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Best Interests Of The Child: By Whose Definition?

Harvey R. Sorkow*

As one gains exposure to the law, knowledge of the law, and experience with the law, a realization is obtained that for all its genius and majesty, it insists on diminishing itself by the use of concepts difficult to define or to interpret, and sometimes to apply.

Finite clarity escapes. The word or phrase being used is found, after examination and analysis, to be an amorphous form. It is, therefore, suggested that the practice of law for all of its *stare decisis* is still the practice of an art and not a science.

There is little that is absolute about rules, regulations, precedents, or statutes so that in final analysis they require *subjective* application to the fact circumstances under review. Of course, there are patterns discernable from groups of decisions that can lead to a reasonable anticipation of a result. It is submitted, however, that in a fact-intensive circumstance under judicial scrutiny, similar results by different judges is problematic.

Early in our study of the law, we encounter a foundational phrase: the "reasonable man" (our now non-sexist society reads the "reasonable person"). A judge, several judges, or a jury, wherever found, can be expected to reach different results at different times on what that phantom of the law should or should not have done at a certain time and place. Yes there is anticipation, but of the probable, not the absolute.

Rules of evidence are another area of the law submitted herewith to prove the premise. It is rhetorically asked, "At what point does 'prima facie' evidence become evidence that is 'clear and convincing'?" It is further questioned whether this evidence can grow to a "preponderance" or to the absolute "beyond a reasonable doubt".

Next we explore a phrase that any practitioner of family law—

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from law clerk to counsel to court—speaks of, writes about, attempts to define, and ultimately applies to a set of facts. The phrase to be examined, dissected, and defined is “the best interest of the child.”

Historically Justice Benjamin Cardozo, speaking for the New York Court of Appeals in *Finlay v. Finlay*,¹ quoted an 1847 English Chancery case saying “The Chancellor interferes for the protection of infants.”² Justice Cardozo further emphasized that “such interference is no concern for the disputants but for the child only.”³

The concept of the child’s “best interest” evolved over hundreds of years. Early on, from Roman times through and into the nineteenth century, English, American, and other common law jurisdictions maintained the view that there was a paternal preference in child placement. Indeed, the father was provider and head of the family. Moreover, he alone could determine the child’s religion and education. At common law, the father’s residence was the child’s residence. Only extraordinary unfitness would deprive the father of his custodial right.⁴

In the nineteenth century, as society found the mother at home nurturing and caring for the child and the father out of the house for long hours each day, courts began to grant the mother custody of the child, recognizing her primary role as wife and mother. This was especially true if the child was young.

It is noteworthy that even though the court was found to interfere for the child’s welfare, what it was really doing was substituting maternal custody for paternal custody. This result may be historically interesting, however, it fails to tell us what circumstances define a child’s “best interest.”

What are the elements of “best interest”? A leading New Jersey case⁵ held that the court must explore factors relevant to a child’s “safety, happiness, physical, mental and moral welfare.”⁶ However, it is submitted that more is required. In particular, the New Jersey trial court in *In re Baby M.* mentioned several definitions of the subject phrase.⁷

In *Baby M.*, experts called by the mother said, among other things, that “the best interest is the best placement.”⁸ But that language ap-

1. *Finlay v. Finlay* 240 N.Y. 429, 434, 148 N.E. 624, 626 (1925) (quoting *In re Spence*, 41 Eng. Rep. 937, 938 (1847)).

2. *Id.*

3. *Id.* at 938.

4. *Shelley v. Westbrooke*, 37 Eng. Rep. 850, 851 (1821).

5. *Fantony v. Fantony*, 21 N.J. 525, 122 A.2d 593 (1956).

6. *Id.* at 536, 122 A.2d at 598.

7. *In re Baby M.*, 217 N.J. Super. 313, 525 A.2d 1128 (1987), *aff'd in part and rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988). For examples of “best interest” see *infra* notes 8-17.

8. *Baby M.*, 217 N.J. Super. at 391, 525 A.2d at 1167.

pears conclusory and without factual basis. Another of the mother's experts suggested "best interest" was that which "is most suitable for a child's proper growth [and] development with a minimum amount of disability."⁹ This is seemingly more appropriate. One of the father's experts suggested the standard required was "[a] psychological milieu and environment best conducive to healthy normal relationships."¹⁰ Finally, the guardian *ad litem's* experts in *Baby M.* defined "best interest" as that which consists of two basic needs: "A closeness to be loved and to love—to feel nurtured and a sense of oneness with the opportunity to be separate—to develop one's own ideas and feelings, to be independent."¹¹

The court in *Baby M.*, however, determined the "best interest of the child" by utilizing the combination of factors suggested by one of the father's experts.¹² Serially, the factors used by the court can be universally applied in defining what is the best interest of a child.

First, examine each parent to determine whether the child is truly wanted.¹³ Then explore the emotional stability of each applicant.¹⁴ For example, is there a stability found in the household?¹⁵ Next, determine the ability of the subject adults to recognize, respond, and satisfy the child's physical and emotional needs.¹⁶ Can one or the other subordinate themselves for the benefit of the child? Finally, inquire into the family's views on education and religion.¹⁷ How sincere are the responses? Are there credible facts to support the answers?

It is also necessary to investigate outside the household, in order to get a total picture of "best interest." Significant questions include: What relationship exists between a parent and his or her siblings? What is the employment status and stability of each parent? Has the working parent stayed with the same employer for a substantial period? In consideration of these questions, one may have to look at the geographical area's demographics and economy.

Looking again at the applicants seeking child custody, and trying to

9. *Id.*

10. *Id.* This author questions whether this rationale retires to square one, wherein the father would have exclusive right to child custody.

11. *Id.*

12. *See infra* notes 13-17.

13. *Baby M.*, 217 N.J. Super. at 362, 525 A.2d at 1151.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 363, 525 A.2d at 1152.

define "best interest," one must additionally review the finances of the parties and their respective motives for seeking custody. In determining motive, consideration must be given to whether the prayer for custody was in the complaint or counter-claim, and whether the claim made was for tactical or positional purposes, so as to affect the economic bargaining usually attendant to a child-related parental dispute.

If a child is of sufficient age to be a reliable reporter, one should favorably consider having the child speak to the judge who could then hopefully gain a definition of the psychological relationship between the child and parents.

Noteworthy is the Uniform Marriage and Divorce Act, Section 402 (UMDA).¹⁸ Section 402 of the UMDA provides that:

The Court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.¹⁹

Thirty seven states, including California,²⁰ have adopted legislative criteria.²¹

Beyond the acts of the legislatures, our courts have generated a number of criteria to use in seeking the elusive "best interest." In the Alabama case of *Ex parte Devine*,²² the sex and age of the children were factors employed in defining "best interest."²³ In addition, the following guidelines were utilized:

- 1) emotional, social, moral, material and educational needs;
- 2) the respective home environments offered by the parties;
- 3) the characteristics of those seeking custody, including age, character, stability, mental and physical health;
- 4) the capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the children;

18. UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1982).

19. *Id.*

20. CAL. CIV. CODE § 4600.1 (West 1983 & Supp. 1991).

21. Freed and Foster, *Family Law in The Fifty States: An Overview*, 16 FAM. L.Q. 289, 350 (1983). Other states, such as New Jersey, have chosen not to adopt legislative criteria and instead rely on judicial precedent.

22. *Ex parte Devine*, 398 So. 2d 686 (Ala. 1981). See also *In re Marriage of Keating*, 689 P.2d 249 (Mont. 1984).

23. *Devine*, 398 So. 2d at 696.

- 5) the interpersonal relationship between each child and each parent;
- 6) the interpersonal relationship between the children;
- 7) the effect on the child of disrupting or continuing an existing custodial status;
- 8) the preference of each child, if the child is of sufficient age and maturity;
- 9) the report and recommendation of any expert witnesses or other independent investigator;
- 10) available alternatives; and
- 11) any other relevant matter the evidence may disclose.²⁴

In applying all of the many aforestated criteria, the family law practitioner has the opportunity to genuinely help a child. Care must be taken not to subordinate the client's interest. If a conflict between a parent and the child becomes apparent, counsel should petition the court for the appointment of a guardian *ad litem*. Indeed, a guardian *ad litem* should be mandatory in every contest where child custody is involved.

Parental equality is the prevailing norm today. That is, each parent comes into court with equal rights to the child.²⁵ It is this issue that has espoused the concept of "least detrimental alternative."²⁶ "Least detrimental alternative" is used by the courts when both parents are virtually equal as determined by "best interest" factors applied, but one or the other is genuinely bonded to the child. Other limiting "but for" factors might be that the child is so young as to require neo-natal nurturing, that there is evidence of some measure of unfitness in a parent, or that day to day care and activities are solely one parent's function.

From a judge's concerned position, only the passage of time and the development of the child will determine if the trial judge was correct in defining "best interest of the child."

24. *Id.* at 696-97.

25. Although each parent maintains equal rights to the child, in actuality, it is possible that neither parent may be best suited for the child.

26. G. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD* (2d ed. 1979).

