



# In 'The Best Interests of the Child': Critical Reflections on an Overused Construct

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The construct 'the best interest of the child' is embedded in child protection legislation in all Australian states and territories. This phrase or construct in its modern iteration that dates from 1973 is constantly evoked when decisions are being made about a child's future following the substantiation of a case of child abuse and neglect. The use of the best interests of the child as a standard for decision-making, even though there is no consensus in law or social science as to what the construct means, needs to be questioned. What often follows from reliance on the best interests of the child is the placement of a child in foster care or kinship care in the hope that this will produce a better outcome for the child than if they remained in parental care. No doubt this is true for some children. Recent outcomes studies of foster care point to less than promising results for many children. As a result it can be argued that placing a child in foster care is a gamble with the child's future life.

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The construct or phrase 'the best interest of the child' gained most prominence in the 1970s with the publication of the book *Beyond the Best Interests of the Child* (Goldstein, Freud, & Solneit, 1973). It was reinforced in subsequent years with the publication of *Before the Best Interest of the Child* (Goldstein, Freud, Burlingham, & Solnit, 1979) then *In the Best Interest of the Child* (Goldstein, Freud, Solnit, & Golstein, 1986) and finally *The Best Interest of the Child. The Least Detrimental Alternative* (Goldstein, Solnit, Golstein, & Freud, 1996). Antecedents of this construct are to be found in earlier British case law that embodied 'the welfare of the child principle' (*Re A and B (infants)* [1897] 1 Ch 786 at 792) and in family law in regard to women's rights (Dickey, 1997). Nevertheless in the 37 years since the publication of the first book this construct has, in law and child protection practice, acquired such standing that it is rarely challenged or critically examined.

The construct itself is hard to criticise. It is a motherhood and apple pie statement to which everyone is willing to pay lip service. It would be hard, for example, to argue that a legal decision should be made that is *not* in the best interest of the child and to expect that such a proposition would be easily heard. It may be possible to construct a check list of factors such as physical health, cognitive devel-

opment and education that foreshadow anticipated future developmental progression for a child. At the point of decision-making by a magistrate or child protection caseworker such factors can only indicate hope for the future that the positive growth and development will occur. There is also the question about how a checklist would work if it existed. Would all the factors have to score positively or would a 51% majority be good enough to support a claim that a decision was in the best interest of the child? What must be emphasised is that there is no agreed definition of the construct.

The inconsistency in the use of the construct in the best interest of the child is borne out by data about the number of children in out-of-home care. For example, in New South Wales (NSW) 9.6 children (per 1,000 children) were removed to out-of-home care in the year 2008–09 with 40.5% of the children being placed in foster care and a further 56.7% in relative/kin care. In contrast, in Victoria

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the rate for the same period was 4.3 (per 1,000 children) with 45.2% in foster care and 37.2% in relative/kin care (Australian Institute for Health and Welfare [AIHW], 2010; Winokur, Crawford, Longobardi, & Valentine, 2008). Yet both states are supposedly acting in the best interest of the child. Why then does Victoria remove fewer children from parental care than NSW? Seemingly the construct can be used to justify whatever you like.

## Legal Challenges

From a legal point of view the best interest of the child is not a simple ideal principle (Dickey, 1997; Parker, Parkinson, & Behrens, 1999). Some of the identified problems with the principle include issues of 'indeterminacy, fairness and cost effectiveness' (Parker, Parkinson, & Behrens, 1999, p. 739). Parker and colleagues define determinacy as existing when there is 'the uniquely correct answer' (p. 740). Using Elster's (1989) analysis these authors demonstrate that the best interests of the child is anything but determinate. The fairness issue concerns whether application of the principle infringes parental rights. The cost efficiency raises the concern about the cost in time and money resulting from prolonged litigation and whether the child's interests are interfered with by the litigation process itself.

Other challenges to the best interests of the child construct are presented by Reece and Freeman. In a particularly virulent attack Reece (2010) cites a British legal ruling about paramountcy as follows.

A process whereby, when all the relevant facts, relationships, claims, and wishes of parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare, which I call the paramountcy principle. (*J v C*, Lord MacDermont, 1970 AC 668)

Reece (2010) then comments 'in other words, children's welfare trumps and outweighs all other considerations; no other interests or values may affect the decision; children's interests are the only one that count' (p. 105). She then goes on to argue that the paramountcy principle while based on a wide consensus (everyone agrees — that the best interest of the child should come first) is shaky because of its indeterminacy. There is no agreement as to what this means and how decisions should be made to ensure the best interests of the child.

Freeman, writing shortly after the publication of *The Best Interest of the Child* trilogy (Goldstein, Solnit, Goldstein, & Freud, 1996) and writing from a children's legal rights perspective, is particularly critical of the foundation of the best interests of the child argument because of its dependence on psychoanalytic theory. He rightly points to the limitation of this theory as a basis for social policy, given its derivation from clinical practice rather than scientific empirical evidence. Freeman also notes, as have other authors (Hansen & Ainsworth, 2009), how the

best interests of the child construct is held as if it 'embodied incontestable truth and be beyond any challenge' (Freeman, 2010, p. 78). Freeman further comments as follows: 'Too often reading the *Best Interests* I have been left with a feeling of being trapped in a time warp. Not least I sense that *Best Interests* has an almost cereal package image of the family' (Freeman, 2010, p. 101).

Unfortunately, this lack of consensus in law and social science as to the meaning of the overutilised best interests of the child construct has led to a situation in which 'the personal preferences of lawyers, magistrates, judges social workers and others' (Hansen & Ainsworth, 2009, p. 432) govern decision-making. Similarly Zito, an experienced Australian lawyer, states that:

A judge must determine each case on the basis of evidence properly introduced and must apply the law to its circumstances. Of course a judge will be influenced by views and conceptions of what is good for children generally. So, two different judges might well reach different decisions in a very similar set of circumstances. (Zito, 2010, p. 49)

In the same article, Zito also wrote:

I do not believe that we will ever be able to create a standard, a test, a rule of practice or of law that will be able to definitively to establish what is or is not in the best interests of a child. (Zito, 2010, p. 51)

Moreover, because of the indeterminacy as to what the best interest of the child means:

in order to make a rational choice the judge (added or magistrate) needs to compare the expected utility of each (added placement) option. To do this the judge would need considerable information, predictive ability and some source for the values to measure utility. (Reece, 2010, p. 109)

Needless to say, it is rare to find a judge or magistrate who is able to satisfy all of these requirements in any particular case.

## Foster Care Outcomes

Given that the use of the best interests of the child construct is relied on in Children's Court proceedings the next step is to consider what we know about the outcomes of foster and relative/kinship care. When a state child protection authority applies to the Children's Court for an order allocating parental responsibility to the Minister, in NSW this is usually until the age of 18 years, this invariably means that the child will be placed in long-term foster or kinship care. Thus a magistrate, when granting such an order, is effectively deciding that growing up in foster care or kinship care rather than in parental care is in the best interest of the child. We would argue that implicit in this decision is the states' promise to the child that growing up in foster care or kinship care will enhance the child's life chances and allow them to transition to a healthy adulthood. In that respect, is the magistrate

relying on his/her 'predictive ability', or just making what we term the 'happiness assumption' with the hope that all will be well?

Unfortunately, studies of the outcome of foster care are only partially supportive of this assumption. The 1996 Cashmore and Paxman study of wards leaving care in NSW and the subsequent follow up study (Cashmore & Paxman, 2006) shows that:

Many young people leaving care are not faring well relative to other young people their age; as a result, their life chances are diminished by poor educational attainment, marginal employment, short-term and poor quality accommodation, poor mental health and limited social support. (Cashmore & Paxman, 2006, p. 20)

Similar results are also reported from a small Victorian study of eight young people by Frederick and Goddard (2006). Most recently a Victorian study of the educational attainment of children in out-of-home care (mostly foster care) provides evidence of continuing poor educational outcomes for many of these children (Wise et al, 2010).

Of course, it will be argued that these young people had to be removed from parental care as it was in their best interests. No doubt it will also be argued that the poor outcomes on all of the above measures are a result of the abuse and neglect these children and young people experienced while in parental care and before they were placed in foster care. The conclusion seems to be that the poor outcomes are not the responsibility of the foster care system. This evidence does not support such faith in the beneficence of foster care for all children.

Other recent studies are even more worrying as they suggest that children on the margin of placement have better outcomes when they remain with parents. Children on the margin are those about whom there is debate as to whether they should be removed from parental care (Doyle, 2007, 2008; Lawrence, Carlson, & Egeland, 2006). Both of the Doyle studies use large-scale Illinois databases as the source of the statistical data. Doyle uses random assignment and child protection investigators as an instrumental variable to identify causal effects of foster care on long-term outcomes for young people. These effects are juvenile delinquency, teen motherhood, and employment and earnings as measures of stability. The results indicate that, on these three counts, marginal children appear to have better outcomes when they stay at home rather than when they are placed in foster care. Marginality in the Doyle sense is derived from viewing child protection investigators as 'strict' and 'lenient'. Thus a condition is embraced whereby 'any child removed by a lenient investigator would also be removed by a strict one, and a child not removed by a strict case manager would not be removed by a lenient one' (Doyle, 2007, p. 1586). The result is that we have three groups of children — those who strict and lenient investigators agree should be removed, those who strict and lenient investigators agree

should not be removed and those marginal children where there is difference as to what decision should be made, but who nevertheless were placed in foster care.

In the second study Doyle used the same method and a new Illinois dataset that links child protection and criminal justice data 'to estimate the causal effects of foster care on adult crime'. The result was that 'Children on the margin of placement were found to be two to three times more likely to enter the criminal justice system as adults if they were placed in foster care' (Doyle, 2008, p. 746). This is compatible with earlier studies of foster youth in adult corrections where the findings show that 'nearly 20% of the U.S. prison population under the age of 30, and 25% of these prisoners with prior convictions report spending part of their youth in foster care' (Johnson-Reid & Barth, 2000a; 2000b).

Similarly, a survey of 'children who turned 18 years in foster care in the Midwest (inserted *Illinois*) found that 67 per cent of the boys and 50 percent of the girls had a history of juvenile delinquency' (Courtney, Terao, & Bost, 2004, p. 9). A latter evaluation of the outcomes for the same former foster children, but at age 23 and 24 years, reinforces these findings (Courtney et al., 2010). The Australian national juvenile justice minimum dataset does not contain information in regard to the foster care history of young people in detention or on supervision orders (AIHW, 2009).

A further study raises question about the impact of foster care on child development and the possibility that some children would have gained greater benefit from remaining in parental care (Lawrence, Carlson, & Egeland, 2006). This study of 189 children used a prospective longitudinal dataset to investigate child behaviour and psychological functioning, taking account of baseline adaptation prior to placement and socioeconomic status at the time of placement' (Lawrence et al., 2006, p. 57). The three groups in the study were as follows: 'those who experienced foster care, those who were maltreated but remained in parental care and children who had not been in foster care and received adequate care (Lawrence et al., 2006, p. 57). The results indicate that:

Children placed in out-of-home care exhibited significant behaviour problems in comparison to children who had received adequate care ... following release from care. Similarly, children placed in unfamiliar foster care showed higher levels of internalising problems compared to with the children reared by maltreating caregivers, children in familiar care, and children who received adequate care. (Lawrence et al., 2006, p. 57)

Lastly, we have a five-year developmental outcomes study of young children remaining in foster care, returning home or being adopted (Barth & Lloyd, 2010). The data for this study was drawn from the National Survey of Child and Adolescent Well-being and consisted of 353 children who were under 13 months at the time of base-

line sampling. Twelve measures were used in relation to cognitive and language skill as well as the Vineland adaptive behaviour scale screener—daily living and the Child Behaviour Check List (CBCL). The results indicate that the young children who remained in foster care long term and who were not returned to parents or adopted, fared least well on the measures of cognitive and language skill development.

Clearly, these studies suggest that foster care has a long way to go before all children placed in foster care can be guaranteed that their placement will enhance their future life chances.

This is not to deny the existence of a number of well-designed research-based and effective foster care models, the outstanding example of which is the Oregon multidimensional treatment model (Chamberlain, 2003). But these models are expensive and have not been carefully replicated in Australia. Moreover, the recent Boston Consulting Group (2010) review of out-of-home care in NSW and the discussion of the nongovernment models of foster care focused not on the effectiveness of these models but on reducing the cost to government of foster care services. This focus does not fit well with the clear evidence that foster care provided by a nongovernment organisation at a higher cost than state care can have significant beneficial effects on the long-term physical and mental health of former foster care children (Kessler et al., 2008).

## Outcomes of Kinship Care

The news from relative/kinship care is more positive. In 2008–09 of the 34,069 children in out-of-home care in Australia as many as 15,479 (45.4%) of these children were in relative/kinship care with a slightly higher figure of 16,043 (47.1%) placed in foster care (AIHW, 2010).

The state and territory figures vary with 8,620 (56.7%) of children in care in NSW in relative/kinship care while in the Northern Territory the figure is a low 107 (22.2%) of the children in care. Of the NSW figure of 8,620 in relative kin care 4,169 are indigenous children placed according to the Aboriginal placement principle, mainly in relative/kinship care.

As Kang indicates, the primary justification for relative/kinship care:

... is that helps children ease the pain of losing birth parents because it offers social relationships of extended kin networks and familial and cultural continuity. In addition biological ties and established bonds between kin caregivers and children are expected to increase caregiver commitment. (Kang, 2007, p. 575)

In a 2009 NSW study that is supportive of kinship care, a plea is made for relative/kinship care to be seen as unique and separate from foster care. This argument is based on the view that 'the way kinship carers take on the task of caring for their relative children, not like foster carers, as

"quasi professionals" in stranger relationships with the children — but because of familial relationships and obligations' (Yardley, Mason, & Watson, 2009, p. 79). Their proposal is for relative/kinship care to cease being modelled against foster care and to move to a whole-of-family model supported by specialist training and support services.

Nowhere is this argument about the 'familial relationships and obligations' basis for kinship care better illustrated than where grandparents are caring for grandchildren, often as a result of parental drug use (Joslin, 2009; Paton, 2003, 2004). In 2003 this phenomenon led to the Council on the Ageing being commissioned by the federal government to undertake the study, 'Grandparents Raising Grandchildren' (Fitzpatrick & Reeve, 2003). This report identifies the lack of specialist support services for grandparents as kinship carers.

Finally, in an important US study of the outcome of kinship care and foster care it was found that:

After controlling for demographic and placement characteristics, children in kinship care in Colorado experienced as good or better outcomes than did children in foster care. Specifically, children in foster care were four times more likely to still be in placement, 10 times more likely to have a new allegation of institutional abuse or neglect, and six more times likely to be involved with the juvenile justice system. Children in kinship care had significantly fewer placements and were seven times more likely to be in guardianship, whereas children in foster care were two times more likely to be reunified with their biological parents. (Winokur, Crawford, Longobardi, & Valentine, 2008, p. 144)

This outcome study needs to be replicated to reconfirm the findings. It suggests that placing a child in nonrelative foster care may not always be in the best interest of the child.

## Conclusion

It is clear that child protection systems can and should be managed in such a way as to reduce the number of children removed from parental care (Ainsworth & Hansen, 2008) while at the same time protecting children from harm.

The removal of a child from parental care is traumatising for the parents and the child. For it to be in the best interests of the child there has to be overwhelming evidence that without removal from parental care the child would be at risk of significant harm. In addition, we argue that there has to be a guarantee that removal from parental care and the placement of a child into state care will enhance the child's future life chances.

The question may be asked 'should the state be held to a higher standard of care than required of parents?' Our answer is an unequivocal 'yes'. How can this not be the case, as in seeking to remove a child from parental care the state is judging the parents as incompetent. Surely we cannot have the situation where there is dissatisfaction

with the standard of parental care but satisfaction with a lower standard of care when care is provided by the state. There is no place for this type of double standard. Without this guarantee the removal of a child from parental care cannot be justified and may be nothing other than a gamble with the child's future.

What we have shown in this article is that overreliance on the construct the best interests of the child and the removal of children to out-of-home care provides an uncertain future for these children. Our conclusion is that removal of a child from parental care is not a time for celebrating a child's new-found safety and future opportunities. At best, it signals further uncertainty for far too many of the children who are removed from parental care.

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