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The Courts Determine the "Best Interest" of a Child

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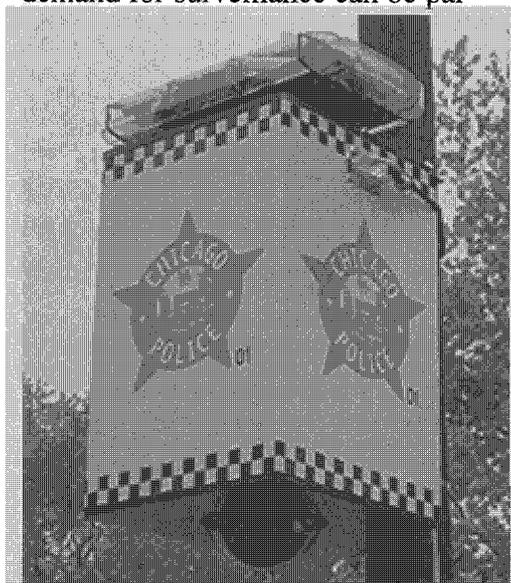
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pressing criminal activity. According to Yohnka, the experience elsewhere indicates they won't be very effective, and he suggests the cameras could serve to simply drive criminals to other areas.

Bayless, however, says it won't be easy to run and hide from the cameras, which are easy to take down and put up again. Plus, he says, cameras are only part of the solution. A total solution to the crime problem also includes more traditional efforts such as more officers walking their beats.

Chicago's use of public surveillance cameras is part of a growing national trend. Similar measures have been installed in cities such as Washington, D.C., where the local chapter of the ACLU has opposed the taping of law-abiding people in public places without suspicion of wrongdoing.¹

Yohnka says the increased demand for surveillance can be par-



tially attributed to the terrorist attacks on September 11, 2001. He says fears of terrorism and the availability of increasingly affordable cameras have accelerated the trend.

"This development is not so much new after September 11th, but the terrorist attacks of that day clearly have accelerated the process of

extending surveillance," Yohnka said. "What has changed is that the marketers of these technologies have been unleashed to use fear as a sales tool, and they are hard at work." Although it has not opposed Chicago's public surveillance system, the ACLU does have some trepidation about where these types of measures might lead in the future, and the effect that heightened surveillance will have on the way we live our lives. Yohnka worries that the cameras are just one step in a longer march toward building a surveillance society.

"The real problem is that we as a society extend these technological usages without adequate policies to protect individual privacy," he said. "We think, or convince ourselves, that

cameras and other technologies will make us safer without ever considering the long term impact. I suppose our real concern is the development of a society where individuals are constantly monitored by government agents, cameras, computer monitoring and by gathering of information about our credit and banking activities."

"It is critical that the government is engaging in this activity because that information could then be used to prosecute individuals. This type of surveillance not only invades an individual's privacy, but is likely to have a chilling impact upon expressive activity in our society - a very distressing prospect."

1. National Capital Area ACLU, D.C. *Video Cameras vs. Live Community Police in Our Neighborhoods*, at <http://www.aclu-nca.org/boxSub.asp?id=8>

The Courts Determine the "Best Interest" of a Child

Karine Polis

The "best interest" standard is not applied consistently to all custody proceedings, especially when comparing foster care/adoption cases with divorce/domestic relations cases. The Illinois Appellate Court recently decided *In re: Marriage of Sobol*, where it revisited the "best interest of the child" standard in a divorce context.¹ This case most comprehensively applied the five factor "best interest" test that the Illinois Supreme Court has identified.² The issue before the court was "whether the best interests of the children would be served by

remaining in Illinois or moving to Colorado." In their decision, the Court focused on the children's quality of life in Illinois and whether the parent in Colorado would receive a reasonable amount of visitation without the children having to move. The court ruled that it was in the children's best interest to stay in Illinois since they were doing well there and reasonable visitation was possible.

The Juvenile Court Act of 1987 defines the "best interests" of a child as including the following factors: the physical safety and welfare of the child, the child's background

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and ties to family and community, the child's sense of attachments including where the child feels love, security, familiarity, and continuity of affection, and the child's wishes and long-term goals.³ Courts generally use the "best interest" standard when determining child custody arrangements. Still, there is disagreement about how this standard should be applied, especially when comparing foster care/adoption cases to domestic relations/divorce cases.

In *Collingbourne v. Collingbourne*, the Supreme Court of Illinois discussed the "best interest" test and allowed a mother to move her child from Illinois to Massachusetts, away from the child's father and the paternal family.⁴ The court, in a detailed discussion of the child's "best interest," ruled that moving the child to Massachusetts would enhance the child's quality of life and ability to prosper and develop as an individual. The court held that the move was in the child's "best interest" since he would be able to live in a family unit, would be out of day care and be able to spend more time with his mother, could be involved in more after school activities, would have more children his age around, and would be able to visit with his father frequently and for longer periods of time.⁵

Although these two Illinois cases placed the child's "best interest" at the forefront of their decisions, some argue that this standard is disregarded during other custody determinations. Eleanor Willemsen, a professor of psychology at Santa Clara University, and Michael Willemson, an attorney who works on child custody cases, co-authored an article that criticizes the inconsistent use of the "best interest" standard by the courts.⁶ The authors argue that failure to place this standard at the heart of all custody decisions can be extremely damaging to a child's development and

happiness. The authors advocate the need for courts to protect children's rights to continue their close relationships in any custody decision.

The first case that the authors critique is the famous Baby Jessica case. In this case, the birth parents claimed that the father had never received notice of his right to object to the adoption.⁷ During the two-year trial, the child was in the custody of the adoptive parents. The court finally denied the adoption and returned Baby Jessica to her birth parents, without regard to which living situation would be in her "best interest." The second case, *Crandall v. Wagner*, discussed two lesbian women who had raised a baby together and after their relationship ended, the biological mother refused to let the other woman visit the child.⁸ The court held that visitation can only be granted in connection with a divorce, paternity, or juvenile dependency action; thus, the court could not award visitation regardless of the "best interest" of the child.

Gail T. Smith, the Executive Director and staff attorney at Chicago Legal Advocacy for Incarcerated Mothers, works on child custody and guardianship cases and she agrees that the "best interest" standard is very subjective. In her opinion, the standard tends to operate very differently in domestic relations/divorce cases than it does in foster care/termination of parental rights cases. She explains that "domestic relations law usually assumes that children should have a right to a relationship with both parents unless visits pose a threat of endangerment. Child welfare law tends to assume that since the child was removed from a parent and the parent has not managed to regain custody, continued contact is not necessary for the child's healthy development."⁹

The discrepancy in the application of the "best interest" test is

most visible when comparing a divorce case to an adoption case. In a divorce proceeding, the "best interest" of the child is usually more thoroughly analyzed since both parents have a legal right to the child and a connection with the parent is viewed as essential to a healthy future. On the other hand, in an adoption case, the

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parent's legal right to a child has been terminated so the "best interest" of the child is often trumped by the fact that the parent has failed to maintain a steady relationship with the child. In both cases, the child should be able to maintain the bond that it had with its biological parent, yet the legal right of the parent tends to trump the "best interest" of the child in adoption cases. "Children who enjoy relationships of intimacy and security with their closest caregiver(s) are more likely than those who do not to be curious, friendly, successful, and are better able to communicate with others."⁹ This does not change solely because a parent has lost his or her right to the child. If a connection with the biological parent has been established, then the courts should apply the "best interest" test.

1. *In re: Marriage of Sobol*, No. 4-02-0935, 2003 Ill. App. LEXIS 1097 at 4 (Aug. 26, 2003).

2. *Id.* at 14-15. "The court used the five factor test that was set out in *In re: Marriage of Eckert*, 119 Ill. 2d 316, 326-27 (1988). The five factors are (1)

whether the proposed move will enhance the quality of life for both the custodial parent and the children, (2) whether the proposed move is a ruse designed to frustrate or defeat the noncustodial parent's visitation, (3) the motives of the noncustodial parent in resisting removal, (4) the visitation rights of the noncustodial parent, and (5) whether a reasonable visitation schedule can be worked out."

3. 89 D.C.F.S. §309.20 (2002).

4. *Collingbourne v. Collingbourne*, 204 Ill. 2d 498, 536 (2003).

5. Willemsen, Eleanor and Michael Willemson, *The Best Interest of the Child: A Child's Right to have Stable Relationships must be Central to Custody Decisions*, Issues in Ethics, Vol. 11, No. 1, (Winter 2000).

6. *In Interest of B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1992).

7. *Crandall v. Wagner*, 84 Cal. Rptr. 2d 48, 49 (1999).

8. Gail T. Smith, Executive Director and Staff Attorney, Chicago Legal Advocacy for Incarcerated Mothers.

9. Willemsen & Willemson, *supra* note 9.