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DOMESTIC RELATIONS—JUDICIAL DETERMINATION THAT GRANDPARENTS WOULD BEST SERVE INTERESTS OF THE CHILD SUPPORTS AWARD OF CUSTODY TO GRANDPARENTS RATHER THAN FATHER. *Painter v. Bannister* (Iowa 1966).

Following the accidental death of his wife in 1963, Painter placed his five-year-old son in the temporary custody of the boy's maternal grandparents. Upon their refusal two years later to return the boy, Painter brought habeas corpus proceedings and was awarded custody of his son by the trial court. On appeal to the Supreme Court of Iowa, *held*, reversed: Painter, although a *fit* parent, could not offer his son the security and stability necessary to assure the child's *best interests*. *Painter v. Bannister*, —Iowa—, 140 N.W.2d 152 (1966), *cert. denied*, 385 U.S. 949 (1966).¹

In awarding custody to the grandparents, the Iowa Supreme Court adhered to the well established principle that in custody actions, primary consideration must be given to the *best interests* of the child.² More significantly, the court applied the principle in such a way that the boy's *best interests* were determined by comparing the relative advantages to be gained by awarding custody of the child to Painter, an admittedly *fit* father, as against an award to the *fit* grandparents.³ While a comparative fitness test has frequently been applied in Iowa decisions to deprive *fit* parents of the custody of their children, the test does not appear to have been uniformly applied.⁴

¹ The questions presented to the Supreme Court in Painter's unsuccessful petition for certiorari were:

(1) Does Fourteenth Amendment bar state from depriving parent of custody of his child and awarding such custody to others, so long as parent is fit and qualified and has not abandoned child? (2) If state in any circumstances may deprive such parent of custody, may it do so, consistently with First Amendment and Fourteenth Amendment's Due Process Clause, on basis of parent's political and religious beliefs or on basis of no evidence other than testimony of psychologist who had never professionally seen parent or his household and who was retained by persons contesting parent's claim of custody? 35 U.S.L. WEEK (U.S. Oct. 18, 1966) (No. 518).

² "It is universally recognized by all courts that, in fixing the custody of a child, considerations of the welfare and interests of the child outweigh all other considerations . . ." Annot., 15 A.L.R.2d 432 (1951). See discussion of terms, note 9 *infra*; Carrere v. Prunty, — Iowa —, 133 N.W.2d 692 (1965); Vanden Heuvel v. Vanden Heuvel, 254 Iowa 1391, 121 N.W.2d 216 (1963); Finken v. Porter, 246 Iowa 1345, 72 N.W.2d 445 (1955); Lursen v. Henrichs, 239 Iowa 1009, 33 N.W.2d 383 (1948).

³ "We are not confronted with a situation where one of the contesting parties is not a fit or proper person. There is no criticism of either the Bannisters or their home. There is no suggestion in the record that Mr. Painter is morally unfit." — Iowa —, 140 N.W.2d at 154.

⁴ In Finken v. Porter, 246 Iowa 1345, 72 N.W.2d 445 (1955), a comparative fitness test was applied. Dissenting from the majority opinion, Justice Hays pointed to the principle previously expressed by the Iowa Supreme Court in *Watters v. Watters*,

Perhaps the most startling aspect of the case was the court's consideration of Painter's religious and political beliefs, as well as his unconventional attitudes and tastes,⁵ as factors in determining whether or not he was entitled to custody of his son. Journalists have focused much of their indignation on the court's contention that a conventional, middle-class home is more conducive to security than an "arty, bohemian" one, and the related assumption that security is a more valuable commodity than intellectual stimulation.⁶ While these assertions are certainly open to question, a decision based upon such beliefs constitutes no judicial novelty⁷ and was well within the court's discretion. Of more legitimate concern to the legal community was the introduction into the deliberations of the court of matters dealing with constitutionally protected freedoms of individual conscience and belief.⁸

While these aspects of *Painter v. Bannister* have subjected the de-

243 Iowa 741, 744, 53 N.W.2d 162, 163 (1952), that "the unfitness which deprives a parent of the right to the custody of a child must be positive, and not merely comparative." The principle cited was, however, only a partial and apparently misleading quotation from 67 C.J.S. *Parent and Child* § 12 (1950) at 659, for, on the same page, it is stated that "there may be other considerations superseding the parents' fitness and competence."

⁵ — Iowa at — - —, 140 N.W.2d at 154-56. Painter was characterized as "either an agnostic or atheist" and as "a political liberal." Comparison was also made of the Bannister's "stable, dependable, conventional, middle-class, middlewest background" as against Painter's "Bohemian approach to finances and life in general." The court concluded that while the boy's life with his father would "be more exciting and challenging in many respects," nevertheless "security and stability in the home are more important than intellectual stimulation in the proper development of a child."

⁶ "So the corn-fed voice of justice. . . ."

"And for these reasons, and in such terms, a man is denied his own son!

"In Iowa, I suppose, such yokel justice wears a halo—or is that just hayseed caught in the judicial hair?

"And still the ruling remains an infamous distortion of natural right, infamously based on a clod-hopping self-righteousness so smug that contempt of court is not a sufficient response to it, and even derision is only a beginning. The court in its fat-headed apotheosis of the yokel has cited wantonly provincial reasons for denying one of the most natural ties known to man. It is not enough to cite the court for incompetence. It has been nothing less than sinfully self-laudatory of its own barren mores." Ciardi, *Saturday Review*, p. 26, 44, March 26, 1966. The extent to which courts should reflect the prevailing mores of their communities is a separate question, not dealt with here.

⁷ *Carrick v. Stoddard*, 250 Iowa 1181, 1185, 98 N.W.2d 315, 318 (1959) ("The record shows the Stoddards are a religious and wholesome young couple."); *Stevenson v. McMillan*, 250 Iowa 737, 741, 95 N.W.2d 719, 722 (1959) (peculiarity as to food matters element in denying custody to father).

⁸ See material cited note 1 *supra*; 43 *ACLU FORUM*, No. 10, at 8 (Oct. 1966) ("The national office of the ACLU has decided to file an amicus curiae [brief] after first concluding that there was no civil liberties issue at stake."); see generally, *Annot.*, 66 *A.L.R.2d* 1410 (1959).

cision to considerable criticism and commentary, the underlying and determining *comparative fitness doctrine*, together with the *best-interests-of-the-child* rule, have received little attention and remain the virtually unchallenged law in many jurisdictions.⁹ Perhaps the *Painter* decision will attain its ultimate legal and social value by inducing legislative and judicial reconsideration of these widely accepted doctrines.

In contrast to the prevailing trend, the California Supreme Court has consistently enunciated the principle that "[I]f either of the parents is a fit and proper person to have custody of a child, a stranger may not usurp that right."¹⁰ The primary significance and difficulty of these decisions rests, however, on the California Supreme Court's interpretation of the California codes respecting custody actions, rather than on any notable differences in California statutory law. Both Iowa and California law entertain rebuttable presumptions of parental preference¹¹ and both subscribe to the *best-interests-of-the-child* principle.¹² The main difference seems, at first glance, to lie

⁹ See, e.g., *Root v. Allen*, 151 Colo. 1311, 377 P.2d 117 (1962); *Thumma v. Hartsook*, 239 Md. 38, 210 A.2d 151 (1965); *Mitchell v. Powell*, 253 Miss. 867, 179 So. 2d 811 (1965); *Com. ex rel. Ruczynski v. Powers*, 206 Pa. Super. 415, 212 A.2d 922 (1965); *Scozzari v. Curtis*, 398 S.W.2d 819 (Tex. 1966). *But see* *Application of Mittenhal*, 37 Misc. 2d 502, 235 N.Y.S.2d 729 (Fam. Ct. 1962). Although it would appear to be the adjective *best* which compels courts to resort to a *comparative fitness* test to determine where a child's *best interests* lie, the terms *welfare*, *best welfare*, *interests* and *best interests* are, in practice, often used interchangeably. It is probably safe to assume, then, that in a jurisdiction which awards custody on the basis of a comparison among *fit* claimants, the *best interests* rule prevails, regardless of whether or not the adjective is employed in every instance.

¹⁰ *Roche v. Roche*, 25 Cal. 2d 141, 143, 152 P.2d 999, 1000 (1944); *accord*, *Guardianship of Smith*, 42 Cal. 2d 91, 265 P.2d 888 (1954); *Stewart v. Stewart*, 41 Cal. 2d 447, 260 P.2d 44 (1953); *Stever v. Stever*, 6 Cal. 2d 166, 56 P.2d 1229 (1936); *Marlow v. Wene*, 240 Cal. App. 2d 746, 49 Cal. Rptr. 881 (1966); *Guardianship of Clark*, 217 Cal. App. 2d 808, 32 Cal. Rptr. 111 (1963); *Guardianship of Wisdom*, 146 Cal. App. 2d 635, 304 P.2d 221 (1956); see discussion of other jurisdictions with similar holdings, note 40 *infra*.

¹¹ *Painter v. Bannister*, — Iowa at —, 140 N.W.2d at 156 ("[T]here is the presumption of parental preference, which though weakened in the past several years, exists by statute."); CODE OF IOWA § 668.1 ("Parents are the natural guardians of the persons of their minor children . . ."); *accord*, *Carrere v. Prunty*, — Iowa —, 133 N.W.2d 692 (1965). CAL. PROB. CODE § 1407 ("Of persons equally entitled in other respects to guardianship of a minor, preference is to be given as follows: 1. to a parent . . ."); see cases cited note 10 *supra*.

¹² *Childers v. Childers*, — Iowa —, 136 N.W.2d 268 (1965); *Finken v. Porter*, 246 Iowa 1345, 72 N.W.2d 445 (1955); CAL. PROB. CODE § 1406 ("In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interests of the child in respect to its temporal and mental and moral welfare . . ."); *accord*, *Guardianship of Newell*, 187 Cal. App. 2d 425, 10 Cal. Rptr. 29 (1960).

merely in the relatively greater weight accorded the parental preference presumption in California.¹³ In *Guardianship of Smith*,¹⁴ for example, Justice Carter states that "it has been held repeatedly that, while the best interests of [a] . . . child is the important factor, the parents of such child have a superior claim as against the world to his custody if they are fit and proper."¹⁵ Such a statement incorporates the identical elements of *fitness*, *parental right*, and the child's *best interests* relied upon repeatedly in Iowa case law,¹⁶ as well as most other jurisdictions.¹⁷ Yet, in California, a *fit* parent invariably prevails over strangers,¹⁸ while under Iowa law, the rights of even *fit* parents must "yield readily to . . . the best interests of the children."¹⁹

The majority of courts have had little difficulty in juggling the terms *fit*, *suitable*, and *proper*,²⁰ together with the concepts of the *natural* or *superior* rights of parents, to arrive at a presumption of parental preference.²¹ This presumption may be more or less readily overcome by a showing that the parent is not, in fact, best suited to assure his child's *best interests*.²² California, on the other hand, has

¹³ In California, the presumption of parental fitness (see *Guardianship of Rose*, 171 Cal. App. 2d 677, 340 P.2d 1045 (1959)), together with the requirement that *fit* parents be preferred over strangers (see cases cited note 10 *supra*), necessarily results in a particularly strong parental preference presumption.

¹⁴ 255 P.2d 761 (1953), *rev'd on other grounds*, 42 Cal. 2d 91, 265 P.2d 888 (1954).

¹⁵ *Id.* at 762.

¹⁶ See, e.g., *Vanden Heuvel v. Vanden Heuvel*, 254 Iowa 1391, 121 N.W.2d 216 (1963); *Finken v. Porter*, 246 Iowa 1345, 72 N.W.2d 445 (1955).

¹⁷ E.g., *Wilson v. Mitchell*, 406 P.2d 4 (Alaska 1965); *Setser v. Caldwell*, 300 Ky. 356, 188 S.W.2d 451 (1945); *State ex rel. Lott v. Courtney*, 248 La. 466, 178 So. 2d 489 (1965); *Mitchell v. Powell*, 253 Miss. 867, 179 So. 2d 811 (1965); *Boucher v. Dittmer*, 151 Neb. 580, 38 N.W.2d 401 (1949); *People ex rel. Anonymous v. Talbot Perkins Adoption Service*, 46 Misc. 2d 369, 259 N.Y.S.2d 440 (1965); *Scozzari v. Curtis*, 398 S.W.2d 819 (Tex. 1966).

¹⁸ See cases cited note 10 *supra*.

¹⁹ *Thein v. Squires*, 250 Iowa 1149, 1157, 97 N.W.2d 156, 162 (1959); *accord*, *Carrere v. Prunty*, — Iowa —, 133 N.W.2d 692 (1965); see cases cited note 16 *supra*.

²⁰ While the terms *fit*, *suitable* and *proper* are sometimes equated by the courts, the concept of a *suitable* parent is often distinguished from the other two as encompassing a wider range of elements. *State ex rel. Tuttle v. Hanson*, 274 Wis. 42, 80 N.W.2d 387 (1957). *Fitness*, in most jurisdictions, is determined by the trial court and rarely indicates more than that a parent is not grossly incompetent or immoral. See 67 C.J.S. *Parent and Child* § 12 (1950) at 659.

²¹ See, e.g., *In the Matter of Ramelow*, 3 Ill. App. 2d 190, 121 N.E.2d 41 (1954); *Roaden v. Roaden*, 394 S.W.2d 754 (Ky. 1965); *State ex rel. Lott v. Courtney*, 248 La. 466, 178 So. 2d 489 (1965); *Vollbrecht v. Vollbrecht*, 178 Neb. 31, 131 N.W.2d 651 (1964); *People ex rel. Anonymous v. Talbot Perkins Adoption Service*, 46 Misc. 2d 369, 259 N.Y.S.2d 440 (1965); *McKay v. Mitzel*, 137 N.W.2d 792 (N.D. 1965); *In re Cooper*, 17 Utah 296, 410 P.2d 475 (1966).

²² See, e.g., *McReynolds v. Hughes*, 398 S.W.2d 482 (Ky. 1966); *McKay v. Mitzel*, 137 N.W.2d 792 (N.D. 1965); *Whitman v. Whitman*, 28 Wis. 50, 135 N.W.2d 835 (1965).

interrelated the same concepts in such a way that only abandonment²³ or judicially determined unfitness²⁴ have been held sufficient to rebut the presumption. The reason for these paradoxically dissimilar holdings is not difficult to ascertain—a meaningful application of the principle of *superior* parental *rights* is, in practice, incompatible with any true adherence to the doctrine that a child's *best welfare* must be the paramount consideration.²⁵ Since neither principle has, for historical reasons, been abandoned by most courts, a preference for one has necessarily entailed a corresponding adulteration or weakening of the other. In the majority of jurisdictions it has been *parental rights* which have been sacrificed, although these *rights* are almost universally recognized to exist.²⁶ It may not be so remarkable, then, that in stressing *parental rights*, California has, at least nominally, retained the *best-interests-of-the-child* test, while declining to apply the necessary corollary to that test—a comparison among claimants to determine which will best serve those interests.²⁷

While both Iowa and California decisions are, in a sense, equally the victims of these conflicting principles, the California position is more difficult to maintain. Although Iowa courts have almost fatally weakened the concept of *superior parental rights* by subordinating these *rights*, in every case, to a child's *best interests*,²⁸ the decisions

²³ Guardianship of Rutherford, 188 Cal. App. 2d 202, 10 Cal. Rptr. 270 (1961); CAL. PROB. CODE § 1409 ("A parent who knowingly or willfully abandons, or, having the ability so to do, fails to maintain his minor child . . . forfeits all right to the guardianship of such child . . .").

²⁴ Guardianship of Wisdom, 146 Cal. App. 2d 635, 304 P.2d 221 (1956) (parent entitled to preference over all others in absence of finding of unfitness or incompetency); *accord*, cases cited note 10 *supra*.

²⁵ If a parent's *superior right* to custody is conditioned on his ability to match the advantages offered his child by all contending strangers (although mere financial superiority is generally discounted), this *right* seems tenuous, at best. If, on the other hand, his *superior rights* are enforced by automatically awarding him custody as against strangers unless he is proven grossly incompetent (see material cited note 39 *infra*), consideration of his child's *best interests* can hardly have been paramount.

²⁶ *E.g.*, Stubbs v. Hammond, — Iowa —, 135 N.W.2d 540 (1965) (parental right inherent, constitutionally protected); State *ex rel.* Lott v. Courtney, 248 La. 466, 178 So. 2d 489 (1965) (if rights, best interest conflict, best interests prevail); Vollbrecht v. Vollbrecht, 178 Neb. 31, 131 N.W.2d 651 (1964); Com. *ex rel.* Ruczynski v. Powers, 206 Pa. Super. 415, 212 A.2d 922 (1965) (*prima facie* right of mother must yield to child's best interest); Scozzari v. Curtis, 398 S.W.2d 819 (Tex. 1966) (parental right must yield to child's best interests).

²⁷ See cases cited note 10 *supra*. In Roche v. Roche, 25 Cal. 2d 141, 144, 152 P.2d 999, 1000 (1944), the California Supreme Court cites with approval the opinion of *In re White*, 54 Cal. App. 2d 637, 640, 129 P.2d 706, 708 (1942) ("The right of a parent to the care and custody of a child cannot be taken away merely because the court may believe that some third person can give the child better care and greater protection.").

²⁸ See cases cited note 2 *supra*.

represent little more than the court's choice of priorities—strict adherence to one principle, mere lip service to the other. The California Supreme Court, on the other hand, has committed itself to the untenable proposition that a *fit* parent is necessarily, or perhaps by definition, best able to assure his child's welfare.²⁹ The difficulties entailed in assuming such a stance are twofold: (1) The decisions, presumably based on statutory law, do not appear to conform with legislative intent;³⁰ and (2) to predicate that a *fit* parent is, ipso facto, the best possible guardian for his child begs the question and makes a factual determination of who can best subserve the child's interests impossible.³¹

If, then, Iowa's stress on the *best-interests-of-the-child* rule tends to emasculate the *parental rights* doctrine, and California's commitment to *parental rights* makes its presumed application of the *best interests* test meaningless, it becomes necessary to ask: (1) Why have both principles, at least nominally, been retained by most jurisdictions? and (2) Does only one of the two principles deserve to survive, or is a workable compromise possible and desirable?

The policies underlying a court's authority as *parens patriae* reach back to ancient times³² and appear basically sound—to guard minors and to preserve the state.³³ At common law, however, *parental rights*

²⁹ In *Roche v. Roche*, 25 Cal. 2d 141, 152 P.2d 999 (1944), the court based its opinion, in part, on the provisions of Calif. Prob. Code section 1407, which gives first preference to parents among persons "equally entitled in other respects to the guardianship of a minor . . ." By construing *equal entitlement* as the equivalent of *fitness*, the court concludes that a *fit* parent must always be preferred over strangers. To permit this conclusion to conform with the *best interests* requirement of Calif. Prob. Code section 1406, the court apparently determined that if *fit* parents were to be preferred, the justification for this preference must lie in their superior ability to serve their children's *best interests*. In *Guardianship of Smith*, 42 Cal. 2d 91, 95, 265 P.2d 888, 891 (1954), Justice Traynor, in concurring, argued that "it would seem inherent in the very concept of a fit parent that such a parent would be at least as responsive as the trial court, and very probably more so, to the best interests of the child."

³⁰ In *In re Smith's Guardianship*, 147 Cal. App. 2d 686, 692, 306 P.2d 86, 91 (1956), the District Court of Appeal clearly manifested its dissatisfaction with the California Supreme Court's reasoning by pointing out that

A literal reading of these sections [see discussion and citations note 29 *supra*] would tend to indicate that it was the legislative intent that the best interests of the child should be the controlling factor, and that the right of the parent to be appointed only comes into existence when the parent is "equally entitled" to the guardianship with the contending person. But the cases have not so held. They have held that the best interests of the child require that the parent be its guardian unless that parent is unfit.

³¹ See discussion note 29 *supra*; see generally, Comment, 33 CALIF. L. REV. 306 (1945).

³² *Lippincott v. Lippincott*, 97 N.J. Eq. 517, 128 Atl. 254 (1925) (authority of state to protect and control infants is fundamental and was exercised in ancient Greece, Egypt and Persia).

³³ *Helton v. Crawley*, 241 Iowa 926, 41 N.W.2d 60 (1950).

were supreme, and the court's authority was essentially restricted to protecting children from gross abuse.³⁴ With the emergence of a more enlightened recognition of the rights of children as individuals, the common law view that parental rights to the custody of their children represented mere extensions of their property rights³⁵ fell into disrepute. Although belief in the importance of preserving the *natural* family unit seems too deeply engrained in tradition to have been discarded altogether, most modern jurisdictions have nevertheless been reluctant to espouse the rights of parents too vigorously. This reluctance, and the corresponding development of the principle that a child's *best interests* must be paramount, seem, from the language of courts and legal commentators alike,³⁶ to be explainable, in large part, as vehement and outraged reactions to the earlier *child-as-chattel* theory. Consequently, exclusive focusing on the undesirability of regarding children as property has tended to result in an uncritical acceptance of the *best-interests-of-the-child* rule as the single alternative to the common law view.³⁷ It is at least questionable, however, whether a child who happens to be the subject of a custody action need be guaranteed *best interests* protection—a far higher standard of welfare than is accorded other children.³⁸ Furthermore,

³⁴ See 2 TIFFANY, PERSONS AND DOMESTIC RELATIONS 343-44 (3d ed. 1921).

³⁵ Campbell v. Wright, 130 Cal. 380, 382, 62 Pac. 613, 614 (1900).

[I]t is a mistake to suppose that the right of the father is merely fiduciary. It is that; but it is also—like the right of the child in the father—a right vested in him for his own benefit, and of which it would be a personal injury to deprive him. The right must therefore be regarded as coming within the reason, if not within the strict letter, of the constitutional provisions for the protection of property.

³⁶ Justice Schauer, dissenting from the majority opinion in *In re Kentera's Guardianship*, 41 Cal. 2d 639, 645, 262 P.2d 317, 321 (1953), charges that "Again, this court places reliance upon and follows the dark view that as against parents a child is a mere chattel." See Kenner v. Kenner, 139 Tenn. 211, 221, 201 S.W. 779, 782 (1918) (The "dominant thought . . . that children are not chattels, but intelligent and moral beings, and that as such their welfare and their happiness is a matter of first consideration . . . [expresses] elevated and humane sentiments [which] must find response in the bosom of every right-thinking man.").

³⁷ Professor Sayre of the State University of Iowa, less than enchanted with the rule, writes: "Courts and legal writers alike seem so pleased with themselves in hitting on the best-interests-of-the-child test, that they are both unable and unwilling to think of anything else." Referring to a leading opinion which upholds the doctrine, Prof. Sayre continues: "With evident relish, the court repudiated the former rule which affirmed the parent's primary right to custody, and, having rejected this, luxuriated in the solemn self-righteousness of applying the best-interests-of-the-child test against all comers." Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672, 678-79 (1941-42). It should be noted, however, that while Professor Sayre objects to the "partiality" of the test and recommends that the interests of parents, as well as those of the child, be taken into account, his criticism appears to stem more from a conviction that "such a test will in fact injure the child" than from concern with parental rights per se. *Id.* at 681.

³⁸ *Guardianship of Smith*, 42 Cal. 2d 91, 95, 265 P.2d 888, 891 (1954) (concurring opinion).

parental *rights* need not be predicated on a property theory. The proposition that parents may have defensible moral and legal *rights* to the companionship and rearing of their children is quite distinct from the *chattel* theory and is entitled to evaluation on its own merits.

If such a principle of parental *rights* is to be given serious effect, however, it appears very nearly inevitable that some rule of law much like California's would need to be applied. To remedy the two fundamental flaws inherent in the California position, it would be necessary to: (1) broaden the concept of *unfitness* to encompass elements beyond gross incompetence, neglect or abuse³⁹ (*e.g.*, evident lack of parental affection or concern, degree of justification for initial separation from child); and (2) eliminate the *best interests* test and substitute for it a *basic* or *primary* standard of welfare comparable to that which the ordinary parent is required to maintain for his child. By applying a reasonable *fitness* test, broadly outlined to permit the exercise of judicial discretion, courts could safeguard the *basic* welfare of children as well as the *rights* of parents without resort to the inflexible *best interests* standard adhered to in most jurisdictions. Such a test would, moreover, eliminate the need to subject presumably *fit* parents to the further burden of establishing that their *fitness* equals or exceeds the *fitness* of contending strangers. While there may be little reason to question the justice or wisdom of most custody decisions, it seems fair to conclude that most courts have been hindered rather than helped in their efforts to balance conflicting rights and interests by adherence to the rigid and constricting maxim

One gains perspective by recalling that families are ordinarily allowed to function without outside interference though their wisdom in the upbringing of children may vary as widely as the physical heritage or economic advantages they give their children. Unless the upbringing of the child is so defective as to call for action by the juvenile court, it is unlikely that an outsider will challenge the parental custody or seek by legal process to prove that the child's welfare would best be served elsewhere.

Cory v. Cory, 70 Cal. App. 2d 563, 569-70, 161 P.2d 385, 389 (1945). In a custody suit to determine fitness of a mother who was a member of Jehovah's Witnesses, the court reasoned: "If it is right to take these children from their mother's custody for the reasons stated, then by the same course of reasoning we must conclude that it would be right and proper to deprive all Jehovah's Witnesses of custody of their offspring"

³⁹ See 29 SO. CAL. L. REV. 96, 97 (1954). A modest attempt to tighten the California *fitness* standard was made in Guardianship of Newell, 187 Cal. App. 2d 425, 10 Cal. Rptr. 29 (1960), by suggesting that the "best interest of the child may be considered as bearing on the question of fitness." In support of this position, the court cited *In re Guardianship of Smith*, 147 Cal. App. 2d 686, 696, 306 P.2d 86, 93 (1956) (see quotation from case note 30 *supra*), in which the court allowed itself, apparently with some misgivings, to declare unfit a mother whose "past conduct was far below society's moral norm" and who, in addition, had been romantically involved with her husband's murderer both before and after the killing. *Id.* at 702-03, 306 P.2d at 97-98.

that in custody actions, the "best interests of the child must be paramount."⁴⁰

VERONICA A. ROESER

⁴⁰ Comment, 33 CALIF. L. REV. 306, 311-12 (1945) points to several jurisdictions in which the paramount rights of parents to custody can, as in California, be forfeited only by a finding that the parent is unfit or has abandoned his child, despite statutory "best interests" requirements. While a majority of these jurisdictions have continued to uphold the paramount rights of fit parents with little apparent discomfiture, the Illinois Supreme Court has concluded, in *People ex rel. Pace v. Wood*, 50 Ill. App. 2d 63, 68, 200 N.E.2d 125, 127 (1964), that despite a parent's superior right, "it is not necessary that the natural parent be found unfit in order to award custody of his child to a third party."

Ernst v. Flynn, 373 Mich. 337, 129 N.W.2d 430 (1964), presents a fascinating study of a court's struggle with the conflicting principles of parental rights and a child's best interests. Justice Black, in a supplemental opinion, voiced a frustration one might expect to find expressed in many jurisdictions when he complained that: "[W]e do have 'two irreconcilable lines of cases'—pure shuttlecock law that is—for whimsical application to child custody controversies." *Id.* at 354, 129 N.W.2d at 439. An alternative, though seemingly quite undesirable solution to the dilemma, would be simply to deny that a problem exists by holding that "the question is not the 'rights' of the person claiming custody, for there are no such rights; the question is rather the welfare of the child." (Emphasis added.) 2 IND. L.J. 325, 329 (1927).