

The Psychological Best Interest of the Child Is Not the Legal Best Interest

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J Am Acad Psychiatry Law 30:196–200, 2002

The “best interests of the child” is the legal standard in custody disputes. It is also the mental health standard. One gets the impression that the court’s job is to implement the recommendations of the experts, but the principle is not the same in law and mental health. The psychiatric expert is limited to determining the psychological best interest; the court considers additional factors in its determination.

A psychiatrist was testifying in a custody hearing. During the course of direct examination, the doctor stated that psychological parents should always retain custody when the biological parents have been long absent.

On cross-examination, the biological mother’s attorney asked:

Doctor, suppose that a couple kidnaps a newborn girl. When the girl is seven, the kidnappers are discovered. You are asked to examine the child. You find that she is doing fine emotionally, and there is a loving relationship between her and her kidnapper-parents. Of course, they are her psychological parents and they are quite competent caretakers. Wouldn’t it be your opinion that the child should remain with them rather than be returned to her natural parents?

The doctor squirmed, but reluctantly agreed that he would have to answer “yes.” The judge, noting the doctor’s anxiety, reassured him that he need not be upset because the law did not allow a person to profit from criminal acts.

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Answering Only the Psychological Question

“Yes” indicated that, despite the kidnappers’ unlawful actions, they would best serve the child’s psychological welfare. After all, the hypothetical stipulated that they were his only known parents and they raised the child well. Thus, despite the moral wrongdoing of the kidnapping, despite the ill effects on the child in learning of her kidnapping, and despite the question of the fitness of parents who would perform such an unlawful act, the doctor could rightly conclude that, on balance, the least detrimental emotional alternative was for the child to remain with the kidnapper-parents. Perhaps the doctor was squirming because he felt uneasy advocating a position that entailed a grave injustice to the biological parents, or perhaps he was squirming because of the enormous difficulty of explaining what appears to be a morally dubious answer. His task, however, was to consider only the psychological aspects of best interest, and he stuck to the task. Yes was the correct answer for the psychological expert to give under the circumstances.

In fact, in certain situations, a kidnapper may be the best parent for a child. Consider, for example, a divorced mother who secretly moves with her child to another state because of the father’s abuse of the child. If she has violated a court order, she would be charged with kidnapping in some states; but even though she may be convicted of a crime, she is the better one to assure her child’s welfare.

The psychiatrist’s expertise is limited to psychiatric and psychological matters. Most authorities agree that best interest is satisfied by an adult who wants the child, who has had a continuous and affectionate relationship with her, and who is capable of raising

her. That is, the best interest is focused on the emotional well-being of the child.

As the example illustrates, what is best psychologically for the child is not necessarily the best morally. Emotional development is related to moral development, but there is no absolute correlation between the two. Moral parents do not assure a psychologically well-developed child. Conversely, an immoral parent may be a good parent.

In the kidnapping case described earlier, a mental health practitioner could argue that the girl's psychological welfare would be best served by returning her to the natural parents. Here, one would say that living with the kidnappers-psychological parents would send an unintended signal to the child that one could commit crimes without punishment. If the emotional well-being of the child is to be addressed, however, the focus cannot be limited to moral considerations. The welfare of the child must be broadened to include her ability to function in school and to enjoy herself, which are separate from her moral qualities.

Moving to a new home would be a traumatic loss for the girl and would permanently affect her. It is not clear whether she would continue to thrive in the new environment. She may not make an adequate attachment to her new caretakers after the bond to her original caretakers was severed. If she could not, it is not even clear that she would be able to integrate the moral lessons society wanted her to learn. Even if she became a morally better person by the move, at what cost to other functions would this be achieved?

In the kidnapping example, there is a conflict between what in a psychological sense may be interpreted as the child's best interest (e.g., warm relationships) and what in a nonpsychological sense may be in the child's best interest (e.g., strong moral development). The expert may be able to say something about the emotional aspects related to the moral question, but that is only a component of the answer and may not be the most important part of the court's assessment.

It is the judge who has to consider the other factors. Her notion of best interest is not limited to psychological development, even though it strongly influences her decision. She must also consider other matters, such as educational opportunities, financial resources, and health of the parents—matters that are independent of psychological problems. Unlike the judge, the doctor's testimony is limited to the domain of emotional best interests, but he may be

tempted to opine about matters outside his field of expertise.

What Principle Takes Precedence?

One such temptation is to trade the psychological standard for a competing one—usually, an important principle. In the Elian Gonzalez case, many thought freedom trumped best interests. As Charles Krauthammer wrote:

The Miami cousins are doing no more than giving life to the dying wishes of Elian's mother. She risked, and gave, her life to bring him to freedom. . . . Do her wishes count for nothing? Elian should be allowed to stay here. First, to honor the wishes of his dead mother. Second, because here he could actually have a reasonably normal life, and not become the symbol and tool of a police state. . . . Keep him here. Make him an American. Honor his mother.¹

Krauthammer wrote this as a journalist. Had he testified as a psychological expert—he is trained as a psychiatrist—he would have had to say that the mother's wishes count for nothing, or almost nothing, because the wishes of Elian's dead mother would have little influence on Elian's welfare. As for the importance of freedom, that is not the psychiatrist's field of expertise.

The danger is that the expert is tempted to reformulate these principles into psychological best-interest propositions. The court may subtly encourage the expert to do so to justify its own desires. In the Elian Gonzalez case, a Florida judge granted temporary custody to the boy's great uncle, opining that Elian was threatened with harm if he went back to Cuba, which was "a living hell." Furthermore, the judge ordered the father, then in Cuba, to appear before the court and stated that "by insisting that the boy be [returned to Cuba, the father] is engaging in conduct that constitutes abuse and neglect."²

Although custody cases regularly bring out the madness of the participants, the Gonzalez case, because it was so politically centered, went to absurd proportions. In Cuba there were a series of protests involving tens of thousands of people. In the United States, there was a congressional movement to make Elian an honorary citizen, thereby taking his place beside Winston Churchill, Raoul Wallenberg, and Mother Theresa.

Those who believe that our form of government is superior for the raising of children should keep in mind the mistakes of other societies. In Iran, a court awarded custody to an Iranian father, rather than

allow the child to return to the United States with the mother, because the United States was a "godless society." In 1858, in Italy, a six-year-old Jewish boy was successfully kidnapped by the Catholic Inquisition because a housemaid had secretly baptized him.³ The church argued that the baptism could not be nullified. He was never returned to his Jewish parents and was raised a Catholic. The Church did not believe his best interest lay with a close attachment to his parents; it lay in his salvation by becoming a Catholic, rather than being condemned to Hell as a Jew. Clearly, Iran and the Church did not consider emotional well-being to be the paramount consideration.

Beyond the Psychiatric Domain

Almost anything can be considered in the legal determination of best interests. Michigan law, for example, considers 12 criteria, the last one being ". . . any other factor considered by the court to be relevant to a particular child custody dispute."⁴ Because a psychiatrist must consider information from many areas, he or she may be tempted to testify in fields related to psychiatry, but in which he or she is not expert.

Financial security may be considered in custody determinations. Professionals involved in enforcement of child support obligations point out that the financial security of the child is one of the most important factors in establishing the psychological well-being of the child. Based on available scientific evidence, the effects of poverty on a child are more damaging than the benefit of visitation. It is therefore a reasonable conclusion that if a hard choice must be made between financial support and visitation, the first should be chosen, even if the consideration is limited to emotional aspects of best interests. Of course, the psychiatric expert should be aware of such findings. But the psychiatrist should also realize that expertise in these matters is usually outside his or her domain, and, if possible, should leave those determinations to someone else.

Education is another important matter. The psychiatrist has no business recommending a school placement unless he is certain that the recommendation would clearly affect the child's psychological development. If the custodial mother wishes to move to a distant location that has better educational opportunities, it is the educational specialist who can best

present the difference between schools. (The specialist may even consider the effect of psychological well-being as it bears on schooling, but she is no more expected to make a psychiatric evaluation than a psychiatric expert is expected to make an educational evaluation.) The psychiatrist should be concerned only with the emotional effect of changing schools and must balance any benefits of the move with the losses the child would suffer as a result of the move.

It is also tempting to assume that there are certain categories of unlawful activity (e.g., if the parent is a felon or a drug abuser) that should automatically exclude a parent from being the custodian. As the kidnapping case demonstrates, however, unless the expert has evidence that the psychological welfare of the child is harmed by living with the wrong-doing parent, he may not testify to it.

Nor should legal interpretations cloud psychiatric judgments. In neglect cases, experts have testified for parents because they believed the law favored parental rights over best interest. Such breaches are usually obvious. More often, they are subtle. Consciously or unconsciously, an examiner may emphasize the factors that the court would prefer, but whatever trends exist in the courtroom should be considered irrelevant to the expert. Here it is best to remember Judge David Bazelon's dictum: "The less you know about the law, the better!"

Psychological Matters Irrelevant to the Determination

Custody examinations can be very involved. The examiner may gather a mass of information, but it is important that the information be directly relevant to the intent of the evaluation. If not, the evaluation may be damaging.

When Ely was seven months old, his mother abandoned him. From that time on, he was raised uninterrupted by a middle-aged couple. There was a reciprocal loving relationship between the child and his common-law parents.

When he was four, his biological mother, who had seen the child once for a half-hour visit and who lived in a distant city, sought custody. Experts who examined Ely thought he was doing well psychologically. There was never a question of abuse or neglect.

The psychologist retained by the biological mother reviewed hundreds of pages of documents. He spent more than 20 hours interviewing more

than 10 people. His evaluation included a thousand-mile trip for a visit to the home of the biological mother and her family and a visit to the school Ely would attend if he were to live with the mother. He concluded that custody should be changed.

This assessment should have been simple. Ely had a satisfactory and continuous relationship with his common-law parents, who loved him and wanted him. He had had no contact with his biological mother. The psychologist needed only to verify the facts. The examination required no more than the one that the psychologist would have conducted if the child's caretakers had been his biological parents. Any evaluation beyond that was not only unnecessary, it was damaging. It cost much in time and money. More important, it harmed the boy. He had recurrent nightmares and fears of being taken away, and it caused the common-law parents to be frightened that their son would be taken from them. Even if the expert's examination allowed a deeper understanding of Ely and his family, it did not provide information that was relevant to the disposition.

Nor are psychiatric diagnoses of either the parents or the child usually helpful in making a placement decision. Because diagnosis is so central to practice, the psychiatrist may overweigh its importance. The expert may determine that one parent is seriously disordered and, by virtue of that, recommend against that parent's being made the custodian. Although a psychiatric diagnosis of a parent may be made, it is only useful to the extent that it establishes the parent's fitness to take care of the child. Fitness is necessary, but not sufficient, for custodianship. Both parents may be fit, but it is the child's reaction to them that determines the better custodian.

The psychiatrist should, of course, examine the child for the presence of any psychiatric disorders. Unfortunately, there is little that can be said about placement based on diagnosis of the child. Looking toward the future, the psychiatrist can sometimes make short-term predictions—for example, that separation of a very young child from her parents will produce depressive symptoms or enuresis. Even this is hardly certain: a child with enuresis who is separated from an abusive parent may become symptom free. Long-term predictions of disorders related to child placement are highly speculative.

It is ironic that the diagnostic skills of a child psychiatrist, which play so important a part in practice, are rarely of value in custody decisions. Nor, in this

era of evidence-based medicine, may we turn as easily to classic psychodynamic theories.

Countertransference

Child cases are among the most emotionally complicated of all forensic work. Serious countertransference problems are always a risk.

Dr. E. recommended at a hearing that the custody of a three-year-old girl, living with adoptive parents since birth, should be gradually transferred to the biological mother. The court did not make the change. Five years later, the matter came before the court in a second hearing, and Dr. E. testified again.

On the first day on the stand, Dr. E. reversed the position that he had reported to the court five years before. When court was adjourned that day, he told the mother's attorney that he was troubled about his testimony. That night, the doctor reviewed the case and examined his part in it.

On the second day, he reported that, from the time he had become involved in the case:

...he quickly became deeply involved emotionally with the plight of everyone. He stressed that everyone was suffering and getting hurt. He claimed that [in the first hearing] it was quite clear that custody should be transferred. However, that view tore him apart emotionally, in part because it was so unfair to the family [raising the child].

Dr. E. told the court that he had repressed his earlier recommendation because it was so painful. He did not even recognize his own words when he read the transcript. Apparently, as a result of his self-analysis, Dr. E. reversed himself again.

The court commented that Dr. E. had failed to be objective. It was "deeply troubled" about Dr. E.'s twice changing his testimony. The court questioned his credibility and truthfulness, and called his testimony "suspect."

Dr. E., a distinguished scholar and an honorable man, found himself in a position every expert dreads. It is clear that Dr. E. had overidentified with the mother, but was torn by his sense of injustice to the girl's common-law parents and probably also by his concern about the child's fate. This sort of identification is a hazard in any forensic case, but it is more likely in a child placement case because the expert cannot help but recall personal experience touching on the issues in court. Every expert was once a child; many are married and parents; some are divorced. The expert is likely to have many feelings in common with participants in a custody battle.

Toward a Child-Centered Jurisprudence

The psychiatrist regards best interests as the ultimate principle. That is not true for the judge. For example, in the case of *Palmore v. Sidoti* the U.S. Supreme Court was faced with deciding whether racial prejudice could be considered in a custody dispute.⁵ The father, a white man, petitioned for custody of his daughter Melanie when his former wife, also white, lived with and then married a black man. A Florida court decided that Melanie's welfare would be better served by living with the father because, it wrote, living with the mother in a mixed-race marriage would subject her to peer pressures and stigmatization.

When the Supreme Court heard the case, it reversed the judgment. The Court issued its decision because it would not tolerate prejudice as a basis for a change of custody. The lower court erred by not upholding the equal protection of the mother. The Supreme Court had little difficulty concluding ". . . that the reality of private biases and possible injury they might inflict were impermissible considerations under the equal protection clause for divesting the natural mother of custody of her infant child because of her remarriage to person of different race."

The decision was a powerful statement against racism, but it was not made on the basis of the best interests of the child. Indeed, the Court acknowledged that Melanie could be injured by the biases of others. (It is astounding that the Florida court could have come to such a decision in the first place. Had it not considered the bond between Melanie and her mother, with whom the girl had lived her entire life?)

However, if it were true that the girl would suffer more emotionally from the difficulties of a racially mixed marriage than from a placement with her father, then the psychological recommendation would be to change custody no matter how abhorrent the move is morally. The expert is not called to assess the

morality of the situation and, as an expert, should offer no opinion. His expertise is not in democratic principles; it is in the development of affective relationships. Unlike the Supreme Court, the psychiatrist *qua* psychiatrist cannot make judgments based on fairness to the mother.

The problem is that courts make a determination from an adult perspective. The Supreme Court's judgment, powerful as it is, considered the equal protection of the mother—that is, her best interests. It did not consider the equal protection of the child. Similarly, in the kidnapping case, the judge focused on the injustice done to the biological parents who were unlawfully deprived of their child. What of the child herself, who through no fault of her own, would lose the only people she knew as parents? Only the mental health worker is solely committed to the child's emotional best interests. All others have conflicting loyalties. The judge follows legal precedent. The attorneys represent the parents' wishes. The parents have to balance their welfare with that of their child.

It is important for the expert to stick to the task, even if placed in an enormously uncomfortable position. The expert's opinion may bewilder the court. A parent may hate him. A good solution for the child, however, is an act of preventive psychiatry and is far more effective than psychiatric treatment afterward. Although the doctor carries an impossible burden, knowing that he or she has served the child's welfare is reward enough.

References

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