Maine Law Review

Volume 40 | Number 1 Article 5

January 1988

In re Misty Lee H.: Application of the Best Interests Standard in Parental Rights Terminations

William L. Dawson Jr.
University of Maine School of Law

IN RE MISTY LEE H.: APPLICATION OF THE BEST INTERESTS STANDARD IN PARENTAL RIGHTS TERMINATIONS

The family unit is perhaps America's most deeply rooted social institution.[1] The integrity of the family unit has been repeatedly recognized by the United States Supreme Court as warranting constitutional protection.[2] As a means of protecting family autonomy, natural parents possess a fourteenth amendment liberty interest in the care and custody of their children.[3] The parental liberty interest encompasses a wide range of rights.[4] Although substantial, these parental rights are not absolute.[5] By virtue of the *parens patriae*

---

1. *See* Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (plurality opinion). Justice Powell explained: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 503. *See generally* M. GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985).

2. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 758 (1982) (Natural parent's "desire for and right to" custody of child "is an interest far more precious than any property right."); Stanley v. Illinois, 405 U.S. 645, 651 (1971) (Right of man "in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . ."); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (right to "marry, establish a home and bring up children").

For a comprehensive survey of the development of constitutional law regarding the family, see *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980) [hereinafter *Developments*].

3. The fourteenth amendment provides in relevant part: "No State shall . . . deprive any person of life, liberty or property without due process of law . . . ." U.S. CONST. amend. XIV, § 1. *See also* ME. CONST. art. I, § 6-A. For cases interpreting the fourteenth amendment liberty interest, see Santosky v. Kramer, 455 U.S. at 753 (Natural parents have fundamental liberty interest in care, custody, and management of their child.); Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981) ("This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' ") (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)); Danforth v. State Dep't of Health and Welfare, 303 A.2d 794, 796 (Me. 1973) ("Whatever may be the portion of the Bill of Rights giving rise to the constitutional protection of the right to raise one's children, we are satisfied such protection exists under the Federal Constitution.").

4. *See* Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (the right to rear one's child); Meyer v. Nebraska, 262 U.S. 390 (1923) (the right to rear one's child). *Cf.* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (contraception); Rowe v. Wade, 410 U.S. 113 (1973) (abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception).

5. Prince v. Massachusetts, 321 U.S. 158, 169-70 (1944) (parents have no absolute right to direct activities of their children); Merchant v. Bussell, 139 Me. 118, 122, 27 A.2d 816, 818 (1942) ("The natural right of a parent to the care and control of a child

power,[6] the state may interfere with parental rights in order to preserve and promote the welfare of the child.[7] The most extreme form of such interference is the permanent severance of the familial relationship between parent and child.[8] In Maine, the termination of parental rights is governed by title 22, section 4055 of the Maine Revised Statutes Annotated.[9]

In *In re Misty Lee H.*,[10] the Maine Supreme Judicial Court, sitting as the Law Court, affirmed a district court judgment terminating a mother's parental rights to her two children.[11] In affirming the

---

should be limited only for the most urgent reasons. At the same time it has long been recognized that such right of a parent is not absolute."); Chapsky v. Wood, 26 Kan. 650, 652-53 (1881) ("[A] parent's right to the custody of a child is not . . . an absolute and uncontrollable right.").

6. *Parens patriae*, literally "parent of the country," refers to the role of the state as sovereign and guardian of persons under legal disability. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). For discussion of the doctrine's evolution, see Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978); Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205 (1971); *Developments*, *supra* note 2, at 1221-41.

7. Santosky v. Kramer, 455 U.S. at 766.

8. *See infra* notes 33-36 and accompanying text.

9. Maine's parental rights termination statute requires two grounds for severance of the parent-child relationship. The court must find that termination is in the best interest of the child and, as determined by at least one of four alternative tests, that the parent is unfit. ME. REV. STAT. ANN. tit. 22, § 4055 (Supp. 1987-1988). The statute provides in relevant part:

> **§ 4055. Grounds for termination**
>
> **1. Grounds.** The court may order termination of parental rights if:
>
> . . . .
>
> **B.** Either:
>
> **(1)** The parent consents to the termination. . . . or
>
> **(2)** The court finds, based on clear and convincing evidence, that:
>
> **(a)** Termination is in the best interest of the child; and
>
> **(b)** Either:
>
> **(i)** The parent is unwilling or unable to protect the child from jeopardy and these circumstances are unlikely to change within a time which is reasonably calculated to meet the child's needs;
>
> **(ii)** The parent has been unwilling or unable to take responsibility for the child within a time which is reasonably calculated to meet the child's needs;
>
> **(iii)** The child has been abandoned; or
>
> **(iv)** The parent has failed to make a good faith effort to rehabilitate and reunify with the child pursuant to section 4041.

Id.

10. 529 A.2d 331 (Me. 1987).

11. *Id.* at 334. The Law Court has recently affirmed an extensive number of such cases. *See In re* Catherine T., 533 A.2d 915 (Me. 1987) (mem.); *In re* Joseph P., 532 A.2d 1031 (Me. 1987); *In re* Sarrah P., 532 A.2d 155 (Me. 1987) (mem.); *In re* Cassandra B., 531 A.2d 1274 (Me. 1987); *In re* Jacob G., 531 A.2d 674 (Me. 1987) (mem.); *In*

judgment, the Law Court held that the district court's findings were properly supported by clear and convincing evidence pursuant to Maine's parental rights termination statute.[12] One member of the Law Court dissented, arguing that the evidence was insufficient to support the district court's judgment.[13] The dissent recommended that, pursuant to the best interests standard, "[t]he State should be required to demonstrate by clear and convincing evidence that the consequences in harm to the children of allowing the parent-child relationship to continue are more severe than the consequences of termination of that relationship."[14]

This Note examines the application of the best interests of the child standard as a ground for termination of parental rights. This Note agrees with the concerns evidenced by the dissent's recommendation. Moreover, in order to guard more effectively against erroneous termination of parental rights, this Note advocates the adoption of substantive factors to define further the best interests standard.[15] The best interests standard is presently characterized by a large measure of substantive imprecision[16] which, by itself, fosters an unwarranted risk of erroneous decision-making.[17] This risk of error is further exacerbated by two additional factors: the broad discretion granted to judges in applying the standard,[18] and the traditional deference applied by the Law Court when reviewing a judge's best interests findings.[19] Given the grave constitutional nature of a parental rights termination proceeding, this risk of error is unwarranted. This Note argues that the Law Court should articulate spe-

---

re Matthew T., 527 A.2d 319 (Me. 1987) (mem.); *In re* Maria C., 527 A.2d 318 (Me. 1987); *In re* Kandi C., 518 A.2d 121 (Me. 1986) (mem.); *In re* Randy Scott B., 511 A.2d 450 (Me. 1986); *In re* Samuel B., 510 A.2d 1068 (Me. 1986) (mem.); *In re* Christopher J., 505 A.2d 795 (Me. 1986), *cert. denied sub nom.* Coombs v. Maine Dep't of Human Servs., 107 S. Ct. 1372 (1987); *In re* John M., 502 A.2d 1048 (Me. 1986) (mem.); *In re* Bradford B., 500 A.2d 1390 (Me. 1985) (mem.); *In re* Chesley B., 499 A.2d 137 (Me. 1985); *In re* Dean A., 491 A.2d 572 (Me. 1985); *In re* Crystal S., 483 A.2d 1210 (Me. 1984); *In re* Walter C., 481 A.2d 1312 (Me. 1984) (mem.); *In re* Daniel C., 480 A.2d 766 (Me. 1984), *noted in* Note, *In re* Daniel C.: *Reunification Efforts and the Termination of Parental Rights*, 37 MAINE L. REV. 429 (1985); *In re* Arnold R., 477 A.2d 737 (Me. 1984) (mem.); *In re* Gaylord P., 477 A.2d 737 (Me. 1984) (mem.); *In re* Edmund M., 475 A.2d 1143 (Me. 1984) (mem.); *In re* Simone S., 474 A.2d 500 (Me. 1984). *But see In re* Michael V., 513 A.2d 287 (Me. 1986) (vacating judgment where district court refused to allow mother's psychological expert to examine child); *In re* John Joseph V., 500 A.2d 628 (Me. 1985) (vacating judgment on basis of insufficiency of evidence).

12. *In re* Misty Lee H., 529 A.2d at 332.
13. *Id.* at 334-36 (Glassman, J., dissenting).
14. *Id.* at 336.
15. *See infra* notes 123-55 and accompanying text.
16. *See infra* notes 93-96 and accompanying text.
17. *See infra* notes 81-87 & 97-99 and accompanying text.
18. *See infra* notes 100-103 and accompanying text.
19. *See infra* notes 53-55 & 104-10 and accompanying text.

cific decision-making criteria under the best interests standard in order to diminish more effectively the likelihood of an erroneous severing of the parent-child relationship and ultimately to protect better the child's welfare.

Maine's parental rights termination statute is a provision of the Child and Family Services and Child Protection Act (Child Protection Act),[20] which authorizes the Maine Department of Human Services (DHS) "to protect and assist abused and neglected children."[21] State intervention by the DHS to protect children may include the investigation of suspected abuse,[22] the provision of short term emergency services,[23] and the procurement of a protection order from a court.[24] If a child is placed in the custody of the DHS pursuant to a protection order, the Department must determine whether to commence efforts toward rehabilitation and reunification of the family.[25] When such efforts are undertaken, the Department must develop a rehabilitation and reunification plan which specifies *inter alia* why the child was removed from the home and how the child may be returned.[26] After determining that there is no need to commence or

---

20. P.L. 1979, ch. 733, § 18 (current version at ME. REV. STAT. ANN. tit. 22, §§ 4001-5005 (Supp. 1987-1988)).

21. ME. REV. STAT. ANN. tit. 22, § 4003(1) (Supp. 1987-1988).

Child abuse and neglect is a serious problem in Maine. The Department of Human Services reported that 13,063 Maine families were reported to the Department during 1986 because of suspected abuse or neglect. Of this total, the Department assigned 5,627 cases for investigation. *See* CHILD AND FAMILY SERVS., ME. DEP'T OF HUMAN SERVS., 1986 SUMMARY OF CHILD ABUSE/NEGLECT REFERRALS (1986). *See also* THE GOVERNOR'S WORKING GROUP ON CHILD ABUSE AND NEGLECT LEGAL PROCEEDINGS, PROTECTING OUR CHILDREN: NOT WITHOUT CHANGES IN THE LEGAL SYSTEM (1986). For a helpful bibliography concerning the problem nationally, see R. COZZOLA, ANNOTATED BIBLIOGRAPHY OF LEGAL ARTICLES ON CHILD ABUSE (1979).

22. ME. REV. STAT. ANN. tit. 22, § 4021 (Supp. 1987-1988) (providing *inter alia* that the DHS may issue subpoenas, obtain relevant criminal history information, and interview a child without prior notification under appropriate circumstances).

23. *Id.* § 4023(1)(B) (providing that the DHS may furnish to a child "protective services, emergency shelter care, counselling, emergency medical treatment and other services which are essential to the care and protection of a child").

24. *Id.* §§ 4032-4036. A protection order may provide *inter alia* that the child's custody be changed; that the child, custodians, or parents accept treatment; or that the parents pay a reasonable amount for support of the child. *Id.* § 4036(1).

The Law Court has held that the application of the preponderance of the evidence standard of proof at a child protection proceeding under sections 4031-4041 does not violate a parent's due process rights. Proof by clear and convincing evidence is thus not required in Maine in order to remove a child initially from parental custody. *See In re* Sabrina M., 460 A.2d 1009, 1015 (Me. 1983).

25. ME. REV. STAT. ANN. tit. 22, § 4041(2) (Supp. 1987-1988). One of the Legislature's purposes for enacting the Child Protection Act was to "give family rehabilitation and reunification priority as a means for protecting the welfare of children." *Id.* § 4003(3).

26. *Id.* § 4041(1)(A)(1). This section articulates the requirements for a reunification plan and states:

A. The department shall:

continue reunification efforts,[27] the DHS may petition the court to terminate the parent-child relationship.[28]

Title 22, section 4055 of the Maine Revised Statutes Annotated articulates the procedure for termination of parental rights.[29] The procedure is framed according to a two-pronged analysis: whether termination is in the best interests of the child and whether the parent is unfit.[30] A finding of parental unfitness may be satisfied by any

---

(1) Develop a rehabilitation and reunification plan which shall include the following:

(a) The reasons for the child's removal;

(b) Any changes which must occur for the child to return home;

(c) Rehabilitation services which must be completed satisfactorily prior to the return home;

(d) Services available to assist the parents in rehabilitating and reunifying with the child, including reasonable transportation within the area in which the child is located for visits if the parents are unable to afford that transportation;

(e) A schedule of visits between the child and the parents when visits are not detrimental to the child's best interests, including any special conditions under which the visits shall take place;

(f) A reasonable time schedule for proposed reunification which is reasonably calculated to meet the child's needs; and

(g) A delineation of the financial responsibilities of the parents and the department during the reunification process[.]

Id.

27. *Id.* § 4041(2)(A)(1)-(6). This section specifies particular circumstances which may justify the DHS's decision not to commence reunification efforts or, if such efforts are commenced, to discontinue them. Examples of such circumstances include abandonment of the child by the parent, unwillingness or inability of the parent to rehabilitate, and the commission of a heinous act by the parent. *Id.*

28. *Id.* §§ 4041(2), 4050, 4052 (Supp. 1987-1988).

29. For the text of section 4055, see *supra* note 9.

30. ME. REV. STAT. ANN. tit. 22, § 4055(1)(B)(2) (Supp. 1987-1988).

Under Maine's two-pronged scheme, the requirement that the court *first* address the child's interests may pose constitutional difficulties. While the United States Supreme Court has never expressly held that a parent must be adjudged unfit *prior* to addressing the question of a child's welfare, it is arguable that the Court would so hold. *See* Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' ") (quoting Smith v. Organization of Foster Families, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)); Stanley v. Illinois, 405 U.S. 645, 651-52, 657-58 (1972) (If the parent is fit, the parent's interest in custody of the child is "cognizable and substantial" while the state's interest is "*de minimis.*").

Several states require a showing of parental unfitness before permitting the application of the best interests standard. *See, e.g., In re* Baby Girl M., 37 Cal. 3d 65, 75,

one of four alternative tests.[31] Following a finding that termination is in the child's best interests and that the parent is unfit, the court may enter a termination order divesting the parent of all rights to the child.[32]

The permanent severance of the bonds linking a parent and a child is the most extreme remedy authorized by the Child Protection Act.[33] Courts frequently observe that destruction of the parent's liberty interest in preserving family autonomy constitutes a drastic measure.[34] In *Santosky v. Kramer*,[35] the United States Supreme Court recognized the severe nature of the termination action[36] and held that the decision to terminate parental rights must be supported by clear and convincing evidence.[37] In accordance with

---

688 P.2d 918, 925, 207 Cal. Rptr. 309, 316 (1984); *In re* J.P., 648 P.2d 1364, 1375-76 (Utah 1982). Prior to the current Maine statute, Maine followed this rule. *See* Blue v. Boisvert, 143 Me. 173, 183, 57 A.2d 498, 503 (1948) (" '[N]ature demands that the right [of child custody] shall be in the parent, unless the parent is affirmatively unfit.' " Judges are not authorized by statute to be " 'the guardians of all the children in the state, with the power to take them from their parents . . . and give them to strangers because such strangers may be better able to provide what is already well provided.' ") (quoting Norvall v. Zinsmaster, 57 Neb. 158, 161-62, 77 N.W. 373, 374 (1898)).

The 111th Legislature modified section 4055 substantially by reducing the number of required grounds for termination from three to two and by making the best interest of the child the threshold consideration. *Compare* ME. REV. STAT. ANN. tit. 22, § 4055 (Supp. 1987-1988) (current version consisting of the best interests and parental unfitness prongs) *with* P.L. 1983, ch. 772, § 8 (amending last prior version of paragraph B, subsection 2).

For a discussion of the two-pronged termination scheme, see Comment, *The "Two-Pronged" Inquiry—The Best Alternative For the Conflicting Rights Involved in Proceedings for Termination of Parental Rights*, 13 CONN. L. REV. 709 (1981).

31. ME. REV. STAT. ANN. tit. 22, § 4055(1)(B)(2)(b) (Supp. 1987-1988). For the text of section 4055(1)(B)(2)(b), see *supra* note 9. The Law Court has made clear that each of the four alternative tests is independently adequate to justify termination. *See In re* Misty Lee H., 529 A.2d 331, 334 (Me. 1987) (citing *In re* Randy Scott B., 511 A.2d 450, 455 (Me. 1986)).

32. *See* ME. REV. STAT. ANN. tit. 22, § 4056 (Supp. 1987-1988) (describing the effects of a termination order).

33. *See id.* § 4056(1) (Termination "divests the parent and child of all legal rights . . . except the inheritance rights between the child and his parent.").

34. *See, e.g.*, Davis v. Page, 618 F.2d 374, 379 (5th Cir. 1980) ("[I]t is not unlikely that many parents would choose to serve a prison sentence rather than to lose the companionship and custody of their children."), *aff'd in part, vacated and rev'd in part on reh'g*, 640 F.2d 599 (5th Cir. 1981); *In re* Gibson, 4 Wash. App. 372, 379, 483 P.2d 131, 135 (1971) (Termination cuts off rights "more precious to many people than the right of life itself.").

35. 455 U.S. 745 (1982).

36. *Id.* at 759 ("Few forms of state action are both so severe and so irreversible."), *quoted in In re* Shannon R., 461 A.2d 707, 715 (Me. 1983).

37. Santosky v. Kramer, 455 U.S. at 769. For commentary on *Santosky*, see Note, Santosky v. Kramer: *The Standard of Proof in the Termination of Parental Rights —How Much is Enough?*, 20 HOUS. L. REV. 937 (1983) and Note, Santosky v. Kramer: *A Higher Evidentiary Standard Is Applied In Parental Rights Termination Cases*,

Santosky, Maine's Child Protection Act specifies that the court's findings must be "based on clear and convincing evidence."[38]

In *In re Misty Lee H.*, Lori P.'s two daughters, Misty Lee H. and Jessica H., were ordered into the temporary custody of the DHS on February 23, 1984.[39] The children were three years old and thirteen months old respectively.[40] Three months later, a final protection order awarded full legal custody of the children to the DHS.[41] Eight months after the DHS obtained temporary custody, the Department submitted a reunification plan which "asked [Lori] to visit her children on a regular basis; accept homemaking services; and engage in psychological counseling on issues of her childhood and adolescence, her inability to control her anger, and her relationships with men."[42]

By April 1985, Lori had made sufficient progress on the plan to allow the children to be moved from their foster home to Lori's home on a trial basis while still in the DHS's legal custody.[43] Five days after the children's return, however, she quarreled violently with her live-in boyfriend.[44] During the altercation Lori "threw a television out the front door of her home, punched her boyfriend and a neighbor in the mouth, broke several windows in the family car . . . and slashed the car's tires."[45] The children were immediately returned to foster care. The Department thereafter revised Lori's reunification plan so as to incorporate "six therapeutic tasks" recommended by a psychologist who had evaluated her.[46] In June 1986, the DHS concluded that Lori had failed to make "significant progress" and filed a petition to terminate her parental rights.[47] The district court, after a hearing, granted the petition in December

---

14 U. TOL. L. REV. 165 (1982).

38. ME. REV. STAT. ANN. tit. 22, § 4055(B)(2) (Supp. 1987-1988).

39. Brief of Lori Phillips, Appellant at 1, *In re* Misty Lee H., 529 A.2d 331 (Me. 1987) (No. Fra. 87-69); Brief for Appellee, Department of Human Services at 2, *In re* Misty Lee H., 529 A.2d 331 (Me. 1987) (No. Fra. 87-69).

40. Brief for Appellee, Department of Human Services at 2.

41. *Id.*

42. *Id.* at 2-3.

43. *Id.* at 3.

44. Brief of Lori Phillips, Appellant at 4; Brief for Appellee, Department of Human Services at 3. Lori explained the background of this argument in her brief. Evidently a neighbor in the mobile home park where Lori resided had been harassing her with phone calls "at odd hours of the night as well as tapping on windows." The argument arose when Lori demanded that her boyfriend do something about the neighbor and she understood that he was about to leave her. Brief of Lori Phillips, Appellant at 4.

45. Brief for Appellee, Department of Human Services at 3.

46. *Id.* at 3-4. The six psychological tasks included:

"1. Recognizing your ambivalence and dependency needs[;] 2. Trusting your therapist[;] 3. Reviewing your life[;] 4. Resolving your sadness and anger[;] 5. Learn how to express your anger appropriately[; and] 6. Insight into your parenting." *In re* Misty Lee H., 529 A.2d 331, 335 n.3 (Me. 1987) (Glassman, J., dissenting).

47. Brief for Appellee, Department of Human Services at 5.

1986.[48]

In appealing the district court's decision to terminate her parental rights, Lori argued that the evidence supporting termination did not meet the clear and convincing standard.[49] The Law Court confined its analysis to two issues. First, the Law Court examined "whether the District Court erred in finding by clear and convincing evidence that termination [of Lori's parental rights] was in the best interests of the children."[50] Second, under the parental fitness prong, the court examined "whether the District Court erred in finding by clear and convincing evidence that the mother [was] unwilling or unable to protect her children from jeopardy, and that these circumstances [were] unlikely to change within a time that [was] reasonably calculated to meet the children's needs."[51]

The Law Court began its analysis by discussing the trial court's findings in regard to the best interests of the child standard.[52] In so doing, the court made clear that the judge's findings on the best interests issue were "*entitled to substantial deference*, in that the judge is directly able to evaluate the testimony of the witnesses."[53] The court quoted an extended passage from an earlier Maine case to explain and support its deferential treatment of the lower court's findings:

> "The trial justice who hears and is able to appraise all the testimony of the parties and their experts in social work and child psychology . . . exercises a broad discretion, and is charged with a correspondingly weighty responsibility, to determine the particularly sensitive question of a child's best interests. His judgment, when properly exercised on the basis of the evidence before him, is entitled to *very substantial deference*. . . . An appellate court's independent evaluation of the evidence is especially inappropriate on a delicate issue of this sort."[54]

---

48. *In re* Misty Lee H., 529 A.2d at 332.

49. *Id.*

50. *Id.* (citing ME. REV. STAT. ANN. tit. 22, § 4055(1)(B)(2)(a) (Supp. 1986-1987)).

51. *Id.* at 333 (citing ME. REV. STAT. ANN. tit. 22, § 4055(1)(B)(2)(b)(i) (Supp. 1986-1987)).

52. *Id.* The district court judge made findings of fact on each of the grounds for termination. On the best interest of the child issue, the lower court stated:

> "The court . . . finds, by clear and convincing evidence, that termination of parental rights is in the best interest of these children. Expert testimony was presented proving it is critical to the welfare of both youths that a permanent plan for placement be adopted without further delay. Given the family history of violence, and based upon the developmental needs of these children, the court is not disposed to order further reunification efforts by the Department with the mother . . . ."

Id.

53. *Id.* (emphasis added).

54. *Id.* (emphasis added) (quoting Cooley v. St. Andre's Child Placing Agency, 415 A.2d 1084, 1086 (Me. 1980)). The Law Court also stated, " 'As always, we leave to the trial judge questions of credibility and weight to be given testimony; he alone has had

Thus, under the "very substantial deference" approach, the Law Court evaluated the best interests finding with an express predisposition to uphold it.[55]

In reviewing the record, the court found evidence that Misty suffered from physical neglect and emotional harm.[56] The court candidly conceded that there was evidence showing Jessica had not suffered the same degree of neglect as her sister, but reasoned that the lower court could have attributed Jessica's better condition to foster care.[57] The Law Court completed its brief best interests review by noting that "there was competent evidence . . . that Lori's violent behavior, instability, and unwillingness to take responsibility for her own emotional problems resulted in an unsafe and unstable home environment for the children."[58] Viewing the evidence in the context of a statutory policy favoring permanent placement where reunification is not possible,[59] the Law Court concurred in the district court's conclusion that termination of Lori's parental rights served the best interests of the children.[60]

The Law Court then proceeded to examine the parental fitness prong of the termination procedure. At issue was whether Lori was "unwilling or unable to protect her children from jeopardy, and that these circumstances [were] unlikely to change within a time that

---

the opportunity to observe the witnesses.'" *Id.* (quoting *In re* Chesley B., 499 A.2d 137, 138-39 (Me. 1985)).

55. For further discussion of the deferential standard of review, see *infra* notes 104-10 and accompanying text.

56. *In re* Misty Lee H., 529 A.2d at 333.

57. *Id.*

58. *Id.*

59. The Child Protection Act provides:

> § 4050. Purpose
>
> Recognizing that instability and impermanency are contrary to the welfare of children, it is the intent of the Legislature that this subchapter:
>
> 1. **Termination of parental rights.** Allow for the termination of parental rights at the earliest possible time after rehabilitation and reunification efforts have been discontinued and termination is in the best interest of the child;
>
> 2. **Return to family.** Eliminate the need for children to wait unreasonable periods of time for their parents to correct the conditions which prevent their return to the family;
>
> 3. **Adoption.** Promote the adoption of children into stable families rather than allowing children to remain in the impermanency of foster care; and
>
> 4. **Protect interests of child.** Be liberally construed to serve and protect the best interests of the child.

ME. REV. STAT. ANN. tit. 22, § 4050 (Supp. 1987-1988). *See also id.* § 4003(4) (Supp. 1987-1988) (articulating "early establishment of permanent plans for the care and custody of children who cannot be returned to their family" as an express purpose for the child protection statute).

60. *In re* Misty Lee H., 529 A.2d at 333.

[was] reasonably calculated to meet the children's needs."[61] The district court resolved this issue primarily on the basis of a finding that Lori "frequently indulged in violent outbursts and consistently refused to address her behavior in therapy."[62] The principal basis for this finding was the violent episode which occurred shortly after the trial reunification with her children in April 1985,[63] some seventeen months prior to the termination hearing.[64] The Law Court carefully noted that while Lori's violent outburst was not directed at the children, it caused Misty, who observed the incident, to suffer emotional problems.[65]

The Law Court continued its analysis of Lori's parental fitness by noting that the record included evidence of child neglect.[66] The principal evidence tending to show neglect consisted of testimony by the children's foster mother. She testified that three-year-old Misty was still in diapers, her teeth were in "very, very bad decay," and both children's hair was "very drab and uneven."[67] The foster mother also testified that the children "just looked neglected."[68] After noting that there was evidence of Lori resisting mental health counseling "to address the issues that contributed to the placement of the children in jeopardy," the Law Court upheld the district court's parental fitness finding and affirmed the termination of Lori's parental rights.[69]

Justice Glassman, in dissent, disagreed sharply with the Law Court's analysis and conclusions. Characterizing the evidence as "inconclusive,"[70] the dissent reached contrary conclusions on both the parental fitness and the best interests findings. In regard to the parental fitness finding, the dissent questioned whether, on the basis of Lori's single violent outburst,[71] the district court "reasonably could have been persuaded that it was proved to be 'highly proba-

---

61. *Id.* at 333 (citing ME. REV. STAT. ANN. tit. 22, § 4055(1)(B)(2)(b)(i) (Supp. 1986-1987). "Jeopardy" is defined by the statute as "serious abuse or neglect." ME. REV. STAT. ANN. tit. 22, § 4002(6) (Supp. 1987-1988).

62. *In re* Misty Lee H., 529 A.2d at 334.

63. *See supra* notes 43-45 and accompanying text.

64. The termination hearing was held in October 1986. Brief for Appellee, Department of Human Services at 6.

65. *Id.* "Serious mental or emotional injury" comes within the statutory definition of "jeopardy." *See* ME. REV. STAT. ANN. tit. 22, § 4002(10)(B) (Supp. 1987-1988).

66. *In re* Misty Lee H., 529 A.2d at 334. The statute provides that an inability or unwillingness to protect a child from jeopardy, i.e. serious abuse or neglect, may be evidenced by "[d]eprivation of adequate food, clothing, shelter, supervision or care, including health care when that deprivation causes a threat of serious harm." ME. REV. STAT. ANN. tit. 22, § 4002(6)(B) (Supp. 1987-1988).

67. *In re* Misty Lee H., 529 A.2d at 334.

68. *Id.*

69. *Id.*

70. *Id.* at 334 (Glassman, J., dissenting).

71. *See supra* notes 43-45 and accompanying text.

ble' Lori's children were subject to 'serious harm or threat of serious harm' from future outbursts."[72] The dissent also challenged the finding of neglect which was based almost entirely on the foster mother's testimony that the children "looked neglected."[73]

The dissent focused its sharpest criticism on the conclusion that termination was in the best interests of the children. Noting that the "District Court and now this court find support for this conclusion in the evidence of 'violence' and 'physical neglect,' " Justice Glassman asserted: "Those powerful words provide more heat than light."[74] Thus, the dissent clearly did not believe parental custody to be a sufficient source of jeopardy to justify termination. Most important, the dissent argued that termination could actually threaten Misty Lee and Jessica's welfare. Observing that the children's foster parents had no interest in adopting the children, she noted that it might take as long as two years to finalize an adoption, thus causing the children to face "continued uncertainty."[75] The dissent insisted, "The State should be required to demonstrate by clear and convincing evidence that the consequences in harm to the children of allowing the parent-child relationship to continue are more severe than the consequences of termination of that relationship."[76]

The dissent expressed considerable concern in regard to whether termination of Lori's parental rights would effectively serve the best interests of her children. From the dissent's perspective, Lori's custody of the children was not a sufficient source of jeopardy to justify termination. Moreover, termination of Lori's parental rights carried a threat of greater harm for the two children. This Note maintains that the concerns voiced by the dissent find their roots in a number of decision-making risks identified by the United States Supreme Court in *Santosky v. Kramer.*

The *Santosky* Court addressed the issue of whether the fair preponderance of the evidence standard[77] was constitutionally sufficient

---

72. *In re* Misty Lee H., 529 A.2d at 335 (Glassman, J., dissenting).

73. *Id.* (observing that the foster mother's "background and standards for comparison are unknown").

74. *Id.* at 336.

75. *Id.*

76. *Id.*

77. The evidence must be weighed against a specific standard of proof in every lawsuit. *See* McCORMICK ON EVIDENCE §§ 339-341 (E. Cleary ed. 3d ed. 1984); McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242 (1944). Courts traditionally utilize three such standards: proof by a preponderance of the evidence, proof by clear and convincing evidence, and proof beyond a reasonable doubt. Under the "preponderance of the evidence" standard, the factfinder must believe that it is more probable than not that the facts are true or that they exist. McBaine, *supra*, at 261. The "clear and convincing" standard requires the factfinder to possess "an abiding conviction" that the truth of the factual contentions is "highly probable." Colorado v. New Mexico, 467 U.S. 310, 316 (1984). *See also* Taylor v. Commissioner of Mental Health, 481 A.2d 139, 153 (Me. 1984) (expressly adopting *Colorado* clear and

to ensure that parental rights termination proceedings are fundamentally fair.[78] The Court noted that the function of a standard of proof as a vehicle of procedural due process and of factfinding is to " 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' "[79] As a practical effect, the standard of proof serves to "allocate the risk of error between the litigants."[80]

In analyzing the risk of error in a parental rights termination proceeding,[81] the *Santosky* Court enumerated five risk factors inherent in the proceeding: (1) imprecise substantive standards that leave determinations open to the subjective values of the judge;[82] (2) the unusual discretion of the court to underweigh probative facts that might favor parents;[83] (3) the likelihood of cultural or class bias directed at parents who are poor, uneducated, or members of minority groups;[84] (4) the state's ability to assemble its case inevitably dwarfing the parents' ability to mount a defense;[85] and (5) the state's potential for using its superior resources to make repeated termination efforts if necessary.[86]

The Court concluded that the above factors presented a "*significant* risk of erroneous termination" of the parent's rights when "[c]oupled with a 'fair preponderance of the evidence' standard."[87] Moreover, since the risk factors resulted in a "near-equal allocation of risk between the parents and the State," the Court further concluded that the application of the lower standard of proof was "constitutionally intolerable."[88] The Court held that the higher standard of clear and convincing evidence should be applied at a parental rights termination proceeding because the private interests affected

---

convincing standard). Proof "beyond a reasonable doubt" requires the factfinder to believe the truth of the facts to the point of almost certainty. McBaine, *supra*, at 265. *See In re* Winship, 397 U.S. 358, 361-64 (1970) (discussing due process demands for reasonable doubt standard at criminal trial).

78. Santosky v. Kramer, 455 U.S. at 750-51, 754.

79. *Id.* at 754-55 (quoting Addington v. Texas, 441 U.S. 418, 423 (1979)).

80. Addington v. Texas, 441 U.S. at 423.

81. To determine the specific standard of proof required under the due process clause, the Court considered three factors: the private interests affected by the proceeding, the risk of error created by the state's procedure, and the countervailing governmental interests supporting the procedure. Santosky v. Kramer, 455 U.S. at 754 (applying the three-pronged test of Mathews v. Eldridge, 424 U.S. 319 (1976)).

82. *Id.* at 762.

83. *Id.*

84. *Id.* at 763.

85. *Id.*

86. *Id.* at 764. *See also In re* Shannon R., 461 A.2d 707, 715 (Me. 1983) (discussing *Santosky's* risk factor analysis).

87. Santosky v. Kramer, 455 U.S. at 764 (emphasis added).

88. *Id.* at 768.

by the lower standard of proof are commanding, and the state's interest favoring retention of the lower standard is comparatively slight.[89]

The heightened standard of proof required by *Santosky* is thus designed to reduce the risk of error resulting from a variety of factors.[90] Whether the risk of error is reduced *in practice* is a different matter and one that demands consideration. The concerns voiced by the dissent in *In re Misty Lee H.*[91] indicate that the risk factors reviewed by the *Santosky* Court are still very much alive under Maine's parental rights termination statute.[92] This Note contends that two risk factors are unduly prevalent: the employment of a largely imprecise best interests of the child standard, and the delegation of broad judicial discretion in applying the standard. These risk factors are in turn exacerbated by the Law Court's deferential appellate review under the best interests standard.

The best interests of the child standard is commonly viewed by courts as vague and imprecise.[93] The Maine Law Court has also referred pejoratively to the "abstract" nature of the phrase "best interest of the child."[94] Although Maine's termination statute does not expressly define the term, the statute does state that "the court shall consider the needs of the child, including the child's age, the child's attachments to relevant persons, periods of attachments and separation, the child's ability to integrate into a substitute placement or back into the parent's home and the child's physical and emotional needs."[95] The statute, however, neglects to set forth in

---

89. *Id.* at 769.

90. *Id.* at 757 n.9 (standard of proof's primary function is to minimize the risk of erroneous decisions). *See also supra* notes 79-80 and accompanying text.

91. *See supra* text accompanying notes 70-76.

92. *See infra* text accompanying notes 93-103.

93. *See* Smith v. Organization of Foster Families, 431 U.S. 816, 835 n.36 (1977) ("vague standards like 'the best interests of the child' "); *In re* Adoption of J.S.R., 374 A.2d 860, 863 (D.C. 1977) (standard does not contain precise meaning); *In re* N.M.S., 347 A.2d 924, 927 (D.C. 1975) (hardly expression of precise meaning); State *ex rel.* Lewis v. Lutheran Social Servs., 59 Wis. 2d 1, 9, 207 N.W.2d 826, 831 (1973) ("The phrase, 'best interests of the child,' means all things to all people . . . ."). For early cases applying the standard or its equivalent, see Finlay v. Finlay, 240 N.Y. 429, 433, 148 N.E. 624, 626 (1925) (judge must put himself in position of wise, affectionate and careful parent); Wilson v. Mitchell, 48 Colo. 454, 465, 11 P. 21, 25 (1910) (child's interests must control custody dispute); Chapsky v. Wood, 26 Kan. 650, 654 (1881) (paramount consideration is welfare of the child). For an historical account of the creation of the best interests standard, see M. GROSSBERG, *supra* note 1, at 237-54.

94. Cyr v. Cyr, 432 A.2d 793, 796 (Me. 1981).

95. ME. REV. STAT. ANN. tit. 22, § 4055(2) (Supp. 1987-1988). When evaluating the child's interests in a termination proceeding, the courts also apply the general statutory policy favoring placement of the children into a "permanent environment" when reunification of the child and parent is not possible. *See In re* Misty Lee H., 529 A.2d 331, 333 (Me. 1987) (citing ME. REV. STAT. ANN. tit. 22, §§ 4003(4), 4050 (Supp. 1986-

any precise manner what weight to accord these considerations. If a child, such as Jessica in *In re Misty Lee H.*, is three years old at the time of a termination hearing and demonstrates attachment to a foster parent with no interest in adoption,[96] how should these factors bear upon the question of what is best for the child? The termination statute contains no precise guidance as to how to weigh these vital considerations.

The decision-making risks inherent in such imprecision lie in a tendency by social agencies and judges to disregard objective criteria and rest their decisions on subjective values.[97] Termination proceedings which apply imprecise standards are often susceptible to cultural or class bias because the parents are often poor, uneducated, or members of minority groups.[98] As one court candidly explained, "[T]he tendency . . . is to apply intuition in deciding that a child would be 'better' with one set of parents than with another, and then to express this intuitive feeling in terms of the legal standard of being 'in the best interests of the child.' "[99]

In Maine, judges have traditionally been endowed with broad discretion in determining the best interests of the child.[100] The Maine judge in family law cases is viewed as a "wise, affectionate, and careful parent."[101] In order to facilitate the exercise of this discretion, legislatures have traditionally refrained from defining the best inter-

---

1987)).

96. *See infra* notes 133 & 150 and accompanying text.

97. *See* Santosky v. Kramer, 455 U.S. 745, 762 (1982); Smith v. Organization of Foster Families, 431 U.S. at 834-35. *See also* Cooper & Nelson, *Adoption and Termination Proceedings in Wisconsin: A Reply Proposing Limiting Judicial Discretion*, 66 MARQ. L. REV. 641 (1983). The authors of this article explain:

> The problem with the best interest standard is that it has no content without further definition. It may become a mere facade behind which social workers, lawyers and judges hide when making decisions based on intuition, personal likes and dislikes, armchair psychology, and ideology so deeply rooted that the decision makers are unaware that it is mere ideology.

Id. at 643. *See also* Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (Summer 1975).

98. Santosky v. Kramer, 455 U.S. at 763.

99. State *ex rel.* Lewis v. Lutheran Social Servs., 59 Wis. 2d 1, 9, 207 N.W.2d 826, 831 (1973).

100. *In re* Misty Lee H., 529 A.2d 331, 333 (Me. 1987) (quoting Cooley v. St. Andre's Child Placing Agency, 415 A.2d 1084, 1086 (1980)); MacCormick v. MacCormick, 513 A.2d 266, 268 (Me. 1986) ("The trial court is vested with broad discretion in determinations concerning the best interests of the child."); Huff v. Huff, 444 A.2d 396, 398 (Me. 1982); Harmon v. Emerson, 425 A.2d 978, 983 (Me. 1981); Ziehm v. Ziehm, 433 A.2d 725, 730 (Me. 1981); Roussel v. State, 274 A.2d 909, 921 (Me. 1971).

101. *See* Huff v. Huff, 444 A.2d at 398; Harmon v. Emerson, 425 A.2d at 985; Cyr v. Cyr, 432 A.2d 793, 796 (Me. 1981); Costigan v. Costigan, 418 A.2d 1144, 1147 (Me. 1980); Roussel v. State, 274 A.2d at 926. Maine derived the "wise, affectionate and careful parent" language from Finlay v. Finlay, 240 N.Y. 429, 433, 148 N.E. 624, 626 (1925) (quoting The Queen v. Gyngall, 2 Q.B. 232, 241 (C.A. 1893)).

ests standard with particularity, and courts have viewed the imprecision as "a mandate from the legislature, directing the judge to use his discretion in making a disposition."[102] Thus, although Maine's Legislature instructs judges to consider *inter alia* the age of the child and the child's attachments, the judges are endowed with broad discretion to determine the relative importance and meaning of these considerations in particular cases.[103]

The risk of error characterizing the best interests standard is further magnified during the appellate review stage. In *In re Misty Lee H.*, the Law Court noted that the district court judge's findings on the issue of the best interests of the child are "entitled to substantial deference."[104] The Law Court limits review of the best interests issue because of the delicate nature of the issue and the inappropriateness of allowing appellate judges to read a cold record and independently evaluate what is best for a child.[105] This approach to appellate review, however, militates against the detection and correction of erroneous decisions. Accordingly, the risk that a court may mistakenly extinguish parental rights is magnified. Moreover, as indicated by the dissent, an erroneous termination may cause real harm to the child—harm which goes undiscovered as a result of deferential review.[106]

The "very substantial deference" accorded lower court findings on the best interests issue in effect lowers the standard of review in parental rights termination appeals. In *In re Misty Lee H.*, the Law Court defined the appropriate standard of review for judgments of termination as " 'whether the factfinder could reasonably have been persuaded that the required factual findings [were] proved to be *highly probable.*' "[107] This high probability standard is designed to

---

102. Katz, *Foster Parents Versus Agencies: A Case Study in the Judicial Application of "The Best Interests of the Child" Doctrine*, 65 MICH. L. REV. 145, 153-54 (1966) (citing and quoting statutes from various states).

103. *See supra* notes 95-96 and accompanying text.

104. *In re* Misty Lee H., 529 A.2d at 333. *See supra* notes 53-55 and accompanying text for a discussion of the use of substantial deference in *In re Misty Lee H. See also In re* Cassandra B., 531 A.2d 1274, 1275 (Me. 1987) (applying substantial deference approach).

105. Cooley v. St. Andre's Child Placing Agency, 415 A.2d 1084, 1086 (Me. 1980), *quoted in In re* Misty Lee H., 529 A.2d at 333.

106. *In re* Misty Lee H., 529 A.2d at 336 (Glassman, J., dissenting) (noting that "the children faced continued uncertainty").

107. *In re* Misty Lee H., 529 A.2d at 333 (quoting Taylor v. Commissioner of Mental Health, 481 A.2d 139, 153 (Me. 1984)) (emphasis in original).

In *Taylor*, the Law Court expressly overruled Horner v. Flynn, 334 A.2d 194 (Me. 1975). Under *Horner*, Maine's clear and convincing standard of review merely required a "better quality of evidence." Taylor v. Commissioner of Mental Health, 481 A.2d at 153. *Taylor* added a quantitative dimension to the standard by requiring a sufficient quantum of evidence to make the findings "highly probable." *Id. See generally* Note, Horner v. Flynn: *A Preponderance of Clear and Convincing Evidence*, 28 MAINE L. REV. 240 (1976).

promote more meaningful review by permitting the Law Court to evaluate as a matter of law whether a sufficient *quantum* of evidence was admitted to support the findings.[108] Rather than apply the more penetrating review necessary to evaluate the evidence quantitatively, the Law Court in *In re Misty Lee H.* examined the district court's best interests findings cursorily.[109] The brevity of the Law Court's best interest analysis was evidenced in the dissent's assertion that words like violence and physical neglect "provide more heat than light."[110]

While the best interests standard carries a dramatic risk of erroneous application in the parental rights termination context, the converse is true in the marital relations context. In 1980, the Law Court substantially reduced the potential for erroneous allocation of child custody between divorced or separated parents by enumerating, in *Costigan v. Costigan*,[111] a lengthy list of best interests of the child factors.[112] The Law Court's stated rationale for doing so was "to give that concept some measure of substantive meaning."[113] The court provided *inter alia* that judges should consider the child's relationship with his parents; the wishes of the parents and the children; the motivation of the competing parties and their capacity to give the child love; and the child's adjustment to his present home, school, and community.[114] The Maine Legislature, four years later, expanded this list and codified twelve factors bearing on the best

---

108. *See* Taylor v. Commissioner of Mental Health, 481 A.2d at 153. In fact, more meaningful appellate review was the Law Court's stated reason for redefining the clear and convincing standard. *Id. Cf. In re* Dean A., 491 A.2d 572, 574 (Me. 1985) ("The *Horner* formulation was found to be inadequate, not because it failed to convey to the fact finder the necessity for a higher degree of certainty, but because it removed the 'higher standard of proof aspect of the lower court's factual findings from appellate review.' ") (quoting Taylor v. Commissioner of Mental Health, 481 A.2d at 153). *See also In re* Debra B., 495 A.2d 781, 783 (Me. 1985) (discussing relationship of clearly erroneous rule to clear and convincing standard of review). *See generally* Note, *Appellate Review in the Federal Courts of Findings Requiring More Than a Preponderance of Evidence*, 60 HARV. L. REV. 111 (1946).

109. *See supra* text accompanying notes 56-60.

110. *In re* Misty Lee H., 529 A.2d at 336 (Glassman, J., dissenting).

111. 418 A.2d 1144 (Me. 1980).

112. *Id.* at 1146.

113. Cyr v. Cyr, 432 A.2d 793, 796 (Me. 1981) (discussing *Costigan*). Substantive precision is desirable in marital relations cases because a trial court's decision is reversable only upon an abuse of discretion. This same rationale also applies to cases regarding termination of parental rights. Although the Law Court technically applies a high probability standard of review in termination cases, reviewing the best interests findings with very substantial deference results in a standard of review comparable to the abuse of discretion standard. *See* Huff v. Huff, 444 A.2d 396, 398-99 (Me. 1982) (equating abuse of discretion with deference and discussing best interests factors). *See* also *supra* notes 104-10 and accompanying text (discussing relationship between high probability standard of review and application of very substantial deference).

114. Costigan v. Costigan, 418 A.2d at 1146.

interests of the child and binding upon marital relations proceedings.[115]

The Maine Law Court and the Maine Legislature have thus recognized the need both to reduce substantive imprecision and to restrict judicial discretion in cases where child custody must be allocated between parents. The twelve factors delineated in the domestic relations statute add considerable content to an otherwise imprecise standard. The net effect is to reduce substantially the risk of a determination based on the judge's mistaken impressions.[116] By contrast, the termination statute simply requires the judge to weigh a few general considerations such as the child's needs, age, and attachments.[117] These considerations lack the comprehensiveness of the twelve factors delineated in the marital relations context,[118] and unlike the child custody provisions, are not specifically tailored to the nature of the proceeding.[119] Given that the domestic relations

---

115. *See* P.L. 1983, ch. 813 (codified at ME. REV. STAT. ANN. tit. 19, §§ 214(5), 581(5) (Supp. 1987-1988)). The statute mandates consideration of the following factors:

A. The age of the child;
B. The relationship of the child with the child's parents and any other persons who may significantly affect the child's welfare;
C. The preferences of the child, if old enough to express a meaningful preference;
D. The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity;
E. The stability of any proposed living arrangements for the child;
F. The motivation of the parties involved and their capacities to give the child love, affection and guidance;
G. The child's adjustment to the child's present home, school and community;
H. The capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent, including physical access;
I. The capacity of each parent to cooperate or to learn to cooperate in child care;
J. Methods for assisting parental cooperation and resolving disputes and each parent's willingness to use those methods;
K. The effect on the child if one parent has sole authority over the child's upbringing; and
L. All other factors having a reasonable bearing on the physical and psychological well-being of the child.

ME. REV. STAT. ANN. tit. 19, §§ 214(5), 581(5) (Supp. 1987-1988).

116. *See supra* notes 97-99 and accompanying text.

117. *See* ME. REV. STAT. ANN. tit. 22, § 4055(2) (Supp. 1987-1988). *See supra* note 95. For an excellent critique of this stark contrast, see Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423 (1983).

118. *See supra* note 115 (listing the twelve factors).

119. *See, e.g.*, ME. REV. STAT. ANN. tit. 19, § 214(5)(H) (Supp. 1986-1987). This provision requires the court to consider "[t]he capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent, including physical access." *Id.* Because this and other factors are specially tailored to

provision merely allocates parental rights whereas the termination statute may extinguish a fundamental parental liberty interest,[120] the need for precise substantive standards governing the application of the statutes is even greater in the latter case than in the former. Unfortunately, the statute that permits the greater deprivation also creates the greater risk of error.[121]

The best interests test recommended by the dissent in *In re Misty Lee H.* offers one means of enhancing substantive precision and diminishing the risk of error in termination proceedings. The dissent asserted, "The State should be required to demonstrate by clear and convincing evidence that the consequences in harm to the children of allowing the parent-child relationship to continue are more severe than the consequences of termination of that relationship."[122] The dissent's proposed test establishes a key priority: decisionmakers should seek the least harmful placement option for children. Inasmuch as it would require judges to evaluate the consequences of harm to children resulting from termination, the test would likely provide some further guidance in answering the difficult question of what is best for children. Much greater precision is possible, however, if additional decision-making factors are identified, evaluated, and included in the court's decision.[123]

Although an exhaustive list of factors cannot be derived from a single case, several decision-making factors bearing on the best interests standard can be extracted both from the concerns underlying the dissent's recommendation and the facts of *In re Misty Lee H.*[124]

---

the task of child custody allocation, the level of precision in decision-making is increased accordingly.

120. *See* Santosky v. Kramer, 455 U.S. 745, 759 (1982) ("When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest [in the care and custody of the parent's child], but to end it.").

121. This Note does not advocate that the best interests of the child standard is unconstitutionally vague as it is presently defined in the termination statute. Rather this Note simply asserts that the rationale supporting the enhancement of substantive precision in the marital relations context applies with even greater weight in the parental rights termination context. The best interests standard should, therefore, be further defined in the latter context because of that rationale.

For a discussion of the vagueness doctrine as it applies to termination statutes, see Comment, *Application of the Vagueness Doctrine to Statutes Terminating Parental Rights*, 1980 DUKE L.J. 336; Annotation, *Validity of State Statute Providing for Termination of Parental Rights*, 22 A.L.R.4th 774 (1983).

122. *In re* Misty Lee H., 529 A.2d at 336 (Glassman, J., dissenting).

123. For a discussion of the court's obligation to make findings on each best interests factor, see *infra* text accompanying notes 158-59.

124. Since these factors are only extracted from the facts of *In re Misty Lee H.*, the list should not be viewed as exhaustive. Considering the large number of appeals of parental rights termination cases, *see supra* note 11, the Law Court has both the opportunity and experience to enumerate further factors. Other factors may also be derived from further study. For example, section 48.426(3) of the Wisconsin Statutes Annotated provides:

These factors include the comparative timeliness of various permanent placement options, including adoption and parental rehabilitation, and whether the reunification and rehabilitation plan imposed upon the parent by the DHS contained reasonable expectations. This Note recommends that these factors be weighed against a rebuttable presumption recognizing that the child's needs are best satisfied in the natural family context.

Courts commonly apply a strong presumption that a child's welfare is best protected if family autonomy is preserved.[125] Application of such a presumption not only affords enhanced protection for the parent's liberty interest, but also recognizes that the natural family fosters the child's best interests.[126] It is generally believed that "chil-

---

(3) Factors. In considering the best interests of the child under this section the court shall consider but not be limited to the following:

(a) The likelihood of the child's adoption after termination.

(b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child is removed from the home.

(c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.

(d) The wishes of the child.

(e) The duration of the separation of the parent from the child.

(f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

WIS. STAT. ANN. § 48.426(3) (West Supp. 1987). Model termination statutes ordinarily define the best interests of the child standard by enumerating specific decisional criteria. *See, e.g.*, Coleman, *Standards for Termination of Parental Rights*, 26 WAYNE L. REV. 315, 349 (1980) (listing eleven best interests factors); Comment, *Minnesota Adopts a Best Interests Standard in Parental Rights Termination Proceedings: In re J.J.B.*, 71 MINN. L. REV. 1263, 1286-91 (1987) (listing and discussing five best interests factors).

125. *See Ex parte* Sullivan, 407 So. 2d 559, 563 (Ala. 1981) ("So strong is the presumption, that 'the care . . . is prompted by the parental instinct, and responded to by filial affection' . . . that the parental authority will not be interfered with, except in case of gross misconduct. . . .") (quoting Striplin v. Ware, 36 Ala. 87, 89-90 (1860)); *In re* M.H., 367 N.W.2d 275, 278 (Iowa Ct. App. 1985) ("It is presumed that the best interests of the child will be served by leaving it with its parents, but this is not a conclusive presumption."); *In re* L.F., 617 S.W.2d 335 (Tex. Ct. App. 1981) (strong presumption that children's best interests are usually served by keeping them with their natural parents); Patrick v. Byerley, 228 Va. 691, 694, 325 S.E.2d 99, 101 (1985) (" 'The law presumes that the child's best interests will be served when in the custody of its parent.' ") (quoting Judd v. Van Horn, 195 Va. 988, 995-96, 81 S.E.2d 432, 436 (1954)).

The *Santosky* Court stated that "while there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds." Santosky v. Kramer, 455 U.S. 745, 766-67 (1982).

126. *See* Parham v. J.R., 442 U.S. 584, 602 (1979) (The law has historically recog-

dren's needs are best met by helping parents achieve their interests."[127] The best interests standard should, therefore, incorporate a rebuttable presumption in favor of preserving family autonomy. Not only would this presumption better protect the parental liberty interest, but it would recognize that only in the most extreme cases does permanently foreclosing the possible nurturing influence of natural parents promote child welfare. The factors discussed below should be viewed through the prism of this presumption.

The facts of *In re Misty Lee H.* clearly illustrate the importance of a child's sense of time[128] and the need for evaluating the timeliness of various permanent placement options.[129] Jessica was only thirteen months old when first removed from her mother's custody,[130] yet she was over three years old at the time of the termination hearing.[131] Jessica had thus spent more than two-thirds of her life in foster care by the time Lori's parental rights were actually terminated. Given these facts, the foster parents will no doubt serve as "psychological parents" for Misty Lee and Jessica.[132] Yet the foster parents possessed no interest in adoption, and adoption was pro-

---

nized that "natural bonds of affection lead parents to act in the best interests of their children."). *See also* Coleman, *supra* note 124, at 322 ("A basic assumption underlying society's child rearing system is that the best interests of the child are advanced by placing the child in the home of the child's parents.").

127. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 625, 638 (1976). *See also* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 3-14 (1979) (discussing various needs of child for maintaining autonomous familial relationship); Beyer & Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L.Q. 233 (1986).

128. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 40-42 (new ed. 1979) (discussing importance of the child's sense of time).

129. The Child Protection Act expressly recognizes that time is of the essence in achieving permanent placement for children. One of the purposes of the Act is to "[p]romote the *early* establishment of permanent plans for the care and custody of children who cannot be returned to their family." ME. REV. STAT. ANN. tit. 22, § 4003(4) (Supp. 1987-1988) (emphasis added).

For criticism of current approaches to permanent placement, see Beyer & Mlyniec, *supra* note 127, at 233. The authors conclude, "The current system of permanency planning with its emphasis on adoption, while theoretically sound, is still rife with problems relating to fairness to parents, the provision of services to families, and the development of children." *Id.* at 254.

130. Brief for Appellee, Department of Human Services at 2, *In re* Misty Lee H., 529 A.2d 331 (Me. 1987) (No. Fra. 87-69).

131. *Id.* at 5.

132. For a discussion of the psychological parent-child relationship, see J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 128, at 17-20.

Some indication of this "psychological parent-child" phenomenon is seen by noting that Jessica, who was only thirteen months old when removed from Lori's custody and had spent two-thirds of her life with the foster mother, would "go to her foster mother to be held" when Lori visited. Brief for Appellee, Department of Human Services at 6.

jected to take as long as two years to finalize.[133] These facts posed a serious source of concern for the dissenting justice, who felt that termination would bring the children "continued uncertainty."[134] The dissent's fear that terminating the natural parent-child relationship would harm the children is equally valid in regard to the emotional harm caused by the severing of the psychological parent-child relationship. These facts also demonstrate why courts should apply the "all deliberate speed" principle which requires the attainment of stable and permanent placement as soon as practicable.[135] As a means of applying the "all deliberate speed principle," this Note recommends the articulation of a best interests factor requiring the court to evaluate the comparative timeliness of permanent placement options.

Under this factor the court must include in its decision separate findings on the likelihood and timeliness of adoption and parental rehabilitation. One of the principal concerns underlying the dissent's best interests recommendation was the fact that the children's foster parents had no interest in becoming adoptive parents.[136] Moreover, no adoption plans had been commenced and a DHS caseworker testified that it might take as long as two years before an adoption could be completed.[137] The inevitable result of a distantly timed and uncertain adoption is prolonged foster care, which is recognized as an extremely detrimental alternative for children.[138] The record indicated that Lori could have made the necessary gains that contrib-

---

133. *In re* Misty Lee H., 529 A.2d at 336 (Glassman, J., dissenting).

134. *Id.*

135. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 128, at 42. ("The child's-sense-of-time guideline would require decisionmakers to act with 'all deliberate speed' to maximize each child's opportunity either to restore stability to an existing relationship or to facilitate the establishment of new relationships to 'replace' old ones.").

It should be asked whether the DHS applied the "all deliberate speed" principle in this case. Note that the DHS received temporary custody of the children in February 1984, and a reunification plan was not submitted to Lori until that fall. The termination order was eventually entered by the court in December 1986, after the children had spent over two years becoming attached to foster parents who had no interest in adoption. *See supra* notes 39-48 and accompanying text.

136. *In re* Misty Lee H., 529 A.2d at 336 (Glassman, J., dissenting).

137. *Id.* Current statistics indicate that "terminating parental rights does not guarantee an adoptive placement." Beyer & Mlyniec, *supra* note 127, at 246. *See also* Ketcham & Babcock, *Statutory Standards for the Involuntary Termination of Parental Rights*, 29 RUTGERS L. REV. 530, 542-44 (1976) (advocating the need to couple termination with adoption).

138. *See generally* Note, *Termination of Parental Rights: Putting Love in its Place*, 63 N.C.L. REV. 1177 (1985) (describing detrimental impacts of prolonged foster care).

Under Maine's Child Protection Act, long-term foster care is recognized as a "permanent plan" alternative under appropriate circumstances. ME. REV. STAT. ANN. tit. 22, §§ 4002(7-A)(D), 4064 (Supp. 1987-1988).

ute to positive parenting in approximately one year.[139] The Child Protection Act clearly states that reunification of the family should receive "priority as a means for protecting the welfare of children."[140] This provision recognizes that reunification, where possible, promotes the best interests of the child.[141] The foregoing considerations, therefore, warrant evaluation by the court of the likelihood and timeliness of adoption and parental rehabilitation, and the inclusion of relevant findings in the court's decision.

The facts of *In re Misty Lee H.* indicate that permanent placement could possibly have been achieved sooner by rehabilitating Lori rather than by proceeding with termination and awaiting the adoption.[142] The DHS should have been required to establish that there was a higher probability that adoption would occur prior to parental rehabilitation. Such a test is consistent with the "all deliberate speed" principle requiring permanent and stable placement *as soon as practicable.* The courts should thus consider the likelihood of parental rehabilitation in order to determine whether a return of custody to the natural parent carries any potential for a more timely permanent placement option.[143]

The facts of *In re Misty Lee H.* also demonstrate the need for a best interests factor requiring evaluation of the reasonableness of the DHS's reunification and rehabilitation plan. The dissent questioned the reasonableness of the DHS's insistence that Lori address "her childhood issues" and engage in "meaningful psychotherapy"

---

139. Brief of Lori Phillips, Appellant at 5, *In re* Misty Lee H., 529 A.2d 331 (Me. 1987) (No. Fra. 87-69).

140. ME. REV. STAT. ANN. tit. 22, § 4003(3) (Supp. 1987-1988).

141. *Cf. supra* notes 125-27 (discussing the importance of nurturing, natural parents to a child's welfare).

142. *In re* Misty Lee H., 529 A.2d at 336 (Glassman, J., dissenting).

Some commentators recommend the use of an interlocutory termination order which could be rescinded or made final at a later date, depending on whether adoption has been finalized. *See, e.g.*, Ketcham & Babcock, *supra* note 137, at 543-44 (advocating the use of interlocutory termination orders). Such an order could be beneficial in a case such as *In re Misty Lee H.* where the timing factor showed some likelihood that the parent could be rehabilitated prior to the finalization of adoption.

143. It should be noted that two of the alternative tests under the parental fitness prong require consideration of whether the factors causing parental unfitness are likely to change "within a time which is reasonably calculated to meet the child's needs." ME. REV. STAT. ANN. tit. 22, § 4055(1)(B)(2)(b)(i)-(ii) (Supp. 1987-1988). Unlike the latter test, the test proposed by this Note for use under the best interests prong is a comparative test. It asks specifically whether parental rehabilitation could lead to the earliest possible permanent placement option. The parental rehabilitation test, as applied under the best interests prong, recognizes that a parent may be found unfit under the fitness prong; however, the child's interests demand consideration of whether parental rehabilitation carries potential for a comparatively more timely option. Incorporation of this factor is also consistent with the rebuttable presumption in favor of family autonomy. *See supra* notes 125-27 and accompanying text.

as a rehabilitation requirement.[144] The record indicated that Lori had "attended counseling sessions";[145] she was "genuinely interested in making a secure home for her children";[146] and she had visited her children regularly.[147] Despite these positive factors, the DHS proceeded with termination of Lori's parental rights, citing a "lack of significant progress" on Lori's part.[148] These facts give rise to a need to address whether the Department's expectations as embodied in the reunification and rehabilitation plan were reasonable.[149] If, in fact, it was unreasonable to condition increased visitation rights, i.e., reunification, on Lori's progress in "meaningful psychotherapy," i.e., rehabilitation, the court may not have been justified in weighing the children's attachment to their foster parents[150] against Lori and in favor of termination.[151]

The reasonableness of the reunification and rehabilitation plan is thus a relevant consideration bearing on the best interests of the

---

144. *In re* Misty Lee H., 529 A.2d at 335-36 (Glassman, J., dissenting). *See supra* note 46 and accompanying text (identifying six psychological tasks which were required of Lori by the DHS). Lori's alleged failure to make "significant progress" in regard to these tasks was a primary influence leading to the Department's decision to petition for termination. *See supra* note 47 and accompanying text.

Justice Glassman warned that the reliance on psychological experts "at almost every stage of termination proceedings increases the ever present risk that such proceedings are vulnerable to judgments based on cultural or class bias." *In re* Misty Lee H., 529 A.2d at 336 (Glassman, J., dissenting).

145. *In re* Misty Lee H., 529 A.2d at 336 (Glassman, J., dissenting).

146. *Id.*

147. Brief of Lori Phillips, Appellant at 2 (stating that Lori "increasingly and regularly visited the children"); Brief of Appellee, Department of Human Services at 5 (stating that Lori "continued to visit her daughters at the foster home").

148. Brief of Appellee, Department of Human Services at 5.

149. In *In re* Daniel C., 480 A.2d 766 (Me. 1984), the Law Court affirmed a parental rights termination even after recognizing that the DHS had made inadequate efforts to reunify the family. *Id.* at 769 n.3. The Law Court concluded, "We simply do not detect any legislative intent that the department's reunification efforts be made a *discrete* element of proof in termination proceedings." *Id.* at 770. The court reaffirmed this conclusion in *In re* Joseph P., 532 A.2d 1031, 1035 (Me. 1987), and *In re* Maria C., 527 A.2d 318, 319 (Me. 1987). For an excellent discussion of the issue, see Note, *In re* Daniel C.: *Reunification Efforts and the Termination of Parental Rights*, 37 MAINE L. REV. 429 (1985) (arguing that the Law Court should reconsider its conclusion).

150. Justice Glassman noted that the district court "recited in its order that termination . . . was in the best interests of the children because of 'their strong attachment to their foster family.' " *In re* Misty Lee H., 529 A.2d at 336 (Glassman, J., dissenting). A child's attachments are presently recognized by the termination statute as a relevant consideration. *See* ME. REV. STAT. ANN. tit. 22, § 4055(2) (Supp. 1987-1988) (child's attachments to relevant persons).

151. Following the violent episode of April 1985, the DHS imposed six therapeutic tasks on Lori. *See supra* note 46. The DHS also reduced her visitation rights to two monthly visits. Brief of Lori Phillips, Appellant at 2. Given the diminished visitation schedule it is not surprising that the children's attachments to the foster parents increased.

child. If the plan imposed unreasonable expectations on the parent, the welfare of the child may demand a restructured plan and the continuation of reunification efforts. Such a step would be consistent both with the legislative intent giving priority to family reunification as a means of protecting the child's interests[152] and the presumption recognizing that the child's needs are most effectively met by natural, nurturing parents.[153] When coupled with the absence of a permanent placement plan, the unreasonableness of a DHS reunification plan clearly demonstrates the need to deny termination and continue reunification efforts.[154]

This Note has argued that substantive precision and the limitation of judicial discretion are constitutionally warranted goals in the context of parental termination proceedings. A degree of discretion is, of course, necessary in order to allow the judge to retain flexibility in addressing the full variety of circumstances which inevitably occur and which no seemingly comprehensive list of decision-making factors can ever foresee. The judge should thus be granted discretion to identify and consider "[a]ll other factors having a reasonable bearing on the physical and psychological well-being of the child."[155]

The concerns voiced in the dissent in *In re Misty Lee H.* also evidence the failure of deferential appellate review to protect adequately both parental rights and child welfare by effectively detecting and correcting erroneous best interests determinations.[156] The Law Court has noted that "the policies that motivated the imposition of the 'clear and convincing evidence' standard apply with equal force at both the factfinding and appellate stages."[157] Enumeration of specific decision-making criteria, such as those recommended by this Note, not only offers the hope of minimizing the risk of error at the fact-finding stage, but also offers a more effective means of enhancing appellate review. On review, the Law Court will be able to require "some indication in the record that the [judge] considered those factors . . . to allow the appellate court to determine the grounds for the [judge's] decision."[158] The delineation of

---

152. *See supra* note 140 and accompanying text.

153. *See supra* notes 125-27 and accompanying text.

154. Indeed, the dissent argued, "The absence of a permanent plan for the children's care points up the State's lack of a compelling interest in protecting the two girls from further reunification efforts with their mother." *In re* Misty Lee H., 529 A.2d at 336 (Glassman, J., dissenting).

155. Maine's domestic relations statute includes this provision. *See* ME. REV. STAT. ANN. tit. 19, § 581(5)(L) (Supp. 1987-1988).

156. *See supra* notes 105-11 and accompanying text.

157. Taylor v. Commissioner of Mental Health, 481 A.2d 139, 153 (Me. 1984).

158. MacCormick v. MacCormick, 513 A.2d 266, 268 (Me. 1986) (quoting Cyr v. Cyr, 432 A.2d 793, 797 (Me. 1981)).

Under the marital relations statute, Maine does not require detailed findings of fact pertaining to the individual best interests factors. *Id.* Other jurisdictions, however, impose the requirement of detailed findings of fact in the parental rights termi-

best interests factors will promote more precise findings of fact which in turn will accommodate a more searching appellate scrutiny.[159]

The facts of *In re Misty Lee H.* and the concerns raised by the dissent demonstrate that adjudication under the presently imprecise best interests standard carries a substantial risk of erroneous termination. This risk of error is unwarranted in light of the constitutional nature of a parental rights termination proceeding. Moreover, this risk of error should not be tolerated in light of the serious consequences of harm to children which may follow an erroneous termination.

The risk of error may be diminished if the vague best interests of the child standard is further defined. When the decision-making factors recommended by this Note are combined with the presently prescribed considerations,[160] a dramatically more precise best interests of the child standard will emerge. The result will benefit the system in two ways, for specific decision-making factors will both guide the application of judicial discretion and enhance appellate review. These error-reducing factors are not only consistent with what is best for the child, but are also entirely consistent with "[t]he commanding nature of the parental interest."[161] They merit articulation by the Maine Law Court and application in Maine's parental rights termination proceedings.

William L. Dawson, Jr.

---

nation context. *See, e.g., In re* Termination of Parental Rights to T.R.M., 100 Wis. 2d 681, 686-87, 303 N.W.2d 581 (1981) (remanding case for purpose of making proper findings of fact where trial court failed to make specific findings of fact supporting termination and failed to make specific and formal determination regarding best interests of the child).

159. Although not recommended by this Note, a number of jurisdictions apply a de novo review of best interest findings. *See, e.g., In re* M.H., 367 N.W.2d 275, 278 (Iowa Ct. App. 1985) (in de novo review of parental rights termination weight is given to lower court's findings, but they are not binding); Commonwealth *ex rel.* Pierce v. Pierce, 493 Pa. 292, 296, 426 A.2d 555, 557 (1981) (reviewing court must make own findings and is not bound by the trial court); *In re* Donna W., 325 Pa. Super. 39, 42-53, 472 A.2d 635, 636-42 (1984) (extensive discussion of authorities and rationale supporting broad independent appellate review of termination orders).

160. *See* ME. REV. STAT. ANN. tit. 22, § 4055(2) (Supp. 1987-1988).

161. *In re* Misty Lee H., 529 A.2d 331, 335 (Me. 1987) (Glassman, J., dissenting).