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Baby Richard and Beyond: The Future for Adopted Children

ANTHONY S. ZITO

INTRODUCTION

On April 30, 1995, the Baby Richard case came to a much anticipated end when Otakar Kirchner, accompanied by his wife and attorneys, arrived at “Baby Richard’s” home. Pulling him from his adoptive mother’s arms and carrying him into an awaiting minivan, Baby Richard was taken by his biological parents to begin another life.

The Illinois Supreme Court ruled that married parents cannot be deprived of the care, custody and control of their child for the sole reason that it would be in the child’s best interests. Rather, a natural parent must first be found unfit. In addition, a determination that a parent does not have physical custody of a child enables a non-parent to demand a custody hearing under the Marriage and Dissolution of Marriage Act using the best interests of the child standard. This custody hearing outcome, however, does not turn on possession of the child, but instead requires a showing that the parent somehow voluntarily and indefinitely relinquished custody of the child through calculated decision or abandonment.

While the Baby Richard case has an interesting history, the effects are only just beginning to surface. One could question whether the logic surrounding the Illinois Supreme Court’s decision was sound. Further, one wonders if the law that allegedly protects adopted, illegitimate and abandoned

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2. Kirchner, 649 N.E.2d at 331; Quilloin, 434 U.S. at 255 (citing Organization of Foster Families for Equal. & Reform, 431 U.S. at 862-63).

3. Kirchner, 649 N.E.2d at 335. Section 601(b)(2) states: “(b) A child custody proceeding is commenced in the court: (2) by a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in the physical custody of one of his parents.” 750 ILL. COMP. STAT. ANN. 5/601(b)(2)(West 1992).

4. Kirchner, 649 N.E.2d at 335.

5. Id.
children truly looks out for the children's best interests. The "best interest" of a child is a phrase that seems to be tossed around loosely. Is it sound legal principle or mere rhetoric? While the law is now amended, only time will tell whether the legislation will prevent a similar saga from ever happening again.

In In re Petition of Kirchner,6 the Illinois Supreme Court confronted the issue of whether the adoptive parents asserted standing to request a custody hearing to determine the child's best interests under either section 601(b)(2) of the Illinois Marriage and Dissolution of Marriage Act7 or the 1994 amendment to the Adoption Act.8 In Kirchner, the Illinois Supreme Court held that: (1) habeas corpus was an appropriate method for father to seek release of son; (2) former adoptive parents lacked standing to seek a custody hearing; (3) physical possession of child did not entitle former adoptive parents to a custody hearing; and (4) an amendment to the adoption statute could not be applied retroactively to adoptive parents to allow them to seek a custody hearing.9

Courts around the country hear numerous adoption disputes, but the Baby Richard case was the first time a court discussed the rights of an unwed father who wanted the opportunity to raise his child but was prevented from doing so through the intentional deception of the child's biological mother.10 No laws or Illinois statutes addressed the rights of all the parties to a failed adoption. Therefore, Illinois courts faced the problem of deciding Baby Richard's fate without any direct guidance. Now facts have recently surfaced that indicate Kirchner is no longer living with his son and the Does may want to try to regain custody of their "son," Richard.

8. Kirchner, 649 N.E.2d at 332. The General Assembly passed Public Act 88-550 to amend the Adoption Act. Id. at 336. The amendment states:
   In the event a judgment order for adoption is vacated or a petition for adoption is denied, the court shall promptly conduct a hearing as to the temporary and permanent custody of the minor child who is the subject of the proceedings pursuant to Part VI of the Illinois Marriage and Dissolution of Marriage Act. The parties to said proceedings shall be the petitioners to the adoption proceedings, the minor child, any biological parents whose parental rights have not been terminated, and other parties who have been granted leave to intervene in the proceedings .... This amendatory Act of 1994 applies to cases pending on and after its effective date.
750 ILL. COMP. STAT. ANN. 50/20 (West 1994).
9. Kirchner, 649 N.E.2d at 332, 335, 338. As a matter of law, the court determined that neither of the statutes applied to the instant case and no further factual issues were to be determined. Id. at 332.
10. See generally In Re Petition of Kirchner, 649 N.E.2d 324 (Ill. 1995).
Part I of this article examines the facts underlying Baby Richard's case from the time he was conceived until the time of adoption. Additionally, this Part analyzes the case law which ensued as a result of emotional complexities of the Baby Richard situation. This Part also addresses the amendment to the adoption act known as the "Baby Richard Amendment." Part II of this article explores Justice McMorrow's differences with the majority opinion. Furthermore, Part III discusses the Does' possible courses of action and evaluates how realistic their chances are of regaining custody. Part IV of this article explores the possibility of a solution.

I. BACKGROUND FACTS AND HISTORY OF THE BABY RICHARD CASE

Section A of Part I explores the facts giving rise to the birth, adoption, and the custody change of Baby Richard. Section B discusses the legal proceedings which ensued to effectuate the Does' adoption of Baby Richard. Section C analyzes the Illinois Appellate Court review of the finding of unfitness and the best interests of the child. Section D discusses the Illinois Supreme Court's first look at the Baby Richard case. Section E analyzes the Adoption Act Amendment. Finally, Section F explores the Illinois Supreme Court's second look at the Baby Richard case.

A. THE FACTS GIVING RISE TO THE BIRTH, ADOPTION AND CUSTODY CHANGE OF BABY RICHARD

During the Fall of 1989, Kirchner, 32, and Daniella Janikova, 21, met while working together at a restaurant. Both were immigrants from Czechoslovakia. Soon thereafter they decided to live together in Chicago. The following June, Daniella learned that she was pregnant and was to give birth in March 1991. Immediately after learning of her pregnancy, Daniella quit working to become a full time cosmetology student. Kirchner was her sole source of financial and emotional support as they continued to live together and prepare for the birth of their baby. Although Daniella was bearing his child, Kirchner delayed plans to marry Daniella, using conflicting work schedules as his reason.

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12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
When Daniella was six months pregnant, Kirchner left the United States to return to Czechoslovakia to tend to an ill grandmother. Daniella received a phone call two weeks later from Kirchner's aunt informing her that Kirchner would not be returning to resume his relations with her. The aunt stated that Kirchner had resumed relations with his former girlfriend and they were married and on their honeymoon. Daniella immediately phoned Kirchner and told him that she no longer wanted to see him. Kirchner denied all the accusations, but Daniella immediately moved out of their apartment and into a Chicago shelter for abused women.

While living in the shelter, Daniella decided to place her baby up for adoption. Kirchner returned to Illinois on February 8, 1991. By this time, however, Daniella had moved out and already scheduled a meeting with the Does (the future adoptive parents) and an attorney on February 11, 1991. During the meetings with the Does, at all relevant times, both the Does' lawyer and the Does were fully aware of the fact that Daniella knew who the father was and that she intended to tell the father that the baby had died. Moreover, Daniella asked the Does' attorney if he knew how to fake a birth certificate. The attorney stated that he could not be party to such a transaction.

Instead of insisting that Daniella disclose the name of the father so that he could properly be notified of the adoption proceedings, the Does acquiesced in Daniella's plans to tell Kirchner that the baby had died. In fact, they even arranged for Daniella to give birth to the child in another hospital.

In mid-February, Daniella left the shelter to live with her uncle. Kirchner was completely aware of her whereabouts, but was unsuccessful in his attempts to contact her. Kirchner then asked a friend to mediate on his behalf, but Daniella refused. At the end of February, Kirchner sent five

18. _Id._ at 649.
19. _Id._
20. _Id._
21. _Id._
22. _Id._
23. _In the Matter of Doe,_ 627 N.E.2d at 649.
24. _Id._
25. _Id._ at 649-50.
26. _Id._ at 657-58 (Tully, J., dissenting).
27. _Id._ at 659 (Tully, J., dissenting).
28. _Id._
29. _In the Matter of Doe,_ 627 N.E.2d at 650.
30. _Id._
31. _Id._
32. _Id._
hundred dollars to Daniella via a friend, but Daniella refused the charity. At no time during this period did Kirchner seek legal advice to assert his paternity. Eventually, however, the two decided to meet at a restaurant. They went through a brief period of reconciliation. During this time, Daniella did not inform Kirchner of her decision to give the baby up for adoption. Subsequently, the two separated again and Daniella gave birth on March 16, 1991.

Unaware of the change in hospitals, Kirchner inquired about Daniella and the child at the hospital where they intended that she would give birth. The hospital had no record of her. Four days after giving birth, Daniella signed a final and irrevocable consent to adoption. The Does filed a Petition for Adoption the same day, listing the natural father as unknown. Legal notices were sent out in the Chicago Daily Law Bulletin. Baby Richard was given to the Does.

Kirchner, knowing that Daniella was close to her due date, telephoned Daniella’s uncle, and was informed that the baby died three days after birth. To date, Kirchner never attempted to visit the home of Daniella’s uncle. All communication attempts were done by telephone.

Daniella instructed her uncle to lie about the status of the child. On March 26, 1991, Kirchner called Daniella’s uncle twice more to notify him that he did not believe that Richard was dead.

Subsequently, Kirchner began visiting the uncle’s home after work. In the early mornings he would look in parked automobiles for infant car seats and went through the garbage looking for bottles, diapers and other baby paraphernalia. His inquiries at several hospitals regarding the birth of his

33. Id.
34. Id. at 651.
35. In the Matter of Doe, 627 N.E.2d at 650.
36. Id.
37. Id.
38. Id.
39. Id.
40. Id.
41. In the Matter of Doe, 627 N.E.2d at 650.
42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
47. In the Matter of Doe, 627 N.E.2d at 650.
48. Id.
49. Id.
50. Id.
child were unsuccessful.\textsuperscript{51} He also enlisted the help of friends in locating the
death certificate for the child.\textsuperscript{52} His attempts in this respect also failed.\textsuperscript{53}

Finally, in early May, Kirchner was informed by a friend that the baby
did not die, but had been put up for adoption.\textsuperscript{54} He did not confront Daniella
until May 12, 1991.\textsuperscript{55} That same day, he found out that she moved back into
his apartment while he was at work.\textsuperscript{56} This was the first time he had spoken
to her since their brief reconciliation in March 1991.\textsuperscript{57} Daniella then
proceeded to tell him that Baby Richard was adopted and that she had
terminated her parental rights.\textsuperscript{58}

\textbf{B. THE LEGAL PROCEEDINGS WHICH ENSURED TO EFFECTUATE THE DOES' ADOPTION OF BABY RICHARD: KIRCHNER FOUND UNFIT}

Six days after their reconciliation, Kirchner decided to speak to an
attorney for the first time.\textsuperscript{59} On June 6, 1991, Kirchner filed an appearance in
the adoption proceeding and on June 13, 1991, he sought leave of court to file
an answer.\textsuperscript{60} The trial court struck his answer on the basis that he had no
standing in the adoption proceeding.\textsuperscript{61}

Three months later, Kirchner and Daniella got married and on September
23, 1991, Kirchner filed a petition to declare paternity.\textsuperscript{62} The trial commenced
on December 9, 1991, and he was found to be the biological father of Baby
Richard.\textsuperscript{63}

On December 23, 1991, the Does filed an amended petition to adopt.\textsuperscript{64} They alleged that Kirchner was an unfit parent and, therefore, his consent to
the adoption was not necessary.\textsuperscript{65} The petition declared that Kirchner had not

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\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} In the Matter of Doe, 627 N.E.2d at 650.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 651.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} In the Matter of Doe, 627 N.E.2d at 651.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} In the Matter of Doe, 627 N.E.2d at 651; see 750 ILL. COMP. STAT. ANN. 50/8
(a)(1), 50/14 (West 1992).
demonstrated a reasonable degree of interest, concern or responsibility with respect to his child during the first thirty days of Richard’s birth.66

The adoption hearing did not begin until May of 1992.67 At this time, the trial court agreed with the Does’ petition.68 The court entered an order on May 8, 1992 that Kirchner was an unfit parent.69 The judgment for adoption was entered on May 13, 1992.70

Kirchner filed a Notice of Appeal on the day his parental rights were terminated and five days before the adoption judgment became final.71 The appeal was not heard until August 1993.72 Baby Richard had then been living with the Does for two and a half years.73 The appellate court affirmed the trial court’s decision for adoption.74

C. THE ILLINOIS APPELLATE COURT’S REVIEW OF THE FINDING OF UNFITNESS AND THE BEST INTEREST OF THE CHILD

The appellate court’s opinion reviewed two issues and discussed various other points. First, the court looked at whether disturbing a judgment of adoption after a child lived with his adoptive parents for more than two years would be in the best interest of Baby Richard.75 Second, the court’s decision regarding whether Kirchner was an unfit parent was based on his failure to demonstrate reasonable interest, care and concern of Richard during Richard’s first thirty days.76

The court first held that a child is not a chattel, and therefore, belongs to no one but himself.77 The court further stated that both child and parent have
rights which are protected under the law.\textsuperscript{78} In an adoption case, the child is the real "party in interest," and the child’s rights should come first.\textsuperscript{79} The court concluded that the best interest of Richard was of foremost importance in this case.\textsuperscript{80}

The court reasoned that a child’s best interest is not "part of an equation" to be balanced against other interests.\textsuperscript{81} It is the sole factor.\textsuperscript{82} The court’s logic was based on interpreting a part of the Illinois Adoption Act that stated, "[t]he best interests and welfare of the person to be adopted shall be of paramount consideration in the construction and interpretation of this Act."\textsuperscript{83}

The court also reasoned that the delay in determining custody was not in the best interest of the child and could further harm him.\textsuperscript{84} It supported its conclusion with the legislative intent of the Juvenile Court Act.\textsuperscript{85} The Juvenile Court Act was designed to ensure "speedy" resolve of questions of child placement.\textsuperscript{86} It also states that reunifying families is intended if it is in the best interest of the child.\textsuperscript{87} Therefore, the court concluded that it was not in Richard’s best interest to remove him from a family that he had grown to believe was his own.\textsuperscript{88} According to the court, the mere existence of the Adoption Act is proof that making a child is not what makes one a parent.\textsuperscript{89}

The court found several of the facts of the case to be so meritless that the court decided that the Does were the better parents for Richard.\textsuperscript{90} For example, Daniella, although not technically a party to the case, had tried to find a fraudulent death certificate for her own child so that Kirchner would not know of the child.\textsuperscript{91} Furthermore, just prior to Richard’s birth, she had sexual relations with Otakar Kirchner and then refused to see him again.\textsuperscript{92} Shortly

\textsuperscript{78} Id.
\textsuperscript{79} In the Matter of Doe, 627 N.E.2d at 652.
\textsuperscript{80} Id. The court distinguished a previous Illinois case that held that the best interest of the child should not be considered when determining fitness of a biological parent. Id. at 652 n.2.
\textsuperscript{81} Id. at 652.
\textsuperscript{82} Id.
\textsuperscript{83} Id. The court felt that this was the logical stance to take. Id. It reasoned that if it could focus on the child and diminish the presence of all parental interests, that the decision would be an easier one to make. Id. See 750 ILL. COMP. STAT. ANN. 50/20(a) (West 1994).
\textsuperscript{84} Id.
\textsuperscript{85} Id. at 653; see 705 ILL. COMP. STAT. ANN. 405/2-14 (West 1992).
\textsuperscript{86} In the Matter of Doe, 627 N.E.2d at 653.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 654.
\textsuperscript{91} Id. at 653 n.4.
\textsuperscript{92} In the Matter of Doe, 627 N.E.2d at 653 n.4.
thereafter, she decided that she would commit herself in marriage to the man that she left.93

The court took a similar common sense approach to Kirchner's behavior prior to the birth.94 The court surmised that a man with a reasonable degree of care and concern for his child would have stayed in close contact with the birth mother until the child came.95 According to the law, when looking at the evidence, a court may also consider what occurred during the pregnancy and birth.96 In this case, Kirchner was back in Chicago for over a month before Richard's birth.97 He knew the child's due date, "[y]et he did virtually nothing that a responsible unwed man would do if he expected that a woman would soon give birth to his child."98 There is no solace for Kirchner to claim that Daniella did not return his phone calls.99 "More needed to be done to demonstrate a reasonable degree of interest, concern and responsibility for the welfare of one's expected child."100 He never went to Daniella to speak to her in person, even though he knew her whereabouts.101 He did not contact Daniella to check on the baby's health.102 He did not show any effort in giving Richard a first or surname.103 He never consulted with an attorney to ascertain his legal rights prior to birth.104 He never filed a lawsuit to either assert his paternity or determine his rights to Richard until well after Richard's birth.105

Furthermore, the court decided that Kirchner's actions within Richard's first thirty days of life also demonstrated a lack of concern.106 He made a few telephone calls to Daniella's uncle and also allegedly visited the hospital where Richard was supposed to be born.107 He went to the uncle's house to search Daniella's car and garbage cans for baby paraphernalia.108 He asked friends to speak to Daniella, but did not attempt to do so himself except over the phone.109 The court decided that seeking to find whether a child was alive
or dead is not enough to determine that an unwed father demonstrated a reasonable amount of care, concern and interest for his child.\textsuperscript{110} Thus, the appellate court affirmed the judgment of adoption on the basis that Kirchner was an unfit parent to have a child.\textsuperscript{111} Therefore, his consent to adoption was not required.\textsuperscript{112}

D. THE ILLINOIS SUPREME COURT'S FIRST LOOK AT THE BABY RICHARD CASE

The Illinois Supreme Court obtained its first chance to review the Baby Richard Decision in June 1994.\textsuperscript{113} In a brief majority opinion, the court ruled that there was enough evidence to show that Kirchner demonstrated a reasonable degree of interest in his child.\textsuperscript{114} Pursuant to section 8(a)(1) of the Adoption Act, where the birth mother is not married to the father, his consent to the adoption is essential except where he has been found unfit by clear and convincing evidence.\textsuperscript{115} Among the statutory factors for finding unfitness is the provision where the father fails to demonstrate a reasonable degree of interest in the newborn child during the first thirty days after its birth.\textsuperscript{116} In an attempt to learn the truth about Richard, Kirchner called various hospitals and sorted through Daniella's garbage cans in his search to know the truth about his child.\textsuperscript{117} Although the trial court did not deem this to be sufficient to show an interest in the baby, the Illinois Supreme Court did, thus deeming Kirchner a fit parent.\textsuperscript{118}

The finding of Kirchner being a fit parent, however, was not the key to the court's ruling. It was only when the finger was pointed at both Daniella and the Does that the court illustrated why Kirchner had every right to Baby Richard.\textsuperscript{119} The court placed the blame on the Does for not somehow forcing Daniella to divulge the name of the baby's father.\textsuperscript{120} The Does and their lawyer were always aware that Daniella knew who the father was, and that she

\textsuperscript{110} Id.
\textsuperscript{111} Id. at 656.
\textsuperscript{112} Id.; see 750 ILL. COMP. STAT. ANN. 50/8(a)(1), 50/14 (West 1992).
\textsuperscript{114} Id. at 182.
\textsuperscript{115} Id.; see 750 ILL. COMP. STAT. ANN. 50/8 (West 1992).
\textsuperscript{116} In re Petition of Doe, 638 N.E.2d at 182.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
did not want to come forward with his name in fear of him filing for custody. In fact, not only did the Does know of her secrets; but they assisted in insulating Baby Richard from Kirchner. They helped in arranging for Daniella to give birth in another hospital and they acquiesced in Daniella’s scheme to tell Kirchner that his child died at birth. Moreover, the Does continued this subterfuge in their adoption petition filed with the circuit court, which falsely alleged under oath that the father was “unknown.” The court went on to reason that if the best interests were the only standard by which courts were bound, then few parents would be secure in their own qualifications as parents. People in a superior financial position or even those highly educated could potentially take a child away from the natural parents.

The Illinois Supreme Court chastised the court below for not realizing that the burden to demonstrate the unfitness of the birth parents, and to notify both natural parents of the action (so that the natural parents may assert their rights), belongs to the adoptive parents. Justice Heiple took it upon himself to strongly denounce the legislature, the governor and Bob Greene (a Chicago journalist) for their involvement in the case.

E. THE ADOPTION ACT AMENDMENT: STANDING OF NON-PARENT TO SUE FOR CUSTODY OF CHILD IS ADDRESSED

Less than three weeks after the Illinois Supreme Court issued its decision on June 16, 1994, reversing the trial and appellate courts’ decisions in Kirchner, the General Assembly held an emergency session to pass Public Act 88-550, which amended the Adoption Act. The amendment provides, inter alia:

In the event a judgment order for adoption is vacated or a petition for adoption is denied, the court shall promptly conduct a hearing as to the temporary and permanent

121. Id.
122. In re Petition of Doe, 638 N.E.2d at 182.
123. In the Matter of Doe, 627 N.E.2d at 650.
124. Id. at 659.
125. In re Petition of Doe, 638 N.E.2d at 182.
126. Id. at 183.
127. Id. at 182. In Illinois, the law requires a good faith effort to notify the natural parents in their preemptive rights to their own children wholly apart from any considerations of the best interests of this child. Id.
128. Id. at 189-90 (Heiple, J., in support of the denial of rehearing).
custody of the minor child who is the subject of the proceedings pursuant to Part VI of the Illinois Marriage and Dissolution of Marriage Act. The parties said proceedings shall be the petitioners to the adoption proceedings, the minor child, any biological parents whose parental rights have not been terminated, and other parties who have been granted leave to intervene in the proceedings. The provisions of this Section shall apply to all cases pending on or after July 3, 1994.\textsuperscript{130}

The amendment became effective on July 3, 1994, prior to the Illinois Supreme Court’s denial of the adoptive parents’ writ of certiorari.\textsuperscript{131} “The principle of separation of powers is embodied in Article II, section 1, of the Illinois Constitution of 1970, which provides: ‘The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.’”\textsuperscript{132} The Kirchner court expressed the proposition that the General Assembly is not a court of last resort and it may not attempt to retroactively apply new statutory language to annul a prior decision of the court.\textsuperscript{133}

The Illinois Supreme Court based its decision not to retroactively apply the amendment in Kirchner, upon the decision in \textit{In re Marriage of Cohn}.\textsuperscript{134} Similarly, in \textit{Cohn}, the Illinois Supreme Court considered the applicability of an amendment to the Marriage and Dissolution of Marriage Act passed by the legislature subsequent to the appellate court adjudicating the case.\textsuperscript{135} The \textit{Cohn} court held that although the legislature may change a law as interpreted by the courts prospectively, it cannot retroactively alter a statute with the explicit intent to overrule the decision of a reviewing court.\textsuperscript{136}

Based on the analysis in \textit{Cohn}, the Kirchner court reasoned that the General Assembly may enact retroactive legislation that changes a prior decision of a reviewing court concerning others whose circumstances are similar, but whose rights have not been finally adjudicated.\textsuperscript{137} It may not, however, enact a statute that changes a decision of the court which adjudicated
the rights of particular parties. 138 The court noted that the "filing of a petition for rehearing does not alter the effective date of the judgment of a reviewing court" unless the rehearing is allowed. 139 If the rehearing is allowed, the effective date of the judgment is synonymous with the rehearing date. 140 The court reasoned that since the petition for rehearing and writ of certiorari to the United States Supreme Court was denied in the instant case, the effective date of the judgment was June 16, 1994, prior to the passage of the Adoption Act amendment. 141 Therefore, the Kirchner court held that on June 16, 1994, the rights of all parties were fully adjudicated by the Illinois Supreme Court, thereby rendering the subsequent amendment constitutionally inapplicable. 142

F. THE ILLINOIS SUPREME COURT TAKES A SECOND LOOK AT THE BABY RICHARD CASE

During the Illinois Supreme Court's second look at the Baby Richard case, it looked at more than just applying the Adoption Act amendment retroactively. The Does, testing the retroactivity of an Illinois Statute specifically passed in response to public outcry over the case, requested a hearing. 143 In January 1995, the request was denied. 144 Kirchner filed a habeas corpus writ to obtain custody of Richard. 145 In February 1995, the Illinois Supreme Court again followed with an opinion that granted the writ and explained why the Does were not entitled to a custody hearing. 146 In the majority opinion, the court ruled that Kirchner had standing to file his habeas corpus petition because, as the child's father, no one had a better position than he to represent the child's best interests. 147

A writ of habeas corpus is appropriate where the custody of a child is at issue and the petitioner has no other recourse by which to seek custody rights to his/her child. 148 The Does argued that Kirchner should not have been able to seek the writ because a vacation of adoption does not necessarily require that the custody of Richard should immediately go to him as his father. 149 The

138. Id.
139. Id.
140. Id.
141. Id.
142. Id.
143. Kirchner, 649 N.E.2d at 332.
144. Id. at 329.
145. Id.
146. Id.
147. Id.
148. Id.
149. Kirchner, 349 N.E.2d at 329.
Does also urged that sections of the Marriage and Dissolution Act, as well as the Adoption Act, should govern the proceeding.\textsuperscript{150} The Does also contended that the writ was improper because Richard was not being kept from Kirchner against Richard’s will.\textsuperscript{151} Finally, the Does argued that when factual questions must be answered, a writ of habeas corpus petition must not be considered for want of jurisdiction.\textsuperscript{152} The majority disagreed on all points.\textsuperscript{153}

The case law cited by the Does to support their position involved custody hearings after vacated adoptions.\textsuperscript{154} In \textit{Sullivan v. People ex rel. Heeney},\textsuperscript{155} the court stated that in the case of a vacated adoption, a best interest custody hearing must be granted to determine who should have custody of an improperly adopted child.\textsuperscript{156} The majority felt that the Does took language to this effect out of context.\textsuperscript{157}

The \textit{Sullivan} case dealt with a father who had abandoned his wife and children for six years prior to the adoption proceeding.\textsuperscript{158} The appellate court remanded that case to the trial court for a determination of the father’s fitness.\textsuperscript{159} The \textit{Sullivan} case states that a child may not stay with the adoptive parents unless the natural parent is unfit.\textsuperscript{160} The hearing, therefore, was to determine fitness and not best interests.\textsuperscript{161}

Since the Illinois Supreme Court had already determined that Kirchner was a fit parent, there was no fitness issue to deal with in a subsequent hearing.\textsuperscript{162} A “best interests” custody hearing was not needed for this reason.\textsuperscript{163}

The Does also cited \textit{Giacopelli v. Florence Crittenton Home},\textsuperscript{164} which stated that a married father could be denied rights to the child without a finding of unfitness if it was in the child’s best interest.\textsuperscript{165} The Illinois Supreme Court noted that, although not tested, \textit{Giacopelli} would probably be

\begin{itemize}
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} \textit{Id.} at 330.
\item \textsuperscript{153} \textit{Id.} at 329-32.
\item \textsuperscript{154} \textit{Id.} at 330-31.
\item \textsuperscript{155} 79 N.E. 695 (Ill. 1906).
\item \textsuperscript{156} \textit{Id.} at 697.
\item \textsuperscript{157} \textit{Kirchner}, 649 N.E.2d at 330.
\item \textsuperscript{158} \textit{Sullivan}, 79 N.E. at 695.
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id.} at 697.
\item \textsuperscript{161} \textit{Id.} at 696. The \textit{Sullivan} case also stated that the natural parent’s rights were superior to the rights of any other person. \textit{Id.}
\item \textsuperscript{162} \textit{Kirchner}, 649 N.E.2d at 330.
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} 158 N.E.2d 613 (Ill. 1959).
\item \textsuperscript{165} \textit{Kirchner}, 649 N.E.2d at 330; see also \textit{Giacopelli}, 158 N.E.2d at 618.
\end{itemize}
unconstitutional since married parents cannot be denied custody without first showing unfitness.\textsuperscript{166} \textit{Giacopelli} also did not comport with recent Illinois pronouncements on custody and adoption.\textsuperscript{167} Under the Adoption Act, both the superior right doctrine and the best interest standard are applied.\textsuperscript{168} A third party may not determine rights, including custody, unless unfitness is first determined.\textsuperscript{169}

The Illinois Supreme Court found that the Does had no standing to seek a custody hearing under the Illinois Marriage and Dissolution Act.\textsuperscript{170} The Does also argued that Kirchner had waived his right to challenge their status by not filing a timely answer to their petition, which he had not raised until three years later.\textsuperscript{171} The court felt that this claim was meritless.\textsuperscript{172} The Does' petition was filed with their amended petition to adopt.\textsuperscript{173} Therefore, when the adoption was approved erroneously, there was no need for a hearing regarding custody.\textsuperscript{174}

The court believed that although due process is a right granted to unwed fathers who accept responsibility for their children, there is no Federal law regarding fathers who want to raise their children, but who are unable to do so because of deception.\textsuperscript{175} This is what the Illinois Supreme Court ranted about with regard to the alleged deceptive practices of the Does in keeping Richard from Kirchner.\textsuperscript{176} The court decided that even though Daniella lied about Richard and then signed away her parental rights, the waiver of rights could not be imputed to Kirchner.\textsuperscript{177} In fact, Kirchner should be placed in the same position as he would have been prior to the invalid adoption's approval.\textsuperscript{178} The court felt that custody of Richard should be immediately granted to Kirchner as stipulated under the Adoption Act.\textsuperscript{179} In fact, custody should have automatically reverted to Kirchner at the time of the adoption's invalidation.\textsuperscript{180}

\begin{itemize}
\item \textsuperscript{166} Kirchner, 649 N.E.2d at 331 n.1.
\item \textsuperscript{167} Id.
\item \textsuperscript{168} Id. at 331-32.
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id. at 332-36.
\item \textsuperscript{171} Id. at 332.
\item \textsuperscript{172} Kirchner, 649 N.E.2d at 332.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Id. at 332-33.
\item \textsuperscript{175} Id. at 333.
\item \textsuperscript{176} Id.
\item \textsuperscript{177} Id.
\item \textsuperscript{178} Kirchner, 649 N.E.2d at 334.
\item \textsuperscript{179} Id.
\item \textsuperscript{180} Id.
\end{itemize}
The court claims that the Does misinterpreted section 601 of the Adoption Act, which suggests that a petition for a custody hearing may be filed by a non-parent if the child is not in the custody of one of his parents. 181 The Marriage and Dissolution Act states that, "(b) A child custody proceeding is commenced in the court: (2) by a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in the physical custody of one of his parents." 182 Taken in a literal sense, it appears on its face that the Does should have qualified under the act. 183 In Illinois, however, a special meaning is given to the phrase "physical." 184

For example, in In re Custody of Peterson, the father and mother had a child and were subsequently divorced. 185 The mother was awarded custody of the child and the father was granted visitation rights. 186 When the mother became ill, her parents had her move into their house so they could help take care of the child. 187 The father continued to exercise his visitation right twice a week. 188 Eventually, the mother died and the grandparents petitioned for sole custody of the child. 189 The Illinois Supreme Court held that the circuit court had properly dismissed the petition for lack of standing under section 601(b)(2) of the Marriage Act and properly granted custody of the child to his father. 190 The court reasoned that the father had gained "physical custody" of the child through reasonably exercising his visitation rights, thus barring the grandparents from having standing to seek custody. 191 The court went on to say that to allow physical possession (at the time the petition for custody is filed) to be the decisive factor on the standing issue would "encourage abductions of minors in order to satisfy the literal terms of the standing requirement and would, in reality, defeat the statutory intendment." 192

On the other hand, in In re Custody of Menconi, 193 the court found that the father did not have physical custody of his child when in fact at the time

181. Id.
183. Kirchner, 649 N.E.2d at 334.
185. Id. at 1151.
186. Id.
187. Id.
188. Id.
189. Id.
190. Peterson, 491 N.E.2d at 1152-53.
191. Id. at 1153.
192. Id.
he filed the petition for custody he literally had physical custody.\textsuperscript{194} In \textit{Menconi}, the mother of the child died shortly after the little girl's birth.\textsuperscript{195} Pursuant to section 8(a)(1) of the Adoption Act, where the birth mother is not married to the father, his consent to the adoption is essential except where he is found unfit by clear and convincing evidence.\textsuperscript{196} After the mother's death, the father asked the grandparents to care for the child.\textsuperscript{197} From December 1974, the day after her mother died, until April 11, 1981, the child lived mostly in the care and custody of her grandparents.\textsuperscript{198} There were several instances when the father would pick the child up, but keep her for only short periods of time.\textsuperscript{199} Upon returning the child to her grandparents, the father would state that he could not properly care for her.\textsuperscript{200} Subsequently, the father forcibly removed the child from her grandparents' house and refused to return the child despite the grandparents' request.\textsuperscript{201} The grandparents filed a petition for custody. In holding that the grandparents had standing to file their petition, the court reasoned that the father had relinquished his physical custody of the child in favor of the grandparents.\textsuperscript{202} Moreover, the child had lived with the grandparents for six and one-half years with uninterrupted care and custody.\textsuperscript{203} The court also emphasized the fact that the father's visitations with the child were "sporadic" at best.\textsuperscript{204} It is because of these decisions that the court could reasonably deduce that under the Adoption Act physical custody was not synonymous with physical possession.\textsuperscript{205}

Baby Richard is certainly distinguishable from the \textit{Menconi} case. Unlike the father in the \textit{Menconi} case, Kirchner demonstrated an interest in searching for the child that he had been told was dead. The late night searches and the calls to both the uncle's house and to the hospital were sufficient to establish

\textsuperscript{194} Id. at 839.
\textsuperscript{195} Id. at 836-37.
\textsuperscript{196} Kirchner, 649 N.E.2d at 333. Included in the statutory factors for finding unfitness is the section finding unfitness where a parent fails to "demonstrate a reasonable degree of interest, concern and responsibility as to the welfare of a new born child during the first 30 days after its birth." Id.; see 750 ILL. COMP. STAT. ANN. 50/1 (D)(1), 8(a)(1)(West 1992).
\textsuperscript{197} Menconi, 453 N.E.2d at 837.
\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Id. at 839.
\textsuperscript{203} Menconi, 453 N.E.2d at 839. What is even more interesting is that the court also had an appointed psychologist, who determined that the child was firmly integrated into the grandparents' household. Id. In addition, the relationship between the grandmother and the child was like mother-daughter. Id.
\textsuperscript{204} Id.
\textsuperscript{205} Id.
Kirchner's physical custody of Richard. Therefore, the Does' possession of Baby Richard did not establish technical custody of Richard, under the meaning of the Marriage and Dissolution Act. Kirchner's actions, however, did establish custody.

II. THE DISSENT DISCUSSES THE NATURE OF CUSTODY

Section A of Part II analyzes Justice McMorrow's dissenting opinion in the Baby Richard case. Specifically, Section B explores standing to seek custody under the Baby Richard Amendment according to Justice McMorrow. Section C discusses retroactively applying the Baby Richard Amendment. Section D analyzes Justice McMorrow's interpretation of Baby Richard's due process rights.

A. A DIFFERENT INTERPRETATION OF THE LAW BY JUSTICE MCMORROW

In her dissenting opinion, Justice McMorrow offered a different view of the same laws. McMorrow made a distinction between the termination of parental rights in an adoption proceeding and interference with parental rights in custody hearings. A custody hearing under the Marriage and Dissolution Act does not affect a permanent termination of parental rights. It simply provides a "lawful avenue for judicial supervision over the exercise of parental rights because of a judicial determination that such custodial arrangements will serve the best interests of the child." Furthermore, the dissent asserts that the majority's opinion of Kirchner's superior position as defender of Richard's interest is in fact both illogical and legally problematic. Kirchner represented no one's interest but his own. The Does, however, represented both Richard's and their own interests because of their familial relationship.

Similarly, in a custody battle, the child becomes a ward of the court and the court sees to the child's care and support until the child reaches

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206. Kirchner, 649 N.E.2d at 336.
207. Id. at 343 (McMorrow, J., dissenting).
208. Id. at 346 (McMorrow, J., dissenting).
209. Id. (McMorrow, J., dissenting).
210. Id. (McMorrow, J., dissenting).
211. Id. at 346-47 (McMorrow, J. dissenting).
212. Kirchner, 649 N.E.2d at 347 (McMorrow, J., dissenting).
213. Id.
214. Id.
majority. The court, therefore, looks out for the best interest of the child. Daniella terminated her rights, placing Richard in the care of the State of Illinois. When the court vacated the adoption, the Does took on temporary custody of Richard until his best interests could be determined.

In addition, the dissent claims that the majority has skewed the role of habeas corpus proceedings in child custody cases. In several cases, a natural parent was required to file a habeas corpus action in the circuit court and then subject himself to a best interest hearing. Kirchner circumvented a custody hearing; no discussion and debate over the child’s best interests ever took place.

The dissent also argues that the dismissal of the Giacopelli case was erroneous because of the majority’s “newly created law of biological determinism.” This new principle of the “superior right of natural parents” is not what was explained in several previous Illinois cases. In all such cases, the right of the natural parent only manifests when it is accompanied by the best interest of the child.

The majority also misstated the facts in Giacopelli by failing to recognize that Giacopelli dealt with a custody hearing which occurred after a mother terminated her parental rights. Based on the evidence given at the hearing in Giacopelli, the court awarded custody of the child to the adoptive parents because of the father’s criminal background. In the Baby Richard case, the Illinois Supreme Court circumvented such a hearing and placed the child with his biological father without determining what was in the child’s best interests.

The dissent also cited People ex rel. Edwards v. Livingston, where the court held that a child should be with a party other than a biological parent if

215. Id.
216. Id.
217. Id.
218. Kirchner, 649 N.E.2d at 347 (McMorrow, J., dissenting).
219. Id.
220. Id.
221. Id.
222. Id. at 348 (McMorrow, J., dissenting).
223. Id. at 348-50 (McMorrow, J., dissenting).
224. Kirchner, 649 N.E.2d at 348-50 (McMorrow, J., dissenting).
225. Id. at 348 (McMorrow, J., dissenting). The natural father asserted his rights at a best interest hearing. Id.
226. Id.
227. Id.
it is in the child’s best interest. However, the majority in Richard’s case determined that *Livingston* was a probate case rather than an adoption case. Therefore, although the surrounding circumstances were similar, an allegedly different standard would be applied to Richard’s case. Interestingly, in the *Livingston* case, although the child was ultimately placed with the non-parent, the natural father was granted liberal visitation rights so that he could develop a relationship with his child. Obviously, the majority did not want to charter that course, even though this had been recognized as an acceptable practice in several Illinois cases.

Additionally, the dissent accuses the majority of omitting “the myriad appellate court cases which squarely embrace the best interests of the child principle as determining custody,” even when the natural parent may lose custody to third parties.

**B. STANDING TO SEEK CUSTODY UNDER THE BABY RICHARD AMENDMENT ACCORDING TO JUSTICE MCMORROW**

In McMorrow’s dissent, she attacks the majority’s denial of the Does’ standing with respect to the Marriage and Dissolution Act as well as the enacted Baby Richard Amendment.

The majority decided that the Does had no standing to seek custody of Richard under the Marriage and Dissolution Act. Immediately after the first Illinois Supreme Court decision on this case was entered, however, the General Assembly passed legislation which amended the Illinois Adoption Act. This amendment made a custody hearing mandatory promptly following a vacation of an adoption. Under the amendment, participants in such hearings include adoptive parents and natural parents who have not yet terminated their parental rights.

229. *Kirchner*, 649 N.E.2d at 348-49 (McMorrow, J., dissenting); *Livingston*, 247 N.E.2d at 421.
231. *Id.*
234. *Id.* at 350.
235. *Id.* at 350-51.
236. *Id.* at 332.
237. *Id.* at 336.
238. *Id.* at 336; Pub. Act 88-550, eff. July 3, 1994 (adding 750 ILL. COMP. STAT. ANN. 50/20(b)).
The majority denied the hearing under the new amendment based on two grounds. First, that the adjudication of the matter was final at the time of the amendment. Second, that the General Assembly had no position to act as a “court of last resort” in cases, and could not enact and apply legislation retroactively while purposefully trying to change the outcome of a case. Therefore, applying the amendment retroactively was not sanctioned under the law.

The majority looked at the legislative history of the amendment and decided that it was clear in the General Assembly’s record that the legislators had the Baby Richard case specifically in mind when adding the mandatory hearing language to the statute. The majority cited *In re Marriage of Cohn* which held that a statute may only change the law interpreted by the court prospectively. The court decided in the *Cohn* case not to apply the legislation retroactively because the legislature cannot change a statute “with the explicit intent to overrule the decision of a reviewing court.”

The Does argued that the amendment was not designed to alter the court’s decision to vacate the adoption. Instead, the legislature intended to clarify what happens after the vacated adoption takes place. Thus, the court should apply the amendment to the present case. The majority did not accept their reasoning.

In McMorrow’s dissent, she explains why she feels that the Does do indeed have standing. First, she chastises the majority for repeatedly reverting to their rationale for precluding a custody hearing on best interest: that the Does engaged in “deceit,” “subterfuge” and “false pleadings.” McMorrow states that nowhere is it asserted by either of the Kirchners that the Does’ conduct was fraudulent and conspiratorial. Neither the Does, nor their attorneys, were ever charged with or convicted of misconduct, and there is nothing in the record to support the majority’s accusations. The majority,

241. *Id.* at 337.
242. *Id.* at 338.
243. 443 N.E.2d 541 (Ill. 1982).
244. *Kirchner*, 649 N.E.2d at 337; *Cohn*, 443 N.E.2d at 549.
245. *Kirchner*, 649 N.E.2d at 337.
246. *Id.*
247. *Id.* at 338.
248. *Id.*
249. *Id.*
250. *Id.* at 351 (McMorrow, J., dissenting).
251. *Kirchner*, 649 N.E.2d at 351.
252. *Id.* at 351-52 (McMorrow, J., dissenting).
253. *Id.* at 352 (McMorrow, J., dissenting).
the dissent concludes, uses empty accusations of misconduct to support its conclusion regarding standing.\textsuperscript{254}

The Marriage Act provides that a child custody hearing is initiated "by a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in the physical custody of one of his parents."\textsuperscript{255} Even Kirchner did not deny that\textsuperscript{256} the Does satisfied the requirements under the plain language of the statute.\textsuperscript{257}

Kirchner, however, argued that case law required a voluntary relinquishment of custody by the natural parent as a prerequisite to a custody hearing.\textsuperscript{258} The majority failed to realize that the purpose of a custody hearing in either a habeas corpus motion or in accordance with the Marriage Act is not custody nor possession nor termination of rights.\textsuperscript{259} The hearing is to determine the best interest of the child.\textsuperscript{260}

The majority's application of \textit{In Re Peterson} was incorrect because the facts in \textit{Peterson} and in the case at bar were not parallel.\textsuperscript{261} In \textit{Peterson}, the child was first in the custody of the natural mother until her death.\textsuperscript{262} The court denied the grandparents' custody motion because the natural father had been exercising his visitation rights.\textsuperscript{263} The grandparents could not use the "fortuity" of the mother's death to deny custody to the natural father.\textsuperscript{264}

The standing under the Marriage Act has not been used to prevent custody claims by people who have cared for children as parents.\textsuperscript{265} It does protect against temporary caretakers, such as camp counselors and headmasters, from filing claims.\textsuperscript{266} The majority's opinion that the Does had less standing than a camp counselor seeking custody is "patently absurd."\textsuperscript{267}

The fact that the Does developed a strong familial bond with Richard has been subject to a great deal of criticism.\textsuperscript{268} The purpose of the standing

\begin{footnotes}
\item[254.] Id.
\item[255.] Id.; 750 ILL. COMP. STAT. ANN 5/601 (b)(2) (West 1992).
\item[256.] Kirchner, 649 N.E.2d at 352.
\item[257.] Id.
\item[258.] Id.
\item[259.] Id. at 352-53 (McMorrow, J., dissenting).
\item[260.] Id. at 353 (McMorrow, J., dissenting).
\item[261.] Id.
\item[262.] Peterson, 491 N.E.2d at 1151.
\item[263.] Id. at 1153.
\item[264.] Id.
\item[265.] Kirchner, 649 N.E.2d at 354 (McMorrow, J., dissenting).
\item[266.] Id.
\item[267.] Id.
\item[268.] Id. at 355 (McMorrow, J., dissenting).
\end{footnotes}
requirement was to protect the custody rights of the natural parent and also the environmental stability of the child. The court needed to look at Richard's circumstances to determine the standing of the adoptive parents. The Does acted in accordance with the law throughout the proceeding and no wrongdoing was ever asserted in any of the proceedings. Furthermore, the dissent adds that the majority, in imputing the alleged bad acts to the Does, tries to taint the Does standing in order to prevent the custody hearing.

C. A RETROACTIVE APPLICATION OF THE BABY RICHARD AMENDMENT

ACCORDING TO JUSTICE MCMORROW

The dissent also tried to shed light on a different interpretation of the Baby Richard amendment. Justice Morrow felt that the language of the statutory amendment left no doubt as to the intent of the legislators. Therefore, the Does would be entitled to the hearing unless the amendments do not apply or the statute is unconstitutional.

Although the majority held that the statute could not be applied retroactively, the dissent stated otherwise. On July 3, 1994, the amendment became effective. The Does' motions had not been completely exhausted until months later. The majority wanted to call the end of the final adoption appeal (June 16, 1994) the end of the case. According to the dissent, the majority's position in this matter lacks support. The law states that "[w]here the legislature changes the law pending an appeal, the case must be disposed of by the reviewing court under the law as it then exists, not as it was when the judgment was entered in the lower court." Therefore, since the Does' petition for rehearing was still pending on July 3rd, the amendment should have been applied.

269. Id. at 354 (McMorrow, J., dissenting).
270. Id.
271. Kirchner, 649 N.E.2d at 354 (McMorrow, J., dissenting).
272. Id. at 355-56 (McMorrow, J., dissenting).
273. Id. at 356.
274. Id.
275. Id.
276. Id.
277. Kirchner, 649 N.E.2d at 356 (McMorrow, J., dissenting).
278. Id.
279. Id.
280. Id.
281. Id. at 356-57 (McMorrow, J., dissenting) (quoting Bates v. Board of Education, 555 N.E.2d 1 (Ill. 1990)).
282. Kirchner, 649 N.E.2d at 357 (McMorrow, J., dissenting).
The dissent also criticized the idea that the custody hearing would diminish Kirchner's rights to custody. The majority failed to realize that Kirchner's custody rights were unchanged at the time the adoption was overturned because the first Illinois Supreme Court decision never addressed custody. Rather, it addressed whether Kirchner's parental rights should have been terminated. There is no Illinois law prior to this that states that once an adoption is vacated, child custody "automatically reverts to an unwed biological father." It was a separate matter that needed to be separately litigated.

Likewise, the dissent agreed that separation of powers precluded the legislature from enacting law that tampers with the results of litigation pending in the courts. However, the dissent cited previous cases which recognized the need in some cases for the legislature to define unclear statutes.

D. DUE PROCESS FOR BABY RICHARD ACCORDING TO JUSTICE MCMORROW

The final issue in the case was deciding the due process rights of Richard. The issue raised by the Does and Richard's guardian ad litem was whether Richard himself had a liberty interest in the familial relationship he had developed with the Does. Their claim was based on the theory that just as Kirchner has a liberty interest in his relationship with Richard, Richard should have a liberty interest in his current relationship with his current parents. The majority found that children have due process rights, but their rights are not independent of the rights of their fit parent. Any losses that a child might suffer do not create a liberty interest in the continued maintenance of the adoptive relationship. Therefore, the relationship that Richard had with his adoptive parents could not be legitimised because it had continued despite the procedural safeguards afforded by law. It is possible

283. Id.
284. Id.
285. Id.
286. Id. at 358 (McMorrow, J., dissenting).
287. Id.
288. Kirchner, 649 N.E.2d at 358 (McMorrow, J., dissenting).
289. Id.
290. Id. at 359 (McMorrow, J., dissenting).
291. Id.
292. Id. at 359-61 (McMorrow, J., dissenting).
293. Id.
294. Id.
that the court felt that the liberty interest of the father was superior to that of Richard’s. Perhaps they may have adopted the reasoning of the Quilloin case, which stated, “[w]e 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.’”

The dissent, however, objected by stating that a protected liberty interest required a legitimate claim of entitlement. The dissent argued that Richard was deprived of his rights as granted by statute. By statute, Richard had the right to a best interest hearing. The adoption of Richard was invalidated. Kirchner’s parental rights were not terminated, but these two proceedings were completely different from the custody hearing afforded by law. The hearing officer may have found that it was in Richard’s best interests to be with his biological father. It will never be known because the procedural rights afforded by law were not carried out.

III. WHAT CAN THE PARTIES DO NOW: A LOOK AT THE POSSIBILITIES OF FUTURE BABY RICHARD LITIGATION

At this point in time the Does do not have standing to request a hearing regarding the custody of Richard under section 601(b)(2) of the Illinois Marriage and Dissolution of Marriage Act. The statutory language of “physical custody” requires a determination of who is providing for the care, custody, and welfare of the child before the beginning of a custody proceeding. Kirchner has been and continues to provide for Richard’s care, custody and welfare. Furthermore, Kirchner has given no indication that he has any

296. Kirchner, 649 N.E.2d at 360-61 (McMorrow, J., dissenting).
297. Id.
298. Id.
299. Id.
300. Id.
301. Id.
302. Kirchner, 649 N.E.2d at 361 (McMorrow, J., dissenting).
303. Id.
304. Id.
future plans to "voluntarily or indefinitely relinquish" custody of his son. Although Daniella is not recognized as having any legal right to Richard, the fact that she is in physical possession of Richard is not enough to show that Kirchner does not have physical custody of Richard. A previous court decision held that a father had not given up physical custody of his daughter even though she was residing with her maternal grandparents for the past two years. In that case, the natural mother and daughter were living with the grandparents until the mother's death. The Illinois Supreme Court has firmly established that a parent does not relinquish custody of his child by not living with the child. In Kirchner's case, he could never live with Richard again, but still retain custody of him under the law. The Does will have to look elsewhere in the law in order to have a chance at getting Richard back.

A. EVENTS WHICH MUST OCCUR FOR THE DOES TO GET RICHARD BACK

In order for the Does to get Richard back, there is a sequence of events that must occur. First, someone would have to contact The Department of Children and Family Services (DCFS) to complain that Kirchner is abusing or neglecting Richard. DCFS would then have to investigate the complaint and find that Kirchner was abusing or neglecting Richard. According to the Juvenile Court Act, a child must be a ward of the court in order for the state to have jurisdiction to file in Juvenile Court and proceed to termination. Terminating parental rights is a two part process. First, a parent must be found unfit and then a best interest hearing is conducted. The courts must find unfitness prior to considering best interest evidence. When parental

307. See In re the Marriage of Sechrest, 560 N.E.2d 1212, 1215 (Ill. App. Ct. 1990) (stating that the standing requirement is not based on who is in actual possession of the child when the custody petition is filed).

308. In re Custody of Peterson, 491 N.E.2d 1150, 1153 (Ill. 1986).

309. Id. at 1151. The grandparents tried to assert standing under the Marriage and Dissolution of Marriage Act, but the Illinois Supreme Court found that they did not have standing because although they did have possession of the child, the father had exercised regular visitation twice a week, and did not show any intent to voluntarily or indefinitely relinquish his rights to custody of his daughter. Id. at 1153.

310. See In re Petition of Kirchner, 649 N.E.2d 324, 340 (Ill. 1995) (holding that a father can regain custody of his child after the child was improperly removed from his custody); see also In re Custody of Peterson, 491 N.E.2d 1150, 1153 (Ill. 1986) (holding a father can regain custody of his daughter even though the child resided with her grandparents for a period of time).

311. 705 ILL. COMP. STAT. ANN. 405/2-29.

312. In re Adoption of Syck, 562 N.E.2d 174, 183-84 (Ill. 1990) (stating that the best interest of the child is not to be considered until the parent is found to be unfit).

313. Id.

314. Id.
rights are sought to be permanently severed, the best interest of the child can only be considered "if the courts find by clear and convincing evidence that the parent is unfit." The court would have to find that Kirchner was unfit pursuant to the Adoption Act. Once the court has found Kirchner unfit, a best interest hearing would be conducted to determine if it would be in Richard's best interest to return to the Does.

Terminating parental rights is a serious action taken by the courts. Due to the serious and permanent nature of the decision to terminate parental rights, the Illinois Supreme Court has said that when the State seeks to terminate parental rights, it must prove that a parent is unfit by "clear and convincing" evidence. Using this standard of proof strikes a fair balance between the rights of natural parents and the state's legitimate concerns regarding the welfare of a child. The various states are free to determine whether or not they would like the precise burden of proof to be equal to or greater than "clear and convincing," but the standard of proof cannot be any less.

The party seeking to terminate a parent's parental rights has the burden of proving that a parent is unfit by clear and convincing evidence. Unfitness may be based upon "any one or more" of the grounds listed in The Adoption Act.

B. FINDING KIRCHNER UNFIT ON GROUNDS OF FAILING TO MAINTAIN A REASONABLE DEGREE OF INTEREST, ABANDONMENT OR DESERTION

At this point in Kirchner's situation, the only realistic way his parental rights would be terminated would be if the court found that he has failed to maintain a reasonable degree of interest in Richard, that he has abandoned Richard, or that he has deserted Richard.

1. Failing to maintain a reasonable degree of interest

A court must find by clear and convincing evidence that a parent has failed to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare to find that parent unfit under Section 1(D)(b) of the Adoption Act. In order to determine if a parent has failed to maintain a

315. Id.
316. Id. at 182-84.
317. Id.
318. Id.
319. Id. at 183.
320. 750 ILL. COMP. STAT. ANN. 50/1 (West 1992).
reasonable degree of concern, interest or responsibility as to the child’s welfare, the case must be examined in light of the parent’s circumstances.322

Most often, a parent’s rights are terminated under this standard when the parent has failed to visit or tried to visit the child, or has failed to maintain any sort of personal contact with the child.323 The courts take into consideration the parent’s difficulty in finding transportation to the child’s residence, actions and statements made by others to hinder or discourage visitation, or whether the parent’s lack of visits with the child was motivated by true indifference.324 If visiting the child is not practical, letters, telephone calls, and gifts may demonstrate a reasonable degree of concern, interest and responsibility.325 Courts focus on a parent’s efforts to communicate with a child and show some interest in the child, not on how successful those efforts are.326

Additionally, courts do not penalize a parent for moving out of the state where the child resides if the parent shows that it was necessary to move for financial reasons or other family obligations.327 Normally, lack of contact or concern with the child must continue over a substantial period of time. The parent must have made no efforts to speak to or see the child for at least six months before the court will consider terminating the parent’s rights.

In a case where a parent attempted to keep in contact with her child, but was prevented from doing so by the child’s father and his parents, she was not found unfit for failure to maintain a reasonable degree of concern about her child’s welfare and thus her rights could not be terminated.328 In the Syck case, the mother had not seen her child for over five years and lived out of state, but her attempts to communicate were enough to show that she tried to maintain contact and cared about her child’s welfare.329 Since the court examines each case in light of its particular circumstances, the court in Syck took into account the mother’s “limited education and the restrictions that it put on her employment opportunities, her poor financial condition, her young age, and the absence of any substantial emotional support . . . .”330 The court

322. Syck, 562 N.E.2d at 182-83.
323. Id. at 182-84.
324. Id. at 185.
325. Id. Demonstrating a reasonable degree of concern, interest and responsibility by actions other than personal visits is dependent upon the “content, tone, and frequency of those contacts under the circumstances” of the case. Id.
326. Id. (citing In re Drescher, 415 N.E.2d 636, 641 (Ill. App. Ct. 1980)).
327. Syck, 562 N.E.2d at 186. To terminate a particular parent’s parental rights, the courts must find that there is clear and convincing evidence that a level of reasonable interest and concern was not maintained. Id. at 185-86.
328. Id.
329. Id.
330. Id. at 186.
noted that while such facts do not excuse a complete absence of communication with one’s child, they do relate to the reasonableness of the communication that a parent attempts to maintain with the child.\textsuperscript{331}

Terminating Kirchner’s parental rights under this standard would be difficult under the present circumstances. If the newspaper stories are correct about the situation, Kirchner has been seeing his children weekly, calling them regularly, and giving his wife money to help support them. Even if Kirchner moved back to Czechoslovakia, he could still maintain a reasonable degree of concern for Richard by calling and sending cards regularly, and visiting a few times a year. If Kirchner stopped visiting Richard for a period of at least six months, with no adequate explanation for his actions, then this could be used as evidence that he has failed to maintain a reasonable degree of concern, interest or responsibility as to the welfare of Richard, and his rights could be legally terminated under this section of the statute. Additionally, if Kirchner moved a far distance from Richard, and did not make an effort to communicate with him either by calling him or sending him letters, the courts could terminate his rights under the statute. If this happened, the courts would probably terminate his parental rights in light of the circumstances that surround this whole case; that Kirchner fought so hard to get his son back just to leave him a year and a half later. The Does would have to wait at least six months, but realistically much longer, before they could get Richard back into their home. Realistically, termination proceedings can last for years.

2. Abandonment

Another way that Kirchner’s parental rights could be terminated is if the court found that Kirchner abandoned Richard under the Adoption Act.\textsuperscript{332} “Abandonment is conduct on the part of a parent which demonstrates a settled purpose to forego all parental duties and to relinquish all parental claims to the child.”\textsuperscript{333} The evidence must show that the parent, through his actions, intended to forego permanently all parental obligations and claims.\textsuperscript{334} Any evidence of interference with the parent’s efforts to contact the child will defeat any claim of abandonment.\textsuperscript{335}

The question of intention is one to be determined by the evidence. Under this standard, the evidence must show that the parent intended to give up their parental rights and responsibilities. This means that even if a parent’s actions

\textsuperscript{331}. \textit{Id.}
\textsuperscript{332}. 750 ILL. COMP. STAT. ANN. 50/1(D)(a) (West 1996).
\textsuperscript{334}. \textit{Id.}
\textsuperscript{335}. 750 ILL. COMP. STAT. ANN. 50/8 (West 1996).
show that the parent has realistically left his child’s care and responsibility of that child to another, the court cannot terminate the parent’s rights under the abandonment standard unless the parent intended to relinquish their rights as a parent. It must be clear from the evidence that the parent intended to relinquish the child or abandon it. The court may terminate the parent’s right for failure to maintain a reasonable amount of concern, interest and responsibility for the child’s welfare, but not for abandonment.

If Kirchner were to leave his child and tell Daniella that he no longer wanted responsibility for Richard, this would be evidence of an intention to forego all his parental responsibilities and duties. If Kirchner leaves for Czechoslovakia and tells Daniella that he does not care about Richard and does not want the responsibility of being his father, this action could constitute abandonment and his parental rights could be terminated. However, if Kirchner just leaves the care of Richard to Daniella and does not intend to forego his parental obligations, he cannot be found to have abandoned Richard unless he vanishes from his life for a substantial period of time. A mother’s rights were terminated upon showing that she had abandoned her son for the first six years of his life even when it was shown that she later began visiting him in an effort to win his return home to her. If Kirchner were to abandon Richard for a period of years, then his rights could be terminated for abandonment even if he did not intend to relinquish custody of Richard. The problem with abandonment is that the Does would have to wait until Richard was in his teens to try and get him back. Terminating Kirchner’s rights for abandonment would be very difficult to prove, but terminating his parental rights by desertion is another matter.

3. Desertion

Unlike abandonment, a parent can be found unfit on grounds of desertion when he or she has demonstrated through his or her conduct an intention to relinquish custody of the child permanently, but not to relinquish all legal claims to the child. Involuntary separations do not constitute desertion. This means that even if Kirchner were put in jail in another state, he could not be found to have deserted Richard. He could be found unfit pursuant to other sections of the statute, but not for desertion.

340. Id.
The difference between abandonment and desertion is that a finding of abandonment requires the court to find that a parent intended to relinquish all legal claims to the child. Desertion requires the parent to permanently terminate custody over the child or intend to give up custody.\textsuperscript{341} Intent to give up custody is easier to prove than intent to give up all legal rights to the child. If Kirchner were to tell Daniella that he did not want custody of Richard and that she could keep him, his parental rights could be terminated if it is shown that he fails to communicate with Richard at all.

Additionally, if Kirchner fails to have contact with Richard for more than three months prior to the termination proceeding, he can be found to have deserted Richard. This is not to say that if he has to go back home for more than three months, his parental rights will be terminated because he has been gone, but, if he leaves and his conduct shows an intention to relinquish custody, his rights may be terminated. Furthermore, if Kirchner has no contact with Richard for over three months and a petition to terminate his parental rights is sought, this lack of contact for three months prior to the petition may show evidence of an intent to relinquish custody of Richard. It would be much easier to terminate Kirchner’s rights under this section than under abandonment because as history has shown, Kirchner will probably never show any specific intent to relinquish all legal rights to his son.

The Does should watch Kirchner’s actions very carefully in the next few months because Kirchner could show conduct that would evidence a finding of parental unfitness under the sections discussed above. Terminating Kirchner’s rights is only the beginning of the battle for the Does. After Kirchner’s parental rights are terminated, under the law, a best interest hearing would be held to determine if it would be in Richard’s best interest to return to the Does permanently. This is where the fight for Richard becomes more difficult.

C. THE SECOND STEP IN THE PROCESS: THE BEST INTEREST OF THE CHILD

After a parent is found unfit under the Adoption Act, the court must then look at best interest evidence.\textsuperscript{342} Although a parent may be found unfit to have custody of his/her children, it does not follow that the parent cannot remain the child’s legal parent with “the attendant rights and privileges.”\textsuperscript{343} Once evidence of parental unfitness is found, however, “all of the parent’s rights

\textsuperscript{341}. Cech, 291 N.E.2d at 23.
\textsuperscript{342}. Syck, 562 N.E.2d at 183-84.
must yield to the best interest of the child."344 There are many factors to consider when deciding what is in the child’s best interest: effect of termination on the child, presence of an adoptive home, bonding of the child to foster parents, age of the child, the child’s wishes if he or she is fourteen or older, continued contact with siblings, and the child’s adjustment to his home, school and community.345 Unfortunately, even if Kirchner’s parental rights are terminated, the Does would not have much chance of getting Richard back in light of the best interest evidence.

Richard has already been torn from one home. The court would never put him through this again if the evidence proved that Daniella was taking good care of him. Richard now has a sister, and it would be hard to imagine that being placed back with the Does would be in his best interest. First of all, by the time Kirchner’s parental rights were terminated, Richard would probably be about eight or nine. He would have been in Kirchner’s home for at least four or five years. It would be doubtful that any evidence would prove that it would be in Richard’s best interest to be removed from Daniella’s home. Although Daniella is not recognized as Richard’s parent under the law (because she voluntarily signed away those rights when she put Richard up for adoption), at this point in time, Richard recognizes her as his mother. She can get legal custody of Richard if the court finds that it is in Richard’s best interest to stay with her.

The only way that the Does would get Richard back is if evidence was presented to the court that showed Daniella was not adequately providing for Richard, either by neglecting him, not attending to his physical needs, not attending to his educational needs, or that she has a drug or alcohol problem. Even if Daniella was found to have one of the above mentioned problems, the court and DCFS would most likely try to help her overcome her problems before removing Richard. Due to Richard’s past legal history, the court would probably be very apprehensive about removing him from Daniella’s care. The court may want to give Richard back to the Does to make up for the 1995 decision, and the public would probably applaud, but Richard’s best interest would probably be served by remaining with Daniella Kirchner.

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345. 750 ILL. COMP. STAT. ANN. 5/602 (West 1992); 750 ILL. COMP. STAT. ANN. 50/12 (West 1992); 750 ILL. COMP. STAT. ANN. 50/6 (West 1992); 750 ILL. COMP. STAT. ANN. 50/1 (West 1992).
D. WHO IS TO BLAME?

As the debate goes on, so will the blame. The general public is quick to criticize Justice Heiple for his notorious opinion in the *Kirchner* case. Even Governor Edgar in his annual state address in January 1997, included criticism of the Illinois Supreme Court's decision. In the middle of his address, during the portion about violence toward children, Edgar said, "And speaking of children . . . I hope this year the judicial system in Illinois can find a way to try to bring a fair, happy ending to the Baby Richard tragedy." When one reads the case closely, however, Justice Heiple is quick to place the blame on the adoptive parents.

In his opinion, Justice Heiple took a moment to address the length of time it took to resolve the matter. He stated that it was unfortunate that over three years of the baby's life had to elapse before the final judgment. Moreover, he went on to state that the fault lies initially with the mother, who fraudulently tried to deprive the father of his rights, and next, with the adoptive parents and their attorney, who proceeded with the adoption when they were aware that a real father existed who was denied knowledge of his baby's existence. He further stated that when the father entered his appearance in the adoption proceedings fifty-seven days after the baby's birth and demanded his rights as a father, the petitioners should have relinquished the baby at that time. "It was the adoptive parents decision to prolong this litigation through a long and ultimately fruitless appeal." On Justice Heiple’s behalf, his duty is to interpret the law and to see to it that it is administered to all properly. The law by which the case was resolved was strictly followed, and that is why Kirchner was eventually awarded custody of the child. Chances are, the majority of the population is ignorant of the facts of this case. Few know that both the Does and their attorney acquiesced in Daniella’s scheme to fake the death of her child. This is definitely an act that is not worth rewarding. On the other hand, why should an innocent child suffer the consequences?

When viewed strictly from the child’s point of view, what matters most is finding the distinction between recognizing the natural parent-child relationship and terminating an existing relationship. Although these issues

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347. *In re Petition of Doe*, 638 N.E.2d 181, 190 (Ill. 1994) (Heiple, J., in support of the denial of rehearing).
348. *Id.* at 188.
349. *Id.*
350. *Id.*
are addressed in every custody case, they are often lost in the heat of advocacy. In the heat of the courtroom, the focus tends to be not on the child, but rather on scrutinizing the actions of everyone but the child prior to the taking or the relinquishing of that child. When all is said and done, several years have passed and the child has developed a relationship with those he has been living with. The Kirchner line of court proceedings should not have taken three or four years to resolve. Whatever the facts of a particular case, courts must be cognizant of the toll that lengthy proceedings exact on a young child’s life.

IV. Is There A Solution?

One proposed alternative would be to give the child the right to decide. It is, however, superficially appealing at best in that it runs counter to the complexity of what it means to be a child. As dependents, children are almost universally incompetent under the law until they reach majority. More specifically, in Illinois they are not permitted to make decisions about their lives while still in minority. As a result, the responsibility for making life decisions rests in the hands of the parent. This seems like the only logical choice because children at very young ages are more apt to decide not based upon what is best for them, but upon who is influencing them more at the time.

In recognition that children cannot speak for themselves, the court may appoint a guardian ad litem to make decisions based upon the best interests of the child. However, all this resolves to do is mix in another adult into the heat of the battle. Moreover, who is to say that the guardian would be making those decisions based upon the best interests of the child. The guardian ultimately makes choices based upon his view of what is best for the child, not the child’s view. Thus, a measure giving the child the right to decide would probably never pass the door step of the legislature.

Judging from recent events, it would appear that the most logical solution would be to expand the “interest” requirement of the natural parent seeking to attain custody of the child. In Kirchner, the court held that Kirchner displayed a sufficient amount of interest in trying to reunite with his son. He searched through garbage cans for diapers, he repeatedly called the home in which Daniella was staying and he called several hospitals to inquire about the status of his baby. However, Kirchner is now separated from Daniella once again and he has chosen to leave his children with her. Somehow, these recent events do not seem as shocking as they should.

When a parent seeks to assert his paternity rights, stricter standards should be applied to make certain that the parent not only has an interest in his
child, but has the character that illustrates unconditional feelings for that child as well. Without certainty, many situations may end up like this one and the parent may all of a sudden disappear.

CONCLUSION

The Baby Richard case, to some, signified everything that was wrong with our judicial system. There was something very troublesome in allowing an innocent child to be torn from one family in order to be placed with another. The future is sure to bring about some changes regarding the custody of children. That much is apparent from the recent legislation that has been passed. However, legislatures can create as many laws as they want, but such laws will not make a difference if the amount of time taken to administer these laws through the court system takes three to four years in each case. For every new piece of legislation there is a new twist of facts that only complicates matters further. Life for a child, much less an adult, does not put itself on hold for the judicial system. In some respects, a whole life flashes by during court proceedings. Nevertheless, the legislature must consider not only the most efficient laws, but the ones that elicit the fastest result as well.

Yet from the horror, perhaps came some good. The legislation amending the Adoption Act may not have helped Richard, but it may someday affect the life of another child. Only time will tell what the future will bring for adopted children who are caught in the web of our court system.