witnesses, including Mr. Mayo, Ms. Fields,

K.W., and A.W.'s teachers. A.W.'s guardian *ad litem* also shared his views with the court.

The trial court's factual findings show that A.W. was born in January 1995, to teenage parents (17 and 18 years old at the time). He spent the first year of his life with his father, in the home of Mr. Mayo's mother. During the following year and several months, A.W. resided with his mother, K.W., in the southern part of the United States. As a result of K.W.'s request, Ms. Fields had custody of A.W., beginning in May 1997, and continuing to March 2006. Ms. Fields adopted A.W.'s sister in 2002, after the trial court found that K.W. had neglected her daughter. From May 1996 to 2000, Mr. Mayo had no contact with A.W. and provided virtually no financial support for A.W. Commencing in 2000, however, Mr. Mayo had regular contact with A.W. while the child was living with Ms. Fields, but other than the payment of two small sums of money in 2000 ($50 and $75), he did not financially support his son. However, the trial court found that "Mr. Mayo started becoming involved in [A.W.'s] education—regularly visiting [his] school, conferring with teachers, etc.—when [A.W.] was in 1st grade, and has been actively involved since." Ms. Fields and Mr. Mayo worked out a mutually agreeable visitation schedule, and the trial court determined that in the home of Mr. Mayo and his fiancee, A.W. "has his own bedroom and Mr. Mayo and his fiancee are able to give [A.W.] more personalized attention than he receives at Ms. Fields' home."

The trial court described the home of Ms. Fields and her husband as "a somewhat chaotic household." Ms. Fields cared for A.W., his younger brother and his sister on a full-time basis and her husband worked to provide financial support for the family. [2] In addition to A.W. and his siblings, the Fields' grandchildren and other relatives visited on a regular basis. Consequently, the trial court found that even "[t]hough [Ms.] Fields has been very involved in [A.W.'s] school life, she is not always able to afford him individualized ***812** attention in the home, due to the number of children in the home and other quasi-parental obligations ['there are always two or three children sharing a bedroom']."

The trial judge examined the hearing record and applied the statutory factors set forth in D.C.Code § 16–914(a)(3) (2008 Supp.) that are pertinent to a custody decision. [3] In deciding whether Mr. Mayo or Ms. Fields should be awarded permanent custody of A.W., the judge recognized that "[c]ustody claims between parents are subject to the preponderance of the evidence standard of proof." However, because the case involved Mr. Mayo as a biological parent and Ms. Fields as "a non-parent third party to whom a biological parent, who has been found to have neglected at least one of her children has thrown her proxy or support," the trial court invoked the "presumption that the best interests of a child are served by being in the custody of a biological parent, unless clear and convincing evidence demonstrates that such custody would be detrimental to the child's best interests." The court concluded that Ms. Fields had not sustained her burden to overcome the presumption.

The trial court acknowledged (1) the guardian *ad litem's* position that the statutory factors were "evenly in balance but nonetheless ... that [A.W.'s] best interests would be served by continuing placement with Ms. Fields," and (2) the guardian *ad litem's* reservations about Mr. Mayo. In response, the trial judge declared:

> The Guardian's points are well taken, however the evidence in toto presented the Court with two households: one where [A.W.] has been 'treading water' barely staying afloat amongst several others doing the same; the other where the promise, which the Court finds to be borne out by the evidence, of individualized attention from a father who will take the time to help and guide [A.W.] as he grows up into a young man.

Furthermore, the trial court stated that its decision would not have been different if it had ignored the presumption in favor of Mr. Mayo and decided the case on a preponderance of the evidence standard:

> ***813** [E]ven if Mr. Mayo and Ms. Fields were on an "even footing" arguing over the preponderance of the evidence, with the benefit of no presumption or heightened evidentiary burden, the facts of this case read through the statutory factors would nonetheless lead this Court to award custody to Mr. Mayo. This is not to ignore the

> contribution Ms. Fields has made to [A.W.] for the last seven years; it has been significant and at a time when no one else was available. [Ms.] Fields is to be commended for her efforts on behalf of [A.W.] and the Court will order liberal visitation in recognition of her efforts.

The trial court awarded "sole legal and physical custody of [A.W.] to [Mr.] Mayo," and left it to the parties to work out a "liberal visitation" schedule for Ms. Fields and A.W.

ANALYSIS

Ms. Fields argues that the trial court erred by not recognizing that she is A.W.'s "de facto parent," and hence, the court "fail[ed] to accord proper weight to her request for custody." Furthermore, she claims that "[b]y simply characterizing this case as 'effectively an action between a parent, Mr. Mayo, and a non-parent, Ms. Fields,' the [trial court] improperly applied a presumption in favor only of [A.W.'s] biological father and incorrectly maintained that Ms. Fields had to prove by 'clear and convincing evidence' that custody with Mr. Mayo is not in [A.W.'s] best interests." On October 20, 2008, prior to oral argument in this case, Ms. Fields submitted a letter under D.C.App. R. 28(k) calling the court's attention to the fact that the Council of the District of Columbia had codified "de facto parental status." [4]

[1] Under D.C. Law 17–21, the District of Columbia Safe and Stable Homes for Children Act of 2007, which became effective on September 20, 2007, after the trial court issued its March 2, 2006 findings and conclusions in this case, the District's legislature provided that a de facto parent "shall be deemed a parent" for the purpose of determining the legal and physical custody of a child. [5] D.C.Code § 16–831.03 provides, in pertinent part:

> (a) A de facto parent may file a complaint for custody of a child or a motion to intervene in any existing action involving custody of the child.
>
> (b) An individual who establishes that he or she is a de facto parent by clear and convincing evidence shall be deemed a parent for the purposes of §§ 16–911, 16–914, 16–914.01, and 16–916, and for the purposes of this chapter if a third party is seeking custody of the child of the de facto parent.

D.C.Code § 16–831.01(1) defines "de facto parent" as follows:

> (1) "De facto parent" means an individual:
>
> (A) Who:
>
> ***814** (i) Lived with the child in the same household at the time of the child's birth or adoption by the child's parent;
>
> (ii) Has taken on full and permanent responsibilities as the child's parent; and
>
> (iii) Has held himself or herself out as the child's parent with the agreement of the child's parent or, if there are 2 parents, both parents; or
>
> (B) Who:
>
> (i) Has lived with the child in the same household for at least 10 of the 12 months immediately preceding the filing of the complaint or motion for custody;
>
> (ii) Has formed a strong emotional bond with the child with the encouragement and intent of the child's parent that a parent-child relationship form between the child and the third party;
>
> (iii) Has taken on full and permanent responsibilities as the child's parent; and
>
> (iv) Has held himself or herself out as the child's parent with the agreement of the child's parent, or if there are 2 parents, both parents.

Assuming application of the statute to Ms. Fields, [6] arguably she would qualify as a "de facto parent" under D.C.Code § 16–831.01(1)(B) and § 16–831.03, even under a clear and convincing evidence standard (§ 16–831.03(b)). Contrary to the trial court's ruling, she would not have the burden of demonstrating by clear and convincing evidence that custody of A.W. by his biological father would be detrimental to A.W.'s best interests.

Since the trial court assumed that "even if Mr. Mayo and Ms. Fields were on an 'even footing' arguing over the preponderance of the evidence, with the benefit of

no presumption or heightened evidentiary burden, the facts of this case read through the statutory factors would nonetheless lead this Court to award custody to Mr. Mayo," we see no prejudice to Ms. Fields traceable to the trial court's non-consideration of D.C. Law 17–21, assuming its application to this case. Thus, unlike our disposition in *In re K.R., supra* note 6, we decline to remand this matter to the trial court for consideration of D.C. Law 17–21.

Second, Ms. Fields contends that the trial court "erred in ignoring [K.W.'s] fundamental interest regarding the custody of her son and in using a neglect adjudication to invalidate K.W.'s proxy in favor of M[ ]s. Fields without legal justification." During the hearing, K.W. expressed her view that "[she] and Ms. Fields should have joint custody of [A.W.]...." She acknowledged a past neglect case against her involving one of her other children [the child adopted by Ms. Fields]. While the trial court stated that K.W. "has been visiting with [A.W.] at Ms. Fields' house since he started living there in 1997," the court determined that "she has not spent much time with him and evidences little involvement in his school or social life."

[2] **[3]** **[4]** "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary ***815** custody of their child to the State." [7] But, a parent may "forfeit[ ] the right to direct the upbringing of [her child]." [8] Here, K.W. did not take the position that Ms. Fields alone should have custody of A.W. rather than Mr. Mayo. Instead, K.W. desired joint custody with Ms. Fields. But, the trial court implicitly found, and the record establishes, that K.W. had forfeited her right to parent A.W. by failing to spend much time with him, and by having virtually no involvement in A.W.'s schooling or his social life; and similarly, had neglected her parental duties with respect to another of her children. Indeed, K.W. conceded that only two of her seven children resided with her. Considering the factual context in which the trial court viewed this case, that is, K.W.'s desire that she and Ms. Fields have joint custody of A.W. and K.W.'s lack of significant involvement in the development of A.W., we cannot agree that the trial court ignored K.W.'s fundamental liberty interest as a parent and her "proxy" in favor of Ms. Fields. K.W.'s liberty interest in designating (a) caretaker(s) for A.W. is not absolute and "must yield to [the child's] best interests and well-being." [9] The trial court, properly exercising its discretion, [10] determined that custody by Mr. Mayo was in A.W.'s best interests, even though K.W. had entrusted Ms. Fields with custody of A.W., beginning in May 1997.

Finally, Ms. Fields maintains that the trial court "erred, as a matter of law, by failing to give sufficient weight or to respond adequately to guardian *ad litem* recommendations that were based on careful research and personal interactions with the parties." She asks us to reverse and remand this case because the trial court "substantially undervalued the guardian *ad litem's* recommendations and neglected to explain its reasoning in departing from the guardian's expert conclusions about what would serve [A.W.'s] best interests."

In fact, the trial court did consider the guardian *ad litem's* comments during the hearing, and explicitly considered his opinion that (as the trial court articulated it), although "the evidence on the statutory factors [was] evenly in balance, ... A.W.'s best interests would be served by continuing placement with Ms. Fields," in part because of A.W.'s relationship with his brother and sister in the Fields' home. [11] ***816** The court also mentioned the guardian's reservations about Mr. Mayo based on his failure to search for A.W. "in earnest" and, after he eventually found him, his failure to support A.W. financially, an unexplained failure which "concern[ed] the [c]ourt." [12] On the last day of the hearing, the trial court gave the guardian *ad litem* an opportunity to voice his opinion, and the guardian stated, in part:

> I think that probably Mr. Mayo is better equipped to assist [A.W.] in his educational, ... intellectual development, and I think Mr. Mayo provides a fine home. However, ... balanced against ... that fine home, that fine home is miles away from that [which A.W.] has had over the last seven to nine years. From the human contact ... that he has developed and from the family to friends and neighbors and his brother, ... whom he has ... lived his life with so far, ... this is not a case involving [A.W.'s brother] and [A.W.] moving to a new home. This is a case involving [A.W.] moving to a new home and being separated from his brother.
>
> Mr. Mayo has not shown a passionate and sincere interest in [A.W.]. He may well have but ... to my

> mind, he has not shown it. And this comes from his failure to undertake an earnest and exhaustive search for the child.... His failure to actively provide support during pendency of this litigation, attending to [A.W.'s] education, and certainly, there have been instances where Mr. Mayo has participated.., but it hasn't been consistent.... I like Mr. Mayo, I think he is a respectable man, I just did not see the sincerity of interest that is required.... So my final view is that the best interest of [A.W.] is that he remain in a stable environment with his family and with a caregiver that has shown through her actions, a stable and passionate and sincere interest in the consistent upbringing of the child.

D.C.Code § 16–918(b) states: "In any proceeding wherein the custody of a child is in question, the court may appoint a disinterested attorney to appear on behalf of the child and represent his best interests." The August 2004 order appointing Mr. Cunningham to serve as A.W.'s guardian *ad litem* "authorized [him] to obtain records and information ..., and to speak with any person with knowledge relevant to the best interests of the child ..., [and ordered him to] submit a written status report to the Court by September 16, 2004." It appears that Mr. Cunningham's role was that of an advocate for A.W. rather than that of a neutral factfinder, since he recommended a particular disposition to the trial court. [13]

***817** **[5]** **[6]** As an advocate for the child, the position taken by the guardian *ad litem* can, in appropriate circumstances, serve as an inference of a child's preference. [14] Here, however, such an inference cannot reasonably be drawn. Mr. Cunningham informed the trial court that A.W. did have a "view" of the situation. But he stated that A.W. "[was] not really conscious of what was going on." Therefore, Mr. Cunningham "[did not] find [A.W.'s view] very probative," or "terribly probative." In light of Mr. Cunningham's assessment, the trial court left it to the parties to request that the court interview A.W., and the trial judge indicated that he would conduct the interview in his chambers upon request. An examination of the entire transcript of the proceedings reveals that no one asked the trial court to interview A.W. Hence, the court did not receive any first-hand indication of A.W.'s preference. Moreover, Mr. Cunningham's assessment that A.W.'s view was "not terribly probative" or "very probative" did not lead to a strong, perhaps not even a reasonable, inference, that Mr. Cunningham's recommended disposition—that A.W. remain with Ms. Fields—reflected A.W.'s actual preference.

[7] "[I]t is without question ... that in any child custody case the controlling consideration is the best interest and welfare of the child [,][and] [t]he determination of the best interest and welfare of the child ... [is] entrusted to the sound discretion of the trial court." [15] Here, the trial court undoubtedly heard the guardian *ad litem's* advocacy position on behalf of A.W., took it into consideration, and after studying the record, exercised its discretion to choose between two suitable homes for A.W., and decided (and explained) that it was in A.W.'s best interests to award legal and physical custody of A.W. to his biological father, and to grant Ms. Fields liberal visitation rights. Under the circumstances of this particular case, we are satisfied that the trial court did not abuse its discretion.

Accordingly, for the foregoing reasons, we affirm the judgment of the trial court.

So ordered.

All Citations

982 A.2d 809

Footnotes

1 Neither Mr. Mayo, nor appellee, K.W., A.W.'s biological mother, filed a brief in this matter.

2 Ms. Fields received $298.00 per month in TANF funds (Temporary Assistance for Needy Families) for A.W. and his brother.

3 D.C.Code § 16–914(a)(3) provides:

> (3) In determining the care and custody of a child, the best interest of the child shall be the primary consideration. To determine the best interest of the child, the court shall consider all relevant factors, including, but not limited to:
> (A) the wishes of the child as to his or her custodian, where practicable;
> (B) the wishes of the child's parent or parents as to the child's custody;

(C) the interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may emotionally or psychologically affect the child's best interest;
(D) the child's adjustment to his or her home, school, and community;
(E) the mental and physical health of all individuals involved;
(F) evidence of an intrafamily offense as defined in section 16–1001(5) [now § 16–1001(8)];
(G) the capacity of the parents to communicate and reach shared decisions affecting the child's welfare;
(H) the willingness of the parents to share custody;
(I) the prior involvement of each parent in the child's life;
(J) the potential disruption of the child's social and school life;
(K) the geographic proximity of the parental homes as this relates to the practical considerations of the child's residential schedule;
(L) the demands of parental employment;
(M) the age and number of children;
(N) the sincerity of each parent's request;
(O) the parent's ability to financially support a joint custody arrangement;
(P) the impact on Temporary Assistance for Needy Families, or Program on Work, Employment, and Responsibilities, and medical assistance; and
(Q) the benefit to the parents.

4 A few of our pre–2007 cases use the term "de facto parent(s)" but without explication of the concept. *See Simms v. United States,* 867 A.2d 200, 206 (D.C.2005); *In re P.S.,* 797 A.2d 1219, 1224 (D.C.2001); *In re L.W.,* 613 A.2d 350, 354 (D.C.1992). The term has been used and explained in other jurisdictions. *See Philbrook v. Theriault,* 957 A.2d 74, 78–80 (Me.2008) (grandparents failed to establish that they were de facto parents); *In re Parentage of L.B.,* 155 Wash.2d 679, 122 P.3d 161, 165 (2005) (case remanded to determine whether a female partner enjoyed the status of de facto parent); *Blixt v. Blixt,* 437 Mass. 649, 774 N.E.2d 1052, 1061 n. 15 (2002) (defining de facto parent).

5 For the legislative history of the Act, *see* COUNCIL OF THE DISTRICT OF COLUMBIA COMMITTEE ON HUMAN SERVICES, REPORT ON BILL 17–41, THE "SAFE AND STABLE HOMES FOR CHILDREN AND YOUTH ACT OF 2007."

6 *See K.R. v. C.N.,* 969 A.2d 257 (D.C.2009) (involving the biological father's challenge of the trial court's award of his child to the maternal aunt under D.C.Code § 16–831.02; indicating that D.C. Law 17–21 "did not ... include language addressing the question of whether this law should be applied retroactively" and remanding the case to the trial court "for the trial court to determine whether jurisdiction is proper ... and, if so, to make a custody determination consistent with the standards set forth in D.C.Code § 16–831.01–.13 (2008 Supp.))."

7 *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

8 *See In re T.J.,* 666 A.2d 1, 14 (D.C.1995) (citations omitted).

9 *See In re K.I.,* 735 A.2d 448, 454 (D.C.1999).

10 *See Johnson v. United States,* 398 A.2d 354 (D.C.1979).

11 In assessing one of the D.C.Code § 16–914 statutory factors concerning the best interests of the child, § 16–914(a)(3)(C), "the interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may emotionally or psychologically affect the child's best interest," the trial court stated:

> Ms. Fields is the most consistent guardian [A.W.] has known; she provides a home life for him which includes day-to-day interaction with extended family including [his brother], his sister whom [Ms.] Fields has adopted, and [A.W.'s] mother, on the occasions that she comes to visit. [A.W.'s] interaction and interrelationships with Ms. Fields and the other members of her household are quite significant.
>
> [A.W.'s] interaction with his father in recent years has also been significant: in weekend and summer visitations, he has become acquainted and interrelated with his father's side of the family and fiancee. The relationships he has developed with these relatives and others who emotionally and psychologically affect him are important.
>
> Placing [A.W.] with Mr. Mayo would deprive him to some extent of the relationships he has forged in the Fields' home; leaving him with Ms. Fields would leave, at best, strained his relationship with his father and that side of the family.

12 Scott Cunningham, A.W.'s guardian *ad litem,* submitted a report to the trial court on September 17, 2004, prior to the beginning of the hearing. The report revealed that A.W. resided with Ms. Fields and her husband, and his two half siblings, P.W. and S.W. In addition, three of the Fields's grandchildren stayed in the home. Mr. Cunningham's initial impression was that A.W.'s "current placement with Ms. Fields provides him with a stable environment, in which he is surrounded by people who care for him." Mr. Cunningham was "a bit concerned about [A.W.'s] educational development" and "about

whether Mrs. Fields has enough time to spend one-on-one with [A.W.], helping him with his reading." He commented that K.W. "does not appear to play any significant role in [A.W.'s] life."

13 We enunciated the distinction between a guardian *ad litem* as a neutral factfinder and as an advocate in *S.S. v. D.M.,* 597 A.2d 870 (D.C.1991):

> As neutral factfinder, the attorney's duties are to investigate the details of the case and to prepare a report summarizing the relevant facts for the presiding judge; as factfinder, the attorney does not recommend a particular disposition. As advocate, the attorney forms an opinion, either in consultation with the child or based on his or her own analysis, about the disposition which would promote the child's best interests and advocates that position before the court.

Id. at 875.

14 *See, e.g., In re J.L. & R.L.,* 884 A.2d 1072, 1079–80 (D.C.2005) (discussing how the testimony of two social workers made known the children's opinion in an adoption proceeding and stating that: "Given that the guardian ad litem is appointed to represent the children's interests, ... it is reasonable to infer from his position [in support of the petition] that the children prefer to be adopted...." (Citation omitted)); D.C.Code 16–914(a)(3)(A) (requiring the judge to take into account "the wishes of the child as to his or her custodian, wherever practicable").

15 *Utley v. Utley,* 364 A.2d 1167, 1170 (D.C.1976) (citations omitted); *see also Spires v. Spires,* 743 A.2d 186, 190 (D.C.1999).

969 A.2d 257
District of Columbia Court of Appeals.

K.R., Appellant,
v.
C.N., Appellee.

No. 05–FM–371.
|
Argued Sept. 24, 2008.
|
Decided April 15, 2009.

Synopsis

Background: Maternal aunt filed petition seeking custody of child in father's custody. The Superior Court, J. Michael Ryan, J., awarded custody to aunt. Father appealed.

Holdings: The Court of Appeals, Kramer, J., held that:

[1] statutes governing family court's jurisdiction of actions seeking custody of minor children contemplate an award of custody only as between parents who are parties to a divorce proceeding;

[2] child's continued custody with aunt would be governed by Safe and Stable Homes for Children and Youth Amendment; and

[3] father failed to provide sufficient foundation for admission of document under business records exception to hearsay rule.

Remanded.

West Headnotes (4)

[1] Child Custody
Constitutional and Statutory Provisions

Statutes governing family court's jurisdiction of actions seeking custody of minor children contemplate an award of custody only as between parents who are parties to a divorce proceeding. D.C. Official Code, 2001 Ed. §§ 11–1101(4), 16–914(a)(3).

1 Cases that cite this headnote

[2] Child Custody
Particular Status or Relationship

Minor child's continued custody with maternal aunt, following grant of maternal aunt's petition seeking custody of child in father's custody, would be governed by provisions of subsequently enacted Safe and Stable Homes for Children and Youth Amendment Act. D.C. Official Code, 2001 Ed. § 16–831.01 et seq.

Cases that cite this headnote

[3] Evidence
Official Records and Reports

Evidence
Proof of Genuineness in General

For hearsay evidence to be admitted as a public record, the party proffering the record must prove that the facts stated in the document are within the personal knowledge and observation of the recording official and that the document is prepared pursuant to a duty imposed by law or implied by the nature of the office; the offering witness must be able to identify the record as authentic and as made in the ordinary course of business.

Cases that cite this headnote

[4] Evidence
Proof of Genuineness in General

Testimony of father, as the offering witness, was not sufficient in child custody proceedings to support admission, under business records exception to hearsay rule, of client status report from a domestic violence prevention training program in which father participated; father had no personal knowledge and could not testify about whether the document was

authentic or made in the ordinary course of business.

Cases that cite this headnote

Attorneys and Law Firms

***258** Cynthia Nordone for appellant.

Sonia W. Murphy, with whom Paul S. Lee and Rachel L. Strong were on the brief, Washington, for appellee.

Before GLICKMAN, KRAMER and FISHER, Associate Judges.

Opinion

KRAMER, Associate Judge:

Appellant, the father of the minor child A.R., challenges the decision of the trial court awarding custody of A.R. to his maternal aunt, C.N., arguing that the court did not have jurisdiction to hear a motion for custody brought by a non-parent, that it failed to apply the presumption in favor of parental custody, and that it made no finding that he was unfit to parent his son. We remand for a rehearing on the question of custody in which the provisions of the subsequently enacted Safe and Stable Homes for Children and Youth Amendment Act, *see* D.C.Code §§ 16–831.01–.13 (2008 Supp.), shall be applied.

I. Jurisdiction

[1] **[2]** In the original proceeding addressing C.N.'s complaint for custody, the trial court based its jurisdiction on D.C.Code § 11–1101(4) (2001), providing, in pertinent part, that the Family Court "has exclusive jurisdiction of actions seeking ***259** custody of minor children." The basis for the court's decision to award custody to the maternal aunt was set out by the trial court in a carefully written twenty-page order dated March 7, 2005, in which the court took into account a number of factors that must be considered in making a child custody decision in the context of a divorce proceeding, which the court appears to have viewed as analogous. *See* D.C.Code § 16–914(a)(3) (2001). We have previously held, however, that D.C.Code §§ 11–1101(4) and 16–914(a)(3) "contemplate an award of custody only as between parents who are parties to [a] divorce proceeding." *T.S. v. M.C.S.*, 747 A.2d 159, 163 (D.C.2000). *See also W.D. v.C.S.M.*, 906 A.2d 317, 318 (D.C.2006) ("[T]he trial court exceeded its authority in awarding permanent custody of [a] child to unrelated third parties in [a] domestic relations case.") [1] Accordingly, when the trial court issued its March 7, 2005, order, there was no statutory provision in effect that gave it jurisdiction to hear C.N.'s complaint for custody.

In response to what the Council of the District of Columbia viewed as the "substantial uncertainty" created by *W.D. v.C.S.M.* about whether "persons other than parents [could] seek custody of a child when in the child's best interest," [2] the Council enacted the Safe and Stable Homes for Children and Youth Amendment Act of 2007, which became effective on September 20, 2007. *See* D.C.Code §§ 16–831.01–.13 (2008 Supp.). This Act established a "rebuttable presumption ... that custody with the parent is in the child's best interests." *Id.* § 16–831.05(a). Nonetheless, it also gave standing to file a custody action to a third party "with whom a child has established a strong emotional tie" and "who has assumed parental responsibilities." Council Report at 4. [3] It chose the "best interest of the child" standard for determining whether custody to a third party should be awarded. *See* D.C.Code § 16–831.05, –831.08 (2008 Supp.).

The Act did not, however, include language addressing the question of whether this law should be applied retroactively, and we conclude that we need not address that issue either, particularly since we recognize that there is some tension in our case law regarding retroactive application ***260** of statutes by an appellate court. [4] At oral argument, both sides agreed that given the lapse of time and the absence of a record informing us of whether the requirements of the D.C.Code § 16–831.02(a)(1)(2008 Supp.) have been met, we cannot know if A.R. should remain in C.N.'s custody. Accordingly, we must remand this matter for a hearing conducted pursuant to the new statute at which the trial court can determine whether the prerequisites of the statute have been satisfied and whether continued custody with C.N. remains in A.R.'s best interest.

II. CSOSA Document

K.R. also contends that the trial court erred by not admitting a document from the Court Services and Offender Supervision Agency into evidence. The document in question is a Client Status Report from a domestic violence prevention training program in which K.R. participated, detailing his participation, motivation, and overall adjustment as a result of the training. K.R. contends that this document should have been admitted under the public record exception to the hearsay rule. To support this argument, K.R. cites *Goldsberry v. United States,* 598 A.2d 376 (D.C.1991), which describes the requirements of the public records exception.

[3] **[4]** For hearsay evidence to be admitted as a public record, "the party proffering the record must prove that the facts stated in the document are within the personal knowledge and observation of the recording official and that the document is prepared pursuant to a duty imposed by law or implied by the nature of the office." *Id.* at 378 (citations and internal quotation marks omitted). In *Goldsberry,* the hearsay evidence in question consisted of Superior Court docket entries, and the testimony to establish personal knowledge of the documents' preparation came from a Superior Court employee who served as a calendar coordinator. *Id.* at 377. The offering witness must be "able to identify the record as authentic and as made in the ordinary course of business." *Id.* at 379 (citation and internal quotation marks omitted). The personal knowledge of the Superior Court calendar coordinator was sufficient because he "identified the docket entries as official court records and testified that they appeared to have been made in conformity with normal courtroom procedures." *Id.* In this case, K.R. himself served as the offering witness. He had no personal knowledge and could not testify about whether the document was authentic or made in the ordinary course of business. Thus, the trial court properly excluded the evidence as hearsay.

*261 III. Conclusion

The case is remanded for the trial court to determine whether jurisdiction is proper under D.C.Code § 16–831.02 (2008 Supp.) and, if so, to make a custody determination consistent with the standards set forth in D.C.Code § 16–831.01–.13 (2008 Supp.).

So ordered.

All Citations

969 A.2d 257

Footnotes

1 We note that unlike the situation in *W.D. v.C.S.M.,* where the persons obtaining custody were not relatives of the child, A.R.'s aunt clearly is a relative, putting her in a somewhat stronger position. Nonetheless, she is not a parent.

2 See COUNCIL OF THE DISTRICT OF COLUMBIA COMMITTEE ON HUMAN SERVICES, REPORT ON BILL 17–41, THE "SAFE AND STABLE HOMES FOR CHILDREN AND YOUTH ACT OF 2007, " at 1–2 (2007) (hereafter, "Council Report").

3 This was limited by the fact that the third party is required to show that at least one of the following conditions is met:

> (A) The parent who is or has been the primary caretaker of the child within the past 3 years consents to the complaint or motion for custody by the third party;
>
> (B) The party has:
>
> (i) Lived in the same household as the child for at last 4 of the 6 months immediately preceding the filing of the complaint or motion for custody, or, if the child is under the age of 6 months, for at least half of the child's live; and
>
> (ii) Primarily assumed the duties and obligations for which a parent is legally responsible, including the child with food, clothing, shelter, education, financial support, and other care to meet the child's needs; or
>
> (C) The third party is living with the child and some exceptional circumstance exists such that relief under this chapter is necessary to prevent harm to the child; provided that the complaint or motion shall specify in detail why the relief is necessary to prevent harm to the child.

D.C.Code § 16–831.02(a)(1) (2008 Supp.)

4 Compare *Speyer v. Barry,* 588 A.2d 1147, 1154 (D.C.1991) ("[A]n appellate court must 'apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.' " (quoting *Bradley v. Sch. Bd. of City of Richmond, Va.,* 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974))) *with Washington v. Guest Servs.,* 718 A.2d 1071, 1074 (D.C.1998) ("As a general rule, statutes

operate prospectively, while judicial decisions are applied retroactively." (citing *United States v. Security Indus. Bank,* 459 U.S. 70, 79, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982))). *See also Landgraf v. USI Film Prods.,* 511 U.S. 244, 274, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) ("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed."); *DeGroot v. DeGroot,* 939 A.2d 664, 670 n. 5 (D.C.2008) ("[A] court may apply new laws to pending cases when those laws 'speak to the power of the court [to hear a case] rather than to the rights or obligations of the parties.' " (quoting *Coto v. Citibank FSB,* 912 A.2d 562, 566 n. 4 (D.C.2006) (quoting *Landgraf, supra,* 511 U.S. at 274, 114 S.Ct. 1483)).

4 A.3d 890
District of Columbia Court of Appeals.

In re C.A.B. & H.N.B.; L.M.F., Appellant.

No. 09-FS-858.
|
Argued May 27, 2010.
|
Decided Sept. 23, 2010.

Synopsis

Background: Maternal grandmother and foster parents filed competing adoption petitions. Following a trial, the Superior Court, Janet Albert, Magistrate Judge, terminated mother's parental rights and granted adoption petition of foster parents. Grandmother and mother filed motions for review. The Superior Court, Laura A. Cordero, J., affirmed, and grandmother appealed.

Holdings: The Court of Appeals, Belson, Senior Judge, held that:

[1] grandmother's appeal of decision of family court judge was timely;

[2] grandmother had standing on appeal to argue that the trial court applied the wrong evidentiary standard in regard to mother's choice for a caretaker;

[3] in proceedings on competing adoption petitions, a parent's choice for caretaker could only be overridden on clear and convincing evidence; and

[4] error of trial court, in applying preponderance of the evidence rather than clear and convincing standard to mother's choice, was harmless.

Affirmed.

West Headnotes (8)

[1] Adoption
Review

Order of magistrate judge, in proceeding on competing adoption petitions, denying maternal grandmother's adoption petition, waiving biological parents' consent to foster parents' adoption petition, and ordering Child and Family Services Agency (CFSA) to make necessary preparations to proceed to a final decree on foster parents' petition, was not final for purposes of grandmother's motion for review by a family court judge, and thus order of family court judge dismissing grandmother's first motion for review was not a final order that triggered 30-day period for grandmother to appeal to the Court of Appeals, as such order of the magistrate judge did not dispose of the whole case on its merits. D.C. Official Code, 2001 Ed. § 11-721(a)(1); Court of Appeals Rule 4(a)(1).

Cases that cite this headnote

[2] Adoption
Review

Maternal grandmother, in proceeding on competing adoption proceedings, appealed to the Court of Appeals both the denial of her adoption petition and the granting of foster parents' adoption petition, where grandmother's notice of appeal to the Court of Appeals identified the date of two orders, the date of the order of the magistrate judge granting foster parents' adoption petition and the date of the order of the trial court denying grandmother's motions for review of the magistrate's orders on both adoption petitions, and trial court in the latter order specifically addressed and rejected grandmother's arguments relating to both adoption petitions.

Cases that cite this headnote

[3] Adoption
Review

Maternal grandmother, in appeal of orders issued in proceeding on competing adoption petitions, had standing to assert claim that the trial court erred in failing to give sufficiently

weighty consideration to biological mother's choice of caretaker for the child, though mother had not appealed, as grandmother was not asserting that the trial court had violated mother's constitutional rights, but was asserting that the trial court used an improper evidentiary standard; once the biological mother consented to grandmother's petition, the grandmother occupied a position different from every other potential petitioner for adoption, and trial court was obligated to weigh the evidence in a manner that took mother's support into account.

Cases that cite this headnote

[4] Adoption

Review

A trial court's order granting adoption is reviewed for abuse of discretion; an appellate court determines whether the trial court exercised its discretion within the range of possible alternatives, based on all the relevant factors and no improper factors.

4 Cases that cite this headnote

[5] Adoption

Review

When reviewing an order granting an adoption petition, an appellate court assesses whether the trial court applied the correct standard of proof, and then evaluates whether its decision is supported by substantial reasoning drawn from a firm factual foundation in the record.

4 Cases that cite this headnote

[6] Adoption

Examination and approval by court

In a proceeding involving competing adoption petitions, a parent's preference for her child's caretaker may be overridden only by clear and convincing evidence, regardless of whether the proceeding ultimately concludes with the termination of the parent's rights, and, absent extraordinary circumstances, regardless of whether the parent is found by clear and convincing evidence to be withholding her consent to one of the petitions contrary to the child's best interests. D.C. Official Code, 2001 Ed. § 16-304(e).

3 Cases that cite this headnote

[7] Constitutional Law

Parent and Child Relationship

The fundamental liberty interest of natural parents in the care, custody and management of their children does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state.

Cases that cite this headnote

[8] Adoption

Review

Error of trial court, in proceeding on competing adoption petitions, by applying the preponderance of the evidence standard rather than the clear and convincing evidence standard when it overrode biological mother's preference that maternal grandmother's petition be granted and instead granted petition of foster parents, was not reversible error; magistrate judge also concluded that, under the clear and convincing standard, custody for grandmother was not in child's best interest, evidence was sufficient to support magistrate judge's findings that grandmother was already overwhelmed by caring for four other grandchildren, that grandmother was either unable or unwilling to participate in child's medical care and that removal from foster parents' home would have devastating effects on child's physical and mental health, and family court judge on grandmother's motion for review did not disturb magistrate judge's conclusions.

Cases that cite this headnote

Attorneys and Law Firms

***892** T. Michael Barry for appellant.

Jonathan M. Krell, with whom Christine M. Smith was on the brief as guardian ad litem, for appellee L.S.

George Tilton filed a statement in lieu of brief, for appellee S.S.

Stephen L. Watsky, Washington, DC, for appellees C.A.B. and H.N.B.

Tobey K. Oliver, Assistant Attorney General, with whom Peter J. Nickles, Attorney General for the District of Columbia, Todd S. Kim, Solicitor General, and Donna M. Murasky, Deputy Solicitor General, were on the brief for the District of Columbia.

Before THOMPSON and OBERLY, Associate Judges, and BELSON, Senior Judge.

Opinion

BELSON, Senior Judge:

Appellant L.M.F., the grandmother of minor child L.S., appeals from a final decree of the Family Court of the Superior Court denying her petition to adopt L.S. and granting the competing adoption petition of C.A.B. and H.N.B., the child's foster parents. In the same proceeding, the court terminated the parental rights of S.S., the child's natural mother, and also the parental rights of the child's natural father, Lo.S., who did not seek review of the magistrate judge's order to that effect. The mother had consented to the grandmother's adoption petition and withheld her consent from the foster parents' petition. The grandmother, L.M.F., argues that the trial court applied an incorrect standard, preponderance of the evidence, when evaluating the merits of the competing petitions. Appellee foster parents oppose this argument on the ground that the finder of fact, the magistrate judge, specifically made the necessary finding by clear and convincing evidence. Appellee Guardian ad Litem (GAL) of the child makes the same argument. Appellee the District of Columbia argues similarly that the magistrate judge's finding under the preponderance standard was harmless error, as she found against appellant under the clear and convincing standard as well. Appellees also argue that we should dismiss the case for lack of jurisdiction, for lack of standing, or because this court cannot afford an adequate remedy. While we disagree with appellees' justiciability arguments, we agree with appellees that the trial court did not abuse its discretion in its evaluation of the competing petitions. Accordingly, and for the reasons stated herein, we affirm.

***893 I. The Neglect and Adoption Proceedings**

Because of the nature of the issues involved, we set forth the procedural history and the most relevant facts in some detail. L.S. was born on January 30, 2005, to mother S.S. and father Lo.S. In February of 2005, doctors discovered that the child suffered from a "posterior urethral valve" and "poor renal function" that caused significant problems for him in voiding urine. At the age of two-and-a-half weeks, the child underwent vesicostomy surgery at Children's National Medical Center to "relieve the urinary obstruction." [1] He was released to the mother on February 21, with instructions for his care. Two days later, the child had to be hospitalized again because of alleged neglectful treatment by the mother in administering the care he needed. On February 23, he was placed in shelter care and, on March 2, when he was less than five weeks old, he was placed in the foster parents' home, where he remained until the time of trial.

On June 2, 2005, the mother, S.S., entered into a stipulation with the government that she had a history of mental illness and had been diagnosed with bipolar disorder. On that same day, the Superior Court found, pursuant to D.C.Code § 16-2301(9)(A)(iv) (Supp. 2007), that the child was neglected and committed the child to the care and custody of the Child and Family Services Agency. The court initially set reunification with the mother as the permanency goal, but on May 8, 2006, that goal was changed to adoption and guardianship by the maternal grandmother, L.M.F. The grandmother was already caring for four children, including three of the mother's other children.

On September 15, 2006, the court again changed the reunification goal, this time to adoption by the foster parents. On September 27, the foster parents filed a petition to adopt the child. On November 27, the grandmother filed a competing adoption petition. On December 1, 2006, a Superior Court judge consolidated the cases with respect to the competing adoption petitions and the neglect case. On July 17, 2007, the mother filed

a consent to the grandmother's adoption petition. A trial was held on the competing petitions and motions to terminate parental rights on October 22, 23, 29, and 30, November 28 and 30, and December 11, 2007, before Magistrate Judge Janet Albert. The GAL supported the foster parents' adoption petition.

At the trial, the magistrate judge received testimony and exhibits relating to the relative merits of the petitioners, including testimony from social workers, family members, the petitioners, and the natural parents. [2] The magistrate judge found, inter alia, that the child had lived virtually his entire life with the foster parents and had a "strong and secure" attachment to them. The magistrate judge credited the testimony of Dr. Susan Theut, a child psychiatrist with Youth Forensic Services who specialized in the bonding and attachment of children ages zero to three. Dr. Theut conducted attachment evaluations of the child to the foster parents and of the child to the grandmother. Dr. Theut found that the foster parents' contact with the child was "warm, rich, and emotionally textured." Dr. Theut also ***894** found that there was a "good connection" between the child and the grandmother, but of the competing petitioners, the foster parents' attachment to the child was stronger. She concluded that the child viewed the foster parents as his mother and father, and she opined that removing the child from the home of the foster parents "would seriously affect his emotional or mental health," and "would likely impair his ability to form secure and loving attachments."

In addition to crediting the testimony of Dr. Theut, the magistrate judge found that the foster parents "demonstrated a more mature emotional health" than the grandmother, who at times put her own emotional needs before those of the child's. The magistrate judge found the foster parents capable and reliable in dealing with the child's medical problems, in that they had never missed a doctor's appointment or a single dose of medication for the child. The child appeared to be healthy and well adjusted in their care. The magistrate judge found that "there was not a shred of doubt" that the foster parents "would meet [the child's] future medical needs, no matter how extensive, expensive or time-consuming." By contrast, the grandmother had "only attended a handful" of the child's numerous medical appointments and was frequently late to those she attended. She appeared withdrawn when doctors would attempt to discuss the child's medical needs, either out of frustration or a fear that she was being judged for her lack of knowledge. The magistrate judge was left with "no confidence" that the grandmother would be able to meet the child's ongoing medical needs.

The magistrate judge found that the child had positive relationships with the other children in the grandmother's household and that the child would have the greatest ongoing contact with his birth family if he lived with the grandmother. However, the magistrate judge also found that the mother's continuing presence would have a negative effect on the child. Specifically, the court noted that the mother was a source of "tension and instability" when she would visit the grandmother's household, evidenced by the fact that on two occasions the grandmother took out protective orders against the mother. The court found that in addition to her mental condition, the mother had admitted to a long history of using marijuana and PCP. Further, the court found that the grandmother was under a great deal of stress from taking care of four other grandchildren already, and that, "Under the best of circumstances, [the grandmother] is spread extremely thin without significant outside support." [3] Ultimately, the magistrate judge concluded that the grandmother "is not a viable placement option" for the child.

On April 3, 2008, the magistrate judge issued an order (1) denying the grandmother's adoption petition, (2) waiving the consent of the biological father and mother to the foster parents' adoption petition, and (3) granting that petition. Five days later, on April 8, 2008, she issued an amended order (1) denying the grandmother's adoption petition, (2) waiving the mother's and father's consent to the foster parents' adoption petition, and (3) ordering that CFSA "proceed to make all necessary preparations to proceed to final decree" in the foster parents' petition. [4] In considering ***895** the petitions before her, the magistrate judge found by clear and convincing evidence that both parents were withholding consent to the adoption by the foster parents against the best interests of the child, pursuant to D.C.Code § 16-304(e). In so doing, the court analyzed the case in light of each of the factors in D.C.Code § 16-2353(b). The court also found by clear and convincing evidence that the parents had abandoned the child pursuant to D.C.Code § 16-304(d).

Having found that the parents' consent should be deemed waived, the magistrate judge proceeded to analyze the

merits of the competing petitions to determine which placement was in the child's best interest, using a preponderance of the evidence standard. Counsel for the grandmother argued that under this court's decision in *In re T.J.*, 666 A.2d 1 (D.C.1995), the court could override the mother's choice of custodian only if it found by clear and convincing evidence that the placement would not be in the child's best interest. The magistrate judge disagreed, citing this court's decision in *In re J.D.W.*, 711 A.2d 826 (D.C.1998), and concluded that once a determination has been made by clear and convincing evidence that the natural parents are withholding their consent to the adoption petition contrary to the best interest of the child, the two competing adoption petitions may be compared using the preponderance of the evidence standard.

In a footnote, however, the magistrate judge articulated her further conclusion that the court would find, even under a "clear and convincing evidence" standard, that placement with the grandmother was not in the child's best interests. She supported this conclusion by finding:

> The evidence is overwhelming that L.M.F. is overwhelmed with the responsibility of raising four other grandchildren. Because of that immense responsibility she was either unable or unwilling to participate in the [child]'s medical care. She neither understands the gravity of his medical condition nor has the capacity-both because she is spread so thin and because she is in denial-to meet the [child]'s ongoing medical needs. Moreover, the child has a secure attachment to C.A.B. and H.N.B. and removal from their care would have devastating effects on his physical and mental health.

On April 21, 2008, the mother and the grandmother independently filed timely motions for review of the magistrate judge's April 8, 2008, order by an associate judge of the Superior Court, pursuant to Super. Ct. Gen. Fam. R. D(e). On August 7, 2008, Associate Judge Laura Cordero of the Family Court dismissed these motions without ruling on them, finding that the magistrate judge's order was not final for the purposes of a Rule D(e) review. The court reasoned that since no final decree had been entered on the foster parents' petition, the April 8 order did not dispose of "the whole case on its merits so that the court has nothing remaining to do but to execute the judgment or decree already rendered." [5] The court ruled the grandmother and mother had to wait until a ***896** final decree of adoption was entered to have the case reviewed under Rule D(e).

On October 1, 2008, the magistrate judge granted the foster parents' adoption petition in a final adoption decree. On October 10, the grandmother and mother once again moved for review by an associate judge. [6] The foster parents argued that the motions for review were no longer timely, since Judge Cordero's August 7 order was in error in finding that the April 8 order of the magistrate judge was not final for the purposes of review by an associate judge, and therefore the motions for review, filed on October 10, were untimely for purposes of review of the April 8 denial of the grandmother's adoption petition. Judge Cordero dismissed this argument for the same reasons she articulated in her August 7 order, and she reached the merits of the grandmother's and mother's arguments.

On June 24, 2009, the trial court denied the motions for review on the merits. The court ruled that the magistrate judge was correct in applying the preponderance of the evidence standard for the competing adoption petitions. The trial court did not comment on the magistrate judge's alternative conclusion that the evidence supported granting the foster parents' petition over the grandmother's, even under a clear and convincing evidence standard. The court found that "the evidence supports the Magistrate Judge's findings." Specifically, the court cited to the evidence of the child's medical condition, noting that the evidence showed "the severity of Respondent's condition, the ongoing medical concerns, his continuing need for the frequent administration of medicine, and his required future medical supervision."

The court squarely rejected the grandmother's argument that the magistrate judge "improperly considered the [foster parents'] material superiority," pointing out that "the Magistrate Judge's findings did not relate to material superiority; rather, they related to the relative safety and well-being of Respondent." The court went on to note the magistrate judge's consideration of the social worker's testimony that the grandmother's home was dirty, cluttered and smoke-filled (this resulted from the

grandmother's continuing to smoke, even though the respondent child's half-sister suffered from asthma). This was in contrast to the home of the foster parents which, the magistrate judge found, "was very appropriate and sparkling clean as [the female adoption petitioner] was very sanitary." Because the magistrate judge was required to compare the relative merits of the competing adoption petitions, and that comparison required consideration of the impact the placement would have on the child's health, safety and well-being, the trial court concluded, the magistrate judge "committed no error in comparing the placements and finding that placement with the [foster parents] better served the [child's] best interests." On July 14, the grandmother noted an appeal with this court. The mother has not appealed.

*897 II. Jurisdiction

Appellees argue this court lacks jurisdiction to hear the grandmother's appeal. The basis of this argument is that the trial court acted erroneously in dismissing the grandmother's April 21, 2008, motion for review because the denial of the grandmother's adoption petition *was* a final order, and therefore the grandmother's motion for review on October 10, 2008, was not timely. Appellees further argue that once Judge Cordero dismissed the grandmother's motion for review on August 7, the grandmother had a remedy, which was to appeal to this court. She did not do so, and therefore, appellees argue, this court cannot exercise review over her untimely appeal of the denial of her adoption petition.

[1] We disagree. As we stated above, the trial judge expressed the view that the magistrate judge's order of April 8, 2008, was not a final order for purposes of review by a Family Court judge under rule D(e) of the General Rules of the Family Division. The District cites no authority for the proposition that when there are competing adoption petitions and a magistrate judge denies one, but keeps the other petition under consideration, the denial of the first is ripe for review. Judge Cordero reasoned, to the contrary, that because no final decree had been entered on the foster parents' petition, the April 8 order did not dispose of "the whole case on its merits so that the court had nothing remaining to do but to execute the judgment or decree already rendered," citing *McDiarmid, supra* note 5, 594 A.2d at 81, and *In re K.M.T., supra* note 5, 795 A.2d at 688 (an order "usually is not final unless it completely resolves the case").

We agree. In circumstances like those in the present case, where two competing adoption petitions have been consolidated for trial, the appropriate course for the Family Division judge to follow when only one of the petitions has been ruled upon by the magistrate judge is to decline to consider, review or rule upon the matter raised in the motion for review of that order, but rather to dismiss the motion, as the Family Court judge did here. [7]

This court has jurisdiction over appeals made within thirty days of final orders or judgments of the Superior Court. D.C.Code § 11-721(a)(1) (2001); D.C.App. R. 4(a)(1); *Banov v. Kennedy,* 694 A.2d 850, 856 (D.C.1997). In this case, the final order of the Superior Court was entered on June 24, 2009, and the grandmother's appeal from that final order was timely.

[2] The District argues this court cannot afford the grandmother an adequate remedy because she appealed only the denial of her adoption petition, and not the granting of the foster parents' petition. Contrary to the District's contention, the record shows the grandmother did properly appeal the trial court's adjudication of ***898** both petitions. Our Rule 3(c)(1)(B) requires an appellant's notice of appeal to "designate the judgment, order, or part thereof being appealed." In her notice of appeal, in the space for the date of the order appealed from, the grandmother wrote October 1, 2008, and June 24, 2009. On these dates, the orders that issued were (1) the decree of the magistrate judge granting the foster parents' adoption petition (October 1), and (2) the order of the trial court denying the grandmother's and mother's motions for review of the magistrate judge's orders (June 24). In the June 24, 2009, order, the trial court specifically addressed and rejected the grandmother's arguments relating to both adoption petitions, as compared against each other. Further, "this court has never indicated that an appellant must always be impeccably precise in meeting" Rule 3(c)(1)(B)'s requirement. *Perry v. Sera,* 623 A.2d 1210, 1215 (D.C.1993); *see also Patterson v. District of Columbia,* 995 A.2d 167, 172 (D.C.2010) (rule requiring designation of order being appealed is, "judging by the case law, more forgiving" than rule requiring designation of parties appealing). Under the circumstances presented here, the notice of appeal is clear enough to "demonstrate compliance with the rule" and thus to "preserve for review

the claims of" the grandmother with respect to both of the adoption adjudications. *Patterson,* 995 A.2d at 171.

III. Standing

[3] Appellees assert that the grandmother lacks standing to challenge the trial court's purported application of an erroneous legal standard to the competing adoption petitions. They argue that even if the court erred in failing to give sufficiently weighty consideration to the mother's choice of caretaker for the child, the right to have that consideration applied is personal to the mother. Since the mother has not appealed, they argue, this claim cannot be asserted by the grandmother on appeal. [8]

This court has held that a parent is entitled to have his or her choice of caretaker be given weighty consideration. *See In re T.W.M.,* 964 A.2d 595, 603 (D.C.2009); *T.J.,* 666 A.2d at 15. These cases are often decided against the backdrop of the fundamental right to parent, which would be burdened if the parent's choice of caretaker were not so respected. *See T.W.M.,* 964 A.2d at 602 ("[o]ur holding in *T.J.* is premised on the notion [ ] that natural parents have a 'fundamental liberty interest ... in the care, custody, and management of their children' ") (quoting *T.J.,* 666 A.2d at 11). In various contexts, courts have held that a litigant may not assert a violation of another's constitutional rights as a basis for pursuing relief on appeal. *See, e.g., Tileston v. Ullman,* 318 U.S. 44, 46, 63 S.Ct. 493, 87 L.Ed. 603 (1943) (due process); *Rakas v. Illinois,* 439 U.S. 128, 133-34, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (Fourth Amendment). Appellees essentially argue that the grandmother lacks standing to claim a violation of the mother's fundamental right to parent.

The grandmother, however, is not asserting a violation of constitutional rights. Nor were the parents in *T.J.* or *T.W.M.* In those cases and in the present one, the appellants challenged the adoption disposition on the ground that the court viewed the evidence using an erroneous *evidentiary* ***899** *standard. See T.W.M.,* 964 A.2d at 601 (parents contend that trial judge failed to give their choice of caregiver sufficient "weighty" consideration); *see also In re S.M.,* 985 A.2d 413, 420 (D.C.2009) ("[w]e cannot properly assume that the court's application of its findings, while looking through the prism of an erroneous legal test, would be the same when looking through another prism [encompassing the proper test]") (citation omitted). The *T.J.* standard, by its nature, contemplates application when the petitioning parties are not the parents themselves. The fact that this standard has its roots in the parents' fundamental rights does not mean that the necessity of applying it in assessing the competing petitions of third parties evaporates if the parents are not parties on appeal.

Once the mother consented to the grandmother's petition, the grandmother occupied a position different from that of every other potential petitioner for adoption of the child. The mother, whose parental rights were intact at every stage of the proceeding, had designated the grandmother as the only adoption petitioner to whom she gave her consent. The mother having given this unique support to the grandmother's petition, the trial court was obliged to weigh the evidence in a manner that took that support into account, that is, under the clear and convincing standard of proof.

Moreover, the use of the clear and convincing standard is warranted by more than the parents' fundamental rights. The standard is also consonant with considerations that focus purely on the child. We have repeatedly emphasized that it is the child's best interest, not the fundamental right to parent, that is paramount in adoption cases. *See, e.g., In re G.K.,* 993 A.2d 558, 570 (D.C.2010); *In re S.M.,* 985 A.2d at 419. We made clear in *T.J.* that ultimately, "the child's best interest should be the determining factor for the trial court." 666 A.2d at 15. Custody for the great-aunt in *T.J.,* therefore, was appropriate not just because a contrary result would burden the mother's fundamental rights, but because a parent's choice of caregiver is entitled to great weight in the determination of what is in the child's best interest. *Id.* Given that recognition, we held that "[t]he natural mother's views ... must be taken into consideration in determining what is in the child's best interest." *Id.* Considerations about the child's well-being permeate every aspect of an adoption case, and those considerations are no less present when neither parent is a party. These considerations counsel in favor of allowing the grandmother to assert her argument regarding the standard of proof on appeal. [9]

IV. Application of the Proper Standard of Proof

[4] **[5]** "We review a trial court's order granting adoption for abuse of discretion, determining whether

the trial court exercised its discretion within the range of possible alternatives, based on all the relevant ***900** factors and no improper factors." *S.M.,* 985 A.2d at 418 (internal citations and quotation marks omitted). In so doing, "we assess whether the trial court applied the correct standard of proof, and then evaluate whether its decision is supported by substantial reasoning drawn from a firm factual foundation in the record." *T.W.M.,* 964 A.2d at 601 (citations and quotation marks omitted).

In *T.J.,* this court recognized that parents have a "fundamental liberty interest in the care, custody, and management of their children." 666 A.2d at 11. This being the case, even where they themselves have been found unfit to parent, their choice for an alternate caretaker in a custody determination must be given "weighty consideration." *Id.* Therefore:

> Where the parent(s) have unequivocally exercised their right to designate a custodian, *i.e.,* made their own determination of what is in the child's best interest, the court can "terminate" the parent(s)' right to choose only if the court finds by clear and convincing evidence that the placement selected by the parent is clearly not in the child's best interest....

666 A.2d at 16.

Despite this unambiguous language, our fact-specific holding in another case, *J.D.W.,* led the magistrate judge and associate judge in the present case to question the scope of *T.J.'s* application. In *J.D.W.,* a mother had voluntarily surrendered custody of her child at his birth, and two sets of prospective parents petitioned for adoption. 711 A.2d at 828. The court was faced with a unique set of circumstances: the mother initially voiced her consent to adoption by the mother's brother and sister-in-law, but then, admittedly out of spite arising from her brother's lack of support during her personal drug crisis, gave formal written consent to adoption by the foster parents. *Id.* at 829. The court employed a two-step process, finding first by clear and convincing evidence that the mother was withholding her consent to the brother's adoption petition contrary to the child's best interests, and then finding by a preponderance of the evidence that custody in the brother and sister-in-law would be in the child's best interest. *Id.* at 829-30. We affirmed, holding that "[i]n such circumstances, we think that the trial court permissibly focused ... on the mother's reasons for withholding consent to the Wilsons," because "[t]hose reasons ultimately bore directly upon whether the withholding of consent was indeed at the time motivated by and in the 'best interests' of the child." *Id.* at 833. The two-step inquiry, with a different level of proof applied at each stage, was thus deemed reasonable in the "unusual situation" presented, where the mother's actions and testimony showed persuasively that the mother was not acting in the child's best interests when she gave her consent to a non-family member's adoption petition. [10] *See id.*

Our subsequent holding in *T.W.M., supra,* laid to rest any ambiguity as to what standard to apply in the usual case, where the evidence simply shows that a natural parent has consented to one adoption petition ***901** and not to the other. There, we clarified that *T.J.'s* holding meant that:

> in a case where there are competing adoption petitions for placement of a child and one of the petitioners is favored by the natural parent, the party without the parent's consent has the burden of establishing by clear and convincing evidence that placing the child with the parent's preferred caregiver is contrary to the child's best interest.

T.W.M., 964 A.2d at 604. Appellee the District of Columbia concedes that, given *T.W.M.'s* unambiguous language, the magistrate judge and the associate judge incorrectly concluded that it was appropriate to apply the preponderance standard in weighing the petitions in this case.

[6] Our case law thus shows that a parent's preference for her child's caretaker may be overridden only by clear and convincing evidence. This standard applies regardless of whether the adoption proceeding ultimately concludes with a termination of the parent's rights. *See id.* at 603 ("[b]ecause their parental rights were intact *at the time of the adoption proceeding,* Appellants had not forfeited their right to choose a caregiver for [the child] merely because they were unfit to personally parent the child") (emphasis added). Absent extraordinary circumstances like those present in *J.D.W.,* this same standard applies

regardless of whether the parent was found by clear and convincing evidence to be withholding her consent to one of the petitions contrary to the child's best interests, as required by D.C.Code § 16-304(e). *See T.J.,* 666 A.2d at 5 (court found by clear and convincing evidence that mother was withholding consent contrary to child's best interests); *id.* at 16 (despite this finding, court still required, when comparing petitioning parties, to override mother's preference only upon a showing of clear and convincing evidence); *S.M.,* 985 A.2d at 419 (even though father was found to be withholding consent contrary to best interest, reversible error where court did not find by clear and convincing evidence that placement with petitioners was in child's best interest). [11]

Applying the clear and convincing evidence standard at each step is necessary because, in determining whether the parent's consent can be waived under § 16-304, the court is, in effect, conducting a comparison between the natural parent(s) and the petitioners from whom the parents have withheld consent. *See T.J.,* 666 A.2d at 5 ("the court found ... when pitting the foster mother against the natural parents, that the parents were withholding their consent to the adoption contrary to T.J.'s best interest"). In the second step, the court is comparing the competing adoption petitioners against each other, and there the merits may be far more balanced. If the court is to protect the parent's right to have her choice of caretaker overridden only by clear and convincing evidence "that placing the child with the parent's preferred caregiver is contrary to the child's best interest," [12] the clear and convincing evidence standard must be applied at each step.

[7] Further underlying the necessity of applying the clear and convincing evidence standard throughout the process is this court's longstanding recognition that the "fundamental liberty interest of natural parents in the care, custody and management ***902** of their children does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state." *Matter of P.D.,* 664 A.2d 337, 340 (D.C.1995) (Mack, J., concurring) (quoting *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)). "If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs." *Santosky,* 455 U.S. at 753, 102 S.Ct. 1388. We have held that "only upon a final decree of adoption are the 'rights and duties' of natural parents terminated." *In re S.J., supra* note 7, 772 A.2d at 248. Thus, the necessity of an evaluation of the competing adoption petitions using the clear and convincing evidence standard was in force at all points during the trial court's analysis.

[8] Despite the view by the magistrate judge and associate judge that the foster parents' adoption petition could be granted if a preponderance of the evidence showed it was in the child's best interests, the granting of the foster parents' adoption petition over that of the grandmother's does not require reversal. The magistrate judge also found, when applying the clear and convincing standard of proof, that custody for the grandmother would not be in the child's best interest. She found that the grandmother was "overwhelmed" with her existing parenting responsibilities and that she was "either unable or unwilling to participate in the [child]'s medical care." She further found that because of the child's secure attachment to the foster parents, his removal from their care would have "devastating effects on his physical and mental health." Given the testimony presented, particularly by Dr. Theut regarding the bonding between the child and the foster parents, these factual findings were not "clearly erroneous," and therefore we do not disturb them. *In re Baby Boy C.,* 630 A.2d 670, 683 (D.C.1993). Indeed, the numerous findings comparing the two prospective placements throughout the magistrate's order plainly buttress her later conclusion that clear and convincing evidence also supported the granting of the foster parents' petition.

While the associate judge did not make a similar, alternative finding by clear and convincing evidence, she affirmed the magistrate's ruling, not disturbing any of her findings of fact and stating that "the Magistrate Judge's decision was ... fully supported by the evidence." Further, while the court explicitly stated its support for the use of the preponderance standard, it at no point called into question the magistrate's legal conclusion of clear and convincing evidence, based on the same findings of fact. We are mindful that from a procedural standpoint, our role is to review the order of the associate judge, not the magistrate judge. *See D.H.,* 917 A.2d at 114 n. 1. However, we do not believe our powers of appellate review are so limited that, in reviewing the trial court's final order we may not look to the findings and conclusions of the fact finder on which that ruling is based. [13] A

contrary conclusion would create the need for countless remands, consuming time and judicial resources, in cases like the present one, where a magistrate has painstakingly reviewed the record and made comprehensive findings and conclusions, and an associate ***903** judge succinctly affirms. [14]

Under the circumstances, where the evidence strongly supports the magistrate judge's conclusion under a clear and convincing evidence standard, and where the associate judge did nothing to disturb this conclusion, we conclude that the trial court did apply, and the evidence did meet, the more exacting standard of proof necessary to grant the foster parents' petition. [15] The evidence, as the magistrate judge put it, was "overwhelming" that the foster parents were better able to meet the needs of the child than the grandmother, and had done so admirably since his birth. Accordingly, a remand to the trial court for an additional review under the clear and convincing evidence standard would serve no useful purpose.

Accordingly, the order entered by the trial court is hereby affirmed.

So ordered.

All Citations

4 A.3d 890

Footnotes

1 The procedure involved cutting a hole beneath the child's navel to allow urine to be voided through this hole.

2 Lo.S. was apparently incarcerated at various times from 2005 to 2008, including at the time of the trial on the competing adoption petitions. He testified via telephone from federal prison in Kentucky, but the court found he had little to no involvement in the child's life. He is not a party to this appeal.

3 The magistrate judge also found the grandmother had failed to complete the foster parent licensing process and the adoption licensing process because she was overwhelmed with other parenting responsibilities. As a result, CFSA was never able to make a final report or recommendation as to her adoption petition.

4 There are no indications in the record on appeal why the original April 3, 2008, order was amended, or why a final adoption decree for the foster parents was not issued until October 2008, other than the reference in the amended order to "preparations to proceed to final decree" to be made by CFSA.

5 The court cited *McDiarmid v. McDiarmid,* 594 A.2d 79, 81 (D.C.1991). The court also relied on *In re K.M.T.,* 795 A.2d 688 (D.C.2002), where we observed, "finality has generally been held to mean either a restoration of physical custody, a termination of parental rights, or an adoption. An order that is merely a step toward one of those acts is therefore not final and appealable." *Id.* at 690.

6 The District contends that it is "unclear what order(s) [the grandmother] attempted to challenge" in her motion for review because the motions of the grandmother and the natural mother "are not in the record." Under Rule 10(a)(1) of the rules of this court, "the original papers and exhibits filed in the Superior Court" are part of the record on appeal. The absence of this particular paper, the motion for review filed on October 10, 2008, from the appendix of appellant's brief or the other papers before us would present no problem, in any event, as the trial court, in its June 24, 2009, order explicitly states that the arguments in the motions for review are "substantively identical" to the arguments made in the April 21, 2008, motions.

7 A somewhat similar situation exists when the trial court rules in the course of an adoption proceeding that it will waive the consent of the natural parents to the adoption, having found that their consent has been withheld contrary to the best interest of the child. We have said that "an order waiving a birth parent's consent to an adoption is not a final order and may not be appealed until the adoption proceedings have been concluded." *In re Petition of S.J.,* 772 A.2d 247, 248 (D.C.2001). On the other hand, it is important to observe that there may be some orders entered by a Family Court judge dismissing a motion for review of a magistrate judge's ruling that are appealable to this court, for example, one presenting a situation comparable to that in *In re D.M.,* 771 A.2d 360 (D.C.2001), where, not in the course of an ongoing proceeding such as for adoption or termination of parental rights, a magistrate judge enters an order as consequential as barring visitation by a mother with her minor daughter.

8 We note that appellees do not argue that the grandmother lacks standing to bring her claim in its entirety, instead contending that she lacks standing to raise the argument regarding the standard of proof. The grandmother clearly has standing to appeal to this court as a general matter, since the denial of her adoption petition made her a "party aggrieved by" a final order of the Superior Court. *See* D.C.Code § 11-721(b) (2001).

9 The grandmother also argues on appeal that the trial court erred in finding that the mother had abandoned the child pursuant to D.C.Code § 16-304(d). Appellees argue the grandmother lacks standing to assert this claim as well. However, because we hold that the trial court properly applied a clear and convincing evidence standard to the denial of the grandmother's adoption petition, we need not reach the grandmother's argument, since whether the finding of abandonment was properly reached or not, the trial court was nonetheless obligated to apply, and did apply, the clear and convincing standard to the grandmother's adoption petition. See *infra* Section IV. Thus, we need not reach appellees' argument that the grandmother lacks standing to make the claim that the trial court erred in finding abandonment.

10 The magistrate judge and the associate judge also cited to certain factors in *T.J.* as providing a justification for a narrower reading of its holding. Among these factors was that *T.J.* did not involve competing adoption petitions but rather an adoption petition by the foster mother and a complaint for custody by the mother's preferred caregiver, the child's great aunt. 666 A.2d at 5. The trial court noted that while the mother's preferred placement in *T.J.* was designed to allow for the "preservation of the parent-child relationship," the mother's preferred placement in the present case, in the court's view, was not.

11 This would, *a fortiori,* apply with equal force to a finding that the parent has "abandoned" the child pursuant to D.C.Code § 16-304(d), which also requires a finding by clear and convincing evidence.

12 *T.W.M.,* 964 A.2d at 604.

13 Appellee the District of Columbia argues that the magistrate judge's use of the preponderance standard is harmless error as the magistrate judge also found in favor of appellees C.A.B. and H.N.B. using the clear and convincing standard. Thus, it argues, the error did not affect the outcome.

14 Arguing in support of the Family Court's determination that the foster parents' adoption petition should be granted, the GAL states:

> The magistrate judge conducted a meticulous review of the record evidence, concluding in a sixty-eight page opinion that adoption by L.M.F. was contrary to L.S.'s best interests. While the magistrate judge believed she need only make this finding by a preponderance of the evidence, she expressly held that her decision would be the same under the higher clear and convincing standard.... This holding was well-supported by the extremely detailed analysis of the record evidence.

15 In addition to arguing the application of an erroneous legal test, the grandmother makes several arguments on appeal that clearly lack merit. Among these is an argument that the court incorrectly favored the foster parents because of their increased education and economic status over that of the grandmother and that the grandmother's adoption petition should have been treated as a petition for guardianship, and therefore the clear and convincing evidence standard should have been applied, pursuant to *T.J.* Regarding the latter argument, we have already addressed the proper standard of review for the competing adoption petitions, and we are satisfied that the trial court properly analyzed the petitions under this standard. Regarding the former argument, as we set forth above, the trial court concluded that the magistrate judge properly considered the petitions in light of the "relative safety and well-being" of the child and did not decide the case because of the foster parents' "material superiority." The record, including the copious findings regarding the child's medical condition and the parties' relative abilities to address his medical needs, gives this court no reason to call the trial court's conclusion into question.

26 A.3d 772
District of Columbia Court of Appeals.

In re K.D. and S.D., Appellants.
In re K.D.; S.D.; C.C., Appellants.

Nos. 10–FS–753, 10–FS–826.
|
Argued May 24, 2011.
|
Decided Aug. 25, 2011.

Synopsis

Background: Child's foster mother filed petition to adopt child. Child's maternal grandfather and his wife also filed petition to adopt child. Child's mother consented to child's adoption by grandfather and his wife. Following a trial, the Superior Court, Fern Flanagan Saddler, J., Noel T. Johnson, Magistrate Judge, granted foster mother's petition. Mother, grandfather, and his wife appealed.

Holdings: The Court of Appeals, Washington, C.J., held that:

[1] trial court gave sufficient consideration to mother's preferred adoptive placement;

[2] clear and convincing evidence supported finding that child's adoption by grandfather and his wife would be contrary to child's best interests; and

[3] proceedings were not rendered unfair due to pre-existing bond between child and foster mother.

Affirmed.

West Headnotes (8)

[1] Adoption
Necessity of consent in general
Adoption
Examination and approval by court
Infants
Determination and findings
Infants
Disposition, placement, and custody

Where a parent whose parental rights are still intact unequivocally exercises her right to designate a custodian or adoptive parent for her child, her choice must be given weighty consideration, and may be overcome only by a showing, by clear and convincing evidence that the parent's choice of custodian is clearly contrary to the child's best interest.

5 Cases that cite this headnote

[2] Adoption
Necessity of consent in general
Infants
Disposition, placement, and custody

The choice of a parent whose parental rights are still intact as to a custodian or adoptive parent for her child may be overcome by the proper evidentiary showing.

1 Cases that cite this headnote

[3] Adoption
Necessity of consent in general

In a case where there are competing petitions to adopt a child and one of the petitioners is favored by the natural parent, the other petitioner bears the burden of establishing by clear and convincing evidence that placing the child with the parent's preferred caregiver would be clearly contrary to the child's best interest.

2 Cases that cite this headnote

[4] Evidence
Degree of Proof in General

"Clear and convincing evidence" is evidence which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.

2 Cases that cite this headnote

[5] **Adoption**
Review

Court of Appeals reviews the trial court's order granting an adoption of a child for abuse of discretion, and determines whether the trial court exercised its discretion within the range of permissible alternatives, based on all the relevant factors and no improper factors; in this review, the Court assesses whether the trial court applied the correct standard of proof, and then evaluates whether its decision is supported by substantial reasoning drawn from a firm factual foundation in the record.

Cases that cite this headnote

[6] **Adoption**
Examination and approval by court

Trial court gave sufficient consideration to mother's preference in contested adoption proceeding that child's paternal grandfather and his wife, rather than child's foster mother, adopt child, though court failed to make explicit findings on issue of whether the "weighty consideration" due to mother's choice of adoptive placement was overcome by clear and convincing evidence that her choice was clearly contrary to child's best interests, as the court, in its 53-page opinion, discussed in detail the fitness of grandfather and his wife as potential caretakers, but ultimately concluded that moving child from her current home where she has bonded with her foster family would subject her to psychological harm.

2 Cases that cite this headnote

[7] **Adoption**
Persons who may adopt others

Clear and convincing evidence supported trial court's finding, in contested adoption proceeding, that child's adoption by maternal grandfather and his wife, as preferred by child's biological mother, rather than child's foster mother, would be contrary to child's best interests; child had already moved three times in her short lifetime and doctors and social workers testified that moving child once more to an unfamiliar environment and breaking her secure and loving bond with foster mother would create a significant risk of psychological harm to her, and while grandfather and his wife could be fit caregivers for child, the establishment of a secure bond with them was entirely speculative, and, even if such a bond were possible, the process of establishing it would necessarily uproot child once more, jeopardizing her interests in stability and permanency.

Cases that cite this headnote

[8] **Adoption**
Persons who may adopt others
Adoption
Examination and approval by court

Fact that by the time child's material grandfather and his wife began exploring the possibility of adopting child, the bond between child and her foster mother was already formed and "a fact of life" did not render contested adoption proceeding between grandfather and his wife and foster mother unfair to grandfather and his wife, as the interests of natural and potential adoptive parents had to give way before the child's best interests, and, thus, trial court properly considered the facts as they were, not as they might have been were the circumstances more favorable to grandfather and his wife.

Cases that cite this headnote

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Attorney General for the District of Columbia at the time the brief was filed, Todd S. Kim, Solicitor General, and Donna M. Murasky, Deputy Solicitor General, were on the brief, for appellee; the District of Columbia.

Jenny Epstein, Washington, DC, Guardian Ad Litem for respondent A.S., filed a statement joining the brief of appellee District of Columbia and appellee C.M.

Before WASHINGTON, Chief Judge, FISHER, Associate Judge, and PRYOR, Senior Judge.

Opinion

WASHINGTON, Chief Judge:

C.C., the biological mother of minor child, A.S., along with A.S.'s biological grandparents, K.D. and S.D., challenge the adoption of A.S. by her foster mother, C.M., arguing that C.C.'s support for the Ds' petition was not given sufficient consideration. We "recognize, as we always do in such cases, that it is no small matter for a court to permit the adoption of a child over the objection of a mother who loves [her]." *In re W.D.*, 988 A.2d 456, 457 (D.C.2010) (internal quotations marks omitted). However, because appellants have not demonstrated that the trial court abused its discretion in reaching its decision, we affirm.

I. FACTS

The minor child, A.S., was born on October 26, 2004, to C.C., the mother, who at the time was a ward of the District residing ***775** in a foster home.[1] A year later, A.S. was removed from C.C.'s custody, C.C. stipulated to neglect, and A.S. was placed into foster care. Because of C.C.'s drug use, poor performance of her court-ordered duties, and psychological diagnoses, the court changed the goal for A.S. from reunification to adoption in January of 2007. A.S. has no health concerns or special needs, and received no special services. Social workers testified that she is social, intelligent, inquisitive, resilient, and comfortable with different people. A.S. had been moved from three different foster homes before finally being placed with C.M. in July 2007. C.M. soon petitioned to adopt A.S.

At the time C.M. petitioned to adopt A.S., A.S. had lived with C.M. for almost nine months. C.M. was a fifty-two-year-old single woman with two biological children (a son, twenty-one, and a daughter, sixteen), and a two-year-old adopted daughter. The daughters lived with her, and A.S. shared a bedroom with the adopted daughter. C.M. was in good physical health, was financially stable, and had never been married but had a "boyfriend." C.M. took over custody of A.S. after participating in a long transition plan from her prior foster placement, which involved increasing visitation. A.S. called C.M. "momma" or "mommy" and referred to C.M.'s children as siblings. They enjoyed a warm, affectionate relationship.

C.C. had not met her father, K.D., until 2007, shortly before her twenty-first birthday. K.D. lives in California, and fathered C.C. with a woman who did not provide K.D.'s name for C.C.'s birth certificate and ran off with C.C. soon after she was born. From then until K.D. was introduced to C.C., K.D. made no attempt to locate C.C. K.D. admitted that he led a "wild" lifestyle at that time, but had since changed his life. K.D. has two other children and is now married to S.D. K.D. and S.D. have no children together. K.D. owns a hauling business and is training to be a minister, and S.D. owns a fitness franchise. The couple also operates a reentry home for ex-drug abusers through their church. When K.D. was contacted by C.C., he traveled to the District to meet her and learned about A.S. (his granddaughter). Soon thereafter, K.D. and S.D. petitioned to adopt A.S., as well.

C.C. never visited the Ds in California, but was confident that A.S. would be "very well taken care of" in their household, and therefore consented to the Ds' petition. Based on her own experience in the "system," C.C. felt strongly that the biological connection would be important for A.S.'s long-term well-being. She stated that if A.S. were moved to California, she would move to California, as well, and would maintain a relationship with A.S.[2] She also stated that she believed that A.S. should be raised in a two-parent household, with a male role model.

A contested adoption trial commenced in April of 2008. The evidence at trial consisted of the testimony of C.M., the Ds, C.C., and three expert witnesses. C.M. testified that she first met A.S. while A.S. was transitioning from her previous foster placement into C.M.'s home. By the conclusion of the trial, A.S. had lived in C.M.'s home for eighteen months. C.M. tended to all of A.S.'s medical and educational needs, and A.S. followed C.M.'s directions

***776** and guidance. C.M. testified that A.S. also had a strong relationship with C.M.'s two-year-old adopted daughter, having learned to share space, attention, and toys with her. C.M. felt that A.S. was like a daughter to her and that she would be hurt if she could not adopt A.S. C.M. testified that if her petition were granted, she would work with C.C. and the Ds to allow them to maintain a relationship with A.S. She also testified that were the Ds' petition granted, she would work with them to ease the transition.

In support of their petition, the Ds testified that their four visits [3] with A.S. went well and that they felt as if A.S. "knew" them. S.D. testified that A.S. would easily transition into their home because of her adaptability, and because "love covers everything."

The trial court heard from three additional witnesses on the issue of which party should adopt A.S. First, A.S.'s social worker, Ms. Murphy, oversaw four ninety-minute visits between A.S. and the Ds and testified that she was pleased with how they went. According to Ms. Murphy, A.S. was initially reluctant to interact with the Ds, but eventually opened up to them. From what she knew of A.S.'s personality, having seen A.S. at least once a week since 2006, Ms. Murphy testified that this behavior was typical of A.S. meeting any new person. She stated that had the Ds started their petition earlier, and had more time to bond with A.S., perhaps she would have supported their petition. However, she noted that removing A.S. from C.M.'s care, after the child had bonded so strongly with C.M., would likely have deleterious effects on A.S. At the time of the trial, she was not sure how an appropriate transition to the Ds' home would be accomplished, given the strong bond A.S. had with C.M. versus her relative unfamiliarity with the Ds. [4]

Next, Dr. King, a clinical psychologist, who had performed a "bonding study" in July 2007 to assess A.S.'s bond with C.C., C.M., and A.S.'s previous foster parent, testified. [5] Dr. King opined that a child bonds based on the amount of time spent with a caregiver, and how that caregiver treats the child. Dr. King further testified that A.S.'s bond with C.M. was strong as evidenced by the quality of their interaction and A.S.'s reaction when C.M. left her during the exercise. He testified that placing A.S. in a home with people A.S. did not know well, like the Ds, would be quite traumatic, and stated that moving A.S. from C.M.'s home to the Ds' home would have detrimental effects that would likely be "immediate and long lasting." He testified that A.S.'s long-standing connection to a sole caregiver would make transitioning her into a new home difficult, requiring several months with no guarantee of success. He also testified that the presence of two parents in a home would make no difference in A.S.'s ability to adapt to the home, and the presence of a male role model in a child's life does not need to come from within the home, as long as the child receives quality care.

Finally, Dr. Missar testified that the methodology Dr. King used for his bonding study was sound. He noted that research does support the conclusion that a ***777** child can benefit from a two-parent household, and that if the choice was between two equally able caretakers, most professionals would recommend placing the child in a two-parent home. However, he also testified that while some children are more resilient than others, breaking a bond will affect the child's self-esteem and development in both the short and long term. Given A.S.'s age, Dr. Missar believed that it would not matter if the new caregivers were relatives because A.S. was too young to understand what "biological" means. He testified that in adolescence A.S. might have some identity issues growing up with a non-biological parent, but that those issues could be managed with stable and loving care.

The Magistrate Judge, in a fifty-three-page decision, found that C.C. was withholding her consent to C.M.'s adoption petition contrary to A.S.'s best interests. He considered each of the factors listed in D.C.Code § 16–2353(b) (2001), [6] and noted that the "balance overwhelmingly falls in favor of granting C.M.'s petition." With regard to C.C.'s concerns about biological family and male role models, the Magistrate Judge found that it was more important to A.S.'s development to have stability, and that a fourth move in her life would not promote stability. The Magistrate Judge concluded that A.S. is too young to understand biology, and that if A.S. had issues with her identity later in life, he was confident that C.M. would enroll her in counseling. Further, the Magistrate Judge credited Dr. King's testimony that a male role model can come from outside the home and weighed K.D.'s non-involvement in C.C.'s life until after she was emancipated from the District's care against his performance as a parent. He granted C.M.'s petition and denied the Ds'.

An Associate Judge of the Superior Court affirmed the Magistrate Judge's findings, adding little additional legal or factual analysis before concluding that the Magistrate Judge had given ample consideration to the mother's choice and that the decision was based on clear and convincing evidence. Appellants challenge this ruling.

II. LEGAL STANDARDS

[1] **[2]** **[3]** **[4]** Where a parent whose parental rights are still intact "unequivocally exercise[s] [her] right to designate a custodian," her choice "must be given *weighty consideration,*" and may "be overcome only by a showing, by clear and convincing evidence" that the parent's choice of custodian "is *clearly contrary* to the child's best interest." *In re T.W.M.,* 964 A.2d 595, 602 (D.C.2009) ("*T.W.M. I*") (first emphasis in original, second emphasis added) (citing *In re T.J.,* 666 A.2d 1, 10 (D.C.1995)). "If the trial court has not given sufficient consideration to the natural parent's choice, ... we have generally reversed the trial court's decision." *A.T.A., supra,* 910 A.2d at 297.[7] With that said, it is "important to ***778** recognize that our 'weighty consideration' cases do not 'say that the parents' preferences are necessarily controlling,' " and thus the parents' choice may be overcome by the proper evidentiary showing. *In re R.E.S.,* 19 A.3d 785, 790 (D.C.2011) (quoting *In re C.T.,* 724 A.2d 590, 598 (D.C.1999)). This means that "in a case where there are competing petitions" to adopt a child and one of the petitioners is "favored by the natural parent," the other petitioner bears "the burden of establishing by clear and convincing evidence that placing the child with the parent's preferred caregiver" would be "clearly contrary to [the child's] best interest." *T.W.M. I, supra,* 964 A.2d at 604 (citing *T.J., supra,* 666 A.2d at 16). Clear and convincing evidence is evidence "which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re W.E.T.,* 793 A.2d 471, 478 (D.C.2002) (citations omitted). However, "clear and convincing" does not mean "clear and unequivocal." *Id.*

[5] "We review the trial court's order granting adoption for abuse of discretion, and determine whether the trial court 'exercised its discretion within the range of permissible alternatives, based on all the relevant factors and no improper factors.' " *T.W.M. I, supra,* 964 A.2d at 601 (quoting *T.J., supra,* 666 A.2d at 10). "In that review, we assess whether the trial court applied the correct standard of proof, and then evaluate whether its decision is 'supported by substantial reasoning drawn from a firm factual foundation in the record.' " *Id.*

III. ANALYSIS

A. *Whether the Trial Court Gave "Weighty Consideration" to the Mother's Preference.*

[6] We note at the outset that the circumstances of this case compel us to once again remind trial courts that when a natural parent, with parental rights intact, consents to an adoption petition in a contested adoption proceeding, the trial court cannot merely weigh the competing adoption petitions against one another, as if they began in equipoise. This case came dangerously close to requiring reversal in this regard because the trial court did not make explicit findings on the issue of whether the "weighty consideration" due to the mother's choice of caregiver was overcome by clear and convincing evidence that her choice was "*clearly contrary* " to the best interests of the child. *See, e.g., T.W.M. I, supra,* 964 A.2d at 606 (emphasis added) (finding that the matter of the child's adoption "must be considered anew" where "appellants were prejudiced because the trial court's decision misapplied the law relating to their designation of a custodian for their child, and the adoption decree terminated their parental rights"); *see also R.E.S., supra,* 19 A.3d at 793 (quoting *In re Ja.J.,* 814 A.2d 923, 924 (D.C.2002) ("We have 'granted relief in [ ] cases [where] the trial court had not given sufficient consideration to the alternate custody arrangements proposed by the [parent].' ")); *A.T.A., supra,* 910 A.2d at 297 ***779** ("If the trial court has not given sufficient consideration to the natural parent's choice, ... we have generally reversed the trial court's decision."). We reiterate that courts must, as a threshold inquiry, give "weighty consideration" to "a parent's choice of a fit custodian," "unless it is established that the parent is not competent to make such a decision." *T.J., supra,* 666 A.2d at 11. A natural parent's choice may be "overcome only by a showing, by clear and convincing evidence, that the custodial arrangement ... is *clearly contrary* to the child's best interest." *Id.* In keeping with the fundamental rights at stake in contested adoption proceedings, *see id.,* the focus must remain on the question of whether the party lacking the natural parents' blessing has met his or her burden to overcome the natural parents' contrary preference. Nevertheless, in this particular case, it is clear that the trial court gave extensive consideration

to the merits of the mother's choice of caretaker, the Ds. In its fifty-three-page opinion, the trial court discussed in detail the fitness of the Ds as potential caretakers, but ultimately concluded that moving A.S. from her current home where she has bonded with her foster family would subject her to psychological harm. Thus, we are satisfied that the trial court gave sufficient consideration to the mother's preference. *See R.E.S., supra,* 19 A.3d at 790 (finding that "weighty consideration" standard was satisfied where "the fitness of [the birth parent's] proposed caretakers was the focal point of the trial and of the court's detailed findings of fact and conclusions of law" and "almost all of the evidence presented ... was directed toward this issue").

B. *Whether Honoring the Mother's Preference Would Be "Clearly Contrary" to the Best Interests of the Child.*

[7] Having determined that the trial court gave "weighty consideration" to the mother's choice, we turn to the question of whether sufficient evidence was presented that her choice was "clearly contrary" to the best interests of the child. We have stated that "it is generally contrary to a child's best interest 'to take [her] out of a loving home, when she ha[s] lived [there] for a substantial period of time as a result of her biological parents' inability or unwillingness to care for her.' " *R.E.S., supra,* 19 A.3d at 794 (quoting *In re An.C.,* 722 A.2d 36, 41 (D.C.1998)). We have time and again noted the "importance of stability and continuity when assessing a child's best interests," acknowledging that " 'a stable and desired environment of long standing should not be lightly set aside.' " *In re T.W.M.,* 18 A.3d 815, 820 (D.C.2011) ("*T.W.M. II* ") (quoting *W.E.T., supra,* 793 A.2d at 478); *see also In re L.L.,* 653 A.2d 873, 883 (D.C.1995) ("[I]t would be 'ruthless beyond description' to take a child out of a loving home, when she had lived at that home for a substantial period of time...."); *S.S. v. D.M.,* 597 A.2d 870, 883 n. 35 (D.C.1991) ("[T]he interests of the natural parent cannot overcome the interests of the child in physical and mental health and continuity of care."). With these principles in mind, we conclude that the trial court properly determined that despite C.C.'s preference, the best interests of A.S. would be served by adoption by C.M.

We recently reached a similar conclusion in *T.W.M. II, supra,* 18 A.3d at 820. There, in a contested adoption proceeding between the minor child's adult cousin and the child's current foster mother, the natural mother consented to the cousin's petition and not the foster mother's. The trial court granted the foster mother's petition and the natural parent appealed, arguing that insufficient consideration was given to her preference. Following a remand in ***780** which we ordered the trial court to consider anew the child's adoption giving "weighty consideration" to the birth mother's preference, *see T.W.M. I, supra,* 964 A.2d at 606, we upheld the trial court's grant of the foster parent's petition. *T.W.M. II, supra,* 18 A.3d at 821. In reaching that conclusion, we noted that the trial court properly relied on undisputed evidence that—though the cousin would be a fit caregiver—the child was "securely attached" to the foster parent, and unrebutted expert testimony that removing the child from her foster mother's care could have "potentially devastating" psychological consequences for her. *Id.* Likewise, in *R.E.S., supra,* 19 A.3d at 791–93, we noted that the trial judge properly weighed the child's lack of a relationship with the proposed blood relatives, the child's clear attachment to her foster caregiver, and the child's interest in permanency in concluding that the child's best interests were served by granting the foster parent's adoption despite the birth parent's objection. In reviewing the birth parent's claims on appeal, we stated that "[t]he absence of attachment to a birth parent and his blood relatives is particularly relevant when compared to the loving bond that had been established" between the child and the foster parents. *Id.* at 791. [8] We also approved of the trial court's reliance on the fact the child "had been in foster care and numerous placements for years without permanency," noting that these are "precisely the sort of questions this court has considered when resolving similar claims." *R.E.S., supra,* 19 A.3d at 791, 793.

Applying these precedents to the facts before us, we are satisfied that the trial court appropriately found that honoring C.C.'s choice would be clearly contrary to A.S.'s best interests because she had already been moved three times in her short lifetime and doctors and social workers testified that moving the child once more to an unfamiliar environment and breaking her secure and loving bond with C.M. would create a significant risk of psychological harm to her. The unrebutted evidence showed that A.S. was thriving in C.M.'s care and, as we noted in *T.W.M. II,* the child enjoyed a parent-child relationship with her foster parent. The trial court acknowledged that while the evidence showed that the Ds could be fit caregivers for A.S., the establishment of a secure bond with them was entirely speculative on this record, and, even if such a bond were possible, the process of establishing it would

necessarily uproot the child once more, jeopardizing her interests in stability and permanency. *See R.E.S., supra,* 19 A.3d at 793 (citing *T.M., supra,* 665 A.2d at 951–52 (approving of the "trial judge's concern that uprooting child from her 'home and family of three years and plac[ing] her with an aunt with whom she has had little contact' in the hope that some day her mother could resume caring ***781** 'for her would be contrary to her interests in continuity of care and caretakers and [would] defeat [her] well-founded integration into the stable [ ] home she currently enjoys' ")). Experts testified that transitioning A.S. successfully into the Ds' home would require a long time and intensive support, and that the risk of psychological harm to A.S. would persist even if the transition were done properly. Thus, the evidence presented below was sufficient to establish a "firm belief" on the part of the trial court that placing A.S. with the Ds, in accordance with C.C.'s choice, would be clearly contrary to her best interests. *See W.E.T., supra,* 793 A.2d at 478. Given that finding, and given the fact that C.M.'s petition satisfied all of the factors we require the trial court to consider in granting an adoption, [9] we conclude that the trial court did not abuse its discretion in granting C.M.'s petition and denying the Ds.

C. *Appellants' Arguments Regarding the Fairness of the Proceedings.*

[8] We note that, given the adversarial aspect of these proceedings, the circumstances of this case seemingly placed the Ds at a disadvantage. A.S. had already been living with C.M. for several months at the time of the Ds' petition—as is likely true in many similar cases involving children in the foster system—which gave C.M. ample time to bond with the child. Appellants argue that they were prejudiced by the relatively short amount of time the Ds were allowed to spend with A.S. in order to explore whether the child would also bond with them. They contend that this unfairness violates the "presumption" that the trial court must afford the mother's choice of caregiver.

In the interest of fairness, it may be advisable for the trial court to allow each side in a contested adoption, such as this one, due opportunity to establish an adequate basis for its petition. Notwithstanding, in reviewing appellants' claim of prejudice, "we cannot 'lose sight of the principle that governs in this context—the best interest of the child.' " *R.E.S., supra,* 19 A.3d at 794 (citation omitted); *see In re C.A.B.,* 4 A.3d 890, 899 (D.C.2010) ("[I]t is the child's best interest, not the fundamental right to parent, that is paramount in adoption cases."); *In re M.L.P.,* 936 A.2d 316, 321 (D.C.2007) (Even where we are asked to evaluate whether a parent's rights were violated, "in matters affecting the future of a minor child, the best interest of the child is the decisive consideration."); *L.L., supra,* 653 A.2d at 882 (quotations omitted) ("[T]he overriding consideration is the best interest of the child, which may compel the [trial court to] terminate parental rights regardless of the defaults of public agencies in seeking reunification of the family."); *In re A.B.E.,* 564 A.2d 751, 754 (D.C.1989) ("The legal touchstone in any proceeding to terminate parental rights is the best interest of the child, and that interest is controlling."). While we cannot charge the blood relatives with "c[oming] too late" with a willing adoptive placement for A.S. as we have done in other cases, *see An.C., supra,* 722 A.2d at 41, [10] we cannot count the ***782** alleged inefficiencies of the agency in their favor, either. Where an adoption is "demonstrably in the child's interest," the child "cannot be punished for the alleged wrongs of the bureaucracy." *L.L., supra,* 653 A.2d at 882. Thus, the interests of natural and potential adoptive parents "must give way before the child's best interests." *In re A.B.E., supra,* 564 A.2d at 755. It could not be helped that by the time the Ds began exploring the possibility of adopting A.S., regardless of any blame to be placed on the agency or the blood relatives themselves, the bonding between A.S. and C.M. was already "a fact of life." *In re R.E.S., supra,* 19 A.3d at 791 (quotation omitted). Accordingly, faced with the very real question of the current placement of A.S., the trial judge did not err in considering the facts as they were, not as they may have been were the circumstances more favorable to the Ds. [11] And, as we discussed, those facts established a sufficient basis upon which to conclude that placement with the Ds would be clearly contrary to the best interests of the child.

IV. CONCLUSION

Accordingly, the decision below is *affirmed.*

So ordered.

All Citations

26 A.3d 772

Footnotes

1 A.S.'s biological father is alive and has been identified, but is not relevant to the proceedings as the Magistrate Judge waived his consent to C.M.'s adoption and he did not appeal.

2 C.M. testified, however, that C.C. told her that she actually did not plan on moving to California and would prefer that A.S. stay in the District. The Magistrate Judge credited C.M.'s testimony in this regard.

3 The Ds initially tried to visit A.S. on one occasion and were turned away. They returned in April of 2008, the week of the adoption trial. They had two visits with A.S. then, and two more visits later on. They also communicated at least once by phone.

4 Ms. Murphy's testimony suggests that A.S. did not remember the Ds and had to be reintroduced to them in subsequent visits.

5 No bonding study was conducted with the Ds.

6 Because the adoption of a child necessarily terminates the birth parents' rights to parent that child, the trial court must consider the six factors detailed in D.C.Code § 16–2353(b) (2001) for termination of parental rights. *In re A.T.A.,* 910 A.2d 293, 295 n. 1 (D.C.2006). These factors are:

> (1) the child's need for continuity of care; (2) the physical, mental and emotional health of all individuals involved; (3) the quality of the interaction and interrelationship of the child with his family and caretakers; (3A) consideration of a child's abandonment, if the child was left by his parent in a hospital located in the District of Columbia for at least 10 days following the birth of the child, and the parent's actions to maintain a custodial relationship or contact with the child; (4) to the extent feasible, the child's opinion; and (5) evidence of drug-related activity.

Id.

7 As we discussed in *T.W.M. I, supra,* this standard is "premised on the notions that natural parents have a 'fundamental liberty interest ... in the care, custody, and management of their child[ren]' and they do not lose their constitutionally protected interest in influencing their child's future 'simply because they have not been model parents or have lost temporary custody of their children.' " 964 A.2d at 602 (quoting *T.J., supra,* 666 A.2d at 11–12) (internal citations omitted). We have recognized that "[p]arental liberty interests are fundamental, not fleeting," and "as long as natural parents' parental rights remain intact, their indiscretions or parenting failures alone will not act to automatically sever their right to join in decision-making related to the rearing of their child." *Id.* (citations omitted).

8 *See also In re B.J.,* 917 A.2d 86, 94 (D.C.2007) ("[P]lacement with a non-relative is clearly in the best interests of the children since they do not at this time have a substantial bond with any family members."); *A.T.A., supra,* 910 A.2d at 294–97 (affirming grant of adoption by foster mother despite parent's preference for relative's adoption petition where children had lived with foster mother for about a year before relative met children or filed competing petition); *Ja.J., supra,* 814 A.2d at 924 (finding no error in the trial court's declining to remove children from foster care and place them with mother's preferred caretakers where caretakers "had no relationship with [the boys] and had not seen them for several years"); *An.C., supra,* 722 A.2d at 40–41 (finding it in children's best interests for foster mother to adopt them, rather than placing them with father's chosen caregiver, where children had bonded with foster mother for nearly two years); *In re T.M.,* 665 A.2d 950, 952 (D.C.1995).

9 *See* D.C.Code § 16–2353(b) (2001). The evidence was undisputed that remaining with C.M. would serve A.S.'s interest in continuity of care, that A.S. was thriving in C.M.'s care, and that A.S. was securely bonded with C.M. The trial court did not solicit the child's opinion due to her young age, but the child's *guardian ad litem* supported C.M.'s petition. Further, the trial court noted that no evidence of drug use existed in either home, although C.C. had struggled with drug abuse in her past.

10 We decline to apply the principle that a biological parent's choice of related caretakers should not be afforded the same weighty consideration where the neglected child had been in the custody of foster care for a considerable length of time before the biological parent demonstrated any interest in exploring possible familial placement options. *See An.C., supra,* 722 A.2d at 40–41; *A.T.A., supra,* 910 A.2d at 297. In *An.C., supra,* upon which the trial court relied, the neglected children had lived with their foster mother for two years before the biological father suggested that the children be placed with their paternal grandmother. Similarly, in *A.T.A., supra,* the children had been in foster care for two years before the family members filed for adoption. In *An.C., supra,* we held that the birth parent's suggestion "came too late" to be afforded weighty consideration. 722 A.2d at 41. Conversely, in *A.T.A., supra,* we found that because "the record d[id] not indicate that [the birth parent] was derelict in exploring family members who could be potential caretakers, ... it [was] unnecessary to decide the extent to which our holding in *In re An.C.* [wa]s applicable." 910 A.2d at 297 n. 4. Here, because the trial court did not find that the birth parents were derelict in locating other family members to adopt the child—in fact, the birth

mother was unaware of her father's identity until only a few months before C.M. filed her adoption petition—we conclude similarly to the panel in *A.T.A.* that the birth mother's choice should have been entitled to weighty consideration.

11 Granting appellants relief based on this argument would sponsor the "wait and see" approach which we have rejected in other cases. *See R.E.S., supra,* 19 A.3d at 793 n. 9 (quoting *In re J.G.,* 831 A.2d 992, 1001 (D.C.2003)) ("The 'wait and see' approach of 'indefinitely deferring adoption or termination of parental rights [leaving a child in 'legal limbo' for the foreseeable future] is inappropriate where [the likelihood of a different option succeeding] within a reasonable time is entirely speculative.' ").

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78 A.3d 327
District of Columbia Court of Appeals.

W.H., Appellant,
v.
D.W., et al., Appellees.

No. 11–FM–1334.
|
Argued Nov. 15, 2012.
|
Decided Oct. 24, 2013.

Synopsis

Background: Children's half brother and their maternal grandmother filed complaint for custody of children after their mother died. Biological father moved to dismiss complaint and counterclaimed for custody. The Superior Court, District of Columbia, John Bayly and Hiram E. Puig–Lugo, JJ., denied motion to dismiss, and subsequently entered order awarding joint legal and physical custody of children to brother and grandmother. Father appealed.

Holdings: The Court of Appeals, Reid, Senior Judge, held that:

[1] brother met statutory requirements for seeking third-party custody of children after their mother died, under District of Columbia Safe and Stable Homes for Children and Youth Act;

[2] brother had Article III standing to seek custody of children;

[3] grandmother was not de facto parent authorized to seek custody of children;

[4] grandmother did not meet statutory criteria for seeking third-party custody of children;

[5] awarding grandmother joint legal and physical custody of children was in best interests of children; and

[6] brother and grandmother adequately rebutted statutory presumption in favor of parental custody.

Affirmed.

West Headnotes (25)

[1] Appeal and Error
Cases Triable in Appellate Court

Appeal and Error
Clearly erroneous findings

Whether a party has standing is a question of law reviewed de novo; however, underlying factual determinations are reviewed under the "clearly erroneous" standard.

Cases that cite this headnote

[2] Action
Persons entitled to sue

Standing is a threshold jurisdictional question which must be addressed prior to and independently of the merits of any party's claim.

1 Cases that cite this headnote

[3] Action
Persons entitled to sue

The question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues, that is, whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of jurisdiction and to justify exercise of the court's remedial powers on his behalf.

1 Cases that cite this headnote

[4] Action
Persons entitled to sue

Article III standing exists only to redress or otherwise to protect against injury to the complaining party. U.S.C.A. Const. Art. 3, § 1 et seq.

Cases that cite this headnote

[5] **Action**
Persons entitled to sue

Standing requires actual or threatened injury, and such injury may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.

Cases that cite this headnote

[6] **Action**
Persons entitled to sue

One manifestation of injury in fact that will create standing is the violation of legal rights created by statute.

Cases that cite this headnote

[7] **Action**
Persons entitled to sue

An "injury in fact" may be shown, as a prerequisite to standing, in part, by an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.

1 Cases that cite this headnote

[8] **Action**
Persons entitled to sue

In order to have standing, a plaintiff must show a judicially cognizable interest of his or her own, and a generalized grievance is insufficient as a basis for standing.

Cases that cite this headnote

[9] **Statutes**
Language and intent, will, purpose, or policy

The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used.

Cases that cite this headnote

[10] **Statutes**
Plain Language;Plain, Ordinary, or Common Meaning

The court interprets the words used by the legislature according to their ordinary sense and with the meaning commonly attributed to them.

Cases that cite this headnote

[11] **Statutes**
Related provisions

When interpreting a statute, the court does not read statutory words in isolation; the language of surrounding and related paragraphs may be instrumental to understanding them.

Cases that cite this headnote

[12] **Statutes**
Legislative History

In appropriate cases, a court will consult the legislative history of a statute to determine its meaning.

Cases that cite this headnote

[13] **Parent and Child**
Care, Custody, and Control of Child; Child Raising

Parents have a fundamental right to make decisions concerning the care, custody and control of their children.

Cases that cite this headnote

[14] **Constitutional Law**
Parent and Child Relationship

The liberty protected by the Due Process Clause includes the right of parents to establish a home and bring up children and to control the education of their own. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[15] **Infants**

Interest, role, and authority of government in general

So long as a parent adequately cares for his or her children, there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Cases that cite this headnote

[16] **Constitutional Law**

Parent and Child Relationship

Natural parents do not lose their constitutionally-protected right to care for, have custody of, and manage their children simply because they have not been model parents or have lost temporary custody; nevertheless, the constitutionally-protected right is not absolute and must yield to the child's best interest and well-being, which is the overriding concern. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[17] **Parent and Child**

As to Paternity;Presumed Fatherhood

The right to presumptive custody of a fit, unwed, noncustodial father who has grasped the opportunity to be involved in his child's life can be overridden only by a showing by clear and convincing evidence that it is in the best interest of the child to be placed with someone else.

Cases that cite this headnote

[18] **Infants**

"De facto" or presumed parent or status in general

The District of Columbia Safe and Stable Homes for Children and Youth Act creates a legal right of a de facto parent, or a third party who meets statutory requirements, to take over the duties and responsibilities normally assumed by a natural or biological parent; however, to have standing in a court of law, the de facto parent or the third party must satisfy the statutory requirements for standing and must show the existence of a case or controversy within the meaning of Article III. U.S.C.A. Const. Art. 3, § 1 et seq.; D.C. Official Code, 2001 Ed. § 16–831.01 et seq.

Cases that cite this headnote

[19] **Child Custody**

Adult siblings

Children's brother met statutory requirements for seeking third-party custody of children after their mother died, under District of Columbia Safe and Stable Homes for Children and Youth Act; he lived with children in same household since their birth, and therefore, lived with them in same household for at least four of six months immediately preceding filing of complaint for custody, and brother had primarily assumed duties and obligations for which parent was legally responsible. D.C. Official Code, 2001 Ed. § 16–831.02(a)(1)(B)(i, ii).

Cases that cite this headnote

[20] **Child Custody**

Adult siblings

Child Custody

Parties;intervention

Children's brother had Article III standing to seek custody of children after their mother died, under District of Columbia Safe and Stable Homes for Children and Youth Act; brother faced imminent, concrete, and particularized deprivation of his statutory right to assume duties and obligation of parent, which he had undertaken before mother died, when children's biological father filed motion to dismiss brother's complaint and counter-claimed for custody, and father's opposition to brother's complaint provided actual controversy. U.S.C.A. Const. Art. 3, §

1 et seq.; D.C. Official Code, 2001 Ed. § 16–831.01 et seq.

Cases that cite this headnote

[21] **Child Custody**

Conduct or Status of Child's Parent or Custodian

Children's maternal grandmother was not de facto parent authorized to seek custody of children after their mother died, under District of Columbia Safe and Stable Homes for Children and Youth Act; grandmother did not live with children in same household at time of their birth, she did not live with children in same household for at least ten 12 months immediately preceding filing of complaint for custody, and she did not hold herself out as children's parent with agreement of their mother or father. D.C. Official Code, 2001 Ed. § 16–831.01(1)(B)(i).

Cases that cite this headnote

[22] **Child Custody**

Conduct or Status of Child's Parent or Custodian

Children's maternal grandmother did not meet statutory requirements for seeking third-party custody of children after their mother died, under District of Columbia Safe and Stable Homes for Children and Youth Act, where she did not reside in same household with children for at least four of six months immediately preceding filing of complaint for custody. D.C. Official Code, 2001 Ed. § 16–831.02(a)(1)(B)(i).

Cases that cite this headnote

[23] **Child Custody**

Grounds and factors in general

Order awarding children's maternal grandmother joint legal and physical custody of mother's children after mother died was in best interests of children, even though grandmother did not meet statutory criteria for seeking third-party custody of children under District of Columbia Safe and Stable Homes for Children and Youth Act in view of evidence of her longstanding involvement in care of children, frequency of her contact with them, and other evidence of important role that grandmother had played in their lives. D.C. Official Code, 2001 Ed. §§ 16–831.01, 16–831.02(a)(1)(B)(i, ii), 16–831.04(a)(5).

Cases that cite this headnote

[24] **Child Custody**

Adult siblings

Child Custody

Presumption in favor of parent

Presumption under District of Columbia Safe and Stable Homes for Children and Youth Act that custody of children with father was in their best interests after their mother died was adequately rebutted, on complaint for custody filed by children's half brother, by evidence that father had been unwilling to care for children and was uninvolved in their lives for significant periods of time, that children wanted to continue living with their brother who had cared for them when mother became ill and after she died, because they were "afraid that [father] may leave them over at his friend's house most of the time and not pay much attention to them," that father had failed to report for supervised visitation with children and was unresponsive during home study process, and that he had lived with older child for less than one month of her life and had never resided with younger child. D.C. Official Code, 2001 Ed. § 16–831.05(a).

Cases that cite this headnote

[25] **Child Custody**

Presumption in favor of parent

The District of Columbia Safe and Stable Homes for Children and Youth Act's rebuttable presumption that custody with the parent is in the child's best interests is consistent with the constitutionally recognized fundamental right of parents to make decisions concerning the care, custody

and control of their children, but the parental presumption also accords with the principle that a parent's constitutionally-protected right is not absolute and must yield to the child's best interest and well-being, which is the overriding concern. D.C. Official Code, 2001 Ed. § 16–831.05(a).

Cases that cite this headnote

Attorneys and Law Firms

***330** Michael A. Troy, for appellant.

Anna Myles–Primakoff, with whom Melissa Colangelo was on the brief, for appellees.

Before BLACKBURNE–RIGSBY and EASTERLY, Associate Judges, and REID, Senior Judge.

Opinion

REID, Senior Judge:

This case involves a justiciability question, that is, whether appellees, D.W. and J.W., have standing under a District of Columbia statute that authorizes custody by persons other than a natural or biological parent. The case also raises an issue concerning the presumption that a natural or biological parent, here appellant W.H. III ("W.H."), has the right to custody of his children.

W.H. appeals from the order of the Family Court granting joint legal and physical custody of his biological children, T.H. and W.H. IV, to their brother, D.W.[1] and their maternal grandmother, J.W.; the order provided for supervised visitation by W.H. The Family Court issued its order after D.W. and J.W. applied for custody of T.H. and W.H. IV under the District of Columbia Safe and Stable Homes for Children and Youth Act of 2007 ("the Act"), D.C.Code §§ 16–831.01, *et seq.* (2012 Repl.). As we discuss below, among other provisions, the Act creates a legal right on the part of a third party, defined as someone who has lived with a child for a specified period of time and who also has "primarily assumed the duties and obligations for which a parent is legally responsible"; the third party has a legal, statutory right to seek legal and physical custody of the child, that is, legal responsibility for the child, thereby "promot[ing] a safe and stable home for [the] child." *See* D.C.Code § 16–831.02(B)(i) and (ii); *see also* COUNCIL OF THE DISTRICT OF COLUMBIA, COMMITTEE ON PUBLIC SAFETY AND THE JUDICIARY, REPORT ON BILL 17–41, "SAFE AND STABLE HOMES FOR CHILDREN AND YOUTH AMENDMENT ACT OF 2007," 1 (Comm. Print 2007). The Act also includes a rebuttable parental presumption, specifies the factors for refutation of that presumption by clear and convincing ***331** evidence, and calls for custody to be awarded based upon the best interests of a child. D.C.Code §§ 16–831.05, 16–831.07.

W.H. challenges the judgment of the Family Court, arguing that the Family Court "erred in finding that the plaintiffs individually and/or jointly had standing, and erred in awarding custody to them," because (1) as the biological father of the children, he "has a preferred status under the Act"; (2) third party custody "standing has not yet been found to be a constitutional undertaking by the District of Columbia"; and (3) D.W. and J.W. "lack standing to bring their claim against [W.H.], the children's biological father." We conclude that (1) the Family Court correctly determined that D.W. has standing to bring a complaint for custody under the Act; (2) although J.W. does not have standing under the Act, the Family Court did not err by awarding custody of T.H. and W.H. IV jointly to D.W. and J.W. based on the best interests of the children; and (3) the Family Court properly found that D.W. and J.W. rebutted the statutory parental presumption by clear and convincing evidence. Consequently, we affirm the judgment of the Family Court.

FACTUAL SUMMARY

The record reveals that T.H. and W.H. IV, born in 1998 and 1999 respectively, are the biological children of W.H. and C.W. W.H. and C.W. resided together for only about one month. The children lived with their mother and D.W., who was born in 1991. Because C.W. experienced serious health problems, her mother, J.W., as well as D.W., provided increasing care for and nurture of T.H. and W.H. IV. C.W. died of an epileptic seizure in August 2010.

A few days after C.W.'s death, D.W. filed a complaint for custody of the children, indicating that he was the

caretaker of T.H. and W.H. IV. He sought sole legal and physical custody of the children. He requested child support from W.H. D.W. and J.W. lodged an amended complaint for custody of the children on September 7, 2010. They requested joint legal and physical custody, and child support from W.H. The Honorable John Bayly issued an order, *pendente lite,* on the same day, requiring the children "to remain in the physical custody of [D.W. and J.W.]," with supervised visitation by W.H. The judge also placed the children in the "shared" legal custody of D.W., J.W., and W.H. In addition, Judge Bayly issued an order, on September 10, 2010, for home studies relating to the children.

On February 7, 2011, W.H. sought to dismiss the amended complaint on the ground that D.W. and J.W. did not have standing under the Act. Specifically, W.H. asserted that in accordance with D.C.Code § 16–831.02(b)(1), "[a] parent may move to dismiss a third party's claim at any time on the grounds that the third party does not meet the statutory requirements for standing under the Act," including D.C.Code § 16–831.02(a)(1). [2] In his opposition ***332** to W.H.'s motion to dismiss, D.W. argued that (1) he had standing under the Act as T.H.'s and W.H. IV's "de facto parent," [3] (2) he also had standing to file for custody of the children as a third-party under D.C.Code § 16–831.02(a)(1)(B)(i) and (ii), and (3) clear and convincing evidence refuted the statutory parental presumption.

Judge Bayly held a hearing on the motion to dismiss, on May 4, 2011. [4] He determined that D.W. had standing within the meaning of §§ 16–831.02(a)(1)(B)(i) and (ii), and that W.H. had not assumed his parental responsibilities "at all." Therefore, he decided that D.W. could "proceed as Plaintiff in this case." He did not reach a definitive conclusion as to J.W.'s standing, but he "proceed[ed] as though [J.W.] [were] here as Plaintiff," while he continued to think about "the unusual factual situation." After the hearing, Judge Bayly issued an order on May 4, 2011, declaring that: "Upon consideration of" D.W.'s "Opposition ... and all evidence herein, ... Defendant's Motion to Dismiss for Lack of Standing is DENIED."

The case was transferred to the Honorable Hiram Puig–Lugo sometime in August 2011. On August 29, 2011, W.H. filed a "Contested Answer to Complaint for Custody and/or Access to Children and Counterclaim for Custody and/or Access to Children." The trial court conducted an evidentiary hearing on the same day. D.W., J.W. and Ms. Bradford testified on behalf of Plaintiffs D.W. and J.W.; and W.H. and his fiancée testified on his behalf.

***333** D.W.'s testimony revealed the following information. He was twenty years old at the time he testified, he worked about 24–27 hours a week, and he was the primary care giver for T.H. and W.H. IV. He has lived with them since their respective births, which is thirteen years in the case of T.H. Prior to her death, C.W. was "severely ill," and experienced "really bad seizures." As a result, "[s]he was normally in the bed for two weeks, three weeks at a time out of the month." D.W. cooks and cleans, attends school meetings, has conferences with the children's teachers, and accompanies the children to many functions as their guardian. He also assists in paying the rent, does the shopping, buys the children's clothes, and does the laundry. Because both children have asthma, and W.H. IV also suffers from attention deficit and hyperactivity disorder, and because the children still are grieving over the loss of their mother, D.W. ensures that they get to appointments with doctors and therapists, and that they take their required medication. His grandmother helps with the care of the children.

During C.W.'s life, W.H. lived with T.H. for only "three weeks to a month," never lived with W.H. IV, and visited with his children only "two to three times out of the year." When W.H. IV and T.H. were around nine and ten years old, respectively, W.H. did not see them for a two-year period. After C.W.'s death, the children stayed with him for about three weeks in the summer of 2010, but W.H. usually did not keep his visitation appointments, and he failed to celebrate their birthdays. During the then current year, 2011, W.H. had sent only three checks in support of the children. The children "fear" the prospect of living with their father; they informed D.W. that they are "afraid that [W.H.] may leave them over at his friend's house most of the time and not pay much attention to them." D.W. stated that he "would rather [the children] see [W.H.]," and that "they would love to see him more often, but they would rather stay with [D.W.]"

J.W., a full-time government employee, testified about her frequent contact with T.H. and W.H. IV (seven days a week), but indicated that C.W. and D.W. were "primary caregivers" for the children, and after C.W.'s death, D.W. remained their primary caregiver. J.W. lives

about seven miles from D.W.'s residence; two adult sons reside with her. She confirmed the major caretaking tasks that D.W. performed (for example, cooking, shopping, doing the laundry), the contact of the children with their father only two to three times a year, and W.H.'s absence for a two-year period before C.W. died. J.W. described D.W.'s relationship with the children as "pretty good." She has watched their interaction especially on Fridays or Saturdays at their "family night" during which they play games or watch a movie. T.H. and W.H. IV have a "very close" relationship with J.W.'s adult daughter and her three children. However, when W.H. "comes around," W.H. IV "doesn't say a lot," and T.H. "always argue[s] with him, asking him where he's been and why it took so long to contact them." The children would rather stay with D.W. T.H. has stated that when W.H. takes them for a visit, he tends to "drop[ ] them off with somebody, or leav[e] them in the car for a couple of hours at a time."

Ms. Bradford, discussed her home study investigation and report. She was able to complete the study of the homes of D.W. and J.W., but never received a response from W.H. to her contact letter or voice mail messages. She observed the interactions of D.W., T.H. and W.H. IV in their home, and the children took Ms. Bradford on a tour of their home. Each child had a separate bedroom and there was sufficient ***334** food and clothing in the home. She concluded that the children "were very respectful and comfortable at home"; they were in "a safe environment"; and "they treat [D.W.] as a parental figure." Ms. Bradford recommended that the children remain in the joint custody of D.W. and J.W. Judge Puig–Lugo admitted the home study report and recommendation into evidence.

W.H. resides in Fredericksburg, Virginia with his fiancée and her five children; when he testified, he had lived in Virginia for two years. His fiancée was pregnant with his child. W.H. is employed as a bus driver for a private company. He claimed that he had an arrangement with C.W. from 2002 to her death. "[He] got the kids every weekend and every summer, all summer long." After C.W.'s demise, he "kept the children for three or four days," then he had to go to work for a day, but told the children that he would "be by [the next day]." The children asked to spend the night at their grandmother's house. However, when he went back, he received "the subpoena to come to court for custody." He became "upset" and "had [a] big argument," apparently with J.W. and D.W. [5]

W.H. acknowledged that he had not had contact with his children since the Family Court awarded temporary custody to D.W. and J.W. He claimed that when he would call J.W., either "they hung up the phone or they're not at home." Therefore, he "just stopped calling." W.H. explained that he had been out of work for a year due to a spinal and neck injury, and he had returned to his job in late September 2010. In addition, his fiancée had a medical problem, and then she was injured in a bus accident. She gave birth to a child who only lived one week.

W.H. admitted that at the time of C.W.'s death, he owed $13,000 in child support, but claimed that he could not pay because he had been out of work. In response to questions from Judge Puig–Lugo, W.H. said he had seen his children only "twice" since the court entered the temporary custody order, and that the last time he saw his children was "maybe middle of September" 2010. He insisted that he had called the Family Court's Supervised Visitation Center but he "never got in contact with [anyone]." But, he also asserted that he "spoke with one person," and "she didn't know exactly who was on the case but they would contact both parties."

W.H.'s fiancée testified that she "consider[ed] [T.H. and W.H. IV]" like "[her] kids," and "[l]ike a best friend." She described the personal problems she had in late September and early October 2010; her uncle was terminally ill and she suffered problems with her pregnancy. She characterized W.H. as "a fit and proper person to have custody of his two children." She had not seen the children "[s]ince their mother passed," and she could not recall the exact date on which she last saw them. She would "see [the children] on weekends or ... if they're out of school, they'll come over, in the summertime." In response to Judge Puig–Lugo's question about the "kind of things ... the children [did] when they were with [her] during the summers," the fiancée answered: "We did like a lot of outside activities. We take them out [to] movies." ***335** She added: "Anytime we can't get out, we do like family time inside."

Judge Puig–Lugo made extensive oral findings based on the testimony and documentary evidence, and he drew conclusions about the interpretation of the applicable statutory provisions, including the rebuttable parental presumption, [6] and third party custody. He credited testimony given by D.W. and J.W. The judge specifically discredited W.H.'s testimony concerning his efforts to be

involved in the children's lives, and generally discredited that of W.H.'s fiancée.

Judge Puig–Lugo also issued written findings and conclusions of law on September 21, 2011. He reiterated much of the trial testimony given by D.W. and J.W. regarding their caretaker relationship with the children, commented on the failure of W.H. to keep his supervised visitation appointments with the children, and found that: "[b]oth children wish to continue living with their brother, [D.W.], and frequently staying with their grandmother, [J.W.]." He concluded that D.W. "has standing to file a third party complaint pursuant to D.C.Code § 16–831.02(a)(1)(B)," and that J.W. "has standing to file for third party custody because pursuant to D.C.Code § 16–831.04(a)(5),[7] an order may include any custody arrangement that the [c]ourt determines is in the best interests of the child." He further found that there is clear and convincing evidence to rebut the parental presumption under D.C.Code § 16–831.07,[8] because of W.H.'s lack of involvement with the ***336** children, his failure to (1) visit with them, (2) respond to and participate in the home study process, (3) make child support payments, and (4) "participate [in] the children's lives overall"; these failures "amount [ ] to abandonment." Judge Puig–Lugo also declared that "exceptional circumstances support rebuttal of the presumption favoring parental custody because the children have lived their entire lives in the same home with the constant support and presence of [D.W.], who has helped raise them," and because "the children see [D.W.] as a parental figure." Finally, Judge Puig–Lugo considered and applied the factors, set forth in D.C.Code § 16–831.08, that determine the best interests of the child.[9]

W.H. noticed a timely appeal.

ANALYSIS

W.H. first argues that the trial court erred because it failed to recognize that as the biological father of T.H. and W.H. IV, he "has a preferred status under the Act." Second, he contends that standing for third parties to sue for custody "has not yet been found to be a constitutional undertaking by the District of Columbia," and that the Supreme Court of the United States has not "embraced" the kind of standing reflected in the Act. Third, he maintains that neither D.W. nor J.W. has standing under the Act.

D.W. and J.W. assert that W.H. has challenged neither the trial court's factual findings relating to the statutory parental presumption, nor the award of shared joint and legal custody of the children to D.W. and J.W. on the ground of "the children's best interests under [D.C.Code] § 16–831.04." They argue that D.W. has standing under D.C.Code § 16–831.02(a)(1)(B) (relating to standing based on third party custody), and § 16–831.02(a)(1)(C) (pertaining to standing based on "exceptional circumstances"). They contend that the trial court properly determined that placement of the children under the shared physical and legal custody of D.W. and J.W. was consistent with the best interests of the children. Furthermore, they believe that if J.W. does not qualify for custody of the children under the Act, then sole physical and legal custody of the children should be given to D.W.

Standard of Review and Applicable Legal Principles

[1] **[2]** "Whether appellants have standing is a question of law reviewed *de novo;* however, underlying factual determinations are reviewed under the clearly erroneous standard." *Gaetan v. Weber,* 729 A.2d 895, 897 (D.C.1999) (citation omitted); *see also Daley v. Alpha Kappa Alpha Sorority, Inc.,* 26 A.3d 723, 729 (D.C.2011). ***337** " 'Standing is a threshold jurisdictional question which must be addressed prior to and independent[ly] of the merits of any party's claim.' " *Grayson v. AT & T Corp.,* 15 A.3d 219, 229 (D.C.2011) (en banc) (quoting *Bochese v. Town of Ponce Inlet,* 405 F.3d 964, 974 (11th Cir.2005)) (citations omitted).

[3] **[4]** **[5]** **[6]** **[7]** **[8]** Even though we are an Article I court under the Constitution, "our cases consistently have followed the constitutional minimum of standing" required by Article III. *Grayson, supra,* 15 A.3d at 235. " 'In essence[,] the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues .... [so far as Article III is concerned, *that is,*] whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of ... jurisdiction and to justify exercise of the court's remedial powers on his behalf.' " *Id.* at n. 19 (quoting *Warth v. Seldin,* 422 U.S. 490, 498–99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). Article III "confines the judicial power of federal courts to deciding actual cases or controversies." *Hollingsworth v. Perry,*

—U.S. ——, 133 S.Ct. 2652, 2661, 186 L.Ed.2d 768 (2013). Furthermore, "[Article] III judicial power exists only to redress or otherwise to protect against injury to the complaining party." *Grayson, supra,* 15 A.3d at 235 (quoting *Warth, supra,* 422 U.S. at 498, 95 S.Ct. 2197). Article III requires "actual or threatened injury," and such injury "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Id.* at 224–25 (citing *Warth, supra,* 422 U.S. at 500–01, 95 S.Ct. 2197) (internal quotation marks and citations omitted). "One manifestation of injury in fact is the violation of legal rights created by statute." *Id.* at 234. Thus, an "injury in fact" may be shown, in part, by "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *United States v. Windsor,* —— U.S. ——, 133 S.Ct. 2675, 2685, 186 L.Ed.2d 808 (2013) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)) (internal quotation marks omitted). In that regard, a plaintiff must show "a judicially cognizable interest of [his or her] own," and "a generalized grievance" is insufficient as a basis for standing. *Hollingsworth, supra,* 133 S.Ct. at 2662, 2663.

[9] [10] [11] [12] Statutory interpretation principles are applicable to this case because we must interpret District of Columbia statutory provisions pertaining to third party custody and the rebuttable parental presumption. "[I]nterpreting a statute or a regulation is a holistic endeavor." *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 528, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (internal quotation marks and citation omitted); *see also Tippett v. Daly,* 10 A.3d 1123, 1127 (D.C.2010) (en banc). "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used." *Peoples Drug Stores, Inc. v. District of Columbia,* 470 A.2d 751, 753 (D.C.1983) (en banc) (internal quotation marks omitted). We interpret the words used by the legislature "according to their ordinary sense and with the meaning commonly attributed to them." *Id.* at 753 (internal quotation marks and brackets omitted). "[W]e do not read statutory words in isolation; the language of surrounding and related paragraphs may be instrumental to understanding them." *District of Columbia v. Beretta, U.S.A., Corp.,* 872 A.2d 633, 652 (D.C.2005) (en banc). "In appropriate cases, we also consult the legislative history of a statute." *Abadie v. District of* ***338** *Columbia Contract Appeals Bd.,* 843 A.2d 738, 742 (D.C.2004) (citation omitted).

[13] [14] [15] [16] [17] In addition to applying the canons of statutory interpretation, this case requires us to examine legal principles governing certain fundamental parental rights and the limits on the exercise of those rights, because a statutory presumption may have "constitutional underpinnings." *See In re D.S.,* 60 A.3d 1225, 1228 (D.C.2013) (citation omitted) (*In re D.S. II*). Parents have a "fundamental right ... to make decisions concerning the care, custody and control of their children." *Troxel v. Granville,* 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (citations omitted). "The 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children' and 'to control the education of their own.' " *Id.* at 65, 120 S.Ct. 2054. "So long as a parent adequately cares for his or her children ..., there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68–69, 120 S.Ct. 2054 (citation omitted). Natural parents do not lose their constitutionally-protected right to care for, have custody of, and manage their children "simply because they have not been model parents or have lost temporary custody of their children to the State." *In re C.M.,* 916 A.2d 169, 179 (D.C.2007) (citing *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)) (internal quotation marks omitted). Nevertheless, the constitutionally-protected right "is not absolute and must yield to the child's best interest and well-being, which is the overriding concern." *Id.* (internal quotation marks and citation omitted). But, "the right to presumptive custody of a fit, unwed, noncustodial father who has grasped the opportunity to be involved in his child's life can be overridden only by a showing by clear and convincing evidence that it is in the best interest of the child to be placed with someone else." *In re D.S.,* 52 A.3d 887, 888 (D.C.2012) (*In re D.S. I*), *as clarified in part by In re D.S. I, supra,* on petition for rehearing.

The Standing Issues

Because standing is a threshold issue that must be decided prior to considering the merits of a case, *see Grayson, supra,* 15 A.3d at 229, we first address the standing issues raised by W.H. As we understand it, part of W.H.'s contention is that the Supreme Court has never "embrace[d]," or "directly spoken on" the kind of "broad third-party standing" embodied in the Act, nor has "[s]uch standing ... been found to be a constitutional undertaking

by the District of Columbia." [10] By mixing or ignoring different statutory provisions and words of the Act that confer ***339** standing on third parties on different grounds, [11] W.H. loosely and insufficiently describes the Act as "establish[ing] a framework for finding standing to file a custody action to [*sic*] third parties with whom a minor child has established a strong emotional tie and who has assumed parental responsibilities for that minor child." Basically, he mixes part of the definition of a *de facto* parent with part of the third party custody provision. In the second part of his standing argument, W.H. claims that neither D.W. nor J.W. has standing under the Act.

We conclude that the Family Court did not run afoul of constitutional standing requirements, as those requirements have been interpreted and applied not only by the Supreme Court, but also by this court. In addition, we hold that D.W. has standing under D.C.Code § 16–831.02(a)(1)(B)(i) and (ii) of the Act. However, we further hold that J.W. does not have standing under either the *de facto* parent or the third party provisions of the Act, but that the Family Court did not err in permitting her to remain in the case as an interested party plaintiff; nor did the Family Court err by including her in the award of joint legal and physical custody of the children, consistent with D.C.Code § 16–831.04(a)(5), and § 16–831.13 (which preserves the Family Court's common law and equitable jurisdiction).

As this court extensively discussed in *Grayson, supra,* the Supreme Court has articulated principles governing both constitutional standing under Article III, and prudential or judicially adopted principles of standing. We have followed those principles in our cases. *Grayson* also makes clear that provisions enacted by the Council of the District of Columbia may provide a basis for satisfying the constitutional standing requirement of " 'an injury-in-fact ..., even though the plaintiff would have suffered no judicially cognizable injury in the absence of the statute.' " *Floyd, supra,* 70 A.3d at 251 (quoting *Grayson, supra,* 15 A.3d at 249).

[18] Here, the Act creates a legal right of a *de facto* parent, or a third party who meets statutory requirements, to take over the duties and responsibilities normally assumed by a natural or biological parent. However, to have standing in a court of law, the *de facto* parent or the third party must satisfy the statutory requirements and must show the existence of a case or controversy within the meaning of Article III.

[19] D.W. satisfies the requirements of D.C.Code § 16–831.02(a)(1)(B)(i) and (ii). [12] In order for a third party to "file a complaint for custody of a child," D.W. must have "lived in the same household as the child for at least 4 of the 6 months immediately preceding the filing of the complaint ... for custody." The ordinary meaning of "to live in" is "to reside," and "to reside" means "to live in a place for a permanent or extended time." WEBSTER'S II NEW COLLEGE DICTIONARY 656, 965 (3d ed. 2005). Because D.W. has resided continually in the same house as T.H. and W.H. IV since their respective births in 1998 and 1999, he lived with the children "at least 4 of the 6 months immediately preceding the filing of [his] complaint ... for custody," as the Family Court found. Under the statutory ***340** provision, D.W. must also have "primarily assumed the duties and obligations for which a parent is legally responsible." D.C.Code § 16–831.02(a)(1)(B)(i) "Primarily" means "principally" or "chiefly." WEBSTER'S, *supra* at 698. "Assume" means to "take on." *Id.* at 70. Based on testimony at the evidentiary hearing, the factual findings and credibility determinations of the Family Court, there is no doubt that D.W. mainly took on the duties and obligations for which a natural or biological parent is responsible; during C.W.'s illness, she was unable to assume those duties and obligations. D.W. dropped out of school in the 12th grade to assume them, and he continued to perform those duties after C.W. died, as the Family Court found.

[20] The remaining question is whether in the context of this case, D.W. satisfied constitutional standing requirements to bring his third party complaint for custody of the children. When W.H., the surviving natural or biological parent of the children (whose involvement with his children was minimal or non-existent through the years), filed his motion to dismiss and his counterclaim for custody, D.W. was threatened with deprivation of his statutory right to assume the duties and obligations for which a parent is legally responsible. And, the deprivation or invasion of D.W.'s legally protected interest was "concrete and particularized, ... imminent, not conjectural or hypothetical." *Windsor, supra,* 133 S.Ct. at 2685. (quoting *Lujan, supra,* 504 U.S. at 560–61, 112 S.Ct. 2130). As such, D.W. had such " 'a personal stake in the outcome of the controversy' " (regarding who should have custody of the children) " 'as to warrant his invocation of'

the court's jurisdiction." *Grayson, supra,* 15 A.3d at 234 (quoting *Warth, supra,* 422 U.S. at 498–99, 95 S.Ct. 2197). W.H.'s opposition to D.W.'s complaint also provided the actual controversy and adversarial posture required under Article III, *Hollingsworth, supra,* 133 S.Ct. at 2661, and under prudential standing requirements, *Windsor, supra,* 133 S.Ct. at 2685, 2687, and 2688.

[21] While we hold that D.W. had standing as a third party within the meaning of D.C.Code § 16–831.02(a)(1)(B)(i) and (ii), we conclude that J.W. does not satisfy the requirements of a *de facto* parent under § 16–831.01(1) and § 16–831.03(a) because she did not "live[ ] with [T.H. and W.H. IV] in the same household at the time of the [children's] birth," D.C.Code § 16–831.01(1)(A)(i), and did not "live[ ] with [them] in the same household for at least 10 of the 12 months immediately preceding the filing of the complaint ... for custody." D.C.Code § 16–831.01(1)(B)(i). Moreover, J.W. "has [not] held ... herself out as the [children's] parent with the agreement of the [children's] parent." D.C.Code § 16–831.01(1)(A)(iii), § (1)(B)(iv).

[22] **[23]** Nor does J.W. satisfy the statutory requirements for a third party who may bring a complaint for custody because she did not "live[ ] in the same household as the [children] for at least 4 of the 6 months immediately preceding the filing of the complaint ... for custody." D.C.Code § 16–831.02(a)(1)(B)(i). Nevertheless, because of her longstanding involvement in the care of the children, the frequency of her contact with the children, and the other factual findings of the Family Court revealing that she has played an important role in the lives of the children, we cannot say that including her in the award of joint legal and physical custody of the children constituted error, given the Family Court's statutory authority to enter "[a]ny other custody arrangement the court determines is in the best interests of the child." D.C.Code § 16–831.04(a)(5). Indeed, the Act clearly provides that: "Nothing in [the ***341** chapter pertaining to third-party custody] shall be construed ... to preempt any authority of the court to hear and adjudicate custody claims under the court's common law or equitable jurisdiction." D.C.Code § 16–831.13.

The Rebuttable Parental Presumption

[24] W.H. contends that as the biological father of T.H. and W.H. IV, he "has a preferred status under the Act." Citing *Shelton v. Bradley,* 526 A.2d 579, 580 (D.C.1987), W.H. emphasizes the "strong presumption that, upon the death of one parent, the surviving parent will have custody of any minor children." He asserts that "it is not enough for a court to find that a certain party will possibly be a better parent for a minor child; instead, extremely sufficient evidence must be found to take a child away from his or her rightful parent."

[25] In considering W.H.'s arguments, we first note that neither the Act nor the Family Court's judgment terminates W.H.'s parental rights. He is still the natural, biological father of T.H. and W.H. IV. In fact, the Act specifically contains a "rebuttable presumption ... that custody with the parent is in the child's best interests." D.C.Code § 16–831.05(a). This presumption is consistent with the constitutionally recognized "fundamental right [of parents] to make decisions concerning the care, custody and control of their children." *Troxel, supra,* 530 U.S. at 66, 120 S.Ct. 2054. But, the parental presumption also accords with the principle that a parent's constitutionally-protected right "is not absolute and must yield to the child's best interest and well-being, which is the overriding concern." *In re C.M., supra,* 916 A.2d at 179 (citing *Santosky, supra,* 455 U.S. at 753, 102 S.Ct. 1388).

The Act further safeguards the constitutionally-protected parental right by specifying that "the court must find, by clear and convincing evidence, one or more of [three] factors": "(1) [t]hat the parents have abandoned the child or are unwilling or unable to care for the child, (2) [t]hat custody with a parent is or would be detrimental to the physical or emotional well-being of the child; or (3) [t]hat exceptional circumstances, detailed in writing by the court, support rebuttal of the presumption favoring parental custody." D.C.Code § 16–831.07(a)(1), (2), and (3).

The record here establishes that Judge Puig–Lugo made detailed written findings, by clear and convincing evidence, showing that (1) W.H. was "unwilling ... to care for [his] children,"[13] as indicated by his lack of involvement in their lives for significant periods of time, (2) W.H.'s custody of the children "would be detrimental to the ... emotional well-being of the child[ren]," because they wanted to continue living with D.W. because they "fear[ed]" the possibility of living with their father, and because they were "afraid that [he] may ***342** leave them over at his friend's house most of the time and not pay much attention to them"; and (3) "exceptional circumstances ... support rebuttal

of the presumption favoring parental custody." These "exceptional circumstances" include the Family Court's written findings that D.W. and the children actually want the children to have more frequent contact with W.H., but he has not "grasped the opportunity to be involved in the [children's] life," *In re D.S., supra,* 52 A.3d at 888, as evidenced by "his failure to report for supervised visitation," his "unresponsiveness during the home study process" conducted by the Family Court's Social Services division, the fact that he lived with T.H. for less than a month of her life and never resided in the same household with W.H. IV. Furthermore, W.H. did not see his children for a two-year period beginning when they were nine and ten years old, respectively. W.H. usually saw the children only two or three times a year, and by his own admission, the last time he saw his children was "maybe the middle of September 2010." In addition, the Family Court credited the testimony of Ms. Bradford that the children "treat [D.W.] as a parental figure." Significantly, W.H. does not contest the Family Court's factual findings relative to the rebuttable presumption. Nor does he contest the court's specific findings concerning the best interests of the children under D.C.Code § 16–831.08(a).

In sum, we are satisfied that D.W. had standing to bring his third party complaint for custody of T.H. and W.H. IV, that the Family Court did not err by concluding that D.W. and J.W. presented clear and convincing evidence refuting the parental presumption, and that the court did not err by awarding joint legal and physical custody of the children to D.W. and J.W. under D.C.Code §§ 16–831.02(a)(1)(B)(i) and (ii), in the case of D.W., and under § 16–831.04(a)(5) and § 16–831.13, in the case of J.W.

Accordingly, for the foregoing reasons, we affirm the judgment of the Family Court.

So ordered.

All Citations

78 A.3d 327

Footnotes

1 D.W. is not the biological child of W.H.; D.W.'s father was G.B. W.H. states that D.W. is the "step-brother" of T.H. and W.H. IV. D.W. is the children's half-brother because D.W., T.H. and W.H. IV have the same biological mother, C.W. Although D.W. technically is the children's half-brother, we refer to him in this opinion as T.H.'s and W.H. IV's "brother."

2 D.C.Code § 16–831.02(a)(1) states:

> (a)(1) A third party may file a complaint for custody of a child or a motion to intervene in any existing action involving custody of the child under any of the following circumstances:
> (A) The parent who is or has been the primary caretaker of the child within the past 3 years consents to the complaint or motion for custody by the third party;
> (B) The third party has:
> (i) Lived in the same household as the child for at least 4 of the 6 months immediately preceding the filing of the complaint or motion for custody, or, if the child is under the age of 6 months, for at least half of the child's life; and
> (ii) Primarily assumed the duties and obligations for which a parent is legally responsible, including providing the child with food, clothing, shelter, education, financial support, and other care to meet the child's needs; or
> (C) The third party is living with the child and some exceptional circumstance exists such that relief under this chapter is necessary to prevent harm to the child; provided, that the complaint or motion shall specify in detail why the relief is necessary to prevent harm to the child.

3 (1) "De facto parent" means an individual:

> (A) Who:
> (i) Lived with the child in the same household at the time of the child's birth or adoption by the child's parent;
> (ii) Has taken on full and permanent responsibilities as the child's parent; and
> (iii) Has held himself or herself out as the child's parent with the agreement of the child's parent or, if there are 2 parents, both parents; or
> (B) Who:
> (i) Has lived with the child in the same household for at least 10 of the 12 months immediately preceding the filing of the complaint or motion for custody;
> (ii) Has formed a strong emotional bond with the child with the encouragement and intent of the child's parent that a parent-child relationship form between the child and the third party;

(iii) Has taken on full and permanent responsibilities as the child's parent; and

(iv) Has held himself or herself out as the child's parent with the agreement of the child's parent, or if there are 2 parents, both parents.

D.C.Code § 16–831.01(1).

4 D.W. and W.H. were represented by counsel, but J.W. appeared without counsel. After summarizing D.W.'s role in caring for the children, as outlined in the court-ordered home studies which were conducted by Joyce Bradford, Probation Officer in the Superior Court's Social Services division, the judge quoted a passage from the report concluding that "both [D.W. and J.W.] have a long history of making provisions and sacrifices for [T.H. and W.H. IV]." D.W. stopped going to school in the twelfth grade in order to help care for T.H. and W.H. IV. He later obtained a high school equivalency diploma (GED). Judge Bayly contrasted that finding from the home studies with the conclusion Ms. Bradford reached as to W.H.: W.H. assumed "a rather apathetic and irresponsible position," as manifested by "his failure to report for supervised visitation, inconsistent child support payments, [and] unresponsiveness during the home study process." The judge noted that the record estimated the amount owed by W.H. in child support at $14,000.

5 When asked what he did "to stay involved when the children were born, W.H. replied, "I worked—I picked up a second job" because "children can be expensive." C.W. used his insurance card when she had to take the children to the hospital. When C.W. had something else to do, he would take the children to the hospital. He estimated that he had taken the children to medical appointments about "ten, twelve" times. W.H. discussed his dissatisfaction with T.H.'s school, saying that she "fought all year round."

6 D.C.Code § 16–831.05 contains the parental presumption and provides:

(a) Except when a parent consents to the relief sought by the third party, there is a rebuttable presumption in all proceedings under this chapter that custody with the parent is in the child's best interests.

(b) If the court grants custody of the child to a third party over parental objection, the court order shall include written findings of fact supporting the rebuttal of the parental presumption.

7 D.C.Code § 16–831.04 specifies that:

(a) A custody order entered under this chapter may include any of the following:

(1) Sole legal custody to the third party;

(2) Sole physical custody to the third party;

(3) Joint legal custody between the third party and a parent;

(4) Joint physical custody between the third party and a parent; or

(5) Any other custody arrangement the court determines is in the best interests of the child.

(b) An order granting relief under this chapter shall be in writing and shall recite the findings upon which the order is based.

8 D.C.Code § 16–831.07 states:

(a) To determine that the presumption favoring parental custody has been rebutted, the court must find, by clear and convincing evidence, one or more of the following factors:

(1) That the parents have abandoned the child or are unwilling or unable to care for the child;

(2) That custody with a parent is or would be detrimental to the physical or emotional well-being of the child; or

(3) That exceptional circumstances, detailed in writing by the court, support rebuttal of the presumption favoring parental custody.

(b) The court shall not consider a parent's lack of financial means in determining whether the presumption favoring parental custody has been rebutted.

(c) The court shall not use the fact that a parent has been the victim of an intrafamily offense against the parent in determining whether the presumption favoring parental custody has been rebutted.

(d) If the court concludes that the parental presumption has not been rebutted by clear and convincing evidence, the court shall dismiss the third party complaint and enter any appropriate judgment in favor of the parent. The court shall only address the factors set forth in § 16–831.08 once the presumption favoring parental custody has been rebutted.

9 D.C.Code § 16–831.08 states:

(a) In determining whether custody with a third party, pursuant to this chapter, is in the child's best interests, the court shall consider all relevant factors, including:

(1) The child's need for continuity of care and caretakers, and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages;

(2) The physical, mental, and emotional health of all individuals involved to the degree that each affects the welfare of the child, the decisive consideration being the physical, mental, and emotional needs of the child;

(3) The quality of the interaction and interrelationship of the child with his or her parent, siblings, relatives, and caretakers, including the third party complainant or movant; and

(4) To the extent feasible, the child's opinion of his or her own best interests in the matter.

(b) There shall be a rebuttable presumption that granting custody to a third party who has committed an intra-family offense is not in the best interest of the child.

10 We are not persuaded by W.H.'s argument that the Supreme Court has not "embraced" the kind of standing reflected in the Act, and that that type of standing reflected in the Act "has not yet been found to be a constitutional undertaking by the District of Columbia." First, as early as the decade of the 1970s, *Warth, supra,* at 422 U.S. at 500–01, 95 S.Ct. 2197, recognized that statutes creating legal rights may serve as a basis for constitutional standing. More recently, when the United States decided to change its position in a case after the decision of the federal appeals court, the Supreme Court concluded that an entity that intervened in the case had standing to argue the original position of the federal government, and that an *amicus* appointed by the Supreme Court to argue that the Court did not have jurisdiction provided the necessary adversarial posture of the case to satisfy Article III. *See Windsor, supra,* 133 S.Ct. at 2683–88. Second, this court has found standing where a plaintiff has asserted the deprivation of a statutory right. *See Grayson, supra,* 15 A.3d at 249; *Floyd v. Bank of Am. Corp.,* 70 A.3d 246, 251 (D.C.2013).

11 Under the Act, two categories of people may establish standing: *de facto* parents, and third parties who can demonstrate that they meet the requirements set forth in D.C.Code §§ 16–831.02(a)(1)(A), (B), or (C).

12 Given our conclusion that D.W. has standing to bring a third party complaint under § 16–831.02(a)(1)(B)(i) and (ii), we do not decide whether he also has standing under other provisions of the Act.

13 Judge Puig–Lugo concluded that W.H. had "abandoned" his children. We rest our conclusion on the alternative statutory language, "unwilling ... to care for the child." At this point we are not prepared to say that W.H. has "abandoned" his children. The Act does not define abandonment in the context of a third-party custody complaint where there is no allegation of neglect and no effort to terminate parental rights. We have used an objective test for abandonment under the neglect statute: the parent "has made no reasonable effort to maintain a parental relationship with the child for a period of at least four (4) months." D.C.Code § 16–2316(d)(1)(C); *see also In re Je.A.,* 793 A.2d 447, 449 (D.C.2002). In the adoption/termination of parental rights context, to determine abandonment we ask whether, in the totality of the circumstances, " 'the parent's conduct manifests an intention to be rid of all parental obligations[,] and to forego all parental rights.' " *In re Petition of J.T.B.,* 968 A.2d 106, 118–19 (citing *In re C.E.H.,* 391 A.2d 1370, 1373 (D.C.1978)).

88 A.3d 678
District of Columbia Court of Appeals.

In re D.S., K.M., B.S., R.S.,
T.S. & P.S.; J.M., Appellant.

Nos. 10–FS–1556, 10–FS–1557, 10–FS–1558, 10–FS–1559, 10–FS–1560, 10–FS–1561.
|
Argued March 8, 2012.
|
Decided Sept. 20, 2012.
|
As Amended on Rehearing March 13, 2014.

Synopsis

Background: The Child and Family Services Agency (CFSA) initiated neglect proceedings as to six children. The Superior Court, Nos. NEG–334–10, NEG–336–10, NEG–337–10, NEG–338–10, NEG–339–10, and NEG–340–10, Lori E. Parker, Magistrate Judge, and Jeannette Jackson Clark, J., committed the children to the CFSA. Unwed father appealed. The Court of Appeals, 52 A.3d 887,reversed and remanded, and issued a clarifying opinion on rehearing, 60 A.3d 1225.

[Holding:] On government's second petition for rehearing, the Court of Appeals, Beckwith, J., held that, in rejecting father's request for custody of the children, trial court did not adequately consider the parental presumption.

Reversed and remanded.

West Headnotes (20)

[1] Infants
Interest, role, and authority of government in general

The purpose of the State's intervention as parens patriae in child neglect proceedings is to promote the child's best interest. D.C. Official Code, 2001 Ed. § 16–2320(a).

Cases that cite this headnote

[2] Infants
Alternative remedies or placement

Infants
Needs, interest, and welfare of child

In neglect proceedings, the standard "best interest of the child" requires the judge, recognizing human frailty and man's limitations with respect to forecasting the future course of human events, to make an informed and rational judgment, free of bias and favor, as to the least detrimental of the available alternatives. D.C. Official Code, 2001 Ed. § 16–2320(a).

Cases that cite this headnote

[3] Infants
Placement or Custody

The trial court's power to commit children to the care of Child and Family Services Agency (CFSA) in order to protect their best interests is broad in neglect proceedings; but it is not unbounded. D.C. Official Code, 2001 Ed. § 16–2320(a).

Cases that cite this headnote

[4] Infants
Deprivation, Neglect, or Abuse

The child's interest, not the parents' conduct, is the overriding concern in a neglect proceeding. D.C. Official Code, 2001 Ed. § 16–2320(a).

Cases that cite this headnote

[5] Infants
Nature and Scope of Disposition

Nothing in the statute governing disposition in child neglect proceeding requires that a finding of neglect must first have been entered against a non-custodial parent before the court may order a disposition over that parent's objection. D.C. Official Code, 2001 Ed. § 16–2320(a).

Cases that cite this headnote

[6] **Infants**
Needs, interest, and welfare of child in general

What is in a child's best interest, for purposes of making disposition in neglect proceeding, is informed by venerable principles that recognize a natural parent's right to develop a relationship with his child. D.C. Official Code, 2001 Ed. § 16–2320(a).

Cases that cite this headnote

[7] **Constitutional Law**
Protection of Children;Child Abuse, Neglect, and Dependency

An unwed father who demonstrated a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child acquires substantial protection under the Due Process Clause, for purposes of making disposition in neglect proceeding. U.S.C.A. Const.Amend. 14; D.C. Official Code, 2001 Ed. § 16–2320(a).

Cases that cite this headnote

[8] **Infants**
Care, custody, and control by parent

The parental presumption, providing that a child's best interest is presumptively served by being with parent, is inherent in the natural parent, subject to nullification by a government showing of unfitness.

2 Cases that cite this headnote

[9] **Infants**
Evidence

A parental presumption applies in temporary custody decisions in neglect proceedings, just as in permanent orders, and must be given significant weight.

Cases that cite this headnote

[10] **Infants**
Care, custody, and control by parent

When a fit parent exercises his or her opportunity interest to parent child, the trial court can deem the parental preference rebutted only by clear and convincing evidence that the best interest of the child would be better served if the child were placed elsewhere.

2 Cases that cite this headnote

[11] **Infants**
Disposition, placement, and custody

Infants
Rights of subject parent or party in general

Neglect statute does not require the court to place a child with his or her natural parents, and there conceivably can be circumstances in which clear and convincing evidence will show that an award of custody to a fit natural parent would be detrimental to the best interests of the child. D.C. Official Code, 2001 Ed. § 16–2320(a).

1 Cases that cite this headnote

[12] **Infants**
Determination and findings

In rejecting unwed father's request for custody of his six children and committing them instead to care of Child and Family Services Agency (CFSA) after they were adjudicated neglected, trial court did not adequately consider the parental presumption, providing that child's best interest was presumptively served by being with a parent; trial court incorrectly treated the lack of information regarding father's health problems and allegedly inadequate housing situation as a reason to place children in care of CFSA, and, while trial court verbally acknowledged existence of the presumption, it did not base its decision on any finding that father failed to grasp his opportunity interest, that he was unfit, or that there was clear and convincing

evidence that it was in children's best interest to be placed with someone else. D.C. Official Code, 2001 Ed. § 16–2320(a).

Cases that cite this headnote

[13] Infants

Deprivation, neglect, or abuse

While Court of Appeals' review in child neglect cases is of the associate judge's order affirming the magistrate judge, rather than the ruling of the magistrate judge, the Court's powers of appellate review are not so limited that, in reviewing the trial court's final order, the Court may not look to the findings and conclusions of the fact finder on which that ruling is based.

Cases that cite this headnote

[14] Infants

Discretion of lower court

In reviewing trial court's orders in child neglect proceedings, the Court of Appeals employs an abuse-of-discretion standard and evaluates whether the trial court exercised its discretion within the range of permissible alternatives, based on all relevant factors and no improper factor; the Court of Appeals then evaluates whether the decision is supported by substantial reasoning, drawn from a firm factual foundation in the record.

1 Cases that cite this headnote

[15] Infants

Trial or review de novo

On appeal in child neglect proceedings, the Court of Appeals reviews de novo the legal question whether the trial court applied the proper legal standard.

Cases that cite this headnote

[16] Infants

Care, custody, and control by parent

When a court is deciding whether the parental presumption applies in making a disposition in neglect proceeding and whether there are grounds for rebutting it, it should base these decisions on a record worthy of the weight of this decision. D.C. Official Code, 2001 Ed. § 16–2320(a).

Cases that cite this headnote

[17] Infants

Deprivation, neglect, or abuse

In neglect proceedings, counsel for the government has the responsibility in the first instance to take the trouble to investigate the overall family situation and present an adequate evidentiary picture, a burden that is commensurate with the gravity of the petition for intervention in the lives of parent and child that the government files.

Cases that cite this headnote

[18] Infants

Physical condition

Infants

Financial stability and impoverishment

Infants

Nature of harm or injury in general; failure to thrive

As a parent's poverty, ill health, or lack of education or sophistication will not alone constitute grounds for termination of parental rights, nor should these factors be dispositive in a hearing that can have potentially permanent consequences in neglect proceeding.

Cases that cite this headnote

[19] Infants

Nature of harm or injury in general; failure to thrive

Child neglect statute was not intended to provide a procedure to take the children of the poor and give them to the rich, nor to take the children of the illiterate and give them to the educated, nor to take the children of the crude and give them to the cultured, nor to take the children of the weak and sickly and give them

to the strong and healthy. D.C. Official Code, 2001 Ed. § 16–2320.

Cases that cite this headnote

[20] Infants

Nature of harm or injury in general; failure to thrive

Family poverty is not a reason, in and of itself, to find a child neglected, even if it plausibly could be argued that the child's best interests would be served by removal to a materially wealthier home; instead, when it is poverty alone that causes an otherwise fit parent to be unable to care for her child, adequate public or private benefits should and will be made available to the family.

Cases that cite this headnote

Attorneys and Law Firms

***680** Leslie J. Susskind, appointed by the court, for appellant.

Mindy Leon, appointed by the court, Guardian ad Litem for appellees D.S., K.M., B.S., R.S., T.S. & P.S., filed a statement in lieu of brief.

Beverli B.V. Wynn–Euell, appointed by the court, for appellee V.S., filed a statement in lieu of brief.

Dana K. Rubin, with whom Irvin Nathan, Attorney General for the District of Columbia, and Todd S. Kim, Solicitor General, were on the brief, for appellee.

Before BLACKBURNE–RIGSBY and BECKWITH, Associate Judges, and FERREN, Senior Judge.

Opinion

BECKWITH, Associate Judge:

This case involves the ardent yet unsuccessful effort of an unwed biological father of six children to keep these children after their mother's abuse of them led first to their removal from her home, then to her stipulation that they were neglected, and ultimately to their commitment to the District of Columbia Child and Family Services Agency (CFSA) over the father's objections. We concluded in an opinion issued after our initial hearing of this case that the trial court's determination that it was in these children's best interest to be committed to CFSA for up to two years failed sufficiently to take into account a fit parent's right to presumptive custody—a right that applies in temporary custody determinations in neglect proceedings as well as in cases involving the termination of parental rights. *In re J.F.*, 615 A.2d 594, 598 (D.C.1992). We therefore reversed the trial court's order committing the children to CFSA and remanded to the trial court for reconsideration of the appropriate disposition under the correct legal standards. *See In re D.S.*, 52 A.3d 887 (D.C.2012). On rehearing, we issued a separate opinion clarifying why our case ***681** law mandates the clear-and-convincing-evidence standard for the disposition—for temporary custody—in this neglect case. *See In re D.S.*, 60 A.3d 1225 (D.C.2013).

On consideration of the government's second petition for rehearing, we now grant rehearing again and issue this amended opinion in place of the prior two opinions in this case. We reiterate our holding—this time with additional explanation of its underlying rationale [1]—that the trial court failed to give real weight to the principles, well established in our cases and our law, that a "child's best interest is presumptively served by being with a parent, provided that the parent is not abusive or otherwise unfit," *In re S.G.*, 581 A.2d 771, 781 (D.C.1990), that "it is generally preferable to leave a child in his or her own home," D.C.Code § 16–2320(a) (2012 Repl.), [2] and that the right to presumptive custody of a fit, unwed, noncustodial father who has grasped the opportunity to be involved in his child's life can be overridden only by a showing by clear and convincing evidence that it is in the best interest of the child to be placed with someone else.

I. Factual and Procedural History

On June 1, 2010, CFSA received a hotline tip reporting that four-year-old P.S. had sustained an eye injury and had told staff at her school that her mother, V.S., had hit her in the face with a boot when P.S. would not stop crying. That day, a CFSA social worker conducted interviews with P.S. and her five siblings—eleven-year-old K.M.; nine-year-old B.S.; R.S., who was two weeks shy of his eighth birthday; and six-year-old twins D.S. and T.S. The agency determined that immediate removal from the mother's home was necessary and placed the

children in three different foster homes after P.S. told the social worker that "mommy hit [her] with a boot," K.S. reported that her mother "still hits [her]" and had previously punched her in the eye, several of the children stated that their mother hit them with a belt, and a medical examination revealed that P.S. had unexplained marks on her legs and scars on her buttocks that she said were caused by her mother hitting her with a broom. CFSA notified the mother that the children had been removed from her home and that a family team meeting would be held in two days, but the agency failed to locate the children's father, J.M. The mother and several of the children told the social worker that the father was in the hospital, but they did not know which hospital.

From the outset CFSA received information that the children's father did not live with the children at their mother's home but that he had a significant relationship with them. R.S. told the investigator that his father did not live at home, and K.M. added that the siblings stayed with their father every weekend, Friday through Sunday. The children's mother also told the investigator that the father was involved with the children prior to his hospitalization. K.M., R.S., and B.S. each said that they felt safe with their father—R.S. specifically said "my daddy keeps me safe"—while B.S. said he "sometimes" felt safe with his mother and K.M. and R.S. said they did not feel safe with her.

In the two days following the children's removal, CFSA still failed to locate the father to notify him of the June 3, 2010, family team meeting. The father nevertheless found out about the meeting and ***682** participated over the telephone in the parties' discussion of the abuse and neglect allegations and the services that were available for the children.

Over the course of the next three months, the children's parents took part in four hearings pertaining to the neglect proceedings: the initial hearing on June 4, 2010, at which the government served the parents with petitions alleging that the children were neglected and the father acknowledged paternity of all six children; the pretrial hearing on July 30, 2010; the August 12, 2012, hearing at which the mother stipulated to the children's neglect and the magistrate judge adjudicated all six children to be neglected; and the disposition hearing on August 27, 2010, at which the court committed the children to the custody of CFSA for at least two years. Throughout these proceedings, which were presided over by Superior Court Magistrate Judge Lori Parker, the father repeatedly requested immediate release of all six of his children into his custody.

At the initial hearing, which the father attended after having been released from the hospital that morning, a dispute immediately arose over the questions whether the father lived with the mother and children and, if he lived somewhere else, whether the eldest child, K.M., lived with him. Notwithstanding the children's unequivocal indications to the contrary during their interviews, the government's petition indicated—and the government maintained at the hearing—that the entire family lived together at the mother's home on Alabama Avenue.[3] Yet the Guardian ad Litem (GAL) noted that when she had spoken to R.S. and B.S. the night before the hearing, "they definitely spoke of two[ ] different homes." And with respect to K.M.'s address, although the GAL said that K.M. herself referred to her mother's house as "home," both parents indicated that she lived with her father and was listed on his lease, and the father's counsel said he was "prepared to prove" that she had been living with her father and asked that K.M. be returned to his care immediately. The magistrate judge did not take any evidence or resolve the dispute over where K.M. lived, but ordered the government to investigate the father's address. The government later amended the neglect petition to reflect the father's correct address.

Also at the initial hearing, the mother waived her right to a probable cause hearing. The father explicitly stated that he was not waiving a probable cause hearing, but did not object to the mother's waiver. The father's attorney argued that the government's efforts to prevent removal of the children were not reasonable because the father "was available to the agency for further investigation" even while hospitalized, "he is here today at the time that the Court is making the decision with respect to removal," and he "is ready, willing, and able to take care of the children." The magistrate judge found that, in light of the father's initial unavailability and the nature of P.S.'s injury, the government's efforts to prevent removal—efforts it was required by law to demonstrate—were reasonable.[4] Finally, over the father's ***683** strong objections, and despite the GAL's statement that "the boys" told her "they love going to dad" and that "several of the children ... express[ed] feeling safe with their father," the court adopted the government's recommendation that the father be allowed only supervised visitation with his

children, stating that CFSA needed time "to determine that unsupervised visits would be in the children's best interest."

When the parties reconvened on July 30, 2010, for a pretrial hearing, the magistrate judge, who had in the interim already rejected the father's motion for reconsideration of the court's ruling rejecting his request for custody of his children, also rejected the father's renewed request for liberal unsupervised visitation. The court did so in "an abundance of caution" after the government and the GAL expressed concerns about the father's health and the children's extensive tooth decay. The father's counsel objected to the lack of notice and opportunity to respond to new allegations that both parents had neglected the children's dental health,[5] and complained that the government's requests to restrict the father's parental rights should be based on "more than just the fact that they have concerns" and the government should have to present "facts upon which the Court can rest its ruling." The government responded that it was important for the judge to have "a total mosaic of what's been going on in this family" and "all information that it deems necessary in order to make a decision as to whether or not these children have been abused or neglected."

On August 12, 2010, the magistrate judge accepted the mother's stipulation of neglect as to each of the children and adjudicated all six children neglected. The father attended the proceeding and did not object.

The disposition hearing was held on August 27, 2010. The government and GAL recommended commitment of the children to CFSA with a goal of reunification by June 1, 2011. By this point, the children had for several weeks been living at the Maryland home of K.V., the children's paternal aunt and foster care provider, and the government asked the magistrate judge to maintain the supervised visitation arrangement. The government and GAL continued to oppose granting custody of the children to the father—including the father's latest request that the children be released to him under protective supervision—based upon ongoing concerns about the father's lung disease,[6] his problems ***684** controlling anger,[7] and the adequacy of his home,[8] and upon the government's view that "[t]here is still very little information known about Mr. M."

Acknowledging the concerns that had been expressed regarding the father's health and the adequacy of space in his apartment, the magistrate judge committed the children to the care of CFSA for a period not to exceed two years with the future goal of reunification with a parent, denied again the father's request for unsupervised visitation, and ordered the father to submit to a mental health evaluation.[9] The father filed a motion for review of the shelter care order, the visitation order, and the disposition, and on November 29, 2010, Associate Judge Jeannette Clark issued an order affirming the decision of the magistrate judge. The father now appeals from that order.

II. Analysis

On appeal, J.M. challenges the trial court's order committing his children to CFSA in the absence of any proof that he was an unfit parent and, he claims, contrary to his constitutional due process rights and to the statutory presumption recognizing "that it is generally preferable to leave a child in his or her own home." D.C.Code § 16–2320(a). He also argues that the trial court abused its discretion in the way it conducted the initial hearing at which the court ordered the children to be placed in shelter care pending the disposition hearing,[10] and that it erred in imposing supervised visitation, particularly when he was not involved in the physical abuse that led to their removal and when he routinely had the children at his home on weekends.

A. The Father's Challenge to the Children's Commitment to CFSA

1. Governing principles

[1] We have long recognized that neglect statutes that allow the state to intervene ***685** on a child's behalf are remedial and "should be liberally construed to enable the court to carry out its obligations as *parens patriae*" *In re S.G.*, 581 A.2d 771, 778 (D.C.1990). The purpose of the state's intervention as *parens patriae* is to promote the child's best interest, which this court has sometimes characterized as "paramount." *In re S.K.*, 564 A.2d 1382, 1388 (D.C.1989) (Schwelb, J., concurring in part and dissenting in part).

[2] This requirement to consider the "best interest" of the child is dictated by the neglect statute, D.C.Code § 16–2320(a), which states that "[i]f a child is found to be neglected," the court may order any number of possible dispositions, "which will be in the best interest of the child."[11] We have noted that the best interest standard "does not contain precise meaning," and "given the multitude of varied factual situations which must be embraced by such a standard, it must of necessity contain certain imprecision and elasticity." *In re J.S.R.,* 374 A.2d 860, 863 (D.C.1977) (citations omitted); *see also In re N.M.S.,* 347 A.2d 924, 927 (D.C.1975) (stating that "best interest is hardly an expression of precise meaning"). "[T]he standard 'best interest of the child' requires the judge, recognizing human frailty and man's limitations with respect to forecasting the future course of human events, to make an informed and rational judgment, free of bias and favor, as to the least detrimental of the available alternatives." *In re J.S.R.,* 374 A.2d at 863 (citing *In re Adoption of Tachick,* 60 Wis.2d 540, 210 N.W.2d 865 (1973)).

[3] The trial court's power to commit children to the care of CFSA in order to protect their best interests is therefore broad. But it is not unbounded.

[4] **[5]** As for the breadth of the court's power, it is true, for example, that the child's interest, not the parents' conduct, is the overriding concern in a neglect proceeding. "[W]e have recognized that the relevant focus for the court in neglect proceedings is the children's condition, not parental culpability." *In re T.G.,* 684 A.2d 786, 789 (D.C.1996) (citation and internal quotation marks omitted). It is also true that "[n]othing in the statute requires that a finding of neglect must first have been entered against a non-custodial parent before the court may order a disposition over that parent's objection." *In re S.G.,* 581 A.2d at 784; *see also In re J.W.,* 837 A.2d 40, 45–46 (D.C.2003) (stating that the trial court may still adjudicate the children neglected over the father's objection to the mother's stipulation because the focus of the court is the children's condition, not the father's culpability); *In re B.C.,* 582 A.2d 1196, 1198 (D.C.1990) ("The father's aversion to the potential personal implication of the court's finding that his children are neglected children is not the relevant issue.").

[6] Yet it is equally well established that what is in a child's best interest is informed by venerable principles that recognize a natural parent's right to develop a relationship with his child. These principles have compelled this court to conclude that a parental preference long recognized in cases involving termination of parental rights also applies to the temporary placement of a neglected child under D.C.Code § 16–2320. *See* ***686** *In re J.F.,* 615 A.2d 594, 598 (D.C.1992) (reaffirming that the parental preference applies to temporary custody orders); *In re S.G.,* 581 A.2d at 786 (Rogers, C.J., and Ferren, J., concurring).

The presumption is spelled out expressly in the neglect statute, which states that in abuse and neglect proceedings in the District of Columbia, it "shall be presumed that it is generally preferable to leave a child in his or her own home," D.C.Code § 16–2320(a), and which also precludes placing a child with a relative or other person without a finding that "the child cannot be protected in the home and there is an available placement likely to be less damaging to the child than the child's own home." D.C.Code § 16–2320(a)(3)(C). The statute thus "incorporate[s] the basic principle underlying the parental preference, namely, that a child's best interests usually will be to be in the custody of his or her natural parent or parent." *In re S.G.,* 581 A.2d at 786 (Rogers, C.J., and Ferren, J., concurring); *see also In re S.K.,* 564 A.2d 1382, 1387 (D.C.1989) (Schwelb, J. concurring in part and dissenting in part) (stating that the "child's best interest is presumptively served by being with a parent, provided that the parent is not abusive or otherwise unfit") (citation omitted).

[7] In addition to its statutory footing, the parental presumption has roots in the U.S. Constitution. The Supreme Court has recognized the constitutional protections afforded to parents to "establish a home and bring up children," *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), to "direct the upbringing and education of children," *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary,* 268 U.S. 510, 534, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), and to direct the "care, custody, and management of their child," *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). This court has made clear that a noncustodial father has a "constitutionally protected 'opportunity interest' in developing a relationship with his child." *See, e.g. Appeal of H.R.,* 581 A.2d 1141, 1143 (D.C.1990) (per curiam) (citing *Lehr v. Robertson,* 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983)); *In re*

J.F., 615 A.2d at 597. Accordingly, "an unwed father who demonstrated a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child ... acquires substantial protection under the Due Process Clause." *Id.* at 597 (citation and internal quotation marks omitted). Having expressed concern that "temporary placement of a neglected child can substantially interfere with a natural parent's right to develop a relationship with a child," this court has recognized that there are "important reasons" that "the procedural protection of the Due Process Clause should extend to disposition proceedings involving the placement of a neglected child pursuant to D.C.Code § 16–2320." *Id.* at 598 (citing *In re S.G.,* 581 A.2d at 786 (Rogers, C.J., and Ferren, J., concurring)).

2. The Parental Presumption in Analogous Cases

On several occasions this court has considered noncustodial fathers' challenges to the commitment of their children after neglect findings stemming from abuse or neglect occurring in the mother's home. This precedent demonstrates the importance of explicit and genuine accommodation of the parental presumption at the disposition stage of neglect proceedings in cases involving fit parents who have been involved in the lives of their children prior to the neglect adjudication.

In *In re S.G.,* 581 A.2d 771, a child was adjudicated to have been neglected by her mother and stepfather after she was sexually ***687** abused by her stepfather. The child's natural father appealed the trial court's decision to grant custody to the child's maternal grandmother. Noting "the reality that such [temporary custody] orders may effectively become permanent as a result of the delays attendant to litigation and appeal," the court held—in a two-judge concurrence that constituted the opinion of the court on the issue of temporary custody [12] —that "[t]here can be no doubt that the [parental] presumption applies" to the temporary placement of children and the trial judge must develop "transitional arrangements aimed at returning the child to his or her natural parent or parents whenever a temporary custody order placing the child in the custody of a nonparent is required." *Id.* at 786–87 (Rogers, C.J., and Ferren, J., concurring).

As for the standard of proof required to rebut this parental presumption, the two-judge majority concluded that the trial judge in that case had "properly proceeded" in applying the parental presumption, observing that the judge had "found by clear and convincing evidence that S.G.'s best interests for the immediate future lay in remaining" where she had always lived with her siblings and grandmother rather than with her father in another city. [13] *In re S.G.,* 581 A.2d at 786–87. Judge Schwelb stated for himself that "assum[ing], without deciding," that the presumption applied to a temporary placement of a neglected child, it had been "effectively rebutted" because the trial court had found it rebutted by clear and convincing evidence. *Id.* at 781; *see also id.* at 785 (concluding that the trial court's application of the clear-and-convincing-evidence standard accorded "the father's presumptive rights ... the requisite consideration"). In converting Judge Schwelb's mere assumption into a holding that the parental presumption applies to temporary custody, the majority in *In re S.G.* did not explicitly discuss the evidentiary standard required for rebutting the presumption, although all three members of the panel acknowledged the trial court's use of the clear-and-convincing standard. In doing so, the court focused upon the lasting prejudice to a noncustodial parent once the child begins bonding with a different custodian—an insight that signified that the parental preference, when applied to a neglect disposition, incorporated the same clear-and-convincing-evidence standard that is so critical to forestalling such prejudice in the context of permanent custody decisions.

[8] Two years later, in *In re J.F.,* 615 A.2d 594—perhaps the case that is closest to the circumstances in the present case—this court stated more directly what it strongly implied in *In re S.G.* In *In re J.F.,* an unwed father sought custody of his son when neglect proceedings were initiated against the child's mother and the mother subsequently stipulated that the ***688** child was neglected. *Id.* at 595. The father was not the custodial parent at the time of government involvement, but had substantially supported the child throughout his life. *Id.* The trial court rejected the father's request for custody of the child and ordered that custody be given to the child's grandmother, at whose house the child had lived for much of his life, usually with his mother. *Id.* This court reversed the orders granting custody to the grandmother and remanded to the trial court for further proceedings, noting that the judge had "fail[ed] to recognize the constitutionally protected interest at stake" when she stated "that she did not need to decide the rights of the adult parties, since the best interests of the child was the issue." *Id.* at 595,

598. Reviewing a litany of reasons the trial judge's order violated the father's statutory and due process rights, the court stated: "The judge also did not acknowledge, much less address, the presumption in favor of a fit parent. No express finding was made, by clear and convincing evidence, that the father was unfit." *Id.* at 598 (citation omitted). The court's decision in *In re J.F.* to construe "the presumption" at issue as a statutory presumption with constitutional underpinnings that could only be rebutted by a standard more stringent than a straightforward best-interest determination followed logically from *In re S.G.* [14]

This court again grappled with a placement decision appealed by a fit noncustodial father in *In re L.J.T.,* 608 A.2d 1213 (D.C.1992). In that case, the mother, "previously found unfit, had reclaimed her suitability as custodian sufficient to be entrusted with her child under court supervision." *Id.* at 1216. The case therefore involved the respective interests of a fit noncustodial father and a custodial mother who had demonstrated her fitness, rather than a fit parent's challenge to an order granting custody to a nonparent or committing his children to the state's custody. This court upheld the child's placement with the mother, noting that the trial court "took proper account of [the father's] status as a fit, noncustodial natural father" and "explicitly addressed [his fitness] in the home study before the court." *Id.* Thus, where the father "received notice, an opportunity to be heard, and ample consideration at the hearings, the judge's decision, supported by substantial evidence, to place the child with the natural mother did not violate [the father's] constitutional rights." *Id.*

[9] **[10]** These decisions establish that a parental presumption applies in temporary custody decisions just as in permanent orders and must be given significant weight. *See In re J.F.,* 615 A.2d at 598; *In re S.G.,* 581 A.2d at 786 (Rogers, C.J., and Ferren, ***689** J., concurring). This case law also firmly establishes that when a fit parent [15] exercises his or her opportunity interest, [16] the trial court can deem that preference rebutted only by clear and convincing evidence that the best interest of the child would be better served if the child were placed elsewhere. *In re J.F.,* 615 A.2d at 598; *In re S.G.,* 581 A.2d at 781, 785; *id.* at 786 (Rogers, C.J., and Ferren, J., concurring). [17] Finally, the trial court must afford the noncustodial parent due process, including notice, an opportunity to be heard, and full consideration supported by substantial evidence. *In re L.J.T.,* 608 A.2d at 1216.

***690** The government has argued on rehearing that *In re S.G.* and *In re J.F.* could not overrule several earlier decisions that hold that the preponderance standard applies in neglect proceedings. None of the cases it cites, however, involves anything akin to the circumstances here, in which a noncustodial father who has a close ongoing relationship with his children, who was not the subject of the neglect petition, and who has not been found to be unfit asked the court to place those children with him. [18] Our use of the clear-and-convincing-evidence standard also does not conflict with *In re A.G.,* 900 A.2d 677 (D.C.2006), where this court held—well more than a decade after *S.G.* and *J.F.*—that the preponderance standard governed the determination of custody in a guardianship proceeding following a finding of neglect. This court accepted the preponderance standard rather than insisting on the clear and convincing evidence required by statute for proceedings that wholly terminate parental rights. We justified this ruling by pointing out that the entry of a guardianship order does not terminate many of the natural parents' important rights, such as the right to visitation, the right to determine the child's religious affiliation, and the right of the child to inherit from his parents. *Id.* at 681. But we drew this distinction in a context fundamentally unlike the one in this case. The father's challenge in *In re A.G.* was limited to his status as a natural father per se; it did not involve a request for custody by a fit parent who had grasped his opportunity interest—a status, potentially true in this case, entitling the father to the strong presumption of custody rebuttable only by clear and convincing evidence. [19] In sum, the critical distinction between this case and *In re A.G.* is the difference between a potentially fit father who may well have ***691** grasped his opportunity interest and one who has not satisfied these two criteria.

Notwithstanding the potential tension between *In re A.G.'s* holding and *In re S.G.* and *In re J.F.'s* approval of a more exacting standard of proof in particular neglect dispositions, the narrowness of the question before the court in *In re A.G.* makes that case fully reconcilable with the conclusion that where a noncustodial father who was not the subject of the neglect petition has satisfied the fundamental criteria justifying custody, the preponderance standard is insufficient to prevent the accelerating prejudice against his retention of parental

rights once temporary custody is awarded to another party.

3. The Role of the Parental Presumption at the Disposition

[11] If this case had arisen in another state, the trial court's flexibility in crafting the disposition may have been more limited. Neighboring Maryland, for example, prohibits the long-term commitment of children to a third party when the allegations of neglect are sustained against only one parent and the other parent is able and willing to care for the children. Md.Code Ann., Cts. & Jud. Proc. § 3–819 (West 2001). "A child who has at least one parent willing and able to provide the child with proper care and attention should not be taken from both parents and be made a ward of the court." *In re Russell G.,* 108 Md.App. 366, 672 A.2d 109, 114 (1996); *see also In re Sophie S.,* 167 Md.App. 91, 891 A.2d 1125, 1133 (2006).[20] In the District of Columbia, however, it is clear that the neglect statute "does not require the court to place a child with his or her natural parents," *In re J.F.,* 615 A.2d at 598, and that "[t]here conceivably can be circumstances in which clear and convincing evidence will show that an award of custody to a fit natural parent would be detrimental to the best interests of the child." *Appeal of H.R.,* 581 A.2d at 1178.

[12] **[13]** **[14]** **[15]** Our task is to determine whether the trial court, in rejecting the father's request for custody of his six children and committing them to the care of CFSA, adequately considered the parental presumption recognized in our decisions and in the District of Columbia Code.[21]

***692** While the associate judge reviewing the magistrate judge's adjudication acknowledged the existence of "a preference toward placing children with their natural parents," neither judge based the decision to commit the children upon any finding that the father failed to grasp his opportunity interest, that he was unfit, or that there was clear and convincing evidence that it was in the children's best interest to be placed with someone other than their father. And the record in this case, with its many unanswered questions and yet-to-be-investigated facts, does not demonstrate that the court could have readily made such findings. On the contrary, the indications in the record that the father had been involved in his children's lives, that the children spent weekends with him, that they viewed themselves as having two homes, and that they felt safe with their father at least hint that he was not incapable of taking care of them. *See In re J.F.,* 615 A.2d at 598–99 (noting that the record in that case did not compel a finding that the father was unfit to have custody of his child, and "[i]f anything it suggests the contrary (a matter for trial court consideration on remand)").

[16] At the outset, proper recognition of the parental presumption requires more than a verbal allowance that the presumption exists. This court "has expressly acknowledged the importance of assuring that the trial court 'explicitly recognized and accommodated the existence of [the parental] presumption.' " *In re J.F.,* 615 A.2d at 598 (quoting *In re S.G.,* 581 A.2d at 785). When a court is deciding whether the presumption applies and whether there are grounds for rebutting it, it should base these decisions on a record worthy of the weight of this decision.

[17] In neglect proceedings, counsel for the government has the "responsibility in the first instance to take the trouble to investigate the overall family situation and present an adequate evidentiary picture," a burden that is "commensurate with the gravity of the petition for intervention in the lives of parent and child that the [government] files." *In re A.H.,* 842 A.2d 674, 685 n. 16 (D.C.2004). And while the GAL and the lawyers for the parties share this responsibility, the court "ought not to be passive in the face of what it recognizes is a deficient presentation of evidence" and should instead "take affirmative steps to ensure that it has enough evidence before it to make an informed decision." *Id.* (quoting *In re M.D.,* 758 A.2d 27, 34 (D.C.2000)). Here, while the magistrate judge was presented with a difficult task of weighing conflicting interests in a case involving six abused children and some extenuating circumstances, we are not convinced that the magistrate judge or the associate judge applied the parental presumption at the disposition stage of these proceedings.

At the disposition hearing, the father made repeated requests for custody of his children, insisted that he was able to care for them, and emphasized the absence of evidence that he had neglected his children or that he was unfit. He also raised procedural challenges, claiming, most notably, that he had a lack of notice of, and a lack of adequate opportunity to respond to, the government's allegations that the children had suffered from dental

neglect, which had not been part of the initial petition or the neglect adjudication. *Cf.* ***693** *In re J.F.,* 615 A.2d at 598 (finding the rights of the noncustodial father were violated where, among other things, he was not given the required notice that a court proceeding would be a dispositional hearing). In response, the government, the GAL, and the court at times acknowledged the significance of keeping neglected children in their homes but accorded no real weight to the father's presumptive right to care for his children.

The thrust of the magistrate judge's ultimate ruling, which adopted the government's arguments regarding the placement of the children, was that there was not enough information to allow the children to remain with their father. The government opposed placing the children with their father, and instead asked for commitment, because "we are actually in the same place we were when the children were removed," meaning that "[t]here is still very little information known about Mr. M.," and that the government still had concerns about the father's health and the adequacy of his housing. Instead of recognizing the presumption that a parent acts in his children's best interest, taking evidence on disputed matters of consequence, and requiring the government to overcome the parental presumption with clear and convincing evidence that it would not be in the children's best interest to be with their father, the magistrate judge treated the lack of information as a reason to place the children in the care of someone other than their father. The magistrate judge then committed the children to CFSA "based on all the information presented"—which, as we know, the government had characterized as "very little information." The associate judge's unadorned affirmance of the magistrate judge's disposition, which addresses the father's constitutional claim in a short discussion focusing primarily upon the order for supervised visitation, indicates that the father's right must yield to his children's best interest, but does not specify how the evidence in this case defeated the father's parental presumption.

Two factors that were the focus of much discussion at the disposition, the father's housing and his health, warrant particular mention. Throughout these proceedings the government opposed placing the children with the father —or even granting the father unsupervised visitation with his children—based in part upon its concern that the father did not have enough space in his home to accommodate the children and that his lung condition made it impossible for him to care for six active children. These are legitimate considerations under D.C. law, and each could be a relevant factor in the determination whether the government presented clear and convincing evidence that it was in the children's best interest to be placed with someone besides their father. [22]

The main problem with any serious reliance upon the father's purportedly inadequate housing and ill health, however, was that neither was well substantiated at the time of the disposition hearing. The government and the GAL gave great weight to the observation that the father remained sitting throughout a supervised visit with his children, that his lung condition ***694** required him to carry an oxygen tank, and that his apartment only contained two or three bedrooms. Yet these proffers hardly constitute a sufficient factual basis for deeming the father to be an unsuitable placement for the children.

[18] **[19]** **[20]** And even if the government had established more definitively that the father's home was too small for six children and that his health was an impediment to his parenting, our cases have cautioned against too heavy reliance upon factors of this nature when making decisions that result in the removal of children from the custody of a parent. As "a parent's poverty, ill health, or lack of education or sophistication, will not alone constitute grounds for termination of parental rights," *In re J.G.,* 831 A.2d 992, 1000–01 (D.C.2003) (emphasis added), nor should these factors be dispositive in a hearing that can have potentially permanent consequences. [23] *See In re S.G.,* 581 A.2d at 786 (Rogers, C.J., and Ferren, J., concurring). That is particularly true in this case, where prior to the children's removal from their mother's home, the father had no reason to have a home large enough to accommodate all the children as full-time residents. [24] The court's decision to commit these children based in part upon inconclusive contentions of this nature reinforces our sense that it overlooked the parental presumption in its determination of what was in the children's best interest.

B. The Initial Hearing and the Reasonable Efforts Requirement

Our view that the court failed to apply the parental presumption at the disposition stage of this case is bolstered by a review of events that preceded the hearing

at which the magistrate judge committed the children to CFSA. Though our decision to remand this case for reconsideration of the disposition decision obviates our formal consideration of the father's claim that he was deprived of his due process rights at the initial hearing, [25] early events in this case shed light upon the court's subsequent disposition and seemed to set the stage for the continuing inattention to the father's presumptive right to the care of his children.

Two statutes make clear that the rights of parents carry significant weight at the point of the initial shelter care determination. The first, D.C.Code § 16–2310(b), states that before a child can be placed in shelter care prior to a factfinding or dispositional hearing, it must be clear that shelter ***695** care is required "(1) to protect the person of the child" or "(2) because the child has no parent, guardian, custodian, or other person or agency able to provide supervision and care for him, and the child appears unable to care for himself," *and* that "(3) no alternative resources or arrangements are available to the family that would adequately safeguard the child without requiring removal." D.C.Code § 16–2310(b). The second, D.C.Code § 16–2312, requires the family court to determine whether "(A) [r]easonable efforts were made to prevent or eliminate the need for removal, or, in the alternative, a determination that the child's removal from the home is necessary regardless of any services that could be provided to the child or the child's family; and (B) continuation of the child in the child's home would be contrary to the welfare of the child." D.C.Code § 16–2312(d)(3). These statutes require the government to make a showing that the children's placement in shelter care was the only available option to protect the children.

We recognize, as an initial matter, that the mother's waiver of a probable cause hearing and her stipulation that the children were neglected had the curious effect of turning the trial court's focus away from the children's father—in some ways legitimately, as "the relevant focus for the court in neglect proceedings is the children's condition, not parental culpability." *In re T.G.,* 684 A.2d 786, 789 (D.C.1996) (citation and internal quotation marks omitted). We also cannot reasonably fault the government for any initial failure to contemplate placing the children directly with their father upon their removal from their mother's home. CFSA had reason to believe one or more of the children were being physically abused, and all it knew about the children's father was that he had been admitted to a hospital and that no one seemed to know which one.

Yet from the very outset of this case, and at every turn, the father presented himself as the best placement option for the children and urged the magistrate judge to grant him custody of his children. When the court denied these requests, he filed a motion to reconsider, and when the court denied that motion, he asked for custody under protective supervision. At the initial hearing, when the father was out of the hospital and available to care for the children, his attorney's very first statement was to ask that the children be released into the father's care. The magistrate judge still found that "the efforts made with this family to prevent removal were in fact reasonable" [26] but then specified somewhat differently in the initial hearing order that due to the extraordinary circumstances —namely, the injury to P.S.'s eye, the risk that P.S.'s siblings would also be abused, and the initial inability to locate the father—"the fact that no reasonable efforts were made is hereby deemed reasonable."

While these findings may satisfy the reasonable efforts requirement of D.C.Code § 16–2312(d)(3), it is not clear that they address D.C.Code § 16–2310's prohibition on placing a child in shelter care unless there is *no parent* able to provide supervision *and no alternative resources* that can be made available to safeguard ***696** the children. In this regard, the government appeared to downplay and then delay confirming the father's, mother's, and children's assertions that the father lived separately from the family —a claim that was critical to the father's request for custody of his children and that the trial court refused to accept without further investigation by CFSA. The government also questioned both the mother's and father's insistence that one of the children, K.M., was already living at her father's home at the time of the children's removal, that her name was on her father's lease, and that her name was *not* on her mother's lease. [27] The father's attorney, asking that K.M. be returned to the care of her father and that he also be granted custody of the other children who lived with their mother, stated that "[t]here are no allegations against him in the petition" and "we're prepared to prove" that K.M. lived with her father.

To her credit, the magistrate judge, though finding the government's efforts reasonable, pressed the agency on many of these matters and urged it to investigate the father as a placement option. The court nonetheless agreed with

the agency that "it would be contrary to the welfare of all of the children to return home at this time," noting that the agency needed more time to investigate this issue. These exchanges exemplify the government's mindset throughout the early stages of these proceedings —a mindset that resembled a presumption against the father rather than a recognition of his heightened interest in the placement of these children.

III. Conclusion

As in *In re J.F.,* the father here "promptly and continuously asserted his right to custody of the child[ren]." 615 A.2d at 597 (citing *In re S.G.,* 581 A.2d at 783 n. 17). And also as in *In re J.F.,* the court did not apply the presumption in favor of the children's father, did not make any express finding—and was not asked to make any finding—that their father was unfit, and did not have a record before it that adequately supported such a finding. 615 A.2d at 598–99; *cf. In re S.G.,* 581 A.2d at 787 (Rogers, C.J., and Ferren, J., concurring) (noting the trial court's "insufficient factual basis for determining where [the child's] best interest lay"). What is known from the record is that this father was involved in his children's lives, that they spent weekends together, that the children viewed themselves as having two different homes, that they felt safe with their father, that they "love[d] going to dad," and that the father's sister, who was the children's caretaker since they moved from the foster homes, viewed her brother as "a great father." At the disposition hearing, a social worker stated that the father's visits with his children were "going well," that there were "no problems or concerns," and that "everybody [was] enjoying visits." While the government leveled allegations regarding the father's anger management issues, his physical inability to care for the children, the children's dental neglect, and the family's history of contacts with CFSA, the magistrate judge "never made any findings regarding the father's fitness," *In re S.G.,* 581 A.2d at 787 (Rogers, C.J., and Ferren, J., concurring), stated that his health "may or may not be one factor to be considered," and made the decision to commit the children while leaving many factual disputes unresolved. ***697** In affirming the order committing the children, the associate judge likewise never characterized the father as unfit and never specified, if he was fit, what evidence justified the rebuttal of his right to presumptive custody of his children.

We conclude that the trial court applied an incorrect legal standard by failing to give meaningful weight to the parental presumption before it rejected the father's request for custody of his children and committed them to CFSA. We therefore reverse the trial court's order affirming that disposition and remand this case so that the trial court may incorporate the parental presumption into its analysis. Absent a showing that the father has failed to meet the threshold criteria for custody, the government must prove by clear and convincing evidence that awarding him custody would be contrary to the children's best interest.

So ordered.

PER CURIAM

BEFORE: WASHINGTON, Chief Judge; GLICKMAN, FISHER, BLACKBURNE–RIGSBY, * THOMPSON, BECKWITH, * EASTERLY, and McLEESE, Associate Judges; FERREN, * Senior Judge.

ORDER

On consideration of appellee's motion for an extension of time within which to file a petition for rehearing or rehearing *en banc,* appellee's motion for leave to file excess pages of appellee's lodged petition for rehearing or rehearing *en banc,* and appellant's opposition thereto, it is

ORDERED that appellee's motion for an extension of time within which to file a petition for rehearing or rehearing *en banc* is granted. It is

FURTHER ORDERED that appellee's motion for leave to file excess pages of appellee's lodged petition for rehearing or rehearing *en banc* is granted, and the Clerk shall file appellee's lodged petition for rehearing or rehearing *en banc.* It is

FURTHER ORDERED by the merits division * that the petition for rehearing is granted to the extent that the opinions issued by this court on September 20, 2012, 52 A.3d 887 (D.C.2012), and February 21, 2013, 60 A.3d 1225 (D.C.2013), are hereby vacated. It is

FURTHER ORDERED that appellee's petition for rehearing *en banc* is denied. It is

FURTHER ORDERED that the Clerk shall issue the accompanying opinion on this day, March 13, 2014.

All Citations

88 A.3d 678

Footnotes

1 The revisions appear primarily in Part II.A.1, Part II.A.2, and the Conclusion.

2 All sections of the D.C.Code cited to in this opinion are to the 2012 Repl. version unless otherwise specified.

3 The petitions also stated that a CFSA social worker had been unable to speak with the father because she had not determined where he was hospitalized.

4 Our law requires the family court to determine whether the government made "reasonable efforts" to prevent removal of the child from the home. D.C.Code § 16–2312(d)(3). Relatedly, D.C.Code § 16–2310(b) states that a child cannot be placed in shelter care unless it is clear that shelter care is required to protect the child or because he has no parent or other person to care for him and "no alternative resources or arrangements are available to the family that would adequately safeguard the child without requiring removal." The reasonable efforts requirement is discussed in further detail *infra* at 695.

5 In the parties' joint pretrial statement, the GAL contended that the parents "failed to provide proper parental care necessary to protect the health of their children," specifically noting the children's need for treatment for serious tooth decay. Arguing that this was "a whole new topic of neglect" "only two weeks away from trial," the father asked that the court order the government to proceed to trial on the original petitions. After a discussion of the necessity to formally amend the petition, the government informed the parties on the record that the petition now included charges relating to dental neglect. The petitions were never formally amended.

6 Throughout these proceedings, the government and GAL raised concerns about the father's lung condition and the fact that he remained seated during at least one of his supervised visits with his children. The father's attorney disputed a claim in a pretrial report that the father had to be hospitalized monthly, asserting that his lung condition was under control, that he was capable of "actively parenting his children," and that it was appropriate to remain seated during visits in which everyone else was seated. With respect to the government's concerns about his "ability to monitor such active kids," the father himself stated that "we go walking," "we go to the store or the playground" that was right outside his door, and "I have all day to watch them play."

7 The GAL stated, for example, that she had witnessed some "anger management problems," including a voice message the father left for his sister, K.V., in which he used profanity when referring to the children. K.V. called the outburst "an isolated incident" and stated that her brother had not used profanity in front of the children.

8 The government objected to the father's request for release of his children under protective supervision based in part upon concern "as to whether or not [the father's] current housing situation would support all six of the children." While a social worker had visited the father's apartment, Delia Hoffman, the ongoing social worker on the case, stated at the disposition hearing that she had not been to the father's apartment but that she "believe[d]" it was "a two or a three bedroom" apartment. Almost three months after the children's removal from their mother's home, the government still claimed to have insufficient information to allow the father to have unsupervised visits, no less custody of his children. For his part, the father stated at the hearing that he had "taken care of [his] kids before we came into this court system."

9 The father had opposed the order that he undergo psychological testing, asserting that his mental competence had never been raised as an issue in this case, that the government was on a "fishing expedition," and that "there is no showing that he is an unfit parent and there is no basis to have a mental health evaluation of him." The government argued, among other things, that the father's anger management issues justified the request.

10 Specifically, the father argues that he was denied a probable cause hearing, that he was denied the right to offer testimony, that the court's decision to place the children in shelter care was legal error and factually unsupported, and that the court's finding that the government made reasonable efforts to prevent placement of the children outside the home was based on improper factors.

11 The possible dispositions include returning the child to the care of his parent or guardian, protective supervision, placing the child with a third-party provider (including an agency facility or foster care), commitment of the child to a treatment facility, termination of the parental rights and adoption, or any other disposition permitted by law that serves the best interests of the child. D.C.Code § 16–2320(a).

12 Although some of the relevant sections of the opinion in *In re S.G.* appear in a concurrence, the court noted that "[t]he concurring opinion represents the opinion of the court with respect to the issue addressed herein," 581 A.2d at 786 n. *, namely, the application of the parental presumption to fit noncustodial parents.

13 The court concluded that the father in that case was not entitled to the parental presumption because he had failed to grasp his opportunity interest by long ago surrendering custody of the child to the mother and never seeking to regain it prior to the neglect finding. Had the father *not* relinquished his opportunity interest, this court stated, the trial court "would have an insufficient factual basis for determining where S.G.'s best interest lay" because "the judge never made any findings regarding the father's fitness." *In re S.G.,* 581 A.2d at 786–87.

14 As our prior cases make clear, the parental presumption is inherent in the natural parent, subject to nullification by a government showing of unfitness. *See, e.g., In re S.M.,* 985 A.2d 413, 418–419 (D.C.2009) (noting that the trial court did not "find that [the father] was unfit so as to negate by itself the presumption"); *id.* at 417 (noting that "application of the statute must take into account the presumption that the child's best interest will be served by placing the child with his natural parent, provided the parent has not been proved unfit"). We do not, moreover, read the *J.F.* decision to require clear and convincing evidence of the father's unfitness—a question that is not, in any event, an issue in this appeal, and we express no opinion on the evidentiary standard for determining fitness. The standard we apply here, as stated in the context of an adoption case, is this: "When a fit, unwed, noncustodial father has seized his opportunity interest, his resulting right to presumptive custody 'can be overridden only by a showing by clear and convincing evidence that it is in the best interest of the child to be placed with unrelated persons.' " *In re C.L.O.,* 41 A.3d 502, 512 (D.C.2012) (quoting *In re S.M.,* 985 A.2d at 417).

15 The District of Columbia applies a broad and flexible definition of fitness, recognizing "many varying degrees of fitness." *In re N.M.S.,* 347 A.2d 924, 927 (D.C.1975); *see also Appeal of H.R.,* 581 A.2d at 1178 (suggesting mental illness, violence, "serious emotional problems," and "history of alcohol abuse and an inability to hold jobs" as justifications for a finding of unfitness). *Cf. Estate of Williams,* 922 S.W.2d 422, 425 (Mo.Ct.App.1996) ("It appears that 'unfit' is given a broad definition in child custody matters and courts are given considerable discretion in applying that term."). Other states have employed a variety of judicially crafted definitions. *See, e.g., Petition of New England Home for Little Wanderers,* 367 Mass. 631, 328 N.E.2d 854, 863 (1975) ("grievous shortcomings or handicaps that would put the child's welfare in the family milieu much at hazard"); *Ritter v. Ritter,* 234 Neb. 203, 450 N.W.2d 204, 210 (1990) ("a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being"); *In Interest of Kerns,* 225 Kan. 746, 594 P.2d 187, 193 (1979) (surveying the various definitions of unfitness used by Kansas courts).

16 *Appeal of H.R., supra,* contains a comprehensive discussion of what it means for a noncustodial parent to have "grasped his opportunity interest." 581 A.2d at 1159–65.

17 *In re J.F.* and *In re S.G.* did not put it in these terms, but in seeking to interpret the parental preference of D.C.Code § 16–2320(a) in a way that ensures its constitutionality in the absence of an express statutory standard, we find in the principle of constitutional avoidance the justification for the presumption in our case law that a fit parent who has grasped his opportunity interest will be awarded temporary custody of his children absent clear and convincing evidence that placement with the CFSA is in the children's best interests. *See Mack v. United States,* 6 A.3d 1224, 1233–34 (D.C.2010) ("[T]he canon of constitutional avoidance 'is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.' " (quoting *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 516, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009))); *accord Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). As our prior decisions have recognized, the time between the decisions on temporary and permanent custody can be substantial, and the considerable bonding between the third-party custodian and the child will almost inevitably give that custodian an advantage over the noncustodial father in a best interest analysis at the time permanent custody is determined. Under these circumstances, a serious constitutional problem arises with respect to whether a "clear and convincing" or a lesser preponderance standard should apply to a period of time that may seriously prejudice a fit parent's presumptive right to permanent custody in the event he is deprived of temporary custody. *See In re S.G.,* 581 A.2d at 786. Because it is typically not possible to discern the length of the interval between temporary and permanent custody at the time temporary custody is awarded, and it is therefore not possible to identify a constitutional limitation on the award of temporary custody in every case, the likelihood of a constitutional issue arising is nonetheless sufficiently strong that we should construe the statute by applying a policy

that would assure its constitutionality—the clear and convincing standard when a fit natural father who has seized his opportunity interest seeks custody.

18 *See In re B.K.,* 429 A.2d 1331, 1333 (D.C.1981) (reviewing only the neglect adjudication, not the disposition, in a case in which both parents were neglectful); *In re N.H.,* 569 A.2d 1179, 1181–83 (D.C.1990) (reviewing a mother's challenge to a neglect finding where no father was involved); *In re L.E.J.,* 465 A.2d 374, 375–377 (D.C.1983) (same); *see also In re M.D.,* 602 A.2d 109, 115 n. 17 (D.C.1992) (reversing the denial of visitation rights to a father where both parents had stipulated to the child's neglect); *In re Ko.W.,* 774 A.2d 296, 304 (D.C.2001) (reviewing an order depriving a father of any visitation with his sons).

19 In *In re A.G.,* this court expressly declined to reach, as unnecessary, the government's final argument that the father's opposition to the guardianship petition lacked merit because he was unfit and had not seized his opportunity interest. 900 A.2d at 682 n. 8. One might argue that this court, in declining to address this argument, was drawing a bright line, announcing a preponderance standard for custody decisions in all neglect proceedings except for those proposing complete termination of parental rights. Yet because the court did not address, let alone come to grips with, the "fitness" and "opportunity" criteria central to our disposition here—criteria stressed years earlier in *In re S.G.* and *In re J.F.*—*In re A.G.* is not binding authority beyond the facts and issues it expressly addresses. It is worth noting that three years after *In re A.G.,* this court indicated that a clear-and-convincing-evidence standard may apply in other guardianship contexts. "We reiterate, that parents whose parental rights are intact do not lose the right to have their choice as to their child's adoption *or guardianship* being accorded substantial weight simply because they have not been model parents or have lost temporary custody of their children." *In re T.W.M.,* 964 A.2d 595, 601–02 n. 6 (D.C.2009) (emphasis added) (reversing trial court's denial of adoption petition of natural parents' chosen caregiver) (internal quotation marks omitted). *See also id.* at 602 (stating that a "parent's choice of a fit custodian for the child must be given *weighty consideration* which can be overcome only by ... clear and convincing evidence" (quoting *In re T.J.,* 666 A.2d 1, 11 (D.C.1995))) (emphasis added in *T.W.M.*).

20 The parameters of other states' jurisdiction in circumstances in which a noncustodial parent seeks custody are discussed in Angela Greene, *The Crab Fisherman and His Children: A Constitutional Compass for the Non–Offending Parent in Child Protection Cases,* 24 Alaska L.Rev. 173, 181–88 (2007); Leslie Joan Harris, *Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions,* 9 J.L. & Fam. Stud. 281, 304–06 (2007); and Vivek S. Sankaran, *Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents,* 82 Temp. L.Rev. 55, 70–77 (2009).

21 While we recognize that our review is of the associate judge's order affirming the magistrate judge, rather than the ruling of the magistrate judge, "we do not believe our powers of appellate review are so limited that, in reviewing the trial court's final order we may not look to the findings and conclusions of the fact finder on which that ruling is based." *In re C.A.B.,* 4 A.3d 890, 902 (D.C.2010); *see also id.* at 902–903 ("A contrary conclusion would create the need for countless remands, consuming time and judicial resources, in cases like the present one, where a magistrate has painstakingly reviewed the record and made comprehensive findings and conclusions, and an associate judge succinctly affirms."). In conducting this review of the trial court's orders in neglect proceedings, we employ an abuse-of-discretion standard and evaluate whether the trial court "exercised its discretion within the range of permissible alternatives, based on all relevant factors and no improper factor." *In re Baby Boy C.,* 630 A.2d 670, 673 (D.C.1993) (citing *In re R.M.G.,* 454 A.2d 776, 790 (D.C.1982)). "We then evaluate whether the decision is supported by substantial reasoning, drawn from a firm factual foundation in the record." *In re D.I.S.,* 494 A.2d 1316, 1323 (D.C.1985) (internal quotation marks and citations omitted). We review de novo the legal question whether the trial court applied the proper legal standard. *See In re C.L.O.,* 41 A.3d at 510; *Davis v. United States,* 564 A.2d 31, 35 (D.C.1989) (en banc).

22 Indeed, two statutes in related family law contexts specifically support consideration of parental health. D.C.Code § 16–2353, which sets forth factors to consider when evaluating a termination of parental rights petition, lists "the physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child." D.C.Code § 16–2353(b)(2). And D.C.Code § 16–914 includes "the mental and physical health of all individuals involved" in a best interest calculation as it relates to custody determinations outside of the abuse and neglect sphere. D.C.Code § 16–914(3)(E).

23 "[O]ur child neglect statute ... was not intended to provide a procedure to take the children of the poor and give them to the rich, nor to take the children of the illiterate and give them to the educated, nor to take the children of the crude and give them to the cultured, nor to take the children of the weak and sickly and give them to the strong and healthy." *In re J.G.,* 831 A.2d at 1000 (quoting *In re T.W.,* 732 A.2d 254, 262 (D.C.1999)).

24 In any event, we have routinely held that "[f]amily poverty is not a reason, in and of itself, to find a child neglected, even if it plausibly could be argued that the child's best interests would be served by removal to a materially wealthier home." *In re A.H.,* 842 A.2d 674, 687 (D.C.2004). Instead, "[w]hen it is poverty alone that causes an otherwise fit parent to be unable to care for her child, adequate public or private benefits should and will be made available to the family [.]" *Id.*

25 We note, in addition, that the father's appellate counsel essentially acknowledged at oral argument what the government also emphasized in its brief—namely, that the father's challenges to the initial hearing were rendered moot by the disposition order. Our disposition in this case likewise makes it unnecessary for us to address the father's challenge to the imposition of supervised visitation, as any additional factfinding on remand may affect matters of visitation.

26 The judge based her finding upon the allegations in the complaint, the fact that CFSA had convened a family team meeting, the fact that the father was not "physically available at that time to serve as a resource," and the fact that the family had had prior contacts with CFSA. Counsel for the father disputed the significance of the prior contacts and argued that each of the referrals was either unfounded or inconclusive. The court considered the prior contacts while explicitly "not taking any position with respect to the outcomes in those cases" and without resolving the disputed issues.

27 When the government indicated at the initial hearing that the mother was receiving social security payments for K.M., the mother stated that this was not true and that she did not receive social security, while the father stated that he *did* receive social security and that he had K.M.'s papers at home.

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86 A.3d 584
District of Columbia Court of Appeals.

In re D.M.
T.M., Appellant.

No. 13–FS–406.
|
Argued Jan. 30, 2014.
|
Decided March 13, 2014.

Synopsis

Background: The Stated moved to terminate mother and father's parental rights to child. The Superior Court, District of Columbia, 188–TPR–07, Lloyd U. Nolan, Jr., Magistrate Judge, Jennifer DiToro, Reviewing Judge, terminated parental rights. Mother appealed.

[Holding:] The Court of Appeals, Glickman, J., held that the magistrate failed to give weighty consideration to mother's preference that mother in law have custody of child if mother's parental rights were terminated.

Vacated and remanded.

West Headnotes (4)

[1] Infants
Dependency, Permanency, and Rights Termination

In conducting appellate review of a decision to terminate parental rights, a determination committed in the first instance to the trial court's discretion, the Court of Appeals is mindful that from a procedural standpoint, its role is to review the order of the trial judge, not the magistrate judge.

Cases that cite this headnote

[2] Infants
Post-termination plan for child

Infants
Determination and remand

The magistrate failed to give weighty consideration to mother's preference that mother in law have custody of child if mother's parental rights were terminated, and thus vacation of order terminating parental rights and remand to consider mother's preference was required; the record contained no finding that mother in law was unfit to care for child, or that it was contrary to child's best interest to be placed in mother in law's care.

Cases that cite this headnote

[3] Infants
Post-termination plan for child

A parent's choice of a fit custodian for the child must be given weighty consideration which can be overcome only by a showing, by clear and convincing evidence, that the custodial arrangement and preservation of the parent-child relationship is clearly contrary to the child's best interest.

Cases that cite this headnote

[4] Infants
Drug and alcohol abuse, dependency, and exposure

Infants
Abandonment, absence, and nonsupport

Evidence supported finding that termination of mother's parental rights was in child's best interest; mother was addicted to drugs, she was not consistent in maintaining contact with child, she missed visitation with child, and child was a viable candidate for adoption. D.C. Official Code, 2001 Ed. § 16–2353.

Cases that cite this headnote

Attorneys and Law Firms

***585** Madhavan K. Nair for appellant T.M.

Jon S. Pascale for appellant T.P. filed a statement in lieu of brief in support of appellant T.M.

Charmetra L. Parker, Assistant Attorney General, with whom Irvin B. Nathan, Attorney General for the District of Columbia, Todd S. Kim, Solicitor General, and Donna M. Murasky, Deputy Solicitor General, were on the brief, for appellee District of Columbia.

R. Michael Labelle, guardian ad litem, for appellee D.M.

Before GLICKMAN and EASTERLY, Associate Judges, and FERREN, Senior Judge.

Opinion

GLICKMAN, Associate Judge:

T.M., the biological mother of D.M., appeals the termination of her parental rights. She contends that the magistrate judge erred by failing to give weighty consideration to the third-party custodial arrangement she proposed as an alternative to the termination of her parental rights, and that there was insufficient evidence that termination was in D.M.'s best interest. Although we are not persuaded by the latter claim, we agree that the magistrate judge did not discuss T.M.'s proposed custody arrangement in enough detail to demonstrate that it received the weighty consideration our cases require. Accordingly, we vacate the judgment of the Superior Court and remand this case for further evaluation of T.M.'s alternative custody proposal, and for such other proceedings as may be appropriate in the light of changed circumstances.

I.

D.M. was born on January 14, 2000, to T.M., his biological mother, and T.P., his biological father. On June 19, 2007, D.M. was committed to the care of the Child and Family Services Agency ("CFSA") following T.M.'s stipulation that she was unable to care for him herself due to her incarceration and that she had not designated another person to care for him in her absence.

The original goal of D.M.'s commitment was for him to be reunited with his biological mother. Eventually, however, on account of T.M.'s persistent drug dependency, which caused cognitive deficits and ***586** hampered her capacity for rational decision-making, and T.M.'s inability to complete court-mandated parenting classes and therapy, the goal changed to adoption. On March 26, 2010, the District of Columbia moved to terminate the parental rights of both T.M. and T.P. [1] The hearing on that motion commenced in late 2011.

In the course of the hearing, T.M. testified that she wished to resume her parental role and have D.M. live with her, but if that were not possible, she wanted her son to live with her mother-in-law, T.M.2. [2] T.M.2, who did not know D.M. well, [3] testified that she nonetheless was interested in becoming a foster parent for him, even after she learned about his special needs and behavioral issues. To that end, she testified, she had completed foster parenting classes, undergone a home study, and been licensed as a foster parent by the relevant agency in Virginia (where she resided). T.M.2 expressed a willingness to adopt D.M. if CFSA recommended it.

CFSA, however, did not support T.M.2's candidacy as a suitable placement for D.M. Michael Carr, an adoption recruitment social worker with CFSA, testified that the placement team doubted T.M.2's ability to care for D.M. in view of his special needs and challenging behavior, [4] T.M.2's demanding work schedule, and the minimal supervision that would be available to D.M. in her absence. [5] Carr testified, moreover, that despite D.M.'s age, special needs, and serious behavioral issues, he was still adoptable; he had seen children with similar characteristics find permanent adoptive placements.

The magistrate judge orally granted the District's motion on May 1, 2012, and issued written findings of fact and conclusions of law on September 20, 2012. He determined "by clear and convincing evidence that it is in [D.M.]'s best interest to terminate the rights of his biological mother and father." Only T.M. sought review of that decision. The reviewing judge in Superior Court affirmed it, and T.M. timely appealed to this court.

II.

[1] In conducting our review of a decision to terminate parental rights, a determination committed in the first instance to the trial court's discretion, [6] "we are mindful that from a procedural standpoint, our role is to review the order of the trial judge, not the magistrate judge." [7] However, as this court has stated, "we do not believe our

powers of appellate review are ***587** so limited that, in reviewing the trial court's final order we may not look to the findings and conclusions of the fact finder on which that ruling is based." [8] Rather, "we review the magistrate judge's factual findings as the findings of the trial judge and review for abuse of discretion or a clear lack of evidentiary support." [9]

[2] **[3]** T.M.'s strongest claim is her contention that the magistrate judge did not properly evaluate her preference for T.M.2 to have custody of D.M. Because "a child and the natural parents share a vital interest in preventing erroneous termination of their natural relationship," we have mandated that "a parent's choice of a fit custodian for the child must be given weighty consideration which can be overcome only by a showing, by clear and convincing evidence, that the custodial arrangement and preservation of the parent-child relationship is clearly contrary to the child's best interest." [10] In other words, a parent, whose parental rights are still intact, has the right to propose a custodial arrangement, which may include not only adoption but also placement of the child with someone else while the biological parent retains residual rights, [11] and the court must give weighty consideration to such an alternative before terminating the parent's rights. This requirement, we have held, applies in connection with a petition to terminate parental rights whether or not a custody or adoption petition has yet been filed or is pending. [12]

As the District notes, this court has, in dictum, construed its decision in *In re An.C.* [13] to mean that "a biological parent's choice of related caretakers should not be afforded the same weighty consideration where the neglected child had been in the custody of foster care for a considerable length of time before the biological parent ***588** demonstrated any interest in exploring possible familial placement options." [14] But the court did not say this in *An.C.,* and if this dictum is understood to state a categorical exception to the rule that a biological parent's choice of a fit custodian is entitled to weighty consideration in a termination of parental rights proceeding, neither *An.C.* nor any of our subsequent cases supports it, and it is not correct. "It is important to recognize that our 'weighty consideration' cases do not say that the parents' preferences are necessarily controlling." [15] Our opinion in *An.C.* simply made clear that, while a natural parent's preference for a fit custodian deserves weighty consideration (which it received in *An.C.*), the parent's tardiness in expressing that preference legitimately may count against it when the delay allowed the children to develop a strong bond with a fit foster caregiver who wishes to provide a permanent home for them. [16] In *A.T.A.* and the other cases cited in footnote 14, *supra,* the trial court properly gave great weight to the biological parents' belatedly announced preference before finding it overcome by clear and convincing evidence of the children's best interests, and on appeal this court did not hold that the weighty consideration was unnecessary. [17] We have never upheld a trial court's failure to give weighty consideration to a parental preference on account of parental dilatoriness; nor has this court ever held that weighty consideration was unnecessary because the parent waited too long to propose a custody arrangement. [18] At most, we now make clear, dilatoriness is simply a factor to be considered as part of the weighty consideration that is due.

We are constrained to say that the requisite "weighty consideration" and justification ***589** for overriding T.M.'s preference do not appear on the face of the magistrate judge's order in the present case. The order contains no finding that T.M.2 is unfit to care for D.M. or that it would be contrary to D.M.'s best interest to place him in T.M.2's care. [19] Indeed, there is no discussion at all of T.M.2 in the section of the order setting forth the magistrate judge's conclusions of law, nor any explicit recognition of the "weighty consideration" requirement. The reviewing judge, addressing this same claim of error, concluded that "[n]othing in the record below supports the contention that the Magistrate Judge failed to give preference to family members." We do not agree with that conclusion. It would be more accurate to say that nothing in the record assures us that the magistrate judge in fact gave the requisite weighty consideration to T.M.'s preference for placing D.M. with T.M.2. Moreover, in the absence of more detailed factual findings than were made here, such an omission cannot be cured by a *de novo* assessment of the evidence by the reviewing judge or this court. We do not mean to suggest that the magistrate judge could not have reached the conclusion on the record before us that T.M.'s preference was clearly contrary to D.M.'s best interest; perhaps he did reach that conclusion *sub silentio.* But he failed to put it in his order and explain it.

[4] That, however, is the only material deficiency we perceive in the trial court's determination in this case. In reaching the conclusion that termination of parental rights was in D.M.'s best interest, the magistrate judge addressed each of the relevant statutory factors[20] and properly required proof by clear and convincing evidence.[21] The magistrate judge also considered whether the purposes of terminating parental rights would be served by granting the government's motion in this case—including the purpose of enhancing the opportunity for a prompt adoptive placement.[22] Setting aside the question of T.M.2's candidacy as a custodian for D.M., there was ample evidentiary support for the conclusions that the magistrate judge reached with respect to all these factors. This evidentiary support included testimony regarding D.M.'s special needs, which were a challenge even for his therapeutically-trained foster parent, T.D.; T.M.'s severe PCP dependence;[23] her lack of consistency in maintaining contact with ***590** D.M., which included showing up quite late or missing scheduled visitation sessions; and the quality of their interactions, during which D.M. sometimes acted more like a parent to T.M. than vice versa. And notwithstanding the fact that no petition for adoption of D.M. was pending, the finding that he was "still a viable candidate for adoption" was supported not only by Carr's testimony but also, as the magistrate judge stated, by the potential adoptive interest expressed by T.D. Thus, subject to the need for further evaluation of T.M.'s preference for placing D.M. in the custody of T.M.2, we are not persuaded by T.M.'s contention that there was insufficient evidence to find the termination of her parental rights to be in D.M.'s best interest.

III.

Because the magistrate judge failed to give the requisite consideration to T.M.'s choice of caretaker, we vacate the judgment of the Superior Court terminating her parental rights and remand the case for further proceedings consistent with this opinion.[24]

So ordered.

All Citations

86 A.3d 584

Footnotes

1 Although, for a period of time, T.P. had expressed an interest in reuniting with D.M., by the time of trial he had (to quote the order of the magistrate judge) "seemingly disappeared" from T.M.'s life.

2 T.M. further testified that she would consent to D.M.'s adoption by T.M.2.

3 She recalled having met him only once, when he was a young child.

4 It was noted that T.M.2 had indicated in a "matching" questionnaire that she would hesitate to care for a child with suicidal ideation or a problem with head-banging. T.M.2 testified that she still desired to care for D.M. after she learned that he had both those issues, but the CFSA social workers felt that she minimized the seriousness of D.M.'s troubling behavior and difficulties.

5 At the time of the hearing, T.M.2's job at the Department of Corrections required her to be at work from 12:30 p.m. to 9:00 p.m., and her commute was an hour and a half each way. T.M.2 testified that she would be able to change her schedule so that she could work from 5:00 a.m. to 1:30 p.m. She anticipated that her 23–year–old son would be available to supervise D.M. when she was not at home.

6 *See In re Baby Boy C.,* 630 A.2d 670, 683 (D.C.1993).

7 *In re C.L.O.,* 41 A.3d 502, 510 (D.C.2012) (citation, alterations, and internal quotation marks omitted).

8 *Id.* (citation omitted).

9 *Id.* (internal quotation marks omitted).

10 *In re T.J.,* 666 A.2d 1, 11 (D.C.1995); *see also In re T.W.M.,* 18 A.3d 815, 819 (D.C.2011) ("Where the parents have unequivocally exercised their right to designate a custodian, the court can terminate the parents' right to choose only if the court finds by clear and convincing evidence that the placement selected by the parents is clearly not in the child's best interest.") (internal citations and quotation marks omitted); *In re F.N.B.,* 706 A.2d 28, 31 (D.C.1998) ("[T]he availability of a fit family member willing to assume legal custody of the child is an important consideration in the court's decision whether to terminate the parent-child relationship.") (citing *In re Baby Girl D.S.,* 600 A.2d 71, 83–84 (D.C.1991)).

11 *See* D.C.Code § 16–2301(22) ("The term 'residual parental rights and responsibilities' means those rights and responsibilities remaining with the parent after transfer of legal custody or guardianship of the person, including (but not limited to) the right of visitation, consent to adoption, and determination of religious affiliation and the responsibility for support."). Foster care, third-party custody, and permanent guardianship are three different forms of child placement that are not incompatible with the maintenance of a biological parent's parental rights. *See* 29 DCMR § 6000 *et seq.* (foster care); D.C.Code § 16–2381 *et seq.* (permanent guardianship); D.C.Code § 16–831.01 *et seq.* (third-party custody).

12 *See In re F.N.B.,* 706 A.2d at 31 ("Although *T.J.* concerned adoption, its underlying rationale is equally applicable to termination of parental rights cases ... especially because the constitutional implications are close, if not identical.") (internal citations omitted); *see also In re A.B.,* 955 A.2d 161, 165 (D.C.2008) (applying *T.J.* standard in a termination-only hearing, where alternative caretaker identified himself during a permanency hearing as a placement resource); *In re B.J.,* 917 A.2d 86, 89 (D.C.2007) (applying *T.J.* standard where alternative caretaker testified during termination of parental rights hearing that she would consider adopting or filing for guardianship of the children).

13 722 A.2d 36 (D.C.1998).

14 *In re A.T.A.,* 910 A.2d 293, 297 n. 4 (D.C.2006) (citing *In re An.C.,* 722 A.2d at 40–41); *see also, e.g., In re K.D.,* 26 A.3d 772, 781–82 n. 10 (D.C.2011); *In re R.E.S.,* 19 A.3d 785, 790 n. 5 (D.C.2011); *In re B.J.,* 917 A.2d at 93–94. In each of these cases, beginning with *In re A.T.A.,* the stated proposition, supposedly originating in *In re An.C.,* was dictum. *See infra,* footnote 17.

15 *In re R.E.S.,* 19 A.3d at 790 (internal quotation marks omitted).

16 *See In re An.C.,* 722 A.2d at 41 ("Although, as we held in *T.J.,* the wishes of a fit parent as to the custody of his or her child constitute an important factor in the judge's calculus, the TPR judge could rationally find, and she did find, that in this case the father's statement of preference came far too late, that the proposed alternative placements were unrealistic, and that further delay would be detrimental to the children's well-being.").

17 *See In re K.D.,* 26 A.3d at 781–82 n. 10 ("declin[ing] to apply the principle that a biological parent's choice of related caretakers should not be afforded the same weighty consideration where the neglected child had been in the custody of foster care for a considerable length of time before the biological parent demonstrated any interest in exploring possible familial placement options" where the natural parent was not "derelict in locating other family members to adopt the child," and her choice was entitled to receive and did receive weighty consideration); *In re R.E.S.,* 19 A.3d at 790 n. 5 (same); *In re B.J.,* 917 A.2d at 94 ("[T]he trial judge carefully considered whether placement with Le.J. would be in the best interests of B.J. and Br.J., and we are satisfied that, however weighty the consideration to be given to L.J.'s desire that Le.J. be permitted to care for B.J. and Br.J., there was ample evidence that placement with Le.J. would not have been in the children's best interests."); *In re A.T.A.,* 910 A.2d at 297 ("Based on the trial court's detailed findings, we find the great weight given to T.H.'s choice of caretaker was overcome by the best interests of the twins.").

18 *Cf. In re C.L.O.,* 41 A.3d 502, 512 (D.C.2012) (not deciding whether, in a contested adoption proceeding, clear and convincing evidence is required to override the opposition and waive the consent of a fit, unwed, noncustodial father who has failed to seize his opportunity interest in developing a custodial relationship with his child).

19 Rather, the magistrate judge acknowledged that T.M.2 had taken foster care classes and become a licensed foster parent in Virginia, and that she was willing to change her shift at work and make other accommodations in order for D.M. to be placed with her. Although the magistrate judge noted that "[T.M.2] only recalled meeting [D.M.] once as a toddler" and "testified that she did not know everything about [D.M.]," those isolated findings fall well short of a determination that the proposed placement of D.M. with T.M.2 would be contrary to his best interest. The magistrate judge also noted that Carr "had concerns about [T.M.] minimizing [D.M.]'s behaviors, as well as her work schedule and her ability to have or give appropriate care to [D.M.];" but the judge did not evaluate those concerns or weigh them in light of the totality of the evidence and the weight to be accorded T.M.'s preference.

20 *See* D.C.Code § 16–2353 (2012 Repl.).

21 *See In re C.M.,* 916 A.2d 169, 175 (D.C.2007).

22 *See* D.C.Code § 16–2351(a)(3) (2012 Repl.); *see also In re C.M.,* 916 A.2d at 178 (noting that in reviewing a termination of parental rights, the court "considers whether any of the three enumerated purposes offer an answer for the purpose of determining whether the termination of parental rights is warranted") (internal quotation marks omitted).

23 T.M. tested positive for PCP each time she submitted for a drug test and though she had been in seven to ten drug programs, she had not completed any. Despite this history, T.M. would not acknowledge that she was addicted to PCP or that she needed long-term treatment.

24 We recognize and do not foreclose the possibility that changed circumstances also may need to be taken into account on remand in deciding whether to grant the District's motion for termination of parental rights.

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92 A.3d 1128
District of Columbia Court of Appeals.

S.M., Appellant
v.
R.M., Appellee.

No. 13–FM–236.
|
Argued Dec. 12, 2013.
|
Decided June 12, 2014.

Synopsis

Background: After successfully completing a drug treatment program, mother filed motions to modify child custody order, to which she had consented, which awarded child's aunt, the mother's sister, custody of her child in anticipation of her entry into treatment for her addiction. The Superior Court, District of Columbia, Alfred S. Irving, Jr., Trial Judge, denied motions. Mother appealed.

[Holding:] The Court of Appeals, Easterly, J., held that mother did not knowingly waive the parental presumption by consenting to order awarding her sister custody of her child after she was led to believe that such custody arrangement would be temporary.

Reversed and remanded.

West Headnotes (3)

[1] Child Custody
Agreements, Contracts, or Stipulations
Child Custody
Presumptions

A parent's irrevocable consent to the transfer of custody of the parent's child to a non-parent under the third-party custody statute generally waives the parent's parental presumption, such that the presumption will not apply in subsequent modification proceedings, assuming the parent's irrevocable consent to a transfer of custody to a third party is given with full knowledge and understanding of what the parents is consenting to and the consequences of that consent; clearly, if a parent believes that he or she is consenting to a provisional custody arrangement, but the third party is seeking a permanent custody transfer, the parent is not providing irrevocable consent to the relief sought by the third party. D.C. Official Code, 2001 Ed. §§ 16–831.05(a), 16–831.11.

Cases that cite this headnote

[2] Appeal and Error
Cases Triable in Appellate Court

Questions of law are reviewed de novo.

Cases that cite this headnote

[3] Child Custody
Agreements
Child Custody
Presumptions

Mother's irrevocable consent to transfer of custody of her child to her sister, in anticipation of her entry into drug treatment program, was not given with full knowledge and understanding of what she was consenting to and consequences of that consent, and thus, mother was entitled to the parental presumption, for the first time, in proceedings on her motion to modify custody upon her successful completion of the drug treatment program; during initial custody hearing, mother was led to believe that she was consenting to a temporary arrangement and that she could regain custody of her child by filing a modification motion as soon as she completed treatment, within a year. D.C. Official Code, 2001 Ed. §§ 16–831.05(a), 16–831.11.

Cases that cite this headnote

Attorneys and Law Firms

***1129** Michelle R. Bonner, for appellant S.M.

R.M., pro se.

Melissa Colangelo, Children's Law Center, with whom Katherine Zeisel, Washington, DC, was on the brief, for amicus curiae in support of child's best interests.

Before GLICKMAN and EASTERLY, Associate Judges, and FARRELL, Senior Judge.

Opinion

EASTERLY, Associate Judge:

This case requires us to interpret the Safe and Stable Homes for Children and Youth Amendment Act of 2007, D.C.Code §§ 16–831.01 to .13, 21–2301 (2012 Repl.), the child custody statute governing transfer of custody to non-parent third parties. Specifically, we consider whether the statutory parental presumption that custody with a parent is in a child's best interest applies beyond the initial custody transfer decision, to the modification of a third-party custody order.

In May 2006, R.M. ("the aunt") sought custody of T.P., the daughter of her sister S.M. ("the mother"). After a November 2007 hearing at which the Superior Court (the Honorable Fern Flanagan Saddler) awarded the aunt temporary custody of T.P., the mother filed an emergency motion for a stay. However, at a subsequent December 2007 hearing, the mother, who appeared pro se, retracted the allegations she had made in her emergency motion and agreed that custody of T.P. should be given to the aunt. The mother consented to this arrangement with the understanding that, in a year, when she completed treatment for her acknowledged drug problem, she would get her "baby" back. This understanding was affirmed by the aunt, who repeatedly reassured the mother at the hearing that she would regain custody of T.P.

As the parties discussed the custody arrangement, the Superior Court largely remained silent. Although the court did note that the parties would have to file a motion to modify the custody order, it did not explain what such a proceeding would entail. At no point was there any acknowledgment that the aunt's complaint ***1130** for custody had to be evaluated under the third party custody statute, D.C.Code § 16–831.01 et seq. (2012 Repl.), or that the third party custody statute recognizes a parental presumption that custody with a biological parent is in a child's best interest. At no point was there any acknowledgement that under the third party custody statute, the mother had three choices: (1) she could preserve her parental presumption by arranging, subject to her revocable consent, a temporary custody situation for T.P. with the aunt; (2) she could stand on her parental presumption and force the aunt to rebut it by clear and convincing evidence; or (3) she could waive the parental presumption by giving irrevocable consent to a custody transfer to the aunt, at which point the only concern in any future modification of custody proceedings would be whether, given a substantial and material change in circumstances, removal of T.P. from the custody of the aunt was in T.P.'s best interest. In fact, as reflected by its January 2008 order granting the aunt sole physical and legal custody of T.P., the Superior Court did not appear to be aware that the third-party custody statute governed these proceedings and cited instead to the intra-parental custody statute, D.C.Code § 16–914 (2012 Repl.).

The mother successfully addressed her drug problem, but she did not regain custody of T.P. Several years passed, during which the mother filed multiple motions to modify the 2008 custody order, as she had been directed to do at the 2007 hearing. It is the resolution of the fourth modification motion that concerns us. The mother, newly represented by counsel, asked the Superior Court (the Honorable Alfred S. Irving, Jr.) to incorporate the parental presumption under D.C.Code § 16–831.05 in its custody modification decision under D.C.Code § 16–831.11. In orders issued in December 2012, the Superior Court declined to apply the parental presumption and rejected the mother's motion for reconsideration. In an order issued in January 2013, the court ruled on the mother's motion for modification, finding that the mother had made a substantial change in her circumstances, but determining that modification of custody was not in the best interests of T.P. [1] These three orders are now on appeal.

The mother's central argument is that the Superior Court erred by not incorporating the parental presumption into its custody modification decision. Although she concedes that the parental presumption under D.C.Code § 16–831.05 ordinarily does not apply when a parent moves to modify a third-party custody order to which the

parent initially consented, she argues that such consent must be knowing and intelligent, and that she did not understand at the December 2007 hearing that she was irrevocably relinquishing custody of T.P. to the aunt. Accordingly, the mother asserts that the parental presumption, having never been properly rebutted or waived at the 2007 hearing, was still in force when she filed the subject motion for modification. The aunt disputes the mother's contention that she did not knowingly consent to an irrevocable transfer of custody and argues that the parental presumption should not apply in this case. Amicus curiae Children's Law Center argues that the parental presumption is categorically inapplicable whenever the Superior Court ***1131** is considering a motion to modify a custody order to a non-parent.

Examining the text of the modification provision, D.C.Code § 16–831.11, and the third party-custody statute as a whole, we determine that a parent's irrevocable consent to the transfer of custody of her child to a non-parent under D.C.Code § 16–831.05(a) generally waives his or her parental presumption, such that the presumption will not apply in subsequent modification proceedings. As the third-party custody statute reflects, however, this general rule presumes that a parent's irrevocable consent to a transfer of custody to a third party is given with full knowledge and understanding of what she is consenting to and the consequences of that consent. We conclude that the current appeal presents the exceptional case in which the record does not support the finding that the mother knowingly and intelligently consented to an irrevocable transfer of custody of her child. We therefore reverse the Superior Court's judgment awarding the aunt sole legal and physical custody of minor T.P., and remand the case for further proceedings consistent with this opinion.

I. Facts and Procedural History

T.P. was born in February 2000 to the mother and J.P. ("the father"), now deceased. In May 2006, the aunt sought custody of T.P. At the time the aunt's complaint was filed, the mother was housed at the D.C. jail. The father, who determined that he was unable to adequately care for T.P. due to his advancing age and failing health, [2] consented to the aunt's complaint for custody. For over a year, little action was taken in the case. In September 2007, the Superior Court held a hearing on the aunt's complaint and took sworn testimony. In November 2007, the parties received a ruling from the bench awarding the aunt temporary sole legal and physical custody with visitation to both parents, and a hearing was scheduled for May 2008 on the issue of permanent custody. Shortly thereafter, the mother filed a pro se emergency motion to stay the entry of the temporary order. The court granted the motion and the case was continued to early December 2007.

In December 2007 the mother, father, and aunt appeared for a status hearing; all were without counsel. The mother then retracted the allegations she had made in her emergency motion for a stay of the temporary order of custody. The mother told the court that she had made arrangements to enter a year-long drug treatment program and that she wished for the aunt to have custody of T.P. until she returned. Instead of simply issuing the order for temporary custody awarded in November, however, the court, sua sponte and without explanation, announced that it would issue an order granting the aunt permanent custody.

The court explained that the order would "say permanent custody, but it does not mean forever." Rather, the court informed the mother that it meant: "[A]nytime you want to change it, you file your motion." To this the mother responded: "I ain't going to want to change—I want her to keep ... my daughter ... [u]ntil ... I come home and complete that program and show my sister that I don't have to use [drugs] to live my life."

The mother's explicit desire to regain custody of her child prompted no comment from the court other than an affirmation that filing a motion would be "all you have to do." After this exchange, the court appeared ready to quickly conclude the proceedings, but then realized that it needed to confirm that the father consented to ***1132** a permanent transfer of custody to the aunt.

As the court spoke to the father, the mother repeatedly interjected with comments and questions. First, the mother informed the court that she wanted to return to court to regain custody of T.P. "this month next year before Christmas." The court explained that she could come back "whenever [she] want [ed] to do it." When the court asked the father if he consented "to the aunt having sole legal and sole physical custody," the mother asked: "What [does] that mean, legal custody?" The court

told her that "it just means that [the aunt] gets to make decisions about education ... religious affiliation ... [and] medical issues," but that the aunt and the mother could still confer about these matters. The mother accepted this explanation, but then returned to her questions about regaining custody: "And I still get my daughter back when I ... complete the program? Excuse me, Your Honor, I get my daughter back?" The aunt quickly responded to this question: "Yes." The court then qualified: "It's not automatic. What I'm trying to tell you is I'm giving her custody. If you want to get your daughter back, file a motion with the court."

The mother continued to express confusion, however, telling the court: "I don't understand that." Instead of getting an explanation from the court, she ended up in a dialogue with her sister:

AUNT: Just like how you came and filed that [emergency] motion, for to stop me?

MOTHER: I could file a motion to get my baby back?

COURT: Correct.

AUNT: Yeah, we'll do it together, you know?

MOTHER: Okay, let me ask you this in front of the judge.

AUNT: Yes.

MOTHER: When I complete the program, can I have my baby back?

AUNT: Yes, what did I tell you?

MOTHER: Okay.

AUNT: What did I tell you about that?

MOTHER: You told me you want me to go get myself together because you don't want me to die like our brothers died over drugs and you don't want [T.P.] to go into a home.

AUNT: Okay and what did I tell you, I'm [T.P.]'s what?

MOTHER: Aunt.

AUNT: And you are her what?

MOTHER: Mother.

AUNT: And—and—and who going to run—who needs to raise her?

MOTHER: Her mother.

AUNT: Right.

MOTHER: Me.

AUNT: Yes, yes.

The mother and the aunt concluded their conversation with the aunt reassuring the mother that she would bring T.P. to visit. The court, which had been silent during this exchange, then changed the subject, asking the father how to spell his surname and to confirm his date of birth and address.

The hearing concluded shortly thereafter. The aunt and the father thanked the court, and the mother told the court: "I'll see you next year." The court responded: "[T]here's no court date." As the court began to explain, the aunt interrupted:

COURT: If you want to change the ... order ...

AUNT: You have to file the papers.

COURT: ... file something.

The mother asked one last time, "but it will still be next year, right?" The aunt responded first:

AUNT: Okay, yes.

COURT: Whenever you file.

***1133** MOTHER: Okay.

AUNT: Yes.

The Superior Court issued a written order in January 2008 awarding the aunt permanent custody of T.P. The court said nothing in its order about the mother's repeatedly expressed desire to regain custody of her child in a year. Instead, the court noted without further discussion that both the father and mother "wish for the plaintiff to have custody of their minor child." Even so, the court did not rest its order on the parents' consent nor cite to any provision of D.C.Code § 16–831 governing awards of custody to non-parent third parties. Rather, the court applied D.C.Code § 16–914 (2012 Repl.), which governs

custody determinations "in any proceeding between parents," and makes determinative a "best interest of the child" analysis using a list of statutory factors. Examining these factors, the Superior Court concluded that the aunt was "a fit and proper person to have permanent sole physical custody and permanent sole legal custody of the minor child T.P. until further order of the court," and that to award such custody was "in the best interest of the minor child T.P."

The mother did not appeal the January 2008 order. Rather, over the next three years she sought to regain custody of her daughter by filing a series of pro se motions for modification of this order. In these motions she represented that she had completed drug treatment, that she was no longer using drugs, and that she wanted to regain custody of her child, but that the aunt was reneging on her promise to return T.P. to her mother. Each motion was denied.

In January 2010, the mother filed her fourth pro se motion to modify custody, which is the subject of the order on appeal.[3] In this motion, the mother asserted that there had been a substantial and material change in circumstances, because, among other reasons, she had her own apartment and a stable job, and because she had attended anger management classes, GED classes, and parenting classes. A few months later Our Place DC assumed representation of the mother, and in June 2010 counsel submitted an array of supporting documentary materials to the court, including a letter from the mother's supervisor at the National Center for Children and Families where she completed the Nurturing Parent Program, a certificate of completion of that program, a letter from the principal of T.P.'s former elementary school where the mother works, an email from the D.C. Children's Advocacy Collaborative concerning the mother's contribution to a community program for teen girls, a psycho-social assessment conducted by Our Place DC, and confirmation of negative results in random drug tests given by the organization.[4]

The hearing on the mother's fourth motion for modification of custody was finally held in December 2012.[5] Prior to the ***1134** hearing, the court (now Judge Irving) ruled on the mother's motion to incorporate the parental presumption under D.C.Code § 16–831.05 in its custody modification decision under D.C.Code § 16–831.11. The mother argued that she had not given irrevocable consent to a transfer of custody to her sister and that the parental presumption had, accordingly, not been properly waived at the 2007 hearing.

The Superior Court denied the motion, determining that Judge Saddler had "informed" the mother "that she would not forever be precluded from seeking custody in her own right, but that she would have to file a motion to seek a change." The Superior Court also found that Judge Saddler had "indicated, perhaps not clearly enough for [the mother], that her written request would not necessarily result in an automatic grant [of modification], but would require a hearing and a best interest determination." Although the Superior Court acknowledged that there were "portions of the transcript" that show that the mother and aunt "contemplated a time and circumstances (her complete recovery from drug use and abuse) when [the mother] would be able to care for" T.P. and when the aunt would be "receptive to returning the child" to her mother's care, "[t]he transcript reveals that Judge Saddler after sufficient and patient inquiry, was satisfied that [the mother] understood that the custody order was permanent, and that [the mother] would have to return to court to obtain a change." "As such" the Superior Court found "no indication on the record" that the mother did not give irrevocable consent to a transfer of custody of T.P. to the aunt under D.C.Code § 16–831.05(a).

Against this factual backdrop, the Superior Court then considered "whether the parental presumption (under D.C.Code § 16–831.05) applies in a modification proceeding where custody has been awarded to a third party." Analyzing the statutory section that provides for the modification of a third-party custody order, D.C.Code § 16–831.11(a), the Superior Court concluded it did not. The mother moved for reconsideration of the court's ruling on her motion to apply the parental presumption to the modification decision, but this motion was denied.

After hearing testimony on December 18 and 19, 2012, the court based its decision on the mother's motion to modify custody solely on whether the standard set forth in D.C.Code § 16–831.11(a)—i.e., whether there has been a substantial and material change in circumstances and whether the modification would be in the child's best interests—had been met. The court acknowledged that the mother had undergone a "drastic change in behavior and

attitude." Specifically, the Superior Court noted that the mother "no longer uses drugs, and has not been arrested since 2008," that she "attended several parenting classes and seminars, as well as obtained part-time employment," and that she "volunteers at a local elementary school." The court also acknowledged that the mother had "put forth numerous witnesses vouching for the change in her demeanor, behavior[,] and maturity over the last two years." The court "commended" the mother for this turn-around, but nonetheless determined that, although this constituted a "substantial change" under the statute, modification of the custody order was not in the best interests of T.P. This appeal followed.

II. Analysis

Title 16 of the D.C.Code contains two chapters that address child custody determinations. ***1135** The first is Chapter 9, which concerns the divorce or separation of individuals with children; the provision therein addressing child custody determinations between parents, § 16–914, contains no mention of a parental presumption for obvious reasons. The second is the more recently codified Chapter 8A, which addresses custody awards to non-parent third parties.

The Council of the District of Columbia enacted Chapter 8A as part of the Safe and Stable Homes Act in 2007. This legislation was at least in part a response to this court's decision in *W.D. v. C.S.M.*, 906 A.2d 317 (D.C.2006), which determined that the Superior Court had exceeded its statutory authority in awarding custody of a child to non-parent third parties in a domestic relations case. D.C. Council, Comm. on Pub. Safety & the Judiciary, Report on Bill 17–41 at 2 (June 4, 2007) [hereinafter "Judiciary Comm. Report"]. The Council gave courts limited authority to grant a non-parent third-party[6] custody of a child, while at the same time "recognizing and enforcing the constitutional rights of parents." Safe & Stable Homes for Children & Youth Amendment Act of 2007, D.C. Law 17–21; 54 D.C.Reg. 6835 (2007).[7] To this end, D.C.Code § 16–831.05(a) expressly acknowledges that "there is a rebuttable presumption in all proceedings under this chapter that custody with the parent is in the child's best interests."

Under the third party custody statute, the statutory parental presumption must be dealt with in one of three ways before a third party custody order is entered. First, the parental presumption may be preserved if the parent enters into a revocable, court-approved[8] custody agreement with a third party. D.C.Code §§ 16–831.06(d)(1); 16–831.11(c). The court will memorialize this consensual agreement in an order, D.C.Code § 16–831.06(d)(1), but "upon the filing of a revocation by the consenting parent or the third party" this order "shall be immediately vacated and of no further effect." § 16–831.11(c).

Second, the parental presumption may be overcome if the third party seeking custody of the child can rebut the presumption by clear and convincing evidence. D.C.Code §§ 16–831.06(b), 16–831.07(a), (d). Once rebutted, the court may consider whether custody with a third party is in the best interest of the child under the factors set forth in D.C.Code § 16–831.08. However, "[i]f the court concludes that the parental presumption has not been rebutted by clear and convincing evidence, the court shall dismiss the third-party complaint and enter any appropriate judgment in favor of the parent." D.C.Code § 16–831.07(d).

***1136** Third, the parental presumption may be waived "when a parent consents to the relief sought by the third party." D.C.Code § 16–831.05(a). Read in conjunction with D.C.Code §§ 16–831.06(d)(1) and 16–831.11(c), which acknowledge a parent's statutory option to give revocable consent to a third-party custody arrangement, this provision only makes sense if the consent given under D.C.Code § 16–831.05(a) is irrevocable.

The mother argues that the Superior Court failed to apply the correct law in its January 2008 order granting custody to the aunt, because the court should have applied the provisions of Title 8A of Chapter 16 protecting her rights as a parent instead of the provisions of Title 9 of Chapter 16 governing intra-parental custody disputes, which contain no such protections. While it seems clear that the Superior Court did not apply the correct law, that is not, and cannot be, the issue before us. The mother never appealed the 2008 custody order. The only orders that are before this court are the Superior Court's 2012 and 2013 orders resolving the mother's fourth motion to modify custody.

[1] **[2]** The question thus becomes whether the parental presumption that is statutorily acknowledged

in proceedings to transfer custody of a child from a parent to a third party may be considered in modification of custody proceedings conducted pursuant to D.C.Code § 16–831.11. The mother argues the parental presumption should have been applied in the consideration of her fourth motion for modification of custody, because she did not knowingly and intelligently waive this presumption at the December 2007 hearing. Amicus defends the Superior Court's determination that the parental presumption does not apply in custody modification determinations under D.C.Code § 16–831.11. Moreover, going a step beyond the Superior Court—which found that the mother had knowingly consented to a permanent custody transfer to the aunt [9]—amicus argues that there is no statutory requirement that waiver of parental rights must be knowing and intelligent, and that the parental presumption would not apply at the modification stage even if the mother had not knowingly or intelligently consented. We review these questions of law de novo. *District of Columbia v. Morrissey,* 668 A.2d 792, 796 (D.C.1995) (noting this court conducts de novo review where "[t]he construction of a statute raises a clear question of law." (internal quotation marks omitted)).

We begin with the text of D.C.Code § 16–831.11, [10] governing modification of third party custody orders. It contains three subsections, none of which make any mention of the parental presumption. Subsection (a) sets forth the standard under which modification decisions are made: To modify custody there must be a "determination that there has been a substantial and material change in circumstances and that the modification or termination is in ***1137** the best interests of the child." Subsection (b) places the burden of proof on the party seeking modification and requires a showing by a preponderance of the evidence. As discussed above, subsection (c) carves out from the typical modification standard awards of custody based on revocable consent under D.C.Code § 16–831.06(d)(1), and provides that modification under such circumstances is self-executing and not submitted to the court for review; rather, "upon the filing of a revocation by the consenting parent or the third party," the agreement of the parties "shall be immediately vacated and of no further effect."

As we read D.C.Code § 16–831.11, unless the custody transfer was made pursuant to a revocable consent agreement (in which case the parental presumption remains fully intact and is not relevant to modification because the parent can unilaterally decide to modify the arrangement), the parental presumption does not apply at the modification stage. A parent seeking to regain custody awarded to a third party enjoys no special status and must bear the burden of proof when seeking to modify an order. The only statutory concern under these circumstances is the best interest of the child.

This makes sense against the backdrop of D.C.Code §§ 16–831.05 and 16–831.06. [11] If a parent's statutory presumption has already been rebutted (pursuant to D.C.Code § 16–831.06) or waived after a parent gives her irrevocable consent to the custody transfer (pursuant to D.C.Code § 16–831.05(a)), there is no need to revive the parental presumption at the modification stage. To do so would seem contrary to the clear legislative intent to give parents heightened protection when initial custody transfer decisions are made, but to make determinative the best interest of the child after custody has been transferred to a third party.

The mother clarified at oral argument before this court, however, that her argument is not that the parental presumption must always be considered in modification determinations, but only when a parent, like her, does not knowingly and intelligently give irrevocable consent to a custody transfer. We find this argument compelling.

Again, we note that the statute was written with a strong desire to protect the rights of parents, requiring that for other-than-revocable consent transfers the statutory presumption be rebutted or waived at the outset. It would make little sense, however, to provide robust protection for parental rights for the former mechanism for disposing of the parental presumption—requiring the third party seeking custody of the child to bear the high burden of rebutting the parental presumption by clear and convincing evidence—but to provide only weak protection with the latter, by liberally recognizing irrevocable consent-based waivers without assurance that those waivers were knowing or intelligent. [12]

***1138** Ultimately our analysis turns on the language of D.C.Code § 16–831.05, which provides that the parental presumption has no application "when a parent consents to the relief sought by the third party." In our view, this statutory language conclusively indicates that, to give irrevocable consent to a third-party custody transfer and thereby effect a valid waiver of the parental presumption,

there must be a meeting of the minds between the parent and the third party regarding "the relief sought." *Id.* Clearly, if a parent believes that she is consenting to a provisional custody arrangement, but the third party is seeking a permanent custody transfer, the parent is not providing irrevocable "consent[ ] to the relief sought by the third party." [13]

[3] Reviewing the transcript of the December 2007 hearing, the Superior Court in this case made the factual determination that the mother knew she was agreeing to permanently relinquish custody of T.P. to her sister and Judge Saddler adequately apprised her of the consequences of her consent. [14] We conclude that this factual determination was plainly wrong and without evidence to support it. [15]

The transcript of the December 2007 custody hearing indicates that the mother, appearing pro se, did not intend to permanently give up custody of T.P. to the aunt. Although Judge Saddler told the mother that the order would "say permanent," she immediately undercut this admonition by stating that it "does not mean forever," and informing the mother she could file a modification motion. Moreover, from the mother's subsequent statements on the record, it is apparent that she thought that she was consenting to a temporary arrangement and that she intended to file a modification motion as soon as she completed treatment, within a year. Indeed, the aunt, whom the court allowed to engage in a lengthy dialogue in open court with the mother, was integral in leading the mother to believe that she would only ***1139** have custody of T.P. temporarily. The aunt repeatedly reassured the mother that when the mother "complete[d] the program" she could "have [her] baby back," because T.P. needed to be with the mother.

Relatedly, the mother did not understand the consequences of giving her consent to a transfer of custody to the aunt. Certainly the mother understood that she would need to take certain steps to regain custody of T.P.: she needed to "get [herself] together," and she needed to file a motion. Indeed, Judge Saddler imprecisely informed her that that was "all you have to do." But the mother does not appear to have understood that these steps would not be pro forma and that custody of T.P. would not immediately be returned to her upon taking such actions. In particular, she does not appear to have understood that she was permanently losing her special status as parent to maintain custody of her child, and thus, that in order to regain custody of T.P. she would have to prove to the satisfaction of the court not only that she met the aforementioned goals constituting "a substantial and material change in circumstances," but also that it would be in her daughter's best interests to be returned to her care. *See* D.C.Code § 16–831.11(a).

The mother does not appear to have understood this, because, the Superior Court's finding notwithstanding, Judge Saddler never so advised the mother. Although the Superior Court found that Judge Saddler indicated "that [the mother's] written request would not necessarily result in an automatic grant, but would require a hearing and a best interest determination," in fact, contrary to the Superior Court's findings, there was no mention at the December 2007 hearing that that any modification motions filed by the mother would turn solely on what a court deemed was in the "best interests of the child." Meanwhile, the aunt indicated that she would not oppose an effort by the mother to regain custody and that she and the mother would petition the court "together" to make this happen. [16]

To assess the mother's understanding of the nature and consequences of her consent to a custody transfer, we look not only to what was said (and unsaid) at the December 2007 hearing, but also to what the mother did afterwards. As instructed, she filed repeated motions to modify the custody order, in which she asserted that she had successfully completed treatment and gotten her life back together, but that although she had upheld her end of the bargain, the aunt had "betray[ed] [her] trust." In so doing, the mother reflected her understanding that the transfer of custody had not been permanent and that she thought she had an enforceable agreement with her sister to have T.P. returned to her.

Accordingly, we determine that the mother did not knowingly and intelligently consent to a permanent transfer of custody as the statute requires. And because there was no meaningful consent, the parental presumption must be applied, for the first time, in the Superior Court's resolution of the mother's fourth motion to modify custody. Unless the parental presumption is rebutted on remand (or unless the mother conveys new legitimate consent to the aunt's continued custody of

T.P.), the mother's motion for modification may not be denied. [17]

***1140** We conclude by emphasizing that we do not intend for this decision to give a green light to parents seeking to upend truly consensual irrevocable custody transfers to nonparent third parties. In other words, we do not herein accord parents the right to revive in modification proceedings a legitimately waived parental presumption. We presume that the facts of this case are exceptional, and moreover, that in the future the Superior Court will both ensure that parents, particularly those proceeding pro se, understand the special status they relinquish if they give irrevocable consent to a transfer of custody to a third party, and understand how their consent fundamentally alters the child custody calculus going forward. Consent knowledgeably and intelligently given will permanently waive a parent's statutory parental presumption.

For the reasons set forward above, we reverse the Superior Court's order denying the mother's motion to modify custody and remand the case for further proceedings consistent with this opinion.

So ordered.

All Citations

92 A.3d 1128

Footnotes

1 In this opinion, all references to actions by the Superior Court between 2007 and 2009 are to Judge Saddler; all references to the actions of the Superior Court after November 2011 are to Judge Irving. The Honorable John H. Bayly, Jr. and the Honorable Zinora M. Mitchell–Rankin were also assigned to this case between 2009 and 2011, but made no rulings pertinent to this appeal. It is unclear why the case was transferred so many times.

2 The father was 71 years old when the aunt filed the complaint for custody.

3 We note that neither the aunt nor amicus curiae Children's Law Center contends that any of the Superior Court's previous denials of the mother's motions for modification were merits-based such that her fourth motion to modify custody was barred by res judicata.

4 Because the mother did not test positive on any of the court-ordered drug tests administered between June 2010 and August 2011, the Superior Court eventually discontinued drug testing of the mother. The court later credited the mother's testimony that she has not used drugs since June 2008.

5 It is not clear from the record why the case languished for two and a half years. In the summer of 2010, the Superior Court ordered a home study, a psychological evaluation of the mother and father, and bonding studies for T.P. and all parties. All these studies were completed by April 2011. In November 2011, seventeen months after the mother filed her motion for modification, the court set the case for trial. But that date did not hold. Instead, the court granted several continuances to the aunt and the guardian ad litem appointed to represent T.P. In the meantime, T.P.'s father died in October 2011.

6 Specifically noting that it was "mindful of the sanctity of parent [s'] rights," the Committee "narrowly tailored this bill's third party standing in order to show consideration of those rights." Judiciary Comm. Report at 2. *See* D.C.Code § 16–831.02 (addressing who may seek custody of a child as a third party).

7 *See* D.C. Council, Comm. on Human Servs., Report on Bill 17–41 at 4–5 (Mar. 23, 2007) (quoting a statement from former D.C. Superior Court Judge Eric Holder stating that the Act "provides a clear framework to protect the rights of parents"); *id.* at 5–6 ("The Supreme Court has recognized that natural parents have a fundamental liberty interest ... in the care, custody, and management of their children, which is protected by the Fourteenth Amendment's Due Process Clause.... Natural parents do not lose this constitutionally protected right simply because they have not been model parents or have lost temporary custody of their child to the State." (citing this court's opinion in *In re C.M.,* 916 A.2d 169, 179 (D.C.2007))).

8 The court may reject this agreement if it determines it is not in the best interest of the child. D.C.Code § 16–831.06(d)(1).

9 Judge Irving appears to have understood waiver of the parental presumption to require knowing and intelligent consent. His order with regard to the application of the presumption hinged in large part upon his determination that "after sufficient and patient inquiry," Judge Saddler was "satisfied that [the mother] understood that the [c]ustody [o]rder [would be] permanent, and that [she] would have to return to Court to obtain a change." He found that the mother "indicated more than once that she understood, and maintained her consent," and further, that there was "no indication on the record that [she] did not consent to [the aunt] having custody of the minor child."

10 *Morrissey,* 668 A.2d at 797 ("[I]f the words are clear and unambiguous, we must give effect to its plain meaning." (internal quotation mark omitted)); *see also Peoples Drug Stores, Inc. v. District of Columbia,* 470 A.2d 751, 753 (D.C.1983).

11 *See In re T.L.J.,* 413 A.2d 154, 158 (D.C.1980) ("a statute should be interpreted as a harmonious whole" (quoting *United States v. Firestone Tire & Rubber Co.,* 455 F.Supp. 1072, 1079 (D.D.C.1978)) (internal quotation mark omitted)).

12 We note that in other states where the transfer of custody to non-parent third parties is permitted, the valid waiver of parental rights is premised on a meaningful understanding of the effects of their actions. For example, the Tennessee Supreme Court has emphasized "that a parent's voluntary relinquishment of custody must be made with knowledge of the consequences of that decision," asserting that where a natural parent does so "without knowledge of the effect of that act, then it cannot be said that these rights were accorded the protection demanded by the Constitution. As such, application of the [parental presumption] in a subsequent modification proceeding would be justified." *Blair v. Badenhope,* 77 S.W.3d 137, 147 n. 3 (Tenn.2002). Similarly, the Alaska Supreme Court explained that it did not "disfavor the practice of vesting custody temporarily in a nonparent until a parent can get his or her life sufficiently together to resume custody," but noted that "[c]ourts should make clear whether a grant of nonparental custody is temporary or permanent, and ensure that they carefully warn a parent that a hearing may have the latter result." *C.R.B. v. C.C.,* 959 P.2d 375, 381 n. 12 (Alaska 1998).

13 As previously discussed, we recognize that the fundamental right to parent has constitutional underpinnings. *See Troxel v. Granville,* 530 U.S. 57, 87, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) ("Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children .... [and] our cases applying this principle have explained that with this constitutional liberty comes a presumption (albeit a rebuttable one) that 'natural bonds of affection lead parents to act in the best interests of their children.' " (quoting *Parham v. J.R.,* 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979))); *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (recognizing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"). Given the statutory foundation for our analysis, however, we do not assess the impact of these constitutional principles on this case. *Blodgett v. Univ. Club,* 930 A.2d 210, 217 (D.C.2007).

14 Judge Saddler made no such factual findings in her order: She simply found that the mother "testified that [the aunt] can devote her full time and attention to the minor child," and noted in her discussion of the D.C.Code § 16–914 best interests analysis that the mother "wish[ed] for the [aunt] to have custody" of T.P.

15 *Hernandez v. Banks,* 84 A.3d 543, 552 (D.C.2014) ("We review bench trials both as to the facts and the law, but may not set aside a trial court's judgment 'except for errors of law unless it appears that the judgment is plainly wrong or without evidence to support it.' " (quoting D.C.Code § 17–305(a) (2012 Repl.))).

16 To the extent the Superior Court relied on Judge Saddler's January 2008 order to determine that the mother knowingly and intelligently consented to an unconditional custody transfer, this gives us further cause for concern. The 2008 order simply does not capture what the mother said at the hearing or the qualified nature of her consent.

17 The mother argues in the alternative that there is no need for her to seek modification of the third party custody order because, in fact, she had a revocable consent agreement pursuant to D.C.Code § 16–831.06(d). But the mother did not cite this provision of the statute nor raise this issue below until she moved for reconsideration of the Superior Court's order declining to incorporate the parental presumption under D.C.Code § 16–831.05 in its custody modification decision under D.C.Code § 16–831.11. Even as she invoked the revocable consent provisions of the third party custody statute, the mother acknowledged that her consent agreement was not unilaterally revocable as contemplated by D.C.Code § 16–831.06(d) and D.C.Code § 16–831.11(c), but instead was an (extra-legal) conditional consent agreement, subject to revision by the Superior Court. In this court, the mother continues to acknowledge that her agreement "was to be revisited by the [c]ourt for determination of fulfillment of its conditions." Although, as explained above, we conclude that the agreement struck between the mother and the aunt preclude this court from determining that the mother consented to an irrevocable permanent custody transfer and that she knowingly and intelligently waived the parental presumption, we cannot agree that the mother entered into a revocable consent agreement within the meaning of D.C.Code § 16–831.06(d) and D.C.Code § 16–831.11(c).

110 A.3d 1275
District of Columbia Court of Appeals.

In re Petition of S.L.G. & S.E.G.; D.A., Appellant.

No. 14–FS–73.
|
Submitted Oct. 30, 2014.
|
Decided March 5, 2015.

Synopsis

Background: After child was committed to the custody of Child and Family Services Agency (CFSA) and permanency goal was changed from reunification to adoption due to mother's failure to comply with court-ordered drug testing and therapy, foster parents petitioned to adopt child. The Superior Court, Tara Fentress, Magistrate Judge, found it in child's best interest to waive mother's consent to adoption and approved petition. On motion for review, the trial court, Maribeth Raffinan, J., affirmed. Mother appealed.

[Holding:] The Court of Appeals, Glickman, J., held that findings and conclusions supporting decision to waive mother's consent to adoption were deficient.

Vacated and remanded with instructions.

Newman, Senior Judge, filed separate concurring statement.

West Headnotes (22)

[1] Adoption
Necessity of consent in general

Expert testimony on child's bond or attachment with mother or prospective adoptive parents was not required in proceeding as to waiver of mother's consent to adoption; social worker, mother, prospective adoptive parent, and other witnesses who had first-hand knowledge of child's relationship with parties testified during proceedings, and expert testimony was not required by statute or case law. D.C. Official Code, 2001 Ed. § 16–2353.

Cases that cite this headnote

[2] Adoption
Review

Court of Appeals reviews trial court's determination for abuse of discretion. D.C. Official Code, 2001 Ed. § 16–2353.

Cases that cite this headnote

[3] Adoption
Review

In reviewing for abuse of discretion a trial court's determination in a proceeding to terminate parental rights and waive a natural parent's consent to adoption, Court of Appeals' task is to ensure that trial court has exercised its discretion within range of permissible alternatives, based on all relevant factors and no improper factor. D.C. Official Code, 2001 Ed. § 16–2353.

Cases that cite this headnote

[4] Adoption
Review

Trial court's decision in a proceeding to terminate parental rights and waive a natural parent's consent to adoption must be supported by substantial reasoning drawn from a firm factual foundation in the record. D.C. Official Code, 2001 Ed. § 16–2353.

Cases that cite this headnote

[5] Adoption
Review

When reviewing proceeding to terminate parental rights (TPR) and waive natural parent's consent to adoption, Court of Appeals reviews magistrate judge's factual findings as findings of trial judge and reviews

for abuse of discretion or a clear lack of evidentiary support when magistrate judge's order was reviewed by associate judge; as to alleged errors of law, however, Court reviews the record de novo, without deference to the judges below.

Cases that cite this headnote

[6] **Adoption**
Exceptions;relinquishment or forfeiture of parent's rights in general
Adoption
Necessity of consent in general

A court may grant an adoption petition without the consent of a natural parent if it finds by clear and convincing evidence that the consent is being withheld contrary to the best interest of the child; because granting an adoption over a natural parent's objection necessarily terminates the parent's rights, the court must weigh the same statutory factors that are considered in a termination of parental rights (TPR) proceeding to decide whether termination is in the child's best interest.

1 Cases that cite this headnote

[7] **Infants**
Disposition and placement of child

Although the paramount consideration in determining whether to terminate parental rights is the best interest of the child, factors considered in proceedings to terminate parental rights must be applied in accordance with presumption that child's best interest will be served by placing child with his natural parent, provided the parent has not been proven unfit. D.C. Official Code, 2001 Ed. § 16–2353(b).

2 Cases that cite this headnote

[8] **Adoption**
Examination and approval by court
Infants
Disposition and placement of child

Presumption in a termination of parental rights (TPR) or contested adoption proceeding that child's best interest will be served by placing child with his natural parent is a strong one that reflects and reinforces fundamental and constitutionally protected liberty interest that natural parents have in the care, custody, and management of their children. D.C. Official Code, 2001 Ed. § 16–2353(b).

2 Cases that cite this headnote

[9] **Adoption**
Examination and approval by court
Infants
Disposition and placement of child

Presumption in a termination of parental rights (TPR) or contested adoption proceeding that child's best interest will be served by placing child with his natural parent is not absolute and must necessarily give way in the face of clear and convincing evidence that requires the court, in the best interest of the child, to deny custody to natural parent in favor of an adoptive parent. D.C. Official Code, 2001 Ed. § 16–2353(b).

1 Cases that cite this headnote

[10] **Adoption**
Examination and approval by court
Infants
Disposition and placement of child

Presumption in favor of the natural parent in a termination of parental rights (TPR) or contested adoption proceeding is rebutted only by a showing that parent is either unfit or that exceptional circumstances exist that would make continued relationship detrimental to child's best interest. D.C. Official Code, 2001 Ed. § 16–2353(b).

3 Cases that cite this headnote

[11] **Adoption**
Exceptions;relinquishment or forfeiture of parent's rights in general

Infants
Expectation or probability of improvement

Infants
Unfitness or Incompetence of Parent or Person in Position Thereof

Question of parental fitness in a termination of parental rights (TPR) or contested adoption proceeding turns on whether the parent is, or within a reasonable time will be, able to care for the child in a way that does not endanger the child's welfare. D.C. Official Code, 2001 Ed. § 16–2353(b).

Cases that cite this headnote

[12] **Adoption**
Exceptions;relinquishment or forfeiture of parent's rights in general

Infants
Unfitness or Incompetence of Parent or Person in Position Thereof

Statutory factors that guide court's determination of child's best interest in a termination of parental rights (TPR) or contested adoption proceeding guide court's assessment in that proceeding of the natural parent's fitness vel non by identifying and focusing court's exercise of discretion on fundamental determinants of a child's well-being. D.C. Official Code, 2001 Ed. § 16–2353(b).

1 Cases that cite this headnote

[13] **Adoption**
Exceptions;relinquishment or forfeiture of parent's rights in general

Infants
Unfitness or Incompetence of Parent or Person in Position Thereof

For purposes of determining parental fitness in a termination of parental rights (TPR) or contested adoption proceeding, an individual may be a fit parent for one child but not for another. D.C. Official Code, 2001 Ed. § 16–2353.

Cases that cite this headnote

[14] **Constitutional Law**
Parent and Child Relationship

Fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state.

Cases that cite this headnote

[15] **Adoption**
Persons who may adopt others

Adoption
Exceptions;relinquishment or forfeiture of parent's rights in general

Termination of a natural parent's rights, in a proceeding to terminate parental rights and waive a natural parent's consent to adoption, may not be based on a direct comparison of the natural parent with the adoption petitioners; rather, all persons involved with the child are to be considered in relationship to the best interests of the child, not in comparison to one another. D.C. Official Code, 2001 Ed. § 16–2353(b).

Cases that cite this headnote

[16] **Adoption**
Exceptions;relinquishment or forfeiture of parent's rights in general

Adoption
Necessity of consent in general

Court's inquiry in a proceeding to terminate parental rights and waive a natural parent's consent to adoption is not to determine whether adoption petitioners would be better parents or would provide a better home than natural parent; natural parent's constitutionally protected interest in raising his or her children may be overridden only if there is clear and convincing evidence presented that continuing parent-child relationship would be contrary to the

best interests of the children, and not merely that the adoption would be more beneficial to the children's interests. D.C. Official Code, 2001 Ed. § 16–2353(b).

Cases that cite this headnote

[17] Adoption

Exceptions;relinquishment or forfeiture of parent's rights in general

Court cannot constitutionally use the best interests of the child standard to terminate parental rights of a fit natural parent and, instead, grant adoption in favor of strangers simply because adoption petitioners are fitter. D.C. Official Code, 2001 Ed. § 16–2353(b).

Cases that cite this headnote

[18] Adoption

Examination and approval by court

It is incumbent on the trial court, in determining whether to waive natural parent's consent to proposed adoption, to give the most careful consideration to relevant statutory factors, to make specific findings based on evidence with respect to each factor, and, mindful of the presumption favoring continuation of parental relationship, determine expressly whether those findings suffice either to show unfitness on the part of the parent to remain in a parental relationship with the child or to constitute an exceptional circumstance that would make continuation of the parental relationship detrimental to the best interest of the child, and, if so, how. D.C. Official Code, 2001 Ed. § 16–2353(b).

Cases that cite this headnote

[19] Adoption

Examination and approval by court

Trial court does not fulfill its responsibility to make express, specific, and well-reasoned findings in a proceeding to terminate parental rights and waive a natural parent's consent to adoption merely by reciting evidence adduced at the hearing, cursorily considering it with respect to each factor considered in termination of parental rights (TPR) proceedings, and then rendering a conclusory, totality-of-the-circumstances determination that parental consent should be waived in the child's best interest; this is not enough to show that court is applying the law correctly and respecting presumption in favor of maintaining parental rights of a fit natural parent. D.C. Official Code, 2001 Ed. § 16–2353(b).

Cases that cite this headnote

[20] Adoption

Examination and approval by court

Proper recognition of the presumption in favor of maintaining parental rights of a fit natural parent, in a proceeding to terminate parental rights and waive a natural parent's consent to adoption, requires more than verbal allowance that presumption exists; court must correctly and explicitly incorporate parental presumption into its analysis. D.C. Official Code, 2001 Ed. § 16–2353(b).

Cases that cite this headnote

[21] Adoption

Examination and approval by court

Trial court's findings and conclusions supporting its decision to terminate parental rights and waive mother's consent to adoption that it was in child's best interest to waive mother's consent were deficient, where there was no explicit determination that mother was an unfit parent; even though evidence was sufficient to support finding of mother's unfitness, court failed to acknowledge presumption in favor of maintaining parental rights of a fit natural parent and to explain why that presumption was either inapplicable or overcome by clear and convincing evidence of what child's welfare required despite parental fitness. D.C. Official Code, 2001 Ed. § 16–2353(b).

1 Cases that cite this headnote

[22] **Adoption**
Examination and approval by court

Infants
Determination and findings

For the trial court's decision in a termination of parental rights (TPR) or contested adoption case to be supported by substantial reasoning drawn from a firm factual foundation in the record and amenable to proper appellate review, it must not require Court of Appeals to speculate as to court's penultimate determinations regarding natural parent's fitness and presumption in favor of maintaining parental rights of a fit natural parent; those determinations must be set forth with clarity. D.C. Official Code, 2001 Ed. § 16–2353(b).

Cases that cite this headnote

Attorneys and Law Firms

***1278** Jon S. Pascale was on the brief for appellant D.A.

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Ronald Woodman, guardian ad litem for appellee A.A., filed a statement in lieu of brief opposing the appeal and supporting appellees S.L.G. and S.E.G.

Before GLICKMAN and BECKWITH, Associate Judges, and NEWMAN, Senior Judge.

Opinion

GLICKMAN, Associate Judge:

D.A. appeals the decision of the Superior Court waiving her consent to the adoption of her daughter A.A. by appellees S.L.G. and S.E.G.[1] She primarily contends that the Superior Court erred by basing its decision, improperly, on a direct comparison of her with the adoption petitioners, and by failing to consider the likelihood that she would become a fit parent for A.A. within the foreseeable future. We conclude that although there is ample evidentiary support in the record for the trial court's ruling, the court did not make the necessary predicate determinations relating to appellant's fitness *vel non* to parent A.A. herself. We therefore find it necessary to remand for further proceedings to rectify this deficiency.

I.

A.

On November 4, 2010, when A.A. was just over ten months old, she was brought to Children's National Medical Center with a skull fracture and subdural bleeding. Appellant could not satisfactorily explain how A.A. received these injuries, and the Child and Family Services Agency (CFSA) removed the child from appellant's care. A neglect proceeding was begun in Superior Court, and on December 8, 2010, appellant stipulated that A.A. was a neglected child. The court committed A.A. to the custody of CFSA, which placed her in foster care with S.L.G. and S.E.G.

At the disposition hearing, the court set the permanency goal as reunification of A.A. with appellant. To that end, the court directed appellant to participate in an Addiction Prevention and Recovery Assessment (APRA) and weekly drug testing, to attend parenting classes, and to receive psychological and psychiatric evaluations and individual therapy. All these services were made available to her. However, some sixteen months later, on April 24, 2012, the court changed the permanency goal from reunification to adoption in light of appellant's failure to comply with the court-ordered drug testing and therapy, among other problems. In the wake of that goal change, S.E.G. and S.L.G. petitioned to adopt A.A. The child's biological father consented to the adoption, but appellant did not.

Magistrate Judge Fentress presided over a four-day evidentiary hearing on whether to waive appellant's consent and approve the adoption petition. At its

conclusion, the magistrate judge, ruling from the bench, found it to be in A.A.'s best interest to do so. The magistrate judge later issued written findings, conclusions of ***1280** law, and an order to the same effect. Associate Judge Raffinan affirmed the magistrate judge's decision on appellant's motion for review. Whence comes this appeal.

B.

At the hearing, the magistrate judge heard testimony from several witnesses in addition to the parties, the most important of whom proved to be A.A.'s social worker and a psychologist who had evaluated appellant.

Marie Cohen was the social worker assigned to the case by the Board of Child Care (BCC), the organization that ran the foster care program in which A.A. was placed. Cohen testified about her experience with appellant, A.A., and the foster parents, including her efforts to help appellant comply with the court's directives and be reunified with A.A.[2] As Cohen recounted, she spent considerable time explaining to appellant what she needed to accomplish, made lists with her to help her stay on track, and checked on her progress. Cohen also supervised appellant's visits with A.A. and made referrals for appellant to receive psychiatric and psychological evaluations and therapy and to attend parenting class. To assist appellant with transportation for these services and her visits with A.A., BCC provided appellant with $20 to $40 per week. It continued to provide this funding even though appellant repeatedly failed to document her expenses or participate as she was asked to do. Despite the financial and other assistance she received, appellant's visits with A.A. and her compliance with the court's order were erratic at best. Although she attended the parenting class and received the APRA and mental health evaluations, appellant did not follow through with their recommendations or comply with the court-ordered drug testing and therapy. In addition, she displayed a variety of behaviors that raised concerns about her mental health and her ability to care for a child.

Appellant's visits with A.A. were a chief area of concern. Cohen began overseeing appellant's weekly visitation with A.A. in November 2010. She testified that from then until December 2011, appellant attended only 65% of her scheduled visits, often cancelling on the morning of the day the visit was to occur. After December 2011, and until the court hearing (which commenced in November 2012), there was modest improvement, but only to the extent that appellant made 77% of her scheduled visits. Appellant often was late when she did visit A.A. To make up for her latenesses, BCC allowed appellant to have extra time with A.A.[3] In addition, the agency twice changed the location of the visits at appellant's request to make it easier for her to get to them.[4]

***1281** Cohen testified that appellant's interactions with A.A. during the visits usually were appropriate. Appellant brought toys, books, and food for A.A. and read stories to her, and the child seemed happy to see her "mommy" and sad when the visits ended. However, appellant's behavior was sometimes worrisome. She often brought other people with her, including different men with whom she appeared to be in a relationship. She referred to two of these men as "daddy" in front of A.A., though neither one was A.A.'s natural father. On one of these occasions, appellant locked herself, A.A., and her male companion in the bathroom for fifteen minutes and insisted that A.A. be transported to the emergency room because she professed to believe the child had been sexually abused while in the care of her foster family. A.A. was not wearing any clothes when appellant locked the bathroom door. The police were called and were able to convince appellant to open the door. On another occasion, appellant again insisted that A.A. had been sexually abused. After each of these incidents, A.A. was seen by a physician, who found no evidence of sexual abuse. The child did have a diaper rash.

While A.A. was in foster care, she was identified as having a developmental speech delay and began seeing a speech therapist. Cohen encouraged appellant to attend the sessions and provided her with financial assistance to do so. Appellant failed to attend them, however, and did not interest herself in A.A.'s progress.

As the magistrate judge noted in her oral findings, another "one of the most serious concerns in this case" was appellant's use of cocaine and her failure to comply with drug testing. Appellant tested positive for cocaine when the testing began in November 2010. Over the next year and a half, she consistently failed to report for testing or, when she did report, she failed to produce a urine sample that could be tested.[5] Appellant did not provide a testable sample at all between July 5, 2011, and January 6, 2012, or

between January 27, 2012, and May 25, 2012. Although she did test negative for cocaine on a few occasions, she also tested positive for cocaine as late as January 2012. It was not until July 2012 (after the permanency goal had been changed to adoption and just a few months before the hearing) that appellant started showing consistently negative drug test results.

Relatedly, appellant failed to pursue recommended drug treatment. Her APRA assessment in early 2011 had resulted in the recommendation that she enter a 12–step recovery program, and later a therapist recommended that she attend a substance abuse support group. But while appellant attended some meetings, she did not consistently hand in attendance forms to Cohen. Appellant never provided documentation to show that she had completed any drug treatment program.

Dr. Seth King, who had performed appellant's psychological evaluation, diagnosed her as having a mood disorder, not otherwise specified, and ADHD, in addition to her abuse of cocaine. Dr. King also believed that appellant needed to be evaluated further for bipolar disorder in light of ***1282** a number of symptoms she displayed, including her high energy, rapid speech, grandiosity, depression, anxiety, irritability, and a pattern of getting involved in many different jobs and projects but never finishing them. Nonetheless, appellant failed to follow through on the mental health therapy that was recommended and that she had been ordered by the court to pursue.

In early 2011, appellant assured Cohen that she was receiving therapy through an organization called Washington Empowered Against Violence. Upon investigation, Cohen confirmed that this was not true. Accordingly, though appellant denied needing therapy, Cohen helped her make arrangements to receive it at the Hillcrest Children and Family Center. Appellant began attending therapy sessions at Hillcrest in April 2011, but she stopped after a few months. She never provided Cohen with documentation that she had been discharged from therapy. At trial, appellant identified Crystal Hill, a community support worker at Hillcrest, as her therapist. However, Hill testified that she is not a therapist and had not done any therapy with appellant.

Appellant gave Cohen a variety of medical excuses for missing her visits with A.A. and for not attending therapy sessions, but she never provided medical documentation of them. She also cancelled visits for work-related reasons. At the hearing, appellant claimed to have been employed in various jobs, including as a driver, a nurse's aide, and a receptionist. However, though Cohen had requested appellant to furnish proof of employment, she never did so. Furthermore, she did not provide financial support for A.A.

In the opinion of Dr. King, appellant's mental health and behavioral issues raised serious concerns about her ability to care for A.A. and ensure her safety. Dr. King was concerned, for example, by appellant's expressed perception that there was no justification for the removal of A.A. from her care; by her history of exposing A.A. to inappropriate people and her evident dependence on men, which introduced dangerous and negative elements into her life and exposed her to domestic violence; by her indecisiveness and her poor compliance with therapy and treatment; by her recent history of drug abuse and the high likelihood of a relapse given the short period of time she had been testing negative; and by appellant's inability to remain organized and focused on A.A.'s needs, to exercise good judgment, to provide consistency in parenting, and to model good behavior for A.A. Noting the "higher demands associated with caring for a young child," Dr. King perceived appellant as being "susceptible to becoming overwhelmed [and] experiencing an intensification of symptoms of anxiety and mania," resulting in poor decision making and parenting practices that "could lead to unsafe conditions and the neglect of her daughter."

Furthermore, in Dr. King's view, appellant's continuing resistance to engaging in therapy boded poorly for her capacity to gain the insight and make the changes in behavior necessary to avoid exposing A.A. to those risks in the foreseeable future. In order for reunification even to be considered, Dr. King opined, appellant would need to demonstrate the ability to focus on A.A.'s developmental needs and to comply with court-ordered services, including in-home mental health services to monitor her parenting practices for at least a year. Dr. King thought it unlikely that appellant would accomplish these things or become fit to parent A.A. in the foreseeable future.

The magistrate judge also heard testimony about the adoption petitioners and ***1283** A.A.'s adjustment to

her foster family. At the time of trial, A.A. had been with S.E.G. and S.L.G. and their family for two years.[6] She called them "mommy" and "daddy," and it was Cohen's observation, seconded by the foster parents themselves, that she was very happy in their home. A.A. also had bonded with S.E.G.'s mother, whom she called "grandma," and the couple's twelve-year-old daughter. The two girls shared a room, and the daughter enjoyed teaching A.A. her colors, letters, numbers, and shapes. A.A. attended church and Sunday school with the family, and they went to the library, park, and Chuck–E–Cheese together. S.E.G. and S.L.G. provided for A.A. financially, buying her clothes, shoes, coats, and other items. S.E.G. took A.A. to all her routine medical appointments and her appointments with the speech therapist. The family worked diligently with A.A. to improve her speech by reading to her and modeling correct speech, and was otherwise attentive to her needs. At the time of trial, A.A. no longer exhibited any developmental delays.[7]

In rendering her decision orally and in writing, the magistrate judge recited the evidence adduced at the hearing in considerable detail. It is clear that the magistrate judge credited the testimony of Cohen and Dr. King in particular and—focusing on the statutory factors that must be considered in determining whether to terminate parental rights—found, *inter alia,* that appellant's inconsistent and erratic behavior had "negative implications" for her capacity to provide a stable home for her daughter, and that appellant's unresolved mental health issues raised "concerns" as to her ability to care for A.A.[8] However, while she identified these issues, the magistrate judge made no express finding that appellant was not fit to parent A.A. or that preservation of the parent-child relationship would endanger or be detrimental to A.A. Nor did she acknowledge explicitly the presumption in our law favoring maintenance of a child's relationship with a parent who is fit.

Regarding the proposed adoption, the magistrate judge found, *inter alia,* that S.L.G. and S.E.G. were meeting and would continue to meet A.A.'s need for continuity of care and timely integration into a stable and permanent home,[9] that they had developed a close, happy, and loving relationship with A.A., and that the child's health and wellbeing had improved in their care.

After thus reviewing the salient evidence, the magistrate judge stated her conclusions as follows:

> ***1284** The Court, having weighed the relevant factors and considered the respondent's best interest, finds by clear and convincing evidence, that the mother is withholding her consent to the adoption, contrary to the respondent's best interest. The petitioners are fit, able, and willing caretakers and the child is thriving in their care. The social worker and GAL support the adoption.
>
> Adoption by the petitioners is in the respondent's best interest; accordingly, the biological mother's consent is waived.

On review the associate judge, finding that the magistrate judge did not abuse her discretion or make any error of law or erroneous factual finding, affirmed that determination. Like the magistrate judge, the associate judge did not address explicitly the question of appellant's fitness or the presumption in favor of a fit natural parent.

II.

[1] Appellant challenges the waiver of her consent on two main grounds. First, she contends that the decision to waive her consent to the adoption of A.A. was based on an improper "direct comparison of the natural parent and the foster home"[10] rather than a proper consideration of the relevant factors. Second, appellant argues that the trial court failed to give adequate consideration to the possibility that she "might become a suitable parent in the foreseeable future."[11] For the reasons that follow, we conclude that a remand is necessary to clarify these matters in light of the absence of express findings by the trial court as to appellant's fitness to parent A.A. and the applicability of the presumption in favor of a fit natural parent.[12]

A.

[2] **[3]** **[4]** We review a trial court's determination in a proceeding to terminate parental rights (TPR) and waive a natural parent's consent to adoption for abuse of discretion.[13] "In reviewing for an abuse of discretion, our task is to ensure that the trial court has

exercised its discretion within the range of permissible alternatives, based on all relevant factors and no improper factor." [14] The trial court's decision must be "supported by substantial reasoning drawn from a firm factual foundation ***1285** in the record." [15]

[5] As a procedural matter, we now are reviewing the order of the associate judge, who reviewed the magistrate judge's order in this case for errors of law, abuse of discretion, or clear lack of evidentiary support. But as we have said, "our powers of appellate review are [not] so limited that, in reviewing the [associate judge's] final order we may not look to the findings and conclusions of the fact finder on which that ruling is based." [16] Rather, "we review the magistrate judge's factual findings as the findings of the trial judge and review for abuse of discretion or a clear lack of evidentiary support. As to alleged errors of law, however, we review the record *de novo,* without deference to the judges below." [17]

B.

[6] A court may grant an adoption petition without the consent of a natural parent if it finds by clear and convincing evidence that the consent is being withheld contrary to the best interest of the child. [18] Because granting an adoption over a natural parent's objection necessarily terminates the parent's rights, the court must weigh the same statutory factors that are considered in a TPR proceeding to decide whether termination is in the child's best interest. [19] The statutory TPR factors relevant to this case are:

> (1) the child's need for continuity of care and caretakers and for timely integration into a stable and permanent home, taking into account the difference in the development and the concept of time of children of different ages;
>
> (2) the physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental, and emotional needs of the child;
>
> (3) the quality of the interaction and interrelationship of the child with his or her parent, siblings, relative, and/or caretakers, including the foster parent; ...
>
> (4) to the extent feasible, the child's opinion of his or her own best interests in the matter; and
>
> (5) evidence that drug-related activity continues to exist in a child's home environment after intervention and service have been provided.... [20]

[7] **[8]** **[9]** **[10]** Although "the paramount consideration" in determining whether to terminate parental rights is the best interest of the child, [21] our case law recognizes that the TPR factors must be applied in accordance with "the presumption that the child's best interest will be served by placing the child with his natural parent, provided the parent has not been proven unfit." ***1286** [22] This presumption in favor of the natural parent is a strong one that reflects and reinforces the fundamental and constitutionally protected liberty interest that natural parents have in the care, custody, and management of their children. [23] While the presumption "is not absolute" and "must necessarily give way in the face of clear and convincing evidence that requires the court, in the best interest of the child, to deny custody to the natural parent in favor of an adoptive parent," [24] the question of parental fitness is almost always at the heart of any proceeding to terminate parental rights or waive a natural parent's consent to adoption. As the Maryland Court of Appeals has expressed it, the presumption in favor of the natural parent in a TPR or contested adoption proceeding is "rebutted only by a showing that the parent is either unfit or that exceptional circumstances exist that would make the continued relationship detrimental to the child's best interest." [25]

[11] **[12]** **[13]** Parental "fitness" is not a statutorily defined term in this jurisdiction, nor do the statutory TPR factors refer to "fitness" as an explicit criterion. Broadly speaking, though, fitness refers to the parent's intention and ability over time to provide for a child's wellbeing and meet the child's needs. [26] The question of fitness turns, in other words, on "whether the ***1287** parent is, or within a reasonable time will be, able to care for the child in a way that does not endanger the child's welfare." [27] The same statutory factors that guide the court's determination of a child's best interest in a TPR or contested adoption

proceeding therefore also guide the court's assessment in that proceeding of the natural parent's fitness *vel non.* The TPR factors do so by identifying, and focusing the court's exercise of discretion on, the fundamental determinants of a child's wellbeing. [28]

[14] So, for example, if the natural parent is unable or unwilling to meet the child's critical needs or maintain an appropriate parental relationship with the child, or if placement of the child with the natural parent would endanger the child or be detrimental to the child's wellbeing, that would mean the parent is unfit to care for that child. Conversely, if the natural parent is able and motivated to meet the child's fundamental needs and appropriately parent the child (or likely will be able to do so without undue delay because any parental disability has a reasonably close endpoint in sight), and placement with the parent would not otherwise be harmful to the child's welfare, then the TPR factors weigh in favor of finding the parent fit and applying the presumption. Accordingly, while "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State," [29] a natural parent's unfitness may be evidenced by a variety of behaviors, conditions, and circumstances, including but not limited to past or ongoing child abuse, neglect, maltreatment, or abandonment; a failure to maintain contact with, nurture, or support the child; involvement in criminal or other activities that are seriously inimical to a child's welfare; the inability or unwillingness to make reasonable efforts to correct the behaviors or conditions that led to the child's removal from the parent's custody, to provide a safe and stable home for the child, or to meet a particular child's special needs; chronic drug or alcohol abuse; and mental health issues or other impairments that demonstrably interfere with the parent's ability to care for the child or that expose the child to undue risk of harm. [30] This, of course, is not intended to be an exhaustive list.

[15] **[16]** **[17]** Consistent with the foregoing principles, this court has admonished that ***1288** a termination of a natural parent's rights may not be based on a direct comparison of the natural parent with the adoption petitioners. [31] Rather, "[a]ll persons involved with the child are to be considered in relationship to the best interests of the child, not in comparison to one another." [32] The child's relationship with the adoption petitioners may have a bearing on the TPR decision; for example, if disrupting the child's relationship with the adoption petitioners and returning the child to the natural parent would be seriously detrimental to the child's wellbeing, [33] or if terminating even an unfit natural parent's rights would be contrary to the child's best interest. [34] But this must not obscure the need for a threshold determination regarding the parental presumption. "[T]he court's inquiry is not to determine whether the adoption petitioners would be better parents, or would provide a better home," than the natural parent; the natural parent's constitutionally protected interest in raising his or her children "may be overridden only if there is clear and convincing evidence presented that continuing the parent-child relationship would be contrary to the best interests of the children, and not merely that the adoption would be more beneficial to their interests." [35] A court "cannot constitutionally use the 'best interests' standard to terminate the parental rights of a 'fit' natural [parent] ... and, instead, grant an adoption in favor of strangers simply because they are 'fitter.' " [36]

[18] **[19]** **[20]** From all we have said thus far, it should be clear that it is incumbent on the trial court, in determining whether to waive the natural parent's consent to a proposed adoption,

> to give the most careful consideration to the relevant statutory factors, to make specific findings based on the evidence ***1289** with respect to each of them, and, mindful of the presumption favoring a continuation of the parental relationship, determine expressly whether those findings suffice either to show an unfitness on the part of the parent to remain in a parental relationship with the child or to constitute an exceptional circumstance that would make a continuation of the parental relationship detrimental to the best interest of the child, and, if so, how. If the court does that —*articulates its conclusion as to the best interest of the child in*

> *that manner*—the parental rights we have recognized and the statutory basis for terminating those rights are in proper and harmonious balance.[37]

The trial court does not fulfill its responsibility to make express, specific, and well-reasoned findings merely by reciting the evidence adduced at the hearing, cursorily "considering it" with respect to each TPR factor, and then rendering a conclusory, "totality-of-the-circumstances" determination that parental consent should be waived in the child's best interest. This is not enough to show that the court is applying the law correctly and respecting the presumption in favor of maintaining the parental rights of a fit natural parent.[38] Similarly, "proper recognition of the parental presumption requires more than a verbal allowance that the presumption exists."[39] The court must correctly and explicitly "incorporate the parental presumption into its analysis."[40] If we have not made this requirement clear in our prior TPR and contested adoption cases (as we have done in our neglect cases where custody is at issue[41]), we do so now.

We do not mean to suggest that a mere failure to use the particular terminology of "fitness" is necessarily fatal by itself. The omission of an explicit statement that a natural parent is "unfit" may be of no moment if there are equivalent findings, supported by the evidence, that the parent lacks the capacity or motivation to meet the child's needs or protect the child from harm. While ambiguity may be avoided and our appellate review is greatly facilitated when the trial court has made an explicit finding of fitness or the lack thereof, "fitness" is simply a shorthand term of art, not a term of talismanic significance. ***1290** But if the trial court's findings and conclusions are materially deficient in this or other key respects, this court may conclude that "a remand is required to apply the best interest standard" properly, even though we may be satisfied that there is sufficient evidence in the record to support the ultimate determination.[42]

C.

[21] In the present case, the findings and conclusions of the trial court are incomplete: For all the detailed and well-supported factual findings and the significant "concerns" expressed about appellant's parenting ability, the trial court decisions fail to acknowledge the presumption in favor of a fit natural parent and explain why that presumption either is inapplicable in this case or is overcome by clear and convincing evidence of what A.A.'s welfare requires despite parental fitness. The decisions contain no *explicit* determination (under the correct standard of proof by clear and convincing evidence[43]) that appellant is unfit. As a result, they are susceptible to appellant's charges that the trial court merely found her a less capable or preferable caretaker for A.A. than petitioners, and that the court ignored evidence that appellant was making progress and "might become a suitable parent within the foreseeable future."[44]

[22] To be sure, the magistrate judge's serious and justified concerns as to appellant's parenting abilities are abundantly clear from her findings (and were shared by the associate judge). The magistrate judge did not *overtly* engage in an improper comparison of appellant with the adoption petitioners,[45] and she cited the substantial evidence of appellant's *lack* of progress toward becoming a fit caretaker for A.A. despite the considerable assistance she was provided. A proper conclusion that appellant cannot parent A.A. adequately ***1291** and hence is unfit may well be implicit in the magistrate judge's extended discussion of the evidence. Moreover, we do not doubt that the evidence on which the magistrate judge relied was sufficient to support a finding of unfitness. But sufficiency of the evidence is not enough for us to be confident the trial court actually made such a determination, and we cannot say it was compelled as a matter of law. For the trial court's decision in a TPR or contested adoption case to be "supported by substantial reasoning drawn from a firm factual foundation in the record"[46] and amenable to proper appellate review, it must not require us to speculate as to the court's penultimate determinations regarding the natural parent's fitness and the parental presumption. Those determinations must be set forth with clarity.[47]

For the foregoing reasons, we conclude that a remand is necessary and appropriate in this case, in order for the trial court to rectify the absence of explicit determinations regarding appellant's fitness *vel non* and whether the presumption in favor of a fit parent has been

rebutted. Accordingly, we vacate the judgment of the Superior Court and remand for further proceedings not inconsistent with this opinion.

So ordered.

Concurring opinion by Senior Judge NEWMAN.

NEWMAN, Senior Judge, concurring:

While I join the court's opinion, I write separately to state that my fertile imagination is not able to postulate a realistic factual situation where a "fit" parent can be properly deprived of parental rights based on the "best interest of the child." However, on the premise that virtually anything is "possible," I join.

All Citations

110 A.3d 1275

Footnotes

1 Appellant also asks this court to reopen the case in which A.A. was found to be neglected and placed in foster care with S.L.G. and S.E.G., but as she presents no argument on this request, we treat it as abandoned. *See Wagner v. Georgetown Univ. Med. Ctr.,* 768 A.2d 546, 554 n. 9 (D.C.2001).

2 Cohen also testified about her unsuccessful efforts to find a suitable placement for A.A. with a family member or other person proposed by appellant. As appellant does not claim these efforts were deficient, we need not describe them in this opinion, beyond noting that Cohen found some of appellant's suggestions to be troublingly inappropriate. At different times, for example, appellant asked Cohen herself to co-parent A.A. with her; asked another BCC staff member to adopt A.A.; and recommended a man who (Cohen learned) had an alcohol abuse problem and, on one occasion, had appeared naked outside appellant's door, banging on it and demanding sex.

3 The magistrate judge noted that "the agency [BCC] went out of its way ... to accommodate [appellant], especially with respect to visits."

4 At one point, claiming she was afraid of A.A.'s father, S.J., because he had abused her, appellant asked Cohen to permit her and S.J. to visit A.A. separately. Cohen made arrangements to accommodate this request. Yet the following week, appellant and S.J. came to visit A.A. together.

5 Appellant said she was unable to produce a urine sample because of a "shy bladder." She was prescribed a medication for this condition in May 2012. The magistrate judge noted that this was "long after" appellant was ordered to begin drug testing.

6 S.E.G. and S.L.G. had been married for twenty-six years. S.E.G. had been a prekindergarten teacher for twenty-six years. Her husband S.L.G. is a retired IRS senior budget analyst. They reside in a six-bedroom, single-family home with A.A. and their four biological children (three adult sons and one twelve-year-old daughter).

7 The guardian ad litem for A.A. informed the court that he supported the petition for adoption as being in A.A.'s best interest.

8 The magistrate judge also perceived that the quality of appellant's relationship with A.A. had been diminished by appellant's spotty visitation record and her failure to comply with court-ordered services meant to facilitate their reunification; and that "serious concerns" were raised by appellant's recent past use of cocaine and her failure to comply with treatment and regular drug testing.

9 *See, e.g., In re D.H.,* 917 A.2d 112, 118 (D.C.2007) ("Timely integration into a stable and permanent home is arguably the most important factor when considering the best interests of the child."); *In re F.W.,* 870 A.2d 82, 86 (D.C.2005) ("A stable and desired environment of long standing should not be set aside" when the children have lived with the prospective adoptive parents for most of their lives.) (internal citation omitted).

10 *In re C.O.W.,* 519 A.2d 711, 714 (D.C.1987).

11 *In re C.T.,* 724 A.2d 590, 597 (D.C.1999).

12 Appellant also complains that the decision was made without an expert psychiatric or psychological evaluation of A.A.'s bond or attachment with her or with the adoption petitioners. Instead, the magistrate judge relied on the testimony of Cohen, appellant, S.E.G., and other witnesses who had first-hand knowledge of A.A.'s relationships with the parties. This was not improper, however. Given the importance of a healthy attachment to the psychological wellbeing of a child, expert testimony on attachment is relevant and often quite helpful to the court in making a determination in cases like this. *See, e.g., In re T.W.M.,* 18 A.3d 815, 821 (D.C.2011) (trial court relied in part on expert testimony that removing the child from the foster parent would have "devastating consequences"); *In re K.D.,* 26 A.3d 772, 776–77 (D.C.2011) (trial court

heard testimony from clinical psychologist who performed a bonding study). However, neither the statute nor the case law requires such testimony in every case, and its absence here does not, by itself, undermine the trial court's determination.

13 *In re D.R.M.,* 570 A.2d 796, 803 (D.C.1990).

14 *Id.* at 803–804 (internal citation omitted).

15 *In re J.C.F.,* 73 A.3d 1007, 1012 (D.C.2013) (citing *In re C.L.O.,* 41 A.3d 502, 510 (D.C.2012)).

16 *In re C.L.O,* 41 A.3d at 510.

17 *Id.* (internal quotation marks and footnotes omitted).

18 D.C.Code § 16–304(e) (2012 Repl.).

19 D.C.Code § 16–2353(b) (2012 Repl.); *In re P.S.,* 797 A.2d 1219, 1223 (D.C.2001).

20 D.C.Code § 16–2353(b). A sixth statutory factor, not at issue in this case, is whether the child was abandoned at the hospital following his or her birth. *See id.* § 16–2353(b)(3A).

21 *In re S.M.,* 985 A.2d 413, 416 (D.C.2009).

22 *Id.* at 417.

23 *See Troxel v. Granville,* 530 U.S. 57, 65–66, 68–69, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) ("[T]here is a presumption that fit parents act in the best interests of their children.... Accordingly, so long as a parent adequately cares for his or her children (*i.e.,* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.").

24 *In re S.M.,* 985 A.2d at 417; *see also, e.g., In re J.G.,* 831 A.2d 992, 1001 (D.C.2003) ("Notwithstanding the presumption in favor of the birth parent, ... we have repeatedly held that the parent's rights may and must be overridden when such a drastic measure is necessary in order to protect the best interests of the child."); *In re Baby Boy C.,* 630 A.2d 670, 682 (D.C.1993) ("Thus, ... a finding of parental unfitness is not a constitutional prerequisite to granting an adoption petition notwithstanding lack of parental consent."); *Appeal of H.R. (In re Baby Boy C.),* 581 A.2d 1141, 1176–79 (D.C.1990) ("[A] fit parent must prevail over a prospective adoptive family unless clear and convincing evidence demonstrates that the natural parent's custody would be detrimental to the best interests of the child.... [T]he assumption that a natural parent's fitness incorporates the child's best interests may be suspect on occasion. There conceivably can be circumstances in which clear and convincing evidence will show that an award of custody to a fit natural parent would be detrimental to the best interests of the child.... [T]he most obvious, and possibly the only, basis for denying custody to a fit parent in the best interests of the child would be a finding based on clear and convincing evidence that parental custody would actually harm the child.") (Ferren, J., concurring).

25 *In re Rashawn H.,* 402 Md. 477, 937 A.2d 177, 190 (2007). In Maryland, as in the District of Columbia, the best interest of the child standard remains "the overriding statutory criterion in TPR cases," and that standard is applied with the strong but rebuttable "implicit substantive presumption that the interest of the child is best served by maintaining the parental relationship." *Id.* at 189–90; *see also In re Jayden G.,* 433 Md. 50, 70 A.3d 276, 286 (2013) ("[T]he focus of the inquiry [in contested adoption and TPR cases] into the child's best interest—even with the parental presumption in place—must be on the child, not the parent."). Thus, decisions of the Maryland Court of Appeals in this area may be instructive as we interpret the requirements of our own statutory framework.

26 We have recognized that parental fitness is determined by reference to the specific child whose placement is in issue. "An individual may be a fit parent for one child but not for another." *In re L.W.,* 613 A.2d 350, 360 n. 24 (D.C.1992).

27 *In re Rashawn H.,* 937 A.2d at 191.

28 *See In re K.A.,* 484 A.2d 992, 998 (D.C.1984) ("[A] straightforward reading of § 16–2353(b) reveals that a concern over the natural parents' unfitness inheres in this analysis. Continuity of care, stability and permanence of home environment, physical, mental and emotional health, interactions and relationships, and the child's judgment on the ultimate question all focus on fitness."); *see also Appeal of H.R.,* 581 A.2d at 1178 (explaining that the TPR factors, "as applied to the natural parent ... are of central concern" in evaluating the meaning of parental "fitness") (Ferren, J., concurring); *In re Jayden G.,* 70 A.3d at 303 n. 32 ("[P]arental fitness, exceptional circumstances, and the child's best interests considerations are not different and separate analyses. The three concepts are fused together, culminating in the ultimate conclusion of whether terminating parental rights is in a given child's best interests.") (internal quotation marks and citation omitted).

29 *Santosky v. Kramer,* 455 U.S. 745, 754, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

30 *See generally* Joan H. Hollinger, *Adoption Law and Practice* § 4.04 [1] (Matthew Bender 2014); *see also In re D.S.,* 88 A.3d 678, 689 n. 15 (D.C.2014).

31 *See, e.g., In re J.G.,* 831 A.2d 992, 1000 (D.C.2003) (reiterating that "in no case may a contest between parent and nonparent resolve itself into a simple factual issue as to which affords the better surroundings, or as to which party is better equipped to raise the child.") (internal quotation marks, brackets and ellipses omitted).

32 *In re C.O.W.,* 519 A.2d at 713–14.

33 *See, e.g., In re J.G.,* 831 A.2d at 1002 ("[W]here, as in this case, a small child has spent almost his entire life in the care of the prospective adoptive parent, and where his contact with his birth mother has been quite limited, it may be damaging to the child's welfare to extract him from the only home he has ever known.").

34 *See In re C.O.W.,* 519 A.2d at 714 (concluding that "insofar as the child's relationships with persons other than the natural parent are important in determining whether termination is required and if so, what its effects might be, statutory consideration of such relationships is constitutional"); *see also In re C.T.,* 724 A.2d 590, 598 n. 9 (D.C.1999) ("[I]n determining whether the drastic measure of terminating parental rights is required in the child's best interest, the court must consider the adoptive prospects of the child along with other relevant factors."); *In re Jayden G.,* 70 A.3d at 301–02 ("A finding of parental unfitness overcomes the parental presumption, but it does not establish that termination of parental rights is in the child's best interest. To decide whether it is, the court must still consider the statutory factors[.]").

35 *In re J.L.,* 884 A.2d 1072, 1077 (D.C.2005). "Parental rights, therefore, may not be terminated solely because of poverty, ill-health, or lack of education or sophistication, but only upon a high showing that such a drastic measure is necessary in order to protect the best interests of the child." *Id.* (internal quotation marks omitted). *See also* footnote 24, *supra.*

36 *Appeal of H.R.,* 581 A.2d at 1178 (Ferren, J., concurring).

37 *Rashawn H.,* 937 A.2d at 192 (emphasis in the original); *see also In re C.L.O.,* 41 A.3d 502, 511 (D.C.2012) ("The court therefore begins by recognizing the presumption that the child's best interest will be served by placing the child with his natural parent, provided the parent has not been proven unfit.") (internal quotation marks omitted). We add that because the statutory TPR factors also are relevant in deciding whether an adoption petition should be granted, the court must render comparable findings and conclusions with respect to placement of the child with the adoption petitioners. *Cf.* D.C.Code § 16–309(b) (2012 Repl.) (criteria for granting adoption petition include the fitness of the adoption petitioner and the best interests of the prospective adoptee).

38 *Cf. In re J.F.,* 615 A.2d 594, 598 (D.C.1992) (explaining that where the trial judge in a child neglect proceeding did not "acknowledge, much less address, the presumption in favor of a fit parent" in its custody determination, "[t]he judge's statement that she did not need to decide the rights of the adult parties, since the best interests of the child was the issue, fail[ed] to recognize the constitutionally protected interest at stake").

39 *In re D.S.,* 88 A.3d 678, 692 (D.C.2014) (reversing custody order in neglect proceeding because trial court failed to give meaningful weight to the parental presumption before rejecting father's request for custody).

40 *Id.* at 697.

41 *E.g., In re D.S.,* 88 A.3d at 692.

42 *Appeal of H.R.,* 581 A.2d at 1143 (holding that "[b]ecause the best interest standard, as applied by the trial court, did not incorporate [the necessary] parental preference, ... a remand is required to apply the best interest standard as properly formulated").

43 *See Santosky v. Kramer,* 455 U.S. 745, 758, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

44 *In re C.T.,* 724 A.2d at 597. Despite this court's "general disapproval" of taking a "wait and see" approach to permanency determinations, *id.* at 599, we have recognized that "termination of parental rights might well be inappropriate where there is a reasonable likelihood that the parent's unfitness at the time of trial may be only temporary." *In re L.L.,* 653 A.2d 873, 889 n. 34 (D.C.1995) (internal quotation marks omitted). We emphasize, however, that this proposition must be applied with caution, because "protracted stays in [foster] care ... may deprive [neglected] children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens." *In re T.W.,* 732 A.2d 254, 258 (D.C.1999) (quoting *Smith v. Org. of Foster Families for Equality & Reform,* 431 U.S. 816, 835–36, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977)); *see also In re J.G.,* 831 A.2d at 1001. Accordingly, we have held, "[i]f reunification with a biological parent is not feasible, and if a child is adoptable, then adoption is the statutorily preferred plan.... To 'wait and see' is rarely, if ever, an acceptable option when so much time has already passed." *In re T.W.,* 732 A.2d at 258 (internal citation omitted).

45 Importantly, the magistrate judge properly focused on appellant and the petitioners in relation to A.A.'s best interest, not on how appellant and the petitioners compared to each other. For example, her findings were not that S.E.G. and S.L.G. could provide a *more* stable home for A.A. than appellant, but were to the effect that the petitioners were meeting the child's need for stability while there were reasons to doubt appellant's capacity to do so.

46 *In re J.C.F.,* 73 A.3d 1007, 1012 (D.C.2013).

47 *Cf. In re S.M.,* 985 A.2d 413, 420 (D.C.2009) (remanding for further proceedings where trial court did not accord natural parent the presumption in favor of a fit parent).

111 A.3d 1038
District of Columbia Court of Appeals.

In re Petition of J.J.; T.R., Appellant.

No. 14–FS–352.
|
Argued Dec. 2, 2014.
|
Decided March 26, 2015.

Synopsis

Background: Foster mother petitioned to adopt child. The Superior Court, Errol R. Arthur, J., and Jennifer A. Di Toro, J., granted petition. Biological parents appealed.

[Holding:] The Court of Appeals, Blackburne–Rigsby, J., held that trial court did not abuse its discretion in waiving parental consent to adoption.

Affirmed.

West Headnotes (14)

[1] Adoption
Review

On review of ruling in adoption proceeding, Court of Appeals' role is to review the ruling of the associate judge, in which associate judge reviewed the magistrate judge's order for errors of law, abuse of discretion, and clear lack of evidentiary support.

1 Cases that cite this headnote

[2] Adoption
Review

On review of adoption proceeding, Court of Appeals is not limited to the associate judge's ruling and may review the trial court as a whole, looking to the findings and conclusions of the fact finder on which that ruling is based; Court of Appeals applies the same standard of review that the associate judge applied to the magistrate judge's order and may review the magistrate judge's factual findings as the findings of the trial judge for abuse of discretion or a clear lack of evidentiary support, but its review of legal conclusions is de novo.

1 Cases that cite this headnote

[3] Adoption
Exceptions;relinquishment or forfeiture of parent's rights in general

The determination whether a birth parent's consent to the adoption of a child has been withheld contrary to the child's best interest is confided to the trial court's sound discretion.

1 Cases that cite this headnote

[4] Adoption
Review

On review of determination whether a birth parent's consent to the adoption of a child has been withheld contrary to the child's best interest, Court of Appeals determines whether the trial court exercised that discretion within the range of permissible alternatives, based on all relevant factors and no improper factor, and supported its decision with substantial reasoning drawn from a firm factual foundation in the record.

Cases that cite this headnote

[5] Adoption
Exceptions;relinquishment or forfeiture of parent's rights in general

Adoption
Presumptions and burden of proof

Trial court must apply statutory termination of parental rights factors, in determining whether waiver of biological mother's consent to adoption is in the child's best interest, with full appreciation of the gravity of terminating those rights, beginning with the presumption that the child's best interests will be served by placing the child with his natural parent,

provided the parent has not been proven unfit. D.C. Official Code, 2001 Ed. § 16–2353(b).

2 Cases that cite this headnote

[6] **Adoption**
Presumptions and burden of proof
Constitutional Law
Adoption

Strong presumption, in applying statutory termination of parental rights factors to determine whether waiver of biological mother's consent to adoption is in the child's best interest, that the child's best interest will be served by placing the child with his natural parent reflects and reinforces the fundamental and constitutionally protected liberty interest established by the Due Process Clause that natural parents have in the care, custody, and management of their children. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[7] **Adoption**
Presumptions and burden of proof

Presumption in applying statutory termination of parental rights factors to determine whether waiver of biological mother's consent to adoption is in the child's best interest, that the child's best interests will be served by placing the child with his natural parent may be rebutted only by a showing that the parent is either unfit or that exceptional circumstances exist that would make the continued relationship detrimental to the child's best interests. D.C. Official Code, 2001 Ed. § 16–2353(b).

1 Cases that cite this headnote

[8] **Adoption**
Review

When the trial court's findings, in applying statutory termination of parental rights factors to determine whether waiver of biological mother's consent to adoption is in the child's best interest, are deficient with regard to best interests of the child, Court of Appeals may determine that remand is appropriate; yet, trial court may satisfy its responsibility, and thereby avoid remand, without making an explicit fitness finding if it makes equivalent findings, based on the evidence in the record, demonstrating that the parent lacks the capacity or motivation to meet the child's needs or protect the child from harm.

1 Cases that cite this headnote

[9] **Adoption**
Examination and approval by court

Trial court did not abuse its discretion in determining that waiver of biological mother's consent to adoption was in the child's best interest, although it did not make an express finding of parental unfitness to rebut the presumption in favor of placing child with her natural parents, where the magistrate judge made comprehensive factual findings, including that biological mother's impairments prevented her from parenting child, adoptive mother provided continuous care for all but the first eight months of seven-year-old child's life, biological mother made several questionable parenting choices, and refused to engage in individual or joint therapy with child, and child did not respond to biological mother as a primary caretaker, while foster mother was child's primary caretaker for most of her life. D.C. Official Code, 2001 Ed. § 16–2353(b).

Cases that cite this headnote

[10] **Adoption**
Necessity of consent in general

Clear and convincing evidence supported trial court's determination that child's need for continuity of care and caretakers and for timely integration into a stable and permanent home weighed in favor of adoption by child's foster mother, in determining whether waiver of biological mother's consent to adoption was in the child's best interest, where

biological mother made many questionable parenting decisions during visits with child, foster mother's stable employment and home environment drew a glaring contrast with that of biological mother, who was unemployed at the time of the hearing, after quitting two jobs. D.C. Official Code, 2001 Ed. § 16–2353(b).

Cases that cite this headnote

[11] Adoption

Exceptions;relinquishment or forfeiture of parent's rights in general

The trial court's role in making a determination of whether to terminate parental rights in favor of adoption is not to inquire whether the adoption petitioners would be better parents or would provide a better home but, rather, whether the drastic measure of terminating rights is necessary in order to protect the best interests of the child. D.C. Official Code, 2001 Ed. § 16–2353(b).

Cases that cite this headnote

[12] Adoption

Exceptions;relinquishment or forfeiture of parent's rights in general

Trial court did not abuse its discretion in determining that statutory termination of parental rights factor, providing for consideration of physical, mental, and emotional health of all individuals involved, weighed in favor of waiving biological mother's consent to adoption as in the child's best interest, where biological mother had a history of personal trauma and mental health treatment, made several questionable parenting choices, foster mother was emotionally stable and a role model, in whose care child flourished, and expert testified that removing child from foster mother's care would have been potentially devastating and could have impacted child's development. D.C. Official Code, 2001 Ed. § 16–2353(b).

Cases that cite this headnote

[13] Adoption

Presumptions and burden of proof

Trial court did not abuse its discretion, in determining whether waiver of biological mother's consent to adoption was in the child's best interest, in inferring child's preference to remain with foster mother, although child referred to both biological and foster mothers as "mommy," where child was four years of age at the time of the hearing, magistrate inferred the preference from witness testimony regarding their level of comfort and familiarity, and expert testified that child had a strong bond with foster mother that was not present with biological mother.

Cases that cite this headnote

[14] Adoption

Necessity of consent in general

Adoption

Examination and approval by court

A trial court is not required, in determining whether waiver of biological mother's consent to adoption is in the child's best interest, to elicit a child's opinion regarding her own best interests from direct testimony, and the absence of such direct testimony does not prevent the trial court from determining the child's preference.

Cases that cite this headnote

Attorneys and Law Firms

***1041** Ronald A. Colbert, Washington, DC, for appellant T.R.

Gary P. Jacobs filed a statement in lieu of a brief, for appellant J.B., supporting appellant T.R.

Anthony R. Davenport, for appellee J.J.

Dennis Eshman, Washington, DC, for appellee J.R.

Aisha Lewis, Assistant Attorney General, with whom Irvin B. Nathan, Attorney General for the District of Columbia, Todd S. Kim, Solicitor General, and Loren L. Alikahn, Deputy Solicitor General, were on the brief, for appellee District of Columbia.

Before GLICKMAN and BLACKBURNE–RIGSBY, Associate Judges, and REID, Senior Judge.

Opinion

BLACKBURNE–RIGSBY, Associate Judge:

This case involves a challenge to a court-ordered waiver of parental consent to the adoption of child J.R. by appellee-foster parent J.J., after a magistrate judge found that appellants, T.R. and J.B., the biological mother and father, had withheld their consent against the best interests of the child. T.R. contends that there was insufficient evidence to support the magistrate judge's decision to waive her consent to adoption, and that the reviewing associate judge therefore abused her discretion by affirming. J.B. joins without making additional claims. [1] We discern no abuse of discretion and affirm.

I. FACTUAL BACKGROUND

J.R. was born on February 28, 2008, to mother T.R. and father J.B., but has lived continuously with her adoptive mother J.J., a licensed foster parent, since October 28, 2008. J.R. came into J.J.'s care at approximately eight months old, after J.R. was committed to the custody of the District of Columbia upon allegations that T.R. failed to provide proper formula, used a sanitary napkin for a diaper, and engaged in an act of prostitution with J.R. present. J.B. is not actively involved in J.R.'s life, but has provided occasional financial support and visited J.R. several times before and after his incarceration for second degree assault from June 2011 through October 2012.

At J.R.'s adoption hearing, three social workers who have worked with J.R. testified in support of J.J.'s adoption petition. Dr. Seth King, a psychologist qualified as an expert witness, also testified in favor of J.J.'s adoption petition after individually evaluating T.R. and J.J. and observing their interactions with J.R. The magistrate judge presiding over the hearing concluded that J.J. had established by clear and convincing evidence that T.R. and J.B. had withheld their consent to adoption against J.R.'s best interests, [2] and granted J.J.'s petition for adoption on May 8, 2013. A final decree of adoption followed.

***1042** T.R. and J.B. filed motions for review of the magistrate judge's order in the trial court, pursuant to D.C. Fam. Ct. R. D(e)(1). Specifically, T.R. alleged that the magistrate judge granted J.J.'s adoption petition without making sufficient factual findings, pursuant to D.C.Code § 16–2353(b) (2012 Repl.), to establish by clear and convincing evidence that: (i) T.R. withheld her consent to J.R.'s adoption contrary to J.R.'s best interests, (ii) T.R. suffers from physical, mental, or emotional impairments that prevent her from parenting, or (iii) J.R. has an opinion regarding her custodian. Additionally, J.B. alleged that the magistrate judge granted J.J.'s adoption petition without first finding that he was unfit or adequately considering his request to place J.R. with him, thereby depriving him of his constitutional right to maintain a relationship with J.R. [3]

On review, the associate judge concluded that the magistrate judge did not abuse his discretion in finding clear and convincing evidence to waive T.R.'s consent to adoption, pursuant to D.C.Code § 16–304(e) (2012 Repl.). [4] In reaching this conclusion, the associate judge noted the following findings of the magistrate judge: J.R. has lived with J.J. for most of her life, and that J.J. provides "excellent care" and a stable environment in a "clean and 'kid-friendly' " two-level home, where J.R. is an integrated part of J.J.'s family. J.J. meets J.R.'s educational and medical needs, including administering epilepsy medication, takes J.R. to dance and music lessons, and makes an effort to facilitate interaction with T.R. and J.B. Dr. King testified that J.R. was accustomed to the stability of J.J.'s care, and social worker Kimberly Beard testified that J.R. needed the permanency of living with J.J. J.J. has maintained J.R.'s physical, mental, and emotional health, and properly responded to an incident in which J.R. sustained a serious burn injury in T.R.'s care by taking J.R. to the hospital for treatment, whereas T.R. did not do so. [5]

On the other hand, the associate judge noted that T.R.'s relationship with J.R. is less developed and her visits with J.R. have been inconsistent. [6] Dr. King individually assessed J.J. and T.R., and their respective relationships with J.R., and opined that T.R. did not

demonstrate insight into the need to comply with mental health treatment, in spite of her history of mental health treatment and therapy and her ongoing "emotional distress and impulse control problems." Dr. King observed that T.R. seemed to focus on her own needs when interacting with J.R. and that J.R. did not readily comply with T.R.'s instructions and demonstrated a less secure attachment with T.R., even asking ***1043** for "mommy" during their interaction. On the other hand, Dr. King concluded that J.J. demonstrated emotional stability and an ability to be a positive role model. J.R. regards J.J. as her "mother figure," and their interaction was natural and "bi-directional." After reviewing these findings of the magistrate judge, the associate judge inferred J.R.'s preference to remain with J.J., and concluded that T.R. suffers from various "physical, emotional, and mental health impairments that would prevent her from parenting [J.R.]."

The associate judge also reviewed the magistrate judge's findings related to J.B. Prior to J.B.'s incarceration in June 2011, his visits with J.R. were limited, and he made no effort to contact J.R. during his incarceration. After his release in October 2012, J.B. waited for two months to visit J.R., and did so only twice before the adoption hearing, although eleven visits were offered. Other than visitation, J.B. has made minimal effort to contact J.R. As a result, J.B.'s relationship with J.R. is "less well-developed" than J.J.'s relationship with J.R. Further, J.B. has provided little financial support and has never attempted to become familiar with addressing J.R.'s epilepsy. Accordingly, the associate judge concluded that the magistrate judge did not abuse his discretion in determining, based on clear and convincing evidence, that J.B. waived his consent to J.R.'s adoption. The associate judge further concluded that J.B. had "failed to grasp his opportunity interest" [7] after his incarceration and that the magistrate judge was not required to make an explicit finding that J.B. was "unfit" in order to waive his consent to adoption. *See In re C.L.O., supra* note 7, 41 A.3d at 512; *In re J.C.F.*, 73 A.3d 1007, 1015 n. 4 (D.C.2013) (affirming waiver of biological father's consent "even though the magistrate judge did not mention [the father's] opportunity interest in the written findings of fact and conclusions of law [because] the record supplied clear and convincing evidence supporting the waiver"). On this same basis, the associate judge concluded that the magistrate judge did not need to make a finding with regard to J.B.'s request that J.R. be placed with him, and determined that J.R.'s best interests lay with J.J. rather than her father, "with whom she had never lived and whose contact was limited." This appeal followed.

II. ANALYSIS

A. Standard of Review

[1] **[2]** Procedurally, our role is to review the ruling of the associate judge, in which it reviewed the magistrate judge's order for errors of law, abuse of discretion, and clear lack of evidentiary support. *In re C.L.O., supra* note 7, 41 A.3d at 510 (citation omitted). Nonetheless, we are not limited to the associate judge's ruling and may review the trial court as a whole, "look[ing] to the findings and conclusions of the fact finder on which that ruling is based." *Id.* at 510 (citation omitted). Thus, in reviewing the trial court's determination, we apply the same standard of review that the associate judge applied to the magistrate judge's order and may "review the magistrate judge's factual findings as the findings of the trial judge ... for abuse of discretion or a clear lack of ***1044** evidentiary support." *Id.* (citations and internal quotation marks omitted). [8] Our review of legal conclusions, however, is *de novo. Id.* (citations omitted).

[3] **[4]** "The determination whether a birth parent's consent to the adoption of a child has been withheld contrary to the child's best interest is confided to the trial court's sound discretion." *In re J.G.*, 831 A.2d 992, 999 (D.C.2003) (citation omitted). In our review, we determine whether the trial court exercised that discretion "within the range of permissible alternatives, based on all relevant factors and no improper factor," and supported its decision with "substantial reasoning drawn from a firm factual foundation in the record." *In re S.L.G. & S.E.G.*, 110 A.3d 1275, 1291 (D.C.2015) (citations omitted).

B. Applicable Law

Generally, a trial court may not grant an adoption petition without the consent of both biological parents. *See* D.C.Code § 16–304(a)–(b) (2012 Repl.); *In re C.L.O., supra* note 7, 41 A.3d at 510. Yet the trial court, in its discretion, may grant an adoption petition without parental consent if, after a hearing, the prospective adoptive parent meets the burden of showing by clear and convincing evidence that the biological parents withheld their consent "contrary to the best interest of the child." § 16–304(e); *see In re C.L.O., supra* note 7, 41 A.3d at

510–11 (citation omitted). In making a "best interests" determination, the trial court applies the same statutory factors that apply in a proceeding to terminate parental rights, as outlined in D.C.Code § 16–2353(b) (2012 Repl.). *See In re D.H.,* 917 A.2d 112, 117 (D.C.2007). Section 16–2353(b) provides:

> (b) In determining whether it is in the child's best interests that the parent and child relationship be terminated, a judge shall consider each of the following factors:
>
> (1) the child's need for continuity of care and caretakers and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages;
>
> (2) the physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child;
>
> (3) the quality of the interaction and interrelationship of the child with his or her parent, siblings, relative, and/or caretakers, including the foster parent;
>
> (4) to the extent feasible, the child's opinion of his or her own best interests in the matter ... [9]

D.C.Code § 16–2353(b) (2012 Repl.).

[5] **[6]** **[7]** A trial court must apply these statutory factors with full appreciation of the gravity of terminating parental rights, beginning with "the presumption that the child's best interest will be served by placing the child with his natural parent, provided the parent has not been proven unfit." *In re C.L.O., supra* note 7, 41 A.3d at 510 (citation omitted). This strong presumption ***1045** "reflects and reinforces the fundamental and constitutionally protected liberty interest that natural parents have in the care, custody, and management of their children." *See In re S.L.G. & S.E.G., supra,* at 1286. The presumption may be rebutted "only by a showing that the parent is either unfit or that exceptional circumstances exist that would make the continued relationship detrimental to the child's best interest." *Id.* at 1286 (quoting *In re Rashawn H.,* 402 Md. 477, 937 A.2d 177, 190 (2007)). Accordingly, in *In re S.L.G. & S.E.G.* we held that it is incumbent on the trial court to make "express, specific, and well-reasoned findings," based on the statutory factors, as to whether the presumption has been rebutted, and that only through such findings does a court strike the "proper and harmonious balance" between parental rights and the statutory basis for terminating these rights. *Id.* at 1289 (quoting *In re Rashawn H., supra,* 937 A.2d at 192).

[8] When the trial court's findings are deficient in this regard, this court may determine that remand is appropriate. *Id.* at 1290. (concluding that remand was appropriate because "the findings and conclusions of the trial court are incomplete: For all the detailed and well-supported factual findings ... the trial court decisions fail to acknowledge the presumption in favor of a fit natural parent and explain why that presumption either is inapplicable in this case or is overcome by clear and convincing evidence of what [the child's] welfare requires despite parental fitness"). Yet the trial court may satisfy its responsibility, and thereby avoid remand, without making an explicit "fitness" finding if it makes "equivalent findings," based on the evidence in the record, demonstrating that the parent "lacks the capacity or motivation to meet the child's needs or protect the child from harm." *Id.* at 1289.

C. Discussion

[9] Preliminarily, we note that the magistrate judge did not make an explicit finding that T.R. and J.B. were "unfit" to parent J.R. Even so, this does not necessitate a remand where the trial court made "equivalent findings" for each parent, based on the evidence in the record. *See In re S.L.G. & S.E.G., supra,* at 1289. Our scope of review encompasses the findings and conclusions of the trial court, including the magistrate judge in the first instance and the reviewing associate judge, and we conclude that "equivalent findings" are readily apparent here. *See id.* at 1284–85, 1289 (quoting *In re C.L.O., supra* note 7, 41 A.3d at 510). In contrast to *In re S.L.G. & S.E.G.,* here, the reviewing associate judge relied upon the magistrate judge's comprehensive findings of fact to determined that T.R. suffers from various "physical, emotional, and mental health impairments that would prevent her from parenting [J.R.]," and that the parental presumption in favor of J.B. was rebutted by his "fail[ure] to grasp his opportunity interest upon his release from incarceration." *See In re S.L.G. & S.E.G., supra,* at 1289. These "equivalent findings" rebut the presumption in favor of placing J.R. with her natural parents, *see id.* at

1286 (quoting *In re Rashawn H.,* 402 Md. 477, 937 A.2d 177, 190 (2007)). We now turn to T.R.'s arguments on appeal and the trial court's conclusions with regard to each factor outlined in § 16–2353(b) to determine whether T.R. waived her consent to adoption against J.R.'s "best interest."

1. The child's need for continuity of care and caretakers and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages

[10] T.R. broadly claims that the trial court erred by making a direct comparison ***1046** of her abilities and means with those of J.J. *See In re A.W.K., supra,* 778 A.2d at 326 (citation omitted). T.R. contends the facts in the record demonstrate her ability to provide a stable home for J.R., and that because she is J.R.'s biological mother, our review should weigh this fact heavily. She explains that she has a room, clothes, and toys for J.R. in the apartment that she shares with her fiancé and their two children. She explains that the burn J.R. suffered in her care was "a wake up call for being a parent," and that she is a better parent because of it. If J.R. were entrusted to her care, she contends that she has a transition plan that includes a period of contact with J.J. J.R. also states that she serves as the "neighborhood mother" to the children in her apartment complex and reports that she has completed court-ordered parenting classes.

[11] The trial court's role in making a determination of whether to terminate parental rights is not to inquire "whether the adoption petitioners would be better parents, or would provide a better home[,]" but rather, whether the drastic measure of terminating rights "is necessary in order to protect the best interests of the child." *In re J.L., supra,* 884 A.2d at 1077 (citation omitted). The trial court did not misunderstand this role. In weighing this factor in favor of adoption, the trial court determined that T.R. has made many questionable parenting decisions during supervised and unsupervised visits with J.R. We also note that T.R. testified at the adoption hearing about her involvement in incidents of domestic violence and stated that she was unemployed at the time of the hearing, after quitting two jobs. T.R.'s efforts to better herself and to learn from her mistakes are commendable, but do not overcome the evidence undermining her ability to provide a stable home environment. That J.J.'s stable employment and home environment draw a glaring contrast is not the result of erroneous analysis or direct comparison. J.J. has provided continuous care for all but eight months of J.R.'s seven-year life, and Dr. King testified that removing J.R. from this environment could be "potentially devastating." *See In re J.L., supra,* 884 A.2d at 1078 (weighing a child's need for a stable and permanent home in favor of adoption where children had lived with a stable caretaker for four years and the biological parent was "unable to offer such an environment either at this time or in the near future"). The trial court did not abuse its discretion in concluding that clear and convincing evidence in support of this statutory factor weighs in favor of waiving parental consent to adoption.

2. The physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child

[12] T.R. argues that this factor should weigh in her favor for multiple reasons. First, she has raised two additional children since J.R., neither of whom was removed from her care, in spite of an investigation request submitted by one of J.R.'s social workers. Second, she has grown as a parent because of J.R.'s burn incident. Third, she explains that her visits with J.R. have been limited because she uses public transit to get to work and the agency has not accommodated her request for weekend visits. Fourth, she argues that she no longer needs therapy and that there is no indication that living without therapy has impacted her ability to parent J.R. or her other children.

The trial court considered the health of all individuals involved in weighing this factor in favor of adoption, and did not abuse its discretion in concluding that T.R.'s impairments "prevent her from parenting ***1047** T.R." In particular, T.R. has a history of personal trauma and mental health treatment, has made several questionable parenting choices, and refused to engage in individual or joint therapy with J.R. In Dr. King's individual evaluation, T.R. mentioned trauma in her past and symptoms throughout her life, but did not see any need for additional therapy, nor did she seem to have insight into the need to be compliant with treatment. On the other hand, Dr. King's evaluation of J.J. showed

that she is emotionally stable and a role model, in whose care J.R. has flourished, through J.J.'s active participation in J.R.'s education, medical care, and activities such as dance and music classes. *See In re Petition of W.D.,* 988 A.2d 456, 461–62 (D.C.2010) (weighing the second statutory factor in favor of an adoption petitioner who had a strong bond with the child and provided for medical and educational needs, over a mother who failed to avail herself of "recommended services, including therapy"). Importantly, J.J. also took an active role when J.R. was burned in T.R.'s care, whereas T.R. did not.

The "decisive consideration" for this statutory factor is J.R.'s physical, mental, and emotional needs. Particularly relevant to this consideration is Dr. King's conclusion that removing J.R. from J.J.'s care would be "potentially devastating" and could impact J.R.'s development. It is concerning, then, that T.R. agrees that therapy between J.R. and J.J. would be helpful to ease a transition, but that she would not participate in similar therapy with J.R. Bearing this consideration in mind, and weighing heavily the trial court's conclusion that T.R.'s impairments "would prevent her from parenting "[J.R.]," we discern no abuse of discretion in the trial courts determination to weigh this statutory factor in favor of waiving parental consent to adoption.

3. The quality of the interaction and interrelationship of the child with his or her parent, siblings, relative, andlor caretakers, including the foster parent

In challenging the trial court's determination on this factor, T.R. explains that her work schedule interfered with her ability to visit J.R., that the foster agency was unwilling to provide weekend visits, and that she was forced into the quandary of providing for her other children or visiting with J.R.

While we are cognizant of the impact that public transportation, work schedule, and other parenting duties have had on T.R.'s missed visitation, we see no abuse of discretion in the weight that the trial court accorded this statutory factor. Visitation is T.R.'s primary opportunity to interact with and develop a relationship with J.R., and T.R.'s visits became quite sporadic after February 2012. Moreover, after Dr. King evaluated T.R.'s interaction with J.R., he determined that J.R. does not respond to T.R. as a primary caregiver and that T.R. seemed to focus on her own needs when interacting with J.R. J.J., on the other hand, has served as J.R.'s primary caregiver for most of J.R.'s life, and Dr. King's evaluation led him to conclude that J.R. regards J.J. as her "psychological parent" and "mother figure" and calls her "mommy." Their interaction is natural and bidirectional. Further, J.R. is close to J.J.'s family and refers to them by family names. *See In re Petition of W.D., supra,* 988 A.2d at 463 (concluding that "extensive evidence of [the child's] bond with the [adoptive parent] and [the child's] limited interaction with her mother supports the trial court's determination" to weigh the third statutory factor in favor of adoption). Given these findings, the trial court did not abuse its discretion in finding clear and convincing evidence that this statutory factor ***1048** should weigh in favor of waiving parental consent to adoption.

4. To the extent feasible, the child's opinion of his or her own best interests in the matter

[13] T.R. merely argues that this factor "cannot be properly weighed" because of J.R.'s age and because J.R. refers to both T.R. and J.J. as "mommy."

[14] A trial court is not required to elicit a child's opinion regarding her own best interests from direct testimony, and the absence of such direct testimony does not prevent the trial court from determining the child's preference. *See In re T.W.M.,* 18 A.3d 815, 822 (D.C.2011) (ruling that a court has no duty to rely on direct testimony and that "in many cases the most probative evidence of the child's opinion may lie in statements the child has made to others such as psychologists or in the child's past behavior ..."). J.R. was four years old at the time of the adoption hearing, and the magistrate judge inferred her preference to remain with J.J. from witness testimony regarding their level of comfort and familiarity. Dr. King's interaction evaluations and the testimony of J.R.'s social workers indicate that J.R. has a strong bond with J.J. that is not present with T.R. Therefore, evidence that J.R. has referred to T.R. and J.J. as "mommy" is not dispositive and, in any event, the record also indicates that J.R. has asked for "mommy" in the presence of T.R. On these facts, the trial court did not abuse its discretion in weighing the clear and convincing evidence of J.R.'s behavior in favor of waiving parental consent to adoption.

III. CONCLUSION

While the magistrate judge did not make an express finding of parental unfitness to rebut the presumption in favor of placing J.R. with her natural parents, we do not discern any deficiency necessitating a remand under our holding in *In re S.L.G. & S.E.G., supra,* at 1286. In so holding, we emphasize that the magistrate judge's comprehensive factual findings, and the associate judge's thorough review of those findings and her conclusions with regard to parental fitness, place this case in a different posture than *In re S.L.G. & S.E.G.* Here, the trial court's detailed factual findings and determination that T.R.'s impairments prevented her from parenting J.R. constitute "equivalent findings" of unfitness, as contemplated by the court in *In re S.L.G. & S.E.G.,* to rebut the parental presumption and avoid remand. *See id.* at 1289. Nor do we discern any abuse of discretion in the trial court's determination to waive parental consent to adoption. Accordingly, the petition on appeal is hereby affirmed.

So ordered.

All Citations

111 A.3d 1038

Footnotes

1 J.B. did not file a notice of appeal from the trial court's order, and presumably waived his right to do so, but he nonetheless filed a statement in lieu of a brief through court-appointed counsel. We consider J.B.'s statement supporting T.R.'s appeal in equity. *See* D.C.Code § 11–721 (2012 Repl.).

2 *See* D.C.Code § 16–304(e) (2012 Repl.) ("The court may grant a petition for adoption without any of the consents specified in this section, when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interest of the child.").

3 J.B. did not renew these claims on appeal to this court. See *supra* note 1.

4 See *supra* note 2.

5 According to J.J.'s testimony regarding this incident, in July 2010, J.R. received serious burns to her upper and lower arm while on an unsupervised visit with T.R. When J.J. arrived to pick up J.R., T.R. told J.J. that the burns were "sunburn." T.R. did not take J.R. to the hospital for treatment. J.J. did not think that the burns looked like sunburn because J.R.'s skin was loose and blackened, so J.J. took J.R. to the emergency room where the burns were cleaned and J.R. received pain medication. The burns healed within four to five weeks. The court considered this event in its decision to order supervised visitation and, on October 27, 2010, to revise J.R.'s permanency goal from "reunification" to "adoption."

6 Two social workers testified at the adoption hearing that T.R. visited J.R. consistently until February 2012, then visited only three times between February 2012 and October 2012, after failing to show up for eight visits. From October 2012 through the date of testimony, T.R. attended six visits out of eleven visits offered, citing sickness and not wanting to take her other children out in bad weather.

7 *See In re C.L.O.,* 41 A.3d 502, 511–12 (D.C.2012) (internal citations and quotation marks omitted) ("The court will invoke the presumption or preference in favor of a fit, unwed, noncustodial father only when the court finds that he timely grasped his constitutional 'liberty' interest—now commonly called his 'opportunity interest'—protected by due process. That is to say, the father must have early on, and continually, done all that he could reasonably have been expected to do under the circumstances to pursue that interest in developing a custodial relationship with his child.").

8 *See* D.C. Fam. Ct. R. D(e)(5) ("The standard of review by the associate judge of a magistrate judge's final order or judgment shall be the same as applied by the Court of Appeals on appeal of a judgment or order of an associate judge of the Superior Court. In accordance with this standard a magistrate judge's finding of fact may not be set aside unless clearly erroneous; nor may the magistrate judge's final order or judgment be set aside except for legal error or abuse of discretion.").

9 Two additional factors, D.C.Code § 16–2353(b)(3A) and (5), relate to hospital abandonment and drug activity, respectively, and are not at issue here.

149 A.3d 1060
District of Columbia Court of Appeals.

In re Ta.L.
In re A.L.
In re Petition of R.W. & A.W.
In re Petition of E.A.
A.H. and T.L., Appellants.

Nos. 11–FS–1217, 11–FS–1218, 11–FS–1255, 11–FS–1256, 11–FS–1257, 11–FS–1258, 11–FS–1259 & 11–FS–1260

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Argued En Banc June 17, 2014

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Decided December 8, 2016

Synopsis

Background: Foster parents filed a petition to adopt two children after a permanency goal had been changed from reunification with biological parents to adoption. Aunt of children also filed a petition to adopt, supported by the biological parents. After a trial, the Superior Court, District of Columbia, Neal E. Kravitz, J., granted foster parents' petition and denied aunt's petition. Biological parents and aunt appealed. The Court of Appeals, 75 A.3d 122, reversed and remanded, but subsequently granted petitions for rehearing en banc.

Holdings: On rehearing, the Court of Appeals, Washington, C.J., held that:

[1] a change in the permanency goal of a child neglect case from reunification to adoption is an order subject to immediate appellate review, overruling *In re K.M.T.*, 795 A.2d 688;

[2] presumption in favor of a fit parent's right to raise his or her children must be rebutted by a finding of parental unfitness before the trial court can make the ultimate determination to terminate a biological parent's rights to raise his or her children; and

[3] evidence supported conclusion that disruption of children's attachment with foster parents would pose unacceptably grave risks to children's short-and long-term psychological, intellectual, and social development.

Affirmed.

Thompson, J., joined in part and in the judgment.

Glickman, Fisher, and McLeese, JJ., concurred in the judgment.

Beckwith and Easterly, JJ., joined in part but dissented from the judgment.

Glickman, J., filed an opinion concurring in part and dissenting in part, with which Fisher and McLeese, JJ., joined, and Thompson, J., joined in part.

Beckwith and Easterly, JJ., filed an opinion concurring in part and dissenting in part, with which Washington, C.J., joined in part.

West Headnotes (41)

[1] Constitutional Law
Parent and Child Relationship

Even when parents have not been model parents or the state has temporary custody of their child, parents retain their fundamental liberty interest in the care, custody, and management of their child and have a critical need for procedural protections. (Per Washington, C.J., with two judges joining and four judges concurring in the judgment).

Cases that cite this headnote

[2] Parent and Child
Actions and Proceedings

When the state intervenes into a biological parent's relationship with his or her child, the state must provide the parent with fundamentally fair procedures. (Per Washington, C.J., with two judges joining and four judges concurring in the judgment).

Cases that cite this headnote

[3] Adoption

Natural Parents, Necessity of Consent in General

Absent termination of parental rights or some other finding that the parents should no longer be permitted to influence the child's future, the parents' rights necessarily include the right to consent, or withhold consent, to the child's adoption. (Per Washington, C.J., with two judges joining and four judges concurring in the judgment).

Cases that cite this headnote

[4] **Adoption**

Exceptions;relinquishment or forfeiture of parent's rights in general

Because granting an adoption without the natural parent's consent necessarily terminates the parent's rights, the court must weigh the same statutory factors that are considered in a termination of parental rights proceeding to decide whether termination is in the child's best interest. (Per Washington, C.J., with two judges joining and four judges concurring in the judgment). D.C. Code §§ 16-304(e), 16-2353(b).

Cases that cite this headnote

[5] **Adoption**

Necessity of consent in general

Adoption

Examination and approval by court

Where there are competing adoption petitions and the biological parents have consented to adoption by one of the petitioners, before rejecting the designated custodian's petition and severing the child's relation with his parent and other relatives the trial court must find by clear and convincing evidence both that the custody arrangement chosen by the parents would clearly not be in the best interest of the child and that the parents' consent to adoption is withheld contrary to the child's best interest. (Per Washington, C.J., with two judges joining and four judges concurring in the judgment). D.C. Code §§ 16-304(e), 16-2353(b).

Cases that cite this headnote

[6] **Adoption**

Necessity of consent in general

Adoption

Examination and approval by court

Clear and convincing evidence standard applies both when determining whether biological parents' consent to adoption can be waived and when considering whether granting custody to the parent's preferred caregiver is contrary to the best interest of the child. (Per Washington, C.J., with two judges joining and four judges concurring in the judgment). D.C. Code §§ 16-304(e), 16-2353(b).

Cases that cite this headnote

[7] **Adoption**

Review

An appellate court reviews a trial court's order granting an adoption for abuse of discretion and determines whether the trial court exercised its discretion within the range of permissible alternatives, based on all the relevant factors and no improper factors; it then assesses whether the trial court applied the correct standard of proof, and evaluates whether the trial court's decision is supported by substantial reasoning, drawn from a firm factual foundation in the record. (Per Washington, C.J., with two judges joining and four judges concurring in the judgment).

Cases that cite this headnote

[8] **Appeal and Error**

Necessity of objections in general

Court of Appeals only applies the exception for reviewing unpreserved issues to civil cases; the exception does not extend to criminal cases, where it applies the more rigorous plain error test.

Cases that cite this headnote

[9] **Constitutional Law**
Removal or termination of parental rights
Infants
Hearing

A trial court's grant of a permanency goal change from reunification to adoption over the parents' objection, without an adjudicatory hearing to determine whether the District has fulfilled its duty to expend reasonable efforts to reunify the family, violates a parent's procedural due process rights and, therefore, is appealable by the parents as a matter of right. U.S. Const. Amend. 5; D.C. Code § 16-2323(c).

Cases that cite this headnote

[10] **Motions**
Form and Requisites of Orders

An order is not usually "final" unless it completely resolves the case on its merits; but, to be "final," an order need not necessarily be the last one in a proceeding. D.C. Code § 11-721(a)(1).

Cases that cite this headnote

[11] **Infants**
Vacation, extension, and modification

A change in the permanency goal of a child neglect case from reunification to adoption is an order subject to immediate appellate review; overruling *In re K.M.T.*, 795 A.2d 688. D.C. Code § 16-2323(c).

Cases that cite this headnote

[12] **Infants**
Course and conduct

In child neglect proceedings, a permanency goal hearing must be conducted in a way that affords parents their due process rights. U.S. Const. Amend. 5, D.C. Code § 16-2323(c).

Cases that cite this headnote

[13] **Constitutional Law**
Removal or termination of parental rights
Infants
Proceedings

While a government's permanency report, without any testimony from those who provided the information on which the government's recommendations are based or any other evidence that undergirds the findings and/or conclusions found in those reports, may be sufficient for a typical child neglect review hearing, it does not pass due process muster when the rights at stake are as great as a parent's constitutional right to raise his or her child. U.S. Const. Amend. 5; D.C. Code § 16-2323(c).

Cases that cite this headnote

[14] **Constitutional Law**
Removal or termination of parental rights

Unless the parents are prepared to stipulate that reasonable efforts were made by the government to help the parents ameliorate the problems that led to a neglect adjudication, due process requires that, at a permanency goal hearing, the government must produce sufficient evidence from which a trial court can find by a preponderance of the evidence that the presumption in favor of reunification has been rebutted before the goal can be changed from reunification to adoption; in other words, the government must prove by a preponderance of the evidence that it has provided the parents with a reasonable plan for achieving reunification, that it expended reasonable efforts to help the parents ameliorate the conditions that led to the child being adjudicated neglected, and that the parents have failed to make adequate progress towards satisfying the requirements of that plan. U.S. Const. Amend. 5; D.C. Code § 16-2323(c)(2).

Cases that cite this headnote

[15] **Infants**

In general;nature and purpose

In child neglect proceedings, primary focus of the permanency planning hearing should be on the parents' efforts to ameliorate the conditions that led to the neglect and the District's efforts to assist them in achieving those goals. D.C. Code § 16-2323(c).

Cases that cite this headnote

[16] **Infants**

Course and conduct

In child neglect proceedings, to ensure that the government has made reasonable efforts to reunify the family, parents must have an opportunity at a permanency goal hearing to challenge any statements, observations, and evaluations that form the basis of the Child and Family Services Agency's (CFSA) recommendation to the court to change the permanency goal. D.C. Code § 16-2323(c)(2).

Cases that cite this headnote

[17] **Infants**

Hearing

Where the government moves to change the permanency goal from reunification to adoption in child neglect proceedings, an appropriate hearing will provide a forum where the parents can testify, under oath, concerning any alleged failure on the District's part to provide the requisite services and resources as well as their own efforts to meet the goals set forth in the plan that was developed to promote reunification; the hearing will also enable parents to present any other evidence that they believe supports a decision to continue with reunification efforts. D.C. Code § 16-2323(c)(2).

Cases that cite this headnote

[18] **Infants**

Determination and findings

Based on the evidence presented at the hearing in child neglect proceedings on government's motion to change the permanency goal from reunification to adoption, the trial court will be able to make findings of fact and conclusions of law that will allow the appellate court to conduct a meaningful review of the trial court's permanency decision and determine whether the trial court exercised its discretion within the range of permissible alternatives, based on all relevant factors and no improper factor. D.C. Code § 16-2323(c)(2).

Cases that cite this headnote

[19] **Infants**

Determination and findings

Before approving a permanency goal change that allows the District to divert its limited resources from reunification to adoption in child neglect proceedings, the trial court, absent waiver by the parent, must ensure that a goal change is the appropriate course of action by, at a minimum, making findings that: (1) the District has in fact expended reasonable efforts to reunify the family as it is statutorily obligated to do; (2) the goals set for the parents were appropriate and reasonable; and (3) other vehicles for avoiding the pursuit of termination, e.g., kinship placements, have been adequately explored. Social Security Act § 475, 42 U.S.C.A. § 675(5)(E)(iii); D.C. Code § 16-2323(c)(2).

Cases that cite this headnote

[20] **Infants**

In general;nature and purpose

In child neglect proceedings, a permanency goal hearing, generally, is not the appropriate time to consider kinship placements; however, that assumes other options were explored at the beginning of the removal process as required by law. D.C. Code § 16-2323(c)(4).

Cases that cite this headnote

[21] **Infants**
Questions of Fact and Findings

On appeal of an order on government's motion to change the permanency goal from reunification to adoption in child neglect proceedings, an appellate court will review whether the trial court has made the requisite findings to justify a goal change and whether those findings were adequately supported by the record. D.C. Code § 16-2323(c)(2).

Cases that cite this headnote

[22] **Infants**
Time for pleading, proceedings, or ruling; stay

Time is of the essence in child neglect proceedings, and if the District's support for family reunification as a permanency goal was improperly withdrawn, it must be restored as soon as possible. D.C. Code § 16-2323(c)(2).

Cases that cite this headnote

[23] **Infants**
Care, custody, and control by parent

The presumption in favor of a fit parent's right to raise his or her children must be rebutted by a finding of parental unfitness before the trial court can make the ultimate determination to terminate a biological parent's rights to raise his or her children. D.C. Code § 16-2353.

Cases that cite this headnote

[24] **Constitutional Law**
Parent and Child Relationship

Constitutional Law
Protection of Children;Child Abuse, Neglect, and Dependency

Substantive due process requires a presumption that fit parents act in the best interests of their children and recognition that the state may not inject itself into the private realm of the family absent a finding of unfitness. U.S. Const. Amend. 5; D.C. Code § 16-2353.

Cases that cite this headnote

[25] **Infants**
Determination and findings

While the best interest of the child are the decisive factor in determining whether to ultimately terminate parental rights in a neglect proceeding, it is critical that the trial court make a parental unfitness determination before undertaking a best interests of the child analysis. D.C. Code § 16-2353.

Cases that cite this headnote

[26] **Parent and Child**
Care, Custody, and Control of Child; Child Raising

So long as a parent adequately cares for his or her children (i.e. is fit), there will normally be no reason for the state to interject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Cases that cite this headnote

[27] **Infants**
Unfitness or Incompetence of Parent or Person in Position Thereof

Parental "fitness" is not merely a restatement of the best interests of the child, as determined by a termination of parental rights or contested adoption proceeding; "fitness," rather, is an independent determination of parental intention and ability over time, to resolve the natural parent's capacity to care for the child and protect the child against undue risk of harm. D.C. Code § 16-2353.

Cases that cite this headnote

[28] **Infants**
Unfitness or Incompetence of Parent or Person in Position Thereof

Because a child's best interests are presumably served by being placed with his or her fit

natural parent, a finding of parental fitness will in most cases preclude a trial court from terminating a natural parent's parental rights, except for those truly exceptional circumstances where the trial court is convinced that a continuation of the parental relationship between a fit parent and child is nonetheless detrimental to the best interest of the child. D.C. Code § 16-2353.

Cases that cite this headnote

[29] Infants

Care, custody, and control by parent

While the fitness of the parents must first be determined in any proceeding that may terminate their parental rights, if the trial court is satisfied by clear and convincing evidence that reunification of the child with the family would grievously harm the child, the presumption in favor of a fit parent raising his or her child gives way to what is in the child's best interest. D.C. Code § 16-2353.

Cases that cite this headnote

[30] Infants

Disposition, Placement, and Custody

Evidence supported conclusion that disruption of neglected children's attachment with prospective adoptive parents would pose unacceptably grave risks to children's short- and long-term psychological, intellectual, and social development, warranting granting of prospective parents' adoption petition for two children over petition filed by children's aunt, who had been chosen by biological parents as preferred caregiver; expert conducted attachment study that found that the older child had a secure attachment, and younger child had an anxious avoidant attachment, to prospective mother, and the expert testified that the children had a primary attachment to prospective mother, that they viewed the prospective parents as their primary caregivers, and that severance of this type of attachment would necessarily cause significant harm to the children, regardless of the qualities of the person who served as their subsequent caregiver. (Per Washington, C.J., with three judges joining and three judges concurring in the judgment). D.C. Code §§ 16-304(e), 16-2353(b).

Cases that cite this headnote

[31] Adoption

In general;who may or must consent

Biological parents who are unable or unwilling to raise their own children may choose to consent to an adoption by a preferred caregiver so that their children can be raised by someone with whom they have close familial ties. (Per Washington, C.J., with three judges joining and three judges concurring in the judgment). D.C. Code § 16-304.

Cases that cite this headnote

[32] Adoption

Examination and approval by court

When parents whose parental rights are still intact choose a custodian for their children in the context of a contested adoption, to allow adoption by the non-chosen party, the trial court must find by clear and convincing evidence that the custody arrangement preferred by the parents would clearly be contrary to the best interests of the child. (Per Washington, C.J., with three judges joining and three judges concurring in the judgment). D.C. Code §§ 16-304, 16-2353(b).

Cases that cite this headnote

[33] Adoption

In general;who may or must consent

Parent and Child

Care, Custody, and Control of Child; Child Raising

Biological parents have a right to raise their children and, therefore, when biological parents consent to an adoption by one of the petitioners in a contested adoption proceeding, the trial court cannot merely

weigh the competing adoption petitions against one another, as if they began in equipoise. (Per Washington, C.J., with three judges joining and three judges concurring in the judgment). D.C. Code § 16-304.

Cases that cite this headnote

[34] **Adoption**
Necessity of consent in general
Adoption
Examination and approval by court

An adoption petitioner who is not favored by the biological parents in a contested proceedings is required to prove by clear and convincing evidence that placement of the children with the favored petitioners would be detrimental to the children's best interest; if the non-favored petitioners meet that burden, they must subsequently prove by a preponderance of the evidence that granting their adoption petition is in the children's best interest before the court can waive the parents' consent and grant the adoption. (Per Washington, C.J., with three judges joining and three judges concurring in the judgment). D.C. Code §§ 16-304, 16-2353(b).

Cases that cite this headnote

[35] **Evidence**
Degree of Proof in General

"Clear and convincing evidence" is evidence which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. (Per Washington, C.J., with three judges joining and three judges concurring in the judgment).

Cases that cite this headnote

[36] **Adoption**
Examination and approval by court

An adoption petitioner who is not favored by the biological parents in a contested proceedings bears the burden of establishing by clear and convincing evidence that placing the children with the parents' preferred caregiver would be contrary to the children's best interest. (Per Washington, C.J., with three judges joining and three judges concurring in the judgment). D.C. Code §§ 16-304, 16-2353(b).

Cases that cite this headnote

[37] **Infants**
Disposition and placement of child
Infants
Adoptive placement

In proceedings where biological mother designated neglected child's aunt as mother's preferred adoptive parent, aunt was not entitled to the same presumption favoring fit natural parents; designation by the mother as the preferred caregiver was instead entitled to weighty consideration. (Per Washington, C.J., with two judges joining and four judges concurring in the judgment). D.C. Code §§ 16-304, 16-2353(b).

Cases that cite this headnote

[38] **Adoption**
Examination and approval by court
Infants
Disposition and placement of child

In neglect and adoption proceedings, preservation of natural parents' constitutionally protected right to the care, custody, and management of their child demands a strong presumption in favor of placing the child in the care of the natural parent unless the parent is first proven to be unfit. (Per Washington, C.J., with two judges joining and four judges concurring in the judgment). D.C. Code §§ 16-304, 16-2353(b).

Cases that cite this headnote

[39] **Adoption**
Exceptions;relinquishment or forfeiture of parent's rights in general

Court cannot constitutionally use the best interests standard to terminate the parental rights of a fit natural parent and grant an

adoption in favor of prospective adoption petitioners simply because they are fitter. (Per Washington, C.J., with two judges joining and four judges concurring in the judgment). D.C. Code §§ 16-304, 16-2353(b).

Cases that cite this headnote

[40] Adoption

Examination and approval by court

While it is possible that an attachment study might adequately support a finding by clear and convincing evidence in contested adoption proceedings that placement of children with someone other than the person to whom they are attached would be detrimental to their best interests, the same cannot be said for a bonding study because children can bond with more than one individual. (Per Washington, C.J., with three judges joining and three judges concurring in the judgment). D.C. Code §§ 16-304, 16-2353(b).

Cases that cite this headnote

[41] Adoption

Persons who may adopt others

While attachment studies are a significant consideration in the weighty consideration analysis of a contested adoption proceeding, there are also other important considerations for the trial court when weighing a petition for adoption by a caregiver preferred by a biological parent with that of a non-preferred caregiver, such as the appropriateness of the preferred caregiver, preservation of extended family ties, and issues pertaining to racial, cultural, and family identity, among others. (Per Washington, C.J., with three judges joining and three judges concurring in the judgment). D.C. Code §§ 16-304, 16-2353(b).

Cases that cite this headnote

***1067** Appeals from the Superior Court of the District of Columbia, (ADA–115–09) (ADA–116–09) (NEG–234–08) (NEG–235–08) (ADA–172–09) (ADA–173–09), (Hon. Neal E. Kravitz, Trial Judge)

Attorneys and Law Firms

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Kelly Venci, guardian ad litem, filed a brief in support of appellees R.W. and A.W.

James Klein, Public Defender Service, filed a brief as amicus curiae in support of appellants A.H., T.L., and E.A.

Melissa Colangelo and Allen Snyder, Children's Law Center, filed a brief as amicus curiae on limited issue and in support of neither party.

John C. Keeney, Jr., Legal Aid Society of the District of Columbia, Kyle J. Fiet, and David Reiser filed a brief for amici curiae Legal Aid Society of the District of Columbia; National Association of Counsel for Children; Center for Family Representation, Inc.; Family Defense Center; and Family Law Professors Vivek S. Sankaran, Christine Gottlieb, and Martin Guggenheim in support of appellants A.H., T.L., and E.A.

Richard P. Goldberg and Jeremy C. Doernberger filed a brief for amicus curiae Dr. Robert S. Marvin in support of appellees R.W. and A.W.

Douglas H. Hallward–Dreimeier filed a brief for amici curiae Law Professors James G. Dwyer, J. Herbie Difonzo, Jennifer A. Drobac, Deborah L. Forman, William Ladd, Ellen Marrus, and Deborah Paruch, in support of appellees R.W. and A.W.

Before Washington, Chief Judge, Glickman, Fisher, Blackburne–Rigsby, Thompson, Beckwith, Easterly, and McLeese, Associate Judges, and Reid, Senior Judge.

Opinion by Chief Judge Washington, with whom Blackburne–Rigsby, Associate Judge and Reid, Senior Judge, join in full; Thompson, Associate Judge, joins in Parts III and V (except for footnote 38) and the judgment; Glickman, Fisher, and McLeese, Associate Judges, concur in the judgment; and Beckwith and Easterly, Associate Judges, join in parts III and IV, but dissent from the judgment.

Concurring and dissenting opinion by Glickman, Associate Judge, with whom Fisher and McLeese, Associate Judges, join in full, and Thompson, Associate Judge, joins in Parts III and IV, at page 1088.

Concurring and dissenting opinion by Associate Judges Beckwith and Easterly, with whom Washington, Chief Judge, joins in Part I and II, at page 1121.

Opinion

Washington, Chief Judge:

A.H. and T.L., biological parents of minor children A.L. and Ta.L., along with the ***1068** children's aunt, E.A., challenge the trial court's decision granting the adoption of A.L. and Ta.L. by their foster parents, R.W. and A.W. (the "W.s"), and denying E.A.'s adoption petition. This court granted the petition by appellees R.W. and A.W. for rehearing en banc, thereby vacating its original opinion in this case, *In re Ta.L.*, 75 A.3d 122 (D.C. 2013), *vacated sub nom. In re R.W.*, 91 A.3d 1020 (D.C. 2014), in part because this appeal raises serious concerns about our prior decision in *In re K.M.T.*, 795 A.2d 688 (D.C. 2002), where a division of this court held that permanency goal decisions of the trial court are not appealable.[1] Specifically, appellants A.H. and T.L. complain that the informal process used to change the permanency goal for their family from reunification to adoption, a decision they could not challenge on appeal and one that ultimately resulted in a termination of their parental rights, violated their constitutional due process rights. In addition, appellants argue that the trial court erred in granting the W.s' adoption petition because, in considering the competing adoption petitions, the trial court failed to give weighty consideration to the adoption petition of the biological parents' preferred caregiver, E.A. We agree with appellants that when the Child and Family Services Agency, ("CFSA")—the agency charged with assisting parents in their efforts to reunite with their children that have been removed from their home—requests that the trial court change the goal for the family from reunification to adoption, the parents must have the right to contest the goal change before they are forced to make a Hobson's choice between contesting the adoption petition of a stranger or consenting to the adoption of their children by a family member. Additionally, the parents should be able to appeal such a change because it marks a point in time when the trial court has effectively authorized CFSA to transfer its support to someone else to parent the child. Despite our ruling here today, we affirm the trial court's decision to grant the adoption petition of the W.s because it is supported by clear and convincing evidence that at the time of the adoption hearing, the biological parents, T.L. and A.H., withheld their consent to the adoption against the best interest of the children and there was clear and convincing evidence that adoption by E.A. was not in the best interests of the children.

I. Facts

On March 24, 2008, A.L. and Ta.L. were removed from the care and custody of their biological parents, A.H. and T.L., following the arrest and incarceration of both parents for a domestic violence incident in the family's home. The CFSA immediately assumed custody of the children, and placed them in foster care with R.W. and A.W. A.L. was sixteen months old and Ta.L. was three months old at the time. The children were both underweight. A.L. was not current on her immunizations and suffered from significant medical problems, including sleep apnea and chronic pulmonary issues as well as an eye disorder and acid reflux. Ta.L. was diagnosed with failure to thrive syndrome and had not seen a doctor since birth. A.L.'s pediatrician later testified that she was concerned that A.L. might not regularly be receiving the proper treatment required for her ailments, which could be life-threatening without treatment.

***1069** Two days after the children's removal from their biological parents' care, CFSA conducted a Family Team Meeting[2] to identify family members who might provide a temporary placement for the children while A.H. and T.L. worked toward reunification. Two of T.L.'s sisters, K.A.–R. and E.A., attended the meeting. K.A.–R. indicated that she would be willing to become a kinship

foster care provider for the children, and E.A. agreed to be a backup provider for K.A.–R. E.A. testified that it was her understanding that if K.A.–R.'s foster care license was denied, she would be second in line to get the children as a kinship foster care provider; however, E.A. did not take any steps to become a kinship foster parent at that time.

Approximately two weeks later, K.A.–R. learned that her husband did not pass the requisite background check and, as a result, she could not be licensed to care for the children in her home. K.A.–R. told E.A. that she was unable to complete the licensing process, but reassured E.A. that the children's permanency goal was reunification, which T.L. confirmed to E.A. a short time later. E.A. testified that because she understood the children's permanency goal to be reunification, she did nothing to attempt to become a placement for the children. CFSA also did not make any attempts to contact E.A. and qualify her as a kinship placement.

A.L. and Ta.L. were adjudicated neglected children on May 1, 2008, because they lacked proper parental care and control and because T.L. and A.H. were unable to discharge their parental responsibilities due to their incarceration and substance abuse problems.[3] The trial court committed the children to CFSA's custody and care, with a permanency goal of reunification with the biological parents to be achieved by May 2009.

On May 14, 2009, the trial court held a permanency hearing during which the government moved to change the permanency goal from reunification to adoption because the biological parents had not made sufficient progress towards reunification. The trial court approved the change in permanency goal from reunification to adoption, finding that T.L. and A.H. had not: 1) complied with the trial court's order for drug testing or participated in drug treatment; 2) regularly attended couples' counseling; 3) consistently visited the children; 4) secured stable housing; and 5) been involved with the children's medical care and educational services.

Less than a month later, on June 12, 2009, R.W. and A.W., who had been caring for Ta.L. and A.L. since March 2008, filed a petition to adopt Ta.L. and A.L. Shortly thereafter, E.A. was contacted by a social worker because T.L. mentioned E.A. as a placement option for the children during the May 14, 2009, change of permanency goal hearing.[4] E.A. began visiting the children in June or July 2009. Visits were moved to E.A.'s home in August 2009 where the children would visit with E.A. and their biological parents for one to two ***1070** hours per week. E.A. testified that she requested more visits with the children, but her requests were denied.

On October 9, 2009, four months after the first adoption petition was filed, E.A. filed a petition to adopt A.L. and Ta.L. At a review hearing held on November 6, 2009, A.H. and T.L. indicated they would consent to E.A.'s adoption petition because it was in the best interest of the children to be adopted by E.A. rather than be returned to their own care. E.A. began taking foster care classes in November 2009 and became a licensed therapeutic foster care provider in December 2009. An adoption social worker deemed E.A.'s home appropriate for children. CFSA, however, supported R.W. and A.W.'s petition, citing the foster parents' ability to provide a stable home and meet all of the children's daily and medical needs, the children's strong bond with the W.s, E.A.'s limited involvement in the lives of the children, and concern for the safety of the children while in E.A.'s care in terms of her ability to protect the children when their biological parents are around.

The adoption trial was held in May 2011.[5] At the time of the adoption trial, the children had been in R.W. and A.W.'s care for three uninterrupted years. A.H. and T.L. explained to the court that they consented to adoption by E.A. because they wanted A.L. and Ta.L. to remain in their family. At trial, E.A. claimed that CFSA had a duty to contact her so that she could become a kinship care provider, and that she would have had a stronger bond with the children had she been timely informed. The W.s argued that it was in the children's best interest to be adopted by their foster family. Three experts also offered testimony during the adoption proceeding: Dr. James Venza, who conducted an attachment study between the children and the W.s; Dr. Sheryl Frank, who conducted a court-ordered bonding study of all the parties; and Dr. Charles David Missar, who offered a critique of the aforementioned studies on behalf of A.H., T.L., and E.A.

The W.s called psychologist Dr. Venza as an expert witness. Dr. Venza conducted a study of the attachment between the W.s and the children in March 2010, when A.L. was three and Ta.L. was two. The children had been with the W.s for two years at that point, and had been visiting E.A. weekly for approximately a year. Dr.

Venza concluded that A.L. had a secure attachment to A.W., which is the optimal level of development, and that Ta.L. had an anxious avoidant attachment to A.W., due in part to his age.[6] Dr. Venza noted substantial growth in the children's cognitive abilities while in the W.s' care and predicted the children would regress cognitively if separated from the W.s. Dr. Venza concluded that the impact of removing the children from the W.s' care would be potentially "devastating" to their long-term development, particularly given their early history of neglect, medical challenges, and developmental delays, and that the risk of permanent or irreparable harm ***1071** was "clear" and "unmistakable." Dr. Venza also concluded that the impact of the children's separation from the W.s would not differ based on where they were subsequently placed. Dr. Venza did not, however, study A.L. and Ta.L.'s attachment to E.A.

Dr. Frank, a consulting psychologist with the Department of Mental Health's Assessment Center and court-appointed neutral expert, also testified about a court-ordered bonding study she performed in July 2010 between the children, the biological parents, and all the petitioners. Dr. Frank largely echoed Dr. Venza's testimony. Dr. Frank testified that the children's relationship with their biological family was positive and that E.A. ably directed the children's play, set appropriate limits, had a nice manner with the children, and was attuned to their needs. However, Dr. Frank concluded that A.L. and Ta.L. were "most attached" to the W.s and would suffer the greatest harm, in both the short- and long-term, if that bond were broken, and that the children's "emotional and behavioral development" were at a "high risk of derailment." Accordingly, Dr. Frank agreed with Dr. Venza's assessment and recommended that the court grant the W.s' petition.

E.A. called clinical psychologist Dr. Missar as her expert witness to offer a critique of Dr. Venza's and Dr. Frank's assessments. Although he generally agreed with their opinions, Dr. Missar opined that Dr. Frank was not in a position to offer an opinion about the children's attachment to any party because she had only conducted an assessment of their bonding. As for Dr. Venza's evaluation, Dr. Missar found the primary limitation to be that he did not assess the children's attachment to their biological family, including E.A. However, Dr. Missar agreed with Dr. Venza's testimony concerning the importance of attachments in child development and agreed that "severing a child's strong primary attachment to a caretaker poses significant risks of short- and long-term harm to the child—risks that are more severe than the loss of a sense of family identity occasionally experienced by an adopted child." Dr. Missar testified that these short-term risks include "behavioral regression," "signs of withdrawal, signs of anxiety, [and] signs of depression," while long-term risks include "a lack of trust in others ... as well as some on-going problems with depression and anxiety."

On August 31, 2011, the trial court granted R.W. and A.W.'s adoption petition over E.A.'s adoption petition. The trial court stated that it gave "weighty consideration" to the biological parents' preference for E.A. to adopt A.L. and Ta.L., but that evidence presented at trial clearly established that the children's primary attachments were to the W.s, not E.A. The trial court concluded that given the limited time the children had spent with E.A. and their birth parents in the past three years, it was "inconceivable that the children [had] meaningful attachments to any of them." On the basis of the three experts' testimony—which the trial court regarded as "very persuasive"—the trial court found that a disruption of the attachments would pose a significant risk that all or most of the progress of the past three-plus years would be lost and that the children would regress to their pre-removal developmental trajectories. Although the trial court found E.A. to be a "forceful, healthy, and competent person" and stated that it "[did] not doubt her fitness as a caretaker for Ta.L. and A.L.," the trial court found the risk to the children's progress too great if the continuity of care provided by the W.s and the children's attachment to the W.s was not maintained. In its analysis, the trial court assessed the relevant statutory termination of parental rights factors set out in D.C. Code § 16–2353 (b) and concluded that A.H. and T.L. were withholding ***1072** their consent to adoption by the W.s contrary to the children's best interests and that placement of the children with E.A. was not in the children's best interests.

II. Legal Standards

[1] **[2]** The Supreme Court has long recognized the fundamental right of parents to raise their children.[7] Even when parents have not been "model parents" or the state has temporary custody of their child, parents retain their "fundamental liberty interest ... in the care, custody, and

management of their child" and have a "critical need for procedural protections [.]"[8] This court has held that because the Constitution protects a biological parent's liberty interest in preserving a relationship with his or her child, any "state intervention [into that] relationship is subject to constitutional oversight." *In re T.J.*, 666 A.2d 1, 12 (D.C. 1995) (citing *In re Baby Boy C.*, 630 A.2d 670, 673 (D.C. 1993)). The state "must provide the parents with fundamentally fair procedures."[9]

[3] **[4]** "Absent termination of parental rights or some other finding that the parents should no longer be permitted to influence the child's future, the parents' rights necessarily include the right to consent, or withhold consent, to the child's adoption." *In re T.J.*, 666 A.2d at 12. However, under our current adoption statute, a court may grant a petition for adoption without the consent of the natural parent if it finds by clear and convincing evidence that the consent is being withheld contrary to the best interest of the child. *See* D.C. Code § 16–304 (e) (2012 Repl.). Because granting an adoption without the natural parent's consent necessarily terminates the parent's rights, the court must weigh the same statutory factors listed in D.C. Code § 16–2353 (b) that are considered in a termination of parental rights ("TPR") proceeding[10] to decide whether termination is in the child's best interest. *See In re S.L.G.*, 110 A.3d 1275, 1285 (D.C. 2015).

[5] **[6]** Where there are competing adoption petitions and the biological parents have consented to adoption by one of the petitioners, "before rejecting the designated custodian's petition and severing the child's relation with his parent ... and other relatives ... the trial court must ***1073** find by clear and convincing evidence both that the custody arrangement chosen by the [parents] would clearly not be in the best interest of the child and that the parent[s'] consent to adoption is withheld contrary to the child's best interest." *In re T.J.*, 666 A.2d at 11 (citing *In re J.S.R.*, 374 A.2d 860, 864 (D.C. 1977)). Thus, the clear and convincing evidence standard applies both when determining whether the parents' consent to adoption can be waived under § 16–304, and when considering whether granting custody to the parent's preferred caregiver is contrary to the best interest of the child. *See In re C.A.B.*, 4 A.3d 890, 901 (D.C. 2010).

[7] "We review the trial court's order granting an adoption for abuse of discretion, and determine whether the trial court 'exercised its discretion within the range of permissible alternatives, based on all the relevant factors and no improper factors.' " *In re T.W.M.*, 964 A.2d 595, 601 (D.C. 2009) (quoting *In re T.J.*, 666 A.2d at 10). We then assess whether the trial court applied the correct standard of proof, and "evaluate whether the [trial court's] decision is supported by 'substantial' reasoning, ... 'drawn from a firm factual foundation' in the record." *In re D.I.S.*, 494 A.2d 1316, 1323 (D.C. 1985) (quoting *In re R.M.G.*, 454 A.2d 776, 790 (D.C. 1982)).

III. Appellate Review of Permanency Goal Changes From Reunification to Adoption

[8] Before we turn to the merits of this appeal, we must first address whether the constitutional rights of biological parents to raise their children are effectively protected under the statutory scheme currently utilized in neglect cases, and whether our decision to preclude review of permanency goal changes in *In re K.M.T.* undermines those rights. Our dissenting colleagues disagree with our decision to address the appealability of decisions which change the permanency goal in neglect cases from reunification to adoption in this appeal. *Post* at 1090–91. They contend that the issue is not properly before us because the natural parents failed to preserve the issue in the trial court. While we agree that this issue was not raised below we believe that the issue is ripe for consideration. *In re K.M.T.* effectively precluded a timely challenge to the permanency goal change and, therefore, no party will be unfairly prejudiced by our review. We have repeatedly affirmed our discretion, in the interests of justice, to consider an argument that is raised for the first time on appeal if the issue is purely one of law, ... the factual record is complete, and a remand for further factual development would serve no purpose. *See Pajic v. Foote Prop., LLC*, 72 A.3d 140, 145–46 (D.C. 2013) (quoting *District of Columbia v. Helen Dwight Reid Educ. Found.*, 766 A.2d 28, 33 n.3 (D.C. 2001).[11] Thus, we are satisfied that addressing this issue at this time is not inconsistent with our case law that provides a narrow exception to our general error preservation rule because the question before us is ***1074** purely one of law and no further factual record is necessary.

In seeking to protect the rights of biological parents to raise their children, give full weight to the District of Columbia's policy preference that children be placed

with family members,[12] ensure that all decisions are guided by the best interest of the children over whom this court exercises *parens patriae* authority, and move the children to permanency within timeframes set forth in the Adoption and Safe Families Act ("ASFA"),[13] we have endorsed a process that appellants here, as well as several amici, contend significantly undermines the constitutional rights of parents to raise their children as well as their ability to effectively challenge a trial court's determination that they were not making sufficient progress towards reunification to warrant CFSA's continued efforts to achieve that goal. In fact, appellants, A.H. and T.L., as well as several amici,[14] argue that our efforts to balance the respective rights of the biological parents, the children, and the prospective adoptive parents have led the court to endorse a process that actually denies the biological parents their due process rights and undermines any meaningful opportunity they may have had to challenge permanency goal change decisions that often preordain the termination of the parent-child relationship. They argue that we must first require the government to meet its burden of proving, by a preponderance of the evidence, that reasonable efforts were made to assist the parents in achieving reunification with their children, that reunification efforts failed despite the agency's reasonable efforts, and that changing the goal from reunification to adoption is in the best interest of the children.

Specifically, appellants A.H. and T.L., as well as the amici, contend that when a trial court changes the goal of a neglect proceeding from reunification to adoption, it informally terminates the pending neglect case and effectively puts the case on an almost unalterable path to adoption without a full evidentiary hearing or recourse to an appeal. This contention is not without support in the record of this case and many others. In fact, it only makes sense that when a child's permanency goal is shifted from reunification to adoption, government resources and services are also shifted away from facilitating reunification, and instead, focus on finding and supporting potential new and permanent placements for the child.[15]

While it is ostensibly possible for the biological parents to attain reunification notwithstanding a decision by the trial court to grant a permanency goal change, this very rarely occurs in practice. *See, e.g.*, *In re G.A.P.*, 133 A.3d 994 (D.C. 2016); *In re W.D.*, 988 A.2d 456, 458–59 (D.C. 2010) (goal change from reunification to adoption led to grant of foster parent adoption); *In re F.W.*, 870 A.2d 82, 87–88 (D.C. 2005) ***1075** (affirming trial court's decision to grant petition for adoption). More often, the parents' efforts to build or maintain a positive relationship with their child is severely hampered by the trial court's permanency decision and by the time a parent is given the ability to challenge that decision, the passage of time and the child's resulting attachment to the custodial adoption petitioner tends to make the granting of the adoption petition and the consequent termination of parental rights a *fait accompli*. *See, e.g.*, *In re R.E.S.*, 19 A.3d 785, 791 (D.C. 2011); *In re An.C.*, 722 A.2d 36, 40 (D.C. 1998); *In re D.R.M.*, 570 A.2d 796, 806 (D.C. 1990).

[9] It is quite possible that this court's distaste for terminating parental rights without a viable alternative permanent living situation for the children is what led us to endorse this TPR by adoption practice in the first instance. However, we now recognize that the parents' right to timely challenge the effective severing of their relationships with their children is too important a right to sacrifice to achieve some marginally greater efficiency in moving children to permanency. In sum, we hold that a trial court's grant of a permanency goal change from reunification to adoption over the parents' objection, without an adjudicatory hearing to determine whether the District has fulfilled its duty to expend reasonable efforts to reunify the family, violates a parent's procedural due process rights and, therefore, is appealable by the parents as a matter of right.

The District of Columbia is among the few remaining jurisdictions that do not permit appeals of permanency goal changes from reunification to adoption in neglect proceedings. Indeed, a vast majority of jurisdictions allow appellate review of goal changes either as appeals as of right or interlocutory appeals.[16] In *In re K.M.T.*, this court departed from the norm in our sister jurisdictions, holding that permanency goal changes are not among the orders and judgments with the "finality" necessary to warrant the right of appeal. *In re K.M.T.*, 795 A.2d at 690.

[10] This court has jurisdiction over all "final orders and judgments" of the Superior Court. D.C. Code § 11–721 (a)(1) (2012 Repl.). An order is not usually final unless it completely resolves the case on its merits;[17] but, to be final, an order need not necessarily be the last one in a proceeding. *See District of Columbia v.*

Tschudin, 390 A.2d 986, 988 n.1 (D.C. 1978). In the context of neglect proceedings, we have held that orders modifying visitation, and restoring physical custody, are "final orders" for purposes of appealability; however, we have held that a change of permanency goal is merely a step towards the termination of parental rights or an adoption and is not final, and thus not appealable. *See In re K.M.T.*, 795 A.2d at 690 ***1076** (citing *In re D.M.*, 771 A.2d 360, 365 (D.C. 2001)).

[11] In holding that a permanency goal change is not appealable, this court in *In re K.M.T.* reasoned that such an order "merely sets goals for the children," and therefore, "does not affect the parents' substantive rights in any way." *Id.* at 690–91. At least with respect to goal changes from reunification to adoption, we now disagree. The decision to change the goal for a child from reunification to adoption is more than just a step in the neglect process. It is a critical point in the proceedings, one that often irreversibly dictates the result of a child's ultimate custody disposition at a subsequent adoption proceeding. Such an order is at least as critical a change in a neglect proceeding as an order modifying visitation or restoring physical custody to one parent, for which we already recognize the right of a parent to appeal. Given that a goal change to adoption cannot be appealed under our current neglect process and, recognizing that the decision has the potential to strongly influence the outcome of a subsequent adoption proceeding, we are now of the opinion that a trial court's decision to change the goal from reunification to adoption must be appealable to adequately protect the constitutional rights of parents involved in neglect proceedings. Therefore, we overrule our prior decision, *In re K.M.T.*, and hold that a change in the permanency goal of a neglect case from reunification to adoption is an order subject to immediate appellate review. [18]

[12] **[13]** We do not overrule *In re K.M.T.* lightly and recognize that such a decision will have a significant impact on the process currently used by trial courts in making permanency goal decisions. Because trial court decisions that change goals from reunification to adoption will now be appealable, the permanency goal hearing must be conducted in a way that affords parents their due process rights. Our review of the record here, as in many other neglect cases, indicates that trial courts are routinely presented with information contained in the government's permanency report without any testimony from those who provided the information on which that the government's recommendations are based or any other evidence that undergirds the findings and/or conclusions found in those reports. While a report of this kind may be sufficient for a typical neglect review hearing, it does not pass due process muster when the rights at stake are as great as a parent's constitutional right to raise his or her child.

It is also important to recognize that permanency goal hearings are required by ASFA. Concerned that too many children were languishing in foster care, Congress sought to increase the number of adoptions so children could be moved more quickly into permanent homes. [19] However, in so doing, Congress recognized the need to strike a balance between pursuing this goal and preserving the right of families to ***1077** remain intact. In fact, as a condition for obtaining federal funds to support their foster care programs, ASFA requires participating states to expend reasonable efforts to "preserve and reunify" families "to make it possible for a child to safely return to the child's home." 42 U.S.C. § 671(a)(15)(B)(ii) (2012); *see also* D.C. Code § 4–1301.09a (b) (2012 Repl.). In this vein, the Act requires that within a child's first twelve months in foster care, and at least every six months thereafter, state courts must hold a permanency hearing. 42 U.S.C. § 675 (5)(B), (C) (2012); *see also* D.C. Code § 16–2323 (a)(4) (2012 Repl.). At these periodic review points, courts must consider whether the child can be returned to the parent, 42 U.S.C. § 675 (5)(C), and must assess whether the state has expended reasonable efforts to achieve reunification and whether those efforts should continue, 42 U.S.C. § 671(a)(15)(C); *see also* D.C. Code § 4–1301.09a (c); D.C. Super. Ct. Neglect Rule 34 (c). [20] However, ASFA also establishes a time frame within which parents have to ameliorate the conditions that led to the finding of neglect or face the prospect of having their parental rights terminated. Under ASFA, if a child has been in foster care for fifteen out of the preceding twenty-two months, the state is required to seek termination of the parents' rights unless certain exceptions apply. 42 U.S.C. § 675 (5)(E) (2012). One of these exceptions is a safety valve to protect families who have not received sufficient assistance from the state: termination need not be sought if "the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described

in section 671(a)(15)(B)(ii) of this title are required to be made with respect to the child." *Id.* [21]

[14] Similarly, under our neglect statute, when a child has been adjudicated neglected and remains in an out-of-home placement, a review hearing must be held every six months unless a permanency hearing was held during the preceding six months. D.C. Code § 16–2323 (a)(1). Review hearings are conducted by the court to determine whether the child is safe, and whether appropriate steps are being taken to address the needs of the child and to ameliorate the problems that led to the child being brought into the system. *See id.* § 16–2323 (b)(1)–(5). A permanency hearing not only concerns itself with the issues typically addressed at a review hearing but also requires the court to determine the permanency plan for the child, including whether, and if so when, the child will be returned to the parent(s), placed pursuant to an award of legal custody or guardianship, placed in another permanent living situation, or placed for adoption. *See id.* § 16–2323 (c)(2). Section 16–2323 (d) of the neglect statute sets out the obligations of the government preceding a permanency hearing in which the government recommends a goal change. *See* D.C. Code § 16–2323 (d). Under this provision, ***1078** the government is required to submit a report to the court and the parties that addresses the services offered to the child and the parents; any evidence that the issues that led to the neglect disposition have been ameliorated or have worsened; and when, if at all, the child can be returned to the parent's home. [22] Given the importance of the permanency hearing, we conclude that unless the parents are prepared to stipulate that reasonable efforts were made by the government to help the parents ameliorate the problems that led to the Neglect adjudication, due process requires a more formal hearing than has been afforded to parents in the past when no such right of appeal existed. At such a hearing, the government must produce sufficient evidence from which a trial court can find by a preponderance of the evidence that the presumption in favor of reunification has been rebutted before the goal can be changed from reunification to adoption. In other words, the government must prove by a preponderance of the evidence that it has provided the parents with a reasonable plan for achieving reunification, that it expended reasonable efforts to help the parents ameliorate the conditions that led to the child being adjudicated neglected, and that the parents have failed to make adequate progress towards satisfying the requirements of that plan. If the government satisfies its burden, a change of permanency goal from reunification to adoption would be presumptively consistent with the requirement that we act in the best interest of the child.

[15] Given AFSA's delicate balancing of interests, it only makes sense that the primary focus of the permanency planning hearing should be on the parents' efforts to ameliorate the conditions that led to the neglect and the District's efforts to assist them in achieving those goals. Acting on a determination of past neglect, the District maintains custody of this child with the understanding that such custody is temporary and that it will expend all reasonable efforts to help the troubled family and to reunify the child with her parents. [23] However, ***1079** once it is determined that the goal should be changed to adoption, the District is obligated to put forth its best effort to make that goal a reality. [24] To put a finer point on it, such goal change orders modify the fundamental terms of the custody order in the neglect proceeding and mark a critical point in time when the role of CFSA changes from a supporter of family reunification to an advocate for breaking up that same family. And, even though we recognize that nothing in the statute prohibits a court from establishing concurrent goals of reunification and adoption, the presumption in favor of reunification remains the primary goal of neglect proceedings with adoption as a favored alternative placement for children when efforts to reunify the family fail. Thus, a permanency goal decision that might lead to a situation that destroys family bonds must not be given short shrift when it comes to protecting the rights of parents to raise their own children. [25]

[16] **[17]** **[18]** To ensure that the government has made reasonable efforts to reunify the family, parents must have an opportunity to challenge any statements, observations, and evaluations that form the basis of CFSA's recommendation to the court to change the permanency goal. An appropriate hearing will provide a forum where the parents can testify, under oath concerning any alleged failure on the District's part to provide the requisite services and resources as well as their own efforts to meet the goals set forth in the plan that was developed to promote reunification. The hearing will also enable parents to present any other evidence that they believe supports a decision to continue with reunification efforts. Based on the evidence presented at the hearing,

the trial court will be able to make findings of fact and conclusions of law that will allow this court to conduct a meaningful review of the trial court's permanency decision and determine "whether the trial court 'exercised its discretion within the range of permissible alternatives, based on all relevant factors and no improper factor.' " *In re D.S.*, 88 A.3d 678, 691 n.21 (D.C. 2014) (quoting *In re Baby Boy C.*, 630 A.2d at 673).

[19] **[20]** **[21]** More specifically, before approving a permanency goal change that allows the District to divert its limited resources from reunification to adoption, the trial court (absent waiver by the parent) must ensure that a goal change is the appropriate course of action by, at a minimum, making findings that: (1) the District has in fact expended reasonable efforts to reunify the family as it is statutorily obligated to do, in accordance with 42 U.S.C. § 675 (5)(E)(iii); (2) the goals set for the parents were appropriate and reasonable; and (3) other vehicles for avoiding the pursuit of termination, e.g., kinship placements, 42 U.S.C. § 675 (5)(E)(i), have been adequately explored.[26] ***1080** This court will review on appeal whether the trial court has made the requisite findings to justify a goal change and whether those findings were adequately supported by the record.[27]

[22] Adversarial litigation of these issues followed by appellate review is further compelled where the District's shift in support and allegiance can harm the constitutionally protected parent-child relationship, if not preordain its ultimate termination. The services and support the District provides to fragile families in the neglect system are essential to achieving their reunification goals. Presumably, the District's intervention would not have been necessary had the parents not been facing serious challenges and lacking robust support systems; the removal of a child from her parent's home may be an additional destabilizing force. Courts may restrict visitation, lessen parental involvement in the child's life, and even order information about the child to be withheld from the parents. D.C. Super. Ct. Neg. R. 34 (g)(6). These changes can devastate parent-child relationships.[28] Time is of the essence, and if the District's support for reunification was improperly withdrawn, it must be restored as soon as possible.[29]

We are well aware that this decision places an additional burden on the Superior ***1081** Court and, while we are confident that these permanency goal hearings can be conducted efficiently, we recognize that associate judge review of the magistrate judge order may result in some delay in moving children who have been adjudicated as neglected into permanent living situations. We are equally mindful of the potential additional delay that may occur if parents avail themselves of the right to appeal permanency goal decisions. Because of the limited scope of this court's review, and the broad discretion enjoyed by trial courts in making permanency goal decisions, we are confident that in the vast majority of cases our review can be adequately addressed using our summary appeals process. To that end, parties involved in an appeal from a decision by the trial court to change a permanency goal from reunification to adoption are encouraged to file cross-motions for summary disposition within the time frames provided for in Rule 4 (c) of the Rules of the Court of Appeals relating to appeals from Family Court cases. In the event that this court is unable to resolve the appeal through the summary disposition process, the appeal still will be expedited consistent with our existing rules.

IV. Unfitness Requirement and the Termination of Parental Rights

[23] **[24]** **[25]** **[26]** **[27]** In this case, neither the parents nor E.A. challenged the adoption on the basis that the trial court failed to first find that the parents, themselves, were unfit to raise their children. However, we take this opportunity to remind our colleagues on the trial court that the presumption in favor of a fit parent's right to raise his or her children must be rebutted by a finding of parental unfitness before the trial court can make the ultimate determination to terminate a biological parent's rights to raise his or her children.[30] The Supreme Court has recognized that the fundamental right of an individual to parent his or her child, *see Stanley*, 405 U.S. at 651, 92 S.Ct. 1208,[31] may not be terminated without a predicate determination, by clear and convincing evidence that the individual is unfit to parent.[32] Thus, while we have recognized the "best interest of the child" as the decisive factor in determining whether to ultimately terminate parental rights in a neglect proceeding, it is critical that the trial court make a parental unfitness determination before undertaking a "best interests of the child" analysis.[33] Here, the trial court failed to ***1082** make a finding of parental unfitness and even though the parents have not

raised this failure as an issue on appeal, we would be remiss in not reminding our colleagues on the trial bench of this obligation to make an independent determination of the fitness of birth parents. ... In *In re S.L.G.*, we recognized that "[p]arental 'fitness' is not a statutorily defined term in this jurisdiction" but we said that "fitness refers to the parent's intention and ability over time to provide for a child's wellbeing and meet the child's needs." 110 A.3d at 1286. We further explained that the basic inquiry is "whether the parent is, or within a reasonable time will be, able to care for the child in a way that does not endanger the child's welfare." *Id.* This approach to fitness is consistent with Supreme Court precedent. As the Court stated in *Troxel v. Granville*, 530 U.S. 57, 68–69, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), "so long as a parent adequately cares for his or her children (i.e. is fit), there will normally be no reason for the State to interject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *See also* Part I of the separate opinion of Associate Judges Beckwith and Easterly in this case, concurring in part and dissenting, in part. In our opinion in *In re Petition of G.A.P.*, we reiterated our view as to the distinction ***1083** between parental fitness and the best interest of the child. "[P]arental 'fitness' is not merely a restatement of the 'best interests of the child,' as determined by a TPR or contested adoption proceeding. 'Fitness,' rather, is an independent determination of parental 'intention and ability over time,' ... to resolve the natural parent's capacity to 'care for the child' and protect the child against 'undue risk of harm.' " 133 A.3d at 998 (quoting *S.L.G.*, 110 A.3d 1275, 1287 (D.C. 2015)).

[28] Because a child's best interests are presumably served by being placed with his or her fit natural parent, *see Troxel, supra*, a finding of parental fitness will in most cases preclude a trial court from terminating a natural parent's parental rights, except for those truly "exceptional circumstance[s]" where the trial court is convinced that "a continuation of the parental relationship [between a fit parent and child is nonetheless] detrimental to the best interest of the child.' " *Id.* No finding was made in this case that the parents were unfit ostensibly because once they chose to support the adoption petition of E.A., as opposed to contesting the W.'s petition and seeking reunification, the trial court may have felt that such a finding was unnecessary. However, since the adoption proceeding resulted in the termination of their parental rights, had the failure of the trial court to make a fitness determination been challenged on appeal by the parents, it is likely that a remand would have been necessary.

[29] To require less than an independent determination of parental fitness would run counter to the Supreme Court's pronouncements in *Troxel* and *Santosky*, the express policy of the ASFA, and the underlying purpose of the neglect process, which is not to punish parents for past wrongs, but rather to rehabilitate parents and reunite children with their families. *See In re S.L.G.*, 110 A.3d at 1286 n.24 ("While the [parental] presumption 'is not absolute' and 'must necessarily give way in the face of clear and convincing evidence that requires the court, in the best interest of the child, to deny custody to the natural parent in favor of an adoptive parent,' *the question of parental fitness is almost always at the heart of any proceeding to terminate parental rights or waive a natural parent's consent to adoption.*" *In re S.L.G.*, 110 A.3d 1275, 1286 (D.C. 2015) (emphasis added). We acknowledge that there may be "circumstances in which clear and convincing evidence will show that an award of custody to a fit natural parent would be detrimental to the best interests of the child." *Id.* (quoting *Appeal of H.R. (In re Baby Boy C.)*, 581 A.2d 1141, 1176–79 (D.C. 1990) (Ferren, J. concurring)); *but see id.* at 1291 (citing the inability "to postulate a realistic factual situation where a 'fit' parent can be properly deprived of parental rights based on the 'best interest of the child.' ") (Newman, J., concurring). Therefore, while the fitness of the parents must first be determined in any proceeding that may terminate their parental rights, if the trial court is satisfied by clear and convincing evidence that reunification of the child with the family would grievously harm the child, the presumption in favor of a fit parent raising his or her child gives way to what is in the child's best interest. It may be the case that trial judges are considering future harm in their assessment of parental fitness consistent with the way this court articulated the fitness test in *In re S.L.G.* However, without an express fitness determination it is difficult to assess whether that is in fact the case and so the call by Judges Easterly and Beckwith for the D.C. Council to review and update our neglect and adoption statutes may ***1084** prove to be helpful in this regard. *Post* at 1122–23.

V. "Weighty Consideration" to the Biological Parents' Preferred Caregiver

[30] **[31]** **[32]** **[33]** **[34]** **[35]** **[36]** In this case, the children's biological parents and their aunt, E.A., whom the parents wanted to adopt their children, argue that the trial court, in granting the adoption petition of the W.s, failed to give weighty consideration to E.A.'s competing adoption petition as required by our case law. Under current law, biological parents who are unable or unwilling to raise their own children may choose to consent to an adoption by a preferred caregiver so that their children can be raised by someone with whom they have close familial ties. We have consistently held that when parents whose parental rights are still intact choose a custodian for their children, that choice is to be given great weight when there are competing adoption petitions before the court. *See In re T.J.*, 666 A.2d at 11. Under such a scenario, the trial court must find by "clear and convincing" evidence that the custody arrangement preferred by the parents would clearly be contrary to the best interests of the child. *Id.* The court's rationale underlying this parental preference is the recognition that biological parents have a right to raise their children and, therefore, when biological parents consent to an adoption by one of the petitioners in a contested adoption proceeding, "the trial court cannot merely weigh the competing adoption petitions against one another, as if they began in equipoise." *In re K.D.*, 26 A.3d 772, 778 (D.C. 2011). [34] In order to recognize this parental right in a manner that is consistent with applicable presumptions and the best interest of the child standard, our case law requires the non-favored petitioner to prove by clear and convincing evidence that placement of the children with those petitioners would be detrimental to the children's best interest. If the non-favored petitioners meet that burden, they must subsequently prove by a preponderance of the evidence that granting their adoption petition is in the children's best interest before the court can waive the parents' consent and grant the adoption. "Clear and convincing evidence is evidence 'which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. ...' " *In re W.E.T.*, 793 A.2d 471, 478 n.15 (D.C. 2002) (quoting *In re Estate of Soeder*, 7 Ohio App.2d 271, 220 N.E.2d 547, 574 (1966)). The non-favored petitioner bears the burden of establishing by clear and convincing evidence that placing the children with the parents' preferred caregiver would be contrary to the children's best interest. [35] "If the trial court has not given sufficient consideration to the [biological] parent[s'] choice ... we have generally reversed the trial court's decision." *In re A.T.A.*, 910 A.2d 293, 297 (D.C. 2006).

Turning to the merits of this case, we must determine whether the trial court gave weighty consideration to E.A. as the preferred adoption petitioner for the children. Thus, we have to determine whether ***1085** the competing non-preferred adoption petitioners, the W.s, met their burden of proving by clear and convincing evidence that the placement of Ta.L. and A.L. with E.A. would be contrary to their best interests. This is not an easy burden to prove and at the outset, we "recognize, as we always do in such cases, that it is no small matter for a court to permit the adoption of a child over the objection of a mother [or father] who loves [her]." *In re W.D.*, 988 A.2d at 457 (internal quotations marks and citation omitted). However, this is not a situation where the parents, themselves, are seeking reunification so the concerns raised above about protecting the rights of parents to raise their own children and the presumptions involved in that situation are not implicated here.

Here, appellants claim that Dr. Venza's attachment study involving the children and the W.s, and upon which the trial court primarily relied, did nothing to undermine the presumption favoring the choice of a caregiver by the biological parents because the attachment study did not also evaluate the children's attachment to E.A. [36] As a result, they contend that there is no evidence that placement of the children with E.A. would be detrimental to the best interests of the children, [37] that E.A. would not be a fit caretaker for the children, or that E.A. would not be able to help the children transition to her home and care. Instead, they argue that the trial court should have "focus[ed] its inquiry on the aunt's fitness" rather than the potential harm the children would experience in being separated from their foster parents of three years. We disagree.

In granting the W.s' adoption petition and denying the petition of E.A., the trial court issued findings of fact concerning the development of the children and relied on expert testimony concerning the closeness of the relationship the children had with the W.s and with E.A. In its July 7, 2011 order, the trial court gave appropriate

consideration to the relevant statutory factors set out in § 16–2353 (b) in determining that the parents were withholding consent to adoption contrary to the best interest of the child, and acknowledged in its analysis the "weighty consideration" that it gave to the parents' preference between the competing adoption petitions.

[37] **[38]** **[39]** While the trial court did not find that E.A. would be an unsuitable caregiver,[38] the trial court did find that placement ***1086** of the children with E.A. would be contrary to their best interests before granting the W.s' adoption petition. The trial court's finding was based primarily on expert testimony that the children risked short- and long-term psychological harm if their attachments to their pre-adoptive foster parents, R.W. and A.W., were broken. While the qualities of the particular person the biological parents favor is always critical to the court's inquiry, the primary issue the court must grapple with, as discussed *infra*, is whether there is clear and convincing evidence that the favored custodial arrangement, including continuation of the relationship between the natural parents and the children, would be clearly contrary to the best interests of the children. *In re T.W.M.*, 964 A.2d at 604 (citing *In re T.J.*, 666 A.2d at 16).

[40] **[41]** In answering that inquiry, and in addition to the attachment study prepared by Dr. Venza, the trial court appeared to rely in part on the testimony of Dr. Frank who conducted a bonding study but testified that breaking the children's "attachment" to the W.s would harm the children. Dr. Frank's testimony appears to have conflated or, at a minimum, blurred the lines between the bonding and attachment studies and it is not clear whether the trial court fully recognized the misstatement. Thus, to the extent the trial court relied on Dr. Frank's bonding study to make findings focused on *attachment*, that reliance was misplaced. While a bonding study carries some weight in an analysis of the best interest of the children, it does not carry the same weight as an attachment study, which according to the evidence presented at trial, has a stronger correlation to emotional attachment and which, if broken, could cause significant harm to the children. Therefore, while it is possible that an attachment study might adequately support a finding by clear and convincing evidence that placement of the children with someone other than the person to whom they are attached would be detrimental to their best interests, the same cannot be said for a bonding study because children can bond with more than one individual. When this case was originally before a division of this court, the panel was not convinced of the significance of the distinction being drawn between a bonding study and an attachment study and, therefore, was reluctant to rely on either one or both as adequate support for the trial court's decision in this case to grant the adoption petition of the W.s over E.A. who, by all accounts, also enjoyed a positive relationship with the children. Further, the panel was concerned that a "one-sided attachment study" prepared by the W.'s expert without a corresponding study measuring the attachment the children had to E.A. was not an appropriate or balanced way of measuring the harm to the children caused by removing them from the care and custody of the W.s. On *en banc review*, however, those concerns are no longer shared by those on the panel or our colleagues who join this part of the opinion. We are satisfied that the record supports the trial court's finding that breaking the children's attachment to the W.s would significantly harm them,[39] and ***1087** that is especially the case now that the children have been in the W.'s care for an exceedingly long period of time.

Here, the trial court, in relying primarily on Dr. Venza's attachment study found that A.L. had a secure attachment, and Ta.L. had an anxious avoidant attachment, to A.W. The court also credited Dr. Venza's testimony that the children had a primary attachment to A.W. and that they viewed the W.s as their primary caregivers. Most importantly, Dr. Venza testified that severance of this type of attachment will necessarily cause significant harm to the children, regardless of the qualities of the person who serves as their subsequent caregiver.

In addition to the testimony by Dr. Venza and Dr. Frank, Dr. Missar, appellants' expert at trial, also acknowledged the value of attachment studies and conceded that "moving children who are securely attached does carry with it some psychological risk." Based on this evidence, the trial court concluded that there was clear and convincing evidence in the record that the custodial relationship preferred by the biological parents with an otherwise fit and suitable caregiver would clearly be contrary to the children's best interest. Because the trial court's conclusion is supported by our prior decisions in a line of similar cases, we have no basis to disagree here. *See, e.g.*, *In re T.W.M.*, 18 A.3d 815, 821 (D.C. 2011) (holding that based on undisputed evidence that the prospective adoptee had a secure attachment to the foster parent, there was clear and convincing evidence that

removing the child from the foster parents' care would be contrary to the child's best interests *even though the parents' preferred caregiver, a relative, was fit to care for the child*); *In re R.E.S.*, 19 A.3d at 791 (approving the trial court's reliance on the child's lack of relationship with the preferred relatives, and the child's clear attachment to the foster parent, in concluding that the child's best interests were served by granting the foster parent's adoption over the biological parent's objection). Thus, we are satisfied that the trial court did not abuse its discretion in this case. We reiterate the great importance of stability and continuity this court has recognized in evaluating the best interest of child. *See Rutledge v. Harris*, 263 A.2d 256, 257–58 (D.C. 1970) ("[A] stable and desired environment of long standing should not lightly be set aside.").

While the expert testimony offered by both the appellant and appellee also recognized the fact that a positive environment in E.A.'s home could have a mitigating effect on the risk of harm to the children, the attachment study and the compelling testimony of the W.s and their experts —credited by the trial court and undisputed by E.A.'s expert—convinces us that disruption of the children's attachments with the W.s would pose "unacceptably grave" risks to the children's short- and long-term psychological, intellectual, and social development. We are satisfied that the W.s have produced clear and convincing evidence that granting E.A.'s adoption petition would have been contrary to the best interest of the children and therefore, the W.s successfully met their burden. Thus, the trial court's decision to grant the W.'s adoption petition over the petition filed by E.A. is supported by the evidence in the record.

*1088 VI. Conclusion

For the above reasons, we hold that: (1) permanency goal review hearings must be conducted in a manner that protects the due process rights of parents; (2) the trial court must find by a preponderance of the evidence that the government has made reasonable efforts to help the parents achieve reunification with their children consistent with the neglect plan that was developed for that purpose before the trial court can change the goal of a neglect proceeding from reunification to adoption; (3) a change of the presumptive goal of a neglect proceeding from reunification to adoption is an appealable final order; and (4) prior to the termination of parental rights, either through a TPR or through an adoption proceeding, a finding of parental unfitness must first be made by the trial court unless truly exceptional circumstances exist or the parents have otherwise stipulated to their continued unfitness.

Having reviewed the permanency goal review hearing in this case, we are satisfied that even had the rights discussed herein been afforded to the parents in that proceeding, including the right to appeal the trial court's decision to change the goal to adoption, the outcome would not have been different. The government's evidence supports a finding that it made reasonable efforts to assist the parents in meeting the requirements contained in their reunification plan. Further, there was clear and convincing evidence in the record to support the trial court's findings that: (1) adoption by E.A. was detrimental to the children's best interest; (2) the biological parents were withholding consent to the W.s' petition to adopt contrary to the best interests of the children; and (3) adoption by the W.s was in the children's best interest.

Thus, the judgment of the trial court is

Affirmed.

Glickman, Associate Judge, with whom Fisher and McLeese, Associate Judges, join in full, and Thompson, Associate Judge, joins in Parts III and IV, concurring and dissenting:

This contested adoption case concerns the fate of two grievously neglected children. The sole question actually presented on appeal is a narrow one: whether the trial court properly considered psychological attachment evidence regarding how these children would be harmed if removed from their foster parents. Somehow, though, in the course of prolonged appellate gestation, the case has been transformed into a judicial battleground over settled law and a vehicle for the majority to effect far-reaching changes in our law—changes that we think will be detrimental to abused and neglected children in the District of Columbia. At stake is the fundamental proposition embodied in our statutes and enshrined in our cases, that the paramount consideration when determining parental rights and child placements is the best interest of the child.

This court did not set out to overhaul our law. It granted rehearing en banc simply to reconsider a new rule announced in the division's opinion severely limiting the use of psychological attachment studies to determine the child's best interest in contested adoption proceedings. The division held that a trial court may rely on an attachment study to find that the weighty consideration due the biological parents' preference for a competing caregiver has been overcome "only if the preferred caregiver has also been given the opportunity to have a meaningful attachment or bonding study conducted between him or herself and the children, and the study concludes that an appropriate attachment or bond with the preferred caregiver has not ***1089** or is not likely to occur." [1] In seeking en banc rehearing, the guardian *ad litem* and the foster parents challenged this rule as unprecedented, unsound, and incompatible with the best-interest-of-the-child standard.

Having now had the opportunity to consider the matter en banc, the court has decided to abandon the rationale on which the division based its ruling. Suffice it to say that the court's *sub silentio* rejection of the rule fashioned by the division reflects the fact that no judge on this court is in favor of it. We recognize that the restriction on the trial court's consideration of attachment studies in contested adoption proceedings is unsound because severing a child's strong attachment to her foster parents may be traumatic and harmful to the child regardless of whether she is attached to an alternative caregiver, whoever that might be. The en banc majority therefore is entirely right, in our view, to uphold the trial court's reliance on Dr. Venza's study of the children's attachment to their foster parents even though Dr. Venza did not evaluate the possibility that the children could develop an attachment to their aunt. *Ante* at 1086–87. Accordingly, we are pleased to join with the majority of our colleagues (all of them except Judges Beckwith and Easterly) in affirming the trial court's decision to grant the foster parents' adoption petition in this case. We believe the evidence in its totality, including but not limited to the testimony of the child psychologists, overwhelmingly supports the court's determinations that the biological parents withheld their consent to the foster parents' adoption petition contrary to the children's best interests, and that placement of the children with their aunt would not be in their best interests. [2]

We write separately to express our disagreement with the unwarranted transmutation of this case into an instrument for rewriting our law in other areas. No one asked us to grant rehearing en banc in order to overturn this court's holding in *In re K.M.T.* that "an order changing a permanency planning goal is not final or appealable" as of right. [3] Our colleagues' discussion and resolution of this issue has absolutely no bearing on the outcome of the present appeals. *See ante* at 1087–88. The same holds true for the majority's *sua sponte* declaration that parental rights ***1090** may not be terminated without a predicate finding of parental unfitness. With this dictum, a bare majority of the court unnecessarily reaches out to disavow this jurisdiction's settled constitutional precedent on a matter of fundamental importance, and it does so without the benefit of notice to, or briefing by, the parties or their *amici*. In our view, which we explain in Part I of this opinion, the foregoing issues (as well as the issues broached for the first time in the separate opinion of Judges Beckwith and Easterly) are not properly before us.

Nonetheless, because our colleagues have chosen to decide these issues, we are compelled to respond on the merits. And on the merits, we respectfully dissent. In Part II, we explain why orders changing a child's permanency goal are not appealable final orders, and why allowing immediate interlocutory appeals of those orders as of right is contrary to governing law and detrimental to at-risk children in foster care.

In Part III, we argue that our colleagues' elevation of parental rights over the best interests of the child in termination of parental rights (TPR) and contested adoption proceedings is contrary to decades of prior decisions of this court and not required by the Supreme Court decisions on which the majority relies. Our colleagues fail to appreciate how the vital interests of children may conflict with and outweigh their biological parents' interests and preferences. We believe it to be well-settled that the Constitution and our governing statutes permit even fit parents' rights to be terminated when necessary to protect a child from harm because the child's best interest is paramount.

Lastly, in Part IV, we rebut the contention, advanced only by Judges Beckwith and Easterly, that fit parents have a presumptive constitutional right to "control" who will adopt their children even where (as in the present case) their choice would be detrimental to the children's best

interests. *Post* at 1129. For different reasons, we agree that our judge-made doctrine requiring a court to give "weighty consideration" to whichever adoption petition the biological parents prefer is problematic and should be re-examined. But we think such re-examination should await a case in which jettisoning the requirement of special deference would affect the outcome.

In their separate opinion, Judges Beckwith and Easterly go on to address the Council of the District of Columbia directly and call for legislation to replace our supposedly "inadequate" statutes governing adoption and termination of parental rights. *Post* at 1122–23, 1127–29. Our colleagues object to our current statutes because they establish the best interest of the child, and not parental fitness, as the primary test governing adoption and TPR decisions. Although we see no need to further discuss our colleagues' legislative suggestions, we do note that we strongly disagree both with our colleagues' view that our current statutes are constitutionally inadequate and with many of their specific suggestions for revision.

I. The Court Errs By Undertaking to Decide Issues Not Properly Presented in These Appeals.

"The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." [4] Thus, even when it ***1091** sits en banc, this court has no "roving commission [ ]" to pass judgment at whim on the interpretation and validity of our laws. [5] Rather, "[c]ourts should not decide more than the occasion demands." [6] The principles of forfeiture, waiver, and materiality to the controversy at hand are meant to restrain courts from overreaching and deciding questions when it is unnecessary, unwise, and inappropriate to do so. Moreover, fairness to parties who have a stake in the resolution of an issue and the desirability of receiving their informed input require that they be given notice and an opportunity to be heard before the court undertakes to reach a decision. Regrettably, our colleagues ignore these well-established principles.

To begin with, because the biological parents did not seek to be reunified with their children or oppose the change of permanency plan to adoption, we think the majority is incorrect in stating that these appeals raise "serious concerns" about *In re K.M.T.*'s holding. *Ante* at 1068. In fact, while the biological parents complain on appeal about the effects of permanency goal changes and urge us to permit interlocutory appeals from them as of right, they did not present these complaints in the trial court despite multiple opportunities to do so. [7] They did not seek an evidentiary hearing on the change in goal or claim they were prejudiced by the supposed deprivation of such a hearing. They did not dispute the material accuracy or the sufficiency of the magistrate judge's factual findings underlying the change in goal, and they did not request additional findings. [8] They conceded in the trial court proceedings that they had not complied with the conditions for reunification. They did not maintain that they were fit to care for their children or advocate for the children to remain in foster care (rather than be adopted) while they continued to work toward reunification. The biological parents did not claim that the Child and Family Services Agency (CFSA) had failed to make reasonable efforts to help them achieve reunification, and they did not object to any supposed discontinuation or curtailment of those efforts attendant on the goal change. [9] Furthermore, the biological ***1092** parents did not challenge or appeal the goal change. Even now, on appeal from the final adjudication, they have not claimed that the magistrate judge abused her discretion in deciding that the children's permanency goal should be changed to adoption. The division acknowledged this when it concluded that "this case is not the appropriate vehicle for reconsidering" *In re K.M.T.*, and that "had an appeal been taken from the order changing the permanency goal from reunification to adoption there would not have been a different outcome." [10]

Following the goal change, the biological parents chose not to pursue reunification with their children and not to oppose adoption as the goal. At a subsequent permanency hearing in November 2009, they supported the adoption petition of the aunt. They never contended that the goal change prevented or impeded them from opposing the termination of their parental rights or the competing adoption petition filed by the foster parents.

In addition, the biological parents told the trial court that a finding of their own unfitness to parent the children was unnecessary because they were not seeking to preserve their parental rights. Even on appeal they have not argued

that the trial court erred in terminating their rights without a finding of unfitness.

In short, the biological parents waived or forfeited any claim of error in connection with the goal change, including any claim that they should have been able to appeal it,[11] and any claim of error in connection with the lack of an express finding of their unfitness. For that reason alone, this court should not undertake to address any of these issues in this case.[12] There is no necessity for the en banc court to depart from settled principles constraining judicial review—especially with respect to a constitutional claim not even raised on appeal.[13]

One result of the biological parents' forfeiture and waiver is the absence of a record showing that they were prejudiced ***1093** by the unavailability of an immediate appeal of the permanency goal change or by any of the alleged evidentiary deficiencies in the permanency hearing our colleagues identify on their own. In fact, as the division recognized, the goal change was advantageous to the biological parents because "[t]he trial court, by changing the permanency goal to adoption, provided the impetus for CFSA to become involved in providing services to [the aunt] and thus effectively helped facilitate [the biological parents'] goal of placing the children with [her]."[14] We shall see that the lack of record support also undermines key factual assertions made in the majority opinion to justify its legal conclusions regarding goal changes.[15]

As the government aptly says in its brief, because the issues regarding permanency goal changes have no bearing on the parties' rights and no effect on the outcome of these appeals, what the biological parents (and the *amici* supporting them) have requested (and now, in the majority opinion, received) from this court is nothing more than an advisory opinion on those issues. The same is true of the majority's *sua sponte* discussion of the need for a finding of unfitness to support a termination of parental rights.

"An issue is ripe for adjudication only when the parties' rights may be immediately affected by it."[16] Our judicial duty "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."[17] Accordingly, "as a general rule, this court will decide only such questions as are necessary for a determination of the case presented for consideration, and will not render decisions in advance of such necessity, *particularly when the question is a constitutional one, or involves the construction of a statute*."[18] Except in extraordinary circumstances not present here, we do not issue advisory opinions. Our colleagues ignore this "basic limitation upon the duty and function of the [c]ourt."[19]

***1094** Finally, in elevating the rights of putatively fit parents over the welfare and rights of their children, our colleagues render an unrequested and potentially transformative constitutional ruling without having afforded the parties and their *amici* the opportunity to brief the issues. We suspect this will come as a particular shock to the institutional litigants in this case that will continue to be involved with regularity in TPR and contested adoption cases—the District and the Children's Law Center. It is ill-advised, unfair to the parties, and contrary to this court's norms to proceed in this manner. In the past, when this court has considered deciding an appeal on a basis "the parties fail[ed] to identify and brief," we have taken pains to "ensure procedural fairness ... by providing each party with the opportunity to brief" the issue.[20] The court has no justification for deviating from that rule of basic fairness here.

Our disagreement goes beyond the inappropriateness of deciding important constitutional and statutory issues that are not properly before us in these appeals. We disagree with our colleagues' resolution of those issues on their merits as well.

II. A Change in a Child's Permanency Goal From Reunification to Adoption Is Not a Final Order

With exceptions not relevant here, this court's jurisdiction over appeals from the Superior Court is confined by statute to the review of "final" orders and judgments.[21] "Normally, an order or judgment is deemed final 'only if it disposes of the whole case on its merits so that the court has nothing remaining to do but to execute the judgment or decree already rendered.' "[22] This court held in *In re K.M.T.* that "an order changing a permanency planning goal is not final or appealable" because "it is only

a step toward the final act of adoption and does not yet affect or alter the parent's legal rights with respect to the children." [23] In our view, this holding was and remains correct.

Yet the majority overrules *In re K.M.T.* It reasons that a change in the permanency goal from reunification to adoption is "effectively a final order" even though more remains to be done, *ante* at 1076 n.18, and that "an order need not necessarily be the last one in a proceeding" to be final. *Ante* at 1075 (citing *District of Columbia v. Tschudin* [24]). In our view, however, the majority errs both factually and legally in its characterization of the effects of a goal change from reunification to adoption. The goal change does not satisfy the finality requirement of our jurisdictional statute because it is not conclusive in itself and does not satisfy the strict requirements of the collateral order doctrine.

***1095** Preliminarily, it should be noted that the question of our appellate jurisdiction is only statutory, not constitutional. Although the majority opinion might be read to suggest otherwise, *see ante* at 1074, 1075–76, for over a century the Supreme Court has reiterated that the availability of appellate review is not a component of due process of law. [25] The Supreme Court has specifically recognized that the Due Process Clause does not guarantee a right to appeal decisions terminating parental rights. [26] Consistent with this precedent, our court has held that a parent has no due process right to appeal an order placing her child in shelter care, even though such an order deprives the parent of physical custody of the child indefinitely pending the outcome of neglect proceedings. [27] If there is no due process right to appeal decisions terminating parental rights or indefinitely depriving a parent of physical custody of her child, there surely is no due process right to appeal mere goal changes.

A. Changing the Permanency Goal From Reunification to Adoption Is Not Tantamount to a Termination of Parental Rights

The majority asserts repeatedly that a change in the permanency goal from reunification to adoption is effectively equivalent to a final termination of parental rights. It is, the majority declares, "a critical point in the proceedings, one that often irreversibly dictates the result of a child's ultimate custody disposition at a subsequent adoption proceeding." *Ante* at 1076. Elaborating, the majority asserts that goal change orders "modify the fundamental terms of the custody order in the neglect proceeding and mark a critical point in time when the role of CFSA changes from a supporter of family reunification to an advocate for breaking up that same family." *Ante* at 1079 [28] Relatedly, the majority repeatedly asserts that the government must rebut a "presumption in favor of reunification" before the goal can be changed to adoption, *ante* at 1078, 1079, implying that the change in goal effects a change of some kind in the parent's legal rights or status.

These and similar assertions by the majority are incorrect and unsupported by the record before this court. First, a goal change from reunification to adoption does not constitute a termination of the biological parents' rights, preclude familial reunification, or otherwise alter the parents' legal relationship with their children. Moreover, it is misleading at best to speak in the permanency planning context of a "presumption in favor of reunification" with biological parents found to have abused or neglected their child. The child is in foster care because the presumption "that it is generally preferable to leave a child in his or her own home" already was rebutted at the disposition hearing following ***1096** the adjudication of neglect, when the court determined that the child would not be safe ("cannot be protected") in the home of the biological parents. [29] This determination was immediately appealable as of right. [30] That reunification thereafter may be a *goal* that the parents may attain by making "progress ... toward alleviating or mitigating the causes necessitating [the child's] placement in foster care" [31] does not make reunification a *presumption*. [32]

Second, a goal change does not alter the terms of the disposition order entered following the adjudication of the child as neglected. [33] Third, as the majority concedes, the change in goal is not "irreversible." [34]

Fourth, a change in the permanency plan to adoption does not "preordain" or "dictate" the outcome of any subsequent TPR or adoption proceeding. *Ante* at 1074, 1076. It does not constitute a determination that the biological parents are unfit; it has no collateral estoppel or res judicata consequences; it does not relax or reduce the evidentiary burdens on the government and the adoption petitioners in the TPR and adoption proceedings; it does

not limit the parents' participation in those proceedings; and it is not a factor in the trial judge's findings and conclusions therein. At one point, the majority opinion states that the biological parents are "forced" by the goal change "to make a Hobson's choice" between contesting the adoption petition of a "stranger" and consenting to adoption by a family member. *Ante* at 1068. That too is incorrect. The ***1097** goal change leaves the biological parents entirely free to oppose the termination of their parental rights and to argue in the alternative that, if their rights are to be terminated, it is in their child's best interest for the court to grant whichever competing petition they favor. [35]

Fifth, the change in goal does not mandate or cause the curtailment of reasonable efforts by the CFSA to reunify the family. The law is otherwise. In many (though not all) cases of parental abuse and neglect, the CFSA is obligated to undertake "reasonable efforts ... to preserve and reunify the family ... [and] make it possible for the child to return safely to the child's home." [36] There is no statutory requirement or presumption that these efforts shall be terminated when a child's permanency plan changes to adoption. Rather, the statute specifically allows "[r]easonable efforts to place a child for adoption [to be] made concurrently with the reasonable efforts required [to preserve and reunify the family]." [37] Such concurrent efforts do not require court approval.

Even so, the majority insists that if not as a legal matter, then in actual practice and effect, "[w]hen a child's permanency goal is shifted from reunification to adoption, government resources and services are also shifted away from facilitating reunification, and instead, focus on finding and supporting potential new and permanent placements for the child." *Ante* at 1074. In this way, the majority asserts, goal changes deprive "fragile families" of services "essential to achieving their reunification goals," *ante* at 1080, and "severely hamper[ ]" biological parents' "efforts to build or maintain a positive relationship with their child." *Ante* at 1075. "These changes," the majority declares, "can devastate parent-child relationships" even if reunification remains a concurrent goal with adoption. *Ante* at 1080. It is on the purported truth of these serious charges that the majority bases its conclusion that immediate appellate review is necessary because goal changes "tend[ ]" to make the granting of an adoption petition and the termination of parental rights a "*fait accompli*." *Ante* at 1075.

But are these and similar broad generalizations made by our colleagues actually *true*? Are they grounded in fact? Or, as one might suspect given the dearth of specifics and hard evidence, does the majority's conclusion rest on a weak foundation contrary to the typical realities of child neglect, foster care, and CFSA's efforts to reunify families? These questions beg to be asked because the majority cites nothing to substantiate its allegations. It offers nothing beyond its vague assurance that they are "not without support in the record of this case and many others." *Ante* at 1074.

We have found no support "in the record of this case" for the claim that a goal change from reunification to adoption results as a practical matter in the withdrawal of assistance to the biological parents and interference with their efforts to rehabilitate ***1098** themselves and recover their neglected children. On the contrary, the record before us actually shows that even after the goal change, the CFSA continued without interruption to furnish the court-ordered reunification services to the biological parents and facilitate their visitation with the children. The biological parents make unsupported assertions in their brief that they and their children "lost assistance in being reunified" and had "to fend for themselves," [38] but those assertions appear to be false. Not only that, the goal change paved the way for the CFSA to provide services to the children's aunt when she emerged as the biological parents' preferred caregiver.

The majority cites nothing for the proposition that "many other" cases support its claim, and we are unaware of such supporting authority. The government represents that it actually is the CFSA's general "practice [to] afford [ ] biological parents the opportunity even after a goal of adoption has been set to maintain a relationship with the child and show that the goal should be changed back to reunification." [39] We have no reason to disbelieve this representation absent evidence to the contrary; the neglect statute permits such concurrent efforts, which are meant to foster the important public policy of avoiding unnecessarily prolonged stays in foster care while still keeping alive the potential for reunification.

It is argued that reunification efforts *may* be discontinued if it is determined that they would be "inconsistent with

the child's permanency plan."[40] Perhaps this occurs in some cases, though not surprisingly (given the irrelevance of the appealability issue to these appeals) the record before this court is uninformative as to when, why, how often, or to what extent. But as the present case vividly illustrates, a goal change to adoption need not entail the discontinuation of reasonable efforts in furtherance of family reunification. Ordinarily, assisting the biological parents with visitation and a range of rehabilitative services (anger management and domestic violence assistance, parent training, counseling, mental health services, substance abuse treatment, and so forth[41]) is compatible with the CFSA's simultaneous support for an adoptive placement.

In any event, as we explain below, the appealability of a denial of critical reunification services to which the biological parents might claim a legal entitlement is a different question from the appealability of a change in a child's permanency plan, and it may have a different answer.

B. A Permanency Goal Change From Reunification to Adoption Is Not a "Final Order" Under the Collateral Order Doctrine

Even if it were shown that, as a practical matter, changing a child's permanency plan from reunification to adoption adversely affects the biological parents' efforts to regain custody, that would not mean such decisions have the requisite finality to be appealable as of right. It is true that "[s]ome trial court rulings that do not conclude the litigation nonetheless are sufficiently conclusive in other respects that they satisfy the finality requirement of our jurisdictional statute."[42] This proposition implicates the "collateral order doctrine" enunciated by the Supreme ***1099** Court in *Cohen v. Beneficial Industrial Loan Corporation*[43] and its judicial progeny. But the requirements of the collateral order doctrine are meant to be quite "stringent,"[44] and no party or *amicus* in this case has even tried to argue that goal change orders meet them. The majority opinion does not make that argument either, though it implicitly relies on *Cohen*.[45]

The collateral order doctrine applies only to a "small class" of orders: those that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[46] To come within the doctrine, an order therefore must satisfy three conditions: It "must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment."[47] These conditions are strictly construed to prevent the collateral order doctrine from subverting the important policies promoted by the final judgment rule.[48] The Supreme Court thus has explained that a "further characteristic that merits appealability under *Cohen*" also must be present, and "that something further boils down to 'a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.' "[49] Accordingly, the "effective unreviewability" requirement is met only when "some particular value of a high order," typically "a substantial public interest," will be imperiled by the denial of an immediate, interlocutory appeal.[50]

Orders changing a neglected child's permanency goal from reunification to adoption do not satisfy any of the three preconditions for invocation of the collateral order doctrine. First, such orders do not "conclusively determine" the "disputed questions" of reunification and adoption (or any other contested issues, for that matter). Second, the principal issue the orders *tentatively* "resolve" is merely whether the government should move to terminate parental rights and pursue an ***1100** adoptive placement. This "resolution" resolves nothing—it is only a prelude to further litigation of the TPR and adoption issues—and it is intertwined with, not "completely separate from," the merits of the action. As for the third condition, we have seen that permanency goal changes to adoption do not jeopardize sufficiently substantial interests of the biological parents. If further proceedings do eventuate in TPR and adoption orders, "effective" review is available on appeal from the final judgment; in the past, this court has granted meaningful relief in cases where the record showed that a biological parent was denied a fair opportunity to achieve reunification.[51]

Orders that merely change the permanency goal to adoption are not equivalent to, and should not be confused with, other interim orders that actually do

conclusively deny important legal rights of biological parents for reasons separate from the merits of any future TPR and adoption determinations. This court has held that an order permanently or indefinitely prohibiting a biological parent from visiting his or her neglected child may fall within that category and be appealable as a final order.[52] Conceivably, an order denying a biological parent's claim of statutory entitlement to reasonable reunification services similarly might be conclusive, important, and separate enough in a particular case to satisfy the collateral order doctrine. But orders such as these should not be confused with orders that merely approve a change in the permanency plan for a neglected child and direct the District to either file a TPR motion or seek to be joined as a party to a filed adoption petition.[53] It is instructive to compare goal changes with other interim orders in neglect proceedings that we have held not to be appealable by the biological parents even though the orders can have prolonged and dramatic adverse consequences for the likelihood of reunification: (1) an order removing a child from her parent's physical custody and placing the child in shelter care pending the adjudication of the government's allegations of neglect,[54] and (2) an order prohibiting a parent facing criminal charges from even seeing his children until the criminal charges are finally resolved.[55] If orders such as these do not satisfy the requirements of finality for purposes of our appellate jurisdiction, it is difficult to see how orders merely changing a child's permanency goal could be thought to do so.

In support of its holding, the majority states that "[t]he District of Columbia is among the few remaining jurisdictions that do not permit appeals of permanency goal changes from reunification to adoption in neglect proceedings," and that *In re K.M.T.* "departed from the norm," inasmuch as "a vast majority of jurisdictions allow appellate review of goal changes either as appeals as of right or [discretionary] interlocutory appeals." *Ante* at 1075. These statements are materially inaccurate.

First, *In re K.M.T.* did not even consider the availability of discretionary interlocutory appeals of goal changes—an entirely different question from whether goal changes are final and hence immediately appealable as of right. But our decision in ***1101** another case, *In re J.A.P.*,[56] indicates that discretionary interlocutory appeals from goal change decisions are *permitted* in this jurisdiction pursuant to D.C. Code § 11–721 (d).[57] Thus, if the majority's count is accurate, *see ante* at 1075 n.16, the District appears to join at least twenty-six states that allow for discretionary interlocutory review of changes in the permanency goal from reunification to adoption—hardly a "departure from the norm."

Second, far from being an outlier, *In re K.M.T.*'s holding that a goal change from reunification to adoption is not a final order appealable as of right is solidly in the mainstream. A substantial majority of jurisdictions—two-thirds of the states, according to the survey on which the majority relies—do *not* permit appeals of goal changes as of right.[58] Moreover, because of differences in the statutory language from jurisdiction to jurisdiction, the fact that a handful of states do permit appeals of goal changes as of right holds little significance for us. For example, the reason the Court of Appeals of Maryland held that changes in the permanency plan from reunification to adoption are appealable was not because such changes are final orders, but because Maryland has a specific statutory exception to the final judgment rule permitting ***1102** such appeals.[59] Similarly, goal change orders are appealable as of right in Massachusetts, Louisiana, Oklahoma, and Oregon not because the orders are deemed final, but because specific statutory provisions in those states allow them to be appealed anyway.[60] The statutory exceptions in these states have no counterpart in the law of the District of Columbia.

C. Permitting Interlocutory Appeals of Permanency Plan Orders Will Disserve the Policies of the Final Judgment Rule By Threatening to Prolong the Retention of Children in Foster Care.

The requirement that a trial court proceeding be concluded in its entirety before an appeal may be taken serves several important public policies. Most pertinently, those policies include preventing "the unnecessary delays resultant from piecemeal appeals" and "the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise."[61] These policies are of utmost importance in proceedings intended to end prolonged stays in foster care and achieve permanent, stable homes for abused and neglected children. As *amicus curiae* Children's Law Center warns, permitting interlocutory appeals as of right from permanency plan orders will cause substantial delays

in the overall permanency process—delays that the neglect statute was specifically written to prevent, and that will cause real harm not only to the very children the process is designed to protect, but also to biological parents and to prospective adoptive parents.

Permitting interlocutory appeals of goal changes is sure to add substantial delay to an already protracted process. These appeals will have to go from the magistrate judge to an associate judge of the Superior Court for a ruling before the order then can be appealed to this court. [62] It is wishful ***1103** thinking to suppose that all these appeals will be disposed of quickly. Consider the following:

> In the experience of amicus curiae Children's Law Center, which handles approximately one third of all abuse and neglect cases in D.C., over the past two years the average time from the date of a magistrate judge order to an associate judge order is 103 days—ranging from 54 days to 226 days. During the same two-year period (April 1, 2012 to April 1, 2014), the average time from the date of filing a notice of appeal from the associate judge order to obtaining a decision from [the Court of Appeals] is 511 days—ranging from 356 days to 741 days. In other words, the total time for the appeal process from the initial trial court decision to [the Court of Appeals] ruling in our cases over the past two years has averaged 614 days. While those neglect, termination of parental rights, adoption, and custody appeals may involve more issues than the average permanency goal change appeal, these are all matters that the courts are currently handling on an expedited timeline. [63]

This court knows all too well how accurate this portrayal is.

Rather than engage with such informative data, the majority opinion minimizes the concern that overruling *In re K.M.T.* will mean lengthy interlocutory appeals in a large number of neglect cases. The opinion hopefully states that "[b]ecause of the limited scope of this court's review, and the broad discretion enjoyed by trial courts in making permanency goal decisions, we are confident that in the vast majority of cases our review can be adequately addressed using our summary appeals process." *Ante* at 1081. Of course, in predicting that our review will be so limited and deferential to the trial court that the vast majority of appeals from permanency goal changes will be resolved summarily, the majority implicitly admits what it has taken pains to deny—that such appeals will provide few if any benefits to parents (unless they view disruption and delay of the permanency process as benefits, which is hardly to be encouraged). But while we too expect that the costs of the decision to permit interlocutory appeals of permanency goal changes will greatly outweigh the minimal potential benefits, we think the majority's optimism regarding the speed of appellate review is unconvincing for several reasons.

First, as even two members of the majority are compelled to acknowledge, before an appeal even reaches this court, it must complete the time-consuming intermediate appeal within the Superior Court, from magistrate judge to associate judge. [64] Second, the necessary steps of appellate litigation, such as obtaining and reviewing the record and transcript, briefing, judicial consideration, and opinion-writing, are time-consuming, and even if our summary appeals process is completed in months rather than years, that is still an undesirable prolongation of the time a fragile child remains in foster care.

Third, the majority disregards the potentially transformative consequences of its holding that the government must "produce sufficient evidence" at a "formal hearing" to rebut a "presumption in favor of reunification" by a preponderance of the ***1104** evidence in order to secure a change in the permanency plan from reunification to adoption. *Ante* at 1078. This holding will narrow considerably the "broad discretion enjoyed by trial courts in making permanency goal decisions" that the majority counts on to ensure swift appellate review. [65] *Ante* at 1081.

Fourth, the majority also overlooks the range of issues that can and predictably will arise in contested goal change hearings. Potential appellate issues include challenges for abuse of discretion and insufficiency of the

evidence (which the majority's burden of proof holding will encourage), questions regarding the admission or exclusion of expert medical and psychiatric testimony and other evidence pertaining to the parents and their children, and substantive issues of all kinds (limited only by the ingenuity of counsel) relating to the reasonableness of plans and efforts to preserve and reunite the family, the parents' compliance and progress, the best interests of the children, and other pertinent matters.

Fifth, the majority disregards the complications and delay that will ensue simply from the fact that there will be multiple parties in these appeals—at a minimum, the neglected child and the District—who undoubtedly will participate in the briefing and argument at every stage.

Interlocutory appeals do "not operate to stay" the order appealed from.[66] We presume this means that the Superior Court will have concurrent jurisdiction over the case during the pendency of an appeal of an order changing the permanency goal from reunification to adoption. Perhaps the disruption and delay caused by these appeals can be mitigated by the exercise of such concurrent jurisdiction. Nonetheless, we cannot put too much faith in that possibility, for the reality is that trial judges and litigants eyeing the possible reversal of goal change orders on appeal may be understandably reluctant to move forward with the challenged goal changes or with hearings on TPR and adoption petitions until the appeals are concluded. The Children's Law Center advises that, in its experience, "judges have declined to hold further hearings that are allowed under concurrent jurisdiction, due to the pendency of appeals."[67]

The alarming prospect of adding years of interlocutory appellate delay to the process of providing permanent homes for neglected and abused children in the District of Columbia should dissuade this court from relaxing the requirements of the collateral order doctrine to permit appeals of permanency goal changes. Such additional delay will frustrate the "strong public policy, enhanced by federal legislation, ***1105** disfavoring the protracted retention of children in foster care"[68] and will threaten dire harm to the children who are most at risk.

The District's neglect statute provides for permanency planning and permanency hearings to fulfill the requirements set forth by Congress in the Adoption and Safe Families Act ("ASFA").[69] The stated aim of those requirements is to prevent "unnecessarily prolonged stays in foster care" and achieve "early permanent placements" of neglected and abused children in stable homes.[70] As the Supreme Court has said, "protracted stays in [foster] care ... may deprive [neglected] children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens.' "[71] "Legislatures and courts alike have recognized that, in the words of one commentary, 'no child can grow emotionally while in limbo. He cannot invest except in a minimal way ... if tomorrow the relationship may be severed.' "[72] The goal of permanency planning is to "end the uncertainty of foster care and allow the dependent child to form a long-lasting emotional attachment to a permanent caretaker."[73] Time is of the essence, for the years in foster care constitute "an enormous span in the lifetime of a child"[74]—a critical, uniquely sensitive period in the child's growth.[75] Thus, "[t]here comes a time, sooner for younger children than for older children, when a permanent decision is more important than waiting for a potentially better option to be in place. Permanency planning is recognizing the need for a final decision to be made consistently with the child's developmental needs and sense of time."[76] Until now, this court has appreciated that "*[t]imely* integration into a stable and permanent home is arguably *the most important factor* when considering the best interests of the child."[77]

The majority discounts the concern about appellate delay as merely one about "marginally greater efficiency in moving children to permanency." *Ante* at 1075. We ***1106** think this statement gravely underestimates the stakes for these children and fails to respect the public policy determinations made by Congress when it enacted ASFA and the Council in enacting our neglect statute.

The majority is concerned that deferring appellate review of a change in the permanency goal to adoption is prejudicial to biological parents because it allows the children time to develop attachments to their foster parents while proceedings continue. *See ante* at 1074–75. But the way to address this concern is to require prompt TPR and adoption hearings following the goal change, as the statute contemplates, not to permit interlocutory appeals. The delays caused by interlocutory appeals of goal change decisions will only exacerbate the problem

that the majority perceives by lengthening the time children remain in foster care before permanency is achieved. This is so even when the biological parents *succeed* in reversing the goal change on appeal, because that merely will return the goal to reunification; it will not be a determination that the biological parents have met that goal and are entitled to regain custody of their children from the foster parents. [78]

In sum, for the preceding reasons, we would hold that permanency goal changes from reunification to adoption are not final orders appealable as of right. We respectfully dissent from the decision to overrule *In re K.M.T.* [79]

***1107 III. The Constitution Does Not Require Proof of Parental Unfitness Before a Court May Terminate Parental Rights When Necessary to Protect a Child From Serious Harm.**

Our colleagues assert that the substantive due process right of an individual to continue or resume parenting her abused or neglected child may not be terminated without a predicate finding by clear and convincing evidence that the individual is unfit to parent. We agree that this is ordinarily true, but our agreement comes with the critical caveat that the best interest of the child is the paramount and overriding consideration in the decision. As we held in *In re S.L.G.*, there is a "presumption in favor of the natural parent in a TPR or contested adoption proceeding" that is "rebutted only by a showing [either] that the parent is ... unfit or that exceptional circumstances exist that would make the continued relationship detrimental to the child's best interest." [80] Our colleagues, however, insist that a finding of unfitness is a virtually absolute, "essential" constitutional requirement that must *always* be made before the child's best interest may be taken into account. *Ante* at 1081, 1087–88; *post* at 1121, 1123, 1126–27, 1129–30. In effect, the opinions of our colleagues treat the interest of the parent rather than that of the child as the paramount concern, and would substitute the criterion of parental fitness for the best interest of the child; indeed, one of the opinions declares that the en banc decision in this case "overrule[s] prior pronouncements that proof of unfitness is not constitutionally required to permanently sever an existing parent-child relationship—that all that is needed is a showing that termination is in the best interests of the child." *Post* at 1123. To be sure, our colleagues "acknowledge that there *may* be circumstances in which clear and convincing evidence will show that an award of custody to a fit natural parent would be detrimental to the best interests of the child," and hence that "there *might* be truly exceptional circumstances where termination is permissible notwithstanding a parent's fitness." *Ante* at 1123, *post* at 1123 n.6 (emphases added, internal quotation marks omitted). Thus our colleagues ultimately do adhere to what we said on the subject in *In re S.L.G.* [81] Yet they proceed to dismiss this qualification as unrealistic and merely theoretical. *See ante* at 1083, *post* at 1123 n.6. At least three judges in the majority appear ready to jettison entirely the principle enshrined in our jurisprudence that the child's health and welfare is the decisive consideration in parental termination cases. *See, e.g.*, *post* at 1121–22 n.4, 1123 n.7, 1125 n.12.

We fundamentally disagree with our colleagues' constitutional analysis and resulting elevation of parental rights over the best interest of the child in TPR and contested adoption proceedings. The right to parent one's child is not a right to harm one's child. Decades of precedent from this court, the dictates of logic, and guidance from the Supreme Court, Congress, and other courts all weigh against the position ***1108** our colleagues espouse. Their constitutional pronouncement is based on a misreading of the Supreme Court's decisions in *Stanley v. Illinois* [82] and *Santosky v. Kramer* [83] that this court long ago considered and rejected and that the Supreme Court itself has made clear was not what those cases held. Our colleagues' position also is based on their reluctance to face an oft-demonstrated fact—that in some infrequent but recurring circumstances, termination of the biological parents' rights is indeed necessary to protect the child they neglected or abused from serious and irreparable harm even though the parents belatedly may have rehabilitated themselves and become otherwise "fit." [84]

Preliminarily, to reemphasize a point made earlier, whether a court constitutionally may terminate a parent's rights without finding the parent "unfit" is not a question we should be addressing in this case. Because the parents here waived the issue, it has no impact on the court's resolution of the present appeals. Moreover, the issue has long been settled by a generation of this court's past decisions, and the parties and *amici* in this case (including the institutional litigants who have a strong interest in the matter) have not been afforded an opportunity to be heard on the question. For all these reasons, it strikes us

as highly inappropriate for the majority to reach out *sua sponte* and, as some members of the majority would have it, "overrule" those decisions in this case. *Post* at 1123. Our main objection, however, is a substantive one.

Our colleagues undermine, if they do not actually reject, what we take to be a principle of overriding importance, namely, that the child's best interest is the paramount consideration in parental termination and contested adoption proceedings. It is a corollary of this principle that a court may and should terminate parental rights without a predicate finding of parental unfitness if the court finds by clear and convincing evidence that it is necessary to do so to protect the child's wellbeing. As we shall discuss, there indeed are "realistic factual situation[s]," *ante* at 1083, in which a neglected child would be harmed if returned to her fit biological parents. In case after case, this and other courts have been confronted with such situations and resolved them in favor of protecting the child from actual harm.

To contextualize the question, let us think of children like those before us in the ***1109** present appeals—at-risk children who would be psychologically devastated if they were permanently removed from the only safe and loving home they have ever known, that of the foster parents who have cared for them, restored them to health, and seek to adopt them. In affirming the trial court's decision in this case, most of our colleagues recognize that the danger of irreparable psychological harm to the children outweighs the biological parents' preference that they be placed with an otherwise fit alternative caregiver. That being so, it is hard for us to understand why our colleagues refuse to acknowledge that the same grave danger of irreparable harm would exist if the question were whether to return these or similar at-risk children to the custody of their (hypothetically) fit biological parents.

A. The Child's Best Interest Is the Paramount Consideration in Termination Proceedings.

For decades, and until now, this court's considered answer to the question we face has been this:

> [A] termination proceeding involves more than a parent's fundamental liberty interest in the care, custody, and control of his child. The child's interests in stability, safety, security, and a normal family home are also at stake, as well as the prompt finality that protects those interests. So, even though we are evaluating whether a parent's rights were violated, in matters affecting the future of a minor child, the best interest of the child is the decisive consideration. *Parental rights are not absolute, and must give way before the child's best interests. The legal touchstone in any proceeding to terminate parental rights is the best interest of the child, and that interest is controlling.* [85]

Accordingly, this court has "repeatedly emphasized that it is the child's best interest, not the fundamental right to parent, that is paramount in [TPR and] adoption cases," [86] and therefore that "a finding of parental unfitness is not a constitutional prerequisite" to the termination of parental rights when the child's welfare is at stake. [87] Courts in other jurisdictions have been of the same mind. [88]

***1110** This position aligns with Congress's declaration that ASFA "establishe[d] explicitly for the first time in Federal law that a child's health and safety must be the paramount consideration when any decision is made regarding a child in the Nation's child welfare system." [89] Congress took much the same position in the Indian Child Welfare Act of 1978 [90] in establishing "minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." [91] The Act provides for the termination of parental rights based not on a showing of parental unfitness, but rather on "evidence ... that the continued custody of the child by the parent ... is likely to result in serious emotional or physical damage to the child." [92] This is a best-interest-of-the-child standard. [93] In 2013, when the Supreme Court examined this provision in *Adoptive Couple v. Baby Girl*, [94] there was no indication that any Justice thought it vulnerable to a substantive due process challenge for its failure to require a finding of parental unfitness. Contrariwise, Justice Sotomayor's dissent, which three other Justices joined, evinced agreement with our understanding that a finding

of unfitness is not always required to terminate parental rights because the child's best interest is paramount. "Of course," Justice Sotomayor wrote, "it will *often* be the case that custody is subsequently granted to a child's fit parent, consistent with the presumption that a natural parent will act in the best interests of his child." [95]

The Supreme Court likewise has "emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed." [96] In *Quilloin v. Walcott*, its only case directly on point, the Court expressly held that the best interest of the child is, at least in some circumstances, a constitutionally *permissible* basis for terminating a biological parent's rights without a finding of unfitness and for approving an adoption by an existing non-relative caregiver whom the parent opposed. [97] As in this case and other cases we now are discussing, the child's interest at stake in *Quilloin* was in maintaining his existing familial relationship with the non-relative caregiver. [98]

***1111** It may well be, as the Court said in dictum, that "some showing of unfitness" would be required before the state could "force the breakup" of a natural family unit "over the objections of the parents and their children ... for the sole reason that to do so was thought to be in the children's best interest." [99] But that normative proposition did not apply to *Quilloin* and it is a *non sequitur* here. The present case and the other cases we are talking about are ones in which (1) the natural parents *do not* have an unbroken custodial relationship with the child—the child had to be removed from their home and placed in foster care [100]; (2) the child's removal and placement in foster care *was* based on "some showing of unfitness" (namely, the showing of abuse or neglect and a demonstrated risk to the child's safety); (3) the reason for terminating parental rights is *not* "solely" the child's best interest, but rather and more specifically the compelling need to protect the child from demonstrated harm of great magnitude; and (4) the abused or neglected child typically does *not* "object" to the "breakup of the family"—rather, the child or her guardian *ad litem* typically *favors* the proposed TPR and adoption.

Contrary to our colleagues' contentions, *see ante* at 1081, *post* at 1124–27, neither *Stanley v. Illinois* [101] nor *Santosky v. Kramer* [102] established that the Constitution demands a finding of parental unfitness before a court may terminate a biological parent's rights in the best interest of the child. Those two cases concerned the requirements of procedural due process, not substantive due process. Accordingly, in *In re P.G.*, this court squarely rejected the contention that "to permit adoption, with the concurrent termination of preexisting parental rights, without requiring a finding of parental unfitness, violates the parent's right to due process." [103] Chief Judge Newman, who authored the court's opinion, explained:

> The Supreme Court cases invoked by appellant are either inapposite or consistent with the constitutionality of the D.C. statute. *Stanley v. Illinois* ... established that a natural father, even of an illegitimate child, has the right to a due process hearing (applying the substantive state law) before his rights are terminated. However, appellant's claim is not founded on procedural, but *substantive* due process—a challenge to the best interest standard. Contrary to appellant's suggestion, *Stanley* does not stand for the proposition that the father of an illegitimate child has a constitutional right to block adoption unless he is unfit. Lack of fitness was an essential finding in that case only because *under state law*, that was the only basis for granting an adoption without parental consent even when the parents were married.

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> Finally, in *Santosky v. Kramer*, ... the Court held that procedural due process requires findings based on clear and convincing evidence before parental rights are terminated. In that case, under applicable state law, parental fitness was the test. However, the Court carefully refrained from any constitutional holding regarding the substantive criteria, limiting its attention to the standard of proof. [104]

This court has adhered to Chief Judge Newman's analysis in a myriad of decisions in the ensuing three-and-a-half decades, and no party or *amicus* in the present case has questioned it. Our colleagues in the majority have not refuted it. And the Supreme Court itself has confirmed our understanding that *Stanley* and *Santosky* were *not* substantive due process cases and did *not* hold that

the Constitution requires a finding of parental unfitness in TPR cases. First, when presented with this precise substantive due process claim in *Caban v. Mohammed*,[105] the Supreme Court declined to reach it and signaled that *Stanley* did not settle the question.[106] Thereafter, in *Santosky* itself, the Court expressly acknowledged that it still was not "clear" whether a State constitutionally could terminate a parent's rights without showing parental unfitness.[107] It would be quite surprising were it otherwise, for the Supreme Court normally refrains from deciding momentous constitutional issues when they are not presented or it is unnecessary to do so in the case before it. This court should exercise similar restraint.

B. The Vital Interests of Neglected Children, Including Their Interests in Maintaining Intimate Familial Relationships With Their Foster Parents, Take Precedence Over Their Biological Parents' Interests.

Surely "the most obvious ... basis for denying custody to a fit parent in the best interests of the child would be a finding based on clear and convincing evidence that parental custody would actually harm the child."[108] That is why we have held that parental rights may be terminated even without a showing of unfitness where "exceptional circumstances exist that would make the continued relationship detrimental to the child's best interest."[109]

We would adhere to this long-settled position. The reason parental "fitness" is important is precisely because the term "refers to the parent's intention and ability ***1113** over time to provide for a child's wellbeing and meet the child's needs,"[110] as "determined by reference to the specific child whose placement is in issue."[111] Parental unfitness can be established by evidence that returning a particular neglected child to the parent's care and custody would seriously harm that child, regardless of why that would be so.[112] "The same statutory factors that guide the court's determination of a child's best interest in a TPR or contested adoption proceeding therefore also guide the court's assessment in that proceeding of the natural parent's fitness *vel non*."[113] Clearly, the question of whether a parent is unfit overlaps substantially the question of whether regaining custody of her child is in the child's best interest.[114]

The possibility that termination of a putatively "fit" biological parent's rights would be justified, indeed necessary, to protect a previously abused or neglected child from "actual harm" is emphatically *not* an unrealistic "scenario." This court and other courts have confronted such "scenarios" repeatedly in real life. They have arisen most commonly, perhaps, in cases involving young children who, after having been removed from abusive or neglectful parents for their own safety, remained in foster care for protracted periods while the biological parents slowly took the steps necessary to rehabilitate themselves and evidence their fitness to care for the children. By that time, in some of these cases, courts have found that preserving the biological parents' rights would come at a high cost to the children, for it necessarily would entail disrupting strong attachments the children developed with foster caregivers who have become the only parents they have ever known. As child psychologists have testified in this and many other cases, severing those attachments would expose the children to serious and permanent behavioral, cognitive, and psychiatric damage.[115] There is nothing controversial about this testimony; the importance to a child's wellbeing of a healthy and undisrupted attachment to a primary caregiver has been well-studied ***1114** and is widely accepted in the literature of child psychology.[116] That common-sense proposition is well-accepted in court decisions too, up to and including the present case. On numerous occasions, for example, this court has appreciated that "it would be 'ruthless beyond description' to take a child out of a loving home, when she had lived at that home for a substantial period of time as a result of her biological parents' inability or unwillingness to care for her."[117]

When faced with these unfortunate but all-too-realistic situations, this court and other courts have adhered to the principle that the child's best interest is the overriding consideration. They consistently have approved or authorized termination of the biological parents' rights when necessary to avoid causing the child severe emotional trauma and permanent psychological harm—despite or regardless of the biological parents' fitness.[118] As one court confronted with this painful choice empathically said:

> There can be no solution satisfactory to all in this kind of case. Justice to both mother and child, the desired

> objective, can only rarely be attained where, as here, the best interest of one is only achieved at the expense of the other. Where courts are forced to choose between a parent's right and a child's welfare, they choose the child by virtue of their responsibility as parens patriae of all minor children, to protect them from harm. [119]

This may seem unfair to biological parents who eventually have rehabilitated themselves and might be said to meet criteria of "fitness" that would render them suitable parents for other children or under other circumstances. However, such ***1115** parents cannot expect to resume their relationship with their child as if the abuse and neglect had never happened. The child may suffer lasting psychological trauma from the previous mistreatment and have developed a primary attachment to the foster caregivers. Severing that attachment and returning this child to the parents who harmed her may entail an unacceptable risk of psychological injury to the child despite the parents' good faith efforts to overcome the past and achieve reunification. When that is so, a court may have no choice but to terminate the parents' rights in order to safeguard the child's welfare. [120]

This is not to deny or minimize the "fundamental liberty interest" that biological parents have in "the care, custody, and management" of their children. [121] But the parents are not the only parties with vital interests at stake in these child placement decisions. The Supreme Court has long recognized that children too are protected by the Constitution and possess constitutional rights. [122] Just as adults have a well-established, fundamental liberty interest in preserving their intimate familial and caregiving relationships from harmful state interference and destruction, [123] so too do children for whom such relationships are at least as important. [124] Consequently,

> ***1116** [a] parent's rights with respect to her child have ... never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of [the Supreme] Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae ... and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection.* [125]

In short, notwithstanding the troublingly scant recognition of the vital interests (and, arguably, constitutional rights) of children in our colleagues' opinions, the Constitution obliges us to "reject any suggestion that when it comes to parental rights, children are so much chattel." [126]

To enlarge on a previous point, for a young child who was removed from parents who neglected or abused her and placed for a lengthy time in foster care, it may become "natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family." [127] When that happens, the child's vital interest in preserving familial relationships that serve her welfare and protection is often in maintaining her relationship with the foster family rather than, and in preference to, reunifying with the biological parents who abused or neglected her. Ultimately it must be recognized that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." [128] A *genuine* parent-child relationship deserves protection whether biological or not; more so, if push comes to shove, than a superficial parent-child relationship that happens to be biological in origin.

Ordinarily, in the family law context, "the parameters of legal discourse have been based on parents' rights to their children instead of on a child's right to be parented." [129] This is because it usually is valid to "presum[e] that fit parents act in the best interests of their children." [130] But this is only a presumption, albeit a strong one. It is not always true, and it is rebuttable. [131] Children's separable interests come ***1117** to the fore when it becomes clear, commonly in the wake of a finding of neglect and

a disagreement over placement, that a parent's liberty interests are not necessarily aligned with her child's. This, after all, is why courts appoint guardians *ad litem* for the children and apply the "best interest of the child" standard in such cases. Put differently, respecting biological parents' interests to the exclusion of the children's is tantamount to assuming that their interests are always aligned. That assumption is both logically erroneous and contrary to legislative policy determinations inherent in fashioning a "best interest of the child" standard in the first place.

Consequently, where the interests of child and parent are in fundamental conflict, the rights of the parents must be understood in light of the duty of the state, in its role of *parens patriae*, to defend and vindicate the child's rights —"to guard the general interest in youth's well being." [132]

In our view, therefore, taking the vital interests of the child into consideration, the threat of harm to a child can take precedence over a biological parent's interest in preserving the parent-child relationship, regardless of whether the parent is (otherwise) "fit" to regain custody of the child. If any of our colleagues in the majority disagree, and are of the view that the Constitution compels a court to preserve a parent-child relationship despite clear and convincing evidence that doing so will prove harmful to the child's welfare, we think they need to say so and defend that position rather than dismiss the danger as only an unrealistic or theoretical possibility.

IV. A Parental Preference for an Adoption Petitioner Must Be Rejected When It Is Contrary to the Child's Best Interest.

We agree with the majority of our colleagues that the trial court properly fulfilled its obligation under our existing case law to give "weighty consideration" to the biological parents' choice of adoption petitioner, and that the court did not err in rejecting that choice as clearly contrary to the children's best interests because it would pose "unacceptably grave" risks to the children's psychological, intellectual, and social development. *Ante* at 1087. Judges Beckwith and Easterly criticize this court's "weighty consideration" doctrine and argue that if parents have not been found to be unfit, their preference for an adoptive placement of their child should not merely receive "weighty consideration," but "should presumptively control," subject only to the statutory requirements for the approval of all adoptions set forth in D.C. Code § 16–309 (b) (2012 Repl.). *Post* at 1129. On that premise, our two dissenting colleagues would reverse the trial court because, "[i]n the absence of ***1118** any concerns about [the aunt]'s competence as a caregiver, [the parents'] choice should have been honored" despite the trial court's finding of its injuriousness to the children. *Post* at 1129–30. We disagree with that conclusion on both statutory and constitutional grounds.

First, as a statutory matter, D.C. Code § 16–309 (b) requires a court to be "satisfied" not only that the petitioner is competent to be the prospective adoptee's caregiver, but also that "the prospective adoptee is physically, mentally, and otherwise suitable for adoption by the petitioner," and that "the adoption will be for the best interests of the prospective adoptee." [133] These requirements focus on whether the adoption would be good for the child. They are not satisfied where, as here, the trial court finds, by clear and convincing evidence, the very opposite—i.e., that the adoption would be harmful to the mental health of the prospective adoptees and therefore contrary to their best interests. The law of the District of Columbia does not permit a court to approve an adoption that it finds would be injurious to the child's welfare.

Second, for many of the same reasons we have already discussed in Part III of this opinion, we are confident that nothing in the Constitution requires the court to order an adoption that it finds would be clearly harmful to a child merely because the parents who support the adoption have not been found unfit. A valid finding of injuriousness rebuts the presumption that ostensibly fit parents act in their children's best interests; and the *parens patriae* powers of the state to limit and override "parental decisions [that] will jeopardize the health or safety of the child" are beyond dispute. [134]

On a separate point, however, we do agree with Judges Beckwith and Easterly (though our reasons are not the same as theirs). We, too, think that our judge-made "weighty consideration" doctrine is problematic, at least as it is currently articulated and applied in contested adoption proceedings. In an appropriate case—one in which "weighty consideration" leads the trial court to defer to the parent's choice when, in the child's best interest, it otherwise would not do so—we would favor re-examination of the doctrine. [135]

Our "weighty consideration" rule requires that when there are competing adoption petitions, the one favored by the child's biological parent must prevail unless the court finds by clear and convincing evidence (rather than the usual preponderance-of-the-evidence standard) that the parent's choice is "*clearly contrary* to the child's best interest." [136] The parent is entitled to this heavy thumb on the scales as long as her parental rights are still intact when the adoption proceeding commences, ***1119** unless the court finds that the parent is not "competent" to make a decision about the child's caregiver. [137] This remains so even though the court finds the parent in that proceeding to be unfit and enters an order terminating her parental rights in conjunction with the order granting an adoption. This "weighty consideration" requirement seems to be unique to the District of Columbia; no Supreme Court precedent requires it, and other jurisdictions do not appear to accord any special weight to the biological parent's preference in determining which adoption petition is in the child's best interest. [138]

The "weighty consideration" rule requiring a court to approve an adoption petition unless clear and convincing evidence shows it to be *clearly contrary* to the child's best interest, and regardless of better alternatives, is problematic in a number of respects. It conflicts not only with D.C. Code § 16–309, but also with the principle that the child's best interest is the *paramount* consideration in adoption decisions, and it ignores the vital interests of the child. The rule is "premised on the notions that natural parents have a 'fundamental liberty interest ... in the care, custody, and management of their child[ren]' and they do not lose their constitutionally protected interest in influencing their child's future 'simply because they have not been model parents or have lost temporary custody of their children.' " [139] But biological parents *do* lose all these interests when their rights are formally terminated; the termination decree divests them of all legal rights, powers and privileges with respect to their child, including any right to object to the child's adoption or participate in any way in the adoption proceedings. [140] That being so, it is difficult to see why the court must give special weight to the preference of a parent whose rights are about to be terminated once and for all during the contested adoption proceeding (especially, one would think, when the termination is based on a finding of unfitness). It similarly is difficult to see why the parent's preference regarding this most critical decision as to the child's future should be entitled to special weight no matter how ill-informed, unconcerned, or prejudiced the parent is about the child's needs and the adoption petitioners' capabilities.

A parental preference for adoption by a family member may raise particular concerns, especially when (as in the present case) there are indications that the family member will be unable to protect the child from the parents. [141] The law of the District of Columbia does not incorporate a kinship preference in contested adoption proceedings. [142] Hence, the "weighty consideration" ***1120** doctrine is not supported by any legal preference for relatives over non-relatives in those proceedings. Rather, in the absence of such a thumb on the scales, what governs in any choice between adoption by a relative or by a non-relative is simply the child's best interest.

These and similar considerations, on which this court has not focused, are what lead us to think that the full court should re-examine our "weighty consideration" doctrine. Doing so can and should await a case in which application of the doctrine makes a difference to the outcome and in which we have the benefit of full briefing by the litigants. For now, it suffices to say that the trial court in the present case certainly gave the parents' preference the deference required by our current law, and that any error in so doing did not affect the outcome.

V. Conclusion

Together with other judges making up a majority, we hold that the trial court properly relied on the attachment study and the expert testimony regarding the harmfulness of severing the children's attachments to their foster parents. We are satisfied that clear and convincing evidence supported the trial court's findings that the foster parents' adoption petition was in the children's best interests and that their aunt's petition, though preferred by the children's biological parents, was clearly contrary to their best interests. The en banc court therefore affirms the trial court's decision to grant the foster parents' petition.

We would stop there. Unfortunately, our colleagues do not. Let us inventory their principal missteps, to all of which we object. First, in spite of the collateral order doctrine and on dubious factual premises unsupported by the record, they overrule *In re K.M.T.* to permit

interlocutory appeals of permanency goal changes. We fear that these appeals will prove to be disruptive, time-consuming, of scant legitimate benefit to the biological parents, and detrimental to the best interests of the children involved in them. Second, misreading Supreme Court precedent, disregarding decades of settled case law, and minimizing what is at stake for the abused and neglected children who will be affected, the majority declares that parental rights may not be terminated without a predicate finding of parental unfitness. Although our colleagues acknowledge that even a fit parent's rights may be terminated in order to protect the child's welfare in exceptional circumstances, they dismiss this possibility as hypothetical despite abundant evidence to the contrary. Third, and most ironically given our colleagues' concern with procedural fairness, they raise and decide constitutional questions without giving notice to the litigants or affording them the opportunity for briefing. This is contrary to ***1121** settled norms of appellate adjudication—norms that we follow, of course, for the express purpose of ensuring procedural fairness. Fourth, our colleagues' most basic error is in undertaking to decide the foregoing issues at all, for they all have been waived or forfeited, they are not properly before us in this case, and they make no difference to its outcome. Regrettably, our colleagues disregard well-established limits on judicial authority.

The full ramifications of our colleagues' actions remain to be seen, and certainly many questions have been left unanswered. We fear, however, that the majority's unnecessary, legally flawed holdings will prove detrimental to the welfare of abused and neglected children in the District of Columbia.

We respectfully dissent.

Beckwith and Easterly, Associate Judges, with whom Washington, Chief Judge, joins in Parts I and II, concurring in part and dissenting in part:

We join the court's holding that permanency goal changes (1) must be supported by a sufficient record developed at an evidentiary hearing and (2) are immediately appealable. As a majority of this court explains, permanency goal changes from reunification to adoption must be adequately litigated and immediately appealable because the courts have a critical role to play to ensure that the District—having been authorized to remove a child from her parents based on a determination of past neglect and with the presumptive understanding that removal is temporary and that the child should be returned—does not give up on parents too soon. Parents have a constitutionally protected right to have a relationship with their children, and before a court issues a final order authorizing the District to redirect its efforts to dissolve the parent-child relationship and cultivate a new, government-sanctioned parental substitute, the court must ensure that the District has met its statutory obligations to expend reasonable efforts under the circumstances to reunify a child in the neglect system with his or her family. [1]

We also join the court's related holding that the District must show by clear and convincing evidence that a parent is unfit before her relationship with her child may be involuntarily terminated absent as-yet-undefined "truly exceptional circumstances," *ante*, at 1088, and that, as a constitutional matter, it is not enough to assess only the best interests of the child as our termination of parental rights (TPR) [2] and adoption [3] statutes (as the latter provision has been interpreted by this court) direct. [4]

***1122** We write separately to emphasize that these procedural protections are compelled by Supreme Court precedent recognizing the substantive due process right of parents to maintain their relationships with their children and keep their families intact. We also write separately to highlight the inadequacy of the District's TPR and adoption statutes. Passed in 1977 and 1963 respectively, these statutes do not reflect modern Supreme Court precedent recognizing that the Constitution requires a showing of unfitness by clear and convincing evidence as a prerequisite to legal dissolution of the parent-child relationship. Not only do the statutes fail to require a determination of parental unfitness at some point in termination or adoption-without-consent proceedings, they fail to mention fitness altogether. Thus they do not define what constitutes parental unfitness. They say nothing about who must prove unfitness and by what measure. And they do not specify when such fitness determinations should be made. In these and other respects, the District's statutes stand in poor contrast to other states' statutes establishing procedures for termination of the parental-child relationship and for adoption without consent. The result is that our statutes do not with sufficient clarity protect the constitutional rights of parents to maintain their relationships with their

children without government interference. Nor do they address critical policy issues, such as the preference, if any, to be given to kinship adoptions. These are matters for the legislature, not the judiciary, to address. We urge the Council of the District of Columbia to reassess and revise the District's TPR and adoption statutes.

As to this court's implicit decision to retain (at least for now) the weighty consideration test, we dissent. Not only does this test lack clarity and force, it cannot be reconciled with this court's clear holding that a parent's rights may not be terminated absent a determination of unfitness and, ***1123** correspondingly, with the presumption that a parent who has not been deemed unfit makes decisions in the best interests of the child. Thus, if a parent has not been determined to be unfit, her choice of adoptive placement should not merely be given "weighty consideration." It should presumptively control.

I. A Showing of Unfitness by Clear and Convincing Evidence as a Constitutional Prerequisite to Termination of a Parent's Rights

With this opinion, a majority of the en banc court definitively holds that before the rights of a parent who has grasped her opportunity interest may be involuntarily terminated either directly or indirectly via adoption without consent, the District must prove the parent's unfitness by clear and convincing evidence. In so holding we build on recent acknowledgments by this court that a showing of unfitness is an essential part of the termination inquiry,[5] and we overrule prior pronouncements that proof of unfitness is not constitutionally required to permanently sever an existing parent-child relationship—that all that is needed is a showing that termination is in the best interests of the child.[6] Supreme Court precedent compels this change in our law.[7]

As the Supreme Court explained in *Troxel v. Granville*, the government presumptively has no authority to intervene in parent-child relationships:

> "[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations .... Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

***1124** 530 U.S. 57, 68–69, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (quoting *Parham v. J.R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979)) (brackets in original). In this same body of precedent to which the Court in *Troxel* alluded, the Court has made clear that a parent's relationship with her child enjoys intertwined substantive and procedural due process protection, and thus that this relationship may not be involuntarily, permanently terminated absent a showing by clear and convincing evidence of parental unfitness.[8]

In *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), the Court acknowledged that the substantive due process guarantees of the Fourteenth Amendment include the right to "establish a home and bring up children." *Id.* at 399, 43 S.Ct. 625. And *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), stated that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at 166, 64 S.Ct. 438. Accordingly, in *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), the Court held that as "a matter of due process of law," a parent is "entitled to a hearing on his fitness ... before his children [are] taken from him." *Id.* at 649, 92 S.Ct. 1208. The Court noted that a parent's right to raise his own children is "essential" and "substantial" and deserving of deference "absent a powerful countervailing interest." *Id.* at 651–52, 92 S.Ct. 1208. Although the Court acknowledged the state's interest in protecting the wellbeing of children, it pronounced that "the State registers no gain towards its declared goals when it separates children from the custody of fit parents." *Id.* at 652, 92 S.Ct. 1208. The Court thus held that "the Due Process Clause mandates" an individualized hearing to assess a parent's fitness "when the issue at stake is the dismemberment of his family."[9] *Id.* at 658, 92 S.Ct. 1208.

Five years after *Stanley*, the Court shed more light on the constitutional nature and bounds of the familial liberty

interest in *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977). The Court distinguished between the substantive rights of "natural" families [10] not to be ***1125** dismantled and the rights of individuals serving as foster parents to keep in their care children with whom they may have formed strong emotional bonds. [11] The Court determined that the same substantive and procedural protections owed to the former were not owed to the latter. *Id.* at 842–51, 97 S.Ct. 2094. The next year, in *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978), the Court rejected the due process claim of a non-custodial father who objected to the adoption of his child by the child's mother's partner. On the one hand, the Court observed that a non-custodial parent who has not taken affirmative steps to claim parentage of the child and raise him or her will not be granted the substantive due process protections that a "family unit already in existence" will enjoy. *Id.* at 255, 98 S.Ct. 549. On the other hand, the Court, quoting Justice Stewart's concurrence in *Smith*, stated that it had "little doubt that the Due Process Clause would be offended 'if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' " [12] *Id.* (quoting *Smith*, 431 U.S. at 862–63, 97 S.Ct. 2094 (Stewart, J., concurring in judgment)).

Then, in 1982, the Supreme Court decided *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), holding unconstitutional a New York statute permitting termination of the parental rights of a father who had been found to have "permanently neglected" his child by only a preponderance of the evidence. *Id.* at 768, 102 S.Ct. 1388. The Court held that permanent neglect had to be proven by ***1126** clear and convincing evidence before a parent's rights could be terminated. *Id.* at 769, 102 S.Ct. 1388. The Court explained that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Id.* at 753, 102 S.Ct. 1388. To the contrary, because the right to parent one's children is "an interest far more precious than any property right" and because the termination of that right "work[s] a unique kind of deprivation," protection of that right by a high evidentiary standard was necessary. *Id.* at 758–59, 102 S.Ct. 1388.

Santosky was centrally focused on the state's burden of proof, but there was never any serious question that what had to be proved by clear and convincing evidence was some type of unfitness, in that case "permanent neglect." [13] The Court observed that, although the precise issue of fitness was not presented by that case, it was not at all "clear that the State constitutionally could terminate a parent's rights *without* showing parental unfitness." *Id.* at 760, 102 S.Ct. 1388 n.10 (citing *Quilloin*, 434 U.S. at 255, 98 S.Ct. 549). But *Stanley* had already established that the essential predicate to a person's parental rights is his or her fitness to parent. *See* 405 U.S. at 651–52, 92 S.Ct. 1208; *see also id.* at 657–58, 92 S.Ct. 1208. Moreover, elsewhere in *Santosky* the centrality of fitness was accepted as a given: the Court noted, for example, that the termination of parental rights "entails a judicial determination that the parents are unfit to raise their own children." 455 U.S. at 760, 102 S.Ct. 1388. It also observed that, "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Id.* *Santosky*, in conjunction with *Stanley*, makes clear that for the state to terminate parental rights consistent with the Constitution, a determination of unfitness by clear and convincing evidence must be made.

In short, in every case of the last fifty years addressing the termination of parents' substantive due process rights, the Supreme Court's "threshold focus" [14] has been parental fitness. [15] With our decision ***1127** in this case, this court aligns our law with Supreme Court precedent (and with the laws of other states [16]) and acknowledges fitness as the constitutional dividing line: parents who have not been deemed unfit have a substantive due process right to parent their children; they are accorded broad authority over their children and are presumed to act in their children's best interests. *Troxel*, 530 U.S. at 68, 120 S.Ct. 2054. This right may be temporarily restricted if it is determined by a preponderance of the evidence that a child was abused or neglected while in the parent's care. *See Stanley*, 405 U.S. at 658, 92 S.Ct. 1208. In that scenario, the child may be removed from the parent's home for a limited time. But consistent with the Constitution, a parent's relationship with her child may not be permanently severed unless and until the District

has proved unfitness by clear and convincing evidence. *Santosky*, 455 U.S. at 769, 102 S.Ct. 1388.

II. The Inadequacy of the District's Statutes and the Need for Legislative Action

Although this court has now recognized that parental rights may not be terminated without a determination of parental unfitness, the fact remains that our TPR and adoption statutes make no mention of this constitutional marker. It is an omission that only lends itself to confusion—confusion that should not be tolerated given the magnitude of the issues at stake. Moreover, this statutory silence leaves unanswered a number of related policy questions that are for the Council, not this court, to address. [17]

Preliminarily, there is the question of how to define unfitness. As this court acknowledged in *In re S.L.G.*, 110 A.3d at 1286, and in contrast to other states, [18] the D.C. Code currently contains no reference to unfitness. We tried to fill this statutory gap in *In re S.L.G.* by noting that "[b]roadly speaking ... fitness refers to the parent's intention and ability over time to provide for a child's wellbeing and meet the child's needs. ... [It] turns, in other words, on whether the parent is, or within a reasonable time will be, able to care for the child in a way that does not endanger the child's welfare." *Id.* at 1286–87. We thus indicated that a trial court must assess, as a threshold matter, the parent's ability to function as such. It should not ***1128** consider whether removing the child from the foster parents who now seek to adopt would disrupt the child's continuity of care, [19] or whether the adoptive parents are comparatively more healthy (physically, mentally or emotionally) than the birth parents. [20] The District's statutory scheme should make that clear. It should also concretely define what constitutes unfitness.

Furthermore, there is the question of precisely when an express fitness assessment must be made; in particular, whether such an assessment should be made in a separate proceeding that precedes consideration of any adoption petition. Relatedly, the Council should clarify that the District bears the burden of establishing unfitness by clear and convincing evidence. Currently, it appears to be common practice for the District to move to terminate parental rights in compliance with the timetable set by ASFA and incorporated by the D.C. Code; [21] but if CFSA succeeds in recruiting an adoptive parent, the District's practice is to move to hold the termination petition in abeyance pending the litigation of the adoption-without-consent petition. In so doing the District offloads the burden of terminating parental rights to the adoptive parents. This creates an unseemly situation where a private third party is petitioning the courts both to destroy the parent's rights and to present herself as a viable parental alternative. The District should not be permitted to enlist private proxies to do the parens patriae work of the government. Rather, if the District wants a child to be eligible for adoption, it must bear the full burden of demonstrating that a parent's relationship with her child should be severed.

Lastly, now that this court has recognized that a showing of unfitness is required to terminate directly or indirectly a parent's relationship with her child, the Council should clarify how a best-interests-of-the-child analysis interacts with a fitness determination. For example, some states base termination decisions solely on a determination that a statutory ground of unfitness has been proved, without additional regard for the best interests of the child. [22] Other states require proof of unfitness as a threshold matter and treat the best interests of the child as an additional inquiry—thus allowing a court to preserve an unfit parent's rights if it believes that termination would not be in the child's best interests. [23]

It is this court's role to ensure that our statutory scheme for terminating the relationship between a parent and her child passes constitutional muster. By recognizing that unfitness is a prerequisite for such a termination decision, this court has fulfilled its role. But we acknowledge that we ***1129** leave behind a statute that does not clearly align with the holdings of this case, and that leaves unanswered a number of questions regarding how and when unfitness should be assessed. These are questions for the Council to address in the course of reevaluating the District's statutory scheme.

III. Weighty Consideration

We dissent from this court's implicit retention of the weighty consideration test from *In re T.J.*, 666 A.2d

1, 12 (D.C. 1995). Four judges of this court state that this test equates to a procedural requirement that there be " 'clear and convincing' evidence that the custody arrangement preferred by the parents would clearly be contrary to the best interests of the child." *Ante*, at 1084. Clear and convincing evidence of the relative measure of the "best" interests of a child is a nebulous standard, and, standing alone, it provides weak protection for parents' rights. But it is particularly feeble protection in light of the assertion that evidence indicating that "breaking the children's attachment to [the non-preferred caregiver] would significantly harm them" is a "significant consideration in the weighty consideration analysis." *Ante*, at 1086–87 & n.39. In Superior Court, the conflicts about who should adopt a child almost always arise when the choice is between the parent's preferred custodian and the foster parent. Yet it is almost certain that a child will have developed emotional ties to the foster parent with whom she has been living and who wants to adopt her. And it is equally certain that the "significant consideration" afforded to these emotional ties—particularly when such ties are presented in the form of expert "attachment" or "bonding" studies—will cancel out the "great weight" of the parental preference, as is true for the majority in this case.

In addition to the inherent weakness of the weighty consideration test, we have a more fundamental concern: preservation of this test cannot be reconciled with the majority's holding that determinations of unfitness must precede adoption-without-consent decisions. The majority holds that parents who have not been deemed unfit cannot have their rights terminated, directly or indirectly through adoptions without consent. *Ante*, at 1081–84, 1088. But if parents have not been deemed unfit, their decisions about the adoptive placement of their child should presumptively control.[24] *See ante*, at 1081 n.30 (acknowledging the presumption that fit parents act in the best interests of their children). In other words, the weighty consideration test gives too little protection to parents who have not been proven unfit and whose authority to make decisions for their children is still constitutionally protected.[25] The parents in this case fall in this category. They were never determined to be unfit. They chose E.A., a relative who was already fostering A.L.'s and Ta.L.'s half-brother, to be the adoptive mother of A.L. and Ta.L. In the absence of any concerns ***1130** about E.A.'s competence as a caregiver, that choice should have been honored.

* * *

We summarize our points of agreement and disagreement with our colleagues. We agree with our colleagues in the majority that permanency goal change orders from reunification to adoption are immediately appealable to this court, with the focus of the trial court litigation, as well as our appellate review, on the District's efforts to reunify the family. We also agree that a parent's rights may not be terminated directly or indirectly by means of adoption without consent, unless and until the District proves that the parent is unfit by clear and convincing evidence. We disagree with our colleagues in the majority, however, that this court can or should retain our weighty consideration test from *In re T.J.*, and we dissent from that portion of the opinion. Consequently, we also dissent from the court's ultimate judgment affirming adoption of the children by R.W. and A.W. Finally, we urge the Council to revisit the District's termination and adoption statutes, to align them with the dictates of the Constitution, and to address the many policy questions that our concurrence has highlighted.

All Citations

149 A.3d 1060

Footnotes

1 795 A.2d at 690 ("In the context of neglect proceedings after the court has made an adjudication of neglect, finality has generally been held to mean either a restoration of physical custody, a termination of parental rights, or an adoption. An order that is merely a step toward one of those acts is therefore not final and appealable.").

2 Family Team Meetings are "family group decision-making meetings for children in the child welfare system[ ] that enable families to make decisions and develop plans that nurture children and protect them from abuse and neglect." 42 U.S.C. § 627 (a)(3)(A) (2010); D.C. Code § 16–2312 (a–1)(1) (2012 Repl.) (Family Team Meetings in the District "solicit the input of family members, relatives, and others concerned with the welfare of the child to develop a safety plan approved by the Agency.").

3 D.C. Code § 16–2301 (9)(A)(ii)–(iii) (2012 Repl.).

4 E.A. was also previously identified as a potential kinship care provider at the Family Team Meeting in March 2008.

5 No effort was made to terminate A.H. and T.L.'s parental rights before this time, which would have provided the biological parents with an appealable order prior to adoption.

6 In his amicus brief, Dr. Robert Marvin explains that a secure attachment "is the [healthiest and] most trusting pattern of attachment, in which a child sees the attachment figure as *both* a secure base *and* a safe haven." An anxious-avoidant attachment, the next-healthiest type of attachment, "represents a relationship in which a child is strongly attached to the caregiver. However, the child may anxiously avoid some of the more-intimate types of parent-child interactions that are typical of children with secure attachments."

7 *See, e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (acknowledging the "[Supreme] Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest"); *Stanley v. Illinois*, 405 U.S. 645, 651–52, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

8 *Santosky*, 455 U.S. at 753, 102 S.Ct. 1388.

9 *Santosky*, 455 U.S. at 754, 102 S.Ct. 1388.

10 The factors, among those relevant to the present circumstances, are:

> (1) the child's need for continuity of care and caretakers and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages;
>
> (2) the physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child;
>
> (3) the quality of the interaction and interrelationship of the child with his or her parent, siblings, relative, and/or caretakers, including the foster parent; ...

D.C. Code § 16–2353 (b) (2012 Repl.). Other factors set out in the statute, not at issue in the present case, are whether the child was abandoned at the hospital following his or her birth; the child's opinion of his or her own best interests in the matter; and evidence of ongoing drug-related activity in the child's home environment. *See id.* § 16–2353 (b)(3A), (b)(4), (b)(5).

11 This court only applies the exception for reviewing unpreserved issues under *Pajic* and *Helen Dwight Reid* to civil cases; the exception does not extend to criminal cases, where we apply the more rigorous plain error test under *Puckett v. United States*, 556 U.S. 129, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009) and *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). *See, e.g.*, *Fortune v. United States*, 59 A.3d 949, 954–55 (D.C. 2013) (finding plain error under *Olano* where the trial court failed to obtain a valid waiver of appellant's jury trial right in a criminal case); *In re Robertson*, 19 A.3d 751, 760 (D.C. 2011) (applying the test from *Puckett* and *Olano* in a criminal contempt case); *Otts v. United States*, 952 A.2d 156, 161–62 (D.C. 2008) (applying the plain error test under *Olano* in a criminal, unlawful-drug-possession case).

12 *See* 42 U.S.C. § 671 (a)(19) (2012); *see also* 62 Fed. Reg. 36610, 36617 (July 8, 1997).

13 Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115, 2128 (1997) (amending section 475 (5)(c) of the Social Security Act, codified as amended at 42 U.S.C. § 675 (5)(c) (Supp. 1999)).

14 Legal Aid Society of the District of Columbia, National Association of Counsel for Children, Center for Family Representation, Inc., Family Defense Center, and Family Law Professors Vivek S. Sankaran, Christine Gottlieb, and Martin Guggenheim.

15 42 U.S.C. § 671 (a)(15)(C) (if reasonable efforts are inconsistent with the permanency plan for the child, that is, the goal has been changed to adoption rather than reunification, reasonable efforts "shall be made to place the child in a timely manner in accordance with the permanency plan"); D.C. Code § 4–1301.09a (c) (2012 Repl.).

16 Sixteen states allow parents to immediately appeal permanency goal changes as of right (Alabama, Connecticut, Florida, Georgia, Louisiana, Maryland, Massachusetts, Montana, Nebraska, Oklahoma, Oregon, Pennsylvania, South Carolina, Vermont, Virginia, and Wyoming). Twenty–six states allow for interlocutory review of permanency goal changes, either at the discretion of the appellate court or by certification of the family court (Alaska, Arkansas, Colorado, California, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Dakota, South Dakota, Tennessee, Washington, West Virginia, and Wisconsin). *See also* Md. Code, Courts & Jud. Proc. Art. § 12–303 (3)(x); *In re Damon*, 362 Md. 429, 765 A.2d 624, 628–29 (2001) ("[A]n order amending a permanency plan calling for reunification to foster care or adoption is immediately appealable.").

17 *See In re C.A.B.*, 4 A.3d at 897 (citing *In re K.M.T.*, 795 A.2d at 688).

18 An order changing the permanency goal from reunification to adoption, which as we have said is effectively a final order as it is unlikely that it will be changed back to reunification, cannot be compared, as the dissent attempts, to an order removing a child and placing him or her in shelter care, *see In re S.J.*, 632 A.2d 112 (D.C. 1993), or to an order suspending visitation until a parent's criminal charges are resolved, *see In re M.F.*, 55 A.3d 373 (D.C. 2012), which are both temporary situations limited in time.

19 H.R. Rep. No. 105–77, pt. 1, at 8 (1997) ("There seems to be almost universal agreement that adoption is preferable to [indefinite] foster care and that the nation's children would be well served by a policy that increases adoption rates.").

20 In the District, CFSA is required "[a]t least 10 days prior to each review or permanency hearing ... to submit a report ... which shall include," *inter alia*, "[t]he services provided or offered to the child and his parent, guardian, or other custodian." D.C. Code § 16–2323 (d).

21 Termination also need not be sought if "the child is being cared for by a relative." 42 U.S.C. § 675 (5)(E). A third exception to a forced goal change allows the state to avoid the obligation of filing a termination petition if the "State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child." *Id.*

22 Section 16–2323 (d) provides, in full:

> (d) At least 10 days prior to each review or permanency hearing the Division or the department, agency, or institution responsible for the supervision of the services to the child and his parent, guardian, or custodian shall submit a report to the Division which shall include, but not be limited to, the following information:
>
> (1) The services provided or offered to the child and his parent, guardian, or other custodian;
>
> (2) Any evidence of the amelioration of the condition which resulted in the finding of neglect and any evidence of new problems which would adversely affect the child;
>
> (3) An evaluation of the cooperation of the parent, guardian, or custodian with the Division or the applicable department, agency, or institution;
>
> (4) In those cases in which the custody of the child has been vested in a department, agency institution, or person other than the parent:
>
> (A) The extent to which visitation has occurred and any reasons why visitation has not occurred or has been infrequent;
>
> (B) The estimated time in which the child can be returned to the home; and
>
> (C) Whether the agency has initiated or intends to initiate the filing by the Corporation Counsel of a motion requesting the termination of the parent and child relationship and any reasons why it does not intend to;
>
> (5) Any other information as may be required by the rules of the Superior Court of the District of Columbia.

23 Pursuant to ASFA, the presumptive goal is reunification, and states have an obligation to expend "reasonable efforts" to help families reunify. *See* 42 U.S.C. § 671 (a)(15)(B)(ii); H.R. Rep. No. 105–77, pt. 2, at 12 (1997). ("[T]ermination of parental rights is such a serious intervention that it should not be undertaken without some effort to offer services to the family."); *see also* D.C. Code § 4–1301.09a (b); 45 C.F.R. 1356.21 (b)(2) (2001).

24 Once a goal change from reunification to adoption has been endorsed, the state assumes the obligation to expend reasonable efforts to achieve *that* goal. *See* 42 U.S.C. § 671 (a)(15)(C); D.C. Code § 4–1301.09a (c).

25 It is immaterial that a permanency goal of adoption can theoretically be changed back to reunification. When a court orders a new permanency goal, this goal, as its name indicates, is intended to set out the District's final plan for a child's permanent placement. As such, it is akin to an indefinite visitation order, which we have held to be appealable because it is final unless and until it is changed. *In re D.M.*, 771 A.2d at 365.

26 In the District, placement with relatives is recognized as a preferred alternative to placement with foster parents. In this case, the District's failure to follow up with E.A. at the beginning of the case led to the issue of kinship placement being unresolved at the time of the permanency goal change. We agree with the dissent that pursuant to D.C. Code § 16–2323 (c)(4) (2012 Repl.), a permanency hearing, generally, is not the appropriate time to consider kinship placements; however, that assumes other options were explored at the beginning of the removal process as required by law. *See also, e.g.*, 29 DCMR § 6028.2 (k) (referring to the District's "hierarchy of permanency plan options," in the order of "[r]eturn home to parents" and "placement with relatives"); 29 DCMR § 1642.1 ("The first priority of the foster care system shall be to maintain a child in his or her home or that of a relative."); 42 U.S.C. § 671 (a)(19); CFSA, Permanency Planning Policy 9–11 (May 25, 2011), available at http://cfsa.dc.gov/DC/CFSA/PublicationF#iles/PolicyM#anual/Policies/Prog ram–# P#ermanencyP#lanning(#final)(H).pdf (CFSA's policy that "[w]hen reunification is not in a child's best interest, adoption by kin shall be considered as a permanency goal" and "[a]doption by non-kin is an alternative permanency option when permanency with kin not in the child's best interests.").

27 During the permanency proceeding in this case, the magistrate judge seemed more intent on resolving the goal change issue "right quick" than in making the requisite findings to support it. It is possible that the magistrate judge was prepared to rule based on information gleaned during some of the prior review hearings and was thus deciding this matter on the basis of information that is not evident in the record of this appeal. However, there appears to be a dispute of fact regarding the accuracy of the visitation records in this case, which the magistrate judge does not seem to have recognized was her obligation to resolve, observing "[n]othing's been done that proves either way ... so the goal is changed." She also appears to not have questioned the District about its efforts, if any, to assist the children's father with visitation after he apparently reported that he was unable to make his scheduled visitation because he was out of work and had lost his housing.

28 This is so even if the permanency goal change is only to make adoption a concurrent goal with reunification. Familial relationships may be undermined when the District shifts from total support for the parent-child relationship and throws even partial support behind a competing parental candidate.

29 Subsequent review at the termination stage is too late. But in any event this court's prior decisions make clear that the District's shortcomings in expending reasonable efforts to achieve reunification of the natural family are not a proper consideration at termination proceedings. This precedent essentially treats as harmless any failure by the District to meet its obligations under ASFA. Our conception of permanency hearings addresses this deficiency by squarely focusing the trial court's attention (and, on appeal, this court's attention) on the adequacy of the District's efforts to reunify the family.

30 Substantive due process requires "a presumption that fit parents act in the best interests of their children," *Troxel v. Granville*, 530 U.S. 57, 68, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), and recognition that the state may not "inject itself into the private realm of the family" absent a finding of unfitness. *Id.* at 68–69, 120 S.Ct. 2054.

31 *See also Lehr v. Robertson*, 463 U.S. 248, 261, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) ("[A parent's] interest in personal contact with his [or her] child acquires substantial protection under the due process clause); *In re Ko.W.*, 774 A.2d 296, 304–05 (D.C. 2001).

32 *See Santosky*, 455 U.S. at 760, 768–71, 102 S.Ct. 1388 (holding that proof of unfitness must rise to the level of clear and convincing evidence before a parent's rights could be terminated, and observing that "until the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their relationship").

33 The focus on parental fitness is also reflected in the termination procedures of other states. *See, e.g.*, *In re Ann S.*, 45 Cal.4th 1110, 90 Cal.Rptr.3d 701, 202 P.3d 1089, 1102 (2009) (noting that as a matter of constitutional law, "some showing of unfitness is called for when a custodial parent faces termination of his or her rights. ... In that circumstance, there is no dispute that the best interest of the child would not be a constitutionally sufficient standard for terminating parental rights" (internal quotation marks and citation omitted)); *In re Five Minor Children*, 407 A.2d 198, 199 (Del. 1979) (citing *Quilloin*, 434 U.S. at 255, 98 S.Ct. 549) ("The State cannot terminate parental rights by showing it is in the best interests of the children without showing the parents were unfit") (overruled on other grounds); *In re D.T.*, 212 Ill.2d 347, 289 Ill.Dec. 11, 818 N.E.2d 1214, 1225–27 (2004) (explaining that *Santosky* requires clear and convincing evidence of parental unfitness, and that best interests is a separate inquiry); *In re Scott S.*, 775 A.2d 1144, 1151 (Me. 2001) (holding that a court seeking to terminate parental rights must consider parental unfitness before it separately considers the best interests of the child and noting that this holding "springs from the mandates of the federal ... constitution [ ]" which has made clear that "the State may not remove children from a parent's care solely on the basis of the best interests of the children"); *In re Rashawn H.*, 402 Md. 477, 937 A.2d 177, 188 (2007) (explaining that in terminating parental rights, the Constitution requires the state to show "that the parent is 'unfit' or that 'exceptional circumstances' exist" before considering best interests of the child); *Kenneth C. v. Lacie H.*, 286 Neb. 799, 839 N.W.2d 305, 314 (2013) (discussing constitutional constraints and noting that "there is no clear and convincing evidence that [appellant father] is presently unfit as a parent"); *In re J.J.B.*, 119 N.M. 638, 894 P.2d 994, 1003–04 (1995) (holding that statute establishing "abandonment" as a criterion for TPR was constitutional only because "abandonment of one's child establishes parental unfitness"); *In re Kristina L.*, 520 A.2d 574, 579–80 (R.I. 1987) (explaining that the Constitution requires a finding of unfitness and that "[t]he best interest of the child outweighs all other considerations once the parents have been adjudged unfit. In essence, a finding of parental unfitness is the first necessary step"); *In re J.P.*, 648 P.2d 1364, 1376 (Utah 1982) (determining that statute providing for termination of parental rights based on the best interests of the child alone was "unconstitutional on its face" and explaining that "[u]nlike the standard of 'parental fitness,' which imposes a high burden on the state in an adversary proceeding, the standard of 'best interest' of the child provides an open invitation to trample on individual rights through trendy redefinitions and administrative or judicial abuse"); *Copeland v. Todd*, 282 Va. 183, 715 S.E.2d 11, 20 (2011) (for a TPR statute "to pass constitutional due process scrutiny, [it] must provide for consideration of parental fitness and detriment to the child" because "the Constitution requires more than a mere showing of the child's best interests to terminate parental rights"); *In re A.B.*, 168 Wash.2d 908, 232 P.3d 1104, 1109 (2010) (en banc) ("The first question here

is whether a parent has a due process right not to have the State terminate his or her relationship with a natural child in the absence of an express or implied finding that he or she, at the time of trial, is currently unfit to parent the child. According to the United States Supreme Court, this court, and our Court of Appeals, the answer is yes").

34 We need not address here whether the court must give weighty consideration to the preference of a biological parent who has demonstrated utter lack of regard for, or even hostility to, the best interest of the child. In such a case, at least arguably, "the parent is not competent to make ... a decision" about a caregiver for the child. *See In re T.J.*, 666 A.2d at 11, 16. And, in any event, it may be that, in any such cases, the burden of demonstrating that it would be clearly contrary to the child's best interest to place the child with the parents' preferred caregiver would not be a difficult one.

35 *In re T.W.M.*, 964 A.2d at 604 (citing *In re T.J.*, 666 A.2d at 16).

36 Appellant E.A. also contends that the trial court erred in not considering the District of Columbia's failure to pursue a family placement with E.A. after it was determined that T.L.'s sister, K.A.–R. could not be certified as a family placement for A.L. and Ta.L. We have repeatedly held that a "child cannot be punished for the alleged wrongs of the bureaucracy." *In re L.L.*, 653 A.2d 873, 882 (D.C. 1995) (quoting *In re L.W.*, 613 A.2d 350, 355 n.11 (D.C. 1992)). At this stage, which is past the permanency goal change, "the overriding consideration is the best interest of the child ... regardless of the defaults of public agencies in seeking reunification of the family." *In re A.C.*, 597 A.2d 920, 925 (D.C. 1991).

37 As Dr. Venza testified, attachment is a dynamic process, and children can have attachments to several people at once. However, the trial court concluded that it was "inconceivable that the children had meaningful attachments to [E.A.]" given the limited time the children had spent with E.A. in the past three years.

38 We emphasize again that in neglect and adoption proceedings, preservation of natural parents' constitutionally-protected right to the care, custody, and management of their child demands a strong presumption in favor of placing the child in the care of the natural parent unless the parent is first proven to be "unfit." *See In re S.L.G.*, 110 A.3d at 1285–86. The court "cannot constitutionally use the 'best interests' standard to terminate the parental rights of a 'fit' natural parent, and instead, grant an adoption in favor of prospective adoption petitioners simply because they are 'fitter.' " *Id.* at 1287–88 (internal quotation and citation omitted). This presumption, however, does not apply in favor of a designated caregiver herself. E.A. asserts that the trial court erred in not focusing its analysis on her own fitness, but this assertion is unavailing because she is not entitled to the same presumption favoring "fit" natural parents. Instead, her designation by the natural mother as the preferred caregiver is entitled to "weighty consideration" as articulated herein.

39 While attachment studies are a significant consideration in the weighty consideration analysis, we caution that there are also other important considerations for the trial court when weighing a preferred caregiver's petition for adoption with that of a non-preferred caregiver, such as the appropriateness of the preferred caregiver; preservation of extended family ties (a policy reflected in District of Columbia law); and issues pertaining to racial, cultural, and family identity, among others. *See In re T.J.*, 666 A.2d at 5, 14.

1 *In re Ta.L.*, 75 A.3d 122, 133 (D.C. 2013), *vacated*, 91 A.3d 1020 (D.C. 2014).

2 We base our conclusion that the evidence supported the trial court's decision on the evidence introduced at the hearing in the trial court rather than on factual assertions contained in the briefs on appeal. The trial court relied, in part, on the results of Dr. Venza's study of the children's attachment to their foster family and the unrebutted testimony of all three child psychologist witnesses describing why and how the children would be harmed if they were removed from their foster parents. (We do not agree with the suggestion that the trial court erred by relying on Dr. Frank's bonding study, or with the view that bonding studies in general have little probative value in this context. *See ante* at 1086.)

> The expert psychological testimony was not the only evidence undergirding the trial court's determinations, however. The foster parents' petition was supported as well by the children's pediatrician and the social workers who had worked with the children and their families. In addition, the court received powerful evidence of the children's sickly, emaciated, and developmentally arrested condition at the time they were removed from their parents' custody, and of how the children had thrived in response to the loving care and attention to their special needs provided by the foster parents. There was evidence, too, of the aunt's inability or unwillingness to appreciate and address the children's medical and developmental problems and to protect them from their biological parents' mistreatment.

3 795 A.2d 688, 690 (D.C. 2002).

4 *Ford v. United States*, 533 A.2d 617, 624 (D.C. 1987) (en banc) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)); *accord Rose v. United States*, 629 A.2d 526, 536–37 (D.C. 1993).

5 *See Broadrick v. Oklahoma*, 413 U.S. 601, 610–11, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

6 *District of Columbia v. WICAL Ltd. P'ship*, 630 A.2d 174, 182 (D.C. 1993) (quotation marks and citation omitted).

7 The children's aunt has not raised any challenges to the permanency goal changes.

8 The magistrate judge changed the children's permanency goals at a permanency review hearing after the children had been in foster care for approximately fourteen months because, in that time, the biological parents had not (1) complied with court-ordered drug testing and drug treatment, (2) regularly attended couples' counseling (despite their history of domestic violence that had led to their own arrests and their children's removal), (3) secured stable housing or employment, (4) consistently visited their children, or (5) involved themselves in their children's medical care and National Children's Center Services.

9 In fact, even after the goal change, the CFSA continued to facilitate the services ordered for the biological parents and their visitation with their children. The biological parents did not demonstrate improvement, however.

> Of particular note, the biological mother gave birth to another son a year after the permanency goal was changed. When he was four months old, this child had to be removed from the biological parents' care after another incident of domestic violence, in which he sustained a severe head injury that resulted in hemorrhaging in his brain. In the ensuing neglect case, the biological mother was ordered to drug test, attend parenting classes, undergo a mental health assessment, and participate in individual therapy and visitation. She was not compliant.

10 *In re Ta.L.*, 75 A.3d at 130 & n.4 ("There is nothing in the record to suggest that [the biological parents] were in substantial compliance with the trial court's order or that they were moving towards reunification in a timely fashion. Moreover, appellants are not challenging on appeal the trial court's decision that the permanency goal be changed from reunification to adoption[.]").

11 *In re Antj.P.*, 812 A.2d 965, 968 (D.C. 2002) (holding that biological mother forfeited her claim that the agency "failed to provide adequate services geared to her special needs so that she could be reunited with her children" when she raised it for the first time in her appeal from the termination of her parental rights) (internal quotation marks omitted).

12 *D.D. v. M.T.*, 550 A.2d 37, 48 (D.C. 1988) ("Questions not properly raised and preserved during the proceedings under examination, and points not asserted with sufficient precision to indicate distinctly the party's thesis, will normally be spurned on appeal.") (quoting *Miller v. Avirom*, 384 F.2d 319, 321–22 (D.C. Cir. 1967)); *see also, e.g.*, *Williams v. Gerstenfeld*, 514 A.2d 1172, 1177 (D.C. 1986) ("As a general rule, matters not properly presented to a trial court will not be resolved on appeal .... A court deviates from this principle only in exceptional situations and when necessary to prevent a clear miscarriage of justice apparent from the record.").

13 *See Rose v. United States*, 629 A.2d 526, 536–37 (D.C. 1993) ("Where counsel has made no attempt to address the issue, we will not remedy the defect, especially where important questions of far-reaching significance are involved .... This is not to say an appellate court is absolutely precluded from reaching an issue *sua sponte*; it is not .... But even when the courts have elected to do so, as in a *sua sponte* analysis of harmless error, ... they have done so only when a statute required it or when the record was not complex and resolution of the issue was easy, beyond serious debate.") (internal punctuation, brackets, citations and footnotes omitted).

14 *In re Ta.L.*, 75 A.3d at 130.

15 In response to our objections, the majority argues that we have discretion to consider the appealability of permanency goal changes because the question is purely one of law, the factual record is complete, and a remand for further factual development would serve no purpose. *Ante* at 1073–74 (citing *Pajic v. Foote Prop., LLC*, 72 A.3d 140, 145–46 (D.C. 2013), and *District of Columbia v. Helen Dwight Reid Educ. Found.*, 766 A.2d 28, 33 n.3 (D.C. 2001)). But those conditions are not met here, for the absence of any meaningful factual record and the consequent dubiousness of the majority's key factual assertions impair this court's ability to give an informed answer to the legal question presented. Furthermore, of course, we normally exercise our discretion to address a question raised for the first time on appeal only when we find it necessary to do so because the answer would affect the outcome of the appeal and prevent a clear miscarriage of justice —not when, as here, the answer concededly is irrelevant to the outcome and does not correct any injustice in the matter.

16 *Allen v. United States*, 603 A.2d 1219, 1228 n.20 (D.C. 1992) (en banc).

17 *Local No. 8–6, Oil, Chem. & Atomic Workers Int'l Union v. Missouri*, 361 U.S. 363, 367, 80 S.Ct. 391, 4 L.Ed.2d 373 (1960) (quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895)); *accord*, *In re D.T.*, 977 A.2d 346, 352 (D.C. 2009).

18 *District of Columbia v. WICAL Ltd. P'ship*, 630 A.2d 174, 182 (D.C. 1993) (quoting *Johnson v. Morris*, 87 Wash.2d 922, 557 P.2d 1299, 1305 (1976) (en banc)) (emphasis added; brackets omitted).

19 *Local No. 8–6, Oil, Chem. & Atomic Workers Int'l Union*, 361 U.S. at 368, 80 S.Ct. 391.

20 *Randolph v. United States*, 882 A.2d 210, 226–27 (D.C. 2005); *see also id.* at 226 ("[N]o matter whose ox is gored, this court has frequently requested post-argument briefing of issues not adequately raised by counsel, to the end that, after both parties have been fully heard, the court is in the best position to render a sound decision.").

21 D.C. Code § 11–721 (a)(1) (2012 Repl.); *Rolinski v. Lewis*, 828 A.2d 739, 745 (D.C. 2003) (en banc). Review of a magistrate judge's decision by an associate judge of the Superior Court (which is a prerequisite to any review of that decision by the Court of Appeals) similarly is limited to "final" orders and judgments. *See* D.C. Fam. Ct. R. D (e)(1)(a) & cmt.

22 *Rolinski*, 828 A.2d at 745–46 (quoting *In re Estate of Chuong*, 623 A.2d 1154, 1157 (D.C. 1993) (en banc)).

23 *In re K.M.T.*, 795 A.2d 688, 691 (D.C. 2002).

24 390 A.2d 986, 988 n.1 (D.C. 1978).

25 *See Evitts v. Lucey*, 469 U.S. 387, 393, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); *Chaffin v. Stynchcombe*, 412 U.S. 17, 24 n.11, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973); *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S.Ct. 585, 100 L.Ed. 891 (1956); *McKane v. Durston*, 153 U.S. 684, 687, 14 S.Ct. 913, 38 L.Ed. 867 (1894); *see also Howell v. United States*, 455 A.2d 1371, 1372 (D.C. 1983) (en banc).

26 *See M.L.B. v. S.L.J.*, 519 U.S. 102, 110–11, 120, 124, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (holding that while the Fourteenth Amendment does not guarantee a right to appellate review of a TPR decision, once a state affords that right, it may not effectively deny review to indigent parents by conditioning appeals on their ability to pay record preparation fees).

27 *See In re. S.J.*, 632 A.2d 112, 112 (D.C. 1993) (dismissing appeal for lack of jurisdiction).

28 *See also ante* at 1074; *id.* at 1076 n.18.

29 D.C. Code § 16–2320 (a)(3), (a)(3)(C) (2012 Repl.).

30 *See In re Na.H.*, 65 A.3d 111, 114 (D.C. 2013) ("In neglect cases, the disposition is the final order.").

31 D.C. Code § 16–2323 (b)(4) (2012 Repl.).

32 Furthermore, under ASFA and our implementing legislation, any presumption in favor of pursuing reunification evaporates after the child has remained in foster care for a protracted period of time. Specifically, after a neglected child has been in foster care for fifteen of the most recent twenty-two months, the government "shall" file a TPR motion unless the court finds a "compelling reason" that it would be contrary to the child's best interest to do so D.C. Code § 16–2354 (b)(3)(A), (g)(2) (2012 Repl.); *see also id.* § 16–2355 (2012 Repl.) (requiring court to "determine why a motion to terminate the parent and child relationship has not been filed" after specified periods of time have elapsed following the neglected child's commitment to the custody of a department, agency, or institution). These provisions are not compatible with a broad presumption in favor of reunification even after a prolonged period of foster care.

33 The disposition orders in the present case committed the two neglected children to the care and custody of CFSA pursuant to D.C. Code § 16–2320 (a)(3). This disposition remained unchanged until the final decrees of adoption were entered. The goal change order did not change the children's placement or their caregivers. We therefore believe it incorrect to say that goal change orders "modify the fundamental terms of the custody order in the neglect proceeding." *Ante* at 1079.

34 The majority asserts that "[w]hile it is ostensibly possible for the biological parents to attain reunification notwithstanding a decision by the trial court to grant a permanency goal change, *this very rarely occurs in practice*." *Ante* at 1074 (emphasis added). The cases cited by the majority do not support this factual claim, and we are aware of nothing in the record or elsewhere that substantiates it. But even if it were accurate, it would not establish that changing the permanency goal to adoption is ever the *reason* for the biological parents' subsequent failure to attain reunification, let alone that there is a robust causal relationship. It is equally possible that trial courts are correctly changing the permanency goal to adoption because there is no reasonable prospect that the biological parents will be capable of attaining reunification.

35 *See, e.g.*, *In re F.N.B.*, 706 A.2d 28, 30 (D.C. 1998).

36 D.C. Code § 4–1301.09a (b)(1), (3) (2012 Repl). The statute provides that "[i]n determining and making reasonable efforts under this section, the child's safety and health shall be the paramount concern." *Id.* § 4–1301.09a (a). Reasonable efforts to preserve the child-parent relationship "shall not be required" if there has been a judicial determination that the parent subjected any child to cruelty or engaged in other specified wrongdoing, if the parent's parental rights have been terminated involuntarily with respect to a sibling, or if the parent is required to register with a sex offender registry. *Id.* § 4–1301.09a (d).

37 *Id.* § 4–1301.09a (f).

38 Br. for Appellants T.L. & A.H. at 24.

39 Br. for Appellee District of Columbia at 68–69.

40 D.C. Code § 4–1301.09a (c).

41 *See* D.C. Code § 4–1301.02 (20).

42 *Rolinski*, 828 A.2d at 746.

43 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

44 *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994).

45 *District of Columbia v. Tschudin*, the case cited by the majority, *ante* at 1075–76, applied *Cohen*'s rationale to hold that an order may be regarded as final and appealable if nothing more than a ministerial act (e.g., execution of the judgment) remains to be done to terminate the proceedings in the trial court. 390 A.2d 986, 988–89 (D.C. 1978). This holding is inapplicable to the present case; far more than a mere ministerial act must occur in the aftermath of a change in the permanency goal before the neglect, TPR, and adoption proceedings are concluded.

46 *Cohen*, 337 U.S. at 546, 69 S.Ct. 1221; *see also, e.g., Will v. Hallock*, 546 U.S. 345, 349–50, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006); *Rolinski*, 828 A.2d at 746.

47 *Rolinski*, 828 A.2d at 747 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978)) (brackets omitted).

48 *See Will*, 546 U.S. at 349–50, 126 S.Ct. 952. We discuss these policies in the next section of this Part.

49 *Id.* at 351–52, 126 S.Ct. 952 (citations omitted).

50 *Id.* at 352–53, 126 S.Ct. 952. "Otherwise, almost every pretrial or trial order might be called 'effectively unreviewable' in the sense that relief from error can never extend to rewriting history." *Id.* at 351, 126 S.Ct. 952 (internal quotation marks omitted).

51 *See, e.g.*, *In re C.T.*, 724 A.2d 590, 599 (D.C. 1999) (reversing TPR determination where there was evidence that father "might be on the road to becoming a fit parent").

52 *In re D.M.*, 771 A.2d 360, 365 (D.C. 2001).

53 *See* D.C. Code § 16–2323 (c)(2).

54 *In re S.J.*, 632 A.2d 112 (D.C. 1993).

55 *In re M.F.*, 55 A.3d 373, 379 (D.C. 2012).

56 749 A.2d 715 (D.C. 2000).

57 *See id.* at 716, 719 (considering application for allowance of interlocutory appeal by the birth mother in a contested adoption proceeding). D.C. Code § 11–721 (d) provides for the availability of discretionary appeals of certain non-final rulings and orders in civil cases "other than a case in which a child, as defined in section 16–2301, is alleged to be delinquent, neglected, or in need of supervision." This exclusion does not extend to cases in which the child is no longer merely "alleged" to be neglected because neglect already has been adjudicated. The neglect statute draws that distinction —when it speaks of proceedings prior to the adjudication, it refers to a "child alleged to be neglected" and "allegations" of neglect, but when it speaks of subsequent proceedings (including permanency hearings), it refers to "a child [who] is found to be neglected" or "a child [who] has been adjudicated neglected." *See, e.g.*, D.C. Code §§ 16–2316.01, –2317, –2320, –2323 (2012 Repl.).

58 *See, e.g.*, *R.N. v. Dep't of Children & Families*, 113 So.3d 1034, 1034 (Fla. Dist. Ct. App. 2013) (holding that an order changing the permanency goal to adoption is not an appealable final order); *In re Curtis B.*, 203 Ill.2d 53, 271 Ill.Dec. 1, 784 N.E.2d 219, 223 (2002) (stating that because "all of the rights and obligations set forth in the permanency order must remain open for reexamination and possible revision until the permanency goal is achieved[,] ... there is no reasonable basis upon which we can determine that a permanency order is [appealable as] a final order"); *In re T.R.*, 705 N.W.2d 6, 9–11 (Iowa 2005) (holding that a permanency order changing custody and directing the filing of a TPR petition is not "a final appealable order"); *In re Chubb*, 112 Wash.2d 719, 773 P.2d 851, 854 (1989) (en banc) (holding that "dependency review orders are not final" and hence are not appealable as of right); *In re H.R.*, 883 P.2d 619, 621 (Colo. App. 1994) ("[T]he permanency plan adopted here did not constitute a final and appealable order because it did not effectuate any change in permanent custody or guardianship or terminate parental rights."); *In re K.F.*, 797 N.E.2d 310, 314–15 (Ind. Ct. App. 2003) (holding that a permanency plan order is not final, and hence not appealable, because "[t]he only way in which the permanency plan affects the [parents] is that it approves the initiation of proceedings which could result in the termination of their parental rights. Such proceedings will not prejudice the [parents] unless and until termination occurs.") (emphasis omitted); *In re L.E.C.*, 94 S.W.3d 420, 425 (Mo. Ct. App. 2003) ("It is clear that a change in the 'permanency plan' [from reunification to adoption] is not in itself a final adjudication. It is, as the name implies, a 'plan,' not a result, although certain changes are implemented in connection with the plan. The jurisdiction of the Circuit Court continues, however, and is one of ongoing management. Accordingly, we do not consider the ruling a final judgment[.]").

59 *See In re Damon M.*, 362 Md. 429, 765 A.2d 624, 626–28 (2001) (relying on Md. Code, Cts. & Jud. Proc. § 12–303 (3) (x) (1998 Repl.)).

60 *See* Mass. Gen. Laws ch. 119, § 29B (e) (2012); La. Child. Code art. 710 (D) (2015); Okla. Stat. tit. 10A, § 1–5–101 (2009); Or. Rev. Stat. § 419B.476 (8) (2015).

61 *Rolinski*, 828 A.2d at 745 & n.8 (internal quotation marks and citations omitted). Other policies served by the final judgment rule include refraining from the unnecessary decision of issues that may be mooted by the final judgment, respecting the role and independence of the trial judge, and fostering efficient judicial administration. *Id.* These policies too will be disserved by the allowance of interlocutory appeals of goal changes. For example, issues regarding the permanency goal change may be rendered moot by a change in the goal back to reunification or by a final adjudication of a TPR motion and any adoption petition. *See In re Karl H.*, 394 Md. 402, 906 A.2d 898, 902–03 (2006); *accord, In re Jayden G.*, 433 Md. 50, 70 A.3d 276, 288, 292 (2013) (rejecting argument that proceedings to terminate a parent's rights must be stayed when the parent appeals a change in the permanency plan, even though "without a stay of TPR proceedings, the outcome of the parent's appeal of a change in the permanency plan may be rendered moot"); *see also Settlemire v. District of Columbia Office of Employee Appeals*, 898 A.2d 902, 904–05 (D.C. 2006) ("In general, when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome, a case is moot. Accordingly, it is well-settled that, while an appeal is pending, an event that renders relief impossible or unnecessary also renders that appeal moot.") (internal citations and quotation marks omitted).

62 *See* D.C. Fam. Ct. R. D (f) ("An appeal to the District of Columbia Court of Appeals may be made only after an associate judge of the Superior Court has reviewed the magistrate judge's order or judgment pursuant to paragraph (e) of this rule."); D.C. Code § 11–1732 (k) (2012 Repl.) ("An appeal to the District of Columbia Court of Appeals may be made only after a judge of the Superior Court has reviewed the order or judgment."); *id.* at § 11–1732A (d) (2012 Repl.).

63 Br. of *Amicus Curiae* Children's Law Center at 3–4 (footnote omitted).

64 *See post* at 1121 n.1 ("Streamlining review procedures in this court will not, however, minimize the time it takes to litigate these matters in Superior Court .... *[I]t may take years before a notice of appeal is filed transferring jurisdiction to this court.*") (emphasis added).

65 In principle, we do not quarrel with the proposition that parents have a right to an evidentiary hearing at which they may cross-examine adverse witnesses and present their own evidence if they wish to contest the material factual allegations supporting the CFSA's decision to seek a goal change. Parents have that right. *See* Super. Ct. Neg. R. 28 (a), (d); *see also* Super. Ct. Neg. R. 30 (a), 32 (e). Nor do we quarrel with putting the burden on the government to establish that a change in the permanency plan from reunification to adoption is in the child's best interests. This is the general rule. *See, e.g.*, *In re Nazier B.*, 96 A.D.3d 1049, 947 N.Y.S.2d 157, 158 (2012). On the other hand, courts in other jurisdictions have held that the rules of evidence are relaxed at permanency hearings. *See, e.g.*, *In re Ashley E.*, 387 Md. 260, 874 A.2d 998, 1018 & 1018 n.19 (Md. 2005). The majority's insistence on a "formal" adjudicatory hearing strikes us as excessive, and as imposing an unnecessary burden on the trial court and the other parties in cases in which the biological parents do not dispute the material facts.

66 D.C. Code § 16–2329 (d) (2012 Repl.).

67 Br. of *Amicus Curiae* Children's Law Center at 11.

68 *In re J.G.*, 831 A.2d 992, 1001 (D.C. 2003) (footnote omitted).

69 Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

70 H.R. REP. NO. 105–77, at 13 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2745–46.

71 *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 835 n.37, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977).

72 *In re L.L.*, 653 A.2d 873, 887 (D.C. 1995) (quoting Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 995 (1975)); *In re An.C.*, 722 A.2d 36, 41 (D.C. 1998) (quoting same).

73 *In re L.L.*, 653 A.2d at 888 (internal quotation marks and citations omitted).

74 *In re A.B.E.*, 564 A.2d 751, 758 (D.C. 1989); *see also In re C.T.*, 724 A.2d 590, 599 (D.C. 1999) (observing that "two and a half years [is] ... an enormous span in the life of a young child").

75 *See* 2 Ann M. Haralambie, *Handling Child Custody, Abuse and Adoption Cases* § 12:36 at 403 (3d ed. 2009) ("The child's sense of time is very different than an adult's, and there is a great deal which must be accomplished during the few short years of childhood. Lost time and lost opportunities can never be regained. Children who do not experience a secure bonded relationship during childhood may have difficulty in forming relationships for the rest of their lives. Every change of placement makes it more difficult for the child to form another attachment.") (footnote omitted).

76 *Id.*

77 *In re D.H.*, 917 A.2d 112, 118 (D.C. 2007) (emphasis added); *see* D.C. Code § 16–2353 (b)(1) (2012 Repl.).

78 *Cf. Santosky v. Kramer*, 455 U.S. 745, 765–66, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) ("For the child, the likely consequence of an erroneous failure to terminate is preservation of an uneasy status quo."). What does serve to alleviate the majority's concern is that the neglect statute already provides a remedy for biological parents who believe foster care is no longer necessary and are seeking a final order reunifying them with their children and terminating the neglect case: they may petition the court to modify the dispositional order accordingly. *See* D.C. Code § 16–2323 (h)(1). If the court finds that the child's commitment to foster care or other protective custody is no longer necessary or appropriate to safeguard the child's welfare, it may order the child returned to the home. D.C. Code § 16–2323 (f)(1). We assume that the denial of a petition for such conclusive relief would constitute a final, appealable order. *Cf. In re L.L.*, 653 A.2d at 875 (permitting appeal from the denial of a TPR motion). Thus, parents who believe they are fit and entitled to reunification have every incentive to move for a hearing if they think they are being prejudiced by delay, and to do so as soon as feasible.

79 Before we leave this topic, we should call attention to the uncertain scope of the majority's overruling of *In re K.M.T.* The majority's explicit holding is that "a change of the presumptive goal of a neglect proceeding from reunification to adoption is an appealable final order." *Ante* at 1088. This leaves some related questions yet to be resolved. Notably, at times the majority implicitly suggests that an appeal also may be permissible if there is a shift to concurrent goals, where planning for adoption will be concurrent with, but will not supplant, planning for reunification. *See ante* at 1079, 1080 n.28. This implication is puzzling, though, because the reasons on which the majority relies to support its holding—the CFSA's supposed withdrawal of support for, and abandonment of, the biological parents—do not apply when the CFSA chooses to pursue concurrent goals. Moreover, the CFSA is permitted at all times to pursue simultaneous efforts to reunify and to place the child for adoption, and it does not need court approval to do so.

Beyond this, it also is unclear whether a parent could later appeal from a refusal to change a goal of adoption back to a goal of reunification. It is similarly unclear whether a neglected child or any other party (the District? an adoption petitioner?) could appeal a permanency goal order—including, for example, an order refusing to change a goal *from* reunification *to* adoption (or another placement), or one setting reunification as the goal. And the majority likewise does not address the appealability of an initial order setting adoption as the goal.

80 *In re S.L.G.*, 110 A.3d 1275, 1286 (D.C. 2015) (internal quotation marks and footnote omitted); *see also Troxel v. Granville*, 530 U.S. 57, 68–69, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality opinion) ("[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will *normally* be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children") (emphasis added).

81 For this reason, we consider it inaccurate to say that prior cases are overruled. *Post* at ——. *In re S.L.G.* remains binding precedent in this jurisdiction.

82 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

83 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

84 It might be thought that our colleagues' fitness criterion could be reconciled with our traditional best-interest-of-the-child jurisprudence if they would agree that even a fully rehabilitated parent should not be deemed "fit" to parent a particular child when returning that particular child to the parent would be detrimental to the child's welfare, whatever the reason. This would be to say that parental "fitness" should be defined as coextensive with the child's best interests. As a practical matter, such a definitional fix might meet our principal objection to the elevation of parental entitlements over the well-being of children. But at least some of our colleagues appear to resist this approach, *see post* at 1121– —— 22 n.4, even though we all agree that, broadly speaking, "fitness refers to the parent's intention and ability over time to provide for a child's wellbeing and meet the child's needs." *In re S.L.G.*, 110 A.3d at 1286. *See ante* at 1082, *post* at 1127. The lack of a more specific definition of parental fitness is unfortunate. In any event, however the presently somewhat nebulous term "fitness" is defined, our position is that in child neglect, TPR and adoption proceedings, "as in all proceedings affecting the future of a minor, the decisive consideration is [and should be] the best interests of the child." *In re S.C.M.*, 653 A.2d 398, 405 (D.C. 1995).

85 *In re R.E.S.*, 19 A.3d 785, 789 (D.C. 2011) (emphasis added; internal citations and punctuation omitted).

86 *In re C.A.B.*, 4 A.3d 890, 899 (D.C. 2010).

87 *In re Baby Boy C.*, 630 A.2d 670, 682 (D.C. 1993); *see, e.g.*, *In re S.M.*, 985 A.2d 413, 416–17 (D.C. 2009) ("[T]he paramount consideration is the best interest of the child .... The presumption [in favor of a fit natural parent] must necessarily give way in the face of clear and convincing evidence that requires the court, in the best interest of the child, to deny custody to the natural parent in favor of an adoptive parent."); *In re J.G.*, 831 A.2d 992, 1001 (D.C. 2003) ("Notwithstanding the presumption in favor of the birth parent, ... we have repeatedly held that the parent's rights may and must be overridden when such a drastic measure is necessary in order to protect the best interests of the child.").

88 *E.g., In re J.C.*, 129 N.J. 1, 608 A.2d 1312, 1316 (N.J. 1992) ("[T]he cornerstone of the inquiry is not whether the biological parents are fit but whether they can cease causing their child harm."); *In re Colby E.*, 669 A.2d 151, 152 (Me. 1995) ("The State is not required to prove that the parent is the cause of the child's jeopardy, or that the parent is generally unfit. The inquiry is whether the parent can protect the child from those circumstances that either will cause or threaten serious harm."); *see also, e.g.*, *In re Ann S.*, 45 Cal.4th 1110, 90 Cal.Rptr.3d 701, 202 P.3d 1089, 1101–03 (2009); *A.D.B.H. v. Houston Cty. Dep't of Human Res.*, 1 So.3d 53, 61 (Ala. Civ. App. 2008); *In re Rashawn H.*, 402 Md. 477, 937 A.2d 177, 189–90 (2007); *Opinion of the Justices to the Senate*, 427 Mass. 1201, 691 N.E.2d 911, 914 (1998).

89 Strengthening Abuse and Neglect Courts Act of 2000, Pub. L. No. 106–314, § 2 (2), 114 Stat. 1266 (2000), 42 U.S.C. § 670 note (2015).

90 25 U.S.C. §§ 1901–1963 (2012).

91 *Id.* § 1902.

92 *Id.* § 1912 (f).

93 *See In re Mahaney v. Mahaney*, 146 Wash.2d 878, 51 P.3d 776, 784–85 (2002); *A.B.M. v. M.H.*, 651 P.2d 1170, 1175–76 (Alaska 1982).

94 —— U.S. ——, 133 S.Ct. 2552, 186 L.Ed.2d 729 (2013).

95 *Id.* at 2583 n.14 (Sotomayor, J., dissenting) (emphasis added). Our dissenting colleagues appear to misunderstand our point in citing *Adoptive Couple v. Baby Girl* and the Indian Child Welfare Act. *See post* at 1126–27 n.15. It is true that the Act requires termination orders to be supported by "evidence beyond a reasonable doubt," 25 U.S.C. § 1912 (f), a more demanding standard than clear and convincing evidence. Our point is that *even under a statute incorporating this heightened standard*, the Justices joining Justice Sotomayor's dissent understood that a *fit* biological parent's rights may be terminated for the child's welfare.

96 *Lehr v. Robertson*, 463 U.S. 248, 257, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983).

97 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978).

98 *See In re P.G.*, 452 A.2d 1183, 1184–85 (D.C. 1982) (explaining that in *Quilloin*, the Supreme Court "found that a best interest [of the child] standard satisfied the due process rights of the nonconsenting parent ... where the effect is simply to recognize an existing family unit," but "declined to address whether the best interest standard would always suffice, i.e., even where the child has not already been integrated into the adoptive family for some time").

99 *Quilloin*, 434 U.S. at 255, 98 S.Ct. 549 (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 862–63, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977) (Stewart, J., concurring)).

100 *See id.*; *see also In re Ann S.*, 45 Cal.4th 1110, 90 Cal.Rptr.3d 701, 202 P.3d 1089, 1101 (2009).

101 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

102 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

103 *In re P.G.*, 452 A.2d at 1184.

104 *Id.* at 1184–85 (footnotes omitted).

105 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979).

106 The Supreme Court stated:

> Finally, appellant argues that he was denied substantive due process when the New York courts terminated his parental rights without first finding him to be unfit to be a parent. *See Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551[ ](1972) (semble). Because we have ruled that the New York statute is unconstitutional under the Equal Protection Clause, we similarly express no view as to whether a State is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit.

Id. at 394 n.16, 99 S.Ct. 1760. "Semble" is a term "used chiefly to indicate an obiter dictum in a court opinion or to introduce an uncertain thought or interpretation." *Semble*, BLACK'S LAW DICTIONARY (10th ed. 2014).

107 *Santosky*, 455 U.S. at 760 n.10, 102 S.Ct. 1388.

108 *Appeal of H.R. (In re Baby Boy C.)*, 581 A.2d 1141, 1178–79 (D.C. 1990) (Ferren, J., concurring).

109 *In re S.L.G.*, 110 A.3d at 1286 (internal quotation marks omitted).

110 *Id.* at 1286.

111 *Id.* at 1286 n. 26 (citing *In re L.W.*, 613 A.2d 350, 360 n.24 (D.C. 1992)). This relationship between parental fitness and the child's best interest is the reason why "the question of parental fitness is almost always at the heart of any proceeding to terminate parental rights or waive a natural parent's consent to adoption," and why the court must make a "threshold determination" as to whether the strong presumption in favor of the natural parent is rebutted by a showing of either unfitness or exceptional circumstances. *Id.* at 1286, 1288.

112 *See id.* at 1287 ("[I]f the natural parent is unable ... to meet the child's critical needs ..., or if placement of the child with the natural parent would endanger the child or be detrimental to the child's wellbeing, that would mean the parent is unfit to care for that child.").

113 *Id.*

114 *See also, e.g.*, *In re Jayden G.*, 70 A.3d at 303 n.32 ("[P]arental fitness, exceptional circumstances, and the child's best interests considerations are not different and separate analyses. The three concepts are fused together, culminating in the ultimate conclusion of whether terminating parental rights is in a given child's best interests.") (internal quotation marks and citation omitted); *In reK.M.M.*, 186 Wash.2d 466, 494, 379 P.3d 75 (2016) ("[I]n order to determine whether a parent is a fit parent *to a particular child*, the court must determine that the parent is able to meet that child's basic needs." (emphasis in original)).

115 Often, moreover, the biological parent cannot parent the child properly because of the corresponding lack of attachment in their relationship. *See, e.g.*, *In reK.M.M.*, 186 Wash.2d at 494, 379 P.3d 75 (upholding TPR based on evidence that biological parent would be unable to parent the child due to child's lack of attachment to him).

116 *See* Ross A. Thompson, *The Development of the Person: Social Understanding, Relationships, Conscience, Self*, in 3 HANDBOOK OF CHILD PSYCHOLOGY, SOCIAL, EMOTIONAL, AND PERSONALITY DEVELOPMENT 24, 42–70 (William Damon *et al.* eds., 6th ed. 2006); Marsha B. Liss & Marcia J. McKinley–Pace, *Best Interests of the Child: New Twists on an Old Theme*, in PSYCHOLOGY AND LAW: THE STATE OF THE DISCIPLINE 341, 351–55 (Ronald Roesch *et al.* eds., 1999).

117 *In re L.L.*, 653 A.2d 873, 883 (D.C. 1995) (citation omitted); *see also, e.g.*, *In re K.D.*, 26 A.3d 772, 779 (D.C. 2011); *In re J.G.*, 831 A.2d 992, 1002 (D.C. 2003).

> While these may be the most commonly encountered situations in which returning an abused or neglected child to a reformed biological parent would be contrary to the child's wellbeing, we can envision others as well. Even when there is no showing of present parental unfitness, the child still may have unhealed emotional and psychological wounds and abiding anger and hostility due to the parent's prior mistreatment. Such a child may be completely opposed to being returned to her parent and desperate to avoid it. In such circumstances, it is quite foreseeable that, however "fit" the parent, an attempt at reunification might prove not only futile, but disastrous for the child. *See, e.g.*, *In reK.M.M.*, 186 Wash.2d at 474–76, 484, 379 P.3d 75 (reunification found to be futile in light of child's fear and inability to "tolerate" interactions with her father and her adamant refusal to attend visitation sessions with him or engage in reunification efforts); *cf.* Elizabeth Bartholet, *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative* 106–07 (1999) (hereinafter, Bartholet, *Nobody's Children*).

118 *See, e.g.*, *In re C.L.O.*, 41 A.3d 502, 512–13 (D.C. 2012); *In re Baby Boy C.*, 630 A.2d 670, 683 (D.C. 1993); *see also, e.g.*, *In reK.M.M.*, 186 Wash.2d at 476–78, 494, 379 P.3d 75; *In re Alonza D.*, 412 Md. 442, 987 A.2d 536, 547 n.9 (2010); *Charleston Cty. Dep't of Soc. Servs. v. King*, 369 S.C. 96, 631 S.E.2d 239, 243–44 (2006); *L.G. v. State*, 14 P.3d 946, 950 (Alaska 2000); *In re Baby Boy Smith*, 602 So.2d 144, 148–49 (La. Ct. App. 1992); *In re Colby E.*, 669 A.2d 151, 152 (Me. 1995); *In re Jasmon O.*, 8 Cal.4th 398, 33 Cal.Rptr.2d 85, 878 P.2d 1297, 1311–12 (1994); *In re J.C.*, 129 N.J. 1, 608 A.2d 1312, 1323 (1992).

119 *In re R.*, 174 N.J.Super. 211, 416 A.2d 62, 68 (Ct. App. Div. 1980).

120 *See In re Jasmon O.*, 33 Cal.Rptr.2d 85, 878 P.2d at 1313–14 (rejecting the argument that because the government "caused the child to be placed in a foster home, created the child's bonds to the foster parents, and disrupted the child's potential bond with the father, it would be fundamentally unfair to terminate the father's parental rights even if it would be detrimental to the child to be returned to his care.").

121 *Santosky*, 455 U.S. at 753, 102 S.Ct. 1388.

122 *E.g.*, *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) (children's substantive due process right of access to abortion) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); *In reGault*, 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."); *see also Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) ("[A] child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment[.]"); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506–07, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (First Amendment right to political speech).

123 *See, e.g.*, *Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, 2599, 192 L.Ed.2d 609 (2015) ("[C]hoices concerning ... family relationships ... are protected by the Constitution[.]"); *Santosky*, 455 U.S. at 753, 102 S.Ct. 1388 ("[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.");

Roberts v. U.S. Jaycees, 468 U.S. 609, 617–20, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (discussing the constitutional protection accorded "choices to enter into and maintain certain intimate human relationships," in particular "[f]amily relationships [that,] by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.").

124 *See Santosky*, 455 U.S. at 754 n.7, 102 S.Ct. 1388 (recognizing that "important liberty interests of the child and its foster parents may also be affected" by a TPR proceeding); *Troxel*, 530 U.S. at 88, 120 S.Ct. 2054 (Stevens, J., dissenting) ("While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, ... it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation."); *see also, e.g.*, *In re Jasmon O.*, 33 Cal.Rptr.2d 85, 878 P.2d at 1307 ("Children, too, have fundamental rights—including the fundamental right to be protected from neglect and to have a placement that is stable and permanent. Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent.") (internal punctuation and citations omitted).

125 *Troxel*, 530 U.S. at 88, 120 S.Ct. 2054 (Stevens, J., dissenting) (emphasis added, internal citations omitted).

126 *Id.* at 89, 120 S.Ct. 2054.

127 *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 n.52, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977).

128 *Caban v. Mohammed*, 441 U.S. 380, 397, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979) (Stewart, J., dissenting).

129 Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care–Based Standard*, 16 Yale J.L. & Feminism 83, 124 (2004).

130 *Troxel*, 530 U.S. at 68, 120 S.Ct. 2054 (plurality opinion).

131 *See Parham v. J.R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this.") (citation omitted).

132 *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944). *See, e.g.*, *Gomes v. Wood*, 451 F.3d 1122, 1128 (10th Cir. 2006) ("[T]he parents' liberty interest is not absolute. States have a *parens patriae* interest in preserving and promoting children's welfare, *Santosky*, 455 U.S. at 766, 102 S.Ct. 1388, ... including a traditional and transcendent interest in protecting children from abuse[.]" (internal quotation marks omitted)); *Brokaw v. Mercer Cty.*, 235 F.3d 1000, 1019 (7th Cir. 2000) ("[The] liberty interest in familial integrity is limited by the compelling governmental interest in the protection of children particularly where the children need to be protected from their own parents.") (quoting *Croft v. Westmoreland Cty. Children & Youth Servs.*, 103 F.3d 1123, 1125 (3rd Cir. 1997)).

133 D.C. Code § 16–309 (b)(1), (3).

134 *Wisconsin v. Yoder*, 406 U.S. 205, 234, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

135 The separate opinion of Judges Beckwith and Easterly refers to "this court's implicit decision to retain (at least for now) the weighty consideration test." *Post* at 1122. To be clear, we think no decision has been made to retain the weighty consideration doctrine; rather, the concurring and dissenting opinions show that a majority of the court is skeptical of the doctrine.

136 *In re K.D.*, 26 A.3d 772, 778 (D.C. 2011) (internal quotation marks omitted). This is a deviation from the usual rule that "[i]n the case of a contested adoption between two non-parents, the ultimate decision on whether granting a petition serves the adoptee's best interests is made by the preponderance of the evidence." *In re T.J.L.*, 998 A.2d 853, 860 (D.C. 2010) (quoting *In re J.D.W.*, 711 A.2d 826, 830 (D.C. 1998)).

137 *In re T.J.*, 666 A.2d 1, 11 (D.C. 1995).

138 *See Adoption of Hugo*, 428 Mass. 219, 700 N.E.2d 516, 521 & n.9 (1998) ("[An adoption] plan proposed by a parent is not entitled to any artificial weight in determining the best interests of the child .... Presented with more than one potential adoption placement, the judge's task is to determine which plan will serve the best interests of the child, not to afford any particular weight to either plan.") (internal quotation marks omitted); *see also In re David H.*, 33 Cal.App.4th 368, 39 Cal.Rptr.2d 313, 323 (Ct. App. 1995) ("[W]e are aware of no authority which allows parents who face a probable termination of their rights to condition acquiescence in the termination upon a right to designate or influence the adoptive placement.").

139 *In re T.W.M.*, 964 A.2d 595, 602 (D.C. 2009) (quoting *Santosky*, 455 U.S. at 753, 102 S.Ct. 1388).

140 D.C. Code § 16–2361 (2012 Repl.).

141 *See* Bartholet, *Nobody's Children* 89–93 (discussing the risks and benefits of kinship care).

142 Maintaining a child in his or her home or that of a relative is a "first priority" when making decisions about *foster care*, *see* 29 DCMR § 1642.1 ("Placement Considerations for Foster Care"), but there is no comparable prioritization favoring relatives in the counterpart regulation listing "Placement Consideration[s] for Adoption," *see id.* § 1633. As the majority notes, *see ante* at 1079–80, 35 n.26, the CFSA's Permanency Planning Policy prioritizes adoption by kin as a permanency goal over adoption by non-kin, but this is merely internal agency policy that does not have the force of law and, though it may be entitled to some deference and respect, is not entitled to the same sort of deference from the courts as formal agency adjudications and rule-making. *See, e.g.*, *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000); *Nunnally v. District of Columbia Metro. Police Dep't*, 80 A.3d 1004, 1012 & n.17 (D.C. 2013). Indeed, the Permanency Planning Policy explicitly recognizes that "[a]doption by kin may be established as the primary goal by the Court *if it is determined to be in the child's best interests*." CFSA, Permanency Planning Policy (May 25, 2011), Part VII, Procedure G: Adoption by Kin, ¶ 2 (emphasis added).

1 We express concern, however, about delay in the judicial review of permanency goal changes. The majority offers summary review procedures as a means of minimizing the delay in this court. Certainly we need to do what we can to accelerate review and resolution of these cases. Streamlining review procedures in this court will not, however, minimize the time it takes to litigate these matters in Superior Court. Currently, magistrate judges conduct evidentiary hearings pursuant to Family Court Rule D (c) and issue final orders of the court. These orders and judgments must then be reviewed by an associate judge of the Superior Court before they can be appealed to this court. D.C. Code § 11–1732 (k) (2012 Repl.); *see, e.g.*, *In re S.L.G.*, 110 A.3d 1275, 1285 (D.C. 2015) (noting the path to appellate review in that case). As a result, it may take years before a notice of appeal is filed transferring jurisdiction to this court.

2 D.C. Code § 16–2353 (2012 Repl.).

3 D.C. Code § 16–304 (e) (2012 Repl.).

4 In this regard, even our colleagues who dissent as to the need for a predicate unfitness determination concede that an assessment of parental fitness is critical and that a trial court "*must* make a 'threshold determination' as to whether the strong presumption in favor of the natural parent is rebutted by a showing of either unfitness or exceptional circumstances." *Ante*, at 1113 n.111 (emphasis added) (quoting *In re S.L.G.*, 110 A.3d at 1286, 1288); *see also ante*, at 1107 (indicating that it is "ordinarily true" that "the substantive due process right of an individual" to parent her child "may not be terminated without a predicate finding by clear and convincing evidence that the individual is unfit to parent"). Given that the District's termination and adoption-without-consent statutes are silent on the subject of fitness, the partial dissent appears to recognize that courts must evaluate parental fitness in order to protect the "fundamental liberty interest" that parents have " 'in the care, custody, and management' of their children"—a liberty interest the partial dissent expressly does "not [ ] deny or minimize." *Ante*, at 1115 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)).

Still our colleagues in partial dissent assert that the judicially determined best interests of the child are "paramount." *See, e.g.*, *ante*, at 1109, 1119. Apart from relying on this court's case law and the District's termination of parental rights statutes, neither of which can trump the constitutionally compelled fitness inquiry, they defend terminating parental rights solely on a consideration of the best interests of the child by stating in a footnote that "parental 'fitness' *should be* defined as coextensive with the child's best interests." *Ante*, at 1108 n.84 (emphasis added). They do not explain how they reconcile this definition with Supreme Court case law, *see infra*, which clearly distinguishes between the threshold parental fitness inquiry—i.e., whether the parent is able to provide adequate care for the child—and the question of what is "best" for the child.

Our colleagues in partial dissent also argue that the "right to parent one's child is not a right to harm one's child." *Ante*, at 1107. But the harm they posit is the harm of returning a child to her fit parents. This is not a constitutionally cognizable harm, and there is no authority for the radical expansion of government intervention in the lives of families that these colleagues favor.

5 *See ante*, at 1082–83 (discussing *In re S.L.G.*, 110 A.3d 1275 (D.C. 2015), and *In re G.A.P.*, 133 A.3d 994 (D.C. 2016)); *see also In re J.J.*, 111 A.3d 1038, 1044–45 (D.C. 2015) (acknowledging the parental presumption and the centrality of a fitness determination); *In re D.S.*, 88 A.3d 678, 681 (D.C. 2014) (same).

6 We acknowledge that there might be "truly 'exceptional circumstances' " where termination is permissible notwithstanding a parent's fitness. *Ante*, at 1088 (brackets omitted). The "exceptional circumstances" language that this court endorsed in *In re S.L.G.* appears to come from a Maryland statute that incorporates a Maryland common law rule predating the Supreme Court decisions discussing the relationship between fitness and termination of parental rights. *See In reS.L.G.*,

110 A.3d at 1286 (quoting *In re Rashawn H.*, 402 Md. 477, 937 A.2d 177, 189–90 (2007) (citing Md. Code, Fam. Law § 5–323 (2007), which specifically provides that a court can grant guardianship without parental consent if it finds that the parent is unfit or "exceptional circumstances" exist)); *see also* *Ross v. Pick*, 199 Md. 341, 86 A.2d 463, 468 (1952) (noting that parents "are ordinarily entitled to [ ] custody" unless they are unfit or "some exceptional circumstances render such custody detrimental to the best interests of the child"). There is no express support for this safety valve in the Supreme Court case law, but as that precedent does not plainly foreclose this safety valve, it is theoretically possible that it exists.

7 Our colleagues in partial dissent rely on this court's earlier decisions pronouncing that the best-interests-of-the-child inquiry is controlling. As we are sitting en banc, however, we are not bound by this precedent. *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971). And given that these decisions fail to adequately protect the constitutional rights of a parent who has not been found unfit, as recognized by the Supreme Court, *see infra* at 141–49, we must disavow them.

8 Our colleagues in partial dissent seek to distinguish between discussions of procedural due process rights and substantive due process rights, *ante*, at 1111–12, but as the former flow from the latter in this context, both are implicated, *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 842, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977) (acknowledging that parental rights are "afforded both substantive and procedural protection"). And the fact remains that the Supreme Court has identified a showing of unfitness as the constitutional prerequisite to the termination of an existing parent-child relationship.

9 Our colleagues in partial dissent highlight this court's examination of *Stanley* in *In re P.G.*, 452 A.2d 1183, 1184 (D.C. 1982), and quote its pronouncement that "[l]ack of fitness was an essential finding in [*Stanley*] only because *under state law*, that was the only basis for granting an adoption without parental consent." *Ante*, at 114. But this is not what *Stanley* said, as other courts have recognized. *See, e.g.*, *In re Sanders*, 495 Mich. 394, 852 N.W.2d 524, 533 (2014) (explaining that "[t]he rule from *Stanley* is plain: all parents 'are constitutionally entitled to a hearing on their fitness before their children are removed from their custody' " (quoting *Stanley*, 405 U.S. at 658, 92 S.Ct. 1208)).

10 Although families with same-sex partners had yet to be validated as such, the Court explained that its concept of a "natural" family was not limited to biological ties, but rested also on "intrinsic human rights," such as the right to marry and have children. *Smith*, 431 U.S. at 845, 97 S.Ct. 2094; *see also* *Obergefell v. Hodges*, ––U.S. ––––, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). In addition, the Court contrasted the natural family with the relationship between a foster parent and a child in her care, which "derives from a knowingly assumed contractual relation with the State." *Smith*, 431 U.S. at 845, 97 S.Ct. 2094; *see also* *Id.* at 844 n.51, 97 S.Ct. 2094 (acknowledging adoption "as the legal equivalent of biological parenthood"). When we use the term "natural family," we understand it to have this broader meaning.

11 The development of strong emotional bonds between foster parents and the children in their care is unquestionably a good thing. But these bonds cannot, as our colleagues in partial dissent argue, be elevated over natural familial relationships such that their preservation justifies terminating a fit parent's constitutional rights. *See ante*, at 1112–17–.

12 Our colleagues in partial dissent assert that this proposition—that a best-interests-of-the-child test cannot be employed to break existing parental bonds—has no application to this case or in any case where there has been a determination of neglect and the child has been temporarily removed from the parent's care, because in such cases the parents "do not have an unbroken custodial relationship with the child." *Ante*, at 1111 (emphasis omitted). There is no support in the Supreme Court's case law for the proposition that a single determination of neglect, made only by a preponderance of evidence, suffices to change the constitutional calculus for termination of parental rights. Indeed, the Supreme Court rejected this proposition in *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *see also supra* at 1124–25. The only circumstance in which the Court has indicated that parental rights are diminished is in cases where, as in *Quilloin*, the parent has been absent from the child's life and failed to grasp the opportunity to form a familial bond with the child. *See* *Lehr v. Robertson*, 463 U.S. 248, 261, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) (explaining that the "difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban* and the potential relationship involved in *Quilloin* and this case, is both clear and significant"). Moreover, while there may be "truly exceptional circumstances" under which a fitness inquiry can be circumvented, we are confident that a determination of past, temporary neglect is not one of them.

13 Permanent neglect was statutorily defined as more than a year-long period during which "the child's natural parents failed substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so." *Santosky*, 455 U.S. at 748, 102 S.Ct. 1388.

14 Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 68 (1995).

15 Our colleagues in partial dissent cite *Adoptive Couple v. Baby Girl*, –– U.S. ––––, 133 S.Ct. 2552, 2579, 186 L.Ed.2d 729 (2013), for the proposition that the Court endorsed the constitutionality of a best-interests-of-the-child test for

the termination of parental rights under the Indian Child Welfare Act of 1978. *Ante*, at 1109–10. But not only was no constitutional challenge raised in that case, that statute does not employ a best-interests-of-the-child test. Rather, to advance its goal of reducing "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption ... usually in non-Indian homes," Congress mandated that parental rights of Native Americans could not be terminated absent a "heightened showing," above and beyond that of unfitness proved by clear and convincing evidence, that the parent's continued custody of the child would, beyond a reasonable doubt, result in "serious emotional or physical damage." *Adoptive Couple*, 133 S.Ct. at 2557–58; *see also id.* at 2579 (Sotomayor, J., dissenting) (explaining that the ICWA imposes a "more demanding [standard] than the showing of unfitness under a high 'clear and convincing evidence' standard, [which] is the norm in the states" for termination decisions); *id.* at 2583 n.14 (emphasizing that the ICWA "is more protective" of parent's rights).

16 *See ante*, at 39–40 n.33. Indeed, we were able to find only one other state—New Jersey—that appears to allow termination of parental rights based only on the best interests of the child. *See* N.J. Stat. Ann. 30:4C–15.1. Further research reveals, however, that (1) New Jersey's "best interests" inquiry focuses solely on the abilities of the parent, and thus is effectively a fitness inquiry, and (2) the New Jersey Supreme Court has held that consideration of a TPR petition must include "an evaluation of parental unfitness." *N.J. Div. of Youth & Family Servs. v. G.L.*, 191 N.J. 596, 926 A.2d 320, 325 (N.J. 2007).

17 The termination procedures of other states may be a helpful reference point for the Council. *See ante*, at 1081–82 n.33.

18 Other jurisdictions have legislatively defined parental unfitness. Common statutory grounds include a failure to rectify the conditions that caused the child to be adjudicated neglected ("permanent neglect") despite the state's reasonable efforts toward reunification, sexual abuse, abandonment of the child, long-term mental illness or deficiency of the parent, long-term alcohol- or drug-induced incapacity of the parent, failure to support or maintain contact with the child, conviction for qualifying serious crimes, such as rape or murder, or involuntary termination of the rights of the parent to another child. *See* Child Welfare Information Gateway, *Grounds for Involuntary Termination of Parental Rights* (2013), https://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.pdf.

19 A consideration under D.C. Code § 16–2353 (b)(1).

20 A consideration under D.C. Code § 16–2353 (b)(2).

21 *See ante*, at 1076–78.

22 *See, e.g.*, Fla. Stat. § 39.806; La. Child. Code Ann. art. 1015; N.H. Rev. Stat. Ann. 170–C:5.

23 Some states simply permit courts to consider the best interests of the child as an additional factor. *See, e.g.*, Alaska Stat. § 47.10.088, –.011; Ariz. Rev. Stat. § 8–533; Colo. Rev. Stat. § 19–3–604; 705 Ill. Comp. Stat. 405/1–2; Iowa Code § 232.116; Minn. Stat. 260C.301; Mont. Code Ann. § 41–3–609; N.M. Stat. Ann. 32A–4–28; N.Y. Soc. Servs. Law § 384–b; 23 Pa. Cons. Stat. § 2511. Other states require an explicit determination that termination is in the child's best interests. *See, e.g.*, Conn. Gen. Stat. § 17a–112; Ga. Code Ann. § 15–11–310; Haw. Rev. Stat. § 571–61 to –63; Me. Rev. Stat. tit. 22, § 4055; Mich. Comp. Laws § 712A.19b; Mo. Rev. Stat. § 211.447; N.C. Gen. Stat. § 7B–1110, –1111; Ohio Rev. Code Ann. § 2151.414.

24 Subject to the requirements of D.C. Code § 16–309 (b) (listing criteria for court approval of all adoptions).

25 Meanwhile, if a parent has been deemed unfit, the parent does not have a constitutionally protected right to choose her child's adoptive parent or to have her preference be given any weight. Thus the weighty consideration test gives too much, as a constitutional matter, to parents who have properly been found unfit.

Constitutional rights aside, the Council could decide to give preference to the parental choice, even if the parent has been deemed unfit and his constitutional rights have been terminated. But that is another policy decision that is beyond the authority of this court to make.