DETERMINING CUSTODY IN THE BIASED INTERESTS OF THE DETERMINATOR

By Robert Z. Dobrish

Custody determinations seem to be following a pattern that is similar to hemlines. They are fashionable for a period of time and then they change. As we well know, in the eighteenth and nineteenth centuries, fathers were granted custody of their children since society was paternalistic. Men had all the rights and responsibilities and were in the best position to take care of things. And children were among those things.

Then came children's rights, child work laws, the development of the tender years doctrine and the acknowledgment that children - particularly young ones - could best be cared for by their mothers. It was generally acknowledged that children needed their mothers; that there was a maternal instinct that was natural to women and critical to child-rearing.

In the 1960's and 1970's, the world changed and so did attitudes about child custody determinations. The self- actualization movement, women's rights and fathers' awareness all coalesced. Equal rights considerations touched parenting, and a trend toward joint custody arose at the same time that a fathers' rights movement developed. In 1973, Joseph Goldstein, Anna Freud, and Albert Solnit advocated allowing the psychological parent to make all decisions arguing that a caring parent would, on the whole, make better decisions than a judicial officer even if some of those decisions were vindictive or flat out wrong.[1] That well thought out concept was rejected.

In 1975, Robert Mnookin proposed a decision analytical framework which was somewhat similar to Goldstein, Freud and Solnit's modest proposal.[2] It, too, got no momentum. To this day, gender equality, joint custody and the best interest of the child remain in vogue.

But just as with fashion, there are trends within the trends. In making "best interest determinations" courts have struggled with finding ways in which the decision making process can be more certain. There is recognition that custody decisions are difficult to make and standards are generally subjective. It is for that reason that judicial determinations have been questioned and alternatives have been proposed.

In 2001, the prestigious American Law Institute, recognizing the vagaries of the best interest standard and the need for prompt and certain results in custody disputes, proposed an approximation standard which measured the time spent by each parent prior to break up and attempted to replicate that post divorce.[3] While the concept gained a little traction by being included as a factor in several states, only West Virginia utilizes the approximation standard as a

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[1]Goldstein, Freud & Solnit, Beyond the Best Interests of the Child (1973).

[2]Robert Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy, Law and Contemporary Problems, Vol 39, No. 3, Summer 1975.

[3]American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (2001).

method for resolving custody issues. Arbitration, mediation and diversion programs of every stripe have been recommended, and sometimes implemented, but have consistently been found to be inadequate.

Left with having to make decisions using a best interest standard, judges have tried to gain assistance from outside sources: mental health professionals acting as evaluators or attorneys acting as advocates for the children and both sets of professionals sometimes assuming the role of "guardian". In addition, legislatures and court decisions have explored the use of "factors" to serve as guides for custody determinations.

But the 21st century brought about some critical thinking relating to the influences on making judicial decisions, and outside sources have been seriously criticized for having no genuine basis on which to make recommendations about best interests. In 2002 an article appearing in the Journal of the American Academy of Matrimonial Lawyers written by some forward-thinking mental health professionals questioned the methodology that was being employed in forensic services to custody cases.[4] What followed was articles, books and then judicial decisions which impugned what was deemed to be a non-scientific approach to those reports. A small, quiet, but effective, revolution followed resulting in efforts by mental health professionals to be more professional and by judges to be more careful in relying on the recommendations made by outside sources. Standards were adopted by professional organizations and some psychological tests fell into disrepute. In many cases, mental health professionals were directed to refrain from actually making recommendations about custody outcomes, that being the sole province of judges. This, too, caused a debate.[5]

Similarly, with regard to attorneys for children who were substituting judgment in cases where they believed their clients were not making "correct" choices - choices deemed to be not in their best interests - a movement began to restrict such recommendations. Standards were adopted for substituting judgment, the strictest being that of the American Academy of Matrimonial Lawyers which recommended that an attorney never have that right because of a lack of expertise in that area.[6]

The criticisms leveled against mental health professionals and attorneys for children were based on those professionals' inability to make unbiased determinations; their recommendations were based primarily on their "feelings", their predilections. While their recommendations sounded

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[4]Dana Royce Baerger, Robert Galatzer Levy, Jonathan W. Gould, Sandra Nye, A Methodology for Reviewing the Reliability and Relevance of Child Custody Evaluations, AAML Journal.

[5]See, series of articles published in New York Law Journal written by Timothy Tippins and Robert Z. Dobrish, between November, 2004 and September, 2008.

[6]Representing Children : Standards for Attorneys for Children in Custody or Visitation Proceedings: American Academy of Matrimonial Lawyers (2011)

like something worthy of consideration, in fact, there was often little substance amounting to not much more than a rationalization for their biases.

Taking away the recommendations of mental health professionals and attorneys for children, however, leaves the decision-making solely for the judge. What training, what scientific method, what unbiased mechanism does any judge have for decision making in a custody case?

In fact, custody decisions have always been made based on biases - and they always will be. The written decision has never been more than a rationalization for a determination made from the gut. And, perhaps that is exactly what it must be.

In 2009, during the period when President Obama was vetting candidates for the U.S. Supreme Court, he spoke of Judge Sonia Sotomayor as a person who had "empathy", which he described as a quality he was looking for in a judge. This statement brought about significant criticism from the Right, where strict constructionists argued that empathy was no different from personal bias and had no place on the Supreme Court. If indeed empathy is similar to, or a form of bias, then in the field of custody litigation, where strict construction is virtually impossible, empathy is certainly a positive quality and something we want judges to utilize n making their decision.

To be brutally honest, bias is one of the most important determinants in every custody case. Gender bias was the sole factor in the early days of custody decisions. Gender neutrality is a legal concept not a soulful one. While the tender years doctrine has been eliminated in the law do we really believe that judges, mental health professionals and attorneys are not still married to the concept that young children need "motherly love" more than "fatherly care", whether those qualities came from men or women? And, do we not recognize that qualities that are normally considered to be feminine, such as warmth, sensitivity and understanding, are also considered to be the qualities that make for a good parent.[7]

What about cultural bias? Can we seriously argue that judges, mental health professionals and attorneys who are involved in custody determinations do not have a preference for behaviors that are favored in our own culture as opposed to cultures of which we know very little. Standards regarding breast feeding, discipline, leaving children with caregivers, medical treatment, accepting responsibility, sexual freedom and a raft of other important parental decision making responsibilities differ significantly in other cultures. No valid studies have been made testing which standards are preferable, yet which standards are to be followed often weigh heavily in a custody determination based on the beliefs of the decision maker. The same can be said of economic biases, racial biases, educational biases, religious biases which all play a part in cases where those differences arise.

[7]See: Bem Sex Role Inventory (BSRI)

The best interests of the child is a standard that invites biased determinations, no matter how you slice it. If bias is inevitable, perhaps we should sit back and enjoy it.

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