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# CHILD CUSTODY: EVOLUTION OF CURRENT CRITERIA

Donald C. Schiller\*

*With the elimination of the presumption in favor of the mother, courts are left with "the best interest of the child" as the sole criterion in contested child custody cases. In this Article, Mr. Schiller describes several methods courts have begun to utilize to obtain the information necessary to determine which parent should be awarded custody. Due to a lack of precedent establishing any particular procedure, and in view of recent legislation by various states, the author concludes that legislation should be enacted to create a defined procedure which will more adequately inform the court and better serve "the best interest of the child."*

## INTRODUCTION

In divorce proceedings, the most difficult problems that courts and lawyers encounter are contested custody issues. Dollar values for support and property interests can be dealt with in concrete terms, using traceable objective criterion. On the other hand, decisions affecting custody of children necessarily are based on far more elusive and subjective factors. A custody decision by a court is one of the few types of judicial decisions which will in effect regulate the day to day life of a human being for an indefinite period of time. Such a decision, depending on the age of the child, will probably shape that child's personality for the rest of his life. Despite the agony a judge must experience in making decisions of this magnitude, the courts nevertheless must step forward and accept this Solomon-like task<sup>1</sup> when parents are unable to solve this problem for themselves. It is the purpose of this Article to delineate the methods used in child custody determinations. Possible improvements of the current methods that are still in an embryonic stage of development also will be discussed.

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1. 1 Kings 4:16 et. seq.

## HISTORIC PRESUMPTIONS

At common law, courts had little difficulty in determining which parent was entitled to custody. The sex of the parent was the sole criterion. A father had the right to custody of his child unless he somehow abused that right.<sup>2</sup> This right to custody in favor of the father at times went to the extreme of allowing the father to have custody when the child was still nursing at the mother's breast.<sup>3</sup> At common law, this preference in favor of the father was based upon the presumption that it would benefit a child to be in the care of his or her father because of the father's natural and legal obligations to support and protect the child.<sup>4</sup>

In 1849, the Illinois Supreme Court discussed the existence of this common law right of a father to his child in the case of *Miner v. Miner*.<sup>5</sup> But in *Miner*, the court noted that there was then a statute in Illinois which authorized a court, when granting a divorce, to make such order touching "the care, custody and support of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just."<sup>6</sup> Using this statute to show that the right of the father is no longer absolute, the court gave custody to the mother.<sup>7</sup> How-

2. *The King v. De Manneville*, 102 Eng. Rep. 1054 (K.B. 1804).

3. *Id.*

4. See Comment, *Custody and Control of Children*, 5 FORDHAM L. REV. 460 (1936) which states:

At early English common law the father, as of right, was entitled to the custody of his minor children and at times his right was considered absolute, even when its exercise was detrimental to the infant's welfare. . . . In the United States at common law the father, because of his natural and legal obligations to support, protect and educate, was recognized as the natural guardian of the person of his minor child. . . . [I]t centered in the father primarily for the benefit of the infant, the law presuming that it would be for the child's best interest to be under the nurture and care of the father.

*Id.* at 461-62. See also Note, *Reciprocity of Rights and Duties Between Parent and Child*, 42 HARV. L. REV. 112, 112 n.2 (1928), quoting 1 SCHOULER, MARRIAGE, DIVORCE, SEPARATION, AND DOMESTIC RELATIONS §752 (6th ed. 1921), which noted, "This right [to services], like that of custody, rests upon the parental duty of maintenance, and furnishes some compensation to the father for his own services rendered the child."

5. 11 Ill. 43 (1849).

6. *Id.* at 50.

7. The court reached the conclusion to leave custody with the mother first by making a point that the father was the guilty party in the divorce. Then, the court noted that next to the father's right was the mother's right and it is up to the chancery courts to look to the best interests of the child. *Id.* at 49. The court noted that this child was a 7-or-8-year-old female who would get daily care and supervision from a mother, but who would be left with strangers during the father's working hours. *Id.* at 51.

ever, the court in *Miner* went further than abolishing the father's common law right to custody and established a presumption in favor of the mother stating that:

[A]n infant of tender years is generally left with the mother, (if no objection to her is shown to exist) even when the father is without blame, merely because of his inability to bestow upon it that tender care which nature requires, and which it is the peculiar province of a mother to supply.<sup>8</sup>

Thus, *Miner* became the first expression of the "tender years doctrine" in Illinois, creating a presumption in favor of the mother.

The tender years doctrine thereafter became entwined in most decisions awarding custody to mothers.<sup>9</sup> However, the courts that awarded custody to mothers, utilizing the tender years doctrine, frequently stated that the primary or controlling consideration for determining custody was the best interests and welfare of the children.<sup>10</sup> It became apparent from reading the courts' opinions that they were functioning from a preconceived notion that it was in the best interests and welfare of young children to place them in the custody of their mother unless the mother did something to forfeit her right to have the children.<sup>11</sup> This preference in favor of mothers was frequently applied in spite of serious marital misconduct.<sup>12</sup>

The tender years doctrine may have validity presuming that the mother is able to be a full-time parent. However, society today has changed with an increasing equalization of the sexes, both socially and economically. Women are now a large part of today's work force,<sup>13</sup> and those who need not work often engage

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8. *Id.* at 49-50.

9. *See, e.g.*, *Nye v. Nye*, 411 Ill. 408, 105 N.E.2d 300 (1952); *Pierce v. Wade*, 2 Ill.App.3d 717, 276 N.E.2d 744 (5th Dist. 1971); *Melvin v. Melvin*, 131 Ill.App.2d 1070, 269 N.E.2d 363 (5th Dist. 1971); *Frees v. Frees*, 99 Ill.App.2d 213, 240 N.E.2d 274 (1st Dist. 1968); *Dokos v. Dokos*, 88 Ill.App.2d 330, 232 N.E.2d 508 (1st Dist. 1967); *People v. Gaddis*, 240 Ill.App. 508 (3d Dist. 1926); *Pearson v. Pearson*, 179 Ill.App. 127 (2d Dist. 1913); *People ex rel. Hickey v. Hickey*, 86 Ill.App. 20 (1st Dist. 1899). *See also* Taylor, *Child Custody Problems in Illinois*, 24 DEPAUL L. REV. 521, 525-27 (1975) [hereinafter cited as Taylor].

10. *See, e.g.*, *Nye v. Nye*, 411 Ill. 408, 105 N.E.2d 300 (1952); *Frees v. Frees*, 99 Ill.App.2d 213, 240 N.E.2d 274 (1st Dist. 1968).

11. *See* *Nickell v. Nickell*, 112 Ill.App.2d 330, 250 N.E.2d 790 (2d Dist. 1969).

12. *See, e.g.*, *Nye v. Nye*, 411 Ill. 408, 105 N.E.2d 300 (1952); *Schulter v. Schalter*, 5 Ill.App.3d 698, 283 N.E.2d 924 (2d Dist. 1972); *Hockett v. Hockett*, 128 Ill.App.2d 255, 261 N.E.2d 822 (5th Dist. 1974).

13. NATIONAL COUNCIL OF ORGANIZATIONS FOR CHILDREN AND YOUTH, AMERICA'S CHILDREN

in social, cultural, or philanthropic activities which keep them away from the home. Slowly, the courts have come to recognize this change and its effect on family life.

#### ELIMINATION OF PRESUMPTIONS

In *Patton v. Armstrong*,<sup>14</sup> Illinois courts began to deviate from the tender years doctrine. There the Fifth District Appellate Court affirmed an award of custody of two children to their father. The court reasoned that the presumption that the mother was better able to care for the children was based on the assumption that the mother would remain at home and care for the children. Since the mother in this case worked, the court held that the tender years doctrine was inapplicable.<sup>15</sup> In *Marcus v. Marcus*<sup>16</sup> the First District further weakened the doctrine by recognizing the increasing equalization of the sexes, stating:

[I]t should be noted that there is today no inflexible rule which requires that custody of the children, especially of tender age, be vested in the mother. Equality of the sexes has entered this field. The fact that a mother is fit is only one facet of the situation and, standing by itself, it does not authorize a denial of custody to a father.<sup>17</sup>

Finally in 1975, the Illinois Appellate Court for the Fourth District openly rejected the tender years doctrine in *Pratt v. Pratt*,<sup>18</sup> stating that as a result of the recent social and legal trends, the presumption in favor of the mother could no longer be recognized.<sup>19</sup>

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1976: A BICENTENNIAL ASSESSMENT 55-57 (1976). As of 1975, 47% of all women with children under 18 were in the labor force. *Id.* at 53.

14. 16 Ill.App.3d 881, 307 N.E.2d 178 (5th Dist. 1974).

15. Similarly, in *Plant v. Plant*, 20 Ill.App.3d 5, 312 N.E. 2d 847 (5th Dist. 1974), the court indirectly attenuated the doctrine in a support action. The court stated that with the emancipation of women and the change in times, the view that support of a child was exclusively the father's obligation is now outmoded. In the court's opinion, the support of a child is a joint and several obligation of the mother and father with the amount and source thereof to be determined on the basis of the needs of the child and the means and capacity to produce income of the respective parents. For a further discussion of the equalization of the sexes regarding child support obligations, see Comment, *Child Support: His, Her, or Their Responsibility?*, 25 DEPAUL L. REV. 707 (1976).

16. 24 Ill.App.3d 401, 320 N.E.2d 581 (1st Dist. 1974).

17. *Id.* at 407, 320 N.E.2d at 585.

18. 29 Ill.App.3d 214, 330 N.E.2d 244 (4th Dist. 1975).

19. *Id.* at 216, 330 N.E.2d at 246, citing *Marcus v. Marcus*, 24 Ill.App.3d 401, 320

Thus, with the courts having recognized the equality of sexes, their task has become much more difficult in determining an award of custody. Obviously, it was easier for a court to start with a preference in favor of one parent. This would leave it to the non-preferred parent to show why the preferred parent should not have custody. With both parties on an equal footing, the custody decision becomes more difficult. Consequently, it is important to develop some criteria for determining which award of custody would be in the child's best interest.<sup>20</sup>

#### RELEVANT FACTORS IN DETERMINING THE BEST INTERESTS OF THE CHILD

Many cases discuss several influential factors considered relevant in determining the best interests of the child. The primary areas the courts generally look to are the parents' relative stability, home environment, and emotional health.<sup>21</sup>

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N.E.2d 581 (1st Dist. 1974). In *Drake v. Hohimer*, 35 Ill.App.3d 529, 341 N.E.2d 399 (4th Dist. 1976), the trial court awarded custody to the father after finding both parties were fit. The mother on appeal argued that since both were fit, the court should have awarded the mother custody because of the tender years doctrine. The father argued that to make use of the tender years doctrine in favor of the mother would be in violation of the Illinois Constitution article I, section 18 (1970), which forbids discrimination because of sex. The appellate court side-stepped the constitutional issue. The court, instead, rejected the tender years doctrine citing the *Pratt* case and went on to state, "The guiding star is and must be at all times, the best interests of the child." *Id.* at 530, 341 N.E.2d at 400. It is interesting that the court cited as authority for the "best interest" standard the *Nye* case, which really was decided upon the tender years doctrine.

20. It should be noted that there is a significant difference between an award of custody in the original divorce decree and the award of custody when one parent, after the divorce decree is entered, seeks a change in custody. This changing of custody is possible because according to ILL. REV. STAT. ch. 40, §19 (1975), the court has continuing jurisdiction to modify custody decrees or orders. Although admittedly the standard for determining custody should be solely the best interests of the minor child, the party seeking the change of custody is not on an equal basis with the party who has custody under the divorce decree. In *Brady v. Brady*, 26 Ill.App.3d 131, 324 N.E.2d 645 (5th Dist. 1975), it was held that the party seeking the change in custody must show that there has been a substantial change in circumstances since the previous custody award. Courts do not like to shift children back and forth between contesting parents. Therefore, a change in custody is not easy to accomplish unless the court is convinced that the change of circumstances, which occurred after the original decree, requires that custody be changed for the best interest of the child. The non-custodial parent merely improving his or her own situation after the divorce has been held not to be sufficient change of circumstances to warrant a change of custody. See *Israel v. Israel*, 8 Ill.App.2d 284, 131 N.E.2d 555 (2d Dist. 1956); *Maupin v. Maupin*, 339 Ill.App. 484, 90 N.E.2d 234 (4th Dist. 1950).

21. See text accompanying notes 22-32 *infra*.

Stability of the child's home has been considered an important factor.<sup>22</sup> Thus, placing a child with a parent who would give a more traditional background to the child as opposed to placing the child with a parent with more experimental views, is a proper basis for an award of custody.<sup>23</sup> Similarly, a parent who places great emphasis on family life and activities may be given custody over the parent who frequently is away from home.<sup>24</sup> Courts also have recognized the positive behavioral influence of a parent who is a strict disciplinarian as opposed to a parent who allows the children to do as they please.<sup>25</sup> Thus, it is obvious in custody considerations that the courts tend to prefer a more traditional environment.

This is further demonstrated by the courts' concern with the emotional maturity of the custodial parent. The physical and mental condition of both parents is a material issue considered in awarding custody.<sup>26</sup> Thus, where one parent's judgment was held to be immature, it was proper to award custody to the other parent.<sup>27</sup> It also has been considered materially relevant to a decision for a court to assess and evaluate the party's temperaments, personalities and capabilities.<sup>28</sup> Therefore, judicial concern with several traditional factors provides a reliable yet subjective means of furthering the search for just results in this sensitive area.

However, there are a number of factors which the courts have rejected as criteria for awarding custody. Past marital misconduct is not a proper basis to deny an award of custody.<sup>29</sup> The relative wealth<sup>30</sup> and religion<sup>31</sup> of the parents, while carrying some

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22. *Melvin v. Melvin*, 131 Ill.App.2d 1070, 269 N.E.2d 363 (5th Dist. 1971).

23. *See Anagnostopoulos v. Anagnostopoulos*, 22 Ill.App.3d 479, 317 N.E.2d 681 (1st Dist. 1974).

24. *See, e.g., Patton v. Armstrong*, 16 Ill.App.3d 881, 307 N.E.2d 178 (5th Dist. 1974); *Wilner v. Wilner*, 131 Ill.App.2d 891, 266 N.E.2d 918 (3d Dist. 1971).

25. *See, e.g., Wilner v. Wilner*, 131 Ill.App.2d 891, 266 N.E.2d 918 (3d Dist. 1971).

26. "[T]he physical and mental condition of both parents is necessarily a material issue in cases involving custody of a child." *Marcus v. Marcus*, 24 Ill.App.3d 401, 406, 320 N.E.2d 581, 584 (1st Dist. 1974).

27. *Id.*

28. *Id.* at 407, 320 N.E.2d at 585.

29. *See Nye v. Nye*, 411 Ill. 408, 105 N.E.2d 300 (1952); *Huey v. Huey*, 25 Ill.App.3d 20, 322 N.E.2d 560 (5th Dist. 1975).

30. *People v. Schaedel*, 340 Ill. 560, 173 N.E. 172 (1930).

31. *Frank v. Frank*, 26 Ill.App.2d 16, 167 N.E.2d 577 (1st Dist. 1960).

weight with regard to the welfare of the child, are not exclusive factors in discerning the best interest of a child. Furthermore, in interracial marriages the awarding of custody to a particular parent because the children are of his color is not considered a proper basis for the court's decision.<sup>32</sup>

It is apparent that factors which the courts apply in determining the best interests of the minor child are quite subjective. The one objective factor that the courts will consider, but refuse to be bound by, is the preference of the child, if expressed.<sup>33</sup> A fourteen-year-old child is regarded as mature enough for the court to give serious weight to his or her preference.<sup>34</sup> However, the preferences of the child are valid only if they are based on what the court considers reasons which relate to the child's best welfare.<sup>35</sup> Because of the discretionary weight the court may or may not give to the child's preference, it likewise becomes a subjective factor.

A further problem in contested custody cases stems from the fact that a court of law is bound by formal rules of evidence and judicial procedure. These formalities are awkward encumbrances in a trial of this type. Rules of evidence usually require specifics, such as dates, times, and places, and they generally filter out testimony regarding opinions and feelings. Consequently, many factors that would be relevant to determining the best interest of the child are inadmissible.<sup>36</sup> Young children whose futures are at stake are not formal parties and, therefore, their activities may be limited in the litigation. Are they to testify in the divorce proceedings, and if so, are they to be treated like any other witness? How does a court, or will a court, obtain those facts necessary to make the determination of which award of custody will be in that child's best interest? This is an evolving area of law; however, certain methods of obtaining the necessary facts are becoming established.

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32. *Fontaine v. Fontaine*, 9 Ill.App.2d 482, 133 N.E.2d 532 (1st Dist. 1956).

33. *Strouse v. Strouse*, 75 Ill.App.2d 362, 220 N.E.2d 485 (4th Dist. 1956).

34. See *Patton v. Armstrong*, 16 Ill.App.3d 998, 307 N.E.2d 351 (5th Dist. 1974); *Marcus v. Marcus*, 109 Ill.App.2d 423, 248 N.E.2d 800 (1st Dist. 1969). See also ILL. REV. STAT. ch. 3, §136 (1975), which gives a minor above the age of fourteen, without a guardian, the right to nominate a guardian subject to approval of the probate court.

35. *Garland v. Garland*, 19 Ill.App.3d 951, 312 N.E.2d 811 (1st Dist. 1974).

36. See text accompanying notes 83-86 *infra*. See also note 87 *infra*.



## DEVICES PRESENTLY UTILIZED

*Social Service Report*

In Illinois a court may order, on motion of the parties or on its own motion, a social service investigation and report to assist in establishing a factual basis for determining the best interest of the child. The report is generally the product of an investigation of the parents and the child's home, their respective neighbors, and the child's school teachers. In Cook County these investigations are conducted by the Department of Supportive Services.<sup>37</sup> Outside of Cook County, the courts most often order investigations by probation departments. These investigations are not founded upon statutory authority; rather, the courts order these investigations under their general equity powers.<sup>38</sup> It is peculiar to divorce cases that although the investigation and report are ordered by the judge, he is not allowed to read the report.<sup>39</sup> This prohibition holds true even if the parties stipulate that the court may read it.<sup>40</sup> The rationale for prohibiting the court from reading these reports is that they are basically hearsay, contain the author's conclusions, and the qualifications of the author may be questionable.<sup>41</sup> The reason for this prohibition, even if the parties agree, is that they cannot stipulate and bind

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37. Until recently, this agency was known as the Court Service Division of the Cook County Department of Public Aid.

38. See *Harris v. Spencer*, 86 Ill.App.2d 41, 229 N.E.2d 16 (5th Dist. 1967); *Walter v. Walter*, 61 Ill.App.2d 476, 209 N.E.2d 691 (2d Dist. 1965).

It is interesting to note that in cases of adoption under the Adoption Act, ILL. REV. STAT. ch. 4, §9.1-6 (1975), these types of investigations are provided for by statute and a written report must be filed. The judge may read the report and disclose only those portions to the petitioners which may be adverse to them. However, the statute specifically prohibits the court from considering facts set forth in the report at a hearing unless the facts are established by competent evidence. This is directly contrary to what the court may do with a written report by an investigator in a divorce proceeding.

39. See *Patton v. Armstrong*, 6 Ill.App.3d 998, 286 N.E.2d 351 (5th Dist. 1972), wherein it was stated:

[I]t is improper for a judge to base a decision on reports or evidence that are not available to the parties or in the record. . . . [The report] does not constitute admissible evidence under Illinois rules of evidence. . . . We do not permit courts to make decisions on such an unreliable basis.

*Id.* at 1000-01, 286 N.E.2d at 352-53.

40. See *Scott v. Cohn*, 134 Ill.App. 195 (1st Dist.), *aff'd*, 231 Ill. 556, 83 N.E. 191 (1907).

41. See *Patton v. Armstrong*, 6 Ill.App.3d 998, 1000, 286 N.E.2d 351, 353 (5th Dist. 1972).

the minor child to have his destiny determined by less than credible evidence.<sup>42</sup>

It is valid, therefore, to question the purpose of ordering the investigation and report in the first place. In spite of the restrictions on the use of these reports, they do serve a purpose. They are made available to the attorneys for the benefit of the parties, and therefore are a helpful discovery tool. They can lead to finding new witnesses, including the author of the report. Although the report cannot be read, this does not mean that the author of the report cannot testify in court to facts he observed. Consequently, the investigator may be called to testify by the party to whom his testimony would be favorable. In addition, the report of an impartial party may enlighten both parties to thoughts or observations that they had not previously considered. This may lead to settlement of the entire dispute by an agreement between the parties.

### *Physical and Mental Examination*

Another available tool in presenting facts to the court relating to the best interests of children is the physical or mental examination.<sup>43</sup> Under Supreme Court Rule 215,<sup>44</sup> either party may seek to have the other submit to a physical or mental examination if the physical or mental condition of the party, or person in the party's custody, is in controversy. This seeking of a court-ordered examination extends even to submitting a child in a party's custody to an examination.<sup>45</sup> The physician may be chosen by the

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42. See *Cohn v. Scott*, 231 Ill. 556, 83 N.E. 191 (1907). See also *In re Estate of LeCocq*, 17 Ill.App.3d 1011, 309 N.E.2d 84 (3d Dist. 1974) in which it was held not to be reversible error for the trial court to read an investigative report before modifying custody. The court stated:

This report was received by the court pursuant to a stipulation of the parties. Since this proceeding was undertaken by the Court without a jury and the *Court-appointed guardian ad litem did not object*, we find no reversible error in the procedure, particularly since there is no indication in the record that the report was of any significance in the determination by the Court of the issues in this case.

*Id.* at 1013-14, 309 N.E.2d at 86. (emphasis added)

The only apparent difference between this case where the report could be read and *Cohn v. Scott*, where it could not, is the fact that in this case there was a guardian ad litem for the child who did not object, so that the parties were not themselves stipulating away the rights of the minor who was independently represented.

43. ILL. REV. STAT. ch. 110A, §215 (1975).

44. *Id.*

45. *Id.* at §215(a).

party who is seeking the examination. If the party who is to be examined objects to that physician, then the party seeking the examination may suggest others. For example, if a husband seeking custody feels that his wife has some physical or mental problem that may adversely affect her obtaining custody, then he may seek an order directing the wife to go to a physician of his choice. Consequently, the husband will have the opportunity to present the doctor at trial to present medical evidence that the husband could not have otherwise obtained. This device also is useful when a child has a particular mental or physical disorder that, if proved, could affect a custody decision in favor of a parent who may have a special skill in dealing with the child's problem.

There is no question that when a physician testifies under these circumstances he is the witness for the party who calls him. This is distinct and separate from an impartial medical examination. The authority for an impartial medical examination is Supreme Court Rule 215(d).<sup>46</sup> Under this rule, the court prior to trial on its own motion or on motion of either party, or on its own motion during a trial, may order either or both parties to submit to a physical or mental examination. This is conditioned upon the court's finding that it will materially aid the just determination of the case.<sup>47</sup> If this impartial examination is ordered by the court, it is without cost to the parties. The parties also are removed from the selection process of the physician. The Administrative Office of Illinois Courts selects the physicians from a board of specialists it maintains. In addition, either party may call the physician as a witness at trial. However, written reports to the court and the attorneys are required under both procedures.<sup>48</sup>

Although the rule does not express it, and there is no precedent in Illinois dealing with the question, it is reasonable to conclude that the written reports have no probative value at trial. They would be considered hearsay, just as in the case of investigative reports by a state agency.<sup>49</sup> Furthermore, the rule specifically provides that either party may call the physician to testify and that he may be cross-examined by the other party.<sup>50</sup> The implica-

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46. *Id.* at §215(d).

47. *Id.*

48. *Id.* at §§215(c), 215(d)(3).

49. See text accompanying notes 37-42 *supra*.

50. ILL. REV. STAT. ch. 110A, §215(d)(4) (1975).

tion is that if the report was considered admissible evidence such a provision would be unnecessary. The supreme court rule was originally intended to be used in personal injury cases.<sup>51</sup> It has only recently been employed in custody disputes. It truly is an effective tool in informing the court of physical or mental factors which might lead the court to a decision in the best interests of the child, especially considering the fact that the physical and mental condition of both parents is a material issue in custody disputes.<sup>52</sup> It also has been held that the court in a bench trial may receive the opinion of a psychiatrist as to the fitness of the parents. Although it may relate to the ultimate issue in a custody case, the court is not required to accept the expert opinion, and therefore the expert is not usurping the decision-making power of the court.<sup>53</sup>

#### *In-Chambers Interview*

Another device employed by courts in gathering information to assist in determining the best interests of the child is an in-chambers interview with the minor child or children. Parents normally want their child to suffer as little as possible during the ordeal of a contested custody trial. The child, however, may have information which is relevant to the custody issue that cannot be introduced into evidence without the child's testimony. To lessen the burden for the child, the parties can stipulate to have the judge interview the child or children in the judge's chambers and out of their presence.<sup>54</sup> Prior to *Oakes v. Oakes*,<sup>55</sup> in 1964, it was considered improper for the court to speak to the children outside the presence of the parties, even by agreement, and then base its decision in part on secret information not contained in the record.<sup>56</sup> The *Oakes* case overcame this objection by having the court, upon motion of either party, state for the record the substantive parts of the child's statements. In 1975, the Illinois Ap-

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51. See ILL. ANN. STAT. ch. 110A, §215 (Smith-Hurd 1968) (Committee Comments 199).

52. *Marcus v. Marcus*, 24 Ill.App.3d 401, 320 N.E.2d 581 (1st Dist. 1974). See also note 29 *supra*.

53. See *Marcus v. Marcus*, 24 Ill.App.3d 401, 406, 320 N.E.2d 581, 584 (1st Dist. 1974); *Filipello v. Filipello*, 130 Ill.App.2d 1089, 268 N.E.2d 478 (1st Dist. 1971).

54. *Oakes v. Oakes*, 45 Ill.App.2d 387, 195 N.E.2d 840 (1st Dist. 1964).

55. *Id.*

56. See, e.g., *Albert v. Albert*, 340 Ill.App. 582, 92 N.E.2d 491 (1st Dist. 1950).

pellate Court for the First District extended *Oakes* even further. The court decided in *Seniuta v. Seniuta*,<sup>57</sup> that a judge could interview the children in chambers even over one of the parties' objection. Therefore, the stipulation is no longer necessary for the court to conduct the interview. The appellate court in the same decision clearly stated, however, that the subject matter of the in-chambers interview must be limited to matters related to custody and the welfare of the child. The child's testimony concerning other matters, *i.e.* grounds, property rights, etc., must be taken in the presence of the parties and their counsel, unless waived by the parties.<sup>58</sup>

### *Conciliation Conference*

Another aid to the court and the parties involved in contested custody cases is a conciliation conference. The Circuit Court of Cook County is the only circuit court in the state which has a formal divorce conciliation service. The Presiding Judge of the Divorce Division of the Circuit Court of Cook County, Robert L. Hunter, created this service, exercising the statutory authority granted to divorce courts to employ administrative aides.<sup>59</sup> The Divorce Conciliation Service has six full-time counselors trained in the behavioral sciences. The counselors have no authority to order the parties to do anything, and their recommendations cannot be told to the court. If a judge refers a matter to the Conciliation Service, the parties are assigned to one or two counselors. These counselors interview the parties to the case, the children, and any other persons who would have regular contact with a child if custody or visitation rights were awarded to either party. The counselors use their training and experience to attempt to ease the hostilities between the litigants. The counselors will generally give their unbiased recommendation to the parties, and then attempt to help the litigants see the problems involving custody more clearly. This may be valuable because while the parties are litigating their vision frequently is blurred by the emotions of the fight. If the conciliation fails, the parties can then return to the battleground of trial having lost nothing for their effort except time.

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57. 31 Ill.App.3d 408, 334 N.E.2d 261 (1st Dist. 1975).

58. *Id.* at 416, 334 N.E.2d at 267.

59. ILL. REV. STAT. ch. 40, §30 (1975).

*Guardian Ad Litem*

A relatively new tool which insures the court is fully informed of the child's best interests is the appointment of a guardian ad litem to represent the child. In Illinois, the appointment of a guardian ad litem for children in custody disputes is in its early stage. It is not utilized in every case. Although there are statutory references for such appointment in other types of litigation involving children,<sup>60</sup> there is no statutory authority for the appointment of a guardian ad litem in contested custody disputes. The appointments presently made are based upon the courts' inherent and plenary jurisdiction over minors.<sup>61</sup> While procedures governing the guardian ad litem are emerging, there is no clear precedent defining his duties and powers.

At present, the guardian ad litem has no power greater than any other lawyer involved in the litigation. He is an officer of the court, as are all lawyers. The guardian is subject to the constant supervision of the court, and the court will protect the minor, whether or not he effectively acts.<sup>62</sup> It is imperative that he take an active role in the case because courts have held that a guardian ad litem who perfunctorily files an answer and then abandons the case fails to comprehend his duties as an officer of the court.<sup>63</sup> The guardian must fully examine the case and determine the rights of his ward, and the defenses their interests require, raise any necessary defenses, and if necessary file a counter-complaint, or even file or defend an appeal.<sup>64</sup> He should not raise vexatious issues or defenses not warranted by the law,<sup>65</sup> and he cannot waive any rights of his ward or stipulate to incompetent testimony.<sup>66</sup> That is not to say that the guardian cannot participate in settle-

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60. Probate Act, ILL. REV. STAT. ch. 3, §338 (1975); Chancery Act, ILL. REV. STAT. ch. 22, §5 (1975); ILL. SUP. CT. R. 217(2); Illinois Civil Practice Act, ILL. REV. STAT. ch. 110, §54 (1975); Juvenile Court Act, ILL. REV. STAT. ch. 37, §§704-705 (1975).

61. See *Flynn v. Flynn*, 283 Ill. 206, 220, 119 N.E. 304, 310 (1918), citing BLACKSTONE COMMENTARIES\*427.

62. See *Gibbs v. Andrews*, 299 Ill. 510, 132 N.E. 544 (1921).

63. See *Rom v. Gephart*, 30 Ill.App.2d 199, 173 N.E.2d 828 (1st Dist. 1961); *Baker v. Baker*, 202 Ill. 595, 67 N.E. 410 (1903).

64. See cases cited in note 65 *infra*. See *Leonard v. Chicago Title & Trust Co.*, 287 Ill.App. 397, 5 N.E.2d 282 (1st Dist. 1936); *Sprague v. Beamer*, 45 Ill.App. 17 (2d Dist. 1891).

65. *Rom v. Gephart*, 30 Ill.App.2d 199, 173 N.E.2d 828 (1st Dist. 1961); *McCarthy v. Cain*, 301 Ill. 534, 134 N.E. 62 (1922).

66. *Cartwright v. Wise*, 14 Ill. 417 (1853).

ment negotiations. He can participate, but in doing so he cannot bind the child without court approval since the court still maintains its supervision over both the child and the guardian ad litem.<sup>67</sup> In order for the guardian ad litem to examine the case and present all the relevant facts concerning the child's welfare, it is obvious that he can employ the same tools of litigation available to the primary parties in the case. This would include the following, some of which were previously discussed:

1. Participate or even initiate discovery:
  - a. Take depositions or be present while other persons' depositions are being taken.<sup>68</sup>
  - b. Require the production of documents, photographs or other tangible items.<sup>69</sup>
  - c. Require that he be given access to inspect real estate.<sup>70</sup>
  - d. Seek orders for physical or mental examination.<sup>71</sup>
  - e. Seek to have the matter referred to the Divorce Conciliation Service for possible counseling and mediation.
  - f. Seek to obtain an order for an in-home social investigation.
2. Participate at trial:
  - a. Call witnesses.
  - b. Cross-examine witnesses called by other parties.
  - c. Seek an in-chambers interview of the children by the judge instead of direct testimony.

In addition, there has been much controversy over whether the guardian ad litem should make a written report, and if he does, whether the court should be permitted to read and consider it. There is no precedent yet in Illinois concerning this question. Those who argue against this practice say that it is improper for the same reasons that reading an investigative report is prohibited in custody cases.<sup>72</sup>

The modern approach in dealing with this question recently was discussed in an opinion rendered by the Massachusetts Su-

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67. Pittsburgh, Cinn., Chgo. & St. L. Ry. v. Haley, 69 Ill.App. 64 (1st Dist. 1896), *aff'd*, 170 Ill. 610, 48 N.E. 920 (1897); Johnson v. McCann, 61 Ill.App. 110 (3d Dist. 1895).

68. ILL. REV. STAT. ch. 110A, §§202-212 (1975).

69. *Id.* §214.

70. *Id.* This provision can be used as good authority for the guardians ad litem inspecting the proposed residences of the child or children.

71. *Id.* §215.

72. See text accompanying notes 41-43 *supra*.

preme Judicial Court in the case of *Gilmore v. Gilmore*.<sup>73</sup> *Gilmore* involved a Massachusetts statute which permits the court to appoint a guardian ad litem and have him make a written report.<sup>74</sup> In *Gilmore* the court affirmed the right of a court to read the report and consider it together with the facts presented at trial. However, in this case, the supreme judicial court reversed and remanded the decision of the lower court because the trial court had refused to permit a party to call the guardian ad litem as a witness in order to cross-examine him as to his report. This is a sound decision which appears to permit the court to receive a wealth of helpful information while protecting the parties by subjecting the guardian ad litem to the test of cross-examination.

The author believes that, notwithstanding the absence of statutory authority in Illinois, a guardian ad litem should be required to make reports, and that these reports should be read by the court. Each party in a contested case files a pleading. These pleadings contain allegations of facts constituting the parties' theory of the case and the reasons that they are entitled to the relief they are seeking. These pleadings have no probative value in themselves, but at trial the parties may offer evidence to support them. If the guardian ad litem is to protect the interests of the child, what pleading does he have before the court? What outline does the court have before it in order to put in perspective the facts or evidence that the guardian ad litem may adduce at trial? The report of the guardian ad litem is that pleading. It has no probative value as other pleadings have no probative value. The court reads the parties' pleadings, and it should read the report for the same reasons. All parties have copies of each other's pleadings, and so should all parties have a copy of the guardian ad litem's report. If the evidence at trial fails to substantiate the statements or allegations contained in the report, then the conclusions or recommendations in the report should be given less weight by the judge in the same manner as if parts of the complaint or petition have not been substantiated fully. In summary, the report is not offered as proof of the matters asserted in it, but only as the guardian ad litem's position in the case subject to proof. It is therefore not hearsay.

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73. 341 N.E.2d 655 (Mass. 1976).

74. MASS. GEN. LAWS ANN. ch 215, §56A (West 1975).



In an adoption case, the Illinois Appellate Court inferentially substantiated this theory. In *Taylor v. Starkey*,<sup>75</sup> a guardian ad litem filed a brief with the trial court which the parties referred to as a report. It was his opinion that the defendant, the natural father, was not unfit and depraved, and that the adoption should be denied. The trial court took a contrary view and allowed the adoption. In affirming the trial court, the appellate court stated, "The court was not bound by the recommendations of the guardian ad litem. It can be pointed out in at least one instance, the report of the guardian ad litem did not agree with the evidence presented at the hearing."<sup>76</sup>

### CONCLUSION

The court can move only within a limited area to expand the methods of getting before a judge all the facts he should consider in making the difficult decision of placing a child. Progressive legislation truly is the answer to this problem. The states of Arizona,<sup>77</sup> Colorado,<sup>78</sup> Georgia,<sup>79</sup> Kentucky,<sup>80</sup> Montana<sup>81</sup> and Washington<sup>82</sup> have enacted far-sighted legislation in this area.<sup>83</sup> They provide for representation of the child by an attorney, although they do not call it a guardian ad litem. They specifically set forth

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75. 20 Ill.App.3d 630, 314 N.E.2d 620 (5th Dist. 1974).

76. *Id.* at 634, 314 N.E.2d at 623.

77. ARIZ. REV. STAT. ANN. §§25-311 to 25-339 (Supp. 1973).

78. COLO. REV. STAT. ANN. §§14-2-101 to 14-2-113, 14-10-101 to 14-10-133 (West 1973).

79. GA. CODE ANN. § 30-127 (Supp. 1976).

80. KY. REV. STAT. ANN. §§403.110-350 (Baldwin Supp. 1974).

81. MONT. REV. CODES ANN. §§48.301-341 (Supp. 1975).

82. WASH. REV. CODE ANN. §§26.09.180 to 26.09.280 (Spec. Pamphlet 1976).

83. These states have enacted the Uniform Marriage and Divorce Act or a substantially similar version of the Act. This Act was written by the National Conference of Commissioners on Uniform State Laws. Its section on custody brings fresh air to child custody trials. UNIFORM MARRIAGE AND DIVORCE ACTS §402 (1971 version), provides in relevant part:

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

1. the wishes of the child as to his custodian;
  2. the wishes of the child's parents as to his custody;
  3. the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
  4. the child's adjustment to his home, school and community; and
  5. the mental and physical health of all individuals involved.
6. The Court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

sensitive standards to guide the court in determining the best interest of the child. Essentially those standards include the child's preference, the parents' preference, interaction and relationship of the child with other family members, the child's adjustment to his environment and the mental and physical conditions of all persons involved.<sup>84</sup> In addition, these jurisdictions provide for in-chambers interviews<sup>85</sup> and written reports to the court from appointed investigators or advice from appointed professional personnel, as long as copies are furnished to the parties.<sup>86</sup> Michigan and Minnesota have the most progressive legislation in this area. Their statutes provide for the appointment of guardians ad litem, and in addition, delineate nine relevant considerations for determining the best interests of the child.<sup>87</sup>

This movement by the aforementioned states in enacting this legislation is an essential step towards effectively dealing with custody disputes. It is a recognition that many of the elements involved in determining the best interest of a child are subjective and emotional and thus not communicable through testimony relating specific facts. In Illinois, technical evidentiary objections

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84. *Id.*

85. *Id.* § 404.

86. *Id.* §§404-405.

87. The relevant portions of MINN. STAT. ANN. §518.165 (Supp. 1976) provide as follows:

- (a) The love, affection and other emotional ties existing between the competing parties and the child;
- (b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any, or culture;
- (c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs;
- (d) The length of time the child has lived in a stable, satisfactory environment and desirability of maintaining continuity;
- (e) The permanence, as a family unit, of the existing or proposed custodial home;
- (f) The cultural background of the child;
- (g) The mental and physical health of the competing parties;
- (h) The home, school and community record of the child;
- (i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
- (j) Any other factor considered by the court to be relevant to a particular child custody dispute.

The Michigan statute is essentially similar to Minnesota's. See MICH. COMP. LAWS ANN. §§722-723 (Mason Supp. 1976); MINN. STAT. ANN. §518.17 (Supp. 1976).

can be used to exclude many important and necessary factors in determining the best interest of the child. These elements should not be barred from the courtroom merely because of evidentiary rules that require a witness to relate specific, objective facts. The proper elimination of preference of one parent over the other in Illinois makes the court's job in determining custody far more difficult. The Illinois legislature should react to this problem by enacting legislation that enables trial courts to be informed of all the relevant factors in determining a child's best interest.