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Cynthia R. Mabry

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THE TRAGIC AND CHAOTIC AFTERMATH OF A BABY SWITCH: SHOULD POLICY AND COMMON LAW, BLOOD TIES, OR PSYCHOLOGICAL BONDS PREVAIL?

CYNTHIA R. MABRY

I. INTRODUCTION

In the Commonwealth of Virginia, a baby switch has inextricably entangled the lives of three families. In the summer of 1995, Paula Johnson gave birth to a baby girl at the University of Virginia Medical Center. Since then, together with her ex-boyfriend and the father of her daughter, Carlton Conley, Johnson has been rearing a child named Callie Marie Johnson.

Within a few hours of Callie Marie Conley's birth, Whitney Rogers gave birth to a baby girl at the Medical Center. Kevin Chittum was Rogers's fiancé and her daughter's father. On July 4, 1998, Rogers and Chittum were killed in a head-on collision in Southwest Virginia. As a result of their deaths, five grandparents—two more families—became embroiled in this drama. Linda and Thomas Rogers are Whitney Rogers's parents. After they divorced, Thomas married Brenda Rogers, his current wife. Larry and Rosa Lee Chittum are Kevin Chittum's parents. After Kevin and Whitney died, the Rogersons and the Chittums began sharing custody of Rebecca Grace Chittum. She is the child Kevin and Whitney brought home from the Medical Center in mid-1995.
Three years after Rebecca and Callie were born and just days after Whitney and Kevin died, all three families learned that each of the two mothers had taken the wrong baby home. For some unknown and perplexing reason, someone switched Rogers's baby with Johnson's baby. These circumstances raised several complex family law issues that these families must confront. They must resolve matters concerning parental rights, relatives' rights, custody, visitation, child support, adoption, and inheritance rights, to name a few. This Article identifies pertinent issues that arose from this tragedy, predicts how a court of law would resolve those issues, and suggests alternative resolutions that the families may fashion with minimal court intervention.

II. FACTUAL BACKGROUND

Perhaps the greatest irony of this situation is that Rogers and Johnson actually met at the Medical Center. Their paths crossed as they were taking a walk in the maternity ward, trying to induce labor, on the night of June 29, 1995. The two women encountered one another and talked briefly. Johnson was a twenty-seven-year-old single woman who was about to give birth to her third child. Rogers, a sixteen-year-old cheerleader, unmarried and a sophomore in high school, was going to give birth to her first child. Johnson recalled that Rogers was "warm and enthusiastic.”

Later that night, at 11:12 p.m., Johnson gave birth to a baby girl. A few hours later, on June 30, 1995, Rogers also gave birth.

11. See Jerry Harris, DNA Results Expected Next Week, NEWS-GAZETTE (Lexington, Virginia), Aug. 12, 1998, at A1 (recounting that Rebecca Grace Chittum was tested to see if she was the biological daughter of Paula Johnson and Carlton Conley); Harris, supra note 1 (indicating that a blood test had been run on Conley in connection with a dispute Johnson and Conley had over child support for Callie).
12. See infra note 24 (discussing how the switch may have happened).
13. See Cynthia R. Mabry, Switched Babies' Families Face Many Complicated Issues, ROANOKE TIMES & WORLD NEWS, Aug. 22, 1998, at A9 (listing relevant issues). Although negligence and malpractice potentially are related issues, they are not addressed in this Article.
15. See Jones & Shear, supra note 14.
16. See id.
17. See id.
18. See id.
20. See id.
to a girl. Johnson says that, on July 1st, between 2:00 a.m. and 7:00 a.m., her baby was in the nursery. She believes that the switch occurred during those hours.

On July 1, 1995, the Medical Center discharged Johnson with a baby girl. She took the child, to whom she thought she had given birth, home. Six hours later, Johnson returned to the hospital because the baby was not accepting nourishment. It was the first ominous hint that something had gone awry. Although Johnson gave birth to an infant who weighed nine pounds and six ounces, the baby she brought back to the hospital weighed only seven pounds and twelve ounces.


After a three-month investigation, investigators were unable to determine how or why the switch occurred. One hypothesis is that the children's identification bracelets slipped off and were switched when they were put back on the children. See Jerry Harris, Baby Switch Ruled Unintentional, NEWS-GAZETTE (Lexington, Virginia), Nov. 25, 1998, at A1 (finding no "probable cause . . . [that] a criminal offense was committed" and that hospital negligence was the most likely explanation); Michael D. Shear, Baby's Identity Bracelets Loose Enough to Slip Off, WASH. POST, Aug. 11, 1998, at B1 (hereinafter Shear, Baby's Identity). As a result of this incident, the Medical Center is implementing new procedures to avoid loss of infant identity bracelets and clamps in the future. See Michael D. Shear, Criminal Probe of Baby Switching at U-Va. Nears End, WASH. POST, Oct. 23, 1998, at B1 (hereinafter Shear, Criminal Probe) (finding no answers for how the switch occurred); Michael D. Shear, U-Va. To Test New Form of Infant Identification, WASH. POST, Oct. 7, 1998, at B1 (hereinafter Shear, U-Va. To Test). John T. Casteen III, the president of the University of Virginia, took out whole page advertisements expressing his condolences and vowing to implement better procedures where needed. See A Message from the University of Virginia, NEWS-GAZETTE (Lexington, Virginia), Aug. 19, 1998, at B16. Johnson has rejected a two million dollar settlement offer from the State of Virginia. See Carlos Santos, Settlement Offers Made in Baby Switch, RICH. TIMES-DISPATCH, Feb. 10, 1999, at A1.

21. See id.
22. See Blum & Shear, supra note 1.
24. See id. This is consistent with the results of the investigation by the University of Virginia Police Department and the Virginia State Police:

The information available to investigators tends to suggest that the switch occurred during the morning of July 1, 1995. . . . Both babies were present in the nursery along with many others . . . . Weight and feeding records of the Chittum and Conley babies from before 6 a.m. on July 1st show a significantly heavier Conley baby with a healthy appetite in comparison with the much lighter Chittum baby, who ate much smaller amounts. The recorded weights and feeding histories of these babies after 8:30 a.m. on July 1st reflect the reverse.

25. See id.
26. See Cloud, supra note 6, at 65; Jones & Shear, supra note 14; Shear, Baby's Identity, supra note 24.
weight discrepancy, Medical Center employees shrugged it off as "something that just happens." Later, Johnson would learn that this was the exact birth weight of Whitney Rogers’s daughter. The Medical Center discharged Rogers on July 2, 1995, and Rogers took her baby girl, the one Medical Center attendants handed to her, home. Those events occurred in 1995. For more than three years, the Johnson, Rogers, and Chittum families nurtured these girls and watched them grow as they discovered the world. In 1998, all three families' worlds turned upside down.

This saga began unfolding when Conley fought against an increase in his child support payments in January 1998. Johnson insisted that Conley increase the seventy-five dollar a week child support payments he voluntarily had been making to cover Callie Marie's needs. Johnson and Conley often argued about the amount of monetary support that Conley provided. This time, Conley refused to pay more and denied parentage. In retaliation, Johnson filed a child support claim against Conley in a Virginia court.

To resolve the paternity and child support disputes, a judge in the Greene County Juvenile and Domestic Relations Court ordered Johnson, Callie Marie, and Conley to undergo deoxyribonucleic acid (DNA) testing to ascertain whether Conley was Callie Marie's biological father.

28. 20/20: Switched at Birth, supra note 27.
29. See id.; see also Deborah Kelly, Did U. VA Miss Clue, RICH. TIMES-DISPATCH, Aug. 9, 1998, at A1 (discussing the hospital’s failure to notice a twenty percent weight difference).
30. See Cloud, supra note 6, at 62; Harris, supra note 1; Kelly, supra note 29.
31. See 20/20: Switched at Birth, supra note 27; Cloud, supra note 6, at 65; Harris, supra note 1.
32. See 20/20: Switched at Birth, supra note 27; Cloud, supra note 6, at 65.
33. See 20/20: Switched at Birth, supra note 27.
34. See id. Conley says that his lawyer told him to contest paternity. See id.
35. See Blum & Shear, supra note 1.
36. See 20/20: Switched at Birth, supra note 27. Virginia statutory law permits determination of parentage through "scientifically reliable genetic tests." Va. CODE ANN. §§ 20-49.1(B), 20-49.3(A), 20-66.1 (Michie 1998). Virginia's paternity proceedings are designed to identify a child's biological parents. See Va. CODE ANN. § 20-49.1 to .9 (Michie 1998). These proceedings are held in order to identify the people responsible for supporting the child so that she does not become a ward of the state. When a putative father denies parentage, the court may order him to submit to a paternity test. See § 20-49.3 (declaring the admissibility of the tests).

The deoxyribonucleic acid, or DNA, test, which uses a buccal swab, provides conclusive proof of parentage. See Commonwealth ex rel. Comptroller v. Flaneary, 469 S.E.2d 79, 80 (Va. Ct. App. 1996) (holding that DNA test establishing paternity with over 98% probability was a finding of parentage as a matter of law); see also Hamm v. Office of Child Support Enforcement, 985 S.W.2d 742, 744 (Ark. 1999) (explaining the testing process); Cable v. Anthou, 699 A.2d 722, 723, 726 (Pa. Super. Ct. 1997) (acknowledging the accuracy of DNA testing using a buccal); Spencer v. Commonwealth, 384 S.E.2d 775, 781-82 (Va. 1989), cert. denied, 493 U.S. 1036 (1990) (admitting the tests in Virginia in criminal
On July 2, 1998, the court revealed some astonishing news. The DNA test results showed that neither Conley nor Johnson possessed a genetic link to Callie Marie. Johnson contacted her attorney, and her attorney contacted Medical Center officials. After assuring counsel that procedures for banding the baby and the mother with identity bracelets had been followed, Medical Center officials launched an investigation.

During the investigation, the officials determined that Rebecca Chittum, a little girl living in Buena Vista, Virginia, could be Johnson's and Conley's biological child. On July 21, 1998, a doctor and a nurse from the Medical Center traveled to Linda Rogers's residence and took a blood sample from Rebecca. Weeks later, to her grandparents' chagrin, the test results conclusively established that Rebecca, the child whom Kevin and Whitney reared for more than three years, actually was Johnson's child. Another test revealed that Rebecca was Conley's child.

III. THE RIGHTS OF REBECCA'S BIOLOGICAL PARENTS

A critical question that arises from the Medical Center baby switch is who is entitled to have custody, meaning possession and control, of Rebecca. The United States Supreme Court usually declines to address matters concerning domestic relations, but, on

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39. See id.
40. See Dennis Cauchon, Va. Babies Switched at Birth 3 Years Ago, USA TODAY, July 31, 1998, at 1A.
42. See Blum, supra note 37; DNA Test Confirms, supra note 37.
43. See Blum, supra note 37.
44. See Mabry, supra note 13 (discussing the many issues involved in establishing custody of the girls).
45. See Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992) (reaffirming the domestic
many occasions, the Court has defined as fundamental a parent's right to nurture and rear her own child. The Supreme Court based these rulings on the Fourteenth Amendment of the United States Constitution. The Court reasoned that the liberties protected by the Fourteenth Amendment include the right to "bring up children." Almost six decades after establishing the right, the Supreme Court recently emphasized that the "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."

Generally, the rights of biological parents are superior to the claims of all other third persons. In Virginia, the court will honor "the primacy of the parent-child relationship." The policy underlying these rights is that "society has made a judgment that these non-interventionist rules are best for children .... Empowering parents, therefore, represents a means of ensuring that such decisions will be made by someone who presumably will act in the children's best interests."


47. U.S. CONST. amend. XIV, § 1 (Equal Protection and Due Process Clauses).

48. Meyer, 262 U.S. at 399. A biological parent also has the right to custody or visitation, to develop a relationship with her child, to manage the child, and to share the child's companionship. See Uhing v. Uhing, 488 N.W.2d 366, 371 (Neb. 1992) (listing parental and children's rights).

49. Santosky, 455 U.S. at 753.


51. VA. CODE ANN. § 20-124.2(B) (Michie 1998).

52. Martin Guggenheim, The Best Interests of the Child: Much Ado about Nothing?, in CHILD, PARENT, & STATE: LAW AND POLICY READER 27, 28 (S. Randall Humm et al. eds., 1994) (explaining how the presumption works); see also Parham v. J.R., 442 U.S. 584, 602 (1979) (recognizing that "natural bonds of affection lead parents to act in the best interests of their children"); In re Michael B., 604 N.E.2d 122, 128 (N.Y. App. Div. 1992) (discussing how a biological parent has a right to custody of a child superior to all others, unless that parent abandons this right or is proven unfit, even if the State can find "better" parents); Christi Gill Baunach, Note, The Role of Equitable Adoption in a Mistaken Baby Switch, 31 U. LOUISVILLE J. FAM. L. 501, 510 (1992) (describing the presumption that "giving custody to a biological
A. Awarding Custody

Following these principles, state courts, including those in the Commonwealth of Virginia, apply a strong presumption that "a child's best interest will be served" when she is placed in the custody of her biological parents. Johnson and Conley are Rebecca's biological parents. They do not live together now and do not intend to live together in the future. Therefore, in most states, a court would rely upon the "best interests" standard to determine whether custody should be awarded to one or both parents. Criteria that a court may use to discern whether awarding custody of Rebecca to Conley and/or Johnson would be in Rebecca's best interests are enumerated in section 20-124.3 of the Virginia Code:

1. The age and physical and mental condition of the child . . . ;
2. The age and physical and mental condition of each parent;
3. The relationship existing between each parent and each child . . . ;
4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;
5. The role which each parent has played and will play in the future, in the upbringing and care of the child;
6. The propensity of each parent to actively support the child's contact and relationship with the other parent, the relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in matters affecting the child;
7. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;
8. Any history of family abuse . . . ; and such other factors as the court deems necessary and proper to the determination.

54. See generally 20/20: Switched at Birth, supra note 27.
56. VA. CODE ANN. § 20-124.3 (Michie 1998).
A majority of states rely upon similar statutory factors to make custody and visitation decisions. A majority of states rely upon similar statutory factors to make custody and visitation decisions. In Virginia, joint or sole custody is allowed. A brief review of the factors utilized in Virginia indicates that Johnson probably would receive sole custody of Rebecca.

1. The Parents' and the Child's Age and Physical and Mental Condition

Rebecca is four years old and healthy, with no mental or physical disabilities or special needs. Johnson and Conley are relatively young adults. Conley is thirty-four years old; Johnson is thirty years old. Neither of them possesses physical or mental incapacities that would render one unable to care for Rebecca. Under the circumstances presented, this factor does not weigh in favor of or against either Johnson or Conley.

2. Child's Relationship with Her Parents

Johnson and Conley have met Rebecca and visited her. They have not, however, had sufficient opportunity to develop fully a relationship with their biological child because Rebecca has been...
living with people who are unrelated to her. Consequently, at this point, it is safe to say that they are attempting to develop a meaningful relationship with their child. Yet, because they have not maintained a relationship with Rebecca, this factor may weigh in favor of the putative grandparents keeping Rebecca.

3. Child's Relationships with Others

In addition to Callie, Johnson cares for her three sons and an adopted daughter—Rebecca's siblings. Courts have determined that keeping siblings together is an important consideration. One court stated that it was "well recognized that the love and affection of a brother and sister...is important in the lives of both of them." The policy that buttresses this legal principle is an "assumption that separation of children from each other will further weaken familial ties...and...endanger the children's emotional well-being. The potential for future bonding between siblings who are very young...militates in favor of keeping the children together." Therefore, in making placement decisions, courts endeavor to order the same placement for siblings. Even though Callie and Rebecca have not lived with their siblings, leaving the children where they are may deprive them of the opportunity to know and love their consanguineous siblings.

63. See id.

64. See infra notes 200-207 and accompanying text (discussing the grandparents' custody chances).

65. See 20/20: Switched at Birth 2, supra note 62 (stating that Johnson has three boys); Cloud, supra note 6, at 64 (reporting that Johnson has three boys and custody of a 16-year-old girl). But see Baby-Switch Mother Loses Custody of Son, WASH. POST, Aug. 2, 1999 (noting a change in custody of one of Johnson's sons to his father).


67. Scruggs, 693 So. 2d at 926 (quoting Mixon v. Bullard, 217 So. 2d 28, 30-31 (Miss. 1968)).

68. Harris, 647 A.2d at 313 (citation omitted); accord In re Marriage of Fynnaardt, 545 N.W.2d 890, 893 (Iowa Ct. App. 1996) (stating that the separation of siblings "deprives children of the benefit of constant association with each other" (citation omitted)); Honaker v. Burns, 388 S.E.2d 322, 324-26 (W. Va. 1989) (awarding custody to biological parent and visitation rights to the half-sibling).
4. **The Role Played by the Parents**

Again, Conley and Johnson have not had an opportunity to play an influential role in Rebecca's life because she is living with her grandparents in Buena Vista.\(^6\) Relatives and friends have reported, however, that Conley has been a doting father to Callie.\(^7\) Likewise, Johnson has been a good mother to both Callie and her other children.\(^7\) Most likely, both parents would provide the same loving and doting care for Rebecca—their own biological child.

5. **Propensity to Support Contact with the Other Parent**

For the past three years, Conley and Johnson have been cooperating regarding Conley's contact with Callie.\(^7\) Conley told Barbara Walters of the ABC News show 20/20 that he takes Callie everywhere he goes: "[I] take her to car races. I take her to feed my dogs. And everywhere I go, she is behind me."\(^7\) Although Conley's and Johnson's relationship has been tumultuous, "they are on good terms now."\(^7\) If things continue as they are, Johnson and Conley would continue to encourage and support contact between Rebecca and each other.

6. **Child's Reasonable Preference**

In custody disputes, one factor that courts may consider is a child's wish to live with a particular parent.\(^7\) The probability that a court will consider a child's preference rests primarily on her age.\(^7\) If the child is younger than eight years old, her preference

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69. See Cloud, supra note 6, at 63.
70. See Jones & Shear, supra note 14.
71. See Cloud, supra note 6, at 64-65 (detailing Johnson's devotion to her family).
72. See 20/20: Switched at Birth, supra note 27.
73. Id.
74. Cloud, supra note 6, at 65.
75. See T.K.T. v. F.P.T., 718 So. 2d 1235, 1238 (Ala. Civ. App. 1998) (stating that a child's preference will be considered in determining the child's best interests); Guardianship of Sydney Simpson, 67 Cal. App. 4th 914, 940 n.22 (1999) (noting that a ten-year-old's and a thirteen-year-old's preferences should be considered); Keller v. Keller, 584 N.W.2d 509, 513 (N.D. 1998) (stating that a fourteen-year-old's preference should be considered); Haase v. Haase, 460 S.E. 585, 589 (Va. Ct. App. 1995) (holding that although the child's wish was not controlling, it may be considered and given weight). But see Bigelow v. Bigelow, 959 S.W.2d 897, 899 (Mo. Ct. App. 1997) (finding that the child's preference is not dispositive in a custody dispute).
may not be considered at all, or will be given very little weight.\textsuperscript{77} If the child is twelve years old, however, her preference may be given considerable weight.\textsuperscript{78} If she is fourteen years old or older, she will be placed with the parent she chooses unless that parent is unfit.\textsuperscript{79} If she chooses, the judge may ascertain the child's preference for living with a particular parent by interviewing the child in chambers.\textsuperscript{80} The child's preference then is balanced with other factors including her maturity,\textsuperscript{81} educational level,\textsuperscript{82} intellectual and emotional development,\textsuperscript{83} hostility toward one parent,\textsuperscript{84} the advisability of recognizing a teenager's wishes,\textsuperscript{85} and whether a young child recounts persuasive reasons for her choice.\textsuperscript{86} By these (providing examples of four states where age is a factor in weighing a child's custody preference); D.W. O'Neill, Annotation, Child Wishes as Factor in Awarding Custody, 4 A.L.R.3d 1396, 1416 (1965 & Supp. 1999) (giving instances when age of the child was a factor).

\textsuperscript{78.} See Bailey v. Sours, 340 S.E.2d 824, 827 (Va. 1986).
\textsuperscript{80.} See ILL. COMP. STAT. ANN. 40/6043(2) (1998) (authorizing a court in its discretion to interview a child in chambers in the presence of counsel and a reporter); VA. CODE ANN. § 20.124.3 (Michie 1998) (permitting a court to ascertain “the reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference”); In re Marriage of Doty, 629 N.E.2d 679, 682-84 (Ill. App. Ct. 1994) (refusing to exercise court's discretion to examine a child); Haase, 460 S.E.2d at 589 (electing to interview a child in chambers as “the preferred method” in most jurisdictions).
\textsuperscript{81.} See, e.g., IOWA CODE ANN. § 598.41(3)(f) (West 1997) (stating that the court shall consider an articulated preference based on “consideration of the child's age and maturity”).
\textsuperscript{82.} See, e.g., In re Marriage of Blume, 473 N.W.2d 629, 631 (Iowa Ct. App. 1991) (citing education level of child as factor in giving weight to her articulated custody preference).
\textsuperscript{83.} See, e.g., Commonwealth ex rel. Sage v. Sage, 28 A. 863, 865 (Pa. 1894) (finding “where the child is of sufficient intelligence, its preferences and attachments should be consulted before the question of its custody is determined”). But see Pekarek v. Pekarek, 394 N.W.2d 493, 498 (Minn. Ct. App. 1986) (finding that although children over eight years old could express a custody preference, the trial court was proper in disregarding it because “the children were in such a confused and anxious state” that such a conversation “would be fruitless”).
\textsuperscript{84.} See Yates v. Yates, 702 P.2d 1252, 1256 (Wyo. 1985) (listing hostility toward non-preferred parent as one factor).
\textsuperscript{85.} See O’Neill, supra note 76, at 1426 (“[M]ental capacity, and not age, [is] the criterion . . . .”).
\textsuperscript{86.} See, e.g., Davidson v. Davidson, 576 N.W.2d 779, 785 (Neb. 1998) (finding that when a young child gives sound reasons for custody choice, it can be a factor in custody award); Alvarez v. Carlson, 524 N.W.2d 584, 589, 592 (N.D. 1994) (stating that an intelligent choice articulated by a mature child is a weighted factor in custody decision); In re Marriage of Moe, 676 P.2d 336, 338 (Or. 1984) (listing the child's reasons for wanting to live with her father); Haase v. Haase, 460 S.E.2d 585, 589 (Va. Ct. App. 1995) (stating that the court may examine the child, in camera, to decide whether the child has “reasonable intelligence, understanding,
standards, Rebecca's wishes will not be given any weight because she is only four years old. Even if she were capable of verbalizing her preference, she is too young for a court to credit her testimony.

7. Family Abuse

There is a history of discord between Johnson and Conley. More specifically, there is evidence of repeated domestic violence. Relatives proclaimed that Carlton Conley was a doting father, but court records tell a more chilling story about his relationship with Johnson. In 1997, he served a four-day jail sentence for criminally assaulting and battering Johnson. In January 1998, Johnson accused Conley of assaulting her again and restraining her at gunpoint. According to Johnson, Conley has pushed, shoved, threatened to shoot her, and intentionally hit her car with his truck. As a result, in April 1998, a court convicted him of assault and battery. He had another court date set for September 1998 for the adjudication of another assault charge when news of the switch became public. Johnson obtained two restraining orders and a permit to carry a concealed weapon to protect herself from Conley's physical attacks.

Domestic violence is a factor that should be and is considered in making custody and visitation decisions. There is no indication

age and experience to express a custody preference); see also O'Neill, supra note 76, at 1426-31 (providing examples of when a child's age was taken into account in deciding the child's custody preference).

87. See Cloud, supra note 6, at 63.
88. See Jones & Shear, supra note 14.
89. See Cloud, supra note 6, at 63.
90. See id.
91. See id.
92. See 20/20: Switched at Birth, supra note 27 (stating that Johnson did not intend to drop the assault charges); Jones & Shear, supra note 14.
93. See 20/20: Switched at Birth, supra note 27; Jones & Shear, supra note 14.
that Conley has abused Callie Marie or Rebecca although he has abused Johnson on more than one occasion. Domestic violence affects children even when they are not directly or physically harmed. Children who are not victimized by the abuser suffer residual effects when there is violence in their home.

"Children exposed to abuse are more insecure, more aggressive, and more prone to depression. Children in this situation commonly feel divided loyalties between their mothers and fathers. Research shows that childhood exposure to wife abuse is a significant predictor of future wife abuse." Placing a child in the custody of a parent who batters the other parent is detrimental to the child's safety and well-being. For these reasons, a court may be reticent about placing Rebecca with Conley unless it is assured that she will be safe when she is in his care.

8. Other Factors: The Effect on the Child

“Other factors” is a catchall provision in the list of factors that courts should consider in making custody determinations. Obviously, in light of this provision, a court would consider the extenuating circumstances in this particular matter. One such extenuating circumstance may be the effect of the custody decision on the child.

Spirited debates have erupted about the potential problems or detrimental effects that transferring custody of either of these girls will have on them. Under other circumstances in which a parent sought to regain custody from a non-parent, one court defined detriment as "circumstances that produce or are likely to produce lasting mental, physical, or emotional harm." Another court further explained that detriment is "more than the normal trauma

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95. See David Adams, Identifying the Assaultive Husband in Court: You Be the Judge, BOSTON B.J., July/Aug. 1989, at 23, 24 (citations omitted).
96. See id.
97. Id.
99. See Mabry, supra note 13.
caused to a child by uprooting him from familiar surroundings such as often occurs by reason of divorce, death of a parent, or adoption. It contemplates a longer term adverse effect that transcends the normal adjustment period in such cases.101

Naturally, the maintenance of stability in a child's life is a paramount concern.102 A few courts have decided, however, that a child who is six years old or younger should be placed in the custody of her biological parent when she has lived with a third party for less than four years.103 The courts have emphasized three prerequisites for biological parents to take custody of a young child who has lived with a non-parent for an extended period: the biological parent must be fit, the parent must have maintained a relationship with the child, and a change of custody must be in the child's best interest.104 Even in light of these qualifications, however, the courts place substantial weight on a fit biological parent's fundamental right to custody.105

When ordering a transfer of custody from a non-parent to a parent, courts have rejected arguments that the child should remain in the non-parent's home simply because the child already had lived there for a long, uninterrupted period of time.106 A change

103. See Syphrit v. Turner, 446 So. 2d 626, 629-30 (Ala. Civ. App. 1983) (deciding that a parent has primary right to custody over a non-parent); Evans v. Santoro, 507 A.2d 1007, 1011 (Conn. Ct. App. 1986) (determining that the financial status of a non-parent is not enough to overcome a parent's primary right to custody); In re Guardianship of D.A. McW., 460 So. 2d 368, 369-70 (Fla. 1984) (noting that the right to custody of one's offspring predates common law); Bordley v. Blake, 478 So. 2d 510, 512 (Fla. Dist. Ct. App. 1985) (sending a child who lived with grandparents for two years back to natural father); cf. Matzen, 600 So. 2d at 490 (transferring custody to parent after children had lived with their grandparents for six years); Hoy v. Wills, 398 A.2d 109, 114-16 (N.J. Super. Ct. App. Div. 1978) (denying biological mother's petition for change of custody after leaving child with his aunt for six years); Bailes v. Sours, 340 S.E.2d 824, 827 (Va. 1986) (granting custody to a stepmother who had reared the child for ten years).
104. See Syphrit, 446 So. 2d at 629-30 (determining a change of custody based on these three factors); see also Evans, 507 A.2d at 1011 (noting the three prerequisites before transferring custody); D.A. McW., 460 So. 2d at 369-70 (noting that when both parents are fit and have equal rights to custody, the only consideration left is what would be in the best interests of the child).
105. See, e.g., D.A. McW., 460 So. 2d at 370 (noting that where custody is between a natural parent and a third person, the test is weighed in favor of the natural parent and is rebutted only if custody with the natural parent would be detrimental to the welfare of the child).
106. See Syphrit, 446 So. 2d at 628 (granting custody to natural father even though child lived with grandparents for three years); D.A. McW., 460 So. 2d at 369-70 (rejecting argument that custody should be granted to grandparents who had cared for child since its birth).
of custody has been ordered despite the child's strong attachment to the non-parent.\textsuperscript{107} Not unsympathetic, courts have noted that in these situations, a child is likely to suffer some psychological trauma as a result of the transfer to her biological parent's home.\textsuperscript{106} Still, the courts have ruled that "an early change would be less traumatic than one ordered after the children had become older and possibly less adaptable to change."\textsuperscript{109} Based upon this precedent, in a court, the presumption that Rebecca should be placed with her biological parents most likely would prevail.

Johnson made contact with the Chittums and the Rogerses immediately after she learned that her child was living with them.\textsuperscript{110} She has visited Rebecca,\textsuperscript{111} and she has been concerned about Rebecca's well-being.\textsuperscript{112} More important, the reason that she did not have contact with Rebecca for three years was because she did not know that Rebecca was her daughter. Moreover, although Rebecca has been separated from her mother for three years, she has lived with her grandparents for only a few months.\textsuperscript{113} After Rogers and Chittum died, their families endeavored to rear Rebecca together.\textsuperscript{114} They have an alternating shared custody arrangement that allows one set of grandparents to have custody of Rebecca for four months.\textsuperscript{115} During the first rotation, she lived with the Rogers family—and that is where Johnson found her.\textsuperscript{116}

In the beginning, Johnson decided that all she wanted was to visit her biological child.\textsuperscript{117} She did not intend, she said, to wrest Rebecca from the only family she knew.\textsuperscript{118} As Rebecca's biological

\begin{footnotes}
\item[107.] See Evans, 507 A.2d at 1011 (acknowledging the experts' assessment of a strong bond between the child and her grandparents).
\item[108.] See id; see also In re Guardianship of K.H.O., 736 A.2d 1246, 1258 (N.J. 1999) (terminating a biological mother's parental rights while recognizing the trauma of removing a child from her long-term home).
\item[109.] Meinking v. Meinking, 529 S.W.2d 440, 444 (Mo. 1975) (changing custody from grandparents to father); cf. Bailes v. Sours, 340 S.E.2d 824, 827-28 (Va. 1986) (declining to change custody based on a twelve-year-old's preference to be with her stepmother and a psychologist's conclusion that a transfer of custody would have a "significant, harmful, long-term impact").
\item[110.] See Cloud, supra note 6, at 64; Jones & Shear, supra note 14.
\item[111.] See Jones & Shear, supra note 14.
\item[112.] See id.
\item[113.] See id.
\item[114.] See id.
\item[115.] See id.
\item[116.] See Cloud, supra note 6, at 64 (noting that the grandparents had set up a rotation schedule to care for Rebecca); Jones & Shear, supra note 14 (reporting that a U. Va. medical team found Rebecca at Linda Rogers's home).
\item[117.] See Jones & Shear, supra note 14.
\item[118.] See Cloud, supra note 6, at 63.
\end{footnotes}
parent, however, Johnson is entitled to custody of Rebecca.\textsuperscript{119} She has a fundamental right to rear her own child, to make decisions about her education, religious upbringing, and her general welfare.\textsuperscript{120} Therefore, in a court of law, it is very likely Johnson would receive custody of Rebecca. If necessary, she could file a habeas corpus petition to regain custody of Rebecca from the grandparents.

In May 1999, Johnson filed a lawsuit against the Commonwealth of Virginia and Medical Center officials, doctors, and nurses.\textsuperscript{121} Among other claims, Johnson properly alleged that those defendants deprived her of her constitutional right to rear Rebecca.\textsuperscript{122}

\section*{B. Conley's Rights as an Unwed Father}

Carlton Conley was Johnson's boyfriend when Rebecca was born.\textsuperscript{123} From the beginning, Johnson and Conley assumed that the child that Johnson gave birth to in June 1995 was Conley's child.\textsuperscript{124} After Conley contested parentage, however, the court ordered paternity tests.\textsuperscript{125} DNA test results proved that there is a 99.94% probability that Conley is Rebecca's biological father.\textsuperscript{126} Conley does not live with Johnson and does not intend to live with her in the future.\textsuperscript{127} Nevertheless, as Rebecca's father, he has cognizable rights.\textsuperscript{128}

\begin{itemize}
\item \textsuperscript{120} See id.
\item \textsuperscript{121} See Michael D. Shear, Mother of Switched Baby Files Suit for $31 Million, WASH. POST, May 25, 1999, at B1.
\item \textsuperscript{122} See id. The Virginia Supreme Court refused to invalidate a settlement reached between the grandparents and the Medical Center. Johnson unsuccessfully argued that the settlement was invalid because the grandparents did not have a right to negotiate with state officials as they are not biologically related to Rebecca. See Supreme Court Refuses to Hear Settlement Appeal, DAILY PRESS (Newport News, Virginia), Sept. 11, 1999, at C5 [hereinafter Supreme Court Refuses].
\item \textsuperscript{123} See 20/20: Switched at Birth, supra note 27; Jones & Shear, supra note 14.
\item \textsuperscript{124} See 20/20: Switched at Birth, supra note 27.
\item \textsuperscript{125} See Jones & Shear, supra note 14.
\item \textsuperscript{126} See Identity of Switched Baby's Father Confirmed, WASH. POST, Sept. 10, 1998, at D3.
\item \textsuperscript{127} See 20/20: Switched at Birth, supra note 27.
\item \textsuperscript{128} See generally Quilloin v. Walcott, 434 U.S. 246 (1978) (finding that unwed fathers who did not contribute child support or visit their children still have rights to custody of their children, but less than that of divorced or separated fathers); Stanley v. Illinois, 405 U.S. 645 (1973) (holding that the State was barred from taking custody of children from an unwed father absent a hearing and finding that father was unfit; presumption of unfitness was a violation of due process and equal protection); Vanderlaan v. Vanderlaan, 292 N.E.2d 145 (Ill. 1972) (noting that an unwed father is not barred from obtaining custody of children).
\end{itemize}
In the United States, both parents have equal rights under the presumption that biological parents have a fundamental right to rear their own children. Accordingly, single biological fathers have a right to develop a relationship with their children. They have a right to custody, or, as non-custodial parents, they have a right to visitation. Once a relationship has been established, they may have a right to grant or deny consent for their child's adoption. Virginia law also requires that both parents have frequent and continuous contact with the child and must share child-rearing responsibilities. Thus, Conley may have the right to custody of or visitation with Rebecca, to develop a relationship with her, and to contest her adoption.

To fulfill the statutory mandate of making placement decisions with the child's best interest in mind, Johnson probably would receive custody of Rebecca. She is her biological mother. There is no indication that she is unfit. She has provided adequate care for her other children and for Callie. Conley's history of domestic violence probably would be a hindrance to his ability to obtain custody of Rebecca. As the non-custodial parent, however, it is likely that he would have visitation rights.

C. Exceptions to the Biological Parents' Right to Custody

The fundamental right to raise one's child is not absolute, and the presumption that a biological parent has a right to custody is rebuttable. States describe the presumption in different ways. In Virginia, for example, in custody cases between a parent and a non-parent, the law presumes that the child's best interest will be

131. See Vanderlaan, 292 N.E.2d at 146.
132. See N.C. GEN. STAT. § 49-15 (1998); Quilloin, 434 U.S. at 255; Stanley, 405 U.S. at 651-52; Pi v. Delta, 400 A.2d 709, 711-12 (Conn. 1978); Vanderlaan, 292 N.E.2d at 146; Sparks v. Phelps, 540 P.2d 397, 398 (Or. 1975).
133. See VA. CODE ANN. § 20-124.2(B) (Michie 1998).
134. See generally 20/20: Switched at Birth, supra note 27; Cloud, supra note 6.
135. See Cloud, supra note 6, at 63-64.
served when the child is in the parent’s custody. A court may determine that placement with a non-parent would be in the child’s best interest when there is clear and convincing evidence that: “(1) the parents are unfit; (2) a court previously has granted an order of divestiture; (3) the parents voluntarily relinquished custody; (4) the parents abandoned the child; or (5) special facts and circumstances constitute extraordinary reasons to take the child from the parents.”

Obviously, an unfit parent may not rear her child. Unfitness may refer either to the parent’s unwillingness or inability to properly care for the child. Also, a biological parent may forfeit her right to rear her own child when there is clear and convincing evidence that the parent abused, abandoned, or neglected the child, misused alcohol or drugs, or had mental or physical disabilities that rendered her incapable of caring for the child.

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139. See id. at 748.
140. Mason v. Moon, 385 S.E.2d 242, 244 (Va. 1989); see also Bottoms v. Bottoms, 457 S.E.2d 102, 104 (Va. 1995) (finding “clear and convincing” as standard for awarding custody to non-parent and only when parent has been determined to be unfit including parent’s misconduct that affects child, neglect of child, demonstrated unwillingness and inability to promote emotional and physical well-being of child, nature of home environment, and moral climate in which child is to be raised); Smith v. Pond, 360 S.E.2d 885, 886 (Va. 1987) (finding the best interests of the child not served through parental custody only when the non-parent adduces clear and convincing evidence that parents are unfit, the court previously has granted order of divestiture, parents voluntarily relinquished custody, parents abandoned child, or special facts and circumstances constitute extraordinary reason to take child from parents).
141. See Va. CODE ANN. § 20-124.2(B) (Michie 1995) (stating that the court may award custody to a third party if evidence proves that it would be in the child’s best interests); Williams v. Williams, 922 S.W.2d 422, 425 (Mo. Ct. App. 1996) (discussing the presumption that it is in the best interest of minor child to have parent appointed conservator and guardian, but it may be overcome by evidence that parent is unfit or incompetent to take charge of child); Gomez v. Savage, 580 N.W.2d 523, 533 (Neb. 1998) (listing reasons for finding a parent unfit); Uhing v. Uhing, 488 N.W.2d 366, 372 (Neb. 1992) (defining unfitness as “a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child’s well-being”); Raynor v. Odom, 478 S.E.2d 655, 661 (N.C. 1996) (awarding custody to grandmother because mother was unfit); Hickman v. Putty, 489 S.E.2d 232, 238 (Va. 1997) (finding that the mother was unable or unwilling to care for her daughter and granting grandparent’s petition to adopt); Winfield v. Urquhart, 492 S.E.2d 464, 468-69 (Va. 1997) (finding father who murdered the children’s mother unfit); Bailes v. Sours, 340 S.E.2d 824, 827-38 (Va. 1986) (awarding custody to stepmother over mother’s objection); Forbes v. Hancy, 133 S.E.2d 533, 536 (Va. 1963) (awarding custody to grandmother); Richardson v. Richardson, 415 S.E.2d 276, 278-79 (W. Va. 1992) (defining fitness).
142. See, e.g., R.F. v. S.S., 928 P.2d 1194, 1197 (Alaska 1996) (terminating father’s parental rights involuntarily when the father had been convicted of murdering mother but had not exhausted his appeals, given that the child had special medical needs and maternal
At this point, Johnson’s unfitness has not been demonstrated, but her right to rear Rebecca may be challenged on two grounds. First, Johnson has a criminal record too, albeit a short one. In 1994, Johnson admitted to abusing and cursing a teacher—a misdemeanor in Virginia. \(^{143}\) Apparently, the teacher spun gravel on Johnson’s twelve-year-old son, Wesley, after the teacher drove Wesley home. This act angered Johnson, and she cursed the teacher as she ran after the teacher’s car. \(^{144}\) Johnson, who says she was only protecting her son, was placed on probation.\(^ {145}\)

Even though Johnson pled guilty to this crime, there is no evidence that she is an unfit mother. That five-year-old misdemeanor offense alone is not enough for a court to deny Johnson the right to rear Rebecca. “[T]he fundamental liberty interest of natural parents in the care, custody, and management of their children does not evaporate simply because they have not been model parents.”\(^ {146}\)

The second challenge to Johnson’s ability to rear Rebecca may be based on her economic status. Johnson is a flagger for a construction company with a monthly salary of $1000.\(^ {147}\) Someone who is contesting Johnson’s right to rear Rebecca may contend that grandparents wished to adopt and could provide a permanent environment for such care; In re A.C., 507 S.E.2d 549, 551 (Ga. Ct. App. 1998) (terminating father’s rights for reasons of drug abuse and sexual and physical abuse of others in the household); Craven v. Doe, 915 P.2d 720, 724 (Idaho 1996); Gomez, 550 N.W.2d at 534 (terminating father’s rights for failing to provide child support, having a criminal record, and abusing alcohol and drugs); Bush v. State, 929 P.2d 940, 941 (Nev. 1996) (terminating parental rights where parents were mentally challenged); In re Guardianship of K.H.O., 736 A.2d 1246, 1254-55 (N.J. 1999) (terminating a biological mother’s parental rights due to persistent drug addiction); In re Roselyn Mercedes F., 657 N.Y.S.2d 8, 8 (N.Y. App. Div. 1997) (terminating rights of mentally ill parent); Hickman, 489 S.E.2d at 238 (failing to establish a relationship with the child, to visit her, or to attempt to regain custody); Winfield, 492 S.E.2d at 470 (concluding that “de facto abandonment” had occurred); Bottoms, 457 S.E.2d at 107 (defining fitness); Patrick v. Byerley, 325 S.E.2d 99, 101 (Va. 1985) (abandoning a child constitutes unfitness); Toombs v. Lynchburg Div. of Soc. Servs., 288 S.E.2d 405, 409 (Va. 1982) (finding that a father was unwilling and unable to provide a suitable home and a mother who was mentally unstable).

143. See 20/20: Switched at Birth, supra note 27; Cloud, supra note 6, at 65. The statute that governs that crime provides that:

If any person shall, in the presence or hearing of another, curse or abuse such other person, or use any violent abusive language to such person concerning himself or any of his relations, or otherwise use such language, under circumstances reasonably calculated to provoke a breach of the peace, he shall be guilty of a Class 3 misdemeanor.

VA. CODE ANN. § 18.2-416 (Michie 1998).

144. See Cloud, supra note 6, at 65.
145. See 20/20: Switched at Birth, supra note 27.
147. See Blum & Shear, supra note 38; Cloud, supra note 6, at 63-64.
the grandparents could offer Rebecca a better lifestyle.\(^{148}\) On the contrary, it is well established that custody determinations may not be made based on a parent's socioeconomic status or a conclusion that someone else may provide a better home for the child.\(^{149}\) The fact that a non-parent may be able to offer more material advantages in life for the child is not determinative.\(^{150}\) The equalizer is child support. "[T]he purpose of child support awards is to ensure that the [parent] otherwise best fit for custody receives adequate funds for the support of the child."\(^{161}\)

There is very little precedent regarding how a court should resolve a custody dispute between a parent and a non-parent when a baby switch has occurred. A similar case involving two female infants was litigated in a Florida court.\(^{152}\) At Hardee Memorial Hospital in Florida, Barbara Mays and Regina Twigg gave birth to their baby girls on or about the same day in 1978.\(^{153}\) When the Twigg child was tested ten years later, the Twiggs learned that the child they had named Arlena Beatrice was not their biological child.\(^{154}\) When they received this information, Arlena was very ill with a congenital heart condition.\(^{155}\) Later, she succumbed to her illness and died.\(^{156}\)

Kimberly Mays was the only other white female child born at Hardee Memorial around the same time as Arlena.\(^{157}\) The parties stipulated that they would submit to Human Leukocyte Antigen blood testing.\(^{158}\) The test results showed that the probability that Kimberly was the Twiggs' daughter was greater than 95%.\(^{159}\) After an intense, five-year custody battle, the judge decided, however,

\(^{148}\) There is no indication that money is a factor in the grandparents' threats of filing suit for Rebecca or Callie, apart from the general allegations that Johnson is an unfit mother. See Michael D. Shear, Settlement Approved for Family in Baby Swap, WASH. POST, April 6, 1999, at B1.

\(^{149}\) See Cooper v. Roe, 23 Cal. Rptr. 2d 295, 300 (1993); In re Matzen, 600 So. 2d 487, 489-90 (Fla. 1992); Scott v. Steelman, 953 S.W.2d 147, 151 (Mo. 1997); Gomez v. Savage, 580 N.W.2d 523, 533-34 (Neb. 1998); Raynor v. Odom, 478 S.E.2d 655, 659 (N.C. 1996).

\(^{150}\) See Raynor, 478 S.E.2d at 659.

\(^{151}\) Burchard v. Garay, 724 P.2d 486, 488 (Cal. 1986). The court further explained that "comparative income or economic advantage is not a permissible basis for a custody award." Id. at 491.


\(^{153}\) See Mays, 543 So. 2d at 242.

\(^{154}\) See id.

\(^{155}\) See id.

\(^{156}\) See id.

\(^{157}\) See id.

\(^{158}\) See Twigg, 1993 WL 330624, at *1. See also supra note 36 for an explanation of different methods of establishing paternity.

\(^{159}\) See id. at *2.
that a legal determination that the Twiggs were Kimberly's biological parents would be too detrimental to Kimberly.\textsuperscript{160} "The effect of this ruling is that the [Twiggs] have no legal interest in or right to Kimberly Mays; that Robert Mays' legal status as the father of Kimberly Mays remains unchanged . . . ."\textsuperscript{161}

The outcome for Callie Marie and Rebecca would not be the same as the outcome in the Twigg/Mays baby switch controversy. Kimberly spent ten years with the Mays family,\textsuperscript{162} a much longer period than Rebecca has been separated from her biological family. Kimberly believed that the Mays were her biological parents, and she established a strong psychological bond with them.\textsuperscript{163} By comparison, because Rogers and Chittum, the adults who reared Rebecca for three years, died, Rebecca has not been with the wrong family for a significant amount of time. Admittedly, there will be some trauma if Rebecca is removed from the Chittum and Rogers families—the people with whom she has lived and bonded, on some level, for several months. In addition, as grandparents, the Chittums and Rogerses have had some contact with Rebecca for years.

Johnson has said that it would be unfair to take Rebecca out of the only home she has known and to move her to Ruckersville with four other children who are strangers to her.\textsuperscript{164} In agreement, Brenda Rogers, Callie's step-grandmother, said, "[p]eople think that you can just turn your love off and turn a child over that you've had for three years. You can't do that. You cannot take a child that you have had for three years and say, 'we don't want her anymore' . . . ."\textsuperscript{165} This statement does not appear to reflect true consideration for Rebecca's best interests. It reflects more concern for how the adults will feel than it does for the effect that this switch will have on Rebecca.

If another switch is made, one way of minimizing disruption in the girls' lives is to gradually introduce them to their new families. The children have met the other family members.\textsuperscript{166} Gradual and phased-in visits would help each girl to become familiar with her new surroundings and the people who live there. It is true that Rebecca and Callie probably will be traumatized upon removal from

\textsuperscript{160} See id.
\textsuperscript{161} Id. at *6.
\textsuperscript{162} See id.
\textsuperscript{163} See id.
\textsuperscript{164} See 20/20: Switched at Birth, supra note 27; Cloud, supra note 6, at 63.
\textsuperscript{165} 20/20: Switched at Birth, supra note 27.
\textsuperscript{166} See 20/20: Switched at Birth 2, supra note 62.
their current homes. In the long term, however, more damage may be done if they are not transferred.

IV. PARENTAL OBLIGATIONS

Just as biological parents have parental rights, they have obligations to their children. All states, for example, require that children attend school. In addition, states require parents to provide necessary and proper care for their children including food, clothing, shelter, and medical care.

A. Child Support

One obligation parents share is their equal responsibility in providing monetary support for their children's general maintenance and education. The policy underlying child support payments is that they are "exclusively for the benefit and economic best interest of the child." In addition, the non-custodial parent may be expected to provide medical and dental insurance, health care, and life insurance. The support obligation begins when

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168. See, e.g., N.D. CENT. CODE § 14-08.1-01 (1997) (making parents "legally responsible" for the physical and educational maintenance of their children); see also infra notes 169-74 and accompanying text.


171. See VA. CODE ANN. § 20-108.2(D) (Michie 1995) (ordering the payment of "extraordinary mental and dental expenses" by the non-custodial parent).


the child is born and continues until the child becomes emancipated, reaches the age of majority, marries, or dies. As Rebecca's biological parents, both Johnson and Conley have a legal obligation to provide monetary support for her general maintenance.

A Virginia judge properly ruled that because Callie is not Conley's daughter, Conley is not legally obligated to support her. On the other hand, Conley may not be able to recover reimbursement for any amount he already paid. Although Conley does not have a legal obligation to support Callie, as Rebecca's biological father, he does have a legal obligation to provide support for Rebecca. The amount he would have to pay would be calculated by using a statutory guideline. In Virginia, and in the majority of states, a guideline called the Income Shares Model is used to determine the amount of child support.

B. Tax Consequences

Child support and payment of federal income taxes are linked. Thus identifying Rebecca's custodial parent is also important in determining federal tax obligations. Under the Internal Revenue

174. See TEX. FAM. CODE ANN. § 154.001 (West 1998); VA. CODE ANN. §§ 16.1-278.15, 20.124.2(C) (Michie 1998); Hawthorne, 938 P.2d at 1015 (finding that an obligation exists even when the father is unaware of the child's birth). For cases in which parents may have an ongoing support obligation when the adult child is disabled or the parent agrees to pay college expenses, see Kiken v. Kiken, 694 A.2d 557, 562-63 (N.J. 1997); Cohn v. Cohn, 934 P.2d 279, 280 (N.M. Ct. App. 1996).


Code, the custodial parent—the parent who has custody for the majority of the tax year—is entitled to a child dependency tax exemption. The custodial parent is entitled to the exemption even if the non-custodial parent provides more than half of the monetary support for the child. To transfer entitlement, the custodial parent must file a written declaration with the IRS. Thus, if Johnson receives custody of Rebecca, she would be entitled to claim the exemption. She could, however, waive her right and transfer the exemption to Conley.

V. PSYCHOLOGICAL PARENTS

Joseph Goldstein coined the phrase “psychological parents.” These are persons who, on a continuing day-to-day basis, through “interaction, companionship, and shared experiences,” fulfill a child’s psychological needs. No blood relationship to the child is required. This theory focuses on the emotional bond that exists between the child and the adults in her life. By definition, any caring person with a relationship with the child, regardless of whether that person is a biological parent, could be adjudged a psychological parent. Furthermore, psychologists have deduced that “so far as the child’s emotions are concerned, interference with the tie, whether to a ‘fit’ or ‘unfit’ psychological parent, is extremely painful.”

179. See id.
180. See id.
181. See § 152(e)(2) (Release of Claim to Exemption for Child of Divorced or Separated Parents on Form 8332); see also Flanagan v. Flanagan, 656 So. 2d 1228, 1232 (Ala. Civ. App. 1995) (assuming that the custodial parent will take the exemption, but allowing the court, in its discretion, to award the exemption to the non-custodial parent); Dahlberg v. Dahlberg, 358 N.W.2d 76, 82 (Minn. 1984) (assuming that the custodial parent will take the exemption, but allowing the court, in its discretion, to award the exemption to the non-custodial parent); Dahlgren v. Dahlgren, 378 N.W.2d 76, 82 (Minn. 1984) (assuming that the custodial parent will take the exemption, but allowing the court, in its discretion, to award the exemption to the non-custodial parent); Dahlberg v. Dahlberg, 358 N.W.2d 76, 82 (Minn. 1984) (assuming that the custodial parent will take the exemption, but allowing the court, in its discretion, to award the exemption to the non-custodial parent).
182. See § 152(e)(2).
184. Id.
188. GOLDSTEIN ET AL., supra note 183, at 12.
In a Maryland court, a judge announced criteria that may be used to determine whether a child should be placed with a non-parent who has cared for the child for an extended period:

The factors which . . . may be of probative value in determining the existence of exceptional circumstances include the length of time the child has been away from the biological parent, the age of the child when care was assumed by the third party, the possible emotional effect on the child of a change of custody, the period of time which elapsed before the parent sought to reclaim the child, the nature and strength of ties between the child and the third party custodian, the intensity and genuineness of the parent's desire to have the child, the stability and certainty as to the child's future in the custody of the parent. . . . The child may be so long in the custody of the non-parent that, even though there has been no abandonment or persistent neglect by the parent, the psychological trauma of removal is grave enough to be detrimental to the best interest of the child. The court may consider whether the child is in the present custody of the parent or non-parent. "Changes in conditions which affect the relative desirability of custodians, even when the contest is between two natural parents, are not to be accorded significance unless the advantages of changing custody outweigh the essential principle of continued and stable custody of children."189

One author advocates that when non-parents have developed a relationship with a child because of a baby switch, the psychological parent should be treated as an equitable adoptive parent.190 Such treatment would place the psychological parent on equal footing with the biological parent:

In a mistaken baby switch situation, the legal system confronts the child with the fact that his or her "parents" are not really related to the child at all, thus crumbling the world as it stood for the child. Moreover, the possibility that the biological parents could assert an absolute right to custody would allow infliction of serious, possibly permanent, psychological harm to the child.

The alternative to this is to give the psychological parent, when appropriate, the status of an equitably adoptive parent. In effect, the child then has two sets of parents, biological and psychological. Each parent has equal rights to seek custody and

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190. See Baunach, supra note 52, at 512.
visitation. Putting them on equal footing allows the court to bypass all of the parental rights problems and go straight to the issue: the best interests of the child.

In determining the existence of an equitable adoption, a court should apply a Singer test of clear, cogent and convincing evidence. The court should consider, among other things, the love and affection between the parent and child, the length of the relationship, and reliance by the child on the existence of this parent-child relation. . . . [T]he equitable nature of custody proceedings demand that the court place paramount importance on the child's best interests, even if that includes giving a third party the status of a parent.191

Undeniably, Johnson is Callie Marie's psychological parent. Continuously, she has been Callie Marie's primary caretaker for more than three years, and Callie is thriving in Johnson's home.192 She is treated as a member of Johnson's family in the only home that she has ever known.193

Conley also may have psychological parent status. When asked who her father is, in the breathy voice of a young toddler, Callie Marie responded, "Carlton Conley."194 Conley, who appears to spend a significant amount of time with Callie, at the races and doing chores,195 intimated his future plans "to be out there [for both girls] as long as they live."196 Consequently, he may be Callie's psychological parent, too. Due to Conley's bond with Callie, he should be entitled to visitation rights with the same potential restrictions that could limit his visitation with Rebecca.197

As Callie's biological parents are deceased and Johnson has been the primary caregiver for her, there is a high probability that Johnson would receive custody of Callie. A judge already has placed Callie in Johnson's legal custody.198 On September 21, 1998, Judge Frank Somerville decided that Johnson should retain custody

192. See 20/20: Switched at Birth, supra note 27.
193. See id.
194. Id.
195. See id.
196. Id.
197. See, e.g., In re Matzen, 600 So. 2d 487, 490 (Fla. Dist. Ct. App. 1992) (granting "liberal and reasonable visitation" to grandparents who had cared for their grandchildren for six years); In re Slayton, 685 N.E.2d 1038, 1043 (Ill. 1997) (granting visitation rights to the psychological parent); In re Jonathan G., 482 S.E.2d 893, 912 (W. Va. 1998) (awarding visitation to those who have a "parent-like relationship with the child").
198. See Reed, supra note 175.
of Callie, in part because “nobody else has come forward.”\textsuperscript{199} He then added that Callie’s biological grandparents (the Rogerses and the Chittums) could petition for custody later.\textsuperscript{200}

The Rogerses and the Chittums are Callie’s biological grandparents.\textsuperscript{201} In Virginia, grandparents are deemed to have a legitimate interest in their grandchildren’s well-being.\textsuperscript{202} A court may award custody to anyone, including grandparents, “with a legitimate interest” in the child’s custody.\textsuperscript{203} Thus, the Rogerses and the Chittums have a statutory right to seek custody of Callie. Because of the strong emotional bond between Callie and Johnson, however, a court probably would determine that it would be in Callie’s best interest to remain in Johnson’s custody.

With regard to Rebecca, the Rogerses and the Chittums may contend that they stand in loco parentis.

The theory of in loco parentis, provides . . . that . . . one who knowingly and voluntarily assumes the role of parent to a child may obtain certain legally cognizable rights and obligations the same as if between “a parent and child” but only so long as the relationship which gave rise to the rights and duties continues to exist.\textsuperscript{204}

Considering the shared custody arrangement and the date of Whitney Rogers’s and Kevin Chittum’s death, the Rogerses and Chittums have had physical custody of Rebecca for only a few months.\textsuperscript{205} Courts have not held that a child has to be in a psychological parent’s custody for a minimum amount of time before the psychological parent doctrine will be applicable.\textsuperscript{206} Yet, in light of the case authority discussed above\textsuperscript{207} and the fact that neither Johnson nor Conley has relinquished rights over Rebecca, it is highly unlikely that a court would award custody to Rebecca’s grandparents even if it finds that these third parties have a legitimate interest in Rebecca.

\textsuperscript{199} Id.
\textsuperscript{200} See id.
\textsuperscript{201} See Cloud \textit{supra} note 6, at 64; \textit{Two Families}, \textit{supra} note 60.
\textsuperscript{202} See VA. CODE ANN. § 16.1-278.15(B) (Michie 1998).
\textsuperscript{203} Id.
\textsuperscript{205} See \textit{Family Authorizes}, \textit{supra} note 41.
\textsuperscript{206} Some statutes do require, however, that a child live with her adoptive family for a trial period before the adoption may become final. See \textit{GOLSTEIN \textit{ET AL.}}, \textit{supra} note 183, at 14.
\textsuperscript{207} See \textit{supra} Part III.A.8.
VI. VISITATION

A. Parental Rights

Shortly after discovery of the Johnson/Chittum switch, all of the adults involved expressed their intent to leave the girls in place and to work out liberal visitation plans.\(^\text{208}\) There is a presumption in favor of a non-custodial parent's right to visitation.\(^\text{209}\) Two policies support that presumption. First, the non-custodial parent has a right to love and to instruct the child and to become a companion for the child.\(^\text{210}\) Second, visitation encourages maintenance of a strong familial relationship between the child and both parents.\(^\text{211}\)

Moreover, visitation usually benefits the child. The child has a right to know, love, and respect both parents as well as to receive both parents' love and guidance.\(^\text{212}\) Still, "[a] fundamental concept

\begin{footnotes}
\item[208] See Shear, Baby's Identity, supra note 24 (vowing to agree on liberal visitation); Two Families, supra note 60 (originally agreeing to let the families get together informally).
\item[209] See People ex rel. Vallera v. Rivera, 351 N.E.2d 391, 393-94 (Ill. 1976); LeHew v. Mellyn, 475 N.E.2d 913, 915 (Ill. App. Ct. 1985); see also MO. ANN. STAT. § 452.400(2) (West 1999) (restricting visitation only if there is proven physical or emotional danger to the child).
\item[211] See id.
\item[212] See J.F.E. v. J.A.S., 930 P.2d 409, 413-14 (Alaska 1997) (finding that parents have a right to "reasonable visitation" and that sharing parenting responsibilities is in the public's best interest); In re Avery, 622 N.E.2d 1231, 1235 (Ill. 1993) (finding orders of child support and visitation independent of each other and for the primary benefit of the child; the obligations cannot be joined); Appert v. Appert, 341 S.E.2d 342, 349 (N.C. Ct. App. 1986) (considering "best interests" of child in making visitation decisions as an important, natural right of the parent); Sterbling v. Sterbling, 519 N.E.2d 673, 676 (Ohio Ct. App. 1987) (calling the non-custodial parent's right to visitation a "natural right" which "should be denied only under extraordinary circumstances"); Carter v. Carter, 479 S.E.2d 681, 687 (W. Va. 1996) (noting that even nonpayment of child support should not suspend visitation rights as purpose of visitation is to benefit the child); Weber v. Weber, 457 S.E.2d 488, 490-91 (W. Va. 1995) (recognizing "primary concern of . . . the non-custodial parent's right to a close relationship with his or her child"); White, 453 S.E.2d at 677 (reminding the courts to "facilitate the right of the non-custodial parent to a full and fair chance to continue to have a relationship with his children").
\end{footnotes}
in the public policy . . . is that the best interest and welfare of the children are paramount when deciding matters of visitation.\textsuperscript{213} Thus, the trial judge has broad discretion in determining the scope and frequency of visitation.\textsuperscript{214} The length of time that the judge allows a non-parent or non-custodial parent to visit with the child depends upon the child's age, the parties' jobs and other responsibilities, and other factors relevant to the child's best interests.\textsuperscript{215}

As with the presumption that biological parents should have custody of their children, biological parents' right to visitation is not absolute.\textsuperscript{216} Visitation should not be allowed, for instance, when a non-custodial parent is unfit,\textsuperscript{217} visitation is not in the child's best interest,\textsuperscript{218} or when visitation would seriously endanger the child's physical, mental, moral, or emotional health.\textsuperscript{219}

On the other hand, even though a parent may be unfit, courts are reluctant to completely curtail visitation between the parent and the child.\textsuperscript{220} Visitation should not be denied unless extraordinary circumstances exist.\textsuperscript{221} Instead, courts are more likely to order supervised visitation or place other conditions on the parent's visitation privileges.\textsuperscript{222} Supervised visitation requires a third person's presence while the non-custodial parent spends time with the child.\textsuperscript{223} The purpose of supervised visitation is to ensure the safety of the child or the child's custodial parent.\textsuperscript{224}

Thus, a court could order a pretrial social services investigation to determine whether Conley should have unrestricted visitation.\textsuperscript{225}

\textsuperscript{216} See id.
\textsuperscript{217} See id.
\textsuperscript{218} See id.
\textsuperscript{219} See id.
\textsuperscript{221} See In re Guardianship of K.H.O., 736 A.2d 1246, 1258-59 (N.J. 1999) (finding that where a positive, benign relationship had formed between a parent and the biological child, visitation was to continue as in a case of "open adoption"—even after natural parent's rights were severed).
\textsuperscript{224} See id. at 229.
If Conley has difficulty in controlling his anger, supervised visitation and counseling should be required if Callie's, Rebecca's, or Johnson's safety or well-being may be threatened. Alternatively, some other condition may be imposed.

Visitation was the compromise in the 1992 Paul baby switch case. Jodie Denise Paul learned that her son had been switched nine years ago and was living with adoptive parents. When Paul challenged the custody arrangement, she was awarded visitation. Thus, as an alternative to custody of Rebecca, both Johnson and Conley legally would be entitled to visitation with Rebecca.

B. Grandparents' Right to Visitation

In nearly all states, legislatures have enacted legislation that allows grandparents to spend quality time with their grandchildren. In most states, however, grandparent visitation is restricted to particular circumstances that are designated in the statute. Typically, grandparents may not even petition for visitation unless their grandchild's parents are divorced, the grandparent's child cannot be located, the grandchild has lived with the grandparents for a significant length of time, or the grandparent's child is deceased. Some courts determine whether visitation

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226. See Blum & Shear, supra note 38.

227. See id.

228. See id.; see also Hoy v. Wills, 398 A.2d 109, 114 (N.J. Super. Ct. App. Div. 1978) (granting the natural mother visitation rights even after voluntarily placing child in care of paternal aunt and aunt had become the "psychological parent").

229. See Gregory, supra note 46, at 370-71. But see Brunetti v. Saul, 724 So. 2d 142, 142 (Fla. Dist. Ct. App. 1998) (holding that grandparent visitation statute was unconstitutional); Goldstein et al., supra note 183, at 23 (declaring that "grandparents ought not to have a legally enforceable right to visit"). See generally American Bar Ass'n, Grandparent Visitaton Disputes: A Legal Resource Manual (Ellen C. Segal & Naomi Karp eds., 1989) (discussing grandparents' rights); Sandra Joan Morris, Grandparents, Uncles, Aunts, Cousins, Friends: How Is the Court to Decide Which Relationships Will Continue? 12 Fam. Advoc. 10 (1989) (discussing logistical problems with third-party visitation and listing state statutes).


231. See Kudler v. Smith, 643 P.2d 783, 786 (Colo. 1981) (denying visitation that had an
would be appropriate based upon other statutory criteria including whether the grandparent had personal contact with the child before the petition for visitation was filed, whether visitation would interfere with the parent/child relationship, and whether visitation would be in the child's best interest.232

In Virginia, statutes governing visitation of minor children authorize courts, in their discretion, to order visitation with grandparents.233 First, section 16.1-278.15 of the Virginia Code provides that when a petition for visitation is pending, a Virginia court may award visitation to any petitioner "with a legitimate interest therein."234 Persons with legitimate interests include the child's maternal and paternal grandparents.235 Consistent with section 16.1-278.15, section 20-124.1 identifies grandparents as "person[s] with a legitimate interest."236 Section 20-124.2(B) provides that "[t]he court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award . . . visitation to any other person with a legitimate interest."237 These statutory commands survived constitutional challenges at four levels of court review, from the Montgomery County Juvenile and Domestic Relations District Court to the Supreme Court of Virginia.238

Case law also supports the theory that grandparents be included among those who have a legitimate interest in a child. Recently, the Court of Appeals of Virginia ruled that grandparents and other consanguineous relatives are persons who have "a legitimate interest" in a child under section 16.1-241(a) of the Virginia Code.239 First, the court held that the statute expressly provides that the phrase shall include "grandparents and other
blood relatives” as persons who have “a legitimate interest.” The court ruled that “this term means not only a party possessed of legal rights with respect to the child, but also any party having a cognizable and reasonable interest in maintaining a close relationship with the child.” The court cautioned, however, that its ruling “addres[ed] only standing to seek visitation, not the right to enjoy visitation.”

Based on the plain meaning of the Virginia statutes and their interpretation, Rebecca’s grandparents and Callie’s grandparents are entitled to seek visitation. Under the circumstances, Callie’s grandparents have a better chance of receiving visitation because Callie’s parents are deceased. The Chittums and the Rogerses are Callie’s blood relatives. As her maternal and paternal grandparents, they have a genetic connection to Callie. Whitney Rogers gave birth to another girl, Lindsey, after Callie was born. Lindsey is living with the Rogerses and Chittums on a rotating basis. Callie could develop a relationship with her sister when she visits her grandparents. They will be able to answer questions that she certainly will have someday about her deceased parents. The Rogerses and the Chittums could argue persuasively that if Johnson receives permanent custody of Callie, there will be detrimental harm if Callie’s grandparents are not allowed to maintain a relationship with Callie through visitation.

C. Siblings’ Right to Visitation

Both Rebecca and Callie have siblings or half-siblings. In several states, siblings may have visitation rights. In Virginia,
for instance, the child's relationship with siblings is a factor for consideration when visitation and custody are disputed. Moreover, in Virginia, the sibling's right to seek visitation under section 16.1-241(A) of the Virginia Code continues after adoption.

In other states, siblings have a right to visit each other as long as it is in the minor child's best interest to maintain contact with her siblings. New Jersey is one of those states that recognizes the importance of sibling contact. When some adult siblings sought a visitation order to visit a younger sibling, a New Jersey court concluded that sibling visitation is a "natural, inherent and inalienable right."

D. The Need for a Written Visitation Plan

The parties who are responsible for Rebecca's and Callie's care should agree upon specific rather than liberal visitation terms. Dates, times, and restrictions, if any, should be agreed upon, memorialized in writing, and approved by the court. For example, because these families live ninety miles apart, transportation plans should be made. Most often, vague visitation terms lead to litigation of numerous disputes in court. Specificity would decrease the likelihood of disputes about visitation in the future.

Furthermore, because no adult on either side has had sufficient time to develop a relationship with Callie or Rebecca, a


249. See id.


251. Id.

252. See, e.g., Broocke v. Broocke, 873 S.W.2d 330, 333 (Mo. Ct. App. 1994) (ordering the trial court to define visitation terms in detail to avoid further litigation).

253. See W. VA. CODE § 48-2-15(b)(1) (1999) (stating that the court "shall specify a schedule for visitation by the noncustodial parent"); Fanning v. Fanning, 504 So. 2d 737, 738-39 (Ala. 1987) (modifying original order to expand visitation into a more a detailed plan for visitation); Brooke, 873 S.W.2d at 333 (noting that the trial court found that unsupervised visitation would endanger the children and that a court-ordered supervised, structured visitation plan was proper); Weber v. Weber, 467 S.E.2d 488, 489-90 (W. Va. 1995) (determining the level of detail required based upon the "circumstances of each case").
gradual or phased-in visitation plan may be helpful. It would allow the girls to get to know the other families and to feel comfortable with them before they go to spend lengthy periods with them.\footnote{254} Like the families in Virginia, the Mayses and the Twiggs initially had an amicable visitation plan, but eventually a tumultuous relationship developed.\footnote{255} Robert Mays was accused of interfering with the Twiggs' visitation rights after just five visits occurred in 1990.\footnote{256} Regina Twigg publicly accused the Mayses of intentionally swapping their unhealthy baby for a healthy one.\footnote{257} She published her accusations in letters to the editor of Kimberly's hometown newspaper.\footnote{258} As an unfortunate result, Kimberly was fully aware of all of those shenanigans.\footnote{259} When the situation escalated, Regina Twigg accused Robert Mays of child abuse and made outrageous visitation demands.\footnote{250} In short, "the relationship between the parties went from deterioration to complete disintegration."\footnote{261}

Finally, allowing non-parent visitation may further complicate matters in the Rogers/Johnson baby switch. As the children age, visitation arrangements that are made now may need readjustment. Arrangements may have to be modified when they enroll in school. Also, if Callie or Rebecca decides that she does not want to visit the other family, she should not be forced to go. "[F]orced visitation is likely to produce mental, physical, or emotional harm of a lasting nature."\footnote{262} In addition, "[c]oordinating schedules so that children are all together in one household during any particular visit is often impossible. Adding [other related and unrelated persons] to the list of those demanding time with the child may result in an itinerary more complex and rigid than most adults could tolerate."\footnote{263}

\footnote{255. See Twigg v. Mays, No. 88-4489-CA-01, 1993 WL 330624, at *2 (Fla. Cir. Ct. Aug. 18, 1993).}
\footnote{256. See id.}
\footnote{257. See id.}
\footnote{258. See id.}
\footnote{259. See id.}
\footnote{260. See id.}
\footnote{261. Id.}
\footnote{262. Id. at *3; see also GOLDSTEIN ET AL., supra note 183, at 23-27 (opposing forced visitation).}
\footnote{263. Morris, supra note 229, at 13.}
VII. TERMINATION OF PARENTAL RIGHTS AND ADOPTION

When the mix-up was disclosed, these families had no intention of changing the status quo or changing the girls' living arrangements. If they continue to hold this view, permanent placement arrangements should be made regarding these children. This section discusses alternatives to a harsh, court-imposed custody decision.

A. Termination of Parental Rights

Termination of parental rights is a permanent severance of a biological parent's rights and obligations toward her child. The severance may be voluntarily or involuntarily transacted in accordance with statutory requirements. Voluntary termination is effectuated with the biological parents' written consent to give up all fundamental rights that the United States Constitution and the courts have bestowed. In comparison, to effect an involuntary termination, there must be clear and convincing evidence that the parent is unfit and that placement with a non-parent is in the child's best interest.

Johnson, Conley, and Callie's biological grandparents steadfastly proclaimed that they would not switch the children again. If they maintain this position, Johnson and Conley should give their written consent to voluntarily terminate their parental rights to rear Rebecca. Rebecca's consent will not be necessary because she is not yet fourteen years old. As a consequence, neither Conley

264. See 20/20: Switched at Birth, supra note 27.
265. See Santosky v. Kramer, 455 U.S. 745, 748 (1982) (denying the right to physical custody, visitation, or communication with the child or to regain custody).
266. See, e.g., Santosky, 455 U.S. at 743 (finding constitutional a New York statute that involuntarily terminated a parent's rights when a child is found to have been permanently neglected); In re Guardianship of K.H.O., 736 A.2d 1246, 1259 (N.J. 1999) (terminating a biological mother's rights involuntarily by court order).
267. See Va. Code Ann. § 63.1-225(D)(2) (Michie 1995 & Supp. 1999) (denoting the requirement for written consent prior to adoption, and giving a father the right to notice and an opportunity to be heard unless his identity is "not reasonably ascertainable" or his whereabouts are unknown); In re Adoption of K.M.W., 718 A.2d 332, 333 (Pa. Super. Ct. 1998) (denying grandparent's adoption petition until the mother relinquished her rights). But see Va. Code Ann. § 63.1-225.1 (Michie Supp. 1999) (deciding whether consent is withheld "contrary to the best interests of the child").
269. See supra note 264 and accompanying text.
nor Johnson will be obligated to support Rebecca, and they will forfeit all rights to make major decisions on her behalf.

On the other hand, the grandparents may be awarded custody of Rebecca if Johnson's and Conley's rights are involuntarily terminated. To be successful, the Rogerses and the Chittums must show that Johnson and Conley are both unfit. Evidence of unfitness could include indicia of Johnson's and Conley's inability or unwillingness to feed and clothe Rebecca properly, to supervise her, to protect her from harm, to provide habitable housing, to avoid extreme discipline, and to refrain from immoral behavior that would adversely affect Rebecca's well being.\(^{271}\)

Generally, courts have been loath to interfere with the biological parent-child relationship.\(^{272}\) As previously stated, biological parents usually obtain custody of their children and retain their parental rights.\(^{273}\) On the other hand, when a child's health or safety is at risk the state may intervene despite the parent's constitutionally protected right to autonomous child rearing.\(^{274}\)

The facts in *Bottoms v. Bottoms*\(^{275}\) indicate circumstances under which the Virginia Supreme Court will override a parent's rights and grant custody to a grandparent. The court granted custody to the child's maternal grandmother because it found that the presumption in favor of the natural mother's custody was rebutted by clear and convincing evidence of the mother's unfitness.\(^{276}\) The court awarded custody to this non-parent because the toddler used profane language, and he screamed, cried, and held his breath until he turned purple when his mother attempted to take him from his grandmother's home.\(^{277}\) The court also was persuaded to transfer custody because his mother was unemployed most of the time and was nomadic.\(^{278}\) Because of the mother's mobility, the child stayed with his grandmother seventy percent of the time.\(^{279}\) In addition,
the mother had difficulty controlling her temper and struck the child hard enough to leave fingerprints on him.280

The Rogerses and the Chittums have begun to spar against one another for custody of Rebecca.281 If the court decides that neither Conley nor Johnson should get custody of Rebecca, the court could decide that the grandparents would get custody. In a custody battle between the grandparents, the question posed would be whether it is in Rebecca's best interest to be placed with either or both families.282

Based on the information that is available at this time, however, there is insufficient evidence that Johnson is unfit. Therefore, involuntary termination of her rights is not likely. Also, although Conley's access to Rebecca may be restricted if someone demonstrates that his violent conduct toward Johnson is harmful to Rebecca, his parental rights would not be terminated on that basis alone.283

B. Adoption

Initially, Johnson, Conley, the Chittums, and the Rogerses planned to rear the girls together as an extended family.284 At times, they vehemently opposed adoption.285 On other occasions, however, the Rogerses and the Chittums expressed an interest in adopting Rebecca.286 Recently, Johnson filed a petition to adopt Callie.287 If Callie's grandparents and Johnson agree that the grandparents should retain custody of Rebecca and that Callie should permanently live with Johnson, adoption is the recommended procedure.

280. See id. at 107-08 (expressing further concern regarding the "social condemnation" that the child would suffer because his mother was engaged in "active lesbianism").
284. See 20/20: Switched at Birth, supra note 27; Cloud, supra note 6, at 63.
285. See Cloud, supra note 6, at 63.
286. See Grandparents Seek to Adopt Switched Baby, CNN.COM (Aug. 19, 1998) <http://cnn.com/US/9808/19/switched.babies.01/index.html> (indicating that both paternal and maternal grandparents contemplated adoption); Two Families, supra note 60 (expressing the Rogerses' desire "to place in stone the legal status of these children").
287. See Shear, supra note 121.
Adoption is encouraged for three reasons. First, under the current arrangement, too many people are involved in resolving potentially volatile issues. Often only two people, a mother and a father, have to confront serious and ongoing disagreements about custody, visitation, support, and other major issues regarding their child’s upbringing. Additional people only complicate such problems.

Already, these families disagree about some matters. Early on, they disagreed about whether they would tell the girls about the mix-up.\textsuperscript{288} Johnson said that she would tell Callie, whereas Brenda Rogers said that she would not tell Rebecca.\textsuperscript{289} Also, the paternal and maternal grandparents disagreed about whether Rebecca should submit to DNA testing.\textsuperscript{290} For days, the Chittums agreed to allow testing while the Rogerses refused to give their consent.\textsuperscript{291} They did not want to take the risk of learning that Rebecca was not actually their biological granddaughter.\textsuperscript{292}

The second reason that adoption is a highly recommended procedure is that only one family should legally be responsible for making decisions about each girl’s education, religious upbringing, parenting, and discipline. Likewise, one and only one family should be legally responsible for each child’s support and general welfare. Such decisions would make it easier to enforce obligations if, in the future, one of the adults balks at caring for the child for whom she has assumed responsibility.

Third, although the adults in these children’s lives have vowed to love them and to rear them as extended family members, sometimes hearts and minds change. To avoid further disruption, each child should be adopted. Two years, two months, or even two weeks after a living arrangement is made, it can be dissolved without mutual consent if adoption has not been finalized.

Unfortunately, past relationships among these families signal that other disputes are likely to resurface at anytime. Efforts to overturn an agreement to care for Rebecca already have been attempted.\textsuperscript{293} For the first few months after the switch was discovered, the relationship between Johnson, Conley, and the Rogers and Chittum families was amicable.\textsuperscript{294} In an effort to

\textsuperscript{288} See 20/20: Switched at Birth, supra note 27.
\textsuperscript{289} See id.
\textsuperscript{290} See Cloud, supra note 6, at 65.
\textsuperscript{291} See id.
\textsuperscript{292} See id.; Michael D. Shear & Justin Blum, Tests Set for Child Feared Switched at Birth, WASH. POST, Aug. 6, 1998, at D5.
\textsuperscript{293} See Supreme Court Refuses, supra note 122.
\textsuperscript{294} See 20/20: Switched at Birth, supra note 27.
maintain familial harmony, they even excluded their attorneys from meetings when they were getting to know each other. A fundamental disagreement arose between Rebecca's grandparents when Tommy and Linda Rogers petitioned the court for sole custody of Rebecca and Lindsey. In early November 1998, the Rogerses, who had shared custody of Rebecca with the Chittums, filed a petition to modify an earlier order of joint custody to one of sole custody. The petition was filed just days before the Rogerses were supposed to relinquish Rebecca to the Chittums for the latter's four-month custody of the girls. One family member posited that an underlying reason for the petition to modify the custody arrangement was to prevent Johnson from visiting Rebecca. Another Chittum family member said that the Rogerses' behavior has been "kind of sneaky and underhanded. They don't know how to share, and they don't know how to cooperate." Less than two weeks after the Rogerses filed their petition, however, the dispute was resolved, and the Rogerses withdrew their request for sole custody.

A few months later, in April 1999, the sparks started to fly again. The Commonwealth of Virginia, on behalf of the Medical Center, a state-run hospital, offered to pay two million dollars to the guardians of each girl, with a small amount actually paid to the guardians and the remainder held in trust for the girls. Johnson unsuccessfully tried to block the grandparents' decision to accept the offer on Rebecca's behalf. She argued that the Commonwealth of Virginia should pay much more than two million dollars. As a result of losing that argument, Johnson threatened, through her attorney, to seek custody of Rebecca. She further

295. See Harris, supra note 11.
296. See Harris, supra note 9.
297. See id.
298. See id.; see also Update: Switched at Birth, TIME, Dec. 7, 1998, at 34, 34 (stating that one set of grandparents filed for a change of custody from joint custody to sole custody).
299. See Harris, supra note 9.
300. See Shear, supra note 281.
301. Id.
303. See Shear, supra note 148.
304. See Supreme Court Refuses, supra note 122.
305. See Shear, supra note 148; Supreme Court Refuses, supra note 122. In fact, the settlement was for Rebecca to get $200,000 up front and $400,000 in an annuity that would be worth $1.5 million in 25 years. See id. The grandparents would share $125,000 and their lawyer would get $150,000. See id.
306. See Shear, supra note 148.
claimed that shuttling Rebecca between grandparents is not in Rebecca’s best interest and that acceptance of this settlement demonstrates that the grandparents are not making decisions that are most beneficial to Rebecca. \[307\]

To prevent Rebecca and Callie from becoming pawns in other custody battles, if no switchback is agreed upon, the grandparents should adopt Rebecca. Likewise, Johnson should adopt Callie. Adoption would protect the persons who obtain custody of Rebecca and Callie from custody and visitation claims and unwanted interference from others who claim a legitimate interest in the children. The judge who decided Kimberly Mays’s fate ruled that the Mayses could commence an *ex parte* adoption proceeding. \[308\] The same procedure should be followed with respect to Rebecca and Callie.

Ideally, each child’s adoption would be open \[309\] so that if Johnson, Conley, and the grandparents wanted to maintain contact with either child and her adoptive family and share in all aspects of the girls’ lives, they could do so. \[310\] The Court of Appeals of Virginia, however, has interpreted sections 63.1-233 and 63.1-220.2 of the Virginia Code to mean that when a biological parent’s rights are terminated, “the ties between the parent and child are severed forever and the parent becomes a ‘legal stranger to the child.’” \[301\]

Section 63.1-233 of the Virginia Code explains the biological parents’ interests upon adoption. \[311\] Birth parents and all other persons who had legal rights and obligations to a child are divested of those rights and obligations. \[310\] Also, for inheritance purposes,

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307. See id.


309. The court in *Cage v. Harrisonburg Dep’t of Soc. Servs.*, 410 S.E.2d 405, 406 (Va. Ct. App. 1991) defined “open adoption” as a situation where the adoptive parents and the natural mother agree to terms by which the natural mother can maintain contact with her children, at the discretion of the adoptive parents. The adoptive parents would not be under any legal obligation to allow the natural mother to visit or continue visits.

Id.

310. See id. at 406-07; see also James B. Boskey, *The Ties That Bind: Untangling the Rights of Natural Families in Adoption*, FAM. ADVOC., Fall 1989, at 16, 18, 45 (describing situations in which an open adoption may be appropriate and explaining how the agreement would be implemented).


312. See *VA. CODE ANN. § 63.1-233* (Michie 1998).

each child will be considered a child of her adoptive parent(s) instead of her biological parents. As a consequence, although some other states would allow Johnson to maintain a relationship with Rebecca after Rebecca's adoption, Virginia would not allow Johnson to continue such a relationship because Virginia law does not recognize open adoptions.

There is another downside to adoption: it may have detrimental psychological effects on Rebecca and Callie. Some adoptees develop strong feelings of abandonment, coupled with a strong desire to know the circumstances under which their parents consented to their adoption. "The search usually is for information and not for a replacement relationship. In addition to discovering the biological and medical aspects of their family background, most adoptees want to know what happened to their birth parents in order to gain knowledge about themselves." Great conflicts develop in the child's mind, as when Kimberly Mays discovered that she was not living with her biological parents. She ran away from the home where she had lived for ten years in order to live with her biological parents. Later, she ran away from the home of her biological parents. Eventually, she reconciled with both families.

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315. Virginia is not the only state that would terminate such a relationship. See CAL. FAM. CODE § 3102(c) (West 1999) (terminating visitation rights upon adoption by any person other than a grandparent or stepparent); Vice v. Andrews, 945 S.W.2d 914, 915 (Ark. 1997) (severing grandparent's statutory right to visitation after adoption); In re Ellis, 537 N.W.2d 1, 6-7 (S.D. 1995) (recognizing the concept in South Dakota and discussing the split of authority among various states regarding whether open adoption should be recognized).

316. See GOLDSTEIN ET AL., supra note 183, at 244-45 n.8 (quoting from an adoptee's letter to syndicated newspaper advice columnist Ann Landers).


319. See id.

320. See id.
With respect to Rebecca, Johnson and Whitney Rogers noted genetic links or differences from other family members.\textsuperscript{321} After she saw a picture of Rebecca, her biological child, Johnson exclaimed, "\textit{[s]he looks like me.}"\textsuperscript{322} Also, on more than one occasion, Rogers had said, "I don't understand Rebecca. I don't know who she looks like. Her personality—it's not like [our personality]."\textsuperscript{323} Relatives had observed that Rebecca's "chunky" features were not like the Rogerses' and Chittums' leaner features.\textsuperscript{324} Just as other family members noticed differences, at some point Rebecca and her playmates will notice differences, too.\textsuperscript{325}

Information about genetic ties is of critical importance to older adoptees. At this stage in their lives, however, blood-ties are not as important to Rebecca and Callie.

Unlike adults, children have no psychological conception of blood-tie relationships until quite late in their development.\textsuperscript{326} . . . what matters to them is the pattern of day-to-day interactions with the adults who take care of them and who, on the strength of such interactions, become the parent figures to whom they are attached.\textsuperscript{327}

The unanswerable question is whether these girls will suffer less in the future if genetic ties are allowed to trump psychological bonds for custody purposes. Before any adoption could occur, however, unless a court decides that they are unfit parents, Johnson and Conley must relinquish their parental rights and give their consent for Rebecca's adoption. Johnson and Conley, as Rebecca's unmarried birth parents, would relinquish their parental rights by preparing a written and notarized consent to the adoption. Then they could recommend placement of Rebecca with the

\textsuperscript{321} See Blum & Shear, supra note 14; Richard Cohen, The Lure of Family Ties, WASH. POST, Aug. 6, 1998, at A19.

\textsuperscript{322} Blum & Shear, supra note 1; see also Blum & Shear, supra note 14 (noting that Johnson cried when she noticed the resemblance).

\textsuperscript{323} Blum & Shear, supra note 14.

\textsuperscript{324} See id.

\textsuperscript{325} See Cohen, supra note 321 (predicting that the girls will develop a "natural curiosity" about their heritage).

\textsuperscript{326} Goldstein et al., supra note 183, at 9; see also Elizabeth Bartholet, Family Bonds 164-86 (1993) (disputing the existence of adoption stigmas and emphasis on genetic ties); Miriam Komar, Communicating With the Adopted Child 156-59 (1991) (expressing the desire to belong to the adopted family); Baunach, supra note 52, at 511 (describing the levels of awareness that occur during child development).
adoptive parents of their choice. No consent is needed for Callie's adoption because her parents are deceased.

VIII. OTHER RIGHTS OF THE CHILDREN

A. Inheritance Rights and Social Security Benefits

All biological and adopted children have a right to inherit from their parents' estate. Callie's parents, who were unmarried when she was born, are deceased. Still, she is entitled to inherit from their estates. Before he died, Kevin Chittum was busily planning to make a home for his family. He had purchased eight acres of land, some furniture, and a big screen television. He had bought a house and had elicited some friends to assist him with renovating it. Callie, as one of his biological children, is entitled to inherit a portion of that property and any other property that her parents owned. Furthermore, the Social Security Act provides that monthly survivor benefits shall be paid to young, unmarried children.

B. Wrongful Death Benefits

There is some evidence that Kevin Chittum may have been driving negligently minutes before the automobile collision that claimed his life and the lives of six other people. Eyewitnesses said that Chittum was attempting to pass a tractor-trailer as he was driving Rogers's Honda in southbound traffic on Interstate 81.

327. See VA. CODE ANN. § 63.1-220.3(A) (Michie 1998).
328. See VA. CODE ANN. § 63.1-225(G) (Michie 1998).
330. See § 64.1-6.1(1).
331. See Cloud, supra note 6, at 65. But see Harris, supra note 9 (claiming that Chittum's estate does not have any assets).
332. See Jones & Shear, supra note 14.
333. See Social Security Act, 42 U.S.C. §402(d)(1) (1998); see also Trimble, 430 U.S. at 771-72 (finding state statute excluding children born out-of-wedlock from inheritance unconstitutional); Mathews v. Lucas, 427 U.S. 2755, 2767 (1976) (allowing statutory classifications that impose conditions on the eligibility of certain illegitimate children for surviving child's insurance benefits); Shear, supra note 23 (reporting that Paula Johnson had been contacted by Social Security officials and was informed that Callie Marie may be entitled to Social Security Benefits as an orphan, and that Rebecca may also be eligible because her "adoptive" parents are now deceased).
334. See Jones & Shear, supra note 14. Police told USA Today that Kevin Chittum was not technically speeding but was going too fast on the wet highway. See Cloud, supra note 6, at 65.
in Virginia.\textsuperscript{335} A rain storm had developed suddenly,\textsuperscript{336} and he lost control of the car as it hydroplaned and struck a diesel fuel tank truck.\textsuperscript{337} The collision caused both vehicles to careen off an overpass and crash onto Route 11, a roadway that ran beneath the overpass.\textsuperscript{338} Seven people died in the accident,\textsuperscript{339} including Rogers, Chittum, and four young children they were taking to the state fair.\textsuperscript{340} Jerry Douglas Gregory, the driver of the tractor-trailer, also died.\textsuperscript{341} Gregory’s survivors alleged that Chittum “failed to drive the Honda according to the existing road conditions and weather.”\textsuperscript{342}

As Rogers’s biological child, Callie may have a right to sue Chittum’s estate for her mother’s wrongful death.\textsuperscript{343} Indeed Rogers’ estate has brought a wrongful death claim against Chittum’s estate.\textsuperscript{344} The court ruled that Lindsey and Callie shall share the settlement.\textsuperscript{345}

C. The Right to a Guardian ad Litem

A guardian \textit{ad litem} (GAL) is appointed by a court to protect a child’s interests when custody and visitation are disputed.\textsuperscript{346} It is the GAL’s duty “to see that the interest of the child is [presented to the court]. Th[ere] child h[as] no other independent participant in the proceeding, aside from the trial court, to protect his interests.”\textsuperscript{347}

\begin{footnotesize}
\begin{enumerate}
\item See Cloud, \textit{supra} note 6, at 65.
\item See Jones & Shear, \textit{supra} note 14.
\item See id.
\item See id.
\item See Jones & Shear, \textit{supra} note 14.
\item See Hamilton, \textit{supra} note 339.
\item Id.; see also Harris, \textit{supra} note 9 (stating that survivors of the children who were in Kevin Chittum’s car and the truck driver already have filed wrongful death actions).
\item See id. (describing an award of two-thirds to Lindsey and the remainder to Callie).
\item See Clark v. Alexander, 953 P.2d 145, 152 (Wyo. 1998) (describing how important the guardian \textit{ad litem} is in representing child’s best interest).
\item Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (holding that the guardian’s recommendation, although not binding, should have been considered); see also Guier v. Guier, 918 S.W.2d 940, 950 (Mo. 1996) (stating that the role of the guardian \textit{ad litem} is to “stand in the shoes of the child and weigh the factors as the child would weigh them if his judgment were mature and he was not of tender years” and that his “function is to advocate” the best interests of the child); Shainwald v. Shainwald, 395 S.E.2d 441, 444 (S.C. 1990) (noting that children need a “vigorous advocate”); Doe v. Doe, 421 S.E.2d 913, 915 (Va. 1992)
\end{enumerate}
\end{footnotesize}
Under Virginia state law, however, a GAL will not be appointed automatically when custody is at issue and each parent claiming custody is represented by counsel. Before a GAL is appointed, a Virginia court must determine whether the parents' counsel can adequately represent the child's interests. At some point, it may become clear that the adults involved in this custody dispute are not acting in Rebecca's and Callie's best interests. If that ever happens, a GAL should be appointed for each girl.

IX. MEDIATION—A METHOD TO FIND AN AMICABLE RESOLUTION

Johnson, Conley, and the members of the Chittum and Rogers families—all persons who have a legitimate interest in obtaining custody and visitation of Rebecca and Callie—have met informally. They have exchanged photographs and stories about the two children who are at the center of this controversy. Most of the time, they have cooperated, communicated, and established good rapport with one another. Thus, these families have taken the first step toward an amicable resolution of the issues.

Parents settle ninety percent of custody disputes without court intervention. Mediation, one method of informal settlement, is "a process through which an impartial and neutral third person called a mediator encourages and assists disputants to negotiate a settlement of their conflict." In accordance with statutory commands in several states, mandatory or voluntary mediation may be ordered in custody and visitation disputes such as this one.
The relevant Virginia statute provides that, "[m]ediation shall be used as an alternative to litigation where appropriate." This order is consistent with the informal efforts to resolve the issues that arose as a result of the Mays/Twigg switch. To end the dispute regarding which family would rear Kimberly, the Florida court ordered the Twigg and Mays families to attempt to mediate their differences.

Mediation is a good method of conflict resolution for families who want to resolve their own internal disputes. The main advantage is that it fosters autonomous decision-making. Therefore, if the parties want to avoid the harsh rulings that a court could be obligated by statute and case precedent to make, they should mediate their claims. Mediation, a confidential process, would allow these families, who have shunned the local, national, and international media attention that the baby switch has generated, to avoid litigation and the continued barrage of press stories. Thus, they could maintain their privacy. Furthermore, mediation of disputes results in faster disposition of family matters, and the three families could resolve the issues in a less painful manner.

One of the greatest benefits of mediation is that after the mediator drafts the agreement and the parties have an opportunity to seek advice from their legal counsel, the agreement will be submitted to a court for approval. The effect of the agreement

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356. See id.


358. See id.


360. See id. at 2; Forrest S. Mosten, supra note 360, at 56-57 (1997).


362. See Linda Elrod, Child Custody Practice and Procedure § 16:12-13, at 23-24 (1997) (mediating disputes in 12 to 15 hours); Mosten, supra note 360, at 33 (averaging three to eight hours for mediation).

363. See Mosten, supra note 360, at 60-61; Mabry, supra note 354, at 415.

reached in mediation then will be as enforceable as any other written contract. In the event that someone fails to comply with one or more provisions of the agreement, adverse parties would be able to enforce the agreement and obtain sanctions and remedies. So, the adults involved will have a remedy if disputes develop later. Mediation of disputes between Johnson and Conley may not be appropriate, however, if screeners determine that Conley has an abusive nature that would create an unequal bargaining power. Some state legislation requires mediators or court officials to screen disputants to ascertain whether there is a history of domestic violence in the family. If abuse has occurred, mediation may be barred, in accordance with some statutes, or the abused person has the option of refusing to participate in mediation.

At present, Johnson and Conley appear to have resolved their differences and joined forces against the Chittums and Rogerses. A mediator could assist the parties to resolve matters including working out a detailed visitation plan. If they establish a plan for these children on their own, they are more likely to honor that plan in the future.

X. FAMILY COUNSELING: A PRESCRIPTION FOR HEALING

Regardless of the outcome of this controversy, counseling is recommended for all interested parties. All of these adults, and perhaps the children, have been traumatized by this travesty. Only the family members know the real depth of their fears and anxieties. Johnson has verbalized her emotions publicly more often than other family members. She has described her pain as “more than anyone should have to bear.” She took several days leave from work when she became aware of the DNA test results. These adults may need counseling to deal with their beliefs about the medical profession. They may distrust medical employ-

366. See id.
367. See VA. CODE ANN. § 20-124.4 (Michie 1995) (requiring the court to “ascertain upon motion of a party whether there is a history of family abuse”).
368. See VA. CODE ANN. § 20-124.4 (Michie 1995). For other examples of state statutes that consider domestic violence a factor in determining whether a case should go to mediation, see ALA. CODE § 6-6-20(d) (Supp. 1999); COLO. REV. STAT. § 13-22-311 (1) (1998); HAW. REV. STAT. § 580-41.5(a) (Supp. 1998); IOWA CODE ANN. § 598.7A (West Supp. 1999); KY. REV. STAT. ANN. § 403.036 (Michie 1998); LA. REV. STAT. ANN. § 9:4103(B)(1) (West Supp. 1999).
369. See Family Authorizes, supra note 41.
370. Blum & Shear, supra note 14.
371. See id.
ees. This distrust is of major significance because Rebecca and Callie are still toddlers. The likelihood that the children will require some medical attention is quite high because many children sustain bumps, bruises, scrapes, and broken bones as they grow. At a minimum, annual medical examinations are a necessity. Therefore, these parents and caregivers may need counseling to assist them in renewing their faith in the medical profession.

Counseling may be beneficial for other reasons. The custody and visitation plans have not been finalized. If one or more of the parents, grandparents, or psychological parents voluntarily or involuntarily gives up a child or contact with that child is diminished, she may need counseling to deal with the sense of loss that she surely will feel. She may need assistance to come to grips with separation from the child she has loved and nurtured for years.

These families have been bombarded by the media. At one point, Johnson left town to get away from reporters. Both Johnson and the grandparents were forced to hide and take refuge from camera crews and reporters who staked out their homes. As a result, the adults may need support to regain their confidence in the public realm and to protect these children from other media frenzies.

More important, the parties may agree, or a court may order, that they maintain contact with each other through visitation or some other arrangement. In that instance, they would have to learn to communicate and cooperate with one another on a long-term basis in a manner that will be in Rebecca's and Callie's best interests. Additionally, as the girls mature, they may need counseling to build positive relationships with all of the people who care for them:

When family problems involving children are of sufficient depth and duration that professional counseling is needed to heal the relationships of the child or children with the parent or parents, or to assist the child or children in dealing with such emotional estrangement, a circuit court may direct participation in such

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372. See Harris, supra note 9.
373. See Jerry Harris, National, International Media Descend on Area, NEWS-GAZETTE (Lexington, Virginia), Aug. 8, 1998 at A1 (complaining about the invasion of privacy and threatening to seek police protection); Deborah Kelly, Media Frenzy: It's a Horror Show,” RICH. TIMES-DISPATCH, Aug. 9, 1998, at A1 (noting how the families were annoyed by the media's constant intrusions in their lives); Michael D. Shear, Families Meet, Cry, Connect, WASH. POST, Aug. 9, 1998, at B1 (having a fearful five and one-half hour meeting and finding something—reporters and cameramen—in common).
374. See Kelly, supra note 373.
375. See Harris, supra note 373.
counseling and may in its discretion determine how the cost of such counseling shall be paid.\textsuperscript{376}

So, as other courts have required when parents have been separated from their children,\textsuperscript{377} all adults who will have ongoing contact with Callie and Rebecca should undergo counseling.

XI. CONCLUSION

Baby switches occurred before and after the Johnson/Chittum and the Twigg/Mays switches.\textsuperscript{378} Days after the Johnson/Chittum switch was discovered, a woman gave birth to a boy at a Lowell, Massachusetts hospital.\textsuperscript{379} A few hours later, a nurse's aid brought a baby to the mother for nursing.\textsuperscript{380} After the mother nursed the newborn whom she thought was her own son, she decided to change the child's diaper.\textsuperscript{381} When she loosened the diaper, she discovered that the child she had nursed obviously was not her child.\textsuperscript{382} The aid had brought the woman a female child.\textsuperscript{383} When the mother notified the hospital attendant, her son was found safely asleep in the nursery.\textsuperscript{384} Hospital officials immediately offered to provide counseling for the mother and to conduct DNA testing.\textsuperscript{385}

A second switch also occurred at the University of Virginia Medical Center.\textsuperscript{386} Two infant girls died on or about the same date in March 1998.\textsuperscript{387} When Mistie Fritz asked to take her baby home for a burial service, she received a white plastic casket containing

\textsuperscript{376} Mary Ann P. v. William P., 475 S.E.2d 1, 8 (W. Va. 1996).


\textsuperscript{378} See, e.g., Carlos Santos, 2 Mothers Discuss U.Va. Experiences on "Maury," RICH. TIMES-DISPATCH, Sept. 15, 1998, at B7 (introducing South African mothers whose sons were switched at birth)


\textsuperscript{380} See id.
\textsuperscript{381} See id.
\textsuperscript{382} See id.
\textsuperscript{383} See id.
\textsuperscript{384} See id.
\textsuperscript{385} See id.


\textsuperscript{387} See Shear, Babies' Bodies Switched, supra note 386.
a deceased baby girl. As she and her husband were about to leave the hospital, they returned to claim their baby's blanket. When hospital employees searched for the blanket, they found it with Fritz's baby elsewhere. Fritz had received someone else's deceased child.

Steve Kaufer of Inter/Action Associates, a consulting firm in Las Vegas, Nevada, recently conducted a study of baby switches. More than 400 employees at maternity wards across the nation participated in the study. Kaufer found that employees made a mistake in 1 out of 1000 times. "Almost none of those mistakes are permanent, but every year two or three babies in the U.S. probably go home with the wrong mothers." Hospital security representatives predict that genetic testing may cause the number of reported baby switches to increase. The Johnson/Chittum switch will not be the last one.

In a court of law, a judge probably would award custody of Rebecca to Johnson—Rebecca's biological mother. As the psychological parent, she would receive custody of Callie too. These decisions would be based upon case precedent, statutes, and policies designed to promote each child's best interests. If the parties wish to avoid this outcome, the adults who have vowed to care for these children should mediate their disputes to resolve them in the manner in which they choose and solidify the arrangement with a court order.

"There are times when the best interests of a child warrant 'fixing' his custodial arrangement." For genetic reasons and because these young children will be resilient enough to overcome the disruption that a switch will cause, Rebecca and Callie should be switched so that they will grow up with their biological families. The unrelated people who have developed a relationship with these girls should be allowed visitation rights.

388. See id.
389. See id.
390. See id.
391. See Cloud, supra note 6, at 66.
392. See id.
393. See id.
394. See id.
395. Id.
396. Id.
Whatever these adults decide, these issues should be resolved quickly because the longer they wait, the more trauma it may cause Callie and Rebecca. A child’s sense of time is much longer than an adult’s sense of time. For a child who is younger than five years old, as these two girls are, “an absence of parents for more than two months is intolerable.” Moreover, the “bond between [Rebecca, the Chittums, and the Rogerses] is growing stronger so that it will be all the more traumatic for the child [if] custody is returned to [Johnson].”

Rebecca and Callie are caught up in a great tragedy that will affect them for life. Admittedly, it is difficult to predict what long-term effects will plague them. In some respects, though, they are blessed. Three families are vying to rear them and to do what is in their best interests. For hundreds of thousands of children, including approximately 100,000 who are available for adoption from foster care, there is no one who wants to care for them on a permanent basis. As a judge lamented during another custody dispute:

Both sets of grandparents are also to be commended for their unselfish willingness to accept this child into their homes and to aid in its upbringing. It goes without saying [that a decision to grant custody] must of necessity bring joy to some and sadness to others. We can only hope that the pain of separation to be felt by the . . . grandparents will in time subside as the child adjusts to his new family setting, and that ways will be found to keep alive the relationship they have established with the child.


397. GOLDSTEIN ET AL., supra note 183, at 41-43.
400. Bordley, 478 So. 2d at 512.