

A Wonderful Case and an Irrational Tragedy: The Phillip Becker Case Continues George J. Annas

Why are the courts having so much trouble deciding what should be done with Phillip Becker? Two years ago this column discussed the first series of cases involving Phillip. At that time the California courts decided that his parents had the right to refuse recommended heart surgery for this twelve-year-old Down syndrome child, even though this would result in a slow and painful death for Phillip. "Denying the Rights of the Retarded: The Phillip Becker Case," *Hastings Center Report*, December 1979, pp. 18-20). That decision was arbitrary, unprincipled emotional and placed parental autonomy ahead of the right to life of a mentally retarded child.

Another court has now ruled in Phillip's favor. Unfortunately, the opinion is again unprincipled and emotional. I can applaud the outcome and still be appalled at the methodology. In the previous case the state sought an order for surgery, alleging child neglect. In this case Patsy and Herbert Heath sought guardianship of Phillip, arguing that they had become his psychological parents and that it would be in Phillip's best interests to be placed in their care. They promised, among other things, to reconsider the surgery decision (*Guardianship of Phillip Becker*, Superior Court of Cal., Santa Clara Co., No. 101981, Aug. 1981).

In his memorandum of decision California Superior Court Judge William J. Fernandez describes it as "both a wonderful case and an irrational tragedy"-wonderful because "so many people [came] forward to try to make a little boy's life better . . . tragic because God and nature may already have determined Phillip's future life course [i.e. his ventricular septal defect may now be inoperable] . . . irrational because the contestants are spending thousands of dollars and thousands of hours fighting over rights." The Judge believed "that time could be better spent trying to make the last part of Phillip Becker's life happier than the earlier part."

In the latest court decision, Judge Fernandez confronted two related issues: parental autonomy and the child's right to life. Regarding parental autonomy, the judge should have considered the limits of what Professor Bernard Dickens of Toronto describes as the modern American neoconservative doctrine of "radical nonintervention." Specifically, the notion is that the interventionist activities of the liberal welfare state have failed to arrest family breakdown and violence, juvenile delinquency, poverty, etc., and that letting families alone may be a better way to promote their autonomy and that of their children (Bernard M. Dickens, "The Modern Function and Limits of Parental Rights," *97 Law Quarterly Review* 462, 465-66 [July 1981]). Limiting state intervention in family decisions to all but the most extreme life-and-death cases is also generally espoused by Joseph Goldstein, Anna Freud, and Albert Solnit in their *Before the Best Interests of the Child* (New York: Free Press, 1979). They argue that before the best interests of the child should even be questioned, it must be demonstrated by due process

of law that the family has fallen short of legally set and prenotified standards *of* child care. While the 1979 Becker opinions were decided before this book was written. they are consistent with this noninterventionist notion

Unfortunately, Judge Fernandez declines to discuss this critical issue, and instead launches into a discursive essay on parenting. In his words: "The issue [in the former proceedings] was too narrow, that is, the risk of surgery. The basic issue is and always has been one of parenting." In this regard the judge finds it critical to compare the role of the Beckers as parents to that of the Heaths.

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While the Beckers win biologically. the Heaths are clear psychological winners. The court found that Phillip never received nurturing, constancy of affection and love, or the opportunity to develop a basic trust and confidence from his biological parents They placed him in an institution at birth. viewed his potential for development as very low, and refused to consent to life-prolonging surgery.

"Their basic opinion of Phillip was that he was a permanently mentally retarded low IQ Down's child who would never have a hope of living in society." the court argues. Their view is that he should be permanently institutionalized. not have surgery, not have visits with people who love him. and never develop "any permanent attachments to anyone or to have any home life." They even barred the Heaths from visiting him after the initial litigation.

In contrast, the Heaths have had a continuing relationship with Phillip since he was five years old. "Their love for him is unquestioned . . . they offer love and home care. tutoring. and all that Phillip may need in terms of educational, vocational and basic skills training." He would live in their home. have a private tutor; surgery would be reconsidered. Their expectations for Phillip are great and "they will always treasure him as if he were their own son." On this basis the court concluded that "psychological parenting between the Heaths and Phillip exists."

The judge is no closer to the mark when he discusses Phillip's rights. Nowhere. for example, does he even suggest that the mentally retarded as a class have a right to life. Instead his analysis focuses on the much narrower issue of a right to habilitation--suggesting that those mentally retarded persons who do not have the options the Heaths have now opened to Phillip may not have a right to live. Instead of using solid legal principles, the judge posits a hypothetical conversation in which he explains Phillip's options:

THE COURT: Phillip. I am convinced . . . you have arrived at a crossroad in your life. . . . Your first choice will lead you to a room in an institution where you will live. You will be fed, housed, and clothed, but you will not receive any life--prolonging medical care. . . . You will not be given an opportunity to add to your

basic skills. . . . You will not be allowed to become attached to and person. . . .
Your biological parents will visit you occasionally. . . .

Your second choice will lead you to a private home where you will be bathed in the love and affection of your psychological parents. . . . You will be given private tutoring . . . in order that some day you may enter into society and be a productive member of our community. . . . You will have a chance for life-prolonging surgery. . . . Best of all, your psychological parents will do all in their power to involve your biological parents in your habilitation and to unite both families together. . . .

The judge clearly believes Phillip would decide to live with the Heaths. But since he feels such an analysis is without California precedent, the judge goes on to find detriment to Phillip from his biological parents, concluding that they have caused him to suffer severe emotional, physical and medical harm.

Admitting that he is "stretching important legal doctrines to the utmost" to make a "little one's life better," the judge concludes that guardianship should be given to the Heaths, Phillip's psychological parents, without severing the parental bonds with his biological parents. The judge's stated purpose is to provide Phillip a "chance to secure a life worth living."

Since the search for a legal principle of decision making is fruitless, the judge's emotional reaction to the case should be examined. Here the judge is remarkably candid. The twenty-page opinion has twenty-six additional pages of notes, in solve the judge expresses his reactions. At one point he remarks, "What the Court is critical of is their (the Beckers') insensitivity to his [Phillip's] needs and the immutable label of retarded that they have placed upon their child." And later, "Obviously the Beckers' attitude is unrealistic. Life is an ever changing kaleidoscope." He recalls his feelings when he read Phillip's medical records:

I weep uncontrollably at the struggle of this wee lad to survive. My soul reaches out to him and his laboring heart to try to give it ease, and in this time of grief, i think of Tiny Tim and what might have been but for old Marley's ghost.

Later he wonders out loud if he is not letting his emotions carry the day. He suggests that a cynic might say, "Judge, isn't that just a little bit subjective, if not maudlin and trite?" His response, of course, is in the negative. He goes on to explain that "Judges are humans and not machines," and in his view this is the most critical characteristic of a judge. He even takes the occasion to compare his decision to Solomon's, noting again his reactions to Phillip's medical records:

Intuitively, I reason if I a stranger but a parent can be so overcome with grief as I read the symptoms pointing to the slow but inexorable approach of the child's death. what does the real mother feel? I am struck by the indifference towards Phillip's doom displayed by Mr. and Mrs. Becker. It can only come from a failure to

associate with the child and see him on a daily basis. No true parent can watch a child's life slowly ebbing and not cry out. "Oh Lord. let the child live."

While argued before different courts and couched as different legal proceedings, the basic issue at stake is the same now as it was in 1979: who should decide if Phillip Becker possesses a "life worth living," and therefore a right to life" Goldstein et al. argue that these are "highly personal terms about which there is no societal consensus" and suggest accordingly that this is precisely the type of decision "parents must remain free of coercive state intervention in deciding. . . ." In the first Becker case Judge Eugene M. Premo agreed when he determined that the parental decision against surgery was "in the range of debatable actions" and therefore to be made only by the parents. But his decision cautions that such a loose rule may protect parental autonomy at too high a price: the lives of children. Judge Fernandez, for example, is especially persuasive when he compares the perceptions of Phillip's biological parents with those of his psychological parents regarding the type of life Phillip is capable of living:

BIOLOGICAL PARENTS

Phillip can't talk, communicate, write his name, draw, cook or form loving attachments. He is a low Down's, and has few basic skills.

PSYCHOLOGICAL PARENTS

Phillip can talk, communicate, write his name, draw, cook, and form loving attachments. He is a high Down's, is educable, and has many basic skills. The question of life-prolonging surgery for the individual described by Phillip's biological parents may be "debatable" for some; but surgery for the individual described by his psychological parents is not a matter "about which there is no societal consensus."

Most of these characteristics are, of course, matters of fact, and the courts are excellent forums in which to prove such fact: if they are disputed. Courts are less skilled at making predictions about the "best" placements for children. And this court provides an example of the problems courts get into when they try to engineer the future. Instead of finding Phillip's biological parents unfit and giving Phillip's exclusive custody to the Heaths, Judge Fernandez gives the Heaths guardianship without severing the Becker's parental rights. Now Phillip has not one set of parents, but two. This is not only unprecedented: it seems to make little sense if one is seeking a continuity of care and responsibility for the child.

First, both of the lower court judges let their emotions as hypothetical parents to Phillip determine their decisions. Second, instead of dealing with the child's right to life, the judges concentrated on the quality of his life, so that the rulings seem to depend upon Phillip's chances to be self-sufficient. Third, no attempt is made to define the functions or limits of parental autonomy.

I applaud Justice Fernandez for giving Phillip a chance to live. But his emotional appeals and dearth of analysis make this case almost useless as a precedent. A tribute to the judge's humanity, it is otherwise as much a travesty as the 1979 Becker opinions. Judges must use their humanity in judging others. But judges sit as judges, not surrogate parents, and they have a responsibility to articulate their opinions on the basis of principles. Unless they do, issues of parental autonomy will be decided by emotional caprice. All our children deserve more from the law.

Judge Fernandez should have stated simply that parental rights exist primarily to enable parents to prepare their children for adulthood and their own emerging autonomy (Dickens, *supra*). When parents abdicate this goal, the state or others properly step in to act for them.

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