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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.¹ 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.²

Within a few hours of Callie Marie Conley's birth, Whitney Rogers gave birth to a baby girl at the Medical Center.³ Kevin Chittum was Rogers's fiancé and her daughter's father.⁴ On July 4, 1998, Rogers and Chittum were killed in a head-on collision in Southwest Virginia.⁵ 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.⁶ After they divorced, Thomas married Brenda Rogers, his current wife.⁷ Larry and Rosa Lee Chittum are Kevin Chittum's parents.⁸ After Kevin and Whitney died, the Rogerses and the Chittums began sharing custody of Rebecca Grace Chittum.⁹ She is the child Kevin and Whitney brought home from the Medical Center in mid-1995.¹⁰

* Associate Dean for Academic Affairs, Howard University School of Law; J.D., Howard University School of Law, 1983; L.L.M., New York University School of Law, 1996. I gratefully acknowledge Suzanne Reynolds of Wake Forest University, who meticulously perused a draft, and support from Professors Ann Massie, Sarah K. Wiant, Douglas Rendleman, and Keith Engel of Washington & Lee University, who made suggestions for enhancing this article. In addition, several professors at Howard University School of Law provided valuable comments at a presentation on April 8, 1999. Also, I appreciate the technical support and updates that Vera Mencer, my secretary, provided.

1. See Justin Blum & Michael D. Shear, *Of One Mind on Two Children*, WASH. POST, Aug. 5, 1998, at B1; Jerry Harris, *How the Switch Came to Light*, NEWS-GAZETTE (Lexington, Virginia), Aug. 5, 1998, at A3.

2. See Blum & Shear, *supra* note 1.

3. See *id.*

4. See *id.*

5. See *id.*; Harris, *supra* note 1; Jerry Harris, *Orphan Center of Baby Switch Story*, NEWS-GAZETTE (Lexington, Virginia), Aug. 5, 1998, at A1.

6. See John Cloud, *Where Do They Belong?*, TIME, Aug. 17, 1998, at 62, 65.

7. See *id.*

8. See *id.* at 64.

9. See Jerry Harris, *Custody Suits, Wrongful Death Actions Filed*, NEWS-GAZETTE (Lexington, Virginia), Nov. 25, 1998, at A5.

10. See Cloud, *supra* note 6, at 62.

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.¹¹ For some unknown and perplexing reason, someone switched Rogers's baby with Johnson's baby.¹² 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.¹³ 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.¹⁴ Their paths crossed as they were taking a walk in the maternity ward, trying to induce labor, on the night of June 29, 1995.¹⁵ The two women encountered one another and talked briefly.¹⁶ Johnson was a twenty-seven-year-old single woman who was about to give birth to her third child.¹⁷ Rogers, a sixteen-year-old cheerleader, unmarried and a sophomore in high school, was going to give birth to her first child.¹⁸ Johnson recalled that Rogers was "warm and enthusiastic."¹⁹

Later that night, at 11:12 p.m., Johnson gave birth to a baby girl.²⁰ 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.

14. See Justin Blum & Michael D. Shear, *2nd Family Wants to Keep Girl They Got in Hospital Mix-up*, WASH. POST, Aug. 4, 1998, at A1; Cloud, *supra* note 6, at 62; Tamara Jones & Michael D. Shear, *Baby Switch Leaves Disparate Lives Forever Entwined*, WASH. POST, Aug. 8, 1998, at A1.

15. See Jones & Shear, *supra* note 14.

16. See *id.*

17. See *id.*

18. See *id.*

19. Blum & Shear, *supra* note 14.

20. See *id.*

to a girl.²¹ Both babies were healthy and blonde.²² Johnson says that, on July 1st, between 2:00 a.m. and 7:00 a.m., her baby was in the nursery.²³ She believes that the switch occurred during those hours.²⁴

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.²⁵ Six hours later, Johnson returned to the hospital because the baby was not accepting nourishment.²⁶ 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.²⁷ When Johnson inquired about the

21. See *id.*

22. See Blum & Shear, *supra* note 1.

23. See Michael D. Shear, *Baby's Mother Zeroes in on Time that Switch Could Have Occurred*, WASH. POST, Aug. 14, 1998, at B1.

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. . . . [B]oth 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.

Report Excerpts, NEWS-GAZETTE (Lexington, Virginia), Nov. 25, 1998, at A5.

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.

25. See Shear, *Baby's Identity*, *supra* note 24.

26. See Cloud, *supra* note 6, at 65; Jones & Shear, *supra* note 14; Shear, *Baby's Identity*, *supra* note 24.

27. See 20/20: *Switched at Birth: Paula Johnson Tells Her Incredible Story* (ABC television broadcast, Aug. 14, 1998), available in 1998 WL 5433678 [hereinafter 20/20: *Switched at Birth*]; Cloud, *supra* note 6, at 65.

weight discrepancy, Medical Center employees shrugged it off as "something that just happens."²⁸ Later, Johnson would learn that this was the exact birth weight of Whitney Rogers's daughter.²⁹ The Medical Center discharged Rogers on July 2, 1995, and Rogers took her baby girl, the one Medical Center attendants handed to her, home.³⁰ 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 1998.³¹ 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.³² Johnson and Conley often argued about the amount of monetary support that Conley provided.³³ This time, Conley refused to pay more and denied parentage.³⁴ In retaliation, Johnson filed a child support claim against Conley in a Virginia court.³⁵ 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.³⁶

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 filiation or 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. Flanery, 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.³⁷ Johnson contacted her attorney, and her attorney contacted Medical Center officials.³⁸ After assuring counsel that procedures for banding the baby and the mother with identity bracelets had been followed, Medical Center officials launched an investigation.³⁹

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.⁴⁰ 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.⁴¹ 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.⁴² Another test revealed that Rebecca was Conley's child.⁴³

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,⁴⁴ meaning possession and control, of Rebecca. The United States Supreme Court usually declines to address matters concerning domestic relations,⁴⁵ but, on

proceedings and explaining the testing process). See generally Christopher Blakesley, *Scientific Testing and Proof of Paternity: Some Controversy and Key Issues for Family Law Counsel*, 57 LA. L. REV. 379 (1997) (discussing various methods for establishing paternity); Linda L. Lemmon & Lynn K. Murphy, *The Evidentiary Use of HLA Blood Test in Virginia*, 19 U. RICH. L. REV. 235 (1985) (discussing the use of the Human Leukocyte Antigen test—a test on white blood cells); William C. Thompson & Simon Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 VA. L. REV. 45 (1989) (examining how courts look at DNA typing evidence).

37. See Justin Blum, *Genetic Tests Confirm U-Va. Baby Swap*, WASH. POST, Sept. 2, 1998, at B3; *DNA Test Confirms Second Half of Baby Switch*, CNN.COM (Sept. 1, 1998) <<http://cnn.com/US/9809/01/switched.babies/>> [hereinafter *DNA Test Confirms*].

38. See Justin Blum & Michael D. Shear, *A Small Child, A Large Question*, WASH. POST, Aug. 2, 1998, at B1.

39. See *id.*

40. See Dennis Cauchon, *Va. Babies Switched at Birth 3 Years Ago*, USA TODAY, July 31, 1998, at 1A.

41. See *Family Authorizes Genetic Test in Baby Switching Case*, CNN.COM (Aug. 6, 1998) <<http://cnn.com/US/9808/06/switched.babies.01/>> [hereinafter *Family Authorizes*]; Jones & Shear, *supra* note 14.

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.⁴⁶ The Supreme Court based these rulings on the Fourteenth Amendment of the United States Constitution.⁴⁷ The Court reasoned that the liberties protected by the Fourteenth Amendment include the right to "bring up children."⁴⁸ 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."⁴⁹

Generally, the rights of biological parents are superior to the claims of all other third persons.⁵⁰ In Virginia, the court will honor "the primacy of the parent-child relationship."⁵¹ 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."⁵²

relations exception that "divests the federal courts of power to issue divorce, alimony, and child custody decrees").

46. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); accord *Santosky v. Kramer*, 455 U.S. 745, 747 (1982); *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 27 (1981); *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977); *In re M.M.L.*, 900 P.2d 813, 819 (Kan. 1995); *Wolinski v. Browneller*, 693 A.2d 30, 36-37 (Md. Ct. Spec. App. 1997); *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988); see also John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351, 351 (1998) (discussing natural parents' successful attempts to resist visitation by non-parents).

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.

50. See *Meyer*, 262 U.S. at 399; *In re Adoption of L.*, 462 N.E.2d 1165, 1168 (N.Y. App. Div. 1984); *Bottoms v. Bottoms*, 457 S.E.2d 102, 104 (Va. 1995). But see *In re Marriage of Liebich*, 547 N.W.2d 844, 849 (Iowa Ct. App. 1996) (awarding custody to a grandmother who had cared for the child for eight years); *Locklin v. Duka*, 929 P.2d 930, 933-36 (Nev. 1996) (enumerating factors which constitute circumstances that overcome the presumption in favor of parental custody).

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.⁵³ Johnson and Conley are Rebecca’s biological parents. They do not live together now and do not intend to live together in the future.⁵⁴ Therefore, in most states, a court would rely upon the “best interests” standard⁵⁵ 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.⁵⁶

parent necessarily serves the best interest of the child”).

53. *Bottoms v. Bottoms*, 457 S.E.2d 102, 104 (Va. 1995) (quoting *Judd v. Van Horn*, 81 S.E.2d 432, 436 (Va. 1954)); accord *Wilkerson v. Wilkerson*, 200 S.E.2d 581, 583 (Va. 1993); *Walker v. Fagg*, 400 S.E.2d 208, 210 (Va. 1991); *Mason v. Moon*, 385 S.E.2d 242, 244 (Va. 1989); *Smith v. Pond*, 360 S.E.2d 885, 886 (Va. 1987); *Patrick v. Byerley*, 325 S.E.2d 99, 101 (Va. 1985); *Judd v. Van Horn*, 81 S.E.2d 432, 436 (Va. 1954).

54. See generally 20/20: *Switched at Birth*, *supra* note 27.

55. See sources cited in *supra* notes 52-53 for a discussion of the “best interests of the child” standard.

56. VA. CODE ANN. § 20-124.3 (Michie 1998).

A majority of states rely upon similar statutory factors to make custody and visitation decisions.⁵⁷ In Virginia, joint or sole custody is allowed.⁵⁸ 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.⁵⁹ Johnson and Conley are relatively young adults. Conley is thirty-four years old; Johnson is thirty years old.⁶⁰ Neither of them possesses physical or mental incapacities that would render one unable to care for Rebecca.⁶¹ 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.⁶² They have not, however, had sufficient opportunity to develop fully a relationship with their biological child because Rebecca has been

57. See ARIZ. REV. STAT. ANN. § 25-403(A) (West Supp. 1998); COLO. REV. STAT. § 14-10-124 (1999); FLA. STAT. ANN. § 61.13(3) (West Supp. 1999); IOWA CODE ANN. § 598.41(3) (West Supp. 1999); KY. REV. STAT. ANN. § 403.270 (Michie 1999); MASS. GEN. LAWS ANN. ch. 208, § 31 (West 1998); MINN. STAT. ANN. § 518.17(1) (West Supp. 1999); MO. ANN. STAT. § 452.375(2) (West 1997 & Supp. 1999); NEV. REV. STAT. ANN. § 125.480(4) (Michie 1998); N.C. GEN. STAT. § 50-13.2 (1999); OHIO REV. CODE ANN. § 3109.04(F)(1) (West 1994); TENN. CODE ANN. § 36-6-106 (Supp. 1996); TEX. FAM. CODE ANN. § 153.002 (West 1996); WIS. STAT. ANN. § 767.24(5) (West 1993 & Supp. 1998). But see generally *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981) (announcing the primary caretaker presumption).

58. See VA. CODE ANN. § 20-124.2(A) (Michie 1998); see also *Taylor v. Taylor*, 508 A.2d 964, 966-67 (Md. 1986) (explaining different variations of joint custody); D. Lee Khachaturian, *Domestic Violence and Shared Parental Responsibility: Dangerous Bedfellows*, 44 WAYNE L. REV. 1745, 1761-64 (1999) (defining joint legal and joint physical custody).

59. Callie Marie and Rebecca were born on June 29 and 30, 1995, respectively. See *A Tale of Two Babies*, WASH. POST, Aug. 5, 1998, at B8. There is no indication of disease or disability in either child. See Blum & Shear, *supra* note 1.

60. See Cloud, *supra* note 6, at 64 (reporting that Johnson is 30 years old); Jones & Shear, *supra* note 14 (providing ages for Conley and Johnson); *Two Families Want to Adopt Switched Baby*, CNN.COM (Aug. 19, 1998) <<http://cnn.com/US/9808/19/switched.babies.02/index.html>> [hereinafter *Two Families*] (telling Conley's age).

61. See *Families of Switched Babies Seek Custody Solution*, CNN.COM (Aug. 4, 1998) <<http://cnn.com/US/9808/04/switched.babies.03/>>.

62. See *20/20: Switched at Birth—Paula Johnson's Incredible Story* (ABC television broadcast, Dec. 25, 1998), available in 1998 WL 5433846 [hereinafter *20/20: Switched at Birth 2*].

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.⁶³ Yet, because they have not maintained a relationship with Rebecca, this factor may weigh in favor of the putative grandparents keeping Rebecca.⁶⁴

3. *Child's Relationships with Others*

In addition to Callie, Johnson cares for her three sons and an adopted daughter—Rebecca's siblings.⁶⁵ Courts have determined that keeping siblings together is an important consideration.⁶⁶ 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."⁶⁷ 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."⁶⁸ 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).

66. *See* McQuade v. McQuade, 901 P.2d 421, 425 (Alaska 1995); Adoption of Hugo, 700 N.E.2d 516, 524 (Mass. 1998), *cert. denied*, Hugo P. v. George P., 119 S. Ct. 1286 (1999); Sefkow v. Sefkow, 427 N.W.2d 203, 215 (Minn. 1988); *In re Marriage of Moe*, 676 P.2d 336, 338 (Or. 1984); Pennington v. Pennington, 711 P.2d 254, 256 (Utah 1985); Hughes v. Gentry, 443 S.E.2d 448, 451-52 (Va. 1994); Dowdy v. Dowdy, 864 P.2d 439, 440 (Wyo. 1993); Jay M. Zitter, Annotation, *Child Custody: Separating Children by Custody Awards to Different Parents—Post-1975 Cases*, 67 A.L.R.4th 354, 360 (1989). *But see* Scruggs v. Saterfiel, 693 So. 2d 924, 926 (Miss. 1997) (finding no statutory basis for visitation between siblings that were placed with separate guardians); Harris v. Harris, 647 A.2d 309, 314 (Vt. 1994) (concluding that the reasonableness of splitting siblings was supported by the evidence).

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 Fynaardt*, 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. Burnside*, 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.⁶⁹ Relatives and friends have reported, however, that Conley has been a doting father to Callie.⁷⁰ Likewise, Johnson has been a good mother to both Callie and her other children.⁷¹ 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.⁷² Conley told Barbara Walters of the ABC News show *20/20* that he takes Callie everywhere he goes: "[I] [t]ake her to car races. I take her to feed my dogs. And everywhere I go, she is behind me."⁷³ Although Conley's and Johnson's relationship has been tumultuous, "they are on good terms now."⁷⁴ 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.⁷⁵ The probability that a court will consider a child's preference rests primarily on her age.⁷⁶ If the child is younger than eight years old, her preference

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.*, 716 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 (1998) (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).

76. See Kathleen Nemecek, Note, *Child Preference in Custody Decisions: Where We Have Been, Where We Are Now, Where We Should Go*, 83 IOWA L. REV. 437, 446-51 (1998)

may not be considered at all, or will be given very little weight.⁷⁷ If the child is twelve years old, however, her preference may be given considerable weight.⁷⁸ If she is fourteen years old or older, she will be placed with the parent she chooses unless that parent is unfit.⁷⁹ If she chooses, the judge may ascertain the child's preference for living with a particular parent by interviewing the child in chambers.⁸⁰ The child's preference then is balanced with other factors including her maturity,⁸¹ educational level,⁸² intellectual and emotional development,⁸³ hostility toward one parent,⁸⁴ the advisability of recognizing a teenager's wishes,⁸⁵ and whether a young child recounts persuasive reasons for her choice.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).

77. See *Gresser v. Glynn*, 73 N.E.2d 671, 671 (Ill. App. Ct. 1947).

78. See *Bailes v. Sours*, 340 S.E.2d 824, 827 (Va. 1986).

79. See *Tompkins v. Tompkins*, 961 P.2d 419, 423-24 (Alaska 1998); *Green v. Kelly*, 712 So. 2d 1201, 1202 (Fla. Dist. Ct. App. 1998); *Roehrdantz v. Roehrdantz*, 438 N.W.2d 687, 691 (Minn. Ct. App. 1989); *Bailes*, 340 S.E.2d at 827; *Paige K.B. v. Molepske*, 580 N.W.2d 289, 295 (Wis. 1998); *Russell v. Russell*, 948 P.2d 1351, 1354 (Wyo. 1997).

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).

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").

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).

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*, 384 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").

84. See *Yates v. Yates*, 702 P.2d 1252, 1256 (Wyo. 1985) (listing hostility toward non-preferred parent as one factor).

85. See O'Neill, *supra* note 76, at 1426 ("[M]ental capacity, and not age, [is] the criterion . . .").

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.⁸⁷ 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.⁸⁸ In January 1998, Johnson accused Conley of assaulting her again and restraining her at gunpoint.⁸⁹ According to Johnson, Conley has pushed, shoved, threatened to shoot her, and intentionally hit her car with his truck.⁹⁰ As a result, in April 1998, a court convicted him of assault and battery.⁹¹ He had another court date set for September 1998 for the adjudication of another assault charge when news of the switch became public.⁹² Johnson obtained two restraining orders and a permit to carry a concealed weapon to protect herself from Conley's physical attacks.⁹³

Domestic violence is a factor that should be and is considered in making custody and visitation decisions.⁹⁴ 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.

94. See VA. CODE ANN. § 20-124.3(8) (Michie 1998) (making "history of family abuse" admissible in custody determinations). For other examples of state statutes admitting abuse evidence in custody disputes, see NEV. REV. STAT. ANN. § 125.480(4)-(7) (Michie 1998); N.H. REV. STAT. ANN. § 458:17 II(c) (1992); N.J. STAT. ANN. § 9:2-4c (West 1993 & Supp. 1999); N.D. CENT. CODE § 14-09-06.2(1)(j) (1997); WASH. REV. CODE ANN. § 26.09.191 (2)(a)(iii) (West 1997); WIS. STAT. ANN. § 767.24(5)(i) (West 1993 & Supp. 1998). For cases admitting domestic abuse evidence in custody proceedings, see *Guardianship of Sydney Simpson*, 67 Cal. App. 4th 914, 940 (1998); *In re Heather*, 60 Cal. Rptr. 2d 315 (Cal. Ct. App. 1996); *Knock v. Knock*, 621 A.2d 267, 273-74 (Conn. 1993); *In re Irwin v. Schmidt*, 653 N.Y.S.2d 627, 629 (N.Y. App. Div. 1997); *In re J.D. v. N.D.*, 652 N.Y.S.2d 468, 468 (N.Y. Fam. Ct. 1996); *Mary Ann P. v. William R.P., Jr.*, 475 S.E.2d 1, 7-8 (W. Va. 1996); *Henry v. Johnson*, 450 S.E.2d 779, 783 (W. Va. 1994). For analysis of current statutes and recommendations for courts, see Family Violence Project, Nat'l Council of Juvenile & Family Court Judges, *Family Violence*

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.⁹⁵ Children who are not victimized by the abuser suffer residual effects when there is violence in their home.⁹⁶

"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."⁹⁷ Placing a child in the custody of a parent who batters the other parent is detrimental to the child's safety and well-being.⁹⁸ 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.⁹⁹ 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."¹⁰⁰ Another court further explained that detriment is "more than the normal trauma

in *Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 225-27 (1995); Family Violence Project, Nat'l Council of Juvenile & Family Court Judges, *Family Violence: Improving Court Practice*, JUV. & FAM. CT. J., No. 4 1990, at 19-20.

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.*

98. See Laura Crites & Donna Coker, *What Therapists See That Judges May Miss*, JUDGES' J., Spring 1988, at 8, 12; Carla Garrity & Mitchell A. Baris, *Custody and Visitation: Is It Safe?* FAM. ADVOC., Winter 1995, at 40, 42-43; Khachaturian, *supra* note 58, at 1757-58; Lenore E. Walker & Glenace E. Edwall, *Domestic Violence and Determination of Visitation and Custody in Divorce*, in DOMESTIC VIOLENCE ON TRIAL 127, 133-38 (Daniel J. Sonkin ed., 1987).

99. See *Mabry*, *supra* note 13.

100. *In re Marriage of Matzen*, 600 So. 2d 487, 490 (Fla. Dist. Ct. App. 1992) (citation omitted).

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

101. *Filter v. Bennett*, 554 So. 2d 1184, 1185 (Fla. Dist. Ct. App. 1989).

102. *See Adoption of Hugo*, 700 N.E.2d 516, 523 (Mass. 1998), *cert. denied*, *Hugo P. v. George P.*, 119 S. Ct. 1286 (1999).

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.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.¹⁰⁸ 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."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.¹¹⁰ She has visited Rebecca,¹¹¹ and she has been concerned about Rebecca's well-being.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.¹¹³ After Rogers and Chittum died, their families endeavored to rear Rebecca together.¹¹⁴ They have an alternating shared custody arrangement that allows one set of grandparents to have custody of Rebecca for four months.¹¹⁵ During the first rotation, she lived with the Rogers family—and that is where Johnson found her.¹¹⁶

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

107. See *Evans*, 507 A.2d at 1011 (acknowledging the experts' assessment of a strong bond between the child and her grandparents).

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).

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").

110. See *Cloud*, *supra* note 6, at 64; *Jones & Shear*, *supra* note 14.

111. See *Jones & Shear*, *supra* note 14.

112. See *id.*

113. See *id.*

114. See *id.*

115. See *id.*

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).

117. See *Jones & Shear*, *supra* note 14.

118. See *Cloud*, *supra* note 6, at 63.

parent, however, Johnson is entitled to custody of Rebecca.¹¹⁹ She has a fundamental right to rear her own child, to make decisions about her education, religious upbringing, and her general welfare.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.¹²¹ Among other claims, Johnson properly alleged that those defendants deprived her of her constitutional right to rear Rebecca.¹²²

B. Conley's Rights as an Unwed Father

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

119. See *Sobin v. Department of Human Dev.*, No. 153340, 1997 WL 1070632, at *1 (Va. Cir. Ct. July 1, 1997).

120. See *id.*

121. See Michael D. Shear, *Mother of Switched Baby Files Suit for \$31 Million*, WASH. POST, May 25, 1999, at B1.

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*].

123. See 20/20: *Switched at Birth*, *supra* note 27; Jones & Shear, *supra* note 14.

124. See 20/20: *Switched at Birth*, *supra* note 27.

125. See Jones & Shear, *supra* note 14.

126. See *Identity of Switched Baby's Father Confirmed*, WASH. POST, Sept. 10, 1998, at D3.

127. See 20/20: *Switched at Birth*, *supra* note 27.

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).

In the United States, both parents have equal rights under the presumption that biological parents have a fundamental right to rear their own children.¹²⁹ Accordingly, single biological fathers have a right to develop a relationship with their children.¹³⁰ They have a right to custody, or, as non-custodial parents, they have a right to visitation.¹³¹ Once a relationship has been established, they may have a right to grant or deny consent for their child's adoption.¹³² Virginia law also requires that both parents have frequent and continuous contact with the child and must share child-rearing responsibilities.¹³³ 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.¹³⁴ She has provided adequate care for her other children and for Callie.¹³⁵ Conley's history of domestic violence probably would be a hindrance to his ability to obtain custody of Rebecca.¹³⁶ 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.¹³⁷ 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

129. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); accord *Santosky v. Kramer*, 455 U.S. 745, 747 (1982); *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 27 (1981); *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977); *In re D.A.McW. v. McWhite*, 460 So. 2d 368, 369 (Fla. 1984); *Brauch v. Shaw*, 432 A.2d 1, 5 (N.H. 1981).

130. See *Lehr v. Robertson*, 463 U.S. 248, 260-61 (1983).

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.

136. See, e.g., *Gomez v. Savage*, 580 N.W.2d 523, 534 (Neb. 1998) (finding that father's recent improvements did not mitigate past criminal conduct and neglect of children).

137. See *Santosky v. Kramer*, 455 U.S. 745, 747 (1982); see also *In re Guardianship of K.H.O.*, 736 A.2d 1246, 1251 (N.J. 1999) (finding the constitutional protection of family rights tempered by the State's *parens patriae* responsibility to protect a child's welfare).

served when the child is in the parent's custody.¹³⁸ Yet, the child's best interests still are paramount when the dispute is between a parent and a non-parent.¹³⁹ 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."¹⁴⁰

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.¹⁴¹ 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.¹⁴²

138. See *Elder v. Evans*, 427 S.E.2d 745, 747 (Va. 1993).

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. Fatty*, 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, 827-28 (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*, 580 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.

146. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

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."¹⁵¹

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.

152. See *Mays v. Twigg*, 543 So. 2d 241 (Fla. Dist. Ct. App. 1989); *Twigg v. Mays*, No. 88-4489-CA-01, 1993 WL 330624 (Fla. Cir. Ct. Aug. 18, 1993).

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.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" 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,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.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.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'" 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.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

160. *See id.*

161. *Id.* at *6.

162. *See id.*

163. *See id.*

164. *See 20/20: Switched at Birth*, *supra* note 27; *Cloud*, *supra* note 6, at 63.

165. *20/20: Switched at Birth*, *supra* note 27.

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.¹⁶⁷ In addition, states require parents to provide necessary and proper care for their children including food, clothing, shelter, and medical care.¹⁶⁸

A. *Child Support*

One obligation parents share is their equal responsibility in providing monetary support for their children's general maintenance and education.¹⁶⁹ The policy underlying child support payments is that they are "exclusively for the benefit and economic best interest of the child."¹⁷⁰ In addition, the non-custodial parent may be expected to provide medical and dental insurance,¹⁷¹ health care,¹⁷² and life insurance.¹⁷³ The support obligation begins when

167. See, e.g., VA. CODE ANN. § 22.1-254 (Michie 1999). For a discussion on the development of compulsory education laws, see R. FREEMAN BUTTS, PUBLIC EDUCATION IN THE UNITED STATES FROM REVOLUTION TO REFORM 102-03 (1978).

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.

169. See, e.g., ALASKA STAT. § 25.27.065 (Michie 1999) (making the custodial parent responsible for ensuring payment); ARIZ. REV. STAT. ANN. § 25-501(A) (West 1999) (ordering reasonable support for minor, unemancipated children); CAL. FAM. CODE § 3900 (West 1999) (giving mother and father "equal responsibility to support their minor children"); N.C. GEN. STAT. § 110-128 (1999) (drafting legislation to ensure payment of support); OHIO REV. CODE ANN. § 2919.21(A)(2) (West 1997 & Supp. 1998) (stating that parents must provide for their able-bodied children below the age of 18 and their handicapped children below the age of 21); VA. CODE ANN. § 63.1-250.1(A) (Michie 1995) (authorizing the Department of Social Services to order child support payments). For examples of cases mandating child support payments, see *Lo Porto v. Lo Porto*, 717 So. 2d 418, 421 (Ala. 1998); *Alaska ex rel. Hawthorne v. Rios*, 938 P.2d 1013, 1015 (Alaska 1997); *Baggett v. Baggett*, 693 So. 2d 264, 269 (La. 1997); *Carole K. v. Arnold K.*, 380 N.Y.S.2d 593, 597 (N.Y. Fam. Ct. 1976); *Bennett v. Commonwealth*, 472 S.E.2d 668, 672 (Va. 1996); see also JUDITH CASSETTY, CHILD SUPPORT AND PUBLIC POLICY 5-14 (1978) (chronicling the history of the support obligation).

170. *Carter v. Carter*, 479 S.E.2d 681, 686 (W. Va. 1996); accord *Dillard v. Dillard*, 727 P.2d 71, 76 (N.M. Ct. App. 1986); *McReynolds v. McReynolds*, 787 P.2d 530, 532 (Utah Ct. App. 1990); *Commonwealth Dep't of Soc. Servs. v. Hogge*, 431 S.E.2d 656, 657 (Va. 1993); *Broyles v. Broyles*, 711 P.2d 1119, 1125 (Wyo. 1985).

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).

172. See VA. CODE ANN. §§ 63.1-250, 20.108.1(C) (Michie 1998).

173. See VA. CODE ANN. § 20.108.1(D) (Michie 1998).

the child is born and continues until the child becomes emancipated, reaches the age of majority, marries, or dies.¹⁷⁴ 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.¹⁷⁵ On the other hand, Conley may not be able to recover reimbursement for any amount he already paid.¹⁷⁶ 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.¹⁷⁷

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).

175. "I can't order child support from people who aren't parents," the Judge ruled. David Reed, *Mom of Switched Baby Gets Custody*, ASSOCIATED PRESS, Sept. 22, 1998, available in 1998 WL 6726861; see also *N.P.A. v. W.B.A.*, 380 S.E.2d 178, 181 (Va. 1989) (stating that, absent special circumstances, a non-parent will not be legally obligated to support a child).

176. See *Evink v. Pekin Ins. Co.*, 460 N.E.2d 1211, 1216 (Ill. 1984) (denying reimbursement without a parent's express or implied promise to repay a third party); *Samuelson v. Samuelson*, 644 N.Y.S.2d 232, 232-33 (N.Y. App. Div. 1996) (denying reimbursement for failure to show expectation of reimbursement or make a demand for reimbursement within a reasonable time).

177. See VA. CODE ANN. § 20-108.1-2 (Michie 1998); accord ARIZ. REV. STAT. ANN. § 25-320 (West 1999); W. VA. CODE § 48A-1B-1(d) (1998); see also *Jenkins v. Jenkins*, 704 A.2d 231, 235-36 (Conn. 1998) (explaining the principles of the guidelines and using them to calculate child support payments); *Homsher v. Homsher*, 678 N.E.2d 1159, 1164 (Ind. 1997) (defining the guideline); *Drummond v. Drummond*, 714 A.2d 163, 172 (Md. 1998) (recognizing the method in Maryland); *Bast v. Rossoff*, 635 N.Y.S.2d 453, 458 (N.Y. App. Div. 1995) (explaining how the calculation is done); *Fink v. Fink*, 462 S.E.2d 844, 853 (N.C. 1995) (using the guidelines to determine amount of child support); *Ball v. Minnick*, 648 A.2d 1192, 1197 (Pa. 1994) (discussing principles of guidelines and the implementation of the practice); *Donnelly v. Donnelly*, No. 146187, 1998 WL 972128, at *7 (Va. Cir. Ct. Mar. 4, 1998) (using the formula to calculate the child support amount). But see *Robertson v. Robertson*, No. 03A01-9711-CV-00511, 1998 WL 783339, at *4 (Tenn. Ct. App. Nov. 9, 1998) (stating that the Income Shares Model had not been adopted in Tennessee).

Code, the custodial parent—the parent who has custody for the majority of the tax year—is entitled to a child dependency tax exemption.¹⁷⁸ 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.¹⁷⁹ The custodial parent, however, may relinquish that entitlement to the non-custodial parent.¹⁸⁰ To transfer entitlement, the custodial parent must file a written declaration with the IRS.¹⁸¹ 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.¹⁸²

V. PSYCHOLOGICAL PARENTS

Joseph Goldstein coined the phrase “psychological parents.”¹⁸³ These are persons who, on a continuing day-to-day basis, through “interaction, companionship, and shared experiences,” fulfill a child’s psychological needs.¹⁸⁴ No blood relationship to the child is required.¹⁸⁵ This theory focuses on the emotional bond that exists between the child and the adults in her life.¹⁸⁶ 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.¹⁸⁷ 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.”¹⁸⁸

178. See 26 U.S.C. § 152(e)(1)(A) (1998).

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) (refusing to address the issue in a divorce proceeding but referring the parties to tax laws).

182. See § 152(e)(2).

183. JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD* 12 (1996).

184. *Id.*

185. See *Smith v. Organization of Foster Families*, 431 U.S. 816, 843-44 (1976).

186. See GOLDSTEIN ET AL., *supra* note 183, at 12-13.

187. See *id.*; see also *In re Thaddeus*, (no docket number in original), 1998 WL 779548, at *6 (Conn. Super. Ct. Nov. 2, 1998) (finding that the foster parent who had cared for the child for two years was the psychological parent); *Twigg v. Mays*, No. 88-4489-CA-01, 1993 WL 330624, at *5 (Fla. Cir. Ct. Aug. 18, 1993) (declaring that Robert Mays who reared Kimberly for ten years was her psychological parent); *Hickman v. Fuddy*, 489 S.E.2d 232, 233 (Va. Ct. App. 1997) (describing a child’s adaptation to a prospective adoptive family’s home).

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

189. *Ross v. Hoffman*, 372 A.2d 582, 593-94 (Md. Ct. Spec. App. 1977) (citations omitted) (quoting *Bennett v. Jeffreys*, 356 N.E.2d 277, 284 (N.Y. 1976)).

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

191. *Id.* at 512-13 (footnotes omitted) (citing *Atkinson v. Atkinson*, 408 N.W.2d 516 (Mich. Ct. App. 1987) and *Singer v. Singer*, 250 S.E.2d 369 (W. Va. 1978)).

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."¹⁹⁹ He then added that Callie's biological grandparents (the Rogerses and the Chittums) could petition for custody later.²⁰⁰

The Rogerses and the Chittums are Callie's biological grandparents.²⁰¹ In Virginia, grandparents are deemed to have a legitimate interest in their grandchildren's well-being.²⁰² A court may award custody to anyone, including grandparents, "with a legitimate interest" in the child's custody.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.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.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.²⁰⁶ Yet, in light of the case authority discussed above²⁰⁷ 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.

199. *Id.*

200. *See id.*

201. *See* Cloud *supra* note 6, at 64; *Two Families*, *supra* note 60.

202. *See* VA. CODE ANN. § 16.1-278.15(B) (Michie 1998).

203. *Id.*

204. *NPA v. WBA*, 380 S.E.2d 178, 180-81 (Va. Ct. App. 1989) (quoting *Doughty v. Thornton*, 145 S.E. 249, 251 (Va. 1928)).

205. *See Family Authorizes*, *supra* note 41.

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* GOLDSTEIN ET AL., *supra* note 183, at 14.

207. *See 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.²⁰⁸ There is a presumption in favor of a non-custodial parent's right to visitation.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.²¹⁰ Second, visitation encourages maintenance of a strong familial relationship between the child and both parents.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.²¹² Still, "[a] fundamental concept

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).

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).

210. See *White v. Williamson*, 453 S.E.2d 666, 677 (W. Va. 1994).

211. See *id.*

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 "facilitat[e] the right of the non-custodial parent to a full and fair chance to continue to have a relationship with his children").

Some psychologists do not recommend visitation:

Where courts impose visitation as a condition of custody, this may itself be source of discontinuity. . . . [L]oyalty conflicts are common under such conditions and may have devastating consequences by destroying the child's positive relationships to both parents. A parent visiting *against or without regard to the wishes of the custodial parent* has less chance of serving as a constructive force in the life of her child. The non-custodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits.

GOLDSTEIN ET AL., *supra* note 183, at 23.

in the public policy . . . is that the best interest and welfare of the children are paramount when deciding matters of visitation."²¹³ Thus, the trial judge has broad discretion in determining the scope and frequency of visitation.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.²¹⁵

As with the presumption that biological parents should have custody of their children, biological parents' right to visitation is not absolute.²¹⁶ Visitation should not be allowed, for instance, when a non-custodial parent is unfit,²¹⁷ visitation is not in the child's best interest,²¹⁸ or when visitation would seriously endanger the child's physical, mental, moral, or emotional health.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.²²⁰ Visitation should not be denied unless extraordinary circumstances exist.²²¹ Instead, courts are more likely to order supervised visitation or place other conditions on the parent's visitation privileges.²²² Supervised visitation requires a third person's presence while the non-custodial parent spends time with the child.²²³ The purpose of supervised visitation is to ensure the safety of the child or the child's custodial parent.²²⁴

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

213. *Carter*, 479 S.E.2d at 686; *accord* *DuBois v. DuBois*, 714 So. 2d 308, 309 (Ala. Civ. App. 1998); *Avery*, 622 N.E.2d at 1235; *Appert*, 341 S.E.2d at 349; *Vissicchio v. Vissicchio*, 498 S.E.2d 425, 431 (Va. 1998).

214. *See* *Hubbard Hall v. Hubbard*, 697 So. 2d 486, 490 (Ala. 1997); *Watkins v. Watkins*, 462 S.E.2d 687, 689 (N.C. Ct. App. 1995); *Vissicchio*, 498 S.E.2d at 431.

215. *See* *Jones v. Patience*, 466 S.E.2d 720, 724 (N.C. Ct. App. 1996).

216. *See id.*

217. *See id.*

218. *See id.*

219. *See* *J.F.E. v. J.A.S.*, 930 P.2d 409, 413-14 (Alaska 1996); *Marriage of Sundberg*, 946 P.2d 296, 299 (Or. Ct. App. 1997).

220. *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).

221. *See* *Minas v. Shevlin*, 678 N.Y.S.2d 672, 672 (Sup. Ct. App. Div. 1998).

222. *See* Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L.Q. 229, 230 (1995).

223. *See id.* at 229.

224. *See id.*

225. *See* VA. CODE ANN. §§ 16.1-273 to 274 (Michie 1999); *see also* *Khan v. Khan*, 654 N.Y.S.2d 34, 35 (N.Y. App. Div. 1997) (ordering supervised visitation because of father's history of abusing the children's mother).

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.²²⁶ Jodie Denise Paul learned that her son had been switched nine years ago and was living with adoptive parents.²²⁷ When Paul challenged the custody arrangement, she was awarded visitation.²²⁸ 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.²²⁹ In most states, however, grandparent visitation is restricted to particular circumstances that are designated in the statute.²³⁰ 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.²³¹ Some courts determine whether visitation

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 VISITATION 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).

230. See ALA. CODE § 30-3-4 (1998); ARIZ. REV. STAT. ANN. § 25-409(A) (West Supp. 1998); ARK. CODE ANN. § 9-13-103(a) (Michie 1998); COLO. REV. STAT. § 19-1-117 (1999); FLA. STAT. ANN. § 752.01 (West 1997); GA. CODE ANN. § 19-7-3 (1998); 750 ILL. COMP. STAT. ANN. 5/607(b)(1) (West Supp. 1999); IOWA CODE ANN. § 598.35 (West Supp. 1999); MINN. STAT. ANN. § 257.022(1) (West Supp. 1999); MO. ANN. STAT. § 452.402 (West Supp. 1999); MONT. CODE ANN. §§ 40-9-102(1)-(2) (1997); NEB. REV. STAT. § 43-1802(1)-(2) (1998); N.M. STAT. ANN. § 40-9-2 (Michie 1998); N.C. GEN. STAT. § 50-13.2(b1) (1995); N.D. CENT. CODE § 14-09-05.1 (Michie 1997); OHIO REV. CODE ANN. § 3109.051(B)(1) (West 1994 & Supp. 1998); OR. REV. STAT. § 109.121 (Supp. 1998); W. VA. CODE §§ 48-2B-2 to 6 (1999); WIS. STAT. ANN. § 767.245 (West Supp. 1998); see also Gregory, *supra* note 46, at 370-71 (discussing various grandparent visitation 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

adverse effect on the grandchildren); *Ward v. Dibble*, 683 So. 2d 666, 669 (Fla. 1996) (finding no presumption of grandparent visitation and that visitation was not in the child's best interest); *Williams v. Williams*, 501 S.E.2d 417, 418 (Va. 1998) (denying visitation in intact families unless there is a showing, by clear and convincing evidence, that there will be "actual harm to the child's health and welfare" and that visitation would be in the child's best interest); *Elmer Jimmy S. v. Kenneth B.*, 483 S.E.2d 846, 849-50 (W. Va. 1997) (denying grandparent visitation because certain limited circumstances had not been met).

232. See VA. CODE ANN. § 16.1-278.15(F) (Michie 1999).

233. See § 16.1-278.15(B).

234. *Id.*

235. See *id.*

236. VA. CODE ANN. § 20-124.1 (Michie 1995) (mandating a broad construction of the phrase "person with legitimate interest" to include grandparents).

237. § 20-124.2(B).

238. See *Williams v. Williams*, 501 S.E.2d 417, 417-18 (Va. 1988). Actually, the Supreme Court found "no constitutional infirmity in the applicable statutes . . ." *Id.* at 418.

239. See *Thrift v. Baldwin*, 473 S.E.2d 715, 716 (Va. Ct. App. 1996).

blood relatives" as persons who have "a legitimate interest."²⁴⁰ Then 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."²⁴¹ The court cautioned, however, that its ruling "addresse[d] only standing to seek visitation, not the right to enjoy visitation."²⁴²

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.²⁴³ Lindsey is living with the Rogerses and Chittums on a rotating basis.²⁴⁴ 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.²⁴⁵ In several states, siblings may have visitation rights.²⁴⁶ In Virginia,

240. *Id.*

241. *Id.* Under this theory, the Rogers and Chittum families also could be able to visit Rebecca. They would qualify as persons who have a legitimate interest because they have established an emotional bond with Rebecca. See *V.C. v. M.J.B.*, 725 A.2d 13, 22-23 (N.J. 1999); *In re Zachary William R.*, 509 S.E.2d 897, 900 (W. Va. 1998).

242. *Thrift*, 473 S.E.2d at 716; see also *O'Brien v. O'Brien*, 684 A.2d 1352, 1353 (N.H. 1996) (recognizing grandparents' standing); *Kenyon v. Kenyon*, 674 N.Y.S.2d 455, 456 (N.Y. App. Div. 1998) (allowing visitation to grandparents who had spent a great deal of time with their grandson); *Williams*, 501 S.E.2d at 417 (denying grandparents visitation without clear and convincing evidence showing that visitation would serve the best interests of the child).

243. See *Jones & Shear*, *supra* note 14.

244. See *id.*

245. See *id.*; Cloud, *supra* note 6, at 64.

246. See, e.g., CAL. WELF. & INST. CODE § 362.1(b) (West Supp. 1999) (stating that "any order placing a child in foster care and providing reunification services shall include provisions for sibling visitation if such visitation is not detrimental to the child"); 750 ILL. COMP. STAT. ANN. 5/607(b)(1) (West 1993 & Supp. 1999) (empowering the court to allow sibling visitation); MD. CODE ANN., FAM. LAW § 5-525.2(a) (1999) (allowing visitation upon

for instance, the child's relationship with siblings is a factor for consideration when visitation and custody are disputed.²⁴⁷ Moreover, in Virginia, the sibling's right to seek visitation under section 16.1-241(A) of the Virginia Code continues after adoption.²⁴⁸

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.²⁴⁹ New Jersey is one of those states that recognizes the importance of sibling contact.²⁵⁰ 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."²⁵¹

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.²⁵² Specificity would decrease the likelihood of disputes about visitation in the future.²⁵³ Furthermore, because no adult on either side has had sufficient time to develop a relationship with Callie or Rebecca, a

adoption or foster care placement); N.H. REV. STAT. ANN. § 169-C:19-d (Supp. 1998) (granting the court the ability to ensure that sibling relationships continue after placement in foster homes); N.J. STAT. ANN. § 9:2-7.1 (West Supp. 1999) (giving siblings standing to petition the court for visitation rights); OHIO REV. CODE ANN. § 3109.051 (West 1994 & Supp. 1999) (stating that the court may grant visitation to any person related to the child); R.I. GEN. LAWS § 15-5-24.4 (1996) (relating sibling rights in detail).

247. See VA. CODE ANN. § 20-124.3(4) (Michie 1999); see also Christine D. Markel, Note, *A Quest for Sibling Visitation: Daniel Weber's Story*, 18 WHITTIER L. REV. 863, 877 (1997) (applying the best interests standard to resolve sibling visitation issues).

248. See *Thrift v. Baldwin*, 473 S.E.2d 715, 716 (Va. Ct. App. 1996).

249. See *id.*

250. See *L. v. G.*, 497 A.2d 215, 222 (N.J. Super. Ct. 1985) (concerning adult siblings who wanted to visit minor siblings).

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); *Broocke*, 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*, 457 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.²⁵⁴

Like the families in Virginia, the Mayses and the Twiggs initially had an amicable visitation plan, but eventually a tumultuous relationship developed.²⁵⁵ Robert Mays was accused of interfering with the Twiggs' visitation rights after just five visits occurred in 1990.²⁵⁶ Regina Twigg publicly accused the Mayses of intentionally swapping their unhealthy baby for a healthy one.²⁵⁷ She published her accusations in letters to the editor of Kimberly's hometown newspaper.²⁵⁸ As an unfortunate result, Kimberly was fully aware of all of those shenanigans.²⁵⁹ When the situation escalated, Regina Twigg accused Robert Mays of child abuse and made outrageous visitation demands.²⁶⁰ In short, "the relationship between the parties went from deterioration to complete disintegration."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."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."²⁶³

254. See *In re Sundberg v. Sundberg*, 946 P.2d 296, 299 (Or. Ct. App. 1997) (suggesting gradually increased unsupervised visitation for a child who had not known her father); *Honaker v. Burnside*, 388 S.E.2d 322, 326 (W. Va. 1989) (providing for a six-month transition period).

255. See *Twigg v. Mays*, No. 88-4489-CA-01, 1993 WL 330624, at *2 (Fla. Cir. Ct. Aug. 18, 1993).

256. See *id.*

257. See *id.*

258. See *id.*

259. See *id.*

260. See *id.*

261. *Id.*

262. *Id.* at *3; see also GOLDSTEIN ET AL., *supra* note 183, at 23-27 (opposing forced visitation).

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.²⁶⁴ 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.²⁶⁵ The severance may be voluntarily or involuntarily transacted in accordance with statutory requirements.²⁶⁶ 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.²⁶⁷ 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.²⁶⁸

Johnson, Conley, and Callie's biological grandparents steadfastly proclaimed that they would not switch the children again.²⁶⁹ 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.²⁷⁰ 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 748 (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").

268. See VA. CODE ANN. § 16.1-283 (Michie 1999); *In re Adoption of a Child by P.S.*, 716 A.2d 1171, 1180 (N.J. App. Div. 1998); *McEntire v. Redfearn*, 227 S.E.2d 741, 744 (Va. 1976).

269. See *supra* note 264 and accompanying text.

270. See VA CODE ANN. § 63.1-225(D)(4) (Michie 1995 & Supp. 1999).

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,

271. See *Marilyn H. v. Roger Lee H.*, 455 S.E.2d 570, 574 (W. Va. 1995).

272. See *Williams v. Williams*, 501 S.E.2d 417, 420 (Va. 1998).

273. See *id.* at 418.

274. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (enforcing child labor laws); *Lecky v. Reed*, 456 S.E.2d 538, 541 (Va. 1995) (protecting the child from "an unstable and irresponsible lifestyle"); *Logan v. Fairfax County Dep't of Human Dev.*, 409 S.E.2d 460, 463 (Va. 1991) (protecting the child from neglect).

275. 457 S.E.2d 102 (Va. 1995).

276. See *id.* at 107.

277. See *id.* at 106.

278. See *id.* at 105.

279. See *id.*

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").

281. See Michael D. Shear, *Custody Battle Underway for Switched Baby*, WASH. POST, Nov. 13, 1998, at B1.

282. See *Farley v. Farley*, 387 S.E.2d 794, 795 (Va. 1990).

283. See VA. CODE ANN. § 16.1-283 (Michie 1999); see also *Wright v. Alexandria Div. of Soc. Servs.*, 433 S.E.2d 500, 503 (Va. Ct. App. 1993) (explaining that party petitioning for termination must prove that parental abuse or neglect threatens the child's life or well-being).

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.²⁸⁸ Johnson said that she would tell Callie, whereas Brenda Rogers said that she would not tell Rebecca.²⁸⁹ Also, the paternal and maternal grandparents disagreed about whether Rebecca should submit to DNA testing.²⁹⁰ For days, the Chittums agreed to allow testing while the Rogerses refused to give their consent.²⁹¹ They did not want to take the risk of learning that Rebecca was not actually their biological granddaughter.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.²⁹³ For the first few months after the switch was discovered, the relationship between Johnson, Conley, and the Rogers and Chittum families was amicable.²⁹⁴ In an effort to

288. See 20/20: *Switched at Birth*, *supra* note 27.

289. See *id.*

290. See Cloud, *supra* note 6, at 65.

291. See *id.*

292. See *id.*; Michael D. Shear & Justin Blum, *Tests Set for Child Feared Switched at Birth*, WASH. POST, Aug. 6, 1998, at D5.

293. See *Supreme Court Refuses*, *supra* note 122.

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.²⁹⁵ Later, however, ambitious, harmonious, extended family plans deteriorated.²⁹⁶ A fundamental disagreement arose between Rebecca's grandparents when Tommy and Linda Rogers petitioned the court for sole custody of Rebecca and Lindsey.²⁹⁷ 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.²⁹⁸ 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.²⁹⁹ One family member posited that an underlying reason for the petition to modify the custody arrangement was to prevent Johnson from visiting Rebecca.³⁰⁰ 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."³⁰¹ Less than two weeks after the Rogerses filed their petition, however, the dispute was resolved, and the Rogerses withdrew their request for sole custody.³⁰²

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.³⁰³ Johnson unsuccessfully tried to block the grandparents' decision to accept the offer on Rebecca's behalf.³⁰⁴ She argued that the Commonwealth of Virginia should pay much more than two million dollars.³⁰⁵ As a result of losing that argument, Johnson threatened, through her attorney, to seek custody of Rebecca.³⁰⁶ 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.*

302. See *Custody Agreement in U-Va. Baby Switch*, WASH. POST, Dec. 18, 1998, at C3.

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 open³⁰⁹ 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.'"³¹¹ Section 63.1-233 of the Virginia Code explains the biological parents' interests upon adoption.³¹² Birth parents and all other persons who had legal rights and obligations to a child are divested of those rights and obligations.³¹³ Also, for inheritance purposes,

307. *See id.*

308. *See Twigg v. Mays*, No. 88-4489-CA-01, 1993 WL 330624, at *6 (Fla. Cir. Ct. Aug. 18, 1993).

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).

311. *Cage*, 410 S.E.2d at 406-07 (quoting *Lowe v. Richmond Dep't of Pub. Welfare*, 343 S.E.2d 70, 72 (Va. 1986)); *accord In re Melanie S.*, 712 A.2d 1036, 1037 (Me. 1998). *Compare* MD. CODE ANN. FAM. LAW § 5-525.2 (1999) (allowing visitation rights for siblings of adoptees upon adoption or foster care placement), *with* MINN. STAT. ANN. § 257.022, subd. 3 (West 1998) (terminating visitation unless child is adopted by a grandparent or a stepparent).

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

313. *See id.*; *see also* *Rocker v. Brown*, No. 0392-98-2, 1998 WL 527070, at *1-2 (Va. Ct.

each child will be considered a child of her adoptive parent(s) instead of her biological parents.³¹⁴ 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.³¹⁵

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.³¹⁶ "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."³¹⁷ 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.³¹⁸ Later, she ran away from the home of her biological parents.³¹⁹ Eventually, she reconciled with both families.³²⁰

App. Aug 25, 1998) (finding that the mother of the birth father had no standing to sue for legal rights to child given up for adoption); *Thrift v. Baldwin*, 473 S.E.2d 715, 716 (Va. Ct. App. 1996) (finding that while adoption terminated the legal grandparental and sibling relationship, those blood relatives still had standing to sue for visitation); *Cage*, 410 S.E.2d at 406-07 (declaring that the Virginia adoption statute does not accommodate open adoptions); *Frye v. Spotte*, 359 S.E.2d 315, 317 (Va. Ct. App. 1987) (noting that when an adoption becomes final, the parent no longer has legal rights in relation to the child).

314. See VA. CODE ANN. §§ 64.1-71.1, 64.1-5.1 (Michie 1998); cf. *Hyman v. Glover*, 348 S.E.2d 269, 274-75 (Va. 1986) (interpreting statutes to include adopted children unless they are excluded in a will). See generally J. Rodney Johnson, *Inheritance Rights of Children in Virginia*, 12 U. RICH. L. REV. 275 (1978) (discussing Virginia statutory law dealing with the succession rights of children).

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*, 681 N.E.2d 1145, 1149 (Ind. Ct. App. 1997) (refusing to recognize open adoptions in Indiana); *People in Interest of S.A.H.*, 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).

317. ALBERT J. SOLNIT ET AL., *WHEN HOME IS NO HAVEN* 111 (1992).

318. See *Do What's Best for Kids, Baby Swap Victim Urges*, CHARLESTON GAZETTE (W. Va.), Aug. 7, 1998, at 10A, available in 1998 WL 5966861.

319. See *id.*

320. See *id.*

With respect to Rebecca, Johnson and Whitney Rogers noted genetic links or differences from other family members.³²¹ After she saw a picture of Rebecca, her biological child, Johnson exclaimed, "[s]he looks like me."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]."³²³ Relatives had observed that Rebecca's "chunky" features were not like the Rogerses' and Chittums' leaner features.³²⁴ Just as other family members noticed differences, at some point Rebecca and her playmates will notice differences, too.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[;] . . . what matters to them is the pattern of day-to-day interchanges 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.³²⁶

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

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

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

323. Blum & Shear, *supra* note 14.

324. See *id.*

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

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.³²⁷ No consent is needed for Callie's adoption because her parents are deceased.³²⁸

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.³²⁹ Callie's parents, who were unmarried when she was born, are deceased. Still, she is entitled to inherit from their estates.³³⁰ 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.³³¹ He had bought a house and had elicited some friends to assist him with renovating it.³³² 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.³³³

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.³³⁴ 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).

329. See VA. CODE ANN. § 64.1-5.1(1) (Michie 1998); see also *Trimble v. Gordon*, 430 U.S. 762, 769-70, 776 (1977) (finding statute that excluded children born out of wedlock from inheritance to be a violation of the Equal Protection Clause); *Marshall v. Bird*, 334 S.E.2d 573, 575-76 (Va. 1985) (finding that *Trimble* implicitly overruled a similar Virginia statute).

330. See § 64.1-5.1(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.³³⁵ A rain storm had developed suddenly,³³⁶ and he lost control of the car as it hydroplaned and struck a diesel fuel tank truck.³³⁷ The collision caused both vehicles to careen off an overpass and crash onto Route 11, a roadway that ran beneath the overpass.³³⁸ Seven people died in the accident,³³⁹ including Rogers, Chittum, and four young children they were taking to the state fair.³⁴⁰ Jerry Douglas Gregory, the driver of the tractor-trailer, also died.³⁴¹ Gregory's survivors alleged that Chittum "failed to drive the Honda according to the existing road conditions and weather."³⁴²

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

C. *The Right to a Guardian ad Litem*

A guardian *ad litem* (GAL) is appointed by a court to protect a child's interests when custody and visitation are disputed.³⁴⁶ It is the GAL's duty "to see that the interest of the child is [presented to the court]. Th[e] child h[as] no other independent participant in the proceeding, aside from the trial court, to protect his interests."³⁴⁷

335. See Cloud, *supra* note 6, at 65.

336. See Jones & Shear, *supra* note 14.

337. See *id.*

338. See *id.*

339. See Tammy Jarvis Hamilton, *Trucker's Sons File \$1 Million Lawsuit against Chittum Estate*, NEWS-GAZETTE (Lexington, Virginia), Nov. 4, 1998, at A11.

340. See Jones & Shear, *supra* note 14.

341. See Hamilton, *supra* note 339.

342. *Id.*; see also Harris, *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).

343. See VA CODE ANN. § 8.01-53 (Michie 1998) (permitting an award of damages to the decedent's children); Carroll v. Sneed, 179 S.E.2d 620, 623 (Va. Ct. App. 1971) (allowing a child born out of wedlock to recover for father's wrongful death). *But see* Levy v. Louisiana, 391 U.S. 1509, 1511 (1968) (finding unconstitutional a statute that distinguished children born out of wedlock from those born during marriage).

344. See Harris, *supra* note 9.

345. See *id.* (describing an award of two-thirds to Lindsey and the remainder to Callie).

346. See Clark v. Alexander, 953 P.2d 145, 152 (Wyo. 1998) (describing how important the guardian *ad litem* is in representing child's best interest).

347. 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 *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)

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.³⁴⁸ Before a GAL is appointed, a Virginia court must determine whether the parents' counsel can adequately represent the child's interests.³⁴⁹ 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.³⁵⁰ They have exchanged photographs and stories about the two children who are at the center of this controversy.³⁵¹ Most of the time, they have cooperated, communicated, and established good rapport with one another.³⁵² 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.³⁵³ 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."³⁵⁴ In accordance with statutory commands in several states, mandatory or voluntary mediation may be ordered in custody and visitation disputes such as this one.³⁵⁵

(finding that a guardian *ad litem* needs to safeguard the child's interests); *Clark*, 953 P.2d at 152 (describing the guardian *ad litem*'s role as "investigator, monitor, and champion for the child").

348. See *Verrocchio v. Verrocchio*, 429 S.E.2d 482, 484-87 (Va. Ct. App. 1993) (discussing the procedures, significance, and appropriateness of appointing a guardian *ad litem*).

349. See VA. CODE ANN. § 16.1-266(D) (Michie 1999).

350. See Jerry Harris, *Legal Issues Could Be Complex*, NEWS-GAZETTE (Lexington, Virginia), Aug. 8, 1998, at A3; Jones & Shear, *supra* note 14.

351. See 20/20: *Switched at Birth 2*, *supra* note 62; Harris, *supra* note 11.

352. See 20/20: *Switched at Birth 2*, *supra* note 62; Cloud, *supra* note 6, at 63.

353. See Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 286 (1987).

354. Cynthia R. Mabry, *African Americans "Are Not Carbon Copies" of White Americans—The Role of African American Culture in Mediation of Family Disputes*, 13 OHIO ST. J. ON DISP. RESOL. 405, 408 (1998); see also ALA. CODE § 6-6-20(3)(a) (Supp. 1998) (defining mediation).

355. See ALA. CODE § 6-6-20(b)(3) (Supp. 1998); COLO. REV. STAT. § 14-10-129.5 (1)(c) (1999); CONN. GEN. STAT. ANN. § 46b-53a (West 1995); FLA. STAT. ANN. § 44.102(2)(b) (West Supp. 1998); IOWA CODE ANN. § 598.41(2)(d) (West Supp. 1999); KAN. STAT. ANN. § 23-602(a) (1995); ME. REV. STAT. ANN. tit. 19-A, § 251(2) (West 1998); MICH. COMP. LAWS ANN. § 552.513(1) (West Supp. 1999); MINN. STAT. § 518.619, subd. 1 (1990 & Supp. 1999); NEV. REV.

The relevant Virginia statute provides that, "[m]ediation shall be used as an alternative to litigation where appropriate."³⁵⁶ This order is consistent with the informal efforts to resolve the issues that arose as a result of the Mays/Twigg switch.³⁵⁷ 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.³⁵⁸

Mediation is a good method of conflict resolution for families who want to resolve their own internal disputes.³⁵⁹ The main advantage is that it fosters autonomous decision-making.³⁶⁰ 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,³⁶¹ 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,³⁶² and the three families could resolve the issues in a less painful manner.³⁶³

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.³⁶⁴ The effect of the agreement

STAT. ANN. § 3.500(1) (Michie 1998); N.M. STAT. ANN. § 40-12-5 (Michie 1999); N.C. GEN. STAT. § 50-13.1(b) (1995); N.D. CENT. CODE § 14-09.1-02 (1997); OHIO REV. CODE ANN. § 3109.052(A) (West 1994); OR. REV. STAT. § 107.765(1) (1996 & Supp. 1998); R.I. GEN. LAWS § 15-5-29(a) (1996); WASH. REV. CODE ANN. § 26.09.015 (West 1997).

356. VA. CODE ANN. § 20-124.2(A) (Michie 1995 & Supp. 1998); *see also* VA. CODE ANN. § 20-124.4 (Michie 1995 & Supp. 1998) (referring the parties to mediation "at no cost to the parties"); VA. CODE ANN. § 8.01-576.4 (Michie 1998 & Supp. 1999) (indicating procedure for mediation).

357. *See Twigg v. Mays*, No. 88-4489-CA-01, 1993 WL 330624, at *2 (Fla. Cir. Ct. Aug. 18, 1993).

358. *See id.*

359. *See* JOHN M. HAYNES & STEPHANIE CHARLESWORTH, *THE FUNDAMENTALS OF FAMILY MEDIATION* 2, 3 (1996).

360. *See id.* at 2; FORREST S. MOSTEN, *THE COMPLETE GUIDE TO MEDIATION* 33, 56-57 (1997).

361. *See* VA. CODE ANN. § 8.01-576.10 (Michie Supp. 1999) (making mediation confidential); *cf.* MOSTEN, *supra* note 360, at 60-61 (indicating that some families choose mediation to preserve their privacy).

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.

364. *See* VA. CODE ANN. § 20-124.2(A) (Michie 1995 & Supp. 1999).

reached in mediation then will be as enforceable as any other written contract.³⁶⁵ 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.³⁶⁶ 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.³⁶⁷ 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.³⁶⁸

At present, Johnson and Conley appear to have resolved their differences and joined forces against the Chittums and Rogerses.³⁶⁹ 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."³⁷⁰ She took several days leave from work when she became aware of the DNA test results.³⁷¹

These adults may need counseling to deal with their beliefs about the medical profession. They may distrust medical employ-

365. See VA. CODE ANN. § 8.01-576.11 to 12 (Michie Supp. 1999).

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.³⁷² 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.³⁷³ At one point, Johnson left town to get away from reporters.³⁷⁴ Both Johnson and the grandparents were forced to hide and take refuge from camera crews and reporters who staked out their homes.³⁷⁵ 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

372. See Harris, *supra* note 9.

373. See Jerry Harris, *National, International Media Descend on Area*, NEWS-GAZETTE (Lexington, Virginia), Aug. 5, 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.³⁷⁶

So, as other courts have required when parents have been separated from their children,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.³⁷⁸ Days after the Johnson/Chittum switch was discovered, a woman gave birth to a boy at a Lowell, Massachusetts hospital.³⁷⁹ A few hours later, a nurse's aid brought a baby to the mother for nursing.³⁸⁰ After the mother nursed the newborn whom she thought was her own son, she decided to change the child's diaper.³⁸¹ When she loosened the diaper, she discovered that the child she had nursed obviously was not her child.³⁸² The aid had brought the woman a female child.³⁸³ When the mother notified the hospital attendant, her son was found safely asleep in the nursery.³⁸⁴ Hospital officials immediately offered to provide counseling for the mother and to conduct DNA testing.³⁸⁵

A second switch also occurred at the University of Virginia Medical Center.³⁸⁶ Two infant girls died on or about the same date in March 1998.³⁸⁷ When Mistie Fritz asked to take her baby home for a burial service, she received a white plastic casket containing

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

377. *See generally* *Matter of Baby M.*, 537 A.2d 1227 (N.J. Super. Ct. Ch. Div. 1988) (mandating that all parties—child, surrogate mother and family, and adoptive parents—participate in counseling as directed by a court-appointed mental health professional); *Williams v. Williams*, 501 S.E.2d 417 (Va. 1998) (Hassell, J., dissenting) (noting that juvenile & domestic relations court had mandated that parents and grandparents enter counseling).

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).

379. *See Wrong Baby* (CNN Headline News television broadcast, Aug. 19, 1998), available in LEXIS, News Library, Transcripts File.

380. *See id.*

381. *See id.*

382. *See id.*

383. *See id.*

384. *See id.*

385. *See id.*

386. *See* Michael D. Shear, *Babies' Bodies Switched at U-Va Hospital*, WASH. POST, Sept. 5, 1998, at B1 [hereinafter *Shear, Babies' Bodies Switched*]; Michael D. Shear, *In Latest U-Va. Switch, Counsel from Other Case Retained*, WASH. POST, Sept. 8, 1998, at C9.

387. *See* *Shear, Babies' Bodies Switched*, *supra* note 386.

a deceased baby girl.³⁸⁸ As she and her husband were about to leave the hospital, they returned to claim their baby's blanket.³⁸⁹ When hospital employees searched for the blanket, they found it with Fritz's baby elsewhere. Fritz had received someone else's deceased child.³⁹⁰

Steve Kaufer of Inter/Action Associates, a consulting firm in Las Vegas, Nevada, recently conducted a study of baby switches.³⁹¹ More than 400 employees at maternity wards across the nation participated in the study.³⁹² Kaufer found that employees made a mistake in 1 out of 1000 times.³⁹³ "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."³⁹⁴ Hospital security representatives predict that genetic testing may cause the number of reported baby switches to increase.³⁹⁵ 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."³⁹⁶ 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. *Id.*

395. *See* Spencer S. Hsu, *1995 Baby Switching Discovered*, WASH. POST, July 31, 1998, at A1; *see also* Jane Wulf, *What If My Test-Tube Babies Were Swapped in the Lab?*, TIME, Apr. 12, 1999, at 69, 69 (telling the story of a mix-up during an infertility treatment). For examples of international switches involving babies in Ireland and Germany, *see* Baunach, *supra* note 52, at 502 n.10.

396. *Adoption of Hugo*, 700 N.E.2d 516, 524 (Mass. 1998), *cert. denied sub nom. Hugo P. v. George P.*, 119 S. Ct. 1286 (1999).

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."³⁹⁷ 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]."³⁹⁸

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.³⁹⁹ 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.⁴⁰⁰

397. GOLDSTEIN ET AL., *supra* note 183, at 41-43.

398. *Bordley v. Blake*, 478 So. 2d 510, 512 (Fla. 1985).

399. See 142 CONG. REC. H-4433 (daily ed. May 7, 1996) (statement of Rep. Canady); Cynthia R. Mabry, "Love Alone is Not Enough!" in *Transracial Adoptions—Scrutinizing Recent Statutes, Agency Policies, and Prospective Adoptive Parents*, 42 WAYNE L. REV. 1347, 1354 (1996); Amanda Spake, *Adoption Gridlock*, U.S. NEWS & WORLD REP., June 22, 1998, at 30, 31. For foster-care statistics in Virginia, see Lelia Baum Hopper, *Improving Court Practice in Child Abuse and Neglect Cases*, 47 VA. LAW., Feb. 1999, at 32, 33 (noting that in June 1998, 7,756 children were in Virginia's foster care system and remained there for an average of 2.8 years).

400. *Bordley*, 478 So. 2d at 512.