

## The Best Interest of the Child Doctrine in Wisconsin Custody Cases

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## COMMENT

# THE BEST INTEREST OF THE CHILD DOCTRINE IN WISCONSIN CUSTODY CASES

### I. INTRODUCTION

The best interest of the child doctrine in custody and adoption proceedings has long been hailed in Wisconsin as the primary guide for any custody decision. The Wisconsin Supreme Court mentioned the doctrine as early as 1865: "But if [the child] was of such tender years that he could not form a proper judgment, the court would exercise its judgment for his benefit, and do what it thought most for his interest and welfare."<sup>1</sup> Such a devotion to the child's interest is, to the modern person, unquestionably laudable and well-placed. However, throughout the past 150 years, there have always been preferences and presumptions in custody cases, favoring either the father or the mother as against one another, or either parent as against a third party. These preferences and presumptions, this Comment argues, sap the primacy of the best interest of the child doctrine.

The scope of this Comment is quite narrow; it focuses upon chapter 247,<sup>2</sup> custody alone (as opposed to adoption)<sup>3</sup> as most often arises from divorce proceedings and limits itself to an investigation of the two above-mentioned preferences and presumptions. This Comment traces the history of parental

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1. *In re Stillman Goodenough*, 19 Wis. 291, 296 (1865).

2. Wis. STAT. ch. 247 (1977), renumbered Wis. STAT. ch. 767 (1979). Chapter 247 was recently renumbered. Because virtually all of the case law regarding the custody issue uses the ch. 247 designation, that statutory number will arise in much of the discussion in this Comment.

3. Although this Comment applies to adoptions by analogy because the final test in adoption proceedings is also the best interest of the child (*see* Wis. STAT. § 48.01.(2) (1977)), adoption proceedings are governed by Wis. STAT. ch. 48, not ch. 247 (767), *Actions Affecting Marriage*. Moreover, there have been some clarifying advances made in the best interest of the child rule in adoptions (*e.g.*, *Adoption of Tachick*, 60 Wis. 2d 540, 210 N.W.2d 865 (1973)) which similarly apply to ch. 247 custody cases by analogy, (*e.g.*, *Adoption of Randolph*, 68 Wis. 2d 64, 227 N.W.2d 634 (1975)).

preferences and presumptions in Wisconsin law to the present day, argues that these are inconsonant with the best interest doctrine as espoused by Wisconsin law, and concludes that case law could gain consistency without losing any flexibility if they were eliminated.

## II. THE HUSBAND-WIFE PREFERENCE

### A. *The Father's Common Law Right*

Since at least the Civil War, Wisconsin courts have noted the best interest doctrine as at least an important factor or element in deciding custody.<sup>4</sup> However, throughout much of the latter half of the 19th century, the "well settled doctrine of the common law, that the father is entitled to the custody of his minor children, as against the mother and everybody else . . ."<sup>5</sup> vitiated any real effect of the child's best interest upon custody. Clearly, such a preference for the father was economically based and reflected a time, happily gone, when children were valued for their contribution to the work force and, consequently, the family board.

The primacy of the child's economic value is illustrated in *In re Stillman Goodenough*.<sup>6</sup> There, the court found that an eleven-year-old girl had been bound as an apprentice to a third party through an invalid indenture. The child's mother was, at that time, an inmate of the county poorhouse and the father a convict in the state prison.<sup>7</sup> Although the court favored the holder of the indenture over the father (given the father's straitened circumstances), it made it clear that, in the absence of any great deficiency on the father's part, he would be entitled to custody. "That the father has a legal and paramount right to the custody and services of his child will not in general be denied."<sup>8</sup> Particularly telling was the court's reference to the "services" of the child. Even though the court in this case paid lip service to the child's interest,<sup>9</sup> the child-as-

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4. See *In re Stillman Goodenough*, 19 Wis. 291 (1865).

5. *Statę v. Richardson*, 40 N.H. 272, 273 (1860).

6. 19 Wis. 291 (1865).

7. *Id.*

8. *Id.* at 295.

9. *Id.* at 296. "But if [the child] was of such tender years that he could not form a proper judgment, the court would exercise its judgment for his benefit, and do what it thought most for his interest and welfare."

commodity concept, coupled with the statutory preference for the father,<sup>10</sup> demonstrated that any consideration for the child's interest was, at best, secondary.

The earliest mention in Wisconsin of the best interest doctrine appears to have been in *Welch v. Welch*.<sup>11</sup> There, the court said that that "[t]he welfare of the children, and how their interests will be best subserved, are the matters of primary consideration with the court, and [in] whatever order is made respecting the care and custody of them, these should constitute the governing motives of judicial action."<sup>12</sup> While the court, recognizing its own (and the trial court's) broad discretionary powers in such a decision,<sup>13</sup> examined the child's interest in light of the circumstances, it admitted that "[i]n general, all other circumstances being equal, the paramount common law right of the father to the children will be recognized."<sup>14</sup> This admission shows, however inadvertently, that the best interest of the child consideration cannot have primacy as long as there are parental rights (or, in more modern time, presumptions or preferences) regarding custody. If the father has, in the absence of unfitness, a common law right to custody, the court must really decide a custody issue on the basis of parental fitness, with the best interest of the child relegated to the subordinate role of being merely a factor in that decision.

The above cases demonstrate the tension between the child's best interest and the father's right to custody. The obvious question then becomes: What weight was given each? Some guidance may be found in the statutes. The salient language, unchanged from 1849 through 1919, was that the father was entitled to custody if he were "competent to transact [his] own business and not otherwise unsuitable."<sup>15</sup> Where the

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10. WIS. STAT. ch. 112, § 5 (1858):

The father of the minor, if living, and in case of his decease, the mother, while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, shall be entitled to the custody of the person of the minor, and to the care of his education.

The essence remained virtually unchanged for 70 years.

11. 33 Wis. 534 (1873).

12. *Id.* at 542.

13. *Id.* at 541.

14. *Id.*

15. WIS. STAT. ch. 80, § 5 (1849); WIS. STAT. ch. 112, § 5 (1858); WIS. STAT. ch. 170,

father's unsuitableness was patent, as in the aforementioned *In re Stillman Goodenough*, then the child's best interest governed. But what if the father were not so patently unfit? In such a case, it became difficult to see the role of the child's interests.

### B. The "Mother's Love" Theory

Although the statutory preference in favor of the father was to linger until 1921,<sup>16</sup> a contrary preference, at least as strong and perhaps stronger, in favor of the mother began to stir as early as the 1890's. An 1895 case, *Johnston v. Johnston*,<sup>17</sup> showed the kind of thinking that shifted custody considerations from a common law right of the father to a preference for the mother. In finding the father unfit on the bases of dissipation, infidelity, and lack of means, the court granted custody to the child's mother although it acknowledged that the mother was of slender means; had, on occasion, directed "violent and profane language"<sup>18</sup> toward her husband; and was herself raised by a mother "of coarse and vulgar speech and conduct, whose presence and example might exert an unfavorable influence upon the children if they were permitted to remain at the home of the [mother's] father."<sup>19</sup> In so holding, the court said: "Strong natural affection of a devoted mother living an industrious and reputable life, though she be in straitened circumstances, is a very sufficient assurance that she will tenderly care for and properly nurture and educate her children."<sup>20</sup>

Such a holding is perhaps not at all inconsonant with the children's best interests. Yet the court went on to disallow custody to the children's paternal grandfather, a "man of am-

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§ 3964 (1898); WIS. STAT. ch. 170, § 3964 (1919).

16. WIS. STAT. ch. 170, § 3964 (1921) provides in part:

The father and mother of the minor, if living together, and if living apart then either as the court may determine for the best interests of the minor, and in case of the death of either parent the survivor thereof, being themselves respectively competent to transact their own business and not otherwise unsuitable, shall be entitled to the custody of the person of the minor, and to the care of his education.

17. 89 Wis. 416, 62 N.W. 181 (1895).

18. *Id.* at 419, 62 N.W. at 182.

19. *Id.*

20. *Id.* at 420, 62 N.W. at 182.

ple means,"<sup>21</sup> who was "evidently attached to the children, and has done much for their care and support in the past and would doubtless continue to do so in the future . . ." <sup>22</sup> by holding that "the mother is not to be deprived of [the children's] care and custody, or the children of the companionship and maternal affection of their mother, because some wealthy relative is willing to take them and give them better advantages in life than those to which they were born."<sup>23</sup> While this case is admittedly archaic, it does serve to show that the best interest of the child consideration, in spite of language to the contrary, is a subsidiary consideration as long as there is a governing preference.

Rhetoric not dissimilar to that in *Johnston v. Johnston* may be found in *Jenkins v. Jenkins*;<sup>24</sup> language from this case has been often cited by the Wisconsin court and is probably the hallmark of what might be termed the "tender years" or "mother's love" preference, which, for a time, often seemed to be irrebuttable. In this case, the wife had temporary custody of the youngest son while the husband had temporary custody of the elder two sons. The circumstances of each parent were roughly equal.<sup>25</sup> Although the court mentioned that the best interests of the children might be served by keeping the three boys together,<sup>26</sup> it appears to have made its determination on the basis of a subsuming notion of motherly love:

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 mother. Here we have

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21. *Id.*

22. *Id.*

23. *Id.*

24. 173 Wis. 592, 181 N.W. 826 (1921).

25. *See id.* at 594-95, 181 N.W. at 826.

26. *Id.* at 593, 181 N.W. at 826.

none so far as mother love is concerned.<sup>27</sup>

Not surprisingly, the court granted custody of all three boys to their mother.

Once again, we can see that the best interest of the child is held up as paramount, but is really not the final arbiter. And lest it be thought that the sentiments of the court are no longer applicable, it must be noted that the above quote from *Jenkins* has been often reiterated by the court, as recently as 1975.<sup>28</sup>

A relatively recent case, *Templeton v. Templeton*,<sup>29</sup> makes the tension between best interest of the child and the "mother's love" preference absolutely lucid. The court declared that "as stated in the brief of the defendant, the controlling consideration in all custody matters is the welfare of the child."<sup>30</sup> However, the court conditioned the best interest of the child solely upon the fitness of the plaintiff mother as a parent and, to determine the mother's fitness, searched strictly for neglect and failure of duty to the child.<sup>31</sup> To so restrict the best interest test to the question of maternal fitness is to say that a child's best interest is inevitably served as long as its mother is anything but unfit. As contradictory and simplistic as this may sound, it was nevertheless to be the rule in Wisconsin until a statutory change in 1971.<sup>32</sup>

### C. The "Mother's Love" Preference As An "Element"

Prior to 1971, the Wisconsin Statutes regarding custody following divorce indicated only that the "court may make such further provisions therein as it deems just and reasonable concerning the care, custody, maintenance and education

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27. *Id.* at 595, 181 N.W. at 827.

28. *E.g.*, *Acheson v. Acheson*, 235 Wis. 610, 614, 294 N.W. 6, 8 (1940); *Peterson v. Peterson*, 13 Wis. 2d 26, 30, 108 N.W.2d 126, 128 (1961); *Scolman v. Scolman*, 66 Wis. 2d 761, 768, 226 N.W.2d 388, 391 (1975).

29. 254 Wis. 92, 35 N.W.2d 223 (1948).

30. *Id.* at 93, 35 N.W.2d at 224.

31. *See id.* at 94, 35 N.W.2d at 224.

32. 1971 Wis. Laws ch. 157, § 2 states that § 247.24(3) of the statutes is created to read: "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." § 247.24(3) has been renumbered § 767.24(3).

of the minor children . . . .”<sup>33</sup> The primacy of the child’s best interest and the preference for the mother (all other things being equal) were strictly case law elements, yet they were most influential. However, chapter 157 of the 1971 Laws of Wisconsin, which amended Wisconsin Statute 247.24, dealt explicitly with both.<sup>34</sup> For the first time, the best interest doctrine as a paramount consideration was given statutory authority; at the same time, the amendment eliminated any parental preference based on sex.

Although some felt at the time that this amendment would result in a marked substantive change in policy,<sup>35</sup> time has shown that, at least as far as maternal preference is concerned, the court’s stand does not appear to have changed altogether. In *Scolman v. Scolman*,<sup>36</sup> the court brought back in through the back door what the legislature had just thrown out the front. There, following a divorce proceeding, the custody of a six-and-one-half-year-old boy was in question. The trial court granted custody to the mother (although the evidence may be understood to indicate that the father would have had greater resources and more time to spend with his son)<sup>37</sup> apparently on the sole ground of her being the mother. The Wisconsin Supreme Court reversed, finding that, since the 1971 amendment of section 247.24, currently numbered 767.24, there is no longer a strong preference in favor of the mother, and further, that any decision must be “based on precise findings that such placement is in the best interests of the child.”<sup>38</sup> Had the court stopped there, it would have appeared that, for once, some real attention was being paid to the best interest of a *particular* child, by requiring the trier of fact to “make a personal evaluation of this mother’s qualities and weigh them against those of this father.”<sup>39</sup> However, the

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33. WIS. STAT. § 247.24 (1969).

34. 1971 Wis. Laws ch. 157.

35. Podell, Peck & First, *Custody—To Which Parent?*, 56 MARQ. L. REV. 51, 51-54 (1972).

36. 66 Wis. 2d 761, 226 N.W.2d 388 (1975).

37. *Id.* at 764-65, 226 N.W.2d at 389-90.

38. *Id.* at 767, 226 N.W.2d at 391.

39. *Id.*

court went on to resurrect the florid prose of *Jenkins v. Jenkins*<sup>40</sup> on motherly love, and concluded that

sec. 247.24(3), Stats., does not strike down the holdings of this court indicating that, other things being equal, there is usually a preference for the mother. . . . The statute merely decrees what the law in Wisconsin is already, that the trial court's decision cannot solely be based on the sex of the parent.<sup>41</sup>

The court cited with approval three Minnesota cases, all based on statutory language identical to that in section 247.24,<sup>42</sup> currently 767.24. The most recent of these, *Erickson v. Erickson*,<sup>43</sup> held that the statute<sup>44</sup> "should not give the mother an 'absolute or arbitrary preference' on the basis of her sex."<sup>45</sup> This last comment raises a difficult problem: What is the quality of any preference of the mother, if all other things are equal? The Minnesota quote appears to make it something just short of an irrebuttable presumption, or at least to allow it to be understood as such. Independent language in the *Scolman* decision appears to put Wisconsin's test in the same category.<sup>46</sup> It might be argued that the Wisconsin court answered the question when it said: "The preference to be given to a mother in the award of custody of a minor child is only one *element* to be considered."<sup>47</sup> This would mean that the court is asserting that there is no preference of any sort in favor of the mother, but that there is a permissible element or factor to be considered. This distinction, however, raises its own problems and questions.

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40. 173 Wis. at 595, 181 N.W. at 827.

41. 66 Wis. 2d at 766, 226 N.W.2d at 390.

42. See *Petersen v. Petersen*, 296 Minn. 147, 206 N.W.2d 658 (1973); *Ryg v. Kerkow*, 296 Minn. 265, 207 N.W.2d 701 (1973); *Erickson v. Erickson*, 300 Minn. 559, 220 N.W.2d 487 (1974).

43. 300 Minn. 559, 220 N.W.2d 487 (1974).

44. MINN. STAT. § 518.17 (1971).

45. *Scolman v. Scolman*, 66 Wis. 2d 761, 767, 226 N.W.2d 388, 391 (1975) citing *Erickson v. Erickson*, 300 Minn. 559, —, 220 N.W.2d 487, 489 (1974).

46. "[T]he trial court's decision cannot solely be based on the sex of the parent. Our interpretation is consistent with [that of] the Minnesota Supreme Court . . ." *Scolman v. Scolman*, 66 Wis. 2d 761, 766, 226 N.W.2d 388, 390 (1975).

47. *Id.* at 767, 226 N.W.2d at 391 (italics supplied).

### III. PREFERENCES, PRESUMPTIONS AND ELEMENTS

Perhaps it would be wise at this point to make some clear linguistic distinctions. Since parental custody is so obviously a balancing test between husband and wife, let us adopt the scale or balance as the operative extended metaphor for a custody decision, with each side representing a party. Evidence in favor of a particular party weighs down the appropriate side of the balance; whichever side is heavier wins. And here, since the avowed "paramount consideration" is the best interest of the child, each bit of weight would be an element or factor contributing to that end. Now, a hypothetical "element" or "factor" might be "financial stability" or "earning capacity" or "ability to contribute to a child's physical welfare." In the application of any such element, it is clear that either father or mother could avail himself or herself of this element; it is simply contingent on who makes or saves or could make or save more money and upon his or her ability to demonstrate such to the court. But note that the one who would use such a factor or element in his or her behalf must make a positive showing that it applies to his or her position.

However, if we consider the *Scolman* court's labeling of the "mother's love" preference as an "element," we find a certain logical inconsistency. An element or factor, as defined above, is neutral in that it could be utilized by either party to a custody action. But the preference in favor of the mother obviously cannot be used by the father. A preference of this sort is much more in the nature of a rebuttable presumption than a factor. It places upon the father the burden, *ab initio*, of demonstrating either that the mother is unfit or that the father is equally capable of providing the care that an ideal mother would be expected to provide. In any case, this preference suggests that the balance may be tilted toward the mother from the start.

Curiously, the *Scolman* court recognized this problem, acknowledged it to be a problem, but took inadequate steps to correct it. The court, in referring to the trial court's reflexive preference for the mother, stated that "[a] review of the record here clearly indicates that the trial court transformed a slight preference for the mother into an almost irrebuttable

*presumption* in favor of the mother."<sup>48</sup> Clearly, the court recognized the danger implicit within the preference; nevertheless, it refused to completely discard it.

The inconsistency, then, is obvious if we return to the scale metaphor. If the sides of the balance are empty when the parties to a custody action enter the courtroom, to be filled only when husband or wife present factors in each one's favor, then when does the preference for the mother enter into the balance? The *Scolman* court addressed this question by stating that "other things being equal, preference will ordinarily be given to the mother if she is not unfit."<sup>49</sup> Logically, this suggests that the preference ought to be applied only as a kind of judicial tiebreaker, that is, in the event that the evidence shows both mother and father to be equally capable of caring for the child, or more importantly, when the child's best interest could be served equally well by either parent. But the court is not clear in setting forth such a limited use of the presumption. In fact, the following *Scolman* language indicates that the factor might justifiably be applied at any time: "The preference to be given to a mother in the award of custody of a minor child is only one element to be considered."<sup>50</sup> Thus, presumably, the trial judge need not wait for the evidence in order to give the mother an advantage.

Hence, if preferences are allowed for purposes of custody, the sides of the balance are, *ab initio*, not necessarily equal. If, as *Scolman* asserts, it is permissible for the trier of fact to assume that "other things being equal, there is usually a preference for the mother,"<sup>51</sup> then the father clearly has a greater burden of proof. Moreover, *dicta* in the opinion<sup>52</sup> suggests that the preference may be quite strong; hence, the father's burden will be all that much greater.

Finally, it must be said that, given the *Scolman* court's discussion of a particular mother's love as weighed against the particular father's love,<sup>53</sup> one might argue that the court really meant to reduce the presumption to a true factor or element;

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48. *Id.* at 764, 226 N.W.2d at 389.

49. *Id.*, quoting *Belisle v. Belisle*, 27 Wis. 2d 317, 322, 134 N.W.2d 491, 494 (1965).

50. *Id.* at 767, 226 N.W.2d at 391.

51. *Id.* at 766, 226 N.W.2d at 390.

52. *Id.* at 766-67, 226 N.W.2d at 390-91.

53. *Id.* at 767, 226 N.W.2d at 390-91.

that is, that henceforth, the particular mother's love will be put in one side of the balance and the particular father's love in the other. However, considering the other above-mentioned rhetoric used by the court,<sup>54</sup> the inclusion of the *Jenkins* court's paean to mother love,<sup>55</sup> the absence of any such praise for a father's love, and the half-century history of a quasi-presumption in favor of the mother, such an argument is not at all persuasive.

#### IV. THE PARENT-THIRD PARTY PRESUMPTION

The previous discussion points to the conclusion that what is being measured by the courts is not the best interest of the child, but the best interest of the parent. This is even clearer when we examine the presumption which operates when a custody battle arises not between mother and father, but between parent and third party. In early Wisconsin case history, the presumption in favor of the parent as against a third party is certainly as strong as, if not stronger than, the preferences already discussed. The 1895 *Johnston v. Johnston*<sup>56</sup> case, mentioned earlier, shows that, in spite of the admitted advantages which the grandfather could provide for the children, "the mother is not to be deprived of [the children's] care and custody . . ."<sup>57</sup> The language chosen by the court demonstrates that children were little more than chattels; advantages which would seem to be in their best interest were withheld from them if a parent were to press his or her right to custody.

A case of the same vintage, *Markwell v. Pereles*,<sup>58</sup> illustrates this pre-emptive parental right. Upon the death of her mother, the infant girl in question was turned over to her aunt and uncle by her father. Nearly two years later, the father sought to take the child back, but was refused, and a court battle ensued. While there was no evidence that the aunt and uncle were in any way unfit or unsuitable,<sup>59</sup> the record was clear on the father's deficiencies:

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54. *Id.* at 766-67, 226 N.W.2d at 390-91.

55. *Id.* at 768, 226 N.W.2d at 391.

56. 89 Wis. 416, 62 N.W. 181 (1895).

57. *Id.* at 420, 62 N.W. at 182.

58. 95 Wis. 406, 69 N.W. 798 (1897).

59. *See id.* at 407-08, 69 N.W. at 798.

[H]e is of a somewhat cold, reserved, and unsympathetic nature, rather than warm hearted and affectionate, and has never exhibited much love or affection for said child; that he is a traveling salesman by occupation, . . . and in the course of his business must be absent from his home a great part of his time.<sup>60</sup>

Nevertheless, the court granted custody to the father, citing and agreeing with the position taken in prior English custody cases,<sup>61</sup> that, generally, custody should be withheld from the father only if he is in such a position "as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended."<sup>62</sup> Happily, modern results are not quite as severe.

In these cases, where most frequently the dispute is between one parent (the other parent having little or no interest in custody) and a third party (often foster parents or a relative who has had custody for some time), recent Wisconsin case law is not particularly clear. The statute on custody<sup>63</sup> treats this situation differently than it does the usual husband-wife custody battle. Where a third party is involved, the test is "[i]f the interest of any child demands it, and if the court finds either that the parents are unable to care for such children adequately or are not fit and proper persons to have the care and custody [thereof] . . . ."<sup>64</sup> Hence, it would appear that in these cases, the best interest of the child is not absolutely paramount. Case law, however, has not always given such a plain meaning to the statute, as the following four cases illustrate.

*Dees v. Dees*<sup>65</sup> involved a divorce action wherein both parties stipulated to the placing of their child in a foster home. Two years later, the mother sought a change of custody to herself. She had had, however, during and after the marriage, a history of severe emotional problems.<sup>66</sup> The trial court did

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60. *Id.* at 415, 69 N.W. at 801.

61. *Id.* at 417, 69 N.W. at 801.

62. *Id.*

63. WIS. STAT. § 247.24 (1977), renumbered WIS. STAT. § 767.24 (1979).

64. WIS. STAT. § 247.24(1)(c) (1977), renumbered WIS. STAT. § 767.24(1)(c) (1979).

65. 41 Wis. 2d 435, 164 N.W.2d 282 (1969).

66. *Id.* at 439, 164 N.W.2d at 284.

not find her unfit per se but found that she was unable to adequately care for the child; hence, the trial court denied her petition.<sup>67</sup> The Wisconsin Supreme Court reversed, holding that the best interest of the child required a guardian ad litem to aid the trial court in its decision.<sup>68</sup> In its opinion, the court discussed the statutory language as follows:

In this state, where the primary and controlling consideration is what will be best for the child [the distinction between "unfitness" and "inability to adequately provide care"] is not as crucial because in this state the would-be custodian must establish not only fitness and ability to provide adequate care but also that his or her being awarded custody would be in the best interests of the child.<sup>69</sup>

This reasoning, however, transforms what appears to be a clear statutory presumption in favor of the parent as against nonparents into a test additional to that of best interest. But whether viewed as a presumption or as a test, the statutory provision does modify the primacy of the best interest of the child, in spite of language in the opinion, quoted from *Welker v. Welker*,<sup>70</sup> that "the polestar remains the welfare of the child."<sup>71</sup>

A 1972 case, *Ponsford v. Crute*,<sup>72</sup> appears to construe the language of the statute as creating a presumption in favor of the parent. The mother, who lived with her parents, had custody of the child following the couple's separation. While the father was in the armed forces, the mother died in an accident. Her parents took care of the child for more than a year, at which time, the father, having remarried, sought custody. An initial habeas corpus proceeding held in favor of the grandparents, finding that the husband was not "suitable" and that the best interests of the child were served by her staying with her grandparents.<sup>73</sup> But the trial court in the custody proceeding found in favor of the father.<sup>74</sup> The Wisconsin

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67. *Id.* at 438-39, 164 N.W.2d at 284.

68. *Id.* at 443-44, 164 N.W.2d at 286.

69. *Id.* at 440, 164 N.W.2d at 285.

70. 24 Wis. 2d 570, 578, 129 N.W.2d 134, 139 (1964).

71. 41 Wis. 2d at 443, 164 N.W.2d at 286.

72. 56 Wis. 2d 407, 202 N.W.2d 5 (1972).

73. *Id.* at 410, 202 N.W.2d at 6.

74. *Id.* at 411, 202 N.W.2d at 7.

Supreme Court affirmed this judgment, and in doing so, implied that, with respect to parent-third party actions, the statute mandates that the best interest of the child is not the sole consideration; that the father "cannot be deprived of the custody of his minor child unless there is a finding that either he is unfit or is unable to care for the child."<sup>75</sup> Regardless of the policy behind it, this seems to be a more direct reading of the statute and therefore at odds with the interpretation adopted in *Dees*.

In a third case, *Kurz v. Kurz*,<sup>76</sup> the court attempted to resolve the discrepancy between *Ponsford* and *Dees*, but with little success. This case involved a divorce judgment where both parents were found to be unfit persons for custody purposes.<sup>77</sup> Custody was granted to the paternal grandparents, with whom the child and father then lived for two years, at the end of which time the mother sought custody, claiming she had been cured of her adulterous and emotionally disturbed tendencies.<sup>78</sup> She argued that the *Ponsford* interpretation overruled *Dees*, and therefore, no showing of the best interest of the child was required in order for her to regain custody, that she need only prove she was no longer unfit in order for custody to automatically revert to her.<sup>79</sup>

For whatever reason, the court in *Kurz* refused to hold that *Ponsford* overruled *Dees*. In lengthy discussions of each, the two cases were distinguished in that *Dees* was a custody action arising from a divorce under section 247.24,<sup>80</sup> while *Ponsford* was a custody action brought by a surviving spouse under section 247.05(4).<sup>81</sup> The problem with this distinction is that section 247.05 was the jurisdictional statute for all actions affecting marriage, including divorce.<sup>82</sup> Moreover, sec-

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75. *Id.* at 413, 202 N.W.2d at 8.

76. 62 Wis. 2d 677, 215 N.W.2d 555 (1974).

77. *Id.* at 679, 215 N.W.2d at 556.

78. *Id.* at 679-80, 215 N.W.2d at 556.

79. *Id.* at 683, 215 N.W.2d at 558.

80. *Id.* at 682, 215 N.W.2d at 558.

81. *Id.* at 684, 215 N.W.2d at 559. Section 247.05(4) has been renumbered § 767.05(2).

82. WIS. STAT. § 247.045 (1971) stated:

In any action for an annulment, divorce, legal separation, or otherwise affecting marriage, when the court has reason for special concern as to the future welfare of the minor children, the court shall appoint a guardian ad litem to

tion 247.05(4), the statute under which *Ponsford* was brought, was technically the same section which governed, jurisdictionally, divorce custody cases:

(4) ACTIONS FOR CUSTODY OF CHILDREN. The question of a child's custody may be determined as an incident of any action properly commenced under sub. (1), (2) or (3); or under s. 247.055, or an independent action for custody may be commenced in any county of this state in which the child is present.<sup>83</sup>

The last clause above governs *Ponsford*, but subsection (3), mentioned within the statute, governs *Dees*.<sup>84</sup> Therefore, it appears that this is a distinction without a difference, especially since the substantive legal standards governing the *Ponsford* "independent action for custody" are the very ones set forth in 247.24, the statute governing *Dees*, since that statute provides the only applicable standards in the entire chapter.

A recent statement on the subject may be found in *LaChapell v. Mawhinney*,<sup>85</sup> in which the literal reading taken

represent such children. If a guardian ad litem is appointed, the court shall direct either or both parties to pay the fee of the guardian ad litem, the amount of which fee shall be approved by the court. In the event of indigency on the part of both parties the court, in its discretion, may direct that the fee of the guardian ad litem be paid by the county of venue.

This section is now numbered § 767.045.

83. Wis. STAT. § 247.05(4) (1971). This is currently covered in Wis. STAT. § 767.05(2) (1979), which is phrased differently, but not so as to affect the outcome here:

(2) ACTIONS FOR CUSTODY OF CHILDREN. Subject to ch. 822, the question of a child's custody may be determined as an incident of any action affecting marriage or in an independent action for custody. The effect of any determination of a child's custody shall not be binding personally against any parent or guardian unless the parent or guardian has been made personally subject to the jurisdiction of the court in the action as provided under ch. 801 or has been notified under s. 822.05 as provided in s. 822.12. Nothing in this section may be construed to foreclose a person other than a parent who has physical custody of a child from proceeding under ch. 822.

84. Wis. STAT. § 247.05(3) (1971) read as follows:

(3) ACTIONS BY OR AGAINST RESIDENTS FOR DIVORCE. Regardless of where the cause of action arose, an action for divorce by or against a person who has been a bona fide resident of this state for at least 6 months next preceding the commencement of the action shall be commenced in the county of this state in which at least one of the parties has been a bona fide resident for not less than 30 days next preceding the commencement of the action.

85. 66 Wis. 2d 679, 225 N.W.2d 501 (1975).

in *Ponsford* is considerably mollified. There, after the divorce, custody was given to the mother, who died eight years later. At that time, the maternal grandparents, who had assisted in the "personal and financial care"<sup>86</sup> of the children since the divorce, sought custody, as did the father. The trial court found for the father, believing that the *Ponsford* rule required such, in the absence of a showing of the father's unfitness.<sup>87</sup> But the Wisconsin Supreme Court reversed, holding that

[the] conclusion reached by this court in *Ponsford* should not be interpreted as laying down an inflexible rule, that in every case involving a dispute between the natural father or mother and grandparents for the custody of the children, the doctrine of the best interests of the children cannot prevail.<sup>88</sup>

Arguably, however, the above statement is a direct contradiction of the *Ponsford* rule.<sup>89</sup> The court further undercut the *Ponsford* holding (and section 247.24) by saying: "As a general matter, but not invariably, the child's best interest will be served by living in a parent's home. However, if circumstances compel a contrary conclusion, the interests of the child, not a supposed right of even a fit parent to have custody, should control."<sup>90</sup>

## V. CONCLUSION

With the *LaChapell* interpretation of the *Ponsford* rule (and hence the statute), we have now reached a position analagous to and as awkward as that reached by *Scolman* regarding husband-wife custody disputes. In each situation,

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86. *Id.* at 681, 225 N.W.2d at 502.

87. *Id.* at 683, 225 N.W.2d at 503.

88. *Id.*

89. In *Ponsford* the court stated:

From the statute and this court's construction of it in *Sommers v. Sommers*, *supra*, as between Dale, the natural father, and the Crutes, the maternal grandparents, Dale cannot be deprived of the custody of his minor child unless there is a finding that either he is unfit or is unable to care for the child. The court affirmatively found that as of the time of the trial in this case Dale was fit to have the child and that he was able to adequately take care of her. Under these findings the trial court was obligated to award the custody of Kim to the father, Dale.

56 Wis. 2d 407, 413, 202 N.W.2d 5, 8 (1972) (footnote omitted).

90. 66 Wis. 2d at 683, 225 N.W.2d at 503.

there is a presumption or preference which weakens the primacy of the best interest of the child rule. In a *Scolman* husband-wife dispute, the court took a strong preference created by years of case law precedent, asserted that it is no longer a strong preference, declared the primacy of the best interest of the child doctrine, but then relegitimated the preference by holding that it may still be a valid element. In a *Ponsford-LaChapell* parent-third party dispute, the court took a statutory presumption (which appears from its language to be irrebuttable assuming no parental unfitness),<sup>91</sup> asserted that it is no longer irrebuttable, declared the primacy of the best interest of the child doctrine, but, by implication, still allowed the presumption to exist.

By this time, it should be clear that a combination of a doctrine declared to be absolutely governing and a presumption or preference which weakens that doctrine can only lead to a morass of muddled rationalizations. Ironically, all of the decisions reached could have been achieved without the imposition of any presumptions or preferences at all. Given the rhetoric found in each case which praises the best interest doctrine, such could easily have been the sole rule in each case without disturbing the result. Eliminating the presumptions and preferences and giving real credence to the best interest rule may not add to the substance of custody law, but it would serve to rid the law of an unnecessary stumbling block, to promote a clarity of language in both trial court and appellate decisions, and perhaps to foster closer examination of the particular circumstances in any given case; an approach which common sense dictates as the most sound.

Implementing this change would be simple, but would require different methods for each of the situations discussed. The husband-wife presumption, since it arose out of case law, may certainly be disposed of in the same way; a clearer statement of policy than can be found in *Scolman* would serve nicely. To do so would in no way prevent a trier of fact from taking a *particular* mother's love and care into account; it

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91. "As a consequence, before a trial court can deprive the natural parents of custody, there must be findings supported by the evidence sufficient to show that both natural parents are either unfit or unable to adequately care for the children." *Ponsford v. Crute*, 56 Wis. 2d 407, 413, 202 N.W.2d 5, 8 (1972), quoting *Sommers v. Sommers*, 33 Wis. 2d 22, 26, 146 N.W.2d 428, 430 (1966).

would only preclude him from assuming *a priori* that a mother's love is superior to that of a father.

The parent-third party presumption is statutory and therefore can only be eliminated by the legislature. Once again, to do so is not in any way to preclude a trial court from finding that a *particular* parent should have custody as against a third party, given the best interest of the child. Nor would it invite abuse by random third parties, since it would not likely be in the child's best interest to grant custody to those not intimately connected with the child, whether by blood or by long-standing devotion.

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