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Child Custody Disputes and the Beyond the Best Interests Paradigm: A Contemporary Assessment of the Goldstein/Freud/Solnit Position and the Group's Painter v. Bannister Jurisprudence

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Child Custody Disputes and the Beyond the Best Interests Paradigm: A Contemporary Assessment of the Goldstein/Freud/Solnit Position and the Group's *Painter v. Bannister* Jurisprudence

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TABLE OF CONTENTS

I.	INTRODUCTION	621
II.	THE BEYOND THE BEST INTERESTS PARADIGM REVEALED	626
III.	<i>PAINTER V. BANNISTER: SPECIMEN FOR ANALYSIS</i> ..	634
IV.	THE CRITIQUE EXTENDED	655
V.	CODA	676
A.	<i>Stage I: The Age of Attachment, Reciprocity, and the Formation of Basic Trust during the first year of life</i>	677
B.	<i>Stage II: The Quest for Autonomy during the second and third years of life</i>	679
C.	<i>Stage III: The Phase of Expansion between ages of four and five</i>	679
D.	<i>Stage IV: The Learning Age from approximately the sixth through the eleventh year</i>	681
E.	<i>Stage V: Adolescence and the Struggle for Identity between age twelve through age eighteen</i>	681

I. INTRODUCTION

A jurisprudential paradigm functions ideally as a guide to research, policy creation, norm construction, proof presentation, and deci-

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sion-making in specific cases.¹ More often than not, such a paradigm is an amalgam which is the product of observation, conceptualization, and imagination. Of course, no such paradigm is ever free of value permeation. Furthermore, such a jurisprudential paradigm is a model which provides us with a vision of a particular reality. It is my purpose to explicate, in some detail, two specific jurisprudential paradigms. It is stressed that both are relevant to the everyday court handling of child custody disputes. These are models directed at lawyer action, and not simply at scholarly interaction.

Child custody decision-making focuses on the best interests of the child.² The best interests test is a general proposition which articulates a fundamental value position³ - a preference for the child's well-being. Best interests analysis can focus on economic well-being, physical health, family setting, or on a great number of things. But under the law, the aspirational position of our legal system is that the child's welfare is always paramount. Within the context of marital dissolution or separation, it is the judge's duty to promote the well-being position of the child. In this article, we deal with a very critical dimension of the child's best interests, that is, the child's psychological well-being. Our goal is to see how the abstract best interest legal standard can be implemented to produce more appropriate outcomes in child custody cases. It is my contention that better decisions can be produced through the use of models which give sufficient guidance in concrete cases to lawyers, judges and expert witnesses. The two decision-making paradigms discussed in this article have been created to assist those persons who participate in the process of deciding child custody cases. Addi-

1. The classic example of a comprehensive, imaginatively conceived and most useful jurisprudential paradigm is the law, science and policy "decision process" focused "quantum intellectual physics" of Myers S. McDougal and Harold D. Laswell. *See generally*, MYERS S. McDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980) (for the best introduction to their paradigm-in-action); *see also* FRITZOF CAPRA, THE TURNING POINT: SCIENCE SOCIETY AND THE RISING CULTURE (1982) (for useful material on the role of paradigms in decision-making); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2nd ed. 1970, 6th Impress. 1975) (for informative background reading focusing on the role of paradigms in scientific revolutions).

2. *See* HARRY D. KRAUSE, FAMILY LAW: CASES AND MATERIALS 719-24 (2nd ed. 1983).

3. The term "value position" refers to one's stand on a preference for a particular value. Examples of fundamental values critical in decision-making are security, wealth, respect, enlightenment, well-being, affection and skill. *See generally*, MYERS S. McDUGAL, STUDIES IN WORLD PUBLIC ORDER 15-36 (1960).

tionally, it is anticipated that a discussion of the two models will be of value to professors, scholars and law students.

The first model we will examine is known as the beyond the best interest of the child theory. This paradigm⁴ has been widely disseminated and has had a very substantial impact on family law decision-making. Created by Joseph Goldstein, Anna Freud and Albert Solnit,⁵ this model has helped to revolutionize thinking and action regarding child placement decisions,⁶ and it has sensitized a great number of judges, practitioners, law professors, mental health providers and laymen to the important psychological dimensions of child custody cases. The other model discussed is the psycho-social developmental best interests model. This model is based on, but is not limited by, the work of the psychoanalytic humanist, Erik Erikson. Erikson is a very well regarded clinician, theorist and social commentator.⁷ This model has been examined in several law journal articles and the model has attracted the attention of a number of persons interested in child custody issues.⁸

4. In their widely used casebook, Professors Homer H. Clark and Carol Glowinsky call the Goldstein/Freud/Solnit model an influential treatment of the child custody dispute problem. HOMER H. CLARK & CAROL GLOWINSKY, CASES AND PROBLEMS ON DOMESTIC RELATIONS, 1066 (4th ed. 1990). This particular paradigm was created by Joseph Goldstein, Anna Freud and Albert Solnit. See JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTEREST OF THE CHILD (1973) [Hereinafter BBI (1973)]; JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTEREST OF THE CHILD (2nd ed. (1979)[Hereinafter BBI (1979)]; JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD (1979); JOSEPH GOLDSTEIN ET AL., IN THE BEST INTEREST OF THE CHILD (1986).

5. Their interdisciplinary effort draws upon the materials of law, psychoanalysis and psychiatry.

6. Although all do not agree with Goldstein, Freud and Solnit, no one ignores their views. They surely have forced others to re-think the whole child custody matter. See, e.g., KRAUSE, *supra* note 2, at 752-55. Law Professor Louise Graham and Judge James Keller describe the Goldstein/Freud/Solnit work as seminal and of influence on the national level. LOUISE GRAHAM & JAMES KELLER, KENTUCKY DOMESTIC RELATIONS, 404 (1988). In addition they discuss this author's criticism of the Goldstein/Freud/Solnit paradigm. *Id.*

7. See ERIK ERIKSON, THE LIFE CYCLE COMPLETED (1982) (for an introduction to the author's thought process). Erikson is certainly Western culture's foremost student of human development.

8. See John Batt, *Child Custody Disputes: A Development-Psychological Approach To Proof And Decision-Making*, 12 WILLAMETTE L. REV. 491 (1976); John Batt, *The Child's Right To A Best Interest Psychological Development Under The Declaration of the Rights of the Child: Policy Science Reflections On International*

The first model, articulated by Goldstein, Freud and Solnit, provides guidelines for legal decision-making.⁹ Yet only an artless examiner could fail to perceive the paradigmatic nature of this jurisprudential effort. It is no exaggeration to say that they have created a truly influential paradigm. Their work has had an extraordinary impact on the thinking and action of those who concern themselves with issues of child placement, such as, the resolution of private child custody disputes.¹⁰ Through their publications and appearances testifying as ex-

Law, Psychological Well-Being and World Peace, 2 HUM. RTS. ANN. 19 (1984).

Over the years, this author has worked at creating a paradigm useful in making child-custody decisions. This work has received attention from others seriously concerned about how we decide child custody cases. See, e.g., N. Repucci, *The Wisdom of Solomon: Issues in Child Custody Determination*, in CHILDREN, MENTAL HEALTH AND THE LAW (N. Repucci, et al., eds. 1984). In this work Dr. Repucci, of the University of Virginia's Institute of Law, Psychiatry and Public Policy, after discussing the work of The Colorado Children's Diagnostic Center writes:

The C.C.C.'s philosophical basis for criteria is essentially derived from Goldstein et.al.'s (1973) proposed criteria. . . . In contrast John Batt . . . advocates a procedure that focuses on the child's developmental stage, assessing his or her relevant needs. Then the parents are evaluated in terms of practical and theoretical considerations - time, devotion, attitudes toward the child as well as intentions, objectives and goals. On the basis of these criteria, the goal is to determine who will best serve the child's needs and interests relative to his or her development stage.

Id. at 70-71.

The New Jersey Superior Court, after referring to the work of Goldstein, Freud and Solnit, states: "another approach is that of John Batt, who approaches child custody questions 'from a psychologically oriented child development standpoint' . . . [and] proposes that the court take into account five phases of development of the human child before making a custody placement." *Mayer v. Mayer*, 376 A.2d 214,217 (N.J. Super. Ct. Ch. Div. 1977).

In the present article, the author has refined and added to the developmental paradigm referred to in the above works. A large number of circuit judges and Master Commissioners dealing with custody cases in various parts of the State of Kentucky have made extensive use of this work.

9. BBI (1973), *supra* note 4, at 31.

10. See Richard E. Crouch, *An Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child*, 13 FAM. L. Q. 49 (1979-80) (in this work, Crouch skillfully summarizes representative reactions from lawyers, psychiatrists, policy scientists, law professors, social workers and judges and gives one a "feel" for the impact of Goldstein, Freud and Solnit's work); see also JOSEPH GOLDSTEIN & ALBERT SOLNIT, DIVORCE AND YOUR CHILD (1984) (providing a basic description of the model). The language used by the authors of this publication makes the BBI Model intelligible to experts and laymen alike. Essentially, the work is a popularization of the BBI model. See *id.*

pert witnesses, they have widely circulated their model.¹¹ Judges, lawyers, law professors, law students, mental health professionals, social scientists and concerned laymen have been very affected by their message.¹²

In this article, I shall describe the Goldstein, Freud, Solnit model, de-code it, analyze it and provide an assessment of it.¹³ The model will be referred to as the BBI paradigm. This language derives from the title of Goldstein, Freud and Solnit's best selling book, *Beyond the Best Interests of the Child*.¹⁴ In performing the above outlined intellectual tasks, we will limit ourselves to the evaluation of their model and to its everyday use in deciding private child custody disputes.¹⁵ Placement decisions arising out of cases involving physical child abuse, sexual abuse, physical neglect of children, emotional neglect of children, etc. occur under institutional, psychological, social and legal conditions that are different from private child custody disputes.¹⁶ An attempt to assess the BBI model in relation to these other child placement decisions

11. See, e.g., *Pierce v. Yerkovick*, 363 N.Y.S.2d 403 (N.Y. Fam. Ct. 1974); *Faria v. Faria*, 456 A.2d 1205 (Conn. Super. Ct. 1982); J. AREEN, CASES AND MATERIALS ON FAMILY LAW 511-23 (1982) (this casebook contains excerpts from a case tried in the state of Washington consisting mainly of the testimony of Professor Goldstein).

12. In my home city of Lexington, Kentucky, law clerks are urged by a number of judges and lawyers to attend to the wisdom of Goldstein, Freud and Solnit. A number of psychiatrists, psychologists, sociologists and social workers in the community rely on the wisdom of these three researchers. Many of the behavioral professionals appear as expert witnesses in child custody disputes, and other child focused cases, and rely heavily on the BBI canon. It should be kept in mind that I reside in a relatively isolated southern metropolitan area with a population of approximately 200,000. We are not Atlanta, Baltimore, Miami, Nashville or Richmond and surely we are not Chicago, San Francisco, Boston or New York. Reasoning from our local experiences and the substantial attention given to their work in the legal literature, I am compelled to conclude that the influence of Goldstein, Freud and Solnit is extremely widespread.

13. My approach is very much influenced by the work of Harvard psychiatrist Robert Coles. See generally ROBERT COLES, PRIVILEGED ONES: THE WELL-OFF AND THE RICH IN AMERICA (1977); ROBERT COLES, WALKER PERCY, AN AMERICAN SEARCH (1978). Equally influential is the existential method of Walker Percy. See, e.g., WALKER PERCY, LOST IN THE COSMOS (1983); CONVERSATIONS WITH WALKER PERCY (Lewis A. Lawson & Victor A. Kramer ed. 1985).

14. BBI (1973), *supra* note 4.

15. Limiting the scope of the paper so as to cover only such cases serves to increase the intensity of focus and permits us to produce a complete critique which will be of true functional utility.

16. It is my contention that other paradigms must be developed to deal with these cases. See, e.g., AREEN, *supra* note 11, at 959-1126.

would not produce a clearly focused evaluation of the BBI model. Analysis of the model within the private child custody dispute situation will enhance our understanding of this critical model. It is my opinion that a comprehensive analysis of the BBI paradigm has not been provided for those persons working in the private child custody field. This article seeks to overcome that failure of scholarship.

As already stated, two jurisprudential paradigms will be examined in this paper. The bulk of my effort will be devoted to an assessment of the BBI paradigm; however, I shall also offer my thoughts on an alternative model.¹⁷ Before beginning my assessment of the BBI paradigm, I add one final introductory comment. In assessing the BBI model, my first task will be to articulate its major sustaining ideas and elements, make reference to practical considerations, provide comments on particular implications and fully elaborate my critique. The reader should keep in mind that my essential position is that the creation and study of legal reality directed decision-making models is the first step toward intelligent decision-making in concrete cases.¹⁸ Without models of utility to guide us, real world decision-making is devoid of enlightened intelligence.

II. THE BEYOND THE BEST INTERESTS PARADIGM REVEALED

It is important to recognize that the Goldstein-Freud-Solnit model is firmly rooted in psychoanalysis. This means that their work is derivative of a psychoanalytic view of existence.¹⁹ Understanding the paradigm is enhanced if one remembers that Goldstein, Freud and Solnit's work is the product of the institutional ties established between the Yale Law School and the Hampstead Child-Therapy Clinic.²⁰ This relationship began in 1962. Psychoanalysis has been a part of Yale Law School's interdisciplinary program of legal studies for decades.²¹

17. See *supra* note 8 and accompanying text.

18. See Richard Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 YALE L.J. 969 (1975).

19. See Joseph Goldstein, *The Hampstead Child-Therapy Clinic and Legal Education, in STUDIES IN CHILD PSYCHOANALYSIS: PURE AND APPLIED: THE SCIENTIFIC PROCEEDING OF THE 20TH ANNIVERSARY CELEBRATION OF THE HAMPSTEAD CHILD-THERAPY COURSE AND CLINIC BY MEMBERS OF THE STAFF* 15 (1975).

20. *Id.*

21. See J. KATZ, ET AL., *PSYCHOANALYSIS, PSYCHIATRY AND LAW* (1967)(an early classic demonstrating the high quality of the work produced by the Yale program). The more recent publications of the BBI group are evidence of the continued

The first fundamental idea in this model is that the psychological well-being of the child is a paramount interest which must be promoted in the child custody decision-making process.²² Both judicial and legislative decision-makers have failed to understand the fundamental importance of the child's emotional needs.²³ Goldstein, Freud and Solnit's model of psychoanalytic perspective allows them to comprehend the importance of the child's psychological needs.

The model establishes that in order to protect the child's psychological best interests, the law must assure that each child will be a member of a family. Specifically, the family environment is an essential zone of privacy which serves as the protective surrounding, making possible a positive developmental experience.²⁴ Further, the model establishes that the law must act to maximize the child's opportunity to be in a family where he or she is wanted, receives affection on a continuing basis, learns how to give affection and is taught to cope with his or her aggressive impulses.²⁵ The BBI decision-making paradigm places great emphasis on the child's need for continuity of relationship with people who act to humanize the child.²⁶ Disruptions of continuity of relationships are perceived as being very detrimental to the child's psychological development.²⁷ The damage done by these disruptions of continuity of relationships vary according to the age of the child.²⁸ The younger the child, the more the child is at risk. Goldstein, Freud and Solnit contend that the young child who suffers from some substantial disruption of continuity of relationship will grow up to be less than psychologically normal.²⁹ The authors of the paradigm stress the significance of disturbances of continuity; even periodic court-ordered visitation is detrimental to continuity of relationship which exists between child and custodian.³⁰ This position is grounded in a particular psychological reason: "Children have difficulty in relating to, profiting from and maintaining contact with two psychological parents who are not in

success of the Yale based interdisciplinary effort.

- 22. BBI (1973), *supra* note 4, at 4.
- 23. *Id.*
- 24. *Id.* at 7.
- 25. *Id.* at 5.
- 26. *Id.* at 31-32.
- 27. BBI (1973), *supra* note 4, at 32-33.
- 28. *Id.* at 32.
- 29. *Id.* at 34.
- 30. *Id.* at 38.

positive contact with each other.”³¹

Goldstein, Freud and Solnit concluded that the law must evaluate the importance of this psychological reality. They believed that the law should act to insure that a custodian determined visitation, as the custodian saw fit. The visiting parent, according to the creators of the BBI paradigm, has “little chance to serve as a true object for love, trust and identification since this role is based on being available on an uninterrupted day-to-day basis.”³² The day-to-day custodian is the person who promotes the child’s psychological development. Goldstein, Freud and Solnit call the day-to-day facilitator of emotional development the “psychological parent.”³³ Testifying as an expert witness for the defendant father in a custody case, Professor Goldstein provided us with an interesting introduction to the BBI paradigm in action.³⁴ In explaining “psychological parent” to the court, he stated:

By ‘psychological parent,’ we’re talking about a person who has assumed responsibility and continuity of care on a daily basis. That doesn’t mean on an hour-to-hour or minute-by-minute basis, but it means someone to whom the child can turn in times of need and frustration, someone whom the child can find a source of affection and a source of control.³⁵

This concept of “psychological parent” is fundamental to the BBI system. It is a concept which stresses attachment presence.³⁶ Attachment is viewed as essential to normal psychological development.³⁷ One may have the status of biological parent, but if physically absent, one cannot be a psychological parent. Instead, this person tends to fall into the logical, psychological, and legal class of stranger.³⁸ For Goldstein,

31. Compare *id.* at 38 (joint or shared court decreed custody is not discussed in any detail in this work) with Joseph Goldstein, *In Whose Interests*, in **JOINT CUSTODY AND SHARED PARENTING** 47 (Jay Folberg ed. 1984)(joint court decreed custody is discussed at length in this work). Professor Goldstein’s application of the BBI paradigm to joint legal custody will be discussed fully in a later section of this paper. For now, it is adequate information to know that Goldstein believes that under certain specific conditions joint custody can be highly disruptive in terms of the continuity of relationship.

32. BBI (1973), *supra* note 4, at 38.

33. *Id.* at 17.

34. See AREEN, *supra* note 11, at 511-23.

35. *Id.* at 514.

36. See BBI (1973), *supra* note 4, at 17.

37. *Id.*

38. *Id.*

Freud and Solnit, the relationship between child and "psychological parent" is paramount, and its integrity should be preserved by law.³⁹ Ruptures in the relationship between the "psychological parent" and the child are viewed as producing failures in emotional development and resulting psychological symptoms.⁴⁰ The results of such ruptures are people who become mentally ill, dependent on society or engage in criminal conduct. Like the continuity concept, the "psychological parent" concept has been widely accepted by the courts.⁴¹

*Ellenwood and Ellenwood*⁴² is a representative opinion which analyzed the "continuity" and "psychological parent" principles. Factually, *Ellenwood* is fairly typical: the parties had a stormy marriage, gave birth to children, associated with paramours, displayed instability, separated and then sought dissolution.⁴³ The trial judge awarded custody of the minor daughters to the mother. The husband appealed; however, the trial judge's decision was affirmed. The appellate court quotes heavily from Goldstein, Freud and Solnit's *Beyond the Best Interests*.⁴⁴ It is clear that the appellate court relied primarily on the BBI paradigm in reaching its decision.

The appellate court placed great importance on the continuity of relationship of the children with the psychological parent. The court, with the BBI model substantially influencing the logic of its analysis, stated:

It [the trial court] gave substantial weight to the fact that the children always have been in the wife's care. Their *psychological attachment* to her as the only *continuous* parent figure they have known is a strong reason for the trial court's decision, and after balancing the applicable factors, we come to the same conclusion the trial court did. . . . What registers in [children's] minds are the day-to-day interchanges with the adults who take care of them and who, on the strength of these, become the parent figures to whom they are attached.⁴⁵

39. This is clearly the ultimate juridical point made by the BBI group.

40. *Id.* at 18.

41. See Crouch, *supra* note 10, at 80-103.

42. *In re Ellenwood*, 532 P.2d 259 (Or. Ct. App. 1975).

43. *Id.* at 260.

44. The appellate court's opinion would be improved by a change in the ratio of original language of analysis to the language of approved authority.

45. BBI (1973), *supra* note 4, at 262. In many of the cases in which the courts adhere to the BBI approach, decisions appear to be almost decisions by paraphrase or quotation.

Another concept fundamental to the BBI model is the idea that custody decisions should reflect the child's sense of time.⁴⁶ This sense of time depends upon where the child is in the process of psychological development.⁴⁷

Children, according to Goldstein, Freud and Solnit, do not experience time as adults experience it. Instead, they experience time in relationship to "subjective feelings of impatience and frustration."⁴⁸ The child's sense of time is viewed by the creators of the model as an "integral part of the continuity concept," even though it is treated separately.⁴⁹ However, any ruptures of continuity must be viewed from the vantage of the child's sense of time. The BBI model makes it clear that those who work in law must recognize the seriousness of the separation of a child from a parent, and must see breaks in continuity from the child's subjective perspective. It is believed that once they achieve this view, they will realize that the law's delay in deciding cases is not in the child's best psychological interests.

The child's sense-of-time guidelines would require decision makers to act with 'all deliberate speed' to maximize each child's opportunity either to restore stability to an existing relationship or to facilitate the establishment of new relationships to 'replace' old ones.⁵⁰

Under this view, the decision process should never extend beyond "the time that the child-to-be-placed can endure loss and uncertainty."⁵¹ Court decisions must be made in line with the urgency which is derivative of the child's subjective sense of time. Thus, whenever there is a dispute as to who is to be the custodian, placement must be considered an emergency matter.⁵² Decision makers are urged to act quickly so as to prevent "irreparable psychological injury."⁵³ Courts, for this reason, should give child custody cases priority,⁵⁴ and appellate review should be greatly accelerated so that the child's interest is promoted.⁵⁵

46. See BBI (1973), *supra* note 4, at 40.

47. *Id.* at 40-41.

48. *Id.* at 41.

49. *Id.* at 40.

50. *Id.* at 41.

51. BBI (1973), *supra* note 4, at 41.

52. *Id.* at 43.

53. *Id.*

54. Even the most vigorous critics of the work of the BBI group would agree with this position.

55. BBI (1973), *supra* note 4, at 45.

Goldstein, Freud and Solnit state that the child's sense of time "guideline" requires that particular action be taken in child custody disputes derivative of divorce or separation proceedings.⁵⁶ The custody question should be decided in a separate proceeding. Custody decisions must be made as quickly as possible. These decisions should not have to await the court's decision on divorce, separation, maintenance, property division or any other matter. The creators of the BBI paradigm vigorously propound the idea that time is a critical element in the making of final custody decisions. Informed by the findings of classical clinical psychoanalysis, they argue that not to be sensitive to the time issue is to act with disregard for the psychological needs of the child.

A third component in what Goldstein, Freud and Solnit have termed their "guidelines"⁵⁷ for legal decision-making relates to the inherent limitations of the law. The authors of the paradigm contend that the law is functionally unable to supervise interpersonal relationships and is, in addition, unable to make long-range predictions in regard to many person to person situations.⁵⁸ The law must take these things into account. Goldstein, Freud and Solnit state that experience with child placement cases makes it clear that the law can do little more than recognize or destructure relationships.⁵⁹ The law is not able to control the on-going interaction between child and parent. Moreover, as psychoanalytically informed professionals, they have come to the conclusion that the law does not have the "capacity to predict future events and needs, which would justify or make workable over the long run any specific conditions it might impose concerning, for example, education, *visitation*, health care, or religious up-bringing."⁶⁰ However, Goldstein, Freud and Solnit allow for the making of certain predictions, based on the elements of their paradigm "[a]s the continuity and child's-sense-of-time guideline suggest, placement decisions can be based on certain generally applicable and useful predictions."⁶¹ They state that it is possible to identify the adult individual involved in the custody dispute who is the "psychological parent" or who has the capacity to become a successful psychological parent.⁶² Further, they state that it can be pre-

56. *Id.* at 47.

57. See JOSEPH GOLDSTEIN, ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 6 (1979).

58. BBI (1973), *supra* note 4, at 49.

59. *Id.* at 49-50.

60. *Id.* at 50.

61. *Id.* at 51.

62. *Id.*

dicted that the person most suited to the role of the custodian is the one with whom the child has already had continuing affectionate attachment. This person should be preferred over the person who has not had such a continuing relationship, even though the other person has equal or a greater potential for being successful as a "psychological parent."⁶³ The authors also believe that greater damage can be predicted to the child's psychological well-being when the child is young and the period of separation is protracted or uncertain.⁶⁴ Many future events and experiences are beyond the reach of the legal and psychoanalytic "sciences". Moreover, Goldstein, Freud and Solnit state that no one can "predict in detail how the unfolding development of the child and his family will be reflected in the long run in the child's personality and character formation."⁶⁵ As a consequence of the preceding limitations, the law does not act to promote the child's interest when it attempts to predict the future and sets special conditions for the care of the child.⁶⁶ Goldstein, Freud and Solnit reason that the imposition of conditions only leads to uncertainty, and this uncertainty creates a threat of discontinuity because the placement decision is subject to modification due to changing conditions.⁶⁷ If one accepts the BBI view, non-custodian visitation and modification based on change of circumstances are disallowed.⁶⁸ To many scholars, law practitioners and judges, this position is astounding. Visitation and modification are traditionally viewed as vehicles for promoting the child's best interests.

The most important element of the model is a substitute for the traditional "best interests of the child" test.⁶⁹ Goldstein, Freud and Solnit created a replacement for the traditional legal test: an over-arching standard to be used in the child custody decision-making process. This standard is "the *least detrimental alternative* for safeguarding the child's growth and development test."⁷⁰ This standard encompasses

63. BBI (1973), *supra* note 4, at 51.

64. *Id.*

65. *Id.*

66. *Id.* at 52.

67. *Id.*

68. See generally HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS, 598-601 (1968) (for a discussion of visitation and modification).

69. See generally, *supra* note 3 and accompanying text; see also HOMER H. CLARK, *supra* note 68, at 584-589 (for additional material relevant to an understanding of the best interests test); MORRIS PLESOWE, ET AL., FAMILY LAW: CASES AND MATERIALS 879-932 (2d. ed. 1972).

70. BBI (1973), *supra* note 4, at 53-64.

continuity, including the "psychological parent" concept, the child's sense of time, and the "prediction" element. Goldstein, Freud and Solnit explain this standard as

[t]he least detrimental alternative, then, is that specific placement and procedure for placement which maximizes in accord with the child's sense of time and on the basis of short-term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent.⁷¹

The architects of this model prefer this standard for several reasons. First, the new standard is more realistic and less "grandiose."⁷² Child custody decisions are simply "making do" under a very bad set of circumstances. The child's "best interests" cannot be served, given the reality of family break-up. Second, the traditional "best interests" standard does not emphasize the fact that the children of separation and dissolution-disrupted families are "victims," and are at psychological risk.⁷³ Third, the "best interests" of the child standard has been overused by courts: often undercutting the child's interests and elevating those of involved adults.⁷⁴ Goldstein, Freud and Solnit state that the "least detrimental alternative" standard will remind those who make custody and other placement decisions that all these types of decisions are inherently unsatisfactory.⁷⁵ Finally, the "least detrimental alternative" standard makes everyone face the fact that dispositional choices in custody cases are limited.⁷⁶

If the choice, as it may often be in separation and divorce proceedings, is between two psychological parents and if each parent is equally suitable in terms of the child's most immediate predictable developmental needs, the least detrimental standard would dictate a quick, final, and unconditional disposition to either of the competing parents.⁷⁷

71. *Id.* at 53.

72. *Id.* at 63.

73. *Id.* at 54.

74. *Id.*

75. BBI (1973), *supra* note 4, at 63.

76. *Id.*

77. *Id.*

Having performed the basic intellectual task of depiction,⁷⁸ we are ready to involve ourselves in the systematic assessment of the BBI model. Let us begin in a traditional manner. We shall initiate our assessment by analyzing a particular case. Our specimen for evaluation is that heartland classic of custody law *Painter v. Bannister*.⁷⁹ This case will be viewed first from the BBI perspective and then scrutinized from a second, alternative, vantage point.⁸⁰ In examining the *Painter* case,⁸¹ we will focus intensively on the "continuity" and "psychological parent" elements of the BBI paradigm. We approach the paradigm through the medium of the particular because it is my belief that a phenomenologically⁸² significant actual custody case will orient us to the paradigm "in-action."⁸³ Such an approach is necessary if we are to talk meaningfully about the reality of decision-making in child custody cases. To maximize our intellectual gain, *Painter v. Bannister*⁸⁴ will be treated in some significant depth.⁸⁵

III. PAINTER V. BANNISTER: SPECIMEN FOR ANALYSIS

The *Painter* case involved a custody dispute between a thirty year old father, Harold Painter, and the child's maternal grandparents,

78. Depiction (description in requisite detail) - this author believes - is the first intellectual task of the critic. All too often critical evaluation is marked by a failure to truly confront the work which is the target of focus. Consequently, much criticism lives a life unrelated to the reality of the work being criticized. Surely, the work reduced to its essence is an appropriate beginning point. See generally HOMER H. LASWELL, A PREVIEW OF POLICY SCIENCE (1971).

79. 140 N.W.2d 152 (Iowa 1966).

80. See *supra* note 8 and accompanying text. The alternative vantage point will be that established by the author of this current article.

81. *Painter*, 140 N.W.2d 152.

82. The focus on the exemplar, the case instance, clears away trance inducing abstractions. The phenomenon, the case, facilitates movement toward meaningful paradigms. Of course, the case itself never takes us far enough. Again, my effort draws upon the work of Walker Percy. See generally ROBERT COLES, WALKER PERCY, AN AMERICAN SEARCH (1978).

83. It is contended that the validity of the paradigm cannot be tested by traditional logic, but only by attempted "holistic" application to legal events.

84. *Painter*, 140 N.W.2d 152.

85. Depth here is provided by immersion in the factual aspects of the case. Rather than emphasizing legal theory alone, I have drawn material from the trial transcript as well as from the appellate opinion. See *In Re Painter v. Bannister*, No. 24981 Trial Trans. (Dist. Ct. Iowa, Stony County, July 12, 1965) (providing background information concerning the case at the trial level).

Margaret and Dwight Bannister, both in their sixties. The child, Mark Painter, was seven years old at the time of the appellate decision by the Supreme Court of Iowa. In December of 1962, Mark's mother and his young sister were killed in a car accident. Harold Painter, severely depressed⁸⁶ by the family tragedy, placed Mark with non-relatives. The arrangement was not successful and Mark went to Iowa to stay with the maternal grandparents. Harold Painter did not relinquish his parental rights.⁸⁷ Moreover, in her will, Mark's mother had named Harold as the child's legal guardian.⁸⁸ When Mark arrived at the Bannister home, he seemed to be very affected by his mother's and sister's deaths, and by the separation from his father.⁸⁹ In November, 1964, Harold Painter remarried. He contacted the Bannisters and informed them that he wanted Mark to live with him and his new wife. The Bannisters refused to return Mark to his father. In June 1965, Harold Painter brought a habeas corpus action. After a hearing on the custody issue, the trial judge awarded custody to Harold Painter. From July, 1965 until the time of the Supreme Court of Iowa decision in 1966, Mark remained in the custody of the Bannisters under a Supreme Court order. This order stayed the execution of the judgment of the trial court until the appellate court decided the appeal. In 1966, the Iowa Supreme Court reversed the trial court.⁹⁰ The court discusses several societal factors, including the fact that American family life styles were in transition.⁹¹ It is clear from the court's opinion that the Bannisters and the Painters have vastly different life-styles. The court profiles the Bannister's home as traditional. Specifically, the court states

86. See generally HAROLD PAINTER, MARK I LOVE YOU 85 (1969) (for background information concerning Harold Painter's depression).

87. Painter, apparently under the burden of a depression, derived from the family tragedy and apparently realizing that his condition impaired his parenting capacity did what he perceived to be in his son's best interest.

88. *Painter*, 140 N.W.2d at 156.

89. *Id.* (the court's description of his problem is consistent with a child's reaction to such a tragedy). In regard to the matter of depression, see J. BOWLBY, 3 ATTACHMENT AND LOSS, LOSS SADNESS AND DEPRESSION 7-37 (1980).

90. *Painter*, 140 N.W.2d at 152. In 1969, Mark visited his father in California. His father obtained a custody order in a California court. The grandparents did not oppose the shift in custody. See generally HOMER H. KRAUSE, FAMILY LAW 745 (1983).

91. In fact, a "new nation" was beginning to emerge. See generally A. TOFFLER, THE THIRD WAVE (1979) for an analysis of what happened while suggesting where we might be going.

His [the child's] mother was born, raised and educated in rural Iowa. Her parents are college graduates. Her father is agricultural information editor for the Iowa State University Extension Service. The Bannister home is in the Gilbert community and is well kept, roomy and comfortable. The Bannisters are highly respected members of the community. Mr. Bannister has served on the school board and regularly teaches a Sunday school class at the Gilbert Congregational Church. Mark's mother graduated from Grinnell College. She then went to work for a newspaper in Anchorage, Alaska where she met Harold Painter.⁹²

Further, the court states that the Bannister home "provides Mark with a stable, dependable, conventional, middleclass, middlewest background. . . .[;]" It provides a solid foundation and secure atmosphere."⁹³

In discussing Mark's father, the court paints a different picture.⁹⁴ Mark's father was born in California. His parents were divorced, and he went into a foster home. Harold Painter viewed the foster parents as his family. He was not successful academically, and flunked out of school because of lack of interest. After service in the navy, he obtained a high school diploma by examination and then attended college for two and one-half years under the G.I. bill. He left college and took a job on a newspaper in the state of Washington. Within less than a year, he went to work for an Alaskan newspaper which employed Jeanne Bannister, Mark's mother.

The court's description of the father's life clearly illustrated that it considers it to be a non-traditional life style. Harold Painter is depicted as one who has a Bohemian approach to life and money. Moreover, he is a political liberal.⁹⁵ He is not interested in traditional employment, but prefers life as a free lance artistic type.⁹⁶ He writes and has published, but does not make a great deal of money. He is described as changing jobs frequently and is a reader of Zen Buddhism.⁹⁷ It is pointed out that at the time of the trial, Mr. Painter was considering a move to Berkeley, California.⁹⁸

92. *Painter*, 140 N.W.2d at 153-54.

93. *Id.* at 154.

94. *Id.*

95. *Id.* at 154-55.

96. *Id.* at 155.

97. *Painter*, 140 N.W.2d at 155.

98. *Id.*

The court admits that the child, Mark, would be allowed more freedom of thought and action in the Painter home environment. The court, however, emphasized that although life would be more exciting and challenging with Harold Painter, it would also be impractical, unstable and romantic.⁹⁹

The court also considered expert testimony. It gave great weight to the testimony of Dr. Glenn Hawks, a child psychologist who testified at the trial.¹⁰⁰ Dr. Hawks, who did not examine Harold Painter, testified that Dwight Bannister was the "father figure."¹⁰¹ It is clear from Dr. Hawks' testimony that he saw Mr. Bannister as the child's "psychological parent."¹⁰² Dr. Hawks described Mrs. Bannister as the "mother figure"¹⁰³ and a "psychological parent."¹⁰⁴ In his testimony, Dr. Hawks told the trial court that his concern was with the welfare of the child. He made it clear that he believed that Mark was at a very critical development point in his life, but that if he were four or five years younger, he would not be as much at risk.¹⁰⁵ He further testified that if custody were not *continued* with the Bannisters, there was a high probability that Mark would become anti-social.¹⁰⁶ The doctor hinted at juvenile delinquency and aggressive acts against others. As an alternative, Dr. Hawks suggested that there might be significant "withdrawal"¹⁰⁷ by Mark, such as a schizoid or schizophrenic reaction.¹⁰⁸

A careful reading of Dr. Hawks' testimony makes it clear that he is talking about what Goldstein, Freud and Solnit refer to as "con-

99. *Id.* at 156.

100. *In re Painter v. Bannister*, No. 24981 Trial Trans. at 2-43 (Dist. Ct. Iowa, Stony County, July 12, 1965).

101. *Id.* at 28.

102. *Id.* At the trial level, Dr. Hawks testified that the "psychological father of the child . . . is the most important. . . . Now the father figure is a figure that the child sees as an authority figure . . . and one who typifies *maleness* and stands as a male as far as the child is concerned." (emphasis added); *see also supra* page 8 (for a discussion of the "psychological parent").

103. *In re Painter*, No. 24981 at 30.

104. *See supra* note 8.

105. *In re Painter*, No. 24981, at 31.

106. *Id.* at 35.

107. *Id.*

108. Schizoid conditions and schizophrenia are serious mental disorders. *See generally* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 301.20 at 310 (3rd ed. 1980) (for background reading on schizoid personality disorders); P. O'BRIEN, THE DISORDERED MIND: WHAT WE KNOW ABOUT SCHIZOPHRENIA (1978) (for background reading on Schizophrenia).

tinuity of relationship" with the "psychological parent(s)." Dr. Hawks, like Goldstein, Freud and Solnit, believed that disruptions in continuity are very likely to produce extraordinarily, undesirable psychological outcomes, either severe mental disorder or criminal and anti-social conduct. It is beyond question that the Iowa Supreme Court reacted favorably to the ideas and conclusions put forth by Dr. Hawks.¹⁰⁹ The court viewed continuity of relationship between Mark and the Bannisters as being in the seven year old boy's best interests.

The Iowa Supreme Court, reversing the trial judge, took the position that Mark and Mr. Bannister had a relationship which Mark had not had with his natural father. This relationship was an important psychological one. The court stated that it was in Mark's best interest to be in the stable situation provided by the Bannister home. The court concluded that Mark should not be shifted to his father "in the face of the dire warnings from an eminent child psychologist. . . ."¹¹⁰

Goldstein approves of the decision in *Painter v. Bannister*.¹¹¹ He characterizes the case as one in which a court was asked to disrupt a "satisfactory on-going 'parent-figure' - child relationship and make an abrupt change without any plan for transition to allow for the gradual re-establishment of a relationship between natural father and son."¹¹² In his article, he outlines the court's adjective-oriented comparison of the contending parties;¹¹³ but, he offers no critique of this comparison. Goldstein applauds the court for its decision to avoid making judgments based on the choice of competing life styles. He asserts that the choice in this case was between parties who were all fit custodians. Goldstein indicates that the court's unwillingness to simply support the preference in law for the biological parent was proper. Finally, he states "[e]valuated in the light of Anna Freud's need-for-continuity formulation, the decision can be understood as a determination made in accord with the overall mandate of the state - the child's best interests."¹¹⁴

A careful reading of Goldstein's article makes it clear that he supports the Iowa Supreme Court's decision because it stresses the importance of the "continuity of relationship" and "psychological parent"

109. *Painter*, 140 N.W.2d at 158.

110. *Id.*

111. 140 N.W.2d 152 (1966).

112. BBI (1973), *supra* note 4, at 475-76.

113. *Id.* at 476.

114. *Id.*

concepts.¹¹⁵ The language in his article relating to a planned transition so that custody could be transferred to the father is of no relevance to the *Painter* case.¹¹⁶ The basic question for decision in *Painter*¹¹⁷ was which of the contending parties was entitled to here-and-now "full" legal custody. Goldstein's opinion would be that the court made the right decision in protecting the child's continuity.

At the time of the appellate court decision, Mark was seven years old and functioning well. He was at a psychological state of development which is termed "latency."¹¹⁸ Latency is generally viewed as "existing" between approximately ages six and thirteen.¹¹⁹ According to psychoanalysts, by the time the child reaches the latency phase of psychological development, the executive psychological apparatus, the ego,¹²⁰ is well-evolved and the aggressive and affectional - erotic urges (instincts)¹²¹ are controlled by the child. By the latency phase of psychological development, the child has achieved substantial psychological maturity.

As Anna Freud, one of the creators of the BBI placement paradigm writes:

In the course of a few years the situation alters. The latency period sets in, with a physiologically conditioned decline in the strength of the instincts and a truce is called in the defensive warfare waged by the ego. It now has leisure to devote itself to other tasks and it acquires fresh contents, knowledge and capacities. At the same time it becomes stronger in relation to the outside world; it is less helpless and submissive and does not regard the world as quite so omnipotent as heretofore. Its whole attitude to external objects [people] gradually changes as it surmounts the Oedipus situation. Complete dependence on the parents cease. . . .¹²²

115. *Id.*

116. *Id.* at 475-76.

117. *Painter*, 140 N.W.2d at 153.

118. See ERIK ERIKSON, CHILDHOOD AND SOCIETY 86 (2d. ed. 1963).

119. A. WATSON, PSYCHIATRY FOR LAWYERS 292 (Rev. ed. 1978).

120. The ego is in actuality a brain system network (neurochemical, etc.) which acts to balance the interests of the desiring self, one's moral conscience and social reality. See JEAN LAPLANCHE & JEAN-BERTRAND PONTALIS, THE LANGUAGE OF PSYCHOANALYSIS 130-43 (1973) for a condensed discussion of the ego and its operation.

121. *Id.* at 214-16. Those who prefer an orthodox psychoanalytic approach view instincts as pressures which create tensions. Normally it is stated that human beings seek to reduce these tensions via interactions with other persons.

122. ANNA FREUD, THE EGO AND THE MECHANISMS OF DEFENSE 157 (1946); see

Ms. Freud makes the following points in her statement: first, by the latency phase, the child's psychological life has settled down to a very significant extent; second, the executive apparatus of the psyche, the ego, has things relatively well in hand; third, a state of stability has been achieved; fourth, the child is ready for an extensive real world education; and fifth, the parents are no longer as psychologically as important as they were in the past. The well-established fact is that the latency child, called middle years child by some, "characteristically turns his attention away from family involvements and outward to the world at large."¹²³ Our culture, though its system of education, promotes this development.¹²⁴

Mark, at age seven, is capable of significant self control. In addition, he has attained substantial cognitive capacity. He has become more naturalistic, more objective, has developed the ability to classify, and is becoming versed in the use of numbers. Further, he is acquiring a fund of general knowledge and is learning to think and reason in a manner similar to adults. In addition, the psychologically normal child is capable of making age appropriate moral judgments. All in all, the child is quite different from the being he or she was three or four years earlier.¹²⁵ A latency stage child is, in sum, a competent human being.

For these reasons, it was improper for the Court to fail to return Mark to the custody of his father. This return would not have put Mark at risk. At age seven and functioning well within the normal range, Mark cannot be seen as extremely vulnerable. Furthermore, Harold Painter was examined by a psychiatrist and was found to be psychiatrically fit.¹²⁶ There was no evidence which indicated that Harold Painter was legally unfit in any way. The normal seven year old is psychologically capable of handling the shift from the grandparents to the father. His adaptive capacity is significant.¹²⁷ This does not mean that there will not be problems; however, problems can be solved.

also ANNA FREUD, PSYCHOANALYSIS FOR TEACHERS AND PARENTS (Beacon Press ed. 7th prtg 1971).

123. L. JOSEPH STONE & JOSEPH CHURCH, CHILDHOOD AND ADOLESCENCE 388 (3d ed. 1973).

124. In a complex modern society, this is a matter of necessity. The family simply cannot prepare one for life in the broader environment of modern existence. Educational specialists must perform the task of preparation.

125. See STONE & CHURCH, *supra* note 123, at 388-400.

126. Painter, 140 N.W.2d at 154-55.

127. See generally D. GESENSWAY, PSYCHOANALYTIC PSYCHIATRY FOR LAWYERS 84 (1982).

Goldstein and those who adhere to the BBI paradigm are overly apprehensive. For them, the custody conflict is an event which is a jeopardy situation of the highest order. This position cannot be supported; and in fact, there exists significant findings which cast doubt on it. For example, the Berkeley, California study conducted by Joan MacFarlane and her associates¹²⁸ contains findings which support this position. The study covers a period of thirty years; thus, it is a long range study with findings that are directly relevant to our discussion.

The study illustrates that those who place a great emphasis on the link between trauma in childhood and resulting psychopathology in later years may well be in error. Arlene Skolnick, reporting on the Berkeley study, wrote:

Foremost, the researchers tended to over-estimate the damaging effects of early troubles of various kinds. Most personality theory has been derived from observations of troubled people in therapy. The pathology of adult neurotics and psychotics was traced back to disturbances in childhood-poor parent-child relations, chronic school difficulties, and so forth. Consequently, theories of personality based on clinical observation tended to define adult psychological problems as socialization failures. But the psychiatrist sees only disturbed people, he does not encounter 'normal' individuals who may experience childhood difficulties, but who do not grow into troubled adults. The Berkeley method, however, called for studying such people. Data on the experience of these subjects demonstrated the error of assuming that similar childhood conditions affect every child the same way.¹²⁹

All of this applies to many psychoanalytic clinicians, psychoanalytic researchers, and makers of psychoanalytic jurisprudence.¹³⁰ One must keep in mind that psychoanalytic theory derives from very special clinical circumstances. Sigmund Freud worked almost exclusively with adults - including himself as analysand.¹³¹ He built his theory by recon-

128. JOAN MACFARLANE, ET AL., A DEVELOPMENTAL STUDY OF THE BEHAVIOR PROBLEMS OF NORMAL CHILDREN BETWEEN TWENTY-ONE MONTHS AND FOURTEEN YEARS (1954).

129. ARLENE SKOLNICK, THE INTIMATE ENVIRONMENT, EXPLORING MARRIAGE AND THE FAMILY 379 (1973).

130. E.g., J. KATZ, ET AL., PSYCHOANALYSIS, PSYCHIATRY AND LAW (1967) (an interesting work of this sort which is an important early contribution to psychoanalytic jurisprudence).

131. Freud's self-analysis was certainly essential to the building of his theoretical

structing the psychological lines of those who sought treatment. Anna Freud, one of the creators of the BBI model, spent much of her career working within the model constructed by her father.¹³² She is the first lady of orthodox psychoanalysis, and the BBI paradigm is definitely rooted in orthodox psychoanalysis. Orthodox psychoanalysis, because its theory is primarily a product of the historical reconstruction of the lives of the psychological dysfunctional and because it over-predicts psychological dysfunction, does not produce a model which has the appropriate level of judicial decision-making reliability. Other workers in psychology, especially non-orthodox psychoanalysts, have suggested more appropriate models for use in the legal system. The theory, the clinical practice, and the isolation of orthodox psychoanalysis from the current of social, historical, political, economic and cultural aspects of existence all combine to lead orthodox psychoanalytic observers and practitioners to overreact when confronted with the phenomenon of the child custody dispute.¹³³

However, for those who are less focused on clinical psychoanalysis and classical, orthodox, psychoanalytic theory, things are viewed differently.¹³⁴ Not every child of divorce or of a custody dispute is a victim proximate to his or her psychic undoing. Life is as it is. Existential realities are within the coping capacity of many, children and adults.¹³⁵ Divorce has become commonplace in our society. Parents are often separated from their children; they fall ill, they die, they go off to serve in the military, they hire surrogate caretakers, or they go through significant personal changes. Children lose their friends, they leave behind their favorite teacher, they move to a new community.¹³⁶ Loss is a basic experience in life - things do not stay the same. How a child fares, psychologically, ethically, and morally, depends to a very significant ex-

and clinical edifice. See PAUL ROAZEN, FREUD AND HIS FOLLOWERS 82-88 (1975).

132. *Id.* at 436-60.

133. See generally M. EAGLE, RECENT DEVELOPMENTS IN PSYCHOANALYSIS (1984) (for alternatives to orthodox psychoanalysis).

134. See e.g., Jerome Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, 39 LAW & CONTEMP. PROBS. 38 (1975) (for an outstanding article on this point).

135. See e.g., KURT VONNEGUT, WELCOME TO THE MONKEY HOUSE (1968); WILLARD GAYLIN, FEELINGS: OUR VITAL SIGNS (1979); KARL MENNINGER ET AL., THE VITAL BALANCE (1963).

136. This is the reality of existence. See HERMAN HESSE, SIDDARTHA (New Directions ed. 1957) (perhaps the best text on the "true" conditions of existence).

tent on what happens to the child after the loss or trauma.¹³⁷ For example, some children may lose someone who was a satisfactory custodian, but gain another who is even more life-enhancing. Other children may lose a parent who was, in fact, a negative force - that child is liberated by the separation. The life outcome depends on the people one meets and attaches to outside of the family. The shape of our life depends upon the vicissitudes of social history. Children need psychological attachment; however, not every disruption of continuity of relationship is going to cause serious long term damage to a child. Children are resilient.¹³⁸ Judges and lawyers must understand this reality.

The *Painter* case¹³⁹ did not involve an adoption. Further, the case is not a termination of parental rights case; Mark's father was never charged with parental neglect. Harold Painter was the biological father of Mark. Mark did not begin living with the Bannisters until he was five years old.¹⁴⁰ The bulk of Mark's first five years of life were spent with his father, Harold Painter. Consequently, Harold was not a psychological stranger to his son. Thus, it is clear that, during Mark's early formative years, Harold was a "psychological parent" and his interactions with Mark were very important in building Mark's personality and intellectual capacity. It is well known that psychological structure and intellectual, or cognitive, development in these formative years is very dependent on mimetic operations within the context of the child-parent interaction.¹⁴¹ The child learns by imitating the parents. Finally, psychological attachment, in these especially formative years, is the foundation of developmental progress.¹⁴² The Iowa Supreme Court overlooked this reality of this basic process and its significance in its decision. The Court accepted the fact that Mark was psychologically healthy and intelligent.¹⁴³ Dr. Hawks had testified to this fact.¹⁴⁴

137. See generally H. DERROSSIS & V. PELLOGRINO, THE BOOK OF HOPE (1976) (for an interesting work on this matter).

138. Lloyd DeMause, *The Evolution of Childhood*, 1 HIST. OF CHILDHOOD Q. THE J. PSYCHOHISTORY 503-75 (1974).

139. *Painter*, 140 N.W.2d 152.

140. *Id.* at 156.

141. See STONE & CHURCH, *supra* note 123, at 72-73; see also S. FRAIBERG, THE MAGIC YEARS (1959).

142. See JOHN BOWLBY, ATTACHMENT AND LOSS (1969); see also JOHN BOWLBY, THE MAKING AND BREAKING OF AFFECTIONAL BONDS (1979).

143. *Painter*, 140 N.W.2d at 156.

144. *In Re Painter*, No. 24981, at 17-18 (trial transcript containing the testimony of Dr. Hawks).

Since the Iowa Supreme Court portrayed Harold Painter as a fit father, it is reasonable to infer that he had been involved with his son and had played an important role in the child's early psychological and cognitive development.¹⁴⁵

Despite the fact that Harold Painter had been physically out of Mark's life as a parent, during Harold's life crisis time-out, he was still Mark's "psychological parent" and was therefore psychically engraved in Mark's mind. Psychological parents are encoded in a child's brain system.¹⁴⁶ A "psychological parent" exists within the mind and influences thought, emotion and behavior. Furthermore, Freud's work on the parent-derived super-ego makes this abundantly clear.¹⁴⁷ Moral conscience is derived from interaction with the parents. The BBI theory does not instruct child custody decision makers on this most important psychological fact. Even Professor Goldstein fails to discuss this psychic reality when he comments on the decision in the *Painter* case.

The psychological situation in the *Painter* case was that between the ages of five and seven, Mark's image of Harold, a "psychological parent," was not expunged. Memories, emotions, images, ideas and fantasies relating to his father continued to exist in Mark's mind. In a psychological and brain-content sense, his father lived within him. This basic fact makes the *Painter* case quite different from one involving adoption by a stranger or custody to a third party who has not been in psychological attachment to the child. The Iowa Supreme Court failed to see these differences. Harold Painter was not without attachments to his son. A very strong attachment between Mark and Harold already existed. Harold Painter had been a "psychological parent" in Mark's critical first five years of development. This intense psychological attachment still existed in the minds of Mark and Harold. Because of Mark's internalized image of Harold as his "psychological parent," a shift in custody from the Bannisters to Harold Painter did not present

145. The designation of a parent's fitness is a result of the court's evaluation of the "relevant factors" which, of course, relate to the individual's capacity to parent. "Relevant factors" would include mental health, physical health, moral character, intelligence, economic position, etc.

146. The most accessible material on this reality can be found in the following works: *see* ERIC BERNE, GAMES PEOPLE PLAY 23-28 (1964); JONATHAN WINSON, BRAIN AND PSYCHE: THE BIOLOGY OF THE UNCONSCIOUS (1985) (a much more complex, but very enlightening discussion of the relationship between/among life experience, brain function and psychic contents).

147. *See* 21 STANDARD EDITION OF COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 62 (James Strachey ed. 1964).

the at-risk situation the Iowa Supreme Court and Professor Goldstein found to exist. The psychological relationship was a pre-existing infrastructure which could "smooth" the transition of custody from the Bannister's to Harold. Certainly, there would be a period of adjustment; however, given the existence of the earlier attachment, the opportunity for a successful change of custody would be much enhanced.

Due to the existence of an antecedent attachment, and the fact that Mark was of school age and relatively resilient, it can be concluded that Professor Goldstein's support for the *Painter* decision is open to criticism.¹⁴⁸ Professor Goldstein placed too much emphasis on the utility of the pure continuity approach. Specifically, a psychosocial "best interest" approach to the *Painter* case should be preferred to the orthodox psychoanalytic approach.¹⁴⁹ The term "psychosocial" is used to emphasize the relationship between the psychological structure of the individual and his or her surrounding social world. The crux of this approach is to examine how the individual exists within the social ecosystem of his historical time.

It is inherent in the positions of the Iowa Supreme Court and Professor Goldstein that Mark Painter needed continuity of relationship with his maternal grandparents. This emphasis on continuity does not do justice to the human complexity which is the true context of the custody decision. To determine the best interests position of the child in the *Painter* case, and in many other cases, the limited approach required by a guideline as basic as the continuity concept must be eschewed. The child's needs must be analyzed by looking to the *totality* of relevant *psychosocial circumstances*. This approach requires the decision-makers to scrutinize the child's best interests situation by determining where the child stands developmentally, assessing what her or his needs are in relationship to developmental status, and determining who out of those seeking custody has the capacity to best promote the child's interests. In the simplest terms, the court must determine *who is most fit*.

Erikson's model contains eight life stages.¹⁵⁰ Three of the stages relate to adulthood and are not relevant to child custody disputes. The five stages relevant to the child custody matters are:¹⁵¹

148. See MACFARLANE et al., *supra* note 128; DEMAUSE, *supra* note 138.

149. On this matter of psychosocial emphasis I am greatly influenced by the work of Erik Erikson. See *supra*, note 7.

150. See ERIKSON, *supra* note 118.

151. *Id.*

(1) Stage I - (approximately the first year of life). During this developmental phase, the child has the opportunity to achieve a positive life view called basic trust. Basic trust develops when the child is well cared for, psychologically and physically, by an adult or adults of attachment. An appropriate experience in attachment during this stage of development prepares one for human intimacy and social interaction in later stages.

(2) Stage II - (about the second and third year of life). The child seeks to develop personal autonomy and begins to explore the home environment.

(3) Stage III - (about age four and five). The child starts to take a serious interest in life outside of the home. The child is learning through play. Attachments to people outside of the home are made.

(4) Stage IV - (approximately the sixth through the eleventh year). The child becomes immersed in the outside culture. The acquisition of culturally approved skills and knowledge is the major task of this stage. This is the stage of essential learning.

(5) Stage V - (about the twelfth through eighteenth year). The child is in the process of consolidating the emerging self. Cultural and gender identities are worked out.

Evaluating the Erikson model in light of the *Painter* case, it is clear that Mark was in Stage IV at the time of the trial and appellate decisions. He was seven years of age. Mark had already become actively involved outside of the home. Trial testimony illustrated that he was relating to children and adults outside of the family setting.¹⁵² During this phase of active learning, the child is interested in imitating the behavior of adults in the outside world. The male child becomes interested in the social role activities of firemen, truck drivers, musicians, athletes, sales people, policemen and other grown-ups engaged in vocation and avocation.¹⁵³ Further, school is a focal point of the child during this stage of psychosocial development, and learning from the electronic media is also an important experience. The school experience is instrumental in the development of a child. Culture makes itself known to the child in the form of the school and its teachers. The teacher, the transmitters of the cognitive technology and the values of culture, inhabits the school environment and passes on the culture fund to the child. Moreover, the child is surrounded by a large number of peers who come from "other" homes - homes with norms, values and

152. *In Re Painter*, No. 24981, at 17.

153. See ERIK H. ERIKSON, IDENTITY YOUTH AND CRISIS 112 (1968).

ways of doing things that differ from those of her or his own parents. In addition, older students will also influence the child. At this stage of psychosocial development, the child will go through the process of adjusting to a great variety of personality types and will experience a diversity of folkways. Very significant cognitive, social, aesthetic and moral - ethical development is occurring during this developmental stage.

At school, the child is being prepared to function in a complex society which holds organization to be an important value. Our educational institutions make the child aware of the fact that our culture requires that people learn to structure time. In addition, the child discovers that the formal curriculum is structured. Planning, as a socially approved behavior, is also modeled by the teachers. The school places great emphasis on culturally valued work and citizenship values. The child has left the world of play behind, and is learning fundamentals which will prepare the child to take his or her place in the material economy. There is an emphasis on productivity. The child is learning to work cognitively on his or her own and to work socially with other people. The child has moved from the "womb" of the family into the surrounds of school and the larger world.

Through the school experience, the child learns to take pride in culturally approved production. This ability to be productive is important in helping the child ward off feelings of incapacity and inadequacy. Doing becomes an important part of being.¹⁵⁴ If things go well, the child begins to feel that he or she can succeed in the world outside of the family. This experience is critical to the process of becoming fully "grown-up." However, not all learning goes on in school: it occurs on the playground after school, in the neighborhood, on trips around town, city, county, region, country and the world. Children learn out of school from peers, older children, adults and electronic media. This learning is cognitive, affective and social.

The child is also going through a phase of moral/ethical evolution.¹⁵⁵ The swirl of life outside of the home provides standards, models and examples which impact heavily on the moral/ethical development of the child. The ethical and moral standards of the child's particular

154. *Id.* at 87-93. The author acknowledges the possibility that all school, including homework, and no play may endanger the child. A programmed compulsive work ethic will not benefit the child. A sense of proportion is critical in promoting healthy development.

155. See ROBERT COLES, THE MORAL LIFE OF CHILDREN (1986).

family are compared to those available in the environs of the non-familial world. Freedom, equality, justice, injustice, law, order, authority, power, prestige, privilege, oppression, license, loyalty, treachery, and pride are matters on the existential agenda of the learning stage child.

During this stage of psychosocial development, the child is moving along cognitive, social, moral and ethical lines of development. However, another critical line of development is called the affectional and erotic line of development. This line of development is essential to the acquisition of psychological health. Professor Goldstein, the BBI group, and the Iowa Supreme Court have failed to appropriately treat the fundamental aspects of the child's learning stage. They have also failed to emphasize the best interests importance of the affectional and erotic development stage in the "latency" child (Stage IV). Professor Goldstein makes this mistake because of his preference for orthodox psychoanalysis. This preference causes him to ignore the affectional and erotic development in the child's latency age. L. Joseph Stone and Joseph Church agree with this theory:

Freud's original notion of latency as an asexual time out has had to be modified in the light of what we now know about sexuality in the middle years (*Stage IV*). Sexual interest and play are not snuffed out. . . . It is worth noting that whereas Freud had to combat the popular belief that there was no infantile sexuality to become latent, the post-Freudians have to combat Freud's idea that there is a gap in the chain of overt psychosexual development.¹⁵⁶

Prior to the 1960's, when the *Painter* case was decided,¹⁵⁷ the latency theory of psychosexuality had been greatly criticized. Stage IV children are very interested in sexuality and these children form affectional and erotic attachments. Affectional and erotic issues do not simply appear out of the blue in adolescence. A failure to focus attention on this line of development makes a best interests analysis incomplete. An appropriate custodian can deal affectively with affectional and erotic matters, and Judges must be aware of this reality.

In *Painter*, the Iowa Supreme Court made reference to the topic of college education. The Bannisters were described as "college graduates".¹⁵⁸ Jeanne Painter, Mark's mother, was described as a graduate of Grinnell College, and Jeanne's three sisters received college educa-

156. STONE & CHURCH, *supra* note 123, at 381.

157. *Painter*, 140 N.W.2d 152.

158. *Id.*

tions and married college men. The Court stated that "if placed in the custody of the Bannisters, Mark would have an opportunity for a college education and a profession . . ."¹⁵⁹ On the other hand, Harold Painter was described as having gone to college on the G.I. Bill for two and one half years, and quit college to take a job on a small newspaper. It is clear from this comparison that the court placed great value on education. The court stressed the fact that higher learning had played a great role in Bannister family history. Further, the court suggested that Harold, as drop-out and potential custodian, did not have the "correct" view of the matter of higher learning.

When the *Painter* court discussed college education, it was not evaluating the experience or quality of cognitive, aesthetic, social, moral and ethical learning. It was simply accepting that certain classes required steps to gain traditional social status. The court's inquiry into the social levels of each of the parties revealed that the court was more interested in status than the quality of the mind. The court's emphasis on the conventional, the middle class, and the stable, demonstrated that "traditional" social status, represented by the Barristers, was a value which the court emphasized. Education was viewed by the court as a way one took his or her place in a social/economic hierarchy. The alternative view, that education is an experience which can maximize the growth of the cognitive, social, aesthetic and moral/ethical self, was not addressed by the court. The court's failure to address these issues flaws the *Painter* decision.

In *Painter*, the Iowa Supreme Court stated that if Mark were to be placed in the custody of his father, he would have more "freedom of conduct and thought."¹⁶⁰ Moreover, the court admitted that life in the Painter household would be more "intellectually stimulating."¹⁶¹ However, the court failed to give the proper weight to this information or facts. From a psychosocial developmental perspective, the Painter home was the intellectually stimulating environment of choice. This home setting would promote the development of Mark's cognitive processes, and these processes are critical to Mark's future state of being.

From a best interests perspective Harold Painter would have been a great custodian for Mark's learning stage (Stage IV). Harold Painter was a widely travelled man, who had met people from all walks of life. He had served in the U.S. Navy and had experienced life within the

159. *Id.* at 154.

160. *Painter*, 140 N.W.2d at 154.

161. *Id.* at 156.

structure of the military. He had flunked out of high school because "of a lack of interest in academic subjects, rather than any lack of ability."¹⁶² He had attended a trade school and had spent two and one half years in college. Furthermore, he had worked as a newspaperman in the states of Washington and Alaska. In addition, he had held a number of other kinds of jobs. Overall, Harold Painter had done and experienced a great deal and had a life perspective. He had proved himself to be a skilled writer, one who could effectively use the language of his culture, and a serious photographer. At the time of the custody hearing, Harold Painter was planning a move to Berkeley, California. Berkeley, home of a major university center, has been known as a community devoted to arts, humanities, sciences, politics and moral and ethical issues of human history. A large number of creative, intelligent and concerned people are always members of the Berkeley community, and Berkeley has historically been an ideal environment for those interested in focused learning.

At the time of the original custody hearing, Mark's father was a young, energetic individual with a self-actualizing attitude toward learning. He sought to learn, not simply to earn a living, but also to enrich his self and his interactions with others in society. On the other hand, the Bannisters were over sixty years old at the time of the custody dispute. They were educated in the World War I era, and before the Great Depression. Their cognitive styles and value sets were more congruent with a culture on the wane than with the emerging modern culture. The gap between the Bannisters and the new culture was just too great, and they could not have maximized Mark's developmental position. Moreover, Harold Painter's age was a factor which supported his custody claim. All in all, a father in his thirties would possess more psychic and physical energy than the grandparents in their sixties. These varieties of energy are vital in the parent's task of promoting best interests psycho-social development of the child. Further, Harold Painter's new young wife was also capable of substantially supporting Mark's intellectual, social, and aesthetic experience. She was an intelligent, well educated woman, with a masters degree from the University of California. Her specialty field was cinema design, an area of work which surely requires cognitive and aesthetic capacity.¹⁶³ According to the Court, Marilyn Painter liked children and had been in a position to

162. *Id.* at 154.

163. *Painter*, 140 N.W.2d at 155.

have "considerable contact" with them.¹⁶⁴ Harold and his new wife clearly formed a dyad which was possessed of those capacities which would promote Mark's development best interests.

In its opinion, the Iowa Supreme Court made it clear that stability and security were more important for Mark than intellectual stimulation. This position, of course, meant that custody be awarded to the grandparents. However, the court stated that Harold Painter was a fit father, and it is clear that the case involved a learning age ("latency") child. The court did not understand the process of child development in our culture. It was not informed to what cognitive, aesthetic, moral/ethical and social learning "in culture" meant in the process of self formation. The court was unable to conceptualize the particular psychosocial needs of the learning stage child in our modernized culture.

Placement with Harold and his new wife, Marilyn, would have been the *appropriate best interests disposition*. The intellectually and aesthetically stimulating environment which they were able to provide was exactly what Mark needed in order to prepare him for life in a Toffleresque world. In such a world the ability to continue to learn was extremely important. By 1965, the "old" approach to learning and the "old" curriculum - the one that the Bannisters had experienced - was clearly of diminished applicability. With the advent of the age of information, communications and high technology, it should be clear that Harold Painter was a fit parent and would provide a learning environment for Mark that would favor optimal best interests psycho-social development. Harold Painter had pursued a life of learning, free expression and creativity. He had mastered the craft of writing and like many aspiring writers had worked as a newspaperman. He had developed a "sense of purpose";¹⁶⁵ he had intentions, objectives and life goals. He operated as an open, expanding self system, preferring the study of Zen Buddhism to less demanding activities. He was a Western man who was willing to search the wisdom of the East for insights into being. Today it is not uncommon for seasoned corporate managers to seek to learn from the philosophers of the Orient. Harold Painter, a man in his thirties, was deeply involved in learning relevant to the emerging new American culture, and he was a man of development.

As indicated earlier, the learning age child is undergoing moral and ethical development, as well as cognitive, social, emotional, and

164. *Id.*

165. See ERIK ERIKSON, INSIGHT AND RESPONSIBILITY 120-22 (1964).

aesthetic development. Harold Painter, as portrayed in the Iowa Supreme Court's opinion, is a politically involved person. He is described as a political liberal and a supporter of the activities of the American Civil Liberties Union.¹⁶⁶ He engaged in the political debates of his time, and he had long been concerned about matters of right and wrong, justice and injustice, the legitimacy of authority and the distribution of values among the citizens of his country. Harold Painter was an appropriate model of moral and ethical values for a learning age child in a nation which keeps alive the ideology of democratic values. Of course, the Bannisters moral and ethical perspective was typical of those of their age and life stage. However, their vision of moral and ethical life was such that they were not the persons who should have received custody. Generationally and psychosocially, they appear to have been too far removed from the moral and ethical milieu of Mark's present and future.

Further, the court and Professor Goldstein failed to discuss age appropriate sexuality (affectional/erotic behavior) and gender identity.¹⁶⁷ Viewed from a psycho-social vantage point, this promotes an incomplete best interests analysis. Mark would be entering adolescence in the near future.¹⁶⁸ Sexuality and gender identity are critical issues at that time, and had already become important issues in the learning stage.

Dr. Hawks, the Bannister's expert witness, testified:

He is sensitive about sex, which one would expect of a seven year old. Again, he has some questions and some anxieties about maleness. And the anxieties do show up. Mark is not free in his own mind to discuss some of these anxieties about this, but he is concerned about maleness, femaleness at this time.¹⁶⁹

Learning age children are existentially engaged in an effort to orient themselves on the issue of gender identity. They are attempting to de-

166. *Id.*

167. See generally ALICE MILLER, FOR YOUR OWN GOOD (Hildegard Hannun & Hunter Hannun trans. 1983); ALICE MILLER, THOU SHALT NOT BE AWARE (Hildegard Hannun & Hunter Hannun trans. 1984); ALICE MILLER, PRISONERS OF CHILDHOOD (Ruth Ward trans. 1981) (these works provide one with real insight into the psychology of the self).

168. See STONE & CHURCH, *supra* note 156, at 421-25.

169. *In Re Painter*, No. 24921, at 21 (Dr. Hawks, amazingly, goes on to state that this material is dangerous and should not be discussed).

termine what the gender standards of being and action are in our culture. Moreover, there is an age appropriate interest in sexuality. Dr. Hawks testified that Mark was involved in the process of dealing with these very fundamental matters. It can be inferred that Mark's difficulties in regard to communicating his feelings about these matters stemmed from his experience with the Bannisters. Their views on sexuality and gender identity were old fashioned and, given that fact, it was highly likely that they did not deal in "modern style" with questions of sexuality and gender identity. Their personal ethic dictated that Mark be shielded from direct, age appropriate handling of these fundamental issues. In addition, it would be reasonable to surmise that they were overly repressive in regard to the sexual interest and action of children. Mark's father, on the other hand, was a free thinker and free spirit: a person open to the process of cultural change. It is unlikely that he would be responsible for the creation of Mark's anxiety and sensitivity.

Harold Painter, and his wife Marilyn, appeared to have been a young, energetic couple. Harold had been able to achieve affectional and erotic intimacy during his life.¹⁷⁰ He had formed a family and had fathered children. His life history indicated that he was attuned to contemporary models of masculinity and femininity.¹⁷¹ Both he and Marilyn are capable of providing the appropriate environment for Mark's development of culture-acceptable gender identity and sexual behavior orientation. Parents, and custodians, who provide such a developmental setting during the learning stage are normally capable of coping well with gender identity and sexuality issues which are presented during adolescence.¹⁷² Speaking comparatively, Mark's self development along gender identity and sexuality lines would have been most effectively enhanced by placement with his father and his father's new wife.

Further, Mark would be moving into adolescence. In our culture, adolescence is a very special phase of psycho-social development.¹⁷³ To appropriately decide a child custody case involving a learning stage child, one must think not only about the parents, but must engage in a

170. See ERICKSON, *supra* note 7, at 70-72.

171. See generally IVAN ILLICH, GENDER (1982) (an excellent work on gender identity); see also P. SLATER, FOOTHOLDS (1977) (also containing valuable information on gender identity).

172. See generally E. FRIED, THE EGO IN LOVE AND SEXUALITY (1966) (on the importance of love and sexuality in the adult years).

173. See STONE & CHURCH, *supra* note 156, at 425-32.

prospective analysis which considers the psycho-social situation of the child in adolescence. Both the court and Professor Goldstein fail to focus on this best interest consideration.

Adolescence is a time of biological maturation, rite of passage, strong sexual emphasis and finding one's way.¹⁷⁴ There is certainly a great deal going on in this phase of development (Erikson's Stage V). However, the complexity of legal decision-making in regard to this stage of development can be dealt with if we organize our thinking around a very fundamental idea. Developmentally, adolescence is characterized by the young person's search for an authentic "sense of identity."¹⁷⁵ Identity, as used here, refers to one's sense of individual continuity. Consolidating a sense of identity at this stage means integrating the self so that one is prepared to move into young adulthood.

Lawyers and judges must keep in mind that the quest for identity is an essential task of adolescence. Identity cannot be assigned to the adolescent by parents, court, or society. The "sense of identity" must be acquired over protracted time through individual interaction with others in our culture who are available as identity models. Experimentation and choice are critical in the acquisition of this fundamental sense of self. The very way in which a young person acquires her or his identity gives adolescence a variable, protean quality. Out of psychological necessity, adolescents are shape shifters, they appear in different forms at different times. Self experimentation is the science of adolescent identity research. Ideologies, styles, behaviors, and perspectives are donned and doffed. Revisionism is the rule and the process of revision is critical to psycho-social development. In our culture, this process is essential in developing a "sense of identity." The adolescent may develop an authentic "sense of identity," drift on the sea of "identity confusion" or develop a "negative identity."¹⁷⁶ The preferred result is the construction of an authentic "sense of identity." "Identity confusion" is not a positive outcome because it leaves one prey to anxiety and insecurity. A "negative identity," for example, that of "delinquent," "addict" or "criminal," jeopardizes one's opportunity for a life free of legal stigma and social and psychological deprivation. Both the Iowa Su-

174. *Id.* at 419-77.

175. ERIK ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968).

176. See ERIKSON, *supra* note 163 and accompanying text. "Identity confusion" and "negative identity" are not positive outcomes. One's life will not be enhanced by one's achieving one or the other.

preme Court and Professor Goldstein failed to consider the relationship between a best interest decision and the task of adolescence.

Recall that the Bannisters were in their sixties at the time of the appellate decision. By the time Mark graduated from high school they would have been past age seventy. Given their ages, their philosophy of life, and their life style, it was not in Mark's best interests for the Bannisters to be awarded custody. The Bannisters were not best suited to deal with the vicissitudes of adolescence. In comparison to Harold Painter, they had much less of the flexibility required to deal with the emerging adolescent identity models of the 1960's and early 1970's. The "fit" required between Mark, the culture and the grandparents did not exist. Harold Painter's life history indicated that he had worked hard at achieving a culture-appropriate authentic "sense of identity." It is a fair inference from the facts, that he searched, revised, experimented and achieved identity continuity. Moreover, given his openness and vitality, he appeared to be a person who would be able to accept the shape shifting and revisionism of Mark's adolescent stage of development. Further, his adolescence would be historically "closer" to Mark's than the adolescent periods of Mr. and Mrs. Bannister. In addition, his wife Marilyn's age and social experience also made her well-equipped to participate in Mark's coming of age.

The Iowa Supreme Court's and Professor Goldstein's emphasis on continuity of relationship does not make it possible to arrive at a true best interests decision. There is no room for the complexities of adolescence within the monism of the continuity concept. A best interests decision can be reached only if psychosocial reality is comprehensively considered.

The preceding particularized discussion of *Painter v. Bannister*,¹⁷⁷ from the psychosocial best interests perspective, clearly demonstrates that the zealous judicial application of the continuity concept, and the psychological parent model, may well result in child custody decisions which are more reflexive than wise.

IV. THE CRITIQUE EXTENDED

As indicated, the BBI approach may produce decision outcomes which do not meet the child's psycho-social best interests, however, the strict application of the model may beget monsters of jurisprudential injustice. Consider the following question and testimony from *Hoy v.*

177. 140 N.W.2d 152.

*Willis.*¹⁷⁸ On cross-examination the testifying expert, Dr. Hollander, a proponent of continuity was asked:

If a couple kidnapped an infant, kept it for four years and within that four years they became the psychological parents of the child and if both the parents and the kidnappers were equal in all respects would it be in the best interests of the child to continue custody with the kidnappers?¹⁷⁹

The expert said "yes."¹⁸⁰ Such a decision would surely be wild justice. The application of the continuity and psychological parent concepts to such a fact pattern could only be the product of a professional scotoma which impairs one's capacity to see the full array of values our culture apply to such a case.

How Goldstein or Solnit would evaluate the preceding case is unknown.¹⁸¹ However, on cross-examination in a custody case, Goldstein was asked to assume that a non-custodial parent had kidnapped a child from the custodial parent. It was hypothesized that several months had passed before the child was located. Goldstein was then asked to assume that the child had developed a real psychological attachment to the "kidnapping" parent. Goldstein was asked whether the court ought to leave the child with the parent who abducted the child. In offering his opinion, Professor Goldstein characterized the act as kidnapping but went on to say:

If a new and meaningful relationship had developed over a sufficient period of time, I would be very reluctant, from the child's point of view, to move that child, and I think I am responding to your question, because to move that child in order to protect the State's policy with regard to kidnapping is to use the child as a chattel, which is what we are moving away from . . . My answer is if the child is thriving, and a substantial period of time has gone by where the old ties have begun to dissolve or break down, and new meaningful ties have developed, that I would, from the child's vantage point, I would leave him there.¹⁸²

178. 398 A.2d 109 (N.J. Super. Ct. App. Div. 1978).

179. *Id.* at 111.

180. *Id.*

181. I omit Ms. Freud from the matter as she died approximately five years ago.

182. See JUDITH AREEN, CASES & MATERIALS ON FAMILY LAW 518-19 (1982). This quote is taken from the case styled, *Rose v. Rose*, however, the parties names have been changed by Professor Areen to protect their privacy.

Certainly, a "kidnapping" by a parent differs from kidnapping by a stranger. In the case of the abduction by the parent, there normally exists a prior affectional and psycho-social relationship. Thus, the taking is certainly not as reprehensible as the taking by the stranger. It is highly unlikely that a stranger who abducts a child would be a fit psycho-social parent. However, it seems that to ignore community ideas about justice and the law and to adhere strictly to the BBI paradigm view of the case is to accept a jurisprudential vision which inhibits our ability to do substantial justice in complex cases.

It must be kept in mind that the family law perspective is only one of many perspectives. We must recognize that there are a number of interests, values, and systems perspectives which ought to be considered in decisions at an interface.¹⁸³ Children's psychological interests are very important but there are other rights and interests to be considered. Certainly when we are confronted with unusual cases such as the kidnapping cases, we must remember that they are not examples of the custody cases we normally encounter. Such unusual cases exist as a special class of cases which are best examined from the vantage points of constitutional law, criminal justice policy-making, the policy underpinnings of family law jurisprudence, and our moral/ethical vision. The kidnapping cases are hybrids which analytically cannot be contained by a model constructed for application in child placement disputes. Dr. Hollander and Professor Goldstein are consistent given their theoretical starting point, however, the complexity of reality calls for outcomes which do not reward the wrongdoers and deprive the custodians.

We turn now to a consideration of the BBI paradigm in relation to the time-honored practice of courts granting visitation rights. In *Pierce v. Yerkovich*,¹⁸⁴ Professor Solnit testified as an expert witness. The case involved an effort by the acknowledged father of a five-year old child to have his right of visitation recognized and enforced against a mother who denied him access to the child. The Court, in deciding *Pierce*, summarized Professor Solnit's basic position in these words:

In short, the professor's thesis, although variously stated is that it serves the best interests of the child with the least detriment to have his custodial parent, the one with whom the child lives, *rather than a court*, make the determination as to when and under what

183. See M. McDUGAL, ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980).

184. 363 N.Y.S.2d 403 (N.Y. Fam. Ct. 1974).

circumstance, if at all, the noncustodial parent should be permitted visitation with their child.¹⁸⁵

The Court then made the following comment:

This is indeed, a novel and startling doctrine, and if accepted literally as Professor Solnit and his co-authors Goldstein and Freud seriously urge, would leave the court shorn of much of its traditional role as *parens patriae* and guardian of the child's best interest. Quite frankly, I do not believe that the law of this state would tolerate this court, charged as it is with a responsibility for the welfare of children so supinely and abjectly abdicating its function to any parent, however well intentioned.¹⁸⁶

Rejecting the BBI approach, the court held that the custodian mother did not have the right to determine whether or not the noncustodial father should be permitted visitation. That decision belonged to the court. The court pointed out that a child has two parents and the fact that the parents do not live together cannot negate the existence of the two parent situation. The court concluded that it was in the child's best interests to have contact with the father. The *Pierce* case demonstrates the reality of the advocacy of the BBI paradigm in the arena of everyday decision-making.

The basic BBI position on *court ordered* visitation is that it may in fact be a "source of discontinuity."¹⁸⁷ The non-custodian, visiting parent is perceived as being a potential threat to the continuity of relationship which exists between the child and custodian. The emphasis is again on continuity. Goldstein, Solnit and Freud reason that the child has a difficult time relating to "two psychological parents who are not in positive contact with each other."¹⁸⁸ They state that conflicts in regard to loyalty can destroy the child's relationship with both of the parents. Further, they argue that the non-custodial parent will have little opportunity to promote the child's psychological position, because that can only be done by one who is available on a continual and uninterrupted basis. Goldstein, Freud and Solnit assert a child traumatized by separation or divorce is appropriately protected only if the child is permitted to "settle down in the *privacy* of their reorganized family

185. *Id.* at 411 (emphasis added).

186. *Id.*

187. BBI (1979), *supra* note 4.

188. *Id.* at 209.

with one person in *authority* upon whom they can rely for answers to their questions and for protection from external influence."¹⁸⁹ The BBI group's belief is that by ordering visitation, a court undercuts the child's trust in the parent, the parent's authority and the capacity of the custodian to parent.

I dissent strongly from this view. Granting the custodial parent the authority to determine visitation rights is not in the child's best interests. On the contrary, it promotes the child's best interests for decision-makers to act in accord with a checks and balances "philosophy." A decision-maker approach which emphasizes feedback carries with it the opportunity to prevent runaway.¹⁹⁰ A valid best interests model must fit the reality of human life. The truth is that custodians are not always perfect people. The best of them have their ups and downs. All too often they can manifest very real psychopathology which can cause them to do emotional and/or physical harm to the child. Alice Miller, a Swiss "non-orthodox" psychoanalyst has made this clear in her recent landmark publications.¹⁹¹ Miller's clinical work demonstrates that parents often use their children to fulfill their egoistic wishes. The results for the child are confusion, depression, alienation, pathological grandiosity, contempt for self and/or others and the inability to achieve intimacy. No one parent should be permitted to wall off a child from concerned others. What we have learned about the physical and sexual abuse of children in our culture should make us wary of totalistic authority systems from which concerned adults are excluded.¹⁹²

The psychoanalyst, Bruno Bettelheim, who has written¹⁹³ on children growing up in the multiple caretaker environment, a kibbutz in Israel, stated: "[i]n the kibbutz, things can never get as bad as they may between a lone mother [or father] and her infant, because there is more than one person taking care of the infant."¹⁹⁴ The preceding requires us to oppose the BBI group's stand on court ordered visitation. Single parent totalism is not in the best interests of the young.

The BBI approach is objectionable for other important reasons. After divorce the psychological ties between the child and the non-cus-

189. *Id.* at 117.

190. See generally GREGORY BATESON, MIND AND NATURE: A NECESSARY UNITY (paperback ed. 1980).

191. See MILLER, *supra* note 167.

192. See, e.g., FLORENCE RUSH, THE BEST KEPT SECRET, THE SEXUAL ABUSE OF CHILDREN (1981); RUTH S. KEMPE & C. HENRY KEMPE, CHILD ABUSE (1978).

193. BRUNO BETTELHEIM, CHILDREN OF THE DREAM (1978).

194. *Id.* at 137.

todian continue to exist.¹⁹⁵ Both the child and the non-custodian have important relational interests which deserve protection. It is obvious that people need not live together in order to have on-going relationships. Furthermore, it may be quite important for both child and non-custodial parent to continue to have contact. For example, a young male child may have his psychological best interests served by maintaining contact with a non-custodian father who has been serving as a gender identity model. To disrupt this relationship might well be an act against the child's best interests. The BBI group errs when they state that a child cannot relate affirmatively to two parents who have made the decision to end the marriage.¹⁹⁶ There is evidence to the contrary. One can use counselling, mediation and the power of the court to promote rational interaction.¹⁹⁷

Parents can learn to grow beyond the old domestic conflicts and come to terms with a new way of co-existence which benefits the child. After divorce, life need not be an eternal cold war between the parents.

Turning to modification of custody decrees, the law is that custody orders can be modified if a change of circumstances can be demonstrated to the court.¹⁹⁸ The kind of change of circumstances contemplated by the law is that which substantially effects the child's best interests.¹⁹⁹ Historically, it has been our collective public policy preference that cases can be reviewed to determine whether or not a child's best interests are being protected.

The BBI group rejects the traditional rule of law. They argue that the law of modification invites judicial challenge by non-custodian and consequently is a threat to continuity of relationship. For this reason, they contend that custody decrees should be final and not subject to modification.²⁰⁰ Again, their emphasis on continuity stands in the way of a true best interests analysis.

Let us consider a simple illustrative example. A custodian mother

195. See JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAK UP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 311 (1980) (giving details relating to this point).

196. See Susan Steinman, *What We Know, What We Have Yet To Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739, 743 (1983) (refuting this BBI position).

197. See CIJI WARE, SHARING PARENTHOOD AFTER DIVORCE 11-13 (Bantam ed. 1984).

198. See CLARK, *supra* note 68, at 598.

199. *Id.* at 600.

200. BBI (1973), *supra* note 4, at 37.

may have done a satisfactory job of raising a boy up to age eight. However, the facts may indicate that at the learning stage of development, the mother is failing to do a best interests job of optimizing his cognitive, social, and moral and ethical development. In fact, to a neutral observer it appears that she has lost interest in the boy. This is not an uncommon situation. Custodian parents, fathers or mothers, can grow psychologically distant from their children. Assume that the facts demonstrate that the father is highly motivated and well qualified to promote the boy's best interests development. Given such a case, it is wise public policy to maintain a legal standard which authorizes the court to modify the custody arrangement. Substantial changes in circumstances will often impact on the best interests situation. Children's lives are important and must have the protection of the law. A policy preference which places the child at the total mercy of one parent until the end of adolescence can do very little to insure justice for the young.

Given the preceding and the BBI group position, it should come as no surprise that the creators of the paradigm view court ordered joint custody²⁰¹ as another significant threat to continuity of relationship. Professor Goldstein made this clear²⁰² when he stated that the authority of the law should not be used to require an objecting parent to participate in a joint custody arrangement.²⁰³ Court ordered joint custody, according to Professor Goldstein, undermines the process of psychological bonding between the child and parent because the parents in such cases are in conflict.²⁰⁴ He holds that this state of conflict will produce discontinuity.

It is the BBI position that if the parents cannot reach an agreement on joint custody, they reveal themselves as "unfit to decide custody."²⁰⁵ Professor Goldstein declares that the court should quickly award custody to the parent of attachment.²⁰⁶ Mediation, negotiation, counselling, and arbitration are not perceived as being as applicable

201. See Carolyn S. Bratt, *Joint Custody*, 67 KY. L.J. 271 (1978) (for an excellent "pioneer work" on joint custody).

202. See GOLDSTEIN, *supra* note 31, at 47.

203. *Id.* at 46. Professor Goldstein indicates that joint custody determined by agreement of the parties is satisfactory; however, if agreement cannot be reached initially or maintained once reached then there can be no joint custody because the matter must be submitted to the court and according to Professor Goldstein the above situation serves to place continuity of relationship in jeopardy.

204. *Id.* at 48.

205. *Id.* at 51.

206. *Id.*

alternative approaches. A failure to agree on joint custody is held to be a crisis situation. The child is seen as being in jeopardy. The BBI judgment is that the child's psychological interest can be protected only if the child is placed immediately in the custody of one person with *full authority*.²⁰⁷

A close reading of Professor Goldstein's 1984 article reveals that he is, in truth, no friend of any type of, agreed or ordered, joint custody. He writes "[w]hen the fad for joint custody agreements fades, we will begin to realize how costly it, like other magic formulas, has been to children."²⁰⁸

Note that he refers to joint custody agreements as a "fad" and as "magic formulas." This is certainly strong labelling. The implication is that those who support joint custody have not truly engaged in the requisite reflection and analysis. Although the BBI group favors contact between the non-custodian and the child, Professor Goldstein states "[e]ven if requested by both parents we would object to courts making a visitation or joint custody agreement a part of a decree."²⁰⁹

Note that an acceptance of this notion in regard to joint custody would mean that the agreement would in reality have no authoritative significance. People are invited to act capriciously. Under this approach, no one has any legally protected rights.²¹⁰

In discussing joint custody, Professor Goldstein states that he and his co-workers "reasoned from the child's point of view . . ."²¹¹ This position is not supportable. Judith Wallerstein, a psychologist trained in psychoanalysis, who conducted a long-term psychosocial study of one hundred and ninety-one children from families of divorce wrote "[t]here is considerable evidence that the relationship between the

207. GOLDSTEIN, *supra* note 31, at 52.

208. *Id.* at 54.

209. *Id.* at 53.

210. Further, it should be noted that the footnotes to Professor Goldstein's article contain not one source from the legal, and sociological literature on joint custody. And, in fact, his only citation to the psychological literature is to a paper published in 1926 by Sigmund Freud. 20 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 87-174 (James Strachey ed. 1959). Freud, of course, never evaluated joint custody from a clinical or a theoretical psychoanalytic perspective. There was no joint custody phenomenon to be studied during Freud's time. Moreover, orthodox psychoanalysts practicing in the years since Freud's death have not systematically studied joint custody. Further, it is clear that there is an unwillingness to directly counter the findings of those whose work indicates that joint custody can at times well serve the best interests of the child.

211. See GOLDSTEIN, *supra* note 31, at 52.

child in the divorced family and both of his or her parents does not diminish in emotional importance within the post-divorce family.”²¹²

Wallerstein’s work is important because it is, in a very real sense, “in context” field work. Wallerstein evaluated the children at home and in the school setting, not simply in an office clinical setting. Her research leads her to believe that in many cases joint custody can, under certain situations, promote the emotional best interests of the child. She is aware that a child under the sole control of a lonely, post-divorce emotionally dysfunctional parent is likely to suffer.²¹³ Wallerstein knows that joint custody can act to neutralize the negative effects of interaction with a psychologically dysfunctional parent. The results of Wallerstein’s work indicate that, in some cases, people are not able to overcome their hostility.²¹⁴ As a consequence they may not be able to act responsibly, and joint custody will not work in these cases. It is clear that her work demonstrates that joint custody in a number of cases is a viable alternative to sole custody.

Susan Steinman, another social science researcher writing for a law journal audience, in referring to a group of joint custody children she studied stated:

These children clearly had two psychological parents to whom they were positively attached and loyal, despite the marital split. This does not support the *assumption* in Freud, Solnit and Goldstein’s, *Beyond the Best Interests of the Child* that children cannot relate well to two separated parents who are not in positive relation to one another.²¹⁵

Steinman’s view is strikingly different from the position put forward by the BBI group. As Steinman perceives it, the Goldstein, Freud and Solnit view is no more than an assumption. It is not the product of solid in-the-environment research. My participant/observer experience and my reading of the relevant research work causes me to support the

212. Judith Wallerstein, *The Child In The Divorcing Family*, in THE RIGHTS OF CHILDREN: LEGAL AND PSYCHOLOGICAL PERSPECTIVES 106 (J. Henning ed. 1982). Dr. Wallerstein and Sandra Blakeslee state that the custody arrangement itself does not determine the child’s future. It is the experience with people which is crucial. JUDITH S. WALLERSTEIN & SANDRA S. BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE 271 (1989).

213. See WALLERSTEIN, *supra* note 212, at 108.

214. *Id.* at 109.

215. See Steinman, *supra* note 196, at 747.

Steinman view.

Psychologist Joan B. Kelly points out that parents who divorce usually have not been in conflict about the approach to child rearing.²¹⁶ This is an important finding. The non-existence of a conflict in regard to parenting smooths the way to workable joint custody. In addition, Kelly's research indicates that children do better psychologically when there is contact with both parents.²¹⁷ Once again, the research results refute the BBI position.

The BBI group has failed to recognize certain realities which limits their understanding in joint custody matters. The juridical and social situation is that, in approximately ninety percent of all cases, it is the mother who becomes the custodian.²¹⁸ About eighty percent of divorced mothers with custody work outside the home,²¹⁹ and their incomes are notoriously low.²²⁰ In addition, child support is all too often not paid by obligors.²²¹ The majority of mothers in our culture are not able to remain at home and perform the "traditional" mother's role. Today's mothers must rely on babysitters, relatives, day care, kindergarten, and the schools to support them in parenthood.

It is only at the end of a long day of work that most mothers come home to act as parent. One could forcefully argue that a sole custodian mother is the victim of Kafkaesque form of punishment.²²² Her second stint of "compulsory" labor for the day begins when she arrives home. Often she returns to the domestic scene physically fatigued and emotionally overloaded or drained. Quite often while a mother-in-custody is trying to cope with employment and the task of child care, she is endeavoring to restructure her own life line. The woman finds that, in addition to working and taking care of the parenting task, she must chart and navigate the new culture of divorce. The reality is that very few mothers are able to sit at home all day in continuity of relationship with their children. In the evening, after a full day on the job, these women often are unable to put forth a psychological best interests ef-

216. See Joan B. Kelly, *Further Observations On Joint Custody*, 16 U.C. DAVIS L. REV. 762 (1983).

217. *Id.* at 764-65.

218. See MEL ROMAN & WILLIAM HADDAD, THE DISPOSABLE PARENT 23 (1978).

219. See WARE, *supra* note 197, at 44.

220. *Id.*

221. *Id.*

222. Kafkaesque means nightmarishly strange, mystifying, and bizarre. THE RANDOM HOUSE COLLEGE DICTIONARY 729 (revised ed. 1980).

fort. These women need and deserve all the help they can get. Responsibility ought to be shared. Joint (shared) custody can do much to relieve the mother (or father) custodian of an excessive psychological (and physical) burden which derives from social and economic realities. The sharing of responsibility and contact with the child will reduce the stress on any one parent and can dramatically enrich the child's life. Furthermore, in today's world of accelerated social and psychological change, a shared custody arrangement can greatly increase the child's exposure to evolving forms of human attachment and relationships. The greater the number of fit and concerned caretakers, including significant others available, and the more diverse the child's social contacts, the more likely it is that the child's psychological and social development will be enhanced.²²³ The continuity concept is simply not comprehensive enough to be useful in dealing with the dynamics of legal and human reality.

In order to fully understand the BBI position on joint custody, it is necessary to examine the concept of "family" and "authority". Beneath the verbal structure of the BBI paradigm exists a psychological and social commitment to a particular concept of the "family". This family of preference might well be labelled the family-of-privacy.²²⁴ It is most often known as the traditional or nuclear family. This type of family is rooted in the Western middle class family structure which came into prominence in the sixteenth and seventeenth centuries.²²⁵ The context of its creation was the culture of the industrializing nations of Western Europe. This family-of-privacy was the product of particular social, economic and historical forces.²²⁶ This new family structure was a "created" form; it did not derive from biological compulsion. It is virtually a law of history that cultural ideology in large measure determines the idealized family form of a particular period of history. However, it is here pointed out that not everyone in the Western world has grown up in a family-of-privacy. The poor generally have not been able to afford to live in this manner.²²⁷ And, in fact, those children who have lived in this "traditional" family have been subjected to isolation, instruction in individualization and competition, and split off from life in the broader

223. See BETTELHEIM, *supra* note 193, at 137.

224. BBI (1979) *supra* note 204, at 7.

225. See PHILLIPPE ARIES, *CENTURIES OF CHILDHOOD*, 365-404 (1962).

226. *Id.*

227. See JOEL KOVEL, *THE AGE OF DESIRE* 108-33 (1981). Perhaps the family-of-privacy has been more a fantasy than a reality.

community.²²⁸ This family-of-privacy does much to make the child exceedingly dependent on the parents. Further, it is arguable that the family-of-privacy and its social alienation inducing tendencies have contributed to the absence of genuine community in our time.²²⁹ Psychoanalysts and other therapists have treated enormous numbers of people who were victims of this family structure.²³⁰ This is not to say that privacy-in-itself is valueless. Traditional families are as important as any other form of family. However, privacy has been overstressed in Western culture. The truth is that in our time the family-of-privacy is simply one living style among many. Our culture has changed dramatically and will continue to change.

The perfect traditional family of today is an experience most people will not have. It is clear that the nuclear family with strictly assigned "traditional" sex roles is on the wane. It is well known that single-parent families and blended families are common. Certainly the line between the family and the broader culture of day care center, school, media, and recreational life, has been blurred and new forms of relationships between family members and "outsiders" have come into being.²³¹ The family-of-privacy is not the only reality which one sees in the world. Reality is other than the proponents of orthodox psychoanalysis would have us believe, and a theory-determined preference for the family-of-privacy, or traditional family, can do little to help us fashion sound legal policy to produce realistic court custody decisions. We are best advised to study things as they truly are. Continuity of relationship with a psychological parent in a family-of-privacy is an image too removed from contemporary realities to guide legal decision-making.

According to the BBI originators, the family-of-privacy has "one person in authority."²³² This person protects the child from outsiders and acts as the fount of all wisdom. This monotheism is a hangover from older patriarchal times.²³³ The patriarchal era is coming to an end, but the predilection of some for mono-authority survives. One should not be concerned that in the BBI post-divorce and post-separation family, the new single authority is most frequently the mother.

228. *Id.*

229. See Bruno Bettelheim, *Some Comments on Privacy*, in *SURVIVING AND OTHER ESSAYS* 399-411 (1979).

230. See R. LAING, *THE DIVIDED SELF: A STUDY IN SANITY AND MADNESS* (1960).

231. See WARE, *supra* note 197.

232. BBI (1979), *supra* note 204, at 117.

233. See generally ERIK FROMM, *THE CRISIS IN PSYCHOANALYSIS* 110-35 (1976).

The determinative logic is not of gender, but structural form. The "placing" of authority in one pre-eminent being is what is important. This position on authority and the family is directly derivative of the patriarchal cultural origins and the mono-authority bias of psychoanalysis. It is certainly fair to state that Freud was a very powerful mono-authority who dominated orthodox psychoanalysis.²³⁴ In addition, psychoanalytic treatment with the analyst in charge and the analysand ("patient") in Transference²³⁵ is a very "private" little dyadic "family" situation. The person receiving analysis is the child and the analyst is the parent (authority figure). The preference for authority and privacy displayed in the work of the BBI group appears to be rooted in the history and method of psychoanalysis. We cannot, however, allow ideas which fit the history of psychoanalysis and the treatment of people in analysis to be implemented in legal reality if they do not "fit." In our time, authority for the child comes from many sources, in many forms. It comes from two parents, one parent, a grandmother, uncles, aunts, other relatives, day care workers, babysitters, television, peers, older children, teachers, and other unrelated adults. The elements of authority can be combined into a multiplicity of possible configurations. Television, by itself, has radically reworked the topography of authority. Today norms and values are electronically projected. Authority, to a very great extent, is imaged up on the 525 "lines" of the television screen.

In passing judgment on the sharing of responsibility for the child through joint custody and visitation, we are best advised to accept social reality and avoid the BBI preference for mono-authority. Joint custody can, in many cases, do much to promote the child's psychological best interests. Outdated views on authority can serve as no significant support for the continuity of relationship concept.

To this point, a great deal of attention has been devoted to the continuity concept (and the related idea of the psychological parent) because it is the quintessence of the legal and psychological BBI paradigm. It is clear that Goldstein, Freud and Solnit's views on custody dispute outcomes, visitation, modification of custody and joint custody

234. See O. MANNONI, FREUD 108 (Vintage 1st ed. 1974). My basic contention is that Freud, as the leader of an "outcast" movement, felt it necessary to set himself up as *the* authority. He, like Moses, became the "law-giver."

235. In transference the analysand-driven by the unconscious-is psychologically deeply involved with the analyst. See ANDREW WATSON, *supra* note 119, at 2-8 (discussing transference).

are overwhelmingly determined by their penchant for the continuity concept. In fact, a dedicated reductionist might argue that beyond the continuity concept, all is but tautology. Logic supports such a view. The truth is that all other formal elements of the BBI paradigm are derivative of the continuity concept. The paradigm is, in fact, a logic loop. This is, of course, why this article has devoted so much effort to an extensive explication of this central concept. All other BBI paradigm ideas are simply secondary. For this reason only a relatively small part of this article will now be devoted to a discussion of "the child's sense of time,"²³⁶ the law's inability to make predictions,²³⁷ and "the least detrimental alternative"²³⁸ test.

The BBI group has stated that "the child's sense of time" is an integral part of the continuity concept.²³⁹ They argue that custody cases are potentially quite destructive of continuity, and therefore, must be heard quickly and decided with dispatch, keeping the continuity concept in mind. Because a rapid movement to finality of decision is necessary to protect the child's psychological interests, the appellate process must also be accelerated. Basically, the task of the court is to determine quickly with whom the child is in continuity.²⁴⁰ The fundamental issue, put another way, is: who is the psychological parent? This person, if fit, becomes the sole legal custodian. While I agree that final decisions in these cases are too often needlessly delayed, I cannot fully accept this position. It is clear that the sense of time concept is inextricably tied to the continuity concept. "[T]he child's sense of time" idea, can rise intellectually no higher than the whole continuity concept. The continuity concept clearly does not take into account such fundamental matters as the child's particular needs, the adult's fitness in regard to these needs, and the benefit of contact with both parents, etc. In the abstract, most would agree that it is important to decide custody cases as quickly as is reasonably possible. It is best to decide on arrangements, work out the necessary plans and get people going in a new life pattern. However, the BBI approach would appear to be a rush to custody. To rush to finality is to commit judicial errors. It takes a significant period of time to gather the relevant best interest facts, analyze them and place them before the judge. Further, the court should al-

236. BBI (1973), *supra* note 4, at 40-49.

237. *Id.* at 49-52.

238. *Id.* at 53-64.

239. *Id.* at 40.

240. *Id.* at 42-43.

ways carefully evaluate the material presented by counsel, parties, witnesses, etc. Mediation, counseling and negotiation, all recognized aspects of our system, take time if we are truly to further the child's best interests. In addition, appropriate appellate review takes time. We can expedite, but a bullet train process will not serve the child's best interests.

In summary, the "child's sense of time" idea is of very limited utility for two reasons: first, because it is bound to the flawed continuity concept; second, because it does not take into account the time realities of gathering and fairly evaluating the information necessary to the court's making of best interests decisions.

Goldstein, Freud and Solnit believe that the law is but a crude "instrument"²⁴¹ for dealing with that legal problem which we call the child custody case. The BBI group argues that the law can recognize relationships and allow them to evolve. In addition, Goldstein, Freud and Solnit stress their belief that the law does not have the resources to monitor relationships on a day to day basis.²⁴² It is their view that the law cannot predict a child's future needs and future events which impact upon that child.²⁴³ Because of this perceived defect in the legal process, the BBI group states that no conditions should be imposed on the custodian.²⁴⁴ Private ordering should prevail.²⁴⁵ However, Goldstein, Freud and Solnit do believe that there is enough knowledge available to judges so that a limited number of things can be done with some assurance. It is possible, according to the BBI proponents, for the judge to identify which person among those contending for custody is a psychological parent or has the capacity to be such a parent.²⁴⁶ They state that it is possible to predict that the person most suited to be custodian is the person with whom the child has had a relatively long term, *continuous* psychological attachment.²⁴⁷ Finally, we are told that separation from the psychological parent and uncertainty in regard to placement will do significant psychological damage to the child.²⁴⁸

Admittedly, the law cannot determine life on a day-to-day basis. This is self evident. Furthermore, it is not possible for decision-makers

241. BBI (1973), *supra* note 4, at 49-50.

242. *Id.* at 50.

243. *Id.*

244. *Id.* at 52.

245. *Id.* at 50.

246. *Id.* at 51.

247. BBI (1973), *supra* note 4, at 51.

248. *Id.*

to predict exactly what the future has in store for a child. The great majority of judges do not strive to act as supervisors who seek to meddle in the on-going everyday life of the family. Professor Goldstein has the impression that the judiciary is overly concerned with the control of family life.²⁴⁹ My view is that in the bulk of the cases, judges make a sincere effort to insure that best interests decisions are implemented.²⁵⁰ Intervention is relatively limited. Questions of visitation and support do come to court, but there is no day-to-day "supervision," and most judges are not interested in performing such monitoring. As to the law's capacity to predict and impose conditions, visitation is the condition which most concerns the BBI group.²⁵¹ Generally, they oppose it. Although visitation is a "condition," in a sense, a visitation decision is not an attempt to "predict" the future. A visitation decision is primarily an "in the present" effort to adjudicate rights in the best interests of the child. The same is true of a decision regarding shared custody. I doubt that the judicial assumption is that scientific forecasts of the future are being made. However, the law does make special provisions for the future. Under prevailing norms, the courts have the power to modify decrees in order to protect the child's best interests.²⁵² Every experienced judge is aware that things can change and that it may be necessary, in the future, to change arrangements regarding custody, visitation, etc.

The fundamental position the courts take is: "Let us try to make the best decision we can now, hopefully it will hold up in the future." The law's view is that if things change substantially, the new situation will be dealt with through a change in custody or some other appropriate remedy.

The BBI position on prediction and conditions is in large part an extension of their preference for a private ordering.²⁵³ This preference would appear to derive from their positions on familial mono-authority. As a result of this orientation it is arguable that they wish to limit the law's jurisdiction. The BBI group leaves to the judge the task of determining who is the psychological parent in continuity. This, of course, is

249. See GOLDSTEIN, *supra* note 31, at 52.

250. See MICHAEL WHEELER, DIVIDED CHILDREN 52-71 (1981). My participant/observer field research gives me a high degree of confidence in the view expressed in the text.

251. See BBI (1973), *supra* note 4, at 37-38.

252. See HARRY D. KRAUSE, FAMILY LAW: CASES AND MATERIALS 847-62 (3rd ed. 1990).

253. See BBI (1973), *supra* note 4, at 50.

a rather simple task. It comes down to who cares for the child most of the time? Note that the judge is not to concern herself or himself with the child's full range of best interests needs. The BBI group desires not only to prevent the courts from making decisions pointed at the future, but wishes to deny the courts the right to impose any conditions, such as visitation, which undercut the authority of the parent-in-custody. The BBI group undoubtedly takes this stand because they wish to support the continuity concept from all conceivable directions.

Finally, the BBI idea that we can predict that children will be harmed by separation from the psychological parent and damaged by uncertainty produced in cases which are not disposed of rapidly, does not take us far enough. It, at first glance, engages our sympathy, but it seems evident that a rush to judgment is not in the child's long term best interests. Substantial justice only can be done by a comprehensive best interests, psychosocial, analysis.

At this juncture, we turn to the ultimate element in the BBI paradigm: the least detrimental alternative.²⁵⁴ It is the BBI's groups substitution for the time-honored best interest test. This element, when carefully analyzed, turns out to be a specific custody placement and procedure for placement which is made in accordance with the BBI groups views on continuity, the child's sense of time, and the law's limitation in regard to prediction. The fact is that the least detrimental alternative idea is but the final "legal test" element in the great logic loop which makes up the paradigm. Aptly translated, least detrimental alternative means that cases are to be decided in accordance with the three preceding main elements of the Goldstein, Freud and Solnit model. Reduced to operational reality it means that all decisions must be based on the continuity concept.

The BBI group states that the least detrimental alternative standard is to be preferred because it emphasizes the fact that the children of divorce and custody disputes are victims who are at risk.²⁵⁵ From their point of view, a custody decision is just a matter of making the best of a bad bargain.²⁵⁶ I cannot share this extraordinarily pessimistic outlook. Divorce, separation, and the necessity of making custody determinations are cultural and historical realities. Life changes and loss of relationships are something human beings learn to deal with.²⁵⁷ If

254. *Id.* at 53-64.

255. *Id.* at 54.

256. *Id.* at 63.

257. See BOWLBY, *supra* note 89.

things are done in the right spirit and with social support, things can work out. It is certainly possible that, in many cases, the child's post-divorce life can turn out to be better than the child's pre-divorce life. The BBI "legal test" seems to be the product of Goldstein, Freud and Solnit's inability to see family break-up in the light of modern reality.²⁵⁸ The rearrangement of the life configuration over time is part of the *normal* passage through existence in our era.²⁵⁹ We need not see things so "darkly." What we must do is develop institutions, programs and procedures which promote the child's best interests under contemporary conditions. Keep in mind that divorce and conflict over custody does not condemn all involved to life in a depressing Ingmar Bergman film. Perhaps the orthodox psychoanalytic view inclines its followers toward the Bergmanesque. A theory built on ideas such as the death instinct, the repetition compulsion, sadomasochism etc. certainly might dispose one to the "tragic sense of life."²⁶⁰ My opinion is that the least detrimental alternative standard is a manifestation of the impulse to overreact to perceived crises. The traditional best interests test is more in keeping with an active, life-affirming approach to the custody issue.

Having completed my explanation and critical evaluation of each element of the paradigm, I now offer some miscellaneous, but relevant, thoughts on the work of the BBI group.

In his 1968 essay "Psychoanalysis and Jurisprudence"²⁶¹ Professor Goldstein announced something which should be of great interest to us. He stated that "[s]ince dispositions are frequently rendered in divorce proceedings without presenting the decision makers with adequate data about the child and the available alternative custodians, a presumption should be established to favor relatively long-standing and continuous relationships."²⁶² This pronouncement has escaped the attention of those who have criticized the work of Goldstein, Freud and Solnit. This statement does much to undercut the authoritative nature of the BBI paradigm. Keep in mind that the paradigm is essentially the continuity concept. The general rule is that custody goes to the person who has spent the most time with the child. Professor Goldstein's words indicate

258. The orthodox psychoanalytic perspective appears to isolate the BBI advocates from the interpersonal process dimensions of modern culture.

259. See, e.g., DANIEL LEVINSON, THE SEASONS OF A MAN'S LIFE. (Ballantine paperback 1979).

260. See SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (W. W. Norton paperback ed. 1961)(detailing this "tragic sense of life").

261. See GOLDSTEIN, *supra* note 19.

262. *Id.* at 475.

that the continuity concept is in essence a makeshift. The professor's statement indicates that what is truly needed in all cases is adequate data. This author agrees. Further, our discussion of *Painter*²⁶³ makes it clear that there exists a useful basic model which can guide us in gathering and evaluating the important facts. It is a great mistake to raise a stopgap formula to the level of decision-making paradigm. This is simply not the way to promote the psychological best interests of the child. The way to produce appropriate decisions is to conscientiously apply ourselves to the acquisition and evaluation of the relevant facts.²⁶⁴

The psychoanalytic infrastructure of the BBI paradigm makes it clear that the type of psychoanalysis embraced by the BBI group is the orthodox psychoanalysis long-championed by Anna Freud. As Paul Roazen, a scholarly commentator on psychoanalysis, wrote in 1975, "Anna Freud remains today one of the most outspoken defenders of psychoanalysis."²⁶⁵ It is clear from the context of Roazen's statement that he was referring to orthodox psychoanalysis. However, it must be stated that the orthodox theory is simply outdated. The classical theory is too much of a product of Freud's immersion in the "work-machinery image of his time."²⁶⁶ His psychodynamic model was in large measure determined by the concepts current in the nineteenth century world of physical science. Freud's language and preferred metaphors plainly reveal his affinity for the concepts of mechanics, work and energies.²⁶⁷ For example, the "ego" of Freud's psychoanalysis acts as a machine which converts the energy of the "id," the reservoir of sexuality and

263. *Painter*, 140 N.W.2d 152 at 156.

264. In order to do this most effectively, those of us in legal education must continue to make law students aware of the models useful in advocating and deciding such cases, expose them to appropriate fact gathering processes, teach them how to evaluate the facts, demonstrate how the facts should be presented to the trier and sensitize them to the human dimensions of child custody cases. Over the last decade legal education has done much to prepare students to operate in the modern custody milieu. We surely must do more. Moreover, continuing legal education programs have enlightened many who did not have the benefit of the new curriculum. Many individual social workers, psychologists, human development specialists, legal scholars and psychiatrists have done a great deal to educate judges, law professors and practitioners. Creative and concerned law practitioners have instructed many of us on this matter of deciding best interests custody cases. All of us must continue to raise the collective level of the law's best interests awareness. We should not allow ourselves to be enthralled by the skill of those who have mastered the art of Occam's razor.

265. PAUL ROAZEN, FREUD AND HIS FOLLOWERS 458 (1975).

266. See EDGAR LEVISON, THE FALLACY OF UNDERSTANDING 58 (1972).

267. *Id.* at 59.

aggression, into a force which can be used in socially acceptable ways.²⁶⁸ Drive, cathexis and libido are all concepts derived from energics.²⁶⁹ Repression is a concept derived from hydraulics.²⁷⁰ The orthodox psychoanalytic model has very definite bio-mechanical qualities. It is this model which has so greatly influenced Anna Freud and her BBI colleagues. Anna Freud, in fact, has discussed the possibility of refining ego functions so that they become "more and more objective and independent of the emotions until they become as accurate and reliable as a mechanical apparatus."²⁷¹

Today, other models are available for those who are working in family law which will prove to be far more useful than the nineteenth century rooted paradigm of orthodox psychoanalysis which has very definite bio-mechanical qualities. The following models, briefly discussed, are firmly rooted in the twentieth century experience of human beings. Erik Erikson's model²⁷² introduced in the context of the analysis of *Painter*,²⁷³ is one which has great potential utility. Erikson's theoretical model which is soundly rooted in clinical observation has been built over the last thirty years. He certainly owes a very real debt to Freud, but his work is substantially informed by modern anthropology, history, developmental psychology, ethics/morals, politics, literature, etc. Erikson's model is far less reductionistic, closed and negativistic than that of orthodox psychoanalysis. Robert J. Lifton, a psychiatrist, has certainly drawn on Freud's pioneering work but he too offers a new paradigm.²⁷⁴ He has created a new model by mending a revisionist psychoanalysis and the lessons of modern history.²⁷⁵ Lloyd DeMause has also joined history and psychoanalysis to teach about the psychology of children and adults.²⁷⁶ Gregory Bateson, an eclectic scholar, has combined communications systems theory, ecology and psychoanalysis to

268. *Id.*

269. *Id.*

270. *Id.*

271. PAUL ROAZEN AND ERIK ERIKSON, THE POWER AND LIMITS OF A VISION 22 (1976). Scrutiny of Anna Freud's work reveals that it, like her father's, is rooted in nineteenth century concepts of physical science. Her most widely read publication is *The Ego and the Mechanisms of Defense*, 2 THE WRITINGS OF ANNA FREUD (1967).

272. See ERIKSON, *supra* note 7.

273. See LASWELL, *supra* note 78 and accompanying text.

274. See R. LIFTON, THE LIFE OF THE SELF (1976).

275. See R. LIFTON, DEATH IN LIFE: SURVIVORS OF HIROSHIMA (1969); R. LIFTON, HOME FROM THE WAR (1973); R. LIFTON, THE BROKEN CONNECTION (1979).

276. See DEMAUSE, *supra* note 138.

give a new perspective on family life.²⁷⁷ Heinz Kohut,²⁷⁸ a psychoanalyst, has authored a new self-psychology which emphasizes interpersonal phenomenon and the development of the individual's narcissistic life line. Finally, Alice Miller, a Swiss psychoanalyst, has created a revisionist psychoanalytic model focusing on failures in parental empathy and the resulting impact on the child's psychological development.²⁷⁹

In summary, there is much modern work available to us which incorporates certain psychoanalytic ideas of current utility and brings us a great deal of the relevant wisdom of our time. Ultimately, we live in our own historical era. The legal problems of our time are best understood when we employ models relevant to our condition. The Victorian era is dead. It is simply fact that orthodox psychoanalysis was not formulated by people who understood the contemporary "culture of divorce." Further, we live in a new, electronic, information, economic, political and social environment - we are "new" people. We must turn to the "new" psychology and other up-dated disciplines to aid our quest for human justice. Thus, the BBI paradigm takes parents, children and the law out of the context of modern relevancy. There is more to parent-child life in these days than the family-of-privacy. Day care, baby sitters, single parent life styles, single parent family structure, the unwed mother phenomenon, latch-key life, joint (shared) custody, blended family existence, media impact on children and parents etc. have worked enormous changes in the way children and their parents live. We cannot deny the existence of a recently evolved and complex reality.

Anna Freud's orthodox psychoanalysis is objectionable for another fundamental reason. The theory is essentially a psychology of social adjustment.²⁸⁰ This theory assumes that the child is primarily a being of impulse which must be tamed. Ms. Freud, in commenting negatively on freedom-oriented progressive schools, stated "[i]nstead of forcing the child to fit into the environment, they aim at fitting a flexible environment to the needs of the individual child, so as to give the pupil's abilities the widest possible scope for expression."²⁸¹ She opposes such

277. See G. BATESON, *STEPS TO AN ECOLOGY OF THE MIND* 271-78 (1972).

278. See generally HEINZ KOHUT, *THE ANALYSIS OF SELF* (1971); HEINZ KOHUT, *THE RESTORATION OF SELF* (1977) for an overview of Kohut's work.

279. See MILLER, *supra* note 167.

280. See, e.g., 4 *THE WRITINGS OF ANNA FREUD 1945-1956*, 75-94 (1968).

281. *Id.* at 84.

progressive schooling because "the result is a lack of adjustment to current reality."²⁸² This preference for social adjustment is made manifest in the academic and expert witness work of the BBI group.²⁸³

Certainly, one must be able to act in an adaptive manner. An individual must understand the social context in which he or she lives and be able to take this context into consideration when making private or public decisions. That flexibility is desirable. Social reality is always a process of change. By forcing an "adjustment" from the child we, in fact, deprive her or him of not only autonomy but the capacity to adapt to social change.

If a child is to have a full measure of individual best interests opportunity, something else is needed. To succeed over the life span the child must be permitted to become protean enough to adapt to cultural change.²⁸⁴ In other words, we should seek to give children the power to self-actualize. One must "adapt" to his or her personal self and loved ones as well as to society. To know only the norms current as injunctions and exhortations during one's childhood is not in one's best interests. There is no overall social advantage in such a situation because it does not prepare the young to meet the future.

Edgar A. Levenson, in discussing the move to a new psychoanalytic paradigm, wrote that "[f]amilies in our present society, although in rapid flux, are quite differently organized [from the family of privacy]. They tend to be nonauthoritarian, matriarchal, relatively unstructured. . . ."²⁸⁵ The psychoanalytic model which underlies the BBI paradigm is the product of a social order which no longer exists. Adjustment, authoritarian structure, patriarchal control and "traditional" family life styles are no longer "dominant" phenomena. A new "best interests test" focused decision-making model built on a contemporary human science, is required in order to have informed child custody adjudication in a culture of change.

V. CODA

This coda is affixed to the criticism of the BBI paradigm in order to suggest that there is an alternative approach to the resolution of

282. *Id.*

283. See BBI (1979), *supra* note 4, at 16 (using the term "*social adaptation*").

284. See LIFTON, *supra* note 275 (the body of Lifton's works both describe and analyze this "protean quality").

285. EDGAR LEVISON, THE FAILURE OF UNDERSTANDING 113 (1972).

child custody disputes. Although the construction of a critique has been my primary endeavor, I believe that an obligation exists to describe, in short form, a manner in which lawyers, judges and psychological experts might better approach the matter of the child's psychological best interests.²⁸⁶

It is emphasized that a true best interests approach must emphasize the child's psycho-social needs rather than a developmental perspective. Any serious best interests analysis must be retrospective, focused in the present, and at the same time, prospective. The essence of the best interests paradigm, presented here, derives from the work of Erik Erikson a non-medical psychoanalyst, field researcher, and developmental theorist.²⁸⁷ I have taken certain necessary terminological liberties with Erikson's model so that his work is more easily understood; however, the essential integrity of Erikson's vision is preserved. Keep in mind that the elements of Erikson's model presented at this point serve to enhance our best interests perspective as it relates to the resolution of child custody disputes.

For those working in the child custody arena, the first five stages of Erikson's model are relevant. These five stages cover the child's psychosocial development from birth through adolescence²⁸⁸ and will be discussed in some detail.²⁸⁹ In order to provide additional data which sheds light on the best interests decision in *Painter*, I further elaborate on the brief outline of the Erikson model.

A. Stage I: The Age of Attachment, Reciprocity, and the Formation of Basic Trust during the first year of life

In this first phase of psycho-social development, the child needs very significant physical and emotional input. The child needs attention and stimulation. This is a time period during which the child seeks very close attachment to a custodian who will provide nurturing. Any custo-

286. An earlier version of this alternative paradigm has been discussed in a prior publication. See John Batt, *Child Custody Disputes: A Developmental-Psychological Approach to Proof and Decision-Making*, 12 WILLAMETTE L. REV. 491 (1976).

287. Erikson is a Pulitzer Prize winner and a leading American humanist as well as a clinician/theoretician. For a most personal and readable perspective on the man and his work, see R. EVANS, DIALOGUE WITH ERIK ERIKSON (1964).

288. See ERIKSON, *supra* note 7.

289. For the most accessible detailed account of the five stages, see ERIKSON, *supra* note 118.

dian must be capable of giving a responsive human reaction²⁹⁰ and a best interests legal analysis must focus on this developmental reality. It is requisite for appropriate development that the custodian and child must form a relatively close personal bond. The child's psychosocial development requires a relationship based on close reciprocal interaction. In order for the child's best interests to be promoted there must be a commitment by the custodian to adapt to the child's need for attachment and psychological and physical stimulation. The custodian must learn to adjust to the child's internal bio-psychological clock. Time-scheduled mechanical parenting will not meet the child's needs. Moreover, the child's best interests require that any person acting in a custodial capacity must share substantial periods of time with the child concerned. Close human contact with the child is absolutely essential for appropriate development.

The psychological consequences of appropriate child and custodian interaction during this period are significant. A positive first phase experience produces "a sense of basic trust."²⁹¹ This "sense of basic trust" allows a child to feel confidence in those who nurture and in the child's immediate environment. Over time, this form of trust generalizes to other persons and other environmental settings. This feeling of basic trust allows children to bond with and show concern for people outside of the family. In addition, it promotes communal combinations and social interaction. A just society based on equality before the law must draw on a social structure derivative of this "sense of basic trust." Further, the development of this condition of trust gives rise to a sense of hope.²⁹² This sense of hope gives one faith in a future of possibilities. All this serves as a defense against the inevitable set-backs, disappointments and tragedies of real life. Only a custodian who can be deeply engaged with the child during this stage of development can give the child what she or he needs. Finally, a best interests custody court disposition will be one which favors a potential custodian who can meet the very special needs of the Stage I child.

290. See Erik Erikson, *Identity and the Life Cycle*, in 1 PSYCHOLOGICAL ISSUES 63 (1959)(for a discussion of this requisite).

291. See ERIKSON, *supra* note 153, at 96-97.

292. See ERIKSON, *supra* note 7, at 79.

B. Stage II: The Quest for Autonomy during the second and third years of life

During this stage of development the child is much less dependent than he or she was in the first phase of development. There is a significant increase in motor behavior. There is also a concomitant need to assert the self.²⁹³ The child is actively exploring the world in which he or she lives. The "I", often in the form of "me", begins to assert itself. The child is initiating the development of an independent existence. Of course, the child still needs the custodian, but the relationship is in the process of changing. The child seeks an age appropriate sense of liberation, a feeling of autonomy. She or he starts to manifest a personal sense of will.

In this developmental phase the child insists on doing things for himself/herself. Furthermore, the phase two child can be rebellious and "no" saying. Negation becomes a way of asserting the burgeoning self. This kind of self expression can frustrate the custodian, but an appropriate custodian is one who is able to accept this situation as a natural part of the child's psychological development.²⁹⁴ Too much "law and order" will break the child's spirit and undercut his or her authentic autonomy.²⁹⁵ The proper custodian for the child in this stage of development is the person who can accept the fact that the child is no longer as dependent as he or she was in stage one. The best custodian for the child, in this time of the child's life, is one who is not disturbed by the child's movement along the autonomy line. A custodian who institutes repressive measures during this developmental phase does no act in the child's best interests. A best interests custodian must be tolerant and capable of using reasonable restraints in a manner suited to the child's development.

C. Stage III: The Phase of Expansion between ages of four and five

At this time, the child ventures away from the family and enters the greater social realm. Play with children from other homes gives the child new experiences. Additionally, the child begins to see that grown-ups work in stores, as police officers, truck drivers, office workers, and

293. See ERIKSON, *supra* note 153, at 107.

294. *Id.* at 109.

295. *Id.* at 113.

other jobs. The child's social awareness increases dramatically. Through play, the child explores some of our culture's available socio-economic roles. Phase III is one of energetic activity. Aggressively curious, physically active, and verbally invasive, the child is at times approaching a "run-away" state.²⁹⁶ However, the custodian must understand that this is normal from the child's perspective. Again a best-interests stance dictates that the custodian act in a manner which provides reasonable protection for and restraint of the child. On the other hand, there must be a reasonable opportunity for self expression in deed, thought, and word.

A successful phase three child has learned to exercise initiative.²⁹⁷ However, during this period of development the child also begins to learn that one's personal initiative must be channeled. Culture requires the child to become concerned about intention, objective and result. Our culture expects the child to develop a "sense of purpose."²⁹⁸ In addition, the child must learn to relate to social groups made up of non-family as well as family members. The child must come to learn that life requires harmonious social interaction with those beyond the family enclave. Finally, it is well documented that phase three is a time when sexual identity is beginning to become strongly established.²⁹⁹ A gender style is being derived from the child's experience in family and culture. Given this information, it is certain that this phase of development is a lively one.

The best interests custodian under law for the phase three child will have the following orientation:

1. prefer age-appropriate, independent behavior, not tether the child to the family
2. be encouraging of and supportive of purposeful activity
3. be able to model and support culture appropriate gender identity development
4. will not be threatened by the child's movement away from the custodian and into the world of others

296. *Id.* at 115.

297. See ERIK ERIKSON, *CHILDHOOD AND SOCIETY*, 255-58 (2d ed. 1983).

298. See ERIK ERIKSON, *INSIGHT AND RESPONSIBILITY* 120-22 (1964).

299. For a well-written explanation of the gender making process, see H. NUNBERG, *PRINCIPLES OF PSYCHOANALYSIS* 69-70 (1955).

D. Stage IV: The Learning Age from approximately the sixth through the eleventh year

In discussing Painter,³⁰⁰ much information about this phase has been put forth. Thus, a short description is presented here. In this phase of psycho-social development the child is transported by culture into the environment of school.³⁰¹ The child is now engaged in learning fundamentals which are relevant to taking a place in the society and economy of his generation. This is a time of rapid intellectual growth promoted by adults situated outside of the home. This does not mean that parents have no role to play. They can play a significant part in introducing the child to the broader culture and its fund of knowledge and values. However, at this time, the adult agents of culture operating in the school environment will play a major role in the child's development. The child is now caught up in the task of working to master the operations and values deemed important by our culture. Mastery and competency are fundamental matters. Given this psycho-social reality, the preferred best interests custodian under law is one who can act to support the child in the educational setting.

E. Stage V: Adolescence and the Struggle for Identity between age twelve through age eighteen

The crucial task of adolescence is to fashion an individual sense of self. Erikson uses the term "existential identity."³⁰² Earlier psychosocial experiences are integrated and the young person is prepared to move into adulthood. Acquiring an authentic "sense of identity"³⁰³ is no simple matter. The process of identity acquisition is, at times, quite chaotic. The adolescent changes styles, ideologies, roles and behavior with great frequency. She is a revisionist-in-action. To the adult, it may appear that the adolescent is adrift on the sea of existence. But the adolescent's efforts are purposeful. The process has its own validity. The adolescent is trying to answer the question: "Who am I?"

Viewed from an outcome perspective, adolescence holds three pos-

300. See LASWELL, *supra* note 78 and accompanying text.

301. See ERIKSON, *supra* note 153, at 122-28.

302. On the matter of "existential identity" see ERIKSON, *supra* note 7, at 73.

303. See ERIKSON, *supra* note 153, at 128-135; see also ERIK ERIKSON, TOYS AND REASONS 106-110 (1977).

sible fates. The adolescent can develop an authentic, sustaining self, flounder in "identity confusion,"³⁰⁴ or accept a "negative identity."³⁰⁵ Of course, the coming into being of an authentic identity is the desired result. "Identity confusion" means that the person will be psychosocially impaired and, if things are not corrected, will experience vitality eroding psychological symptoms throughout his or her lifetime. If the outcome is a "negative identity" one suffers throughout life as an outcast, beyond integration into our culture. Delinquency, crime and severe mental illness may become the lifeline of such a person. The best interests custodian for a young person on this identity quest is the adult who can be empathically involved in the journey, but still keep in mind that, as an adult, one is in a different phase of the life cycle. The competent custodian will not be a person who returns to adolescence. The best interests custodian must be one who can act out of adult wisdom to facilitate best interests development. Further, it is important that the custodian not be authoritarian, negativistic or highly punitive. An effective custodian will be one who understands that adolescent experimentation is necessary. However, the effective custodian is able to recognize when the young person is in real trouble and intervene, if necessary. The best interests caretaker is the person who can accept the protean style of adolescence, avoid promoting negative identity or identity confusion, provide wise counsel and act to promote a positive identity.

Thus, the Eriksonian paradigm has very significant potential for use in the child-custody decision process. The use of the paradigm by attorneys, psychological experts and judges can do much to produce an appropriate best interests result. The above discussed paradigm is of more use to those involved in the child custody arena than that model put forth by the BBI group.

Used by itself, the Erikson derived paradigm has great utility. However, certain rather recent developments in modern psychoanalysis have provided us with important concepts which ought to be affixed to the Eriksonian paradigm. For example, non-orthodox psychoanalytic clinicians and theoreticians, Heinz Kohut³⁰⁶ and Alice Miller³⁰⁷ have developed empathy-centered approaches to psychotherapy. Both of

304. For a discussion of identity confusion, see ERIKSON, *supra* note 153, at 131.

305. For a discussion of the concept of negative identity, see ERIKSON, *supra* note 7, at 73.

306. See KOHUT, *supra* note 278.

307. See MILLER, *supra* note 167.

these psychoanalysts focus on so-called object relations and the self. The technical term "object relations" refers to relationships between people. Kohut and Miller stress empathic interpersonal attachments and their relationship to the child's development of a positive sense of self. Both of these free-thinking psychoanalysts eschew the nineteenth century vocabulary and models of orthodox psychoanalysis. Alice Miller's work is especially accessible to those who have little experience with psychoanalytic or psychological concepts.

Heinz Kohut stresses the importance of the empathic situation.³⁰⁸ The custodian must be psychologically in tune with the child's needs. In order for successful parenting to occur the adult, through identification with the child must be able to "experience" the feelings, thoughts, wishes, anxieties, etc. of the child. Empathy allows the custodian to "read" and then respond in line with the "information" received through the empathic experience. Kohut who is certainly the pioneer of the "science of empathy", states:

Empathy is, I am convinced not just a poor relation of those other forms of cognition that we hold in high esteem because we consider them functions of our prized intellect. Empathic modes of perceiving ourselves and our surroundings exist from the beginning of our lives side by side with other, nonempathic, modes of perception.³⁰⁹

Kohut's clinical work indicates that the lack of an empathic response from the parent weakens the child's sense of self and undermines psychological stability.³¹⁰ Such a result is, of course, not in the psychological best interests of the child. On the other hand, an empathic response called mirroring, which shows the child that in the parent's eyes she or he is a valuable person, is the key to the development of a stable sense of self and a basic sense of security.³¹¹

Alice Miller also stresses the need for an empathic relationship between custodian and child.³¹² Miller's clinical work has persuaded her that empathic nurturing is necessary for successful psychological development. The empathic custodian is one who can allow the child to

308. See HEINZ KOHUT, THE RESTORATION OF SELF 85 (1977).

309. *The Search for the Self: Selected Writings of Heinz Kohut 1950-1978* 678 (P.H. Ornstein ed. 1980).

310. See KOHUT, *supra* note 308, at 77-79.

311. See HEINZ KOHUT, THE ANALYSIS OF SELF 105-199 (1971).

312. ALICE MILLER, FOR YOUR OWN GOOD 62 (1983).

have or express his or her real emotions.³¹³ The child is free to be happy, sad, angry as well as other emotions. The empathic parent does not teach the child to make a social impression. Moreover, the child is not used to satisfy the needs and the ambitions of the parent.³¹⁴ Like Kohut, Miller concludes that the empathic parent is one who is capable of giving adequate "mirroring."³¹⁵ In mirroring, a custodian looks upon the child with a fundamental sense of approval.³¹⁶ Mirroring is a manifestation of a healthy parental pride directed toward the being of the child. Miller also holds that the empathic parent gives respect and attention as well as providing mirroring.³¹⁷ Such a parent does not humiliate, ridicule, deceive or manipulate the child. Miller states that it is only through a satisfactory relationship with a relatively empathic parent that a child comes to have a true self. The true self allows one to connect honestly with his or her emotions and with a life which promotes the well-being of the self.

My opinion is that Alice Miller and Heinz Kohut provide us with clinically based insights important in the making of best interests child custody determinations. Although Erikson's psycho-social paradigm is the core of a very useful approach to child custody dispute resolution, I would contend that Kohut and Miller's findings in regard to empathy and mirroring can be used to "perfect" the decision-making process. Miller and Kohut's emphasis on the empathy-mirroring role of the parent serves to complement Erikson's focus on the vital matter of psycho-social needs. The empathy-mirroring response is most critical in the earlier years of childhood; however, a best interests custodian must provide empathy and mirroring at all stages of development. How the parent provides empathy and mirroring should be a function of what the child requires at particular Eriksonian stages of development. The needs of adolescents, of course, differ from the needs of children in earlier stages.

Combining the approaches of Miller, Kohut and Erikson the proposed decision-making perspective can be summarized in the following way. Custody under the law should be awarded to the person who is

313. See ALICE MILLER, PRISONERS OF CHILDHOOD 16 (1981).

314. *Id.* at 34.

315. See ALICE MILLER, PRISONERS OF CHILDHOOD 16 (1981); see also ALICE MILLER, THE UNTouched KEYS 47-68 (1990); HEINZ KOHUT, HOW DOES ANALYSIS CURE 143 (1984).

316. See ALICE MILLER, PRISONERS OF CHILDHOOD 16 (1981).

317. *Id.* at 14-21.

comparatively the most capable of providing appropriate empathy/mirroring and the most capable of meeting the psycho-social developmental needs of the child. In a sense what is required is a totality of psycho-social circumstances best interests analysis. The term psychosocial is here expanded to encompass the empathy/mirroring relationship between child and custodian. In addition, lawyers, psychological experts and judges must keep in mind that any informed custody decision requires that there be a retrospective analysis of the relevant material, an "in the present" analysis and a prospective analysis. A future projection is required. It cannot be avoided. Past and present data are fundamental in making future-casts. In particular cases, it might be appropriate to modify the custody decree as the child moves from one stage to another stage. Realistically speaking, given our current orientation, this would seldom be done. But courts should not hesitate to change custody, at any time, if a shift would maximize the best interests position of the child. It should be emphasized that the above stated approach involves in part an evaluation of the comparative "parenting" fitness of the contesting custodians. Comparative fitness is certainly a general concept familiar to those who focus on the resolution of child custody disputes.

Finally, it is a fundamental contention of this writer that the BBI "presumption" with its focus on continuity can only serve to blur our best interests focus of attention. Reality is far too complex to be evaluated from the continuity position. True best interests decisions require that we evolve a decision centered paradigm of relevance - one which allows insight into the complexities of a best interests existence. The reader is, of course, reminded that a paradigm expresses an ideal and it must be used with that knowledge in mind. However, the suggested paradigm is a guide to practice. Our practice work can be benefitted by its use.