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Family Law - Contested Consent to Adoption: No Longer a Decision in the Child's Best Interest - In re Adoption of BGD

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FAMILY LAW—Contested Consent to Adoption: No Longer a Decision in the Child's Best Interest. *In re Adoption of BGD*, 713 P.2d 1191 (Wyo. 1986).

In *In re Adoption of BGD*¹ a fifteen-year-old unwed mother, TD, and her parents challenged the consent to adoption signed one week before her daughter's birth. TD's physician facilitated the adoption of TD's child, BGD, by his office manager and her husband. The physician directed TD and her mother to the adoptive parents' attorney one week before delivery. The attorney explained that he represented the adoptive parents, then discussed the consent and TD's rights. TD then signed the irrevocable adoption consent and relinquishment.²

BGD was born on March 22, 1983.³ The physician removed her from the hospital and placed BGD with the adoptive parents seven hours after her birth.⁴ The adoptive parents' attorney filed the adoption papers the next morning.⁵

On May 9, 1983, TD⁶ sued the adoptive parents to set aside the adoption consent and have the child returned.⁷ The court denied summary judgment for the defendants.⁸ At trial TD claimed that the physician pressured her into consenting to the adoption and that she did not understand the consent.⁹ TD also claimed that she demanded to keep her baby at delivery.¹⁰ Although the physician acknowledged that TD was "ambivalent" about the adoption, he testified that she did not clearly indicate her intent to keep BGD until the morning after delivery.¹¹ The trial court found for the defendants, holding that TD's revocation was untimely.¹²

On appeal TD argued that her written consent was invalid because she lacked the necessary understanding and intent to relinquish her parental rights to BGD.¹³ She maintained that she had acted under the physician's undue influence and that her revocation was timely.¹⁴

1. *In re Adoption of BGD*, 713 P.2d 1191 (Wyo. 1986) [hereinafter *BGD I*], *aff'd on rehearing*, 719 P.2d 1373 (Wyo. 1986) [hereinafter *BGD II*]. This casenote generally addresses the original opinion, *BGD I*, 713 P.2d 1191 (Wyo. 1986). Also, it is primarily concerned with contested consent to adoption cases, as compared to cases involving divorce custody disputes, parental abandonment or termination of parental rights. Judicial considerations and child placement standards in those situations may differ.

2. Brief for Appellee at 1-6, *BGD I* (No. 85-1). For appellant's account of this litigation, see Brief for Appellant at 1-3, *BGD I* (No. 85-1).

3. *BGD II*, 719 P.2d at 1374.

4. *BGD I*, 713 P.2d at 1192.

5. *Id.*

6. Plaintiffs include TD and her parents, JD and ZD.

7. *BGD I*, 713 P.2d at 1192.

8. Brief for Appellant at 2, 3.

9. *Id.* at 12.

10. *BGD II*, 719 P.2d at 1374.

11. *BGD I*, 713 P.2d at 1192.

12. *Id.*

13. Brief of Appellant at 9.

14. *Id.* at 4, 12.

The Wyoming Supreme Court reversed, holding that Section 1-22-109(a) of the Wyoming Statutes¹⁵ requires a relinquishment statement separate from the written consent.¹⁶ It also ruled that Section 1-22-109(c)¹⁷ requires written relinquishment *after* the child's delivery.¹⁸ The court also indicated that "physical relinquishment"¹⁹ of the child was necessary and found that the natural mother failed to physically relinquish BGD.²⁰ The court's analysis focused on the adoption statute which does not incorporate consideration of the "best interests" of the child.²¹ One dissenting justice rejected the majority's statutory interpretation and urged adherence to the "best interests" doctrine.²²

The adoptive parents petitioned for rehearing alleging that the court failed to follow the trial court's findings of fact. They contended that the best interests of the child should be the controlling factor in adoption cases and asked that the court's statutory interpretation only be applied prospectively.²³ Further, they petitioned for an evaluation by the Department of Public Assistance and Social Service to determine the child's best custody interests.²⁴ The court granted only the petition for rehearing.²⁵ Upon rehearing the court reaffirmed its previous decision.²⁶

15. WYO. STAT. § 1-22-109(a) (1977) provides:

A written relinquishment of the child and written consent to adoption shall be filed with the petition to adopt and shall be signed by:

- (i) Both parents, if living; or
- (ii) The surviving parent; or
- (iii) The mother and putative father of the child if the name of the putative father is known; or
- (iv) The mother alone if she does not know the name of the putative father, in which case she shall sign and file an affidavit so stating . . .

16. *BGD I*, 713 P.2d at 1192-93.

17. WYO. STAT. § 1-22-109(c) (1977) provides that "[t]he consent may be signed at any time and shall be acknowledged before a notary public . . ."

18. *BGD I*, 713 P.2d at 1193.

19. *Id.*

20. *Id.* The trial court held (1) that T.D. signed the consent of her own free will, (2) that she intended to place her child for adoption, (3) that she had ample opportunity to reconsider and withdraw her consent during the week prior to delivery, (4) that she failed to communicate her desire to revoke consent until the morning after delivery when the adoption petition had already been filed, and (5) that T.D. was "very immature and had little touch with reality." See *BGD II*, 719 P.2d at 1380-81 n.2 (Urbigkit, J., dissenting).

The Wyoming Supreme Court generally limits appellate reviews to the factual findings made by the trial court. *McColley v. State ex. rel. Wyoming Workers Compensation Div.*, 708 P.2d 441 (Wyo. 1985). The trial court made no specific finding of fact concerning "physical relinquishment," although the physician's testimony indicated that TD knew the adoptive parents would receive BGD the night of delivery.

21. *BGD I*, 713 P.2d at 1193, 1194.

22. *Id.* at 1193 (Thomas, C.J., dissenting).

23. Appellee's Brief in Support of Petition for Rehearing at 1, 2, *BGD I* (No. 85-1) [hereinafter Appellee's Brief, Petition for Rehearing].

24. Petition for the Appointment of Western County Depass [sic] as Guardian Ad Litem to Investigate the Parties to Aid in Determining what is in the Best Interest of BGD, a Minor, at 103, *BGD I* (No. 85-1).

25. *In re Adoption of BGD*, 716 P.2d 983 (Wyo. 1986) (order granting petition for rehearing).

26. *BGD II*, 719 P.2d 1373 (Wyo. 1986).

In re Adoption of BGD was a difficult case which sparked an emotional public controversy.²⁷ The case raises many questions concerning consent to adoption, parental rights and the rights of infants in adoption. This casenote examines the court's interpretation and application of the adoption statutes in relation to its previous adoption decisions which were based on the child's best interests.

BACKGROUND

Legislative History

Natural parents have the constitutional right to rear their children without undue state interference.²⁸ Adoption, which creates a parent/child relationship between persons unrelated by blood,²⁹ is a statutory procedure.³⁰ A child may be adopted only with the natural parent's consent or after judicial determination that the natural parent has lost all legal rights to the child.³¹

Early Wyoming adoption laws required only that the natural parents' written consent accompany the adoption petition.³² Although the 1963 statutes mentioned the term "relinquish,"³³ it was not until 1977 that the Wyoming adoption statutes required written relinquishment.³⁴ *Relinquishment* indicates the parents' intent "to abandon, to give up, [and] to surrender"³⁵ the child. *Consent* is an agreement to a course of action or decision.³⁶

Section 1-22-111 of the Wyoming Statutes also addresses the adoption decree, investigation and denial of adoption.³⁷ This section, dating

27. *Id.* at 1373 (Brown, J., specially concurring).

28. U.S. CONST. amend. XIV, § 1 (the due process clause); see *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Meyer v. Nebraska*, 262 U.S. 399, 399 (1923); see also Note, *Natural Parent Preference or the Child's Best Interests: The Court's Dilemma in S.O. v. W.S.*, 12 U.C.L.A.-ALASKA L. REV. 141 (1982-83).

29. BARRON'S LAW DICTIONARY 13 (2d ed. 1984) ("Adoption").

30. *Lucas v. Strauser*, 65 Wyo. 98, 110, 196 P.2d 862, 866 (1948).

31. See WYO. STAT. §§ 1-22-109 to -111 (1977).

32. *BGD I*, 713 P.2d at 1194 (Thomas, C.J., dissenting); see also 1929 Wyo. Sess. Laws, ch. 121.

33. *BGD I*, 713 P.2d at 1194 (Thomas, C.J., dissenting); 1963 Wyo. Sess. Laws, ch. 59 § 6.

34. *BGD I*, 713 P.2d at 1194 (Thomas, C.J., dissenting); WYO. STAT. § 1-22-104(c)(ii) (1977 Supp. 1986).

35. BLACK'S LAW DICTIONARY 1161 (5th ed. 1979) ("Relinquish").

36. AMERICAN HERITAGE DICTIONARY 283 (1982) ("Consent").

37. WYO. STAT. § 1-22-111 (1977) states:

(a) After the petition to adopt has been filed and a hearing held the court acting in the best interest and welfare of the child may make any of the following orders:

(i) Enter an interlocutory decree of adoption giving the care and custody of the child to the petitioners pending further order of the court;

(ii) Defer entry of an interlocutory decree of adoption and order the division of public assistance and social services . . . or a private licensed agency to investigate and report to the court the background of the child and of the petitioners. . . . [T]he court shall determine if the adoption by petitioners is in the best interest and welfare of the child. . . ."

(b) If the court denies the adoption it shall make an order for proper custody consistent with the best interest of the child.

back to 1876, allows the court to order custody "consistent with the best interest and welfare of the child."³⁸ The court may also order an investigation of the child's, the natural parents' and the adoptive parents' backgrounds to determine if adoption is in the child's best welfare.³⁹

Case Law

The Wyoming Supreme Court has long considered the best interests of the child in adoption cases.⁴⁰ In the 1949 case of *Morris v. Jackson*, Justice Riner, speaking for the court, stated, "[T]he legal right of the parent is secondary to the best interest of the child, and such right will not be enforced where it is not advantageous to the child."⁴¹

In *Morris*, the six-year-old child lived with the adoptive family for several years before the natural father attempted to regain custody.⁴² Although the natural father had provided limited care for the infant, he was never notified of the adoption proceedings, contrary to the adoption statutes.⁴³ The court, leaving the child with his adoptive parents, stated that "the paramount question at all times, when the custody and control of a minor child is in dispute, is the welfare of such child. That has been declared to be the rule by this court a number of times."⁴⁴

The Wyoming Supreme Court in more recent cases, reaffirmed its commitment to resolving adoption disputes in favor of the child's best interest. In *In re Adoption of D.P. and F.P.*, a 1978 decision, the stepmother was allowed to adopt her stepsons despite the natural mother's attempt to revoke her consents to adoption.⁴⁵ The court determined that the consent was validly received; but, more importantly, the boys' adoptive home served the children's best interests.⁴⁶

In 1982, the court considered the case of a New York mother who consented to the adoption of her infant by a Wyoming couple.⁴⁷ Shortly after placing the child with the adoptive parents in Wyoming, the natural mother attempted to withdraw her consent. The court held that the trial court correctly applied Wyoming adoption statutes and also properly considered the child's best interests in reaching the decision.⁴⁸ In addition to considering the child's best interests,⁴⁹ the court relied on section

38. 1876 Wyo. Territorial Sess. Laws, ch. 2, § 3.

39. WYO. STAT. § 1-22-111(ii) (1977).

40. See *BGD I*, 713 P.2d at 1193, 1194 (Thomas, C.J., dissenting).

41. *Morris v. Jackson*, 66 Wyo. 369, 380, 212 P.2d 78, 82 (1949) (quoting 39 C.J.S. *Habeas Corpus* § 416, at 572-73 (1944)).

42. *Id.* at 373-78, 212 P.2d at 79-81.

43. *Id.*

44. *Id.* at 381, 212 P.2d at 82 (quoting *Kennison v. Chokie*, 55 Wyo. 421, 425, 100 P.2d 97, 97 (1940)).

45. *In re Adoption of DP & FP*, 583 P.2d 706 (Wyo. 1978).

46. *Id.* at 708-709.

47. *In re Adoption of MM*, 652 P.2d 974 (Wyo. 1982).

48. *Id.* at 979-981; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 289 & comments (a), (b) (1971) (discussing application of local adoption law hearings).

49. *In re Adoption of MM*, 652 P.2d at 980, 981.

1-22-109, finding that the mother had voluntarily signed a valid consent. Therefore, the consent was irrevocable.⁵⁰ The child remained with the adoptive parents.⁵¹

In *In re adoption of Voss*, the court considered the benefits a child of divorced parents receives from association with his natural father as well as his step-family.⁵² The natural father sought to block adoption by the stepfather, wanting only to reestablish his visitation rights.⁵³ The court, noting that the child would not be displaced, acknowledged that parents have the first and natural right to their children. It indicated that the child had an interest in sharing a warm and active relationship with a natural parent, if possible. Here the court decided for the natural father after considering his and the child's mutual rights and benefits.⁵⁴

A majority of courts accept the "best interest of the child" as a primary factor in adoption cases.⁵⁵ The New Jersey Supreme Court strongly adheres to the "best interest" doctrine. In *Sorentino v. Family and Children's Society of Elizabeth*,⁵⁶ the court found that the child's natural mother had signed the consent for adoption under undue influence.⁵⁷ The child was thirty-one months old at the time of the decision. Concerned about the emotional consequences of displacement, the court ordered a special evaluation and hearing to determine the child's best interests. It observed, "The court cannot evade its responsibility as *parens patriae* of all minor children, to preserve them from harm. The possibility of serious psychological harm to the child in this case transcends all other considerations."⁵⁸ After the trial court found that transferring the child from his custodial parent would be harmful, the supreme court allowed the adoptive mother to file the adoption proceedings.⁵⁹

In Alaska when the natural parent consents to the child's adoption and then seeks to withdraw consent no parental preference is given in determining what is in the child's best interest.⁶⁰ In *S.O. v. W.S.*, the court held that because the natural mother's consent substantially complied with the statutory requirements, she had sufficiently expressed her

50. *See id.* at 978.

51. *See id.* at 981.

52. *In re Adoption of Voss*, 550 P.2d 481, 486 (Wyo. 1976).

53. *Id.*

54. *Id.*

55. *In re Adoption of MM*, 652 P.2d 974, 980 (Wyo. 1982) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 289 comment (a) (1971)). *See also Natural Parent Preference*, 12 U.C.L.A.-ALASKA L. REV. at 141, 142 n.11.

56. *Sorentino v. Family & Children's Soc'y of Elizabeth*, 72 N.J. 127, 367 A.2d 1168 (1976); *Sorentino v. Family & Children's Soc'y of Elizabeth*, 74 N.J. 313, 378 A.2d 18, 21-22 (1977).

57. *Sorentino*, 72 N.J. 127, 367 A.2d at 1169. "Undue influence" is defined as one party having an unfair advantage over another based on real or apparent "authority, knowledge of necessity or distress, or a fiduciary or confidential relationship." BARRON'S LAW DICTIONARY 497 (1984).

58. *Sorentino*, 72 N.J. 127, 367 A.2d at 1171 (citations omitted).

59. *Sorentino*, 74 N.J. 127, 378 A.2d at 18.

60. *S.O. v. W.S.*, 643 P.2d 997, 1005 (Alaska 1982).

intent to relinquish the child.⁶¹ In his best interests, the child was left with the adoptive parents.⁶²

A minority of states do not consider the child's best interests in adoption cases.⁶³ The Oregon Court of Appeals observed: "Where circumstances have indicated that consent was not given freely and knowingly, we have allowed the natural parent to disavow it, even though it was clearly in the best interests of the child to remain with the adoptive parents."⁶⁴

The Minnesota Supreme Court has held that a child's best interest is to be reared by the natural mother unless she is incapable of the responsibility.⁶⁵ Utah courts also follow this rationale although it may be overcome by "clear and convincing evidence."⁶⁶ Courts that follow the "parental right" preference focus on the natural parent's rights and try to preserve the family unit as a matter of public policy.⁶⁷

THE PRINCIPAL CASE

The *BGD* court decided the matter on a strict, technical interpretation of the adoption consent statutes.⁶⁸ Section 1-22-104(c)(ii) requires written statements showing that the person with legal custody prior to adoption "has duly relinquished the child to the petitioners for adoption."⁶⁹ Section 1-22-109(a) states: "A written relinquishment of the child and written consent to adoption shall be filed with the petition to adopt" The court focused on the written relinquishment and written consent clauses. It interpreted this section to mean that a relinquishment must be a statement separate and distinct from the consent.⁷⁰ Additionally the majority ruled that the separate "written relinquishment" must be given after the child's birth since no child exists until birth.⁷¹ This interpretation prevents the natural mother from consenting to adoption prematurely while "under the stress of unfortunate and unhappy circumstances."⁷²

TD signed the following document prior to delivery.⁷³ It reads in part:

That I, [TD], do hereby voluntarily and freely give my full and free consent to the adoption of my child by [LDP] and [MFP], it

61. *Id.* at 1000.

62. *Id.* at 1002.

63. *Natural Parent Preference*, 12 U.C.L.A.-ALASKA L. REV. at 142 n.11, 149; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 289, at 264.

64. *In re Adoption of Vaida*, 34 Or. App. 631, 579 P.2d 313, 315-316 (1978).

65. *In re Alsdurf's Petition*, 270 Minn. 236, 133 N.W.2d 479, 482 (1965).

66. *D.P. v. Social Serv. & Child Welfare Dep't*, 19 Utah 2d 311, 431 P.2d 547 (1967).

67. *Natural Parent Preference*, 12 U.C.L.A.-ALASKA L. REV. at 142 n.11, 149.

68. *BGD I*, 713 P.2d 1192.

69. WYO. STAT. § 1-22-104(c) (1977 & Supp. 1986) reads:

The following documents shall be filed with every petition to adopt a child:

(i) The appropriate consent to adoption pursuant to 1-22-109;

(ii) Any relinquishments necessary to show the court that the person or agency legally authorized to have custody and control of the child prior to the adoption, has duly relinquished the child to the petitioners for adoption[.]

70. *BGD I*, 713 P.2d at 1192-93.

71. *Id.* at 1193.

72. *Id.*

73. Brief for Appellee at 4.

being understood by me that in giving such consent that *I am relinquishing all of my rights* of whatsoever nature in and to said child and that said child can never be claimed by me and that this consent is irrevocable.

That believing it to be for the best interest of the said child, I do hereby voluntarily relinquish and release forever all right, claim, interest and control which I may have in and to said child; and that I do hereby *voluntarily relinquish and release unto the above-named adopting parents the lawful physical custody* and control of my said child⁷⁴

The court concluded that the document was invalid.⁷⁵ It failed to provide adequate written relinquishment as required by section 1-22-109(a) because at the time TD signed, her child did not yet exist.⁷⁶ In addition, there was no separate relinquishment statement.⁷⁷ The court also held that although the statute allowed the *consent* to be signed at any time, the statutory language omitted the word *relinquishment*.⁷⁸ Therefore, a relinquishment could be signed only after the child's birth.⁷⁹ The majority justified its interpretation by noting that other states safeguard the natural mother's rights to her child by requiring either relinquishment after birth, consent signed before a judge or provisions for withdrawal of consent.⁸⁰

The Wyoming Supreme Court also found that TD did not "physically" relinquish the child, because the physician took the baby from the hospital without the mother's knowledge.⁸¹ The court did not indicate which statutory provision requires "physical" relinquishment, nor did it specify what behavior fulfills this requirement.⁸²

As noted, the Wyoming Supreme Court previously examined adoption cases in light of the child's best interests.⁸³ The majority opinion stated: "The policy of this court, in adoption cases, is to look at what is best for the child under all circumstances."⁸⁴ The court, although not specifically over-ruling this policy, elected to apply the statutes to sustain the natural family.⁸⁵

On rehearing, the court considered leaving the child with her adoptive parents because of their three year association. It rejected this, com-

74. *BGD II*, 719 P.2d at 1378-79 (Urbigkit, J., dissenting) (emphasis supplied).

75. *BGD I*, 713 P.2d at 1193.

76. *Id.*

77. *Id.*

78. *See id.*

79. *See id.*

80. *BGD II*, 719 P.2d at 1377-78.

81. *BGD I*, 713 P.2d at 1193.

82. *Id.*

83. *In re Adoption of MM*, 652 P.2d 974, 980 (Wyo. 1982); *In re Adoption of DP & FP*, 583 P.2d 706, 709 (Wyo. 1978); *Morris v. Jackson*, 66 Wyo. 369, 380, 212 P.2d 78, 82 (1949); *Kennison v. Chokie*, 55 Wyo. 421, 427, 100 P.2d 97, 97 (1940).

84. *BGD I*, 713 P.2d at 1193.

85. *Id.*

paring it to awarding "custody to a parent who kidnaps children and hides them for three years while bonding occurs."⁸⁶

ANALYSIS

The court's interpretation of the "Consent to adoption" statute⁸⁷ is narrowly conceived. Although no express statutory language mentions separate documents, the court read section 1-22-109(a) to require "a written relinquishment of the child *and* written consent to adoption . . ."⁸⁸ The court reasoned that because section 1-22-109(c) allowed consent anytime, but required written relinquishment after childbirth, section (a) must require two documents.⁸⁹ Therefore, the mother could give signed consent prior to delivery, but she could only agree to relinquish the child after birth.

The statutory interpretations seem inconsistent. The court liberally construed section 1-22-109(a) to mean "separate" consent and relinquishments were required, even though the word "separate" is not in the statute. However, it strictly construed the wording in section 1-22-109(c) by insisting that "consent" did not include relinquishment, although other sections using "consent" suggest that it does.⁹⁰

The court's strained construction apparently failed to satisfy the legislative intent. Immediately following publication of the first *BGD* decision, the 1986 Wyoming Legislature enacted section 1-22-109(e).⁹¹ It provides that "[t]he consent to adoption and the relinquishment of a child for adoption may be contained in a single instrument. A separate post-birth written or physical relinquishment is not required."⁹² The court is highly critical of the new legislation.⁹³ The new statute, however, allows consent and relinquishment to be signed at any time,⁹⁴ encouraging early and reliable adoption arrangements. This prevents delays between childbirth and placement, thus decreasing waiting periods which are psycho-

86. *BGD II*, 719 P.2d at 1373, 1378.

87. WYO. STAT. § 1-22-109 (1977 & Supp. 1986).

88. *BGD I*, 713 p.2a at 1193.

89. See *BGD I*, 713 P.2d at 1193.

90. The legislature, in several statutes, seems to suggest that the consent and relinquishment can be contained in the same document. The statutory language of § 1-22-109 *Consent to adoption*, does not specify that the consent and relinquishment must be separate documents. Also, WYO. STAT. § 1-22-107(a) (1977), amended by 1983 Wyo. Special Sess. Laws, ch. 16, § 1, allows a default judgment against a parent who does not consent to adoption and who fails to respond after notice of the adoption has been given. The statute refers to entry of the judgment for "consent" only. If the court's interpretation of § 1-22-109(a) is followed, it would be impossible to enter a default judgment for the adoptive parents, because a separate order of "relinquishment" would also be required. Section 1-22-107(a) does not address an order for relinquishment. See also *BGD I*, 713 P.2d at 1194 (Thomas, C.J., dissenting).

91. 1986 Wyo. Sess. Laws ch. 118.

92. WYO. STAT. § 22-109(e). See also 1986 Wyo. Sess. Laws, ch. 118.

93. *BGD II*, 719 P.2d at 1376. Justice Cardine, writing for the majority on rehearing, was extremely critical of the new legislation. He noted, "The statute was hastily written, poorly conceived and stands alone among the statutes of the fifty states."

94. WYO. STAT. § 1-22-109(e) (1986).

logically harmful to the development of a healthy adoptive parent-child relationship.⁹⁵

Despite recent statutory changes, the majority on rehearing encouraged the legislature to revise Wyoming's adoption statutes. The court urged statutory clarification of natural parent, adoptive parent, and child rights.⁹⁶ The court warned that "[i]f no action is taken it seems clear that we can expect more controversy and more litigation of this kind."⁹⁷

Departure from Precedent

The court failed to follow its own precedent of placing the child with those who can provide for his best welfare.⁹⁸ Adoption proceedings require the judge to act as a "wise, affectionate and careful parent."⁹⁹ Courts must grant custody in a manner promoting the child's welfare.¹⁰⁰ Determining the child's best welfare requires a complicated judicial comparison of factors including "the character and maturity of the parents, their commitment to the care of the child, the child's present bonds of affection, the family setting and stability . . . which together form the foundation for a stable and happy home for the child."¹⁰¹ Young children, lacking awareness of the biological family,¹⁰² become emotionally attached to the "psychological parent," who provides regular care and affection.¹⁰³ The earlier the child is permanently placed in the adoptive home, the stronger the psychological parent-child relationship will be.¹⁰⁴ If another adult displaces the psychological parent, the child regresses emotionally, socially and physically. The psychological parent's role cannot be as satisfactorily fulfilled by an adult who has been absent or inactive in the child's early care as by the original psychological parent.¹⁰⁵

In *BGD*, the child's best interest dictated that her three year relationship with her psychological parents should not have been interrupted. She should have been "protected against intrusion by the state on behalf of other adults."¹⁰⁶ In *Morris*, the Wyoming Supreme Court held that the

95. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 22, 35, 45-46 (1973) [hereinafter J. GOLDSTEIN]. It is also more difficult to find adoptive homes unless adoption consents are "consistently treated like irrevocable contracts." *Small v. Andrews*, 20 Or. App. 6, 530 P.2d 540, 545 (1975). Adoptive parents are less willing to become involved in a parent-child relationship which may be unexpectedly terminated.

96. *BGD II*, 719 P.2d at 1377-78.

97. *Id.* at 1378.

98. *In re Adoption of MM*, 652 P.2d 974, 980 (Wyo. 1982); *in re Adoption of DP and FP*, 583 P.2d 706, 709 (Wyo. 1978); *Morris v. Jackson*, 66 Wyo. 369, 380, 212 P.2d 78, 82 (1949); *Kennison v. Chokie*, 55 Wyo. 421, 427, 100 P.2d 97, 97 (1940).

99. *Finlay v. Finlay*, 240 N.Y. 429, 434, 148 N.E. 624, 626 (1925) (quoting *Queen v. Gynghall*, [1893] 2 Q.B. 232).

100. See J. GOLDSTEIN, *supra* note 95, at 11.

101. *S.O. v. W.S.*, 643 P.2d 997, 1006 (Alaska 1982) (quoting *In re Anderson*, 99 Idaho 805, 589 P.2d 957, 974 (1979) (Bakes, J., dissenting)).

102. J. GOLDSTEIN, *supra* note 95, at 17.

103. *Id.*

104. See *id.* at 22.

105. *Id.* at 18-19.

106. See *id.* at 105-106.

child's welfare superseded the biological parents' claims.¹⁰⁷ There, as in *BGD*, a violation of the adoption statutes could have blocked legal adoption, but the court left the child with the adoptive parents for his best welfare.¹⁰⁸ In *BGD*, the court failed to consider the child's psychological status or to follow precedent which has, until now, consistently solved these adoption dilemmas by adhering to the "best interests" policy.¹⁰⁹

The Wyoming Supreme Court also failed to consider prospective statutory application, a doctrine the court has previously applied to achieve the interests of justice.¹¹⁰ The child's protection should be the court's main concern when considering adoption issues.¹¹¹ The court's decision requiring separate consent and relinquishment documents and a post-birth relinquishment was based on a statutory interpretation not anticipated by the parties and not before the court.¹¹² Further, the delays which made displacement of the three-year-old so psychologically damaging were primarily attributable to the judicial system.¹¹³ Prospectively applying its decision would have avoided the delayed displacement of *BGD* and would have furthered the court's "best interest" standard, thus yielding a more reasonable result.

The Wyoming Supreme Court should adopt clear guidelines for adoption disputes which will better assist Wyoming courts and attorneys in protecting children's best interests. First, the court should allow a child full party status and separate legal counsel in disputes involving custody decisions or potential displacement from the child's present home.¹¹⁴ The child is an indispensable party;¹¹⁵ the results of the proceedings will directly affect his personal rights and interests. Adult parties represent their own hearts and minds.¹¹⁶ Second, the court should consider the natural parents' rights, but balance those rights with the child's best welfare. The child's welfare is the primary factor considered by courts in adoption cases

107. *Morris v. Jackson*, 66 Wyo. 369, 212 P.2d 78 (1949).

108. *Id.* at 389, 212 P.2d at 86.

109. *In re Adoption of MM*, 652 P.2d 974, 980 (Wyo. 1982); *In re Adoption of DP and FP*, 583 P.2d 706, 709 (Wyo. 1978); *Morris v. Jackson*, 66 Wyo. 369, 380, 212 P.2d 78, 82 (1949); *Kennison v. Chokie*, 55 Wyo. 421, 427, 100 P.2d 97, 97 (1940).

110. *Adkins v. Sky Blue, Inc.*, 701 P.2d 549, 551 (Wyo. 1985); *Ostwald v. State*, 538 P.2d 1298, 1303 (Wyo. 1975).

111. J. GOLDSTEIN, *supra* note 95, at 65, 66, 105, 108-10.

112. Appellee's Brief, Petition for Rehearing at 12. Contrary to the decision in *BGD*, the Wyoming Supreme Court has a standard appellate rule that "issues not raised before the trial court will not be considered for the first time on appeal." *In re State Bank Charter Application*, 606 P.2d 296, 300 (Wyo. 1980); see also *Scherling v. Kilgore*, 599 P.2d 1352, 1358 (Wyo. 1979); *Schaefer v. Lampert Lumber Co.*, 591 P.2d 1225, 1227 (Wyo. 1979).

113. The initial complaint was filed on April 29, 1983. The adoptive parents moved for summary judgment on August 8, 1983; that hearing was postponed until September 23, 1983 at the request of TD. The district court denied summary judgment six months later in March, 1984. The trial was delayed until June 28, 1984, at TD's request. The trial court found for the adoptive parents on February 28, 1985, twenty-two months after filing the initial complaint. Appeal to the Wyoming Supreme Court exhausted an additional fourteen months, ending with the rehearing decision on May 30, 1986. Appellees Brief on Order Granting Rehearing at 7-8, *BGD II* (No. 85-1).

114. J. GOLDSTEIN, *supra* note 95, at 65.

115. *Id.*

116. *Id.* at 65-66.

throughout the country and is strongly supported by child development specialists.¹¹⁷ Third, the court should appoint impartial, qualified child development agencies to evaluate and recommend conditions that constitute the child's best interest.¹¹⁸ Fourth, the child should not be displaced until after the final decision, nor should interim visitation rights be ordered if not previously established.¹¹⁹ These measures decrease the child's confusion and prevent what may be unnecessary psychological trauma. Finally, the court should protect the rights of the intervening biological or adoptive parent, as well as the child, by rapidly facilitating trials and appeals.¹²⁰ By establishing a timetable for hearings and decisions early in the litigation the court is more likely to resolve the dispute rapidly, minimizing psychological disruption for all parties.

CONCLUSION

Natural parents have the first right to custody of their children.¹²¹ Voluntary written consent and relinquishment to place a child for adoption, however, is irrevocable by statute and it terminates the natural parent's right to custody of the child.¹²² In *BGD*, the Wyoming Supreme Court construed the adoption statute to require written relinquishment both separate from the consent and effective only after delivery.¹²³ The legislature clearly disagreed with the court's statutory interpretations. It immediately passed new legislation specifically allowing consent to adoption and relinquishment to be contained in a single instrument with no post-birth relinquishments required.¹²⁴

The court's failure to follow its precedent of considering the child's best interest in adoption cases should cause great public and parental concern for the children who will find their futures placed in the hands of this court. The three-year-old child in *BGD* was taken from her psychological parents and placed with a family of strangers without evaluating or considering her developmental or physical well-being. The court rejected its long-standing practice of weighing the child's best interests above other factors. Instead, it applied the statutes strictly and chose to follow its "predilection to sustain the natural family."¹²⁵

117. *BGD II*, 719 P.2d at 1381-84. (Urbigkit, J., dissenting) (quoting *Natural Parent Preference*, 12 U.C.L.A.-ALASKA L. REV. at 149).

118. One author has detailed specific guidelines to evaluate a child's best interests in custody disputes. *Natural Parent Preference*, 12 U.C.L.A.-ALASKA L. REV. at 153.

119. J. GOLDSTEIN, *supra* note 95, at 101.

120. *Id.*

121. U.S. CONST. amend. XIV, § 1 (the due process clause); see *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Meyer v. Nebraska*, 262 U.S. 309, 399 (1923); see also *Natural Parent Preference*, 12 U.C.L.A.-ALASKA L. REV. 141 (1982-83).

122. See WYO. STAT. §§ 1-22-104, -109 (1977 & Supp. 1986); see also *id.* § 1-22-114(a) (1977).

123. *BGD I*, 713 P.2d at 1193.

124. WYO. STAT. § 1-22-109(e) (1986); see also 1986 Wyo. Sess. Laws ch. 118.

125. *BGD I*, 713 P.2d at 1193.

The court should reaffirm that its paramount concern in adoption cases is the child's best welfare. Revised legislation and adoption of judicial guidelines will further assure that the child's legal rights are more fully protected.

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