

10-1-1972

Adoption and Child Custody: Best Interests of the Child?

Henry H. Foster Jr.
New York University

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Family Law Commons](#)

Recommended Citation

Henry H. Foster Jr., *Adoption and Child Custody: Best Interests of the Child?*, 22 Buff. L. Rev. 1 (1972).
Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol22/iss1/2>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

ADOPTION AND CHILD CUSTODY: BEST INTERESTS OF THE CHILD?*

HENRY H. FOSTER, JR.†

INTRODUCTION

And the king said, Bring me a sword. And they brought a sword before the king. And the king said, Divide the living child in two, and give half to the one, and half to the other. Then spake the woman whose the living child was unto the king, for her bowels yearned upon her son, and she said, O my lord, give her the living child and in no wise slay it. But the other said, let it be neither mine nor thine, but divide it. Then the king answered and said, Give her the living child, and in no wise slay it: she is the mother thereof. And all Israel heard of the judgment which the king had judged; and they feared for the king: for they saw that the wisdom of God was in him, to do judgment.

I *Kings* 3:23-28.

The Biblical story of the wisdom of Solomon and the applied psychology by which he resolved a disputed custody case has served as a most uncertain precedent. Every judge confronted with such a problem fervently desires to follow that tradition and to make a wise decision.¹ Moreover, he tends to rely upon his emotions and his hunches as to behavior and human relationships. In the individual case, no matter what the result, reasons for the decision are expressed in terms of the child's best interests.

Thus the proverbial wisdom of Solomon was based upon the judge's own psychological sensitivity and it also sowed the seeds of superstition, for implicit in Solomon's ruse was the assumption that mother love was of a different dimension and that "blood is thicker than water." It is this shibboleth, and related slogans, which encourage lesser judges to avoid the hard task of weighing and balancing relevant facts in the determination of complicated custody matters. The prob-

* Some of the substance of this article appeared as a paper delivered before the annual meeting of the American Academy of Pediatrics on October 19, 1971.

† Professor of Law, New York University. Member, New York, Pennsylvania, & Nebraska Bars. A.B., University of Nebraska, 1933; LL.B., 1936; LL.M., Harvard University, 1941; LL.M., University of Chicago, 1960. Co-author of H. FOSTER & D. FREED, *LAW AND THE FAMILY—NEW YORK* (rev. ed. 1972) and M. PLOSCOWE, H. FOSTER & D. FREED, *CASES AND MATERIALS ON FAMILY LAW* (rev. ed. 1972).

1. "A judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders." B. BOTEIN, *TRIAL JUDGE* 273 (1952).

lem is aggravated because the controlling principle of a child's best interests is an amorphous concept which may serve as a basis for rationalization of any result and because of an unfortunate judicial—and human—tendency to stereotype relationships. The concept applies, and rationalization occurs, in both custody cases and where there is an attempted revocation of consent to adoption.

Before the last century Anglo-American law had no difficulty in resolving parental disputes as to custody. The father had a property interest in his children; their mother had none.² The paterfamilias owned or managed all the family property, he had an uncertain reciprocal duty to support, and the mother was a legal nonentity. It is rather amusing that it was not until the moral activism which culminated in the Victorian era that a father lost a custody dispute. The honor of first loser went to the poet Percy Shelley whose romantic adventures and religious heresy provoked the court to punitive retaliation.³ It was not poetic justice. Lest this be viewed as chauvinistic, it should further be noted that Mary Besant, a few years later, also was barred from custody because she had been active in the dissemination of birth control information.⁴ Thus was established the doctrine that immoral or unfit parents should be punished by depriving them of custody or visitation rights to their children.⁵ It was not until after the 1920's that a wife divorced for adultery had any standing to be considered as legal custodian of her children.

In other connections, it has been said that generalizations or abstractions do not form the basis for deciding concrete cases.⁶ In custody disputes, however, such all too frequently is the case. There appear to be at least three major reasons for this phenomenon. First, a "rule of thumb" complex is evident in such cases. Second, fact finding and adjudication is a painful process. And third, judges generally do not have and are not given relevant psychological insights which would aid decision.

The "rules of thumb": (1) parental fitness, and (2) best interests

2. For examples of the strong preference for the father over the mother, see *Ex parte Skinner*, 9 Moore 278, 27 Rev. R. 710 (C.P. 1824); *Rex v. Greenhill*, 111 Eng. Rep. 922 (K.B. 1836).

3. See *Shelley v. Westbrook*, 37 Eng. Rep. 850 (Ch. 1817).

4. See *In re Besant*, [1879] 11 Ch. D. 508.

5. See Simpson, *The Unfit Parent*, 39 U. DET. L.J. 347 (1962).

6. "A generalization is empty so far as it is general. Its value depends on the number of particulars which it calls up to the speaker and the hearer." Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 461 (1899).

ADOPTION AND CHILD CUSTODY

of the child, constitute the black letter law of custody. Usually it is said that the consideration of parental fitness determines a contest between a natural parent and a "stranger," the latter being any non-parent. The best interests of the child is said to control parental disputes over custody and visitation.⁷ The generalizations are misleading and it is necessary to explore the actual workings of these rules of thumb.

We have said that fact finding and adjudication in custody matters is a painful process for a court. In part this is so because there is involved not only a decision as to past conduct but a prediction as to the future. It would be far more simple if all the court had to do was to award money damages. But how does a judge know for sure what actually will serve the best interests of a child? Unless the issue is broken up into more specific and concrete elements stressing the child's psychological welfare,⁸ the cliché is meaningless. The temptation is great for overburdened courts to resort to secondary rules of thumb such as "a natural parent is to be preferred over a stranger," "a mother is to be preferred over a father," and that "the non-custodial parent should be given liberal visitation rights." Each of these generalizations may further the best interests of children in many if not most cases but none of them should be inflexible or automatic. Moreover, in practice they often are utilized to avoid hard work.

If courts are to do a better job in custody matters it is essential that such cases be referred to judges who have some knowledge of behavioral science and who are receptive to expert testimony and the recommendations of specialists. In this connection, it is tragic that the literature of psychiatry and psychology has relatively little to offer as a direct aid to a specific decision.⁹ Furthermore, the clinicians and practitioners usually have avoided forensic issues.

In the discussion that follows we will concentrate on two highly publicized cases—both wrongly decided—and each of which has been reversed by subsequent events or legislation. In the Iowa custody case,

7. See Foster & Freed, *Child Custody* (pts. 1-2), 39 N.Y.U.L. REV. 423, 615 (1964).

8. See Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55 (1969); Oster, *Custody Proceeding: A Study of Vague and Indefinite Standards*, 5 J. FAMILY LAW 21 (1965); Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963) [hereinafter cited as *Alternatives*].

9. The difficulty is that psychiatric or psychological comment generally is not directed specifically at the issue before the court and there is a paucity of helpful material directly in point.

young Mark did ultimately rejoin his father; in the New York case, the drastic remedy of self-help worked in Florida and the New York legislature changed the rules and rationale of revocation of consent to adoption.¹⁰

IOWA GOTHIC

Grant Wood's memorable portrait, "Iowa Gothic," seems to epitomize the Iowa court's holding in *Painter v. Bannister*.¹¹ There, as may be recalled, the court decided that four year old Mark's welfare would be better served by remaining on a farm with elderly maternal grandparents than by returning him to his father and new step-mother who were living in what was described as the "Bohemian atmosphere" of the San Francisco Bay Area. The decision occasioned an uproar and a wave of indignation, but attempts to raise a federal issue were unsuccessful.¹² What was wrong with the decision?

It is evident that there were a number of errors. Most important, the court had no cause to get into an invidious comparison of rural Iowa and the Bay Area. Mark, following the tragic death of his mother and baby sister in a car accident, was placed temporarily by the distraught father with the maternal grandparents on the understanding that he would be returned when the father re-established a home. There was no relinquishment nor abandonment by the father. Under these circumstances, to award legal custody to the grandparents was the equivalent of taking a child from a poor home in order to place him with a more affluent couple who could give him greater material advantages. There was no basis for the operation of the so-called best interests rule. Before that rule comes into play some event or behavior must have terminated the parental right to custody.

There is bitter irony in the fact that the Iowa court in *Painter* blindly applied the so-called best interests rule and ignored the parental interest of the father. Usually, it is the parental rights doctrine that is applied inflexibly and without regard to the psychological consequences to the child. *Raymond v. Cotner*,¹³ is a far more typical illustra-

10. N. Y. DOM. REL. LAW § 115-b (McKinney Supp. 1972).

11. 258 Iowa 1390, 140 N.W.2d 152 (1966), cert. denied, 385 U.S. 949 (1966). See also, H. PAINTER, MARK, I LOVE YOU (1967).

12. H. PAINTER, *supra* note 11, at 199.

13. 175 Neb. 158, 120 N.W.2d 892 (1963). According to *Raymond*, even an indifferent father had exclusive right to custody of a daughter versus maternal grandparents who had raised the child for ten years, unless the father's unfitness was affirmatively established.

ADOPTION AND CHILD CUSTODY

tion of errors in judicial judgment and the preference for natural parents which usually exists. The point, of course, is that no test should be applied exclusively or inexorably, but at most should merely serve as a guideline in weighing and balancing all relevant considerations. Later Iowa decisions indicate that this point has been grasped and that a Procrustean technique has been abandoned.¹⁴

Painter may also involve a problem of misapplied psychology. At the trial the expert testimony of a competent child psychologist was introduced in behalf of the grandparents. He was the only expert witness. The transcript shows that he was permitted to ramble without interruption or objection and that there was no meaningful cross-examination. Admittedly, he had not seen the father. A great deal of the testimony was the grossest kind of speculation and many of the conclusions arrived at were questionable or controversial from the viewpoint of child psychology. For example, the expert witness concluded that it would be harmful to Mark to take him away from his grandparents, even though he also testified that Mark had shown capacity to adjust to changes in custody. It would be logical to say that in this case the fears expressed by the psychologist were not consistent with Mark's past record of adaptability. This writer subsequently appeared on a law school program with the child psychologist who testified for the grandparents. The psychologist admitted that he "got carried away," that he relied solely on a couple of interviews with Mark and what the grandparents had told him, and that a full scale investigation might have proved him wrong.¹⁵

Thus we see that although there is an urgent need for competent expert testimony in child custody cases it also is essential that there be a balanced presentation of opinion and that conclusions be subjected to the search of incisive cross-examination. The *psychological* well-being of the child should be the goal; there should be concern over his "affection-relationship" and his personality development; but the ultimate decision must be that of a court which insists on compiling all the facts, psychological and otherwise.¹⁶

14. See *Alingh v. Alingh*, 259 Iowa 219, 144 N.W.2d 134 (1966), and *Halstead v. Halstead*, 259 Iowa 526, 144 N.W.2d 861 (1966), both of which correctly applied the best interests test since in each case grandparents had de facto custody for ten years and there was parental misconduct or neglect.

15. A panel discussion of *Painter v. Bannister* was held at the Rutgers Law School in 1967, and there was extended discussion of the expert testimony in the case.

16. See *Alternatives*.

A recent custody battle in England and France raises some of the issues that have become familiar in the United States.¹⁷ On December 7, 1970, an English magistrates court, presided over by 66-year-old Mrs. Peile, a lay judge, awarded the custody of a baby girl to the estranged father. The father, a Frenchman, was separated from his English wife after seven months of marriage and before the birth of the child. Mrs. Peile explained the decision on the basis that the magistrates had felt that the nineteen year old mother was very young and inexperienced and that she had not sustained her allegations that the husband had been guilty of cruelty. Moreover, it was concluded that the daughter would be "happier as a French child and a Catholic in France with her father." Admittedly, the child's religion was an important point in the decision.

The magistrate's decision was reversed by the British Appeal Court in February 1971, and custody was given to the mother. In May 1971, the Versailles county court ruled that the child should spend alternative periods of three months with each parent, but was reversed by the Paris appeal court in July when custody was given to the French paternal grandmother. In March 1972, the father took the child away from the grandmother, the grandmother secured an injunction against him, but in June a children's court "provisionally" gave him custody. On July 4, the Versailles court gave custody to the mother, and was sustained upon appeal later that month. The baby, Caroline Desramault, was nine months old when the case came to court for the first time in England. She was two and a half at the time of the last French decision. In the interim, the case had been heard by eight courts, and most of the trial court decisions were reversed upon appeal. As of mid-August 1972, the father still had the child and was rumored to be in Belgium where he could avoid French process.

The major blame for this tragedy of errors must be attributed to the lay magistrates. As in *Painter*, there is irony. The magistrates did overcome the usual blind prejudice for the mother, but did so in the wrong fact situation. She was not shown to be unfit—they merely "felt" that she was young and inexperienced, took away her baby, and gave it to a father who saw it for the first time during the trial. There was no psychological evidence in the case. One suspects that the religious

17. The case involving Caroline Desramault was extensively reported in English and French periodicals during 1972. See especially the editorial in *The Guardian* of August 10, 1972, and the account in *The Times* (London), July 29, 1972, at 2, col. 5, regarding reasons given for the magistrate's decision.

ADOPTION AND CHILD CUSTODY

training problem was not merely a factor but the overriding consideration in the case, effecting an unnatural result.¹⁸

THE BABY LENORE CASE

"Baby Lenore" was born in Manhattan on May 18, 1970. Her mother was a 32 year old Colombian native who had graduated from college in the United States.¹⁹ She returned to this country after having an affair with a married man in Colombia and on January 14, 1970 contacted a reputable New York adoption agency, saying that when her baby was born, she wanted to place it for adoption. The agency had some fourteen counselling interviews with the mother between January and the date of birth in May. Six or more alternative plans were proposed, including temporary boarding care after birth until the mother made up her mind about placement. Throughout all these interviews, the mother steadfastly insisted that she wanted to place the child for adoption and rejected all other alternatives. She did not see the baby after it was born; it was placed in nursery care. On June 1, 1970, the mother, accompanied by a sister, signed and executed a formal surrender to the agency for placement of the child in an adoptive home. The surrender was signed, sealed, and acknowledged by two witnesses. At the time the mother had around \$20,000 in the bank.

"Baby Lenore" was placed with the Di Martino family on June 18, 1970, when she was just a month old. The adoptive parents already had an adopted daughter who was about four years older than "Baby Lenore" and the family had been thoroughly investigated for adoption before both placements. Mr. Di Martino was a lawyer who specialized in the adjustment of accident cases for insurance companies, and Mrs. Di Martino was an exceptionally bright and active young woman.

On June 29, 1970, the natural mother called the agency and said that "she felt unhappy and unfulfilled." There is a dispute as to whether or not she asked for the return of her baby at this time. The

18. Compare the recent decision of the Court of Appeals in *Dickens v. Ernesto*, 30 N.Y.2d 61, 281 N.E.2d 153, 330 N.Y.S.2d 346 (1972).

19. The facts recited appear in the transcript of the New York case or were presented at the Florida habeas corpus hearing. The writer was of counsel in the Florida proceeding on behalf of the Di Martino family. The Florida decision is unreported, but for the New York decision, see *People ex rel. Scarpetta v. Spence-Chapin Adoption Serv.*, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971). For criticisms of the decision, see Foster, *Revocation of Consent to Adoption: A Covenant Running With the Child?*, N.Y.L.J., Aug. 6, 1971, at 1, cols. 4-5; Katz, *The Adoption of Baby Lenore: Problems of Consent and the Role of Lawyers*, 5 FAMILY L.Q. 405 (1971); Inker, *Expanding the Rights of Children in Custody and Adoption Cases*, *id.* at 417.

agency recommended a psychiatrist who was consulted by the mother. The agency said nothing to the Di Martino family, even after the mother commenced a habeas corpus action in September 1970 to reclaim her child from the agency. It was not until early November 1970 that Mr. Di Martino learned of the litigation and he did not tell Mrs. Di Martino until the last week in November.

The Di Martino family sought to intervene in the habeas corpus proceeding but, due to procedural technicalities, were not permitted to do so. They were not even called as witnesses. The litigation degenerated into a contest of slogans and presumptions. The agency asserted that the mother was bound by her contract. The mother claimed that she had a natural right to her child—at least until an adoption order was entered—and that she was merely exercising her female prerogative to change her mind. The mother prevailed, and in May 1971 the New York Court of Appeals affirmed both the decision to return “Baby Lenore” to her natural mother and the refusal to permit the Di Martinos to intervene in the proceedings.²⁰

In April 1971, before the Court of Appeals decision, Mrs. Di Martino moved to Florida with the two children and was later joined by Mr. Di Martino. When the decision was handed down, the Di Martinos claimed a Florida residency. They were never served with any papers or orders in the State of New York or elsewhere. Nonetheless, they were adjudged in contempt.

In June 1971, the natural mother brought a habeas corpus action in Florida seeking the return of “Baby Lenore.” Her attorneys argued that full faith and credit had to be given to the New York decision and that the Di Martinos in effect were “outlaws.” Counsel for the Di Martinos argued that since they were not parties to the New York litigation and had not been permitted to intervene they were not bound by that decision and that in any event the sole issue for the Florida court was the best interests of “Baby Lenore.” The trial proceeded accordingly. The natural mother produced no witnesses nor evidence that the child’s welfare would be best served by its return to her. The Di Martinos, on the other hand, produced a series of expert and character witnesses. The New York and Miami pediatricians who had cared for “Baby Lenore” were important witnesses and testified how she had grown and improved while with the Di Martinos. Dr. Stella Chess, a

20. *People ex rel. Scarpetta v. Spence-Chapin Adoption Serv.*, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971).

ADOPTION AND CHILD CUSTODY

leading medical authority on child development, testified as to the possible trauma removal might precipitate to a thirteen month old child.²¹ Dr. Andrew Watson,²² and others, gave similar testimony. On the basis of this medical proof, the Florida trial court decided that the baby should remain with the Di Martino family; its decision was affirmed in September 1971.²³

Note that both the New York and Florida courts purported to apply the best interests test and said that it controlled. However, since the New York courts had no evidence or testimony about what would actually serve the welfare of "Baby Lenore" the void was filled by presumptions. It was asserted that unless parental unfitness was affirmatively established, it would be presumed that a child's welfare would best be served by placing it with a parent. By this legerdemain, parental unfitness rather than an inquiry into best interests, became the real issue. Florida, on the other hand, did not engage in any presumptions but made a full scale inquiry into the facts bearing on "Baby Lenore's" welfare.

There also was disagreement between New York and Florida as to the extent of the right to revoke a consent to adoption.²⁴ New York purports to follow the majority rule that a court has discretion to permit such revocation if the best interests of the child would be served by its return to the natural mother and the revocation occurs before the adoption order is entered.²⁵ Florida, on the other hand, follows a minority rule that the mother has no right to revoke if she gave an informed and valid consent to the adoption, *i.e.*, unless there was fraud or overreaching.²⁶ Both states reject another minority rule which

21. Dr. Chess is the author of the classic *AN INTRODUCTION TO CHILD PSYCHIATRY* (2d ed. 1969) and is a leading authority on child development.

22. Dr. Andrew Watson is a psychiatrist on the faculty of both the law and medical schools at the University of Michigan and is the author of *PSYCHIATRY FOR LAWYERS* (1968).

23. The Florida cases are unreported but the habeas corpus decision was by the Circuit Court of Dade County on June 22, 1971.

24. H. CLARK, *LAW OF DOMESTIC RELATIONS* 626-29 (1968); Katz, *Judicial and Statutory Trends in the Law of Adoption*, 15 *Geo. L.J.* 64 (1962); Comment, *Revocation of Consent and Adoption: Legal Doctrine and Social Policy* 28 *U. CHI. L. REV.* 564 (1961). All discuss the state of the law regarding revocation of consent to adoption.

25. *People ex. rel. Scarpetta v. Spence-Chapin Adoption Serv.*, 28 *N.Y.2d* 185, 269 *N.E.2d* 787, 321 *N.Y.S.2d* 65 (1971). Some 25 or more states are said to follow the "discretion" rule, which makes revocation subject to the court's discretion in terms of the best interests of the child. In about 10 states there are no statutes or decisions in point.

26. Florida, Illinois, Ohio, Texas and Washington have held that a valid consent to adoption is irrevocable. *See Skeen v. Marx*, 105 *So. 2d* 517 (Fla. Dist. Ct. App. 1958); *ILL. ANN. STAT.* ch. 4, § 9.1-11 (Smith-Hurd 1966).

permits revocation for any reason unless a final order of adoption has been entered.²⁷ Since in custody matters guidelines rather than hard and fast rules are to be preferred, the majority or New York rule appears to be the most desirable. It is not to be preferred, however, if the court does not do its job of inquiring into all the facts and merely indulges in presumptions.

In the "Baby Lenore" case it was a matter of great significance that there was an agency placement rather than a private placement. The New York statutes on adoption show a legislative policy of differentiating the two processes and different procedures are set out under different titles of the law.²⁸ The "Baby Lenore" decision ignores this legislative policy and lumps together agency and private placements, saying "[N]or do we perceive any distinction, in principle, between the effect of surrender to an authorized agency and of a surrender to an individual."²⁹ It is this error which threatened the integrity of the adoption process in New York. Agency placements *are* different from private placements, in principle, in procedure, in surrounding circumstances, and in the way the legislature has regarded them.

As a matter of public policy, it may be argued that in the case of a private placement, greater leeway should be given to a revocation of consent to adoption. It is in this situation that there is most apt to be an impetuous or emotional decision to give up the child.³⁰ However, where the child is surrendered to an agency, and as in the "Baby Lenore" case the natural mother has been given counseling and assistance, the decision is most apt to be an intelligent and rational one. Agency placements also involve extensive prior investigations of the

27. Michigan is the leading example of this extreme rule. See *In re White's Adoption*, 300 Mich. 378, 1 N.W.2d 579 (1942).

28. Chapter 147 of the 1961 N.Y. Session Laws created two titles for Domestic Relations Law: Article 7, title II referring to "Adoption from Authorized Agency" which covered sections 112-14 of the Domestic Relations Law, and title III referring to "Private Placement Adoptions" which covered sections 115-16 of the Domestic Relations Law. It is clear that it was intended that the two types of placements should have different procedures and should be distinguished.

29. 28 N.Y.2d at 193, 269 N.E.2d at 791, 321 N.Y.S.2d at 71.

30. It has been reported that in Los Angeles County there is an attempted revocation of consent to adoption in less than 1 percent of the agency placements; but the figure is 13 percent for private placements. See the January 1970 report by the Advisory Commission to the Department of Adoptions of Los Angeles County in its comment on the proposed revision of the Uniform Adoption Act of 1968. In the *Scarpetta* case, a representative of the Spence-Chapin Adoption Service testified that less than 1 percent of their agency placements have involved attempted revocation of surrenders for adoption. Record at 49.

ADOPTION AND CHILD CUSTODY

adoptive parents, whereas in private placements investigation generally occur after the baby has been received into the adoptive home.

The New York legislature at its 1972 session overruled the rationale of the "Baby Lenore" case and its unsupportable refusal to differentiate agency and private placements.³¹ In general, it is provided that natural parents "shall have no right to the custody of such child superior to that of adoptive parents" even if they are "fit, competent and able to duly maintain, support and educate the child. The custody of such a child [surrendered for adoption or placed in an adoptive home] shall be awarded solely on the basis of the best interests of the child, and there shall be no presumption [as in the "Baby Lenore" case] that such interests will be promoted by any particular custodial disposition."³²

Except where there are allegations of fraud, duress or coercion in the execution or inducement of a surrender for adoption, there are strict limitations on the commencement of an action to revoke consent to adoption or to regain the child who was surrendered for that purpose. If the surrender so states, no such actions may be brought if the child has been placed in an adoptive home and more than thirty days have elapsed since the surrender was executed.³³

In private placement adoptions, where there was no surrender to an agency, there also are limitations on any attempted revocation of consent. If the consent agreement so states, it is not subject to revocation if it is in prescribed form and executed or acknowledged before the court where the adoption proceeding is to take place, or even where not executed or acknowledged in court, written notice of revocation is not received within thirty days. If the written notice is given, it may be given effect only if it is unopposed by the adoptive parents or the best interests of the child would be served by revocation. The procedure for revocation of consent cases is set forth in the new statute which confers upon adoptive parents full standing to appear and be heard.³⁴

It remains to be seen whether the New York courts will fully implement the philosophy as well as the letter of the amended laws. Although it may be argued that the amendment gives a natural parent thirty days from the date of the surrender to change her mind, in

31. N.Y. DOM. REL. LAW §§ 115-16 (McKinney Supp. 1972).

32. N.Y. SOC. SERV. LAW § 383(5) (McKinney Supp. 1972).

33. N.Y. SOC. SERV. LAW § 384(5) (McKinney Supp. 1972).

34. N.Y. DOM. REL. LAW § 115-b (McKinney Supp. 1972).

actual practice the agency may deliver the child to the adoptive home only when such period has expired, so that there is minimal danger of successful revocation after adoptive parents have formed a bond of attachment with the child. It is to be hoped that courts do not readily find fraud or overreaching so as to negate the intent of the new law and that in resolving the "sole issue" of best interests of the child courts will be receptive to cogent expert testimony that is relevant to the proceeding.

Approval of the new amended adoption law is not inconsistent with our prior criticism of *Painter*. In the Iowa case there was no act or event that had the effect of terminating parental rights. Under the new statute, however, the formal execution of a surrender for placement for adoption or a consent to adoption, is such an event. It is only after such an event occurs that the best interests rule becomes the "sole issue." Moreover, the rubric of "best interests" is broad enough to cover a multitude of factors.

It is to be hoped that when and if a court reaches the best interests of the child issue in revocation of consent to adoption proceedings the psychological welfare of the child will be the focal point for inquiry. Recent decisions in other states indicate an increasing acceptance of generally recognized theories of child development.³⁵ It has been recognized that the psychological parent-child relationship is more important than biological parenthood and that true mother love entails the care and nurture of a child, rather than an empty sentiment.³⁶ Ordinarily, the best psychological interests of a child require continuity and consistency in the parent-child relationship.³⁷ Removing a child from

35. Compare *People ex rel. Scarpetta v. Spence-Chapin Adoption Serv.*, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971), with *In re Adoption of a Child by P and Wife*, 114 N.J. Super. 584, 277 A.2d 566 (1971), and *In re Revocation of Appointment of a Guardian of a Minor Surrendered for Adoption*, — Mass. —, 271 N.E.2d 621 (1971).

36. See cases cited *id.*

37. One authority has recently concluded:

Any psychiatrist or psychologist, experienced parent, grandparent, or teacher will state that when there has already been an upheaval in the child's life due to divorce or some other misfortune, the first and foremost requirement for the child's health and proper growth is stability, security, and continuity. Dr. Andrew Watson, psychiatrist and professor of law, has said that stability is "practically the principal element in raising children, especially pre-puberty ones," and that "a child can handle almost anything better than he can handle instability." [*Citing* PROCEEDINGS OF SPECIAL COMMITTEE ON UNIFORM DIVORCE AND MARRIAGE ACT, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 98, 101 (Dec. 15-16, 1968)]. Furthermore, Dr. Watson maintains that "poor parental models are easier to adapt to than ever shifting ones." Simi-

ADOPTION AND CHILD CUSTODY

the warmth and security of the place he knows as home should be done only in the most compelling circumstances. In the case of infants, there is a real danger of trauma if they are taken from the mother figure.³⁸ These general principles also apply to adoptions by foster parents and it is interesting to note in passing that also in that situation there has been legislative revision of legalistic court decisions so that under present law foster parents have a preference for adoption and may even be encouraged to adopt by the granting of a subsidy.³⁹

larly, Dr. Herbert Modlin of the Menninger Foundation stresses the importance of "constancy of mothering" and describes the characteristics of children in the various periods of preadolescent and preadult existence in which their needs vary somewhat, but there is always the requirement of continuity and a sense of family, satisfying a need to belong. [Citing READINGS IN LAW AND PSYCHIATRY 319-22 (R. Allen, E. Ferster & J. Rubin eds. 1968). See also Plant, *The Psychiatrist Views Children of Divorced Parents*, 10 LAW & CONTEMP. PROB. 807, 812-14, 816 (1944).]

Bodenheimer, *Uniform Child Custody Jurisdiction Act*, 22 VAND. L. REV. 1207, 1208-09 (1969). Professor Homer Clark has expressed the cruciality of stability in the following manner:

One of the things that the child's welfare certainly demands is stability and regularity. If he is continuously being transferred from one parent to the other by conflicting court decrees, he may be a great deal worse off than if left with one parent, even though as an original proposition some better provision could have been made for him.

H. CLARK, LAW OF DOMESTIC RELATIONS 326 (1968). In *Psychiatry for Lawyers*, Dr. Andrew S. Watson has asserted that once custody decisions have been made they "should nearly always be permanent and irrevocable." A. WATSON, PSYCHIATRY FOR LAWYERS 197 (1968).

38. See 1 J. BOWLBY, ATTACHMENT AND LOSS 223 (1969):

After about six months . . . babies are more likely to respond to strange figures with fear responses, and more likely also to respond to them with strong fear responses, than they are when they are younger. Because of the growing frequency and strength of such fear responses, the development of attachment to a new figure becomes increasingly difficult towards the end of the first year and subsequently.

Dr. Bowlby makes it clear that he is concerned with the person who mothers the child and to whom he becomes attached, rather than the biological mother. In S. CHESSE, AN INTRODUCTION TO CHILD PSYCHIATRY 16 (1969), Dr. Stella Chess notes her agreement with Dr. Bowlby and comments that "such workers as Levy, Ribble, Anna Freud, and Bowlby have assigned prime importance in the child's development to intrafamilial phenomena as manifested during the first year of life." In R. G. PATTON, GROWTH FAILURE IN MATERNAL DEPRIVATION 38 (1963), Dr. Robert Gray Patton says: "The gravest effects of separation are seen between the ages of three months and two years and then gradually decrease in severity until the age of 7 or 8, when the child is able to tolerate long periods of separation without any lasting major damage to personality structure." For the most recent study in this field, see R. DAVIE, N. BUTLER & J. GOLDSTEIN, FROM BIRTH TO SEVEN (1972) (Second Report of the English National Child Development Survey).

39. Following the decision in the case of *In re Jewish Child Care Ass'n*, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959) [criticized by Katz, *Foster Parents Versus Agencies: A Case Study in the Judicial Application of "The Best Interests of Children" Doctrine*, 65 MICH. L. REV. 145 (1966)], and by Foster & Freed, *Children and the Law*, 2 FAMILY L. Q. 40, 54-56 (1968)] the legislature passed chapter 1080 of the 1969 N.Y.

This discussion of the "Baby Lenore" case would be incomplete unless brief reference were made to Florida's refusal to give comity or full faith and credit to the prior New York decision. Child snatching by parents who lose custody has become a national and international scandal.⁴⁰ The existing law of most jurisdictions encourages the violation and defiance of court orders. Perhaps it is impossible to completely eliminate the problem, due to human nature, favoritism for local people, and the sad fact that outrageous custody decisions are not infrequent. In a few cases, to deny a contumacious parent a modification of a prior custody award which he has violated might punish the child to spite the erring parent. Nonetheless, application of the clean hands doctrine in such cases has much to commend it and certainly courts should show greater deference to prior decisions, even though full faith and credit is not required, in order to discourage flight across state lines or international boundaries. Enactment of the Uniform Child Custody Jurisdiction Act,⁴¹ if accomplished in most states, would provide an effective remedy to the child snatching problem, but to date this model act has not met with widespread acceptance, perhaps because unwise custody decisions are known to be common. There are no indications that the federal courts or Congress intend to deal with the problem. The final irony, of the several we have pointed to, is that the two states with the worst records on extending credit or deference to sister state's custody orders, are Florida and New York.⁴² In declining to recognize New York's decree in the "Baby Lenore" case, Florida violated no ideal principle of reciprocity, for in the famous *Halvey* case,⁴³ New York had rejected a prior Florida custody award.

Session Laws, amending section 383 of the N.Y. Social Service Law thus granting a preference to foster parents in applications for adoption. Thus the policy against allowing foster parents to adopt was completely reversed.

40. See H. FOSTER & D. FREED, 2 LAW AND THE FAMILY—NEW YORK, §29:35 (1966), and Bodenheimer, *Uniform Child Custody Jurisdiction Act*, 22 VAND. L. REV. 1207 (1969).

41. See discussion of the Uniform Child Custody Jurisdiction Act in Bodenheimer, *supra* note 40.

42. The New York Court of Appeals in *Bachman v. Mejias*, 1 N.Y.2d 575, 136 N.E.2d 866, 154 N.Y.S.2d 903 (1956) rejected any full faith and credit obligation in custody cases. See also *Berlin v. Berlin*, 21 N.Y.2d 371, 235 N.E.2d 109, 288 N.Y.S.2d 44 (1967), *cert. denied*, 393 U.S. 840 (1968), in which the court of appeals denied full faith and credit to the decision reported in 239 Md. 52, 210 A.2d 380 (1965). The leading Florida decisions stipulating a de novo inquiry in modification of custody proceedings include: *State ex rel. Fox v. Webster*, 151 So. 2d 14 (Fla. Dist. Ct. App. (1963)), *cert. denied*, 379 U.S. 822 (1964); *Avery v. Heermance*, 138 So. 2d 775 (Fla. Dist. Ct. App. 1962); *Neal v. State ex rel. Neal*, 135 So. 2d 891 (Fla. Dist. Ct. App. 1961).

43. *People ex rel. Halvey v. Halvey*, 185 Misc. 52, 55 N.Y.S.2d 761 (Sup. Ct.), *aff'd*,

ADOPTION AND CHILD CUSTODY

CONCLUSION

Where the life and welfare of a child is at stake, law, public policy, procedure, attitudes, and prejudices are all important. A sound substantive law will provide guidelines but no absolutes, and presumptions will not be allowed to serve in lieu of a full scale inquiry into relevant facts. The goal of public policy should be to promote the welfare of children and claims of parental rights must be subordinated to that end.⁴⁴ However, before parental rights may be terminated, there must be some act or event that constitutes an express or implied relinquishment of parental authority. Such may be an abandonment, serious neglect, conduct showing unfitness as a parent, or by a knowing surrender of the child for adoption. Under such circumstances, the issue of the best interests of the child should become the controlling concern.

In addition to substantive law, the fact finding process must be made to work effectively. It was legalistic in the extreme to deny leave to intervene to the Di Martino family in the "Baby Lenore" case. They literally were real parties in interest. But more significant was the fact that the court cut itself off from a source of relevant testimony on the issue of the best interests of "Baby Lenore." All too often, custody disputes degenerate into adversary contests between embittered parties both of whom lose sight of the child's welfare. If we assume that existing procedure is here to stay, there is only one reform which shows promise of success. That is independent representation of any child directly involved in a dispute between his parents.⁴⁵

It is anomalous that under the procedure which exists in most states children are unrepresented when parents seek a divorce even though the issue of their custody may be the major one in the case. Children should be heard as well as seen and should be regarded as persons by the law. Their interests may not coincide with those of either parent and require independent presentation. Counsel for the father or mother cannot be relied upon to present facts detrimental to

269 App. Div. 1019, 59 N.Y.S.2d 396 (1st Dep't 1945), *aff'd*, 295 N.Y. 836, 66 N.E.2d 851 (1946), *aff'd*, 329 U.S. 697 (1947). The day before the entry of a Florida divorce decree and custody decree, the father fled with the child to New York. Florida awarded the child to the mother and made no mention of visitation rights for the father. The New York court awarded the father visitation rights and was sustained by the Supreme Court.

44. See *Alternatives*.

45. See Speca & Wehrman, *Protecting the Rights of Children in Divorce Cases in Missouri*, 38 U.M.K.C. L. REV. 1 (1969); Foster & Freed, *A Bill of Rights for Children*, N.Y.L.J., July 28, 1972, at 1, cols. 4-5.

his client to whom the duty of loyalty is owed. The result is that although the best interests of the child may be the "sole issue," opposing counsel serve the best interests of their own clients. Moreover, the court for numerous reasons ordinarily will not try to develop the child's welfare issue from the child's vantage point. In short, there is an urgent need to extend the fundamental principle of right to counsel to all cases where the placement of a child is at stake in divorce, custody, contested adoption, delinquency, and termination of parental rights proceedings. That right to counsel means independent representation of the child by a lawyer who will serve his interests.

It may be objected that courts have no authority to designate counsel to represent children except in delinquency cases. On the contrary, unless there is a statute or rule of court that forbids such an appointment, there is inherent power to do so.⁴⁶ Nor is there any lack of lawyers to serve in such a capacity. The new breed of young attorneys constitutes a valuable resource for such service, whether chosen on a permanent or guardian ad litem basis.

With reference to the practical significance of attitudes and prejudices, it is clear that unless there is a genuine dedication to further the welfare of children, reforms of substantive law and procedures will go for naught. Today it is rare for courts to speak in terms of proprietary rights in children or even to stress parental rights as such but not infrequently courts rule as if there was a covenant running with the child. The shibboleth that "blood is thicker than water" has no place in a modern court. Hopefully, education may dissipate superstition and prejudice, and that may be done in this area by opening up the admission of medical and psychological proof bearing upon the issue of a child's welfare.⁴⁷ If children are truly regarded as persons before the law and are represented by independent counsel it should follow that in fact the best interests of the child will become the ultimate issue in disputed custody cases.

Editorial Note

On Monday, November 13, 1972, the United States Supreme Court denied a petition for certiorari by the natural mother in the controversial "Baby Lenore" case. As a practical matter, the ruling refuses to disturb the Florida courts' decision permitting the baby to remain with the Di Martino family.

46. See authorities cited *id.*

47. See Foster & Freed, *supra* note 7.