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Family Permanence Versus the Best Interests of the Child

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Historically, promoting family permanence (e.g., keeping the original parent-children relationships intact) has been controversial. At times, priority was given to the family of origin, but due to the best interests of the child principle, there has also been preference for foster placements and adoptions. This article presents the legal backdrop (e.g., the Adoption and Safe Families Act of 1997) and discusses history, as well as ethical and psychological issues. It is asserted that (1) at present, the concept of the best interests of the child is of foremost importance, and (2) biological and psychological parental qualities can be enhanced through preventive and remedial parent education in the family therapy context.

Historically (when children were assumed to be chattel) the law guarded the biological parents' rights (particularly for the father) (Emery, Otto, & O'Donohue, 2005). As society evolved, the 1950s reflected the public sentiment that a child deserved elevated protection. By the 1960s and 1970s, concerned groups of parents engaged in advocacy for the well-being of children, pursuing the notion that foster and adoptive parents provided the best solution. With governmental intervention for foster placement or adoption, the prevailing assumption was that a child would be assured of a "good and loving home," and the biological parents were more or less forgotten. Unfortunately, extra-familial placements did not always result in ideal (or even adequate) conditions.

Beginning in about 1975, the Child Welfare League of America, the Junior League of America, and the North American Council on Adoptable children began working with Congress on a bill that would eventually become Public Law 96-272, the Adoption Assistance and Child Welfare Act of 1980. The legislation provided for the funding of foster care, adoption, daycare services, and services for caretakers (e.g., those with substance abuse problems). Above all, the main goal of the legislation was to promote for family of origin permanency. That is, efforts were to eventually return any child in foster or potentially adoptive circumstances to the original biological or psychological parents, notwithstanding any neglect or abuse that had been inflicted. There should be "family permanency."

In the 1980s, there seemed to be a surge toward termination of parental rights. There were case-by-case rulings, applying a clear and convincing standard (*Santosky v. Kramer*, 1982), with somewhat unpredictable results. Termination of parental rights reflected a distinct public policy and legal movement towards the best interests of the child principle: "Termination must be shown to be in the child's best interests and convincingly based upon at least one of the five criteria. . . (extreme abuse or neglect, abandonment, incapacity, stagnation and failure to remedy, or irretrievable breakdown in the parent-child relationship)" and "alternatives may be entertained: open adoption (in which the natural parents retain the right to communicate with the child), long-term foster care, or the awarding of legal guardianship of custody to a third person" (Nurcombe & Partlett, 1994, p. 148).

In the 1990s, Congress passed legislation that put the well-being of the child before family permanency. Public Law 105-89, the Adoption and Safe Families Act of 1997, greatly expanded upon its predecessor.

One of the substantial expansions of P.L. 105-89 was that “reasonable efforts” should be made to ensure the safety and well-being of the child. Unfortunately, “reasonable efforts” were not defined clearly. The lack of a clear definition was sometimes viewed as a “loop hole.” The Act provided a protocol for the termination of parental rights, criminal background checks on potential caretakers, checking on states performance to ensure the well being of the child, and permanency hearings. More positively, the legal system tended to support individualized decision-making; that is, the “best interests” for one child were not necessarily the “best interests” for another child.

In this day and age, state statutes commonly provide for possible family permanency, albeit there are some differences and conditions. As a few examples: Nebraska LB 1041 advocates for “reasonable efforts” to provide for the welfare of the child, including a permanency plan or an adoption plan. Arizona Statute 8-845(C) requires that the state make every effort to reunify the family if possible; plans for permanency and adoption can be made concurrently. Florida Statute 39.001(f) endorses permanence: “To preserve and strengthen the child’s family ties whenever possible, removing the child from parental custody only when his or her welfare cannot be adequately safeguarded without such removal.” However, the best interests of the child remain paramount.

The best interests of the child principle has received statutory adoption in every state jurisdiction. Consideration is given to psychological and other needs: “legal decisions should try to provide children with childrearing environments that are most likely to ensure optimal development in light of their unique needs and circumstances” (Roesch, Zapf, & Hart, 2010, p. 76).

In general, the modern trend is to place the well-being of the child above preservation of the family unit per se. This can be accomplished through the creation of a permanency plan that lays out the protocol for placement and services to be provided in foster care, as well as a plan for reunification of the family if it is plausible. The nature of “transgressions of parenting” is complex and difficult to resolve, remediate, or improve, as could lead to family permanency supporting the best interests of the child (Keifer, Worthington, Myers, Kliwer, Berry, et al., 2010). If parent-child reunification is not plausible, parental rights can and will be terminated and alternative living arrangements will be made for the child.

Ethical Issues

When dealing with permanency issues, “who is the client?” is one of the more troubling questions the family therapist must answer. According to Principle I of the code of ethics of the American Association for Marriage and Family Therapy (AAMFT, 2001), the family therapist must: “advance the welfare of families and individuals. They respect the rights of those persons seeking their assistance, and make reasonable efforts to ensure that their services are used appropriately” (American Association for Marriage and Family Therapy, 2001, p. 220).

Regardless of the professional relationship with the family, the family therapist must act in the best interests of the child. The ethics code of the American Psychological Association (APA, 2002) declares “do no harm” (p. 1062). This admonition is applicable as a fundamental ethics principle for all of the mental health professions, and is relevant to family therapy. Consequently, if the child’s family origin, foster placement, or adoptive family situation seems detrimental to a child’s development, the family therapist’s advocacy for permanency of the negative relationships would seemingly be a potential violation of “do no harm.”

Balancing confidentiality for all parties involved in a permanency hearing is another ethical concern for the family therapist. The APA (2002) ethics code states: "Psychologists have a primary obligation to take reasonable precautions to protect confidential information obtained through or stored in any medium recognizing that the extents and limits of confidentiality may be regulated by law or established by institutional rules of professional or scientific relationship" (p. 1066). Similarly, according to the AAMFT (2001) ethics code states: "Marriage and family therapists do not disclose client confidences except by written authorization or waiver, or where mandated or permitted by law" (p. 221). The family therapist must keep in mind that clinical case records may be subjected to a subpoena or court order, which may require that the family therapist obtain legal counsel (Woody, 2008).

During a permanency hearing, the family therapist can encounter a dilemma between ethics and the law. The family therapist, to keep from breaking confidentiality must make efforts to resolve this conflict. It should be noted that the conflicts between ethics and law has led recently to a revision of the APA (2002) ethics code, which now states:

Standard 1.02, Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority

If psychologists' ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists clarify the nature of the conduct, make known their commitment to the Ethics Code and take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. Under no circumstances may this standard be used to justify or defend violating human rights. (Faberma, 2010, p. 62)

If an ethics versus law conflict cannot be resolved, the APA revision requires making known the allegiance to ethics. In accordance to the AAMFT (2001) ethics code, the family therapist is expected, such as in permanency proceedings, to "exercise special care when making public their professional recommendations and opinions through testimony" (p. 222). Therefore, even when mandated by law to reveal information in permanency hearings, the family therapist must act in accordance with what is in the best interests of the child.

Psychological Issues

Across various therapeutic modalities, the family unit is widely recognized as the cornerstone of child development. For optimum development of social, emotional, cognitive, and psychological skills, a loving, reinforcing, and constructive family/home system is imperative. Positive qualities are developed through attachments and bonds with caregivers. However, if the attachments and bonds are negative, the child's development will likely be jaundiced. The family therapist should always address the question of whether or not family permanency is beneficial for the child.

In today's society, divorce is pandemic in nature and detrimentally impacts children (Clarke-Stewart, Vandell, McCartney, Owen, & Booth, 2000). The dissolution of the family unit can lead to grave consequences for children (social, emotional, cognitive, psychological, and behavioral).

Although there is a legal difference between divorce and permanency proceedings, the psychological and developmental outcomes for the child are similar. When the family unit is modified or dissolved, the child will quite likely have difficulty achieving homeostasis and becoming a healthy self-regulating adult (Applegate & Shapiro, 2006). With both divorce and permanency proceedings, the best interests of the child are at risk.

Permanency of the family unit, although admirable in purpose, is not always in the best interests of the child. A negative environment can be just as detrimental to a child's well being as being moved from placement to placement (Hess & Falaron, 1991). Therefore, it seems that a child's optimal development depends on a positive, nurturing family/home environment. Whether family permanency contributes any assurance to this developmental objective remains for conjecture.

Conclusion

Currently, the primary goal of permanency legislation is to ensure the best interests of the child and to make reasonable efforts to reunify the family unit. Commonly, reasonable legal efforts to protect the child are made on a case-by-case basis and procedures may be inconsistent and poorly defined. Regardless, the nature of family therapy seems to support the family therapist's promoting a plan to help parents and caregivers to regain, better establish, and maintain effective family permanency (Canstankos, 2008). For example, a permanency plan could include requiring parents to attend parenting classes and adhering to plans that are in accord with legal rulings (e.g., as might be crafted by court ordered parenting coordinators). If, however, reunification is found to not be in the best interests of the child, alternative plans should be developed and advocated by the family therapist. In all permanency planning efforts, expertise in family assessment and interventions is essential, which carves out a critical role for family therapists.

Permanency of the family can be a delicate and complex subject. It is no longer enough to strive to keep every biological or psychological parent-child relationship together, as seemed to prevail in the early 1980s. The family therapist should encourage parental competency for identifying and meeting the best interests of the child. Regrettably, even with extensive professional interventions (e.g., supervision of parenting), there are some family systems that lack positive potential to meet the best interests of the child, and permanency hearings will have to arrange the least detrimental alternative (Goldstein, Freud, & Solnit, 1973; Goldstein, Solnit, Goldstein, & Freud, 1996).

A critical question is what could society do to better fulfill the best interests of the child? Obviously, more funding for social and mental health programs and better-qualified service providers would be helpful. Reality dictates, however, that financial issues prevent that approach, especially in the current economic era. It seems that, regardless of context, the only practical and achievable approach is to enrich the existing services and to better focus on prevention ineffective parenting and cultivate effective parenting.

Although expanded opportunities for parent education would require funding, benefits will quite possibly outweigh the costs, and the best interests of the child, parents, and society will be served. In accord with the best interests of the child, preventative measures should receive priority. As one strategy, before or soon after birth, the hospital should provide information about parenting and community resources (e.g., in a class format) and evaluate the participants' competency. For parents or caretakers involved in permanency proceedings, the same of information and evaluation should be required, albeit reactive in nature.

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