

THE MASSACHUSETTS CHILD CUSTODY STANDARD: A NEED FOR REFORM

In the United States, it is generally assumed that children are best reared in a family setting, especially the family setting into which they are born.¹ Our laws thus grant parents broad freedom in deciding how to raise their children.² In general, the parent-child relationship is free from state regulation.³ The state is not, however, powerless to intervene in the parent-child relationship: intervention can and does occur when the child's welfare is threatened by inadequate parenting.⁴

The state has traditionally justified this intervention in the parent-child relationship under the doctrine of *parens patriae*.⁵ This doctrine, which is said to be derived from an English royal prerogative, involves the notion of the state as a substitute parent when the safety or welfare of a child is threatened.⁶ This conception of the state intervening in the parent-child relationship to protect a child's safety remains the primary justification for state involvement in child-custody cases.⁷

¹ S. KATZ, WHEN PARENTS FAIL I (1971).

² Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 989 (1975).

³ One commentator has even suggested that the parent-child relationship is constitutionally protected as a fundamental right. Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213, 240 (1979). While the United States Supreme Court has protected certain family rights as fundamental, the Court has never explicitly applied the fundamental right analysis to the parent-child relationship.

⁴ See, e.g., *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166-67 (1944). The Supreme Court has stated that "the family itself is not beyond regulation in the public interest . . . [a]nd neither rights of religion nor rights of parenthood are beyond limitation." *Id.* at 166.

⁵ See Note, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894, 894 (1966); S. KATZ, *supra* note 1, at 4; Wald, *supra* note 2, at 989. The term is literally defined as parent of the country. BLACK'S LAW DICTIONARY (5th ed. 1979).

⁶ Note, *supra* note 5, at 894. The King of England was, in theory, the "father" of his country, whose duty it was to defend "his" children when their safety or welfare was threatened. *Id.* That duty applied particularly to those of his subjects who could not protect themselves, including children. S. KATZ, *supra* note 1, at 17 n.17. The English case of *Eyre v. Shaftesbury*, 2 P. Wms. 103, 24 Eng. Rep. 659 (1722), is generally regarded as the first judicial recognition of the validity of the doctrine. S. KATZ, *supra* note 1, at 17 n.17. The Court of Chancery, in deciding a guardianship question concerning the Earl of Shaftesbury, declared that "every loyal subject is taken to be within the King's protection, for which reason it is, that idiots and lunatics, who are unable to take care of themselves, are provided for by the King as *pater patriae*, and there is the same reason to extend this care to infants." *Eyre v. Shaftesbury*, 2 P. Wms. at 118, 24 Eng. Rep. at 664.

⁷ Note, *supra* note 5, at 897. Massachusetts' legislature has explicitly recognized the use of the *parens patriae* doctrine to protect the children of the Commonwealth. See MASS. ANN. LAWS ch. 119, § 1 (Michie/Law. Co-op. 1975). See also Note, *King Solomon's Court: Reconciling the Interests of Parent, Child and State Under Mass. Gen. Laws ch. 119*, 15 NEW ENG. L. REV. 853, 856-57 (1980). Section 1 of chapter 119 provides that substitute care is to be provided for children whose parents are temporarily or permanently unable to provide "care and protection for their children." MASS. ANN. LAWS ch. 119, § 1 (Michie/Law. Co-op. 1975). Chapter 119 thus provides broad authorization for the courts to intervene in the parent-child relationship when a child's welfare is threatened. See *id.* §§ 1, 24 and 26. See also *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944) (acting to "guard the general interest in youth's well being," state, may, as *parens patriae*, restrict parents' control over their children in many ways).

Tension, however, often has arisen between the state's duty to protect children under its *parens patriae* power and biological parents' right to rear their children as they see fit.⁸ State statutes authorizing courts to intervene in the parent-child relationship traditionally have granted the judiciary broad, general power to resolve child-custody disputes.⁹ Statutory terms such as "neglect," "parental fitness," or "best interests of the child" cannot be simply or rigidly defined.¹⁰ These standards are subjective and are designed to give trial judges, who are close to the family situation and knowledgeable about the community's resources, discretion in their interpretation and application.¹¹ The legislature thus has left the courts the task of balancing the interests of the state, the child, and the parents in deciding cases involving the temporary and permanent severance of the parent-child relationship.¹²

Against the background of this general statutory grant, the courts have developed two doctrines which address the balance between the state's *parens patriae* duty and the rights of biological parents in child-custody cases. These two doctrines are known as the best interests of the child test and the parental fitness test.¹³ Under the best interests test, courts focus primarily on the interests of the child in deciding whether a parent may retain custody of his or her child.¹⁴ In contrast, under the parental fitness test, also known as the parental right doctrine, biological parents are entitled to the custody of their child unless they are affirmatively shown to be unfit.¹⁵ Under the parental fitness standard, then, the rights of the biological parents are decisive in the disposition of child-custody disputes.¹⁶

Massachusetts purports to use a "dual" standard in child-custody disputes, which considers both the fitness of the natural parents and the best interests of the child. This article argues, however, that the Commonwealth, in recent years, has adopted a strict parental right approach to resolving these disputes. The Supreme Judicial Court has established a presumption that a child's interests, except in the clearest cases of parental unfitness, are best served by the child remaining with or being returned to his or her natural family.¹⁷ In accord with this presumption, the court has refused to recognize the validity of psychological parenthood¹⁸ and has ruled that a statutory presumption favoring adoption of children who have been with their foster parents for more than one

⁸ See, e.g., *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 165-66 (1944); Note, *supra* note 3, at 214.

⁹ See S. KATZ, *supra* note 1, at 58-65.

¹⁰ *Id.* at 59.

¹¹ *Id.*

¹² *Id.* at 58-65.

¹³ Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 152 (1963).

¹⁴ *Id.* at 156.

¹⁵ *Id.* at 152-53.

¹⁶ See *id.* at 155.

¹⁷ See Petition of the Department of Public Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 588-89, 421 N.E.2d 28, 36-37 (1981).

¹⁸ See *Care and Protection of Three Minors*, 392 Mass. 704, 716 n.18, 467 N.E.2d 851, 860 n.18 (1984). Psychological parenthood is the term used to describe the process where children are separated from their natural parents and subsequently form parental bonds with their foster parents. See *id.* For a discussion of psychological parenthood see *infra* notes 217-35 and accompanying text.

year is unconstitutional.¹⁹ Massachusetts' approach to child-custody disputes contrasts markedly with that of many other states. In these jurisdictions, recognizing a child's need for continuity and emotional stability, courts have accepted the concept of psychological parenthood and have established fixed time periods within which natural parents can regain their children who have been placed with foster parents.²⁰

This note will trace the development of the present Massachusetts standard for intervention in the parent-child relationship and will suggest that the Supreme Judicial Court's use of the parental right doctrine favors parental rights at the expense of the welfare of Massachusetts' children. It also will suggest that Massachusetts adopt a standard which makes the physical and psychological interests and welfare of the child in custody disputes the paramount consideration of Massachusetts' courts. This note begins by tracing the historic development and use of Massachusetts' "dual" standard for intervention in the parent-child relationship. Against this background, the note examines the Supreme Judicial Court's present interpretation of the standard as evidenced by two recent decisions. Next, a critique and evaluation of the Massachusetts standard, as well as alternatives adopted by other states, is presented. In conclusion, the note advances a proposal for legislative change in Massachusetts which is consistent with the mandate implicit in the state's *parens patriae* power.

I. THE DEVELOPMENT OF THE MASSACHUSETTS STANDARD

The *parens patriae* doctrine has long been employed by Massachusetts' courts to uphold the right of the state to intervene in the parent-child relationship. In 1894, in *In re Wares*,²¹ the Supreme Judicial Court upheld the constitutionality of a child-custody statute which allowed the state to take custody of children when their welfare or best interests were threatened by their natural parents.²² According to the court, the state's intervention in the parent-child relationship was justified by its *parens patriae* power to protect children.²³ In 1943, in *Commonwealth v. Prince*, the court relied on the state's authority as *parens patriae* to uphold the validity of Massachusetts' child-labor laws, which regulated the employment of children by forbidding their participation in selling religious literature.²⁴ The court ruled that since the state is responsible for protecting the welfare of children, the legislation was justified.²⁵ More recently, the court affirmed the vitality of the *parens patriae* doctrine in *Custody of a Minor*.²⁶ In this case, the court observed that "the State has a long-standing interest in protecting the welfare of children living within its borders."²⁷ Hence, the *parens patriae* doctrine has withstood constitutional

¹⁹ See Petition of the Department of Social Services to Dispense with Consent to Adoption, 389 Mass. 793, 802-03, 452 N.E.2d 497, 503 (1983).

²⁰ For an example of such a state, see *infra* notes 291-301 and accompanying text.

²¹ *In re Wares*, 161 Mass. 70, 74, 36 N.E. 586, 587 (1894).

²² *Id.* at 74, 36 N.E. at 587.

²³ *Id.*

²⁴ See *Commonwealth v. Prince*, 313 Mass. 223, 231, 46 N.E.2d 755, 758 (1943). This case was considered by the United States Supreme Court. The Supreme Court upheld the state's authority as *parens patriae* to protect the welfare of children. See *Prince v. Commonwealth v. Massachusetts*, 321 U.S. 158, 167 (1944).

²⁵ *Prince*, 313 Mass. at 231, 46 N.E.2d at 758.

²⁶ *Custody of a Minor*, 375 Mass. 733, 379 N.E.2d 1053 (1978).

²⁷ *Id.* at 754, 379 N.E.2d at 1066.

challenge in Massachusetts and is recognized to be both vital and necessary in protecting the welfare of children in child-custody disputes. Thus, as interpreted by the courts, the doctrine gives the state a broad "right" to intervene in the parent-child relationship when a child's welfare is threatened.²⁸

The practical decision as to when intervention in a particular parent-child relationship is justified, however, rests mainly on legal standards formulated by the Massachusetts state legislature.²⁹ In Massachusetts, the legislature has outlined the state's authority in this area in chapter 119.³⁰ This statute provides that any person who has reason to believe that a child is being neglected or is not receiving proper care can file a care and protection petition with the Juvenile Court requesting intervention in the parent-child relationship.³¹ If the court finds that the allegations in the petition have been proved,³² the child may be committed to the custody of the Department of Social Services³³ (the department) until the child is either eighteen or until, in the opinion of the department, the object of his or her commitment has been achieved.³⁴ The judge, however, is given

²⁸ See *id.*

²⁹ See MASS. ANN. LAWS ch. 119, §§ 24, 26 (Michie/Law. Co-op. Supp. 1986). See also S. KATZ, *supra* note 1, at 56. Professor Katz has observed that child-custody statutes provide a legal standard which essentially incorporates the community's norm of adequate parenting by defining when parents are inadequate to provide and care for their children. *Id.* at 57. Professor Katz maintains that these statutes essentially attempt to delineate unacceptable child-rearing practices. *Id.* The approach of the neglect statute is therefore negative: it defines what the state considers to be undesirable parenting practices while leaving the "desired" approach to child-rearing to be filled in by inference. *Id.*

³⁰ See MASS. ANN. LAWS ch. 119 (Michie/Law. Co-op. Supp. 1986).

³¹ *Id.* § 24. Section 24 provides in pertinent part that

[U]pon the petition of any person alleging on behalf of a child under the age of eighteen years within the jurisdiction of said court that said child is without: (a) necessary and proper physical or educational care and discipline or; (b) is growing up under conditions or circumstances damaging to the child's sound character development or; (c) who lacks proper attention of parent, guardian with care and custody, or custodian or; (d) whose parents, guardian or custodian are unwilling, incompetent or unavailable to provide any such care, may issue a precept to bring such child before said court, shall issue a notice to the department, and shall issue summonses to both parents of the child to show cause why the child should not be committed to the custody of the department or other appropriate order made.

Id.

³² The court must find that the child before it is a victim of parental neglect as defined by MASS. ANN. LAWS ch. 119, § 24 (Michie/Law. Co-op. Supp. 1986). See *id.*

³³ The Department of Social Services was, prior to 1978, known as the Department of Public Welfare. See ch. 119, § 26(2)(iii) (Michie/Law. Co-op. Supp. 1986).

³⁴ *Id.* Section 26 provides in pertinent part that

[i]f the court finds the allegations in the petition proved within the meaning of this chapter, it may adjudge that said child is in need of care and protection and may commit the child to the custody of the department until he becomes eighteen years of age or until in the opinion of the department the object of his commitment has been accomplished, whichever occurs first; or make any other appropriate order with reference to the care and custody of the child as may conduce to his best interests, including but not limited to any one or more of the following: —

(1) It may permit the child to remain with his parents, guardian, or other custodian, subject to conditions and limitations which the court may prescribe including supervision as directed by the court for the care and protection of the child.

(2) It may, subject to such conditions and limitations as it may prescribe, transfer temporary legal custody to any of the following: —

broad discretion in his or her disposition of the petition. The statute authorizes the judge to "make any other appropriate order with reference to the care and custody of the child as may conduce to his best interests."³⁵ In general, the court is faced primarily with the choice of leaving the child with his parents, subject to supervision by the department,³⁶ or transferring temporary legal custody to an individual, a licensed private agency, or the Department of Social Services.³⁷ Once a case has been decided, the court may be petitioned every six months for a review and redetermination of the "current needs" of the child.³⁸

A care and protection petition, if granted, allows the state to intrude into the familial sphere. Neglectful parents may be subject to supervision by the Department of Social Services or may lose temporary legal custody of the child.³⁹ Parents do not, however, lose all parental rights with regard to their children under chapter 119. Transfer of legal custody, usually to foster parents, is statutorily defined as "temporary."⁴⁰ Once the child has been removed from its natural parents, the state is required to make every effort to reunite the family.⁴¹

Unlike the foster parent-child relationship, which is intended to be temporary, the adoptive parent-child relationship is permanent and only exists if the rights of the natural parents have been terminated.⁴² In general, under chapter 210, Massachusetts requires that the natural parents give written consent to an adoption.⁴³ Under certain circumstances, however, that consent is not required.⁴⁴ The court may dispense with the natural parents' consent if it finds that doing so would be "in the best interests of the child."⁴⁵

(i) any individual who, after study by a probation officer or other person or agency designated by the court, is found by the court to be qualified to give care to the child;

(ii) any agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child;

(iii) the department of social services.

(3) It may order appropriate physical care including medical or dental care.

On any petition filed in any court pursuant to this section, the department, parents, person having legal custody of, counsel for a child, the probation officer, guardian or guardian ad litem may petition the court not more than once every six months for a review and redetermination of the current needs of such child whose case has come before the court.

Id.

³⁵ *Id.*

³⁶ *Id.* § 26(1).

³⁷ *Id.* § 26(2)(i)-(iii).

³⁸ *Id.* § 26(3). This provision is consistent with the overall purpose of chapter 119, which is to "provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual and moral development." *Id.* § 1. The state's first objective, however, is the "strengthening and encouragement of family life for the protection and care of children." *Id.* Thus, substitute care is only to be provided *after* the state has attempted to help strengthen the family and only when such help has not altered the neglect situation.

³⁹ *Id.* § 26(2)-(3).

⁴⁰ *Id.* § 26(2).

⁴¹ See *id.* § 1. See also *Care and Protection of Three Minors*, 392 Mass. 704, 715, 467 N.E.2d 851, 859-60 (1984) (quoting *Petition of the Department of Public Welfare to Dispense with Consent to Adoption*, 376 Mass. 252, 266, 381 N.E.2d 565, 573 (1978)).

⁴² See S. KATZ, *supra* note 1, at 115.

⁴³ See MASS. ANN. LAWS ch. 210, § 2 (Michie/Law. Co-op. 1981).

⁴⁴ See *id.* § 3.

⁴⁵ See *id.* § 3(a)(ii).

In considering whether the best interests of the child will be served by termination of the parent-child relationship, the court is required to consider the fitness of the natural parents.⁴⁶ If the parents are unfit, their consent to adoption will be waived and, in most cases, their rights to their child will be terminated by the subsequent adoption of the child.⁴⁷ Thus, a petition under chapter 210, section 3, if allowed, will usually result in a permanent severance of the parent-child relationship. Once the child has been adopted, the natural parents have lost forever any rights to that child.⁴⁸

Thus, the legal standard which the Massachusetts legislature has provided for determining whether the state should intervene in the parent-child relationship considers both the best interests of the child and the fitness of the natural parents.⁴⁹ The combination of these two standards has long been applied in Massachusetts to cases involving the care and protection of children.⁵⁰ The parental fitness test provides that natural parents are entitled to custody of their child unless they are affirmatively shown to be unfit.⁵¹ Historically, the parental fitness test seems to have evolved from the notion of the child as property.⁵² The disappearance of this notion and the rise of the *parens patriae* doctrine have led courts to place an increasing emphasis on the welfare of the child in custody cases.⁵³ Theoretically, then, under the best interests standard, the rights of the child are the courts' paramount consideration while, under the parental fitness test, the

⁴⁶ See *id.* § 3(c). Section 3(c) provides in relevant part that
[i]n determining whether the best interests of the child will be served by issuing a decree dispensing with the need of consent as permitted under paragraph (b), the court shall consider the ability, capacity, fitness and readiness of the child's parents . . . to assume parental responsibility, and shall also consider the plan proposed by the department or other agency initiating the petition.

Id.

⁴⁷ Allowance of a petition to dispense with parental consent to adoption is *not*, however, final approval of the department's plans. Petition of the Department of Public Welfare to Dispense with Consent to Adoption, 376 Mass. 252, 262 n.2, 381 N.E.2d 565, 571 n.2 (1978). The actual adoption proceeding is separately conducted under ch. 210, § 5A. See MASS. ANN. LAWS ch. 210, § 5A (Michie/Law. Co-op. 1981).

⁴⁸ See MASS. ANN. LAWS ch. 210, § 6 (Michie Co-op 1981). The child's rights with regard to his parents are also terminated. For example, in most cases, the child loses his right of inheritance. See *id.* § 7.

⁴⁹ See MASS. ANN. LAWS ch. 119, § 26 (Michie/Law. Co-op. Supp. 1986); MASS. ANN. LAWS ch. 210, § 3(c) (Michie/Law. Co-op. 1981). Chapter 210, § 3 provides that the best interests of the child should guide the court in deciding whether to grant a petition to dispense with parental consent to adoption. MASS. ANN. LAWS ch. 210, § 3 (Michie/Law. Co-op. 1981). The statute, however, defines the child's best interests in terms of the fitness of his parents. *Id.* § 3(c). Chapter 119, § 26 uses the best interests standard but, section 1 of Chapter 119, provides that substitute care should be provided in the "event of the absence, temporary or permanent inability or unfitness of parents to provide care and protection for their children." MASS. ANN. LAWS ch. 119, § 1 (Michie/Law. Co-op. 1975).

⁵⁰ See, e.g., *In re Kauch*, 358 Mass. 327, 329, 264 N.E.2d 371, 373 (1970) (guardianship petition); *Duclos v. Edwards*, 344 Mass. 544, 546, 183 N.E.2d 708, 709 (1962) (guardianship petition); *Sinson v. Meegan*, 318 Mass. 459, 462-63, 62 N.E.2d 113, 115 (1945) (habeas corpus proceeding); *Richards v. Forrest*, 278 Mass. 547, 551, 180 N.E. 508, 510 (1932) (guardianship petition); *Purinton v. Jamrock*, 195 Mass. 187, 201, 80 N.E. 802, 805 (1907) (adoption proceeding).

⁵¹ Note, *supra* note 13, at 152-53. See, e.g., *Care and Protection of Three Minors*, 392 Mass. 704, 711-12, 467 N.E.2d 851, 857 (1984). For a discussion of the parental fitness test see *infra* notes 197-204, and accompanying text.

⁵² S. KATZ, *supra* note 1, at 4.

⁵³ *Id.*; Note, *supra* note 13, at 155.

rights of the parents — the “blood tie” — constitutes the decisive element in the decision-making process.⁵⁴

The best interests and parental fitness tests focus on different aspects of the parent-child relationship in resolving child-custody disputes. The best interests test focuses on the rights of the neglected children, while the parental fitness test focuses on the rights of the natural parents. This difference in emphasis leads to different results.⁵⁵ The state is therefore more likely to be successful in intervening in the parent-child relationship under the best interests standard than it is under the parental fitness test.⁵⁶

The legislature historically has given wide discretion to trial-court judges to decide each child-custody case on its facts and to develop their own standards as to what constitutes a “neglected” child. While it has always been clear in Massachusetts that, under certain circumstances, the state can intervene to protect the welfare of children, the judicial justification for such intervention has varied. Moreover, as the state has assumed ever-increasing responsibility for the care and protection of “neglected” children,⁵⁷ the legislative standard for such intervention and its subsequent judicial interpretation have evolved.

In Massachusetts, the Supreme Judicial Court has long struggled with balancing the often competing interests of natural parent and child in custody disputes. The early decisions of the Supreme Judicial Court favored the best interests of the child standard. In 1907, for example, in *Purinton v. Jamrock*,⁵⁸ the Supreme Judicial Court stated that parents did not have an absolute right to custody of their children.⁵⁹ According to the court, a parent's right would not be enforced to the detriment of the happiness or well-being of the child.⁶⁰ The *Purinton* court further held that the right to custody was conditioned on the ability or fitness of the parents to provide for and protect their child.⁶¹

The 1932 landmark case of *Richards v. Forrest*,⁶² a guardianship proceeding, brought into clearer focus the conflict between the parental fitness standard and the best interests of the child standard.⁶³ The guardianship statute allowed the court to give custody and care of the child to petitioning guardians if the natural parents were found “unfit to have such custody.”⁶⁴ Yet, despite this statutorily defined standard of unfitness, the court

⁵⁴ See *Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption*, 367 Mass. 631, 647–51, 328 N.E.2d 854, 863–65 (1975) (Hennessey, J., dissenting).

⁵⁵ *Id.* at 648, 328 N.E.2d at 864 (Hennessey, J., dissenting).

⁵⁶ See *id.*

⁵⁷ Even anti-interventionist commentators recognize that the state has assumed an ever increasing role in child-rearing. Wald, *supra* note 2, at 989 n.25. The ancient notion of the child as the private property of its parents has lost much of its vitality. S. Katz, *supra* note 1, at 4.

⁵⁸ 195 Mass. 187, 80 N.E. 802 (1907).

⁵⁹ *Id.* at 201, 80 N.E. at 805.

⁶⁰ *Id.*

⁶¹ *Id.*

The right of the parents is not an absolute right of property, but is in the nature of a trust reposed in them, and is subject to the correlative duty to care for and protect the child; and the law secures their right only so long as they shall discharge their obligation.

Id.

⁶² 278 Mass. 547, 180 N.E. 805 (1932).

⁶³ See *id.* at 554, 180 N.E. at 511.

⁶⁴ *Id.* at 552, 180 N.E. at 510 (quoting MASS. ANN. LAWS ch. 201, § 5 (Michie/Law. Co-op. 1981)). The court defined “unfit” as follows:

concluded that "the first and paramount duty of the courts is to consult the welfare of the child . . . [t]o that governing principle every other public and private consideration must yield."⁶⁵ The court ruled that the welfare of the child could not properly have been ignored by directing attention exclusively to the abstract question whether the parents were unfit.⁶⁶ While the guardianship statute directed the court to consider only the fitness of the parents in deciding whether to intervene in the parent-child relationship, the court indicated that precedent dictated that the term "fitness" be interpreted in terms of the welfare or best interests of the child.⁶⁷ Hence, after the *Richards* decision, the parental fitness and best interests standards were intertwined in Massachusetts. As the *Richards* court noted, however, the court's paramount consideration was still the welfare of the child.⁶⁸

In 1975, in *Petition of The New England Home For Little Wanderers to Dispense with Consent to Adoption*,⁶⁹ the Supreme Judicial Court formally adopted an approach to child-custody adjudication which considered both the fitness of the biological parents and the best interests of the child.⁷⁰ In that case, the mother of the child argued that the court should apply the parental fitness test rather than the best interests standard in deciding whether to grant a petition dispensing with her consent to adoption.⁷¹ The court rejected

In general, the word means unsuitable, incompetent, or not adapted for a particular use or service. As applied to the relation of rational parents to their child, the word usually although not necessarily imports something of moral delinquency. Violence of temper, indifference or vacillation of feeling toward the child, or inability or indisposition to control unparental traits of character or conduct, might constitute unfitness. So, also, incapacity to appreciate and perform the obligations resting upon parents might render them unfit, apart from other moral defects. Parents are the natural guardians of their children. They are under the legal as well as the moral obligation to support and educate them and to bring them up to be healthy, intelligent and virtuous . . . citizens.

Id. at 552-53, 180 N.E. at 510-11.

⁶⁵ *Id.* at 553, 180 N.E. at 511.

⁶⁶ *Id.* at 554, 180 N.E. at 511. The court stated that "[t]he unfitness of parents in this section of the statute must be determined with respect both to their own character, temperament, capacity, and conduct, and to the welfare of the child in connection with its age, environment and affections."

Id.

⁶⁷ *Id.* at 553, 180 N.E. at 511.

⁶⁸ *Id.* From 1945 to 1975 the court consistently reaffirmed this notion in child-custody cases. See, e.g., *In re Kauch*, 358 Mass. 327, 329, 264 N.E.2d 371, 373 (1970) (in deciding guardianship petition, court must consider best interests of the child in determining whether parents are unfit); *Duclos v. Edwards*, 344 Mass. 544, 546, 183 N.E.2d 708, 709 (1962) (unsuitability of guardian must be measured with reference primarily to the welfare of the child); *Stinson v. Meegan*, 318 Mass. 459, 462-63, 62 N.E.2d 113, 115 (1945) (in habeas corpus proceeding involving minor child, the welfare of the child was the court's primary consideration).

⁶⁹ 367 Mass. 631, 328 N.E.2d 854 (1975).

⁷⁰ *Id.* at 641, 328 N.E.2d at 860. In *Little Wanderers*, the mother voluntarily placed her newborn baby with a child-care institution. *Id.* at 633-34, 328 N.E.2d at 856. Ten months later, the institution filed a petition under chapter 210, § 3 to dispense with the mother's consent to adoption. *Id.* at 631-32, 328 N.E.2d at 855. Chapter 210, § 3 provides that petitions dispensing with parental consent to adoption shall be granted if the court finds that doing so would serve the "best interests of the child." MASS. ANN. LAWS ch. 210, § 3 (Michie/Law, Co-op. 1981).

⁷¹ *Little Wanderers*, 367 Mass. at 636, 328 N.E.2d at 858. The mother argued that since the agency's custody had originated from her voluntary consent, and, since she subsequently withdrew that consent, she therefore had never relinquished legal custody of the child to the child-care

the mother's arguments and ruled that both the best interests and parental fitness standards were to be applied in deciding child-custody cases concerning neglected children.⁷² According to the court, the best interests of the child were to be considered in determining whether the parents were unfit.⁷³ The court stated that the two standards "reflect different degrees of emphasis on the same factors . . . [and] are not separate and distinct but cognate and connected."⁷⁴ The court did, however, reject the notion of "precipitate" attempts to dispense with parental consent to adoption merely because a foster care situation had occurred.⁷⁵ The court ruled that before parental consent to adoption could be waived parents must be shown "to have grievous shortcomings or handicaps that would put the child's welfare in the family milieu much at hazard."⁷⁶ Although the best interests standard was still the paramount consideration of the court,⁷⁷ the rights of the natural parents, the court found, were an important secondary consideration in child-custody disputes.⁷⁸ While the exact interrelationship between the two standards was not explained, the court indicated that the best interests of the child was still to be the primary consideration of the courts in deciding child custody cases.⁷⁹

The dissent in *Little Wanderers*, written by Justice Hennessey, flatly disagreed with the majority's equation of the two standards.⁸⁰ Justice Hennessey maintained that, under a best interests test, the rights of the parents were subordinated to the rights of the child.⁸¹ The best interests standard was, he indicated, less protective of parents' rights than the parental fitness standard.⁸² According to Justice Hennessey, the two standards brought to "the fore considerations different in kind and degree."⁸³ Justice Hennessey stated that he would give the mother's rights in *Little Wanderers* more weight than they were accorded by the majority's use of what was essentially the best interests of the child standard.⁸⁴ He asserted, in accord with the parental right doctrine, that a petition to

institution. *Id.* She thus contended that the chapter 210, § 3 "best interests" standard should not be applied to her case: she maintained that the best interests test should only be applied when the parent has already been deprived of custody of her child by court action. *Id.* In cases where the child has been voluntarily relinquished, she asserted that a showing of parental unfitness, like that required under the guardianship statute, was necessary to deprive a parent of custody. *Id.*

⁷² *Id.* at 641, 328 N.E.2d at 860.

⁷³ *Id.* at 641 (quoting *Kauch*, 358 Mass. at 329, 264 N.E.2d at 373).

⁷⁴ *Little Wanderers*, 367 Mass. at 641, 328 N.E.2d at 860. The court went so far as to conclude that the petition would have been granted under *both* the best interests of the child and the parental fitness tests. *Id.* at 645, 328 N.E.2d at 862-63.

⁷⁵ *Id.* at 646, 328 N.E.2d at 863.

⁷⁶ *Id.*

⁷⁷ *Id.* at 640, 328 N.E.2d at 860.

⁷⁸ *Id.* at 646, 328 N.E.2d at 863.

⁷⁹ *Id.* at 641, 328 N.E.2d at 860.

⁸⁰ *Id.* at 647, 647-48 n.1, 328 N.E.2d at 864 n.1 (Hennessey, J., dissenting).

⁸¹ *Id.* at 648, 328 N.E.2d at 864 (Hennessey, J., dissenting).

⁸² *Id.* at 648, 650, 328 N.E.2d at 864, 865 (Hennessey, J., dissenting).

Under a best interests test the rights of the parent are likely to be heavily subordinated to those of the child while under an unfitness test the focus of inquiry is more on the conduct and character of the parent as it affects the child, although, of course, unfitness involves the interests of the child.

Id. at 648, 328 N.E.2d at 864 (Hennessey, J., dissenting).

⁸³ *Id.* at 650, 328 N.E.2d at 865 (Hennessey, J., dissenting).

⁸⁴ *Id.*

dispense with parental consent to adoption should be denied unless the parents have been shown to be unfit.⁸⁵ This finding, he maintained, was not supported by the facts in *Little Wanderers*.⁸⁶

Justice Hennessey thus advocated a less interventionist approach to state involvement in the parent-child relationship than did the *Little Wanderers* majority. By focusing primarily on the fitness of the parents, rather than on the welfare of the child, Justice Hennessey indicated a desire to tip the balance between child, state, and parents in "favor" of the parents.⁸⁷ Under the standard advocated by Justice Hennessey, the rights of the child would be subordinated to the rights of the parents.

In the years between 1975 and the present, Justice Hennessey's dissenting viewpoint became the majority position of the Supreme Judicial Court in all child-custody cases.⁸⁸ This shift in the child-custody standard occurred gradually.⁸⁹ For example, in the 1979 case of *Custody of a Minor (1)*,⁹⁰ the Supreme Judicial Court focused its inquiry on the fitness of the parent rather than on the welfare of the child. Chief Justice Hennessey, writing for the court, held that a finding of "current parental unfitness" was required in a proceeding in which parents were threatened with the loss of their children.⁹¹ While

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *id.* Justice Hennessey concluded that he "would give the mother's rights in this case more weight than accorded them under the best interests standard." *Id.*

⁸⁸ See *supra* notes 69-87 and accompanying text and *infra* notes 89-106 and accompanying text for a discussion of the shift in the majority's position. Seven months after the court's decision in *Little Wanderers*, Justice Hennessey became Chief Justice of the Supreme Judicial Court.

⁸⁹ In 1978, for example, Chief Justice Hennessey applied the dual standard of the *Little Wanderers* majority to a petition to dispense with parental consent to adoption. *Petition of the Department of Public Welfare to Dispense with Consent to Adoption*, 376 Mass. 252, 265-66, 381 N.E.2d 565, 572-73 (1978). See ch. 210, § 3. The court upheld the decree granting the petition pursuant to chapter 210, section 3. 376 Mass. at 256, 381 N.E.2d at 571. The court rejected the parents' arguments that intervention in this case would violate the protection afforded the family by the United States Constitution and both federal and state statutes, *id.* at 256-57, 381 N.E.2d at 568, and firmly upheld the state's authority to intervene in the parent-child relationship when the natural parents were unable to assume responsibility for their children and adoption would serve the child's best interests. *Id.* at 263, 381 N.E.2d at 572.

It should be observed that the mother in this case had physically abused her child and had been diagnosed as a borderline psychotic. *Id.* at 257, 381 N.E.2d at 565. At one point, she had stated that "she would kill the babies." *Id.* at 258, 381 N.E.2d at 565. Thus, in a case so clearly calling for state intervention, the court may have been reluctant to concentrate on the fitness of the mother at the expense of the child's welfare.

⁹⁰ 377 Mass. 876, 389 N.E.2d 68 (1979). In this case, the Department of Public Welfare petitioned the municipal court, under chapter 119, § 24, to provide care and protection for a mother's newly born baby. *Id.* at 877, 389 N.E.2d at 70. The department's petition was based on the mother's long history of neglectful parenting with her other children. *Id.* at 878-79, 389 N.E.2d at 71.

⁹¹ *Id.* at 880, 389 N.E.2d at 72. It is not at all clear upon what precedent Justice Hennessey based this new formulation of the dual standard proposed in *Little Wanderers*. He stated that [w]hile there may have been some question in prior years regarding the kinds of evidence sufficient to prove cases, like those under c. 119, where a parent stands to lose custody of a child . . . it is now clear that the Commonwealth may not attempt to force the breakup of a natural family without an affirmative showing of parental unfitness. *Little Wanderers*, *supra* at 641-42. *Quillon v. Walcott*, *supra* at 225. *Id.* at 882, 389 N.E.2d at 73.

admitting that some confusion had existed in the past regarding the proper standard to be used in child-custody proceedings, the court maintained that it was now clear that the state could not intervene in the parent-child relationship without an affirmative showing of parental unfitness.⁹² The court briefly mentioned the best interests test. The court asserted that since the interests of the child were best secured in the stable, continuous environment of his or her own family, state intervention in that relationship was justified only when parents were unable to provide for their children's care and protection.⁹³

In *Custody of a Minor (1)*, the Supreme Judicial Court essentially adopted a strict parental right standard which made it more difficult for the state to intervene in the parent-child relationship.⁹⁴ The court indicated that Massachusetts courts should presume that the best interests of the child were served in his or her biological family.⁹⁵ Judges in child-custody cases, the court ruled, must enter "specific and detailed" findings of fact which "persuasively" show the necessity of removing the child from his or her parents.⁹⁶ Thus, the less interventionist approach to child custody that Justice Hennessey had advocated in dissent in *Little Wanderers* had now become the majority position of the Supreme Judicial Court.

A few months after its decision in *Custody of a Minor (1)*, the Supreme Judicial Court, in *Custody of a Minor (2)*,⁹⁷ attempted to demonstrate that the parental fitness standard was still related to the welfare of the child. The court ruled that the unfitness of the parents must be shown to "endanger the well-being of [the] child."⁹⁸ The court asserted, however, that only "grievous" shortcomings which seriously endangered the child's welfare would constitute parental unfitness.⁹⁹ Thus, while the court re-established, to some extent, the best interests of the child element of the dual standard proposed in *Little Wanderers*, it continued to focus primarily on parental fitness as the critical element of that standard.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ The Supreme Judicial Court's use of the Supreme Court's landmark decision, *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944), illustrates the court's desire to bring a less interventionist approach to child-custody cases. In *Custody of a Minor (1)*, the court quoted a portion of the *Prince* opinion which noted the existence of a "private realm of family life which the state cannot enter." 377 Mass. at 880, 389 N.E.2d at 72 (quoting *Prince*, 321 U.S. at 166). In the past, however, the court had used the *Prince* opinion to justify state intervention in the parent-child relationship. See, e.g., *Petition of the Department of Public Welfare to Dispense with Consent to Adoption*, 376 Mass. 252, 265, 381 N.E.2d 565, 572 (1978); *Little Wanderers*, 367 Mass. at 642, 328 N.E.2d at 861. While the *Prince* Court did recognize that the family, in general, does have a right to privacy, it also recognized that the family was not "beyond regulation in the public interest." *Prince*, 321 U.S. at 166. Thus, the Supreme Judicial Court's use of *Prince* can, at best, only be termed selective.

⁹⁵ *Custody of a Minor (1)*, 377 Mass. at 882, 389 N.E.2d at 73.

⁹⁶ *Id.* at 886, 389 N.E.2d at 75. The court, in *Custody of a Minor (1)*, upheld the judge's custody award to the department. *Id.*

⁹⁷ 378 Mass. 712, 393 N.E.2d 379 (1979).

⁹⁸ *Id.* at 722, 393 N.E.2d at 385. "The crucial questions are: From what shortcomings or handicaps does the parent suffer that would endanger the well being of this child if exposed and has the necessity of permanently removing the child from its parent persuasively been shown?" *Id.* Thus, the court indicated that the well-being of the child should be defined as a function of the fitness of the child's parent. *Id.*

⁹⁹ See *id.* at 719, 722, 393 N.E.2d at 383, 385.

This approach was reinforced in a 1980 decision, *Bezio v. Patenaude*.¹⁰⁰ In *Bezio*, the court, faced with a petition by a mother to revoke guardianship,¹⁰¹ stated that the critical question was whether the natural parents were "currently fit to further the welfare and best interests of the child."¹⁰² According to the court, "[n]either the 'parental fitness' test nor the 'best interests of the child' test is properly applied to the exclusion of the other."¹⁰³ The court therefore reversed the lower court's denial of the mother's petition to remove the guardian and regain custody of her children and remanded the case to the probate court for a determination of whether the mother was currently fit to advance the best interests of her children.¹⁰⁴

In child-custody cases decided after *Little Wanderers*, the Supreme Judicial Court thus exhibited an increasing reluctance to intervene in the parent-child relationship. In these cases, the court changed the emphasis of its standard for determining whether the state's intervention in the parent-child relationship was proper: if the natural parents were "fit," then the child's interests were best served with them. While this test appeared nominally to incorporate both the parental fitness and best interests standards, in applying the test, the court focused primarily on parental fitness.

Finally, in 1981, in *Petition of the Department of Public Welfare to Dispense With Consent to Adoption*,¹⁰⁵ the court explicitly recognized the primacy of parental rights in child-custody cases.¹⁰⁶ While the welfare of the child was still a factor, the court presumed that a child's interests were best served in the family environment provided by the child's natural parents.¹⁰⁷ For this reason, the court noted formally that parental rights, rather than the rights of the child, should be the court's primary consideration in deciding whether the state has properly exercised its *parens patriae* power.¹⁰⁸ According to the court, the unfitness standard must be applied whenever the state seeks to intervene in any manner in the parent-child relationship.¹⁰⁹ By continuing to define the best interests of the child in terms of the fitness of his or her parents, the court thereby limited state intervention in the parent-child relationship and effectively reduced the standard for intervention to the parental fitness test.¹¹⁰

Furthermore, the court refused to recognize a "per se" rule that prospective adoptive foster parents, who have effectively become a "parent" to the child, should under certain

¹⁰⁰ 381 Mass. 563, 410 N.E.2d 1207 (1980).

¹⁰¹ The custody provision of the guardianship statute requires a showing of parental unfitness in order to deprive the parent of custody. See MASS. ANN. LAWS ch. 210, § 5 (Michie/Law. Co-op. 1981).

¹⁰² *Bezio*, 381 Mass. at 576, 410 N.E.2d at 1214.

¹⁰³ *Id.* at 576-77, 410 N.E.2d at 1214-15.

¹⁰⁴ *Id.* at 579, 410 N.E.2d at 1216.

¹⁰⁵ 383 Mass. 573, 421 N.E.2d 28 (1981).

¹⁰⁶ *Id.* at 587-93, 421 N.E.2d at 36-38.

¹⁰⁷ *Id.* at 588, 421 N.E.2d at 36. The court cited Professor Mnookin for the proposition that disruption of the parent-child relationship carries significant risks for the child. *Id.* (citing Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 265 (1975)).

¹⁰⁸ *Petition*, 383 Mass. at 588-89, 421 N.E.2d at 37.

¹⁰⁹ *Id.* at 589, 421 N.E.2d at 37. The court included in this statement the care and protection statute, see MASS. ANN. LAWS ch. 119, §§ 23-29 (Michie/Law. Co-op. Supp. 1986), the adoption statute, see MASS. ANN. LAWS ch. 210, § 3 (Michie/Law. Co-op. 1981), and the guardianship statute, see *id.* § 5.

¹¹⁰ See 383 Mass. at 589, 421 N.E.2d at 37. The court stated that unfitness was the "standard by which we measure the circumstances within the family as they affect the child's welfare." *Id.*

circumstances automatically prevail in a custody dispute with the child's natural parents.¹¹¹ In other words, the court rejected the notion of mandatory, fixed time periods within which natural parents would be allowed to regain their children presently living with foster parents.¹¹² Thus, in *Petition of the Department of Public Welfare to Dispense with Consent to Adoption*, although the child in question had been with her foster parents for four years,¹¹³ and despite the existence of evidence which suggested parental unfitness, the court held that the lower court judge had failed to make the requisite finding of parental unfitness and rejected the judge's "wholesale incorporation" of a psychiatrist's testimony, which had indicated that a break in the child's relationship with his foster parents would be "devastating" to the child.¹¹⁴ The court once again sent a message to the lower courts that consideration of the child's best interests, without specific and detailed findings of parental unfitness, would be insufficient to justify state intervention in the parent-child relationship.¹¹⁵

In 1983, the Supreme Judicial Court re-examined the interrelationship between the best interests standard and the parental fitness test,¹¹⁶ and further restricted the rights

¹¹¹ *Id.* at 591 n.16, 421 N.E.2d at 38 n.16. The court's reluctance to recognize the importance of psychological bonding by children to foster parents goes against psychological theory and is contrary to the court's central premise that the child's interests are best served in a "stable, continuous family environment." *Id.* at 588, 421 N.E.2d at 36.

¹¹² *See id.* at 591 n.16, 421 N.E.2d at 38 n.16.

¹¹³ *Id.* at 574, 421 N.E.2d at 29.

¹¹⁴ *Id.* at 593, 421 N.E.2d at 39. At the time of birth, the child's mother was in the Massachusetts Correctional Institution at Framingham. *Id.* at 574, 421 N.E.2d at 29. The child had been with her prospective foster parents since she was two years old. *Id.* They were, in effect, the only parents she had ever known.

¹¹⁵ *See id.* at 574, 421 N.E.2d at 29. *See also* *Petition of the Department of Social Services to Dispense with Consent to Adoption*, 391 Mass. 113, 119, 461 N.E.2d 186, 190 (1984). The court reversed the lower court's decree granting the petition and remanded the case for further findings as to the parent's unfitness. *Petition*, 383 Mass. at 594, 421 N.E.2d at 40.

¹¹⁶ *See* *Custody of a Minor*, 389 Mass. 755, 765, 452 N.E.2d 483, 489 (1983); *Petition of the Department of Social Services to Dispense with Consent to Adoption*, 389 Mass. 793, 799, 452 N.E.2d 497, 501 (1983). In *Custody of a Minor*, the court maintained that state intervention in the parent-child relationship was "justified only when parents appear unable to provide for their children's care and protection." 389 Mass. at 765, 452 N.E.2d at 489 (quoting *Custody of a Minor* (I), 377 Mass. 876, 882, 389 N.E.2d 68, 73 (1979)). The critical issue was still whether the parents were currently fit to further the best interests of the child. *Custody of a Minor*, 389 Mass. at 766, 452 N.E.2d at 490. "In that sense, the fitness of the parents and the best interests of the child are related." *Id.* at 766, 452 N.E.2d at 489-90. The court, in accordance with the Supreme Court's decision in *Santosky v. Kramer*, 455 U.S. 745 (1982), held that evidence supporting a finding of unfitness must be "clear and convincing." *Custody of a Minor*, 389 Mass. at 766, 452 N.E.2d at 490. The Supreme Court's decision had very little effect on the Supreme Judicial Court's parental unfitness standard: specific and detailed findings of fact were still required in order to remove a child from his or her natural parents. *Id.* at 767, 452 N.E.2d at 490. The court held that the lower court judge had given "inappropriate weight" to the child's welfare as evidenced by the special weight the judge had given the child's own wishes. *Id.* at 769, 452 N.E.2d at 491. The district court judge observed that "[t]he minor child has a valid and enforceable right in determining the direction of her future life especially where her circumstances from birth to date were as they were in this case and she should not be compelled to revert to a life for which she obviously has a [distaste] and aversion." *Id.* Despite the existence of a "stable, loving and devoted relationship," *id.* at 768, 452 N.E.2d at 491, between the foster mother and the child, the court held that the wishes of the child were not controlling. *Id.* at 769, 452 N.E.2d at 491. The controlling question was "whether the welfare of this child would be seriously endangered if custody is not transferred from the mother."

of foster parents seeking to adopt a foster child. In *Petitions of the Department of Social Service to Dispense with Consent to Adoption*,¹¹⁷ the court considered a custody dispute between a child's natural parents and his or her prospective adoptive foster parents.¹¹⁸ While granting the petition to dispense with consent to adoption, the court considered the natural mother's contention that the statutory presumption that foster parents should be entitled to adopt children who have been in their care more than a year was unconstitutional.¹¹⁹ In dictum, the court stated that this presumption was unconstitutional as a violation of the natural parents' due process rights.¹²⁰ The court, therefore, having previously rejected prospective adoptive foster parents' right to adopt children in their long-time care under a per se rule, now rejected their right to a statutory presumption. In effect, then, the court protected the rights of biological parents to regain their children from foster parents, even after lengthy separations from them.

In the years after the Supreme Judicial Court's decision in *Little Wanderers*, the court increasingly focused on the rights of natural parents in child-custody disputes. At the same time, as a result of the court's apparent retreat from the best interests of the child standard, trial court judges struggled with the application of the dual standard proposed in *Little Wanderers*.¹²¹ Especially after the court's decision in *Custody of a Minor (1)*, trial court judges appeared confused as to the role of the best interests standard in deciding child-custody cases.¹²² Faced with the difficulties and confusion resulting from its shift in focus to the parental fitness standard, the court in 1984 attempted to clarify the standard through two child-custody cases.¹²³

Id. Thus, once again focusing attention primarily on the fitness of the parent rather than on the welfare of the child, the court reversed the lower court's award of custody to the Department of Social Services and denied the power of the state to intervene in the parent-child relationship absent a clear showing that the child's parents were unfit and that the child's welfare would be seriously endangered if the state did not intervene. *Id.* at 769-70, 452 N.E.2d at 491-92. While the primary consideration of the court was the fitness of the parents, the best interests of the child still received some judicial notice. *See id.* Perhaps this was so because in this case the court was affirming the lower court's approval of state intervention in the parent-child relationship.

¹¹⁷ 389 Mass. 793, 452 N.E.2d 497 (1983).

¹¹⁸ *Id.* at 793-94, 452 N.E.2d 498-99.

¹¹⁹ *Id.* at 802-03, 452 N.E.2d at 503. MASS. ANN. LAWS ch. 210, § 3(c) (Michie/Law. Co-op. 1981) provides in pertinent part:

If said child has been in the care of the department or a licensed child care agency for more than one year . . . there shall be a presumption that the best interests of the child will be served by granting a petition for adoption . . . or by issuing a decree dispensing with the need for consent.

¹²⁰ 389 Mass. at 802-03, 452 N.E.2d at 503.

¹²¹ *See, e.g., Custody of a Minor (1)*, 377 Mass. at 882, 389 N.E.2d at 73.

¹²² *See, e.g.,* *Petition of the Department of Social Services to Dispense with Consent to Adoption*, 391 Mass. 113, 461 N.E.2d 186 (1984); *Custody of a Minor*, 389 Mass. 755, 452 N.E.2d 483 (1983).

¹²³ Earlier in 1984, the court reaffirmed the present dominance of the parental right doctrine in Massachusetts. *See* *Petition of the Department of Social Services to Dispense with Consent to Adoption*, 391 Mass. 113, 118-20, 461 N.E.2d 186, 190-91 (1984). In this case, the court held that it was error to base the allowance of a petition to dispense with parental consent to adoption on a finding that the child would be hurt by being returned to the natural parent. *Id.* at 119, 461 N.E.2d at 190. If the parent was fit, the court asserted, the petition to dispense with consent should be denied. *Id.* The court referred to the allowance of a petition to dispense with parental consent to adoption as an "extreme step" which required "clear and convincing evidence that the parent's unfitness to assume parental responsibility is such that it would be in the best interests of the child for all legal relations to be ended." *Id.* The court again held that a lower court judge had made inadequate findings as to the issue of parental fitness. *Id.*

II. THE PRESENT MASSACHUSETTS STANDARD

In August of 1984, the Supreme Judicial Court decided two important child-custody cases together.¹²⁴ The court, at this time, was approaching child-custody cases with several "tests." First, and most importantly, the court maintained that parents were presumptively entitled to the custody of their children unless they were affirmatively shown to be unfit.¹²⁵ As a corollary to this test, the court asserted that a child's interests were best served by being with his or her natural parents.¹²⁶ And finally, as a consequence of both these presumptions, the court firmly refused to recognize that foster parents, after a period of time, become a child's "psychological" parents.¹²⁷

The first of these cases, *Care and Protection of Three Minors*,¹²⁸ added a new dimension to the Massachusetts standard for state intervention in the parent-child relationship. In this case, the court considered care and protection petitions filed by the Department of Public Welfare¹²⁹ on behalf of three minor sisters.¹³⁰ The mother of the children had been abused physically as a child by her parents.¹³¹ After the mother's first child was born, her husband became physically abusive toward her.¹³² Shortly afterward, the parents separated.¹³³

¹²⁴ See *Care and Protection of Three Minors*, 392 Mass. 704, 467 N.E.2d 851 (1984); *Custody of a Minor* (2), 392 Mass. 719, 467 N.E.2d 1286 (1984). See also *Petition of the Department of Social Services to Dispense with Consent to Adoption*, 392 Mass. 696, 467 N.E.2d 861 (1984).

¹²⁵ See *Petitions of the Department of Social Services to Dispense with Consent to Adoption*, 389 Mass. 793, 799, 452 N.E.2d 497, 501 (1983).

¹²⁶ See *Custody of a Minor* (1), 377 Mass. 876, 882, 389 N.E.2d 68, 73 (1979).

¹²⁷ See *Petition of the Department of Public Welfare to Dispense with Consent to Adoption*, 383 Mass. 573, 591 n.16, 421 N.E.2d 28, 38 n.16 (1981). See also *Petition of the Department of Social Services to Dispense with Consent to Adoption*, 389 Mass. 793, 802-03, 452 N.E.2d 497, 503 (1983).

¹²⁸ 392 Mass. 704, 467 N.E.2d 851 (1984).

¹²⁹ The Department of Public Welfare is now known as the Department of Social Services. See *supra* note 33.

¹³⁰ *Three Minors*, 392 Mass. at 705, 467 N.E.2d at 853. On April 18, 1978, a social worker for the Department of Public Welfare filed petitions pursuant to chapter 119, § 24 on behalf of three minor sisters. *Id.* On September 13, 1979, a judge of the Chelsea District Court found all three girls in need of care and protection and committed them to the department pursuant to chapter 119, § 26. *Id.* After a trial de novo in the Appellate Division of the Juvenile Court pursuant to chapter 119, § 27, the children were again committed to the custody of the department. *Id.* at 705, 467 N.E.2d at 853-54.

Following this award of custody, the mother, the children, and the maternal grandmother filed notices of appeal. *Id.* at 706, 467 N.E.2d at 854. Because the department was planning to move the two older children from their foster home, the mother sought a stay of the dispositional order, which was denied by the trial court on July 29, 1983. *Id.* She appealed this denial to the appeals court. *Id.* A single justice denied the application for a stay pending appeal and on September 13, 1983, transferred the cases to the Supreme Judicial Court for Suffolk County. *Id.* On November 19, 1983, the single justice reserved and reported the cases for decision to the full court of the Supreme Judicial Court. *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 706, 467 N.E.2d at 855. In 1976, the couple's second child was born. *Id.* The couple temporarily reunited and, in 1977, their third child was born. *Id.* at 707, 467 N.E.2d at 855. The marriage deteriorated at a rapid pace and the police were summoned on numerous occasions to prevent the father from beating the mother. *Id.* Eventually, the father left the family and the mother moved to Chelsea with the three children. *Id.*

The Department of Public Welfare became involved in 1978 when the mother became ill and was hospitalized.¹³⁴ The children were left with a babysitter who left them alone without care.¹³⁵ The department was notified by the police and, on April 14, 1978, pursuant to chapter 119, the children were taken into the department's care.¹³⁶ The children were examined at a local hospital and placed in temporary foster care.¹³⁷ On the same day, the department, pursuant to chapter 119, section 24, filed a care and protection petition in the district court.¹³⁸ On June 9, 1978, the physical custody of the two oldest children was returned to the mother, although legal custody remained in the department.¹³⁹ The department offered several times to return the youngest child to her mother's care, but she did not accept their offers.¹⁴⁰

On February 16, 1979, the department was notified that the mother had left the two oldest children with a neighbor and had not returned.¹⁴¹ The children had severe colds and head lice and were living in an unheated apartment.¹⁴² The children were placed in a foster home where they lived until July 1983.¹⁴³ At that time, they were moved to their paternal grandparents' home.¹⁴⁴

In considering the department's petition for permanent custody of the three children, the court began its analysis by stating the oft repeated standard: removal of a child from the custody of his or her parents may be ordered only if there is clear and convincing evidence¹⁴⁵ that the parent is currently unfit to care for that child.¹⁴⁶ In addition, the court noted, the judge must make specific and detailed findings of fact.¹⁴⁷

¹³⁴ *Id.*

¹³⁵ *Id.* at 707-08, 467 N.E.2d at 855.

¹³⁶ *Id.* at 708, 467 N.E.2d at 855. MASS. ANN. LAWS ch. 119, § 23E (Michie/Law. Co-op. 1975) provides in relevant part that any minor "who is seemingly without a parent or legal guardian available shall be immediately reported to the department, which shall proceed to arrange care for such child temporarily and shall forthwith cause search to be made for parent or guardian."

¹³⁷ *Three Minors*, 392 Mass. at 708, 467 N.E.2d at 855.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* Since 1979, the mother had changed apartments frequently. *Id.* at 709, 467 N.E.2d at 855. She was plagued with health problems which made steady employment difficult. *Id.* at 709, 467 N.E.2d at 856. In October of 1982 the mother was knifed in an incident involving a former boyfriend. *Id.* The record showed that the mother had resisted therapy and counselling programs urged by the department and was unreliable in keeping appointments with case workers and therapists. *Id.* Similarly, she was inconsistent in maintaining visits with her children. *Id.* When the visits did take place they were, however, generally successful. *Id.* at 710, 467 N.E.2d at 856. Some troublesome incidents did occur: during one visit, the mother left the children by themselves and did not return for four days. *Id.* It should be noted that the mother contested some of the lower court judge's findings of fact. *Id.* at 711, 467 N.E.2d at 857. The Supreme Judicial Court held that, while there were some errors in the judge's findings of fact, given other evidence indicating the mother's unfitness, that "error does not appear to have unfairly influenced the judge's ultimate conclusion." *Id.*

¹⁴⁵ For a discussion of the Supreme Court's decision in *Santosky*, which required that evidence supporting a finding of parental unfitness be clear and convincing, see *supra* note 116.

¹⁴⁶ *Three Minors*, 392 Mass. at 711-12, 467 N.E.2d at 857.

¹⁴⁷ *Id.* at 712, 467 N.E.2d at 857. These findings, the court stated, may not be based on inappropriate factors, such as disapproval of a parent's way of life or a comparison of the material advantages a foster parent may offer with those offered by the natural parents. *Id.*

In this case, the court found that the lower court judge's findings were adequate to support his order that the children be removed from their mother.¹⁴⁸ The court upheld the department's intervention in the parent-child relationship under the parental fitness test.¹⁴⁹ According to the court, the district court judge had correctly found the mother to be currently unfit to provide for her children.¹⁵⁰

The court noted, however, that the parental fitness and best interests of the child tests are not mutually exclusive but rather "reflect different degrees of emphasis on the same factors."¹⁵¹ Moreover, the court held for the first time that the judge's task in a care and protection proceeding was not complete once he had determined that the children should be removed from their mother's custody. The court held that the judge should have "addressed the various placement options which would further the children's best interests."¹⁵² Moreover, the court found that the judge should have issued more than a general dispositional order committing the children to the permanent custody of the department.¹⁵³ The court stated that the judge's findings concerning the disposition of the children were deficient in two respects: he had failed to address both the importance of the sibling relationship and the question of whether placement of all three children with their paternal grandparents would be in the best interests of the children.¹⁵⁴

Although chapter 119, section 26 and the applicable regulations of the department only require the judge to make a simple commitment order concerning a child's placement in a care and protection proceeding, in this case the court held that the judge should have given the department some guidance as to the ultimate placement of the children and the visitation rights of the children's family.¹⁵⁵ The court pointedly noted

¹⁴⁸ *Id.* The court listed the following as evidence of the mother's unfitness: (1) she had left the children with unreliable caretakers; (2) she had been erratic and unreliable in her visits to the children; (3) she had not provided a clean, healthy home for the children; (4) she had not maintained any sort of financial stability; and (5) she had been unable to provide the children with the psychological nurturing they needed. *Id.* at 713, 467 N.E.2d at 858.

¹⁴⁹ *Id.* at 712, 467 N.E.2d at 857.

¹⁵⁰ *Id.* at 712, 467 N.E.2d at 858.

¹⁵¹ *Id.* at 714, 467 N.E.2d at 858 (quoting *Petition of the New England Home for Little Wanderers*, 367 Mass. 631, 641, 328 N.E.2d 854, 860 (1975)).

¹⁵² 392 Mass. at 714, 467 N.E.2d at 858.

¹⁵³ *Id.* The department was planning to leave the youngest sister with her foster parents, who intended to adopt her and to move the two oldest sisters to their paternal grandparents, who also intended to adopt them. *Id.* at 714, 467 N.E.2d at 859. The court observed that the obvious alternative to the department's plan was for all three sisters to be adopted by their grandparents. *Id.* In that way, the sisters would be together and they would remain within the natural family. *Id.*

¹⁵⁴ *Id.* at 715, 467 N.E.2d at 859. The Supreme Judicial Court noted that the courts of Massachusetts had long recognized the importance of siblings being raised together. *Id.* Further, it also has been a policy of the courts to keep children within the natural family. The state was required to make every effort to strengthen and encourage family life before intervening in the parent-child relationship. *Id.* at 715 n.17, 467 N.E.2d at 859 n.17. The lower court judge found that removal of the youngest sister from her foster home would be psychologically devastating to the child. *Id.* at 716, 467 N.E.2d at 860. The Supreme Judicial Court stated: "Although we have said that separation from natural parents and bonding with foster parents may result in a finding of parental unfitness, such circumstances are rare . . . [t]oo often the claim that bonding justifies adoption is the result of a self-fulfilling prophecy." *Id.* at 716 n.18, 467 N.E.2d at 860 n.18. Thus, by not considering the need for the youngest sister to be raised with her other sisters or by her grandparents, the lower court failed to demonstrate that the youngest child's best interests had been adequately considered. *Id.* at 716, 467 N.E.2d at 860.

¹⁵⁵ *Id.* at 717, 467 N.E.2d at 860. The court stated that although such an order was not required

that the Department of Social Services enjoyed great latitude in determining matters of parental fitness and child custody in both care and protection and adoption proceedings.¹⁵⁶ Quoting two commentators critical of the department's control of child-custody cases, the court indicated that the critical decisions in such cases were made by department caseworkers and that courts often had the mistaken notion that these caseworkers always knew what was best for the child.¹⁵⁷

The Supreme Judicial Court thus called for more judicial direction and control when permanent custody of the child was awarded to the department.¹⁵⁸ Despite a correct finding by the district court judge that the mother currently was unfit, the court held that the lower court judge had inadequately addressed the various placement options which would further the child's best interests.¹⁵⁹ In particular, the district court judge's dispositional order had ignored the importance of both the sibling relationship and the presumption in Massachusetts in favor of keeping children within the natural family.¹⁶⁰

Hence, the court based its rejection of the trial court's disposition of the case on the presumption that a child's best interests are served by his natural family — a preference that extends even to grandparents. Further, to ensure that the department did not ignore its preference for the biological family, the court held that trial court judges were to "guide" the department both in placing the children pursuant to a care and protection proceeding and in continued visitation by the natural family. In this role, trial court judges were to act, above all, in accord with the court's presumption in favor of the biological family.¹⁶¹

On the same day that it decided *Care and Protection of Three Minors*, the Supreme Judicial Court also decided *Custody of a Minor (2)*.¹⁶² This case, as had *Care and Protection of Three Minors*, involved a care and protection petition.¹⁶³ The child in question was

by the statute, given the fact that the judge knew of both the department's plans to separate the sisters and of the grandparent's willingness to adopt the sisters, his order should have been more detailed. *Id.*

¹⁵⁶ *Id.* at 717, 467 N.E.2d 861.

¹⁵⁷ *Id.* at 717-18, 467 N.E.2d at 861. The court observed:

"the courts play a minimal role in exercising the state's care and protection policy. The real locus of decision making is within [the department] and the individual who tends to be the ultimate decision maker there, is the case worker" As a critic more recently said, "[t]he paternalistic justification of this broad direction — that the professionals and not the parents always know what is best for children — underlies most of what is wrong with the present system."

Id. at 718, 467 N.E.2d at 861 (citations omitted) (quoting Campbell, *The Neglected Child*, 4 SUFFOLK U.L. REV. 632, 645-46 (1970); McCathren, *Accountability in the Child Protection System: A Defense of the Proposed Standards Relating to Abuse and Neglect*, 57 B.U.L. REV. 707, 731 (1977)).

¹⁵⁸ See 392 Mass. at 718, 467 N.E.2d at 861. In *Three Minors*, the court stated that if the trial court judge was to separate the youngest sister from her older sisters and her grandparents, the judge was required to give direction concerning continued visitation by the natural family. *Id.* If the judge concluded that visitation by the natural family should not be allowed, he was now required to make findings that supported this conclusion. *Id.*

¹⁵⁹ *Id.* at 712, 467 N.E.2d at 857.

¹⁶⁰ *Id.* at 715, 467 N.E.2d at 859. For these reasons, the court remanded the case to the juvenile court. *Id.* at 718, 467 N.E.2d at 861.

¹⁶¹ See *id.* at 715 n.17, 467 N.E.2d at 859 n.17.

¹⁶² See *Custody of a Minor (2)*, 392 Mass. 719, 467 N.E.2d 1286 (1984).

¹⁶³ *Id.* at 720, 467 N.E.2d at 1287. When the child was two years old, the district attorney of

born on April 11, 1978.¹⁶⁴ On January 22, 1980, the office of the district attorney of Norfolk County filed a report which alleged that the child was abused and neglected.¹⁶⁵ The report charged that the mother, a battered wife, was an irresponsible parent and indifferent to her daughter's needs.¹⁶⁶

The department filed a care and protection petition on March 19, 1980.¹⁶⁷ The mother agreed to grant temporary custody to the department and to have the child placed with her grandmother.¹⁶⁸ Shortly after the department filed its care and protection petition, the father returned from Florida and moved in with the mother at a friend's apartment.¹⁶⁹ Soon afterwards, the grandmother broke her arm and returned the child to her parents.¹⁷⁰ The department immediately took the child from her parents and placed her in a foster home far from where her mother and grandmother lived.¹⁷¹ This placement made it difficult for the mother to visit the child.¹⁷²

On May 25, 1982, the lower court judge committed the child to the permanent custody of the department and terminated the parents' visitation rights.¹⁷³ In his findings, the judge noted that the father had a long history of unemployment and alcoholism and that the parents were frequently evicted from their apartments because of the father's lack of employment.¹⁷⁴ The judge did note, however, that since the birth of her second child the mother had exhibited positive parenting skills.¹⁷⁵ The judge adopted the opinion of the psychologist who testified at trial that the child had become psychologically bonded to her foster parents.¹⁷⁶

Norfolk County filed a report, pursuant to chapter 119, § 51A, which alleged abuse and neglect of the child. *Id.* at 720-21, 467 N.E.2d at 1288. On March 19, 1980, the department filed a care and protection petition, pursuant to chapter 119, § 24, in the Quincy District Court. *Id.* at 721, 467 N.E.2d at 1288. On July 17, 1981, the judge awarded permanent custody of the child to the department. *Id.* at 722, 467 N.E.2d at 1288. On May 25, 1982, following a de novo trial, the judge committed the child to the permanent custody of the department and terminated the parent's visitation rights. *Id.* at 722, 467 N.E.2d at 1289. The mother appealed this decision to the appeals court and obtained a stay to the order terminating visitation rights. *Id.* In December 1982, the department moved to revoke the stay and, in January 1983, the judge allowed the motion and terminated all parental visitation. *Id.* The appeals court affirmed in a summary order. *See* 17 Mass. App. Ct. 1109, 459 N.E.2d 840 (1984). The Supreme Judicial Court granted the mother's application for further appellate review. *Custody of a Minor* (2), 392 Mass. at 720, 467 N.E.2d at 1288.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 720-21, 467 N.E.2d at 1288.

¹⁶⁶ *Id.* at 721, 467 N.E.2d at 1288. The department social worker who worked on the case filed a report which stated that the mother and child had been living with the father in Florida until the father had allegedly threatened the mother with a gun. *Id.* The social worker's report further disclosed that the mother and child had subsequently returned to Massachusetts and moved in with the child's grandmother. *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 722, 467 N.E.2d at 1289.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 723, 467 N.E.2d at 1289.

¹⁷⁶ *Id.*

Seven months later, in supplementary findings issued in conjunction with the trial court's final order terminating visitation, the judge noted that the mother was living with the child's father again.¹⁷⁷ The judge ruled that the father, who had not appeared at all in court during the prolonged hearings, was an improper person to have custody of the child and that his influence on the mother contributed to her unfitness as a parent.¹⁷⁸ The judge further observed that the child was suffering from the protracted custody dispute and that the visits from her mother and grandmother contributed to her distress.¹⁷⁹

In reviewing the lower court's holding, the Supreme Judicial Court began with its central premise for all child custody cases: parental unfitness must be persuasively shown in order to justify state intervention in the parent-child relationship.¹⁸⁰ In this case, the court held that the trial judge's decision to grant the care and protection petition was not supported by a finding of parental unfitness.¹⁸¹ In fact, the trial court judge had found that the mother was exhibiting positive parenting skills at the time of trial.¹⁸² Instead of focusing on parental unfitness, the order granting custody to the department, the court found, appeared to be based entirely on a finding that the child had become "psychologically bonded" to the foster parents.¹⁸³ The court noted that no "per se" rule granting custody to prospective adoptive foster parents who had become the child's psychological parents existed.¹⁸⁴ The court stated that judges were required to make specific and detailed findings concerning parental fitness in custody proceedings and that such findings, as in cases involving petitions to dispense with parental consent to adoption, must be based on clear and convincing evidence.¹⁸⁵ In this case, the court ruled that the lower court judge had failed to make specific and detailed findings regarding the psychological effect of returning the child to her mother.¹⁸⁶ The Supreme Judicial Court thus found that the lower court judge had "erroneously presumed that he was restricted to considering only evidence related to the best interests of the child"¹⁸⁷ and had apparently disregarded evidence of current parental fitness.¹⁸⁸

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 724, 467 N.E.2d at 1289. "Because the interest of the child is thought to be best served in the stable, continuous environment of his own family . . . State intervention in the parent-child relationship is justified only when parents appear unable to provide for their children's care and protection." *Id.* at 724, 467 N.E.2d at 1289-90 (citations omitted) (quoting *Custody of a Minor* (1), 377 Mass. 876, 882, 389 N.E.2d 68, 73 (1979)).

¹⁸¹ 392 Mass. at 724, 467 N.E.2d at 1290.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 725, 467 N.E.2d at 1290.

¹⁸⁶ *Id.* The court observed that the trial judge's "wholesale adoption of the psychologist's opinions and findings is entirely insufficient." *Id.*

¹⁸⁷ *Id.* at 723, 467 N.E.2d at 1289. The court stated that "rather than focusing on parental unfitness, the order granting permanent custody to the department appears to be based entirely on the finding that the child had psychologically bonded to the foster parents." *Id.* at 724, 467 N.E.2d at 1290.

¹⁸⁸ *Id.* at 723, 467 N.E.2d at 1289. The court continued, "in this case, the judgment allowing the department's petition was not supported by a finding of parental unfitness." *Id.* at 724, 467 N.E.2d at 1290. The judgment was therefore vacated and the case remanded to the district court

The court also considered the issue of visitation rights. When the department gains custody of a child it has the power to control visits to that child.¹⁸⁹ The court noted, however, that this power was modified by chapter 119, section 35, which gives parents the right to visit their children if "the welfare of the child and the public interest will not be injured."¹⁹⁰ The court held that the decision to terminate visitation rights was of such significance to the parties that the same standard which applies in permanent custody decisions should also apply in termination proceedings.¹⁹¹ Thus, before visitation rights can be terminated, judges must make specific findings demonstrating that parental visits will harm the child or the public welfare.¹⁹² In this case, the court ruled that such findings were not present.¹⁹³ The court stated that on a petition from the child's mother the judge should reinstate her visitation rights unless the department could demonstrate that such visitation would threaten the welfare of the child.¹⁹⁴

Moreover, the court, in accord with its use of the parental right doctrine and its presumption that a child's interests are best served in his biological family, essentially rejected the notion of psychological parenthood in disputes between a child's foster parents and his natural parents. Under the court's present approach, if the natural parents are found to be "fit," evidence that the child will be harmed by a separation from long-time caretakers to whom the child has psychologically bonded will be ignored. Further, the court set a high and difficult level of proof for the department if it wishes to terminate visitation rights in a care and protection proceeding.¹⁹⁵

Thus, following the trend established in its decisions after *Little Wanderers*, the Supreme Judicial Court continued to emphasize in 1984 that removal of a child from the custody of his or her parents is justified only if there is clear and convincing evidence that a parent is currently unfit to care for the child.¹⁹⁶ The Supreme Judicial Court also seemed to desire to shift power from the department's hands to the trial court's, both in the disposition of children under a care and protection proceeding and in the determination of the subsequent visitation rights of the natural parents.¹⁹⁷ Furthermore, in *Custody of a Minor (2)*, the court noted that the concept of psychological bonding between foster parents and a child in their care would be recognized only in rare circumstances.¹⁹⁸

for further proceedings. *Id.* at 727, 467 N.E.2d at 1291. On the same day as *Care and Protection of Three Minors* and *Custody of a Minor (2)* were decided, the court also decided *Petition of the Department of Social Services to Dispense with Consent to Adoption*, 392 Mass. 696, 467 N.E.2d 861 (1984). This decision added little new to what the court had already held that day. The court held that the lower court judge had correctly decided that the mother was unfit to further the best interests of the child. *Id.* at 700, 467 N.E.2d at 864. The court also held that the trial court, in granting a petition to dispense with parental consent to adoption, had the authority to allow for post-adoption visitation by the natural family. *Id.* at 702, 467 N.E.2d at 866.

¹⁸⁹ 392 Mass. at 727, 467 N.E.2d at 1291.

¹⁹⁰ *Id.* at 725-26, 467 N.E.2d at 1291 (quoting MASS. ANN. LAWS ch. 119, § 35 (Michie/Law. Co-op. 1975)).

¹⁹¹ 392 Mass. at 726, 467 N.E.2d at 1291.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 727, 467 N.E.2d at 1291.

¹⁹⁵ *Id.* at 726, 467 N.E.2d at 1291.

¹⁹⁶ *Id.* at 724, 467 N.E.2d at 1289; *Three Minors*, 392 Mass. at 711-12, 467 N.E.2d at 857.

¹⁹⁷ *Minor (2)*, 392 Mass. at 726, 467 N.E.2d at 1291.

¹⁹⁸ *Three Minors*, 392 Mass. at 716 n.18, 467 N.E.2d at 860 n.18.

These developments in the court's approach to child-custody disputes arose as a consequence of the court's presumption that children's best interests in custody disputes are served with their natural parents.

III. CRITIQUE OF THE MASSACHUSETTS STANDARD IN CHILD-CUSTODY CASES

The Massachusetts Supreme Judicial Court now demands a finding of current parental unfitness to justify state intervention in the parent-child relationship.¹⁹⁹ Further, in accord with the parental fitness test, the court has defined the best interests of the child in terms of custody with his or her natural parents.²⁰⁰ The court has applied the parental fitness test in its "pure" form and has "cloaked" the test in the best interests standard by establishing a presumption that custody of the child by its biological parent(s) is in the best interests of the child.²⁰¹ Thus, in Massachusetts, the best interests of the child standard is a factor in deciding child-custody cases in name only.²⁰² Unsurprisingly, then, since 1979,²⁰³ close and difficult decisions have been decided in favor of the biological parents.²⁰⁴ Hence, the court's use of the parental fitness standard has made state intervention in the parent-child relationship more difficult.

The parental fitness approach to child-custody disputes, predominant in Massachusetts, runs counter to the approach adopted by most states. The majority of jurisdictions in the country use the best interests standard in deciding whether to intervene in the parent-child relationship.²⁰⁵ This section will critique and evaluate the parental fitness standard used by Massachusetts in determining whether to intervene in the parent-child relationship. The benefits of the best interests standard will be evaluated and the need for recognizing the validity of psychological parents in child-custody disputes will be assessed. Finally, as an alternative to Massachusetts' current standard in child-custody cases, this note will propose that Massachusetts adopt the best interests standard and recognize the effects of psychological bonding between foster parents and children in their care.

¹⁹⁹ See *Three Minors*, 392 Mass. at 711-12, 467 N.E.2d at 857; *Minor (2)*, 392 Mass. at 724, 467 N.E.2d at 1289.

²⁰⁰ See *Minor (2)*, 392 Mass. at 724, 467 N.E.2d at 1289-90. In *Three Minors*, the court remanded the case because the lower court had ignored the child's "best interests" in making its dispositional order. 392 Mass. at 713-14, 467 N.E.2d at 858-59.

²⁰¹ See *Minor (2)*, 392 Mass. at 724, 467 N.E.2d at 1289-90; *Minor (1)*, 377 Mass. at 882, 389 N.E.2d at 73. See also Note, *supra* note 13, at 154 n.18.

²⁰² See *Minor (1)*, 377 Mass. at 882, 389 N.E.2d at 73. See also *Three Minors*, 392 Mass. at 711-12, 467 N.E.2d at 857.

²⁰³ In 1979, the court first established the parental fitness test as the critical element in child-custody cases. See *Minor (1)*, 377 Mass. at 882, 389 N.E.2d at 73.

²⁰⁴ See, e.g., *Custody of a Minor (2)*, 392 Mass. 719, 467 N.E.2d 1286 (1984); *Custody of a Minor*, 389 Mass. 755, 452 N.E.2d 483 (1983); *Petition of the Department of Public Welfare to Dispend with Consent to Adoption*, 383 Mass. 573, 421 N.E.2d 28 (1981).

²⁰⁵ See, e.g., CAL. CIV. CODE § 232.5 (West 1982) ("[t]he provisions of this chapter shall be liberally construed to serve and protect the interests and welfare of the child"); COLO. REV. STAT. 19-3-109 (1978) ("the court shall hear evidence on the question of the proper disposition best serving the interests of the child and the public"); OHIO REV. CODE ANN. § 2151.38 (Supp. 1985) ("the court shall make disposition of the matter in whatever manner will serve the best interests of the child"); OKLA. STAT. ANN. tit. 10, § 29.1 (West Supp. 1985) ("at the hearing, the court may, if it is in the best interests of the child . . ."); VA. CODE § 16.1-279 (Supp. 1985) ("[i]f a child is found to be . . . neglected . . . the juvenile court . . . may make any of the following orders of disposition to protect the welfare of the child"). See also Note, *supra* note 13, at 152.

A. *The Inadequacies of the Parental Right Doctrine*

The parental fitness standard holds that biological parents are entitled to the custody of their children unless they are affirmatively shown to be unfit.²⁰⁶ The parental right doctrine, whether stated in terms of parental fitness or cloaked as a presumption that a child's interests are best served in his or her biological family, has often been justified on principles of morality and natural affection.²⁰⁷ The history of the doctrine, however, reveals that it may have been created for considerations of economic expediency rather than morality.²⁰⁸ During the feudal period, custodial rights were subject to transfer and sale.²⁰⁹ At that point, then, a custodial right was essentially a property right.²¹⁰ Eventually, as concern developed for the welfare of the child, the emphasis shifted from the property theory of custody to the personal status theory: biological parents, because the child was born to them, were assumed to be the custodians best suited to serve the child's interests.²¹¹ Even today, the state would prefer that biological parents shoulder the economic burdens of raising a child. The state has a vested interest in maintaining the biological parent-child relationship.

Legal and psychological commentators have attacked the parental right doctrine.²¹² Professor Sanford Katz has stated that "[i]t seems safe to say that when courts invoke the parental right doctrine to award custody to the natural parents, they are merely articulating an archaic notion, based upon a preference for the continuity of blood ties or the preservation of kinship loyalty, in order to justify a decision."²¹³ While Professor Katz does not dispute that biological parents have the greatest potentiality for carrying on the healthiest parent-child relationship, he argues that that potentiality may never be realized: "[o]thers may perform the task better."²¹⁴

The Supreme Judicial Court of Massachusetts has never explicitly justified its presumption that even when the child has been separated from his biological parents and

²⁰⁶ See Katz, *Foster Parents Versus Agencies: A Case Study in the Judicial Application of "The Best Interests of the Child" Doctrine*, 65 MICH. L. REV. 145, 151 (1966); Note, *supra* note 13, at 152-53.

²⁰⁷ S. KATZ, *supra* note 1, at 4.

²⁰⁸ *Id.*

Allocation to parents of power and control over their children has its roots in our society's culture; it may be based on social, psychological, and even financial considerations. Quite simply, parents have traditionally reared their children in their home; society believes it is healthy, for the most part for them to perform that function; and it is economically expedient for the state that they do so.

Id. at 14.

²⁰⁹ *Id.* at 4.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See, e.g., J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 4 (1979); Katz, *supra* note 206, at 152; Note, *supra* note 13, at 156-58.

²¹³ Katz, *supra* note 206, at 152. See also S. KATZ, *supra* note 1, at 52. Professor Katz does not dispute the notion that children are "best" reared in their biological families. *Id.* at 52. He adds, however, that:

[b]est is here used synonymously with "ideally." Our culture considers the ideal parents for a child to be his biological mother and father. They are the ones who have at least the *potentiality* for carrying on the healthiest parent-child relationship. "Potentiality" is an important qualification because some biological parents may in fact be entirely ill equipped . . . to continue a parental relationship without intervention.

Id. at 52-53 (emphasis in original).

²¹⁴ *Id.* at 54.

placed with foster parents for a long time, a child's interests are best served in his or her biological family. One commentator has suggested that both this presumption and the parental right doctrine are defensible only by the intuitive but *incomplete* psychological generalization that a "blood-tie" between a biological parent and child will result eventually in "better" love for the child and hence, in the "best" psychological development of that child.²¹⁵ The flaw in this generalization is that it completely overlooks the child's present relationship to caretakers other than his natural parents, who may have assumed the role of "parent" for the child.²¹⁶

Joseph Goldstein, Anna Freud, and Albert Solnit, in *Beyond the Best Interests of the Child*, contend that birth is not the cause of children's attachment to their natural parents.²¹⁷ Rather, they assert that it is the day-to-day interaction, companionship, and shared experiences that lead to love, affection, and a basic trust between adult and child.²¹⁸ The parent, they maintain, must provide day-to-day attention to the child's needs for physical care, nourishment, comfort, affection, and stimulation.²¹⁹ Goldstein, Freud and Solnit state that:

[O]nly a parent who provides for these needs will build a psychological relationship to the child on the basis of the biological one and will become his 'psychological parent' in whose care the child can feel valued and 'wanted.' An absent biological parent will remain or tend to become, a stranger.²²⁰

While the biological parent starts with the greatest potentiality for becoming his or her child's psychological parent,²²¹ this role can be fulfilled "either by a biological parent or by any other caring adult — but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be."²²² Hence, from a psychological viewpoint, a healthy parent-child relationship can be defined as a mutual interaction between adult and child, biologically related or not, in which the adult provides the child with affection, stimulation, and unbroken continuity of care.²²³ It is this psychological relationship which has been identified as critical to a child's successful personality development.²²⁴ Thus, the "right" to a child, which is normally secured over time by biological or adoptive

²¹⁵ See Note, *supra* note 13, at 157-58.

²¹⁶ *Id.* See also J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 212, at 4. Goldstein, Freud and Solnit maintain that while the law has traditionally been protective of a child's physical well-being it has been slow to understand and acknowledge the necessity of safeguarding the child's psychological well-being:

While [decisionmakers in law] make the interests of a child paramount over all other claims when his physical well-being is in jeopardy, they subordinate, often intentionally, his psychological well-being to, for example, an adult's right to assert a biological tie. Yet both well-beings are equally important, and any sharp distinction between them is artificial.

Id.

²¹⁷ *Id.* at 17.

²¹⁸ *Id.* at 19.

²¹⁹ *Id.* at 17.

²²⁰ *Id.*

²²¹ S. KATZ, *supra* note 1, at 54.

²²² J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 212, at 19.

²²³ S. KATZ, *supra* note 1, at 53.

²²⁴ See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 212, at 17-28; S. KATZ, *supra* note 1, at 52-55; Note, *supra* note 13, at 160-61.

parents, may be lost by their failure to provide continuous care for their child and earned by those who do provide for the child's needs.²²⁵

According to Goldstein, Freud and Solnit, because continuity of relationships, surroundings, and environmental influences are essential for a child's normal development, the goal of child placement should be permanence and stability.²²⁶ They contend that when a foster parent or other adult has assumed the position of psychological parent to a child, this psychological parent-child relationship should not be disrupted.²²⁷ The new parent-child relationship, which develops in the absence of the biological parents, has been compared to a successful adoption, although it is not recognized as such in law.²²⁸ When a child who has formed a psychological bond with an adult other than his biological parents is returned to his biological parents, the child's separation from the psychological parent can be equated psychologically to the orphaning of that child.²²⁹ Because of the importance of psychological parent-child relationships, Goldstein, Freud and Solnit argue that the law should accord psychological parenthood the same protection it affords the natural parent-child relationship. The psychological parent should be treated in law as if he or she were the biological parent.²³⁰

A number of commentators, recognizing the validity of psychological parenthood, have stated that psychological foster parents should be allowed to adopt children in their care after a fixed period of years of separation from the child's biological parents.²³¹ A child's sense of time has a bearing on his or her need for continuity.²³² Younger children have less ability to withstand successfully separations from their parents.²³³ For most children under five years old, the "temporary" absence of parental figures for greater than two months is an incomprehensible event which is experienced as a permanent loss accompanied by feelings of helplessness and extreme deprivation.²³⁴ Therefore, Goldstein, Freud and Solnit argue that the courts can best promote the psychological well-being of the children in custody disputes by "quickly" recognizing prospective adoptive foster parents who have become a child's psychological parents as his parents in law.²³⁵

The Supreme Judicial Court of Massachusetts, in accord with its use of the parental right doctrine, has been very reluctant to recognize psychological parents' rights. The

²²⁵ J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 212, at 39.

²²⁶ *Id.* at 35.

²²⁷ *Id.* at 39. See also S. KATZ, *supra* note 1, at 104; Note, *supra* note 13, at 158-59; Note, *Child Custody — Rebutting the Presumption of Parental Preference*, 43 MISS. L.J. 247, 253 (1972).

²²⁸ See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 212, at 27.

²²⁹ Note, *supra* note 13, at 161. Goldstein, Freud and Solnit state that "[s]uch reactions do not differ from those caused by separation from, or death of, natural parents." J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 212, at 27.

²³⁰ J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 212, at 39. See Note, *supra* note 13, at 159.

²³¹ See e.g., J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 42, 46; Wald, *State Intervention on Behalf of Neglected Children*, 28 STAN. L. REV. 625, 696 (1976); Mnookin, *Child Custody Adjudication*, 39 LAW & CONTEMP. PROBS. 226, 280 (1975).

²³² See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 231.

²³³ *Id.* at 45.

²³⁴ J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 212, at 41.

²³⁵ *Id.* at 42. In *BEFORE THE BEST INTERESTS OF THE CHILD*, Goldstein, Freud & Solnit propose the following "time limits" beyond which it is unreasonable to assume that the child's residual ties to his natural parents are more significant than those which have developed between the child and his psychological foster parents; (a) one year for a child up to the age of three years at the time of placement; and (b) two years for a child from the age of three at the time of placement. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 231, at 46.

court has explicitly rejected the large body of legal and psychological commentary which urges fixed time periods in granting permanent custody to caretakers who have become a child's psychological parents.²³⁶ Further, in 1983, the court ruled that the statutory presumption that a child's interests are best served by termination of parental rights when the child has been in foster care for more than one year,²³⁷ was unconstitutional as a violation of the natural parents' due process rights.²³⁸ Contrary to the legislative intent evidenced in chapter 210, section 3(c), the court has stated that it will grant custody to prospective adoptive psychological foster parents only in rare circumstances.²³⁹ The court has contended, without any psychological basis, that "[t]oo often the claim that bonding justifies adoption is the result of a self-fulfilling prophecy."²⁴⁰

The court's use of the parental fitness doctrine often places children with their natural parents even when those parents are unable to further the best interests of their children. As long as the court determines the biological parents to be "fit," it will ignore the devastating psychological effects of disturbing a parent-child relationship and, even after a number of years with foster parents, return the child to its natural parents.²⁴¹ This result fails to take into account the child's present relationship with his psychological parents and presumes, contrary to psychological studies, that the child's interests are always best served in his biological family.²⁴²

The court's adherence to the parental right doctrine has, therefore, significant negative consequences for the children of Massachusetts. Under this doctrine, the psychological well-being of Massachusetts' children is often ignored on the basis of an archaic generalization that the biological family is presumed to be the only family unit in which a child can prosper. There appears to be no reasonable explanation for the court's rejection of the considerable legal and psychological commentary which has recognized the critical importance of a child's psychological parents. The court's failure to recognize the importance of psychological parents has often led to unstable placements with many "parental" figures. Under such conditions, children cannot prosper.

²³⁶ See, e.g., *Petition of the Department of Public Welfare to Dispense with Consent to Adoption*, 383 Mass. 573, 591 n.16, 421 N.E.2d 28, 38 n.16 (1981).

We emphasize that we do not recognize a per se rule that prospective adoptive foster parents, who have become a minor child's psychological parents, should automatically prevail in a custody dispute over a natural parent. We are not unaware of a significant body of legal commentary that urges such an approach.

Id.

²³⁷ MASS. ANN. LAWS ch. 210, § 3(c) (Michie/Law. Co-op. 1981) provides in pertinent part that "[i]f said child has been in the care of the department for more than one year . . . there shall be a presumption that the best interests of the child will be served by granting a petition for adoption . . . or by issuing a decree dispensing with the need for consent."

²³⁸ See *Petition of the Department of Social Services to Dispense With Adoption*, 389 Mass. 793, 802-03, 452 N.E.2d 497, 503 (1983). The Supreme Judicial Court noted that termination of parental rights under *Santosky v. Kramer*, 455 U.S. 745 (1982), requires clear and convincing evidence. 389 Mass. at 802, 452 N.E.2d at 503. The court ruled that the presumption of ch. 210, § 3(c) was unconstitutional because it shifted the burden of proof to the natural parents, thereby violating their due process rights under *Santosky*. *Id.* at 802-03, 452 N.E.2d at 503.

²³⁹ *Care and Protection of Three Minors*, 392 Mass. 704, 716 n.18, 467 N.E.2d 851, 860 n.18 (1984).

²⁴⁰ *Id.*

²⁴¹ See, e.g., *id.*; *Custody of a Minor (2)*, 392 Mass. 719, 724, 467 N.E.2d 1286, 1289-90 (1984); *Petition of the Department of Social Services to Dispense with Consent to Adoption*, 391 Mass. 113, 118-19, 461 N.E.2d 186, 190 (1984); *Petition of the Department of Public Welfare to Dispense with Consent to Adoption*, 383 Mass. 573, 591 n.16, 421 N.E.2d 28, 38 n.16 (1981).

²⁴² See Note, *supra* note 13, at 158-59.

B. *The Best Interests Standard*

The approach of the Massachusetts Supreme Judicial Court, which is based on the primacy of parental rights, appears to violate the spirit of the *parens patriae* doctrine. Sanford Katz has stated that "[t]heoretically, the court's role in child custody cases is that of *parens patriae*. As such, the court has a responsibility . . . to determine the best interests of the child."²⁴³ The interests of the child, and hence his or her need for a psychological parent, should be the paramount consideration of Massachusetts' courts in deciding custody disputes. The choice between the possibility of inflicting harm upon an adult or upon a developing, helpless child seems a clear one.²⁴⁴ The child should not be made to suffer the consequences of his biological parents' inadequacies.²⁴⁵ Goldstein, Freud and Solnit point out that their value preference for making the child's needs paramount, and thereby affording the child the utmost protection from physical and emotional abuse, is in more than just the child's best interests. According to these commentators, "[t]his value preference . . . is in society's best interests. Each time the cycle of grossly inadequate parent-child relationships is broken society stands to gain a person capable of becoming an adequate parent for children of the future."²⁴⁶ By adopting a standard which focuses first and foremost on the needs of the child, the law may serve to help both present and future generations of children.²⁴⁷ Hence, in order to promote the interests of society in general, Goldstein, Freud and Solnit have stated that "a child's placement should rest entirely on consideration for the child's own inner situation and developmental needs."²⁴⁸

While advocates of psychological parenthood believe that the welfare of the child should be the primary consideration of the courts, they have differed as to the appropriate standard to achieve this result. The best interests standard has, for example, been criticized as being too broad and vague and thereby allowing trial judges too much discretion.²⁴⁹ Both Professors Mnookin and Wald maintain that the best interests standard allows the state to intrude too easily into the parent-child relationship.²⁵⁰ Both commentators premise their rejection of the best interests standard on their preference for family autonomy.²⁵¹ They maintain that because judges are unable to predict accurately what is truly in a child's best interests, the best interests standard allows trial judges too much latitude.²⁵² Wald has stated that, without legislative definition, decisions made

²⁴³ S. KATZ, *supra* note 1, at 104.

²⁴⁴ See Note, *supra* note 13, at 156.

²⁴⁵ Wald, *supra* note 231, at 638.

²⁴⁶ J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 212, at 7. Many people demonstrate the same inadequacies as their parents exhibited. Wald, *supra* note 231, at 638. For example, many abused children later abuse their children. *Id.* at 639 (citing D. Gil, VIOLENCE AGAINST CHILDREN 18-48 (1973)).

²⁴⁷ Wald, *supra* note 231, at 639.

²⁴⁸ J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 212, at 106.

²⁴⁹ See Mnookin, *supra* note 231, at 230; Wald, *supra* note 231, at 650.

²⁵⁰ Mnookin, *supra* note 231, at 277; Wald, *supra* note 231, at 650.

²⁵¹ Mnookin, *supra* note 231, at 266; Wald, *supra* note 231, at 638.

²⁵² Mnookin, *supra* note 231, at 258-61; Wald, *supra* note 231, at 650. Mnookin states that [t]here are numerous competing theories of human behavior, based on radically different conceptions of the nature of man, and no consensus exists that any one is correct. No theory at all is considered widely capable of generating reliable predictions about the psychological and behavioral consequences of alternative dispositions for a particular child.

under the best interests standard "merely reflect a judge's own 'folk psychology.'" ²⁵³ As a result, Mnookin and Wald contend that the courts should reject the best interests standard and intervene in the parent-child relationship only when the child's health is substantially or seriously threatened. ²⁵⁴

Professor Katz, on the other hand, has pointed out the value of broad neglect statutes utilizing the best interests standard. He maintains that the rationale for allowing trial judges wide discretion in making custody decisions is that local judges presumably have the best knowledge of the community resources available to them. ²⁵⁵ Further, according to Katz, juvenile and domestic judges are considered "closer" to the issues involved and are thought to reflect community values. ²⁵⁶ Katz asserts that broad neglect statutes also allow for a wide degree of variance in child-rearing. Because there is no exact or perfect formula for raising children, Katz states that the law must allow, to a certain extent, for differences in style in parental behavior toward their children. ²⁵⁷ Moreover, Katz observes that broad neglect statutes recognize that neglectful behavior can and does vary widely from case to case. ²⁵⁸ Thus, a broad neglect standard allows judges to examine each case on its facts and, according to Katz, therefore eliminates the need to search for specific behavior upon which to "peg" the neglect charge. ²⁵⁹

Professor Katz has recognized, however, that while the breadth of neglect statutes enhances trial court judges' discretion, it may also provide these judges with the opportunity to impose their own child-rearing preferences on the parents before them. ²⁶⁰ But, unlike Mnookin and Wald, who have rejected the best interests standard for its grant of wide discretion to trial court judges, Katz suggests that the possible abuse of trial court discretion can be curtailed by placing guidelines on the standard. ²⁶¹ Katz contends that "best interests" should include "a constellation of social values essential to a child's development into a physically and emotionally healthy and responsible adult." ²⁶² Katz

Mnookin, *supra* note 231, at 258. In a sense, Mnookin and Wald argue that because psychological theory cannot predict the future course of the child's life it should be ignored. Goldstein, Freud & Solnit contend, however, that psychological theory can be utilized, in the short run, to minimize harm to the child. For a discussion of their theory, see *infra* notes 266-80 and accompanying text.

²⁵³ Wald, *supra* note 231, at 650.

²⁵⁴ See Mnookin, *supra* note 231, at 278; Wald, *supra* note 231, at 642. Mnookin's proposed standard for removal provides in relevant part that

[a] state may remove a child from parental custody without parental consent only if the state first proves: (a) there is an immediate and substantial danger to the child's health; and (b) there are no reasonable means acceptable to the parents by which the state can protect the child's health without removing the child from parental custody.

Mnookin, *supra* note 231, at 278. Wald proposes that "state intervention be limited to instances where a child has suffered serious physical harm, serious and narrowly defined emotional damage or sexual abuse, or where there is a substantial likelihood that the child imminently will suffer serious physical harm." Wald, *supra* note 231, at 642.

²⁵⁵ S. KATZ, *supra* note 1, at 62.

²⁵⁶ *Id.* at 63.

²⁵⁷ *Id.* at 64.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 64-65.

²⁶⁰ *Id.* at 65.

²⁶¹ Katz, *supra* note 206, at 168. These value judgments also may go unchecked because of the lack of a written opinion and because few child-custody cases are appealed. S. KATZ, *supra* note 1, at 65.

²⁶² *Id.* at 145.

asserts, in accord with a child's need for continuity and emotional stability, that the primary responsibility facing the courts should be to decide what custodial disposition will provide the child with a stable and secure parent-child relationship.²⁶³ He suggests a number of specific goals that a disposition should seek to provide the child: (1) physical and emotional health; (2) an economic base from which the child can grow into a contributing member of society; (3) the development of skills and the fulfillment of his or her intellectual potential; and (4) the development of equal respect for all human beings and the child's maturation into a responsible adult.²⁶⁴ The fundamental underlying notion of these criteria, Katz maintains, is "that a child's healthy development is ultimately a question of emotional stability, promoted by a relationship of affection, stimulation and unbroken continuity of care."²⁶⁵ Consequently, Katz defines the best interests standard in terms of certain social values which will promote both the physical and psychological health of the child.

Goldstein, Freud and Solnit, while agreeing with Professor Katz that the interests of the child should be the paramount consideration of the courts, have suggested a standard which they call the "least detrimental alternative."²⁶⁶ In answer to Mnookin and Wald's criticism that psychological theory is too confused to predict which disposition will lead to a child's healthiest development, Goldstein, Freud and Solnit contend that placement decisions can be based on certain generally applicable and useful predictions.²⁶⁷ It can be predicted, they assert, that, given a child's sense of time and his need for continuity in personal relationships,²⁶⁸ adults who are a child's psychological parents are best suited to raise that child.²⁶⁹ Goldstein, Freud and Solnit contend that while no one can truly predict the future course of another's life, the law can act, in the short run, to minimize harm to the child and to safeguard the child's growth and development.²⁷⁰

The least detrimental alternative, as defined by Goldstein, Freud and Solnit, is that placement

which maximizes, in accord with the child's sense of time and on the basis of short-term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent.²⁷¹

While Goldstein, Freud and Solnit agree with the manifest purpose of the best interests standard, they contend that the least detrimental alternative standard is preferable

²⁶³ *Id.* at 146.

²⁶⁴ *Id.*

²⁶⁵ *Id.* Anna Freud, a well known child development psychologist, states that:

"The best interests of a child are served, according to our point of view, by all measures which promote his smooth progression toward normal maturity. The latter, in its turn, depends above all . . . on the free interchange of affection between child and adult; on ample external stimulation of the child's inborn, internal potentialities; and on unbroken continuity of care."

Id. at 82 n.3 (quoting A. FREUD, 5 THE WRITINGS OF ANNA FREUD: 1956-1965 469 (1969)).

²⁶⁶ J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 212, at 53.

²⁶⁷ *Id.* at 51.

²⁶⁸ *See id.* at 53.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 51, 53.

²⁷¹ *Id.* at 53.

because it conveys to judges that the child's psychological development is at risk and that speedy action is necessary to avoid further damage.²⁷² Moreover, these authors contend that the best interests standard has often been construed by courts and legislatures in a way which has not truly promoted children's best interests.²⁷³ The use of the least detrimental alternative standard, they assert, would serve to remind judges and social welfare agencies that their task is to salvage an unsatisfactory situation by weighing the advantages and disadvantages of actual options.²⁷⁴ Hence, the standard proposed by Goldstein, Freud and Solnit is phrased in terms of minimizing harm to a child in a custody dispute rather than maximizing the child's best interests.²⁷⁵ By essentially rephrasing the best interests standard in a negative way, Goldstein, Freud and Solnit hope to force the courts to make the child's interests paramount and to strive for realistic predictions of what disposition will best serve the child's interests.²⁷⁶

Finally, Professor Katz and Goldstein, Freud and Solnit advocate family autonomy.²⁷⁷ Contrary to what Mnookin and Wald suggest, these commentators contend that a standard which makes children's rights the paramount consideration of the courts need not violate basic societal notions of familial privacy and autonomy.²⁷⁸ Importantly, however, their preference for minimal state intrusion is defined in terms of psychological parent-child relationships: "[i]n a case, for example, involving a child in the longtime care of persons who are not his legal parents, it is the intrusion upon that relationship which must be minimized."²⁷⁹ Thus, these commentators maintain that the goal of minimum coercive intervention by the state always applies to a child's *de facto*, ongoing parents, who may or may not be his lawful parents at the time intervention is contemplated.²⁸⁰ In other words, Katz, and Goldstein, Freud and Solnit, in accord with children's critical need for continuity and emotional stability, recognize the need to protect psychological parent-child relationships, whether or not they are also biological parent-child relationships.

Hence, the Massachusetts Supreme Judicial Court's use of the parental right doctrine, coupled with its rejection of the validity of psychological parenthood, has often led to child-custody dispositions which are in the child's best interests "in-name-only."²⁸¹ The statutory presumption that adoption is in a child's best interests after more than

²⁷² *Id.* at 54.

²⁷³ *Id.* Goldstein, Freud & Solnit contend that many decisions made under the best interests standard are "in-name-only" for the best interests of the child being placed. *Id.* The criticism certainly seems applicable to many of the Massachusetts Supreme Judicial Court's decisions. See *infra* notes 281-83 and accompanying text.

²⁷⁴ J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 212, at 63.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 53. When a child is removed from his or her natural parents, in some ways the child's "best" or ideal interests are no longer completely attainable. Thus, Goldstein, Freud and Solnit contend that when this happens judges should not become "enmeshed in the hope and magic associated with 'best,'" but instead should seek to minimize any further disruptions in the child's life. *Id.* at 63, 99; S. KATZ, *supra* note 1, at 146.

²⁷⁷ See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 231, at 28-29; S. KATZ, *supra* note 1, at 145-46.

²⁷⁸ See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 231, at 28-29; S. KATZ, *supra* note 1, at 145-46.

²⁷⁹ J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 231, at 28-29.

²⁸⁰ See *id.*; S. KATZ, *supra* note 1, at 145-46.

²⁸¹ See *supra* note 273 and accompanying text.

one year in foster care seems to have been intended to prevent the disruptive situation whereby a child who has psychologically bonded with his foster parents is returned to natural parents who have become strangers to the child.²⁸² Returning children who have bonded to their foster parents to their natural parents ignores a child's critical need for emotional stability and continuity and has a devastating impact on the child's development.²⁸³

To prevent, or at least to minimize the developmental harm that neglected children inevitably incur, Massachusetts must, therefore, make the child's interests the paramount consideration of its courts. The child's best interests should be broadly defined by the legislature to promote the child's physical and psychological health and to minimize disruption to the child's development. The critical importance of psychological bonding to foster parents should be recognized and these "new" families should be accorded the same familial autonomy Massachusetts accords the biological family.

The Supreme Judicial Court's rejection of the statutory presumption in favor of adoption after the child has been in foster care for more than one year is inconsistent with the maximization of neglected children's welfare advocated by Goldstein, Freud, Solnit and Katz. The court's rejection of the presumption is, however, consistent with its adherence to the parental right doctrine. The court's position is in the minority in the United States. Not surprisingly, therefore, other states, consistent with the best interests standard, have enacted child-custody statutes which are premised on the recognition of psychological parenthood and correspondingly accord psychological parent-child relationships the same familial autonomy the state accords the original biological family.

IV. PROPOSAL FOR REFORM AND AN ILLUSTRATION OF ITS SUCCESS IN CALIFORNIA

Prior to 1969, California had been, as Massachusetts is now, a stronghold of the parental right doctrine.²⁸⁴ Moreover, the California courts were extremely reluctant to label any parent "unfit," and thus awarded custody of children to their biological parents, even after long periods of separation from them.²⁸⁵ Increasing dissatisfaction with this situation, however, led to the enactment of Civil Code section 4600²⁸⁶ as part of the California Family Law Act of 1969.²⁸⁷ Section 4600, with its emphasis on the welfare of the child, marked the beginning of the decline of the parental fitness doctrine in California.²⁸⁸

The California approach to child-custody disputes, sixteen years after the passage of the Family Law Act of 1969, has made the best interests of the child the primary consideration of the courts of California. The notion of psychological parenthood is

²⁸² See MASS. ANN. LAWS ch. 210, § 3(c) (Michie/Law. Co-op. 1981).

²⁸³ See *supra* notes 226-30 and accompanying text.

²⁸⁴ Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 21 (1975).

²⁸⁵ *Id.* at 19, 23.

²⁸⁶ CAL. CIV. CODE § 4600 (West 1983) provides in pertinent part that

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

CAL. CIV. CODE § 4600(c) (West 1983).

²⁸⁷ Bodenheimer, *supra* note 284, at 24.

²⁸⁸ *Id.* at 24-28.

recognized, and fixed time limits are statutorily set within which the natural parents, with the Department of Welfare's help, must "rehabilitate" themselves or risk losing their child to adoption. The California approach, therefore, represents a model, modern approach to child custody whose twin goals are permanency and emotional stability for the child. While natural parents are given every opportunity to keep their children, the ultimate best interests of the child, as embodied in Goldstein, Freud and Solnit's least detrimental alternative standard, is the basic guideline by which California's courts decide child-custody cases.

Massachusetts' legislature should follow the lead of California's legislature. The best interests of the child should be statutorily mandated as the primary consideration of the courts in deciding child-custody cases. Further, when possible, the child's wishes should be consulted. The natural parents' right to raise their own children should be given some weight, but the ultimate best interests of the child should be the critical factor in deciding child-custody cases.

Foster care should be defined by the Massachusetts legislature as a temporary solution to the problem of inadequate parenting. While the Supreme Judicial Court has ruled that a statutory presumption that foster parents be allowed to adopt children who have been in their care more than one year is unconstitutional, other state courts appear to have found that such statutes are constitutional.²⁸⁹ The legislature should force the court to reconsider its position on fixed time limits for the adoption of foster children by their foster parents. After a care and protection petition has been granted, parents should have a fixed number of years within which to regain custody of their children. If the parents fail to "rehabilitate" themselves, the Department of Social Services should institute a petition to dispense with parental consent to adoption.

Even if the Supreme Judicial Court refuses to accept a *per se* rule for the adoption of foster children, the ultimate goal of the system should be to provide neglected children with a permanent, secure, and stable environment in which to grow. The court presumes that the natural parents are the only ones capable of providing such an environment. Massachusetts' legislature must make clear to the court that if the natural parents are unable to provide the child with adequate parenting the state must place the child with adoptive parents who can adequately care for the child. The assumption that a child's needs are best served with his natural parents must not be allowed to override the state's primary consideration in child-custody cases — the welfare and best interests of the child. To achieve permanence and emotional stability for Massachusetts' neglected children, the legislature must formally recognize the validity of psychological bonding to foster parents and must act to protect psychological parent-child relationships which form with long-time caretakers other than natural parents. Children who have psychologically bonded to their foster parents should not be returned to marginal natural parents who are strangers to their children. This unhappy result can no longer be justified by such ancient notions as the blood tie or a presumption that it is always in a child's best interests to be with his or her natural parents.

Massachusetts' legislature has a duty, as *parens patriae*, to ensure that the children of its state receive adequate parenting. The court, left by the legislature to its own devices in this area, has formulated a standard which focuses on the rights of natural parents rather than on the best interests of the child. The court, by using a parental fitness

²⁸⁹ For an example of such a state, see *infra* notes 291-315 and accompanying text.

standard, is breaching its *parens patriae* duty. The legislature must remind the court of its own words that in child-custody cases "the first and paramount duty of the courts is to consult the welfare of the child . . . [t]o that governing principle every other public and private consideration must yield."²⁹⁰

California mandates by statute that its courts consider primarily the best interests of the child in neglect proceedings. Section 4600 of the Civil Code focuses on the interests of the child and requires a finding of detriment to the child for removal "[i]n any proceeding where there is at issue the custody of a minor child."²⁹¹ In California, an award of custody to a nonparent is required if it serves the best interests of the neglected child and the court finds that an award of custody to the natural parents would be detrimental to the child.²⁹² Hence, California has responded to the legal and psychological commentators who have urged that the child's best interests should be the decisive factor in child-custody adjudication. In contrast to Massachusetts, child-custody law in California has evolved as the state of psychological knowledge concerning child development has become more certain.

Termination of parental rights without the consent of the natural parents is also governed by the best interests standard in California. Section 232(b) provides that "[a]t all termination proceedings, the court shall consider the wishes of the child and shall act in the best interests of the child."²⁹³ Section 232.5, amended in 1983, also provides that the courts "shall act in the best interests of the child" in all termination proceedings.²⁹⁴ Thus, not only are California courts required to consider the best interests of the child in termination proceedings, but they are also required to consult the wishes of the child in deciding whether to terminate parental rights.

Section 232(a)(7) of the California Civil Code provides that if the parents' incapacity or unwillingness to provide care or control continues for longer than one year an action may be brought to terminate parental rights.²⁹⁵ This provision enables the court to remove the child from foster care and place him or her in a permanent familial situation. California's child-custody statutes recognize that foster care is only a temporary solution to the problem of inadequate parenting and that the ultimate best interests of the child calls for permanence and stability, either with his natural parents or with foster parents to whom the child has psychologically bonded.²⁹⁶ California Welfare and Institutional Code section 396 provides in pertinent part that

[i]t is the policy of the legislature that foster care should be a temporary method of care for the children of this state, that children have a right to a normal life, that reunification with the natural parent or parents or another alternate permanent living situation such as adoption or guardianship are more suitable to a child's well-being than is foster care . . . and that, to the

²⁹⁰ *Richards v. Forrest*, 278 Mass. 547, 553, 180 N.E. 508, 511 (1932).

²⁹¹ See CAL. CIV. CODE § 4600(a) (West 1983).

²⁹² *Id.* § 4600(c).

²⁹³ See *id.* § 232(b) (West 1982).

²⁹⁴ See *id.* § 232.5. Section 232.5 provides in relevant part that:

[t]he provisions of this chapter shall be liberally construed to serve and protect the interests and welfare of the child. At all proceedings to declare a child free from parental custody and control, the court shall consider the wishes of the child, bearing in mind the age of the child, and shall act in the best interests of the child.

²⁹⁵ See *id.* § 232(a)(7).

²⁹⁶ See CAL. WELF. & INST. CODE § 396 (West 1984).

extent possible, the current practice of moving children receiving foster care services from one foster home to another . . . should be discontinued.²⁹⁷

Hence, after dependency proceedings have been instituted and the child removed from the parents' custody, the natural parents have one year to "rehabilitate" themselves. During this year, the Department of Welfare is required to offer reasonable rehabilitative services to the parents.²⁹⁸ If, after one year, the court determines that return of the child to the natural parents would be detrimental to the welfare of the child, then termination proceedings will be instituted.²⁹⁹

The purpose of the termination statute is then to "serve the welfare and best interests of a child by providing the stability and security of an adoptive home."³⁰⁰ While the statute recognizes the importance of the natural family, it also recognizes the detrimental effect that multiple placements have on the well-being of the child. If the natural parents cannot prove to the court within one year that they are able to provide and care for the child, the court will attempt to place the child in an adoptive situation.³⁰¹

The California courts have followed the strong mandates of California's child-custody statutes. In *In re Laura F.*,³⁰² for example, the California Supreme Court considered a termination proceeding under California Civil Code section 232(a)(7).³⁰³ The court, quoting *In re Eugene W.*, stated that "it seems indisputable that . . . the state as a *parens patriae* not only has a compelling interest but also a *duty* to sever the parental bonds once a situation contemplated by the statute arises."³⁰⁴ In *Laura F.*, the mother, after more than one year, was still unable to provide a proper home for her children.³⁰⁵ The court determined that return of the children to her would be detrimental to the children's welfare.³⁰⁶ The court therefore held that there was "substantial evidence that termination is in the best interests of the children."³⁰⁷

Likewise, the California Supreme Court, in *In re Angelia P.*,³⁰⁸ while noting the need to balance the interests of the child with those of the parents in maintaining the natural family, also observed that the legislature had clearly manifested its desire that all termination statutes "be liberally construed to preserve and protect the interests and welfare of the child."³⁰⁹ The court stated that "[i]n theory" the parental preference and best interests of the child standards need not necessarily conflict.³¹⁰ When they do conflict, however, the court maintained that the legal system should protect the child's interests.³¹¹ In the case before it, the court noted that the child in question had been in foster care for four years and that return of the child to her parents would be detrimental to the

²⁹⁷ *Id.*

²⁹⁸ See CAL. CIV. CODE § 232(a)(7) (West 1982).

²⁹⁹ See *id.*

³⁰⁰ See *id.* § 232.6.

³⁰¹ See *id.* § 232(a)(7).

³⁰² 33 Cal. 3d 826, 662 P.2d 922, 191 Cal. Rptr. 464 (1983).

³⁰³ *Id.* at 829, 662 P.2d at 923, 191 Cal. Rptr. at 465.

³⁰⁴ *Id.* at 837, 662 P.2d at 930, 191 Cal. Rptr. at 471 (emphasis added).

³⁰⁵ *Id.* at 835, 662 P.2d at 928, 191 Cal. Rptr. at 470.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 836, 662 P.2d at 928, 191 Cal. Rptr. at 470.

³⁰⁸ 28 Cal. 3d 908, 916, 623 P.2d 198, 171 Cal. Rptr. 637 (1981).

³⁰⁹ *Id.* at 916, 623 P.2d at 202, 171 Cal. Rptr. at 641.

³¹⁰ *Id.*

³¹¹ *Id.* at 917, 623 P.2d at 202, 171 Cal. Rptr. at 642.

child's welfare.³¹² Rejecting the parents' request for further delay before termination of their parental rights,³¹³ the court found that "[s]uch uncertainty conflicts with the intent of section 232 to afford children during their formative years a permanent, secure, and stable environment."³¹⁴ The court therefore held that the trial court had correctly terminated the parental rights of the natural parents.³¹⁵

The Massachusetts legislature should enact a child-custody statute similar to that now used by California. Under this statute, a neglected child's best interests and welfare would be the primary consideration of the courts in determining whether the state should intervene in the parent-child relationship. The legislature should not ignore parental rights, but these rights should be subordinate to the child's right to a permanent, secure, and stable environment. While parents should be given every opportunity to keep custody of their children, the legislature must recognize that when parents fail to provide proper parenting for their children the state has a *duty* to intervene as *parens patriae* to further the ultimate best interests of the child. Thus, when the natural parents fail to "rehabilitate" themselves within one year, this intervention should take the form of a termination of their parental rights. The legislature should make clear, however, that termination is not to be followed by long-term foster care. Once parental rights have been severed, the legislature should mandate that every effort be made to see that the child is adopted and that he or she is afforded a permanent, stable environment in which to grow.

CONCLUSION

Massachusetts, in contrast to the majority of jurisdictions, essentially uses the parental fitness test to determine whether state intervention in the parent-child relationship is justified. To remove a child from his or her parents, the Supreme Judicial Court requires a current finding of parental unfitness. Moreover, the court presumes that a child's best interests are served with his or her natural family. In accord with this presumption, the court recognizes the notion of psychological bonding between foster parents and children in their care in rare circumstances only. The court's use of the parental fitness test has made state intervention in the parent-child relationship difficult. Since the court's decision in *Little Wanderers*, close decisions have been decided consistently in favor of the biological parents. In some instances, these decisions have produced harsh results. In some cases, children who have been with foster parents all of their lives have been returned to natural parents who are strangers to these children. Children cannot prosper in this type of unstable environment. Thus, the Supreme Judicial Court, by making parental rights the primary concern of Massachusetts' courts in child-custody cases, has breached the state's duty as *parens patriae* to protect the welfare of the children of Massachusetts.

The Massachusetts legislature therefore must make clear that the paramount consideration of the courts in child-custody cases is the child's best interests and welfare. The primary goal of child custody should be to place the child in a permanent, secure

³¹² *Id.* at 923, 925, 623 P.2d at 206, 208, 171 Cal. Rptr. at 646, 647.

³¹³ *Id.* at 923, 623 P.2d at 206, 171 Cal. Rptr. at 646. The parents requested a delay "until some uncertain future date when, if all went well, Angelia could be returned to them." *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 927, 623 P.2d at 208, 171 Cal. Rptr. at 648.

and stable environment. When parents fail to provide adequate parenting for their children, the state, as *parens patriae*, must intervene to protect the child's welfare. While natural parents should be strongly encouraged to regain their children, when they fail to "rehabilitate" themselves within a certain time, parental rights should be terminated and every effort should be made to have the child adopted. In this type of framework, where a child's best interests are paramount over the rights of natural parents, neglected children have the best chance to develop normally and lead psychologically healthy childhoods.

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