

Book Reviews

BEYOND THE BEST INTERESTS OF THE CHILD. By Joseph Goldstein, Anna Freud, and Albert J. Solnit. New York: The Free Press. Pp. 171. 1973. Price \$7.95 hardcover, \$1.95 paperback.

This is an engaging mixture of expert and lay opinion on the difficult problem of child placement. Insofar as this short book undertakes to inform the bench and the bar of the dynamics of the child-parent relationship it is a magnificent albeit controversial contribution to the literature. In undertaking the draft of a "Model Child Placement Statute," however, the distinguished authors come up with an Edsel. The formulation of social policy and the establishment of fixed legal principles obviously are outside the scope of their special competence.

Since the prestige of the three psychoanalysts who wrote *Beyond the Best Interests of the Child* is such that any caveat or disagreement in some quarters will be regarded as heresy, or, at best as divisive, one assumes a heavy burden of persuasion, if not proof, in reviewing their book. We are reminded of Emerson's comments on young Holmes' critique of Plato: "When you strike at a king, you must *kill* him."¹ It must be an obsessive compulsion neurosis that impels us to enter where angels fear to tread and to tell it like it is, from our point of view.

Our major objection to *Beyond* has been indicated: the authors have abandoned the couch for the bench. In doing so they leave their expertise behind and acquire a Jehovah complex, a rather common occupational disease of the judiciary.² Their formulation of categorical imperatives is excessive because they supply new rigidity to problems that call for flexibility. In their justified enthusiasm to educate courts as to their meaningful theory of child development they promulgate a new natural law and apply it immutably. In effect, they throw the parents out with the bath water! Such was unnecessary and perhaps occurred because the authors switched to the role of advocates and adopted the partisan techniques of exaggeration, over-simplification, and one-sidedness.³ It's a case of oversell.

Turning to the Model Statute, from our point of view, in general we endorse the concepts of "wanted child," "psychological parent," and an emphasis upon the "child's sense of time" and believe that they will be helpful to courts. However, we believe that the coined phrases "common-law parent-child relationship" and "common-law adoption" are exceedingly unfortunate even though in a facetious moment we once referred to "common-law divorce."⁴ If the authors had realized how ambiguous a "common-law" relationship really is,⁵ they might have used an alternative term such as "de facto parent-child relationship." But semantics aside, our main point of departure is their implementation of the "common-law parent-child relationship" concept in custodial disputes.

The hobgoblin of their consistency is exposed when the authors cite the example of Dutch Jews who left their children with gentile neighbors when they fled from the Nazi terror, and conclude that contrary to the decision of the Dutch government, the children should *not* have been returned to their natural parents.⁶ There is no need for an automatic "yes" or "no" in such tragic situations and the fact that the surrogate parents "want" the child or have established a "common-law parent-child relationship" with him, although factors of great significance, should not be determinative.

This critic would have no argument with the formulation of a legal principle that suitable de facto parents who have had a child for a substantial period of time (time being considered from the child's viewpoint as well as the calendar) are *prima facie* entitled to retain custody, and, indeed, he has espoused such a view.⁷ We object, however, to conclusive presumptions which provide no leeway for exceptional circumstances.

The Model Statute, for example, validates the result in the highly publicized case of *Painter v. Bannister*.⁸ There, as may be recalled, young Mark (then aged seven), was awarded to his elderly maternal grandparents who lived in rural Iowa rather than be returned to his father who was a denizen of the "Bohemian atmosphere" of the San Francisco Bay area. Unquestionably, young Mark was "wanted" by his grandparents and had established a "common-law parent-child relationship" with them. The court overlooked the fact, however, that the father, immediately after the tragic deaths of his wife and daughter, had temporarily placed Mark with the grandparents on the express understanding that he would be returned to him as soon as he established a new and suitable home. Moreover, the only expert witness (a child psychologist) to testify at the trial stated in effect that although Mark had initial difficulties in adjusting to the Iowa milieu, in time he made a good adjustment. We may infer that Mark had demonstrated a capacity to adjust to custodial change.

From our point of view, *Painter v. Bannister* was an extremely unfortunate decision, both in rationale and result.⁹ We are sympathetic with the court's rejection of a parent's proprietary interest in his child and its emphasis upon the child's best interests, but we lament the overtones of "Iowa gothic" and the court's over-reaction to the traditional rules of parental prerogative. In its reaction to the extremes of earlier law the Iowa court itself took the extreme position that parenthood inevitably must yield when it comes into conflict with a child's best interests. It looked at only part of the human situation and it ignored the express terms of the placement with the grandparents.

The point is that the Model Statute and the Iowa decision lack necessary flexibility and ignore the compromising function of law. In the Iowa case, before the court became concerned with "best interests" it should have been clear that the issue was before it. Parents do and should have a legally recognized interest in the companionship of their children, and that legal right should be terminable only if in some way it has been forfeited. Parental rights are relinquished if the parent becomes "unfit," surrenders the child for placement, abandons it, or, questionably, loses custody in a divorce case.¹⁰ Unless there has been such a relinquishment, the "best interests" issue does not arise. Otherwise, poor children could be transferred to more affluent couples because their "best interests" presumably would thereby be served.¹¹

To return to the Model Statute, it provides that "Unless other adults assume or are assigned the role, they (biological parents) are presumed to become the child's psychological parents."¹² Depending upon the meaning attributed "presumed" and the situation before the court, this provision may or may not be sound. Obviously, where there has been a "relinquishment," as above defined, such a presumption should be overcome. It is clear that in cases of child abuse or emotional deprivation such a presumption should be rebuttable.¹³

Another provision of the Model Statute asserts that "It is the policy of this state to minimize disruptions of continuing relationships between a psychological parent and the child. The child's developmental needs are best served by continuing unconditional and permanent relationships. The importance of a relationship's duration and the significance of a disruption's duration vary with the child's developmental stage."¹⁴ Again, while the substance of the above quotation has our general approval, we regret the absence of qualification or limitation. Ordinarily, there should be no judicial disruption of the described relationship and usually the child's developmental needs will be best served by the continuity of his relationship. But not always, as the authors themselves recognize in the last sentence quoted above. Moreover, there are various styles of child rearing and one wonders what the result would be, under the literal language of the above provision, in situations involving an English nanny, or an Israeli child in a kibbutz, a child kidnapped by gypsies, or a schoolchild with a crush on teacher. Continuity of relationship is extremely important for the child, but it is not the sole criterion.

The proposed act also states that "A child is presumed to be wanted in his or her current placement. If the child's placement is to be altered, the intervenor, except in custody disputes in divorce or separation, must establish both: (i) that the child is unwanted, and (ii) that the child's current placement is not the least detrimental

available alternative."¹⁵ In the divorce situation, the adult seeking custody must establish that he or she is "the least detrimental alternative."

In connection with the above provision, a wanted child is defined as "one who receives affection and nourishment on a continuing basis from at least one adult and who feels that he or she is and continues to be valued by those who take care of him or her."¹⁶ "The least detrimental available alternative" is defined as "that child placement and procedure which maximizes, in accord with the child's sense of time, the child's opportunity for being wanted and for maintaining on a continuous, unconditional, and permanent basis a relationship with at least one adult who is or will become the child's psychological parent."¹⁷

To the extent that the proposed statute points up emotional deprivation rather than customary factors of lesser importance, we are in accord with the thrust of the proposal. The child's psychological best interests warrant and need judicial evaluation and all too often are ignored. However, there is the matter of administrative feasibility and the question of whether or not the quoted language is functional. There are too many borderline cases, and a child's feeling of being "unwanted" may arise from diverse sources including the birth of a sibling.¹⁸ Parental ambivalence is a common phenomenon and many adults are undemonstrative, but that does not mean that their parenthood should be revoked.

Courts have the capacity to adjudicate cases involving physical abuse but a neglect petition based upon psychological abuse (or emotional deprivation) may flounder on conflicting psychiatric opinion and controversial evidence.¹⁹ Except in clear cases, subjective rather than objective data may be all the court has to work with in reaching its opinion. In theory, as many spouses know, psychological abuse may be as bad or worse than physical abuse, but prudence dictates that the divorce doctrine of mental cruelty should not be transferred to custodial disputes. The cliché is that bad parents are better than good institutions.

Although the authors argue with conviction that "the least detrimental alternative" is an improvement over the nebulous "best interests test,"²⁰ it is doubtful that they prove their case. It is a negative rather than an affirmative formulation. There is no gloss of judicial construction as to what it means, which has advantages and disadvantages, and it appears as much to lack precision as does the old "best interests" rule. However, by definition, it would seem to rule out institutional child care as a most detrimental alternative, and many if not most foster home placements.²¹ It is intended to stress the child's sense of time but it is not clear that the "time is of the essence" notion could not be incorporated into the "best interests" test.²²

The most objectionable statement in this book is one with regard to custody and visitation upon parental divorce. The authors assert that "the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits."²³ In short, at the whim of the custodial parent, all contact with the other parent would be foreclosed. There would be an absolute veto power over visitation. Such a position ignores the child's needs and desires, as well as those of the other parent, and in the name of continuity and autonomy encourages spiteful behavior. Given such power, one can visualize the blackmailing, extortion, and imposition which might be visited upon the non-custodial parent who wants to maintain contact with his or her child.

It is reported that Imanuel Kant having stated that it was wrong to lie was asked whether he would lie or tell the truth to police state officials who inquired concerning the whereabouts of his best friend who was hidden in Kant's attic. Kant foolishly (from my point of view) answered the hypothetical by saying he would tell the truth.²⁴ The authors of *Beyond* in their promulgation of absolutes overlook humane considerations and ignore the weighing and balancing process which is the essence of law. There are other examples. An adoption decree is to be made final the moment a child is actually placed with the adopting family.²⁵ "As in adoption, a custody decree should be final, that is, not subject to modification."²⁶ One may accept the proposition that continuity in placement is a matter of crucial concern but one rejects the notion that it is the *only* matter of importance. Depending upon age and circumstance, children

also evince resilience and adaptability,²⁷ although such is overlooked in this volume.

Few if any courts will accept the absolutes and extreme positions advanced by the authors. It will be the law's loss, however, if the thrust of their arguments are not considered due to the overzealousness of their advocacy. It is indeed unfortunate that a matrimonial lawyer was not brought in to temper and qualify some of the assumptions and statements in this book that detract from its general usefulness. I am sure that many non-lawyers will catch the enthusiasm of the authors and will be carried along by it, just as many have succumbed to the missionary zeal of Dr. Thomas Szasz. Such levels of communication may have a propaganda impact and the "oversell" may be a legitimate part of advocacy, but serious attempts at legal reform should not be judged on that basis. The test should be, have the authors provided a sound and workable alternative to the present system? The answer is that they have not, but in mitigation, it should be recognized that they have provided a basis for the critique and improvement of existing law so that it may give a qualified acceptance to some of their recommendations which should be considered in the resolution of placement problems.

Courts cannot and will not abdicate from the *parens patriae* or wardship responsibilities they have assumed. They will not abandon continuing jurisdiction over custodial and placement matters, as advocated by the authors,²⁸ because there should be a running check even though we favor an emphasis upon the factor of continuity. A veto power over visitation rights will be rejected because from the legal viewpoint the dissolution of a marriage does not terminate the parent-child relationship, and the child ordinarily needs and is entitled to an ongoing relationship with both parents. Most courts will continue to require parental relinquishment of the child before they consider either the best interests or least detrimental alternative tests. Even though a state adopts no-fault divorce, it will shy away from no-fault termination of parental rights.²⁹

Hopefully, this book with its emphasis upon the "common-law parent-child relationship" will help to dispel the shibboleth of the "blood is thicker than water" type of thinking that many courts have witlessly espoused. Its recommendation that independent counsel be provided for children whenever their placement is at issue has our enthusiastic endorsement.³⁰ We also applaud the stress placed upon the child's sense of time and his individual needs. But these virtues of the book should not be taken as absolutes.

Our criticism admittedly has been from our legal point of view and may be one that is not shared by other legal commentators. The psychological vulnerability of inflexible rules precluding the exercise of continuing jurisdiction over placement cases and the modification of custody decrees, and the denial of visitation rights by the private decision of the custodian, invites challenge by other distinguished behavioral scientists who are in the best position to argue that *Beyond the Best Interests of the Child* goes beyond the pale.

Judge Bazelon, one time law partner to an *entente cordiale* with psychiatry,³¹ became disenchanted with that symbiotic relationship when he discovered that it was impossible to keep lawyers from asking and psychiatrists from answering the wrong questions with the right answers.³² Courtroom phenomena of transference and countertransference³³ between all forensic participants, he belatedly concluded, impaired the judicial process so that it was necessary to abandon *Durham*.³⁴ The responsibility issue was a buck that could not be passed.

The appropriate judicial use of psychiatric and analytic insights and witnesses, from the law side, is determined by the structure of our legal system and its division of labor.³⁵ Experience rather than logic has set the ground rules and it is clear that the trier of (legal) facts should not abdicate the decision making responsibility.³⁶ Expert opinions are of juridical value only on esoteric subjects within the expertise of experts so when the psychiatrist strays into the thicket of law and ethics, the natural habitat of lawyers, philosophers, and theologians, he is a trespasser unless an invitation gives him the status of an invited guest.³⁷ His privilege of entry, if one there be, entitles him only to the due deference generally accorded the views of intelligent and sensitive laymen.³⁸

In conclusion, we recall the Biblical story of the wisdom of Solomon in resolving a custody issue. Implicit in his ruse was his assumption that mother love was of a

different dimension and that "blood was thicker than water." The latter shibboleth has been laid to rest by this book, and that service alone is a substantial contribution to the law and literature regarding child placement.³⁹

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Footnotes

1. See Howe, JUSTICE HOLMES: THE SHAPING YEARS 54 (1957).
2. A beautiful example of the "Jehovah's complex," operating in a psychiatric context, is "The case of Anthony Giordello" reported in Katz, Goldstein, and Dershowitz, PSYCHOANALYSIS, PSYCHIATRY, AND LAW 572-575 (1967), where an unsophisticated judge refused to consider the phobic fears of one summoned to appear before him.
3. It is not claimed that lawyers and politicians have a patent right on partisan advocacy but merely that men from other callings adopt such roles when there is fervent belief in a cause.
4. See Foster, *Common Law Divorce*, 46 Minn. L. Rev. 43 (1961).
5. *Ibid.* The "common law" relationship in legal parlance refers to a legal relationship of husband and wife entered into informally. Such a marriage is just as valid as any other. In common vernacular, however, "common law" often refers to an illicit and at-will relationship which does not constitute a "marriage." Moreover, the fourteen American jurisdictions retaining legal "common law" marriages impose varying burdens of proof regarding the relationship and other states differ in their willingness to recognize such unions, especially where a local resident is involved.
6. At p. 107. The authors would have each such instance decided on a case-by-case basis pursuant to their criteria but the biological parents would have the burden of proving both that the child was unwanted and that the child's current placement was not the least detrimental alternative and hence would lose in every case where a good relationship had developed between the child and surrogate parents.
7. See Foster and Freed, *Child Custody*, 39 N.Y.U. L. Rev. 423, 615, at 628-629 (1964).
8. 258 Iowa 1390, 140 N.W.2d 152 (1966), cert. denied, 385 U.S. 949 (1966).
9. See Foster, *Adoption and Child Custody: Best Interests of the Child?*, 22 Buffalo L. Rev. 1, at 4-7 (1972).
10. *Id.* It is obvious that there are constitutional limitations on state intervention in placement situations. See *Stanley v. Illinois*, 405 U.S. 645 (1972); *Armstrong v. Manzo*, 380 U.S. 545 (1965); and *May v. Anderson*, 345 U.S. 528 (1953).
11. See Foster and Freed, LAW AND THE FAMILY—NEW YORK §29:10 for an analysis of judicial consideration of financial circumstances in custody disputes.
12. Art. 20 of the Model Statute at p. 99. A useful quote appears at p. 17: ". . . the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation. Only a parent who provides for these needs will build a psychological relationship to the child on the basis of a biological one and will become a 'psychological parent' in whose care the child can feel valued and 'wanted.' An absent biological parent will remain, or tend to become, a stranger."
13. The authors at p. 115 n. 4 cite several useful articles on the subject.
14. Art. 30 of the Model Statute at pp. 99-100 and at pp. 32-34 the authors discuss the effects of disruption of continuity at various ages.
15. Par. 30.3 of the Model Statute at p. 100.
16. Par. 10.2 of the Model Statute at p. 98.
17. Par. 10.6 of the Model Statute at p. 99.
18. Compare with this book the late Dr. Kubie's article on *Provision for the Care of Children of Divorced Parents: A New Legal Instrument*. 73 Yale L.J. 1197 (1964), and see the book review of BEYOND THE BEST INTERESTS OF THE CHILD by Wechsler in 1 J. of Psychiatry & Law 391 (1973).
19. Compare a recent discussion of child placement problems by Levine in *Caveat Parens: A Demystification of the Child Protection System*, 35 U. Pitt. L. Rev. 1 (1973).
20. See Chap. 4.
21. The foster parent-child relationship is discussed at pp. 23-26 and it is correctly pointed out that such placement clashes with the child's need for emotional constancy.
22. The child's sense of time is stressed at pp. 11-12 and 40-41 and a compelling case is made that courts should take this factor into account. Admittedly, delay in disposing of custodial problems is unconscionable.
23. At p. 38.

24. Here the defense mechanism of rationalization is of great help.
25. At p. 35. If investigation of the adoptive family was had beforehand, ordinarily it is a sound rule to treat the placement as permanent, subject, however, to possibly overturning the decree on the basis of fraud or coercion. *People ex rel. Scarpetta v. Spence-Chapin Adoption Service*, 28 N.Y. 2d 185, 269 N.E. 2d 787, 321 N.Y.S. 2d 65 (1971), is a horrible example of a violation of sound principles regarding the finality of placement. However, fact patterns are so varied that one hesitates to form an absolute and unqualified principle.
26. At p. 37. An alternative position is that followed by courts, namely, child custody awards are always subject to modification due to changed circumstances. In addition, courts having a professional staff may make regular checks on how the child fares under custodial arrangements. The *Rothman* decisions, set forth in Chap. 6, do not support the argument of the authors.
27. Of course, as the authors acknowledge, disruption of the continuity of relationship has different impacts at different ages. See also Patton, GROWTH FAILURE IN MATERNAL DEPRIVATION 38 (1963).
28. The *parens patriae* function of courts is deemed to be a serious responsibility and it has been said that "A judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders." Botein, TRIAL JUDGE 273 (1972).
29. It is interesting to note that several states with adoption of no-fault divorce, viz., California, nonetheless admit fault evidence on the issue of child custody.
30. See Foster and Freed, *A Bill of Rights for Children*, 6 Fam. L.Q. 343 (1972); and Foster, *A Bill of Rights for Children*, 1 Bull. A.A.P.L. 199 (1973).
31. The partnership was formed in *United States v. Durham*, 214 F.2d 862 (D.C. Cir. 1954), went into receivership in *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967), and finally was dissolved in *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). The phrase "entente cordiale" is borrowed from its use by Glueck, LAW AND PSYCHIATRY: COLD WAR OR ENTENTE CORDIALE? (1962).
32. See *Washington v. United States*, 390 F.2d 44 (D.C. Cir. 1967).
33. See Reiwald, SOCIETY AND ITS CRIMINALS (1949) for a discussion of this phenomenon.
34. *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972), abandoned *Durham* and adopted a modified version of the Model Penal Code's provision on the insanity defense. One of the most helpful publications on the insanity defense is that by Abraham S. Goldstein, THE INSANITY DEFENSE (1967).
35. See Foster, *What the Psychiatrist Should Know About the Limitations of Law*, 1966 Wis. L. Rev. 189, 224-234, for a discussion of the psychiatrist as an expert witness and his role in the legal process.
36. It is frequently said that the usual rules regarding the insanity defense place too heavy a burden on the psychiatric witness. See Dershowitz, *Psychiatry in the Legal Process: "A Knife That Cuts Both Ways"*, 51 Judicature 370 (May 1968). On the other hand, state court decisions have held that it would be unconstitutional to abolish the insanity defense and to eliminate psychiatric testimony at the trial. See *State v. Strasberg*, 60 Wash. 106, 110 P. 1020 (1910); *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931); and *State v. Lange*, 168 La. 958, 123 So. 639 (1929).
37. Ordinarily, no duty of care is owed to a trespasser, and the usual obligation owed to an invitee is to warn him of concealed dangers.
38. See Guttmacher, THE ROLE OF PSYCHIATRY IN LAW 74 (1968), for a discussion of the history of expert testimony. The rules of evidence ordinarily preclude the giving of opinion testimony, the expert witness is one exception.
39. It may be noted that the facts also bring into question the wisdom of Solomon. King Solomon reputedly had 700 wives and 300 concubines. What time did he have for thinking?

A THEORY OF JUSTICE. By John Rawls. Cambridge, Mass.: The Belknap Press of Harvard University Press. Pp. 607. 1971. Price \$3.95 (paper).

Many philosophers and many laymen who have tried to read the writings of English-speaking moral philosophers of this century have found them in large part trivial and uninteresting. In the wake of G. E. Moore's wholesale attack on the tradition of European moral philosophy (*Principia Ethica*, 1903), most philosophers abandoned the attempt to develop systematically (and, if possible, justify) particular substantive moral outlooks. Impressed with the arguments by which Moore tried to show that this is an impossible task, undertaken only in confusion, they retreated to the new subject of "meta-ethics," which dealt exclusively with formal questions, leaving the substance of morality to one side. Increasingly over the past 15 years signs of counter-