Book Review

BOOK REVIEW

TOO LITTLE, TOO LATE

BEFORE THE BEST INTERESTS OF THE CHILD. BY JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT. New York: The Free Press, A Division of Macmillan Publishing Co., Inc. 1979. Pp. xii, 288. $3.95 (softcover).

CHILD custody law in its present state is unsatisfactory because society is ambivalent about whose rights should be paramount. Three different interests are involved in any action concerning the care and training of children: those of the child, the parent, and the state or society. The child obviously has an interest, but can neither express nor know the form or substance of that interest. The parent has an interest and sometimes can articulate both its nature and a program for protecting and furthering it. The state, or society, has an interest in child custody based on community needs and it has the power to bring about changes in the status of custody. The state, however, lacks the predictive capability to enable it to appreciate the full consequences and implications of its actions.

Given, therefore, those three interests involved in a child custody action, the question arises: which interest should have the greatest weight in determining the outcome? The authors of *Before the Best Interests of the Child*[1] would favor the parents, consider the child, and disfavor the state. In their view, "So long as a child is a member of a functioning family, his paramount interest lies in the preservation of his family."[2] The authors are quick to point out that because freedom from state interference in the functioning family unit is in the child's interest, this emphasis on parental autonomy is not to be viewed as a denigration of their "preference for making a child's interest paramount."[3] The thesis espoused in the book, then, is a policy of minimum state intervention based on the belief that this policy generally is in the child's best interest.

The authors of *Before the Best Interests of the Child* are the same three who wrote *Beyond the Best Interests of the Child*,[4] published in 1973.[5] The

1. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979) [hereinafter cited as BEFORE].

2. *Id.* at 5.

3. *Id.* at 7.

4. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979) (first published in 1973) [hereinafter cited as BEYOND].

5. The authors are a distinguished group. Joseph Goldstein is Sterling Professor of

earlier work appeared at a time when the bias of the courts in custody cases favored natural parents.[6] Goldstein, Freud, and Solnit argued then that more than biology is involved in the parent-child relationship, and they popularized the concept of the psychological parent who may or may not be the biological parent.[7] The impact of this book cannot be overestimated. It was widely reviewed and cited, although not necessarily followed, by many judges.[8] The book focused on the damage done to children by the seemingly irrebuttable presumption that natural parents have the right to custody of their children. The author's attack on this presumption caused some to view the book as a tract favoring the destruction of the natural family.[9]

Before the Best Interests of the Child should answer many of the criticisms of the earlier book, as the authors try to make clear that in most instances the interests of all are best served by the preservation of family integrity. Family integrity is defined in *Before the Best Interests of the Child* as encompassing the "three liberty interests of direct concern to children (parental autonomy, the right to autonomous parents and privacy)."[10] By espousing this concept of family integrity, the authors naturally also would favor minimum state intervention. This book is an attempt to define strictly the limits of the power of the state to intrude into the family in child custody cases.

While this newer book is somewhat longer than *Beyond the Best Interests of the Child*, it has many of the same defects. The authors are unquestionably eminent in the field of child psychiatry, but this status does not mean that their statements are persuasive without a factual basis.[11] Nor does the great intellect of the authors guarantee that their ideas, though worthy, are new. *Before the Best Interests of the Child* concerns an area in which much activity, adjudication, and research has occurred. The authors have not chosen to discuss the proposals of various other writers in the field, although they are aware of them.[12] Instead, they have written as if their voice was the first crying out against the various problems the book addresses. This tone of dogmatic uniqueness is unfortunate because much of what the authors are espousing already has been widely considered by var-

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Law at Yale University School of Law and Child Study Center, and has written in the areas of criminal and family law. Anna Freud is the Director of the Hempstead Child Therapy Clinic and has written numerous works on psychoanalysis and child development. Albert J. Solnit is Sterling Professor of Pediatrics and Psychiatry at Yale University School of Medicine and Director of the University's Child Study Center, and has written on the subject of child behavior and development.

6. *See, e.g.*, Scarpetta v. Spence-Chapin Adoption Serv., 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971); Gunn v. Cavanaugh, 391 S.W.2d 723 (Tex. 1965); Szemler v. Clements, 202 S.E.2d 880 (Va. 1974).

7. BEYOND, *supra* note 4, at 19.

8. *See, e.g.*, Crouch, *An Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child*, 13 FAM. L.Q. 49 (1979).

9. *See id.* at 72.

10. BEFORE, *supra* note 1, at 9.

11. *See, e.g., id.* at 16, which cites as authority BEYOND.

12. *See* BEFORE, *supra* note 1, at 208, 210, 247.

ious segments of the community. For example, the idea that state interference in family matters should be as infrequent as possible is not revolutionary. On a number of occasions the United States Supreme Court has stated a preference for parents over the state,[13] especially in the area of education.[14] While the Court has not yet dealt directly with state custody versus parental custody, it has indicated that it probably would favor parental rights.[15] In addition, lawyers and sociologists have done extensive research and writing on the subject of the importance of preventing the state from unnecessarily interfering with the family unit, while protecting the safety of children.[16]

One of the major proposals in *Before the Best Interests of the Child* is the author's child placement code.[17] The code is not based on any existing code, nor does it attempt to incorporate or build on the suggestions of legal scholars.[18] While a total change undoubtedly sometimes is necessary to achieve any change, too radical a suggestion often is ignored. A major change suggested by the authors, for example, is the definition of child abuse. The difficulty of establishing a clear definition has not escaped the notice of persons concerned with the care and protection of children.[19] The authors rely on the medical definition of child abuse, the "battered child syndrome," which supposedly can be established by objective criteria. Their definition, however, would not include emotional abuse. Instead, abuse would be limited to the infliction or attempted infliction of serious bodily injury,[20] or sexual abuse, for which the parents actually were convicted in criminal court.[21] As a result, by relying on the "battered child syndrome"[22] the authors' proposals effectively would limit the state's ability to intervene in cases of nonphysical child abuse, ignoring the fact that emotional abuse, while unlikely to be life threatening, sometimes can cripple the child's capacity to lead a productive life. Thus, the definition proposed in the book, while appearing clear and easy to apply, in fact is

13. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." Ginsberg v. New York, 390 U.S. 629, 639 (1968).

14. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

15. *See* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977), in which the Court held that state-created foster parent-child relationships do not require a hearing prior to a state-initiated change, but indicated that natural parents' rights might be treated differently. *Id.* at 846.

16. *See, e.g.*, R. MNOOKIN, CHILD, FAMILY AND STATE (1978); Solender, *Family Law: Parent and Child, Annual Survey of Texas Law*, 31 SW. L.J. 133, 147 n.112 (1977).

17. *Id.* at 167.

18. *See generally* R. MNOOKIN, *supra* note 16, at 577-90.

19. *See* J. GIOVANNONI & R. BECERRA, DEFINING CHILD ABUSE (1979) (a 302-page work on the difficulty of arriving at concensus on a definition of child abuse).

20. BEFORE, *supra* note 1, at 72.

21. *Id.* at 62.

22. "The Battered-Child Syndrome is a term used by us to characterize a *clinical* condition in young children who have received serious physical abuse, generally from a parent or foster parent." Kempe et al., *The Battered Child Syndrome*, 181 J. AM. MED. ASS'N 17 (1962) (emphasis added).

deceptive. It diminishes the scope of the problem area, while leaving the situation outside the circumscribed area unchanged.

The authors would minimize the possibility of state intervention not only in child abuse cases, but also in all situations where the parents themselves have made provisions for the child's care. Thus, if the parents could reach agreement privately on child custody in a divorce case, court approval would not be required.[23] Without court involvement in the original arrangement, changes could be made informally without the need for a custody modification hearing.[24] Inability to reach agreement would be grounds for intervention;[25] however, the usual custody agreement, which now is so often hammered out by the parties' attorneys with court approval in mind, would not be brought to the court's attention as it would be a voluntary agreement. This change might mean that lawyers would not be essential to child custody agreements and that members of the behavioral professions could be substituted when needed.

Any exploration of the possible ramifications of such unsupervised private custody agreements is precluded by the brevity of the book and its emphasis on restricting the grounds for state intervention. The most obvious result is that these agreements probably would not be considered final and frequently would be modified in small increments to suit the changing needs of the parties. Modifications of this type undoubtedly occur now, despite strict court orders to the contrary. Because a taint of guilt in such self-help is likely, most people tending to be law-abiding, the suggested reform might have some beneficial results. A controversial, though not necessarily a deleterious, change might be an increase in the number of joint custody arrangements. The authors apparently would favor such voluntary joint custody arrangements, given their support of noncoerced agreements. Voluntary arrangements, the authors contend, permit the parents to remain autonomous, thus protecting the somewhat dispersed family's privacy and integrity.[26] Apparently, court supervised joint custody is what the authors disfavor.[27] The fact that the authors do not put much emphasis on this aspect of their proposals is unfortunate because their earlier work has been perceived as negating any consideration of joint custody.[28]

Some of the misunderstanding, if it is a misunderstanding, of the authors' views on custody arrangements may stem from *confusion* as to the authors' intended roles. In addition to being public advocates and originators of suggestions for broad changes in our legal structure, Goldstein, Freud, and Solnit are private practitioners of law or child psychology.[29] A comment such as "every child requires continuity of care, an unbroken

23. BEFORE, *supra* note 1, at 32.
24. *Id.*
25. *Id.* at 31.
26. *Id.*
27. *See* BEYOND, *supra* note 4, at 117.
28. *See, e.g.*, M. ROMAN & W. HADDAD, THE DISPOSABLE PARENT 105-16 (1978).
29. *See* BEFORE, *supra* note 1, at 118-21; BEYOND, *supra* note 4, at 125.

relationship with at least one adult who is and wants to be directly responsible for his daily needs,"[30] can be construed as opposing day care for young children or shared care by members of an extended family. The comment, however, may merely reflect the kind of advice the authors would give a private patient who had a choice as to different methods of child-rearing. This may be the authors' choice as practitioners, but the thrust of *Before the Best Interests of the Child* is that until a family unit is broken either voluntarily or by a gross failure of parental care, full parental autonomy should not be abridged and state intervention should not be allowed. Thus, families, the authors appear to believe, are entitled to maintain a variety of structures, and the state should not enforce one model over another.

The weakest section of this book concerns legal representation for children. *Beyond the Best Interests of the Child* concluded that in matters of child placement a child should have party status and be represented by personal legal counsel.[31] Left unanswered in that work were the difficult questions of competence of counsel, attorney-client relationship and the accompanying problem of attorney allegiance, and the method for and time of appointment. Chapter 7 of *Before the Best Interests of the Child* contains the authors' attempts to answer these questions.[32]

In our society, a child in an intact family usually will not need independent representation. Should the need arise because of an external situation, the parents will meet the need from their own resources or, when necessary and provided, with state funds. Providing for personal representation for a child member of an intact family without the consent of the parents can in itself create an adversary situation and thereby destroy family integrity.[33] No legal right apparently now exists for children who are a part of an intact family to have independent representation in matters concerning their own welfare.[34]

Goldstein, Freud, and Solnit agree that children from an intact family have no right to independent counsel. They cite *In re Gault*[35] as authority for the child's right to have his own parents make the decision with regard

30. BEFORE, *supra* note 1, at 40.

31. BEYOND, *supra* note 4, at 67.

32. BEFORE, *supra* note 1, at 111-29.

33. The phrase "family integrity" is used here in the sense that the authors use it. *See* text accompanying note 9 *supra*.

34. *See* Wisconsin v. Yoder, 406 U.S. 205, 230-31 (1972). Contrast Chief Justice Burger's opinion in *Yoder* with Justice Douglas's dissent, in which Justice Douglas argues that when children's interests may conflict with those of their parents, "the children should be entitled to be heard." *Id.* at 244. The Court in this case held that the parents' right to free exercise of religion under the first amendment to the United States Constitution had been violated by the state's compulsory school attendance laws and carefully avoided ruling on a child's independent right to schooling. If this issue had been addressed, then a child's right to personal independent counsel might have been included. The discussion between Justices Burger and Douglas is the closest the Court has come to addressing the problem of enforcing an external resolution of problems that arise within an intact family.

35. 387 U.S. 1 (1967) (child charged with delinquency is entitled to due process and therefore has the right to be represented by counsel).

to counsel even in delinquency matters, basing their interpretation on the Court's statement that a child and his parents must be notified of the right to counsel.[36] Other scholars, however, have interpreted the decision as meaning that the right to counsel in criminal cases is the child's right and cannot be waived by the indigency or indifference of the parents.[37] This distinction is important in criminal cases, as a solvent parent might desire a child's incarceration and so fail to provide counsel, but it is especially important in parent-child relationship cases. The parent-child relationship, of course, normally is based on biology. This biological relationship creates many legal obligations.[38] The courts cannot change the biological aspect of the parent-child relationship, but they can change or even sever the legal obligations. Support and custody are the primary obligations with which the courts deal, and these are not necessarily connected. Thus, the possibility exists that one parent may seek a legal minimization or termination of the other parent's obligations without giving sufficient consideration to the child's needs. The arrangement may be totally voluntary, especially if it absolves one parent of all financial responsibility. This possible trade of visitation rights for no support obligation is what has created the pressure for externally imposed child counsel rights to ensure that the child's interests are adequately protected. The authors are correct, however, in pointing out that the appointment of counsel in disregard of the parents' concerns is a form of intrusion and, thus, a violation of family integrity by the state.[39]

Goldstein, Freud, and Solnit would minimize the possibility of state intrusion by the procedural device of appointing counsel for the child only after an adjudication has established a ground for modifying or terminating the parent-child relationship.[40] The idea that the appointment of an attorney should be delayed until after a portion of the issue for which the attorney is being appointed has been decided is hard, if not impossible, to comprehend. Properly representing a client after the fact is extremely difficult. An adjudication of the need for state intervention would be based on certain facts that, established without counsel, would be the facts with which the child's appointed counsel would have to work in resolving the question of disposition. Had counsel been appointed earlier, a different set of facts might have been established, facts that could have led to a different placement, or even to a conclusion that state intervention was not necessary. Under the authors' plan the child's attorney must accept as a fact that a need for state intervention exists and can act only as an advocate to the court of a particular placement plan.[41] Because the attorney probably

36. *Id.* at 41; *see* BEFORE, *supra* note 1, at 129.

37. *See* H. CLARK, DOMESTIC RELATIONS 479 (2d ed. 1974); R. MNOOKIN, *supra* note 16, at 108; *Recent Developments—Domestic Relations*, 58 CORNELL L. REV. 177, 177-79 (1972).

38. *See, e.g.*, Gomez v. Perez, 409 U.S. 535 (1973) (if legitimate child can enforce claim for support against father, so can illegitimate child).

39. BEFORE, *supra* note 1, at 112.

40. *Id.* at 114.

41. *Id.* at 111-12.

is not a social worker, the attorney's role necessarily would be limited to seeing that the placement plan as formulated would comply with the statutes and due process. The attorney's role would be further limited, according to the author's plan, because counsel should not be concerned with the implementation of the plan, and any involvement with the child would terminate upon final disposition.[42]

The attorney-client relationship when the client is incompetent is a problem that has long troubled the legal profession.[43] Children, of course, are members of the class of incompetents. The question for an attorney who is appointed to represent a child is: who is the client? When a parent is financially capable, most states expect the parent to pay the fee of the child's attorney.[44] When parents are not financially responsible, the state generally pays that attorney.[45] The unresolved question is: does the client change based on financial circumstances, or is the client always the child? If the client is the child, then the question arises as to the proper standards to be applied by the lawyer to afford the child adequate representation. The "best interest" standard is not adequate because most attorneys are not child psychologists. The standard of "what a reasonable child would want" is equally unworkable because most often the situation has arisen as a result of unreasonableness. Most attorneys seemingly apply standards based on their personal experience and background, and these may or may not be suitable for the particular circumstances.[46]

The authors of *Before the Best Interests of the Child* offer no real solution to the problem. They suggest that the court should be the advisor to counsel in accordance with the statutes and that counsel should try to persuade the court to take into account such factors as the child's sense of time and the limitations of experts.[47] This theory suggests that the court is the client, a view that is reinforced by the authors' advice that counsel might turn to the parents and the child for information.[48] The authors, however, do not say that the court is the client, nor do they say the child is not the

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42. *Id.* at 113.

43. *See* Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424 (1966). *See also* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12.

44. *See, e.g.*, TEX. FAM. CODE ANN. § 51.10(d) (Vernon 1975): "The court shall order a child's parent or other person responsible for support of the child to employ an attorney to represent the child . . . ."

45. *See, e.g., id.* § 51.10(f): "The court shall appoint an attorney to represent the interest of a child entitled to representation by an attorney, if . . . (2) the court determines that the child's parent . . . is financially unable to employ an attorney to represent the child . . . ."

46. *See* Dembitz, *Beyond Any Discipline's Competence*, 83 YALE L.J. 1304, 1308 (1974) (book review of *Beyond the Best Interests of the Child*):

> A ghetto child, [poverty lawyers] argue, must learn to cope with an environment filled with drugs, crime, prostitutes, pimps, and other perils. An extreme of this argument . . . was that a mother's deliberate punitive burning of her seven-year-old daughter's arm with a curling iron was de minimis in comparison to the general misery of life in Harlem and should therefore be ignored in considering the child's need for foster care.

47. BEFORE, *supra* note 1, at 122.

48. *Id.*

client. In each situation, the authors describe the attorney's role as advisory. The guidance offered to appointed counsel by Goldstein, Freud, and Solnit is so nebulous that it appears almost intentionally nonhelpful. The best conclusion that can be drawn is that the authors apparently would prefer the role of attorneys in resolving problems of the parent-child relationship to be sharply diminished.[49] This preference accords with the book's basic thesis, that state intervention should be minimized.

Before the Best Interests of the Child is a disappointing book. It suffers from the same difficulty as do courts and social agencies, being too little, too late.[50] Perhaps if it had been published prior to *Beyond the Best Interests of the Child* it would have made an important contribution to the whole area of the state-parent-child relationship. So much has been studied and written about unnecessary and destructive state intervention in the past few years that in order to make a contribution, this book should have synthesized or incorporated the work of other scholars to formulate a complete statement of the problem, and perhaps a solution. *Beyond the Best Interests of the Child* was valuable because it argued so forcefully that a biological connection with a child is not essential to, or even important in, establishing a psychological relationship. This statement was accepted because it was convincingly phrased and because of the eminence of the authors in child psychology. *Before the Best Interests of the Child*, however, misses the mark because state intervention, while it may be wrong psychologically, is a creature of the legal system, and revision of that system requires legal expertise. Criticism of a legal form by nonlawyers often is an essential element in the revision of that form. Prominence and achievement in child psychology, however, does not necessarily create credibility for criticisms of a legal structure, even though the criticism is well-deserved. The authors' contention that much state intervention in the parent-child relationship is misplaced cannot be denied. Nonetheless, one wishes that they had used more of the thinking of other members of the legal profession in formulating their guidelines.

*Ellen K. Solender**

49. *Id.* at 112.

50. *Id.* at 134. To state the problem for society as the authors do: "Too Early, Too Late, Too Much, or Too Little." *Id.* at 133.

* A.B., Oberlin College; J.D., Southern Methodist University. Professor of Law, Southern Methodist University.