COMMENT

The State vs. The Family: Does Intervention Really Spare the Child?

Courts all across this country are attempting to balance the interests of children and parents. It has long been the general rule that natural parents, if considered fit, have the right to the custody of their children, uninterrupted even by a state exercising its parens-patriae power.[1] This right of the natural parent has traditionally taken precedence over the interests of everyone else, including the best interests of the child.[2]

There has been a recent trend, however, toward paying more attention to what the court feels is in the best interests of the child. Although the law is still weighted in favor of the natural parent, courts are increasingly willing to interfere with parents' rights if called for by the best interests of the child.[3] One example of this trend is exemplified by those courts which have recognized the importance of the "psychological parent" as explained by Goldstein, Freud and Solnit in their book, *Beyond the Best Interests of the Child.*[4]

This trend toward the best interests of the child, while often very beneficial for the child, heralds an increase in the state's parens patriae power to intervene in the lives of its citizens. Although the reasons behind intervention and the results of it are often desirable, we must consider the consequences of permitting more state intervention.[5]

One area which deserves attention is that of moral unfitness as it applies to parents in termination cases. The applicable Georgia statute says:

1. *See* Chapin v. Cummings, 191 Ga. 408, 12 S.E.2d 312 (1940), and Williams v. Crosby, 118 Ga. 296, 45 S.E. 282 (1903).

2. "Under the Georgia statute, the only questions before the court in a proceeding for the adoption of a child are: (1) do the natural parents consent to the adoption of the child, or, in some instances have they abandoned the child so as to dispense with their consent as a prerequisite; (2) are the adopting parents worthy and able to care for the child; and (3) is the adoption for the best interest of the child? The court is not required to declare the adoption unless all three of these factors unequivocally appear. If there is no parental consent and the natural parents have not abandoned the child, the court *is required* to deny the adoption. If either or both of the other factors are absent, the court *may deny* the adoption." Herrin v. Graham, 87 Ga. App. 291, 291-292, 73 S.E.2d 572, 573 (1952), *citing* Allen v. Morgan, 75 Ga. App. 738, 747, 44 S.E.2d 500, 506 (1947) (emphasis in original).

3. *Cf.* Chapin v. Cummings, 191 Ga. 408, 12 S.E.2d 312 (1940).

4. J. GOLDSTEIN, *et al.*, BEYOND THE BEST INTEREST OF THE CHILD (1973).

5. *See* Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226 (Summer, 1975).

> The court by order may terminate the parental rights of a parent with respect to his child if:
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> . . . .
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> (2) the child is a deprived child and the court finds that the conditions and causes of the deprivation are likely to continue or will not be remedied and that by reason thereof the child is suffering or will probably suffer serious physical, mental, *moral,* or emotional harm.[6]

In other words, the State of Georgia has the power to terminate a parent's right to his or her child if that parent is found to be morally unfit or if the child's morals are found to be threatened. Even if one agrees with this power in theory, the questions remain: Who has the power to decide exactly what constitutes moral unfitness? Where are the guidelines to follow in making such a decision? Of course, the ultimate query is whether the state should have such intervention power at all.

In reality, the presiding judge in a parental-rights-termination case is given the power to impose his or her own moral standards on the parents. According to Mnookin,

> [a]n *indeterminate standard allows a court to evaluate parental attitudes and behavior on the basis of the judge's personal values.* An indeterminate standard invites reliance by the judge on personal values, and this is especially risky when class differences confound the problem. . . . Even though there are other plausible explanations for the high proportion of foster children from poor families, present-day juvenile court standards allow a judge to import his own personal values into the decision-making process and therefore leave considerable scope for class bias.[7]

The Georgia Code provides no definitive outline of what conduct or parental teachings constitute behavior so unacceptable that parents may be deprived of their own child.[8] Do such parents have even a chance for meaningful review of such decisions? Justice Gunter, dissenting in *Bennett v. Clemens,*[9] remarked, "[W]ith all due deference to my brothers of the majority, I think that they merely substituted their standard of morality for that of the natural parents of the child in affirming the judgment below."[10]

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6. GA. CODE ANN. §24A-3201(a) (1976). *See also* ORE. REV. STAT. §107.105(1)(a) (1973) ("the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties"); UTAH CODE ANN. §30-3-10 (Supp. 1973) ("the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties"); ALA. CODE tit. 34, §35 (1958) (". . . having regard to the moral character and prudence of the parents . . .").

7. Mnookin, *supra* note 5, at 269 (emphasis in original) (footnotes omitted).

8. "Every state, except perhaps Maine and West Virginia, include in their jurisdictional statute at least one extremely vague and broad provision, allowing jurisdiction over a child who is not receiving 'proper' care or attention." Mnookin, *supra* note 5, at 241 n. 68.

9. 230 Ga. 317, 196 S.E.2d 842 (1973).

10. *Id.* at 323, 196 S.E.2d at 845.

As early as the first part of the nineteenth century, the states had well-developed powers to intervene if the state decided that intervention was necessary.

> [A]lthough, in general, parents are intrusted with the custody of the persons, and the education of their children, yet this is done upon the natural presumption, that the children will be properly taken care of, and will be brought up with a due education in literature, and *morals,* and religion; and that they will be treated with kindness and affection. But, whenever this presumption is removed; whenever (for example) it is found, that a father is guilty of gross ill treatment or cruelty toward his infant children; or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or that he professes atheistical or irreligious principles; or that his domestic associations are such as tend to the corruption and contamination of his children; or that he otherwise acts in a manner injurious to the morals or interests of his children; in every such case, the Court of Chancery will interfere, and deprive him of the custody of his children.[11]

Today, such power, or "state paternalism,"[12] does not appear to fit in with this country's continuing attempts to promote individual freedoms and family autonomy.[13] The U.S. Supreme Court, which often stresses the importance of the family, has, in *Stanley v. Illinois,*[14] gone so far as to classify the right to "raise one's children" as "essential;" the Court said that "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment."[15] Despite such expressed sentiments, many state courts, including those of Georgia, continue to expand the traditional bases for state intervention in domestic matters.

The broad discretion exercised by judges is also exercised at the initial stages of the termination process. Investigators and complainants from social-welfare or probation offices, in deciding to petition for termination of parental rights on the ground of moral unfitness, in effect are deciding what behavior and what ideas are harmful to a child's upbringing. Not only do these case workers decide which family "needs" intervention by the state, but they also make recommendations about the disposition to judges, who generally consider them extremely persuasive.[16] This far-reaching power, given rather arbitrarily to people who happen to be employed in certain agencies, should be frightening to citizens; it is an unjustifiable encroachment upon basic family rights. The power becomes even

11. 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 702 (7th ed. 1857) (emphasis added) (footnotes omitted).

12. Mnookin, *supra* note 5, at 266-267.

13. *Id.*

14. 405 U.S. 645 (1972).

15. *Id.* at 651.

16. For just one example of the weight given to a caseworker's testimony, see Moss v. Moss, 135 Ga. App. 401, 218 S.E.2d 93 (1975).

more frightening in light of evidence "that many public social work agencies have untrained or poorly trained staff."[17]

It is paradoxical that we are granting such discretionary power over the lives of our citizens to persons at every stage of the judicial process when it is generally admitted by psychological professionals that experts are not yet able to make accurate predictions of the effects of various means of upbringing.

> [T]he determination of what is "best" or "least detrimental" for a particular child is usually indeterminate and speculative. For most custody cases, existing psychological theories simply do not yield confident predictions of the effects of alternative custody dispositions. Moreover, even if accurate predictions were possible in more cases, our society today lacks any clear-cut consensus about the values to be used in determining what is "best" or "least detrimental."[18]

The dangers implicit in broad discretionary powers in initial custody procedures are further demonstrated by the results of a study conducted on the factors considered in decisions affecting child placement. Three professionals in the area of child welfare were given 94 case files and were asked to decide whether the child in each case should be removed from the family unit. The professionals agreed on less than half of the cases and could not agree on the determinative factors in the agreed cases.[19] "In spite of . . . advances," wrote Anna Freud, "there remain factors which make clinical foresight, i.e., prediction, difficult and hazardous. . . . [E]nvironmental happenings in a child's life will always remain unpredictable since they are not governed by any known laws . . . ."[20]

It has also been demonstrated that the damaging effects of childhood trouble have been overestimated. Similar childhood experiences do not affect all children in the same manner; some individuals put what appeared to be "severe pathology to constructive use."[21] Removing a child from his or her family environment, regardless of the high-minded, well-meaning reasons prompting it, may often have more adverse consequences than allowing the child to remain in a questionable situation. There is "no evidence whatsoever that foster care is psychologically therapeutic,"[22] and it may, in fact, be harmful. Few will argue that institutionalizing a child or allowing the child to be continually shifted from one foster home to

17. Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 998 (1975).

18. Mnookin, *supra* note 5, at 229.

19. M. PHILLIPS, *et al.*, FACTORS ASSOCIATED WITH PLACEMENT DECISIONS IN CHILD WELFARE 69-84 (1971).

20. A. FREUD, CHILD OBSERVATION AND PREDICTION OF DEVELOPMENT — A MEMORIAL LECTURE IN HONOR OF ERNST KRIS, 13 THE PSYCHOANALYTIC STUDY OF THE CHILD 92, 97-98 (1958).

21. A. SKOLNICK, THE INTIMATE ENVIRONMENT, EXPLORING MARRIAGE AND THE FAMILY 378, 379 (1973).

22. Mnookin, *supra* note 5, at 278-279.

another is a beneficial result of termination of parental rights. In such cases, the results and the concomitant effects on the children concerned should be kept in mind.[23] It has been suggested that to separate a child from his or her parents (natural or psychological) can be the psychological equivalent of "orphaning."[24] Wald stresses the importance of the continuity of relationships and asserts that the psychological damage caused by separating a child from his or her family may in reality be more detrimental to the child "than the harm intervention is supposed to prevent."[25]

What is the solution to the arbitrariness of our neglect and termination laws? The simple answer, obviously, is to frame the applicable statutes in more positive, concrete terms to avoid unwarranted intervention into the family unit. This is no simple task,[26] of course, but it is imperative to our judicial system's concepts of due process. "[I]mprecise standards inevitably create uncertainty, unpredictability, and a lack of clear rules of law to guide judicial discretion."[27] Imprecision is especially dangerous when we are dealing with such a subjective and highly emotional area as moral unfitness. If no distinct guidelines are available for the court's use, we are inviting the continued increase of state intervention into our private lives. Such intervention should not be permissible, regardless of the benevolence of the purpose, unless tangible evidence clearly shows that there will be severe damage to the child and that such damage will almost certainly continue to be inflicted.[28] Some commentators take this thesis a step further and insist that, as Wald says:

> [C]oercive intervention should be permissible only when a child has suffered or is likely to suffer serious physical injury as a result of abuse or inadequate care; when a child is suffering from severe emotional damage and his parents are unwilling to deal with his problems without coercive intervention; when a child is sexually abused; when a child is suffering

23. *See* Mnookin, *supra* note 5.

24. Freud, *Some Remarks on Infant Observation*, 8 PSYCHOANALYTIC STUDY OF THE CHILD 17-19 (1953), discussed in Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 160-161 (1963).

25. Wald, *supra* note 17, at 994.

26. This writer has never seen a satisfactory definition of "unfitness," for example. One of the relatively few attempts can be found in Comment, *The Law of Custody and Its Adequacy*, 10 KAN. L. REV. 560, 561 (1962).

27. Foster and Freed, *Child Custody (Part II)*, 39 N.Y.U. L. REV. 615, 626 (1964).

28. "A reappraisal of the neglect jurisdiction of juvenile courts is indeed necessary. In contrast to those who advocate extending the reach of neglect laws, I submit that a narrowing of neglect jurisdiction is needed. The sympathetic appeal of beaten, malnourished, or helpless children is a strong inducement for expanded intervention. However, because legislators and judges presume the beneficence of such intervention, there is a great temptation to intervene too often, and restraints placed on the exercise of coercive state power elsewhere are minimized or disregarded in the child neglect area. Since our society values the principle of family autonomy and privacy, we should carefully examine any decision to coercively limit parental autonomy in raising children." Wald, *supra* note 17, at 987 (footnotes omitted).

> from a serious medical condition and his parents are unwilling to provide him suitable medical treatment; or when a child is committing delinquent acts at the urging or with the help of his parents.[29]

Whether state intervention in the family on the ground of moral unfitness is eliminated or simply limited to clarify and specify such open-ended terms as "moral unfitness," we will be proceeding in the right direction. We must take steps to escape from the present situation, in which more states have legislation regulating moral neglect than physical neglect,[30] and in which it is possible to attempt the enforcement of societal norms through parental custody proceedings.

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29. Wald, *supra* note 17, at 1008.
30. *Id.* at 1033.