IN WHOSE BEST INTEREST?

Joseph Goldstein

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I.

The law ought to and does presume that children are entitled to the joint care and custody of their parents. Indeed, it is generally in the best interests of a child to be in the joint custody of his or her parents--whether or not they are now or ever have been married. That is certainly what the continuity guideline of Beyond the Best Interests of the Child is all about. In that book Anna Freud, Albert J. Solnit and I explained how important continuity of relationships is to a child's normal development. We observed:

> Physical, emotional, intellectual, social, and moral growth does not happen without causing the child inevitable internal difficulties. The instability of all mental processes during the period of development, from infancy to adulthood, needs to be offset by stability and uninterrupted support from external sources. Smooth growth is arrested or disrupted when upheavals and changes in the external world are added to the internal ones.*

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Thus it is important for the law to facilitate the establishment and continuation of what we call "psychological" parent-child relationships--to "maintain" as, I understand Canadian law intends "the family unit in domestic peace" and "where there is a breach... to reinforce the remainder of the unit where the breach is irreparable.**

Joint custody and indeed access or visitation are it would seem buttressed if not justified by the continuity guideline. That is true up to a point--up to the point where the breach makes the maintenance, the reinforcement and continuity of "the remainder of the unit" critically important to the well-being of the child--up to the point that the authority of the court becomes a substitute for shared understanding between separated parents--up to the point that the authority of the law may be used to impose the will of one parent over another and thus undermine the continuity of relationships within the newly organized family unit. At that point joint custody is no longer joint. In the eyes and the life of the child it becomes split or divided custody. At that point visitation or access becomes transportation--forced attendance. At that point

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**From remarks of Chief Judge H.T.G. Andrews of Jan. 7, 1980 reputed by Judge Karswick in "In the Matter of Roy M.C. et al. Feb. 22, 1980).

only lip service is paid to continuity--the continuity of tie to both parents is placed in jeopardy. Indeed the continuity guideline, correctly understood, should enable the court to recognize when the law becomes an interrupter not a reinforcer of the remainder of the family unit--not a protector but an underminer of psychological bonding between child and parent.

Thus, from the vantage point of a child's well being, the presumption in favor of joint custody is not without qualification. It is valid only so long as both separated parents remain in agreement about continuing together to be directly responsible for the custody and care of their children. The word agreement in this context--in terms of the child's best interest--does not mean a legally enforceable agreement or a token agreement camaflouging the coercive force of the state. It means real agreement on the part of both parents to share in the care and custody of their child--to cooperate with one another in fulfilling their parental roles--despite their inability to find in each other as adults a satisfactory basis for living together.

How we come to take the stand we do about the limits and limitations of the law and of judges in determining custody for children of separating parents may best be explained first by reviewing what we said in Beyond the Best Interests of the Child and secondly by discussing in some detail its implications for determining:

1. What ought to be established befor the "best interests of the child" can be invoked over the right of even separating parents to decide who shall be responsible for the custody and care of their children,

2. The role of law with regard to visitation or access,

and

3. The role of law with regard to joint custody.

II.

The guidelines that we developed in Beyond the Best Interests of the Child rest on two convictions. First, we believe that a child's need for continuity of care by autonomous parents requires acknowledging that parents should generally be entitled to raise their children as they

think best, free of state interference. This conviction finds expression in our preference for minimum state intervention and prompts restraint in defining justifications for coercively intruding upon family relationships. Second, we believe that the child's well-being--not the parents', the family's, or the child care agency's--must be determinative once justification for state intervention has been established. Whether the protective shell of the family is already broken before the state intrudes, or breaks as a result of it, the goal of intervention must be to create or re-create a family for the child as quickly as possible. That conviction is expressed in our preference for making a child's interests paramount once his care has become a legitimate matter for the state to decide.

So long as a child is a member of a functioning family, his paramount interest lies in the preservation of his family. Thus, our preference for making a child's interests paramount is not to be construed as a justification in and of itself for intrusion. Such a reading would ignore the advantages that accrue to children from a policy of minimum state intervention. The goal of every child placement, whether made automatically

by birth certificate or more deliberately following direct intervention by administrative or court order, is the same. With the possible exception of the placement of violent juveniles, it is to assure for each child membership in a family with at least one parent who wants him. It is to assure for each child and his parents an opportunity to maintain, establish, or reestablish psychological ties to each other free of further interruption by the state. That is what continuity is all about.

With these convictions and that common purpose in mind, in Beyond the Best Interests of the Child we proposed and explained the following guidelines for determining the placement and process of placement for children whose custody becomes the subject of legal action:

> Placement decisions should safeguard the child's need for continuity of relationships. Placement decisions should reflect the child's, not the adult's, sense of time. Placement decisions must take into account the law's incapacity to supervise interpersonal relationships and the limits of knowledge to make long-range predictions.

These guidelines were designed to pour content into the best interests standard--or what we call the least detrimental available alternative standard.--

In the eyes of the law, to be a child is to be at risk, dependent, and without capacity or authority to decide free of parental control what is "best" for oneself. To be an adult is in law to be perceived as free to take risks, with the independent capacity and authority to decide what is "best" for oneself without regard to parental wishes. To be an adult who is a parent is therefore to be presumed by law to have the capacity, authority, and responsibility to determine and to do what is "good" for one's children, what is "best" for the entire family.

Freud refers to "the long period of time during which the young of the human species is in a condition of helplessness and dependence."* He explains how this "biological factor" on the one hand burdens the parents with the full weight of responsibility for the survival and well-being of their offspring and, on the other hand, assures that the day-to-day ministering to the child's multiple requirements will turn the physical tie between them into a mutual psychological attachment. Such constantly ongoing interactions between parents and children become for each child the starting point for an all-important line of development that leads

*Sigmund Freud, Inhibitions, Symptoms, and Anxiety [1926] Standard Edition 20: 154-55 (1959).

toward adult functioning. Helplessness requires total care and over time is transformed into the need or wish for approval and love. It fosters the desire to please by compliance with a parent's wishes. It provides a developmental base upon which the child's responsiveness to educational efforts rests. Love for the parents leads to identification with them, a fact without which impulse control and socialization would be deficient. Finally, after the years of childhood comes the prolonged and in many ways painful adolescent struggle to attain a separate identity with physical, emotional, and moral self-reliance.

These complex and vital developments require the privacy of family life under guardianship by parents who are autonomous. The younger the child, the greater is his need for them. When family integrity is broken or weakened by state intrusion, his needs are thwarted and his belief that his parents are omniscient and all-powerful is shaken prematurely. The effect on the child's developmental progress is invariably detrimental. The child's need for safety within the confines of the family must be met by law through its recognition of family privacy as the barrier to state

intrusion upon parental autonomy in child rearing. These rights--parent autonomy, a child's entitlement to autonomous parents, and privacy--are essential ingredients of "family integrity."

Two purposes underlie the parents' right to be free of state intrusion. The first is to provide parents with an uninterrupted opportunity to meet the developing physical and emotional needs of their child so as to establish the familial bonds critical to every child's healthy growth and development. The second purpose, and the one on which the parental right must ultimately rest, is to safeguard the continuing maintenance of these family ties--of psychological parent-child relationships--once they have been established. The two purposes are usually fulfilled when the parental right is assigned at a child's birth simply on the basis of his biological tie to those who produce him.

Beyond these biological and psychological justifications for protecting parent-child relationships and promoting each child's entitlement to a permanent place in a family of his own, there is a further justification for a policy of minimum state intervention. It is that the law does

not have the capacity to supervise the fragile, complex interpersonal bonds between child and parent. As parens patriae the state is too crude an instrument to become an adequate substitute for flesh and blood parents. The legal system has neither the resources nor the sensitivity to respond to a growing child's ever-changing needs and demands. It does not have the capacity to deal on an individual basis with the consequences of its decisions, or to act with the deliberate speed that is required by a child's sense of time. Similarly, the child lacks the capacity to respond to the specific rulings of an impersonal court as he responds to the demands of personal parental figures. Parental expectations, implicit and explicit, become the child's own. However, the process by which a child converts external expectations, guidance, commands, and prohibitions into the capacity for self-regulation and self-direction does not function adequately in the absence of emotional ties to his caretakers.

A policy of minimum coercive intervention by the state thus accords not only with our firm belief as citizens in individual freedom and human dignity, but also with our professional understanding of the intricate

developmental processes of childhood.

III.

What are the implications of the convictions and guidelines of Beyond the Best Interests of the Child for (1) state intervention to determine custody when parents separate and (2) if intervention is justified, making custody joint or subject to visits or access with the non-custodial parent.

1. Divorce or separation of married parents would no longer in and of itself automatically give the court authority to review or decide custody. Judicial intervention would only be justified when one or both separating parents, whether married or unmarried, bring to the court their disagreement, if they have one, about the custody of their child. Children of unwed parents would be regarded no differently than the child of married parents who divorce or separate. In accord with the continuity guideline the courts would be restrained from forcing parents who separate to abdicate their role as exclusive (but joint) representatives of their children. They, the parents, would remain free to work out for themselves, if they can, the

custody and care arrangements that they believe will best serve the interests of their child and their now divided family. They would continue to have joint custody and care of their children even if one parent with the support of the other assumes full responsibility for day-to-day care.

But when they fail to find their own way of resolving their disagreements about custody, separating parents in effect, temporarily, give up an important part of their autonomy. By turning to the court, they open up the otherwise "private realm of family life which the state cannot enter." They declare themselves unfit to decide custody; they significantly alter the parent-child relationship; they deprive their child, momentarily--until the court decides which one will have custody,--of insulation from direct contact with the law. The child is exposed, for as short a time as possible, to the impersonal direction and coercion of the court. Since there is little possibility of the child's entering into any intimate relationship with the court, there is also no likelihood that he will identify with the attitudes and rulings of the new authority over his life. Therefore, the court's discretion at the disposition stage should be limited to deciding who shall

have custody, and as little time as possible should elapse before the child's position under a personal parental authority is fully restored.

2. Courts and commentators most frequently question our conclusion that it is in the best interest of the child for the custody award to be as unconditional as a child's assignment at birth to his parents; as unconditional as we believe it ought to be when parents remain together or remain in agreement about their children despite their separation.

Too often judges confuse their authority to do with their capacity to do. They fail to realize that the who and how of custody are and must be separate. It is the who which judges must and can decide. It is the how which is beyond any judge's competence. But judges often fail to see what must be obvious once said, that the intricate and delicate character of the parent-child relationship places it beyond their constructive (though not beyond their destructive) reach. Familial bonding is too complex and too vulnerable a process to be managed in advance or from a distance by so gross and impersonal an instrument as the law. In rejecting this simple guideline as simplistic, judges become the oversimplifiers.

Were judges able to put themselves in the skin of a child who is the subject of a custody dispute they would restrict their activity to answering the one question that they really can and must answer, which is who shall have custody and not how or under what conditions the custodian and child are to relate to one another and to others. But, like the well-intentioned, overprotective, and often destructive parent who doesn't know when to let go, such judges decide not only who is to be parent, but also give in to the temptation of deciding how the child ought to be raised.

Too frequently judges behave as if the function of placement decisions is to provide a child with autonomous judges, not autonomous parents. They act as if the parens patriae doctrine and the best interests standard granted them the competence to be good, albeit absentee, super-parents with a veto power. Courts, administrative agencies, and the experts upon whom they rely must learn to reject such simplistic remedies for the harm and hurts children may suffer when their parents separate. Judges can no longer deny what their own experience should make obvious to them, which is that they have the time and capacity to damage but not to nurture or

manage the healthy growth of familial bonds. In their professional roles they cannot be parent to someone else's children. The best informed and most sensitive family court judges singly or rolled into one do not a parent make. At best and at most, law can provide a new opportunity for the relationship between a child and at least one of his parents to unfold free of coercive meddling by a judge. To say this is not to say that the law should preclude the development of a cooperative arrangement over time between the parents who are in conflict. But it is to say that no such arrangement can be forced or enforced by law and still serve the child's interests.

Our conclusion that noncustodial parents should have "no legally enforceable right to visit" their children continues to be the most misunderstood, most controversial, and most resisted aspect of our suggestion that all but emergency and other truly temporary placements should be unconditional. Since we hold the same view about court enforceable joint custody agreements--what we have to say about access or visitation applies as well to joint custody. Our view on visitation has been misread to mean

that we oppose the continuation of contact between a child and his noncustodial parent. It has been challenged with the argument that our position (a) conflicts with the least detrimental alternative standard, especially with the continuity guideline; (b) deprives a child of his basic right to maintain his ties to the noncustodial parent; and (c) places an instrument of revenge in the hands of the custodial parent (usually pictured as an angry mother) who will use it to spite the noncustodial parent (usually picture as a thwarted and well-motivated father).

We reasoned, always from the child's point of view, that custodial parents, not courts or noncustodial parents, should retain the right to determine when and if it is desirable to arrange visits. We took and continue to take this position because it is beyond the capacity of courts to help a child to forge or maintain positive relationships to two people who are at cross-purposes with each other; because, by forcing visits, courts are more likely to prevent the child from developing a reliable tie to either parent; and because children who are shaken, disoriented, and confused by the breakup of their family need an opportunity to settle down

in the privacy of their reorganized family with one person in authority upon whom they can rely for answers to their questions and for protection from external interference. After all, the goal of every placement decision, whether made at birth by certificate or later by more direct state intervention, is to provide each child with an opportunity--unbroken by further intrusion--to establish or reestablish and maintain psychological bonds to those to whom he is entrusted.

A child develops best if he can have complete trust that the adults who are responsible for him are the arbiters of his care and control as he moves toward the full independence of adulthood and gradually comes to rely upon himself as his own caretaker. A court undermines that trust when it subjects his custodial parent to special rules about raising him, for example, by ordering (even scheduling) visits with the noncustodial parent. In the child's eyes, the court, by directing him to act against the express wishes of his custodial parent, casts doubt on that parent's authority and capacity to parent. It damages, particularly for the younger child, his confidence in his parent's power to shield him from unwanted and painful threats from the outside. It invites the older child to manipulate his

parents by invoking the higher authority of the court rather than to learn to work things out with his custodial parent. We formulated the continuity guideline in direct response to such considerations. We urged, therefore, that the already handicapped relationship between child and custodial parent not be plagued by the never-ending threat of disruption by the impersonal authority of the court.

However, we did not and do not oppose visits. Indeed, other things being equal, courts, in order to accord with the continuity guideline, could award custody to the parent who is most willing to provide opportunities for the child to see the other parent. And--even though we do not believe that a noncustodial father (or mother) can play the same significant role in a child's life as a parent in an intact family--we usually encourage custodial parents who seek our advice to facilitate the maintenance of the relationship between the child, particularly the older child, and his noncustodial parent. But such advice can and should be nothing more. Custodial parents must remain free to accept or reject our notions about the importance of continuity. The guideline cannot be pressed any further in favor of the child's

now secondary relationship to his custodial parent. As time goes by and as circumstances change, the child needs a parent who can work out with him ways of resolving his wishes to see and not to see the other parent as well as of dealing with his joys and sorrows following visits and his hurts when noncustodial parents refuse to maintain contact or fail to show. Meaningful visits for the child can occur only if both the custodial and the noncustodial parents are of a mind to make them work. If so, a court order is both unnecessary and undesirable. If not, such orders and the threat or actual attempt to enforce them can do the child no good.

We favor contact between a child and his noncustodial parent so long as neither parent can use the courts to enforce the other to arrange visits. Even if requested by both parents, we would object to courts making a visitation or joint custody agreement a part of its decree. If mere registration were to give both parents a greater sense of commitment to make visitation or joint custody work, a certificate of recognition of the agreement with no more than symbolic force might be issued to them. As an alternative, it might not be inappropriate for judges to add to their unconditional custody awards a paraphrase of the state's WARNING to cigarette smokers:

DENIAL OF VISITS OR FAILURE TO COOPERATE IN MAKING YOUR JOINT CUSTODY AGREEMENT WORK MAY BE DETRIMENTAL TO YOUR CHILD.

Out of concern for equalizing the bargaining strength of separating parents Mnookin and Kornhauser argue that visitation and joint custody agreements should be specifically enforceable in law.* Their faith in the law's capacity to implement such contracts in situations where the law has already proved powerless to enforce meaningful marriage relationships by contract seems ludicrous. The marriage contract is now generally construed to mean "till divorce do us part." When the fad for joint custody agreements fades we will begin to recognize how costly it, like other magic formulas, have been to children. Strangely our reasons for objecting to court-enforceable visits seem to be more easily recognized by courts resolving disputes about "joint" custody. For example, in reversing a lower court order that had "awarded to the parents jointly [two sons aged six and seven and a half] to spend weekdays with the mother and weekends with the father, Chief Judge Breitel of the New York Court of Appeals said:

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*See R. H. Mnookin and L. Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," 88 Yale Law J. 950, 980-984 (1979).

"Entrusting the custody of young children to their [divorced] parents jointly, especially where the shared responsibility and control includes alternating physical custody, is insupportable when parents are severely antagonistic and embattled... [I]t can only enhance family chaos... It would, moreover, take more than reasonable self-restraint to shield the children as they go from house to house, from the ill feelings, hatred, and disrespect each parent harbors towards the other."* After observing that the court must "recognize the division in fact of the family" and that "there are no painless solutions," Judge Breitel said: "In the rare case, joint custody may approximate the former family relationships more closely than other custodial arrangements. It may not, however, be indiscriminately substituted for an award of sole custody to one parent." What the court fails to recognize is that no parent has sole custody so long as he or she is subject to rules of visitation, and that courts are as powerless to forge affection by a visitation order as they are by decreeing any other form of "joint," "divided," or "split" custody.

Finally, courts and commentators, blinded by the specter of spiteful

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*Braiman v. Braiman 378 N.E. 2d 1019, 1020 (1978).

custodial parents denying visits or opposing joint custody at the child's expense, have rejected our position with the misleading assertion that visitation or access is a right of the child, not of the parents. In fact, by subjecting an award of custody to an order imposing visits, the court does not protect the child's "basic right" to see his noncustodial parent. It merely shifts the power to deprive the child of his "right" from the custodial parent to the noncustodial parent. Visitation orders make the noncustodial parent--rather than the parent who is responsible for the child's day-to-day care--the final authority for deciding if and when to visit. Even if the court orders visits because it believes they will serve the child's best interest, the noncustodial parent remains free not to visit, to "reverse" the court without risk of being in contempt. The court is powerless, as it should be, to order noncustodial parents to visit their "waiting" children. But the court has the corrosive power to have a child forcibly removed from a custodial parent who refuses to allow visits, or to imprison that parent for contempt. When it exercises such power, the court disrupts, not insures, continuity of parent-child relationships. It

establishes for the child--and indeed for other children in the family who are not themselves subject to visitation orders--that his custodial parent cannot be trusted and is powerless to protect him. Courts obscure the real issues when they say what they cannot mean--that access or visitation or indeed joint or divided custody is "a basic right of the child rather than a basic right of the parent."

Briefly--and from the child's vantage point--the right of decision about his care, about his wishes must be vested in someone. Common sense and psychoanalytic notions about child development confer it upon the custodial not the noncustodial parent. However parental fitness is defined, separated parents in disagreement about joint custody or access when forced to "cooperate" become for their child unfit even though each individually could be a fit parent for that child. Changed circumstances and changing needs in the life of a child are best met by a functioning family, by the

family's decision at the time. The court's enforcement or even the threat of enforcement of a prior agreement about jointness or access becomes an obstacle to the integrity of the new family, an invitation to the invasion of its privacy and a violation of parental autonomy. Courts and legislatures must not allow their good intentions to obscure the harm they do to children.