

# Biological Parents Regaining Their Rights: A Psycholegal Analysis of a New Era in Custody Disputes

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The evolving American family presents new psycholegal dilemmas. Recently many publicized landmark cases have involved custody disputes in which settlements turn on the genetic component. Although the court acknowledges the principle of "the best interest of the child" as important to the determination of custody, this interest is not absolutely paramount. Court rulings have taken the position that the rights of biological parents are a threshold issue that must be resolved first. Thus, children may be removed from their adoptive and psychological parents through a court order. The authors present a psycholegal analysis of important cases with a guideline for the future.

The basic concepts of "the rights of parents" and "the interest of the child" have gone through evolutionary changes. Until the 19th century, children were treated as the property of their parents, particularly their father. In the 20th century, society began to take an interest in the well-being of minors. Eventually the doctrine of "the best interest of the child" evolved<sup>1</sup> as a standard in settling disputes, initially among two biological parents and later between a biological parent and a psychological parent. In some earlier cases the courts showed a willingness to

favor the psychological parent for the child's placement if that parent met certain criteria.<sup>2</sup> As the sociopolitical atmosphere changed again, individual rights, including parental rights, came to predominate and become cherished above other values. The U.S. Supreme Court, in a series of cases, noted that the biological relationship, although not the exclusive consideration, is a significant element in parenthood.<sup>3,4</sup>

The law also presumes that a child and his/her parents share the same vital interest, which is to keep the family bond intact; and, further, that it must not be easy or routine for courts or others to weaken this bond.<sup>5</sup> On the other hand, the law recognized that children are persons with constitutional rights to pursue happiness,

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as well as rights to the due process clause of the Fourteenth Amendment. In that context, child-rights advocates drafted a bill of rights specifically for children requesting "party status" in custody disputes.<sup>6</sup>

Today the courts need to balance several interests when deciding the fate of a child, and the case law is mounting. This poses a new moral dilemma for professionals who are involved in such cases.

### **The Interest of Children Independent of the Interest of Parents**

The cases of Gregory Kingsley and Kimberly Mays are landmarks. Those two cases caught the nation's attention and became the subject of media focus as well as the subject of discussion among scholars of law and behavioral science. In both cases, the court granted "party status" to the child and ruled that the child had the greatest interest in the outcome of the litigation.<sup>6</sup>

Gregory K,<sup>7</sup> who was twelve years old during the period of litigation, pleaded with the court to sever his relationship with the biological mother he barely knew and let him be adopted by his foster parents. The biological mother, Rachel, retained parental rights even though Gregory had lived with her for only seven months over the previous eight years. Gregory spent 30 months in Florida's foster care system before the State of Florida began to resolve the issue and placed him in foster care with the Russ family. As Gregory grew older, he learned that he might have some legal recourse and sought to terminate his mother's parental

rights over the objection of the Florida Department of Health and Rehabilitation Services. His name was changed to Shawn Russ. Nevertheless, an appeals court reversed the adoption one year later and gave no weight to the emotional bond between Gregory (or Shawn) and his foster parents, the Russes. Further appeal is in process.

Kimberly was nine years old when her father Robert Mays informed her that neither he nor his late wife were her biological parents. Instead, Mr. Mays had just learned that Kimberly was the biological daughter of Ernest and Regina Twigg. In 1988, the Twigg's daughter Arlene died of a heart defect. Blood tests and other issues led to the discovery that the two girls had accidentally or otherwise been switched at birth in a small rural hospital. The Twiggs brought a lawsuit to gain custody of Kimberly, and the ensuing court battle continued for years. Kimberly went through a series of emotional disturbances. When she was 14 years old, she, like Gregory, hired her own attorney to "divorce" her genetic parents out of fear that the law could give priority to the genetic parents. In August of 1993, five years after the ordeal began, the court ruled that Kimberly could remain with the man she considered her father and that she had no obligation to maintain contact with her biological parents. In this case, the court understood that the psychological relation is paramount and should be protected. Therefore the court set aside longstanding legal doctrines that regard biology as the primary determinant of parentage. The court decision was hailed by child advocates and condemned by

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those who believe that biological parents are entitled to have contact with their offspring unless the parents are found to be unfit. Nevertheless, the saga continued. In March 1994, Kimberly, for unknown reasons, changed her mind, left Mr. Mays, and went to live with her biological parents, the Twiggs.<sup>8</sup>

In another case, two-year-old Jessica DeBoer drew attention nationwide and became a subject of debate among scholars of the law and behavioral science. In this case, the court disregarded the psychological well-being of an infant.

Jessica was less than two days old when her biological mother waived parental rights and placed her for adoption. The mother initially identified her boyfriend, Scott, as the father. He also consented to the adoption. Thus Jessica was placed in the custody of the DeBoer family in Michigan. Six days later, the mother informed her ex-boyfriend, Daniel Schmidt, that he was the father of Jessica, and that she had named Scott as the father to avoid the embarrassment of acknowledging an ex-lover. Schmidt objected to the placement and started a lawsuit to regain custody. During this time Schmidt married Jessica's biological mother. The legal battle was launched both in Iowa, where the biological parents resided, and in Michigan, where the adoptive/psychological parents lived. After two years of trials and numerous court hearings, the courts favored the claim of the biological parents. Jessica was returned to her biological parents and her name was changed to Anna Lee.<sup>9, 10</sup>

Jessica's plight was appealed to the U.S. Supreme Court. However the Court

refused to accept the case for ruling, although two of the judges expressed concern about the vulnerability of the child and her best interest.

## Psychological Parents Versus Biological Parents

In one estimate, about one percent or 500 of the 50,000 U.S. adoptions each year are contested.<sup>11</sup> Disputes over who shall gain custody of the child may arise between the natural parents and third parties such as adoptive parents, relatives, or foster parents. In many cases, the natural father was unavailable at the time of the adoption; after completion of the placement, the absent father would appear and make his claim to custody. The courts might, and most of the time do, favor the claim of the biological parent, thereby undoing the emotional tie between the adoptive/psychological parent(s) and the child without consideration of the child's best interest.

Today, half a million American children live in foster care. The majority of them never return to their biological parents. States must bear the cost of placement. If a biological parent who has not been charged with abuse or neglect makes a claim to custody, the court will return the child to the biological parent and ignore any psychological bond that may have grown between the foster parent(s) and the child, as the DeBoer case demonstrates.

## Biological Parent Versus Psychological Parent

Since the introduction of new medical technology such as *in vitro* fertilization

and surrogate embryo transfer, the courts have faced a dilemma in having to decide and establish the identity of parenthood, specifically motherhood. An example would be a mother who, unable to gestate the fetus, donates her egg for fertilization to another woman who furnishes her uterus for the gestation. Each of the two women makes a biological contribution to the creation of a child; one has contributed through her genetic structure and the other through her hormonal and other biological components. Legal disputes may arise when the gestating mother claims motherhood and refuses to return the child to the mother who contributed the egg (*Johnson v. Calvert*).<sup>12</sup> In deciding such a case, the court is not looking at the best interest of the child, but rather aims to determine which of the two women claiming parental rights has the greater right. The court has tended to give the child to the genetic mother under the presumption that the genetic material plays a more decisive role in the formation of a human being. The moral and ethical problems inherent in such cases and related surrogacy issues have been discussed in detail elsewhere.<sup>13</sup>

Such problems keep growing in number and it seems that legislators are showing some interest in settling these issues through the creation of new statutes. So far, only three states have enacted legislation, however: Arkansas and New Hampshire favor the gestational mother and Virginia favors the genetic mother.<sup>14</sup> The rest of the country remains at the mercy of the court or common law. For example, in *Johnson*,<sup>12</sup> the California Appeals Court affirmed the lower court ruling and de-

clared that Anna Johnson, the gestational mother, did not have any liberty interest in a relationship with the child, believing in the specific aspect of paternity determination through blood tests and other genetic analyses rather than anticipating the psychological issues and considering what would be in the best interest of the child.

The court decision in *Johnson* was both hailed and denounced by mental health professionals and ethicists. One group argued for the appropriateness of greater weight being given to the genetic contribution, based on the belief that a child should not be cut off from his or her genetic heritage. The other group believed that the gestational mother should legally be presumed to have the right and responsibility to rear the child as there is a greater biological and psychological investment in the child made by the gestational mother.<sup>15, 16</sup>

The value of genetic contribution and disputes over it may arise not only between two biological mothers but also in so-called surrogacy cases, in which an infertile woman's husband donates his sperm through artificial insemination to another woman who agrees to conceive, bear, and then renounce the child to the husband and his wife. This clinical method has created a legal and emotional furor not only by those directly involved, but by society at large. In the case of Baby M, Mary Beth Whitehead agreed to be inseminated with the sperm of William Stern and had agreed to give the baby to the Sterns after its birth. Whitehead changed her mind soon after the birth and tried to keep the baby by claiming that she

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was the real mother with all of the mother's rights. The Superior Court of New Jersey decided that the contract between Stern and Whitehead was valid and enforceable.<sup>17</sup> However, on appeal, the New Jersey Supreme Court declared that the surrogacy contract undermines the dignity of human life and cannot be enforced. Although the New Jersey Supreme Court granted the custody to the natural father, it voided both the termination of the surrogate mother's parental rights and the adoption of the child by Stern's wife.<sup>18</sup>

One year after the Baby M decision, the U.S. Supreme Court had to address a new moral dilemma and decide on the nature and extent of the rights of the biological father when he is not the husband of the child's mother,<sup>19</sup> and whether the constitutional rights of the biological father had been violated by state laws. At that time California recognized only the husband of the mother as the legitimate father.

In the case of Michael H, unlike Stern and other cases, there was no artificial insemination, transplantation, or previous contractual agreement, but a child was born, in the justice's language, as a result of "adultery." The conclusion of a sharply divided plurality was that the framers of our Constitution never intended to give the right of fatherhood to a man who cohabitates with a married woman and then declares a constitutional right to "the product of adultery."

In the Baby M and Michael H cases, both courts reflected what society's conscience appears to be. Stern was motivated by love and the desire to have a family, whereas the biological father of

Michael H was assumed to be motivated, at least initially, by lust.

## Discussion

The right and authority of parents to raise their children is rooted in the U.S. Constitution. In a series of cumulative decisions, the U.S. Supreme Court justices have demonstrated the right of parents to be independent and free from governmental interference, and they have recognized that parents have the authority and right to direct the rearing of their children as basic to the structure of our society.<sup>20-24</sup> The rights of parents can be curtailed only in cases in which parental action jeopardizes the health or safety of the child, and that must be proved with clear and convincing evidence.<sup>5</sup> Otherwise, "natural parents and the child share a vital interest in preventing erroneous termination of parental rights." Moreover, the state must commit, in each case, to making a "reasonable effort" to prevent the need for removal of children from their home, and, if the removal has already occurred, the state must make an effort to reunify the family before proceeding with the final termination of parental rights (*Suter v. Artist*).<sup>25</sup> The foregoing points indicate that the highest court in the land has guided us on the importance of keeping a family intact and not letting a child be deprived of his/her heritage.

Yet, the issues are complex and their resolution does not come easily. Court battles between competing parties take months to years to conclude. The court itself becomes stymied in deciding which bonds should prevail and which should be severed, as well as how to balance the

rights of the biological parents, a third party, and the children themselves.

In the absence of neglect, the rights of the biological parents have been deemed paramount to others' rights, and for that reason the court might ignore the powerful bond that forms between a child and those that care for him/her. For example, in the *DeBoer* case, the emotional relationship between a two-year-old infant and her adoptive parents was severed, the family environment changed, and the young child required to adjust to her new home.

Along the same line of argument, the case of *Suter v. Artist*,<sup>25</sup> as previously mentioned, is somewhat troublesome. From different points of view, the child might remain with an unsuitable, albeit biological, parent for a long time until all "reasonable efforts" have been exhausted, or the biological parent may demand his/her right to "reunification" after the child has formed a new bond with a caregiver.

The input of mental health professionals who practice forensic psychiatry is crucial in helping the court render a proper decision. Many authors such as Schetky,<sup>26</sup> Schetky and Slader,<sup>27</sup> Schoettle,<sup>28</sup> and Quinn and Nye<sup>29</sup> have provided us with guidelines for the role of mental health professionals in those situations. In their views, the assessments should address, among other things, parental ability to provide reasonable continuity, the parents' ability to organize and perform the routine tasks of daily life for themselves and their child, and the appreciation of the child's need.

Another problematic issue is the right

of a father who was not present during the adoption procedure and later appears on the scene after the adoption has been completed claiming he has never renounced his parental rights. In such cases, there is a strong probability that the court will reverse the adoption, regardless of the "best interest of the child" doctrine. These are issues that should be clarified by legislatures within the framework of the state statutes; otherwise the adoptive parents must wonder and fear whether their child will remain their child.

Moreover, the long process of court procedures and appeals creates frustration, fear, anxiety, and feelings of insecurity in a parent who might or is about to lose their parental rights. It would not be unusual for such parents to transfer their emotional reaction to the infant or child, who has no conception of what is happening. In the case of custody reversal, the young child loses his/her trust and experiences identity confusion as his/her environment and even name changes.

The evolving American family confronts us with new ethical, moral, and legal dilemmas that represent a vast and uncharted terrain. There is no path to follow in resolving these issues, and therefore much research is needed. In the meantime, new cases will continue to be brought before the courts. Psychiatrists and other mental health practitioners must familiarize themselves with these issues and participate in mapping this new frontier.

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