1999

Interdependency Theory - Old Sausage In a New Casing: A Response to Professor Czapanskiy

John DeWitt Gregory
Maurice A. Deane School of Law at Hofstra University

INTERDEPENDENCY THEORY—OLD SAUSAGE IN A NEW CASING: A RESPONSE TO PROFESSOR CZAPANSKIY

John DeWitt Gregory*

In her article, *Interdependencies, Families, and Children*,[1] Professor Karen Czapanskiy begins with the observation that the law "addresses the needs and miseries of children through a variety of interventions designed to protect or advance a child's best interests."[2] After coming to the conclusion that the "best interests" of the child standard is devoid of content, Czapanskiy proposes her own "interdependency theory" as a solution.[3] Czapanskiy argues that "a proposed legal intervention is acceptable when it supports caregivers in maximizing their ability to care for a child."[4] Conversely, "[a] proposed legal intervention is unacceptable when it impedes a caregiver's ability to do what is best for a child."[5] While Professor Czapanskiy would see her theory applied to a variety of social practices that affect children, including education, employment, housing, taxation, transportation, daycare, and public benefits,[6] the primary concern of her article is with child visitation by persons not living in the household of the child. Accordingly, I shall limit this response to that context.

As illustrations of her belief that the "[l]aw is often oblivious to the needs of caregivers, despite the fact that society

* Sidney and Walter Siben Distinguished Professor of Family Law, Hofstra University. I am grateful to Mitchell Treger for assistance in preparing this article.

1. Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957 (1999).

2. *Id.* at 957.

3. *Id.* at 957. *See generally* John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE LAW REV. 351, 385-88 (1998) (discussing the extensive scholarly criticism of the best interest of the child standard).

4. Czapanskiy, *supra* note 1, at 957.

5. *Id.*

6. *Id.* at 957.

relies on caregivers to raise children,"[7] Professor Czapanskiy provides several examples of clients she represented in her clinical legal practice. She is convinced that the law gave these clients "a raw deal."[8] Representative is her story of an HIV+ father of two preschool children who were abandoned in infancy by their HIV+ mother, an illegal drug user who sees the children infrequently.[9] The father rejects the clearly available remedy of termination of the mother's rights that, we are told, would permit him to adopt his children under Maryland law and give him sole authority to decide on who would care for his children after his death.[10] Rather, the father hopes that this unfit mother who has deserted her infant children will change.[11] He seeks a legal remedy "allowing her the dignity of the title of mother" while permitting him, as caretaker, to know that after he dies some other trusted person will look after the children.[12] Professor Czapanskiy bemoans the fact that "the law . . . gives him no intermediate path."[13]

The actors in the second story include the mother of a young child who divorced her husband after several beatings and agreed to court ordered visitation.[14] The child, during adolescence, decided to move in with the father and later attacked and injured the mother during a visit to her home.[15] Despite reconciliation of the mother and child, their relationship is difficult and the young man is "quite troubled."[16]

Yet another story involves an out-of-wedlock child whose paternity was established in a judicial support proceeding that the state required in order for the mother to secure welfare payments.[17] Before her death, the child's mother designated the stepfather to be the child's guardian.[18] The stepfather's adoption of the child was delayed for more than a year because of the law's requirement that either the mother obtain the natural father's consent or show that it was impossible to find

7. *Id.* at 960.
8. *Id.* at 962.
9. *Id.* at 960.
10. Czapanskiy, *supra* note 1, at 960.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 961.
15. *Id.*
16. Czapanskiy, *supra* note 1, at 961.
17. *Id.*.
18. *Id.*

him.[19]

Finally, Professor Czapanskiy describes a case where a woman adopted a child who became mentally ill.[20] As a teenager, the adopted child was in a relationship with an abusive older man who was convicted of assaulting her, and was raped by still another man, who was also convicted.[21] She became pregnant by one or the other of the men.[22] With the teenager's consent, the adoptive mother undertook to care for the baby and subsequently petitioned for adoption, which by law required service on both men, either of whom might have been the father.[23] Ultimately, the adoptive mother/grandmother withdrew the petition to avoid subjecting her mentally ill teenage daughter to testifying again about the rape and the assault.[24]

There is no denying that Professor Czapanskiy's clients in these cases received "raw deals." It is not entirely clear, however, that only the law is to blame for the different deals they received. To conclude that the law is entirely to blame for such treatment is to ignore the clients' bad choices, extraordinarily bad luck, or both. While it may seem cruel to say so, it is arguable, nevertheless, that considerable social pathology and dysfunction, including domestic abuse, criminality, and child abandonment and neglect, together with the consequences of poverty and mental illness, contributed to the unfortunate straits in which Professor Czapanskiy's clients found themselves and to the distressful results in these cases. Simply stated, Professor Czapanskiy's illustrative cases hardly provide persuasive support for the substitution of interdependency theory for traditional legal approaches.

Interdependency theory would give caregivers "maximum autonomy, authority, and assistance,"[25] in recognition of every child's need for a caregiver and every caregiver's need for support from institutions and other people.[26] Accordingly, the law respecting child visitation would not recognize legal relationships or status. Rather, the central question is whether

19. *Id.*
20. *Id.* at 962.
21. *Id.*
22. Czapanskiy, *supra* note 1, at 962.
23. *Id.*
24. *Id.*
25. *Id.* at 959.
26. *Id.*

the claimant for child visitation has "provid[ed] the caretaker-child unit with support in a reliable and respectful way, and whether that supportive relationship will continue" into the future.[27] Furthermore, a court should rescind an order of visitation obtained by a person who fails to continue behaving "in a supportive, reliable, and respectful manner."[28]

Professor Czapanskiy asserts that interdependency theory would significantly reduce court intervention on behalf of private parties into the lives and decisions of children and their caregivers, and would permit intervention only to reward supporting caregivers.[29] To the contrary, the standard she provides is just as likely to increase judicial interventions and consequent opportunities for conflict as it is to reduce them. It is not at all clear, I think, what facts will satisfy the standard of supportive, reliable, and respectful behavior. If the courts should adopt interdependency theory and apply Professor Czapanskiy's standard, one may confidently predict that judicial decisions will be no more fathomable than they now are under the prevailing standard of best interests of the child.

That is to say that judges, in determining what constitutes supportive or reliable or respectful behavior, will continue "to award custody [or visitation] to those litigants whose attributes and values most resemble their own."[30] Professor Czapanskiy's virtually indeterminate standard does not allow judges the opportunity to obtain reliable information from which they can make an informed and logical choice. In this respect, interdependency theory presents the same difficulty that Professor David L. Chambers has identified with respect to best interests. Professor Chambers has stated that "[r]egardless of what values judges apply, they do not obtain, and perhaps can never routinely obtain, reliable information about the child and the parents, and thus they cannot make sensible predictions or choices."[31]

The standard of behavior under interdependency theory—reliable, predictable, and supportive—provides to judges no less

27. *Id.* at 970.

28. Czapanskiy, *supra* note 1, at 970.

29. *Id.* at 964.

30. *See* Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L.Q. 191, 197 (1991).

31. *See* David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 482 (1984).

discretion than best interests of the child. Accordingly, interdependency theory is subject to the same criticism to which some commentators have subjected the best interests test over the years:

> Leaving judges with an ultimate standard but with no real guidance on how to satisfy it puts them in a position of having only two ways to do their job: either they follow their own instincts or they rely on the expertise of others. Following their own instincts is simply another way of saying that they act in a vacuum, a philosophical vacuum, in which their particular experience, upbringing, biases, and perhaps, irrationalities led them to a conc[l]usion. This form of decision-making is not only personal, bearing no necessary relation to what another judge might decide on the facts, but also utterly without any necessary relation to what is best for the child in question.[32]

Simply stated, interdependency theory gives minimal guidance to judges. Rather, it affords them the opportunity, which in all probability they will be eager to accept, to exercise virtually unlimited discretion in custody and visitation cases.[33]

Interdependency theory would rely on function as a basis for making visitation decisions and entirely reject status.[34] The critical question is "whether the potential visitor has a history of providing the caregiver-child unit with support in a reliable and respectful way, and whether that supportive relationship will continue into the future."[35] As a result, entirely fit, non-custodial natural parents of children could be denied visitation and unrelated third parties could be granted visitation.[36] In this respect, interdependency theory rejects both conventional wisdom and constitutional principle.

Current custody and visitation law reflects the societal consensus that married parents generally make decisions that are in the interests of their children and that they continue to do so after divorce.[37] This consensus is reflected in conventional

---

32. JAMES C. BLACK & DONALD J. CANTOR, CHILD CUSTODY 42 (1990).

33. It is also arguable that some judges might apply Professor Czapanskiy's uncertain standard too narrowly. Apart from intervention as a means of rewarding a supporting caregiver, there are certainly instances when intervention is required to save a child from significant harm, as under current law.

34. It is assumed, for purposes of this discussion, that Professor Czapanskiy asserts that the theory would also apply in custody decisions.

35. Czapanskiy, *supra* note 1, at 970.

36. *Id.*

37. *See* PETER N. SWISHER ET AL., FAMILY LAW: CASES, MATERIALS AND

custody arrangements at divorce. Under what may be called the "traditional arrangement," the court ordinarily will award physical or residential custody to one of the parents. In addition, the court will usually award reasonable rights of visitation to the non-custodial parent.[38] Parents in divorce cases in which custody is not contested frequently agree on a similar arrangement.

Recently, courts and legislatures in almost all states have viewed joint custody as a means of giving divorced parents shared and equal responsibility and decision making authority.[39] Both the traditional custody with liberal visitation arrangement and joint custody reflect the same principle, which is deeply imbedded in the law. A colloquium of practicing and academic lawyers, mental health professionals and judges have stated this long accepted and generally recognized principle as follows:

> Many observers, parents as well as mental health experts, lawyers, and judges, believe that children are injured substantially if denied interaction and relationship with both parents. Whatever conclusions should be drawn from the data, however, there is no doubt that judicial decisions, and increasingly, statutory formulations make assumptions which benefit non-custodial parents' visitation interests. It is assumed, and not infrequently stated explicitly, that it is in the best interest of a child to have continuing contact and a continuing relationship with the non-custodial parent. Indeed, the common

---

PROBLEMS 1091 (2d ed. 1998).

38. *See* JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 106 (2d ed. 1995).

39. *Id.* at 387. *See* SWISHER *supra* note 37 for a useful definition of joint custody:

> Many courts and commentators distinguish two aspects of joint custody: legal custody and physical custody. Joint legal custody generally means that parents have shared and equal authority to make significant decisions involving a child's health, education, and welfare. Joint physical custody, by contrast, refers to a residential arrangement under which a child spends substantial periods of time living with, and being cared for by, each parent. *See* Jana Singer & William B. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 499 (1988). Although some joint custody arrangements involve both joint physical custody and joint legal custody, many other awards entail joint legal custody only. Indeed, several empirical studies suggest that joint custody to the mother is now the dominant custody arrangement in several parts of the country.

SWISHER, *supra* note 37, at 1163.

> judicial warnings against denial of all visitation or restriction of even supervised visitation indicate the social value assigned to non-custodial parent-child relationships.[40]

Noting that even a parent's psychiatric disorder is not a sufficient basis for denying visitation between a parent and child, the same authors observe that "[m]ost mental health professionals believe that children develop best in the context of an ongoing relationship with *both* parents, and that some form of contact between child and parent is preferable to no contact."[41]

Interdependency theory appears to ignore the conventional wisdom that a continuing relationship with both parents is important for the well being of children of divorce. Rather than seeking to maintain these relationships, under interdependency theory "it is critical to determine who the lead caregiver is."[42] For children who live with one parent, most often the mother, it is the mother who is the lead caregiver for interdependency theory purposes.[43]

The importance of identifying the lead caregiver becomes apparent under interdependency theory, however, when there is a change in composition of a two-parent family,[44] which is, of course, what occurs at divorce. For this purpose, Professor Czapanskiy favors an "approximation rule," which "looks to the prior caregiving practices of the adults and seeks to approximate those practices in the future by allocating caregiving responsibilities along the same lines, to the extent that is possible."[45]

Professor Czapanskiy provides several reasons for adopting the so-called approximation rule and invariably favoring the lead caregiver. This approach, she suggests, recognizes the importance of maintaining security and stability in the child's

---

40. National Interdisciplinary Colloquium on Child Custody, LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES 131 (1998) (citations omitted).

41. *Id.* at 185.

42. Czapanskiy, *supra* note 1, at 972-73.

43. *Id.* at 973.

44. *Id.*

45. *Id.* (citing A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.09 (Tentative Draft No. 3 1998); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody,* 80 CAL. L. REV. 615, 630 (1992).

life.[46] Further, favoring the lead caregiver under the approximation rule identifies caregiving as important and deserving of reward.[47] Also, it provides incentives to adults to put children's needs first, "because their opportunities to spend time and make decisions for the child after separation depend on their caregiving practices before the separation."[48] Finally, favoring the lead caregiver will discourage caregivers from behaving disrespectfully toward each other because such conduct may lead to separation from, and less time with, and diminished authority over, the child.[49]

In sum, interdependency theory gives virtually untrammeled authority over children of divorce or other family breakups to the parent who functioned as the lead caregiver while the marriage was intact. Professor Czapanskiy does not describe in any detail the everyday childcare functions that will qualify a claimant as lead caregiver. Presumably, these functions are identical to those described as caregiving functions in the American Law Institute Principles from which the "approximation rule"[50] is derived. The first (and, I suggest, critical and determinative) set of functions under this approach include "feeding, bedtime and wake-up routines, care of the child when sick or hurt, bathing, grooming, personal hygiene, dressing, recreation and play, physical safety, transportation, and other functions that meet the daily physical needs of the child."[51]

Obviously, the provision of direct, day-to-day care is the *sine qua non* for qualifying as lead caregiver and enjoying all the benefits, privileges, and advantages that status affords in a contested custody or visitation case. Just as obviously, in most families, moms will qualify as lead caregivers, with full authority over the children when the family breaks up, and dads will not. Professor Czapanskiy acknowledges that "[s]ometimes parents or other adults who share a home with a child allocate their child-rearing roles badly."[52] Interdependency theory, as under current law, would permit

46. Czapanskiy, *supra* note 1, at 973.
47. *Id.* at 974.
48. *Id.*
49. *Id.* at 974-75.
50. *See* A.L.I., *supra* note 45, § 2.09.
51. *Id.* § 2.03(6)(a).
52. Czapanskiy, *supra* note 1, at 975.

parents by agreement to allocate responsibility in a manner that is not consistent with the approximation rule. But in the absence of parental agreement, interdependency theory would not permit a court to deviate from the approximation rule in allocating authority to the lead caregiver.[53]

It is appropriate and fair for fit parents to agree at the time of divorce or separation on a mutually satisfactory arrangement for the allocation of child caregiving responsibilities. To require application of the approximation rule as the unvarying default rule when the parents are not in agreement, however, may be grossly unfair. In the first place, allocation of caregiving responsibilities during marriage is not necessarily a matter of choice. Responsibilities are influenced, if not controlled, not only by preference, but also by a myriad of other factors, including skills, abilities, temperament, employment opportunities, and the like. Secondly, and most significantly, the time and energy spent in providing necessary economic support necessarily denies the lead economic provider, who is likely to be the father, of the opportunity to engage in caregiving. It follows, of course, that without such economic support the lead caregiver, usually the mother, would be unable to carry out the functions that give her this preferred status.[54]

Nevertheless, upon separation or divorce, a father who has fulfilled all of his marital obligations and functioned in ways that are consistent with the mutual expectations of the parties is relegated to the secondary position of supporting caregiver. The ways in which interdependency theory would address this father's dilemma strike me as entirely unsatisfactory. First, a court may permit him, in this lesser role, "to continue to spend time with, and have some decision making authority for, the children."[55] There is no apparent standard for determining how much time he may get to spend with his children or the extent of his authority.

The second means of resolving his predicament is hardly within the divorced or separated father's control. If he "continues to behave consistently after the separation,"[56] then the children may decide as they grow older, and particularly

53. *Id.* at 975-76.

54. I am indebted to Ronald K. Henry, Esq., for bringing this anomaly to my attention.

55. Czapanskiy, *supra* note 1, at 976.

56. *Id.*

after they reach adolescence, to increase the time they spend with him.[57] The benefit that supposedly flows from all of this is to stop courts from reinforcing "gendered practices" during marriage and to inspire couples "to allocate child-rearing responsibilities according to their talents rather than according to their gender."[58]

As I have stated, couples do not engage in so-called gendered child rearing practices simply because of a deliberate choice to do so. Furthermore, the arguments presented in favor of interdependency theory do not prove, nor do they even suggest, that "gendered" allocations of responsibility during marriage are in the least harmful for the children of those marriages. Absent such harm, I see no compelling reason for preventing divorce courts under any and all circumstances from reinforcing a couple's child rearing practices during the marriage, however "gendered" they may have been. Even less justifiable is the implicitly threatening suggestion that couples had better be careful not to engage in child rearing practices during marriage that may be characterized as "gendered." Otherwise, in the event of divorce, at least one of them will surely pay the consequences.

Among the more troubling aspects of interdependency theory is an insistence on diminishing the status and authority of fit natural parents. As Professor Czapanskiy points out, American law entitles legal or biological parents to exercise authority with respect to their children.[59] Like others before her, however, she declines to afford any advantage or privilege based on legal status or blood relationships in custody and visitation disputes, but would substitute function as the critical element.[60] Giving paramount importance to function, I suggest, is unlikely to produce results that differ significantly from those

57. *Id.*

58. *Id.* at 977.

59. *Id.* at 985.

60. *See, e.g.*, Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 410-11 (1994) (arguing courts should grant visitation rights to individuals who maintain parent-like relationships with other people's children); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 464 (1990) (arguing for "expanding the definition of parenthood to include anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature.").

that divorce courts presently reach when contending parents make custody and visitation claims. In cases involving third parties contending for custody or visitation over the objection of natural parents, however, interdependency theory could have a significant and deleterious impact on current law.

As Professor Czapanskiy acknowledges, legal parents typically satisfy the requirements of interdependency theory, which means that most visitation orders would remain the same.[61] What this also means is that courts will for the most part continue to give preference to the mother over the father as child custodian, as they have in recent years.[62] Indeed, for quite a long time this preference was explicitly accepted by many courts in the form of the "tender years" doctrine, which presumed that a child of tender years should be placed in the custody of the mother.

Despite the view of some courts that the tender years doctrine was simply a factual presumption based on the role that mothers historically played,[63] and its continued defense by some legal commentators,[64] the doctrine eventually came into constitutional disrepute as a gender-based classification. Subsequently, the Supreme Court of West Virginia in *Garska v. McCoy*[65] created the primary caretaker presumption, requiring that custody of a child of tender years be awarded to the primary caretaker parent, as long as he or she is a fit parent.[66] In order to establish which parent is the primary caretaker, the trial court:

> shall determine which parent has taken primary responsibility for, *inter alia,* the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e. babysitting, day-care, etc; (7) putting child to bed

61. Czapanskiy, *supra* note 1, at 986.

62. *See* SWISHER, *supra* note 37, at 1101.

63. *See, e.g.,* Hammac v. Hammac, 19 So.2d 392, 393-94 (Ala. 1944).

64. *See, e.g.,* Mary Becker, *Maternal Feelings: Myth, Taboo and Child Custody,* 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 203-22 (1992).

65. 278 S.E.2d 357 (W. Va. 1981).

66. Garska v. McCoy, 278 S.E.2d 357, 363-64 (W. Va. 1981).

> at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e. religious, cultural, social, etc; and, (10) teaching elementary skills, i.e. reading, writing and arithmetic.[67]

There could not be a clearer example of function rather than status as the determinative factor. Moreover, although the primary caretaker presumption may be gender-neutral on its face, it may compel the same "gendered" results as the tender years presumption. What is more, in the following sense it presents the same kind of potential for unfairness to married couples that have been discussed above in relation to interdependency theory.

> Presumably, the primary caretaker has made some sacrifices, either in terms of career or leisure time, in order to care for the child; in light of those sacrifices, that same parent may "deserve" to continue in the primary caretaking role, if she or he so chooses. On the other hand, it may be that the secondary parent wanted to be the primary caretaker, but sacrificed his or her preferences in order to be the breadwinner for the family. A rule that accomplishes fairness between some parents may thus be unfair between others.[68]

While West Virginia is the only state that has judicially adopted a presumption favoring the primary caretaker, many states, if not most, consider primary caretaker as a factor.[69]

To some extent, even joint custody is rooted in the recognition of function rather than status. As the Supreme Court of Iowa observed, "[f]or the otherwise non-custodial parent, joint custody gives recognition for prior performance of the parental duties and prevents the termination of gratifying interpersonal relationships."[70] With respect to natural or legal parents who confront each other in visitation or custody litigation, I do not question Professor Czapanskiy's conclusion that interdependency theory does not pose a threat.

In other cases, however, interdependency theory not only poses a threat to natural parents, but it would radically alter

---

67. *Id.* at 363.

68. IRA MARK ELLMAN ET AL., FAMILY LAW 514 (2d ed. 1991).

69. *See, e.g.*, Maxfield v. Maxfield, 452 N.W. 2d 219 (Minn. 1990); Wolf v. Wolf, 474 N.W.2d 257 (N.D. 1991).

70. *In re* Marriage of Burham, 283 N.W.2d 269, 273 (Iowa 1979).

current law and reject long-standing and valued constitutional principles. Professor Czapanskiy states:

> Because it privileges function over status, interdependency theory supports some results in visitation disputes that differ from current law .... [I]t does not matter if the person seeking time with a child is a parent. Any formerly co-resident adult may qualify, so long as the person qualifies as a supporting caregiver. In other words, post-separation contact with a child depends on pre-separation behavior, not legal status. Parents and non-parents who behave the same are treated the same.[71]

She identifies those non-parents who may claim access to children as non-marital partners: (1) same sex partners who separate after having created a parent-child relationship together;[72] (2) grandparents; (3) former lovers of a single parent, in which category I assume includes former stepparents who are separated or divorced from a child's natural or legal parent; and (4) babysitters.[73]

I have examined in detail case law, statutes, and scholarly commentary relating to child visitation by legal strangers in several of those categories, namely, lesbian co-parents, grandparents, stepparents, and foster parents, and I have concluded that parental primacy should prevail in such cases.[74] I have not found any case in which babysitters have sought custody or visitation, but I am confident that I would not afford them standing to petition, let alone have their claims recognized before the court. Professor Czapanskiy, to the contrary, would not rule out the possibility of a paid babysitter qualifying as a lead or supporting caregiver, even though she believes that such an event would be rare under interdependency theory.[75] This is because "few babysitters live with their charges long enough for the relationship to ripen into a caretaking or even supporting caretaker claim."[76]

---

71. Czapanskiy, *supra* note 1, at 987.

72. *Id.* at 988.

73. *Id.* at 989.

74. *See* Gregory, *supra* note 3.

75. Czapanskiy, *supra* note 1, at 992-93. It is interesting to note that the A.L.I. Principles permits certain adults who have resided with the child and performed caretaking functions "for reasons primarily other than financial compensation," to qualify as de facto parents. *See* A.L.I., *supra* note 45, § 2.03(1)(b)(ii). Obviously, the quoted language eliminates babysitters.

76. Czapanskiy, *supra* note 1, at 992.

I am not aware of empirical support for this assertion. If it is based on experience, suffice to say that mine has been different from Professor Czapanskiy's. Permit me to engage briefly in storytelling. During my childhood and adolescence, one of my aunts was actually named Nannie, which is ironic because she was employed as one. I only saw Aunt Nannie on Thursdays, her regular day off, and sometimes on Sundays. The rest of the time, she lived with her charges, who were my contemporaries, and their parents. My clear recollection is that she cooked, cleaned, fed, diapered early on, and performed any number of functions that presumably would qualify her to make at least a supporting caretaker claim. My point is that at least in some Black communities, the circumstances that I have described are far from rare.

In further support of the babysitter's claim to supporting caregiver status, she may even be contributing to the financial well-being of the child's household. It is certainly within the realm of plausibility that Aunt Nannie's presumably underpaid services, which enabled the doctor who employed her and his spouse to pursue their professional and other interests, contributed to the financial well being of the household.

But the far more serious problem with interdependency theory's equating third parties with natural parents is its rejection of the long tradition in American law of family autonomy and its natural concomitant, parental authority. As one commentator accurately has observed:

> The traditional view of our society is that the care, control, and custody of children resides first in their parents; in fact "constitutional 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." This parental interest in family relationships has been defined as a liberty interest entitled to due process protection.[77]

More than three quarters of a century ago, in *Meyer v. Nebraska*,[78] the United States Supreme Court explicitly recognized the right "to marry, establish a home and bring up "children" as a "liberty" guaranteed by the Fourteenth

77. Ellen B. Wells, *Unanswered Questions: Standing and Party Status of Children in Custody and Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW 95, 109 (1995).

78. 262 U.S. 390 (1923).

Amendment.[79] In *Pierce v. Society of Sisters*[80] the Court reaffirmed this principle.[81] Almost a half-century later, in *Wisconsin v. Yoder*,[82] the Court quoted *Pierce* approvingly, characterizing that case as "perhaps the most significant statement of the Court in this area."[83] The Court stated:

> [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.[84]

In subsequent decisions, the Court has repeatedly endorsed family autonomy principles.[85] Even if the reservations that I have expressed are unpersuasive or can be overcome, interdependency theory cannot be acceptable until it can be squared with the commands of the Constitution.

---

79. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

80. 268 U.S. 510 (1925).

81. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

82. 406 U.S. 205 (1972).

83. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

84. *Id.*

85. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 753-54 (1982) (stating that natural parent is entitled to due process at state-initiated parental rights termination proceeding); Smith v. Organization of Foster Families, 431 U.S. 816, 843-45 (1977) (outlining procedures required to remove foster children from foster homes); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (holding that mandatory termination provisions for public school teachers violate due process); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (holding that state statute that allows removal of children from custody of unwed father upon death of mother violates due process rights of father).

***