2003

Overburdened Child's 'Best-Interest' Test

Stephen A. Newman
New York Law School, stephen.newman@nyls.edu

Overburdened Child's 'Best-Interest' Test; Overburdened Child's 'Best-Interest' Test

New York Law Journal (Online)

December 18, 2011 (LOAD DATE)

New York Law Journal

Length: 705 words

Byline: Stephen A. Newman,letters to the , *editor@corp.law.com*, , Special to the new york law journal

Body

The "best interest of the child" standard reverberates through countless judicial opinions involving children. Despite steady criticism of its indeterminacy and vagueness, it persists and even expands its legal domain.

The test serves a necessary function in the common divorce case, in which two parents have equal status in their claims to child custody. Courts have to have some standard, and doing what's best for the child seems reasonable. Of course, the words lack all content, and courts have developed more particular criteria to infuse the standard with meaning and a modest degree of predictability. Thus, courts favor the parent who is the primary caretaker and nurturer, who provides stability, sympathy and affection, and who is likely to facilitate the child's relationship with the other parent. Courts assume, with strong support from the psychological literature, that a child needs contact with both parents. The custody choice is sometimes clear, sometimes too close to call with any confidence. However close, the divorce necessitates a choice, and the courts routinely provide liberal visitation for the parent not chosen for custody.

When the best-interest test branches out to other contexts, it can cause trouble. Legislators who resort to it, for example, to tell courts to award a grandparent visitation in "the best interests of the child" In reality, the

best-interest test, when used to review and justify the overriding of parental childrearing decisions, is virtually impossible to apply intelligently, except in a narrow band of cases where the child's needs are perfectly clear. **Davis v. Davis** Most grandparents, however, are not so intimately involved in their grandchildren's lives. They do not have parent-like relationships with them. One major study showed grandparents were usually secondary figures and "only rarely a primary source of psychological support for the child." Does anyone really think judges can (or should) second guess such parental decisions? There is no way to isolate one of these secondary relationships and predict its future course or its impact on the child. If lawsuits to determine whether parents have made the best choices among uncles, cousins and coaches seem preposterous, why do lawsuits with respect to grandparents not seem so as well? If it's because grandparents are special, consider the parent's judgment that a particular grandparent is not a good influence, is a source of stress and unhappiness, is aggressive, intrusive, belligerent, or otherwise detrimental to the welfare of the child and her family. The judge has very limited knowledge of the child, parent and grandparent, of the relationships between them, and of the history of the family that has preceded the parental decision against visitation. Unlike the divorce judge, he cannot assume that each of the contestants before him has a claim based upon an overwhelmingly important psychological attachment to the child. There is no universally accepted child-rearing philosophy to guide the court. Some judges fall back on personal childhood memories or generalizations about the "moral obligations of familial relationships." The best-interest test is something of a fraud in this context. It allows the law to make a covert policy choice, e.g., one that empowers grandparents and judges to undermine parental authority, while pretending an old reliable standard ? the best-interest test ? explains and supports the intrusion into family life. The litigation spawned by the vague test is itself harmful, placing the child at the center of an intense conflict between adults. Visitation orders heighten tensions and stress even more. Parents who resist face contempt orders and are sometimes jailed. Over the remaining years of childhood, both child and parent are deprived of the peace and stability that are truly in the child's best interest. It would be far better if judges kept out of the child-rearing business, and deferred to parents' judgments about the "best interest of the child."**Luma v. Kawalchuk, Fitzpatrick v. Youngs, Troxel v. Granville,** Stephen A. Newman **is a professor of law at New York Law School.Stephen A. Newman is a professor of law at New York Law School.** FootNotes:

Load-Date: December 18, 2011