Child Placement: Law and Theory

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CHILDREN AND THE LAW
— A SYMPOSIUM
CHILD PLACEMENT: LAW AND THEORY*

[It is axiomatic in the field of child development that healthy emotional
and intellectual growth—the ability to relate to others and to learn—depends
to a very great extent on the establishment very early in life of a mutually
gratifying, continuing relationship with a mothering figure who cares for and
stimulates the infant.]

Although this postulate is generally accepted and followed by psychol-
ogists, the legal community has yet to apply it in the area of child place-
ment. In a recent book, Beyond the Best Interests of the Child, Anna
Freud and her co-authors, Joseph Goldstein and Albert J. Solnit, recog-
nize that the law and those charged with its administration go to great
lengths to protect a child's physical development and health. However,
they assert that the legal community has failed to give equal recognition
to the safeguards essential to the child's psychological well-being. The
authors take exception to the proposition that the law protects the best
interests of the child in cases of adoption, foster care and custody proceed-
ings in matrimonial actions, and stress that the "emotional needs of the

* This article is a student work prepared by Joel B. Savit, a member of the ST. JOHN'S LAW
Review and the St. Thomas More Institute for Legal Research.

1 Kramer, The Psychological Parent is the Real Parent, N.Y. Times, Oct. 9, 1973, § 6 (Magaz-
ine), at 70 [hereinafter cited as Kramer].

2 The term "child placement" includes all proceedings wherein governmental authorities
attempt to administer the parent-child relationship. "These procedures include birth certifi-
cation, neglect, abandonment, battered child, foster care, adoption, delinquency, youth of-
fender, as well as custody in annulment, separation, and divorce." J. Goldstein, A. Freud,
A. Solnit, Beyond the Best Interests of the Child 5 (1973) [hereinafter cited as Goldstein,
Freud & Solnit].

3 See id.

4 Anna Freud is the founder and director of the Hampstead Child Therapy Clinic in London
and "is probably the foremost living authority on the emotional lives of children, a subject
she explored in depth among children separated from their families during World War II." Kramer, supra note 1, at 70.

Joseph Goldstein is a professor of law, science and social policy at Yale University Law
School. In addition to being a lawyer, political scientist, and psychoanalyst, he is the author
of many books dealing with government, law and the family, and law and crime.

Albert J. Solnit is a professor of pediatrics and psychiatry at Yale University School of
Medicine and the director of Yale's child study center. He served as president of the American
When viewed in the light of the authors' psychoanalytic theories, the shortcomings of New York's approach to child placement become manifest. Upon examination of the statutory and decisional law of New York, which is representative of the law of many jurisdictions, it is apparent that the psychological needs of the child have been largely ignored. The authors have proposed a number of reforms in the law of child placement—reforms which are intended to serve the best interests of the child.

THE AUTHORS' CHILD CARE THEORIES

According to the authors, one of the most important factors in the proper development of the child is the continuity of his relationships. Because this continuity is essential to a child's proper psychological development, adoption, placement and custody decisions must protect the creation of a strong psychological attachment by continuing the parent-child bond. Because of the instability of a child's mental processes during the developmental stages, external environmental forces must be stable and continuous so as to offset internal disruptions. "Smooth growth is . . . disrupted when upheavals and changes in the external world are added to the internal ones." Any alterations of the parental model or "hurtful"

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5 Id.
6 Id. at 31-39.
7 Id. at 99.
8 GOLDSTEIN, FREUD & SOLNIT at 32.
9 Id. In one study, the effect of disturbances in the relationship between children with severe depressive personalities and their respective mothers or fathers was examined. It was found that, between the ages of 10-15, these children lost a parent at a rate twice that of the population as a whole. In another study, severe depressives were found to have lost their mothers by death before reaching their twenty-first birthday, and were likely to have lost at least one parent before their sixteenth birthday. Weininger, Effects of Parental Deprivation: An Overview of Literature and Report on Some Current Research, 30 Psych. Rep. 591, 597-98 (1972) [hereinafter cited as Weininger].

Several studies performed in England are in accord with the authors' theory that non-continuity of relationship is detrimental to child development. In one, a comparison was made between offenders from two prison populations and a control group. One group of prisoners consisted of first offenders who were charged with less serious crimes. The second group of prisoners had long term sentences, were generally recidivists, and had committed serious crimes. The control group consisted of the population at large. It was discovered that parental loss, often due to the failure of pre-existing family relationships, was common among prisoners and statistically significant. This was especially true of the long term prisoners. Koller & Castanos, Family Background In Prison Groups: A Comparative Study of Parental Deprivation, 117 Brit. J. Psychiatry 371 (1970).

In a second study, the researchers hypothesized that early adverse experiences are related to juvenile delinquency among females. Many variables relating to parental deprivation, birth order, size of the family, ages of the father and mother, and ratio of male and female siblings were examined with respect to delinquent girls in a training school. Of the girls studied, 61-1/4% had experienced prolonged parental separation and an additional 32% had experienced at least one lengthy separation. Of the separations, 80% had been the result of
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interruptions will make evident the child's vulnerability and explicitly demonstrate that his relationships are extremely fragile. The child's psychological growth may be detrimentally affected by a regressive development in his affections, achievements, skills or social intercourse. "So far as the child's emotions are concerned, interference with the tie, whether to a fit or unfit psychological parent is extremely painful." Thus, any statutory provisions that create waiting periods and lack finality interfere with this concept of continuity. If the child's best interests are to be served, then child placement decisions must increase the likelihood of a continuing relationship.

Finality is another crucial element of the developmental process. Many psychological studies substantiate the authors' theory that a lack of finality caused by repeated changes and uncertainties in relationships will cause serious developmental problems within the child's psyche. Current separation, divorce, or institutional placement. Koller, Parental Deprivation, Family Background and Female Delinquency, 118 BRIT. J. PSYCHIATRY 319 (1971).

In yet another research project, the hypothesis that early negative childhood experiences related to alcoholism was tested. A group of patients at an alcoholic unit were compared with a group from the normal population. The two groups were matched on the basis of sex, age, and socio-economic status. It was found that the alcoholic patients had experienced events which were both qualitatively and quantitatively different from those of their matched, normal counterparts. It was common to find parental loss among the alcoholics, especially the loss of both parents, and placement in some sort of institution. It is also interesting that those alcoholics who had suffered parental loss had commenced drinking earlier and had younger parents than those alcoholics who had not experienced such parental loss. Koller & Castanos, Family Background and Life Situation in Alcoholics, 21 ARCHIVES OF GEN. PSYCHIATRY 602, 609 (1969).

GOLDSTEIN, FREUD & SOLNIT at 18.

In one study, conducted at an institution for children, sample institutionalized infants were compared with those reared in loving family environments. Id. at 875-81. At the end of the first year of life, the institutionalized infants exhibited prominent abnormalities in development and behavioral patterns. Id. at 878. There was a general impairment of their interactions and relationships with other people, and even when some sort of relationship was established, the emotional attachment was extremely weak. Furthermore, in contrast to the normally reared children, there were no indications of strong attachment to any one individual, nor a sense of trust in the adults who provided the child with necessities. Their ability to anticipate future events and postpone immediate gratification of needs was impaired. Additionally, the separation from the psychological parent had a more obvious effect upon the children's patterns of speech and communication. The institutionalized infants spoke no words, had no names for any of the people who cared for them, and used very few vocal signals to express their inner feelings or to elicit satisfaction of any of their needs. Id. Their behavior evidenced a failure to develop a normal self-concept, as they seemed to perceive their environment and themselves on a very low level of worth. Id. at 878-79.

A second study, conducted at the Bloorview Children's Hospital in Toronto, undertook a determination of the effect of maternal separation on physical processes of children. The basic hypothesis was that children living in large institutions develop an attachment to that institution, and any plans for leaving it, no matter how short the period, cause a significant change in behavior. This study bolsters the authors' theory by displaying the effect of separa-
The laws governing foster parenthood are the subject of particular criticism by the authors for disregarding the concept of finality. It is pointed out that psychological attachment can be established with a foster parent though custody is merely temporary. Yet, foster parents are generally "deprived of the position on which parental tolerance, endurance, and devotion are commonly based," and, thus, cannot be the sole possessor of the child, nor the ultimate arbiter of the child's destiny. As for the child, after early infancy has passed, he will "feel the impermanency and insecurity of the arrangement which clashes with his need for emotional constancy." It is imperative, therefore, that any placement decisions be made with the child’s need for finality of relationships in mind.

The authors contend that the continuing, final relationship necessary to the child’s well-being be nurtured between the child and his "psychological parent. If children are detrimentally affected by separation from an environment which does not afford the gratification and satisfaction of a true psychological parent, the magnitude of the effect when the separation is from a strong parent-child relationship must certainly be greater.

Compared with that of the control group, the pulse rate of children in the institution who were told of plans to leave the hospital, even for an overnight visit, increased significantly. "It is possible that the anticipation of leaving an environment which is safe and very familiar, does create separation anxiety, which apparently causes significant changes in these children's pulse rates." Weininger, supra note 9, at 608. When the urine output was measured, the findings indicated a consequent change in the amount of urine. By analogy, these findings seem to indicate that a disrupted social tie between child and parent will create a sense of anxiety in the child. Id. at 607-08.

In a similar study conducted in 1942, psychologists were able to measure the effect upon blood pressure of an impending admission to a hospital and consequent separation from parents. It was discovered that under such circumstances a child's blood pressure could rise by as much as 30 to 40 millimeters of mercury. Id. at 594. A 1969 study investigated the childhood experiences of psychopathic individuals. The study concluded that the childhood periods of psychopaths are more frequently highlighted by parental death, separation, or divorce, than those of normal persons. Id. at 598. Other studies reveal that 41% of a sample of sociopaths questioned had sustained the absence of a mother for more than six months prior to their sixth birthday and 65% of the male aggressive psychopaths studied had been separated from either their mother or father before the age of ten.

As evidenced by the foregoing studies, the authors' advocacy of uninterrupted relations between child and parent, so as to develop the psychological attachment required for healthy child development, is supported. For further studies of the effect of institutionalization upon the psychological development of children, see S. Provence & R. Lipton, Infants in Institutions (1972); M. Ribble, The Rights of Infants: Early Psychological Needs and Their Satisfactions (1943); Goldfarb, Effects of Psychological Deprivation in Infancy and Subsequent Stimulation, 102 Am. J. Psychiatry 18 (1945).

* In New York, the foster parents' care and custody is made temporary by statute:

The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded.


* Goldstein, Freud & Solnit at 25.

* Id.
The psychological parent is a role to be played by either "a biological parent or by an adoptive parent or by any other caring adult—but never by an absent inactive adult, whatever his biological or legal relationship to the child may be." Thus, the biological parent, i.e., the one who physically produced the child, is not necessarily the psychological parent. The authors note that "the physical facts of having begotten a child or given birth to it have far reaching psychological meaning for the parents as confirmation of their respective sexual identities, their potency and intactness." This strong emotional impact upon the biological parents, however, may not be mutually experienced by the child. The psychological consequences to the child do not flow from birth itself, but instead result from the satisfaction of its needs.

It is possible for the adoptive parent to develop a caring relationship with the child and, therefore, become a psychological parent. The authors emphasize that this is no reason why adoption and custody laws must change. They realize that "[t]he facts of legal adoption are no guarantee that the adopting adults will become the psychological parents or that the adopted child will become a wanted child." However, adoption in the early weeks of a child's life bestows upon the adoptive parents sufficient opportunity to develop a psychological parent-child relationship.

According to the authors, another aspect of the child's emotional makeup which must be taken into consideration in placement decisions is the child's unique sense of time. In contrast to mature individuals who are cognizant of future events and who measure the passage of time by clocks, watches or calendars, children have "their own built-in time sense, based on the urgency of their instinctual and emotional needs." Thus, the au-

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*Id.* at 19.

*Id.* at 16-17.

*Id.* at 17.

*Id.* at 22-26.

*Id.* at 22.

*Id.* Whether this relationship will succeed in an adoption situation depends on many factors. The reason for adopting is one very important factor which must be investigated. Thus, if the adoptive parents are motivated by their childless state, or because they wish to compensate for the loss of a child by death, or bestow upon their only existing child a companion, or rescue an abandoned or orphaned child, the parent-child relationship will undoubtedly suffer because of an absence of the necessary loving bond.

*Id.* at 11.

Emotionally and intellectually an infant and toddler cannot stretch his waiting more than a few days without feeling overwhelmed by the absence of parents. He cannot take care of himself physically, and his emotional and intellectual memory is not sufficiently matured to enable him to use thinking to hold onto the parent he has lost.

*Id.* at 40-41. Youngsters also fail to experience other events in a true perspective and react in an egocentric manner by viewing themselves as the center of the universe. Thus, "the mere move from one house or location to another" is viewed as a "grievous loss, imposed on them; the birth of a sibling as an act of parental hostility . . . [and] the death of a parent as intentional abandonment." *Id.* at 11-12.
Authors feel that children have a "marked intolerance for postponement of gratification or frustration, and an intense sensitivity to the length of separations." When determining a child's destiny, therefore, adults must take this into account to avoid a detrimental effect on the child's psychological development. What appears to an adult to be a short length of time may be an eternity to a child. Accordingly, statutory provisions which relate to the custody or placement of a child should take into account the necessity for swift final decisions.

The authors add substance to their theories by codifying them in a Model Child Placement Statute. Under the authors' proposed statutory provisions, it becomes irrelevant whether a parent is the biological, adoptive or foster parent so long as there is a psychological attachment. Any child placements must be in accordance with the child's sense of time, continuity and permanence. The authors apparently drafted their statute in general terms in the hope that its essential characteristics could be copied by the various jurisdictions.

CURRENT WEAKNESSES OF NEW YORK CHILD PLACEMENT LAW

The judiciary plays an all-encompassing role in the affairs of displaced

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24 Id. at 11. The effects of maternal separation upon a child have been the subject of comprehensive investigation by numerous psychologists. In a series of studies, Professor Harry F. Harlow illustrated the effects of maternal separation in the development of the rhesus monkey. Young, Suomi, Harlow, McKinney, Early Stress and Later Response to Separation in Rhesus Monkeys, 130 AM. J. PSYCHIATRY 400 (1973). Because of the great similarity of certain aspects of human and primate behavior, and the "tendency [of both] to form close social bonds," the validity of such animal studies is no longer contested. In addition, primates have an ability to utilize their "stored knowledge" with respect to social behavior and the laboratory provides a suitable site for "well-controlled" longitudinal studies. Id.

The Harlow studies attempted to assess whether separation from a mother early in life would affect an infant's psychological development. Two groups of monkeys were established. Offspring in the experimental groups were isolated from their mothers. The control group consisted of monkeys who remained with their mothers during infancy. After removal from their isolated environment, the experimental group monkeys were socially withdrawn, lacked normal locomotion, and exhibited high levels of self-clasping, rocking motions, and huddling behavior rarely seen in the control group. Id. at 404.

In a study conducted by Dr. J. Bowlby, the effects of child-parent separation on human children were studied. An investigation was undertaken to determine how young children (between one and four years of age) were affected when placed in a tuberculosis sanitarium. Dr. Bowlby found that these children, when tested years later, were less capable of concentrating and becoming involved in simple tasks, more apt to withdraw from activities, and more prone to apathy, roughness, and maladjustment than those children reared in normal environments. J. BOWLBY, CHILD CARE AND THE GROWTH OF LOVE 216 (1965). Dr. Bowlby advanced the hypothesis that "the defensive detachment which succeeds despair when a young child suffers a depriving separation for a prolonged period precludes a healthy working through of grief and predisposes him to later depressive reactions." Id. at 217.

25 GOLDSTEIN, FREUD & SOLNIT at 40-42.
26 Id. at 98.
27 Id. at 99.
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infants. The court’s discretionary power emanates from the parens patriae doctrine:

It has often been said that a child’s welfare is the first concern of the court . . . where the judge acts ‘as parens patriae to do what is best for the interests of the child.’

Under parens patriae, the state is a parent and protector of all infants within its jurisdiction with the reserve power to act for the promotion of the child’s welfare. Therefore, in order to protect its children, the state has seen fit to supervise their custody and placement.

Adoption

Under the New York statutory scheme, before an adoption is finalized, the child, if less than 18 years of age, must reside with the adoptive parents for at least six months. This period may be altered, however, in the presiding justice’s discretion in his role as protector of the state’s infants. The purpose of the waiting period is to prevent hasty, impulsive action during the creation of new relationships and the breaking of the “blood-tie.” Time is provided to permit reflection and in-depth consideration of this far reaching decision. The adoptive parents are given the opportunity to see the results of the placement decree and the natural parents receive the needed time to weigh their decision. During this time period and before finalization of the adoption decree, the presiding justice will require that an investigation be conducted to examine the allegations of the petition “and to . . . ascertain facts relating to the adoptive child and adoptive parents as will give . . . [him an] . . . adequate basis for determining the propriety of approving the adoption.”

Provisions such as the foregoing, setting forth a waiting period and empowering the court to extend such period, create a period of uncertainty for both the child and the adult. The adoptive parents who might otherwise provide the child with proper care and affection may choose this period to place the child on “probation.” This presents an intolerable burden for

31 Id.
34 Goldstein, Freud & Solnit at 38. The parents may utilize the waiting period in a variety of manners. “It may even provide a temptation for some adopting parents (and for some adopted children) not to allow the new relationship to develop.” Id. at 35. In addition, the period may have a detrimental effect on families who have other children in addition to the newly adopted one. For these non-adopted children, “the knowledge that the state can take the new child away is experienced as a threat.” Id. at 36. If this threat becomes a reality, “the detrimental impact on the health and well-being of the child who is already a member of the family is incalculable.” Id.
the child during the initial and developmental stages of the interaction process between the child, his parents and his external environment. Even if the adoptive parents wish to properly care for the child, the uncertainty of the period prevents them from doing so. Because of these adverse possibilities, Ms. Freud and her associates proposed that the adoption become final the moment a child is placed with his new family. "[T]his would mean that the adoption order would be as final as a birth certificate, not subject to special supervision or open to special challenge by state or agency."35

In People ex rel. Scarpetta v. Spence-Chapin Adoption Service,36 the renowned Baby Lenore decision, the consequences of such waiting periods were apparent. Several days after the birth of her child, the mother placed the infant with an adoption agency. Ten days later, a written surrender document was signed by the mother. Seventeen days thereafter the baby was placed with a family for adoption, but five days after placement and, hence, before the final adoption took place, the natural mother sought the infant's return. Because the statutory waiting period precluded finalization of the adoption, the court exercised its discretion and ordered Lenore returned to the natural mother, causing chaos in the lives of both the adoptive parents and the child.37 Since she remained with her adoptive parents throughout the appeals, it is quite possible that a psychological disruption arose in the infant's life.38 The authors note that even an infant under 18 months of age can be discomforted and distressed by continuing parental uncertainties.39

There are some aspects of New York adoption laws which tend to coincide with the authors' views. An example is the statutory scheme pertaining to the irrevocability of adoption surrender. The statute provides that "no action or proceeding may be maintained by the surrendering parent . . . to revoke or annul such surrender where the child has been placed in the home of adoptive parents and more than thirty days have elapsed since the execution of the surrender."40 Under this provision, the

35 Id. at 36.
37 Subsequent to the decision by the New York Court of Appeals, the adoptive parents, rather than return the baby, fled to Florida. The natural mother followed and brought suit in the Florida courts to regain custody. The trial court in Florida did not consider itself bound by the New York decision and held that the best interests of the child were served by the baby remaining with the adoptive parents. This Florida decision was affirmed on appeal. Scarpetta v. De Martino, 254 So. 2d 813, cert. denied, 409 U.S. 1011 (1971). See Note, Adoptive Parent Versus Natural Parent: Severing the Gordian Knot of Voluntary Surrenders, 18 CATH. LAW. 90, 107 n.91 (1972).
38 See note 23 supra.
39 Golstein, Freud & Solnit at 32.
surrender of the child creates an apparently irrevocable relationship, thereby permitting the psychological bond to develop. The surrender instrument may be rescinded, however, if the mother has been induced to execute the instrument through fraud, duress or coercion. It is somewhat disturbing that the law permits the child's relationship with the adoptive parents to be upset on grounds that the natural mother was wrongfully induced into executing the instrument. Since the child's psychological state seems irrelevant, one may question whose best interests are being protected.

New York might well profit from the guidance of other jurisdictions. A recent New Jersey decision provides an example of judicial emphasis on the psychological effects of placement on a child. In In re P, a natural mother who had given her child up for adoption later objected to the proceeding when she learned she would be able to marry the child's father. The trial court found that both the natural and adoptive parents were of equal fitness to raise the child and, therefore, the relationship with the natural parents would better serve the "child's interests." The appellate division reversed, believing that the best interests of the child required the "psychological parents" to maintain control. The court based its findings on the testimony of specialists in child care who told of the damaging effects which may result from the separation of a child from the only parents he has ever known. Thus, the court saved the continuity of the established parent-child bond.

Foster Care

In the area of foster care, as well, New York pays little attention to the need for continuity between the psychological parent and child. In fact, present law induces a disruption of the parent-child psychological relationship. Foster care agreements generally include two conditions. First, place-
ment in the home is temporary. Second, the welfare agency or commissioner reserves the right to remove the child at will.\textsuperscript{46} Reservation of such control has been deemed a valid exercise of the state’s power since it is vested with responsibility for the child’s welfare.\textsuperscript{47}

Section 383 of the New York Social Services Law provides that any adult, married or unmarried, who has been a foster parent for a continuous period of two or more years, may apply to an authorized agency for the child’s adoption.\textsuperscript{48} This section, however, permits the court to exercise its discretion to prevent the adoption.\textsuperscript{49} The statute’s application might run counter to the needs of the child by aborting a strong and lengthy relationship although the results of various psychological studies would warrant its continuance.\textsuperscript{50}

*In re Jewish Child Care Association,\textsuperscript{51}* a custody dispute between foster parents and the natural mother, illustrates how a foster child may be tossed from one environment to another with little judicial regard for the child’s psychological continuity and attachments. A psychiatrist testified that he had interviewed Laura, the foster child, and found her to be presently well-adjusted, but suggested that if she were taken from her foster parents an emotional disturbance would probably result. He felt it preferable for Laura to remain with her foster parents and make the adjustments to her natural parents in the future. The court, however, believing that the child had become too emotionally attached to the foster parents, ordered the child taken from them.\textsuperscript{52}

By so acting, the court failed to consider who was Laura’s psychological mother. According to the authors, the real parent is the one who has developed the necessary psychological bond with the child through daily interaction, companionship and mutual love. The fact that the court conceded that a strong emotional attachment to the foster parents existed illustrates the authors’ sentiments, *viz.*, the needs of the child have been overlooked through judicial failure to safeguard the child’s psychological interests.\textsuperscript{53}

\textsuperscript{46} Goldstein, Freud & Solnit at 24.
\textsuperscript{47} See *In re Jewish Child Care Ass’n*, 6 App. Div. 2d 698, 699, 174 N.Y.S.2d 335, 337 (2d Dep’t 1958).
\textsuperscript{49} Id. It must be remembered that although a two year period may be a short time for an adult, it may be an eternity in relation to a child’s sense of time.
\textsuperscript{50} See note 13 supra.
\textsuperscript{51} 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959).
\textsuperscript{52} Id. at 228, 156 N.E.2d at 703, 183 N.Y.S.2d at 69.

The court stated:

In short, the content and tone of the record disclosed a situation in the foster parents’ home which has reached such a peak of emotion and possessiveness that it is entirely inconsistent with Laura’s future with her own mother, and her need to be prepared for that future.

*Id.*

\textsuperscript{53} Although this decision was contrary to the authors’ psychological theories, there was per-
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It must be noted, however, that contrary to the opinion of the authors, the New York legislature and courts do not intentionally subordinate the child's interests and interfere with his psychological development by disrupting a continuing parent-child bond. Various statutory provisions reveal a legislative intent to benefit the child and strengthen the bond. In foster care, for example, the court may order an authorized agency to diligently attempt to encourage and strengthen the parental relationship. To promote this goal, the court will allow the agency to help the parent obtain adequate housing, employment, counseling, medical treatment or psychiatric care. Provisions like these, when implemented properly, are in accord with the authors' theories. More must be done in line with this type of legislation, however, to fully promote and protect the child welfare.

Child Custody Proceedings

In custody proceedings, stemming from divorce and separation actions, the continuity concept is grossly overlooked. Child placement under this branch of the law is very often conditional and never final. The lack

haps a benevolent omen evidenced by the dissenting opinion. The dissent relied upon the words of the psychiatrist who had testified at the trial, quoting:

'This child is at a critical period . . . This is by far the worst time to consider changing the placement . . . [I][I]f this child is moved now . . . she will be uprooted from . . . the only ones she has ever known as parents . . . . She will be taken out of an environment which made her the healthy, normal, well-adjusted child that she is. That is going to open up the possibility of all kinds of maladjustments . . . . I can't see where they [the Agency] get this notion of placing a child in a neutral environment, without love and without hate, possibly, without this, without that. It is as though you are taking the child and placing it in a bare environment with nothing but food . . . . In my experience [on placement] we have sought homes where [children] can get this type of love, where there is care and attention and concern which might duplicate that of a parent . . . . A child learns to react to others by reacting to the emotions . . . of liking and disliking, of love and hate. This is normal . . . . If you take a child and deprive him of that, you are depriving the child of the essentials of life . . . . Here these people are taking the child; the agency is taking the child away from these people, and they treat this child as their own, offering the child the best that the child could get. I really don't understand why the agency feels this way . . . . I think these people would make better parents since they have raised the child this far and they have made an attachment to the child and the child has made an attachment to them.'

Id. at 232-33, 156 N.E.2d at 705-06, 183 N.Y.S.2d at 73.

51 N.Y. Soc. Servs. Law § 392(9) (McKinney Supp. 1973). This section requires the courts to direct an order for the child's best interests. The court will review the child's present circumstances to insure that the child is growing up in a proper home with good care, a feeling of belonging, and a sense of being loved. See In re P, 71 Misc. 2d 965, 969, 337 N.Y.S.2d 203, 207-08 (Fam. Ct. N.Y. County 1972).


53 GOLDSTEIN, FREUD & SOLNIT at 37. The conditional right to custody is evidenced by section 70 of New York's Domestic Relations Law which states:

Where a minor child is residing within this state, either parent may apply to the
of finality, which manifests itself in the retention of jurisdiction by the courts over custody placements, allows for challenges by one of the parties through claims of changed circumstances. The constant possibility of varying conditions and attitudes on the part of divorced or separated parents results in a subordination of the child's needs for continuous relationships to the adult's needs.

*Rosenblatt v. Birnbaum* suggests how a court may move a child from one relationship to another in satisfaction of the parents' needs. In *Rosenblatt*, the husband and wife, prior to their divorce, entered into a separation agreement whereby the husband agreed to pay his wife a stipulated sum per month for support of their two children. Because this money was not expended on the children, the court allowed the father to seek a change in custody. The fact that the wife spent her former husband's money for other purposes may be embarrassing and distressing, but it should not be determinative of a change in custody. It would appear that the father's financial interest alone was considered with little thought given to the psychological attachment between the mother and the children. No showing was made, in the court's opinion, that the children had suffered in any way because the payments were spent in an unauthorized manner. Nevertheless, the court allowed the request for a change in custody. It is clear that courts must reevaluate their standards as to what constitutes the child's primary needs.

*Problems Pervading the Entire Statutory Scheme*

It is apparent that the New York statutes do not adequately meet the recommendations of the authors. In addition to the specific shortcomings in the areas of adoption, foster care and custody proceedings, there are structural and procedural problems and problems of attitude to be found throughout the child placement system. Procedural delay, for example, exacerbates the shortcomings of present judicial determinations. The placement of a child or the decision as to who deserves the child should not extend over a greater period of time than that required for other judicial action. The authors have pointed out that even though expediency is called for where a child's psychological needs are involved, immediate action is rarely forthcoming. In other areas of the law, *e.g.*, where certain constitutional rights or physical emergencies are concerned, courts have

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supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter, vacate or modify such order.

N. Y. DOM. REL. LAW § 70 (McKinney 1964) (emphasis added).

* Id.


GOLDSTEIN, FREUD & SOLNIT at 43.
been known to move swiftly. Child placement proceedings are, similarly, matters of great concern and immediate action should be mandated.

The much publicized Baby Lenore case illustrates that courts, even when attempting to decide custody issues in light of what is necessary for the child’s proper development, fail to proceed with sufficient speed. Lenore had been placed in her adoptive parents’ home on June 18, 1970 and remained there until the appeal was finally determined on April 7, 1971. Thus, even within the adult time framework, almost a year passed between the time of placement and final decision. Although careful consideration of the issues is warranted in formulating an adoption decree, the resultant delay, combined with the usual backlog of cases in the court system, creates a serious neglect of the child’s sense of time.

An inspection of New York’s Domestic Relations Law also shows that the child’s concept of time has been ignored. An adoption cannot take place until the child has lived with the adoptive parents for six months. The very existence of a six-month time limit reveals that the statute is based upon adult standards. Under a child’s sense of time, this extended period can give rise to a strong bond with the adoptive parents which, if broken, can cause psychological disturbances and improper development. It is apparent, therefore, that New York permits too great a time to elapse before an adoption decree may be entered.

The decision in O’Brien v. Brown, 409 U.S. 1 (1972), illustrates quickness of action in a first amendment setting. On July 3, 1972, delegates to the Democratic Party’s national convention from the states of California and Illinois brought suit in the United States District Court for the District of Columbia, claiming that their unseating (which had been advocated by the Democratic Party’s Credentials Committee) was improper. The convention was scheduled to convene on July 10th, thus necessitating a swift determination of the case. After the district court dismissed the suits, an appeal was taken, and, on July 5th, the court of appeals revised the decision in both cases. Thus, the commencement of the action, the initial determination by the court, and the decision in the court of appeals spanned only a few days. In addition, petitions for writ of certiorari were filed only one day prior to the Supreme Court’s hearing of the case.

Swift, immediate judicial action has also occurred in the midst of a dire physical emergency. See Application of President & Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964), wherein a woman in need of blood transfusion to save her life refused to give her consent to this procedure on religious grounds. Unable to obtain consent from her husband, attorneys for Georgetown Hospital sought an order from the court which would enable the hospital to perform the transfusion without consent. Within one hour and twenty minutes of the hospital’s application, such an order was signed by the judge. Id. at 1001.

Publicity may have a great impact upon the final determination of a case. The court may be required to overcome not only legal hurdles but public opinion as well. Very often, newspapers will concentrate on the emotional aspects of the controversy by casting the welfare agency (which seeks to recover the child) as a villain and the adoptive parents as the heroes. The welfare department may be depicted as “cold blooded and all knowing” with “no concern for the welfare of children and their custody,” and interested only in their internal rules. See Katz, Legal Aspects of Foster Care, 5 FAM. L.Q. 283, 298-99 (1971).


See text accompanying notes 23-25 supra.
Another pervasive problem is the longstanding judicial bias for the natural parent. In People ex rel. Kropp v. Shepsky, for example, the Court of Appeals stated that a child's welfare is the first concern of the court upon a habeas corpus proceeding, where the judge acts 'as parens patriae to do what is best for the interest of the child.' However valid this statement may be in a contest for custody involving the parents alone, it cannot stand without qualification in a contest between parents and non-parents.

Language of this sort indicates that the child's interests are not necessarily primary. They apparently are reduced to secondary importance when conflict arises between biological and non-biological parents. The court, however, conceded that under some circumstances the rights of natural parents are not supreme:

We have sanctioned withholding the child from the custody of a parent who has abandoned or transferred the parental right, either expressly or by implication. And, quite obviously, a parent who is 'a drunkard, an incompetent, a notoriously immoral person, cruel or unkind towards his child,' may have the child taken from him.

Apart, however, from such special and weighty circumstances, the primacy of parental rights may not be ignored. Shepsky indicates that unless special circumstances are shown, the rights of the natural parent are paramount to the rights of both the child and adoptive parents. Clearly, the authors would take issue with the statement that only where the parent is a drunkard or the like, the child's needs will be satisfied by dissolving the "primary parental right."

The traditional view of the natural parents' priorities, as maintained by the New York courts, is manifestly refuted by the authors. Judicial emphasis upon the natural mother's right is in part based upon a layman's appraisal of the situation which evidences a misconception surrounding natural parents. One court has stated that a "mother's love is one factor which will endure: possibly endure after other claimed material advantages and emotional attachments may have proven transient." Another court has held that although the natural parent's right is not "proprietary" as if the "child were a chattel," it has been regarded as one of the highest natural rights even "in primitive civilization." In refuting this analysis, the authors disregard the usual terminology of "natural" and "adoptive"

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64 305 N.Y. 465, 113 N.E.2d 801 (1953).
65 Id. at 468, 113 N.E.2d at 803 (footnotes omitted).
66 Id. at 469, 113 N.E.2d at 804 (footnotes omitted) (emphasis added).
67 See Goldstein, Freud & Solnit at 19-20.
68 Id. at 94-95.
70 In re Livingston, 151 App. Div. 1, 7, 135 N.Y.S. 328, 332 (2d Dep't 1912).
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parents. As noted above, the authors emphasize that courts should inquire into whether the child is being placed with psychological parents.\textsuperscript{71}

One obstacle that has confronted adoptive parents is the judicial requirement that they sustain the burden of proof as against natural parents in contests over custodial rights. In 1961, the Appellate Division, Third Department, stated in a child custody conflict:

The petitioner has not sustained the burden of proof that the moral and temporal interests of the children will be promoted by granting the adoption and by breaking the blood ties of the natural parents.\textsuperscript{72}

Additionally, New York courts have been reluctant in allowing adoptive parents to represent their interests. In the Baby Lenore case,\textsuperscript{73} it was stated:

To allow the prospective adoptive parents to intervene as a matter of right, thereby assuming all the rights of other parties to the action, would necessarily lead to disclosure of the names of the natural parents and prospective adoptive parents to each other. In view of the statutory scheme enacted by the Legislature to guard against such disclosure, and the settled public policy, we are unwilling to hold that the prospective adoptive parents are entitled to intervene.\textsuperscript{74}

Fortunately, current New York law alters this situation by permitting the child's custodian for adoption purposes to intervene as an interested party through an authorized agency in a proceeding to set aside a surrender.\textsuperscript{75}

The legislature has taken further steps to remedy the existing emphasis on the natural parent's rights to the child's custody. It is now provided that with respect to a revocation or annulment of a surrender instrument,

the parent or parents who surrendered such child shall have no right to the custody of such child superior to that of the adoptive parents, notwithstanding-

\textsuperscript{71} See text accompanying notes 17-19 supra. One impediment in New York to a placement based solely on psychological factors is a statutory requirement that religious faith be considered. Section 373(2) of the Social Services Law requires, when possible, that a child be placed in the custody of a person of the same religious faith. In addition, the New York Family Court Act mandates that when a child is placed in the custody of an agency or other institution, such placement should be in accordance with "the religious wishes of the natural mother, if possible." N.Y. FAMILY COURT ACT § 116 (McKinney Supp. 1973).

\textsuperscript{72} In re Adoption of Anonymous, 13 App. Div. 2d 885, 887, 215 N.Y.S.2d 684, 687 (3d Dep't 1961) (emphasis added). The court relied upon language from a Court of Appeals decision dealing with removal of a child from the custody of her neglectful mother.

"Her right as a parent, not as a married woman, to the care and custody of the child, becomes superior to that of all others, unless it should be shown anew by the child's relatives or custodians that she is an unfit person to exercise such guardianship." Portnoy v. Strasser, 303 N.Y. 539, 542, 104 N.E.2d 895, 896 (1952).


\textsuperscript{74} Id. at 195-96, 269 N.E.2d at 793, 321 N.Y.S.2d at 73.

\textsuperscript{75} N.Y. SOC. SERVS. LAW § 384(3) (McKinney Supp. 1973).
ing that the parent or parents who surrendered the child are fit, competent and able to duly maintain, support and educate the child. Thus, it seems that the rights of both the natural and adoptive parents are now equal, and a presumption no longer exists in favor of either. This is admirable and certainly in line with the authors’ views. In addition, New York currently allows foster parents to intervene as interested parties, as a matter of right, in any proceeding involving their child’s custody. Unfortunately, the statute does not permit such intervention unless the child has resided with the foster parents continuously for two years. Thus, their right to intervene on behalf of themselves or the child is severely limited. These statutory changes admirably erode judge-made advantages given to natural parents. If the courts implement the rationale behind such legislation, the child’s interests will be better served.

IMPLEMENTING THE AUTHORS’ THEORIES

Despite minor shortcomings and inconsistencies in the authors’ arguments, a convincing case is made for remedial action. Many of the authors’ proposals would appear to provide effective solutions to the plight of the child. Inherent in any theory, however, is the problem of implementation.

The authors espouse the position that placement should be treated as an emergency situation and not one which merely receives preference over other court actions. As a matter of regular procedure, courts and adoption agencies must give priority to placement proceedings and accelerate the course of review and ultimate decision. In adoption proceedings,

initial hearings should be promptly scheduled and decisions rendered quickly. The period for appeal should be extremely short, not more than a week or two with a final decision rendered within days after the close of that hearing.

Such swift judicial action will not only promote the child’s interests but will reduce the aggravation and frustration experienced by both the natural and adoptive parents. Yet the authors concede that the court system is burdened with “overcrowded dockets.” Their support of immediate action in placement cases raises the pervasive problem of financing the increased judicial workload. An unanswered question is whether those areas of the system of justice that are equally in need of speedy determina-

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84 Id. § 383(5).
85 Id. § 383(3).
86 GOLDESTEN, FREUD & SOLNIT at 43.
87 Id. at 43.
tion, e.g., criminal actions, are to be subordinated to the needs of child placement proceedings.

The authors also fail to consider that necessary facets of a judicial proceeding cannot be omitted in the interest of speed. For example, a written report containing all pertinent allegations and facts must be submitted to the judge or surrogate before he determines whether an adequate basis for granting an adoption is present. Deleting such an important part of the process would make it impossible for a court to correctly decide any adoption question. Although judicial determinations should proceed with all due speed, the necessary components of placement decisions must not be sacrificed.

The authors also propose that a greater emphasis be placed on the views of experts in the field of child development, including psychologists and psychiatrists. If the determination is to be predicated upon the recommendation of an expert, one may ask what remedy would there be if the psychologist's findings were incorrect? There are many schools of thought in the field of psychology, and it is conceivable that one man's opinion may be in error. To minimize the risk, a board or panel of psychologists should be utilized to provide varying viewpoints. This procedural device is already in effect in the areas of criminal and domestic law, suggesting its feasibility in child placement proceedings.

Change is also necessitated in the area of representation of the child in placement proceedings. Even though New York now permits foster parents to intervene as interested parties in custody cases, this right attaches only where the foster parents have had continuous custody for a period exceeding twenty-four months. The right of representation can also be exercised by adoptive parents. Such intervention should be carefully guarded, since in all child placement proceedings parents are attempting to assert their own rights. Parents are interested parties and, therefore, do not "have a conflict-free interest in representing the child." Consequently, the child's interests may still be without proper representation. For this reason, the authors stress that a child should be represented by autonomous counsel, that is, a counsellor who represents no one but the child. Although this is certainly a laudable manner in which to provide

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83 See GOLDSTEIN, FREUD & SOLNIT at 87-90.
84 In New York, the court will obtain the testimony of psychologists and psychiatrists to determine whether a defendant is mentally capable of proceeding in a criminal trial. After examining the defendant, these experts submit a report of their findings to aid the court in its decision. N.Y. CRIM. PROC. LAW § 730.20(5) (McKinney 1970).
85 The Domestic Relations Law requires a panel of three physicians, all authorities on mental disease, to unanimously agree that a spouse is incurably insane before granting an annulment on the grounds of insanity. N.Y. DOM. REL. LAW § 141(3) (McKinney Supp. 1973).
87 Id. § 384(3).
88 GOLDSTEIN, FREUD & SOLNIT at 65-66.
conflict-free representation, the authors offer no method by which this undertaking may be accomplished. The supply of qualified child placement lawyers is limited. To specialize in this area requires a great deal of skill and training. One must master not only knowledge of the law, but also child psychology.

An additional proposal of the authors is that in lieu of treating the natural and adoptive parents neutrally (as does New York by precluding any presumption in favor of either), the burden of proving that a change of custody is for the welfare of the child should be placed upon the person seeking the change. The courts should presume that once an ongoing relationship has been established between the child and his parents, whether natural or adoptive, the child’s best interests will be served by leaving this child-psychological parent relationship intact. Hence, the intervening party should carry the burden of proving that the existing relationship should be terminated. This proposal can easily be implemented by a change of statutory language and would coincide with the psychological goals of the authors.

The authors contradict themselves when they speak of “final placements.” They assert that the adoption decree should “be made final the moment a child is actually placed with the adopting family.” Yet, they also state that if adopting parents change their minds, they can initiate state intervention to provide the child with another placement opportunity. This procedure makes the authors’ “final” placement somewhat less than final and conflicts with the very thesis of their book—that the child should not become a football in the judicial system. Perhaps there is ultimately no perfect reconciliation between conflicting considerations of finality and changed circumstances. While it is essential that an ongoing psychological relationship continue, it must also be recognized that there are instances when a change may be necessary even though a disruption in the child’s environment will likely occur. However, a breach of the bond cannot be permitted merely at the whim and caprice of the adoptive parents. If the bond is to be broken, it should only be allowed under extraordinary circumstances, such as cases of child beating or parental degeneracy.

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8 Id. at 65-67.
9 Id. at 100.
10 Id. at 77.
11 Id. at 36.
12 Id.
13 Kentucky permits an adoption to be annulled if within five years of such adoption the child reveals definite traits of ethnological ancestry, different from those of the adoptive parents, and of which the adoptive parents had no knowledge or information prior to the adoption.” Ky. REV. STAT. ANN. § 199.540(1) (1972). The Kentucky legislature has apparently seen fit to declare a difference in ethnic background as a sufficient basis for making the adoption less than final. If the ethnic background difference, forming the basis for annulment, is grounded on the possibility that the adoptive parents, now frustrated and angry by the discovery, will
Another criticism which can be leveled at the authors is their failure to show how a psychological parent is to be determined during the early weeks of a child's life. It is possible that a young infant has not yet developed an attachment to anyone and that a change of parents would have no adverse psychological impact. It has been stated that should a court be called upon to make the determination during the first days or weeks of the life of a child, our policy in favor of the blood relationship, the so-called biological tie, would have been reasonably conclusive, absent a showing of unfitness of the natural mother. The authorities do not go so far as to suggest psychological or emotional harm in the event of transfer of custody at so early an age.88

If the latter statement is indeed true, then psychological factors need not be heavily weighed by the courts unless the child is beyond the earliest days of infancy.

Recent proposals in the New York Legislature point toward a greater emphasis upon the authors' theories. For example, in the area of foster care, one proposal would create a presumption that the child's needs are best served by placing him with foster parents who have cared for him continuously for two years or more, and who apply for adoption. The presumption, however, may be rebutted by direct evidence to the contrary.89

This approach is in accord with the authors' theory since it would allow, in the first instance, for a continuous, ongoing relationship with the parents reject and psychologically injure the child, then the statute is laudatory. If however, the provision amounts to little more than a ground for rescission, should the product not measure up to expectations, then the child is little more than a pawn on a chessboard, and the statute must be criticised for that reason.

88 Polow, The Lawyer in the Adoption Process, 6 Fam. L.Q. 72, 87 (1972). The authors of Beyond the Best Interests of the Child do indicate that changes in the psychological relationship have varied effects upon children of different age groups. In infants, for example, such changes from the familiar to the unfamiliar create distressful delays in the infant's mastery of his surroundings. Goldstein, Freud & Solnit at 32. "When infants and young children find themselves abandoned by the parent, they not only suffer separation distress and anxiety but also setbacks in the quality of their next attachments, which will be less trustful." Id. at 33.
For somewhat older children, each disruption affects the developmental stages which are rooted in the interaction with a "stable parent figure." Id. "After separation from the familiar mother, young children are known to have breakdowns in toilet training and to lose or lessen their ability to communicate verbally." Id. In school-age children, disruptions from their psychological parents have a detrimental effect upon those processes which are based on "identification with the parents' demands, prohibitions and social ideals." Id. Thus, multiple placements at this age result in many children being beyond the reach of educational influence, and [become] the direct cause of behavior which the schools experience as disrupting and the courts label as dissocial, delinquent or even criminal.

Id. at 34 (footnote omitted).

89 S. 3706 & A. 5511, 197th Reg. Sess. (1974). This proposal is almost identical to the type enunciated by the authors. In their model statute, they state:

A child is presumed to be wanted in his or her current placement. If the child's...
ents to whom the child has developed an attachment. The burden of showing the absence of an ideal relationship would be with the party seeking to disrupt the child's present environment.

A second resolution would make an adoption surrender irrevocable upon its execution and prohibit any action or proceeding for annulment of the surrender. It would require the judge to inform the natural parent of the consequences of his decision at the time the consent to the adoption is executed. This resolution also comports with the postulates of the authors by providing the continuity and finality which is so necessary for the normal development of the child. By creating a permanent relationship, the detrimental effects of constant changes in the child's environment will be overcome.

Finally, a third proposal would enable city public welfare officers to provide family and psychiatric counseling to adoptive parents to ensure smooth transitions. This counseling would continue for one year after the adoption becomes final. This resolution suggests a recognition by the Legislature of the necessity for reliance upon the discipline of psychology in achieving the best interests of the child. However, in addition to such "out-of-court" utilization of psychologists and psychiatrists, it must be stressed that greater emphasis on their knowledge should exist in in-court proceedings.

CONCLUSION

It is evident that present law fails to provide what is best for the child. Lack of conformity among judges in the criteria upon which they base their

placement is to be altered, the intervenor . . . must establish both:

(i) that the child is unwanted, and
(ii) that the child's current placement is not the least detrimental available alternative.

Goldstein, Freud & Solnit at 100.

* S. 4087, 197th Reg. Sess. (1974). This proposal by Senator Pisani is very similar to the Model Statute of the authors. The Model Statute states:

All placements shall be unconditional and final, that is, the court shall not retain continuing jurisdiction over a parent-child relationship or establish or enforce such conditions as rights of visitation.

Goldstein, Freud & Solnit at 101.

By statute, in a private placement adoption, if the parties consent, such adoption shall become irrevocable thirty days after the commencement of the adoption proceedings unless written notice of revocation thereof shall have been received by the court within said thirty days.

N.Y. Dom. Rel. Law § 115(b) (McKinney Supp. 1973). This section, although appearing to be an answer to the authors' proposals, has its shortcomings. For one, it applies only to private placements. Secondly, this provision may be inapplicable to a situation where a child has already been living with the foster parents and an adoption proceeding is subsequently commenced. The natural mother may be permitted to revoke her consent to the foster care arrangement.

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decisions makes it difficult to forecast the outcome of a custody case. Therefore, it is necessary to establish proper guidelines which can be uniformly followed. By adopting the views of the authors, the legal profession can accomplish this objective. If the decision-making process were based on psychological theories, the courts’ prejudicial judgments would cease. No longer would the child’s best interests be determined by “psychological laymen” who often fail in their attempts to do what is best.

In their Model Child Placement Statute, the authors indicate that it is irrelevant whether a parent is the biological, adoptive or foster parent, so long as the child has a psychological attachment to one or the other.\textsuperscript{98} Child placements must be in accordance with the child’s sense of time, continuity and permanence.\textsuperscript{99} The burden must rest on the party who seeks to disrupt an ongoing parent-child relationship to establish that his custody would be the least detrimental alternative.\textsuperscript{100} The child should be provided with independent counsel to assure an unbiased view.\textsuperscript{101} Finally, the time for hearings and appeals must be reduced so disruptions in the child’s life will be minimized.\textsuperscript{102}

New York could be the leading jurisdiction in giving legal recognition to the child’s best interests. This can be achieved only by a thorough examination of those interests from a psychological viewpoint and by new legislation which will serve to guide courts in meeting the essential needs of the real party in interest—the child.

\textsuperscript{98} Goldstein, Freud & Solnit at 98.
\textsuperscript{99} Id. at 99.
\textsuperscript{100} Id. at 100.
\textsuperscript{101} Id.
\textsuperscript{102} Id. at 101.