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RACIST PARENTING AND THE BEST INTERESTS OF THE CHILD:

A LEGAL AND ETHICAL ANALYSIS

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In this article, we use a recent Manitoba child custody case to provide a legal and ethical account of the notion of the best interests of the child. We explore the tension between the best interests of the child and parental rights to expression of a racist nature. We consider how the interests of different actors – the state, parents and children – are considered in the context of racist parenting. The parent-child relationship is salient in formulating and influencing acceptable and unacceptable thoughts, ideas and behaviours in children but the views of parents do not always coincide with what society tolerates as acceptable. We ask, when do parental views on subjects such as religion, race or politics reach the level of 'legal unacceptability' such that a parent could face a loss of custody as a result of expressing or teaching these views to his or her child? We also consider the ethical frames which apply to this proposed fact situation to help us make sense of the best interests of the child principle where racist parental beliefs are at the fore. This article encourages advocates, care-givers, and adjudicators to work with Solomon-like wisdom for the best interests of the child by bringing to consideration the commonly taken-for-granted jurisprudential and ethical meanings and interpretations that are perhaps over-embedded and under-considered in the cliché-oriented notion of the best interests of the child.

Introduction

The headlines are sensational, provocative and enraging:

Mother of Girl with Swastika Wants Children Back (CTV Winnipeg, 2008, July 4)

Winnipeg 'White Pride' Mother Regrets Redrawing Swastika on Child's Arm (CBC, 2008, July 10)

> *Manitoba Government Seeks to Ban Media from 'White Pride' Custody Trial* (CBC, 2009, January 29)
>
> *Custody Trial Set for Accused White Supremacist Parents in Winnipeg* (CBC, 2009, May 15)
>
> *Girl Watched Skinhead Videos and Talked of How to Kill, Hearing Told Parents Accused of Racist Teachings Begin Court Battle for Children* (CBC, 2009, May 25)

This is the misfortune of some children who wind up in circumstances where their parents become embroiled in media frenzies and custody battles, where the simple, fragile and innocent processes of growing up become incredibly complicated by adult attentions, inattentions, and contested rights, responsibilities and interests. Alternatively, it is the good fortune of some children that some matters generally considered private end up in the public realm where they are subjected to public scrutiny and reason. In this article we have selected the case depicted in these headlines to provide a legal and ethical account of the notion of the best interests of the child. We explore the tension between the best interests of the child and parental rights to expression of a racist nature. We consider how the interests of different actors – the state, parents and children – are considered in the context of racist parenting. We also offer ethical frames to help us make sense of the best interest of the child principle where racist parental beliefs are at the fore. We then look at the recent Manitoba decision in, *Director of Child and Family Service v. D.M.P*. (MBQC, 2002, no. 32; MCJ, 2010, no. 37) and briefly consider how the best interests of the child principle has been applied in this case.

The Unfortunate Drama

Imagine eight adults (grandfather, social worker, teacher, child and family service supervisor, child's step father, child's natural mother, foster mother (child's paternal aunt) and foster father (child's uncle) standing in a circle around an eight year old elementary school child, who is sitting in the middle of the circle next to a likewise seated judge. The judge listens to the perspectives of the surrounding adults with the view to deciding what, in the end, will be 'best' for the child. The only evidences of physical abuse are the swastika, neo-nazi phrases and drawings on her body. She mimics her step-father's racist utterances as her own truths. The step-father, who is estranged from the child's biological mother, admits to telling racist jokes, to having been a skinhead, and expresses distain for "interracial breeding." He has been employed, sporadically, for nine months as a security guard, admits to having kicked his heroin habit and says he is willing to "do" counseling. The man recounts his ADHD and Dyslexia diagnoses, the bullying that he experienced as a student and says he believes it is his right to instill his beliefs in the child. He alleges that the Child and Family Services (CFS) reports have been exaggerated and misrepresent him and the home environment. The step-father wishes to regain custody.

The mother of the child, who married the step-father in 2005, has moved away and out of Province. She has been dealing with a recent legal charge of credit fraud. She is mother to a second, younger, boy with her estranged husband. In her view, the step-father's talk is "just slang" and not hateful or wrong. The assessing psychologist testifies that the mother is emotionally immature. The grandfather paints two seemingly contradictory stories. He expresses disgust and fury concerning the raising of the children: the parents are "not fit to care for a cat" (a statement he would later deny uttering). He says his son can parent with help and that, as grandfather, he would be happy to raise both children. As we know, teachers are required by law

to report suspected cases of abuse where they have reasonable grounds to suspect such abuse. The child's teacher recounts a disturbing parent-teacher meeting where the parent was 45 minutes late and smelled of alcohol. However, in her culturally diverse classroom, there were no concerns about racism. She speaks of the intellectual brightness of the young student. A social worker (representing two others who testified) gives witness to racial slurs emanating from the father. The CFS representative says they have seized the children and are seeking permanent guardianship for both. The claim is that the parents are unfit, the living quarters are filthy, the eight year old is exposed to violence, drug and alcohol abuse, together with emotional abuse related to the racist beliefs of the parents.

In many ways this is an all too ordinary, messy case of marginal or unfit parents whose behaviour has triggered the response of the state to intervene in their family circumstances. The unusual aspect of this drama is the excursion out of a private home situation where the child arrives at school with objectionable racist propaganda on her body. This drama raises questions with respect to the parents' capacity to provide adequate care for the two children. The conflation of issues related to the fitness to parent and the right to educate or 'indoctrinate' has sensationalized this otherwise all too common child welfare case. In some ways the education/indoctrination question is the more interesting question from a best interests perspective. It deals with autonomy and maturity of both parent and child. The case runs headlong into issues of social determinations of deviance and fundamental rights. Teetering on the fine lines of provoking violence, breaking local mores, inciting hate, offending sensibilities, uttering threats, showing disrespect for persons, and corrupting the young, this step-father may be within the law in terms of his right to freely express his racist beliefs. But what is his effect on the emotions, behaviours, well-being, and views of the child? Can we know the answer to this

question? The situation is on the other side of ideal. Do we need to consider the minimal interests, the optimal interests and the best interests of a child? Is there a hierarchy or range of interests that is not practically accounted for in the best interests of the child doctrine?

Legal Considerations: Best Interests of the Child, Rights and Racist Expression

The parent-child relationship is fundamentally salient in formulating and influencing acceptable and unacceptable thoughts, ideas and behaviours in children. However, the views of parents do not always coincide with what society, as a whole, may tolerate as acceptable. So when do parental views on subjects such as religion, race or politics reach the level of 'legal unacceptability' such that a parent could face a loss of custody as a result of expressing or teaching these views to his or her child?

In all cases involving free speech claims under the *Canadian Charter of Rights and Freedoms (*the *Charter),* the Supreme Court of Canada has invariably identified three basic values, which justify constitutional protection of freedom of expression. In *Ross v. New Brunswick School District No. 15 (SCJ, 1996, No. 40; SCC, 2007*, No. 30, para 34), a unanimous Court stated: "The purpose of the guarantee is to permit free expression in order to promote truth, political and social participation, and self-fulfillment" (SCC 2007 No. 30, para 59). From a theoretical perspective, these core ethical, moral and political values are primarily liberal values and provide a conceptual and justificatory framework for thinking about free speech. The Court has noted that, given the centrality of freedom of expression to a democratic society, this right "should only be restricted in the clearest of circumstances" (SCC 2007, No. 30, para 60).

As a racist, the step-father has morally abhorrent views. He believes people from different races should be separated and is against interracial breeding. He also contends that

people of different races should go back to their countries, makes racist jokes and uses the 'Heil Hitler' salute in front of his children (McIntyre, 2009, June 23). He is the poster boy for racist parenting. The step-father's claim is that he is simply promoting white pride. It is unlikely that his racist claims are truthful or will lead to the search for truth. Racist and repugnant speech, however, is protected because the *Charter* protects both fallacious and truthful expression, the ugly as well as the good and the beautiful utterances.[1] In essence, the truth rationale behind free speech covers both falsehoods and verities.[2]

With respect to the political process rationale, the step-father could argue that a democracy must protect divergent and controversial types of expression. Political correctness must not be used to silence dissident or unpopular opinions, especially in the family circle which is a private space as opposed to a public square. Should one's fitness to parent be a function of one's political or moral views, no matter how awful these views may be? Does living in a toxic family environment of racism and hate, justify state intervention? Or does intervention in such a situation admit of the possibility of abuse by state powers? One might envisage new parents having to register their prescribed beliefs with a 'Ministry of Virtue' to ensure these beliefs are state sanctioned and do not run afoul of the official orthodoxy. One writer described the dangers of the slippery slope as follows:

> If political beliefs, as odious as they may be, can be regarded as emotionally abusive and can draw a family into the clutches of the child welfare agencies, many parents should be nervous. Where will the reach of child and family services workers end? Indeed, if a parent is inadequate because he or she is

[1] Provided, of course, that the expression does not take a violent form. This type of expression is not protected under s. 2(b) of the *Charter*.

[2] Contra. A unanimous SCC in *Ross* explained why racist speech was unlikely to promote the search of truth:

> This Court has held that there is very little chance that expression that promotes hatred against an identifiable group is true. Such expression silences the views of those in the target group and thereby hinders the free exchange of ideas feeding our search for political truth. … [T]o give protection to views that attack and condemn the views, beliefs and practices of others is to undermine the principle that all views deserve equal protection and muzzles the voice of truth (para. 91).

> narcissistic and incapable of accepting blame, why not those who compulsively drive their children to fulfill their own unrealized dreams? Hundreds of mothers or fathers may fall under the microscope of interventionists for their personal foibles. (Winnipeg Free Press, 2009, June 26)

Finally, the self-fulfillment rationale might also provide a justification for the step-father's expression. He could claim that his beliefs, regardless of their nature, are central to who he is as both a person and a parent. More important, he may claim a freedom to communicate these opinions and beliefs to his children because this respects his autonomy as an adult and allows him to fulfill his aspirations and yearnings, however uninformed and misdirected they may be. In some deep sense, he must remain master of his own destiny and have the right to be wrong (about the moral course of his life) both as an adult and a parent. In essence, the free speech right is an attempt by the step-father to resist authorities attempting to exert power over people with unpalatable beliefs. If this freedom protects only that with which we agree, it is indeed a hollow protection. As McLachlin J. (as she then was) of the Supreme Court of Canada declared in *R. v. Keegstra* (SCR, 1990, No. 697), "If the guarantee of free expression is to be meaningful, it must protect expression which challenges even the very basic conceptions about our society" (SCR, 1990, No. 697, para 85). He could claim that allowing Child and Family Services to censor him as a parent (by taking his children) simply because it does not like his racist views, fails to treat him as a morally responsible and autonomous agent.

In the Supreme Court of Canada decision in *Young v. Young (SCR, 1993, No. 3),* McLachlin J. distinguished a parent's right to freedom of religious expression from the broad scope of freedom of expression generally, making the following observations:

> I come then to freedom of expression. The ambit of this right has been more broadly drawn than freedom of conscience and religion, in that even harmful expression may be protected: . . .On the other hand, some forms of harmful expression are not constitutionally protected. Violence or threats of violence are

> not protected: … Nor is expression which takes the form of "direct attacks by violent means on the physical liberty and integrity of another person" protected: … The fact that conduct has been criminalized by Parliament is an indication, although not a conclusive one, that expressive conduct falls in the latter category: …

So while freedom of religion may be narrower in scope than other forms of expression, as even harmful expression is *Charter* protected, expression in the form of physically violent acts is not constitutionally protected. Furthermore, while the *Charter* protects a parent's right to freedom of religion and expression, most family law legislation in Canada applies a 'best interests of the child' test to determine custody and access awards.[3] This complex relationship between a parent's right to express oneself and the determination of a custody situation that is appropriate for a child may be hard for a court to reconcile. The potential conflict between the protection of a parent's racial expression and the best interests of the child is a relatively unexplored issue.

The *best interests of the child* principle is consistent with Canada's international commitments under Article 3 of the *UN Convention on the Rights of the Child (1989)* which provides:

> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration* [italics added].

This standard is child focused, in requiring the best interests of the child to be a primary consideration in custody and access decision-making. However, the test has also been criticized

[3] The best interests of the child test in custody and access orders is found in the Divorce Act, R.S.C. (2nd Supp.), c.3 s.16 (8). It is also the test applied in British Columbia, Manitoba, New Brunswick, Newfoundland, Ontario, Prince Edward Island, Saskatchewan and Yukon. In Alberta, the "welfare of the minor" is found in the Domestic Relations Act, R.S.A. 1980, c.D-37, but the Provincial Court Act, R.S.A. 1980. c.P-20 requires a court to consider the best interests of a child in a custody order. In North West Territories and Nova Scotia, the "welfare of the child" is considered and in Quebec it is the "child's interest."

on several fronts. It is proffered that the best interests of the child principle is a *paternalistic* approach, vesting in a person or institution the right to determine whether a particular living arrangement is or is not in the child's best interest. This approach is distinguished from an approach that requires deference be given to a child's decisions or an approach that articulates certain fundamental rights of the child are to be upheld in any decision made concerning the child's welfare.

The best interests of the child test has also been criticized for its *indeterminacy*. Simply put, there is no single definition of what is or is not in the best interests of a child. Most legislation governing the application of the test sets out non-exhaustive lists of factors to be considered when making a determination, with no prioritizing of these factors. This can lead to two problems. First, without a clear definition of "best interests," anything and everything can be relevant in determining what is in a child's best interests. This indeterminacy may result in increasing the complexity of custody, access and protection disputes and fueling family law litigation. Second, indeterminacy may provide an institution or judge with great flexibility in determining what factors will or will not be relevant in a particular case. From a 'process' perspective this can result in a judge searching for an objective standard of best interests, placing too much reliance on social workers, or mental health professionals, to render an opinion on what is in the child's best interests to the exclusion of parents or caregivers. This indeterminacy can also have the opposite effect by enabling judges to be guided by their own subjective biases, values, beliefs and experiences as to what is 'best' for the child.

The Supreme Court of Canada has acknowledged these difficulties with the formulation and application of the 'best interests of the child test'. In *Gordon v. Goretz* (SCR,

1996, No. 27), McLachlin J. noted the following in the context of a custody and access variation application pursuant to the *Divorce Act*:

> The best interests of the child test has been characterized as "indeterminate" and "more useful as legal aspiration than as legal analysis:" … Nevertheless, it stands as an eloquent expression of Parliament's view that the *ultimate and only issue when it comes to custody and access is the welfare of the child* whose future is at stake. The multitude of factors that may impinge on the child's best interest make a measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interests to expediency and certainty. Moreover, Parliament has offered assistance by providing two specific directions -- one relating to the conduct of the parents, the other to the ideal of maximizing beneficial contact between the child and both parents [italics added]. (1996, No. 27, para 30)

She then confirmed that the 'best interests of the child' by necessity requires an individualized inquiry into the best interests of the particular child in question:

> The Act contemplates individual justice. The judge is obliged to consider the best interests of the particular child in the particular circumstances of the case. Had Parliament wished to impose general rules at the expense of individual justice, it could have done so. It did not. The manner in which Parliament has chosen to resolve situations which may not be in the child's best interests should not be lightly abjured. Even if it could be shown that a presumption in favour of the custodial parent would reduce litigation that would not imply a reduction in conflict. (SCR, 1996, No. 27, para 38)

The combination of a multifactor approach and child-specific inquiry, contributes to the complexity of the application of the best interests principle in any particular case. What is clear, however, is that the best interests of the child is considered to be a distinct inquiry from the interests of the parents or caregivers. Nowhere is this more apparent than in child protection proceedings, where the interests of the parents and the child may be in direct conflict. In *Syl Apps Secure Treatment Centre v. B. D.* (SCR, 2007, No. 83), Abella J. made the following observations in the context of a dispute between parental interests and treatment decisions made by a state authority while the child was a temporary and, later, permanent ward of the state:

> The primacy of the best interests of the child over parental rights in the child protection context is an axiomatic proposition in the jurisprudence. As Daley J.F.C. observed in *Children's Aid Society of Halifax v. S.F.* …[Child welfare statutes] promot[e] the integrity of the family, but only in circumstances which will protect the child. When the child cannot be protected as outlined in the [Act] within the family, no matter how well meaning the family is, then, if its welfare requires it, the child is to be protected outside the family. (2007, No. 83, para 44)

She then went on to add:

> This Court has confirmed that pursuing and protecting the best interests of the child must take precedence over the wishes of a parent … It also directed in *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, . . . that in child welfare legislation the "integrity of the family unit" should be interpreted not as strengthening parental rights, but as "fostering the best interests of children" . . .. L'Heureux-Dubé J. cautioned …that "the value of maintaining a family unit intact [must be] . . . evaluated in contemplation of what is best for the child, rather than for the parent." (SCR, 2007, No. 83, para 45)

The Supreme Court of Canada has also tried to draw distinctions between the best interests of the child principle and the protection of fundamental rights, as articulated and protected by the *Charter.* In two salient cases, the Court looked at a potential conflict between the application of the best interests of the child principle and freedom of religion. In *Young v. Young* (SCR, 1993, No. 3), an access parent was providing religious instruction to his children, against the objections of both the custodial parent and the children. In this case, McLachlin J. concluded that the *Charter* did not protect a parent's right to religious expression if it was not in the best interests of the child (SCR, 1993, No. 3, para 215-218). In a more recent decision of *A.C. v. Manitoba (Child and Family Services)* (SCJ, 2009, No. 30), one issue raised was whether a 14 year old child could exercise a right to freedom of religion by refusing a medically necessary blood transfusion. In the face of a refusal by both the parents and the child to submit to this medical treatment, Manitoba Child and Family Services brought an application to the Court seeking a medical treatment order based on what was in the best interests of the child.

Justice Abella, writing for the majority, had to reconcile the statutory scheme of court authorized treatment for minors and its attempt to protect vulnerable children from harm with an individual's fundamental right to autonomous decision-making. Her conclusion was that the multifactoral approach to the best interests of the child test enabled the Court to give deference to a young person's religious wishes as her maturity increased and was a proportionate response to her religious rights and the protective goals of s. 25(8). As Justice Abella ruled:

> In conclusion, I agree with A.C. that it is inherently arbitrary to deprive an adolescent under the age of 16 of the opportunity to demonstrate sufficient maturity when he or she is under the care of the state. It is my view, however, that the "best interests" test referred to in s. 25(8) of the Act, properly interpreted, provides that a young person is entitled to a degree of decisional autonomy commensurate with his or her maturity. The result of this interpretation of s. 25(8) is that adolescents under 16 will have the right to demonstrate mature medical decisional capacity. This protects both the integrity of the statute and of the adolescent. It is also an interpretation that precludes a dissonance between the statutory provisions and the Charter, since it enables adolescents to participate meaningfully in medical treatment decisions in accordance with their maturity, creating a sliding scale of decision-making autonomy. This, in my view, reflects a proportionate response to the goal of protecting vulnerable young people from harm, while respecting the individuality and autonomy of those who are sufficiently mature to make a particular treatment decision. (SCJ, 2009, No. 30, para 114-115)

As a result, the best interests of the child test appears to be malleable enough to enable the views and decisions of the child to be taken into account in a degree commensurate with his or her maturity level.

Principles and Contending Interests in a Parents Right to Educate/Indoctrinate

The application of the best interests of the child test in the context of racist parenting gives rise to questions regarding whether parents have the right to educate or indoctrinate their children in accordance with their personally held racist views. Who should decide how and how

well a child ought to be nurtured and educated? Are racist parents unfit parents and thus required to hand their children over to the state for upbringing?

In the context of home schooling and public education, legal and political theorists (see Callan, 1997; Dwyer, 1998; Macedo, 1995) have identified a trilogy of interests, which come into play when considering who gets to decide how children are educated: the interests held by the state; the parent(s); and, the child. What might be the status and weighting afforded to the interests of these important participants?

State Interest in Children's Education

Rob Reich noted that the state has an interest in exercising educational authority over its youngest citizens (2002, p. 283). These interests are twofold. First, the state wants children to become able citizens. Second, it wants children to develop into independently functioning adults. As for the first interest, there is great debate about the appropriate scope of civic education the state should offer its young. On the more demanding side of the spectrum, Reich observed:

> [S]ome argue that the state must teach children not only basic literacy but knowledge of public policy issues, the conclusions of contemporary science, a foundation in world and national history, the structure and operation of federal, state, and local government, and a broad palette of critical thinking and empathy skills necessary to facilitate democratic deliberation amidst a complicity of competing interests and among diverse races, religions, and worldviews. (2002, p. 287)

Yet, others argue for a middle of the road approach while some even adopt a minimalist view about the ambit of civic education. As Reich stated:

> Others indicate that the state's civic interest in education lies more generally in assuring that children will have the opportunity to participate in public institutions and come to possess a number of political virtues, such as tolerance, civility, and a sense of fairness. And on the less demanding side of the spectrum, some argue

> that civic requirements are more minimal, encompassing the teaching of tolerance and, as one theorist puts it, 'social rationality'. (2002, p. 287)

Concerning the second interest, the state must perform a 'backstop' role to parents to ensure that their children develop into independently functioning adults (Reich, 2002, p. 288).[4] In the literature, this interest is not the subject of much controversy. The state wants to enable children, through education, to become self-sufficient and self-reliant as they make the transition from childhood to adulthood.

Parental Interest in Children's Education

According to Reich, parents have two primary interests in their children's education: self-regarding interests; and, other-regarding interests (2002, p. 283). In the first category, parents have an interest in children's education that reflects deep meaning for the lives of parents themselves. Callan described this as the "expressive significance" of child rearing and notes: "By the 'expressive significance' of child-rearing I mean the way in which raising a child engages our deepest values and yearnings so that we are tempted to think of the child's life as a virtual extension of our own" (1997, p. 197). He suggested that our judgment of how well we parent and the way parenting helps shape our identities have profound significance for our lives. Callan also acknowledged that measures of success vary widely within and across cultures, but "they almost always include broadly educational ends of one sort or another (1997, p. 197)." Hence, the educational hopes and ambitions parents have for their children are closely intertwined with the expressive interest in child-rearing.

[4] According to Reich: By 'independently functioning' adults, I mean persons who are self-sufficient, productive members of society, who are able to navigate and participate in the familiar social and economic institutions of society. We would rightly consider a child unfairly deprived if he or she were denied the opportunity to receive an education" (2002, p. 288).

The second interest parents have in their children's education is an 'other-regarding' claim. Reich depicted this interest as follows:

> Of course, the parents' interest in exerting authority over the educational provision of their children is also grounded in the interest of the children themselves. Children are dependent beings, not yet capable of meeting their own needs or acting in their own interest. Parents, it is generally understood, are best situated (better situated than the state and the children themselves) to act in the best interests of their children, or, in an alternate formulation, to promote their general welfare. In modern society, the welfare of a child depends in part on being educated. Therefore, as the guardian of their children's best interests or welfare, parents have an interest in the education that their children receive. (2002, p. 283)

A recognition of this parental interest at common-law was articulated by Justice Gonthier of the Supreme Court of Canada in his dissenting opinion in *Chamberlain v. Surrey School District No. 36* as follows:

> [T]he common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being….Thus, parents are clearly the primary actors, while the state plays a secondary, complementary role. It is essential to note, however, that when parents exercise this primary responsibility, they must act in accordance with the "best interests" of their children: *Young v. Young*.... Parents, exercising choice in how to raise their children, acting on the basis of their conscience, religious or otherwise, however, will be presumed to be acting in the "best interests" of their children. Generally, it is only when parental conduct falls below a "socially acceptable threshold" that the state may properly intervene… (SCC 2002, No. 36; SCR 2002, No. 710, para 102-103)

The parental right to nurture, educate and make decisions for their children is further protected by two provisions of the *Canadian Charter of Rights and Freedoms:* s. 2(a), the right to freedom of religion and conscience;[5] and, s. 7, the right to life, liberty and security of the person.[6] As expressed by Gonthier J. in *Chamberlain v. Surrey School District No. 36*:

> I was then, and I am still of the view that the above overview is a correct statement of the law: parents clearly have the right, whether protected by s. 7 or s.

[5] This section states: Everyone has the right to freedom of conscience and freedom of religion.
[6] This section states: Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

> 2(*a*) of the *Charter*, to nurture, educate and make decisions for their children, as long as these decisions are in the children's "best interests". Parents will be presumed to be acting in their children's "best interests" unless the contrary is shown. That having been said, it is clear that, whether rooted in s. 2(*a*) or s. 7 of the *Charter*, the paramount parental right to nurture, make decisions for and direct the moral education of their children, like all rights protected by the *Charter*, is obviously not absolute. (SCC 2002, No. 36; SCR 2002, No. 710, para 108)

We are putting the spotlight on the Manitoba case where the step-father might argue that he is entitled to raise his children as he sees fit. This parental liberty includes the inculcation of ideas that the majority of society would find offensive, racist and deeply shocking. This is the essence of the guarantees of freedom of expression and the right to life, liberty and security of the person as protected, respectively in sections ss. 2(a) and 7 of the *Charter*. He may argue that parenting is not a popularity contest and these constitutional provisions encompass a wide range of parenting styles and beliefs. In this regard, the step-father could also present a free speech argument protected by s. 2(b) of the *Charter*[7] which protects individuals from government censure solely on the basis of their speech.

In this regard, section 2(1) of Manitoba's *Child and Family Services Act* (1985) stipulates that in determining the child's best interests, the child's "safety and security shall be the primary considerations." After that, all other relevant matters shall be considered, including:

> (a) the child's opportunity to have a parent-child relationship as a wanted and needed member within a family structure;
>
> (b) the mental, emotional, physical and educational needs of the child and the appropriate care or treatment, or both, to meet such needs;
>
> (c) the child's mental, emotional and physical stage of development;
>
> (d) the child's sense of continuity and need for permanency with the least possible disruption; …

[7] This section declares: Everyone is entitled to … freedom of expression.

> (f) the views and preferences of the child where they can reasonably be ascertained; …
>
> (h) the child's cultural, linguistic, racial and religious heritage. (1985)

If a parent is able to meet a child's basic nutritional and housing needs and there is no physical or sexual abuse or issues of neglect, the central query becomes whether 'racist parenting' alone, which includes the promotion of hatred and intolerance of others, constitutes sufficient justification to allow the Director of Child and Family Services to remove permanently the children in question from the care and custody of the parent?[8]

Limits to Constitutional Rights and The State's Interest

We are not suggesting that the step-father's *Charter* rights to freedom of religion and conscience or to free speech are absolute. This is neither tenable in common sense nor in law. Section 1 of the *Charter* makes this abundantly clear:

> The rights and the freedoms contained in the *Charter* are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 2(a) of the *Charter* does not protect religious expression that is not in the best interests of the child, particularly if that religious expression is in the form of conduct that poses a risk of injury to the child or intrudes on the child's own rights. As articulated by McLachlin J. in *Young v. Young:*

> [R]eligious expression and comment of a parent which is found to violate the best interests of a child will often do so because it poses a risk of harm to the child. If so, it is clear that the guarantee of religious freedom can offer no protection. But I think a case can be made that even in cases where a risk of harm may not have

[8] Under MB's legislation, s. 17(1) of the Child & Family Services Act defines a child in need of protection in these terms: "[A] child is in need of protection where the life, health or emotional well-being of the child is endangered by the act or omission of a person."

> been established, the guarantee of freedom of religion should not be understood to extend to protecting conduct which is not in the best interests of the child. I understand "injure" . . . to be a broad concept. To deprive a child of what a court has found to be in his or her best interests is to "injure," in the sense of not doing what is best for the child. The vulnerable situation of the child heightens the need for protection; if one is to err, it should not be in favour of the exercise of the alleged parental right, but in favour of the interests of the child. (SCR, 1993, No. 3, para 215-218)

Similarly, parental actions which undermine children's safety, will not be constitutionally sheltered. As Chief Justice McLachlin stated in *Canadian Foundation for Children, Youth and the Law:*

> Children need to be protected from abusive treatment. They are vulnerable members of Canadian society and Parliament and the Executive act admirably when they shield children from psychological and physical harm. In so acting, the government responds to the critical need of all children for a safe environment. (SCJ, 2004, No. 6, para 58)

More significantly, the step-father's constitutional rights claims must be placed in proper context. The scenario we are examining is not simply a competition between the step-father and the state. This is not about the state attempting to impose restrictions on a hate-monger à la Ernst Zundel. Rather, the best interests of the children are the focal point and must remain so. Hence, the step-father's *Charter* arguments cannot be entirely self-referential. This means that the arguments cannot be used to undermine the best interests of the child doctrine. But even admitting the centrality of the best interests concept does not make the basic question disappear. Does the expression of odious and racist beliefs justify the placement of children into the permanent custody of the state? Does this serve the best interests of the children in this case? As was reported by the media in the context of *Director of Child and Family Service v. D.M.P.*:

> The father, who admits to having been a Nazi in the past, was deemed the better parent by a psychologist who assessed the parents for Child and Family Services. He has some good skills, a good head on his shoulders and the kids like him, the psychologist told the court this week. The psychologist said he was not so

> concerned about what the parents think, but what they do. The media, he said, were making too much of the parents' racist views. (CBC, 2009, May 25)

Children's Interest in Education

To this point our analysis has focused primarily on two actors: on the one hand, the interests-constitutional rights of the step-father to parent as he believes he is entitled to, and, on the other hand, the interests of the state in ensuring that the children in question are safe and not unduly harmed. But, what about the children themselves in this case? How do they figure in this discussion? Let us not forget that they are separate persons and rights bearers deserving of equal respect and consideration. Their distinct personhood cannot simply be conflated with the wishes of the parents or those of the state. The children's interests, therefore, must be considered separately. Children themselves obviously have a significant interest in their own education. According to Reich, this interest can be accounted for in two ways. First, children have an interest in becoming independently functioning adults (2002, p. 287). This interest mirrors the state's interest and does not seem to be contested by political and legal theorists. Second, children have an interest in becoming minimally autonomous (Reich, 2002, p. 287).

Although a detailed consideration of these two factors is beyond the scope of this article, we suggest that a court must grapple with how the education or indoctrination of the two children stacks up against these two interests. Questions to address would include: does racist indoctrination undermine the children's ability to become independently functioning adults? Does it interfere with their interest in minimal autonomy? If so, how? And is the interference, assuming it exists, in both cases strong enough to warrant state intervention? It does not seem much of a stretch to suggest that many children raised in rabidly racist homes will in turn

become racists themselves. By the same token, and in this case at least for the 8-year-old daughter, she is attending a public school where she is exposed to a different type of education and appears to be interacting socially in an appropriate manner with her classmates who come from an ethnically rich background. This exposure may be sufficient to protect her interest in minimal autonomy as she has the potential (at least) to see other children from diverse backgrounds in ways that do not correspond with the reality presented at home.

In its analysis, the court would also consider a host of other factors in ascertaining what constitutes the best interests of the two children. Two of these include the preferences/views of the children (Manitoba *Child and Family Services Act*, s. 2(1)(f)) and the need for a family relationship (s. 2(1)(a)). In this case, the children are respectively four and eight years old. What might they have to say about their home environment and the type of education they are receiving or even desire? At first blush, to even ask the question in this way may seem absurd. Most four year olds would surely not even understand the question and for good reasons. But, what about the eight year-old? Would she be cognitively, emotionally, and socially capable of articulating her views about the kind of education she would like to have? Perhaps yes, perhaps no. And even if she could, she might simply parrot, unthinkingly, the opinions of her step-father. The child's views about education thus might not be determinative. Instead, the court might concentrate on her relationship with her father and ask her how she feels about being with him and having him in her life as a full-time parent. The nature of these interactions and the views of the child about the step-father's ability to parent would (absent of coercion or other exceptional circumstances and once again assuming the dad is able to meet the other needs of his children with respect to basics such as housing, food and clothing) be very relevant testimony. In *Director of Child and Family Services v. D.M.P.*, at least, it appears that the step-father "has some good

skills, a good head on his shoulders and the kids like him…" (CBC, 2009, May 25). If, on the other hand, the child testified that she did not want to be with her step-father or that she was afraid or exhibited other types of worrisome behaviour, then this too would obviously be highly germane in the court's determination of best interests.

The need for a family relationship is also a central consideration. Our identity as human beings is forged in the crucible of belonging to multiple and various communities. But, none (generally speaking) holds the special, influential and foundation shaping place of family. The connections and relationships with parents and/or siblings typically define who we are and who we become. In *Director of Child and Family Services v. D.M.P.*, the children "like" their dad and appear to have some kind of relationship with him (CBC, 2009, May 25). Beyond that, we cannot speculate. That said, removing a child from her home is an extraordinary measure and should only be exercised in the most compelling cases. If the children in this case do have a bond with their step-father/father, however tenuous it may be, then destroying this bond could cause irreparable harm to the emotional, intellectual and social development of the children in spite of his morally repugnant racist opinions. In sum, in its analysis about ascertaining what constitutes the best interests of the children in this case, the court is charged with a complex and difficult task. It must reconcile the interests and rights of the father and of the children with the interests and duty of the state to protect those most vulnerable among us.

Ethical Considerations: Ethical Frames for Adjudicating the Best Interests of the Child

We now want to take our reader back to the drama that we began with. The judge is sitting with the child and deliberating on the best interests of the child. S/he reflects further and more deeply on what criteria might provide sufficient cause for the state to replace a child's

parent(s). S/he considers the authoritative relationship between the state and parent? To what extent, if any, should a parent's racist beliefs and expressions pertain to their fitness relative to the best interests of the child? Are there restrictions on the extent to which parents are permitted to indoctrinate their children, inculcate them with anti-social beliefs or use them as billboards to display their beliefs? Where are the lines to be drawn between the private act of parenting and the public responsibility to parent? Who owns the child and by what authority are this child's best interests adjudicated? When in conflict, how do the rights of child, parent, and state get resolved? When parent, child and state interests are mutually exclusive whose interests are privileged? How do we determine risk and remedy with regard to inherent or potential harm derived from the alleged negative influence or behaviour of a parent (physical, emotional, social, intellectual, and spiritual)? These are certainly legal-ethical questions. As noted, the notion of "best" is problematic in many ways. As we have seen, knowing what is in the best interests of a child is not a matter of applying a simple formula; it has an indeterminacy about it and seems to require a case-by-case assessment. The '*best interest of the child'* is a complex construct. However, we do know that while there may be thresholds, the best interests of the child should not be a minimalist standard. "Best" demands more than compliance to a predetermined minimum legal threshold. Determining "best interests" requires an ethical perspective, and application to particular circumstances, without prejudice (Walker, 1998a; Walker, 1998b; Walker, 1995, pp. 3-8).

Of course, ethical questions are determined by certain human values (Hodgkinson, 1991) and ethical discourse concerns itself with decisions about rightness and wrongness, goodness and badness. The overall normative constraints and motivations of deliberative processes are assumed to be grounded in the ambition to be ethically wise and virtuous, consistent with

obligations, and responsible. Those employing an ethical process for mediating contested rights or interests will: identify the key factors that shape the situation and raise the ethical issues; define the ethical issues and separate these from other non-ethical issues; identify the key individuals or groups affected by the situation; generate a viable course of action; evaluate how each alternative affects the stakeholders and determine how ethical each alternative is; generate the practical factors that may limit the agent's ability to implement an alternative; and, after weighing these considerations, determine exactly what steps should be taken to implement the selected alternative.

Typically, this approach provides for at least four basic levels of ethical analysis: Identification and description of decision information, assessment of stakeholder values and interests, and delineation of ethical and non-ethical issues; establishing criteria for ethical decision-making; generation of alternate scenarios, projection of ethical implications, adjustments that consider practical constraints; and ethical evaluation and reflection on appropriateness of solutions and action. Acknowledgment of both rational and intuitive biases should be a salient function of the decision-making process. These biases provide a starting place for what Strike calls dialogical competence: "the ability to talk about, reason about, and experience appropriate phenomena via a certain set of concepts" (Strike & Ternasky, 1993, p. 105). Strike said that moral reasoning consists of a reflective equilibrium of interaction between moral data, moral principles, and background conceptions or convictions (1993, pp. 107-108). Burke suggested that when there is disagreement in the language of our judgments and motivations, then attention to the adequacy of our answers to five basic questions will help agreement to be restored: "What was done (act), when or where it was done (scene), who did it (agent), how she or he did it (agency), and why (purpose)" (1969, p. XV).

The first-phase task is to enumerate stakeholders, to identify their particular values and interests, and to enumerate their short-through-long-term interests. The earlier sections of this article have posited many of these values and interests for the case at hand. Furthermore, degrees of indifference amongst individuals and groups of stakeholders and their fiduciary responsibilities to each set of stakeholders must be determined. These tasks are especially important when the consequences of alternative responses are anticipated. This analysis must be conducted in the context of the particular case. After identifying the stakeholders' rights and interests, the adjudicator should be reminded of their relative obligations. Further, an adjudicator must, by some means, determine which of the value conflicts are ethical and which are non-ethical (or ethically neutral) in nature. This distinction is important, because non-ethical values allow much more room to negotiate or to compromise than do ethical values, whether the ethical values are derived from purpose (teleological ethics), principle (deontological ethics), and probability (consequentialist ethics). In order to proceed with this distinction, a sampling of potentially troublesome issues in the form of questions is undertaken. In this section of the article, we provide a three lens approach to ethical consideration for the case at hand. The key task is to determine if any of the relevant issues are of an ethical nature.

What about basic human needs with respect to the child? Assume that there is no evidence of neglect with respect to food and shelter. Is there a risk to the child's safety and security? Assume there is no evidence of sexual or physical abuse with one possible exception: the step-father has allowed the child to be used as a means to convey his beliefs by allowing and encouraging the mother in "painting her up like a billboard." Does this constitute physical abuse? In this case one might infer that there may be an escalation of behaviour that will

present some physical risk to the child. Is this an example of using a person as a means rather than an ends? Is there a risk that he will become physically abusive? Is it a speculative jump to suggest that the step-father's background makes him a more likely physical offender? The step-father has been bullied himself, he is verbally abusive in his utterances against non-whites, physically abusive to non-whites and he has been physically self-abusive with respect to drugs and alcohol. As a parent, has he already been offensive in his propagation of hate and distain such that we may say his behaviour has been emotionally damaging and socially unacceptable? How does one assess the extent to which socially unacceptable parental beliefs are passed onto a child? Flourishing humans have social needs. Is there not an ethical imperative beyond not doing harm, physical or material? It is claimed that the home environment is toxic for these children and that the indoctrination of the children is less than pro-social. Beyond the physiological and security needs, what right does the state have to intervene in the higher level needs of a child? Is the ethical standard of "best" a neutral and minimal standard or does it aspire to these higher needs and embody a vision for the child beyond their surviving to their thriving?

For the purpose of ethical adjudication, a number of more specific ethical questions may be used to determine or clarify the best interests of children in circumstances such as depicted in this case, especially where interests seem to be in conflict. The so-called "golden rule" continues to be a useful tool for presenting interests from the position of the child. This role-reversing instrument attempts to determine what the response or effect might be from the child's perspective. This means asking what it would be like to be this child, this step-father, this mother. Reversing roles and anticipating the possible benefits and harms resulting from a judge's decision is not easy. There are many other variations on this and other themes that can be used: What would we do if our own children were watching and learning from the example of

this decision-making process and its effects? Would this be our decision if these were our own children or those of a person we had particular affinity to or respect for? Is the justification for this decision, over its alternatives, sufficiently explainable to the people (including the child)? How do the long term benefits from this decision compare with the short or intermediate term gains or losses to the child? Are we allowing the long term interests and potentials of the child concerned to trump his or her short term interests? If our view of the best response to this case were set as precedence, would other children, anywhere or at any time in the future, be likely to be hurt or suffer disadvantage from synchronized decision? If they might be disadvantaged, do the varied direct and residual benefits derived from the decision, clearly outweigh the potential or anticipated harms? What are the "no deal," "no way" thresholds when it comes to a vulnerable child? Could we unashamedly tell our respected professional peers or a group of caring parents our reasons for this decision with full confidence, they would agree that we had carried forward the best interests of the child in our deliberations? Would our decision be seen as choosing the most caring and just alternative for the best interests of the child; a decision that an all knowing, just, and loving Judge would like-wise make? Are the particular standards or external obligations entrusted to us with respect to the social definitions of the child's best interests satisfied by the decision taken? Is the decision we are making consistent with our careful stewardship of the public trust and the compelling interest of the public in the welfare of this child?

Ethic of Purpose

The best interests of the child concept may also be understood from the teleological or greatest good perspective. This ethic witnesses those entrusted with the welfare of the child

setting goals and casting a vision which embodies the best interests of a child. Kreeft described the nature of this ethic of purpose as a quest for the ideal or greatest good:

> Every great philosopher has philosophized about it. Every great writer has written about it. Every thoughtful person has thought about it. And every active person has acted on it. It is the quest for the *summum bonum*, the greatest good, the ultimate meaning and purpose of life, the answer to the question: Why was I born? Why am I living? (1990, p. 73)

Kreeft proposed ten candidates for the position of the greatest good: pleasing oneself; helping one's self to wealth; sustaining physical health; gaining honor, fame, and acceptance in sight of others; exercising power over others; experiencing peace and contentment; helping others; sustaining the health of one's soul; gaining wisdom through the knowledge of truth; and experiencing God. One might ask: what decision will best afford this child the opportunity to pursue their greatest good, however she or he comes to define this in later life? Aristotle's (384-322 B.C.E.) determination of a proper purpose or *telos* (final end) could aid child advocates in defining the notion of the best interests of the child. For Aristotle, *eudaimonian* (happiness) or flourishing according to one's characteristic being was the highest or greatest good. The attention of this ethic is on the principal (child), agent (care-giver) and the act (decision with respect to the best interest disposition). A particular decision is in the best interests of the child if it facilitates the development of the child's potential as a human being. Scheffler agreed that decisions should be based on an ethic of purpose, but he strongly disagreed with the deterministic views of Aristotle (1985). In other words, one needs to avoid limiting the vision of what one sees as the ideal childhood experience. This means we need to be cautious not to impose a vision simply because it is held by the dominate culture or a particular view of the good life or the child. If the best interests of this child are determined by the ethic of purpose, then the disposition of adjudicator will place the child in a situation wherein he/she will flourish as a human being.

Resources and means need to be provided to children realize their widest possible potential. This obviously includes a safe and generative home environment. An ethic of purpose puts the facilitation of a child's ultimate external and internal goods at the center of all decision making. The challenge, issued by Scheffler, is to enhance our understanding of best interest ethics through enriching our notion of human potential (1985). "Potential," "flourishing," "happiness," "well-being," and the "greatest good" concepts are allied to the notion of the best interest of the child.

Ethic of Principle

Alternatively, the theories of rights and deontological (Garner & Rosen, 1967, p. 36) ethics provide decision criteria based on moral entitlements and obligations. Deontological theories of ethics have been defined negatively as non-teleological theories. Theories of moral obligation consider factors other than (or as well as) the ends of action to determine their rightness or wrongness (Garner & Rosen, 1967). From a deontological position, the best interest of the child decision will be deemed right when it conforms to a relevant principle of duty. Obligations may be self-imposed, socially-imposed, or divinely-imposed (Holmes, 1984, p. 69). The ethic of principle judges best interest decisions according to implicit and explicit rules or duties owed. In other words, the best interests of the child is defined by *a priori* duties, rules, or principles. The focus tends to be on the conformity to an ethical principle or a set of rules.

The various theories of justice (Rawls, 1971/1991) also offer help to resolve conflicts of rights and interests among stakeholders. One way of dealing with justice is to give each constituent group its due according to its work and its predisposition to dependence. Rawls stated that any inequality of opportunity has to enhance the opportunities of those with the lesser

opportunity. He said that an excessive rate of saving must be realized in order to mitigate the burden of those bearing this hardship (1971/1991, pp. 83-90).

Kant (1785/1983) is the most prominent of moral philosophers to be associated with the notion that one should act only according to a maxim that would aptly become a universal rule for all. This rule of universality, or the "categorical imperative," was formulated in his doctrine of respect of persons. Kant underlines the important obligation of regarding every human being with dignity as one strives to develop a "Kingdom of Ends" (1785/1983, p. 429, 438). In practical terms, the adults (whether parents, state or judge) should act in such a way that the child is never treated as means to an ends but, rather, always as an Ends. Thus, the determinative criterion for a decision based on the best interests of the child will be one that affirms the dignity of the child as a free person with intrinsic and inherent worth and that advocates decisions that might, under similar circumstances, be applied universally to all children, or any child.

Some moral philosophers allow for conflicting but generally equal ethical principles to be used as criteria for determining the best interests of the child. Ross (1939), for example, indicated that adjudicators owe *prima facie* duties of reparation, gratitude, justice, beneficence, self-improvement, avoidance of harm, and sustaining of fidelity. Unless over-ridden by competing ethical demands, the adults in the child's life should determine and facilitate the child's best interests in a fashion consistent with each of these duties. For Ross, when these duties are in conflict, then one's "actual duty" will be self-evident at decision time. Ethically speaking, inculcating a child to feel racial superiority and racial hatred for others is offensive for obvious reasons. Yet, a different standard applies to the legal and constitutional contexts. Protecting a child to ensure his or her safety is obviously in their best interest. At the same time, the state has a further and higher duty to promote family stability and security. In egregious

circumstances, the family unit can be interfered with. If, in the Manitoba case, the dad has a relationship with his child and is able to meet his other parenting obligations (such as feeding, clothing, housing and educating his children), then greater harm may well ensue if the child is removed from the home solely because of their dad's racist beliefs.

An ethic of principle affords to each child the respect and dignity of personhood by highly principled adults fulfilling their objective obligations.

Ethic of Probability

The best interests of children may also be interpreted through a calculation of the probable positive or negative consequences (short and long term) for this particular child. Once the likely outcomes are predicted the alternatives that result in the greatest benefit and least determent may be chosen. Methods of cost-effectiveness, cost-benefit analysis, risk-cost-benefit analysis, and multi-attribute utility analysis each have advocates, and each are informed by different value criteria used to predict outcomes and impact of decisions. Jeremy Bentham (1781/1988) and John Stuart Mill (1861/1979) are two of the most prominent and progenitive utilitarians. Issues are most readily addressed if predetermined principles, precepts, and precedents are available to serve as plumb-line type criteria. For example, utilitarianism offers a set of theories that regard the end of action to be "general happiness," and it affirms those "acts, dispositions and institutions which maximize the happiness of all who are affected by them" (Ashmore, 1987, p. 68). The basic question a utilitarian asks in determining the moral status of an action or practice is: "Will this action produce greater overall human well-being?" One can easily see the resonance of this ethic to the purpose ethic, described earlier, as both have teleological features. For many utilitarians, well-being is the only good, and they consider their

own well-being as neither more nor less important than the well-being of anyone else. If utilitarian principles are retained to determine the moral worth of any decision with respect to the child, one would project the benefits and costs of the decision for the interests of the child. A quantitative approach to this analysis might include such factors as are included in Bentham's calculus (1781/1988, pp. 30-31). Bentham used elements such as intensity, duration, certainty, and propinquity to estimate the benefit produced by any act, practice, or decision. He also identified fecundity (chance that more of the same good benefits would follow), purity (chance that the opposite of good benefits would not follow), and extent (the number of people affected by the act). The utilitarian decision-maker focuses on the short and long term impact of such an offer on others, together with the net welfare for the child.

According, then, to simple utilitarianism, one may judge the best interests of the child by determining which decision alternative is likely to produce the greatest pleasure, happiness, or utility for the child. In other words, the best interests of the child are served if the negative consequences are minimized and positive benefits are maximized for the child in one's care.

When applied to the best interests of the child, Bentham's approach provides a means for calculating the advantages of one alternative over another by measuring and comparing the amounts of pleasure or pain that particular actions produce. Second, the duration of benefits and disadvantages accrued to the child is calculated. Third, the certainty or likelihood that interests will accrue to the child is considered. Finally, remoteness of experience of benefits or disadvantages and the relative fecundities of each option are weighed using Bentham's approach. The adjudicator might ask: How likely is it that one alternative will produce more advantage or disadvantage over time? What is the likelihood that the alternative will help the child to experience personal nurture? Bentham suggested that, in the case of conflicting interests and

values, the decision may be determined by using the descriptive warrants to quantitatively calculate the best option.

Mill hoped to improve on Bentham's approach to the conflict of alternatives by suggesting a more qualitative assessment template. Mill extended Bentham's probability ethic by developing secondary ends "which would serve as guides for action and could be justified by the principle of utility ... [these] became indispensable guides for understanding the primary end of utility" (Brown, 1991, p. 89). He indicated that goods or interests differ in kind, and that higher internal goods are to be preferred over lower external ones. According to Mill, goods do not differ merely in their amount or intensity but also their normative value. This upgrading of Bentham's formulations by Mill exemplifies the distinctions that make the best interests of the child situated, indeterminate and subjective.

In sum, the ethic of probability encourages decision makers to focus on their responsibility for outcomes as well as on inputs. This ethic reminds adjudicators to consider not only principles of due process or just means (as with the ethic of principle) but also to perceive the effect of the decision on both the child's well being and on the social good.

An ethical discourse concerning the best interests of the child defines the ethics of purpose, principle, and probability. These distinctions and categories of descriptive ethics are overlapping and complementary, on one hand; but also, through their epistemological and ontological roots, each is different in expression. It can be very difficult to know, with accuracy and appropriateness, what the best interests might be for a particular child. There is no singular right, good, or virtuous pattern for all children. The fallacies of determinism, rationalism, and relativism must be displaced with jurisprudentially and ethically defendable expressions of the best interests of the child. These defendable expressions should be based on a distillation and

application of purpose, probabilities and principles which are critically warranted by responsible conceptions of justice and caring.

The plurality of understandings related to the best interests of the child concept does not and should not deter the courts and care-givers from taking responsibility for the influence and direction for this mediation work. The well considered shibboleth that the best interest of the child will be used to override conflicting interests continues to have aspirational and axiological potency.

Parent Fitness and the Best Interests of the Child: Recent Manitoba Case

So what is the result if a parent's interest in exercising his or her right to freedom of expression is determined not to be in the best interests of the child? Does protection of a parent's right to express him or herself, even if that expression is determined to be 'harmful' expression trump a statutory authority's obligation to protect children from harm by seeking temporary or permanent custody orders which the authority perceives is in the child's best interests? In what ways do the courts consider the purpose, principle, and probability-focused ethics in their adjudications dealing with the best interests of a child?

This issue of best interests of the child faced the court in the *Director of Child and Family Service v. D.M.P*. (MBQC, 2002, no. 32; MCJ, 2010, no. 37). In this case, a permanent custody order was sought by Manitoba Child and Family Services and resisted by the father/step-father of the children in question. To review, the media brought particular attention to this case due to the fact that the children were apprehended after the young girl came to school with a Swastika and other racist symbols and writings embossed on her body in permanent marker (MBQC, 2002, no. 32; MCJ, 2010, no. 37, para 8, 9). These markings resulted in a social worker

interviewing the child, determining that the child clearly understood the meaning of the racial expression and that the parents had been responsible for teaching the child these meanings (MBQC, 2002, no. 32; MCJ, 2010, no. 37, para 10-13). The information provided by the child to the social worker and subsequently to the police resulted in the child and her sibling being apprehended.

In the interviews, the young girl not only expressed racist views on her own, but confided to social workers how to commit acts of violence against minorities. As reported by one media source:

> She said the swastika symbol meant "Heil Hitler" and she spoke about people of other races and how they should all be dead because this is a white man's world, the social worker testified. The girl also provided graphic suggestions of how to kill people, the social worker said. During their interview, the girl also told the social worker that she watched skinhead videos on the internet with her parents and knew that her parents belonged to a skinhead website. She also knew their password-protected log-ins, which gave her full access. (CBC, 2009, May 25)

In the judgment of the court, Madam Justice Rivoalen concluded that the young girl provided the following information to the social worker:

> S.M.T.S. explained to the worker that the swastika on her right arm meant that "black people don't belong." She explained further that "White Pride" on her left arm meant "to be proud as a white person in the world." She explained that with respect to the inscription of "14/88" on her arm, "14" stood for "the 14 words" and "88" stood for "HH," the 8s standing for the 8th letter of the alphabet (h); together she understood them to be an encoded expression of "Heil Hitler." S.M.T.S. pulled up her pant leg and showed the worker the writing of "We must secure the existence of our people and a future for white children" ("the 14 words"). S.M.T.S. explained that she understood this to mean that "we have to protect the white kids from niggers." Questioned further, she explained that "nigger" meant a black person. When asked by the abuse worker if there was any violence 'in the things that her mother and father taught her,' S.M.T.S. described different skinhead movies and videos that her parents, that is, J.A.M.P and D.M.P., showed her on the Internet and what she had learned from them. (MCJ, 2010, no. 37, para 10-11)

She went on to hold:

> S.M.T.S. stated to the abuse worker that "what people don't understand is that black people should die." The worker questioned S.M.T.S. about this statement. Without hesitation, S.M.T.S. launched into a detailed description of how to kill a black person: "You would put a strap around your wrist attached to a chain. At the end of the chain there would be a black ball with spikes on it and you would whip the black people with the ball and chain so they die." When asked where she learned this, S.M.T.S. stated that this was what her mother and father had told her. When asked if 'the things that her parents talked about ever scared her,' she responded thus, "No, black people just need to die. That's not scary. This is a white man's world." S.M.T.S. went on to explain to the worker that "[s]and niggers should die" and that "everyone who is not white should die." (MCJ, 2010, no. 37, para 12)

These facts are disturbing. According to Child and Family Services in Winnipeg, the government agency is worried about the "psychological impact upon the children stemming from the [parents'] acute hatred for other people" (MCJ, 2010, no. 37, para 12). David Matas, legal counsel for B'nai Brith Canada, framed the harm in these terms:

> Indoctrination to racial hatred and being a billboard for hatred is a form of child abuse. It marginalizes the child from society, and it has a lasting impact on character development. (Wente, 2009, May 26)

Social science evidence indicates that children of racist parents become social outcasts or have difficulty integrating into society in their later years. It may also be reasonable to anticipate that sustained exposure to racial hatred will harm the moral and psychological development of the child more than other deleterious forms of parenting. By the same token, the daughter may be simply parroting what she had heard at home without really understanding what she is saying or appreciating the consequences of her actions. In other words, she may not comprehend or believe what she is saying. It is also conceivable that when the child comes of age, she may renounce both her mother and stepfather's racist beliefs because they do not suit her any more.

Racist teachings are not the only kinds of harms that children may be subjected to. Some parents believe that one child is better than another and tell the children this. They may also think

that some children are a failure or that a child's actions disqualify him from membership in the family circle. For religious reasons, they may even make their children believe that they will suffer hell and eternal damnation unless they espouse the beliefs of their parents and become "saved." All these examples are forms of emotional child abuse yet we do not take kids away from their parents in these circumstances. To date, we do not take children from parents who are misogynist, homophobic or otherwise morally wanting. As Bill Whatcott, an anti-gay Christian activist has observed: "If you're going to target neo-Nazis who haven't actually hit or sexually abused their children, who's to say conservative Christian evangelicals aren't next" (Wente, 2009, May 26)?

There is a difference, however, between these forms of parenting and those contained in the Manitoba case. There is little doubt that the state should intervene if the parent has committed an act of violence against the child, or counseled his child to commit acts of violence against another person because of that person's ethnicity. The *Criminal Code of Canada* exists to deter this type of behaviour. The court in *Director of Child and Family Service v. D.M.P* recognized this distinction when it found that the children, at the time of their apprehension, were in need of protection on this basis:

> Using a permanent marker on a child to publicize cultish slogans and opinions is not just irresponsible. Writing and drawing racist expressions and symbols on one's child is not just bad parenting. Those interferences with a child's person are batteries. Teaching one's child that "black people need to die" is not just reprehensible parenting. Advocating genocide and the willful promotion of hatred against an identifiable group are crimes in this country. These children have a right to be protected from these things. (MCJ, 2010, no. 37, para 20)

The 'best interests of the child' principle is firmly embedded in Manitoba's *Child and Family Services Act* (1985). At the outset, the Act contains a Declaration setting out eleven (11)

principles guiding the provision of services to children and families, with the best interests of the child being articulated in the first principle, as well as principles 4, 9 and 10.[9]

> 1. The safety, security and well-being of children and their best interests are fundamental responsibilities of society.
>
> 4. Families and children have the right to the least interference with their affairs to the extent compatible with the best interests of children and the responsibilities of society.
>
> 9. Decisions to place children should be based on the best interests of the child and not on the basis of the family's financial status.
>
> 10. Communities have a responsibility to promote the best interests of their children and families and have the right to participate in services to their families and children.

The distinction in the legislation drawn between the best interests of the child and the interests of parents or families is consistent with Supreme Court of Canada case law on this subject.

Within the body of the legislation, direction is provided to a director, authority, children's advocate, agency and a court in all proceedings (with the exception of child protection proceedings) to make the best interests of the child the 'paramount consideration' and sets out a

[9] The complete set of principles is as follows - Supra note 42. Principles guiding the provision of services to children and families:

1.The safety, security and well-being of children and their best interests are fundamental responsibilities of society.
2. The family is the basic unit of society and its well-being should be supported and preserved.
3.The family is the basic source of care, nurture and acculturation of children and parents have the primary responsibility to ensure the well-being of their children.
4.Families and children have the right to the least interference with their affairs to the extent compatible with the best interests of children and the responsibilities of society.
5.Children have a right to a continuous family environment in which they can flourish.
6.Families and children are entitled to be informed of their rights and to participate in the decisions affecting those rights.
7.Families are entitled to receive preventive and supportive services directed to preserving the family unit.
8.Families are entitled to services which respect their cultural and linguistic heritage.
9.Decisions to place children should be based on the best interests of the child and not on the basis of the family's financial status.
10.Communities have a responsibility to promote the best interests of their children and families and have the right to participate in services to their families and children.
11.Indian bands are entitled to the provision of child and family services in a manner which respects their unique status as aboriginal peoples.

non-exhaustive, non-prioritized list of factors to consider when making this determination *(Child and Family Services Act)*.[10] In child protection proceedings, however, explicit priority is given to a child's 'safety and security' over any other consideration when determining the child's best interests. For example, a best interests of the child determination in a protection situation would require the court to give precedence to the *safety* of the child over the child's cultural, linguistic, racial and religious heritage (*Child and Family Services Act*, s. 2(1)(h)). This is likely the case because safety and security are both basic human needs and also relatively easy to assess from objective, physical and short-term perspectives.

Section 17(1) of the Act further articulates a 'child is in need of protection where *the life, health or emotional well-being of the child is endangered* by the act or omission of a person.' These human needs can be more difficult to assess and evaluate, from an objective perspective. The Act provides a non-exhaustive illustrative list of circumstances where a child is considered to be in need of protection:

> 17(2) Without restricting the generality of subsection (1), a child is in need of protection where the child
> (a) is without adequate care, supervision or control;
> (b) is in the care, custody, control or charge of a person
> (i) who is unable or unwilling to provide adequate care, supervision or control of the child, or
> (ii) whose conduct endangers or might endanger the life, health or emotional well-being of the child, or
> (iii) who neglects or refuses to provide or obtain proper medical or other remedial care or treatment necessary for the health or well-being of the child or who refuses to permit such care or treatment to be provided to the

[10] "2(1) The best interests of the child shall be the paramount consideration of the director, an authority, the children's advocate, an agency and a court in all proceedings under this Act affecting a child, other than proceedings to determine whether a child is in need of protection, and in determining best interests the child's safety and security shall be the primary considerations. After that, all other relevant matters shall be considered." See above pp. 16-17 for these other considerations.

> child when the care or treatment is recommended by a duly qualified medical practitioner;
> (c) is abused or is in danger of being abused;
> (d) is beyond the control of a person who has the care, custody, control or charge of the child;
> (e) is likely to suffer harm or injury due to the behaviour, condition, domestic environment or associations of the child or of a person having care, custody, control or charge of the child;
> (f) is subjected to aggression or sexual harassment that endangers the life, health or emotional well-being of the child;
> (g) being under the age of 12 years, is left unattended and without reasonable provision being made for the supervision and safety of the child; or
> (h) is the subject, or is about to become the subject, of an unlawful adoption under *The Adoption Act* or of a sale under section 84.

This list appears to contain various related circumstances; for example, a child is determined to be in need of protection when: the person in care, custody or control of the child engages in conduct that endangers or might endanger the life, health or emotional well-being of the child (*Child and Family Services Act*, s. 17(2)(b)(ii)); the child is abused or in danger of being abused (s. 17(2)(c)); or, the child is likely to suffer harm or injury due to the behaviour, condition, domestic environment or associations of the child or of a person having care, custody, control or charge of the child (s. 17(2)(e)).

In the current case, the Manitoba Child and Family Services decision to apprehend the children was upheld as the court concluded that the children were in need of protection in accordance with s. 17(1) and (2) of the Act as "the emotional well-being of both children was endangered by the actions and teachings of their parents"...and "[t]he children were likely to suffer harm if left with their parents and exposed to their behaviour, domestic environment and associations" (MCJ, 2010, no. 37, para 19).

Manitoba Child and Family Services also sought a permanent guardianship order (*Child and Family Services Act*, s. 38(1) (f)). A successful order results in the agency being given

discretion over any access that may be exercised by the parents of the children, subject only to court order(*Child and Family Services Act*, s. 39(3), 38(1)(f) and 39(4)). The order also enables the children to be placed for adoption in accordance with the *Adoption Act* (*Child and Family Services Act*, s. 45(1)). In this case, the permanent order was successful, with a plan in place for the foster parents of the children (the paternal aunt and uncle of the eldest child) to continue to provide for the care and custody of the children.

In this case, the court did not find the parent's expression of racist views was sufficient to warrant a permanent guardianship order (MCJ, 2010, no. 37, para 22). Rather, in her reasons for judgment, Madam Justice Rivoalen stated:

> It is important that I not be swept away by the scandalous inscriptions on the children's bodies. They serve as a starting place in the consideration of the ultimate question in this case, which is whether an order of permanent guardianship is warranted. As shocking as this defacing of children is to right thinking persons, the defilements alone would not be enough to justify a permanent removal of the children. Revulsion can interfere with objectivity, and so care must be taken to keep this in check. (MCJ, 2010, no. 37, para 22-23)

The court followed the format of other child protection cases generally, focusing on the question of whether there was a continuing need for protection. In this assessment, racist views alone, were insufficient to warrant a permanent loss of custody. Rather, the court concluded that the deficiencies in the home environment that were uncovered during the investigation, to the extent possible, "should be considered in isolation from the markings, the outrageous teachings of D.M.P and J.A.M.P. and the misanthropic belief system that they cultivated in S.M.T.S" (para 24).

The court considered the historical exposure of the children to violence and criminal acts (para 36-44), neglect (para 45-50), drug and alcohol abuse (para 51-57), failure to provide the necessities of life and living conditions (para 58-62) as well as the capacity for the father/step-

father to meet the needs of the children in the future (para 63-64, 68-73). In this regard, the court relied on the expert opinion of psychologists and social workers to give their perspective on the parental relationship and capacity of the father/step father to appropriately parent the children.

In granting the permanent guardianship order to Manitoba Child and Family Services, the court concluded that the "political or religious view, and the expression of those views, are really tangential to the child protection concerns that must predominate (para 96)." Rather, the court concluded that:

> At the end of the day, this case was no so much about racism as it was about the protection of children from poor parenting. Serious but commonplace flaws in parenting were uncovered in the Agency's investigation of this family. Parental shortcomings sadly common to many child protection cases lie at the foundation of the Agency's case. (para 106)

From a legal and constitutional law perspective, this case reinforces the notion that expression of racial hatred alone is insufficient to allow the state to intervene to apprehend the children of racist parents. Parental expression of odious views is protected because such expression is consistent with the core ethical and political values of free speech, namely, the promotion of truth, political and social participation and self-fulfillment. That said, parental expression is only one element in the mix when it comes to ascertaining what constitutes the best interests of the child. First, it is important to realize that the best interests of the child are distinct from parental interests. Second, our courts have made it clear that the *Charter* will not protect a parent's right to expression if this is not in the best interests of the child. Third, when racism crosses the line from expression of racist views to the active counseling and promoting of criminal code infractions such as genocide and violence against racial groups, the parent has clearly crossed the line from legal to illegal behaviour.

In the case of *Director of Child and Family Services v. D.M.P*, parental expression of racist views were ultimately irrelevant. The court concluded that it was not in the children's best interests to stay with their father/step-father because of prior and continuing neglect, as well as a history of drug and alcohol abuse. This meant that the male figure(s) in the children's lives could not provide the necessities of life and basic living conditions minimally necessary to sustain the best interests of the children.

From an ethical perspective, exposing children to virulently racist beliefs and expression is problematic on a number of fronts. Such behaviour is antithetical to a number of ethics, namely, an ethic of purpose, an ethic of principle, and an ethic of probability. The ethic of purpose perspective suggests that the best interests of the child notion may be understood from a teleological or greatest good perspective. Whether we define human flourishing in a narrower Aristotelian sense or more widely as Scheffler does, it is obvious that instilling hatred for others is inconsistent with potential, flourishing, happiness, well-being and the greatest good as these terms all relate to the best interests of the child. As for the ethic of principle, the best interests of the child are defined by *a priori* duties, rules or principles. Kant's work is informative in this regard. He stressed the importance of acting in ways so that every individual is never treated as means to an end but, rather, always as an ends. This thinking affirms the dignity of the child as an autonomous being with intrinsic and inherent worth. In *Director of Child and Family Service v. D.M.P*., the mother and stepfather used the child as a weapon of indoctrination and a human bill board to further their racist views. Lastly, the best interests of the child may be analyzed through a calculation of the probable positive or negative consequences for the child. In other words, an ethic of probability requires utilitarians to address a fundamental query: Will this action produce greater overall human well-being? Applying simple utilitarianism, it is difficult to

see how exposing a child to vitriolic racist expression and beliefs will produce the greatest pleasure, happiness or utility for the child. On the one hand, these ethical discourses are overlapping and complimentary. However, they remain distinct because of their different epistemological and ontological sources. Although it can be very difficult to know with certainty what constitutes the bests interests of a particular child, these ethical frames still provide a helpful way of understanding and justifying how we think about the concept which goes beyond the merely legal frame of analysis.

Conclusion

At the very least, decisions and remedies related to children must be grounded in applied jurisprudential and ethical considerations. The capacity to mediate value conflicts and disagreements using jurisprudential and ethical understandings of the best interests of the child is a vital aspect of a civil society's efforts to support the welfare of children, the rights and responsibilities of families and the role of the state. Where there are competing agents and care-givers, adjudicators must not only clarify the empirical facts but also generate and recognize the varying grounds and warrants that commend particular alternatives. It may be wise to exchange the question "What is best for this child?" with the question "Who should decide what is best for this child?" Some people are in better positions relative to a particular child than others. From this article, we see that the power to decide what is best resides with a variety of persons and institutions. Decisions regarding the best interests of the child require the wisdom of Solomon (1 Kings 3:16-28), to do justice to the abetting and conflicting needs of children, parents, and the state. The real mother, in the Court of Solomon, won the day because she was willing to respond to what the King deemed to be a deep and responsible commitment to the best interests of the

child.[11] Likewise, this article encourages advocates, care-givers, and adjudicators to work with Solomon-like wisdom for the best interests of the child by bringing to consideration the commonly taken-for-granted jurisprudential and ethical meanings and interpretations that are perhaps over-embedded and under-considered in the cliché-oriented notion of the best interests of the child.

[11] The story is as follows (1 Kings 3:16-28 New International Translation): Two prostitutes came to the king (Solomon) and one of them said, "My lord, this woman and I live in the same house. I had a baby while she was there with me. The third day after my child was born, this woman also had a baby. We were alone; there was no one in the house but the two of us. During the night this woman's son died because she lay on him. So she got up in the middle of the night and took my son from my side while I your servant was asleep. She put him by her breast and put her dead son by my breast. The next morning, I got up to nurse my son—and he was dead! But when I looked at him closely in the morning light, I saw that it wasn't the son I had borne." The other woman said, "No! The living one is my son; the dead one is yours." But the first one insisted, "No! The dead one is yours; the living one is mine." And so they argued before the king. The king said, "This one says, 'My son is alive and your son is dead,' while that one says, 'No! Your son is dead and mine is alive.' Then the king said, "Bring me a sword." So they brought a sword for the king. He then gave an order: "Cut the living child in two and give half to one and half to the other." The woman whose son was alive was filled with compassion for her son and said to the king, "Please, my lord, give her the living baby! Don't kill him!" But the other said, "Neither I nor you shall have him. Cut him in two!" Then the king gave his ruling: "Give the living baby to the first woman. Do not kill him; she is his mother." When all Israel heard the verdict the king had given, they held the king in awe, because they saw that he had wisdom from God to administer justice.

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