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Leigh H. Taylor

CHILD CUSTODY PROBLEMS IN ILLINOIS

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Professor Taylor delves into the perplexing problems encountered in the area of child custody. The author traces the development of judicial decisions, noting that the major deficiency is the absence of judicial guidelines in determining the best interests of the child. He suggests that the child's best interest should be viewed in the light of our present changing society, and admonishes archaic deference to the nineteenth century philosophy which presumes the mother can best fulfill the needs of a child, and does not take into account the physical and emotional characteristics of each parent.

RESOLVING parents' competing claims for the custody of their children continues to be one of the most perplexing problems of the judicial process.[1] In most areas of the law, the trial judge fashions a remedy after determining the present legal rights of adverse parties who have formulated an adequate factual record. However, in a contested custody proceeding the trial judge must frequently make a disposition between two equally qualified and fit parents, aided only by the principle that his "guiding star is and must be at all times the best interest of the child."[2] Characterized as "the best interest rule," this principle focuses upon the child's well-being, and hopefully implements the societal interest in insuring an environment in which the maximum potential of each child may be realized. The best interest rule is a legal conclusion which is properly utilized only after all factors affecting custody

* Associate Dean and Professor of Law, DePaul University, College of Law; Visiting Professor, St. Mary's University School of Law. The author gratefully acknowledges the assistance of the following DePaul law students: Ronald Roesser, Mark Stavsky, and Jeanne Toussaint.

1. Judge Botein observed that "[a] judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders." B. BOTEIN, TRIAL JUDGE 273 (1952).

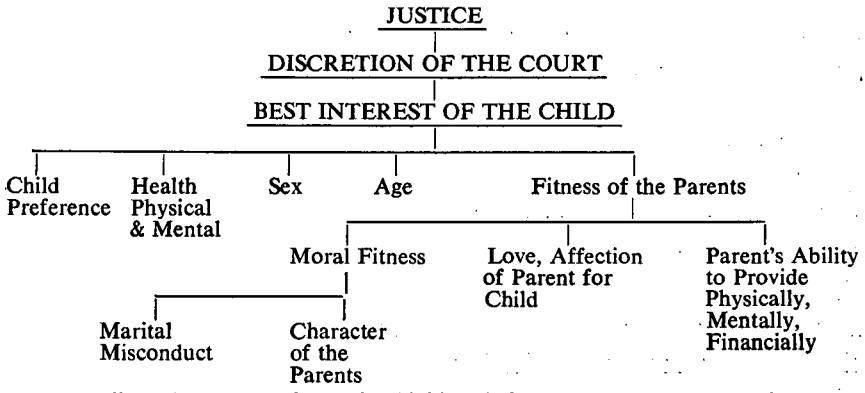
2. Nye v. Nye, 411 Ill. 408, 415, 105 N.E.2d 300, 304 (1952). *Cf.* Comment, *The Best Interest of the Child—The Illinois Adoption Act in Perspective,* 24 DEPAUL L. REV. 100 (1974).

have been considered, balanced, and weighed. Yet, often the application of the rule, especially in appellate decisions, is merely a sweeping dogmatic statement.

While a number of factors have been identified as relevant to custody determinations,[3] many decisions are simply statements of results accompanied by skeletal factual accounts with little or no attempt to support the results in reason. These opinions fail to build the necessary bridge between the facts and the authorities on the one hand, and the result that is reached on the other. Frankly, their precedential value is limited.

This Article will focus on three areas of custody recently examined by Illinois appellate courts: grandparent visitation, the tender years doctrine, and the repose of former custody decrees. These

3. While no single factor necessarily controls, the following chart from Oster, *Custody Proceedings: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21, 22 (1965) indicates the type of factors which courts utilize:



See generally Callow, *Custody of the Child and the Uniform Marriage and Divorce Act*, 18 S. DAK. L. REV. 551 (1973); Lyon, *Awarding Custody in Illinois—Review of the Factors Considered by the Courts*, 11 DEPAUL L. REV. 42 (1961); Weinman, *The Trial Judge Awards Custody*, 10 LAW & CONTEMP. PROB. 721 (1944). Section 402 of the UNIFORM MARRIAGE AND DIVORCE ACT (1973) provides:

> 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's parent or parents as to his custody;
> (2) the wishes of the child as to his custodian;
> (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. The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

three areas provide a framework in which to consider the basic problem in custody proceedings: the failure of the Illinois courts to provide comprehensively reasoned opinions.

GRANDPARENT VISITATION

In *Boyles v. Boyles*,[4] the Third District Appellate Court held that the custodial parent could not prevent grandparents from visiting their grandchild. After reiterating the best interest rule, the court concluded:

> [E]vidence was presented as to what was in the best interest of this child who had just lost his mother and who was close to his maternal grandparents whom he had visited every day prior to his mother's death. We believe where a parent has died, the continuation of the relationship between child and grandparents, which may be promoted by visitation, may be a positive benefit affecting the best interest of the child.[5]

It is fair to ask what specific interest of the child is served by permitting grandparents to visit: is it the interest in the continuity of affection-relationships;[6] is it the interest of preserving, to the extent possible, normal and traditional family relationships which include grandparents;[7] is it the judge's perception of the child's wishes to visit with individuals with whom he has developed a psychological relationship;[8] or is it some other interest. The decision may simply be a recognition of grandparents' rights clothed in the best interest rule to avoid the harsh but logical application of the parent's exclusive right to custody under the parental right approach.[9] *Boyles*

4. 14 Ill. App. 3d 602, 302 N.E.2d 199 (3d Dist. 1973).

5. *Id.*

6. *See, e.g.*, Kewish v. Brothers, 279 Ala. 86, 181 So. 2d 900 (1966). *See* J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973). The authors place the interest in continuity of affection relationships above all other interests.

7. *Cf.* Lucchesi v. Lucchesi, 330 Ill. App. 506, 71 N.E.2d 920 (1st Dist. 1947).

8. *See generally* GOLDSTEIN, FREUD & SOLNIT, *supra* note 6.

9. The fact that the grandparents love the child is no cause to give them a *legally enforceable right* to have the child visit with them. . . . It is surely to be desired that the child will be able to enjoy the love and affection of her grandparents and that they in turn will be able to enjoy the love and affection of the child. But this desire does not justify interfering with the proper and normal parent-child relationship.

Thomas v. Pickard, 18 N.C. App. 1, 5, 195 S.E.2d 339, 342 (1973); *accord*, Lee v. Kepler, 197 So. 2d 570 (Fla. 1967); Green v. Green, 485 S.W.2d 941 (Tex. Civ. App. 1972). In Lucchesi v. Lucchesi, 330 Ill. App. 506, 71 N.E.2d 920 (1st Dist.

raises, but fails to adequately resolve, a number of questions: do all grandparents have rights to visitation, or only grandparents who have maintained a close relationship with the child, or only those who cannot visit their grandchild because of the death of the child's parent?[10] Are these rights of visitation limited to grandparents, or is there, for example, a right to visitation by a step-parent who through death or divorce of the child's biological parent, has no practical opportunity to visit the child?

In contrast to the *Boyles* rhetoric, *Lucchesi v. Lucchesi*[11] is certain and comprehensively reasoned.

> A decent regard for the wishes of the dead, for the natural feelings of the petitioners, and for the right of the child to meet and know her grandparents, should cause respondent to voluntarily perform her plain duty in this matter without the pressure of a court order.[12]

The equivocal nature of the *Boyles* court's conclusion leaves one with the impression that the court was not convinced it had correctly decided the case. Yet such timidity is unwarranted by the factual situation. In the absence of evidence that some harm will result to the child[13] or to the relationship of child and custodial parent,[14] it is clear that there *will* be a positive benefit to the child from grandparent visitations.[15] The underlying questions *Boyles* raised may have been answered if the court had taken greater care in identifying the interests involved and in providing a more thoroughly reasoned opinion.

1947), the court recognized the parent's right to exclusive custody but held that it was not materially abridged by grandparents' visitation. *See* Gault, *Statutory Grandchild Visitation*, 5 ST. MARY'S L.J. 474 (1973); Veverka, *The Right of Natural Parents to Their Children as Against Strangers. Is the Right Absolute?*, 61 ILL. B.J. 234 (1973).

10. *Cf.* Solomon v. Solomon, 319 Ill. App. 618, 49 N.E.2d 807 (1st Dist. 1943).

11. 330 Ill. App. 506, 71 N.E.2d 920 (1st Dist. 1947).

12. *Id.* at 512, 71 N.E.2d at 922.

13. *See, e.g.*, Kay v. Kay, 51 Ohio Op. 434, 12 N.E.2d 562 (1953). In Commonwealth v. Dratch, 192 Pa. Super. 1, 159 A.2d 70 (1960) the court ordered visitation by grandparents despite psychiatric testimony that such visits might not be in the child's present best interest.

14. *See, e.g.*, Burge v. Burge, 88 Ill. 164 (1878); Commonwealth v. Sharp, 151 Pa. Super. 612, 30 A.2d 810 (1943).

15. Visitation may lessen the effect of separation which has been likened to an orphaning. Comment, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 161 nn. 43 & 44 (1963).

THE TENDER YEARS DOCTRINE

Another area of uncertainty is the application of the "tender years doctrine" to custodial dispositions. This doctrine is a presumption that the mother is better able to care for children of tender years than the father and that unless she is found to be unfit, or unusual circumstances compel a different result, the mother should normally be granted custody.[16]

For over a century, Illinois has embraced this doctrine. In *Miner v. Miner*,[17] the supreme court first articulated the best interest rule as the proper alternative to the common law rule based on property, which automatically granted the father custody of the child.[18] The court indicated that the best interest of the child must control and that this would be guaranteed by granting custody to the child's mother.

> It is upon this consideration that an 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.[19]

The court reasoned that to grant custody of the child to the father would result in her being cared for and educated by a non-biological parent because of demands on the working father's time. Conversely, the unemployed mother's time and ability to care for and educate the child were seen as critical. It is apparent that the court's decision was based on its notions of biological motherhood and the fact that the mother's societal role in 1849 gave her the opportunity to personally care for the child.

The *Miner* conclusion could have been reached without the aid of a specific doctrine favoring the mother if the court simply had analyzed the factors affecting the child's best interest. The cultural milieu of the nineteenth century which dictated the roles of mothers

16. *See, e.g.*, People v. Bukovich, 39 Ill. 2d 76, 233 N.E.2d 382 (1968); Draper v. Draper, 68 Ill. 17 (1873); Wolfrum v. Wolfrum, 5 Ill. App. 2d 471, 126 N.E.2d 34 (3d Dist. 1955). *But see* Carlson v. Carlson, 80 Ill. App. 2d 251, 255 N.E.2d 130 (1st Dist. 1967); Israel v. Israel, 8 Ill. App. 2d 284, 131 N.E.2d 555 (2d Dist. 1955) (abstract decision).

17. 11 Ill. 43 (1849).

18. *See* Comment, *Measuring the Child's Best Interests—A Study of Incomplete Considerations*, 44 DENVER L.J. 132, 133-34 (1967).

19. 11 Ill. at 49-50.

as homemakers and fathers as breadwinners compelled the decision that young children be placed with their mothers. However, the many changes which have occurred in the traditional socio-economic sexual roles since *Miner*, coupled with the claim that sexual classifications are impermissible under the Illinois constitution and the equal protection clause of the fourteenth amendment of the United States Constitution, demand a re-examination of the tender years doctrine. This examination is particularly necessary because the doctrine is premised upon a status—the physiological fact of motherhood—rather than upon objective factors relating to the child's best interest—the developmental acts of motherhood. The continued uncritical acceptance and use of the doctrine does not necessarily serve the best interest of children.[20]

The Fifth District Appellate Court in *Patton v. Armstrong*[21] focused upon this lack of analysis as it significantly undercut the tender years doctrine by concentrating on the factors which are the basis of the rule itself. The court indicated that "the mother is given first preference on the assumption that she will remain in the home and thereby be better able to care for the young children on a full time basis . . . whereas here [the mother] testified that she was working during the day and expected to continue to do so."[22] In *Patton*, many of the underlying reasons which led other courts to rely upon the presumption did not exist; therefore there was simply no reason to apply the doctrine in this case. The custodial decision was reached by focusing on factors relating to the best interest of the child and not because the father was or was not "equally gifted in lactation."[23]

As previously mentioned, the tender years doctrine may present an

20. *See generally* Foster & Freed, *Child Custody—(Part I)*, 39 N.Y.U.L. REV. 423 (1964); Podell, Peck & First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51 (1972). That interference with the best interest of the child may occur through the mechanical use of the doctrine is illustrated by the language used by Justice Underwood in People v. Bukovich, 39 Ill. 2d 76, 83, 233 N.E.2d 382, 386 (1968): "everybody understands that a mother is better equipped to raise a child than is the father."

21. 16 Ill. App. 3d 881, 307 N.E.2d 178 (5th Dist. 1974).

22. *Id.* at 882, 307 N.E.2d at 179-80.

23. Arends v. Arends, 30 Utah 2d 328, 329, 517 P.2d 1019, 1020 (1974). *See also* Moezie v. Moezie, No. D3535-71 (D.C. Sup. Ct., Fam. Div. 1973) *cited in* K. DAVIDSON, R. GINSBERG & H. KAY, SEX BASED DISCRIMINATION 250 (1974).

impermissible sexual classification under both the Illinois constitution[24] and the fourteenth amendment of the United States Constitution.[25] Basing a custody decision on the sex of the parents involves a classification which compels an examination of the underlying state interest. Because the presumption, that the mother is more able than the father to care for children of tender years, does not necessarily promote the best interest of the child, there is not a compelling state interest which would survive a constitutional challenge. In *State ex rel. Watts v. Watts*,[26] Judge Kooper found the tender years doctrine interfered with sound custodial determinations. The court held that the doctrine violated the equal protection clause of the fourteenth amendment as well as New York law requiring courts to focus solely upon the best interest of the child. The New York court specifically recognized no prima facie right to custody in either parent.

Discarding the presumption in favor of the mother requires courts to focus upon factors which directly bear on the child's best interest, factors which compare the relative abilities of the parents to physically and emotionally care for and educate minor children. In contested cases wherein the mother is not employed and can provide a greater degree of care for her minor children than their father, she will prevail. But in situations where both parents are employed, the courts will have to explore other factors in making custodial determinations. When judges eliminate this doctrine which has clouded the real issue, they will come closer to the goal of furthering the best interest of the child.

FORMER CUSTODY DECREES

The stability and continuity of the child-custodial parent relationship are important considerations when the non-custodial parent seeks a change in custody. The best interest of the child is not promoted when the child is "shuttled between contesting parents."[27]

24. *See* People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974).

25. State *ex rel.* Watts v. Watts, 350 N.Y.S.2d 285 (Family Ct. 1973). *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). *But see* Kahn v. Shevin, 416 U.S. 351 (1974). *See generally* Comment, *Are Sex-Based Classifications Constitutionally Suspect?*, 66 NW. U.L. REV. 481 (1971).

26. 350 N.Y.S.2d 285 (Family Ct. 1973).

27. Dokos v. Dokos, 88 Ill. App. 2d 330, 334, 232 N.E.2d 508, 511 (1st Dist. 1967). *See, e.g.*, Wise v. Gillette, 90 Idaho 136, 408 P.2d 806 (1965); Willey v.

For a change in custody, there must be a sufficient change of condition in the qualifications of the custodial parent, the quality of child care, or the quality of the child-custodial parent relationship. Changes concerning the non-custodial parent's qualifications are often said to be insufficient alone. The rule structure attaches great weight to continuity and only permits change when it is needed to promote the best interest of the child.

The Illinois courts recently have found a sufficient change in custodial conditions to warrant a change in custody when the conduct of the custodial parent was outrageous or the situation posed a significant danger to the child's development. In *Stark v. Stark*,[28] the record indicated a sufficient change of condition because the mother had taught the children to shoplift. Similarly, a sufficient change was found in *Holloway v. Holloway*[29] when the mother admitted her inability to care for the child, failed to remain in one home for any length of time, and entrusted the primary care of the child to other adults. Likewise, the change in custodial conditions was ruled sufficient to warrant a change in custody in *Sorenson v. Sorenson*,[30] where the mother had moved often, was not employed, and had become intoxicated in front of the child on several occasions. In all three cases the alternative to the existing arrangement was preferable because it better served the child's interest.

Courts have not simply been applying moral judgments in resolving these problems. In *Fears v. Fears*[31] the court held that marijuana use was not, in itself, sufficient to warrant a change of custody. In *Van Buskirk v. Van Buskirk*[32] the court refused to change custody although the mother had had sexual relations with an ex-convict prior to their marriage. Thus, in assessing a custodial parent's qualifications for custody, *Van Buskirk* reiterates that sexual relations are irrelevant either if a marriage results or if the mother indicates she will not continue illicit liaisons.

Willey, 235 Iowa 1294, 115 N.W.2d 833 (1962); Hedman v. Hedman, 62 N.W.2d 223 (N.D. 1954).

28. 13 Ill. App. 3d 35, 299 N.E.2d 605 (3d Dist. 1973).
29. 10 Ill. App. 3d 662, 294 N.E.2d 759 (1st Dist. 1973).
30. 10 Ill. App. 3d 980, 295 N.E.2d 347 (4th Dist. 1973).
31. 5 Ill. App. 3d 616, 283 N.E.2d 709 (5th Dist. 1972).
32. 19 Ill. App. 3d 647, 312 N.E.2d 395 (2d Dist. 1974).

The significance of the consistency in these decisions cannot be underestimated. In *Reddig v. Reddig*,[33] the trial court refused to permit the plaintiff-mother to remove her children to Texas so that she could remarry. Since she moved to Texas with the children in spite of the judicial order, the court found her in willful contempt. On appeal, the parties addressed themselves to the correctness of the trial court's determinations. The Third District Appellate Court virtually ignored the trial court's decision and concentrated on the fact that the children had been in Texas for six months. The children's interest was of greater concern than either the question of the correctness of the trial court's determination or any question of punishment for contempt. The court ordered a hearing to determine their present well-being but strongly indicated that, in the absence of a change in circumstances (other than the move itself) which affected the children's well-being, custody should remain undisturbed. In *Garland v. Garland*,[34] the mother had received custody of the children by original agreement. Both parents were clearly fit, maintained a consistent and beneficial relationship with their children, and had or planned to remarry. The mother planned to move to Mississippi to remarry and to obtain new employment. Although the court recognized that the move in question would limit the father's visitations and therefore probably have a deleterious psychological effect on the children, the court held that the best interest of the children was better served by continuing custody in the mother.

Recently, doubt has been cast on the application of the change of condition rule. *McDonald v. McDonald*,[35] decided by the Fourth District Appellate Court, was a garden variety change of custody decision,[36] but it contains foreboding language which may affect the repose of other custody decrees solely based on the parties' agreement. Dicta in that opinion states:

> In awarding the custody of the children, the court exercises a judicial discretion . . . . There is persuasive reasoning in *King v. King*, 25 Wis. 2d 550, 131 N.W.2d 357, that where custody is awarded upon the stip-

33. 12 Ill. App. 3d 1009, 299 N.E.2d 353 (3d Dist. 1973).

34. 19 Ill. App. 3d 951, 312 N.E.2d 811 (1st Dist. 1974).

35. 13 Ill. App. 3d 87, 299 N.E.2d 787 (4th Dist. 1973).

36. The court concluded "that there is, in fact, such change of condition as would subject the custody order to modification." *Id.* at 89, 299 N.E.2d at 789.

> ulation of the parties and the court receives no evidence upon the best interests of the child or children, the court does not, in fact, exercise judicial discretion in awarding custody and that the rule that a custody order is subject to modification only if there is a substantial change of condition affecting the child's welfare does not apply.[37]

Formerly, there was but one criterion for modification of any custody decree: a sufficient change in the condition of the custodial parent. The *McDonald* approach diminishes the effect of certain custody decrees because of its dependence on a threshold determination of whether the original custody decree was based on an adequate record. Parties could formerly find finality in decrees and the rules for modification; the *McDonald* approach invites noncustodial parents to seek changes of custody when there is not even a pretense of a significant change in condition. If this phenomenon occurs, the stability and continuity of existing custodial arrangements will be impaired and the best interest of the child could be subordinated.

The *McDonald* dicta should warn practitioners and trial judges to develop adequate records. Only then can courts say definitively that decrees are based on the exercise of judicial discretion, rather than the agreement of the parties. Clearly delineated reasoning would supplement and substantiate decrees and the children's interest would remain in the forefront. In cases where existing decrees are tenuous because they rest upon agreement of the parties, courts can avoid the *McDonald* problem by recognizing the interest in continuity and assigning to that interest the weight which it deserves.[38]

CONCLUSION

Although the nature of custody determinations demands flexibility in decision making, the absence of structure invites unnecessary

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37. *Id.*

38. *See* Willey v. Willey, 253 Iowa 1294, 115 N.W.2d 833 (1962). *See generally* GOLDSTEIN, FREUD & SOLNIT, *supra* note 6. Section 409 of the UNIFORM MARRIAGE AND DIVORCE ACT (1973) provides one way to insure continuity without jeopardizing the child's interest:

> (a) No motion to modify a custody decree may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral, or emotional health.

See 18 ILL. STATE BAR ASS'N, FAMILY L. BULL. No. 1 at 4 (1974).

post-decree litigation which wastes judicial resources and may adversely interfere with the stability of custodial relationships. But flexibility need not mean uncertainty as long as a pattern of reasoned elaboration is followed. Uncertainty can be removed and the best interest of children can be made more ascertainable only when the courts attempt to identify the interests involved and provide comprehensively reasoned opinions. Then it can be said that they are furthering the best interest of children.