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CUSTODY—TO WHICH PARENT?

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INTRODUCTION

Child custody cases are widely acknowledged by judges as among the most painful and difficult tasks they face demanding cognizance that the generalizations and absolutes of the past have often led to a result contrary to the child's best interest.

> A judge agonizes more about reaching the right result in a contested custody issue than about any other type of decision he renders.[1]
>
> This (custody) law bears the stamp of many conflicting values from the past, randomly and often illogically mixed with newer views about the rights of children.[2]
>
> Historically, custody awards have been dictated or controlled by amorphous platitudes or generalizations on one hand and by rigid absolutes on the other.[3]

At common law the father was generally entitled as a matter of right to custody of his minor children,[4] but later the law generally gave the mother preference. Today the law recognizes the child's best interest as the determinative factor. The best interest rule was formulated by two of our most eminent jurists, Justices Cardozo and Brewer. Mr. Justice Brewer did much to shape the doctrine in his opinion in *Chapsky v. Wood*,[6] rendered before his appointment to the United States Supreme Court. He repudiated the rule which affirmed the parent's primary right and applied the

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1. B. BOTEIN, TRIAL JUDGE 273 (1952).

2. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55 (1969).

3. Foster and Freed, Child Custody, 39 N.Y.U.L. REV. 422 (1964).

4. 2 W. NELSON, DIVORCE AND ANNULMENT 234 (2d ed. 1961). Jensen v. Jensen, 168 Wis. 502, 170 N.W. 735 (1919).

5. Larson v. Larson, 30 Wis. 2d 291, 140 N.W.2d 230 (1966).

6. 26 Kan. 650 (1881).

best interest of the child test. In a precedent setting opinion, Judge Cardozo reaffirmed Brewer's ruling.[7]

The best interest of the child doctrine cannot be applied within its historical and present spirit and purpose unless the law places both parents on equal footing.[8]

II. BEST INTEREST OF CHILD RULE DEMANDS EQUALITY BETWEEN PARENTS

Fortunately for the children of divorced parents the law has progressed from the illogical rhetoric which stated "There is but a twilight zone between a mother's love and the atmosphere of heaven,"[9] to the point where the parents are considered equals, the child's interest is considered paramount, and the courts even appoint a guardian for the children.[10] The assumption that, other things being equal, maternal custody was best, has been justly criticized as incongruous with the best interest of the child theory and out of touch with contemporary thought.[11]

> What a mother's care means to her children has been so much romanticized and poeticized that its reality and its substance

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7. Finlay v. Finlay, 240 N.Y. 429, 433, 148 N.E. 624, 626 (1925).

> The chancellor in exercising his jurisdiction upon petition does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against anyone. He act as *parens patriae* to do what is best for the interest of the child.

8. DESPERT, CHILDREN OF DIVORCE (1962); GOLDSTEIN AND KATZ, THE FAMILY AND THE LAW, (1965); Coyne, *Who Will Speak for the Children*? 383 ANNALS 34 (1969); Foster and Freed, *Child Custody, supra* note 3; Hansen, *The Role and Rights of Children in Divorce Actions*, 6 J. FAMILY LAW 1 (1966); Oster, *Custody Proceedings: A Study of Vague and Indefinite Standards*, 5 J. FAMILY LAW 21 (1965); Plant, *The Psychiatrist Views Children of Divorced Parents*, 10 LAW & CONTEMP. PROB. 807 (1944); Watson, *The Children of Armageddon: Problems of Custody Following Divorce, supra* note 2; Weinman, *The Trial Judge Awards Custody*, 10 LAW & CONTEMP. PROB. 721 (1944); Comment, *Measuring the Child's Best Interests—A Study of Incomplete Considerations*, 44 DENVER LAW J. 132 (1967); Note, *Custody of Children in Minnesota: Factual Considerations*, 38 MINN. L. REV.; Comment, *Child Custody Considerations in Granting the Award Between Adversely Claiming Parents*, 36 S. CAL. L. REV. 255 (1963).

9. Tuter v. Tuter, 120 S.W.2d 203, 205 (Mo. 1938). Jenkins v. Jenkins, 173 Wis. 592, 595, 181 N.W. 826, 827 (1921):

> For a boy of such tender years nothing can be an adequate substitute for mother love—for that constant ministration required during the period of nurture that only a mother can give because in her alone is duty swallowed up in desire; in her alone is service expressed in terms of love. She alone has the patience and sympathy required to mold and soothe the infant mind in its adjustment to its environment. The difference between fatherhood and motherhood in this respect is fundamental and the law should recognize it unless offset by undesirable traits in the matter.

10. Foster and Freed, *Child Custody*, 39 N.Y.U.L. REV. 422, 436-7 (1964).

11. Wendland v. Wendland, 29 Wis. 2d 145, 138 N.W.2d 185 (1965).

have sometimes been lost in the flowers of rhetoric. Not all mothers can lay claim to such eulogy.[12]

A. The Difficulties Involved with Mother As Head of Family Unit Further Support ParentalEquality.

The assumption that the mother is a better custodian was and is wrong from an historical, economic, sociological, and philosophical point of view. The notion is unfounded because it fails to project the family unit into the post-divorce reality where the mother must assume both a mother's and a father's role. A look at the contemporary role of the mother and the difficulties encountered when she alone runs the family unit supports the current egalitarian viewpoint.

> A role analysis of the family members is a useful tool of sociologists in determining family relationships and attitudes. Motherhood is only one of the various sociological roles assumed by the wife in our society. The behavioral scientist recognizes the other emerging roles of companion and partner played by the modern American wife.
>
> . . . *Assuming that the wife has fulfilled the court's notion of motherhood on the basis of her conduct prior to the custody award, the issue is raised whether she will in fact continue to fulfill this role as a single parent.* An examination of this question rests on the concept of the organization of the family in our culture . . .
>
> The family in a custody matter is always a disunited family. Its structure as an organized unit has been dissolved by the divorce or separation decree . . . .
>
> . . . . In the American conjugal family, however, divorce or separation of the parents means dissolution of the unit . . . .
>
> Upon the dissolution of the nuclear family by divorce or separation, three responses of the remaining spouse may be manifested. (1) *Reconstruction of the Basic Unit With a New Member.* The parent can remarry with the anticipation that her new spouse will legally adopt the children to restore the family to its original state . . . (2) *Reorganization of the Remaining Members by Assignment of New Roles Within the Structure.* The parent may reassign obligations performed by the absent spouse to herself and her children . . . . (3) *Dissolution of the Family Unit.* The parent may terminate the nuclear family by taking the children to live with grandparents.

12. Stanfield v. Stanfield, 435 S.W.2d 690, 692 (Mo. 1968).

> When any of these three responses is manifested, any traditional notion of motherhood seems to be undermined, due to the practical difficulties with which the divorce custodian is faced. As Robert F. Drinan has stated (Drinan, *The Rights of Children in Modern American Family Life*, 2 J. FAM. L. 101, 102 (1962) "It seems fair to say that American law has not thought out a consistent legal theory by which the once-married but emancipated, and now divorced, woman can fulfill all her duties to . . . the children over whom she has custody."
>
> . . . . Mothers, in order to meet the practical necessities of their situation as sole parent, had assumed roles opposed to the traditional notion of motherhood and more analogous to the fatherhood role. *It is submitted that in cases where the mother must assume the role of father, which the courts have found is usually not in the best interest of the child, that she should not be entitled to custody under the traditional "motherhood" test. In such cases, the mother and father should be considered on an equal role status and other factors should be given consideration in determining custody.* (Emphasis added)[13]

B. *Recent Statutes and Court Decisions Support The Egalitarian View*

Recent statutes and decisions support equal status of mother and father vis-a-vis custody. Perhaps this trend is best exemplified by the recent amendment to Wisconsin statutes which provides that "in determining the parent with whom a child shall remain, the court shall consider all facts in the best interest of the child and shall not prefer one parent over the other solely on the basis of the sex of the parent."[14]

The standards for court determination of custody, set forth in the proposed Uniform Marriage and Divorce Act, provide as follows:

> (Best Interest of Child) The court shall determine custody in accordance with the best interests of the child. The court shall

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13. Comment, *Measuring the Child's Best Interests—A Study of Incomplete Considerations*, 44 DENVER LAW J. 132, 138-42 (1967) (emphasis added).

Oster, *Custody Proceeding: A Study of Vague and Indefinite Standards*, 5 J. FAMILY LAW 21, 26 (1965).

> However, the urban family of today is a different unit, economically and sociologically, from its rural counterpart of one hundred years ago. It can no longer be stated that woman's sole occupation is to care for babies.

See WINCH, THE MODERN FAMILY, 721 (Rev. ed. 1965); Davis, *Sociological and Statistical Analysis*, 10 LAW & CONTEMP. PROB. 700 (1944).

14. WIS. STAT. § 247.24(3) (1971), as created, Wis. Laws 1971, ch. 157.

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 parents, his siblings, and any other person who may significantly affect the child's best interests;
(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.[15]

As the comment following this section makes clear, it contains no new law but merely codifies the existing law in most jurisdictions relating to factors generally held relevant in determining what the best interests of the child dictate. The section avoids restatement of the familiar presumptions to which courts have frequently alluded, pointing out that they are valid only when and to the extent that they promote the best interest of the child. That recommendation thus moves beyond the rhetoric to the rationale and reinforces the argument as to the standards the court should apply and the manner of this application.

Section 70 of the New York State Domestic Relations Law was recently amended to reflect a similar outlook:

> In all cases there shall be no *prima facie* right to the custody of the child in either parent, but the court shall determine solely which is for the best interest of the child, and what will best promote its welfare and happiness . . . .

Florida's new Domestic Relations Law, which went into effect on July 1, 1971, gives the father equal consideration in the awarding of child custody.

> The court shall award custody and visitation rights of minor children of the parties as a part of proceeding for dissolution of marriage in accordance with the best interest of the child. Upon considering all relevant factors, *the father of the child shall be given the same consideration as the mother in determining custody.* (Emphasis added)[17]

15. UNIFORM MARRIAGE AND DIVORCE ACT. This act was drafted by the National Conference of Commissioners on Uniform State Laws, at St. Louis, Missouri, August, 1970.

16. N.Y. DOMESTIC LAW § 70 (McKinney 1964).

17. FLA. STAT. § 61.13(2) (1971).

> No party shall be presumed to be able to serve the best interest of the child better than the other party because of sex.[18]

The Wisconsin Supreme Court has progressed in the same direction. While fifteen years ago this court felt that the mother was to be preferred,[19] it has since moved along the path suggested by Justice Thomas Fairchild in his dissent to *Eisler*, where he quoted *Hamachek v. Hamachek*:

> The importance of the natural love and affection of the mother may be outweighed by other elements . . . .[20]
>
> The influence capable of inspiring wholesome ideals and purposes in a growing child is not completely encompassed in the relationship of mother and child . . . .

Typical of this trend is *Kritzik v. Kritzik*.[21] There the court criticized the concept that the trial judge was merely an arbiter between two private parties, balancing their rights and interests, and emphasized the function of the courts "to determine what provisions and terms would best guarantee an opportunity for the children involved to grow to mature and responsible citizens regardless of the desires of the respective parties."

A year later in *Greenlee v. Greenlee*,[22] the court approved a transfer of custody from the mother to the father without any finding of unfitness, adhering to the rule that the best interests of the children were the controlling criteria, and pointing out that there was no rule of law that the mother was entitled to any preference.

Perhaps the best indication that courts are not merely paying lip service to the "best interest of child rule" but giving it substance and following its spirit is an analysis of the numerous recent cases in which the parents were treated equally and the *father* prevailed.[23]

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18. COLO. REV. STATS. § 46-1-5(7) (1963), PERM. SUPP. (1969). *See generally*: Turner v. Turner, 46 Ala. 350, 242 So.2d 397 (1970); Barton v. Barton, 230 Cal. App. 2d 43, 40 Cal. Rptr. 676 (1964); Smith v. Smith, 474 P.2d 619 (Colo. 1970); Reiland v. Reiland, 290 Minn. 497, 499, 185 N.W.2d 879, 880 (1971):

> The father and mother are the natural guardians of the minor children and, if not unsuitable, are, depending upon the circumstances, equally entitled to their custody . . . .

19. State ex rel. Hannon v. Eisler, 270 Wis. 469, 71 N.W.2d 376 (1955).

20. Hamachek v. Hamachek, 270 Wis. 194, 201, 70 N.W.2d 595, 599 (1959).

21. Kritzik v. Kritzik, 21 Wis.2d 442, 124 N.W.2d 581 (1963).

22. Greenlee v. Greenlee, 23 Wis. 2d 669, 127 N.W.2d 737 (1964).

23. Ayers v. Kelley, 284 Ala. 321, 224 So. 2d 673 (1969). Northcutt v. Northcutt, 45 Ala. App. 646, 235 So. 2d 896 (1970); Harding v. Harding, 377 P.2d 378 (Alaska 1962);

III. AGE, INTELLIGENCE AND MATURITY OF CHILDREN DEMAND THEIR PREFERENCE BE GIVEN CONSIDERABLE WEIGHT: ARCHAIC "TENDER YEARS" DOCTRINE IS INAPPLICABLE.

The consideration given a child's preference in awarding custody depends upon several factors: (i) the age and maturity of the child; (ii) the strength of the preference; and (iii) whether or not all of the children in the family express the same preference.

A recent annotation summarizes the law regarding a child's preference:

> It seems to be generally recognized by the courts that the initial factor to be examined by the court in determining what weight, if any, to give to the custodial preference of the child involved is the child's capacity to make an informed and intelligent judgment. The courts have frequently taken the position, in the absence of specific statute, that the law does not set a specific age at which it will be presumed that the child has such capacity, but rather, the capacity of each child will be evaluated individually on the basis of the child's mental development, maturity, and the extent to which the child exhibits intellectual discretion.

Qualls v. Qualls, 250 Ark. 328, 465 S.W.2d 110 (1971); Shaw v. Shaw, 249 Ark. 835, 462 S.W.2d 222; Hobby v. Hobby, 214 Cal. App. 2d 246, 29 Cal. Rptr. 472 (1963); Wood v. Wood, 207 Cal. App. 2d 24 Cal. Rptr. 260 (1962); Harrison v. Harrison, 170 Colo. 397, 462 P.2d 119 (1969); Dixon v. Dixon, 190 A.2d 652 (D.C. 1963); Longstreth v. Longstreth, 171 So. 2d 550 (Fla. 1965); Pacheco v. Pacheo, 246 So. 2d 778 (Fla. 1970); Parks v. Parks, 91 Ida. 420, 422 P.2d 618 (1967); Froman v. Froman, 73 Ill. App. 2d 421, 218 N.E.2d 808 (1966); Maroney v. Maroney, 109 Ill. App. 2d 162, 249 N.E.2d 871 (1969); Heater v. Heater, 254 Iowa 586, 118 N.W.2d 587 (1962); Jones v. Jones, 175 N.W.2d 389 (Iowa 1970); McNamara v. McNamara, 181 N.W.2d 206 (Iowa 1970); Gardner v. Gardner, 192 Kan. 529, 389 P.2d 746 (1964); Merriweather v. Merriweather, 190 Kan. 598, 376 P.2d 921 (1962); Hamilton v. Hamilton, 458 S.W.2d 451 (Ky. 1970); Morris v. Morris, 152 So. 2d 291 (La. 1963); Glick v. Glick, 232 Md. 244, 192 A.2d 791 (1963); Bushre v. Smedley, 18 Mich. App. 347, 171 N.W.2d 50 (1969); Damaschke v. Damaschke, 21 Mich. App. 80, 174 N.W.2d 608 (1969); Dimmick v. Dimmick, 22 Mich. App. 84, 176 N.W.2d 728 (1970); Fish v. Fish, 21 Mich. App. 183, 175 N.W.2d 343 (1970); Lamky v. Lamky, 29 Mich. App. 17, 185 N.W.2d 203 (1970); Tarr v. Pollock, 25 Mich. App. 437, 181 N.W.2d 664 (1970); Lobash v. Lobash, 283 Minn. 255, 167 N.W.2d 43 (1969); Shoffner v. Shoffner, 244 Miss. 557, 145 So. 2d 149 (1962); J. v. R., 446 S.W.2d 425 (Mo. 1969); Kelch v. Kelch, 462 S.W.2d 161 (Mo. 1970); Rasco v. Rasco, 447 S.W.2d 10 (Mo. 1969); Copple v. Copple, 186 Neb. 696, 185 N.W.2d 846 (1971); Costello v. Costello, 185 Neb. 396, 176 N.W.2d 10 (1970); Lemay v. Lemay, 109 N.H. 217, 247 A.2d 189 (1968); Ettinger v. Ettinger, 72 N.M. 300, 383 P.2d 261; In re Anonymous, 238 N.Y.S.2d 422 (1962); T. v. V., 318 N.Y.S.2d 110 (1971); Elmore v. Elmore, 4 N.C. App. 192, 166 S.E.2d 506 (1969); Thomas v. Thomas, 259 N.C. 461, 130 S.E.2d 871 (1963); Brown v. Brown ___ Or. ___, 481 P.2d 643 (1971); Cathcart v. Cathcart, 232 Or. 624, 376 P.2d 665 (196wz; Jebousek v. Jebousek, 252 Or. 628, 451 P.2d 865 (1969); Kightlinger v. Kightlinger, 249 Or. 521, 439 P.2d 614 (1968); McLaughlin v. McLaughlin, 253 Or. 447, 454 P.2d 857 (1969); Daniels v. Daniels, 414 S.W.2d 207 (Tex. 1967); Rowlee v. Rowlee, 211 Va. 689, 179 S.E.2d 461 (1971).

> The importance of the preliminary inquiry into the child's age, maturity, and intelligence is readily seen from the fact that a number of courts have held that findings that the child has reached the age of intellectual discretion justified giving controlling effect or great weight to the child's custodial preference.[24]

In *Seelandt v. Seelandt*,[25] the Wisconsin Supreme Court discussed the weight a trial court should give to the preference of a child. The court observed that the daughter was only three weeks short of her fifteenth birthday at thetime of the hearing, and cited *Jones v. State ex rel. Falligant*,[26] which approved the practice of giving serious consideration to the wishes of minor children. The court held that, as in *Edwards v. Edwards*,[27] the personal preference of the child is very important, and although not controlling on the issue of custody, should be followed if *the child "gives substantial reasons why it would be against his or her best interest to award custody contrary to such expressed preference."*

The decision suggests two possible procedures in discussing the issue of custody with the child. One is to have a reporter in chambers during a conference with the judge to record what transpires. He would not transcribe his notes or file a transcript, unless an appeal was taken. The second procedure would be to have the trial judge dictate the gist of the child's comments into the record. This case thus outlines with some specificity the steps that should be taken to consider a child's preference, and indicates what questions children should be asked by the judge to make the record clear.

In *Graichen v. Graichen*,[28] the court approved asking the preference of the minor daughter who lacked only one day of attaining her fourteenth birthday. The court cited *Jones v. State ex rel. Falligant*,[29] to the effect that the primary consideration is the child's welfare, and parents have no right to the child as if he or she were a chattel, but rather only a privilege to raise the child and prepare if for life. Since the time at which the child will take charge of his or her own life is not too far distant, it is appropriate to

24. Annot., 4 A.L.R.3d 66 (1964). *See* 2 W. NELSON, DIVORCE AND ANNULMENT 259-63 (2d ed. 1961).

25. 24 Wis. 2d 73, 128 N.W.2d 66 (1964).

26. 211 Wis. 9, 247 N.W. 445 (1933).

27. 270 Wis. 48, 70 N.W.2d 22 (1955).

28. 20 Wis. 2d 200, 121 N.W.2d 737 (1963).

29. 211 Wis. 9, 247 N.W. 445 (1933). The court also cited In re Goodenough, 19 Wis. 274 (1865), Johnson v. Johnson, 7 Utah 2d 263, 323 P.2d 16 (1958) and Vilas v. Vilas, 184 Ark. 352, 42 S.W.2d 379 (1931) to the effect that the preferences of a child should be considered.

consider the child's wishes and desires. Statutes provide that a minor over fourteen years of age may nominate his own guardian, who shall be appointed if the court approves. Ordinarily, courts give much consideration, in cases where guardians are to be appointed, to the wishes of the child.

The child's preference rule is, of course, but one facet of the child's best interest test. Nevertheless, in most cases it will be in the child's best interest to be with the parent preferred.

Writers have sharply criticized courts for paying mere lip service to the child's wishes regarding custody.

> At least where the pertinent factors are evenly balanced, the child's wishes should be *decisive* unless the person chosen by the child is obviously unfit or the child's choice is the result of coercion or bribery. (emphasis added)[30]

In *Edwards v. Edwards*,[31] custody was transferred from a foster home to the father despite the adverse history of the father's performance. The court felt that there was ample evidence he had reformed over the preceding five years. Although this may not always be sufficient, it was in this case. The court stressed the importance of an eleven-year-old boy having his father's affection and guidance through his teenage years. It should be noted, however, that the mother was neither fit to have nor interested in custody.

In a dramatic display of the importance of a child's preference, the decision was reversed on rehearing, solely because the foster parents submitted a brief stating that the child was "sick at heart" because custody had been returned to his father. Although this did not appear in the record, and two of the justices dissented for that reason, the court vacated its order and directed that the trial court take the testimony of the young child. At the time of the decision on rehearing the boy had just reached his twelfth birthday. Although he was under fourteen years of age, the court held it was imperative to have his testimony. The court said that if he testified that he preferred to remain in the foster home, it should be deemed controlling on the issue of custody if "the testimony of the boy goes beyond this matter of personal preference, and gives substantial reasons why it would be against his best interests to be compelled to reside with his father."

30. Foster and Freed, *Child Custody*, 39 N.Y.U.L. REV. 442, 443 (1964).

31. 270 Wis. 48, 70 N.W.2d 22, 71 N.W.2d 366 (reversed on rehearing) (1955).

The preference of the child has been considered an important factor in many jurisdictions other than Wisconsin. In *J. v.E.*,[32] the preference of a fifteen-year-old boy for his father was deemed persuasive considering his antipathy toward his mother, his mental maturity, and judgmental ability. In *Hurly v. Hurly*,[33] the father was granted custody of his thirteen- and eleven-year-old daughters as the court found they were of sufficient age to form intelligent opinions and disliked their mother. In *Aske v. Aske*,[34] the court considered the preference of a nine-year-old girl to remain with her father holding that intelligence and maturity were determined not by an arbitrary age standard but by actual mental development.[35]

Some courts have characterized the child's preference as a "major factor,"[36] given it "serious consideration,"[37] or held it to be an "important factor."[38] In the celebrated *DuPont* case[39] the preference of a sixteen-year-old girl to go with her father was held to be decisive.[40]

A child's preference for one parent may reflect his best interests and compulsion to live with the other parent may be severely detrimental. In *Commonwealth ex rel. McDonald v. McDonald*,[41] the court complied with the preference of a twelve-year-old boy for his

32. 417 S.W.2d 199 (Mo. 1967).

33. 147 Mont. 118, 411 P.2d 359 (1966).

34. 233 Minn. 540, 47 N.W.2d 417 (1951).

35. Other cases in which the courts have given "a real weight" to the child's preference include: Davis v. Davis, 255 Ala. 592, 52 So. 2d 387 (1951); Gardiner v. Willis, 258 Ala. 647, 64 So. 2d 609 (1953); Eddy v. Staufer, 37 So. 2d 417 (Fla. 1948); Roberts v. Roberts, 194 S.W.2d 1003 (Ky. 1946); and Sanders v. Felzman, 213 S.W.2d 428 (Ky. 1948).

Two 1971 cases gave "considerable weight" to the preference of the child: Okun v. Okun, 66 Misc. 2d 241, 320 N.Y.S.2d 137 (1971); and In re Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

36. In re Custody of Smesler, 22 Ohio Misc. 41, 257 N.E.2d 769 (1969).

37. Marcus v. Marcus, 109 Ill. App. 2d 423, 248 N.E.2d 800 (1969).

38. In re Neff, 394 Pa. 162, 145 A.2d 857 (1958).

39. DuPont v. DuPont, 216 A.2d 674 (Del. 1966).

40. Hammett v. Hammett, 46 Ala. App. 206, 239 So. 2d 778 (1970) (father granted custody of three children who preferred him; girls eleven and fourteen years old, boy twelve years old); Barton v. Barton, 230 Cal. App. 2d 43, 40 Cal. Rptr. 676 (1964) (sixteen-year-old girl to father); Guldman v. Heller, 151 N.W.2d 436 (N.D. 1967) (preference of nine-year-old boy for father); Rayner v. Rayner, 253 Or. 447, 454 P.2d 856 (1969) (Supreme Court modified trial court decision so as to change the custody of all five children from mother to father); Commonwealth ex rel. Traeger v. Ritting, 206 Pa. Super. 446, 213 A.2d 681 (1965) (father granted custody of five children who expressed a preference for him); In re Snellgrose, 432 Pa. 158, 247 A.2d 596 (1968) (unequivocal preference of intelligent eleven-year-old girl); Smith v. Smith, 15 Utah 2d 36, 386 P.2d 900 (1963) (custody of six-year-old child to father).

41. 183 Pa. Super. 411, 132 A.2d 710 (1957).

paternal aunt rather than his father or step-mother. Carefully considering his preference, the court held that when a child of his age was emphatic the court must seriously consider the emotional effect of the course he feared.

Courts have also felt that few desires are as strong or fears as great as those of youth, and a twelve-year-old boy's lack of control over his own destiny could be frustrating to the degree that he could become emotionally disturbed and permanently harmed.[42]

IV. Emotional Instability of One Parent Important Factor in Awarding Custody

The Wisconsin Supreme Court has adopted the view that a finding of "an emotional disturbance of a parent which makes it harmful to the welfare of a minor child to continue custody in such parent is tantamount to a finding of unfitness."[43] This is the controlling factor when a parent involved in a custody fight is emotionally disturbed or unstable. The court uses the terms synonymously, and holds that they establish unfitness as a matter of law. This determines the custody question since a parent who is unfit cannot have custody of a child.

It is interesting that both *Belisle* and *Seelandt* result from attempts of a mother to gain custody of a minor child from paternal grandparents. According to the Wisconsin court, *Seelandt* is the first holding in this state that emotional disturbance requires a finding of unfitness, within the Wisconsin statutes. The court in *Seelandt* conceded that the mother was a woman of good morals, and that usually was enough to be "fit and proper" in the past. The court pointed out, however, that *Hellermann v. Hellermann*,[44] preshadowed change, for it expressed concern with whether a divorced mother:

> possessed the mental and emotional stability to permit custody

42. *See* Varney v. Trout, 232 Ky. 513, 23 S.W.2d 944 (1930); Anderson v. Anderson, 110 Utah 300, 172 P.2d 132 (1946).

See also Foster and Freed, *Child Custody*, 39 N.Y.U.L. Rev. 422, 433 (1964):

> Where the child's attachment to one parent is intense, severe damage may result from awarding custody or excessive visitation rights to the other. Whenever a child indicates a strong preference, the court should throughly study not only what is best for the child's psychological welfare but also what effect custody and visitation rights will have on his emotional and mental health.

43. Belisle v. Belisle, 27 Wis. 2d 317, 134 N.W.2d 491 (1965); Seelandt v. Seelandt, 24 Wis. 2d 73, 128 N.W.2d 66 (1964).

44. 249 Wis. 190, 23 N.W.2d 408 (1946).

> of two minor children to be awarded her. Implicit in the decision in that case was the assumption that if she lacked such mental or emotional stability, she would not be a fit person to be awarded custody within the provisions of Sec. 247.24, Wis. Stats.

Nearly one year later to the day *Belisle* was decided, in which the Wisconsin court held that the trial court's finding that the mother was "still emotionally unstable" was equivalent to a finding of unfitness, even though the trial court did not expressly find unfitness. Although the trial court used the terminology "emotionally unstable," the Wisconsin Supreme Court used the words "emotional disturbance" and "emotional instability," as well as "emotionally unstable." The court refused to permit the mother to have custody despite a decision of another trial court holding the same mother fit to have custody of a daughter born of a different previous marriage.

In *Seelandt*, the court also observed that the "plaintiff's neurosis had a harmful effect on" the child. Apparently the term "neurosis" is also synonymous with "emotional disturbance."

Other courts have held the same way. In Illinois, the courts denied custody to the mother of boys, two and six years old, and a five-year-old girl upon a finding that the mother exhibited unstable behavior.[45] In *Kayser v. Kayser*,[46] custody was awarded to the father upon a finding that the wife was incapable of giving the children a proper home because of her personal weaknesses, notwithstanding her love, sincerity of purpose and feeling for her children. In *Bull v. Bull*,[47] custody was awarded to the father solely because the mother lacked emotional stability. In another case, a mother, who needed psychiatric care, was denied custody of her nine-year-old daughter.[48]

A mother was denied custody in *Modling v. Modling*,[49] because she was away from home many nights, highly nervous and at times emotionally unstable. Based on a finding that the mother was emotionally disturbed and the children all preferred the father, the

45. Loveless v. Loveless, 128 Ill. App. 2d 297, 261 N.E.2d 732. *See also* Corcoran v. Corcoran, 79 Ill. App. 2d 328, 224 N.E.2d 611 (1967) (father awarded custody of boys, fifteen and seventeen years old, and girls, nine and thirteen years old, where mother had history of mental illness and failed to get medical evidence of recovery, and there was no question of father's ability to care for the children).

46. 164 N.W.2d 95 (Iowa 1969).

47. 206 Cal. App. 2d 642, 24 Cal. Rptr. 149 (1962).

48. Knox v. Knox, 226 Ga. 619, 176 S.E.2d 712 (1970).

49. 45 Ala. App. 493, 232 So. 2d 673 (1970).

Illinois court, in *Barbara v. Barbara*,[50] awarded him custody of his thirteen- and fourteen-year-old daughters and eight- and ten-year-old sons. In *Hyde v. Hyde*,[51] the father was awarded custody of his two-year-old daughter on a finding that the mother's emotional state was such that she could not give care and security to the child. Because of a personality disorder, the mother was denied custody of her three daughters in *Hohensee v. Hohensee*.[52] In another case, when psychiatrists testified that the mother was a "disturbed individual" and the children should not be placed with her, she was denied custody.[53]

V. Other Relevant Factors in Custody Determinations

A. Valid Considerations

The Wisconsin Supreme Court has looked to a broad spectrum of factors in analyzing parental behavior to determine which parent should have custody in the best interests of minor children. Some of the major factors have been previously discussed, but there are others, less important individually, which nevertheless merit amplification.

In *Obenberger v. Obenberger*,[54] the court denied the mother custody of a boy in his early teens because of her excess drinking and harboring a married man in her home under such circumstances as to indicate that her adulterous relationship with the man was known to her son.

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50. 110 Ill. App. 2d 189, 249 N.E.2d 269 (1969).

51. 22 Utah 2d 429, 454 P.2d 884 (1969).

52. 183 Neb. 388, 154 N.W.2d 878 (1967).

53. Morrissey v. Morrissey, 182 Neb. 268, 154 N.W.2d 66 (1967). *See also*: Borden v. Borden, 193 So. 2d 15 (Fla. 1966) (mother had personality problem); Cleverly v. Stone, 141 Mont. 204, 378 P.2d 653 (1962) (mother unstable); Swanson v. Swanson, 137 Neb. 699, 290 N.W. 908 (1940) (mother had highly nervous temperment and was given to instability of a nature not conducive to a proper home life for children); Kroll v. Kroll, 241 Or. 576, 407 P.2d 643 (1965) (mother emotionally unstable); Brown v. Brown, 206 Pa. Super. 439, 213 A.2d 395 (1965) (mother's character unstable); Commonwealth ex rel. Bell v. Bell, 200 Pa. Super. 646, 189 A.2d 908 (1963) (mother emotionally unstable); Long v. Long, 247 So. Car. 250, 146 S.E. 873 (1966) (mother unstable).

Foster and Freed, *Child Custody*, 39 N.Y.U.L. Rev. 422, 441-2 (1964):

> A questionnaire used by Wisconsin adoption agencies, for example, could perhaps assist courts in custody cases more than the rather vague standards now in use. The questionnaire attempts to ascertain relevant factual material and to discover the physical, social and material circumstances of those seeking to take charge of a child's life. The following questions are posed . . . . b. *Mental Health*, Whether there has been . . . . (2) a past history of outpatient psychiatric treatment . . . .

54. 200 Wis. 318, 228 N.W. 492 (1930).

In *Cudahy v. Cudahy*,[55] custody of an eight-year-old boy was granted to his father. The court alluded to the favorable influence of the father and his qualifications to direct the child's growth and development. The court noted that although the mother was of good moral character and able to give the boy love, attention and affection, her insistence upon regulating minor details of his life was not beneficial to development of mature and responsible initiative and tended to make him nervous. The court considered expert evidence that an eight-year-old boy has more need of his father than his mother.

In *Lewis v. Lewis*,[56] the court approved a finding that the wife was unfit because an illicit relationship, which started while her husband was in the Armed Forces and continued after his return, showed so great a disregard of proprieties as to warrant awarding custody to the husband. The wife's unwillingness to give up her improper association and consider conventionalities required awarding custody to the husband.

Although not controlling, in *State ex rel. Hannon v. Eisler*,[57] and *Acheson v. Acheson*,[58] the court held that the financial circumstances of the parent requesting custody could be considered. In the latter case, the court also felt that the compansionship of other children was a desirable factor.

In *Wall v. Wall*,[59] the court held the mother was unfit because she frequently kept late hours without explanation, was guilty of immodest and improper actions while in the company of men, and neglected and left the child without adequate supervision.

Hill v. Hill,[60] apparently turned on the facts that the father was financially and otherwise unable to give the child the advantages he could receive in his mother's home, and maternal custody would result in the family remaining together. *Sommers v. Sommers*,[61] clarifies the rule in *Hill* by pointing out that it is not the law in Wisconsin that an impoverished parent cannot have custody because financially unable to support the child. The court in *Sommers* held that such an interpretation would not be "in accordance with an enlightened concept of the law."

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55. 217 Wis. 355, 258 N.W. 168 (1935).
56. 252 Wis. 576, 32 N.W.2d 227 (1948).
57. 270 Wis. 469, 71 N.W.2d 376 (1955).
58. 235 Wis. 610, 294 N.W. 6 (1940).
59. 252 Wis. 339, 31 N.W.2d 527 (1948).
60. 257 Wis. 388, 43 N.W.2d 455 (1950).
61. 33 Wis. 2d 22, 146 N.W.2d 428 (1966).

Vishnevsky v. Vishnevsky,[62] is a somewhat sophisticated case in which the custody decision hinged on psychiatric testimony that the mother would dominate and interfere with the maturation of her four-and seven-year-old sons, thereby distorting their interpretations of sex, particularly in adolescence and adulthood; that she had a great need to dominate all situations; and that she tended to blame her environment and others for her own difficulties. It is noteworthy, however, that the wife presented no psychiatric testimony on her own behalf.

In *Peterson v. Peterson*,[63] the court listed enlightenment, lovingness, understanding, good judgment, and a sufficiently comprehensive plan for the child's future as important factors.

In *Bohn v. Bohn*,[64] custody of three young boys, aged nine, seven and five was determined on the basis that ordinarily it is in the best interests of children that they be kept together, and, in general, maternal custody is considered best for young children. The respective and relative financial situations of the parties were also weighed by the court.

In *Wendland v. Wendland*,[65] the court looked to neglect or mistreatment of the children, difficulty or failure to work up to capacity in school, attendance at the same church as prior to divorce proceedings, the recommendation of the Department of Family Conciliation, grooming, manners, health and nutrition.

Among the factors considered in *Dodge v. Dodge*,[66] was the mother's propensity to use improper language and to yield to a quick temper so as to inflict excessive and harmful discipline on her daughter.

Subrt v. Subrt[67] is a more obvious case involving the custody of minor boys, approximately eight and ten years old. Custody was awarded to the maternal grandmother, when the mother failed to contest the order depriving her of custody, and the father was so unfit that the children were afraid of him and so parsimonious as to deprive them of proper food and clothing.

Brown v. Brown[68] turned on the wife's inability to provide parental supervision. The court found that she frequently absented

62. 11 Wis. 2d 259, 105 N.W.2d 314 (1960).
63. 13 Wis. 2d 26, 108 N.W.2d 126 (1960).
64. 16 Wis. 2d 258, 114 N.W.2d 423 (1962).
65. 29 Wis. 2d 145, 138 N.W.2d 185 (1965).
66. 268 Wis. 441, 67 N.W.2d 878 (1955).
67. 275 Wis. 628, 83 N.W.2d 122 (1957).
68. 9 Wis. 2d 322, 101 N.W.2d 48 (1960).

herself from the home, leaving her ten- and twelve-year-old sons alone without providing for care or supervision. Custody was granted to the remarried father who could provide full-time care.

In *Larson v. Larson*,[69] in granting custody to the father, the court considered the mother's association with other men under circumstances that implied or suggested moral laxity, irregular hours, failure to keep the children as clean as appropriate, failure to feed the children at regular hours, and frequent appearances at local taverns, holding that both her moral conduct and the physical care which she gave the children were insufficient.

B. Invalid Considerations.

On the other hand, there are various types of conduct which courts have specifically rejected as support for a finding that a parent was not entitled to custody. Perhaps the most important of these is a distinction which might have been expected to fall prey to prejudice but has not. The courts have repeatedly held that the personal life of a parent, whether illegal or immoral, provided it does not adversely affect the ability to be a parent and raise children, is not determinative in custody questions, for a person may be a bad spouse or citizen without necessarily being a bad parent.

As early as 1919, in *Jensen v. Jensen*,[70] the Wisconsin court held that an illegal attempted remarriage, including cohabitation, did not necessarily "demonstrate depravity of heart or moral unfitness to bring up a child."

In *Elies v. Elies*,[71] the court discouhted the fact that the wife remarried within one year in a different state on the advice of an attorney, holding this was insufficient to overcome the evidence showing that she was a good mother.

In *Vogel v. Vogel*,[72] the court held that because the evidence established the wife's adulterous conduct, she was morally unfit (she became pregnant on two occasions by another man). The court ruled that when the wife is morally unfit and there is no testimony that the father is incompetent, unfit or unworthy, custody must be awarded to him if he can provide a suitable home with proper supervision in his absence. The trial court's decision

69. 30 Wis. 2d 291, 140 N.W.2d 230 (1966).
70. 168 Wis. 502, 170 N.W. 735 (1919).
71. 239 Wis. 60, 300 N.W. 493 (1941).
72. 259 Wis. 373, 48 N.W.2d 501 (1951).

to the contrary was reversed and the cause remanded for a new trial.

In *Bliffert v. Bliffert*,[73] the court approved the trial court's determination that the mother was unfit because she engaged in sexual relations with another man after the divorce, holding this supported a finding of unfitness despite her repentance and reform, because the trial court was entitled to evaluate the likelihood of such reform and the seriousness of such repentance. Custody was transferred to the father although he had remarried within the one-year waiting period because that did not bear on fitness to raise a child.

The principle that immorality does not determine fitness, in the absence of an adverse effect on the parent's ability to raise the child or on the children themselves, was reaffirmed in *Wendland v. Wendland*.[74] There the court distinguished *Hamachek v. Hamachek*,[75] and *Lewis v. Lewis*,[76] on the grounds that any inference drawn from immorality in those cases was not a holding that the immorality rendered the person unsuitable for custody, but rather that the person had been found to be an unfit parent, and therefore *could* not have custody, stressing that in the absence of a finding of unfitness, there must be a specifically demonstrable effect of the immoral conduct on the welfare of the children before it can be controlling.

Similarly in *Molloy v. Molloy*,[77] the Wisconsin Supreme Court declined to hold that adultery as a matter of law rendered a mother unfit for custody of her children, but agreed that it was a factor to be considered. The court cited *Larson v. Larson*,[78] and held that an inference against the parties' interests could be drawn on the issue of adultery from a refusal to testify on the grounds of possible self-incrimination.

In *Welker v. Welker*,[79] the court held as a matter of law that a party could not be denied custody on the grounds of her doubts about the existence of God and classification of her religious beliefs as agnostic.

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73. 14 Wis. 2d 316, 111 N.W.2d 188 (1961).
74. 29 Wis. 2d 145, 138 N.W.2d 185 (1965).
75. 270 Wis. 194, 70 N.W.2d 595 (1955).
76. 252 Wis. 576, 32 N.W.2d 227 (1948).
77. 46 Wis. 2d 682, 176 N.W.2d 292 (1970).
78. 30 Wis. 2d 291, 140 N.W.2d 230 (1966).
79. 24 Wis. 2d 570, 129 N.W.2d 134 (1964).

In *Koslowsky v. Koslowsky*,[80] the court held that a stipulation of parties was not determinative in custody matters, and that the requirement that the court decide on the basis of the best interest of the child transcended any agreement of the parties.

VI. CONCLUSION

In conclusion, it seems clear that the trend particularly among the more enlightened courts is to ignore the rigid absolutes and legalisms of the past and adhere with increasing frequency to the trend toward reliance on the social scientists and expert testimony of psychologists, psychiatrists, social investigators and other experts in the fields of human behavior.

> On the other hand, there is the growing conviction that persons with specialized training and experience, such as social workers, are better qualified to determine what is in the best interests of the child than even the best-intended judge. . . .[81]
>
> Such a study (of past court decisions) reveals that, in reaching conclusions as to the best interests of a child and as to parental fitness, courts consider criteria which, although useful, are inadequate in that they fail to force courts to consider essential factual, social, medical and psychological information. Consequently, a judge may have nothing but his common sense to guide him to a wise solution of a complex problem. . . .[82]
>
> If ever the law should keep its eye on the dynamic quality of the facts involved when juggling legal concepts, this is such a case . . . In a word, it is not a field for fixed legal concepts adapted to isolated instances like a single contract or a single tort. It is a relationship that has within its almost all the complexity of life itself. If ever there was a case in which the court should weigh carefully all the individual interests and all the social interests involved, this would seem to be that case. . . .[83]

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80. 41 Wis. 2d 275, 163 N.W.2d 632 (1969).
81. Annot., 35 A.L.R.2d 629, 632 (1954).
82. Foster and Freed, *Child Custody*, 39 N.Y.U.L. REV. 422, 438 (1964).
83. Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672, 684 (1942).