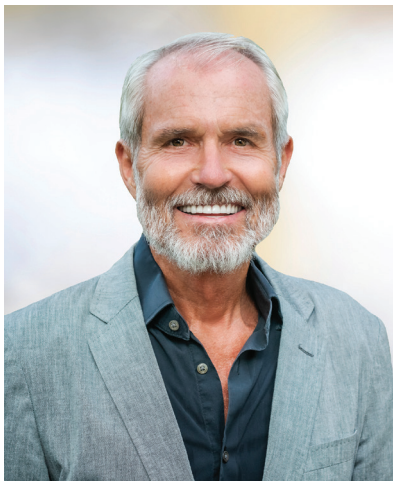


When Best Interests are Not: The Need to Redefine the Best Interest of the Child

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The phrase best interest(s) of the child is prevalent in child welfare law and practice. It is a legal standard on which attorneys root arguments and a basis of judicial determinations. It is used to guide social work practice and expert recommendations for what should happen to a child. They are words that are commonly spoken in justifying a decision to remove a child from their parents and place him/her/they in foster care. They are words utilized to sever permanently a parent's rights and promote adoption. They are words used to describe the opinions formed by lay volunteers or attorneys that advocate for what they think will benefit a child instead of a child's wishes. And they are words that are used too often as something distinct from a child's parents. They can be weaponized to punish parents.

Best interest(s) are utilized in our current system so often to justify so many things that they fail to carry true meaning, which can and does cause harm to children and their parents. We must reexamine this longstanding feature of the child welfare system and define its meaning more explicitly and completely or jettison it altogether. This is the focus of this issue of the Family Integrity & Justice Quarterly and one that is closely linked to other critical aspects of the child welfare system, including how the family's interests are understood and addressed.

As a legal standard, best interest is anything but standard. There is no federal definition of best interest(s), and state definitions vary widely. As multiple authors point out in this issue of the journal, best interest is among the most ambiguous standards in child welfare law, and this ambiguity increases the likelihood of subjective decision-making that can reflect harmful bias.

The lack of clarity on what constitutes best interests, and whose judgment prevails, in making those decisions is described adeptly in Cheri Williams' article in this issue. She notes that the local child welfare culture and subjectivity in decision-making trump the actual law. She notes further that courts can become "rodeos" of subjective arguments over what constitutes the best interests of a child.



The danger of subjectivity and bias extends to the bench, where judges and judicial officers receive arguments or reports of what is in a child's best interests and often insufficient information about the details of important family dynamics and relationships or child-specific needs and desires. Rather, making a determination of "best interest of the child" when removing a child is inextricably linked to the child's ongoing eligibility for federal

reimbursements to states for the cost of the child's foster care maintenance. Therefore, we must ask in whose best interests are those decisions made — the child's or the agency's — and whose judgment decides what is in a child's best interests? And absent a termination of parental rights, why wouldn't a parent's wishes — which are constitutionally protected — continue to carry the most weight in what is best for their own child?

The standard and determination beg a litany of questions. What do we truly mean by best interests? What does it require or entail? Who should make those decisions? How do we safeguard against implicit and explicit biases, cultural misunderstanding, and racism?

Some state statutes include attempts to flesh out the standard by including specific components of what should be considered in a best interest determination. However, we have yet to see a definition that is as wholistic and accounts for critical continued family connection. The need to redefine best interest was underscored further in a recent conversation with members of the National Association of Counsel for Children's National Advisory Committee on Legal Representation, a group composed entirely of people who have or are experiencing out-of-home placement. When the Advisory Committee was asked to share what best interest meant to them, love, connection, and belonging were centerpieces of their expert opinion. Advisory Committee members spoke about the importance of their familial relationships—especially with parents and siblings. Their desire for those relationships to be strong and continue in the ways that best suited them when they were in foster care and how those relationships helped or would have benefited them. Best interest and well-being were intertwined and not viewed as something separate from their parents or family but as something deeply tied to their parents and loved ones.

We do not often see recognition of the fact that what is in the parents' best interest is almost always in the child's best interests, and we continue to see parents vilified for non-compliance with case plans that are ill-matched to their strengths and needs or patently unreasonable.

We see a fleet of lay volunteers in court who, at least in our perception, are represented by mostly white, middle-class individuals who may have no real-life connection to the cultures, the struggles, and the historical trauma experienced by the families and children whose very lives hang in the balance, yet who are called upon to say what is in the child's "best interests."

We see guardians ad litem, required for children in foster care proceedings by federal law, whose job it is to represent the child's best interests, often when they have not really known the child or the family or had or could take the time to get to know them and understand what might really be in their "best interests."

And they may or may not actually be lawyers.

Less frequently, we see children having independent legal representation, bound to represent the child's expressed interests and desires for their futures rather than substituting the lawyers' judgments for the child's wishes. In fact, we see alarmingly little attention paid to relying upon parents' and children's voices about what is in their best interests in making the determinations.

And so, we ask ourselves again, whose best interests are at stake?

In their article, Angelique Day, Claudette Grinnell-Davis, and Dakota Roundtree-Swain further this discussion by noting that there are no concrete guidelines for determining best interests, and provide insight into the concept of someone else determining a child's best interests as opposed to permitting the child or youth to express directly what they believe to be in their interests. Day, Grinnell-Davis, and Roundtree-Swain offer compelling insights into the practice of many tribal courts that, as a matter of culture and respect for children, always consult with the children on their expressed interests.

Best interest determinations affect literally every aspect of a child's experience in foster care, from whether or not they enter foster care to when and if they return home or leave for another reason. Perhaps no other aspect of the foster care experience is as continually affected by these judgments as where and with whom a child is placed—more specifically, the extent to which children remain with known family members or enter the homes of strangers.

Gupta-Kagan's article notes clearly that our laws do not actually favor placement of children with relatives, owing to the flexibility and subjectivity permitted by States and local agencies to decide where a child goes. He and

Day, et al (in A Better Way) note the freedom that agencies have to regard any background information on relatives as undesirable and to forego relative placement. This is true even if the background information is on someone else living in the home and not the relative caregivers themselves.

We believe these aspects of our child welfare system are often a reflection of our values and how we regard families involved in child welfare. For much of child welfare's history, there has been the myth of the "apple not falling from the tree," as noted in Williams' description of myths in the child welfare system. Yet, nonetheless, the judgments we make about relatives of families involved in the child welfare system reinforce this concept over and over again.

In Reflections, Mrs. Carolyn Tancemore provides a resounding description of this ongoing practice through the story of her grandson who was removed from his parents' care at birth. She wanted to care for him and made the offer, only to be told she could not meet licensure standards for adoption and because she had low income and was defensive of the child's father, her son, despite the fact that she was a nurse who loved her grandson and wanted to care for him.

Unfortunately, we do not see this story as an outlier or exceptional. While some jurisdictions have moved to a much greater reliance upon kinship care, others have not. At times, it appears that we try to screen families out rather than looking for opportunities to screen them in, all in the name of best interests. This is broadly reflected in the application of background checks and licensing standards that may be impossible for some families to meet but should not preclude them from caring for their own.

We acknowledge that families can be complicated at times and that competing dynamics may steer us away from seeing a family member as a safe and secure placement option for a child. Yet, we agree with Amelia Watson's perspective that "family is in a child's best interests." She notes that "family" is also in the parents' best interests since kinship placements often permit parents the relative comfort of knowing who their children are with

and that they are being cared for so that the parents can focus on what they need to do.

Liliana Cory notes that even when relative placements are complicated, they can bring community and support to a person that remains with them throughout their lives.

If we truly believe (and not everyone does) that children should remain with their families, we should at the very least substitute a "best efforts" standard for a best interest concept and amend federal statutes to require evidence of best efforts in monitoring and improvement efforts related to eligibility for federal funding.

The "best interests" standard and determination should be either done away with, since it is practically meaningless, or linked specifically to the family's best interest. Also, it should require substantial and objective evidence of what is in the best interests of a child and family for the court determinations and for state and federal monitoring efforts. And it should certainly not be in the hands of individuals with little understanding or knowledge of the child's and parents' circumstances to make recommendations as to what is in their best interests.

Thanks to all our authors who have gone to the core of this incredibly important part of our work with families.

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