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Comment

WHEN THE CHILD'S BEST INTEREST CALLS FOR IT: POST-ADOPTION CONTACT BY COURT ORDER IN MARYLAND

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The child's best interest is the governing standard in all child custody determinations, including visitation, divorce, termination of parental rights cases, and adoptions in Maryland.¹ Psychological studies demonstrate that both continuity of psychological attachments and connection to the biological family are important to a child's development, identity formation, and overall psychological well-being.² Nevertheless, the current legal framework governing adoptions following termination of parental rights in Maryland does not allow courts to fashion relief that would truly be in the child's best interest.³ When a Maryland court terminates a parental relationship, it can order post-termination visitation with the parent if it is in the child's best interest.⁴ But such orders do not survive adoption. If or when a child is adopted, courts are without power to extend the effect of a post-termination visitation order past adoption.⁵ As a result, in cases where courts terminate parental rights in order to free the foster

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1. *In re Adoption/Guardianship of Ta'Niya C.*, 417 Md. 90, 112, 8 A.3d 745, 758 (2010) [hereinafter *Ta'Niya*] (citations omitted).

2. *See infra* Part I.B.1.

3. *See infra* Part II.B.2. This Comment will address only adoptions following termination of parental rights. It will not discuss independent and private agency adoptions, in which biological parents relinquish their parental rights voluntarily and are able to negotiate post-adoption contact with the prospective adoptive parents. *See* MD. CODE ANN., FAM. LAW § 5-3A (West 2006) (private agency adoptions); *id.* § 5-3B (independent adoptions); *id.* § 5-308 (authorizing biological and adoptive parents to enter into post-adoption contact agreements).

4. FAM. LAW § 5-324(b)(1)(ii)(5).

5. *See infra* Part II.B.2.

child for adoption, post-termination visitation orders are short-lived. In the absence of an agreement between the adoptive and biological parents, the subsequent adoption necessarily severs the child's psychological and biological ties to the biological parent.⁶

In re Adoption/Guardianship of Alonza D., Jr., and Shaydon D. (“*Alonza*”)⁷ demonstrates the inadequacies of the current system. Alonza and Shaydon were removed from their mother's care and placed in foster care—as opposed to with their father—because the house where the father resided tested positive for the presence of lead.⁸ The father had a “positive relationship” with his sons and visited them regularly.⁹ Nevertheless, because the prospective adoptive mother did not want the boys' contact with their father to continue,¹⁰ when the father's parental rights were terminated to free the boys for adoption,¹¹ the relationship between the boys and their father came to an end.¹² (The author of this Comment participated in an appeal of this case.)¹³

This Comment will argue that continuation of foster children's relationship with their biological parents following termination of parental rights and the subsequent adoption would be in the children's best interest in cases like *Alonza*.¹⁴ It will examine the statutory framework for adoption following termination of parental rights,¹⁵ explore the importance of attachments and biological connection to the child's psychological well-being,¹⁶ and address the legal presumption that the parent always acts in the child's best interest.¹⁷ The Comment will conclude first that courts should use their authority to order post-termination visitation,¹⁸ and second that the legislature

6. See *infra* Part II.B.2.

7. 412 Md. 442, 987 A.2d 536 (2010) [hereinafter *Alonza*].

8. *Id.* at 444, 987 A.2d at 536, 537.

9. *Id.* at 445, 987 A.2d at 538.

10. Brief for Petitioner at 20 n.4, *Alonza*, 412 Md. 442, 987 A.2d 536 (2010) (No. 40), 2009 WL 3197642, at *20 n.4.

11. *Alonza*, 412 Md. at 449–54, 987 A.2d at 540–43.

12. See *infra* text accompanying notes 211–216.

13. The author represented the children's father in his latest appeal before the Maryland Court of Special Appeals, *In re Adoption/Guardianship of Alonza D. and Shayon S.*, No. 2089 (Md. Ct. Spec. App. May 24, 2011), as a Maryland Rule 16 attorney through the University of Maryland Francis King Carey School of Law Appellate Advocacy Clinic. See *infra* note 215 for this case's procedural history.

14. See *infra* Part II.A.

15. See *infra* Part I.A.

16. See *infra* Part I.B.1.

17. See *infra* Part I.B.2.

18. See *infra* Part II.B.1.

should authorize courts to extend the effect of post-termination visitation orders past adoption¹⁹ in cases where doing so would be in the child's best interest.²⁰

I. BACKGROUND

The child's best interest governs all child custody determinations in Maryland, including third-party visitation, custody, termination of parental rights, and adoption proceedings.²¹ The exact contours of this standard, however, have proved difficult to define.²² That may be so because in any child custody dispute at least four interests are at stake: (1) the child's interest in stable and nurturing relationships with significant adults,²³ (2) the legal parent's interest in making decisions regarding the child's upbringing,²⁴ (3) the third party's interest in visiting or having custody of the child,²⁵ and (4) the State's interest in protecting the child's welfare in the State's capacity of *parens patriae*.²⁶

In the context of adoption after termination of parental rights, these interests interact within the statutory framework for termination of parental rights and adoption proceedings. The standard for both proceedings is the child's best interest, which has both psychological and legal underpinnings. Therefore, in the context of adoption after termination of parental rights, no discussion of the child's best interest is possible without examining first, the statutes governing termination of parental rights and adoptions,²⁷ second, the child's best interest from the psychological standpoint,²⁸ and third, the United States Supreme Court's and Maryland courts' parental rights jurisprudence,

19. In this Comment "post-adoption contact" refers to contact between the biological parents whose rights have been terminated and their children who have been adopted.

20. See *infra* Part II.B.3.

21. *Ta'Niya*, 417 Md. 90, 112, 8 A.3d 745, 758 (2010).

22. See *id.* at 94, 8 A.3d at 747 (stating that although the governing standard in termination of parental rights is the "best interests of the child," constitutional and common-law rights of parents require consideration of countervailing factors that can make the 'best interest' analysis somewhat circuitous").

23. See *infra* Part I.B.1.

24. See *infra* Part I.B.2.a.

25. See, e.g., *Janice M. v. Margaret K.*, 404 Md. 661, 664, 948 A.2d 73, 75 (2008) (examining a claim by a member of a same-sex relationship for custody or visitation of the child adopted by the other member of that relationship).

26. See *infra* Part I.A.1.

27. See *infra* Part I.A.

28. See *infra* Part I.B.1.

which presumes the parent always knows what is in his or her child's best interest.²⁹

A. Adoption After Termination of Parental Rights in Maryland

Adoption after termination of parental rights is a statutory mechanism that allows courts to terminate parental rights of one individual and assign those rights to another individual.³⁰ Although the State engages in both termination of parental rights ("TPR") and adoption proceedings in its ancient *parens patriae* capacity of protecting the welfare of the State's citizens, neither mechanism existed at common law.³¹ Currently, TPR and adoption proceedings are codified in the Family Law Article, which outlines the powers and obligations of courts in deciding these matters.³²

1. Termination of Parental Rights and Adoption Proceedings in Maryland from a Historical Perspective

States have inherent authority to protect children's welfare under the doctrine of *parens patriae*. Under the doctrine, states have an interest in protecting and promoting the welfare of their citizens, including children.³³ In Maryland, "[i]n this paternalistic role, the State imposes the obligation upon the parents to maintain, care for and protect their children."³⁴ "[W]henever necessary," through its courts the State may regulate the parental relationship.³⁵ In child custody matters, juvenile courts enjoy "the inherent power . . . of securing the welfare and promoting the best interest of the children."³⁶ Under the *parens patriae* power, courts are "in the unique position to marshal the applicable facts, assess the situation, and determine the correct means of fulfilling a child's best interests."³⁷ They also have broad powers "to afford whatever relief may be necessary to protect [the children's]

29. See *infra* Part I.B.2.

30. MD. CODE ANN., FAM. LAW § 5-323(b) (West 2006); *id.* § 5-352(a)(2). Although termination of parental rights and adoption do not always go together, this Comment focuses on situations when they do.

31. See *infra* Part I.A.1.

32. See *infra* Part I.A.2.

33. *In re Adoption/Guardianship of Victor A.*, 386 Md. 288, 300–01, 872 A.2d 662, 669 (2005).

34. *Kennedy v. Kennedy*, 55 Md. App. 299, 309, 462 A.2d 1208, 1215 (1983).

35. *Id.* at 309–10, 462 A.2d at 1215.

36. *Barnard v. Godfrey*, 157 Md. 264, 267, 145 A. 614, 615 (1929) (the reported title of this case in the Atlantic Reporter is *Barnard v. Barnard*).

37. *In re Mark M.*, 365 Md. 687, 707, 782 A.2d 332, 343–44 (2001).

best interests.”³⁸ Furthermore, courts maintain jurisdiction over the children’s welfare even following the initial custody, support, or visitation determination.³⁹ Their *parens patriae* role requires them “to monitor the welfare of children in their jurisdiction and promote the children’s best interests.”⁴⁰

However broad Maryland courts’ power to promote children’s best interests may have been at common law, it did not include the power to terminate parental rights and enter adoption decrees.⁴¹ The law thus did not recognize as binding a parent’s attempt to relinquish parental rights and allowed parents “to retract and repudiate [any such promise] at any time.”⁴² At the same time, in the United States, it was rather common in the seventeenth and eighteenth centuries for some parents to “apprentice” their children to live and work for other families.⁴³ There were a few cases where “a court precluded a parent from regaining physical custody of a child who had been ‘apprenticed’ to another family and who was being well-treated.”⁴⁴ But even though those cases effectively transferred at least some parental rights, there was no “legal authority under the common law in this State for a total relinquishment of parental rights and obligations or any inherent authority in any court to terminate them.”⁴⁵

In fact, courts in the United States did not have “clear authorization for the legal termination of the entire parental relationship” until the passing of adoption statutes, which took place in Maryland only in the first half of the nineteenth century.⁴⁶ The first adoption statutes were in the form of private bills, and Maryland did not enact its first general adoption statute until 1892.⁴⁷ At that time, the statute did not contain a “statement of purpose, and appears to have been primarily concerned with the effect of adoptions on inheritance and distribution of estates.”⁴⁸

38. *Wentzel v. Montgomery Gen. Hosp., Inc.*, 293 Md. 685, 702, 447 A.2d 1244, 1253 (1982).

39. *Kennedy*, 55 Md. App. at 310, 462 A.2d at 1215.

40. *Id.*

41. *In re Adoption/Guardianship No. 2152A, 2153A, 2154A*, 100 Md. App. 262, 279, 641 A.2d 889, 897 (1994).

42. *Carroll County Dep’t of Soc. Servs. v. Edelmann*, 320 Md. 150, 172, 577 A.2d 14, 25 (1990) (citations omitted) (internal quotation marks omitted).

43. *Id.* at 173, 577 A.2d at 25 (internal quotation marks omitted).

44. *Id.* at 173–74, 577 A.2d at 25.

45. *Id.*

46. *Id.* at 174, 577 A.2d at 25.

47. *Id.*, 577 Md. at 25–26.

48. *L.F.M. v. Dep’t of Soc. Servs.*, 67 Md. App. 379, 391, 507 A.2d 1151, 1157 (1986). Specifically, the 1892 adoption statute provided that:

In 1947, the General Assembly amended the 1892 adoption statute and added a statement of legislative policy, “acknowledg[ing] the need for protection of the familial integrity of the adopting parents as well as the protection of the natural parents and of the child.”⁴⁹ Specifically, the statute identified its purpose as

the three-fold protection of (1) the adoptive child, from unnecessary separation from his natural parents and from adoption by persons unfit to have such responsibility; (2) the natural parents, from hurried and abrupt decisions to give up the child; and (3) the adopting parents, by providing them information about the child and his background, and protecting them from subsequent disturbance of their relationships with the child by natural parents.⁵⁰

Other than minor changes in style, this statement of legislative intent remained the same until 2005, when it began to apply both to termination of parental rights proceedings and adoptions.⁵¹

Therefore, as a *parens patriae*, the State of Maryland has historically enjoyed the right and had the responsibility to promote the child’s welfare by playing a role in all matters concerning children. At common law, however, this *parens patriae* interest did not include the right to terminate parental rights of one parent and to assign them to another parent. These powers are entirely statutorily-based.

2. *The Current Statutory Framework for Termination of Parental Rights and Adoption*

The General Assembly substantially restructured the TPR and adoption laws in 2005 by enacting the Permanency for Children and Families Act.⁵² As a result, presently both the TPR and adoption statutes are codified under the Children subtitle of the Family Law Article. The purpose of the laws governing TPR proceedings and adoptions is to:

[t]he effect of [a] decree of adoption shall be to entitle the child so adopted to . . . the same rights of protection, education and maintenance as if born to [the adopting parent] in lawful wedlock, and the natural parents of such child shall be freed from all legal obligations toward it . . .

Id. (alterations in original) (quoting the 1892 Act). This original adoption statute “remained in effect without substantial change for more than fifty years.” *Id.*

49. *Id.* at 392, 507 A.2d at 1157.

50. *Id.* (quoting the 1947 Act).

51. See MD. CODE ANN., FAM. LAW § 5-303 (West 2006) (providing an expanded purpose beyond the scope of the 1947 purpose as seen in *infra* text accompanying note 53).

52. *Alonza*, 412 Md. 442, 455 n.8, 987 A.2d 536, 543 n.8 (2010).

- (1) timely provide permanent and safe homes for children consistent with their best interests;
- (2) protect children from unnecessary separation from their parents;
- (3) ensure adoption only by individuals fit for the responsibility;
- (4) protect parents from making hurried or ill-considered agreements to terminate parental rights;
- (5) protect prospective adoptive parents by giving them information about children and their backgrounds; and
- (6) protect adoptive parents from future disturbances of their relationships with children by former parents.⁵³

To achieve these goals, the statutory framework allows for a number of ways to finalize children's placements, including adoption without prior termination of parental rights and adoption after termination of parental rights.⁵⁴ As its name suggests, adoption after termination of parental rights is a two-step process. First, in a separate proceeding, the court terminates the biological parent's parental rights and declares the State the child's guardian.⁵⁵ Second, the court allows the prospective adoptive family to adopt the child.⁵⁶

a. Termination of Parental Rights

Termination of parental rights is a statutory mechanism that allows the court to terminate an existing parental relationship and make the State the guardian of the child with the hope that the State will later re-transfer the parental rights to an adoptive family.⁵⁷ Termination of parental rights "constitutes a total rescission of the legal relationship between parent and child, and that rescission is generally final."⁵⁸ Specifically, in accordance with section 5-325, termination of parental rights

- (1) terminates a parent's duties, obligations, and rights toward the individual;
- (2) eliminates the need for a further consent by a parent to adoption of the individual;
- (3) grants a local department guardianship with the right to consent to

53. FAM. LAW § 5-303(b).

54. MD. CODE ANN., FAM. LAW § 5-338 (West 2006 & Supp. 2010); FAM. LAW § 5-345 (West 2006).

55. FAM. LAW § 5-323(b) (West 2006 & Supp. 2010).

56. FAM. LAW § 5-345 (West 2006); FAM. LAW § 5-350 (West 2006 & Supp. 2010).

57. *In re Adoption/Guardianship of Rashawn H. and Terese H.*, 402 Md. 477, 494, 496, 937 A.2d 177, 187–89 (2007) [hereinafter *Rashawn*].

58. *Id.* at 496, 937 A.2d at 188.

the individual's adoption or other planned permanent living arrangement; and (4) . . . terminates the individual's CINA [(child in need of assistance)] case.⁵⁹

The TPR process is rather straightforward. In order to terminate parental rights, the Department of Social Services must file a Petition for Guardianship under section 5-313 of the Family Law Article. In ruling on a guardianship petition, a juvenile court is required to "give primary consideration to the health and safety of the child."⁶⁰ Importantly, the statute provides that before a juvenile court could grant the department guardianship of a child without a parent's consent, the court must find "that a parent is unfit to remain in a parental relationship with the child or that exceptional circumstances exist that would make a continuation of the parental relationship detrimental to the best interests of the child such that terminating the rights of the parent is in the child's best interest."⁶¹ If the court makes those findings, it may grant the department's guardianship petition, i.e. terminate the parent's parental rights.⁶² Simultaneously, the court must also terminate the child's CINA case and may order a number of directives in accordance with the child's best interest, including "visitation . . . with a specific individual," placement, and provision of services by the Department of Social Services.⁶³

59. FAM. LAW § 5-325(a) (West 2006). A child in need of assistance ("CINA") "means a child who requires court intervention because: (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs." MD. CODE ANN., CTS. & JUD. PROC. § 3-801(f) (West 2006 & Supp. 2010).

60. FAM. LAW § 5-323(d) (West 2006 & Supp. 2010).

61. *Id.* § 5-323(b).

62. *Id.*

63. *Id.* § 5-324(b)(1). The court must also set a date for a guardianship review hearing within 180 days of terminating parental rights. *Id.* § 5-324(a)(3). At the initial guardianship review hearing, in accordance with the child's best interest, the court determines the child's permanency plan, which may be, in the order of priority,

- (i) adoption of the child;
- (ii) custody and guardianship of the child by an individual; or
- (iii) another planned permanent living arrangement that:

1. addresses the individualized needs of the child, including the child's educational plan, emotional stability, physical placement, and socialization needs; and
2. includes goals that promote the continuity of relations with individuals who will fill a lasting and significant role in the child's life.

Id. § 5-326(a). The department must make "[e]very reasonable effort . . . to implement a permanency plan within 1 year." *Id.* § 5-326(a)(1)(7).

b. Adoption After Termination of Parental Rights

Once the court terminates parental rights by assigning guardianship of the child to the local Department of Social Services, the prospective adoptive parents may petition for adoption.⁶⁴ The adoption proceeding begins with the prospective adoptive parents filing a petition in accordance with section 5-345 of the Family Law Article. The child's biological parent's consent for the child's adoption is no longer necessary.⁶⁵ Instead of the biological parent, the department, as the child's guardian, and the child may consent to the adoption.⁶⁶ The adoption order makes the child's adoptive parents the child's parents "for all intent and purposes," and relieves the biological parent "of all parental duties and obligations to the adoptee."⁶⁷ The adoption order also terminates the department's guardianship over the child.⁶⁸

As part of the 2005 overhaul of the TPR laws, the Maryland legislature has begun to expressly authorize prospective adoptive parents and biological parents, as well as adoptive parents and former parents, to enter into post-adoption contact agreements to allow adopted children to have contact with the biological parents following adoption.⁶⁹ Any such agreement must be attached to the adoption petition,⁷⁰ is enforceable in court, and may be modified upon a showing of an exceptional circumstance making modification in the child's best interest.⁷¹

As this brief overview of Maryland's TPR and adoption after TPR statutes demonstrates, the General Assembly has spelled out a straightforward process for termination of parental rights and adoptions after termination of parental rights. First, the court terminates the biological parents' parental rights upon a showing of parental un-

64. *Id.* § 5-345(a).

65. *Id.* § 5-325(a)(2). In fact, the court is not even required to inform the biological parent of the filing of the petition for adoption. *Id.* § 5-315.

66. *Id.* § 5-351. The child's consent to adoption is necessary for a child over the age of ten. *Id.* § 5-350.

67. *Id.* § 5-352(a)(2).

68. *Id.* § 5-328(c).

69. *Id.* § 5-308(a). The legislature did not, however, give courts specific authority to order post-adoption contact in the absence of such an agreement between the parties. 1 MD. LAW ENCYC. § 51 (West 2009); *see infra* Part II.B.2.

70. FAM. LAW § 5-345(c)(1)(ii) & (c)(2).

71. *Id.* § 5-308(f)(1). The party seeking modification of a post-adoption visitation agreement must demonstrate "that modification is justified because an exceptional circumstance has arisen and the court finds modification to be in an adoptee's best interests." *Id.* § 5-308(f)(2). The statute also provides that the court may refer any disputes regarding the agreement to mediation. *Id.* § 5-308(e).

fitness or exceptional circumstances making continuation of the parental relationship detrimental to the child's best interest. Second, the court may allow another family to adopt the child, giving the adoptive families all rights and responsibilities regarding custody and care for the child. Through this process, in the name of the child's best interest, the child loses one set of parents and gains another.

B. The Child's Best Interest

All child custody matters in Maryland, including termination of parental rights, adoptions, custody, and visitation are governed by the child's best interest. Although easy to state, in practice this standard has not been easy to define⁷² or apply⁷³ because it combines a number of considerations and may encompass other interests in addition to the child's best interest. From the point of view of the child's psychological well-being, continuity of relationships—psychological and biological—should receive the utmost consideration in child custody determinations.⁷⁴ From a constitutional law point of view, more weight may be assigned to the child's relationship with a legal parent to the exclusion of all other relationships.⁷⁵ Finding a proper balance between these countervailing interests may be difficult but necessary in order to come as close as possible to meeting the child's "best" interest.⁷⁶

1. The Child's Best Interest from the Standpoint of Psychology

From the psychological point of view, preserving continuity of a child's attachments and maintaining the child's ties to the biological family are in the child's best interest. Attachments are important because they have a profound influence on the "child's psycho-social

72. As the court observed in *Montgomery County Department of Social Services v. Sanders*, The United Nations Declaration states "[m]ankind owes to a child the best it has to give." Very few persons will quarrel with the tenor of that assertion. What gives rise to controversy is not the general proposition of mankind's obligation to provide what is best for the child, but rather, what is best.

38 Md. App. 406, 407, 381 A.2d 1154, 1156 (1978).

73. In *Ta'Niya*, the court admitted its third-party custody and TPR jurisprudence shows the court "ha[s] struggled in defining how parental unfitness, exceptional circumstances and the child's best interest analyses relate to one another." 417 Md. 90, 94, 8 A.3d 745, 747 (2010).

74. See *infra* Part I.B.1.

75. See *infra* Part I.B.2.

76. See *infra* Parts II.A–B.

functioning.”⁷⁷ Disruption of attachments in childhood impairs a child’s ability to form meaningful relationships in adulthood, use the individual’s full potential for acquiring new knowledge and skills,⁷⁸ and often accompanies psychiatric disturbances.⁷⁹ Furthermore, maintaining the biological connection is vital for the formation of an individual’s identity and overall psychological well-being.⁸⁰ Because “no one developmental theory can provide a complete understanding of child psycho-social development,”⁸¹ this Comment examines some of the more prominent and innovative theories applicable in the adoption context, including (1) the attachment theory, (2) the psychological parent theory, and (3) the importance of the biological connection in the child’s psycho-social development.

a. Attachment Theory: A Link Between Separation from Primary Caretaker in Childhood and Psychological Problems and Psychiatric Disorders in Adulthood

The attachment theory is one of the most successful and enduring developmental theories of the past century. Under the theory, the attachment behavior is thought to be “organized by means of a control system within the central nervous system, analogous to the physiological control systems that maintain physiological measures such as blood pressure and body temperature within set limits.”⁸² The attachment theory undertakes to “explain[] the many forms of emotional distress and personality disturbance, including anxiety, anger, depression, and emotional detachment, to which unwilling separation and loss give rise.”⁸³

77. KWAME OWUSU-BEMPAH, CHILDREN AND SEPARATION: SOCIO-GENEALOGICAL CONNECTEDNESS PERSPECTIVE 10 (2007).

78. Phillip R. Shaver & Maria Mikulincer, *An Overview of Adult Attachment Theory*, in ATTACHMENT THEORY AND RESEARCH IN CLINICAL WORK WITH ADULTS 17, 21 (Joseph H. Obegi & Ety Berant eds., 2009).

79. JOHN BOWLBY, THE MAKING & BREAKING OF AFFECTIONAL BONDS 71 (1979). Clinical research shows “[t]hose who suffer from psychiatric disturbances, whether psychoneurotic, sociopathic, or psychotic, always show impairment of the capacity for affectional bonding, an impairment that is often both severe and long lasting.” *Id.*

80. See *infra* Part I.B.1.c.

81. OWUSU-BEMPAH, *supra* note 77, at 20.

82. JOHN BOWLBY, A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT 123 (1988).

83. BOWLBY, *supra* note 79, at 127.

i. Attachment Formation Is a “Basic Component of Human Nature”

Under the attachment theory “the propensity to make intimate emotional bonds [is] a basic component of human nature.”⁸⁴ According to the theory’s founder, John Bowlby, infants are programmed by evolution to engage in behaviors that ensure proximity with adults, “who are likely to provide protection from physical and psychological threats, promote safe and healthy exploration of the environment, and help the infant learn to regulate emotions effectively.”⁸⁵ It is at this early stage of infancy that an individual’s attachment style begins to form and stays with him or her “from the cradle to the grave,” activating whenever the individual “is distressed, ill, or afraid.”⁸⁶

These early experiences form mental representations of attachments, or “internal working models” of relationships.⁸⁷ Although relationships with different people imprint a number of internal working models in an individual’s memory, because the child’s relationship with the attachment figure predominates over other relationships and surfaces more often, the internal working model of that relationship is going to have more influence over the individual in the long run.⁸⁸ Accordingly, the kind of relationship the child had with

84. BOWLBY, *supra* note 82, at 120–21.

85. Shaver & Mikulincer, *supra* note 78, at 18 (emphasis omitted). John Bowlby is considered the father of modern attachment theory. JERROLD R. BRANDELL & SHOSHANA RINGEL, ATTACHMENT AND DYNAMIC PRACTICE: AN INTEGRATIVE GUIDE FOR SOCIAL WORKERS AND OTHER CLINICIANS 29 (2007). Mary Ainsworth expanded and deepened the theory by new methodology and additional concepts. Inge Bretherton, *The Origins of Attachment Theory: John Bowlby and Mary Ainsworth*, in ATTACHMENT THEORY: SOCIAL, DEVELOPMENTAL, AND CLINICAL PERSPECTIVES 45, 45 (Susan Goldberg et al. eds., 1995) [hereinafter ATTACHMENT THEORY]. Generally, the theory combines “concepts from ethology, cybernetics, information processing, developmental psychology, and psychoanalysis.” *Id.*

86. Giovanni Liotti, *Disorganized/Disoriented Attachment in the Psychotherapy of the Dissociative Disorders*, in ATTACHMENT THEORY, *supra* note 85, at 343, 343. Indeed, John Bowlby’s early work, which would later develop into the attachment theory, began as an examination of the mother-infant relationship. BOWLBY, *supra* note 82, at 21–22.

87. OWUSU-BEMPAH, *supra* note 77, at 12. The internal working models identify the attachment figure for the child and indicate how available and reliable he or she is. *Id.* These inner working models are not just characteristic of children’s perceptions of their attachment figures; on the contrary, “[o]nce the inner working models become established, they are increasingly likely to define social experience rather than be defined by social experience.” *Id.* (citations and internal quotation marks omitted).

88. Shaver & Mikulincer, *supra* note 78, at 24–25. Because an infant’s and a child’s interactions with the primary caregiver are “fairly consistent,” their pattern is likely to become part of a person’s implicit procedural knowledge about close relationships, social interactions, and distress regulation. They tend to operate automatically and unconsciously and are resistant to change. Thus what

his or her primary caretaker is going to determine what kind of an attachment style the child will develop and maintain through life.⁸⁹

ii. The Role of Attachments and Their Continuity in the Individual's Mental and Overall Well-Being

The persistency of internal working models and their role in the formation of a person's attachment style "suggest that, beginning in infancy and throughout the life cycle, an individual's mental health is intractably linked to their attachment relationships."⁹⁰ Indeed, there is a consensus in the field of psychiatry and psychotherapy "that childhood separation or maladaptive attachment or maladaptive working models are implicated in almost every mental disorder."⁹¹ According to Bowlby, "[t]hose who suffer from psychiatric disturbances, whether psycho-neurotic, sociopathic, or psychotic, always show impairment of the capacity for affectional bonding, an impairment that is often both severe and long lasting."⁹² Hence, not surprisingly, "[b]oth the *Diagnostic and Statistical Manual of Mental Disorders* . . . and the *International Classification of Disease* . . . include attachment disorders of childhood in their classification systems."⁹³

As one researcher explains, Bowlby attributed this correlation between mental disorders and incapacity to form affectional bonds to "a disturbance of bonding[] in childhood which he regarded as the cause of psychiatric disorders."⁹⁴ Bowlby believed "that both parental loss and prolonged separations from parents in childhood were potentially traumatic experiences," and "that the stable presence of primary caretakers was essential to healthy personality development, while discontinuities in this care could have profound deleterious ef-

began as representations of specific interactions with particular primary caregivers during childhood tend to be applied in new situations and relationships, and eventually they have an effect on attachment-related experiences, decisions, and actions in adulthood.

Id. at 25.

89. OWUSU-BEMPAH, *supra* note 77, at 13. ("The type and quality of the working models which children develop of their attachment figures are believed to exercise a profound and lasting influence on their relationships throughout the rest of their lives."). There are three principal attachment styles: secure, anxious-ambivalent, and anxious-avoidant. For a discussion of the characteristics of these attachment styles and their manifestation in childhood and adulthood, see BOWLBY, *supra* note 82, at 124.

90. OWUSU-BEMPAH, *supra* note 77, at 11.

91. *Id.* at 14.

92. BOWLBY, *supra* note 79, at 71.

93. OWUSU-BEMPAH, *supra* note 77, at 14 (citations omitted).

94. *Id.* at 11.

fects.”⁹⁵ In childhood, the negative effect of separation manifests itself through “symptoms rang[ing] from emotional problems such as enuresis to physical growth problems such as dwarfism.”⁹⁶ Later in life, adults who had been separated as children may have psychiatric problems such as “[c]hronic anxiety, intermittent depression, attempted or successful suicide [and development of] psychopathic or sociopathic personalities.”⁹⁷

On a seemingly less drastic level, other theorists and researchers have argued that the type of an individual’s attachment style has an impact on at least three major aspects of that individual’s life. First, healthy attachment behavior is crucial in forming and maintaining relationships because every positive “attachment-related interaction” reinforces an individual’s sense of security.⁹⁸ Second, a healthy attachment style “help[s] a person maintain emotional balance and resilience in the face of stress” because it equips a secure individual with tools to deal with negative emotions.⁹⁹ Third, “attachment security [i]s an important foundation for developing skills and competence of all kinds” because the individual does not feel intimidated by new challenges and endeavors.¹⁰⁰

b. The Psychological Parent Doctrine: When the Primary Caretaker Is Not the Child’s Legal Parent

While the attachment theory underscores the importance of an uninterrupted attachment to the caregiver, the “psychological parent” doctrine hypothesizes that what matters for a child’s psychological well-being is the psychological connection between the child and the

95. Kenneth S. Adam et al., *Attachment Organization and Vulnerability to Loss, Separation, and Abuse in Disturbed Adolescents*, in ATTACHMENT THEORY, *supra* note 85, at 309, 313.

96. OWUSU-BEMPAH, *supra* note 77, at 6.

97. BOWLBY, *supra* note 79, at 81.

98. Shaver & Mikulincer, *supra* note 78, at 21. (“Every attachment-related interaction that restores a person’s sense of security reaffirms the value of closeness and strengthens affectional bonds with the relationship partner responsible for augmenting the sense of security.”).

99. *Id.* A healthy attachment style plays “an important part in teaching a person how to regulate and deescalate negative emotions, such as anger, anxiety, and sadness.” *Id.*

100. *Id.* (“A child or adult who feels threatened and inadequately protected or supported has a difficult time directing attention to free play, curious investigation of objects and environments, and affiliative relationships with peers. Extended over long periods of time, this kind of interference disrupts the development of self-efficacy, self-esteem, and positive, trusting social attitudes.”). *Id.*

parent.¹⁰¹ According to the doctrine's founders, Goldstein, Freud, and Solnit,¹⁰²

Unlike adults, children have no psychological conception of relationship by blood-tie until quite late in their development. For the biological parents, the facts of having engendered [] or given birth to a child produce an understandable sense of preparedness for proprietorship and possessiveness. These considerations carry no weight with children who are emotionally unaware of the events leading to their births. What registers in their minds are the day-to-day interchanges with the adults who take care of them and who, on the strength of these, become the parent figures to whom they are attached.¹⁰³

Thus, under the psychological parent theory, a child's relationship with the biological parent is only meaningful to the child if the biological parent is also the psychological parent.¹⁰⁴

Regardless of the existence of the blood relationship between the child and his or her primary caretaker, if there is a "forcible interruption" of a child's relationship with the person who provides for the child's daily needs, the child reacts "with emotional distress and a setback of ongoing development."¹⁰⁵ The extent of the setback depends on the child's age at the time of the separation.¹⁰⁶ For instance, from birth to approximately eighteen months, children may react to separation by refusing food, and experiencing "digestive upsets, sleeping

101. According to Goldstein, Freud, and Solnit, the "psychological parent" is one who continuously and consistently provides for a child's physical and emotional needs. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 17 (1973).

102. The doctrine was first introduced in the 1970s in the book *Beyond the Best Interests of the Child*, in which the authors—Goldstein, Freud, and Solnit—criticized courts for disregarding the child's need for continuity of relationships and advocated a child-centered approach in child placement decisions, including but not limited to foster care, custody, and adoption. *Id.* at 5. The ideas expressed in the book lack support of clinical research but according to the preface, the authors appeared to have relied on clinical experience about the relationships "between children and their adult environment" gained in the Hampstead Child-Therapy Clinic and "actual cases of broken families [and] displaced children" of the Child Study Center at Yale University. *Id.* at ix–x. See also Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 457 & n.155 (1983) (noting that Goldstein, Freud, and Solnit did not provide readers with studies or theoretical work supporting their findings).

103. GOLDSTEIN, *supra* note 101, at 12–13.

104. Conversely, the child may be attached to any caring adult, such as a foster, adoptive, or "common-law adoptive" parent. *Id.* at 27, 19.

105. *Id.* at 27.

106. *Id.* at 32.

difficulties, and crying.”¹⁰⁷ Infants who have experienced early separations “not only suffer separation distress and anxiety but also setbacks in the quality of their next attachments, which will be less trustful.”¹⁰⁸

Similarly, young children under the age of five manifest distress caused by separation by regressing in newly acquired skills, such as using the bathroom or speaking.¹⁰⁹ Likewise, when school-aged children are separated from their psychological parents, they tend to experience a more profound relapse in “those achievements which are based on identification with the parents’ demands, prohibitions, and social ideals.”¹¹⁰ If children are made to go from one foster family to another during this stage of development, “they may cease to identify with any set of substitute parents.”¹¹¹

To avoid such deleterious effects on the child’s psychological well-being, Goldstein, Freud, and Solnit advocate child placement guidelines that provide “the least detrimental available alternative for safeguarding the child’s growth and development.”¹¹² In their opinion, such placement decisions must provide children with a timely “opportunity to be placed with adults who are or are likely to become their psychological parents,”¹¹³ even if that comes at the expense of losing the children’s relationship with their biological parents. Although the doctrine was considered controversial at first, with time it has received “widespread acceptance” and influenced foster care legislation in many states.¹¹⁴

107. *Id.* When an infant is moved from one home to another, there are “changes in the ways the infant is handled, fed, put to bed, and comforted. Such moves from the familiar to the unfamiliar cause discomfort, distress and delays in the infant’s orientation and adaptation within his surroundings.” *Id.*

108. *Id.* at 33.

109. *Id.* (emphasis omitted). Young children tend to regress in “those achievements which are rooted and develop in the intimate interchange with a stable parent figure, who is in the process of becoming the psychological parent.” *Id.*

110. *Id.*

111. *Id.* at 33–34. Accordingly, multiple placements during the school age “puts many children beyond the reach of educational influence, and becomes the direct cause of behavior which the schools experience as disrupting and the courts label as dissocial, delinquent, or even criminal.” *Id.* at 34.

112. *Id.* at 53 (internal quotation marks omitted). The authors prefer to use the term “the least detrimental available alternative for safeguarding the child’s growth and development” over “the child’s best interest standard” in part in recognition of the fact that a child subject to child placement decisions “is already a victim of his environmental circumstances, that he is greatly at risk, and that speedy action is necessary to avoid further harm being done to his chances of healthy psychological development.” *Id.* at 54.

113. *Id.* at 31.

114. Garrison, *supra* note 102, at 449.

c. The Biological Connection

Neither Bowlby's attachment theory, with the roots in the mother-infant relationship, nor Goldstein's psychological theory, with its exclusive focus on the child's current psychological parent, account for the longing that children have for finding the biological parents from whom they have been separated. This is the result mainly because Bowlby's theory was first formulated in the late 1940s/early 1950s¹¹⁵ and Goldstein's psychological parent theory was first introduced in the 1970s,¹¹⁶ when the environment in which many children grew up was significantly different from the present. Today, "a much higher proportion of children" experience "separation and loss of one or both birth parents not only through divorce or death, but also through fostering and adoption."¹¹⁷ These new circumstances of child upbringing sparked a number of studies, seeking to understand the impact of the child's separation from the child's biological parents and placement with an adoptive family on the child's psychological development.¹¹⁸ Specifically, these new studies examined (1) the socio-genealogical connectedness theory, (2) the effects of closed and open adoptions, and (3) the importance of preserving contact with biological parents for foster children.

i. Socio-Genealogical Connectedness

The socio-genealogical connectedness¹¹⁹ theory is a relatively new developmental theory that attempts to explain the psycho-developmental difficulties of children separated from their biological parents.¹²⁰ As opposed to actual interactions and the resulting attachment between children and their caretakers, on which both Bowlby's attachment theory and Goldstein's psychological parent-hood theory are based, the socio-genealogical connectedness theory examines the "sense of human connectedness, social and genealogical linkage" that exists between biological relatives even in the absence of

115. BOWLBY, *supra* note 82, at 21.

116. *See supra* note 102.

117. OWUSU-BEMPAH, *supra* note 77, at 21.

118. *See* Karen March & Charlene Miall, *Adoption as a Family Form*, 49 FAM. REL. 359, 360-61 (2000) (introducing a number of studies on open adoptions and foster adoptions).

119. OWUSU-BEMPAH, *supra* note 77, at ix ("The term socio-genealogical connectedness refers to the degree of our knowledge about our hereditary origins and the extent to which one assimilates that knowledge into one's inner world.").

120. *Id.* at 22-23. *But see* GOLDSTEIN, *supra* note 101, at 12 (arguing that "children have no psychological conception of relationship by blood-tie until quite late in their development").

face-to-face contact.¹²¹ Thus, the theory attempts to explain why a child may be bonded not only to a nurturing adult present in his or her life, but also to an abusive parent, a parent from whom the child is separated, and even to a biological family member the child has “never actually met, such as a father or grandparent who died before the child was born.”¹²²

The socio-genealogical connectedness theory is based on three main principles. First, under the theory, the amount or quality of information a child has about his or her biological parents determines the extent to which the child will integrate the parents’ biological, cultural, and social backgrounds into the child’s inner world.¹²³ Second, the more adequate the information a child has about his or her biological roots, the deeper the child’s sense of connectedness and belonging.¹²⁴ Third, children with a deeper sense of connectedness are better equipped to deal with separation than children who lack the sense of connectedness or whose sense of connectedness is weak.¹²⁵

According to the theory’s founder, Kwame Owusu-Bempah, “deliberate denial or negative distortion of parental information to a child may be equated with deliberate infliction of emotional abuse on that child, which is as psychologically damaging as sexual abuse and may be as physically detrimental as starvation.”¹²⁶ The biological parent and information about him or her is so important to a child that

121. OWUSU-BEMPAH, *supra* note 77, at 21–22, 34–35. In distinguishing between attachment built on interaction and a sense of connectedness that exists in the absence of an interactive relationship, Owusu-Bempah builds on Mary Ainsworth’s distinction between attachment behavior and attachment bond. *Id.* at 34–35. Ainsworth used the term “attachment behavior” to describe proximity-seeking behavior of an infant toward his or her attachment figure and a subsequent integration of those behaviors in an adult. *Id.* at 34. In contrast, the term “attachment bond” referred to an affectional tie, which may exist regardless of whether attachment behavior is also present. *Id.*

122. *Id.* at 35; see also Margaret Beyer & Wallace J. Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L.Q. 233 (1986) (arguing the social services system must begin to recognize the importance of the biological family and provide reunification services that actually give biological parents a chance for reunification).

123. OWUSU-BEMPAH, *supra* note 77, at 23.

124. *Id.*

125. *Id.* Conversely, the less adequate or less favorable the information the child has about the biological family, the less likely the child is to integrate that information, and, as a result, the weaker the child’s sense of his or her connectedness will be. *Id.*

126. *Id.* at 73 (citations omitted). Owusu-Bempah studied the relationship between the amount and quality of information children in single-parent families have about the biological parent who is not present in their lives, and reviewed studies performed by other researchers and practitioners on the issue of childhood separation. *Id.* at 47, 52–53, 71.

devaluation or negation of even an abusive or neglectful parent is detrimental to the child's well-being.¹²⁷

Indeed, this intricate connection between children and their parents may make children who lack information about their biological parents or possess inadequate information "genealogically bewildered."¹²⁸ Even though children may not manifest "overt concern about their lack of [knowledge] at every stage of their development, at some time, usually in early adolescence, they will begin searching for clues."¹²⁹ This search for clues about one's hereditary roots becomes especially prevalent during adolescence because adolescence is a critical age for identity formation.¹³⁰ Some adolescents who are deprived of socio-genealogical information become so obsessive in their search that it turns into a preoccupation of "disturbing proportions," as they "seem to believe that solving this problem will lead to solutions to all their troubles."¹³¹ This often happens in the adopted community, where the break in "the socio-genealogical linkage is obvious."¹³²

To avoid the adverse effects of the severance of the socio-genealogical connection, Owusu-Bempah advocates for continued contact between the child and the non-resident biological parent after separation to allow the child to gain socio-genealogical information from such contact.¹³³ In instances "[w]here such contact is already severed or restricted, it will be in the child's interest for social workers or therapists to inform the custodial parent of the benefits of

127. *Id.* at 54, 73. To illustrate the importance of the parental image to the child, Owusu-Bempah uses the extreme example of a child clinging to an abusive parent while being removed from the abusive parent's custody by child protection services or running away from an adequate foster home to an abusive or neglectful parent. *Id.* at 54. Owusu-Bempah explains this paradox by the child's tendency to associate himself or herself with the parent to the point that "the denial or denigration of [any] parent[, even an abusive or neglectful one,] results in the negation of the child's self and subsequent splitting off of that self part." *Id.* at 73.

128. *Id.* at 95. "A genealogically bewildered child is one who has either no knowledge of his natural parents or only uncertain knowledge about them. The resulting state of confusion and uncertainty fundamentally undermines his security and thus affects his mental health." *Id.* (citations omitted). This equally applies to adopted children, step-children, foster children, and children in single-parent and divorced families. *Id.*

129. *Id.* at 95-96.

130. Owusu-Bempah describes one's identity as "the awareness, understanding and acceptance of both the self and one's biological, cultural and social roots." *Id.* at 99.

131. OWUSU-BEMPAH, *supra* note 77, at 95-96.

132. *Id.* at 44; *see also* Beyer & Mlyniec, *supra* note 122, at 238 ("An adolescent's normal search for an independent identity can result in a reassertion of the original connection, irrespective of the biological parent's inadequacy and the foster or adoptive parent's love.").

133. OWUSU-BEMPAH, *supra* note 77, at 53, 73-74.

contact, and to encourage the parties concerned to facilitate contact.”¹³⁴

ii. Closed and Open Adoption Studies

The studies of the effects of parental separation on adopted children also suggest that the biological connection cannot be disregarded. For the most part of the twentieth century, psychologists believed that closed adoptions with a total severance of biological ties of adopted children promoted attachment between those children and their adoptive parents.¹³⁵ As a result, confidential adoptions, where the adoption records were kept secret, were the norm.¹³⁶ To further promote this policy of confidentiality, adoption agencies sought to “match” the prospective adoptive parents with their prospective adopted children “in terms of appearance, interests, intelligence, personality, or other traits.”¹³⁷ If the “match” was a “good” one, the adopted child may have looked as if he was the adoptive parents’ biological child, thereby making it easier for the adoptive parent not to reveal to the child the fact of adoption and more possible that the child would not question his or her heritage.¹³⁸ The law reflected these beliefs, “contemplat[ing] a clean break from the past, extinguishing all biological family connections . . . and even changing the child’s birth certificate to reflect the adoptive parents as the child’s birth parents.”¹³⁹

Beginning with the 1960s, however, researchers began to question the view that the secrecy surrounding adoptions promoted the adopted child’s adjustment in the adoptive family.¹⁴⁰ Instead, it be-

134. *Id.* at 74.

135. Jeanne Etter, *Levels of Cooperation and Satisfaction in 56 Open Adoptions*, 72 CHILD WELFARE 257, 258–59 (1993); see also Harold D. Grotevant et al., *Adoptive Identity: How Contexts Within and Beyond the Family Shape Developmental Pathways*, 49 FAM. REL. 379, 379 (2000) (discussing how social changes have prompted a change in the adoption practices).

136. Another reason adoptions used to be confidential was the desire to protect children from the prevailing societal attitudes regarding “illegitimacy” or “bad blood,” “associated with being born out of wedlock, being infertile, or having a child outside of marriage.” Grotevant, *supra* note 135, at 379 (internal quotation marks omitted).

137. *Id.* at 379–80.

138. See *id.* at 380 (stating that “[t]he underlying goal of matching was for the child to be able to ‘pass’ as a biologically-related member of the adoptive family”).

139. Annette Ruth Appell, *Reflections on the Movement Toward a More Child-Centered Adoption*, 32 W. NEW ENG. L. REV. 1, 3 (2010).

140. See Grotevant, *supra* note 135, at 380 (citing H. David Kirk’s work from 1965, 1981, and 1995). But see Michael P. Sobol et al., *Paths to the Facilitation of Open Adoption*, 49 FAM. REL. 419, 419 (2000) (observing that proponents of “maintaining confidentiality argue that open adoption interferes with proper grieving for the birth mother, has negative ef-

came known that with acknowledgment of the child's adopted status adoption outcomes were better because the acknowledgment of the adopted status "necessitates recognizing the importance of the biological relatives in the child's life."¹⁴¹ With time, the psychologists understood that to ensure healthy development, more than mere acknowledgement of the child's adoptive status was necessary because many adoptees wanted "to know their genealogical history, increase their sense of identity and to establish a relationship with birth parents."¹⁴² Thus, over the last four decades the concept of openness in adoptions¹⁴³ has expanded and now encompasses a range of options, from prospective adoptive parents meeting the biological parents without exchanging identifying information, to the occasional exchange of letters and phone calls or frequent face-to-face contact after adoption.¹⁴⁴ Slowly but steadily, the law has been catching up with these developments, and many states have enacted statutes allowing post-adoption contact between adopted children and their biological parents.¹⁴⁵ Maryland, however, is not one of them.

Although studies on post-adoption contact show that at the beginning of the adoptive journey many adoptive parents tend to be hesitant about post-adoption contact, research suggests once they have experienced openness in adoption, they begin to see it in a positive light.¹⁴⁶ This may seem counterintuitive, but in "open adoptions,

fects on the child's development, leads to adoptive parent insecurity and uncertainty, and is more likely to result in identity confusion for the adoptee").

141. Etter, *supra* note 135, at 259; *see also* Grotevant, *supra* note 135, at 380 (noting a change in the adoptive policies following a realization of "the importance of acknowledging the unique circumstances of adoptive families"); Sobol, *supra* note 140, at 419 (noting that for Kirk, the pioneer researcher who was the first to introduce the concept of openness in adoptions, "openness pertained only to communicative relationships within the nuclear adoptive family and not to individuals outside of this family group").

142. Michael P. Sobol & Jeanette Cardiff, *A Sociopsychological Investigation of Adult Adoptees' Search for Birth Parents*, 32 FAM. REL. 477, 477 (1983).

143. "Open adoption" may be defined as an adoption with "an ongoing channel between biological and adoptive parents, with communication going both ways." Etter, *supra* note 135, at 260.

144. Sobol, *supra* note 140, at 419. For a discussion of the variety of open adoption options currently in existence and their possible effects on the parties involved, see Leigh Gaddie, *Open Adoption*, 22 J. AM. ACAD. MATRIM. LAW 499 (2009).

145. *See* Appell, *supra* note 139, at 3 n.6 (observing that since 1990, the number of cases and statutes allowing post-adoption contact agreements has grown significantly). Appell points out that there are two types of post-adoption contact statutes: (1) those permitting courts to enforce post-adoption contact agreements between biological and adoptive parents, and (2) those permitting courts to order post-adoption contact in the absence of an agreement between parties. *Id.* at 5.

146. *See* Sobol, *supra* note 140, at 419 (pointing out that although potential adoptive parents often fear openness will result in the birth mother's attempt to regain custody, af-

adoptive parents feel a greater sense of entitlement to parent and less fear of losing the child to [the] birth family.”¹⁴⁷ Also, researchers have found no “deleterious effect” of openness on younger children, and although research of the effect of openness on adolescents remains to be seen, the reunion outcomes of adult adoptees likewise suggest that “accessibility to birth parents should aid in resolving many of the identity challenges late adolescent adoptees may encounter.”¹⁴⁸

iii. Foster-Care Adoptions

The discovery that confidential adoptions do not promote the interests of either party in the adoption triad coincided with the social changes of the 1960s and 1970s, which reduced the number of unwanted pregnancies and normalized single parenting, thereby reducing the number of healthy infants available for adoption and making “matching” more challenging.¹⁴⁹ At the same time, a greater number of children in foster care became available for adoption.¹⁵⁰ These children were different from the “healthy infants” who used to comprise “the largest pool” of prospective adopted children in that many foster children were older and had lived with their biological parents for some time prior to being separated from them.¹⁵¹

Studies on continued contact between foster children and their biological parents demonstrate that contact “generally promotes the child’s sense of well-being and emotional security.”¹⁵² The benefits of maintaining the biological connection were evident not only among children who were separated from their biological parents at an older age¹⁵³ but “even [among] children who were separated from their parents at a very early age and whose subsequent contacts with their

ter experiencing openness they become less fearful and even “have a greater sense of permanence about the adoption”).

147. *Id.* at 423.

148. *Id.*

149. Grotevant, *supra* note 135, at 380.

150. *Id.*

151. *Id.* Other research showed that the older the child is at the time of adoption, and the more the adopted child knows about his or her biological parents, the more likely he or she is to search for them. Sobol & Cardiff, *supra* note 142, at 479–80, 482.

152. Garrison, *supra* note 102, at 461. Garrison notes, however, “that most studies have not measured the child’s well-being in any consistent manner, and one study measured it only by impressionable evidence.” *Id.* at 461 n.169.

153. *See* Beyer & Mlyniec, *supra* note 122, at 238 (“The continuing relationship between a seven- or eight-year-old child and a biological parent with whom he has lived cannot be denied. That connection exists forever. Neither adoption nor limited visitation with the biological parent during foster care can cut the lifeline.”).

parents are sporadic.”¹⁵⁴ For instance, one study “found that frequent parental visitation correlated strongly with higher ratings on a variety of scales designed to measure the child’s intellectual and emotional development.”¹⁵⁵

Although adoptions of children from foster care have become more common,¹⁵⁶ there has been little research on how openness and contact with the biological parents plays out in those circumstances.¹⁵⁷ One longitudinal study focused solely on the openness and contact in adoptions of foster care children that followed a large number of families over a period of several years.¹⁵⁸ It revealed that contact with the biological parents of the adopted children has evolved over the years.¹⁵⁹ Although the amount of contact declined within the two years immediately following adoption, it stabilized during the later years.¹⁶⁰ The researchers expected the contact with the biological parents to increase, however, as the children reached adolescence.¹⁶¹

As psychology shows us, attachments, especially the attachment to the primary caregiver, are very important to the child’s development and psychological well-being. Likewise, the child’s contact with the biological family may be equally important to the child’s identity formation and may affect the child for the rest of his or her life.

154. Garrison, *supra* note 102, at 461. Garrison pointed out that these studies did not exclude children who had neglectful or inadequate parents. *Id.*

155. *Id.* at 463 (“The researchers thus urged that, ‘in the interests of the child’s emotional well-being,’ parental visitation should be encouraged.” (citation omitted)).

156. See Grotevant, *supra* note 135, at 380.

157. Karie M. Frasch et al., *Openness and Contact in Foster Care Adoptions: An Eight-Year Follow-Up*, 49 FAM. REL. 435, 445 (2000).

158. *Id.* at 443. The research consisted of three waves of questionnaires mailed to adoptive parents at two, four, and eight years following adoption. *Id.* at 436–37. Although the original pool of adoptive parents willing to participate in the study was over 2,000 and included non-foster care adoptions, by the completion of the study, the final sample consisted solely of questionnaires completed by adoptive parents of former foster children and included 231 questionnaires. *Id.* Out of the 231 adoptions, the mean length of time the children had spent in foster care prior to being adopted was approximately two-and-a-half years, and 90 percent of the children were placed in the adoptive homes before the age of five. *Id.* The researchers observed that most children in the study were adopted as infants but that older children who are adopted may have a “greater interest in maintaining contact” with their biological parents because they had had relationships with the biological parents prior to the adoption. *Id.* at 444.

159. *Id.* at 443. Almost 40 percent of families began as closed adoptions, having no contact with the biological parents of the adopted children, and remained that way within the following eight years. *Id.* Approximately 25 percent of families began as open adoptions and continued to have some contact with the biological parents. *Id.* The remaining 35 percent of families have either begun having contact with the biological parents even though there was no contact initially or stopped contact that used to exist. *Id.*

160. *Id.*

161. *Id.* at 445.

Therefore, from the standpoint of psychology, to meet the best interest of the child, one must strive to maintain all of these important relationships in a child's life.

2. *The Law Presumes That the Legal Parent Acts in the Child's Best Interest, Unless the Parent Is Unfit or There Are Exceptional Circumstances Overcoming the Presumption*

Although a psychologist would argue that a child's attachment to the primary caretaker and the connection to the biological parents should dictate a child placement decision, psychology is not the courts' only guide in cases in which a third party seeks to infringe on the legal parent's relationship with his or her child. Instead, courts presume that parents always promote the child's best interests because historically courts have believed "that natural bonds of affection lead parents to act in the best interests of their children."¹⁶² The presumption that parent knows best, however, may be overcome by a showing of parental unfitness or exceptional circumstances making the parental prerogative detrimental to the child's best interest.

a. *The Law Recognizes the Legal Parents' Liberty Interest in the Care, Custody, and Control of Their Children and Presumes That Parents Always Act in Their Children's Best Interests*

The relationship between a parent and a child occupies a special place in the law. The Supreme Court has observed that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children."¹⁶³ The presumption that parents are the best persons to decide what is in their children's best interest is "established beyond debate as an enduring American tradition."¹⁶⁴ Although the federal and state constitutions are silent with regard to the parent's right to parent, in furtherance of the traditional belief that parents act in their children's best interest, the Court has recognized this fundamental right under the Fourteenth Amendment,¹⁶⁵ which protects against state deprivation "of life, liberty, or property, without due process of law."¹⁶⁶

162. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (citations omitted).

163. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

164. *Id.*

165. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (explaining that the Fourteenth Amendment protected an individual's liberty interest to "bring up children").

166. U.S. CONST. amend. XIV, § 1.

The evolution of parental rights jurisprudence began in *Meyer v. Nebraska*, where the Court considered the constitutionality of a state ordinance that prohibited instruction in a foreign language to students who had not passed the eighth grade.¹⁶⁷ Acknowledging the State's interest in having all citizens speak English, the Court insisted that "the individual has certain fundamental rights which must be respected," including the parents' decision regarding their children's education.¹⁶⁸ The Court explained that the Fourteenth Amendment's liberty interest

[d]enotes . . . the right of the individual to . . . engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹⁶⁹

Two decades later, in *Prince v. Massachusetts*, while reaffirming parental rights, the Court established that such rights were not without limitations.¹⁷⁰ In *Prince*, a woman was convicted for violating the state child labor laws for engaging her nine-year-old niece in the sale of religious pamphlets.¹⁷¹ Although the Court stated that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents," it nevertheless held the state's restriction on the parental rights in this case was constitutional.¹⁷² The Court reasoned that the "rights of parenthood are not beyond limitation," and "the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."¹⁷³

167. 262 U.S. 390, 396–97 (1923). The suit was brought by a school teacher who was convicted under the statute for teaching reading in German to a student who had not passed the eighth grade. *Id.*

168. *Id.* at 401, 399.

169. *Id.* at 399. Just two years later, the Supreme Court was asked again to resolve a dispute between the parents and the State in the education context in *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 529–30 (1925). *Pierce* involved a state law that required parents to send to public schools all children between the ages of eight and sixteen. *Id.* The Court held that the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534–35.

170. 321 U.S. 158, 166 (1944).

171. *Id.* at 159–60, 162.

172. *Id.* at 166.

173. *Id.* (footnotes omitted).

The reasoning of *Meyer*, establishing the fundamental right to parent on the one hand, and *Prince*, acknowledging the right yet subjecting it to the State's authority to limit that right on the other hand, appeared in the context of the termination of parental rights in *Stanley v. Illinois*.¹⁷⁴ *Stanley* addressed the constitutionality of an Illinois law that automatically determined the custody of children of unwed fathers upon the death of the children's mother.¹⁷⁵ While the Court did "not question the assertion that neglectful parents may be separated from their children," it found that the Illinois law violated the Equal Protection Clause of the Fourteenth Amendment because it treated unwed fathers differently from other parents.¹⁷⁶ Accordingly, the Court held that the State could only assume custody of children after a hearing and upon proof that the unwed father was an unfit parent.¹⁷⁷

Even more recently, the Court has reaffirmed that "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."¹⁷⁸ In *Troxel v. Granville*, the Court reviewed a court's award of visitation rights to grandparents under a statute that allowed any third party to petition for visitation with a child over the parent's objection and authorized a court to grant visitation rights when visitation is in the child's best interest.¹⁷⁹ Declining to declare the statute unconstitutional, the Court nevertheless found the state court's decision granting visitation to grandparents violated the mother's fundamental rights because it failed to give proper weight to her decision.¹⁸⁰

Thus, in the past century, the Supreme Court has established "that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest—absent exceptional circumstances—in doing so without the undue interfe-

174. 405 U.S. 645 (1972).

175. *Id.* at 646. In contrast to the law's relaxed standard with respect to unwed fathers, the State assumed custody of children of unwed mothers; divorced, separated, and widowed fathers; and adoptive parents only after a hearing and upon showing of neglect. *Id.*

176. *Id.* at 652, 658.

177. *Id.* at 658. Ten years later, in *Santosky v. Kramer*, the Court was presented with an opportunity to determine the standard of proof necessary for a showing of parental unfitness. 455 U.S. 745, 747 (1982). After weighing the parent's interest of preserving familial ties against the State's "*parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings," the Court concluded that a clear and convincing evidence standard of proof is consistent with both interests. *Id.* at 753–54, 758–60, 766–67, 758.

178. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

179. *Id.* at 60.

180. *Id.* at 69–70.

rence of strangers to them and to their child.”¹⁸¹ At the same time, the Court has emphasized that the parental right is not absolute: when the parents’ liberty interest in raising their children as they see fit comes into conflict with the State’s *parens patriae* interest in promoting the children’s best interests,¹⁸² the State or another third party may infringe on the parent’s right to parent, if it can overcome—by clear and convincing evidence¹⁸³—the presumption that the parent acts in the child’s best interest.

b. Courts May Substitute Their Own Judgment for That of a Parent When the Parent Is Unfit or There Are Exceptional Circumstances Giving Reason to Doubt the Parent Acts in the Child’s Best Interest

Like the Supreme Court, Maryland courts also acknowledge that generally “the child’s interest is inextricably linked with the parents’ interest in and obligation for the welfare and health of the child.”¹⁸⁴ This presumption, however, “may be rebutted upon a showing either that the parent is ‘unfit’ or that ‘exceptional circumstances’ exist which would make continued custody with the parent detrimental to the best interest of the child.”¹⁸⁵ The need to overcome the parental presumption is relevant in four types of cases: (1) third-party custody disputes, (2) third-party visitation cases, (3) termination of parental rights proceedings, and (4) contested adoption cases.¹⁸⁶ In all four types of cases, Maryland courts use similar factors in deciding whether there are exceptional circumstances overcoming the presumption that parents act in their children’s best interests.¹⁸⁷

181. *Id.* at 60.

182. *See, e.g., Santosky*, 455 U.S. at 766 (explaining the conflicting interests in the context of the termination of parental rights).

183. *Id.* at 747–48.

184. *See In re Yve S.*, 373 Md. 550, 572, 819 A.2d 1030, 1042 (2003) (citations and internal quotation marks omitted).

185. *Rashawn*, 402 Md. 477, 495, 937 A.2d 177, 188 (2007).

186. *See Janice M. v. Margaret K.*, 404 Md. 661, 675, 948 A.2d 73, 81 (2008) (identifying three circumstances in which the child’s best interest standard may arise: (1) custody disputes between legal parents, (2) state proceedings in which the State acts in its *parens patriae* capacity, and (3) third-party custody or visitation disputes); *Ta’Niya*, 417 Md. 90, 112, 8 A.3d 745, 758 (2010) (stating that the child’s best interest is the governing standard even in TPR and contested adoption cases).

187. *See infra* Part I.B.2.b.

i. Third-Party Custody and Visitation Cases

Third-party custody and visitation cases have much in common. First, neither custody nor visitation orders are permanent, but they are subject to modification upon a showing of a material change in the circumstances.¹⁸⁸ Second, courts consider visitation to be “a species of custody, albeit for a different duration.”¹⁸⁹ Not surprisingly then, in determining whether there are exceptional circumstances warranting the court’s intrusion into the parent’s decisions regarding what is in the child’s best interest, courts use similar approaches in these two types of cases.

With regard to both third-party custody and visitation cases, the Court of Appeals has noted “that exceptional circumstances are not established through a rigid test, but rather by an analysis of all of the factors before the court in a particular case.”¹⁹⁰ In many earlier third-party custody cases, Maryland courts did not rely on a specific list of factors but found exceptional circumstances overcoming parental preference on the grounds of the child’s general emotional well-being.¹⁹¹ This often happened in cases where children were in the care of third parties for a significant period of time, thereby forming a strong attachment to the third parties who cared for them.

In 1977 in *Ross v. Hoffman*, however, the Court of Appeals for the first time set forth a comprehensive list of exceptional circumstances factors,¹⁹² on which courts have since relied, supplementing it with

188. *Barrett v. Ayres*, 186 Md. App. 1, 18, 972 A.2d 905, 915 (2009).

189. *Koshko v. Haining*, 398 Md. 404, 429, 921 A.2d 171, 185 (2007).

190. *Janice M.*, 404 Md. at 693, 948 A.2d at 92.

191. *See, e.g., Piotrowski v. State*, 179 Md. 377, 383, 18 A.2d 199, 201–02 (1941) (awarding custody to maternal grandparents over the father’s objections because removal of the child from the grandparents’ home, where the child lived from infancy till the age of eight, may have been “injurious” and “detrimental” to the child); *Dietrich v. Anderson*, 185 Md. 103, 106–08, 43 A.2d 186, 187–88, 193 (1945) (refusing to modify a custody decree, thereby leaving custody with third parties who cared for the child from the age of ten months to five years, while the father first pursued an education and then a career in the Army Air Corps); *Trenton v. Christ*, 216 Md. 418, 419, 423, 140 A.2d 660, 662 (1958) (leaving the child in the custody of maternal grandparents despite the father’s objections because the child “has had no opportunity to develop real attachment to her father, step-mother, and half-brother,” and “the mere contemplation of the change [of custody] produced a serious emotional upset” in the child); *Melton v. Connolly*, 219 Md. 184, 189–90, 148 A.2d 387, 390 (1959) (awarding custody to the third parties in fear that a change of custody after so many years would cause the child “emotional upset” but ordering that the child “see and get to know well her siblings and her father”).

192. 280 Md. 172, 191, 372 A.2d 582, 592–93 (1977). In *Ross*, the child lived with the third parties—the Hoffmans—from the age of three-and-a-half months to eight-and-a-half years, seeing the mother only occasionally. *Id.* at 181–82, 372 A.2d at 588–89. As a result, the child and the Hoffmans developed “a bond of mutual attachment,” and the child

additional factors, as necessary.¹⁹³ The *Ross* factors include (1) the length of time the parent and the child were separated, (2) the age of the child when the child was first separated from the parent, (3) the attachment between the child and the third party who cared for the child during the separation of the child from the biological parent, (4) the length of time it took the biological parent to attempt to reclaim the child, (5) the stability of the biological parent's household, and (6) the genuineness of the biological parent's desire to have custody of the child.¹⁹⁴

In third-party visitation cases, Maryland courts initially did not give any special weight to the parents' decision concerning visitation and delved directly into the child's best interest analysis.¹⁹⁵ However, in *Koshko v. Haining*, the Court of Appeals began to require that a grandparent who is challenging a parental decision with regard to visitation must demonstrate parental unfitness or exceptional circumstances.¹⁹⁶ Reviewing the constitutionality of Maryland's grandparent visitation statute ("GVS")¹⁹⁷ the *Koshko* court held that because "visitation is a species of custody, albeit for a more limited duration,"¹⁹⁸ the parental decisions regarding visitation must receive the same constitutional protections as custody determinations.¹⁹⁹ To save the GVS from

viewed the Hoffmans as her parents. *Id.* at 183, 372 A.2d at 589. Not surprisingly, "[w]hen the mother attempted to reclaim the child, the child's reaction 'was one of emotional upheaval[, and s]he was under emotional stress.'" *Id.* at 182, 372 A.2d at 589. A psychiatrist testified at trial that "he did not feel that it was in the best interests of the child to place her in the custody of her biological mother because the child viewed Mrs. Hoffman psychologically as the mother." *Id.* at 182–83, 372 A.2d at 589. With this evidence, the Court of Appeals concluded that there were ample grounds for the family court to find exceptional circumstances making custody with the biological mother detrimental to the child's best interest. *Id.* at 192, 372 A.2d at 594.

193. *Aumiller v. Aumiller*, 183 Md. App. 71, 80–81, 959 A.2d 849, 854–55 (2008).

194. *Ross*, 280 Md. at 191, 372 A.2d at 593.

195. *See, e.g.*, *Fairbanks v. McCarter*, 330 Md. 39, 47–48, 622 A.2d 121, 126 (1993) (holding that a threshold showing of parental unfitness or exceptional circumstances is not required in grandparent visitation cases), *overruled in part by Koshko v. Haining*, 398 Md. 404, 445, 921 A.2d 171, 195 (2007).

196. 398 Md. 404, 444–45, 921 A.2d 171, 195 (2007).

197. GVS hinges upon the child's best interest without requiring the threshold finding regarding parental unfitness or exceptional circumstances. *Id.* at 424, 921 A.2d at 182.

198. *Id.* at 429, 921 A.2d at 185.

199. *Id.* at 444–45, 921 A.2d at 195. The court explained:

There is no dispute that the grant or modification of visitation involves a lesser *degree* of intrusion on the fundamental right to parent than the assignment of custody. . . . [A]lthough there may be a difference in the degree of intrusion, it is not a difference of constitutional magnitude. Visitation, like custody, intrudes upon the fundamental right of parents to direct the "care, custody, and control" of their children. Though visitation decisions granting such privileges to third

being declared facially unconstitutional, the court engrafted into the statute the presumption that the parents' decision regarding visitation was in the child's best interest.²⁰⁰ Thus, the court held that before grandparents could challenge parental decisions prohibiting or limiting visitation, they must show either parental unfitness or exceptional circumstances.²⁰¹

Although Maryland courts have yet to develop a list of factors to consider in making exceptional circumstances determinations in third-party visitation cases, the many similarities between third-party custody and visitation matters mean that the same factors courts use in third-party custody cases "may be relevant" in the visitation context as well.²⁰² For instance, evidence of "a long and frequent history of visitation" and "lay and/or expert evidence of a detrimental physical or emotional effect on the children as a result of the cessation of visitation" are some of the factors a court may consider in third-party visitation cases.²⁰³

ii. Termination of Parental Rights Proceedings

The exceptional circumstances analysis in TPR proceedings is even more important than the analysis in the third-party custody and visitation cases because termination of parental rights "does not just allocate access to a child but constitutes a total rescission of the legal relationship between parent and child, and that rescission is generally final."²⁰⁴ The TPR statute groups exceptional circumstances factors into four major categories.²⁰⁵ The first category focuses on the services provided by the Department of Social Services to the parent in an effort to reunify the parent and the child and the parents' compliance

parties may tread more lightly into the protected grove of parental rights, they tread nonetheless.

Id. at 430–31, 921 A.2d at 186 (footnote omitted) (citation omitted).

200. *Id.* at 426, 921 A.2d at 184.

201. *Id.* at 444–45, 921 A.2d at 195.

202. *Aumiller v. Aumiller*, 183 Md. App. 71, 84–85, 959 A.2d 849, 857 (2008).

203. *Id.* at 85, 959 A.2d at 857. Lack of visitation, in and of itself, however, is not enough to establish exceptional circumstances. *Id.* Instead, the party challenging the parental decision to limit or prohibit visitation must present evidence, often in the form of expert testimony, that "harm . . . results or likely will result from the refusal to provide visitation." *Id.*

204. *Rashawn*, 402 Md. 477, 496, 937 A.2d 177, 188 (2007). Additionally, unlike with custody and visitation disputes where the State plays a neutral role, in termination of parental rights proceedings, the State is the moving party. *Id.*

205. MD. CODE ANN., FAM. LAW § 5-323 (West 2006 & Supp. 2010).

with the department's requirements.²⁰⁶ The second category combines a number of considerations evaluating the parent's efforts and success in adjusting his or her circumstances, such as the parent's maintenance of contact with the child and the department and financial contributions to the child's support.²⁰⁷ The third category looks into any past child abuse or neglect by the parent, whether the child was drug-positive at birth, the parent's convictions for a crime of violence against parents and children, and whether the parent's parental rights have been previously involuntarily terminated.²⁰⁸ The fourth category considers the child's emotional well-being by examining (1) "the child's emotional ties with and feelings toward the child's parents, the child's siblings, and others who may affect the child's best interests significantly;" (2) the child's adjustment to the new home, school, and community; (3) "the child's feelings about severance of the parent-child relationship;" and (4) "the likely impact of terminating parental rights on the child's well-being."²⁰⁹

Although many of these exceptional circumstances factors appear to focus on the parent, as opposed to the child, in two of its recent TPR decisions—*Alonza* and *In re Adoption/Guardianship of Ta'Niya S.*—the Court of Appeals emphasized that, in determining whether there are exceptional circumstances, courts must focus on the child's best interest.²¹⁰ In *Alonza*, Alonza and Shaydon were placed in foster care at a young age because their father's house tested positive for the presence of lead.²¹¹ The boys had a "close" and "positive relationship"

206. *Id.* § 5-323(d)(1). Section 5-706 of the Maryland Family Law Article requires the local Department of Social Services to investigate any reports of child abuse or neglect. *Id.* § 5-706. Depending on the results of its investigation, the department may remove the child from the parents' custody and file a petition requesting that the court find the child in need of assistance ("CINA"). See MD. CODE ANN., CTS & JUD. PROC. § 3-809, § 3-811 (West 2006 & Supp. 2010). If the court adjudicates the child CINA, the department would either place the child with a suitable family member or in foster care. *Id.* § 3-819. After the child's removal from the parents' custody, the department is required to provide reasonable efforts to aid the parent in reunifying with the child. *Id.* § 3-802.

207. FAM. LAW § 5-323(d)(2)(i)–(ii). Under this category, courts may also take into account any parental disability that would make the parent unable to care for the child and whether any additional services would aid the parent in making the required changes so that the parent and the child could be reunified within eighteen months. *Id.* § 5-323(d)(2)(iii)–(iv).

208. *Id.* § 5-323(d)(3).

209. *Id.* § 5-323(d)(4).

210. *Alonza*, 412 Md. 442, 468, 987 A.2d 536, 551–52 (2010); *Ta'Niya*, 417 Md. 90, 116, 8 A.3d 745, 761 (2010).

211. See *Alonza*, 412 Md. at 444, 987 A.2d at 537. Alonza and Shaydon lived with their biological parents until the parents separated when Alonza and Shaydon were sixteen months and two months old respectively. *Id.* At first, the children went to live with their mother, but because of a neglect allegation, the Baltimore City Department of Social Ser-

with their father, Mr. D., who visited them regularly.²¹² When Alonza was seven years old and Shaydon was five-and-a-half, however, Mr. D.'s parental rights were terminated in order to free the boys for adoption by their foster mother.²¹³ The juvenile court terminated Mr. D.'s parental rights finding exceptional circumstances based on the length of time the boys lived with the foster mother but without an explicit finding of how this length of time related to their best interest.²¹⁴ Although Mr. D.'s parental rights were ultimately terminated,²¹⁵ the Court of Appeals reversed the juvenile court's initial finding of exceptional circumstances based on the length of time alone, holding that—absent a specific finding of a detriment to the children's best interest—neither the length of time in foster care nor the resulting bond between the children and the foster mother amounted to exceptional circumstances warranting termination of parental rights.²¹⁶

Likewise, in *Ta'Niya* the court held that, in determining whether there are exceptional circumstances, the child's best interests "trump[] all other considerations."²¹⁷ In *Ta'Niya*, the juvenile court denied the local department's Petition for Guardianship, reasoning the mother's inability to fully comply with the department's requirements did not rise to the level of exceptional circumstances warranting termination of parental rights.²¹⁸ The Court of Appeals reversed, however, holding that the juvenile court improperly focused on the

vices removed them from her custody. *Id.* The department considered placing the boys with Mr. D., but the house where Mr. D. was residing at the time tested positive for the presence of lead. *Id.*

212. *Id.* at 445–47, 987 A.2d at 538–39.

213. *Id.* at 444, 450, 987 A.2d at 537, 540.

214. *Id.* at 468, 987 A.2d at 551–52.

215. This case has a complex procedural history. There were several termination of parental rights hearings and several appeals. The Court of Appeals remanded the juvenile court's ruling twice. First, the Court of Appeals remanded the case to the juvenile court on February 15, 2008. *In re Adoption/Guardianship of Alonza Lynn D., Jr.*, 403 Md. 424, 424, 942 A.2d 755 (2008). The second time the court remanded the case to the juvenile court was on January 19, 2010. *Alonza*, 412 Md. at 468, 987 A.2d at 552). In May 2011 the Court of Special Appeals affirmed the juvenile court's latest TPR finding in the case. *In re Adoption/Guardianship of Alonza D. and Shayon S.*, No. 2089, slip op. at 1 (Md. Ct. Spec. App. May 24, 2011). No certiorari petition has been filed in the Court of Appeals.

216. *Alonza*, 412 Md. at 460–61, 987 A.2d at 547. In *Ta'Niya*, the Court of Appeals clarified *Alonza* as holding that "[f]or exceptional circumstances to exist, the court must also find that the passage of time when the parent and the child were apart makes continuation of parental relationship detrimental to the best interest of the child." *Ta'Niya*, 417 Md. 90, 112, 8 A.3d 745, 758 (2010) (citing *Alonza*, 412 Md. at 463, 987 A.2d at 548).

217. *Ta'Niya*, 417 Md. at 111, 8 A.3d at 758.

218. *Id.* at 112, 8 A.3d at 759. Further, the court did not think it was appropriate to terminate the mother's parental rights to *Ta'Niya* when the department returned *Ta'Niya's* older sister to the mother's care. *Id.* at 115, 8 A.3d at 760.

mother, as opposed to the child, in determining whether exceptional circumstances existed.²¹⁹ Thus, when courts apply the statutory provisions of section 5-323 to determine whether exceptional circumstances warranting termination of parental rights exist, they must focus on the child's best interest.

iii. Contested Adoption Cases

In the adoption context, the need to overcome the presumption that a continued parental relationship is in the child's best interest arises in cases where one parent wants to place the child for adoption but the other parent contests that decision.²²⁰ Although adoption proceedings, like TPR proceedings, carry with them a finality that is not present in third-party custody and visitation cases, the court's exceptional circumstances analysis in those cases is more similar to third-party custody cases than to TPR proceedings.²²¹ Unlike the exceptional factors courts consider in TPR proceedings, the exceptional circumstances factors in contested adoption cases are not codified but are derived from common law.²²² As with third-party custody and visitation cases, the exceptional circumstances a court would consider in contested adoptions depend on the facts of a particular case.²²³ Nev-

219. *Id.*, 8 A.3d at 760–61. Criticizing the juvenile court for its preoccupation solely with the mother's compliance or noncompliance with the service agreements and the mother's relationship with her other daughter, the Court of Appeals observed that the juvenile court failed to inquire into Ta'Niya's emotional ties or lack thereof to the biological mother and sister and Ta'Niya's feelings regarding termination of her mother's parental rights. *Id.* at 116, 8 A.3d at 760–61. The court concluded:

Such a characterization of the exceptional circumstances analysis is incorrect as it does not take into account circumstances particular to an individual child. A court may reach different conclusions under FL Section 5-323(d) regarding different children of the same parent. Indeed, as the facts of this case demonstrate, a parent may, for example, have regular and frequent contact with one child, but not the other, and have varying degrees of success in completion of different service agreements with respect to each child. Also, depending on the age at which the children of one parent were placed in foster care, the length of time they spent in foster care, and the frequency of contact with the natural parent, one child may have maintained or formed an attachment to the natural parent, while the other child has not.

Id., 8 A.3d at 760.

220. *See, e.g., In re Adoption/Guardianship No. A91-71A*, 334 Md. 538, 542–43, 640 A.2d 1085, 1087 (1994) [hereinafter *In re A91-71A*] (the biological father contesting independent adoption).

221. *See id.* at 559–61, 640 A.2d at 1096–97 (observing that the third-party custody exceptional factors apply in contested adoptions).

222. *See id.* at 561–64, 640 A.2d at 1097–98 (reviewing precedents addressing exceptional circumstances).

223. *Id.* at 561, 640 A.2d at 1096.

ertheless, courts often rely on factors similar to those enumerated in the seminal third-party custody case *Ross v. Hoffman*.²²⁴

For instance, as with third-party custody cases, in contested adoption cases courts have considered (1) “the length of time that a child has been with the prospective adoptive parents and the strength of the attachment between the child and the prospective adoptive parents,” (2) “the relative stability of the child’s future with the natural parent and with the prospective adoptive parents,” and (3) “the relative effect upon the child’s stability of having one, as opposed to another, or both, of the relationships continue.”²²⁵ Additionally, the Court of Appeals has observed that other third-party custody considerations, such as “the sincerity of the natural parent’s desire to rear the child, the age of the child when care was assumed by the third party, and the emotional effect of the adoption upon the child” may be relevant in a contested adoption case.²²⁶ Beyond these factors, in contested adoption cases courts have also considered the biological parent’s behavior toward the child, as demonstrated by the parent’s visitation and support of the child on one hand and abandonment on the other.²²⁷

The third-party custody, visitation, TPR proceedings, and contested adoption cases demonstrate that when a legal parent’s decisions concerning the child’s upbringing are at odds with a third party’s interests, the law seeks to protect the relationship between the child and his or her legal parent because it presumes that the parent is the best person to decide what is in the child’s best interest. Courts may, however, substitute their own judgment for that of a parent if there are exceptional circumstances demonstrating that parental judgment is detrimental to the child’s best interest. In determining whether there are exceptional circumstances, courts must focus on the child’s best interest.

II. ANALYSIS

Psychology teaches us that continuity of attachments and integrity of bonds play a crucial role in children’s ability to form and maintain healthy attachments in adulthood and to grow into happy and productive adults. From the psychology standpoint, then, allowing attachments to endure and keeping the biological bonds intact is in

224. 280 Md. 172, 372 A.2d 582 (1977).

225. *In re A91-71A*, 334 Md. at 561, 640 A.2d at 1097.

226. *Id.*

227. *Id.* at 562–63, 640 A.2d at 1097.

the child's best interest.²²⁸ Applying this rationale to the legal context means that foster children should be able to continue to have contact with their biological parents after termination of their parental rights and after the subsequent adoption.²²⁹ Under the current statutory framework, however, even if courts order post-*termination* contact, such orders do not survive adoption, and courts lack the inherent authority to order post-*adoption* contact.²³⁰ As a result, in cases where the adoptive parent does not wish for the contact between the adopted child and his or her biological parents to continue after the adoption, courts are without power to intervene even if the adoptive parents' stance with regard to visitation is detrimental to the child's best interest.²³¹

To allow courts to fully carry out the State's *parens patriae* responsibility of promoting the child's welfare, the legislature must create a statutory scheme that would allow post-termination visitation orders to survive adoption in cases where continuing visitation would be in the child's best interest.²³² The General Assembly could do that by amending the current TPR and adoption laws to allow courts to extend the effect of post-termination visitation orders past adoption. Before post-termination visitation orders turn into post-adoption visitation orders, however, courts would need to find exceptional circumstances making the adoptive parents' decision not to allow contact between the adopted children and their biological parents to be detrimental to the child's best interest.²³³ If the General Assembly expressly requires such a finding, the proposed post-adoption contact legislation will survive a constitutional challenge.²³⁴

A. *From the Standpoint of Psychology, Post-Termination and Post-Adoption Contact with the Biological Parents Is Often in the Child's Best Interest*

From the psychology standpoint, post-termination and post-adoption contact with biological parents may be in the best interests of many adopted foster children because it would allow them to preserve their attachment to their biological parents, if any, and give them an opportunity to stay connected to their socio-genealogical

228. See *supra* Part I.B.1.

229. See *infra* Part II.A.

230. See *infra* Part II.B.2.

231. See *infra* Part II.B.2.

232. See *infra* Part II.B.3.

233. See *infra* Part II.B.3.b.

234. See *infra* Part II.B.3.b.iii.

roots. By the time many foster children are removed from their biological parents' care—even in cases of abuse and neglect—those children had probably formed an attachment to their parents.²³⁵ Severance of that attachment—although often necessary for the child's physical well-being²³⁶—is inevitably detrimental for the child's emotional well-being.²³⁷ While the biological parent's visitation during the child's stay in foster care probably diminishes the negative effect of separation,²³⁸ termination of parental rights and the subsequent adoption with no further contact with the biological parent would abruptly sever that important connection.

Even if the child has no attachment to the biological parent either because the child had been taken away from the parent before he or she had had an opportunity to form an attachment²³⁹ or because the child's attachment to the parent was disrupted,²⁴⁰ post-termination and post-adoption contact with the biological parent may still be beneficial to the child as it would preserve the child's socio-genealogical connection to the child's roots.²⁴¹ The fact that the

235. See, e.g., OWUSU-BEMPAH, *supra* note 77, at 54 (“The importance of the biological parent's value to the child's emotional welfare is even more dramatically demonstrated in child abuse cases: All [child protection workers] who have been involved when children are removed from a home have witnessed how youngsters cling even to abusing parents . . . [and] seen children run away from adequate foster homes to inadequate parental homes.”) (alterations in original) (citations omitted); Douglas F. Goldsmith et al., *Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care*, 55 JUV. & FAM. COURT J. 1, 6 (2004) (“Professionals seem to ignore that for the child the maltreating parents are the only parents he or she has, and that any separation, particularly if long and abrupt, will evoke strong and painful emotional reactions.”).

236. See, e.g., *Rashawn*, 402 Md. 477, 481–83, 937 A.2d 177, 180–81 (2007) (describing Rashawn's and Terese's lives with their biological parents when the children moved eleven times from and to “various shelters and finally ended up in a roach and rat-infested apartment, where [the parents] had to take turns staying awake at night to guard the children from the noxious animals”).

237. See *supra* note 235.

238. See Margaret Smariga, *Visitation with Infants and Toddlers in Foster Care: What Judges and Attorneys Need to Know*, 1, 6 (2007), http://main.zerotothree.org/site/DocServer/Visitation_with_Infants_and_Toddlers_in_Foster_Care.pdf?docID=3981 (arguing, among other things, that frequent and meaningful visitation “[p]romotes healthy attachment and reduces the negative effects of separation for the child and parents”).

239. See, e.g., *Alonza*, 412 Md. 442, 444, 987 A.2d 536, 537 (2010) (stating that at the time Shaydon was placed in foster care, he was two months old).

240. The separation of the child from the parent, however, does not necessarily lead to a disruption of the child's attachment to the parent. See Goldsmith, *supra* note 237, at 1 (stating that during the stay in foster care, “children find themselves torn between forming an attachment to their foster parents while simultaneously longing to return to their parents”).

241. OWUSU-BEMPAH, *supra* note 77, at 73–74 (citations omitted). Professionals often misinterpret a child's behavior during separation as an indication that continuation of

child's prospective adoptive parent has become or is likely to become the child's "psychological parent"²⁴² does not diminish the child's need for maintaining a connection to his or her socio-genealogical heritage.²⁴³

*Alonza*²⁴⁴ presents a factual situation where post-severance contact with the biological parent would have likely been in the children's best interests for at least three reasons.²⁴⁵ First, prior to Alonza's placement in foster care, he had been in his biological father's, Mr. D.'s, care for sixteen months.²⁴⁶ Although to adults this may seem like a very young age of which Alonza would have little or no recollection, as the attachment theory demonstrates, infancy is a crucial time for an individual's attachment formation.²⁴⁷ Regardless of the instability of Alonza's early life, when Alonza was first placed in foster care, he likely suffered emotionally as a result of the separation from his only attachment figures.²⁴⁸ Regular visitation with Mr. D. over the following years in foster care likely helped Alonza cope with the separation and to transition smoothly into a new life with the foster mother.²⁴⁹ Visitation by Mr. D. probably also allowed the attachment to endure. In circumstances like these, another severance of a child's attachment may disturb the child's emotional well-being, further challenging his or her ability to form healthy attachments, pursue new endeavors, and deal with negative emotions that life brings.²⁵⁰

Second, regardless of whether Alonza and Shaydon had an attachment to Mr. D., the boys' socio-genealogical connection to their biological father cannot be negated. Alonza and Shaydon's contact with Mr. D. during their time in foster care provided them an oppor-

contact with the parent has a detrimental effect when the opposite is true. *See* Goldsmith, *supra* note 237, at 2–3 (“[T]he behavior of a foster child who returns from a visit with his biological parents and destroys his room, wets on the floor, and experiences nightmares may incorrectly be interpreted to indicate that the child was subjected to abuse or harsh parenting during the visit. In fact, such emotional dysregulation following contact with the biological parents may be a reasonable, if not expected, response from a child who is once again being forced to cope with an unwanted separation.”).

242. *See supra* note 101.

243. *But see* GOLDSTEIN, *supra* note 101, at 11–13 (arguing the blood connection is of no relevance to children).

244. *Alonza*, 412 Md. 442, 987 A.2d 536 (2010).

245. *See supra* text accompanying notes 7–12 & 214–216.

246. *Alonza*, 412 Md. at 444, 987 A.2d at 537. Shaydon was only two months old when he stopped living with Mr. D. and may have been too young to have formed an attachment to Mr. D. prior to the separation. *Id.*

247. *See supra* text accompanying notes 84–89.

248. *See supra* text accompanying notes 105–108.

249. *See supra* text accompanying note 238.

250. *See supra* text accompanying notes 90–100.

tunity to preserve a connection to their socio-genealogical roots.²⁵¹ This connection will probably prove to be even more beneficial to the boys when they begin to form their identities during early adolescence.²⁵² Because in circumstances like these the child's adoptive parent would unlikely be able or willing to provide the child adequate socio-genealogical information, adopted foster children with no post-adoption contact with their biological parents may experience a diminished sense of security, self-doubt, and the relentless need to get to their roots.²⁵³

Third, Mr. D. visited Alonza and Shaydon regularly while they were in foster care, and was eager to maintain the relationship with them.²⁵⁴ Mr. D. also never engaged in child abuse, and the only barrier to their reunification with Mr. D. was the presence of lead in the home where Mr. D. resided.²⁵⁵ Furthermore, although Mr. D. was unable to satisfy the Department of Social Service's conditions for reunification with his children, he nevertheless demonstrated a strong desire to get the boys back.²⁵⁶ Thus, like Mr. D., some parents whose parental rights were terminated—if allowed to have post-adoption contact with their children—would pose no threat to the children's safety and would likely maintain contact with them after adoption.

As the *Alonza* facts demonstrate, in some cases, post-termination and post-adoption contact may be in the child's best interest because it would preserve some children's attachment to their first attachment figures—their biological parents—and help all children avoid “genealogical bewilderment” by staying connected to their biological roots. Such contact would be particularly important in cases like *Alonza*, where (1) the children are older at the time of the termination of the

251. See OWUSU-BEMPAH, *supra* note 77, at 73–74 (emphasizing that benefits of contact between children and parents from whom they have been separated “seem[] to derive more from the quantity and/or quality of socio-genealogical information which the child gains from such contact than from contact itself”).

252. See *supra* text accompanying notes 130–131.

253. See OWUSU-BEMPAH, *supra* note 77, at 44 (discussing studies suggesting that the “intellectual, emotional and behavioral difficulties experienced by many adopted children [may be attributed] to the loss of genealogical continuity”).

254. *Alonza*, 412 Md. 442, 445, 447, 987 A.2d 536, 538, 539 (2010).

255. *Id.* at 444–45, 987 A.2d at 537–38. The circumstances of *Alonza* and Shaydon's separation from their biological parents are not exceptional: “Experts estimate that 40 to 70 percent of children currently in foster care have not been abused and would not need to be separated from their families if society sufficiently assisted poor families in raising their children.” GUGGENHEIM, *supra* note 43, at 192.

256. In terminating Mr. D.'s parental rights, the juvenile court observed, “It does appear as if [the father] was trying his best, I just don't think he quite made it.” *Alonza*, 412 Md. at 448, 987 A.2d at 539.

biological parent's parental rights, (2) the children had lived with the biological parent for a significant length of time prior to the child's removal from the parent's home or had had regular contact with the biological parent during the child's stay in foster care, and (3) the biological parent is determined to continue the relationship with the child after the termination of parental rights and the subsequent adoption.

B. Maryland Courts Should Be Able to Require Post-Termination and Post-Adoption Contact with Biological Parents When It Would Be in the Best Interest of the Adopted Foster Children

Under the doctrine of *parens patriae*, the State of Maryland—through its courts—should promote child welfare by following the research in the field of psychology, which demonstrates the benefits of contact between children and their biological parents, and requires such contact following the severance of the legal parent/child relationship. Maryland's TPR statutes already allow courts to order visitation following termination of parental rights in cases where visitation would be in the child's best interest.²⁵⁷ But despite evidence that such contact would be beneficial for the child's psychological well-being, juvenile courts have not ordered post-termination contact²⁵⁸ and have no express or inherent authority to extend post-termination visitation orders post-adoption.²⁵⁹ Thus, legislative action is necessary for any meaningful change in the lives of those foster children who are adopted following termination of their biological parents' parental rights.²⁶⁰

The General Assembly should authorize courts to extend the effect of post-termination visitation orders past adoption by amending the TPR and adoption laws to allow adoption courts to review the appropriateness of a post-termination visitation order.²⁶¹ Although such legislation would fall within the State's *parens patriae* authority, the General Assembly must be mindful that any post-adoption visitation legislation does not infringe on the adoptive parents' fundamental right to raise their children as they see fit.²⁶² New legislation would avoid such a constitutional challenge if, as a prerequisite to ordering post-adoption contact, the legislation requires courts to find excep-

257. MD. CODE ANN., FAM. LAW § 5-324(b)(1)(ii)(5) (West 2006 & Supp. 2010).

258. See *infra* note 265.

259. See *infra* Part II.B.1.

260. See *infra* Part II.B.2.

261. See *infra* Part II.B.3.

262. See *infra* Part I.B.2.a.

tional circumstances overcoming the presumption that the adoptive parents' decision against post-adoption contact is in their child's best interest.²⁶³

1. *Courts Should Use Their Authority to Order Post-Termination Contact in Cases Where It Would Be in the Child's Best Interest*

The TPR laws already permit courts to order post-*termination* visitation between a child and his or her biological parents when courts terminate those parents' parental rights and give the Department of Social Services guardianship over the child.²⁶⁴ Despite this statutory authority, however, courts do not appear to order post-termination contact.²⁶⁵ Courts may be reluctant to order post-termination contact between foster children and their biological parents because (1) the post-termination visitation provision is relatively recent and does not expressly refer to biological parents; (2) courts are of the opinion that termination of parental rights is not consistent with post-termination visitation; or (3) courts continue to follow the dispelled belief that closed adoption promotes the child's well-being. None of these three reasons, however, justifies denying children what is in their best interest.

First, the General Assembly gave courts authority to enter post-termination orders when it overhauled the TPR and adoption laws by enacting the Permanency for Families and Children Act of 2005. In allowing courts to order post-termination contact, section 5-324(b) does not specifically speak of the child's biological parent whose rights have been terminated but instead broadly states that the court may "allow visitation for the child with a specific individual."²⁶⁶ Nevertheless, the General Assembly probably envisioned that courts would use that provision to order post-termination visitation between foster children and their biological family members, including parents,

263. See *infra* Part II.B.3.b.iii.

264. MD. CODE ANN., FAM. LAW § 5-324(b)(1)(ii)(5) (West 2006 & Supp. 2010).

265. The author was not successful in finding appellate cases reviewing the juvenile court's granting or failure to grant post-termination visitation generally or with a biological parent specifically. This may be attributed to the statute's ambiguity. See Annette R. Appell, *Survey of State Utilization of Adoption with Contact*, 6 ADOPTION Q. 75, 80 (2003) (observing that South Dakota's post-adoption agreement statute is ambiguous, and "persons at South Dakota state and private agencies did not believe that their state permits enforcement of post-adoption contact agreements" even though it does).

266. FAM. LAW § 5-324(b)(1)(ii)(5).

grandparents, and siblings.²⁶⁷ After all, it enacted this statute during the same legislative session and as part of the same legislation as the post-adoption visitation agreement statute.²⁶⁸

Second, although termination of parental rights and adoption previously constituted an all-or-nothing approach to child placements, that is no longer so.²⁶⁹ Indeed, the General Assembly has recently begun to authorize courts to order post-termination visitation in TPR proceedings.²⁷⁰ It has also begun to expressly provide that parties may enter into post-adoption visitation agreements enforceable in court,²⁷¹ and to require that any post-adoption agreements accompany petitions for adoption.²⁷² Many other jurisdictions have likewise enacted post-adoption visitation statutes,²⁷³ making the all-or-nothing approach more of an exception than the norm.

Third, the myth has long been dispelled that pretending as if the child's biological parents and the child's relationship with them never existed helps the child move on with his or her life following adoption. Since the "open adoption movement" first began in the early 1970s, psychological studies and the adoptees' personal accounts have increasingly demonstrated the numerous negative effects of closed adoptions on child development.²⁷⁴ At the same time, awareness

267. It may have been more helpful if the General Assembly had expressly stated a "specific individual" includes the parent whose rights have been terminated. For example, the Florida post-termination statute reads:

If the court terminates parental rights, it may, as appropriate, order that the parents, siblings, or relatives of the parent whose rights are terminated be allowed to maintain some communication or contact with the child pending adoption if the best interests of the child support this continued communication or contact

If the court orders such continued communication or contact, which may include, but is not limited to, visits, letters, and cards or telephone calls, the nature and frequency of the communication or contact must be set forth in written order and may be reviewed upon motion of any party, or, for purposes of this subsection, an identified prospective adoptive parent. If a child is placed for adoption, the nature and frequency of the communication or contact must be reviewed by the court at the time the child is placed for adoption.

FLA. STAT. ANN. § 39.811(7)(b) (West 2003 & Supp. 2011).

268. Compare Legis. Notes accompanying MD. CODE ANN., FAM. LAW § 5-324(b)(1)(ii)(5) (West 2006) (part of Acts 2005 c. 464), with Legis. Notes accompanying FAM. LAW § 5-308(a) (part of Acts 2005 c. 464).

269. See Appell, *supra* note 139, at 1–5 (discussing how adoption policies have changed since she began to represent foster children).

270. FAM. LAW § 5-324(b)(5) (West 2006 & Supp. 2010).

271. *Id.* § 5-308.

272. *Id.* § 5-345(c)(ii).

273. See Appell, *supra* note 139, at 27–32 (reporting on post-adoption statutes with contact in twenty states).

274. See *supra* text accompany notes 126–131, 136–148.

about the benefits of post-adoption contact has increased among psychologists, legislatures, and courts.²⁷⁵ Therefore, if courts have any reservations about ordering post-termination visitation between children and their biological parents as part of the TPR proceeding, those reservations are unwarranted and must be abandoned for the sake of the children's best interests.

2. *Post-Termination Visitation Orders Are Meaningless If They Do Not Extend Past Adoption but Maryland Courts Have No Express or Inherent Authority to Order Post-Adoption Contact*

Ordering post-termination visitation when such visitation is in the child's best interest is only a partial solution to the problem of severed psychological and socio-genealogical connections between former foster children and their biological parents. This is so because any post-termination order would be short-lived as it only has force while the child is under the guardianship of a local department of social services. Once the court signs the adoption decree, it effectively terminates the child's guardianship case and with it any post-termination visitation order.²⁷⁶ Thus, for a post-termination visitation order to have any meaningful effect, courts must be able to extend its force beyond adoption.

Maryland courts lack any express or inherent authority, however, to order contact once adoption takes place. Although the adoption laws expressly authorize prospective adoptive parents and biological parents to enter into an agreement to allow the child to continue to have contact with the biological parent or another relative following the adoption,²⁷⁷ they are silent with regard to court-ordered post-adoption contact. Because the adoption laws do not authorize courts to order post-adoption contact in the absence of an agreement between the parties, courts have no express authority to order such contact.²⁷⁸

Neither do courts possess any inherent power to order post-adoption contact. Maryland courts have long acknowledged that they possess certain inherent powers that enable them to carry out their

275. See generally Appell, *supra* note 139 (discussing the increasing awareness of open adoption benefits, as demonstrated by the growing number of post-adoption visitation agreement statutes).

276. MD. CODE ANN., FAM. LAW § 5-328(c) (West 2006).

277. *Id.* § 5-308(a).

278. 1 MD. LAW ENCYC. § 51 (West 2009). *But see In re Adoption of Vito*, 728 N.E.2d 292, 299–300 (Mass. 2000) (holding courts have equitable powers to order post-adoption visitation to former parents).

judicial functions, such as, for example, the inherent authority to administer justice and to regulate the practice of law.²⁷⁹ Courts also possess certain inherent powers in the absence of statutory authorization if such powers existed at common law, such as, for example, the inherent power to award alimony.²⁸⁰ But because power to enter adoption decrees did not exist at common law,²⁸¹ courts do not have any inherent powers pertaining to adoptions specifically.

Furthermore, even though the Maryland courts have jurisdiction over child visitation generally,²⁸² court-ordered post-adoption visitation between the adopted child and his or her biological parent would run contrary to the express legislative intent of terminating all rights of former parents upon adoption.²⁸³ Indeed, under the Maryland adoption law, upon adoption, “each of the adoptee’s living parents is: relieved of all parental duties and obligations to the adoptee; and divested of all parental rights as to the adoptee.”²⁸⁴ A post-adoption order allowing visitation to a former parent, however, would preserve in the parent a visitation right, and would thus run contrary to the legislative intent. Since the current adoption laws do not give courts express authority to order post-adoption contact between adopted children and their biological parents, and because courts do not have any inherent authority to enter such orders, to promote the child’s welfare, legislative action is necessary.²⁸⁵

279. *See* *Wynn v. State*, 388 Md. 423, 431 & n.2, 879 A.2d 1097, 1102 & n.2 (2005) (cataloguing cases including *Archer v. State*, 383 Md. 329, 360, 859 A.2d 210, 229 (2004) (administration of justice); *Post v. Bregman*, 349 Md. 142, 163, 707 A.2d 806, 816 (1998) (practice of law)).

280. *Thomas v. Thomas*, 294 Md. 605, 613, 451 A.2d 1215, 1219 (1982) (“As pointed out on many occasions, the 1777 statute merely confirmed the previously existing inherent authority of equity courts over the matter of alimony.”).

281. *See supra* Part I.A.1.

282. FAM. LAW § 1-201(a)(6).

283. *Spencer v. Franks*, 173 Md. 73, 82–83, 195 A. 306, 310 (1937) (“Since the general effect of the decree of adoption under the statute was to terminate the legal relations between the child and its natural parents, the statute contemplated that the custody of the infant, which was an incident of the parental relation, would no longer be the right of the natural parents, but would be the exclusive right of the adoptive parents.”). *But see In re Adoption of Francisco A.*, 866 P.2d 1175, 1181 (N.M. Ct. App. 1993) (“Although granting visitation to a nonparent does affect a parent’s custody rights, this is not sufficient reason to apply a blanket rule against such decrees. It is well established in New Mexico that parents do not have absolute rights in their children; rather, parental rights are secondary to the best interests and welfare of the children.”).

284. FAM. LAW § 5-352(a)(2)(ii).

285. *See L.F.M. v. Dep’t of Soc. Servs.*, 67 Md. App. 379, 397, 507 A.2d 1151, 1160 (1986) (stating “that the legislature is the appropriate forum in which to decide the matters of family policy involved [in post-adoption visitation]”).

3. *The General Assembly Should Authorize Courts to Extend Post-Termination Contact Orders into the Post-Adoption Period Because It Would Be in the Best Interest of Some Children and Because It Would Not Violate Adoptive Parents' Right to Raise Their Adopted Children as They See Fit*

Research in the field of psychology demonstrates that post-adoption contact between adopted children and their biological parents would be beneficial for many adopted children. Because protecting and promoting child welfare falls within the State's *parens patriae* authority, the State of Maryland should be able to require such contact in cases that warrant it.²⁸⁶ Since adoption is a statutory mechanism, before courts could order such contact, the General Assembly would need to authorize courts to adjudicate in this arena.²⁸⁷ Legislating in this context, however, the General Assembly must be mindful of the adoptive parents' fundamental right to raise their children as they see fit without undue State interference.²⁸⁸ Court-ordered post-adoption contact will not violate the adoptive parents' rights if the post-adoption legislation is linked to the existing post-termination visitation provision and hinges upon a finding of exceptional circumstances overcoming the presumption that the adoptive parents' decision not to allow visitation is in their child's best interest.

- a. *The Proposed Post-Adoption Legislation Could Become Part of the Existing TPR and Adoption After TPR Statutes*

The current statutory framework governing termination of parental rights and adoption after termination of parental rights in Maryland has all of the prerequisites for the proposed court-ordered post-adoption visitation legislation.²⁸⁹ During the 2005 overhaul of

286. See *supra* text accompanying notes 33–40; Williams, *supra* note 19, at 630 (“States should not fail to recognize their responsibility to further the best interests of children in fear of potentially infringing on adoptive parents’ rights.”).

287. See *supra* text accompanying note 285.

288. See *infra* Part II.B.3.b.i.

289. For discussion of other ways to preserve some aspects of the biological parent-child relationship, see Garrison, *supra* note 102, at 425, 444 (arguing against termination of parental rights, except for cases where it is necessary to protect the child against “specific, significant harm” and advocating for other alternatives promoting permanency, such as guardianship by the long-term foster parents and continued visitation by the biological parents or long-term foster care contracts); Nitti, *supra* note 104, at 1035–39 (suggesting “open adoption,” whereby biological parents rights would lose their parental rights but retain visitation rights, would be a better alternative than terminating parental rights based on the psychological parenthood concept); Candace M. Zierdt, *Make New Parents but Keep the Old*, 69 N.D. L. REV. 497, 498–99 (1993) (arguing for “weak adoptions,” which “termi-

TPR and adoption laws, the General Assembly acknowledged the child's need for continuity of relationships with the child's biological parents by enacting two new provisions. First, through the TPR laws, the General Assembly began to allow courts to order post-termination visitation between the child and any individual.²⁹⁰ Second, through the adoption statute, it began to authorize post-adoption visitation agreements and require that all such agreements come before the court as part of the adoption petition.²⁹¹ The General Assembly could thus take one more step toward openness in adoptions and amend the adoption statute to allow the post-termination visitation order to survive adoption.²⁹²

Specifically, the General Assembly could do that by amending the adoption laws to require (1) that—as with the post-adoption visitation agreements—any post-termination visitation order be made part of the adoption petition,²⁹³ and (2) that the adoption court review the appropriateness of post-termination contact ordered by the TPR court during the adoption proceeding.²⁹⁴ The first requirement—that any post-termination visitation order be filed together with the adoption petition—would ensure that the adoption court is aware of the post-termination visitation order even though the biological parent is not a party in the adoption proceedings.²⁹⁵ The second requirement—that the adoption court review the post-termination visitation order—would allow the court to use the record created at the TPR hearing and rely on the factual findings made by the TPR court, such as the nature of the relationship between the child and the biological par-

nate[] most, but not all, of a birthparent's rights to her child(ren)" and allow the birthparent to "retain court ordered and legally enforceable visitation rights").

290. MD. CODE ANN., FAM. LAW § 5-324(b) (West 2006 & Supp. 2010).

291. *Id.* § 5-308; *id.* § 5-345(c)(ii).

292. *Cf.* Cynthia E. Cordle, *Open Adoption: The Need for Legislative Action*, 2 VA. J. SOC. POL'Y & L. 275, 276, 289–90 (1995) (while not necessarily advocating for post-adoption contact between biological parents and their children, pointing out that if a legislature decided to allow "open adoptions," it could amend the state's termination of parental rights statute to allow parents to retain visitation rights).

293. *See* FLA. STAT. ANN. § 39.811(7)(b) (West 2003 & Supp. 2011) (requiring that "[i]f a child is placed for adoption, the nature and frequency of the communication or contact must be reviewed by the court at the time the child is placed for adoption").

294. *Cf.* MD. CODE ANN., FAM. LAW § 5-345(c)(1)(ii) (requiring post-adoption visitation agreements be attached to the adoption petition). In cases where there is a post-adoption visitation agreement, the adoption court should defer to the parties' agreement. *See* Appell, *supra* note 139, at 9 (observing that "the agreement of the parties models a more private and organic family operation and is more consistent with U.S. norms of family autonomy" than the court-ordered post-adoption model).

295. *See supra* text accompanying notes 64–67.

ent, the visitation history, and the emotional effect of the termination of parental rights on the child.²⁹⁶

If upon consideration of these and other relevant factors,²⁹⁷ the court finds that discontinuation of contact with the biological parent would be detrimental to the child's best interest, it would order post-termination visitation to continue past adoption. The amended statute should, however, give the adoptive and biological parents an opportunity to work out the conditions of contact through mediation.²⁹⁸ If they are unable to come to an agreement, the adoption court would spell out the nature and frequency of contact.²⁹⁹

As in the case with a post-adoption agreement, court-ordered post-adoption visitation would be enforceable in court, but a party's noncompliance with a post-adoption contact order would not give grounds for setting aside the adoption order itself.³⁰⁰ Finally, like post-adoption visitation agreements, the post-adoption contact order should be subject to modification upon a showing of "an exceptional circumstance [that] has arisen and [if] the court finds modification to be in an adoptee's best interests."³⁰¹ By making the post-adoption contact part of the existing TPR and adoption after TPR statutes, the General Assembly will further emphasize the interconnectedness of

296. See FLA. STAT. ANN. § 63.0427(1)(a) (requiring adoption court to consider the TPR court's post-termination visitation order). Other considerations include "[r]ecommendations of the department, the foster parents if other than the adoptive parents, and the guardian ad litem," "[s]tatements of the prospective adoptive parents," and "[a]ny other information deemed relevant and material by the court." *Id.* § 63.0427.

297. See *infra* Part II.B.3.b.ii.

298. See Emily Chase Dubansky, Note, Koshko v. Haining: *Does a Heightened Standard for Grandparent Visitation Really Protect Children's Best Interests?*, 67 MD. L. REV. 805, 828 (2008) (arguing the Maryland General Assembly should make mediation mandatory in all third-party visitation cases to avoid litigation where the third party must challenge parental decision regarding visitation which may be harmful to children).

299. See FLA. STAT. ANN. § 63.0427(d) ("If the court determines that the child's best interests will be served by postadoption communication or contact, the court shall so order, stating the nature and frequency for the communication or contact.").

300. See MD. CODE ANN., FAM. LAW § 5-308(d), (f) (West 2006) (explaining that a violation of a post-adoption agreement is not grounds for setting aside the adoption); see also FLA. STAT. ANN. § 63.0427 ("This order shall be made a part of the final adoption order, but in no event shall the continuing validity of the adoption be contingent upon such postadoption communication or contact.").

301. MD. CODE ANN., FAM. LAW § 5-308(f)(2); see also FLA. STAT. ANN. § 63.0427 ("[T]he adoptive parent may, at any time, petition for review of a communication or contact order entered pursuant to subsection (1), if the adoptive parent believes the best interests of the adopted child are being compromised, and the court shall have authority to order the communication or contact to be terminated or modified, as the court deems to be in the best interests of the adopted child. As part of the review process, the court may order the parties to engage in mediation.").

the two statutes and enable the adoption court to rely on the evidence before it and the factual findings made by the TPR court.

b. The Proposed Legislation Would Be Constitutional If It Gives Proper Weight to the Presumption That the Adoptive Parents Know Best Whether Contact with Biological Parents Is in the Child's Best Interest

Although legislation authorizing courts to order post-adoption contact would fall within the State's *parens patriae* power, in order to withstand a constitutional challenge it must not violate the adoptive parents' right to raise their children as they see fit. The adoptive parents acquire a fundamental right to raise their adopted children as they see fit, free from State interference, because the adoption decree makes them the new legal parents of the adopted children.³⁰² Since a fundamental right is involved, if the proposed post-adoption contact legislation became subject to a constitutional challenge, it would undergo a strict scrutiny standard of review.³⁰³ Under this standard of constitutional review, "a statute may be validated only if it is deemed to be suitably, or narrowly, tailored to further a compelling state interest."³⁰⁴ Despite this high standard, if the proposed legislation gives proper weight to the presumption that the adoptive parents' decision whether to allow contact between their adopted children and their biological parents is in the children's best interest, the post-adoption statute will withstand any constitutional challenge.

302. FAM. LAW § 5-352(a)(2).

303. See *Koshko v. Haining*, 398 Md. 404, 431, 921 A.2d 171, 186 (2007) ("In matters implicating state interference with a fundamental right we generally apply the strict scrutiny standard."). In *Koshko*, the Court of Appeals observed that some courts had subjected statutes to strict scrutiny only in cases where the State's interference was "significant." *Id.* at 431–32, 921 A.2d at 186–87 (internal quotation marks omitted) (citation omitted). Because in *Koshko* the court found the grandparent visitation statute constituted a "direct and substantial" interference with the parents' right to raise their children as they see fit, legislation authorizing courts to order post-adoption contact would also work a "direct and substantial interference" with adoptive parents' rights. *Id.* at 434, 921 A.2d at 188–89. Thus, the proposed post-adoption statute would be subject to strict scrutiny even under the more selective "significant interference" approach.

304. *Id.* at 438, 921 A.2d at 191.

i. Adoptive Parents Enjoy the Same Constitutional Protections as the Biological Parents Had Enjoyed Before Their Parental Rights Were Terminated, but the Adoptive Parents' Right to Make Parenting Decisions Is Not Absolute and May Give Way to the State's Parens Patriae Interest

If prior to termination of their parental rights, the child's biological parents' relationship with their children had enjoyed constitutional protection, upon termination of parental rights, the biological parents become legal strangers to the child and lose all their "duties, obligations, and rights toward [the child.]"³⁰⁵ Conversely, upon the court's entry of an adoption order, the adoptive parents become the child's parents "for all intent and purposes."³⁰⁶ As a result, by the virtue of adoption, the adoptive parents are entitled to the same constitutional protections that the biological parents had lost by virtue of termination of their parental rights.³⁰⁷

The adoptive parents' newly acquired liberty interest in raising their adopted children as they see fit without the State's interference includes the right to decide whom the child will or will not visit.³⁰⁸ Thus, if a court were to extend the effect of a post-termination visitation order past adoption without affording any additional protections to the adoptive parents, it would infringe on the adoptive parents' fundamental constitutionally-based right to raise their child without the State's interference.³⁰⁹ Moreover, even though court-ordered visitation may not seem like a very significant intrusion, it is an intrusion nonetheless because "like custody, [it] intrudes upon the fundamental right of parents to direct the 'care, custody, and control' of their children."³¹⁰

This does not mean, however, that the State may not intrude on the adoptive parents' right when the child's welfare is at stake. The jurisprudence of the United States Supreme Court and Maryland courts demonstrates that the balance between parents' fundamental right to make parenting decisions free from the State's interference on the one hand, and the State's *parens patriae* interest in protecting and promoting child welfare on the other hand, equally applies to

305. FAM. LAW § 5-325(a).

306. *Id.* § 5-352(a)(2).

307. *See supra* Part I.B.2.

308. *See Koshko*, 398 Md. at 423, 921 A.2d at 182 (stating that parents are "entitled to the long-settled presumption that a parent's decision regarding the custody or visitation of his or her child with third parties is in the child's best interest").

309. *See supra* Part I.B.2.a.

310. *Koshko*, 398 Md. at 430, 921 A.2d at 186.

adoptive parents. Thus, the constitutionally-protected right to parent that the adoptive parents acquire through adoption is not absolute and is subject to limitation when it conflicts with the State's interest in protecting and promoting the welfare of children who cannot protect themselves.³¹¹

Indeed, parents' right to raise their children as they see fit has been infused with limitations since it was first recognized. Beginning with *Prince v. Massachusetts*, the Supreme Court has emphasized that "the family itself is not beyond regulation in the public interest," and neither are the "rights of parenthood . . . beyond limitation."³¹² The Maryland Court of Appeals also observed that, "[o]ne need not wander far into the thickets of family law before running into situations and circumstances where application of an absolute right of the parent would fail to produce a just result."³¹³ Accordingly, while the adoptive parents' decision regarding their adopted child's contact with his or her biological parent is due a presumption of validity,³¹⁴ the State may substitute its own judgment for that of the adoptive parents when their decision conflicts with the State's *parens patriae* responsibility of promoting child welfare.³¹⁵ Before the State does that, however, there must be exceptional circumstances indicating that discontinuance of visitation with the biological parents would have a detrimental effect on the child to be adopted.³¹⁶

ii. The Presumption That Adoptive Parents Act in Their Adopted Child's Best Interest May Be Overcome by Similar Exceptional Circumstances as Those Used in Third-Party Custody, Visitation, TPR Proceedings, and Contested Adoption Cases

As with third-party custody, visitation, TPR proceedings, and contested adoption cases, the presumption that the adoptive parents' decision against post-adoption contact is best for the child may be overcome by exceptional circumstances that show discontinuation of contact with the biological parent to be detrimental to the child's best

311. See *supra* Part I.B.2.b.

312. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

313. *In re Yve S.*, 373 Md. 551, 568, 819 A.2d 1030, 1040 (2003).

314. See *Koshko*, 398 Md. at 439, 921 A.2d at 192 (discussing the presumption that a parent's decision regarding visitation should not be disturbed).

315. The State must be able to intervene as *parens patriae* to promote the child's best interest because "[r]ather than furthering the best interests of the child, an adoptive parent may be more concerned with having complete parental control over the child." Williams, *supra* note 19, at 622.

316. See *supra* Part I.B.2.b.

interest.³¹⁷ Because of the many similarities and overlaps between third-party visitation, custody, TPR proceedings, and contested adoption cases, the same factors that courts rely on in finding exceptional circumstances in those types of cases are likely to be helpful in the context of post-adoption contact. Furthermore, the focus of these exceptional circumstance factors must likewise be in the child's best interest, as opposed to the biological or the adoptive parents' interests.³¹⁸

Indeed, despite the Court of Appeals' "occasional rhetoric" placing parental rights above the child's best interest, the child's best interest has been the governing standard at all stages of the analysis in cases involving child custody.³¹⁹ Maryland's TPR jurisprudence supports the view that the child's best interest—not the parents' circumstances—is the proper focus in determining whether there are exceptional circumstances making parental relationship detrimental to the child's best interest.³²⁰ As the Court of Appeals clarified in *Ta'Niya*, the inquiry into exceptional circumstances is "intended only to place the parent's important rights in proper perspective, not to elevate it above the child's best interest, which is the standard infusing all elements of the typical child custody analysis."³²¹ Thus, "[s]ince one cannot make a determination of whether there are exceptional circumstances that would overcome the presumption of parental rights and make continuation of parental rights detrimental to the child's best interest without looking into the child's best interest, the ultimate focus of the juvenile court's inquiry must be on the child's best interest."³²² Accordingly, the exceptional circumstances analysis in the post-adoption visitation context must likewise focus on the child's best interest.

In deciding whether the presumption that the adoptive parent's decision not to allow visitation with the biological parent is in the child's best interest, the court may borrow a number of exceptional circumstance factors courts use in third-party custody, visitation, contested adoption, and TPR proceedings. Namely, the following third-party custody and visitation exceptional factors may be relevant: (1) the length of time the parent and the child were separated, (2) the age of the child when the child was first separated from the parent,

317. *See supra* Part I.B.2.b.

318. *See supra* text accompanying notes 210–219.

319. *Ta'Niya*, 417 Md. 90, 111, 116, 8 A.3d 745, 758, 761 (2010).

320. *See supra* text accompanying notes 217–219.

321. *Ta'Niya*, 417 Md. at 111, 8 A.3d at 757.

322. *Id.* at 116, 8 A.3d at 761.

and (3) the attachment between the child and the biological parent.³²³ Additionally, like the courts in contested adoption cases, courts deciding the appropriateness of post-adoption contact may inquire into “the relative effect upon the child’s stability of having one . . . or both, of the relationships continue;” and “the emotional effect of the adoption on the child.”³²⁴

Likewise, because many of the statutory exceptional circumstance factors courts consider in TPR proceedings address the effect of severance of the parent-child relationship on the child’s psychological well-being, they would be helpful in deciding whether there are exceptional circumstances in the post-adoption visitation context.³²⁵ These factors include “the child’s emotional ties with and feelings toward the child’s parents, the child’s siblings, and others who may affect the child’s best interests significantly;” “the child’s feelings about severance of the parent-child relationship;” and “the likely impact of terminating parental rights on the child’s well-being.”³²⁶

Furthermore, in accordance with the courts’ willingness to supplement additional exceptional circumstance factors depending on the circumstances of a particular case,³²⁷ in the context of post-adoption contact it would be appropriate for the court to inquire into the impact of the severance of the biological connection on the child’s development.³²⁸ It may be proper for courts to consider whether in the absence of contact with the biological parent, the adoptive parent would be able and willing to provide the adopted child with information on his or her socio-genealogical background. This inquiry is relevant because psychological research indicates the quantity and quality of information a child has regarding his or her socio-genealogical background affects the child’s identity formation, self-worth, and general well-being.³²⁹ Additionally, for the post-adoption contact to have any benefit at all, the biological parent must

323. See *supra* text accompanying note 194.

324. *In re* No. A91-71A, 334 Md. 538, 562, 640 A.2d 1085, 1097 (1994).

325. See *supra* text accompanying note 209.

326. MD. CODE ANN., FAM. LAW § 5-323(d)(4) (West 2006 & Supp. 2010).

327. See *Aumiller v. Aumiller*, 183 Md. App. 71, 80–81, 959 A.2d 849, 855 (2008) (observing that courts “supplement [the exceptional circumstances factors] with additional factors based on the specific facts and circumstances before the court”).

328. See *supra* Part I.B.1.c.

329. See *OWUSU-BEMPAH*, *supra* note 77, at 33–34 (hypothesizing that the amount of information the child has about his or her biological heritage determines the child’s perception of connectedness and belonging).

be committed to maintaining the relationship with the child,³³⁰ and thus, the court must inquire into how committed the biological parent is to the preservation of this aspect of the parent-child relationship.

Therefore, based on Maryland's third-party custody, visitation, contested adoption cases, and TPR proceedings, in deciding whether there are exceptional circumstances making discontinuation of contact with the biological parent after adoption detrimental to the child's best interest, it would be appropriate for courts to consider such factors as (1) the length of time during which the biological parent and the child were separated, (2) the age of the child when the child was first separated from the biological parent, (3) the attachment between the child and the biological parent,³³¹ (4) "the relative effect upon the child's stability of having one . . . or both, of the relationships continue," (5) "the emotional effect of the adoption on the child,"³³² (6) "the child's emotional ties with and feelings toward the child's [biological] parents, the child's siblings, and other [biological family members]," (7) the child's feelings about discontinuation of contact with the biological parent upon adoption, (8) the likely impact of discontinuation of contact with the biological parent on the child's well-being,³³³ (9) the likelihood the child's adoptive parents would make efforts to make available to the adopted child information on the child's socio-genealogical background in the absence of contact with the child's biological parent, and (10) the likelihood the biological parent would maintain the court-ordered contact. If upon consideration of these factors the court finds exceptional circumstances making discontinuance of contact detrimental to the child's best interest, it may order post-adoption visitation between the child and his or her biological parent.

330. See Williams, *supra* note 19, at 627 ("Post-termination contact will never be in the best interests of a child unless his or her birth parent is not only willing to maintain contact, but is also committed to and invested in maintaining contact.")

331. Ross v. Hoffman, 280 Md. 172, 191, 372 A.2d 582, 593 (1977).

332. *In re* No. A91-71A, 334 Md. 538, 562, 640 A.2d 1085, 1097 (1994).

333. MD. CODE ANN., FAM. LAW § 5-323(d)(4) (West 2006 & Supp. 2010).

iii. The Proposed Legislation Would Be Constitutional Under Koshko if It Requires a Finding of Exceptional Circumstances Making Discontinuation of Contact with the Biological Parent Detrimental to the Child's Best Interest

If the proposed post-adoption legislation was subject to a constitutional challenge, it would be constitutional even under the strict scrutiny standard of review because it is “suitably, or narrowly, tailored to further a compelling state interest.”³³⁴ The Court of Appeals’ analysis of the constitutionality of Maryland’s grandparent visitation statute in *Koshko* is instructive.³³⁵ The *Koshko* court “appl[ied] a gloss to the Maryland GVS requiring a threshold showing of either parental unfitness or exceptional circumstances indicating that the lack of grandparental visitation has a significant deleterious effect upon the children who are the subject of the petition.”³³⁶ Under this analysis, the proposed post-adoption legislation would likely survive a constitutional challenge. If preserving the relationship with grandparents was sufficiently compelling in *Koshko* because of the numerous benefits of contact between children and their biological parents,³³⁷ then the State’s interests in authorizing courts to order post-adoption contact are sufficiently compelling as well.

A court would also likely find the proposed legislation to be narrowly tailored to further this State interest. If the proposed legislation permits courts to order post-adoption contact only in cases where discontinuation of post-termination visitation would be detrimental to the child’s best interest, the legislation would not violate the adoptive parents’ constitutional rights: the child’s best interest standard encompasses the presumption that the parent always acts in the child’s best interest.³³⁸ As a precaution, however, similarly to the TPR statute, the General Assembly may expressly require a finding of exceptional circumstances making the adoptive parent’s decision to discontinue post-termination visitation detrimental to the child’s best interest.

334. See *Koshko v. Haining*, 398 Md. 404, 438, 921 A.2d 171, 191 (2007) (citations omitted).

335. See *supra* text accompanying notes 195–201.

336. *Koshko*, 398 Md. at 441, 921 A.2d at 192–93.

337. *Id.* at 438–39, 921 A.2d at 191 (“There can be no legitimate debate as to the sufficiency of the State’s compelling interests here, chief of which is the overarching role as *parens patriae* to ensure the well-being of Maryland’s children. . . . The State’s interest in encouraging the salutary contributions grandparents make to the lives of their grandchildren is clearly a compelling one.” (citations omitted)).

338. See *supra* text accompanying notes 319–324.

Furthermore, since the initial finding that contact with the biological parents is in the child's best interest would be made during the TPR proceeding when the adoptive parents are still prospective adoptive parents, the adoptive parents would not "be hailed into court to defend their decisions."³³⁹ Instead, they would be on notice of the post-termination visitation order and understand the contact between the child they seek to adopt and his or her biological parents may continue post-adoption.³⁴⁰ Therefore, because legislation authorizing courts to order visitation between adopted parents and their biological parents would (1) further a compelling state interest of promoting child welfare and (2) be narrowly tailored to further that interest by requiring courts find exceptional circumstances, the legislation would not violate adoptive parents' constitutional rights.

III. CONCLUSION

Authorizing courts to extend the effect of post-termination visitation orders past adoption, thereby allowing contact between adopted children and their biological parents in adoptions following terminations of parental rights, would be in the child's best interest. It would also not violate the adoptive parents' fundamental right to raise their children as they see fit free from the State's undue interference.³⁴¹ This Comment has sought to demonstrate that the continuance of adopted foster children's contact with their biological parents after termination of parental rights and the subsequent adoption would promote the children's developmental needs and emotional well-being by preserving continuity of their relationships with the biological parents and allowing them to stay connected to their sociogenealogical roots.³⁴²

Courts must use their authority to order post-termination visitation between foster children and their biological parents whose parental rights have been terminated in cases where such visitation is in the child's best interest. Furthermore, because post-termination visitation orders are of a limited duration in cases where adoption follows termination of parental rights, in order to fully carry out the State of Maryland's *parens patriae* role in promoting child welfare, the Maryland General Assembly has an obligation and authority to allow courts to extend the effect of post-termination visitation orders past adop-

339. *Koshko*, 398 Md. at 439, 921 A.2d at 192.

340. *See supra* Part II.B.3.a.

341. *See supra* Part II.B.3.b.iii.

342. *See supra* Part I.B.1.c & II.A.

tion.³⁴³ The General Assembly could narrowly tailor the post-adoption contact legislation to further the State's compelling interest by requiring that courts order post-adoption contact only in cases where there are exceptional circumstances making discontinuance of post-termination contact detrimental to the child's best interest.³⁴⁴ Thus, if the post-adoption statute focuses on the child's best interest with the rebuttable presumption favoring parental decisions regarding visitation, it would allow courts to come one step closer to meeting the child's best interest without violating the adoptive parents' constitutional right to parent.³⁴⁵

343. *See supra* Part I.A.1 & II.B.2.

344. *See supra* Part II.B.2.b.ii.

345. *See supra* Part II.B.3.iii.