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“Best Interests of the Child”

by Andrew Shepard

Parents are essential to raising children. They love them, make major decisions for them, provide a roof over their heads. They offer emotional, educational, and economic support. In “intact” families, parents make decisions for their children jointly. There is no issue about where a child lives because parents live together with the child in the same place.

However, many families in Virginia and throughout the United States do not remain “intact” — the parents separate or divorce and live apart. Or increasingly, the parents choose not to marry and may or may not live together when the child is born. When separating and divorcing parents cannot agree on who should make decisions for their child (e.g., medical care, religion, or schooling), where the child should live, or how much one parent should see the child, they are in dispute over what the legal system has historically called “custody” of a child.

The core method by which a court resolves the parents’ dispute is through a traditional litigation model. The disputing parents bring their disagreement to a judge who hears evidence and makes a decision about what the child’s post separation and divorce custody arrangements should be.

In every state, the overarching principle that the judge uses to evaluate the parent’s competing claims is the “best interests of the child.” This essay is designed to provide a brief introduction to that concept, a place for the reader to begin to formulate his or her own ideas about the usefulness and meaning of the “best interests of the child” standard.

The “best interests” test as a moral imperative and social necessity

In Virginia, the court takes the following factors into consideration when determining the best interests of the child for custody and visitation:

1. The age and physical and mental condition of the child, giving due consideration to the child’s changing developmental needs;
2. The age and physical and mental condition of each parent;
3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child’s life and the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;
4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers, and extended family members;
5. The role that each parent has played and will play in the future in the upbringing and care of the child;
6. The propensity of each parent to actively support the child’s contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;
7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;
8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age, and experience to express such a preference;

9. Any history of family abuse or sexual abuse. If the court finds such a history, the court may disregard the factors in subdivision 6; and
10. Such other factors as the court deems necessary and proper to the determination. (Code of Virginia, §20-124.3)

This is typical of many state statutes that list the factors that go into a best interests determination. The factors seem sensible and thoughtful, but are so general that it is difficult for parents (and indeed other judges) to predict how they will be applied to a particular family.

For example, assume that the court has before it two reasonably fit, loving parents. Both have been involved in parenting the child, albeit with different divisions of time and labor as the now 12-year-old child grew. Neither parent has any obvious parenting deficits — abuse and neglect, violence towards the other spouse, drug or alcohol abuse, or a diagnosable mental illness that affects parenting. The child loves both parents and wants them to stay together. The parents, however, have grown apart. Perhaps they had affairs or argued constantly with each other. They want a divorce. But they cannot agree on who should make decisions for the child, with which parent the child should live, and how often the other parent should see the child.

The court has to decide — it cannot leave a child in limbo caught between warring parents.

However, the determination that the court is being asked to make is different than other decisions that a court typically makes. Most judgments require the court to reconstruct past events through the evidence presented and allocate civil or criminal responsibility — who ran the red light causing the accident and was that negligence? Was the criminal defendant mentally competent when committing the crime? In a child custody determination, however, the court has to make a prediction of what parenting arrangement would benefit a child in the

future based on the evidence before it. Past events are a guide to future parent-child relationships, but do not predetermine them. A parent who stayed home with a child, for example, may have to go back to work after separation and divorce because of financial need and a desire for personal fulfillment. Several years after divorce, a teenage child may blossom as a soccer player because of one parent's coaching and involvement, something that was not evident at the time of the custody determination. One parent may relocate to a community that a child may love or hate.

In short, a judicial "best interests" custody determination is, in effect, an educated prediction about how parents and children will evolve, not simply a reconstruction and legal interpretation of past events.

Unfortunately, there is scant evidence that anyone — including judges and psychologists — is very good at making such a prediction of the future. While available social science data creates a general framework about what parenting arrangements would be good for children after separation and divorce (e.g., they need "stability of relationships" in a time of uncertainty and stress), the data cannot always create an accurate prediction/decision for every particular child.

Further, the hostility, expense, trauma, and uncertainty for parents and children required for the presentation of evidence to the court to make a custody determination can make everything worse. The parents air accusations and counter accusations about family life. Each will have to pay a lawyer at a time when family finances are under great stress already because of the need to support two households. The court may order an expensive and intrusive mental health report to help it make a decision. The child may be interviewed or called to testify.

However, the “best interests” test remains the overarching standard for making child custody determinations. It is fundamentally a moral statement; recognizing our responsibility to try to “do right” by children through an orderly and rational process when parents separate or divorce. The best-interests standard keeps everyone’s focus on the duty to protect the weakest, most vulnerable actor in the separation or divorce process. Generally children do not have a voice when their parents separate or divorce yet they are the ones most put at risk by the adult decision foisted on them.

The governing legal standard should remind parents of their responsibility — while marriages and relationships may dissolve, parents are forever.

In addition, society has a powerful practical reason to try to structure post-separation and divorce parenting arrangements by reference to the child’s best interests. The millions of children raised by separating and divorcing parents are future parents, taxpayers, and citizens. Parental separation and divorce can put them at emotional, educational, and economic risk. While social science cannot provide data that will accurately determine what parenting arrangements are best for an individual child, it can tell us something about arrangements are likely to benefit children. In most cases this includes:

- assuring their safety
- removing them from conflict
- providing emotional stability and adequate parenting
- having a meaningful relationship with both parents
- receiving adequate economic support

The best interests of the child standard codifies these requirements and provides guidance to judges who are asked to make critical determinations about a child's future

What does the “best interests of the child” standard mean?

As discussed above, the “best-interests” test is the overarching guide for policy and practice to determine a child's post-separation and divorce parenting arrangements. There simply is no ethical, moral, or legal competitor. No one would, for example, seriously argue that a court should determine custody according to the best interests of a parent or of the state.

Agreeing on the overarching principle that a child's best interests should be determinative, however, does not help us determine what those best interests are in a particular case. We live in a pluralistic, democratic society where different judges can attach different meanings to that phrase, even if there is a list of the factors that go into it, as in Virginia.

Essentially, the “best interests” test is at best an aspirational statement;

it is what society hopes the outcome of a child custody dispute will be rather than a proscription for a particular type of custody arrangement in a particular family. The very high level of generality at which it is stated leaves a great deal of discretion to judges implementing it. The way that discretion is exercised has altered over time, influenced by changing views of gender, economic power, and, more recently, social science.

THE ERAS OF GENDER BIAS

Until the latter half of the 20th century, judicial definition of a child's best interests was largely gender based. Historically, in England and in the early years of the United States, fathers received custody as children

were seen as the property of the father. This rule made economic sense, as men had access to resources to support the child that women generally did not have. Mothers were, in broad terms, the property of their husbands and did not have an independent economic existence.

By the end of the 19th century, the gender bias flipped. At this time, courts developed and applied the “tender years” doctrine. Simply put, the doctrine meant that courts presumed that the mother was the more appropriate custodial parent for young children. Court decisions of the time referenced the transcendental importance of mother love, something seen as more important than the father’s affection for and involvement with the child.

This judicial switch from father to mother reflects the influence of contemporary thought on the importance of the mother-child bond in the child’s emotional development. It also reflects the realities of the increasing industrialization and division of labor within the family. Even then some gender bias in favor of father continued during the tender years era. Fathers typically had superior economic resources, so boys of teenage years could be placed with the father largely because he had the ability to support the adolescent child and prepare him for an occupation.

Fast forward to the middle of the 20th century. The tender years doctrine was challenged by the massive entry of women into the work place. The influence of the campaign to eradicate gender bias against women in the workplace had the opposite effect in custody disputes. If mothers could not be denied access to jobs and economic opportunity on the basis of gender, fathers could not be denied custody on the same basis. Many states and courts began to move away from the tender years doctrine and

toward a more gender-neutral decision process for custody and visitation.

THE MENTAL HEALTH COMMUNITY ENTERS THE PICTURE — THE ERA OF ONE

The end of gender-based presumptions unmoored custody determinations from their anchors of certainty and predictability. Enter a new conception of the “best interests” standard, this one heavily influenced by mental health concepts.

By the last third of the 20th century, courts moved away from a presumption in favor of mother custody to a psychological and emotional “best interests of the child” standard. This movement also began a systematic involvement of mental health practitioners and the social sciences into child custody disputes, which continues to this day.

Originally published in 1973, Goldstein, Freud, and Solnit’s *Beyond the Best Interests of the Child* was the first highly influential attempt by a law professor and two psychiatrists to integrate mental health concepts into the best interests test. Based on case studies from foster care and their own clinical experience, the authors postulated that the child’s most important emotional need after divorce and separation was psychological stability and preservation of key emotional relationships. They advocated that the court identify the child’s single “psychological parent” and give that parent all custody rights. To the authors, the child’s need for stability was so important that they advocated that the psychological parent should have the power to deny the other parent visitation with the child. While most courts did not take this reasoning that far, the book was heavily discussed and cited in the courts, and within the law and mental health communities.

The evolution of the “best interests” standard, however, shows some of the pitfalls of trying to base legal standards on mental health concepts.

For example, while the concepts in *Beyond the Best Interest of the Child* were ostensibly gender neutral, the author’s emphasis on the need for a court to identify a single psychological parent meant that mothers, who in the early 1970s were less likely to work outside the home, received custody more often than fathers. Gender bias thus crept back into the best interests standard under a more neutral label than the discredited tender years doctrine.

Later research also revealed that Goldstein, Freud, and Solnit went too far in stating that a child’s best interests after separation and divorce were served by a stable relationship with a single psychological parent. A strong research base established that fathers played both a significant and complementary role in the development of children. Other studies established that one of the best predictors of how well a child could surmount the challenges of separation and divorce is strong relationship with both parents, not just one.

JOINT CUSTODY — THE ERA OF TWO

Based on this research, many states, including Virginia, included the possibility of joint custody — where parents shared parenting on an equal footing rather than allocating primary power to one parent over the other — as a possible outcome in custody cases. Some states enacted a presumption that parents should share legal custody (decision making) after separation or divorce but not share residence of the child equally. Many states also began to incorporate the “friendly parent” idea into their best interests determination. If a court had to choose between parents, it should choose the one who is more likely to foster the other parent’s continuing relationship with the child.

While joint custody is a promising improvement in many cases, recent research has qualified that idea with a warning that joint custody and the child's continuing contact with both parents has to be balanced against the need to shield the child from high levels of continuing parental conflict that can result when unwilling and sometimes emotionally unstable parents share responsibilities.

What does the “best interests standard” mean today?

So, what does the “best interests of the child” mean today? Overt gender bias has been eliminated, as have most mechanical formulations of the test. In general terms, courts define the child's best interests by listing multiple factors that go into it, but without setting priorities among the factors that it lists, leaving the final determination to judicial discretion. The result is guided but individualized judicial decision making through an evidentiary process that can cause great expense, anxiety, and uncertainty.

The political and empirical battle over what is in the child's best interests continues. Courts continue to be accused of de facto gender bias by father's groups or mother's groups. Because of the expense and uncertainty of the litigation process, some advocate more predictability in application of best interests standard by creating more presumptions to confine judicial discretion. Some legislatures and courts are experimenting with presumptions of joint legal (decision making) or physical (50-50 timesharing) custody or the approximation rule (parenting arrangements after separation and divorce should “approximate” those that existed before).

The problem with all presumptions is that they challenge the fundamental moral goal of the best interests test — treating children and families as individuals and unique beings.

The most promising shift in thinking to reconcile the competing values involved in defining a child’s best interests is for public policy to emphasize that parents should make that determination themselves rather than rely on a judge. Parents are far more likely to adhere to parenting arrangements they agree to voluntarily. Self-determination typically reduces the expense and trauma of the child custody decision-making process significantly.

States can support parental self-determination by changing their legal language from “custody” to “parenting” and by breaking down parental functions (e.g., “decision making” and “residence”) instead of including them in the single term “custody.” Instead of a custody order, parents can create an individualized parenting plan without labeling one parent a “winner” or “loser.” States have also begun to support the movement toward parental self-determination through what Professor Jana Singer has labeled a “velvet revolution” in resolving parenting disputes — away from the courtroom toward mediation, parent education, and collaborative law. The policy goal should be to have as many parents as possible resolve their disputes themselves, reserving courtrooms for protection of safety and legal rights rather than parenting arrangements.

Further Reading

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