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Termination of Parental Rights: Putting Love in Its Place

Parentage is a very important profession; but no test of fitness for it is ever imposed in the interest of the children.

– *George Bernard Shaw*[1]

Shaw may have been an uncommonly perceptive social critic, but in this case he was only half right. Although men and women generally are not told whether they are fit to have children, courts often decide whether they are fit to *keep* them.[2] Statutes in almost every state permit courts to terminate the parental rights of individuals who abandon, abuse, or otherwise neglect their children.[3] North Carolina district courts[4] may "completely and permanently"[5] sever the parent-child relationship in such cases,[6] unless the judge specifically finds that termination of parental rights would not be in "the best interests of the

1. G. SHAW, EVERYBODY'S POLITICAL WHAT'S WHAT 74 (1944).

2. Removal of children from a dangerous environment is justified by the doctrine of *parens patriae* (literally, parent of the country). *Parens patriae* "traces back to the English Court of Chancery's recognition that the throne had a duty to protect every subject incapable of protecting himself, including children." Note, *Termination of Parental Rights: The Substantive Due Process Issue*, 26 ST. LOUIS U.L.J. 915, 917 (1982) (citing Eyre v. Shaftsbury, 24 Eng. Rep. 659, 664 (Ch. 1722)); *see also* Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205 (1971) (history of the *parens patriae* doctrine).

Shaw knew that courts sometimes take children away from their parents, but attributed the practice to something other than pure benevolence: "In certain rare cases like those of the poet Shelley and Annie Besant the State may take the children out of their parents' hands and make them wards in Chancery lest they should be brought up as atheists." G. SHAW, *supra* note 1, at 74.

3. *See* Bell, *Termination of Parental Rights: Recent Judicial and Legislative Trends*, 30 EMORY L.J. 1065, 1067 (1981).

4. "The district court shall have exclusive original jurisdiction to hear and determine any petition relating to termination of parental rights . . . ." N.C. GEN. STAT. § 7A-289.23 (Cum. Supp. 1983). The district courts' jurisdiction, however, is not in fact exclusive. Superior court clerks may terminate parental rights during an adoption proceeding if the child has been abandoned. *See id.* § 48-5 (1984). The North Carolina General Statutes Commission has proposed legislation that would end this practice and give genuinely exclusive jurisdiction over termination cases to the district courts. Letter from Floyd M. Lewis, Assistant Attorney General, to the Honorable Abner Alexander, Chief District Court Judge, 21st Judicial District (Jan. 11, 1985) (available at Institute of Government, University of North Carolina at Chapel Hill).

5. N.C. GEN. STAT. § 7A-289.33 (Cum. Supp. 1983). "Following an order of termination, the parent has no right to contact the child or to be notified of the child's location, welfare, or adoption by a third party." Bell, *supra* note 3, at 1068. Courts frequently have remarked on the severity of this action. *See, e.g.*, Davis v. Page, 618 F.2d 374, 379 (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) (en banc); *In re* William L., 477 Pa. 322, 370, 383 A.2d 1228, 1252 (Manderino, J., dissenting) ("[T]he child is dead so far as that parent is concerned."), *cert. denied*, 439 U.S. 880 (1978); *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 to life itself.").

Neglected children may be–and usually are–temporarily removed from their parents' homes before termination proceedings are initiated. During this period the children may be returned to the parents if the situation improves. *See infra* text accompanying notes 35-39.

6. Grounds for termination in North Carolina are set forth in N.C. GEN. STAT. § 7A-289.32 (1981 & Cum. Supp. 1983), which states in part:

child."[7] Unfortunately, there may be considerable disagreement about what constitutes neglect,[8] or what is in a child's best interests.[9] A recent North Carolina Supreme Court decision, *In re Montgomery*,[10] illustrates the difficulties inherent in using such ill-defined standards to justify breaking up a family.

David Maxwell and Geraldine Montgomery were the parents of four minor children.[11] The couple was not married,[12] and both individuals were mentally retarded.[13] Maxwell earned about $120 a week as a welder and handyman on a farm in Harnett County, North Carolina.[14] The family's small house "was sparsely furnished, having a single bed on which the parents slept and a mattress on the floor on which the four children slept."[15] In September 1980 the children were adjudged neglected[16] and temporary custody was awarded to the Harnett County Department of Social Services.[17] Maxwell later was ordered to pay thirty dollars a week for the support of his children while they were in foster

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> The court may terminate the parental rights upon a finding of one or more of the following:
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> . . . .
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> (2) The parent has abused or neglected the child. . . .
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> . . . .
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> (4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.
>
> . . . .
>
> (7) That the parent is incapable as a result of mental retardation, mental illness, organic brain syndrome, or any other degenerative mental condition of providing for the proper care and supervision of the child . . . and that there is a reasonable probability that such incapability will continue throughout the minority of the child.

7. N.C. GEN. STAT. § 7A-289.31(a) (1981); *cf. id.* § 7A-289.22(3) (1981) ("Action which is in the best interests of the child should be taken in all cases where the interests of the child and those of his parents or other persons are in conflict.").

8. *See infra* note 67. In North Carolina a child "who does not receive proper care, supervision, or discipline from his parent" is said to be neglected. N.C. GEN. STAT. § 7A-517(21) (1981). The full text of this minimally helpful definition is reproduced *infra* at note 23.

9. *See infra* text accompanying notes 51-55 and 95-99.

10. 311 N.C. 101, 316 S.E.2d 246 (1984).

11. *Montgomery*, 311 N.C. at 102, 316 S.E.2d at 248. The children, three girls and a boy, ranged in age from five to ten at the time of the termination hearing. *Id.* at 101-02, 316 S.E.2d at 246-48.

12. *Id.* at 103, 316 S.E.2d at 248. Maxwell testified that he and Montgomery had considered marriage but felt that they got along better without it. *See* Transcript of Termination Hearing at 15. The couple still lives together and they remain unmarried. Telephone interview with O. Henry Willis, attorney for Maxwell and Montgomery (Jan. 24, 1985).

13. *Montgomery*, 311 N.C. at 103, 316 S.E.2d at 248. Maxwell scored 54 on the Wechsler Adult Intelligence Test, which places him in the moderately retarded category. Montgomery scored 55, which is considered mildly retarded. Petition for Termination of Parental Rights at 4 (D. Montgomery). In addition to being retarded, Montgomery frequently insisted that "someone was looking in the windows of her house and also that someone was trying to get inside her mind. She continuously claimed, for a period of about 14 months, that she was pregnant, when in fact she had had a hysterectomy." *Montgomery*, 311 N.C. at 103, 316 S.E.2d at 248.

14. *Montgomery*, 311 N.C. at 103, 316 S.E.2d at 248.

15. *Id.* Other evidence of neglect included the older children's poor school attendance record and a lack of food in the house. *Id.* at 103, 316 S.E.2d at 248-49.

16. Neglect proceedings typically precede—and are distinct from—actions for termination of parental rights. *See infra* text accompanying notes 35-40.

17. *Montgomery*, 311 N.C. at 104, 316 S.E.2d at 249.

care, but during the next forty-five weeks only three payments were made.[18] The county Department of Social Services filed a petition for termination of parental rights, and the district court entered an order against Maxwell and Montgomery in January 1982,[19] "citing as grounds neglect by the mother and both neglect and a failure to pay a reasonable [portion of the] cost of care by the father."[20]

The North Carolina Court of Appeals overturned the trial court's termination order.[21] A three-judge panel[22] in *In re Montgomery* held that the statutory definition of child neglect[23] "is sufficiently broad to allow interpretation by the courts and the engrafting of some requirement that due consideration be given to non-economic or non-physical indicia."[24] Therefore, the court concluded that before terminating parental rights because of neglect, trial courts must "determine whether love, affection, and the other intangible qualities to be found in a family relationship actually exist. . . ."[25] The district court had made no such findings, and consequently its decision in *Montgomery* was vacated.[26]

The North Carolina Supreme Court unanimously reversed the court of appeals and substantially reinstated the judgment of the trial court.[27] In a wide-ranging opinion by Justice Copeland, the supreme court held that "the Termination of Parental Rights statute as drafted provides an appropriate forum to address the 'intangible needs' issue, as well as protects a parent's interest in preserving the family."[28] Thus, it concluded that the court of appeals' requirement of "a separate and distinct finding regarding the adequate fulfillment of a

18. *Id.* Maxwell attributed his nonpayment to a failed hog farming venture. Transcript of Termination Hearing at 18.

19. *See Montgomery*, 311 N.C. at 104, 316 S.E.2d at 249.

20. *Id.* at 102, 316 S.E.2d at 248; *see also supra* note 6 (grounds for terminating parental rights). The trial court held N.C. GEN. STAT. § 7A-289.32(7) (1981), which permits termination based on a parent's mental incapacity, to be unconstitutional. *See Montgomery*, 311 N.C. at 116, 316 S.E.2d at 256. This decision later was reversed by the North Carolina Supreme Court. *See infra* note 29.

21. *In re* Montgomery, 62 N.C. App. 343, 303 S.E.2d 324 (1983), *rev'd*, 311 N.C. 101, 316 S.E.2d 246 (1984).

22. The panel included Judge Hill, who wrote the opinion, and Judges Johnson and Phillips.

23. N.C. GEN. STAT. § 7A-517(21) (1981) defines a neglected juvenile as an individual

> who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.

N.C. GEN. STAT. § 7A-517(21) was held constitutional in *In re* Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), *appeal dismissed*, 459 U.S. 1139 (1983).

24. *In re* Montgomery, 62 N.C. App. 343, 349, 303 S.E.2d 324, 327 (1983), *rev'd*, 311 N.C. 101, 316 S.E.2d 246 (1984).

25. *Id.* at 353, 303 S.E.2d at 330. The court of appeals also held that the trial judge's findings of fact did not support his conclusion that Maxwell had failed to pay a reasonable portion of the cost of caring for his children while they were in the custody of the Department of Social Services. *Id.* at 354-55, 303 S.E.2d at 330. This portion of the court of appeals' opinion, in addition to the portion discussed in the text of this Note, was reversed by the supreme court. *See Montgomery*, 311 N.C. at 113-14, 316 S.E.2d at 253-54; *infra* note 29.

26. *Montgomery*, 62 N.C. App. at 355, 303 S.E.2d at 330.

27. *In re* Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

28. *Id.* at 108, 316 S.E.2d at 251.

child's intangible and non-economic needs . . . is not justified."[29] This Note first examines the supreme court's treatment of the intangible needs issue, and then suggests three ways in which North Carolina's procedures for termination of parental rights should be clarified to better protect the interests of both children and their parents.

Child abuse and neglect are among the oldest and most intractable problems facing our society.[30] Nationwide, more than half a million children are wards of the state.[31] As of September 1984, North Carolina county departments of social services had custody of 6853 children, most of whom had been abused, abandoned, or neglected by their parents or guardians.[32] During fiscal year 1983-84 there were 6642 confirmed cases of child abuse and neglect in North Carolina; another 9901 cases were reported but not confirmed.[33] Although relatively few of these cases end up in juvenile court, and fewer still lead to termination of parental rights,[34] the magnitude of the problem is readily apparent.

Given the severe consequences of an order terminating parental rights,[35]

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29. *Id.* Regarding Maxwell's failure to pay a reasonable portion of the cost of foster care for his children, *see supra* note 25, the supreme court determined that,

> A parent's *ability to pay* is the controlling characteristic of what is a 'reasonable portion' of [the] cost of foster care.... A parent is required to pay that portion of the cost of foster care. . . . that is fair, just, and equitable *based upon the parent's ability or means to pay.*

Id. at 113, 316 S.E.2d at 254 (quoting *In re* Clark, 303 N.C. 592, 603-04, 28 S.E.2d 47, 55 (1981). The court stated further that "[w]e believe there was ample evidence from which the trial court could conclude that respondent Maxwell failed to pay a reasonable portion of the costs of care of the children." *Id.* at 114, 316 S.E.2d at 254.

Although the trial court had declared N.C. GEN. STAT. § 7A-289.32(7) (1981)—which permits termination of parental rights in cases of mental incapacity—to be unconstitutional, *see supra* note 20, the issue was not raised by either party in the court of appeals. *See Montgomery*, 311 N.C. at 114, 316 S.E.2d at 254. It was raised in the supreme court, however, and the judgment of the trial court was reversed. *Id.* at 114-16, 316 S.E.2d at 254-56. The court held that termination of parental rights for reasons of long-term mental incapacity does not violate either the due process or the equal protection provisions of the fourteenth amendment. *Id.* The supreme court thus followed the example of several other states. *See, e.g., In re* Appeal in Maricopa County Juvenile Action, 27 Ariz. App. 420, 555 P.2d 679 (1976); *In re* David B., 91 Cal. App. 3d 184, 154 Cal. Rptr. 63 (1979); *In re* J.C., 242 Ga. 737, 251 S.E.2d 299 (1978), *appeal dismissed sub nom.* Crane v. Carroll County Dep't of Family and Children Servs., 441 U.S. 929 (1979); People *ex rel.* Nabstedt v. Barger, 3 Ill. 2d 511, 121 N.E.2d 781 (1954); *In re* Atkins, 112 Mich. App. 528, 316 N.W.2d 477 (1982); *In re* Sylvia M., 82 A.D.2d 217, 443 N.Y.S.2d 214 (1981), *aff'd*, 57 N.Y.2d 636, 439 N.E.2d 870, 454 N.Y.S.2d 61 (1982); Department of Human Servs. v. Ogle, 617 S.W.2d 652 (Tenn. App. 1980).

30. *See* Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C.L. REV. 293 (1972).

31. *See* Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423 (1983).

32. Memorandum from Sue Glasby, Head, Children's Services Branch, N.C. Division of Social Services, to Permanent Families Task Force, Attachment A (Oct. 23, 1984) (available at Institute of Government, University of North Carolina at Chapel Hill) [hereinafter cited as Memorandum]. Of the 6853 children in Department of Social Services custody, 822 had been abused, 129 had been abandoned, and 3413 had been neglected. *Id.*

33. *Id.* at Attachment D. These figures break down to 11,181 reports of neglect (4980 confirmed) and 5362 reports of abuse (1662 confirmed). *Id.* The major contributing factors in confirmed abuse and neglect reports were the parents' lack of child development knowledge, mental retardation and emotional disturbance, and alcohol abuse. *Id.*

34. Interview with Janet Mason, Institute of Government, University of North Carolina at Chapel Hill (Feb. 18, 1985). Exact figures are unavailable. *See infra* note 41 and accompanying text.

35. *See supra* note 5.

the State typically begins action against parents in juvenile cases by petitioning for an adjudication of neglect, abuse, or dependency.[36] If the court finds the complaint valid, it may award custody of the children involved to the State or to some other foster care provider,[37] subject to periodic review.[38] Although an award of custody in these cases permits the reunification of parents and children if conditions in the home improve,[39] an initial judgment of neglect often results in permanent separation.[40]

Because North Carolina only recently began keeping track of termination petitions,[41] little is known about how often or how quickly the State cuts off parental rights in cases of child abuse and neglect.[42] Termination procedures

36. *See* N.C. GEN. STAT. § 7A-561(b) (1981); 4 R. LEE, NORTH CAROLINA FAMILY LAW § 292 (1979) (quoting H. KRAUSE, FAMILY LAW IN A NUTSHELL § 20.7 (1977)).

37. *See* N.C. GEN. STAT. § 7A-647(2) (1981).

38. *See id.* § 7A-657 (1981). "[T]he judge shall conduct a review within six months of the date the order was entered, and shall conduct subsequent reviews at least every year thereafter." *Id.*

39. *See id.*

40. As of September 1984, only about one-third of the 6853 children in the custody of the North Carolina Division of Social Services placement authority were expected to return home. *See* Memorandum, *supra* note 32, at Attachment A.

41. Telephone interview with Virginia Weisz, Administrator, Guardian Ad Litem Program, N.C. Administrative Office of the Courts (Jan. 24, 1985). Record-keeping began in the summer of 1984 and should be reflected in the Administrative Office of the Courts' next annual report. *Id.*

42. Cases reaching the appellate level indicate that in many instances termination of parental rights is not only justifiable, but arguably overdue. *See, e.g., In re* Adcock, 69 N.C. App. 222, 316 S.E.2d 347 (1984) (child beaten; parents failed to provide adequate food and clothing); *In re* Pierce, 67 N.C. App. 257, 312 S.E.2d 900 (1984) (child born with fetal alcohol syndrome; mother convicted of heroin possession and prostitution); *In re* Apa, 59 N.C. App. 322, 296 S.E.2d 811 (1982) (father's only contribution to child's support in 11 years was gift of bicycle); *In re* Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982) (children frequently dirty, unfed, and urine soaked; parents failed to provide medical care); *In re* Smith, 56 N.C. App. 142, 287 S.E.2d 440 (mother with tuberculosis refused to arrange separate living quarters for infant and later abandoned children), *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982); *In re* Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981) (mother had severe drug and alcohol problems; home infested with pests due to debris and garbage). These extreme examples of neglect and abuse make the evidence against the parents in *Montgomery* seem rather weak by comparison. See *supra* notes 12-20 and accompanying text.

The hair-raising nature of so many published cases also seems to contribute to the failure of most constitutionally based attacks on termination statutes. *See generally* Annot., 22 A.L.R.4th 774 (1983) (compilation of cases discussing constitutionality of state termination statutes). Courts frequently have rejected claims that the provisions of termination statutes are impermissibly vague. *See, e.g., In re* Ladewig, 34 Ill. App. 3d 393, 340 N.E.2d 150 (1975); *In re* Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), *appeal dismissed sub nom.* Moore v. Guilford County Dep't of Social Servs., 459 U.S. 1139 (1983); *In re* J.Z., 190 N.W.2d 27 (N.D. 1971); State v. McMaster, 259 Ore. 291, 486 P.2d 567 (1971); *In re* D.T., 89 S.D. 590, 237 N.W.2d 166 (1975); D—F— v. State, 525 S.W.2d 933 (Tex. Civ. App. 1975). *Contra* Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976); Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd in part per curiam*, 545 F.2d 1137 (8th Cir. 1976); Davis v. Smith, 266 Ark. 112, 583 S.W.2d 37 (1979).

Some state courts have applied strict scrutiny when examining the constitutionality of termination statutes, *see, e.g., In re* David B., 91 Cal. App. 3d 184, 192-93, 154 Cal. Rptr. 63, 68-69 (1979), although this does not appear to be the practice in North Carolina. *See Montgomery*, 311 N.C. at 115, 316 S.E.2d at 255 (statute merely required to have "rational relation" to state interests). The United States Supreme Court has recognized "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child," Santosky v. Kramer, 455 U.S. 745, 753 (1982), but has gone only so far as to say that "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* at 753-54; *see also Montgomery*, 311 N.C. at 106, 316 S.E.2d at 250 (asserting that *Santosky* holding confined to consideration of procedural due process claims).

Courts often reject equal protection challenges to termination statutes. *See In re* Appeal in Maricopa County Juvenile Action, 27 Ariz. App. 420, 555 P.2d 679 (1976); *In re* Adoption of Ah-

begin when a qualified party,[43] frequently a county department of social services, files a petition in district court alleging one or more of the grounds set forth in North Carolina General Statutes section 7A-289.32.[44] A formal hearing is conducted,[45] at which the petitioner must prove by "clear, cogent, and convincing evidence"[46] that at least one of the alleged grounds for termination exists.[47] If the petitioner satisfies this burden, the court is required to issue an order terminating parental rights unless it specifically finds that such action would not be in the best interests of the child.[48]

Termination of parental rights is the method by which the State frees children for adoption without the consent of their parents.[49] Thus, the termination statute ostensibly furthers the State's policy of providing abused and neglected children "a permanent plan of care at the earliest possible age."[50] The permanence and stability envisioned by the statute are largely illusory, however, because relatively few children removed from their parents ever get adopted.[51] "[E]xisting evidence suggests that children removed by the state from the home of their parents are often destined to remain in limbo until adulthood, wards of a

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med, 44 Cal. App. 3d 810, 118 Cal. Rptr. 853 (1975); Chandler v. Cochran, 247 Ga. 184, 275 S.E.2d 23, *cert. denied*, 454 U.S. 872 (1981); *In re* Adoption of Baby Boy L., 231 Kan. 199, 643 P.2d 168 (1982); *In re* Atkins, 112 Mich. App. 528, 316 N.W.2d 477 (1982); *Montgomery*, 311 N.C. at 116, 316 S.E.2d at 255-56. *Contra* Miller v. Miller, 504 F.2d 1067 (9th Cir. 1974); Helvey v. Rednour, 86 Ill. App. 3d 154, 408 N.E.2d 17 (1980); *In re* Miller, 105 Misc. 2d 41, 430 N.Y.S.2d 1007 (Fam. Ct. 1980); *In re* Adoption of Walker, 468 Pa. 165, 360 A.2d 603 (1976).

43. Termination petitions may be filed by either parent against the other, by a child's judicially appointed guardian, by a county department of social services or licensed child placing agency that has custody of the child, by anyone with whom the child has resided for the immediately preceding two years, or by the child's guardian ad litem. *See* N.C. GEN. STAT. § 7A-289.24 (1981 & Cum. Supp. 1983).

44. *See id.* §§ 7A-289.25(6), -.32 (1981); *see also supra* note 6 (list of grounds for termination).

45. The hearing is conducted by a judge, sitting without a jury. N.C. GEN. STAT. § 7A-289.30(a) (1981). Indigent parents have a right to state appointed counsel in termination proceedings. *Id.* § 7A-289.30(al) (1981). *But see* Lassiter v. Department of Social Servs., 452 U.S. 18, 26-27 (1981) (no absolute right to counsel in termination cases).

46. N.C. GEN. STAT. § 7A-289.30(e) (1981); *see also* Santosky v. Kramer, 455 U.S. 745, 769 (1982) (constitutional requirement of clear and convincing evidence to establish grounds for termination).

47. Any one of the grounds stated in N.C. GEN. STAT. § 7A-289.32 (1981) is sufficient to support an order terminating parental rights. *See Montgomery*, 311 N.C. at 110, 316 S.E.2d at 252; *In re* Adcock, 69 N.C. App. 222, 227, 316 S.E.2d 347, 349 (1984).

48. N.C. GEN. STAT. § 7A-289.31(a) (1981); *see supra* text accompanying note 7. The theoretically bifurcated nature of this proceeding—an adjudicatory hearing followed by a dispositional phase—was crucial to the supreme court's decision in *Montgomery*. *See infra* text accompanying notes 76-83. Bifurcation in theory, however, may not be bifurcation in fact. *See infra* text accompanying notes 85-86.

49. *See* N.C. GEN. STAT. § 7A-289.33 (1981 & Cum. Supp. 1983).

50. *Id.* § 7A-289.22(2) (1981).

51. The North Carolina Division of Social Services found adoptive parents for 732 children in fiscal year 1983-84. Memorandum, *supra* note 32. This was a considerable improvement over the year before, when 460 were placed, *id.*, but still represents only a small fraction of the total number of children in Department of Social Services custody. The difficulty in placing children whose parents' rights have been terminated can be especially acute: "Almost all these children, by the time you get around to terminating parental rights, are older or handicapped in some way. So many of them have special problems that make them hard to place." Telephone interview with Sue Glasby, Head, Children's Services Branch, N.C. Division of Social Services (Jan. 24, 1985) [hereinafter cited as Telephone interview with Sue Glasby]; *see also* Santosky v. Kramer, 455 U.S. 745, 765 n. 15 (1982) (termination of parental rights does not ensure adoption).

largely indifferent state."[52] Children in foster care tend to bounce from one placement to another,[53] a phenomenon known as "foster care drift."[54] Termination of parental rights, in other words, is no panacea. If the only thing most neglected children have to look forward to is a bureaucratic journey toward emancipation, one might reasonably ask how often termination orders actually are in the children's best interests.[55]

The court of appeals may have had the inadequacies of the child welfare system in mind when it made its unique[56] and ultimately short-lived decision in *In re Montgomery*.[57] In addition, the panel was required to consider the due process rights of the parents,[58] as well as the state's interest in its role as *parens patriae*.[59] The court began by acknowledging "the due process evolution that has taken place in the area of parental rights."[60] According to Judge Hill, this evolution began in 1972, when the United States Supreme Court recognized the "essential" right to "conceive and raise one's children."[61] It culminated in the case of *Santosky v. Kramer*,[62] in which the Court held that the due process rights of parents required petitioners to prove grounds for termination of parental rights by clear and convincing evidence.[63] The court of appeals acknowledged that the *Santosky* holding had been limited to "matters of procedural due process,"[64] but nonetheless focused on the case's supposed "substantive importance":[65]

> *Santosky* did not attempt to state specifically what must be shown and what quantum of proof must exist to justify a termination of parental

52. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 273 (Summer 1975). As of Dec. 31, 1984, children in the placement authority of the Division of Social Services had been there an average of 3 years for white children, 4.1 years for black children, and 5 years for Indian children. Telephone interview with Sue Glasby, *supra* note 51; *see also* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 833-38 (1977) (describing the "limbo" of the New York foster care system).

53. Telephone interview with Sue Glasby, *supra* note 51; *see* Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 994 (1975).

54. *See* Garrison, *supra* note 31, at 426.

55. *See In re* Moore, 306 N.C. 394, 413-15, 293 S.E.2d 127, 138-39 (1982) (Carlton, J., dissenting). One might argue that termination of parental rights, which at least opens up the possibility of adoption, is preferable to leaving children in the limbo of permanent foster care. *See, e.g., In re* Biggers, 50 N.C. App. 332, 343, 274 S.E.2d 236, 243 (1981). On the other hand, "[t]ermination of parental rights . . . should look . . . to the likelihood that the child in question will find suitable adoptive parents. Except in unusual circumstances, there is nothing to be gained by terminating parental rights where no effective parental substitute can be provided by way of adoption." H. KRAUSE, FAMILY LAW IN A NUTSHELL §20.7 (1977).

56. "The Court of Appeals ruling is believed to be the first to instruct judges specifically to consider parental love." Charlotte Observer, Jun. 9, 1983, at 1B, col. 2. The holding caused "an uproar" among North Carolina child welfare officials. Interview with Janet Mason, Institute of Government, University of North Carolina at Chapel Hill (Jan. 24, 1985).

57. 62 N.C. App. 343, 303 S.E.2d 324 (1983), *rev'd*, 311 N.C. 101, 316 S.E.2d 246 (1984).

58. *See supra* note 42.

59. *See supra* note 2 and accompanying text.

60. *Montgomery*, 62 N.C. App. at 347, 303 S.E.2d at 326.

61. *Id.* (citing Stanley v. Illinois, 405 U.S. 645 (1972)).

62. 455 U.S. 745 (1982).

63. *Id.* at 769.

64. *Montgomery*, 62 N.C. App. at 348, 303 S.E.2d at 326.

65. *Id.* at 348, 303 S.E.2d at 327.

rights. Nevertheless, the Court appeared to endorse an approach that would take into account more than physical or economic factors; an approach that would reflect some consideration by the trial judge of all the circumstances of the parent-child relationship in each individual case. The Court noted that termination proceedings "often required the fact finder to . . . decide issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection between parent and child, and failure of parental foresight and progress."[66]

The words "absence of affection" must have hit a responsive chord in the court's collective mind, because Judge Hill devoted a great deal of his opinion to that subject. Taking advantage of the vague statutory definition of child neglect,[67] the court held that trial courts must consider noneconomic and nonphysical indications of parental fitness in termination cases.[68] Before terminating parental rights on the basis of neglect, trial courts were required to supplement the statutorily mandated findings of fact[69] with evidence concerning the parents' love and affection for their children.[70]

The supreme court reversed,[71] stating that "the Court of Appeals, in contravention of our Legislature's intent, erroneously elevated the burden of proof required in proceedings terminating parental rights."[72] Due process, according

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66. *Id.* (quoting *Santosky*, 455 U.S. at 769).

67. *See supra* notes 23-24 and accompanying text. Although the statutory defintition of neglect has survived constitutional challenges based on vagueness, *see In re* Moore, 306 N.C. 394, 293 S.E.2d 127 (1982); *In re* Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982), phrases such as "proper care, supervision, and discipline" are nonetheless subject to a wide range of interpretations. The court of appeals has ruled that the terms used in the statutory definition "are given a precise and understandable meaning by the normative standards imposed upon parents by our society," *In re* Biggers, 50 N.C. App. 332, 341, 274 S.E.2d 236, 241 (1981), but this kind of precision is not very useful in a difficult case such as *Montgomery*. It has been argued, however, that the statutory definition of neglect must be rather vague if it is to protect the interests of children in a wide variety of circumstances. *See Biggers*, 50 N.C. App. at 342, 274 S.E.2d at 242 ("This context requires flexibility in the weighing of each case's facts in order to give the child, as well as the parent, the highest form of due process."); H. KRAUSE, *supra* note 55, § 20.3, at 236 ("Statutes *need* to be flexible to provide the necessary broad discretion to the courts."); Note, *Application of the Vagueness Doctrine to Statutes Terminating Parental Rights*, 1980 DUKE L.J. 336, 355.

68. *See Montgomery*, 62 N.C. App. at 349, 303 S.E.2d at 327.

69. *See* N.C. GEN. STAT. § 7A-289.30(d) (1981).

70. *See Montgomery*, 62 N.C. App. at 353, 303 S.E.2d at 330.

71. *In re* Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

72. *Id.* at 106, 316 S.E.2d at 250. The supreme court arguably misinterpreted the court of appeals' opinion on this point. The lower court, according to Justice Copeland:

> held that the clear, cogent, and convincing evidence standard of proof requires the party seeking termination of parental rights for neglect to prove not only that the physical and economic needs of the child are not adequately met, but also that the intangible non-economic needs of a child are not adequately met.

Id. at 104-05, 316 S.E.2d at 249. This is not quite what the court of appeals held. It merely required the trial court in termination cases to make specific findings regarding love and affection, *and to take them into consideration. Montgomery*, 62 N.C. App. at 353-54, 303 S.E.2d at 329-30. Judge Hill's opinion clearly indicated that whatever the weight of nonphysical, noneconomic indicia, evidence of physical and financial neglect could be controlling in a given case. *Id.* at 353, 303 S.E.2d at 329.

Even though the supreme court seems to have misinterpreted the court of appeals' ruling, the ultimate holding can be justified as an exercise of judicial restraint. *See infra* text following note 99. The lower court's opinion clearly engrafted an extra *procedural* requirement onto the termination statute, *see Montgomery*, 62 N.C. App. at 349, 303 S.E.2d at 327, and therefore increased the burden

to Justice Copeland, is satisfied when the petitioner has proved grounds for termination as they are set forth in the termination statute.[73] Therefore, the court held that the lower court had erred in requiring separate findings concerning the fulfillment of a child's intangible, noneconomic needs.[74]

> Where the evidence shows that a parent has failed or is unable to adequately provide for his child's physical and economic needs . . . and it appears that the parent will not or is not able to correct those inadequate conditions within a reasonable time, the court may appropriately conclude that the child is neglected. . . . [T]he fact that the parent loves or is concerned about his child will not necessarily prevent the court from making a determination that the child is neglected.[75]

The supreme court did not dispute the importance of love and affection in family relationships.[76] Rather, it held that these intangible factors should be taken into consideration at the *dispositional* stage of a termination proceeding–not during the adjudicatory phase.[77] The purpose of the adjudicatory hearing[78] is to determine whether grounds for termination exist under section 7A-289.32, which says nothing about love or affection.[79] The dispositional phase,[80] on the other hand, is relatively open-ended. Even if grounds for termination have been established, "the [trial] court's decision to terminate parental rights is discretionary."[81] The trial judge may dismiss a petition for termination if, in his opinion, termination of parental rights would not be in the best interests of the child.[82] Thus, intangibles such as love and affection not only are relevant at the dispositional phase–they may be controlling.[83]

The *Montgomery* holding, while seemingly straightforward, raises at least three important questions. First, what exactly did the supreme court mean by its bifurcated approach to termination hearings? The court of appeals seems to have envisioned a unitary proceeding in which the adjudicatory and dispositional phases are merged for all practical purposes.[84] North Carolina's termination statute does not explicitly require separate hearings,[85] and common practice

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on petitioners beyond what was intended by the legislature. *Montgomery*, 311 N.C. at 106, 316 S.E.2d at 250. Moreover, the supreme court made room for consideration of the intangibles during the dispositional phase of termination proceedings. *See infra* text accompanying notes 76-83.

73. *See Montgomery*, 311 N.C. at 108-09, 316 S.E.2d at 251; *see also supra* note 6 (text of statute setting forth neglect grounds for termination).

74. *See Montgomery*, 311 N.C. at 108, 316 S.E.2d at 251.

75. *Id.* at 109, 316 S.E.2d at 252. The supreme court, again overruling the court of appeals, determined that there was substantial evidence supporting a determination of neglect on the part of Maxwell and Montgomery. *See id.* at 111, 316 S.E.2d at 253. Therefore the judgment of the trial court was reinstated.

76. *Id.* at 107, 316 S.E.2d at 250.

77. *See id.* at 107-08, 316 S.E.2d at 251; *see also supra* text accompanying notes 43-48 (synopsis of termination procedure).

78. *See* N.C. GEN. STAT. § 7A-289.30 (1981).

79. *See supra* note 6.

80. *See* N.C. GEN. STAT. § 7A-289.31 (1981 & Supp. 1983).

81. *Montgomery*, 311 N.C. at 110, 316 S.E.2d at 252.

82. *Id.* at 107, 316 S.E.2d at 251.

83. *See id.*

84. *See Montgomery*, 62 N.C. App. at 353-54, 303 S.E.2d at 329-30.

85. *See* N.C. GEN. STAT. §§ 7A-289.30 to .31 (1981 & Supp. 1983).

seems to favor a unitary approach.[86] The supreme court's opinion in *Montgomery* makes little sense, however, unless there is some clear distinction between the adjudicatory and dispositional stages of a termination proceeding.[87]

Second, what is the proper burden of proof in the dispositional phase, and who should bear it? Although the petitioner must prove grounds for termination by "clear, cogent, and convincing evidence,"[88] the statute is silent as to the evidentiary standard governing disposition; nothing is said about which party must prove what is in the child's best interests, or what the quantum of that proof must be.[89] Some have suggested that once grounds for termination have been established, the parents should bear the burden of proving that termination would not benefit the child.[90] The supreme court in *Montgomery* simply stated that disposition is "discretionary,"[91] and strongly implied that the trial judge at this point is on his own.[92] Given that termination of parental rights often results in no demonstrable benefit to the children involved,[93] the best practice in these cases would be to make petitioners prove by at least a preponderance of the evidence that termination would be in the best interests of the children.[94]

Third, what besides love and affection should trial courts consider at the

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86. Appellate records filed in *Montgomery* and other termination cases indicate that evidence typically is taken at a single hearing, after which the judge issues an order that combines his findings concerning grounds for termination and his disposition of the case. See Records on Appeal for *In re* Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984), *In re* Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982), and *In re* Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981).

87. Some states permit, but do not require, separate adjudicatory and dispositional hearings in termination cases. *See, e.g.*, MONT. CODE ANN. § 41-3-607 (1983); WIS. STAT. ANN. § 48.424 (West Supp. 1984). Separate hearings often are required, however, in an initial neglect proceeding, when the petitioner seeks removal of a child from its parents' custody. *See* IOWA CODE ANN. §§ 232.96, -.99 (West 1985); MONT. CODE ANN. § 41-3-404 (1983); N.C. GEN. STAT. §§ 7A-639 to -640 (1981); WASH. REV. CODE ANN. § 13.34.110 (Supp. 1985); Singleman, *A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings*, 17 ARIZ. L. REV. 1055, 1077 (1975); *see also supra* text accompanying notes 35-40 (describing typical pretermination actions taken by state in cases of neglect).

88. N.C. GEN. STAT. § 7A-289.30(e) (1981); *Montgomery*, 311 N.C. at 110, 316 S.E.2d at 252.

89. *See* N.C. GEN. STAT. § 7A-289.31 (1981 & Supp. 1983). The statute, however, does state that when grounds for termination have been proved, "the court *shall* issue an order terminating . . . parental rights . . . *unless* the court shall further determine that the best interests of the child require that . . . parental rights . . . not be terminated." *Id.* (emphasis added). Thus, it can be argued that the burden of proving that termination would not benefit the child is on the parents at this point. *See infra* note 90 and accompanying text. *But cf. infra* text accompanying notes 91-92 (supreme court does not seem to accept this view).

90. This position was argued by the *Montgomery* appellants and their allies before the supreme court. They contended that "at the dispositional stage of a termination case there is a presumption or inference in favor of termination; and . . . the parent should bear the burden of establishing by a preponderance of the evidence that the best interests of the child require that rights not be terminated." Brief for *Amicus Curiae* Mecklenburg County Department of Social Services at 5; *see also* Brief for Appellants at 14-15 (making similar assertions).

91. *Montgomery*, 311 N.C. at 110, 316 S.E.2d at 252.

92. *See id.*

93. *See supra* text accompanying notes 51-55.

94. In some states the court is required to find by clear and convincing evidence that termination would be in the child's best interests. *See, e.g.*, ME. REV. STAT. ANN., tit. 22, § 4055(1)(B)(2)(a) (Supp. 1984); TENN. CODE ANN. § 37-1-147(d) (1984). In addition to protecting children from unwarranted state action, such a rule acknowledges the "fundamental liberty interest of natural parents in the care, custody, and management of their child." *Santosky*, 455 U.S. at 753; *see supra* note 42.

dispositional stage of a termination hearing? Both the statute and the *Montgomery* opinion state that termination decisions are controlled by the best interests of the child.[95] Neither authority, however, spells out how those interests are defined.[96] A comprehensive list of relevant factors probably would be endless, but the trial court should be required to enter at least some findings of fact in support of its disposition.[97] For example, a child's adoptability surely is relevant to whether termination of parental rights would be in his best interests;[98] if a child cannot be placed, termination of parental rights can do him little good.[99]

The North Carolina legislature's definition of child neglect may be vague, but that does not justify the court of appeals' attempt to increase the statutory burden on petitioners in termination cases. Thus, the supreme court's reversal in *Montgomery* was an appropriate exercise of judicial restraint. The court should be commended, moreover, for recognizing the importance of love and affection in termination cases and for putting such considerations in their proper place. Nevertheless, questions and concerns about North Carolina's termination procedures persist in the wake of *Montgomery*. The supreme court should clarify the extent to which termination hearings must be bifurcated, so that proper consideration can be given to the different issues at stake in the adjudicatory and dispositional phases. The burden of proving that termination is in the best interests of the child should be placed squarely on the petitioner in order to protect

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95. N.C. GEN. STAT. § 7A-289.22(3) (1981 & Supp. 1983); *Montgomery*, 311 N.C. at 116, 316 S.E.2d at 256.

96. Wisconsin courts, by way of contrast, have been given explicit guidance by the legislature:

> In considering the best interests of the child . . . 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 was 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 the 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.1984).

97. Termination orders typically make a conclusory statement to the effect that termination of parental rights is in the child's best interests. Findings of fact supporting grounds for termination are included in the order, but there generally are no *separate* findings demonstrating why termination is in the best interests of the child. See Records on Appeal for *In re* Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984), *In re* Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982), and *In re* Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981). Much of the evidence will support both conclusions, of course, but there also may be situations in which the proof establishing grounds for termination is not sufficient to prove that termination is in the best interests of the child. *See Montgomery*, 311 N.C. at 107, 316 S.E.2d at 251.

98. *See supra* note 96.

99. *See* V. DEFRANCIS, TERMINATION OF PARENTAL RIGHTS 15 (1971); *supra* note 55. The court of appeals has ruled that trial judges need not find that a child is highly adoptable before terminating parental rights, *In re* Norris, 65 N.C. App. 269, 310 S.E.2d 25 (1983), *cert. denied*, 310 N.C. 744, 315 S.E.2d 703 (1984), but some district court judges reportedly consider adoptability to be a key factor in their termination decisions: "Some judges think there should be a home waiting before parental rights are terminated. Some [child care] professionals feel that way too." Telephone interview with Sue Glasby, *supra* note 51.

the due process rights of both children and their parents. The factors to be considered in determining a child's best interests should be elucidated. Courts may be justified in deferring to the legislature on some of these matters, but judicial restraint should not be an excuse for inaction when such vital relationships hang in the balance.

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