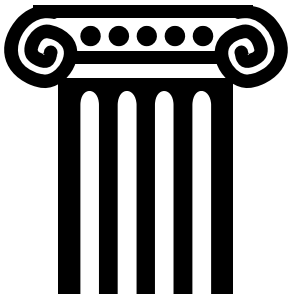

Best Interests of the Child

Brian Bix

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Under current law in the United States and in many other countries, court decisions regarding a child must be grounded on a judgment regarding which option would be in that child's "best interests." By its nature, this is a vague standard rather than a precise rule, more a broad delegation of authority combined with a direction to focus on the perspective of the child (rather than on the claims and interests of other parties). At the same time, this amorphous standard has the potential to hide significant bias and to either cover or encourage arbitrary and inconsistent decision-making.

"Best Interests of the Child" was first introduced as a standard for determining child custody, an open-ended child-centered standard in sharp contrast to the custody standards that had preceded it. In ancient Roman law, and in the English and American common law until the 19th century, custody of a child in a case of divorce or separation would go to the father. In the 19th century, the English courts developed the idea of a "tender years presumption," such that young children (usually understood as 7 years old or younger) would go to the mother, unless she was shown to be unfit; a number of American courts reached similar conclusions at around the same time. Though the new rule could be seen as simply a change from a paternal to a maternal presumption of custody for the youngest children, what was significant was the alternation in the underlying justification: the paternal presumption had been based on a sort of property right the father had in his children; the maternal presumption was grounded on arguments regarding what would be in the best interests of the children. Over time, the justificatory language of "best interests" turned into a standard itself: a legislative or judicial rule that custody decisions should be grounded on the the bests interests of the children.

Most American states have a statute directing courts to consider a long list of factors in coming to their decision regarding which custody outcome is in a child's "best interests," but the statutes usually offer little guidance as to the relative weight to be given to different factors (sometimes guidance has been added by subsequent judicial decisions, but usually significant discretion and indeterminacy remain).

In American custody law today, "best interests" remains the ultimate touchstone, the underlying justification offered for choosing one standard for decision over another, but in many jurisdictions the actual rules may be more specific: e.g., a presumption for joint legal or physical custody, a presumption for custody by the "primary caretaker," a strong preference for parents over non-parents in custody disputes, or deference to the stated custody preference of an older child.

It is interesting to note the way that the legal presumption most states have adopted for parents against non-parents in custody decisions grew out of a reaction against a particular "best interests" analysis: the Iowa Supreme Court's decision in the notorious case of *Painter v. Bannister* (1966), where the court argued that placement with more traditional grandparents in Iowa would be more conducive to a child's "best interests" than returning hthe child to his "bohemian" father in California. In a different sort of legal evolution, the focus on children's "best interests" has been the moving and justifying force behind the "nexus test" in custody decisions adopted by a growing number of jurisdictions; this standard holds irrelevant all accusations of parental immorality (accusations of adultery, promiscuity, homosexuality or polygamy had once been determinative in many custody battles), except in the unusual case where such

alleged immoralities can be shown to directly affect the well-being of the children under care.

The phrase “best interests of the child” in American Family Law has expanded far beyond its origins to become ubiquitous in American family law, covering not only decisions on custody and visitation, but also adoption decisions, decisions whether to allow a custodial parent to relocate, determinations of whether to suspend or terminate parental rights (e.g., due to allegations of abuse or neglect), foster care placements, medical decision-making for the child, and countless other contexts where the question directly concerns children. Even when the legal rule in some areas approximates traditional ideas about parental rights and prerogatives, courts, lawmakers, and commentators often feel a need to justify such rules in terms of how they work for the best interests of children (or, at least, how they serve those interests better than alternative rules).

There are occasions when the rules regarding custody and visitation more clearly subordinate children’s interests to other concerns – whether parental rights (e.g., in the way that it takes a significant show of harm to a child before a court will cut off a legal parent’s right to visitation) or societal interests (e.g., regarding when courts are allowed to take race or religion into account in their rulings regarding custody and visitation).

The “best interests” standard does not assume any particular theory of child development or child psychology, but can in fact work in tandem with or incorporate any such theory – for these are basically competing theories about what would be in the best interests of children.

Though "best interests of the child," at least in that formulation of the standard, may have originated in Anglo-American Family Law, the standard has become common – now, the rule rather than the exception -- in other jurisdictions and in international law. For example, the United Nations Convention on the Rights of the Child (ratified 1989), states (Article 3, point 1): "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Those skeptical of the use of "best interests" standards raise various concerns. Some commentators are worried that the "best interests" standard gives too much discretion to judges, thus (a) creating too much disparity in outcomes among cases; (b) undermining any sense of predictability; and (c) creating too much of an opening for improper, and hidden, motives and reasons for decisions. Related to the above objections, one consequence of a relatively open-ended and discretionary decision standard, as contrasted to a standard more constrained by presumptions (e.g., a presumption for maternal custody, or a presumption for an equal split in physical custody), is that the uncertainty both encourages litigation and leads many who value custody to give up property and alimony rights in order to establish their custody rights in a separation agreement. And the litigation that is encouraged is often harmful both the parents who will have to continue to work together to raise the children, and the chilldren themselves, as the litigation will inevitably focus on each parent accusing the other of being unfit – or, at least, less fit – often an expensive and acrimonious process.

There are also circumstances where a "best interests" standard risks misleading decision-makers. For example, with adoption, the language of "best interests" seems to

direct decision-makers to find the best possible placement for a child, rejecting all others. However, this could lead an agency or court to reject quite adequate placement options, on the basis that a better placement might be available at a later time. The effect, however, would be to let children languish in foster or institutional care when loving homes are available. The better understanding of "best interests" in such cases would be to inquire whether the placement in question is in the best interests of the child, taking into account the current alternatives and those likely available in the near future (where a sub-optimal but clearly loving home placement would arguably almost always be preferable to current institutional care combined with uncertain long-term prospects).

Additionally, some commentators are troubled that a too-great focus on children's interests will lead to an undermining of the rights and interests of parents or the proper claims of certain communities (e.g., American Indian tribes, or certain racial and ethnic groups) to which the children belong. Finally, some have argued that the standards and procedures developed to protect "the best interests of the child," in fact work only to protect the interests of a certain class of adults, often in conflict with children's real interests.

Further Reading

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