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# DIVORCE-CUSTODY DISPOSITIONS: THE CHILD'S WISHES IN PERSPECTIVE

Lawrence A. Moskowitz\*

## INTRODUCTION

In this country, a significant number of marriages ending in divorce involve families with minor children.<sup>1</sup> Frequently, these proceedings are aggravated by child custody disputes. Resolution of such a dispute has a profound impact on a child's future, since it determines where he<sup>2</sup> lives and goes to school, the conditions of his upbringing, and the quality and nature of the training and guidance he is to receive.<sup>3</sup>

Since the child is so extensively affected by such proceedings, the child's wishes in determining his future become a very important consideration, perhaps, in some cases, determinative. At the same time, it must be recognized that a child in a custody dispute is vulnerable to psychological pressures which in themselves might be quite harmful and which may also cause him to reach a decision that is not in his best interests.<sup>4</sup> The child's "right" or "need" to be heard, as will become evident, is balanced by an equally compelling need for emotional protection, which can best be achieved by keeping the child as far away from what one child psychologist has termed "the combat zone."<sup>5</sup>

This article will identify and discuss the various competing interests at stake in a custody proceeding, and will examine several historical methods of handling custody disputes.<sup>6</sup> Fol-

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1. M. WHEELER, NO-FAULT DIVORCE 72 (1974).

2. The male pronoun is used for convenience only. Its use represents an arbitrary choice and is not intended to indicate that only males are under discussion herein.

3. Hansen, *Guardians ad litem in Divorce and Custody Cases: Protection of the Child's Interests*, 4 J. FAM. L. 181 (1964). See also Berdon, *A Child's Right to Counsel in a Contested Custody Proceeding Resulting from a Termination of the Marriage*, 50 CONN. B.J. 150 (1976); Levin, *Guardians ad litem in a Family Court*, 34 MD. L. REV. 341 (1974); Comment, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HASTINGS L.J. 917 (1976).

4. Comment, *The Role of the Child's Wishes in California Custody Proceedings*, 6 U.C.D. L. REV. 332, 345 (1973).

5. See note 50 *infra*.

6. For a good discussion and identification of various strands of custody law, see Bodenheimer, *The Multiplicity of Child Custody Proceedings—Problems of California*

lowing this examination, it proposes some considerations that should play a role in the resolution of future custody disputes. Based on these considerations, the article exposes the inherent weaknesses of the current approaches to custody disputes and proposes a model statute as a workable framework for solving them.

## HISTORICAL RESOLUTIONS OF CUSTODY DISPUTES

### *The Paternal Presumption*

At English common law, when a custody contest developed over a child, the father was *prima facie* entitled to custody unless he was found physically or mentally unfit. This nearly absolute preference was considered the reciprocal right of the father's duty of child support, and was based in part on a belief in the "strength" and "potency" of the father-child relationship.<sup>7</sup> In addition, the rule was a manifestation of the father's complete control over his children in all respects.<sup>8</sup> In sum, the rule precluded judicial consideration of the wishes or welfare of the child unless an aggrieved party other than the child challenged the father's right to custody on the grounds of physical or mental incapacity.

American courts did not apply the paternal preference so strictly. Some courts utilized a fault standard, based on the theory that a person who was not conducting himself properly would not make a good custodial parent.<sup>9</sup> While the apparent rationale for this standard was "the good of the child,"<sup>10</sup> it failed to consider the child's wishes.

### *The "Best Interests" Standard*

During the late nineteenth and early twentieth centuries,

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Law, 23 STAN. L. REV. 703 (1971); Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROB. 226 (1976).

7. *Chapsky v. Wood*, 26 Kan. 650, 652 (1881). While the *Chapsky* court recognized the common law rule, it was in this case that the now-familiar "best interests" standard was first articulated. See note 11 *infra*.

8. M. WHEELER, *supra* note 1, at 75. The father even possessed the right to sell his children.

9. The proposition is generally true, that one who has conducted either well or ill in a particular domestic relation, will conduct the same in another; and so, as a general practice, the courts give the custody to the innocent party; because, with such party, the children will be more likely to be cared for properly.

2 BISHOP ON MARRIAGE AND DIVORCE § 532 (4th ed. 1864).

10. *Id.* §§ 529, 532.

the paternal preference and fault standards were gradually replaced by a rule favoring the "best interests of the child." In *Chapsky v. Wood*,<sup>11</sup> the court made the child's welfare the controlling factor. Thus, it concluded that "a parent's right to the custody of a child is not like the right of property, an absolute and uncontrollable right." Similarly, the court in *Finlay v. Finlay* invoked the state's *parens patriae* power, authorizing judges to generally "do what is best for the interests of the child."<sup>12</sup>

The oft-stated rationale for the "best interests" standard, as the opinion in *Chapsky* suggests, is that children are "intelligent moral beings," and therefore their happiness and welfare are matters of "primary consideration."<sup>13</sup> Since this standard is still used in most American jurisdictions, it is the starting point for an examination of divorce-custody law.

While the courts began to protect the child's interests, they frequently accorded little or no weight to the child's express wishes. Rather, they took it upon themselves to determine what was in the child's best interests.<sup>14</sup> Though the child's wishes were a proper subject of inquiry,<sup>15</sup> their influence was minimized by this exercise of judicial discretion and limited by

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11. 26 Kan. 650 (1881). In *Chapsky*, a father brought a habeas corpus action in an effort to obtain custody of his ten-year-old daughter, who in early infancy had been given by her parents to her aunt, Mrs. Wood. By the time of this action the mother had died; thus the struggle for custody involved the aunt and father only. The Kansas Supreme Court rejected the common law preference in favor of the father and the natural parent, and concluded that the child would simply be better off remaining with her aunt. In so doing, the court used language which has been echoed for almost a century: "Above all things, the paramount consideration is, what will promote the welfare of the child?" *Id.* at 654.

12. 240 N.Y. 429, 433, 148 N.E. 624, 626 (1925).

13. 2 NELSON ON DIVORCE AND ANNULMENT 166 (2d ed. 1945). See also *Chapsky v. Wood*, 26 Kan. 650 (1881).

14. *Berkshire v. Caley*, 157 Ind. 1, 60 N.E. 696 (1901). In *Berkshire* the court agreed that the custodians chosen by the child (namely, her maternal grandmother, aunt and uncle) would promote her welfare more effectively than her father, who had brought a habeas corpus action against the maternal relatives. But here the court made clear what had been implicit in *Neville v. Reed*, 134 Ala. 317, 32 So. 659 (1901), *i.e.*, that the child's wishes, when considered, were at best mere evidence of his "best interests" which could guide, but never control, the trial judge's decision as to custody.

15. *Neville v. Reed*, 134 Ala. 317, 32 So. 659 (1901). In *Neville*, the father sought to obtain custody of his fourteen-year-old son, who had been awarded to his mother when the parents were divorced. The trial court applied the "best interests" standard after asking the boy which parent he preferred; the boy chose his mother. The father's petition was denied, and the Alabama Supreme Court affirmed. It is clear that the "best interests" test was applied at both levels. Therefore, the Supreme Court's regard for the child's wishes must be considered *mere dictum*.

various age presumptions and capacity to reason requirements.<sup>16</sup>

### *The Maternal Presumption*

Eventually, the acceptance and application of the "best interests" standard evolved into a presumption favoring the mother in custody disputes. This rule was apparently based on a general assumption that children would be better off with their mothers.<sup>17</sup> Until 1970, California maintained a statutory maternal preference when the children were of "tender years."<sup>18</sup> Like the paternal presumption, any successful challenge to the right to custody required a showing that the favored spouse was unfit. Additionally, as with the "best interests" standard, the presumption operated to minimize the weight given to the child's express wishes.

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16. For example, former CAL. CIV. CODE § 138 (Deering 1965) provided: In actions for divorce or for separate maintenance the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody of such minor children as may seem necessary or proper, and may at any time modify or vacate the same. In awarding the custody the court is to be guided by the following considerations:
- (1) By what appears to be for the best interests of the child; and if the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question
- ...

The same requirement of "sufficient age and capacity to reason so as to form an intelligent preference" is contained in CAL. CIV. CODE § 4600 (West 1976), California's present custody statute.

17. One court expressed it as follows: "There is but a twilight zone between a mother's love and the atmosphere of heaven, and all things being equal, no child should be deprived of that maternal influence unless there are special and extraordinary reasons for so doing." *Tuter v. Tuter*, 120 S.W. 2d 203, 205 (Mo. 1938). See also 2 NELSON ON DIVORCE AND ANNULMENT, *supra* note 13 at 175.

18. See CAL. CIV. CODE § 138 (Deering 1965), which provided:
- [I]n awarding the custody the court is to be guided by the following considerations . . . (2) As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, custody should be given to the mother . . .

*But see* CAL. CIV. CODE § 4600(a) (West 1976), which provides that custody should be awarded "to either parent according to the best interests of the child." Applying the earlier provision, the California Court of Appeal stated: "It is not open to question, and indeed it is universally recognized, that the mother is the natural custodian of her young. This view proceeds on the well known fact that there is no satisfactory substitute for a mother's love." *Washburn v. Washburn*, 49 Cal. App. 2d 581, 588, 122 P.2d 96, 100 (1942).

### *Guardianship Statutes*

Although guardianship statutes rarely apply directly to divorce-custody cases, they may, nevertheless, bear on the role of the child's wishes. In many states such statutes allow a child above a certain age to nominate his own guardian. Thus, some courts have utilized the age specified in the guardianship statute to establish the point at which the child's express wishes will control in a divorce-custody dispute.<sup>19</sup> In support of this position, these courts simply point out that the intent of a guardianship statute is to give consideration to the wishes of children above the specified age and that this legislative determination should have weight in custody proceedings.<sup>20</sup>

California's statute makes fourteen the "age of discretion," and courts generally give considerable weight to the wishes of children above that age.<sup>21</sup> The only limitations placed on the older child's choice are court inquiries into whether the appointment is "necessary and convenient" and whether the child's nominee is fit.

### *The Child's Choice*

Ohio has experimented with rules making the express wishes of the children controlling in some custody disputes. Former section 8033 of the Ohio General Code provided that a child above the age of ten had the right to choose whom he preferred to live with, as long as that parent was a fit custodian. Only "moral depravity, habitual drunkenness, or incapacity" constituted unfitness under the original statute.<sup>22</sup>

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19. See, e.g., *Vilas v. Vilas*, 184 Ark. 352, 42 S.W.2d 379 (1931).

20. *Id.*

21. CAL. PROB. CODE § 1406 (West 1972) provides:

In appointing a general guardian for a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare; and if the child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question. If the child resides in this state and is over fourteen years of age, he may nominate his own guardian, either of his own accord or within ten days after being duly cited by the court; and such nominee must be appointed if approved by the court. When a guardian has been appointed for a minor under fourteen years of age, the minor, at any time after he attains that age, may nominate his own guardian, subject to the approval of the court.

22. OHIO REV. CODE ANN. § 8033 (Throckmorton 1940) provides:

Upon hearing the testimony of either or both of [the] parents, corroborated by other proof, the court shall decide which one of them shall have the care, custody and control of such offspring, taking into account that

This resulted in continuing litigation over the meaning and application of the fitness requirement.

For example, in *Godbey v. Godbey*<sup>23</sup> an Ohio appellate court concluded that the trial court must first examine the fitness of each parent before the child could choose. One year later, another appellate court held that a child's choice must be respected unless the selected parent was found to be unfit, strongly implying that the choice could be made prior to the determination of fitness.<sup>24</sup> The Ohio Supreme Court did not expressly resolve the disagreement among the lower courts, although in dicta it appeared to disapprove the *Godbey* approach.<sup>25</sup>

At this point, the legislature took over. In 1946, it replaced section 8033 with section 3109.04 which broadened the meaning of "unfit" by deleting the narrow definition contained in the prior section. Additionally, the 1946 revision raised the age of discretion from ten to fourteen.<sup>26</sup>

Currently, Ohio law provides that children twelve years and older are entitled to state a parental preference, and children eleven years and older are allowed to have their wishes

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which would be for their best interests, except that, if such children be ten years of age or more, they must be allowed to choose which parent they prefer to live with, unless the parent so selected, by reason of moral depravity, habitual drunkenness or incapacity, be unfitted to take charge of such children in which case the court shall determine their custodian.

23. 70 Ohio App. 450, 44 N.E.2d 810 (1942). See also *Schwalenberg v. Schwalenberg*, 65 Ohio App. 217, 29 N.E. 2d 617 (1940).

24. See *Rauth v. Rauth*, 73 Ohio App. 564, 57 N.E.2d 266 (1943).

25. In *Dailey v. Dailey*, 146 Ohio St. 93, 64 N.E.2d 246 (1945), the court said: "This provision [§ 8033] . . . is mandatory in respect to the choice by the child, but with the exception that where the parent selected in the exercise of such a choice is unfitted by reason of moral depravity, habitual drunkenness, or incapacity, the court has power to fix the custody." 146 Ohio St. at 94, 64 N.E.2d at 247. This interpretation suggests that the fitness exception was not to become applicable until *after* the child had stated his preference, as the appellate court had held in *Rauth*.

26. OHIO REV. CODE ANN. § 3109.04 (Page 1951) provided:

Upon hearing the testimony of either or both parents, corroborated by other proof, the court shall decide which of them shall have the care, custody, and control of the offspring, taking into account that which would be for their best interest, except that if any child is fourteen years of age or more, it may be allowed to choose which parent it prefers to live with, unless the parent so selected is unfitted to take charge.

The effect of the new unfitness provision—that is to say, the lack of a *specific* one—was apparent in *Watson v. Watson*, 76 Ohio L. Abs. 348, 146 N.E.2d 443 (1956), in which the trial court held that the mother's having committed adultery rendered her unfit and refused to give effect to the fourteen-year-old child's choice of her mother. The appellate court affirmed.

considered.<sup>27</sup> The wishes of children under eleven are completely subject to the court's discretion.

Utah enacted a statute similar to Ohio's in some respects, and experienced like difficulties. Utah's statute originally provided that children ten and older who were of sound mind could choose their custodial parent.<sup>28</sup> The choice was not subject to a parental fitness requirement. In *Smith v. Smith*,<sup>29</sup> the Utah Supreme Court upheld the choice of a child who was over the age of ten. The various opinions in the *Smith* decision are

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27. OHIO REV. CODE ANN. § 3109.04 (Page Supp. 1976) provides:

Upon hearing the testimony of either or both parents the court shall decide which of them shall have the care, custody, and control of the offspring, taking into account that which would be for their best interest, except that any child twelve years of age or more may be allowed to choose the parent with whom the child is to live unless the court finds that the parent so selected is unfitted to take charge or unless the court finds, with respect to a child twelve years of age or older, that it would not be in the best interests of the child to have choice . . . (C) In determining the best interests of a child pursuant to this section, whether on an original award of custody or modification of custody, the court shall consider all relevant factors, including: (1) The wishes of the child's parents regarding custody; (2) The wishes of the child regarding his custody if he is eleven years of age or older; (3) The child's interaction and interrelationship with his parents, 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; (5) The mental and physical health of all persons involved in the situation.

At this point it is appropriate to point out that, given the basic dilemma described in the Introduction, Ohio's present solution reflects the worst of both alternatives. It forces children to take a stand, with all the attendant emotional problems posed thereby, without really giving them much of a say-so regarding the ultimate determination.

GA. CODE ANN. § 30-127 (1976) allows children fourteen and over to choose their custodian subject to a fitness requirement similar to Ohio's. The Georgia cases suggest that, as in Ohio, a child coming within the statutory age provision may choose his custodian, but the court may ultimately give or deny effect to such a choice using the "best interests" standard. See, e.g., *Hardy v. Hardee*, 225 Ga. 585, 170 S.E.2d 417 (1968) (child's choice given effect, court saying that giving effect to child's choice is tantamount to finding that chosen parent is fit); *Pritchett v. Pritchett*, 219 Ga. 635, 135 S.E.2d 417 (1964) (child's choice denied effect since chosen parent found to be unfit). Like the present Ohio statute, the Georgia statute appears to be a "best interests" rule in a slightly varied form.

28. UTAH CODE ANN. § 30-3-5 (1953) provided:

When a decree of divorce is made the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable; provided, that if any of the children have attained the age of ten years and are of sound mind, such children shall have the privilege of selecting the parent to which they will attach themselves. Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper.

29. 15 Utah 2d 36, 386 P.2d 900 (1963).



highly illustrative of the difficulties surrounding the application of the "child's choice" standard in custody disputes.

Justice Crockett, in his dissent, argued that the judgment of children, even those over ten, is likely to be based on whim, and is therefore suspect. He further pointed out that requiring the child to choose between his parents makes him subject to mind-poisoning, coercion, and "ill-advised gifts or favors." Finally, he noted that the choice involves the entire family and therefore should not be left to the child alone.<sup>30</sup>

Conversely, Chief Justice Henriod, in his majority opinion, contended that children over ten have "pretty good sense." He argued that the parents alone were the "homebreakers" and responsible for the divorce. Finally, he maintained that children "invariably" suffer to a greater extent during divorces than do their parents, so at the very least they should be able to make the important determination concerning their future and "make pawns, for a change, out of their parents, and say that although there be a plague on both your houses, I want to live in the one in which I want to live."<sup>31</sup>

As in Ohio, the legislature retreated from the "child's choice" standard by revising Utah Code Annotated section 30-3-5 in 1969. The revision gives the court discretion to make equitable dispositions in custody contests.<sup>32</sup> As a result, both Ohio and Utah have abandoned a strict child's preference rule in favor of one more closely aligned with the "best interests" approach.

### *Appointment of a Guardian Ad Litem*

Wisconsin has taken a different approach in attempting to protect the interests of the child. Wisconsin law requires the appointment of a guardian *ad litem* to represent the child when there is reason for "special concern" as to the child's future well-being.<sup>33</sup> The statute developed from case law, and

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30. *Id.* at 37-46, 386 P.2d at 902-08.

31. *Id.* at 46-49, 386 P.2d at 908-10.

32. See UTAH CODE ANN. § 30-3-5 (1976).

33. WIS. STAT. ANN. § 247.045 (West 1971) provides:

In any action for an annulment, divorce, legal separation, or otherwise affecting, 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 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 shall be approved by the court. In the event of

its doctrinal underpinnings are twofold. First, such appointments are considered to be within the inherent power of the court. The inherent power doctrine finds support in the traditional power of the court to implead parties on its own motion, and perhaps in the *parens patriae* power.<sup>34</sup>

Second, in the view of the Wisconsin Supreme Court, such appointments are considered necessary because "children involved in a divorce are always disadvantaged parties, and . . . the law must take affirmative steps to protect their welfare."<sup>35</sup> Thus, in *Wendland v. Wendland*<sup>36</sup> the court strongly recommended appointing a guardian *ad litem*, especially in "hotly contested" cases where it appears that all of the evidence relevant to the child's "best interests" is not likely to be brought out by the parties or by a social welfare investigation. Pursuant to both of the above considerations, appointments have been directed by the supreme court.<sup>37</sup>

The advantage of this practice is that it is an effective way to insure that the best interests of the child are considered. The function of the guardian *ad litem* is to help articulate those interests. It has been argued that the "best interests" of the child can be better ascertained in a custody dispute if the child has an adult advocate to speak on his behalf.<sup>38</sup> It has been argued, moreover, that the presence of an independent advo-

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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.

34. Hansen, *supra* note 3, at 181. For similar views expressed by courts in other jurisdictions, see Zinni v. Zinni, 103 R.I. 417, 238 A.2d 373 (1968); Barth v. Barth, 12 Ohio Misc. 141, 39 Ohio Op. 2d 83, 225 N.E.2d 866 (1967). See also Berdon, *supra* note 3, at 155; Levin, *supra* note 3, at 347.

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

36. 29 Wis. 2d 145, 138 N.W.2d 185 (1965).

37. See Dees v. Dees, 41 Wis.2d 435, 164 N.W.2d 282 (1969); Gochenaur v. Gochenaur, 45 Wis.2d 8, 172 N.W.2d 6 (1969). The court in *Dees*, per Judge Hansen, suggested that the child was actually a party to the action.

38. See Berdon, *supra* note 3; Levin, *supra* note 3; Comment, *supra* note 3. The author of the above comment complains that "when the court accepts the settlement of the parties as binding on the child or withholds from him the safeguards afforded parents, the child enjoys all the rights of the family car." *Id.* at 927. The author then proceeds to suggest a new doctrinal strand supporting the appointment of guardians *ad litem*; in a nutshell, the argument is that important interests of the child are so critically affected at custody proceedings that to deny him representation at such proceedings violates his right to procedural due process. This argument is well made and is a significant contribution to the literature on the subject. However, it arguably undervalues the interests of the parents and the state vis-a-vis custody proceedings and fails to fully consider the child's need for emotional protection at the time of the custody decision.

cate can make the parents "less hostile and more realistic."<sup>39</sup> Finally, the appointment of a guardian *ad litem* to represent the child affirms the fact that divorce-custody proceedings involve the entire family.<sup>40</sup> Thus, the courts utilizing the guardian *ad litem* approach would appear to avoid some of the disadvantages of the other methods whenever they choose to invoke it.

### *The Uniform Marriage and Divorce Act*

The Uniform Marriage and Divorce Act provides another alternative to the child custody problem. Section 402 of the Act<sup>41</sup> adopts the "best interests" standard; however, it makes two slight inroads into the court's ability to exercise complete discretion. First, before reaching its decision the court is required to consider "all relevant factors,"<sup>42</sup> including the child's wishes. There are no express requirements respecting the child's age or capacity to reason, but Professor Herma Hill Kay, one of the reporters for the drafting of the Act, maintains that such requirements are implicit in the section.<sup>43</sup> Second, the court may not consider the prospective guardian's conduct if it does not "affect his relationship to the child."<sup>44</sup> This latter

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39. REPORT OF THE CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY 43 (1966). The Governor's Commission recommended that the Wisconsin practice be adopted in California, but their recommendation was not followed.

40. See *Dees v. Dees*, 41 Wis. 2d 435, 164 N.W.2d 282 (1969); Hansen, *The Role and Rights of Children in Divorce Actions*, 6 J. FAM. L. 1 (1966).

41. 9 UNIF. L. ANN. § 402 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 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 interests; (4) the child's adjustment to this 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.

42. *Id.* § 402(2).

43. Interview with Professor Herma Hill Kay, in Berkeley, Cal. (Sept. 22, 1975).

44. 9 UNIF. L. ANN. § 402. The most recent revision of the Ohio statute incorporates all but the last sentence of § 402. OHIO REV. CODE ANN. § 3109.4 (Page Supp. 1976). But see *Watson v. Watson*, 76 Ohio L. Abs. 348, 146 N.E.2d 443 (1956). In *Watson* the mother's adulterous conduct did not affect her relationship with her daughter but nevertheless prevented her from obtaining custody. It is clear that the trial judge believed that Mrs. Watson was a poor role model for her daughter, and the appellate court agreed, *Id.* at 351, 146 N.E.2d at 446-47. Presumably this result would have been avoided under the Uniform Act.

rule was intended to eliminate the more flagrant and extreme abuses of discretion possible under the traditional "best interests" approach.<sup>45</sup>

The Uniform Act also permits the appointment of an attorney to represent the child. The appointment of such counsel appears to be entirely within the court's discretion.<sup>46</sup> Interestingly, there are no guidelines, such as those proposed in *Wendland* or provided in the Wisconsin statute, governing the appointment. The broad discretion given the judge under this section reflects the reluctance of the Act's authors to allow the child to become a party to the action, since that would increase the danger of requiring the child to choose between his parents.<sup>47</sup>

### *Historical Resolutions—Perspective*

None of the methods of custody disposition discussed above is without its drawbacks. This dilemma suggests that the principles behind an "ideal" policy will reflect tensions rather than clear-cut solutions. The following sections will identify and discuss the interests that are at stake in a child custody dispute and will then derive and postulate some principles that should be considered in the future.

### POLICY CONSIDERATIONS IN CUSTODY DISPUTES

As has been noted previously, divorce involves each member of the family. Additionally, divorce and custody-related disputes are traditionally resolved in state courts. Thus, there are three major groups with interests at stake in any custody proceeding: children,<sup>48</sup> parents, and the state. An analysis of the interests of these often competing groups discloses the prin-

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45. See *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, cert. denied, 385 U.S. 949 (1966). *Painter* is summarized in note 63 *infra*.

46. 9 UNIF. L. ANN. § 310 provides:

The court may appoint an attorney to represent the interests of a minor or dependent child with respect to his support, custody, and visitation. The court shall enter an order for costs, fees, and disbursements in favor of the child's attorney. The order shall be made against either or both parents, except that, if the responsible party is indigent, the costs, fees, and disbursements shall be borne by the [appropriate agency].

47. See generally R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 220 (1967).

48. For present purposes, the interests of the child embody both his wishes and his present and future welfare, insofar as these can be determined and appear consistent.

ciples that should be at the heart of any method used in resolving custody disputes. Similarly, this analysis reveals the weaknesses in the existing methods of resolving custody disputes.

### *The Child's Interests*

The interests of the child may be divided into two broad categories: those arising at the time of the proceeding, and those pertaining to his future. The immediate interests include the right to be heard and protection from emotional trauma, guilt, and conflict with either or both parents. The right to be heard stems from modern attitudes toward children and child rearing, and expanding views of civil rights in general. The latter concerns result from the emotional vulnerability of children involved in a divorce.

The child's long-run interests include minimizing future emotional stress,<sup>49</sup> and being provided with a stable home life. These are obviously related to the more immediate concerns over emotional protection, but they are more forward looking and less easily protected by the courts.

In their four to five year study of the effects of divorce on children, Wallerstein and Kelly found that children of all ages, from pre-schoolers to adolescents, were subject to disruption of their psychological development, though some children were able to "recover" within approximately one and a half years from parental separation.<sup>50</sup> In light of this study, it would seem

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49. See Wallerstein & Kelly, *Children and Divorce* (1975) (unpublished manuscript on file at the Social Sciences Library, Univ. of Cal., Berkeley).

50. *Id.* See also Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Pre-School Child*, 14 J. AM. ACAD. CHILD PSYCH. 600 (1975); Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Child in Early Latency*, 46 AM. J. ORTHOPSYCH. 20 (1976); Wallerstein & Kelly *The Effects of Parental Divorce: Experiences of the Child in Later Latency*, *id.* at 256; Wallerstein & Kelly, *The Effects of Parental Divorce: The Adolescent Experience* (1975), reprinted in *THE CHILD AND HIS FAMILY* 479-505 (C. Koupernik & C.J. Anthony eds. 1975).

Briefly, the findings of Wallerstein and Kelly may be summarized as follows: The responses of pre-school children included irritability, whining and crying, sleep problems, and increased autoerotic activity. These children were bewildered, frightened, confused and sad. They felt deprived, and the play of many of them was characterized by a preoccupation with hungry animals. They tended to blame themselves for "causing" the divorce through fantasized misdeeds and they also fantasized about the reconciliation of their parents.

Early latency-age children (ages 7-8) often perceived the departure of the non-custodial parent as a departure from them personally. They became depressed, lonely, and fearful of their newly unstable family situation. They also tended to feel deprived and at the same time guilty about "causing" the family breakdown. But most importantly for purposes of this article, they experienced a strong loyalty conflict regarding their parents, and one child complained about being "split in two."

that the interest in emotional protection applies to all children, including older children perhaps only a year or two away from leaving the home. Nevertheless, older children would seem to have stronger reasons for being heard than do younger children.<sup>51</sup>

### *The Parents' Interests*

Clearly, the parents have a strong interest in having their children raised as they (the parents) see fit. Additionally, two Supreme Court decisions, *Pierce v. Society of Sisters*<sup>52</sup> and *Wisconsin v. Yoder*,<sup>53</sup> can be read to imply that parents have a right to determine between themselves the nature and circumstances of the child's post-divorce upbringing. This right should apply equally to each parent, though it is clear that consistency alone provides no guidelines as to how to resolve custody disputes.

In fact, an equal division of the responsibility of upbringing is probably detrimental in that it would ignore the child's interests and could create renewed parental disputes. In this regard, it should be noted that the parents have an additional interest in having a disposition with as little tension as possible, for the sake of both their own post-divorce adjustment and their future relations with their child.

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Later latency age children (ages 9-10) likewise experienced this loyalty conflict, as well as feeling lonesome for the non-custodial parent. They also felt angry at their parents for causing the breakdown of the family structure, were ashamed of their parents' conduct, and some of them experienced psychosomatic symptoms. It is interesting to note that none of the latency-age children felt a sense of relief about the divorce, despite the fact that some of their pre-divorce family situations had been anything but pleasant.

The responses of adolescents also included loyalty conflicts, but at the same time some of them perceived their parents giving little or no consideration to their (the children's) needs and wishes. Many of them saw their parents as fallen idols who had betrayed them, and were angry at their parents for so doing. Another response of some adolescents was to stay away from the home as much as possible in order to avoid the pain and despair of facing up to the family breakdown.

Some of the children studied coped well, and many of these effects had diminished within one year. However, in some cases the effects continued and worsened, detrimentally affecting psychological development. While there does not seem to be a foolproof way of predicting which children will cope well and which will not, Professor Wallerstein believes that the experience during the period of legal proceedings may have a significant impact on a child's subsequent development (telephone interview with Mrs. Judith Wallerstein, principal investigator for the Children of Divorce Project, Marin County, Cal., in Belvedere, Cal. (Nov. 13, 1975)).

51. The author would estimate the cutoff line at age ten. See authorities cited notes 49 & 50 *supra*.

52. 268 U.S. 510 (1925).

53. 406 U.S. 203 (1972).

*The State's Interest*

The state has three primary interests at stake in the custody dispute. First, it has an interest in ensuring that divorces and custody dispositions do not harm children so that they are more likely to become well-adjusted, productive citizens.<sup>54</sup> Second, as in other areas of the law, its court system has an interest in avoiding congestion.<sup>55</sup> Finally, it has an interest in providing adequate guidelines upon which its judges can make sound decisions.

The need for sound guidelines permeates the other two state interests. Without them, many judges simply do not have the training or background to make informed decisions.<sup>56</sup> In the absence of guidelines, then, children are more likely to be harmed by an inadequate resolution of the dispute. Similarly, if the judge lacks the necessary expertise to resolve the dispute, he may—and should—take the time to acquire it, though this will undoubtedly lead to further court congestion.

*Policy Considerations in Formulating Guidelines*

As we have seen, custody law has not developed from well-considered policies, but has been a haphazard evolution characterized by internal inconsistencies. State policy should reflect rational choices based on the interests just examined. The principles discussed here are intended as starting points for the formulation of workable guidelines to be utilized in resolving custody disputes.

The first principle is that the interests of each family member are involved in a custody dispute. A law that reflects this basic fact will be fairer, and will be more likely to effectuate results which are acceptable to the parties. It follows that the state's interest in producing well-adjusted citizens and reduced caseloads would also be served, since the family members would be more satisfied with the results.<sup>57</sup>

A second principle, related to the first, is that adversary custody hearings should proceed only after all available non-adversary procedures have failed. Litigation should not be en-

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54. Podell, *The "Why" Behind Appointing Guardians Ad Litem for Children in Divorce Proceedings*, 57 MARQ. L. REV. 103, 106 (1973).

55. Comment, *supra* note 3, at 923-24.

56. See Mnookin, *supra* note 6.

57. Over one-third of all divorces involving children lead to further litigation, most of which directly involves them. See WHEELER, *supra* note 1, at 72.

couraged since an atmosphere of openness and confidence can be better achieved in a counseling or mediation session than in a courtroom. Furthermore, the adversary system does not facilitate mutually satisfactory solutions. By definition it compels a winner and a loser, and where the stakes are the child, neither side is apt to accept losing very easily. Finally, in court, the child becomes an object to be won rather than a possible contributor to a common solution. Even if a child does not contribute directly to an out-of-court solution, he is better off emotionally than he would be in a courtroom where any loyalty conflict would become devastatingly apparent to him.<sup>58</sup>

The third principle is simply that the child's wishes must be weighed against his need for psychological safeguards. Strict presumptive rules prescribing the evidentiary effect of the child's wishes and the right of the child to testify or be represented are too inflexible and arbitrary. Yet, some guidelines are needed to suggest how a judge should proceed in various situations, since these proceedings have a significant impact on the child's subsequent development.<sup>59</sup>

A fourth principle is that the likelihood of a permanent and stable future home life for the child should be a compelling consideration. In line with this consideration, the custody law should reflect a measure of flexibility in case the original disposition proves unworkable. The ideal guidelines would provide review procedures which strike a balance between the need for stability and the safety valve of flexibility.

The fifth principle is that it is difficult and sometimes impossible to interpret a child's behavior. For instance, he may not express his true feelings at a hearing to avoid hurting one of his parents. On the other hand, a momentary fit of anger may cause a child to express a preference for one of his parents, a choice he may later regret. If the parents are in agreement, the child may vigorously oppose them as a way of venting anger at them for breaking up the home. Since the parents, investi-

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58. Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification in and out of State*, 46 U. COLO. L. REV. 495, 506-07 (1975). Bodenheimer stated:

The only way I can see to give the child full protection [in custody cases] is to assist parties to come to grips with their feelings and with the realities of divorce insofar as the children are concerned. This must be done in a different setting, *in a non-adversary atmosphere*.

59. Telephone interview with Mrs. Judith Wallerstein, principal investigator for the Children of Divorce Project, Marin County, Cal., in Belvedere, Cal. (Nov. 13, 1975).



gating social worker, psychologist, and judge are involved in the proceeding, each may play a part in interpreting the child's behavior. Proper guidelines would resolve the question of who is best qualified to interpret the child's behavior.

The final principle is that, absent physical or mental incapacity, each parent should have an equal right to custody. This principle is a corollary to the first principle that the interests of each family member should be given equal consideration. While it seems to be contrary to the need for judicial guidelines, it actually emphasizes the need for *non-arbitrary* guidelines. Moreover, it recognizes that each parent usually has a strong emotional attachment to the child and each has a constitutionally protected interest in the child's upbringing.<sup>60</sup> Finally, it removes any legal preference that may tend to make the preferred parent more court-oriented and less conciliatory, thus infringing on all other interests.

### *A Critical Look at Existing Solutions*

Having identified the interests involved in a custody proceeding and derived a set of principles to be applied in evaluating child custody legislation, it becomes relevant to critically examine the current methods of resolving custody disputes in light of the preceding discussion.

*The "best interests" standard.* Though the "best interests" standard has come under fire recently,<sup>61</sup> there are some good arguments in its favor. It places the ultimate responsibility for the decision on the judge, thus reducing the child's role and his concomitant anxiety. It also enables the judge, within his discretion, to consider the interests of all family members. Finally, it is flexible in that it allows the judge to consider the unique circumstances of each case, albeit only to the extent that he sees fit.

On the other hand, this method has serious drawbacks. As has been suggested, the phrase "best interests" is overly broad. It is too often a "legal cliché" which may be used to justify almost any outcome.<sup>62</sup> Moreover, it leaves a child's future entirely up to the trial judge. Appellate courts rarely second guess

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60. This equal protection argument has been recognized by the legislatures of Florida, Oregon, and Wisconsin. See FLA. STAT. ANN. § 61.13(2)(b) (West 1971); OR. REV. STAT. § 107.105(1)(a) (1971); WIS. STAT. ANN. § 247.24(3) (West 1976).

61. See, e.g., J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

62. See M. WHEELER, *supra* note 1, at 76.

custody dispositions based on the "best interests" standard.<sup>63</sup> Finally, because it is so vague, the "best interests" standard probably encourages protracted litigation involving the child.

*The maternal presumption.* Like the best interests standard, the maternal presumption keeps the child somewhat insulated from the "combat zone." There are two other advantages to the maternal presumption. First, the rule might not be so arbitrary as one might think. It has been suggested that the father's traditional social role, male skills, and time commitment to his livelihood make him a less desirable custodian than the mother.<sup>64</sup> So perhaps it is not simply a matter of the mother being a "natural guardian" or evoking the "atmosphere of heaven" in the minds of judges; the maternal presumption may, after all, reflect a practical view of the realities of family life. Second, it may be argued that the maternal presumption actually discourages vindictive husbands from litigating since they are more likely to lose.

Nevertheless, the drawbacks of the maternal presumption would seem to outweigh its possible advantages. Initially, its requirement of a showing of unfitness tends to increase adversary litigation and risks exposing the already vulnerable child to more emotional stress. Moreover, if mothers really are better custodians, as some commentators suggest, then they do not need the benefit of a legal preference to obtain custody. The preference itself reflects sexual and social roles that are currently under fire. Similarly, it fails to allow for a consideration of the unique circumstances of each case. Finally, by offering mothers desirous of custody no incentive to come to private agreements, the maternal presumption fails to encourage the use of non-adversary procedures.

*The child's choice rule.* Despite its apparent harshness in some cases, two arguments may be made in favor of the child's

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63. To make matters worse, when appellate courts do get involved they often reveal that they are subject to similar judgmental limitations, and subjective value judgments are the inevitable result. In *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152 (1966), a "stable, dependable, conventional, middleclass, middlewest home" was preferred over an "unstable, unconventional, arty, Bohemian, and probably intellectually stimulating" environment. *Id.* at 1393-96, 140 N.W.2d at 154-56. Whatever one thinks of Bohemianism as opposed to conventionality, it is clear that the value judgments made in *Painter* required no legal training, as the *Painter* court itself recognized. Viewed in this light, the policy of leaving such decisions up to judges is open to question.

64. See generally W. Goode, *AFTER DIVORCE* (1956), cited in R. LEVY, *supra* note 47, at 225.

choice rule. First, given that the child's best interests cannot be easily ascertained, it follows that the child's feelings and values are at least as good as anyone else's.<sup>65</sup> The child is in no worse a position to decide than the parents, who have been unable to make their marriage work, or the judge, whose shortcomings in this regard have already been discussed. Second, the child should be treated as a person, and the best way to achieve that is to let him speak his mind. As Chief Justice Henriod argued in *Smith*, children ten and over have "pretty good sense" and they are likely to be aware of what is at stake regarding their future. Therefore, they will not be inclined to take the decision lightly.

Ultimately, however, the weaknesses of the child's choice presumption outweigh its advantages. The foregoing discussion makes it clear that solutions should seek to avoid increasing the child's emotional trauma. Having the child make the determination would only aggravate these difficulties. Moreover, most parents are not all that bad, as Justice Traynor suggested in *In re Guardianship of Smith*.<sup>66</sup> Additionally, such a rule could go too far; one logical extension of the child's choice rule would empower the child to contest the divorce which could have disastrous results.<sup>67</sup>

A problem related to the child's choice rule is finding standards that enable the courts to determine whether a child is capable of making the decision. It has been argued that instead of relying on arbitrary age criteria, judges should consider the child's mental capacity, intelligence, and maturity. In this fashion the judge could be reasonably sure of the child's ability

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65. It is not uncommon for children to express a clear preference for one parent over the other during custody proceedings. See, e.g., *Lamb v. Lamb*, 230 Ga. 532, 198 S.E.2d 171 (1973); *Pritchett v. Pritchett*, 219 Ga. 635, 135 S.E.2d 417 (1964); *Smith v. Smith*, 15 Utah 2d 36, 386 P.2d 900 (1963); *Watson v. Watson*, 76 Ohio L. Abs. 348, 146 N.E.2d 443 (1956). This could indicate that many children are able to deal with loyalty conflict or suppress it sufficiently to make a choice.

66. 42 Cal.2d 91, 94, 265 P.2d 888, 891 (1954).

67. This has been suggested, apparently in all seriousness, by a Michigan judge. See *M. WHEELER*, *supra* note 1, at 84-85.

It should also be pointed out that the child's choice rule makes it possible for a child originally awarded to one parent to run away to the home of the other parent and bring about further litigation in the form of a modification suit brought by the chosen parent. This happened in *Lamb v. Lamb*, 230 Ga. 532, 198 S.E.2d 171 (1973), wherein the son left his father's home and went to live with his mother upon reaching the age of fourteen. The mother petitioned for modification. The result was that, in addition to the fourteen-year-old's choice being respected, the mother regained custody of the boy's eight-year-old brother. The court reasoned that it was in the latter's best interests for him to remain with his older brother.

to make an informed decision before letting him make it. Yet there are a number of difficulties with using these criteria. First, neither judges nor investigating social workers are experts on child development. Any conclusions as to the child's ability to choose will be colored to a certain extent by what the judge or social worker believes is in the child's best interests. Second, even experts point out that terms like "intelligence" and "maturity" cannot be defined narrowly, and therefore can be interpreted in different ways. Finally, the psychological data itself is subject to varying interpretations. Thus, there is little or nothing to be gained by substituting a mental capacity test for the age standard.<sup>68</sup>

*Appointment of a guardian ad litem.* Several arguments may be made in favor of the Wisconsin practice of allowing the appointment of guardians *ad litem*. Initially, it recognizes that divorce involves the entire family by providing an attorney for the child and making him a party to the action. Further, the presence of a guardian can have a soothing effect on the parents and focus their attention on the welfare of the child. Similarly, a conscientious guardian can also assist the child in his understanding of his own needs and aid in his emotional adjustment. Finally, the guardian's presence may increase the likelihood of finding a good home for the child, which in turn serves the interests of both the child and the state by reducing the chances of future delinquency.<sup>69</sup>

The primary shortcoming of the Wisconsin approach is that it places too much emphasis on the child's "rights" and not enough on his emotional vulnerability. A child is placed in an extremely difficult position when forced to state a parental preference in open court. Neither protection of the child's supposed "rights" nor any notion of conceptual consistency justify the risks. In addition, a nonconscientious guardian could make the disposition process more acrimonious by failing to perceive the needs of all the parties. Finally, lawyers generally are not trained to work with children in the manner contemplated by the Wisconsin statute. On the whole, then, the presence of a guardian *ad litem* is more likely to exacerbate emotional difficulties rather than ameliorate them.

In summary, it seems clear that none of the current meth-

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68. See Ellsworth, *Review of the Psychological Literature Relevant to Custody Litigation*, in LEVY, *supra* note 47, at I-20, I-21.

69. See Podell, *supra* note 54, at 106.

ods available to resolve custody disputes has taken into consideration all of the six basic principles outlined earlier. In fact, each method tends to emphasize one or perhaps two of the principles at the expense of the others. In this fashion the methods provide inadequate guidelines for workable dispositions. Consequently, an alternative is needed that begins with the premise that all six basic principles are worthy of attention and should be accomodated.

#### MEDIATION AND ARBITRATION: A MODEL STATUTE

The following proposed mediation-arbitration statute is offered as a workable method of resolving custody disputes. Though not without its problems, it nevertheless embodies all of the aforementioned principles:

§1. No divorce shall be granted without the parents of children ten (10) years of age and over, and such children, having either:

- a) arrived at a family agreement bearing the endorsement of a counselor from the Department of Social Welfare,<sup>70</sup> or
- b) participated in a Family Counseling Program consisting of bimonthly meetings with the same counselor for a maximum of six months<sup>71</sup> or until a family agreement is reached and receives the counselor's endorsement, in which case it shall become binding upon the court.

Children five (5) years of age and younger may not participate in family meetings; children between five and ten years of age may participate if both parents agree to such participation. If the parents do not agree to their participation, children between the ages of five and ten may not participate.

§2. a) If a family agreement is not reached within the period of time specified in §1(b), the question of custody shall be decided by a three-member Arbitration Panel. Each parent shall choose one member of the Panel, and third member shall be chosen by the other two members.

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70. In California, this function may be fulfilled by a conciliation court. See note 73 *infra*.

71. This figure represents the number of months between the filing of a divorce action and the interlocutory hearing in California.

Those eligible to be Panel members include the family doctor or pediatrician, a clergyman from the family's church or synagogue, a teacher knowing one or more of the children, and any other adult who knows the child or children well enough to make an informed decision respecting, insofar as is practicable, their wishes and welfare. The counselor who was present at the family counseling meeting shall file a report including recommendations as to custody, and such report shall be considered by the Panel but shall not be controlling. Such arbitration shall be binding on the family and may not be reviewed for six months from the date the child commences living with the custodian chosen by the Panel.

b) The decision of the Arbitration Panel may be challenged as follows:

- 1) by appealing to the Panel no less than six months after the child commences living with the custodian originally selected by the Panel;
- 2) by appealing to the Family or Superior Court after having received an unfavorable decision from the Panel's review of its original decision. When the jurisdiction of the court is invoked there shall be a presumption in favor of the Panel's most recent decision. The challenging party must overcome the presumption by clear and convincing evidence. If the challenging party overcomes the presumption and wins a favorable determination from the court, the Panel's decision is considered a nullity, and custody will be awarded to the challenging party.

Only a parent or a third party having a reasonable claim to custody may challenge a ruling of the Panel. A claim that one is the custodial choice of a child is not, in and of itself, a claim on which to base such a challenge.

§3. If the parents are able to work out an arrangement for the sharing of legal (but not physical) custody, they may do so and such arrangement shall be enforceable once endorsed by a counselor from the Department of Social Welfare.

§4. a) There shall be periodic review of all custodial arrangements. The appropriate counselor shall review all family agreements and all final unchallenged dispositions made by an Arbitration Panel on a yearly basis for the first three years after they become effective, and every two

years thereafter until the child reaches majority.

b) A family agreement or Panel disposition shall become effective as of the date of the divorce decree or, if the agreement is reached prior to the pendente lite hearing, it shall become effective as of the date of said hearing.

The mediation program is a forward-looking version of the conciliation services presently provided by courts in various localities. The conciliation procedure is intended to prevent the breakup of the family while mediation attempts to resolve disputed issues between members of a family that has already dissolved. Additionally, the statute's requirement of mediation as a first step supports the principle of consulting all family members and is designed to interpose a "cooling off" period during which the parents can reflect on the prospects of going to court. Such a cooling off period would increase the likelihood of an out of court agreement.<sup>72</sup>

The purpose of requiring the counselor's endorsement is to ensure that the child is at least consulted even in cases where the parents agree on the custody issue. In cases of parental disagreement, the counselor's role is to facilitate a settlement. In either case, it is beneficial to the child to be heard in a conciliatory, non-adversary setting.

While generally encouraging family participation, the proposal also provides that children age ten or older are entitled to participate in the proceedings. The underlying assumption is that older children are aware of what is at stake and are probably somewhat less emotionally vulnerable than younger children. Children age five and under are excluded from participating since they probably have no clear concept of the proceedings and are more vulnerable than older children. Children between the ages of five and ten may or may not understand the consequences or be emotionally stable enough to warrant their participation. If both parents agree, the five to ten year old may participate. This provision seeks to avoid parent-child conflict at the conference while still leaving open the possibility of the child's participation. It is submitted that if the parents

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72. See Marschall & Gatz, *The Custody Decision Process: Toward New Roles for Parents and the State*, 7 N.C. CENT. L. REV. 50 (1975). The authors argue that the proper role for the state in custody cases is to facilitate negotiations between the parents rather than to impose a solution on them. For their proposal of compulsory mediation, see *id.* at 62-65. See also note 58 *supra*.

are unable to agree upon the issue of the child's participation it is likely that there would be serious conflict at the meetings.

To avoid unproductive meetings that are more likely to increase conflict, the proposed statute places a time limit on its mediation process.<sup>73</sup> If the parents are unable to reach an agreement in the time specified, the meetings are terminated. On the other hand, an agreement reached within the time limit will become binding, if the counselor gives his endorsement. Thus, in the event of an agreement, a counselor rather than a judge ratifies the custody disposition. The underlying rationale is that a counselor is more qualified to make such a determination. Admittedly, a counselor may be prone to the same biases and prejudices as a judge, but the use of a counselor is a less onerous alternative.<sup>74</sup>

Cases that are not disposed of through mediation are put into an arbitration proceeding. Arbitration is an informal adversary proceeding with several advantages over court hearings.<sup>75</sup> Because of its informal nature, it probably induces less

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73. Marschall & Gatz suggest a 60-day limit for the mediation process, in the interest of avoiding uncertainty for the child. See Marschall & Gatz, *supra* note 72.

74. Custody counseling is actually being done in Alameda County, Cal., under the auspices of the Conciliation Court. Bodenheimer, *supra* note 58, at 507. The counseling program is voluntary and is being offered pursuant to California's Conciliation Court Law. CAL. CIV. PROC. CODE §§ 1730-1748 (West 1972 & Supp. 1978). One purpose of this law is to provide a means for "the amicable settlement of domestic and family controversies." *Id.* § 1730. Elizabeth O'Neill, Director of the Conciliation Court, reports that some form of conciliation counseling takes place in roughly 25% of the dissolution cases filed in Alameda County. Many of the cases in which custody is in dispute are resolved after two to three weekly sessions. Interview with Elizabeth O'Neill, in Oakland, Cal. (Oct. 16, 1977). It may not be a coincidence that in Alameda County the time between the filing of a dissolution case and the pendente lite hearing at which the question of custody may first be considered is approximately 3 weeks.

In addition, Connecticut requires that couples seeking to obtain a divorce spend two sessions with a conciliation counselor in order to "explore the possibility of reconciliation or of resolving the emotional problems which might lead to continuing conflicts following the dissolution of the marriage." Some of these "emotional problems" could conceivably be related to child custody, so it is possible that, at least in some cases, Connecticut parents are participating in custody mediation, albeit only to the extent of two sessions. CONN. GEN. STAT. ANN. § 46-41 (West Supp. 1978).

75. Arbitration was first proposed as a solution in 1964. Kubie, *Provisions for the Care of Children of Divorced Parents: A New Legal Instrument*, 73 YALE L.J. 1197 (1964). Arbitration has been adopted in at least one county in Maryland where it has apparently been working well. New York courts also allow custody disputes to be resolved by arbitration, but they also reserve the right to deny effect to the arbitrator's decision if they find that such decision does not serve the "best interests" of the child. *Sheets v. Sheets*, 22 App. Div.2d 176, 254 N.Y.S. 320 (1964). See generally Coulson, *Family Arbitration: An Exercise in Sensitivity*, 3 FAM. L.Q. 22 (1969); Holman & Noland, *Agreement and Arbitration: Relief to Over-litigation in Domestic Disputes in Washington*, 12 WILLAMETTE L.J. 527 (1976).



tension than regular courtroom proceedings. Arbitration also eliminates much of the time and expense involved in court proceedings and reduces court congestion. Inasmuch as the panel of arbitrators consists of family acquaintances they are likely to be familiar with the needs and abilities of each member.<sup>76</sup> Indeed, one author has argued that such a panel forces the parents to think of their children's needs by acting as an "externalized conscience."<sup>77</sup>

There are admittedly some problems with the arbitration plan. Most notably, it is an adversary proceeding without the protections afforded by the rules of evidence. The possibility of intimidation and other abuses is increased. Furthermore, it is unknown whether arbitration can be implemented on a large scale. Most arbitrators are not trained counselors or social workers and are therefore subject to the same frustrations experienced by judges. Additionally, arbitrators do not receive much compensation. Unless some profound changes are made in the qualifications and compensation of arbitrators it will be difficult to implement the proposal.<sup>78</sup>

Despite these problems, arbitration has been stressed as a viable alternative to a regular court-custody hearing and has been successfully implemented in at least one county in Maryland. While it manifests certain risks it is probably less harmful to the child than courtroom proceedings.<sup>79</sup>

The proposed statute sets forth a procedure for appealing a decision of the arbitration panel. A party must wait six months before challenging the decision. Arguably, six months is sufficient time in which to ascertain whether the disposition is stable and in the child's best interest. If the arrangement is not working, a longer period would aggravate the situation. Another advantage is that the waiting period establishes a tem-

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76. The model statute's provision for the selection of panel members is precisely that suggested by Kubie, *supra* note 73.

77. *Id.*

78. This last point is particularly telling in light of the panel's continuing "jurisdiction" under the statute. Alternatives might include compulsory arbitration with trained counselors (social workers) serving as arbitrators, or referral to local domestic relations councils. The former alternative would seem to approach court adjudication in its impersonality, while implementation of the latter, unfortunately, appears to be a long way off at this point in time.

79. Kubie proposed that the child have a confidential "adult ally." Kubie, *supra* note 73, at 1199. Such a person might have a role to play in interpreting the child's behavior, but otherwise the "adult ally" appears to be analogous to a guardian *ad litem*, embodying all the benefits and drawbacks of the Wisconsin practice.

porary status quo which may dissuade a potential challenger. The first forum of review is the panel. This provision has the effect of discouraging appeal as it is unlikely that the panel would reverse its earlier decision absent a strong showing of changed circumstances or necessity. Should the appeal reach the stage of court adjudication, the appellant must overcome the presumption in favor of the original disposition by clear and convincing evidence. The reason for the difficult standard is to discourage litigation. Repeated court battles or custody fights could cause a child to suffer severe emotional damage, defeating the proposed statute's focus on the child's well-being. The provision for periodic review of all custodial arrangements also should reduce reliance on litigation. Any party having a claim for custody who is unhappy with either the panel's or the court's disposition need only await the review session with the counselor.

Finally, the purpose of the shared legal custody provision is to encourage parents who are so inclined to cooperate in deciding how the child will be raised. The provision would have the effect of facilitating good relationships between the child and both parents. However, alternating physical custody beyond normal visitation rights is disapproved since it would undermine the objective of stability. In addition, all such arrangements require a counselor's endorsement and subsequent review to prevent magnified conflict over how the child should be raised.

### CONCLUSION

Historically, the best interests standard has been applied most frequently by courts to settle custody disputes.<sup>80</sup> Despite all of its problems, it does promote psychological protection by placing the ultimate responsibility for the custody decision on the judge, not the child. However, as noted previously, trial judges are often ill-equipped to handle custody decisions involving intricate familial relationships. Similarly, the best interests approach simply ignores some of the five basic principles that should be at the heart of any custody disposition.

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80. Other possible standards are ably discussed in Mnookin, *supra* note 6. They include a preference for the richer parent, a preference for the parent willing to spend more time with the child, and an arbitrary coin flip. An examination of these standards, engaging though it may be, would add little to the discussion of the primary question herein, namely the treatment of the child at the time of the disposition.

The proposed method of mediation and arbitration attempts to accommodate all of these principles. Its emphasis on conciliation satisfies the principle of consulting all family members. Further, its elaborate mediation procedure satisfies the second principle by forestalling an adversary confrontation and interposing a cooling off period. By avoiding litigation, unless conciliation, mediation, and arbitration have all failed, the proposed statute contains many built-in psychological safeguards for the child, in line with the third principle.

With its flexible and continuing review procedures of custody decisions made by the panel or the court, the proposed statute places great emphasis on the fourth principle—a stable future home life for the children. Finally, by providing for custody decisions made by people intimately familiar with the family relationships, the mediation-arbitration procedure goes a long way towards satisfying the fifth principle—accurate interpretation of the child's behavior. Finally, the proposed method avoids sex-based preferences and thus embodies the sixth principle.

Perhaps the greatest attribute of the proposed method for resolving custody disputes is its recognition that it is difficult if not impossible to predict the child's long term "best interests."<sup>81</sup> As a result, any custody disposition should be continually monitored. This factor is built into the proposed system. The commitment to this goal of constant monitoring will tend to humanize custody dispositions for the benefit of everyone involved.

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81. *See generally id.*