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# Before the Best Interests of the Child

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BEFORE THE BEST INTERESTS OF THE CHILD, by Joseph Goldstein, Anna Freud and Albert J. Solnit. New York: Free Press/MacMillan. Biblio. Index. 1979. Pp. x 288. $12.95 hardcover.

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The widely acclaimed and much quoted first work by the same authors, *Beyond the Best Interests of the Child,*[1] has been influential in court decisions which reflect a growing societal concern for effective child custodial placement within the parental setting.

The three psychologists now address the growing phenomenon of state intrusion into the area of parental custodial rights. It would seem that the authors' two works have been written in inverse chronological order, with the first book focusing on the determination of what constitutes the dominant psychological parenting figure and urging the child's placement in that setting.

This work seeks answers to the question of when the state can intrude upon and sometimes terminate a child-parent relationship. The authors' conclusion is that intrusion by the courts should be reduced to the absolute minimum at three critical stages: (1) at the time of invoking state intervention; (2) at the time custody is being adjudicated; and (3) at the time custodial disposition is being made.

The obvious implication of urging minimal state intervention into the parent-child relationship is a recognition of the judicial concern in maintaining family privacy. The earlier cases of *Meyer v. Nebraska,*[2] *Pierce v. Society of Sisters,*[3] and *Wisconsin v. Yoder*[4] focused on the balancing of state versus family interests.

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1. J GOLDSTEIN, A FREUD, A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD, (1973).

2. 262 U.S. 390 (1923), where the court ruled a Nebraska statute prohibiting the teaching of the German language in the first eight grades in any school, public, private, denominational or parochial, was an unconstitutional intrusion by the state in the family obligation to educate its young.

3. 268 U.S. 510 (1925), ruling that the Oregon statute requiring all children in the state to receive their primary and secondary education in the public schools was a violation of a fundamental family right. Justice McReynolds, writing for the Court, stated: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

4. 406 U.S. 205 (1972), holding that a Wisconsin statute compelling school attendance until age 16 is violative of the first and fourteenth amendment rights

These interests include the free exercise of religious preferences.

It was not until the case of *Griswold v. Connecticut*[5] that Justice Douglas, in writing for the Court, constructed the concept of family privacy from most of the elements making up the Bill of Rights, namely: amendments 1, 3, 4, 5, and 9.[6] Three concurring Justices accepted the Constitutional idea of family privacy extending to the use of contraceptives in the marital bedroom. However these Justices refused to engraft the first eight amendments to that view, as did Justice Douglas, utilizing instead the ninth amendment as the sole repository of that right. *Eisenstadt v. Baird*[7] extended the private rights of the citizen to contraceptives in his or her bedroom without regard to marital status.

The rights of the individual to privacy have been extended to interracial marriage,[8] the woman's right to terminate a pregnancy

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of Amish parents to discontinue formal education for religious reasons.

5. 381 U.S. 479 (1965).

6. U.S. CONST., amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST., amend. III:

> No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed bylaw.

U.S. CONST., amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person of things to be seized.

U.S. CONST., amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. amend. IX:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

7. 405 U.S. 438 (1972).

8. Loving v. Virginia, 388 U.S. 1 (1967).

(whether married[9] or pregnant out of wedlock[10] and without regard to spousal consent[11] or parental consent, in the case of a minor).[12]

Accordingly, Goldstein, Freud & Solnit (hereinafter "Goldstein") deem it appropriate to suggest that government intervention into the relationship of parent and child should be severely curtailed. The authors could point to the judicial precedents referred to earlier to support that suggestion.[13] But more recent cases have indicated that Constitutional conservatives have been willing to let government interfere with the parent and child relationship in order to impose a morally righteous intrusion into what once was believed to be the business of the family.[14] Nevertheless, Goldstein persuasively demonstrates the psychological damage that can be done by removing a child from a parental setting without first making a serious inquiry into, and determination of, gross parental abuse which mandates placement in a non-parental setting.

Goldstein, in *Beyond the Best Interests of the Child*,[15] established guidelines for placement and emphasized in that work what he emphasizes here, namely: that "so long as a child is a member of a functioning family, his paramount interest lies in the preservation of his family." The authors also warn that this emphasis is not to be construed as a justification *per se* for state intervention. On the contrary, the primary thrust is for the state to refrain from intrusion into the establishment and continuity of the psychological ties of the child to a parent or his parents. (It should be noted here that Goldstein is responsible for promulgating, at least in legal literature, the notion that the parent to whom the child looks for nurturing, guidance, direction and purpose is the "psychological" parent, who may not be the natural or biological parent). The psychological parent is the one to whom the child looks for paren-

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9. Roe v. Wade, 410 U.S. 113 (1973).

10. Eisenstadt v. Baird, 443 U.S. 622 (1979).

11. Planned parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

12. Eisenstadt v. Baird, *supra* note 10.

13. The cases of Meyer v. Nebraska, Pierce Society of Sisters, Wisconsin v. Yoder, *supra* notes 2, 3, 4.

14. *See, e.g.*, the case of Moore v. Simms, 442 U.S. 415 (1979), where a majority of the Supreme Court in an opinion by Rehnquist, J., invoke the abstention doctrine of Younger v. Harris, 402 U.S. 37 (1971), to avoid utilizing the privacy arguments of *Griswold*, note 5, *supra* in order to let stand a termination of parental rights to a child in proceedings where the parents' right to be heard was seriously in doubt. *See* dissent of Stevens, J., 442 U.S. at 428.

15. *Supra* note 1.

tal nurture, guidance, direction and purpose. Further, the psychological parent is established, in the mind of the child, early in the child's development, as the parent who is the nurturing parent. Attempts to alter the child's conception of parentage must be made in the child's own time. To a one-year old child, eight months is two-thirds of his life. The parenting he receives in those eight months is far more significant to him than eight months of parenting is to a twelve-year old child.

Goldstein points out that since the very young child is almost totally dependent on the parent, attachment develops quickly to the parent, parents, or family regardless of the society's view of the attachment. This attachment causes traumatic psychological repercussions to the child if significantly interrupted or interfered with, particularly by an instrumentality as insensitive as the state. Obviously, there are times when the state is called upon or compelled to intervene into the privacy of the family relationship, but the authors caution against overly broad intervention statutes that give overly zealous social workers, lawyers, judges and moralistic meddlers the opportunity to impose their personal preferences on unwilling parents.

When is state intervention appropriate? In some matters intervention is necessary because of a clear societal consensus. But in other situations where a clear consensus does not exist, intervention is statutorily permitted. However, the standards for intervention are imprecise. In the case of a clear societal consensus one sees the development of such ideas as prohibiting a parent from selling his child into bondage. The statutory intervention situation deals with such imprecision as child neglect statutes where intervention into and termination of parental authority may be undertaken if the parents failed to "maintain a reasonable degree of interest, concern or responsibility as to [their] child's welfare."[16] Most parents experience, at sporadic intervals, a waning interest in their children. However a determination of when that interest has waned sufficiently to permit intervention might result in different interpretations of the statute by the courts. The Illinois Appellate Court, First District, (4th Division) in the adoption case of *In Re Ladewig*[17] had no difficulty in determining precisely when a "reasonable degree of interest . . . as to a child's welfare" had not been met. The court stated that a statute need not be more specific

16. ILL. REV. STAT. ch. 4 § 9.1-1D(b) (1973).
17. 34 Ill. App. 3d 393, 340 N.E.2d 150 (1975).

"than is possible under the circumstances."[18] Thus, the Illinois court, holding its hole card on a call (by the parent) says, "We see what's here and we don't have to tell you more than we know. We know what we've got—and it's good enough."

When state intervention is sought, Goldstein poses three questions regarding the decision to intervene:

> (1) What constitutes probable cause for inquiry by the state into a parent-child relationship and what findings should be required before seeking modification or termination of that relationship?
> (2) What is sufficient cause for state modification or termination of the relationship?
> (3) If modification or termination of the relationship is indicated, which available alternative is least detrimental?

The three critical questions, the authors point out, are seldom asked separately or in order. The questions are essential to and concurrent with the three stages of decision, namely, invocation, adjudication, and disposition. Minimum intervention therefore suggests minimum intervention into each of the three stages of decision.

Intervention occurs in several ways. The first ground for state intervention arises out of a parental request. An example of this is a parent asking the court to intervene in a custody dispute arising out of an incident of marital dysfunction. Implicit in this situation is the understanding that if the parents can arrange, without judicial intervention, for joint custody or for custody in one of the parents, then that arrangement should go undisturbed. My only concern with the Goldstein thesis is whether there is sufficient assurance that the private parental arrangement has considered the needs of the child, particularly where the child has been part of the bartering process in which property, income, and status are also put on the block. In other words, is this a setting in which courts might inquire "beyond the best interest of the child."?

Another example of intervention arising out of parental request is the situation in which a request to terminate the relationship is made by one or both parents. This sort of request, the authors suggest, could relieve the parent from the pressure of an abandonment action before such action became necessary. I would suspect that this sort of parental request would be utilized infrequently. Guilt feelings imposed by societal expectations would, it is suggested, result in child abuse or neglect, rather than in a petition

18. 34 Ill. App. 3d at 397.

to terminate the parental relationship.

The second ground for state intervention suggested by the authors is when a long-standing familial (non-parental) relationship is sought to be substituted for a parental relationship. The foster parent who has been identified as the parenting figure is an example. The very young infant will quickly form a psychological image of the person who provides that initial nurturing, regardless of the biological or genetic relationship. It is at this point, when such bonding takes place, that intervention into the child-biological parent relationship would seem appropriate, says Goldstein, and such intervention should take place *before* separation comes about with the foster parent and child.

Goldstein proposes a statutory period during which the child is in the direct care of an adult. This period would constitute "maximum intervals beyond which it would be unreasonable to presume that a child's residual ties to the absent parent" would be of more significance than the ties to the foster parents. The statutory period proposed would be 12 months for a child under 3 years old and 24 months for a child over three. Documentation of the rationale for this recommendation is provided with telling effect by Goldstein, citing case histories resulting in devastating after effects.

The third suggested ground for intervention would occur when gross failures of parental care become manifest. Examples are death or disappearance of the custodial parent when no provision was made for the children by him or her before the death or absence. Another example given is where the custodial parent is convicted of a sexual offense against the child, or where acquittal of the same offense is based on a finding of mental incompetence. The infliction of serious bodily harm on the child or the failure to prevent repeated serious injuries to a child would be further examples cited by Goldstein where judicial intervention is appropriate. As pointed out by Goldstein, the reason for intervention is as much to prevent psychic harm to the child, resulting from abuse, as it is to prevent future physical harm.

The final ground for intervention suggested by the authors is parental refusal to authorize lifesaving medical care. Goldstein is careful to limit intervention only to the occasions when, without the medical procedure, the child would die. This eliminates judicial intervention where a child, suffering from a backbone deformity which condemned him to a lifetime in a wheelchair could be de-

nied an operation. In the case of *In Re Green*[19] the child's mother objected to the operation because of the slight risk of fatality that could result from the operation and because of the likelihood of the necessity of a blood transfusion, which violated the mother's religious precepts.

A chapter is devoted to the need for counsel for the child whose custody is being considered for termination or modification. Goldstein closes with a plea for a society founded on what Professor Fuller has called "the morality of aspiration."[20] Such a society would have fewer laws, less intervention by the state, and more reliance on the moral good sense of the people to take care of their own.

This work is every bit as timely and significant as *Beyond the Best Interests of the Child.* It is carefully documented with case histories and has, in one of the two appendices, a suggested code for child placement. The book is absolutely essential to the family lawyer's library. It should also be dog-eared in every welfare case worker's office and be within arm's reach whenever the urge to correct the ills of society becomes overwhelming.

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19. In re Green, 448 Pa. 338, 292 A.2d 387 (1972).

20. FULLER, THE MORALITY OF THE LAW, (1969). In this work, Professor Fuller points to the Platonic and Aristotelian philosophical exemplifications of the "Good Life", excellence, and the full realization of human powers. In such a life, the morality of duty, though underlying the "Good Life", is muted.